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**VIDEOCONFERENCING:
NOT A FOREIGN LANGUAGE TO INTERNATIONAL COURTS**

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I. Introduction

In an ever expanding world filled with rapidly advancing technology, certain innovations can modify and facilitate some of the world's oldest traditions. The conventional practice of presenting in-person witnesses at trial has become increasingly more difficult due to the introduction and expansion of international crimes. New crimes and clever criminals have resulted in the implementation of new technologies in criminal trials in the United States. While a witness's presence at trial may be hindered by geographical impediments, fears associated with testifying in person, or even lack of security at the trial site, there nevertheless remains a viable method to obtain testimony. Through videoconferencing, unavailable witnesses can be transmitted into courtrooms, thus eradicating the limitations on testimonies of encumbered individuals as well as individuals located worldwide. Videoconferencing appears to be an unassailable solution; however, as a seemingly new technology, it presents a number of practical and legal issues for courts.

This note compares the use of videoconferencing technology (VCT) in federal criminal trials in the U.S. with international criminal trials in various tribunals such as the International Criminal Tribunals for Former Yugoslavia and Rwanda. Part II characterizes the variety of ways videoconferencing may be used in trials. Part III addresses the use of document conferencing in conjunction with videoconferencing, as a more advanced alternative for courts with unavailable

witnesses. It also distinguishes videoconferencing from depositions taken pursuant to Rule 15 of the Federal Rules of Criminal Procedure. Part IV discusses the use of videoconferencing with regard to witness protection, noting issues such as safety and health concerns, minors, and the general unwillingness of witnesses to testify at trial. Part V lists the advantages of using video technology to obtain testimony, including the reduction of costs and persuasion of reluctant witnesses to testify. Finally, Part VI identifies the disadvantages and foreseeable problems associated with the use of VCT in trials.

Videoconferencing preserves evidence by utilizing document conferencing.¹ It also supplements depositions by enabling witnesses to testify from any location in the world. Moreover, videoconferencing protects witnesses by allowing individuals unwilling or unable to testify in court to testify from protected locations that require little to no travel or expense.² Despite such advantages, there are several drawbacks to videoconferencing that have produced a significant amount of criticism.³ Opponents of VCT maintain that the lack of eye-to-eye contact between witnesses and other court participants is troublesome to the constitutional right to confront witnesses.⁴ Additionally, the costs associated with obtaining and maintaining equipment needed for videoconferencing, and the possible inability of developing nations to participate in videoconferencing, are issues central to the debate.⁵

¹ 58 AM. JUR. *Trials* 481 § 104 (1996).

² Carole Basri & Irving Kagan, *Law Department Technology*, in PRACTICING LAW INSTITUTE: CORP. LEGAL DEP'T 6-14 (2005), available at PLIRE R- CORPLEG § 6:9.

³ *Advantages of Videoconferencing Grow with Use*, THE THIRD BRANCH: NEWSL. OF THE FED. CTS., Aug. 2006, at 8, available at <http://www.uscourts.gov/ttb/08-06/video/index.html> [hereinafter THIRD BRANCH].

⁴ *Id.*

⁵ *Id.*

II. What Is Videoconferencing?

Videoconferencing is “the holding of a conference among people at remote locations by means of transmitted audio and video signals.”⁶ Through these conferences, individuals meet one another in a real-time virtual manner as if they “were in the same room” without the hassle and expense of traveling.⁷ While slight limitations remain “[d]epending on the quality of the equipment” employed by courts, the general facial and physical expressions communicated by witnesses are rarely inhibited by the use of such technology.⁸

Videoconferencing systems contain four key components: a “[1] transmission system, [2] camera/microphone, [3] CODEC (encoder/decoder), and [4] compression/decompression hardware and software”⁹ More advanced systems commonly used in courtrooms also include remote controls with “zooming, panning, and tilting functions,” and varying screen options, such as “multiple split-window displays.” Split-window displays present images of several individuals, physically separated by distance, together on one screen.¹⁰ One of the newest and most innovative forms of VCT uses cameras that track a specific type of badge.¹¹ While wearing these unique badges, courtroom participants are followed by cameras as they move, thus allowing a more dynamic interaction to take place.¹² As with most technology, each feature is “expected to become more refined and less expensive over time.”¹³

⁶ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1394 (11th ed. 2003).

⁷ Basfi & Kagan, *supra* note 2, at 6-15 § 6.9.

⁸ *Trials*, *supra* note 1, § 99.

