

Reparations to victims in the Bemba case through the assistance mandate of the ICC Trust Fund for Victims¹.

Introduction

This paper is part of the research work carried out from September 2018 to April 2019 by the International Law Clinic, organized by the *Universidad del Rosario, Bogotá, Colombia* and the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (IIH), at the request of the Office of Public Counsel for the Victims (OPCV) of the International Criminal Court (ICC). It answers the following questions:

In the context of the Bemba case, may participating victims get redress in the case of an acquittal and, if so, how? What is the scope of the assistance mandate of the Trust Fund for Victims (TFV) in this regard? How could a legal representative of victims trigger and/or interact with the TFV for this purpose?

To answer these questions, this paper is divided into four major parts: first, the two-fold mandate of the Trust Fund for Victims ("TFV" or "the Fund") is explained; second, within the general assistance mandate, the different projects that have been implemented by the TFV since 2008 through their Assistance Programs are explained; third, the question concerning the possibility of using the assistance mandate of the TFV to adopt this type of project in favour of victims in the Bemba case will be answered; and, finally, the scope and extent of interaction between the Legal Representatives of the Victims and the TFV will be analysed.

1. The double mandate of the TFV

The TFV is an autonomous organ of the ICC created in 2004 by the Assembly of States Parties, in accordance with the provisions of Article 79 of the ICC Statute. The Fund seeks to benefit victims and their families from crimes that fall within the jurisdiction of the Court. The TFV's activity is framed by a double mandate: first, to comply with the orders of reparation issued by the Chambers of the Court (including individual and collective reparations); and second, the provision of general assistance to victims of crimes within the ICC jurisdiction, that have been carried out in the territory of States under investigation, using contributions made by voluntary donors, in order to achieve their physical and psychological rehabilitation and provide them with material help².

¹ This memorandum has been written by the following members of the eighth promotion (2018) of the International Law Clinic, organized by the *Universidad del Rosario, Bogotá, Colombia* and the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (The Netherlands), under the supervision of Prof. Héctor Olasolo Alonso: Antonio Giraldo, Clara Esperanza Hernández Cortés, Andrés Sánchez Sarmiento, Viviana González, Laura Vargas, Laura Restrepo and Luisa Villarraga.

² Coalition for the International Criminal Court. "Delivering on the promise of a fair, effective and independent Court Trust Fund for Victims", <http://iccnw.org/?mod=trustfund> (last visit: 18 October 2018).

It is important to emphasize that the Fund is not limited to implement the sentences given by the Court in order to offer reparations to victims. This is due to the fact that—according to its second mandate of general assistance—the TFV can use its resources to offer such aid to those who are given the status of victim after a preliminary examination.

In fact, the second mandate was designed precisely to ensure that those who suffered damage caused by the said crimes receive some sort of aid, even if the person responsible is not convicted, charged, or even identified. Although the goal of the fund is to provide aid to the victims and their families, as Tom Dannenbaum has pointed out, this assistance is not dependent on a guilty verdict³.

Moreover, the assistance mandate does not have the same scope and extent as the reparation mandate. The essential purpose of the reparation mandate is to provide redress to direct or indirect victims who have been affected by crimes under the ICC jurisdiction, and have being recognized as such following trial. This means, therefore, that those victims can be individually (as well as collectively) offered reparation—because the specific damage caused to them has been proven beyond reasonable doubt.

On the contrary, individual reparations cannot be granted through the assistance mandate, because there is not a sentence declaring criminal responsibility. The Trust Fund only addresses the general facts that led to international crimes, and, thus they do not address the individual needs of each victim. Therefore, the TFV can only adopt measures of physical and psychological rehabilitation and material support to those communities or groups of people under the assistance mandate.

2. Implementation of assistance programs through the TFV through the second mandate.

Since its creation, the TFV has carried out assistance programs for victims of international crimes and their families in different countries that are under investigation by the Office of the Prosecutor of the ICC. More specifically, these programs have been executed in Uganda and the Democratic Republic of the Congo (DRC), with the Côte d'Ivoire anticipated as being a future recipient⁴.

