



**Convention against Torture  
and Other Cruel, Inhuman  
or Degrading Treatment  
or Punishment**

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COMMITTEE AGAINST TORTURE

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES  
UNDER ARTICLE 19 OF THE CONVENTION**

**Third periodic reports of States parties due in 2000**

**Addendum**

**Austria\***

[30 June 2003]

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\* The information submitted by Austria in accordance with the consolidated guidelines for the initial part of the reports of States parties is contained in document HRI/CORE/1/Add.8.

The initial report submitted by the Government of Austria is contained in document CAT/C/5/Add.10; for its consideration by the Committee, see documents CAT/C/SR.18 and 19 and *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 46 (A/44/46)*, paras. 202-230.

The second periodic report is contained in document CAT/C/17/Add.21; for its consideration by the Committee, see documents CAT/C/SR.395, 398 and 400 and *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 44 (A/55/44)*, paras. 46-50.

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## I. GENERAL REMARKS

1. The present third and fourth periodic reports submitted by Austria in accordance with article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment follow the first two reports submitted by Austria. In accordance with the guidelines of the Committee against Torture for the preparation of reports under article 19 of the Convention, only the new measures and developments since the submission of Austria's second periodic report are presented here. Parts 2 and 3 of the present report contain additional information as requested by the Committee against Torture as well as information on Austria's compliance with the recommendations made by the Committee when reviewing the last report.

2. The commitment to the protection and promotion of human rights and fundamental freedoms has always been a fundamental principle of Austrian policy both in Austria and abroad. As one of the most essential elements of human rights, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment is thus of major relevance in this respect.

3. At the earliest possible date, i.e. on 4 November 2000, Austria and 24 other States signed Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) concerning the prohibition of any form of discrimination, thus making the first important step towards a rapid entry into force of this instrument. Austria also signed Protocol No. 13 to the Convention concerning the abolition of the death penalty in all circumstances the day it was opened for signature on 3 May 2002. In Austria, the death penalty was generally abolished, also for times of war and crises, as early as 1968 (Federal Law Gazette No. 73/1968), which is why Protocol No. 13 does not contain any new aspects in that respect for Austria at the constitutional level. The total abolition of the death penalty throughout Europe, going beyond Protocol No. 6 to the European Convention, constitutes a foreign policy aim pursued by Austria for quite a long time. Austria therefore supported, from the outset, the Swedish initiative following the Conference of Ministers held on 3 and 4 November 2000 in Rome, for a total abolition of the death penalty within the framework of the Council of Europe.

4. Vienna is home to the European Monitoring Centre on Racism and Xenophobia (EUMC). The primary objective of EUMC is to collect and provide objective, reliable and comparable data at the European level on the phenomena of racism, xenophobia and anti-Semitism. Austria provides financial assistance to the work of the Centre in an amount exceeding the usual contributions, and supports the "National Focal Point" established by the Centre for Austria, providing data and information. Insofar as incidents of inhuman or degrading treatment are based on motives of racism, xenophobia or anti-Semitism, the work of the Centre is also of major relevance for combating torture and other cruel, inhuman or degrading treatment or punishment.

5. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited Austria for the third time between 19 and 30 September 1999. The report of the Committee on its visit to Austria (CPT/Inf (2001) 8) and the response of the Government of Austria to the report (CPT/Inf (2001) 9) have been published upon Austria's request. From 27 to 29 March 2000, the European Commission against Racism and Intolerance (ECRI) paid a second contact visit to Austria, and its second report on Austria was published together with the comments of the Government (CRI (2001) 3).

## II. GENERAL INFORMATION ON NEW MEASURES AND DEVELOPMENTS GIVEN IN THE ORDER OF THE ARTICLES OF THE CONVENTION

### Articles 1 and 4

6. Austria considers it very important to note that all acts that may be described as “torture” within the meaning of article 1 of the Convention were already punishable under the Austrian Penal Code prior to the ratification of the Convention and threatened with court sanctions, which take into account the severity of the offence.

7. Austria has a sophisticated and very differentiated system of substantive criminal law in which all intentional acts of the type referred to in article 1, paragraph 1, of the Convention constitute one of the following criminal offences enshrined in the Austrian Penal Code:

- Section 83, causing bodily harm or affecting the health of another person, including physical pain or mental suffering as well as (mere) maltreatment;
- Section 84, causing grievous bodily harm or serious injury to the health of another person (e.g. by causing considerable pain);
- Section 85, causing bodily harm or injury to the health of another person with serious long-term effects, e.g. where the offence results in long and severe suffering;
- Section 86, causing bodily harm to another person which leads to his/her death;
- Section 87, intentionally causing serious bodily harm (where the offender wants to cause severe bodily harm or to severely affect the health of another person);
- Section 313, each of the above acts committed by an official in the course of carrying out his/her official duties, is subject to a one and a half times higher penalty than is otherwise provided for;
- Section 312, maltreatment or neglect of a prisoner by a civil servant, including non-compliance with the duty to care for him/her, thus intentionally affecting his/her health;
- Section 75, murder (any intentional killing of a human being, including those cases where the offender merely considers the death of the victim a genuine possibility and faces up to it).

