Dear Members and Colleagues,

It appears that sadly both summer and my term as the Chair of the International Law Section are flying by much too quickly and nearing their respective ends. While many of us (myself included) are escaping for one last trip before summer is officially over and the kids head back to school, this is also a busy time for the International Law Section. This is the time of year when we plan for our annual meeting in September, elect new officer and council members, and plan our upcoming programs for the 2017-2018 year.

This year, the International Law Section will be holding its annual meeting in conjunction with the State Bar of Michigan’s Annual Meeting at the Detroit Cobo Convention Center. Our annual meeting will take place on September 28th at 1 p.m. and will be followed by an educational program, entitled “The Face of Immigration Under a New Administration: Policy and Practice.” The program will spotlight immigration policy, business immigration, criminal aliens and inadmissibility, family immigration, and asylum/refugee issues. Confirmed speakers include Hon. Elizabeth A. Hacker, U.S. Immigration Judge (Ret.); Robert M. Birach, (Immigration Attorney, AILA Department of Labor Liaison and former AILA Board of Governors); Rachel Settlage (Assistant Professor and Director of Asylum and Immigration Law Clinic, Wayne State University Law School); and Dorothy Hanigan Basmaji (Shareholder, The Murray Law Group, Michigan AILA Liaison to U.S. Customs and Border Protection).


As you can see from the above line up of speakers and presentations, our upcoming annual meeting program offers something for a wide variety of practitioners, not just immigration lawyers, and I am sure that you will all find it informative and interesting. After the program, please join us for an afterglow reception at Detroit Dime Store, 719 Griswold Street, Suite 180, Detroit, MI 48226. We’ve rented the entire restaurant, have an open bar, and our Chair Elect Debbie Clephane is planning a tasty offering of the Dime Store’s finest dishes for us to enjoy so it is sure to be a wonderful time.

Continued on the next page
As our annual meeting quickly approaches, it is hard to believe that my term as Chair is coming to a close. As I reflect back, it was an eventful year for the Section and we fulfilled one of our primary goals of extending our Section’s membership and networking opportunities by partnering with other Bar Sections and other organizations. We kicked off the 2016-2017 bar year, with our annual meeting on September 13th at the Detroit Institute of Arts, which featured a substantive program on Protecting U.S. Intellectual Property Rights in a Global Economy. We were joined at last year’s annual meeting by members from the SBM’s Intellectual Property and Arts, Communications, Media and Sports sections. We followed the annual meeting with a program held jointly with the SBM’s Business Law Section in conjunction with our November Council Meeting that featured a substantive program titled, “The Brexit Effect: Potential Legal Impacts from Brexit on U.S. and Global Companies”. Continuing with our efforts to partner with other SBM sections and to further engage local law schools, our January Council meeting was held at Wayne State University Law School and featured a reception and presentation by former U.S. Senator Carl Levin, “International Tax Havens: Whither or Wither?” Both the reception and presentation were held jointly with the SBM’s Tax Law Section. In March, our brave and devoted Section members battled those tempestuous March winds and a last minute change of venue to Honigman’s newly renovated and opened Detroit conference center to hear about potential changes to trade and immigration policy under the Trump Administration from Nick Couttsas, Chief of Staff of the American Automotive Policy Council and Linda Armstrong and Bushra Malik from Butzel Long. In May, we took our Council Meeting on the road and held our meeting at Grand Valley State University in Grand Rapids in conjunction with West Michigan World Trade Week. The International Law Section sponsored a legal track at this year’s business conference portion of the West Michigan World Trade Week. The program was attended by hundreds of representatives from international companies with a presence in Michigan, as well as by many ILS section members. The program was an undisputed success and enjoyed by all. Given the positive response to our participation in West Michigan World Trade Week, this is something we will look to continue in the coming year. It also provides a wonderful opportunity for us to interface with more of the Section’s members located on the west side of the state.

In addition to planning our participation in next year’s World Trade Week, our Chair Elect, Debra Clephane and the Section’s officers and Council are busy planning programming for 2017-2018 and looking to continue our efforts to partner with organizations that have synergies with the International Law Section such as the many locally based foreign trade councils. Please join us at our upcoming annual meeting to hear more about the Section’s plans for future programming.

Last, but not least, thank you to the ILS officers and council members who supported me throughout the year. It is their contributions that allowed us to offer an incredible slate of programs to our members this past year. And thank you to all of you for letting me serve as your Chair for 2016-2017. It was truly an honor to serve and it has been an incredibly enjoyable and fulfilling experience.

Please enjoy this issue of the Michigan International Lawyer and I hope to see you at a future ILS meeting or program. If I can be of any assistance to you or if you would like to share with me your ideas for the ILS, please feel free to call me at (313) 465-7518 or e-mail me at lara.phillip@honigman.com.

