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THE DOCTRINE OF JOINT CRIMINAL ENTERPRISE IN THE JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA[1]

The concept of a group of people getting together to commit a crime seems simple, but joint criminal enterprise, or JCE as created and used by the ICTY courts, presents serious problems.

For an international tribunal to have credence, not be subject to a charge of merely representing victors' justice or of being biased, legitimately charged violations of international humanitarian law must have been generally accepted before the alleged conduct took place.

The application of the principle **nullum crimen sine lege** [a person should not be held criminal responsible unless the conduct in question was criminal at the time of the action] requires that the international tribunal should apply rules of international humanitarian law which are, beyond any doubt, part of customary international law. There are many doubts, however, that the JCE concept is part of customary international law. There is grave, grave doubt about this. And, as I will note later, the academic community has been severally divided over this issue.

Article 7(1) states: [a] person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in [Articles] 2 to 5 of the present Statute, shall be individually responsible for the crime.[2]

There is no criminal liability listed in the statute for JCE; plainly the Tribunal is not a legislative body empowered to create crimes. It can only apply

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[1] This paper is based upon a speech made on April 22, 2009 before The Academy of Science, Institute for the Study of the Balcan Conflict and the Srebrenica Historical Project in Moscow, Russian Federation.

[2] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, 32 ILM 1159 (1993), as amended by Security Council Resolution 1660 of 28 February 2006 (ICTY Statute), Article 7(1)

the facts to a crime first defined by the U.N. Security Council. The power of the Security Council to legislate is challenged by many scholars.

This Statute stands in contrast to the Rome Statute of the International Criminal Courts, which expressly states that individual criminal liability exists **if a person intentionally contributes to the commission [of] a crime by a group of persons acting with a common purpose in limited and specified circumstances**.[3]

The ICTY Court has been very careful to say that joint criminal enterprise is not the creation of a new crime. It is simply the articulation of a principle of criminal liability under the word **committed** which is in the statute.[4]

But functionally, it is obviously a new crime. It is like conspiracy. It is like the American concept of RICO. It is like what appears in the Rome Statute. Yet all of those are statutorily authorized crimes or statutorily authorized bases for criminal liability. Here what looks like a crime, sounds like a crime, and has all the criteria of criminality, was in effect created by a Court, in the absence of any statutory basis.

None of the five distinct modes of involvement established in Article 7(1) which can expose individuals to criminal liability is JCE. Rather, JCE in practice operates much like a conglomeration, coupled with an expansion, of the five defined modes, allowing prosecutors and judges to aggregate the cumulative evidence against an accused to find him guilty of some generalized crime, without proof that the accused did plan, instigate, order, commit or otherwise aid and abet any specific criminal.

Frequently the actual formulation used to describe JCE varies, because it has been developed by judges in the decisions they have rendered. There are three forms of JCE.[5] I will highlight herein only the first form, which was described as follows, in the Krajišnik Trial Judgement:

> all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they … all possess the intent to kill.
>
> The decision goes on to say the objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have effected the killing are as follows:
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> (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and

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[3] Rome Statute, Article 25 (3)(d)

[4] *Tadić* Appeals Judgement, Case No. IT–94–1-A

[5] *Krajišnik*, Trial Judgement, Case No. IT-00–39-T, para. 879

(ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.[6]

In Krajišnik, the Court went on to summarize the first [and third] form as follows:

(i) Plurality of persons. A joint criminal enterprise exists when a plurality of persons participate in the realization of a common criminal objective.

The persons participating in the criminal enterprise need not be organized in a military, political, or administrative structure.

(ii) A common objective which amounts to or involves the commission of a crime provided for in the Statute. The first form of the JCE exists where the common objective amounts to, or involves the commission of a crime provided for in the Statute. The mens rea required for the first form is that the JCE participants, including the accused, had a common state of mind, namely the state of mind that the statutory crime(s) forming part of the objective should be carried out.

The Court then said, a JCE may exist even if none or only some of the principal perpetrators are part of it, because, for example, they are not aware of the JCE or its objective and are procured by members of the JCE to commit crimes which further that objective.

(iii) Participation of the accused in the objective's implementation. This is achieved by the accused's commission of a crime forming part of the common objective (and provided for in the Statute). Alternatively, [**And this is the nub of the problem it goes on to say]** instead of committing the intended crime as a principal perpetrator, the accused's conduct may satisfy this element if it involved procuring or giving assistance to the execution of a crime forming part of the common objective.