8. Therefore, in conjunction with a number of general provisions enshrined in the Penal Code (e.g. sect. 7 - intent, sect. 12 - inciting another person to commit a criminal act or assisting him/her in the commission of a criminal act, sect. 15 - attempt) all acts described as torture in the Convention and liable to punishment are also punishable in Austria, irrespective of the motives given as examples in article 1, paragraph 1, of the Convention; the pain or suffering inflicted need not be severe (*aiguë*) either. The punishment of torture is thus to some extent wider under Austrian criminal law than the definition of torture in the Convention.

9. The recommendation of the Committee against Torture regarding the punishment of torture (A/55/44, para. 50) has thus been fully complied with under Austrian criminal law. That the definitions of the offence in the Austrian Penal Code as they are normally used differ from the definition of torture in article 1, paragraph 1, of the Convention does not change this situation and is essentially due to the fact that from an overall perspective, the Austrian definition covers a wider range of criminal acts than the provisions of the Convention.

10. The Convention apparently does not contain any obligation to transfer the exact wording of the definition of torture into the domestic law of the State parties; that there is no such obligation is evident from the use of the plural form (“offences”) in article 4, paragraph 1. In which way and with what definitions an international obligation to penalize such an offence is enshrined in the domestic law, either in general or in detail, is subject to the discretion of the individual State party - as is the case with numerous other similar obligations under international agreements - and the definitions of the conducts to be penalized are to be adjusted to the legal system and structures of the respective State.

### **Articles 10 and 16**

11. Since the submission of the second periodic report, the relevant legal provisions guiding the Austrian police forces have been further developed, and the consideration of human rights issues by the police has become a firmly established process and essential element of securing the quality of their work.

12. The Federal Ministry of the Interior continues with the measures adopted for the training of police forces on human rights issues and combating discrimination. Already during the basic training, human rights are taught, in particular in the subjects Constitutional Law, Prison Work, Rhetoric (conflict situations) and the Security Police Act, but also in Applied Psychology. They are firmly rooted in the curricula. Special importance is attached to the European Convention on Human Rights and article 3 thereof. Under the subject Professional Ethics, police officers also consider and discuss their professional image, values and role in society, as well as the causes and handling of role conflicts. Advanced training on human rights issues primarily takes the form of a concomitant vocational training with special emphasis on dealing with foreigners, conflict solution, security, freedom and migration.

13. Moreover, various training courses and projects were carried out for an in-depth consideration of human rights issues and tolerance towards other ethnic groups. In 1998 and 1999, a project week entitled “Human Rights Week”, with a follow-up, was organized for members of the security police, involving internal lecturers and external experts from non-governmental organizations (NGOs) such as Amnesty International and Caritas. The aim of the project was to enable the participants to act as multipliers and to pass on the acquired knowledge to the various organizational units of the security police (snowball effect).

14. The “Human Rights Week 2000”, a project initiated by the Council of Europe and the Federal Ministry of the Interior, was held from 28 October to 4 November 2000. In addition to offering training courses, it was aimed at creating greater awareness among police officers of human rights issues. Special emphasis was placed on paying tribute to the European Convention on Human Rights and its fiftieth anniversary. The security police was involved in regional

conferences throughout Austria. The results of studies and projects, in particular on the issue of “policing in a democratic society” were presented at a large-scale central conference, and various NGOs were given an opportunity to report on their activities.

15. During the “Human Rights Year 2000”, the Ministry of the Interior also carried out the PAVEMENT Project, in cooperation with NGOs. The aim of the project was to find pioneering measures for a successful and efficient implementation of article 13 of the Treaty Establishing the European Community (EC Treaty) by public service providers, whereby the security police was taken as an example. The national project was part of a transnational project of the European Commission in which Italy, France, Spain and Germany participated as partners. Central aims of the project were to determine the question how the police could be refrained from exercising discriminating behaviour, and to create awareness that the police is the guarantor of the implementation of article 13 of the EC Treaty, as well as to develop a multidimensional matrix as an instrument for discussing the issue police and discrimination.

16. Since the autumn of 1999, a two-semester training course is being carried out under the heading “Police activities in a multicultural society” by the International Centre for Cultures and Languages and the *Verband der Wiener Volksbildung*, in cooperation with the Ministry of the Interior. It is intended to increase the competence of police officers in dealing with migrants and is aimed at members of the security police force of the Vienna Federal Police Directorate, who often are in contact with migrants. This course is now part of the training programme provided by the Academy for Security Forces of the Ministry of the Interior.