Kind regards,

Lara Fetsco Phillip
Chair, 2016-2017
International Law Section
Lawyers who specialize in intellectual property law or who work as in-house counsel for a brand owner with a trademark portfolio are familiar with the global problem of trademark counterfeiting. Although national and international trademark registration and criminal and civil legal actions are some of the legal practitioner’s main tools to enforce a trademark owner’s rights, a lawyer who wants to give a comprehensive option for their client or employer will want to consider a holistic approach to combating counterfeit trademarks and products.

Beyond the vital legal knowledge that a practitioner needs to know regarding the trademark law in the jurisdiction where a brand owner’s product is sold or ends up, the holistic framework posits a proactive approach by the brand owner to dealing with counterfeiting. In addition to understanding the legal framework and the problem of counterfeit trademarks, the following topics provide the practitioner with a well-rounded knowledge base: culture of product counterfeiting; working with law enforcement and customs agencies; product counterfeiting investigations; legitimate and illicit supply chains; managing supply chain partnerships; identifying a brand protection team; managing tactics and technologies; developing networks and counter-intelligence in countries where threats are detected; internal and external market monitoring for counterfeits; managing internal and external communications about counterfeits; analytics for product counterfeiting; and management and security of information regarding counterfeits.

The A-CAPP Center

The Center for Anti-Counterfeiting and Product Protection (A-CAPP) housed in Michigan State University, grew out of the interest of brand owners to have a research-based approach to global problem of brand protection and anti-counterfeiting. Today, the A-CAPP Center serves as a leader in the field and an academic resource for industry and law enforcement. As the only center of its kind, the A-CAPP Center serves as a global hub for evidence-based anti-counterfeiting and brand protection research, strategies and education. The Center’s essence builds on its collaboration with industry, law enforcement, academia and other stakeholders.

Resources available

Lawyers have an opportunity to take a lead in creating a proactive and holistic plan for brand owners to protect their trademarks and product. The MSU A-CAPP Center provides several opportunities for lawyers to increase their knowledge in this area. First, the Brand Protection Professional: A Practitioner’s Journal (BPP) was launched in 2016 and is the only quarterly resource dedicated to reporting on brand protection issues, research and professional information for in-house brand protection practitioners.

Second, in late 2017, the Center is launching a self-guided, online certificate program focusing on 17 courses developed through research and focus groups with industry that address product counterfeiting and brand protection. The Certificate will be available online and targets a global audience. The courses are designed for individuals who work in a narrow area of brand protection and are looking to broaden their knowledge base or those who are new to the field.
Comprehensive Study on U.S. Anti-Counterfeiting Criminal and Civil Laws

In 2017, the A-CAPP Center published a study in Northwestern University College of Law Journal of Criminal Law and Criminology on the legal framework available at the U.S. state-level for both civil action and criminal enforcement. The study found that all 50 U.S. States have legislation pertaining to civil action, and 49 have legislation allowing for criminal prosecution. The A-CAPP Center’s next phase of the study examines trademark counterfeiting convictions and sentences, as well as legal analysis of state level case law on trademark counterfeiting.

2017 Brand Protection Strategy Summit

The A-CAPP Center will continue the fight for improving responses to product counterfeiting and protecting brands by hosting its 3rd Annual Brand Protection Strategy Summit. This exclusive summit (no vendors or third parties) offers opportunities for brand owners, law enforcement, and academia to share and learn from one another. The Focus for this year’s summit is: 1) E-Commerce: What Challenges and Opportunities does E-commerce pose?; 2) Partnerships: How Can Partnerships Promote Brand Integrity?, and 3) Return on Investment: How Can We Measure the Return on Investment?

About the Author

Kari Kammel is a lawyer and Assistant Director for Education & Outreach at the Center for Anti-Counterfeiting and Product Protection at Michigan State University. The Center is housed in the College of Social Science and take a cross disciplinary approach to combating the problem of counterfeiting, working with Business, Law, Packaging, Engineering, Criminal Justice, and others on campus and in industry.

For more information on A-CAPP Resources or the Brand Protection Professional Certificate, contact Kari at kkammel@msu.edu, or 517-353-2163.

Endnotes

The Border Line Between the Prohibition of the Use of Force and the Right of Self-Defense Against Non-State Actors

By Paola Diana Reyes Parra

Abstract: Non-State actors have become a threat to international peace and security. Therefore, international law must evolve to apply to new scenarios. International law must provide practical solutions to allow States to defend themselves from the threats that non-State actors present. Consequently, international law governing the use of self-defense should be in a process of change through a new “flexible” approach.

