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**REDRESS OF VICTIMS IN THE INTERNATIONAL
CRIMINAL COURT**

**Analysis of the victim identification process
at the International Criminal Court**

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SUBJECT

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ABSTRACT

Victimology is one of criminology's many branches. Its inclusion is fundamental to the study of this science. This is due to the fact that in the commission of a crime, not only the offender but also the person who receive the damage is involved. The victim. In addition to the other factors that could influence them as: opportunity, criminological profile, location, motive, etc.

The present work aims to analyse, in particular, the right to reparation that the victim of a crime has. But it will be analysed in an international level. It will be based on the qualitative bibliographical study of the three cases in which the International Criminal Court has applied an order of reparation. These are: Lubanga's case, Katanga's case and Al Mahdi's case. The aim of this work is to verify whether the ICC is able to fulfil its goal of responding to victims' rights to redress, and if the Court is capable to take into account all the victims of the crimes within its jurisdiction.

Key words: criminology, victimology, International Criminal Court, ICC, victims, reparation, redress.

RESUMEN

La victimología forma parte de una de las muchas ramas de la criminología. Su inclusión, es fundamental para el estudio de esta ciencia. Esto se debe a que en la comisión de un delito, no interviene tan solo el delincuente sino también la persona que recibe el daño. La víctima. Además del resto de factores que influyen en ellos como puede ser la oportunidad, el perfil criminológico, el lugar, etc.

El presente trabajo pretende analizar en concreto el derecho de reparación que tiene la víctima de un delito a nivel internacional. A partir de un estudio cualitativo de tipo bibliográfico, se analizarán los tres casos en los que la Corte Penal Internacional ha aplicado una orden de reparación a las víctimas de los crímenes de su competencia. Estos son: el caso Lubanga, el caso Katanga y el caso Al Mahdi. El objetivo es comprobar si la CPI es capaz de responder al derecho a la reparación

de las víctimas, y si es capaz de tener en cuenta a todas ellas de los crímenes de su jurisdicción.

Palabras clave: criminología, victimología, Corte Penal Internacional, CPI, víctimas, reparación.

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ABBREVIATIONS

DRC	Democratic Republic of Congo
FRPI	Patriotic Resistance Force in Ituri
FTV	Trust Fund for Victims
ICC	International Criminal Court
ICTR	International Criminal Tribunals for Rwanda
ICTY	International Criminal Tribunals for the former Yugoslavia
OPCV	The Office of Public Counsel for Victim
RDC	The Congolese Rally for Democracy
RPE	Rules of Procedure and Evidence
RS	Rome Statute
TFV	Trust Fund for Victims
UPC	Union of Congolese Patriots

1. INTRODUCTION

The study of the victim has been a great advance for criminology. This is because victimology plays a fundamental role, not only in the study of crime, but also in its prevention and intervention. The victims were no longer just considered the passive subject in the crime. They also became involved, for example, in certain mediation processes.

However, until the last few years victims have been the great forgotten ones in any national or international process. The main reason for this is that they were not considered part of them. And, due to that, their “redress” was not within the jurisdiction of any criminal court.

Nowadays, the victim has been included in the legal reality of many criminal systems, as the Spanish. However, the basis of this paper is not the study of the victims’ role as witness or accusation. But in checking if the court in charge fulfils their right to obtain redress. Specifically, the main characters of this work are victims “of unimaginable atrocities that deeply shock the conscience of humanity”. They are: the crime of genocide; crimes against humanity; war crimes and the crime of aggression. And the tribunal responsible for trying individuals who commit such kind of crimes is the International Criminal Court –henceforth, ICC-.

The present work consists in first place in a theoretical framework. It analyses the concept of victim and its role in international tribunals prior to the ICC. As well as the ICC itself. This subsection explains the inclusion of reparation to the victims and the application of Lubanga’s principles. The court relies on these principles in deciding orders of reparation. The structure concludes with the analysis of the study model, together with the hypotheses.

Following that, the methodological framework consists in the presentation of the method and the design aspects, used in the study. It is the qualitative analysis of the three cases –Lubanga, Katanga and Al Mahdi’s - in which the Court has applied an order of reparations to victims.

The results section shows the data collected from the bibliographic analysis of each decision published. Finally, the conclusions set out the findings and the confirmation or denial of the hypotheses raised above.

2. THEORETICAL FRAMEWORK

This section develops the progress of victimology in the history of criminology worldwide. It also shows the role of the victim in the international processes that have preceded the ICC. And how it ended up including reparations in the Rome statute and its later application by design the Lubanga principles.

Then, this framework will explain the analysis model, including the hypotheses of this study.

2.1 *The victim*

Since its inception at the end of the XIX century, criminology has been a great advancement for criminal justice.

A key figure was Hans Von Hentig. He was the first who systematically study the role of the victims in the crimes. In his book, *The Criminal and His Victim: Studies in the Sociobiology of Crime* (1948), criticized the unidimensional vision on criminology studies. He suggested that the victim may have their own investigation area because their implication to the criminal act by virtue of situational, biological, sociological and psychological factors.

As a result of his statements, the role of the victim in the crime and their study (victimology) became a new branch of criminology. Moreover, the victim started to be accepted globally on the basis of The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted by the General Assembly on 29 November 1985. This Declaration defined “victim” as:

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

In addition, the Declaration points out that this term also includes “family, dependents and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”.

Despite the growing prominence of victims in the national proceedings –and the application of reparation measures-, their inclusion in the international mechanism to fight against international crimes was late.

It was not until the beginning of the 21st century, after the Rwandan genocide and the wars in the former Yugoslavia when reparation and recognition of the victim ceased to be merely symbolic.

