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Vulnerable Witnesses in Practice of International Courts – Definition and Trauma as the Key Risk Factor

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Abstract: This paper offers a summary of a discussion on the definition of a vulnerable witness, a subject extensively explored by the author in her book 'The Vulnerable Witness in the Practice of International and Hybrid Courts.' While the paper specifically addresses trauma as a factor in determining witness vulnerability, the book encompasses a wider examination of various factors that contribute to the classification of a witness as vulnerable. Despite the frequent use of the term 'vulnerable witness', a clear and comprehensive understanding of its scope remains elusive. The discretion exercised by legal practitioners, especially judges, prosecutors, and investigators, in deciding whether to classify a witness as vulnerable, elicits concerns regarding the justice system's capacity to meet the genuine needs of these individuals. There is a risk that the incorrect use of mechanisms intended for this group may compromise their welfare. Very often, it is precisely these witnesses who are pivotal in ascertaining the truth, owing to their direct knowledge of the facts concerning the events being investigated. Given the international community's recognition of the threat to vulnerable witnesses and the need for special protection, this paper contributes to the discourse by examining key elements critical to the effective treatment of vulnerable witnesses in the context of criminal proceedings involving violations of international humanitarian law.

Keywords: *vulnerable witness, judicial system, international humanitarian law, criminal proceedings, testimony*

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Introduction

The proceedings for war crimes and crimes against humanity concern events in which often thousands of people have suffered. All of them are victims as their fundamental rights have been breached or at least jeopardized. Only very few of them have the opportunity to present their version of events during the investigation, and only some of them are given a chance to appear before the court during trials aimed at bringing perpetrators of the most severe atrocities to justice. Witness's participation in international criminal proceedings may involve significant risks to their well-being, conditioned both by their own personal characteristics and external factors, including pressure from their own ethnic group or threats from the perpetrators and their supporters.

A testimony of vulnerable witnesses in criminal proceedings for war crimes and other atrocities under the international law usually relates only to a selected fragment of an overall situation that the international community believes requires justice. Given the huge number of victims of this type of crime, it is not possible to hold the perpetrators of all crimes committed accountable and consequently to compensate all victims. No international court would be capable of handling such a task, nor does it fall within the capabilities of any national judicial system. The principle of prosecutorial discretion, also called opportunism, which allows for selection of cases for investigation based on their gravity therefore applies in proceedings before international courts. This is primarily due to the need to focus the available forces and resources on perpetrators who planned and orchestrated the criminal actions, i.e. those who held key positions in the apparatus of power or were highly placed in the hierarchy armed or political forces involved in the conflict. As a result, most of the defendants standing before international and hybrid courts were not the direct perpetrators of the crimes committed, as they did not participate in the physical realisation of the elements of the criminal acts.

The focus of the international justice system on leaders is justified not only by the principle of prosecutorial opportunism, but above all by the need to punish those who bear the greatest responsibility for the crimes committed, even if direct perpetration cannot be attributed to them. These are mainly political leaders who have used their position to create specific policies against groups considered hostile and to stimulate a variety of actions to implement them. They have led others to commit crimes, using the ideology and propaganda they have created, as well as the power machinery, means of coercion and armed forces in their hands. Military commanders with the authority to issue orders are also an important group of defendants.

Gathering evidence in criminal cases brought before international tribunals is a complex process. Investigations always involve events that span time and space and form a complete picture of an armed conflict or a wider organised operation against a civilian population. In such investigations, it is necessary to establish not only the circumstances and course of individual situations, but also their overall context and the nexus between them. Only when all these elements are present can it be established that a specific crime under international law has been committed. On the other hand, in order to attribute guilt to the accused, it is necessary to prove his role in the system of power or in the command structure of the military or other military organisations.

Witnesses who are called to testify against those accused of international crimes carry the burden of responsibility not only to establish the guilt of the perpetrators whose actions have harmed a huge number of victims, but also to contribute to establishing the version of history which can be perceived as closest to the truth. Many of them are treated as vulnerable witnesses, for whom participation in international criminal proceedings involves personal trauma associated with the re-living of the atrocities they had experienced, enormous pressure from their own social group, threats to their safety from the accused and their supporters, and finally disappointment when the outcome of the proceedings does not satisfy their sense of justice.

1. Definition of a Vulnerable Witness

The term ‘vulnerable witness’ or ‘vulnerable person’ is commonly used in the practice and jurisprudence of courts dealing with criminal cases, not only at the international level. In addition, this terminology is used in various conventions, resolutions and other documents adopted by international organisations. These documents emphasize the responsibility of states to provide assistance and support to victims of crime and to specific groups of witnesses who face particular risks to their well-being when participating in legal proceedings. However, there is no one definition of a notion ‘vulnerable witness’.

The word ‘vulnerable’ in English literally means ‘easy to hurt or attack physically or emotionally’, as well as ‘weak’¹. Historically, it derives from the

¹ Cambridge Dictionary, <https://dictionary.cambridge.org/pl/dictionary/english-polish/vulnerable?q=vulnerable>, accessed: 23/11/2023; Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/vulnerable#synonyms>, accessed: 23/11/2023.

Latin noun ‘vulnus’, meaning ‘wound’, which forms the basis of such words as ‘vulnerare’ - to hurt and ‘vulnerabilis’ – injured².

