

# VIDEOCONFERENCING IN INTERNATIONAL PROCEEDINGS

Dr. Johann Laux (corresponding author)

Dr. Malte Kröger, LL.M. (EUI)

*Article last updated: July 2022*

## TABLE OF CONTENTS

A. INTRODUCTION

B. FIRST STEPS: HISTORY OF VIDEOCONFERENCING TECHNOLOGY IN LEGAL  
PROCEEDINGS

C. TECHNOLOGICAL BACKGROUND

D. VIDEOCONFERENCING AS THE SUBJECT OF INTERNATIONAL PROCEEDINGS

E. VIDEOCONFERENCING IN INTERNATIONAL PROCEEDINGS

1. International Criminal Law
2. International Arbitration and Private International Law
3. Interstate Litigation
4. International Human Rights Law
5. Overall Findings

F. NORMATIVE ANALYSIS OF THE USE OF VIDEOCONFERENCING

1. Normative Reconstruction of the Pragmatic and the Cautious Approach to  
VC
  - a. The Pragmatic Approach I: International Arbitration and  
International Private Law
  - b. The Pragmatic Approach II: International Criminal Law
  - c. The Cautious Approach: Interstate Litigation
2. Toward a Right to VC?
3. Privacy, Data Protection, and Cybersecurity

G. EMPIRICAL ASPECTS OF VIDEOCONFERENCING

1. Competence
2. Judicial Attitudes
3. Behavioural Effects

## H. CONCLUSION AND OUTLOOK

### CITED BIBLIOGRAPHY

### FURTHER BIBLIOGRAPHY

### CITED DOCUMENTS

### CITED CASES

ECtHR

ICC

ICJ

ICSID

ICTR

ICTY

IRMCT

ITLOS

## **A. INTRODUCTION**

**1** Since the 1980s, videoconferencing ('VC') has found wider use in courts around the globe (Lederer, 2021, 303; Valchev, 2020, 656–8; Susskind, 2019, 57). VC refers to the use of video and audio transmissions to allow individuals in different physical locations to communicate by seeing and hearing each other simultaneously (Council of Europe, 2021, 2) (→ *Hearings: International Courts and Tribunals*). It permits remote communication not only through peoples' words but also through their facial expressions and body language (Center for Legal & Court Technology, 2014, 25).

**2** Recently, the global COVID-19 pandemic forced courts to close their buildings and work remotely, supported by VC (White, 2021, 3–4; Susskind, 2020). Courts' response to the pandemic will likely have lasting effects on the use of VC in legal proceedings. Some measures, such as video hearings (also called 'virtual hearings' or 'remote hearings'), implemented as a temporary response to the pandemic, may become permanent features as work cultures are changing (Fekete, 2021, 472–7; Betteto, 2020). In this regard, using VC technology is part of a broader debate around technologically enhanced 'post-covid courts' and the installation of 'virtual courts', featuring immersive telepresence and augmented reality (cf. Engstrom, 2020, 255). While immersive telepresence gives the impression that participants in a VC call are in the same room, augmented reality provides additional audio-visual information to participants (Susskind, 2019, 255–60).

**3** → *International courts and tribunals* [MPEPIL] ('ICTs') have likewise resorted to using VC during the COVID-19 pandemic. ICTs deploy VC technology in various procedural situations: pleadings, hearings of witnesses, deliberations, meetings, consultations, and workshops (self-reported answers by ICTs to a survey conducted by the authors. Survey data available upon request). This entry begins by tracing the history of VC in legal proceedings (B.) and continues by introducing its technological background (C.). It then turns to VC as the subject of international proceedings (D.). The use of the technology in national hearings has led to several rulings on its compatibility with international human rights law. Following this, we provide an overview of how ICTs have so far implemented VC in their practice (E.). By drawing on the rules of procedure and case law we observe two different approaches by ICTs: first, in international private law and arbitration as well as in the practice of international criminal courts and tribunals, a displayed pragmatic approach is generally permissive towards VC. Second, we recognise a cautious approach and some reluctance to use VC in interstate litigation. We further find that international human rights law so far displays instances of both approaches. As the use of VC has been accompanied by normative concerns not least about the right to a fair trial (→ *Fairness*; → *Due Process*), the subsequent section discusses some of the normative issues with VC in international proceedings and presents a normative reconstruction of the pragmatic and the cautious approach of different ICTs (F.). Moreover, the technology raises empirical questions about human behaviour in the court room and potential effects of VC on ICTs' decision-making (G.). This entry concludes by providing an outlook for the further development of VC and international procedural law (H.).

## **B. FIRST STEPS: HISTORY OF VIDEOCONFERENCING TECHNOLOGY IN LEGAL PROCEEDINGS**

4 Historically, one main reason for installing VC in legal proceedings has been to increase efficiency. For example, Australia, whose jurisdictions often cover huge distances, has been an early adopter of the technology. Court appearance via video became a widely used alternative to long-distance travel otherwise required for physical court appearances (Wallace, 2008, 3). Relatedly, VC was implemented to increase access to justice for remote communities, including indigenous peoples (Wallace, 2008, 3). Another traditional rationale for using VC has been to protect vulnerable witnesses in criminal case proceedings such as children from trauma that they may experience in the physical courtroom facing the alleged perpetrator (Wallace, 2008, 3).

5 In international law, criminal tribunals have been early adopters of VC in comparison to other ICTs. For example, the → *International Criminal Court (ICC)* [MPEPIL] amended its Rules of Procedure and Evidence (2002) ('ICC Rules') in 2013 by adding Art. 134bis to allow accused to appear via VC before the Trial Chamber on a case-by-case basis (Resolution ICC-ASP/12/Res.7 (2013)). The amendment was introduced during the trial against Kenya's then-sitting president, Uhuru Kenyatta (Tiba, 2013, 149). African member states had expressed their concern that if Kenyatta had to be physically present at the ICC, this would distract him from governing Kenya (Fabricius, 2013). At the time, there was uncertainty whether the amendment was consistent with the Rome Statute of the International Criminal Court (1998) ('Rome Statute'), whose Article 63(1) requires that the "accused shall be present during the trial" (Fabricius 2013). Moreover, activists argued that there should be no exception made for sitting presidents as this would violate the principle of equality before the law (Fabricius, 2013).

6 From its first introduction, VC in proceedings has been met with normative challenges, such as the concern about equality before the law just mentioned. Most normative concerns cluster around the right to a fair trial as well as security and privacy issues and vary depending on whether the issue at hand is one of private, public, or criminal law, as this entry will show.

7 The normative issues surrounding the use of VC are often shared across domestic and international legal domains. While this entry focuses on international adjudication and proceedings, it should be mentioned that the effects of introducing VC in national court proceedings can have repercussions for the normative order which international conventions are aiming to establish. For example, when VC technology made its way into the courtrooms, it was speculated to have a negative effect on the utilisation of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970) (Hague Evidence Convention, 'HEC') (Davies, 2007, 206–7). In fact, parties often try to bypass the HEC as it does not take advantage of technological improvements such as VC, hence slowing down procedures (Richard and Hess, 2020, 288). As a result, the normative order which has been created by the HEC is in practice neglected (Davies, 2007, 237).

### **C. TECHNOLOGICAL BACKGROUND**

**8** VC technology has evolved from requiring expensive equipment which only few large organisations could afford to running on applications on mobile phones available to a general audience (Lederer, 2020, 325–28; Shannon, 2007; Lawlor, 1998). Today, both high-end commercial VC systems provided by companies such as CourtCall, Cisco or Polycom and software programs such as WebEx, OmniJoin, GoToMeeting, Google Meet, Skype for Business, Microsoft Teams and Zoom can be and are being used at courts (Lederer, 2020, 326–7; Simson, 2020). High-end VC systems were connected via Integrated Services Digital Network (‘ISDN’) until Internet Protocol (‘IP’) connections widely replaced the earlier technology (Lederer, 2020, 326–7).

**9** Three factors determine the ability to take part in VC: Internet access, adequate and stable bandwidth, and appropriate devices (Lederer, 2020, 328). These technological requirements are not easily met in international proceedings and have led to concerns about the feasibility of VC for defence teams in international criminal law. As the Defence in the *Ntaganda* case submitted to the Appeals Chamber of the ICC: “a platform for a virtual ICC appeal hearing in the Ntaganda case would need to facilitate at a minimum: (i) public access to the hearings; (ii) display of multiple images simultaneously; (iii) real-time French-English interpretation; (iv) real-time transcription in French and English; (v) privileged consultations between the Defence and Mr. Ntaganda; (vi) closed sessions for reference to confidential evidence or information; and (vi) the ability for Mr. Ntaganda to be held in a location where he could participate in both open and closed sessions, and potentially address the Appeals Chamber directly” (*The Prosecutor v Bosco Ntaganda*, 2020, Corrigendum\* to the “Defence submissions on the scheduled oral hearing” (6 May 2020), para 23). As access to adequate hardware, software, and broadband is unequally distributed across the globe, international proceedings pose special challenges to implementing VC. Practically speaking, if proceedings are remote, legal teams will often have to coordinate their efforts between multiple time zones (see further below at paras 67–8 and 89). Moreover, depending on the technology being used, synchronisation and standardisation of technical protocols may be required for cross-border VC (Torres, 2018, 73).

**10** VC has different uses in legal proceedings. *Video hearings* may be partly video, when there is a physical hearing into which some participants are connected by video (‘hybrid VC’), or fully video, when there is no physical hearing, and all participants are therefore connected by video (Susskind, 2020). In addition, one may classify hearings in which there is no hearing venue, especially no physical court room, as *virtual hearings* (Scherer, 2020, 410–1). Taking of *evidence by video* shows similarities with pre-recorded evidence: audio-visual evidence gathered on social media, for example, is changing the way in which violations of international criminal law and human rights law are being investigated and prosecuted at the ICC (Laux, 2018, 325). VC is also being used for *lawyer/client communication* when the client is currently incarcerated (as evident from the case law presented in the next section).