2.2. The victim within the international processes

This subsection will develop the role that the victim played in the international tribunals that preceded the ICC. It also includes the legal foundations on which the Court established the right of victims to be redressed.

I. Background to the International Criminal Court

The existence of international prosecutions of international crimes are not contemporary. In the aftermath of the Second World War, the Nuremberg and Tokyo trials, in 1945 and 1947, did not enable the possibility of victims to obtain reparations. These victims’ rights were not part of this “justice system”.

The inability to claim and obtain redress during the proceedings was because that obligation of reparation lay in the State, not the individual judged in those trials.

Therefore, McGonigle Leyh, Brianne (2016) explained that the legacy of these trials was the acceptance of the individuals as subjects of international law, who may be criminally responsible. To this end, it was necessary to depart from State responsibility, as “crimes are committed by men, not by abstract entities” (Beatrice I. Bonafè, 2009), but nothing was said about the victims redress.

Almost fifty years following Nuremberg, and in response to the crimes committed in the former Yugoslavia and Rwanda, the United Nation’s Security Council set the

ad hoc International Criminal Tribunals for the former Yugoslavia – henceforth, ICTY- in 1993 and Rwanda – henceforth, ICTR- in 1994.

Their statutes, as the Nuremberg and Tokyo trials, did not provide the victims' right to reclaim any kind of redress to the convicted persons. However, they deal with the reparations under their own jurisdiction but only through the restitution of unlawfully taken property (Cohen, Miriam, 2014).

As it is established in the Article 24(3) of the Statute of the ICTY (reflected in the article 23(3) of the Statute of the ICTR:

In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

The Rules of Procedure and Evidence in their Rule 105, common in both Tribunals, establish that only the Prosecutor or the Chamber can initiate the request of restitution (Christine Evans, 2012), not the victim.

Also, in comparison with the Nuremberg and Tokyo's Statutes, in this case the victims, or the persons on their behalf, could reclaim compensation through an action in a national court or other authority with competence. Always in accordance with the national legislation. Which means that, despite the recognition by the international law of the right to reparation or compensation for the victims, the responsibility to implement it did not lie with the International Tribunals. As Susanne Malmström (2001) established, it was determined by the domestic legislation, but also by political policy. In consequence, some victims may be redressed, but not others. For example, stateless victims did not have any recourse. This resulted to be a discriminatory treatment of victims.

Despite the deficiencies in the application of the victims' rights by the *ad hoc* Tribunals, they presented important precedents on the creation of the ICC and the inclusion of the victim in the proceeding.

II. The International Criminal Court

The ICC, an international organization, is the result of the adoption of the Rome Statute –henceforth, RS-, by the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, organized by the United Nations on 17 July 1998. However, its Statute was not entered into force until 1 July 2002. At the time of its publication, 122 States Parties ratified it.

The Court is a permanent institution and exercise its jurisdiction to put an end to impunity for the perpetrators as individuals. And it contributes to the prevention of the most serious crimes of concern to the international community as a whole. These are set out in the articles 5, 6, 7, 8 and 8 *bis*, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

A relevant distinction from the courts mentioned above is the recognition of victim's rights in crimes within the jurisdiction of the ICC, on the RS. It is true that the ICTY and ICTR's Statutes include the right of victims to be redressed, but it was only about the restitution of unlawfully taken property.

In comparison, the ICC by The Rules of Procedure and Evidence of the ICC – henceforth, RPE- establishes in its Rule 85 a definition of what the Court understands by victim. They are “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”. Another distinction is that includes organizations or institutions that have sustained direct harm to their property. Something not contemplated previously in the courts mentioned above.

Furthermore, the ICC is also a milestone in the redress matter. Because it goes much further than the ad hoc tribunals. In accordance with Article 75 of the RS:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

In this article, it is necessary to remark other differences between the ICC and the tribunals before it. First, in the section (1) of the article, the Court itself may pursue any decision about redress, something that has not happened in the *ad hoc* tribunals. During their procedures, the national tribunals had the jurisdiction to decide about the reparation of the victims.

Second, and in accordance with what was mentioned, not only the victim could give the request, but also it can be made *ex officio* by the Court.

Third, the Court may make an order of reparation against the guilty, not the State. In the ICC the responsible for the acts is the individual. The subject who decided to commit the crimes.

Finally, the article in its section (2) mentioned another institution, the Trust Fund for Victims –henceforth, FTV-, to provide physical and psychological rehabilitations. In reparations, this organ would act only in cases where the convicted person is declared destitute. The creation of this entity is a before and after compared to the pre-ICC Courts. This is because the Court is not only the responsible to order the redress, but also with the TFV, the ICC guarantees its implementation.

2.3 The victim's redress and the Lubanga's principles

The international law's principle established that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed” (García F.V, 1961). Then, the reparation must be proportional to the damage that the victim has suffered.

There are different kind of redress in international law, which include the restitution, the compensation, the rehabilitation, the satisfaction and the guarantees of non-repetition¹.

Specifically, the RS established in its article 75 (2) the modalities of redress. Which are the restitution, the compensation and the rehabilitation. However, the Court could make a decision to indicate another kind of redress, including the three modalities mentioned. The different kind of redress are widely explained in the Manual for the legal representatives, published by The Office of Public Counsel for Victim -henceforth OPCV-, and developed in the ANNEX I.

Despite the fact that it was in 2002 when the victims' right to be redress was recognised, it was not until 2012 when the ICC issued its first sentence of conviction. The Court considered that Thomas Lubanga Dyilo was guilty of war crimes of conscripting or enlisting children under the age of fifteen years.

