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Will Universal Jurisdiction Advance Accountability for Sexualized and Gender-based Crimes? A View from Within on Progress and Challenges in Germany

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Abstract

This Article is based on the professional experiences of the authors working as lawyers and activists towards accountability for sexualized and gender-based crimes under international law. It provides a critical evaluation of universal jurisdiction cases in Germany addressing conflict-related sexualized violence. In particular, the article looks deeper into the Office of the German Federal Prosecutor General of the Federal Court of Justice's (GBA) approach to gender while taking note of the barriers in the way of investigating and adjudicating crimes under international law. Both authors have been following universal jurisdiction developments in Germany closely, particularly in relation to the investigation and prosecution of sexual and gender-based crimes. With regard to the proceedings against two high-rank representatives of the armed rebel group Forces Démocratiques de libération du Rwanda (FDLR), the findings in this article are informed by trial monitoring reports organized and conducted by a group of organisations and institutions, namely Medica Mondiale, the European Center for Constitutional and Human Rights (ECCHR), and the Hamburger Institut für Sozialforschung. In light of the fact that German trial records are absent of publicly accessible records of what was said in the court room, the consortium of groups co-monitored the FLDR trial.

Keywords: Gender Anlysis; Sexual Violence; International Crimes; Universal Jurisdiction Investigations and Prosecutions

A. Introduction

The prosecution of sexualized and gender-based crimes such as genocide, crimes against humanity, or war crimes at international[ized] courts and tribunals is not very extensive and far from reflecting the reality of crimes committed. There are a variety of factors cumulatively contributing to the under representation of such crimes in any international arena. Many myths exist around sexualized and gender-based crimes. To name a few, these include, the misconception that investigating sexualized and gender-based crimes is more difficult, that the victims do not want to speak out because of shame, that investigators do not have evidence, or that these crimes can only be charged if they have been committed systematically or in a widespread fashion.¹

¹See generally, as a critical example, SERGE BRAMMERTZ & MICHELLE JARVIS, PROSECUTING CONFLICT-RELATED SEXUALIZED VIOLENCE AT THE ICTY (1d ed. 2016).

Failing to adequately investigate and prosecute sexualized and gender-based crimes is still the norm, which in turn upholds the invisibility of such crimes and related harm suffered by survivors. Since the historical silence around accountability for sexualized and gender-based crimes during conflicts in trials at Nuremberg and Tokyo, there have been remarkable developments in both the statutes as well as jurisprudence of the international criminal tribunals for Rwanda and the former Yugoslavia respectively. Such progression is now reflected in the Rome Statute of the International Criminal Court, whose Office of the Prosecutor issued a policy paper on sexualized and gender-based crimes in 2014² and some of the Court's most recent jurisprudence. Notably—albeit not without shortcomings³—in a long-anticipated judgment, Trial Chamber IX found Dominic Ongwen, a former commander in the Lord Resistance Army (LRA), guilty of 61 counts of war crimes and crimes against humanity committed in Northern Uganda, including 19 counts of sexual and gender-based crimes.⁴

Yet, sexualized and gender-based crimes, most notably conflict-related sexualized violence, are not seen nor treated as core prosecutorial work—neither on the national nor international level. Instead, this category of crimes is often dealt with as a separate matter—an afterthought complicating the otherwise perceived-to-be more simple successful investigation or prosecution. Such attitudes, deeply rooted in the inherently Euro-centric, patriarchal foundation on which international criminal justice is based, come with detrimental consequences for survivors and survivor communities demanding justice. Moreover, such practices directly undermine the understanding of and accountability for sexualized and gender-based crimes in relation to other forms of violence committed in the same context. To account for sexualized and gender-based crimes requires a comprehension of power relations with respect to a given conflict or context and more specifically a comprehension of gender relations with respect to other factors, such as race, ethnicity, religion, class, sexualized orientation, and gender identity. A collaboration between disciplines is required to conduct an intersectional gender analysis and diversify evidence about sexualized and gender-based crimes in the context of conflicts or mass violence.

In recent years, the Office of the German Federal Prosecutor General of the Federal Court of Justice (GBA) took on a leading role in investigating international crimes committed abroad in accordance with the principle of universal jurisdiction enshrined in Article 1 of the 2002 Code of Crimes against International Law (CCAIL)⁵—the domestic implementation of the Rome Statute in Germany.⁶ Such developments in combination with Germany's relatively unrestricted universal jurisdiction legislation⁷ and the fact that Germany is a civil law country where victims have ample participatory rights as parties in criminal proceedings,⁸ make it an interesting case study for the purpose of examining the role universal jurisdiction could play in advancing accountability for sexualized and gender-based crimes, in particular conflict-related sexualized violence. It is a challenge for any national jurisdiction to investigate and try crimes that were committed abroad, often

²INT'L CRIM. CT., *Policy Paper on Sexualized and Gender-Based Crimes* (2014), <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexualized-and-gender-based-crimes-june-2014.pdf>.

³Alexandra Lily Kather & Amal Nassar, *The Ongwen Case: A Prism Glass for the Concurrent Commission of Gender-Based Crimes*, VÖLKERRECHTSBLOG, (Mar. 15, 2021), <https://voelkerrechtsblog.org/de/the-ongwen-case-a-prism-glass-for-the-concurrent-commission-of-gender-based-crimes/>.

⁴Prosecutor v. Ongwen, ICC-02/04-01/15-1762-Red, Trial Judgment (Feb. 4, 2021).

⁵Völkerstrafgesetzbuch (VStGB) ("Code of Crimes against International Law" or CCAIL), entered into force on June 30, 2002, <http://www.legal-tools.org/doc/a56805/>, (accessed May 26, 2021).

⁶See e.g., Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?* 16 J. INT'L CRIM. JUST. (2018); Wolfgang Kaleck & Andreas Schüller, *Universal Jurisdiction Gains New Momentum*, TOAEP (2019), <https://www.toaep.org/pbs-pdf/96-kaleck-schueller/>.

⁷Open Society Justice Initiative, *Universal Jurisdiction Law and Practice in Germany*, (Apr. 2019), <https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-germany>.

⁸Cf., *Breaking Down Barriers: Access to Justice in Europe for Victims of International Crimes*, Report, FIDH, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, & REDRESS (Sept. 2020), https://www.fidh.org/IMG/pdf/breaking_down_barriers_en_web_final_2020-11-08.pdf.

in countries with different cultures or value systems and where conflict is still on-going. Among all the challenges that could be discussed, this article focuses on whether, how and to what extent the GBA has investigated conflict-related sexualized violence and how German Regional Courts⁹ dealt with such charges further.

At the time of writing, there have only been two cases in which sexualized and gender-based crimes were included into an indictment since 2002. One of the cases, the first trial under the CCAIL against Ignace Murwanashyaka¹⁰ and Straton Musoni, the President and Vice-President of the Democratic Forces for the Liberation of Rwanda (*Forces Démocratiques de Libération du Rwanda*, FDLR), is final.¹¹ The other one is against two former intelligence service officials of the Syrian President Bashar al-Assad's General Intelligence Directorate, one of which has been indicted with sexual crimes.¹² Although sexualized violence, more specifically sexualized slavery, against Yazidi women and girls forms an integral part of the way international crimes were committed by ISIS against the religious and ethnic minority, the first several cases going to trial addressing international crimes committed against the Yazidi demonstrate an absence of any sexualized violence charges against the accused. Observations from both on-going structural investigation proceedings and concluded as well as on-going trials will be analyzed in this Article. The authors will also focus on the role of victims and survivors in these cases and their possibilities to exercise their rights as civil parties, both in the investigation and in the trial phase.

B. Course of the FDLR Trial

The allegations of sexualized violence were based on the testimony of the affected victims.¹³ How and why exactly these witnesses were chosen to support the prosecution's claims is not publicly known. They were obviously put in touch with the investigating authorities by non-governmental organizations (NGOs). In addition, witnesses from NGOs and the United Nations presented their findings on rape and sexual slavery during trial, crimes which were allegedly committed by the FDLR at the time.¹⁴

The identities of the victims were kept completely anonymous. They gave their testimony via video conference transmitted to the courtroom from an unknown place. The public was excluded during the examination of these witnesses. While the parties involved in the case were able to question them directly, they could only do so to a limited extent due to the anonymization. The information provided by the witnesses could therefore not be fully verified.

The witnesses testified on at least two occasions: In the preliminary investigation proceedings and during the trial. Each examination during the trial lasted several days. At least one witness broke down after seven days of questioning. She was no longer willing to testify as a result of the questioning by the Defense. With only two trial days per week, the questioning of witnesses—often taking several days—continued for weeks. After questioning six, three women and three

⁹In Germany, in general in the first instance the Higher Regional Courts are competent in such cases.

¹⁰Ignace Murwanashyaka passed away after the issuance of the written judgment and the decision of the Federal Court of Justice, which remanded the case back to another Higher Regional Court.

¹¹Oberlandesgericht Stuttgart [OLGSt] [Higher Regional Court] Stuttgart, Sept. 28, 2015, Case No. 5 - 3 StE 6/10, at Juris, <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=164AF809E4181E47C12582E20036E84E&action=OpenDocument>.

¹²Oberlandesgericht Koblenz [OLG] [Higher Regional Court] Mar. 10, 2020, StE 9/19, <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/anlage-gegen-zwei-mutmassliche-mitarbeiter-des-syrischen-geheimdienstes-wegen-gender-begehung-von-verbr/>.

