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# INTERNATIONAL LAW AND IMMIGRATION

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## ILS NEWS (AUGUST 2023)

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### CHAIR'S COMMENT



*Figure 1: Richard Bainter, ILS Chair*

This is an exciting year for ILS. As we fully emerge from the shadow of the pandemic, ILS can actively engage, in-person with many of its foreign friendship bars. As I write this note, I am preparing to

depart for Barcelona where CLA/ILS is partnering with the Barcelona Bar Association to offer a week-long legal conference for attorneys from the U.S. and Europe. Many thanks to ILS member Josh Surowitz for organizing a great week of educational and social activities.

At the same time, we are busy planning for a trip to Japan in October where ILS members will meet with our counterparts in the Osaka, Kanagawa, and Dai-ichi Tokyo bars. Those three Japanese bars have been among ILS's most active partners over many years and we look forward to meeting with them to share best practices and promote the legal profession. ILS member Harumi Hata has done an amazing job of planning an incredible trip.

Registration is now open for the CLA Annual Meeting that will take place in San Diego, September 21-23.



As in past years, we are expecting several foreign delegations to join us at the Annual Meeting. We have been honored to have delegations from Canada, Czech Republic, France, Ireland, Japan, Malaysia, Mexico and Viet Nam attend previous annual meetings.

One of the highlights of the Annual Meeting will be the presentation of the Warren Christopher International Lawyer of the Year Award to former California Supreme Court Justice and current President of the Carnegie Endowment for International Peace, Mariano-Florentino Cuellar. I encourage ILS members to attend the Annual Meeting this year to take advantage of the opportunity to meet with the visiting foreign attorneys and to recognize the distinguished Warren Christopher awardee.

I hope to see you at an ILS event soon.

Ric Bainter, Chair

International Law & Immigration Section

California Lawyers Association

## **INTERNATIONAL PRIVATE (COMMERCIAL) AND PUBLIC LAW DEVELOPMENT HIGHLIGHTS**

This section focuses on developments of note that affect California transnational legal practice. While the developments below were collected by the editors from January 2023 to July 2023, the *ILS NEWS* welcomes Section members to bring other developments to our attention and invites readers to contribute related short updates.

### **US Executive Branch**

#### ***US Government to Share Evidence of Alleged Russian War Crimes in Ukraine***

On July 26, 2023, President Biden ordered the US government to share evidence of alleged Russian war crimes in Ukraine with the International Criminal Court (ICC) prosecutor. This signals a shift in American policy. Currently, the US is not a member of the ICC. More information is available [here](#).

#### ***Providing Accountability Through Transparency Act of 2023***

On July 25, 2023, the President signed into law the Providing Accountability Through Transparency Act of 2023 which requires each agency, in providing notice of a rulemaking, to include a link to a 100-word plain language summary of the proposed rule.

#### ***Office of Pandemic Preparedness and Response (OPPR) Policy***

On July 21, 2023, the Biden-Harris Administration announced the setting up of the OPPR, which is a permanent office in the Executive Office of the President, charged with leading, coordinating and implementing actions related to preparedness for, and response to, known and unknown biological threats or pathogens that could lead to a pandemic or to significant public health-related disruptions in the US. Major General (ret) Paul Friedrichs will serve as the inaugural Director of OPPR and Principal Advisor on Pandemic Preparedness and Response as of August 7, 2023. More information is available [here](#).

#### ***Cybersecurity Certification and Labeling Program***

On July 18, 2023, the Biden-Harris Administration announced a cybersecurity certification and labeling program to help Americans easily choose smart devices that are safer and less vulnerable to cyberattacks. The “US Cyber Trust Mark” program proposed by the Federal Communications Commission would raise the bar for cybersecurity across common devices, such as smart appliances, smart climate control systems, smart fitness trackers and more. More information is available [here](#).

#### ***\$20 Billion Competition to Catalyze Investment in Clean Energy Projects***

The Biden-Harris Administration announced a \$20 billion competition to capitalize a clean energy financing network that will expand investment in new projects that reduce pollution across the country. The funding is part of the Environmental Protection Agency’s Greenhouse Gas Reduction Fund designed to combat the climate crisis by capitalizing public and private capital for projects that reduce harmful climate pollution especially in underserved communities. This



announcement builds on a recent slate of major clean energy announcements through the Biden-Harris Administration's Investing in America agenda. More information is available [here](#).

### ***Completing the Destruction of the US Chemical Weapons Stockpile***

On July 7, 2023, President Biden announced that the US has safely destroyed the final US chemical weapons stockpile. This is consistent with the US' long-standing commitment under the Chemical Weapons Conventions. The US continues to stand with the Organization for the Prohibition of Chemical Weapons to prevent the stockpiling, production, and use of chemical weapons around the world.

### ***Termination of National Emergency related to the COVID-19 Pandemic***

On April 10, 2023, President Biden signed into law J.J.Res.7 which terminates the national emergency related to the COVID-19 pandemic.

### ***National Cybersecurity Strategy***

On March 2, 2023, the Biden-Harris Administration released the National Cybersecurity Strategy which plans to, amongst other things, shift the burden for cybersecurity away from individuals, small businesses and local governments onto organizations that are most capable and best-positioned to reduce risks for Americans. A copy of the full strategy is available [here](#).

### ***Protecting American Intellectual Property Act of 2022***

On January 5, 2023, President Biden signed into law S. 1294 which requires the President to impose

sanctions on foreign individuals and entities that engage in theft of US trade secrets.

### ***US Department of Justice (US DOJ)***

#### ***Trans-Atlantic Data Privacy Framework***

On July 10, 2023, the US DOJ issued a statement welcoming the EU's adoption on July 10 of Trans-Atlantic Data Privacy Framework to restore trust and stability to transatlantic data flows. More information is available [here](#).

### ***CALIFORNIA***

#### ***Updating California's Law of International Commercial Arbitration by Robert E. Lutz<sup>1</sup>***



*Figure 2: Robert E. Lutz*

Inspired by its country-sized economy, large and diverse international trade, and significant foreign investment, California lawyers in 1988 successfully launched a special law governing

international commercial arbitration in California to respond to these growing needs and make California an attractive venue for international dispute resolution. (See California's International Commercial Arbitration & Conciliation Act, Code of Civ. Proc. 1297.11 et seq.). Based on the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), the new law established a global "best-practices" approach. The adoption of this law harmonized California's law with many other

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1 Distinguished Professor Emeritus of Southwestern Law School and chairs the Joint CLA Section of Litigation-International Law Section Working Group that drafted the proposed AB 615 legislation. He is a founding member of the International Law Section of the California Bar (1988), and currently an Executive Committee Member of the CLA's International Law & Immigration Section. Prof. Lutz was the chairperson

of the ABA Section of International Law (2001-2) and the ABA Standing Committee on International Trade in Legal Services (2006-9); he's now a Council member of the ABA Senior Lawyers Division, an international arbitrator, member of CalArb, and an ESG Advisor/Consultant to international and domestic investors.



countries and sub-national entities around the world that also adopted the UNCITRAL Model Law. [It is noted that California's "arbitration-friendly" approach to international arbitration is often confused with its aggressive approach to forced consumer and employment arbitration; this Model Law, however, offers a uniquely different and friendly process for international commercial disputants engaged in resolving business disputes in the Golden State.]

Fast-forward to 2023. While California has made some revisions to its law over the last 35 years and continues to enhance the legal and business environments for resolving international commercial disputes, it has not revised the law to reflect modern technology's influence on dispute-resolution processes and, specifically, UNCITRAL's 2006 amendments to the Model Law. Thus, the CLA Section of Litigation (via the ADR Committee) and the Section of International Law & Immigration, as well as leading international arbitrators in the newly formed CalArb organization, recognized this void and a Working Group was convened in early 2022 to draft the needed revisions.

A.B. 615. The result is a bill currently before the California Legislature that is based on the Model Law's 2006 revisions. AB 615 was introduced this session by Assemblyman Brian Maienschein. At the time of this report, the bill was unanimously approved by the Assembly and the Senate's Judiciary Committee. Although the revisions do not impose costs impacts on the courts, a hearing is scheduled before the Senate Appropriations Committee in early August and may be on its consent calendar. The Working Group anticipates no opposition and that AB 615 will be signed into law by Governor Newsom.

Major Improvements. AB 615 would make the following improvements in California international commercial arbitration:

- Updates what is a written arbitration agreement to "content...recorded in any form". Thus, it adds electronic mail and electronic communications as a basis for establishing an arbitration agreement, while

retaining the former written arbitration agreement requirement.

