

ARTICOLI E SAGGI

NON-PERMANENT MEMBERS OF THE SECURITY COUNCIL AND INTERNATIONAL CRIMINAL JUSTICE. A PROPOSAL FOR REVITALIZATION*

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SUMMARY: 1. Introduction. – 2. The rise and fall of international criminal justice in the Security Council. – 3. International criminal justice divergences between the E10 and some of the P5: the example of the completion strategy of the *ad hoc* tribunals. – 4. Missed opportunities for the IWGIT to give its contribution on international criminal justice issues. – 5. Revitalizing international criminal justice in the Security Council: the IWGIT and the role of the non-permanent members.

1. The aims of this contribution are twofold. The first is to summarize how the treatment of international criminal justice has lost much fervor over the last two decades. The second aim is to explore whether this pattern should be reversed and if so, how. More specifically, what role can the Security Council, and in particular its elected members (E10), play to reach this result?

2. There is a general impression that today, talking about international criminal justice in the Security Council is something of a taboo. With a few exceptions, states are reluctant to talk about international criminal justice in the main political body of the UN system. Notwithstanding, international crimes are still being committed around the world, and the states where these crimes are committed often remain unable or unwilling to investigate – let alone prosecute – those who are allegedly responsible.

There is no doubt that the Security Council was the engine, maybe beyond or even against its own intention, for the promotion of international criminal justice when the massacres in the former

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Yugoslavia and in Rwanda required a response to put an end to impunity for those international crimes¹. After the end of the Cold War, the establishment of these tribunals provided those who believed the repression of international crimes could be achieved through judicial means established at the international level, with the hope that, after decades of sterile debates, the dream of punishing the perpetrators of the most heinous international crimes could be realized. This breakthrough inspired further steps that led to the establishment of other international (or internationalized) criminal tribunals and of the permanent International Criminal Court. In the first years of the twenty-first century, the issue of international criminal justice was abundantly dealt with by the Security Council, as shown by the referral of situations to the ICC's Prosecutor², and by the establishment of the Special Tribunal for Lebanon in 2007. Further initiatives regarding international criminal justice, such as the creation of the Special Court for Sierra Leone and of the Extraordinary Chambers in the Courts of Cambodia (ECCC), were advanced through bilateral agreements between the UN and the interested states; agreements to which the Security Council did not object.

Thanks to the establishment of the ICTY and ICTR as well as the referral of situations to the ICC, international criminal justice became one of the most recurring issues on the agenda of the Security Council. Even in resolutions on the protection of civilians in armed conflicts and other specific situations, the necessity of repressing international crimes and punishing their authors was initially emphasized, although no specific *renvoi* was systematically made to international criminal justice mechanisms³.

¹ Security Council Resolution 827 (1993) and Security Council Resolution 955 (1994), establishing, respectively, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (ICTR).

² This happened with Security Council Resolution 1593 (2005) on Darfur/Sudan, and Security Council Resolution 1970 (2011) regarding Libya.

³ Reference is here to Security Council Resolution 1325 (2000), on the protection of civilians and the role of women in the prevention and resolution of conflicts and in peacebuilding, according to which the Security Council «*emphasizes* the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against

This perceived taboo surrounding the discussion of international criminal justice in the Security Council is clearly in contradiction with what happened in that body starting in the 1990s. As mentioned above, the Security Council was the forum from which the ‘modern’ conception of international criminal justice first emerged, with the creation—through Chapter VII resolutions—of the ad hoc international criminal tribunals strongly supported by some states within the Security Council and outside of it. Among those states, France and Italy and what was the Conference on Security and Cooperation in Europe (today, the Organization for Security and Cooperation in Europe, OSCE), with the UN Secretariat, were extremely active in setting up the ICTY, whose first President was an Italian, the late Antonio Cassese, who later also presided over the Special Tribunal for Lebanon⁴.