⁹ *Id.* § 102.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

III. Preservation of Evidence: Depositions and Document Conferencing

Rule 15 of the Federal Rules of Criminal Procedure states, “[a] party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice.”¹⁴ Depositions are sworn statements made prior to trial, and are an important part of court records.¹⁵ As a result of their nature, depositions do not enable triers of fact, or judges, to examine live witnesses, as they can in traditional courtroom settings.¹⁶ However, testimony provided through VCT preserves evidence for trials more effectively than deposition transcripts, by enabling members of the court to experience real-time facial expressions, body demeanor, and voice inflections.¹⁷ Additionally, VCT offers advantages to participants in international trials, who are limited by the laws of other countries. For example, some states¹⁸ have laws regarding the overseas detention of defendants for significant periods of time.¹⁹ VCT is able to abide by such laws, while simultaneously providing a medium for courts to interact with, assess the demeanor of, and cross-examine defendants.

Many states have started incorporating provisions into their mutual legal assistance treaties (MLAT) which outline the appropriate times to use VCT and address cost division, choice of law rules in regards to court procedure, and strategies to handle fraud and/or misconduct.²⁰ An MLAT is a treaty among states, which allows “for the exchange of evidence

¹⁴ FED. R. CRIM. P. 15.

¹⁵ *Deposition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/deposition> (last visited Feb. 20, 2011).

¹⁶ *Id.*

¹⁷ *Trials*, *supra* note 1, § 88.

¹⁸ “State” is a term used in international law in reference to “nations.”

¹⁹ See Christine L. Olson, Comment, *Accusations From Abroad: Testimony of Unavailable Witnesses Via Live Two-Way Videoconferencing Does Not Violate the Confrontation Clause of the Sixth Amendment*, 41 U.C. DAVIS L. REV. 1671, 1699-1700 (2008).

²⁰ Agreement on Mutual Legal Assistance Between the European Union & the United States of America, art. 6, 2003 O.J. (L1811) 34 (EC).

and information in criminal and ancillary matters.”²¹ For example, the MLAT between the U.S. and the European Union recognizes videoconferencing by stating “the Contracting Parties shall take such measures as may be necessary to enable the use of video transmission technology between each Member State and the United States of America for taking testimony in a proceeding ... of a witness or expert ... to the extent such assistance is not currently available.”²² This provision illustrates how courtrooms can evolve to modern standards by accommodating the global economy and recognizing the appreciation other courts have for the value and potential benefits associated with videoconferencing.²³

In addition to videoconferencing, international courts have embraced document conferencing, the newest advancement in this area of technology. Document conferencing allows “participants in a videoconference to simultaneously access a document, have it projected on screen, and edit it during the conference.”²⁴ Revisions to documents are made using “keyboard commands, a mouse, or a light pen.”²⁵ Each party to a document conference can view revisions as they are being made to the documents.²⁶ Additionally, each party may use a different color of light pen for revisions, thus decreasing any confusion as a result of multiple users and revisions.²⁷ These technological advances allow evidence, such as handwritten letters, to be shown to remote witnesses during trials, to whom counsel may point out specificities by making, for example, red stars next to important sentences in the letters. Furthermore, at any time during a document conferencing process, an altered document can be sent to a fax machine

²¹ *International Narcotics Control Strategy Report*, U.S. DEP’T OF STATE (Mar. 2006), <http://www.state.gov/p/inl/rls/nrcrpt/2006/vol2/html/62137.htm>.

²² Agreement on Mutual Legal Assistance, *supra* note 20.

²³ *Id.*

²⁴ Basri & Kagan, *supra* note 2, at 6-15 § 6.9.

²⁵ *Trials*, *supra* note 1, § 104.

²⁶ Basri & Kagan, *supra* note 2, at 6-15 § 6.9.

²⁷ *Id.*

at another location.²⁸ This technology has the potential to greatly affect the outcome of many cases in the future.

This point is illustrated by *Terrell v. United States*, where a defendant was convicted of murder and the court needed to determine whether or not he was eligible for parole.²⁹ The government sought to use videoconferencing to conduct the parole hearing while the defendant was in jail.³⁰ The court, however, refused to allow the hearing to be conducted through videoconferencing, by reasoning that it would be too difficult to exchange documents in the prisoner's file that discussed his behavior during his incarceration.³¹ To further support this assertion, the court hypothesized that "an incorrect misconduct report evidencing a prisoner's previous unruly or otherwise disruptive behavior [could become] an issue during [a] proceeding... [and that it was] unclear how the examiner [could] pass along the misconduct report to the prisoner to show what specific document the examiner... based his decision upon."³² Following this reasoning, the court determined that videoconferencing the hearing would violate the defendant's due process rights.³³ However, the court failed to notice the recent emergence of document conferencing, which allows a defendant's file to be viewed by each party, their respective counsels, and officials in the courtroom. Thus, the outcome in *Terrell* might have been different had the defendant been afforded his due process rights through both document and videoconferencing technologies.

²⁸ *Trials*, *supra* note 1, § 104.

²⁹ *Terrell v. United States*, No. 05-72353, 2007 WL 2903202, at *1 (E.D. Mich. Sept. 30, 2007).

³⁰ *See id.* at *3.

³¹ *See id.* at *5.

³² *Id.* at *5.

³³ *Id.* at *8.

