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Evolution of Remote Participation of the Accused and Victim in International Criminal Proceedings

Abstract: The use of technologies in criminal proceedings has become increasingly popular. This has not escaped the attention of international criminal proceedings. Of particular importance are remote communication tools, which are now used in proceedings before the International Criminal Court (ICC). These tools enable, among other things, the remote participation of the accused and the victim in the proceedings. In this paper I will analyse how this one form of using technologies in the criminal process has evolved in the changing reality of international criminal proceedings, including how the use of remote communication tools affects the rights of the accused. I will argue that the development of the use of remote communication tools in ICC proceedings has so far been evolutionary and that this has been justified differently depending on the approach taken by the accused and victim in the proceedings. The paper also examines the impact of the COVID-19 pandemic.

Keywords: technology – remote participation – accused – victim – international criminal proceedings – International Criminal Court

1 Introduction

We live in the age of the Fourth Industrial Revolution.¹ On the one hand, this is due to the progressive technological development that we have been observing for several decades and which is characterised, for example, by the spread of Internet access and, in recent years, by artificial intelligence (AI). On the other hand, unexpected events that affect the frequency with which the public uses the latest technological achievements, such as the COVID-19 pandemic and the outbreak of war in Ukraine, are also intertwined with this phenomenon. The pandemic

¹ On this topic, see e.g. K. Schwab, *The Fourth Industrial Revolution* (World Economic Forum, Cologny/Geneva, 2016); P. Ross, K Maynard, 'Towards a 4th industrial revolution', 13(3) *Intelligent Buildings International* (2021) 159–161, pp. 159–161; P. Data, 'The promise and challenges of the fourth industrial revolution (4IR)', 13(1) *Journal of Information Technology Teaching Cases* (2023) 2–15.

has triggered the immediate need to move away from conducting court proceedings on site – at least for the duration of the ongoing health crisis – and to conduct activities remotely or completely remotely.² This applies to both domestic criminal proceedings and those before international courts, including the International Criminal Court (ICC).³ The war in Ukraine, on the other hand, has contributed to the emergence of a different approach to gathering evidence in criminal proceedings, resulting from the modern way in which armed conflicts are conducted, through the use of the latest technological achievements, not only in the conduct of military operations, but also as methods of gathering evidence.⁴ This process, which had begun a few years earlier in the armed conflicts in Syria and Iraq, gained momentum during the war in Ukraine, which only demonstrates the systematic increase in the importance of using electronic and digital evidence in the prosecution of international crimes.⁵

The increasing use of technologies in court proceedings has also attracted the interest from the academic community.⁶ Furthermore, media coverage of artificial intelligence and its development has increased recently,⁷ as has legislative activity to regulate this phenomenon, particularly within the European Union.⁸ It seems to be only a matter of time before the

² See e.g. J. M. Baldwin, J. M. Eassey, E. J. Brooke, 'Court Operations during the COVID-19 Pandemic', 45 *American Journal of Criminal Justice* (2020) 743–758; M. Legg, A. Song, 'The Courts, the Remote Hearing and the Pandemic: From Action to Reflection', 44(1) *UNSW Law Journal* (2021) 126–166; X. Zhang, 'Remote court hearing as a judicial response to the COVID-19 outbreak: An impact assessment and suggestions for improvement', 11 *Journal of Global Health* (2021) 1–6; D. de Vocht, 'Trials by video link after the pandemic: the pros and cons of the expansion of virtual justice', 8 *China-EU Law Journal* (2022), 33–44, p. 33.

³ The International Criminal Court established in 1998 under the Rome Statute of the International Criminal Court adopted at the Conference of Plenipotentiaries in Rome on 17 July 1998, UN Doc. A/CONF.183/9.

⁴ This subject is extensively discussed widely in *The Economist* issue devoted to the war in Ukraine: *A new era of high-tech war has begun. The war in Ukraine shows how technology is changing the battlefield*, available online at [economist.com/special-report/2023/07/03/the-war-in-ukraine-shows-how-technology-is-changing-the-battlefield](https://www.economist.com/special-report/2023/07/03/the-war-in-ukraine-shows-how-technology-is-changing-the-battlefield) (accessed 5 June 2024). See also K. Kowalczyńska, 'War-Torn Justice: Empirical Analysis of the Impact of Armed Conflict on Fair Trial Guarantees in Ukraine', 9(3) *Revista Brasileira de Direito Processual Penal* (2023) 1061–1107, pp. 1077–1079.

⁵ K. Aksamitowska, 'Digital Evidence in Domestic Core International Crimes Prosecutions. Lessons Learned from Germany, Sweden, Finland and The Netherlands', 19 *Journal of International Criminal Justice* (2021) 189–211, p. 191ff.

⁶ See: M. Caianello, 'Criminal Process faced with the Challenges of Scientific and Technological Development', 27 *European Journal of Crime, Criminal Law and Criminal Justice* (2019) 265–289; K. Kamber, 'The Right to a Fair Online Hearing', 22 *Human Rights Law Review* (2022) 1–21; J. V. Noonan, P. T. Stanton, 'Remote Hearings: Let's Not Forget the Cost of What's Lost', 54(1) *Loyola University Chicago Law Journal* (2022) 1–13; A. Falcone, 'Online Hearings and the Right to Effective Defence in Digitalised Trials', in L. Bachmaier Winter, S. Ruggeri (eds.) *Investigating and Preventing Crime in the Digital Era. New Safeguards, New Rights* (Springer, Cham, 2022), pp. 189–212.

⁷ The Editors, 'Is ChatGPT the Start of the AI Revolution?', *Bloomberg*, available online at [bloomberg.com/opinion/articles/2022-12-09/is-chatgpt-the-start-of-the-ai-revolution](https://www.bloomberg.com/opinion/articles/2022-12-09/is-chatgpt-the-start-of-the-ai-revolution) (accessed 5 June 2024); M. Suleyman, 'How the AI Revolution Will Reshape the World', *Time*, available online at time.com/6310115/ai-revolution-reshape-the-world/ (accessed 5 June 2024); G. Sipursky, 'Embracing The AI Revolution', *Forbes*, <<https://www.forbes.com/sites/glebtsipursky/2023/08/14/embracing-the-ai-revolution/>> (accessed 5 June 2024).

⁸ 'Artificial Intelligence Act: MEPs adopt landmark law', available online at europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law (accessed 5 June 2024).

technologies are also used extensively in criminal proceedings. It is therefore necessary to prepare the criminal justice system for the challenges ahead. Hence, the issue of the use of technologies in criminal proceedings requires an attempt to find solutions to problems at hand, which could form the basis for future legislative measures.

In contrast to domestic criminal proceedings, technologies were used much earlier in international criminal proceedings, and it is only in recent years that this phenomenon has systematically increased.⁹ It is therefore worth taking a deeper look at this topic and examining how exactly this development took place and whether sudden phenomena such as the COVID-19 pandemic had a significant impact on it.

The main purpose of this article is to analyse how one of the forms of the use of technologies in the criminal process, i.e. the use of remote communication tools in the course of proceedings, has evolved in the changing reality within international criminal proceedings. The paper includes an analysis of the COVID-19 pandemic's impact and the effects of remote communication tools on the rights of the accused.

