

# STATEHOOD, SELF-DETERMINATION AND INTERNATIONAL CRIMINAL JUSTICE. A FEW REMARKS

## STATEHOOD, AUTODETERMINAÇÃO E JUSTIÇA PENAL INTERNACIONAL: ALGUMAS CONSIDERAÇÕES.

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### RIASSUNTO

In this paper, I will attempt to outline the relationship between international criminal justice and self-determination and explore how it has developed in recent years. Focus will also be dedicated to understanding how the positions of States towards international criminal justice affect their standing and their capacity in international relations. Thus, I will first briefly describe how international criminal justice can affect States and entities aspiring to statehood and how it could strengthen or weaken, in specific cases, uncertain territorial situations. This reconstruction has led to divergent conclusions regarding the impact of international criminal justice on self-determination in situations that appear to be quite similar. The paper will then look into the positions of those States that criticize international criminal justice on the basis, *inter alia*, of its alleged negative impact on the right of self-determination. Since these positions predominantly concern recent ICC activities in Africa, a perusal of the trigger mechanisms in that context should provide some useful suggestions to better understand the relationship between self-determination and international criminal justice. The final section is dedicated to drawing some brief conclusions.

**KEYWORDS:** Statehood. Self-Determination. International Criminal Justice.

### RESUMO

*Neste paper tentarei esboçar a relação entre justiça penal internacional e autodeterminação e explorar como ela se desenvolveu em anos recentes. Será também enfocado o entendimento de como as posições dos Estados em relação a justiça penal internacional afetam suas capacidades nas relações internacionais. Deste modo, irei, primeira e brevemente descrever como a justiça penal internacional pode afetar Estados e entidades aspirantes à Estatalidade (statehood) e como ela pode reforçar ou enfraquecer, em casos específicos, situações territoriais incertas. A reconstrução conduziu a conclusões divergentes em relação ao impacto da justiça penal internacional na autodeterminação em situações que demonstram bastante similaridade. Este trabalho, então, verifica as posições dos Estados que criticam a justiça penal internacional com base, inter alia, em seu suposto impacto negativo no direito à autodeterminação. Vez que estas posições predominantemente referem-se às atividades recentes da CPI na África, uma investigação dos mecanismos de acesso (trigger mechanisms) neste contexto oferecerá algumas sugestões úteis para melhor entender a relação entre autodeterminação e justiça penal internacional. A seção final é dedicada à elaboração de algumas breves conclusões.*

**PALAVRAS-CHAVE:** Estatalidade. Statehood. Autodeterminação. Justiça Penal Internacional.

### 1.

In this paper, I will attempt to outline the relationship between international criminal justice and self-determination and explore how it has developed in recent years. The cases I will refer to are those in which strong positions were taken as

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regards to the impact of international criminal justice on the internal affairs of States. Focus will also be dedicated to understanding how the positions of States towards international criminal justice affect their standing and their capacity in international relations.

In the beginning, the principle of self-determination was seen as a vague and undetermined concept in international law, as it happens quite often with legal issues and principles stemming from the political debate; some might argue that this is still the case. While it is true that, since then, scholars and international practice have served to better define the features of the principle, self-determination has been traditionally looked upon as an issue concerning the creation of new States and respect for human rights; sometimes it was also interpreted as a possible justification when international crimes - and namely war crimes - were committed, for instance in the struggle for independence.<sup>1</sup> To my knowledge, the interaction between self-determination and international criminal justice has not attracted particular attention from scholars thus far. However, although several aspects of self-determination were at the core of the conflicts that prompted the *renaissance* of international criminal justice

