CORE

CENTRE FOR THE OBSERVATION OF THE ROME STATUTE IN THE EUROPEAN UNION

I. Overview

The Rome Statute of the International Criminal Court (ICC) was established in 1998, in order to facilitate the prosecution of the perpetrators of gravest human rights violations. However, the state of affairs 20 years later is disillusioning. Unfortunately, authorities in the signatory states of the Rome Statute (including all states of the European Union) have not been proactive in this matter, despite having agreed to not allow impunity for grave human rights violations. Further, an action by the ICC is unlikely due to lack of jurisdiction over Iraq and Syria. Thus, CORE, part of the Ludwig Boltzmann Institute of Human Rights and under the direction of Professor *Hannes Tretter*, aims to encourage the harmonised application of the Rome Statute in the EU Member States in order to reach a higher rate of prosecutions in accord with international criminal law in front of domestic courts. With a comprehensive scientific examination, in particular a comparative legal analysis of the implementation of the Rome Statue in the EU Member States, CORE will formulate legislative recommendations to strengthen and facilitate law enforcement within the scope of international criminal proceedings. In addition to the scientific examination of the Rome Statute, there will be a strong focus on States that need support in a transitional justice process following an armed conflict and grave human rights violations. Through a platform, victims of such conflicts will be provided with information on how to report gravest human rights crimes in EU Member States. At the same time, the exchange of experience and the networking of law enforcement authorities, lawyers' organisations and NGOs will be promoted. At the moment, the focus of CORE lies on the conflict situation in Northern Iraq where the terrorist organisation "Islamic State" committed gravest human rights violations.

II. Purpose of CORE

For the international community, the Rome Statute is a tool to punish the perpetrators of gravest human rights violations by international criminal law. This international treaty lists the so-called "core international crimes": genocide (Art 6), crimes against humanity (Art 7), war crimes (Art 8) and crimes of aggression (Art 8 bis).[1] With these crimes, which are usually committed against an undefined number of people with a common characteristic (ethnicity, religion, gender, political conviction, etc.), the conviction of the perpetrators is often particularly difficult.

[1] The term "core international crimes" will be used in the following paper to include genocide, crimes against humanity, war crimes, and crimes against aggression. See *Council of the European Union*, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States, 15581/2/14 REV 2, 06.02.15, 4.

Yet the investigation and prosecution of the gravest human rights violations is not only the responsibility of the ICC, established as a consequence of the Rome Statute, but remains primarily in the hands of the member states, as enunciated in the Rome Statute. Only when these are unwilling or unable, the ICC shall step in. This Principle of Complementarity[2] will only work effectively if the obligations resulting from the Rome Statute have been transcribed into national law, in compliance with the aims of the Statute. The Preamble recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". It therefore links also to the controversial concept of Universal Jurisdiction, according to which any state can initiate proceedings against the perpetrators of the gravest crimes under international criminal law, independently of nationality of victim and offender and of the country in which the crime was committed. A scrutiny of the Rome Statute therefore inevitable also entails a closer look at this criterion of jurisdiction.

CORE wants to achieve a harmonised, enhanced and more efficient application of the Rome Statute in EU Member States in order to increase the number of criminal proceedings under international criminal law in front of national courts. CORE combines two approaches:

1. On the one hand, a comprehensive and systematic examination will show the extent to which the Rome Statute has been implemented in the European Union.[3] The process of implementation is not reduced to the mere incorporation of the statutory offences of the Rome Statute into national law, national legal provisions also have to comply with object and purpose of the treaty.
2. On the other hand, the scientific analysis and evaluation shall also have a direct practical impact: CORE applies the learnings to conflict situations worldwide in order to supply victims and witnesses with information, to support the initiation of proceedings and to give non-bureaucratic assistance in the transitional justice process. For the time being, CORE is focusing on human rights violations committed in the Northern Iraq.

III. Objective targets of CORE

A. Legal analysis and recommendations

When observing the implementation of the Rome Statute in all EU countries, it becomes clear that the resulting obligations are still subjected to diverging interpretations. Irrespective of the mere adoption of the statutory offences of the Rome Statute into national law,[4] the implementation of the Statute by some EU Member States is still defective. Particularly the provisions regarding the degree of penalisation, immunity from prosecution and the limitation periods are often not in accordance with the standards of international criminal law. Because of the insufficient adaptation of the national criminal codes there is a risk that a procedure in front of the

[2] The principle of complementarity is expressed in Art 1 and Art 17 of the Rome Statute.