Thanks to both the five permanent members (P5) and the ten non-permanent members (E10), the Security Council was able to play an active role in establishing ad hoc international criminal tribunals, offering an answer to the quest for justice in situations where international crimes were committed⁵. The Security Council actively contributed to the development of international criminal justice in the situations described above because, as many Security Council members clearly stated, the commission of international crimes posed a threat to the maintenance of international peace and security and the perpetrators of those crimes deserved to be prosecuted. Since the states that should have tried the authors of those crimes were unable or unwilling to do so, there was no alternative to the establishment of international criminal tribunals.

One could wonder why things have changed so dramatically in recent years even though international crimes are still being committed, as in the case, among others, of Syria and Myanmar. There could be different explanations for this, some of which relate to the difficult relationship between the Security Council, the main political decision-making body of the UN system, and a jurisdictional body (a court, i.e. not a political body) the actions of which are based

women and girls, and in this regard *stresses* the need to exclude these crimes, where feasible from amnesty provisions» (para. 11).

⁴ L.D. JOHNSON, *Ten Years Later: Reflections on the Drafting*, in *Journal of International Criminal Justice*, 2004, 368.

⁵ Some believed the presence of such tribunals would have discouraged the commission of other international crimes, although one of the worst moments in the former Yugoslavia, the massacre of Srebreniča, took place after the ICTY was established.

on the application of legal norms and procedures. This being said, these judicial organs do not act in a political vacuum. In more general terms, the reasons for which international criminal justice has become a taboo in the Security Council can be summarized as follows. First, in certain cases, the prosecution of those who are supposed to be the main actors in peace processes can and does have immediate repercussions on that process. Second, international criminal tribunals have received countless criticisms aimed at their alleged inefficiency and failures to implement international criminal justice by the pertinent jurisdictions. Third, the international community's attention has been captured by other grave violations of human rights and issues such as terrorism, sustainable development, and protection of the environment—thus detracting from the importance it once assigned to international criminal justice. Fourth, the ICC in particular has repeatedly been accused of practicing a 'double standard' by only prosecuting crimes committed in certain parts of the world, leading to allegations of judicial neo-colonialism⁶. Each of these criticisms would deserve an in-depth examination. However, the purpose of this contribution is not to dive into the intricacies of each of these criticisms, but rather to recognize their role in making international

⁶ These arguments are presented in different fora by states and are commented upon by scholars. See, for instance, K.M. CLARKE, *Fictions of Justice: The International Criminal Court and the challenge of legal pluralism in sub-Saharan Africa*, Cambridge, 2009; K. AMBOS, *Expanding the focus of the "African Criminal Court"*, in W.A. SCHABAS, Y. McDERMOTT and N. HAYES (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, London-New York, 2013, 499; A. 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, 45; R. DICKER, *The International Criminal Court (ICC) and Double Standards of International Justice*, in C. STAHN (ed.), *The Law and Practice of the International Criminal Court*, Oxford, 2015, 3; P.Y. LABUDA, *The International Criminal Court and Perceptions of Sovereignty, Colonialism and Pan-African Solidarity*, in *African Yearbook of International Law*, 2013-14, 289; ID., *Africa and the ICC: Shattered Taboos and the Status Quo*, in *EJIL: Talk!*, November 23, 2016, at www.ejiltalk.org; ID., *The African Union's Collective Withdrawal from the ICC: Does Bad Law Makes for Good Politics?*, in *EJIL: Talk!*, February 15, 2017, at www.ejiltalk.org; G. NESI, *Statehood, Self-determination and International Criminal Justice*, in P. HILPOLD (ed.), *Autonomie und Selbstbestimmung in Europa und im internationalen Vergleich*, Baden-Baden, 2016, 322; J.B.J. VILMER, *The African Union and the International Criminal Court: Counteracting the Crisis*, in *International Affairs*, 2016, 6, 1319. As regards African states practice towards the ICC, see *Decision on Africa's Relationship with the International Criminal Court*, Extraordinary Session of the Assembly of the African Union, 12 October 2013, AU Doc. Ext/Assembly/AU/Dec.1-2; Ext/Assembly/AU/Dec.1-4. (October 2013) at: au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf.

criminal justice a taboo topic in the Security Council and explore a possible remedy to this situation.

