ANNA ADAMSKA-GALLANT

SHIELDING VICTIMS OF WAR CRIMES

AND OTHER VULNERABLE WITNESSES IN THE PRACTICE OF INTERNATIONAL AND HYBRID COURTS

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1.

"The book presents a unique insight into the status of the vulnerable witness, exploring the world of war crimes from the perspectives of evidentiary law, criminology, criminalistics, forensic psychology, and victimology. It is an essential read for justice system's workers at various levels, offering a distinctive viewpoint on a complex subject."

Prof. Maciej Szostak – University of Wroclaw,
Department of Criminology and Security Sciences

2.

"This publication is a treasure trove of practical wisdom, underlying the necessity of vital strategies for the respectful and effective treatment of vulnerable witnesses in the justice system. Its real-world applicability makes it an indispensable guide for legal professionals dedicated to upholding justice with integrity and compassion."

Dariusz Sielicki, LLM, Phd, international judge
(2011–2016) adjudicating war crimes in former
Yugoslavia

3.

"A fundamental guide providing essential knowledge for dignified and effective engagement with vulnerable witnesses in legal proceedings. Invaluable for practitioners, this book skilfully navigates the complexities of international humanitarian legal principles with empathy and professional acumen. The author's judicial experience shines through, carefully selecting issues of utmost significance for those in the field."

Cees J.M. Verhaeren, Detective Chief
Superintendent of the Netherlands National
Police (rtd.), Former Deputy Director of
Investigations of the ICTR, Former Head
of an international Witness Protection Unit

Sometimes I get terribly sad
because I can't imagine what my life will be like.
I will never see my parents again,
but for the rest of my life I will see the people
who killed them and their children.
I can't bear the thought.

Donata, 11, quoted on a plaque
at the Kigali Genocide Museum in Rwanda.

Acknowledgement

I extend my heartfelt gratitude to my parents and my husband for their unwavering belief in me and their steadfast support.

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List of abbreviations

eCCC	Extraordinary Criminal Chambers for Cambodia.
ECHR	European Convention on Human Rights
ICC	International Criminal Court – International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY RPE	Rules of Procedure and Evidence of ICTY
ICTR	International Criminal Court for Rwanda
ICTR RPE	Rules of Procedure and Evidence of ICTR
KLA	Kosovo Liberation Army
KSC	Kosovo Specialist Chambers & Specialist Prosecutor's Office
KSC RPE	Rules of Procedure and Evidence of KSC
SCSL	Special Court for Sierra Leone
SCSL RPE	Rules of Procedure and Evidence of SCSL
STL	Special Tribunal for Lebanon – Special Tribunal for Lebanon
STL RPE	Rules of Procedure and Evidence of STL
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo,
VWS	Victims Witness Service – Vulnerable Witness Service,
VWU	Victims and Witnesses Unit
WPSO	Witness Protection and Support Office

Foreword

When I commenced my work as an international judge in Kosovo in 2013, I never envisioned the transformative journey that awaited me. This experience compelled me to adapt to new legal systems, collaborate with lawyers from diverse backgrounds, and grapple with language and cultural differences. The intricacies of interpreting shared rules often surprised me initially, offering new perspectives upon reflection.

Handling war crimes cases presented an exceptional challenge. These cases were not just legally and factually complex but emotionally demanding. The trials involved vulnerable witnesses who had endured severe crimes under international law. Testifying meant reliving traumatic experiences, carrying the risk of secondary victimization. Many, despite the burden, chose to testify, necessitating careful and sensitive interviewing by judges, prosecutors, investigators, and lawyers. My work with these witnesses fuelled a desire to delve deeper into their motivations. I sought to understand the courage that compelled them to testify, often in the presence of those who had caused their suffering. Researching best practices from international tribunals and studying transcripts of war crimes trials became an integral part of my work. This research formed the foundation of my doctoral dissertation, which I completed at the University of Wroclaw under the guidance of Prof. Maciej Szostak. My aim was to ensure my reflections on vulnerable witnesses were practical and impactful, given my background as a practitioner. I aspired for these insights to contribute to improvements in the treatment of vulnerable witnesses within the Polish justice system. However, I could not have

predicted the heightened relevance of my work due to the war in Ukraine. As someone deeply involved in reforming the Ukrainian judicial system since 2018, I, like many friends and colleagues, initially found it hard to accept the reality of impending conflict.