17. Another basic training measure aimed to combat discrimination is the “A World of Difference” (AWOD) project of the American civil rights organization Anti-Defamation League (ADL). With this programme, ADL has developed a method to create greater public awareness of discrimination. Over 350,000 people have so far attended this seminar in the United States. The programme has been applied with great success in schools and adult education, and especially in basic and advanced training courses for police, security and military personnel. It is also used in Germany for the armed forces.

18. This seminar has now also been adapted for the Austrian police forces and is to be used in various ways in basic and advanced training programmes. By providing better access to this issue, which is of decisive relevance to the police, it is intended to make Austrian police officers more sensitive in exercising their official duties. The Academy for Security Forces has been entrusted with the task of carrying out this seminar within the framework of the Federal Ministry of the Interior.

19. Fundamental rights and human rights and how they can be secured and implemented in legal practice also form an important element of the professional training of judges and public prosecutors. The advanced training programme for judges and public prosecutors held each year by the Federal Ministry of Justice in cooperation with the presidents of the four Austrian Courts of Appeal (*Oberlandesgerichte*), the Association of Austrian Judges, the Association of Austrian Public Prosecutors, the Austrian Section of the International Commission of Jurists and other organizations has been constantly expanded in the field of human rights issues, especially in the last few years, including special topics such as the prevention of discrimination, racism and xenophobia.

20. From 1998 to 2000, the topic “Conflict culture as a contribution to strengthening human rights in a preventive approach to violence” was dealt with in further training seminars. In 2000 and 2001, special events were dedicated to various basic law aspects in criminal proceedings as well as to the development of criminal procedure on the basis of the case law of the European Court of Human Rights. A scheme designed to place considerable emphasis on a comprehensive consideration of the issue of combating discrimination in further training courses has been developed in cooperation with the Ludwig Boltzmann Institute of Human Rights in Vienna and ADL.

21. In court prisons responsible for the execution of detentions on remand as well as of custodial sentences and preventive measures of detention, special attention is being placed on human rights issues, dealing with conflicts and preventive measures against violence, especially in basic and advanced training courses for police and prison staff. The *Fortbildungszentrum Strafvollzug* (training centre for execution of custodial sentences), for example, provides indoor module seminars in the following areas: dealing with conflicts, dealing with aggression, treatment of special inmates, foreign detainees, safety management, crisis intervention and suicide prevention.

22. Under section 184 of the Code of Criminal Procedure (*Strafprozessordnung*) and section 22 of the Execution of Custodial Sentences Act (*Strafvollzugsgesetz*) remand prisoners and prisoners serving a sentence shall be treated with respect for their sense of honour and human dignity, and there shall be as little interference as possible in their personal sphere. Having regard to the statutory provisions and other regulations, they shall be subjected only to such restrictions as are necessary to serve the respective purpose of the detention and to maintain prison security and order.

23. The “Service Order for Prisons” of 22 December 1995, which are the general service instructions of the Federal Ministry of Justice on the tasks and duties of prison staff, contains, in item 1.4, the following general provisions on the treatment of inmates:

“(1) The treatment of inmates shall comply with the principle of respect for human dignity, which is indispensable for the fulfilment of the tasks. Further basic provisions governing the treatment of inmates are contained in s. 22 of the Execution of Custodial Sentences Act and - for remand prisoners - in s. 184 of the Code of Criminal Procedure.

(2) Moreover, inmates shall be treated in accordance with the rules of politeness prevailing in society; regard may be had to special exercises in dealing with others at the workplace and at school in the respective prison units for a better understanding.

(3) In order to establish a feeling of confidence and a basis of discussion, which are a prerequisite for carrying out their tasks, prison officers shall take problems of inmates seriously, giving them the time needed to discuss the matter, and they must also try to explain to the inmate the reasons for a decision taken against his/her views. They shall refrain from any confidentialities with inmates.”

### Articles 11 and 16

24. As regards the administration of prisons, continuous efforts are being made to improve the detention and accommodation conditions, by reducing for example the number of prisoners per cell and creating more single cells. These efforts are facilitated by the fact that in the last several years, the number of prisoners in Austria has remained more or less stable.

25. An expert commission set up by the Federal Ministry of Justice in the autumn of 2001 has considered ways of reorganizing the health care and therapeutic treatment of inmates, in particular the treatment of inmates with obvious psychological disorders and suicide prevention. In its work, the commission also took into account the recommendations made by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) during its visit to Austria in 1999.

26. Special attention is currently being paid in court prisons to the treatment of inmates in acute and exceptional situations (extremely aggressive or mentally unstable) and to a professional crisis management strategy for such situations. In this context, the “cage beds” with metal bars that were still in use in a few prisons until 1999 have been removed where they still existed. In some prisons, security cells were equipped with a special soft padding for sick detainees. General guidelines are currently being developed involving psychiatric experts and experienced experts from abroad.