- Adds comprehensive procedures governing interim measures of protection, a tool increasingly used today in international disputes. In that regard, AB 615—
  - Sets standards for interim relief;
  - Provides for temporary, ex parte orders;
  - Authorizes arbitral tribunals to order security as protection;
  - Provides court enforcement of interim relief measures.
  - Ensures that interpretation of the law should pay "regard ... to [the law's international origin [given that it is based on the UNCITRAL Model Law] and to the need to promote uniformity in its application...."
  - Makes California a Major Venue for International Commercial Disputes. California was the first U.S. state to adopt the UNCITRAL Model International Commercial Arbitration Act in 1988 and will be one of the first U.S. states to modernize its law by adopting UNCITRAL's 2006 Model Law revisions. For several decades, lawyers involved with the International Law Sections of the State Bar and now the CLA, have worked to promote California as a leading venue to conduct international commercial arbitrations by enhancing and modernizing its legal environment, including a statutory right for foreign attorneys to represent their clients in international arbitrations held in California. California's adoption of AB 615 is an important step to offering international litigants an attractive venue ensuring a quality, modern process at the same time providing California lawyers and businesses many opportunities and benefits.



## CLIMATE CHANGE

### ***Dubai Prepares to Host COP28***

From November 30 to December 12, 2023, the United Arab Emirates will be hosting COP28 at Expo City Dubai. It would be interesting to see what progress has been made since the Paris Agreement was adopted. More information is available [here](#).

## OTHER INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL AGREEMENTS

### **United Nations (UN)**

#### ***New UN Treaty to Protect Biodiversity in the High Seas***

On June 19, 2023, the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction, also known as BBNJ, adopted the Agreement under the UN Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction ("**High Seas Treaty**"). A certified true copy of the High Seas Treaty is available [here](#).

#### ***Leading Companies Commit to Accelerate Water Action***

On March 22 to 24, 2023, the UN hosted a conference of leaders from government, business and nonprofits. More than 50 of the world's largest corporations committed to the Open Call for Accelerating Water Action at the conference. The call is an appeal for private sector action to help solve the global water crisis and advance progress on UN's Sustainable Development Goal 6, which aims to achieve access to clean water and sanitation for all people by 2030. Participating companies reportedly have committed to "build water resilience across their global operations and supply chains". More information is available [here](#).

#### ***UNESCO Advises on Appropriate Use of Technology in Schools***

UNESCO issued a report urging countries to carefully consider how technology is used in school since only

16% of countries guarantee data privacy in the classroom, by law. The report also highlights the disparities created by digital learning. More information is available [here](#).

### **European Union (EU)**

#### ***EU Parliament Proposed Amendments to EU Anti-money Laundering Legislation***

On March 28, 2023, the European Parliament announced agreement on amendments to the proposed EU legislation to restrict money laundering. The joint committees on economic affairs (ECON) and home affairs and civil liberties (LIBE) have adopted on behalf of the European Parliament amendments to the anti-money laundering package that the European Commission had proposed in July 2021. This agreement now enables the EU Council, Commission and Parliament to begin negotiations on the final legislation that member states would implement.

Global anti-corruption monitoring coalition Transparency International welcomed the Parliament's amendments in the wake of the EU court ruling in 2022 against public access to company beneficial ownership records. "We commend the European Parliament for responding to the current challenges and proposing provisions which, if adopted, will prevent the EU from sliding back into the corporate secrecy era.

"The proposed provisions respect the Court's ruling while identifying a clear path forward to ensure meaningful access, while also addressing the previous directive's shortcomings in which legitimate interest was only assessed on a case-by-case basis. Ensuring journalists, civil society organisations and academia broader access to beneficial ownership registers is key for them to be able to help prevent and fight money laundering within their mandates."

The European Parliament's proposals to the anti-money laundering package include a number of other welcome measures, including: bolstering the powers of the proposed anti-money laundering authority; lowering the threshold for mandatory disclosure of beneficial ownership information from 25% to 15%



and even lower – to 5% – for companies operating in the extractives sector or those with a structure designated as high risk of money laundering; banning the sale of golden passports and including strict mandatory due diligence checks for golden visa schemes.

## World Trade Organization (WTO)

### ***Dispute Resolution Paralysis at the WTO? by Nilmini Silva-Send<sup>2</sup>***

A little known but vastly important mechanism for international trade disputes is the WTO two-tier system of “Panel Reports” at the first instance and the “Appellate Body” (AB) holdings for appeals as a “second tier”<sup>3</sup>. This mechanism has been used for the last several decades, helping to shape the contours and limits to free trade among nations. The international law principles of national treatment and most-favored-nation treatment have been the backbone of free trade and have allowed competitive advantages of all kinds to flourish by prohibiting discriminatory treatment between domestic and foreign goods. In the WTO Agreement on Subsidies and Countervailing Measures (SCM),<sup>4</sup> certain

subsidies, except for subsidies for certain agricultural goods, are prohibited outright: specifically, “...subsidies contingent ....upon export performance..” (which would make exports of locally produced goods cheaper abroad), or “...subsidies contingent... upon the use of domestic over imported goods” (which would favor local goods over the same imported goods). Only limited exceptions are allowed mainly for developing country members and for a period of time only. The national security exception is nowhere to be found in the agreement on subsidies, however, it is available in GATT, which deals with the trade in goods only. However, the United States and Russia<sup>5</sup>, have always maintained that national security must be excepted from *all* WTO disputes, and that it is up to each state to determine what “national security” is, that is, it is to be self-judged. The situation is particularly difficult to decide when a country invokes national security as a reason for trade protectionism because *many* trade and environmental policies can be alleged to be based on “national security”.

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<sup>2</sup> Dr. Silva-Send is the Associate Director at the Energy Policy Initiatives Center, School of Law, University of San Diego, and Faculty member. She has over 20 years practice in energy and climate technical, policy and legal research and analysis, and leads staff in research, policy development and project implementation in local and regional climate action. Her work ranges from greenhouse gas emission inventories, projections and target-setting for local governments, development of locally specific greenhouse gas mitigation measures, analysis of local energy ordinances, aggregate impacts of local climate action plans, comparison of life cycle analysis with conventional GHG analysis methods for cities, and integration of equity into climate planning. She has been an advisor in the California Water-Energy nexus protocol development.

<sup>3</sup> [Understanding on Rules and Procedures Governing the Settlement of Disputes](#).

<sup>4</sup> [Agreement on Subsidies and Countervailing Measures](#).

<sup>5</sup> Russia has used the national security exception against Ukraine for restrictions on transit traffic through Russia to third countries, which was granted (2019) as at a time of war or emergency, supported by the US, but since then the US and other countries have invoked this exception for trade restrictions, not in a time of war or emergency. However, the very first use of national security was made by Sweden in 1975 when it stated that restrictions on certain shoes were premised on security grounds “... necessitates a minimum of domestic production capacity in vital industries...to meet basic needs in case of war or other emergency in international relations.” Sweden retracted the exception later. More information is available [here](#).



Figure 3: Nilmini Silva-Send

While the US does not constantly lose trade disputes<sup>6</sup>, it lost several recent disputes at the “first” instance<sup>7</sup>. These were all related to US tariffs on steel and aluminum based on the national security exception. After an incredibly lengthy period of four years, the

Panel Report concluded that invocation of the national security exception cannot be fully self-judged contradicting the US and Russian position. Whether the US is using the national security exception as a means of implementing protectionist policies and officially declaring this as the reason to *not* implement WTO decisions against it, or whether the US is using the “appellate trap” as a strategy while implementing domestic content rules in recent legislation, the fact is that the US has blocked the selection of AB tribunal members since 2019, leading to the impossibility of hearing appeals, ‘appealing to the void’, or basically leading to paralysis of the global trading system’s two-tier dispute resolution procedure. At the same time, the US has nonetheless officially appealed the steel and aluminum Panel Reports to the “void”.

In the U.S., a country where free trade has been touted and used extensively as a major economic principle to expand investment and trade abroad, we

now find a retreat into a certain amount of protectionism. Recent Presidents have been consistent in espousing “Made in America” at many venues and a whole Office in the White House is called “Made in America”. Corresponding action has followed, most recently by enactment of the Inflation Reduction Act focused in large part on climate and energy measures funded by \$369 billion in federal spending, rewarding domestic content. The previous CHIPS and Science Act, enacted around the same time, also supports subsidies of \$50 billion for the domestic production of semiconductors<sup>8</sup>. The US is not alone in using subsidies to support “Made in Local”. China, a non-market economy, has similarly used subsidies in the last decades, for solar panels to electric vehicles, and has “Made in China” as part of its strategic national plans. If all WTO members were to insist on “Made in Local” then the economic benefits of comparative advantage would all but disappear.

So the system is now challenged without the full support of the largest free trading nation – can the WTO function? There is news: some 19 like-minded WTO member states, including the EU, Australia and China, major trading partners, took the lead, notwithstanding US action, and started to use an interim solution called the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) in April 2020<sup>9</sup>, an appeals process enabled through Article 25 of the WTO Dispute Settlement Understanding (DSU). Although not a separate agreement, the MPIA must be “committed” to by WTO members. The MPIA was used for the first time to produce an Award upon appeal by Columbia where the panel report had found

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<sup>6</sup> According to [World Trade Law Net](#), there have been 84 cases brought against the US, with 72 cases finding at least one violation (of a claim within the case). There have been 56 cases brought by the US and 51 cases have found at least one violation.