IV. Witness Protection: Safety and Health Concerns, Minors, and Unwillingness

A. United States Federal Courts

Witnesses may refuse to testify at trial for reasons ranging from safety concerns associated with traveling to a particular trial location to something so slight as an illness. More specifically, a minor's testimony might be unobtainable if the minor is required to testify in a courtroom. In 1990, the U.S. Supreme Court determined when the use of one-way VCT³⁴ is permissible.³⁵ *Maryland v. Craig* involved a six year old child who had suffered severe sexual and physical abuse, and the Court feared she would be more traumatized if forced to testify in front of the defendant.³⁶ The Court recognized that forcing a child victim to testify in court could result in "significant emotional distress" and "impair the child's ability to communicate."³⁷ Furthermore, the Court discussed the difference between a child who is traumatized by merely testifying in a courtroom setting and a child who is unable to effectively testify due to the presence of the abuser.³⁸ U.S. and international courts differ significantly in how they treat child victims based on their ages.³⁹ The *Craig* court established a two-prong test to be applied on an ad hoc basis, which allows the use of VCT where it "is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."⁴⁰ The applicability of the *Craig* test is based on the significant amount of state statutes enacted for child welfare, which are indications of great public concern for the well-being of children.⁴¹

³⁴ Two-way video-conferencing is where parties on both ends of the VCT can communicate freely with one another, whereas one-way video-conferencing only allows one side to communicate and the other to receive the communication.

³⁵ See *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

³⁶ *Id.* at 840.

³⁷ *Id.* at 857.

³⁸ *Id.* at 856.

³⁹ *Trials*, *supra* note 1, § 95.

⁴⁰ *Craig*, 497 U.S. at 850.

⁴¹ *Id.* at 851-52.

Concerns exist regarding the reliability prong of the test because courts want to preserve as many aspects of face-to-face confrontation as possible when using VCT.⁴² For example, a videoconferencing witness testifying from Spain to a courtroom in the U.S. could be prompted by another individual outside of the camera's view, consequently resulting in unreliable testimony.⁴³ However, such concerns are minimal because each testifying witness is still required to take an oath, as would be required if physically present in a courtroom. Videoconferencing witnesses are also subject to cross-examination in a real time manner.⁴⁴ Furthermore, courts distinguish these concerns as applicable to one-way VCT rather than two-way videoconferencing, which allows all participants to respond in a real time manner.⁴⁵

In *United States v. Gigante*, the U.S. Court of Appeals concluded that videoconferencing an ill witness's testimony did not violate the U.S. Confrontation Clause.⁴⁶ This case involved the testimony of a witness procured through VCT because the witness was too ill to testify at trial.⁴⁷ The court decided that two-way video technology adequately met the central concerns of the Constitution because the witness "was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and [h]e gave his testimony under the eye of Gigante [the defendant] himself."⁴⁸ In reliance on Rule 15 of the Federal Rules of Criminal Procedure (FRCP), the court determined two-way videoconferencing was permissible, where a deposition would be permitted normally, under a finding of "exceptional circumstances."⁴⁹ The court additionally acknowledged that two-way videoconferencing

⁴² See, e.g., Anthony Garofano, Comment, *Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials*, 56 CATH. U. L. REV. 683, 711 (2007).

⁴³ See *id.*

⁴⁴ Olson, *supra* note 19, at 1701.

⁴⁵ *Id.* at 1684-85.

⁴⁶ *United States v. Gigante*, 166 F.3d 75, 84 (2nd Cir. 1999).

⁴⁷ *Id.* at 80.

⁴⁸ *Id.*

⁴⁹ FED. R. CRIM. P. 15.

provides greater protection for confrontation rights than traditional depositions because it allows cross-examination.⁵⁰

In *United States v. Drogoul*, the eleventh circuit addressed the unwillingness of a witness to testify in a foreign country.⁵¹ The defendant managed the U.S. branch of an Italian bank, and allegedly engaged in “wire fraud, conspiracy, and [the] making [of] false statements to government agencies.”⁵² The court determined that the refusal of six out of thirteen Italian witnesses to travel to the U.S. to testify was an “exceptional circumstance” under FRCP 15.⁵³ The court stated, “In the ordinary case, exceptional circumstances do not exist when the prospective deponent has declared that he or she is willing to testify at trial.”⁵⁴ The refusal of the six Italian witnesses coupled with the witnesses being “beyond the subpoena power of the United States courts,” and the witnesses’ testimonies being significant to the heart of the case, was exceptional enough for the use of video depositions.⁵⁵

Although the eleventh circuit permitted the use of VCT for witness testimony in *Drogoul*, the same court refused to allow VCT in *United States v. Yates* because such use violated the Confrontation Clause.⁵⁶ The defendants in *Yates* were charged with “mail fraud, conspiracy to defraud...and conspiracy to commit money laundering...” through the use of an online pharmacy.⁵⁷ Two of the government’s witnesses resided in Australia at the time of the trial and were “unwilling to travel to the United States” to testify. Thus, the government sought to introduce two-way video testimony.⁵⁸ The court rigorously applied the *Craig* test and stated that,

⁵⁰ *Gigante*, 166 F.3d at 81.

