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Holding perpetrators of atrocity crimes to account: The interplay and effectiveness of humanitarian interventions and the ICC

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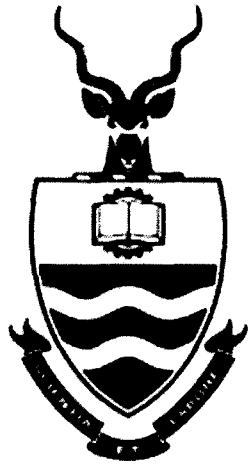

WITS
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Submitted to the International Relations Department, University of Witwatersrand, Johannesburg in partial fulfilment of the requirements for the degree: Master of Arts (International Relations)

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ABSTRACT

Since the end of World War II, we have seen the international community have a great focus on achieving International Criminal Justice for atrocity crimes. This was done through the establishment of different tribunal courts such as the ones in Yugoslavia and Rwanda. This ultimately led to the creation of a permanent court- The International Criminal Court (ICC). This court was established in order to punish those that commit atrocity crimes such as genocide, war crimes, crimes against humanity, ethnic cleansing and crimes of aggression. The intervention in Libya in 2011 saw for the first time the Responsibility to Protect (R2P) doctrine and The ICC interact in the same situation. This research paper aims to explore the interplay between the International Criminal Court and Responsibility to Protect in holding those that are committing atrocity to account. This research paper will look at whether these two mechanisms can effectively work together in achieving justice. It will look at the conceptualisation as to why they should in fact be linked together. It will look closely at the role of R2P and the ICC in Libya and the impact of this for international criminal justice and what this means for future R2P and ICC cases.

ACRONYMS

AU: AFRICAN UNION

GCC: GULF COOPERATION COUNCIL

ICC: INTERNATIONAL CRIMINAL COURT

ICISS: INTERNATIONAL CONVENTION ON INTERVENTION AND STATE SOVEREIGNTY

IGO: INTERNATION GOVERNMENTAL ORGANISATION

LAN: LEAGUE OF ARAB NATIONS

MENA: MIDDLE EAST AND NORTH AFRICA

NATO: NORTH ATLANTIC TREATY ORGANISATION

OIC: ORGANISATION OF ISLAMIC CONFERENCE

R2P: RESPONSIBILITY TO PROTECT

UK: UNITED KINGDOM

UN: UNITED NATIONS

UNDHR: UNIVERSAL DECLARATION ON HUMAN RIGHTS

UNGA: UNITED NATIONS GENERAL ASSEMBLY

UNHRC: UNITED NATIONS HUMAN RIGHTS COUNCIL

UNSC: UNITED NATIONS SECURITY COUNCIL

USA: UNITED STATES OF AMERICA

I. Introduction:

Rationale

Since the end of World War II there has been great focus on international criminal justice. This has been seen through the creation of the Tokyo and Nuremberg Tribunals as a way towards achieving international criminal justice. We have also seen the creation of tribunal courts in Rwanda and Yugoslavia and years later the creation of a hybrid tribunal in Sierra Leone with the same mandate of creating peace and achieving justice in the international community. This ultimately led to the establishment of the International Criminal Court (ICC) with its sole mandate to address and try international crimes as stated in the Rome Statute. This went further with the creation of the Responsibility to Protect (R2P) which aims to prevent the atrocities from occurring in the first place or to intervene once these atrocities occur.

The purpose of this paper is to critically examine the tools that have been put in place in the international community to hold those who commit atrocities such as genocide, crimes against humanity and war crimes accountable, and whether these tools are successful in achieving international criminal justice. The international community is currently facing issues of when to intervene in situations where mass atrocities and crimes against humanity are being committed by state leaders against their citizens. This research paper is relevant to International Relations because the role that international law and international norms play is always a point of contention between states, particularly on how to effectively implement these norms and how to effectively abide by international law.

Since the establishment of the ICC, we have seen atrocities and large-scale violations of human rights across the globe and it is often difficult to determine the manner in which to move forward when dealing with these atrocities and violations. With the establishment of the ICC, the thought was that international justice would be achieved and more perpetrators of international crimes would be punished or crimes would be deterred. But we have often seen that this is not the case and there are more factors to take into account in realising international criminal justice.

The Responsibility to Protect doctrine sets out that the international community has the responsibility to intervene in a sovereign state where there are crimes such as genocide, war crimes, ethnic cleansing and crimes against humanity being committed and where a state fails to protect from and prevent such crimes from occurring. R2P and the ICC are linked or

should be linked because it has been observed that when conversations about R2P are made, talks regarding international criminal justice are not so far off as both deal with the same set of atrocity crimes. In this sense the ICC and R2P both seek to establish international criminal justice. They can be argued to have a similar mandate. Both these mechanisms address the failure of states to address the crimes that are being committed. These two tools both consider the same crimes to be a complete violation in the international system and both require that the international community should respond to such violations. Linking these two mechanisms is also not often discussed in literature and this research paper will seek to contribute this aspect to the knowledge surrounding international criminal justice debate. The conceptualisation of these two tools working together will further be explored in greater detail in the main body of the research paper.

In the international community we have seen cases being put forward to the ICC whether through the UNSC, self-referrals of by way of the prosecutor. We have also seen instances where interventions occurred even before the formal establishment of R2P. However, in terms of the ICC these cases were not preceded by a humanitarian intervention and the perpetrators were only taken or referred to the ICC after they had left their seats in their respective offices. This paper will look particularly at the case of Libya and the interactions between the ICC and R2P. Libya is the only case to have been both an ICC case as well as an R2P case. The basis of using Libya as a case study is that it serves as a test case in which we can evaluate whether these tools can effectively work together. Libya is a special case in the sense that the intervention in Libya resulted in regime change and R2P does not advocate for regime change. This paper will critically look at the intervention that took place in Libya as well as how the ICC then prosecuted those that were referred to the ICC and whether this led to justice being achieved in Libya. In looking at Libya, this paper sought to establish whether it was a unique case or whether there is a chance that Libya will be replicated again. It will further consider whether we will see these tools working effectively together in future R2P and ICC cases. It looked at the shortcomings of the humanitarian intervention and the ICC interventions and what the implications for future ICC and humanitarian intervention cases will be.

This paper itself will not look at the debates surrounding the effectiveness of these two tools, but rather it will seek to analyse the processes in these tools that ultimately lead or do not lead to the achievement of criminal justice. This already narrows the scope of the research. It will

not look at the debates surrounding the effectiveness of whether the ICC is needed or not or whether R2P is something that can be effective in the international community.

Methodology:

Research Question:

Have the mechanisms around the Responsibility to Protect and the International Criminal Court helped achieve International Criminal Justice?

Sub Questions:

1. What are the tools that have been provided by the international community?
2. Have these tools provided been effective in Libya? If not, why not?
3. What are the lessons that can be learned regarding accountability for atrocity crimes?

Variables

Independent Variables:

1. Humanitarian Intervention in R2P
2. ICC Prosecutions

Dependent Variables:

1. International Criminal Justice

Operationalisation:

The dependent variable for this research paper is international criminal justice. For the purpose of this research paper, criminal justice was measured by looking at retributive justice. This research paper looked specifically at retributive justice as a means of measuring the effectiveness of these mechanisms in achieving international justice. Retributive justice states that crime is an act against the state, a violation of a law, an abstract idea which requires an abstract act to correct (Greenawalt 1984, 346).

Theory Testing or Developing

This research paper engaged with theory testing. I used a deductive research design. This research design begins by testing the independent variables that cause the outcome. It tested the independent variables in order to determine the causal mechanisms that ultimately cause the outcome.

How do you prove causality between the IV and the DV?

Causality is when the independent variables are the cause of the outcome. To show causality in this research paper, I used a mixed methods approach of process tracing as well as document analysis. This research paper aims to explain the outcome in Libya with regards to the humanitarian intervention and the ICC referral.

Document analysis is a form of qualitative research in which documents are interpreted by the reader in order to give meaning around the analysis of the topic (Bowen 2009, 27). There are three primary documents (O'leary 2004, 121). These are as follows: public records which consist of the official, ongoing records of an organisation's activities and related content (Bowen 2009). Personal documents which consists of first-person accounts of an individual's actions, experiences and beliefs, and physical evidence which consist ts of physical objects found within the study setting (Bowen 2009, 28). Document analysis is an important research tool in that it helps corroborate findings across different data sets which helps reduce the impact of potential bias by examining all the information collected (Bowen 2009, 28).

When doing document analysis, it is suggested that a wide variety of documents is better, but one should not prefer quantity over the quality of the documents gathered. By gathering a wide variety of information and documents one eliminates the possibility of bias towards certain sources. Documents should also be assessed for their completeness which means that they should be assessed for comprehensive their data is (Bowen 2009, 28).

For the purposes of this research, I looked particularly at public records and also personal documents. By using this methodology, I was able to analyse relevant documents and was able to make inferences relating to the research question and draw conclusions on what has been inferred. I had a comprehensive, clear process that incorporated evaluative steps and measures that helped with analysing the documents I looked at. I relied on information from organisations such as the United Nations, the International Criminal Court, Amnesty International, Human Rights Watch and the Global Centre for the Responsibility to Protect. I examined court reports with regards to cases in the ICC pertaining to Libya. I also examined the founding documents of the ICC and R2P in order to further explain why these two bodies should be viewed together. By extracting the relevant information from the documents, I was able to formulate inferences that will help strengthen the argument or help provide clarity for the research paper.

George and Bennet have described process tracing as attempting to empirically establish the posited intervening variables and implication that should be true in a case if a particular explanation of that case is true (2005). Process tracing has been defined as the "procedure for identifying steps in a causal process leading to the outcome of a given dependent variable of a particular case in a particular historical context (George and Bennett 2005, 206). The main idea behind process tracing is that through seeking key elements of a hypothesised causal mechanism within a case, it should in essence be possible to identity whether the mechanism is operating, and one should be able to trace the mechanism from the cause to the effect. By using process tracing a researcher is able to assess a theory by identifying the causal chain(s) that link the independent and dependent variables. The goal in this instance would be to uncover the relations between possible causes and observed outcomes (George and Bennett 2005). Process tracing is used in both theory testing and development and in explaining an outcome (George and Bennett 2005, 206). In comparison with the positivist epistemology which looks at the principle of parsimony and generalization, by using process tracing one is able to provide a deeper explanation of the case by embracing causal complexity, incorporating a larger set of variables and being aware of context and time (George and Bennet 2005, 2007).

This research report uses a deductive approach, which is theory testing. For this research paper the causal process that has been identified is the relation between the ICC and R2P (independent variables) and the impact both have on the outcome which is international criminal justice. By using process tracing I have observed the outcome that occurred in Libya and further I traced the process that occurred in the humanitarian intervention and also through the referral to the ICC. Through this I was able to make inferences as to why the outcome in Libya occurred the way it did and what led to the outcome being that way. By using process tracing I was able to trace the possible causes of the observed outcome as there is not only one clear cause for the outcome.

The combination of document analysis and process tracing allows for the development of strong inferences on causal mechanisms that may explain the research question. Process tracing is able to convert historical narratives into causal explanations. The combination of document analysis and process tracing may lead to a robust explanation regarding why the humanitarian intervention and the ICC referral in Libya could or could not be argued to have not led to international criminal justice or why it led to the outcome that it did.

This study was one of qualitative research. Qualitative research stresses the socially constructed nature of reality, the intimate relationship between the researcher and what is studied as well as well as the situational constraints that shape the research (Denzin and Lincoln 2005, 5). The data used for this research looked at ICC reports on the situation in Libya. Further I looked at reports of organisations such as Amnesty International and the Global Centre for the Responsibility to Protect. The activities of the ICC and R2P are still being monitored by these institutions. I also looked at other articles that have published on the subject of the ICC and Humanitarian Intervention. Data was also collected by looking at the founding documents of the ICC as well as the conference reports that helped conceptualise R2P.

Theory

The theoretical framework that can best explain this research paper is sociological institutionalism. Sociological institutionalism forms part of the scholarly discipline of new institutionalism which shares the basic understanding that institutions matter in social processes. These include historical institutionalism and rational choice institutionalism. Sociological institutionalism opposes the old institutionalism and rational choice theory which argues that actors have the option to choose independently from a large number of attitudes (Saurugger 2017, 2).

Sociological institutionalism arose from the subfield of organisational theory at the end of the 1970s (Hall and Taylor 1996, 946). Some sociologists began to challenge the differentiation between those parts of the social world that were argued to reflect a more rational approach associated with modern forms of organisation and bureaucracy in contrast to those parts of the social world said to display a diverse set of practices associated with culture. Theorists such as Weber argued that the reason of such an approach towards bureaucratic structures stems from the effort to devise efficient structures that perform tasks associated with modern society. It is against this that new institutionalists in sociology began to emerge. They argued that many of the new institutional forms and procedures used by modern organisations were not adopted simply because they were the most efficient for the tasks at hand but rather they argued that these are also culturally specific and influenced by culture (Hall and Taylor, 1996, 946). They argued that these practices are related to myths and ceremonies devised by many societies and then assimilated into organisations not necessarily for efficiency reasons but rather as a result of processes associated with the incorporation of cultural practices into

institutions (Hall and Taylor 1996, 947). Sociological institutionalists therefore argued that even the most bureaucratic practices need to be explained in cultural terms. They seek to explain that organisations take on specific sets of institutional forms, procedures or symbols as result of cultural norms (Hall and Taylor 1996, 948).

