



**Convention on the
Rights of the Child**

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COMMITTEE ON THE RIGHTS OF THE CHILD

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 12 (1) OF THE OPTIONAL PROTOCOL TO THE
CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF
CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY**

Initial reports of States parties due in 2006

AUSTRIA

[20 July 2007]

Article 3 (paras. 1 and 3)

1. With respect to the term “child” which, for the purposes of the Convention on the Rights of the Child (CRC), is used in relation to persons under 18 years of age, several concepts used in Austrian law must be explained in more detail. According to Section 74 paragraphs 1(1) and (3), of the Austrian Criminal Code (StGB), an underage person (*Unmündiger*) is a person under 14 years of age, a minor (*Minderjähriger*), a person under the age of 18, while an adolescent (*Jugendlicher*) is a person who has completed the 14th year of age, but not yet the 18th year of age (Section 1, subparagraph 2 of the Youth Court Act [*Jugendgerichtsgesetz* – JGG]).

Article 3, paragraph 1(a) (i)

2. According to Section 104, paragraph 1 of StGB, any one who trafficks in slaves (*Sklavenhandel*) is punished by imprisonment from ten to twenty years. Paragraph 2 of this Section also makes punishable anyone who induces the enslavement of another person or causes him or her to be brought into a slavery-like situation or causes this person to submit to slavery or to a slavery-like situation. The concept "slavery-like situation" (*sklavereiähnliche Lage*) also includes debt bondage (*Schuld knechtschaft*), serfdom (*Leibeigenschaft*) and forced or compulsory labour, including forced or compulsory recruitment of children for their involvement in armed conflict.

3. Section 104(a) of StGB specifically serves the purpose of implementing article 3 (1) (a)(i) in conjunction with article 2(a) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC), and already penalizes certain acts and actions preparing for a subsequent exploitation of a person. Under this section, anyone who recruits, harbours or otherwise accommodates, transports or offers or passes a minor on to another person with the intention to exploit the minor sexually or by removing of his organs or by exploiting his labour, is to be punished by imprisonment up to three years.

4. Anyone, who commits the above-mentioned offence by using force or serious threat, is to be punished by imprisonment from six months to five years. If the offence has been committed by a person, who is a member of a criminal organization against an underage person, by using serious violence or in such a way, that the offence, either deliberately or by gross negligence, constitutes a danger for the victim’s life or results in a particularly severe disadvantage for the victim, is to be punished by imprisonment from one to ten years.

5. Taking into account the special vulnerability of underage persons, the Austrian Government decided to generally qualify the commission of a criminal offence against underage persons as a penalty-increasing qualification

6. Exploitation (*Ausbeutung*) means that the vital interests of the victim are suppressed to a substantial extent and with a lasting effect. This connotes that an offence constitutes a crime of sexual exploitation when minors are forced or induced to perform a sexual act or to be involved in sexual acts which are harmful to their normal sexual and moral development. According to Section 90 of StGB, exploitation by removal of organs means the retrieval of organs from a living person without his/her consent and for the benefit of a third party, or if such consent cannot be legally given. The term "no legally effective consent" of the victim applies therefore, if the consent (of the person entitled to child custody) was obtained by force, threat or deceit, or if it violates public morals or it was not given at all. In this context, it is worthy to note that under Austrian civil law, underage persons can never give a legally effective consent to such acts of

legal significance due to the absence of their full legal capacity. In such cases, consent of the legal representative or other persons entitled to child custody, also requires a permission of the Guardianship Court (*Pflegeschaftsgericht*)

7. Exploitation of labour (*Ausbeutung der Arbeitskraft*) means reckless exploitation of the victim. It thus criminalizes any behaviour which does not yet constitute slavery or a situation similar to slavery, but nevertheless, is harmful to the vital interests of the victim, e.g. if labour is not or absolutely insufficiently remunerated, the permissible or reasonable working hours have been excessively extended over a longer period of time, or the working conditions are unacceptable.

8. As with other offences, this provision does not only penalize offenders who act for their own benefit, but also the exploitation by a third party.

9. As an accompanying measure, the sale of children by their parents or legal guardian can also constitute the offence of negligence of care, education or supervision, and is punishable under Section 199 of StGB by imprisonment up to six months or a fine of up to 360 daily rates.

10. Since parents have a guarantor's position (*Garantenstellung*) concerning the physical and mental integrity of their children according to Section 2 of StGB, their acceptance of the sale of a child for the purpose of sexual exploitation, exploitation by removal of organs or by engagement in forced labour, may also result in criminal liability by omission (Sections 2 and 104(a)) (if the parents are not already criminally liable as immediate or assisting offenders). As soon as a minor under 16 years of age is taken away from his/her legal guardian, the elements constituting the offence of child abduction (*Kindesentziehung*) under Section 195 are fulfilled as well.

Article 3, paragraph 1(a)(ii)

11. Section 194 of StGB specifically serves the purpose of implementing article 3(ii) of OPSC. Under Section 194, paragraph 1, anyone who, by granting an advantage to that person or to a third party, makes a person, who is entitled to give that consent, consent to the adoption of a minor by another person, shall be sentenced by imprisonment up to two years. The offender does not have to grant an advantage to himself/herself, and the mere fact that he/she acts as an intermediary granting an advantage to a third party, such as the prospective adoptive parents or to a person whose consent is required, or to a third party, is sufficient to incriminate him/her¹. The decisive circumstance is that the person consents to the adoption because of the advantage granted to him or her, or in other words, he/she consents to the sale of the child for adoption. The constituent element of "advantage" has a wide meaning and it comprises not only material objects or pecuniary benefit (*Vermögensvorteil*), but also everything that may constitute an indirect, and in some cases only an (substantial) immaterial advantage. The advantage must have been granted either to persons whose consent is required or to a third party, e.g. to a close relative. Paragraph 2 of the cited Law provides for a penalty-increasing qualification; if the offender commits this offence with the intention of deriving a pecuniary benefit for himself/herself or for a third party (Section 5, para. 2 of StGB), with imprisonment up to three years.

¹ Section 181 of the Austrian Civil Code (ABGB), or Sections 1 and 26 of the International Private Law Act (IPRG).

