Monitoring the Trial of Onesphore R. Before the *Oberlandesgericht* Frankfurt

By Nicolai Bülte, Johanna Grzywotz, Tobias Römer & Leonard Wolckenhaar[*]

A. Introduction

"Twenty years ago today our country fell into deep ditches of darkness—twenty years later, today, we are a country united and a nation elevated."[1]

Those were the words of Rwanda's Minister of Foreign Affairs, Louis Mushikiwabo, on 7 April 2014, as he spoke to the Rwandan People at the twentieth anniversary of the beginning of the Rwandan genocide. Thousands of Rwandans gathered at Rwanda's main sports stadium, the Amahoro stadium, in Kigali to mourn their losses together. Ban Ki-moon, the UN Secretary-General, lit a flame at the Kigali Genocide Memorial Center and not only expressed his solidarity with all Rwandans, but also emphasized that the United Nations could and should have done more to avoid the most devastating chapter in Rwanda's history.

On 18 February, two months before the anniversary took place, the *Oberlandesgericht Frankfurt* (*OLG Frankfurt*) delivered its judgment regarding an individual who was charged with participating in the Rwandan genocide[2]—a trial which set out to "enlighten everything that needs to be enlightened," as the Presiding Judge Sagebiel phrased it.[3] The trial against Onesphore R. before the *OLG Frankfurt* began on 18 January 2011. R.—a former mayor of

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[1] Louis Mushikiwabo, *Remarks at the Commemoration of the 20th Anniversary of the Rwandan Genocide*, UNITED NATIONS (March 5, 2015), http://www.un.org/sg/statements/index.asp?nid=7572.

[2] *See* Oberlandesgericht Frankfurt [OLG], Case No. 5-3 StE 4/10 - 4 - 3/10, 2014 (Feb. 18, 2014) [hereinafter *Judgment of February 18, 2014*].

[3] *See* The Trial-Monitoring Programme of the International Research and Documentation Centre for War Crimes Trials (ICWC), *Monitoring Report No. 2*, PHILIPPS-UNIVERSITY MARBURG 1 (last visited Mar. 5, 2015), available at https://www.uni-marburg.de/icwc/monitoring/monitoring-prozessbeobachtung-marburg-frankfurt-olg-onesphore-r.

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Muvumba, a small community located in northeast Rwanda—was accused of participating in several mass killings during the Rwandan genocide in 1994. This trial was the first to take place in Germany for crimes committed on the African continent.[4] It lasted three years, during which 120 sessions took place. Finally, R. was convicted for abetment in genocide and sentenced to fourteen years of imprisonment.[5] Over these three years, the court questioned 118 witnesses and four experts.[6] Many witnesses were able to testify in person, though there were also a number of witnesses who could not enter Germany for a variety of reasons. These witnesses testified via video link. In addition, the judges read out eighty-five documents and examined a multitude of photographs and video recordings.

This enormous trial was monitored in its entirety by students from the Marburg Trial Monitoring Program of the International Research and Documentation Centre for War Crimes Trials (ICWC) at Philipps-University Marburg. Because the decision is being appealed on matters of law, this article will be reluctant to assess the court's judgment. Instead, the article will focus on two major points. First, the article will focus on the approach taken in Marburg to the monitoring of trials. Second, the article will explain the judgment against R. in an effort to make it more available to people outside of German speaking countries.

The discussion on the legitimacy of conducting such trials on the ground of universal jurisdiction, and whether this particular trial might be of general relevance for other trials in the field of international criminal law before national courts,[7] has already begun.[8] From a monitors' perspective—without prematurely anticipating the systematic scientific analysis of the monitors' reports yet to come—this article intends to shed light on some problems a

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[4] Patrick Kroker, *Universal Jurisdiction in Germany: The Trial of R. before the Higher Regional Court of Frankfurt*, 54 GER. YEARBOOK OF INT'L L. 671 (2011).

[5] *See Strafgesetzbuch* [StGB] [Penal Code] § 220a. StGB since has been embodied in the *Völkerstrafgesetzbuch* (*VStGB* - Statute of International Criminal Law). Because the older version was in place when the massacre was committed, and the new law is not more lenient, R. was charged based on the older version. An English version of the Statute is available at https://www.mpicc.de/files/pdf1/vstgbleng2.pdf.

[6] *Cf. Press Release*, OLG FRANKFURT (Feb. 18, 2014), *available at* https://olg-frankfurt-justiz.hessen.de/irj/OLG_Frankfurt_am_Main_Internet?rid=HMdJ_15/OLG_Frankfurt_am_Main_Internet/nav/d44/d4471596-ad85-e21d-0648-71e2389e4818,d7012aab-1bf3-4417-9cda-a2b417c0cf46,,,11111111-2222-3333-4444-100000005004%26_ic_uCon_zentral=d7012aab-1bf3-4417-9cda-a2b417c0cf46%26overview=true.htm&uid=d4471596-ad85-e21d-0648-71e2389e4818.

[7] Those to come but also the already ongoing trial against Ignace M. and Straton M. before the Higher Regional Court of Stuttgart.

[8] *Cf.* Natalie von Wistinghausen, *VStGB und Strafverfahren: Beweisaufnahme und Angeklagtenrechte*, *in* VÖLKERSTRAFRECHTSPOLITIK 199, 201–02 & 208–09 (Christoph Safferling & Stefan Kirsch eds., 2014); Florian Hansen, *Zwischenbericht zur Verfahrensbeobachtung im Strafverfahren gegen R. vor dem Oberlandesgericht Frankfurt*, *in* VÖLKERSTRAFRECHTSPOLITIK 433, 435.

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German court has to face when deciding a case that not only occurred in a foreign land but also occurred much earlier in time.

B. The Marburg Trial-Monitoring Program

I. The Idea Behind a Monitoring Program in General

The idea of implementing the Marburg Trial-Monitoring Program is influenced by international monitoring of trials, particularly by programs monitoring proceedings before the Extraordinary Chambers in the Courts of Cambodia (ECCC). Participants in the monitoring program not only watch a trial but also are bound to objective and academic standards while doing so. The monitors compile daily reports during and after the trial, and the reports are available for further examination.[9] The Monitoring Program has many different aims.[10] First, the program aims to secure the rule of law and the rights of the defendant through the mere presence of people during the trial and knowledge of later following publication. From a different angle, monitoring a trial should ensure that the conviction of a defendant is just. Second, patterns of jurisdiction and structural problems in the legal system can be revealed through monitoring a trial, in particular through a major monitoring program because media coverage might be one-sided or reporters might lack the necessary legal background to fairly cover the trial. The publication of the reports may also raise public awareness for other potential problems that exist in the legal system. Moreover, monitoring these trials may also push legislative and public authorities to think about these problems.

II. The Realization of the Marburg Trial-Monitoring Program

R.'s trial before the *OLG* Frankfurt offered an ideal opportunity to establish a monitoring program in Marburg—the first within a university setting. The program had numerous aspirations. The most important ones were, and still are, to ensure adherence to fair trial standards and to provide a detailed documentation of the trial. The Marburg monitors are grouped in teams that watch the trial and keep records of each day.[11] This is of particular interest in the context of the German court system because German procedural law does not provide for a written record. The daily report not only records legal aspects but also information about the participants' behavior. Publishing those records however would cause the risk of witnesses who have not yet given their testimonies being influenced by

[9] *See* Christoph Safferling, et. al, *Das Monitoring-Projekt des Forschungs- und Dokumentationszentrums für Kriegsverbrecherprozesse (ICWC), Marburg*, *in* ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 564 (2011).

[10] *Cf.* OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, TRAINING MANUAL FOR HUMAN RIGHTS MONITORING 285 (2001); TRIAL OBSERVATION FOR CRIMINAL PROCEEDINGS 4 (International Commission of Jurists ed., 2009).

[11] *See* Hansen, *supra* note 8, at 435.

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the reports, and allowing them to change their testimony according to previous statements. Therefore, less detailed reports are written and put online in order to enable people to inform themselves about the proceeding.

After a trial is finished, a scientific evaluation is conducted by comparing different witnesses' testimonies or by examining the behavior of the court to determine whether the court violated the rights of the defendant. The independence of the monitors is crucial. The monitors must not be related to any party of the trial to ensure the objectivity of their work, which is important for the compilation of the reports and the evaluation that will follow later.[12] This requires appropriate training. Participants of the Marburg Trial-Monitoring Program are obliged to attend lectures on substantive and procedural law, for instance on international criminal law. In addition, the supervisors of the Program conduct workshops about monitoring a trial, and in the current case of the R. trial, there were specific workshops focused on the conflict in Rwanda and its historical background. The Marburg Trial-Monitoring Program is highly multidisciplinary because students from peace and conflict studies participate in the program along with law students and students of political science, ethnology, and even pedagogics. This variety of students leads to a flexible exchange between the represented disciplines. During monthly meetings, the monitors inform each other about the progress of the trial. Afterwards, legal problems are discussed or a guest speaker may be invited to communicate his point of view on a special topic.