I successfully defended my PhD thesis on February 28, 2022, just four days after the onset of full-scale aggression against Ukraine. In the weeks leading up to the defense, I vigilantly monitored the internet each day at 4:00 a.m. for news of Russian troops entering Ukraine. Despite the escalating threat, I continued working closely with Ukrainian colleagues and international experts to appoint new members to the High Council of Justice. The hearings for candidates took place via videoconference due to the growing danger. On February 23, 2022, a Ukrainian colleague alerted me to the possibility that the hearings scheduled for the next day might not proceed due to ominous circumstances. On February 24, 2022, Russian troops invaded Ukraine, sparking a wave of refugees into Poland, seeking refuge from the ongoing conflict with no end in sight.

The situation in Ukraine has revealed increasingly more about war crimes and crimes against humanity committed on its soil. Prosecutors and courts in Ukraine are tirelessly pursuing justice, while the International Criminal Court investigates the situation. Many European countries are also investigating crimes committed during the conflict under the principle of universal jurisdiction. The idea of establishing a special international tribunal to prosecute crimes of aggression gains momentum. Testimonies from direct witnesses who have experienced these crimes play a pivotal role in these proceedings, underscoring the importance of skilful handling and protection from secondary victimization.

To you, dear reader, I express my thanks for choosing my book. I hope you find it a compelling and enlightening read.

Introduction

The twentieth century went down in history as a time when totalitarian regimes came to power in many countries, the most dramatic consequence of which were crimes committed on an unprecedented scale, in which millions of people died. In order to describe them, the Polish jurist Raphael Lemkin introduced a new term – genocide – into the language of international law while still in the Second World War, because no previously known term was able to convey the extent of the cruelty and harm caused[1]. According to Raphael Lemkin's conception, genocide is a series of coordinated actions carried out with the aim of destroying a nation or an ethnic group, which are not limited to its physical extermination, but also include actions aimed at destroying its social, political, cultural and economic identity. The need to punish this most serious crime of international law underpinned the creation of a mechanism for international justice.

The experience of the Second World War forced the international community to react to unprecedented atrocities, raising awareness of the need to punish at least those who held the highest leadership positions both in the system of power and in the armed structures. Their prosecution required

[1] Cf. in more detail: R. Szawłowski, *Rafał Lemkin – twórca pojęcia „ludobójstwa" i główny architekt Konwencji z 9 XII 1948 (w czterdziestolecie śmierci),),* „Państwo i Prawo" 1999, notebook 10, pp. 74–86; S. Mikke, *Adwokat Rafał Lemkin: wybitny nieznany,* „Palestra" 51/1-2 (577-578), pp. 110–113, https://bazhum.muzhp.pl/media/files/ Palestra/Palestra-r2006-t51-n1_2(577_578)/Palestra-r2006-t51-n1_2(577_578)-s110-113/Palestra-r2006-t51-n12 (577_578)-s110-113.pdf (accessed 15.04.2021).

special arrangements, based on the participation of lawyers drawn from outside the legal system of the countries involved, due to the conviction that only under such conditions would it be possible to bring the guilty to justice effectively. A similar modus operandi was subsequently applied on a number of occasions, starting with the conflicts in the former Yugoslavia, and the recurrence of war crimes and crimes against humanity highlighted the need for a permanent international tribunal to try them.

Photo 1. Swearing-in of 15-year-old Maria Doležalová as a witness for the prosecution before the International Criminal Tribunal in Nuremberg

Source: United States Holocaust Memorial Museum, https://collections.ushmm.org/search/catalog/pa1036686.

In the photograph above, taken on 30 October 1947 in the courtroom of the Nuremberg Tribunal, fifteen-year-old Maria Doležalová, one of the few witnesses offered by the prosecution, is pictured shortly before she is about to start giving her testimony. The gesture she makes – a raised hand and

two fingers pointing upwards – indicates that she is just making a pledge, committing herself to tell the truth. Doležalová is to testify about what she experienced during a mass execution that took place in the Czechoslovakian village of Lidice, where the Nazis murdered most of the inhabitants, including almost her entire family. She herself and six other children were deported to a concentration camp, from where she was then placed with a German family as part of a forced Germanisation programme. After the war, she was found by a Czechoslovak organisation dedicated to finding children with a similar history and returned to her homeland, where she lived with her relatives. Looking at her photograph from the trial, one can only try to imagine what emotions accompanied her when, in the presence of the defendants, standing before the court with all its solemnity and formalism, she had to answer questions from the prosecutors and defence lawyers about the most traumatic experiences in her life.