12. This provision is directed against persons who act as intermediaries in an intended adoption, where a person whose consent is required receives a benefit in return. This provision shall prevent the preparation or encouragement of such adoptions by a third party. To prevent the adopting married couple from being considered as an intermediary in relation to each other, paragraph 3 of the cited Law explicitly excludes the adopter and also the adopted child from liability to penalty.

Article (3)(b)

13. Sections 206 and 207 of StGB penalize any sexual contact with underage persons. Under Section 206, anyone who has sexual intercourse or performs a sexual act equal to sexual intercourse with an underage person, or induces an underage person to perform a sexual act or to have a sexual act performed on him, shall be sentenced to imprisonment up to ten years. The offence is qualified by bodily injury, pregnancy or the death of the underage person, in the latter case the imposition of life imprisonment is also possible. Section 207 penalizes other sexual acts performed on underage persons, the basic penalty being imprisonment of six months and up to five years. Under Sections 201 and 202, if the offender performs such sexual acts by using force, deprivation of freedom or by serious threat, he or she fulfils also, due to simultaneous commission of two or more offences during an illegal act (*Idealkonkurrenz*), the elements constituting the offence of rape or sexual coercion (*geschlechtliche Nötigung*).

14. Under Austrian criminal law, the uniform “protective age” (*Schutzalter*) for self-determined, consensual sexual acts by minors is fourteen years. However, the law provides for a very extensive criminal protection of under 18 year-old persons from sexual exploitation.

15. Section 207(b) of StGB also aims to protect adolescents who have not yet completed the 16th or 18th year of age from sexual abuse. This provision has been adopted to protect juveniles who, for certain reasons, are not sufficiently mature to understand the meaning of a sexual act or to act according to this understanding or whose capability to do so is clearly limited. Under paragraph 3 of the cited Law, anyone who induces a minor (under 18 years of age) to perform a sexual act or to have a sexual act performed on him by directly offering him/her money, shall be sentenced to imprisonment up to three years. It is also worth mentioning Section 208 which protects persons under the age of 16 from moral endangerment, and Section 212 which penalizes the abuse of a position of authority (*Missbrauch eines Autoritätsverhältnisses*).

16. Section 214 of StGB penalizes procuring sexual contacts with underage persons in return for remuneration. Anyone who, with the aim of gaining a pecuniary or another advantage, arranges a personal contact between an underage person and a third party for the performance of a sexual act, is to be punished by imprisonment of six months up to five years. If the person has reached the age of 14, the maximum term of imprisonment is reduced to two years.

17. Under Section 215 of StGB, anyone who induces another person to engage in prostitution is to be punished by imprisonment up to two years. According to Section 74 paragraph 1(9), prostitution is defined as performing sexual acts or having sexual acts performed on oneself in exchange for remuneration with the intention to derive a continuous income for oneself or a third party from recurrent performance of this kind of activity. For the purposes of this provision, to “induce” a person to something means the exertion of strong influence targeted to change the whole life of the person causing him or her to submit to prostitution.

18. Section 215(a) of StGB explicitly serves the purpose of implementing article 3(1)(b) in conjunction with article 2(b) of OPSC and penalizes the promotion of prostitution (*Förderung der Prostitution*) and pornographic performances involving minors (*pornographische Darbietungen Minderjähriger*). Anyone who recruits or offers or procures a minor to a third party, regardless of whether he/she already engages in prostitution, to engage in prostitution or to participate in pornographic performances, or offers or procures such a person to another person for that purpose, shall be sentenced to imprisonment up to three years. The same punishment shall be imposed on anyone who exploits a minor engaged in prostitution or participating in a pornographic presentation in order to obtain a pecuniary benefit for himself/ herself or for a third party.

19. Anyone who commits any of the aforementioned offences as a member of a criminal organization, by using serious violence against a person, or in such a manner that the offence, either with intent or gross negligence, jeopardises the life of that person or results in a particularly severe disadvantage for him/her, shall be sentenced to imprisonment from six months to five years. Anyone who commits such an offence against an underage person (under 14 years) shall be sentenced to imprisonment from one to ten years.

20. The aforementioned provisions aim at providing a very extensive protection to minors from sexual exploitation, by penalizing not only persons offering children for sexual exploitation but also consumers. The victim is not punishable as he/she is the "object" protected by this provision, and his/her consent (e.g. on account of the remuneration received) is of no legal relevance.

21. Under Section 215(a) of StGB, "Recruiting" (*anwerben*) means to commit somebody to engage in prostitution or to participate in a pornographic presentation. "Offering" (*anbieten*) is the explicit or implied declaration of the willingness to arrange a personal contact between the potential "customer" and a minor, for a professional performance, whether active or passive, of a sexual act for remuneration (prostitution); the same is applicable to procuring participation in a pornographic presentation. An offer as such is sufficient to incriminate regardless if it is accepted or not. Thus it is not only punishable to personally offer such kind of contacts to somebody, but also to make such offers through advertisements. The term "procuring" (*vermitteln*) means arranging such contact as an intermediary. In case of procuring a sexual contact without remuneration for the purpose of gaining a pecuniary benefit for oneself, Section 214 must be considered.

22. A pecuniary benefit could be money, but also real values (e.g. board and lodge). "Exploitation" (*Ausnützen*) means that the offender provides none or only negligible service in return for material advantages received which exceed the value of a tip. "Participation" (*Mitwirken*) means direct (active or passive) participation in a presentation which has to be considered pornographic. A person participates in a pornographic presentation if he/she performs a sexual act as an act in itself, independent from any other expressions of life for the sexual stimulation of an observer, on himself/herself, on another person or with an animal, has such a sexual act performed on him/ herself by another person or presents his/her genitalia or pubic area in such a manner (legal definition in paragraph 3 of the cited Law). "Performance" (*Darbietung*) means any kind of live presentation meant to be watched by spectators, e.g. within the scope of a theatrical or dance performance, a striptease or a so-called "peep show".

