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MILOSEVIC'S ARREST: AN OPPORTUNITY TO REFORM THE U.N. TRIBUNAL

MICHAEL SCARDAVILLE AND JOHN C. HULSMAN, PH.D.

Now that the new democratic government of the Federal Republic of Yugoslavia has arrested former dictator Slobodan Milosevic on domestic charges, calls are increasing to extradite him to the Hague to be tried by the International Criminal Tribunal for Yugoslavia (ICTY). Although Milosevic must be held accountable for the atrocities committed during his rule, having him tried by foreign officials at the Hague will do little to eradicate the ethnic hatreds that enflamed the Balkans for much of the past 10 years. Worse, it could aggravate them. Milosevic's arrest should be recognized as an opportunity to restructure the Tribunal to give the people of the Balkans responsibility for writing their own history and to enable real reconciliation to take root.

Why the Tribunal Needs Reform. When the Tribunal was created in 1993, Milosevic was fighting wars in Bosnia, Croatia, and Slovenia and brutally oppressing the Kosovar Albanian minority in the southern region of his country. Next door, Croatian President Franjo Tudjman was fighting Bosnian Muslims and Serbs for control of Bosnia. Just eight years later, Milosevic is detained in a Belgrade prison and Tudjman is dead. The new leaders of Yugoslavia and Croatia—Vojislav Kostunica and Stjepan Mesic—are committed to turning their war-torn states into modern democracies and recognize that their countries must come to terms with the atrocities their former dictators committed. Most people in the Balkans are tired of fighting and desire a new era of reconciliation and cooperation.

Yet the structure of the Tribunal has not been changed to account for these democratic developments. The people, particularly the Serbs and Croats and their respective groupings in Bosnia-Herzegovina, do not trust or even recognize its authority. They may grudgingly cooperate with it, but only in deference to the greater power of the international coalition that invested significant resources to end the conflict in the Balkans. Such a relationship has historical precedent: Over the past two centuries, great powers have intervened in Balkan affairs and local people, too weak to oppose, have resentfully accepted their *diktats* while stoking their ethnic hatreds.

The current structure of the Tribunal is based on that old relationship. Article 9 of the ICTY charter declares that the Tribunal "shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal." Yet it also states that "the International Tribunal and national courts shall have concurrent jurisdiction to

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Kathryn and Shelby
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prosecute persons for serious violations of international humanitarian law," a provision reaffirmed in U.N. Resolution 1329 on November 30, 2000. The contradictory nature of these two statements enabled the Tribunal to determine its own operational mandate. It chose supremacy.

Rather than relying on the national courts to exercise their jurisdiction in adjudicating the war crimes, as one would expect of democratic governments, the Tribunal will rely on the decision of foreign judges—including one from the People's Republic of China—thereby eliminating the Balkan peoples' accountability and responsibility for meeting international standards. By creating this intrusive yet simultaneously detached role for itself, the Tribunal has distanced itself from the very people an investigation of war crimes should influence. Unless the Balkan people have a primary role in writing their own history and addressing war crimes, true reconciliation will not occur and the future will merely be a continuation of the recent past.

America's Role. An international coalition led by the United States invested significant time and treasure to save the people of the Balkans from themselves. This coalition is not likely to walk away. Nor should it. But the form its involvement takes will have consequences. The United States and its allies should continue to nurture indigenous progress toward democratization and reconciliation in the region. If they are truly committed to this process, the United States and its allies should act as advisor and verifier of local actions on a case-by-case basis. This would enable them to retain the highest degree of diplomatic flexibility. It also would embrace the new governments' commitments to democracy and stability and place responsibility for the future in the hands of the Balkan people.

Reforming the Tribunal. The United States should press the U.N. Security Council to amend Article 9 of the ICTY charter to eliminate contradictory provisions and to establish a new mandate that reflects the democratic realities in Yugoslavia and

Croatia. The amendment should transfer general responsibility for holding war crimes trials to the national judicial systems, while making the Tribunal responsible for certifying a trial's legitimacy. Such a change would preserve the Tribunal's key role in ensuring that international standards are met while placing responsibility for justice and reconciliation in the hands of the popularly elected governments. The ICTY could continue to investigate and issue indictments for war crimes, even while realizing that new debates may arise over the legitimacy of its indictments.

The national governments should cooperate with the Tribunal investigations and assure that the Tribunal is represented during national proceedings, based on its indictments. In practice, this could mean that the Tribunal assigns a prosecutor to the case or cooperates with the national prosecutor. A Tribunal judge also could advise national judges and attest to the trial's legitimacy after its conclusion. If the ICTY judge rules the trial was not legitimate, he or she could request the extradition of the accused to the Hague for an international trial, subject to an appeals process. To ensure the greatest degree of transparency, all trials should be open and broadcast nationally and internationally on television, radio, and the Internet.

Conclusion. Reforming the ICTY charter is more essential now that Milosevic is in custody and calls are increasing to have him stand trial at the Hague. The people of Yugoslavia and Croatia now have democratic governments, and they should be responsible for assuring justice is served and reconciliation begins. Reforming the Tribunal to give them a greater role represents a sea change in how the United States approaches conflict resolution in the Balkans. It abandons the Clinton policy of nation-building in favor of one that supports indigenous democratization and regional cooperation.

—Michael Scardaville is a Research Assistant, and John C. Hulsman, Ph.D., a Research Fellow, in the Kathryn and Shelby Cullom Davis Institute for International Studies at The Heritage Foundation.