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International Criminal Law

DERMOT GROOME AND JUDGE DONALD E. SHAVER*

International criminal law is undergoing a metamorphosis, steadily developing from an indistinct amorphous body of generally recognized and “customarily accepted” legal norms, to a distinct set of statutory laws and a constantly growing body of case law precedents from an increasing number of international tribunals. This trend accelerated in 2007 with a number of important new decisions, including written decisions in the first cases for the prosecution of leaders responsible for using child soldiers, one of the first international criminal law cases to consider the right of the accused to discharge his appointed counsel, and the inauguration of the new Special Tribunal for Lebanon.

I. The International Criminal Court, Special Court for Sierra Leone, and the Guantanamo Military Commission: Recent Case Law Developments on the Offense of Conscripting or Enlisting Child Soldiers

Over the past three decades, the use of child soldiers in combat has become increasingly common. Although precise numbers are difficult to determine, Amnesty International estimates that up to 300,000 child soldiers have been exploited in over thirty conflicts around the world.¹ Children as young as ten years old are either voluntarily recruited into

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1. Press Release, Amnesty International, *Child Soldiers: A Global Issue*, ¶ 5 (Sept. 8, 2007), available at <http://mediaforfreedom.com/ReadArticle.asp?ArticleID=4474>.

the armed forces due to poverty or retaliation or abducted off the streets and out of schools.²

Until recently, the efforts to prevent this abuse have been mainly diplomatic, carried on by various NGOs and the United Nations. In 2002, however, the Optional Protocol to the Convention on the Rights of Children, which implements a number of safeguards and sets the minimum age for direct participation in hostilities at eighteen, came into force.³ In 2006, then U.N. Secretary General Kofi Annan issued a report to the U.N. Security Council, identifying violators and demanding demobilization.⁴ That same year, to mark the tenth anniversary of the landmark U.N. report by Graça Machel, Impact of Armed Conflict on Children,⁵ the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy, and UNICEF co-convened a strategic review of the current situation faced by children in conflict situations. The report of that strategic review was published in 2007.⁶

A new era in the struggle to prevent the recruitment and use of child soldiers occurred in 2007. This year saw the first convictions for this offense by the Special Court for Sierra Leone, and another major offender bound over for trial after a hearing by the International Criminal Court. Also of interest is a pending case before the Guantanamo Military Commission for the prosecution of a child soldier.

A. INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC) is currently prosecuting Congolese warlord Thomas Lubanga Dyilo for conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities between September 2002 and August 2003,⁷ in violation of Article 8(2)(e)(vii) of the Rome Statute.⁸ A “confirmation

2. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, at ¶¶ 6-8, U.N. GAOR, U.N. Doc. A/RES/54/263 (May 25, 2000).

3. *Id.*; see also UNICEF and the Coalition to Stop the Use of Child Soldiers, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* (Dec. 2003), available at http://www.unicef.org/publications/files/option_protocol_conflict.pdf. The Coalition to Stop the Use of Child Soldiers is an umbrella group of NGOs which has worked closely with UNICEF on the issue.

4. The Secretary-General, *Children and Armed Conflict*, ¶¶ 1-3, delivered to the Security Council and the General Assembly, U.N. Doc. A/61/529-S/2006/826 (Oct. 26, 2006); see also Human Rights Watch, *UN: Security Council Must Punish Users of Child Soldiers*, ¶ 1, (Nov., 2006), available at <http://hrw.org/english/docs/2006/11/27/global14664.htm>.

5. The Secretary-General, *Impact of Armed Conflict on Children*, ¶ 1, delivered to the General Assembly, U.N. Doc. A/51/306 (Aug. 26, 1996).

6. The Secretary-General, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, ¶ 1, delivered to the General Assembly, U.N. Doc. A/62/228 (Aug. 13, 2007).

7. *Le Procureur v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, ¶ 9, (Jan. 29, 2007) [hereinafter *Lubanga Dyilo*].

8. Article 8(2) (e)(vii) provides as follows:

For the purpose of this Statute, “war crimes” means . . . (e) other serious violations of the laws and customs applicable in armed conflict not of an international character, within the established framework of international law, namely, any of the following acts: . . . (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

International Criminal Court, ROME STATUTE, art. (8)(2)(e)(vii), A/CONF.183/9 (July 1, 2002) [hereinafter ROME STATUTE].

hearing” was held from November 9 to November 28, 2006, and on January 29, 2007, the Pretrial Chamber rendered its decision confirming the charges and committing the accused to the Trial Chamber.⁹ The trial is scheduled to start June 23, 2008.

The case against Lubanga is the first war crimes trial that focuses exclusively on child soldiers.¹⁰ The Special Representative of the Secretary-General for Children and Armed Conflict called the case a “major milestone in international attempts to eradicate the practice of using child soldiers.”¹¹ The Chamber resolved a number of issues relating to the prosecution of this type of offense. Their opinion was relied on by the Special Court for Sierra Leone in rendering their judgment in the *Brima* case in June¹² and will undoubtedly influence judicial interpretations in future cases.

1. *Mens Rea* Issues

A number of issues were raised concerning the necessary *mens rea* required to commit this offense.

a. Must the Accused have Actual Knowledge that this Practice was Considered a Crime Under the Rome Statute and Customary International Law?