#### **D. VIDEOCONFERENCING AS THE SUBJECT OF INTERNATIONAL PROCEEDINGS**

**11** With national jurisdictions increasing their use of VC in their proceedings, its compatibility with international law, especially international human rights law, has become the subject of international adjudication. The → *European Court of Human Rights (ECtHR)* [MPEPIL] has to date ruled on several occasions on the use of VC in national hearings and the right to a fair trial guaranteed by Article 6 of the → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* [MPEPIL] ('ECHR') (cf. Fekete, 2021, 472–7; → *Fair Trial, Right To, International Protection* [MPEPIL]; → *Right to Be Heard*).

**12** Analysing the case law of the ECtHR on video hearings, Fekete concludes that the party's right to an effective presence (as guaranteed by Art 6 ECHR) is handled differently in criminal and civil cases and in different stages of the procedure (Fekete, 2021, 477). As regards criminal cases, a defendant's participation in the proceedings by VC is not as such contrary to the Convention (*Viola v Italy*, 2006, para 140). In particular, appellate hearings via video link were repeatedly found to not violate Article 6 ECHR, if a first instance hearing had been held in person (Fekete, 2021, 474). The personal appearance of the defendant does not take the same crucial significance for an appeal hearing as it does for the trial hearing (*Viola v Italy*, 2006, para 137; *Trepashkin v Russia*, 2010, para 149). As long as appeal procedures only deal with questions of law and not with questions of fact, a proceeding may comply with the requirements of Article 6 ECHR even though the appellant was not given the opportunity of being heard in person (*Viola v Italy*, 2006, para 137). However, at the trial stage of criminal proceedings, VC proceedings in general fail to comply with Article 6 ECHR. As regards the right to communicate with one's lawyer, a video link or VC system that is installed and operated by the state needs to offer sufficient privacy of communication and be secured against interception (*Sakbnovskiy v Russia*, 2010, para 104; *Gorbunov and Gorbachev v. Russia*, 2016, para 37) (→ *Attorney-Client Privilege*).

**13** In civil proceedings, video hearings were regarded by the ECtHR as 'obvious solutions' in a case where detained applicants sought to testify in person during a defamation claim (*Yevdokimov and Others v Russia*, 2016, para 42). VC at the parties' request to lower costs and save time constitutes a legitimate aim (Fekete, 2021, 477). The ECtHR acknowledged that the use of VC is aimed at, among other things, reducing delays incurred in transferring detainees and thus at simplifying and accelerating proceedings (*Yevdokimov and Others v Russia*, 2016, para 43). In addition, the ECtHR stated that in non-criminal matters Article 6 ECHR does not guarantee an absolute right to be present at one's trial, except for a limited category of cases in which the character and way of life of the person concerned was directly relevant to the subject matter of the case or where the decision involved the person's conduct or experience (*Vasilyev v Russia*, 2012, para 76; *Yevdokimov and Others v Russia*, 2016, para 25). In these cases, it is not sufficient that the person concerned is represented by a

lawyer. Courts must then make procedural arrangements to uphold the fairness of the proceedings.

14 Interestingly, for detainees the ECtHR does not make a difference whether the proceedings take place in person or via VC (*Yevdokimov and Others v Russia*, 2016, para 42). If taking place via VC, the court must make sure that certain technical requirements are fulfilled: the detainee must be able to follow the proceedings, to see the persons present and hear what is being said, but also to be seen and heard by the other parties, the judge, and witnesses, without technical impediment (*Yevdokimov and Others v Russia*, 2016, para 43).

15 Since the decisions of the ECtHR regarding the use of VC in proceedings is based on cases in which persons are detained, it is not established that using VC in other cases is equivalent to a proceeding in person. Of course, the Article 6 ECHR case law only concerns domestic, not international proceedings. However, the reasoning of the ECtHR provides some normative backdrop for the implementation of VC within international procedural law, as will be shown now.

16 The right to a fair trial is of paramount importance in the protection of international human rights and in international criminal law (White, 2021, 5). It has been included in Article 10 of the Universal Declaration of Human Rights (1948) ('UDHR') and Article 14(1) of the International Covenant on Civil and Political Rights (1966) ('ICCPR'). Article 14(3)(d) ICCPR states the accused's right "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing." The presence of the accused at trial has been implemented as a requirement for a trial's fairness in international criminal tribunals' rules, cf. (cf. Art. 63(1) of the Rome Statute; Art. 21(4) of the Statute of the International Tribunal for the Former Yugoslavia (1993) ('ICTY Statute'); Art. 20(4) of the Statute of the International Criminal Tribunal for Rwanda (1994) ('ICTR Statute'); Art. 20 (4) of the Statute of the International Residual Mechanism for Criminal Tribunals (2010) ('IRMCT Statute'); see also White, 2021, 7).

17 The next section shows that international criminal law displays a more pragmatic approach to VC than the ECtHR's normative limits established in its Article 6 ECHR case law for national criminal proceedings may suggest. The ECtHR generally seems to hold VC use at trial stage to be largely incompatible with the ECHR. As mentioned, the ICC's Trial Chamber allows the use of VC on a case-by-case basis for almost a decade now (see above at para 5). However, in international criminal law 'presence' during trial had for some time also been interpreted as requiring physical presence. Some argue that presence at trial is a right rather than a duty of the accused, thus generally being waivable by the accused (cf. above the introduction of VC for sitting presidents at para 9), although perhaps requiring limits (White, 2021, 9; Zakerhossein and de Brouwer, 2015, 212). The practice of several international criminal courts and tribunals appears to follow the latter understanding.

## **E. VIDEOCONFERENCING IN INTERNATIONAL PROCEEDINGS**

**18** VC technology may be used in different procedural constellations. For example, the court and the parties in a case may hold a hearing in person and – as a part of the hearing – a witness or an expert is connected via VC with the people in the court room. Another possibility is that one or both of the parties participate via VC while the judges are in the court room. Furthermore, the judges of a court may also participate remotely. In this article, the term ‘VC’ includes all uses of VC in the proceedings of an ICT, including the procedural constellations listed above.

**19** This section provides an overview on the current practice of using VC in international proceedings based on the rules and procedures and case law of ICTs. Our examination begins with the domain of international criminal law (1.), continues with international arbitration and private international law (2.), moves on to interstate litigation (3.) and concludes with international human rights litigation (4.). We observe a generally permissive pragmatic approach towards VC in the first two domains and a more reluctant cautious approach to using VC in interstate litigation.

## **1. INTERNATIONAL CRIMINAL LAW**

**20** As mentioned, VC has been practiced in international criminal law already before the advent of the COVID-19 pandemic (see above at para 5). Just as in other legal domains, however, the pandemic has sped up the implementation of virtual proceedings. As White writes, “[a]s of December 2020, virtual presence for the purposes of trials has become the new norm” (White, 2021, 21). White lists several international criminal law cases which have proceeded virtually or partially virtually in the year 2020 alone at the ICC, at the International Residual Mechanism for Criminal Tribunals (‘IRMCT’), and at the Special Tribunal for Lebanon (‘STL’), (see White, 2021, 21 for references).

**21** This development is far from being unremarkable in that presence at trial as part of the right to a fair trial has often been interpreted as requiring ‘physical presence’, although the requirement is not absolute, as statutes and rules of international criminal courts enumerate examples of permissible departures from it (White, 2021, 7–8; cf. also the history of Rule 134bis ICC Rules mentioned above at para 5). However, still in 2006, the International Criminal Tribunal for Rwanda (‘ICTR’) ruled that participation via VC “is not considered presence” (*Zigiranyirazo v Prosecutor*, 2006, Decision on Interlocutory Appeal (30 October 2006), para 12). While several (not all) Statutes explicitly forbid trials in absentia (cf. Art. 21(4) of the ICTY-Statute; Art. 20(4) of the ICTR-Statute, Art. 19 of the IRMCT Statute), this does not render virtual presence necessarily irreconcilable with the presence requirement (White, 2021, 7). Note furthermore, that in the case of *Zigiranyirazo*, the accused did not seek to waive their right to be present.

**22** The following paragraphs analyse the recent development in using VC in international criminal law. They focus on the different participants of the case, including the accused, counsel, judges, witnesses, and the public. This section presents a general overview of the legal development and procedural issues involved in the

rollout of VC technology. It cannot, however, offer a conclusive overview of the use of VC at each international criminal court or tribunal.

**23** Arguably the most salient question for VC in criminal law is its effect on the presence of the accused during the proceedings. Before the COVID-19 pandemic, presence of the accused via VC had already been considered as an issue, as the prosecution in various briefs argued for the possibility of remote trials (White, 2021, 16). As White shows, in the pre-pandemic case-law the physical absence of the accused had been considered as impeding the accused's (fair trial) right to confront witnesses or accusers in person (White, 2021, 16–7; citing: *Prosecutor v Hadzić*, 2016, Decision on Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings (4 March 2016), para 24; *Prosecutor v Stanisic and Simatovic*, 2008, Decision on Defence Appeal of the Decision on Future Course of Proceedings (16 May 2008), paras 15–16; *Zigiranyirazo v Prosecutor*, 2006, Decision on Interlocutory Appeal (30 October 2006), paras 12, 13, 19, 21, 22). White further states, however, that the right to attend trial is not absolute and may be limited “when restrictions are proportionate to other protected interests”, such as the right to expeditious proceedings during the pandemic (White, 2021, 17).

**24** As of 2013, Rule 134bis of the ICC Rules allows for an accused to request taking part in their trial via VC. However, it is the ICC (i.e., the Trial Chamber) which rules on such a request of an accused subject on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. In a procedure for review concerning reduction of sentence, the hearing may only be conducted by way of a VC under “exceptional circumstances” (Rule 224.1 of the ICC Rules). Already since 2009, Rule 104 of the STL Statute states that its proceedings are not considered in absentia if an accused appears via VC.

