



## **ECCHR-Status Report February 2012**

### *FDLR-Leadership Case in Stuttgart*

4 May 2011 saw the start of the trial against two Rwandan leaders of the “Forces Démocratiques de Libération du Rwanda” (FDLR) before the Higher Regional Court in Stuttgart. Since then ECCHR, along with other organisations and institutions, has been monitoring the proceedings of the first trial taken in Germany under the Code of Crimes Against International Law (Völkerstrafgesetzbuch or “VStGB”), a law that entered into force in 2002 and allows for the prosecution of war crimes and crimes against humanity by German courts.

All 50 days of proceedings since the beginning of the trial until mid-January 2012 were observed, giving the ECCHR a comprehensive insight into the events unfolding before the Court. The key issues since the hearing of evidence began have been the leadership and military organisational structure of the FDLR, as well as the role of the accused within the FDLR. This first status report aims to summarize the trial sessions held so far.

### **The Charges**

The President of the FDLR, Ignace Murwanashyaka, and his deputy, Straton Musoni, are accused of having committed war crimes (§ 8 (1) Nos. 1 - 5, (4); § 9 (1); § 11 (1) No.4 VStGB) and crimes against humanity ( § 7 (1) Nos. 1,3,6,8 and 9, (3) VStGB) in 2008 and 2009 in the Eastern region of the Democratic Republic of the Congo. Murwanashyaka is also accused of leadership of a foreign terrorist organisation (§ 129a (1) No.1, (4); 129b (1) of the German Criminal Code, or “StGB”), and Musoni of membership in a foreign terrorist organisation (§§ 129 a (1) No. 1; 129b (1) StGB). The precise charge relates to the failure to undertake measures or give orders from their places of residence in Germany that would have prevented further crimes, since both exercised control over the perpetrators in the region and knew about the acts.

To date only a redacted bill of indictment (with names removed), containing an extract from the full indictment, is available to the public. In similar proceedings before the International Criminal Court, that Court—contrary to the German judiciary—made the entire anonymised indictment as well as further written submissions and court orders available online, which made observation of the proceedings considerably easier. According to the anonymised bill



of indictment in the Stuttgart trial, attacks by the FDLR against the Congolese civilian population in the Eastern region of the Democratic Republic of the Congo had been occurring for years. The FDLR are composed mainly of Hutu refugees, who fled from Rwanda into Eastern Congo as a result of the 1994 genocide and in the following years. From there they have been fighting the Rwandan government ever since. Attempts by the United Nations and the Democratic Republic of the Congo to disarm the FDLR are met again and again with revenge campaigns against the civilian population. In spring of 2009 the FDLR intensified their attacks on the civilian population in Eastern Congo. The bill of indictment in this case deals primarily with attacks leading to the deaths of many civilians in Kipopo, Mianga, Busurungi, Kubua and Manje as well as the charge of having recruited child soldiers. Women are said to have been enslaved for several months and forced to have sexual intercourse, which allegedly caused their death in some cases.

## **Status of the Trial**

Up to the 50<sup>th</sup> day of proceedings on 11 January 2012, the hearing of evidence dealt mainly with the organisational structure of the FDLR as well as the role of the accused within the FDLR and a possible chain of command. To date almost no concrete accusations relating to the attacks against the civilian population have been brought up.

To date 22 witnesses and one expert witness have given testimony on the structure of the FDLR and the role of the accused: staff of the German Federal Criminal Police Office, friends and the former wife of the accused Murwanashyaka as well as a former military chief of the FDLR, a former officer of the supreme command of the FDLR, a former vice-commissioner for legal affairs of the group, a former FDLR lieutenant and other former FDLR fighters, who had however largely left the FDLR before the commission of the alleged acts. During the course of these hearings just one of the witnesses stated that Murwanashyaka himself gave military orders.

Some of the witnesses live in Europe; only in isolated cases did witnesses from Rwanda testify, and to date no victim-witnesses have given evidence. The duration of the hearings was extended from the originally planned one day to up to four trial days per witness. So far, the Court's method of questioning in relation to the specific crimes can be characterised as very one-sided. In particular, the sexualised violence which was carried out as an instrument of war and intimidation has hardly been addressed or questioned. Furthermore, there is no balanced representation of male and female judges, as is required at the International Criminal Court. Particular expertise of the judges in dealing with sexual crimes is also



lacking. Neither of these elements are requirements under German law, nor can they be currently said to be compatible with fundamental rules of German procedural law.