At the hearing, the defense argued that the recruiting and use of child soldiers had been common in the region for some time and that neither Uganda nor the Democratic Republic of Congo (DRC) took any steps to publicize the new prohibition in the Rome Statute after its adoption in September of 2002.¹³ Therefore, it was not foreseeable by Lubanga that the conduct would later be criminally punishable.¹⁴ Moreover, the defense argued, customary international law¹⁵ only prohibited the recruitment of children and did not mention enlistment. Since Lubanga was being prosecuted for both recruitment and enlistment under the Rome Statute, the defense argued that knowledge could not be imputed based on the customary international law in place at the time.¹⁶

The Chamber rejected these arguments, finding that there was no need to establish actual knowledge of the statute by Lubanga. Since the statute was clear and unambiguous on its face, no further foreseeability was required under Article 32(2), which contains the doctrine on “mistake of law.”¹⁷ This holding follows the traditional common law rule that ignorance of the law is no defense.

9. *Lubanga Dyilo*, *supra* note 7, at ¶¶ 156-57.

10. Press Release, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, ICC’s First Case is Milestone for Issue of Child Soldiers (Nov. 9, 2006) available at <http://www.un.org/children/conflict/pr/2006-11-09130.html>.

11. *Id.* at ¶ 1.

12. See, e.g., Judgment, *Prosecutor v. Brima*, SCSL-2004-16-T, ¶ 729 and note 1418 (June 20, 2007) [hereinafter *Brima*].

13. *Lubanga Dyilo*, *supra* note 7, at ¶ 296.

14. *Id.* at ¶¶ 294, 304.

15. *Id.*; Protocols Additional I and II to the Geneva Conventions, and the Optional Protocol to the Convention on the Rights of the Child.

16. *Id.* at ¶ 296.

17. *Id.* at ¶¶ 302, 305.

In addition, the Chamber found that the Rome Statute did not intend to establish new crimes simply because it included both recruitment and enlisting.¹⁸ The Geneva Conventions and the two Additional Protocols of 1977 provide that children under the age of fifteen are “protected persons” and the parties to conflicts must insure that they “do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.”¹⁹ In this context, the Chamber interpreted the provision to include both recruitment and enlisting.²⁰

b. What is the Mental State Required to Commit the Offense?

Article 30 of the Rome Statute states that an accused may only be found criminally liable if he committed the material elements of the offense with “intent and knowledge.”²¹ Does this mean that the accused must have specifically intended or expressly discussed with or directed subordinates to recruit underage children, or that he must have been actually aware of the ages of each of the underage children? The Chamber resolved both of these issues by answering “no.”

In explaining this holding, the Chamber began with a discussion of principal and accessory liability (“co-perpetration”).²² The Chamber considered and rejected the objective approach found in those systems, which hold that only an accessory who physically carries out one or more of the elements of the offense may be equally liable with the principal.²³ The Chamber next considered and rejected those systems used by entities such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and most U.S. jurisdictions, which consider an accessory equally liable if he aided and abetted the commission of the offense with the same intent, common plan, or purpose to commit the offense as the principals, regardless of the extent of his contribution (subjective approach).²⁴

Instead, the Chamber adopted an approach that predicates accessory liability on control over the crime.²⁵ Under this approach, even those removed from the scene of the crime may be found equally liable if they control or mastermind its commission because they decide whether and how the offense will be committed.²⁶ The Chamber held that this approach best harmonized the various ways of finding accessory liability under Article 25(3) in light of the “residuary” liability provision in Article 25(3)(d), which provides for accessory liability in cases involving contributions to the crime for the purpose of further-

18. *Id.* at ¶ 298.

19. *Id.* at ¶ 308.

20. *Id.*

21. *Id.* at ¶ 350.

22. The Rome Statute provides for joint and several liability and provides that an accessory shall be equally liable with a principle if he:

(b) [o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) [facilitates,] . . . aids, abets or otherwise assists in its commission. . . ; (d) [or] [i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose . . . made with the aim of furthering the criminal activity, . . . [or with] the knowledge of the intention of the group to commit the crime.

ROME STATUTE, *supra* note 8, art. 25(3).

23. *Lubanga Dyilo*, *supra* note 7, at ¶ 328.

24. *Id.* at ¶ 329. In the U.S. system, this equates to specific intent.

25. *Id.* at ¶ 330.

26. *Id.*

ing the criminal activity or with knowledge of the group's criminal intent, where such contributions cannot otherwise be shown to be ordering, soliciting or inducing, facilitating, aiding or abetting, or assisting in the commission of the crime.²⁷

Closely related to the concept of required mental state is the concept of required knowledge. The Chamber held that the war crime of conscripting and enlisting children under the age of fifteen for combat is a general intent crime and does not require a specific intent.²⁸ But the elements do require that the "perpetrator knew or should have known that such person or persons were under the age of 15 years."²⁹ Does this mean that the prosecution must prove that the accused actually knew which specific individuals were underage or knew how many were underage? May the accused insulate himself from liability by intentionally remaining ignorant of the ages? Once again, the Chamber answered both questions in the negative.

The Chamber focused on the phrase "should have known" and found that it falls within the concept of negligence.³⁰ The Chamber held that if lack of knowledge resulted from a failure to act with due diligence, the "should have known" element is satisfied.³¹ The Chamber found that this element is actually an exception to the general intent and knowledge requirement contained in Article 30, since that general provision begins with the phrase "[u]nless otherwise provided."³²

2. *Actus Reus Issues*

In addition to prohibiting the conscription or enlistment of children into armed forces, the statute generally proscribes "using them to participate actively in hostilities."³³ The Chamber further clarified what constitutes "using" children in hostilities.

