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Mr Rafael Rivas Posada
Chairperson, Human Rights Committee
Office of the High Commissioner for Human Rights
U.N. Headquarters
New York, N.Y. 10017
USA

22 March 2007

Re: Pre-sessional meeting on Austria during the 89th session of the Human Rights Committee

Dear Mr Rivas Posada,

I am writing with a view to the adoption of the list of issues to be taken up in connection with the consideration of Austria's fourth periodic report under Article 40 of the International Covenant on Civil and Political Rights (ICCPR) at one of the Human Rights Committee's future sessions.

The enclosed memorandum summarizes Amnesty International's main concerns about Austria's implementation of the ICCPR – in particular in relation to the obligation of the state party to ensure the right to a remedy for violations of the ICCPR (Article 2), torture and other ill-treatment (Article 7), the treatment of persons deprived of their liberty (Article 10) as well as the right to equality before the law (Articles 2 and 26) and the right to respect of privacy (Article 17).

We hope this memorandum will be helpful to the members of the country report task force.

Yours sincerely

Nicola Duckworth
Director
Europe and Central Asia Programme

Memorandum on Amnesty International's concerns regarding the implementation of the International Covenant on Civil and Political Rights (ICCPR) by Austria

Right to remedy for violations of the ICCPR (Article 2)

Amnesty International continues to be concerned about the failure of the Austrian authorities to ensure respect for the obligation to ensure adequate redress for violations of the Covenant, including following the finding of a violation by the Committee in cases examined under the Optional Protocol. Various authorities continue to state that neither the ICCPR nor the views of the Human Rights Committee have direct effect in domestic law. Furthermore the federal authorities have repeatedly denied their competence to ensure redress for violations found by the Committee with the justification that the issues involved fell within the competence of the regional authorities. At the same time it appears that regional authorities (Bundesländer) continue to deny their obligations to ensure respect for the Covenant and redress for violations of rights enshrined therein in respect of matters which fall within their competence, claiming that they are not a party to the Covenant and hence not bound by its provisions.

Case example

Paul Perterer: On 20 August 2004, the Human Rights Committee concluded that Paul Perterer was denied his right to a fair hearing when he was dismissed from the civil service of the municipality of Saalfelden in 1996. Having done so, the Committee thereupon reminded the authorities of their obligation to ensure an effective remedy to Mr Perterer, including payment of adequate compensation, as well as their duty to take measures to prevent similar violations in the future (CCPR/C/81/D/1015/2001). Paul Perterer has yet to receive compensation.

Torture and cruel, inhuman or degrading treatment or punishment (Article 7)

Allegations of torture and ill-treatment by police officers: Amnesty International continues to receive reports of alleged ill-treatment by police officers of individuals. The majority of allegations concern the ill-treatment of foreign nationals.

Amnesty International considers the lack of a definition of torture in the Austrian Criminal Code – which at least incorporates the elements of Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as recommended by the Committee against Torture when it last examined Austria's implementation of that Convention – is a shortcoming that should be addressed by the government.

Furthermore, Amnesty International has called on the authorities to implement legislative and administrative changes which would guarantee the impartiality and independence of investigations into allegations of ill-treatment by law enforcement officials. Amnesty International has also urged the authorities to ensure that law enforcement officials suspected of involvement in such cases are suspended from duty pending the outcome of the investigation; that those responsible for any misconduct are brought to justice within a reasonable time in proceedings that meet international standards of fairness; that government officials refrain from making public statements which may be deemed to pre-judge the outcome of any investigation and possible proceedings; and that methods and findings of investigations into alleged excessive use of force by law enforcement officials be made public. The Austrian authorities should also ensure that all law enforcement officials and other state agents receive training on safe and effective restraint techniques.

Case examples

Cheibani Wague: On 16 July 2003, Cheibani Wague, a Mauritanian citizen, died while being restrained by police officers. Police officers and paramedics were called following an altercation between Cheibani Wague and another man in a Vienna park on the night of 15 to 16 July 2003.