At the time of Maria Doležalová's testimony before the Nuremberg Tribunal, the well-being of the witnesses did not receive much attention. The fact that she was still a child at the time of the hearing, a survivor of the war who had seen the death of her loved ones, even though such experiences must have been a source of trauma for her that had a significant impact on her psyche, was not taken into account. The needs of crime victims were not offered due consideration, nor were their personal characteristics that, according to today's knowledge and judicial practice, could justify special treatment. There is no information in the records of the Nuremberg trials that psychological care was provided to witnesses. Although the tribunal employed psychologists, their task was to observe and assess the defendants, not to provide assistance to the victims[2]. In turn, it was up to the latter, if evidence of their testimony was allowed at all, only to answer the questions asked and, as a result, to provide evidence in support of the allegations made.

The treatment of victims of crime has changed over time, as a better understanding of their needs, as well as the risks to their well-being resulting from participation in legal proceedings has emerged. When the International Criminal Tribunal for the former Yugoslavia (ICTY) was established almost 50 years after the end of the Second World War, the need to compensate

[2] See on this subject G.M. Gilbert, *Nuremberg Diary,* London 1948.

victims of crime was identified as one of its most important tasks, thus strengthening their role in the process. Similar objectives were set for subsequent courts and tribunals created to try the most serious international crimes, including atrocities against humanity. The change in the approach to victims was also due to the fact that, unlike the Nuremberg Tribunal, which based its findings predominantly on documentary evidence, other international courts relied to a far greater extent on the testimony of participants in the events charged.

Thanks to direct contact with witnesses, who often testify about extremely drastic events involving them, judges adjudicating in the international and hybrid courts that are being set up today have a better understanding of the needs of the persons standing before them. This is reflected in the rules of procedure and evidence they adopt, as well as shaping judicial practice, which also manifests itself in decisions on how to deal with a witness whose welfare is deemed to be particularly at risk for various reasons. Influenced by the ongoing changes in the legal acts that form the basis for the functioning of successive international courts, the term 'vulnerable witness' has emerged[3]. Such a category of witnesses is also known to the legislation of some countries, especially those originating from the common law system, and the manner of dealing with them is regulated in a specific way.

In the sphere of operation of international and hybrid courts, there is no common definition of the concept of a 'vulnerable witness,' nor are criteria always defined that would support the assumption that a witness should be considered as such. Relevant definitions are found at most at the level of internal regulations on the organisation of these institutions, but not in international agreements or other acts of will of the international community relating to their creation[4]. This was particularly evident at the stage of functioning of the first international courts created today (International Criminal Tribunal for the former Yugoslavia – ICTY, International Criminal Tribunal

[3] Cf. Rule 75 (B) (iii) of ICTY RPE, Rule 75 (B) (iii) of ICTR RPE, Rule 75 (B) (iii) of SCSL RPE, Rule 133 (B) (iii) of STL RPE, Rule 80 (4) (c) of KSC RPE.

[4] We are referring to international treaties, such as the Statute of the International Criminal Court, signed in Rome on 17 July 1998, and UN resolutions, such as UN Security Council Resolution 827 of 25 May 1993 on the establishment of the International Criminal Tribunal for the former Yugoslavia.

for Rwanda – ICTR, Special Tribunal for Lebanon – SCL), where it was left to the discretion of the judges adjudicating in specific cases to decide which witness should be treated as vulnerable. Such a decision may justify a different way of dealing with such a witness.

The author's interest in the topic of the participation of the vulnerable witness in proceedings before international and hybrid courts is closely related to her professional experience. Between 2013 and 2018, she adjudicated as an international judge in cases of the most serious war crimes and crimes against humanity (international crimes) in hybrid courts of all instances in Kosovo. The observations made during this time showed a wide spectrum of phenomena conditioning the special situation of vulnerable witnesses and the various negative consequences of their participation in the proceedings to which they are sometimes exposed. Misunderstanding on the part of investigators, prosecutors and judges of the challenges faced by witnesses, together with a lack of adequate support for them, are a significant source of difficulties in the effective handling of evidence in international justice. Furthermore, and it is important to note in the context of the ethical aspects of international justice, such a situation creates far-reaching discomfort for witnesses, often leading to their repeat victimisation, as well as undermining confidence in international justice.

