



Transforming attendance at the International Criminal Court: Judicial approaches to remote participation of witnesses and the accused

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Abstract

This paper examines how the International Criminal Court (ICC) has addressed remote participation of both witnesses and the accused, and how these practices have shaped attitudes toward presence. By analysing ICC decisions in which remote participation has been authorised, and drawing on current doctrinal research on virtual justice, we show that judicial practice remains fragmented. ICC judges tend to permit remote testimony by witnesses more openly than remote participation by the accused, relying on inconsistent understandings of presence. We argue that a clearer and more coherent framework is needed—one that places the accused's fair trial rights at its core.

Key words

Remote participation, virtual justice, International Criminal Court, judicial approaches, witnesses, accused

Resumen

Este artículo examina cómo la Corte Penal Internacional (CPI) ha abordado la participación a distancia tanto de los testigos como de los acusados, y cómo estas prácticas han influido en las actitudes respecto a la presencia. Mediante el análisis de las

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resoluciones de la CPI en las que se ha autorizado la participación a distancia, y basándonos en la investigación doctrinal actual sobre la justicia virtual, demostramos que la práctica judicial sigue estando fragmentada. Los jueces de la CPI tienden a permitir el testimonio a distancia de los testigos con mayor apertura que la participación a distancia de los acusados, basándose en interpretaciones inconsistentes del concepto de presencia. Sostenemos que se necesita un marco más claro y coherente, que sitúe en el centro los derechos del acusado a un juicio justo.

Palabras clave

Participación a distancia, justicia virtual, Corte Penal Internacional, enfoques judiciales, testigos, acusados

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1. Introduction

In 2021, a “digital turn” in international criminal proceedings was identified (Koenig *et al.* 2021, 5). While much attention has focused on the increasing use of digital technologies in the investigation and prosecution of international crimes, their influence extends beyond evidence gathering and analysis. Digital technologies have also transformed the conduct of proceedings themselves, reshaping courtroom practices. One manifestation of this development is the growing use of remote participation, which has become increasingly common and, in some contexts, standard practice. This evolution appears particularly suited to international criminal proceedings, where participants are often located far from the places where crimes were committed and from the courts adjudicating them.

In the context of the International Criminal Court (ICC), remote participation raises several questions with competing interests. The permanent jurisdiction was established with the dual objective of ending impunity for the most serious human rights violations and exemplifying adherence to international human rights standards, including the rights associated with a fair trial. Allowing the virtual attendance of key trial participants raises the question of whether the rights of the accused can be effectively safeguarded in a remote setting.

We aim to address this issue by analysing ICC Chambers’ decisions relating to the remote participation of two sets of participants, namely witnesses and the accused. In doing so, we reconstruct the judicial approaches to video-link testimonies of witnesses and the accused’s remote participation. Our focus covers all stages of proceedings in which remote participation has so far occurred at the ICC. We supplement our analysis with current research on virtual justice, as well as scholarship on the implementation of remote participation at the ICC. This combined approach allows us to integrate judicial reasoning with academic insights and to critically reflect on ICC Chambers’ approach to participation.

The following part of our paper provides an overview of the rationales for physical participation in criminal proceedings. The third part outlines the rationale for remote participation at the ICC. The fourth part presents the fragmented picture of judicial approaches to participation, highlighting the differences between witnesses and the accused. The fifth part discusses remote participation and its implications for fairness and certain rights of the accused, notably the rights to be present at trial, to cross-examine, and to a fair assessment of evidence.

2. The rationales for physical participation in the ICC courtroom

The Rome Statute, the constituent treaty establishing the ICC, entered into force in 2002 following years of negotiations between UN Member States. Drafters brought with them practices from both inquisitorial and adversarial models of justice, shaping the treaty to varying degrees (Kress 2003). That said, many agree that the Rome Statute cannot be characterised as a hybrid system combining elements of the two traditions; rather, it constitutes a *sui generis* system (Weisbord 2011). Some procedures are therefore unique and alien to both models. At the same time, experts consider that several procedures and aspects of the trial have taken on an adversarial nature, following the example set by the ICC’s predecessors, the International Criminal Tribunal for the former Yugoslavia and

the International Criminal Tribunal for Rwanda (Fairlie 2018). These aspects include, notably, the accused's physical participation and important principles of evidence, such as the principle of orality (Schabas 2016).