The International Criminal Court and responsibility to protect could be argued to be the products of the cultural norms of seeking and achieving justice. In other words, the decision to have such organisations is a result of cultural norms that influence society in which they operate. Societies throughout history have always aimed to punish or deter criminal activities from occurring in their communities. Bureaucratic establishments such as the police and judicial establishments were created for the purpose of punishing and deterring what the society deemed wrong. In the international community, the same could be argued to have occurred. There has been a need to punish those that commit atrocity crimes such as genocide, war crimes and crimes against humanity, not only on a national level but also an international level too. These atrocity crimes are known as the most serious crimes committed against humankind (UN Framework 2014). They are referred to as atrocity crimes due to the fact that these are the acts most associated with the violations to the core dignity of human beings (UN Framework 2014). The ICC and R2P are not merely a product of achieving efficiency in the international criminal justice system but also a product of the societal norms that are reflected in these institutions.

This theory helps conceptualise the establishment of the ICC and R2P as part of the cultural norm in society of achieving justice not just domestically but also internationally. There are however limitations in that it does not account for institutional change as well as the differentiated power relations amongst the actors. We have seen that states do not often speak with one voice when it comes to matters of prosecutions through the ICC or humanitarian interventions through R2P. There are different power relations involved in the ICC and R2P that sociological institutionalism does not account for. It does not account for the extent to which processes of institutional creation or reform entail a clash of power among the actors that have competing and different interests (Nichols 1998, 483-484). It also does not effectively address the shortcomings in terms of why these institutions change over time or what the catalysts for this change are.

Sociological institutionalism does however provide an analysis of how these institutions come about and what the societal influence for these institutions is, and therefore it is a

suitable theoretical framework for this body of research. It does offer an explanation as to why these institutions were created and their importance in society.

Existing Knowledge: Literature Review

This research paper will focus on the literature around what international justice is. For the purpose of this paper, International criminal justice will be examined through retributive justice. This form of justice justifies punishment based on the culpability of the accused rather than by taking into account societal impact (Greenawalt 2014, 972). The retributive justice system has its focus on the imposition of punishment as an effective way to deter or prevent crime. Philosophers such as Kant have put forward the argument that when it comes to pursuing justice, punishment must be carried out for the sake of the rule of law and not the victim or perpetrator (James 2007, 133-136). Kant argues that the only legitimate form of punishment that a court should adhere to is one based on retribution and no other system (James 2007, 136). The basis of the above arguments is that justice cannot be achieved without the punishment of the guilty.

International criminal justice and the jurisprudence for it are often found grounded in the sources of international criminal law. These lay a framework on how to achieve international criminal justice as it provides the scope of what is considered wrongful conduct under international criminal law. These sources are inclusive of five main sources which are treaties, customary international law, general principles of law, judicial decisions and then the writings of eminent jurists (Rome Statue of the International Criminal Court 2002). These sources of international criminal law help us understand how and which crimes can be tried under an international jurisdiction. It also provides precedence on how to go forward with prosecuting certain crimes. It provided the relevant information for the ICC and then eventually the doctrine of R2P.

The evolving system of international criminal justice has been argued to consist of more than just the ICC (Van der Merwe 2014). It is however the most prominent symbol and actual manifestation of international criminal justice. International criminal justice is a part of international law with the purpose of calling for the prosecution of the planners and organizers of the gravest war crimes and human rights abuses (Rodman 2016, 1). It forms part of a growing body of international law that seeks to place the individual at its centre, both in the instance of a perpetrator (in order to be held accountable) and also as a victim

(with a right to redress) (Rodman 2016, 2). The entire system of international criminal justice goes against the very concept of sovereignty of states. By having a justice system that transcends the domestic affairs and borders of a state does go against the very nature of sovereignty. Despite this, the concept of international criminal justice system came about after the emergence of a modern state (Rodman 2016, 1).

Much of the focus in early modern history was on redress for the victim. This was seen through the establishment of the Nuremberg Tribunals and the tribunal in Tokyo (Rodman 2016, 1). These tribunals were established after World War Two. These were much more focused on the individual rather than on state responsibility for violations of international law, even though it went against the traditional notions of grating immunities to state officials in such circumstances (Rodman 2016, 1). It was then that the crime against humanity was established as a concept. This went against the principle of non-interference which was established in the 1700s and, in more contemporary terms, it, being the principle of non-interference was officially recognised by the UNGA through the Declaration on the Inadmissibility of Intervention and Interference in the Domestic Affairs of States in 1965 (United Nations General Assembly 1981). This granted the ability to interfere when states committed crimes such as murder and persecution in their territory, even though it could have been covered and was consistent with the handing of crimes under domestic law (Rodman 2016, 2). The end of the Cold War also helped move the progress of international criminal justice in the international community.

In the 1990s this was seen through the tribunals in Rwanda and in Yugoslavia (Rodman 2016, 1). Here the United Nations allowed for the establishment of ad hoc tribunals that merged international and domestic judges in addressing the violations. This was subsequently also seen in Sierra Leone, East Timor and Cambodia. The ICC was established to punish those who commit the crimes as defined in the Rome Statute. This focus of achieving International Criminal Justice led to the establishment of the ICC and the eventually the notion of the Responsibility to Protect which also aims to bring about justice on a global stage (Rodman 2016, 1).

The International Criminal Court was established by the Rome Statute and this statute grants the ICC jurisdiction over four main crimes. The crimes are as follows: genocide, crimes against humanity, war crimes and crimes of aggression (Rome Statute 2002). These blanket terms cover crimes such as murder, torture, rape, ethnic cleaning etc., particularly when it is

systematically conducted against certain groups in society or the larger population of a country.

R2P refers to the obligation of states toward their populations, especially those that are at risk of genocide and other mass atrocity crimes (Global Centre for the Responsibility to Protect). The doctrine of R2P has three pillars which are as follows: 1) that every state has the responsibility to protect its citizens from four mass atrocities such as genocide, war crimes, crimes against humanity and ethnic cleansing; 2) The wider international community has the responsibility to encourage and assist individual states in meeting that responsibility; and 3) in the event that the state fails to do so, the international community has the responsibility to intervene in this situation (Global Centre for the Responsibility to Protect). This third pillar is one of intervention and is the one that is mostly contested in the international community and the one that is relevant to this research paper. These above principles were mentioned in the 2001 report of the International Commission on Intervention and State Sovereignty and were further encouraged by the United Nations General Assembly in the 2005 World Summit Outcome Document (Global Centre for the Responsibility to Protect).

Much of the literature around achieving international criminal justice in relation to the ICC and R2P is viewed in isolation from each other. It centres on whether each tool on its own can work or has been working in the international community. Whether these tools have been effective in administering international criminal justice as intended or mandated has been part of the literature and the debates surrounding the ICC and R2P.

It has become a normalised practice to call on the United Nations Security Council to refer atrocious situations that are dire to the International Criminal Court (Reike 2015). In the article written by Ruben Reike, the argument is that the reason for this is to advance the principle of R2P (2015). There is a belief put forward by this author that the doctrine of the R2P and the ICC can mutually reinforce each other's objectives. Much of the argument by this author is that it would be ideal that such a scenario would occur, but he does argue that this is not the case. This belief that these two mechanisms are mutually dependent has not been fully researched in International Relations or under International Law. The limitations of international criminal justice are merely observed through the lens of the effectiveness of the two mechanisms on their own or the political limitations of fully implementing these mechanisms rather than the idea that interventions followed by the ICC would be a more effective manner of achieving international criminal justice.

The research on Libya in relation to the ICC and humanitarian intervention is centred mostly around the effects these interventions had on Libya post the Arab Spring revolutions. Even though it will form part of this research report, it will not be the focus of this research paper. In an article by Sarah Brockmeier et al (2016, 115), she makes the argument that R2P in Libya represents a key turning point in the implementation of R2P in that it shifted R2P from merely a concept or an idea but something that was implemented in practice. Others have a contrasting view in that they view the Libyan intervention in a negative light. They argue that the intervention in Libya has negative consequences for R2P (Brockmeier, Stuenkel and Tourinho 2016, 117). They argue that the intervention discredits R2P in that it can be abused by the parties involved (Brockmeier et al 2016, 120). Here the literature centred around Libya in this sense focuses on the impact that Libya has for future R2P cases that should have humanitarian interventions, such as Syria and Myanmar, and how there has not been a general consensus regarding having interventions in these instances (Brockmeier et al 2016, 120).

The above shows that even in instances where both the ICC and R2P were present, the literature around this is mostly focused on looking at the two mechanisms in isolation from each other. It rather has the focus on looking at the ICC and Libya and then R2P and Libya but never the role of these two tools together. It is merely the same debates around the effectiveness of these tools and the power politics that are prevalent in these institutions.

Chapterisation:

There will be a total of 5 chapters in this research paper. This first chapter consists of the methodological aspects of the research. It looks at the theory surrounding the research and also the relevance and knowledge gain of the research area. This first chapter serves to introduce the topic and outline the research topic.

The second chapter looks at the theoretical framework of the research. It will look closely at what international criminal justice is through examining the theory of retributive justice. It will further engage with the conceptualisation of the ICC and the Responsibility to Protect and why in essence these two concepts should be linked together when addressing international criminal justice and the achieving thereof.

The third chapter, which is the crux of the research paper, closely examines the role of the R2P in Libya. It will look at the failings of this in Libya and why this intervention is argued to have not been successful and contrary to its mandate and contrary to international law.

The next chapter looks at the role of the ICC in Libya. It will look at how the prosecutions and investigations conducted against perpetrators of international crimes in Libya happened and whether there has been success in indicting these perpetrators and the current status of the investigations.

The conclusions of this research paper seek to provide a way forward in which these two mechanisms, which in theory should be working alongside each other, can be improved in order to meet their respective mandates. It provides a way forward as to how international criminal justice can be achieved if these two institutions are working together.

II. Theoretical and Conceptual Framework

The international community has provided tools through the different mechanisms in order to achieve international criminal justice. These tools include the Responsibility to Protect Doctrine and the International Criminal Court. This part of the research will look at the tools that have been provided. In order for one to fully understand the conceptualisation of these tools, one has to understand the basis of the form of justice they are built on. In the international criminal justice system there are two main theories of justice: retributive and restorative. There are often debates regarding which system would be more effective in administering justice. However, for the purposes of this research report, the focus will be on retributive justice as a measure of whether justice has been achieved in the international community.

Thereafter I look at R2P and the ICC and how these tools can be conceptually linked in order to understand the role in which they interact or should interact in the international community in order to achieve justice. Further I examine how these tools interacted in the case of Libya and helped shape the events that occurred in the aftermath of the Libyan crises.

A. Retributive Justice

International criminal justice as a concept embodies both punishment of those who commit violations and also restoration of the victims of these violations. However, in the context of how the ICC and R2P have often worked, the focus of this paper will look at the punishment of those of who are accountable for atrocity crimes. It will focus rather on retributive justice rather than restorative justice.

When there is a violation of societal norms, laws and values, there is a demand for justice for the community that is affected by such violation. Society demands that there should be some form of a consequence for such violations. It is through this that the establishment of retributive justice exists. Immanuel Kant, once argued in his book *The Science of Right* that, "the only legitimate form of punishment the court can prescribe must be based on retribution and not other principles" (Kant 1797). This in essence means that if the guilty party cannot be punished or are not punished, justice has not been done. It is through this perspective that one can begin to understand the conceptualisation of retributive justice as a leading form of justice in the international criminal justice system.

According to the Stanford Encyclopaedia of Philosophy, there are three basic principles that help understand what retributive justice entails (Walen 2014). These three principles are as follows: "*1) that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment; 2) that it is intrinsically morally good – good without reference to any other goods that might arise – if some legitimate punisher gives them the punishment they deserve; and 3) that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers*" (Walen 2014). It is through this understanding of retributive justice that many justice systems across the world have been built upon including that of the International Criminal Court. This also forms part of the reasoning behind the creation of the R2P doctrine.

Retributive justice refers to the subjectively appropriate punishment of individuals or groups who have violated rules, laws, or norms and thus are perceived to have committed a wrong doing, offence, or transgression (Wenzel, et al 2008, 378). Crime has been defined "*as any wrong against the public which is punishable in a criminal proceeding by the state in its own name, or in the name of the people, or of the sovereign*" (In Re Bergin, 1986). Furthermore, under English law, a crime has been defined as "*a crime or an unlawful act or default which is an offense against the public, and renders the person guilty of the fault, liable to punishment*" (Simmons, 1955). Understanding the definition of a crime also helps with the contextualisation of retributive justice and what it entails.