While searching for the definition, it is worth to mention Recommendation No. (97) 13 of the Committee of Ministers of the Council of Europe, which addresses witness intimidation and the right of defense, emphasizing the necessity of protection against such phenomena³. Chapter IV of the Recommendation provides guidance on implementing measures concerning the specific category of vulnerable witnesses. However, it does not explicitly define how this category should be understood, particularly in cases of crimes occurring within families. Nevertheless, the subsequent section of the Recommendation discussing this group of witnesses includes references to children (p. 19), women who have experienced domestic violence, and elderly individuals who have been victims of inappropriate behavior by family members (p. 20). By identifying these specific subgroups, the interpretation of the concept of a vulnerable witness is, to some extent, clarified.

Also, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime in the English version, refers in point 38 to persons who are particularly vulnerable, or who find themselves in situations that expose them to a particularly high risk of harm, such as persons subjected to repeat violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crime in a Member State of which they are not nationals or residents⁴. In turn, the preamble of Council of Europe Resolution (2006) 8 on assistance to victims of crime points out the need to avoid repeated victimisation, especially for victims belonging to vulnerable groups⁵.

The concept of a vulnerable witness can be found in the legislation of many countries, particularly those with an Anglo-Saxon legal tradition. These jurisdictions have established comprehensive regulations addressing both the status of vulnerable witnesses and the procedures for handling their cases.

In the United Kingdom, the treatment of vulnerable witnesses is governed by the Youth Justice and Criminal Evidence Act of 1999. Its initial

² A Latin Dictionary, <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0059:entry=vulnus>, accessed: 23/11/2023.

³ <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c4a0f>, accessed: 19/11/2022.

⁴ <https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A32012L0029>, accessed: 19/11/2023.

⁵ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afa5c, accessed: 19/11/2023.

chapter addresses the use of special measures directed for vulnerable and intimidated witnesses. Although the law does not provide a specific legal definition of a vulnerable witness, it can be inferred from the regulations within the act which individuals are eligible for the prescribed measures. By analyzing these provisions, it becomes apparent to whom the intended measures may be applied. It is evident that there are two distinct categories of vulnerable witnesses for whom special measures must be implemented. The first category, as stipulated in section 16 (1), includes children under the age of 18 at the time of the hearing, regardless of any specific circumstances. The second category encompasses witnesses whose testimony may be compromised due to certain conditions outlined in section 16 (2)⁶. These conditions include mental disorders that significantly affect intelligence and social functioning, as defined by The Mental Health Act of 1983 or other sources (s. 16 (2a)), as well as physical disabilities or disorders. Importantly, prior to deciding whether special measures are warranted for a witness based on the aforementioned grounds (excluding age), the court is obligated to hear from the witness⁷.

Similarly, in Australia, the Evidence Act of 2008 defines the vulnerable witness and sets out the procedures for conducting specific procedural activities involving them. According to this law, a vulnerable witness is: (a) a witness under the age of 16; (b) a witness with cognitive impairment; (c) a witness who is a presumed victim of the crime in question, particularly if it is a serious offense against a person, or in other cases, if, due to the circumstances relating to the witness or the case, the witness would be exceptionally uncomfortable if not treated as a vulnerable witness; (d) a witness who has been threatened with violence or retaliation in connection with the ongoing proceedings, or a witness who has reasonable fears of violence or retaliation in connection with the ongoing proceedings; (e) in cases involving serious organized crime, as defined in the Criminal Law Consolidation Act of 1935, a person who agrees to be a witness in the case only if treated as a vulnerable witness for the purposes of the proceedings⁸.

In Canada, special arrangements have been made in court proceedings for children and vulnerable adult witnesses. Under the current version of the Criminal Code of 1985 and the Canada Evidence Act, in force since 2006, the questioning of children under the age of 18 and adults with mental or physical disabilities may justify the use of legally prescribed measures to

⁶ <http://www.legislation.gov.uk/ukpga/1999/23/contents>, accessed: 22/11/2023.

⁷ <https://www.legislation.gov.uk/ukpga/1983/20/contents>, accessed: 22.11.2023.

⁸ <https://www.legislation.sa.gov.au/LZ/C/A/EVIDENCE%20ACT%201929/CURRENT/1929.1907.AUTH.PDF>, accessed 17/11/2023.

facilitate their testimony. With respect to other witnesses, the court may decide to do so because of the circumstances of the offence, the nature of the relationship with the accused or the special characteristics of the witness⁹.

In criminal proceedings for international crimes, it is generally accepted that the victims, based on their personal characteristics and external circumstances, form a specific category of witnesses. They face unique challenges as they are not only exposed to secondary victimisation (Bieńkowska 2018, 51-65; Gronowska 1985, 129-148) when recounting traumatic events in court but also subjected to various forms of negative impact from their own ethnic group and supporters of the accused. The magnitude of this exposure is particularly noteworthy when compared to trials for other crimes. This heightened exposure is a consequence of the pervasive cruelty typically associated with the described events and the intense emotions exhibited by opposing groups, who possess considerable numbers and significant means to exert pressure on witnesses.

The participation in international courts and tribunals of lawyers from systems where the institution of vulnerable witnesses was already known has contributed to the introduction of similar solutions in the proceedings conducted in cases for international crimes. In fact, thanks to the freedom given to judges, they have been able to develop the rules of procedure to ensure that witnesses who are particularly vulnerable to secondary victimisation are dealt with in such a way as to minimise the risk of such victimisation. As a result, it is very common to find references to vulnerable witnesses in the jurisprudence of international and hybrid courts, despite the fact that the notion does not appear in the normative instruments establishing them. It does, however, appear in most of their internal rules, including the applicable rules of procedure and evidence, and is often used in decisions on how to deal with witnesses deemed to be vulnerable.

