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Universal Jurisdiction in Germany?

The Congo War Crimes Trial:

First Case under the Code of Crimes against International Law

Executive Summary

Berlin, 8 June 2016

Introduction

In September 2015 the Higher Regional Court in Stuttgart convicted two leaders of the *Forces démocratiques de libération du Rwanda* (FDLR), a rebel group active in eastern Democratic Republic of Congo (DRC), of war crimes and leadership of a terrorist group. This was the first trial held in Germany based on charges arising from the Code of Crimes against International Law (*Völkerstrafgesetzbuch*, hereafter “VStGB”) which was adopted in 2002. Spanning 320 days of proceedings, it was also the longest trial ever held before the Higher Regional Court in Stuttgart. Over 50 witnesses were heard and more than 300 motions to admit evidence were filed. The trial is reported to have cost over 4.8 million euro.

The European Center for Constitutional and Human Rights (ECCHR) monitored this trial together with other organizations.¹ ECCHR is a Berlin-based organization that uses legal means to defend human rights. Its work includes taking action to bring about prosecutions in cases of grave human rights violations such as murder, torture, and enforced disappearance. As such, the VStGB is an important tool in the work of ECCHR. Since its establishment in 2007, ECCHR has called for the enforcement of the VStGB in Germany.² The results of the FDLR trial monitoring were assessed in a comprehensive report, available in German only.³ The key elements of the report are set out in this executive summary.

¹ Hamburger Stiftung zur Förderung von Wissenschaft und Kultur, Human Rights Watch and medica mondiale.

² For an overview of this case and other ECCHR cases see http://www.ecchr.eu/en/our_work/international-crimes-and-accountability.html.

³ The German report will be published on the ECCHR website at http://www.ecchr.eu/en/our_work/international-crimes-and-accountability/congo-war-crimes-trial.html. The original report and this summary are based on a first instance decision from the Higher Regional Court in Stuttgart that is not yet final. Both the defense and the prosecutors have appealed the decision. At the time of writing the report, the written judgment had not yet been published. The court is not obliged to provide its written judgment until January 2017. As such, the report represents an initial analysis based only on the oral judgment pronounced by the court. The trial notes on which this report is based were compiled on behalf of the trial monitoring group. They describe the proceedings in the courtroom. Once the case has reached its conclusion and the decision is final, the trial notes may be viewed in the archive of the Hamburg Institute for Social Research.

Section One: Background of International Criminal Law in Germany

I. Why a trial in Germany?

Following the adoption of the Rome Statute of the International Criminal Court (ICC) in 1998, Germany, like many other countries, passed its own law on the domestic prosecution of international crimes. The fundamental concept underpinning international criminal law is that “the most serious crimes of concern to the international community as a whole must not go unpunished”. It is, therefore, “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.⁴

Impunity is about more than simply an absence of punishment; failure to prosecute also affirms and cements the structures of violence that must be dismantled before societal change is possible. In societies where perpetrators face no punishment, and where the structures underpinning rights violations stay intact, there is a much greater likelihood that systematic violence will recur. Part of the significance of legal proceedings for crimes of this kind is thus to demonstrate that acts of intolerable violence will have consequences. This can in turn trigger the complex and often slow-moving societal processes aimed at coming to terms with past atrocities.

In principle, a society’s efforts to come to terms with violence will be best served by legal action conducted in the country where the acts occurred. As such, the Rome Statute of the ICC provides for the general priority of domestic jurisdiction.⁵ In many cases, however, court proceedings within the state in question will not be feasible. International crimes are often committed by states or with state complicity. The perpetrators tend to hold powerful positions within the state in question, resulting in the unwillingness of a state to bring about criminal proceedings. Other problems arise when crimes are committed in places of limited statehood, as was the case with the crimes committed by the FDLR and examined before the court in Stuttgart. In such cases, the state where the crimes were committed is not able to bring the perpetrators to justice. In the FDLR case, the two accused had come to Germany to study in

⁴ Preamble of the Rome Statute of the International Criminal Court, available at: https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

⁵ Art. 17 of the Rome Statute.

the 1980s and had remained there ever since. Furthermore, they were said to have committed the crimes in question – the ordering of massacres – from within Germany. Germany thus additionally had territorial jurisdiction over the crimes.

Under the principle of universal jurisdiction, every state is authorized to prosecute cases of international crimes regardless of where they were committed or who the perpetrators are, especially in cases in which those crimes would go unpunished in the state where they were committed or the home state of the perpetrators.⁶ This is because crimes of this nature concern the international community as a whole, and because the ICC can only deal with a limited number of cases. The legal interests protected by international criminal law – particularly human rights and international humanitarian law – can only be effectively protected if there are universal mechanisms for bringing criminal legal action in cases of violations. The German FDLR case is of broader, international significance since under the principle of complementarity the German authorities are expected to play an active role in the participation and maintenance of the international criminal law system.

Since the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), there is a growing trend towards taking legal action in response to grave crimes, even in situations of ongoing conflicts, for example in Uganda, Sudan, Kenya, Colombia or, as in this case, in the DRC. By establishing liability for human rights violations committed during the conflict, the legal actions aim to prevent further crimes, contribute to the de-escalation of the conflict and pave the way for a transition to political negotiations.⁷

II. International Criminal Law in Germany

In the period after the Second World War, Germany generally rejected international criminal law. With a few exceptions, the German legal system failed when it came to addressing Nazi

⁶ On the current status of proceedings held under the principle of universal jurisdiction see: Make Way for Justice #2, Universal Jurisdiction Annual Review 2016, by TRIAL, ECCHR, FIDH, FIBGAR, available on the ECCHR website at: http://www.ecchr.eu/en/our_work/international-crimes-and-accountability.html?file=tl_files/Dokumente/Universelle%20Justiz/MakeWayForJustice%232.pdf.

⁷ Par Engstrom, Transitional Justice and Ongoing Conflicts, in Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants, ed. Chandra Lekha Sriram, Jemima Garcı́a-Godos, Johanna Herman and Olga Martin-Ortega (New York: Routledge, 2013), 42.

crimes.⁸ From the early 1990s, however, there was a gradual shift within Germany towards actively advancing and helping to shape international criminal law.⁹ This was furthered by the criminal proceedings initiated in response to the Yugoslavian conflict.¹⁰ Today, Germany is one of the major financial supporters of the ICC and seeks to ensure an “effective, functional, independent and thus credible International Criminal Court.”¹¹

In 2002 Germany implemented the criminal provisions of the 1998 Rome Statute by means of a new law, the VStGB, which essentially adopted the material provisions of international criminal law set out in the Rome Statute,¹² introducing the principle of universal jurisdiction for crimes under the VStGB.¹³ German legislators, however, included a set of more nuanced rules concerning the jurisdiction of German authorities for the prosecution of crimes under the VStGB. These rules provide that authorities may at their discretion decide not to prosecute in cases of crimes with no link to Germany.¹⁴ This mechanism is designed to avoid overburdening German investigative resources with cases that have no connection to Germany. The provision is problematic, however, given that victims of crimes are provided with no legal avenue to challenge such a decision by the authorities to dismiss a case.¹⁵ The VStGB provides that the Federal Prosecutor at the German Federal Court of Justice is

⁸ Koskeniemi, Martti, *Between Impunity and Show Trials*, in: Max Planck Yearbook of United Nations Law, 2002, Vol. 6, p. 6; on a positive exception in the Auschwitz trial, pushed by the famous prosecutor Fritz Bauer, see Wagner, Julia, *The Truth about Auschwitz: Prosecuting Auschwitz crimes with the Help of Survivor Testimony*, German History Vol. 28 (2010), p. 343-357.

⁹ Steinke, Ronen, *The Politics of International Criminal Justice*, Oxford 2012. The legal response to East German injustices marked a turning point. In addressing killings at the East/West German border, the German Federal Court of Justice (BGH) explicitly embraced international criminal law, building on and further developing the substantive foundations of the Nuremberg judgment: BGH NJW 1995, 2728 (2731); BGHSt 41, 101, 109 (in German).

¹⁰ At that time over 100 investigations were opened against suspects in Germany based on the principle of universal jurisdiction. A number of these proceedings led to convictions, in some cases for the crime of genocide.

¹¹ See Federal Foreign Office (*Auswärtiges Amt*): <http://www.auswaertiges-amt.de/DE/Aussenpolitik/InternatRecht/ISStGH/Hintergrund.html> (author's translation).

