The character of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has changed three times so far. In the first phase of its existence, after it was established in February 1993, the Tribunal served as a means of making amends. The big powers felt they were responsible for failing to act in time and prevent war crimes committed in Croatia in 1991 and in Bosnia in 1992. All war crimes committed during this period were subjected to strong condemnation by the international public, which also expressed outrage over the failure by the big powers to prevent them, although they had had the military capacity to do so.

For quite a while the policies of the big powers towards the warring sides in the former Yugoslavia were confused, to say the least. The United States initially stayed out of the crisis completely - its last deed, made by the Bush administration in 1991, was extending support for the preservation of Yugoslavia and reformist policies of the then Yugoslav Prime Minister, Ante Marković. The initiative in the search for a halt to the break-up of Yugoslavia was then assumed by the European Union. The big powers made almost no reaction at all when the war in Slovenia broke out. It was only in the summer of 1991 that a EU ministerial troika arrived in Yugoslavia in what was an unsuccessful bid to prevent a further escalation of the crisis. The war in Croatia began in the autumn of 1991, and in Bosnia, war broke out after the collapse of the Cutilhero plan for the division of Bosnia early in 1992.

For a long time the big powers harboured illusions that diplomacy would be sufficient to prevent wars and crimes committed in them. The first calls for military intervention were made early in 1993, after Bill Clinton’s election to the US Presidency. The idea was allegedly shelved after Clinton read Robert Kaplan’s book *The Balkan Ghosts*, a factually weak work but one holding a clear warning that the Balkans were a quagmire to be avoided at all costs. Once it had become clear that the failure to prevent the disintegration of Yugoslavia had opened the door to war and the spilling of innocent blood, in February 1993 the ICTY was established at the Hague as an expedient of big powers to accomplish post factum what they had not been able to do when the time was right.

In its first three years the Tribunal was mainly involved in issuing indictments, mainly because the war was still raging and no one had any reason to cooperate either with the Tribunal or with the big powers. But then an event took place that changed its character for the first time: the warring sides ended the conflict and assumed obligations to cooperate with the big powers. By signing the Dayton Agreement in November 1995, Bosnia, Croatia and the FR Yugoslavia - the representatives of the governments bearing
most of the responsibility for war crimes - formally pledged to cooperate with the ICTY. This improvement of relations between the big powers and the warring sides created hope that concrete cooperation would begin and that war crimes indictees would be handed over. To a certain extent that did happen. Croatia adopted in March 1996 a Constitutional Law on Cooperation of the Republic of Croatia with the International Criminal Tribunal, and sent a dozen war crimes indictees to the Hague on that basis. Regardless of Croatia’s primacy in cooperating with the ICTY, it was evident that Zagreb was generous only in regard to the extradition of Bosnian Croats, while those who were Croatian citizens were not sent to the Hague.

It appeared in 1996 that Serbia would follow Croatia’s lead; its president, Slobodan Milošević, became after Dayton a close ally of the US administration, which declared him the chief peacemaker in the Balkans. But Serbia failed to hand over to the Tribunal either Bosnian or its own citizens. Although many war crimes indictees moved freely around Belgrade and the rest of Serbia, neither the big powers, the ICTY Prosecutors nor Milošević did anything towards the fulfillment of the relevant provisions of the Dayton Agreement. Although the FRY did not extradite anyone to the ICTY during the period when relations between Milošević and the Clinton administration were friendly, Milošević continued enjoying the unreserved support of Europe and the US. It went so far that when Milošević tried to cancel the undesirable results of local elections, Washington waited for more than two weeks for him to resolve the crisis on his own before reacting and siding with the Serbian opposition.

As we have seen, there was partial cooperation with the ICTY during this period, but only by Croatia and not Serbia. But it could already be seen in the case of Croatia that it was impossible to separate the work of the Tribunal from political conditionality. One of the score or so of conditions issued to Croatia for admittance to the Council of Europe was cooperation with the ICTY. In contrast to Serbia, Croatia sought immediately after Dayton to integrate itself into the international community and therefore had to meet the conditions being laid by it.