¹³This and the following information revealed in this paragraph is based on our observations as expert observers and informed by trial monitoring reports organized and conducted by a group of organisations and institutions, namely Medica Mondiale, the European Center for Constitutional and Human Rights (ECCHR), and the Hamburger Institut für Sozialforschung.

¹⁴ECCHR, FDLR-Leadership Trial in Stuttgart, Status Report, Nov. 2012, 2, https://www.ecchr.eu/fileadmin/Gutachten/Second_status_report_FDLR_2012-11.pdf.

men, of the ten so-called Z-witnesses¹⁵ originally called to testify over 24 days of the trial, the Court dispensed the testimony of the four remaining witnesses.

Earlier, the witnesses had already provided information regarding the sexualized offenses to the NGOs, which then contacted the GBA or the Federal Criminal Police Office (BKA). Thus, the victims were subjected to at least three interviews regarding the sexualized offenses.

The Trial Chamber dropped two-thirds of the charges after three of the victims of sexualized violence had testified at the main trial by way of video conference. The Presiding Judge gave as a reason for the dismissal that the proceedings would otherwise never come to an end. As a basic principle, a criminal court has the duty to examine the charges.¹⁶ To a certain extent, this also includes conducting its own investigation with regard to the facts and circumstances that come to light from the witnesses' testimonies. The Trial Chamber did not meet its obligation to investigate the charges to the full extent and therefore decided to reduce them by way of dismissal.

I. Background

The duration of the trial encompassed 320 trial days from May 4, 2011 to September 28, 2015. The charges amounted to thirty-nine war crimes and twenty-six crimes against humanity, committed from 2008 to 2009 in the eastern part of the Democratic Republic of the Congo (DRC) against the civilian population.¹⁷ The conviction of *Musoni* was upheld on December 20, 2018, while the conviction of *Murwanashyaka* was only partially upheld.¹⁸ *Murwanashyaka* was sentenced to thirteen years imprisonment for being the ringleader of a foreign terrorist organization and concurrently for aiding and abetting four war crimes. *Musoni* was sentenced to eight years imprisonment for being the ringleader of a foreign terrorist organization. His arrest warrant was suspended.¹⁹ He had been in custody since November 17, 2009, and as such, he had already served almost six years of the prison sentence.

Two-thirds of the charges were dismissed in the course of the trial²⁰, which also included all sexualized offenses. The witnesses questioned at the trial were predominantly demobilized Rwandan FDLR fighters as well as foreign experts. The Trial Chamber heard six surviving Congolese witnesses, including three women who claimed they had been raped. The identity of the witnesses was kept anonymous. The questioning took place via video conferencing.

II. Examination in Preliminary Proceedings

A prosecutor, but not a prosecutor of the GBA, interviewed seven witnesses in the preliminary proceedings. According to her statement at the trial, she was selected for this task because there were no female prosecutors at the GBA at the time and because she had worked in Germany in the field of sexualized abuse in the past. She had participated in a workshop to prepare for her work in the FDLR case.

¹⁵The ten witnesses who were anonymous, and who instead of their names bore the letter Z and a sequential number, were called Z-witnesses.

¹⁶STRAFFPROZESSORDNUNG [StPO] [Criminal Procedure Code] § 244 (2) "The court shall, in order to establish the truth, ex officio extend the taking of evidence to all facts and means of proof which are relevant to the decision." For the official translation, see https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1751.

¹⁷Patrick Kroker, *Weltrecht in Deutschland? Der Kongo-Kriegsverbrecherprozess: Erstes Verfahren nach dem Völkerstrafgesetzbuch*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, 53 (2016); DOMINIC JOHNSON, SIMONE SCHLINDWEIN & BIANCA SCHMOLZE, TATORT KONGO-PROZESS IN DEUTSCHLAND: DIE VERBRECHEN DER RUANDISCHEN MILIZ FDLR UND DER VERSUCH EINER JURISTISCHEN AUFARBEITUNG, 20 (2016).

¹⁸Bundesgerichtshof [BGH] [Federal Court of Justice], Dec. 20, 2018, 3 StR 236/17 <https://www.hrr-strafrecht.de/hrr/3/17/3-236-17.php>.

¹⁹Oral Judgement on day 320, Higher Regional Court Stuttgart, September 28, 2015, see DOMINIC JOHNSON, SIMONE SCHLINDWEIN & BIANCA SCHMOLZ supra note 25, at 21.

²⁰See KROKER supra note 25.

Crucially and unusually, she had no access to the case file to prepare for the questioning of the witnesses.²¹ She was instructed to conduct each examination in no more than one day, which included the retranslation of the transcript of the interview. Some of the witnesses had completed a journey of several days to arrive at the place of the interview. Since the questioning had to be completed before nightfall, the actual time for the examinations was very limited. The net time for each interview averaged to about five hours per person.

The witnesses were merely instructed to tell the truth and informed that they did not have to incriminate themselves or close relatives.²² The witnesses did not receive any information on their rights as victims in criminal proceedings in a case in Germany, where the German Code of Criminal Procedure applies. They could have joined the proceedings as civil parties and received further assistance and legal representation free of charge.²³ As can be seen from the testimony of the prosecutor who was not a GBA prosecutor but served from another prosecution section—not tasked with the investigation and prosecution of international crimes—for the GBA on this case, conducting the interviews, sexualized organs were not explicitly named or clearly referred to. She called them “there” or indicated that she did not want to take pictures of “down there.” Psychological support was available—not for the victims, but for the prosecutor, the Federal Police Officer and the interpreter.

There is no evidence that follow-up interviews took place. Since the prosecutor had no access to the case file, it was impossible for her to ask follow-up questions and to fully clear up the facts of the case with the necessary calm and time and situate the facts within the overall context.

Not until very late in the proceedings were those witnesses who testified in the main trial by way of a video conference assigned a witness counsel. While this lawyer was allowed to be present during the examination transmitted by video conference to the trial, she had no access to the case file either and was thus considerably limited in her actions, because the rights of a witness counsel do not exceed the rights of a witness.

Even if the individual parties involved, for example, the Public Prosecutor, interpreter, NGO employee, BKA official, BKA officer assigned to protect the witness, witness counsel, and GBA all did their best, the interviews and the accompanying circumstances were not suitable to obtain comprehensive, sufficient, and complete witness statements, or to give the witnesses enough time, advice, and accessible information to give their testimonies properly.

III. Danger and Protection

Actual witness protection was not granted. Only a single BKA officer was responsible for the entire “witness protection,” that is to say for the logistics and the anonymization of identities, if anything. The reason given by the GBA for the anonymity sounds very dramatic and does not allow for any questions: Witnesses whose identity comes to light can “expect certain death.” If witness protection measures had in fact been granted, the witnesses could have benefitted from differentiated measures. However, given the fact the witnesses were based abroad, any witness protection measures were extremely limited. In fact, BKA/GBA simply anonymized their identities. This made a conviction based alone on the testimony of the anonymized witnesses more difficult from the outset, though not impossible.

²¹See Rule 12 of the Richtlinien für das Straf- und Bussgeldverfahren (Instructions for the criminal and summary proceedings) provides that only in urgent and exceptional cases the case file is not sent to the section/person to whom investigative activities are delegated. Since the preparation for her tasks lasted a while—an additional workshop that she attended and preparation of travel etc.—it was not such an urgent case that did not allow for providing her the relevant case file. The prosecutor who interviewed the victim-witnesses testified in public court on day 229, May 7, 2014.

²²Statement of the prosecutor in public court on May 7, 2014.

²³StPO, s.172.

1. Consequences of Anonymization

The identity of the Z-witnesses was kept strictly confidential by the BKA. Confidentiality was applied to their names, addresses, and to any other information pointing to their identity. The parties, in particular the Defense, were quite limited in asking further questions of the witnesses.²⁴

Despite the strict anonymity, the real names of eight witnesses could still be gleaned from the letters requesting judicial assistance, which formed part of the case file. Accordingly, a Defense Counsel revealed two names in public trial. This clearly questions the quality of the anonymization.

The Trial Chamber comments in the judgment as follows:

Due to the special circumstances of the examination of the Z-witnesses, the Trial Chamber took into account the greatly diminished evidential value of their testimony when assessing the evidence. To ensure that these witnesses were not exposed to any danger to life and limb, they had to be questioned by video conference while maintaining their anonymity and all the restrictions this entailed. The parties to the proceedings were not aware of the precise personal information and habitual residence of the witnesses, of their concrete location when testifying in the video conference or of the persons looking after them when they were not testifying nor, in the cases of the witnesses Z 5, Z 9 and Z 10, were they aware of their whereabouts in the period relevant to their evidence. While the Trial Chamber, on the basis of the plausible information provided by BKA Chief Inspector H., who was present at the place of the interviews during the respective transmissions and who determined this on the basis of presented ID documents, previous meetings with the witnesses and contacts with the NGOs who cared for the witnesses, is satisfied that the examined Z-witnesses are the same witnesses previously questioned by the investigating authorities, any objectified insights into the witnesses beyond that were otherwise still largely missing. Restrictions to the questioning of the witnesses also became evident as the possibility to confront them was limited in that the witnesses refused to answer questions that could lead to the discovery of their identity and only witness Z 9 was available to the Defense to exercise their full right to ask questions. The Trial Chamber therefore subjected the testimonies of the witnesses to an extremely cautious and reserved assessment of their evidentiary value and has used the information only for the purpose of rounding off and confirming the evidence otherwise obtained.²⁵

The Trial Chamber thus took the easy way out. The mere fact that the right of the Defense was limited due to the anonymization was enough for the Trial Chamber not to render a verdict on sexualized violence on the basis of the testimony of the Z-witnesses. It must be noted here that the Z-witnesses did not name the defendants as direct perpetrators. The question, therefore, was merely one of determining whether the rapes and sexualized enslavements were committed by members of the FDLR during the period when the crimes took place. The subsequent examination should then have asked the question whether the defendants had the authority as commanders and leaders of these FDLR forces and the actual power to prevent the commission of these crimes. All these determinations would have had to be made regardless of the anonymization of the witnesses.