This was the first ICC's decision with a firm condemnation and therefore it had to establish the principles and the process of victims' redress. Nowadays, these principles are known as "Lubanga's Principles"², and there are:

- i) The right of reparation is recognized as a human right. Every victim of a crime under the jurisdiction of the ICC has the right to be redressed and have accessibility for that.
- ii) Victims should receive appropriate, adequate and prompt reparations³. That means that they need to be formulated and applied in a non-discriminatory manner. It is not necessary that the victim has participated in the process. The Court has to take into consideration the needs of all of them.

¹ The Universal Declaration of Human Rights (Article 8); the International Covenant on Civil and Political Rights (Article 2.3); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 14); and the African Charter on Human and Peoples' Rights (Articles 7 and 21.2).

² Trial Chamber I. *The Prosecutor v. Thomas Lubanga Dyilo*. "Decision establishing the principles and procedures to be applied to reparations", No. ICC-01/04-01/06-2904. 07.08.2012. Para.222. Accessed 18 January 2020. Available at: https://www.icc-cpi.int/CourtRecords/CR2012_07872.PDF

³ Ibid. para.242 p.81

- iii) It has to be considered the direct and indirect victims. Direct victims are those that receive the harm or the “immediate effects”. Indirect victims are family members and persons who have intervened to help the direct victims. And all the communities affected.
- iv) Reparation must take into account the sexual violence, as well as its consequences.
- v) Reparations may be symbolic, individual or collective. These are not mutually exclusive.
- vi) Reparations should reflect local cultural and customary practices, unless these are discriminatory, exclusive or deny victims the equal access to their rights.
- vii) The “damage, loss and injury”, must have resulted from the crimes⁴.
- viii) The facts, which form the basis of the claim, have to be proved.
- ix) The State Parties should cooperate in the execution of the reparation orders.
- x) These principles and the reparation process shall be public and shall include awareness-raising activities with the authorities of national States, communities and populations.

About the process to apply in the implementation of the redress to the victims, the Trial Chamber I decided to delegate this labour to the TFV. This independent entity of the Court is based on the article 79(1) of the RS, the Rule 98 of the RPE, and the Resolution 6 of the Assembly of the States Parties issued on September 2, 2002.

For the implementation of the reparation orders, the Chamber recommends the creation of a multidisciplinary team of experts. In order to evaluate the harm, the effect that the crime had, for the identification of the most appropriate reparation and the establishment of which individuals, organizations, groups or communities has to be redressed (López Martín & Anna Gemma, 2012).

⁴ Ibid. para.247 p.82

The implementation of the reparations plan was suggested by the TFV, and it has to be executed in conjunction with the Registry, the OPCV and the experts. Its development started a five-step process to determine the victims who ought to participate in the reparation process. First, the team established which localities ought to be involved. Second, they carried out a consultation phase. Third, in that consultation, there was an assessment of harm. Fourth, public debates were held in each locality, in order to explain the reparation principles and procedures, and to address the victims' expectations. And finally, the team collected the proposals for collective reparations to be developed in each locality⁵.

2.5 Analysis Model

I. Study Model

After a theoretical analysis about the ICC, and its objective and proceeding to redress the victims of the crimes under its jurisdiction, this paper aims to study the process carried out by the Court on the eligibility of victims for their participation in the reparation process. In order to verify if the ICC is able to achieve the expected redress for all victims of a crime within its jurisdiction, in terms of effectiveness.

II. Hypotheses

H1: The ICC is unable to fulfil its goal of responding to victims' rights to redress, because the Court does not take into account all the victims of the crimes within its jurisdiction.

This main hypothesis is shelled into a group of sub-hypotheses that will allow us to go deeper:

SH1: The slowdown in proceedings makes it difficult to find and effectively identify victims.

SH2: The ICC does not have enough material sources to identify all victims.

⁵ Ibid. para.281-282.

3. METHODOLOGY

3.1 Presentation of the method

For the purposes of this investigation, the methodology used has been through the documentary method. It is a systematic procedure for evaluating documents in qualitative research. Corbetta, P. (2007) determined that this analysis requires that data be examined and interpreted in order to develop empirical knowledge.

The election of this method is because document analysis is particularly applicable for intensive studies producing rich descriptions of a single phenomenon, event, organisation, or program. Moreover, among the wide variety of documents that can be used for research, this study has been employed as primary sources the ICC's institutional documents. Concerning the three cases that the ICC ordered the redress of their victims, which are The Lubanga Case⁶, the Katanga Case⁷, and the Al Mahdi Case⁸.

3.2 Design aspects

The footnotes that appear throughout this study will indicate the location of the information found in the different documents. The reason for this is to facilitate the search for such information and for reasons of clarity and understanding.

On the other hand, the analysis will considerate a number of issues, for further comparison between the order issued and the result obtained to date:

a) The crime under the jurisdiction of the Court, in which the subject is considered guilty. Besides the total estimated victims of the crime.

⁶ ICC-01/04-01/06-2904.

⁷ Trial Chamber II. *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Germain Katanga*. Order for Reparations pursuant to Article 75 of the Statute. No.ICC-01/04-01/07-3728-tENG. 24.03.2017.Available at: https://www.icc-cpi.int/CourtRecords/CR2017_05121.PDF

⁸ Trial Chamber VIII. *Situation in the Republic of Mali in the case of The Prosecutor v. Ahmad Al Faqi Al Mahdi*. Reparations Order. No.ICC-01/12-01/15-236. 17.08.2017.Available at: https://www.icc-cpi.int/CourtRecords/CR2017_05117.PDF

b) The kind of redress applied, and the considerations of the ICC in its decision. Including the criteria of eligibility that the Court takes into account for the election of the victims who will receive reparation.

c) The final number of victims who received redress.

In order to carry out a complete analysis, this work will include a self-made comparative table in the ANNEX II.

