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Protecting the World from Genocide?
A Comparative Analysis of the Responsibility to Protect and the International
Criminal Court

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Abstract

Protecting the World from Genocide?

A Comparative Analysis of the Responsibility to Protect and the International Criminal Court

Lara K. Wagner

In a world plagued by human rights abuses and genocide, it is essential that the international community has strong and effective institutions. Such institutions would allow the international community to enforce the accepted international norms condemning both human rights abuses and genocide. This paper focuses specifically on two such institutions: the Responsibility to Protect doctrine and the International Criminal Court, and seeks to explain why the International Criminal Court has a stronger institutional form and greater international acceptance than the Responsibility to Protect doctrine. This discussion begins with a look at the historical development of the genocide regime and how this development affects the International Criminal Court and the Responsibility to Protect doctrine. Next the form and strength of these institutions are analyzed. Finally, an institutional explanation, Elite Theory, and the Multiple Streams Model are used to explain the strength and acceptance of the International Criminal Court within the international system. The paper concludes with a discussion of possible consequences of these differing institutional forms.

The discourse on human rights is huge. It spans subject fields; from philosophy, to medicine, to politics. It began centuries ago, with the ancient Greek and Roman philosophers and continued to develop through the middle Ages, the creation of the nation-state, the Enlightenment, two world wars and a cold war, remaining forever relevant. Today the discussion focuses on a long list of continued abuses, on genocide in Darfur, on government repression of rebellion in Iran, Libya, Syria and Egypt, on torture for reasons of national security in the United States, and on pirates and extreme enforcement of Shar'ia law in Somalia. The international community is forever struggling to deal with these and countless other human rights issues. With every new crisis, states create new institutions, intended to better deal with such crises than those they replace. But international cooperation is no easy game. Each state has its own individual interests to protect and with 194 universally recognized states in the world today, initial alignment of interests is rare. Much give and take is necessary to produce even the most simple of institutions, and more often than not, these institutions are imperfect solutions to complex problems.

This paper focuses on two such institutions: The Responsibility to Protect Doctrine (R2P) and the International Criminal Court (ICC). Both institutions developed in the early 2000s as a response to the complex humanitarian emergencies and the resultant humanitarian crimes of the 1990s. In particular, this paper focuses on the R2P and the ICC's institutional forms, and seeks to explain the differences between them, and specifically the differing strength of these two institutions.

The concepts of strength and success as they relate to these institutions are defined by a very simple assumption: human rights are good things. To many readers this seems obvious, but the laundry list of human rights abuses that are occurring daily around the world indicates that it is not as obvious as it might seem. This paper makes no effort to prove this assumption; that is well outside its scope and, in fact, is probably better left to philosophers. But, the success of institutions be they the R2P, the ICC, or any of the numerous other institutions discussed below, will be determined by their ability to protect the human rights of people worldwide.

The paper is written in two parts: a largely introductory section followed by an explanatory section. The introductory section includes a look at the historical development of human rights institutions and a brief overview of the three theories used in the explanatory section: Elite Theory, New Institutional Economics, and the Multiple Streams approach. The explanatory section then begins with an introduction to the R2P and the ICC, and a look at their differing institutional forms. The section continues with a discussion of the key players, using framework of Elite Theory. From this arises a discussion of the institutions these players develop, and the reasons they develop them, using the framework of New Institutional Economics. Finally, the role of non-state actors and individual policy makers is discussed within the framework of the Multiple Streams Approach. The paper concludes with a brief discussion of some of the implications of the strengths and weaknesses of the R2P and the ICC, and the reasons for these strengths and weaknesses.

Historical Timeline

The 1858 Battle of Solferino, one battle of the second Italian War of Independence, was perhaps one of the bloodiest battles of its time. But what was unique about this battle, was that the majority of the casualties were not a result of the fighting, but of the inadequate medical care the soldiers received. It served as a wake-up call for the international community; states began to realize that there might be actions too inhumane even for war, a direct contradiction to prior total war doctrines. This led, first, to the foundation of the International Committee for the Red Cross by Henry Dunant in 1863; the goal of this new organization, founded on the principles of neutrality and impartiality, was to aid victims of war.¹ The first of the Geneva Conventions, on the Amelioration of the Condition of the Wounded in Armies, followed in 1864; it declared the neutrality of ambulances, hospitals, and medical staff during wartime, along with the overall need to care for the wounded and sick in battle, regardless of their allegiance to a specific party of the conflict.² Additional details were added to this convention in 1906.³ A second Geneva Convention on Maritime Warfare was signed in 1899. This convention applied many of the principles from the 1864 convention to battles at sea.⁴ 1899 was also the year of the Hague Peace Conference, which discussed the development of laws and

¹ "Founding and Early Years of the ICRC," International Committee of the Red Cross, accessed March 26, 2011, <http://www.icrc.org/eng/who-we-are/history/founding/overview-section-founding.htm>.

² Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, ICRC: International Humanitarian Law- Treaties and Documents.

³ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, July 6, 1906, ICRC: International Humanitarian Law-Treaties and Documents.

⁴ Convention for the Adaption to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, July 29, 1899, ICRC: International Humanitarian Law-Treaties and Documents.

customs of war. The final outcome resulted in a number of guidelines for the conduct of hostilities and the occupation of territories which remain in force today.⁵

The beginning of World War I in 1914 sent another shock through the international community. WWI introduced new weapons into warfare, perhaps most prominently biological weapons. The destruction caused by such weapons was like nothing the world had ever seen. As a result the Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armies was updated, adding additional details about and protection for medical transports and buildings.⁶ Additionally a new Geneva Convention was signed, on the Treatment of Prisoners of War; this convention laid down a number of guidelines for the capture and evacuation of POWs, for the creation of POW camps, and for the internal management of such camps, including the hygiene of prisoners, the work they were allowed to do, the relations they could have with the exterior, and their required food rations.⁷

In addition to these updates, the international community took up United States President Wilson's proposal for a League of Nations.⁸ Founded in 1920, the new organization was to serve as a forum for discussion amongst states, and promote cooperation between them. However, the organization was dealt a number of early blows. First, the United States' congress refused to ratify the covenant, and

⁵ Dietrich Schindler, "International Humanitarian Law: its Remarkable Development and Persistent Violation," *Journal of the History of International Law* 5(2003): 166-68.

⁶ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, ICRC: International Humanitarian Law- Treaties and Documents.

⁷ Convention relative to the Treatment of Prisoners of War, July 27, 1929, ICRC: International Humanitarian Law- Treaties and Documents.

⁸ William R. Keylor, *The Twentieth-Century World and Beyond* (New York: Oxford University Press, 2006), 67; 98-99.

thus the United States never became a member of the League. Secondly, required unanimity in voting meant that one state could block an action. Finally, the League had no security force by which to enforce its decisions, nor did it have the ability to create one. As a result, the League of Nations collapsed with the beginning of World War II.

World War II took human destruction to a level previously unimaginable. The military strength of Germany and Japan left much of Europe and Asia reeling, not only from physical destruction, but also from the consequences of a series of war crimes and crimes against humanity. Such destruction led to the creation of numerous new institutions and organizations, so many in fact, that former Secretary of State Dean Acheson felt he had been 'present at the creation' of a new international system.⁹

The new creation, and perhaps the most game changing, was the United Nations (UN). Founded in 1945 at the San Francisco conference, the goals of the UN were almost identical to those of the now defunct League of Nations: to create a global town hall style forum, where states could come to discuss and debate issues, and cooperate to solve problems. The General Assembly serves as this forum for discussion; all member states are represented and every state gets one vote. However, most decisive action is taken by the Security Council. This much smaller council has only fifteen members: ten rotating seats and five permanent seats, held by the United States, Russia, China, the United Kingdom, and France. Like in the

⁹ Dean Acheson, *Present at the Creation: My Years in the State Department* (New York: W.W. Norton and Company, 1987).

General Assembly, every member gets one vote. However, the permanent five members hold additional veto power.¹⁰

In its first few years, the United Nations successfully fostered cooperation between states on a number of issues. First was the Universal Declaration of Human Rights passed by the General Assembly in 1948. This thirty article declaration became the basic framework for all future human rights law; today it has the status of customary international law.¹¹ 1948 also saw the beginning of UN Peacekeeping as the Security Council authorized military observers in the Middle East. At this point, Peacekeeping had as its primary functions maintaining ceasefires and stabilizing situations; it was not till later that it would begin to take on many of the peace-enforcing functions it has today.¹² The final of these early successes was the creation of the UN High Commissioner for Refugees (UNHCR) in 1950, to help Europeans displaced by WWII. While originally given only a three year mandate, the adoption of the Convention on Refugees and continued problems with refugees caused the General Assembly to make the UNHCR a permanent part of the UN human rights framework.¹³

The UN was not the only organization created in 1945; this was also the year the allied powers founded the International Military Tribunal at Nuremberg.¹⁴ The

¹⁰ Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, U.N.T.S

¹¹ Universal Declaration of Human Rights, G.A. Res 217 (III) A, U.N. Doc A/RES/217 (III) (Dec, 10, 1948).

¹² "History of Peacekeeping: Early Years," United Nations Peacekeeping, accessed March 26, 2011, <http://www.un.org/en/peacekeeping/operations/early.shtml>.

¹³ "History of UNHCR," United Nations High Commissioner for Refugees, accessed March 26, 2011, <http://www.unhcr.org/pages/49c3646cbc.html>.

