

Permissibility of cross-border virtual court hearing under international law

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Let me focus my comment on an aspect of cross-border virtual court hearing, namely the infringement of sovereignty.

In his paper, Professor Inchausti notes that to conduct video conferencing under the new Regulation, it is not necessary to seek judicial cooperation from the destination State. At fn. 39, he also refers to the observation of Professor Hess that the Regulation has resolved any doubt that the sending a videoconference link to a person in another State might encroach on the sovereignty of the latter. These observations are not surprising since the EU Member States may be deemed to have implicitly waived their sovereignty to the extent necessary to implement any EU Regulation.

As a third country national, I am personally more interested in the permissibility of cross-border virtual court hearing outside the realm of the EU law. What I would like to submit is that cross-border virtual court hearing does not involve the infringement of sovereignty under the general international law, either.

Among the different types of jurisdiction that a State may exercise, only enforcement jurisdiction is strictly territorial. This is because using physical force to enforce laws across borders involves intruding into another State's territory. The use of physical force includes arresting individuals, seizing property, and imposing fines. Sending a link of video conferencing seems to fall much short of the use of physical force.

It is true that cross-border virtual hearings could involve the exercise of adjudicatory jurisdiction and prescriptive jurisdiction. Thus, when the legislature prescribes sanctions on witnesses for failing to give testimony or providing false statements, it is exercising prescriptive jurisdiction. When the court rules against the party who fails to cooperate in the hearing, it is exercising adjudicatory jurisdiction. It is, however, well established that those types of jurisdiction are not constrained by a strict territoriality principle. It is true that the exercise of those types of jurisdiction may give rise to frictions and tensions with the destination State. But it would only raise the issue of comity. The infringement of sovereignty is a breach of international law which legitimises otherwise wrongful countermeasures. Comity, on the other hand, is merely a matter of courtesy and its observance is not sacrosanct. Comity may be overridden by other considerations.

In my view, the benefits of cross-border virtual court hearings outweigh any concerns over comity. Virtual hearings can save time and money, as it makes it easier for witnesses and parties to participate in the proceedings. It also makes it possible for the judge to directly interact with the parties and witnesses across borders while judicial assistance would only yield a piece of paper drawn up by the assisting judge on behalf of the presiding judge. In the long run, I believe that the practice of cross-border virtual court hearings will become increasingly common, so that even the concerns over comity may eventually subside.