C. The Trial Against R. Before the *OLG* Frankfurt

It might be surprising that a trial is held in Germany because of a mass crime that occurred half a world away.[13] Generally, State sovereignty limits the penal power of a state to its own territory. There are, however, exceptions to this general rule. This section will lay out one important exception regarding international criminal law, which provided the legal framework for R. to be tried in Germany.

I. Legal Background

Certain situations that allow for universal jurisdiction are provided for in section 6 of the *StGB*.[14] According to this provision, German jurisdiction applies for every crime that is

[12] *See id.* at 436.

[13] In addition, it has a highly complicated historical background. This will not be examined here because it is beyond the scope of this article.

[14] *Cf.* StGB § 6, *in* KOMMENTAR ZUM STRAFGESETZBUCH 1 (Urs Kindhäuser, Ulfrid Neumann, & Hans-Ullrich Paeffgen eds., 2013); CAROLINE VOLKMANN, DIE STRAFVERFOLGUNG DES VÖLKERMORDES NACH DEM WELTRECHTSPRINZIP IM INTERNATIONALEN STRAFRECHT UND IM VÖLKERSTRAFRECHT 37 (2009).

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enumerated later in the statute. Genocide[15] was the first enumerated crime. In 2002, the federal German legislator introduced the *Völkerstrafgesetzbuch* (*VStGB* – Code of Crimes Against International Criminal Law) and thereby transferred the old section 220a of the *StGB* to the new section 6 of the *VStGB*. This did not result in any significant modifications to the substantive law,[16] but the legislator used this opportunity to change the prerequisites for German prosecution in the field of international criminal law. Due to section 1 of the act, the *VStGB* applies even to offences committed abroad and without any link to the Federal Republic of Germany. In previous cases, the *Bundesgerichtshof* (*BGH* - Federal Court of Justice) had required a domestic link[17] in order to protect the sovereignty of other states.[18] Although this prerequisite is now obsolete following the introduction of section 1 of the *VStGB*, it is nevertheless fulfilled in R.'s case. This is relevant because he was tried under the old law.[19]

II. R. in Germany

R. studied in Trier, Germany, from 1982 until 1985. Afterwards, he returned to Rwanda and was appointed mayor of Muvumba in 1988, a position he held until the genocide started in 1994. Afterwards, he fled to Tanzania and the Congo, eventually returning to Germany in 2002. He was granted asylum in 2007. One year after R. had been granted asylum, the investigative authorities sprang into action on his case. R. was arrested for the purpose of extradition on 25 March 2008 due to a letter rogatory from Rwandan authorities.[20] After a decision by the *OLG Frankfurt*, R. was released from detention in November of the same year.[21] In its decision, the *OLG Frankfurt* referred to the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR),[22] stating that the structure of punishment in Rwanda would not comply with international standards and a fair trial could not be ensured.[23] The

[15] *See supra* note 5.

[16] *See* Kroker, *supra* note 4, at 673.

[17] *See* Bundesgerichtshof [BGH - Federal Court of Justice], Case No. I BGs 100/94, 1994 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 14, para. 232 (Feb. 13, 1994).

[18] Nevertheless, the *Generalbundesanwalt* shuts down investigation based on universal jurisdiction if a domestic link is missing due to the principle of opportunity (*Opportunitätsprinzip*) to avoid a violation of a state's sovereignty. *Cf. Generalbundesanwalt*, JURISTISCHE ZEITUNG (JZ) 311 (2005).

[19] *Cf. id.*

[20] *See* von Wistinghausen, *supra* note 8, at 199.

[21] *See* OLG, Case No. 2 Ausl A 175/07 (Nov. 6, 2008).

[22] *See Prosecutor v. Munyakazi*, ICTR - Trial Chamber III, Case No. ICTR-97-36-R11bis (May 28, 2008); *see also Prosecutor v. Munyakazi*, ICTR - Appeals Chamber, Case No. ICTR-97-36-R11bis (Oct. 8, 2008).

[23] The jurisprudence of the ICTR referring to this has changed since December 2011. As a result extraditions to Rwanda have been declared legitimate. *Cf. Prosecutor v. Uwikinid*, ICTR - Referral Chamber, Case No. ICTR-2001-

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Generalbundesanwalt (The Federal Prosecutor General) then initiated investigations with the material available in Europe. This once again resulted in R.'s arrest in December 2008.[24] This warrant of arrest was also annulled by the *BGH* in May 2009.[25] The *Generalbundesanwalt* started investigations in Rwanda with the aid of the *Bundeskriminalamt* (German Federal Criminal Police Office), finally leading to R.'s imprisonment on remand in July 2010.[26] A few days later, the *Generalbundesanwalt* brought the charges against R.

III. The Indictment

R. was accused of genocide on three counts in concurrence with offenses of murder according to sections 220a (old version), 211, and 52 of the *StGB*. He was accused of killing 3,732 people in total.[27] Originally, the indictment was focused on three massacres, but on the forty-seventh day of the trial, the court modified and limited the charges to one massacre on 11 April 1994 at a church ground in Kiziguro. The court did so in correspondence with section 154a of the *Strafprozessordnung* (*StPO*[28]–German Code of Criminal Procedure) upon application of the *Generalbundesanwalt*.[29]

IV. Rendition of Judgment

On 18 February 2014, the one hundred twenty-first day of the trial, the judgment was delivered. R. was convicted of abetment in genocide and sentenced to fourteen years' imprisonment.[30] It was further ruled that six months of the sentence be considered to have already been served because of the inappropriate length of the trial.[31]

75-R11bis (June 28, 2011); *Prosecutor v. Uwikindi*, ICTR - Appeals Chamber, Case No. ICTR-01-75-AR11bis (Dec. 16, 2011); *Ahorugeze v Sweden*, ECHR App. No. 37073/09 (Oct. 27, 2011); Kroker, *supra* note 4 at 676.

[24] *See* von Wistinghausen, *supra* note 8, at 200.

[25] *See* BGH, Case No. 3 BJs 10/08-2 (May 14, 2009).

[26] *Cf.* Christian Ritscher, *Die Ermittlungstätigkeit des Generalbundesanwalts zum Völkerstrafrecht: Herausforderungen und Chancen*, *in* VÖLKERSTRAFRECHTSPOLITIK, 223, 228 (Christoph Safferling & Stefan Kirsch eds., 2014).

[27] *See* ICWC, *Monitoring Report No. 1*, *supra* note 3.

[28] An English version of the Code is available at http://www.gesetze-im-internet.de/englisch_stpo/index.html (last visited Mar. 5, 2015).

[29] *Cf.* ICWC, *Monitoring Report No. 28*, *supra* note 3.

[30] *Cf. supra* note 5.

[31] *See* BGH, Case No. GSSt 1/07 (Jan. 17, 2008).

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1. The Court's Findings

The *OLG* Frankfurt was satisfied that R. had participated in the massacre of Kiziguro. Before describing the process, the court set out two things. First, it described at considerable length the historical background of the genocide.[32] This is not unusual for German courts dealing with complex crimes, especially in trials dealing with crimes committed in Nazi Germany. It may be surprising, however, because there might be no need, strictly speaking, to do so when examining a specific charge—the historical background is not of particular interest when answering the question of whether or not a crime has been committed.

Second, the court remarked that R. fled south with citizens of his community to Murambi to escape the Rwandan Patriotic Front (RPF) attacks. Jean Baptiste Gatete, who was convicted for his participation in the Rwandan genocide by the ICTR,[33] was mayor of Murambi and considered the community's "strong man." After the president's airplane was shot down on 6 April 1994, a multitude of refugees—mostly Tutsi but some moderate Hutu—gathered on the church grounds of Kiziguro seeking protection. The court concluded that in the early morning of 11 April 1994, G. and R. arrived at the scene where hundreds of soldiers waited for their orders. It further found that G. was the main perpetrator who had control over both the situation and the attackers. He ordered the soldiers to begin their "work"—a word still used in Rwanda to this day as a synonym for "kill"[34]—which as a consequence led to the killings.[35] The court repeatedly pointed out that the killing only began after G.'s command. In addition, the court referred to the Rwandan mentality present at the time to adhere to the orders of authority figures described as administrators. Dr. Hankel,[36] one of the main experts during the trial, described this

[32] *Cf. Judgment of February 18, 2014* at paras. 134–208; *see also infra* Section C.IV.1.

[33] *Cf. Prosecutor v. Gatete*, ICTR - Trial Chamber III, Case No. ICTR-2000-61-T (Mar. 31, 2011); *Prosecutor v. Gatete*, ICTR - Appeals Chamber, Case No. ICTR-00-61-A (Oct. 9, 2012).

[34] *See Judgment of February 18, 2014* at para. 621.

[35] *Cf. Judgment of February 18, 2014* at paras. 620 & 731.

[36] He is both a linguist and a lawyer and belongs to the staff of the renowned "Hamburger Institut für Sozialforschung." He did a lot of research in Rwanda as well. *See infra*, Section C.V.2.a) (describing further details on his reports).