A contribution of the accused to the JCE need not have been, as a matter of law, either substantial or necessary to the achievement of the JCE's objective.[7]

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[6] *Krajišnik*, Trial Judgement, paras..880–81. The second form of JCE, which is described as a special case of the fist form, found to have served cases where the offences charged were alleged to have been committed by members of military or administrative units, such as those running concentration camps and comparable "systems."

The third form of JCE is characterized by a common criminal design to pursue a course of conduct where one or more of the co-perpetrators commit an act which, while outside the common design, is a natural and foreseeable consequence of the implementation of that design.

[7] *Krajišnik*, Trial Judgment, para. 883 (iii)

The recent Krajišnik case to shows how amorphous the concept has become. There is no question for example that Mr. Krajišnik was a strong, vocal advocate for protecting Serbian interests, and that he sought to avoid Serbs being a powerless minority within a separate country of Bosnia-Herzegovina. There is further no doubt that he was a principal negotiator seeking to establish that position. What is seriously in doubt, what is not only unclear but was internally inconsistent within the decisions in Krajišnik, is any indication that Mr. Krajišnik shared a common objective to carry out violations of the statute, the permanent removal by force of Croats and Muslims, and that he participated during the indictment period in any criminal acts to effectuate the common criminal goal. What constituted the actus reus of Mr. Krajišnik? The Opinions, the indictment and the Prosecution all concur — that he did not personally commit war crimes. He did not engage in looting or burglary or rape or murder. He was not charged with waging a war. Mr. Krajišnik was convicted for acts which are accurately characterized as political speech and political activity. Here defendant's actus reus was based on human rights protected conduct. Had a State tried to prevent Mr. Krajišnik from making the speeches that formed the basis for the criminal liability here, that state itself would have been violating norms of customary international law.

There are inherent problems with allowing "participation in a JCE" to have been established solely because a person performs an act which, in some way, whether intentionally or not, furthers the JCE. But the problems, I submit, are exacerbated if the sole act is political speech. Numerous examples from the daily newspapers show the point, whether it involved North Korea, Afghanistan, Pakistan, Gaza, etc. There are often agreements between doves and hawks as to the goal, but serious disagreements as to means of achieving that goal. Look historically, for example, at the actions of Mahatma Gandhi and Martin Luther King, Jr.: both advocated the use of peaceful means to effectuate a common goal that they shared with others. But, it could be argued that the speeches of Gandhi and King — which sought change by peaceful means — actually advanced the objectives of those who used violence to effectuate the common goal.

The Appeals Tribunal in Krajišnik, sadly, concluded that political speech can and should be treated as an act no different than other acts. It chose not to accord a greater protection to political speech. The ICTY Tribunal thus concluded that a person who performs an act which advances the JCE shared goal (even if legitimate) is guilty of participating in a JCE. This conclusion is a radical departure from what in the past was viewed as participating in war crimes. The view that a person must abandon a legitimate goal because advancing his goal would aid those with whom he disagrees, has extraordinary implications for international law. Whether such principles constitute previously established law or customs of law is seriously debatable.

The Appeals Judgment in Krajišnik states:

> "JCE counsel further asserts that Krajinik's speeches cannot, as a matter of law, constitute a contribution to a JCE, because they were

> protected under his right to freedom of speech. The Appeals Chamber disagrees. What matters in terms of law is that the accused lends a significant contribution to the commission of the crimes involved in the JCE. Beyond that, the law does not foresee specific types of conduct which *per se* could not be considered a contribution to the common purpose. Within these legal confines, the question of whether the accused contributed to a JCE is a question of fact to be determined on a case-by-case basis."

The argument that was advanced on Krajišnik's behalf was that political speech is in a different category from other acts, and must be given greater protection. A political speech can incite but whether such a speech can be viewed as contributing to a JCE which advocates committing war crimes as a means of effectuating such a legitimate goal, cannot be so blithely dismissed.

Thus a person who made an effort to create a separate Serbian-Bosnian Republic — peacefully — could be declared a war criminal. This result is in direct conflict with the report of the Secretary-General accompanying the statute, and the language and objective of the statute itself.

Let me explain how this happened.

History

As noted, there is no statutory description of individual criminal liability through JCE or membership in a JCE in the ICTY statutes.