The 9/11 attacks resulted in an unprecedented response to the threats posed by international terrorism. The response eventually shaped into the “war on terror” and the declaration of a new type of armed conflict. Different legal concepts were combined in the attempt to create the idea of a global “war” without geographical and temporal frames. The subsequent intervention of international coalition forces in Afghanistan (2001) and Iraq (2003), along with the contemporary counter-terrorism caused by the presence of non-State actors (NSAs), have blurred the lines between the universally accepted prohibition of the use of force and the inherent right of self-defense.

In particular, the United Nations (UN) Charter1 was envisioned as a framework of an international community of nation-states.2 However, NSAs such as the Islamic State of Iraq and Syria (ISIS) have entered into the international scene using “force.” Consequently, the claim to “use force in self-defense” in response to “armed attacks” by NSA is undoubtedly one of the most interesting and controversial issues in modern international law, given that treaties, custom, and case law do not address the issue in a way that allows States to defend themselves by targeting NSAs directly instead of other States.

It is well known that in order to maintain international peace and security, the UN Charter prohibits the threat or use of force by its Member States in their international relations.3 Citing UN General Assembly Resolution 2625 (XXV),4 the International Court of Justice (ICJ) has recognized a general prohibition on the threat or use of force as both a customary rule and a principle of international law.5 Therefore, the prohibition has a binding nature that applies to all States worldwide.

Despite the general prohibition on the use of force, Chapter VII of the UN Charter allows for two exceptions: (i) the authorization by the UN Security Council (SC) (article 42); and, (ii) the inherent right of every State to defend itself against armed attacks, in both individual and collective manner (article 51).6 An additional exception exists in situations of military interventions conducted by another State or interregional organization, where the host State gives its consent regarding the use of force within its territory.

In the first exception, Chapter VII provides the framework by which the SC may take enforcement action. Prior to acting, the SC must “determine the existence of any threat to the peace, breach of the peace, or act of aggression” (article 39). There are many different types of situation that may rise to the level of threat or potential threat to international peace and security.7 Should the SC reach such a decision, it would then decide to authorize the resort to military enforcement measures (article 42).

Regarding the second exception, it is well-established that the right of all States to defend themselves was customary international law (CIL) prior to the adoption of the UN Charter.8 In the exercise of self-defense, some States argue in favor of a more restrictive approach and a textual interpretation of the UN Charter. Others however, support its expansive interpretation focusing on the possibility of invoking the right to self-defense against NSAs on the basis that the relevant customary law is pre-existent to and broader than the UN Charter. Bearing that in mind, a first step should be to clarify the scope of the rules established in the UN Charter regarding the self-defense.

Article 51 provides for the protection of a State’s “inherent right” to self-defense if case an armed attack occurs or is imminent.9 According to ICJ jurisprudence, the use of force must satisfy the criterion of necessity (as “last resort”), of proportionality (the level of force is reasonable to counter that threat),10 and of “immediacy.”11 Additionally, article 51 provides that the State exercising self-defense shall immediately inform the SC of the measures taken and shall subordinate its action at the disposal of that body. Therefore, the measures taken will be temporal until the SC takes appropriate action.

However, what happen if a State is attacked by a NSA located in another State which has not provided its consent to the NSA’s actions? Without SC authorization or the consent of the State where the NSA is located, would it be possible for the attacked State to justify the use of force as self-defense against the NSA’s attack?

Certainly, the restricted approach of self-defense based only on what is stated article 51 would lead us to believe the right of self-defense is reserved only for armed attacks launched
by States, the full and primary subjects of international law. However, because of this approach, States could have more reasons to fear armed attacks launched by NSAs than those coming from a State.

The approach used by the ICJ in the *Nicaragua Case* is that the victim State may not resort to force in response to attacks by NSA unless the NSA had effective control of the State or the NSA’s actions were attributable to that State. Therefore, if none of those situations exists, the use of force by the victim State will be considered unlawful since, it contradicts the principles of the sovereign equality of States and the prohibition of force in international relations.

Considering that a State cannot be held responsible for all activities originating from its territory, a question is raised as to how the international community should manage threats imposed by NSAs such as ISIS. In 2014, ISIS shook the international scene, by posing a new -- and possibly the greatest -- threat to peace and security in the Middle East. Indeed, ISIS enjoys financial and military resources (i.e. massive wealth, sophisticated training and organization, access to destructive weaponry, etc.) and controls some territory of both Syria and Iraq.

To address the issue, the United States (USA) along with other States launched attacks against ISIS in Iraq and Syria. However, it must be considered that “[w]hile the Iraqi government has consented to foreign military action against ISIS within Iraq, the Syrian government did not. Rather, Syria protested that the air strikes in Syrian territory were an unjustifiable violation of international law.” The USA claimed that the attacks against ISIS in Syria were lawful acts of collective self-defense on behalf of Iraq.