[3] The Rome Statute is non-self-executing, therefore an implementation in national law is required.

[4] It is still disputed whether there is an obligation to implement the statutory offences of international law into national law. Since 2014, all EU Member States, with the exception of Italy, have implemented the statutory offences of international law in their respective national legal systems.

ICC is ultimately prevented by national law. In the field of international criminal offences the judicial cooperation between the EU Member States is still insufficient. With the "Genocide Network of Eurojust", set up in 2002, the Council of the European Union created a first institutional prerequisite for the improvement of cooperation in the prosecution of crimes under Art 6, 7 and 8 of the Rome Statute. And yet, only 9 of the 28 EU Member States have established special units (so-called war crime units) focused on the investigation of core international crimes.[5]

All in all, it can be stated that the form of implementation of the Rome Statute in the European Union varies heavily from State to State. This is also reflected in the statistics on convictions. While in Germany, the Netherlands and Belgium – countries with war crime units – more than 160 persons have been charged with genocide, crimes against humanity or war crimes since the year 2000, there were no prosecutions for these charges in Italy, Austria and Slovakia.[6] The intention of CORE is to provide a comprehensive insight into the application of the statutory offences of international criminal law in the European Union by means of a study. Beyond only giving an overview of the *status quo* in terms of criminal proceedings, evidence or implementation of the Rome Statute, CORE's ultimate aim is rather to point out flaws in the system and to articulate legal and political recommendations.

Ideally, criminal proceedings instigate or accelerate the process of coming to terms with the past. Especially in the case of gravest human rights violations, the juridical aspect of the transition process is crucial for the victims, in order to confront the past events and obtain justice. For this purpose, it is of paramount importance that victims can exercise the right to participate in criminal proceedings and the victims' right to question and to inspection of records. In the case of international criminal law, the use of these rights is difficult to achieve, since proceedings often take place abroad and victims are not informed to a sufficient extent of the initiation of proceedings. Tackling these problems would also contribute to a more effective prosecution. To fully satisfy the principle of the public nature of the proceedings, victims have to be regarded as an important part of the public. Art 6 of the European Convention on Human Rights (ECHR) sets the uniform standard for EU Member States. The effective access to information about proceedings and the safeguarding of victims' rights are questions of procedural nature which require an adaptation of national procedural law to make it correspond to the aims of the Rome Statute.

[5] See *Council of the European Union*, Strengthening the fight against impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States, 15584/2/14 REV 2, 12.05.2015, 28 f: http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetwork/Council%20Conclusions%2015-16%20June%202015/Council_Conclusions_15584_2_14_EN.pdf (date of access 17.01.19). In Germany the *Zentralstelle für die Bekämpfung von Kriegsverbrechen und weiteren Straftaten nach dem Völkerstrafgesetzbuch* conducts investigations in cases of suspected infringements of the German *Völkerstrafgesetzbuch* (Code of international criminal law) to drive proceedings in front of national courts.

[6] Ibidem p. 31.

In the context of international criminal proceedings communication mechanisms have to be improved. Parting from the judiciary problematic assumption that it is not its obligation to disseminate information about trials and convictions,[7] it has to be civil society and the media that take over this role. Yet, these actors can only meet this challenge with a certain level of knowledge, thus making access to court decisions indispensable. In practice, access is rendered difficult in numerous EU states,[8] despite Art 6 of the ECHR clearly stating that court decisions must be accessible to everyone.[9] Communication of proceedings can only be optimised through the cooperation between courts, civil society and the media. CORE will stimulate cooperation to ensure a better information situation and counteract the lack of knowledge of the affected community in the country where the crime took place.