Under common law traditions, the presence of the accused at trial has been justified on two main grounds. On the one hand, presence operates as a fair trial *right*: being present allows the accused to participate effectively in the proceedings, including by hearing and understanding the case against them, instructing counsel, and challenging the evidence (Cataleta 2014, Triffterer and Ambos 2016, Registry of the European Court of Human Rights 2026). On the other hand, it is conceived as a public *duty*: the accused must appear before the court to answer the charges, thereby reinforcing the authority and deterrent functions of the criminal justice system (Tladi 2017, Turner 2025).

Both aspects are reflected in the ICC framework, in particular in Article 63(1) of the Rome Statute, which requires the accused's presence, and Article 67(1)(d), which guarantees the right to be present. As explained below, certain rationales for the physical participation of the accused and witnesses are interdependent. The accused's ability to effectively confront witnesses depends, in part, on the physical participation of both. In addition, the long-standing assumption that in-court testimony discourages deception is tied to the accused's duty to be physically in the courtroom.

More prominently in relation to testimonies, truth-seeking rationales lie at the core of the requirement that witnesses testify in person. This is achieved in large part through the principle of orality, which holds that "evidence is heard live and orally from individuals who possess first-hand knowledge about the material issues in the case" (Fairclough 2024, 648). The Rome Statute reflects this principle in Article 69(2), which expresses the desire that the primary source of testimonial evidence be given orally (Gosnell 2010, Schabas 2016, Ambos 2022, Ochi 2024, ICC, *The Prosecutor v. Bemba Gombo*, Decision, 3 May 2011, para 76): "*The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. [...].*" (ICC 1998, Article 69(2); emphasis added).

The ability to observe a witness' demeanour is considered a corollary to the orality principle, alongside cross-examination (Jackson 2023, Fairclough 2024). Historically, demeanour evidence was believed to guarantee a comprehensive and reliable credibility assessment, by allowing truth-finders to detect lies and discern a witness' "deep character", while cross-examination provided the best opportunity to establish rapport with witnesses and challenge the accuracy and veracity of their account (Wallace 2011, McKay 2018, Abu 2020, Bandes and Feigenson 2020, Baker McKenzie 2021, Denault and Patterson 2021, Lazer 2021, Jackson 2023, The Pandemic Practices Working Group 2023, Jackson *et al.* 2024). As a result, in-person testimony was, and is still considered by some practitioners and scholars today, the gold standard for implementing these two corollaries (Garofano 2007, Porter *et al.* 2010, Wallace 2011, McKay 2018, Bandes and Feigenson 2020, Jiang *et al.* 2020, Benninger *et al.* 2021, Carline *et al.* 2021, Lederer 2021, Turner 2021, Denault and Patterson 2021, Philp 2022, The Pandemic Practices Working Group 2023, McKay 2026).

However, recent doctrinal and empirical research has challenged these assertions, particularly with respect to vulnerable witnesses, for whom reliance on demeanour may perceptively undermine their credibility rather than facilitate the search for truth

(Fairclough 2024). In parallel, scholars have also reconsidered whether the accused's physical presence is necessary at all stages of proceedings to achieve the public and procedural objectives traditionally associated with it (Wheeler 2018, Massimino 2024, Gureghian Hall 2026). Against this background, many commentators argue that the core features of both the orality principle and the accused's participation may, in certain circumstances, be preserved remotely, that is, through a form of live, interactive, but technologically mediated presence (Wheeler 2018, Ambos 2024, Ochi 2024, Sobański 2025). This reassessment has contributed to the growing use of video-link technology in criminal proceedings, including before the ICC.

That said, socio-legal studies have added nuance to the debate, questioning the impact of remote participation on the broader quality of justice. For centuries, legal proceedings have been anchored in a specific physical setting that brings together the accused, the accuser(s) (sometimes witnesses), and the decision-makers. The courthouse has thus functioned not merely as a venue for adjudication but also as "as an appropriate medium through which to represent prevailing ideals of justice" (Mulcahy 2008, 476). As such, the design and materiality of court buildings communicate authority and reinforce relations of power, signalling that appearing before a court is not an ordinary social interaction but a formal and consequential civic encounter. Courtrooms are therefore expected to embody the *gravitas* of judicial proceedings and the authority of the law itself (Flower 2025).