Nevertheless, it cannot be denied that since the establishment of international criminal tribunals the members of the Security Council, and especially the P5, have had to face the 'quest' for independence by judicial organs set up to prosecute the authors of international crimes. The crucial role of legal norms and procedures in the functioning of international criminal judicial bodies is something that does not leave much (or any) space for the political flexibility that usually inspires the decisions of the UN's body to which the Charter assigns 'the primary responsibility for the maintenance of international peace and security'⁷. This is difficult to accept for the body with the greatest executive discretion of the UN system, and especially by some of its permanent members. At the same time, the E10, or at least those who are in favor of a thick conception of the rule of law based on human rights, should support the involvement of the Security Council in international criminal justice issues since the repression of international crimes could favor the maintenance of international peace and security. However, it seems that the positions of some permanent members diverge from the position of many of the E10 (or even the overwhelming majority of the General Assembly) in managing international criminal justice. This could raise some difficult issues within the Security Council. It is not a coincidence that three out of five of the P5 are not parties to the Rome Statute of the ICC.

3. In order to better understand the different positions within the Security Council with regard to international criminal justice, I refer to the issues that emerged during the long negotiations that led to the adoption of the completion strategy of the ad hoc international criminal tribunals. Recalling what happened in this case and the role played by some of the E10 in this regard could suggest some actions that the E10 could promote in order to 'permanently' incorporate international criminal justice in the work of the Security Council.

The negotiations that led to the adoption of the completion strategy were conducted in the Informal Working Group on International Tribunals (IWGIT), a subsidiary open-ended organ of the Security Council, where the members of the Security Council are

⁷ 1945 UN Charter, Art. 24.

usually represented by their legal advisers. This working group was established informally in June 2000 at the request of three E10, namely Bangladesh, Canada and Tunisia. Its first denomination was ‘Working Group on International Criminal Tribunals’, and it was originally convened to debate a specific issue concerning the Statute of the ICTY and subsequently mandated to deal with other (legal) issues pertaining to the tribunals⁸. Until 2008, the IWGIT kept its original denomination and did not have a stable presidency, i.e. the presidency was given to the state that was presiding over the Security Council, following the monthly rotation scheme. In 2008, at the proposal of some of the E10, namely Belgium, Italy, Panama and South Africa, and with the consent of the P5, it was decided to ‘stabilize’ the presidency from year to year. It was further decided that Belgium would hold the presidency for the year 2008.

A permanent presidency offered a potential for continuity, which could help strengthen co-operation among the members of the Security Council and the UN Secretariat on the matter of international criminal justice. In this sense, these reforms could provide stronger institutional backing at a political level. This strength and continuity proved vital to accomplishing the considerable task of assembling a workable completion strategy.

Although the idea of setting up a completion strategy for the ad hoc international criminal tribunals was first addressed by the President of the ICTY in the year 2000⁹, the Security Council began the substantive debate on the matter only in 2008, and completed it in 2010 with the adoption of Resolution 1966 (2010), under the IWGIT presidency of Austria¹⁰. The working group dealt almost exclusively with the issue of the completion strategy of the ad hoc international criminal tribunals¹¹. This conveys the importance attached to the need

⁸ *Repertoire of the Practice of the Security Council, Informal and ad hoc working groups*, at www.un.org/en/sc/repertoire/2000-2003/00-03_5.pdf#page=20.

⁹ Seventh annual *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* to the Security Council and the General Assembly. See UN Doc. A/55/273-S/2000/777 (2000).