Cheibani Wague was subsequently arrested and was forcibly restrained. Video footage of the incident, taken by a local resident, showed six police officers as well as three paramedics surrounding Cheibani Wague as he lay handcuffed, face-down on the ground, apparently unconscious. The video showed three paramedics standing or leaning on his legs, while six police officers stood or leaned on his upper body, including his shoulders and back. The video footage also showed that a doctor who was present watched Cheibani Wague being treated in this manner without taking any action.

Cheibani Wague was restrained in this position for approximately four-and-a-half minutes before somebody apparently noticed that he was no longer breathing. However, the video footage shows that no one took measures to resuscitate him once this was discovered. Cheibani Wague died at the scene of the arrest on the night of 15 to 16 July 2003. The autopsy report indicated a lack of oxygen to the brain and irreversible failure of the circulatory system as the causes of death.

Investigations into Cheibani Wague's death were opened immediately, however none of the police officers was suspended during the investigations and the trial was not held until August 2005. The six police officers, the three paramedics and the doctor were charged with involuntary manslaughter under especially dangerous conditions; in November 2005, the Higher Criminal Court in Vienna sentenced the doctor and one police officer to suspended seven-month prison terms; the other defendants were acquitted. Appeals procedures are pending.

Amnesty International had repeatedly expressed concern about the circumstances surrounding the death of Cheibani Wague and at what appeared to be substantial failures to conduct a prompt, independent and impartial investigation aimed at bringing those responsible to justice. Pre-trial investigations were delegated to the Bureau of Internal Affairs [*Büro für interne Angelegenheiten*], which is part of the Ministry of the Interior. Amnesty International expressed concern at the long delay between pre-trial investigation and trial hearings and urged the Austrian government to conduct an inquiry into the possible reasons for this delay. Evidence produced in the trial also highlighted deficiencies within the police training system with regard to restraint methods. (See *Austria: Court delivers verdict in the case of Cheibani Wague*, AI Index EUR 13/002/2005, <http://web.amnesty.org/library/Index/ENGEUR130022005?open&of=ENG-AUT>)

Bakary J: On 7 April 2006, four police officers drove Bakary J., a Gambian citizen whose deportation had been cancelled, to an empty warehouse in Vienna. At the warehouse police subjected Bakary J to torture and other ill-treatment; in particular while handcuffed, Bakary J. was kicked, beaten, threatened with a mock execution and told that the policemen had orders to kill him.

Thereafter Bakary J. was brought to a hospital. At the hospital policemen claimed that Bakary J had been injured in an attempt to escape. Following treatment at the hospital he was eventually returned to a detention centre. Neither the policemen nor medical staff at the hospital reported the events. Criminal investigations were not initiated until Bakary J.'s wife made a complaint. According to medical documentation, Bakary J. sustained several fractures to his skull as well as several bruises; a doctor also attested a severe psychological trauma as a result of the torture and ill-treatment he was subjected to.

On 31 August 2006, following confession of the police officers at trial, the Higher Criminal Court in Vienna ruled that the police officers had inflicted or abetted the injuries of Bakary J.; the police officers were given suspended sentences of eight and six months' imprisonment for tormenting Bakary J and for neglect, respectively. The judge characterised the incident as a "slip-up" and considered the confession as well as the stressful conditions under which deportation occurs to be mitigating factors.

On 15 December 2006, the disciplinary commission of the Vienna Police imposed fines on the four officers involved (three were fined in the amount of five months' of their salary and one officer received a fine of the equivalent of one month's salary). An appeal is pending at the

upper disciplinary commission in the Chancellor's Ministry (*Bundeskanzleramt*). The officers are now back in service.

In its report of the visit to Austria in 2004, which was published on 21 July 2005, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) raised concern, inter alia, about a considerable number of complaints in connection with ill-treatment of suspects, especially in the area of Linz and surroundings. Such complaints included allegations of ill-treatment of children as young as 14, who were alleged to have been subjected to ear-cuffing, punches, kicking and blows to the head with telephone books, and handcuffing too tightly and for long periods of time in order to obtain a confession (see paragraphs 13 and 128 of the report, <http://www.cpt.coe.int/documents/aut/2005-13-inf-eng.pdf>).