It will be argued that the development of the use of remote communication tools in ICC procedures to date has been evolutionary. The main aim was to ensure effective safeguards for victims and increase the likelihood of their participation in the proceedings. At the same time, the possibility of remote participation by the accused was only permitted within a narrow framework. The extension of such participation over time arose from procedural pragmatics and was not widespread in practice. The situation changed with the onset of the COVID-19 pandemic, which led to increased remote participation of the accused in the proceedings, contributing to the further development of this phenomenon. In consequence, the post-pandemic outlook suggests that remote communication tools for the accused may continue to evolve and develop further. However, remote participation by the accused and the victim is not neutral regarding the accused's rights and has a significant impact on them.

The article consists of 4 parts. The first defines the concept of remote communication tools used in the criminal process and before the ICC. In the second part of the article, the development of remote participation in international criminal proceedings is presented against the background of changes in the use of technologies in proceedings before international courts and tribunals. This enables to answer the question of what the use of these means looked like

⁹ See e.g.: C. H. Wheeler, *The Right to Be Present at Trial in International Criminal Law* (Brill, Boston, 2019), p. 226; K. Khan, 'Innovation and Technology in Building Modern Investigations and Prosecutions at the ICC', in C. Stahn, R. Braga da Silva (eds.), *The International Criminal Court in Its Third Decade. Reflecting on Law and Practices*, (Brill/Nijhoff, Leiden-Boston, 2024), pp. 101–122.

during the development of international criminal proceedings and what effects this phenomenon had on the form of participation of the accused and victim in the proceedings. The third part is dedicated to discussing the changes caused by the COVID-19 pandemic in relation to the use of remote communication tools in proceedings before the ICC. The fourth part is the summary with the conclusions that crown the article.

In the literature, international criminal law is defined¹⁰ and some authors also define international criminal procedure.¹¹ The concept of international criminal procedure used in this paper should be treated as a part of the broader criminal procedure. It covers criminal proceedings before international criminal courts and tribunals, including the ICC, *ad hoc* tribunals¹² or military tribunals¹³ as well as numerous hybrid courts¹⁴. It is reasonable to separate international criminal procedure from international criminal law. The first term refers to the procedural aspects of proceedings before the ICC, and the former *ad hoc* and military tribunals, while the second term refers to the substantive provisions on international crimes committed.

The concept of remote communication tools used in criminal proceedings discussed in this article should be singled out as a fragment of the broad application of technologies, as this far-reaching concept may also include AI, the transmission of trials or electronic methods of taking evidence. In the literature itself, terms such as remote court,¹⁵ remote proceedings¹⁶ or remote hearings¹⁷ are used. These concepts refer primarily to the participation of all or some of the participants in proceedings in the conduct of a given procedure remotely (in the form of a video conference), i.e. without them being physically present in the same room. On the other

¹⁰ See e.g. R. Cryer, D. Robinson, S. Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2019), pp. 3–26; P. Hofmański, H. Kuczyńska, *Międzynarodowe prawo karne* (Wolters Kluwer Polska, Warszawa 2020), p. 17.

¹¹ See e.g. K. Ambos, *Treatise on International Criminal Law. Volume III: International Criminal Procedure* (Oxford University Press, Oxford, 2016), pp. 1–98.

¹² The main task of such tribunals is to prosecute perpetrators of international crimes committed in the context of a particular armed conflict.

¹³ They were created on the initiative of the victorious states for the purpose of putting on trial those responsible for the crimes committed during the Second World War.

¹⁴ Their distinctive feature is that they often include national and international judges, and procedural regulations go beyond national regulations.

¹⁵ A. L. Bannon, D. Keith, 'Remote Court: Principles for Virtual Proceedings during the COVID-19 Pandemic and Beyond', 115(6) *Northwestern University Law Review* (2021) 1875–1920, p. 1875.

¹⁶ *Ibid.*, p. 1880.

¹⁷ Noonan, *supra* note 6, pp. 1–13.

hand, the Rome Statute of the ICC¹⁸ and the ICC Rules of Procedure and Evidence (ICC RPE)¹⁹ mention the possibility of using audio or video technology (means of audio or video technology), but no collective term for such tools is used.

It can therefore be assumed that the remote communication tools used in the criminal process are all technical solutions (such as video conferencing,²⁰ video and/or audio link,²¹ closed-circuit television²²) that allow the partial or full participation of participants in criminal proceedings in a given procedure without their simultaneous physical presence in the same place, consisting in them not being physically present in the place where the procedure is conducted (what can be referred to as: remote participation/presence or virtual participation/presence).²³ In this way, one of the participants in the criminal process can participate in proceedings from another location (*e.g.* another court, detention centre or another state building, house or other permitted place – the important issue is to determine the possible rigour associated with the conditions of the connection), while the rest of the participants in such a scenario remain in the courtroom or other location where a procedural step is being carried out. A model in which all participants are outside the courtroom is also possible. A hybrid scenario in which some of the participants are in the courtroom and others are elsewhere is also acceptable.

2 Use of Technologies in International Criminal Proceedings

2.1 The Origins of International Criminal Justice and Technologies

The modern origins of international criminal justice can be seen in the establishment of the International Military Tribunal (IMT) at Nuremberg in 1945. The desire to restore justice and stability after the world war and, to a lesser extent, to provide redress to the victims, can be seen as the fundamental motivation for the establishment of the IMT. As a result, the victims were not placed at the centre of the criminal proceedings at that time, which is one of the

¹⁸ Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, no. 3854. available online at [icc-cpi.int/sites/default/files/RS-Eng.pdf](https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf) (accessed 5 June 2024).

¹⁹ Rules of Procedure and Evidence of the International Criminal Court (ICC RPE), reproduced from the Official Assembly of States Parties to the Rome Statute of the International Criminal Court, first session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), Part II.A, as amended, available online at [icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf](https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf) (accessed 5 June 2024).

²⁰ It can be assumed that it is an online meeting of many people using a specialised platform.

²¹ Such a method means the remote participation of a person with whom one is in contact through communication.

²² This term means observation and enabling a person to speak through cameras.

²³ See *e.g.* E.-J. Van der Vlis, 'Videoconferencing in criminal proceedings', in S. Braun, J. L. Taylor (eds.), *Videoconference and remote interpreting in criminal proceedings*. (Intersentia, Guildford: University of Surrey, 2012), p. 12.

fundamental characteristics of international criminal justice, or at least a standard that is supposed to be followed today.²⁴ The judicial decision-making of the IMT was mainly based on documentary evidence, therefore minimising the role of the victims, whose testimonies were not given increased attention.²⁵ For this reason, it is argued that the IMT was unable to fully grasp and understand the Holocaust and the perspectives of Holocaust survivors.²⁶ Neither the IMT Charter²⁷ nor the Rules of Procedure²⁸ provided for specific measures to safeguard the rights of victims, who, above all, did not have the right to actively participate in the proceedings. As a result, the system of victim protection in IMT proceedings cannot be considered developed.

For obvious reasons, in the case of the IMT it is also not possible to talk about the use of remote communication tools in the proceedings, which is due to the lack of corresponding technical progress at that time in history. The IMT began its operations in November 1945, while the spread of television at the expense of radio, as well as the creation of remote communication tools, dates back to the early post-war period. However, despite all these limitations, the beginning of the use of technology in international criminal proceedings can already be seen in the proceedings before the IMT. For example, simultaneous interpreting was used in proceedings before the IMT,²⁹ which was an innovative solution for the circumstances of the first half of the 20th century. The individual steps of these proceedings were filmed and the evidence presented was photographed.³⁰ Despite its limitations, the IMT thus heralded the wider use of modern technology in international criminal proceedings.