23. A penalty-increasing qualification applies if the offence is committed as a member of a criminal organization (*kriminelle Vereinigung*)², by using serious violence (*schwere Gewalt*)³ or in such a manner that the offence, either with intent or gross negligence, jeopardizes the life of the minor, or results in a particularly severe disadvantage for him/her.

24. Furthermore, Section 216 of StGB (procurement) (*Zuhälterei*) which penalizes exploitation of a prostitute (this provision is construed neutrally as to gender) and Section 217 (transborder trafficking for prostitution) (*grenzüberschreitender Prostitutionshandel*), which aim at protecting persons, irrespective of their age or gender or whether they are already engaged in prostitution or not, from being procured or recruited for prostitution in a foreign State.

Article 3, paragraph 1(c)

25. Section 207(a) of StGB explicitly serves the purpose of implementing article 3 (1)(c) in conjunction with article 2(c) of OPSC, and criminalizes all forms of production of, and trade in pornographic representations of minors as well as the acquisition and possession of such representations (imprisonment up to three years). Under this provision, anyone who, for the purpose of dissemination, produces or imports, transports or exports or offers, procures, makes available, presents or otherwise makes accessible to a third party any pornographic material involving a minor, commits a punishable offence. This provision thus penalizes any kind of child pornography traffic and dissemination. A pornographic representation involving minors (*pornographische Darstellung Minderjähriger*) is defined in Austrian criminal law as the realistic representation of a sexual activity performed on an underage person (person under 14 years) or of an underage person on him/herself, on another person or with an animal, as well as a realistic representation of activities involving an underage person which, due to their nature, produce the impression of showing a sexual activity performed on an underage person or a sexual activity performed by the underage person on himself/herself, on another person or with an animal. In addition, this applies to all realistic representations of genitals or the pubic area, insofar as they are distorted for no purpose other than to arouse sensation, and independent from any other expressions of life for the sexual stimulation of an observer, as well as to all visual representations, which as a result of a modification or not, under given circumstances convey the impression to be such a representation.

26. As regards minors who have reached the age of consent (14 to 18 years of age), generally the same applies as to minors under the age of consent, only that in this case the representation of the aforementioned sexual activities or aforementioned actions must be in the same way distorted for no purpose other than to arouse sensation, and independent from any other expressions of life for the sexual stimulation of an observer, to fulfil the elements constituting this offence.

27. The method, medium, material or storage device of the representation is legally irrelevant. The relevant representation may be a photograph, slide, any other kind of visual representation or film, as well as a computer disk, CD-ROM, DVD, computer game and a similar object. The term "representation" comprises unmodified representations of real activities or real events with

² A criminal organization is an association of two or more persons formed over a long period with the aim of committing an offence or offences, other serious violent crimes against life and limb (...), either by one or by several of its members. (Section 278, para.1 of StGB).

³ Serious violence is the use of superior physical strength which reaches a high level of intensity or dangerousness, with the aim to overcoming real or only expected resistance by the victim.

real persons or representations of real persons, as well as virtual pictures, i.e. representations which are based on a representation of real things and have been correspondingly altered or generated completely artificially. The Austrian law also penalizes the offence of "simulated pornography" (*Anscheinspornographie*), i.e. representations of real events which involve a minor in such a way that an objective observer gets the impression of a real sexual activity, even when the offender knows that, in actual fact, no sexual act has been performed.

28. A penalty-increasing qualification applies if the offence is committed on a commercial basis (*Gewerbsmäßigkeit*) by a person who is a member of a criminal organization (*kriminelle Vereinigung*)⁴, in such a manner that it results in a particularly severe disadvantage for the minor, or if the offender produces pornographic material involving a minor by using serious violence (*schwere Gewalt*)⁵, or if he/she, either with intent or by gross negligence, jeopardizes the life of the depicted minor when producing the pornographic material.

29. The own private use (*Eigengebrauch*) of pornographic representations of minors is punishable insofar as obtaining and possessing such materials constitutes a criminal offence (imprisonment up to one year in case of minors at the age of consent, and up to two years in case of minors under the age of consent, respectively). Obtaining such representations on the Internet and their storage on a storage medium is also punishable under the same provision. Importing, transporting and exporting for own use is punishable as well. The punishability of the production and possession of pornographic representations of minors at the age of consent is excluded when it is targeted for the personal use by the minor and done with his/her free consent. The same applies to the production and possession of virtual pornographic materials showing minors at the age of consent, if no real pornographic material has been used in the process of production, and if targeted for own private use, provided that the act does not entail the risk of it being disseminated.

Article 3, paragraph 2

30. According to Section 12 of StGB, not only the immediate offender, but also anyone who instigates another person to commit an offence, as well as any person who contributes to its commission by aiding and abetting, will face the same level of punishment. The Austrian Government thus has decided to stipulate that every person who causally contributes to the commission of an offence is considered an offender, even if the different forms of participation are defined separately in the respective provision. The liability to penalty of two or more persons involved is independent of each other. Assisting offenders are thus also punishable if the immediate offender is exempted from criminal liability due to for example insanity defence (*Schuldunfähigkeit*), or is under the age of criminal liability (*Strafunmündigkeit*) (monistic model of perpetration -*funktionale Einheitstäterschaft*). Every offender is criminally liable for the committed offence by his/her individual guilt, and his/her activity must fulfil particular elements of criminal intent defined for the respective criminal offence.

31. Pursuant to Section 15 of StGB, the criminal liability for intentionally committed offences does not only refer to a perpetrated, but also to an attempted offence and participation in an attempt. The attempt is thus, generally speaking, punishable like a perpetrated offence. The fact that an attempted offence has not been completed is only a mitigating circumstance according to

⁴ See footnote 1 above.

⁵ See footnote 2 above.

Section 34, subparagraph 13. The punishability of an attempt (*Strafbarkeit des Versuchs*) does not only apply to the person who directly undertook the attempt, but also to every person participating in the attempt. Inducing someone to, and assisting in an offence, which does not get beyond the stage of attempt, is punishable as an attempt to commit an offence. In addition, the attempted committal of an offence as well as the attempt to induce another person to commit an offence is also punishable. However, under Austrian law, the attempt to assist in the commission of an offence is not punishable, provided that the actual committal has not been “at least” attempted impunity of attempted assistance (*Beitragsversuch*).

