

The Impact of the Leading Digital Technologies on Criminal Proceedings: A Case of Video Conferencing

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Abstract Currently, the use of modern technologies in criminal proceedings is becoming developed. Their application can contribute to raising the quality of preliminary investigations and trials in criminal cases to a higher level. One of these modern technologies is videoconferencing, which will be replaced subsequently by web-conferences. Videoconferencing provides not only access to justice, but also contributes to the possibility of carrying out investigative and other procedural actions, making them safer and more comfortable. The use of videoconferencing can take place regardless of the distance at which the participants are located. At the same time, under conditions of internationalisation of criminal proceedings and the development of technologies, an appeal to universal procedural models at the international level is of particular interest. In this regard, the article discusses the use of videoconferencing in the system of international criminal justice. The authors propose a new way to assess the possibility of proof using videoconferencing. Proposals are made regarding the classification of evidence by relative strength, taking into account the use of videoconferencing systems, as well as proposals related to the improvement of existing institutes for regularising and promulgating the proper uses of criminal procedures and the emergence of new ones.

Keywords: *leading digital technologies, criminal proceedings, video conferencing, criminal investigation*

1 Introduction

The emergence of new technologies, the acceleration of social life, the proliferation of digital forms of interaction between legal entities, as well as globalization form the bases that dictate the need to improve procedures for obtaining evidence in criminal proceedings (Osula 2015).

However, the introduction of digital technologies in criminal proceedings creates a situation that calls into question certain elements of the formation of the evidentiary trail. Thus, in criminal proceedings, it is increasingly necessary to obtain and transmit evidence remotely. This is due to new types (varieties) of crimes that have emerged recently, which are committed simultaneously on the territory of both one state and several. As a result of the commission of such crimes and their investigation, evidence can be obtained not only by traditional means, but also with new technologies. In this regard, there is a need to use other means for obtaining and transmitting evidence remotely. However, this issue is not sufficiently developed in the doctrine of criminal procedure. Therefore, the topic of future changes in the construction of the evidence process in criminal proceedings is again becoming relevant both in theory and practice.

For example, videoconferencing (in the future, a web conference) can be a means of transmitting evidence. The use of videoconferencing leads, on the one hand, to an increased possibility for transmitting evidence at a distance and on the other, affects the quality of the evidence thus transmitted. The latter, in turn, entails a need for theoretical study of this issue from the aspect of compliance of new types of evidence with the rules of evidentiary production and their transformation. Therefore, we should talk about a new stage in the development of research in evidence-based law.

Currently, the use of videoconferencing has become widespread, not only in a number of countries around the world, but also at the international level. Thus, the International Criminal Court (hereinafter – the ‘ICC’) operates on a permanent basis. An analysis of the rules of evidentiary production and jurisprudence of the ICC

allows the use of videoconferencing in order to ascertain the actual and original refraction model of proof, until classification evidence is the best or the worst.

The purpose of this study is to analyse the impact of digital technologies on the development of the model of evidence in criminal proceedings, on the example of videoconferencing under conditions of maintaining a trend of strengthening principles of competition. The achievement of this goal is due to the following tasks: identifying positive and negative aspects of the use of videoconferencing, taking into account international experience, assessing the consequences of introducing digital technologies, and indicating prospects for transforming the model of evidence in criminal cases in connection with the emergence of new technological forms of interaction between legal entities.

2. Literature review

The problem of transformation of the evidentiary theoretical model under the influence of modern technologies is relatively new for criminal law science. The theoretical basis of this study is created by papers of researchers on the problems of criminal law and procedure in the development of information technologies, especially within the sphere of videoconferencing. For example, we used researches of Sossin and Yetnikoff (2007), which mentioned concerns both with videoconferencing in principle and in practice, Dutton (2012), which proposed a rule to allow witnesses to testify remotely by way of two-way, live videoconferencing technology, Johnson and Wiggins (2006), which raised the question of extent of use of video conferencing, how it is implemented, and, most importantly, whether it affects the behaviour of participants in a way that violates a defendant's fundamental rights. Other scientists such as Christie (1993) draw attention to the positive aspects of using modern technologies in evidence, pointing to examples of communication between judges and prisoners, especially with long distances. Nevertheless, the modern process becomes global, and the videoconferencing is using not only in a number of countries, but also at the transnational level. That is why there are some major scientific works which are devoted to problems of use of the latest technologies in justice within the International Criminal Court procedures, such as Ambos (2003), Triffterer (2008), Broomhall (2003), Volevodz (2003) and others, that also were used during the preparation of the article.