¹⁰ The resolution was adopted with fourteen votes in favor and the abstention of the Russian Federation. For the official records of the final meeting see UN Doc. S/PV.6463 (2010).

¹¹ In those years (2007-10), the IWGIT episodically dealt with other issues concerning international criminal tribunals, i.e. the establishment and financing of the Special Tribunal for Lebanon or the issues raised by the ECCC. Meetings concerning those issues were even

for a completion strategy by the members of the Security Council. Discussions on the nature of the mechanism emphasized, on the one hand, the type of activities that should be assigned to the new body, and on the other, the reconstitution of the rule of law in the areas of operation of the same tribunals. The debate ultimately recognized how these two elements were really two indispensable sides of the same coin, as the re-establishment of the rule of law could only take form under the oversight of an international residual mechanism.

It is worth noting that states with a reputation as strong supporters of non-interference in internal affairs (i.e. Russian Federation and China) stood firmly in favor of terminating the role of the Security Council vis-à-vis the ad hoc tribunals. This vision saw the situations in Rwanda and the Former Yugoslavia as ultimately resolved, and urged the need for local courts to follow up on the work of the tribunals free from entanglements at the international level. Scholars such as Pocar, highlighted the need for a continuation strategy in which local courts had to at least base their work on the work of the ad hoc tribunals. This created the problem of ensuring local courts would keep to the line traced by the ad hoc tribunals. Consequently, the need for an international mechanism became evident¹².

Through the activities of the Belgian and Austrian presidencies, both strong supporters of international criminal justice, a new pattern of conduct was introduced in the work of the IWGIT, beyond the stable presidency. It suffices to recall how, while until 2007 the IWGIT met once or twice a year and sometimes even without an agenda, in 2008 about a dozen meetings took place and in 2009 there were 26 meetings of the IWGIT¹³. This served as a testament to the

more 'informal', since they took place not at the UN Headquarters but in one of the Permanent Missions of states member of the Security Council, or in other buildings.

¹² F. POCAR, *Completion or Continuation? Appraising Problems and Possible Developments in Building the Legacy of the ICTY*, in *Journal of International Criminal Justice*, 2008, 655; ID., *The ICTY's Completion Strategy: Continuing Justice in the Region*, in *Proceedings of the Annual Meeting (American Society of International Law)*, 2009, 222.

¹³ In a very smart move, the presidencies of the IWGIT, supported by other states, succeeded in 'formalizing' the activities of the IWGIT by proposing the adoption of documents that, contrary to what normally happens in the case of informal working groups of any sort, recorded (although not *verbatim*) the activities of the IWGIT. This happened in 2008 and 2009 with the following documents, respectively: UN Doc. S/2008/849 and UN Doc. S/2009/687. For this information and other interesting considerations on the activities of the IWGIT, see K. BÜHLER, *The Role of the U.N. Security Council in Preserving the Legacy of the Tribunals: Establishment of a Residual Mechanism and Preservation of the Archives*, in R.H. STEINBERG (ed.), *Assessing the Legacy of the ICTY*, Leiden, 2011, 59.

central role of the continuity provided by a permanent one-year presidency to the formulation of a completion strategy.

In the IWGIT, all the political and legal issues concerning the divergent positions of states on the tribunals emerged. Those issues were, among others, the co-operation among states and between states and international organizations in apprehending and transferring the alleged criminals to the tribunals; the protection of human rights (not only those pertaining to victims and witnesses but also those of the alleged perpetrators of the crimes); non-interference in internal affairs; and the influence of international criminal justice on domestic legal orders¹⁴. In this context, the presidency of the IWGIT served to mediate among divergent positions on these issues and to clarify that what was at stake was not the closing of the tribunals (as requested by Russian Federation and China) but the accomplishment and the continuation of their residual activities¹⁵. After several debates, a formal compromise created what was called a Residual Mechanism for Criminal Tribunals ('Mechanism'), which would hold jurisdictional and administrative functions, and would have replaced the tribunals in due course¹⁶. More specifically, it was clarified that the Mechanism's functions were, as reported in Security Council Resolution 1966 (2010):