2.2 Ad Hoc Tribunals and the Progressive Change in the Approach to Victim and Remote Communication Tools

The IMT ceased its activities in October 1946 and the development of international criminal justice stalled during the Cold War, only to return with renewed vigour in the 1990s. At that time, *ad hoc* tribunals were created, which brought a new dynamic to the development of

²⁴ See e.g. T. Bonacker, C. Safferling, 'Introduction', in T. Bonacker, C. Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse* (T.M.C. Asser Press, The Hague, 2013), pp. 1–7.

²⁵ Y. Danieli, 'Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law', 27(4) *Cardozo Law Review* (2006) 1633–1650, pp. 1641–1644.

²⁶ *Ibid.*

²⁷ See the text of the Charter: avalon.law.yale.edu/imt/imtconst.asp#art25 (accessed 5 June 2024).

²⁸ See the text of the Rules of Procedure: avalon.law.yale.edu/imt/imtrules.asp (accessed 5 June 2024).

²⁹ See *Translation in the courtroom*, available online at encyclopedia.ushmm.org/content/en/article/translation-in-the-courtroom (accessed 5 June 2024) and *The Nuremberg courtroom*, available online at encyclopedia.ushmm.org/content/en/article/the-nuremberg-courtroom (accessed 5 June 2024).

³⁰ Available, for example in: *Nuremberg*, available online at virtualtribunals.stanford.edu/nuremberg (accessed 5 June 2024).

international criminal proceedings. Two such tribunals were created, the International Criminal Tribunal for the former Yugoslavia (ICTY)³¹ and the International Criminal Tribunal for Rwanda (ICTR)³². The historical period in which these tribunals were established differed significantly from that of the IMT in terms of the technological context. Television was already readily available and the Internet was also spreading, which had an impact on the activities of both tribunals.

At the same time, there was a very significant paradigm shift in terms of the role of the victim. The statutes of both ad hoc tribunals clearly indicate the need to protect victims and witnesses in the course of the proceedings.³³ The UN Security Council has explicitly obliged the ICTY and the ICTR to regulate the protection of victims in the Rules of Procedure and Evidence (RPE)³⁴ taking into account the exclusion of the publicity of the proceedings and the protection of victims' identity.³⁵ Although the protection measures only specify the non-disclosure of the identity of a victim or witness who may be in danger or at risk,³⁶ so that no direct reference is made to remote communication tools as a means of this protection, this does not block the way for the use of a video call for this purpose.

An example of such an approach is visible in the ICTY Rules of Procedure and Evidence (ICTY RPE) which allow an order, issued at the request of a party or *proprio motu*, to conduct a hearing by way of video-conference link.³⁷ Thus, if a witness feels threatened or is unable to attend the proceedings in person for other compelling reasons, his or her

³¹ The International Criminal Tribunal for prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council, S.C. Res. 827, 25 May 1993.

³² International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994, S.C. Res. 955, 8 November 1994.

³³ Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), SC, 3217th meeting, U.N. Doc. S/RES/827 (1993) with amendments, available online at [icty.org/en/documents/statute-tribunal](https://www.icty.org/en/documents/statute-tribunal) (accessed 5 June 2024); Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), SC, 3453rd meeting, U.N. Doc. S/RES/955 (1994), available online at https://legal.un.org/avl/pdf/ha/ict_r_EF.pdf (accessed 5 June 2024).

³⁴ Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia (ICTY RPE), IT/32/Rev.50 (adopted on 11 February 1994, last amended on 9 August 2015), available online at [icty.org/x/file/Legal_Library/Rules_procedure_evidence/IT032Rev50_en.pdf](https://www.icty.org/x/file/Legal_Library/Rules_procedure_evidence/IT032Rev50_en.pdf) (accessed 5 June 2024) and Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (ICTR RPE), (adopted on 5 July 1995, last amended on 13 May 2015), available online at [unict.org/sites/unict.org/files/legal-library/150513-rpe-en-fr.pdf](https://www.unict.org/sites/unict.org/files/legal-library/150513-rpe-en-fr.pdf) (accessed 5 June 2024).

³⁵ Article 22 of the Statute of the International Criminal Tribunal for the former Yugoslavia and Article 21 of the Statute of the International Criminal Tribunal for Rwanda.

³⁶ Rule 69 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia; Rule 69 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

³⁷ Rule 81 *bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia.

participation may take the form of a remote testimony.³⁸ This phenomenon is rightly associated with logistical problems related to the need for the witness to reach the seat of the court or to ensure his or her protection.³⁹ This suggests that at this stage in the development of international criminal justice, there is scope for the use of technologies, including, for the first time, remote communication tools. The introduction of remote means of communication was therefore a milestone, albeit not the last step on the way to criminal proceedings that put the victim at the centre.⁴⁰

The *ad hoc* tribunals have thus seen a consistent development in the use of technologies in international criminal proceedings. This time, however, the development not only concerned support in the conduct of the proceedings in the form of simultaneous interpreters, but also enabled the witness and victims as witnesses to participate in a hearing remotely via a video-conference link.

To conclude, the rationale behind allowing this form of participation was to ensure that as many victims as possible could take part in the trial as witnesses, thereby contributing their perspectives on the conflicts being adjudicated. This goal was achieved by addressing two primary disincentives to participation. The first was the risk to victims' safety and the potential for retraumatization. The second involved the logistical challenges and financial costs of traveling to the seat of the *ad hoc* tribunal. Therefore, it can be concluded that the motivations behind this decision were not inherently problematic.

However, it is important to emphasise that the remote participation of victims as witnesses can impact the rights of the accused. Remote participation can limit the defence's ability to fully question and challenge the testimony of a witness. In this situation, the defendant and their defense attorney may be present in the courtroom, while the witness testifies from a

³⁸ See e.g. ICTY, *Prosecutor v. Dusko Tadić*, Case no. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995.

³⁹ As in e.g. A. Dieng, 'International Criminal Justice From Paper to Practice – A Contribution From The International Criminal Tribunal For Rwanda to the Establishment of the International Criminal Court', 25(3) *Fordham International Law Journal* (2001) 688–707, p. 701.

⁴⁰ For a positive assessment of ad hoc tribunals and their activities, see e.g. A. Adams, 'The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape', 29(3) *European Journal of International Law* (2018) 749–769; A. Richterová, 'Ad Hoc Tribunals and Their Significance for Developing the Activities of the ICC', in P. Šturma (ed.), *The Rome Statute of the ICC at Its Twentieth Anniversary* (Koninklijke Brill NV 2019), pp. 1–12. Critical voices on the functioning of ad hoc tribunals should also be noted, such as those in: C. P. Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings', 29(4) *Michigan Journal of International Law* (2008) 777–826, pp. 786–789; M. Simons, 'Yugoslavia Tribunal Leaves Rich Legacy, but "Immense" Challenges Remain', *The New York Times*, available online at [nytimes.com/2017/12/23/world/europe/yugoslavia-tribunal-hague.html](https://www.nytimes.com/2017/12/23/world/europe/yugoslavia-tribunal-hague.html) (accessed 5 June 2024); A. Cascais, 'ICTR: A failed tribunal for genocide victims and survivors', *DW*, available online at [dw.com/en/icttr-a-tribunal-that-failed-rwandan-genocide-victims-and-survivors/a-51156220](https://www.dw.com/en/icttr-a-tribunal-that-failed-rwandan-genocide-victims-and-survivors/a-51156220) (accessed 5 June 2024).