Regarding the International Criminal Tribunal for former Yugoslavia (ICTY), Rule 75 (B) (iii) of the Rules of Procedure and Evidence addresses the issue of vulnerable witnesses and victims and the protective measures concerning them¹⁰. This rule has been repeated with the same numbering in the procedural and evidentiary rules applicable in the International Criminal Tribunal for Rwanda (ICTR)¹¹, and the Special Court for Sierra Leone (SCSL)¹².

⁹ https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr13_15a/p1.html#sec1, accessed 16/11/2023.

¹⁰ https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf, accessed: 16/11/2023.

¹¹ <https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>, accessed: 16/11/2023.

¹² <https://www.rscsl.org/Documents/RSCSL-Rules.pdf>, accessed: 16/11/2023.

According to these rules, the court, during closed sessions (in camera), can make decisions regarding the application of appropriate measures aimed at facilitating the testimony of vulnerable victims and witnesses, including the use of Closed-Circuit Television (CCTV). In the Special Tribunal for Lebanon (STL), a similar provision is found in Rule 133 C (iii), which empowers the court to adopt measures aimed at facilitating the testimony of vulnerable witnesses¹³. These measures may include the utilization of CCTV and the use of screens to prevent direct visual contact between the witnesses and the accused. However, none of these regulations contain criteria that should be taken into account when deciding whether to classify a particular witness as vulnerable.

Within the International Criminal Court (ICC), the concept of the vulnerable witness is defined in Regulation 94 bis contained in the Regulations on the Operation of the Registry, which is an administrative body of the court¹⁴. This regulation concerns special measures for vulnerable witnesses and victims testifying before the court, which should be applied to protect them from psychological damage resulting from their participation in the proceedings and to facilitate their appearance before the court. It provides a definition of a vulnerable person, which is a person who is at increased risk of psychological harm from appearing in court or who experiences psychosocial or physical difficulties that affect their ability to appear. A person's vulnerability can be a consequence of various factors, including:

1. person-related factors: age (e.g. child, elderly person), personality, impairment (including perceptual impairments), mental illness or psychosocial problems (such as those arising from trauma or lack of social support);
2. factors related to the nature of the criminal act, in particular, sexual and gender-based violence (gender), violence against children, torture or other highly violent crimes;
3. factors relating to specific circumstances, such as significantly increased stress and anxiety due to relocation or resettlement, fear of retaliation or adaptation difficulties due to cultural differences or other factors.

The issue of vulnerable witnesses is dealt with in a slightly different way in the Rules of Procedure and Evidence of the Kosovo Specialist Chambers (KSC). They do not contain a definition of this notion, again leaving room for interpretation as to what should guide the decision to include a witness in the vulnerable category. Indeed, according to Rule 80 (4) (a), the court may

¹³ <https://www.stl-tsl.org/en/documents/legal-documents/rules-of-procedure-and-evidence>, accessed: 16/11/2023.

¹⁴ <https://www.icc-cpi.int/Publications/Regulations-of-the-Registry.pdf>, accessed: 15/11/2023.

decide in camera to apply special measures to traumatised or vulnerable witnesses, including victims of sexual or gender-motivated violence, older witnesses, as well as those under 18 years of age¹⁵.

The analysis of the solutions adopted by various international and hybrid courts reveals that individuals referred to as 'vulnerable witnesses' constitute a distinct category characterized by their heightened sensitivity to stress associated with potential participation in legal proceedings, particularly when it comes to giving testimony. In certain instances, the emotional burden experienced by these witnesses is so significant that they may ultimately choose not to testify or, quite frequently, alter the content of their testimonies before a court compared to what they previously stated during pre-trial proceedings. Consequently, safeguarding the well-being of witnesses is not only a matter of their personal welfare but also serves the interests of justice. Given that witnesses cannot be compelled to testify, it is crucial to establish conditions that prevent witnesses from being deterred and, specifically, shield them from possible intimidation. In the absence of an effective witness support system, there exists a tangible risk of losing crucial evidence that may even be pivotal to a case.

The definition of a vulnerable witness adopted in the ICC, due to its completeness and flexibility, should serve as a model both for other international courts created on an ad hoc basis and for national courts which, due to the principle of universal jurisdiction in many countries for war crimes and crimes against humanity, also adjudicate on this category of acts. For this reason, it is worth raising the profile of this definition by including it in a legal act of a higher order than the internal regulation, the so-called registrar, which in principle applies only to the ICC. One option for generalising the adopted definition could be to introduce it into the Rome Statute. Another option would be to move it from the level of the internal registrar's regulation to that of the ICC Rules of Procedure and Evidence. Similarly, the definition should be included in international agreements or other acts of will of the international community that form the basis for the functioning of other international and hybrid courts.