Under retributive justice deterrence or rehabilitation are not often taken into consideration when administering the appropriate and proportionate punishment for crimes that have been committed by perpetrators. Retributive justice argues that those who commit crimes should in essence also suffer the consequences through the administration of punishment (Walen 2014). The understanding of retributive justice can be phrased negatively or positively. This is further qualified by Jeffrie Murphy (2007, 7) who argues that someone who is a retributivist believes that the primary reasoning for punishment is that the wrongdoer or criminal deserves it. On the other had one who does no wrong can also not be punished (Walen 2014).

This can also be seen in the understanding of punishment. It is understood in a wide sense as any negative outcome (cost, loss or suffering, which can be material or symbolic) imposed on an offender in response to the wrongdoing (Wenzel et al 2008, 380). This understanding of punishment does not entail a redistribution of outcomes. It is crucial for retributive justice

that the wrongdoing itself is responded to; one cannot undo the wrongdoing therefore an additional act is required. Another element that is important to retributive justice is that the punishment is enforced by a third party with the required authority and not by the person that the wrong act was done upon. The state for example through prosecution before a judge must establish the guilt of a person for violation of the law (Hart 1968). After the guilt has been established, the judge would impose the appropriate sentence which can be inclusive of a fine, incarceration and in extreme cases, the death penalty.

It is also important to note that not all negative outcomes imposed on a person or a group constitute punishment as understood above. It is more important to understand that the outcome is imposed as a response to a wrongdoing (Wenzel et al 2008, 380). This means that we are not seeking this punishment as a means of deterring or conditioning behaviour but rather as a means of holding people accountable for their wrongful conduct.

There are many debates around retributive justice and whether it is the most effective way of ensuring and achieving justice. One of the arguments that is against retributive justice is centred around the fact that retributive justice is unjust to the offender, ineffective in producing social safety and order, and burdensome due to the cost of social resources. It has failed in that it does not present a corrections approach to crime to produce effective deterrence and the programmatic effect of failure to address the rights of the victims to any effective redress (Hermann 2017).

There are further arguments that have been made that a retributive justice as a concept of "just desert" is problematic. The very nature of morality being subjective makes it difficult to deliver punishments. Retributivist theory mostly deals with crimes that are both immoral and illegal such as rape, murder and theft which makes it much easier to punish than in other instances where we are dealing with situations that are amoral. This is not so simple to administer justice through punishment in such instances (Maiese 2004).

There are instances where offering a pardon or mercy might be a more effective way of dealing with those that have committed crimes. It has been argued that a greater good can be achieved by pardoning a criminal instead of enforcing punishment (Maiese 2004). However, in the instance of retributivists, pardoning goes against the very core of what it entails. Kant has argued that "if justice goes, there is no longer any value in human beings living on the earth" (Kant 1887, 371). This simply means that should criminals be pardoned for crimes that they have committed, it would be doing a disservice to the very core of what it means to

administer justice. This is considered a disadvantage or a shortfall of the retributive theory of justice as it limits how much deterrence and rehabilitation can actually occur with criminals outside of the context of punishment.

Retributive justice is also flawed in the sense that it separates the victim and the accused. In fact, this relationship is often disregarded as irrelevant to the whole process of justice (Armstrong 2012). Retributivism concerns itself with restoring victims and offenders to their rightful position (Maiese 2004). This process removes itself from the victims as it makes it difficult for them to be involved in the process and fully achieve the justice they need.

However, retributive justice is still a necessity and it still matters because conflicts that last long or continue for periods longer than expected often involve violence or cruelty suffered by innocent civilians. This violence is often carried out systematically and in the form of genocide, ethnic cleansing, enslavement or systematic racial discrimination. This is also extended to crimes such as rape, murders, torture that may be carried out haphazardly during these conflicts and wars. These are the same crimes that the ICC and R2P identified as crimes that can and should be dealt with on an international platform. It is important to recognise that these violations of human rights need a stronger form of justice in order to be dealt with. It is important for those who commit these crimes to receive their "just deserts" (Minow 1998). This just means that it is important for those who commit these crimes to be able to be held accountable for their actions in a way that can be seen and felt by them. This results in the perpetrators being deprived in the way that they have deprived those they committed the crimes against. Punishment in this instance reinforces the rules of international law and it denies those that have violated these rules a way in which they can further continue and perpetrate these crimes.

B. The Responsibility to Protect

The Responsibility to protect is a norm that the international community has provided in order to achieve international criminal justice and maintain peace and security in the international community. The responsibility to protect doctrine was established through a report by the "*International Commission on Intervention and State Sovereignty (ICISS)*" in Canada 2001. This report was compiled for understanding and establishing the so-called right of humanitarian intervention. Particularly the question of when, if ever, it is appropriate for states to take coercive – and in particular military- action, against another state for the purpose of protecting people at risk in that other state. The mandate of the ICISS was to

generally build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty. It was more specifically to try and develop a global political consensus on how to move from polemics and often paralysis towards action using the United Nations (ICISS Report 2001).

This question of when to intervene in situations is one of the most contested issues in international relations since the Cold War (ICISS Report 2001). The responsibility to protect doctrine seeks to establish under which circumstances states can breach sovereignty and intervene in other states.

The responsibility to protect requires that states protect all populations from mass atrocity crimes and gross human rights violations. These crimes are inclusive of the following crimes: genocide, war crimes, ethnic cleaning and crimes against humanity. These crimes are found in the principles based on the respect for the norms and principles in international law that relate to sovereignty peace and security and human rights and armed conflict.

The basic principles of the Responsibility to Protect is that "*where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure and the state in question in unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect*" (ICISS Report 2001). This principle does go against the first basic principle of R2P in which it is stated that state sovereignty does imply that the primary responsibility to protect the states people lies with the state itself (ICISS Report 2001). This report does seek to address the situations in which other states can intervene in the affairs of the states when there is a failure to protect its own people.

The notion that other states have the responsibility to protect can be found under the duties and roles of the United Nations Security Council under Article 24 of the UN Charter highlighting the maintenance of peace and security in the international community. There are further legal obligations under human rights and human protection declarations, covenants and treaties such as the UNDHR as well as international humanitarian law and national law (ICISS Report 2001). These mechanisms have made it easier or more prevalent to prioritise the importance of upholding human rights and maintaining peace and security in the international community even if it means breaching state sovereignty. In this manner states have also acted in certain situations of humanitarian crises, as well as regional organisations and the Security Council in addressing matters of peace and security in the international

community (ICISS Report 2001). This has contributed immensely to the changing approaches and narratives towards the human rights violations occurring in the world.

There are three key elements of the R2P doctrine. The first is that there is a responsibility to prevent (ICISS Report 2011). This requires that both the root causes and direct causes of the internal conflict and other man-made crises that place populations at risk are addressed timelessly. The second element is the responsibility to react (ICISS Report 2001). This requires action through appropriate measures which may include things such as coercive measures such as sanctions and international prosecution and in most severe cases, military intervention. The last element is the responsibility to rebuild (ICISS Report 2001). This requires that the intervening state should provide, especially in instances where there was military action taken, full assistance with recovery, reconstruction and reconciliation. This is done with the aim of addressing and fixing the issues that resulted from the harm and the intervention itself. These three elements form the very basis of the responsibility to protect and humanitarian interventions should be conducted if and when needed.

The humanitarian intervention aspect of R2P has caused problems in instances where it occurred such as when it happened in Somalia, Bosnia and Kosovo in the 1990s and also when it failed to happen during the Rwandan genocide (ICISS Report 2011). In both instances of action and when action does not take place, it has been a point of contestation in the international community and is still a point of contestation in recent times.

In the case of Bosnia, there was failure of the United Nations to intervene which resulted in the massacre of thousands of civilians that were seeking shelter and protection in the UN (ICISS Report 2001). There was also a failure on the part of UN peace operations in Somalia in that the international intervention to save and restore order was destroyed by flawed panning and terrible execution and complete dependence on military forces (ICISS Report 2001).

In the case of Rwanda, the international community saw what happens when there is failure on the part of the international community to act. The Rwandan Genocide in 1994 is one of the most horrific events that occurred in modern history. The United Nations and some of the permanent members of the Security Council were aware of the planned genocide and yet did not have sufficient presence in Rwanda and there were not sufficient and credible strategies in place in preventing or mitigating the effects of the genocide (ICISS Report 2001). This inaction was a failure on the international community's part and further derailed any attempts

made towards achieving and maintaining peace and security in the international community. However, in Kosovo there was an intervention in 1999. However, this intervention was plagued with questions around the legitimacy of the intervention. There were many questions around whether the actions of the Belgrade authorities warranted external interventions (ICISS Report 2011). There were further questions regarding whether the intervention itself only worsened the situation in Kosovo instead of mitigating it. This intervention took place without the consent of the Security Council and there were questions regarding the legitimacy of this and whether such interventions that take place without the Security Council approval are legitimate.

These cases of humanitarian interventions, which were mostly failures, all occurred before the establishment of the report on the responsibility to protect. There was backlash from the international community regarding the efforts to maintain peace and security considering there was much focus on international criminal justice following the end of the Cold War. These failures led to many people questioning the efforts and intentions of international organisations for peace keeping and justice. This is part of the reasoning as to why there was a debate on the policy of humanitarian intervention as the guidelines needed to be clearer and the circumstances as to when to intervene needed to be made clearer. Hence the commission's report was negotiated and established.

After the report was established there were other instances of interventions that occurred after 2001. One of the first was in Iraq in 2003 and then much later in Libya in 2011. These two interventions have further caused issues for the implementation of the responsibility to protect doctrine which again raises questions about the legitimacy of humanitarian interventions. This is on the back of the lack of intervention in Syria since the beginning of the Syrian Civil War as well as a lack of intervention in Burma with the Rohingya people. There is a clear issue regarding humanitarian interventions in that there is not enough action from the international community or there are too many political voices that determine whether one should intervene or not and this causes distrust and lack of faith in the mechanisms in place to help prosecute those that are charged with atrocity crimes.

The concept of R2P evolved and developed through the course of the conference that helped establish the report. R2P and what it entails has evolved in three stages (Rim 2017, 73). These three stages are: 1) accepting the concept as a subject of international public discourse. This simply means that the international community is recognising more and more the need

for states to be accountable for what occurs not only within their borders but also outside. Further, that there is a need to stop violations of human rights occurring in other states. The second stage is contributing towards the shaping of concrete implementation mechanisms (Rim 2017, 73). Making the manner in which criminal justice is dealt with at an international level is effective and ultimately will contribute to the realisation of justice. The final stage is the reappraisal of the concept vis-à-vis its application in practice (Rim 2017, 73). As the concept of R2P becomes more and more utilized in the international community, it brings it from merely being a concept but also something that is actually materialising in situations of conflict.

These above stages outline the increasing importance of R2P and the role it continues to play in the achievement of international criminal justice. Even though there are debates regarding its effectiveness and the manner it has already been used in the international community, it has contributed to the discourse and debates around human rights and the humanitarian response to violations thereof (Rim 2017, 74). By advocating that states should be mindful of their responsibility with regards to situations where there are gross human rights violations, R2P helped to capture the attention and concern of the international community (Rim 2017, 74). It requires that states go beyond their state interests and the protection of their sovereignty in order to form solidarity of the international community for the protection and upholding of human rights.

C. International Criminal Court

The International Criminal Court was established through the Rome Statute and began functioning on the 1st of July 2002, which is the date the Rome Statute came into force. The idea of establishing an International Criminal Court was a result of the ongoing threats to the peace and security in the international community. With an increase in threats, there was a greater call for the international community to be able to hold those that commit crimes that violate human rights and pose a threat to peace and security accountable for their actions. Such accountability would not only be on a national level but on a global level. There was further intention that punishing those that commit atrocity crimes would aid in the deterrent of future atrocity crimes. This court was also established in the hopes that not only will there be a moral condemnation of the human rights violations but that states would also uphold the rule of law at the national and international level (Maina 2014, 21).

The ICC was established as a permanent institution and it has the power to exercise its jurisdiction over persons for the most serious crimes of international concern (Rome Statute of the International Court 2002). The Statute under Article 5 establishes the jurisdiction of the court. The Statute provides that the jurisdiction of the court shall be limited to the most serious crimes of concern to the international community as a whole (Rome Statute of the International Court 2002). These crimes are as follows:

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.

The Statute then further provides explanations as to what each crime entails. Genocide is defined as: "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group". This could be inclusive of killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part etc. (Rome Statue 2002). Crimes against humanity have been defined as "any of the following acts when committed as a part of a widespread or systematic attack directed against any civilian population with knowledge of the attack." This is inclusive of crimes such as murder, extermination, enslavement, deportation or forcible removal of population and imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law etc. (Rome Statue 2002). War crimes have been defined as crimes committed in part of a plan or policy or as a part of large-scale commission of such cries. The crimes of aggression is defined as the: "planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale is a violation of the Charter of the United Nations" (Rome Statute 2002).