On one hand, the prohibition of the threat or use of force is a norm applicable amongst States, since an armed attack would undoubtedly affect the territory of another State. However, could it be possible that an armed attack launched by an entity different from a State would justify the right of self-defense? Given the current context, warrants such a question.

Many scholars base the legality of cross-border attacks against NSAs on whether the host State is “unwilling or unable” to deal with those who are launching armed attacks from within its territory. For instance, Marko Milanovic has identified three possible scenarios: (i) the territorial state is complicit or supports the NSA; (ii) the territorial state fails to exercise due diligence by not doing all that it could reasonably do to avoid the NSA use its territory; and, (iii) despite exercising its due diligence, the territorial state is unable to prevent the attack. The last two situations reflect the “unwilling or unable” test whose recognition would per se constitute a radical change from the prior-existing rule.

While even though this framework is a radical change from the existing rule, it is interesting to note that State practice claiming self-defense against NSAs has existed even before 9/11. For example, the 1998 the USA used the justification of self-defense for its attack against Al Qaeda facilities in Afghanistan as a response to terrorist attacks on the U.S. embassies in Nairobi and Dar Es Salaam. Another interesting example was the Hezbollah attack against Israel from Lebanon in 2006. In response, Israel invaded Lebanon invoking the right of self-defense. From its point of view, Israel claimed not to be acting against the territorial host State, but against the NSA. Despite its actions were considered disproportionate, “a majority of [SC] members, as well as the UN Secretary-General, recognized Israel’s right to defend itself,” implicitly accepting a right to use force in self-defense against NSA. Before the 9/11 attacks, the “international community has been practically unanimous that the US invasion of Afghanistan was a lawful exercise of self-defense” against not only NSA but also against the Afghan State because of its acquiescence, “though some have expressed certain doubts as to the proportionality of the regime-toppling intervention.”

Regarding the “unwilling or unable” test, prior to the appearance of ISIS, the Russian Federation claimed its right to use force in self-defense on Georgian territory against Chechnya for Chechen attacks launched against Russia. In particular, the Russian Federation claimed that Georgia was unwilling to take measures to halt terrorist attacks from its border region. No SC action was taken on the matter, but Georgia did object to Russia’s interpretation of article 51 of the UN Charter.

Additionally, ISIS, as a threat to international peace and security, has raised subsequent examples of invocations by States of the right of self-defense against an NSA. For instance, following the 2015 and 2016 ISIS attacks in Paris and Nice, France invoked the right to self-defense. Moreover, many States are taking action in Syria and Iraq on different legal bases. As explained by Dapo Akande and Marko Milanovic:

The US-led coalition relies on consent with regard to action taken within Iraq, and the collective self defence of Iraq with regard to action taken in Syria. But the US, the UK and perhaps France have also made reference to individual self-defence with regard to strikes in Syria. Russia for its part (and presumably Iran) would rely on consent from the Syrian government with regard to their action in Syria, and like Syria regard actions taken by Western states in Syria without the consent of the Syrian government to be unlawful.

In light of the current events, State practice could suggest an initial recognition of the right to use force in self-defence targeting NSAs in foreign territory when the host State cannot be relied on to prevent or suppress terrorist actions. However, there is not a uniform practice. Therefore, it is necessary to explore in depth this issue, in order for international law to eventually provide practical solutions to this new global challenge, even if it means moving away from the classical rules of self-defense, or the ICJ’s conditions of the resort to use of force against NSAs.
Imminent threats are fully covered by Article Derecho,
Derecho Internacional
Letter dated 20 (Nov.
Talk! –
fter was adopted June 26, 1945 and entered into
the Peruvian University of Applied Sciences. Moreover, she serves
as civilian instructor at the Center for International Humanitarian
Law and Human Rights of the Joint Command of the Armed
Forces of Peru.

The author would like to thank Miss Karem Cárdenas Ynfanzon and Katerina Pitsoli for their useful comments on many
issues dealt with in this article.