The vulnerability of a witness may be due both to internal reasons, resulting from their personal characteristics and qualities, and to reasons external to them, related to the circumstances of the incident and the person of the perpetrator. Their vulnerability justifies treating them in a slightly different way to protect their well-being as far as possible, especially to avoid secondary victimisation. However, it must be emphasised that special

¹⁵ <https://www.scp-ks.org/sites/default/files/public/content/documents/ksc-bd-03-rev3-rulesofprocedureandevidence.pdf>, accessed 17/11/2023.

treatment of a witness cannot result in a violation of the defendant's right to a fair trial, the elements of which are, first and foremost, the right to defence, the preservation of the principle of objectivity and the endeavour to reconstruct the facts in accordance with what happened. With all respect for the victim and their suffering, one cannot lose sight of the fact that the main purpose of a criminal trial is to impose punishment for the crime committed and not for the trauma inflicted on the victim, which by its very nature is subjective (Rauschenbach and Scalia 2008, 449).

The identification of a witness as vulnerable has consequences regarding the way in which the witness is dealt with, both in the run-up to, during and after their testimony. As a result, the authorities involved in the proceedings have a number of obligations towards such a witness aimed at protecting their welfare. This is necessary not only because of the need to prevent secondary victimisation and to ensure safety, but also plays a key role in the process of obtaining witnesses, of which all those involved in the conduct of such trials should be aware from the outset. Indeed, a witness cannot be expected to choose to give evidence when he or she has good reason to fear not only for their life and that of their close relatives, but also for being humiliated in the eyes of the community in which he or she lives. Without adequate safeguards in place, the effectiveness of the process in cases before international courts will be compromised by the difficulty of presenting witnesses' testimony to the court, while allowing them genuine freedom of expression.

International and hybrid courts have introduced a number of principles and practical solutions aimed at ensuring that conditions of interview are as good as possible to allow vulnerable witnesses testifying. Importantly, they are applicable to any witness who needs protection, regardless of which party offered them. Support to vulnerable witnesses is provided through the activities of a so-called victim/witness support service, but only within the ICC and SCSL is the functioning of the Victims and Witness Unit (VWU) regulated in the statutes of these courts and reflected in their organisational structure and budget distribution. In the other courts, the operation of the relevant witness support service resulted only from procedural rules. The support provided by the VWU includes logistical assistance, providing the witness with access to information, and psychological care if necessary. However, there is a lack of examples of the application of such measures, let alone relevant regulations at an early stage of the proceedings.

Numerous measures exist to guarantee the safety of witnesses during legal proceedings and to optimize their comfort while providing testimony in court. Considering their immediate objectives, these measures can be categorized as follows:

- protection the identity of the witness from the accused (anonymous witness);
- not disclosing the identity of a witness until it is necessary for the proper preparation of the defence;
- protection a witness from the public and the media;
- protection from confrontation with the accused, understood as direct contact with him during the proceedings;
- special measures for victims of sexual violence.

International courts are tasked with guaranteeing the safety of witnesses not only during pre-trial proceedings but also throughout the trial stage. The determination of suitable protective measures is made by the court in each instance, following an evaluation of the circumstances surrounding the individual witness, while also considering procedural safeguards for the accused. Present regulations afford considerable latitude in securing witnesses, empowering judges to customize solutions based on revealed needs and available resources. Consequently, the most frequently employed methods of safeguarding witnesses with diverse sensitivities appearing before international courts encompass:

- use of pseudonyms for vulnerable witnesses;
- not revealing the identity of witnesses as long as it is not necessary to ensure that the accused is prepared to defend himself;
- giving evidence using obscuring screens;
- conducting the interview using closed-circuit television or other technical solutions allowing video and audio transmission;
- the use of solutions that allow for sound or image distortion;
- exclusion of the public from the hearing.

The results of the research carried out support the introduction of the category of the vulnerable witness not only at the level of legal acts regulating the functioning of international courts adjudicating cases of war crimes and crimes against humanity. It also seems reasonable to consider defining such a witness in national legislation, which would allow for the development of an appropriate support system for the witness in order to adequately care for their well-being and, in particular, to avoid secondary victimisation in the case of victims of crimes. The experience of international courts and those legal systems where this category of witnesses has been adopted shows that they can count on a much better understanding of their needs and also on the preparation of those involved in proceedings, investigators, prosecutors, lawyers and judges.

2. Post-Traumatic Stress Disorder (PTSD) as a Factor Affecting the Ability to Perceive and Reproduce

Perceptions by Vulnerable Witnesses

Witnesses whose personal experiences entail severe violations of humanitarian law are commonly referred to as survivors in the literature. Typically, these individuals faced life-threatening circumstances but managed to endure due to a combination of factors, some within their control and others beyond their influence, while many others tragically perished. This interpretation of the term 'survivor' is highlighted by psychiatrist R.J. Lifton, who extensively studied individuals who survived the atomic bomb blast in Hiroshima, as well as those who endured the horrors of concentration camps and prisoner of war camps during World War II and the Korean War (Lifton 1988, 18).

The violence experienced by the survivors not only entailed physical effects, but also negatively affected their psychological state. It undermined their belief in the existence and validity of fundamental values relevant in all circumstances, on which they had built their previous relationships, such as a sense of security, control over what they do and the value of human life. In the absence of support after the trauma suffered, especially from those closest to them, a sense of abandonment and misunderstanding began to dominate in the victims, thus contributing to their secondary victimisation (Herman 1992, 37-38). Survivors very often fail to realise the deep imprint of the events they experienced. As a result, they do not realise how strong emotions can be triggered in them by having to stand trial and give evidence (Stover 2005, 72).