27. The reform of the criminal investigation procedure (preliminary proceedings) which has been the subject matter of discussions for several years and has been prepared by the Federal Ministry of Justice, entered a concrete phase in April 2001 when a comprehensive bill of law was completed and sent to the competent bodies for general consultation. In 2002, the bill was revised on the basis of the statements presented in the consultation procedure and submitted to the Austrian Parliament in June 2002. The general elections on 24 November 2002 prevented a further continuation of the issue in parliament, and the bill will therefore have to be adopted by the new Government.

28. The principal aim of the reform draft is to create a modern legal basis for the work of criminal investigation officers, for strengthening the position of the Public Prosecutor’s Office, which is to exercise control over litigations concerning criminal investigation officers as well as over the judicial legal protection during the entire investigation proceedings. It is also intended to considerably improve the legal position of suspects and to extend their rights to defence and legal protection. For this purpose, the Government bill provides, in particular, for:

- An extension of the right to inspect the file, which as a rule is to be given to the defendant and his/her counsel also during police investigations;
- An express reference in the legal provisions to the already existing right of the defendant not to make any statement (right to remain silent), and - also in the case of an arrest - to contact a counsel and to talk to him/her prior to the interrogation;
- The right of the defendant to call in a person of his/her confidence for the interrogation;



- The right of the defendant to make “objections” already during the investigations because of a violation of an individual right;
- The right of the defendant to challenge the permission of means of coercion;
- The right of the defendant to the assistance of an interpreter if he/she does not have sufficient command of the German language.

29. According to the Government bill, the interrogation of the defendant is to be postponed for an adequate time in order to give him/her the opportunity to exercise his/her rights if necessary and possible. One section of the draft of the Criminal Procedure Reform Act also contains provisions governing the execution of detentions on remand and prison conditions, including for example the separation of remand prisoners from other prisoners, outside contacts of remand prisoners, etc.

30. As regards the access to counsel of defendants during arrest the Government bill for a Criminal Procedure Reform Act suggests that an arrested defendant shall be given a guaranteed right to contact a defence counsel, to give him/her a power of attorney and to speak with him/her prior to the interrogation, a right to which the defendant is basically entitled already during the first 48 hours following his/her arrest by criminal investigation officers. Before granting a power of attorney, the defendant shall be able to contact a lawyer under surveillance. In particular, in the prosecution of extremely serious offences and organized crime, there are however situations where the imminent danger of absconding or collusion cannot be prevented by surveillance measures either. In such cases, it shall be possible to restrict the contact of the arrested defendant for a short time - i.e. until his confinement to a prison (48 hours after his/her arrest at the latest) to the period required for granting a power of attorney and a short and general legal consultation, whereby special reasons must be given for such a conduct. Moreover, the defendant should as a rule be entitled to discuss the matter with his/her counsel out of hearing of third persons.

31. It should be noted that an arrested person is already entitled under the current legal situation to request that a relative and a legal counsel of his/her choice be notified of his/her arrest at the time of his/her arrest or without unnecessary delay immediately thereafter, but in any event prior to his/her interrogation (see article 4, paragraph 7, of the Federal Constitutional Act of 29 November 1988 on the Protection of Personal Freedom (PersFrG); sections 178 and 179, paragraph 1, of the Code of Criminal Procedure; section 36, paragraph 3, of the Code of Administrative Offences (*Verwaltungsstrafgesetz*); section 8, paragraphs 1 (1) and 2, of the Guidelines Regulation of the Federal Minister of the Interior; the Joint Guidelines of the Federal Ministries of the Interior and Justice; and the Introductory Ordinance of the Federal Ministry of Justice on the 1993 Criminal Procedure Amendment Act (*Strafprozessänderungsgesetz*)). With the 2002 Criminal Law Amendment Act, greater emphasis is now placed on the right of an arrested defendant to speak with his/her counsel without a court official being present. This is also in compliance with the judgement of the European Court of Human Rights in *Lanz v. Austria* of 31 January 2002. The investigating judge may only order and carry out a surveillance by a court official (*Strafrechtsänderungsgesetz*) if detention on remand was imposed exclusively or also because of the risk of collusion, and if, due to aggravating circumstances, it is believed that the conversation with the counsel would lead to evidence being tampered with.

32. For a surveillance to be lawful, it must in any event (including during the first 14 days of detention) be ordered in the form of a decision in which the requirements are set out and substantiated in detail. A mere reference to facts relied upon to substantiate the assumption of a risk of collusion as a reason for arrest is insufficient; there must be reason to the fear that there will be an impairment of evidence as a result of the defendant's contact with the outside, established through conversations with his/her lawyer. A concrete example would be that, in the case of organized crime, contacts with the lawyer, e.g. through codified messages, may be used to warn accomplices still to be arrested or other members of the criminal organization.

### **Articles 12, 13, 14 and 16**

33. Already by an order of 15 September 1989, the Federal Ministry of Justice provided the public prosecutors with detailed instructions regarding those cases where an accusation of abuse, bodily harm or degrading treatment is raised against organs of the security authorities (police officers). This order contained a special reference to the right of speedy and impartial examination of the case as laid down in articles 13 and 16, paragraph 1, of the Convention.