JCE liability is without any textual basis. It is but a theory created and developed by ICTY judges, at the urging of ICTY prosecutors, to expand the scope of criminal liability under the Statute. This was improper, since the forms of liability set forth in Article 7(1) are specific and exhaustive. The Statute drafters did not contemplate that ICTY judges would develop and add new theories of liability; in the Secretary-General's Report which accompanied the draft statute, ICTY judges were expressly invited to decide on various personal defenses which may relieve a person of individual criminal responsibility drawing upon general principles of law recognized by all nations.[8] There was no such invitation to develop new modes of liability.[9]

Moreover, the Statute drafters expressly considered the problem of liability for heads of State and other actors who might be removed from an actual crime, and in Articles 7(2) and 7(3), the drafters explicitly addressed the issue, without creating any JCE or common plan liability.

The Report of the Secretary-General accompanying the original draft of the Statute expressly stated:

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[8] UN DOC S/25704, para. 58

[9] Steven Powles, Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity, P2, Criminal Justice, 606–613 (2004)

> Virtually all of the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The State should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment.
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> A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. And, he should also be held responsible for failure to prevent a crime or to deter the unlawful behavior of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.[10]

These stated principles, incorporated as Articles 7(2) and 7(3), indicate that the Statute's drafters carefully considered the specific issue of liability for government officials, and that their solution was twofold: they eliminated any notion of official immunity, and provided that superiors would be liable for actions of their subordinates in certain limited circumstances. Article 7(3) establishes the culpability of a superior for the actions of a subordinate. By using JCE, the Tribunal in effect circumvents the statutory articulation of subordinate--superior liability and creates a different category, JCE, to secure culpability based upon comparable principles when the statutory definition is found inapplicable.

JCE liability thus illegitimately extends the scope of criminal liability for high-level government officials far beyond that contemplated by the Statute's drafters. The *Tadić* Appeals Chamber, which first described a theory of JCE liability, insisted that JCE was based upon customary international law, described by the World War II tribunals. It claimed to have examined several relevant precedents, from which it elucidated the theory of JCE, including its three separate forms each with distinct actus reus and mens rea. However, a review of that precedent by leading academic scholars reveals that the *Tadić* Chamber took wide latitude in its interpretation, repeatedly and unsoundly inferring the bases for liability from isolated statements by the prosecutors, when a clear judicial statement was unavailable.[11]

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[10] UN DOC S/25704, paras. 55–56

[11] *Jenny S. Martinez and Allison Martson Danner*, Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law, 93 Cal.2 L. Rev. 75 (2005).

Ultimately, these scholars conclude that, while ICTYs interpretation of JCE does not accurately reflect the World War II cases, it does share many of the features of the criminal-organization and conspiracy-based prosecutions undertaken post-World War II. This is significant, since the ICTY Statute expressly rejects both those forms of liability. The Secretary-General's Report explicitly rejects the idea of holding individuals criminally liable merely through membership in organizations as was done following World War II explaining that "[t]he criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups."[12] And liability for conspiracy is provided for in the Statute only as to the crime of genocide.

If one looks at *Tadić* and its precursor — the case of *Furundzija*,[13] which Judges Cassese and Mumba relied on, wherein the JCE concept was first introduced — the concept was very, very limited. In the preliminary case, the one that was decided in 1998, the first case to discuss a common enterprise or common objective, there was one individual seeking to secure information through interrogation of a prisoner while at the same time another individual with him actually committed physical violence and rape.

The decision held that the person who was seeking the information and the person who was actually committed the crime were co-perpetrators. There was an acquittal, by the way, on the rape charge in that case.

The concept of two people carrying out the acts together is so far removed from the concept as it is presently applied that one could not recognize the new concept in those earlier cases. The same thing is true in *Tadić*. The Court first made the preliminary determination that Tadić was a part of the group of people that actually committed the atrocities, but they could not point to him specifically as a person who shot someone. It does not take a grave extension of actual participation to find that, when five people go into a town and people are killed in that town by that group, that all five people are responsible. That again is so far removed from the way it is being used now.

The core problem with *Tadić* is that there was a desire to look for theories in order to justify what was stated in that decision as being the legitimate objective, and that is a recognition that under international law all participants in serious violations of international law could and should be found responsible for the acts that they committed. The Tribunal went so far as to suggest that it not only had the right but it had an obligation to find a theory to justify that. But it is inappropriate for the Tribunal to be the entity that establishes policy. It appears to be blind to reality not to recognize that when dealing with levels of culpability, it is policy decision-making. A line has to be drawn on the continuum as to who we hold culpable. This determination normally occurs by a statutory grant of power.