These and other literary sources relate to the issue under study; however, none of them analyses the impact of digital technologies on the transformation of the evidentiary theoretical model. Therefore, this article describes the achievements of experts in criminal law and criminal procedure, and affording the acquisition of new knowledge, which could be used in future by both practitioners and academics.

3. Methods of assessment

The methodological basis for this study is generally adopted as methods of academic research (systems analysis, methods derived from informed debates between opposed positions, comparative methods) and methods of legal research (methods of interpreting legal norms). As part of the generally adopted research methodology, a system approach allows a comprehensive disclosure of the features for implementation digital technologies and identifying related risks. The debate method (reconciling opposed pairs of positions) used for deriving a body of knowledge involves the study of any material or theoretical phenomenon in its context and with the developments in the sphere in different countries.

4. Subheadings of discussion

1. Videoconferencing criminal proceedings.
2. Procedural Model of the International Criminal Court.
3. The impact of digital technologies on the development of the model of proof in criminal proceedings (an example of videoconferencing).

5. Results

The development of digital technologies and their active implementation in law enforcement practice inevitably lead to the transformation of regulatory regimes, including in the field of criminal justice. Technologies can make it possible to achieve procedural actions in a different context, at a higher technical level. Today, the use of videoconferencing in the production of evidence is common. Taking into account international experience, this study has allowed us to identify both positive and negative aspects of their use. On the one hand, videoconferencing allows for proceedings to be accelerated and simplifies access to justice, as well as to certain information for quick decision-making on the merits. On the other hand, the use of these systems cannot yet be considered perfected and, therefore, the evidence obtained in this way is usually of an auxiliary nature. However, the positive and negative aspects of the use of videoconferencing in the production of evidence, as well as other means (for example, web

conferences), does not negate - the influence of digitalization on the transformation of the model of evidence production. Thus, an appeal to international experience in the specific case of the International Criminal Court proves the thesis of the emergence of new types of evidence, suggesting their gradation in legal force. This is due to the approach developed in judicial practice, according to which the evidentiary value of the testimony presented by videoconference, although more significant than the testimony obtained as a result of giving written documents, that is, in the absence of a person, cannot but have the same force as testimony presented in the courtroom in person, which builds a hierarchy of evidence inherent in the inquisitorial form of the process, in historical retrospect. Therefore, modern technologies inevitably affects the transformation of the model for constructing the proof in criminal proceedings. Therefore, the directions of research relating to the specifics of developing the doctrine of evidentiary law are updated. The introduction of new rules for evaluating proofs in criminal proceedings on the best and worst, depending on the form of their representation as it is observed in connection with videoconferencing, emergence of digital proofs, features of their collecting and fixing, allows for a transition from the mixed to the new digital form of processing to be considered.

6. Discussion

- **Videoconferencing criminal proceedings**

With the modern development of technologies, new means of communication can be used. The relevant literature notes that "technology helps to democratize a planet where the basic rights are to have a reliable identity system and interact through a network" (Skinner 2018). The use of new technologies in all types of legal proceedings is designed to raise its quality to a higher level. In the case of criminal proceedings, new technologies should have a positive impact on the quality of preliminary investigation, judicial proceedings, and the protection of human and civil rights and freedoms.

The use of modern technologies should lead to qualitative changes in legal proceedings, contribute to the improvement of existing procedural institutions, and lead to the development of new ones. They can make it possible to perform procedural actions in a different way and at a higher technical level, which previously, without the use of such technologies, could not have been carried out at all, or were carried out for a very long time.

One of the new types of modern technologies is videoconferencing (Volevodz 2003). In its implementation, individuals may see and hear what is happening on the screen and, in particular, place themselves on the screens as participants in proceedings (Johnson and Wiggins 2006). This can happen, in particular, by asking questions to each other through the person conducting the criminal proceedings and receiving answers to questions that are transmitted to and played on the screen.

Some authors question the possibility of using videoconferencing, as this practice violates the rights of the accused, especially in the United States, where human rights and freedoms are not always protected at such a high level, even despite the amendments to the U.S. Constitution. The rights of the accused may conflict with activities of the courts using videoconferencing if, for example, the accused does not wish to be interrogated indirectly, i.e. by a technological means of communication. In particular, the participation of a lawyer is seen as problematic. It is not clear whether the lawyer should be-in the courtroom or with the accused. It may be necessary to have two lawyers present; but then there would be the problem of ensuring the right of the accused to receive explanations from the lawyer from a distance – that is, present in the courtroom (Poulin 2004; Thaxton 1995). Moreover, a test of the jurors' perceptions of witness testimony by video transmission has shown that they tend to have less confidence in evidence obtained indirectly than in evidence in the form of personal testimony (Goodman and Tobey 1998).

