

Remote testimony before the International Criminal Court in light of technological development

الشهادة عن بعد امام المحكمة الجنائية الدولية في ظل التطور التكنولوجي

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Abstract:

The impact of technological development on evidence-seeking proceedings before the International Criminal Court is one of the most prominent issues of legal problem and one of the most important problems is with regard to the authenticity of this evidence, Especially in testimony, where an adversarial testimony takes an important place among the evidentiary evidence, In the face of the accused, there are two things that technological development in this area results from being made using audio or visual interconnection technologies, It is considered a solution to exceptional cases where it is difficult to testify in cases where there is a risk to witnesses' safety imprisonment ", which is a means of obtaining evidence and preventing offenders from escaping pursuit and punishment. s personal conviction in accordance with the Rome Statute and the Rules of Procedure and Evidence

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Introduction

One of the most important difficulties facing international criminal justice during the investigation and prosecution of international crimes is to secure the witness's presence, given the gravity of the criminal capacity in international crimes and the seriousness of these crimes per se, but technological development has produced modern techniques that can be used in investigating and prosecuting the International Criminal Court.

The field of communication and information has evolved and it is possible to meet through very sophisticated means that make a group of individuals communicate simultaneously despite their different whereabouts, which is expressed in remote visual conversation which not only ceased to be used in ordinary life but became one of the means of obtaining evidence before the International Criminal Court, Not only before international criminal justice, but also domestic legislation has adopted audio-visual communication techniques in criminal proceedings.

The subject of remote testimony and its authenticity are among the most important subjects in the field of criminal evidence. international and national crimes ", where this importance derives from the role played by testimony in establishing crimes, both internationally and nationally, From the extent to which the defendant's rights are available during the adoption of this technique, where it can be said that no crime is barely without a prosecution witness, This testimony's communication with audiovisual means of communication has brought to the fore problems with its authenticity as evidence and scope of use.

The objective of the study is to analyse the technique of teleconference and the impact of technological development on its authenticity as evidence of the most serious crimes, and to indicate the judge's authority to estimate testimony by means of audio-visual interconnection technologies.

From what has been presented, the following problem can be raised: How does technological development affect the authenticity of testimony before the International Criminal Court?

In response to the problem, we have adopted descriptive methodology tools to determine the intent of the certificate by means of audio-visual interconnection technologies and techniques, as well as the analytical approach to the analysis of the various texts regulated by them within the Statute of the International Criminal Court and the Rules of Procedure and Evidence.

So we followed the bilateral division that included researchers, where we devoted the first research to defining the general framework of the ICC s teleconference mechanism in the light of technological development, and the second to studying the authenticity of teleconference before the ICC in the light of technological development.

Firstly : Mechanism of Remote Witness Testimony

Remote witness testimony is one of the modern methods adopted in criminal proceedings, which has recently seen large-scale application with various procedures

and diverse denominations varying according to the field of application. The study of this method necessitates, firstly, understanding its concept, followed by an examination of its techniques.

1. Concept of Remote Witness Testimony

Oral testimony is well-known, being one of the oldest and most disseminated forms of evidence. However, testimony conducted through audio or visual link technologies is a recent issue that requires a comprehensive study encompassing its linguistic, jurisprudential, and legal definitions.

1.1 Linguistic Definition

The nomenclature of testimony linked to technologies varies across legislations. In the Rome Statute of the International Criminal Court, it is termed "oral testimony through visual or auditory presentation technologies"¹

At the domestic legislative level, Algerian law refers to it as "remote visual conversation," with the legislature permitting the use of technological techniques to obtain testimony.²

As for the Jordanian legislator, it has adopted the term "Testimony using modern communication means" under Article 81/7 of the Jordanian Civil Procedure Law, which authorized electronic witness testimony. In jurisprudence, the appellations vary; some use the term "electronic testimony," while others refer to it as "remote testimony."