34. The public prosecutors were requested to examine without delay any not manifestly unfounded reproach of an abuse or similar action by a police officer by way of preliminary judicial inquiries and thereby to guarantee the right under the Convention.

35. Since the Federal Ministry of Justice was aware of the common practice of such complaints still being initially examined by an investigation conducted by the security authorities themselves, and the public prosecutors frequently only informed about the complaint several weeks after the accusation, the Federal Ministry of Justice issued another order in which it stressed that this practice was incompatible with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

36. Therefore, by an order of 30 September 1999, the Federal Ministry of Justice recalled the order of 1989 and requested public prosecutors to clarify any accusation of ill-treatment against a police officer by way of preliminary judicial inquiries. This also applies to those cases where, without any concrete reproach being expressed, indications of such a suspicion exist, e.g. following the transfer of an arrested defendant to the court prison or during his/her examination by an investigating judge. In this context, a detailed documentation of all charges of abuse or injuries, if any, was declared to be indispensable. In the event of any visible injuries or similar signs, an expert opinion is sought to determine the cause of this physical harm.

37. By an order of 10 November 2000, the Federal Ministry of the Interior, in order to coordinate the measures concerning security authorities with the order of the Federal Ministry of Justice, requested all security police authorities to report any ill-treatment charge against a police officer without delay - if possible, within 24 hours - to the competent public prosecutor. In addition, the security police authorities were instructed to restrict their own actions and inquiries in such cases to a documentation of the charge and to indispensable measures for the preservation of evidence.

38. At the beginning of 2001, the Federal Ministry of Justice issued an order in which it also instructed prison directors to ensure, in the event of any charges of ill-treatment of prisoners or any indication of such charges, that the competent public prosecutor's office is informed, which will then follow the above-mentioned procedures.

39. As regards court prisons that are responsible for the execution of custodial sentences and preventive measures as well as for detentions on remand, an amendment to the Execution of Sentences Act 2001 (*Strafvollzugsgesetznovelle*), was adopted, which provided for five regional appeals boards (*Vollzugskammern*), consisting of a judge acting as president, a prison director or experienced prison officer and another member (usually also a judge). These chambers decide on complaints of inmates against the head of a prison or against a decision or order imposed by him/her.

40. The establishment of such independent "tribunals" in the prison administration sector has led to a better protection of the rights of remand prisoners, prisoners serving a sentence and persons placed in custody as a preventive measure.

41. Originally created by an order of the Federal Ministry of the Interior, and subsequently confirmed by the constitutional provision of section 15 (a) of the Security Police Act, an independent human rights advisory board (*Menschenrechtsbeirat*) was set up at the Interior Ministry in June 1999. The constituent meeting of the Board took place on 5 July 1999.

42. The task of the Human Rights Advisory Board is to advise the Federal Minister of the Interior on human rights issues and to submit proposals for improvement. In this regard, it is the responsibility of the Human Rights Advisory Board to monitor and concomitantly review the work of the security police and of authorities otherwise subordinate to the Federal Ministry of the Interior, and of organs authorized to exercise direct administrative power and coercion in the context of protection of human rights. The Human Rights Advisory Board is authorized to visit any unit of the security police and any place where administrative power and coercion are exercised by the security police as well as to examine the detention of persons at any station or office of the security police. The latter task is discharged by commissions consisting of several experts and headed by a specialist in the field of human rights.

43. The Human Rights Advisory Board in its design thus goes beyond the recommendation of the CPT in two ways. The activity of the Human Rights Advisory Board is not limited in substantive terms to a review of the treatment of detained persons in conformity with their human dignity (art. 3 of the European Convention on Human Rights) but also includes all aspects of human rights in the context of the overall performance of the security police, based on priorities defined by the Board.

44. The members of the Human Rights Advisory Board are not subject to instructions and are appointed for a term of three years. At the end of the first term in July 2002, new members of the Board were appointed for a further three-year term on 23 July 2002. Five non-governmental organizations are also represented on the Human Rights Advisory Board. The recommendations - accompanied by the reasons motivating them - which the Human Rights Advisory Board communicates to the Federal Minister of the Interior are published in the annual security report that the Federal Government is required to submit to the two houses of parliament (National and Federal Council) under section 93 of the Security Police Act.

45. The work performed by the Human Rights Advisory Board since 2001 includes the compilation and publication of a number of comprehensive reports on the following topics - human rights issues in the context of detention of females by organs of the security police, information for detainees, and medical care for detainees - as well as the submission of numerous recommendations. In 2001, the commissions of the Human Rights Advisory Board conducted 425 inspection visits to security police authorities, including 66 police detention centres (previously called police prisons). On 11 occasions, the activities of police organs in events or places where administrative power and coercion (demonstrations, raids, etc.) are exercised were examined with a focus on the protection of human rights.

