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Anonymous witnesses in International Criminal Law*

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Witness anonymity as a protective measure leads to a conflict between two rights – the defendant's right to confront and cross-examine witnesses, on the one hand, and the witness's right to protection. How witnesses before international criminal courts faced threats and intimidation, and their role in international criminal trials is important and indispensable, the question arises as to whether they should be granted anonymity in certain cases and under certain conditions. So far, in the practice of international criminal courts, anonymity has been granted to witnesses only in the *Tadić case* before the ICTY. Although other chambers of the ICTY considered the application of this protective measure, and the chambers of the ICC as well, anonymity was not granted to any witness. The main reason is that it is considered that the application of this protective measure is not in accordance with the rights of the defendant. Today, when examples of the use of anonymous witnesses can be found in the practice of certain national courts, which has been confirmed in the practice of the European Court of Human Rights, their use in the practice of international criminal courts can be reconsidered. If the use of anonymous witnesses is allowed before international criminal courts, it must be a last resort and an exceptional measure. Strict conditions for its application must be met first of all, and a balance must be established with the rights of the accused, which are limited due to the use of anonymous witnesses. If the use of anonymous witnesses is not allowed, the consequence may be an acquittal due to lack of evidence, because witnesses refuse to testify out of fear, which has already happened in the practice of international criminal courts. The paper provides a brief historical overview of the use of anonymous witnesses, as well as a brief presentation of national solutions and decisions of national courts regarding their use. The protective measures provided by the acts of international criminal courts, which can serve as a basis for the use of anonymous witnesses, are analyzed. Various positions presented in the *Tadić case* before the ICTY when deciding on

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the use of anonymous witnesses, as well as some positions presented before the ICC, are also analyzed. Finally, some guidelines are provided that may be useful for granting anonymity status if this protective measure is to be applied in international criminal justice.

KEYWORDS: victims, witnesses, protective measures, anonymous witnesses, right to confront, right to cross-examine witnesses, international criminal courts.

Introduction

Prosecution and punishment of perpetrators of international crimes is considered the basic task of international criminal courts, which, by doing their task, contribute to the achievement of the goals of international criminal justice, which are more broadly set and consist of „fighting impunity, administration of justice, strengthening the rule of law, endeavors to conflict ending and preventing its re-occurrence, establishing truth for reconciliation, providing victims with closure and compensation, as well as contributing to the restoration of international security and peacekeeping" (Ranđelović *et al*., 2023, p. 78). In order to realize the stated tasks and goals, international criminal justice relies on the testimonies of victims and witnesses of international crimes, whose importance is invaluable and their role is irreplaceable. International criminal justice faces numerous challenges in finding witnesses, contacting them, and getting them to agree to come before the international criminal court and testify. Since the international criminal courts are mostly dislocated from the country where the conflict took place and where the international crimes were committed, it is sometimes very difficult for the investigators to locate witnesses and get in touch with them. This is especially the case when an armed conflict is still ongoing in a country. For the witnesses themselves, testifying before international criminal courts can seem intimidating, primarily for two reasons. First, because they may be afraid of retaliation by the defendant or his associates, which is especially pronounced in the case when the armed conflict is still ongoing, and after testifying, the witnesses need to return to their country of residence where the situation is generally unsafe, and they fear for their lives and the lives of their families. Second, in addition to the fear of reprisals, the fact that they have to go to an unknown country, sometimes even in another continent, and testify before an international criminal court, where they do not know anyone, nor do they know what the procedure itself looks like, can be frightening for witnesses.

Aware of these dangers, the creators of the statutes of international criminal courts paid great attention to prescribing measures for the protection of witnesses and victims, with the establishment of special units for victims and witnesses that will provide them with assistance before, during and after the testimony. Measures to protect victims and witnesses, among other things, include concealing their identities from the public and trial in closed sessions. Their goal is threefold: to minimize the threat to their safety, to avoid an attack to their privacy and dignity, and to avoid or minimize the traumatic experience of testifying before an international criminal court (De Brouwer, 2015, p. 704). One of the protective measures that has emerged as particularly controversial in the practice of international

criminal courts, but also in theory, is the anonymity of witnesses. In the broadest sense, witness anonymity implies that „witnesses provide testimony in criminal proceedings without being seen, heard or identified by the accused (and his/her legal representative(s)) or anybody else in the public arena of the court room" (Le Roux-Kemp, 2010, p. 353).

