

## МЕЖДУНАРОДНОЕ ПРАВО

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### THE REALITY OF VICTIMS' REPARATIONS UNDER ARTICLE 75 OF ROME STATUTE

**Snizhana OSARCHUK,**  
Master Student of Personnel Training Institute  
for the Bodies of Justice of Ukraine  
of Yaroslav Mudryi National Law University

#### SUMMARY

In the article the theoretical research is providing the illustration of the impact of victims' reparations under Article 75 of Rome Statute and demonstrating the practical issues of today's reality connected with Trust Fund for Victims and the International Criminal Court. The analysis of legal literature is carried out on research of the concept of Rome Statute and on comparison of the ICC decisions in Lubanga (2012), Katanga (2017) and Bemba (2017) cases. For the purpose of clearly understanding the role of victims in the ICC criminal justice system, this article, firstly, identifies who can be considered as victims and who have a right for reparations under the ICC, then determines the reparations from the side of individual responsibility and what is the role of Trust Fund for Victims in this ICC mechanism, and, the last but not the least, demonstrates existing rulings in the context of their practical contribution to the highlighted problem and represents significant challenges that the Court has already faced in its early hearings.

**Key words:** Rome Statute, International Criminal Court, Victims reparations, Trust Fund for Victims.

#### ВІДШКОДУВАННЯ ШКОДИ ПОТЕРПІЛИМ ВІДПОВІДНО ДО СТАТТІ 75 РИМСЬКОГО СТАТУТУ

**Сніжана ОСАРЧУК,**  
студентка магістратури  
Інституту підготовки кадрів для органів юстиції України  
Національного юридичного університету імені Ярослава Мудрого

#### АНОТАЦІЯ

У статті проводиться теоретичне дослідження організаційно-правового забезпечення відшкодування шкоди потерпілим відповідно до статті 75 Римського Статуту та розкрито практичні питання, пов'язані зі створенням Цільового фонду в інтересах потерпілих та Міжнародного кримінального суду. Здійснюється аналіз юридичної літератури щодо дослідження рішень Міжнародного кримінального суду в справах Лубанга (2012 р.), Катанга (2017 р.), Бемба (2017 р.). Для кращого розуміння ролі потерпілих у кримінальних провадженнях Міжнародного кримінального суду розкрито поняття «потерпілі» та їхні права на відшкодування відповідно до Римського Статуту, а також розглянуто поняття «відшкодування» як індивідуальну відповідальність, розкрито роль Цільового фонду в інтересах потерпілих. Стаття висвітлює наявні судові рішення в контексті їх практичного значення, а також наголошує на викликах, які є актуальними для Міжнародного кримінального суду на ранніх слуханнях.

**Ключові слова:** Римський статут, Міжнародний кримінальний суд, відшкодування потерпілим, Фонд International Criminal Court, Victims reparations, Цільовий фонд в інтересах потерпілих.

**Statement of the problem.** Recognition of the rights of victims is one of the greatest achievements made by the international criminal justice system.

Comparing with the Nuremberg and Tokyo tribunals where prosecution of war criminals started, and the Tribunals for the Former Yugoslavia and Rwanda<sup>1</sup> where the notions of victims and witnesses dawned to be an issue, International Criminal Court was the first international criminal tribunal to award victims the right to actively participate in international criminal proceedings and to grant victims the right to claim reparations before the International Court.

<sup>1</sup> In the Yugoslavia and Rwanda tribunals, victims can enter the courtroom only as witnesses, providing one of the means through which evidence may be brought before the tribunal.

The mechanism of reparations under the Rome Statute<sup>2</sup> outstandingly **moves far from the worldwide law state-driven methods** of risk for reparations **to more private-law individual obligation** and even formative developmental or subsidiary responsibility provided by the Trust Fund for Victims [1, 4].

Despite the fact that the victims are entitled to reparation, it is completely problematical for judges to apply the same rules in different situations, as the circumstances in cases are fundamentally contrasting.

**This article seeks** to illustrate the impact of victims' reparations under Article 75 of Rome Statute and, in relation to

<sup>2</sup> The Statute of the International Criminal Court, adopted in Rome on 17 July 1998, is one of the most significant developments in international law and international relations of the second half of the twentieth century.

first three court decisions, to demonstrate the practical issues of today' reality connected with Trust Fund for Victims and the International Criminal Court.

Comparing the different approaches and interpretations of the ICC decisions in Lubanga (2012), Katanga (2017) and Bemba (2017) cases, we realize that the Court is still not able to predict and prepare the main direction of the Victims reparations' mechanism according to the Article 75 of Rome Statute.