With regard to remote testimony, Linda Mulcahy argues that it

produces witnesses to whom a physical or emotional reaction, be it attraction or repulsion, is less likely or less potent. [...] The power of legal proceedings to shock, move or anger participants is reduced and the power of the trial as an important social ritual lessened (Mulcahy 2008, 486).

The physical absence of the witness from the courtroom, outside the accused's presence, may also convey the impression that the public performance of civic duties associated with testimony has become an inconvenience to be managed rather than a central component of the justice process (Flower 2025). A similar observation can be made for the physical presence of the accused.

In addition, video-link technologies are routinely used for everyday life activities such as attending classes or communicating with friends and family. Precisely because of this ubiquity, they carry an aura of informality that may limit their capacity to convey solemnity or gravity when transposed into the judicial context. Mulcahy illustrates this point through an analogy:

If we accept that the experience of watching a film in a cinema is a radically different experience from live theatre, why are we not more alert to the difference between live performance and images conveyed on a flat screen in the courtroom? Viewed in this way live link is not just a substitute for a well-worn method of producing evidence. It is a new way of communicating; a hybrid form of media which relies on a mixture of silicon and genes and generates representations of witnesses that we can hear but not smell, see but not touch. In other words, it transforms evidence-giving from the sensual to the sanitized and conveys images through a medium closely associated with fiction. [...]. The experience of presence and absence presents a cognitive contradiction between sensation and thought which, it is suggested, may leave us confused about what matters in the courtroom and why (Mulcahy 2008, 485-486).

3. Rationales for remote participation at the ICC

Whether to ensure the accused's participation or to allow witnesses to testify remotely, the use of video-link technology at the ICC has been driven by distinct needs and contextual constraints.

Similar to domestic jurisdictions, the need to protect witnesses' safety and well-being emerged as the primary driver of the use of video-link testimony, albeit for different reasons. While it is true that this mode of testimony generally shields witnesses from confronting the accused in person,³ at the ICC, video-link testimony can be said to protect witnesses' safety and well-being to a greater extent. ICC witnesses have often experienced significant trauma having suffered and/or witnessed "the most serious crimes of concern to the international community" (ICC 1998, Preamble; see Schot 2024, 5-7, Knoops 2024, 47-48), they are required to travel to the seat of the Court in The Netherlands, a foreign country, for several days,⁴ and they sometimes risk physical retaliation from unprosecuted perpetrators upon return to their country of residence. On that last point, given that the ICC seeks to prosecute "those situated at the highest echelons of responsibility," there is a risk that low-ranking perpetrators remain at large and pose threats to witnesses (Office of the Prosecutor of the International Criminal Court 2010, 6, Ochi 2024, Knoops 2024). Video-link testimony thus serves here as a de facto protective measure.

Similarly, the well-being of accused persons detained at the ICC Detention Centre has been a central factor in the use of video-link technology. In fact, accused persons are sometimes of advanced age, as they are typically high-ranking officials alleged to have committed crimes decades prior to the proceedings.⁵ As such, sustained physical participation in the courtroom can be difficult and demanding, especially when compounded by physical or mental health issues. In these cases, a request for a video-link may be necessary to ensure the accused's effective participation (see section 3.2). Additionally, some accused may also be victims of the conflict or broader political context, having endured torture before being transferred to The Hague or having been former child soldiers.⁶ As a result, trauma may be triggered when they are required to physically participate in the courtroom. That being said, in the Al-Hassan case, Defence counsel opposed remote participation for the accused, arguing that, as a torture survivor, he suffered from "post-traumatic stress syndrome with chronic dissociative features" and needed to be physically present so that counsel could "assess if he's effectively

³ This was one of the primary reasons to introduce video-link testimonies in domestic jurisdictions.

⁴ A majority of situations and cases at the ICC involve crimes committed in African countries; witnesses must therefore travel overseas to testify in person. Prolonged absence may risk signalling witnesses' cooperation with the ICC and hence exposing them to threats. See "Situations under investigations", *International Criminal Court* (Web page) <https://www.icc-cpi.int/situations-under-investigations>; Human Rights Center, University of California, *Bearing Witness at the International Criminal Court: An Interview Survey of 109 Witnesses* (June 2014), 14; International Bar Association, *Witnesses before the International Criminal Court* (July 2013), 18.