In the linguistic sense, the term "testimony" connotes presence, as in: "Witnesses witnessed the council," meaning he attended it. It may also imply observation and examination, as in: "He witnessed the matter," meaning he observed and examined it. Similarly, "He watched," denotes he scrutinized it.³

The term "remote visual conversation" refers to video conference has its etymological roots in both the French and English languages, comprising two words. The first, "vidéo," corresponds to "televisual" in Arabic, denoting any device that transmits image and sound via various communication waves. The second word, "conférence," refers to a gathering of individuals for the purpose of conducting a discussion or conference on a specific subject.

1.2 Jurisprudential and Legal Definition

In accordance with the Rome Statute of the International Criminal Court, it does not define the testimony conducted through audio-visual link technologies. It acknowledges the possibility of resorting to and adopting it for testimony without delving into its definition. Similarly, in national legislation, the Algerian legislator did not define remote testimony but rather specified procedures and conditions for its use.

Among the jurisprudential definitions provided for remote testimony, or what is referred to in jurisprudence as electronic testimony, it is defined as "the substantiation of a specific event through the verbal account of an individual

regarding what they have perceived with their senses about that event, directly conveyed by stating their account through an electronic system or an intermediary.⁴

The fundamental principle of testimony is that it should be direct; the witness informs the judge of what they have personally seen or heard, or both seen and heard, through a digital intermediary. This enables investigative authorities and parties involved in the legal case to orally discuss and immediately respond to the testimony, similar to a witness who directly narrates to the judge an incident they have heard or witnessed firsthand through video conferencing technology.⁵

2. Technologies of Remote Witness Testimony

The use of remote witness testimony technologies requires the provision of technical means and advanced technological devices. It also requires determination of the communication system to be adopted to obtain the testimony, according to the circumstances and nature of each crime.

2.1 Technical Means

The use of remote video conferencing technology to obtain witness testimony evidence requires the provision of all technical devices, including computers and internal networks, and ensuring their legal protection to the widest extent possible.

Technical means are considered the foundation for resorting to the use of video conferencing to obtain witness testimony, which primarily consists of a computer system that is highly advanced and modern, in addition to establishing an internal network specific to the International Criminal Court system only.

A computer is defined as an electronic device programmed to process data inputted by the user, perform arithmetic and logical operations on it, and then output it in the form of meaningful and understandable information, or store and save it through the available storage units for later use by the user. Through a computer, various types of calculations can be processed, as this device is designed to execute different applications and programs. It consists of a collection of diverse devices and compatible software to function across most computer devices.

2.2 Communication Systems

Communication systems take four distinct forms, varying according to the nature of the action to be taken and in accordance with the available devices, while adhering to the fundamental principles of fair trial. These systems include point-to-point communication system, active speaker system, unified attendance system, and advanced continuous attendance system.

➤ Point-to-Point Communication System

The point-to-point communication system is one of the simplest systems, through which visual and auditory communication is conducted between the location of the tribunal or investigation and the location of the witnesses or other parties to the dispute.⁶

➤ Active Speaker System

In this system, various locations are equipped for remote communication through audio conferencing technology. This system necessitates the proper technical

and logistical preparation of these locations. The display screens in these locations only show the image of the speaker with the highest voice level among the participants, whether it is the judge, the defendant, or the witness.⁷

➤ **Unified Attendance System**

In the Unified Attendance System, communication is established among five different and geographically distant locations. These locations include the presence chamber of the judiciary or investigative authority and four other locations where the other parties to the case are located, including the witnesses. Each location is equipped with a display screen to show images of these individuals, in addition to precise devices for hearing the speaker's voice.⁸

➤ **Advanced Continuous Attendance System**

The visual and auditory connection is established between the location of the judiciary or investigative authority and a large number of distant locations. Each screen is divided into four sections: the first section displays a general view of the session hall, with two sections for two of the locations connected to this hall. The fourth section of the display screen automatically transmits the image of the speaker, whose voice is louder than the other participants in the session.