Of course, videoconferencing cannot always completely replace a person's direct participation in a courtroom session. At the same time, the use of videoconferencing in some cases helps to optimize the conduct of court sessions, prevent their disruption, and so on (Christie 1993). However, there may be instances where appearing in person for specific individuals involved in a hearing may be mandatory, as in certain categories of criminal cases, and because of the petitions of these individuals, such as defendants, who may have expressed a desire to participate in the hearing, or if they had previously filed complaints based on court decisions. The same applies to cases of electing a preventive measure against a person related to the restriction of the person's freedom. Therefore, in some cases, the use of videoconferencing may not be appropriate.

The meaning of provisions of the code of some countries, including Russia, that the use of any means videoconferencing can take place in situations where, without it, you could not do other actions and ways would be impossible to hold the hearing. However, what is characteristic of national orders may not be characteristic of international institutions, for example, in criminal proceedings before the ICC. For example, in the UK, during interrogation procedures by videoconference, the jury has the right to become acquainted with the entire transcript of witness testimony – i.e., with the case materials – but only in isolation from the videoconference session (Hungerford-Welch 2019). In other words, during the videoconferencing procedures, one must focus fully on the

evaluation of indirect evidence of such technologies. There is no such detailed regulation at the international level, which is generally understandable given the rules and purposes of evidentiary proofs.

The use of videoconferencing has become widespread in proceedings of courts of appeal and cassations. When considering criminal cases on appeal / cassations, those accused and others, cannot always be remanded to the courtrooms for various reasons – in particular, due to remoteness, technical impossibility, etc. Therefore, in such cases, videoconferencing is used. In addition, the use of videoconferencing is also possible in other procedures, involving those persons whose testimony would be deemed classified, for example, but whose testimony is necessary for participants in criminal proceedings, or when their data cannot be disclosed in the interests of national security. Of course, there should be no abuse, when allegedly, abuse might occur, and during a videoconference session, a secret witness or other person would not speak, but instead a law enforcement officer or other person who is not a witness or victim, and may be installed or falsified. However, possible drawbacks do not negate the progressiveness of these means of evidentiary proof (Sossin and Yetnikoff 2007).

The difference in procedures for using videoconferencing is that it takes place in live time, and procedural actions take place at a time when everything occurs without "editing". Of course after a videoconference session, the data that was displayed can be used in a variety of situations and purposes for making appropriate decisions. Thus, if a court session was held using videoconferencing - based on complaints received from the participants in this case, in connection with a violation of the appeal session, then when considering the case in a higher court, it would be possible to use the materials of the videoconference session that took place and establish whether there were any violations.

Of course, it is not always possible to determine what actually happened during the videoconferencing procedure – whether mistakes or abuses were made during the videoconferencing session itself (McDonald et al. 2016). However, this state of affairs will remain only until a certain time – namely, until the qualitative development of this means of proof and its transformation into a web conference, when any personal device of the user participating in criminal proceedings could be safely used for communication. When conducting a court session in a web conference mode, each participant in the process is at his workplace and has the opportunity to interact with both the court and participants. Analogs of the web conference system proposed for development for worldwide business practice are WebEx Meeting Center and Skype. Coupled with the development of digital technologies, the ability to scan the speaker's facial expressions during his interrogation, analysis of this data, as well as voice timbre data, and so on, it is possible to predict a significant and qualitative transformation of the model for producing evidence for international and national criminal proceedings. This thesis is already confirmed when referring to the experience of building the process of proof of such international bodies as the ICC.

Production regulations and judicial practice of the ICC allow, for example, to regulate the rules of use of means of videoconferencing to ascertain the actual and original refraction model of proof, until classification evidence is the best or the worst. However, before proceeding directly to the discussion of the main issue of the article, it is necessary to explain the reasons why we turn to an analysis of the process of building evidence in the ICC.

- **Procedural Model of the International Criminal Court**

Reference to the experience of the ICC is connected with the fact that its participants are many nation-states, each of which has its own rules with its own characteristics. Therefore, the founders of the ICC sought to build a procedural model that could easily interact in the future with the national system of law of any state and essentially be universal (Broomhall 2003).

The main achievement of the ICC Rome Statute (hereinafter referred to as the 'Rome Statute') is the consolidation and unification of disparate legal provisions belonging to different legal traditions in order to combine or mix (Ambos 2003) their elements gave the greatest positive effect.