4. RESULTS

The following sections will show the results that have been obtained from the different orders and decisions of the ICC in each case. Specifically, it will show the process and eligibility criteria that the Court has followed for the selection of potential victims to receive reparations. It will also include the modalities of reparations that have been adopted and the difficulties identified in each case.

4.1 Lubanga Case

This case is concerned with the events that took place between September 2002 and August 2003 in Ituri, which is a district of Oriental Province in the north east of the DRC.

During this period, Lubanga created the Union of Congolese Patriots –henceforth, UPC-, a political and militia group in Ituri. The UPC face off against the Congolese People’s Army and the Patriotic Resistance Force, resulting in more than 60.000 deaths. Moreover, the participation of more than 3.000 child soldiers, recruited by Thomas Lubanga.

He was found guilty on 2012 and sentenced to a total of 14 years of imprisonment.

I. Estimated number of victims in the conflict

The Trial Chamber I, in its judgement of 14 March 2012, estimated a population ranged from 3.5 to 5.5 million people⁹. From 1999 to 2003, there was an armed conflict which was called “Ituri conflict”. During this period of time, Médecins Sans Frontières estimated that the conflict had led more than 50,000 deaths and more than 500,000 civilians displaced (Ahoua, L et. al, 2006).

II. Criteria of eligibility

In accordance with the Chamber’s decision¹⁰, the Judges determined that the potential beneficiaries of an order for reparations were the direct or indirect victims

⁹ ICC-01/04-01/07, para.67.

¹⁰ ICC-01/04-01/06-2904.

of the charges for which Lubanga was convicted¹¹ who fulfilled three criteria of eligibility:

Firstly, the victim must have suffered harm following the crimes enlisting, conscripting and using children under 15.

Secondly, this harm must have been caused in Ituri.

And thirdly, this harm must have been caused from September 2002 to 13 August 2003.

However, the ICC (2017), in the Case Information Sheet, acknowledged that:

Given the uncertainty as to the number of victims of the crimes in this case save that a considerable number of people were affected -and the limited number of individuals who have applied for reparations-, the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified (para. 219).

On the other hand, the Court stated that collective and individual reparations are not mutually exclusive and could be granted simultaneously. As long as individual reparations are granted without creating tensions within the communities.

III. Difficulties in identifying eligible victims

The 3 November 2015, the Trial Chamber II presented the Reparations and Draft Implementation Plan developed by the TFV and approved by the Chamber¹².

On 20-21 July 2015, the team of experts presented to the Secretariat their findings and recommendation from the consultation held in 22 locations in Ituri involving over 1,340 victims -1,015 men and 348 women-, family members and

¹¹ It included family members of direct victims, along with individuals who intervened to help the victims or to prevent the commission of these crimes.

¹² Trial Chamber II. *Situation Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo*. “Redaction of Filing on Reparations and Draft Implementation Plan”. No.ICC-01/04-01/06-3177-Red. 03.11.2015. Accessed 15 March 2020. Available at: https://www.icc-cpi.int/CourtRecords/CR2015_20832.PDF

representatives of affected communities. The Board decided to extend the period of consultation by two months¹³.

Nevertheless, the Victims' Participation and Reparation Section –henceforth, VPRS-, admitted not being able to provide an estimation of the number of potentially eligible victims¹⁴. The difficulties that hampered that calculation were, on the one hand that child soldiers in particular have self-demobilized; and, on the other hand the social and cultural factors that influence a person to identify themselves as a victim for being a child soldier and the effect this has on their community.

It is also important to note that, due to a prolongation of the process over more than twelve years, the difficulties of identifying eligible victims that in the time of the crimes had less than 15, increased. For example, as the TFV established, there were difficulties in reliably establishing age, or the fact that they could have scattered through the area.

This period of time results in most of the relevant documentation and other evidence was no longer available¹⁵. Also, another difficulty is the political factors in some areas, which is because nowadays the region of Ituri is still unstable. This fact reveals a lack of material resources to face the process of identifying potential victims.

In view of the above, the TFV shared all information at its disposal and relevant to this matter to assist the Court in making its own determination¹⁶.

The references include the report of the Human Right Watch (2003), which stated:

In an interview with Human Rights Watch researchers, UPC President Lubanga claimed to have 15,000 troops. Local experts and observers believe

¹³ Ibid. para.32.

¹⁴ Ibid. para.41.

¹⁵ Ibid. para.42.

¹⁶ ICC-01/04-01/06-3177-Red, para.240-243

that nearly 40 per cent of these were children under the age of eighteen (i.e. 6,000), (page.46).

The report also included some of the declarations made by the U.N Organization Mission in the DRC –henceforth, MONUC-:

An estimated twenty percent of the recruits in Mandro camp were children. Other sources estimated the Mandro camp to have about 5,000 fighters, implying there may have been nearly 1,000 child soldiers there (page, 47).

In 2004, the international non-governmental organization Child Soldiers International published a Global Report, the Coalition to Stop the Use of Child Soldiers (2004), stated that:

As many as 30,000 child soldiers were estimated by international and government agencies to need demobilizing in 2003 (page, 51).

The TFV estimated that up to 6,000 child soldiers were engaged in the FLP/UPC. In fact, another difficulty was that the term “child soldier” used in the reports included all children under the age 18 rather than 15.¹⁷

Also, TFV admitted not having any information as to the percentage of child soldiers who have died as a result of the conflict, and how many direct and indirect victims suffered harm. On the other side, if the establishing number of direct victims it was almost impossible to specify, the number of indirect victims is even more challenging.¹⁸

IV. Victims that received reparation

Finally, the TFV noted that “for planning purposes”, the estimated number of total potentially eligible direct and indirect victims was 3,000. This figure is subject to modification, as specified, during the implementation of the repair plan.¹⁹

¹⁷ ICC-01/04-01/06-3177-Red, para.246.