The language barrier is causing further difficulties and delays. To date, interpreters for French, Norwegian, Swahili and Kinyarwanda have been employed. The interpreter for Kinyarwanda has been repeatedly criticised by the defence for incorrect translations and a purported lack of neutrality with regard to the accused. So far all of the applications from the defence for a change of interpreters have been refused by the Court. Several of the defendants' emails, telephone calls and text messages emerging from telecommunication surveillance have been presented at the trial.

Documents from Murwanashyaka's asylum procedure relating to the position of the accused within the FDLR were also read out (decisions and judgments, the refusal to extradite and the denial of refugee status). The manifesto and charter of the FDLR, records, reports and recommendations from meetings were among the documents presented as supporting evidence. A television piece from German current affairs programme ARD FAKT from 3 November 2008 was also considered.

### **Role of the Parties in the Proceedings**

The fifth criminal division of the Higher Regional Court in Stuttgart is composed of five judges (four male, one female) and one substitute judge. The relevant federal public prosecutor is generally represented during the main proceedings by three staff members.

The four court-appointed counsels for the defence continually question the legal and material legitimacy of the trial. They question the neutrality of the Court and of the public prosecutor's representatives, and challenge what they see as the insufficient protection of the rights of the accused. They have voiced this criticism by bringing numerous motions to disqualify, on the grounds of bias, the Court Division, the representatives of the public prosecutor, and the interpreter for Kinyarwanda. These focussed chiefly on Germany's cooperation with Rwanda during the investigation and the accusation that the Rwandan government would manipulate witnesses to ensure that the trial resulted in a conviction of their enemies in the FDLR. To this end the former public prosecutor was called as a witness by the defence and questioned on the twelfth day of proceedings. Most of the motions of the defence have so far been rejected by the Court.



## **Features of the Trial thus far**

### **1) Involvement of those affected by the violence**

So far neither any of those affected by the acts of violence nor any of their relatives have been part of the proceedings. In accordance with German procedural law, persons aggrieved by the acts could have joined the proceedings as a private accessory prosecutor in order to pursue their personal interest in redress if, due to special circumstances—in particular due to the seriousness of the acts' consequences—this appeared necessary for the safeguarding of their interests (§395 (3) of the German Code of Criminal Procedure or StPO). Furthermore, it is stipulated (§406h StPO) that such persons must be informed of their rights and of possible compensation claims. As of today, however, no civil parties have joined the proceedings.

It remains unclear how the safety of potential witnesses from Rwanda and the eastern region of the Democratic Republic of Congo can be guaranteed. The media and NGOs are reporting the affected communities' fear of further attacks and intimidation. Even if testifying witnesses were to be relocated with the support of the German judiciary, they would still have to fear attacks on their families and village communities. For safety reasons, some of the witnesses called by the Court did not want to name names during the proceedings. They also wished that those present observing the trial (including a staff member from the Rwandan embassy) be ordered to leave the courtroom.

### **2) Right to disclosure of materials**

One core issue lies in the handling by a German Court of a situation which necessitates dealing with an on-going armed conflict in another part of the world. Accordingly, documents from the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), among others, have been consulted. Over a long period of time, crimes of the FDLR have been documented and testimony recorded by MONUC. From the start, however, these documents have not been disclosed to the defence, as, according to the public prosecutor, they cannot be considered as part of the actual case file. It was also claimed that the United Nations reserved some specific permissions as to when and under what circumstances the documents could be added to such case files, files which would then also be available to the counsel for the defence for inspection. A similar problem had already presented itself in the trial against Thomas Lubanga before the International Criminal Court. It already occurred during these proceedings that United Nations documents classified as confidential were withheld from the accused. The trial almost collapsed on the basis of insufficient disclosure of the documents. The chamber of the International Criminal Court set



out comprehensive duties of disclosure for the prosecution, which were to be adhered to with only few exceptions.

### **3) Constitutionality of the Code of Crimes Against International Law**

The defence also raises questions as to the legal legitimacy of the trial, specifically whether the provisions of the German Code of Crimes Against International Law are compatible with the German constitution.

At the opening of the trial, the defence filed a motion for judicial review of the constitutionality of the legislation. They submitted that § 7 (1) No. 9, § 8 (1) Nos. 1-5 and § 9 (1) of the Code were unconstitutional in that they violated the principle of legal certainty. The motion was at that stage rejected by the Court. In the Court's view, a referral at this point to the Federal Constitutional Court would be inadmissible. The prerequisites for referral would not be met, it held, because it could not be established that the provisions in question were materially relevant to the decision. The provisions do form part of the charge, but in accordance with previous holdings of the Constitutional Court, the facts of the case must first be clarified to such an extent that the relevance of a particular provision can be established; this is only possible when the hearing of evidence has been completed.

