International and Internationalized Criminal courts: the new face of international peace and security?

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1. Introduction: “The price of action and inaction”

On December 16, 1998, responding to a series of confrontations and incidents involving UN weapons inspectors (UNSCOM) in Iraq, former U.S. President Bill Clinton ordered U.S. armed forces to strike military and security targets in that country. In a televised address the same day, the former president justified the four-day bombing campaign (called “Desert Fox”) that ensued as a necessary means of protecting US national interests and “people around the world.” Former President Clinton ended his address by saying that “because we are acting today, it is less likely that we will face these dangers in the future.”

Being on the threshold of a new conception of international peace and security, it is important to contemplate the concluding words of Mr. Clinton in the context of international criminal law. After all, these notions – international peace and security and international criminal law – are deeply intertwined as this article will assess. Similar to the subject of international peace and security, the discipline of international criminal law finds itself on the eve of weighing “the costs of action . . . against the price of inaction.” This consciousness-raising process among international criminal lawyers surfaced in 1998–99 as a result of three far-reaching developments which arose within a year of each
other. These developments are seen to be indicative of the extent to which a
new system of international criminal law is transforming the present interna-
tional legal order. These three developments are: first, the adoption by the
United Nations Diplomatic Conference on 17 July 1998 of the Statute for an
International Criminal Court; second, the arrest in London on 16 October 1998
of Senator Augusto Ugarte Pinochet, the former President of Chile, as a result
of an extradition request by Spain for charges relating to crimes against humanity committed during his time as President; and third, the indictment issued on
27 May 1999 by the Prosecutor for the International Criminal Tribunal for the
former Yugoslavia against (former) President of the Federal Republic of
Yugoslavia, Mr. Slobodan Milosevic. This latter event was the first time that a
serving Head of State had ever been charged by an international criminal
tribunal.

Were these events isolated occurrences? Or symptoms of the emergence of
a new order in international criminal law in which international or interna-
tionalized criminal courts could be arbiters of international or regional peace
and security? If the latter is true, can the “costs” (metaphorically speaking) of
this new legal order outweigh the “price of inaction” – i.e., are such courts able
to live up to the expectation of enforcing international peace and security? Or
are these legal ventures doomed to failure in the face of political and military-
strategic imperatives?

This article examines possible answers to these questions of perennial
importance in which realm several topical issues will be addressed such as the
recent establishment of the special court for Iraq on December 10, 2003.

2. Contemporary Military, Political and International Legal Challenges
of International Peace and Security: Cause or Causative Effect?

Prior to evaluating international and internationalized criminal courts in terms
of international peace and security, the potential causal relationship between
international peace and security and the emergence of such courts, more par-
ticularly their military and political denominators is reviewed.

The term “international peace and security” as such is not defined within the
UN Charter. As a consequence, the Security Council has attributed itself broad
powers under Chapter VII of the UN Charter to determine the existence of any

See Philippe Sands, Ben Barkow and Katharine Klinger, “Preface,” in From Nuremberg to

See para 3 below.

Chapter VII is titled “Action with respect to threats to the peace, breaches of the peace and
acts of aggression.”