According to the case law of the European Court of Human Rights (ECtHR) on the testimony of anonymous witnesses, the case needs to be considered as a whole. It is important to note that

²⁴See the European Court of Human Rights as to under which circumstance the testimony of anonymous prosecution witnesses are permissible: *Al Khawaja & Tahery v. United Kingdom*, App. No's 26766/05 & 22228/06, para. 146, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-108072%22%5D%7D> (2012); *Ellis, Simms, & Martin v. United Kingdom*, App. No's. 46099/06 & 46699/06, para. 70 <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-108072%22%5D%7D> (2012); *Pesukic v. Switzerland*, para. 45 (2012); *Scholer v. Germany*, App. No. 14212/10 para. 5 (2014).

²⁵*Supra* note 11, Judgment, para. 430. Translated by the authors.

the ECtHR no longer upholds its previously established rule over whether the testimony is the “sole or decisive” testimony and that in the meantime the ECtHR has allowed compensatory measures in its later case law, if the verdict is solely or decisively based on the testimony of an anonymous witness for the prosecution. Similarly, there are certain circumstances under which the German Constitutional Court allows the use of testimonies of anonymous witnesses when the trial as a whole is fair.²⁶

In its judgment, the Trial Chamber did not consider these questions. This is formally explained by the fact that the allegations made during the trial were dismissed.²⁷ However, it stands to reason that the fact that the identity of the witnesses remained anonymous already generally reduced the evidential value for the Court to such an extent that it led to dropping the charges. This was further complicated by the trial being generally too much for the Court to handle²⁸ in terms of the number of allegations and the huge differences and distances that existed and still exist between the world of the Trial Chamber and that of the witnesses.

2. No Civil Party Action

None of the women who were victims of sexualized crimes appeared as civil parties. They had no way to exercise their rights in criminal proceedings in Germany. Although the offenses under the CCAIL are not explicitly offenses that allow a victim to join the proceedings as a civil party, such action would still have been permissible under the catch-all provisions of Sect. 395 (1) No. 1 (rape) and Sect. 395 (3) of the German Code of Criminal Procedure.²⁹

It can further be concluded that it is unlikely that the witnesses even knew that they had any rights in a German Court. The prosecutor who interviewed the witnesses responded that she informed the witnesses that they had to tell the truth and about their rights not to incriminate themselves and any family members.³⁰ The investigating authorities have a duty to inform the injured parties of their rights and to do so in a way that they will understand these rights and also be able to actually assert them. But a violation of this obligation is not sanctioned, nor does it lead to a new trial or constitute admissible grounds for an appeal.

Even if the witnesses had been informed at any point about the possibility of joining the proceedings as civil parties, no support was given as to how they could have exercised these rights in Germany from afar in the DRC. However, there are considerable doubts that such an explanation was provided, since the GBA took the view that witness protection and anonymization precluded any participation as a civil party, even though, as explained, this opinion has no basis in law.

The result was that the victims could not exercise the rights to which they were entitled, such as the right to be represented by a lawyer, to inspect the case file³¹, to submit applications for

²⁶See BVerfG, 2BvR 547/08, Oct. 8, 2009, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2009/10/rk20091008_2bvr054708.html.

²⁷*Supra* note 11, Judgment, para. 6. If parts of the accusations are dismissed, the Trial Chamber does not need to discuss the evidence in the judgment.

²⁸See Dominic Johnson, *Haft für den Präsidenten*, TAZ (Sept. 28 2015) where he quotes the Presiding Judge on the day of the oral judgment saying that such a huge trial can not be handled with the tools of the criminal procedure code. He said: “So geht es nicht” (That’s not how it works).

²⁹STRAFPROZESSORDNUNG [StPO] [Criminal Procedure Code] §395, abs. 3:

Whoever is aggrieved by another unlawful act, in particular pursuant to sections 185 to 189, section 229, section 244 subsection (1), number 3, sections 249 to 255 and section 316a of the Criminal Code, may join the public prosecution as private accessory prosecutor if, for particular reasons, especially because of the serious consequences of the act, this appears to be necessary to safeguard his interests.

³⁰The prosecutor who interviewed the Z-witnesses testified on May 7, 2014 in the trial. She was asked what information and instructions she provided to the witnesses. She responded that she informed them only that they have to tell the truth and they have the right to not incriminate themselves or relatives.

³¹STRAFPROZESSORDNUNG [StPO] [Criminal Procedure Code] §406(e). Victims regularly experience difficulties gaining access to the criminal file in investigations concerning international crimes due to claims that overriding interests warrant refusal, for example, data protection or national security interests, see also: *Breaking Down Barriers*, *supra* note 8, at 66.

evidence and investigations, and to question witnesses, including the right to claim compensation against the defendants.^{32,33}

Here it would have been incumbent on the Trial Chamber, at least within the scope of its duty of care towards the victims, to make sure that they knew their rights and to enable them to exercise those rights remotely. But this was obviously not done. It is possible that an active pursuit of a civil party action would have led to another outcome of the trial. The opportunity of being awarded compensation from the defendants by way of an adhesion procedure,³⁴ for example, was thus lost to the victims.

This disquieting realization creates an urgent need for German legislators to act and to also grant victims of crimes committed under international criminal law access to benefits under the German Victim Compensation Act (*Opferentschädigungsgesetz*). The EU Victim Protection Directive of 2012, which provides for state compensation for victims if the perpetrator fails to do so, applies to all victims whose case is being dealt within an EU member state, regardless of their residence and nationality.³⁵ The Congolese witnesses belong to this group.

IV. Court and Witnesses

1. Recognition of the Victimized Witnesses

Experience has shown that witnesses continue to suffer from the consequences of sexualized violence. According to all trial monitoring reports, the statements about this were and still are painful, even if some good may have come from talking about the experiences, despite the stress. It must be assumed that they feel that neither they nor the crimes committed against them were being taken seriously. The Trial Chamber found no reason to assume that “any of the witnesses, on the basis of their testimony, had given an account of things they actually had not experienced or heard of, especially since they described details again and again, which were also confirmed by other evidence.”³⁶

The Trial Chamber further states the following:

Neither was there any evidence that the witnesses, who over a period between three and seven days were facing questions from the Trial Chamber, the Federal Prosecutor’s Office and the questions of Defense Counsel, which at times were much too detailed (and quite insensitive), would have refused to be questioned again in order to prevent a finding of the truth.³⁷

Nevertheless, it was clear from the outset that it would be difficult, if not impossible, to convict the defendants for sexualized crimes in light of the anonymization and that further evidence would have to be presented which would back up and confirm the testimony of the witnesses.

At the international level, however, the situation is different; the procedural rules of the International Criminal Court stipulate that there is no requirement, especially in the case of sexualized offenses, to back up the testimony of those affected with further evidence.³⁸

³²STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE] §§403-406(c).

³³Joint plaintiffs (*Nebenkläger*) have a number of additional procedural rights to those joining procedures as an injured party. Additional procedural rights include; STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE] §397, §397(a), §§400-401, §406(d), §406(e), §406(i); GERICHTSVERFASSUNGSGESETZ [GVG] [COURT CONSTITUTION ACT], §187(4).

³⁴STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE] §404(1). Through the adhesion procedure, the victim may present a civil claim for compensation resulting from the crime during the criminal proceedings. The claim can be made in writing or orally, right up until the moment of closing statements.

³⁵Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012 O.J. (L 315) 9, 13.

³⁶*Supra* note 11, Judgment, para. 429.

³⁷*Id.*

³⁸*See, e.g.*, International Criminal Court (ICC), Rules of Procedure and Evidence, Rule 63 (4).

The Trial Chamber states the following:

The Z-witnesses gave detailed information on the relationship and coexistence of the local population with the FDLR in the places where they lived and described in particular their experiences in the year 2009. Although none of the witnesses showed any signs of being unfit to testify, it was clearly evident, based on their accounts and reactions that the events they recounted still stirred up great emotions in all witnesses despite the time that had passed in the meantime. This was especially evident in the case of the three female witnesses when the testimony dealt with the rapes they had reported and the events in connection with this. When questioned, they broke into tears again and again so that the main trial had to be briefly interrupted several times to give the witnesses time to collect themselves.³⁹

The Trial Chamber thus acknowledges the statements of the Z-witnesses in its verdict and believed them to be credible. It saw no reason to believe that they had made up the events. Although the comments on the testimony of all Z-witnesses only take up little more than one page of the 318 page judgment, they are, after all, a recognition, even if a conviction is missing.