<sup>7</sup> [Four Panel decisions ruled against the US](#) on tariff on steel and aluminum imports by China, Turkey, Norway and Switzerland, with two cases pending by Russia and India. All are based on threats to national

security exception in WTO-GATT Article XXI. DS556 United States-Certain Measures on Steel and Aluminium Products.

<sup>8</sup> [Subsidies race casts pall over global free trade from Nikkei Asia](#), accessed August 1, 2023

<sup>9</sup> [Multiparty Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU](#). 4



violations of WTO provisions by Columbia towards the EU. The MPIA confirmed three of the Panel findings against Columbia but reversed a fourth, and significantly, Columbia has stated that it will abide by the appellate ruling, which bodes well for a second-tier appeals process at the WTO. In another associated development, Japan has committed to the MPIA<sup>10</sup> and evidence that nations need and want such a system and are able to find work-arounds without the US.

The WTO is not the only treaty which deals with protectionism. Regional Free trade Agreements such as the CPTPP arising out of the TPP (“to ensure that the United States - and not countries like China – was writing the rules for the world’s economy...”) from which the US withdrew anyway, leaving China to join, and others, are trying to deal piecemeal with distortions related to subsidies. Despite all that, the number of subsidies globally have increased rapidly since about 2008. The OECD Government Support and Subsidies Portal<sup>11</sup> shows that many internationally traded goods are subsidized by governments, especially following Covid, the Ukraine-Russia war exposing dependencies for food, needs of large-scale investment for greening the global economy etc. and subsidies will continue to lead to increasing international disputes.

....And yet, new agreements at the WTO – the WTO Fisheries Subsidies Agreement

At the same time as subsidies are made contingent on domestic content rules across many countries and industries in one area of international trade, and the national security exception is invoked to defend domestic trade policies, a new international agreement has been adopted that seeks to *end* subsidies for fisheries in the high seas and EEZs of nations, as a means to limit illegal, unreported and unregulated (IUU) fishing. It is a recognition by

countries, that fish, as a globally shared resource, must be regulated globally and that subsidies distort fish prices across the world to the detriment of sustainable fish stocks. More than 95% of fish landings occur in countries’ Exclusive Economic Zones, a maritime area 200 nautical miles from the shore, where coastal nations have the sovereign rights to explore and exploit, conserve and manage all the resources of the waters, including fisheries resources. Under the Law of the Sea, countries must establish laws and regulations for the licensing of fisher people, vessels and equipment, determine fish catches and quotas, regulate areas and seasons and any other measures that promote the optimum and sustainable utilization of the resource. Countries should cooperate in these activities and may be supported by regional fisheries management organizations (RFMOs). However, there are many nations which are unable to regulate fisheries on their own, or has no access to RFMOs. As a result, there is a significant amount of IUU fishing going on in EEZs, and beyond, in the High Seas, and this is a major cause of significant declines in fish stock globally. IUU fishing in turn has been directly connected to governmental subsidies to the tune of \$10 billion per year<sup>12</sup>.

Therefore it is a historic achievement after 20 years of negotiations at the 12<sup>th</sup> Ministerial Conference of a WTO-Fisheries Subsidies Agreement available for ratification by 100 member states before it can come into force. Already, most major fishing nations which have been accused of IUU fishing, such as China, Japan, the European Union, and the US, have all ratified the treaty, boding well for international law and an indication of the seriousness of the impacts on a major source of our future nutrition. It remains to be seen once the treaty comes into force, how its disputes will be handled, as the WTO-DSU is fully part of this agreement. Whether any nation will try to

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<sup>10</sup> [Cabinet Understanding regarding Participation in the MPIA](#), accessed August 1, 2023.

<sup>11</sup> [Government support and subsidies](#), accessed July 12, 2023.

<sup>12</sup> Subsidies, Competition and Trade. OECD 2022. <https://www.oecd.org/agriculture/topics/fisheries-and-aquaculture/>, accessed July 12, 2023.



defend its fisheries subsidies based on national security remains to be seen. What these contradictory approaches to subsidies means is that it is a topic of vast importance to nations, and nations must continue to cooperate to agree on the limits of subsidies when it comes to international trade.

## International Criminal Court (ICC)

### Remembering Ben Ferencz, by Sean Butler<sup>13</sup>



Figure 4: Ferencz in 2012 by Adam Jones, Ph.D. - Own work, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=22166713>

Ben Ferencz was the last surviving US Nuremberg prosecutor. He went to Harvard Law but enlisted in the Army during **WWII** and was tasked with gathering evidence at liberated NAZI camps. He then successfully prosecuted a group that had mobile extermination units in his first trial experience. He went on to advocate for an international criminal

court and for accountability for the crime of aggression. He believed in "Law Not War." and was a relentless advocate even in his 100s. He was a modest man of immense good will and worked to persuade everyone that resolution of international disputes pursuant to law was always better than the horrors of war and genocide that he had witnessed first-hand. Ben Ferencz passed away on April 7, 2023 at age 103.

### The Effect of the ICC Arrest Warrant for Putin by Sean Butler<sup>14</sup>



Figure 5: Sean Butler

On March 17, 2023, ICC President Judge Piotr Hofmański announced the [issuance of arrest warrants](#) for Vladimir Putin, President of Russia, and its so-called

commissioner for children's rights, Maria Lvova-Belova, for the alleged war crime of unlawful deportation and transfer of Ukrainian children from occupied areas of Ukraine to the Russian Federation, contrary to article 8(2)(a)(vii) and article 8(2)(b)(viii) of the Rome Statute.

On the basis of evidence collected and analyzed by the ICC pursuant to its independent investigations, the Pre-Trial Chamber has confirmed that there are reasonable grounds to believe that President Putin and Ms Lvova-Belova bear criminal responsibility for the forcible removal of children, which is a war crime under the 1998 Rome Treaty of the ICC (See Article 8, 2(a)(vii) and 2(b)(viii) available [here](#)).

The ICC is a treaty based international organization that exists separately from the United Nations (UN). The ICC's president is one of, and elected by, the ICC's 18 judges. The Rome Treaty provides for referrals of cases from the UN as one of the methods to initiate cases. The ICC does not have its own police force and does not rely on the UN Peacekeeping "Blue Helmets" to enforce arrest warrants. Instead, the ICC relies on cooperation of nations, including those who are parties to the Rome Treaty, to obtain custody of those accused. (Rome Treaty, Article 89).

Currently 123 nations are parties to the Rome Treaty ("state parties") including most NATO alliance

<sup>13</sup> Attorney and Board President of the International Criminal Court Alliance, Los Angeles.

<sup>14</sup> Attorney and Board President of the International Criminal Court Alliance, Los Angeles.



nations, Canada and most West European nations. <https://asp.icc-cpi.int/states-parties>. Notably absent are Russia, the United States, and China.

After the idea of creating an international criminal court was resurrected by Trinidad and Tobago at the UN, the US advocated for the ICC. The US was deeply involved in drafting the terms of the treaty, the elements of crimes and the rules of procedure and evidence.

At the 1998 Rome Treaty conference, the US advocated for the UN Security Council to be the exclusive method to initiate a case before the ICC. The others at the treaty conference disagreed and included state referrals and cases initiated by the prosecutor as other methods to initiate cases. At the conclusion of the treaty conference the US voted against the treaty.

The US since claims that ICC improperly asserts jurisdiction over nationals of nations that are not parties to the treaty. The Rome Treaty provides for jurisdiction by the ICC (1) if the alleged crime is committed by a national of a state party, and (2) over nationals of non-state parties if the alleged crime occurred on the territory of a state party. The US asserts the second basis is improper.

Russia also claims improper assertion of jurisdiction by the ICC over nationals of non-state parties with respect to the March 17, 2023 arrest warrants. Russia does not recognize the assertion of jurisdiction of the ICC over any Russian nationals.

Russia further claims the arrest warrants violate the international law principle of immunity for heads of state.

The Rome Treaty, Article 27, entitled "Irrelevance of Official Capacity" provides the following.

*1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case*

*exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*

*2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*

The ICC previously ruled on this issue when an [ICC appeal chamber decided head of state immunity did not apply to Jordan's failure to arrest and surrender Omar Al-Bashir, the head of state of Sudan for whom an arrest warrant was issued in connection with the Darfur situation, a UN Security Council referral.](#)

As Russia denies that the ICC arrest warrants for Russian nationals are proper, as long as Putin remains in territory controlled by Russia, it is unlikely the ICC will ever obtain custody of him. If Putin travels to nation states that are not parties to the Rome Treaty however, it will depend on whether that nation decides to cooperate with the ICC.