46. As to the tragic death of the Nigerian national Marcus Omofuma during his deportation on 1 May 1999, the following may be said concerning articles 12 to 14 of the Convention.

47. The Korneuburg Public Prosecutor's Office brought charges against three police officers suspected of having, on 1 May 1999, bound and gagged the detained Marcus Omofuma before carrying him on board the aircraft to be deported. In the aircraft, they are alleged to have tied him down to his seat, and forcibly strapped him with adhesive tape several times around his chest and the backrest of his seat. They also allegedly sealed his mouth and part of his right nostril with several strips of tape around his head. To immobilize his mouth, they strapped his head to the headrest of his seat, causing breathing difficulties. Maintained in this position, Mr. Omofuma died during the flight. The police officers were charged with having tortured a prisoner in their custody, resulting in his death. Legally, this conduct was qualified as an offence of torturing a prisoner under section 312, paragraph 1, first case, and paragraph 3, third case, of the Penal Code.

48. During the preliminary investigations, three expert opinions were sought. Whereas the Bulgarian expert believed in the existence that there was a link between his death and the treatment, the Austrian expert came to the conclusion that Mr. Omofuma's death might have been caused by other factors as well. In the end, the Korneuburg Public Prosecutor's Office based its charge on the "main expert opinion", prepared by a German expert who like his Bulgarian colleague assumed that death resulted from asphyxiation. By judgement of the Korneuburg Regional Court of 15 April 2002, the police officers were found guilty and sentenced to eight months' imprisonment each for the offence of involuntary manslaughter under especially dangerous circumstances according to section 81, paragraph 1, of the Penal Code. Under section 43, paragraph 1, of the Penal Code, the prison sentences were suspended, with a three-year probationary period. Both defence counsels and the Korneuburg Public Prosecutor's Office gave notice of appeal. Since their appeals were withdrawn, the judgement is now legally binding.

49. The main reason for the relatively long duration of these criminal procedures was that the cause of Marcus Omofuma's death, one of the central issues in these proceedings, had to be ascertained beyond doubt. Accordingly, the Public Prosecutor's Office first had to concentrate on eliminating the existing contradictions between the first two expert opinions for the purposes of sections 125 and 126 of the Code of Criminal Procedure. Only when this turned out to be impossible, was it able and under an obligation to request another expert opinion. Before this new opinion was delivered, the Public Prosecutor's Office was not in a position to make a reliable assessment of the facts and to submit a final application.

50. Mr. Omofuma's daughter lodged an appeal with the Vienna Independent Administrative Tribunal (*Unabhängiger Verwaltungssenat*), challenging the police officers of exercising direct administrative power and coercion against her father. By decision of 22 October 1999, the Independent Administrative Tribunal found the appeal inadmissible, inter alia, because the daughter of the directly affected Marcus Omofuma was not entitled to file a complaint. In response to a complaint by Mr. Omofuma's daughter, the Constitutional Court (*Verfassungsgerichtshof*) rescinded the decision in its ruling of 6 March 2001. The Independent Administrative Tribunal subsequently admitted the complaint in its decision of 24 January 2002, declaring the sealing of Marcus Omofuma's mouth, that started at Vienna Airport and continued on board of the aircraft, as well as tying him down and strapping him to his seat on board the aircraft were unlawful.

51. Under section 1, paragraph 1, of the Official Liability Act, the federal authorities as a legal entity are responsible for unlawful actions by their organs. Any claims by the injured person are dealt with on the basis of general civil law. Unless settled out of court, such claims are to be asserted in regular civil proceedings by filing an action with the locally competent regional court. This may of course also include claims resulting from a conduct declared unlawful in the present Convention.

52. As mentioned above, claims of persons who have suffered damage as a result of unlawful actions by State organs are based on provisions of general civil law. This implies in particular that not only the victim of a conduct that is not in conformity with the Convention and thus unlawful but also his or her relatives may sue the State for damages. The most relevant provision here is section 1327 of the Civil Code, according to which dependants of a person that has been killed are entitled to compensation for lost maintenance to be paid by the person causing the damage (in the case of official liability by the responsible legal entity). Moreover, it must be pointed out that under Austrian jurisdiction "damages for grief and suffering" are awarded in the case of gross negligence or intention on the part of the person causing the damage, to close relatives of the person who has been killed even if their own health has not been affected. There are no objections against this precedent also being applied to cases where a State organ has acted with gross negligence or intentionally.

53. Three sets of claims are pending against Austria in the Omofuma case:

(a) Action for succession in respect of Marcus Omofuma with claims for damages in the amount of €100,000 for pain and suffering. The proceedings were conducted without a lengthy procedure and have meanwhile been terminated. A ruling will be issued in writing, and the judgement will presumably be served during the first six months of 2003;

(b) Action brought by Marcus Omofuma's minor daughter, Franziska Mahou, claiming damages of €7,920 for lost maintenance and €50,000 for pain and suffering. Action brought by Marcus Omofuma's minor daughter for a compensation of €10,999.54 to cover legal expenses in the proceedings before the Administrative Court and the Vienna Independent Administrative Tribunal. This and the foregoing claim are being treated jointly;

(c) Action brought by Marcus Omofuma's father, mother, son, daughter, widow, sister and brother, claiming compensation in an amount of €95,000 for pain and suffering, and requesting a statement confirming the loss of maintenance. The action was not served on the agents of the Republic of Austria until 23 October 2002.