The subject of this dissertation, therefore, is an issue belonging to the research field of forensic tactics, namely the attempt to establish criteria for defining the category of vulnerable witnesses for the purposes of proceedings before international and hybrid courts. Intuitively, it is possible to assign to this category those witnesses who – due to special circumstances, either as a result of the trauma they have suffered, their personal characteristics, or the reaction of the community to which they belong and finally because of the threats posed by the perpetrators or their supporters – are exposed to significant distress as a result of their participation in criminal proceedings. An indication of the grounds for considering a witness as a vulnerable witness, as well as an examination of their motivation for giving evidence, can be useful in international justice practice, both at the case-building stage during an ongoing investigation and in proceedings before the court. This knowledge may facilitate the acquisition of a witness for the proceedings and may help in the choice of tactics for questioning them in order to achieve

the fundamental objective of the international criminal process, which is to establish the factual circumstances of the international crimes committed and to punish those responsible.

In addition, the study will present selected issues of forensic tactics relating to vulnerable witnesses in terms of conditions specific to war crimes and crimes against humanity cases, which may affect, on the one hand, their motivation to testify and, on the other hand, their ability to perceive and record perceptions, as well as their subsequent reproduction before the court. Knowledge of these factors is useful for prosecutors and judges involved in international criminal proceedings at every stage of the case, from obtaining witnesses, i.e., persuading them to testify during the investigation phase, maintaining their willingness to testify, to assessing the credibility and reliability of their testimony.

This book explores the issue of dealing with vulnerable witnesses before international and hybrid courts, especially as there is so far a lack of academic studies that capture it from a practical perspective. Typically, authors focus on a specific group of witnesses, singled out because of a common factor in favour of treating them as vulnerable, such as victims of sexual violence. One also encounters studies dealing with a specific phase of the proceedings, that is most often the trial, while the initial stage of the witness's cooperation with the investigator, especially the acquisition of the witness, is left out.

The first chapter of the dissertation analyses the positioning of the vulnerable witness in the general classification of witnesses before international courts. It will require a brief discussion of the specifics of proceedings before international criminal courts that determine the categories of witnesses to testify. The proposed distinction of witnesses, made taking into account the purpose of the proceedings and the tactics used to build the case, may contribute to a more effective collection of evidence. Awareness of the importance of specific information and sources of evidence in order to establish the circumstances of the events that took place and, in particular, the need to reconstruct the broader context of the events is crucial for the formulation of prosecution in war crimes and crimes against humanity cases. Presenting the issue of the participation of vulnerable witnesses in proceedings in this way makes it possible to limit their number and rationalise the steps taken.

In the second chapter, attention focuses on the specific circumstances that may affect a vulnerable witness appearing before an international or hybrid court. These are both of an internal nature, concerning the witnesses themselves, their personal characteristics and conditions, and of an external nature, stemming in particular from security threats, as well as from their relations with other members of the group to which they belong. The latter element is particularly important in the case of international crimes, which are not exclusively an individual experience, but involve the entire community. Given that, unlike proceedings before national courts, the appearance of a witness before an international court is based on their goodwill, it is also necessary to consider the motivation that guides a vulnerable witness in deciding whether to testify in a case. Awareness of what the motives may be for participating in the proceedings may make it easier to obtain witnesses.

A better understanding of the factors that may affect vulnerable witnesses will not only help to identify them more effectively in the course of proceedings, especially at the preliminary stage, but will also allow building a relationship with them that helps to make their testimony as reliable and credible as possible. Awareness of the needs of vulnerable witnesses on the part of those involved in the proceedings, including investigators and judges, can contribute to more fully safeguarding their welfare, which is particularly important in view of the need to avoid secondary victimisation.

The third chapter presents the elements of forensic tactics related to the participation of the vulnerable witness in the different stages of criminal proceedings conducted within the international justice system, starting from their acquisition by investigators through the testimony phase, to the actions carried out after the hearing. Particular attention will be paid to the system of support provided to witnesses and the ways in which their welfare is protected during the proceedings. Specific elements concerning the questioning of a witness, which have permeated the practice of international and hybrid courts from the common law system, often constituting a cause of considerable stress for vulnerable witnesses, will be analysed.