On the other side, the big powers were a little more pliant towards Milošević in regard to the issue of (non-)cooperation with the ICTY because in contrast to other Balkan leaders, he had been regarded for a long time as the main architect of the wars in the region. This concession was a sort of reward for Milošević’s decisive pressure on the Bosnian Serbs to halt the war and accept his signature on the Dayton Agreement, but also a result of the fact that Serbia had never aspired towards even formal integration into the international community. The relatively good relations between Serbia and the West, in particular the US, broke down after the outbreak of fighting in Kosovo in 1998 and the 1999 NATO intervention against the FRY. During the aggression, Milošević himself was indicted for war crimes in Kosovo, and there appeared at that moment no chance whatsoever of any cooperation between the ICTY and the FRY.

3.

The Tribunal began to operate more efficaciously only when the necessary conditions for political conditionality had appeared, primarily as a result of the fall in 2000 of authoritarian regimes in both Serbia and Croatia and their replacement by democratic administrations. As soon as the authoritarian leaders had fallen in Serbia and Croatia, the ICTY’s prosecutors stepped up their activities and began exerting pressure on the new
governments to upgrade their cooperation with the Hague. The Tribunal could not have been established as a mechanism of pressure without a replacement of the governments of the countries targeted as those which were to cooperate with the ICTY. Carla del Ponte, named chief prosecutor late in 1999, has been very aggressive in trying to accomplish her goals and bring suspects to justice. As we have seen, cooperation was formally possible, but not effectively, due to the authoritarian nature of the regimes in Croatia and Yugoslavia. Even if the big powers had tried to exert pressures to enforce cooperation with the Tribunal, the authoritarian regimes would have found it easy to avoid their obligations as they harboured little interest in good relations with the big powers and full reintegration into the international community.

The strategy of waiting for favourable conditions to increase pressure is shown by the ICTY prosecution's attitude towards the FRY in the period between 24 September and 23 December 2000. The Tribunal did not begin pressuring the Yugoslav and Serbian governments to begin cooperating immediately after the October 5 democratic turnabout, but instead waited for the outcome of the 23 December elections. As soon as she had seen that the outcome was positive and that Milošević was politically dead, the ICTY's prosecutor travelled to Belgrade in January 2001 and began demanding the handover of war crimes indictees.

What form does the conditionality applied by the Tribunal take? It needs to be said that the Tribunal is not a mechanism in the service of the interests of the governments of the big powers or other international institutions, but in fact the opposite: the Tribunal lobbies the governments of the big powers in an effort to force the governments of the ex-Yugoslav states to start cooperating with it by extraditing indictees or in other manner. In the case of the FR Yugoslavia, it happened twice so far - the first was Slobodan Milošević's arrest on 1 April 2001, and the second his handover to the ICTY on 28 June that year. On both occasions the Yugoslav and Serbian authorities were under direct or indirect pressure - the extradition was tied to foreign financial aid. In the first case it was direct assistance from the US budget worth USD 100 million, and in the second the outcome of the Donor Conference - after Milošević's handover, the final sum reached USD 1.2 billion. Had Milošević not been extradited, the Paris Club of creditors would certainly not have written off that November 66% of Yugoslavia's foreign debt. Pressure in this form continues. Late in 2001, the US administration once again made financial assistance to the FRY, this time worth USD 115 million, conditional on enhanced cooperation with the ICTY, whatever that means.

4.

The Hague Tribunal can operate efficiently only with the help of political pressure applied by the big powers. Two circumstances make this possible: the first is the political bias of the ICTY's prosecutors, and the second the nationalism exhibited by the new democratic governments in Serbia and Croatia.

The Tribunal's method of pressure works because it exploits its good connections with the governments of the big powers, but also because of the fact that it is avoiding investigations which would probably lead to the questioning of senior officials in those governments. The converse is not the case: the Hague Tribunal is not a means of pressure used by governments. The Tribunal is not even being treated as a political instrument in the traditional sense of the word, but it is logical to assume that it will not
conduct any investigative activities into the affairs of governments which have the capacity to make aid to ex-Yugoslav states conditional on their cooperation with the ICTY. If the Tribunal were to begin indicting these governments’ officials for war crimes, it would lose the help it gets in the form of efficient pressure mechanisms.