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1 The bibliography on self-determination is immense and continuously evolving. Among the classical volumes on the topic, see CASSESE, *Self-determination of Peoples: A Legal Reappraisal*, Cambridge, 1995. For a recent and very rich contribution on the issue, see PALMISANO, *Il principio di autodeterminazione dei popoli*, in *Enciclopedia del diritto, Annali*, vol. V, Milano 2012, p. 81 ff. On the vagueness of the concept, see more recently PERTILE, *Il parere sul Kosovo e l'autodeterminazione assente: quando la parsimonia non è una virtù*, in GRADONI e MILANO (eds.), *Il parere della Corte internazionale di giustizia sulla dichiarazione d'indipendenza del Kosovo: un'analisi critica*, Padova, 2011, p. 89 ff. (Especially p. 120 f.). When I speak about the use of self-determination as a possible justification for international crimes, I refer to what happened in a number of situations where, in the course of an armed conflict, international crimes were committed by all parties. In contemporary international law it is clear that there is no justification for the commission of any type of international crime. This issue is clearly explained in the following lines: "international law should operate in a normatively coherent manner in assigning legal burdens and responsibilities to all the relevant actors involved in a situation where a claim of external self-determination is asserted. This entails making both state and non-state actors responsible for the way that violence and other coercive actions (e.g. "ethnic cleansing") are used to either further or frustrate a claim of self-determination. International law today is evolving so as to regulate internal and external conflict, whether conducted by state or non-state actors, through a framework combining elements of human rights, the law of war, and international criminal justice, what Teitel calls Humanity Law. This framework abhors gaps in legal rights and responsibilities, especially concerning the protection of persons and peoples (TEITEL, *Humanity's Law*, Oxford, 2011). That a claim for external self-determination has resulted in the recognition of the international community of statehood should not for example excuse the independence movement and its members of responsibility for acts committed prior to the achievement of statehood and the very same should go for the existing state or other groups who may have fought against the independence bid" (HOWSE and TEITEL, *Humanity Bounded and Unbounded: The Regulation of External Self-Determination under International Law* (November 25, 2013). Law & Ethics of Human Rights, De GRUYTER, Volume 7, Issue 2, 2013; NYU School of Law, Public Law Research Paper No. 13-78. Available at SSRN: <http://ssrn.com/abstract=2359600>, p. 54).

during the 1990s (reference is here to tragic events that led to the establishment of the *ad hoc* international criminal tribunals) it appears as though this major principle of international law was hardly considered by those responsible for the creation of these international judicial bodies. As made amply clear by their respective Statutes, the primary objective of those tribunals was to prosecute those responsible for committing international crimes in specific situations of armed conflict. In addition, the creation of those tribunals was decided by the Security Council in the framework of its responsibilities in the maintenance of international peace and security.<sup>2</sup> In both cases, self-determination seemed to be of little or no concern. Similarly, the *travaux préparatoires* of the Rome Statute of the International Criminal Court (hereinafter ICC) contain just a few direct or indirect references to the principle of self-determination. When this happens, self-determination is recalled with regard to the necessity of distinguishing terrorism from “legitimate struggle” for self-determination, or in cases where participants expressed perplexities on possible interference of the ICC in internal affairs.<sup>3</sup> Despite the absence of any reference to self-determination in those legal texts, international criminal justice may interact both with the external and the internal dimension of the principle. In fact, in recent years the ICC continues to receive criticisms directed at its supposed disregard for the principle of self-determination.<sup>4</sup>

In this context, this paper aims to reveal that there is a relationship between self-determination and international criminal justice and that it can be both dissonant and harmonious. Furthermore, this paper observes that the link between international criminal justice and self-determination usually exists through the topic of statehood. Thus, I will first briefly describe how international criminal justice can affect States and entities aspiring to statehood and how it could strengthen or weaken, in specific cases, uncertain territorial situations. This reconstruction has led to divergent conclusions regarding the impact of international criminal justice on self-determination in situations that appear

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2 A strong position on the lack of legitimacy of the establishment of the International Criminal Tribunal for the former Yugoslavia is taken by ARANGIO-RUIZ, *The Establishment of the International Criminal Tribunal for the former Territory of Yugoslavia and the Doctrine of Implied Powers of the United Nations*, in LATTANZI and SCISO (eds.), *Dai Tribunali penali internazionali ad hoc a una Corte permanente*, Napoli, 1996, p. 31 ff. For divergent views on the issue, see CONDORELLI, *Legalità, legittimità, sfera di competenza dei tribunali penali ad hoc creati dal Consiglio di sicurezza delle Nazioni Unite*, *ivi*, p. 47 ff.; and PICONE, *Sul fondamento giuridico del Tribunale penale internazionale per la ex Jugoslavia*, *ivi*, p. 65 ff.

3 *United Nations Conference of the Establishment of an International Criminal Court, Rome 15 June - 17 July 1998, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, Official Records, Volume II*, pp. 75 (China and Brazil), 78 (Armenia), 110 (Oman), 123-124 (China), 172 (Syrian Arab Republic), 281 (Egypt).

4 Cfr., more recently, LABUDA, *The International Criminal Court and Perceptions of Sovereignty, Colonialism and Pan-African Solidarity*, in *African Yearbook of International Law*, 2015, p. 289 ff.

to be quite similar (section 2). The paper will then look into the positions of those States that criticize international criminal justice on the basis, *inter alia*, of its alleged negative impact on the right of self-determination. Since these positions predominantly concern recent ICC activities in Africa, a perusal of the trigger mechanisms in that context should provide some useful suggestions to better understand the relationship between self-determination and international criminal justice (section 3). The final section (4) is dedicated to drawing some brief conclusions.