The Chamber used as its starting point Article 77(2) of Additional Protocol I to the Geneva Convention, which prohibits using minors in the gathering and transmission of military information, transportation of arms and ammunition, or the provision of supplies.³⁴ To that list they added "combat related activities" mentioned in the ICC Preparatory Committee report, such as scouting, spying, sabotage, and the use of children as decoys, couriers, or at military check points.³⁵ The Chamber next went to the International Red Cross's Commentary on the Additional Protocols of 8 June 1977 to the Geneva

27. *Id.* at ¶ 337.

28. *Id.* at ¶ 357.

29. International Criminal Court, *Elements of Crimes*, 33, ICC-ASP/1/3 (Sept. 9, 2002). The elements are listed as:

1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

30. *Lubanga Dyilo*, *supra* note 7, at ¶ 358.

31. *Id.*

32. *Id.* at ¶ 359.

33. ROME STATUTE, *supra* note 8, art. 8(2)(e)(vii).

34. *Lubanga Dyilo*, *supra* note 7, at ¶ 260.

35. *Id.* at ¶ 261.

Conventions of 12 August 1949 to add the use of children to guard military objectives, military quarters, or as bodyguards to commanders.³⁶ But the Chamber specifically pointed out that the prohibition did not apply to using children in food deliveries to an airbase or as domestic staff in married officers' quarters.³⁷

The Chamber clarified other basic principles relating to the offense. The Chamber held that "conscripting" and "enlisting," the terms used in the Rome Statute, are both forms of "recruitment," the term's used in Article 77(2) of Additional Protocol I—the distinction being that "conscripting" is forcible recruitment, and "enlisting" is voluntary recruitment.³⁸ Thus, under customary international law and the Rome Statute, consent of the child is not a defense to the offense.³⁹

The Chamber also determined that the crime is a continuing offense.⁴⁰ The crime continues to be committed as long as the child remains in the armed group or forces and ceases upon the child leaving or reaching the age of fifteen.⁴¹ But the Chamber further held that the Prosecution could elect to charge each instance of enlistment or recruitment and each instance of use in hostilities as a separate offense under the statute.⁴²

B. SPECIAL COURT FOR SIERRA LEONE

On June 20, 2007, the Special Court for Sierra Leone handed down the first convictions ever rendered by an international tribunal for the crime of recruiting and using child soldiers in hostilities.⁴³ Human Rights Watch called it "a ground-breaking step toward ending impunity for commanders who exploit hundreds of thousands of children as soldiers in conflicts worldwide."⁴⁴ After a trial that lasted just over three years,⁴⁵ the three defendants, Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, were convicted of eleven counts of war crimes and crimes against humanity,⁴⁶ including charges of conscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities.⁴⁷ Brima and Kanu were sentenced to fifty years each, and Kamara to forty five years.⁴⁸

36. *Id.* at ¶ 263.

37. *Id.* at ¶ 262.

38. *Id.* at ¶ 246.

39. *Id.* at ¶ 247.

40. *Id.* at ¶ 248.

41. *Id.*

42. *Id.* at ¶ 321.

43. *Brima*, *supra* note 12.

44. Human Rights Watch, *Sierra Leone: Landmark Convictions for Use of Child Soldiers*, (June 20, 2007), available at http://hrw.org/english/docs/2007/06/20/sierra16214_txt.htm.

45. *Brima*, *supra* note 12, at ¶¶ 5-10.

46. *Id.* at ¶¶ 2112-23.

47. *Id.* at ¶¶ 2113, 2117, 2121 (citing STATUTE OF THE SPECIAL COURT OF SIERRA LEONE, art. 4(c), available at <http://www.sc-sl.org/Documents/scsl-statute.html>).

48. *S Leone Militia Leaders Convicted*, BBC NEWS (Aug. 2, 2007), <http://news.bbc.co.uk/2/hi/africa/6927550.stm>.

1. *Mens Rea* Issues

The Sierra Leone Court was faced with many of the same issues that were raised in the *Lubanga* case, and in most cases, their rulings were similar.

a. Did the Accused Have Adequate Notice that their Conduct Would be Punishable as a Crime?

Unlike the *Lubanga* case, the accused were charged with violations that occurred before the passage of the Statute of the Special Court for Sierra Leone.⁴⁹ Therefore, the prosecution was required to prove the defendants' conduct would be punishable under accepted customary international law at the time and could not resort to the constructive notice provision of the statute as the *Lubanga* court had been able to do. But defense counsel in both cases made essentially the same arguments to the Court, which they characterized as "Mistake of Law."⁵⁰ The defense claimed that various governments of Sierra Leone also recruited underage children during the period charged.⁵¹ Indeed, a defense expert testified that, in the traditional African setting, the concept of childhood is more related to ability to perform tasks, not chronological age, and that the use of children combatants was a long standing practice in the decades prior and all factions resorted to using children.⁵²

The argument, however, was no more successful in the Sierra Leone Court that it had been in the International Criminal Court. "The rules of customary international law," the Sierra Leone Court held, "are not contingent on domestic practice in one given country."⁵³ Moreover, the Court held that the age limit of fifteen was fixed in customary international law, and not flexible depending on the local culture.⁵⁴

In finding that the practice was recognized as a crime under customary international law, the Sierra Leone Court relied on the same documents that the ICC did—the 1949 Geneva Conventions and Additional Protocol II.⁵⁵ In addition, the Sierra Leone Court found support for this proposition in the Convention of the Rights of the Child and the African Charter on the Rights and Welfare of the Child.⁵⁶

2. *Actus Reus* Issues

The Sierra Leone Court adopted many of the conclusions of the ICC on the important *actus reus* characteristics of the offense. They found that the offense is committed by either conscripting, enlisting, or using underage children in hostilities.⁵⁷ Additionally, the court adopted the holding from *Lubanga* that the recruitment could be either forcible

49. The accused were charged with events occurring between May 1997 and January 2000 (*Brima*, *supra* note 12, ¶ 16), and the Special Court was not established until August 14, 2000. (S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000)); *Lubanga Dyila*, *supra* note 7, at ¶ 9.