separate room. This arrangement prevents direct contact between them. However, the defence can still ask questions either via video link or by having the defence attorney enter the room where the witness is testifying. In either case, the defence retains the opportunity to question the witness. By contrast, when testifying remotely with protective measures such as anonymisation, this is not as easily achieved. Such limitations negatively impact the defendant's ability to fully exercise his or her rights. It was thus essential to implement this participation in a manner that carefully considered the rights of the defence. Over time, it has been suggested that a balance must be struck between using protective measures (such as remote communication tools) and safeguarding the rights of the accused to ensure a fair trial.⁴¹

2.3 The ICC as a Venue for a Two-pronged Approach to the Remote Participation of Victim and Accused in Proceedings

2.3.1 Remote Participation of the Victim

The ICC was founded as the first permanent international criminal court. As with other international criminal courts and tribunals, it had to be decided for the ICC what role the victims should be given in the proceedings. However, the ICC went a step further than the *ad hoc* tribunals by comprehensively regulating the system of victim protection and offering victims a more effective opportunity to participate in the proceedings. Among other things, victims were granted the right to submit applications and ask questions,⁴² which is a clear reference to the experience with the continental system of criminal proceedings. In addition, a special unit for witness protection was set up within the ICC administration.

An example of the special treatment of victims are the provisions of the Rome Statute that determine how they can participate in the proceedings and the availability of appropriate protective measures for victims.⁴³ The Rome Statute also requires the ICC Chambers to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of persons involved in the proceedings.⁴⁴ It is important to note that these measures are also available to persons who are not witnesses or participants in the proceedings, but who have been named in the statements of other witnesses.⁴⁵ In addition, the ICC Chambers and other

⁴¹ R. Beqiri, 'Review of Some Procedural Witness Protective Measures at the International Criminal Tribunal for the Former Yugoslavia', 13(34) *European Scientific Journal* (2017) 251–268, pp. 256–259.

⁴² Article 68(3) of the Rome Statute of the International Criminal Court.

⁴³ Cf. Article 68 of the Rome Statute of the International Criminal Court.

⁴⁴ This follows from Article 68(1) of the Rome Statute of the International Criminal Court.

⁴⁵ A.-M. de Brouwer, M. Heikkilä, 'Victim Issues: Participation, Protection, Reparation, and Assistance', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, S. Zappalà (eds.), *International Criminal Procedure: Principles and Rules* (Oxford University Press, Oxford, 2013), p. 1333.

ICC bodies should take into account the needs of victims and witnesses in their directions and orders.⁴⁶ This legal formulation of the role of victims and the mechanisms dedicated to them stems from the functions of ICC proceedings, which are not only about prevention and prosecution, but also about uncovering the truth and redressing injustice.⁴⁷ The protection of victims and witnesses is a cornerstone of the system built around the Rome Statute, as these individuals are almost inevitably at risk due to the high status of persons accused in international criminal proceedings.⁴⁸ Therefore, the scope of victim protection in proceedings before the ICC can be considered far-reaching.

The protection of victims is realised, among other things, through protective measures that are also available to other ‘persons at risk’.⁴⁹ The will to use these means depends largely on the nature of the offences within the jurisdiction of the Court, as well as their gravity and scope. This is mainly due to the fact that the accused persons are usually state officials, which poses a potential threat to the safety of persons who testify as witnesses.⁵⁰ The gravity of the international crimes that fall within the jurisdiction of the ICC is also important. Due to their scale, as well as their impact on the functioning of local communities and the reputation of victims in those communities, protection measures aim to increase the participation of victims in proceedings before the ICC.

One of the discussed protective measures is the possibility of witness testimony by means of video or audio technology.⁵¹ Another is the possibility of presenting testimony electronically or by other special means, including those enabling the alteration of pictures or voice, as well as with the use of audiovisual technology, in particular videoconferencing and closed-circuit television.⁵² The reason for using remote communication tools may also be that the witness cannot physically attend the proceedings for logistical reasons or that their safety is jeopardised.⁵³ In order to allow a person to testify remotely, the ICC services must provide

⁴⁶ Such a conclusion may be reached based on Rule 86 of the Rules of Procedure and Evidence of the International Criminal Court.

⁴⁷ D. D. Cattin, ‘Victims’ Rights in the International Criminal Court’, in M. Natarajan (ed.), *International and Transnational Crime and Justice* (Cambridge University Press, Cambridge 2019), p. 421.

⁴⁸ D. D. Cattin, ‘Article 68’, in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (C.H. Beck, München, 2022) side note 2 to art. 68.

⁴⁹ Rule 87(1) of the Rules of Procedure and Evidence of the International Criminal Court.

⁵⁰ K. Kremens, ‘Mechanizmy ochrony świadków w międzynarodowych procesach karnych’, 6 *Prokuratura i Prawo* (2021), 73–101, p. 73ff.

⁵¹ Article 69(2) of the Rome Statute of the International Criminal Court.

⁵² See Rule 87(3)(c) of the Rules of Procedure and Evidence of the International Criminal Court.

⁵³ C. Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, Cambridge, 2019), p. 319.

that person with a safe place and this method of testimony must not violate the rights of other parties to the proceedings and, in particular, the right of the accused to a fair trial.⁵⁴

In the case of the ICC, the increased role of victims in the proceedings thus goes hand in hand with the extensive use of remote communication tools. This is due to the desire to enable victims to participate effectively in the proceedings. It is a response to potential factors that hinder their participation, such as the fear of secondary victimization, the return of trauma, as well as the need to reduce logistical problems arising from the need to reach the seat of the ICC in The Hague. Therefore, the use of remote communication tools in proceedings before the ICC has increased significantly in order to ensure the participation of the largest possible group of victims as witnesses in the proceedings and thus provide them with justice and reparation.⁵⁵

However, the broader use of remote communication tools has not been without controversy. Following the example of *ad hoc* tribunals, the ICC has also acknowledged that a witness testifying via video link or using protective measures can pose risks to the fair trial rights of the accused. As a result, the Rome Statute mandates that remote witness participation or the use of protective measures must not undermine or conflict with the accused's rights.⁵⁶ Therefore, it cannot be said that remote testimony is inherently neutral toward the accused. It must be conducted in a manner that does not negatively impact the defence's rights. For instance, this risk arises if the accused or their defence counsel is unable to question the witness and challenge their account of events. The ICC Chambers recognise this and evaluate each situation on a case-by-case basis, considering the positions of the parties involved when deciding on the use of remote participation.⁵⁷

2.3.2 Remote Participation of the Accused

In the case of the ICC, remote communication tools are not only used for the victims, but for the first time in the history of international criminal justice, it is possible to use such methods

⁵⁴ *Ibid.*

⁵⁵ See T. R. Kirabira, 'Technology as a Key Tool for the Prosecution of International Crimes: Lessons from Uganda', 22(5–6) *International Criminal Law Review* (2021) 1143–1167, pp. 1153–1157.

⁵⁶ See Article 69(2) of the Rome Statute of the International Criminal Court.