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mentality in his report.[37] The court was satisfied that G. did not conduct the killings but committed his crime indirectly "through other people."[38]

The court further stated that R., as mayor, was a highly respected figure. Thus, he had been able to convince a greater amount of people to go to the church, and took them there by car. They then, in turn, participated in the killing. The breadth of his authority was not only limited to the people of Muvumba but also comprised attackers from Murambi. This, in the eyes of the court, proves that the attackers were not indifferent as to the defendant's actions. Rather, they could have gotten into a conflict of loyalty between G. and R.[39] In the very next paragraph, however, the court set out that it was not able to determine what would have happened if R. had given different orders. Because all of the attackers from Muvumba as well as those from Murambi were aware of the fact that G. was the "strong man" of the community of Murambi, it could not be said that the attackers would not have attacked as they did without R.'s presence. Thus, to the court, there were two possible scenarios. In the first, G. and R. were co-perpetrators of the massacre. In the second, G. was the main perpetrator and R. only aided his crime. *In dubio pro reo*, the court assumed the latter.[40] Further, a conviction for perpetratorship was not possible because the court had not made any findings as to whether R. himself had intent to commit genocide.[41] The court only was satisfied that he knew of the attackers' intent to do so.

2. Perpetratorship in German Law

The scenario as set out by the court might be a textbook example of the distinction between perpetratorship and participation in German law. Thus, the legal framework will be set out briefly. German law recognizes three forms of perpetratorship and two forms of participation.[42]

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[37] *See Judgment of February 18, 2014* at para. 623; *see also* ICWC, *Monitoring Report No. 2 & 3*, *supra* note 3.

[38] *See Judgment of February 18, 2014* at para. 734.

[39] *See id.* at para. 624.

[40] *See id.* at paras. 625 and 764–65. *Cf.* BGH, Case No. 1 StR 168/96, 1996 NStZ, 434–35 (May 19, 1996); BGH, Case No. 4 StR 369/11 (Aug. 10, 2011).

[41] *See Judgment of February 18, 2014* at para. 765. This, however, comes close to circular reasoning; the court did not undertake any investigations in that matter because it had already come to the conclusion that R. was not a perpetrator for the former reason.

[42] *See* StGB §§ 25–27.

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2.1 Different Forms of Perpetratorship

Section 25 of the *StGB* defines perpetratorship in its first paragraph. The provision distinguishes between a person who commits a crime fully by themselves, direct perpetration, and through others, indirect perpetration. The second paragraph makes another distinction between a perpetrator acting on their own (*Alleintäterschaft*) and in conjunction with others (*Mittäter* – co-perpetratorship). Combining these two distinctions leads to three possible kinds of perpetratorship. Logically, there are four combinations. The fourth one, however, which combines indirect perpetration and co-perpetration, does not imply any legal consequences exceeding those of the two forms of perpetratorship individually. Hence there is no reason to speak of four kinds in legal terms.[43] The first one—sole perpetration—is the most basic form of perpetration and thus does not need be explained.

2.2 Indirect Perpetration

The concept of indirect perpetration is more complex. It applies where the perpetrator uses another person, called *Tatmittler* (intermediary), as a tool to commit the offence. This kind of perpetratorship is distinct because the intermediary—at least in most cases—lacks criminal responsibility for the crime that the indirect perpetrator may later be charged with, and that the indirect perpetrator is able to control the crime due to his full knowledge and power in that situation. A very basic example is a case in which a physician hands a syringe to a nurse and orders her to administer "medicine" to a patient. The nurse, believing what she has been told to be true, follows the physician's instructions. In truth, the syringe was filled with poison leading to the patient's death, as the physician intended.

In this case, there are multifarious reasons why the intermediary might lack criminal responsibility. The nurse had no intent. Other examples may be inculpable or justified intermediaries.[44] It should be pointed out that it is not necessary that the intermediary not face any criminally liability, but only that the intermediary does not face liability for the crime the indirect perpetrator commits. Thus, it is possible that the nurse might be liable for negligent manslaughter because she ought to have known that the syringe did not contain medicine. If she knew the truth about the content, she would be liable for murder after administering the poison. In that case, the physician would not be an indirect perpetrator.

In some cases, however, there are exceptions. A person can be an indirect perpetrator of a crime even if the intermediary is fully criminally liable for the very same offence. This is described as *mittelbare Täterschaft kraft Organisationsherrschaft* (indirect perpetration

[43] *See* Thomas Fischer, *§ 25*, *in* STRAFGESETZBUCH MIT NEBENGESETZEN para. 2 (62th ed. 2015).

[44] *See id.* at para. 5.

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through organizational power).[45] Its applicability is quite restricted and may only be found when the indirect perpetrator is able to command the intermediary because of his membership in an organization, the organization has loosened itself from the boundaries of law, thus is no longer controlled by it, and the intermediary is fungible, meaning that if they do not carry out the deed, somebody else will. The concept was first developed by Roxin[46] as a reaction to the Eichmann trial in Israel.[47] Since then, it has been used as a means to sentence, *inter alia*, heads of states and other highly ranked officials whose orders are indirectly responsible for pulling the trigger, not only as instigators but as perpetrators;[48] especially in concentration camp trials and after the German reunification in the trials over the Berlin Wall Shootings.[49]

The case discussed here might be another infamous example of the applicability of indirect perpetratorship through organizational power, at least in the opinion of the court. Hence, it was never an issue whether R. could have been the massacre's instigator,[50] but rather whether he, if found guilty, was perpetrator or mere abettor.

2.3 Co-Perpetration

The third kind of perpetratorship is co-perpetration, where several people act together as principals to commit an offence. While determining whether someone acted as co-perpetrator is relatively easy as long as every actor commits at least one *actus reus* element themselves, it becomes rather difficult as soon as one does not. The question then arises as to whether this person may have only abetted the others. How to distinguish these possibilities is not unanimously answered among jurisprudence and scholars. Certainly two people committing an offense must act upon a common plan. The *Tatherrschaftslehre* (doctrine of effective control) additionally demands—as the name suggests—that every perpetrator is able to control the situation, having the further progress or termination of the offense at his fingertips.[51] As an element of *mens rea*, this

[45] *See* Fischer, *supra* note 43, at paras. 2–7.

[46] *See* Claus Roxin, *Straftaten im Rahmen Organisatorischer Machtapparate*, 110 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 963, reprinted in *Crimes as Port of Organized Power Structures*, 9 J. OF INT'L CRIM. JUST. 193 (2011).

[47] *See* Wolfgang Joecks, *§ 25, in* MÜNCHNER KOMMENTAR ZUM STRAFGESETZBUCH para. 133 (Wolfgang Joecks et al. eds., 2d ed., 2011).

[48] States are one of the two historically interesting areas of that concept, the other being organized crime in which this concept might be applied. *See* Joecks, *supra* note 47, at paras. 140–52 (discussing whether or not to apply it to international concerns).

[49] *See* BGH, Case No. 5 StR 98/94, BGHST 35, 347 (July 26, 1994); *see also* BGH, Case No. 5 StR 281/01, BGHST 48, 77 (Nov. 6, 2002).

[50] *See* Ritscher, *supra* note 26, at 229.

[51] *See* Joecks, *supra* note 47, at para. 5.

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theory demands *Tatherrschaftswillen* (intent to be in control of the situation). The other popular theory, which is constantly used by the courts, is the *modifizierte Animus-Theorie* (modified animus-theory). This theory requires an assessment of the whole situation to find co-perpetratorship, for which four criteria are used: The interest the person has in committing the crime, the extent of participation in it, how much control they have in the situation, and their intent to be in control.[52] As has been stated, the court was not satisfied that R. was in control of the situation. R., therefore, could only be convicted of abetting the crime. Despite the fact that it never really was an issue whether he himself had killed anyone, this outcome was by no means certain.[53]

3. The Sentence

R. was sentenced to fourteen years' imprisonment,[54] just below the maximum sentence possible for aiding in a crime. In such cases, the possible sentence depends on the offense abetted but has to be reduced.[55] The offense aided in was genocide,[56] which carries a mandatory life sentence.[57] The reduction leads to a penalty range of at least three years.[58] The maximum temporal sentence is fifteen years.[59] In analyzing the mitigating factors regarding sentencing, the court took into consideration that the defendant made a statement not only as to his person but also as to the offense he was charged with, including things that spoke against him. The court however did not set out which of the defendant's statements were important in that matter. Further, R. had not previously been convicted. Additionally, he helped Tutsi during the genocide before and after the massacre, held conventions asking his people not to partake in the genocide, and helped Tutsi from his community get through roadblocks on their way to Tanzania. Further, R. and his family had lost members of their family in the war, and he had been separated from his family on the run. During that time, he was a prisoner of militia commander Bemba, who compelled him to help build roads.

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[52] *See* Fischer, *supra* note 43; *see also* BGH, Case No. 1 StR 739/73, BGHSt 28, 346 (Mar. 13, 1979); *see also* BGH, Case No. 5 StR 492/90, BGHST 37, 289 (Jan. 15, 1991).

[53] See the original charge. The prosecution kept to their assessment that R. was a perpetrator up to their closing statement. *Cf.* ICWC, *Monitoring Report No. 84*, *supra* note 3.