⁵ A useful example could be the Duterte case, where health issues related to advanced age play an important role in discussions about how the proceedings should be conducted.

⁶ It should be noted that this type of accused person has already been tried before the ICC, although they were physically present in court. As technology advances, it would be advisable for the ICC to reconsider whether remote attendance could offer a more comfortable form of participation for vulnerable accused persons, even for parts of the proceedings.

participating or whether he's coping by dissociating, by switching off" (ICC, *The Prosecutor v. Al-Hassan*, Transcript, 30 June 2020, 38, 39).

Beyond safety and well-being considerations, video-link technology has emerged as a pragmatic and efficient tool. As a technology that bridges distances, this remote form of participation is particularly relevant to the ICC, as it sits thousands of kilometres away from most of its witnesses, who must obtain visas and passports to travel abroad (ICC, *The Prosecutor v. Bemba*, Unified Protocol, 22 October 2010, Human Rights Center 2014). Securing this documentation often encounters unforeseen administrative delays in countries of residence or resistance from those States to cooperate with the Court. This is particularly true for Defence witnesses, as "some governments may have a vested interest in seeing certain ICC defendants convicted" (International Bar Association 2013, 38). In such circumstances, video-link testimonies provide an easier and more expeditious alternative.

Similar considerations apply to accused persons who are not detained at the ICC Detention Centre. If they are summoned to appear, or if they have been released and are not subject to an arrest warrant, travelling from other continents can disrupt their daily lives and professional responsibilities (Wheeler 2017, 2018). Interestingly, the ICC's jurisdictional focus on high-ranking officials is a key rationale for the accused's remote participation. In fact, these accused might find it challenging to balance official duties with repeated physical appearances before the ICC.⁷ For these reasons, in the second decade of the ICC's functioning, the State Parties amended the Rules of Procedure and Evidence to introduce the possibility for the accused to request remote participation during part(s) of the trials (ICC Assembly of State Parties 2013, Tladi 2017). Allowing virtual participation may reduce the burden associated with physical attendance and, in consequence, increase the high-rank accused's willingness and ability to participate in the proceedings at all (Wheeler 2017).

Less explicit, video-link testimonies respond to financial pressures from the Court's donors to speed up proceedings and cut costs (Naouri and Jacobs 2023). In this regard, the Independent Expert Review, established by ICC States Parties to enhance the "performance, efficiency and effectiveness of the Court", suggested in 2019 to "maximise the use of technology in the presentation of evidence insofar as that is consistent with the interests of justice" (Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020, 7, 179).

4. The disjointed rise of remote participation at the ICC

4.1. Video-link testimonies of witnesses

As noted above, the possibility of video-link testimony is provided for in Article 69(2) of the Rome Statute. Notwithstanding this textual basis, the Court's early practice was characterised by a presumption in favour of in-person testimony, which remained the predominant mode of adducing evidence to establish the accused's guilt until

⁷ It is possible for the ICC Pre-Trial Chambers to issue arrest warrants against high-ranking officials who remain in power during the investigation and subsequent stages. It may therefore occur that such individuals participate in ICC proceedings while still serving as presidents or other senior officials, as was the case of Ruto and Kenyatta.

approximately 2020 (International Bar Association 2013). Over time, however, and as discussed below, the use of video-link testimony evolved through the Court's jurisprudence: initially conceived as an exceptional measure, granted only in limited circumstances, it has progressively come to be treated as an equivalent substitute for in-person testimony.

The issue of video-link testimony first arose in the ICC's inaugural *Lubanga* case in 2008. In preparation for trial, the Court indicated that the general presumption was that "witnesses will give evidence by way of live in-court testimony" (ICC, *The Prosecutor v. Lubanga*, Decision, 29 January 2008, para 41; ICC, *The Prosecutor v. Lubanga*, Redacted Decision, 9 February 2010, paras 15-18; ICC, *The Prosecutor v. Bemba Gombo*, Decision, 6 February 2013, paras 28-31). As the proceedings unfolded, exceptional circumstances required the Court to assess its first request for remote testimony. The request concerned a vulnerable Defence witness who had never travelled abroad and was unfamiliar with basic norms of life in Europe, such that the change of environment was expected to be extremely upsetting (ICC, *The Prosecutor v. Lubanga*, Redacted Decision, 9 February 2010, para 16). The Court granted the request, finding that the risks to her psychological well-being were sufficiently significant to justify video-link testimony (ICC, *The Prosecutor v. Lubanga*, Redacted Decision, 9 February 2010, para 16).