¹⁸ Ibid, para.252

¹⁹ Ibid, para.253

In the Report of the Board of Directors of the Trust Fund for Victims, in 4 December 2017, Mr. Motoo Noguchi, Chair of the Board of Directors, confirms that the number is roughly estimated at 3,000 victims.

4.2 Katanga's Case

Germain Katanga was considered the highest-ranking leader of the Patriotic Resistance Force in Ituri –henceforth, FRPI- since 2003. In 2004 he became Brigadier General in the Army of the DRC.

Katanga was tried for the crimes that took place in the notorious “Bogoro Massacre”. It occurred on February 24, 2003 when at least 200 civilians were killed by the attackers who went on an “indiscriminate killing spree” (Fatou Bensouda, 2007). Survivors were imprisoned in a room filled with corpses, and women and girls were sexually slaved and raped.

He was found guilty on 2014 of the crime against humanity of murder and four counts of war crimes which are murder, attacking the civilian population, destruction of property and pillaging. He was sentenced to a total of 12 years’ imprisonment²⁰.

I. Estimated number of victims in the conflict

The Chamber was unable to establish the precise number of civilians living in Bogoro during the attack²¹. But the Court established that at least 800 civilians were in the village at that time²². As mentioned above, it is estimated that at least 200 people were killed. Nevertheless, The Chamber considered that the lists presented by witness did not specify the circumstances of the death or identity, military or

²⁰ Trial Chamber II. *Situation Democratic Republic of the Congo in the case of The Prosecutor v. Germain Katanga*. “Judgment pursuant to article 74 of the Statute”, No.ICC-01/04-01/07-3436-tENG. 07.03.2014. Accessed 26 March 2020. Para.6.Available at: https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF

²¹ Ibid, para.730.

²² Trial Chamber II. *Situation Democratic Republic of the Congo in the case of The Prosecutor v. Germain Katanga*. “Order for Reparations pursuant to Article 75 of the Statute”, ICC-01/04-01/07-3728-tENG. 24.03.2017. Accessed 26 March 2020. Para.19. Available at: https://www.icc-cpi.int/CourtRecords/CR2017_05121.PDF

civilian status. On this basis, the Chamber established that at least 60 people were killed on the day of the attack, including at least 25 children.²³

On the other hand, the ICC also condemned Katanga for the war crimes of destruction of enemy property that “did not constitute military objectives and such destruction was not justified by military necessity”,²⁴ and pillaging.

In the light of the evidence, the Court established that on 24 February 2003 the attackers demolished and/or set ablaze the houses of the Hema population of Bogoro, as well as the buildings of Diguna Mission, including a church. As for the pillaging, the ICC established that properties which are essential to the daily life was taken away by the attackers.

However, Katanga was not found guilty of the rape and sexual slavery or the crime of using child soldiers because the Chamber concluded that the evidence presented in support of the accused guild did not satisfy the standard of proof “it beyond reasonable doubt” of the accused’s responsibility for these crimes (Women’s Initiatives for Gender Justice, 2014).

II. Criteria of eligibility

The Chamber referred to the Lubanga’s case to emphasize the importance of the victims, families and communities throughout the reparation process and the necessity to apply the redress in a broad and flexible manner; in order to make their participation “substantive and effective”²⁵.

During the trial, 366 individuals were authorised to participate as victims -11 of them as child soldiers-²⁶. In the Order of reparations, the bar puts 341 applications for reparations before the Chamber. It decided that, in order to be accepted, the applications ought to be individually analysed to know the total extent of harm caused to the Applicant.²⁷

²³ ICC-01/04-01/07-3436-tENG. Para.837-838.

²⁴ Ibid, para.880.

²⁵ ICC-01/04-01/07-3555-tENG, para.21.

²⁶ ICC-01/04-01/07-3436-tENG, para.25.

²⁷ ICC-01/04-01/07-3728-tENG, para.32.

The Chamber determined that 297 Applicants could be considered victims of the crimes of which Katanga was convicted²⁸. And established that, in addition to individual reparations –a symbolic award of USD 250 per person²⁹–, collective reparations are also appropriate in this case³⁰. These collective reparations were in the form of support for housing; for an income-generating activity; for education and psychological support. Including the “clear and sufficient explanations to inform the victims of and foster their trust in the measures”³¹.

III. Difficulties in identifying eligible victims

First of all, the time extension between the attack -2003-, and the Order of reparations, in 2017³². During this period of time, the evidence had almost disappeared, for example, in the case of property which was destroyed or because more of them were displaced from their homes as refugees. As well as the providing of information for the potential victims of the massacre to submit an application for reparation.

And another reason is because cultural and social factor about what it takes to be considered a victim. Stigmatization is common in women and girls who suffered crimes like rape or sexual slavery for example. The fear of getting banned from the community could be a reason.³³ Because of this, the Chamber relied only on the testimony of three witnesses. And finally, the Chamber considered, despite of their credibility, that there were contradictions in their testimony. For this reason, the charges of rape and sexual slavery were dropped³⁴.

Taking into consideration the difficulties; it is necessary remark the lack of sources that the ICC and the DRC’s government could provide for the identification of

²⁸ Ibid, para.168 and 287.

²⁹ Ibid, para.306.

³⁰ Ibid, para.193.

³¹ Ibid, para.306.

³² Ibid, para.53.

