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# The Covid-19 pandemic and the realities of the International Criminal Court

## 1. Introduction

The specificity of the International Criminal Court (ICC), the cases before it and the separateness of the proceedings meant that during the pandemic the Court had to face challenges that did not occur in the reality of other courts. I would like to focus here only on these particular aspects.

## 2. The International Criminal Court

First of all, the ICC is a global institution and present on all continents except Australia and Antarctica. According to Article 3(1) of the Rome Statute<sup>1</sup>, the seat of the ICC is the city of The Hague in the Netherlands. Judges and most of its staff are in office here, but the ICC has representations and field offices in the USA, Costa Rica, the Democratic Republic of the Congo, Côte d'Ivoire, Mali, Central Africa, Uganda, Sudan, Georgia and Ukraine. Everywhere there are people working to conduct investigations, ensure the participation of victims of crimes in proceedings and prepare reparation programs. The Prosecutor's investigations of the Court are currently being conducted in 15 countries of the world, including those where the ICC does not have (or does not yet have) its country offices. Article 3(3) of the Rome Statute allows the Court to hold hearings in any country in the world if circumstances so warrant. In particular, it is possible to hold trials in the country where the crimes were committed, because this is where the main evidence is located and local communities follow every minute of the trial in anticipation of justice. All this means that the Court's operation during the Covid-19 pandemic had to take into account the changing pandemic situation

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1 See: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> (Accessed: 24 August 2022).

in various places around the world. In addition, travel restrictions, occurring during the pandemic with particular intensity, have had a significant impact on the restrictions or delays of certain operations.

Another condition is the specifically shaped proceedings in cases of international crimes. As expected, periods of exacerbation of the pandemic with varying intensity affected the progression depending on its stage. I have already mentioned the investigations conducted in various countries of the world. It is clear that they have suffered the most; in some cases, the pandemic has led to long-term downtime, which has further extended the time of proceedings, which is not short also without the pandemic.

### 3. Modification of the procedure before the International Criminal Court

It should be emphasized that during the entire pandemic period, the ICC did not suspend or adjourn at least one date of a hearing or a trial. This applies to both the so-called the pre-trial phase of the proceedings, which includes the confirmation hearing (usually several weeks), and the judicial phase, the main part of which is a trial that usually lasts several years, with 8-hour sessions each day. Organizing hearings, and even more so, trials, was of course a very special challenge. Due to the specificity of cases heard by the Court, the organization and holding of a hearing is extremely complicated, even in times without plague. It is necessary to gather in one place several hundred people performing various roles. Apart from judges and the defendant (or defendants), there are defense counsels in the courtroom (usually several or a dozen in each team representing the accused), the prosecution team (more than a dozen), legal experts of judges, security officers, representatives of the ICC Registry, witnesses, *amicus curiae*, and in separate rooms interpreters translating everything simultaneously into several or even a dozen languages, court reporters, stenographers, etc. It is also impossible not to allow journalists and reporters to participate. Usually we also have a full gallery for the public.

The pandemic required significant modifications. The traditional deal with the physical presence of all participants in the courtroom was usually impossible, especially due to the fact that witnesses, defense lawyers or experts would most often have to travel from distant continents. Therefore, we used techniques enabling the transmission of sound and image to a large extent. Hearing participants usually had the opportunity to participate online in separate rooms, or even in different places around the world (an additional factor that had to be taken into account here was the existence of time zones on Earth). This also

applied to judges, sometimes some of them, who could sit in their offices, and monitors transmitting their images were placed on the table in the courtroom.

The participation of witnesses in the hearing is presented in a special way. There is a known controversy as to whether the replacement of their physical presence in the courtroom with video transmission is important for the credibility of evidence and the way it is perceived by judges and participants in the proceedings. In proceedings before the ICC, the use of video broadcasts and previously recorded testimony simply has no alternative. After all, it is about hundreds or sometimes thousands of people who most often live thousands of kilometers from the seat of the Court. It would be logistically impossible and costly to ensure the physical presence of all witnesses in The Hague. Hence, the Rome Statute (Article 69 (2)) and the Rules of Procedure and Evidence (Rule 69) allow the use of previously recorded testimony, of course under strict conditions relating to the relevancy of a given testimony in the context of the subject of the expected decision, the presence of a defense counsel during questioning, the possibility of cross-examination (even online) after playing the recording, etc. Without going into the details of this complicated and very specific regulation, it must be stated that during the pandemic the judicial chambers used these procedural options to a greater extent than usual. It could be argued that the pandemic thus left its mark on the integrity of the evidence taking; on the other hand, without the use of remote techniques and extensive use of previously recorded testimonies, the trial could not be held at all, and this would in turn affect the right of the accused (in principle, deprived of liberty) to proceed without undue delay.