Article 3, paragraph 4

32. The Austrian Law on Criminal Liability of Enterprises Having Legal Personality (*Verbandsverantwortlichkeitsgesetz – VbVG*), entered into force on 1 January 2006, and established the criminal liability of enterprises (legal entities and certain joint partnerships (*Personengesellschaften*)) for every punishable offence, thus also considering all offences prohibited by article 3, paragraph 1 of OPSC. VbVG establishes the criminal liability of decision makers, as well as of employees. Sanctions provided by the Act are fines based on the economic capacity of the liable enterprise. Proceedings against entities are carried out under the Code of Criminal Procedure (StPO).

Article 4

33. According to Section 62 of StGB, the provisions of the Austrian Penal Code are applicable to all offences which have been committed in Austria. According to Section 63, they also apply to offences committed on board of an Austrian ship or aircraft, no matter where it is located.

34. In addition, according to Section 64, paragraph 1(4) of StGB, irrespective of the law of the territory in which the offence has been committed, offences committed abroad are punishable under the Austrian Criminal Code, particularly in cases of slave trafficking (Section 104), trafficking in human beings (Section 104(a)) or trans-border trafficking for prostitution (Section 217), and if the offence violates Austrian interests or the culprit can not be extradited. Austrian interests are affected, for example, if the criminal offence has been committed against an Austrian national. The extradition is not possible, if, for example, the offender is an Austrian national or a national of a foreign State and all efforts towards his extradition have remained fruitless. Under paragraph 4(a) of the cited Law, the provisions of Austrian law, regardless of the provisions of the law in the territory in which the offence has been committed, apply also to criminal offences which have been committed abroad if they constitute an aggravated sexual abuse of underage persons (Section 206), sexual abuse of underage persons (Section 207), pornographic representations involving minors under Section 207(a), paragraphs 1 and 2, or sexual abuse of minors under Section 207(b), paragraphs 2 and 3, or the promotion of prostitution and pornographic performances involving minors (Section 215(a)), or pornographic representations involving minors (Section 207(a), paragraphs 1 and 2), and the offender is an Austrian national and has his or her habitual residence (*gewöhnlicher Aufenthalt*) in Austria. According to this provision, Austrian nationals who have their habitual residence in Austria are also criminally liable if they, as sex tourists, buy a sexual contact with persons under age, even if these activities are not punishable under the laws of the respective foreign country. The same applies to the sexual abuse of minors under 16 years of age (Section 207(b), para 2) if the offender exploits a situation of distress of the victim, e.g. drug addiction, illegal stay, homelessness (*Ausnützung einer Zwangslage*).

35. As far as Austrian jurisdiction is not already established on ground of the aforementioned provisions, the general provisions of Section 65 of StGB may also apply (in case of offences committed abroad). Under this provision, Austrian nationals as well as foreign nationals caught in Austria who cannot be extradited on other ground than the character of their offence, are, subject to Austrian jurisdiction also for offences committed abroad, provided that the principle of double criminality applies.

Article 5

36. With respect to this article, no special measures were required, since international conventions are, according to Austrian law, self-executing on ratification.

37. Concerning paragraph 2, it is noted, that Austria does not make an extradition conditional on the existence of a treaty.

38. Concerning paragraph 5, reference is made to relevant provisions of Section 65 of StGB.

Article 6

39. Austria can afford mutual legal assistance on the basis of numerous bilateral and multilateral treaties and arrangements, in particular the European Convention on Mutual Assistance in Criminal Matters, of 20 April 1959 and its First Additional Protocol, as well as the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May .2000. Also, in the absence of a treaty or arrangement, judicial assistance can be afforded if the principle of reciprocity applies.

Article 7

40. Section 26 of StGB provides for the confiscation of items (*Einziehung von Gegenständen*) used or intended to be used to commit an offence or resulting from an offence, provided that the items, due to their specific character, represent the risk of being used for the commitment of new punishable offences (e.g. falsified documents, counterfeit money).

41. The confiscation of proceeds of crime (*Abschöpfung der Bereicherung*) under Section 20 of StGB provides for the seizure and confiscation of property which the offender derived from criminal activities. A confiscation may also be imposed on persons who have not committed an offence, but, received an economic advantage from criminal offences and thus benefited from proceeds of crime, since it is legally insignificant if a person did actually know about the criminal origin of the property. The confiscation of proceeds of crime can also be applied to legal persons. This provision does not require the property derived from offences to be still directly accessible. It can already also have been transformed through money laundering into other forms of property. In addition, property controlled by a criminal organization or deriving from an offence which is not punishable under Sections 62 to 65, may be declared forfeited (*verfallen*) under Section 20(b).

Article 7 (b)

42. Requests by another State party for seizure or confiscation can be executed on the basis of the European Convention on Mutual Legal Assistance in Criminal Matters of 20 April 1959, (Federal Law Gazette No. 41/1969), and from Member States of the EU also on the basis of the Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, (Official Journal of the European Union L 196 of 2 August 2003), or the Framework Decision of 6 October 2006 on the application of the principle of the mutual recognition to confiscation orders, (Official Journal of the European Union L 328 of 24 November 2006) (the implementation period concerning the latter has not yet expired). In the absence of a treaty or another arrangement, such requests may be executed on the basis of Section 56 et seq. and 64 et seq. of the Law on Extradition and Mutual Judicial Assistance (ARHG), provided that the principle of reciprocity applies.