## 2.

As regards the impact of international criminal justice on self-determination in contexts characterized by undefined territorial post-conflict situations, the acceptance and promotion of - and cooperation with - international criminal justice is perceived as an element that can contribute to strengthening the legitimacy of States and aspiring States where international crimes were committed.

I refer firstly to the case of Palestine, where the acceptance and promotion of international criminal justice appears to be used as a means to legitimize and strengthen the process of external self-determination leading to the affirmation of the State as a subject of international law. In recent years, Palestinian authorities have repeatedly attempted to bring criminal cases before the ICC. These attempts were linked, by the ICC system, to statehood. A valuable example of this is the failure to bring the “Flotilla” incident to the ICC due to what the ICC Prosecutor considered lack of Palestinian statehood. Following this event, the Palestinian authorities tried, and failed, to become member of the United Nations in 2011 through the procedure provided by Article 4 of the UN Charter. States supporting the statehood of Palestine then promoted the adoption of the UN General Assembly resolution 67/19 of 29 November 2012, which qualified Palestine as a non-member observer State in the General Assembly; this initiative was criticized by some with specific reference to the likelihood that it could lead to Palestine becoming party to the Rome Statute.<sup>5</sup> After the adoption of this resolution, the Palestinian authorities declared their readiness to accept the ICC jurisdiction

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5 More precisely, on that occasion some States declared that the support to the resolution concerning the *status* of Palestine in the General Assembly should have been interpreted not as a support to particular development as regards the ICC. For instance, the Permanent Representative of Italy to the UN, Ambassador Cesare Ragaglini, declared: “Italy decided to vote in favor of resolution 67/19. We took that decision in the light of the information we received from President Abbas on the constructive approach he intends to take after this vote. I refer in particular to his readiness to resume direct negotiations without preconditions and to refrain from seeking membership in other specialized agencies in the current circumstances, or pursuing the possibility of the jurisdiction of the International Criminal Court. With regard to the latter, Italy would not accept instrumental actions intended to question Israel’s inalienable right to defend itself or to have recourse to measures necessary to protect the lives of its citizens” (A/67/PV.44, 29 November 2012 p. 18 s.).

with regard to the events that took place in and around Gaza during summer 2014. Moreover, on 31 December 2014, after the failure to effectively promote the adoption of the UN Security Council draft resolution that aimed to recognize Palestinian sovereignty over Gaza and the occupied territories and East Jerusalem by 2017, Palestine decided to accede to the Rome Statute, this being – according to the Palestinian authorities – the only remedy to the stall in the Security Council on the issue. These authorities do not see international criminal justice as a barrier to the creation of the State or peace negotiations. Quite conversely, the recourse to international criminal justice is perceived as one of the means to reaffirm the statehood of Palestine.

Those who oppose this interpretation of the relationship between international criminal justice and self-determination (USA, United Kingdom, some European Union States, and Israel) suggest not only that the accession of Palestine to the Rome Statute endangers peace negotiations, but also that it will have negative repercussions on several other issues. These States rather hold that a settlement of the dispute over the statehood of Palestine can only be reached through political negotiations.<sup>6</sup> Nonetheless, on 2 January 2015 Palestine acceded to the Rome Statute and became a party as of 1 April 2015<sup>7</sup>. The future (and unforeseeable) developments will clarify whether the accession of Palestine to the Rome Statute will corroborate its claims to self-determination. This is a case where the *external* dimension of self-determination, namely the right of people to determine their own political status and to be free of alien domination – including

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6 See the position expressed by Permanent Representative of the United States with regard to GA Resolution 67/19: “We have always been clear that only through direct negotiations between the parties can the Palestinians and Israelis achieve the peace that both deserve — two States for two peoples, with a sovereign, viable and independent Palestine living side by side in peace and security with a Jewish and democratic Israel” (A/67/PV.44, 29 November 2012, p. 13) and more specifically on the negative impact of an eventual involvement of the ICC in Palestine: <http://www.state.gov/r/pa/prs/ps/2015/01/235695.htm>. See also the position of Canada (A/67/PV.44, 29 November 2012 pp. 8-9), Israel (A/67/PV.44, 29 November 2012 pp. 5-7) and Czech Republic (A/67/PV.44, 29 November 2012 pp. 19-20). The UK abstained on the upgrade of Palestinian status at the UN, but expressed concerns as to the future involvement of the ICC as a result of Palestinian will to join the Rome Statute: “We also sought an assurance from the Palestinians that they would not pursue immediate action in United Nations agencies and the International Criminal Court, since that would make a swift return to negotiations impossible” (A/67/PV.44, 29 November 2012 p. 15). The same holds true with regard to the position of Germany: “It is our expectation that the Palestinian leadership will not take unilateral steps on the basis of today’s resolution 67/19 that could deepen the conflict and move us further away from a peaceful settlement.” (A/67/PV.44, 29 November 2012, p. 15).

