

INTERNATIONAL LAW ONLINE: HOW WILL THE PANDEMIC CHANGE THE PRACTICE OF LAW?

This panel was convened at 1:45 p.m., Friday, March 26, 2021, by the ASIL-Midwest Interest Group. Through a roundtable discussion, the panel explored the changes that the pandemic has had on the practice and teaching of international law. Professor Brian Farrell¹ and Professor Stuart Ford,² Co-Chairs of the Midwest Interest Group, co-moderated the panel discussion and introduced the panelists: Juliet Sorensen³ of the Northwestern Pritzker School of Law; Lawrence Schaner⁴ of Schaner Dispute Resolution LLC; Kanglin Yu⁵ of the University of Iowa College of Law; Dr. Robert Eno,⁶ Registrar of the African Court of Human and Peoples' Rights; and Vera Korzun⁷ of the University of Akron School of Law.

Professor Farrell introduced the panel and welcomed the audience. He noted that the panel will explore: (1) what might change in international law because of the pandemic; (2) what has already changed; and (3) what impacts those changes might have on the practice of international law. He then invited the panelists to highlight the most significant changes they have seen in their fields in response to the pandemic.

Professor Sorensen observed that the pandemic had changed her own practice, her clinical teaching and her conception of international human rights law. In response to the pandemic, she made all her work virtual. She noted that, as a clinical professor, there is an obvious downside to moving online because a fully multifaceted experiential learning experience is hard to provide to students virtually. For example, her clinic would normally complement ten weeks of Chicago-based work with a week of field work with a local partner. The field work is a very important part of the clinic as

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⁴ Founder of Schaner Dispute Resolution LLC, where he serves as an arbitrator in international and complex commercial cases, acts as counsel in select arbitration and litigation matters, and advises clients regarding cross-border and domestic dispute resolution matters.

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⁶ Registrar at the African Court of Human and Peoples' Rights. Dr. Eno has extensive experience in international human rights including at the African Commission on Human and Peoples' Rights and the South African Human Rights Commission. He has also taught at the University of the Gambia.

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it inevitably becomes a transformative experience for students, but the field work was impossible this year. Nevertheless, there are also ways in which the move to virtual work has had advantages. She will speak to those later in the discussion.

Mr. Lawrence Schaner noted that he works as an arbitrator in international and domestic cases. As a result of the pandemic, he observed three major changes. The first is that everyone is working from home. In international arbitration, moving online was a remarkably easy transition. Overall, international arbitration has adapted quite well to the working from home. The second change is that hearings in international arbitration are now all virtual. Zoom has become the preferred platform and it has worked well. As an arbitrator, Mr. Schaner had a hearing every month or so during the pandemic. Some of these hearings lasted for a week or more, some involved hundreds of millions of dollars, and all were handled on Zoom, which is a major change for international arbitration. The third change has to do with conferences and seminars, which are a key part of the international arbitration world. Because of the pandemic, major conferences and events were either postponed or cancelled, but there has been an explosion of online programming. Other pandemic-related changes involved rapid development of protocols and best practices for conducting online hearings in international arbitration. This has spawned new kinds of professionals, like the Zoom consultant, who assists counsel teams in making sure that backgrounds and lighting are appropriate. But the overall experience of the virtual hearings is still similar to the pre-pandemic hearings.

Ms. Kanglin Yu shared her perspective as a third-year law student. She noted that all her classes have been moved online for three consecutive semesters already. Many of her fellow students report Zoom fatigue and feel less engaged socially. Ms. Yu was participating in the Jessup Moot Court Competition and the Vis Moot Court Competition, both of which have moved online. As a result, there was no opportunity to meet with anyone in person. But Ms. Yu also felt that moving online had the advantage of a broader selection of judges and participants in these competitions because there is no requirement that they all be physically in the same room at the same time.

Dr. Robert Eno started by noting that as the Registrar of the African Court of Human and Peoples' Rights he deals mostly with case management issues to ensure that parties that come before the Court have their cases processed in accordance with the rules. When the pandemic struck, it took the Court by surprise. There were many aspects of practice that were not covered in the rules of the Court. This ultimately required an amendment to the rules of the Court. For example, the Court had to organize virtual public hearings, but these were not provided for in the rules. The Court had to adopt a new practice direction to provide for virtual public hearings. Further, the Court could not invite witnesses or experts because of the pandemic. In fact, since the pandemic started, the Court has not been able to have live public hearings. Unfortunately, some participants have been unable to attend the virtual hearings. This has affected many applicants before the Court.