The use of anonymous witnesses is always considered in conjunction with the defendant's right to confront and cross-examine witnesses, and throughout history there has been a constant debate about whether it is in conflict with this right of the defendant, whether anonymous witnesses should be allowed at all, and if so, under what conditions. The right of the defendant to cross-examine witnesses, or to have someone do so on his behalf, dates back to Roman criminal procedure during the Republic and early Empire, which was adversarial. The Roman governor of Judea, Festus, once said that „It is not the custom of the Romans to hand over any man to death before the accused has met his accusers face to face and before he has had an opportunity to defend himself against the charge" (Lusty, 2002, p. 363). The use of anonymous witnesse is related to generally "dark" historical periods, such as a new way of questioning witnesses by the judge himself and in secret, developed in secular and ecclesiastical courts throughout Europe in 12th century (Herrmann and Speer, 1999, pp. 515-516; Lusty, 2002, pp. 364-365), and so called "Inquisition" appeared in the 13th century, which meant that witnesses against the accused remained completely anonymous (Lusty, 2002, pp. 365-367). Today, the right of the accused to examine witnesses is established in all modern national legislation and in important international treaties, such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. This right of the accused is guaranteed in the statutes of international criminal courts, as well. However, in numerous cases, both in national and international trials, it has been considered whether the restriction of the right of the defense to cross-examine a witness, which inevitably occurs when granting the witness the status of anonymity, constitutes a violation of the right to a fair trial. Not only are the theoretical positions on this issue very different and contradictory, but also in the practice of different courts, decisions range from allowing to not allowing the anonymity of witnesses, and in the case of allowing – the conditions set and the legal argumentation differ.

The aim of the paper is to summarize some basic historical circumstances in which anonymous witnesses were used, as well as situations in which the practice of the courts of individual national states raised the question of granting witnesses the status of anonymity, which can be useful in order to create a complete picture when considering whether or not anonymous witnesses should be allowed in international criminal trials. The next goal of the work is the analysis of the provisions of the statutes of international criminal courts on the protection of witnesses and victims, which are the basis for granting the status of anonymity. The last goal of the work is the presentation and analysis of the judicial practice of international criminal courts on anonymous witnesses, in order to finally indicate the arguments for and against the use of anonymous witnesses in international criminal trials, the conditions under which it would possibly be justified, but also alternative ways of providing protection to witnesses of the commission of international crimes.

Witness protection in international criminal law

According to the conducted research, the disclosure of information about the identity of witnesses and victims before international criminal courts resulted in intimidation, death threats, attacks, murders, stigmatization and isolation by relatives, the community and others (especially in cases of sexual violence), economic and social hardship (such as job loss), offering bribes. Such consequences did not occur only in relation to the victims and witnesses, but also in relation to their relatives and other close persons (De Brouwer, 2015, pp. 709-710). Bearing this in mind, prescribing protective measures in the acts of international criminal courts is considered necessary, both for the purpose of guaranteeing the safety of victims and witnesses, and for the undisturbed conduct of proceedings before these courts.

The historical development of international criminal justice shows that at the beginning of this development, victims and witnesses of international crimes were completely marginalized and that little attention was paid to their position and role before international criminal courts. The Statute of the International Military Tribunal in Nuremberg does not mention victims of international crimes at all, and it is interesting that in the trials before this Tribunal, not a single victim was called to testify, because all the evidence was based on documentation from the Nazis themselves (Garkawe, 2003, pp. 346-347).

However, the situation is changing before the *ad hoc* tribunals, so their statutes and rules of procedure and evidence contain a number of provisions relating to the position of and assistance to victims and witnesses, which are essentially reflected in the establishment of victim and witness units authorized to propose protective measures and to provide victims and witnesses with expert advice and support, and in the definition of special procedural rules and measures for the protection of victims and witnesses (See more: Banović, 2009; Banović and Milekić, 2014). This is logical, since the trials before the two tribunals were largely based on the testimonies of victims and witnesses, while written documents were a secondary source of evidence. Therefore, the need for the protection of victims and witnesses was essential.