The Court in Stuttgart furthermore does not consider the contested provisions of the Code of Crimes Against International Law to be unconstitutional: According to the consistent case law of the Constitutional Court, the principle of legal certainty applies only to the legislator, and the meaning of the contested provisions can be established through interpretation.

### **4) Separate Trial of FDLR executive secretary Mbarushimana before the International Criminal Court in The Hague**

On the 30<sup>th</sup> day of the proceedings, the indictment before the International Criminal Court in The Hague against the executive secretary of the FDLR Callixte Mbarushimana was introduced into the proceedings before the Court in Stuttgart. To date two witnesses in the Stuttgart trial have been presented with various parts of the charges against Mbarushimana, with certain extracts being read aloud in Court. In its decision of 16 December 2011, however, the Pre-Trial Chamber of the International Criminal Court declined to confirm the charges against Callixte Mbarushimana, the arrest warrant was lifted and his release was ordered. The Pre-Trial Chamber did, however, confirm that between 20 January 2009 until at least 31 December 2009, a non-international armed conflict took place in the North and South Kivus in the Democratic Republic of Congo, and that war crimes were perpetrated by FDLR troops on five out of the twenty-five identified occasions. A majority of the chamber found, though, that Callixte Mbarushimana did not provide any contribution that could sufficiently



establish his individual criminal responsibility under the Rome Statute of the International Criminal Court. The prosecution has since filed an application for leave to appeal. Irrespective of the decision of the International Criminal Court, the individual criminal responsibility of the two accused must be proven at the trial in Stuttgart, a responsibility which will differ according to the respective functions of the accused within the FDLR.

Furthermore, the charges against Callixte Mbarushimana only correspond with those of the public prosecutor in Stuttgart with respect to some incidents. Of the five incidents confirmed in The Hague, the Court in Stuttgart will deal with those in Busurungi in May 2009, in Manje on or about 20 July 2009, and in Mianga on or about 12 April 2009. To what extent the Court in Stuttgart has access to further information relating to the incidents in Kipopo in February 2009 and Kibua in January 2009, which could possibly lead to a decision different from the one reached in The Hague, remains unclear.

## **Outlook**

The Court, the public prosecutor and the defence are confronted with various unique elements of this extraterritorial case. Investigations must be carried out in the Eastern region of the Democratic Republic of the Congo and in Rwanda, translations into Kinyarwanda are necessary. How the difficulties of extraterritorial investigations will influence the trial, especially the content and value of witness testimonies, remains to be seen. The use of video recordings of the interrogations in the region as well as statements by the victims will allow further conclusions in this regard.


Further dates for the continuation of the trial have been scheduled up to 25 April 2012. The extensive gathering of evidence is taking longer than originally planned by the Court, which makes it difficult to predict when this phase will come to a close and a decision will be reached. Victims from the region will not be heard until the summer. As a result, it remains to be seen when the Court will render its first instance decision.




## ECCHR Background Material on the FDLR-Leadership Trial

[www.ecchr.eu/index.php/gender-based\\_crimes/articles/criminal-proceedings-against-two-rwandan-militia-leaders.html](http://www.ecchr.eu/index.php/gender-based_crimes/articles/criminal-proceedings-against-two-rwandan-militia-leaders.html)

In German:

 [ECCHR Hintergrundbericht: Internationale Regeln bei Verfahren sexualisierter Kriegsgewalt \(252,0 kB\)](#)

 [ECCHR Hintergrundbericht: Sexualisierte Kriegsgewalt vor deutschen Strafgerichten \(222,3 kB\)](#)

 [ECCHR Hintergrundbericht: Verpasste Chancen – Verfolgung von Völkerstraftaten in Deutschland \(219,7 kB\)](#)

 [ECCHR Hintergrundbericht: Das Völkerstrafgesetzbuch – Überblick \(226,1 kB\)](#)

### Further References:

#### Following the trial (in German):

Amnesty International: <http://amnesty-straftlosigkeit.de/>

Article from German newspaper Die Tageszeitung on the proceedings:  
<http://www.taz.de/Schwerpunkt-Kongo-Kriegsverbrecherprozess/!t28/>

#### Right to disclosure of materials:

Proceedings against Thomas Lubanga before the International Criminal Court:

<http://www.icc-cpi.int/iccdocs/doc/doc511249.PDF> and

<http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf>

#### On the constitutionality of the German Code of Crimes Against International Law (in German):

T. Darge, *Kriegsverbrechen im nationalen und internationalen Recht, Unter besonderer Berücksichtigung des Bestimmtheitsgrundsatzes*, Heidelberg 2010.

#### Proceedings against Callixte Mbarushimana before the International Criminal Court:

Decision of the Pre-Trial Chamber:

<http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf>

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