Based on this precedent, the Court subsequently acknowledged that the term "given in person" in Article 69(2) did not imply unconditional testimony in court; rather, exceptions exist, including video-link testimony, which may be granted "whenever necessary" (ICC, *The Prosecutor v. Bemba Gombo*, Redacted Decision, 12 October 2010, para 10). As a result, the personal circumstances of the witnesses, previously linked to considerations of well-being, were extended in the *Bemba* case to encompass "other types of personal circumstances" (ICC, *The Prosecutor v. Bemba Gombo*, Redacted Decision, 12 October 2010, para 13). In that instance, the witness was unable to travel to the Hague due to exceptional professional obligations, arising from his role "in the judicial system and the presidential election process of the Central African Republic" (ICC, *The Prosecutor v. Bemba Gombo*, Prosecution request, 6 February 2012, para 4).

In the years that followed, grounds for permitting video-link testimonies moved beyond the witness's personal circumstances to include "logistical difficulties in arranging a witness's travel to testify at the seat of the Court in The Hague, which would seriously impact upon the expeditious conduct of the proceedings" (ICC, *The Prosecutor v. Bemba Gombo*, Public redacted version, 7 March 2013, para 7). This reasoning emerged after prolonged efforts to secure cooperation from the countries where witnesses were located, including non-States Parties to the Rome Statute, in order to facilitate their appearance before the Court (ICC, *The Prosecutor v. Bemba Gombo*, Defence Submissions, 10 May 2013, para 6).

In 2016, the practice of video-link testimony took a significant step forward when Single Judge Schmitt departed from the presumptive rule requiring in-person testimony. The judge based this decision on the view that the two modes of testimony were, both legally and factually, not "meaningfully different" (ICC, *The Prosecutor v. Bemba Gombo et al.*, Decision, 4 March 2016, para 15). From a legal standpoint, Judge Schmitt argued that the term "presence" as used in relevant provisions of the ICC legal framework, notably Rule 134 *bis* concerning the accused's "Presence through the use of video technology", had

been interpreted in both a physical and virtual sense. Consequently, he suggested that “If video-link witnesses are ‘present’ before the Chamber and give *viva voce* testimony, then there is simply no statutory imperative to treat video-link significantly differently from in-court testimony” (ICC, *The Prosecutor v. Bemba Gombo et al.*, Decision, 4 March 2016, para 11). From a factual perspective, the judge emphasised the live nature of video-link testimony, as well as the possibility of cross-examination and the Chamber’s observation of witnesses’ demeanour and composure, assuming a good connection (ICC, *The Prosecutor v. Bemba Gombo et al.*, Decision, 4 March 2016, para 12).

Based on this “established” equivalence, Judge Schmitt concluded that parties should retain “a degree of deference in whether they wish for witnesses to appear in-court or via video-link” (ICC, *The Prosecutor v. Bemba Gombo et al.*, Decision, 4 March 2016, paras 14, 16). Subsequent Chambers likewise abandoned the exceptional character previously ascribed to video-link testimony, allowing its use for reasons not previously contemplated, such as the Court’s limited financial resources (ICC, *The Prosecutor v. Bosco Ntaganda*, Decision, 9 September 2016, paras 1-4; ICC, *The Prosecutor v. Bosco Ntaganda*, Decision, 5 January 2018, paras 3-4).

Beyond recognising its factual and legal equivalence, the Court later also established the *procedural* equivalence of video-link testimony, thereby removing the need to submit formal requests or provide specific justification for its use. Since around 2020, parties have been required only to indicate their preferred mode of testimony for each witness in the witness list they submit in preparation for trial (ICC, *The Prosecutor v. Al-Hassan*, Annex A to the Decision, 6 May 2020, paras 54-55; ICC, *The Prosecutor v. Al-Hassan*, Decision, 6 August 2020, para 5).

In sum, while video-link testimony was initially distinguished from in-person testimony on evidentiary grounds, the two modes are now considered equivalent, regardless of the testimony’s importance. Here, remote presence is equated to physical presence (provided a good connection).