The statutes of these tribunals stipulate that the Court itself, in its rules of procedure and evidence, ensures the protection of victims and witnesses, and protective measures include, among other things, conducting proceedings in camera and protecting the identity of victims (art. 22 of the ICTY Statute and art. 21 of the ICTR Statute). The protection of victims and witnesses is further specified in the Rules of Procedure and Evidence, prescribing that in exceptional circumstances, any party to the proceedings may request a judge or a trial chamber to order that the identity of a victim or witness who may be in danger or at risk be withheld until such person has been placed under the protection of the International Tribunal. The identity of the victim or witness must be disclosed within a period specified by the trial chamber to allow sufficient time for the preparation of the Prosecution or the defence (Rule 69 of the ICTY and ICTR Rules of Procedure and Evidence). Under Rule 75, some of protective measures are: 1. measures to prevent the public or the media from revealing the identity or whereabouts of the

victim or witness or persons who are related to the victim or witness, in the following manner: a) by erasing from the public files of the International Court names and data that can be used to determine identity; b) by not disclosing to the public any document that indicates the identity of the victim or witness; c) using a device to alert the image or voice or internal television during testimony; and d) assigning a pseudonym; 2. holding closed sessions in accordance with rule 79; 3. appropriate measures enabling sensitive victims and witnesses to testify, such as one-way closed circuit television.

Such measures for the protection of victims and witnesses were, among other things, „imposed" by the factual situation that the Tribunal for the former Yugoslavia began its work while the armed conflict in the territory of the former Yugoslavia was still ongoing, so it was therefore necessary to ensure the protection of victims and witnesses who, after testifying, were supposed to return to their homes in the war-torn area. Logically, there was a fear that they might be in danger because of their testimony (Momeni, 1997, pp. 162-163). However, some believed that the protective measures conceived in this way could damage the reputation of the Court in two ways: first, because they could violate the defendant's right to confront and cross-examine the witness, and second, because they are not in accordance with the presumption of innocence (Falvey, 1995, p. 517).

In the context of the growing commitment to understanding and respecting the importance and significance of victims and witnesses in international human rights law and international humanitarian law, the Statute of the ICC has included numerous provisions regulating their position at various stages of the proceedings,[1] and imposing on the authorities of the proceedings an obligation to take care about their position (Schabas, 2001, pp. 146-147). Those who worked on the drafting of the ICC Statute and the Rules of Procedure and Evidence have highlighted the modest provision on victims and witnesses in the ICTY and ICTR statutes as a major shortcoming of these statutes (Jorda and De Hemptinne, 2002, p. 1399).

The protection of victims and witnesses before the ICC can be general and special protection. While general protection is enjoyed by all victims and witnesses, special protection can be granted only to certain categories of victims and witnesses.

The general protection of victims and witnesses is prescribed in the ICC Statute and according to it the Court shall take appropriate measures to protect the physical and psychological integrity, dignity and privacy of victims and witnesses. In taking these measures, the Court shall take into account all relevant circumstances of the case, including the age of the victims and witnesses, their sex, their state of health and the nature of the criminal offence committed, in particular, but not limited to, in cases where the acts committed involve sexual or gender-based violence or violence against children. The Prosecutor shall take these measures in particular at the stage of investigation and

[1] The provisions on the position of victims in proceedings before the ICC are largely taken from the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985: UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution 40/34, UN Doc A/RES/40/34, 29 November 1985, cited in: Van den Wyngaert Hon, C., Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge, Case Western Reserve Journal of International Law, vol. 44, issue 1, 2011, p. 478.

prosecution of such criminal offences. The taking of these measures shall not prejudge the outcome of the proceedings, nor be contrary to the rights of the accused and to a fair and impartial trial (Art. 68 para. 1 of the Statute).

The following measures are available to the chamber: 1. that the names of these persons or any information that could lead to their identification be deleted from the public records of the Court; 2. that the Prosecutor, the defense or any other participant in the proceedings be prohibited from disclosing such information to a third party; 3. that the testimony be conducted by electronic or other special means, including the use of technical means that allow for the alteration of the image or voice, the use of audio-visual technology, in particular video conferencing and closed-circuit television, and the exclusive use of sound media; 4. that a pseudonym be used for victims, witnesses or other persons at risk due to the testimony of the witnesses; 5. that the Chamber conduct some phases of the proceedings in camera (Rule 87 par. 3 of the Rules of Procedure and Evidence) (See more on these protective measures: Gajić, 2010, pp. 94-175).