For state parties, there is an obligation to cooperate. (The consequences for failure to cooperate is a separate issue.) This obligation to cooperate limits the places Putin can enter without fear of arrest.

Whether or not Putin is ever arrested, the warrants send an important message. Even the head of state of one of the permanent five members of the UN Security Council can be named as an accused if there are facts to substantiate the charges.

As in all legitimate criminal proceedings, an accused is entitled to a presumption of innocence. The burden is on the prosecution to prove beyond a reasonable doubt both that the crime was committed and that the individual is criminally responsible. A likely potential defense by Russia would be that "the relocation of the children was for their own protection."

However, the simple fact that charges were brought means there is enough evidence for the prosecutor and judges of the court to believe the charges can be proved.



It is unlikely Putin will turn himself in and defend against the charges. If he evades capture and prosecution, the cloud of being charged with war crimes related to the forced removal or deportation of children will remain over him for the rest of his life. He will be limited in his travel options, unable to travel to most of Europe. It has already caused Putin to decide not to attend the BRIC meeting in South Africa rather than place South Africa in the position of violating the duty to cooperate with any arrest warrants issued by the ICC.

Putin may never face the bar of justice. Still, the ICC arrest warrants destroy any good reputation he may have had and will adversely affect his life and historical legacy. The issuance of the arrest warrant against Putin shows the strength and determination of the ICC to hold those found guilty of atrocity crimes accountable, regardless of official capacity and status with the UN Security Council.

### **Update on the International Criminal Court (Jan-July 2023) by Radulf Mohika<sup>15</sup>**

#### ***Commemoration of the 25th Anniversary Adoption of the Rome Statute***

On July 17, 2023, the Assembly of State Parties to the Rome Statute of the International Criminal Court commemorated the [25th Anniversary of the adoption of the Rome Statute at the United Nations Headquarters in New York.](#)



Figure 6: Radulf Mohika

The meeting was chaired by President of the Assembly, Silvia Fernández de Gurmendi. The “ceremony remarks were delivered by Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel (on behalf of the Secretary-

General of the United Nations), Ms. Maria Tripodi, Undersecretary of State for Foreign Affairs and International Cooperation (Italy), Judge Piotr Hofmański, President of the International Criminal Court, H.E. Mr. Lloyd Axworthy, Former Minister of Foreign Affairs of Canada, Mr. William R. Pace, former Convenor of the Coalition for the International Criminal Court and Ms. Minou Tavárez Mirabal, Chair of the Board of Directors of the Trust Fund for Victims.” During the Ministerial Roundtable “Strategic vision for the next decade: How to ensure consistent and sustainable support for the ICC,” Prosecutor Karim Khan stated that the ICC Court “stands as a powerful emblem of our shared determination to eradicate impunity and preserve the principles of justice. However, as we mark this anniversary, we must also recogni[z]e the need for adaptation and growth in order to increase our effectiveness amidst a rapidly transforming global landscape. The multiplication of crises globally demands we are innovative and focused in our response. As Prosecutor, I am seeking to deliver a revitali[z]ed strategy, reinvigorating my Office's efforts, and ensuring that our work is felt by those most in need on the frontlines.” More information can be found [here](#). ICC also hosted the “[Common bonds](#)” exhibition.

#### ***Philippines***

On July 18, 2023, the ICC Appeals Chamber granted the OTP's request to resume its investigation of crimes against humanity in the Republic of the Philippines between November 2011 and March 2019 due to its government failure to conduct its investigation. More information is available [here](#).

#### ***Sudan - Darfur***

On July 13, 2023, OTP delivered the “Thirty-Seventh” Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1593 (2005)” reporting on the Darfur

<sup>15</sup> Undergrad at University of Southern California and Board Member of the International Criminal Court Alliance, Los Angeles.



investigation. Prosecutor Karim Khan reported receiving a report from the Office of the High Commissioner for Human Rights concerning the killing of 87 ethnic Masalit by the Rapid Support Force which he is now investigating. Khan is asking that anyone with information related to the crimes can make a submission via the secured [OTPLink](#) portal.

Prosecutor Karim Khan also reported on the prosecution of Ali Muhammad [Abd-Al-Rahman](#) (aka Ali Kushayb) on 31 counts of war crimes and crimes against humanity that concluded with testimony from 81 witnesses. Khan also reported that the Government of Sudan is not cooperating in the investigation pursuant to Chapter 7 of the Charter in Resolution 1593. The Thirty-Seventh Report is available [here](#).

On June 5, 2023, the Legal Representatives of Victims, who represents 600 victims in the case against Ali Kushayb case, made their opening statements and called witnesses. More information is available [here](#).

### **Libya**

On May 12, 2023, OTP delivered the "Twenty-Fifth" Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011). OTP reported working with the government of Libya under the principles of complementary, and have conducted twenty investigative missions, obtained 500 items of evidence, issued four arrest warrants, and submitted an application for two more warrants. More information is available [here](#).

### **Bolivarian Republic of Venezuela**

On June 27, 2023, the Pre-Trial Chamber authorized the OTP to resume its investigation after Venezuela failed to investigate itself under article 18(2) of the Rome Statute. On September 2018, OTP received a referral from Argentina, Canada, Columbia, Chile, Paraguay, and Chile, regarding crimes against humanity of deprivation of physical liberty, torture, rape, and political persecution that allegedly occurred since February 2014. More information is available [here](#).

On June 10, 2023, OTP and President of the Republic Nicolás Maduro Moros entered into a Memorandum of Understanding to establish an OTP office for their investigation, and created an outline of priority areas. More information is available [here](#).

### **Ongoing ICC Proceedings**

Other ongoing court proceedings include: (1) [Ali Kushayb](#) aka Ali Muhammad Ali Abd-Al-Rahman (Darfur), Trial Chamber I, defense is scheduled to present its case on August 28, 2023; (2) [Al Hassan](#) (Mali), Trial Chamber X, [case is submitted](#) for deliberations; (3) [Mokom](#) (Central Africa Republic), Pre-Trial Chamber II, confirmation hearing is scheduled for August 22, 2023; (4) [Said](#) (Central African Republic), Trial Chamber VI, trial began on September 26, 2022; and (5) [Yekatom and Ngaissona](#) (Central African Republic), Trial Chamber V, OTP is presenting its case.

### **Pre-Trial Cases**

Several pre-trial cases are pending the arrest or voluntary appearance of [14 defendants](#) who remain at large. A calendar of proceedings is available on the ICC website [here](#), at the end of the opening page.

### **Preliminary Examinations:**

- [Nigeria and Boko Haram](#) - The preliminary examination concluded with OTP's determination to request authorization from the Pre-Trial Chamber to open an investigation
- [Democratic Republic of Congo \(DRC\)](#) - North Kivu (self-referral) - OTP will begin a preliminary investigation related to the alleged crimes in North Kivu from Jan. 1, 2022 to present.

### **Trust Fund for Victims**

The [Trust Fund for Victims](#) (TFV) was established by the Assembly of State Parties to deal with reparations and is funded by voluntary contributions. On March 13, 2023, TFV made an urgent call for contributions for reparation to victims of conflict-related sexual violence. More information is available [here](#).



On April 25, 2023, Ms. Deborah Ruiz Verduzco was appointed as the new TFV Executive Director. She holds a PHD in International Law, and she was previously the Director of the Coalition for the ICC. More information is available [here](#).

On April 6, 2023, TFV launched a reparation program for victims of war crimes and crime against humanity that occurred in and around South Ossetia, Georgia, between July 1-October 10, 2008. More information is available [here](#).

The following State Parties made voluntary contributions to the TFV: The [Dominican Republic](#) became the 51<sup>st</sup> State Party to make its first voluntary contribution of \$10,000 dollars; [Andorra](#) €10,000 for victims of sexual and gender-based crimes; [Austria](#) €50,000; [Belgium](#) €500,000; [Bulgaria](#) €20,000; [Chile](#) €11,000; [Colombia](#) \$50,000; [Czech Republic](#) Kč500,000; [Lithuania](#) €20,000; [Sweden](#) €1,3 million; and [United Kingdom](#) £430,000 for victims of sexual and gender-based crimes

The ICC also ordered TVF to implement four reparation programs for the victims on the cases against the convicted individuals found indigent: Lubanga, Katanga, and Al Mahdi.

#### ***Trial Chamber II Delivers a Reparation Order Against Bosco Ntaganda***

On July 14, 2023, the Trial Chamber II delivered its order finding that [Bosco Ntaganda](#), who was found guilty on 18 counts of war crimes and crimes against humanity, reparation to his victims is \$31,300,000. More information can be found [here](#).