7 The facts illustrated here are summarized and thoroughly analyzed by DANIELE, *La Palestina aderisce alla Corte penale internazionale: e ora?* In *SIDIBlog*, 10 January 2015, at <http://www.sidi-isil.org/sidiblog/?p=1251>. On claims to statehood in the light of the principle of self-determination see LONGOBARDO, *Lo Stato di Palestina: emersione fattuale e autodeterminazione dei popoli prima e dopo il riconoscimento dello status di Stato non membro delle Nazioni Unite*, in DISTEFANO (ed.), *Il principio di autodeterminazione dei popoli alla prova del nuovo millennio*, Padova, 2014, p. 9 ff. (especially pp. 21-28).

the right to the formation of their own independent State – can intersect with international criminal justice.

In spite of the different geo-political and historical context, the same reasoning has been followed in the very interesting case (which is still in progress) of Kosovo with regard to the punishment of the alleged authors of international crimes at the end of the last century in the territory of the former autonomous province of Serbia. In that context, the establishment of “Specialist Chambers and the Specialist Prosecutor’s Office” in Kosovo, with international assistance and jurisdiction on international crimes is envisaged by Kosovo authorities to deal with allegations stemming from the Martyr Report of 12 December 2010 on “Inhuman treatment of people and illicit trafficking in human organs in Kosovo”, in order to further favor the international recognition of Kosovo and its admission into international organizations. This decision, which has been incorporated in the Constitution of the Republic of Kosovo<sup>8</sup>, has been the object of a judgment by the Constitutional Court, which on 15 April 2015 decided that the new article was in conformity with the Constitution.<sup>9</sup> Clearly, this approach was favored by the EU (see Council Decision 2014/685/CFSP of 29 September 2014: “EULEX Kosovo shall support re-located judicial proceedings within a Member State, in order to prosecute and adjudicate criminal charges arising from the investigation into the allegations”).<sup>10</sup> According to part of the international community, in post-conflict situations the interested States should be in favor of international criminal justice because through its acceptance those States can overcome internal conflicts and show their readiness to end impunity for international crimes committed by individuals on their territories. However, one should not underestimate the impact of the creation of an international (or internationally assisted) criminal tribunal on those among current State leaders who were once fighters in a struggle for

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8 Amendment n. 24, consisting in adding Article 162.

9 Constitutional Court of the Republic of Kosovo, Judgment in case KO 26/15, of 15 April 2015 on “Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo”, especially para. 23. The first comma of the new Article 162 states: “1. To comply with its international obligations in relation to the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011, the Republic of Kosovo may establish Specialist [N.B. The word “Specialist” in the English text reads as “Specialized” in the Albanian text and as “Special” in the Serbian text.] Chambers and a Specialist Prosecutor’s Office within the justice system of Kosovo. The organization, functioning and jurisdiction of the Specialist Chambers and Specialist Prosecutor’s Office shall be regulated by this Article and by a specific law.” With regard to the issues discussed in the present paper, it is meaningful that the parliamentary group that strongly opposes the creation of those Specialist Chambers and Prosecutor’s Office is named “Self-determination”. The position of this parliamentary group with regard to the impact of international criminal justice on self-determination is clearly presented in the judgment (paras. 24-34). See also *Human Rights Watch, Kosovo: Approve Special Court for Serious Abuses*, 11 April 2014, at hyperlink <http://www.hrw.org/news/2014/04/11/kosovo-approve-special-court-serious-abuses>”.

10 This is the text of the new Article 3.a of the Joint Action 2008/124/CFSP, adopted on 4 February 2008.

independence.<sup>11</sup> The choice of establishing such a mechanism is made by Kosovo authorities, conscious of the need to strengthen their legitimacy and ensure a judicial response to allegations that have clouded the fight for independence.

Finally, as regard to the impact of international criminal justice on the reputation of States, it is worth recalling that some of the States that today criticize the position of the Palestinian authorities, while supporting the recourse to international criminal justice in Kosovo as referred above, are among those who - at the end of the 1990s' and in the first decade of this century - strongly affirmed that Serbia and Croatia had to surrender their fugitives to the ICTY.<sup>12</sup> When just a few (albeit major) fugitives remained to be apprehended in both States, the EU subordinated the continuation of EU integration of those States to their cooperation with the ICTY. Around this time, someone even suggested that the lack of cooperation could have prompted international sanctions. In this case, cooperation with the ICTY provided a way for the States of the former Yugoslavia to be fully rehabilitated into the international community.