¹² English version of the VStGB is available at: <https://www.mpicc.de/files/pdf1/vstgbleng2.pdf>.

¹³ In Section 1. Under this provision the VStGB is applicable to all situations around the world, regardless of where the acts in question took place or the nationality of the parties involved.

¹⁴ Section 153 f of the German Code of Criminal Procedure. An English version of this law is available online at: http://www.gesetze-im-internet.de/englisch_stpo/

¹⁵ See the statements presented at the German Bundestag before the Committee for Legal Affairs and Consumer Protection in a public hearing on international criminal law practice in Germany in April 2016, especially the statements from Kaleck, Wolfgang, p.8, Heinsch, Robert, p.7 f., Werle, Gerhard, p. 8f. These are available (in German) at: <https://www.bundestag.de/bundestag/ausschuesse18/a06/anhoerungen/stellungnahmen/419782>.

responsible for investigations initiated under the VStGB.¹⁶ Legislators did not set down any specific procedural rules for proceedings under the VStGB, and as such the regular provisions of the German Code of Criminal Procedure apply.

When the VStGB entered into force in Germany, there was a failure to ensure adequate staff resources within the various authorities involved or to train existing personnel in the particulars of international criminal law. In the first few years after the new law was passed, criminal complaints were systematically dismissed, resulting in some strong criticism.¹⁷ The expansion of investigative capacities and, in 2009, the addition of a dedicated international crimes department at the office of the Federal Prosecutor and a central office for combating war crimes and other crimes under the Code of Crimes against International law¹⁸ at the German Federal Criminal Police Office,¹⁹ led to some of the first breakthroughs that eventually brought about the FDLR proceedings, the first complete trials carried out under the new code.

German authorities carry out their investigations under the VStGB as follows. They first systematically review all situations around the world that could be relevant from an international criminal law point of view by assessing numerous reports from the media, NGOs, blogs and reports by international organizations and then set up monitoring procedures.²⁰ Where an initial threshold of suspicion is met, and the case has some link to Germany, the authorities will open a “*Strukturverfahren*” or a background investigation.

¹⁶ Under Section 120 (1) No. 8 in combination with Section 142a (1) of the Courts Constitution Act (*Gerichtsverfassungsgesetz*).

¹⁷ Schüller, Andreas, *The Role of National Investigations and Prosecutions in the System of International Criminal Justice – Developments in Germany*, in: *Sicherheit und Frieden (S+F)*, 2013, Vol. 4, p. 226 (230); Human Rights Watch, *The Long Arm Of Justice*, 2014, p. 51 f., available at: <https://www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and>. On the importance of criminal complaints for the German Federal Prosecutor see also: Beck Thomas/Ritscher Christian, *Do criminal complaints make sense in (German) International Criminal Law? A prosecutor’s perspective*, in: *Journal of International Criminal Justice*, 2015, Vol. 13, Issue, 2, p. 229 - 235, p. 229. The cases mentioned include the criminal complaints from 2004 and 2006 against Donald Rumsfeld and other US officials for war crimes and torture in Abu Ghraib and Guantanamo as well as the criminal complaint against the Uzbek Interior Minister Zokirjon Almatow in 2005. See the ECCHR website at: http://www.ecchr.eu/en/our_work/international-crimes-and-accountability.html.

¹⁸ *Zentralstelle für die Bekämpfung von Kriegsverbrechen und weiteren Straftaten nach dem Völkerstrafgesetzbuch*.

¹⁹ *Bundeskriminalamt*.

²⁰ Beck, Thomas/Ritscher, Christian, [Do Criminal Complaints Make Sense in \(German\) International Criminal Law?](#), in: *Journal of International Criminal Justice*, 2015, Vol. 13, Issue 2, p. 229 - 235, p. 233.

These are proceedings against as yet unidentified persons. These proceedings qualify as investigations as defined in the German Code of Criminal Procedure and can thus involve criminal justice mechanisms such as the hearing of witness testimony. They are comparable to “situations” under scrutiny at the ICC. Over the course of these proceedings, individual suspects may be identified. Further investigations are then pursued against these suspects in separate proceedings.

Between the introduction of the VStGB and the close of the FDLR proceedings, there have been 29 investigations against a total of 60 suspects and 11 background investigations concerning unknown suspects. Around the same time as the FDLR proceedings, another trial took place before the Higher Regional Court in Frankfurt am Main concerning the 1994 Rwanda genocide. The accused was given a life sentence for being an accomplice to genocide based on his role in a massacre at a church in Kiziguro.²¹ On 11 April 2016 the second trial under the VStGB opened against a German man accused of committing war crimes in Syria. Two further investigations into war crimes in Syria have led to two suspects being taken into pre-trial detention. A total of 18 investigations under the VStGB are currently being pursued by the Federal Prosecutor.²²

²¹ Since the VStGB was not yet in existence at this time, the proceedings were brought under the genocide provision (Section 220a) of the old German Criminal Code. Rwabukombe was initially convicted by the Higher Regional Court in Frankfurt only of aiding genocide and was sentenced to 14 years:

http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:7413865 (in German).

This decision was partly reversed by the Federal Court of Justice and sent back to a different chamber at the Frankfurt court (<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&client=12&nr=72189&pos=0&anz=2&Blank=1.pdf>), which in December 2015 sentenced Rwabukombe to life imprisonment, finding a particularly grave level of culpability (OLG Frankfurt, 29.12.2015 - 4-3 StE 4/10 - 4 - 1/15); see also Kroker, Patrick, *Universal Jurisdiction in Germany: The Case of Onesphore R. before the Higher Regional Court in Frankfurt*; in: *German Yearbook for International Law*, 2011, Vol. 54, p. 671 - 687.

²² See Almohibany, Amer, *Refugees spur German justice to tackle Syrian war crimes*, available at:

<http://www.justiceinfo.net/en/component/k2/27104-refugees-spur-german-justice-to-tackle-syrian-war-crimes.html>.

Section Two: FDLR Trial in Stuttgart

I. Background

The two men on trial in Stuttgart were leaders of the *Forces Démocratiques de Libération du Rwanda*. The FDLR is a rebel group made up partly of former soldiers of the Rwandan state army who fled to the DRC after the 1994 genocide. Their original aim was to regain political influence in the Republic of Rwanda and eventually seize power.²³ Their sphere of influence is limited to certain parts of the Kivu regions in eastern DRC that they control and where they are a major party in the Congolese civil war which has been ongoing since 1996. A number of different conflicts converge in this war. The fighting is fuelled by a complex mix of political powers as well as ethnic and economic interests, in particular the question of access to and control of the abundant natural resources in the region.²⁴

The group has a military and a political wing. The military wing, the *Forces Combattantes Abatchunguzi* (FDLR-FOCA), is the larger of the two divisions, with an estimated membership of between 6,000 and 10,000.²⁵ It is headed by General Sylvestre Mudacumura, the subject of an outstanding arrest warrant issued by the ICC.²⁶ Like most of armed groups in the conflict, the FDLR is accused of committing grave crimes against the civil population.²⁷

The violence intensified in early 2009 when the Rwandan and DRC armies launched a joint offensive against the FDLR. This had devastating consequences for the civil population in

²³ Romkena, Hans, Opportunities and Constraints for the Disarmament and Repatriation of Foreign Armed Groups in the DRC, Washington DC: Wilson Center 2001, p. 11, available at:

https://www.wilsoncenter.org/sites/default/files/MDRPDRCCOFSSStudy_Final_ENGL.pdf, p. 11

²⁴ International Peace Information Service (IPIS), Mineral supply chains and conflict links in Eastern Democratic Republic of Congo: Five years of implementing supply chain due diligence, 2015, available at:

http://ipisresearch.be/wp-content/uploads/2015/11/20151124_Mineral-Supply-Chains-DRC-Due-Diligence-Report.pdf.

²⁵ International Crisis Group, Rwandan Hutu Rebels in the Congo: A New Approach to Disarmament and Reintegration, Africa Report No. 63, Nairobi/Brussels 2003, p. 8; Rafti, Marina, South Kivu: a Sanctuary for the Rebellion of the Democratic Forces for the Liberation of Rwanda, Discussion Paper, Antwerp 2006, available at <http://www.ua.ac.be/objs/00152969.pdf>, p. 12.