54. Austrian legislation thus ensures in particular with regard to the pending proceedings referred to above, that the requirements of fair and adequate compensation as enshrined in article 14 of the Convention are fully complied with.

55. As regards the general measures taken by the Republic of Austria in response to Marcus Omofuma's tragic death in order to ensure compliance with human rights principles during deportations, see paragraphs 64-67 below.

### **Article 15**

56. Section 166 of the Government bill for a Criminal Procedure Reform Act discussed above in the context of article 11 expressly prohibits the use of statements of a defendant or a witness that have been obtained by means of torture, coercion, deception or other inadmissible methods of interrogation.

57. Section 166 reads as follows:

#### **“Use of evidence**

§ 166. The statements of a defendant and those of witnesses and co-defendants must not be used as evidence to the detriment of the defendant - except against a person who is charged with a violation of the law in connection with his/her interrogation -, and are otherwise void (s. 281 para. 1 (3)), if they have been obtained.

1. as a result of torture (Article 7 of the International Covenant on Civil and Political Rights, Federal Law Gazette No. 591/1978, Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Federal Law Gazette No. 210/1958, and Art. 1 para. 1 and Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, Federal Law Gazette No. 4921/1987), or by other unlawful means of coercion, threat, deception, other measures affecting the freedom of taking a decision or action according to his/her own will, or through unlawful methods of interrogation insofar as they violate fundamental procedural principles.”

### **III. ADDITIONAL INFORMATION REQUESTED BY THE COMMITTEE**

58. In accordance with the request by Mr. Mavrommatis, the English version of the 1997 Aliens Act and the 1997 Asylum Act are enclosed in the annex. A comprehensive amendment to the 1997 Aliens Act and an amendment to the 1997 Asylum Act entered into force on 1 January 2003. We apologize for the fact that an English translation of the current version has not yet been prepared, it will certainly be submitted as soon as it is available.

59. In addition, we have enclosed statistical data on asylum and measures taken by the *Fremdenpolizei* (aliens' police) (annual report for 2001 and latest data of June 2002).
60. As regards issues raised in paragraphs 49 (a) and 50 (a) of the Committee's conclusions and recommendations (A/55/44), reference is made to our observations above, relating to articles 1 and 4 of the Convention.
61. As regards issues raised in paragraphs 49 (b) and (c) of the Committee's conclusions and recommendations, reference is made to our observations above, relating to articles 12 and 13 of the Convention.
62. As regards the concern expressed by the Committee at the possible obstruction of complaints about police abuse through recourse to defamation proceedings against the complainant (para. 49 (c)), it must in addition be pointed out that under Austrian law, the offence of defamation (i.e. knowingly wrongful accusation of a person) is an offence liable to public prosecution (*Offizialdelikt*) and as such, subject to the legality principle (according to which prosecution of an offence is mandatory). Therefore, anyone - and thus also a police officer - is entitled to notify the competent authorities of any suspicion regarding the commission of such an offence.
63. The Federal Ministry of Justice already made a number of recommendations to the Public Prosecutors' Offices several years ago suggesting that they examine very carefully the necessity of introducing or continuing criminal proceedings against the complainant in such cases and adopt a restrictive approach to his/her prosecution. This recommendation has led to a considerable reduction of these proceedings. Since then, there have been very few cases where persons complaining of ill-treatment by members of the security authorities have been convicted for defamation.
64. As concerns paragraph 49 (d) of the conclusions and recommendations of the Committee, the Federal Ministry of the Interior has, since the summer of 1999, taken numerous measures that have led to a reorganization of deportation procedures, with special attention given to human rights issues.
65. These new regulations are based, in particular, on the following criteria:
- Only adequately trained public security organs shall be in charge of deportations by air;
  - The public security organs in charge of the deportation shall contact the aliens to be deported in due time in order to allow them to psychologically prepare themselves for their deportation;
  - A report is to be submitted on the course of each completed or attempted deportation by air. The report must in any event contain information about the type, intensity, duration of and reason for the applied means of coercion. All relevant circumstances of the official act are to be documented;

- Special attention is drawn to the principle that shouting and making noise are no grounds for using powers of coercion;
- Measures blocking the respiratory system (mouth or nose) in order to overcome physical resistance and to put an end to noise constituting a nuisance and disruptive conduct that might prevent the passage of the person to be deported on the aircraft together with other passengers, must by no means be applied;
- In exercising measures of coercion, special attention must be given to securing the proportionality principle within the meaning of section 29 the Security Police Act and to ensure that the measures of coercion do not violate the human dignity of the person concerned (article 3 of the European Convention on Human Rights);
- The use of adhesive tape, elastoplast or similar products is strictly prohibited;
- The alien concerned is to be examined by a medical officer immediately, if possible, or within the 24 hours prior to the flight;
- The authority must inform the medical officer prior to the examination of any conspicuous features, in particular of a psychological nature as well as of inclinations to aggressive behaviour, and must provide him/her with existing data (report on the alien's fitness for detention, medical records, other forms of treatment, results from other sources);
- The medical officer must set out in an “additional information for the accompanying official” any necessary information relevant for carrying out the deportation.

