Power and Principle

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The civil war in Syria is an epic struggle for power between the government of Bashar al-Assad and an array of nearly one thousand rebel groups, including jihadist groups such as the Islamic State (ISIS) and the al-Nusra Front. On August 21, 2013, chemical weapons were unleashed on the civilian population in Syria, killing thirteen hundred people and turning a dark page in an ongoing civil war that had already claimed the lives of over one hundred thousand. Gruesome images of the victims, four hundred of them children, shocked the world and were accompanied by firsthand accounts of the suffering they endured as they gasped for breath in their final moments of life. As has too often been the case in human history, the powerless again found themselves victims of a violent struggle for political power.

Events like these are why human rights advocates have long pressed for the creation of international criminal courts—to restrain the brutal instruments of realpolitik that are so often unleashed on the innocent. The creation of the International Criminal Court (ICC), the first permanent international court of its kind, has been lauded by many as a landmark achievement, one

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**Conclusion**

*Between Power and Principle*

The war in Syria may not represent the end of humanity, but every injustice committed is a chip in the façade of what holds us together. The universal principle of justice may not be rooted in physics but it is no less fundamental to our existence. For without it, before long, human beings will surely cease to exist.

—Stephen Hawking
that not only would provide justice to the victims of atrocities but could potentially serve as a transformative force in the fundamental character of international society. Some have suggested that the prevailing rule of force would be increasingly replaced by the rule of law. Much of the scholarship on international criminal courts, including the ICC, fits this broad narrative emphasizing the growing power of norms of justice and human rights in the creation of international criminal courts. It is a narrative of principles finally emerging triumphant over the frequently ruthless struggle for power.

This book explores the terrain that exists between two opposing takes on international humanitarian law—one that sees justice as transformative, another that sees it as either dangerous or irrelevant. The increasingly dominant view is that international criminal courts are primarily a product of principles, mobilized by key norm entrepreneurs, human rights activists, and NGOs. Although not always framed in terms of principles, this view is generally consistent with a constructivist approach that emphasizes the role of ideals, norms, and social identities in world politics. This view often has been placed in contrast to power-based explanations, and the empirical evidence put forward by constructivists suggests the limits of a realist approach that emphasizes the role of interests defined in terms of power. This is not to say that the existing literature turns a blind eye to the presence of power politics. Indeed, there are scant few extant works that do not acknowledge that interests defined in terms of power have exerted influence on the process of creating international criminal courts at some point. Yet, power politics tend to be peripheral to the primary narrative regarding the growth of human rights norms and the application of evolving principles of justice.

There can be little doubt that evolving human rights norms and principles of justice figure prominently in the creation of international criminal courts. Moreover, it stands to reason that the more political mobilization that is rallied in support of these principles, the greater their potential influence. However, these arguments are hardly counterintuitive. One could mount a similar argument about the formation of the contemporary international trade regime. It is unlikely that we would see the emergence of the World Trade Organization (WTO) or the General Agreement on Tariffs and Trade (GATT) absent the central tenets of Ricardian economics forwarded by influential economic advisers in the post–World War II period. This book does not refute the notion that principles and norms matter. Indeed, it is impossible to imagine the creation of the Nuremberg Principles or the Rome Statute
without them. Rather, the empirical evidence offered here suggests that arguments regarding the influence of idealpolitik frequently overstate the role of norms and often fail to recognize how crucial a role realpolitik has played in the evolution of international criminal court. The existing literature far too often imagines idealpolitik and realpolitik as separate and opposed and thus fails to adequately explain how power and principle often overlap in shaping interests and outcomes concerning international criminal courts. This book addresses this critical absence in the literature by focusing on the intersection of power and principle in shaping the origins, design, and operation of international criminal courts.

**Principal Findings**

This book contributes to our understanding of international criminal courts through the development and application of theory. Theory provides the underlying rationale for the development of falsifiable and empirically testable hypotheses. In this book, I develop and apply both grand theory and middle-range theory to explain the origins, design, and behavior of international criminal courts. I do so in a somewhat eclectic manner. Rather than proposing a monocausal explanation of outcomes or seeking to establish the superiority of one approach, I synthesize elements and insights from several schools of thought. Identifying and explicating the political dynamics involved in international criminal courts requires multiple analytical tools. Instead of drawing solely on one analytical approach, theoretical frameworks used in this book are tailored to the specifics of the facet of institutionalization under investigation. This “theory through synthesis” is consistent with the “eclectic” approach advocated by Rudra Sil and Peter Katzenstein, among others. This approach not only draws from different epistemological perspectives, but may also shift the level of analysis where it is called for. As David Lake notes, “It is precisely this ‘mixing and matching’ of assumptions, issue areas, units, and interests that makes this sort of theorizing ‘eclectic.’”

So what have we learned using these theories and analytical techniques? The following highlights some of the key points raised in the book:

1. Interests defined in terms of power were instrumental in the initial decision to create international tribunals. However, once the decision
to form them was made, norm entrepreneurs seized the opportunity to institutionalize liberal principles of international humanitarian law within them.

Contrary to the conventional wisdom, the evidence presented in the introduction reminds us that the original impetus for the creation of the International Military Tribunals after World War II was to legitimize Allied actions during the war by establishing that the Axis powers waged a war of aggression. It was not initially driven by concerns regarding human rights, principles of justice, or even the horrors of the Holocaust. The International Military Tribunals not only provided Allied powers the opportunity to legitimize their participation in the war but also their execution of it. This aim to legitimize their use of force during the war did not reflect Allied concerns that they would be vulnerable to prosecution for wartime actions. As instruments of victor’s justice, the International Military Tribunals posed no legal threat to Allied leadership. Rather, the Allied interest in adjudicating the crime of aggression was primarily rooted in gaining soft power during a period of global transformation where international order was being reconstituted.

2. Growing human rights norms and public outcry may have pressed liberal states to act in the face of atrocities during the early 1990s, but they are not sufficient to explain the UN Security Council’s (UNSC’s) choice to create international criminal tribunals. Rather, the choice was strongly influenced by interests defined in terms of power for both liberal and illiberal members of the Security Council.