²⁶ The Pre-Trial Chamber issued an arrest warrant on 13 July 2012. He is accused of being responsible for a series of attacks in the Kivu provinces in eastern DRC as Supreme Commander of the FDLR-FOCA. Mudacumura remains at large.

²⁷ Autesserre, Séverine, The Trouble With Congo. How Local Disputes Fuel Regional Conflict, in: Foreign Affairs, 2008, Vol. 87, No. 3, p. 94-110, p. 104.

particular. Massacres and atrocities were widespread, often as part of punishment actions taken against villagers accused of collaboration with another party to the conflict. Human Rights Watch documented the killing of more than 1,400 civilians, most of them women, children and older people, between January and September 2009 alone. Rape was often an element of the attacks.²⁸ This pattern was evident in many of the attacks attributed to the FDLR and those examined at the heart of the Stuttgart trial. After enemy groups withdrew from villages, the FDLR would enter the villages and carry out revenge attacks on the civilian populations. Some of the attacks led to the destruction of entire villages. Between February and October 2009, the UN documented 1,199 cases of grave human rights violations by FDLR troops, including 384 killings, 135 cases of sexual violence, 521 kidnappings, 38 cases of torture and 5 cases of mutilation.²⁹ This resulted in the wide-scale forced displacement of people from the disputed regions which went hand in hand with the extensive destruction of homes and property.

Ignace Murwanashyaka and Straton Musoni, the two men convicted at the court of first instance in Stuttgart, were accused of directing the political arm of the FDLR from Germany. Both men are Rwandan citizens but have lived in Germany for many years, including during the Rwandan genocide in 1994. In 2001 Murwanashyaka was elected president of the FDLR, making him head of the organization's steering committee. He subsequently made several trips to the DRC but continued to live in Germany and directed FDLR political affairs by e-mail, phone and text. At trial Murwanashyaka claimed he had exerted influence only over the political section of the FDLR and not over the military powers of the FDLR-FOCA. From June 2004, Musoni was the first Vice President of the FDLR and deputy to Murwanashyaka. During the trial, in 2012, he announced that he had left the organization. The third political leader in line is executive secretary Callixte Mbarushimana, who lived in and acted from France. He was later arrested in France, transferred to the ICC but subsequently released.³⁰

²⁸ Human Rights Watch, "You Will Be Punished" Attacks on Civilians in Eastern Congo, December 13 2009, available at: <https://www.hrw.org/report/2009/12/13/you-will-be-punished/attacks-civilians-eastern-congo>, p. 58 ff.; see also: International Crisis Group, Congo: A Comprehensive Strategy to Disarm the FDLR, Africa Report No. 151, 9 July 2009, p. 3 ff., available at: <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/151-congo-a-comprehensive-strategy-to-disarm-the-fdlr.aspx>, p. 3 ff.

²⁹ United Nations Security Council, Final Report of the Group of Experts on the Democratic Republic of the Congo (S/2009/603), 23 November 2009, Paras 345 ff.

³⁰ He was arrested by French authorities in October 2010 and transferred to the ICC in The Hague on 25 January 2011. A warrant had been issued for his arrest on 28 September 2010. He too was accused of responsibility for the war crimes of the FDLR in the Kivu region. In its confirmation of charges from 16 December 2011, the Pre-

Around the same time of the Stuttgart proceedings, others were put on trial at the Higher Regional Court in Düsseldorf on charges of membership of the FDLR, which is designated as a terrorist organization in Germany. This designation applies to any organization whose aims include the commission of crimes under the VStGB. Three people were accused of setting up an FDLR cell in Germany and working with the FDLR's executive commissioner for information, Callixte Mbarushimana, to compose, edit and publish texts for the group. The judgment was issued on 5 December 2014 after 92 trial days. The accused were convicted and handed down sentences of two to four years for support and membership of a terrorist group abroad under the German Criminal Code.³¹ These proceedings did not include any charges under the VStGB relating to acts committed by the FDLR in the DRC.

II. Case development

1. Investigations against Murwanashyaka and Musoni

In 2008 the German Federal Prosecutor reopened investigations against Murwanashyaka – concerning possible crimes under the VStGB and membership in a foreign terrorist organization – which had been initiated in 2006 but subsequently discontinued due to evidentiary problems. The 2008 decision also broadened the scope of the original investigation to include the second suspect, Musoni. In November 2009 both suspects were arrested and their homes and vehicles were searched. The Federal Prosecutor and the Federal Criminal Police Office travelled to Rwanda and the DRC shortly after, and for a second time in April/May 2010. Most witness testimony was gathered during these two visits. The difficulties arising from these investigations, especially given the security situation in DRC, are set out in more detail below.³² In Rwanda the investigators were dependant on the cooperation of the Rwandan Attorney General and in DRC on locally active NGOs as well as

Trial Chamber at the ICC dismissed the case against Mbarushimana. The Pre-Trial Chamber found there was not sufficient evidence to show that Mbarushimana bore individual criminal responsibility for the war crimes identified by the prosecution because he had no authority over FDLR-FOCA commanders or soldiers. Mbarushimana was released from detention at the ICC on 23 December 2011. On 30 May 2012 the Appeals Chamber confirmed the decision of the Pre-Trial Chamber: Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled Decision on the confirmation of charges; No. ICC-01/04-01/10 OA 4, 30 May 2012, available at <https://www.icc-cpi.int/iccdocs/doc/doc1420080.pdf>.

³¹ Section 129b (1) and Section 129a (1) No. 1.

³² See p. 17 ff.

on the *Mission de l'Organisation des Nations Unies en République Démocratique du Congo* (MONUSCO), who assisted with finding and contacting witnesses.

2. Charges and trial

Murwanashyaka and Musoni were charged in December 2010 with having command responsibility for 26 counts of crimes against humanity and 39 counts of war crimes occurring as part of 16 actions carried out by the FDLR between January 2008 and November 2009 in eastern DRC. Seven of these actions involved attacks on villages, ranging from pillage to massacres and the destruction of entire villages. These were part of the aforementioned acts of punishment for alleged collaboration between the civilian population and troops of the FDLR's opponent groups. The most serious attack was the raid on the Busurungi village on 10 May 2009, which was subsequently documented by Human Rights Watch.³³ This raid was carried out to avenge an attack by government troops on Rwandan refugees in a nearby village. The FDLR-FOCA troops stormed the village of Busurungi under the cover of darkness, opened fire seemingly at random and set fire to hundreds of houses. Soldiers committed numerous rapes. At least 96 people were killed and the village was completely destroyed.

Five of the acts relate to rape and sexual slavery. Available information suggests that 15 cases of rape were investigated and that the majority of these incidents occurred in the context of mass rape and great brutality. These often went hand in hand with other injuries; in many cases victims were stabbed in the abdomen or beaten in the face with the butt of a gun. Many of the women died as a result of rape. Others were enslaved for months and regularly raped, in most cases by a group of FDLR soldiers. Three charges related to individual attacks on civilians. One set of acts concerned the recruitment of child soldiers.

Murwanashyaka and Musoni were accused of bearing command responsibility for these crimes. They were said to have represented the senior leadership of the FDLR along with Callixte Mbarushimana. They were accused of determining and guiding the FDLR's

³³ Human Rights Watch, "You Will Be Punished" Attacks on Civilians in Eastern Congo, 13 December 2009, available at: <https://www.hrw.org/report/2009/12/13/you-will-be-punished/attacks-civilians-eastern-congo>, p. 63.

approach, strategies and tactics from Germany by satellite phone, e-mail, internet and radio. Their indictment papers stated that because they exerted control over the perpetrators on the ground, had knowledge of the acts and omitted to take measures or give orders from their places of residence in Germany that could have prevented the commission of further crimes, they bore command responsibility for the acts under Section 4 VStGB. Under this provision, a military or civil commander who fails to prevent his subordinate from committing a crime under the VStGB is to be punished as a perpetrator of that crime.³⁴ Murwanashyaka was also accused of leadership of a foreign terrorist organization³⁵ while Musoni was accused of membership of such a group.³⁶

The trial lasted from 4 May 2011 to 28 September 2015. There were generally two days of proceedings per week, for around six hours per day on average. Over 50 witnesses were heard during the trial. The biggest group of witnesses was comprised of former FDLR members who now live in Rwanda. The indictment listed ten anonymous victim-witnesses who could give testimony, though only five of these gave evidence during the proceedings. The public was excluded from the court while they gave their testimony via video link from a secret location in the region where the crimes occurred. Witness evidence was also heard from an investigator from Human Rights Watch who worked on the documentation of the crimes and from former members of a UN expert group who in 2008 and 2009 examined the activities of all the armed groups in the DRC.