For the purpose of clearly understanding the role of victims in the ICC criminal justice system, in the main part of my article, I would like, firstly, to identify who can be considered as victims and who have a right for reparations under the ICC, then to determine the reparations from the side of individual responsibility and what is the role of Trust Fund for Victims in this ICC mechanism, and, the last but not the least, to demonstrate existing rulings in the context of their practical contribution to the highlighted problem and represent significant challenges that the Court has already faced in its early hearings.

The idea of the individual's right to reparation is a fundamental human right that is not only expressly guaranteed by human rights institutions but also applied by international and national criminal courts. Talking about ICC, it is only with article 75 of the Rome Statute, the idea of restorative justice against the individual perpetrators of violations has become a dimension of international criminal justice. However, Article 75 does not include **the means** through which victims of crimes might be compensated and only in the Article 79 of the Rome Statute, the establishment of a Trust Fund for "...the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims" is provided [2].

Who can be Victims under ICC regulation?

Interestingly, the Rome Statute does not contain a definition of victims, but taking into account the evolution of the status and the definition of victims in international law, Rule 85 of the ICC Rules of Procedure and Evidence [3] settles that:

(a) "Victims" mean natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

As it mentioned in the FIDH report [4], in order to fall within the definition, a person has to show that he or she "suffered harm as a result of the commission of any crime within the jurisdiction of the Court". There is no requirement that the crime directly targeted him or her, or that the harm suffered was directly caused by the crime. The definition should, therefore, be interpreted to include victims' families and dependents referred to as 'indirect victims'. In addition, victims "may" include certain organizations or institutions which have suffered 'direct harm' to property (FIDH report, page 38).

Therefore, as we can learn, all those who are considered victims under Rule 85 can be permitted to participate in court proceedings and are able to seek reparations under Article 75 of the Rome Statute.

Article 75 of the Rome Statute states that 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].

As it is clarified in Rule 97, Assessment of reparations, the Court may order the convicted person to make reparations for the harm caused from his or her own assets, may award reparations on an individualized basis, a collective basis or, when appropriate, a combination of both, depending on the specifics of the case in hand [3].

The question whether states are under an international obligation to provide for reparation claims is not a notion, however, the individuation of the reparation has become quite an innovation since Rome Statute came in force.

According to the Article 75(2) of Rome Statute, as individuals who are judged have to provide reparations to victims [2]: "*The Court may make an order **directly against a convicted person** specifying appropriate reparation to, or in respect of, victims, including restitution, compensation and rehabilitation*"<sup>3</sup>.

How Victims' Reparation Process went in the first two cases?

The first two convictions at the ICC, where reparations used to individual criminal liability in the cases of Lubanga<sup>4</sup> and Katanga<sup>5</sup> gave the opportunity to implement Article 75 for the first time and showed challenges that the Court has already faced in its early hearings.

Due to the first decision in the case against Thomas Lubanga was convicted for "*conscripting and enlisting children under the age of 15 in armed groups and using them to participate actively in hostilities in the district of Ituri*". According to the details of this case, firstly, Mr. Lubanga was declared bankrupt and individual reparation for his victims was impossible to conceive, secondly, we have a lot of potential victims "children under the age of 15... in the district of Ituri" who are eligible for reparations under Article 75 of Rome Statute.

Obviously, it was impossible to give individual reparations since Lubanga was not financially able to provide reparation for its countless victims, the Court decided that collective reparation should be awarded by creating activities that would be beneficial for the victims. In final decision of Appeal Chamber, it was decided to organize collective reparation with the help of Trust Fund for Victims (TFV).

However, we should keep in mind that neither the Rome Statute, nor the Rules of Procedure and Evidence (RPE), nor the TFV Regulation state that the Trust Fund for Victims has the direct obligation to provide reparation for a convicted person declared bankrupt by the Court.

The only one reason is mentioned in the Article 42 [5]:

*The resources of the Trust Fund shall be for the benefit of victims of crimes within the jurisdiction of the Court, as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families.*

In Lubanga Case, firstly, reparations were limited to **collective reparations** for child soldier victims that include psy-

<sup>3</sup> According to Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. URL: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

Restitution should seek to restore a victim to the status quo ante, the original situation before the violation(s) of international human rights or humanitarian law occurred. This includes such measures as the restoration of liberty, legal rights, social status, family life, and citizenship; return to one's place of residence; and restoration of employment and return of property.