#### ***Presidency of the Assembly of State Parties to the Rome Statute Announcement***

On August 1, 2023, the Presidency of the Assembly of States Parties to the Rome Statute renounced the Russian Federation's "[reported issuance of an additional arrest warrant](#)" against an ICC Judge, and any threats made against the International Criminal Court's [Prosecutor and Judges of Pre-Trial Chamber II](#) involved in the issuance of the arrest warrant in the Ukraine situation. The Presidency of the Assembly reaffirmed "full confidence in the Court as an independent and impartial judicial institution and

... our strong commitment to uphold and defend the principles and values enshrined in the Rome Statute and to preserve its integrity undeterred by any threats."

#### ***ICC and the Prosecutor General of Ukraine Establish a Country Office in Ukraine***

On March 23, 2023, the Registrar of the ICC, Peter Lewis and the Prosecutor General of Ukraine, Kostin Andriy, signed a cooperation agreement on the establishment of an ICC country office in Ukraine. Country offices are established to support ICC's mandates and activities in those countries. ICC has a Liaison Office to the United Nations in New York, and seven field country offices in Kinshasa and Bunia (Democratic Republic of the Congo, "DRC"); Kampala (Uganda); Bangui (Central African Republic, "CAR"); Abidjan (Côte d'Ivoire); Tbilisi (Georgia); and Bamako (Mali). More information is available [here](#).

#### ***ICC's Training on Victim and Witness Support***

In March 2023, ICC held a three-day training on witness protection and support for victims of conflict-related sexual violence in Ukraine. "The Rome Statute was ground-breaking in demanding the inclusion of trauma-experts in the Victims and Witnesses Section and provide for possibilities to offer specialized psychosocial support." More information is available [here](#).

#### ***ICC New Registrar Appointment***

On April 5, 2023, Mr. Osvaldo Zavala Giler was sworn as the new ICC Registrar, replacing Mr. Peter Lewis, for a period of five years beginning on April 16, 2023. Mr. Giler is a national of Ecuador, and previously worked at the Court as Chief of Budget Section, senior special assistant to the Registrar and Head of Office of the Court's liaison office to the United Nations in New York. More information can be found [here](#).

#### ***ICC will Elects Six Judges of the Court: Assembly of States Parties on December 2023***

The Assembly of States Parties will elect six judges for the ICC at its twenty-second session from December 4 to 14, 2023. The Rome Statute, article 36, paragraph 3, judges "shall be chosen from among



persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial office.” More information is available [here](#).

### **ICC and Europol enter into a Working Arrangement**

On April 23, 2023, judge Piotr Hofmański, President of the ICC, and Catherine De Bolle, Executive Director of the European Union Agency for Law Enforcement Cooperation, signed a Working Agreement to “exchange of information, knowledge, experience, and expertise.” More information can be found [here](#).

### **ICC Marks International Women’s Day**

On March 8, 2023, the ICC marks International Women’s Day in support of global action to advance gender equality and the empowerment of all women and girls. The ICC promotes women’s rights and considers gender perspectives through its work. Most recently, the ICC adopted its first “[Strategy on Gender Equality and Workplace Culture](#) for the International Criminal Court” and “[Policy on the Crime of Gender Persecution](#).” More information can be found [here](#).

### **ICC Roundtable on Crime of Gender Persecution**

On May 14, 2023, Prosecutor Khan and civil society organizations from 11 countries participated in the discussion to effectively implement the Policy of Gender Persecution, and improve the prosecution of sexual and gender-based persecution. More information can be found [here](#).

On May 12, 2023, OTP called for public submission for suggested changes to the “2024 OTP Policy Paper on Sexual and Gender-based Crimes.” More information can be found [here](#).

### **ICC Launches Case Law Database and Introduction to the ICC in French and Spanish**

On January 2023, ICC launched a new series of [15 educational videos](#) in French and Spanish. In addition, their free access to case-law of the Court’s jurisprudence [Case Law Database](#) (CLD) that is part of [ICC’s Legal Tools Database](#).

### **OTP Launches Public Consultation**

On March 9, 2023, OTP calls for public submission for suggested changes to the “[Policy on Children Report](#) (2016).” OTP is seeking new and innovative approaches to improve its investigation and prosecution of crimes against or affecting children more effectively. The deadline for submissions is May 31, 2023. More information can be found [here](#).

### **OTP Launches an Evidence Submission Platform: OTPLink**

On May 24, 2023, OTP launched the OTPLink, a real-time online and email-based secure evidence submission platform. More information can be found [here](#).

### **ICC Launches Chambers Practice Manual (5<sup>th</sup> revision)**

During the Judge’s retreat on June 2023, the Chambers Practice Manual was updated with a new section on principles and procedures on issuance of [dissenting and separate opinions as the last resort](#). The judges also made new changes related to “[judgement of acquittal, amicus curiae in ICC proceedings](#)” as recommended by the [Independent Expert Review](#) report. The Chamber Practice Manual Seventh Edition can be found [here](#).

### **ICC Launches Strategic Plans for 2023-2025 and Key Performance Indicators**

On 2023, ICC released its “[ICC Strategic Plan 2023-2025](#),” “[Office of the Prosecutor \(‘OTP’\) Strategic Plan 2023-2025](#),” “[Registry Strategic Plan 2023-2025](#),” “[Trust Fund of Victims Strategic Plan 2023-2025](#)” and “[Key Performance Indicators](#)” report. More information can also be found [here](#).

### **ICC President Piotr Hofmański keynote speech at the European Criminal Bar Association**

President Piotr Hofmański keynote speech to the European Criminal Bar Association is available [here](#).

## **ICC FAQs**

### **What is The Rome Statute?**

The 1998 Rome Treaty of the International Criminal Court (ICC) is called the Rome Statute.



The treaty is part of the legacy of the Nuremburg trials and is intended to substitute a permanent court instead of the ad hoc or hybrid tribunals set up after the fact (e.g., the former Yugoslavia, Rwanda, Sierra Leone, Cambodia) to try individuals accused of genocide, war crimes and crimes against humanity, also known as atrocity crimes. Terms of the treaty were negotiated through a series of preparatory conferences (prep-coms) sponsored by the United Nations, culminating in a 1998 five-week treaty conference in Rome, Italy. The conference concluded with a vote on July 17, 1998 to establish an independent treaty-based organization with a working relationship with the United Nations.

The Rome Treaty entered into force on July 1, 2002, after at least sixty nations deposited notification of ratification or acceptance of the treaty. The first set of 18 judges were sworn in March 1, 2003. A copy of the Rome Treaty and several other core legal documents can be found [here](#).

### **What are State Parties?**

State Parties are nations (often called “states”) that are parties to the Rome Statute. Currently, there are 123 state parties. List of parties is available [here](#). Only two nations have withdrawn from the treaty (Burundi and the Philippines). The governing body of the ICC is the Assembly of State Parties (ASP), made up of the nations that are parties to the treaty.

### **The US and the ICC**

The ICC is part of the legacy of Nuremburg trials held following the conclusion of World War II. The US was a proponent of the Nuremburg trials and participated in the prosecution of major leaders of Nazi Germany.

The ICC was formed following the creation of ad hoc tribunals to deal with the crimes committed in the former Yugoslavia and Rwanda. It was formed at least in part so there would be a permanent court to try individuals accused of genocide, war crimes and crimes against humanity, rather than courts set up after the alleged crimes. (The crime of aggression was added by amendment effective 2018.)

The US participated in drafting terms of the Rome Treaty, as well as the elements of crimes and the

rules of evidence and procedure. At the 1998 Rome treaty conference, among other things, the US wanted cases initiated only through the UN Security Council referral. The treaty included two other methods for cases to be initiated: (1) referrals by state parties to the treaty, and (2) a decision by the prosecutor on his or her own initiative (*in proprio motu*), subject to approval by a chamber of the court. The US was one of seven nations to vote against the treaty on July 17, 1998.

For most nations, there is a process of first signing the treaty, either at the treaty conference or later, and then a separate process of following a domestic approval and agreement to the terms of the treaty (ratification, acceptance or approval, often subject to reservations.) Under the 1969 Vienna Convention on the Law of Treaties, Article 18, a nation that signs a treaty subject to ratification is obliged to refrain from acts that would defeat the object and purpose of a treaty. The Vienna Convention on the Law of Treaties is available [here](#).

Under the Clinton administration, the US signed the treaty on December 31, 2000. In November 2002 the Bush administration sent a note that the treaty would not be submitted for ratification. Some have referred to this as the US withdrawing its signature from the treaty with the note intending to show that the US would not be bound by the prior signing of the treaty.

There was legislation restricting co-operation with the ICC (See, e.g. 22 USC §§7421 et seq.) The 2015 Dodd amendment loosened those restrictions by permitting cooperation with the ICC for those accused of war crimes and crimes against humanity. (22 USC §7433.) For a period of time the US negotiated bilateral agreements with nations regarding non-surrender of US personnel to the ICC, pursuant to Article 98 of the Rome Treaty.