[54] *See Judgment of February 18, 2014* at para. 790.

[55] *See* StGB § 27.

[56] *See supra* note 5.

[57] At least when the charge is that one killed members of the protected group. All other ways of committing genocide can possibly be considered a less grave incident leading to a minimum sentence of five years. *See id.*

[58] *See* StGB § 49.

[59] *See* StGB § 38.

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R. was well-integrated in Germany and tried to make a living on his own. In addition, the court held in R.'s favor that he had been in detention pending extradition in 2008, and that this trial led to a proceeding which most likely would lead to him being extradited to Rwanda after his imprisonment, and that he had been in investigative custody for about forty-eight months when the judgment was delivered. R. was especially sensitive to being in prison because of his age and different ethnic background. Lastly, the court took into consideration that the deed committed had taken place twenty years ago, and that R. had expressed his empathy towards the victims of the genocide.[60]

The court found to speak against R. that he had aided the killing of at least 400 people, the greater part of which had been committed brutally by cutting down and leaving the victims heavily wounded, to a death during which they experienced several minutes of pain and suffering. The court held that this outweighed the points speaking in favor of R. so much that a sentence at the high end of the penalty range appropriately mirrored the crime and the defendant's guilt.[61]

4. Compensating the Overlong Trial

As has been mentioned above,[62] the trial lasted for three years, from 18 January 2011 to 18 February 2014. Prosecution,[63] defense,[64] and the court all found this to be too long a period. The court found that the defendant's right to a speedy trial guaranteed by Article 6(1) of the European Convention on Human Rights was violated.[65] The prosecution argued that the period of six months was appropriate, while the defense argued that this was not enough, although they made no further specification as to the length. The court shared the prosecution's opinion that six months was to be considered an adequate amount of time served to compensate for the overlong duration of the trial.[66] The court pointed out the difficulties it had to face during the trial, such as the case's international aspects and the fact that it was impossible to hold trial twice a week, as usually is necessary in investigative

[60] *See Judgment of February 18, 2014* at paras. 775–87.

[61] *See id.* at para. 788.

[62] See *supra* Part A.

[63] *See* ICWC, *Monitoring Report No. 84*, *supra* note 3.

[64] *See* ICWC, *Monitoring Report No. 85*, *supra* note 3.

[65] As the defense pointed out in their closing statement, that, *e.g.*, trial took place on only twenty-four days, half of them being short hearings, and the average length of one day being 2.7 hours.

[66] *See Judgment of February 18, 2014* at para. 739 (compensating for overlong trials by considering a part of the sentence as already served is common practice in Germany since BGH, Case No. GSSt 1/07 (Jan. 17, 2008), *available at* http://www.hrr-strafrecht.de/hrr/3/07/gsst-1-07.php).

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custody cases.[67] Some documents were requested from the ICTR by mail that remained unanswered for several months. Some witnesses had to be resummoned from Rwanda, and the court learned of some survivors of the massacre of Kiziguro only during the proceeding. In addition, the defense travelled to Rwanda to gather evidence, which had to be organized.[68] The court was of the opinion that even in those circumstances, the length of the trial was not justified. Based upon the notion of two days of trial per week, and the fact that a year has fifty-two weeks, 104 trial days were considered appropriate. The court subtracted from that fifteen weeks, which were needed to allow for the vacation and schedule difficulties because of other trials the seven judges were involved in. Therefore, seventy-four trial days were required per year, just over six days per month. If that had been the case, the trial would have been over in approximately nineteen months. Because of the more than three-year length of the trial, it took eighteen months too long.[69] The court then set out that the difference was that the defendant had been in penal incarceration instead of investigative custody, the latter not allowing for the easing of detention conditions.

V. Problems During the Trial of R.

The trial against R. surely proved to be a fairly difficult trial. The last part of this article will set out some of the aspects that the monitors deemed relevant.

1. Witnesses as Main Evidence

In national trials conducted on the ground of universal jurisdiction, dealing with the national implementation of international criminal law, the *lex fori* principle leads to the application of national criminal procedural law[70]—the *StPO*. It contains several maxims for conducting criminal proceedings derived from the constitutional rule of law principle. As a part of the continental European civil law system, one of the *StPO* principles is the maxim of *ex officio* investigation. This means the duty of the court to ascertain the truth by investigating all relevant facts of the case,[71] including high efforts for fact finding, stipulated

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[67] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1964/05, BVERFGK paras. 7, 21 (basing analysis upon previous decisions finding that trial must be held "more than once a week"); *see also* BVerfG, Case No. 2 BvR 2057/05, BVERFGK paras. 7, 140 (Dec. 29, 2005); *see also* ECHR App. No. 49746/99 (July 29, 2004) (explaining Cevizoviv against Germany).

[68] *See Judgment of February 18, 2014* at paras. 794–804.

[69] *See id.* at 804.

[70] *See* CHRISTOPH SAFFERLING, INTERNATIONALES STRAFRECHT – STRAFANWENDUNGSRECHT – VÖLKERSTRAFRECHT – EUROPÄISCHES STRAFRECHT § 4, para. 12 (2011).

[71] *See* BVerfG, Case No. 2 BvR 215/81, 57 BVERFGE, paras. 250, 275 (May 26, 1981); *see also* BVerfG, Case No. 2 BvR 864/81, 63 BVERFGE, paras. 45, 61 (Jan. 12, 1983).

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in section 244 II of the *StPO*.[72] Alternatively, the rights of the accused and the efficiency of a trial prohibit excessive investigations and limit the aforementioned duty to the merits of the case.[73] For that purpose, the *StPO* provides for the use of different kinds of evidence.[74] In accordance with the principle of immediacy, evidence mostly related to the incident in question has to be presented primarily, in a direct and unmediated way within the main trial.[75] The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole.[76]

To determine whether basing such conviction in accordance with the rules and maxims of the German national criminal procedural law is possible within the macro criminal context of the Rwandan genocide, it is helpful to observe how the court used evidence. With respect to the events in Kiziguro, the main evidence was almost only comprised of witnesses.[77] A witness is considered the most unreliable kind of evidence.[78] Within 120 days of proceedings the judges had to base their conviction upon hearing 118 witnesses, some of them eye witnesses—and a large number of people from a highly different cultural sphere who testified about events which happened at least seventeen years ago and 6,000 kilometers away from the court—within the complex context of mass crime. Although these are not unusual issues for international courts,[79] they are to date highly unusual for domestic courts.

1.1 General Difficulties

First, it must be emphasized that the cultural background of Rwandan witnesses on the one hand and German jurists on the other hand are highly different. This encompasses

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[72] *See* BVerfG, Case No. 2 BvR 2628/10, BVerfGE paras. 133, 168 (Mar. 19, 2013); *see also* BGH, Case No. 3 StR 281/70, BGHSt paras. 29, 109, 112 (Oct. 10, 1979).

[73] *See* Lutz Meyer-Goßner, *§ 244*, *in* Strafprozessordnung – Gerichtsverfassungsgesetz – Nebengesetze und Ergänzende Bestimmungen para. 13 (Lutz Meyer-Goßner & Bertram Schmitt eds., 57th ed., 2014).

[74] *See* Hans-Heiner Kühne, Strafprozessrecht 792 (7th ed. 2007).

[75] *See* Holle Eve Löhr, Der Grundsatz der Unmittelbarkeit im deutschen Strafprozess 18 (1972); *see also* Werner Beulke, *Der Grundsatz der Unmittelbarkeit in der Hauptverhandlung – Neue Entwicklungen, Chancen und Anfechtungen*, *in* Verfassungsrecht – Menschenrechte – Strafrecht – Kolloquium für Dr. Gollwitzer 1 (Reinhard Böttcher et al. eds., 2004) (regarding the principle of immediacy).

[76] *See* StPO § 261; *see also* Ralf Eschelbach, *§ 261*, *in* Kommentar zur Strafprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen 42 (Jürgen Peter Graf ed., 2d ed., 2012).

[77] *See* von Wistinghausen, *supra* note 8, at 200.

[78] *See* Klaus Schroth, Die Rechte des Opfers im Strafprozess 34 (2d ed. 2011).

[79] *See* Jan Christoph Nemitz, *Die Hauptverhandlung unter besonderer Berücksichtigung des Beweisrechts*, *in* Internationale Strafgerichte, 53, 56 (Stefan Kirsch ed., 2005).