The Rome Statue in and of itself has extensive definitions and details outlining the crimes that would fall under the particular jurisdictions. The Statute further states that the court only has jurisdiction over these crimes after the Statute has come into effect (Rome Statue 2002). This means that the court only has jurisdiction over the crimes that are committed after July 2002 and not before. The Statute also provides for who the jurisdiction of the court is applied to. In order to exercise the jurisdiction of the court the state has to become party to the Statue

and thus will be accepting the jurisdiction of the court with respect to the crimes committed in Article 5. The jurisdiction only applies to the states that are party to the agreement or if a non-state member gives consent to the court to have the jurisdiction of the court apply to it. Such can be limiting in the sense that states that are not party to the Statute are able to commit atrocity crimes with the possibility of not being held accountable by the international community.

The state on which the crime in question has occurred must have been committed within the territory of a state which is member to the Statute or must have been committed by a national of the state member to the Statute (Rome Statue 2002). The court can also exercise jurisdiction by way of referral of a situation by a member of the statute. The member state can refer a situation to the prosecutor in which one or crimes within the jurisdiction of the court appear to have been committed requesting the Prosecutor to investigate the situation (Rome Statute 2002). The Prosecutor of the court may also initiate an investigation based on information that has been given to them. Jurisdiction of the Court is also established through UNSC referrals (Rome Statute 2002). The UNSC may refer situations with alleged atrocity crimes being committed through a resolution mandated by the UN Charter.

Looking at the manner in which the ICC operates in terms of jurisdiction, it is quite easy to see where the court could fail in fully being able to utilise the law to hold those accountable for atrocity crimes. If the jurisdiction of the court does not somehow apply to you, it is very difficult to establish a way in which those that are grossly violating human rights can be held accountable.

Since its inception there have been many cases brought towards the ICC under different circumstances. Many of these cases have portrayed different levels of successes and of failures. One of the first cases that was brought to the ICC is the case of *Prosecutor vs. Thomas Lubanga* on the 26th January 2009 (Graf 2012, 467)). Thomas Lubanga was convicted of war crimes where he conspired and enlisted children under the age of 15 to fight and participate in his crimes in the DRC (Charge Sheet: The Prosecutor v Thomas Lubanga Dyilo 2012). Since its conception there have been 8 situations that have been brought to the court. Countries such as Uganda, Democratic Republic of Congo, Central African Republic and Mali are all party to the Rome Statue and have referred the situations in their countries to the ICC for investigation. In Sudan- Darfur and Libya, the UNSC itself referred the situation for investigation. These two countries are not party to the Rome Statute. The prosecution also

granted the prosecutor's request for the authorisation to start investigating the situation in Kenya in 2011 and Cote d'Ivoire.

All these cases mentioned above have been brought before the court through different channels and have also gone through different levels of litigation through the years. Many of these cases have raised many questions regarding the legitimacy of the ICC and whether the ICC has an African orientated litigation agenda and has raised questions regarding the legitimacy of the organisation as a whole. This forms part of the greater debate regarding the ICC and its functioning, however it is not the main concern of this research paper. Rather I seek to address the failure of the ICC and R2P in Libya when in theory they should have worked in holding those responsible for the commission of atrocity crimes accountable in the international system.

When the ICC was established, it was sought to be an incredible institution that would help with the development of the protection of human rights in the 21st Century (Rim 2017, 73). An institution that would help ensure that the atrocities of the past would not be repeated in the 21st Century and to ensure that those that do commit these atrocities are fully held accountable for their actions. It has been argued that without the domestic law enforcement mechanisms, it is often difficult for the ICC to fulfil its mandate. However, even with its shortcomings, the ICC portrays the commitments of states towards ensuring that justice is achievement for gross human rights violations and that no perpetrator goes unpunished.

D. How R2P and the ICC should be linked

It has been argued that R2P and the ICC are quite possibly the most important of the mechanisms in the international system that can deal with the protection of human rights or should ideally be able to deal with human rights (Ainley 2015, 37). These two mechanisms are not formally linked together, however it could be argued that they were developed side by side or within similar time frames (Ainley 2015, 37. Both R2P and the ICC were inspired by the limitations of the international community in general and the UNSC in particular to intervene and enforce humanity's law. They were developed side by side with similar purposes in order to address the ongoing threat of atrocity crimes through prevention, protection and prosecution (Ainley 2015, 38).

The scope of the crimes that would apply under R2P was a subject of contention in UN discussions and was eventually narrowed down to the following: genocide, war crimes, ethnic cleansing or crimes against humanity (Rim 2017). As we have seen above in the analysis of

the ICC, these crimes are similar to those found under Article 5 of the Rome Statue. R2P in broad is concerned with the protection of victims whereas the ICC is concerned with the punishment of those who have committed these atrocity crimes. These two mechanisms therefore both work towards protecting the victim and prosecuting the perpetrator in some way.

These two mechanisms share a common purpose and foundation. They are identical in their normative grounds in that they are for the "pursuit of humanity and justice through international cooperation" (Rim 2017, 83). This is clearly outlined in the preamble of the Rome Statute with outlines the ICCs commitments to upholding and protecting human rights. This is also seen under R2P through the notion of "just war" theory and the concept of intervention on which R2P was built on: the ideas of prevention, protection and remedial response to humanitarian crises. This clearly shows the link and overlapping of these two mechanisms that have been put in place in the international community to help protect fundamental human rights (Rim 2017, 83).

By understanding the link between the ICC and R2P, one should recognise and work towards imbedding the role of R2P in the broader international judicial system that is spearheaded by the ICC. Both the ICC and R2P are guided by the moral commitment to address and ultimately end atrocity crimes and it is this moral commitment found in both mechanisms that should be the nexus advocating for change in the international system. The Responsibility to Protect helps in gathering the political will of the international community in the efforts of protecting people at risk, whereas the ICC provides a more judicial mechanism to protect people at risk and protect those who commit such crimes (Rim 2017, 91). By having this kind of symbiotic relationship, the ICC and R2P have the immense potential of succeeding and being effective in the international community.

There are clear differences between R2P and the ICC. The ICC is more rooted and entrenched in a legal system regulated by treaties and has a degree of holding those parties to the treaty accountable. This makes the ICC more legalistic in its nature in comparison to R2P which is grounded more in a political and normative framework. This means that R2P is mostly based on the policies of different states regarding human rights violations and is entrenched in politics rather than a legal framework. The ICC and R2P also differ in their scope of application. The ICC has a more restricted scope of application whereas R2P has a broader scope of application through the UNSC. However, even with these differences these

two mechanisms still form part of the potential responses to the international community in the hope of addressing atrocity crimes being committed.

R2P and the ICC have a common subject matter (Rim 2017, 81). As a response to mass atrocities, both R2P and the ICC can be used together or individually. In theory both can be used simultaneously or they can be sequenced together. The main goal of R2P is to prevent or stop mass atrocities and due to the nature of the ICC, in that it advocates for deterrence, it can in theory support the end of these atrocities. However, theoretically, because it can deter these crimes, it could potentially render R2P responses unnecessary. In the sense of the ICC, once a mass atrocity is about to occur or has occurred, the ICC could be useful in that they could send a signal as a way of warning those with authority and those that are in power that they could face prosecution should they persist. This would be a less invasive way in comparison to the R2P principle of military intervention as a means of deterring or stopping the perpetrating of atrocity crimes. In this instance one can see how these two mechanisms would not be working together but rather by ensuring the effectiveness of the ICC, you would in effect be rendering any action through R2P unnecessary and ineffective.

Both the ICC and R2P have a strong reliance on the role of the UNSC in being effective in its duties to exercise their respective mandates. And in both instances, the UNSC has been seen to be the hindering factor to these mechanisms functioning effectively. When dealing with a State's sovereignty and that state is a perpetrator of the atrocity crimes, the only way to deal with such a case is through the UNSC (Rim 2017, 85). However, geopolitics and practical considerations make their relationship much more complicated. Any action that could be taken potentially though R2P relies on the agreement of the permanent members of the Security Council or at least an assessment on the part of at least some of the permanent members of the UNSC (Rim 2017, 85). The UNSC has so far not taken "sufficiently clear and strong action" in many cases even with the international community calling for decisive action from the UNSC. This can be seen in the ongoing conflicts in Syria and even Yemen and in the ongoing genocide of the Rohingya people in Myanmar (Burma) where there is cause for the ICC and R2P to take action. This often poses a problem when trying to establish a working link between R2P and the ICC. Where there is no consensus from the parties, there is rarely room for cooperation, further putting strain on these two mechanisms that should be in effect working together (ResponsibilitytoProtect.org).

There is further argument for why these two mechanisms should be linked in the manner in which they both account for the assigning of responsibilities to an individual state and the international community. These mechanisms embrace the principle of complementarity which assigns the primary responsibility to states while requiring that international action when the state is either runnable or unwilling to take action. R2P requires that international actors should defer first to the state and then act if and when that states fails to act in situations of gross human rights violations (Rim 2017, 95). This simply means that the responsibility to protect is firstly vested in the state. In the event that the state is unable to do so, the responsibility will fall on the international community. This further extends to the role of the UNSC when R2P is in effect. The UNSC will look to the government of that state to end the atrocities and should they fail, the responsibility will transfer onto the international community.

This principle is similar to the principle of complementarity which is found in the Rome Statute. Under this, the ICC has jurisdiction over a case only when the state is unwilling or genuinely unable to carry out the investigation or prosecution of atrocity crimes (Rim 2017, 96). The idea of this is that the ICC should be complementary to the role of national courts when prosecuting criminal matters (Rome Statue 2002). Under this principle it would be ideal that the state should be able to prosecute violations and it should be proven that they are unable or unwilling to do so first before action from the international community (Rim 2017, 96). This is similar to the requirement under R2P that it has been proven that the state has failed or is incapable of acting in order to protect its citizens.

The Responsibility to Protect and the ICC could work together to bring an immediate halt to atrocities and remove from positions of power and authority those who perpetrate such atrocities. This would require full cooperation from both parties involved in both mechanisms. Understanding why these two mechanisms should be linked could aid in the understanding and possibly fix why they each have a history of failing to address their respective mandates. Through understanding the connections between these two mechanisms, it can be argued that we might be able to address the gross human rights violations. By viewing R2P and the ICC as mechanisms that can work together rather than as separate entities, one could potentially be able to address the response to atrocity crimes and how to effectively deal with those that commit such crimes and how to deter the occurrence of such crimes in the first place. By realising that these mechanisms should in effect be working

alongside each other and not against each other, there is an increase in the possibility that international criminal justice could be better realised.

In order to begin to unpack and understand the significance of Libya for international criminal justice, we need to look at the circumstances in which Libya required intervention and action from the international community. In 2011, the Middle East and North Africa (MENA) region went through many changes that would forever impact the stability of this region. What began as a revolutionary act to overthrow the autocratic government in Tunisia, ignited a spark that would cause other countries in this region to act against their authoritative regimes that have been oppressing their countries for years and years. One of these countries was Libya that had been ruled by the autocratic leader: Muammar Gaddafi.

In February of 2011, civilians in Libya began to undertake political protests that demanded that there be an end to the Gaddafi regime that had plagued Libya for 41 years. The protests began peacefully, however this changed when the Gaddafi regime responded brutally to the protesters. What began as a peaceful protest turned into mass public mass violence that later escalate to a full-fledged civil war in the country. The civil war that broke out in Libya was labelled as a violation of human rights and international law by the international community and thus promoted a lot of international attention that called for interference from the international community. This interference would occur through the usage of R2P and the involvement of the ICC.

The case of Libya would serve as the first time these two mechanisms were used in order to achieve a level of international criminal justice. In the theoretical sense, the case of Libya should have garnered a positive result because these two mechanisms should have worked together in order to fulfil their similar, respective mandate in achieving international criminal justice. As we have established above, these two mechanisms should ideally work together. However, in the case of Libya it has often been argued that the response from the international community has been one that has not been successful in realising international criminal justice.

This next part of the paper will look closely as the actions of the ICC and the R2P in Libya and establish inferences as to why these have either been successful or not successful. It will look at how these mechanisms had in essence failed to work together as idealised in achieving their mandate.

III. THE RESPONSIBILITY TO PROTECT IN LIBYA

a. Background to the Libyan crisis

The Libyan crisis began on 22 February 2011 and lasted until 20 October 2011. Libya, much like other countries in the Middle East and North Africa, was inspired by the civil uprising that began in Tunisia (Kedze 2015). The uprising in Libya began in the middle of January 2011 when smallprotests emerged (Kedze 2015). These were mostly directed at issues such as corruption, local concerns and the urge for greater political freedoms (Gebremichael, Kifle, Kidane, Wendya, Fitiwi, Sheriff 2018). These protests grew and by 18February they had become full scale protests in Benghazi and Tripoli, asking for Gaddafi to step down (Gebremichael et al 2018). In response to these protests, the Gaddafi regime retaliated and responded violently against the protestors (Gebremichael et al 2018). The protests escalated significantly between 16 and 19 February, with reported mass killings occurring. It was after this that there was a call for international actors and bodies to step in.