³³ Trial Chamber II. *Situation Democratic Republic of the Congo in the case of The Prosecutor v. Germain Katanga*. “Queen's University Belfast's Human Rights Centre (HRC) and University of Ulster's Transitional Justice Institute (TJI) Submission on Reparations Issues pursuant to Article 75 of the Statute” ICC-01/04-01/07-3551. 14.05.2015. Accessed 30 March 2020. Available at: https://www.icc-cpi.int/CourtRecords/CR2015_05810.PDF

³⁴ ICC-01/04-01/07-3436-AnxI, para. 152-154 and footnotes 189-192

victims; because even today DRC is in a situation of instability due to the wars taking place in the territory. For example, the destruction of documents is very common in this situation.

The TFV in its Draft Implementation Plan, published on 25 July 2017,³⁵ highlighted the difficulties encountered in its drawing up. Firstly, the application of collective reparation for only the group of 297 identified beneficiaries. Secondly, the time extension also caused the displacement of the victims, both those identified and those not.

In this regard, the current location of the identified victims is 265 victims who currently reside in different villages in the DRC; 17 victims currently reside in a refugee camp in Uganda and 15 have been resettled based on their refugee status to a European country or the United States of America -henceforth USA-.³⁶

IV. Victims that received reparation

The implementation of the redress for the 297 victims presented some difficulties. Specifically, those victims that have been resettled in the USA, Europe and Uganda.

Regarding the victims who were located in Europe and the USA –or were on a waiting list-, the TFV established that it was not feasible to provide any of the collective reparations because the different locations where these beneficiaries are located. That’s why the TFV proposed to provide them with the symbolic monetary sum in addition to the USD 250 individual compensation award.³⁷

For those victims who were located in the Uganda’s refugee camp, the TFV did not have enough information to decide if it was possible the application of collective reparations. Because of the uncertainty, the TFV decided to postpone the implementation of the reparation for those victims until the situation is clarified.

³⁵ Trial Chamber II. *Situation Democratic Republic of the Congo in the case of The Prosecutor v. Germain Katanga*. “Draft implementation plan relevant to Trial Chamber II’s order for reparations of 24 March 2017” ICC-01/04-01/07-3751-red. 25.07.2017. Accessed 30 March 2020. Available at: https://www.icc-cpi.int/CourtRecords/CR2017_04789.pdf

³⁶ Ibid. para.59

³⁷ Ibid, para.60-63.

In conclusion, 15 victims only been able to access monetary redress and 17 victims have not been able to receive compensation of any kind due to their irregular situation.

4.3 *Al Mahdi's Case*

Ahmad Al Faqui Al Mahdi admitted in Court that he was guilty of directing attacks around June and July 2012 against 10 buildings of a religious and historical character in Timbuktu. On September 2016 he was found guilty, as co-perpetrator, of the war crime “of intentionally directing attacks against historic monuments and buildings dedicated to religion”.³⁸ He was sentenced to 9 years’ imprisonment.

I. Estimated number of victims in the conflict

The mausoleums of saints and the mosques of Timbuktu are a crucial part of the religious life of his approximately 70.000 inhabitants,³⁹ because they constitute a common heritage of the community,⁴⁰ playing a crucial role in the expansion of Islam in the region and involving the entire community.⁴¹ Additionally, nine of them had the status of protected UNESCO World Heritage sites.⁴²

Because all of that, the Chamber considered that the attack not only affect the considered as direct victims of the crimes –the faithful and inhabitants of Timbuktu– but also Mali and the international community.⁴³

During the trial proceedings, 8 victims participated in the case.⁴⁴

³⁸Trial Chamber VIII. *Situation in the Republic of Mali in the case of The Prosecutor v. Ahmad Al Faqui Al Mahdi*. “Judgment and Sentence” ICC-01/12-01/15-171. 27.09.2016. Accessed 04 April 2020. Available at: https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF

³⁹ ICC-01/12-01/15-236, para.141.

⁴⁰ ICC-01/12-01/15-171, para.34.

⁴¹ Ibid, para.78.

⁴² Ibid, para.39.

⁴³ Ibid, para.80.

⁴⁴ Ibid, para.6.

II. Criteria of eligibility

In 2017, Chamber published the Reparations Order of the case. The Court ordered a combination of individual, collective and symbolic measures to repair the harm caused.⁴⁵

As “relevant victims”, the ICC took into account the Rules 85 (a) and (b) of the RPE. These establish that reparations should be guaranteed both to direct and indirect victims and to legal entities that are direct victims of the crime.⁴⁶

There were only 139 reparation applications.⁴⁷ There was no application submitted for the interests of the national or international community, not even UNESCO. The applications only pertained to the community of Timbuktu.⁴⁸ In this respect, the ICC decided to embrace the appointment of one of its experts:

However, the latter two groups (the broader Malian population and the international community), do not require additional reparative measures, as those directed at the local population of Timbuktu inherently will effectively address the broader harm suffered by Malians and by the international community as a whole (para.54).

The Chamber also established that individual reparations ought to be awarded to subjects whose livelihoods only depends on the Protected Buildings or those whose ancestors rest on the sites that were damaged during the attack. On the other hand, the ICC considered that anyone who did not participate in the screening of individual reparations, could participate in collective reparation programmes.⁴⁹

III. Difficulties in identifying eligible victims

In first place, the Chamber noted that because the situation in Timbuktu, it was difficult to travel and communicate with the victims in order to identify them.⁵⁰ The impracticability of identifying the beneficiaries justified an eligibility screen during

⁴⁵ ICC-01/12-01/15-236, para.135.

⁴⁶ Ibid, para.40-41.

⁴⁷ Ibid, para.9.

⁴⁸ Ibid, para.52.

⁴⁹ Ibid, para.145.