However, what the witnesses experienced was not made public—neither in Germany nor in the DRC—because the statements were made behind closed doors and German courts do not create any transcripts, not even in anonymized form, as is routinely the case with international Courts and Tribunals. The rapes and sexualized enslavement of the witnesses, their suffering, and the ongoing consequences of the crimes thus remain largely unknown—except for this one paragraph in the judgment, in which all they have experienced and suffered in terms of sexualized violence is recognized and acknowledged. Nevertheless, the questions remain whether the repeated interviews and intensive questioning as anonymous witnesses was worth it in light of this result, and whether the women, even without a conviction in this context, received at least a limited recognition, that is, a “little justice.”

2. *The Huge Gulf Between Court and the Witnesses*

Aside from the fact that the witnesses were anonymous when testifying and that the Defense was unable to question them comprehensively, there is another reason why the Court dropped the sexualized violence crime charges and did not render a judgment on these.

The Trial Chamber states the following:

Obviously due to their cultural background, the witnesses Z 5 and Z 10 in particular, found it difficult to provide detailed answers to questions concerning their privacy. Overall, the Court could see that all Congolese witnesses had a special way of describing experiences and events due to their origin in another culture. Thus, at first, they often did not describe events in a chronological order. One also could not always discern whether they themselves had perceived the reported events or whether they knew about them from other sources. While the male Congolese witnesses, all of whom had a good school education, were regularly able to put the events they described in a larger context, to provide follow-up details and to clear up possible misunderstandings by providing further explanations when questioned, it was at times very difficult for the female Congolese witnesses to recognize the direction of questions and to describe the events in a structured way. Due to their lack of schooling, the witnesses Z 1 and Z 5 in particular only used a very simple vocabulary, which is why they could sometimes describe the events only in a rudimentary way even when repeatedly questioned. In addition, they jumped back and forth in time when describing events and had difficulties in assigning a date to them on the calendar. As reported by the witness Dr. Z., who was

³⁹*Supra* note 11, Judgment, para. 428.

involved as Public Prosecutor in the interrogations during the preliminary proceedings, aids in the form of sketches and toy figures were sometimes used for the above reasons when the Congolese witnesses were first questioned to help the witnesses give an account of the sequence of events or to help them determine which persons were present at what time. To ensure that no misinterpretations or misunderstandings could come up in the main trial, relevant follow-up questions were asked to clarify the facts, also with regard to the distinction between one's own experiences and facts obtained from hearsay.⁴⁰

In our opinion, such a reasoning is an illustration of class and gender biases towards survivors of international crimes by the German judiciary in this case, and demonstrates the insensitivity with regard to local structures and forms of systemic discrimination.

In its Judgment, the Trial Chamber describes significant communication problems and problems of comprehension between the Trial Chamber and the witnesses. The Trial Chamber acknowledges the fact that the witness statements were hampered by a lack of education, as well as a simple vocabulary, which resulted in a description of events that was rudimentary at best and acknowledges their inability to give an account that is structured and chronologically ordered. They cannot use a calendar to order events in time. They also often failed to recognize the direction of the questions. Other than the male Z-witnesses, they were hardly able to put things in context and order. Further, according to the Trial Chamber, the witnesses came from a "different cultural background" and had a special way of describing experiences.

This is a case where worlds, which could not be further apart, collide. With its remarks in the Judgment, the Trial Chamber demonstrates that it was unable to communicate and establish contact with these witnesses and to use words and a language that were understandable, even after interpretation. The differences in cultures and classes made meaningful communication impossible. But the Trial Chamber does not assume any responsibility here for these huge difficulties in communication. It also fails to address its own limits in this respect that is its failure to be adequately prepared for input from another continent within the context of a video conference.

Based on our professional experiences from international criminal law practice, we hold that the 5th Trial Chamber of the Higher Regional Court of Stuttgart can be expected to stand for other Trial Chambers. Is it conceivable, therefore, that any German Court is in a position to do its job and also adjudicate crimes under international law? Intensive and specialized training for the Judges, as well as for all other participants in the proceedings, that is, members of the Federal Criminal Police Office, GBA, and the lawyers, can surely make a difference and improve the situation. However, what is needed in addition is a deep and critical self-reflection. There is still much to be done to take sexualized violence as an international crime out of the realm of impunity and to also clear up such crimes in an appropriate manner in a German Court.

C. International Crimes Committed by Non-State Actors in Iraq and Syria

The Office of the German Federal Public Prosecutor has been conducting a structural investigation⁴¹ proceeding against unknown members of the Islamic State (ISIS) on suspicion of having committed crimes under the CCAIL since August 1, 2014.⁴² One focus of the proceeding is on the crimes committed by ISIS against the Yazidi in the Sinjar district from August 3, 2014 involving charges of genocide, § 6 of the CCAIL, crimes against humanity, § 7 of the CCAIL, and war crimes,

⁴⁰*Supra* note 11, Judgment, para. 428.

⁴¹Not yet regulated by law, structural investigations (*Strukturermittlungsverfahren*) can be opened to investigate an organisational structure allegedly responsible for largescale—atrocities—crimes. This enables authorities to gather and preserve evidence available to them in order to facilitate future proceedings before a German, foreign or international court. Such investigations have been used in Germany since 2011. *Breaking Down Barriers*, *supra* note 8, at 63.

⁴²DEUTSCHER BUNDESTAG, DRUCKSACHE 19/2603, <http://dipbt.bundestag.de/doc/btd/19/026/1902603.pdf>.

§ 8 et seq. of the CCAIL.⁴³ According to the United Nations Commission of Inquiry on Syria, ISIS has sought to destroy the Yazidis:

[T]hrough killings; causing serious bodily and [mental harm in the form of sexualized slavery, enslavement, torture and inhuman and degrading treatment and forcible transfer; the infliction of conditions of life that bring about a slow death; the imposition of measures to prevent Yazidi children from being born, including forced conversion of adults, the separation of Yazidi men and women and mental trauma; and the transfer of Yazidi children from their own families and placing them with ISIS fighters, thereby cutting them off from beliefs and practices of their own religious community and erasing their identity as Yazidis.⁴⁴

Since the initiation of the structural investigation proceeding, the GBA has obtained two arrest warrants at the Federal Court of Justice against known members of ISIS based on the strong suspicion of those individuals having been involved in the commission of, *inter alia*, genocide in accordance with § 6 CCAIL.⁴⁵ These were the first judicial decisions determining that the actions of ISIS against the Yazidi in Northern Iraq and Syria amounts to genocide in the meaning of § 6 CCAIL.⁴⁶ One of the arrest warrants⁴⁷ culminated in the extradition to Taha Al-J. from Greece to Germany and the start of the trial against him for charges of genocide, crimes against humanity, and war crimes in April 2020.⁴⁸

Notably in March 2015, the state of Baden-Württemberg issued a state order, also known as the special quota program, for the admission of up to 1000 women and minors living in northern Iraq who had become victims of sexualized violence by ISIS in Syria and Iraq. In July 2015, the state of Lower Saxony followed with a state order foreseeing the admission of up to seventy persons from the same group. In November 2015, the state of Schleswig-Holstein issued a state order admitting up to twenty-two women—plus “up to eleven children of these women if necessary”—from the special quota program of Baden-Württemberg. The Federal Ministry of the Interior had given its consent to these admission orders.⁴⁹ In 2019, the state of Brandenburg implemented its admission program for seventy-two Yazidi women, men, and children affected by war-time and sexualized

⁴³CHRISTIAN RITSCHER, AKTUELLE ENTWICKLUNGEN IN DER STRAFVERFOLGUNG DES GBA IM BEREICH VÖLKERSTRAFRECHT, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK (2019), http://zis-online.com/dat/artikel/2019_12_1334.pdf. Next to the structural investigation proceeding against ISIS concentrated on international crimes committed against the Yazidi, the Office of the German Federal Prosecutor conducts another structural investigation proceeding looking into crimes committed by ISIS more generally. With respect to the armed conflict in Syria, the Office of the German Federal Public Prosecutor is leading two structural investigation proceedings, namely one against Syrian regime officials and another against rebels, with the exception of ISIS, for their involvement in international crimes committed in Syria.

⁴⁴INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, “THEY CAME TO DESTROY”: ISIS CRIMES AGAINST THE YAZIDIS, https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf.

⁴⁵The two arrest warrants were respectively issued in December 2016 and September 2018, see for example: Yassin Musharbash, “*Sie werden nicht vergessen*” *Deutsche Bundesanwälte versuchen in mühevoller Ermittlungsarbeit die IS-Verbrechen an den Jesiden aufzuklären*, *Die Zeit* (Oct. 2018), <https://www.zeit.de/2018/41/voelkermord-jesiden-irak-islamischer-staat-haftbefehle-bundesanaelte-deutschland>.

⁴⁶See Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 28, 2020, AK 10/20; Decision of April 28, 2020 and amendment of the arrest warrant by the 5th Criminal Senate of the Frankfurt Higher Regional Court by Decision of March 19, 2020 (5-3 StE 1/20-4-1-20). See also, CHRISTIAN RITSCHER, AKTUELLE ENTWICKLUNGEN IN DER STRAFVERFOLGUNG DES GBA IM BEREICH VÖLKERSTRAFRECHT, ZEITSCHRIFT FÜR INTERNATIONAL STRAFRECHTSDOGMATIK, (Dec. 2018). http://www.zis-online.com/dat/artikel/2018_12_1249.pdf.

⁴⁷Arrest warrant issued by the investigating judge of the Federal Supreme Court on April 18, 2019 (4 BGs 101/19).