To sum up, in the case of Palestine, accession to the Rome Statute (and thus acceptance of international criminal justice) is seen by the interested authorities as a way to affirm the right to external self-determination on the path to statehood. In the case of Kosovo the acceptance and promotion of international criminal justice - consecrated in a provision of the Constitution and confirmed by the Constitutional Court --is likely to consolidate the State standing and capacity in international relations. In the case of Serbia and Croatia, the fulfillment of the obligation to cooperate with international criminal justice in apprehending those responsible for international crimes is preliminary to the participation of the interested States in international regional organizations. Therefore, at least in some of these cases, the relationship between international criminal justice and self-determination appears to be a system of positive feedback in which the former could help promote the latter.

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11 *Where the past isn't even past. A Special Court to try Kosovars for war crimes moves closer*, *The Economist*, June 20th-26th, 2015.

12 For the position of the United States see, e.g., Congressional Serial Set, 108th Congress, 1st session, House Document 108-91 (2003-2004), p. 16: "The United States continues to consider the apprehension, detention, and trial of Bosnian Serb [...] Radovan Karadzic and Ratko Mladic to be of the highest priority, not only in the interest of justice, but also to facilitate Dayton implementation in BiH and stabilize the region. Their refusal to surrender and ability to avoid apprehension sustains Serb extremism, inhibits the establishment of the trust among ethnic communities, undermines the credibility of the international community, and retards the rule of law". More recently, see the Statement by Secretary of State Condoleezza Rice of 9 December 2005 on the apprehension of Ante Gotovina available at [http://zagreb.usembassy.gov/press\\_20051209\\_en.html](http://zagreb.usembassy.gov/press_20051209_en.html): "The United States calls on the Government of Serbia-Montenegro and the Bosnian Serb authorities to fulfill their international obligations to the Hague Tribunal without any further delay, in particular through the apprehension and transfer to The Hague of Radovan Karadzic and Ratko Mladic, for whom the Tribunal's doors will always remain open".

### 3.

Among those who emphasize the negative fall-outs of international criminal justice on self-determination, one should recall the positions of those African States which have condemned international criminal justice as a destabilizing element in international relations, a political tool that attempts to peace and stability, an interference in internal affairs, and an instrument through which one party to a conflict could “criminalize” another party, and thus delegitimize it. According to this way of reasoning, international criminal justice has heavy repercussions on internal self-determination in some African States. Indeed, in certain cases, one or more parties to an internal conflict (some or all of which are allegedly responsible for the commission of international crimes) hold a significant power in peace negotiations, thereby making the external intervention of the Court a disturbing element in an already complex internal situation.<sup>13</sup> In this framework, the ICC has been the target of several accusations by some African States, ranging from “neo-colonialism”, to a humorous change of denomination from ICC to ACC (African Criminal Court)<sup>14</sup>.

The relationship between the exercise of international criminal jurisdiction and internal and international political dynamics – where frequent recourse is made to the rhetoric of self-determination – may be analysed from the point of view of the different triggering mechanisms under the Rome Statute and in the light of the Court’s practice.<sup>15</sup> One can therefore distinguish three different situations deriving from each triggering mechanism, i.e. State referrals, referrals by the UN Security Council, and *proprio motu* referrals by the ICC Prosecutor.

The possibility that a State party to the Rome Statute could refer a situation to the Prosecutor of the ICC for later decisions as to the opening of an investigation did not seem particularly attractive at the time of the adoption of the Statute. The initial adversity towards this means of referral stemmed mainly from the traditional restraint of States to intervene in each other’s affairs due to lack of compliance with obligations stemming from multilateral treaties (especially in the field of human rights and, in our case, international criminal law).<sup>16</sup> Quite

13 This is the perception in certain African State, both taken individually and in the framework of regional intergovernmental organizations, as well as in States where the Prosecutor did not open formal investigations, but is currently monitoring the national situation with a view to decide over the exercise of criminal jurisdiction (see, e.g., preliminary examination in Colombia).

14 Also in this regard the literature is quite abundant. For a recent, and constructive, contribution on the issue see BABINGTON-ASHAYE, *The International Criminal Court and Its Potential Impact on Development in Africa*, in *L’Afrique et le droit international: variations sur l’organisation internationale*, Liber Amicorum Raymond Ranjeva, Paris, 2013, p. 45 ff.