50. *Brima*, *supra* note 12, at ¶ 730.

51. *Id.*

52. *Id.* at ¶¶ 730, 1250.

53. *Id.* at ¶ 732.

54. *Id.* at ¶ 731.

55. *Id.* at ¶ 728; *Lubanga Dyila*, *supra* note 7, at ¶ 296.

56. *Brima*, *supra* note 12, ¶ 728, n. 1416.

57. *Id.* at ¶ 733.

(conscripting) or voluntary (enlistment), therefore consent of the minor was not a defense.⁵⁸ Furthermore, the court adopted the holding from *Lubanga* that conscription refers to action by nongovernmental armed groups as well as governmental groups.⁵⁹

Moreover, the Court used the exact same passage from the ICC Preparatory Committee report that the *Lubanga* Court did to define “using” and “participate” in the identical way.⁶⁰ The Court generally defined “active participation” as “[a]ny labour or support that gives effect to, or helps maintain, operations in a conflict.”⁶¹ The Court then added some examples of its own to the list of prohibited activities to include: “carrying loads for the fighting;” “finding and/or acquiring food, ammunition or equipment” (not just transporting it); “making trails or finding routes” (whether or not it amounts to “scouting”); and “acting as human shields.”⁶²

C. GUANTANAMO MILITARY COMMISSION

The third case of interest in 2007 in this area involved the questions of whether and how child soldiers should be prosecuted for serious war crimes or atrocities that they commit. According to Jo Becker of Human Rights Watch, while domestic courts in East Timor, Sudan, and the DRC have prosecuted child soldiers, no international tribunal has ever done so,⁶³ and the charters for the International Criminal Court and the Special Court for Sierra Leone both specifically exclude prosecution of most minors.⁶⁴ At the start of 2007, however, the United States was poised to become the first major power to commence such a trial.

United States v. Omar Ahmed Khadr, one of the cases pending before the Guantanamo Military Commission, charges Khadr with murder, conspiracy, spying, and assisting al Qaeda.⁶⁵ Khadr, a Canadian citizen, was captured on July 27, 2002, in Afghanistan after a bloody fire fight with U.S. forces.⁶⁶ He was fifteen years old at the time. He is alleged to have surprised U.S. soldiers clearing the rubble of a destroyed building by throwing a grenade at them, killing one and wounding the another.⁶⁷ His trial was scheduled for

58. *Id.* at ¶ 735, n. 1431. The *Lubanga* decision acknowledged that this distinction was actually made previously by Judge Robertson in his separate opinion appended to the judgment rendered by the Appeals Chamber of the Special Court of Sierra Leone on May 31, 2004, in the case of *Prosecutor v. Sam Hinga Norman*, so it may be a question of who is adopting whose opinion. *Lubanga Dyilo*, *supra* note 7, at ¶ 246.

59. *Id.* at ¶ 734 and n. 1429.

60. *Lubanga Dyilo*, *supra* note 7, at ¶ 339; *Brima*, *supra* note 12, at ¶ 1433.

61. *Brima*, *supra* note 12, at ¶ 737.

62. *Id.*

63. *Accused's Age is Focus at Guantanamo Tribunal*, (NPR radio broadcast June 4, 2007), available at <http://npr.org/templates/story/story.php?storyId=10693462>.

64. Article 26 of the Rome Statute, provides that the Court shall have no jurisdiction over minors who are under eighteen at the time of the offense. ROME STATUTE, *supra* note 8, art. 26. The Statue of the Special Court for Sierra Leone, Article 7, provides that the Court shall have no jurisdiction over minors under fifteen, and for those between fifteen and eighteen, the Court must take into account the desirability of “rehabilitation, reintegration into and assumption of a constructive role in society.” STATUTE OF THE SPECIAL COURT OF SIERRA LEONE, art. 7 (Aug. 14, 2000).

65. Trial Watch, Omar Ahmed Khadr, available at http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/omar-ahmed_khadr_455.html.

66. *In Depth: The Khadr Family*, Omar Khadr, CBC NEWS (June 4, 2007), <http://www.cbc.ca/news/background/khadr/omar-khadr.html>.

67. *Id.*

August 2007, and his lawyers were widely expected to test whether traditional duress defenses would excuse crimes by child soldiers.

Amid growing controversy, however, his case was unexpectedly dismissed by a military judge on June 4, 2007, based on a procedural flaw.⁶⁸ The judge found that under the 2006 Military Commissions Act, the Commission only had jurisdiction to try “unlawful” enemy combatants, not “lawful” combatants.⁶⁹ But previous Combatant Status Review Tribunals for Khadr and others had simply classified detainees as “enemy combatants” without distinguishing between lawful and unlawful.⁷⁰ Thus the Commission did not have jurisdiction to hear the case, and it was dismissed.⁷¹ A motion for reconsideration was denied June 29, 2007.⁷²

In September, the charges were reinstated after the government appealed the ruling to a three judge panel of the U.S. Court of Military Commission Review.⁷³ The Court agreed with the prosecution that the omission of the word “unlawful” was semantics and not substantive and thus returned the case for trial.⁷⁴ No trial date has been set at this time.⁷⁵ Khadr’s lawyers have appealed to the D.C. Circuit Court.⁷⁶ Khadr is now twenty one years old and remains in custody.