Article 8 (para. 1(a) to (d) and (g) and para. 3)

43. According to the Austrian Code of Criminal Procedure (StPO), witnesses in pre-trial proceedings (*Vorverfahren*) are basically heard by the investigating judge without the presence of other parties or witnesses (*Ausschluss der Parteienöffentlichkeit*). Every witness, however, has the right to have a trusted person present during the interrogation (Section 162, para. 2 of StPO). In case of an examination of persons under 14 years of age, the presence of a trusted person is generally required, as far as this serves their interests (Section 162, para. 3). If charges are filed, the witness has to appear before the court at the main trial and to give evidence again (principle of immediacy), to wit generally in presence of all parties involved. Nevertheless, according to Section 250, paragraph 1, the court (presiding judge) may exceptionally temporarily exclude the accused from the courtroom while a witness/co-defendant is testifying. This provision shall give the witness/co-defendant the opportunity to give evidence without fear or favour. There is a similar provision for juvenile defendants (see Section 41 of the Juvenile Court Law - JGG). According to Section 229, paragraph 2 of StPO, the court may, ex officio or upon request, exclude the public from the main hearing if details about the private or intimate sphere of the defendant, witness or a third party is to be discussed, and the protection of vulnerable interests so requires.

44. The Austrian Code of Criminal Procedure does not define any age-limit allowing or requiring a child to be heard as witness in court. Hence, it lies in the discretion of the respective court and its consideration of evidence to assess the capacity of a witness to give evidence in court (Section 151, para. 1(3) of StPO). According to established precedents, children from the age of five are considered capable of being examined (in the presence of a child psychologist). However, this jurisprudence does not exclude in general the capability or capacity of even younger children to testify. Since a child victim is often the only person, that can, from his or her own perception, give evidence about the circumstances of a crime, his/her examination is usually necessary to establish the material truth. The failure to examine a child victim as a witness may even constitute a ground of nullity under Section 281, paragraph 1(4)- violation of the rights to defence (art. 6, paras. 1 and 3 (d) of the European Convention on Human Rights).

45. Nevertheless, in order to prevent that children be required to describe, in presence of the accused/defendant, humiliating and painful treatment they have suffered, the Criminal Procedure Amendment Act (*Strafprozessrechtsänderungsgesetz*) adopted in 1993, (Federal Law Gazette. No. 526/1993) provides for the instruments of adversary and considerate witness examination (Section 162(a) of StPO).

46. The Criminal Procedure Amendment Act of 1998 (Federal Law Gazette. I No. 153/1998) further intensified and extended the range of application of the adversary examination and considerate examination. This was not only, on the one hand, a crucial step to improving the examination of children in court, which always entails a great emotional strain and distress for the young witnesses, but, on the other hand, it was also a vital contribution to improve the process of establishing the material truth, particularly since witness statements of the victims are in many cases decisive in a court trial.

47. An adversary examination (*kontradiktorische Vernehmung*) under Section 162(a), paragraph 1 of StPO, has to be conducted in such a way that the public prosecutor, the accused and his/her defender as well as the private participant (*Privatbeteiligter*) are given the opportunity to take part in the examination and to put questions to the witness. An adversary examination is required if there are reasons for the assumption that an examination of the witness in the main hearing will not be possible for reasons of fact (e.g., illness) or law (e.g., right to refuse to give evidence). This measure provides the victim with the opportunity to make a statement – having still a vivid recollection of the criminal act and with living emotions – while avoiding an immediate confrontation with the accused.

48. The so called “considerate” examination (*schonende Vernehmung*) provided for by Section 162(a), paragraph 2 of StPO is a special form of adversary examination and allows the witness to stay in a separate room when questioned by the public prosecutor, the defendant and his/her defence counsel, without violating the rights of the accused and the public prosecutor in accordance with article 6, paragraphs 1 and 3(d) of the European Convention on Human Rights. Such “restricted” examination is mandatory in relation to underage victims of criminal offences that may have been harmful to their sexual sphere. This connotes that persons underage have the right, in the course of a judicial proceeding only once, to be examined by the investigating judge and an expert in presence of a trusted person (e.g. mother or other relatives) in a considerate way and with restricted participation of the parties involved, and to refuse thereafter to testify again, in particular in the main hearing (Section 152, paragraph 1(3), and Section 252, paragraph 2(a) of StPO). In addition, Section 162(a), paragraph 3 provides for the right to considerate examination to all other underage victims, witnesses who are relatives of the accused and all other persons who may have been harmed by a criminal act in their sexual privacy (Section 152, paragraph 1(2)(a)) if they so request.

49. In order to improve the implementation of this regulation, appropriate examination rooms for children have been established within Provincial Courts (*Landesgericht*). In these rooms children can be, in surroundings suitable for children, informed about their rights by an expert (a child psychologist, child psychotherapist or child psychiatrist) in a language suitable for children in presence of the judge, and questioned about the circumstances of the offence. The public prosecutor, the defence counsel and the accused have the opportunity to follow the examination and to ask supplementary questions in a separate room using audio-visual equipment. The record of this examination can be read out and the respective videotape recording can be shown in the main hearing (Sections 152, paragraph 1(3), 162(a), paragraph 2, 252, paragraph 1(2)(a) of StPO); the videotape recording is, according to Section 271(a), last sentence of paragraph 2, part of the court file and may not be deleted). The considerate examination is also applicable (Section 250, paragraph 3) in the main hearing. This provision shall reduce the risk of exposing traumatised persons to secondary victimization to a minimum.

50. In addition, victims who may have been harmed by a criminal act in their sexual sphere have a relative right to refuse to give evidence, i.e. they can refuse to answer questions relating to

unbearable details of the criminal offence or their very private sphere (Section 153, paragraph 2 of StPO). However, the court may require a victim to testify when his/her statement is crucial for the trial (para. 1 of the cited Law). An additional measure to protect the privacy of the witness provided for by the Austrian Code of Criminal Procedure is to allow the witness to choose if he/she wishes to declare his/her permanent residence or another address, suitable for the serving of summons. The witness is thus not required to declare his/her residential address, and the accused has also no unconditional right to learn the place of residence of the witness.

51. The Federal Act of 1 January 2006 amending the Code of Criminal Procedure of 1975, the Public Prosecution Act (*Staatsanwaltschaftsgesetz*) and the Act on the Erasure of Convictions and Limitation of Information (*Tilgungsgesetz*), (Federal Law Gazette. I, No. 119/2005), was another crucial step towards the improvement of the rights of the victim. It provides for the unconditional right of the victim and the obligation of all authorities involved in criminal proceedings to treat the victim with respect and dignity, give due consideration to his/her rights and interests and instruct him/her on his/her rights in criminal proceedings as well as on the possibility to receive compensation or assistance throughout the legal process. In addition to that, victims of violent or sexual crimes have a right to receive psychosocial and legal assistance and must be informed about this right during their initial examination taking reference to specialized victims of crime support organizations (*Opferschutzeinrichtungen*).