15 See articles 12, 13 and 15 as to the different triggering mechanisms.

16 Multilateral treaties such as the ECHR and the UN Covenants of 1966 provide for inter-state claims, but these mechanisms have been applied in a very limited number of occasions in the history of both systems of human rights protection.

surprisingly, the first three situations were indeed referred to the ICC by States, not in an “inter-state” perspective (i.e. State A referring the situation of possible commission of international crimes in State B), but through what has become known as self-referral (i.e. State A referring the situation with regard to its own territory, or at least parts of it that due to an internal conflict are – in whole or in part – out of governmental control).<sup>17</sup>

An empirical and contextual analysis of these situations and their judicial developments reveals two major challenges to the Court’s legitimacy and the functioning of the international criminal justice mechanism designed by the Rome Statute. First, weak national governments may be inclined to “use” the Court as an instrument to fight against internal political contenders, while gaining a certain degree of international legitimacy through the opportunistic involvement of the Court, thereby creating a façade of respect and deference to international (criminal) law. This seems particularly unfortunate when the self-referral is even encouraged by the Office of the Prosecutor, as it was the case with Uganda. The relationship between the first Prosecutor Luis Moreno Ocampo and the Ugandan government has attracted much criticism, due to an alleged lack of transparency in prosecutorial choices that seriously undermined the perception of the Court’s independence among the involved population. Second, once the Court’s jurisdiction is triggered, frequently the involved State behaves inconsistently as to its duties of cooperation with the Prosecutor and the Court,<sup>18</sup> thereby revealing the opportunistic nature of the referral (i.e. the activity of the Court is supported as long as it serves, albeit indirectly, the government’s interests in both internal and external policies). This happened again in Uganda, where the State authorities (outside of the very limited enclaves where the Lord’s Resistance Army operates) did not efficiently discharge their duties, notwithstanding their capacity to carry out prosecutorial and investigative tasks.

The possibility to widen the territorial and personal scope of the Court’s jurisdiction through Security Council resolutions under Chapter VII of the UN Charter (i.e. UN Security Council referrals) poses additional issues as to the relationship between States, the UN, and the Court when it comes to self-determination claims and/or political transitions. Up to date this path was followed, albeit under very different conditions, with regard to the situation in Sudan-Darfur and Libya. Four issues have arisen from this trigger mechanism. First, the risk of double standards in the selection of those situations that may

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17 This is the way in which the ICC jurisdiction was triggered in Uganda, Democratic Republic of the Congo and Central African Republic (hereinafter CAR). The same path was later followed as to the situation in Mali (referred to the Prosecutor in 2012, investigation opened in 2013) and again in CAR, where a second situation was opened in September 2014 pursuant to a new referral from the authorities of the CAR.

18 Part IX, Rome Statute of the ICC, 1998.

deserve the intervention of the Security Council in order to widen the Court's jurisdiction. Such decisions are fatally conditioned by the political calculus of the five Permanent Members of the Security Council, thereby underlining the inherent fragmentation in the exercise of international criminal justice and the possible adverse consequences of the Security Council's decisions as regards the Court's ability to fulfil its mandate. Second, problems could also arise from the lack of cooperation by national authorities. Once the situation is referred to the Court with regard to a State which is not party to the Rome Statute – and thus is supposed to bear no obligation to cooperate with the Court under Part IX and X of the Statute – the Prosecutor may be confronted with the practical impossibility to effectively investigate and the Court's decisions may have no significant chances of enforcement. Reference is here to what happened in Sudan-Darfur where President al-Bashir – recently re-elected in a much-contested vote – internally enjoys a position of force, which allows him to be virtually exempted by the Court's decisions.<sup>19</sup> A third potential problem stemming from UN Security Council referral is the criticism and open opposition of regional intergovernmental organisations, especially when the interests of high-level officials, statesmen and Heads of State or Government are affected. The vehement reaction of the African Union and its condemnation of the Court's activities provide an example of the possible conflict between the exercise of international criminal jurisdiction and the tendency to protect national leaders with the argument of self-determination and respect for national (allegedly) democratic expressions.<sup>20</sup> Fourth, even when national authorities have been deemed willing and able to prosecute individuals referred to it by the UN Security Council, the political situation in these States may degenerate with extreme speed, effectively rendering national authorities unable to perform any of their international obligations. A somewhat controversial example of this is the case of Abdullah Al-Senussi, Gaddafi's former head of military intelligence, against which ICC proceedings came to an end on 21 May 2014 following the unanimous confirmation by the Appeals Chamber of Pre-

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19 The two arrest warrants issued against President al-Bashir, the first sitting Head of State to face genocide charges at the ICC, are unenforced at the moment and the indicted remains at large. More recently, President al-Bashir was able to leave the 25<sup>th</sup> African Union Summit in Johannesburg despite an arrest warrant issued by the South African Judiciary. See: <http://justiceinconflict.org/2015/06/16/bashir-in-south-africa-defeat-victory-or-both-for-international-criminal-justice/>; <http://www.bbc.com/news/world-africa-33157407>