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[12] UN DOC S/25704, para. 51.

[13] *Furunžija* Trial Judgment, Case No. IT–95–17 (10 December 1998).

Result

The result is that, as applied, JCE conflates three different groups together. The first is the political group that uses arguments and speeches, and peaceful means, for example to create some autonomous authority for Serbians within Bosnia-Herzegovina. Mr. Krajišnik was responsible as a negotiator, and spokesperson, for seeking to accomplish this goal. But, he sought to do so through peaceful means. A second group, sharing the objective of creating an autonomous Serbian entity of Bosnia-Serbia, believed that the objective could only be accomplished by war. A third group believed that only by killing or deporting and ethnically cleansing an area dominated by Bosnian-Serbs could autonomy be achieved. Thus the political goal of accomplishing autonomy by peaceful means, the goal of autonomy by means of war and the goal of autonomy by ethnic cleansing shared a common goal but there were major disagreements as to the means. Technically the only concern of the ICTY Tribunal should relate to those who wanted to accomplish the goal of autonomy by war crimes, which by definition are violations of laws or customs of war. The war crimes must be crimes which are specifically listed in the statute. Thus there is but one goal with three separate beliefs as to the means. JCE as interpreted by the Tribunal merges the three and allows for a conviction on the basis of completely legitimate political statements. For a tribunal to adjudicate who is responsible for violations of international humanitarian law it must make the distinction between the three groups as clearly as possible. I recognize that it is an extraordinarily difficult task, but it is an essential task. It is imperative to distinguish between those who articulate politically acceptable views, even politically unacceptable views, and then those who engage in war and then those who engage in war crimes.

The problem which started with the *Tadić* decision has now reached a point where the elements of JCE are so elastic and unclear that they virtually have no meaning. Equally dangerous, and what is the heart and soul of the Krajišnik case, is that the concepts now criminalize those who are engaging in legitimate protected behavior that should be encouraged, not discouraged.

In this complex world with multi-layered historic and ethnic and religious clashes, it is essential that the core principles of international culpability are capable of being articulated before a person is charged, and not after. The problem with the application of JCE in Krajišnik's case was that not only were these principles not previously articulated, but after reviewing the decisions and the positions of the Prosecutor, there remains a lack of clarity on all basic elements of JCE..

The Court in Krajišnik never discusses the qualitative nature of the contribution that must be made before someone is deemed a participant in a JCE: Can the contribution be entirely political speeches? Can the contribution be entirely political negotiations? Can the contribution consist entirely of protected conduct under international law? The Krajišnik court nowhere discusses or considers the implications of that decision, the implications of allowing protected

political speech and political activity to become the actus reus for a crime of human rights violations or a war crime. For example, if one thinks about the implications of this decision, would it include lawyers? What about financial contributors, or religious supporters? What about activists who provide political support and political organizing skills? The idea that without clear criteria this kind of activity could become the basis for crimes against humanity can have a tremendous deterrent effect on legitimate political speech and political activity. And what is gravely lacking in the opinions of the ICTY Tribunals, is any recognition, even acknowledgment, that it was moving into territory that is unknown and extremely dangerous. Moving from situations where people are engaged in acts of the kind that were committed during the Holocaust or in Darfur, or by the Japanese during World War II, to Krajišnik's situation of engaging in political speech, is a sea-change. The application of JCE to situations involving terrorist groups shows part of the problem. Terrorist groups are often supported by broad networks of supporters. Do you indict a professor from the University who has makes speeches supporting terrorism when some of the speeches have been used in fund-raising activities on behalf of terrorism? Do you include within the range of joint criminal enterprise rabbis or ministers or preachers or imams who might share the goals, and talk from a religious perspective about the goals, but not about the means toward that goal?

The Krajišnik case presented the ICTY Tribunal with a remarkable opportunity to do what many have sought, namely to establish very clear lines. Instead, not only did it muddy the waters, but also it expanded the available use of JCE into an illegitimate area where it has no right to be.

Nathan Dershowitz

THE DOCTRINE OF JOINT CRIMINAL ENTERPRISE IN THE JURISPRUDENCE OF ICTY

The longstanding principle of **nullum crimen sine lege** — holding that a person should not be held criminally responsible for conduct that was not criminal at the time of the action — requires that ICTY should only apply rules of international humanitarian law which are, beyond any doubt, part of customary international law. There are grave doubts, as reflected by the substantial divide in the academic community over this issue, that the Joint Criminal Enterprise ("JCE") concept is part of customary international law.