The first Assistance Program took place in Uganda in in 2008, and different projects have been implemented since then across 18 districts in the northern part of the country⁵. In

³ Dannenbaum, Tom. "The International Criminal Court, article 79, and transitional justice: the case for an independent trust fund for victims". P. 236. Wisconsin International Law Journal. June 1st, 2010. Vol. 28. No. 2. "[...] the TFV should take full advantage of its legal freedom by engaging in reparative projects that seek to benefit and acknowledge those victims that are unlikely to be reached by the Court's Article 75 reparations process".

⁴ Trust Fund For Victims. «Assistance Programmes.» The Trust Fund for Victims. Accessed: November 18th, 2018. <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>.

⁵ TRUST FUND FOR VICTIMS . 2017. "NEWSLETTER#3 - MAY 2017." The Trust Fund for Victims Web site. May, 2017. Accessed: November 18th, 2018. <https://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Newsletter%20May%202017%20ENG.pdf>.

2017, the first of these projects was completed which focused specifically on physical and psychological rehabilitation, as well as providing relief and reparation to the victims of the armed conflict.

The TFV has worked jointly with the Ugandan Ministry of Health, local authorities in each of the affected districts, other public entities, private organizations, social leaders and other professionals to provide the necessary services, all with the critical purpose of aiming to amend the damages related to the conflict⁶.

In terms of physical rehabilitation, the programs have facilitated access to reconstructive surgery (to treat cases of mutilation, sexual assault and severe burns), as well as surgical orthopaedic therapy, prostheses (for amputees), physiotherapy, treatment for STDs, removal of bullets or other foreign objects from the body, as well as early detection of diseases and general medical attention⁷⁸.

Moreover, resources have been used to hire entities and professionals to provide psychological treatment for victims, mainly suffering from post-traumatic stress and other long-term psychological conditions related to the war⁹. In addition to this, psychological support has been given to victims of sexual and gender-based violence, since this was one of the main forms of crime during the conflict¹⁰. Not only is individual support provided, but different support groups are offered, which facilitate interaction between victims depending on their specific needs¹¹.

In addition to all of the above, awareness-raising mass media campaigns were launched within affected communities, with the aim of reducing the stigma and discrimination surrounding victims of the conflict – particularly those of a sexual nature¹².

The second country in which the TFV has intervened is the DRC. Since 2008, its Assistance Program has been helping victims mostly in the Ituri, South Kivu and North Kivu provinces¹³. As with Uganda, the TFV projects in the DRC have focused on

⁶ Centre for Children in Vulnerable Situations (CCVS). 2015. "TRUST FUND FOR VICTIMS LAUNCHES NEW ASSISTANCE PROJECTS IN NORTHERN UGANDA." CCVS Website. July 11th. Accessed: November 18th, 2018. <http://www.centreforchildren.be/support-centres/trust-fund-for-victims-launches-new-assistance-projects-in-northern-uganda/?lid=355>.

⁷ Ibid.

⁸ Trust Fund For Victims. «Assistance Programmes.» The Trust Fund For Victims Website. Accessed: November 18th, 2018. <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>.

⁹ Ibid.

¹⁰ Centre for Children in Vulnerable Situations (CCVS). 2015. "TRUST FUND FOR VICTIMS LAUNCHES NEW ASSISTANCE PROJECTS IN NORTHERN UGANDA." CCVS Website. July 11th. Accessed: November 18th, 2018. <http://www.centreforchildren.be/support-centres/trust-fund-for-victims-launches-new-assistance-projects-in-northern-uganda/?lid=355>.

¹¹ Trust Fund For Victims. «Assistance Programmes.» The Trust Fund for Victims Website. Accessed: November 18th, 2018. <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>

¹² Ibid.

¹³ Trust Fund for Victims. 2017. "NEWSLETTER#3 - MAY 2017." The Trust Fund for Victims Website.

May. Accessed: November 18th, 2018. <https://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Newsletter%20May%202017%20ENG.pdf>.

addressing the damage caused to the victims, promoting their physical and psychological rehabilitation and material support¹⁴, paying special attention to victims of sexual crimes, cases of forced recruitment of minors and the treatment of psychological trauma of the relatives of individuals killed during the conflict¹⁵.

Health services aimed at providing physical rehabilitation have been provided in coordination with the entities specialized in the different needs of the victims¹⁶. Here, the TFV's function is to refer patients to these entities, which have an agreement with the Fund to carry out such activities. Mainly, the resources have been used to assist patients who need general and reconstructive surgery, diagnosis and treatment of STDs, extraction of foreign objects from their bodies, treatment of fistulas, and in general, guaranteed access to basic healthcare – a service that has been difficult to acquire by the affected populations¹⁷.