¹⁴ A Tribunal was also set up in Tokyo. However its influence on later International Tribunals and on International Law was minor in comparison to the Nuremberg Trials.

tribunal, the first of its kind, was set up to try the perpetrators of the crimes of Nazi Germany; it was hoped that a fair trial would allow for real justice, and prevent the allied powers from simply exacting revenge. As the first such international court, the tribunal set a number of new precedencies. First, that a tribunal could have jurisdiction over the territories of multiple states; the Nuremberg tribunal was given jurisdiction over all those territories in which Nazi-Germany had committed crimes, allowing the tribunal to try the perpetrators for all these crimes in a single trial.¹⁵ Secondly, the Statute of the Tribunal defined a number of new crimes, including crimes against humanity and crimes against the peace.

In the post-WWII years, the international community also signed into law a number of new conventions. First, the 1948 Convention on Genocide which defines genocide as an act committed with the intent to destroy a national, ethnic, or religious group. It further states that actual genocide, conspiracy to commit genocide, the attempt to commit genocide, or the incitement of genocide are all punishable both in time of war and in times of peace.¹⁶ Second, the four Geneva Conventions of 1949, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field¹⁷; for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked members of the Armed Forces at Sea¹⁸; relative to the Treatment of Prisoners of War¹⁹; and relative to the Protection of Civilian Persons in

¹⁵ Ann Tusa and John Tusa, *The Nuremberg Trials: A Complete History of World War II's Famous Trial* (New York: Skyhorse Publishing, 2010).

¹⁶ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948. 1 U.N.T.S 1021

¹⁷ Aug. 12, 1949, ICRC: International Humanitarian Law-Treaties and Documents.

¹⁸ Aug. 12, 1949, ICRC: International Humanitarian Law-Treaties and Documents.

¹⁹ Aug. 12, 1949, ICRC: International Humanitarian Law-Treaties and Documents.

Time of War.²⁰ These four conventions tripled if not quadrupled the length of the Geneva Convention. Further, Article 3, common to all four conventions, extends some of the protection provided by the Geneva conventions to victims of non-international conflicts. All four conventions remain in force today with 194 state parties.²¹

Unfortunately, the beginning of the Cold War made international cooperation even more difficult and led to a significant lull in the development of human rights related institutions and organizations. However, there are a few notable exceptions. First, Protocols I and II to the Geneva Conventions of 1949 signed in 1977. Protocol I adds further details and definitions to the four 1949 conventions²², while Protocol II applies the principles of the 1949 conventions to victims of non-international conflicts.²³ Neither Protocol has the universal acceptance of the four original conventions. The second such exception is the 1987 Convention against Torture, which defines torture and states that there are no exceptional circumstances under which torture is permissible.²⁴ Recent issues of national security have led some states, most notably the United States, to contradict this treaty by claiming that threats of terrorism constitute such an exceptional circumstance.

²⁰ Aug. 12, 1949, ICRC: International Humanitarian Law-Treaties and Documents.

²¹ ICRC, *States Party to the Geneva Conventions and their Protocols*, ICRC Annual Report 2009 (2009).

²² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Victims of International Armed Conflicts (Protocol I), June 8, 1977, ICRC: International Humanitarian Law-Treaties and Documents.

²³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, ICRC: International Humanitarian Law-Treaties and Documents.

²⁴ Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1 U.N.T.S. 24841

During the Cold War years, two very important non-governmental human rights organizations were also founded. First, Amnesty International was founded in 1961. At its beginnings Amnesty focused on conditions within prisons, observing Nelson Mandela's trial and other prisons worldwide. Later, Amnesty would begin highly publicized campaigns to end torture and the death penalty both of which continue today.²⁵ The second organization, Human Rights Watch, was founded in 1978 as Helsinki Watch; its original goal was to monitor the enforcement of the Helsinki Accords within the Soviet Republics. As part of this goal, the organization began to name and shame states who were abusing human rights. It later expanded to include America Watch, Asia Watch, Africa Watch, and Middle East Watch and in 1988 the body of organizations adopted the more universal Human Rights Watch moniker.²⁶ Today, both Human Rights Watch and Amnesty International are globally recognized names in reporting and campaigning to end human rights abuses.

Following the fall of the Soviet Union and the end of the Cold War, the world witnessed a huge number of intrastate conflicts, which resulted in grotesque numbers of crimes against humanity and war crimes. These crimes created a new boom in formal human rights institutions. First, the International Criminal Tribunal for the Former Yugoslavia was founded in 1993, with the goal of bringing justice to those who committed war crimes, crimes against humanity, and genocide in Croatia, Bosnia, and Kosovo. It was the first international tribunal to be set up by the UN and the first since Nuremberg. It further helped to bring the term ethnic cleansing into

²⁵ "History of Amnesty International," Amnesty International, accessed March 26, 2011, <http://amnesty.org/en/who-we-are/history>.

²⁶ "Our History," Human Rights Watch, accessed March 26, 2011, <http://www.hrw.org/en/node/75134>.

the human rights discourse.²⁷ The term ethnic cleansing was, however, first introduced and defined by the 1994 Report from the Commissions founded by Security Council Resolution 780(1992) to investigate the situation in Bosnia. The report states that ethnic cleansing is a term original to the Yugoslavian conflict, and that the action itself is carried out in the name of misguided nationalism, historical grievances, and revenge.²⁸ In 1994, a second international tribunal was set up, this one to bring justice to those who committed crimes in Rwanda.²⁹

But these tribunals and reports did not mask the simple fact that the international community had been fundamentally unprepared to prevent the numerous genocides, even in the face of warning signs, and as fundamentally unable to clean up the mess that resulted. New solutions had to be found to prevent such catastrophes from occurring again. The result is the Responsibility to Protect and the International Criminal Court; the former to help prevent genocides before it occurs and end genocide quickly when it does, and the latter to bring justice to those who commit the worst crimes known to mankind. Both the ICC and the R2P will be discussed in greater detail later in the paper.

Review of Literature

The development of the Responsibility to Protect and the international Criminal court can be viewed in two ways: as the development of institutions and as

²⁷ "About the ICTY," International Criminal Tribunal for the Former Yugoslavia, accessed March 26, 2011, <http://www.icty.org/sections/AbouttheICTY>.

²⁸ Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) transmitted by Letter Dated 24 May 1994 from the Secretary General to the President of the Security Council, U.N. Doc. S/1994/674, (May 27, 1994)

²⁹ "General Information," International Criminal Tribunal for Rwanda, accessed March 26, 2011, <http://www.unictcr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx>.

the development of new policies. The theories used in this paper will look at the development of the R2P and the ICC in both lights, as institutional development via New institutional Economics and as policy change via the Multiple Streams Approach. The intersection of these two views is discussed via the third theory, Elite Theory; the focus here is upon those elite actors who are at the forefront of both policy change and institutional change.

Elite Theory:

Elite theory is built upon a single basic assumption: that a small group of elite and powerful actors within a given society or policy system hold all the power and as such are able to make decisions for and autonomous from the 'average' citizens. According to elite theory, this elite class exhibits a number of characteristics. The first such characteristic is autonomy from the rest of society. The elites are rarely, if ever, influenced by the opinions of the average citizens, nor do these average citizens have the ability to control the elites. Rather, the elites act independently of public opinion creating policies meant to promote their own interests, regardless of whether or not these interests align with those of the average citizens.³⁰ This autonomy means that elite actions completely lack transparency and accountability, as decisions are made without the knowledge or the input of the masses.

Elites are further characterized by what is known in Elite Theory as Meisel's Three C's: consciousness, coherence, and conspiracy. The first characteristic, consciousness, simply means that the elites are aware of the power they hold within

³⁰ Geraint Perry, *Political Elites* (New York: Praeger Publishers, 1969).

the system. Coherence and conspiracy are related characteristics; coherence states that the elites act in cooperation with one another, while the conspiracy characteristic states that the elites act in accordance with a collectively formulated plan. In this way, elite theory begins to see the elites as a single rational actor, with a single goal, and a single set of preferences. This allows the theory to assume away the problems of conflicting preferences and incentive structures.

As a result of these characteristics and the extensive power held by elites, the policy making process is entirely within their control. The average citizen becomes largely irrelevant in a system where a minority of actors make the majority of decisions.³¹

Elite Theory further categorizes elites based upon the sources from which they draw their power. The first possible source of power is the innate leadership capabilities of the elites. Theorists such as Mosca and Michels put forth such a claim, stating that while the elite have an abundance of such leadership skills, the average citizens are largely lacking in them.³² The second possible source is the elites' economic influence. In general such explanations of elite power take on a Marxist tone, claiming that the political and social power of the elite is a result of their economic power.³³ Finally, elites may gain their power from the powerful positions they hold in key institutions, an explanation proposed by C. Wright Mills, who states that such key institutions include the military, the economic system, and the political system.

³¹ Geraint Perry, *Political Elites* (New York: Praeger Publishers, 1969), 32-33.

³² Geraint Perry, *Political Elites* (New York: Praeger Publishers, 1969), 35-45.

³³ Geraint Perry, *Political Elites* (New York: Praeger Publishers, 1969), 50-52.