The traumatic events witnessed have left traces in their memory that are hard to erase. For some, revisiting them in their minds as the most important experience of their lives is an important value. Others, on the other hand, would like, above all, to forget what they have experienced, but despite the efforts made to suppress the memories, they are so strong that they cannot erase them from their minds. The trauma leaves images that continually return to consciousness through intrusive thoughts, impressions of illusions or hallucinations, as well as nightmares. As a result, the victim relives what happened. Such traumatic memories are characterised by their intrusiveness in terms of the frequency with which they recur and are accompanied by agitation and feelings of pain. The inability to control the memories only increases the victim's sense of helplessness (Lifton 1988, 18).

When talking about the stigma imprinted on survivors of the most severe crimes, it is worth referring to the term used by R.J. Lifton in his analysis of the results of his research. According to him, survivors of the most traumatic war events have a 'death imprint' in their consciousness (Lifton 1988, 18). The term refers to a constantly recurring sense of a real threat to life. The

survivor's specific fixation on the fear of death may be the result of a very violent one-off event in which many people died, the most drastic example being the deaths of hundreds of thousands of people as a result of the atomic bomb dropped on Hiroshima. However, it can also occur gradually, over time, if the survivor had been previously in a real life-threatening situation. This kind of long-term process is particularly characteristic for people who have participated in armed actions over a long period of time in which people were killed, or of those who have been detained in concentration or prisoner-of-war camps (Lifton 1967, 480). Crucial to its course and outcome is the degree to which the person questions the death they have encountered. The more absurd, premature, or unjustifiable it is, the more likely it is that a sense of threat to one's own life will be perpetuated (Lifton 1988, 18).

The self-perception and mental state of survivors affect how they will cope with giving evidence. The awareness of being involved in criminal proceedings, the prospect of meeting or even confronting the accused, as well as the sheer anticipation - often extremely long - of the moment of testimony, add to survivors' feelings of discomfort and stress (King and Meernik 2017, 9). Many of the witnesses who testified before the ICTY, in their interviews with Victims Witness Service (VWS) staff, admitted that as time passed after the events under investigation, they became increasingly impatient and disillusioned, further compounded by a diminishing understanding on the part of those close to them of their determination to give evidence. This was accompanied by growing concerns about whether it was worth agreeing to be a witness in the trial (King and Meernik 2017, 42).

Applying the term used by R.J. Lifton, arguably most of the survivors testifying before the ICTY, as well as other international and hybrid courts, experienced the 'death imprint' due to direct, often prolonged, contact with situations when people were dying. In their case, the strong development of this phenomenon was fostered not only by the duration of exposure to the real danger of loss of life, communing with the death of others and the reality of the threat that existed, but also by the fact that the greatest threat often came from people known to them, neighbours and even former friends. This amplified the horror and absurdity of the situation, contributing to the development of symptoms characteristic of post-traumatic stress disorder.

Many survivors have been found to suffer from post-traumatic stress disorder (hereafter: PTSD), which manifests itself through specific attitudes about the way they think about themselves, feel and act (Liszewska and Urbańska 2019, 20; Lifton et al. 1993, 1-11; Holiczer et al. 2007, 25-32). Initially, PTSD was categorised as an anxiety disorder, but over time, there has been increasing attention to such a clinical picture of it, in which feelings of anger and guilt predominate. The most characteristic symptoms of PTSD

include constant thought reverting to the traumatic events, taking action to avoid the traumatic stimuli, hyperarousal, mood changes, and cognitive limitations. An important symptom of PTSD is also the disruption of the trauma survivor's thinking about what the causes and consequences of the trauma were, which can sometimes lead to incessant blaming oneself for the events that occurred (Popiel 2014, 616).

In particular, a sense of incapacitating danger accompanies vulnerable civilians exposed to hostilities. Most of the witnesses before international courts fall into this category. This feeling is further reinforced by the lack of any real possibility of defending themselves or preventing the attacks directed against them. In the long term, the consequences of such an experience are mutually contradictory feelings. They appear interchangeably, first as excessive arousal, which then turns into both mental and physical passivity. Such mood variability is one of the most characteristic symptoms of post-traumatic stress disorder. The constant mood shifts between overactivity and tranquillity do not allow the victim to find the balance that is necessary to cope with the trauma. As a result, the instability of the emotional state intensifies the victim's sense of helplessness, and the trauma becomes somewhat self-perpetuating (Herman 1992, 34).

Experiencing the unfolding trauma is accompanied by psychological numbing, which is one way of coping with pain and suffering. Survivors may experience a significant, though often only temporary, reduction in awareness of the unfolding events, a mechanism that protects them from complete and permanent sensory loss. In cases of the most drastic course of trauma, there is numbness manifested in a kind of detachment of consciousness from external stimuli (Lifton 1988, 23). A moving description of the sensations accompanying such numbness can be found in interviews conducted with people exposed to the agonising experience of death. A survivor of the Hiroshima explosion described his feelings as follows:

The whole situation around me was very special ... and my mental condition was very special too About life and death ... I just couldn't have any reaction I don't think I felt either joy or sadness My feelings about human death weren't really normal. ... You might say I became insensitive to ... death (Lifton 1988, 23)

On the other hand, a German soldier who participated in the Nazi war machine for years spoke of the emotions that accompanied him:

We were all too exhausted to react, and almost nothing stirred our emotions. We had all seen too much. In my sick and aching brain, life had lost its importance and meaning, and seemed of no more consequence that the power of motion one lends to a marionette, so

that it can agitate for a few seconds. Of course, there was friendship ... but immediately behind them (two close friends) there was that hole full of guts, red, yellow, and foul smelling; piles of guts, almost as large as the earth itself. Life could be snuffed out like that, in an instant, but the guts remained for a long time, stamped on the memory (Lifton 1988, 24).