Chapter 1 shows how power and principle shaped the interests of the permanent members of the UN Security Council that created the ad hoc tribunals for the former Yugoslavia and Rwanda. Although opinion polls conducted among the UNSC’s liberal democracies showed that the general public had strong concerns regarding atrocities committed during these conflicts, calls for action focused on the question of humanitarian intervention rather than the creation of tribunals. However, the experience in Somalia showed that public support for intervention was fragile. Thus, for the liberal democratic members of the P5 (permanent five members of the UNSC), creating tribunals was a means to respond to public concerns about atrocities in a manner
that presented less political risk and lower cost than more assertive policy options (such as military intervention). In other words, interests defined in terms of power shaped the choice to create tribunals. This was also the case for the council’s two illiberal permanent members, though in different ways. For these illiberal states, interests defined in terms of power were linked to the liberal states’ preferences to create tribunals. At the time the ad hoc tribunals were created, both countries sought closer ties to the West, and supporting liberal states’ preferences for tribunals was one way to achieve this objective. Russia’s foreign policy at the time was based on a broad strategy of Europeanization and forging better ties with both Europe and the United States. Support for the tribunals offered the Russians the chance to show that post–Soviet Russia supported many of the same principles held by the UNSC’s liberal member states. Similarly, China’s emphasis on openness and engagement with the international economy also made them reluctant to stand in the way of the tribunals, even though they maintained strong concerns regarding sovereignty. For the Chinese, not opposing the creation of the courts provided an opportunity to begin to rebuild their tattered human rights reputation in the wake of the Tiananmen massacre.

3. The political fault lines regarding the design of the ICC were not simply between supporters and opponents of international humanitarian law. Rather, interests defined in terms of power figured prominently in the design preferences of many states in a battle over the role of the Security Council in the operation of the court.

Chapter 2 shows us that although the original impetus for the creation of the ICC was squarely rooted in principles of international humanitarian law, once the process of negotiations began states sought to shape the design of the court in accordance with other interests. Chapter 2 shows that interests defined in terms of power were among the most significant for a number of states, and these interests created some of the most contentious debates regarding the design of the ICC. For these states, the process of institutional design was part of a broader struggle between those privileged by existing institutional rules and norms and those who sought to use the ICC as a means of equalizing the hierarchical structure of international order—one skewed in favor of the Security Council’s five permanent members (P5). These politics were evident at several times during the process of institu-
tional design: initially during the PrepCom meetings, then during the Rome Conference, and lastly during the review conference held in Kampala, Uganda. Where there were significant deviations from expected behavior, chapter 3 shows that these too were strongly shaped by interests rooted in realpolitik. In these instances, realpolitik operating at the global level gave way to interests defined in terms of power at the domestic and regional levels.

4. Though charged with a mission firmly rooted in principles of justice and human rights, egoistic institutional interests press the ICC to pursue a more pragmatic course, one whose principled mission is closely intertwined with the strategic interests of the UN Security Council, particularly its three permanent members who are not party to the Rome Statute.

The book also shows how principle and power intertwine to shape the behavior of the ICC as it seeks to investigate the gravest violations of international humanitarian law. Chapter 4 shows the strong—though indirect—influence that state strategic interests have on the behavior of the ICC. Counterintuitively, this involves the strategic interests of three of the most powerful states who are not party to the Rome Statute—the United States, Russia, and China. However, contrary to the views of some of the court’s most vocal critics, the evidence shows that the ICC has not been captured by these powerful countries to do their bidding. Rather, egoistic institutional interests are affected by the court’s dependence on powerful states in order to achieve its mandate for justice. As shown in chapter 4, these interests affect both the court’s choice to pursue a formal investigation for a given situation and the swiftness of its decision to do so. Future scholarship on the prosecutorial behavior of the ICC can test the proposed theoretical framework against the growing body of empirical data.

The theoretical frameworks developed and applied in this book not only provide us lenses to better understand the form and function of international criminal courts but to varying degrees may be useful to understanding outcomes for other institutions. Grand theories are the most widely generalizable, and this book seeks to contribute to the continued development of grand theory by exploring the overlap between two commonly contrasting schools of thought—realism and constructivism. Examining the frequent
overlap between power and principle in the development of international
criminal courts reveals that interests in the form of power provided essential
windows of opportunity for norm entrepreneurs seeking to advance interna-
tional humanitarian law. Adopting a more monocausal framework would
likely not recognize how interests in the form of power could be integral to
the development of interests in the form of principles. Conversely, the ap-
proach used here prompts us to reconsider the forms and functions of power
so central to realist thought. As shown in chapter 1, Allied leaders sought to
use the International Military Tribunals to legitimize their use of force dur-
ing the war and to increase their soft power in the emerging postwar order.
Power is central to the narrative; however, it is not defined solely in terms of
brute material force as is common in most contemporary realist scholar-
ship. Rather, interests defined in terms of power over opinion figure prom-
inently, a dimension of power acknowledged by classical realists such as
E. H. Carr but more commonly associated with a constructivist view among
contemporary scholars. Differing conceptions of power have animated a
lively debate among scholars of international relations, yet too often such
debates press scholars to choose sides. Instead, the examination of interna-
tional criminal courts offered here shows the utility of adopting a more
nuanced approach that brings together elements of both realist and construc-
tivist (and to some degree, neoliberal institutionalist) perspectives. Although
helpful in gaining a sharper understanding of the origins and evolution of
international criminal courts, such an approach is certainly not limited to them.
Rather, it may be useful in understanding a much broader range of phenom-
ena in international politics.

The middle-range theories developed and utilized in the book are also
somewhat generalizable. The theory of institutional design preferences for-
warded in chapter 2 is based on an insight not limited to international courts:
relative power can either be gained or lost depending on the design of an
international institution. Although the design of the ICC clearly had signifi-
cant implications for the relative power of the UN Security Council and
those who sought to remove the prerogatives afforded to its five permanent
members, other institutions may have similar effects. One needs to look no
further than the Doha round of WTO trade negotiations to see how state
preferences were shaped by concerns over relative power as the design of a
new trade agreement was being negotiated. Divergent preferences between
the global North and global South largely derailed the Doha round talks
during the Cancun ministerial meeting in 2003. But the framework forwarded in chapter 2 prompts us to consider more than just how relative power is affected by the design of institutional arrangements. Drawing on (and building on) regime complex theory suggests that such dynamics may be strongly affected by the relationships between institutions. Although a growing body of scholarship has focused on how overlapping institutions can affect interests and outcomes, the framework forwarded in chapter 2 illustrates how institutional nesting can have similarly significant effects.

The insights from the internalization theory developed in chapter 4 may also be generalizable and applied beyond the domain of international criminal courts. The notion that international organizations may develop their own egoistic interests independent of the interests of those states that created them was put forward by the architects of principal-agent (PA) theory. The framework used in chapter 4 builds on the central insights by showing how, in some instances, potential influence moves beyond the binary principal-agent relationship to include consideration of third-party actors. Although this insight has relevance in the case of the ICC, it is not specific to the court. Rather, it should not only prompt scholars to consider the formation of egoistic organization interests more broadly but also apply this framework to a broader array of international courts and international organizations.