Although in cases where convictions under the statutory offences of international criminal law could be possible, those cases are more often prosecuted based on different national statutory offences. Especially convictions because of infringements of anti-terrorism provisions can be attributed to the fact that is easier to prove and therefore often more promising to initiate proceedings for the membership of a terrorist organisation than for the crimes committed during that membership.[10] Not only does this have grave consequences for the judiciary's obligation to bring perpetrators to justice, but also for the victims and their community, which have a legitimate interest in the identification and punishment of the culprits. Additionally, a first conviction could impede a second investigation for the same crime under the principle of *ne bis in idem*. At the same time, a distorted narrative emerges: Based on the current legal practice of national courts in the European Union, it would seem that the central wrongdoing of ISIS fighters has been the membership and support of a terrorist organisation. Whereas, the presumptive genocide committed against the Yezidis[11] and the innumerable crimes against humanity and war crimes are so far barely reflected in the legal practice of domestic courts. Yet, specifically criminal judgements have the capacity to distinctly assign a term to past events, to sanction perpetrators and hence set a scaring example for future offences. CORE holds the view that a better utilisation of existing and future evidence by prosecuting authorities can lead to an increased number of convictions because of core international crimes.

[7] The German Public Prosecutor's Office denies any judicial responsibility in this regard, see *Christian Ritscher,* Keine Straflosigkeit bei Kriegsverbrechen – Völkerstrafprozesse in Deutschland voranbringen, Stellungnahme für die öffentliche Anhörung in der 96. Sitzung des Ausschusses für Recht und Verbraucherschutz am 25.04.2016, 12: https://www.bundestag.de/blob/419818/5e5763448fabb7dfefd0219ec33c573e/drb-data.pdf (date of access 17.01.19).

[8] E.g.: The Austrian Rechtsinformationssystem (RIS) (legal information system) only provides an insight into selected court decisions. In order to receive court decisions not published in the RIS an academic interest has to be demonstrated.

[9] *Christoph Grabenwarter*, European Convention on Human Rights Commentary, 2014, Art 6 ECHR, para 123.

[10] In Austria, in 2016 and 2017 there have been 53 convictions under § 278b StGB (terrorist group) but not a single one under §§ 312 pp. StGB (Genocide, Crimes against Humanity, War Crimes), see *Statistik Austria*, Tabellenband gerichtliche Kriminalstatistik 2016 und 2017.

[11] *European Parliament*, Resolution on the systematic mass murder of religious minorities by the so-called 'ISIS/Daesh', 2016/2529(RSP), 04.01.2016.

In this context, CORE refers to the huge potential and rapidly increasing importance of Open Source Intelligence (OSINT)[12] and calls for an improved use of it under international criminal law since more and more armed conflicts are documented digitally and online. Millions of videos and photographs that were uploaded to websites and social media channels are available as possible evidentiary material. The Prosecuter's Office of the ICC has already demonstrated OSINT's importance for criminal proceedings. National courts can therefore draw from its experience.[13] First successful approaches must not detract from the fact that the use of OSINT in criminal proceedings is not easily compatible with the right to a fair trial. If the prosecution authorities want to use evidence generated through the analysis of thousands of videos, the principle of equality of arms emerging from Art 6 ECHR dictates that the accused must have sufficient opportunity to an independent evaluation of the video material. Art 6 para 3 lit d ECHR expresses the accused's right to ask witnesses. In the case of OSINT, this could imply directing questions at the author of photographic and video material. It is unresolved whether evidence obtained through OSINT should be classified as hearsay evidence, in which case it would (based on the principle of immediacy) have a lower evidentiary value.[14] Therefore CORE will evaluate the possibilities for OSINT from a legal perspective.

B. Project Northern Iraq

The conflict in Northern Iraq shows that the international community has not fully utilized its capacity to impede impunity for the gravest human rights violations. At least since 2014 the international community has witnessed heinous human rights abuses committed in Northern Iraq.[15] Since then, thousands of refugees, amongst them victims, witnesses as well as perpetrators of gravest human rights violations, reached the European Union. Nonetheless, and despite the possibilities that the Rome Statute offers, the number of cases in front of European national courts is strikingly small. Consequently, additionally to the goals explained in Chapter A, CORE wants to cooperate with state and civil society organisations to improve conditions for the initiation of proceedings in EU Member States and to make the necessary information available.