⁵⁰ Ibid, para.141.

the implementation phase. Therefore, individual reparations were awarded by the TFV.⁵¹ In this regard, TFV asked twice to The Chamber for an extension of time.⁵² On May 2018, the TFV published a corrigendum⁵³, qualified by the Court as “vague” and with “unsubstantiated proposals”.⁵⁴

Another difficulty in the identification of victims was that many inhabitants of Timbuktu led due to the occupation.⁵⁵

On the other hand, another difficulty was the obligation of TFV to maintain their anonymity. Due to the volatile environment in terms of security and personal safety, the Court has erased in its public writings any information that might reveal their identity. Taking into account cultural and social factors, and the fear of being exposed, has led many victims not to participate in the reparation process.⁵⁶

In March 2020, The Chamber published the last update of the case, which demonstrate a time delay of 8 years, for the time being.

IV. Victims that received reparation

The reparation process in the Al Mahdi’s case is still ongoing. This makes impossible to know the exact number of victims who will be entitled to be redressed. In addition, the anonymity makes it difficult to ascertain an approximate number.

⁵¹ Ibid, para.144.

⁵² Trial Chamber VIII. *Situation in the Republic of Mali in the case of The Prosecutor v. Ahmad Al Faqui Al Mahdi*. “Public redacted version of ‘Decision on Trust Fund for Victims’ Draft Implementation Plan for Reparations’, 12 July 2018” ICC-01/12-01/15-273-Red. 12.07.2018, para,5. Accessed 04 April 2020. Available at: https://www.icc-cpi.int/CourtRecords/CR2018_03672.PDF

⁵³ Trial Chamber VIII. *Situation in the Republic of Mali in the case of The Prosecutor v. Ahmad Al Faqui Al Mahdi*. “Public redacted version of “Corrected version of Draft Implementation Plan for Reparations, With public redacted Annex I, 20 April 2018, ICC-01/12-01/15-265-Conf”, 30 April 2018 ICC-01/12-01/15-265-Conf-Corr+Corr-Anx” ICC-01/12-01/15-265-Corr-Red. 18.05.2018. Accessed 04 April 2020. Available at: https://www.icc-cpi.int/CourtRecords/CR2018_02612.PDF

⁵⁴ ICC-01/12-01/15-273-Red, para.15.

⁵⁵ Ibid, para.102.

⁵⁶ Trial Chamber VIII. *Situation in the Republic of Mali in the case of The Prosecutor v. Ahmad Al Faqui Al Mahdi*. “Public redacted version of “Trust Fund’s response to the “Prosecution’s Request regarding applications for individual reparations” (ICC-01/12-01/15-345)”. ICC-01/12-01/15-349-Red. 25.03.2020. Accessed 04 April 2020. Available at: https://www.icc-cpi.int/CourtRecords/CR2020_01208.PDF

In conclusion, the ICC estimates that those victims who have submitted the application, mainly the 139 victims, and those who have done so subsequently will be eligible to receive financial compensation as individual reparation. In addition, those who do not and meet the requirements described previously, may be beneficiaries of collective and symbolic reparations.

5. CONCLUSIONS

This section will then present the conclusions drawn from the results presented in this paper. It will show the implications that it may have, as well as the limitations found during its development. Finally, it will conclude with possible lines of research that could be developed in the future.

5.1 Summary of the work approach and results obtained.

On the basis of the results obtained in the three cases it could be seen a decrease, in the number of potential victims that finally received reparation, as the process of reparation progresses. The reasons founded, coincide with the sub-hypotheses put forward in this paper.

“**SH1:** The slowdown in proceedings makes it difficult to find and effectively identify victims.”

In both the Lubanga’s and Katanga’s cases –and it is also happening in Al Mahdi’s–, the extension of the process to more than 10 years has made the identification of beneficiaries for reparations more difficult. Therefore, the sub-hypothesis is confirmed.

These delays mean that, during the identification procedure, some victims cannot be identified. Either because they have fled, as in the Al Mahdi’s case or have been displaced, as in Katanga’s case, or because they have been excluded by the ICC itself for lack of evidence. Evidence which, because of the delay in the procedures, may have been destroyed or may have disappeared, for example the destruction of property or pillage in Katanga’s case. It may also be that the victims of these crimes have died or have self-demobilized because of other conflicts during that period of time, as has happened with child soldiers in Lubanga’s case.

The slowdown in proceedings also leads to confirmation of the following hypothesis.

“**SH2:** The ICC does not have enough material sources to identify all victims.”

This lack of material sources appears in all the three cases. Whether it is because of an ongoing conflict; corruption; the absence of government services; prohibitive costs; displacements to other villages or countries; customary practices or the destruction of records.

From the cases studied, it is possible to highlight other causes that could be included to confirm the main hypotheses, such as: the victims' social and cultural factors and the unpredictability of the identification processes.

Social and cultural factors can affect in the identification process of the ICC because the subjects' own perception of themselves as victims. Also, during the potential victims' information procedure by intermediaries or interpreters. If this information is inadequate or incomplete, it can affect on the presentation of the reparation formularies and their evaluation. Another reason produced by misinformation could be the fear of retaliation or being stigmatized.

About the unpredictability of the identification processes is due, on the one hand because the judges' discretion to develop a procedure for identifying reparation beneficiaries; and, on the other hand, because there are no general principles to guide chambers on the most appropriate procedure to be employed.

Because of all of that, it is possible to confirm the hypothesis.

“H1: The ICC is unable to fulfil its goal of responding to victims' rights to redress, because the Court does not take into account all the victims of the crimes within its jurisdiction.”

5.2 Discussion of the results. Theoretical and practical implications.

Based only on the results obtained, it is possible to say that the ICC is not capable of fulfilling the objective of compensating all the victims of an international crime within its jurisdiction. However, the situation must be taken into account with a broader perspective.

Firstly, it should be borne in mind that the results presented are purely quantitative. To obtain a more detailed and realistic picture, it is necessary to know the type and

the quality of the reparations, and the effect that they produce on the victims. The aim is to redress the damage caused, and therefore it is up to each individual victim to see it restored.