52. In this context, psychosocial assistance includes preparation of the victim for the trial and the emotional stress inherent to it; accompanying him/her to examinations in the preliminary proceedings and main trial; and legal assistance includes legal advice as well as representation by a counsel (Section 49(a) of StPO). The particularly urgent concern of improving the rights of the victim has been considered by implementing a legal right to psychosocial and legal assistance (*psychosoziale und juristische Prozessbegleitung*) to victims of deliberate offences which exposed them to serious violence or serious threat and may have been harmful to their sexual integrity, as well as to close relatives of a person whose death could have been caused by a criminal offence, or other relatives who have been witnesses of an offence (Section 49(a), first sentence of paragraph 1). A person is entitled to receive this assistance if it is required for the protection of his/her rights as a victim of an offence, a fact that has to be assessed by the respective institution. In addition, victims now have, regardless of their respective position as an injured party or private participant, at every stage of proceedings the right to access to files (Section 49(a), last sentence of paragraph 1).

53. Other essential measures to improve the protection of victims include the extension of the obligations to inform and notify the victim about certain facts. Thus, all authorities involved in a criminal proceeding have the duty (Section 47(a), paragraph 1(1) of StPO) to inform the victim of compensation or assistance he/she may be entitled to receive, e.g. under the Victims of Crime Act (*Verbrechensopfergesetz*), as well as of the requirements to receive psychosocial or legal assistance and about respective victims of crime support organizations, to wit before the first examination (Section 47(a), paragraph 1(2)). In addition, victims of sexual offences must be instructed on their right to considerate examination in preliminary proceedings and main hearings, on the possibility to refuse to answer certain questions, as well as on their right to request exclusion of the public from the main hearing (Section 47(a), paragraph 2 in conjunction with Section 229, paragraph 2). The duties of the public prosecutor's offices and courts have also been expanded in this area. These authorities have now the duty to inform the victim in case of an early termination of criminal proceedings in minor or less severe cases under Title IXa (Diversion), or in case of a termination or discontinuation of the proceeding against a known offender or a continuation of the proceeding. In addition, victims which are entitled to

psychosocial or legal assistance must be notified about the release of the suspect/accused from custody (Section 177, last half sentence of paragraph 2, and Section 195). In addition to that, victims have the right to free assistance by a translator or interpreter, as far as this is required for the protection of their rights in criminal proceedings, in particular their right to join the proceeding as a private participant (Section 47(a), paragraph 4 in conjunction with Section 38(a), paragraph 1). In addition, the costs of psychosocial or legal assistance are now included in the catalogue of procedural costs to be borne by the accused (Section 381, paragraph 1(9)).

Article 8, paragraph 1(e)

54. Protection of the identity of victims is provided for in Section 7(a) of the Austrian Media Act (*Mediengesetz*), (Federal Law Gazette No. 314/1981, amended by Federal Law Gazette I, No. 151/2005). According to this provision, in particular cases the disclosure of the identity of a person by the media is prohibited. Under paragraph 1(1) of this law, if the name of a victim or his/her image or other particulars which are likely to lead to the disclosure of his/her identity are published, the victim shall have a claim against the owner of the media (publisher) for damages for the injury suffered. The additional requirement of Section 7(a), paragraph 1, namely that the publication must injure legitimate interests of the person concerned, will generally be always fulfilled according to Section 7(a), paragraph 2(1) in case of child victims of offences mentioned under article 3 of OPSC. The latter provision stipulates that the legitimate interests of the person concerned are in any case injured if the publication is such as to give rise to an interference with the victim's private life or to his/her exposure.

55. Also relevant in this context, is Section 56, paragraph 1(7) of the Security Police Act (*Sicherheitspolizeigesetz - SPG*) according to which security authorities may transmit personal data, in particular of victims of crime support organizations and media enterprises, only for very specific purposes defined in this Act.

Article 8, paragraph 2

56. The Austrian criminal procedure follows the principle that the police and the prosecution authority (*Offizialprinzip*) have a legal duty to investigate and prosecute criminal offences (*Legalitätsprinzip*) as well as to establish the material truth (*materielle Wahrheitsforschung*) (Sections 2, 3 and 34 of StPO). Offences liable to public prosecution (*Offizialdelikte*) fall under the remit of the public prosecutor (exclusive right to institute criminal proceedings) (*Anklagemonopol*). The public prosecutor has the duty, on the basis of suspicious facts established during the investigation, to decide whether or not to bring a criminal charge against the suspect. However, a charge is to be brought only if it is likely that the accused will be sentenced. In order to assess this probability, evidence gathered in the course of investigation must be evaluated by the public prosecutor. Under Section 3, in conjunction with Section 34, paragraph 3, the public prosecutor is officially obliged to take every measure to establish the material truth (the same applies to other authorities involved in criminal proceedings). He/she has the duty of taking every measure likely to throw light on the truth or falsehood of the suspicion.

Article 8, paragraph 4

57. Within the scope of advanced training schemes for judges and public prosecutors, the Austrian Federal Ministry of Justice has been offering for three years already a seminar on

victims of violent criminal offences before the court, intended in particular for judges and public prosecutors having a special competence for proceedings concerning sexual abuse of children and adolescents. In this seminar, experts from different fields of psychology focus on issues relevant to examination in court of minor victims of violence and the resulting consideration of evidence. It includes, inter alia, aspects of the psychosocial background of sexual violence; the psychodynamics of children and adolescents who have been exposed to sexual and/or mental violence; the abuse dynamics and the abuse cycle; the consequences of these dynamics on the willingness to testify and the behaviour of victims of violence as witnesses in judicial proceedings; the characteristics of a social-environmental situation which allows the victim to file a complaint and the consequences of a complaint for the victim and his/her environment; the meaning of examinations by experts as well as of the approach of providing the victim with psychosocial and legal assistance throughout the legal process.