ICTY Article 7(1) lists five distinct modes of criminal liability. It does not authorize JCE as a basis for criminal liability. The Tribunal is not a legislative body, empowered to create crimes; rather, it is bound by those crimes already defined by the U.N. Security Council.

The Tribunal has been careful to say that JCE is not the creation of a new crime, but simply the articulation of a principle of criminal liability under the word "committed" in the statute. Functionally, however, it is plainly a new crime, similar to conspiracy, the American concept of RICO and the Rome Statute — each statutorily authorized crimes or

bases for criminal liability. The ICTY application of JCE, however, is criminal liability in the absence of any statutory basis.

In practice, JCE operates much like a conglomeration of the five individual modes of liability listed in the Statute, which ICTY prosecutors and judges then read expansively to permit an aggregation of the cumulative evidence against an accused to find him guilty of some generalized crime, without the statutorily required proof that the accused planned, instigated, ordered, committed or otherwise aided and abetted any specific crime. The formulation of the JCE concept has thus been developed by ICTY judges in the decisions they have rendered, rather than by statute.

The *Tadić* Appeals Chamber, which first described a theory of JCE liability, insisted that JCE was based upon customary international law, described by the World War II tribunals. It claimed to have examined several relevant precedents, from which it elucidated the theory of JCE, including its three separate forms each with distinct actus reus and mens rea. However, a review of that precedent by leading academic scholars reveals that the *Tadić* Chamber took wide latitude in its interpretation, repeatedly and unsoundly inferring the bases for liability from isolated statements by the prosecutors, when a clear judicial statement was unavailable.

Since then, JCE has evolved into three primary forms, one of which was described in the *Krajišnik* Trial Judgment as existing where:

> all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they … all possess the intent to kill.

The decision goes on to say the objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows:

> (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and
>
> (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.

Krajišnik shows how amorphous the JCE concept has become. Mr. Krajišnik was a strong, vocal advocate for protecting Serbian interests and sought to avoid Serbia becoming a powerless minority within a separate country of Bosnia-Herzegovina — indeed, he was a principal negotiator seeking to establish that position. Mr. Krajišnik did not personally commit any war crimes; instead, he was ultimately convicted for acts which are accurately characterized as political speech and political activity — that is, an *actus reus* based completely on human rights-protected conduct.

By failing to recognize the protected nature of political speech, the ICTY Tribunal thus concluded that Mr. Krajišnik's performance of an act which advanced the share JCE goal (even if legitimate) rendered him guilty of participating in a JCE; a radical departure from what in the past was viewed as participating in war crimes. The implications for international law are extraordinary, given that JCE liability illegitimately extends the

scope of criminal liability for high-level government officials far beyond that contemplated by the Statute's drafters. At a minimum, whether such principles constitute previously established law or customs of law is seriously debatable.

This new effort by ICTY to apply JCE to find individual criminal liability where the Statue does not provide any drastically undermines the credibility of ICTY as a valid tribunal, leaving it open to charges of merely representing victors' justice and of bias.

Натан Дершовиц

СОВМЕСТНОЕ УГОЛОВНОЕ ДЕЯНИЕ

Древний принцип **nullum crimen sine lege** *(нет преступления без закона — прим.перев)* — в соотвествии с которым человек не может отвечать перед судом за дела, которые не являлись противозаконными во время их совершения — требует от МТБЮ применения только тех положений международного гуманитарного права, которые вне всякого сомнения являются частью обычного международного права. Среди ученых, изучающих данную тему, образовался глубокий разрыв по вопросу представляет ли „совместное уголовное деяние" или СУД (Joint Criminal Enterprise) составную часть общепринятого международного права или нет.

Статья 7 (1) Устава МТБЮ перечисляет пять видов уголовной ответственности. В нем СУД не приводится в качестве основы для уголовной ответственности. Трибунал не является законодательным органом и, как результат, не имеет полномочия, необходимые для определения уголовных дел. Он действует только в рамках тех определений преступления, которые предписал Совет безопасности ООН.