Some officials from the Federal Criminal Police Office gave evidence on the investigation process. Expert witnesses also testified on the situation and conflict in the DRC and Rwanda as well as the FDLR's structure and criminal activities. Information gathered through telecommunications surveillance, including emails and text messages, also provided important evidence. These had to be translated into German. Much time was spent addressing disputes over the accuracy of the translation.

The second defendant Musoni repeatedly responded to the allegations against him, arguing that from his position in Germany he had been responsible only for political mobilization,

³⁴ For more detail see below at p. 16.

³⁵ Section 129b (1) in combination with Section 129a (1) No. 1, and (4) of the German Criminal Code.

³⁶ Section 129b (1) in combination with Section 129 a (1) No.1 of the German Criminal Code.

diplomacy and the finances of the FDLR and that he did not maintain contact with military leadership in the DRC. Murwanashyaka did not comment on the charges against him. Each of the defendants was assigned two court-appointed defense lawyers. New lawyers had to be appointed to both of the defense teams after two of the assigned lawyers dropped out of the proceedings for health reasons. Defense lawyers challenged the fundamental legitimacy of the trial as well as its historical and political context.³⁷ They pursued an active and at times confrontational defense strategy which led to heated arguments during the trial. The Federal Prosecutor in its pleadings reprimanded the defense, particularly for its handling of victims who gave evidence. Presiding Judge Hettich made similar remarks when delivering the court's judgment.

3. Judgment

The court's judgment was delivered on 28 September 2015. The court convicted the accused on five of the 15 charges originally brought against them. Neither were convicted of crimes against humanity. Further, the accused were not held liable on the basis of command responsibility. Murwanashyaka was sentenced to 13 years of imprisonment for aiding five war crimes³⁸ and Musoni was given an 8 year sentence for leadership of a foreign terrorist organization.

a) Limiting the charges

Eleven acts originally forming the basis of charges were withdrawn from consideration during trial proceedings at the request of the Federal Prosecutor. The allegation concerning the recruitment of child soldiers was dropped in autumn 2013. Two charges of rape and enslavement were also dropped. In March 2015 further counts were dropped, including charges of rape, mass rape and sexual enslavement as well as individual attacks on civilians. These charges were primarily based on anonymous victim testimony.

³⁷ On international criminal law proceedings from the point of view of the defense: Von Wistinghausen, Natalie, VStGB und Strafverfahren: Beweisaufnahme und Angeklagtenrechte, in: Safferling, Christoph / Kirsch, Stefan, Völkerstrafrechtspolitik, Heidelberg 2014, p. 204 f..

³⁸ In concomitance with leadership of a foreign terrorist organization under Section 129b (1) German Criminal Code in combination with Section 129a (1), (4) German Criminal Code.

These adjustments to the charges were based on Section 154 (2) of the German Code of Criminal Procedure. Under this provision, the court can discontinue some of the charges during the trial at the request of the prosecutor if the expected punishment for those acts is insignificant in comparison to the punishment attaching to the remaining charges. The real reason for the charges being dropped was that the court had expressed doubts as to whether the evidence gathered could lead to a conviction, as the witness testimony could not be corroborated through other evidence. The extensive witness protection measures restricted the right of the defense to challenge witnesses to such a great extent that a conviction could not rest on their testimony alone.³⁹

b) *Crimes against humanity*

There was no conviction handed down for crimes against humanity in this case. This crime, set out in Section 7 of the VStGB, includes crimes such as killing, rape and grave bodily harm committed “as part of a widespread or systematic attack directed against any civilian population”.⁴⁰ The act in question must thus have a functional link to the overarching crime.⁴¹ The target of the attack must be a civilian population. The court in Stuttgart established however that the primary goal of the FDLR attacks was not the civilian population as such. In all of the attacks examined in these proceedings, enemy troops were stationed in the village in question. As a result it was felt that this did not meet the requirement that the attacked groups must be mainly civilian.⁴² The pre-trial chamber of the ICC came to a similar conclusion in proceedings against Sylvestre Mudacumura and against Callixte Mbarushimana.⁴³ In the view of the court in Stuttgart, the accused assumed that the targets were of a primarily military character. The prosecutor’s theory – that an order had been given to systematically take revenge on the civilian population and cause a humanitarian catastrophe in the region in order to turn public opinion against the military offensive of the Congolese army – was thus ultimately not confirmed.

³⁹ See below at p. 24.

⁴⁰ English translation of the VStGB see above at footnote 12.

⁴¹ See Werle, Gerhard / Jessberger, Florian, *Principles of International Criminal Law*, 3rd ed., Oxford 2014, marginal no. 884.

⁴² ICTY (Trial Chamber), *Prosecutor v. Tadić*, Opinion and Judgment, 07.05.1997 (IT-94-1 -T), paras. 638, 643.

⁴³ ICTY (Pre-Trial Chamber II), *Prosecutor v. Sylvestre Mudacumura*, Decision on the Prosecutor’s Application under Article 58, 13.07.2012 (ICC-01/04-01/12-1-Red), marginal no. 26 f, ICC (Pre-Trial Chamber I), *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, 16.12.2011 (ICC-01/04-01/10-465-Red), marginal no. 297.

c) *War crimes*

Murwanashyaka was convicted of aiding five war crimes committed by the FDLR-FOCA troops and which killed at least 181 people.⁴⁴ In the judges' view, there was no reasonable doubt that military orders were issued leading to the burning of houses as part of the punishment attacks, and leading to looting as troops looked for food. These attacks regularly involved civilian deaths and other violations of international humanitarian law by the FDLR-FOCA soldiers. From the seven acts set out in the indictment relating to attacks on villages and settlements, five led to convictions, namely concerning attacks on the villages Kipopo,⁴⁵ Mianga,⁴⁶ Busurungi,⁴⁷ Chiriba⁴⁸ and Mange.⁴⁹

The court also stressed that it had the impression after the evidence gathering process that war crimes were committed by all of the armed groups involved in the conflict but that this did not affect the legal assessment of the acts at the center of this case.

d) *Mode of liability*

⁴⁴ Section 8 VStGB in combination with Section 27 German Criminal Code.

⁴⁵ The court found that FDLR-FOCA soldiers were attacked from the village of Kipopo by FARDC troops. In response, FDLR-FOCA fighters entered the village on 13 February 2009 under the cover of darkness and launched a surprise attack, setting fire to at least 100 straw houses and huts. Some of those living in these homes were locked in and burned to death. At least 13 people were killed by the FDLR-FOCA soldiers.

⁴⁶ The attack on Mianga on Easter Sunday, 13 April 2009, followed attacks on Rwandan refugees. The FDLR-FOCA command ordered the attack as an act of revenge against the disloyal village population. The fighters launched a surprise attack on the village, breaking into the home of the local chief to behead him. The court found that at least 35 FARDC soldiers and roughly 45 civilians were killed in the attack. The soldiers involved in the attack on Mianga later boasted about how many people they had killed.

⁴⁷ The attack on Busurungi in the night between the 9th and 10th of May 2009 involved particularly gruesome attacks on the civilian population. Again this was a revenge attack, launched following an attack by the FARDC. The FDLR-FOCA believed that residents of Busurungi had not only harbored the Congolese army but also led them to FDLR positions. During the attack, FDLR-FOCA fighters quickly overcame the resistance of the FARDC. They shot randomly at houses and people. Several rapes were committed. At least 96 people, including many women and children, were brutally killed by being shot, stabbed or hacked to pieces.

⁴⁸ One of the acts in question in the case encompassed several massacres in the Mubugu region. Prosecutions for most of the crimes were suspended in March 2015. This left the attack on the Chiriba village from 25 to 27 May 2009, during which at least five civilians died, several houses were set on fire and pillage was widespread.

⁴⁹ The Congolese army repeatedly launched attacks on FDLR positions from Mange. A revenge attack was launched on the night of the 20th to the 21st of July 2009, aimed in part at driving the FARDC from the village. FDLR-FOCA soldiers burned homes and several civilians were killed.