⁵¹ See *United States v. Drogoul*, 1 F.3d 1546, 1550 (11th Cir. 1993).

⁵² *Id.* at 1549.

⁵³ See *id.* at 1556-57.

⁵⁴ *Id.* at 1557.

⁵⁵ *Id.*

⁵⁶ *United States v. Yates*, 438 F. 3d 1307, 1319 (11th Cir. 2006).

⁵⁷ *Id.* at 1309-10.

⁵⁸ *Id.* at 1310.

“[t]he prosecutor’s need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants’ rights to confront their accusers face-to-face.”⁵⁹ The court was harsher in applying the public policy prong in this case, because in *Craig*, the public policy interest was only required to be “necessary” to deny defendants their face-to-face confrontation right.⁶⁰ However, due to the court’s enhanced reading of the test in *Yates*, the government was denied its request to use two-way VCT.⁶¹

As demonstrated by the cases discussed, federal courts remain at a standstill concerning which test to apply in order to determine the permissibility of testimonial videoconferencing. One approach to the public policy prong of the *Craig* test involves a balancing analysis. If “the functional constitutional benefits of in-court video testimony outweigh the benefits of (potential) physical confrontation at a deposition taken prior to the trial itself,” the court will “find [that the] video testimony serves an important public policy....”⁶² Alternatively, the Confrontation Clause will outweigh the advantages of in-court video testimony where [1] there is “lack of a valid oath to ensure the reliability of the testimony, [2] ...the fact finder’s ability to assess the witness’s demeanor is compromised, [3] ... adversarial cross-examination is unavailable, or [4] ...the cross-examination available in a Rule 15 deposition will be significantly less effective than that available with video testimony....”⁶³ Nonetheless, video testimony will not pass constitutional scrutiny when witnesses are available to testify at trial in person.⁶⁴

⁵⁹ *Id.* at 1316.

⁶⁰ *See Craig*, 497 U.S. at 850.

⁶¹ *Yates*, 438 F.3d at 1319.

⁶² Matthew J. Tokson, Comment, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1606 (2007).

⁶³ *Id.* at 1607.

⁶⁴ *Id.*

B. International Criminal Tribunals

The U.S. is concerned about the potential conflict videoconferencing may have with the Sixth Amendment Confrontation Clause, because the Confrontation Clause provides a safeguard for defendants by allowing them to confront their accusers.⁶⁵ While the International Criminal Tribunal for the Former Yugoslavia bases many of its practices and laws on the U.S. legal system and other legal systems around the world, it views the benefits of VCT in a positive light.⁶⁶ In *Prosecutor v. Mucic & Landzo*, two witnesses were unable to testify at trial due to their fears of potential repercussions “to [both] themselves and their families....”⁶⁷ The tribunal stated that, “Video-conferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness.”⁶⁸ The defense maintained that the use of videoconferencing for witness testimony would deny the defendant his right to confront witnesses under Article 21(4)(e) of the Statute of the International Tribunal.⁶⁹ The Tribunal rebutted the defendant’s argument by stating that use of VCT to obtain an unavailable witness’s testimony is neither a denial of the defendant’s “right to confront the witness, nor does [the defendant] lose materially from the fact of the physical absence of the witness.”⁷⁰ Thus, in this instance, there was no violation of Article 21(4)(e) in using VCT to procure witness testimony.⁷¹

The International Criminal Tribunal for the Former Yugoslavia established two guidelines for determining whether videoconferencing should be permitted in situations involving witnesses who are unwilling to testify at trial for fear that they will be “exposed to

⁶⁵ U.S. CONST. amend. VI.

⁶⁶ See *Prosecutor v. Mucic & Landzo*, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video Link Conference, ¶ 15 (Int’l Crim. Trib. for the Former Yugoslavia May 28, 1997).

⁶⁷ *Id.* ¶ 1.

⁶⁸ *Id.* ¶ 15.

⁶⁹ *Id.* ¶ 12-13.

⁷⁰ *Id.* ¶ 15.

