

Committee against Torture
Forty-fourth session
26 April-14 May 2010

Consideration of reports submitted by States parties under article 19 of
the Convention

ADVANCE UNEDITED VERSION

Concluding observations of the Committee against Torture

AUSTRIA

1. The Committee against Torture considered the fourth and fifth combined periodic reports of Austria (CAT/C/AUT/4-5) at its 940th and 942nd meetings, held on 5 and 6 May 2010 (CAT/C/SR.940 and 942), and adopted the following conclusions and recommendations at its 950th meeting (CAT/C/SR.950).

A. Introduction

2. The Committee welcomes the timely submission of the fourth and fifth combined periodic report of Austria and the replies to the list of issues. However, it regrets that the report does not follow the Committee's reporting guidelines.

3. The Committee appreciates the constructive efforts made by the high-level delegation to provide information and additional explanations during the discussion of the report.

B. Positive aspects

4. The Committee notes with satisfaction that since the consideration of the third periodic report of the State party, the latter has ratified the following international instruments:

(a) Convention on the Rights of Persons with Disabilities and its Optional Protocol (26 September 2008);

(b) Council of Europe Convention on Action against Trafficking in Human Beings (12 October 2006);

(c) European Convention on the Compensation of Victims of Violent Crimes (30 August 2006).

5. The Committee notes the State party's ongoing efforts to revise its legislation in order to give effect to the Committee's recommendations and to enhance the implementation of the Conventions, including:

(a) The entry into force, on 1 January 2008, of the Criminal Procedure Reform Act and the amendments to the Code of Criminal Procedure. In particular, the Committee welcomes the provisions regarding:

(i) The prohibition of evidence obtained by means of torture or cruel, inhuman, or degrading treatment, or other unlawful interrogation methods;

(ii) The obligation of courts to report cases in which evidence was allegedly extracted by such unlawful means immediately and ex officio to the public prosecutor;

(iii) The express reference to the right of the defendant to remain silent;

(iv) The right to contact a lawyer prior to the interrogation;

(v) The right of the defendant to be assisted by an interpreter;

(vi) The right of the defendant to inspect the police files concerning the case;

(b) The entry into force in June 2009 of the Second Violence Protection Act, which amends the Crimes Victims Act expanding the range of services and support available to crime victims, including victims of gender-based violence.

6. The Committee also welcomes the efforts being made by the State party to amend its policies and procedures in order to ensure greater protection of human rights and give effect to the Convention, including:

(a) The adoption of a firm and principled position against the use of diplomatic assurances to facilitate the transfer of persons to a country where they may be at risk of torture or other inhuman or degrading punishment;

(b) The adoption of a two national action plans against human trafficking for the periods 2007-2009 and 2009-2011;

(c) The establishment of the Coordination Committee to Protect Children from Sexual Exploitation to continuously coordinate and evaluate the implementation of the State party's international commitments to combat sexual abuse of children;

(d) The publication in March 2010 of the Report on the visit to Austria carried out in February 2009 by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the State party's response to it.

7. The Committee appreciates the fact that the State party has issued a standing invitation to the special procedures mechanisms of the Human Rights Council.

C. Principal subjects of concern and recommendations

Definition and offence of torture

8. While noting that the State party is preparing an amendment to the Criminal Code for the inclusion of a definition of torture, the Committee remains concerned that the State party has still not incorporated into domestic law the crime of torture as defined in article 1 of the Convention (arts. 1 and 4).

The Committee reiterates its previous recommendation (A/54/44, para. 50 (a) and CAT/C/AUT/CO/3, para. 6) that the State party should proceed to incorporate into domestic law the crime of torture and adopt a definition of torture that covers all the elements contained in article 1 of the Convention. The State party should also ensure that these offences are punishable by appropriate penalties which take into account their grave nature, as set out in article 4, paragraph 2 of the Convention.