Compensation may be provided for:

- Physical or mental harm, including pain, suffering and emotional distress
- Lost opportunities, including education
- Material damages and loss of earnings, including loss of earning potential
- Harm to reputation or dignity and
- Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

Rehabilitation should include medical and psychological care, as well as legal and social services and may be provided either directly as services or indirectly through the recovery of funds.

<sup>4</sup> Mr. Lubanga was found guilty, on 14 March 2012, of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities (child soldiers). URL: <https://www.icc-cpi.int/drc/lubanga>

<sup>5</sup> Katanga was found guilty, on 7 March 2014, as an accessory to one count of a crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro, in the Ituri district of the DRC. URL: <https://www.icc-cpi.int/drc/katanga>

chological and physical medical services, as well as socio-economic development programmes, such as vocational and skills-based courses [6, 12], secondly, the TFV implemented **symbolic measures**, such as commemoration centers and mobile memorialisation of child soldiers' harm [7].

Discussing second case, Katanga was convicted for crimes committed in a specific village (Bogoro) on a specific day (24<sup>th</sup> February 2003), and he was convicted for much fewer acts than he was charged<sup>6</sup>. This means that not all the victims who participated in the proceedings as witnesses for the crimes he was charged with, will be included in the reparation process as Victims of crimes.

Despite the TFV saying it was unable to make individual reparations in the *Lubanga* case, in the *Katanga* case [8] it found that under Regulation 56 of its Regulations and Rule 98 of the Court's Rules of Procedure and Evidence it could support individual compensation and other reparation measures to victims [6].

As result, Mr. Katanga's liability for reparations included \$1 million USD for reparations to 297 victims: **an individual compensation** award of \$ 250, and **four collective awards** in the form of housing assistance, education assistance, income generating activities, and psychological rehabilitation<sup>7</sup>.

To summarise a bit, we can see that Lubanga's case relies mostly on collective symbolic reparations, while Katanga's decision includes collective reparations with more individual need for compensation [9, page 5].

The reparations in both cases depend on the same three key elements: conviction; definition of 'beneficiary', and applicability of the principles provided for by the Rome Statute and RPE. Albeit the victims in Lubanga's and Katanga's decisions are entitled to reparation, it is difficult to apply the same rules to different circumstances, nature of the crimes and their impact on the victims as well as the essence and meaning of the intended reparation in both cases.

What's the situation with Victims' reparations in Bemba case<sup>8</sup>?

Interestingly, that the main challenge for the Court is to determine which victims are eligible for reparations because in this case, over 5000 victims participated in the proceedings. Firstly, because, Jean-Pierre Bemba was found guilty of all of the crimes he was charged with, all of the victims who were authorized to participate in the proceedings should be eligible for reparation.

Secondly, we have to remember about children born of rape, who should be included in this process as well<sup>9</sup>. Importantly, the rape charges, in this case, were based on evidence from both male and female victims of rape.

<sup>6</sup> Katanga charges included: willful killing, murder, directing an attack against a civilian population as such, destruction of property, pillage, using children under the age of 15 to participate actively in hostilities, sexual slavery, and rape. However, in his conviction, only four charges were retained: as an accessory for murder (as a crime against humanity and as a war crime), the attack against a civilian population as such, destruction of enemy's property, and pillaging.

<sup>7</sup> From the official website of the Trust Fund for Victims. URL: <https://www.trustfundforvictims.org/en/what-we-do/reparation-orders>

<sup>8</sup> Mr. Jean Pierre Bemba Gombo leader of the Congolese Movement of Liberation of the Congo (MLC), convicted in March 2016 of war crimes and crimes against humanity for crimes committed by his troops in the Central African Republic (CAR) between 2002 and 2003 was convicted of murder (as a crime against humanity and a war crime), pillaging (as a war crime), and rape (as a crime against humanity and a war crime).

<sup>9</sup> According to the Expert Report, some mothers to children born of rape have used their own fathers' name to hide the child's origins in an attempt to avoid stigmatization. Indeed, where the identities of these children are known, it has been reported that they have suffered appalling harms in CAR. For instance, they have been referred to as "Bayamulengues," mocked and discriminated against. Consequently, they have been denied welfare, education and a normal childhood. Some children have died from neglect while others have died from untreated HIV/AIDS, either as a result of neglect or where the child themselves avoided being tested so as not to upset their mothers. URL: <https://ilg2.org/2018/01/16/children-born-of-rape-in-bemba-can-the-icc-close-the-accountability-gap/>

The third important issue is that the Court must sentence Bemba to provide reparations, and therefore to pay for them. Including, a great portion of his own assets is taken up paying for the reimbursement of the legal aid to his defense, Bemba has not enough money to cover all of his debt. For many victims who are now in poor health or elderly, reparation is urgent question, but it is impossible for Court and TFV to allocate a significant amount to the financing of all the reparations [10].