- Track and prosecute remaining fugitives;
- Conduct and complete appeal proceedings deriving from the last ICTR and ICTY cases;
- Consider applications for review of ICTR, ICTY, and Mechanism judgments;

¹⁴ The 'six key issues' that were specifically put on the agenda of the IWGIT for the years 2009 and 2010 were: i) structure and organization of the residual mechanism; ii) (co-)location of the residual mechanism and the archives; iii) commencement day of the residual mechanism; iv) fugitives to be tried by the residual mechanism; v) functions of the residual mechanism; vi) archives and information centers, as reported in BÜHLER, *cit.*, 62.

¹⁵ G. ACQUAVIVA, *Was a Residual Mechanism for International Criminal Tribunals Really Necessary?*, in *Journal of International Criminal Justice*, 2011, 789.

¹⁶ On the Mechanism on International Criminal Tribunals see, more recently: G. TORTORA, *The Mechanism for International Criminal Tribunals. A Unique Model and Some of Its Distinctive Challenges*, in *ASIL Insights*, 6 April 2017; M. ARCARI, M. FRULLI, *The advent of the Residual Mechanism for Criminal Tribunals and the future of (ad hoc) international criminal justice: Questions of legality, efficiency, and fairness*, in *Questions of International Law, Zoom-in*, 2017, 1, www.qil-qdi.org; A.S. GALAND, *Was the Residual Mechanism's creation falling squarely within the Chapter VII power of the Security Council?*, *ivi*, 5; A. CARCANO, *Of efficiency and fairness in the administration of international justice: Can the Residual Mechanism provide adequately reasoned judgments?*, *ivi*, 21; Y. McDERMOTT, *Fairness before the Mechanism for the International Criminal Tribunals*, *ivi*, 39.

- Conduct any retrials;
- Conduct investigations, trials, and appeals for contempt and false testimony;
 - Protect victims and witnesses who testified before the ICTR, the ICTY, and the Mechanism;
 - Supervise the enforcement of sentences for persons convicted by the ICTR, the ICTY, and Mechanism;
 - Assist national jurisdictions in investigating and prosecuting cases involving alleged war crimes and other violations of international law;
 - Preserve and manage the ICTR, ICTY, and Mechanism archives; and
 - Monitor cases referred to national jurisdictions.

This is really an impressive list of functions for a Mechanism that, according to some of the P5, should not even have been created. Although the Mechanism would be structurally very different from the tribunals, many functions would be similar to those performed by the latter.

The adoption of Security Council Resolution 1966 (2010), which represented the culmination of the work of the IWGIT between 2008 and 2010, was the most tangible result ever reached by the IWGIT. After the adoption of this resolution, the IWGIT resumed its traditional working methods, meeting just once or twice a year, even if the Security Council still often dealt with both the follow-up of Resolution 1966 (2010) and with other international criminal justice issues. These sparse meetings had to tackle both the reports of the Mechanism, that are presented every six months, as well as the reports of the ICTY and ICTR. It is noteworthy that after the adoption of Resolution 1966 (2010) the IWGIT has never had any prominent role in the negotiation and adoption of other resolutions dealing with international criminal justice issues. The impact of this inaction is explored in the following section.

4. Since Resolution 1966 (2010), the role of the IWGIT has therefore become primarily passive. Nowhere was this more apparent than in Security Council Resolutions 1970 (2011) and 1973 (2011) on the situation in Libya, as well as the highly divisive negotiation on the situation in Syria. None of the pertinent debates took place in the IWGIT. As a result, in my opinion, issues of international criminal

justice arising from these situations were not addressed by the Security Council in a satisfactory manner.