Fundamental safeguards

9. The Committee is concerned at the restrictions placed by the State party on the exercise of the right of an arrested or detained person to communicate with counsel and have counsel present during interrogations. In this respect, it notes with concern that, pursuant to section 59 (1) of the amended Code of Criminal Procedure, police officers can monitor contacts between the arrested or detained person and counsel and exclude the presence of counsel during interrogations if “it appears necessary to prevent interference in ongoing investigations or corruption of evidence”. In such a case, an audio or visual recording of the interrogation must be made if possible (section 164, para. 2, of the Code of Criminal Procedure). The Committee is also concerned at the content of paragraph 24 of Internal Instruction (*Erläss*) Ref. BMI-EE1500/0007-II/2/a/2009 issued by the Federal Ministry of Interior on 30 January 2009, which would seem to infer that there is no obligation on the part of the police to delay questioning to allow the lawyer to arrive at the place of interrogation (arts. 2 and 11).

The Committee reiterates its recommendation (CAT/C/AUT/CO/3, para. 11) that the State party should take all necessary legal and administrative safeguards to ensure that suspects are guaranteed the right of confidential access to a lawyer, including during detention, and to legal aid from the moment of the arrest and irrespective of the nature of their alleged crime. The State party should also extend the use of audio and video equipment to all police stations and detention facilities, not only in interrogation rooms but also in cells and corridors.

The State party should promptly amend paragraph 24 of the above-mentioned internal instruction to avoid situations that would deprive detainees of the right to an effective defence at a critical stage in the proceedings and expose them to the risk of torture or ill-treatment.

Juvenile offenders

10. The Committee notes that, under section 164 paragraph 2 of the amended Code of Criminal Procedure, juvenile offenders cannot be interrogated in the absence of counsel. Nevertheless, the Committee received information alleging that juvenile offenders, some as young as 14, had been subjected to police questioning, sometimes for prolonged periods, and requested to sign statements without the benefit of the presence of either a trusted person or a lawyer (arts. 2 and 11).

The State party should take the necessary measures to ensure the proper functioning of the juvenile justice system in compliance with international standards and to guarantee that minors are always heard in the presence of a legal representative.

Legal aid

11. The Committee takes notes of the legal aid programme initiated by the Federal Ministry of Justice and the Federal Bar Association. However, the Committee remains concerned about reports regarding the persistence of shortcomings in the implementation in practice of the right of access to a lawyer during police custody, particularly with regard to the confidentiality of communications with counsel (art. 2).

The Committee reiterates its recommendation (CAT/C/AUT/CO/3, para. 12) that the State party should consider establishing a fully-fledged and properly funded system of legal aid. In this connection, the Committee recalls the recommendations made in 2004 and 2009 by the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Committee also recommends that the State party should take the necessary measures to provide an effective free legal aid system, in particular for indigent criminal suspects.

Composition of police force and correction system

12. While welcoming the measures taken by the State party to improve the representation of female and minority ethnic police officers, which will have beneficial impacts in policing including in matters of gender-based violence and any act based on discrimination, the Committee is concerned that the representation of women and ethnic minority communities in the police force and correction system remains very low (art. 2).

The State party should continue its efforts to diversify the composition of its police force and correction services and extend recruitment drives amongst ethnic minority communities throughout the country. The Committee invites the State party to provide in its next periodic report information on the measures taken to improve such representation as well as detailed statistical information on the compositions of the police force and correction system.

Non-refoulement and access to a fair and prompt asylum procedure

13. The Committee welcomes the amendments introduced to the Asylum Law following Constitutional Court ruling G151/02 of 12 December 2002, which addressed the concerns expressed by the Committee in its previous concluding observations (CAT/C/AUT/CO/3). The Committee is concerned that under article 12 (a) of the revised Asylum Law, persons basing their repeat applications for international protection on new grounds cannot be granted a stay of their expulsion if they lodge their application within two days prior to the date set for deportation and may, consequently, be at risk of refoulement. Furthermore, persons whose first asylum application was not found admissible according to the Dublin II Regulation are, in case of repeat application, now excluded from de facto protection against removal (*faktischer Abschiebeschutz*), a residence permit for asylum-seekers during the admission procedure which does not allow removal from Austria. The Committee notes with concern that in both situations asylum-seekers are not afforded an effective remedy. The Committee is further concerned by the information provided by the State party

that an appeal of a decision denying asylum based on a procedural issue, as opposed to subject matter, does not have automatic suspensive effect (art. 3).

