

## Genocide against Yazidis

### Austria's obligation to prosecute and punish returning ISIS fighters under international and national law

Rosa Duarte-Herrera and Clara Ifsits<sup>\*</sup>

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<sup>\*</sup> Rosa Duarte-Herrera focused on the international perspective: Chapter III. as well as chapters I., II. parts 1) and 2) are by her; Clara Ifsits concentrated on the prosecution and punishment of ISIS fighters under Austrian national law and wrote Chapter IV. but also Chapter II. part 3); the Conclusion (Chapter V.) was composed in close cooperation.

## I. Introduction

For more than six years Syria has been in a constant state of war. What began as public protests against the Syrian regime in early 2011 quickly emerged into a civil war with a variety of conflict parties.<sup>1</sup> By now, the war has not only crossed Syrian borders, e.g. stretches into Iraqi territory, but has also become an arena for neighbouring states to battle over regional interests supported by global powers such as the USA and Russia.<sup>2</sup> Amidst the numerous actors, one group attracts particular attention: the self-proclaimed 'Islamic State' (hereinafter: ISIS), a designated terrorist organisation,<sup>3</sup> responsible for various terrorist attacks around the world<sup>4</sup> and horrendous acts of violence against the civilian population<sup>5</sup> as well as for the torture and killing of captured (inter-) national journalists<sup>6</sup> and aid workers<sup>7</sup> on Syrian and Iraqi territory. In areas under their control, ISIS particularly targets ethnic and religious minorities, such as Kurds or Christians, destroying their cultural sites and their places of worship, expelling their communities, imposing discriminatory taxes on the remaining members or forcing them to convert.<sup>8</sup>

These widespread and systematic attacks by ISIS have frequently been reported on, in particular by the 'Independent International Commission of Inquiry on the Syrian Arab Republic' (henceforth: Commission of Inquiry or Commission) established by the United Nations (UN).<sup>9</sup> The Commission soon qualified the acts of ISIS as

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<sup>1</sup> For a detailed account of acts and parties involved in the Syrian war see the various Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic (available at <http://www.ohchr.org/EN/HRBodies/HRC/HRCISyria/Pages/IndependentInternationalCommission.aspx>).

<sup>2</sup> A concise overview over the diverging interests is for example given by, BBC, 'Syria crisis: Where key countries stand', 30 October 2015 (available at <http://www.bbc.com/news/world-middle-east-23849587>, accessed 1 October 2016) and BBC, 'Syria war: Why is there fighting in Syria?', 15 March 2016 (available at <http://www.bbc.com/news/world-middle-east-35806229>, accessed 1 October 2016).

<sup>3</sup> By the UN Security Council via S/Res/2170 (2014) through which it declared in para 18 that 'ISI[S] is a splinter group of Al-Qaida' and 'recalls that ISI[S] and ANF are included on the Al-Qaida sanctions list'.

<sup>4</sup> For a comprehensive view regarding the attacks directed or inspired by ISIS see Karen Yourish, Derek Watkins and Tom Giratikanon, 'Where ISIS Has Directed and Inspired Attacks Around the World', updated: 22 March 2016 (available at <http://www.nytimes.com/interactive/2015/06/17/world/middleeast/map-isis-attacks-around-the-world.html>, accessed 1 October 2016).

<sup>5</sup> See for example Independent International Commission of Inquiry on the Syrian Arab Republic, 'Rule of Terror: Living under ISIS in Syria', A/HRC/27/CRP.3, 19 Nov 2014.

<sup>6</sup> A/HRC/27/CRP.3, 19 Nov 2014, paras 39-42; Independent International Commission of Inquiry on the Syrian Arab Republic, Report, A/HRC/28/69, 5 Feb 2015, paras 82-3.

<sup>7</sup> A/HRC/27/CRP.3, 19 Nov 2014, para 41; A/HRC/28/69, 5 Feb 2015, paras 82-3.

<sup>8</sup> A/HRC/27/CRP.3, 19 Nov 2014, paras 20-31.

<sup>9</sup> Established on 22 August 2011 by the Human Rights Council via resolution S-17/1 to document international human rights violations; individual reports of the Commission can be retrieved via the website referred to in footnote 1, all reports are henceforth cited with their official number and their date of distribution.

crimes against humanity and war crimes<sup>10</sup> and lately issued a detailed report<sup>11</sup>, concluding that ISIS committed and continues to commit genocide against the Yazidi Community.<sup>12</sup>

This article first demonstrates why the acts of ISIS against the Yazidi Community indeed qualify as genocide according to the Genocide Convention<sup>13</sup> (II.). It will then be examined which obligations follow from this reasoning for Austria – as a Party to the Convention – regarding ISIS fighters who have been apprehended on Austrian territory after returning from the war (III.). Finally, the relevant domestic legislation and practice will be analysed to assess whether Austria is meeting its international obligations (IV.).

## II. Genocide against the Yazidi Community

Genocide pursuant to the Genocide Convention is a complex crime: its core elements are enshrined in Article II,<sup>14</sup> declaring genocide as acts (listed in (a)-(e) of Article II) committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Hence Article II determines on the one hand that certain acts must be committed against a protected group (material elements); on the other hand that the perpetrator needs to act with the intent to destroy the group on the basis of their member's religion, ethnicity, nationality etc (mental elements).<sup>15</sup>

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<sup>10</sup> A/HRC/27/CRP.3, 19 Nov 2014, paras 46, 52, 74 and 78; A/HRC/28/69, 5 Feb 2015, paras 91, 127, 185; A/HRC/30/48, 13 Aug 2015, paras 172-3; 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 declared more cautiously, that the acts of ISIS may constitute crimes against humanity and war crimes, see A/HRC/28/18, 27 March 2015, para 78.

<sup>11</sup> A/HRC/32/CRP.2, 15 June 2016.

<sup>12</sup> That genocide was and is being committed by ISIS against the Yazidi Community was for example also determined by the EU-Parliament through a resolution on 3 Feb 2016, see, European Parliament, 'Resolution on the systematic mass murder of religious minorities by the so-called 'ISIS/Daesh'', 2016/2529(RSP), para 2; and by the US-Secretary of State, John Kerry, in the Press Briefing of 17 March 2016.

<sup>13</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 Dec 1948, in force 12 Jan 1951, all authentic versions can be accessed via <http://legal.un.org/avl/ha/cppcg/cppcg.html>; Austria ratified the Convention on 27 Feb 1958, OJ 1958/91 the German text can be accessed via <https://www.ris.bka.gv.at/Bundesrecht/> e.g. with the title.<sup>14</sup> If not otherwise stated, all provisions mentioned in this text refer to the Genocide Convention.

<sup>14</sup> If not otherwise stated, all provisions mentioned in this text refer to the Genocide Convention.

<sup>15</sup> For a closer view of the structure of this crime, see Lars Berster, 'Article II', in Christian J. Tams and Lars Berster and Björn Schiffbauer (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (München: C.H. BECK/Hart/Nomos 2014), para 1.

To determine whether ISIS committed and is still committing genocide against the Yazidi Community, we must first look at the factual findings<sup>16</sup> (1). It shall then be examined if the Yazidi Community constitutes a protected group pursuant to Article II, if the acts directed against the Yazidis qualify as any of the acts listed in the provision (2) and if they were or are committed with the intent to destroy this group (3).

### 1) Factual findings

ISIS' aim and its role in the Syrian war have been somewhat unclear at the beginning and may still be difficult to grasp entirely. However, it quickly became evident that the group is not just fighting against the Syrian regime but rather striving to establish its own state.<sup>17</sup> This objective was manifestly demonstrated when its leader, Abu Bakr Al-Baghdadi, proclaimed the 'Caliphate'<sup>18</sup> in June 2014 in an area covering both Syrian and Iraqi territory.<sup>19</sup> All new recruits, who were pouring in great numbers into the Caliphate after its proclamation,<sup>20</sup> were expected to engage in military activities and to support the construction of a state.<sup>21</sup> This approach does not only indicate the group's high degree of organization; its military leadership combined with the large influx of manpower also resulted in a fast expansion of controlled territory<sup>22</sup> including large cities such as Mosul in Iraq<sup>23</sup>. The group has built a

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<sup>16</sup> Which were mainly established through witness reports by the Commission of Inquiry and other investigative bodies, like Amnesty International or the United States Holocaust Memorial Museum.

<sup>17</sup> A/HRC/27/CRP.3, 19 Nov 2014, para 7.

<sup>18</sup> A caliphate is an Islamic state ruled by a political and religious leader with absolute power, the caliph, who is a successor to the Islamic prophet Mohammed, for a quick overview of FAQ regarding ISIS see for example, Adam Chandler, 'What Is an Islamic Caliphate and Why Did ISIS Make One?', 30 June 2014 (available at <http://www.theatlantic.com/international/archive/2014/06/what-is-an-islamic-caliphate-and-why-did-isis-make-one/373693/>, accessed on 1 October 2016); for an in-depth analysis of ISIS' doctrine and development, see for example Cole Bunzel, 'From Paper State to Caliphate: The Ideology of the Islamic State', (2015) *The Brookings Project on U.S. Relations with the Islamic World - Analysis Paper No 19* (available at <https://www.brookings.edu/wp-content/uploads/2016/06/The-ideology-of-the-Islamic-State.pdf>).

<sup>19</sup> Mark Tran and Matthew Weaver, 'Isis announces Islamic caliphate in area straddling Iraq and Syria', 30 June 2014 (available at <https://www.theguardian.com/world/2014/jun/30/isis-announces-islamic-caliphate-iraq-syria>, accessed 1 October 2016).

<sup>20</sup> Alex P. Schmid, 'Foreign (Terrorist) Fighter Estimates: Conceptual and Data Issues', (2015) *The International Centre for Counter-Terrorism - The Hague (ICCT) Policy Brief*, p. 1.

<sup>21</sup> A/HRC/27/CRP.3, 19 Nov 2014, para 17.

<sup>22</sup> A/HRC/27/CRP.3, 19 Nov 2014, paras 12-3.

<sup>23</sup> See for a detailed report on the fall of Mosul, Ned Parker, Isabel Coles and Raheem Salman, 'Special Report: How Mosul fell - An Iraqi general disputes Baghdad's story', 14 October 2014 (available at <http://www.reuters.com/article/us-mideast-crisis-gharawi-special-report-idUSKCN0I30Z820141014>, accessed 1 October 2016).

state-like hierarchal structure to secure control within its own ranks and all over the occupied areas.<sup>24</sup>

Witness reports as well as the group's own presentation show that ISIS leads a rigorous rule under the pretext of 'religious edicts' aiming to eliminate political, cultural or religious diversity:<sup>25</sup> it targets traditional social and cultural events like weddings or other ceremonies as well as buildings dedicated for such activities.<sup>26</sup> The inhabitants of ISIS-controlled areas are further exposed to the group's harsh interpretation of Sharia Law which includes draconian corporal punishments for non-compliance – such as public amputation for theft or lashings for smoking.<sup>27</sup>

The horrific rule of ISIS becomes ever more apparent with regard to the Yazidi Community.<sup>28</sup> Yazidis are considered as 'infidels'<sup>29</sup> and are denied the right to exist in the Caliphate<sup>30</sup>. Members of the Yazidi Community are not only expelled from ISIS-controlled areas but also subject to a large-scale persecution which culminated in the attacks in the Sinjar region in August 2014: On 3 August 2014, ISIS fighters approached the towns and villages located at the base around Mount Sinjar from different directions.<sup>31</sup> They seized village after village, focussing on the capture of Yazidis who – prior to the attack of ISIS – predominantly populated this area.<sup>32</sup> Within 72 hours, almost all villages were emptied.<sup>33</sup> Around 200.000 Yazidis fled to Mount Sinjar and about 50.000 were trapped on the mountain, encircled and besieged by ISIS fighters.<sup>34</sup> The conditions proved to be extraordinarily harsh for the trapped people: they had neither access to medical care, nor to food or water while the temperature rose to over 50 degrees Celsius.<sup>35</sup> Planes and helicopters from US-American, French, Iraqi, British and Australian forces who tried to deliver supplies

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<sup>24</sup> A/HRC/27/CRP.3, 19 Nov 2014, para 13; A/HRC/28/69, 5 Feb 2015, para 90.