**25** In May 2020, shortly after the beginning of the COVID-19 pandemic, the ICC's Registrar began preparing to hold non-physical trials by asking parties and participants in *Gbagbo and Blé Goudé* for their technical requirements for remote hearings (*Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, 2020, Prosecution's response to “Blé Goudé Defence Urgent Request for Postponement pursuant to Article 67 of the Statute” (8 May 2020), para 3; see further White, 2021, 13; cf. also the response by the defence in the *Ntaganda* case quoted above at para 9). In June 2020 an accused appeared before an ICC's Pre-Trial Chamber via VC from the ICC Detention Centre (White, 2021, 14). Also in June 2020, the Registry of the ICC published guidelines on court hearings during the pandemic, amongst other issues, suggesting that each Chamber consider the appropriateness of physical or remote hearings (or a combination thereof) (White, 2021, 14; citing: ICC, Guidelines for the Judiciary Concerning the Holding of Court Hearings during the COVID-19 Pandemic (2020)).

**26** There appears to be some consensus on a differential view regarding the importance of presence during different stages of a case. During trial hearings, Article 63(1) of the Rome Statute mandates the accused's presence unless the Trial Chamber grants an exception to be present via VC based on Rule 134bis of the ICC Rules. Appeals hearings, however, do not have equivalent rules, which lets White conclude that

“physical presence may not hold the same importance at an appeal hearing as at a trial” (White, 2021, 15). In the *Gbagbo* case, during the pandemic, the Prosecution argued that during the appeals hearing, “the right to be present would not be restricted to physical presence but could include other means whereby the persons concerned could effectively and meaningfully participate in the hearing and communicate (in private) with counsel while proceedings are ongoing. A hearing whereby Mr Blé Goudé would be connected with the Judges of the Appeals Chamber, his defence counsel and the other Parties and participants in the hearing through video-link or other virtual technology would not in principle violate his right to be present during the hearing pursuant to article 67(1)(d).” (*Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, 2020, Prosecution’s response to “Blé Goudé Defence Urgent Request for Postponement pursuant to Article 67 of the Statute” (8 May 2020), para 22. The less strict requirements for appeals hearings compared to trial hearings matches the normative assessment of the ECtHR on Article 6 and VC (cf. above at para 12), although, as mentioned, the ECtHR appears to consider VC at the trial stage to be largely incompatible with the ECHR. It thus establishes stricter requirements than the practice in international criminal law displays.

**27** Counsel attending proceedings via VC appears likewise to be common, albeit not without challenges. For example, if communications between members of counsel and between counsel and accused proceed remotely, especially in family homes, then maintaining confidentiality is technologically demanding (White, 2021, 18).

**28** During the pandemic, ICTs in international criminal law installed secured telephone lines with interpretation to facilitate privileged communication when a member of counsel attended a hearing via VC (cf. White, 2021, 20). This included a first appearance hearing as well as an appeal hearing at the ICC as well as appeals hearings at the ICC and an appeal hearing at the IRMCT (see White, 2021, 20 for references).

**29** Note further that the Defence in the *Ntaganda* case claimed that “virtual hearings impair a defendant’s access to counsel because lawyers and defendants are not in the same place, which leads to a “disconnect” in the relationship between the lawyer and the client” (*Prosecutor v Bosco Ntaganda*, 2020, Corrigendum\* to the “Defence submissions on the scheduled oral hearing” (6 May 2020), para 21).

**30** White argues that the participation of judges via VC is not fundamentally incompatible with the rules or rights of international criminal courts and tribunals (White, 2021, 20). After all, Rule 19 of the IRMCT-Statute, for example, allows for hearings to continue in the absence of a judge. However, especially during trial hearings and in cases in which VC has not been requested by the accused it would regularly be normatively unsatisfying if *all* judges participated remotely.

**31** The ICC may allow a → *witness* to give oral testimony before the Court by means of video technology, given that such technology permits the witness to be examined by the Prosecutor, the Defence, and by the Court itself, at the time that the witness so testifies (Rule 67.1 of the ICC Rules). The Court shall ensure that the venue chosen for the conduct of the video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity, and

privacy of the witness (Rule 67.3 of the ICC Rules). VC technology can also be used to protect a victim, a witness, or another person at risk on account of testimony given by a witness (Rule 87.3 letter (c) of the ICC Rules) or to allow a person who is unable, due to a disability or illiteracy, to make a written request, application, observation, or other communication to the ICC (Rule 102 of the ICC Rules) (→ *Witness Protection Measures*).

**32** During the pandemic, the ICC's Registry publicly streamed the hearings in both French and English through the Court's website (White, 2021, 19; citing: *Prosecutor v Al Hassan*, 2020, Registry's Observations on methods of work to minimise the impact of COVID-19 and related measures on the conduct of proceedings (20 May 2020), para 27. The streams were distributed with a delay of 30 minutes, to ensure accuracy of translation and confidentiality of information (White, 2021, 19). Audio-visual materials and summaries of the proceedings were also shared through social media platforms (White, 2021, 19).

## **2. INTERNATIONAL ARBITRATION AND PRIVATE INTERNATIONAL LAW**

**33** In a 2020 survey, arbitration practitioners showed general enthusiasm towards conducting hearings fully remotely via VC, especially for short hearings and meetings, whereas hearings for merits and major procedural issues, preferences varied to some degree, depending on the value of the case and the number of witnesses and experts to be examined (Born et. al., 2020, 306–7). This outcome is somewhat expectable, given the pragmatic approach towards VC in international arbitration and private international law, in which saving time and costs are of great importance to parties. For 2019, the year before the COVID-19 pandemic outbreak, the → *International Centre for the Settlement of Investment Disputes* ("ICSID") reported that around 60% of its hearings and sessions were conducted remotely, including by VC (Simson, 2020). The following paragraphs consult the rules and procedures as well as the case law of ICTs in the field of arbitration to provide an overview of the respective rules concerning VC. As with other domains of international procedural law, the COVID-19 pandemic has recently led to a broad update of rules and procedures as regards the use of VC.

**34** The Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (2022) ("ICSID Arbitration Rules") and the Rules of Procedure for Conciliation Proceedings of the International Centre for Settlement of Investment Disputes (2022) ("ICSID Conciliation Rules"). The opportunity to hold the first session remotely had not been regulated before. However, online hearings were used before, as proven by a guide to online hearings at ICSID's website (ICSID, Guide to Online Hearings, 2020). According to this guide, ICSID's VC platform does not require special hardware or software, thereby allowing participation from any location to join. It is also possible to participate via telephone in case of a poor internet connection.

**35** An important question concerns the effect of a party's objection against using VC. If a court or tribunal orders a virtual hearing, a party which does not wish to resort to

VC may object the judges. In the case *Landesbank v Spain*, the chair of the ICSID Administrative Council denied the claim from Spain that the unilateral decision to hold a virtual hearing was grounds to disqualify the tribunal; the Spanish Representatives had argued that it would be inappropriate to hold the hearing virtually because of the complexity of the case (*Landesbank v Spain*, 2020, para 43 et seq. and 138 et seq.). A similar discussion took place in *Vattenfall AB and Others v. Federal Republic of Germany* (*Vattenfall AB and Others v. Federal Republic of Germany*, 2020, para 129 et seq.).

**36** The Arbitration Rules 2012 of the *Permanent Court of Arbitration* (‘PCA Arbitration Rules’) do not contain provisions which explicitly deal with VC hearings. However, Article 18 of the PCA Arbitration Rules concerning the place of arbitration offers the opportunity to meet at any location the arbitral tribunal considers appropriate. This provision may serve as the basis to allow VC hearings.

**37** Article 26 of the Arbitration Rules 2021 of the → *International Court of Arbitration of the International Chamber of Commerce* (‘ICC Court of Arbitration Arbitration Rules’) also allow for hearings remotely by VC (→ *Arbitration Rules (2021): International Chamber of Commerce*). The norm appears to assume that holding a hearing in person is the regular case, while a hearing via VC is the exception. The arbitral tribunal may decide, after consulting the parties, and based on the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by VC. Following this, the parties have a right to be heard before the arbitral tribunal decides whether to hold the hearing via VC.

**38** Moreover, Article 26 of the ICC Court of Arbitration Arbitration Rules also contains a material element by laying down that the decision to hold a hearing via VC shall be made after having reviewed the relevant facts and circumstances. One may derive from that wording that there are cases in which using VC is not appropriate and others where the technology may be used. VC can also be used in emergency arbitrator proceedings (see Art 4.2 of Appendix V – Emergency Arbitrator Rules of the ICC Court of Arbitration Arbitration Rules).

**39** The ICC Court of Arbitration has published a ‘Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and procedural orders dealing with the organisation of virtual hearings’ (2021). This document formed part of the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, dated 9 April 2020, and is now included in section VII(C) of the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, dated 1 January 2021. The two annexes contained in this document mention aspects of VC hearings parties should think of prior to a virtual hearing, amongst others technical issues, online etiquette, and due process considerations. Furthermore, the ICC highlights that parties should agree on cybersecurity questions and other organisational measures.

**40** The *Korean Commercial Arbitration Board* (‘KCAB’) has published the Seoul Protocol on Video Conferencing in International Arbitration in March 2020 (‘Seoul Protocol’). The Seoul Protocol defines standards for VC in international arbitration. Its aim is to

serve as a guide to best practice for planning, testing, and conducting of VC. The Protocol contains regulations regarding witness examination, the VC venue, observers, documents, technical requirements, test conferencing, interpretation, recordings, preparatory arrangements, and an annex with technical specifications. The Seoul Protocol can facilitate VC in international arbitration because parties can refer to these standards and do not need to negotiate these aspects prior to a VC session.

### 3. INTERSTATE LITIGATION

**41** On the level of inter-state proceedings, a more cautious approach towards VC is observable. As in the previous sections, this section examines the procedural rules of ICTs and some of the case law concerning VC proceedings in interstate litigation.

**42** The Rules of Court of the → *International Court of Justice [MPEPIL]* (1978) ('ICJ Rules of Court') did not contain any provision regarding VC in proceedings until 2020. There has also not been the necessary technical infrastructure in place to hold VC hearings (Pinzauti and Webb, 2021, 790). This has changed due to the lockdown measures in reaction to the COVID-19 pandemic. Since entering into force on 25 June 2020, Article 59(2) of the ICJ Rules of Court now reads as follows:

The Court may decide, for health, security or other compelling reasons, to hold a hearing entirely or in part by video link. The parties shall be consulted on the organization of such a hearing.