⁷¹ *Id.*

serious risk of reprisals.”⁷² In doing so, the tribunal relied on Rule 54 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Former Yugoslavia, as well as the guidelines established by case law.⁷³ Rule 54 states that trial chambers “may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary ... for the preparation or conduct of the trial.”⁷⁴ The first of the Tribunal’s guidelines requires that “the testimony of a witness is shown to be sufficiently important to make it unfair to proceed without it...”⁷⁵ The second guideline entails a limitation “that the witness is unable or unwilling to come to the International Tribunal.”⁷⁶ In *Prosecutor v. Tadic*, the witnesses refused to testify at the trial for fear that they would be arrested by the Prosecutor.⁷⁷ Thus, the trial chamber allowed testimony by video-link provided that the witnesses and individuals conducting the video-link testimony adhered to certain specifications.⁷⁸ For example, the testimonies had to be given at an “appropriate location,” entailing a venue that encouraged “the giving of truthful and open testimony.”⁷⁹ Additionally, the courts required that: (1) a guarantee of “safety and solemnity” be in force; (2) the non-moving party and Registry be well-informed through the entire process, as well as agree on the location; (3) the testimony be given solely in “the physical presence ... of the Presiding officer;” and (4) the witness be given the ability, via monitor, to see “the judges, the accused, and the questioner,” and vice versa.⁸⁰ Lastly, statements made by a witness while under oath “shall be treated as having been made in the courtroom and the witness shall be liable

⁷² *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, ¶ 2 (Int’l Crim. Trib. for the Former Yugoslavia June 25, 1996).

⁷³ *Id.* ¶ 3.

⁷⁴ International Criminal Tribunal for the former Yugoslavia, *Rules of Procedure and Evidence*, at Rule 54, U.N. Doc. IT/32/Rev.7 (Jan. 8, 1996).

⁷⁵ *Tadic*, *supra* note 72, ¶ 19.

⁷⁶ *Id.* ¶ 2.

⁷⁷ *Id.* ¶ 19-21.

⁷⁸ *Id.* ¶ 19.

⁷⁹ *Id.* ¶ 22.

⁸⁰ *Id.*

to prosecution for perjury in exactly the same way as if he had given evidence at the seat of the International Tribunal.”⁸¹ Ultimately, the *Tadic* decision remains accepted law in Yugoslavia, sets guidelines, which must be met in order for a court to allow witness testimony to be produced by video-link, and provides standards to ensure the reliability of procured testimony.

The International Criminal Tribunal for Rwanda applies a more rigorous standard to VCT than the Yugoslavian Tribunal. In *Prosecutor v. Zigiranyirazo*, a witness claimed to be unable to testify at trial due to safety concerns related to his position as an “insider witness.”⁸² Although this exemplifies a situation in which the Yugoslavian Tribunal would likely allow VCT, the Rwandan Tribunal rejected the use of technology to acquire the testimony.⁸³ The Rwandan Tribunal relied on an earlier decision, stating, “Video-link testimony should be ordered when it is in the interest of justice....”⁸⁴ The previous court considered “[1] the importance of the testimony; [2] the inability or unwillingness of the witness to attend; and [3] whether a good reason [had] been adduced for the inability or unwillingness to attend” in defining the basis of the standard.⁸⁵ The court determined that the testimony was an important part of the Prosecution’s case and that there were safety concerns and risks associated with the witness traveling to the trial.⁸⁶ However, the court was not confident in the conveyance of the witness’s demeanor through the video-link testimony.⁸⁷ Thus, the court decided that it would be beneficial to hear the witness in person given the possibility of “poor transmission impairing the testimony of such an important witness....”⁸⁸

⁸¹ *Id.*

⁸² *See* *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Defence and Prosecution Motions Related to Witness Ade, ¶ 12 (Int’l Crim. Trib. for Rwanda Jan. 31, 2006).

⁸³ *Id.* ¶ 34.

⁸⁴ *Id.* ¶ 31.

⁸⁵ *Id.*

⁸⁶ *Id.* ¶ 32.

⁸⁷ *Id.*

⁸⁸ *Id.* ¶ 33.

Both the U.S. federal courts and international tribunals recognize the importance of in-person testimony. Similarly, both legal systems value and identify the rights of defendants to confront witnesses, through either the U.S. Constitution or the International Tribunal's Rules of Procedure and Evidence. Although the criteria which moving parties must meet in order to use videoconferencing differs between legal systems, the unavailability of witnesses must always be clearly established. Unfortunately, no bright line rule exists for courts to follow in assessing whether to allow testimony to be given via VCT in U.S. courts or in the International Tribunals. Although, both seem to recognize the benefits and advantages of using video-link technology in criminal trials with foreign witnesses.

V. Advantages

A. Cost Reduction

VCT has the potential to significantly reduce costs associated with international litigation “[b]y reducing the need to transport inmates to courtrooms . . .,” thereby minimizing security and escape risks and “curtailing [additional] expenses.”⁸⁹ Furthermore, it can expedite judicial proceedings by eliminating much of the travel required for witnesses and experts, and by increasing the number of cases that may be heard by court officials.⁹⁰ A report released by the Federal Judicial Center surveyed fourteen appellate court judges regarding the use of videoconferencing in the courtroom.⁹¹

According to the report, almost all of the surveyed judges liked the way videoconferencing saved travel time and money. Several mentioned scheduling flexibility; videoconferencing can help judges or attorneys work around an unexpected health problem or emergencies that might interfere with travel. Videoconferencing also promotes access to the court, according to the survey

⁸⁹ Fern L. Kletter, Annotation, *Constitutional and Statutory Validity of Judicial Videoconferencing*, 115 A.L.R. 5th 509 (2004).