Endnotes
1 The U.N. Charter was adopted June 26, 1945 and entered into
force October 24, 1945. Currently, the Charter has 193 States
Parties.
2 The U.N. Charter only allows for states to be members and
only applies to states. See, U.N. Charter art. 4, para. 1.
3 U.N. Charter art. 2, para. 4.
5 Mónica Pinto, L’emploi de la force dans la jurisprudence des
tribunaux internationaux, in COLLECTED COURSES OF THE
HAGUE ACADEMY OF INTERNATIONAL LAW 102 (2009).
6 Leo Van Den Hole, Anticipatory Self-Defence under International
7 For example, situations could include country-specific situations
with armed conflicts with a regional/sub-regional dimension,
terrorist acts, proliferation of weapons of mass destruction or
illicit trafficking of small arms and light weapons, among others.
8 U.N. Repertoire of the Practice of the Security Council, Actions
with Respect to Threats to the Peace, Breaches of the Peace, and
9 U.N. Sec. Council, Res. 1368 (2001); U.N. Sec. Council,
Res. 1373 (2001); Military and Paramilitary Activities in and
against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 193 (June 27
[“Nicaragua case”]; RY Jennings, The Caroline and McLeod
Cases, 32 AJIL 82–99 (1938).
10 Nicaragua case, supra note 9, at para. 194; U.N. Secretary-
General, In larger freedom: towards development, security
(Mar. 21 2005) (“Imminent threats are fully covered by Article
51, which safeguards the inherent right of sovereign States to defend
themselves against armed attack. Lawyers have long recognized
that this covers an imminent attack as well as one that has already
happened.”) See also, the U.N. GAOR Res. 3314 (XXIX), 29th
11 Legality of the Threat or Use of Nuclear Weapons, Advisory
12 Yoram Dinstein, War, Aggression and Self-Defence 241
(2011).
13 Nicaragua case, para. 191, 195; Oil Platforms (Islamic Republic
of Iran v United States of America), 2003 I.C.J. (Nov. 6), para. 195-
196; Legal Consequences of the Construction of a Wall in the
Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J.
(July 9), para. 139 [“Legal Consequences of the Construction of
a Wall”]; Armed Activities on the Territory of the Congo (Democratic
14 Legal Consequences of the Construction of a Wall, para. 139.
15 Janine di Giovanni, Leah McGrath Goodman and Damien
Sharkov, How Does ISIS fund its reign of terror?, NEWSWEEK (Nov.
how-does-isis-fund-its-reign-terror-282607.html (last accessed
Nov. 10, 2016).
16 Claire Mills, ISIS/Daesh: The Military Response in Iraq and
Syria, House of Commons Briefing Paper No. 06995 (Sept. 11,
2015), at 4-7.
17 Michael Scharf, How the War against ISIS Changed International
Law, CASE RESEARCH PAPER SERIES IN LEGAL STUDIES,
&context=faculty_publications (last accessed Nov. 11, 2016).
18 Id.
19 Fabián Novak y Luis García-Corrochano. Derecho Internacional
Público. Tomo III “Solución pacífica de controversias”. Lima: Fondo
Editorial PUCP, 2005, p.22; Antonio Remiro Brotóns. Derecho
kind of sources are these? Books? Articles? I need you to describe
them for me so that I can format them correctly.]
20 Ashley S. Deeks, Unwilling or Unable: Toward a Normative
Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 3,
487 (2012).
21 Marko Milanovic, Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum, EJILL: TALK! – BLOG OF
THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, (Feb. 21,
5, 2017).
22 Ashley S. Deeks, supra note 20.
23 A famous historic case often mentioned when regarding
interpretation of article 51, is the 1837 Caroline incident. The
Caroline case involved armed attacks against Canada and the
recognition of the right to use necessary and proportionate
military force in self-defense as a response to NSA attacks
launched from the U.S. territory. See, Edward Collins and Martin
Rogoff, The Caroline Incident of 1837, the McLeod Affair
of 1840–1841, and the Development of International, 20 AM.
REV. OF CAN. STUDIES 1, 81-107 (1990); Michael Reisman,
International Legal Responses to Terrorism, 22 Hous. J. of INT’L L.
august 1998 from the Permanent Representative of the United
States of America to the United Nations addressed to the President
of the Security Council.”