<sup>25</sup> For witness reports see for example A/HRC/27/CRP.3, 19 Nov 2014, para 30; ISIS displays its brutal regime however also via social media and its own magazine 'Dabiq' which is published monthly since July 2014 and can be accessed via <http://www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq#>.

<sup>26</sup> A/HRC/27/CRP.3, 19 Nov 2014, paras 20, 24, 30-1.

<sup>27</sup> A/HRC/27/CRP.3, 19 Nov 2014, para 21; A/HRC/28/69, 5 Feb 2015, paras 158-162.

<sup>28</sup> A/HRC/30/48, 13 Aug 2015, para 113.

<sup>29</sup> A/HRC/27/CRP.3, 19 Nov 2014, para 37.

<sup>30</sup> A/HRC/31/68, 11 Feb 2016, para 112.

<sup>31</sup> A/HRC/32/CRP.2, 15 June 2016, para 23.

<sup>32</sup> A/HRC/32/CRP.2, 15 June 2016, paras 18, 23.

<sup>33</sup> A/HRC/32/CRP.2, 15 June 2016, para 29.

<sup>34</sup> United States Holocaust Memorial Museum, 'Bearing Witness Trip Report: The Islamic State's Targeting of Iraqi Minorities in Ninewa' (2015), p. 15 (henceforth: USHMM, 'Bearing Witness Trip Report').

<sup>35</sup> A/HRC/32/CRP.2, 15 June 2016, para 27.

or evacuate people from the mountain were shot at by ISIS.<sup>36</sup> Hundreds of men, women and children died from starvation or dehydration as a result of this siege, until Kurdish forces together with Yazidi volunteers were able to open a corridor and rescue the besieged.<sup>37</sup>

This systematic approach of ISIS – attacks from different bases, encircling the mountain and emptying the villages within 72 hours – continued with regard to the procedure followed when capturing members of the Yazidi Community: shortly after having seized a village, ISIS fighters would divide the captured Yazidis into one group of men and boys who had reached puberty and another group of women and children. The men and boys would often be executed on the spot, especially when having refused to convert to Islam:<sup>38</sup> for instance, in the village Qani at least 80 men were killed in one single incident while in Kocho, another village in the Sinjar region which was besieged until mid-August 2014, around 700 men were killed during the siege.<sup>39</sup> The remaining Yazidis were first moved into temporary and afterwards into designated holding centres, far into ISIS-controlled areas.<sup>40</sup> After their separation from men and older boys, Yazidi women would further be divided into groups of married women with children, married women without children as well as unmarried women and girls.<sup>41</sup> In some cases, the elder women were executed right away.<sup>42</sup> However, in most cases each group was transferred to a different holding site.<sup>43</sup> Some women were transferred only once, but the majority was transferred many times during a short period of time.<sup>44</sup> After the attack in the Sinjar region in August 2014, no free persons remained in the entire area, originally home to 400.000 Yazidis; they have either been murdered, displaced or taken captive by ISIS.<sup>45</sup>

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<sup>36</sup> A/HRC/32/CRP.2, 15 June 2016, para 27.

<sup>37</sup> A/HRC/32/CRP.2, 15 June 2016, para 28.

<sup>38</sup> A/HRC/32/CRP.2, 15 June 2016, para 27.

<sup>39</sup> A/HRC/28/18, 27 March 2015, para 19.

<sup>40</sup> A/HRC/32/CRP.2, 15 June 2016, paras 29-32.

<sup>41</sup> A/HRC/28/18, 27 March 2015, para 36.

<sup>42</sup> A/HRC/32/CRP.2, 15 June 2016, para 48.

<sup>43</sup> A/HRC/28/18, 27 March 2015, para 36.

<sup>44</sup> A/HRC/28/18, 27 March 2015, paras 36, 42; A/HRC/32/CRP.2, 15 June 2016, para 49.

<sup>45</sup> A/HRC/32/CRP.2, 15 June 2016, para 175.

The captured women and children are treated like chattel – sometimes given as presents and in many cases sold to ISIS fighters.<sup>46</sup> ISIS collects their personal data e.g. name, age, residence, marital status and number of children before distributing them.<sup>47</sup> The Yazidi women are bought and sold in slave-markets spread throughout ISIS-controlled areas as well as through online auctions<sup>48</sup>; the larger slave markets are located in Aleppo, Ar-Raqqah and Dayr az-Zawr<sup>49</sup>. These slave markets are organized by a committee (‘the Committee for the Buying and Selling of Slaves’).<sup>50</sup> The women bought and sold there are predominantly sexually enslaved by their ISIS owners.<sup>51</sup> Some who successfully escaped reported having been raped daily, subjected to severe corporal punishment, and resold many times.<sup>52</sup> The children resulting from these sexual abuses are regarded as belonging to the father.<sup>53</sup> In many cases the enslaved Yazidis are below 18 and some are even below ten years old.<sup>54</sup> The women and girls are often in charge of the entire household, but are denied adequate food and not permitted to leave the house.<sup>55</sup> The enslaved women and girls frequently experience depression, are heavily traumatised, and some have attempted or committed suicide.<sup>56</sup>

In a comparably systematic manner, boys initially left with their mothers are taken away as soon as they reach the age of seven.<sup>57</sup> The boys are then brought to training or military camps where they have to attend daily indoctrination of Quran and military exercises: They are forced to watch propaganda videos including severely violent material such as beheadings and suicide attacks and are taught how to use AK47s, hand grenades and Rocket Propelled Grenades.<sup>58</sup> The boys get ‘Islamic’ names and their history is effectively erased; they are not allowed to communicate

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<sup>46</sup> A/HRC/27/CRP.3, 19 Nov 2014, para 53; A/HRC/28/69, 5 Feb 2015, para 188; A/HRC/31/68, 11.2.2016, para 112; A/HRC/32/CRP.2, 15 June 2016, para 54.

<sup>47</sup> A/HRC/28/18, 27 March 2015, para 37; A/HRC/27/CRP.3, 19 Nov 2014, para 46.

<sup>48</sup> A/HRC/32/CRP.2, 15 June 2016, para 57.

<sup>49</sup> A/HRC/31/68, 11.2.2016, para 141; A/HRC/32/CRP.2, 15 June 2016, para 55.

<sup>50</sup> A/HRC/32/CRP.2, 15 June 2016, para 58.

<sup>51</sup> It is not permitted by ISIS to sell Yazidis to non-ISIS-members – this crime is punishable with death, A/HRC/32/CRP.2, 15 June 2016, para 76.

<sup>52</sup> A/HRC/32/CRP.2, 15 June 2016, paras 64-9.

<sup>53</sup> A/HRC/27/CRP.3, 19 Nov 2014, paras 53-7.

<sup>54</sup> A/HRC/28/18, 27 March 2015, para 40; A/HRC/27/CRP.3, 19 Nov 2014, para 64.

<sup>55</sup> A/HRC/32/CRP.2, 15 June 2016, paras 63, 72-3.

<sup>56</sup> A/HRC/28/18, 27 March 2015, para 43; A/HRC/32/CRP.2, 15 June 2016, para 53, 77-78, 80, 177.

<sup>57</sup> Some are even younger, see A/HRC/30/48, 13 Aug 2015, para 74; A/HRC/32/CRP.2, 15 June 2016, para 92.

<sup>58</sup> A/HRC/32/CRP.2, 15 June 2016, paras 94-5.

with their families and solely treated as ISIS recruits.<sup>59</sup> Hundreds of boys have already been abducted and trained in such ways – after finishing their training, they are allocated with respect to the particular needs of ISIS: some are used as fighters, some as guards or for other duties.<sup>60</sup>

## 2) Material elements

As outlined above, the material elements comprise acts listed in Article II (a)-(e) committed against a national, ethnical, racial or religious group. Yazidis are often considered as an ethno-religious group.<sup>61</sup> According to the practise of international criminal tribunals<sup>62</sup> ‘ethnical groups’ are characterized by their members sharing a common language or culture<sup>63</sup>; whereas members of ‘religious groups’ share a common mode of worship or denomination<sup>64</sup>. While it does not seem to be entirely settled within the Community whether they consider themselves as a distinct ethnical group,<sup>65</sup> they undoubtedly constitute a religious group pursuant to the Genocide Convention: for about 4.000 years Yazidis have been practising a religion which incorporates elements of later faiths such as Zoroastrianism, Judaism, Christianity, and Islam.<sup>66</sup> Thus, over a long period of time they shared the same faith and spiritual practice<sup>67</sup> and are therefore protected by Article II<sup>68</sup>.

The genocidal acts pursuant to Article II are (a) killing members of the group, (b) causing serious bodily or mental harm to members of the group, (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, (d) imposing measures intended to prevent births within the group and (e) forcibly transferring children of the group to another group. It

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<sup>59</sup> A/HRC/32/CRP.2, 15 June 2016, paras 94-6.

<sup>60</sup> A/HRC/32/CRP.2, 15 June 2016, para 97.

<sup>61</sup> A/HRC/32/CRP.2, 15 June 2016, para 101.

<sup>62</sup> The cited judgments of the ICTY are based on Article 4 (2) of the Statute of the ICTY, the judgments of ICTR are based on Article 2 (2) (b) of the Statute of the ICTR, the wording of both is however identical with Article II of the Genocide Convention.

<sup>63</sup> ICTR-96-4-T, The Prosecutor v. Jean Paul Akayesu, 2 September 1998, para 513.

<sup>64</sup> ICTR-96-4-T, The Prosecutor v. Jean Paul Akayesu, 2 September 1998, para 515.

<sup>65</sup> A/HRC/32/CRP.2, 15 June 2016, para 102.

<sup>66</sup> A/HRC/32/CRP.2, 15 June 2016, para 103; USHMM, ‘Bearing Witness Trip Report’, p. 4; Lars Berster and Björn Schiffbauer, ‘Völkermord im Nordirak?’ (2014) *ZaoeRV* 847-872 pp. 853-54.

<sup>67</sup> Concerning these and other elements indicating the existence of a religious group see with further references for example Berster, ‘Article II’, para 59; compare also Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law*, 3rd edn. (New York: Oxford University Press, 2014) para 811.

<sup>68</sup> A/HRC/32/CRP.2, 15 June 2016, para 103; Berster and Schiffbauer, ‘Völkermord im Nordirak?’, pp. 853-54.

shall now be examined, whether the acts of ISIS towards members of the Yazidi Community qualify as any of the genocidal acts listed in Article II (a)-(e).