However, some qualifications must be made to elite theory. Very rarely does a policy system exist in which a small minority of actors holds all the power and makes decisions with absolute autonomy from the rest of the actors. Nor is it likely that a group of actors will act as cohesively or in pursuit of goals as exactly aligned as elite theory assumes elites do. As such, this paper views the guidelines of elite theory in a somewhat tempered fashion. The elites discussed in the following section do not hold absolute power; they do not act with absolute autonomy; their goals are not perfectly aligned; nor do they always cooperate. Rather they exert some special influence over a particular issue area; they are at the forefront of policy development within this issue area; and they act in cooperation with others in pursuit of at least some shared goals.

New Institutional Economics:

New Institutional Economics is a huge, broad body of work focusing on the role institutions play in economic development. In developing such an explanation, new institutional economics also develops a body of theory that looks at institutions in terms of the constraints they place upon human action, and more specifically, the constraints they place on the choices available to individual actors, and the ways institutions alter these individual's incentive structures. Within this body of literature lie explanations for the roles institutions play, for the ways they change and the reasons they change, and for the reasons that humans create institutions. The explanation within this paper will focus primarily on the latter type of literature, drawing upon Douglass North's conceptualization of the reasons for

institutional creation and further how these reasons affect the ways in which institutions change.

First, a definition of institutions is necessary. For New Institutional Economics institutions are the humanly devised rules of the game, be they the formal laws of the state or the informal norms of society. These rules, as stated above, constrain the choices available to actors. Two important points should be made about this definition. First, it excludes organizations, which are instead seen as the players within the game, who, like all the other players, should abide by the institutional rules. Second, that these institutions are human creations; they are not inherent to the world.³⁴

What then might cause humans to create such institutions and thus constrain themselves? According to North, the reason lies with human beings' perceptions of reality. North believes that humans can never objectively understand the reality in which they live. Rather, they continue to operate upon perceived notions of reality, which are based upon how their personal beliefs affect their views of the surrounding world. However, underlying this perceived reality is an uncertainty about the world. In many ways, it is in an effort to end this uncertainty, that institutions are created. Vital to this creation is a notion of human intentionality. Institutions are not created at random; they are created with very specific goals, which none the less, may not be the resultant outcome of the institution.³⁵ Friedrich

³⁴ Douglass North, *Institutions, Institutional Change, and Economic Performance* (New York: Cambridge University Press, 1990)

³⁵ Douglass North, *Understanding the Process of Economic Change* (New York: Cambridge University Press, 2005).

Hayek believes that the original goals of the institution will, in fact, never be the resultant outcome, for humans are fundamentally incapable of planning society.³⁶

And Hayek may very well be right, but humans keep creating new and changed institutions. According to North, such changes in institutions are a result of the ways in which previous or existent institutions have altered perceptions of reality. Within this new reality, humans are faced with new uncertainties, which they must then secure themselves from, by creating new institutions. And with every set of new institutions, the perceived reality changes, and even more institutions are created, in a never ending circle.³⁷

However, institutional change is not as simple as this model might make it seem. Institutional change is constantly struggling against the path dependent nature of institutional structures. The path dependent nature of institutions means that for historically derived reasons, the choices of actors in the present are constrained. As a result of these constraints, new institutions are hard to develop and old, and often ineffective, institutions remain in place, without being changed or altered in any significant way. New Institutional Economics offers two possible reasons for this path dependence. First, that it is simply a fundamental result of the interactions between beliefs, institutions, and organizations, or what North refers to as the artifactual structure. The second reason is that when organizations are created, certain rules of the game are assumed. Changes in these rules are likely to

³⁶ Friedrich Hayek, "The Pretence of Knowledge", in *New Studies in Philosophy, Politics, Economics, and the History of Ideas* (Chicago: The University of Chicago Press, 1978).

³⁷ Douglass North, *Understanding the Process of Economic Change* (New York: Cambridge University Press, 2005).

adversely affect the organizations, thus giving these organizations an incentive to perpetuate the continuation of certain institutions.³⁸

Multiple Streams Model

Developed by John Kingdon, the Multiple Streams Model seeks to explain domestic level policy change and development; within this paper the model will be used to look at international level policy change. Kingdon's original model focuses on policy development in national level legislative settings³⁹, and more specifically on the way numerous actors interact within time constraints to create new policy. However, policy change at the international level is not always legislative; in fact, it often takes the form of negotiated treaties. But even within these circumstances, Kingdon's model of actor interactions is a useful explanatory tool.

The Multiple Streams Model begins by describing all policy networks as 'organized anarchies'. Policy networks are described as such because they exhibit the three characteristics of organized anarchies: fluid participation, problematic preferences, and unclear technology. Fluid participation within an organization means that there is a high turnover rate amongst actors within the organization. Actors are likely to drift from one decision to another, which complicates the decision making process. Secondly, these actors have a problematic set of preferences. These are exhibited in two ways: when actors don't have enough information to formulate their preferences (incomplete information) or when actors

³⁸ Douglass North, *Understanding the Process of Economic Change* (New York: Cambridge University Press, 2005).

³⁹ The original model focused very specifically on policy development in the United States federal government

don't have the time to fully formulate their preferences (time constraints). Finally, the actors are unclear about the organizational process which turns inputs into outputs, a concept sometimes referred to as unclear technology. For this reason actors understand their individual tasks, but not what role that task plays in the overall process.⁴⁰

According to Kingdon every policy network contains three individual streams: the politics stream, the problems stream, and the policy stream, each of which contains different elements of the policy making process.⁴¹

The problems stream contains the various conditions which actors want addressed. However, not all the conditions within the problems stream will actually be addressed. Instead, policy makers use three methods to identify those conditions so pressing they must be addressed. First, policy makers look to indicators to assess the existence and magnitude of conditions, as well as the extent to which these conditions are changing.⁴² Second, 'focusing events' catch the attention of policy makers and direct their attention to particular problems with specific policies.⁴³ In addition, members of the media and policy entrepreneurs help to focus the attention of policy makers on specific conditions, specifically those conditions important to the media and to the entrepreneurs. Finally, feedback from previous programs and policies help policy makers identify what works and what does not.⁴⁴

⁴⁰ Nikoloas Zahariadis, "The Multiple Streams Framework: Structure, Limitations, Prospects" in *Theories of Public Policy* (Boulder: Westview Press, 2007), 67.

⁴¹ Zahariadis, "The Multiple Streams Framework", 71.

⁴² John W. Kingdon, *Agendas, Alternatives, and the Public Policies* (Boston: Addison Wesley, 2003), 90.

⁴³ Zahariadis, "The Multiple Streams Framework", 72.

⁴⁴ Kingdon, *Agendas, Alternatives, and the Public Policies*, 100.

Contained within the politics stream are those things which affect the policy agenda. Kingdon focuses specifically on three things: the political mood, pressure group campaigns, and turnovers within the administration or legislature⁴⁵. Political mood, which is considered by Kingdon to be the most important of these elements, describes public opinion within a policy system; public opinion then affects the policy agenda created by policy makers.⁴⁶ Pressure group campaigns, which include the campaigns of lobbying groups, public policy groups, and NGOs, further try and affect the way policy makers set the policy agenda. In particular, they want to ensure that their special interests are placed on the agenda. Finally, the politics stream also discusses how administrative and legislative turnovers can affect the policy agenda by bringing new policy makers into the policy network.⁴⁷

The final stream, the policy stream, is characterized as a 'soup of ideas' which compete to win acceptance within policy communities or networks.⁴⁸ These ideas are generated by specialists within those policy communities; they generate a huge number of ideas, though only a few of these ideas ever receive consideration. The selection of ideas for consideration occurs on the basis of the technical feasibility and the potential acceptability of these proposals. But all policy communities are not equal. Some communities have more access to resources, and thus a much greater ability to promote their interests.⁴⁹

⁴⁵ Zahariadis, "The Multiple Streams Framework", 73

⁴⁶ Kingdon, *Agendas, Alternatives, and Public Policies*, 146.

⁴⁷ Zahariadis, "The Multiple Streams Framework", 73.

⁴⁸ Zahardias, "The Multiple Streams Framework", 72

⁴⁹ Zahariadis, "The Multiple Streams Framework", 73

It is when windows of opportunity open in one of these streams that policy change occurs. An open window gives policy advocates the opportunity to push through their pet solutions, or to focus the attention of policy makers upon their special problems. Such windows open within either the politics or the problems streams. A window opens within the politics stream when a change occurs within one of the stream's three elements, i.e. a change in the political mood, the development of new pressure group campaigns, or turnovers in the administration or legislature. In contrast, a window opens within the problems stream when either a new condition arises, and is immediately very pressing, or an old condition becomes so pressing that policy makers can no longer ignore it.⁵⁰

However, open windows do not, on their own, create policy change. Rather individuals, who Kingdon calls policy entrepreneurs, orchestrate policy change. These individuals attempt to couple together the three streams; they are described by Zahardias as the power brokers and manipulators of the problematic preferences and unclear technology discussed above as characteristics of policy networks. These entrepreneurs often exhibit three traits. First, they must have a claim to a hearing within the policy system in which they operate. This claim can be made based upon an individual's expertise on a certain issue area, the authority an individual has to speak for others, or the authoritative decision making power an individual possesses. Secondly, within the policy system, individuals must be recognized for their political connections and for their negotiating skill. Finally, entrepreneurs

⁵⁰ Kingdon, *Agendas, Alternatives, and Public Policy*, 168.

must have a persistent willingness to invest resources, time, energy, and their own reputation, in the fight for policy change.⁵¹

As the power brokers of the policy system, policy entrepreneurs couple together the individual streams when a window opens. When this window has opened within the problems stream, entrepreneurs couple together available solutions with pressing problems, and by doing so couple the problems and the policy streams. When the window has opened within the politics stream, entrepreneurs couple agenda items with available policies, thereby coupling the politics and policy streams. If an entrepreneur succeeds in coupling the streams as such, the window of opportunity will remain open, and policy change is likely to occur⁵². However, entrepreneurs are not always successful and windows of opportunity often close before policy change is implemented.