The Triumph of Principle over Power?

Advocates for the creation of the International Criminal Court have long argued that the court would deter the commission of atrocities and contribute to global peace. Some even went so far as to suggest that the court’s creation was a transformative force in the very nature of international politics and world order. Although such rhetoric might easily be dismissed as hyperbole employed in the interests of political salesmanship by the court’s most ardent and idealistic supporters, the goals of deterring future atrocities and contributing to peace are expressly stipulated in the preamble of the Rome Statute itself. As the ICC continues in its second decade of operation, we might consider how successful the court has been thus far in constraining the often tragic effects of the pursuit of power in the name of principles of international humanitarian law. Unfortunately, the available evidence is not particularly encouraging.
There is scant evidence to suggest that the ICC’s presence acts as a significant deterrent on those whose quest for power knows few, if any, moral boundaries. Alleged perpetrators of crimes covered under the Rome Statute were obviously not deterred in the nineteen situations currently under investigation by the ICC. These include Afghanistan, the Central African Republic (CAR), Colombia, the Democratic Republic of Congo (DRC), Côte d’Ivoire, Georgia, Guinea, Honduras, Iraq, Israel (referral brought by Comoros), Kenya, Korea, Libya, Mali, Nigeria, Sudan, Uganda, and Venezuela.

The situation in Libya is a prime example of leaders’ general lack of concern regarding ICC prosecution. After using his military in an attempt to crush the growing civilian demonstrations in Libya, Muammar Gaddafi showed little restraint or concern about potential prosecution. In a speech he stated, “We will fight them and we will beat them. . . . If needs be, we will open all the arsenals.”17 At the time, the ICC had been in existence for nearly a decade.

In addition to those situations already under investigation by the court, there are other prominent examples of leaders undeterred by the presence of the ICC. Among the most significant is Syria, where the Assad regime has shown little restraint in its pursuit to maintain its power. Even after President Obama’s now-infamous “redline” had been crossed following a chemical weapons attack on civilians in August 2013, there are few signs of any deterrent effect. In addition to a protracted policy to restrict essential aid to civilian populations, the military also resorted to the widespread use of “barrel bombs.” These crude weapons are oil drums filled with shrapnel such as nails, which are then dropped from helicopters on the unsuspecting civilians below. In February 2014, U.S. secretary of state John Kerry remarked, “Each and every barrel bomb filled with metal shrapnel and fuel launched against innocent Syrians underscores the barbarity of a regime that has turned its country into a super magnet for terror.”18 Moreover, in June 2014 the Organization for the Prohibition of Chemical Weapons (OPCW) reported that there was evidence to suggest that “toxic chemicals, most likely pulmonary irritating agents such as chlorine, have been used” by the Syrian government in a “systematic manner” long after they agreed to dispose of their chemical weapons cache.19 Needless to say, it is difficult to find evidence of deterrence in Syria.

Another prominent example of atrocities undeterred is North Korea. On February 17, 2014, an official UN inquiry led by Michael Kirby provided
extensive evidence of ongoing atrocities committed by the government of North Korea. Among the evidence forwarded by the Commission of Inquiry on Human Rights in the Democratic People’s Republic of North Korea was an overview of the ongoing situation in state-run political prison camps:

In the political prison camps of the Democratic People’s Republic of Korea, the inmate population has been gradually eliminated through deliberate starvation, forced labour, executions, torture, rape and the denial of reproductive rights enforced through punishment, forced abortion and infanticide. The commission estimates that hundreds of thousands of political prisoners have perished in these camps over the past five decades. The unspeakable atrocities that are being committed against inmates of the kwanliso political prison camps resemble the horrors of camps that totalitarian States established during the twentieth century.20

The report went on to list numerous other violations covered under the Rome Statute, including crimes against humanity. It further concluded that “the gravity, scale and nature of these violations reveal a State that does not have any parallel in the contemporary world.”21 On April 17, 2014, Michael Kirby brought the report to a meeting of the UN Security Council, where he argued for the prosecution of the North Korean leadership. Kirby informed the members present that “in a week of many grave human rights matters occupying the attention of the members of this council, we dare say that the case of human rights in the DPRK (Democratic People’s Republic of Korea) exceeds all others in duration, intensity and horror.”22 Pyongyang’s representative at the meeting, So Se Pyong, responded to the report by arguing that the United States and “other hostile forces” had fabricated the report in an attempt to “defame the dignified image of the Democratic People’s Republic of Korea and eventually eliminate its social system.”23 Pyongyang shows little sign of concern about potential prosecution by the ICC and has shown no signs of change in the wake of the UN report, even though the OTP launched a preliminary investigation.

What is even more damaging to the notion of the deterrent effect of the ICC is evidence of crimes continuing to be committed in situations where the court already has preliminary investigations under way. What behavior do we see among actors who know that the eye of the court is trained on the country? In Nigeria, thousands of innocent people have been slaughtered
from 2009 to 2014 by the Islamic militant group Boko Haram. The group seeks to gain power to establish an Islamic state and appears ready to use all means necessary to achieve its goal. This includes the use of child soldiers, kidnapping, selling girls, and mass slayings, including children. In April 2014, Boko Haram kidnapped some three hundred girls from their boarding school and later released a video that declared the girls would be sold as brides. The video generated global shock and outrage, spawning a global Bring Back Our Girls campaign in international civil society. In June 2014, raids in the northeastern state of Borno claimed hundreds of innocent lives. One local leader described the attack on his village: “The death is unimaginable. We have lost between 400 and 500 people in the attacks in which men and male children were not spared. . . . Even nursing mothers had their male infants snatched from their backs and shot dead before their eyes.”

In addition to these acts, Boko Haram has also begun to utilize children in suicide bombing attacks. According to the United Nations Children’s Emergency Fund (UNICEF), 20% of all suicide bombing conducted by Boko Haram have been carried out by children, and the number of children used in such strikes has increased more than tenfold from 2014 to 2015. Those ordering and conducting such attacks do not appear to be deterred by the prospect of international justice.

Iraq is another example where an active preliminary investigation by the court does not appear to serve as an effective deterrent to the commission of atrocities. This involves the actions of members of ISIS, the self-proclaimed Islamic States of Iraq and Syria, led by Abu Bakr al-Baghdadi. In June 2014, ISIS militants attacked numerous villages south of Kirkuk, Iraq, in what witnesses described as massacres aimed at destroying the Shiite Turkmen communities. Witnesses described mass executions and beheadings, and the victims included young girls. We also see continuing violence in Mali, another country where the ICC has already established an investigation. Where actors feel the stakes are high enough, the means to attaining power appear to be of less concern that achieving their primary objective. Not surprisingly, given the available empirical evidence, a number of scholars have cast considerable doubts on the deterrent capacity of the ICC.