II. The International Criminal Tribunal for the former Yugoslavia: Right of the Accused to Discharge his Appointed Counsel

On May 9, 2007, the Appeals Chamber of the ITCY issued its judgment in *Prosecutor v. Blagojevic & Jokic*. The Prosecution and both defendants appealed the Trial Chamber’s judgment. In its judgment, the Appeals Chamber dismissed the appeals of both Prosecution and the defendant Jokic.⁷⁷ With respect to Blagojevic, the Chamber vacated his conviction for complicity in genocide and upheld his conviction for other related crimes.⁷⁸ The judgment is interesting not only because of its genocide ruling but also because the Appeals Chamber examined whether a complete break-down of communication between Blagojevic and his court-appointed lawyer warranted a new trial.

Vidoje Blagojevic was a former commander of the Bratunac Brigade of the Army of the *Republika Srpska* (Bosnian Serb Army)—one of the army units implicated in having a direct

68. Order on Jurisdiction, *United States v. Khadr*, (June 4, 2007), available at [http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder\(June%204\).pdf](http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder(June%204).pdf).

69. *Id.* at ¶¶ 3, 4.

70. *Omar Khadr Case Sparks debate over U.S. Terror Law*, CBC NEWS (Aug. 24, 2007), <http://www.cbc.ca/world/story/2007/08/24/khadr.html?ref=rss>.

71. Order on Jurisdiction, *Khadr*, *supra* note 68, at ¶ 11.

72. Disposition of Prosecution Motion for Reconsideration P 001, *Khadr*, (June 29, 2007), available at [http://www.defenselink.mil/news/jun2007/KhadJudge%20Denies%20Recon\(June%2029\).pdf](http://www.defenselink.mil/news/jun2007/KhadJudge%20Denies%20Recon(June%2029).pdf).

73. *Terrorism Charges Reinstated Against Khadr*, CBC NEWS (CANADIAN BROADCASTING COMPANY) (Sept 24, 2007), <http://www.cbc.ca/world/story/2007/09/24/guantanamo-khadr.html>.

74. *Id.*

75. William Glaberson, *Decks are Stacked in War Crimes Cases, Lawyers Say*, N.Y. TIMES, Nov. 8, 2007, at A23, available at <http://www.nytimes.com/2007/11/09/washington/09gitmo.html>.

76. *Government to Oppose Khadr Appeal*, SCOTUS Blog, <http://www.scotusblog.com/wp/uncategorized/government-to-oppose-khadr-appeal> (Oct. 17, 2007, 12:37 EST).

77. Judgment, *Prosecutor v. Blagojevic & Jokic*, Case No. IT-02-60-A, ¶ 137 (May 9, 2007) [hereinafter “Blagojevic Appeals Judgment”].

78. *Id.* at 137.

role in the genocidal massacres that followed the takeover of Srebrenica in July 1995. The Trial Chamber found him guilty of complicity in the Srebrenica massacres despite determining that he had no actual knowledge of the killings between July 12th and 14th at the time his conduct contributed to them.⁷⁹

A. GENOCIDE

The key issue related to the genocide conviction was what reasonable inferences could be drawn from the forcible transfer of Muslim refugees in Srebrenica and the subsequent separation and mistreatment of military-aged men. While the Appeals Chamber acknowledged that the transfers were relevant to determine whether the principal perpetrators possessed the *dolus specialis* or special intent of genocide (the intent to destroy, in whole or in part, a protected group), it recalled its findings in the *Krstic* appeals judgment that “forcible transfer does not constitute in and of itself a genocidal act,” it is simply one of several acts that should be considered in the context of all the circumstances to determine the existence of genocidal intent.⁸⁰ The Appeals Chamber rejected as unreasonable the Trial Chamber’s finding that the forcible transfers and subsequent mistreatment sufficiently demonstrated that the principal perpetrators possessed genocidal intent.⁸¹

Similarly, when evaluating the prosecution’s reliance on the opportunistic killings that accompanied the more organized mass executions in Srebrenica, the Appeals Chamber found that “‘opportunistic killings’ by their very nature provide a very limited basis for inferring genocidal intent. Rather, as the Appeals Chamber determined in the *Krstic* Appeal Judgment, these culpable acts simply assist in placing the mass killings in their proper context.”⁸² After acquitting Blagojevic of complicity in genocide, the Appeals Chamber reduced his sentence from eighteen to fifteen years.

B. RIGHT TO COUNSEL

Throughout the course of the trial, the relationship between Blagojevic and his court-appointed counsel was marked by Blagojevic’s animosity toward him and unwillingness to cooperate in his own defense. The Appeals Chamber summarized the relationship as “a complete breakdown in trust and communication, ultimately pervading the entire trial.”⁸³ In his appeal, Blagojevic alleged that the trial had been fundamentally unfair. He claimed that the Tribunal’s legal aid system denied him the right to retain a counsel of his choice. He further claimed that his assigned counsel was incompetent, citing several criticisms directed at the attorney by the Trial Chamber. Lastly, and perhaps most significantly, Blagojevic asserted that the Chamber, by conditioning his testimony on the requirement that his examination be conducted by his attorney, effectively denied him the right to appear as a witness on his own behalf.⁸⁴

79. Judgment, *Prosecutor v. Blagojevic*, Case No. IT-02-60-A, ¶¶ 4-5 (Jan. 17, 2005) [hereinafter “Blagojevic Trial Judgment”].