With regard to the established facts, the acts incorporated in Article II (a) and (b) have been and are still being committed by ISIS: As shown above, ISIS carried out various mass killings, for example in the villages Kocho and Qani. Although there is one documented incident where a group of elderly women was slaughtered, mostly men were subjected to these massacres. Over 30 mass graves were found in the Sinjar region, predominantly containing bodies of men and boys who had reached puberty.<sup>69</sup> However, also women and children are being intentionally killed – the Commission for example interviewed a woman who stated that her children were murdered by her ‘fighter-owner’ to punish her for attempting to escape.<sup>70</sup> According to the practice of international criminal tribunals, bodily or mental harm pursuant to Article II (b) is considered ‘serious’ when it ‘results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life’<sup>71</sup>; however it must not necessarily be ‘permanent and irremediable’<sup>72</sup>. While bodily harm is largely self-explanatory and can be outlined as ‘harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses’,<sup>73</sup> mental harm is ‘more than minor or temporary impairment on mental faculties’<sup>74</sup> and can be ‘inflict[ed by] strong fear or terror, intimidation or threat’<sup>75</sup>. Serious bodily or mental harm can especially be caused by torture, inhumane and degrading treatment, persecution or rape.<sup>76</sup> In the present case, many of these acts were and still are being perpetrated by ISIS: it is beyond doubt that members of the Yazidi Community are subject to large-scale persecution. As shown, women in particular are treated in a degrading and inhumane manner, being considered as chattel, registered, sold on slave markets and their value being bartered over.<sup>77</sup> In most

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<sup>69</sup> A/HRC/32/CRP.2, 15 June 2016, para 108.

<sup>70</sup> A/HRC/32/CRP.2, 15 June 2016, paras 67, 109.

<sup>71</sup> IT-98-33-T, The Prosecutor v. Radislav Krstic, 2 August 2001, para 513.

<sup>72</sup> ICTR-96-4-T, The Prosecutor v. Jean Paul Akayesu, 2 September 1998, para 502.

<sup>73</sup> ICTR-95-1-T, The Prosecutor v. Clément Kayishema and Obed Ruzindana, 21 May 1999, para 109.

<sup>74</sup> With further reference, ICTR-95-1-T, The Prosecutor v. Clément Kayishema and Obed Ruzindana, 21 May 1999, para 110; see also Robert Cryer, Håkan Friman, Darryl Robinson and Elisabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd edn. (Cambridge: Cambridge University Press 2014) pp. 215-6.

<sup>75</sup> ICTR-95-1-T, The Prosecutor v. Clément Kayishema and Obed Ruzindana, 21 May 1999, para 110.

<sup>76</sup> ICTR-96-4-T, The Prosecutor v. Jean Paul Akayesu, 2 September 1998, para 504; IT-98-33-T, The Prosecutor v. Radislav Krstic, 2 August 2001, paras 508-9; compare also Werle and Jeßberger, *Principles of International Criminal Law*, para 802.

<sup>77</sup> A/HRC/32/CRP.2, 15 June 2016, para 125.

cases the enslaved women are subject to extreme (sexual) violence like severe beatings, rape, and gang rape which results in grave injuries.<sup>78</sup> A woman reported that she was beaten black and blue after trying to escape.<sup>79</sup> In another case, a boy was beaten so violently for playing during prayer time that his wrist broke.<sup>80</sup> The record also shows that many members of the Yazidi Community in Syria and Iraq who were and still are exposed to these treatments often suffer long lasting physical and psychological wounds which prevent them from leading a normal life: the witnesses interviewed by the Commission are in many instances scarred from the physical abuse and mentally harmed.<sup>81</sup> Some children are unable to sleep, wet their beds and become extremely protective of their mothers – refusing to leave their sides, especially when unknown men are around.<sup>82</sup>

With regard to the siege of Mount Sinjar, it is without question that ISIS deliberately inflicted conditions of life calculated to bring about physical destruction in whole or in part of the Yazidi Community (Article II (c)). Following the practice, the acts incorporated in Article II (c) comprise means of physical destruction of a group other than killing the members; e.g. deprivation of food and medication, or physical exertion.<sup>83</sup> Because such acts often do not immediately lead to death they are also referred to as slow death measures.<sup>84</sup> The conditions which the besieged Yazidis had to endure qualify as such measures of destruction and slow death: as outlined above, around 50.000 members of the Yazidi Community were trapped on Mount Sinjar in August 2014, without access to food, water, or medication; within a few days 40 children died as a result of the extremely harsh conditions – many men, women and children followed.<sup>85</sup>

In contrast to the alternative paragraphs Article II (d) encompasses not only material elements but also a special form of intent: the measures imposed must be intended to prevent births within the group.<sup>86</sup> It is predominantly accepted that ‘intended’ does not include that the measures are actually capable of preventing births; instead

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<sup>78</sup> A/HRC/32/CRP.2, 15 June 2016, paras 64-5, 68, 119.

<sup>79</sup> A/HRC/32/CRP.2, 15 June 2016, para 66.

<sup>80</sup> A/HRC/32/CRP.2, 15 June 2016, para 91.

<sup>81</sup> They have nightmares and say things such as ‘I wish I was dead. I wish the ground would open and kill me and my children’, A/HRC/32/CRP.2, 15 June 2016, para 77.

<sup>82</sup> A/HRC/32/CRP.2, 15 June 2016, para 88.

<sup>83</sup> IT-97-24-T, *The Prosecutor v. Milomir Stakić*, 31 July 2003, para 517.

<sup>84</sup> ICTR-95-1-T, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, 21 May 1999, para 115; Berster, ‘Article II’, para 74.

<sup>85</sup> USHMM, ‘Bearing Witness Trip Report’, pp. 19-20; A/HRC/32/CRP.2, 15 June 2016, para 28.

<sup>86</sup> Berster and Schiffbauer, ‘Völkermord im Nordirak?’, p. 857.

this element is purely subjective.<sup>87</sup> Acts incorporated in Article II can be measures imposed to physically prevent births, such as the separation of men and women, the prevention of marriage, or sterilization.<sup>88</sup> Births can however also be prevented on a psychological level – for example a woman who was raped or in any way mentally harmed may decide not to procreate.<sup>89</sup> As illustrated above, ISIS systematically separated Yazidi men and women. Women were enslaved and in many cases raped by their owners throughout their entire enslavement on a daily basis, regardless if they were pregnant, had children, or were themselves still children.<sup>90</sup> This alone prevents the birth of Yazidi children.<sup>91</sup> Apart from the fact that the offspring of such circumstances is considered as belonging to the father, these children cannot even become members of the Yazidi Community: according to the Yazidi religion, members of the group require two Yazidi parents,<sup>92</sup> and it is not possible to convert to the Yazidi religion<sup>93</sup>. Furthermore, it has been reported that abortions are being performed on captured pregnant women: one woman recounted that a member of ISIS sat on her stomach to kill her unborn child, saying: ‘This baby should die because it is an infidel’.<sup>94</sup> Another witness reported that prior to an abortion performed on two pregnant women, an ISIS fighter stated: ‘We do not want more Yazidis to be born’.<sup>95</sup> The special intent demanded by Article II (d) is expressed in these statements as well as indicated by the systematic manner in which ISIS prevents births.

Finally, the acts committed by ISIS against Yazidi children qualify as acts pursuant to Article II (e): ISIS forcibly transfers children of one group to another group by (sexually) enslaving girls and forcing them to convert. This provision applies to all children below 18 and requires neither a great distance between the separated children of the group and their families nor a complete loss of contact.<sup>96</sup> As established by the Commission and outlined above, ISIS also detains Yazidi boys from the age of seven in military camps, trains them to fight and handle heavy weapons, and indoctrinates them with their interpretation of Islam. These boys even lose their Yazidi name and are not allowed to communicate with their families.

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<sup>87</sup> Berster, ‘Article II’, paras 1, 85-6.

<sup>88</sup> ICTR-96-4-T, *The Prosecutor v. Jean Paul Akayesu*, 2 September 1998, para 507.

<sup>89</sup> ICTR-96-4-T, *The Prosecutor v. Jean Paul Akayesu*, 2 September 1998, para 508.

<sup>90</sup> A/HRC/32/CRP.2, 15 June 2016, para 64.

<sup>91</sup> Berster and Schiffbauer, ‘Völkermord im Nordirak?’, p. 856.

<sup>92</sup> USHMM, ‘Bearing Witness Trip Report’, p. 20.

<sup>93</sup> A/HRC/32/CRP.2, 15 June 2016, para 64.

<sup>94</sup> A/HRC/28/18, 27 March 2015, para 39.

<sup>95</sup> A/HRC/28/18, 27 March 2015, para 41.

<sup>96</sup> Berster, ‘Article II’, paras 87, 91.

### 3) Mental elements

The crime of genocide requires two separate subjective elements: Firstly, the so-called 'general intent' related to the factual circumstances and the genocidal act.<sup>97</sup> And secondly, as stated in the chapeau of Article II, the perpetrator has to have the 'intent to destroy, in whole or in part a [...] group, as such'. This 'intent to destroy' is a key element of genocide and thus of paramount importance; it is commonly referred to as 'specific intent' and characterizes genocide as a goal-oriented crime.<sup>98</sup>

The specific intent consists of a high volitional element, entailing the destruction of the group as the goal of the perpetrator.<sup>99</sup> In contrast to the general intent, this clear objective goes beyond the genocidal act itself and is thus directed at a future point. Moreover, the completion of the crime is not dependent on whether the destruction of the group is actually achieved.<sup>100</sup>

Pursuant to Article II, the specific intent must be directed against a group 'in whole or in part'. The wording 'in part' is construed as a substantial part of the group sufficient to endanger this entire group and in this sense refers to more than just a small number of persons.<sup>101</sup> In consequence, the actual number of members necessary can only be determined in reference to the group's total size.<sup>102</sup> However, the requirement of a substantial part of the group is not strictly limited to quantitative aspects, but can also be based on whether the targeted members possess certain skills essential for the future existence of a group as well as on other qualitative aspects depending on the circumstances of the particular case.<sup>103</sup> For instance, whether

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<sup>97</sup> Berster, 'Article II', para 96; Florian Jeßberger, 'The Definition and the Elements of the Crime of Genocide', in Paola Gaeta (ed.), *The UN Genocide Convention. A Commentary*, (New York: Oxford University Press, 2009) 87-111 p. 105; Roger O'Keefe, *International Criminal Law* (New York: Oxford University Press, 2015) p. 150; Kai Ambos, 'What does 'intent to destroy' in genocide mean?' (2009) *IRRC* 833-858 p. 834.

<sup>98</sup> Jeßberger, 'The Definition and the Elements of the Crime of Genocide', p. 105; Berster, 'Article II', para 96; O'Keefe, *International Criminal Law*, p. 150; Kai Ambos, *Internationales Strafrecht*, 3rd edn. (München: C.H. BECK, 2011) p. 233, para 146; Ambos, 'What does 'intent to destroy' in genocide mean?', p. 835.

<sup>99</sup> Berster, 'Article II', para 104; Helmut Satzger, *International and European Criminal Law* (München: C.H. BECK/Hart/Nomos, 2012) 250; Jeßberger, 'The Definition and the Elements of the Crime of Genocide', p. 106; Ambos, 'What does 'intent to destroy' in genocide mean?', p. 837.

<sup>100</sup> Ambos, *Internationales Strafrecht*, p. 237, para 149; Jeßberger, 'The Definition and the Elements of the Crime of Genocide', p. 107; Otto Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such' (2001) *LJIL* 399-408 p. 402.

<sup>101</sup> Berster, 'Article II', para 132; Satzger, *International and European Criminal Law*, p. 251, para 16; O'Keefe, *International Criminal Law*, p. 151; Jeßberger, 'The Definition and the Elements of the Crime of Genocide', p. 107; Lars Berster and Björn Schiffbauer, 'Völkermord im Nordirak?', p. 861.

<sup>102</sup> Berster, 'Article II', paras 132-134.