⁹⁰ *Id.*

⁹¹ THIRD BRANCH, *supra* note 3.

responses, by permitting litigants to appear who might not otherwise be able to afford to attend oral arguments.⁹²

While VCT is a valuable tool for attorneys inside the courtroom, it can also be beneficial outside the courtroom. Attorneys can conduct “partner meetings, training, interviews, and expert-witness briefings,” while still being able to assess the demeanor, facial expressions, and physical actions of all the parties involved.⁹³

A proposal to the European Union Preparatory Acts Commission noted a situation in which a hearing was required to determine whether sanctions should be imposed due to a suspect’s failure to comply with pretrial measures.⁹⁴ The proposal described the cost effectiveness of using VCT to conduct the hearing between the foreign suspect and the trial state. It claimed the use “would allow saving the costs for the suspect to travel to the trial state and, possibly, costs of accompanying staff in the state of residence.”⁹⁵ Also, the proposal described the use of video technology in situations where suspects are required to make regular appearances before the “police and prosecuting authorities” during the pre-trial process.⁹⁶ According to the proposal, it would dramatically reduce the costs of transporting the foreign suspect to and from the trial state.⁹⁷

B. Other Advantages

With the evolving nature of global terrorism, courts have found video-link testimony beneficial in cases involving the prosecution of terrorists around the world.⁹⁸ Terrorist groups

⁹² *Id.*

⁹³ *Trials*, *supra* note 1, § 99.

⁹⁴ *Accompanying Document to the Proposal for a Council Framework Decision on the European Supervision Order in Pre-trial Procedures Between Member States of the European Union*, SEC (2006) 1080 (Aug. 29, 2006) [hereinafter *Preparatory Acts*].

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Fredric I. Lederer, *The Potential Use of Courtroom Technology in Major Terrorism Cases*, 12 WM. & MARY BILL RTS. J. 887, 913-15 (2004).

and conspirators are becoming so widespread that it is more difficult to convince witnesses of the necessity to travel to trials; thus, courts are increasingly unable to force or compel witnesses to testify at trials.⁹⁹ An obvious, yet significant, advantage to video-link technology is that it allows courtrooms to evolve alongside the economy and become more global in nature.¹⁰⁰ Some judges further contend that using videoconference technology supports a variety of “public policy goals [including] fairness, access, and judicial efficiency.”¹⁰¹ Furthermore, VCT allows attorneys to use their time more efficiently, by saving travel time normally required to depose witnesses.¹⁰²

VCT also provides an advantage to U.S. courts when dealing with laws of foreign countries. Some foreign countries disallow lawyers to question witnesses, while others forbid magistrates from administering oaths to witnesses.¹⁰³ Videoconferencing is a beneficial alternative to the physical presence of witnesses; individuals in the U.S. may administer oaths to witnesses over VCT and subsequently question them in the presence of the court. In foreign countries where videotaping depositions is forbidden, video testimony would be an effective alternative allowing the jury to personally assess witness conduct, appearance, and overall demeanor without violating law.¹⁰⁴

VI. Disadvantages and Foreseeable Problems

A. Confrontation Clause

In the U.S., the most pervasive issue regarding videoconferencing in legal cases is whether such technology violates the Confrontation Clause of the Sixth Amendment. The Confrontation Clause states, "In all criminal prosecutions, the accused shall enjoy the right ... to

⁹⁹ *Id.*

¹⁰⁰ Marc Chase McAllister, *Two-way Video Trial Testimony and the Confrontation Clause: Fashioning a Better Craig Test in Light of Crawford*, 34 FLA. ST. U. L. REV. 835, 838 (2007).

¹⁰¹ *Id.* at 841.

¹⁰² *Id.*

¹⁰³ Tokson, *supra* note 62, at 1609-10.

¹⁰⁴ *Id.* at 1610-11.

be confronted with the witnesses against him”¹⁰⁵ In general, courts read the Confrontation Clause as the right of the accused to confront a witness in person.¹⁰⁶ In the past, defendants have reasoned that it is much more “difficult for a witness to lie [directly] to [the] defendant’s face” than during an ex parte examination of the witness, which occurs outside of the defendant’s presence.¹⁰⁷ Proponents of this limited reading frequently argue that physical confrontation with witnesses gives the defense the ability to assess their credibility.¹⁰⁸ Courts have always recognized the significance of live witness testimony in the courtroom, as well as the need for cross-examination by the defense “to assess the witness’s credibility”¹⁰⁹ The court’s goal is to uncover the truth, which is furthered by both in-person testimony and cross-examination.¹¹⁰

In *Crawford v. Washington*, the U.S. Supreme Court questioned whether an out of court statement made by a witness violated the Confrontation Clause.¹¹¹ The Court established a two part test to determine the admissibility of out-of-court testimony.¹¹² First, the witness must be unavailable at the time of trial, and second, the defendant must have had a “prior opportunity to cross-examine the witness.”¹¹³ In requiring this test to be applied to all testimonial statements made out of court, the Court emphasized the importance of cross-examination under the Confrontation Clause.¹¹⁴ The court noted that the defense in *Crawford* was never afforded the right to cross-examine the witness because the prosecution was trying to admit recorded testimony as evidence.¹¹⁵ As a result, the court held that the defendant’s conviction should be

¹⁰⁵ U.S. CONST. amend. VI.