20 See the 2013 Declaration at the Extraordinary Session of the African Union, where support was reiterated to both Sudanese and Kenyan leaders, available at: <http://www.au.int/en/content/extraordinary-session-assembly-african-union>. For another significant example of open criticism of the Court see the position of Ugandan President Museveni who went so far as to call for a mass withdrawal of African countries from the ICC: <http://www.reuters.com/article/2014/12/12/us-africa-icc-idUSKBN0JQ1DO20141212>. After the episode referred to in the note above, rumors about the likelihood that South Africa leaves the ICC have been spread: BBC, *South Africa may leave the ICC over Bashir arrest row*, at <http://www.bbc.com/news/world-africa-33269126>

Trial Chamber I's decision of 11 October 2013. Indeed, the rampant instability of Libya's internal political situation does raise some concerns over whether Libyan authorities are competent to hear such a sensitive case.

Given the potential inconveniences of the other two triggering mechanisms, many observers have stressed the importance of the *proprio motu* powers of the Prosecutor as the only mechanism to allow for a truly independent triggering of the Court's jurisdiction. Nevertheless, the Prosecutor waited years before testing this procedural mechanism, and when he finally decided to use it in the Kenyan situation, it resulted in one of the most serious crisis concerning the perception of the Court's role in Africa and elsewhere.<sup>21</sup> The principal issues that appear to surround this triggering mechanism are two. First, the autonomous intervention of the Prosecutor may have a significant impact on national political dynamics, especially when it concerns crimes allegedly committed in the aftermath of political elections and focuses on the role of individuals who came to occupy high-level governmental posts as a result of popular votes. Reference is here to what occurred in Kenya following the post-2007 election violence, i.e. the indictment of President Uhuru Muigai Kenyatta and of Deputy President William Samoei Ruto, and (later) Joshua Arap Sang. Second, the intervention of the Prosecutor may be perceived, both at the national and regional level, as an undue interference in the internal political affairs of a given State and therefore face charges of politicisation and attract criticism from the media, regional organisations, and others. It is well known that the ICC intervention in Kenya against elected political leaders, together with the Court's involvement in Sudan, prompted the reaction of the African Union.

More generally, those most involved in the study of international criminal justice have stressed the potential for politicization of *proprio motu* referrals especially given the vague legal standards of "gravity" and "interests of justice", that could lead to arbitrary decisions by the Office of the Prosecutor.<sup>22</sup> In all these cases international criminal justice plays a debatable role with regard to internal self-determination because the former is likely to affect the participation in the political life of those that, on the basis of popular support, could have a decisive role in the government of the States where international crimes were committed. However, this observation does not imply any criticism to the general principle

21 The *proprio motu* procedure has been used in Kenya and later in Côte d'Ivoire. In both occasions, the Prosecutor was authorized by the relevant Pre-Trial Chamber to open a formal investigation of the respective situations. On this triggering mechanism, its *raison d'être*, its functioning and its inconveniences see SCHABAS, *The International Criminal Court: Struggling to Find Its Way*, in CASSESE (ed.), *Realizing Utopia. The Future of International Law*, Oxford, 2012, p. 250 ff.

22 SCHABAS, *op. cit.*, p. 258 f.

that those allegedly responsible for international crimes should be prosecuted and, anyway, do not enjoy any form of exemption for these crimes due to “popular support”.

#### 4.

The first half of this paper (section 2) analyzed how either directly or indirectly international criminal justice has served to strengthen claims of statehood in different ways and in different contexts.

Self-determination and international criminal justice have a positive relationship in the case of Palestine in the understanding of the Palestinian authorities. Through their accession to the Rome Statute, the Palestinian authorities have taken an important step in the affirmation of statehood. By referring a situation to the ICC, through the State referral triggering mechanism, Palestine is exercising its treaty right under the Rome Statute and hence is performing an action that only a State can perform. Not only that: the decision by the Prosecutor to open a preliminary examination (on 16 January 2015) on the situation referred to it by Palestine on behalf of the ICC is powerful evidence of support for Palestinian self-determination within the international community and the world of international criminal justice. Whether this exercise of “sovereign” powers by Palestine will favor further development in the political negotiations between Israel and Palestine remains to be ascertained and at the moment is really doubtful.

In the case of Kosovo, the establishment of the “Specialist Chambers and Specialist Prosecutor’s Office” appears to be a step towards Kosovo’s recognition by other States and the admission of Kosovo in international organizations. The hope is that the work of the Specialist Chambers and Specialist Prosecutor’s Office will help cement statehood by contributing to overcome traumas that are inherent to post-conflict situations. More specifically, the prosecution of international crimes should help Kosovo gain a better standing and capacity in the international community, strengthening Kosovo’s still disputed statehood and promoting the self-determination of the Kosovar people [as well as the respect for fundamental rights of the Serbian minorities leaving in Kosovo.]