⁴⁸*Germany Charges Iraqi Man With Genocide For Killing Yazidi Child*, DEUTSCHE WELLE, Oct. 11, 2019, <https://www.dw.com/en/germany-charges-iraqi-man-with-genocide-for-killing-yazidi-child/a-50800811>; Pressestelle, Oberlandesgericht Frankfurt [OLG Frankfurt], Beginn der Hauptverhandlung gegen Taha Al. J. 24 (Apr. 24, 2020), <https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/beginn-der-hauptverhandlung-gegen-taha-al-j>.

⁴⁹DEUTSCHER BUNDESTAG, DRUCKSACHE 19/2603, <http://dipbt.bundestag.de/doc/btd/19/026/1902603.pdf>.

violence.⁵⁰ Next to providing protection and physical safety from violence, the program offered medical as well psycho-social support. The implementation of such programs in several states in the country provided enhanced access to survivors and first hand witnesses of international crimes committed by ISIS for investigators of the Federal Police and the GBA. Around 100 survivors, predominantly female, who had been subjected to various forms of sexualized violence among other international crimes, are said to have testified.⁵¹ It is unclear how many of the survivors who testified were in fact informed or made use of their right to be accompanied by a lawyer when testifying in the context of the structural investigation proceeding. According to civil society representatives working with some of these survivors, the majority went without a legal representation since they did not know they had such a right or how to make use of it.⁵² The FDLR trial and the collapse of the sexualized violence charges underlined the fatal consequences, which a lack of communication or information about rights could have at trial stage. It is essential for the investigation and prosecutorial authorities to recognize that their interests and the interests of the survivors and survivor communities may differ. Regardless of how specialized or well-meaning investigators or prosecutors are, part of their professional ethics is to ensure informed consent of survivors, which includes providing detailed communication about their rights in criminal investigations and proceedings.

Supposedly, the criticism of observers from civil society following the conclusion of the FDLR trial demanding adequate resources, training, and expertise for gender-sensitive and culture-sensitive approaches, prompted certain measures such as all-female investigator teams and training for both the Office of German Federal Prosecutor and the Federal Police.⁵³ In response to a question by Members of Parliament, the German government has asserted that dealing with traumatized victims of international crimes has become part of the training courses to be regularly attended by the international criminal law units of the Federal Prosecutor.⁵⁴ The same applies for a training course on a culturally sensitive approach to victim-witnesses, in particular to the victims of sexualized violence. While all employees of the Federal Police attend a training course on international criminal law, some attend a specialized training course on conflict-related sexualized violence. Neither the Federal Prosecutor nor the Federal Police have attended any trainings on anti-discrimination as part of their regular training curriculum.⁵⁵ This should become a prerequisite in the international criminal justice practice, not only for investigators and prosecutors but also—and particularly—for judges at higher regional courts.

According to a report by the Global Justice Center, the genocide committed against the Yazidi is a contemporary example in which the gendered genocidal acts, particularly the “non-killing acts of genocide[—]more likely to be directed against female members of the protected group[—]are often not recognized as intrinsic parts of the continuum of genocidal violence.”⁵⁶ Sexualized

⁵⁰Landesregierung Brandenburg, *Landesaufnahmeprogramm Yezidinnen und Yeziden wird umgesetzt*, (Oct. 18, 2019) <https://www.brandenburg.de/cms/detail.php/bb1.c.648080.de>.

⁵¹CHRISTIAN RITSCHER, AKTUELLE ENTWICKLUNGEN IN DER STRAFVERFOLGUNG DES GBA IM BEREICH VÖLKERSTRAFRECHT, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, (Dec. 2018) http://www.zis-online.com/dat/artikel/2018_12_1249.pdf.

⁵²Conversation between one of the authors of this article and a Yazidi civil society representative working in Germany.

⁵³See, e.g., ECCHR, UNIVERSAL JURISDICTION IN GERMANY? THE CONGO WAR CRIME TRIAL: FIRST CASE UNDER THE CODE OF CRIMES AGAINST INTERNATIONAL LAW. https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Report_Executive_Summary_FDLR_EN.pdf.

⁵⁴DRUCKSACHE 19/12354, ANTWORT DER BUNDESREGIERUNG AUF DIE KLEINE ANFRAGE DER ABGEORDNETEN KATJA KEUL, MARGARETE BAUSE, KAI GEHRING, WEITERER ABGEORDNETER DER FRAKTION BÜNDNIS 90/ DIE GRÜNEN, DRUCKSACHE 19/11480 (Aug. 12, 2019), <https://dipbt.bundestag.de/dip21/btd/19/123/1912354.pdf>.

⁵⁵DRUCKSACHE 19/12354, ANTWORT DER BUNDESREGIERUNG AUF DIE KLEINE ANFRAGE DER ABGEORDNETEN KATJA KEUL, MARGARETE BAUSE, KAI GEHRING, WEITERER ABGEORDNETER DER FRAKTION BÜNDNIS 90/ DIE GRÜNEN, DRUCKSACHE 19/11480 (Aug. 12, 2019), <https://dipbt.bundestag.de/dip21/btd/19/123/1912354.pdf>.

⁵⁶GLOBAL JUSTICE CENTER, BEYOND KILLING: GENDER, GENOCIDE & OBLIGATIONS UNDER INTERNATIONAL LAW, <https://www.globaljusticecenter.net/files/Gender-and-Genocide-Whitepaper-FINAL.pdf> (last accessed May 26, 2021)).

violence, more specifically, the holding of Yazidi females in sexualized slavery has been explicitly sanctioned as part of the genocidal campaign by ISIS.⁵⁷ The harm inflicted on Yazidi women and girls by ISIS dominated the narrative about violence against the religious and ethnic minority. Yet, the first investigation results and indictments against those accused on trial indicate a surprising absence of sexualized and gender-based crimes charges. Neither sexualized violence nor the gendered commission of sexualized violence, in particular sexualized slavery, can be found at the forefront of the facts of the cases on trial. Whereas the Office of the German Federal Prosecutor does not have an influence on the facts of cases which first go on trial, the Office could ensure gender-sensitive investigation and prosecution—including the cumulative charging of international crimes committed in a discriminatory fashion on the basis of gender as gender-based persecution. With the remarkable and promising exception of the verdict against Sarah O. of the Higher Regional Court of Düsseldorf⁵⁸, gender-based persecution has also not been indicted or prosecuted in such cases. Even though the slave trade and followed enslavement, such as in the cases against Jennifer W. and Taha A. for example, for forced labor purposes clearly and exclusively targets females, both adult and children, in a discriminatory manner.⁵⁹ What this ultimately shows—to the disadvantage of successful prosecution of conflict-related sexualized violence—is that investigations of international crimes committed by ISIS conducted by the Federal Police and the GBA are not based on a gender analysis⁶⁰ and thus far do not prioritize sexualized violence as part of the core prosecutorial work.⁶¹

Instead, it has become apparent in the meantime that one focus of the prosecutorial strategy is dedicated to prosecuting ISIS-associated women once they have entered Germany—either instead or in addition to counter-terrorism charges—for the war crime against property, § 9 CCAIL, for living in houses taken by ISIS, such as the cases against Sibel H.⁶², Sabine S.⁶³, Mine K.⁶⁴, or Fatima M.⁶⁵ or for enslavement as a crime against humanity for enslaving Yazidi women

⁵⁷NIKKI MARCZAK, A CENTURY APART: THE GENOCIDAL ENSLAVEMENT OF ARMENIAN AND YAZIDI WOMEN, A GENDERED LENS FOR GENOCIDE PREVENTION, *RETHINKING POLITICAL VIOLENCE*, 133–62 (2016).

⁵⁸Oberlandesgericht [OLG] [Higher Regional Court] Düsseldorf, Pressemitteilung Nr. 18/2021, 16 June 2021, “Versklavung von sieben Jesidinnen: Urteil in dem Verfahren gegen Sarah O. u. a.”, https://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20210616_PM_SarahOUrteil/index.php (last accessed 5 July 2021). This judgment, once finalised, is historic in the sense that for the first time for the first time ever, a court handed down a conviction for persecution as a crime against humanity on intersecting religious and gender grounds.

⁵⁹Alexandra Lily Kather & Alexander Schwarz, *First Genocide Trial Commences in Germany*, *Just Security* (Apr. 2020), <https://www.justsecurity.org/69833/first-yazidi-genocide-trial-commences-in-germany/>.

⁶⁰Such a gender analysis is included in the ICC’s Policy Paper on Sexualized and Gender-Based Crimes and should also be used as a best practice example in the German context. See INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUALIZED AND GENDER-BASED CRIMES, <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexualized-and-gender-based-crimes-june-2014.pdf>. “Gender analysis” examines the underlying differences and inequalities between women and men, girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether and in what ways crimes, including sexualized and gender-based crimes are related to gender norms and inequalities.

⁶¹Alexandra Lily Kather & Alexander Schwarz, *Intersecting Religious and Gender-Based Persecution in Yazidi Genocide Case: A Request for an Extension of Charges*, <https://www.justsecurity.org/74943/intersecting-religious-and-gender-based-persecution-in-yazidi-genocide-case-a-request-for-an-extension-of-charges/>; Alexandra Lily Kather & Alexander Schwarz, *First Yazidi Genocide Trial Commences in Germany*, (Apr. 23, 2020) <https://www.justsecurity.org/69833/first-yazidi-genocide-trial-commences-in-germany/>.