Can the perpetrators provide all the Victims' reparations without TFV? (Basing on the article 75 of the Rome Statute)?

Undeniably, they cannot. Evaluating these three cases, we find out that:

Thomas Lubanga was found to be indigent and without assets for the purpose of reparations. As a consequence, the Court decided to provide reparations to the victims of his crimes with the own resources of TFV.

In Katanga's case, TFV decided to provide \$1 million for the reparations covering the full amount of the payment of both the individual and collective awards<sup>10</sup>.

In Bemba case, more than 5000 victims participated in the proceedings, and the Court is still continuing to discuss the problem with the huge amount of Victims Applications. It is now up to the ICC to determine who will be eligible for reparation, volumes, and nature, considering the limited funds available.

The Lubanga, Katanga and Bemba cases are only the first three convictions of 18 cases currently before the ICC in eight different countries and because of perpetrators' incapability to "pay reparations" the Court decided to organize Individual and Collective reparations with the help of the Trust Fund for Victims [5, article 21] in all of them.

Unfortunately, the ICC is not able to be an equally successful guarantor of reparations – this institution is very different from human rights institutions and addressing individuals, not states, with its own plan.

What should the ICC and TFV do to change the situation?

The main goal of reparations is to stabilize and rebuild the relations in problematic communities and provide a **mechanism** for collective reparations and only after to compensate specific individuals. By the way, the active role of affected individuals and acknowledge of their personal impact of trauma are highly important in the designing of collective reparations for best interests of the majority of victims.

In order to fulfill a restorative mandate and to bridge the gap between victims' right to reparations and redress at the ICC, it is extremely necessary to re-prioritize and improve TFV reparations strategy, implement general assistance of TFV from the Member states' side and their cooperation as well, focus more on complementary reparation measures (such as physical or psychological rehabilitation), satisfaction measures (public apologies, tributes to victims, verification of facts, and full and public disclosure of the truth).

### Conclusion:

On the whole, the mechanism of Victims' reparations under the Rome Statute is one of the greatest achievements which award victims the right to actively participate in international criminal proceedings.

The ICC Reparation' system includes all the provisions in the legal framework attempting to repair the harm suffered by victims of crimes. According to the article 75 of the Rome Statute, reparations can only be ordered directly against a convicted person by specifying appropriate forms: restitution, compensation, and rehabilitation. Considering that this list is

<sup>10</sup> From the official website of the Trust Fund for Victims. URL: <https://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Press%20release%20Decision%20to%20complement%20Katanga%20reparations%20and%20earmarked%20donations%20from%20the%20Netherlands.pdf>

non-exclusive, satisfaction and guarantees of non-repetition also have been affirmed as forms of Court-ordered reparations.

Basing on the evaluations of Lubanga', Katanga' and Bemba's decisions, we find out that the essential question is how to finance these reparations in case the convicted person is not able to afford to pay for reparations for thousands of victims. As neither the Rome Statute, nor the Rules of Procedure and Evidence, nor the TFV Regulation state that the Trust Fund for Victims has the direct obligation to complement reparation for a convicted person, the risk of the convicted person lacking financial resources may endanger the right of victims to remedy for the harm they suffered.

Unfortunately, the ICC is not able to be an equally successful guarantor of reparations – this institution is very different from human rights institutions and addressing individuals, not states, with its own plan. That's why the Court relies on the TFV's voluntary contributions to supplement Court-ordered collective and individual reparation awards. In order to bridge the gap between victims' right to reparations and redress at the ICC, it is extremely necessary to re-prioritize and improve TFV reparations strategy as well as implement general cooperation of TFV, ICC, and Member states.

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#### INFORMATION ABOUT THE AUTHOR

**Osarchuk Snizhana Ivanivna** – Master Student of Personnel Training Institute for the Bodies of Justice of Ukraine of Yaroslav Mudryi National Law University

#### ІНФОРМАЦІЯ ПРО АВТОРА

**Осарчук Сніжана Іванівна** – студентка магістрації Інституту підготовки кадрів для органів юстиції України Національного юридичного університету імені Ярослава Мудрого

*snizhanaosarchuk@gmail.com*