<sup>103</sup> IT-98-33-A, *The Prosecutor v. Radislav Krstić*, 19 April 2004, para 14; Berster, 'Article II', para 133; Satzger, *International and European Criminal Law*, p. 251, para 16; O'Keefe, *International Criminal Law*, p.

a group is affected 'in whole or in part' can be derived from geographic factors, such as in the Krstić judgment concerning the Srebrenica massacre: though the absolute number of people targeted only formed about 2.9 percent of the Bosnian Muslim's population, the ICTY Appeals Chamber took the strategic importance of the group into consideration. The Srebrenica area was located between two disconnected parts of Republica Srpska; its capture was thus of great significance to the Bosnian Serb leaders as well as essential to the existence of the Bosnian Muslim group.<sup>104</sup>

Additionally, it is commonly deemed necessary that the perpetrator's acts are driven by a particular motive to target the victims specifically in their capacity as members of the group.<sup>105</sup> This motive is partly inferred from the wording of Article II, according to which the intent has to refer to the destruction of the group 'as such'.<sup>106</sup> The specific intent to destroy is ordinarily ascertained from conduct and facts in their entirety.<sup>107</sup> Accordingly, the behaviour of ISIS fighters towards the Yazidi community in the Sinjar region manifests their genocidal intent: the atrocities systematically committed against the Yazidis are dictated by religious ideology, as indicated in numerous ISIS statements and documents. For instance, an article in the ISIS magazine *Dabiq* entitled 'The Revival of Slavery Before the Hour' describes the Yazidis as a 'pagan minority' whose 'continual existence to this day is a matter that Muslims should question as they will be asked about it on Judgment Day'.<sup>108</sup> In point of fact, ISIS fighters attack Yazidis because of their affiliation to the group: Yazidi men and boys are killed or forced to convert to Islam, women and girls are enslaved and insulted as '*kuffār*'<sup>109</sup> and 'dirty Yazidi'.<sup>110</sup> While other groups such as Christians are

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151; Ambos, *Internationales Strafrecht*, p. 240, para 154; Jeßberger, 'The Definition and the Elements of the Crime of Genocide', p. 108; Berster and Schiffbauer, 'Völkermord im Nordirak?', p. 861.

<sup>104</sup> IT-98-33-A, *The Prosecutor v. Radislav Krstic*, 19 April 2004, para 15.

<sup>105</sup> Berster, 'Article II', para 140; Satzger, *International and European Criminal Law*, p. 250, para 15; O'Keefe, *International Criminal Law*, p. 150; Berster and Schiffbauer, 'Völkermord im Nordirak?', p. 862.

<sup>106</sup> Berster, 'Article II', para 139; Jeßberger, 'The Definition and the Elements of the Crime of Genocide', p. 109; Berster and Schiffbauer, 'Völkermord im Nordirak?', p. 863.

<sup>107</sup> Berster, 'Article II', para 105; Satzger, *International and European Criminal Law*, p. 251, para 17; A/HRC/32/CRP.2, 15 June 2016, para 151; William A. Schabas, *Genozid im Völkerrecht* (Hamburg: Hamburger Edition, 2003) 295.

<sup>108</sup> A/HRC/32/CRP.2, 15 June 2016, para 153-155; *Dabiq*, 'The Revival of Slavery Before the Hour', Issue 4, 2014, pp.14-16, this magazine can be accessed via the link referred to in footnote 24.

<sup>109</sup> Meaning 'infidels', see A/HRC/32/CRP.2, 15 June 2016, para 40.

<sup>110</sup> A/HRC/32/CRP.2, 15 June 2016, para 159-60

tolerated, though frequently under very precarious and difficult circumstances, Yazidis are denied the right to exist.<sup>111</sup>

The impact of the atrocities perpetrated against Yazidis amounts to the destruction of the group 'in whole' as stated in Article II:<sup>112</sup> The majority of the world's Yazidi population is located in the Sinjar region in Northern Iraq;<sup>113</sup> after the attack of August 2014, the Sinjar community of 400.000 people ceased to exist.<sup>114</sup> Over 3.200 Yazidis remain missing, their families uncertain of whether they are alive or have been captured by ISIS.<sup>115</sup> The survivors are mostly women whose husbands and sons have been executed or forced to convert to Islam, leaving them shattered with severe physical and psychological trauma.<sup>116</sup> In addition to their suffering, having previously been accustomed to a patriarchal society and thus lacking financial support as well as necessary skills, Yazidi women presently face difficulties in living independently;<sup>117</sup> consequently this affects the future existence of the entire group. Even if one assumes the impact of the acts does not constitute the destruction of the group 'in whole', it certainly targets a substantial part of the Yazidi population and therefore the group 'in part' as stated in the provision. In view of these considerations, the ongoing genocidal acts perpetrated by ISIS fighters are committed with the necessary intent pursuant to Article II, in particular the specific intent to destroy.<sup>118</sup>

The precise content of the specific intent is subject to broad discussion in literature and jurisprudence.<sup>119</sup> In contrast to the prevailing purpose-based approach outlined above, an alternative concept emphasizes an intellectual rather than a volitional element of the specific intent: The so-called knowledge-based approach is based on the fact that genocidal patterns ordinarily consist of a small number of leading figures and numerous 'foot soldiers'.<sup>120</sup> While the leaders act deliberately towards the

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<sup>111</sup> Christians are acquiesced as long as they pay the *jizya* tax, A/HRC/32/CRP.2, 15 June 2016, para 162.

<sup>112</sup> See also Berster and Schiffbauer, 'Völkermord im Nordirak?', p. 862.

<sup>113</sup> A/HRC/32/CRP.2, 15 June 2016, para 163; USHMM, 'Bearing Witness Trip Report', p. 4.

<sup>114</sup> A/HRC/32/CRP.2, 15 June 2016, para 175.

<sup>115</sup> A/HRC/32/CRP.2, 15 June 2016.

<sup>116</sup> A/HRC/32/CRP.2, 15 June 2016, para 177; USHMM, 'Bearing Witness Trip Report', p. 21.

<sup>117</sup> A/HRC/32/CRP.2, 15 June 2016, para 180.

<sup>118</sup> See also A/HRC/32/CRP.2, 15 June 2016, para 165; USHMM, 'Bearing Witness Trip Report', pp. 20-1; Berster and Schiffbauer, 'Völkermord im Nordirak?', p. 863.

<sup>119</sup> See Berster, 'Article II', paras 104-31.

<sup>120</sup> With further references Berster, 'Article II', para 117; Ambos, *Internationales Strafrecht*, p. 233, para 146; Ambos, 'What does 'intent to destroy' in genocide mean?', p. 840-2; Berster and Schiffbauer, 'Völkermord im Nordirak?', p. 858; Jeßberger, 'The Definition and the Elements of the Crime of Genocide', p. 106.

destruction of the group, others merely carry out orders lacking the specific genocidal intent.<sup>121</sup> In recognition of these circumstances, the knowledge-based approach differentiates the degree of intent according to the role and status of the perpetrator and thus deems a certain extent of knowledge sufficient for those acting on a lower level of organization.<sup>122</sup> Regarding ISIS fighters, this alternative - knowledge-based - approach is however not necessary to ascertain their specific intent to destroy: as the organization of ISIS is based on a religious ideology that entails the destruction of the Yazidi community and the members are not simply part of a long-existing state mechanism, but join the group with the objective of pursuing the ideology, it can be inferred that leading figures as well as 'foot soldiers' ultimately have the goal of destroying the Yazidi community as such.<sup>123</sup>

### III. Austria's obligations under international law

After determining that genocide pursuant to the Genocide Convention was and is being committed against the Yazidis, this section examines whether international law imposes a duty on Austria to prosecute and punish fighters from ISIS in its custody for the crime of genocide. To outline the subject matter, imagine the following situation: three ISIS fighters return from the Syrian war and enter Austrian territory. One is a sixteen-year-old Austrian national, the other two are adults, one of which is from Belgium and the other one from Syria. The Austrian police takes all three into custody. Are these persons to be tried before Austrian courts and, if rightfully convicted, punished for the crime of genocide?

#### 1) The duty to punish genocide

Prima facie, the Genocide Convention provides a comprehensive approach for this scenario: first and foremost, a general duty to punish genocide is enshrined in Article I, pursuant to which '[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake [...] to punish'.<sup>124</sup> However, the subsequent Articles III, IV, V,

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<sup>121</sup> With further references Berster, 'Article II', para 117; Ambos, *Internationales Strafrecht*, p. 233, para 146; Ambos, 'What does 'intent to destroy' in genocide mean?', p. 840-2; Berster and Schiffbauer, 'Völkermord im Nordirak?', p. 858; Jeßberger, 'The Definition and the Elements of the Crime of Genocide', p. 106.

<sup>122</sup> With further references Berster, 'Article II', para 117; Ambos, *Internationales Strafrecht*, p. 233, para 146; Ambos, 'What does 'intent to destroy' in genocide mean?', p. 840-2; Berster and Schiffbauer, 'Völkermord im Nordirak?', p. 858; Jeßberger, 'The Definition and the Elements of the Crime of Genocide', p. 106.

<sup>123</sup> Berster and Schiffbauer, 'Völkermord im Nordirak?', p. 859.

<sup>124</sup> By now, it is virtually undisputed that Article I constitutes legal obligations especially regarding the duty to punish genocide; for an in-depth analysis of the character of Article I, see for example *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para 162 (henceforth cited as: I.C.J. Reports 2007); see

VI and VII give greater insight as to the distinctive shape of this duty: Article III sets out all acts that shall be punished; Article IV stipulates that any person, regardless if he/she is a constitutionally responsible ruler, public official or private individual, shall be punished if he/she commits any of the acts enumerated in Article III; Article V obliges the Contracting Parties to enact the necessary legislation, in particular to provide penalties for perpetrators guilty of genocide or any of the other acts enumerated in article III; Article VI states that 'persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'; Article VII establishes modalities for extradition.

Articles I, IV and VI appear to be predominant regarding the pivotal question of jurisdiction for punishment, although at first, the provisions seemingly contradict one another: on the one hand Articles I and IV seem to impose a general duty to punish genocide on all Contracting Parties regardless where and by whomever it has been committed, whereas on the other hand, the wording of Article VI suggests that the states in the territory of which the atrocity was committed (henceforth: territorial states) or potentially competent international penal tribunals are required to investigate and eventually prosecute persons suspected of committing genocide<sup>125</sup>. Article VI would therefore indicate that Austria is not obligated to try and to convict any of the ISIS fighters in its custody, whereas Syria and Iraq as territorial states are. To establish whether Austria is in any way addressed by the Genocide Convention in the present situation, we shall first examine the duties incumbent on the Contracting Parties<sup>126</sup> before attending to international penal tribunals.

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also Christian J. Tams, 'Article I', in Christian J. Tams and Lars Berster and Björn Schiffbauer (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (München: C.H. BECK/Hart/Nomos 2014), para 24.

<sup>125</sup> This general duty to investigate and prosecute can be deduced from the phrase 'persons charged [...] shall be tried' in Article VI: Although 'to charge' commonly means 'to formally accuse someone on an offence' (see e.g. Oxford Dictionary the definition of 'charge' online accessible via <https://en.oxforddictionaries.com/definition/charge>) 'persons charged with genocide' obviously includes persons who are not officially accused but reasonably suspected of having committed genocide or any of the other acts listed in Article III. From this follows a duty to prosecute every reasonable suspicion and a duty to bring the case - if there is one - before a trial, see with further references Björn Schiffbauer, 'Article VI', in Christian J. Tams and Lars Berster and Björn Schiffbauer (ed.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (München: C.H. BECK/Hart/Nomos 2014), paras 10-3 and 19.

<sup>126</sup> All states named here (Austria, Belgium, Iraq, Syria) are Contracting Parties to the Genocide Convention. The current status of treaties deposited with the Secretary-General can be requested via the website of the UN Treaty Collection; the status of the Genocide Convention can be accessed via [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=en).