⁶²Oberlandesgericht [OLG] [Higher Regional Court] München, Feb. 13 2020 <https://www.justiz.bayern.de/gerichte-und-behoerden/oberlandesgerichte/muenchen/presse/2020/8.php>

⁶³Oberlandesgericht [OLG] [Higher Regional Court], Stuttgart, Jul. 13 2019, https://www.verfassungsschutz-bw.de/LfV3,Lde,W-2/Startseite/Arbeitsfelder/Sabine+S_+Radikalisierung+als+Weg+ins+Gefahrennis

⁶⁴Oberlandesgericht [OLG] [Higher Regional Court] Düsseldorf, Dec. 4 2019, https://www.olg-duesseldorf.nrw.de/behoerde/presse/archiv/Pressemittelungen_aus_2019/20191204_PM_Urteil-Mine-K_/index.php,

⁶⁵All referenced cases without a corresponding footnote are unpublished, however, the authors are aware of their existence and substance through personal knowledge.

and girls for forced labor in the household, such as the cases against Jennifer W.,⁶⁶ Omaina A.,⁶⁷ Sara O.⁶⁸ or Nurten J.⁶⁹ Notably, war crimes against property charges were initially applied in cases against female returnees, in which neither sufficient evidence for support of or membership in a terrorist organization could be obtained.⁷⁰ As a next step, the German Federal Supreme Court declared the practice of ISIS-associated women living in properties obtained by ISIS as a war crime in accordance with, § 9 CCAIL,⁷¹ which was confirmed by a decision against Sabine S. of the Higher Regional Court in Stuttgart.⁷² ISIS-associated men who also lived in houses obtained by ISIS were, however, not being charged with the war crime of pillage although they lived in such houses. Moreover, it is only females who were charged with crimes—national and international—they committed involving their own children. For example, Carla-Josephine S., sentenced on April 29, 2020 to five years and three months imprisonment,⁷³ was charged with war crimes against persons, specifically the integration of a child under 15 years of age into an armed group in connection with a non-international armed conflict, § 8(1) Nr. 5 CCAIL.⁷⁴ Similarly, Omaina A.'s indictment includes the charges of violation of the duty of care and education—§ 171 German Criminal Code.⁷⁵ Such observations confirm the lack of a gender analysis, which is required to grasp the gender relations on the ground and which further indicates that the prosecutorial strategy itself is gendered, missing an adequate analysis of the degree of women's agency under ISIS' repressive gender norms—including how the role of women within ISIS has evolved over time.⁷⁶

There is a lack of recognition of gender-specific harm of crimes committed by ISIS. It is apparent that Yazidi males and females were separated and international crimes were committed

⁶⁶Oberlandesgericht [OLG] [Higher Regional Court], Mar. 6, 2020, <https://www.justiz.bayern.de/gerichte-und-behoerden/oberlandesgerichte/muenchen/presse/2019/15.php>.

⁶⁷Oberlandesgericht [OLG] [Higher Regional Court], Apr. 22, 2020, 3 St 1/20, <https://justiz.hamburg.de/pressemitteilungen/13871988/pressemitteilung-2020-04-22-olg-01/>.

⁶⁸Oberlandesgericht [OLG] [Higher Regional Court] Sept. 25, 2019, III-7 StS 3/19 https://www.olg-duesseldorf.nrw.de/behoerde/presse/archiv/Pressemitteilungen_aus_2019/20190925_PM_SarahO/index.php.

⁶⁹Generalbundesanwaltschaft [GBA] [Federal Public Prosecutor General], July 27, 2020, <https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/aktuelle/Pressemitteilung-vom-27-07-2020.html?nn=478184>.

⁷⁰See, e.g., Generalbundesanwaltschaft [GBA] [Federal Public Prosecutor General], 23 December 2019, <https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2019/Pressemitteilung-vom-23-12-2019.html>. In which the Federal Supreme Court of Germany denied issuing arrest warrants for membership in or support of a terrorist organization against the ISIS-associated woman who solely took care of the home and family life without being engaged in any activities of the organization; Georg Mascolo, *BGH makes it difficult to prosecute those returning from IS*, SÜDDEUTSCHE ZEITUNG, <https://www.sueddeutsche.de/politik/terrorabwehr-bgh-erschwert-straferfolgung-von-is-heimkehrerinnen-1.3991688>, (last accessed May 26, 2021). Thereafter, ISIS-associated women who returned to Germany began to be charged with the war crime against property.

⁷¹See BUNDESGERICHTSHOF [BGH] [FEDERAL COURT OF JUSTICE], Beschl. v. 4.4.2019 –AK 12/19, from fn. 31. See also, BGH 2019, 2552.

⁷²OBERLANDESGERICHT [OLG] [HIGHER REGIONAL COURT], July 5, 2019, 55-2StE 11/18.

⁷³Oberlandesgericht Koblenz [OLG] [Higher Regional Court] April 29, 2020, 7 StS 4/19.

⁷⁴Generalbundesanwaltschaft [GBA] [Federal Public Prosecutor General], October 21, 2019, <https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2019/Pressemitteilung-vom-21-10-2019.html>; Press Oberlandesgericht [OLG] [Higher Regional Court] Düsseldorf, 30 April 30, 2020 available at: https://www.olg-duesseldorf.nrw.de/behoerde/presse/archiv/Pressemitteilungen_aus_2020/20200430_PM_Carla_S/index.php, last accessed: July 5, 2020.

⁷⁵Generalbundesanwaltschaft [GBA] [Federal Public Prosecutor General], March 16, 2020, <https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/aktuelle/Pressemitteilung-vom-16-03-2020.html>.

⁷⁶See Alexandra Lily Kather & Anne Schroeter, *Co-Opting Universal Jurisdiction? A Gendered Critique of the Prosecutorial Strategy of the German Federal Public Prosecutor in Response to the Return of Female ISIL Members: Part I*, OPINIO JURIS, Mar. 7, 2019, <http://opiniojuris.org/2019/03/07/co-opting-universal-jurisdiction-a-gendered-critique-of-the-prosecutorial-strategy-of-the-german-federal-public-prosecutor-in-response-to-the-return-of-female-isil-members-part-i/>; see also, United Nations Security Council Counter-Terrorism Executive Committee, *Analytical Brief on the Prosecution of ISIL-associated Women*, July 22, 2020, <https://www.un.org/sc/ctc/news/2020/07/22/cted-publishes-analytical-brief-prosecution-isil-associated-women/>.

against them, specific to their religion, ethnicity, and gender and in a discriminatory fashion. For example, it was predominantly if not exclusively females who were subjected to the slave trade and slavery by ISIS.⁷⁷ Crucially, any reflection that enslavement was committed as a form of gender-based, religious, and political persecution as a crime against humanity is missing in charges of the case on trial or cases going to trial in the near future. Overall, what can be observed is that gender-omitting investigations and prosecutions are met by a gendered charging practice. In a situation in which conflict-related sexualized violence is as prevalent as it is in the context of international crimes committed against the Yazidi, it is particularly concerning that with several cases on trial, there is a complete absence of cases addressing sexualized slavery of females by ISIS.

D. International Crimes Committed by the Syrian Regime

In 2011, a structural investigation proceeding was initiated collecting information and evidence of crimes against humanity, § 7 CCAIL, in connection with the uprising in Syria, which was extended to war crimes, §§ 8-12 CCAIL, with the outbreak of war in Syria. This investigation was directed against unknown suspects of all conflict parties who are suspected of having committed crimes under the CCAIL in Syria.⁷⁸ One focus of the structural investigation proceeding in relation to Syria concerns crimes committed by members of the Syrian regime.⁷⁹ Allegedly, sexualized violence has been investigated as part of a widespread and systematic attack against the civilian population in Syria. However, concrete investigation results in the form of arrest warrants and indictments show otherwise.

One focus of the above-mentioned structural investigation proceeding is the analysis of the so-called “Caesar-Files”, approximately 28,000 photographs of over 6,000 killed male persons photographed while lying on their backs, which are now being systematically evaluated from a forensic medical point of view.⁸⁰ For the purpose of prosecuting international crimes committed by the Syrian regime, the GBA has set up a joint investigation team with the Paris Public Prosecutor’s office responsible in France.⁸¹ Such a transnational collaboration is intended to bundle cross-border forces and avoid duplication of work.⁸²

One result of this structural investigation proceeding is an investigation against the former Head of the Syrian Air Force Intelligence Service, Jamil Al-Hassan, on urgent suspicion of having committed crimes against humanity—§ 7 CCAIL.⁸³ In June 2017, the Investigating Judge of the German Federal Court of Justice issued an arrest warrant against Jamil Al-Hassan for killing, torture, severe physical and mental harm, as well as deprivation of liberty as a crime against humanity.⁸⁴ However, additional person-specific investigations have apparently been initiated, particularly in connection with the so-called “Caesar-Files”. Whereas the arrest warrant acknowledges the systematic use of sexualized violence as a torture method, sexualized violence is exclusively charged as torture under § 7 (5) CCAIL and not as sexualized violence § 7 (1) Nr. 6 CCAIL.

⁷⁷Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Missing in Action: The International Crime of the Slave Trade*. 18 J. INT’L CRIM. JUST. 517–42 (May 2020).