With regard to Libya, following the initial referral to the Prosecutor of the ICC, no further action was taken by the Security Council to address the intricacies uncovered by the Prosecutor's investigations. The IWGIT could have provided the Security Council the legal footing on which to base continued political support for the investigations, as had happened repeatedly with the ICTY and ICTR¹⁷. In recognizing this potential for the IWGIT to influence the Security Council, it suffices to recall the central role it played in the adoption of Resolution 1966 (2010) mentioned above. Unfortunately, no such support was forthcoming and this lack of follow-up proved a major hindrance to the ICC's activities in Libya.

With regard to the case of Syria, several proposals to start criminal investigations on cases of grave violations of international humanitarian law were not successful because of the vetoes of the Russian Federation and China to the draft resolutions. These vetoes were explained not by criticizing the integrity or value of international criminal justice, but by utilizing the principle of non-intervention in internal affairs¹⁸.

It should also be underlined that other subsidiary organs of the Security Council, namely some sanctions committees (i.e. Sudan and Libya) could tackle issues concerning international criminal justice if the IWGIT had been more actively involved in their activities.

The IWGIT has proved itself capable of tackling issues regarding the future of international criminal justice in a rational and competent manner, weighing the need for both a return to normality in post-conflict situations against the need for international oversight in this process. International criminal justice remains a novel and complex

¹⁷ It would be sufficient to refer to the debates that took place in the Security Council and in the General Assembly when the principals of the ad hoc tribunals presented their regular reports to those bodies. For these documents, see www.icty.org/en/documents/annual-reports; and unictl.unmict.org/en/documents/annual-reports.

¹⁸ Records of the UNSC's meeting on the Situation in the Middle East, see UN Doc. S/PV. 7180 (2014). See in particular paras. 12-13 for the Russian position and paras. 13-14 for the Chinese position. More specifically, the Russian delegate made reference to the case of Libya and to the fact that the referral to the ICC adhered, in his opinion, to a wider political frame that was aimed at favoring the military intervention and the replacement of Qaddafi's regime. The Chinese delegate referred explicitly to the respect for the principles of state sovereignty and complementarity and to the perplexities of any referral of a country situation to the ICC. The same diplomat declared also that any referral to the ICC would have hampered the solution of the Syrian crisis rather than favor it.

phenomenon that must be addressed by both legal experts and diplomats in the appropriate fora. Failing to do this would mean letting two decades of efforts to end impunity for international crimes fall victim to the political whims of the day.

With this in mind, it should be recognized that this argument hinges heavily on the successes of the IWGIT in influencing the Security Council in the adoption of Resolution 1966 (2010). Though a milestone in international criminal justice, Resolution 1966 (2010) aimed to terminate, or at least reduce, the role of the ICTY and ICTR. Therefore, it had a greater potential to unite the interests of states that supported the work of the tribunals with those that did not. By contrast, the prospect of promoting new international criminal justice initiatives in Libya and Syria are less likely to gather the same kind of support. In other words, with Resolution 1966 (2010), the quality of the matter at hand made compromise easier for the members of the Security Council. Nonetheless, the argument above still suggests that the role of IWGIT as a well-equipped forum to promote the cause of international criminal justice should not be undermined or forgotten.

5. A reflection must therefore be made on how to revitalize international criminal justice in the Security Council. Could the Security Council, through the activities of the IWGIT, contribute to this revitalization, and indicate new avenues with regard to the relevance of international criminal justice?

In this regard, a constructive and realistic suggestion on both the role of international criminal justice in the Security Council and on the IWGIT as a catalyst has been given in a statement recently delivered by one of the E10 in the Security Council. According to this statement the Security Council: «...could adopt a more structured approach in dealing with international criminal justice issues and with the International Criminal Court in particular. In this regard, we favor a broader discussion on the role international criminal justice can play in the activities of the Council, for instance by reinforcing the role of the Informal Working Group on International Tribunals. The Council needs to engage in a strategic reflection on the role of justice, including the International Criminal Court, in the prevention, restoration and maintenance of international peace»¹⁹.