The governing body of the ICC is the Assembly of State Parties (ASP), made up of the nations that are parties to the treaty. The US participates with the ASP as an observer. The [US also participated in obtaining custody of one of the accused, Dominic Ongwen](#), has offered rewards for capture of some of those accused and has offered relocation assistance.



Since Russian invaded Ukraine, the [US has moved towards a more cooperative posture with the investigation and prosecution of alleged war crimes and crimes against humanity committed in Ukraine.](#)

### ***What is a self-referral?***

There are three methods to initiate a case in the ICC: referral by the UN Security Council, referral by a state party, and the prosecutor acting on his or her own initiative (called *in proprio motu*). 1998 Rome Treaty of the ICC, at Articles 13-15 (“Articles”). For cases initiated by the prosecutor, authorization from one of the Pre-Trial Chambers is required to proceed.

Referral by a state party of alleged crimes committed on its territory or by one of its nationals is a self-referral. Thus far, six cases have been state referrals, two UN Security Council referrals and two were initiated by the prosecutor *in proprio motu*. Five of the six state referrals were self-referrals. Following the prosecutor’s request for state referrals of the situation in Ukraine, not less than 43 nations made state referrals so the prosecutor could proceed more quickly than for proceedings initiated by the prosecutor.

### ***What is Complementarity Jurisdiction?***

The ICC’s jurisdiction is “complementary” to national courts, which means the ICC must defer to national criminal processes unless the nation is unable or not genuinely willing to investigate and if warranted, prosecute. For example, if national proceedings were a sham intended to shield an accused from responsibility, that would indicate the nation was not genuinely willing to investigate and if warranted, prosecute.

When the UN established the ad hoc tribunals for the former Yugoslavia and Rwanda, it gave those courts primary jurisdiction for the crimes within the jurisdiction of those courts. That meant the ad hoc tribunals could choose to remove a court from Yugoslavia or Rwanda and try the individuals through the tribunals.

The Rome Statute provides instead for “complementary” jurisdiction to national courts. A case is inadmissible before the ICC if there is a

national court able and genuinely willing to investigate and if necessary, prosecute. The intent is to promote national prosecutions of crimes within the subject matter jurisdiction of the ICC. The ICC is meant to act only when there is no other court able or willing to act genuinely. There is a process for a branch of the ICC to provide notification to national authorities if nationals of that nation are under investigation. That nation then has an opportunity to show that it is conducting a genuine investigation and if necessary prosecution. The prosecutor can challenge a claim that national courts are able and genuinely willing. Articles 17-19.

The complementary jurisdiction issue has been raised in cases related to the situations in Libya and Afghanistan, and allegations of crimes committed by individuals serving with the military of England.

### ***What is a crime under the Rome Statute?***

There are four crimes within the subject matter jurisdiction of the ICC.

When the treaty was negotiated in 1998, the definition of three crimes were included: genocide; crimes against humanity; and war crimes. Genocide requires the acts be committed with intent to destroy, in whole or in part, a protected category of person. Article 6. Crimes against humanity requires a widespread or systematic attack on a civilian population. Article 7. War crimes requires the conduct be part of an armed conflict, with different rules if international or non-international. Article 8.

The fourth crime of aggression was envisioned at the time of the initial treaty but a definition could not be agreed upon at that time. The crime of aggression was added by amendment at the 2010 Kampala review conference. The amendment became effective in 2018 and has different jurisdictional rules than the other 3 crimes. Article 8 *bis*.

### ***What is a “Situation”?***

Under the Rome Statute or an ICC proceedings, a situation is defined as events in a particular conflict or particular location and time period. Situations are distinguished from cases, which are proceeding against individuals alleging a specific set of criminal



conduct. For example, in many conflicts, there are two or more sides involved. Separate cases might be brought against individuals from different sides of a conflict for different crimes. Both cases can arise from the same situation, even though the facts of the two cases might differ.

An example is the situation in the Democratic Republic of Congo, where there were different cases brought against different parties to the conflict, or the example of elections in Kenya, where multiple sides are accused of violent crimes in connection with those elections.

Procedurally, a case that is either referred by a state party or commenced by the prosecutor on his or her own initiative first goes through a “preliminary investigation”. The preliminary examination analyzes if: (1) there is a factual and legal basis to proceed; (2) the court has jurisdiction over the individual; (3) the case is admissible; and

(4) it is in the interests of justice to go forward. If the preliminary investigation deems it warranted, an investigation is opened. A decision not to proceed can be based on lack of legal or factual basis to seek a warrant, that a case is inadmissible because national authorities are handling the matter genuinely, or a determination that prosecution is not in the interest of justice. If the matter was a referral by a state party, that state may seek review of the decision of the prosecutor not to proceed. Articles 53-61.

In addition to the ten situations from which cases were initiated, preliminary investigations were opened regarding situations in: Colombia (decision not to proceed); Guinea (decision not to proceed); Nigeria (ongoing); Honduras (decision not to proceed); Republic of Korea (decision not to proceed); Registered Vessels of Comoros, Greece and Cambodia (involving flotilla to Israel and boarding of vessels by Israeli personnel-decision not to proceed); Iraq/UK (decision not to proceed); Gabon (decision not to proceed); Venezuela (ongoing); and Bolivia (decision not to proceed.)

Investigations were also opened regarding the following situations: Burundi; the State of Palestine;

Bangladesh/Myanmar (Rohingya); Afghanistan; and the Republic of the Philippines.

At this point in time, not less than 32 cases have been initiated arising out of ten different situations: (1) Darfur, Sudan (UN referral); (2) Democratic Republic of Congo (state referral); (3) Central African Republic I (state referral); (4) Central African Republic II (state referral); (5) Kenya (prosecutor opened); (6) Libya (UN referral); (7) Cote d'Ivoire (prosecutor opened); (8) Mali (state referral); (9) Uganda (state referral); and, (10) Ukraine (state referral.)

#### ***How long does it take on average to prosecute a case and issue a ruling or decision?***

There is no right to speedy trial in the ICC. Cases can take years. The ICC has no police force. There is no statute of limitations for the crimes within the subject matter jurisdiction of the ICC (genocide, crimes against humanity, war crimes and the crime of aggression). If an accused evades surrender to the custody of the ICC, a case can remain pending as long as the accused remains alive.

#### ***What does the ICC do?***

The ICC is a treaty-based international organization established as the first permanent international court entrusted to investigate and if warranted, prosecute individuals accused of the crimes within the subject matter jurisdiction of the court: (1) genocide; (2) crimes against humanity; (3) war crimes; and (4) the crime of aggression. Articles 5-8.

The ICC is independent of the UN but has an agreement for the relationship with the UN. Articles 1, 2 and 4. The ICC's headquarters are located at the Hague in the Netherlands. The treaty allows for the court to sit elsewhere whenever it considers it desirable. Article 3.

There are separate branches of the ICC, including the judges, the registrar (similar to a clerk's office but with responsibilities including notifications and regulation of defense counsel), and the Office of the Prosecutor (OTP). Articles 34-43. The ICC has investigators to assist the OTP, however they do not have the powers of local law enforcement when conducting investigations within nations.



The temporal jurisdiction of the ICC is prospective only. The ICC only has jurisdiction over alleged crimes committed after entry into force of the treaty (July 1, 2002), or if a nation later joins the treaty, after entry into force for that nation (the effective date of the ratification, acceptance or accession to the treaty by that nation,) unless that nation makes a declaration accepting jurisdiction of the ICC with respect to the crimes in question. Article 11.

For the ICC to assert personal jurisdiction over the individual accused, either (1) the accused individual must be a national of a nation that is a party to the treaty, or (2) the alleged crime was committed on the territory of a nation that is a party to the treaty. A nation that is not a party to the treaty can lodge a declaration accepting the jurisdiction of the ICC with respect to the crimes in question. Article 12.

A case can be initiated by three methods: (1) a referral by a state party; (2) the prosecutor acting on his or her own initiative (*in proprio motu*); or (3) a referral from the United Nations Security Council. Articles 13-15.

The jurisdiction of the ICC is complementary to national courts. One of the policies of the Rome Treaty is to promote national prosecutions. The ICC is meant to act only when no national courts are able or genuinely willing to investigate and if warranted, prosecute those crimes. Articles 17-19.

## CONSIDERATIONS FOR INTERNATIONAL EXPANSION

by Lee Plave<sup>16</sup>

International growth has a special allure for US companies. International markets present fantastic opportunities after a thoughtful strategy is developed and transactions are properly implemented. However, cross-border expansion also presents significant challenges. This short summary notes some of those challenges.