The crisis in Libya received a lot of attention from the international community. The protests that had begun in the capital of Tripoli spread within weeks across the country to the cities of Benghazi, Ajdabiya, Darnah and Zintan (Winer 2019). These became the oppositions' stronghold and soon became the subject of Gaddafi's brutality (Winer 2019). Muamar Gaddafi called on the national army in order to stop the unrest that had resulted from the protests. Further, he stated that the army would show "no mercy" to rebels (Winer 2019). This indicated that he had every intention to continue committing human rights violations against his people. Even his speeches, which many have argued had similar tones to the language that was used during the Rwandan genocide, portrayed Gaddafi's intention going forward. Gaddafi had requested that his supporters should attack the protestors, which he referred to as "cockroaches", and that his supporters should "cleanse Libya house by house" until such a time that they would surrender (Winer 2019). This language indicated to the international community that Gaddafi was on the verge of committing atrocity crimes against his people in an attempt to silence and stop the protests from continuing.

When Libya faced an imminent humanitarian crisis, the international community responded and urged all relevant actors to intervene. Multiple NGOs from all over the world called on the UN to fulfil its responsibility to protect Libya's civilians and prevent Gaddafi from further committing atrocity crimes. The UN issued statements condemning the Libyan

government for the use of violence against their citizens and also urging Libya to exercise its responsibility to protect its citizens (UN Human Rights Council Res S-15/1, 2011). Regardless of these threats from the international community, Gaddafi continued and escalated the violence. The Libyan government under the authority of Gaddafi used tanks and troops against civilians. The increase in these actions across Libya systematically constituted crimes against humanity (Global Centre for the Responsibility to Protect). With the increase in offensive tactics from the Libyan side, the opposition requested that the UN impose a no fly zone over Libya. This was further supported by the Arab League who also called on the UNSC to impose a no fly zone and establish safe areas in those regions that had been flooded with the violence (Freeman, Meo and Hennessy, 2011). There was even further support from the Arab World, with the Gulf Cooperation Council and the Organization of Islamic Conference also reiterating the same sentiments as the UN and the UNSC.

Even with the pressure from the international community, Gaddafi and his troops did not stop the violence on its citizens, prompting further action (Freeman, Meo and Hennessy, 2011). This led to two resolutions being adopted by the UNSC requiring action from the parties. These two resolutions will be discussed in much greater detail in the next part of the paper.

b. United Nations interference

Following the pressure from multiple international organisations, the United Nations began to issue statements and prepared resolutions for the UNSC to consider in order to take action in Libya. The UNSC adopted Resolution 1970 on the 26TH of February 2011. This resolution was followed by Resolution 1973 which was adopted on the 17th of March 2011. UN Resolution 1970 came as a recommendation by the Human Rights Council and the United Nations General Assembly, deciding to follow this recommendation. This Resolution expressed deep concern at the deaths of the hundreds of civilians and rejected the ongoing conflict in Libya aimed at civilians by the Libyan government (UN Resolution 1970). It reaffirmed the responsibility of all states to protect rights pertaining to life, liberty and security of the person (Resolution 1970). This Resolution reiterated the statements made by the League of Arab Nations, the Gulf Cooperation Council (GCC) and the Organisation of the Islamic Conference and the African Union (AU) regarding the ending of violence and putting up a no fly zone in Libya (UN Resolution 1970). The Resolution further asked that the Libyan government take action regarding the violence and human rights violations happening in Libya. It further decided to refer the situation in Libya to the Prosecutor of the

ICC (Resolution 1970) This Resolution (Resolution 1970) was urging the Libyan government to cease the conflict and the violence towards the citizens. It formed the path towards Resolution 1973 that would ultimately lead to the intervention that occurred.

Resolution 1973 was adopted by the UNSC. This Resolution deplored the failure of the Libyan authorities to comply with Resolution 1970. It further condemned the deteriorating situation and the escalation of violence and the increasing number of civilian causalities (UN Resolution 1973). The situation in Libya was considered a situation that continued to threaten international peace and security. It is because of this the UN used Chapter VII of the UN Charter. This chapters allows the UNSC to "determine the existence of any threat to the peace, breach of peace, or act of aggression and to take military and non-military action to restore international peace and security" (UN Charter). This resulted in the UNSC imposing an asset freeze in Libya, the creation of a no fly zone area, enforcement of an arms embargo, a ban on flights and also reiterated the protection of civilians. These non-military actions, which were part of Resolution 1973, were taken in order to put an end to the systematic violence by the Gaddafi government by limiting their access to arms and other financial aid that would have aided them in their case. The resolution also authorised a special envoy to Libya of the African Union to facilitate talks that would lead to the necessary political reforms that would result in a peaceful and sustainable solution.

Most importantly, Resolution 1973 authorised the UNSC to take any measures necessary in order to protect civilians. Once this resolution was adopted there were many parties that disagreed regarding the course of action to take in Libya. Even with all the disagreements, on 19 March 2011 French, British and American forces began military operations in Libya (Kuperman 2015). They imposed a no fly zone (which was already in place before the 19th) and began bombing Gaddafi tanks from the air. Following this, two week later, NATO took over this operation. This resulted in NATO airstrikes being conducted over the next 6 months. This was occurring concurrently with efforts to find a political solution to the conflict (ResponsibiltytoProtect.org). The NATO operation ended in October, after the rebels had won the conflict, the Gaddafi regime had fallen and Muammar Gaddafi had been killed in the conflict.

The end of the conflict and the NATO operation has amounted to much scholarly debates regarding the legitimacy of the intervention. The aftermath of the intervention in Libya has raised many questions regarding whether the intervention itself fell under the umbrella of

R2P, as well as whether the intervention itself aided in achieving international criminal justice as intended by the R2P doctrine.

c. Applicability of R2P in Libya

In order to fully assess the impact of the intervention in Libya one has to fully assess whether the intervention does fall within the scope of R2P. There is a criterion that needs to be met in order to fulfil the requirements under R2P. Through examining the shortcomings and/or positives of this intervention under the scope of R2P, one can fully assess whether this was a successful attempt and ensuring that international criminal justice was achieved in Libya.

One of the considerations to take into account when reviewing R2P is that the intervention should be authorised by the UNSC in accordance with its powers as stated under Chapter VII of the UN Charter (UN Charter). There is no dispute that the UNSC authorisation of military action is in accordance with the principles of R2P. The necessary authorisation required was stated in Resolution 1973. The legality of the intervention in Libya cannot be questioned due to the fact that this intervention was within the scope of the UN Charter which authorised the UNSC to act accordingly. The Resolution that was adopted by the UNSC authorised the NATO mission to intervene in Libya through military and non-military actions.

As outlined in the R2P documents there needs to be a threat to civilians and the protection of lives in order for a state to be able to intervene. This is based on the just war theory as explained above. In the case of Libya, Gaddafi and his government had been perpetrating violent crimes against their citizens. There was a failure to protect the citizens and therefore there was cause for states to intervene. There was large scale loss of life which was a direct result of the actions by the Gaddafi government. Further there is a requirement that there must be the intention of averting and stopping further commission of violence against the citizens. It has been argued that this intervention was done under the intention of protecting citizens.

There are three factors that can also be used to evaluate the extent of the intention regarding the decision to intervene. Though these factors have no basis under international law, however they can be used to help legitimise an intervention. The first being, that the operation must be a multilateral effort (Norooz 2015, 28). In Libya this was a multilateral military effort by NATO members. The second factor is that the intervention must be conducted with the approval of the country that needs to be protected (Norooz 2015, 29). In this instance the people of Libya had called on the international community to intervene and

to stop the further committal of the atrocity crimes (Norooz 2015, 29). This requirement is not necessarily to argue that had the people of Libya not called for this intervention, it would not occur- as R2P states that the intervening country can go in without the authority of the state involved. It rather speaks to the intention that this intervention was indeed for the protection of the Libyan people. There was a consensus amongst the Libyan people that there needs to be action taken by the international community to protect them. The last requirement is that there must be support of this intervention by other countries or IGOs. In the case of Libya, there was support of IGOs like the LAS, GCC and the UNGA through the different resolutions that were adopted (Norooz 2015, 29). There were calls from members of the LAS and GCC to enforce no fly-zones and other methods of the use of force.

It can also be argued that the military intervention was a method of last resort which is another requirement that needs to be fulfilled. This has been mentioned in the ICISS report. It is stated that "*every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored' or 'there must be reasonable grounds for believing that ... if the measure had been attempted it would not have succeeded* (ICISS Report 2001)". Even though the ICISS explicitly mentions the method of last resort, it is difficult to argue that this should have been applied in Libya as the ICISS document is not a legally binding document. This forms a bigger part of the critique of the intervention as a whole. This requirement can be argued to also have not been met because the close proximity of the Resolutions from the UNSC, there was not enough time given to Libya to exhaust all other possible avenues at resolving the conflict. This can further be linked to the fact that the AUs mediation process was side lined and was not given the opportunity to take effect.

Looking at Brazils report on "Responsibility while Protecting" (RwP), it was argued that because there was no set consensus as to who, when and how the intervention would occur, it resulted in the intervention as a whole failing. The debate around R2P in Libya, which resulted in a debate amongst Brazilian policy makers was on how to legitimately operationalise the use of force in humanitarian crises and how this remains unresolved under R2P (Brockheimer et al, 141). The Brazilian proposal suggested that there should be something like a "code of conduct" that could help with the operationalisation of the use of force. This report helped bring about discussions regarding the development of guidelines or parameters that could be used to operationalise the use of force or conduct in general when

using R2P. The "RwP" did not seek to criticise R2P but rather the actions and role of the UNSC when using mechanisms such as R2P.

This debate has sparked necessary discussions regarding R2P and the role the UNSC plays in establishing when, where and under which circumstances R2P will be utilised. The inconsistent voting in the UNSC forms part of the larger problem as to why the intervention in Libya can be argued to have been a failure.

There had been other attempts to get Gaddafi to prevent the further commission of the violent atrocities in Libya. These calls were often not successful and instead there was an increase in the violence. There were embargos and sanctions imposed on Libya and this did not deter the actions of the Libyan government (Lopez 2014) There is also a call that the method of intervention must be proportional to the force that is been used. Looking at the intervention in Libya, particularly the no fly-zone, it can be argued that this was effective as it heeded effective results (Lopez 2014). In comparison to the use of force by the Libyan government, the actions of NATO was proportional to the force required. Thus, it can be argued that this requirement was also fulfilled.

It is also recommended by the ICISS Report that there must be reasonable prospects that the people of Libya will be far better off with the intervention occurring than without it. In the instance of Libya, there have been arguments made that due to the amount of lives that were saved by this operation; this requirement has also been fulfilled. However, even this has been contested particularly by the African Union. The Libyan conflict had resulted in large scale loss of life, injury and also internal and external displacement of people (Daw 2015, 102). Many of these deaths and injuries were a direct result of the NATO Airstrikes in Libya. Here the argument that the intervention was to preserve life and to deter further loss of life falls, as these attacks also resulted in high numbers of loss of life and injury.

On a superficial analysis of the requirements of R2P, in Libya, it has been argued that all the requirements have been fulfilled thus making the intervention valid under international law as Resolution 1973 was passed under Chapter 7. However, a deeper analysis can prove that even though this intervention complied with Chapter 7 requirements, it was still contested by many countries and thus compromising the legitimacy of the intervention as a whole.

The fact that other factors or recommendations are not taken into account when deciding upon R2P interventions is a cause of concern for many countries. Many countries were not pleased with the outcome of Libya for this very reason. It brought to light questions about the

true intentions of the intervention where it was argued that this intervention occurred because the West's strategic interests had aligned with UN principles which had ultimately made the decision to intervene possible (Brockmeir et al, 143).

When looking at the intervention in Libya, it proved that the R2P doctrine could be corrupted and could be something that would be used with ulterior motives (Brockmeir et al 2016, 143). We immediately saw positive results of the intervention after it had begun in the city of Benghazi when the citizens of this city were no longer in immediate danger from the regime forces. However, even with this positive outcome there were still questions being raised regarding whether the intervention itself should put an end to the Gaddafi regime or that the intervention should stop before Gaddafi would relinquish his power in Libya. In essence, the bigger question that is being asked is whether the regime change in Libya that was being advocated for could be justified under the guise of protecting civilians and under the general scope of the R2P doctrine. While R2P does acknowledge that the sovereignty of states is compromised, it does limit the effects of this since the doctrine does not advocate for interfering in the political situations of the state. It does not advocate for the intention to overthrow a certain regime.