4.2. *The accused’s remote participation*

Regardless of the specific phase of the proceedings, the accused’s remote participation at the ICC requires judicial authorisation. The ICC Chambers retain discretionary power to determine whether an accused participates physically or remotely. In this sense, the accused may request remote participation, but they do not yet possess the right to virtual presence—rather and as a reminder, the accused possesses a right to *physical* presence (see Section 2; ICC 1998, Article 67 (1) (d)). To date, ICC case law has evolved to permit remote participation primarily in preparatory hearings, such as status conferences, and hearings concerning non-evidentiary matters, rather than during key parts of the trial.⁸ This stems from Rule 134 *bis*, which requires the Trial Chamber to consider “the subject

⁸ In addition, Mr Ongwen appeared remotely before the ICC Trial Chamber during the delivery of the Order on Reparations to victims, and before the ICC Appeals Chamber during the delivery of the Judgment on the Appeal against the Reparations Order. See ICC, *The Prosecutor v. Ongwen*, Transcript, ICC-02/04-01/15-T-270-ENG, Trial Chamber IX, 28 February 2024; ICC, *The Prosecutor v. Ongwen*, Transcript, ICC-02/04-01/15-T-271-ENG, Appeals Chamber, 7 April 2025.

matter of the specific hearings in question” then assessing such requests (ICC 2002, Rule 134 bis (2)).

The accused’s virtual participation was first litigated in the *Kenyatta* case. Trial Chamber V(b) had rejected the Defence request for Kenyatta, the President of Kenya at that time, to attend a pretrial status conference remotely. Given the critical nature of the conference and its impact on “the interests of the accused, of victims and of witnesses”, the Trial Chamber concluded that “the requirements of justice” necessitated the physical presence of Kenyatta (ICC, *The Prosecutor v. Kenyatta*, Decision, 30 September 2014). The value attributed to physical presence thus appeared to have depended on the perceived normative importance of the hearings in question.

As was the case for video-link testimonies, the COVID-19 pandemic intensified discussions about the accused’s virtual participation. As part of the Court’s measures to maintain the continuity of proceedings while ensuring physical safety, arrangements were made for the accused’s remote participation from the ICC Detention Centre (The Presidency of the International Criminal Court 2020). During that time, the use of video-link technology increased significantly, although confined to appeal proceedings due to their “civil” nature (Dubuc 2024, Sobański 2024, ICC, *The Prosecutor v. Gbagbo and Blé Goudé*, Decision, 22 May 2020, para 7). This period confirmed the Court’s power to determine the accused’s mode of participation, including, in contrast to *Kenyatta*, the possibility of virtual participation (Dubuc 2024, Sobański 2024, 2025).

Recent developments in the *Gicheru* and *Duterte* cases have further extended the scope of video-link technology to ensure the accused’s participation. During the Defence closing statements, Mr Gicheru was permitted to participate remotely, given that this stage of the proceedings was considered less critical. The ICC Trial Chamber referred to the brief duration of the closing statements and their purposes as part of its rationale, while the Defence argued that it was unreasonable for the accused to bear the costs of travelling to and staying in the Netherlands solely to attend this stage (ICC, *The Prosecutor v. Gicheru*, Decision, 13 June 2022, para 7; ICC, *The Prosecutor v. Gicheru*, Request, 9 June 2022). This case was the first in which virtual participation was extended to accused persons subjected to an arrest warrant who have been granted interim release (Dubuc 2024). In the second case, Mr Duterte was allowed to appear remotely at his initial appearance hearing due to health reasons following a long transfer from Asia to the ICC Detention Centre (ICC, *The Prosecutor v. Duterte*, Transcript, 14 March 2025). To date, Mr Duterte has not appeared in person before the Court, having participated remotely in the confirmation of charges hearing and the first two trial status conferences due to their relatively short duration. He is, however, expected to attend the next hearing on 7 September 2026 in person (ICC, *The Prosecutor v. Duterte*, Transcript, 23 June 2026).

Overall, the use of video-link technology to ensure the accused’s presence is on the rise at the ICC, albeit confined to certain non-evidentiary hearings and subject to the Court’s authorisation. Virtual participation appears to be distinguished from physical participation insofar as only the latter mode can adequately fulfil the interests of justice. Interestingly, the Court cancelled a trial hearing in 2022, given that the accused had not waived his right to be present and was forced to participate virtually from the detention centre. The Court reached that conclusion considering that the witness planned to be heard was central to the Prosecution’s case and would affect the accused “more than

peripherally” (ICC, *The Prosecutor v. Yekatom and Ngaïssona*, Transcript, 5 December 2022).