As stated above, these three theoretical frameworks will be used to discuss the institutional differences between the International Criminal Court and the Responsibility to Protect Doctrine. What follows is a brief overview of both institutions and a discussion of the differences between them.

The Rome Statute and the International Criminal Court

The Rome Statute of the International Criminal Court was signed in 1998 and entered into force in 2002, when the necessary sixty ratifications had been submitted to the United Nations. To date an additional fifty four countries have ratified the statute, bringing the total number of state parties to 114. The Rome

⁵¹ Kingdon, *Agendas, Alternatives, and Public Policy*, 180-181.

⁵² Kingdon, *Agendas, Alternatives, and Public Policy*, 181.

Statute founds the International Criminal Court (ICC) the first ever permanent international criminal court. The statute builds on the precedence set by the Nuremberg Trials, the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda. In the model of past foundational statutes for international criminal tribunals, the Rome Statute lays down the structure of the ICC and defines the crimes within its jurisdiction.⁵³ According to the Rome Statute the court has the jurisdiction to prosecute cases relating to four crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Additionally, this jurisdiction is viewed as being universal. In other words, the ICC can try any individual who commits one of the afore mentioned crimes, even if the crimes were committed in the territory of a state not party to the Rome Statute, or if the individual being tried is a citizen of a state not party to the Statute.

Genocide is defined here as any of a series of acts, which are “committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”.⁵⁴ Such acts include killing members of the group; causing members of the group serious mental or bodily harm; deliberately inflicting conditions upon the group which are calculated to bring about its physical destruction; imposing measure intended to prevent births; and the forcible transfer of children out of the group.

Crimes against humanity are defined by the statute as any of a number of acts, which are committed “as part of a widespread or systematic attack directed

⁵³ Rome Statute of the International Criminal Court, July 17, 1998 18 UNTC 10.

⁵⁴ Rome Statute of the International Criminal Court art. 6, July 17, 1998, 18 UNTC 10.

against any civilian population, with knowledge of the attack”.⁵⁵ These acts include murder; extermination; enslavement; deportation or forcible transfer; severe deprivation of physical liberty including unlawful imprisonment; torture; rape and other forms of sexual violence; persecution of any identifiable group; forced disappearance; apartheid; and other inhuman acts of a similar character, committed with the intention of causing great suffering.

The Rome Statute defines war crimes as grave breaches of the Geneva Conventions of the 12 August 1949, and more specifically any of a number of acts perpetrated against persons or property protected under the Geneva Conventions. These acts include willful killing; torture or inhumane treatment; willfully causing great suffering in the form of serious injury to body or health; extensive destruction or appropriation of property; compelling a prisoner of war to serve in the forces of hostile power; willfully depriving a prisoner of a fair and regular trial; unlawful deportation or confinement; and the taking of hostages.

⁵⁵ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 18 UNTC 10.

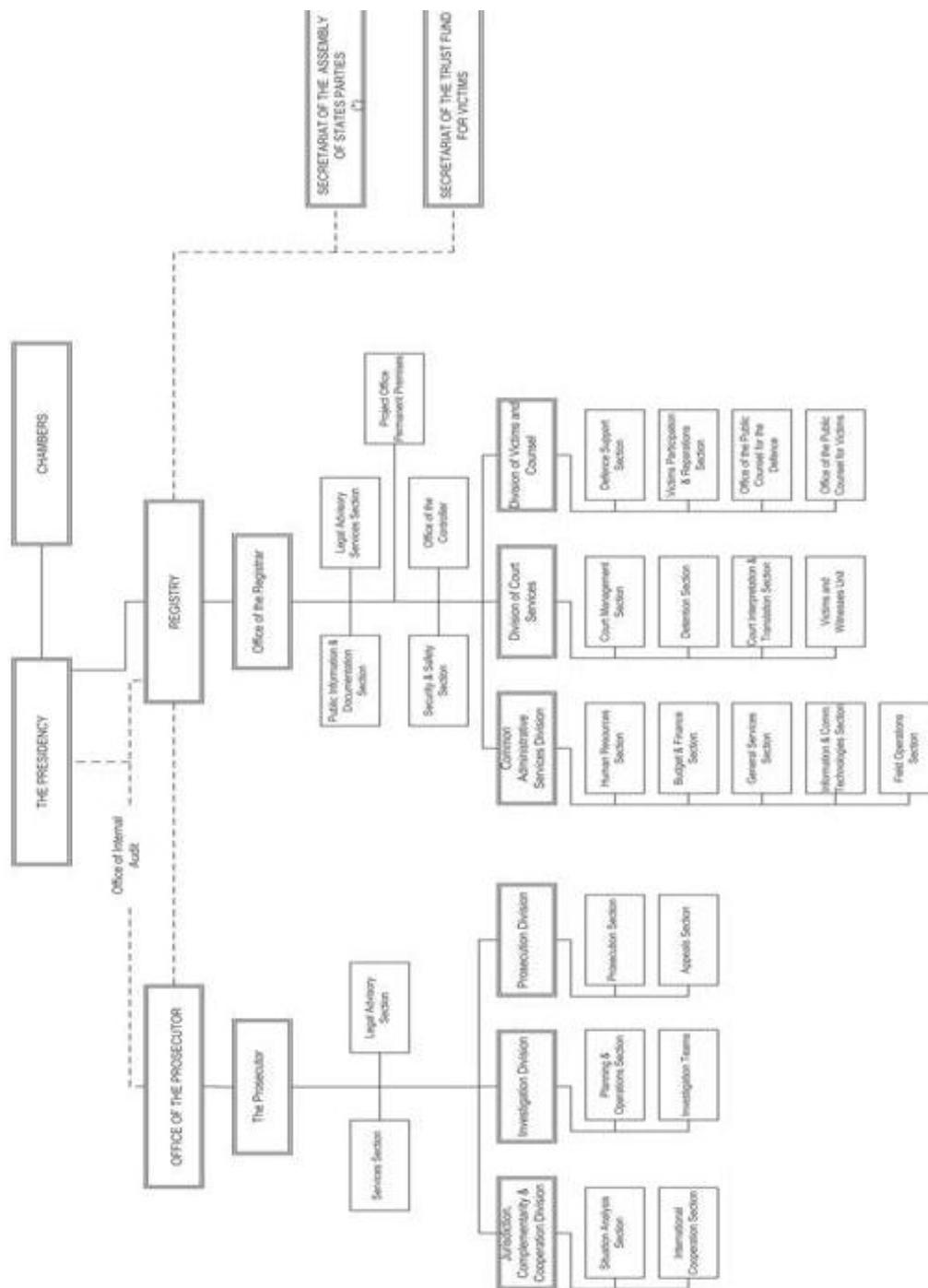


Figure 1, taken from Human Rights Watch Report, *Courting History: the Landmark International Criminal Courts First Years*

The Rome Statute further lays down the structure of the ICC; the structure can be seen in figure 1. As figure 1 shows, the ICC is made up of two primary parts: The Presidency and the Chambers. Within the Presidency, the most important office

is that of the Prosecutor, which conducts investigations for the court. This office is divided into three divisions and two sections: the Investigation Division, the Prosecution Division, the Jurisdiction, Complementarity and Cooperation Division, the Legal Advisory Section, and the Services Section. Each of these specific groups plays a unique role in the investigation process.⁵⁶

Investigations begin in three ways: the prosecutor can begin an investigation of his own initiative, states can refer situations to the court, or the United Nations Security Council can refer situations. The investigation of a situation is conducted primarily within the Investigation Division. They collect information and evidence and then analyze it, both during the process of an investigation and after it. Such investigations have led the ICC to set up field offices in countries including Sudan, the Democratic Republic of the Congo, Uganda, and the Central African Republic. This division is further tasked with preparing security policies necessary to protect witnesses and victims in the case of violent backlash in the face of testimony. However, during the course of such an investigation legal issues often arise; these are dealt with by the Prosecution Division, which is further responsible for litigation strategies and conducting the actual prosecution of cases in the court. The Legal Advisory section, as its name implies, provides legal advice to the prosecutor, while the Services Section handles the administrative functions of the office. The Jurisdiction, Complementarity and Cooperation Division monitors issues relating to the jurisdiction of the court. Such issues could relate to national legal proceedings, which either involves crimes potentially within the jurisdiction of the ICC or

⁵⁶ Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, HRW Index 1-56432-358-7 (July 2008).

proceedings dealing with situations which have been referred to the ICC. The division also evaluates those situations that are referred to the court, to ensure that they lie within the court's jurisdiction.⁵⁷

As stated before, the second primary part of the ICC are the Chambers made up of eighteen judges elected by the Assembly of State Parties. These eighteen judges are split between a Pre-Trial, Trial, and Appeals Division; assignments to a specific division are made by the President of the Court, who is elected by the judges from amongst their ranks.