### a) The jurisdiction of Austria

With regard to Article VI, the scope of the obligation seems to be relatively unambiguous: as the ICJ noted in its judgement of 27 Feb 2007,<sup>127</sup> the duty to prosecute is territorially limited, since pursuant to Article VI, alleged perpetrators are to be tried by competent tribunals of the state in the territory of which the atrocity was committed (or by a competent international penal tribunal).<sup>128</sup> Concerning the genocide in Bosnia the Court declared that Serbia 'cannot be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide' because this 'obligation [...] cannot be deduced from Article VI'.<sup>129</sup> Although a state other than the territorial state is not obliged by Article VI to try alleged perpetrators, it is, according to the ICJ, certainly not prohibited from doing so.<sup>130</sup> This understanding of Article VI is mirrored in the prevailing opinion of the international doctrine:<sup>131</sup> whereas it is acknowledged that the effect of such a territorially limited obligation is unsatisfactory considering that most international crimes are committed by states themselves which consequentially then become their own judges,<sup>132</sup> third states are nonetheless not obligated to prosecute perpetrators of genocide.<sup>133</sup> Still, according to the prevalent view the Convention does not prohibit universal jurisdiction either: as opposed to territorial states, other Contracting Parties are not compelled to, yet also not prevented from prosecuting alleged perpetrators of genocide present on their territory.<sup>134</sup>

In contrast, the obligations enshrined in Articles I and IV appear to be of wider scope: while pursuant to Article I all Contracting Parties are obliged to punish genocide, Article IV declares vice versa that all acts of genocide 'shall be punished'.

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<sup>127</sup> I.C.J. Reports 2007.

<sup>128</sup> I.C.J. Reports 2007, para 184.

<sup>129</sup> I.C.J. Reports 2007, para 442.

<sup>130</sup> I.C.J. Reports 2007, para 442.

<sup>131</sup> With further references Gerhard Werle and Florian Jeßberger, *Völkerstrafrecht*, 4th edn. (Tübingen: Mohr Siebeck 2016) para 259.

<sup>132</sup> Werle and Jeßberger, *Völkerstrafrecht*, para 257.

<sup>133</sup> With further references Werle and Jeßberger, *Völkerstrafrecht*, para 259; O'Keefe, *International Criminal Law*, p. 326.

<sup>134</sup> O'Keefe, *International Criminal Law*, p. 326; with further reference, Christian Tomuschat, 'The Duty to Prosecute International Crimes Committed by Individuals', in Hans-Joachim Cremer, Thomas Giegerich, Dagmar Richter and Andreas Zimmermann (ed.), *Tradition und Weltoffenheit: Festschrift für Helmut Steinberger* (Berlin: Springer 2002) 315-349, p. 331; some scholars even consider complementary universal jurisdiction as customary law, such as Orna Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide', in Paola Gaeta (ed.), *The UN Genocide Convention. A Commentary*, (New York: Oxford University Press, 2009) 27-57, p. 51; and again together with Miri Sharon in Orna Ben-Naftali and Miri Sharon, 'What the ICJ did not say about the duty to punish' (2007) *Journal of International Criminal Justice*, 859-874, p. 869.

The language of both provisions indicates a duty to punish which applies to all Contracting Parties regardless where the genocide has been committed.<sup>135</sup> This interpretation seems to be affirmed by the ICJ in its judgement of 11 July 1996 where it considered the duty to punish genocide to be territorially unlimited.<sup>136</sup> The ICJ reiterated this statement in 2007 by explicitly referring to Article I while declaring that the substantive obligations enshrined in this provision are not subject to territorial limitation, moreover, that 'they apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question'.<sup>137</sup> Although the drafters of the Genocide Convention decided against incorporating mandatory universal jurisdiction<sup>138</sup> and the ICJ went no further and did not, in the case of the Bosnian genocide, find Serbia responsible for not punishing perpetrators in its custody,<sup>139</sup> in the light of the interests protected by the Convention, a territorially unlimited duty to punish seems only consequent: Genocide is considered to be a core crime which is directed against humanity, international security, and world peace.<sup>140</sup> Accountability of those who commit this atrocity therefore constitutes a common interest of the international community as a whole.<sup>141</sup> The Contracting Parties have to support one another in their common interest to suppress genocide – as laid down in the Preamble, 'in order to liberate mankind from such an odious scourge, international co-operation is required'.<sup>142</sup> Therefore it will not suffice to bind territorial states alone: as already mentioned, there may be a significant risk that territorial

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<sup>135</sup> Regarding Article IV see Björn Schiffbauer, 'Article IV', in Christian J. Tams and Lars Berster and Björn Schiffbauer (ed.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (München: C.H. BECK/Hart/Nomos 2014), para 29.

<sup>136</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996, 595, para 31.

<sup>137</sup> I.C.J. Reports 2007, para 183.

<sup>138</sup> See the summary records of the 100<sup>th</sup> meeting of the Sixth Committee of the General Assembly, p. 395-7, 406 (can be accessed via [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/C.6/SR.%20100](http://www.un.org/ga/search/view_doc.asp?symbol=A/C.6/SR.%20100)); see also with further references Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide', p. 47; and Ben-Naftali and Sharon, 'What the ICJ did not say about the duty to punish', p. 865.

<sup>139</sup> However, the ICJ found Serbia responsible for breaching its 'duty to cooperate with an international penal tribunal' pursuant to Article VI by not extraditing alleged perpetrators to the ICTY; because once such a tribunal is established all Contracting Parties are – according to the Court – compelled to arrest alleged perpetrators and extradite them to the tribunal if they do not try the perpetrators before their courts, see I.C.J. Reports 2007, paras 443-50 – although this finding may meet the purpose of the Convention it goes beyond the plain wording of Article VI, see also Ben-Naftali and Sharon, 'What the ICJ did not say about the duty to punish', p. 871.

<sup>140</sup> See for example, Ben-Naftali and Sharon, 'What the ICJ did not say about the duty to punish', p. 867; Tomuschat, 'The Duty to Prosecute', p. 329.

<sup>141</sup> In its Advisory Opinion of 1951 the ICJ declared that '[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention', see Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, p. 15, p. 23; see also Ben-Naftali and Sharon, 'What the ICJ did not say about the duty to punish', p. 863.

<sup>142</sup> See also Schiffbauer, 'Article IV', para 31.

states are unwilling to (adequately) sanction the crimes committed, since – as history shows – states are commonly involved in genocide;<sup>143</sup> e.g. dictators could commit genocide without ever being accountable.<sup>144</sup> But even if a territorial state is willing to prosecute and eventually punish perpetrators of genocide, other circumstances may frustrate its efforts; for example, in situations like the Syrian war it is far from foreseeable at which point in the future the state will regain its capacity to enforce punishment (assuming it will still be the same state as before the war). Furthermore, other states, for example neighbours to the territorial state, could offer refuge to perpetrators without facing any consequences.<sup>145</sup> At worst, solely binding territorial states could culminate in an extensive impunity for perpetrators of genocide. To meet the purpose of the Convention and secure punishment, it is therefore imperative to address not only territorial states but all Contracting Parties.<sup>146</sup>

Consequentially, the duty to punish all perpetrators of genocide pursuant to Articles I and IV and the duty to prosecute pursuant to Article VI should be qualified as two distinct yet closely connected obligations:<sup>147</sup> the former broadly addresses all Contracting Parties to punish genocide whereas the latter specifically binds territorial states to prosecute alleged perpetrators. Together they set out a procedural structure to ensure effective punishment of perpetrators of genocide:<sup>148</sup> the primary obligation to investigate, hold a trial, and pronounce a judgement is incumbent upon the territorial states as formulated in Article VI.<sup>149</sup> Besides respecting the sovereignty of states, this interpretation seems pertinent in view of the wording of the provision and the purpose of effective punishment: after all, the territorial states are usually the first to be able to take hold of potential perpetrators; they also have the most effective and efficient access to witnesses as well as to other evidence.<sup>150</sup> At this

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<sup>143</sup> The most prominent example being the Holocaust by Germany during the World War II, however e.g. also the Armenian Genocide committed by Turkey in the First World War or the genocide in Rwanda in 1994, Marko Milanović, 'State Responsibility for Genocide' (2006) *The European Journal of International Law* 553-604, p. 463.

<sup>144</sup> Tomuschat, 'The Duty to Prosecute', p. 330.

<sup>145</sup> See also Schiffbauer, 'Article IV', para 31; various other Conventions aim to avoid such loopholes in punishment as shown by Ben-Naftali and Sharon, 'What the ICJ did not say about the duty to punish', p. 868.

<sup>146</sup> Compare Schiffbauer, 'Article IV', para 31.

<sup>147</sup> Ben-Naftali and Sharon, 'What the ICJ did not say about the duty to punish', p. 863.

<sup>148</sup> Compare Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide', p. 57.

<sup>149</sup> With further references Ben-Naftali and Sharon, 'What the ICJ did not say about the duty to punish', p. 867; see also Schiffbauer, 'Article VI', para 58, deducing this procedural structure from the joint reading of Articles IV, V and VI.

<sup>150</sup> This procedural hierarchy is comparable with the principle of complementarity enshrined in Article 17 of the Rome Statute, for a more detailed examination of this principle and its reasoning, see for example Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, pp. 154-8.

point, according to the territorially unlimited duty arising from Articles I and IV to punish all perpetrators of genocide, Contracting Parties which have custody over an alleged perpetrator (henceforth: custodial states) are required to secure his or her punishment.<sup>151</sup> The custodial state can meet this duty either by extraditing this person or by trying him/her itself.<sup>152</sup> This means, as long as the punishment is secured by extradition, the respective custodial state is not obligated to prosecute the person itself.<sup>153</sup> However, if punishment cannot be secured by extradition – for example because the extradition is legally impossible<sup>154</sup> or the territorial state is unwilling or unable to prosecute alleged perpetrators – custodial states are obligated to prosecute alleged perpetrators themselves.<sup>155</sup> In this reading, the Genocide Convention therefore also implies the general principle ‘aut dedere aut iudicare’.<sup>156</sup>

Thus, it can be set down that Austria as a Contracting Party is addressed by the territorially unlimited duty to secure punishment of perpetrators of genocide. In the present situation it is however questionable whether Austria would be able to fulfil this obligation by extraditing ISIS fighters to the territorial states, e.g. to Syria. In view of the current situation, reliable prosecution or fair trials before independent and impartial state tribunals in Syria and Iraq seem unlikely: as the Commission of Inquiry as well as Human Rights Watch already documented in 2013, apart from political will, Syria lacks the capacity and resources required to prosecute complex international crimes.<sup>157</sup> At that time the Syrian regime was already unwilling to carry out impartial and independent investigations and just prosecutions.<sup>158</sup> In 2015 the Commission of Inquiry stated: ‘After monitoring national proceedings for more than three years, the Commission has determined that Syrian national courts are not, at this time, an effective mechanism through which to pursue justice’.<sup>159</sup> The

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<sup>151</sup> Schiffbauer, ‘Article IV’, para 30.

<sup>152</sup> With further references Ben-Naftali and Sharon, ‘What the ICJ did not say about the duty to punish’, p. 867; arguing for a general duty to cooperate imposed by Article IV, Schiffbauer, ‘Article IV’, paras 30.

<sup>153</sup> See also Schiffbauer, ‘Article VI’, paras 58 and 63-6; and Berster and Schiffbauer, ‘Völkermord im Nordirak?’, p. 870-1.

<sup>154</sup> E.g. because of protective national laws, see Schiffbauer, ‘Article VI’, para 58.

<sup>155</sup> Compare Schiffbauer, ‘Article VI’, para 58.

<sup>156</sup> With further references Schiffbauer, ‘Article VI’, paras 60-2.