Though they were originally charged with command responsibility for acts, Murwanashyaka was ultimately convicted only of aiding war crimes and Musoni was not found to have any liability for war crimes. The degree of their individual responsibility for the acts was one of the most difficult questions during the proceedings. Both of the accused were in Germany during the period when the crimes were committed but maintained contact with the troops on the ground by phone and internet.

The German legislature decided to regulate the question of command responsibility in a more nuanced and ultimately more restrictive way than simply adopting the relevant wording from Art. 28 of the ICC statute, which was seen as too far-reaching.⁵⁰ The accused in the FDLR proceedings were said to bear responsibility for certain acts under Section 4 VStGB.⁵¹ This provision sets out the liability of military commanders and other superiors. The original accusation was that as commanders, they failed to take measures or give orders from within Germany to prevent their subordinates from committing international crimes. A conviction on these charges would require the accused to have had effective control over and have had the power to command and lead the soldiers who committed these crimes, i.e. that they actually had the opportunity to give binding directions to subordinates and enforce the execution of these directions.

The court did not see this as proven. The court did consider it proven that Murwanashyaka was the political president of the FDLR and was also recognized as such by the fighters in DRC. The court did not accept the argument put forward by the defense that the military (FOCA) and the political (FDLR) wings of the organization were independent from one another and that Murwanashyaka exercised a purely political function. Yet the court found it had not been proven that the accused had the de facto power to prevent the crimes committed.

⁵⁰ See German Bundestag, *Gesetzesbegründung eines Gesetzes zur Einführung des Völkerstrafgesetzbuches*, Drucksache 14/8524, 2002, p. 18 f. (in German). See also the first ICC judgment on Art. 28: ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment, 31.03 2016 (ICC-01/05-01/08).

⁵¹ Section 4 - Responsibility of military commanders and other superiors: (1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinate. Section 13 subsection (2) of the Criminal Code shall not apply in this case.

(2) Any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to a military commander. Any person effectively exercising command and control in a civil organisation or in an enterprise shall be deemed equivalent to a civilian superior.

Many soldiers had testified that they acknowledged Murwanashyaka as their leader but in cases of doubt followed orders from Silvestre Mudacumura.

As a result, Murwanashyaka was convicted only of aiding certain war crimes committed by the FDLR-FOCA.⁵² The court found that Murwanashyaka had physically facilitated the crimes by providing satellite and mobile phones. In addition it found that he had also provided psychological assistance by reinforcing the will of his troops to commit the crimes, mainly by disclaiming, trivializing and knowingly denying the war crimes in the propaganda he produced.

e) *Terrorist organization*

In its judgment the court found that the FDLR represented a foreign terrorist organization in accordance with Sections 129b and 129a of the German Criminal Code. Under German law a terrorist organization is one whose aims or activities are directed at the commission of serious crimes, including acts criminalized under the VStGB. Relatively early on in the proceedings, the allegations against Musoni were limited to leadership of a terrorist organization under Section 129b of the German Criminal Code. Murwanashyaka was also convicted of leadership of a foreign terrorist organization under Sections 129a, 129b of the German Criminal Code.⁵³

III. Significant aspects of the trial

1. Duration of the trial

The FDLR trial stretched over 320 trial days between May 2011 and September 2015. It is not unusual for trials on international crimes to take longer than other kinds of criminal proceedings.⁵⁴ This is partly due to the complexity of the elements of the crimes⁵⁵ and partly

⁵² Aiding (*Beihilfe*) under Section 27 of the German Criminal Code.

⁵³ On criticism of the decision to restrict the international criminal proceedings to terrorism proceedings see below at p. 29.

⁵⁴ The Karadžić proceedings at the ICTY recently came to a close after six and a half years and 498 trial days. Trial documents, including the judgment, are available from the ICTY website at: <http://www.icty.org/case/karadzic/4>. At the Khmer Rouge tribunal in Cambodia the Trial Chamber needed 226 trial days just for the first of four trial segments. At the International Criminal Tribunal for Rwanda, one trial lasted for ten years, see ICTR, Prosecutor vs. Pauline Nyiramasuhuko et al., Judgment, 14 June 2011 (ICTR-98-42-T).

due to the fact that the criminal acts in question are typically made up of numerous smaller collaborative acts. It is thus necessary to determine the responsibility of each individual perpetrator, many of whom are involved behind the scenes but do not take part in the direct commission of the crime.

In most cases, the amount of time elapsed and the distance between investigators and the place where the crimes were committed will present additional difficulties. Under German criminal procedural law, judges must base their decisions only on what they learn during the trial sessions.⁵⁶ Furthermore, to prove a fact, the most direct form of evidence must be chosen. This means for instance that witness evidence should be gathered by holding a hearing with the witness; a witness hearing may not be replaced by simply by reading out the record of a prior hearing or reading out a written statement. Most of the witnesses for the allegations examined at the Stuttgart trial were resident outside of Germany and had to be flown in for the proceedings. They required interpreters for their hearings, which caused delays. As a result, hearing one witness often took four trial days, i.e. two weeks. Over 50 witnesses were heard in total. Emails and text messages had to be read out in court and translated from Kinyarwanda into German, and the resultant disputes over the accuracy of the translation took up a lot of time during the trial. Further, the judges were reliant on the cooperation of other states and the processing of time consuming international legal assistance requests.

2. Evidentiary and investigatory difficulties

The trial showed how difficult it was for prosecutors to investigate this case. The difficulties arose mainly from the international nature of the trial as well as the fact that the conflicts in

⁵⁵ For war crimes and crimes against humanity, the individual crimes such as murder or rape must take place in a broader context: under Section 7 VStGB, crimes against humanity crime must be part of “a widespread or systematic attack directed against any civilian population”; under Section 8 VStGB, war crimes must occur “in connection with an international armed conflict or with an armed conflict not of an international character”. As a result, the proceedings will also involve examining whether this broader functional context was given in a particular case. The historical and political background to the crimes with thus often form part of the trial. This will often make the trial more complex and extensive, with a knock-on effect on the duration of the trial.

⁵⁶ This arises from the *Unmittelbarkeitsgrundsatz*, or “principle of directness”, established in Sections 244, 250 and 261 of the German Code of Criminal Procedure.

the DRC are ongoing, making it impossible to visit the site of the crimes and difficult to gather evidence.

a) *Difficulties in taking witness testimony*

The massive scale of the violence meant that many witnesses suffered from severe trauma and were thus at risk of re-traumatization. Some were subject to constant threats and danger during the conflict. Many of the witnesses in the Stuttgart proceedings indicated that they feared revenge attacks for giving evidence. They were only prepared to give evidence if their identities were carefully protected. There was also a large cultural distance between the investigators and the witnesses, which can impede mutual understanding and make it difficult to assess credibility.⁵⁷ A further problem was that for foreign witnesses or witnesses living abroad, there are no mechanisms to enforce the obligation to give evidence.⁵⁸

b) *Reliance on international cooperation*

Investigations abroad are only possible through the system of international mutual legal assistance. The Stuttgart court's requests for legal assistance from the United Nations, the ICC and the Rwandan and Congolese governments were time consuming and only partially successful. In some cases, no response was received. In Germany, the defense team cannot issue any formal requests for legal assistance and thus must act as private parties in any investigations undertaken abroad. When carrying out investigations in the state where the crimes were committed, German authorities are dependent on the cooperation of that state. There is a danger that authorities in that state will try to influence the investigations, though there was no indication of this in the Stuttgart proceedings.

⁵⁷ Combs, Nancy, *Fact Finding without Facts*, Oxford 2013, p. 63.

⁵⁸ Witnesses are generally under an obligation to give testimony in criminal proceedings unless they have the right to refuse giving testimony for personal (e.g. for the accused's spouse) or professional (for the accused's doctor) reasons. Where the witness cannot avail of this right and still refuses to give testimony, the court can make orders to force the witness to cooperate, including arrest.

c) *Translation problems*

One of the major difficulties in the Stuttgart proceedings was the translation and interpretation into German from Kinyarwanda – which is widely spoken in Rwanda and adjacent regions of the DRC – and at times also from Swahili, French and English. Numerous documents, text messages and wiretap records had to be translated and many witnesses needed interpreters while giving evidence in court. The interpretation during trial was time consuming, and the quality of the translation in all stages of the proceedings was criticized, especially by the defense. The criticism concerned the translations of the interviews in Rwanda and in Congo as well as the many intercepted phone call recordings and text messages introduced as evidence at trial.

d) *Defense challenges*

Unlike at most international tribunals and courts, in Germany investigations are normally conducted only by the prosecutors and the police. These authorities are also obliged to investigate potentially exonerating facts.⁵⁹ A request to take up new evidence may be lodged with the court, which can under certain circumstances decline the request. The defense team in the Stuttgart proceedings unsuccessfully sought court financing to gather their own evidence.