1. The situation in Northern Iraq

The terrorist organisation "Islamic State" (ISIS) is internationally known for the cruelty and inhumanity it has displayed over the past few years. In spring 2014, ISIS launched a large-scale attack throughout which they occupied large parts of Northern Iraq. After capturing the city of

[12] OSINT is the analysis of data collected from publicly available sources (especially videos and pictures available online) to be used to obtain additional information.

[13] The arrest warrant of the ICC against the former Libyan officer *Al-Werfalli* was based solely on internet videos, See Public Warrant of Arrest, Situation in Libya in the *Case of the Prosecutor versus Mahmoud Mustafa Busayf Al-Werfalli*, No. ICC-01/11-01/17, 15.08.17.

[14] *Fraser Sampson,* Following the Breadcrumbs: Using Open Source Intelligence as Evidence in Criminal Proceedings, in: Open Source Intelligence Investigation: From Strategy to Implementation, 2016, pp. 295.

[15] The German Vice-Chancellor *Sigmar Gabriel* classified already in August 2014 the crimes committed against the Yezidis as genocide, Spiegel Online, 17.08.2014, http://www.spiegel.de/politik/deutschland/gabriel-schliesst-waffenlieferungen-gegen-islamischen-staat-nicht-aus-a-985673.html (date of access 17.01.19).

Mossul, ISIS-leadership proclaimed a "caliphate" extending beyond Iraqi borders over significant parts of Syria what posed a direct threat to the existence and autonomy of the Kurdistan Region of Iraq. At the zenith, in August 2014 only 30 km separated the capital city Erbil from advancing ISIS troops.[16] Minority groups living in Northern Iraq (including Yezidis, Shi´a Turkmen, Shabaks, Mandaeans and Aramaic Christians) became evidently victims of core international crimes. The massacre on the Yezidis in Kocho in the Sinjar region, where ISIS fighters murdered over 700 male Yezidis in just two days, is merely one example therefor.[17] Reliable sources have documented these atrocities, like the reports of the United Nations High Commissioner for Human Rights (UNHCHR) as well as the United Nations Assistance Mission for Iraq's (UNAMI) reports.[18] So far, according to available information these crimes committed by the ISIS against the Yezidi community must be classed as genocide.[19] However, especially throughout the course of the reconquest, gravest human rights violations were also committed by other (para)military groups.[20] In order to obtain a better overview of the situation in Northern Iraq, in September 2018 two members of the research team travelled to Erbil and Dohuk, following an invitation by the Kurdistan Regional Government (KRG) and accompanied by the German Development Cooperation (GIZ). Meetings with numerous state and civil society groups provided first-hand insights into the most pressing issues.[21]

2. Challenges of the transitional justice process

Despite sufficient information about respective crimes is available the transitional justice process goes off extremely dragging. The possibilities for the Iraqi justice system seem limited since it falls short of international standards concerning human rights and the rule of law, and the Iraqi Criminal Code does not include genocide or crimes against humanity. Furthermore, there are disagreements amongst the Iraqi judiciary about the applicability or suspension of the death penalty. On the other hand, taking action of the ICC seems nearly impossible for the time being. Neither is Iraq a state party to the Rome Statute, nor is the referral of the case to the ICC by the UN Security Council in view. Beyond that, Iraqi government handing over jurisdiction to the ICC for this conflict seems also unlikely. Therefore, prosecution authorities in the EU Member States are called upon to encourage an effective transitional justice process. The necessary jurisdiction clauses are present in national legal systems, be it through the personality principle in relation to foreign fighters,[22] through the principle of subsidiary criminal justice, or through

[16] *Katrin Kuntz/Christoph Reuter*, The Disturbing Rise of the Islamic State, in: Spiegel Online International, 11.08.19, http://www.spiegel.de/international/world/the-disturbing-advance-of-the-islamic-state-in-northern-iraq-a-985489.html (date of access 11.02.18).

[17] *UNGA*, Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, A/HRC/28/18, 27.03.2015, para 17.

[18] *UNAMI/OHCHR*, Report on the Protection of Civilians in the Armed Conflict in Iraq, 1 May – 31 October 2015.

[19] *OHCHR*, "They came to destroy": ISIS Crimes Against the Yazidis, A/HRC/32/CRP.2, 20.

[20] *UNGA*, A/HRC/28/18, para 53 f.