The State party should take the necessary measures to ensure that individuals under its jurisdiction are guaranteed fair treatment at all stages of the proceedings, including an opportunity for effective, independent and impartial review of decisions on expulsion, return or deportation.

14. The Committee notes that the legal provisions regarding the basic needs of asylum-seekers, including health assistance, contained in the amended Federal Care Act (2005) and the Agreement on Basic Support (2004), have now been adopted by all Länder, as recommended by this Committee in its previous Concluding Observations CAT/C/AUT/CO/3, para. 17). However, the Committee is concerned about reports on extensive statutory grounds for withdrawal and cessation of care provisions, such as filing a subsequent application within six months of a negative decision in a preceding procedure (art. 16).

The State party should take effective measures to ensure that needy asylum-seekers are not left without adequate reception conditions, including accommodation and health assistance, and that adequate social support is provided to them throughout their asylum proceedings.

Training

15. The Committee notes the information provided by the State party on training programmes for judges, prosecutors, police officers and other law enforcement officials. However, the Committee regrets the limited information on monitoring and evaluation of these training programmes and the lack of available information on the impact of the training conducted and how effective they have been in reducing incidents of torture and ill-treatment (art. 10).

The State party should:

- (a) Continue preparing and implementing training programmes to ensure that judges, prosecutors, law enforcement officials and prison officers are fully aware of the provisions of the Convention, that breaches will not be tolerated and will be investigated, and that offenders will be prosecuted;**
- (b) Ensure that all relevant personnel receive specific training on the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol);**
- (c) Develop and implement a methodology to assess the effectiveness and impact of such training and educational programmes on the reduction of cases of torture and ill-treatment;**

Conditions of detention

16. The Committee is concerned at the detention policy applied to asylum-seekers, including reports that they are held in police detention centres for criminal and administrative offenders (*Polizeianhaltezentrum – PAZ*), in some cases confined in their cells for 23 hours a day, only allowed visits under closed

conditions and without access to qualified medical care or legal aid. In this respect, the Committee regrets the change in the legislative framework resulting from the last reform of the Asylum Law and Aliens Police Act, which entered into force on 1 January 2006. Under the new article 76 paragraph 2a of the Aliens Police Act, detention of asylum-seekers whose claims have not been finally decided or were only rejected on procedural grounds has, in certain circumstances, become mandatory, where found necessary to achieve expulsion (art. 11).

In line with the concerns expressed by other relevant international and regional human rights bodies, the State party should:

(a) Ensure that detention of asylum-seekers is used only in exceptional circumstances or as a measure of last resort;

(b) Consider alternatives to detention and end the practice of detaining asylum-seekers in police holding centres;

(c) Take immediate and effective measures to ensure that asylum-seekers who are detained pending deportation are held in detention centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal status;

(d) Ensure that asylum-seekers have full access to free and qualified legal counselling, adequate medical services, occupational activities and the right to receive visits.

17. While noting the measures taken by the State party to improve living conditions in detention centres, including various legislative measures (the so-called "*Haftenlastungspaket*") to reduce the waiting period for conditional release and the grounds for detention on remand, the Committee is concerned that there is continuing overcrowding in places of detention, in particular Josefstadt and Simmerig II prisons in Vienna, as well as understaffing problems. The Committee is also concerned about the reintroduction in June 2009 of the use of electro-muscular disruption devices "Tasers" in the penal service (arts. 2, 11 and 16).

The State party should strengthen its efforts to alleviate the overcrowding of penitentiary institutions, including through the application of alternative measures to imprisonment and the establishment of additional prison facilities as needed. The State party should also take appropriate measures to increase the overall staffing levels and the number of female prison officers.