Today, it is a mixed form of procedures that can be found in most countries. However, each state independently determines the degree of correlation of adversarial and investigative principles in the structure of criminal proceedings.

Despite this fact, today there are more and more calls to build a balanced model of criminal justice. International legal acts do not assign priority to the adversarial form in the construction of procedures for criminal proceedings. On the contrary, they orient the modern legislator to the construction of a balanced system of criminal justice. Therefore, the convergence of approaches of different judicial systems, as well as the construction of criminal proceedings on the basis of a combination of adversarial and investigative principles are legitimate and do not contradict the standards adopted by the international community in the field of administration of justice. Therefore, note that conversion procedures should comply with the position that the approach to change in an extraordinary tradition only one of the main families of proceedings, that is, Anglo-American (an adversarial beginning) or Romano-Germanic (beginning with an investigation), now has exhausted itself (Pechegin 2017).

The ICC embodies the idea of a balanced combination of adversarial and investigative principles and presents researchers with a very special model of universal proof. The ICC's dependence on comprehensive

interaction with various countries has largely determined the need to choose a form of legal proceedings that would reflect the specifics of the main forms of the process, that is, would combine both adversarial and investigative principles. If the ICC were to accept only one principle (e.g., adversarial), it would jeopardize not only the universality, but also the possibility of full operation of the form of the process, especially when an investigation on the territory of a state penal system which mainly comes from the opposite of the beginning, for example investigative (Triffterer 2008).

The problem of finding a harmony in the combination of adversarial and investigative principles, that is, the question of a model for the process, is element of all institutions, including evidence.

On the one hand, criminal proceedings in the ICC are subject to strict rules of principle of proof, according to which the judges are supposed to be directly certified in certain information contained in the sources of evidence, which is necessary for the purposes of achieving justice. This is especially true for obtaining such type of evidence as personal testimony. On the other hand, the ICC allows for videoconferencing facilities.

The use of videoconferencing is characterized by the fact that evidence obtained in this case cannot always be used fully in proof. In some cases, such evidence in the ICC will be of a supporting nature. It appears that the challenge was to give the evidence legal force more fully. This can be achieved not only by means of videoconferencing, but also by using other means of proof together with them. In this situation, the requirements for obtaining evidence, the rules for their evaluation, and the possibilities of their use in criminal proceedings are changing.

In essence, the above leads to the transformation of evidence as a special model for building procedural rules, the process of obtaining and verifying evidence, their meaning for persons, and certainly affects the making of procedural decisions in cases. In our opinion, we can talk about new types of neo-inquisitorial evidence. Such types of evidence will differ from existing traditional evidence - in form, content and legal force. At its core, the approach developed at the level of international tribunals to the evaluation of evidence obtained through videoconferencing allows us to conclude that the idea of classifying evidence into the best and worst, which was inherent in the inquisitorial form of the process, has been revived. We should consider this thesis.

- **The impact of digital technologies on the development of the model of proof in criminal proceedings (an example of videoconferencing)**

As a general rule in criminal proceedings before the ICC, testimony is given by witnesses in court in person (*Prosecutor v. Lubanga*. ICC Trial Chamber Decision. 20 January 2011. No. ICC-01/04-01/06-2662. para. 13). This gives the parties the opportunity to publicly and openly interrogate witnesses, weigh their answers to questions, provide the court with an assessment of the reliability of witness testimony, etc., which generally supports the adversarial nature of criminal proceedings in the ICC and corresponds to the rights of the accused established by Article 67(1)(e).

However, on the basis of Article 69(2) of the Rome Statute and the Rules of Procedure and Evidence, the ICC Trial Chamber may order the reproduction of a witness's testimony, in any form that has been recorded previously. Such a decision may be taken, for example, when a witness is unable to give evidence because of illness, death, injury, age, or other similar circumstances, such as the unique opportunity for investigation provided for in Article 56 of the Rome Statute. Or, if the issue concerns the security of participants, in accordance with Article 68 of the Rome Statute.

In particular, based on the requirements of Article 67 of the Rome Statute, the necessary level of security can be achieved during interrogation of a witness by videoconferencing, using technologies to change the voice of the witness and reveal only his silhouette. Moreover, in some circumstances, the interrogation of a witness may be initiated in an *in camera* and *ex parte* setting, as indicated by Rule 88 of the Rules of Procedure and Evidence, for example, in order to establish his or her identity in court, but to prevent the possibility of any of the participants in the proceedings having information about his or her identity.