[21] The CORE team met, amongst others, representatives of the State Commission CIGE (Commission for Investigation and Gathering Evidence) and NGOs like YAZDA, Jiyan Foundation and Free Yezidi Foundation.

[22] Foreign fighters are individuals who leave their home country and join insurgencies in conflicts abroad. Many of these fighters return to their home country with the end of the conflict. As calculating the exact number of returnees is difficult, there exists only estimates that 30% of the approximately 4,000 former EU fighters came back to

the principle of universal jurisdiction, independent of nationality and the country in which the core crime was committed.

Availability and accessibility of evidence is decisive for the prosecution. In a country like Iraq, which is still recovering from a very recent war and in which the national justice system is insufficient to drive the process of transitional justice, it is the duty of the international community to support national prosecution authorities in the taking of evidence. Due to the recent UN Security Council Resolution 2379 (2017) an investigative team was set up with the task of gathering, securing and preserving evidence in Northern Iraq.[23] Yet, this was decided only four years after the first grave human rights violations in the region, while numerous NGOs had already begun collecting data, documentation and testimonies. However, especially regional NGOs, which are often closer to the victims, frequently lack expertise about the methods that would meet international standards. Interviews with victims and witnesses often resemble "storytelling" more than professional questioning. Thus, to counteract the risk of making evidence unemployable in future criminal proceedings, the taking of evidence must remain primarily the task of prosecution authorities and not of NGOs. Even though NGOs have the advantage that they can often act in a quicker and less bureaucratic way, it is important that they focus on their area of competence. In the context of evidence collection, this is mainly the compilation of metadata[24] to make them available to law enforcement authorities. Even the evidence that has already been collected by Iraqi state agencies is hardly ever used by prosecution authorities in EU Member States. This is mainly due to a lack of international cooperation between the state authorities. Support should particularly come from the signatory states of the Rome Statute, which is why the lack of assistance and of interest in a cooperation with state authorities in Iraq is incomprehensible.

3. Objective of the Project Northern Iraq

CORE will take the role of an informant and a mediator in the Northern Iraq. For that, it will present its findings and relevant information on a public online platform, which will provide some answers to the problems, challenges and controversies that arise in relation to prosecutions under the Rome Statute. Measures that CORE will take include:

a. Informing

The platform informs about the progress of proceedings on core international crimes in national courts of EU Member States. A database indicates pending and concluded proceedings including information about the crime, the site of the crime and the responsible court. In this way, victims in the country where the crime was committed can be informed about the proceedings taking place in EU Member States. Moreover, the platform will shed light on the incomplete transitional justice process in certain regions of Northern Iraq. In a glossary, the most

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the European Union, see International Centre for Counter-Terrorism, The Foreign Fighters Phenomenon in the European Union, April 2016, https://icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf (date of access 09.01.19).

[23] UNSC Res. 2379 (2017), 21.09.17.

[24] In this context, metadata are understood as structured data that order possible evidence according to specific criteria to facilitate searching, finding and selecting of relevant evidence.

relevant terms regarding transitional justice will be explained in a comprehensible manner. Additionally, information about the possibilities for initiating criminal proceedings in EU Member States as well as about legal aid will be provided. Respective support of victims and witnesses may strengthen considerably the efficiency of criminal prosecution. Therefore, it is planned for example to develop guidelines for NGOs for the collection of metadata. Complex questions that might appear during a transitional justice process shall be tackled by means of a scientific analysis.

b. Mediating:

Furthermore, the platform will promote the exchange of experiences and the networking with other actors in order to improve the communication of core international crimes' procedures. Co-operations and partnerships between national prosecution authorities, lawyer associations, scientific institutions and NGOs shall be established. The website will introduce the involved actors and facilitate mutual contacting. In order to avoid redundancies, it will be useful to have a structured and organised distribution of tasks. Workshops and conferences in Iraq and Europe shall be organised to bring expertise from different fields together.

The transfer of information and a stronger cooperation between the actors can generate strong synergy effects and ultimately lead to an increased initiation of criminal proceedings. Scientifically based information as well as empirical values related to practice will support the involved parties in every step of the transitional justice process, from evidence collection to criminal proceedings and their consequences.

Vienna, 25th February 2019

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