Different still is the case of Serbia and Croatia. These States have only existed as we know them since the dissolution of the Socialist Federal Republic of Yugoslavia and its aftermath. To a large extent, during the years following the beginning of the activities of the ICTY, the integration of those States into the international community was largely dependent on their acceptance of international criminal justice and their cooperation with the Tribunal. Therefore, it can be said that the creation of Croatia and Serbia as we know them is tightly linked to the exercise of international criminal justice. However, one must not ignore that the situation in the former Yugoslavia also served as a prelude to

the difficulties that international criminal justice would have faced as it clashed with State sovereignty and self-determination. There are many reasons for which the ICTY still exists, and one of them is that the countries of the former Yugoslavia have not always been particularly cooperative with the activities of the Tribunal, although it must be recognized that with time their cooperation has reached remarkable levels. The argument could be made that new States – or other actors seeking self-determination and aspiring to be recognized as States at the international level – often try to portray themselves as responsible subjects, i.e., subjects that take responsibility for their actions and are willing to submit to international justice mechanisms, even of a criminal nature, to legitimize themselves in the eyes of the international community.<sup>23</sup>

What has just been recalled serves as a viable bridge to the conclusions concerning the more dissonant aspects of the relationship between international criminal justice and self-determination, which have been discussed in the second half of this paper and mainly concerns the analysis of the ICC triggering mechanisms. This analysis has shown that many complications can arise when international criminal justice is placed at odds with self-determination. The first complication concerns State self-referrals through which States on the one hand assert their (presumably temporary) inability to fulfill their obligation to prosecute international crimes. On the other, by renouncing to prosecute international crimes, States amputate the (internal) right of self-determination of the people who chose their form of government of which the jurisdictional apparatus is a pillar. In this regard, the paper observes that the central issue that arises from self-referral is the possible instrumentalization by States seeking to delegitimize their political opponents by having them investigated by the Court's Prosecutor. Such a process can effectively lead to the hindrance of self-determination by interfering with the domestic political dynamics. This problem is further manifested in the inconsistent behavior of the authors of the referral, which are ready to cooperate with the Court only if this matches their interests, i.e. if those that are being prosecuted are the political opponents of the government in power.<sup>24</sup>

Clashes between international criminal justice and self-determination are perhaps more explicit in the case of UN Security Council referrals. The problems surrounding this method of referral mainly concern questions of double standards and non-cooperation. Because the UN Security Council is a political body and not a judicial one, it is easy to argue that its decisions do not reflect

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23 The relationship between subjectivity and responsibility in international law has a rich academic pedigree; see for instance R. QUADRI, *Diritto Internazionale Pubblico*, pp. 534-35 (5th ed., Napoli, 1968). These ideas were more recently further elaborated by ACQUAVIVA, *Subjects of International Law: a Power-Based Analysis*, in *Vanderbilt Journal of Transnational Law*, 2005, p. 1 ff. (esp. p. 46 ff.).

24 This happened in the case of Uganda, as well as in Democratic Republic of the Congo and Central African Republic.

standards of justice but rather the fleeting political interests of the members of the Security Council. Those targeted by UN Security Council referrals can and have argued that this means of referral had been used to violate the right to self-determination, which according to many amounts to a *jus cogens* rule.<sup>25</sup> Consequently, those governments affected by UN Security Council referrals have rarely been cooperative with the Court's activities. On the contrary, these leaders have even gone so far as to lobby their regional organizations to condemn the Court and to ask those State parties to withdraw from the Rome Statute.<sup>26</sup>

In spite of the intention of those who advocated the establishment of the *proprio motu* triggering mechanism, this means of referral is not free from many of the problems inherent to the other mechanisms. Since it was first used by the Prosecutor (five years after the creation of the Court), the *proprio motu* referral mechanism has attracted scores of criticism from experts and States alike. The alleged politicization of this means of referral has led to accusations of interference in internal political processes, which in turn could amount to a violation of a people's right to self-determination.

In conclusion, the real issue of the relationship between international criminal justice and self-determination is that the latter is a politically charged aspect of international law and is thus easily manipulated by those seeking to hinder the course of international criminal justice to protect their own interests. What this paper has hopefully illustrated is that those seeking to use international criminal justice to strengthen their claims to statehood predominantly appear to be acting in good faith before the international community while the same cannot be said of those hiding behind self-determination as if it were a shield capable of protecting them from international criminal responsibility.

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25 Cfr. P.M. DUPUY, *Droit international public*, X ed., Paris, 2010, p. 47.

26 See, *supra*, note 20 for the position of the African Union and certain leaders of African States towards the ICC.