¹⁰⁶ Olson, *supra* note 19, at 1676.

¹⁰⁷ *Id.* at 1677.

¹⁰⁸ *Id.* at 1677-78.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1678.

¹¹¹ *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

¹¹² *Id.*

¹¹³ Olson, *supra* note 19, at 1681.

¹¹⁴ *Crawford*, 541 U.S. at 43-50.

¹¹⁵ *Id.* at 68.

reversed due to the inability of the witness testimony to pass the second part of the test requiring cross-examination.¹¹⁶

The use of two-way VCT gives defendants live face-to-face virtual confrontation, which further provides the opportunity to cross-examine witnesses and have them respond in a real-time manner.¹¹⁷ While this advancement in technology could be enough to substantially satisfy the second prong of the *Crawford* test, U.S. courts remain divided on whether two-way videoconferencing violates the Confrontation Clause.¹¹⁸

B. Lack of Necessary Regulation

Laws which regulate perjury and contempt, and ensure that testimony is reliable and given under oath, are necessary although absent, in VCT usage among courts. For instance, if a witness resides in Morocco, but his testimony is needed at a trial in the U.S., the witness could use videoconferencing as a means to provide live testimony during the trial.¹¹⁹ However, no laws exist concerning a situation where the witness commits perjury while giving testimony under oath from Morocco.¹²⁰ This hypothetical raises several questions, such as whether both the U.S. and Morocco criminalize perjury and if so, whether this amounts to perjury in either country. Furthermore, if it simultaneously amounts to perjury in both countries, it is undecided as to which country would have jurisdiction over the individual.¹²¹ Although no customary international laws establish the procedure to follow in such situations, the territoriality principle, a principle establishing a country's jurisdiction to prosecute a defendant if his crime was committed within the borders of that country, would likely be a dispositive factor giving

¹¹⁶ *Id.* at 69.

¹¹⁷ Olson, *supra* note 19, at 1685.

¹¹⁸ *Id.*

¹¹⁹ See Martin Davies, *Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation*, 55 AM. J. COMP. L. 205, 221-22 (2007).

¹²⁰ *See id.*

¹²¹ *See id.*

Morocco primary jurisdiction over the witness.¹²² In the event that Morocco fails to prosecute the witness, the U.S. would then have the ability to prosecute.¹²³ Additionally, an agreement, such as a Mutual Legal Assistance Treaty, established prior to any VCT use, could prevent potential double liability problems by establishing guidelines beforehand.

Contrary to perjury, contempt is the “[r]efusal by a witness to answer a question...unless that refusal is protected by some privilege or other legal justification.”¹²⁴ Courts distinguish between direct contempt, which is committed in the presence of courts, and indirect contempt, which is committed outside of courts.¹²⁵ A witness’s refusal to answer a question by video-link technology during trial could constitute direct contempt, due to a “virtual presence” in a court.¹²⁶ Alternatively, such actions could be categorized as indirect contempt due to the absence of physical presence at trial.¹²⁷

Article II of the Hague Convention allows an individual to refuse to testify if he raises a recognized privilege in either the country in which he is testifying or in the location the testimony is being received.¹²⁸ The Hague Convention also states, “The general rule in common law countries is that the *lex fori* governs questions about evidence.”¹²⁹ Therefore, if a witness refused to answer a question and raised a privilege, the law in Morocco would likely determine whether the privilege is recognized because Morocco is the forum in which the witness is testifying.¹³⁰

¹²² *Id.* at 224-25.

¹²³ *Id.* at 221-22.

¹²⁴ *Id.* at 228.

¹²⁵ *Id.*

¹²⁶ *Id.* at 230.

¹²⁷ *Id.*

¹²⁸ *Id.* at 231.

¹²⁹ *Id.* (explaining further that the term “*lex fori*” refers to the laws of the nation where the suit is initiated).