<sup>157</sup> A/HRC/22/59, 5 Feb 2013, p. 124; Human Rights Watch, ‘Syria: Criminal Justice for Serious Crimes under International Law’, 17 December 2013 (available at [https://www.hrw.org/news/2013/12/17/syria-criminal-justice-serious-crimes-under-international-law#\\_ftn45](https://www.hrw.org/news/2013/12/17/syria-criminal-justice-serious-crimes-under-international-law#_ftn45)).

<sup>158</sup> A/HRC/22/59, 5 Feb 2013, p. 124; Human Rights Watch, ‘Syria: Criminal Justice for Serious Crimes under International Law’.

<sup>159</sup> A/HRC/28/69, 20 Feb 2015, para 103.

situation in Iraq seems rather similar since the local justice system appears to be arbitrary and non-transparent.<sup>160</sup>

#### b) The jurisdiction of the International Criminal Court (ICC)

As mentioned above, besides Contracting Parties, Article VI alternatively calls upon international penal tribunals to prosecute alleged perpetrators. Up to now no international tribunal has been set up specifically concerning the situation in Syria, therefore solely the ICC seems eligible. The term 'international penal tribunal' certainly covers all competent international criminal tribunals established after the Genocide Convention came into force.<sup>161</sup> Thus, the ICC meets the requirements of Article VI:<sup>162</sup> firstly, the ICC-Statute (henceforth: Rome Statute)<sup>163</sup> was adopted long after the Genocide Convention, namely in 1998, and took effect in 2002 after the required sixty states became parties.<sup>164</sup> Secondly, the ICC has jurisdiction over persons for the most serious crimes of international concern, inter alia over the crime of genocide (Articles 1 and 5 No 1 (a) of the Rome Statute). However, pursuant to Article VI the tribunal is only competent 'with respect to the Contracting Parties which accepted its jurisdiction'. Among states which 'accepted' an international penal tribunal's jurisdiction are particularly those which expressly did so, e.g. by acceding to a treaty to establish such a tribunal.<sup>165</sup> While Syria and Iraq, where most of the relevant acts are being committed, have not yet ratified the Rome Statute, Austria and many other countries have.<sup>166</sup> In the following it shall therefore be examined in which constellations the ICC is competent to try alleged perpetrators in the present situation.

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<sup>160</sup> Amnesty International, 'Annual Report 2015/2016' (2016) pp. 196-198 (available at <https://www.amnesty.org/en/latest/research/2016/02/annual-report-201516/>); Human Rights Watch, 'Iraq: A Broken Justice System', 31 January 2013 (available at <https://www.hrw.org/news/2013/01/31/iraq-broken-justice-system>); Jasper Hoppenbrock, 'Wo ein Henker, da kein Richter?' (2015) p. 5, this paper was published on the website of the Ludwig Boltzmann Institute of Human Rights (BIM) in Vienna (available at <http://bim.lbg.ac.at/en/monographs-and-anthologies>).

<sup>161</sup> I.C.J. Reports 2007, para 445.

<sup>162</sup> Schiffbauer, 'Article VI', para 34.

<sup>163</sup> Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, it can be accessed via [https://www.icc-cpi.int/nr/rdonlyres/ea9aef17-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef17-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

<sup>164</sup> Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, pp. 148-150.

<sup>165</sup> Schiffbauer, 'Article VI', para 38.

<sup>166</sup> Syria signed but has not yet ratified the Rome Statute. The current status of treaties deposited with the Secretary-General can be requested via the website of the UN Treaty Collection; the status of States Parties to the Rome Statute can be accessed via [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en).

As already mentioned above, the ICC has jurisdiction over the crime of genocide which is enshrined in Article 6 of the Rome Statute, using the same wording as the Genocide Convention. The personal and territorial scope of the ICC jurisdiction are to be found in Article 12 (2) (a) and (b) of the Rome Statute: according to these provisions the Court is competent, if the crime has been committed on the territory of a Party to the Rome Statute or if the alleged perpetrator is a national of a Party to the Rome Statute. By virtue of Article 26 of the Rome Statute, the ICC has no jurisdiction over persons below the age of 18 at the time of the alleged commission. Further, the Rome Statute contains two other options in which the ICC gains competence, although both are limited to a specific situation: firstly, states which have not (yet) ratified the Rome Statute can accept the jurisdiction of the ICC over a certain crime by declaration lodged with the Registrar (Article 12 (3) of the Rome Statute). Secondly, the ICC has jurisdiction over a situation which has been referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the UN (Article 13 (b) of the Rome Statute). Since neither Syria nor Iraq have accepted the jurisdiction of the ICC pursuant to Article 12 (3) of the Rome Statute and the Security Council has – despite repeated requests<sup>167</sup> – not yet referred the situation to the ICC, the Court is not competent to try all persons simply because they allegedly committed genocide in Syria or Iraq. Thus the Court solely has jurisdiction over persons who are nationals of a Party to the Rome Statute, e.g. people from Austria, Belgium, the UK, France and many more.

The wording of Article VI Genocide Convention suggests that both the territorial state and the international penal tribunal are equally competent to prosecute.<sup>168</sup> The ICC jurisdiction is, however, based on the principle of complementarity which rests on Articles 1 and 17 of the Rome Statute: following this principle, the primary obligation to investigate and prosecute lies with the respective Party to the Rome Stat-

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<sup>167</sup> 64 states including six members of the Security Council at this time demanded such a referral in 2013, Human Rights Watch, 'Syria: Criminal Justice for Serious Crimes under International Law' (2013); Ian Black, 'Russia and China veto UN move to refer Syria to international criminal court', 22 May 2014 (available at <http://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court>, accessed 1 October 2016); for a general overview regarding this referral Richard Dicker, 'As ICC Caseload Expands, UN Security Council's Support Lags Far Behind', 10 December 2015 (available at <http://www.international-criminal-justice-today.org/arguendo/article/as-icc-caseload-expands-un-security-councils-support-lags-far-behind/>, accessed 1 October 2016).

<sup>168</sup> Schiffbauer, 'Article VI', para 44.

ute.<sup>169</sup> The ICC is competent to exercise jurisdiction only when the Party to the Rome Statute is unwilling or unable to genuinely perform its tasks.<sup>170</sup>

## 2) Conclusion

Austria is subject to the general duty to punish genocide enshrined in Article I and IV, according to which it is obligated to secure punishment of perpetrators of genocide in its custody regardless where they committed the crime. In general, a very efficient and effective way to achieve this goal would be to extradite alleged perpetrators to the state in the territory of which the acts were committed; especially since most evidence, particularly witnesses, will be found on-site. Consequently, according to the procedural order provided by Article VI, the primary duty to prosecute alleged perpetrators of genocide is incumbent upon territorial states. However, due to a lack of political will and/or capacity an extradition of alleged perpetrators neither to Syria nor to Iraq would secure punishment in the present case. Hence, Austria cannot fulfil its international obligation to punish genocide by extraditing ISIS fighters to either one of the two countries.

Article VI also calls upon international penal tribunals to prosecute perpetrators of genocide although, regarding the present situation, this hardly makes any difference for Austria: since no tribunal has been set up concerning the situation in Syria only the ICC comes into question. However, both Syria and Iraq are neither Parties to the Rome Statute nor have they accepted the jurisdiction of the ICC with respect to the genocide against the Yazidis and the Security Council has not (yet) referred the situation to the ICC. The ICC is therefore merely competent to prosecute nationals from Parties to the Rome Statute. Moreover, pursuant to the principle of complementarity, the ICC gains jurisdiction only if a Party to the Rome Statute is unwilling or unable to punish serious international crimes like genocide. With regard to the scenario outlined at the beginning of chapter III., this yields the following result: Austria is obliged to prosecute the Austrian and the Syrian ISIS fighter. The Belgian ISIS fighter can be extradited to Belgium. If Belgium is unwilling to genuinely investigate or prosecute this person, the ICC will gain jurisdiction in this case, because Belgium is a Party to the Rome Statute. If Austria itself is unwilling to genuinely investigate or prosecute, the ICC will neither gain jurisdiction in the case of the Austrian national (because this person was not 18 at the time of the alleged commission of the crime) nor over the Syrian national (because Syria is not a Party

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<sup>169</sup> Cryer, Friman, Robinson and Wilmshurst, *An Introduction to International Criminal Law and Procedure*, p. 154.

<sup>170</sup> Cryer, Friman, Robinson and Wilmshurst, *An Introduction to International Criminal Law and Procedure*, p. 156-158.

to the Rome Statute). In this case, Austria would not be able to meet its obligations pursuant to the Genocide Convention.

#### IV. Prosecution and punishment of ISIS fighters under national law

As outlined in the above section, Austria is obliged to punish the crime of genocide and, pursuant to Article V of the Genocide Convention, to enact 'the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide'. As the Convention is not directly applicable, Austria had to transpose the Convention into national law;<sup>171</sup> transposition measures were taken in the course of the criminal legislation reform of 1974<sup>172</sup> by implementing § 321 Austrian Criminal Code ('Strafgesetzbuch [StGB]' henceforth: StGB), the only crime in the StGB that solely provides for life imprisonment.<sup>173</sup> For systematic reasons, this amendment to the StGB was accompanied by the establishment of a new division: as the crime of genocide is directed against the entire existence of protected groups, rather than individual interests of members belonging to these groups,<sup>174</sup> it was not possible to incorporate the provision under an existing division.<sup>175</sup>

The following section examines § 321 StGB, outlining the material and mental requirements set out in the provision as well as potential deviations from the Genocide Convention. Furthermore, it will assess whether the violations committed by ISIS fighters qualify as genocide pursuant to Austrian Criminal Law. As the conduct of ISIS primarily takes place in Syria and Northern Iraq, the first step is to determine the base of jurisdiction for national courts.

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<sup>171</sup> Cf. Explanatory remarks on the government bill proposing § 321 StGB, 30 BlgNr XIII. GP 472; Stefan G. Huber, '§ 321 StGB', in Otto Leukauf and Herbert Steininger, *Kommentar zum Strafgesetzbuch* 4th edn. (Wien: Linde Verlag, 2017), para 1.

<sup>172</sup> Austrian Federal OJ 1974/60; all Austrian federal statutes can be accessed via <https://www.ris.bka.gv.at/Bund/> by title; amendments can be found by their OJ number.

<sup>173</sup> However, this sanction is moderated by the court's possibility of lowering the sentence on mitigating grounds pursuant to § 41 StGB; see also Gerhard Hafner, '§ 321 StGB', in Frank Höpfel and Eckart Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch* (Wien: Manz, 2009), para 55.

<sup>174</sup> Cf. Explanatory remarks on the government bill proposing § 321 StGB, 30 BlgNr XIII. GP 472; Ernst Eugen Fabrizy, '§ 5 StGB', in Ernst Eugen Fabrizy (ed.), *Strafgesetzbuch* 12th edn. (Wien: Manz 2016), para 1; Huber, '§ 321 StGB', para 1; Hafner, '§ 321 StGB', para 7; see also Otto Trifflerer, '§ 321 StGB', in Otto Trifflerer, Christian Rosbaud and Hubert Hinterhofer (eds.), *Salzburger Kommentar zum Strafgesetzbuch* (Salzburg: LexisNexis, 2001) paras 12-3; Otto Trifflerer, 'Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender „Elements of Crimes“ für alle Tatbestände des Völkermordes', in Bernd Schünemann, Hans Achenbach, Wilfried Bottke, Bernhard Haflke and Hans-Joachim Rudolphi, *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001* (Berlin, Boston: De Gruyter, 2001) 1415-1445 p. 1433.

<sup>175</sup> Hafner, '§ 321 StGB', para 7.