In the view of the ICJ the Court Rules allow that judges also participate remotely (*Guyana v Venezuela*, 2020, Verbatim Record, CR 2020/5, at 9).

**43** This provision is complemented by a further regulation regarding the reading of the judgment in Article 94(2) of the ICJ Rules of Court:

The judgment shall be read at a public sitting of the Court. The Court may decide, for health, security or other compelling reasons, that the judgment shall be read at a sitting of the Court accessible to the parties and the public by video link. The judgment shall become binding on the parties on the day of the reading.

**44** The ICJ has published Guidelines for the Parties on the Organization of Hearing by Video Link (2020) ('Video Link Guidelines'). Even though the wording of Article 62(2) of the ICJ Rules of Court do not mention the use of VC tools, the ICJ in Part V of its Video Link Guidelines makes it clear that this provision also allows for the remote participation of a witness or expert to give evidence in a hearing by video link.

**45** The → *International Tribunal for the Law of the Sea [MPEPIL]* ('ITLOS') has adopted similar provisions regarding VC in proceedings. For example, Article 74(2) of the Rules of the International Tribunal for the Law of the Sea (1997) ('ITLOS Rules') reads as follows:

The Tribunal may decide, as an exceptional measure, for public health, security or other compelling reasons, to hold a hearing entirely or in part by video link.

Similar provisions exist for internal meetings of ITLOS, the reading of a judgment or an advisory opinion (Articles 41(7), 112(5), 124(3), 135(1bis) of the ITLOS Rules).

These rules became part of the ITLOS Rules by the amendments adopted on 25 September 2020. The timing suggests that these amendments were responses to the necessities caused by the COVID 19-pandemic.

**46** An interesting aspect was raised in the *Mauritius/ Maldives* case of the ITLOS. In this case, one of the judges wanted to participate in the oral hearings via VC while the others wanted to participate by being physically present at the court room. The Maldives expressed concerns regarding the participation of the judges in the proceedings “by different means”. The Maldives stated that “[t]his could potentially undermine the fairness of the proceedings” and that “it is consistent with the practice of other international courts and tribunals for parties’ respective appointed Judges to participate in hearings and deliberations on the same basis”. Therefore, the Maldives requested that a further judge participates via VC. Mauritius rejected this point of view. The President of the deciding Chamber indicated that there is no difference between the two modes of participation and that any suggestion to the contrary runs counter to this basic notion of a hybrid hearing. He noted that it is up to each member of the Chamber to decide whether he or she participates in the hearing in person or remotely and that he fully respected the decision of each member in this regard (ITLOS, *Mauritius/ Maldives*, 2021, para 29 et seq.).

**47** The Rules of Procedure of the → *Court of Justice of the Economic Community of West African States* (2002) (‘ECOWAS Court Rules’) do not contain provisions dealing with VC. However, in reaction to the COVID-19 pandemic the President of the ECOWAS Court issued Practice Directions on electronic case management and virtual court sessions in 2020 (‘2020 Practice Directions’) based on Article 100 of the ECOWAS Court Rules. The latter states that “[t]he Court may issue practice directions relating in particulars to the preparation and conduct of the hearings before it and to the lodging of written statements of case or written observations.”

**48** The 2020 Practice Directions contain detailed rules on the preparation and conduct of VC court sessions. First of all, it is in the ECOWAS Court’s discretion whether to hold a VC hearing. The ECOWAS Court may allow further persons, e.g., members of the press, to join the hearing (Art 5.6 of the 2020 Practice Directions). The Proceedings are recorded by the ECOWAS Court (Art 7.1 of the 2020 Practice Directions). In addition, the ECOWAS Court has published Lawyers and Participants Guidelines for Virtual Court Sessions (2021).

**49** The → *Caribbean Court of Justice (CCJ)* [MPEPIL] began digitalising its proceedings before the beginning of the COVID-19 pandemic. Most hearings were already conducted via VC, with the CCJ’s judges and the registry staff being physically present at the court and the litigants and lawyers appearing by video (Saunders, 2020). During the pandemic, the CCJ proceeded to conduct virtual hearings with all judges, the lawyers, and most registry staff videoconferencing from their respective homes (Saunders, 2020).

**50** In proceedings of the CCJ there is the possibility to hold a hearing and receive evidence by VC (Part 8.1 letter (o) and Part 23.2.1 of the Original Jurisdiction Rules 2021 of the Caribbean Court of Justice and Part 8.2 letter (f) and (g) of the Appellate

Jurisdiction Rules 2021 of the Caribbean Court of Justice). The President of the CCJ has issued a practice direction (Practice Direction No 2 of 2021 – Conduct of Online Hearings (‘CCJ Practice Direction No 2’)) which lays down under which circumstances the CCJ conducts online hearings and which requirements exist for parties.

**51** According to this practice direction, the need for an online hearing may arise whenever one or more parties are unable to attend the hearing at the seat of the Court due to a public health, safety or security situation or the urgency of the matter or some other circumstance (Part I.1 of the CCJ Practice Direction No 2). The requirements for the parties in case of an online hearing (Part II of the CCJ Practice Direction No 2) intend to safeguard that the hearing can run without interruptions, that all parties can be heard and seen, and that the dignity of the court is maintained. This includes rules on how to behave and dress in an online court hearing.

**52** Regarding the dispute settlement system of the World Trade Organisation (‘WTO’) neither the Understanding on Rules and Procedures Governing the Settlement of Disputes (1995) (‘DSU’) nor the Working Procedures for Appellate Review (2010) (‘Working Procedures’) contain specific rules regulating VC hearings. However, the wording of the relevant provisions (e.g., Art. 17 of the DSU) does not exclude to hold VC hearings.

#### **4. INTERNATIONAL HUMAN RIGHTS LAW**

**53** In international human rights law, some court rules explicitly allow to hold VC hearings and the delivery of the decision virtually. However, it is often regulated as an exception. For example, the Rules of Court of the African Court on Human and Peoples’ Rights (2020) (‘AfCHPR Rules’) contain such provisions. Rule 24 of the AfCHPR Rules reads as follows:

The sessions shall take place at the Seat of the Court. However, the Court may, pursuant to Article 25 (1) of the Protocol, decide to sit in the territory of any other Member State of the African Union, or in exceptional circumstances or force majeure, hold a Virtual Session.

Regarding the delivery of the decision, Rule 74 of the AfCHPR Rules adds:

Delivery of the decisions of the Court shall be in public, or in exceptional circumstances, in a virtual manner, due notice having been given to the parties.

**54** In response to the COVID-19 pandemic the President of the African Court on Human and Peoples’ Rights (‘AfCHPR’) has published Practice Directions for Virtual Sessions in the African Court on Human and Peoples’ Rights in June 2020 (‘AfCHPR Practice Directions’). According to the AfCHPR Practice Directions, the whole court procedure can be held remotely, beginning with the electronic filing of the documents, a virtual hearing and deliberation of the judges as well as the delivery of the judgment in a virtual manner. Moreover, the Practice Directions also take account of the public by ordering that the hearings and the delivery of the decision shall be live streamed via AfCHPR’s YouTube channel.

**55** Other international human rights courts show are not as proactive in their implementation of VC. As the ECtHR states on its website, on account of the

COVID-19 pandemic, some hearings may be held by VC; the decision lies with the President of the Grand Chamber or the relevant Chamber. The ECtHR's new Rules of Court from June 2022 do not feature any explicit information on VC or virtual hearings.

## **5. OVERALL FINDINGS**

**56** Overall, one of the most important legal questions concerning VC in international proceedings is how to make sure that the right to be heard of a party is not infringed by VC hearings. As mentioned, the ICTs' practice of adopting VC in their proceedings so far follows two different approaches. First, in international private law and arbitration as well as in the practice of international criminal courts and tribunals, a pragmatic approach is generally permissive towards VC. The latter were amongst the first ICTs to adopt VC, a fact which may be counterintuitive at first sight, given the great importance of defendants' rights to a fair trial in criminal law. The normative tensions which using VC in international proceedings can create will be addressed in the next section. For both domains of international law, the COVID-19 pandemic appears to have further accelerated previous trends towards incorporating VC technology.

**57** Second, there is reluctance to use VC in interstate litigation. We recognise a cautious approach towards VC, which regularly requires "compelling reasons" to be present. As shown above, the ICJ for example requires "health, security or other compelling reasons"; the ITLOS permits VC "as an exceptional measure, for public health, security or other compelling reasons"; and the CCJ demands "public health, safety or security situation or the urgency of the matter or some other circumstance". Other than the "exceptional circumstances" required in international criminal law, "compelling reasons" so far appear to be less often recognised as being present in interstate litigation. Again, the next section will present a normative reflection of this finding. So far, we find the domain of international human rights law to show both instances of the pragmatic approach (for example in the practice of the AfCHPR) and of the cautious approach (for example in the practice of the ECtHR).

**58** Another factor of the likelihood of VC adoption in an international proceeding (concerning criminal law) lies in the stage of the procedure. If available, appeal hearings seem to be most suitable for VC, whereas VC at the trial stage requires a more elaborate and case-by-case normative consideration. However, the fact that, for example, the ICC Trial Chamber does allow VC to be used shows the relative openness towards adopting VC in international criminal law compared to the normative order of Article 6 ECHR as interpreted by the ECtHR.

**59** Beyond these approaches, there are differences between the rules of procedure as regards the level of detail decreed. Some rules of procedure only clarify that it is possible to hold hearings via VC while others contain more detailed rules on how to conduct VC hearings. Interestingly, ICTs classify the use of VC hearings as an organisational question. This can be derived from the fact that detailed rules on VC

hearings are laid down in practice directions issued by the president of the respective court. In these practice directions, the focus is rather on how to guarantee that the VC hearing runs smoothly, and that all participants behave and dress properly. There are no rules for technical problems arising during a hearing or how to safeguard the rights of the parties. No doubt, the hearing would have to be suspended if technical difficulties would inhibit the ‘equality of arms’ between parties (→ *Equality of Arms: International Adjudication*).