Not only are political despots apparently undeterred from using all means they consider necessary to achieve their political objectives but also little evidence suggests that the creation of the ICC has made the world more peaceful. As shown in the most recent data released by the Uppsala Conflict Data
Program, yearly fatalities in organized violence have not been trending downward since the ICC became operational in 2002.\textsuperscript{28} In fact, they have risen sharply since 2012. These take into account trends in state-based conflict, nonstate conflict, and one-sided violence. Of course, few (if any) had realistic expectations that the ICC would make violent conflict a thing of the past. Moreover, even though the ICC is nearly halfway through its second decade of existence, it remains an institution that is largely in its infancy. One could argue that it is difficult to establish a deterrent effect until the court has established a proven track record of holding the guilty accountable for their crimes. In addition, with few trials completed as of this writing, it would be reasonable to assume that the court’s impact on postconflict reconciliation would be negligible. From the perspective of postconflict reconciliation, the ICC’s greatest potential contribution to peace may be its ability to keep conflict-prone societies from recidivism. Gauging the court’s success along such lines will clearly require a much longer time horizon. Rather than representing the culmination of a decades-long justice cascade, the ICC is likely better conceived as an institution in its formative stages. Doing so gives us a more measured and realistic perspective regarding its progress and impact.

**Striking the Balance between Power and Principle**

Even this informal and anecdotal consideration of the ICC makes it clear that we are a long way from the time when principle has the upper hand over power. Although idealists commonly see power as the root of the problems that can often generate profound human suffering, power must play an instrumental role in addressing them. The application of power is not only necessary to protect the innocent and provide a deterrent to those who may do them harm but, as shown in this book, can frequently play a crucial in the process building, strengthening, and diffusing principled norms. Indeed, chapter 1 documented how important the International Military Tribunals were to the development of contemporary international law, even though the rationale behind their creation reflected interests defined in terms of power among the victorious Allied powers. In addition, it is the most powerful states in the world that are in a position to have the strongest impact on peace and security. This notion is foundational to the design of the United Nations
and the role of the Security Council. The relationship between power and principle is crucially important to peace, security, and the protection of the innocent. However, the most effective means of combining these forces in the interests of reducing human suffering is not clear. This raises important normative questions for policymakers in the world’s most powerful states. To what degree should idealism (principle) or realism (power) shape how powerful states respond to violent conflict and the atrocities commonly committed during them? Moreover, what role should the ICC play in this response?

Realists do not consider justice to be the primary objective when addressing conflict and the suffering it inflicts. Rather, most would likely argue that stopping the violence and reestablishing stability should be the primary objective. This can be achieved either by altering the balance of power among the combatants or by using their power to bring the warring parties to the negotiating table to broker a political settlement. Direct military intervention would clearly have the greatest impact on the balance of power in a conflict situation, but such action is unlikely to be taken in situations where few strategic interests are at stake for the intervening power. Direct military intervention incurs substantial material and political costs, yet in cases with few strategic interests involved, have little to offer from the standpoint of interests defined in terms of power. In these cases, the more common response by the world’s powerful countries is to provide material or advisory support for one side in the conflict, an approach sometimes referred to as “building partner capacity.” Yet, as the American experiences in Iraq and Afghanistan have shown, such programs too often fail. Moreover, depending on the existing alliance relationships involved in a given situation, providing support to one side may cause powerful states allied with the other side to enter the fray, potentially escalating both the scale and scope of the conflict. Most states would be hesitant to become ensnared in a civil war or ethnic conflict if doing so risks a more substantial military engagement with another powerful state. Given high risks and limited rewards, a realist approach would prefer to either (1) remain disengaged from the conflict until one side is able to secure victory, or (2) promote a political solution to the conflict. Of course, states often may seek to alter the local balance of power in a situation and then quickly push to broker a political settlement to take advantage of short-term gains while minimizing long-term commitments. Regardless of the specific approach taken, the bottom line is that achieving stability takes priority
over achieving justice. Realists would not generally welcome any participation by the ICC into the situation until a political settlement has been reached.

Human rights advocates are all too familiar with the realist logic. They can point to the obvious shortcomings of the realist approach. Perhaps most importantly, many of the atrocities evident in international society take place in countries with limited strategic value to the world’s great powers. In practice this means that it is unlikely that powerful states will be motivated to become involved at all in stemming the violence. Moreover, the realist approach maintains a system in which the powerful remain largely immune to constraints on their use of power. This not only includes their use of power directly but also in their capacity to provide material support to oppressive regimes to which they are allied. To paraphrase Thucydides, in such a system the powerful do what they can while the weak suffer what they must.30 For idealists, this is the reality that not only produces the atrocities they are trying to address but also often shields those most culpable. Indeed, the quest for political power often leads to profound human suffering. As Rudi Rummel put it, “power kills.”31

For these reasons (and others), many idealists place a high priority on principles of human rights and justice in guiding foreign policy regarding violent conflict. For the more legalistic among them, this means framing a given situation through the eyes of international humanitarian law and includes promoting an active role for the ICC in addressing situations where violence is marked by atrocities and profound human suffering. This includes identifying perpetrators of atrocities as war criminals and documenting evidences of crimes to be used in prosecution. Presumably, this perspective includes a preference for regime change because idealists would certainly not consider a government led by a war criminal to possess any legitimacy. Moreover, idealists are not likely to be comfortable with waiting on the sidelines until a military or political solution is reached. Where mass crimes are being committed, the law must take action through the ICC. This position was evident in the case of Darfur. Though the violence in Sudan was ongoing, human rights NGOs pressed the ICC prosecutor to take action. He did so by obtaining a referral from the UN Security Council and issuing arrest warrants, first for Sudan’s interior minister, Ahmed Haroun, and then for its standing president, Omar al-Bashir. At the press conference held to announce the OTP’s request for an arrest warrant for Bashir, the chief prosecutor explained his motive: “These people are waiting for our protection.”32
Legal idealists argue that such actions can deter continued violations in the short run because perpetrators will know that the eyes of the ICC are on them and that they will have to answer for their actions in a court of law. Proponents believe that, as the body of successful prosecutions mounts over time, the actions of the court will contribute to the strengthening and global diffusion of norms that, in turn, will contribute to deterrence more broadly. Moreover, this ability to facilitate compliance with international humanitarian law is affected by the degree of legitimacy enjoyed by the courts that adjudicate them.\(^{33}\) Again, the relationship between power and principle looms large. Many legal experts have argued that the principle of equality under the law is the cornerstone of its legitimacy and, subsequently, its compliance pull.\(^{34}\) Among them, Abram Chayes and Anne-Marie Slaughter suggest that equality under the law is the “one essential factor” of ICC legitimacy and that “exemption of any nation—especially the richest and most powerful—from important legal requirements strikes at the foundation notion of equal treatment under the law.”\(^{35}\)