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diverging understandings about the specifics of times, places, or persons, which during the proceedings often caused discrepancies.[80] Furthermore, the former chief prosecutor of the ICTR, Richard Karegyesa, confirmed the much-discussed assumption that Rwandan witnesses usually do not provide specific information unless they are given a specific question.[81] This becomes even more important as the ability to recall past events in detail is limited.[82] In addition, the main incriminating witnesses were survivors of the massacre of Kiziguro, and thus possibly traumatized.[83] To determine the influence of traumatization on the quality of witness testimonies in general, two experts were provided to report on that issue.[84] According to them, traumatized witnesses may have extra detailed memories through co-occurring pseudo memories with respect to some special segments. This, however, does not reduce their credibility in general.[85] By taking this information into account the court considered testimonies of traumatized witnesses, if any, as not being extra defective and thus adopted the same criteria for determining their credibility as used for other witnesses.[86] Nonetheless, an inquiry leads to the risk of reminiscing about the massacre and the risk of anxiety.[87] Due to such general difficulties, scholars postulate the necessity of a special way of questioning and interpreting answers from traumatized victims.[88]

1.2 Different Languages

For dealing with the aspects of different cultures includes foreign languages, section 185 I of the *Gerichtsverfassungsgesetz* (*GVG*[89] - Courts Constitution Act) requires consulting with a translator for each situation in which an involved person is not able to understand the language of the court. As a consequence of the defendant's nationality and the high number of foreign witnesses, two translators were present at all times, one for

[80] *See Judgment of February 18, 2014* at para. 351; *see also* Hansen, *supra* note 8, at 442.

[81] *See id.*; *see also* ICWC, *Monitoring Report No. 63*, *supra* note 3.

[82] *See* ROLF BENDER ET AL., TATSACHENFESTSTELLUNG VOR GERICHT 49 (3d ed. 2007).

[83] *See Judgment of February 18, 2014* at para. 462.

[84] *Cf. id.*; *see also* Monitoring Report No. 13.

[85] *See id.*

[86] *See Judgment of February 18, 2014 at* para. 463.

[87] *See id.*; *see also* ICWC, *Monitoring Report No. 13*, *supra* note 3; *see also* NANCY AMOURY COMBS, FACT-FINDING WITHOUT FACTS —THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS 14 (2010).

[88] *See* KLAUS HABSCHICK, ERFOLGREICH VERNEHMEN 638 (2012).

[89] An English version of the Act is available at http://www.gesetze-im-internet.de/englisch_gvg/index.html.

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Kinyarwanda and the other for French.[90] According to the *Bundesverfassungsgericht* (*BVerfG* - Federal Constitutional Court), all events ongoing in the presence of the defendant and relevant to his defense must be translated.[91] Within that scope, the concrete legal requirements for a lawful translation process are unclear.[92] Thus, a judge may decide on the correctness of the process by his discretion.[93] In the trial at hand, the court did not complain about the translation, because R.—who spoke German and was observing attentively—never objected to the correctness of the translation.[94]

Due to the complexity of multiple languages, however, a word-by-word translation is often impossible.[95] This leads to the question of how much content may get lost within an intercultural communication through another person.[96] At the trial against R., there were many noticeable situations in which a short question was asked and the translated phrase in Kinyarwanda seemed to be much longer or seemed to include different words from the question, which the court also could have noticed but, in the eyes of the monitors, did not question thoroughly.[97] In default of efficient opportunities of verifying the translation or alternatives to a communication via a third person, the translator becomes an important factor of the trial.[98] This has to be taken into account when determining whether such proceedings take place in accordance with the principle of immediacy.

a) Video Links

Estimating the behavior of a witness—as it became particularly important in times of the foresaid problems—is impeded in many situations, especially when communication is mediated by audio-visual technology.[99] In the presence of a *BKA* official, thirty witnesses

[90] *See* Hansen, *supra* note 8, at 441.

[91] *See* BVerfG, Case No. 2 BvR 731/80, BVERFGE paras. 64, 135, 148 (May 17, 1983).

[92] *See* MANUEL CEBULLA, SPRACHMITTLERSTRAFRECHT—DIE STRAFRECHTLICHE VERANTWORTLICHKEIT DER DOLMETSCHER UND ÜBERSETZER 129 (2007); *see also* Christian Kranjcic, *Dolmetschen im Strafverfahren: wider die Wörtlichkeit und für wirkliche Zweckorientierung (oder: Wem dient der Dolmetscher?)*, 31 NStZ 657, 659 (2011).

[93] *See* Hansen, *supra* note 8, at 441.

[94] *See Judgment of February 18, 2014* at para. 351.

[95] *See* Kranjcic, *supra* note 92, at 659.

[96] *See* Hansen, *supra* note 8, at 441.

[97] *See id.*; *see also* ICWC, *Monitoring Report No. 12, 28, 52, & 62*, *supra* note 3.

[98] *See* Hansen, *supra* note 8, at 441.

[99] *See* BGH, Case No. 1 StR 111/02, 2003 NJW 1, para. 74 (Sept. 26, 2002).

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were able to testify from Kigali with the assistance of this technology.[100] This approach was considered necessary due to health problems of witnesses or the lack of rights of entry to persons who were imprisoned in Rwanda for their involvement in the genocide and who could have applied for asylum in Germany on the grounds of local inhumane treatment.[101] The use of video technology at a criminal trial may have a negative impact on the principles of oral proceedings, public trial, and immediacy.[102] It is therefore important that such an indirect inquiry be as close to a direct source as possible.[103] Still, a judge needs to balance the testimony concerning its evidentiary value.[104]

At the trial of R., commonly occurring issues regarding witness examination via video link were observed: Specifically, the risk of different reactions of accused and witnesses compared to a direct confrontation, a different impact on the interrogated person as a result of the trial, and predicting facial expressions.[105] In addition, throughout the proceedings technical problems and insufficient quality of transmission led to optic and acoustic delays and sometimes even made an interrogation impossible.[106] Although the verisimilitude of a testimony is primarily dependent on its content,[107] it must be taken into account that those witnesses from a different cultural sphere were testifying not only via video link but also via translator. Therefore, a *BKA* official who was in presence of the witnesses while they testified had to give a report on their behavior.[108] Despite this indirect contact, the judges saw themselves in a position of being able to establish relations to the witnesses and to make them answer spontaneously and uninhibitedly, but also observed the problematic nature of limited immediacy.[109]

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[100] *See supra* note 6.

[101] *See Judgment of February 18, 2014* at para. 494; *see also* ICWC, *Monitoring Report No. 16, 22, 44, & 68*, *supra* note 3.

[102] *See* Andreas Hohnel, *Audiovisuelle Vernehmung trotz Zeugenschutzprogramms*, 57 NEUE JURISTISCHE WOCHENSCHRIFT 1356 (2004); *see also* ALI NOROUZI, DIE AUDIOVISUELLE VERNEHMUNG VON AUSLANDSZEUGEN 15 (2010).

[103] *See* SABINE SWOBODA, VIDEOTECHNIK IM STRAFVERFAHREN 177 (2002).

[104] *See* Christoph Safferling, *Völkerstrafgesetzbuch und Strafverfahren*, *in* ZEHN JAHRE VÖLKERSTRAFGESETZBUCH — BILANZ UND PERSPEKTIVEN EINES „DEUTSCHEN VÖLKERSTRAFRECHTS" 189 (Florian Jeßberger & Julia Geneuss eds., 2013) (providing further information regarding the criteria).

[105] *See* Hansen, *supra* note 8, at 440; *see also* NOROUZI, *supra* note 102, at 20.

[106] *See* ICWC, *Monitoring Report No. 27, 34, 36, 39, & 73*, *supra* note 3.

[107] *See* Bender, *supra* note 82, at para. 1427.

[108] *See* ICWC, *Monitoring Report No. 66 & 73*, *supra* note 3.

[109] *See Judgment of February 18, 2014* at para. 446.

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b) The Importance of Experts (not only) in the Trial at Hand

A growing tendency to make use of expert opinions has been observed in modern criminal procedure; this trend is mirrored by the development of experts increasingly becoming the dominant figures within criminal trials, namely when it comes to diagnostic and therapeutic aspects.[110] Even though questions regarding these aspects did not play a dominant role in the trial of R.,[111] the "expert factor," as the following example shows, was of high importance with respect to other problems.

To a large extent the court's belief of the accused's authority as a mayor over the citizens of his community hinged on the expert explanations by Dr. Hankel on the general role of the mayors in Rwanda at the time.[112] In the behavior of the attackers in Kiziguro, the court explicitly recognized a phenomenon reported by this expert, the strong belief in authority and the according obedience of the Rwandan citizens to the local state representatives, especially the mayors.[113] In the end, this belief of the court was one of the decisive aspects for the concrete conviction.[114]

The role of experts within a trial will be, if not "dominant," then at least one of the decisive factors where the subject matter concerns events which are geographically and temporally far distant, and where it stems from a politically and historically highly sensitive—and a

[110] *See* CLAUS ROXIN & BERND SCHÜNEMANN, STRAFVERFAHRENSRECHT EIN STUDIENBUCH, § 27, 220–21, para. 9 (28th ed. 2014).

[111] But, nevertheless, there were at least some issues in this regard: The accused's wife alleged her husband was traumatized, and the defense also seemed to suppose a traumatization. *Cf. Judgment of February 18, 2014* at paras 595–96. The defense, however, declared that the accused was not willing to be evaluated in this regard. *See id.* at para. 596. Moreover, the court summoned two professors as experts for general questions on quality and credibility of traumatized witnesses or witnesses suffering from PTSS. *See id.* at paras. 462–66; *cf. supra* Section C.V.1. 1.1.