**60** Another aspect which is only rarely dealt with is the access of the public to the VC hearing (→ *Public and Media Access to Courtrooms: International Courts and Tribunals*). Depending on the proceeding, public access may be mandatory or desired. Instead, technical limitations (e.g., bandwidth) are seen as justifications to limit the number of participants to a VC hearing. This relates to the observation that the costs and distributional inequalities of bandwidth and other technical prerequisites (cf. above at para 9) are an easily overlooked factor when considering participation via VC as an efficiency-enhancing measure for international proceedings (see further next section). However, as regards the public’s access, the size of a physical court rooms will often set even stricter limits to the number of people who can observe a physical hearing as compared to a virtual hearing.

## **F. NORMATIVE ANALYSIS OF THE USE OF VIDEOCONFERENCING**

**61** The aim of this section is to reflect our findings on the current use of VC in international proceedings in light of the normative debate around VC. We begin with a normative reconstruction of the pragmatic and the cautious approach (1.). Here, we consider the legitimate aims of resorting to VC, i.e., respecting party autonomy, raising the efficiency of proceedings, increasing access to justice, and the public’s access to proceedings against concerns about procedural justice (especially the right to a fair trial), the symbolic dimension of legal proceedings, the legitimacy of ICT authority, the institutional setting of diplomacy and advocacy, as well as the credibility of defendants and witnesses. Neither point is necessarily exclusive to the type of proceeding where it is first mentioned. We then continue our discussion with a view on a potentially emerging right to use VC for parties of international proceedings (2.). We conclude this section with a comment on VC’s implications for privacy and data protection (3.).

### **1. NORMATIVE RECONSTRUCTION OF THE PRAGMATIC AND THE CAUTIOUS APPROACH TO VC**

**62** Below, we reconstruct the normative reasoning behind the pragmatic approach, where we differentiate between the normative bases for arbitration/international private law (a.) and international criminal law (b.), and the cautious approach in interstate litigation (c.). As mentioned, we find international human rights law to be less uniform in its implementation of VC but instead to show instances of both approaches. We therefore do not explicitly discuss the domain of human rights in the

normative reconstruction below. However, the ECtHR's Article 6 ECHR jurisprudence outlined in section D will form an integral part of the analysis below.

#### **a. The Pragmatic Approach I: International Arbitration and International Private Law**

**63** The pragmatic approach's normative reconstruction must proceed from two different angles. First, in international arbitration and international private law VC appears to raise little normative concern. Arguably, party autonomy in international private law provides a strong backing for parties to agree on conducting remote hearings if desired. Some of the normative questions to be raised in this regard are: Who decides on the permissibility of VC in a proceeding? Should this decision be left to the discretion of the judges? Or should the parties have a right to recourse to VC?

**64** From an empirical point of view, it should be mentioned that an investigation by the International Council for Commercial Arbitration ('ICCA') found that in the 77 countries examined, "no jurisdiction expressly recognizes a right to a physical hearing in international arbitration, and only a handful recognize such a right by inference and, even then, it is typically circumscribed" (Rojas Elgueta et al., 2021, 39). This sets international (commercial) arbitration apart from other types of proceedings and may help to explain the few normative reservations towards VC.

**65** As with many uses of technology, VC is supposed to increase efficiency (Valchev, 2020, 658). This is especially the case with arbitration. VC can save travel costs and travel time for parties and their attorneys (Valchev, 2020, 658). In international proceedings, the cost and time saving effects are particularly strong (Davies, 2007, 206). Judges must often travel to their courts and tribunals. Moreover, VC is believed to result in more efficient use of judges' time and scheduling flexibility (Valchev, 2020, 658) (→ *Costs of Proceedings: International Adjudication*; → *Costs: International Arbitration*; → *Financial Aspects of International Adjudication*). The same holds true for international procedures of → *alternative dispute resolution* ('ADR') which are external to the court system. As regards the global goal to reduce carbon emissions, VC presents a substitute to traveling and can help lower the emissions associated with international proceedings.

**66** Using VC to increase the efficiency of proceedings will thus regularly constitute a legitimate aim. This is especially so if at the parties' own request in civil proceedings. Other types of proceedings should – if the parties' rights to a fair trial are respected – likewise be open to such efficiency-enhancing normative reasoning. From case law of the ECtHR, it is clear that depending on the type of legal proceeding, saving time and money can be a legitimate aim for using VC in national proceedings recognised in international human rights law (see above at para 13).

**67** Moreover, VC is regarded by some as a means to solve problems with → *access to justice* (Susskind, 2020; Susskind, 2019, 8–9, 106–9). It is believed to increase the independence of legal proceedings of the participant's location (Susskind, 2020). If blended with recorded video, VC could render procedures asynchronous and thus more flexible as regards the time zones participants are in. Access to justice by civil

society has, to just name one example, been an issue of debate in international investment law (Francioni, 2009, 729–32) and in matters concerning environmental damages caused by transnational corporations (Karageorgou, 2018, 251). Improvements in access to justice can be expected in other domains of law as well, such as international human rights law.

**68** Those who do not have access to a stable internet connection, enough bandwidth, or the right kind of devices are excluded from using VC. If the technology is further implemented in international proceedings, it may be interesting for international human rights lawyers to discuss to what extent there may then be a justiciable legal obligation of states to provide participants with the necessary tools. Especially the least developed countries require technical and financial assistance to build up their digital connectivity (OECD/WTO, 2017, 26). While the broader literature on VC has raised concerns about difficulties that older people and people with disabilities and impairments may encounter during VC-supported proceedings (Lederer, 2021, 328), using VC in the international domain may face additional challenges. Most saliently, cultural differences in exposure to and use of technology could prove to be challenging for proceedings which aim to provide a level playing field between parties. Another salient aspect in international proceedings is that the parties and judges of a VC hearing may participate from different time zones which creates the risk that sitting at unsociable hours may create imbalances between the parties (Bateson, 2020, 166 et seq.).

**69** Video hearings can furthermore be more accessible to the public and media than an offline hearing, as access links can be shared and distributed broadly online, granted that parties' interests allow it {→ *please include a link to the entry: Public and Media Access to Courtrooms: International Courts and Tribunals by Ana Koprivica Harvey*}. However, as mentioned above, granting public access via shared video links requires the public to have sufficient bandwidth and access to necessary devices.

### **b. The Pragmatic Approach II: International Criminal Law**

**70** Second, in international criminal law, the great normative weight of the right to a fair trial needs to be accounted for when resorting to VC. For national criminal justice, criminal cases have most widely been accepted as not suited for VC and requiring a physical hearing (Susskind, 2020). Some argue that virtual criminal sanctioning runs contrary to the ideal of a fair trial, not least in light of national cases in which death sentences have been issued virtually (Susskind, 2020).

**71** At this point, it should be borne in mind that in international criminal law, fundamental rights to procedural justice can be applicable. Article 21(3) of the Rome Statute requires that its “interpretation and application [...] must be consistent with internationally recognized human rights.” While the ICC has in the past used Article 21(3) to bolster human rights protection in its case law, it has also placed limits on the protections that can be read into the ICC legal framework on its basis (Irving, 2019, 837). Section D showed how VC in national criminal proceedings at the trial stage has been challenged based on Article 6 ECHR. Related issues concern the aforementioned areas of equal protection, access to justice, and equality of arms.

72 This contrasts with the early adoption of VC by international criminal courts and tribunals, including the ICC’s Trial Chamber. The ease with which VC is nevertheless accepted in international criminal justice will often be based on pragmatic considerations, too, such as the (alleged) need of heads of state to continue to govern their countries, the psychological benefits of keeping witnesses in their known environment, the saving of time and travel costs.

73 Section E has shown that the right to be present is at some ICTs derogable for the accused (who may not want to travel and thus prefer a virtual hearing); but if the accused wishes to confront witnesses or the accuser it would be difficult during trial to limit their physical presence without their consent. At the same time, however, during “exceptional circumstances” such as a pandemic, the accused’s rights may normatively demand the resort to VC should physical presence during trial not be an option and the need to proceed with the trial weigh heavily.

74 Furthermore, VC’s influence on witness credibility and criminal sanctioning is strongly related to matters of procedural justice. Whether the credibility of witnesses can be assessed in video hearings is, however, open to debate (Susskind, 2020). At this point, the technological setup is crucial: the video setting, such as the position of the camera and the lighting, is expectably impacting the credibility of the person being seen (Lederer, 2021, 333). However, a two-dimensional image on a screen almost certainly conveys less information than a three-dimensional view on a participant of a proceeding. For international procedural law it will be crucial to consider whether – or rather how – VC influences the credibility of claimants, witnesses, or experts’ statements. Note that this is not only a salient issue for international criminal or human rights proceedings, but also for investment arbitration. More generally speaking, factual accuracy is an important aspect of ICT’s legitimacy (Laux, 2019, 3), an issue we will now turn to.

### **c. The Cautious Approach: Interstate Litigation**

75 As the concerns about the right to a fair trial do not seem to hinder ICTs in the domains of international criminal law and arbitration in implementing VC, it may seem surprising that in interstate litigation VC use has faced stronger reluctance. However, legal procedures gain at least some of their authority through appearances: the ‘majesty’ of a court procedure, beginning with the architecture of the courthouse, formal protocols of conduct for trials and hearings, and the dress codes for judges and parties (Lederer, 2021, 334; Rowden, 2018, 45–79) (→ *Architecture and Courtroom Layouts: International Courts and Tribunals*; → *International Justice Emblems*; → *Legitimacy of International Adjudication*). Justice, in other words, has a symbolic dimension, which VC proceedings may lack – especially if they too much resemble a business meeting or a lecture.

76 For interstate litigation, it is thus also about how international court authority presents itself to the authority of states. As mentioned, in the *Mauritius/Maldives* case the state of Mauritius found issue with a judge selected by the Maldives being present

via VC. In the literature, however, it has been argued in response to this particular case that “if a hybrid format can preserve the equality of participation in hearings during “exceptional” times, why should we not fully embrace the hybrid format as a general approach?” (Honniball, 2021). In fact, however, for states as parties of international proceedings, symbolic aspects may regularly trump such pragmatic considerations.