The significant difference between the pre-Covid and Covid regime was, finally, that during the pandemic period, we abandoned the audience. Presence at the public gallery with a small cubature and a large number of seats, would be associated with too big a risk of spreading the infection. However, we decided that we are not attacking the openness of the proceedings, as all hearings before the Tribunal are anyway broadcasted via a dedicated YouTube channel, also available on the ICC website.

The pandemic had relatively the least impact on the course of the appeal proceeding, which is usually of a written nature, which will be mentioned later in this study.

Of course, the work of the ICC is not limited to the courtroom. Meetings and deliberations, many hours of consultations with experts and work related to the preparation of usually extensive draft judgments and other decisions are everyday activities. This sphere of activity has been almost completely shifted to remote modes. In this context, the solution practiced long before the outbreak of the pandemic, consisting in the complete elimination of traditional acts and their replacement with electronic ones, turned out to be beneficial. Its advantages are

so obvious that someone who works for a while at the Court is out of his mind that it is still possible to use paper in some places. The system of electronic files is based on the fact that each participant in the proceedings has access to the database in a dedicated scope, taking into account the level of confidentiality of the documents in the database (this also applies to the accused who is in custody). Such access, at the lowest level of confidentiality (selected documents in redacted form), is also available to every Internet user via the ICC website. There is no dedicated office at the ICC, and the submission of a document involves placing it in the database, which results in an automatic notification addressed to a specific group of recipients. This also applies to ICC judgments that do not require public announcement. The advantages of the system are obvious. First of all, the problem of access to files of the case potentially resulting lengthy proceedings is eliminated. The system is supplemented by the sharepoint, which allows many people to work on the same document at the same time. This is of paramount importance in the case of drafting judgments and other documents, in which experts who support judges and prosecutors actively participate.

The advantages of the electronic record system proved to be successful in the times of the pandemic, and not least because paper could potentially be a carrier of deadly viruses. It is obvious that using the electronic files as well as working on draft documents does not require physical presence at the seat of the Court. Hence, the personnel supporting the judicial activity, as well as the judges themselves, could perform most of the activities without leaving their homes. Sessions and consultations could take place using electronic communication platforms and electronic access to files and prepared documents. This concerned in particular the appeal proceedings, because here the hearing, although legally possible, is not often scheduled in practice. Hence, in the case of a number of appeals examined during the pandemic, from the moment it was registered in the system until the judgment was issued, it was not necessary to visit the seat of the ICC. The rapporteur worked with experts, communicating on one of the electronic communication platforms, projects were prepared in the sharepoint, consulted online, judgments were signed electronically and announced using the transmission of the image of judges to the courtroom and YouTube.

All this meant that the corridors of the ICC Hague headquarters were almost empty in the times of the pandemic, the library, whose collections were digitized and made available online, was not working, the gym and the canteen were closed. It was sad....

Fortunately, this bad time seems to be beyond us and we enjoy normal interpersonal communication again. However, protocols have been developed that can be reused should the need arise. What is more, some of the developed methods of communication can and are actually used also now, because they

greatly facilitate communication between people operating on different continents and contribute to lowering the costs of proceedings.

Finally, it is worth mentioning the specific challenges faced by those responsible for administering the Court, in particular the Registrar and President of the ICC. The Court is seated in the Kingdom of the Netherlands, but is an extraterritorial institution and does not come under Dutch jurisdiction. Therefore, the ICC did not apply to e.g. the Covid restrictions policies adopted by the Dutch Government and it was necessary to systematically monitor the situation and define its own rules relating to limiting the availability of the seat of the Court, freedom of movement around the ICC facilities, the precautionary measures applied, etc. These tasks were performed by a specially appointed crisis management team, which prepared weekly recommendations for the President and the Registrar. Of course, we tried to follow the suggestions of the hosts (the Dutch), but it was necessary to take into account the specificity of the Court, and to develop separate protocols for country offices operating in different countries and at varying degrees of risk from the effects of the pandemic.

#### **4. Conclusions**

Instead of summary, let me express my conviction that in the difficult times of the Covid-19 pandemic, the ICC has passed the exam. Apart from some investigations, the proceedings were not slowed down and the modifications applied did not hit the procedural guarantees of the participants in the proceedings. The Court has prepared itself well for possible future epidemics and pandemics and is now operating normally in the hope that the protocols that have been developed will never be applied again.