⁵⁷ See e.g. ICC, *Prosecutor v. Lauren Gbagbo and Charles Blé Goudé*, Case no. ICC-02/11-01/15, Decision on the Prosecutor's urgent application for testimony by means of videolink technology and for additional special measures with respect to Witness P-0554, 27 November 2017; ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case no. ICC-01/12-01/18, Decision on the Prosecution's application for P-0102's testimony to be conducted via video-link, 6 August 2020.

also in relation to the accused.⁵⁸ The underlying motive was to guarantee the right of the accused to a fair trial and, in particular, to exercise the right to a trial in the presence of the accused.⁵⁹ Initially, the use of remote communication tools in the accused's case was limited to merely allowing him or her to observe the trial and instruct counsel from outside the courtroom through the use of communication technology.⁶⁰ These means are used to respond to a situation in which the trial is constantly disrupted by the accused and this disruption cannot be ended in any other way than by excluding the accused from being physically present at the trial. Nevertheless, since the beginning of the ICC's activities, the remote presence of the accused has not been equated with physical presence.⁶¹ Therefore, the accused's virtual presence in this context could be seen as an exception to the rule, reserved for extraordinary situations when no other alternatives are available.

However, in the second decade of the ICC's operation, an amendment was introduced whereby the accused may, upon his or her written request to the ICC Trial Chamber, participate in the trial in whole or in part via a video link.⁶² The ICC Trial Chamber may agree to the remote participation of the accused, but is not obliged to do so. The interpretation of the reasons for the remote participation of the accused in the proceedings is the responsibility of a particular ICC Trial Chamber, which has discretionary powers to make such a decision. This rule was introduced as ICC RPE rule 134bis on the basis of the *Kenyatta*⁶³ and *Ruto*⁶⁴ cases in 2013.⁶⁵ However, the option of remote participation of the accused in the trial was not utilised in practice at the time, as the accused persons requested a general excusal from the obligation to

⁵⁸ See an analysis of remote presence of the accused in the broader context of international criminal law: C. H. Wheeler, 'Virtually There: Technology and the Right to be Present at Trial in International Criminal Law', 9(2) *Queen Mary Law Journal* (2017), 78–88, pp. 77–83.

⁵⁹ Cf. Article 63 of the Rome Statute of the International Criminal Court. The right of the accused to be present at the trial is cited as part of the broader right to a fair trial (see Ambos, *supra* note 11, pp. 162–165).

⁶⁰ Article 63(2) of the Rome Statute of the International Criminal Court.

⁶¹ W. Schabas, V. Caruana, 'Article 63', in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (C.H. Beck, München, 2022) side note 30 to art. 63.

⁶² This follows from Rule 134 bis of the Rules of Procedure and Evidence of the International Criminal Court.

⁶³ See ICC, *Prosecutor v. Uhuru Muigai Kenyatta*, Case no. ICC-01/09-02/11, available online at [icc-cpi.int/kenya/kenyatta](https://www.icc-cpi.int/kenya/kenyatta) (accessed 5 June 2024).

⁶⁴ See ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case no. ICC-01/09-01/11, available online at <https://www.icc-cpi.int/kenya/rutosang> (accessed 5 June 2024).

⁶⁵ The request was submitted by the African Union following its dispute with the ICC over allegations against Kenyan President Uhuru Kenyatta and his deputy William Ruto. The AU politicians' main argument was that elected heads of state need to be close to their citizens, especially in a country like Kenya that faces the threat of Islamic terrorism. It was therefore argued that they do not have the ability to effectively exercise their mandate as politicians if they attend the trial in a place so far away from where they hold office. Further information on this topic can be found at The Editor, 'Some ICC Accused May Attend Trial By Video-Conference', *African Liberty*, available online at africanliberty.org/2013/11/30/some-icc-accused-may-attend-trial-by-video-conference/ (accessed 5 June 2024); G. Steinhauser, 'ICC Defendants Can Follow Trial Via Video Link, Court Agrees', *The Wall Street Journal*, available online at [wsj.com/articles/SB10001424052702304747004579223981433061074](https://www.wsj.com/articles/SB10001424052702304747004579223981433061074) (accessed 5 June 2024).

attend the trial.⁶⁶ Even though some accused persons later asked to be allowed to attend the trial remotely, their requests were rejected.⁶⁷ The ICC Trial Chamber denied Mr. Sang's request for an 'extended' video link, favoring the more efficient 'regular' video link setup involving only the witness, a Courtroom Officer, and an IT representative.⁶⁸ Moreover, the accused asked to attend the status conference in the *Kenyatta* case remotely⁶⁹ before the trial proper, albeit during the judicial stage of the proceedings. The ICC Trial Chamber, recognising the status conference as a 'critical juncture' impacting the accused, victims, and witnesses, and deeming it necessary for justice, has decided by majority that the accused must be physically present at the Court, so the remote presence was not allowed.⁷⁰ It can thus be inferred that, at the time, the ICC Chambers recognised that virtual presence was not considered equivalent to physical presence, and that being physically present in the courtroom was necessary for activities of significant importance to the trial. The ICC Chambers has also reserved the right to decide when the accused may participate remotely, considering their arguments in a request but not treating them as binding. Also, according to the Regulations of the Court,⁷¹ ICC Chamber may conduct status conferences via hearings, including through audio/video link or written submissions, and may mandate the use of standard forms as appropriate.⁷² Therefore, all of this leads to the conclusion that it is the responsibility of the relevant ICC Chamber to make the crucial decision regarding virtual presence.

It is also important to consider what may have contributed to the ICC Chambers' skepticism regarding the accused's remote participation in proceedings. In addition to the fact that, in the second decade of the ICC's operation, attitudes toward technology were not as open as they are today, one cannot ignore the potential consequences of remote participation for the accused and their rights.

Remote participation inherently imposes a degree of isolation, as the accused is not physically present in the courtroom but in a separate location. This separation can result in the

⁶⁶ Schabas and Caruana, *supra* note 61, side note 32 to art. 63.

⁶⁷ See e.g., ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case no. ICC-01/09-01/11-1458, Decision on the Sang Defence Application for Presence of Mr Sang via Video-link, 14 August 2014.

⁶⁸ *Ibid*, para. 7.

⁶⁹ ICC, *Prosecutor v. Uhuru Muigai Kenyatta*, Case no. ICC-01/09-02/11, Defence Request for Excusal from Attendance pursuant to Rule 134 quater or to Adjourn the Status Conference Scheduled for 8 October 2014 and Permit Mr Kenyatta to Attend on a Rescheduled Date by Means of Video-link pursuant to Rule 134 bis, 25 September 2014.

⁷⁰ ICC, *Prosecutor v. Uhuru Muigai Kenyatta*, Case no. ICC-01/09-02/11-960, Decision on Defence request for excusal from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014, para. 19–20.

⁷¹ Regulations of the Court, adopted by the judges of the International Criminal Court on 26 May 2004, last amended on 12 November 2018, ICC-BD/01-05-16.

⁷² Regulation 30 of the Regulations of the Court.

defence counsel being in one place and the accused in another, making communication more difficult. In addition, studies show that, in a remote setting, such contact may be less frequent.⁷³ In consequence, NGO recommendations on remote proceedings emphasise the importance of ensuring the accused has effective access to defence counsel in a secure manner that facilitates thorough preparation of their defence.⁷⁴ Furthermore, in the context of ICC trials, the accused has the right to pose questions to testifying witnesses either personally or through their defence counsel. This process can be challenging in the context of virtual presence. For instance, it may not be apparent on the screen whether the accused wishes to ask a question, or they may be unable to effectively communicate this intention to their defence counsel.