However, the drafters of the Rome Statute also stipulated that the ICC Trial Chamber must take into account the potential risks of violating the rights of the accused by this decision, in each case, when taking a decision to reproduce the testimony of a witness in his absence or in connection with the adoption of security measures for participants. Thus, we see the desire of the developers of the Rome Statute to lay as its basis the requirement of a balance of interests of the various participants. In any case, the defendant acquires the right in each such situation to express his attitude to the stated testimony to the court, as well as to give counterarguments in favor of his interpretation of events.

In so doing, it is also necessary to bear in mind the provisions of Article 64(6)(b) of the Rome Statute, which discloses the power of the ICC to seek assistance from a particular state in order to ensure the appearance of a person in court (*Prosecutor v. Ruto et al.* ICC Trial Chamber Decision. 17 April 2014. No. ICC-01/09-01/11-1274-Corr2. paras. 100, 193) via videoconferencing (*Prosecutor v. Ruto et al.* ICC Appeal Chamber Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang. 9 October 2014. No. ICC-01/09-01/11-1598) on the grounds of Article 93(1)(b) of the Rome Statute (Broomhall 2003), if the interests of ensuring the safety and

comfort (*Prosecutor v. Bemba*. ICC Trial Chamber Public redacted decision on the 'Prosecution request to hear Witness CAR-OTP-PPPP-0036's testimony via video-link'. 3 February 2012. No. ICC-01/05-01/08-2101-Red2. para. 7) of the witness so require (Stegmiller 2011).

The experience of its predecessor, in the International Criminal Tribunal for the former Yugoslavia is very interesting in all the ways described above for presenting evidences to the ICC (Dutton 2012), which first introduced the gradation of evidence by relative strength, depending on the form of representation, which was a reflection of the inquisition model of building the process of proof at the present stage.

Thus, in the case of *Prosecutor v. Tadić*, it was developed that the evidentiary value of testimony presented by videoconference, although more significant than testimony obtained as a result of providing written documents, that is, in the absence of a person, cannot be as significant as testimony presented in the courtroom in person (*Prosecutor v. Tadić*. ICTY Trial Chamber II Decision on the Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence via Video-link. 25 June 1996. Case No. IT -94-1. para. 21). This gradation is also perceived in the framework of the regulation of the evidentiary process in the ICC, as the successor of previous international tribunals.

According to the established gradation, the above-mentioned evidence would be evaluated differently in the process of considering a case in the ICC on its merits. In other words, the ICC, in resolving a case, is likely to give preference to testimony that was given directly in a trial and, on the contrary, if there is "better" evidence, would not put in the basis of the decision, for example, written testimony that was not confirmed by one or another person.

In this refraction of the structure of evidence, in fact, we can talk about the revival, at the present stage, of the idea of classifying evidence by their relevant strength, which was inherent in the inquisitorial form of criminal proceedings. And such regulation does not contradict internationally recognized standards, as well as the requirements of competition. On the contrary, the above indicates in favour of a real possibility of combining adversarial and investigative principles and, at a higher level, within the framework of the model of building a digital proof process.

The introduction of modern technologies in criminal proceedings will have an impact on the further development of the type of criminal proceedings, in general, and the transformation of the model of evidence, in particular. The directions of research related to the specifics of developing the doctrine of evidentiary law are updated. The introduction of new rules of gradation of proofs in criminal proceedings on the best and worst, depending on the form of their representation as it is observed in connection with use of means of videoconferencing, allows a transition from the mixed to a new, digital, form of process to be predicted, thereby embodying the best practices in applying criminal procedure.

7. Conclusions

All in all, on the one hand, we can draw out some positive aspects of using new technologies in criminal proceeding, such as possibility for obtaining evidence remotely, ability to make decisions faster and, therefore, reduce the cost of legal proceedings and so on.

On the other hand, the use of modern technologies cannot yet be considered perfected and the evidence obtained in this way is usually of an auxiliary nature. Nevertheless, despite all the positive and negative aspects of the use of videoconferencing, as well as web conferences or other modern means, our study showed the impact of digitalization on the model of proof. Thus, an appeal to international experience proves the thesis of the emergence of new types of evidence, suggesting their gradation in legal force, even in an adversarial framework. This is due to the approach developed in judicial practice of the International Criminal Court, which builds a hierarchy of evidence inherent in the inquisitorial form of the process, in historical retrospect.

The introduction of new rules for evaluating proofs in criminal proceedings on the best and worst, depending on the form of their representation as it is observed in connection with videoconferencing, emergence of digital proofs, features of their collecting and fixing, allows for a transition from the mixed to the new digital form of criminal procedure to be considered.

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