80. Judgment, *Prosecutor v. Krstic*, Case No. IT-98-33-A, ¶ 33 (April 19, 2004).

81. Blagojevic Appeals Judgment, *supra* note 77, at ¶ 123.

82. *Id.* at ¶ 123.

83. *Id.* at ¶ 12.

84. *Id.* at ¶ 26.

The relationship between Blagojevic and his attorney rapidly and irreparably deteriorated soon after it began. According to Blagojevic, the demise of the lawyer/client relationship began when his attorney publicly accused him of requesting his counsel to forward part of the defense budget provided by the Tribunal to people designated by Blagojevic.⁸⁵ This issue has arisen in other cases and is referred to as “fee-splitting.” In some cases, the Tribunal’s remuneration exceeds that traditionally paid to defense lawyers in the former Yugoslavia. Some accused have been reported to require lawyers, as a condition of engagement, to remit a portion of their earnings to family members at home to replace income lost because of their pre-trial detention in The Hague. In Blagojevic’s view, this accusation was tantamount to his own counsel accusing him of being a “common criminal” and destroyed the possibility that they could ever establish an effective working relationship.⁸⁶

On the issue of his ability to select counsel, Blagojevic argued that even as a beneficiary of the ICTY’s legal assistance program, he had an absolute right to choose who represented him. The Appeals Chamber summarily dismissed this argument holding that “[a]n accused who lacks the means to remunerate counsel shall have the right to have counsel assigned to him by the Registrar from the list drawn up in accordance with Rule 45 (B).”⁸⁷ The Chamber noted that while the practice of the Registrar was, when possible, to accommodate an accused’s preference for a particular attorney from the list of qualified defense counsel, such practice did not create an enforceable right but simply indicated the Registrar’s deference to the wishes of the accused when possible.⁸⁸

In this case, Blagojevic’s initial choice of defense counsel was honored by the Registrar. It was the Registrar’s refusal to allow him to change attorneys that became the basis of this appeal. The Appeals Chamber recalled its earlier decision on Blagojevic’s interlocutory appeal in which it held that, while Blagojevic and other indigent persons have the right to counsel, such right did not include an absolute right to choose a specific person.⁸⁹ The Chamber then noted that once properly assigned, “counsel has a professional obligation to continue representing the accused and may only be withdrawn or replaced, if sufficient cause exists.”⁹⁰

As the trial progressed, Blagojevic maintained his position that he would not communicate with or instruct his attorney. He resisted the Trial Chamber’s many efforts to restore and facilitate communication between them. The Appeals Chamber recalled its decision dismissing Blagojevic’s interlocutory appeal, which held that the Trial Chamber’s earlier

85. *Id.* at ¶ 18.

86. *Id.* at ¶¶ 17-19. With respect to the fee-splitting allegations made by defense counsel, the Appeals Chamber recalled its earlier ruling that the matter had no bearing on the Trial Chamber’s decision to deny a change of counsel. In this interlocutory decision the Chamber dealt with the matter in detail in an attempt to bring finality to the issue. The Appeals Chamber found that Blagojevic’s defense counsel did not breach the lawyer/client privilege by divulging the fee-splitting matter to the Chamber and in fact was ethically obliged to notify the Registrar of the matter. The Chamber further found that the allegation of impropriety was not directed at Blagojevic himself but was the result of “family pressures.”

87. *Id.* at ¶ 17.

88. *Id.*

89. *Id.* at ¶ 18 (citing Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defense Team, *Prosecutor v. Blagojevic*, Case No. IT-02-60-AR73.4, ¶¶ 22, 23, 54 (Nov. 7, 2003)).

90. Blagojevic Appeals Judgment, *supra* note 77 at ¶ 17.

decision to refuse Blagojevic's request to change counsel did not violate his right to a fair trial and, given the complexity of the case, protected his right to an expeditious trial.⁹¹

Blagojevic also asserted that the poor relationship with his counsel and the fact that his counsel conducted much of the defense without the benefit of instruction from him made his representation ineffective.⁹² The Appeals Chamber noted that attorneys selected by the Registrar are presumed to be competent and such a presumption can only be rebutted by establishing that counsel acted with "gross incompetence."⁹³ In support of his claim, Blagojevic pointed to four examples which he believed demonstrated his counsel's incompetence.⁹⁴ These examples included his claim that his counsel mischaracterized the nature of his military authority over a co-accused in the case, his selection of witnesses that Blagojevic believed harmed his case, and two Trial Chamber decisions that criticized counsel's performance.

The Appeals Chamber found that Blagojevic's own submissions on appeal revealed that the continued poor relationship with his lawyer was due to his unilateral refusal to communicate with defense counsel.⁹⁵ The Trial and Appeals chambers both found that, throughout the trial, defense counsel continued in his willingness to meet with the accused and to receive instructions.⁹⁶ The Appeals Chamber dismissed Blagojevic's claim finding that any short-comings of counsel were due to Blagojevic's steadfast refusal to communicate with him and not because of any inherent defect in his representation.⁹⁷

The discord between Blagojevic and his attorney reached its pinnacle when Blagojevic notified the Trial Chamber that he wished to testify in his own defense. The Chamber ruled that he could provide such testimony in one of two ways. He could give an unsworn statement under the control of the Chamber as provided for in Rule 84 *bis* (this statement would not be subject to cross-examination) or he could give evidence like other witnesses, under oath, and via direct and cross-examination. The court reminded Blagojevic that he could also elect to exercise his right to remain silent.⁹⁸

Blagojevic, seeking to benefit from the greater weight the Chamber would place on testimony taken by conventional methods, was willing to testify under oath and to subject himself to cross-examination. He steadfastly refused to consult with his attorney in advance of his testimony and refused to permit his attorney to question him. The Trial Chamber refused to accommodate Blagojevic's request to be allowed to give his direct testimony, under oath, without being questioned by counsel.⁹⁹ Given the importance of the matter, the Trial Chamber conducted a hearing to receive Blagojevic's decision and interpreted his refusal to accept the court's conditions as a decision to exercise his right to

91. *Id.* ¶ 14 (citing Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defense Team, *Prosecutor v. Blagojevic*, Case No. IT-02-60-AR73.4, ¶ 50 (Nov. 7, 2003)).