Under German criminal procedural law it is clear that the defense may carry out its own investigations in all stages of the proceedings and are not subject to any material limitations, i.e. they may gather any kind of evidence they wish. The cost of this work will, however, only be covered if the defense first receives confirmation from the court that such investigations are necessary.⁶⁰ The court will often deny such requests, arguing that the rights of the accused are adequately protected through the obligation on the prosecution and court to include exculpatory evidence in their investigations. Such decisions are not reviewable, according to many commentators. The court in Stuttgart denied a number of such requests filed by the defense throughout the proceedings, which made it financially impossible for the defense lawyers to travel to the DRC for their investigations.

⁵⁹ Under Section 160 (2), German Criminal Code of Procedure.

⁶⁰ Section 46 (2) sentence 3, Section 55, Law on the Remuneration of Attorneys (*Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte*).

Further difficulties arose concerning the defense team's right to seek the introduction of evidence during the trial. This is of particular relevance in cases where the defense asks the court to summon witnesses. It is easier for the court to refuse a request to summon a witness who lives abroad than if a witness lives in Germany. The statutory limitations on the court's scope to deny a request do not apply here. The court must merely find that the evidence is not "necessary for establishing the truth".⁶¹

3. Sexual and gender-based violence

International crimes often involve acts of sexual violence. They are in mostly, although not exclusively, committed against women and girls. Such acts, which arise in various forms, are often part of the strategy of terrorizing the civilian population in the context of an armed conflict.⁶² Acts of sexual violence were widespread throughout the DRC conflict. The FDLR and other parties to the conflict were all accused of systematically inflicting sexual violence on the civilian population. The original indictment in the Stuttgart case listed five charges involving rape and/or sexual enslavement. All of these charges were dropped over the course of the proceedings.

Despite its prevalence in situations of conflicts, sexual violence is generally seriously underrepresented in the indictments and judgments of international criminal courts and tribunals.⁶³ This is partly due to the difficulties posed by the investigation and prosecution of crimes of sexual violence. Victims often avoid filing a criminal complaint out of fear of marginalization, social stigma or rejection by their families, or avoid mentioning in their testimony the sexual aspects of the violence they suffered. For successful prosecution it is thus important that investigators pay particular attention to these crimes. This also requires

⁶¹ Section 244 (5) sentence 2 Criminal Code of Procedure; see also criticism of this provision: Von Wistinghausen, Natalie, *VStGB und Strafverfahren: Beweisaufnahme und Angeklagtenrechte*, in: Safferling, Christoph / Kirsch, Stefan, *Völkerstrafrechtspolitik*, Heidelberg 2014, p. 204 f. (in German).

⁶² Haer, Roos / Hecker, Tobias / Maedl, Anna, *Former Combatants on Sexual Violence during Warfare; a Comparative Study of the Perspectives of Perpetrators, Victims, and Witnesses*, in: *Human Rights Quarterly*, 2015, Vol. 37, Number 3, p. 609 - 628; Swaine, Aisling, *Beyond Strategic Rape and between the Public and Private: Violence Against Women in Armed Conflict*, in: *Human Rights Quarterly*, 2015, Vol. 3, Number 3, p. 755 - 786.

⁶³ The ICC recently handed down its first conviction for sexual violence, although sexual violence played a role in all the situations examined by the court in the four trials completed at the ICC to date: ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment, 31.03.2016 (ICC-01/05-01/08).

effective – and generally costly – measures for the protection of witnesses and the provision of comprehensive support to victims throughout the entire proceedings.⁶⁴ Another reason for the reticence to investigate acts of sexual violence is that other forms of violence are often prioritized, side-lining the issue of sexual violence.⁶⁵ In many cases the prosecution also lacks any concrete strategy for addressing these crimes as well as sufficient resources like female staff members, psychologists specialized in sexual violence, and cultural mediators.

In light of the marginalization of this topic to date, it was a positive sign that efforts were made to prosecute the systematic and widespread acts of sexual violence. The charges originally brought encompassed the rape of at least 15 women. Some of the women died from the consequences of their rape, others were enslaved for several months and repeatedly raped. The proceedings in Stuttgart also once again highlighted the difficulties in taking criminal action against sexual violence, as set out in more detail below.

a) Treatment of affected persons

While German criminal law does contain some provisions on the interests of victims, some of which are particularly important in cases of sexual violence, the enforcement of these rights proved difficult in the Stuttgart proceedings.

German law includes a number of provisions on the protection of witnesses,⁶⁶ but these can prove inadequate in a situation like the FDLR trial. In this case the need to protect victims

⁶⁴ Killean, Rachel, An incomplete narrative: prosecuting sexual violence crimes at the extraordinary chambers in the courts of Cambodia, in: *Journal of International Criminal Justice*, 2015, Vol. 13, Issue 2, p. 331-352, p. 333 and p. 348.

⁶⁵ Studzinsky, Silke, Neglected Crimes: the Challenge of Raising Sexual and Gender-Based Crimes before the Extraordinary Chambers in the Courts of Cambodia, in: Susanne, Buckley-Zistel / Ruth, Stanley (eds.), *Gender in Transitional Justice*, London 2012; Buss, Doris, Rethinking 'Rape as a Weapon of War', in: *Feminist Legal Studies*, 2009, Vol. 17, Issue 2, p. 145 - 163.

⁶⁶ This includes the obligation to question witnesses in a considerate fashion (Sections 68a, 238, 241a, 242 Code of Criminal Procedure), the chance to have the accused and the public excluded from the hearing (Section 247 Code of Criminal Procedure, Sections 171b, 172 to 174 of the Courts Constitution Act (*Gerichtsverfassungsgesetz*), the partial or full anonymization of the witnesses (Section 68 Code of Criminal Procedure) and the assignment of legal counsel (Section 68b Code of Criminal Procedure). There is also the possibility to make an audiovisual recording of witness testimony taken during the investigations phase and present the recording at trial instead of hearing the testimony again (Sections 58a, 255a Code of Criminal Procedure) or holding the hearing away from the other parties to the proceedings for protection reasons, whereby the witness is at a separate location and an audiovisual recording of the hearing is transmitted before the court

giving witness testimony was particularly high given the ongoing civil war. Continuing battles between rebels and the Congolese army in eastern Congo made it very difficult for witnesses to travel any distance. Furthermore, travelling to Germany or indeed even trying to arrange travel documents combined with a relatively long absence from their homes could have raised suspicions that they were taking part in the proceedings. The German Federal Criminal Police officer responsible for witness protection testified that a witness faced certain death if it became known that he or she had given evidence. German authorities could of course not guarantee protection in the DRC. The entire witness protection program for the Stuttgart proceedings was overseen by just one official from the German Federal Criminal Police.

During the two investigatory visits by the prosecution and police authorities to Rwanda and the DRC in winter 2009 and spring 2010, various precautions were taken to protect victims serving as witnesses in the proceedings. They gave their testimony in locations away from their home villages, and all personal details were anonymized. The interviews were conducted by investigators from the central office for combating war crimes at the Federal Criminal Police Office. Also present during the interviews were staff members from a local organization that arranged the contact with many of the witnesses. It wasn't until August 2011, after witness testimony was gathered during the investigation stage, that the court ordered witnesses to be provided with legal counsel.