Though successful enforcement of these norms of justice is necessary for them to gain strength, in the long run idealists suggest deterrence will be not be achieved primarily through threat of prosecution, but rather through the internalization of these norms.\(^{36}\) Critics may point out that until this norm “tipping point” is realized, ICC involvement in a situation will likely complicate political efforts to establish peace or even a cessation of hostilities.\(^{37}\) The threat of ICC prosecution has shown little effect on curbing the behavior of leaders cast in the court’s spotlight and, in fact, seems more likely to cause them to become even more resolute. In the case of Sudan, for example, President Omar al-Bashir was defiant in the face of the ICC warrant for his arrest, and the African Union’s Peace and Security Council argued that the ICC action was undermining the peace process. When addressing the issue of the timing of the ICC arrest warrant against Ahmed Haroun, the chief prosecutor asked the UN Security Council, “When is a better time to arrest Haroun?”\(^{38}\)

Of course, even the most idealistic supporters of the ICC and human rights more generally do not believe that the court can end atrocities and facilitate peace on its own. Neither a purely realist-based approach nor a purely legal idealist-based approach would be the most effective approach to dealing with the problems of conflict atrocities. The challenge facing policymakers is finding the right mix between power and principle. Proponents of
the doctrine known as the Responsibility to Protect (R2P) suggest that until norms of international humanitarian law reach the tipping point in which they become broadly internalized throughout international society, state power must be brought to bear in defense of civilian populations caught in the crossfire of conflict. These principles gained widespread acceptance at the 2005 World Summit, where all members of the UN General Assembly made a commitment to the Responsibility to Protect doctrine as detailed in the World Summit Outcome document.\textsuperscript{39} In addition to committing to protect their own citizens, states accepted the premise that the international community has an obligation to use all appropriate means to protect the innocent from genocide, ethnic cleansing, war crimes, and crimes against humanity. By exacting a commitment to support humanitarian principles, R2P proponents hoped to compel states to utilize their power in support of the doctrine. Although the document stipulated a preference for nonmilitary means of action, including mediation and economic sanctions, the use of force was also sanctioned if peaceful means were inadequate. However, force must be sanctioned by the Security Council under Chapter VII of the UN Charter.

Applying this doctrine and finding the right mix between power and principle is fraught with challenges. Taking a more passive approach, such as economic sanctions, places pressure on actors to comply, yet rarely produces an immediate effect. Doing so risks that mass casualties and grave atrocities will continue to be committed for some time, exacting a profound human toll. As Moreno Ocampo observed, genocidaires require only two things to achieve their goal: global indifference and time.\textsuperscript{40} Military intervention provides the most direct and immediate means of protecting the innocent. However, even if policymakers are willing to apply military power to cases involving humanitarian interests, other factors raise important questions about utilizing the military option. For powerful states charged with the task of intervention, military engagement carries significant domestic political risks. In addition to likely concerns about bearing the economic burden of military action, mounting casualties invariably result in declining public support. Although liberal democratic states may be more vulnerable to such domestic political costs, illiberal states are not immune to them.\textsuperscript{41} Providing arms but not soldiers may reduce these risks, but doing so raises other potential problems. For example, in the fall of 2015, the U.S. Central Command acknowledged that a $500 million program to train and equip
Syrian rebel forces resulted in a significant amount of these resources passing through the rebels’ hands and into the hands of al-Qaeda. Moreover, it suspected that a large number of the fighters trained by U.S. military advisers had changed sides and were now fighting for the Islamic State. Only four or five fighters of a force intended to number some three thousand to five thousand soldiers remained in active battle against ISIS. There is also the potential that consistently backing rebel groups in the name of defending the civilian population risks moral hazard. Some scholars have raised the question of whether rebel groups may provoke genocidal retaliation against their own group in order to secure outside military intervention that may tip the balance of power in their political struggle. Needless to say, the choice to intervene and how to do so is both weighty and fraught with difficulties.

Lessons from the Syrian Civil War

The situation in Syria provides an excellent example of the difficulty in finding the right balance between principle and power, as well as the potential pitfalls along the way. The roots of the conflict began in March 2011 after Syrian security forces opened fire on pro-democracy protesters in the city of Deraa. The incident triggered mounting protests across the country, and by July, hundreds of thousands of Syrians were taking part. The situation became steadily more violent as antigovernment groups organized and took arms in order to expel security forces from their local areas. Within two years, the UN estimated that some ninety thousand Syrians had perished in the conflict.

American president Barack Obama was under pressure to bring U.S. power to bear onto the mounting crisis in Syria by idealists among his advisory staff. Samantha Power, a member of Obama’s National Security Council staff and a strong proponent of the Responsibility to Protect doctrine, pushed the president to provide arms to the Syrian rebels in their fight against the Assad regime. She was joined by Secretary of State Hillary Clinton in calling for a robust American response to the violence in Syria. Generally speaking, an idealistic approach would involve providing material support for the Syrian rebels to topple the autocratic Assad regime, supporting the arrest and trial of Assad for violations of international humanitarian law, and promoting a Syrian transition to democracy. At the same time, however, former defense
secretary Robert Gates frequently cautioned against overextending U.S. power in the Middle East. Reportedly, Gates quipped on more than one occasion during meetings, “Shouldn’t we finish up the two wars we have before we look for another?”

The realist preference would be to avoid overextension and becoming embroiled in yet another war in the Middle East. Instead of siding strongly toward one approach or the other, Obama preferred to chart what he considered to be a more pragmatic course that navigates the terrain between power and principle:

> I am very much the internationalist. And I am also an idealist insofar as I believe that we should be promoting values, like democracy and human rights and norms and values, because not only do they serve our interests the more people adopt values that we share—in the same way that, economically, if people adopt rule of law and property rights and so forth, that is to our advantage—but because it makes the world a better place. Having said that, I also believe that the world is a tough, complicated, messy, mean place, and full of hardship and tragedy. And in order to advance both our security interests and those ideals and values that we care about, we’ve got to be hard-headed at the same time as we’re bighearted, and pick and choose our spots, and recognize that there are going to be times where the best that we can do is to shine a spotlight on something that’s terrible, but not believe that we can automatically solve it. There are going to be times where our security interests conflict with our concerns about human rights. There are going to be times where we can do something about innocent people being killed, but there are going to be times where we can’t.