58. Within the scope of the four-year-course for Appropriate Dispute Resolution (ADR) judges (*Außerstreitrichter*) and family judges (*Familienrichter*), carried out for the second time and organized by the Association of Austrian judges (professional group for Appropriate Dispute Resolution Law (*Außerstreitrecht*) and Family Law (*Familienrecht*) and the Federal Ministry of Justice, family judges are trained on how to deal with children victims of sexual abuse.

59. In addition, the Federal Ministry of Justice and the presidents of the higher regional courts (*Oberlandesgerichte*), also in cooperation with various victims of crime support organizations, offer on a regular basis, advanced training schemes intended to improve the understanding of judges and public prosecutors of the situation and behaviour of traumatized crime victims.

60. In addition, advanced training schemes are offered on a regular basis concerning trafficking in human beings (including child trafficking).

Article 9, paragraph 1

61. In addition to legal measures adopted directly in the process of implementing OPSC, the preparation of a National Action Plan for the Rights of Children and Adolescents was discussed by an Inter-Ministerial Working Group. This Programme adopted by the Federal Government on 22 November 2004 provides for a package of measures to prevent offences referred to in the Optional Protocol.

62. Furthermore, on 28 March 2007, the Austrian Government adopted the National Action Plan against Human Trafficking, which draws attention to child-specific aspects. This Plan has been worked out by the Task Force "Human Trafficking", which was founded in year 2004. In May 2007, the Task Force decided to set up an operative "sub-Task Force" to identify concrete demand-oriented measures for victims of child trafficking.

63. From the perspective of civil law, Section 146 (a), last half sentence of the Austrian Civil Code (ABGB), renounces any type of physical or mental abuse of children as a means of education. The legal provision is perfectly clear stating that the use of violence and the infliction of physical or mental harm by parents as a means to discipline their children are unlawful. This applies not only to bodily harm and the causing of physical pain, but to every other treatment that violates human dignity, even if such treatment is not perceived by the child as negative.

64. In case of any unreasonable treatment, by parents or other persons with right to custody which is harmful to the well-being of the minor, as for example a continuous violation of the absolute prohibition of violence as a form of education as set out in Section 146(a) of ABGB, the court has the duty, according to Section 176, to undertake measures required for the protection of the well-being of the child. In particular, the court may in such cases withdraw or restrict custody rights. Proceedings related to measures imposed under Section 176 can be initiated either ex officio or upon application by certain persons explicitly mentioned in the law.

65. An entity such as a youth welfare institution for example is entitled to file such an application according to Section 176, paragraph 2 of ABGB (*Jugendwohlfahrtsträger*). According to Section 215, paragraph 1, it has the legal obligation to apply for child custody related court orders required to protect the welfare of minors. This connotes that it is obliged to file the relevant applications as soon as circumstances which require child custody related legal measures to protect the minor's well-being come to its attention. Concerning matters of childcare and education, the competent youth welfare office may, in case of imminent danger (*Gefahr im Verzug*), provisionally apply the necessary measures itself, and in this case, these measures remain in effect until the issuance of a court order (for which it has to apply within eight days).

Article 9, paragraph 2

66. The main objectives of sexual education at schools are to strengthen the minor's own competence, to build up relationship and communication abilities and to prevent exposure of pupils to sexual violence:

(a) *Mein Körper gehört mir* (My body belongs to me)

The Federal Ministry of Education, the Arts and Culture launched the project "My body belongs to me". The heart of this project is an interactive stage play for elementary schools. Child protection organizations provide professional assistance. Accompanying events such as a parents' evening and a school staff meeting complement the project.

(b) Teaching materials "*Hör auf dich – lass dein Selbst laut werden*" (Listen to yourself – allow yourself to speak out loudly)

These teaching materials for female pupils in 1st to 12th grades aim at prevention, explain strategies used by offenders and take intercultural aspects into consideration.

(c) Information booklet entitled "*Beziehungsraum und Begegnungsraum*" (A room for relations, a room to meet)

The target groups are teachers, educators and parents. This booklet provides information on the possibilities and opportunities to support and set up protective measures at both the school and class levels.

67. The educational and school psychological service centres/psychological student service centres serve as low-threshold counselling institutions, and assist teachers and parents in cases of suspected child abuse or sexual exploitation by offering advice and guidance. The school psychological service centers closely cooperate with local networks as for example the Child and

Youth Advocate Offices (*Kinder- und Jugendanwaltschaften*), specialized advice centres and other competent authorities.

68. The Federal Ministry of Health, Family Affairs and Youth informs about and supports the activities of competent NGOs in promoting public awareness in this field, such as the exhibition "*Hinschauen statt wegschauen*" (Look – not look away) organized by ECPAT Austria (platform against commercial sexual exploitation of children). The exhibition draws attention to sexual exploitation of children by tourists. It was first shown in 2005 at the Wien-Schwechat airport, and also at other commonly frequented places in Austria.

69. The in-flight-video "Child abuse is not a peccadillo" launched by the Federal Ministry of Health, Family Affairs and Youth is shown on Austrian Airlines flights to Southeast Asia.

70. The brochure "*(K)ein sicherer Ort*" (An (un)safe place) promotes awareness-raising on sexual violence and offers information on possible aid for children and young people exposed to violence.

71. The website of the Federal Ministry of Health, Family Affairs and Youth www.kinderrechte.gv.at offers resource persons and adolescents comprehensive information on the Convention on the Rights of the Child and the Optional Protocol.

72. The Federal Ministry of Health, Family Affairs and Youth supports facilities devoted to the protection of child victims of violence.

Article 9, paragraphs.3 and 4

73. Under the Victims of Crime Act (*Verbrechensopfergesetz*), victims of sexual abuse are entitled to receive, inter alia, therapeutic treatment financed by the State.

74. In addition, victims of mental, physical and sexual violence are entitled to receive support from youth welfare institutions operated by Federal Provinces.

75. Child protection centres which are open to all child victims of violence receive approximately € 200,000 of financial support from the Federal Ministry of Health, Family Affairs and Youth.