When a situation is referred to the prosecutor or when the prosecutor intends to begin an investigation, the President of the court will assign these situations to the pre-trial division of the court. A different set of three judges will be assigned to each new situation. Specific cases will remain within the Pre-Trial division until a confirmation of charges, a process which requires the defendant to make his or her first appearance before the court and be presented with these charges.⁵⁸ Once this has occurred the case is transferred to the Trial division. The Trial division conducts the actual trial within guidelines based largely on the western legal tradition. Such guidelines include the presumed innocence of a defendant, who is to be tried in a fair and expeditious trial.⁵⁹ The trial division must further act within certain safeguards, laid down in the Rome Statute, which protect witnesses and safeguard evidence which may pose national security risks for certain

⁵⁷ Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, HRW Index 1-56432-358-7 (July 2008).

⁵⁸ Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, HRW Index 1-56432-358-7 (July 2008).

⁵⁹ Rome Statute of the International Criminal Court art. 64 & 66, July 17, 1998, 18 UNTC 10.

states.⁶⁰ Decisions by the trial division as to the guilt of defendants should be made unanimously if possible, but in the case that unanimity of voting is not possible, a majority vote is necessary.⁶¹ The division then has the ability to impose penalties upon the guilty. These penalties include max 30 year imprisonment; fines; forfeiture of proceeds; property; and assets derived directly or indirectly from the crime, and; in extreme cases, life imprisonment.⁶² Decisions of the Trial division and the Pre-Trial division may be referred to the Appeals Division either by the prosecutor or the defendant.⁶³

The Responsibility to Protect Doctrine

In its simplest terms, the Responsibility to Protect is the notion that states have a responsibility to intervene in complex humanitarian emergencies⁶⁴ even if this emergency occurs solely within the sovereign territory of a single state.⁶⁵ Though notions of humanitarian intervention, and even humanitarian intervention in intra-state emergencies, have existed for some time, these notions are first conceptualized as the Responsibility to Protect by the International Commission on Intervention and State Sovereignty or the ICISS in its 2001 final report. This report, entitled “The Responsibility to Protect”, conceptualizes the R2P as three interconnected responsibilities: a responsibility to prevent, a responsibility to react, and a responsibility to rebuild.

⁶⁰ Rome Statute of the International Criminal Court art. 68 & 72, July 17, 1998, 18 UNTC 10.

⁶¹ Rome Statute of the International Criminal Court art. 74, July 17, 1998, 18 UNTC 10.

⁶² Rome Statute of the International Criminal Court art. 77, July 17, 1998, 18 UNTC 10.

⁶³ Rome Statute of the International Criminal Court art. Part VIII, July 17, 1998, 18 UNTC 10.

⁶⁴ According to David Keen in his 2008 book *Complex Emergencies* is a humanitarian crisis “linked with large-scale violent conflict—civil war, ethnic cleansing, and genocide”.

⁶⁵ *The Responsibility to Protect*, (Ottawa: International Development Research Center, 2001), 19.

These three responsibilities can be divided into two groups. In the first is the responsibility to prevent, under which states have a responsibility to contribute to the prevention of future and arising complex humanitarian emergencies. This responsibility lies, first and foremost, with individual states, and the communities and institutions that comprise them. However, the ICISS recognized that not all states have the resources needed to protect human rights. Thus, under the responsibility to prevent, states have a responsibility to give development assistance to those states which need it. This assistance should help promote local initiatives for good governance, protect human rights, and promote the rule of law, all with the final goal of stabilizing states and preventing complex humanitarian emergencies.⁶⁶

Under the responsibility to prevent the ICISS also promotes the development of an early warning system. Such a system would help states recognize fragile political climates, and more specifically identify the climates likely to lead to a complex humanitarian emergency. Once these climates are recognized states must be aware of their 'preventive toolbox', or those measures they can use to stabilize fragile situations. States then have a responsibility to enact such measures⁶⁷.

However, these stabilizing measures are not always successful, and when they fail, states must act on the second group of responsibilities: the responsibility to react and the responsibility to rebuild. First, states have a responsibility to react to the complex humanitarian emergency. While the ICISS considers this to be the most fundamental of the three responsibilities it is also the most controversial, for

⁶⁶ *The Responsibility to Protect*, 19.

⁶⁷ *The Responsibility to Protect*, 20.

under it states have a responsibility to use coercive measures, political, economic, and judicial, to end a complex humanitarian emergency. In very extreme cases, states even have a responsibility to use military force.⁶⁸

However a decision as controversial, costly, and intrusive as military intervention is not to be taken lightly nor is the responsibility to intervene to be abused. As such, the ICISS conceptualizes within the responsibility to react a number of safe guards. First, an intervention requires *the right authority*, which can be achieved via multi-lateral decision making processes like those of the United Nations⁶⁹. Secondly, an intervention requires *just cause*; for the ICISS just cause lies in large scale ethnic cleansing, or a large scale loss of life.⁷⁰ Thirdly a legitimate intervention requires that the intervening coalition have the *right intention*, that being to halt or avert human suffering.⁷¹ Fourth, intervention must be the *last resort*, used only after diplomatic means of ending humanitarian crisis have failed.⁷² Fifth, the intervening coalition must use *proportional means*, or no less force than necessary to fulfill their mandate and no more force than is necessary.⁷³ Finally, a legitimate intervention should have a *reasonable prospect of success*.⁷⁴

Stabilizing climates by intervention creates another responsibility, the ICISS's third and final responsibility, the responsibility to rebuild. Under this responsibility, intervening states are to help the states they have intervened in to rebuild and develop in the aftermath of an intervention. The primary goal of such rebuilding

⁶⁸ *The Responsibility to Protect*, 29.

⁶⁹ *The Responsibility to Protect*, 47-55.

⁷⁰ *The Responsibility to Protect*, 32-35.

⁷¹ *The Responsibility to Protect*, 35.

⁷² *The Responsibility to Protect*, 37.

⁷³ *The Responsibility to Protect*, 37.

⁷⁴ *The Responsibility to Protect*, 37.

programs should be to secure continued good governance within the state, and thus also a lasting peace.⁷⁵ According to the ICISS, fulfillment of this goal involves three tasks. First, coalition forces must provide security, not only during the intervention itself, but also during the re-building process. Further, they are to provide security to everyone regardless of ethnicity or previous involvement in the conflict.⁷⁶ Secondly, the intervening coalition should help to rebuild the judicial system, which was likely destroyed; it must also be ensured that this judicial system does not give impunity to war criminals.⁷⁷ Finally, the intervening coalition must ensure the quick transfer of control to local officials and help to create the conditions for long-term sustainable development.⁷⁸

These basic responsibilities were accepted by the international community in 2005 at the UN Millennium World Summit. In Articles 138-140, states accepted their individual responsibilities to protect, as well as their collective responsibility to do so. The Summit further requested that the General Assembly take on the task of implementing the R2P. In 2009 the General Assembly began this task, with the release of Secretary General Ban Ki-Moon's report, "Implementing the Responsibility to Protect" and subsequent debates on the topic.

Secretary General Ban's report discusses not so much the concept of the R2P, but the possible ways of implementing it within the United Nations Framework. This strategy involves three pillars: one focusing on individual responsibility, a second focusing on the international responsibility for prevention, and a third focusing on

⁷⁵ *The Responsibility to Protect*, 39

⁷⁶ *The Responsibility to Protect*, 40

⁷⁷ *The Responsibility to Protect*, 41

⁷⁸ *The Responsibility to Protect*, 42-43

the international community's responsibility to react to complex humanitarian emergencies.

The first pillar emphasizes the responsibility to protect populations that is contained within basic notions of sovereignty.⁷⁹ According to Ban, sovereignty should not be seen simply as the unbreakable territorial integrity of a state, but also a set of responsibilities which a state has to its citizens; the most important of these responsibilities is the protection of citizens from human rights violations.⁸⁰

The second pillar discusses the responsibility of the international community to help states build up their protection capabilities. This assistance should come in four forms. First the international community should encourage all states to meet their individual responsibilities to protect by creating incentives for states to do so. Secondly, the international community should help one another to exercise their individual responsibilities to prevent. Third, the international community should help fellow states to build their capacity to protect through development aid. Finally, assistance should be given to states with fragile political environments, in order to prevent future conflicts.⁸¹

The third and final pillar emphasizes the international community's collective responsibility to react to complex humanitarian emergencies in a timely and decisive manner.⁸² Ban states that when operating within the United Nations framework, the guidelines for such a reaction should come from the United Nations

⁷⁹ *Implementing the Responsibility to Protect: Report of the Secretary General* (New York: United Nations General Assembly, 2009), 10

⁸⁰ *Implementing the Responsibility to Protect: Report of the Secretary General*, 11.

⁸¹ *Implementing the Responsibility to Protect: Report of the Secretary General*, 15.

⁸² *Implementing the Responsibility to Protect: Report of the Secretary General*, 22.