¹⁹ Italy's statement in the Security Council after a briefing on the situation in Libya (8 May 2017). See www.italyun.esteri.it/rappresentanza_onu/en/comunicazione/archivio-news/2017/05/consiglio-di-sicurezza-briefing_15.html.

In the same vein, just a few days after the previous statement, with regard to ad hoc international criminal tribunals it has been affirmed that: «...the Council should assume full ownership of the work done by these subsidiary organs established in the 1990s and should incorporate their lessons into its activities. Together with the Secretariat we need to find ways to have these issues featured more systematically and analyzed more in depth. Accountability must become part of the United Nations' broader prevention strategy. *There is virtually no situation of which the Council is seized that does not require attention for accountability*: from Syria to Yemen, from Iraq to South Sudan, from the Democratic Republic of the Congo to the Central African Republic. We might have different views, but precisely for this reason we should be able to find a forum where we can discuss about these different views thoroughly, and consider all aspects of justice more systematically. We must not shy away from discussing concerns until we find viable solutions»²⁰.

And it continued: «As long as crimes continue to be committed – and there is abundant evidence that they do continue to be committed – the Council must consider situations including from the angle of accountability and, on the basis of the work done by the ICTY and ICTR, and now the Mechanism on International Criminal Tribunals, redouble efforts to be united in the fight against impunity»²¹.

I think this is a tangible contribution that the E10, together with the 'goodwill' P5, could make to the revitalization of the issue of international criminal justice in the Security Council. Today, international criminal justice is certainly seen as a taboo by some members of the Security Council, as evidenced by how it is not even referenced in debates concerning issues closely linked to the repression of international crimes, such as the protection of civilians in armed conflicts.²² Interesting elements could be deduced through the reading of the records of the Security Council meetings when international criminal justice is on the agenda of the Council. Despite constructive

²⁰ Italy's statement in the Security Council in a meeting on international criminal tribunals (7 June 2017). For the entire text of the statement, see www.italyun.esteri.it/rappresentanza_onu/it/comunicazione/archivio-news/2017/06/consiglio-di-sicurezza-dibattito_12.html (emphasis added).

²¹ *Ibid.*

²² One must recall the most recent Security Council resolution that follows up Resolution 1325 (2000) on the issue: reference is here to Resolution 2378 (2017), adopted on 20 September 2017, where no reference is made to the role of international criminal justice as a means to punish international crimes.

contributions by some members, others confine themselves to interventions that adhere more to a ritual than to principled positions.

One possible remedy to the marginalization of international criminal justice in the Security Council is restructuring and giving a broader mandate to the IWGIT or even establishing a new ad hoc subsidiary organ of the Security Council with a specific mandate centering around international criminal justice. The establishment of such a body could help redirect the attention of the international community to the activities put forward in this context, and recall the idea that respect for international humanitarian law and human rights is a fundamental step towards the maintenance of international peace and security. Acknowledging the role of international criminal justice in the Security Council would contribute to increasing the deterrent effect towards the commission of international crimes and favor the rule of law at the national and international levels.

This work started during the Italian membership in the Security Council and could be completed, continued, or even accomplished by the Dutch membership in 2018.

ABSTRACT

Non-Permanent Members of the Security Council and International Criminal Justice. A Proposal For Revitalization

Through the establishment of the *ad hoc* international criminal tribunals, the referral of cases to the ICC, and its role in establishing further pertinent international or internationalized jurisdictional instances, the Security Council was among the first supporters of contemporary international criminal justice. For reasons emanating from both within and outside the Security Council, this support has progressively decreased to the point that international criminal justice has almost become a taboo topic. However, this institutional uneasiness does not eliminate the need to fight impunity for international crimes. As was recently proposed by one of the elected members, a revitalization of the Security Council's role on this issue could and should come from within.