When examining the documents regarding discussions on what to do in Libya, especially Resolution 1973, these highlight that during the talks, there was rarely any mention of R2P as part of the reason why the intervention should occur. In fact, much of the language was centred around the responsibility of the state to protect its citizens and not the responsibility of the international community to protect the people of Libya (Hobson 2016). Especially around the discussions of invoking pillar one of R2P. Only a few countries had actually argued that R2P should be invoked as part of the international community's responsibility to protect and not just of the domestic state. It is for these reasons that the intentions of the military intervention in Libya was really less for R2P, rather the intention was to always collapse the Gaddafi regime and to advocate for regime change. In this instance, it would delegitimise R2P as a whole and thus make it difficult to invoke it for future cases.

The basis for the call for an end to the regime was based on arguments made by the leading countries in the NATO coalition that Gaddafi had lost any legitimacy to rule the country when the citizens of the country were put at risk by his regime. They argued that if he could not protect his own citizens, then he does not have any authority to remain in power (Hehir 2013, 140) Those who opposed this argued that the force being used in Libya should not be to

put an end to the Gaddafi regime and by doing so they would be putting the humanitarian mission of protecting citizens at risk (Hehir 2013, 140). By advocating for regime change under the guise of humanitarian intervention would delegitimise the concept of R2P and its future applicability.

This brings about the question of whether the R2P doctrine can fully work in achieving its mandate without implementing mechanisms that would ultimately lead to the removal of the oppressive regime or the actors that are perpetrating atrocity crimes against their own people. Without the removal of Gaddafi from office, it could be argued that the violent actions of the regime would have continued, and the intervention would have been done in vain. When the coalition forces had left Libya towards the end of the year, the situation in Libya began to unravel and further deteriorate and thus the questions regarding the effectiveness and legitimacy of the intervention began to emerge. There has been crisis after crisis occurring in Libya and even more atrocity crimes being committed in the state. There have been several prime ministers in Libya since 2011 and the Libyan government continues to struggle to maintain control in the country against militia insurgents (Eljarh 2018, 47). There has been economic crisis and the economy is crippled due to a lack of governance and attacks on oil reserves and ports. Libya is a broken and polarized state with high levels of insecurity and instability (Eljarh 2018, 48). There is a high risk that Libya will become a failed state due to the lack of a unified, representative and legitimate government that is able and willing to exercise its authority over the whole country (Eljarh 2018, 49). The people of Libya have no effective and representative governance structures in place since the fall of Gaddafi and any confidence they have in the government is limited thus contributing to the lack of stability in the country.

There was hope following the democratic elections that were held in Libya in 2012 that brought about a moderate and secular coalition in Libya which served as a stark contrast to the autocratic rule of Gaddafi (BBC News 2012) The first elected prime minster only lasted a month in office and Libya went through seven prime ministers in the last years following the 2011 revolution. This crisis in Libya led to a second civil war in Libya which began in 2014. This has further aided in the instability of Libya and it is because of this that it is often argued that the intervention in Libya in 2011 only made things worse for Libya as Libya had not managed to achieve any form of stability following this (BBC News 2012).

One of the many causes of instability in Libya is that of the involvement of external actors who have had vested interests in Libya. Since the overthrow of the Gaddafi regime, Libya has found itself being a proxy battlefield for regional and international actors to assert their interests in (Mühlberger 2018, 69). Countries such as Turkey, the United Arab Emirates, Qatar and Egypt are some of these actors that have had a negative influence on the stability of Libya. These actors have been arming their proxies in Libya with money and weapons and this has continued to contribute to the increase of violence in Libya. Even with UN efforts at issuing an arms embargo in the Libyan conflict, there is continued defiance of the embargo and there have been reports by the UN Panel of Experts that these countries have continued to violate the terms and conditions of the UN arms embargo imposed on Libya since 2011. By continuing to arm these proxies, these countries have helped militias, criminal gangs and extremists exploit the efforts at peace and security by the Libyan government (Mühlberger 2018, 70)

There is also interference from the countries that had been involved in the intervention in 2011 that has continued to add to the instability in Libya. Countries such as France, Italy, the United Kingdom and the United States have all conflicting views on how to deal with the Libyan conflict post the initial intervention. It has been argued that these Western countries have only pursued their interests in Libya rather than help Libya transition politically effectively. There is no clear consensus from these Western powers as to how to move forward in helping alleviate the situation in Libya to better achieve justice for the Libyan citizen (Mühlberger 2018, 71)

Under the R2P doctrine there is a pillar that calls the international community to provide assistance and capacity building post the intervention. This requires states to help with the process of rebuilding the state after the intervention and conflict has ended and sates are to provide full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was called for (Gagro 2014, 65-68). This process ensures that even after the conflict, states are still meeting their obligation to protect citizens. In the Libyan situation, it can be argued that failure to fully commit to this pillar, is part of the reason why the responsibility to protect in Libya has failed in achieving international criminal justice.

The failure in Libya to disarm and demobilise fighters after the collapse of the Gaddafi regime and the violence that eventually followed, made it difficult to reconstruct political and

economic institutions in Libya. According to the Foreign Select Committee report on Libya, states such as the United Kingdom spent more money for the military intervention in comparison to the amount of money they had spent on the process of rebuilding of Libya (Mühlberger 2018, 72). These states had a responsibility to help rebuild Libya and had in essence failed to do so.

The lack of political stability in Libya makes it difficult to hold those who are accountable for atrocity crimes in Libya accountable. When the state is in anarchy and there is no institutional support from the Libyan government for international mechanisms, it makes it difficult for those who commit atrocity crimes to be held accountable. In fact, the lack of institutional stability makes the environment in Libya more susceptible to more atrocity crimes being committed in the state. However, the new Libyan government that did come into place following the conflict were willing to cooperate with ICC regarding the Gaddafi family and bringing then to justice for the atrocity of crimes. Even with this institutional support from the government, it was still difficult for the ICC to proceed effectively with indictments.

To ensure that states that are in conflict and have had support from the international community in protecting citizens, there has to be greater effort made in ensuring that the post conflict situations are better monitored. By failing to help rebuild, reconstruct, reconcile the Libyan political and economic structures, the international community had failed to help achieve international criminal justice through the Libyan intervention. Many of those that were committing the atrocity crimes in Libya were killed in the aftermath of the intervention, thus making it difficult to hold them accountable for their involvement in the atrocity crimes, making it difficult for international criminal justice to run its course. Those that were apprehended through the intervention are proof that the intervention did succeed in holding those liable accountable for their actions in Libya. Even with the difficulty, the mere fact that most of the Gaddafi clan was apprehended or killed during the intervention, can be perceived as achieving retributive justice.

The R2P doctrine, as mentioned above, was established in an effort to bring about international criminal justice and to hold those that commit atrocity crimes to account. Even with this in mind, R2P is geared towards restorative justice than it is towards retributive justice. The situation in Libya has often been the subject of debate around the legitimacy of the intervention and whether there has been a sense of justice as envisioned by the R2P doctrine. The basis for the whole intervention was to bring about peace and stop the violence

regarding the crimes against humanity that were being committed in Libya. The P3 members that are part of NATO took this further and wanted to remove Gaddafi from office as a way of achieving retributive justice. By removing him from office he would be able to be apprehended and held accountable for his actions in Libya. However, in this instance, Gaddafi was not apprehended but was rather killed as a form of retributive justice. This then poses the question of whether the intervention, as a whole, could be argued to have brought about justice in Libya or was it clouded with other intentions that are not mandated under R2P. Was this a mission for justice or was it a mission for regime change? Further, in order to achieve retributive justice, should R2P be adapted in order to include regime change as part of the process?

The fact that NATO had advocated for regime change in Libya undermines the very core of R2P. Many countries such as Nicaragua stated that "*once again we have witnessed the shameful manipulation of the slogan "protection of civilians" for dishonourable political purposes, seeking unequivocally and blatantly to impose regime change, attacking the sovereignty of a State Member of the United Nations (Libya)*" (Bellamy 2011). Venezuela also added that this action was a violation of Resolution 1973 which called for the respect for the sovereignty and territorial integrity of Libya. This dissatisfaction from many other states including the BRICS members was also reiterated in that they stated that there should not be any attempt by states for regime change or involvement in civil war by any party under the guise of protecting civilians (Bellamy 2011). The language of Resolution 1973 "whatever it takes" was used in a way that helped NATO justify their action of regime change. This has been argued to have been one of the points that resulted in the failure of the Libyan intervention.

The big question with regards to regime change is that in order to achieve retributive justice, i.e. the apprehension of perpetrators, should R2P include regime change? This stems from the argument that the only way to apprehend those liable for atrocity is to remove them from their seats in the government as it makes them more accessible and therefore easier to apprehend. From the actions of Gaddafi it had seemed that he would do anything at the expense of his people in order to retain power (Emerson 2011). Leaving him in power would have only escalated the violence in Libya. By removing perpetrators that are in government allows for their apprehension and then possibly the release into ICC custody. This would be achieving the mandate of retributive justice: punishing those accountable for atrocity crimes.

When evaluating the situation, one could argue that because the intervention helped put an end to the Gaddafi regime and many lives were saved in the process, justice has been achieved. Through the actions of the NATO led coalition, international criminal justice has been achieved. However, looking at the aftermath of the intervention, Libya has been argued to be in a much worse place than what they were before the intervention had occurred.

IV. The International Criminal Court and Libya

The situation in Libya was referred to the ICC by the UNSC in Resolution 1970 on 26 February 2011 due to the alleged crimes against humanity that were committed during the 2011 uprising. As discussed, in order to have jurisdiction over cases, the crimes committed must fall within the scope of the ICC and that those committing the crime must either be a signatory to the Rome Statue or the crimes must have been committed in a country that is member to the statue. A situation could also be referred by the UNSC which was the case for Libya as Libya is not a signatory to the Rome Statute. The UNSC had the backing of African and Arab states who had all unanimously voted to refer the unfolding of the violence in Libya for ICC investigation (Peskin and Boduzynksi 2016, 274). This not only included members of these states that were in the UNSC but also their respective regional bodies. The Arab League and the AU had issued statements of condemnation regarding the crises in Libya. This resolution was brought forward by France, Germany, the UK and the US. The Libyan Ambassador to the UN, who had defected from the Libyan government, had appealed to the UNSC to act on the situation in Libya (Lynch 2011). He appealed to China, India and Russia to include the referral to the ICC (Lynch 2011). This referral by the ICC has often been argued to have been a victory for criminal justice.

The R2P intervention provided hope that the ICC could be able to enforce their mechanisms effectively and efficiently in that there could be adequate arrest and transfer of people that are suspected of committing crimes (Peskin and Boduzynski 2016, 282). This hope is premised on the idea that R2P and the ICC should be working effectively in order to bring about international criminal justice. Following Resolution 1970, the ICC Prosecutor Luis Moreno-Ocampo opened an investigation into the alleged crimes against humanity and war crimes by the Gaddafi regime (Peskin and Boduzynski 2016, 282). Further, he requested that arrest warrants be issued for Muammar Gaddafi, Abdullah al-Senussi (who was the head of internal and external intelligence for Gaddafi's administration) and Saif al-Islam Gaddafi (who was the son and heir apparent to Gaddafi). These arrest warrants were issued by June, even though it was requested in May. This was considered a quick turn-around in comparison to other previous cases under the ICC where arrest warrants were not issued timeously such as the case in Darfur where arrest warrants took two years to issue (Peskin and Boduzynski 2016, 283).

Out of all three arrest warrants that were issued, only two of them heeded results and charges were filed (ICC Situation in Libya ICC-01/11, 2011). The charges that were issued are charges of crimes against humanity, which includes murder and persecution. The arrest warrant against Muammar Gaddafi was withdrawn due to his death so no investigations could be conducted. The proceeding against Abdullah al-Senussi came to an end before the ICC on 24 July 2014 when the Appeals Chamber confirmed the decision of the pre-Trial Chamber that had declared the case inadmissible before the ICC (ICC Situation in Libya ICC-01/11, 2011). This was in large part due to the Court's principle of complementarity (as discussed above). The ICC provides for domestic prosecution in theory and this was the struggle between the ICC and domestic courts in Libya as to who should prosecute the matter (Meierhenrich 2013). This resulted in the ICC deciding that they would not prosecute al-Senussi and rather that his case be subjected to domestic proceedings (Meierhenrich 2013). In this instance Libya was willing and able to hear this matter. This contributed to the outcry and disappointment towards the ICC as a whole (Meierhenrich 2013). This outcry and disappointment mostly came from civil society groups such as Amnesty International and Human Rights Watch. These groups expressed their outcry for the decision made by the Appeals Chamber (Coalition for the International Criminal Court 2014). They stated that by giving al Senussi to Libya for prosecution it was sanctioning unfair domestic proceedings against the al Senussi. Further, arguing that Libya was unable to effectively try the crimes of al Senussi (Coalition for the International Criminal Court 2014).