Although taking a more pragmatic course between power and principle makes sense, charting this path effectively is extremely challenging. In the case of Syria, U.S. policy took a very public stance rooted in principled idealism, yet was not fully committed to bringing U.S. power to bear on achieving these aims. Moreover, several missteps were taken in managing the elements of realpolitik essential to securing peace and stability and, subsequently, minimizing human suffering.

The Obama administration and its European allies defined the situation in Syria as a conflict emanating from a pro-democracy movement similar to others that characterized the “Arab Spring.” Thus the stated aims of policy to address the situation emphasized supporting regime change in Syria rather than stability through a brokered peace agreement that would allow
Assad to remain in power. Initially wary of making a definitive commitment to regime change given the recent experience in Libya, governments on both sides of the Atlantic publicly stated in August 2011 what some policy analysts now refer to as “the magic words”: Assad must go. On August 18, Secretary of State Hillary Clinton stated, “The transition to democracy in Syria has begun and it’s time for Assad to get out of the way.” President Obama echoed this sentiment: “For the sake of the Syrian people, the time has come for President Assad to step aside.” These policy pronouncements were coordinated along with those of France, Germany, and the UK who issued similar calls for Assad’s ouster. Many inside the Obama administration believed that Assad’s hold on power was precarious and that he would soon fall without foreign intervention. As Dennis Ross, former Middle East adviser to Obama, put it, “He thought Assad would go the way Mubarak went.” Not surprisingly, American efforts to bring about regime change did not apply much power. Instead, policy took the form of targeted economic sanctions. Unfortunately for Obama and America’s European allies, Assad would not, to quote Dylan Thomas, “go gentle into that good night.” At this point, these governments were now bound by their public statements, yet were reluctant to bring significant additional power—particularly military power—to bear on the situation. Obama would later justify American reluctance to use its military power to achieve regime change: “The notion that we could have—in a clean way that didn’t commit U.S. military forces—changed the equation on the ground there was never true.” This disjuncture between interests defined in terms of principle and interests defined in terms of power not only locked the United States and its EU partners to their preferred outcome but also complicated any efforts to negotiate a political solution. In short, by taking the position that Assad has to go, the United States and its allies made him less inclined to enter into negotiations. Bruce Jones, vice president of the foreign policy program at the Brookings Institution pointed out, “If you call for Assad to go, you dramatically drive up the obstacles to a political settlement. If you’re not insisting on him leaving, there are more options. If you say Assad must go as the outcome of a settlement, he has the existential need to stop that settlement.” Moreover, by not backing up the principled rhetoric, the U.S.-EU policy likely emboldened Assad not to consider negotiations necessary for his political survival. Jones added, the call for Assad’s exit “was a classic case of talking loudly and carrying a small stick.”
As the Syrian conflict grew in scale, scope, and gravity, the emphasis on interests defined in terms of principle was not only maintained, but expanded. In addition to the issue of regime change and the promotion of democracy in Syria, American and European rhetoric increasingly focused on defense of human rights and promotion of international humanitarian law in Syria. This raised the question of whether the ICC would have a role to play in this process. On the same day that American and EU leaders called for Assad to step down (August 18, 2011), the Office of the United Nations High Commissioner for Human Rights (OHCHR) released a report that defined the Syrian government’s attacks on civilians as crimes against humanity. Moreover, the report urged the UN Security Council to refer the situation to the ICC for investigation. Although the Obama administration did not immediately frame interests in terms of justice, there was a growing linkage created between U.S. interests in Syria and the possible violations of international humanitarian law occurring there. In February 2012, Secretary of State Hillary Clinton declared in a Senate hearing that president Assad “fits the definition of a war criminal.” In the summer of 2012, president Obama suggested that continued violations of international humanitarian law would prompt a strong—presumably military—response from the United States. Specifically, Obama stated that the use of chemical or biological weapons by the Assad regime would cross a “redline” and Assad would be held accountable: “We have communicated in no uncertain terms with every player in the region that that’s a redline for us and that there would be enormous consequences if we start seeing movement on the chemical weapons front or the use of chemical weapons.” Most interpreted Obama’s ultimatum as a signal of American resolve to use military power should the “redline” be crossed. However, one year later it appeared that the line had been crossed when reports that rockets carrying sarin were fired at the Ghouta suburbs of Damascus. Western powers believed that only the Syrian government could have carried out the attack. Yet, no military reprisal was forthcoming from the United States in the aftermath of the attack. Instead, a U.S.-Russian proposal to force the Syrian government to relinquish and destroy its chemical weapons stockpile was passed through the UN Security Council. Under the agreement, Syria had until mid-2014 to destroy its chemical weapons stockpile. Airstrikes were eventually initiated by a U.S.-led coalition in September 2014, but Syrian government forces were not the
targets. Rather, the airstrikes were used against ISIS targets, one of the groups seeking to overthrow the Assad government.

So what effect did the articulation of interests defined in terms human rights and justice have? It certainly had little deterrent effect: reports of atrocities continued to mount following Hillary Clinton’s 2012 statement that Assad “fit the description of a war criminal” and President Obama drew his redline regarding the use of chemical weapons. Moreover, even after the August 2013 attack, numerous reports surfaced that chlorine gas was being used in combat. There were, however, political effects stemming from the legal rhetoric. Just as declaring “Assad must go” most certainly decreased president Assad’s motivation to engage in negotiations to find a political resolution to the civil war, declaring him to be a war criminal likely contributed to a reluctance to negotiate a political settlement that would remove him from power. At this point, the war not only involved political survival for the Assad regime, but potential prosecution for Bashar al-Assad himself. In fact, Secretary of State Hillary Clinton acknowledged as much in her February 2012 Senate testimony. During her testimony, Clinton noted that labeling Assad a war criminal would likely make it more difficult to get Assad to step down and thus would reduce the chances of finding a political resolution to ending the violence in Syria.59 On the other side of a potential bargaining table, labeling President Assad a war criminal no doubt made it more difficult for American and European leaders to soften their insistence that “Assad must go.” How could liberal democratic states accept a peace agreement that would allow a war criminal to remain in power?