¹³⁰ *See id.*

Adequate administration of oaths is a viable concern of using VCT in courts. Conflicts can arise in determining the oath administrator.¹³¹ A handful of “states require the oath to be administered at the place of transmission.”¹³² Therefore, if witnesses were to give video-link testimony from an American Embassy in Morocco, and Morocco recognized the previous rule, then American officials at the embassy could administer the oath because the American Embassy would be the “place of transmission.”¹³³ Additionally, the Federal Rules of Evidence do not specify that those administering the oath be in the physical presence of witnesses, thus allowing United States officials to administer the oath via video-link to witnesses testifying in Morocco.¹³⁴ If the transmitting country does not allow oaths to be administered by foreign officials, then the country receiving the testimony must make a formal request otherwise.¹³⁵ Depending on whether countries are parties to a treaty such as The Hague Convention, specific methods for requests may be detailed in a given treaty.¹³⁶ It is imperative that countries predetermine the procedure for administration of an oath via VCT, in the event a treaty outlining such specifics is not already intact.¹³⁷ The burden is on the countries requesting the video-link testimony to ensure that all of these concerns are specified, and effectively communicated, to all officials and individuals involved in the process.¹³⁸ Consequently, if the oath is not administered properly, U.S. courts are likely to determine the oath unreliable, and thus prohibit the following testimony.¹³⁹

¹³¹ *Id.* at 217.

¹³² *Id.* at 218.

¹³³ *See id.*

¹³⁴ *Id.* at 219.

¹³⁵ *Id.* at 219-20.

¹³⁶ *Id.* at 220.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 220-21.

C. Costs

The costs associated with videoconferencing equipment remain a significant consideration. To fit a large courtroom with high quality VCT equipment costs upward of \$10,000.¹⁴⁰ As with most technology, prices vary depending on the number of installations, choice of network provider, and other optional features.¹⁴¹ Aside from the original fixed costs associated with purchasing and installing the videoconference equipment, other reemerging costs include network access and usage, maintenance, and user training.¹⁴² According to a working document of the Commission of the European Communities, a report of the European Union Member States revealed that “most” Member States have the equipment necessary for videoconferencing.¹⁴³ Thus, the cost of startup VCT equipment would be much lower for such states, decreasing the overall price of creating a VCT compatible courtroom.

D. Additional Disadvantages

A number of judges criticize the inability to make “personal connections” with other individuals participating in videoconferences.¹⁴⁴ Some also maintain that delays in transmission are occasional video conferencing problems; however, such difficulties are rare with high quality equipment.¹⁴⁵ In addition to the two aforementioned opinions, there exists a steadfast concern that witnesses will feel less pressure when testifying by videoconference because the formalities and eye contact exhibited in the courtroom will be less effective through screens or monitors.¹⁴⁶ It has been argued that the failure to imitate in-person eye contact between witnesses, defendants,

¹⁴⁰ Christine Perey, *ABCs of Videoconferencing*, NETWORK WORLD (Oct. 29, 2001), <http://www.networkworld.com/research/2001/1029feat2.html>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Preparatory Acts, *supra* note 94, at 5.

¹⁴⁴ THIRD BRANCH, *supra* note 3.

¹⁴⁵ *Id.*

¹⁴⁶ Ann Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1104-05 (2004).

and judges is a significant barrier for courts to overcome when advocating the use of video-link technology.¹⁴⁷ However, despite these minor concerns, judges seemed satisfied overall with video-link technology.¹⁴⁸ Some judges have even noted forgetting that they were communicating by videoconference, and even acknowledged its ease of use.¹⁴⁹

VII. Conclusion

As globalization expands, technological innovations will continue to emerge and affect the way in which court proceedings are conducted in both the U.S. federal court system and International Criminal Tribunals. Videoconferencing has the ability to grant witnesses protection far greater than that provided by heightened security systems or even security guards. VCT allows witnesses to give testimony in a real time manner in front of judges, the prosecution, and defense without having to physically travel to the actual trial location. The use of VCT may persuade witnesses to testify in circumstances where they normally would be unable, due to safety and health concerns, or unwillingness to travel. Specifically, VCT can protect minors from being forced to testify in front of defendants at trial, and prevent any subsequent emotional distress.

Transcripts of depositions are slowly becoming tools of the past, and videoconferences are quickly becoming a global phenomenon. In the past, one of the most significant concerns with video-link testimony was the inability to share documents with individuals several hundreds or even thousands of miles away. However, the emergence of document conferencing enables all court participants to view the same documents on screens in different locations.

Aside from issues regarding the physical aspects of VCT, there are underlying concerns pertaining to rights under the Confrontation Clause of U.S. Constitution; the lack of rules and

¹⁴⁷ *Id.*

¹⁴⁸ THIRD BRANCH, *supra* note 3.

¹⁴⁹ *Id.*

regulations concerning perjury, contempt, and effective administration of oaths; and the costs necessary to facilitate video and/or document conferencing.

Overall, video-link technology has the potential to overcome impediments currently faced by courts and enable courtrooms to evolve as global entities, along with the rest of modern society. VCT is reasonably simple to use and allows for more effective prosecution of criminals by linking the criminal justice system in one country to witnesses located in another.

Additionally, witnesses are afforded greater protections, ultimately leading to more reliable testimonies. Thus, VCT promotes the ultimate goal of the criminal justice system, the pursuit of truth, and serves as a valuable asset to both domestic and international legal systems.