Charter, and specifically from Chapter VII. Article 41 of that chapter states that peaceful means of ending a conflict, such as economic sanctions and the severance of diplomatic ties, should be the first response. Article 42 states that, if the measures outlined in Chapter VI fail, the Security Council has the ability to authorize a forceful intervention.⁸³

Institutional Forms

As can be seen both the ICC and the R2P are complex institutions; they build on a series of existing international norms and rules, interconnecting these norms in new and sometimes unclear ways. Thus, understanding the forms these institutions take, in more categorical sense, is helpful in an analysis. The following section will use two frameworks to explain the ICC and the R2P as such: McCubbins and Schwartz's somewhat simple and relatively intuitive police patrol and fire alarm model and Donnelly's more complex international regime model. It should be noted that for the purposes of these two frameworks institution means something very different than in new institutional economics. Here, institutions refer to organizations as well as rules.

Mathew McCubbins and Thomas Schwartz developed the Police Patrol and Fire-Alarm Model to explain differing types of congressional oversight. However, in the years since their original article was published in 1984, their model has become universally used as a way to distinguish different types of organizational oversight. The concept is relatively simple. Organizations that have fire-alarm oversight work

⁸³ *Implementing the Responsibility to Protect: Report of the Secretary General*. 22-23

like actual fire alarms. When a problem occurs, it triggers the alarm. The organization must then decide how to react to that alarm. In general, such systems of oversight are decentralized and comparatively non-active. In comparison, police patrol oversight works like actual police patrols. The organization takes initiative; it conducts surveillance in an attempt to detect problems and to solve them quickly. In this way, police patrol systems are often quite centralized and comparatively active.⁸⁴

The R2P and the ICC serve as examples of both the Fire Alarm and the Police Patrol system, respectively. The R2P is primarily based in surveillance. Once the international community sees the early warning signs of genocide or of crimes against humanity (or once it witnesses such crimes if it has missed these early warning signs) it is to act to prevent or end such crimes. But under the R2P, the international community has no responsibility to go out looking for such crimes; rather only to react to the 'fire alarm'. The ICC, on the other hand, and specifically the office of the prosecutor, is charged with investigating such crimes. While the Security Council can recommend that the prosecutor investigate a certain situation, the prosecutor can also begin an investigation of his own initiative.

While this model says a lot about the institutions themselves, it says little about how these supra-national institutions interact with the states that are their foundation, and the consequences of such interactions. Jack Donnelly's model of international regimes, which he applies specifically to human rights regimes, provides some clarification on these issues. According to Donnelly, there are four

⁸⁴ Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *Midwest Political Science Association* 28(1984): 166.

types of international regimes: enforcement regimes, implementation regimes, promotional regimes, and declaratory regimes. Enforcement regimes have international decision making power and, in general, also have “very strong forms of international monitoring of national compliance with international norms”⁸⁵. Implementation regimes involve some monitoring procedures and policy coordination via an international forum. However, policy control still remains ultimately with the individual states. Promotion regimes involve encouraging compliance and enforcement of international regimes. Finally, declaratory regimes involve the creation of international norms but no decision making procedures. These four regime types are summarized in Figure 2.

	National decisions	Promotion or assistance	Information exchange	Policy coordination	International monitoring	International decisions
International norms	Strong declaratory		Strong promotional		Strong implementation	Strong enforcement
International standards with national exemptions						ICC
International guidelines	Weak declaratory	Weak promotional		Weak implementation		Weak enforcement
National standards	No regime			R2P		
	Declaratory regime	Promotional regime		Implementation regime		Enforcement regime

Figure 2, taken from Jack Donnelly’s *Universal Human Rights in Theory and Practice*, pg. 128

As can be seen in Figure 2, the ICC is an example of a strong enforcement regime. Decisions are made at the international level, either by the court itself, or by the Security Council, when it recommends a situation to the prosecutor. For the most part, once a state signs and ratifies the Rome Statute, little decision making

⁸⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice*, (Ithica, New York: Cornell University Press, 2003), 128.

power remains with the individual state. However, decisions to arrest those wanted by the court must be made by the individual states, as the court has no police force. The R2P, in contrast, is weak implementation regime. It sets up certain international guidelines for action, and creates mechanisms by which policy coordination on these guidelines can occur. However, it creates no actual organization by which true international decision making can occur and in doing so, leaves some the decision making power with the individual states.

The remainder of this paper will try and explain why these differences exist between two institutions with almost identical goals: a world safe from genocide and humanitarian crimes. This explanation will be based in the three theoretical frameworks outlined above: elite theory, new institutional economics, and the multiple streams approach. However, none of these frameworks offers a standalone explanation for the institutional differences. Rather, it is a synthesis of the three theories, which combines an understanding of elite structures with an understanding of institutional development and path dependency, with a further understanding of the role non-state actors and individual policy makers play in policy making process that has real merit. The following narrative begins by identifying the elites, whose powerful voice affects the outcome of both the R2P and the ICC. It continues with an institutionalist explanation, focusing on the beliefs of the elites and how these beliefs affect their reactions to the R2P and the ICC. Finally, the multiple streams approach brings into focus the role of humanitarian NGOs and the Secretary General, whose reporting and lobbying activities influence the elites and the 'masses'.

Identifying elites is no easy task, for policy systems are complex at any level, but are particularly complex at the international level where the lines between issue areas and the distinctions between the elites and the masses are often blurred. Thus, in order to clearly identify an elite, a very specific policy system must first be identified. This paper focuses on the decision making mechanism common to both the R2P and the ICC: the United Nations Security Council. However, this is by no means the only decision-making mechanism within either institution.

The R2P doctrine requires that intervention be authorized multi-laterally in order to attain full legitimacy. Such authorization can occur via a number of inter-governmental organizations (IGOs) other than the Security Council, including the European Union and NATO, both of which have lead interventions in the past. And while these interventions, in Macedonia under the authority of the European Union and in Kosovo under the authority of NATO, were legitimate under the R2P doctrine, the ICISS report does state that the Security Council is the best organization for authorizing intervention: “The commission is in absolutely no doubt that there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes.”⁸⁶

Article 13 of the Rome Statute states that the ICC may exercise its jurisdiction in relation to a crime if the situation in which that crime was committed has been referred to the court. Such references can occur in one of three ways. First, state parties may refer situations to the court. Secondly, the prosecutor may initiate an investigation. Finally, a situation may be referred to the court by the Security

⁸⁶ *The Responsibility to Protect*, 2001, prepared by the International Commission on Intervention and State Sovereignty (Ottawa, Canada: 2001), 6:13.

Council, acting in accordance with Chapter VII of the Charter of the United Nations.⁸⁷

The Security Council has shown its willingness to take on this task, having recommended both the situation in Darfur and the situation in Libya to the court.

Now the question becomes who are the elites within the policy system that is the Security Council? Answering this question is a relatively easy task, as the structure of the Security Council creates a clear elite.

According to the Charter of the United Nations, the Security Council is to “promote the establishment and maintenance of international peace and security.”⁸⁸ Chapter VII of the Charter sets down the guidelines for identifying threats to peace and security and the mechanisms by which the Security Council can react to such threats. Under Article 41, the Security Council can authorize peaceful forms of intervention including economic and political sanctions and the severance of diplomatic relations.⁸⁹ If these measures don’t end the threat, the Security Council can, under Article 42, authorize the use of force.⁹⁰

Under the Charter of the United Nations, the Security Council has fifteen members, ten rotating members and five permanent members. The five permanent members, the United States, the United Kingdom, France, China, and Russia, here after referred to as the P-5, have veto power; a no vote by any of the P-5 members blocks a resolution. As the Security Council has so much power within the international system, this veto gives them an immense amount of power; they can

⁸⁷ The Rome Statute art. 13, 17 July 1998, 18 UNTC 10.

⁸⁸ Charter of the United Nations Art. 26, June 26, 1949, 1 U.N.T.S. 1

⁸⁹ Charter of the United Nations Art. 41, June 26, 1949, 1 U.N.T.S. 1

⁹⁰ Charter of the United Nations Art. 42, June 26, 1949, 1 U.N.T.S. 1

block an intervention and block the recommendation of a case to the court. In a broad sense, they can block policy change.

However the power to block policy change does not make an elite; rather the structure of the Security Council is simply the source of power. To truly be an elite, the P-5 must also exhibit Meisel's 3 C's: consciousness, cohesiveness, and conspiracy. It's quite clear that the P-5 are conscious of their power; all five permanent members have shown willingness to threaten use of, and if necessary, actually use their veto. The second two traits, cohesiveness and conspiracy are more problematic. Though, when it comes to the issue areas concerned, there seems to be a pervading principle that being the protection of sovereignty. However, the ways the individual states actually support this concept differs.

First, on the issue of intervention. The peaceful types of intervention outlined by the R2P doctrine are a pretty clear invasion of sovereignty, but the forceful intervention also outlined, is a literal invasion of that sovereignty. In general, China is against intervention in all circumstances. While resolutions that are likely to be vetoed rarely reach a vote, China has been adamant about its opposition. Susan Breau states in her 2006 article, that Chinese opposition is, in fact, one of the greatest obstacles to universal adoption of the R2P.⁹¹ China proclaimed its opposition again in 2009, during General Assembly debates on the R2P. The delegate emphasized that the responsibility to protect citizens lies fundamentally with the national government, and thus, that nothing in the R2P should be seen to "contravene the principle of state sovereignty and the principle of non-interference

⁹¹ Susan C. Breau, "The Impact of the Responsibility to Protect on Peacekeeping," *Journal of Conflict and Security Law* 11:3 (2006): 430.

in the internal affairs of States.”⁹² While also generally opposed to intervention, the other four P-5 states have shown that when intervention is directly beneficial to their interests, then their opposition to intervention dies. Though the cases of intervention are quite clear, the interests are often not. Decisions to intervene are made by the most powerful of policy makers without much transparency. Thus any discussion of interests is, to a very large extent, speculative.