The Committee reiterates its concern that the use of electro-muscular disruption devices can result in severe pain amounting to torture and in certain cases can even be lethal. The State party should consider relinquishing the use of electro-muscular disruption devices to restrain persons in custody, as this leads to breaches of the Convention.

18. While it takes note of the Suicide Prevention Programme established by the Federal Ministry of Justice in December 2007, the Committee finds the number of suicides and other sudden deaths in detention centres to appear to be high (art. 11).

The State party should increase its efforts to prevent suicides and other sudden deaths in all places of detention. The Committee urges the State party to investigate promptly, thoroughly and impartially all deaths of detainees, assessing the health care received by inmates as well as any possible liability of prison personnel, and provide, where appropriate, adequate compensation to the families of the victims.

Furthermore, information on independent investigation of cases of suicide and other sudden deaths, along with any guidelines for suicide prevention adopted in this regard, should be included in the next periodic report.

Prompt, thorough and impartial investigations

19. The Committee regrets the insufficient statistical data on allegations of torture and ill-treatment provided by the State party as well as the lack of information on the results of the investigations undertaken in respect of those allegations. The Committee notes with concern that almost half of the incidents occurred in 2009 concerned foreigners. In this regard, the Committee continues to be concerned about the high level of impunity in cases of police brutality, including that perceived to be racially-motivated. The Committee is further concerned that allegations of torture and ill-treatment are investigated by the Bureau for Internal Affairs, a special unit within the Federal Ministry of Interior, which informs the competent public prosecutor about the outcome of the internal enquiry. Although the Bureau of Internal Affairs provides a copy of the report to the Human Rights Advisory Board, the members of this national human rights institution are not mandated to carry any investigative work (arts. 12-13).

The Committee recommends that the State party should:

- (a) Take appropriate measures to ensure that all allegations of torture or cruel, inhuman or degrading treatment are promptly and impartially investigated, perpetrators duly prosecuted and, if found guilty, convicted to penalties taking into account the grave nature of their acts, and that the victims are adequately compensated, including their full rehabilitation.**
- (b) Establish a mechanism, detached from the Ministry of Interior, to carry out independent investigations into all allegations of torture and ill-treatment committed by law enforcement officials;**
- (c) Strengthen and expand the mandate of the Austrian Ombudsperson Board, to include protection and promotion of all human rights in accordance with the Paris Principles;**
- (d) Ensure that clear and reliable data are compiled on acts of torture and abuse in police custody and in other places of detention;**

The State party should provide the Committee with information on cases of torture and ill-treatment where the aggravating circumstances as stated in section 33 of the Criminal Code, including racism and xenophobia, have been invoked in the determination of sanctions for such crimes.

20. The Committee continues to be deeply concerned about the lenient sentences imposed by Austrian courts in cases of torture or other ill-treatment by law enforcement officials. The Committee is particularly concerned about the case of Cheibani Wague, a Mauritanian national, who died on 16 July 2003 in Vienna

while being restrained during his arrest by police officers and a medical emergency team. In November 2009, the ambulance doctor and one of the police officers received both a seven month suspended sentence, which was reduced to four months on appeal in the case of the police officer. The Committee expresses also its concern at the case of Mike B., a black American teacher who was beaten up in February 2009 by undercover police officers in the Vienna underground (arts. 11 and 16).

The State party should

- (a) **Ensure prompt, thorough and impartial investigations into allegations of torture and ill-treatment, prosecute and punish perpetrators and provide effective remedies and rehabilitation to the victims;**
- (b) **Ensure that sentences for torture and ill-treatment are commensurate with the grave nature of the offence.**
- (c) **Inform the Committee on the results of any investigation undertaken in respect of the case of Mike B., as well as on prosecutions and convictions thereof.**

Redress and compensation, including rehabilitation

21. While noting the information provided by the State party that victims of torture or ill-treatment have a legal right to obtain compensation, the Committee is nevertheless concerned at the difficulties that certain victims face obtaining redress and adequate compensation. The Committee is particularly concerned about the case of Mr. Bakary Jassay, a Gambian national, who was abused and severely injured by policemen in Vienna on 7 April 2006, and who has not received any compensation yet, not even the €3,000 awarded by the Court for the damages resulted from the pain and suffering. The Committee also regrets the lack of statistical data and examples of cases in which individuals have received such compensation (art. 14).