Regarding rehabilitation and psychological treatment, as in Uganda, psychological counselling programs have been implemented both individually and through support groups. In addition, various spaces have been set up, offering activities such as music, dance, and theatre, as well as workshops and community awareness programmes to promote reintegration and social acceptance. Finally, different information channels (radio programs and public information sessions) have been used to allow victims to be aware of their rights¹⁸.

In addition, other material support projects for victims were implemented to provide complementary assistance to affected populations in the DRC. Among them, educational subsidies, vocational training, and workshops regarding labour and financial education were given to promote a culture of a more productive work and financial ethic¹⁹.

By the end of 2017 it was estimated that 400,000 victims had been assisted in Uganda and the DRC together, so it was decided to renew the assistance programs in both countries²⁰. Even though the people affected in the two conflicts exceed 22 million²¹, it is important to note that the programs aim to expand their implementation and coverage. However, this is a

¹⁴ Trust Fund For Victims. «Assistance Programmes.» The Trust Fund for Victims. Accessed: November 18th, 2018. <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>.

¹⁵ McCleary-Sills, Jennifer, and Stella Mukasa. 2013. "External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo." International Center for Research on Women. November. Accessed: November 18th, 2018. <https://www.icrw.org/wp-content/uploads/2016/10/ICRW-TFV--Evaluation-Report.pdf>.

¹⁶ Ibid.

¹⁷ Trust Fund For Victims. «Assistance Programmes.» The Trust Fund for Victims Website. Accessed: November 18th, 2018. <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Chair of the Board of Directors of the Trust Fund for Victims. 2017. "Report of the Board of Directors of the Trust Fund for Victims." The Trust Fund For Victims. December 4th. Accessed: November 18th, 2018. <https://www.trustfundforvictims.org/sites/default/files/reports/ASP-16-BDTFV.pdf>.

²¹ Trust Fund For Victims. «Assistance Programmes.» The Trust Fund for Victims Website. Accessed: November 18th, 2018. <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>

challenge due to the limited nature of financial resources that come from voluntary donors in the international community.

It is also important to mention that in mid-2017 it was decided to begin an assistance program in Côte d'Ivoire²². That same year, a preliminary study was carried out to identify victims and recognize their needs. Following this, the TFV approved an action program to begin in 2018, however this has not been implemented to this date²³.

3. The Possibility of Using the Assistance Mandate to Help Victims of the Bemba Case

The Bemba case involves a citizen of the DRC, Jean-Pierre Bemba who, at the time that the alleged crimes were committed, was the president of the Movement for the Liberation of Congo (MLC). This is a political party founded by himself, and he served as the commander in charge of the armed wing of the group, the Congolese Liberation Army (ALC)²⁴.

On May 23rd, 2008, the ICC Pre-Trial Chamber III issued the arrest warrant for Bemba²⁵. On June 15, 2009, Pre-Trial Chamber III considered that Bemba should be prosecuted for his alleged criminal responsibility as a military commander – as stated under Article 28 (a) of the ICC Statute – for the war crimes of murder, rape, and pillage, as well as the crimes against humanity of murder and rape. These crimes were committed by the MLC soldiers in the Central African Republic (CAR) from October 26th, 2002 to March 15th, 2003²⁶.

After the charges were confirmed, the trial began on November 22nd, 2010, before Trial Chamber III. During this trial, the Chamber recognized 5229 victims, which allowed them to participate in the proceedings²⁷. On March 21st, 2016, the Chamber found that Bemba, as a military commander, was guilty of the crimes stated above, and exactly 1 month later he was sentenced to 18 years in prison²⁸.

The verdict and the sentence were appealed against, and on June 8th, 2018, the Appeals Chamber found that the Trial Chamber III had committed the following errors in its judgment: (i) convicting Bemba for criminal acts that were not among the acts of violence expressly included in the decision of the confirmation of charges issued by the Pre-Trial Chamber III; and (ii) conducting an inadequate evaluation of all reasonable and necessary measures taken by Bemba to prevent, suppress, and punish his subordinates who committed

²² Ibid.

²³ Ibid.