## 1) Jurisdiction

The relevant provisions concerning jurisdiction are set out in §§ 62-65 StGB. The basic principle follows a territorial link and thus establishes jurisdiction for crimes committed on Austrian territory. In addition, a number of other principles extend jurisdiction to crimes committed abroad, such as the principle of personality for nationals or the principle of universal criminal jurisdiction concerning for example torture or human trafficking.<sup>176</sup>

With regard to § 321 StGB, the relevant provision is to be found in § 64 (1) No 4c StGB, which concerns specific crimes such as torture (§ 321a StGB), disappearance of a person (§ 312b StGB), genocide and other crimes regulated under division 25 of the StGB. Pursuant to § 64 (1) No 4c StGB, jurisdiction is to be exercised for these crimes if the perpetrator or the victim is an Austrian national, the offence has infringed on other Austrian interests<sup>177</sup>, or the perpetrator was, at the time of the offence, a foreign national who either had his or her place of habitual residence in Austria, or who is present in Austria and cannot be extradited. The habitual residence of a person is assessed according to a number of personal, occupational, and other factors, such as the economic existence, social relations, the duration and stability of residence.<sup>178</sup>

In consequence, Austrian courts are competent to prosecute Austrian nationals fighting for ISIS who have committed genocide; if the alleged perpetrator is of foreign nationality and either habitually resident or currently present in Austria and cannot be extradited.

## 2) Conditions of responsibility

In structure, § 321 StGB follows Article II Genocide Convention and therefore consists of the actus reus defining the protected groups and enumerating the five genocidal acts, a requisite mens rea mirroring these objective requirements and an additional subjective element, which is referred to as 'genocidal intent'.<sup>179</sup>

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<sup>176</sup> See Farsam Salimi, 'Vor §§ 62-67', in Frank Höpfel and Eckart Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch* (Wien: Manz, 2016), paras 4-16; Helmut Fuchs, *Strafrecht Allgemeiner Teil I*, 9th edn. (Wien: Verlag Österreich, 2016), pp. 56-61, paras 21-41.

<sup>177</sup> For example in the case of destruction of Austrian cultural heritage abroad, for further examples see Farsam Salimi, '§ 64 StGB', para 71/3.

<sup>178</sup> Farsam Salimi, '§ 64 StGB', para 66.

<sup>179</sup> Trifflerer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', p. 399.

a) Material elements

The actus reus of § 321 StGB requires the commission of one of the genocidal acts stated in the provision against a member of a protected group.

The protected groups in § 321 StGB are not simply categorized as national, ethnical, racial or religious entities as in Article II Genocide Convention. Despite the extensive similarities with the Genocide Convention, the Austrian transposition is not identical in wording to the German translation. In particular, the term 'religious group' was replaced by a 'group defined by membership to a church or religious community'. This minor difference in wording is not content-related, but solely due to the necessity of adjusting the text to the language used in the StGB.<sup>180</sup> The exhaustive list of the protected groups and genocidal acts in § 321 StGB adequately implements the international framework; any deviations in wording are inconsequential.<sup>181</sup>

In accordance with the Genocide Convention, the provision enumerates five genocidal acts aimed at the destruction of the group: The killing of members of the group, the causing of serious bodily or mental harm on members of the group, the infliction of conditions of life capable of bringing about the physical destruction of the group in whole or in part, the imposition of measures intended to prevent births within the group and the forced transfer of children of the group to another group. The acts thus entail the infliction of direct bodily and mental harm to individuals of the group as well as forms of biological genocide directed against the future existence, such as the prevention of births.<sup>182</sup> The actus reus of § 321 StGB does not require any kind of manifest pattern of similar conduct or systematic plan of destruction comparable to the further material condition established in the Elements of Crime that were intended to assist the interpretation of the Rome Statute.<sup>183</sup>

Consequently, the atrocities committed by ISIS fighters in Syria and Northern Iraq qualify as genocidal acts pursuant to § 321 StGB: The Yazidis are by definition distinguished by their religious belief and ethnicity and therefore constitute a possible target under the provision.<sup>184</sup> As shown above, the acts of violence such as the kill-

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<sup>180</sup> Cf. Explanatory remarks on the government bill proposing § 321 StGB, 30 BlgNr XIII. GP 472; Trifflerer, '§ 321 StGB', para 45; Hafner, '§ 321 StGB', para 28.

<sup>181</sup> Trifflerer, '§ 321 StGB', para 44; Hafner, '§ 321 StGB', para 36.

<sup>182</sup> Trifflerer, '§ 321 StGB', para 61.

<sup>183</sup> Trifflerer, '§ 321 StGB', para Rz 79; Cf. Explanatory remarks on the government bill proposing § 321 StGB, 30 BlgNr XIII. GP 473; Hafner, '§ 321 StGB', para 36.

<sup>184</sup> A/HRC/32/CRP.2, 15 June 2016, para 101; see above p. 5.

ings of possibly up to thousands of Yazidis, systematic enslavement of Yazidi women and children and sexual enslavement of young girls<sup>185</sup> clearly fulfil the material requirements specified in the provision and therefore establish the actus reus of genocide.

In summary, the attacks conducted by ISIS fighters against the Yazidi community qualify as the actus reus of § 321 StGB, the subsumption thus does not differ from the corresponding objective criteria stipulated in the Genocide Convention.

#### b) Mental elements

As Article II Genocide Convention, § 321 StGB requires two mental elements: Firstly, the intent which refers to the actus reus and therefore has to include the affiliation of the victims to the protected group as well as the genocidal act.<sup>186</sup> Secondly, the perpetrator has to act with the purpose 'to destroy, in whole or in part, a [...] group as such'. Though in practice these two mental elements frequently overlap, they are to be established separately from one another.<sup>187</sup>

While in structure and form the mental elements of § 321 StGB are identical to the international framework, it is necessary to outline the concept of intent in the context of Austrian Criminal Law in order to reveal any conceptual dissimilarities. Intent is defined in § 5 StGB and accordingly consists of a cognitive and a volitional element.<sup>188</sup> These two elements of intent can vary in intensity and thus can constitute *dolus eventualis*, *dolus directus* and other qualified forms of intent.<sup>189</sup> Unless otherwise provided, criminal offences only require *dolus eventualis* (§ 7 (1) StGB).<sup>190</sup> The intent of § 321 StGB refers to the actus reus and therefore must cover the affiliation of the victims to the protected group as well as the committed act. As the provision does not require a specific degree of intent, *dolus eventualis* is sufficient.<sup>191</sup>

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<sup>185</sup> See p. 6-8.

<sup>186</sup> Trifflerer, '§ 321 StGB', para 81; Hafner, '§ 321 StGB', para 46.

<sup>187</sup> Trifflerer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', p. 403.

<sup>188</sup> Susanne Reindl-Krauskopf, '§ 5 StGB', in Frank Höpfel and Eckart Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch* (Wien: Manz, 2015), paras 2-3; Martin Stricker, '§ 5 StGB', in Otto Leukauf and Herbert Steininger, *Kommentar zum Strafgesetzbuch* 4th edn. (Wien: Linde Verlag, 2017), para 1; Fabrizzy, '§ 5 StGB', para 1.

<sup>189</sup> Reindl-Krauskopf, '§ 5 StGB', para 23; Fuchs, *Strafrecht Allgemeiner Teil I*, p. 132-133, para 1-7; Diethelm Kienapfel, Frank Höpfel and Robert Kert, *Strafrecht Allgemeiner Teil* (Wien: Manz 2016) p. 59, para 14.

<sup>190</sup> Fuchs, *Strafrecht Allgemeiner Teil I*, p. 85, para 7; Kienapfel, Höpfel and Kert, *Strafrecht Allgemeiner Teil*, p. 42, para 18.

<sup>191</sup> Trifflerer, '§ 321 StGB', para 81.

In contrast to the intent that merely mirrors the actus reus, the purpose element is directed at a future point. Accordingly, the perpetrator does not have to have achieved the destruction of the protected group, but must commit a genocidal act with this intention. The crime of genocide is therefore completed and punishable, regardless if the perpetrator was or will be successful in his plan.<sup>192</sup> This particularity characterizes § 321 StGB as a crime with an extended mental element.<sup>193</sup> Such structures allow punishment at an early stage and are thus generally chosen when criminalizing especially dangerous acts.<sup>194</sup>

The purpose element requires the commission of a genocidal act against members of a protected group in their quality as members of the group and not solely as individuals.<sup>195</sup> It has to entail either the perpetrator's plan to commit further acts of genocide him-/herself or the intention to trigger a reaction in others that results in such acts.<sup>196</sup> This specific purpose can also be established by killing the leading figures with the intention of destroying the cohesion of the group.<sup>197</sup>

Unlike the intent of § 321 StGB, *dolus eventualis* is insufficient for this specific mental element. Pursuant to the wording in § 321 StGB ('Absicht'), genocidal intent requires a qualified form of intent that is characterized by an extremely strong volitional element, while the cognitive aspect is of secondary importance.<sup>198</sup> According to the definition of 'Absicht' in § 5 (2) StGB, the perpetrator has to deliberately direct his/her conduct towards a specific result, which can constitute his/her ultimate goal as well as a necessary transitional stage in fulfilling his/her actual goal.<sup>199</sup> Overall, the crime of genocide as adopted in the StGB consists of two mental elements with different requirements regarding the degree of intent. While for the acts of genocide *dolus eventualis* is deemed sufficient, the extended purpose element

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<sup>192</sup> Trifflerer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', p. 406; Trifflerer, '§ 321 StGB', para 82; Hafner, '§ 321 StGB', para 47.

<sup>193</sup> Trifflerer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', p. 402; Hafner, '§ 321 StGB', para 47.

<sup>194</sup> Trifflerer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', p. 402; Trifflerer, 'Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender „Elements of Crimes“ für alle Tatbestände des Völkermordes' p. 1424.

<sup>195</sup> O'Keefe, *International Criminal Law*, p. 150; Trifflerer, 'Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender „Elements of Crimes“ für alle Tatbestände des Völkermordes' p. 1424.

<sup>196</sup> Trifflerer, '§ 321 StGB', para 86.

<sup>197</sup> Trifflerer, '§ 321 StGB', para 83; Hafner, '§ 321 StGB', para 48.

<sup>198</sup> Hafner, '§ 321 StGB', para 46; Trifflerer, '§ 321 StGB', para 82; Huber, '§ 321 StGB', para 5.

<sup>199</sup> Reindl-Krauskopf, '§ 5 StGB', para 28; Stricker, '§ 5 StGB', para 5; Fabrily, '§ 5 StGB', para 4; Fuchs, *Strafrecht Allgemeiner Teil I*, p. 134, para 10; Kienapfel, Höpfel and Kert, *Strafrecht Allgemeiner Teil*, p. 59, para 16.

specifically requires 'Absicht'.<sup>200</sup> However, as in the case of genocide the perpetrator ultimately aims at destroying the group, the individual acts that contribute to this goal will in most cases also be committed with a high degree of intent.

These higher requirements in regard to the content of genocidal intent were at times critically appraised for having seemingly established a stricter standard than the Genocide Convention and Articles 6 and 30 of the Rome Statute:<sup>201</sup> By introducing such a qualified form of intent, § 321 StGB would not only exceed its international basis, but would also introduce an imprecise concept not recognized in Common Law Countries.<sup>202</sup> If, due to these high standards, proof of intent cannot be furnished and thus the perpetrator cannot be prosecuted for the crime of genocide, this would raise the question, whether Austria is to be seen as unable or unwilling to carry out the prosecution as stated in Article 17 of the Rome Statute.<sup>203</sup>

In spite of any potential discrepancies to the international conception of genocide, there is widespread acceptance that according to the wording of the law, genocidal intent requires a high volitional element ('Absicht') without any scope of interpretation.<sup>204</sup> Austrian Criminal Law does not recognize a knowledge-based approach<sup>205</sup>; thus by virtue of the provision, the perpetrator must act with the high degree of intent, regardless of his/her role and status in the organization. Whether the material and mental requirements of the provision are fulfilled in an actual individual case is to be assessed by the court at its discretion.<sup>206</sup>

If the perpetrator has not committed a genocidal act him/herself but has solely contributed to such an act carried out by others, he/she is punishable for incitement as

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<sup>200</sup> Cf. Explanatory remarks on the government bill proposing § 321 StGB, 30 Bg/Nr XIII. GP 473; Trifflerer, '§ 321 StGB', para 82; Hafner, '§ 321 StGB', para 46; Fabrizy, '§ 321 StGB', para 2; Huber, '§ 321 StGB', para 5.