In some cases, the interests of multiple P-5 members align. For example, in Bosnia in 1995, when the Security Council authorized NATO intervention at the behest of the United States. In this case, the other P-5 states, with the possible exception of China, had an interest in maintaining the peace, security, and stability of Eastern Europe. By 1995, it was clear that any previous attempts to end the genocide had failed, and that forceful intervention was thus necessary to maintain the peace. A similar situation presented itself in Rwanda in 1994. After numerous acts of genocide has already been committed, and the UN and the P-5 states had failed to act, the Security Council authorized French Troops, as part of Operation Turquoise, to create safe zones within Rwanda. In this case, French interests were perhaps the strongest, as Rwanda was a former colony, but all the P-5 states had an interest in ending the atrocities, and thereby being seen as a human rights protector.⁹³

In other cases, one P-5 state supports intervention, at the opposition of one or more of the remaining four permanent members. This occurred in the case of

⁹² U.N. GAOR, 63rd Sess., 98th plen. Mtg. U.N. Doc A/63/PV.98 (July 24, 2009).

⁹³ For more on the Rwandan Genocide see the BBC News Timeline at, <http://news.bbc.co.uk/2/hi/africa/3580247.stm>

Kosovo, where the United States, France, and the United Kingdom supported intervention at the opposition of Russia. The United States, France and the United Kingdom were interested, much as the United States was in Bosnia, in maintaining peace and security in Europe, while Russia was interested in maintaining its sphere of influence in Eastern Europe. After Russia vetoed a resolution, the United Kingdom, France, and the United States intervened under NATO leadership. These states ended up on opposite sides of the argument in 2008, when Russia intervened in a war in the neighboring state of Georgia, claiming the need to end human rights abuses. It was obvious, however, the Russia was simply trying to maintain control in its sphere of interest, and its intervention was, therefore, condemned by the other P-5 members.⁹⁴

But non-intervention does remain the norm, for there are even more cases, where the P-5 have no direct interest and thus intervention is never seriously contemplated. A number of these cases are some of the most infamous complex humanitarian emergencies occurring in the world today, like the genocide in Darfur, and the situations in the Democratic Republic of the Congo, in Iran, in Israel, in Russia, and in China. In some of these cases, specifically those of Israel, Russia, and China, the P-5 are not simply lacking interest in the situation; they actually have an incentive to prevent intervention.

Though the ICC seems to involve a, just as clear, invasion of state sovereignty, specifically the juridical jurisdiction of a state, the P-5's opposition to the court seems to be minimal. Both the United Kingdom and France are parties to the Rome

⁹⁴ "UN Court Rejects Georgia Case against Russia over War," BBC World News, accessed April 14, 2011, <http://www.bbc.co.uk/news/world-europe-12935149>

Statute, and while the United States, China, and Russia remain officially opposed, they have shown a willingness to recommend situations to the court via the Security Council.⁹⁵ As of writing, the Security Council has only recommended two out of the six situations currently under consideration by pre-trial or trial divisions of the court: the Situation in Darfur⁹⁶ and the Situation in Libya.^{97,98} In both cases, however, recommendations came relatively quickly; for Darfur only three years after the beginning of the conflict and the seating of the first court and for Libya only weeks after the beginning of crimes. Further, both recommendations came prior to intervention. In the case of Libya, only a few weeks prior. In the case of Sudan, there is still no intervention six years later.

But do the recommendation of cases to the court, or the cooperative willingness to intervene, or perhaps to not intervene, mean that the P-5 are acting as a cohesive and conspiratorial elite? The simple answer is: not necessarily. Such decisions are negotiated and made at high levels of government, where there is little transparency in the decision making process, and, therefore, the observer can have no clear understanding of the process. What can be said, however, is that there is a certain cohesiveness in the actions of the P-5 in relation to humanitarian intervention and the R2P and the ICC. This cohesiveness may, or may not, be based in some sort of conspiratorial plan.

⁹⁵ Rome Statute of the International Criminal Court, July 17, 1998 18 UNTC 10.

⁹⁶ See <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/> for more information

⁹⁷ See <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0111/> for more information

⁹⁸ Rome Statute of the International Criminal Court, July 17, 1998 18 UNTC 10.

There remain interesting differences between the P-5's actions relating to the ICC and the R2P. What might explain these differences? The answer lies in the way the P-5 perceive reality, the uncertainty that fuels these perceptions and the ways in which the P-5 believe the R2P and the ICC will interact with and potentially change that reality. Such an explanation is fundamentally based in the new institutional economic explanation of Douglass North discussed above. As way of review, North's fundamental argument is that uncertainty creates certain perceptions about reality, which lead to the creation of certain institutions. These institutions will often alter perceptions of reality and lead to the creation of new institutions.

For centuries, the international system was plagued with the uncertainty of foreign war. Invasion was a way to gain resources, and at times a tool of foreign policy. The Treaty of Westphalia changed this, by setting up the institution of sovereignty. Under this definition, no state was allowed to undermine a government's monopoly on power, or to invade the territorial boundaries of a state, under any set of circumstances. The goal of this institution was to protect states from invasion by others. But, as Hayek points out, no institution is perfect: they all have unintended consequences. In the case of the institution of sovereignty, states are protected from invasion, be that invasion unwanted and unjustified or be that intervention justified, and perhaps necessary to protect human life. Abuses that occur within the borders of an individual state remain entirely the business of that state. The international community can do nothing to alter state behavior.

This unintended consequence has been seen as both positive and negative. It's a positive consequence for those states whose policy involves human rights abuses; they can now continue these abuses free of threat. For others the inability to end crimes and bring justice to those who committed them is a negative consequence. For this group, the unintended consequences of institution of sovereignty, created a new set of uncertainties, uncertainties about ability to protect population's human rights. And new institutions must be set up, to help counteract these new uncertainties. The result was a series of institutions, discussed in the historical timeline above, set up with the goal of protecting human rights. Each time that the imperfections of an institution prevented it from achieving this goal, new, seemingly better, institutions were formed, culminating in the R2P and the ICC.

But what about those states for whom the consequences were positive? They created organizations, alliances, and policies all of which depended upon the old rules of the game. As such, they are interested in maintaining the old rules, even at the cost of the newer more effective rules. For the P-5 states the consequences of the institution of sovereignty have been positive. While today, France and the United Kingdom are not known to be committing humanitarian crimes, they have in the past and have gotten away with it. China, Russia, and the United States all continue to commit such crimes today, and face no consequences for them. But this lack of consequences depends heavily upon a certain set of rules, specifically a very narrow definition of sovereignty which protects their monopoly on power. New rules are a threat to the organizations and policies founded under the old rules. For this reason,

the P-5 have tried to protect and perpetuate the institutions of sovereignty, and thereby prevent the continued development of those institutions they see as threatening.

As mentioned above, the support of institutions by those organizations who require the continuance of these institutions to exist is one of the causes of institutional path dependence. Such path dependence can be seen in the institutions surrounding the traditional conceptualizations of sovereignty, when the effectiveness of these institutions is measured against their ability or inability to protect human rights and prevent complex humanitarian emergencies. History has shown that the traditional institutions of sovereignty, those that originated at Westphalia, have not been effective on either count. It can be assumed that other institutions could be created which would be more effective, institutions like the R2P and the ICC. But their development is stilted by the elites need to perpetuate older institutions to further their own ends.

But as stated above, the elite do not seem to be as opposed to the ICC as to the R2P. The reasons for this difference lie in how the elites view these two institutions, and specifically the extent to which the two institutions create uncertainty, and thereby affect the changes in the current rules of the game. The Rome Statute and the ICC create less uncertainty. Three of the five permanent members, the United States, China, and Russia, are not state parties to the Rome Statute. As such, the Statute, and thus the court it creates, should, under international norms, have no jurisdiction within the United States, China, or Russia, and they should have no responsibilities to it. Though the Rome Statute claims

jurisdiction, all three states have vocally stated their opposition to such a claim, though the United States has been most vocal about its opposition. As of yet, the ICC has respected such a claim, and has not tried to try a case involving American, Russian, or Chinese citizens. An institution which has no jurisdiction over a state, and therefore creates no responsibilities for the state, also creates very little uncertainty. It creates just as little uncertainty for the France and the United Kingdom, both of whom are parties to the Rome Statute, which defines clear responsibilities for them. It is because of this lack of uncertainty that the P-5 have shown a willingness to support the ICC. In the 2005 vote, this recommended the situation in Darfur to the court, France, Russia, and the United Kingdom voted yes, while the United States and China abstained, perhaps as a sign of their initial opposition. However, when a resolution recommending the situation in Libya to the court reaches a vote in 2011, it passes unanimously.