29 Id.


32 Dapo Akande and Marko Milanovic, supra note 28.

---

**Treasurer's Report**

For the four months ending June 30, 2017

<table>
<thead>
<tr>
<th></th>
<th>Current Activity June 2017</th>
<th>Year-to-date June 2017</th>
<th>Year-to-date June 2016</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Revenue:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>International Law Section Dues</td>
<td>14,315.00</td>
<td>1,428.00</td>
<td></td>
</tr>
<tr>
<td>International Stud/Affil Dues</td>
<td>35.00</td>
<td>35.00</td>
<td></td>
</tr>
<tr>
<td>Total Revenue</td>
<td>14,350.00</td>
<td>14,315.00</td>
<td></td>
</tr>
<tr>
<td><strong>Expenses:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ListServ</td>
<td>175.00</td>
<td>225.00</td>
<td></td>
</tr>
<tr>
<td>Meetings</td>
<td>32.22</td>
<td>3,771.96</td>
<td>3,610.25</td>
</tr>
<tr>
<td>Seminars</td>
<td>330.00</td>
<td>330.00</td>
<td>155.00</td>
</tr>
<tr>
<td>Annual Meeting Expenses</td>
<td></td>
<td>810.50</td>
<td></td>
</tr>
<tr>
<td>Speaker Expenses</td>
<td>135.77</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Travel Expenses</td>
<td>1,343.72</td>
<td>1,343.72</td>
<td>480.10</td>
</tr>
<tr>
<td>Telephone</td>
<td></td>
<td>104.52</td>
<td></td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>598.63</td>
<td>235.73</td>
<td></td>
</tr>
<tr>
<td>Newsletter</td>
<td>1,182.26</td>
<td>1,895.15</td>
<td></td>
</tr>
<tr>
<td>Total Expenses</td>
<td>1,705.94</td>
<td>7,537.34</td>
<td>7,516.25</td>
</tr>
<tr>
<td><strong>Net Income</strong></td>
<td>(1,705.94)</td>
<td>6,812.66</td>
<td>6,798.75</td>
</tr>
<tr>
<td>Beginning Fund Balance:</td>
<td>15,053.58</td>
<td>13,814.23</td>
<td></td>
</tr>
<tr>
<td>Total Beginning Fund Balance:</td>
<td>15,053.58</td>
<td>13,814.23</td>
<td></td>
</tr>
<tr>
<td>Ending Fund Balance</td>
<td>21,866.22</td>
<td>20,612.98</td>
<td></td>
</tr>
</tbody>
</table>
Due Process Implications Concerning the *In Absentia* Trial of the Special Tribunal for Lebanon: Revolutionary or Cautionary?  

By Kelsey Heath

The United Nations (UN) not only serves as a post WWII symbol of international cooperation, but also as a pioneer for International Law and its means of enforcement. One such example is the Special Tribunal for Lebanon (STL), an ad hoc court created by the UN in response to former Lebanese Prime Minister Hariri’s assassination in February 2005. Using its Chapter 7 powers under the UN Charter, the Security Council created the Tribunal in 2007, with its doors officially opening in March of 2009. Besides the Tribunal’s nature in only prosecuting a singular incident, the Tribunal is also known for conducting its procedures *in absentia*, or in the absence of the accused. The idea of conducting a trial without the physical presence of defendants vastly differs from traditional common law ideals of jurisprudence, seemingly in defiance to an accused’s right to due process. As the field of International Criminal Law and the debate surrounding its efficiency grows, so do concerns over the legality of the STL proceedings.

**Background of the Attack**

On Valentine’s Day 2005 at 12:55 p.m., former Prime Minister of Lebanon, Rafic Hariri, was traveling through downtown Beirut when a van filled with explosives collided with his motorcade. Hariri, and around 21 others were killed in the blast, which left another 220 persons injured. In the immediate aftermath, a group named “Victory and Jihad in Greater Syria,” claimed responsibility for the attack, but the group was never heard from again. Shortly thereafter, a man named Abu Adass claimed responsibility through a videotape released to media outlet *Al Jazeera*, although the circumstances surrounding his “confession” remain suspicious and it continues to be questioned for its authenticity. Adass remains missing to this day.

**Composition and Jurisdiction of the Court**

Sitting in Leidschendam on the outskirts of The Hague, the Netherlands, the STL is located across the street from a petrol station. It is in an unassuming building that upon first glance, may easily be confused for a High School. Although a large fence and small sign in the front of the building indicate the presence of UN Personnel, many locals are unaware as to the purpose the STL serves. In fact, the building houses the STL and its four organs: The Registrar for administrative purposes, Chambers, The Office of the Prosecutor, and the Defense Office. Compared to similar courts, such as the UN International Criminal Tribunal for the Former Yugoslavia, the STL is the only court with a fully-integrated Defense Office. The presence of the in-house Defense Office serves a special purpose for the STL, for the proceedings are conducted *in absentia*, or in the absence of the accused.

Currently, there are four listed defendants in front of the Tribunal: Messrs Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, and Assad Hassan Sabra. The original indictment also included a fifth defendant, Mustafa Amine Badreddine, but the court subsequently amended the indictment when it ruled that there was enough evidence to assume Mr. Badreddine is deceased. The remaining four defendants remain at large. In addition to the trial over Hariri’s assassination, the court may also choose to exercise jurisdiction over related incidents, such as contempt of court cases and other connected acts.

**In Absentia Proceedings**

After an investigation by the UN, as well as a request from the Lebanese government that the UN create a special independent tribunal of “international character” to prosecute the perpetrators of the attack, Security Council Resolution 1757 established the STL in 2007. The tribunal opened its doors in 2009, although the warrants for the accused remained outstanding. To understand why the court decided to proceed in the absence of the defendants, it is first helpful to understand the wider goals of International Criminal Law.