⁷⁸Christian Ritscher, Aktuelle Entwicklungen in der Strafverfolgung des GBA im Bereich Völkerstrafrecht, *Zeitschrift für international Strafrechtsdogmatik*, 12/2018, at 543, http://www.zis-online.com/dat/artikel/2018_12_1249.pdf (last accessed May 26, 2021).

⁷⁹Christian Ritscher, Aktuelle Entwicklungen in der Strafverfolgung des GBA im Bereich Völkerstrafrecht, *Zeitschrift für internationale Strafrechtsdogmatik*, 12/2019, at 601, http://www.zis-online.com/dat/artikel/2019_12_1334.pdf (last accessed May 26, 2021).

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.*

⁸³CHRISTIAN RITSCHER, AKTUELLE ENTWICKLUNGEN IN DER STRAFVERFOLGUNG DES GBA IM BEREICH VÖLKERSTRAFRECHT, ZEITSCHRIFT FÜR INTERNATIONAL STRAFRECHTSDOGMATIK (2021), http://www.zis-online.com/dat/artikel/2018_12_1249.pdf.

⁸⁴See Bundesgerichtshof [BGH] [Federal Court of Justice], Investigating Judge, arrest warrant of June 6, 2018, 4 BGs 106/18, 3 BJs 18/18-4; See also, Spiegel, *Deutschland jagt Assads Folterknecht* (June 8, 2018) <https://www.spiegel.de/politik/ausland/syrien-deutschland-jagt-baschar-al-assads-folterknecht-per-haftbefehl-a-1211888.html>.

Two years after the arrest warrant, which was issued on June 6, 2018, the European Center for Constitutional and Human Rights submitted in the form of a criminal complaint to the Federal Prosecutor a challenge to explicitly include charges of sexualized violence as a crime against humanity under §7 (1) Nr. 6 CCAIL⁸⁵ in the arrest warrant.

Interestingly, §7 (1) Nr. 6 CCAIL—the crimes against humanity provision on sexualized violence—reads:

Whoever, in the context of a widespread or systematic attack against a civilian population sexually coercing or raping another person, forcing him or her into prostitution, depriving him or her of reproductive capacity or, with the intention of influencing the ethnic composition of a population, holding a woman pregnant under duress, . . . shall be punishable by term of imprisonment of at least five years.⁸⁶

Most notably, the umbrella term “any other form of sexualized violence of comparable gravity”⁸⁷ has not been incorporated in a verbatim manner from the Rome Statute and was instead replaced by “sexualized coercion,” a term transposed from § 177 German Criminal Code. Due to its narrow, outdated, and discriminatory requirements—violence, threat, and impossibility to resist—which need to be met for an act to constitute sexualized coercion, only some forms and acts of sexualized violence could be accounted for and definite impunity gaps existed for others. Moreover, the law did not conform with the standards set by the Istanbul Convention.⁸⁸ Though a reform was brought about in 2016,⁸⁹ for international crimes allegedly committed before this, the old version is sought in the application of the law. In addition, such a replacement of terms in itself provides for an impunity gap for acts of sexualized violence which fall outside the scope of the other listed acts under § 7 (1) Nr. 6 CCAIL, namely sexualized coercion, rape, enforced prostitution, deprivation of a person’s reproductive capacity, enforced pregnancy with the intention of influencing the ethnic composition of a population. Such an impunity gap constitutes a particular risk for culture-specific acts of sexualized violence, which do not necessarily conform with the “German” or “Euro-centric” idea of what sexualized violence is. Considering example acts of sexualized violence in Syrian government-run detention facilities, the forceful removal of a headscarf of a Muslim woman could be argued to constitute an act of sexualized violence at the intersection of religion and gender. Despite the fact that § 7 (1) Nr. 6 CCAIL is to be interpreted in accordance with international law and the jurisprudence of the International Criminal Court and other international courts and tribunals, observations from our professional experiences in practice allow the conclusion that it will be challenging for forms of sexualized violence other than specified forms to be interpreted as constituting sexual coercion in the sense of §7 (1) Nr. 6 CCAIL, in part because judges at higher regional courts are accustomed to referring to national and not international jurisprudence.⁹⁰

⁸⁵ECCHR, *Germany must investigate sexualized and gender-based violence in Syria for what it is: a crime against humanity - Survivors file criminal complaint against Syrian Air Force Intelligence Service*, <https://www.ecchr.eu/en/press-release/germany-must-investigate-sexualized-and-gender-based-violence-in-syria-for-what-it-is-a-crime-against-humanity/> (last accessed May 26, 2021).

⁸⁶Translated by the authors.

⁸⁷UN General Assembly, *Rome Statute of the International Criminal Court (last Amended 2010)*, Article 7 Nr. 1 (g).

⁸⁸Deutscher Juristinnenbund, *Stellungnahme zur grundsätzlichen Notwendigkeit einer Anpassung des Sexualstrafrechts (insbesondere § 177 StGB) an die Vorgaben der Konvention des Europarats zur Verhütung und Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt (Istanbul-Konvention) von 2011*, (May 9, 2014) <https://www.djb.de/verein/Kom-u-AS/K3/st14-07/>.

⁸⁹Heike Rabe, *Sexualisierte Gewalt im reformierten Strafrecht. Ein Wertewandel – zumindest im Gesetz*, Bundeszentrale für politische Bildung, <https://www.bpb.de/apuz/240913/sexualizedisierte-gewalt-im-reformierten-strafrecht> (last accessed May 26, 2021).

⁹⁰See comparatively ECCHR, Executive Summary: Sexual and Gender-based Violence in Detention Facilities of the Air Force Intelligence in Syria: Criminal Complaint to the German Federal Public Prosecutor, undated, 9 et seq., https://www.ecchr.eu/fileadmin/Hintergrundberichte/Executive_summary_SGBV_Syria.pdf.

Another result of the structural investigation proceeding against members of the Syrian regime for their involvement in crimes against humanity is the indictment and opening of a trial against a former head of an interrogation unit in a notorious detention facility run by a Syrian intelligence agency, Anwar R., and one of his former employees, Eyad A.⁹¹ Whereas the case is remarkably the first trial in the world addressing the crimes of killing, torture, and deprivation of liberty as crimes against humanity committed against perceived political opponents of the Syrian regime in government run detention facilities, it shows detrimental short-comings when it comes to accountability of sexualized violence against women, men, children, and lesbian, gay, bisexual, transgender, queer, and intersexed community (LGBTQI) persons. Interestingly, the indictment against the former head of the interrogation unit, Anwar R., contains two counts of sexualized violence, based on an incident of rape and an incident of sexual coercion.⁹² Yet, such crimes have been charged under the German Criminal Code and not as crimes against humanity under § 7 (6) CCAIL. As a result, crimes of sexualized violence were the only category of crimes committed in this facility, which have been characterized in the indictment as isolated criminal acts criminalized under the national criminal code and not as an international crime. This constitutes a failure to apply the CCAIL properly and a misrepresentation of the harms suffered by the survivors of such crimes and the context in which such crimes were being committed. Fortunately, this was challenged in November 2019 and as of March 2021 sexual crimes are being indicted and prosecuted against the remaining defendant Anwar R. as crimes against humanity under § 7 (6) CCAIL.⁹³ Eyad A., one of the two defendants in the trial was sentenced to four and half years imprisonment at the end of February 2021.⁹⁴ The trial against the remaining other defendant Anwar R. is likely to conclude in 2021. An arrest warrant against, Alaa M., a Syrian doctor and alleged member of the Syrian Military Intelligence Service issued in 2020 contains several allegations of crimes against humanity.⁹⁵ These include, for the first time, a reproductive crime—namely, the deprivation of the reproductive capacity—which is identified as a crime against humanity under § 7 (6) CCAIL.

Defenders of Syrian women's rights, such as Sema Nassar,⁹⁶ and international human rights organizations, such as Human Rights Watch⁹⁷ and Amnesty International,⁹⁸ have long alerted to the numerous accounts and forms of sexualized violence committed by the Syrian intelligence services against women, men, girls and boys, as well as LGBTQI persons in detention facilities. In addition to the various forms of sexualized violence such as invasive touching or cavity searches, enforced nudity, electroshocks on genitals, forced abortion, rape with objects or body

⁹¹Generalbundesanwaltschaft [GBA] [Federal Public Prosecutor General], Oct. 29, 2019, <https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2019/Pressemitteilung-vom-29-10-2019.html>.

⁹²See *Anklage gegen zwei mutmaßliche Mitarbeiter des syrischen Geheimdienstes wegen der Begehung von Verbrechen gegen die Menschlichkeit u.a. zugelassen* (Mar. 10, 2020) <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/anklage-gegen-zwei-mutmassliche-mitarbeiter-des-syrischen-geheimdienstes-wegen-der-begehung-von-verbr/>.

⁹³ECCHR, *Sexual Violence Now Indicted as Crime Against Humanity* (Mar. 17, 2021) <https://www.ecchr.eu/en/press-release/syrien-prozess-in-koblenz/>.

⁹⁴Oberlandesgericht [OLG] [Higher Regional Court, Feb. 24, 2021, 1 StE 9/19.

⁹⁵Generalbundesanwaltschaft [GBA] [Federal Public Prosecutor General], Dec. 21 2020, <https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2020/Pressemitteilung3-vom-21-12-2020.html?nn=848266>.