The case of Saif al-Islam Gaddafi is currently being pursued by the ICC, however he is still not in the custody of the ICC. During the Pre-Trail Chamber I, it was determined that there are reasonable grounds to pursue a case under article 25(3)(a) of the Rome Statute which highlights the individual criminal responsibility for crimes committed (Charge Sheet: The Procecutor v. Saif Al-Islam Gaddafi 2018). It states that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person "commits a crime, whether as an individual, jointly with another or through another person, regardless of whether the other person is criminally responsible" (Rome Statute 2002). It was determined that there is a reasonable belief that Said al-Islam Gaddafi is criminally responsible as indirect co-perpetrator for two counts of crimes against humanity: murder and persecution.

The government of Libya challenged the admissibility of the case of Saif al-Islam Gaddafi in the same manner as they did with the case of al-Senussi (UN Press Release 2018). The

challenge was based on the principle of complementarity, however, the Pre-Trial Chamber I rejected this challenge. They acknowledged Libya's efforts to restore the rule of law but concluded that the Libyan government was unable to genuinely carry out the prosecution of Gaddafi (Charge Sheet: The Procecutor v. Saif Al-Islam Gaddafi 2018). Further, the Pre-Trial Chamber argued that the evidence submitted was not sufficient enough to consider that the domestic and the ICC investigations would cover the same case (Charge Sheet: The Procecutor v. Saif Al-Islam Gaddafi 2018).

On 10 December 2014, the Pre-Trial Chamber I had issued a finding of non-compliance by the Government of Libya with regards to the non-execution of two requests for cooperation (ICC). These requests were for cooperation from the Libyan government. The ICC then referred the matter to the UNSC and the UN. The Chamber found that the Libyan government had failed to comply with the requests by the ICC to (i) surrender Said al-Islam Gaddafi to the court and (ii) return to the defence of Gaddafi the originals of the documents that were seized by the Libyan authorities from the former Defence counsel for Saif and then destroy any copies thereof, which they had failed to comply with. This referral to the UN and UNSC was not to sanction or criticise Libya but rather to seek the assistance of the Security Council to determine the cause of the non-compliance to these requests.

Following these initial warrants, two years later, the ICC issued another warrant for Al-Tuhamy Mohamed Khaled who is the former heard of the internal security agency during the Gaddafi regime (Coalition for the International Criminal Court, 2018). It was determined by the Court that there are reasonable grounds to believe that under article 25(3)9a) and (d) and Article 28(b) of the Rome Statute he is criminally responsible for four crimes against humanity allegedly committed in Libya throughout the widespread and systematic attack against the civilians during 2011 (ICC Charge Sheet: The Prosecutor v. Al – Tuhamy Mohamed Khaled 2013). These crimes include imprisonment, torture, other inhumane acts and persecution. It was alleged by the Pre-Trial Chamber I that Mr al-Tuhamy was the head of the ISA and in that capacity, he had the authority to implement Gaddafi's orders to arrest, detain, conduct raids, conduct surveillance, investigate, monitor and torture political prisoners (ICC Charge Sheet: The Prosecutor v. Al – Tuhamy Mohamed Khaled 2013). Mr Khaled has still not been handed over to ICC by the Libyan government.

There has been much debate and dialogue across the globe regarding the ICC in relation to Libya. Many have argued that the pace and efforts that have been made by the ICC is slowing

the move towards achieving international criminal justice. This next part of the paper will fully evaluate whether this tool (the ICC) has been effective or not effective in administering international criminal justice. Further, it will look at the causes that have aided in the ICC being effective or not effective in Libya.

a. Analysis of the ICC referral and effect it has had on achieving international criminal justice

Resulting from the intervention of the ICC to investigate the situation in Libya, there has been debates around the justice versus peace notion in order assess the impact of the Libyan civil war. Many have argued that the intervention in Libya rather added fuel to the fire to an already tense situation. They argue that the action of the ICC had only served to encourage Muammar Gaddafi to increase the violence in Libya. Rather than deter the actions of the regime, it only encouraged them. This kind of critique not only questions the role of the ICC in Libya particularly but also questions the role of the ICC as a whole. The effect that ICC investigations could have on an ongoing situation is unclear, especially in terms of whether it aggravates the situation or calms the situation.

It has been argued that ICC action can create a situation where applying pressure on a hostile situation will only heed results that are disastrous (Kersten 2014, 151). In the case of Libya, it was argued that Gaddafi was prepared to fight until the death and take down as many people as he could as a result of the involvement of the ICC (Kersten 2014, 151). Jackson Diehl (2011) put forward the argument that the ICC itself was to blame for the protracted violence in Libya. He argued that Libya was in a state of a civil war due to the position it had put Gaddafi in. By allowing possible ICC indictments, it had closed the gap for any other solution that could have brought about a change and end to the crisis in Libya. It had closed the options of perhaps engaging in negotiations in bringing about an end to the conflict.

The arrest warrants that were issued were done so quickly and in a manner that made it difficult for the mediation process by the UN to even become an option for all parties involved. Any attempts for mediation were vetoed by the P3 in NATO. The only party that had tried to advocate for mediation was the AU, arguing that this could help to deescalate the crises before it got worse. The AU had argued that the interference of the ICC would only serve to aggravate the situation rather than mitigate it (Hengari 2011). As mentioned above, the interference of the ICC increased the tension in Libya instead of mitigating the situation. By not allowing the UN mediation process to fully take roots in Libya, it did not work in

favour of the peace process. Instead it only made it worse. Many working with the UN mediation process stated that the ICC referrals were too quick and did hinder their progress. They even further went and stated that they had not mentioned anything regarding the UN during their talks for fear of it escalating the conflict on the ground (Reike 2015). The mediation process is very critical to the peace process and by acting too quickly can often hamper the efforts that are made during this process and instead add fuel to the fire.

The ICC further encountered negative outcomes in the fact that they had failed to include the domestic processes in Libya to help with the ICC referral. The idea of complementarity is that there is a system in place that links the national and international court systems to deal with atrocity crimes and hold those that commit these crimes accountable for their actions. It is the idea that the national courts first and foremost deal with the cases of serious violations and the ICC is complementary to these national jurisdictions. In Libya, the referral to the ICC included provisions that would require the ICC to use existing resources within Libya for the investigation. By excluding the Libyan actors from using their national judicial systems in complement of the ICC, it further aggravated the situation in Libya. It delays the efforts of the ICC as a whole in that it affects how Libya will help execute the arrest warrants going forward.

Another factor to take into account when examining the role of the ICC in Libya is to examine the way in which the conflict was perceived. The manner in which conflict is perceived could ultimately aid in the decision on how to proceed in trying to resolve the conflict. It has been argued that how a conflict is understood will inevitable affect any attempts at resolving it and negotiating peace (Kersten 2014, 155). Determining the causes of conflict and differentiating it from the dynamics of the conflict can aid in determining the best approach in negotiating peace (Kertsen 2014, 155). One of the factors that need to be taken into account is that often in conflict there is a need to vilify the other side. There is a need to create a "good versus evil" dynamic in order to establish that there is a side that is "evil" and there is a "good" side that is trying to defeat the evil side (Simpson 2007). In most cases that fall under the jurisdiction of the ICC, there was constant labelling of the perpetrators as inhumane, barbaric and violent people that needed to be stopped (Simpson 2007). It is these kinds of narrative that are created, particularly before the ICC even took action that is likely to determine the reception of ICC action in a state.

The ICC can frame the narrative of a conflict in a way that will be detrimental to a positive outcome which would be holding those accountable through ICC procedures i.e. sentencing of perpetrators. They label the perpetrators of alleged crimes as evil and thus dehumanise them creating a stigma around the conflict itself (Simpson 2007). Once arrest warrants are issued, this stigmatisation will stick with the perpetrators and thus could contribute to the escalation of the conflict in a retaliatory manner (Simpson 2007). Instead of pushing the perpetrators towards ending the conflict, they rather escalate their efforts in the conflict and this decreases the chance of having negotiations that could bring about an end to the conflict.

Secondly, the narratives centred on the individual also hamper the progress the ICC can make in effectively administering international criminal justice. The ICC does set out to individualise guilt and responsibility for crimes that fall under its jurisdiction, however this does have the downside that it can reduce the importance of the conflict as a whole. By individualising the perpetrators to Gaddafi, Omar al-Bashir etc., it reduces the importance of other actors and structures that are involved in this conflict (Branch 2011). In the case of Libya, the portrayal of Gaddafi as the reason for the moral collapse of the state, changed the narrative of the conflict and thus had its emphasis on one particular individual that needed to be brought down. This kind of narrative, although important, does have is negative consequences. Particularly in the case of Libya, the move to remove Gaddafi from office through the R2P intervention, tainted the ICC investigation and further compromised the R2P doctrine. By advocating for the removal of Gaddafi by the NATO parties, it delegitimised the role of R2P and in turn the role of the ICC in this particular situation.

Another factor that centres on the narratives that are created around the conflict is that the ICC often fails to look deeper into "why" the conflict occurred in the first place and the political context in which the atrocities occur (Kersten 2014). The ICC rather looks at the fact that the conflict occurred and that there is a legal and moral framework that exists with a purpose to punish those that are at fault (Kersten 2014). This kind of narrative does heed negative results in the effects it has on the state the atrocities occurred in long after the conflict has ended. The causes of the Libyan conflict stemmed from a country that had decided to have an uprising against an oppressive regime in which the living conditions and the civic liberties in Libya had deteriorated. The oppressive regime retaliated against its citizens. Determining the causes of conflict and differentiating it from the dynamics of the conflict can aid in determining the best approach in negotiating peace (Kertsen 2014). There are many causes of conflict such as ethnicity, identity, religious affiliations and social class

and in the case of Libya it was a case of a mixture of all the above that ultimately was aligned to the politics of the country (Kersten 2014).

The removal and indictment of those that are reasonably believed to be the cause of the atrocities is a positive outcome for international criminal justice but it did not bode well for Libya post conflict. Many have argued that the situation in Libya is far worse and the conflict is still occurring and there is no sight to an end of the conflict. The roots of the conflict were not evaluated and addressed and thus these problems still manifests itself, leaving the people of Libya destitute. One can argue that in this regard, justice has not been achieved. Even though those that were part of the Gaddafi were either apprehended or killed, the after effects are still rife in Libya. Those with indictments against them are not in the custody of the court and those that are still at large have also been reported to be committing atrocity crimes. Here one can argue that retributive justice has not achieved but further that the importance of restorative measures are important in crises such as Libya.

One of the influences when analysing the effectiveness of the ICC is state cooperation. The ICC, in order to be effective does rely on the extent that states are willing to cooperate with the investigation. Cooperation must be multi-faceted in order to enable the effective execution of various ICC functions, and collectively geared at bringing those most responsible for committing atrocity crimes to justice (Rome Statute 2002). The ICC does not have an enforcement mechanism which often makes it difficult for it to fulfil its mandate. The duty to cooperate with the ICC from states is required on two levels: there is a general commitment to cooperate and then there is an obligation on states to amend their domestic laws to permit cooperation with the court (Rome Statute 2002). This is stated under Article 86 and 88 of the Rome Statute which states that "*States Parties shall, in accordance with the provisions of this Statue, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the court.*" Article 88 of the Statute allows and places an obligation on states to enforce ICC regulations into their domestic laws (Rome Statute 2002).

States that are party to the Rome Statute have obligations regarding the arrest and detention of accused persons. The obligation is that "*cooperate fully with the Court in its investigations and prosecution of crimes*" which is found under Article 86 (Rome Statute 2002). This is further supported by Article 89(1) which requires states to provide assistance when there is a request for the arrest and surrender of a person (Rome Statute 2002). Further they have to

provide any information that may be useful for the trial and investigation stages and also useful in locating the person who the Court is looking for (Rome Statute 2002).

One of the biggest issues with the Libyan investigation and the issue of achieving international criminal justice in this sense is that state cooperation from Libya has proven to be difficult. Libya has not been able to secure those that are under investigation into their custody. This process of trying to get custody of those accused has proven difficult in providing international criminal justice. The Prosecutor of the ICC, Fatou Bensouda, has reiterated that all have their respective roles to play and that they should be delivering on their joint commitment in ending impunity for the crimes committed in Libya (United Nations Press Release 2017).

The efforts to prosecute Saif al-Islam Gaddafi and Khaled have proven to be stagnant and difficult. The Libyan government previously stated that Mr Gaddafi is in custody in Zintan and is unavailable to the Libyan government and therefore they are unable to transfer him to the ICC for prosecution. In efforts to secure Mr Gaddafi, the Pre-Trial Chamber received a request from the Office for an order directing the Registry to transmit the request for arrest and surrender of Mr Gaddafi who is currently detained by leaders of a Battalion in Zintan on an amnesty law defence. There have been further requests that the Government of National Accord should take steps to transfer Mr Gaddafi into its custody so that the Libyan government can surrender him to the Court in line with its international obligations (ICC Public Document 2018). However, with all the efforts that have been made in trying to secure Mr Gaddafi, he has been released from Zintan and there have been reports made of him returning to the Libyan political scene (ICC Public Document 2018). In terms of achieving any international criminal justice, the inability to detain Mr Gaddafi proves to be a limitation by the ICC in achieving international criminal justice.