[112] *See Judgment of February 18, 2014 at* para. 323. There, the court further found the expert's general estimation confirmed by one witness and by the defendant himself when he said that, after 6 April, the day of the assassination against president Habyarimana, he more and more lost control over the citizens. Nonetheless, the court explicitly stated that its persuasion would follow at first from the depictions of Dr. Hankel. Following the wording of the judgment it seems, however, that he addressed only the issue of the power and social status of Rwandan majors in general. On the other hand, he certainly reported on the history of Muvumba during the war from 1990 on and was, as a witness, also examined concerning some concrete information on the defendant. *See id.* at para. 211; *cf. id.* at para. 656–57.

[113] *See Judgment of February 18, 2014* at para. 623. Within the argumentation of the court, it is difficult to clarify the relation between the rather abstract considerations on the authority and obedience made by Dr. Hankel and more concrete evidence on concrete acts between citizens and the defendant as given by other witnesses. In any event, the court employs and somehow combines both and so repeatedly refers to Dr. Hankel's general statements on this structure of power in Rwandan communities. *Cf. supra* note 112.

[114] *See supra* Section C.IV.1.

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socio-culturally foreign—[115]context. that This will be underlined by a closer view on the adoption of and dealing with Dr. Hankel's report in the trial.

c) The Court's Dealing with Expert Statements on the Historical and Social Background

The Kiziguro church massacre, a barbaric mass killing in its own right, forms only one out of many pieces to the puzzle of the Rwandan genocide, a tragedy which cost between 500,000 and 1,000,000 lives.[116] It was a macro crime with a deep-rooted historical background. Accordingly, the court put the deeds charged into a broader context and illustrated the overall history of Rwanda at length.[117] The court focused on the relationship between the Hutu and Tutsi, the formation of the different group identities,[118] and other relevant aspects for the further content of the judgment, especially the role of the mayors until 1994[119] as well as the previous history and course of the genocide. These historically reporting passages thus appear as a kind of prearrangement for what follows and leads to the conviction of the accused. The court cannot—and did not—do the work of a historian or a scholar from another pertinent discipline. It did not list and interpret sources for its historical statements or undertake other forms of historical research. Concerning the general historic aspects besides the concrete events in Kiziguro, the court relied on the explanations given by the expert Dr. Hankel.[120] Within the trial, he orally delivered his report, *The Genocide in Rwanda, 1994 – Backgrounds and Courses of Events*.[121]

Given the possible implications of the interpretation of the mentioned backgrounds for the understanding of the events in question[122] and the court's dependency on expert opinions,

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[115] The court considered itself capable of an appropriate examination of witnesses from such a sociocultural foreign background with a different value system and a different culture of narration and communication. *See Judgment of February 18, 2014* at para. 469. *But see* von Wistinghausen, *supra* note 8, at 201; *see also* Hansen, *supra* note 8, at 442 (illustrating some of the problems of cultural differences when Rwandan witnesses are examined).

[116] These are the numbers the court assumed for the time between 6 April and 18 July 1994. *See Judgment of February 18, 2014* at para. 204.

[117] *See Judgment of February 18, 2014* at paras. 134–208.

[118] *Cf., e.g., id.* at paras. 143 & 146.

[119] *See id.* at paras. 158–159. *Cf., e.g., id.* at paras. 173 & 212.

[120] *See id.* at 300.

[121] *See id.*; *see also* ICWC, *Monitoring Report No. 2 & 3*, *supra* note 3. During the trial Dr. Hankel was asked for a second report. He delivered this second one orally as well. It concerned the question of punishability of the acts under the then law of Rwanda. *See Judgment of February 18, 2014* at para. 643.

[122] *Cf.* von Wistinghausen, *supra* note 8, at 201 (stating that knowledge of the historical and political backgrounds of the events in question was necessary to be able to shed light on the facts of the case in order to fulfill the duty of establishing the truth as prescribed by the principles of the German criminal procedure—this duty can be

the importance of the quality and plausibility of such opinions must not be underestimated. The elaborateness[123] by which the judgment aims to substantiate its conviction with the enormous knowledge and experience of Dr. Hankel illustrates this importance. As the court cannot put itself in the position of a colleague of the expert or even a theorist of science, it basically limits itself to an enumeration of the relevant steps in Dr. Hankel's academic career.[124] In addition, from reading extracts from one of his sources, the court drew the conclusion that he had interpreted his sources correctly and concluded that the report, due to several characteristics, was convincing.[125] Expressly, the court repeated how convincing the report was when it came to the mentioned issue of authoritarianism in the local political structures in Rwanda and the obedience of the population.[126] This is not surprising because this topic of "mentality" was crucial for the conviction.

Furthermore, the court applied some other arguments to underline why it was convinced by the expert's statements. The court emphasized that the accused mentioned several of the historical events and developments Dr. Hankel referred to.[127] The court highlighted that the accused took for granted that there is a distinction between Hutu and Tutsi when he spoke of "the Tutsi who lived together with us in Rwanda."[128] Finally, the court underlined that many statements of Rwandan witnesses fit well in the depictions of Dr. Hankel.[129] His high qualifications were not doubted by any of the parties.[130] Quite the opposite, defense counsel von Wistinghausen declared that it was Dr. Hankel who obtained the relevant

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deduced *e.g.* StPO § 244); BGH, Case No. 1 StR 54/51, BGHSt paras. 1, 94, 96 (Apr. 4, 1951); BVerfG, Case No. 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11, 2013 Neue Juristische Wochenschrift [NJW] 1058, 1062 (Mar. 19, 2013); *see also* Ritscher, *supra* note 26, at 223, 229.

[123] *See Judgment of February 18, 2014* at para. 300 (explaining in notable length in comparison to the other paragraphs of the judgment).

[124] *Cf. Id.* at para. 300.

[125] *See id.* at para. 300. These characteristics, according to the court, are impartiality, consistency, high auditability, enumeration of the employed sources, and a scientifically substantiated method.

[126] *See id.* at para. 623.

[127] *See id.* at para. 301; *Cf. Id.* at para. 311.

[128] *See id.* at 301.

[129] *See id.* at paras. 302–09.

[130] And the press—the "tageszeitung"—wrote that his level of knowledge concerning the coming to terms with the past in Rwanda was unique in Germany. *See* Dominic Johnson, Ruanda-Völkermordprozess in Frankfurt: Tag 3 – Krieg um die Gutachter, *available at* http://www.taz.de/!65728/ (last visited Mar. 5, 2015).

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historical context for the court.[131] What were actually debated were the inferences one may have drawn from his statements.[132]

d) The Legal Framework for Experts and the Rejection of an Expert in the Case at Hand

The trial of R. also allows for some short remarks on the general legal framework for experts in German criminal trials.

The German law of criminal procedure attaches the expert the position of a *Gehilfe* or *Helfer* (aider) of the court within the main trial.[133] The court can be more or less coerced to make use of such aid in certain cases. When a court overrates its own expert knowledge and refrains from asking an expert, this action may constitute a ground for appeal on a point of law.[134] This is a consequence of the mentioned section 244 II *StPO*, which would be infringed by such an overestimation.[135] Yet, the court is not bound by this aid; rather, it has to weigh the experts' statements and conclusions independently, and cannot make an uncontrolled use of them for the judgment.[136] Both the court's right *and* the obligation of free and independent consideration of evidence apply for the expert's statements and conclusions as they do for other types of evidence provided by the *StPO*.[137] Therefore, the judgment must show that the court acted accordingly in order to enable the appellate court to re-examine the proceeding.[138] The tradition of referring to an expert as an "aider" of the court has been criticized as correct, but meaningless.[139] However, this phrase implies in turn that the expert is *not* in the position of being an "aider" of one of the *parties*. Correspondingly, the right to choose the expert is, within the main proceedings, reserved

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[131] *See* von Wistinghausen, *supra* note 8, at 201; *see also supra* note 116 (ascribing the knowledge of this context to the appropriate conduction of the trial and finding of the right judgment); *cf.* Ritscher, *supra* note 26, at 229.

[132] *Cf., e.g., Judgment of February 18, 2014*, at paras. 656–64, 713–15 (concerning the question whether the accused might have been in a threat situation and possible regarding implications in Dr. Hankel's explanations).

[133] *See* BGH, Case No. 3 StR 136/56, BGHST paras. 9, 292–93; *see also* ROXIN, *supra* note 110, at 218, § 27, para. 1; *see also* ROXIN, *supra* note 110, at 219, para. 2.

[134] *See* BGH, Case No. 1 StR 631/51, 2 BGHST paras. 163, 165–66 (Feb. 29, 1952); *see also* BGH, Case No. 3 StR 374/52, 3 BGHST paras. 169, 174–75 (Sept. 18, 1952); ROXIN, *supra* note 110, at 221, § 27, para. 10.

[135] *See* ROXIN, *supra* note 100, at para. 10.

[136] *See id.* at para. 2.

[137] *See* ROXIN, *supra* note 110, at 386, § 45, margin number 43; *cf.* STPO § 261.