Dr. Eno further shared that the Court has organized four virtual sessions where judges sit in different countries and attend the sessions and deliberate virtually. These sessions were very successful, and the Court was able to deliver a number of judgments. Dr. Eno also noted that one of the big challenges has been internet connectivity. He estimated that there are days when the Court loses two to three hours of time due to the connectivity issues, which has been challenging. The Court has also taken steps to digitalize the pleadings so that the judges and participants can access the documents virtually. The Court has installed an electronic case management system to facilitate this. Thus, the pandemic has forced the Court to speed up the process of digitalizing the documents. The Court has also introduced an e-filing system that allows applicants to file their cases electronically and monitor developments in their cases. The pandemic required the Court to suspend all the parties' deadlines because many offices were closed, and the parties could not participate. For over three months, the Court gave a grace period to most of the parties. After almost a year, the Court has

been able to adapt to the situation and is now able to deal with its business in an almost normal manner despite doing most of its work virtually. The work the Court has done during the pandemic to adapt will help it respond to difficulties in the future as well.

Professor Korzun shared her perspective as a law professor teaching international law online. She noted that her law school moved to online teaching about a year ago. As a result of the pandemic, she noticed two categories of changes. First, the mode of instruction has changed from in-person to online delivery. Second, there are content changes. Starting with the mode of instruction, Professor Korzun observed that students and faculty members are more equipped now with technology. This allowed everyone to deal with the move to online learning and the transition was surprisingly smooth. At least in some cases, virtual learning has its advantages. For example, Professor Korzun teaches an experiential course in International Negotiations. With synchronous online teaching, she used breakout sessions where students could practice negotiation in small groups of four to five people. Further, they would record their virtual negotiation sessions and could go rewatch these sessions as needed. Professor Korzun used these recordings to provide feedback to the students about their performance. This is harder to do when all the students are in the same classroom together or when they negotiate in person in multiple rooms.

Moving on to content changes, Professor Korzun observed that she uses the same casebooks as last year. However, she was also able to assign her students additional materials, such as recordings of prior workshops and panel discussions that ASIL organizes. This has enriched the content the students have access to. In addition, her students now participate in competitions online and virtually attend workshops and other events happening in other parts of the world. In this way, the mode of delivery made it easier to access a broader variety of content on various topics of international law. This has been an advantage of the online mode of teaching.

Professor Ford then continued the roundtable discussion by inviting everyone to reflect on this question: “Which of these changes do you expect or hope will persist after the pandemic is over?”

Professor Sorensen noted that we had moved previously into the digital age, but we have not fully conceptualized the possibilities of the digital age. The pandemic forced us to think about what was possible in a digital world. Many of the opportunities that have been described, like virtual hearings and virtual conferences, have proven to be better in some ways than their live counterparts and will remain virtual. But we should remember that there are people, institutions, and groups that remain excluded from this because of the digital divide. As we retain many of these digital opportunities post-pandemic, we should think carefully about how to make these digital opportunities available to everyone. If we can do that, then we can benefit from this move to online content and be in a world where the practice and the scholarship of international law have the potential to be more inclusive.

Dr. Eno concurred with Professor Sorensen. He further noted that it is very likely that the online sessions of the African Court of Human and Peoples’ Rights will continue even after the pandemic. Indeed, the African Union has suggested that the online sessions have been so successful that the Court could save money by moving to that format permanently. So, Dr. Eno predicts that the online sessions are likely to continue. He also noted that the Court delivered more judgments in 2020 using online sessions than it had in any previous year. In addition, the Court will also continue to use its new electronic case management system with the e-filing component after the pandemic is over.

Mr. Schaner argued that virtual hearings work quite well in international arbitration and are likely here to stay, particularly for small matters where the cost savings from not having to travel to the hearing site outweigh the downsides of online hearings. But he believes that in-person hearings will continue for medium and large matters. He also expects more hybrid proceedings—proceedings that mix in-person and online components—in the future. For example, a witness that is

only expected to testify for half an hour could appear virtually, while a witness that is expected to testify for two days would still appear live before the tribunal. He noted that hearing centers are upgrading their facilities to provide the necessary infrastructure for virtual proceedings. Mr. Schaner also expects to see clustering of the participants, even when hearings are online. For example, all the arbitrators might well be in the same physical location, even when the tribunal is meeting virtually. Similarly, the claimants, their lawyers and their witnesses might appear virtually before the tribunal, but still be physically in the same location.

But he believes that in-person hearings will still occur, particularly for larger matters, because there are downsides to virtual proceedings. For example, the arbitrators may have difficulty assessing the credibility of witnesses that testify virtually. Arbitrators may also feel less connected and have less rapport with one another when they are not physically present in the same location. This may make it harder for arbitrators to reach a decision. Experts report having difficulty knowing whether they are being understood by the arbitrators in virtual proceedings. There are also ethical concerns about online hearings. For example, it may be hard to tell whether a witness is being coached off-camera during virtual testimony. For these reasons, it is likely that in-person proceedings will still be preferred in larger matters. Nevertheless, the industry is moving toward more online and hybrid proceedings. In this way, the pandemic has pushed us to adopt digital technologies faster than we otherwise would have.

Professor Ford then asked the panelists whether there is a limit to how much online learning we can do. Ms. Yu responded that there are limits because it is easier to build a rapport with people when we can meet them physically. As a student, she hoped to go back to live classes soon because that would improve learning. At the same time, she acknowledged that students have online access to lots of content about international law, like conferences, seminars, and online hearings, that they might not have been able to easily access before the pandemic. In this way, the digitalization of international law has helped students.