The author's participation in proceedings in cases of war crimes and crimes against humanity, to some extent, determined the choice of research methods used in the dissertation. Indeed, participatory observation played an important role in the research conducted. By carefully perceiving the behaviour

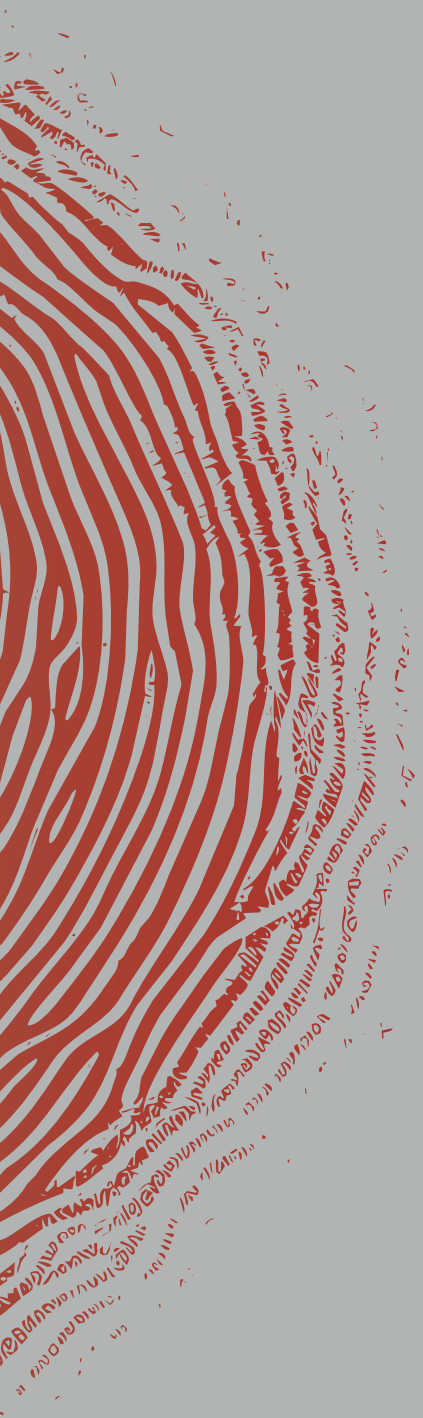
of both the witnesses, who could be considered vulnerable, and the participants in the proceedings, who interacted with them, the author obtained information allowing her to identify the essence of the phenomenon. Through the author's direct, professional-related contact with vulnerable witnesses and her observation of their individual behaviour in specific situations arising from the ongoing criminal trial, knowledge was accumulated, which was used to interpret the remaining collected material. The author's observations were recorded in the form of notes kept on an ongoing basis. These formed the basis of the questionnaires used to interview judges and prosecutors and were also analysed in comparison with the material available in the literature on vulnerable witnesses appearing in criminal proceedings before international and hybrid courts.

The research also used a legal-dogmatic method consisting mainly of an analysis of legal sources, but also of the practice of international and hybrid courts concerning the participation of vulnerable witnesses at different stages of proceedings. The legal solutions concerning them adopted in some countries of the common law system were also analysed. The application of this method was limited to the search in the studied texts of legal acts and jurisprudence for criteria supporting the recognition of a witness as a vulnerable witness, while no logical-linguistic analysis of the studied texts was conducted. The author also referred to the rules and algorithms for taking testimony from such witnesses, which are commonly used in international criminal proceedings, especially in their initial phase, when investigators on the scene collect evidence of crimes committed. Although such regulations are non-binding, as they are prepared by international organisations involved in documenting crimes of a certain type, their importance for the way in which vulnerable witnesses are handled is growing. They are also increasingly part of the training provided to investigators and prosecutors who are involved in investigating crimes under international law.

The research related to the development of this dissertation required the application of a systematic review of specialised literature, especially foreign literature, on the functioning of the international criminal justice system. Among other things, the author drew on the results of studies available in the literature conducted with witnesses testifying before international courts, analysing them in terms of the research question formulated above.

The research material was supplemented by the author's unstructured interviews with international judges and prosecutors involved in proceedings for war crimes and crimes against humanity that took place in hybrid courts operating within the framework of the European Union Rule of Law Mission in Kosovo. This technique of researching information allowed for a more complete analysis of the phenomena under investigation, especially as each interviewee referred to their own observations. Eight people, including four judges and four prosecutors, took part in the interviews. In conducting them, the author used a prepared questionnaire, with the respondent's answers influencing the formulation of further questions. Each interview took approximately two hours and was recorded in the form of reports drawn up at the end of the research.

Synthesising, the theoretical-cognitive object of the research is the presentation of the institution of vulnerable witness on the basis of the practice of international courts (primarily ICTY, ICTR and ICC) and the author's own judicial experience, framed in an interdisciplinary research perspective from the standpoint of forensic tactics, criminological conditions, as well as in the material and criminal law and procedural aspects.



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