In addition to general protective measures, the possibility of applying special protective measures is also provided, in a way that as an exception to the principle of public proceedings, regulated by Article 67 of the Statute, the chambers of the Court may, in order to protect victims and witnesses or the accused, conduct any phase of the proceedings in camera or allow presentation of evidence by electronic or other special means. These measures shall be applied in particular in the case of victims of sexual violence or a child who is a victim or witness, unless otherwise ordered by the Court, taking into account all the circumstances, in particular the views of the victims and witnesses (Art. 68 para. 2 of the ICC Statute). Special measures include, in particular, measures aimed at facilitating the testimony of a traumatized victim or witness, such as a child, an elderly person or a victim of sexual violence (Rule 88 para. 1 of the Rules of Procedure and Evidence). In accordance with the provisions on special measures, all motions and requests, as well as responses to them, may be filed „under seal" and remain so until the chamber decides otherwise (Rule 88 paras. 3 and 4 of the Rules of Procedure and Evidence).

Within the framework of Art. 68 of the ICC Statute, one provision applies exclusively to witnesses before the ICC. According to that provision, in a case where the disclosure of evidence or information in accordance with the Statute could lead to a serious threat to the safety of the witness or his family, the Prosecutor may, for the purpose of any stage of the proceedings taking place before the commencement of the trial, withhold such evidence or information and file a motion in its place, and submit their summary. Such measures shall be applied in a manner that does not prejudge the outcome of the proceedings and is not inconsistent with the rights of the accused and a fair and impartial trial (Art. 68, par. 5 of the ICC Statute).

There are exceptions to the obligation of the Prosecutor, or the defense, to provide the opposing party with the names of witnesses they intend to call to testify, as well as copies of any statements previously made by those witnesses, which apply, inter alia, in accordance with the provisions of Art. 68 of the ICC Statute. Where, in order to protect the safety of a

witness and his family members, certain information is qualified as confidential, such information shall not be disclosed. This may include not disclosing the identity of the witness and his family members before the start of the trial (Rule 81, paras. 3 and 4 of the Rules of Procedure and Evidence).

Anonymity of victims and witnesses as a protective measure

The most controversial protective measure in both theory and practice is the measure aimed at completely concealing the identity of the victim or witness, the application of which was first questioned in the practice of the ICTY and resulted in different positions of judges, but also in a debate among theorists of international criminal law.

In the *Tadić case* before the ICTY, the Trial Chamber emphasized that the right of a witness to protection must be balanced with the right of the accused to a fair trial, that the Prosecutor must demonstrate the existence of five circumstances in order to reach a decision on the complete anonymity of a witness, in relation to the anonymity of the witness and in relation to the accused and his defense. The first circumstance is the existence of a genuine fear for the safety of the witness or his family. This circumstance must be assessed objectively, starting from the British case Regina v. Taylor, where the Court took the position that there must be a real reason for fear of consequences if the evidence is given and the identity of the witness is revealed (Momeni, 1997, p. 165). The second circumstance requires that the testimony of a particular witness must be important to the Prosecution's case. In this sense, the evidence must be such that it would be unfair to the Prosecution to proceed without it, where the Chamber specifically emphasized that the International Tribunal depends to a large extent on the testimony of eyewitnesses and their willingness to appear before the Court and give evidence (ICTY, Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witnesses, 1995, para. 63). The third circumstance implies that the Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is not trustworthy. Essentially, this protects the proceeding itself from witnesses who have a criminal record, or are biased or otherwise unreliable, and shifts the burden of checking the witness in this regard to the Prosecution. The Prosecution must submit a report on the reliability of the witness to both the Court and the defence (ICTY, Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witnesses, 1995, para. 64). The fourth circumstance that must be examined in order to reach a decision on the complete anonymity of the witness is the ineffectiveness or non-existence of effective witness protection programmes. In explaining this requirement, the Chamber explained that a number of witnesses live in the territory of the former Yugoslavia or have family members still living there and fear that they or their family members may be harmed, either because of retaliation for their testimony or to deter others. The Tribunal itself does not have a police force that can provide protection to these witnesses when they leave the Tribunal, nor does it have long-term witness protection programmes (ICTY, Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witnesses, 1995, para. 65). Finally, the fifth circumstance implies that any measure

adopted must be strictly necessary, and if less restrictive measures can provide the protection required, they will be applied (ICTY, Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witnesses, 1995, para. 66). Examples of less restrictive measures include allowing the defense attorney, but not the defendant, to see the witness for the purpose of cross-examination, or revealing the witness's identity only to the defense (Momeni, 1997, p. 175).