Second : Authenticity of Remote Witness Testimony

Witness testimony is an admissible form of evidence in criminal cases according to the rules and standards stipulated in the Rome Statute of the International Criminal Court. For it to be relied upon as probative evidence, general as well as specific legal prerequisites must be satisfied, and it shall be subject to the principle of personal conviction by the judge.

1.Fulfillment of Legal Conditions

The norm for testimony is that it be made in-person and directly. However, as an exception to the norm, testimony may be given remotely by means of technology. For remote testimony to be relied upon as evidence, the specific conditions relating to the nature of testimony must be satisfied. Namely, the existence of exceptional circumstances, without violating or conflicting with the rights of the accused.

1.1 Availability of Exceptional Circumstances

The Rome Statute of the International Criminal Court outlines specific criteria for admitting witness testimony via video, as outlined in Article 68.⁹ The Court permits witness testimony through visual or audio technology when deemed necessary to safeguard the well-being of victims or witnesses .safeguarding the physical or mental health of witnesses is a paramount concern that justifies the utilization of remote testimony ,as video testimony is deemed indispensable in such circumstances .¹⁰ The location chosen for remotely giving testimony using visual or audio technology shall allow for sincere, clear testimony, and be appropriate for the safety, physical and psychological comfort, dignity and privacy of the witness.¹¹

The Rome Statute of the International Criminal Court permits the Pre-Trial Chamber to admit prior recorded witness testimony through visual or audio media if

the witness who previously provided the recorded testimony does not object to the submission of this testimony upon appearing before the Trial Chamber.¹²

The court has traditionally been characterized by the singularity of place and the limitation of its features, with its own privacy and majesty. However, the use of video conferencing technology does not isolate the individual from their normal life, whether an ordinary witness, victim or accused person held in a penal institution.¹³ This prevents such individuals from feeling the awe and sanctity normally associated with the court, as if they were truly present there. It is for this reason that the judiciary resorts to remote testimony technology only in exceptional cases, and not otherwise.

1.2 Not Prejudicing the Rights of the Accused or Conflicting with Them

The position of the accused in legal proceedings is considered the weakest. On that basis, the legislator has aimed to protect their rights and prevent anything that could conflict with those rights. The right to a fair trial is among the foremost human rights upheld in criminal proceedings, especially before the International Criminal Court, given the severity of the crimes committed and their penalties.

The fundamental goal in implementing the Rome Statute of the International Criminal Court is to activate international protection of human rights on one hand, and reinforce the individual in international law on the other hand, as well as to eradicate impunity.¹⁴

One of the conditions for testimony that ensures the rights of the accused in relation to remote testimony is that both the defense and prosecution must have had the opportunity to question the witness during the recording of the testimony.¹⁵

The most important thing that must be ensured when resorting to this technology is guarantees of a fair trial. This can be achieved through respecting the legal rights and freedoms of the accused, most importantly the right to defense and defaulting principle.¹⁶

The principle of defaulting presumes the presence of parties during investigations or trial hearings so they can present evidence and respond to or discuss it, enabling the judge to form their conviction. The rationale lies in allowing the court to evaluate all circumstances surrounding the crime, criminal, and motives to best discover the truth and achieve justice. Thus, applying defaulting principle in criminal trials requires the court to directly examine evidence without an intermediary.¹⁷ However, using visual-audio communication means does not align with the principle of confrontation, as the witness would not physically be present where the investigation or trial is conducted, and their testimony is heard through technological connections.

2. Subjection to the Principle of Personal Conviction by the Judge

Remote testimony is a form of witness testimony, and thus holds the same authenticity as direct testimony. However, there are many issues that could undermine its authenticity given that it is done remotely. As such, it has relative rather than absolute authenticity, and is subject to evaluation and assessment by the

judge according to their authority to determine the worth of testimony regardless of the number of witnesses, their characteristics, or the extent of consistency or contradiction in their statements.