92. *Id.* at ¶ 15 (citing Blagojevic Appeal Brief, *Prosecutor v. Blagojevic*, Case No. IT-02-60-A, ¶¶ 2.14-2.20, 2.23, 2.35, 2.37, 2.38. (May 9, 2007)).

93. Blagojevic Appeals Judgment, *supra* note 77 at ¶ 23.

94. *Id.* at ¶ 24.

95. *Id.* at ¶ 25.

96. *Id.* at ¶ 28.

97. *Id.* at ¶ 25.

98. Blagojevic Trial Judgment, *supra* note 79, at ¶ 907.

99. *Id.*

remain silent.¹⁰⁰ Blagojevic alleged on appeal that the options offered by the Trial Chamber effectively denied him the right to testify.

The Appeals Chamber recalled the *Galic* Appeal Judgment in which a similar issue was raised when the Trial Chamber placed some time limits on Galic's testimony. The Appeals Chamber in *Galic* confirmed that while a defendant has a right to appear as a witness in his own defense, that this right must be exercised within the Trial Chamber's authority to control the conduct of the trial as long as the conditions imposed do not unreasonably interfere with the defendant's opportunity to testify.¹⁰¹ The Appeals Chamber was of the view that the Trial Chamber made every effort to facilitate Blagojevic's testimony and its insistence that his testimony be the product of questioning by defense counsel was not an unreasonable infringement of his right to testify. "It was Blagojevic's unjustified and unilateral refusal to communicate with his assigned counsel that resulted in his failure to testify, rather than any action or unjustified restriction imposed on his right by the Trial Chamber."¹⁰²

Judge Shahabuddeen disagreed with this portion of the majority's holding, believing that the poor relationship between Blagojevic and his attorney required a new trial.¹⁰³ According to the dissent, the record was clear that Blagojevic wanted to testify and was willing to consult with an attorney but simply refused to meet with his assigned counsel who he repeatedly sought to remove. According to Judge Shahabuddeen's analysis, the Trial Chamber incorrectly paired Blagojevic's willingness to submit to cross-examination with a requirement that his direct evidence be the product of questioning by an attorney whom he did not wish to represent him.¹⁰⁴ The assistance of counsel during direct examination of a defendant is a right—a right which Blagojevic could knowingly, intelligently and voluntarily waive. He was under no obligation to use counsel in order to exercise his right to testify before the Chamber. He could waive his right to the assistance of counsel during his direct evidence without waiving his fundamental right to testify. To do otherwise would be to imprison him in the right.¹⁰⁵ In Judge Shahabuddeen's view, the conditions placed by the Trial Chamber on Blagojevic's testimony denied him the right to place his account before the Trial Chamber and the resulting conviction, without the benefit of his evidence, was fundamentally flawed and could only be remedied by granting the request for a new trial.¹⁰⁶

III. The Special Tribunal for Lebanon: The Newest *ad hoc* Tribunal

On May 30, 2007, the U.N. Security Council once again exercised its authority under Chapter VII of the U.N. Charter to create an *ad hoc* international criminal tribunal. With a vote of ten to zero (five members abstained), the Security Council passed Resolution 1757 to create an international tribunal to investigate and bring to justice perpetrators of

100. Blagojevic Appeals Judgment, *supra* note 77 at ¶¶ 28-29.

101. *Id.* at ¶ 27.

102. *Id.* at ¶ 28.

103. *Id.* at ¶ 10 (Shahabuddeen, M., dissenting in part).

104. *Id.* at ¶ 4.

105. *Id.* at ¶ 6 (citing *Adams v. United States*, 317 U.S. 269 (1942)).

106. *Id.* at ¶ 9.

the February 14, 2004, assassination of former Lebanese Prime Minister Rafiq Hariri.¹⁰⁷ The resolution creating the tribunal was sponsored by the United States, the United Kingdom, Belgium, France, Italy, and Slovakia and broke a stalemate in the Lebanese parliament over implementation of a U.N. brokered agreement to establish a tribunal that was approved by the Security Council in November 2006. Five months of discussion in the Lebanese parliament failed to persuade a pro-Syrian minority to withdraw their opposition to the agreement, effectively blocking its implementation. Because of the stalemate, Lebanon's Prime Minister, Fouad Siniora, sent a letter to Secretary-General Ban Ki-moon asking him to place the matter before the Security Council to consider overcoming the stalemate with a binding resolution to establish the tribunal. The Secretary-General, concluding that all other diplomatic efforts had been exhausted, agreed to raise the matter before the Council.¹⁰⁸

The Security Council's action was the culmination of the international community's efforts to establish responsibility for the assassination. In April 2005, the Council established the International Independent Investigation Commission led by Serge Brammertz, the former deputy-prosecutor of the International Criminal Court. The Special Tribunal's administrative structure mirrors that of the other *ad hoc* and special tribunals with independent Chambers, an Office of the Prosecutor, Registry, and a Defence Office. The Chambers consists of both Trial and Appeals chambers, with a Pre-Trial Judge assigned to administer pre-trial matters. Each chamber is composed of both international and Lebanese judges with the Trial Chamber having one Lebanese and two international judges. The Appeals Chamber has two Lebanese judges with the remaining three selected from qualified international jurists.¹⁰⁹

The cost of the tribunal is allocated between Lebanon, which pays 49 percent of the tribunal's expenses, and the other member states that the remaining 51 percent of costs through voluntary contributions.¹¹⁰ The Netherlands agreed to host the tribunal in keeping with its traditional role as the seat of other international criminal courts, including the ICTY, the International Criminal Court, and the Charles Taylor case before the Special Court for Sierra Leone.