66. Moreover, the following measures have been taken:

- Every official must discuss all current cases of detention once a week with the competent judicial head of his/her department regarding the lawfulness of a further detention and the lawfulness and adequacy of the measures imposed by the *Fremdenpolizei* (aliens’ police), and must be able to prove the existence of such discussions. Before every expulsion or deportation the officer in charge shall make sure, through an interrogation of the alien to be deported laid down in writing, that no asylum proceedings are pending;
- Prior to the deportation the judicial head or - in the case of nationals of neighbouring States - the head of the department shall make a note for the file in which he agrees to the deportation after examining its lawfulness.

67. With the involvement of NGOs such as Volkshilfe, Caritas, SOS Menschenrechte and others, persons detained awaiting their deportation are treated on the basis of humanitarian and social aspects, thus reducing and minimizing the conflict potential and improving their conditions of detention.



68. As regards the recommendation of the Committee contained in paragraph 50 (b), reference is made to our observations above, on article 10 of the Convention.

69. As concerns the recommendation contained in paragraph 50 (c), under section 8 of the Asylum Act (*Asylgesetz*), read in conjunction with section 57 of the Aliens Act (*Fremdengesetz*) as amended, the asylum authorities shall examine a deportation in the light of the prohibition of refoulement under articles 2 and 3 of the European Convention on Human Rights and Protocol No. 6 thereto. If an application for asylum is rejected, a decision ex officio on the admissibility of returning the alien to his/her country of origin is taken. If the return is inadmissible, the alien shall be granted the right to stay in Austria for a limited period, under section 15 of the Asylum Act.

70. The deportation of an alien while asylum proceedings are still pending is in any event inadmissible and forbidden by law (sect. 21, para. 2, of the Asylum Act).

71. The members of the asylum authorities receive special training through various basic and advanced training courses. The latter are provided, among others, in cooperation between the Swiss, German and Austrian asylum offices (Schweizerisches Bundesamt für Flüchtlinge, Deutsches Bundesamt für Migration und Flüchtlinge (formerly Bundesamt für die Anerkennung ausländischer Flüchtlinge)), the Bundesasylamt and Federal Ministry of the Interior and its Department on Asylum Law (*Asylrechtsabteilung*). The advanced training course of the Federal Asylum Office, which is given special priority, also includes seminars on the non-refoulement principle.

72. In the detention order, which entered into force in May 1999, special emphasis is placed on the requirement that detainees shall be treated with respect for their human dignity and with the greatest possible consideration. It lays down minimum standards for detention: medical treatment, use of clothes and other personal belongings, spiritual welfare, hygiene, meals, employment, exercises in the open air, etc. A so-called “open station” was established at the Linz Police Detention Centre, in which persons detained awaiting deportation can stay outside their cells and have a kitchen of their own. The Federal Ministry of the Interior is trying to establish further “open stations” for such detainees, taking into account infrastructural capacities and drawing on the experience at the Linz detention centre.

73. Reference must also be made in this respect to a scheme that has been operating for the last few years, which regulates the treatment by NGOs of detained persons awaiting expulsion. The aim of special contracts concluded with various NGOs is to support the Federal authorities in their task of caring for such persons in police detention centres, to improve humanitarian and social standards during their detention and to reduce the conflict potential by providing them with adequate information.

74. Moreover, we would like to refer to a special meeting entitled “On the Future of Detentions Prior to Deportation” held on 7 and 8 June 2001 by the Federal Ministry of the Interior at the initiative of the human rights coordinator. The aim of this meeting was to develop a catalogue of detention standards and conditions.

75. As a result of reviewing detentions, the Human Rights Advisory Board has prepared two comprehensive reports on the following problematic issues - minors detained with a view to their expulsion, and information of detained persons. The Federal Ministry of the Interior is carrying out measures to ensure the implementation of the recommendations contained in these reports.

76. Mention must also be made of the Advisory Board for Asylum and Migration Issues, established in 2001 under section 51 (a) of the 1997 Aliens Act. The Board, which emerged from the former Integration Advisory Board and the Asylum Advisory Board, is to advise the Federal Minister of the Interior on concrete issues of asylum and migration and on the issuance of residence permits for humanitarian reasons.

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