Professor Korzun argued that law schools may move to a blended or hybrid model. There are limits on online learning imposed by the American Bar Association (ABA), which accredits law schools. Most of those limits were waived during the pandemic, but once we are beyond the pandemic it may not be possible to provide so much of our content online without violating ABA rules. But she argued that some sort of blended model will probably persist. This could be a combination of live and pre-recorded content. For example, evening division students could find a blended model appealing. She stressed that developing online content is not easy and that law schools need to develop strong online content, but she expects more law school students will take at least part of their education online. Some parts of law school education, particularly things like clinics and externships, are going to be very difficult to deliver online, however.

Professor Farrell then asked the panelists whether they expected the changes brought about by the pandemic to decentralize international law. After all, if students, litigants, lawyers, and judges can all participate virtually, does this permit the practice of international law to flourish further away from its traditional centers?

Mr. Schaner believes that the answer is uncertain, but he leans toward the conclusion that most international arbitration will not be deeply affected. Regardless of location, everyone will be able to participate in conferences and seminars virtually, but clients will probably continue to prefer law firms that have extensive experience in the field. Those firms will likely continue to be based in their traditional locations. Having said that, the lawyers that work for those law firms may spread out. After all, we now know that much of the work that these lawyers do can be done remotely. Mr. Schaner believes that the leading seats for arbitration proceedings will probably continue to thrive. Parties and counsel are looking for pro-arbitration legal environments and the practical considerations are still important. When the parties enter into an agreement to arbitrate, they likely will not

know if the agreement will result in a live or virtual proceeding. They will have to plan for the possibility of live hearings. This means picking locations with easy access to international airports and good hearing facilities. He further suggested that the move to virtual proceedings in international arbitration might even benefit the established players. They may be able to participate in locations that they would not have been able to easily or economically access in the past.

Dr. Eno concurred that the pandemic would not fundamentally alter the traditional centers of international law. He noted that the African Court will remain at its seat in Arusha, Tanzania. People will be able to access online content from the court from anywhere in the world, but the seat will still be in Arusha and if there are live hearings they will take place in Arusha. In addition, becoming an international lawyer and practicing international law requires specialized training, knowledge and experience. This will still be easier to obtain at the traditional centers where that law is practiced.

Professor Korzun agreed that the pandemic will probably not lead to the decentralization of international law. The seats of international courts are not likely to change. The Hague, for example, will continue to be a center of international law because of the courts headquartered there and it will still be easier to practice before those international courts if you live and work near those courts. Thus, The Hague will continue to be a center of public international law. Ms. Yu concurred, arguing that while access to information is easier virtually, the practice of law still depends on events that occur in particular places in the world and that is unlikely to change.

Professor Ford noted that he taught a night class during the pandemic and that he used a “flipped” classroom where the lecture portions of the material were pre-recorded and the students participated in a virtual discussion of the assigned cases and material during the scheduled class time. This had the advantage of reducing the amount of time that the students spent in class and gave them more flexibility about when and how they prepared for class. He argued that this model might well be preferable for many night students post-pandemic compared to the traditional model that had them sitting in a classroom for three hour stretches in the evening. He invited the panelists to comment on this possibility.

Professor Korzun noted that students wanted in-person interaction. Even for night students, they probably want a mix of pre-recorded material and live class time where they can interact with the professor and their peers. Pre-recorded material is also difficult and time-consuming to prepare. However, she noted that she did plan to prepare some pre-recorded content for her Public International Law course.

Professor Sorensen noted that she had taught a class that combined both pre-recorded and live content. She used the pre-recorded content to interview subject matter experts from all over the world. That part of the class simply could not have been done live because the experts would not have been able to travel to Chicago. She acknowledged that students still want in-person classes but noted that her students have been quite engaged in virtual learning. Professor Sorensen argued that the future of online learning in law schools depended on the ABA. The current ABA rules limit how much online learning students can do. She wondered whether the lessons learned during the pandemic would cause the ABA to loosen the restrictions on online learning.

Professor Ford then noted that the session was nearly over and invited each panelist to give brief closing remarks. Dr. Eno said that although the pandemic took the African Court by surprise, it also provided opportunities to use technology to improve the operation of the court. It opened our eyes to new ways to do things. Mr. Schaner noted that while we have many opportunities to work and learn virtually, there is not a virtual substitute for the opportunities to socialize and interact with people that can be done in-person.

Professor Korzun welcomed the increase in virtual access to information about international law that has been spurred by the pandemic. Online public hearings by courts and arbitrators provide a

great opportunity for students to see what the practice of international law really looks like. Ms. Yu said she misses the old days of in-person learning but agreed that students have access to lots of online resources and encouraged students interested in international law to take advantage of this. Professor Ford wrapped up the session by thanking the panelists for providing their time and their expertise to discuss how the global pandemic has changed the practice of international law.