Another aspect of the problem is potential technical issues, which could cause the accused to miss or misunderstand something crucial during the trial or hearing, particularly in the multilingual environment of the ICC. What is more, the video link is dependent on the quality of the Internet connection and can be compromised by its degradation,⁷⁵ particularly if no support is provided to the accused in this respect. Furthermore, responding effectively to what unfolds in the ICC physical courtroom can be challenging when participating remotely. This is because hearings before the ICC often involve hundreds of witnesses' testimonies and the presentation of extensive evidence, including digitised documents, as well as photos and videos.⁷⁶

Research also suggests that a defendant appearing remotely can be perceived more negatively,⁷⁷ particularly if they are seen in a detention centre wearing prison attire.⁷⁸ Additionally, remote participation can complicate the accused's ability to provide oral statement and assess the credibility of such a statement. This is because judges may lack the appropriate tools to evaluate remote oral statement, particularly as the relevant standards have

⁷³ R. Factor, D. Kariti, H. Lernau, D. Y. Ayubi, 'Videoconferencing in Legal Hearings and Procedural Justice', 18(8) *Victims & Offenders* (2023) 1557–1579, p. 1568.

⁷⁴ See eg. Fair Trials, *Safeguarding the right to a fair trial during the Coronavirus pandemic: remote criminal justice proceedings*, available online at fairtrials.org/app/uploads/2022/01/Safeguarding-the-right-to-a-fair-trial-during-the-coronavirus-pandemic-remote-criminal-justice-proceedings.pdf (accessed 24 September 2024), pp. 4–5.

⁷⁵ See eg. O. Nath, 'Security Risks Associated With Video Conferencing: Why Zero Trust Is Essential', Spiceworks, available online at spiceworks.com/it-security/application-security/articles/video-conferencing-risks-and-best-practices/ (accessed 5 September 2024); Factor, Kariti, Lernau, Ayubi, *supra* note 73, p. 1568.

⁷⁶ See J. W. Hak, KC, *Image-Based Evidence in International Criminal Prosecutions* (Oxford University Press, Oxford, 2024), pp. 21–32.

⁷⁷ See A. Bannon, J. Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court* (New York: Brennan Center for Justice at New York University School of Law, 2020), pp. 6–7.

⁷⁸ See, e.g. C. McKay, 'Video Links from Prison: Court "Appearance" within Carceral Space', 14(2) *Law, Culture and the Humanities* (2018) 242–262.

not yet been developed. The full scientific implications of remote participation, and how it affects the perception of the defendant in a trial context, are not yet fully understood.

All of these factors likely contributed to the decisions by individual ICC Chambers to deny remote participation for the accused at the time. Furthermore, the shift allowing the accused to request remote participation itself did not originate with the ICC judges but with the Rome Statute member states. This change was not accompanied by clear guidelines on how remote participation should be structured – such as where the accused would participate from, how communication with defence counsel would be facilitated, and how other procedural guarantees would be ensured. These factors may have further fueled the controversy surrounding the accused's remote participation in trials. However, this does not mean that the ICC Chambers' approach to the remote participation of the accused in hearings and trials has not evolved over time.

3 The Impact of the COVID-19 Pandemic on the Participation of the Accused in Proceedings Before the ICC

3.1 The Situation in the ICC during the COVID-19 Pandemic

The COVID-19 pandemic was of particular importance for the development of the use of remote communication tools in international criminal proceedings. From the very beginning, this crisis has left an imprint on the course of criminal proceedings⁷⁹ both in domestic systems and in the international justice,⁸⁰ including the trials pending before the ICC. Due to the growing epidemic threat, restrictions were introduced in the Kingdom of the Netherlands, where the ICC is based, at the beginning of 2020 to reduce the transmission of the virus.⁸¹ As a result, the ICC has also taken extraordinary measures to adapt this institution to the pandemic by transitioning to remote operations and using remote communication tools.⁸²

⁷⁹ See e.g. L. Dearden, 'Coronavirus sends justice system into "meltdown" as criminal court case backlog passes 37,000', *The Independent*, available online at [independent.co.uk/%20news/uk/home-news/coronavirus-justice-system-prisons-court-probation-latest-uk-a9430666.html](https://www.independent.co.uk/news/uk/home-news/coronavirus-justice-system-prisons-court-probation-latest-uk-a9430666.html) (accessed 5 June 2024); Department of Justice, *Access to Justice in the Age of COVID-19*, available online at justice.gov/ag/page/file/1445356/download (accessed 5 June 2024).

⁸⁰ See e.g. G. Pinzauti, P. Webb, 'Litigation before the International Court of Justice during the pandemic' 34(4) *Leiden Journal of International Law* (2021) 787–800; 'International courts and arbitration institutions adopt measures in response to the COVID-19 pandemic', available online at fiettalaw.com/pil_news/international-courts-and-arbitration-institutions-adopt-measures-in-response-to-the-covid-19-pandemic/ (accessed 5 June 2024).

⁸¹ 'COVID-19 in The Netherlands: A timeline', available online at containmentnu.nl/articles/timeline?lang=en (accessed 5 June 2024).

⁸² H. Abtahi, 'The International Criminal Court during the COVID-19 Pandemic' 5(18) *Journal of International Criminal Justice* (2020) 1069–1076.

The ‘new normal’ has thus become the increased remote presence of some of the participants in proceedings during the procedural steps carried out within such proceedings.⁸³ In response to this situation, the ICC Presidency has published a guide for judges that made it possible to follow procedural steps by means of remote communication tools.⁸⁴ At the same time, it was emphasised that remote proceedings are only a temporary solution.⁸⁵ The use of the Interactio,⁸⁶ video conferencing platform for partially remote proceedings was also considered.⁸⁷ According to these guidelines, the competent chamber could decide independently whether the necessary hearings should be conducted on-site, remotely or a combination of both. Therefore – at least in theory – full remote proceedings were permitted, although in practice they were handled differently at different stages of the proceedings.

It appears that during the pre-trial proceedings, the use of remote communication tools in meetings with the accused was relatively unproblematic. In *Abd-Al-Rahman*⁸⁸, for example, on his first appearance before the Pre-Trial Chamber, the Chamber held that ‘in light of the restrictions for accessing the Court building and the precautionary measures adopted and in place as a consequence of the current COVID-19 pandemic, attendance in the courtroom might be adapted as required and appropriate, including by way of establishing secure video-links’.⁸⁹ As a result, the accused took part in this procedural step remotely while in a detention centre.⁹⁰ Moreover, in the same case, due to the ongoing COVID-19 restrictions, one of the hearings during the pre-trial proceedings was conducted entirely remotely and all parties and participants participated via the Interactio system.⁹¹

⁸³ P. Hofmański, ‘The Covid-19 pandemic and the realities of the International Criminal Court’, in: K. G. Roszczynialska (ed.), *Impact of the COVID-19 Pandemic on Justice System. Reconstruction or Erosion of Justice Systems – Case Study and Suggested Solutions* (Vandenhoeck & Ruprecht Verlag, Goettingen, 2023), p. 65.

⁸⁴ The Presidency of the International Criminal Court, *Guidelines for the judiciary concerning holding court hearings during covid-19 pandemic*, available online at icc-cpi.int/sites/default/files/itemsDocuments/200623-guidelines-for-court-proceedings-covid-19-eng.pdf (accessed 24 September 2024), p. 1.

⁸⁵ *Ibid*, p. 2.

⁸⁶ This platform enables multilingual and remote meetings at the same time. It is used for videoconferencing. It also has a mobile app for audio streaming. It can also be integrated by Interactio with other video conferencing applications such as Zoom, Webex, Microsoft Teams. More on this topic see interactio.io/ (accessed 5 June 2024).

⁸⁷ ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case no. ICC-01/12-01/18-776, 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. 13.