[138] *E.g.* BGH, Case No. 4 StR 399/58, 12 BGHST paras. 311, 314–15 (Dec. 18, 1958); BGH, Case No. 2 StR 555/81, 1982 STRAFVERTEIDIGER paras. 210–11 (Jan. 20, 1982); BGH, Case No. 1 StR 618/98, 45 BGHST paras. 164, 166 & 182 (July 30, 1999); *cf.* BGH, Case No. 2 StR 367/04, 49 BGHST paras. 347, 358 (Nov. 12 2004); ROXIN, *supra* note 110, at 219, § 27, para. 2.

[139] *See* Bertram Schmitt, *vor § 72*, *in* Lutz Meyer-Goßner & Bertram Schmitt, *supra* note 73, at para. 8.

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to the judge(s) only[140] and the court is not bound by proposals of the parties.[141] Not being an "aider" for one of the parties also implies the expert's duty to be impartial and unprejudiced.[142] Consequently, it is possible to reject an expert who is unsuited in this regard. Under the *StPO*, the according provisions for judges are applied to experts for this purpose.[143] A judge—and by extension an expert—has to be rejected if distrust in his or her impartiality can be justified by a legitimate reason.[144]

This became relevant at the beginning of the trial, as the defense proposed[145] that it planned to summon a second German expert on questions concerning Rwanda. However, his report was eventually unheard because the court sustained the applications to reject him as an expert made by both the prosecution and the representative of the civil parties. As reasons to disqualify him as an expert witness they relied, *inter alia*, on two issues: first, some statements on the trial he made beforehand, *e.g.*, that he "hoped" that the defendant would be released; second, the allegedly close relationship between him and the accused's family.[146] The prosecutors concluded that he had apparently defined himself as an expert for the defense–and not as impartial "aider" of the court.[147] The court was satisfied that this was enough to raise sufficient distrust in his impartiality according to sections 74 I 1, 24 II of the *StPO* and rejected him.[148]

It has been set out above that courts may have the problem of being subject to experts' estimations without being able to fully check the scientific quality of the experts' reports—as otherwise the court would qualify as an expert itself. This could constitute a problem, especially for politically sensitive topics like the Rwandan genocide. The experts might have implicit premises, theoretical approaches, or political pre-attitudes which can influence their conclusions on their topic. In particular, the rejected expert in the trial at hand was known for highly disputed views on the Rwandan history, especially the genocide,[149] and

[140] *See* StPO § 73.

[141] *See* Roxin, *supra* note 110, at 222, § 27, para. 12 and at 388, § 45, para. 46.

[142] *See* StPO § 24; *see also* StPO § 74; *cf.*, *e.g.*, StPO § 79.

[143] *See* StPO § 74. *But see* Roxin, *supra* note 110, at 222, § 27, para. 14; *see also* and Schmitt, *supra* note 73, at § 74, para. 3.

[144] *See* StPO § 24.

[145] *See supra* note 130.

[146] *See* ICWC, *Monitoring Report No. 2*, *supra* note 3.

[147] *See id.*

[148] *See id.*

[149] *See supra* note 130 (describing the mainly responsible forces for the genocide in the U.S. and the then Tutsi rebels around today's Rwandan president Kagame).

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for having made strong and polemic rebukes against the current Rwandan government.[150] Hence, the "*tageszeitung*" deemed the rejection a "decisive turning point" and a "fundamental setting of the course," because whether or not his interpretation of the genocide's background was taken into the court's consideration would be "central for determining the defendant's guilt."[151] This again underlined the importance ascribed to expert witnesses by journalists. Although now one might be a bit more reluctant to do so, as most of the genocide charges against the defendant were later abandoned,[152] it nonetheless holds true that denying the question of whether the massacres against the Tutsi in Rwanda were organized and planned—as is the consensus between most of the analysts, observers, and victims—could lead to deny that the elements of genocide are fulfilled by the perpetrators and G. Such a denial would also then hinder the conviction of the defendant as abettor.[153]

2. The Difficult Relationship Between the Proceedings in Germany and the Rwandan State and Society

One does not need to share the rejected expert's extreme view on President Kagame[154] to understand some concern regarding the relation of the trial to the state of Rwanda today. The court, in its evaluation of the present political situation of Rwanda, again relied on the report of Dr. Hankel.[155] It made use of his statements that there was in fact no division of powers within current Rwandan state organization and that a pressure to conform existed in Rwandan society.[156] The court also cited Dr. Hankel's report regarding election frauds.[157] The court explicitly stated that it, "especially before the backdrop of the explanations of the expert Dr. H.," did not come to a definite opinion whether or not it considers the criminal judiciary in Rwanda independent.[158] However, the court—as well as the

[150] *See id.*

[151] *See id.*

[152] See *supra* Section C.III.

[153] *See supra* Section C.IV.2.2.2.

[154] *See supra* note 130 (equating Kagame to Stalin).

[155] *See Judgment of February 18, 2014* at para. 471.

[156] *See id.* at para. 471.

[157] *See id.*

[158] *See id.* at para. 701. The court cited a witness that worked as a prosecutor for the Rwandan state with positive statements on the independence of Rwandan justice and the phrase that he would be a "a man of the law." *See id.* at para. 501. The court added it would be highly unlikely that the Rwandan state would want to intervene in foreign trials in order to reach a conviction of the accused as, in the eyes of the court, Rwanda had supported the work of the defense counsels in the trial at hand. However, von Wistinghausen made some very critical remarks

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prosecution and the defense—depended on cooperation with the state,[159] placing it in a certain dilemma. As defense counsel, von Wistinghausen listed many grave objections against the fairness of the trial at hand.[160] The court further reported Dr. Hankel's explanations on this complex situation primarily as follows: Kagame's party *RPF* that had been successfully spreading a "religion-like" ideology of a movement necessarily and exclusively identified with any anti-genocidal attitude hasled a monopolistic position.[161] This official ideology contained the idea of only Tutsi being victims of the events under the former regime, and only Hutu being perpetrators.[162] So-called laws "against genocidal ideology" provided draconian sentences for dissenting from this official "narrative" or mentioning crimes of the *RPF*.[163] In addition, there was no free press in Rwanda.[164] After reciting these descriptions of the Rwandan reality, the court summarized them in its own words. Here, the court did nothing more than speak of an "indeed difficult social and political situation."[165]

One often-recurring issue was the question whether outer parties—the Rwandan government in particular—manipulated the witnesses.[166] The court, however, found that the difficult situation did not lead to the witnesses making false accusations.[167] Yet again, the expert Dr. Hankel served as reference for this finding. The court reported his remark that false accusations did not belong to the manipulative ideology of the official narrative of Rwanda today.[168] From the relatively high number of acquittals in Rwandan genocide trials, as reported by Dr. Hankel, the court drew the inference that—in general—an assumption that witnesses would fear to make true exonerating statements in favor of the

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on the cooperation of the Rwandan authorities from the defense perspective. *See* von Wistinghausen, *supra* note 8, at 204.

[159] *See, e.g.*, *Judgment of February 18, 2014* at para. 542. *See* von Wistinghausen, *supra* note 8, at 202–03 (elaborating on this particular problem).

[160] *See* von Wistinghausen, *supra* note 8, at 202–04, 208 (providing further references and in between on problems with the dependence on cooperation with the ICTR as an international tribunal also).

[161] *See Judgment of February 18, 2014* at para. 471.

[162] *See id.*

[163] *See id.*

[164] *See id.*

[165] *See id.* at para. 472.

[166] *See* ICWC, *Monitoring Report No. 85*, *supra* note 3.

[167] *See Judgment of February 18, 2014* at para. 472.

[168] *See id.*

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accused could not be made.[169] Having arrived at the finding that, for these reasons, false accusations do not seem likely, the court added that if one assumed the accused had been slandered by witnesses, this would mean that no less than fifteen witnesses in this case did so, which would seem even more unlikely.[170] The court used two more arguments against the possibility of false accusations against the accused due to the official Rwandan state policy and "narrative." First, the court noted the absence of any Rwandan officials during the witness examinations by both the court and the representative of the *BKA*.[171] Second, the court considered it extremely unlikely for a Rwandan witness to shoulder the efforts of travelling to Germany and run the risk of revenge acts after returning to Rwanda only to adhere to an "official narrative."[172] After all, the court stated that any pressure to conform did not exist in this trial before a German court, and that the trial cannot be compared with *e.g.* the local Rwandan *Gacaca* trials.[173]

After pointing out that Dr. Hankel denied that false accusations are part of the "official narrative," the court might surprise by then remarking that Dr. Hankel in fact gave several examples of false accusations that happened and of rumors about many innocent prisoners in Rwanda.[174] Interestingly, in the words of the court, the reason for the false accusations was not the "official narrative," but rather economic interests and the desire to lay blame at the feet of certain individuals.[175] The court, however, ruled that it could not be inferred that Rwandan witnesses had particularly carelessly or frequently made false accusations.[176] The court also found no reason to conclude that the relevant witnesses

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[169] *See id.*; *see also Judgment of February 18, 2014* at para. 473 (backing this up with the report of the psychological expert Prof. Dr. "E" stating that Rwandan witnesses would not be exposed to stronger influences than witnesses from other countries or cultural backgrounds).