From a perspective that focuses primarily on deterrence, ad hoc tribunals serve more of a symbolic purpose that sends a message to the international community that grave crimes committed against large groups of people will not go unpunished. Furthermore, the *in absentia* trials in particular promote the idea that those who have escaped custody or have evaded capture, will not be spared. In addition to the punitive aspects of the independent criminal tribunals, there are also many rehabilitative features woven into both the composition and procedural components of international courts that emphasize restorative justice. Such measures include providing restitution to victims as seen in the International Criminal Court (ICC), preserving a historical record, and allowing dozens upon hun-
dreds of victims the opportunity to testify in an open forum. Although victims are able to tell their stories in front of the panel of judges, an in absentia trial presents the unique question of whether a defendant is provided an adequate opportunity to face his accuser. In common law jurisdictions, most notably in the United States, a defendant must be afforded the opportunity to cross-examine his accusers, as mandated by the Confrontation Clause of the Sixth Amendment. However, the confrontation issue is only one of the many unique challenges the STL and trials proceeding in absentia must address as they forge ahead into new and ambiguous legal territory.

Although the United States adopted its legal system from the common law tradition of Great Britain, much of Europe follows the civil law system. Notable differences between common law and civil law jurisdictions include that: civil law systems rarely employ the use of juries, opting instead for a panel of typically three judges to serve as the primary finders-of-fact; the use of leading questions; the ability of judges to order special requests for discovery; and verdicts do not usually require judges to adhere to existing precedent. The STL, along with fellow independent UN Tribunals and even the ICC, operate on a sort-of hybrid legal system, using elements from both the common and civil law traditions.

Some components of the hybrid legal system include a piece meal of substantive law and principles of procedural law from different international legal traditions. Specifically at the STL, the court employs the use of Lebanese substantive law, while the judges generally decide procedural issues as they arise. Procedural due process is an important part of many legal traditions. For example, while judges have the ability to decide issues of procedure in the United States, there are also established State and Federal Rules, modeled to adhere to and provide interpretation of the Constitution. These rules often cite to the Due Process Clause of the Fifth Amendment, which guarantees that no person shall be deprived of “life, liberty, or property, without due process of law.” Basic components of due process of law include the right to a fair and speedy trial, the right to confront accusers and witnesses, the right to examine evidence, and the right to an unbiased tribunal. Although the STL does of course not follow the Constitution of the United States, the principles of due process, including the right to representation and the right to a trial itself, are present throughout the international legal community as well. For example the International Covenant on Civil and Political Rights established the international standards of due process rights to afford accused persons a fair trial. The unique problem in the case of the STL however, is ensuring that all four defendants receive these types of protections, when they are not even in the courtroom.

Benefits to a trial In Absentia

Perhaps the most persuasive argument for trials held in absentia would be the most obvious, what is the alternative? What if the defendants are never apprehended? Referring back to the broader goals of international criminal law, there are both deterrent and rehabilitative benefits to simply even holding a trial, despite the witnesses/victims not being able to physically identify and confront the accused. The pain and suffering that both the victims and their families have endured are hard to comprehend. The victims may want to tell their story, the victims may want justice, the victims may want to change the course of history, and the victims may just want the entire process to finally be over. In a way, the victims may even know that the chances of not only apprehension, but then conviction, are slim. But even just the creation of the STL shows that the world is aware of the atrocities of February 2005 and provides hope. In the grieving and healing processes, one could argue that hope helps a great deal. Were the court not created, and the indictment not pursued, what message would that send to the victims, accused, and the world? That mass acts of terror and violence are accepted?

In addition to the symbolic impact of the court, every decision, every witness, every motion, contributes to a greater understanding of the relatively young and evolving field of International Criminal Law. The ICC and various UN Tribunals are unique in that they are independent courts that create their own respective rules, a phenomenon rarely seen since the Nuremberg Trials following WWII. With each new issue comes unchartered legal territory and every new ruling further shapes the structure of similar courts in the future. Although civil law systems are not required to rely on precedent, judges from different special tribunals around The Hague often look to the other tribunals for guidance on procedural issues.

Challenges for a trial In Absentia

Holding trials in absentia may serve important symbolic and procedural purposes that further the goals of International Criminal Law, but there are also many glaring practical and ethical concerns regarding trying defendants in their absence. Each of the four accused has his own defense team appointed by the Defense Office, comprised of eight to ten individuals, three of whom are attorneys. Remarkably, the accused and his defense team have never met and may never meet. In order to uphold the integrity of the tribunal and ensure that it does not become a kangaroo court, the accused are afforded the right to a retrial; meaning that at any point, the accused may step forward and demand a new trial due to the proceedings occurring in his absence. Only if the prosecution can prove that the defendant had knowledge of the proceedings and charges against him, will the court deny a new
If a defendant is granted a retrial, both the prosecution and defense must start anew, meaning that every witness, every piece of evidence, and every strategic decision, must be reconsidered. Considering the STL is already eight years into the trial, a retrial could be detrimental to the existence of the STL itself.