The R2P seems to create far more uncertainties. By not setting down very specific guidelines and decision making mechanisms, the R2P doctrine makes intervention easy, the doctrine itself easy to abuse. And the P-5 are some of its abusers. This is exhibited in the citation of decade old abuses by Saddam Hussein as the reason for the second Gulf War, by the same government who refuses to intervene in the face of clear and pressing abuses in Iran, Israel, Sudan and the Congo. But what is more threatening is the possibility that the P-5 might be asked to participate in an intervention they don't support. In general, when the Security Council approves an intervention they request that every UN member contribute to the intervention force. With large armies and large amounts of resources, the

responsibility to contribute to such forces often lies heavily with the P-5 states. What is, however, the most threatening aspect of the R2P for the P-5 is the possibility that intervention might be turned on them. This is an especially large concern for China, Russia, and the United States all of which are known to be committing crimes against humanity. This uncertainty creates a new reality, one the ICC only makes strides towards, in which the P-5 could face serious consequences for crimes that have, for many of them, become part of state policy. For this reason, they stall its development, hoping to maintain, in its place, those older institutions of sovereignty, the old rules of the game, which will allow them to continue to play the game the way they always have.

However, the elites are not entirely successful in their opposition, for great strides have been made in continuing to develop both the R2P and the ICC. These successes are made possible by circumstances outside of the control of the Elites and organizations and actors outside the state system, who are, as such, less directly influenced by elites power. The Multiple Streams Approach, with its three stream model emphasizes the importance of timing and can help to identify such circumstances and actors.

One such circumstance is the opening of a window of opportunity; in the case of the R2P and the ICC such a window opened within the problems stream. As mentioned above, windows of opportunity occur within the problems stream when some condition becomes so pressing, that policy makers can no longer ignore it. Such a pressing condition arose in the 1990s, when the world witnessed an influx of genocides, ethnic cleansing, crimes against humanity, and war crimes. Of course,

these crimes were not entirely new conditions. But the 1990s reflected an influx of such crimes as had never before been seen. Over the span of only a few years, genocides, ethnic cleansing, war crimes, and crimes against humanity were committed Rwanda, Croatia, Bosnia, Kosovo, and both the Republic of the Congo and the Democratic Republic of the Congo among other states. This huge spike in humanitarian crimes began to press upon international policy makers, until it became so pressing that they were forced to act, and begin searching for solutions. Two separate solutions for the problem were eventually found: the R2P and the ICC. They are both an answer to the same set of problems, and while the path they take towards becoming actual policy change differs slightly, both depend upon pressure groups campaigns, conducted by humanitarian NGOs for their success.

In 1989, the Prime Minister of Trinidad and Tobago had proposed a permanent international court to handle cases related to the international drug trade. The concept of a permanent international court became even more relevant in the aftermath of the numerous complex humanitarian emergencies mentioned above. The need for justice in the aftermath of the crises and the success of the tribunals in Nuremberg and Tokyo led to the creation of International Criminal Tribunals for Rwanda and Yugoslavia. But these tribunals are costly, and it quickly became clear that the continued advent of complex humanitarian emergencies would necessitate the foundation of more tribunals. There was even more pressure to found an international tribunal, and in 1998, the Rome Statute, founding the International Criminal Court, was signed in New York. By 2002 the statute had entered force and the first court had been seated. But development did not end

there. That the Rome Statute today has 114 state parties is the result of a series of pressure group campaigns, run by international humanitarian NGOs, with the goal of gaining universal ratification. Human Rights Watch had release numerous reports on the court's success, as well as sent letters to the Assembly of State Parties. Amnesty International has continued to promote the ICC as part of its Campaign for International Justice.⁹⁹

Pressure group campaigns played an even more fundamental role in the development of the R2P. The numerous interventions, some failed, some of questionable legitimacy that occurred in the 1990s, led the international community to search for new, and more clearly outlined ways, of preventing and reacting to complex humanitarian emergencies. At the request of then Secretary General Kofi Annan, the International Commission on Intervention and State Sovereignty began the task of outlining guidelines, by which states could react to such emergencies. As part of this process, the commission held eleven regional roundtables and national consultations between January and July 2001. National and regional officials, representatives of civil society, NGOs, academic institutions and think-tanks were invited to participate. It is from their expertise, and their proposals that the R2P doctrine comes. The resulting report, entitled *The Responsibility to Protect*, was the first comprehensive conceptualization of the doctrine, and, unfortunately, because of the timing of its release in December 2001, was largely overshadowed by the

⁹⁹ "International Justice: About the Campaign," Amnesty International, accessed April 6, 2011, <http://amnesty.org/en/international-justice/background>.

events of September 11.¹⁰⁰ But it was revived in 2005 when, at the Millennium World Summit, the doctrine was further developed and officially accepted by the international community. Debates continued on the issue in the General Assembly in the summer of 2009.

The revival of the R2P in 2005 was the result of its promotion by policy entrepreneur, most prominently the then Secretary General Kofi Annan. The agenda for the World Summit was based upon a report he wrote, entitled *In Larger Freedom*. In this report, he discussed the role that the R2P should play in international relations. He states quite clearly that

We must also move towards embracing and acting on the “responsibility to protect” potential or actual victims of massive atrocities. The time has come for Governments to be held to account, both to their citizens and to each other, for respect of the dignity of the individual, to which they too often pay only lip service. We must move from an era of legislation to an era of implementation. Our declared principles and our common interest demand no less.¹⁰¹

By ensuring that the R2P was placed on the agenda of the Millennium Summit, Annan served as the policy entrepreneur who pushed through the acceptance of the R2P. But Annan is not the only UN Secretary General to play the role of policy entrepreneur in the development of the R2P. With the realize of his report on the continued development of the R2P in 2009, current Secretary General Ban Ki-Moon ensured continued discussion of the doctrine, and its continued development within the international system¹⁰².

¹⁰⁰ Breau, “The Impact of the Responsibility to Protect on Peacekeeping.”

¹⁰¹ U.N. Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All*, U.N. Doc A/59/2005, (March 21,2005).

¹⁰² U.N. Secretary General, *Implementing the Responsibility to Protect: Report of the Secretary General*, U.N. Doc A/63/677, (January 12, 2009).

The Future of the International Criminal Court and the Responsibility to Protect

Though the continued development of not only the Responsibility to Protect, but also the International Criminal Court are of great importance, there is a certain cynicism with which one must reflect upon their current state. Neither institution has succeeded in fulfilling the goal of its foundation, as genocide and humanitarian crimes continue to occur worldwide. This failure is, primarily, a result of elite power. These elites, most specifically, the five permanent members of the Security Council have tried to prevent the continued development of the ICC and, to an even greater extent, the R2P. Both institutions are seen by the P-5 as threatening, specifically to the traditional institutions of sovereignty which keep the P-5 in power. However, there has been progress in the development of both institutions, as a result of efforts by NGOs and policy makers to push their continued development.

The ICC has made the most significant steps forward of the two institutions. Its investigations have produced tons of previously unavailable information about humanitarian crimes being committed today, and its willingness to make this information public has made the international community much more aware of these crimes. While the court has proved quite effective at investigating crimes and issuing arrest warrants, it has proven equally ineffective at arresting criminals and bringing them to trial. The simple fact that Omar Al-Bashir is not only still president of the Sudan, but not in jail cell, reflects this shortcoming. But it is a shortcoming that may yet be overcome. Universal ratification of the Rome Statute would be a significant first step, for it would ensure that criminals had no safe haven. Every

sovereign state would be required to act upon arrest warrants in the case that a wanted individual entered their territory; this threat of arrest would likely strain diplomatic relations to the point of severing them. And the severance of diplomatic ties with the remainder of the globe may pressure leaders into changing their abusive policies. An even more significant step forward would be the creation of a police force for the ICC, which could enter state territories and arrest the wanted. However, the costs of such a police force are likely to be prohibitively high.

The R2P has been even less successful. Empirically it seems to be little more than an easily abused normative concept. This is best reflected in the interventions that aren't. In Sudan, where after almost ten years of genocide and decades of civil war, it is clear that sanctions will not end the crisis; there is no longer an excuse for in-action. Sudan is not the only case of inexcusable non-intervention. In Israel, abuses have been occurring since the 1970s and even the simplest sanctions have yet to be proposed. Of course the decision to intervene is not to be taken lightly and the costs of intervention itself must be recognized, for intervention is a slippery slope. With every intervention a new threshold is set and the question is asked, 'if we intervene in this situation, mustn't we also intervene in this other similar, though not identical, situation?' If the answer to this question is consistently yes, then intervention is likely to become the norm, rather than the exception. Arguably a world full of military intervention, whatever the reason for such intervention, is only marginally better than one full of genocide, for in both worlds people live in constant fear of their lives.

Thus, while failure seems to be the empirical result, it is not a normatively viable result, for the failure of the Responsibility to Protect and the International Criminal Court means that the international community has yet again failed to protect the victims of humanitarian crimes and thereby failed to ensure that all of humanity has the rights owed to it. The result is a world in which people continue to live everyday in fear, in the face of uncertainties about their very survival. But as Hayek reminded us, there are immense obstacles to creating the perfect institution, one whose outcomes align almost entirely with its goals. In fact, these obstacles are so immense that they are unlikely to be overcome.

But simply giving up, means giving up on all of those people who are suffering, it means accepting a fundamentally broken status quo. It means accepting that our world is one that includes forced starvation, child soldiers, mass murder, torture, rape at the barrel of a gun, genocide, and fear. We should not, and cannot, accept this world. Rather, we must continue to identify the obstacles to institutional creation and development and find ways to combat these obstacles and hopefully find a way of lessening or even erasing genocide, crimes against humanity, and war crimes from our world.

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