[170] *See Judgment of February 18, 2014* at para. 475. *Cf. id.* at para. 485.

[171] *See id.* at para. 474.

[172] *See id.*

[173] *See id.*

[174] *Cf. id.* at para. 477.

[175] *See id.*; *see also Judgment of February 18, 2014*, *supra* note 2, at paras. 504–09 (discussing whether such economic interests of witnesses might have played a role in the case at hand–and rejected this idea). Thereby, the court especially paid attention to the witness reimbursement paid by the German state as this amount of money might be of a considerable level for many witnesses living in circumstances that are very poor even for Rwandan standards; *Cf. id.* at paras. 350, 582–83.

[176] *See id.* at para. 478. Accordingly, there it sounds rather as if Dr. Hankel only reported statements of Rwandan persons, especially prisoners, in this concern. However, in margin number 506 the court explicitly stated that this estimation was Dr. Hankel's own and independent one: There the court referred to the "information by Dr. H. . . ., that according to *his* estimation a considerable number of prisoners in Rwanda is wrongfully convicted because of false witness statements due to the fact that witnesses had accused innocent persons to have committed genocide in order to get or keep the possessions of these persons accused by them" (emphasis added).

might have slandered the accused.[177] Likewise, the court neither saw indications for false accusations in the role of three witnesses also being civil parties nor in the existence of a victims' organization that may pursue certain interests.[178]

Amongst other possible sources of influence,[179] the court also discussed the thought of potential influence or pressure on witnesses committed by the Rwandan state. The rulings in this regard can be essentially summarized as follows: the accused was neither important enough nor of a sufficient political prominence or dangerousness for the Rwandan state to be interested in a wrongful conviction against him.[180] The accused's efforts for the Rwandan exile party *RDR (*Rassemblement Démocratique pour le Rwanda)—before his imprisonment in Germany—did not harm this finding.[181] Some witnesses, whom the court considered closely-related persons to the accused, reported the accused's assumption that the Kagame government would want to bring him into prison, as he would be one of the last eyewitnesses of atrocities committed by the *RPF* in his village in 1990. [182] However, such suspicions remained vague; not even the accused's wife concretized the alleged atrocities her husband should have seen.[183] Because several witnesses were examined via video link due to imprisonment and/or not being allowed to leave Rwanda,[184] the court noted that Rwandan authorities could have easily suborned these particular witnesses.[185] The court, however, highlighted that almost all of them made statements in favor of the accused.[186] To find out whether the Rwandan government was interested in a conviction of R. and whether it tried to gain influence on the proceedings in Frankfurt, the court also questioned *BKA* officials regarding their impressions as to whether influence was exerted on the imprisoned witnesses in Rwanda.[187] Notwithstanding the mentioned findings of the

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[177] *See id.* at para. 479. A guilty person, the court said, is already found with the conviction of G. by the ICTR and also economic interests could not be seen as a convincing reason to make false accusations against the accused.

[178] *See id.* at paras. 481–82.

[179] *See., e.g., id.* at paras. 483–84 (describing a possible conspiracy against the accused—for which to exist the court as well did not see any substance).

[180] *Cf. id.* at para. 487, 490–91 (concerning further arguments the long time period between the massacre and the beginning of Rwandan prosecution of the accused).

[181] *See id.* at para. 487.

[182] *See id.* at para. 489.

[183] *See id.*

[184] See *supra* Section C.V.1.1.2.a).

[185] *See Judgment of February 18, 2014* at para. 495.

[186] *See id.* at para. 495. *Cf. id.* at para. 496.

[187] *See id.*; *see also* ICWC, *Monitoring Report No. 41 & 73*, *supra* note 3.

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court, there was actually one witness claiming he had been requested to give false testimony by Rwandan officials.[188] The complexity around this witness forms one of the dramatic secondary issues in the course of this trial. Between two interrogation dates with German authorities, he disappeared in a foreign country and—after appearing in Germany again—he declared in Rwanda he would now be arrested directly, and that he would be made to fade away forever, before anybody will have noticed. The Rwandan government would do so because he did not give the false evidence as it was expected from him.[189] The court did not believe these allegations. Rather, the court held that the witness concocted the story in order to be granted asylum in Germany.[190]

Finally, while the court did not see considerable problems concerning witness subornation by the "official" Rwanda had adversely affecting the accused,[191] it held on the contrary that Rwandan witnesses might fear friends and relatives of persons involved in genocidal crimes. If they did not mention certain perpetrators when making their statements, they would regularly be frightened to incur the anger of these circles.[192] Even at the trial, the court noted there were witnesses with reason to be worried about their safety.[193] For example, one of the German police officers had said that one witness received a threatening text message after she returned to Rwanda, as well as a telephone call in which an unknown person told her she was a cockroach and one would know what to do with such persons.[194] This example shows the reality of legal accounting for the past regarding the genocide in Rwanda which leads to the question of legitimacy of conducting such trials in third countries.

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[188] *See* ICWC, *Monitoring Report No. 70*, *supra* note 3.

[189] *See Judgment of February 18, 2014* at para. 497.

[190] *Id.* Primarily, the court saw several self-contradictions in the declarations of the witness. But amongst other reasons, it especially was a disadvantage for the witness to maintain that the presiding judge had asserted him confidentiality–whereas, of course, due to the public character of the proceedings confidentiality is not possible: The court rejected this allegation and used it to take the general willingness of this witness for untrue statements for granted.

[191] *See id.* at para. 701 (noting that it deemed exertion of influence on the trial by the Rwandan state possible–in principle; but also that, at the same time, it is convinced that no witnesses were suborned to false accusations against the defendant).

[192] *See id.* at para. 379.

[193] *See id.* at para. 381.

[194] *Id.*

D. Conclusion

In the speech mentioned at the beginning of this paper, Secretary-General Ban Ki-moon not only expressed his solidarity with all Rwandans but also stated that the United Nations should have done more to avoid the 1994 genocide. He also emphasized that states can no longer claim atrocity crimes are only a domestic matter and that international criminal justice is expanding its reach.[195] Regarding international conducting of criminal justice, many national trials dealing with the Rwandan genocide have taken place and still do take place.[196] In light of this, Germany must prevent itself from "being a safe haven for criminals under international law," as the GBA attorney Christian Ritscher called it during an interview.[197] Prosecuting those people in third countries, however, should be legitimized more so than prosecution by international(-ized) tribunals or by the States in which the crimes had occurred. Otherwise, it would be senseless. Such legitimization arises soonest from effective proceedings in accordance with constitutional standards.

As the trial of R. illustrates, the conducting of such required proceedings reveals the limits of the *StPO*, which in large parts was written in 1877, and did not have international criminal law in mind. This primarily applies to the duty of the court to investigate the truth within a bygone context of mass crime in order to determine individual criminal responsibility. Not only does the Rwandan genocide have a complex historical background,[198] but also the *StGB* also contains a differentiating system of diverging forms of individual liability.[199] For this reason, excessive efforts to investigate the relevant facts have to be exercised, which give rise to the necessity of getting large numbers of evidence, including numerous witness testimonies under difficult circumstances.[200] To enable German lawyers to assess their credibility and to get the necessary picture of Rwanda in 1994, experts gave reports and had influence over the trial.[201] Aside from that, a possible effort by outside parties—especially by the Rwandan government— to influence the proceedings

[195] *See supra* note 1.

[196] ALISON DES FORGES, KEIN ZEUGE DARF ÜBERLEBEN – DER GENOZID IN RUANDA 879 (2002).

[197] *See* Viktor Funk, *Deutsche Justiz ahndet Ruanda Massaker*, FRANKFURTER RUNDSCHAU (Feb. 19, 2014), http://www.fr-online.de/politik/urteil-ruanda-deutsche-justiz-ahndet-ruanda-massaker,1472596,26244284.

[198] *Cf. supra* Section C. and Section C.IV.1.

[199] *Cf. supra* Section C.IV.2.

[200] *Cf. supra* Section C.V.1.

[201] *Cf. supra* Section C.V.2.

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must be taken into consideration.[202] These difficulties lead to the risk of unlawful and especially inefficient trials, as the reduced length of sentence demonstrates.[203]

These challenges are not unique to German trials dealing with the implementation of international criminal law.[204] As similar trials may be conducted in the future on the ground of universal jurisdiction as implemented in section 1 VStGB, the case at hand is of general relevance for other trials in the field of international criminal law before other national courts. To determine how such trials can be conducted effectively and in accordance with the constitution, trial monitoring will become an important factor as every difficulty is not only watched, but also analyzed and finally evaluated.[205] Thus, it may help to legitimize such proceedings. As a decision of the *BGH* regarding legal questions which—after the publication of the judgment in the case of R.—is still pending, a complete analysis of the entire proceedings is still to follow.

[202] *Cf. supra* Section C.V.3.

[203] *Cf. supra* Section C.IV.4.

[204] *Cf. supra* note 7.

[205] *Cf. supra* Section B.

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