Even if all five conditions for granting anonymous status to a witness are met, the Chamber emphasized that restricting the defendant's right to examine, or to have others examine a witness testifying against him can only be permitted in exceptional circumstances. It is precisely the situation of armed conflict that existed and continues in the area where the alleged crimes were committed that is cited as the exceptional circumstance *par excellence*. The Chamber refers to most of the main international human rights instruments which allow for certain derogations from recognised procedural guarantees in these situations (Art. 15 of the European Convention on Human Rights, Art. 4 of the International Covenant on Civil and Political Rights and Art. 27 of the American Convention on Human Rights) (ICTY, Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witnesses, 1995, paras. 60-61).

In order to reach this decision and to base it on legal reasoning, the Chamber further investigated the laws of individual states and the case law of various national courts,2 as well as international treaties, and was aware of the controversial nature of its decision. However, the Chamber took the view that the right of the accused to examine a witness need not necessarily be violated if the witness is allowed to remain anonymous. The Chamber proposed four guidelines that should be followed in order to ensure the fairness of the trial in situations where anonymous witnesses are used. First, judges must be able to observe the demeanor of the witness in order to assess the reliability of the testimony. Second, judges must be aware of the identity of the witness in order to test the reliability of the witness. This raises the question of the extent to which judges in international courts are able to examine the reliability of the witness at all. Third, the defence

[2] Of particular relevance to the topic of this paper is how the South African judiciary has dealt with the issue of the use of anonymous witnesses after apartheid, which the country faced throughout the 20th century. It is believed that no other country in the world has faced witness intimidation on such a scale and with such a level of brutality as post-apartheid South Africa. When the apartheid trials began in the High Court in Johannesburg, the political party, the African People's Congress, publicly called for the killing of its former members who were now appearing as witnesses for the Prosecution, considering it „just revenge" (Melaku, 2018, p. 314). In one case, the court considered whether, in addition to denying the public access to the identity of a witness, not to disclose his identity to the defense as well, and took the view that such a measure would represent a departure from the principle of open justice. The court considered that the consequences of not revealing the identity of the witness to the defense are, among other things, that the defense cannot examine and get to know the background of the witness, which would make it difficult to determine whether the witness was really present in the situation he stated, and the witness himself may be „encouraged" to exaggerate or testify falsely. In a similar case before the same Court, a few months later, the Trial Chamber granted a witness complete anonymity (Lusty, 2002, p. 402).

must be given sufficient opportunity to question the witness on matters unrelated to his or her identity or current residence, such as how the witness could have obtained the incriminating information, but excluding information that would enable the witness's real name to be found. The Chamber clarified that the publication of nicknames used in the camps clearly falls into this latter category and the majority of the Trial Chamber will therefore not allow the publication of this information in relation to witnesses who have been granted anonymity without the express consent of those witnesses. *Fourth*, the identity of a witness must be published when there is no longer reason to fear for his or her safety (ICTY, Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witnesses, 1995, para. 71). Following these guidelines, the Chamber in the *Tadić case* granted complete anonymity to witnesses who were forced to participate in the sexual mutilation of other prisoners, to those who observed the beating of soldiers and the killing of people in their neighborhood, and who expressly stated that they would not testify without the granted anonymity (Momeni, 1997, pp. 167-168).

In the *Tadić case*, one judge dissented from the decision on anonymous witnesses, holding that the Statute and the Rules of Procedure and Evidence of the ICTY do not provide a basis for granting anonymity to witnesses to the detriment of the fairness of the proceedings and the rights of the accused, and holding that the use of anonymous witnesses in the present case was not in accordance with the principle of a fair trial (ICTY, Separate opinion of judge Stephen on the Prosecutor`s Motion requesting protective measures for victims and witnesses, 1995).

Although the decision to grant complete anonymity to witnesses in the *Tadić case* is cited as the first such decision made in international criminal justice, it cannot be said that it has become a precedent, because in other cases, trial chambers have not supported such a decision, considering that the anonymity of witnesses is not in accordance with the rights of the accused (Lusty, 2002, p. 419). Although measures related to concealing the identity of witnesses before the ICTY have been most commonly used in cases of sexual violence, there have been very opposing opinions among international criminal law theorists regarding this decision. On the one hand, some are of the opinion that concealing the identity of a victim or witness conflicts with many of the rights of the accused in the proceedings, primarily with their right to a fair trial, since the accused's ability to cross-examine is limited if he does not know the identity of the witness (See more: Leigh, 1996; Leigh, 1997), while, on the other hand, there are opinions that concealing the identity of victims and witnesses is inevitable before international criminal courts, given the nature and consequences of the international crimes committed and the fact that many victims and witnesses generally refuse to appear before the court unless they are provided with protection measures, or will appear before the court at great risk to themselves and/or their families (Chinkin, 1997, pp. 75-79). Trial chambers of international criminal tribunals are obliged to ensure the fairness of the proceedings on the one hand, and the protection of victims and witnesses on the other. With this in mind, the decision of the Trial Chamber in the *Tadić case* is justified by three facts. First, there was no witness protection program before the ICTY. Second, the situation in the former Yugoslavia, despite the presence of peacekeepers, was still unsafe at