Secondly, these are crimes of the greatest magnitude. This makes it more difficult to cover all the victims of the crime. On the other hand, and because of that, it is necessary a greater commitment from organizations and ICC's State Parties to provide greater resources in identifying and reparation area.

And thirdly, but not least, it should be noted that there are only three cases in which the ICC has applied reparation to its victims. This is due to its recent existence, since the first reparation order in 2012. It is therefore a matter of time before the Court improves in this area.

On the other hand, the prolongation in the time of the processes entails a sequence cascade of the rest of the difficulties founded in identifying and electing potential victims. However, it is possible to assess a hypothetical solution. This is a two-stage repair process.

A pre-trial phase. Once it is confirmed the charges against the accused, the TFV's multidisciplinary team of experts could start the investigation of potential and eligible victims. Besides the presentation of the Draft Implementation Plan. It could be also possible the identification of collective reparations, by order of the Chamber.

A post-trial phase. This phase would proceed once the defendant is found guilty. This phase would take into account the investigation realized during the pre-trial phase and would include the reception of applications for individual repairs. The work previously carried out by the TFV could prove positive in gaining the trust of the victims, as well as reducing the workload, speeding up the process.

5.3 Limitations, and possible future lines of research.

The limitations found during the realizations of the present project have been the lack of clarity in the justifications during the admission of certain victims and the

inadmissibility of another. On the other hand, specifically in the Al Mahdi's case, the confidentiality of any data referring to the process of identification of the victims. Also, the fact that this case has not been concluded yet.

About possible future lines of research, it could be interesting to analyse the procedure for determining the type of reparations applied in each case, including the reasons that lead it to make such a decision. It could also be interesting to examine the criminological profile of each defendant, including the different criminological theories applicable.

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ANNEX I. KIND OF REDRESS

The Office of Public Counsel for Victims of the ICC have published a Manual for legal representatives of victims in the ICC. This book develop the different kind of redress, which are restitution, compensation and rehabilitation.

It is under the jurisdiction and discretion of the Court, determine the kind of redress that have to be applied in each case.

Restitution is considered the restoration or recovery of a victim's condition or circumstances prior to the crime. It could be their rights, as liberty for example, their situation, as the reintegration in their jobs, or material goods, as it could be the return or the restitution of their vehicle or home. Nevertheless, the crimes within the jurisdiction of the ICC are difficult to restore, returning the victim to a previous state of a war crime, a crime against humanity or a genocide.

Compensation, by the other hand, should be considered when:

- I) the economic harm –considered as hurt, injury or damage- is sufficiently quantifiable;
- II) an award of this kind would be appropriate and proportionate; and
- III) the available funds mean this result is feasible.

The harm does not need to be direct, but it must be personal. It means that even though the harm has to be individualized for each victim, it need not be direct (as a physical injury), but can be also psychological, material, financial, occupational... Which is different between restitution and compensation is that this last one is difficult to quantify. Is a form of economic relief, proportioned to the age and gender of the impact that the crime have for the victim.

In addition, **rehabilitation** is a right that is based on the principles of non-discrimination. That is because this shall include males and females of all ages. This redress is related to provisions of medical services and health care (for example, HIV and Aids treatment); also psychological, psychiatric and social assistance to reduce as much as possible the trauma as well as the social and physical consequences of the crimes committed.

ANNEX II. RESULT'S GRIDS

The following grids are self-made. Each one of them shows, in a schematic way, the results obtained in the work. The aim is to achieve an easy understanding of the only three ICC's cases in which an order of reparations has been applied to the victims.

Lubanga's Case

Potential victims in the Ituri's conflict.	Victims estimated during the process	Victims estimated by other sources	Victims that have received reparation	Difficulties in the election of eligible victims
<p>550,000 direct victims approx.</p> <p>Unidentified indirect victims</p>	<p>6,000 direct victims approx.</p> <p>Unidentified indirect victims</p>	<p>MONUC: nearly 1,000 child soldiers in Mandro.</p> <p>Human Right Watch: nearly, 6,000 direct victims.</p> <p>Coalition to Stop the Use of Child Soldiers: 30,000 demobilized child.</p> <p>Unidentified indirect victims</p>	<p>3,000 victims approx.</p>	<p>Unknown number of child soldiers who have self-demobilized</p> <p>Prolongation of the process over more than 12 years.</p> <p>Lack of material resources: documental, evidential and economical.</p> <p>Social/Cultural factors</p>

Katanga's case

Victims in the Bogoro's conflict.	Victims estimated during the process	Victims that received reparation	Difficulties in the election of eligible victims
<p>800 potential victims.</p> <p>200 civils have been killed by attackers.</p>	<p>366 victims participated in trial.</p> <p>341 applications for individual reparations</p> <p>The Court established the 60 people were murdered during the attack.</p> <p>Unidentified indirect victims</p>	<p>297 victims:</p> <p>-15 of them only could have monetary reparations.</p> <p>-17 of them are in an irregular situation.</p>	<p>Prolongation of the process over more than 13 years.</p> <p>Lack of material resources: documental, evidential and economical.</p> <p>Most of them were displaced.</p> <p>Social/Cultural factors</p>

Al Mahdi's case

Victims in the Mali's conflict.	Victims estimated during the process	Victims that received reparation by the ICC	Difficulties in the election of eligible victims
70.000 potential victims.	8 victims participated in trial. 139 applications for individual reparations. Collective reparations for those who fulfil the requirements described	Individual reparations: Unknown Collective reparations: Unknown	Prolongation of time: 8 years so far. A lack of resources: communication/travel. Most of them fled. Social/Cultural factors + Fear