**77** For the ICJ, Pinzauti and Webb argue that three features of inter-state dispute settlement render physical presence important: the stronger symbolism of adjudication parties are present in the Great Hall of Justice; the benefits from in-person gatherings and encounters for the diplomatic component of settling disputes between states; and the importance of effective advocacy for guiding the Bench through vast amounts of case materials (Pinzauti and Webb, 2021, 799)

**78** The symbolic dimension of proceedings is not limited to interstage litigation. More generally, public trust in court verdicts is fundamental for a functioning judiciary (Lederer, 2021, 336), and is likely influenced by symbolic perceptions of the proceedings. Some scholars have expressed concerns that physical courtroom rituals cannot be replicated in VC (Rossner, 2021, 334). At the same time, however, new virtual rituals are already emerging (Rossner, 2021, 334)

**79** From a normative point of view based on public authority and symbolic justice, one could theorise that whenever ICTs rule in the name of public authority there is a strong presumption to hold the proceedings in person. Such a view would, however, have to include proceedings in international criminal law and international human rights law where the fundamental rights of individuals are at stake and where ICTs render apex decisions. The observable frequent practice of resorting to VC in international criminal law already defies this view.

## **2. TOWARD A RIGHT TO VC?**

**80** So far, we have discussed the resort to VC under the lens of a potential interference of the parties’ right to a fair trial and the right to a physical hearing. Yet as the case law has shown, parties in all domains of international law have themselves requested the use of VC, for their own participation or for the participation of their selected judges. This raises the question of whether parties should have the right to participate via VC in international proceedings. There will not be a single universal answer to this question across all domains of international law. Defendants in criminal proceedings, parties to an investment dispute, and states arguing before the ICJ, to give just a few examples, strongly diverge in their protected interests in proceedings. However, there are structural considerations that apply if not to all, then to many constellations in international proceedings, some of which we present below.

**81** To begin with, granting a right to at least request participation via VC immediately prompts the question of whether the decision would lie within the discretion of the court or tribunal. There may be good arguments for divergent views on this issue. A solution will most likely have to be found on a case-by-case basis rather than in laying down a general rule. Therefore, it could be helpful to have a pre-proceedings procedure

in which the ICT, after having heard the arguments of the parties, decides whether to hold a hearing in person or via VC (see above at para 37). However, most of the rules of ICTs concerning VC hearings appear to leave the decision to the discretion of the court without a prior procedure on the use of VC.

**82** Two further procedural questions are attached to this, namely whether such a decision must be reasoned by the court and whether it can be reviewed by an appeal given that such appeals exist at the ICT in question (see for example the appeals procedure of the ICC laid down in Chapter 8 of the ICC Rules). If reasoned, respective ICTs would regularly have to balance the normative weight of the right to a fair trial (including the right of the opposing party) with the pragmatic gains of using VC.

**83** Another issue presents itself if international proceedings should ever become fully immersive, i.e., fully virtual without any physical presence. While again in international private law and arbitration, such proceedings would cause less normative concern, the symbolic dimension of being in the physical presence of the court could matter both for the psychological effect towards the parties and the public perception of the trial, especially in international criminal law and international human rights law. However, when seen in light of a right of parties to a virtual hearing, concerns about the symbolic authority of legal procedures in virtual settings should regularly find little consideration.

### **3. Privacy, Data Protection, and Cybersecurity**

**84** Another normative concern not explicitly addressed yet lies with privacy, data protection, and cybersecurity (→ *Cybersecurity in International Courts and Tribunals*). Virtual hearings, especially if recorded, inevitably produce a data trail. Even if the recording of sound and images is disabled, it is very likely impossible to prevent participants from capturing their own recordings (Madyoon, 2021, 603). This can become a highly sensitive issue for example when commercial secrets become part of a hearing. In arbitration, the existence of captured recordings has been considered as compromising the confidentiality of the proceedings (Madyoon, 2021, 603). Moreover, certain VC software has in the past been linked with capture of personal data as well as data sharing with governments (Lederer, 2021, 331; Coyne, 2020). As the ECtHR's case-law in section D has shown, claimants feared that their communication with their lawyers via VC could be intercepted by government officials.

**85** There do not (yet) seem to be specific rules on privacy rights concerning the use of VC in the rules of procedure of ICTs. While the European Union's General Data Protection Regulation (2018) ('GDPR') appears to provide normative guidance on the level of principles, the actual implication of privacy protection will regularly require specific standards (cf. ICCA, 2020, 1).

## **G. EMPIRICAL ASPECTS OF VIDEOCONFERENCING**

**86** Besides the normative debates about using VC in proceedings, the technology also raises empirical issues. Below, we briefly discuss how VC requires users to have or gain competence and skills, how VC's successful implementation depends on benevolent judicial attitudes towards the technology, and the potential effects of VC on judicial behaviour (→ *Behavioural Approaches to International Adjudication*).

### **1. Competence**

**87** First, if VC in proceedings is going to become commonplace, judges and lawyers must become competent users of video technology. This adaptation includes both the handling of the respective software as well as knowing about conventions, such as to mute one's microphone when not speaking (Susskind, 2020). It has been noted that legal professionals may reject the use of VC out of fear to lack the ability to use it properly and/or thus make mistakes during proceedings (Lederer, 2021, 333). Therefore, VC training on a regular basis may reduce the aversion to VC solutions. Alternatively, if the confidentiality of the procedure and the costs involved allow it, ICTs and/or the parties could hire third parties with the relevant IT expertise to administer the hearings.

**88** In international proceedings, the need to be digitally competent creates the risk of a digital divide between legal professionals who are used to VC, not least through exposure in their home countries, and those who did not yet have the opportunity to adapt to it. As mentioned, access to a stable internet connection, sufficient bandwidth, and suitable devices are necessary conditions for participating in VC proceedings, both in domestic as well as in international proceedings.

### **2. Judicial Attitudes**

**89** Based on our previous considerations, it seems safe to say that legal professionals' attitudes towards VC will greatly influence the adoption of the technology. As mentioned, public trust in court verdicts is fundamental for a functioning judiciary. This can motivate conservatism in the judiciary (Lederer, 2021, 336). Moreover, proceedings' schedules have to be adjusted for different time zones to be acceptable for all parties involved.

**90** At the same time, such remote hearings would obliterate the need to travel and eliminate the mental and physical exhaustion from jet lag. Moreover, it would allow participants to remain at their usual workstations, with their familiar equipment and entire team instead of working from a hotel room or a country office. Furthermore, remote hearings could prove to be more compatible with family life. These gains in convenience will likely render VC attractive to legal professionals.

### **3. Behavioural Effects**

91 Finally, the question how legal professional's behaviour, especially that of judges and arbitrators, is changing through the use of VC requires further research. Empirical studies on the use of remote video adjudication in immigration removal hearings, for example, suggest that respondents who appear before judges via video feed fare worse than those who appear in person (Thorley and Mitts, 2019, 82). Future research could examine whether similar results can be derived from observing international litigation and the perception of defendants and claimants therein. Likewise, there is a concern that judges may be more punitive towards defendants they see on screen (Defence in *Prosecutor v Bosco Ntaganda*, para 21; Tait et al. 2017, 17; Gibbs 2017, 2; Simonato 2014, 295–6). These issues are not exclusive to international criminal law. When an ICT addresses especially questions of fact via VC the technology's potential behavioural effects must find the attention of researchers.

92 Moreover, VC may also be used by ICTs during deliberation and drafting. However, unless required to report whether VC has been utilised during those stages of a proceeding, it will be impossible for empirical researchers to observe the effects of VC.

## **H. CONCLUSION AND OUTLOOK**

93 At the point of writing, it seems safe to assume that VC will continue to establish itself as a key technology for international proceedings. For ICTs with budgetary constraints and ICTs or participants in remote locations, the technology holds great potential. From a normative perspective, this digitalisation of the international judiciary will have to proceed iteratively (→ *Artificial Intelligence and International Adjudication*). Practitioners will likely resort to VC where gains in efficiency and/or access to justice outweigh the (normative) costs of its introduction. They will be guided by existing norms of procedural justice (especially fair trial rights), privacy, and cybersecurity. At the same time, scholars will have to assess how VC technology influences human behaviour in court and must suggest normative improvements where necessary to uphold procedural values during technological change.

94 VC technology is predictably going to transform the practice of international law. Participants in international proceedings will encounter each other less often in physical meetings. However, participants' preferences and motivations shape institutions and are themselves shaped by the institutional setting they operate in. It will thus be interesting for future research to study the effects of virtual institutions on the community of international law practitioners, their preferences, and motivations. Moreover, VC will not only have its impact felt in proceedings, but for example also through VC-supported teaching of international law (Stephenson et al., 2009, 237) and the collection of digital evidence (Laux, 2018, 342–5).

95 Lastly, VC will also create new legal questions which practitioners and researchers must address. For example, we did not yet discuss the scenario in which a participant becomes part of a proceeding via VC from a location which is not within the territory of a signatory state to the treaty which grants the ICT's authority and jurisdiction.