2.1 Relative Authenticity of Testimony

The famous quote by Bentham¹⁸ that “Witnesses are the eyes and ears of justice” aptly captures the important role of testimony in investigations, particularly before the International Criminal Court, as testimony constitutes the primary evidence for establishing the commission of crimes and identification of perpetrators. Hence it has been described as “the eyes and ears of justice”, being the evidence closest to the heart and conscience of judges. Testimony forms the bedrock of all criminal cases.¹⁹

The authenticity of testimony is not absolute; that which is proven by testimony can be contradicted by other testimony or means of proof. What is established by testimony is considered valid until proven otherwise before judgment is passed.²⁰

Testimony has relative rather than conclusive weight, meaning what it establishes can be denied through other testimony or other methods of proof. What may diminish the value of the testimony is being remote, making the judge unable to closely study the testimony and observe the witness's demeanor and manner of testifying. The court evaluates the value of remote witness testimony based on the witnesses' characteristics, behavior, and demeanor, as well as other circumstances of the case. However, it may be difficult for the judge to observe all these factors when the witness is not physically present in court.

The testimony of witnesses provided remotely in some cases does not give the judge full conviction, because it is conducted under high surveillance that could impact the manner in which the witness testifies. The high level of surveillance imposed on the witness could cause them stress, which could undermine the value of their testimony if the court finds the witness was tense while testifying.

So that remote testimony be equal to in-person testimony in terms of authenticity, the technology used by the witness must enable the court to view the place where the witness is located, so that the court can ensure the place is isolated and no other person besides the witness is present there. Avoid fatigue from the communication medium used to transmit testimony, it is preferable to schedule the examination in sessions with breaks, or even postpone discussion to a later time.²¹

2.2 Testimony Is Not Binding on the Judge

In general, the principle of personal conviction means the judge has freedom in forming their belief to rely on any evidence presented to them as they see fit, and to evaluate the persuasiveness of each according to their conscience alone.

The origin of this principle originates from French law, after the French Revolution, jurists unanimously agreed that legal evidence must be adhered to in the field of criminal evidence. The judge shall render judgments based on personal conviction. On January 18, 1791, the National Constituent Assembly in France

amended the system of legal evidence and introduced a system of criminal evidence based on the judge's freedom to form their own belief. In accordance with this, the French legislator enacted Article 427 of the Code of Criminal Procedure, which states that 'crimes may be proven by any means of evidence, and the judge shall rule based on their personal conviction unless the law provides otherwise'.²²

As one of testimony's characteristics is that it is not binding on the judge, it is subject to their discretion. The judge has full authority to scrutinize and study it. The court also has complete freedom to weigh the statements of witnesses and evaluate the circumstances in which their testimony is given. It can thus accept or reject testimony irrespective of the witnesses' number or attributes. The court may accept witness testimony to the extent it is convinced of its veracity

Conclusion

This study has enabled us to identify one of the mechanisms for obtaining testimony as evidence before the International Criminal Court through visual-audio communication technologies, which constitute a prominent development from technological progress, within the exceptional circumstances defined by the Court's Statute. Accordingly, we have been able to reach several results that can be highlighted as follows:

1. Remote testimony relies on the availability of advanced technological means with a high level of accuracy and technical sophistication.
2. Remote testimony provides a solution in exceptional circumstances to obtain evidence and prevent impunity, by allowing prosecution of perpetrators and imposition of penalties.
3. Witness testimony in criminal matters falls within the judge's discretion according to the principle of personal conviction, irrespective of whether it is given in-court or remotely.
4. For remote testimony to be relied upon as evidence before the International Criminal Court, general requirements for traditional testimony must be satisfied in addition to special conditions set out in the Court's Statute, Rules of Procedure and Law of Evidence.
5. Methods of evidence in criminal matters have been impacted by technological developments, particularly regarding testimony, though their authenticity remains unaffected as it falls under the judge's discretion and satisfying legal prerequisites.

Recommendations

Through the discussion presented, the following recommendations can be noted:

1. Reviewing the International Criminal Court's Statute, Rules of Procedure and Evidence is necessary to delineate procedures for obtaining testimony using communication technologies.