²⁴ International Criminal Court, “The Prosecutor vs. Jean Pierre Bemba Gombo/ Judgment”, P. 10. https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF. Accessed: October 16th, 2018.

²⁵ International Criminal Court, “The Prosecutor vs. Jean Pierre Bemba Gombo/ Warrant of arrest”, https://www.icc-cpi.int/CourtRecords/CR2008_03303.PDF Accessed: October 16th, 2018.

²⁶ International Criminal Court, “The Prosecutor vs. Jean Pierre Bemba Gombo/ Decision on charges”, https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF Accessed: October 16th, 2018.

²⁷ International Criminal Court, “Case Information Sheets”, <https://www.icc-cpi.int/CaseInformationSheets/BembaEng.pdf> Accessed: October 16th, 2018.

²⁸ International Criminal Court, “The Prosecutor vs. Jean Pierre Bemba Gombo/ judgment”, https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF Accessed: October 16th, 2018.

the acts of violence charged and proven in the oral proceedings²⁹. For these reasons, the Appeals Chamber decided to revoke his conviction and acquitted Bemba of all charges.

As a result of his acquittal, the victims who were recognized as such throughout the trial lost their right to receive individual and directly reparations, since Rule 98 of the Rules of Procedure and Evidence of the ICC establishes that these types of reparations may only be awarded upon a conviction. However, this does not mean that they cannot receive some sort of aid from the TFV.

According to the Office of the Prosecutor of the ICC and the OPCV, the TFV can act upon this situation through its assistance mandate³⁰. Although there are some financial limitations, as in the cases of Uganda and the DRC the Fund can and should use this mandate in the CAR to provide medical and psychological rehabilitation and material support for victims³¹. This is regardless of whether or not they have been recognized as victims in the Bemba case (as long as they are recognized as victims of crimes committed in that situation)³².

As studies have repeatedly expressed that the TFV is an autonomous and independent body, the common understanding of traditional reparation processes has shifted by creating the possibility for collective redress of victims in cases without a conviction³³. In this way, the Fund ensures the implementation of reparation projects to victims of crimes, which do not necessarily result in a criminal charge or a conviction, as in the Bemba case³⁴.

The TFV, in June 2018, stated that, beyond the decision taken by the Appeals Chamber to absolve Bemba of the crimes committed in the CAR, the damage suffered by the victims who participated in this case shall be considered and therefore will proceed to develop projects aimed at repairing and rehabilitating the victims, as far as possible³⁵.

4. The Role of the Legal Representatives of the Victims in relation to the TFV

²⁹ International Criminal Court, “ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity”, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1390> Accessed: October 18th, 2018.

³⁰ Office for Public Counsel for Victims International Criminal Court “Legal Representatives of victim’s joint submission on the consequences of the Appeals Chamber’s Judgment” https://www.icc-cpi.int/CourtRecords/CR2018_03679.PDF Accessed: October 18th, 2018.

³¹ Prosecution International Criminal Court, “Statement of the ICC prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo”, <https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat> Accessed: October 18th, 2018.).

³² Office for Public Counsel for Victims International Criminal Court “Legal Representatives of victim’s joint submission on the consequences of the Appeals Chamber’s Judgment” https://www.icc-cpi.int/CourtRecords/CR2018_03679.PDF Accessed: October 18th, 2018.

³³ Tom Dannenbaum, The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims, 28 Wis. Int’l L.J. 234 (2010)

³⁴ Ibid.

³⁵ Trust Fund For Victims, 2018. «Press release: Following Mr Bemba’s acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic.» The Trust Fund For Victims WebSite. June, 2018. Accessed: November 19th, 2018. <https://www.trustfundforvictims.org/en/news>.

Now, it is necessary to determine the role of the legal representatives of the victims under the TFV, so that victims (particularly those involved in Bemba case) can access the benefits offered by the Fund. In this issue, legal studies emphasize that The Fund should be in contact with the legal representatives and ascertain the victims' needs, in order to determine what should be the appropriate reparation mechanisms for each situation³⁶.

This requirement of the participation of the legal representatives of the victims is also based on the ICC notion that of the legal representation of the victims is understood as a particularly important right of the victims. This has been the case since the negotiations of the creation of the Statute of the ICC³⁷.