- **Strategy.** The company should consider specific goals to accomplish by expanding internationally. This may include financial goals, brand enhancement, development of markets for products and services, and nurturing new consumers who will foster demand over time. Where possible, companies should consider which markets – and in what sequence – they wish to transact.
- **Legal Climate.** A key factor is to review the laws of the target market. In the franchise area, many countries have national statutes, regulations, and other quasi-voluntary standards that must be addressed before undertaking business. These can include franchise-specific laws and regulations, antitrust (or competition) rules, contract law, commercial agency law, and intellectual property law, all of which may have enormous impact on an effective expansion

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<sup>16</sup> Lee Plave is a partner in Washington, DC based Plave Koch PLC, and has worked extensively with franchisors seeking to expand internationally. He formerly served as an enforcement attorney with the Federal Trade Commission. Lee presently serves as Vice Chair of the Clark University Board of Trustees.

Lee has enjoyed the recognition of his peers for many years. He was recognized three times as the global *Franchise Lawyer of the Year* by London-based *Who's Who Legal* (2018, 2019, and 2020), as ranked by his peers. *Who's Who Legal* also designates Lee

as one of its “Global Elite Thought Leaders.” The London-based *Chambers & Partners*, which publishes an internationally respected client guide, annually includes Lee as one of the leading franchise lawyers in both its U.S. and Global editions. In 2023, *Lexology* published a survey of in-house counsel that ranked Lee as the top franchise lawyer in the US. The ABA Forum on Franchising conferred its “Lewis G. Rudnick Award” on Lee in 2019 in recognition of his excellence, professionalism, and leadership in the bar.



strategy. Whether the country is a civil or common law jurisdiction may also make a difference. Local counsel will play an essential role in this regard.

- **Intellectual Property.** Protection of intellectual property assets (e.g., trademarks, service marks, trade names, and signs) is centrally important. Owing to the long lead time needed to secure trademark registrations (as well as the prevalence of different filing and priority regimes for those registrations), this should be the first issue to tackle ahead of international expansion.
- **Franchise Law.** In some jurisdictions, franchise-specific laws focus upon pre-sale disclosure, while other laws may govern the parties' ongoing relationship. A close cousin of these requirements, commercial agency laws, may also play an important role in defining the parties' rights and obligations.
- **Financial.** In some countries, foreign exchange controls might limit the parties' latitude in structuring a transaction. Local withholding tax requirements should also be considered to see whether a double taxation treaty applies as well as whether the US company would be able to use a foreign tax credit (if payment is made to local authorities). Coordination with tax advisors is obviously essential here. And, for some countries and industries, a key factor may be whether foreign parties are banned from directly investing in the market, while others have restrictions based on ownership interest.
- **Customs and Consumer Protection.** Some companies must adapt their products or services to consumer and safety laws that differ from those of their home market. Franchisors must also consider data privacy laws and other consumer protection regulations.
- **Competition and Antitrust.** Considerations in this area include purchasing requirements, non-compete clauses, resale price terms, and other restrictions. In the EU, these might

include limitations on limiting or coordinating how franchisees use the Internet. A franchisor would want to make sure that it could require franchisees to meet quality and brand standards. Ethical sourcing difficulties may also be a consideration, as well as government-controlled supply systems, official or tacit preferences given to domestic business entities – compared with over outsiders.

- **Geography and the US Party's Experience Level.** The proximity of the target to the home market may also be important. Supply chains are often easier to implement when the target market is closer to home. Experienced franchisors may have valuable prior experience dealing with franchisees in a similar country with similar language requirements.
- **Dispute Resolution.** Different legal systems and procedures may impact whether the parties can practically and efficiently enforce a contract as written. For some countries, international arbitration under the rubric of the New York Convention will also be a prime option (e.g., but care should be taken to see whether the target country has set different standards for arbitration to be conducted and awards enforced). Predictable enforceability is also a key practical factor during the contract term, as that tends to motivate parties to comply with contract terms.
- **Contracting Rights.** Another consideration is whether the country generally affords parties the freedom to contract as they wish and enforce those agreements as written?
- **What form of agreement to choose?** In a franchise transaction, various possibilities may be suitable. These include master franchise arrangements, multi-unit development agreements, and unit-by-unit agreements.

This very brief summary notes some of the points that should be at the top of list when considering expanding internationally, especially through a



franchise vehicle. Further analysis, thought, and attention to these factors is unquestionably required to proceed ahead.

## EXECUTIVE COMMITTEE

### 2022-2023 Executive Committee

Chair: Richard Bainter  
Vice Chair: Payal Sinha  
Secretary: Eric Husby  
Treasurer: Agustín Ceballos  
Members: Daniel Alef  
Radhika Balaji  
Bob Bowen  
Valeria Granata  
Harumi Hata  
Theresa Leets  
Robert E. Lutz  
Charles Pereyra-Suarez  
John Van Geffen  
Nilmini Silve-Send  
ILS Representative: Enrique Hernandez  
Immediate Past Chair: Tiffany Heah  
Section Manager: Pam Amundsen

### 2023-2024 ILS Officers

We would like to congratulate the slate of ILS Officers for the upcoming term from 2023 – 2024:

Chair: Margaret Francisco  
Vice Chair: Theresa Leets  
Secretary: Radhika Balaji  
Treasurer: Agustín Ceballos  
Members: Daniel Alef  
Bob Bowen  
Valeria Granata  
Harumi Hata  
Robert E. Lutz  
Charles Pereyra-Suarez  
John Van Geffen  
Nilmini Silve-Send  
ILS Representative: Enrique Hernandez

Immediate Past Chair: Richard Bainter  
Section Manager: Pam Amundsen

## CALIFORNIA INTERNATIONAL ARBITRATION WEEK



ILS sponsored the second annual California International Arbitration Week ("CIAW") from March 13 to 17, 2023 and it was another success. The CIAW was free thanks to the support of its numerous sponsors. This time there was a mix of virtual and in-person events.

Please save the date for the third annual CIAW which will be from March 11 to 14, 2023. More information is available [here](#).

## 2023 CLA ANNUAL MEETING



SAVE THE DATE! The 2023 CLA Annual Meeting will be from September 21 to September 23, 2023 at San Diego Hilton Bayfront Hotel. The Annual Meeting is where legal professionals all over California and beyond meet to learn and connect. The three-day conference is packed with inspiring keynotes, MCLE on emerging topics across practice areas and fun networking events.

We look forward to seeing you there.



## WARREN CHRISTOPHER AWARD



Figure 7: Mariano-Florentino Cuéllar, 2023 Warren Christopher Award Recipient

At the upcoming 2023 CLA Annual Meeting, ILS will be honoring Mariano-Florentino Cuéllar who is the 2023 Warren Christopher Award Recipient. Currently, he is the tenth president of the Carnegie Endowment for International Peace. Mr. Cuéllar was formerly a Supreme Court

Justice of California. He served two US presidents at the white house and in federal agencies. He is a member of the US Department of State's Foreign Affairs Policy Board.

He has written several articles that address problems in international affairs. Before working at the White House, he was a member of the Obama-Biden Transition Project where he co-directed the working group on immigration, borders, and refugee policy. During the Obama Administration, he led the Domestic Policy Council's work on various matters including immigration.

We hope to see you at the Warren Christopher Award Reception which will be held in the evening on September 22, 2023 (Friday) at the Hilton Bayfront, San Diego where we will be honoring Mr. Cuéllar for his work and achievements in the practice of international law.

## FOREIGN BAR AND EXTERNAL RELATIONS COMMITTEE

***Chairs: Joshua Surowitz and Harumi Hata***

Any ILS member interested in joining the Foreign Bar and External Relations Committee of ILS should contact us at [ils@calawyers.org](mailto:ils@calawyers.org).

### 2023 Barcelona CLA Summer Law Conference

***By Theresa Leets<sup>17</sup>***

The ILS always has something interesting in the works and the Barcelona Summer Law Conference exceeded expectations. The conference was expertly planned by Josh Surowitz in close coordination with the Barcelona Bar Association. The Barcelona Bar Association hosted the Conference in their centrally located office at the Ilustre Colegio de La Abogacia de Barcelona. Minutes away from Gaudi architecture wonders Casa Mila and Casa Botllo on Passeig de Gracia where even the most discriminating shopper will be delighted.

The program was perfectly balanced between a wide range of timely and topical programs throughout the week along with food, art, and architecture that Barcelona, the capital of Spain's Catalonia region, is famous for. The following highlights will give you a flavor of how participants earned seven hours of MCLE and still soaked up the vibrant culture that is Catalonia.

The first day included a welcome from CLA President Jeremy Evans and the Chair of the Barcelona Bar Association, followed by a presentation on comparative sports law with Jeremy Evans, also a California sports lawyer, and Maria Barbancho who is the legal adviser to the Catalan Futbol (soccer) Federation and defense attorney. Lunch was hosted by the Barcelona Bar Association whose facilities were at one time a palace. Imagine catered lunch each day in a marbled palace with Roman columns

<sup>17</sup> Assistant Chief Counsel, California Department of Financial Protection and Innovation



floor to ceiling as you network with colleagues adjacent to the third largest law library in Europe. The afternoon program compared the role of the compliance officer in the US and Europe. The panel included Margaret Francisco, Senior counsel at Mitsubishi Electric US and Diego Pol, Partner at Cuatrecasas. The group then toured the otherworldly Gaudi designed Catholic Basilica, La Sagrada Familia, that has been under construction since 1882. It is a UNESCO World Heritage Site.