In the period after the fall of the authoritarian regimes in Serbia and Croatia, the Tribunal has shown a divided character. It is a legal institution serving to prosecute those charged with war crimes, but one politically biased to some extent. It has not considered issuing indictments against many reasonably suspected of having committed war crimes, especially in the post-1998 period. But it also needs to be stressed that the political bias of the Tribunal is limited to the Office of the Prosecutor (OTP). As far as the Tribunal itself is concerned, its adjudication is impartial and its treatment of different cases equitable. But this is definitely not the case with the OTP, which affords similar cases different treatment. The OTP rightly indicted and launched inquiries against Serbia’s political leadership for crimes committed in Kosovo in the 1998-99 period. But it remains unclear why three years after the end of the war in Kosovo it has filed no indictments against those who bombed the building of the Serbian TV in Belgrade on 23 April 1999. This is not an oversight in the work of the Prosecutor. The OTP has issued an indictment against Milan Martić, ex-president of the former Republic of Serb Krajina, for employing in the shelling of Zagreb in 1995 cluster munitions whose use is banned in areas populated by civilians. Cluster bombs were however also used by NATO in 1999 against the city of Niš, most definitely a civilian-populated area. Martić is now hiding from the Tribunal somewhere in Serbia or Bosnia, while the then NATO commander, Gen. Wesley Clark, is walking about openly.

The only manner in which we could explain such an approach by the OTP is that it is politically biased and that a possible inquiry against the criminal bombing of Serbian TV might lead right up to the top of NATO or perhaps the heads of some of its member-countries’ governments. The bias exhibited by the Prosecutor’s office shows that the activities of at least one of the ICTY’s organs are based more on politics than law, creating the necessary preconditions for the political pressures accompanying the work of the Tribunal.

On the other hand, some of the political forces which toppled Tudjman's regime in Croatia and Milošević's in Serbia are nationalistic. Parties like the Croatian Social Liberal Alliance and the Democratic Party of Serbia (DSS) are against unilateral cooperation with the ICTY and do everything possible to hinder it. The problem is even bigger in Croatia, as Tudjman's Croatian Democratic Union (HSZ) still enjoys considerable voter support (about 25%), and because of the large number of war veterans (over 100,000) who depend on the state budget and view cooperation with the Tribunal as a potential blow against their financial privileges. The Croatian political scene was dominated in 2001 by relations with the Tribunal. The demand for the extradition of Gen. Mirko Norac in May 2001 caused major political upheaval and street protests, forcing the government in Zagreb to ask the ICTY to allow Norac to be tried at home. Soon after, a government crisis ensued after Prime Minister Ivica Račan announced that the Government would hand over Gens. Gotovina and Ademi. The OTP and the international community then eased their pressure to avoid upsetting the stability of Račan's government.

Cooperation with the OTP is no smoother in Serbia. The main obstacle is the DSS and its leader, Yugoslav President Vojislav Koštunica, who is not only opposed to the à la carte style handovers of the Serbian Government, but places national interests above
extraditions, in that manner asserting that the principle of the precedence of human rights is invalid. The DSS's views about cooperation with the ICTY are perhaps best seen by studying the draft law the party submitted to the Serbian Parliament late in December last year - after reading the text, the impression is gained that its authors' intention was to obstruct rather than ease cooperation between the FRY and the ICTY. It treats the OTP as if it were one of the parties in a lawsuit in domestic legal proceedings, where no action can be undertaken without a binding decision by a domestic state or judicial authority. It insists on the sovereignty of the state and explicitly demands that in some segments, although this contravenes the principle of the supremacy of international agreements, international law should be brought in conformity with domestic law. The entire procedure, from investigative activities to extradition, is made dependent on domestic law and reasons of state. The Supreme Court of Serbia can rule against a motion to conduct an investigation “if it could be detrimental to the security of the state or national defence”; that Court can also annul consent that has been issued for an inquiry “if it contravenes domestic regulations”; the federal government can refuse to extradite an indictee “if it finds that this would harm the interests of the state”. The proposed extradition procedure is quite complex and tailored in a way which would complicate and draw out cooperation.

