

VIEWPOINT: Justice the Only Victor

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Defendants have always challenged the legitimacy of war crimes tribunals - and they have almost always been wrong.

Slobodan Milosevic is not the first to challenge the legitimacy of a war crimes tribunal. Throughout the history of such tribunals, the accused have blasted their courts as politicised.

After World War I, Kaiser Wilhelm II, hiding in Holland from Allied prosecution as a war criminal, complained that "a tribunal where the enemy would be judge and party would not be an organ of the law but an instrument of political tyranny aiming only at justifying my condemnation". At Nuremberg, Hermann Goring signed his own indictment, "The victor will always be the judge, and the vanquished the accused." And Tojo Hideki, facing war crimes charges at the Tokyo tribunal, said, "In the last analysis, this trial was a political trial. It was only victors' justice."

And Milosevic is not the only one making this kind of argument against The Hague. Immediately after ousting him, Vojislav Kostunica, the new Yugoslav president, called the tribunal "a political institution and not a legal institution; actually not a court at all". These arguments have been echoed at least in part by some Serbian intellectuals, including Aleksa Djilas writing in *Tribunal Update*, and in the West by some on the left who distrust American power (like British playwright Harold Pinter and Canadian law professor Michael Mandel) and by some on the right who distrust international institutions (like Time columnist Charles Krauthammer).

Yet the charge that the court is merely victor's justice does not bear scrutiny.

The first allegation is that the court is really run by the Americans. As Kostunica, himself a legal scholar, has put it, "The Hague court is not an international court, it is an American court and it is absolutely controlled by the American government."

This is far too strong. War crimes prosecutions are carried out by lawyers, not by politicians. Robert Jackson, the US Supreme Court Justice who served as American chief prosecutor at Nuremberg, washed his hands of politics, saying that he had no opinion on the political decision to set up the court. His job - like those of the judges in The Hague - was only to ensure that the court was fair.

True, the risk of losing massive US economic aid compelled Serbian Prime Minister Zoran Djindjic to surrender Milosevic. But this hardly means The Hague dances to Washington's tune. Far from being a tool of NATO, the tribunal has often been an annoyance to the alliance, pushing an agenda of justice that is often at odds with the West's political agenda.

Indeed, The Hague has always had an uneasy relationship with NATO, concerned that the court's independent indictments can undermine Balkan diplomacy. Richard Holbrooke, the Clinton administration's chief Balkan negotiator, worried that the tribunal might indict Milosevic during the Dayton peace talks, possibly wrecking the deal. Especially in the early days of the Bosnian peace implementation, Western diplomats worried that arrests of indictees could also be destabilising.

Even Nuremberg, although an Allied military tribunal, still had great independence - to the annoyance of the Soviets. But unlike Nuremberg, where the victors were indeed the judges, The Hague is an international body. The tribunal was created by an unanimous vote in the Security Council, including China and Russia. Its judges and prosecutors are named by the United Nations, not the United States. Milosevic was indicted by a Canadian (a move that annoyed many US officials, who were trying to negotiate a peace

agreement with Belgrade) and will be prosecuted by a Swiss.

Milosevic's plea was heard by a British judge, but the tribunal's complete bench, elected by the General Assembly, is stocked with jurists from Zambia, Portugal, Australia, Malaysia, France, Colombia, Guyana, Egypt, America, Jamaica, Italy and China. If many Western Europeans are troubled by George W. Bush's unilateralism, then The Hague should be a poster child for institutionalised multilateralism.

Due process is the hallmark of a real court. So it is no surprise that Milosevic is preparing his defence by insisting that the tribunal is rigged. In February, before his arrest in Belgrade, he said wildly, "I've always considered the international tribunal at The Hague an illegal and immoral institution, invented as reprisal for disobedient representatives of a disobedient people - as once there were concentration camps for superfluous peoples and people."

Putting aside the absurd Holocaust reference, Americans themselves worried a half-century ago that Nuremberg was tainted by the presence of a Soviet judge, who assumed all the German defendants were guilty.

But the liberals at Nuremberg did their best to stymie the Soviets. The US, British and French delegations were appalled by Soviet machinations. It's true that a totalitarian regime like that of Joseph Stalin might well try to rig a war crimes tribunal. In a Kafkaesque touch, the Soviets sent Andrei Vishinsky, the notorious prosecutor of the Moscow show trials, to Nuremberg. US chief prosecutor Jackson, horrified by Vishinsky, insisted on keeping Nuremberg as a bona fide court where due process ruled.

Richard Goldstone, Louise Arbour, and Carla Del Ponte - the tribunal's chief prosecutors - are in the tradition of Jackson, not Vishinsky. The Hague has dispensed anything but Soviet-style justice. Its judges are well-respected; its opinions are closely argued; it has an appeals chamber; it has acquitted a number of defendants; and it has tried to give proportional sentences to the guilty. As many of its judges and prosecutors have pointed out, The Hague tribunal, by focusing on individual responsibility, is specifically intended to rehabilitate Serbia. The point may be hard for Milosevic to accept. But judging by the rapid re-integration of Serbs into the international community, it seems already to be working.

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Location: China
Stavropol
Serbia
Russia

Focus: International Criminal Tribunal for the former
Yugoslavia

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