Here are photos from the first day:



Figure 8: L-R Marta Cuadrada, Josh Surowitz, Richard Bainter, Laia Folch, Ariadna Miret Alba



Figure 9: L-R: Josh Surowitz, Jeremy Evans, Maria Barbancho



Figure 10: L-R: Pavan Dhillon and Josh Surowitz at the Barcelona Bar Association



Figure 11: Margaret Francisco at Segrada Familia



*Figure 12: Inside Sagrada Família*

Day two started off with Professor of Business Law at University of Barcelona, Dani Vazquez, and co-panelist Marco Bertaso, dual-qualified lawyer in Spain and Italy and Patrick Byrne, Partner at B. Cremades and Associates discussing conflicts between majority and minority shareholders. The following program explored consumer mediation and arbitration with Ana Sambold, Chair-Elect of the ABA Dispute Resolution Section and Xavi Pineda, Attorney and Mediator in Spain. That afternoon included a tour of the Barca Museum, a pilgrimage site for futbol fans around the world. It includes high-tech touch-screens to allow visitors to explore the FC Barcelona legendary team. Catalonians are quick to let you know that the football is a religion, and this Museum proved it.

Here are photos from the second day:



*Figure 13: L-R: Eric Husby, Ana Sambold, Xavi Pineda*



*Figure 14: Barca Museum*

Day three began with discussions about cybersecurity and cybercrime with James C. Roberts III, Founding Principal at Global Capital Law Group and Andrew Van Den Eynde, criminal lawyer and cybercrime professor. Followed by global mobility discussions with immigration lawyers Ana Homet Alonso, Pavan Dhillon and Ana Garicano. The group visited the Picasso Museum and was greeted by Eva Soira Puig, Barcelona Director of Innovation, Research and Visual Arts. The museum houses an extensive collection of artworks by Pablo Picasso, with a total of 4251 pieces in five adjoining medieval palaces. The group ended the day with dinner at a landmark restaurant with more than a hundred years of history, La Venta, which offered excellent traditional Catalonia cuisine and breathtaking views of Barcelona.



Here are photos from the third day:



Figure 15: Andreu Van Den Eyden



Figure 16: James C. Roberts, III



Day four started at the Barcelona City of Justice and a tour of the Catalonia equivalent of our Supreme Court and a discussion with the President of the High Court of Justice of Catalonia, Jesus Maria Barrientos Pacho. The group returned for its final program to discuss business and investment between Spain and California with Richard Silberstein, Partner at Gomez-

Acebo & Pombo and Patrick Byrne, Partner at B. Cremades and Associates. The Barcelona Bar hosted its annual Summer Dinner at Red Fish Restaurant with the California lawyers welcomed as their VIP guests at a fashionable seafront venue servicing tapas, seafood and cocktails as hundreds of local lawyers socialized and enjoyed the sunset.

Here are photos from the fourth day:



Figure 17: President of the High Court of Justice of Catalonia,



Figure 18: L-R: Yoann Le Bihan, Joanna Wald, Marta Cuadrada



Figure 19: Barcelona Summer Dinner at Red Fish Restaurant



Day Five ended the Summer Law Program with a closing ceremony and then a trip to the Pere Ventura Cava Family Wine Estates. The group learned about the vineyard's sustainable practices, the history of the property (roads there literally lead to Rome) and sampled several award-winning cava (sparkling wines). You can explore their collections [here](#).

If you were unable to join the International Law and Immigration Section on this trip, there is another opportunity to join a delegation to Japan October 16-21, 2023. More information together with the registration link is available [here](#).

### California Delegation to Japan

California Lawyers Association  
International Law and Immigration Section

**California Delegation to Japan**      **October 16 - 21, 2023**

Osaka Tuesday, October 17	Tokyo Thursday, October 19	Yokohama Friday, October 20
		
Osaka Bar Association	Daiichi Tokyo Bar Association	Kanagawa Bar Association

The ILS is organizing a CLA delegation to Japan for visits with Osaka Bar Association, Dai-Ichi Tokyo Bar Association and Kanagawa Bar Association. Participants will need to arrive in Japan on October 16, 2023. We have an exciting itinerary which allows participants to visit various Japanese Courts and other places of interest. There will also be joint seminars on various issues ranging from California Privacy Laws to Alternative Dispute Resolution. More information regarding the Japan trip is available [here](#). If you have any questions about the Japan trip, please do not hesitate to email ILS at [ils@calawyers.org](mailto:ils@calawyers.org).

## PROGRAMS COMMITTEE

**Chair: Eric Husby**

Anyone interested in organizing a webinar or interested in speaking about a particular topic that would be of interest to ILS members should email us at [ils@calawyers.org](mailto:ils@calawyers.org). The Committee is currently scheduled to meet at 1 p.m. on the second Tuesday of each month.

## IMMIGRATION COMMITTEE

**Chair: Payal Sinha**

The immigration committee meets every two months on the first Wednesday at 12:00pm to 12:30pm. The first meeting is on January 4, 2023. Anyone interested in joining the Immigration Committee, please email us at [ils@calawyers.org](mailto:ils@calawyers.org).

## PUBLICATIONS COMMITTEE

**Editor-in-Chief: Tiffany Heah**

Managing Editor: Melissa Allain

Editorial Team: Cathy Carlisle, Valeria Granata, Bob Lutz, Theresa Leets, Payal Sinha, Joshua Surowitz, John Van Geffen

We produce several publications throughout the year for the benefit of our members. These publications are designed to keep members up to date about international legal developments in transnational commercial and public law, immigration matters, and ILS activities.

The ILS encourages members and non-members alike to submit articles for inclusion in its publications. Articles submitted for publication will be considered by the ILS Publications Committee to assess whether they conform to the publications guidelines (below), as well as whether they are a good fit for a particular issue. Acceptance of an article will depend on the above factors, as well as timeliness, editorial schedule, etc. Please send all submissions to [ils@calawyers.org](mailto:ils@calawyers.org).

Guidelines for such submissions are described below:

**Topic/Tone:** Articles should be on topics of interest to a sizable number of international and immigration law practitioners. Acceptable types of articles include updates on current developments, practitioner guides to a particular subject, practice tips, and reasoned presentation and analysis of current issues.

**Length:** Articles should not exceed 1500 words.

**Citations:** Hyperlinks are preferred where possible; otherwise, endnotes in Bluebook format are



acceptable. We encourage citations to be kept to a minimum.

**Format:** Please submit articles in Word.

**Author Bio:** Please provide one or two sentences summarizing the author's professional background and CLA affiliation together with a photo. You may also include a disclaimer that the views expressed are those of the author and do not necessarily reflect the views of their employer.

Please submit articles, ideas, comments, notices, current developments, and new publication announcements to us at [ils@calawyers.org](mailto:ils@calawyers.org).

Opinions expressed herein are those of the authors and are not necessarily those of the CLA or of the ILS.

## EVENTS BY OTHER ORGANIZATIONS, INSTITUTIONS AND GROUP

### ***October 10 to 13, 2023: Asia/Pacific Conference: Law and Technology in a Changing World***

The ABA International Law Section will present the 2023 Fall Conference in Seoul, South Korea on Law and Future of Technology, where they will discuss current issues facing businesses involved in high-tech, covering everything from artificial intelligence and cybersecurity to biotechnology and digital platforms. They will offer programs addressing a wide array of legal issues, including antitrust, commercial transactions, legal ethics, international trade, legal education, litigation, and mergers & acquisitions.

The event will take place primarily at The Commons conference center at Yonsei University, interspersed with visits to palaces, shopping, and legal institutions for registrants and companions. More information is available [here](#).

## BENEFITS OF JOINING ILS

- [Fastcase legal research](#) – Free access to a powerful service that puts a comprehensive, nationwide law library at your fingertips (valued at \$995/year).
- Membership rate to the CLA Annual Meeting, Solo Summit and other distinguished CLA events.

- [ILS NEWS](#) – designed to keep members up to date about international legal developments in transnational commercial and public law and Section activities.
- Lexology feeds subscription – source of international legal updates, analysis, and insights authored by national and international law firms. If you previously unsubscribed and would like to re-subscribe, please update your preferences [here](#).
- Get high-quality [MCLE content online](#) in the format that works best for you: live webinars, on-demand video, downloadable podcasts and self-study articles.
- [6.5 free hours of self-study MCLE Credit](#) and one hour of free MCLE each month in the form of a webinar.
- Up-to-date [California legislation tracking](#).
- Access to [CLA Career Center](#).
- Exclusive discounted offers on house appliances, car rentals and more at CalBar Connect.

## SOCIAL MEDIA

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