

COMMENTARY

The Legitimacy and Limits of “Incapacitation”: A Response to Carsten Stahn

Dan Saxon*

I read with interest Carsten Stahn’s very thoughtful recent piece entitled “The Future of International Justice.” I have some concerns about Professor Stahn’s discussion, on page 265 of this issue, of “incapacitation” as a possible role or mandate for international courts. By “incapacitation,” Professor Stahn refers to the ability of international criminal tribunals to de-legitimize political leaders and shrink the public space for denial that notorious atrocities occurred.¹ This section of Professor Stahn’s article begins with the question: “Can international justice make a contribution to incapacitation?” But before we designate the de-legitimization of political elites as an *objective* of international justice, a longer discussion needs to be held about the *propriety* of casting this goal upon a system of justice.

Who will determine, after all, which political elites require de-legitimization, and which do not? I am the first to admit that the work that I do at the ICTY often has difficult political concerns wrapped around the challenging legal issues. One could argue that, if the United Nations Security Council had not created the ICTY, Slobodan Milošević, Radovan Karadžić and Ratko Mladić might still hold positions of power in the former Yugoslavia. But of course, that argument pre-supposes that each of these men are criminals, and, to date, none have been convicted of any crimes. The danger in using “incapacitation” as an objective of international justice (rather than a result) is that such presumptions may be wrong and are open to abuse and manipulation.

Therefore, I am troubled by a bald acceptance that un-seating politicians is a legitimate *purpose* of the judicial process. I have always understood the law and the courts to be about limiting the uses of power, rather than as a weapon of political power. Professor Stahn notes that following the ICTY’s 1995 indictment of Radovan Karadžić, Mr. Karadžić was unable to participate in the Dayton peace negotiations. But this political effect of the Karadžić indictment was the result,

* Dan Saxon is Senior Trial Attorney at the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY). The views expressed herein are those of the author alone and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

¹ I have discussed this phenomenon in my own writing. See D. Saxon, *Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian and Muslim Communities*, 4 (4) The Journal of Human Rights 559 (2005).

not the intent, of the accusations. Indeed, the ICTY brought this indictment in the middle of the Dayton talks, which was, politically, the *least* expedient time, resulting in a great deal of criticism of the ICTY for interfering with the peace process.²

Such political effects of the ICTY, while real, raise other difficult questions about the proper role of international tribunals. It is necessary now, to borrow a phrase from Antoine Garapon, to rethink “the articulation of justice and politics”.³ For example, if the main achievements of international tribunals like the ICTY are political, rather than legal, should such courts be established in the first place? Are they potentially dangerous instruments rather than tools for the creation of the rule of law? One is reminded of the last Bush administration’s oft-stated criticism of the new International Criminal Court that a “rogue Prosecutor”, with a political agenda, might unfairly target American military officers.

As I have argued previously, however, the suggestion that law is somehow divorced from politics is naïve. Law is only an extension of politics, and if well-reasoned legal decisions can lead to more favourable conditions (i.e. *political* conditions) for the respect of human rights, there seems nothing inappropriate for using the law as such a benevolent tool. The danger lies when courts are established and legal decisions made with the aim of changing politics rather than the goal of making law. If the former, then those courts and the individuals who operate them will quickly lose the credibility of the public they serve, thereby sealing their demise.

In conclusion, while using systems of international justice to incapacitate politicians may be politically – and morally – justified in certain circumstances, I am not aware of any well-reasoned explanation that makes this a “legal” goal of courts. I hope that further discussion of Professor Stahn’s concept of “incapacitation” will occur to determine its proper scope and use.

² A. Neier, *Is International Justice the Enemy of Peace?*, Open Society Institute, 17 July 2008, available at <http://www.soros.org/resources/articles_publications/articles/justice_20080717>.

³ A. Garapon, *Three Challenges for International Justice*, Grotius Centre, The Hague, 4 May 2004, p. 12.