During the trial the Congolese victims gave witness testimony from a secret location in the region. Personnel from the German Federal Criminal Police witness protection program were present, as well as a German lawyer assigned to accompany witnesses. The witnesses were connected by video link to the courtroom in Stuttgart and were questioned by various parties in the proceedings. The identity of the witnesses was kept secret throughout. The public was excluded from the court for the duration of the questioning. Statements from the parties to the proceedings indicate that the process of giving evidence via video link at trial placed a great

(Sections 168e, 247a Code of Criminal Procedure). Furthermore, the prosecution authorities must inform those affected by crimes about their rights as soon as possible (Section 406h sentence 1 No. 1 Code of Criminal Procedure). The information must be communicated "as far as possible in a language they understand". Also of relevance here is the right of affected parties to take an active part in proceedings.

strain on witnesses. It may be questioned whether the court in Stuttgart adequately fulfilled its duty to protect witnesses from inadmissible questions from the defense and whether they were adequately prepared for the experience of testifying.

b) *Problems proving the facts*

The proceedings in Stuttgart also showed how difficult it can be to prove allegations of sexual violence. One reason for this was the aforementioned witness protection measures. Far-reaching witness protection measures can lower the evidentiary value of statements, for instance because the accused persons cannot fully assess the accuracy of anonymized statements and thus cannot defend themselves against these as well as they could in a case with non-anonymous statements. As a result the court in Stuttgart held that anonymous witnesses alone were not enough to support a conviction. Another reason for the lowered evidentiary value is the fact that witnesses living abroad can discontinue their participation hearing at any time or indeed completely refuse to take part. Doing so infringes the fundamental right of the defense to test the testimony of witnesses and question their credibility.

4. Victim participation

Under German criminal procedure law, victims of certain crimes can join the proceedings as a “private accessory prosecutor”,⁶⁷ independent of any other party to the proceedings and with a range of associated rights.

One of the aims of this mechanism is to shield victims from any avoidable strain imposed by the proceedings. It also serves the injured parties’ interest in ensuring the state respects the suffering caused by the crime and to ensure redress. Justice for the victims plays an especially important role in international criminal law. The conflict and post-conflict situations that are often at the center of international criminal proceedings are frequently marked by a culture of impunity and a lack of recognition of victims’ suffering. If the victim can contribute to a court judgment recognizing the injustice of what he or she suffered, this can, ideally, lead to a sense

⁶⁷ In German, *Nebenklage*.

of redress. Participation of many victims can increase the legitimacy of the trial among the affected community.

In order to participate as a private accessory prosecutor under German law, applicants must be victims of one of the crimes set out in Section 395 of the German Criminal Code of Procedure. This provision does not explicitly list crimes under the VStGB, but does include offenses against bodily integrity, murder, and serious sexual offenses, which will often form part of the proceedings brought under the VStGB.

Victims taking part in proceedings through this mechanism have the right to be informed about the proceedings.⁶⁸ They have the right to be present during the trial and to actively contribute to the proceedings, e.g. by applying for evidence to be taken or submitting statements. They have the right to question the accused, witnesses and expert witnesses and have the same right to be heard as the prosecution. They also have the right to give a closing statement⁶⁹ and to appeal decisions.

Of particular importance is the right of the private accessory prosecutor to have legal counsel and representation. On request, payment of the lawyer can be covered by the state in some cases. In cases of serious crimes, the victim will be automatically appointed a lawyer free of charge.⁷⁰

In the FDLR proceedings, no victim made use of this mechanism. The security issues detailed above and the inability of German authorities to guarantee effective protection was likely one reason for this. It is also possible that many of those affected did not know they could participate in proceedings. Questions may at least be raised as to whether, when meeting the victims, the investigators fulfilled their obligation to fully inform injured parties as early as possible of their rights. The court did not order witnesses to be assigned a lawyer – who could

⁶⁸ This includes the right to inspect files which also applies throughout the investigation stage of proceedings (Section 406e Criminal Code of Procedure). Private accessory prosecutors are also sent a copy of the bill of indictment (Section 201 Section 1 sentence 2 Code of Criminal Procedure).

⁶⁹ These and other rights are set out in Section 397 (1) of the Code of Criminal Procedure with a reference to the relevant rules of the various applicable procedural rights.

⁷⁰ In cases of certain grave crimes, the act must have caused or be expected to cause serious physical or mental harm to the private accessory prosecutor. See Section 397a (1) Code of Criminal Procedure.

have informed victims of their right to join the proceedings – until after the interviews in the investigatory stage had been carried out.

Another issue that may have played a role is that even if victims had joined the proceedings as private accessory prosecutors, there was no way to guarantee that they would be able to attend the trial. The German Criminal Code of Procedure only provides for the appointment of a legal counsel and not for the covering of costs associated with attending the proceedings. These costs are covered only when the victim is called to appear as a witness. The continuous attendance at trial and active participation in the proceedings, e.g. by promptly submitting statements on developments in the trials, are thus rendered impossible.

Shortly after the FDLR trial concluded, a new law on strengthening the rights of victims in criminal proceedings was introduced, improving the position of victims taking part in proceedings.⁷¹ Of great importance from the perspective of the victim is the statutory regulation of psycho-social assistance throughout the proceedings. This is defined as a special form of non-legal assistance before, during and after the trial for victims who are under an especially great amount of strain. It includes the conveyance of information as well as the qualified counseling and support throughout the proceedings aimed at reducing the individual strain on the victim, avoiding any secondary victimization and increasing their willingness to give evidence.

5. Perception of the trial in the Democratic Republic of Congo

The legitimacy of a trial under international criminal law arises from its potential impact on the affected society and, in the case of the FDLR trial and the Congolese civil war, ideally on the conflict itself. For this, the public in the affected region must be included in the trial or at least be in a position to learn about the trial.⁷² These aspects go beyond what can be achieved

⁷¹ *Gesetz zur Stärkung der Opferrechte im Strafverfahren (3. Opferrechtsreformgesetz)* (Law on the strengthening of victims' rights in criminal proceedings [3rd victims' rights reform law]), available (in German) at:

https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl_Staerkung_Opferschutzrechte.pdf?jsessionid=12310F99B889610A775FD41A2C799DFD.1_cid334?_blob=publicationFile&v=2. The law serves to implement Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.

⁷² This aims at a minimum to raise awareness of the case and promote understanding of the proceedings. A high degree of awareness among the affected society can raise the deterrent effect of the criminal proceedings and

within the confines of the trial itself, which necessarily focuses only on the criminal liability of certain actors. As part of a broader process of addressing past wrongs, additional measures may be taken to establish channels of communication with the affected population.

In this respect those involved in the FDLR trial failed completely. There was no official communication with the affected region. The brief updates from the press office of the Stuttgart court were published in German and related mainly to organizational aspects such as the scheduling of court dates. The failure to provide information in French or in any other local language mean that even organizations in the DRC working with victims of conflict violence, especially sexual violence, and who actively sought updates, were unable to transmit any information about the trials. In some instances European partner organizations like ECCHR provided them with information that they could disseminate locally.⁷³ The little information available was received with great interest in the region.

There are some positive examples – unfortunately only isolated instances could be found – of how it can be done. Dutch authorities take steps to keep the public at home and abroad informed of international criminal proceedings underway in the Netherlands. This responsibility rests not only on the press officers of the National Prosecution Office (NPO), a body that prosecutes crimes of national importance; staff within the NPO's war crimes unit also see external communication as a key element of their work.⁷⁴

contribute to peace and reconciliation. It also helps to better take into account the needs and expectations of the affected population as part of a broader process of addressing past wrongs. Ideally it leads to a societal sense of ownership over the proceedings. This is seen as crucial to the success of measures addressing past wrongs and to the legitimacy in the region where the crimes were committed. See also: Pentelovitch, Norman Henry, Seeing Justice Done: The importance of prioritizing outreach efforts at international criminal tribunals, in: Georgetown Journal International Law, 2008, Vol. 339, p. 446 ff.

⁷³ ECCHR published four interim reports in German, English and French on the progress of the Stuttgart FDLR trial. These are available at: http://www.ecchr.eu/en/our_work/international-crimes-and-accountability/congo-war-crimes-trial.html.

⁷⁴ Information is provided on the webpage (www.warcrimes.nl) and Twitter (https://twitter.com/warcrimes_nl) on the various cases in the relevant language, including Amharic (spoken in Ethiopia), Persian, Arabic, Kinyarwanda and Serbo-Croatian. The website also includes a database with prior decisions on international crimes, most of which have been translated into English.

IV. Recommendations for future proceedings

After the first completed trial under the VStGB, it can be concluded that the law withstood its first practical test. The proceedings did however reveal a number of deficiencies in the practice of international criminal law that should be remedied for future cases.