⁹⁶See SEMA NASSAR, VIOLENCE AGAINST WOMEN, BLEEDING WOUND OF THE SYRIAN CONFLICT (Nov. 2013), <https://euromedrights.org/wp-content/uploads/2015/03/Doc-report-VAW-Syria1.pdf>. See also, Marie Forestier, *You Want Your Freedom, This Is Your Freedom? This Is Your Freedom: Rape As A Tactic Of The Assas Regime* (Ctr. for Women Peace and Security, Working Paper No. 3, 2017).

⁹⁷See *Sexual Violence against Men and Transwomen in the Syrian Conflict*, HUMAN RIGHTS WATCH (July 2020), <https://www.hrw.org/news/2020/07/29/sexual-violence-against-men-trans-women-syria-conflict>. See also, *Detention and Abuse of Female Activists*, HUMAN RIGHTS WATCH (2013), <https://www.hrw.org/news/2013/06/24/syria-detention-and-abuse-female-activists>; *If the Dead Could Speak: Mass Deaths and Torture in Syria's Detention Facilities*, HUMAN RIGHTS WATCH (2015), <https://www.hrw.org/report/2015/12/16/if-dead-could-speak/mass-deaths-and-torture-syrias-detention-facilities#>.

⁹⁸*It Breaks the Human*, AMNESTY INTERNATIONAL (2016) <https://www.amnesty.org/en/documents/mde24/4508/2016/en/>.

parts, and threat of rape, a repeating pattern in detention facilities run by Syrian intelligence services across the country can be observed.⁹⁹ A line has been drawn between the commission of such crimes and deeply rooted patriarchal structures in society, which is still affecting survivors to come forward until this day. Syrian human rights lawyers, Joumana Seif and Wejdan Nassif, Syrian feminist organizations such as Women Now for Development and Dawlaty, as well as the commentary co-authored by Madeline Rees and Christine Chinkin on the United Nations Syrian Commission of Inquiry conference room paper highlight that not only the commission of sexualized violence in the detention facilities is gendered, but so are its multitude of physical, psychological, social, and economic impacts on survivors.¹⁰⁰ Yet, survivors are still waiting for the gender-specific harm of international crimes to be recognized and for sexualized and gender-based violence to be investigated and prosecuted from the beginning for what it is: A crime against humanity.

In light of the fact that information collected and analyzed by, for example, the United Nations Commission of Inquiry,¹⁰¹ supports the conclusion that sexualized violence in its various forms is both part of the attack against the civilian population and itself widespread in nature, an appropriate legal characterization of such criminal conducts is urgently warranted. According to the German Federal Court of Justice's decision of June 2019, the high number and geographically widespread practice of killing, torture, and deprivation of liberty committed by the Syrian government to oppress members of the opposition since April 29, 2011, constitutes a widespread and systematic attack against a civilian population.¹⁰² The decisive point here is that it is precisely the *combination* of killing, torture, deprivation of liberty, *and* sexualized violence against females, males, children, and LGBTQI that constitutes the widespread and systematic attack against the civilian population committed by the Syrian government through its intelligence agencies. According to the definition provided by the Rome Statute and recognized by the CCAIL, acts of sexual coercion and rape are considered a crime against humanity when committed as part of a "widespread or systematic attack directed against any civilian population."¹⁰³ While it is not necessary that acts of sexual violence form part of the attack itself, there has to be a sufficient nexus between both the single act of sexual coercion or rape and the attack.¹⁰⁴ Such international

⁹⁹U.N. Human Rights Council, "I lost my dignity"- Sexual and gender-based violence in the Syrian Arab Republic, Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic (Mar. 2018), UN-Doc: A/HRC/37/72/CRP.1.

¹⁰⁰See Sexual Violence by Force of Arms Against Women in Syria: A Tool of Political Repression, Social Dismantling and Impoverishment of Women and Communities, WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, 4 ff (2020), https://www.wilpf.org/wilpf_statements/policy-brief-sexual-violence-by-force-of-arms-against-women-in-syria-a-tool-of-political-repression-social-dismantling-and-impoverishment-of-women-and-communities/; See also JOUMANA SEIF, WEJDAN NASSIF, WORDS AGAINST SILENCE (Mar. 2020), https://www.ecchr.eu/fileadmin/Publikationen/WORDS_AGAINST_SILENCE-ENG.pdf; CHRISTINE CHINKIN, MADELEINE REES, A COMMENTARY ON THE SYRIA COL REPORT ON SEXUAL AND GENDER-BASED VIOLENCE (May 2018), <http://www.lse.ac.uk/women-peace-security/assets/documents/2018/LSE-WPS-WILPF-Syria-SGBV.pdf>.

¹⁰¹U.N. Human Rights Council, "I lost my dignity"- Sexual and gender-based violence in the Syrian Arab Republic, Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic (Mar. 2018), UN-Doc: A/HRC/37/72/CRP.1.

¹⁰²Bundesgerichtshof [BGH] [Federal Court of Justice] June 6, 2019, StB 14/1, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 64, 89--11, paras. 58--59 (applying the standard of an urgent suspicion (*dringender Tatverdacht*) within the meaning of Section 112 (1) of the German Code of Criminal Procedure (*Strafprozessordnung*)).

¹⁰³*Id.*

¹⁰⁴See Prosecutor v. Nahimana, Appeals Chamber Judgment, para. 924 (Nov. 28 2007), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-99-52/appeals-chamber-judgements/en/071128.pdf>. See also Prosecutor v. Tadić, Appeals Judgment, IT-94-I-A, para. 248 n. 311 (July 15, 1999), <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> (citing The Prosecutor v. Mile Mrksić et al., Trial Chamber I, "Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", IT-95-13-R61, (Apr. 3 1996), para. 30):

As long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above.

criminal jurisprudence needs to be taken into account by the GBA. The Office should not shy away from demanding a re-characterization of charges in fear of complicating an otherwise seemingly straight forward, successful prosecution. The goal cannot only be to achieve life-long imprisonment for the accused; the goal must be to holistically account for the crimes the person can be held accountable for. Particularly in this case, sexualized violence forms an integral part of the way political opponents were oppressed by the Syrian regime. This needs to be acknowledged in the case against Anwar R. and all others to follow.

On the working level for the Federal Police and Federal Prosecutor, this means evidence-gathering methods and sources need to be diversified beyond the “Caesar-Files” especially when it comes to sexualized violence. The “Caesar-Files”, unfortunately, do not provide visual information on sexualized violence against males since the persons albeit mostly undressed are photographed on their backs and information is lacking on crimes committed against females or children. Investigation and prosecution of sexualized violence needs to be based on interdisciplinary information sources reaching from the medical field, to history, social science, and beyond.

It will be crucial for the German government to make resources available for law enforcement agencies, in line with its commitment to investigate and prosecute individuals involved in the commission of international crimes as a State Party to the Rome Statute and under United Nations Security Council Resolutions 1325 and 2467 *inter alia*, to receive continuous training on both gender-sensitive and trauma-sensitive approaches to their work, as well as anti-discrimination.¹⁰⁵ Work with survivors needs to be expanded beyond their function as witnesses. Instead, survivor communities and other community representatives need to be individually and collectively engaged with as experts on the crimes and structural dimensions of such crimes—both now and in history. As a result, the work of national investigation and prosecution authorities will have the potential to uncover the structural discrimination that both leads and follows on from sexualized violence and to apply such knowledge to adequately account for sexualized violence in conflict.¹⁰⁶ While Germany presents itself as a leader in the fight against impunity for sexualized violence in conflict,¹⁰⁷ the domestic prosecution of such crimes holds much scope for improvement.

E. Conclusion

The FDLR trial was the first trial under the CCAIL which included conflict-related sexualized violence charges. The course and outcome of the trial demonstrates a multitude of shortcomings

See also INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES, <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes-june-2014.pdf>.

¹⁰⁵See, e.g., Medica Mondiale’s demands to the German government with respect to the implementation of the Third National Action Plan in the context of the Women, Peace and Security Agenda [Translated by the authors]. Medica Mondiale, *Demands on the Federal Government*, (last visited June 16, 2021) <https://www.medicamondiale.org/nc/nachrichten/traumanachsorge-ist-krisenvorsorge-sexualisierte-kriegsgewalt-anerkennen.html>.

The Federal Government should strengthen the criminal prosecution of sexualized violence by law enforcement agencies in Germany in proceedings under the principle of universal jurisdiction. This urgently requires the provision of resources and the development of gender competence and trauma expertise in German judicial and security authorities. In addition, victims of (sexualized) violence who give testimony in court must be informed about their right to join the proceedings as a civil party and be able to exercise this right in practice.

¹⁰⁶See the efforts of the IIIM Syria to address sexual and gender-based violence and gender issues more broadly as a core part of its work and implement an effective gender perspective: UN Human Rights Council Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (Feb. 2020), UN-Doc. A/74/699, ¶39 ff.

¹⁰⁷Heiko Maas & Angelina Jolie, *Sexualized violence is rife in war zones. We must take action*. WASHINGTON POST, (Apr. 22, 2019) <https://www.washingtonpost.com/opinions/2019/04/22/sexual-violence-is-rife-war-zones-we-must-take-action/>.

on the side of the prosecution and the court which—in combination—led to the dismissal of all conflict-related sexualized violence charges.

Though there have been improvements, a continuation of shortcomings can be observed regarding the German investigations of international crimes in Syria and Iraq, particularly when it comes to the inclusion of a gender perspective as a basis for successful prosecution of conflict-related sexualized violence.

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