the time of the ICTY proceedings. Third, the fact is that the Prosecutor's Office could not prosecute without the testimony of eyewitnesses, many of whom refused to testify without the protection provided by the Tribunal (Momeni, 1997, p. 170).

Contrary to the position of the Chamber in the *Tadić case* before the ICTY, the Rwanda Tribunal granted witnesses protection measures in the form of non-disclosure of their identities until they were brought under the protection of the Tribunal, but it also ordered the Prosecution to disclose to the defense the identities of protected witnesses and their unredacted statements within 30 days before trial in order to give the defense sufficient time to prepare (Amnesty International, 1999, p. 26).

The issue of the application of the protective measure of concealing identity was raised before the ICC already in the first case before the ICC, the *Lubanga case*, but in relation to minor victims who were allowed to participate in the proceedings (therefore exclusively as victims, not as witnesses). The legal representatives of the victims stated in their submission to the Court that in the majority of cases the victims are persons under the age of 18 and that they constitute a particularly vulnerable group; that until recently these victims were under the authority of the accused; that the families of the victims belong to the same community as the accused, in which he still has a certain influence, and therefore the participation of the victims in the proceedings puts them at risk; that a large number of victims are still in the Republic of Congo, where the situation is still insecure, and the possibilities of providing protection are limited. Therefore, the greatest concern of the victims is their protection and the protection of their families (ICC, Joint submissions of the Legal Representatives of Victims a/0001/06 to a/0003/06 and a/0105/06 on the modalities of victims` participation in the proceedings leading up to and during the trial, 2007, pp. 2-3). Protective measures had already been applied by the Pre-Trial Chamber and the Victims and Witnesses Unit, whereby the Pre-Trial Chamber allowed victims to participate in the proceedings anonymously, concealing their identities from the public and the defense. Victims' representatives requested that these measures remain in force during the proceedings before the Trial Chamber (ICC, Joint submissions of the Legal Representatives of Victims a/0001/06 to a/0003/06 and a/0105/06 on the modalities of victims` participation in the proceedings leading up to and during the trial, 2007, pp. 13-14). The Defense opposed maintaining the anonymity of victims during the trial phase because the defendant has the right to know the identity of all victims and those who have submitted a request to participate in the proceedings, and anonymity at the trial phase is not the only available protective measure, and therefore the disclosure of the victims' identities is a prerequisite for their participation in the proceedings (ICC, Decision on victims` participation, 2008, pp. 17-20). The Prosecutor's position was that the parties to the proceedings should be aware of the identity of victims participating in the trial and in the pre-trial stages of the proceedings, but acknowledged that it may be necessary for victims to remain anonymous to the public (ICC, Decision on victims` participation, 2008, pp. 20-23).

Having considered all the above submissions, the Lubanga Trial Chamber took the view that protective and special measures constitute a legal instrument through which the Court can ensure the participation of victims in the proceedings, as they constitute a necessary

step to protect their safety, psychological and physical well-being, dignity and private life. Furthermore, in the Chamber's view, protective measures constitute a right of victims under the provisions of the ICC Statute. While both the Prosecution and the Defence have objected to the anonymity of victims during the trial and in the pre-trial stages of the proceedings, the Chamber is aware, although it is preferable for the identity of victims to be known to the parties to the proceedings, of the particularly vulnerable position of many victims who continue to live in conflict zones where it is difficult to ensure their safety. However, special consideration must be given to the rights of the accused before allowing the participation of anonymous victims, because while the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be permitted to the extent that it undermines the fundamental guarantees of a fair trial. The greater the scale and importance of the participation of victims in the proceedings, the more likely it is that the Chamber will require their identification (ICC, Decision on victims` participation, 2008, pp. 43-44).