2. Witnesses should be physically brought before the International Criminal Court when reasonably possible rather than relying on remote testimony, given the gravity of international crimes and need to ensure the principle of defaulting for guaranteeing fair trial rights of the accused and avoiding any perception of injustice.

3. Precisely defining the exceptional circumstances warranting reliance on remote testimony technology.

4. Conditioning recourse to this technology on careful criteria such as evaluating a testimony's significance in proving the crime, so it is used for testimony that can prove or disprove charges.

Margins :

¹ Article 69 of the Rome Statute of the International Criminal Court.

² Article 15 of Law No. 15-03 dated 11 Rabi' II 1436 corresponding to 1 February 2015, relating to the modernization of justice.

³ Louis Ma'luf, "Al-Munjid fi al-lughah wa-al-a'lām," Vol. 1, 19th ed., Beirut, 1956.

⁴ Khaled Mamdouh Ibrahim, "The Art of Criminal Investigation in Electronic Crimes," Dar Al-Fikr Al-Jami'i, Alexandria, 2010, p. 260.

⁵ Al-Alami, Mohamed Talal, "The Rules for Conducting Testimonials through Modern Means," PhD Thesis, Faculty of Shariah and Law, The Islamic University of Gaza, Palestine, 2011.

⁶ Amara Abdulhamid, *supra* note, at p. 61.

⁷ Bukhalut al-Zayn, "Remote Trial Mechanism and Principles of Fair Trial," Al-Basaer Journal for Legal and Economic Studies, Special Issue, 2021.

⁸ Adel Yahya, "Remote Investigation and Trial: An Analytical Study of Video Conferencing Technology," Dar Al-Nahda Al-Arabiya, 2006.

⁹ Article 69 of the Rome Statute of the International Criminal Court.

¹⁰ Jenia I. Turner, Remote criminal justice, vol [53:197, 2021.

¹¹ Adnan Al-Sabai, "Evidence before the International Criminal Court," Article published on the website www.droiteteentreprise.com, visited on 20/07/2023 at 2:14.

¹² Article 69 of the Rome Statute of the International Criminal Court.

¹³ Vanessa Perrocheau, Djoheur Zerouki Cottin, La visioconférence dans le procès pénal français, d'un rituel à l'autre ?, onati socio-legal series, v 8, n3, 2018, p352

¹⁴ Juan Antonio carrilosalcedo, la cour pénale internationale : l'humanité trouve une place dans le droit international revue générale de droit international public, N1, 1999, p23-p28

¹⁵ Rule 68, Paragraph (a), of the Laws of Procedure and Evidence.

¹⁶ Amir Bousahia, Wafa Shanatlia, "The Future of Remote Visual Trial Technology in Light of Order No. 20_04," Algerian Journal of Legal and Political Sciences, Volume 58, Issue 02, Algiers, 2021.

¹⁷ Mohammad Ja'far, "Principles of Criminal Trials," University Institution for Studies, Publishing, and Distribution, Beirut, Lebanon, 1994.

¹⁸ Jermy Bentham, A Treatise on justice evidence extracted from the Manuscripts of Jermy Bentham, Esq(1st edn, Baldwin), 1835

¹⁹Adel Yahya, "Remote Investigation and Trial," Dar Al-Nahda Al-Arabiya, Cairo, 2002.

²⁰Hafez Abu Seada, Secretary General of the Egyptian Organization for Human Rights, paper presented at the Conference on the Role of the Judiciary in Political Reform in Egypt and the Arab World, 2003.

²¹Salmon,louisa,I_witness testimony :handling witness interviews in a diggital age ,online research published in thomson reuters ,Practical Law_Arbitration blog ,2020.

²²Article 427 de code procédure pénale : Hors les cas où la loi en dispose autrement, les infractions peuvent être établies par tout mode de preuve et le juge décide d'après son intime conviction. Disponible sur le site Https : www.legifrance.gouv.fr,