## CITED BIBLIOGRAPHY

- Bateson, D., 'Virtual Arbitration: The Impact of COVID-19' (2020) 9 Indian J. Arb. L. 159
- Betteto, N., 'Functioning of courts in the aftermath of the COVID-19 pandemic' (Consultative Council of European Judges 2020), <<https://rm.coe.int/the-functioning-of-courts-in-the-aftermath-of-the-covid-19pandemic/16809e55ed>> accessed 24 June 2022
- Born, G. B., Day, A., Virjee, H., 'Remote Hearings (2020 Survey): A Spectrum of Preferences' (2021) 38 J. Int'l Arb. 291
- Coyne, M., 'Zoom's Big Security Problems' *Forbes* (Jersey City, 3 April 2020) <<https://www.forbes.com/sites/marleycoyne/2020/04/03/zooms-big-security-problems-summarized/?sh=14a8669c4641>> accessed 24 June 2022
- Davies, M., 'Bypassing the Hague Evidence Convention: Private international law implications of the use of video and audio conferencing technology in transnational litigation' (2007) 55 Am J Comp L 205
- Engstrom, D. F., 'Post-Covid Courts' (2020) 46 U Cal LA L Rev 246
- Fabricius, P., 'Is trial by video at the ICC virtual justice or the real thing?' (*Institute for Security Studies*, 21 November 2013) <<https://issafrica.org/iss-today/is-trial-by-video-at-the-icc-virtual-justice-or-the-real-thing>> accessed 24 June 2022
- Fekete, G., 'Videoconference hearings after the times of pandemic' (2021) 5 EU and Comparative Law Issues and Challenges Series (Faculty of Law Osijek) 468
- Francioni, F., 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 EJIL 729
- Gibbs, P., 'Defendants on video: Conveyor belt justice or a revolution in access?' (Transform Justice, 2017) <[http://www.transformjustice.org.uk/wp-content/uploads/2017/10/TJ\\_Disconnected.pdf](http://www.transformjustice.org.uk/wp-content/uploads/2017/10/TJ_Disconnected.pdf)> accessed 24 June 2022
- Honniball, A. N., 'Pandemics, Procedure and Participation: Hybrid Hearings in the Mauritius/Maldives Maritime Boundary Dispute' (*EJIL: Talk!*, 15 March 2021) <<https://www.ejiltalk.org/pandemics-procedure-and-participation-hybrid-hearings-in-the-mauritius-maldives-maritime-boundary-dispute/>> accessed 24 June 2022
- Irving, E., 'The other side of the Article 21(3) coin: Human rights in the Rome Statute and the limits of Article 21(3)' (2019) 32 Leiden J Int Law 837
- Karageorgou, V., 'Access to Justice in Environmental Matters' (2018) 27 Eur Energy Environ Law Rev 251
- Laux, J., 'A new type of evidence? Cyberinvestigations, social media, and online open source video evidence at the ICC' (2018) 56 Archiv des Völkerrechts 324
- Laux, J., 'Public Epistemic Authority: An Epistemic Framework for the Institutional Legitimacy of International Adjudication' (2019) NYU School of Law, Jean Monnet

- Working Paper 5/19 <<https://jeanmonnetprogram.org/wp-content/uploads/JMWP-05-Johann-Laux.pdf>> accessed on 24 June 2022
- Lawlor, J., ‘Videoconferencing: From stage fright to stage presence’ *New York Times* (New York, 27 August 1998) <<https://www.nytimes.com/1998/08/27/technology/productivity-videoconferencing-from-stage-fright-to-stage-presence.html?pagewanted=all>> accessed 24 June 2022
- Lederer, F. I., ‘The evolving technology-augmented courtroom: Before, during, and after the pandemic’ (2021) 23 *Vand J Entertain & Tech L* 301
- Madyoon, N., ‘Virtual Hearings in International Arbitration: Challenges, Solutions, and Threats to Enforcement’ (2021) 87 *Arbitration: Int’l J Arbitration, Mediation and Dispute Management* 597
- OECD/WTO, ‘Aid for Trade at a Glance 2017: Promoting Trade, Inclusiveness and Connectivity for Sustainable Development’ Paris: WTO, Geneva/OECD Publishing, 2017
- Pinzauti, G. and Webb, P., ‘Litigation before the International Court of Justice during the pandemic’ (2021) 34 *Leiden J Intl L* 787
- Richard, V. and Hess, B., ‘The 1965 Service and 1970 Evidence Conventions as crucial bridges between legal traditions?’ in Thomas John, Rishi Gulati and Ben Koehler (eds.), *The Elgar Companion to the Hague Conference on Private International Law* (Edward Elgar, 2020)
- Rojas Elgueta, G., Hosking, J., and Lalou, Y. ‘Does a Right to a Physical Hearing Exist in International Arbitration?’, ICCA Projects, General Report (2022) <[https://cdn.arbitration-icca.org/s3fs-public/document/media\\_document/Right-to-a-Physical-Hearing-General-Report.pdf](https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Right-to-a-Physical-Hearing-General-Report.pdf)> accessed on 2 July 2022
- Rossner, M., ‘Remote rituals in virtual courts’ (2021) *J L Society* 334
- Rowden, E., ‘Distributed courts and legitimacy: What do we lose when we lose the courthouse?’ (2018) 14 *L Cult & Humanities* 263
- Saunders, A., ‘The Court’ as a Service and Not a Place’ (UNODC, May 2020) <<https://www.unodc.org/dohadeclaration/en/news/2020/05/the-court-as-a-service-and-not-a-place.html>> accessed on 2 July 2022
- Scherer, M., ‘Remote hearings in international arbitration: An analytical framework’ (2020) 37 *J Intl Arb* 407
- Shannon, V., ‘Videoconferencing’s virtual leap forward’ *New York Times* (New York, 29 August 2007) <<https://www.nytimes.com/2007/08/29/technology/29iht-ptend30.1.7299576.html>> accessed on 2 July 2022
- Simonato, M., ‘Defence rights and the use of information technology in criminal procedure’, (2014) 85 *Revue internationale de droit pénal* 261

Simson, C., 'Practice Makes Perfect When It Comes To Virtual Hearings' (Law360, 15 April 2020) <<https://www.law360.com/articles/1263982/practice-makes-perfect-when-it-comes-to-virtual-hearings>> accessed on 2 July 2022

Stephenson, M., Morse, B., Robertson, L., Castan, M., Yarrow, D. and Thompson, R., 'International and comparative indigenous rights via videoconferencing' (2009) 19 *Legal Educ Rev* 237

Susskind, R., *Online Courts and the Future of Justice* (OUP, 2019)

Susskind, R., 'The Future of Courts' (2020) 6 *The Practice* <<https://thepractice.law.harvard.edu/article/the-future-of-courts/>> accessed on 2 July 2022

Tait, D., McKimmie, B., Sarre, R., Jones, D., McDonald, L. W., Gelb, K., 'Towards a distributed courtroom', (2017) Western Sydney University, <[https://courtofthefuture.org/wp-content/uploads/2017/07/170710\\_TowardsADistributedCourtroom\\_Compressed.pdf](https://courtofthefuture.org/wp-content/uploads/2017/07/170710_TowardsADistributedCourtroom_Compressed.pdf)> accessed on 2 July 2022

Thorley, D. and Mitts, J., 'Trial by skype: A causality-oriented replication exploring the use of remote video adjudication in immigration removal proceedings' (2019) 59 *Intl Rev L Econ* 82

Tiba, F., 'The Prosecution of Sitting Heads of States by the International Criminal Court' (2013) 21 *Willamette J Intl L & Disp Resol* 134

Torres, M., 'Cross-border litigation: Videotaking of evidence within EU Member States' (2018) 12 *Disp Resol Intl* 71

Valchev, I., 'Can you see and hear us, Ms. Smith?: Protecting defendants' right to effective assistance of counsel when using audio and video conferencing in judicial proceedings' (2020) 110 *J Crim L & Crimin* 655

Wallace, A., 'Virtual justice in the bush: The use of court technology in remote and regional Australia' (2008) 19 *J L Inf & Sci* 1

White, E.R., 'Towards a New Normal: Digitization of International Criminal Law in the Age of Coronavirus' (SSRN, 5 April 2021) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3819276](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3819276)> accessed on 2 July 2022

Zakerhossein, M.H. and de Brouwer, A.-M., 'Diverse approaches to total and partial in absentia trials by International Criminal Tribunals', (2015) 26 *Crim L F* 181

#### **FURTHER BIBLIOGRAPHY**

Kuchler, D. D., O'Toole, L. C., 'How technological advances in the courtroom are changing the way we litigate' (2008) 58 *FDCC Quarterly* 205

## CITED DOCUMENTS

\*African Court on Human and Peoples' Rights, Rules of Court (adopted on 2 June 2010 and last amended on 1 September 2020).\* <<https://www.african-court.org/wpafc/wp-content/uploads/2021/04/Rules-Final-Revised-adopted-Rules-eng-April-2021.pdf>> accessed 2 July 2022

\*African Court on Human and Peoples' Rights, Practice Directions for Virtual Sessions in the African Court on Human and Peoples' Rights (entered into force on 1 June 2020).\* <[https://www.african-court.org/en/images/Basic%20Documents/Practice\\_Directions\\_for\\_Virtual\\_Sessions\\_EN.pdf](https://www.african-court.org/en/images/Basic%20Documents/Practice_Directions_for_Virtual_Sessions_EN.pdf)> accessed 2 July 2022

\*Caribbean Court of Justice, Original Jurisdiction Rules 2021.\* <<https://ccj.org/wp-content/uploads/2021/10/Caribbean-Court-of-Justice-Original-Jurisdiction-Rules-2021.pdf>> accessed 2 July 2022

\*Caribbean Court of Justice, Appellate Jurisdiction Rules 2021.\* <<https://ccj.org/wp-content/uploads/2021/10/Caribbean-Court-of-Justice-Appellate-Jurisdiction-Rules-2021.pdf>> accessed 2 July 2022

\*Caribbean Court of Justice, Practice Direction No 2 of 2021 – Conduct of Online Hearings (issued on 11 October 2021).\* <<https://ccj.org/wp-content/uploads/2021/10/Caribbean-Court-of-Justice-Original-Jurisdiction-Rules-2021.pdf>> accessed on 2 July 2022

\*Center for Legal & Court Technology, *Best practices for using video conferencing for hearings and related proceedings: Draft report to the administrative conference of the United States*, 10 August 2014.\* <[https://www.acus.gov/sites/default/files/documents/Draft\\_Best%2520Practices%2520Video%2520Hearings\\_10-09-14\\_1.pdf](https://www.acus.gov/sites/default/files/documents/Draft_Best%2520Practices%2520Video%2520Hearings_10-09-14_1.pdf)> accessed 2 July 2022

\*Community Court of Justice, The Economic Community of West African States (ECOWAS), Rules of the Community Court of Justice, The Economic Community of West African States (ECOWAS) (effective date 2002).\* <[www.courtecowas.org/wp-content/uploads/2018/11/Rules\\_of\\_Procedure\\_2002\\_ENG.pdf](http://www.courtecowas.org/wp-content/uploads/2018/11/Rules_of_Procedure_2002_ENG.pdf)> accessed 2 July 2022