76. The Child and Youth Advocate Offices (ombudsmen services) on the federal level (Federal Ministry of Health, Family Affairs and Youth) and, in particular, their counterparts in the nine federal provinces offer assistance to children and minors exposed to violence. However, they also promote public awareness through information and other appropriate means.

77. In cases of suspected use of violence, child protection groups established in all children's hospitals in Austria, offer counselling services by multidisciplinary teams and provide support in setting up assistance measures.

78. In Vienna, the so called "*Kinderdrehscheibe*" ("Children's Roundabout") takes care of victims of child trafficking and returns them to a youth welfare institution in their homeland. The "Children's Roundabout" also supports relevant local organizations in Romania and Bulgaria in the development of adequate facilities as well as in staff training.

79. Children and minors who became victims of sexual and/or physical violence, receive professional assistance in legal proceedings which is also supported by the Federal Ministry of Health, Family Affairs and Youth through financing of training and advanced training schemes in the field of psychological and legal assistance to girls, boys and adolescents victims of sexual abuse (evaluation from 2002; see also article 8).

Article 9, paragraph 5

80. Under Section 281 of the Austrian Criminal Code (StGB), anyone who incites general disobedience of a law, and makes it accessible to a wide general public, whether in a publication, through broadcasting media or by any other means, is punishable by imprisonment up to one year. It therefore constitutes a criminal offence, irrespective of the motive, if a person incites to generally and basically ignore a particular law (in the formal sense). If the incitement, however, relates to the commitment of a punishable criminal offence, Section 281 is subsidiary to Section 282, paragraph 1. The latter sanction penalizes the incitement to commit a punishable offence on the one hand, and to express approval of an already committed criminal act on the other hand. If the offender has incited to commit a particular concretized criminal offence, he/she, depending on the respective penalty range, may be criminally liable as an inducing offender (*Bestimmungstäter*) under Section 12, 2nd case of StGB, in conjunction with the respective provision of the criminal law, as well as under Section 282, paragraph 1, 1st case of StGB.

81. There are no specific regulations contained in the Broadcasting Acts (*Rundfunkgesetze*) which explicitly prohibit the dissemination of child pornography. However, both Section 10, paragraph 11 of the Federal Law on the Austrian Public Service Broadcaster ORF - (ORF G), as well as Section 32, paragraph 1 of the Law on Private Television stipulate that broadcasted programmes may not contain pornography. The same is provided for in Section 16, paragraph 3 of the Private Radio Act. According to the present interpretation of Law on Private Television, the prohibition of pornography relates to the criminally relevant concept of pornography defined in the Pornography Act (*Pornographiegeseztz*), (see for example the decision issued by the regulatory authority KommAustria, KOA 2.100/03-49 of 5 November 2003).

82. In addition, under Section 10, paragraph 11 of ORF G, any broadcasts which are harmful to the physical, mental or moral development of minors are prohibited. Concerning programmes which (only) impair the physical, mental or moral development of minors, Section 10, paragraph 12 stipulates that the broadcasting company shall make sure, by choosing an appropriate broadcasting time or by other measures, that these programmes are not commonly seen or listened to by minors. Both provisions may relate to material which does not fall under the criminal concept of pornography.

83. The legal situation under the Law on Private Television is comparable to that under ORF-G. However, broadcastings which are mainly reduced to the "unreflected representation of sexual acts", or contain such elements, must, on top of that, be encrypted according to Section 32, paragraph 4 of the Law on Private Television.

84. It must also be mentioned, that according to Section 14, paragraph 1(1) of ORF-G, and Section 37, subparagraph 1 of the Law on Private Television, advertisements may not injure human dignity. It can thus be assumed that – in addition to the already mentioned prohibitions – spots that make child pornography a subject of the advertisement in a way that injures human dignity are likewise inadmissible.

Article 10 (para. 1)

85. Austria has not signed any bilateral or multilateral agreements to strengthen international cooperation in criminal cases which are especially related to the offences described in the Protocol. However, it must be mentioned in this context that Austria is State party to several bilateral and multilateral agreements on extradition and legal assistance in criminal matters which are applicable also to the criminal offences described in the Protocol.

Article 10, paragraphs 3 and 4

Child trafficking:

- (a) "Transnational Action against Child Trafficking" (TACT III) (€350.000): Project against exploitation and abuse of children in Albania as well as for the protection and reintegration of trafficked children. Interventions are taking place on local levels in order to establish an effective child protection programme.
- (b) "Call for proposals" for a project against trafficking in human beings in South-East Europe (€378.984): Invitation for submission of applications for a two-year project aiming to support young women in Bosnia-Herzegovina to make self-confident decisions.
- (c) "Call for proposals" for a project against trafficking in women and child trafficking in Albania (€350.000): scope: granting rights to trafficked women, victims of white slavery and other high risk groups of human trafficking (such as orphans) and enforcing access to preventive and protective measures, including reintegration. These measures should also make contribution to strategies concerning protection systems of children and families in Albania.
- (d) Project of police cooperation between Austria and several countries of South-East Europe to fight trafficking in human beings (€1.9 million): training schemes and development of capacities;
- (e) Programme for the protection of children and juveniles in Moldova: a training programme which serves indirectly also the purpose of protecting children from human trafficking. The programme represents a new and comprehensive approach in the protection of especially vulnerable children and juveniles in the Republic of Moldova (fight against institutionalization, disregard and abuse of children and adolescents, trafficking in human beings, poverty and poor education).

Child prostitution:

86. Submission of the international NGO ECPAT/Respect: exposition, established in 2005, touring across several countries; sensitization of the tourism industry.

87. Two projects which are committed to lobbying for a "Code of Conduct" against child prostitution in the context of tourism are being carried out, one in Kenya and the other on the Black Sea coast (Romania / Bulgaria):

- (a) Measures against sexual abuse of children and adolescents in the tourism in Kenya, financial support provided by the Austrian Development Cooperation and Cooperation with Eastern Europe (OEZA) in the tune of €73.000 (total project costs: €146,060.50)
- (b) Implementing a Code of Conduct against child trafficking and child prostitution, financial support provided by OEZA in the tune of €61.000 (total project costs: €123,295.84).