The State party should provide redress and compensation, including rehabilitation to victims in practice, and provide information on such cases to the Committee.

The State party should provide the Committee with relevant statistical data and examples of cases in which individuals have received such compensation in its next periodic report.

22. The Committee is concerned about reports of alleged lack of privacy and humiliating circumstances amounting to degrading treatment during medical examinations at the Vienna Communal Health Office, where registered sex-workers are required to undergo weekly medical checkups, including gynaecological exams, and take regular blood tests for sexually transmitted diseases (art. 16).

The State party should ensure that these medical examinations are carried out in an environment where privacy is safeguarded and in taking the greatest care to preserve the dignity of women being examined.

Trafficking

23. While it notes the new programmes that the State party adopted to combat human trafficking and sexual exploitation of women and children, the Committee expresses its concern at persistent reports of trafficking of women and children for sexual and other exploitative purposes and the lack of information on prosecutions and sentences in matters of trafficking (art. 16).

The State party should increase its efforts to combat trafficking in women and children and take effective measures to prosecute and punish trafficking in persons and further strengthen international cooperation with countries of origin, transit and destination so as to further curb this phenomenon.

Domestic Violence

24. The Committee is concerned about highly publicized cases of domestic violence including children occurred in the State party during the period under review (art. 16)

The State party should increase its efforts to ensure that urgent and efficient protection measures are put in place to prevent, combat and punish perpetrators of violence against women and children, including domestic violence and sexual abuse, and conduct widespread awareness-raising campaigns and training on violence against women and girls for officials (judges, lawyers, law enforcement agents and social workers) who are in direct contact with the victims, as well as for the public at large.

Use of net beds in psychiatric facilities

25. Notwithstanding the explanation offered by the delegation, the Committee is concerned at the continuing use of net beds as a measure of restraint in psychiatric and social welfare establishments (art. 16).

The State party should immediately cease the use of net beds as it constitutes a violation of article 16 of the Convention.

Data collection

26. The Committee expresses its concern at the fact that for numerous areas covered by the Convention, the State party was unable to supply statistics, or appropriately disaggregated those in its possession, such as alleged cases of sexual violence in prisons; alleged abuse committed by law enforcement officials against asylum-seekers; cases of appeal for a stay of extradition based on possible refoulement rejected by the Independent Federal Asylum Senate (now, the new Asylum Court); and, the number of applicants who have been deported or extradited while awaiting a decision on an appeal of a decision denying asylum based on a procedural issue.

The State party should establish an effective system to gather all statistical data disaggregated by sex, age and authenticity, relevant to the monitoring of the implementation of the Convention at the national level, including complaints, investigations, prosecutions, convictions of cases of torture and ill-treatment, trafficking and domestic and sexual violence, as well as compensation and rehabilitation provided to the victims.

27. The Committee also recommends that the State party includes in its next periodic report information concerning compliance with its obligations under the Convention by Austrian armed forces deployed abroad.
28. The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet party, namely, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Protection of the Rights of Migrant Workers and Members of their Families; and, the International Convention for the Protection of All Persons from Enforced Disappearances.
29. The Committee invites the State party to submit a core document in accordance with the requirements for the preparation of a common core document established in the harmonized guidelines for the submission of reports approved by the international human rights treaties bodies (HRI/GEN/2/Rev.6).
30. The State party is urged to ensure wide circulation of the report submitted to the Committee and of the Committee's concluding observations through official websites, the media and non-governmental organizations.
31. The Committee requests the State party to provide information, within one year, in response to the Committee's recommendations in paragraphs 9, 16 and 19 of the present document.
32. The State party is invited to submit its sixth periodic report by 14 May 2014.