However, the ICC has proven to be committed to upholding justice in the case of Mr Gaddafi. Saif al-Islam Gaddafi made a request to the ICC to have the investigation dropped on account of the investigations being domestically conducted in Libya against him. He requested that the arrest warrant against him should be ruled inadmissible (ICC Public Document 2018). The ICC Prosecutor has however reiterated that he must be arrested and surrendered to the ICC and account for the international crimes he has committed (ICC Public Document 2018).

In the case of al- Tuhamy Mohamed Khaled, the Prosecutors office has urged all states to take immediate action to verify his whereabouts and facilitate his arrest (ICC Public

Document 2018). Through the actions of unsealing is his arrest warrant in 2017, it was hoped that it would speed up the process of arrest and surrender from Mr Khaled, however this has still not happened. Without this aspect occurring, it still proves to be difficult in achieving international criminal justice as mandated by the Rome Statute.

There are grounds for concern for the ICC as a whole in their inability get the Libyan government to cooperate or meet their obligations with the ICC with regards to arrest and surrender of suspects. This is concerning particularly in the sense that there are still ongoing violations of human rights in Libya that continue to jeopardise the pursuit of justice for the people of Libya.

There could be multiple factors that explain why Libya has been unable to or unwilling to aid in the arrest and detainment of both Mr Gaddafi and Mr Khaled. One of these factors could be that there is a need for the Libyan government to prove that they are able to conduct their own investigations and have control of their institutions, particularly their judicial institutions. This is highly important especially following the Arab Spring and the effects it had on government institutions in Libya. This can be seen in the efforts made in order to get the cases of al- Senussi (which succeeded) and Mr Gaddafi in getting their warrants thrown out on grounds that the Libyan government can handle it. This kind of dilemma could be resolved if the ICC was willing to engage in a policy of shared responsibility along with the Libyan government. This could help bring about trust in the ICC and therefore increase the likelihood that the Libyan government would be more willing to cooperate with the ICC. This would also help the ICC with issues of legitimacy and credibility as an institution. Even if R2P was reworked to advocate for regime change as a means of ensuring those that are liable for atrocities as a part of justice, it would not guarantee that retributive justice would be achieved. This would be in part because of the failure of the new government that is put in place to cooperate with the ICC. The role of the new of the government would be to help ensure that all processes following the regime change are complied with in order to bring about justice. By failing to cooperate with the process, it would be counterproductive to the whole process.

The ICC has had a continued presence in Libya following the conflict in 2011. Following the Civil War that broke out in 2014, there have been instances where further atrocity crimes have been committed in Libya. There have been calls by the international community to intervene and help bring about justice in Libya. This was seen through the actions of the

Chief Prosecutor of the ICC who has requested that the UNSC should support this with effective action, particularly with regards to the arrest of outstanding fugitives and help bring them to justice. The Prosecutor has continued to receive evidence regarding the crimes committed in Libya since 2011. The ICC has continued to monitor the criminal conduct carried out by members of armed groups in Libya who have continued to use violence to gain control over state institutions, commit serious human rights violations and continue to exploit detainees in prisons and other places of detention in the country (Bensouda 2018). The Prosecutor has further stated that there is a need for further arrest warrants to be issued in Libya.

The UNSC referred the situation to the ICC and further authorised the intervention in Libya. It could be argued that due to this, it would be the responsibility of the UNSC to help bring about the justice it sought out in Libya in the first place. It would be required that the UNSC provide adequate assistance to the ICC regarding the apprehending and issuing of arrest warrants for those that have committed atrocity crimes in Libya. The failure of the UNSC to fully help the ICC achieve its mandate, forms part of the reason why it can be argued that there has not been justice achieved in Libya to date.

V. Way Forward and Conclusions

a) Way Forward

The situation in Libya was the first time both the ICC (through UNSC referral) and the Responsibility to Protect doctrine were used. Libya was used a case study and will ultimately affect how these two mechanisms will be seen in future and will affect how they will interact in the future. The situation in Libya has made it difficult for interventions in Syria to be successful due to a multitude of factors that stem from the Libyan intervention.

The ICC and the R2P action in Libya were the first time where these two mechanisms were enforced. They were enforced with the aim of achieving international criminal justice for the atrocity crimes that had been committed in Libya. However, with further analysis and with the passing of time, the effect of both these institutions and the role they played in Libya has raised questions. Further, the legitimacy of both these mechanisms has been questioned. This paper sought to look at what went wrong with these tools in Libya and what the implications of this would be going forward in the project for international criminal justice against perpetrators of atrocity crimes. The idea that these two mechanisms could and should in theory work together in achieving their respective mandates could not be achieved in Libya and going forward, this needs to be addressed.

The R2P doctrine was established in order to allow states to intervene in situations where there is a humanitarian crisis in a state and there is failure of the state to protect the people. This failure to protect then falls on the international community to address and the responsibility to protect the civilians falls on the international community. In Libya, the intervention occurred in order to bring security to the Libyan people and protect them from atrocities that were happening to them by the Gaddafi regime and to further protect them from future atrocity crimes. However, this intervention was questioned due to the call for regime change that was advocated for by NATO and its allies. This questioned the legitimacy of the intervention as a whole as well as the legitimacy of the R2P doctrine and its application.

There was political unrest in Libya, which led to atrocity crimes being committed and a humanitarian crisis emerged and there was support from the international community as the UNSC, NATO and other international actors called for the international community to act in Libya. The involvement of NATO by initiating the no fly zone in Libya had quickly turned

into NATO arming rebel group to remove Gaddafi from office, which succeeded. This led to questions of whether the intervening forces were rather overstepping their purpose by calling and advocating for regime change in Libya. This was not part of their mandate through the R2P doctrine. Resolution 1973 only authorised and reaffirmed that the international community had the responsibility to protect civilians from violence that was caused by their own government.

The intervention in Libya has posed many questions for the international community particularly regarding the role of R2P and how R2P could be invoked in future cases. It has been of much debate regarding how to intervene in Syria. The circumstances of the intervention in Libya have caused a sort of stalemate in Syria regarding any interventions. Countries such as Russia and China have often been on opposing ends with the UK, USA and France regarding on how to proceed after Libya.

Here one is able to argue that the actions of states in Libya through R2P and the ICC have not resulted in retributive justice occurring. Many of the direct causes of the conflict in Libya have either being killed (such as Gaddafi) or their arrest warrants with the ICC have not been effectively executed. The cause of such failure with regards to such has been extensively discussed in the paper.

The breakdown of justice in Libya through the ICC and R2P has clearly highlighted that there is a need for greater efforts to be made and there is a greater need for a change in the approach towards achieving international criminal justice. The intervention route and the ICC indictments are not sufficient in achieving international criminal justice. Libya has further descended into chaos despite all the actions by the international community. This breakdown has only hardened the opinions and loss of faith in these mechanisms. There are many lessons that can be learnt from Libya in order to facilitate and better conduct future interventions and ICC referrals.

Marginalising the role of the national judicial systems in dealing with ways of achieving justice in a particular state could have disastrous results as whole. As can be seen in the Libyan conflict, by isolating the national judicial systems, it only served to increase the tensions in Libya. The importance of the UN mediation process is important and needs to be looked at closely before there is any intervention through R2P and the ICC. Going forward, states that are experiencing conflict should be able to exhaust all possible solutions before there is interference through any of the mechanisms that have been provided. This, however,

would have to occur on a case by case basis. Some situations would require immediate action by the ICC and the R2P and in other situations the action through these mechanisms can be delayed only to give the mediation process a chance. To include the people of the conflict-ridden state to bring about peace and a resolution in manner they see fit.

Further, the failure of both the Libyan government and the ICC to apprehend the suspects after the arrest warrants were issued has proven to be detrimental to the justice cause. Failure to bring these people to the ICC has made it difficult for recourse to be taken in the ICC which delays the process of justice. The punitive measures that are in place through the ICC have to be taken a step further. The ICC relies on the cooperation of sates in order to be effective. State action has proven to be an inhibiting mechanism in achieving international criminal justice. States, particularly those that are a part of the UNSC, have failed to provide the ICC with support regarding the apprehension of the suspects of atrocity crimes. They have failed to ensure that the Libyan government cooperates with the ICC and the hand-over of the suspects as required by the Rome Statute. Failure to do so has delayed the process of justice in Libya.

The role of other states in the pursuit of justice is very crucial particularly with states like Libya that are not party to the ICC and where rather there is a referral. This requires the cooperation of all the members of the P5 in the UNSC. In Libya, this referral was a success, however in cases such as Syria the required cooperation by the UNSC has not be seen. A referral or call for an intervention has not been successful due to the many political implications within the UNSC. These political tensions inhibit the work of the ICC and the doctrine of R2P as it is often used as a political battlefield by states that are often not politically inclined to cooperate.

There is a need for greater enforcement mechanisms in the administration of international criminal justice. One of the ways that this could be done is through working with the national structures in place to help aid in the apprehension of perpetrators of international crimes. By limiting the role of the national state, you alienate them from the process of justice and thus it will make them less likely to cooperate with the international mechanisms in place. This can be seen through the actions of the Libyan government in an attempt to get those that have been issued arrest warrants to be dealt with domestically. These actions are an attempt for the state to show that they do have control over their states and can take the necessary recourse in dealing with atrocity crimes that were committed on their soil.

There are many possibilities in which the international criminal justice system can work together towards achieving the best possible outcomes in situations of mass atrocities. One of the ways that this can be achieved is through the establishment of greater restorative mechanisms within these tools that have been provided. Restorative justice looks at wrongful conduct committed as more than just a crime but as something that also causes harm to people, relationships and the community (Groening and Jacob 2012). It has its focus on repairing the harm caused by criminal behaviour (Groening and Jacob 2012). This is often done through a cooperative process which allows all the willing stakeholders to meet. This is premised on the notion that the people that are most affected by the crime should be able to be involved in its resolution process (Groening and Jacob 2012).

The ICC and R2P grew out of tribunal systems such as the Rwandan Tribunal and the Yugoslavian Tribunal which had relied on retributive measures in bringing about justice for the atrocities that had been committed. These tribunals however had restorative measures in place afterwards that formed part of the greater realisation of justice. There have been remarks made by the ICC that the court has a function of bringing about both restorative and retributive justice for atrocity crimes. It was stated that together these forms of justice are considered important as they consider the interests of the victims and the communities that are affected by the crimes and will in the long term bring about stability post-conflict (ICC Press Release 2015). Restorative justice is a key component of the ICC and there is great provision for restorative justice across the international criminal justice system. This was even established before the establishment of the ICC through the Nuremburg Trials, as well as the Yugoslavia and Rwandan tribunals. By including victims in the process of justice, you do not marginalise them and make them feel as outsiders in a conflict that has had the most effect on them. It is these individuals that are involved in the conflict and it should be them that are part of the solution to the conflict.

Though restorative justice does not form part of this research paper, it is important to acknowledge the importance of gearing towards this in order to achieve justice in a country. In the case of Libya there were many causes that were part in parcel of the issues that resulted in the conflict. Many of these issues could have been resolved through restorative measures. The process of restorative justice in Libya opens up a new research study area in which one examines the role (or the lack of) restorative justice in Libya as a way of achieving justice.

It could be argued that if greater efforts were taken to bring about restorative justice in Libya and not just retributive justice, the society could move towards peace and stability much quicker than the pace they have been going at. Often the ICC and R2P tend to ignore or side-line the inner workings of a society and what had caused the conflict in the first place such as what were the catalysts that resulted in conflict breaking out in the first place. This kind of analysis of situations is important as it could help states better understand how to resolve these conflicts and what action would be better for the countries in the aftermath of whatever interventions have taken place.

b) Conclusion

The tools that have been provided for by the international community serve an important purpose in achieving international criminal justice. They stem from a period in history where great crimes were being committed and no strong accountable mechanism was in place. Much of the international community was complacent and often did not react to situations until it was late. This was a concern. The need for these tools was solidified in the creation of the ICC and later the R2P doctrine, with the hope of going one step further in achieving international criminal justice and holding those who commit atrocity crimes accountable for their actions. It has proven difficult navigating this due to various circumstances such as the role of other states and how to fully engage the national government in this process.

Linking these two mechanisms together is important as they can help each other to fully implement their mandates which are highly similar. Even though the first test case for this has proven to have been less successful than envisioned, it is important to draw lessons from this in order to be more effective in future situations. The lessons learned from Libya are important going forward for future ICC and R2P cases. These tools that have been provided by the international community should not only in theory but also practically work together in order to achieve international criminal justice. Through doing this there will be greater chances of fulfilling their respective mandates. What was supposed to be a successful application of R2P in Libya, has proven to have been the turning point in when and how the R2P could effectively be used in attempt to bring about international criminal justice. Reform of how the ICC and R2P are conducted needs to occur.

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