Article 1 of the Statute establishes that the *ratione materiae*, or subject matter, of the tribunal shall be crimes perpetrated in Lebanon between October 1, 2004, and December 12, 2005.¹¹¹ This may be expanded by the parties to the original agreement if there are other crimes of a similar nature and gravity as the attack that killed Hariri.¹¹² The Security Council must approve any expansion of the Tribunal's mandate.¹¹³ The Tribunal has jurisdiction over other attacks having a nexus to the Hariri assassination. Factors that may establish this nexus include: similarities between motive and purpose of the attacks, the

107. S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007). China, Indonesia, Qatar, Russian Federation, and South Africa abstained from voting on the resolution.

108. *Id.*

109. The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, 25-26, delivered to the Security Council, U.N. Doc. S/2006/893 (Nov. 15, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/617/97/PDF/N0661797.pdf?OpenElement>.

110. *Id.* at 12.

111. *Id.* at 23.

112. *Id.*

113. *Id.*

victims who are targeted, the *modus operandi* of the attacks, or any connections between the perpetrators of the attacks.¹¹⁴

The Special Tribunal for Lebanon differs from other *ad hoc* criminal tribunals in that the applicable substantive law is the criminal law of Lebanon.¹¹⁵ Article 2 of the Statute provides that the Tribunal has jurisdiction to adjudicate those portions of the:

Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and . . . Articles 6 and 7 of the Lebanese law as of 11 January 1958 on ‘Increasing the penalties for sedition, civil war and interfaith struggle.’¹¹⁶

In addition to the Article 2 reference to Lebanese law, Article 3 of the statute incorporates principles of accessory liability from the statutes and jurisprudence of other international criminal tribunals.¹¹⁷ “A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person: (a) [c]ommitted, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute.”¹¹⁸ Article 3 also provides for liability as a member of a joint criminal enterprise – a form of liability having its genesis in the post-World War II war crimes cases and now a common feature of international indictments.¹¹⁹

Article 3 also outlines a form of command responsibility when crimes are “committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates.”¹²⁰ This liability is invoked whenever a superior “knew, or consciously disregarded information that clearly indicated” that subordinates within the effective control of the superior were engaged in criminal activity or when the superior failed to take all necessary measures to prevent or punish the crimes.¹²¹

The Special Tribunal has concurrent jurisdiction with the national courts of Lebanon.¹²² The national judicial authority in Lebanon is required to turn over its file and the evidence it has gathered on the *Hariri* case to the Tribunal. In the event of parallel cases, the Tribunal has primacy and can remove cases from national courts.¹²³ The Statute voids any amnesties that may be granted and empowers the tribunal to subsequently try a per-

114. *Id.*; see also *id* at 3.

115. *Id.* at 5-6.

116. *Id.*

117. *Id.* at 23-24.

118. *Id.*

119. *Id.* (stating:

A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person . . . [c]ontributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.)

120. *Id.*

121. *Id.*

122. *Id.* at 24-25.

123. *Id.*

son who has already been the subject of domestic criminal proceedings if the tribunal determines that the proceedings were not impartial or that the case was not “diligently prosecuted.”¹²⁴

The statute enumerates the rights of suspects and those formally accused of crimes. Rights at the investigatory stage include the right to remain silent, the right to legal representation, and the right to the services of an interpreter.¹²⁵ Once formally accused, a defendant is protected by the presumption of innocence and has the right to be adequately informed of the charges against him as well as the right to examine the evidence against him and present evidence on his behalf.¹²⁶ The Statute requires judges to issue a written judgment that can be appealed and empowers them to impose sentences up to life imprisonment. There is no death penalty.¹²⁷ The Statute also affords victims the right to express their views to the Special Tribunal to the extent such is not inconsistent with the rights of the accused.¹²⁸

Notably, the Statute allows for trials *in absentia* in three cases: where the accused has expressly waived his or her right to be present; where the accused has not been handed over to the Tribunal by the State authorities concerned; or where the accused “ [h]as absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges” in the indictment.¹²⁹ This last provision is apparently in response to the intractable problem that General Radko Mladic and Radovan Karadžić have proven to be for the ICTY, whose statute does not permit trials *in absentia*.¹³⁰ In the event that the tribunal proceeds without the accused being present, the statute requires that the Defence Office of the Tribunal appoint an attorney to represent the interests and rights of the accused.¹³¹

124. *Id.*

125. *Id.* at 28.

126. *Id.* at 28-29.

127. *Id.* at 31 (requiring a “reasoned opinion in writing”).

128. *Id.* at 29.

129. *Id.* at 31.

130. STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, art. 21(4)(d) (last amended Feb. 28, 2006), available at <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb06-e.pdf>

131. *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, *supra* note 109, at 31.