1. The practice of international criminal law in Germany

Investigations carried out to date by German authorities have focused almost exclusively on non-state actors. Yet international crimes are typically state crimes. They are enabled by or perpetrated through the apparatus of the state. This important element has not been reflected in the practice of German investigations. To fully implement international criminal law, Germany must finally start to include state offences in its investigations, irrespective of the nationality or the status of the perpetrators. Moreover, investigations must also include international crimes committed by multinational corporations.

Instead of investigating only lower-ranking perpetrators who happen to be in Germany, German authorities should focus on those most responsible for international crimes, even if it is unclear whether they will be present in Germany in the near future and thus whether it will be possible to undertake proceedings against them.⁷⁵ Even if a trial is not foreseeable, efforts to secure evidence or the issuance of an arrest warrant against those with the most responsibility for international crimes strengthen the system of international criminal justice.⁷⁶ These measures can limit the perpetrators' freedom of movement and material gathered can be used in subsequent criminal proceedings. Beyond that, these measures send a message to perpetrators and potential future offenders that there will be no impunity for grave human rights violations.

German prosecutors, however, still do not have the resources needed to carry out strategic investigations into international crimes under the principle of universal jurisdiction. The resources available to them should be increased to allow them to make a more strategic

⁷⁵ See Langer, Máximo, *Universal Jurisdiction is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven'*, in: *Journal of International Criminal Justice*, 2015, Vol. 13, p. 245 - 256.

⁷⁶ Schüller, Andreas, *The Role of National Investigations and Prosecutions in the System of International Criminal Justice – Developments in Germany*, in: *Sicherheit und Frieden (S+F)*, 2013, Vol. 4, p. 226 (230).

contribution to the international prosecution human rights violations than has been the case to date. As it stands, the principle of universal jurisdiction may be limited by subjective procedural restrictions in Germany, since the Federal Prosecutor has broad discretion when it comes to pursuing cases with no concrete link to Germany.⁷⁷ There needs to be a mechanism for challenging decisions to dismiss cases and decisions not to prosecute under the VStGB, especially where there is a political interest not to pursue the case.⁷⁸

A worrying trend in the current practice of international criminal law in Germany is the tendency to combine international criminal law cases with proceedings under problematic terrorism laws. Sections 129a and b of the German Criminal Code on terrorism offenses are problematic in part because of the requirement that prosecutions under these provisions be authorized by the German Federal Ministry of Justice. This allows prosecutions to be politically controlled in line with foreign policy considerations. Furthermore, the prosecution of international crimes as part of terrorism proceedings introduces the vague terminology of “terrorism” into situations of armed conflict.

2. Handling of sexual violence in conflict

Given the extent of sexual violence in the Congolese civil war it is disappointing that all of the charges relating to sexual violence were dropped over the course of the proceedings. As a result, none of the insight on these crimes provided by victims, likely under great personal strain, will reach the public. This raises the question whether a more careful investigation strategy or a more meticulous approach to evidence might have made it possible to reach a court judgment on some selected instances of sexual violence. There is a failure to do justice to the gravity of the brutal acts of sexual violence when such charges are dropped in favor of other serious crimes for reasons of convenience. The difficulties in proving these crimes may arise partly from the fact that the necessary witness protection measures can lessen the evidentiary value of the witness testimony by limiting the ability of the defense team to challenge the facts put forward. This problem is difficult to resolve, particularly in a situation characterized by the kinds of risks faced by witnesses in eastern DRC. These difficulties

⁷⁷ See above at footnote 14.

⁷⁸ Schüller, Andreas, *The Role of National Investigations and Prosecutions in the System of International Criminal Justice – Developments in Germany*, in: *Sicherheit und Frieden (S+F)*, 2013, Vol. 4, p. 226 (230).

could, however, have been at least reduced through a careful investigative strategy on sexual violence. In future proceedings, care must be taken to ensure that sexual and gender-based violence are adequately taken into account in all investigations and at all stages of the proceedings. This requires all involved personnel at the prosecution and the courts to have the necessary sensibility for these crimes.

There is also a need to ensure that the interests of the victims are taken into account at all stages of the proceedings. This involves, for instance, assigning legal counsel to victims at an early stage in the case and not, as in the FDLR case, months after the trial has started. Victims should also be offered professional psychological support. This would have been particularly necessary in the FDLR trial given what was described as the defense team's aggressive questioning of victims on the witness stand. Judges, prosecutors and police officers should also be trained in dealing with victims and witnesses who may be suffering from trauma. Professional training on trauma and sexual and gender specific violence should be obligatory. Further, there must be an adequate number of female personnel working on the investigation.

The proceedings in Stuttgart also revealed the need for improvements in witness protection measures. In this case the security issues for witnesses arose from the ongoing conflict in eastern DRC, making it impossible for German authorities to guarantee protection. Nevertheless, had adequate resources been made available it would have possible to significantly improve the security situation for witnesses who were prepared to give evidence. In the FDLR proceedings, the entire witness protection program was organized by just one official. By way of comparison, the International Criminal Court employs roughly 200 staff to arrange witness protection in its proceedings.

3. Victim participation

The lack of victim involvement in Stuttgart is disappointing, particularly given the importance of such participation for a society's broader process of addressing acts of mass violence. In future, victims should be offered an effective means of involvement in such proceedings, like the possibility of joining the proceedings as a private accessory prosecutor. This starts with providing sufficient resources for witness protection measures. It is vital for those affected by the crimes in question to be informed of their rights in a timely manner and to be assigned

legal representation as soon as possible. Ideally, Section 395 (1) of the German Code of Criminal Procedure should explicitly incorporate crimes under the VStGB to ensure that victims of these crimes are entitled to join proceedings through an accessory prosecution. The same applies to the appointment of free legal counsel to an accessory prosecutor under Section 397a (1) of the Code of Criminal Procedure.

For crimes of this kind, there is a need to consider amending the laws on private accessory prosecutions in order to allow victims to be present during the proceedings, and further need to consider the associated visa, financial, and organizational problems such as accommodation and living costs. At the very least there is a need to clarify that the state will cover the costs of a lawyer for victims of serious crimes who have a particularly great need for protection. Of course there are limits to the capacity of international criminal proceedings, at least as regards the participation of every victim. One solution might be to set up a system for victim groups to be represented at such proceedings, a proposal that has already been the subject of much discussion in Germany.⁷⁹

4. Outreach

For public outreach work in future proceedings, there is a need for a broader understanding of “public” that goes beyond Germany. Outreach efforts should also aim for a more active involvement of affected populations. Any serious effort to address international crimes will require the press offices of the prosecutors and the relevant courts to publish information on the proceedings in appropriate languages and to communicate this information effectively through various channels. Courts already have access to a pool of translators, but the requisite funding for translation must be allocated and staff resources at the press offices must be expanded accordingly.

It is also worth considering the introduction of a further duty on trial courts to provide information to the affected population. This duty could involve publishing indictments and

⁷⁹ The recent report of the expert commission on the reform of German criminal procedural law recommended establishing a procedure of exceptional cases allowing groups of private accessory prosecutors and the assignment of a legal counsel to represent the group in some. The report is available (in German) at: https://www.bmjv.de/SharedDocs/Downloads/DE/PDF/Abschlussbericht_Reform_StPO_Kommission.pdf?__blob=publicationFile&v=2. The danger of this approach is that the victim may feel the proceedings are being carried out by proxy and without any real participation on the part of the victim.

court decisions online. It would be advisable to set aside a budget for the courts in such proceedings for the translation of documents into the relevant languages. It is not too late to introduce such a procedure for the first instance judgment in the FDLR case. It would also be helpful to provide information on the proceedings that would allow readers to follow the development of the case. This has proven very useful at the international criminal courts and tribunals. Better understanding of the trials would also allow the testimony of victims to have greater resonance. One option would be to compile transcripts of the trial which could subsequently be translated. Another possibility, currently being discussed in Germany, is the introduction of audiovisual documentation of trials.⁸⁰

All of this, of course, requires resources. The costs would be reasonable in light of the importance of public outreach for the legitimacy of such trials and the effort it takes to carry out criminal proceedings for acts with a transnational aspect. Such measures are ultimately essential if Germany is to undertake meaningful criminal proceedings with the capacity to achieve their aims.

⁸⁰ A discussion is currently underway as whether this should be a binding requirement under the condition that this does not extend the possibilities for appeal. See report of the expert commission on the reform of German criminal procedural law, *ibid.*



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