With regard to dual status, the Chamber considers that victims appearing before the ICC should not automatically be considered as witnesses, as whether victims appearing before the Court will also have witness status depends on whether they are called to testify during the proceedings. Victims of crimes are often able to provide direct evidence of the crimes allegedly committed, and a general prohibition on their participation in the proceedings as victims if they are called to testify would be contrary to Art. 68 para. 3 of the ICC Statute and the Chamber's obligation to establish the truth. However, in the case of a person with dual status, the Chamber will determine whether the participation of a victim who is also a witness in the proceedings may adversely affect the rights of the defence at a particular stage of the proceedings. In this regard, the Chamber will consider the manner in which the victim with dual status may participate, the need for her participation and the right of the accused to a fair and expeditious trial (ICC, Decision on victims` participation, 2008, p. 45).

In accordance with the position taken by the Chamber, most of the minor victims who participated in the proceedings remained anonymous in relation to the accused Lubanga, precisely for reasons of their safety, as they continued to live in the conflict zone. However, the Chamber emphasized that the more a victim participates in the proceedings, the more likely it is that the Chamber will decide to disclose his/her identity to the parties to the proceedings, which is in line with the principle of a fair trial. This practically means that when a victim who is allowed to participate in the proceedings also appears as a witness, the Chamber will reconsider the status of her anonymity.

Conclusion

Witness anonymity as a protective measure leads to a conflict between two rights – the defendant's right to confront and cross-examine witnesses, on the one hand, and the witness's right to protection. Today, when the role of witnesses in international criminal trials is important and indispensable, the question arises as to whether they should be granted anonymity in certain cases and under certain conditions.

Faced with the dilemma of whether or not to allow anonymous witnesses, some judges, even in cases of serious crime (organized crime, mafia and gang crimes, drug trafficking, etc.), have taken the position that anonymous witnesses should not be allowed, emphasizing that „the greater danger is if we go too far and accept a restriction of freedom that is foreign to our history and tradition. Because if we do that, we will harm ourselves more than any gang or group of gangs could ever do" (Lusty, 2002, pp. 383-384). Other judges emphasized that states have other ways of providing protection to witnesses, such as protective supervision and accommodation, relocation, issuing documents with a new identity, imposing strict criminal sanctions in the event of injury or intimidation of witnesses, etc (Lusty, 2002, p. 384). On the contrary, there are also views that the anonymity of witnesses is both a way to encourage witnesses to report crimes and testify, but also a way to ensure their complete safety in criminal proceedings (Le Roux-Kemp, 2010, p. 352).

In making a decision whether to allow the use of anonymous witnesses in international criminal trials or not, all of the above views should, first of all, be taken into account, because both the views for and against anonymous witnesses have their own reasons and arguments. The view that anonymous witnesses should not be allowed because it violates the right of the accused and the defense to cross-examine the witness is justified from the aspect of the accused's right to a fair trial. However, the right to a fair trial is not only the right of the accused, but also the right of the victims (who may appear as witnesses in the proceedings), so the question may be raised whether their right to a fair trial is violated if they are allowed to remain anonymous, when all the conditions for that are fulfilled. It seems that listing the arguments for and against anonymous witnesses, although useful, does not offer an answer to the question and a practical solution.

Therefore, we should start from the provision of Art. 64 para 2 of the ICC Statute, according to which the trial chamber is obliged to provide a fair and expeditious trial which is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. This provision is interpreted as meaning that the chamber is obliged to apply a balancing test between the fair trial rights of the accused and the protection of witnesses (Kurth, 2009, p. 615), and it can serve as a basis for deciding on granting witnesses the status of anonymity.

What is very important to note is the fact that some national legislations allow the use of anonymous witnesses, which has been confirmed in the case law of the European Court of Human Rights. If we look at the crimes in which the issue of using anonymous witnesses has been considered, it can be concluded that these are serious forms of crime, such as organized crime (especially related to drug trafficking), crimes committed by the mafia and gangs, sexual crime, etc. If we start from the gravity of the crime as a kind of prerequisite for the use of anonymous witnesses, it can definitely be said that international crimes meet this prerequisite, because they are considered the most serious crimes and are recognized as such by the entire international community. However, another circumstance should be key here, and that is the real danger to the life of the witness and/or his family. This is especially true when an armed conflict in the witness's country of residence is still ongoing at the time of the proceedings before the international criminal court, when the situation

there is generally unsafe, and for the witness it may become even more unsafe if he or she testifies against the accused. Consequently, many witnesses may refuse to testify, thereby reducing the chances that the accused's guilt will be proven, he or she will be punished and the task of the international criminal court will be accomplished.