⁸⁸ See ICC, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Case no. ICC-02/05-01/20, available online at icc-cpi.int/darfur/abd-al-rahman (accessed 5 June 2024).

⁸⁹ ICC, *Prosecutor v. Ahmad Muhammad Harun* (‘Ahmad Harun’) and *Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Decision on the convening of a hearing for the initial appearance of Mr. Ali Kushayb, 11 June 2022, para. 9.

⁹⁰ ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Case no. ICC-02/05-01/20-T-001-ENG, Transcript, 15 June 2020.

⁹¹ ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Case no. ICC-02/05-01/20-T-005-ENG, Transcript, 18 December 2020.

In court proceedings, on the other hand, the remote participation of the accused caused more controversy and discussion, but it was authorised for procedural steps outside the trial. In the case of *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*⁹², the question of remote participation of the accused in the proceedings was considered. The Trial Chamber invited the participants in the proceedings to submit their own proposals on the organization of the trial proceedings during the pandemic.⁹³ In the end, however, there was no widespread use of remote communication tools. In truth, the Chamber took into account the pandemic situation, i.e. the need to adapt the proceedings to this situation and the need to dialogue on the modalities for such an appearance of the accused at the confirmation of charges hearing which would be acceptable for both parties.⁹⁴ The accused waived his right to participate in this procedural step and was physically represented by his defence counsel.⁹⁵ The accused persons in the *Yekatom and Ngaïssona*⁹⁶ trials are another example of the use of remote communication tools. The former attended a confirmation of charges hearing via video link, at which time he was in a detention centre while his defence team were present in the courtroom.⁹⁷ However, this does not apply to the other accused person, who had waived his right to be present via video link and did not attend the hearing at all.

On the other hand, in the *Gbagbo and Blé Goudé*⁹⁸ appeal proceedings, the Appeals Chamber rejected the request to postpone the hearing to a date when all interested parties could attend in person, arguing, *inter alia*, that they could attend remotely.⁹⁹ At the same time, the Chamber emphasised that the decision to allow remote participation is limited to the situation (COVID-19 pandemic) faced by the ICC at that time and to the specific nature of the appeals proceedings scheduled in this case, and that it is therefore not a decision on this issue that applies to general proceedings before the ICC.¹⁰⁰ The Appeals Chamber was even more blunt

⁹² See ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case no. ICC-01/12-01/18, available online at icc-cpi.int/mali/al-hassan (accessed 5 June 2024).

⁹³ ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case no. ICC-01/12-01/18-776, Order to provide information on methods of work to minimise the impact of COVID-19 and related measures on the conduct of proceedings, 29 April 2020, para. 6.

⁹⁴ ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case no. ICC-01/12-01/18-852, Order scheduling a status conference, 9 June 2020.

⁹⁵ ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case no. ICC-01/12-01/18-T-015-Red-ENG, Transcript, 30 June 2020.

⁹⁶ See ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Case no. ICC-01/14-01/18, available online at icc-cpi.int/carII/yekatom-nga%C3%AFssona (accessed 5 June 2024).

⁹⁷ ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Case no. ICC-01/14-01/18-T-012-ENG, Transcript, 9 July 2020, paras. 4–5.

⁹⁸ See ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case no. ICC-02/11-01/15, available online at icc-cpi.int/cdi/gbagbo-goude (accessed 5 June 2024).

⁹⁹ ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case no. ICC-02/11-01/15 A, Decision vacating the hearing before the Appeals Chamber, 22 May 2020.

¹⁰⁰ *Ibid.*, para. 7.

in a later decision. The Chamber found that the holding of a partially virtual hearing between 22 and 24 June 2020 would not affect the rights of Mr. Laurent Gbagbo or the fairness of the proceedings.¹⁰¹

Therefore, the pandemic has accelerated and increased the remote participation of the accused in proceedings before the ICC, but not yet at the trial stage. However, it is noteworthy that, despite skepticism prior to the COVID-19 pandemic, the ICC Chambers seem to have shifted their stance during the pandemic. Under the pressure of urgency, they began permitting remote participation of the accused. It is therefore necessary to answer the question of whether such participation by the accused is possible throughout the proceedings before the ICC or only in the individual phases, as well as to what extent this can happen and whether this method is equivalent to on-site participation.¹⁰² Additionally, it is important to examine the prospects and implications in the post-COVID-19 context.

3.2 Towards Remote Proceedings? The Post-COVID-19 Landscape

The use of remote communication tools has clearly persisted even after the end of the COVID-19 pandemic, demonstrating its significant impact on the functioning of international criminal justice by encouraging even more tendency toward technology. This shift was evident in the increased admission of remote participation in international criminal proceedings. On the one hand as seen in 2022 in the *Gicheru* case¹⁰³, the accused was granted a request to participate remotely during the closing statements. The key argument of the defence invoked the unreasonability of the accused to bear the costs of travel and living expenses in the Netherlands for such a brief and relatively less critical stage of the trial.¹⁰⁴ The ICC Trial Chamber in its decision considered the purpose of the hearing, the brief duration of the closing statements, and the Prosecution's lack of opposition to the request.¹⁰⁵ Although the ICC Trial Chamber did not

¹⁰¹ ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1359, Decision rescheduling the hearing before the Appeals Chamber, 17 June 2020, para. 21.

¹⁰² There is already an academic discussion about remote criminal proceedings, but this does not yet relate directly to proceedings before the ICC [see e.g. C. Peristeridou, D. de Vocht, 'I'm not a cat! Remote criminal justice and a human-centred approach to the legitimacy of the trial', 30 *Maastricht Journal of European and Comparative Law* (2023) 97–106; A. Klip, 'The Right to be Present Online', 1 *European Journal of Crime, Criminal Law and Criminal Justice* (2024) 1–14].

¹⁰³ See ICC, *Prosecutor v. Paul Gicheru*, Case no. ICC-01/09-01/20, available online at icc-cpi.int/kenya/gicheru (accessed 5 September 2024).

¹⁰⁴ ICC, *Prosecutor v. Paul Gicheru*, Case no. ICC-01/09-01/20, Request for Leave for Mr. Gicheru to Appear Remotely during the Closing Statements, 9 June 2022.

¹⁰⁵ ICC, *Prosecutor v. Paul Gicheru*, Case no. ICC-01/09-01/20, Decision on Defence Request for the Accused to Attend the Closing Statements via Video Technology, 13 June 2022, para. 7.

directly address the defence's arguments, it seems to have aligned with them in reaching a favourable decision, citing the brief duration of the planned activity.

On the other hand in its latest strategic plan, the ICC's Office of the Prosecutor has acknowledged the evolving technological landscape and expressed its ambition to become a global leader in technology.¹⁰⁶ These objectives have been further endorsed by the ICC in its most recent strategic plan.¹⁰⁷ Moreover, in its 2023 report, the ICC Office of the Prosecutor dedicated an entire chapter to technology and announced initiatives aimed at enhancing remote participation in ICC proceedings.¹⁰⁸

This reflects the ICC's acknowledgment of the increasing role of technology and its impact on the global landscape. It also confirms that the pandemic has accelerated digitalisation in this area, encompassing the possibility of remote participation in proceedings, including for the accused. Whereas in previous years, there has been a growing normalization of remote testimony given by witnesses and victims.