Likewise, in the Court's Revised strategy in relation to victims made in 2012 by the States Parties, it was stated that the right to be repaired was closely linked to the right to receive legal representation. The legal representation of the victims allows the Fund to know what the general and specific needs of the victims are, which allows them to determine what should be the correct measures to help and rehabilitate them be. Its participation is not imperative; however, it has a great impact in the implementation of assistance projects³⁸.

Specifically, in regards to the Bemba case, the TFV expressly stated that it would communicate with the legal representation of the victims to study the interests and needs of the victims to know how to proceed to assist them³⁹.

it should be noted that, after the acquittal of Bemba, as the International Federation of Human Rights affirms, the legal representatives of the victims have the duty to intercede in favour of their rights so that they are recognized as victims by the TVF and can be included in the assistance projects that are implemented. Additionally, it is necessary that victims' representatives pressure the Trust Fund to effectively implement said projects, in such a way that the specific damages suffered by the victims can be dealt with⁴⁰.

Finally, regarding the way in which the legal representatives of the victims can interact with the TFV, and in the absence of a specific regulation in this regard, it is considered that this should be articulated through the presentation of papers with important information about the relevant issues to determine which assistance measures should be adopted, emphasizing in the general facts, the level of damage suffered by the victims, their main needs and the most effective coping mechanisms.

³⁶ Anne-Marie de Brouwer, *Reparation to Victims of Sexual Violence: Possibilities at the International Criminal*.

³⁷ International Criminal Court, "Rome Statute of the International Criminal Court", 1998. Accessed: October 18th, 2018. <http://www.un.org/spanish/law/cpi.htm>

³⁸ Assembly of States Parties of the ICC, "*Eleventh session. Court's Revised strategy in relation to victims*", 2012. The Hague, Netherlands. Accessed: October 10th, 2018. https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf

³⁹ *Ibid.*

⁴⁰ International Federation for Human Rights, "*The Bemba Case: Heavily criticised, the ICC must maintain victims' legal representation as the establishment of assistance programmes for victims is awaited*", 2018. Accessed: January 10th, 2019. <https://www.fidh.org/en/region/Africa/central-african-republic/the-bemba-case-heavily-criticised-the-icc-must-maintain-victims-legal>

5. Conclusions

As a result of the research carried out by the International Law Clinic with regard to the questions referred to in the introduction, the following conclusions can be reached:

A. As a consequence of its dual mandate on reparations, the TFV has a role of assistance and accompaniment to victims which does not depend on the issuance by the Chambers of the ICC of a conviction. The TFV is, therefore, an autonomous and independent entity, which greatly modifies the common way of understanding the traditional reparation processes because it opens the possibility for collective redress of the victims of those crimes foreseen in the ICC Statute that they are not subject to a declaration of responsibility in a conviction. In this way, it warrants the implementation of reparation projects to victims of crimes not charged, or for which the accused are finally acquitted as in the Bemba case, thus attributing to these projects a priority status in the Statute system of the CPI.

B. The assistance mandate of the TFV does not operate by virtue of a judgment convicting the accused person. It is based on a preliminary study of the TFV itself to determine to which communities and groups of persons the victim status can be attributed according to the article 85 of the ICC Statute. As a result, individual reparations of a monetary nature have no place in the Fund's assistance mandate. Consequently, the latter can only take the form of measures of physical and psychological rehabilitation and material support to these communities or groups of people.

C. In the light of the foregoing, after the acquittal of Bemba, the victims who participated in the oral trial cannot access an individual monetary reparation. However, in carrying out its assistance mandate, the TFV may implement in the Central African Republic an Assistance Program that includes physical and psychological rehabilitation projects and material support for them, having the power to decide autonomously if a part of the Donations received should be used for these purposes.

D. It is necessary that, in order for suitable reparation projects to be adopted, the legal representatives of the victims are consulted so that they shall clearly inform the TFV about the interests of the victims and the most efficient rehabilitation mechanisms for them.

E. In the absence of a specific regulation in this regard, the way in which legal representatives can interact with the TFV must be articulated through the presentation to the TFV of written submissions containing information on the issues relevant to the TFV for the purpose of determining what assistance projects should be adopted. Particular attention should be given to the characterization of the victimizing facts, the nature and level of damage suffered by the victims, their main needs and the most effective mechanisms to deal with them.

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