The two accounts are largely similar. The authors of both experienced the exclusion of any emotion, both positive and negative, associated with the all-pervasive experience of death around them. They were accompanied by a feeling of indifference, and in order to dissociate themselves from the absurd, grotesque death, they disconnected their consciousness, as it were, putting it to death for a period of time. According to post-traumatic stress psychologists, thanks to this mechanism, survivors became more resistant to external stimuli and their own feelings were separated from their awareness of what was happening around them (Lifton 1988, 24).

Traumatic experiences leave an indelible mark on the memory; their victims often return more or less consciously to what they experienced. Some people want to remember these events because by recalling them, they feel they are paying homage to those who died. Others, on the other hand, try hard to forget but nevertheless keep returning their thoughts to the painful events.

In many cases, the images that the trauma has left behind in the survivor's memory persistently return to the survivor in the form of reminiscences (flashbacks) over a long period of time, are often endlessly replayed, and attempts to erase or banish them from memory fail. These memories are relived each time, and the visual impressions can also be supplemented by sounds and even tastes or smells. These experiences are also accompanied by emotions similar to those experienced by the survivor during the original event, giving rise to psychological trauma, such as feelings of helplessness, anger, overpowering fear or terror. Reminiscence may even be accompanied by the reproduction of gestures or movements that were - or could have been - made during the event. This includes, in particular, behaviour that could have been used in defence, such as covering up or dodging a blow. This can include shouting and calling for help, which is particularly common when the reminiscence occurs in a dream. This type of phenomenon is known as reliving or re-experiencing. It can persist for a very long time, often even up to the end of life, and is a burden that victims are unable to cope with (Golier et al. 1997, 226). The associated symptoms are referred to in psychiatry as intrusive symptoms because they are unwanted and involuntary (Edwards and Dickerson 1987, 317-328). In contrast, symptoms involving the conscious, often persistent avoidance of memories, including, for example, avoidance of places, objects and people that might remind one of the events that caused the

psychological trauma, are referred to as restrictive symptoms or avoidance symptoms (Norris and Aroian, 2008, 471-478).

Re-experiencing traumatic events (reliving, re-experiencing) differs from memories experienced under typical circumstances. They are characterised above all by an intrusiveness manifested in the frequency of their recurrence, accompanied by intense psychic pain and emotional arousal. On top of this, the memory may recur only in fragmentary images or individual elements of the event, often even very small ones. Because it appears repeatedly in consciousness, it is impossible to suppress or control, which only increases the feeling of helplessness. With the passage of time, the memory does not fade away in the same way as other memories unrelated to the experience of trauma; instead, quite the opposite happens because the negative feelings arising from it accumulate, which intensifies the stress (Golier et al. 1997, 226).

One who has experienced trauma often does not remember the particular circumstances associated with it. Such a phenomenon is referred to as psychogenic amnesia. It is a source of additional stress because the person experiencing it, unlike the typical form of amnesia, is aware that a specific event took place but is unable to recall its circumstances (Golier et al. 1997, 229). This type of amnesia is the result of various processes taking place in the consciousness of the person experiencing the trauma. It may be since not all the circumstances of the event have been fully recorded because there has been selective remembering of some of them, resulting in gaps in memory. It can also be triggered by the fact that the repressed memories are too painful and difficult. Furthermore, it can be the result of the normal process of forgetting (Golier et al. 1997, 229 - 230).

3. Survivor's Guilt Experienced by Vulnerable Witnesses

The psychological trauma caused by the events experienced during the armed conflict affects the way victims remember the events. A study of victims of violent crimes found that some victims had distorted perceptions of time in that the events in which they were involved seemed to last a very long time, although they took place over a relatively short period of time. They remembered the traumatic experience as if it had played out in slow motion, making it seem as if they not only had much more time to decide about their behaviour, but also to implement the action (Williams 1988, 330, 332). This discrepancy between real time and perceived time has important implications not only for the process of remembering the circumstances of

the event itself but also for the development of survivor's guilt syndrome, as will be discussed below.

Victims who have lived traumatic events have also been found to have distorted visual experiences. These can consist of the victim remembering an event from an external perspective, so to speak, with the impression that he or she did not directly participate in it, but only observed it from the side, although in reality, it was quite different. Another quite typical experience concerning visual impressions is the so-called tunnel perception of the event, which consists of the victim covering with his/her eyes only a very narrow section of the event and consequently not being able to see anything beyond it circumstances (Golier et al. 1997, 226). As a result of such an experience, witnesses remembered only a small, often even a minor fragment of the event unfolding in front of their eyes, such as a pile of folded bodies, the perpetrator's face or a specific element of the building on which they focused their attention. Due to these phenomena, they subsequently found themselves unable to provide an exact account of their involvement, as only the individual circumstances of the event were firmly imprinted in their memory (Williams 1988, 324).

It is also characteristic of survivors that their first perception of traumatic events determines how they remember the event forever. It is, as it were, imprinted in their memory in this original shape (Williams 1988, 330).

Three phases of response can be distinguished in people who experience post-traumatic stress syndrome: shock, impact and recovery. The first of these can be implemented in two ways. One involves the almost complete cessation of any physical activity, accompanied by a pervasive sense of confusion and an inability to do anything. The other involves denying that a particular event has happened at all (Williams 1988, 319 - 320). In this way, the person who experienced the trauma attempts to banish the circumstances associated with it from their memory.