5. Remote participation and fairness

5.1. *Specific rights of the accused*

The use of video-link technology to ensure the accused’s participation or witnesses’ testimonies may both enforce and hinder the accused’s rights.

As for the understanding of fairness and the rights of the accused, we agree with Yvonne McDermott and Sophie Rigney that, although fairness and fair trial rights are analytically distinct, they are closely interrelated and are owed primarily, if not exclusively, to the accused (McDermott 2016, Rigney 2022). Fairness, in this sense, extends beyond the guarantees expressly enumerated in Article 67 of the Rome Statute and includes, *inter alia*, the requirement of a fair evaluation of the evidence. Moreover, we believe that, from this perspective, a fair trial cannot be reduced to formal compliance with procedural guarantees, it also depends on how the proceedings are experienced by the accused. Accordingly, the accused’s perception of fairness should inform, to some extent, the assessment of whether procedural justice is achieved in practice and whether the proceedings can be regarded as fair and legitimate (Belloni *et al.* 2025).

Circling back to the rights of the accused, we argue that the right to presence should encompass both physical and virtual forms of participation, thereby entitling the accused to choose their mode of participation or to waive presence altogether, depending on what best ensures a fair trial. As illustrated in relevant case law above, virtual participation may sometimes be the only way for the accused to exercise their rights, especially their right to be present. Remote participation may thus enable meaningful presence, understood as the ability to follow the proceedings and to instruct counsel. This remains contingent, however, on the adequacy of the video-link conditions, which must approximate physical participation sufficiently for the accused to see the courtroom and all participants, to speak, ask questions, make oral submissions, and review the evidence presented (Dubuc 2024, Sobański 2025). That being said, we remain of the opinion that virtual participation is materially different from physical participation insofar as it introduces physical and psychological distance from the courtroom and reduces exposure to its formality and interpersonal dynamics. For this reason, imposing remote participation on the accused remains controversial, particularly in the absence of consent. Conversely, requiring physical attendance where virtual participation would better secure other fair trial interests, such as effective participation, may equally undermine fairness. Overall, the impact of the mode of participation on fairness is context-specific and depends on the circumstances of the accused and their opinion of what would best safeguard their rights.

For witnesses, video-link testimonies may enforce the right of the accused to obtain the attendance and examination of witnesses on his or her behalf. Conversely, when the technology is used for prosecution witnesses to establish criminal responsibility, it may compromise the right to effective cross-examination and to a fair assessment of the evidence. This potential infringement stems from the studies cited above regarding the establishment of rapport and the evaluation of demeanour evidence and credibility. As

argued by one of us elsewhere with regard to the Court's current approach towards video-link testimonies (VLT):

while the risks to the accused's rights were less pronounced prior to 2016, when VLT remained an exceptional measure typically employed for peripheral witnesses, the adoption of a more flexible approach has amplified the potential for prejudices. In particular, I contend that this shift has weakened the Defence's ability to contest specific uses of VLT and, consequently, undermined safeguards against VLT's adverse effects on the rights of the accused (Dubuc 2026, 12).

5.2. *Different interpretations of presence and its impacts on broader aspects of fairness*

The ICC case law reveals divergent understandings of the notion of "presence" depending on whether it concerns the accused or a witness. With respect to the accused, the concept has encompassed different meanings, reflecting both the discretionary space afforded to judges and the dual characterisation of the accused's presence as simultaneously a right and a duty (Dubuc 2024). In that case, virtual presence appears inherently different, as it cannot fulfil the same penological affordances traditionally attached to the accused's physical presence in the courtroom. By contrast, with respect to witnesses, presence has been understood to encompass both physical and virtual forms, so that a witness may be regarded as present before the Court either in person or via video-link technology (ICC, *The Prosecutor v. Bemba et al.*, Decision, 4 March 2016).

From a fairness perspective, these divergent interpretations entail the risk of undermining legal certainty. The concept's fluctuating meaning undermines clarity and predictability about what is permissible. Such uncertainty engages a core fair trial guarantee, as it may directly affect the right to adequate time and facilities for the preparation of the defence under Article 67(1)(b) of the Rome Statute. In practical terms, this uncertainty does not merely cause procedural inconvenience, it risks placing the defence at a structural disadvantage by diverting limited time and resources to clarifying the scope of an indeterminate concept.