This insistence that any negotiated settlement must be premised on Assad’s removal from power complicated efforts to find a political solution. With no flexibility on this point, the United States was unable to take the lead in promoting a negotiated settlement. Instead, Russia was one of the early proponents of a political solution, hoping that a political compromise might succeed in forwarding two realist-grounded interests: restoring stability in Syria and supporting the continuation of the existing Syrian government with which it was allied. In January 2012, the Russian foreign ministry offered to host “informal talks” between the Syrian government and opposition groups. The next month, the Russian ambassador to the United Nations, Vitaly Churkin, offered a three-point plan that reportedly included a willingness to “find an elegant way for Assad to step aside.”60 Presumably, an “elegant way” meant that Assad’s exit would not be immediate and that the
existing government would not be subject to regime change after Assad’s eventual departure. However, as one European diplomat remarked, “At the time, the West was fixated on Assad leaving.”

The inability of the world’s major powers to find common political ground on Syria resulted in a number of failed attempts at reaching a political solution to the violence. The failure to secure peace between 2012 and 2016 has produced heartbreaking effects: nearly one-half million Syrians have been killed as a direct result of the war, and the conflict has created nearly 5 million refugees and more than 6.6 million internally displaced people (IDPs). The large flow of refugees seeking protection has created subsequent crises in the EU and the Mediterranean region. In the face of these striking numbers, on December 18, 2015, Secretary of State John Kerry announced a profound shift in U.S. policy: the United States was abandoning its demand that Assad step down as a precondition for a peace agreement. Kerry explained, “We began to really come to the reality that this demand was in fact prolonging the war, creating greater agony and suffering, and not getting us anywhere in a stalemate.” It is not clear as of this writing whether the change in the U.S. position will facilitate a return to peace and stability in Syria. However, having the United States and Russia on the same page will no doubt be integral to the peace process.

So what lessons does the Syrian civil war have when considering the relationship between power and principle and the role of international justice? Most obviously, Syria makes clear how difficult finding the right mix between power and principle can be. Moreover, there is no one clearly superior option. However, the difficulties the United States and its European allies have encountered in crafting an effective response does provide important lessons for the future. Probably most important lesson is to make sure that action matches rhetoric. In the U.S. case, strong public pronouncements of “redlines” and that “Assad must go” was not followed with equally strong state action. Policy not only resulted in a loss of American credibility but also likely emboldened Assad and his Russian and Iranian allies and made them less willing to make significant concessions toward a negotiated peace settlement. The experience with the Syrian situation has given reason for pause among those who strongly pressed for strong idealistic public pronouncements in the war’s early stages. Among them, Anne-Marie Slaughter, Hillary Clinton’s director of policy and planning at the State Department, remarked, “In some ways, those of us who want to see more action will often take
whatever we can get. So if we’re not willing to do more, at least we can make a statement to let people know you’re with them. Now many of us think if that’s all you can do, maybe you’re better off not speaking. If we’re going to get people’s hopes up when we’re not willing to do more, we need to be honest about that and maybe it’s better to remain silent.”

Idealists may argue that the central lesson is that liberal states simply need to be true to their principles. However, policymakers face real and potentially significant domestic political costs. Until those potential political costs can be reduced, it would be naïve to presume that policymakers would not take them seriously into account. Thus, policymakers find themselves seeking to find that balance between interests defined in terms of principle and interests defined in terms of power. As President Obama put it, “If it is possible to do good at a bearable cost, to save lives, we will do it.” The key determinant, of course, is what costs are considered “bearable.” Ultimately, it is paramount that policymakers define these parameters at the outset and design policy and resultant public statements so that they are consistent with this calculus.

Another key lesson from the Syrian situation is that great-power cooperation, particularly among the permanent members of the UN Security Council, is essential. Achieving the cooperation necessary requires a deft hand in navigating the realpolitik involved in great power relations. Although the failure to more actively seek a political settlement early in the conflict may be attributed to the United States’ miscalculation of Assad’s ability to remain in power, it was certainly a missed opportunity with profound implications. Russia’s early gestures at seeking a political compromise were largely seen as a thinly veiled attempt to keep their ally Assad in power. Moreover, the idea of granting Russian president Vladimir Putin a leading role as peacemaker was never warmly received in Washington or Europe. This sentiment certainly grew with Western concerns over Russia’s actions in Crimea and Eastern Ukraine, as well as accusations regarding Russia’s role in the downing of Malaysian Flight 17. Before U.S. credibility regarding potential intervention in Syria was weakened by its failure to back up its idealistic rhetoric, the Russians appeared keenly interested in finding a political solution. Granting the Russians a leading role in securing a negotiated peace held considerable promise because it offered strong incentives to the Russians to make sure that the process was successful. Putin has made it clear that he wants Russia to be considered a major player in international
politics in the wake of its “humiliation” at the end of the Cold War. Facilitating a negotiated peace would not only have given Putin what he wanted, but would have made Russia a stakeholder in the outcome. Failure of the Syrian government to negotiate in good faith and comply with commitments made under a peace settlement would reflect badly on Putin and the Russians. It would seem that the early stages of the Syrian conflict represented a unique opportunity to lock Russian interests into achieving and enforcing the peace. Unfortunately, once it became more confident that Western powers were reluctant to become militarily engaged in Syria, it appears that the Russians recalculated their interests and their policies. Although they remain publicly supportive of finding a political solution, they have steadily extended additional military support to the Assad government.

Efforts to refer the Syrian situation to the ICC through the UN Security Council certainly did not facilitate Russian cooperation in stopping the conflict. In fact, it is more likely that the gesture further antagonized the Russians who had early on insisted that the ICC had no role to play in Syria until peace was achieved. The effort to secure a Security Council referral took place in May 2014 when a proposal was forwarded by France with the support of sixty-five countries. Russia had clearly signaled its intent to veto any such proposal well in advance of the vote. Vitaly Churkin, Russia’s ambassador to the UN, suggested that calling for a vote on the proposal was simply a “publicity stunt” and that referring the Syrian situation to the ICC would hamper any efforts to secure a negotiated peace agreement. Even though they knew the proposal would not pass because of Russia’s (and China’s) veto, supporters insisted that bringing it up for a vote still had symbolic and moral value. After the vote, the Americans and Europeans were quick to publicly express their outrage. British Foreign Secretary William Hague described the veto as “indefensible,” while France’s representative to the Council suggested that the action was “an insult to humanity.” U.S. ambassador to the UN, Samantha Power, added, “The Syrian people will not see justice today. They will see crime, but not punishment. The vetoes today have prevented the victims of atrocities from testifying at The Hague.”