<sup>201</sup> Trifflerer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', p. 404; Trifflerer, '§ 321 StGB', para 87; Trifflerer, 'Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender „Elements of Crimes“ für alle Tatbestände des Völkermordes' p. 1440.

<sup>202</sup> Trifflerer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', p. 404.

<sup>203</sup> Trifflerer, '§ 321 StGB', para 87.

<sup>204</sup> Cf. Explanatory remarks on the government bill proposing § 321 StGB, 30 Bg/Nr XIII. GP 473; Trifflerer, '§ 321 StGB', para 87; Hafner, '§ 321 StGB', para 46; Fabrizy, '§ 321 StGB', para 2; Leukauf and Steininger, '§ 321 StGB', para 5; Hubert Hinterhofer and Christian Rosbaud, *Strafrecht Besonderer Teil II* (Wien: facultas.wuv, 2012), p. 465, para 6.

<sup>205</sup> See above p. 11.

<sup>206</sup> In following the principle of free assessment of evidence § 14 Austrian Criminal Procedure Code ('Strafprozessordnung [StPO]'); Kurt Schmoller, '14 StPO', in Helmut Fuchs and Eckart Ratz (eds.), *Wiener Kommentar zur Strafprozessordnung* (Wien: Manz, 2012) para 7-36.

well as aiding and abetting genocide (pursuant to § 12 StGB).<sup>207</sup> Thus, the perpetrator faces the same sentence, as long as there is a causal link between these forms of conduct and both offenders fulfil all the mental requirements as defined in § 321 StGB.<sup>208</sup>

It follows from these considerations that ISIS fighters can only be prosecuted according to § 321 StGB, if they themselves commit or contribute to committing at least one of the five genocidal acts against a protected group such as the Yazidis, encompassed by intent and furthermore the genocidal intent to destroy the group in whole or in part.

### 3) Prosecution of ISIS fighters

In Austria, so far only one decision has been issued by the Austrian Supreme Court ('Oberster Gerichtshof [OGH]' henceforth: Supreme Court or OGH) in regard to § 321 StGB.<sup>209</sup> This judgment is not related to ISIS fighters or any recent events, but concerns acts committed by the Bosnian Serb Duško C. in connection with the conflict in former Yugoslavia from 1991 to 1999. The accused was arrested in Austria and placed in custody in 1993 for having allegedly committed crimes in Kučiće in central Bosnia-Herzegovina, in particular the crime of genocide pursuant to § 321 StGB, murder pursuant to § 75 StGB and arson pursuant to § 169 StGB as the main perpetrator as well as through aiding and abetting.<sup>210</sup> The detention was appealed but upheld by the Court of Appeal and confirmed by the Supreme Court which additionally noted that Austrian law was applicable and Austrian jurisdiction was to be exercised.<sup>211</sup> Though the prosecution even consulted experts from the ICTY Prosecution Office in order to adduce evidence, the accused was subsequently acquitted by the jury due to lack of evidence.<sup>212</sup>

Few decisions by the Supreme Court can be found in regard to ISIS fighters returning to Austria from Syria and Northern Iraq, in none of which the alleged perpetrator was tried for the crime of genocide. The judgments concern convictions for par-

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<sup>207</sup> See also Hafner, '§ 321 StGB', para 52.

<sup>208</sup> Fabrizzy, '§ 12 StGB', para 104.

<sup>209</sup> Austrian OGH, 13.07.1994, 15 Os 99/94; all decisions of the Austrian OGH can be accessed via <http://ris.bka.gv.at/Jus/> by case numbers.

<sup>210</sup> State attorney for the state of Salzburg, AZ 8 St 4570/94; For a detailed account of the case see Alex Marschik, 'The Politics of Prosecution: European National Approaches to War Crimes', in Timothy L.H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes* (The Hague: Kluwer Law International, 1997) 65-102 pp. 79-82.

<sup>211</sup> Austrian OGH, 13.07.1994, 15 Os 99/94.

<sup>212</sup> Alex Marschik, 'The Politics of Prosecution: European National Approaches to War Crimes', p. 81.

ticipation in a terrorist group pursuant to § 278b StGB and appeals against pre-trial detention filed by the accused that have allegedly committed this crime. § 278b StGB was enacted in accordance with the Council Framework Decision on combating terrorism<sup>213</sup> and entails the leading of a terrorist group as well as its aiding and abetting by either committing a (terrorist) crime within the framework of the terrorist organization or by providing information, financial resources or any other form of aiding or facilitating the group in the knowledge of thereby supporting its criminal activities.<sup>214</sup>

In the present judgments, the accused were convicted for traveling to Syria and joining the members of ISIS, offering their services in the training for armed conflict and providing logistical support<sup>215</sup> as well as providing contacts and directly participating in armed hostilities<sup>216</sup>. Furthermore, in rulings regarding the appeals against pre-trial custody, the persons affected are accused of having participated in combat<sup>217</sup> and training for combat and in addition having transferred money in support of ISIS fighters<sup>218</sup>.

In reference to the UN Security Council Sanctions List,<sup>219</sup> the Supreme Court qualified ISIS as a terrorist group pursuant to § 278b (3) StGB and therefore as a structured association established over a period of time of more than two persons, aimed at the commission of terrorist crimes.<sup>220</sup> These terrorist crimes are enumerated in § 278c (1) StGB and entail crimes such as murder, grievous bodily harm and kidnapping for ransom.

As the Supreme Court rulings do not refer in any way to the crime of genocide, it remains unclear, whether investigations were simply never taken up or whether proceedings were terminated due to a lack of evidence. A possible starting point for such investigations could for example be the systematic questioning of asylum seekers coming from targeted areas, as they could serve as potential witnesses or provide other relevant information concerning the acts committed by ISIS fighters. Such

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<sup>213</sup> Council Framework Decision of 13 June 2002 on combating terrorism, 2002/475/JHA.

<sup>214</sup> Franz Plöchl, '§ 278b StGB', in Frank Höpfel and Eckart Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch* (Wien: Manz, 2014), para 11.

<sup>215</sup> Austrian OGH 12.05.2016, 12 Os 22/16a.

<sup>216</sup> Austrian OGH 14.03.2016, 15 Os 16/16s.

<sup>217</sup> Austrian OGH 09.07.2015, 12 Os 73/15z; OGH 27.11.2014, 12 Os 146/14h.

<sup>218</sup> Austrian OGH 27.11.2014, 12 Os 146/14h.

<sup>219</sup> Austrian OGH 14.03.2016, 15 Os 16/16s.

<sup>220</sup> See also Article 2 of the Council Framework Decision of 13 June 2002 on combating terrorism, 2002/475/JHA.

interviews are currently being conducted by the German Federal Prosecutor in cooperation with the Federal Office for Migration and Refugees.<sup>221</sup> An unwillingness to investigate potential crimes of genocide would not only be violating national principles of criminal law such as the principle of *ex officio* stipulated in § 2 StPO, but also fail to meet obligations under the Convention. This cannot be compensated by means of other criminal consequences, even if alleged perpetrators of genocide are convicted for the participation in a terrorist group pursuant to § 278b StGB, which additionally cannot reflect the severity of the committed crimes.<sup>222</sup>

## V. Conclusion

A close examination of the factual findings confirms what various sources have already determined: ISIS committed and is still committing genocide against the Yazidi Community in Syria and Iraq. For years, ISIS has been persecuting and targeting Yazidis. This hostility and ill-treatment culminated in August 2014 in widespread and systematic attacks in the Sinjar region, at that point populated by a large part of the Yazidi Community. Within 72 hours almost all towns and villages home to Yazidis were raided; while the women and children were abducted and transferred throughout ISIS controlled areas, Yazidi men and adolescent boys were, in many cases, executed. Around 200.000 Yazidis managed to flee from the attacks in the Sinjar region. However, 50.000 became trapped on Mount Sinjar which ISIS fighters encircled and besieged. The besieged were exposed to extreme heat without water, food or medical care; as a result, many of them died. ISIS (sexually) enslaved the captured women and girls and sold them to ISIS fighters via newly built slave markets. They were and still are continuously subjected to horrendous acts of physical and psychological violence. The boys are left with their mothers until they reach the age of seven, when they are taken to training or military camps where they are indoctrinated with ISIS interpretation of Islam and trained to be fighters for the Caliphate. Until June 2016 more than 3.200 women and children were still held by ISIS.<sup>223</sup> All these acts qualify as acts of genocide pursuant to Article II (a)-(e) Genocide Convention. The additionally necessary specific intent to destroy the group is not only strongly indicated by the systematic pattern of conduct, but also clearly

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<sup>221</sup> Patrik Kroker and Alexandra Lily Kather, 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany', 12 August 2016 (available at <http://www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/>, accessed 15 February 2017).

<sup>222</sup> Kroker and Kather, 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany', 12 August 2016 (available at <http://www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/>, accessed 15 February 2017).

<sup>223</sup> A/HRC/32/CRP.2, 15 June 2016.

affirmed in various ISIS-statements and documents, questioning the Yazidis' right to exist.

As Article I and IV Genocide Convention enshrine a territorially unlimited duty to ensure punishment of genocide, all Contracting Parties are subject to this general duty regardless where in the world the atrocity was perpetrated. Pursuant to the Genocide Convention, this duty can be fulfilled by prosecuting and punishing perpetrators of genocide present on their territory, but also by extraditing alleged perpetrators to a competent international tribunal or to another state, which is willing and able to adequately prosecute and eventually punish the alleged perpetrator. From the perspective of international law, Austria would thus act wrongfully if it neither prosecutes alleged perpetrators in its custody, nor secures adequate prosecution and punishment by other institutions.

To meet its obligations under the Genocide Convention, Austria introduced a criminal offence (§ 321 StGB) almost identical to Article II. This provision, together with § 64 (1) No 4c StGB, provides for prosecution of alleged perpetrators of genocide, even if the acts were committed abroad.

As far as can be ascertained, in spite of the existence of § 321 StGB, ISIS fighters apprehended on Austrian territory are not being tried for the crime of genocide, but rather for participation in a terrorist group pursuant to § 278b StGB. This could be due to the complex factual situation and difficulties in adducing evidence necessary for convictions under § 321 StGB. However, taking into consideration the extent of the systematic attacks against Yazidis of the Sinjar region, it is highly probable that ISIS fighters who have returned from this region were somehow involved in genocide, if not as immediate perpetrators, then by aiding and abetting. In the case of such reasonable suspicion, Austrian prosecution organs are by national and international law obliged to carry out investigations. An unwillingness to investigate potential crimes of genocide would thus result in a serious breach of national and international obligations.

This examination has shown that the Genocide Convention as well as the Austrian Criminal Code follow the fundamental concept of collective international responsibility: Large-scale violations of human rights induce universal action. Because these crimes are directed against the interests of the entire international community, they cannot be viewed as merely domestic affairs of individual states. To banish such atrocities like genocide the international community must ally: All states must resoundingly condemn acts of ISIS and take combined effort to punish the perpetrators.