The impact phase begins with anger or overexcitement, which can manifest itself in shaking, crying or feelings of tension, anger or indignation. Often, these negative emotions are not directed at the perpetrators of the violence but at the victim herself, who blames themselves for the fact that their behaviour led to a certain event or did not prevent it. Following these negative emotions, the victim begins to consider other possible scenarios for the course of the situation, especially those that may have depended on their own behaviour. Thus, the victim continually questions themselves with the 'what if...' scenario, contemplating various hypothetical situations that, if they had unfolded differently, could have prevented the traumatic experience from occurring. This kind of search for alternatives is characteristic of the so-called survivor's guilt syndrome. The impact phase ends with depression

in its classic sense. The victim manifests all the typical symptoms of such a state, feels misunderstood, and has a sense of hopelessness and failure. When this state of self-doubt is prolonged, the victim is unable to progress to the phase of recovery from the trauma and return to normal life (Lifton 1988, 20).

In extremely severe cases, the effects of psychological trauma can persist even for a very long time, making it difficult for the person to function normally. According to interviews conducted with rape victims in the United States, they experience severe symptoms of trauma for a period of 3 to 6 months after the incident, although fear accompanies them for much longer, even up to several years (Stover E., 2005, p. 73.). In contrast, research on people who have been held hostage shows that even up to 9 years after release, almost half of them (46%) experience restrictive symptoms and 32% experience intrusive symptoms (van der Ploerd and Kleigen 1989, 153 -170). The long-term psychological effects associated with the torture suffered were also found in a study conducted with survivors of traumatic events in Latin America. They show that up to 38% were found to have symptoms of PTSD up to eight years after the events that gave rise to it (Stover 2005, 73).

Prisoners who have been held and tortured for long periods of time are particularly vulnerable to intrusive symptoms. This is the conclusion of a study involving concentration camp survivors and soldiers who were held as prisoners in war camps during World War II and the Korean War. Even 40 years after their release, the victims continued to suffer from nightmares, experienced flashbacks of the dramatic events in which they had participated and reacted violently to any memories of the time when they had been deprived of their freedom (Stover 2005, 74 - 75).

In the case of strong traumatic experiences related to the experience of death, grief and a sense of loss become such dominant feelings that the survivor is unable to cope with them for a long time. This is because they experience not only a sense of danger but also an inability to respond to it appropriately. As a result, as indicated above, they often blame themselves for what had happened, especially for the death of others (Lifton 1988, 20). This is one form of PTSD, called survivor's guilt syndrome, which R.J. Lifton refers to as death guilt (Ibid, 19). It involves a survivor's feeling of guilt for having survived themselves and a willingness to bear the punishment for others having lost their lives (Juni S., 2016, p. 321). The syndrome was first diagnosed as a clinical entity in the 1960s among Holocaust survivors. Psychiatrists who conducted research with them observed that most of them measured themselves with an overwhelming sense of guilt for having survived (Valent 2000, 555).

People who suffer from survivor's guilt syndrome link their survival directly to the death of others, seeing it in a sense as a price for the fact that they themselves are still alive. This is particularly characteristic of survivors of events that have resulted in the death of many people, such as warfare, disasters or terrorist attacks (Juni 2016, 328). Among its most characteristic manifestations are persistent doubts on the part of the survivor about the causes, as well as the validity of their own survival, when juxtaposed with the fact that many others in the same situation died. Research conducted with Holocaust survivors and war veterans shows that guilt towards the victims manifests itself in a desire to swap places with those who died. This is because they are accompanied by a lingering belief that someone else should have survived, while they themselves should have died. Consequently, from the moment of the incident, the lives of the survivors become chaotic, devoid of meaning and value, because probably someone else in their place would have survived theirs better, taking all the chances and opportunities. War veterans, on the other hand, often claim that those who died in the war were lucky because their pain and suffering ended, they were remembered as heroes and their names were engraved on monuments.

Survivor's guilt syndrome can also arise from the victim's self-blame, as they experience a sense of satisfaction for surviving and taking action to save themselves, unlike others. This feeling of satisfaction is accompanied by a simultaneous self-blame for the deaths of others. The survivor feels guilty for not having done anything or not having done enough to save others. They blame themselves for the decisions they believe led to the deaths of others or for prioritizing their own safety by fleeing while leaving others in danger (Juni 2016, 323).

Survivor's guilt can thus be understood as a negative feeling, a mental pain accompanied by many critical thoughts about one's own role in the events that occurred, especially stemming from the belief that one could have acted differently. Guilt consists of emotional stress/pain and dysfunctional beliefs, which mean: (1) the belief that a certain event could have been foreseen and prevented, (2) lack of sufficient justification for one's behaviour, (3) full responsibility for causing negative, often tragic events, (4) violation of one's own principles and values during a traumatic event (Popiel 2014, 617).