Practically, the right to retrial is very complex. In order to preserve the right to retrial, the defense team will actually take steps to avoid coming into contact with the defendant, so that he cannot be said to have knowledge of the proceedings against him. Due to not being able to communicate with him, the defense will also not agree to a single stipulation, citing the ability to not consult their client as reason. For the prosecution, this makes an already lengthy trial even more tedious. However, the defense also faces numerous challenges in in absentia trials.

In contrast to the American legal system, civil systems place more emphasis on the client as the absolute decision maker. Of course American attorneys consult clients on all major decisions, but they are able to also maintain a level of autonomy not granted to counsel in civil law systems. Considering the clients in the case of the STL are not present, one of the greatest challenges defense counsel face is the task of creating a timeline and case theory without the instructions of the defendant. This includes possible alibis, witnesses, evidence, and to what extent the attorneys may strategize with fellow defense teams.

In addition to the practical complications, defense counsel at the STL must also confront a variety of ethical issues concerning the trial being held in absentia. Without the input of the defendant, the teams must decide if they really are creating the strongest and most positive case in order to aid and protect the rights of their client. How far should investigators go to uncover facts? Should there be any stipulations? How should unfavorable evidence be handled?

Perhaps less obvious, are the challenges in even establishing the essential attorney-client relationship. Counsel may not become attached to the client, which is beneficial in terms of lessening the chances of secondary trauma, but it may also impact the sense of responsibility when he/she is not able to determine the motivations of the client. Nonetheless, counsel at the STL believe the lack of an attorney-client relationship does not impact their level of passion or professionalism for the job, and instead claim that it creates a higher level of objectivity in how they approach their case.

Moving Forward

When the STL opened in 2009, the projected duration of the trial was approximately three years. Eight years later, the estimated time of completion is still unclear. Not only does the ad hoc nature of the tribunal itself create complex issues involving jurisdiction, influence from other nations, and questions over funding, but its trial in absentia, while beneficial in terms of solidifying international procedure and symbolizing the importance of both deterrence and restorative justice on a global scale, also raises major practical and ethical concerns for all parties involved. In theory, if a country is unwilling or unable to prosecute the actors of large-scale heinous crimes, there seems to be no alternative to offer the victims of these atrocities any other outlet to express their experiences. But at what cost, and at what point, do UN Tribunals, particularly the STL, diminish their effectiveness and efficiency by encroaching upon the rights of the accused? For now, only time will tell.

About the Author

Kelsey Heath is a graduate of the University of Michigan, who is now a 3L at Wayne State University Law School. Throughout law school, Kelsey has served as an honors intern at the Federal Bureau of Investigation, as well as a student attorney at Wayne’s Asylum and Immigration Clinic. Since 2014, Kelsey has also served as an intern at the Wayne County Prosecutor’s Office. Most recently, she completed a study abroad program through Santa Clara University at The Hague, the Netherlands. In her free time, she enjoys traveling and spending time with friends and family. She hopes to pursue a career in international criminal law.

Endnotes

4. Briefing from the Defense Office- UN Special Tribunal for Lebanon. (May 29, 2017). [include document number or url to webpage].
6. Id.
9. Id.
Due Process .... continued from page 11

10 Briefing from Chambers- UN Special Tribunal for Lebanon. (May 29, 2017).
11 U.S. Const. amend. VI
13 Briefing from Chambers- UN Special Tribunal for Lebanon. (May 29, 2017). [include document number or url for webpage].
14 Briefing from Defense Office, supra note 4.
15 Roundtable on trials in absentia in international criminal justice, supra note 8.
16 Id.
17 Briefing from Defense Office, supra note 4.
18 Id.
19 Defense Panel Discussion- UN Special Tribunal for Lebanon. (June 7, 2017).
20 Id.
21 Id.

Calendar of Events

State Bar of Michigan Annual Meeting & Program
September 28, 2017
Detroit, MI, USA

International Bar Association Annual Conference
Sydney 201
October 8-13, 2017
Sydney, Australia

American Bar Association International Law Section: Doing Business in the Caribbean
October 20-23, 2017
Miami, Florida

American Bar Association International Law Section Fall Conference
October 24-27, 2017
Miami, Florida

International Bar Association Asia Pacific Mergers and Acquisitions Conference
November 2-3, 2017
Hong Kong

International Bar Association International Arbitration Training Day: Introduction of the IBA Soft Law
November 4, 2017
Hanoi, Vietnam