If a witness, despite the unsafe situation in the country of residence and the risk of reprisals, agrees to testify, the need for, and also the right to, protection must be taken into account. Before the international criminal court even considers the possibility of granting the witness complete anonymity, it is obliged to check whether his or her protection can be achieved by applying some other protective measure. In other words, anonymity should be a measure of last resort. In addition, anonymity should be an exceptional measure, to be applied if certain, strictly defined conditions are met. Anonymity of witnesses as a last resort and an exceptional measure is in line with the positions of the European Court of Human Rights, according to which the need for anonymity must be determined in relation to each specific witness, and anonymity must be a last resort - if protection can be provided by less restrictive measures, they must be applied (ECHR, Judgment in Case of Van Mechelen and Others v. The Netherlands, 1996, paras. 58-62).

In deciding whether or not to grant complete anonymity to a witness, the two-step test defined in the practice of the European Court of Human Rights can be useful. This test actually helps the court to decide whether or not to grant anonymity status to a witness, taking into account the balance with the fairness of the proceedings. In the first step, it should be examined whether the difficulties of the defense caused by the anonymity of the witnesses are balanced with some other actions of the court that would allow the defense to challenge the statements of anonymous witnesses and cast doubt on their reliability. The second step involves the court's assessment that the verdict is not based exclusively or to a decisive extent on the statements of anonymous witnesses (ECHR, Judgment in the Case of Doorson v. The Netherlands, 1996, paras. 75-76). The practice of the European Court of Human Rights is developing on the issue of anonymous witnesses, appreciating different circumstances from case to case - the level of fear of the witness, the absence other protection measures, the seriousness of the criminal offense being tried, the nature of the witness (whether he was an official or not), etc. (See more: Turanjanin, 2021), but the principle position is that anonymous witnesses should be allowed in certain cases and under certain conditions.

What should also be kept in mind is that international crimes are characterized by mass victimization, so a large number of victims and witnesses appear in trials before international criminal courts. Most of them do not need any protective measures, and among those who do, only a small percentage can insist on complete anonymity.[3] There-

[3] For example, according to official ICTY statistics, as of mid-2015, more than 4,650 witnesses have testified since the Tribunal's first trial in 1996. In the period from 1996-2013, 72.2% of witnesses testified without any protective measures. Over a quarter of the total number of witnesses testified with some type of protective measure. The majority of these witnesses had their testimony conducted in open court with certain steps introduced such as the name being withheld from the public or the audio and visual broadcast of proceedings being distorted to

fore, the use of anonymous witnesses would not be a rule, but an exception that would be allowed only under strict conditions.

Finally, the use of anonymous witnesses before international criminal courts should not be excluded *a priori* as a possibility, because in some situations, due to retaliation against witnesses whose identity is known, judges may be put in a situation where they have to acquit the accused due to lack of evidence. This was the case in the *Haradinaj et al.* and *Limaj et al.* cases before the ICTY, where witnesses refused to testify due to fear, so the Court issued acquittals due to lack of evidence (De Brouwer, 2015, p. 711). In the case of *Haradinaj et al.*, the Trial Chamber stated in its verdict that it faced great difficulties in obtaining evidence from a large number of witnesses, that many witnesses stated that they were afraid to appear and testify, so the Chamber got the impression that the trial took place in an unsafe atmosphere for the witnesses. This situation was influenced by numerous factors, such as the fact that the area where the witnesses come from - Kosovo, is a small area where family and social ties are strong, so it is difficult to guarantee anonymity, and the situation in Kosovo itself is generally insecure, and therefore unsafe for witnesses (ICTY, Judgement in the Case of Prosecutor v. Haradinaj et al., 2008, para. 6). This can be considered one of the cases where one should have considered granting the witnesses complete anonymity. Of course, the judgment cannot be based only on the testimony of anonymous witnesses, but together with other evidence, the testimony of these witnesses can influence the determination of the defendant's responsibility and the passing of a guilty verdict.

safeguard the identity of the witness. Some witnesses gave testimony in closed session, meaning that only the parties were able to view the proceedings. Less than a fraction of one percent of witnesses have been granted long-term protection such as relocation to third countries. ICTY, Witness statistics, available at:
https://www.icty.org/en/about/registry/witnesses/statistics, accessed: September 2025.

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