As highlighted by R.J. Lifton, survivor's guilt syndrome involves the disempowerment of the survivor and those they feel responsible for, preventing them from taking action in the face of extreme life-threatening situations. To illustrate this phenomenon, Lifton cites the example of a soldier who witnesses the violent death of a fellow soldier. In such a scenario, the survivor is overwhelmed by a mix of horror and grief while desperately searching for ways to assist their comrade, alleviate their suffering, or save

them. However, the circumstances they both find themselves in render any action impossible. The sense of helplessness becomes even more profound in situations of mass destruction, such as Hiroshima or Nazi concentration camps, where the prevention of the worst outcomes was simply unattainable. Nevertheless, this state of inactivity, resulting from circumstances entirely beyond the survivor's control, fuels a growing sense of guilt within them for what they could not do despite their internal belief that they should have acted. They feel guilty for their perceived lack of action, for their emotional detachment, and most importantly, for the discrepancy between what they believe they should have done and their actual inaction (Lifton 1988, 19).

The imagination is constantly suggesting to the survivor the different options of actions he could have taken in the extreme situation they experienced, with the intention of helping the individual who ultimately did not survive. Consequently, the survivor not only grapples with traumatic memories but also continuously analyzes the scenarios they believe they should have pursued in order to save not only themselves but also others. In this heightened emotional state, the individual is unable to accept that, given the objectively existing conditions of imminent life-threatening danger, taking any effective action was objectively impossible. The awareness of their own perceived passivity only amplifies their sense of guilt (Williams 1988, 320; Lifton 1988, 20).

P. Valent underlines that one of the most striking features of the survivor's guilt syndrome is the very fact of blaming oneself for the event while having no objective basis for attributing any responsibility (Valent 2000, 555-556). Similarly, R.J. Lifton speaks of the paradoxical guilt experienced by the survivor (Lifton 1988, 21). This is because there is a completely irrational conviction in the survivor that they did not deserve to survive, and it is strong, especially in a situation where they themselves were saved by the one who died. Guilt may also be associated with the conviction that they did not do everything possible to save others or at least limit their suffering. This kind of thinking is particularly characteristic when the survivor had a special duty towards others to take care of them, as is the case, for example, in the relationship between parents and children (Ibid, p. 556). Such a paradox is indicated, among others, by research conducted with Holocaust survivors, who often claimed that they were to blame for the deaths of their close relatives, even though they had no real possibility to save them. As a result, survivors perceive their lives as valueless, which even constitutes an insult to those who died (Juni 2016, 323-324).

P. Valent also drew attention to another contradiction that emerged in research conducted with Holocaust survivors. While most of them were confronted with an unjustified sense of guilt for the deaths of those close to

them, often the actual perpetrators of the crime did not feel guilty, denying their responsibility for what had happened. When such a strategy proved unsuccessful, they at least tried to rationalise their actions, especially by invoking their duty to obey an order (Valent 2000, 556).

Survivor's guilt syndrome can manifest in various ways, particularly depending on the individuals affected. For instance, a police officer involved in a shooting may experience a loss of confidence, while a rape victim may start blaming themselves for the incident. Holocaust survivors often feel guilt towards those who did not survive, and soldiers who have participated in combat may experience shame regarding their involvement. Common among all these individuals is their tendency to oscillate between extreme states of anger and depression, which hinder their ability to effectively cope with stress and recover from the trauma they have endured.

In therapy for trauma survivors, it is important to build in them the belief that they have done everything possible under the specific circumstances. Once they have gained this sense, they often have a need to contact other victims of trauma or to share their story. This can be done either by reaching out to the media or journalists or by giving evidence in trials against those accused of certain acts (Valent 2000, 330-331).

Conclusion

Because of its completeness and flexibility, the definition of a vulnerable witness adopted by the ICC could serve as a model for other ad hoc international tribunals, as well as for national courts, which, due to the principle of universal jurisdiction in many countries for war crimes and crimes against humanity, also try this category of acts. For this reason, it is worth raising the profile of this definition by including it in a legal act of a higher order than the internal regulation, the so-called Registrar, which in principle only applies to the ICC. One option for generalising the adopted definition could be to include it in the Rome Statute. Another possibility would be to move it from the level of the internal Registrar's Regulation to that of the ICC Rules of Procedure and Evidence. Similarly, the definition should be included in international agreements or other acts of will of the international community that form the basis for the functioning of other international and hybrid tribunals.

The importance of this solution for the protection of the welfare of vulnerable witnesses is significant. The definition contained in the ICC's Regulation is currently only applicable at the stage of proceedings before the Court. When international investigators first begin to gather information

about events that may indicate the existence of crimes against humanity or war crimes, it is generally not clear whether they will be further investigated by the international judicial authorities. Moreover, it is not clear whether the case will fall under the jurisdiction of the ICC or whether another ad hoc international or hybrid court will be established. For example, the definition of a vulnerable witness adopted by the ICC will not apply in every case of international investigation at the trial stage, which may result in vulnerable witnesses being deprived of due protection. It is also necessary to make it compulsory, in the legal acts governing the conduct of preliminary activities related to the documentation of events that may bear the hallmarks of crimes against humanity or war crimes, to apply the aforementioned definition from the very beginning of the proceedings. Indeed, in the absence of relevant provisions containing a binding definition of a vulnerable witness, there is a concern that vulnerable witnesses will not be identified at an early enough stage and their needs will therefore not be adequately protected.

Vulnerable witnesses testifying in proceedings before international and hybrid courts have unique knowledge of events that are often unimaginable to the average person because of the degree of atrocity and the scale on which they occurred. By bearing witness to them, these witnesses enable the justice system to hold the perpetrators accountable and historians to record the facts as they actually were, if only to make it more difficult for them to recur. Everything possible must therefore be done to help achieve this goal.

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