\*Community Court of Justice, The Economic Community of West African States (ECOWAS), Practice Directions on Electronic Case Management and Virtual Court Sessions (adopted on 22 May 2020).\* <[www.courtecowas.org/wp-content/uploads/2021/11/Practice-Direction-English.pdf](http://www.courtecowas.org/wp-content/uploads/2021/11/Practice-Direction-English.pdf)> accessed 2 July 2022

\*Community Court of Justice, The Economic Community of West African States (ECOWAS), Lawyers and Participants Guidelines for Virtual Court Sessions, 2021.\* <[www.courtecowas.org/wp-content/uploads/2021/11/Lawyer-Participant-Guideline-English.pdf](http://www.courtecowas.org/wp-content/uploads/2021/11/Lawyer-Participant-Guideline-English.pdf)> accessed 2 July 2022

\*Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (adopted 18 March 1970, entered into force 7 October 1972) 847 UNTS 231 (Hague Evidence Convention, 'HEC')\* <

<https://treaties.un.org/doc/Publication/UNTS/Volume%20847/volume-847-I-12140-English.pdf> > accessed 2 July 2022

\*Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. C 197/3 (2000).\*

\*Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, O. J. C 197/1 (2000).\*

\*Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), ‘Guidelines on videoconferencing in judicial proceedings’ CEPEJ (2021) 4REV4.\*

\*Council of Europe, European Convention on Mutual Assistance in Criminal Matters, European Treaty Series No. 30 (adopted on 20 April 1959).\* <<https://rm.coe.int/16800656ce>> accessed 2 July 2022

\*European Court of Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950 and entered into force on 3 September 1953).\* <[https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)> accessed 2 July 2022

\*European Court of Human Rights, Rules of Court (adopted 3 June 2022).\* <[https://www.echr.coe.int/documents/rules\\_court\\_eng.pdf](https://www.echr.coe.int/documents/rules_court_eng.pdf)> accessed 2 July 2022

\*International Council for Commercial Arbitration (‘ICCA’), ‘The ICCA-IBA Roadmap to Data Protection in International Arbitration’, Public Consultation Draft, February 2020.\* <[https://cdn.arbitration-icca.org/s3fs-public/document/media\\_document/roadmap\\_28.02.20.pdf](https://cdn.arbitration-icca.org/s3fs-public/document/media_document/roadmap_28.02.20.pdf)> accessed 2 July 2022

\*International Centre for the Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings (Arbitration Rules).\*

\*International Centre for the Settlement of Investment Disputes, Rules of Procedure for Conciliation Proceedings (Conciliation Rules).\*

\*International Centre for the Settlement of Investment Disputes, Proposed Amendments to the Regulations and Rules for ICSID Convention Proceedings, 20 January 2022.\* <[https://icsid.worldbank.org/sites/default/files/publications/rule\\_amendment\\_proposals\\_convention.pdf](https://icsid.worldbank.org/sites/default/files/publications/rule_amendment_proposals_convention.pdf)> accessed 2 July 2022

\*International Centre for the Settlement of Investment Disputes (‘ICSID’), A Brief Guide to Online Hearings at ICSID, 24 March 2020.\* <<https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid?CID=362>> accessed 2 July 2022

\*International Chamber of Commerce, International Court of Arbitration, Arbitration Rules (in force as from 1 January 2021).\* <<https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf>> accessed 2 July 2022

\*International Chamber of Commerce, Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and procedural orders dealing with the organisation of virtual hearings (in force as from 1 January 2021).\* <<https://iccwbo.org/content/uploads/sites/3/2020/12/icc-checklist-cyber-protocol-and-clauses-orders-virtual-hearings-english.pdf>> accessed 2 July 2022

\*International Court of Justice, Rules of Court (adopted on 14 April 1978 and entered into force on 1 July 1978).\* <[www.icj-cij.org/en/rules](http://www.icj-cij.org/en/rules)> accessed 2 July 2022

\*International Court of Justice, Guidelines for the Parties on the Organization of Hearings by Video Link (adopted on 13 July 2020).\* <[www.icj-cij.org/en/other-texts/guidelines-videolink](http://www.icj-cij.org/en/other-texts/guidelines-videolink)> accessed 2 July 2022

\*International Criminal Court, Rome Statute (adopted on 17 July 1998 and entered into force on 1 July 2002).\* <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> accessed 2 July 2022

\*International Criminal Court, Resolution ICC-ASP/12/Res.7 (adopted on 27 November 2013).\* <[https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf)> accessed 2 July 2022

\*International Criminal Court, Rules of Procedure and Evidence, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A.\* <[www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf](http://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf)> accessed 2 July 2022

\*International Criminal Tribunal for Rwanda, Statute of the International Criminal Tribunal for Rwanda (adopted on 8 November 1994).\* <[https://unictr.irmct.org/sites/unictr.org/files/legal-library/100131\\_Statute\\_en\\_fr\\_0.pdf](https://unictr.irmct.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf)> accessed 2 July 2022

\*International Tribunal for the Law of the Sea, Rules of the Tribunal (adopted on 28 October 1997, last amended on 25 March 2021).\* <[https://www.itlos.org/fileadmin/itlos/documents/basic\\_texts/ITLOS\\_8\\_25.03.21.pdf](https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf)> accessed on 2 July 2022

\*International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted on 25 May 1993).\* <[https://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)> accessed 2 July 2022

\*Korean Commercial Arbitration Board, Seoul Protocol on Video Conferencing in International Arbitration (published on 18 March 2020).\* <[javascript:gfnAttachFileDown\('Seoul Protocol on Video Conference in International Arbitration.pdf','/userUpload/2020/03/18/','15845108145076X67A.pdf'\)](javascript:gfnAttachFileDown('Seoul Protocol on Video Conference in International Arbitration.pdf','/userUpload/2020/03/18/','15845108145076X67A.pdf'))> accessed 2 July 2022

\*Permanent Court of Arbitration, Arbitration Rules 2021 (effective 17 December 2012).\* <<https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf>> accessed 2 July 2022

\*Special Tribunal for Lebanon, Statute of the Special Tribunal for Lebanon (adopted on 30 May 2007).\* <[https://www.stl-tsl.org/sites/default/files/documents/legal-documents/statute/Statute\\_of\\_the\\_Special\\_Tribunal\\_for\\_Lebanon\\_\\_\\_English.pdf](https://www.stl-tsl.org/sites/default/files/documents/legal-documents/statute/Statute_of_the_Special_Tribunal_for_Lebanon___English.pdf)> accessed 2 July 2022

\*United Nations, International Covenant on Civil and Political Rights (adopted on 19 December 1966 and entered into force on 23 March 1976).\* <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> accessed 2 July 2022

\*United Nations, Statute of the International Residual Mechanism for Criminal Tribunals (adopted on 22 December 2010).\* <[https://www.irmct.org/sites/default/files/documents/101222\\_sc\\_res1966\\_statute\\_en\\_0.pdf](https://www.irmct.org/sites/default/files/documents/101222_sc_res1966_statute_en_0.pdf)> accessed 2 July 2022

\*United Nations, Universal Declaration of Human Rights (adopted on 10 December 1948).\* <<https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf>> accessed 2 July 2022

\*World Trade Organisation, Understanding on rules and procedures governing the settlement of disputes (entered into force on 1 January 1995).\* <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm)> accessed 2 July 2022

\*World Trade Organisation, Working procedures for appellate review (16 August 2010).\* <[https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm)> accessed 2 July 2022

## **CITED CASES**

### **ECtHR**

Gorbunov and Gorbachev v Russia, Judgment, 1 March 2016, App Nos. 43183/06 and 27412/07

Sakhnovskiy v Russia, Judgment, 2 November 2010, App No. 21272/03

Trepashkin v Russia, Judgment, 16 December 2010, App No. 14248/05

Vasilyev v Russia, Judgment, 10 January 2012, App No. 28370/05

Marcello Viola v Italy, Judgment (extracts), 5 October 2006, App No. 45106/04

Yevdokimov and Others v Russia, Judgment, 16 February 2016, App Nos. 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 76438/11, 14919/12, 19929/12, 42389/12, 57043/12 and 67481/12

### **ICC**

The Prosecutor v Bosco Ntaganda, 2020, Corrigendum\* to the “Defence submissions on the scheduled oral hearing”, 5 May 2020, ICC-01/04-02/06-2524-Corr (6 May 2020)

The Prosecutor v Laurent Gbagbo and Charles Blé Goudé, Prosecution’s response to “Blé Goudé Defence Urgent Request for Postponement pursuant to Article 67 of the Statute”, ICC-02/11-01/15-1341 (8 May 2020),

## **ICJ**

The Arbitral Award of 3 October 1899 (Guyana v Venezuela), Public Sitting on 30 June 2020, CR 2020/05 <<https://www.icj-cij.org/public/files/case-related/171/171-20200630-ORA-01-00-BI.pdf>> accessed on 2 July 2022

## **ICSID**

Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v Kingdom of Spain, ICSID Case No. ARB/15/45, Decision on the Second Proposal to disqualify all Members of the Tribunal, 15 December 2020 <[https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5006/DS15556\\_En.pdf](https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5006/DS15556_En.pdf)> accessed 2 July 2022

Vattenfall AB and Others v Federal Republic of Germany (II), ICSID Case No. ARB/12/12, Recommendation pursuant to the request by ICSID dated 8 May 2020 on the Respondent’s Proposal to disqualify all members of the Arbitral Tribunal dated 16 April 2020, 6 July 2020 <[https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2220/DS14632\\_En.pdf](https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2220/DS14632_En.pdf)> accessed 2 July 2022

## **ICTR**

Protais Zigiranyirazo v Prosecutor, Case No. ICTR 2001-73-AR73, Decision on Interlocutory Appeal (30 October 2006)

## **ICTY**

Prosecutor v Goran Hadziz, Case No. IT-04-75-AR73.1, Decision on Prosecution’s Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings (4 March 2016)

## **IRMCT**

Prosecutor v Stanasic and Simatovic, Case No. IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings (16 May 2008)

### **ITLOS**

Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Case No. 28, Preliminary Objections, Judgment (28 January 2021)

### **Keywords**

International courts and tribunals, powers - Conduct of proceedings - Due process - Right to fair trial - Right to fair trial