Although the moral value of bringing the proposal up for a vote is debatable, the political results are more clear cut. Putting the proposal up for a vote after Russia had signaled its opposition clearly antagonized the Russians, as did the public comments that followed the vote. The Russians viewed the attempt to gain a Security Council referral as detrimental to the unity among
the council’s permanent members that was seen as a necessary condition to achieve a negotiated settlement in Syria. Ambassador Churkin remarked,

It is more difficult to figure out the motives of France which initiated this draft and put it to vote, being fully aware in advance of the fate it will meet. One can hear many complaints about the lack of unity on Syria within the Security Council, among P5. Indeed, when that unity is present we manage to achieve concrete positive results. Among them is undoubtedly the Security Council Resolution 2118 on the destruction of the Syrian chemical stockpile—that program is about to be successfully completed. Another important benchmark was the Security Council Resolution 2139 on humanitarian issues. P5 unity is important. After all, it is for a reason that France has been pushing for P5’s engagement in the political settlement of the crisis, having failed however to advance any positive substantive ideas. Then why deal such a blow to P5 unity at this stage?  

Although idealists may see moral value in speaking justice to power, doing so did little to alleviate the human suffering taking place in Syria. Nor did it facilitate Russian cooperation whose foreign policy is generally based on a realist perspective. Moreover, as was the case with the creation of the ad hoc tribunals, it provided a means through which liberal democratic countries could appear to be making an assertive attempt at dealing with the crisis without incurring the material costs or political risks associated with a more assertive intervention. Syria offers important lessons regarding the need for great-power cooperation, particularly among the five permanent members of the UN Security Council, the role of realpolitik in achieving cooperation, and the need to effectively bring together both power and principle to address human suffering.

In some ways, the principled rhetoric of the ICC’s most ardent supporters echoes the idealism of the interwar period of which E. H. Carr was so critical in his seminal book, *The Twenty Years’ Crisis.* Carr was critical of the growing assumption during that time that human beings could agree on abstract normative principles to guide the behavior of states and that, once these were enshrined in international law, they would influence nations to act with greater justice. In contrast to the idealists, Carr argued that ideals could only be effectively pursued if policymakers were sensitive to the distribution of power and to national interests defined in terms of power. More
recently, Robert Keohane forwarded a similar stance with regard to institutional design. Among his “ten maxims,” Keohane argues that “institutional designers should make differential concessions to states, deferring more to those states whose participation is essential to make agreements effective.” He adds that “we need some system in which the powerful states will find it in their interest to participate. . . . Institutions should reflect power relations, and they can only operate within the bounded scope of power relations.”

What exactly does this involve in the context of the ICC? Most importantly, it requires that idealism give way to higher degrees of pragmatism than has been reflected by many of the court’s most ardent supporters. Because international criminal law requires material power to back it up, it is necessary to fit the principles and practice of the law within the hierarchical framework of the existing international order. Just as all states are not equal in the existing international political order, the international legal order pertaining to the atrocities regime should not be too stringent in its adherence to the principle of equality under the law. This is a necessary quid pro quo exchanged for the special responsibilities bestowed on those called on to provide the power necessary to enforce international law. David Scheffer made essentially the same argument during the Rome Conference, noting that “the requirements of those few countries that are still in a position to actually do something by way of accomplishing various human objectives simply have got to be accommodated. And you can’t approach this on the model of equality of all states.” Without the support of powerful states, particularly those more inclined to take a more central role in applying power in defense of human rights (such as the United States), high-minded principles of justice may be successful only in producing justice for justice’s sake. Some have suggested that the failure to take this view into account during the critical design process may have produced a self-defeating court. For example, Jack Goldsmith writes, “An ICC without U.S. support—and indeed, with probable U.S. opposition—will not only fail to live up to its expectations. It may well do actual harm by discouraging the United States from engaging in various human rights—protecting activities. And this, in turn, may increase rather than decrease the impunity of those who violate human rights.”

The more idealistic among scholars and practitioners of international law are likely to take exception to calls for sacrificing legal principle in the name of political pragmatism. This was certainly true of the more idealistic
members of the Like-Minded Group and members of human rights NGOs participating in the Rome Conference deliberations in 1998. This group already lamented the “unfortunate” design concessions made in the Rome Statute and felt that too much had already been sacrificed at the altar of power politics. In contrast to the idealists, pragmatists give priority to the ultimate goals of institutions and seek to find the most effective ways of achieving their desired end results. In the case of international criminal law, pragmatists do not seek to achieve “perfect justice,” but rather a regime that best reduces the probability of future violations that would produce human suffering. Interestingly, as shown in chapter 4, the chief prosecutors of the ICC seem to be more pragmatic about the pursuit of justice than the idealistic international lawyers and activists who were instrumental in the court’s initial design. In practice, the court has shown itself to be sensitive to the interests of powerful states, though stopping well short of being completely beholden to them. In time, this de facto sensitivity to power relationships and political realities may whittle away at U.S. fears of an overzealous court that form the basis of American resistance to joining the ICC. Should the U.S. eventually join the ICC, this, in turn, may promote more cooperation for the court by Russia and China.

So does that mean normative principles are irrelevant? Absolutely not. Considering the relationship between power and principle in the context of international criminal courts calls to question the role of law in international society. Idealists see norms as transformative. In contrast to the idealistic perspective, a pragmatic view of norms regarding individual criminal accountability for violations of international humanitarian law might suggest that their role is not to redefine international order through prosecution and punishment. Rather, they are a vehicle to articulate and practice values. Through the process of adjudication, law and courts refresh these norms for international society and help to further the normative consciousness of its members. Principles ensconced in international courts may become an important element that defines a common identity among the states in the international system. In other words, abiding by these principles not only shapes how actors in the international system self-identify but also create an element of a common social identity among all members of international society that have internalized these norms.

This is a book about the relationship between power and principle—a relationship that creates one of the most crucial dynamics in international
politics. E. H. Carr was among those who recognized the significance of this relationship. Carr described the antithesis of utopia (i.e., principle) and reality (i.e., power) as being fundamental to international politics: “Most fundamental of all, the antithesis of utopia and reality is rooted in a different conception of the relationship between politics and ethics. The antithesis between the world of value and the world of nature, already implicit in the dichotomy of purpose and fact, is deeply embedded in the human consciousness and in political thought.”

Although this dichotomy influences international politics in myriad ways, it is perhaps most profoundly felt in the politics surrounding international criminal courts. As shown in this book, the creation of the ICC does not signal the ultimate triumph of principle over power, nor is it the harbinger of a fundamental reordering of international society. Power politics have influenced all aspects of regime formation and continue to have a substantial impact on the continuing operation of the court. This does not, however, suggest that the continuing presence and influence of power necessarily come at a cost to the promotion of human rights and the alleviation of human suffering. Although principle and power are often presented as opposing forces in international politics, nations need not choose one over the other in responding to the world’s most pressing global challenges. Instead, effective governance involves managing the complex politics that operates between power and principle.