Трибунал всегда тщательно подчеркивает, что введение СУД в его практику не означает, что таким образом устанавливается новый вид уголовного дела. В Трибунале утверждают, что это просто разработка концепции уголовной ответственности, уже содержащейся в слове „совершить", которое находится в Уставе. Однако, на практике это очевидно представляет новый вид уголовного дела, похожего на „заговор", американскую концепцию расширенной уголовной ответственности по уголовному кодексу, более известном как RICO, а также и по положениям Римского устава — в любом их этих случаев соответствующим законом определяется уголовное дело или основа для установления уголовной ответственности. Лишь в случае применения СУД в МТБЮ речь идет об уголовной ответственности, но без какого--либо обоснования в законе.

На практике СУД работает как смесь пяти отдельных видов уголовной ответственности, приведенных в Уставе, и которые прокуроры и судьи МТБЮ могут толковать в самом широком смысле для того, чтобы, на основании суммы накопленных доказательств, обвиняемого могли провозгласить виновным в каком-нибудь преступлении общего характера, причем без законного обязательства о предоставлении доказательств о том, что обвиняемый планировал, подстрекал, приказывал, совершал или каким-либо другим способом способствовал совершению определенного преступления. Это означает, что понятие СУД разработано самими судьями МТБЮ посредством вердиктов, которые они выносили, вместо того, чтобы это делать посредством принятия соответствующих законов.

В деле Тадича Аппеляционная камера впервые поступила в соотвествии с теорией СУД, заявив, что СУД, через связь с трибуналом со времен Второй мировой войны, имеет обоснование в обычном международном праве. Из Камеры утверждали, что они рассмотрели ряд значимых прецедентов, на основании которых ими сформулирован теоретический принцип СУД, который состоится из трех

отдельных форм, каждая из которых, в свою очередь, имеет свои особые *actus reus (состав преступления — прим.перев.)* и *mens rea (преступный умысел- прим.перев)*. Однако, критический обзор этих прецедентов ведущими учеными приводит к выводу, что Камера в деле Тадича занималась самыми произвольными толкованиями. Она часто и неубедительно выявляла основы уголовной ответственности из изолированных слов прокуроров когда суды не занимали ясной позиции по надлежащему вопросу.

С тех пор СУД развернулся в три основных формы. Одна из форм была сформулирована в деле Краишника следующим образом:

> «Все собвиняемые, в соотвествии с совместной целью, действуют с одинаковым преступным намерением; например, когда со-совершители принимают решение о совершении убийства и когда, несмотря на то, что в рамках реализации плана у них разные роли, каждый из них… действует в в намерении совершить убийство.»

Дальше в вердикте приводятся объективные и субъективные элементы, которые должны установится в случае тех участников, про которых невозможно доказать, что они были непосредственными совершителями гипотетического убийства:

> (1) необходимо установить, что обвиняемый добровольно участвовал в любой части совместного плана (например, нанес жертве не смертельные удары, помогал материально или другим способом поддерживал со-совершителей); и
>
> (2) даже если он лично и не подводил к убийству, необходимо установить, что обвиняемый планировал такой результат.

Дело Краишника иллюстрирует в какой мере понятие СУД стало расплывчатым. Краишник был решительным сторонником защиты сербских интересов и предотвращения превращения сербов в беспомощное меньшинство в рамках отдельного государства Боснии и Герцеговины. Он был одним из главных переговорщиков сербской стороны при реализации этой цели. Краишник лично не совершал ни одного военного преступления. В конце судебного процесса он был объявлен виновным в делах, которые точнее могли бы быть описаны как политические выступления и политические действия — итак, речь идет о *actus reus,* который полностью основывается на формах поведения, которые защищены как основные права человека.

МТБЮ, после того как отказался согласиться с фактом, что политические выступления защищены, приняло заключение о том, что Краишник виновен в совершении поступков, которые приводили к осуществлению совместных целей в рамках СУД (даже когда эти цели сами по себе были легитимны). Это радикальный шаг в сторону из рамок того, что раньше считались военным преступлением. Последствия для международного права — огромные, принимая во внимание, что ответственность в соответствии с СУД противозаконно расширяет рамки уголовной ответственности высокопоставленных государственных руководителей далеко за тем, что имелось в виду когда Устав создавался. По крайней мере, очень спорно идет ли тут речь о предварительно установленных законоположениях или об обычном праве.

Это новейшее стремление МТБЮ применять СУД ради установления личной уголовной ответственности там, где Устав не дает никакого обоснования для этого, радикально подрывает авторитеть МТБЮ как легитимного суда. Это открывает возможность высказаться о нем как о предвзятом, представляющем „справедливость победителей“.