This uncertainty, while it may be motivated by managerial or penological considerations, as if the Court instrumentalises the term to accommodate different imperatives, rests on empirically unsettled assumptions regarding the equivalence between physical and virtual presence and, potentially, on a limited understanding of its phenomenological, behavioural, and psychological dimensions. Notably, ICC judges rarely cite empirical research when discussing the topic. In a recent exchange, the Duterte presiding judge dismissed the defence concerns regarding video-link testimonies by referring to the COVID-19 pandemic and how, during that time, everyone "did everything on AVL" (ICC, *The Prosecutor v. Duterte*, Transcript, 27 May 2026, 17–18).⁹ Nonetheless, and as briefly discussed above, when elements of the trial are displaced into a virtual environment, notably the physical body of a participant, the sensory cues of the courtroom, the judicial authority of the judges, the solemnity of proceedings and the human connections between participants are transformed. This shift may in turn shape how stakeholders, including the accused, experience the trial and perceive its legitimacy (Belloni *et al.* 2025, Kremens and Peristeridou 2025).

⁹ Cf. ICC, *The Prosecutor vs. Said*, Defence Appeal Brief against the "Decision on the Use of Video-Link Technology" delivered on 4 August 2022, 29 August 2022, para 44 ff.

At the ICC, as for other judicial institutions, fairness is closely linked to legitimacy. It is crucial that the accused perceive the proceedings as fair in order to accept the authority of the Court and, as a result, to confer legitimacy upon it. (Wheeler 2023). We submit that an inconsistent framework governing participants' remote attendance risks undermining this perception. Such a framework may give rise to an objectively justified perception that the Chambers are willing to compromise the quality and fairness of the proceedings to secure testimony in an efficient and cost-effective manner, while simultaneously restricting the accused's own ability to participate remotely for deterrence purposes or other discretionary matters. Extending the right to be present to include the possibility of remote participation could enhance the ICC's legitimacy, as it would enable the accused to choose their mode of participation depending on their perception of what is fair (Sobański 2025). Similarly, adopting an approach to video-link testimonies that allows the accused to meaningfully contest their use could better ensure that key witnesses are effectively examined and their evidence assessed fairly. Such recommendations begin with adopting a consistent interpretation of presence, one that explicitly recognises the material differences between physical and virtual attendance, and that the fairness of both depends on a contextual and practical interpretation of fair trial rights. Such an interpretation would not only safeguard the fairness of proceedings but also strengthen the legitimacy of the Court.

6. Conclusion

This article sought to explore the relationship between fairness and remote appearances of witnesses and the accused at the ICC.

Our main finding is that ICC's judicial approaches to presence are inconsistent when comparing witnesses and the accused. Chambers tend to adopt a more liberal approach to remote witness testimony, while applying a stricter standard to the accused's remote participation. Whilst prompted by a myriad of administrative, political and judicial factors, this two-track approach is also based on an inconsistent interpretation of presence. We argued that this lack of clarity impinges on legal predictability. That said, the article suggests that remote testimony and remote attendance are not inherently prejudicial to fair trial rights. The determination of such is context-dependent and requires a case-by-case analysis. In this context, safeguarding the accused's fair trial rights should take primacy as a way to ensure fairness and the legitimacy of proceedings. Remote appearances should be guided primarily by these considerations, rather than by penological, managerial and other peripheral goals of international criminal justice.

While it is important to question the fairness of virtual presence, it is also important to pursue a similar inquiry regarding physical presence, such as asking: are we romanticising physicality? Are we holding on to the traditional practice of conducting trials in a physical courtroom simply because "this is the way it has been done" for decades? There is a danger that an over-reliance on historical precedents can transform justice sites into "frozen sites of nostalgia" (Mulcahy 2008, Susskind 2019). The risk is also to hold on to procedural traditions that are often responsible for excessive delays and costs (de Vocht and Jacobs 2024). Romanticised or not, efficient or not, costly or not, this article ultimately demonstrates that the evaluation of both virtual and physical participation must remain anchored in respect for the rights of the accused, whose culpability constitutes the core subject of international criminal adjudication.

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