Adoption of the bill would certainly further worsen relations between the DSS and the Serbian Government, which is already used to handing over indictees under pressure, unconditionally and without a complex legal procedure. Such a law, which is even more restrictive than that in force in Croatia, would certainly also render cooperation with the ICTY even more difficult and provoke even stronger pressures and conditionality by the international community.

5.

Late in 2001, the Tribunal at the Hague once more altered its character. It is no longer an institution exerting pressure on democratic governments and making foreign aid conditional on cooperation with it, but has become an ace drawn by governments bent on extracting economic or diplomatic help, a major contribution to this being the result of the utilitarian policies of Serbian Prime Minister Zoran Đindjić. This was seen in the case of Slobodan Milošević: before his arrest the US administration had threatened to withhold financial aid, but there was no direct conditionality in the run up to his extradition on 28 June, only signals that the donor conference, scheduled to start the very next day, might not be a full success. All that existed at the time were thus indications that Yugoslavia might not get the promised financial aid. In order to resolve the dilemmas and end the uncertainty, On 28 June Đindjić called a meeting of the government, which at once issued a decree under which Milošević was handed over. Success of the Donor Conference was now certain.

This action of the Serbian Government shows how it views future cooperation with the ICTY. The government has taken the initiative from the Tribunal and preempts events, handing over indictees even when it is not explicitly demanded - this became evident after the extradition of the Banović brothers on 8 November 2001. At the moment they were handed over, the Serbian prime minister was visiting the US and talks between a Serbian delegation and the Paris Club on writing off two-thirds of the debts amassed by the former Yugoslavia were scheduled to begin a few days later. There were no indications during the preparatory stages of those talks that they could fail due to poor
cooperation with the ICTY. But the brothers were nevertheless handed over on the eve
of Đindjić’s meeting with the US President George Bush, who praised the Serbian
government for its action. Thus was ensured diplomatic support in the talks with the
Paris Club, which wrote off 66% of the Yugoslav debt, alongside Bosnia-Herzegovina
the biggest concession made to a post-communist country since 1990.

The Serbian Government is trying to alter the practice and the character of the Hague
Tribunal - instead of waiting for the OTP to step up pressure and issue conditions, it is
handing over indictees before their onset. This could easily result in a temporary easing
of the pressure on the Serbian and Yugoslav governments, but internal divisions on the
issue of cooperation with the ICTY will most probably continue to grow, in turn creating
new grounds for the exercise of conditionality.

6.

It is not possible to imagine at his moment in time that the Tribunal could continue
operating successfully without the application of more political pressure. But it is also
conceivable that its work would be far more efficient if those pressures did not exist. As
we have said, the nationalism of the new authorities in Serbia and Croatia is certainly one
of the generators of the political conditionality to which the OTP resorts as the only
possible efficient mechanism.

But it can also be argued that cooperation of Serbia and Croatia with the ICTY would be
far smoother and pressure-free in the absence of the conditions which exist within the
international community itself which aggravate such cooperation. The international
community is quite clear in its demand for the ex-Yugoslav states to take the Tribunal
seriously, yet it isn’t ready to do so itself. That reluctance in the case of the ICTY is not
an isolated case, and this is shown by the four-year-long experience with the
establishment of a permanent international criminal court. That court’s statute was
adopted in Rome in 1998 and signed by 139 countries, but so far only 32 of the required
60 countries have ratified it. But it is even more important for that statute to be ratified
by the big powers, like the US, which has been stalling on the issue. It is quite possible
that acceptance of unselective justice will lead to the successful establishment of an
international criminal court, just as it is certain that acceptance of unselective justice
would lead to the abolition of political pressures and more efficiency by the Hague
Tribunal in prosecuting war criminals.