However, it should be emphasised that although the remote participation of the accused has not been repeated since the *Gicheru* case in the ICC context, this does not suggest that the shift developed during the pandemic has been lost. There are two reasons to support such claim. Firstly, there is a clear trend of growing interest in remote proceedings after the COVID-19 pandemic,¹⁰⁹ including the possibility of granting the accused a legitimate right to participate remotely in criminal trials.¹¹⁰ This is because recent advancements in technology, accelerated by the COVID-19 pandemic, have significantly enhanced video link and increased the adoption of remote communication tools. Within this context, both the ICC and the ICC Office of the Prosecutor are actively planning to incorporate technological developments into their strategic activities. Therefore, this trend is likely to stay in the international criminal justice ecosystem, which has embraced technology since its inception. Secondly, also after the COVID-19 pandemic, attention was increasingly drawn to the ongoing crisis regarding the enforcement of arrest warrants.¹¹¹ This led the ICC Pre-Trial Chamber, at the request of the ICC Office of the

¹⁰⁶ ICC Office of the Prosecutor, *Office of the Prosecutor Strategic Plan 2023–2025*, available online at icc-cpi.int/sites/default/files/2023-08/2023-strategic-plan-otp-v.3.pdf (accessed 24 September 2024), p. 14.

¹⁰⁷ International Criminal Court, *International Criminal Court Strategic Plan 2023–2025*, available online at icc-cpi.int/sites/default/files/2023-08/2023-strategic-plan-icc-v.2.pdf (accessed 24 September 2024), p. 12.

¹⁰⁸ ICC Office of the Prosecutor, *Office of the Prosecutor Annual Report 2023*, available online at icc-cpi.int/sites/default/files/2023-12/2023-otp-annual-report.pdf (accessed 24 September 2024), pp. 49–57.

¹⁰⁹ See *supra* note 2.

¹¹⁰ See e.g. Klip *supra* note 102.

¹¹¹ See e.g. I. V. Massimino, 'The ICC and in-absentia proceedings: Finding a response to the difficulties of executing arrest warrants', 13(9) *ESIL Reflections* (2024) 1–10, available online at esil-sedi.eu/wp-content/uploads/2024/05/Massimino-Vol.13-Issue-9.pdf (accessed 5 September 2024).

Prosecutor, to issue a decision to proceed with the confirmation of charges in the *Joseph Kony* case¹¹² in absentia.¹¹³ This necessitates avoiding further proceedings in the absence of the defendants, while also encouraging their cooperation with the ICC. The solution may lie in leveraging the pandemic experience to advance digitisation and utilise the existing infrastructure within the ICC framework. This could lead to the consideration of permitting defendants to have at least a partial remote presence during ICC proceedings.

The primary reason for considering remote communication tools in this context is that remote participation in hearings or trials alleviates the burden on the defendant's daily life, making the process less inconvenient. This is because it eliminates the need for costly and often lengthy travel to the ICC headquarters. While this incentive may not appeal to all individuals subject to arrest warrants, even partial success in its implementation could benefit international criminal justice. A similar phenomenon was observed in the context of the Kosovo Specialist Chambers, where remote participation reduced the psychological stress on the accused and potentially increased their willingness to engage in the trial process.¹¹⁴

All of this highlights the need for further research on remote proceedings and a deeper analysis of past experiences in this area. Such study will better equip the ICC and other international criminal courts and tribunals to handle the challenges of a digitised future. While the COVID-19 pandemic may have caused temporary fatigue and disengagement from remote communication tools, the future suggests that the legacy of COVID-19 will remain relevant. Therefore, it is concerning that the ICC still fails to take action in case of making consistent rules or guidelines for remote participation in trials or hearings.

4 Conclusions

The above considerations give rise to a picture of international criminal justice as a legal system in which technologies are currently being used on a large scale. The development of the use of remote communication tools deserves particular attention. They have a considerable influence on the course of proceedings and can improve their implementation. Remote communication tools also offer the possibility of a potentially wider participation of victims in the proceedings.

¹¹² See ICC, *Prosecutor v. Joseph Kony*, Case no. ICC-02/04-01/05, available online at <https://www.icc-cpi.int/uganda/kony> (accessed 5 September 2024).

¹¹³ ICC, *Prosecutor v. Joseph Kony*, Case no. ICC-02/04-01/05, Decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence, 23 November 2023.

¹¹⁴ See Wheeler, *supra* note 9, p. 230.

The main mechanism that has made progress in the use of remote communication tools in international criminal proceedings so significant can be seen as the linking the role of these methods of participation in proceedings with the role of the victim. The willingness to use remote means of communication as a means of protection for witnesses is due to the need to increase the likelihood of victims' participation in proceedings, and thus the legitimacy of international criminal courts and tribunals. The specificity of international criminal law as it relates to crimes under international law, which are often committed by persons who are also high-ranking state or military officials, is also important. In this context, there is a risk that such officials may influence the victims and pose a threat to their safety. This leads to an increased use of protective measures, such as remote communication tools, which allow victims to participate in proceedings from a distance.

While until the COVID-19 pandemic, the development of remote communication tools was more related to the increase in the role of the victim in international criminal proceedings in the context of individual courts and tribunals, during the pandemic the axis of interest shifted towards the accused.

There was thus a further change in the approach to participants in international criminal proceedings, which was determined by the use of remote communication tools. On the one hand, the remote participation of the accused in the proceedings has increased significantly. On the other hand, in some cases one can recognize the pressure from the ICC Chambers, which suggest on their own initiative that remote means of communication should be used and that the accused should participate in parts of the proceedings in this way. There is therefore a third possibility for the accused to participate in the proceedings remotely. This time, this remote participation does not happen due to a disruption of the trial by the accused or at his or her written request, but due to a necessity caused by the circumstances of a health crisis, which entails the need to adapt to this type of situation, whereas there is also the influence of the ICC Chambers on the remote appearance of the accused. These decisions were not made on the basis of the provisions of the Rome Statute on remote attendance, but on the basis of mutual agreements and interpretations of the existing rules.

During the pandemic, more attention has been paid to the remote participation of the accused in the proceedings (or parts of the proceedings). A decision had to be made as to whether the health conditions allowed individual stages of the proceedings to be conducted on-site. Previously, this question mainly related to the victim. The pandemic therefore represents a further milestone in the evolutionary development of remote participation in international criminal proceedings. This health crisis has increased the frequency of remote participation by

the accused, although it has not led to such participation in the trial, but only in other parts of the proceedings, especially pre-trial.

While in the case of the victim, remote participation does not cause much controversy, in relation to the accused, one can see a field for development and further discussion on this topic. There is a lack of a system of adequate procedural safeguards for the remote participation of the accused in the proceedings. An important question that needs to be clarified is, above all, whether the remote participation of the accused is equivalent to being present on-site. Irrespective of this, the conditions for the remote participation of the accused in the trial should also be defined. Undoubtedly, remote participation affects the rights of the accused, warranting further research into its implications. This topic will probably attract the most interest in the coming years, as the current development of remote participation of the accused in proceedings before the ICC is focused on procedural steps other than the trial proper. On the other hand, the literature explicitly mentions that trial can be conducted remotely, even if only partially.¹¹⁵ It appears that the use of remote communication tools, including for the accused, is likely to persist, particularly due to the pandemic experience, ongoing technological advancements, and evolving challenges in international criminal justice.

Therefore, a new approach to the remote participation of accused persons in proceedings before the ICC is needed in the future, which at the same time offers them procedural guarantees and clearly defines the conditions for such participation.

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¹¹⁵ Schabas and Caruana, *supra* note 61, side note 38 to art. 63.