During its examination of Austria's implementation of the Convention against Torture in 2005, the Committee Against Torture expressed concern about a new provision in Article 59, paragraph 1, of the Austrian Criminal Procedural Law, which will come into effect on 1 January 2008 and will allow for restrictions on the right of an arrested person to have counsel present during interrogation. According to this provision restrictions can be imposed if "there is some evidence to suggest that the presence of counsel would jeopardize further investigative steps." The Committee recommended that the authorities take all necessary measures to ensure that such restrictions are not misused, and that such measures are used only if authorised by a judge (Conclusions and recommendations of the Committee against Torture, CAT/C/AUT/CO/3, 15 December 2005, paragraph 11, see: <http://daccessdds.un.org/doc/UNDOC/GEN/G05/455/21/PDF/G0545521.pdf?OpenElement>).

Risk of refoulement in extradition cases - Reliance on diplomatic assurances

Amnesty International is concerned by Austria's reliance on diplomatic assurances in cases of extradition. The organization considers that diplomatic assurances do not provide an effective safeguard against the risk of torture and other ill-treatment. Rather the organization considers that reliance on diplomatic assurances in the face of risk of torture and other ill-treatment circumvents and undermines the absolute prohibition of torture and other ill-treatment, and is inconsistent with the *non-refoulement* obligation, inherent in the prohibition. Amnesty International is also concerned that such assurances were accepted and extradition ordered in some cases despite the fact that the individual's claim for asylum proceedings remained pending. The organization expressed concern that the right to asylum may be eroded if extradition takes place before completion of a fair and satisfactory individualized determination of an individual's claim for international protection.

Case examples

Muhammad 'Abd al-Rahman Bilasi-Ashri: On 13 September 2005, the Vienna Court of Appeal confirmed a previous court decision allowing the extradition of Muhammad 'Abd al-Rahmin Bilasi-Ashri to Egypt on the basis of diplomatic assurances given by the Egyptian Deputy Minister of Foreign Affairs and despite the fact that his claim for asylum remained pending. His extradition to Egypt was stayed only as a result of an interim measure, ordered by the European Court of Human Rights on 18 November 2005. Amnesty International expressed concern that Muhammad Bilasi-Ashri would be at serious risk of torture and other serious human rights violations if returned to Egypt (see *Austria: Risk of forcible return / torture: Muhammad 'Abd al-Rahmin Bilasi-Ashri, (m)*, EUR 13/001/2005, <http://web.amnesty.org/library/Index/ENGEUR130012005?open&of=ENG-AUT>).

Akhmet A.: On 24 February 2004, Akhmet A., a Russian citizen, was extradited to Russia despite pending asylum procedures, after the Russian Procurator General applied for his extradition on charges of the abduction of two members of the Russian military, and the illegal acquisition and

possession of weapons. The Regional Appeal Court granted the extradition request based on assurances from the Russian Procurator General, which were included in his request for extradition, that Akmet A's human rights would be respected after his return to Russia. According to information available to Amnesty International, following his extradition, further criminal charges were brought against Akhmet A in Russia, which did not relate to the request for extradition. Also, Amnesty International received reports which raised concern that Akhmet A. may have been ill-treated in pre-trial detention by Russian law enforcement officers following his return to Russia. (see *Europe and Central Asia: Concerns in Europe and Central Asia: January – June 2004*, EUR 01/005/2004, <http://web.amnesty.org/library/Index/ENGEUR010052004?open&of=ENG-AUT>)

Purchase of taser guns for use by prison wards and police officers

In July 2005, 60 taser guns, model X26, were purchased for Austrian judicial institutions. In preparation for the Austrian EU Presidency in 2006, police institutions purchased further taser guns. Amnesty International is concerned that taser guns are particularly open to misuse as they can cause severe pain at the push of a button without leaving marks. Amnesty International has called on the authorities not to use taser guns until comprehensive and independent research is completed into the effects of such weapons; instructions on their safe use are issued and those that are authorised to use them have been trained to use them in a manner that is consistent with the duty to preserve life and human dignity and the prohibition of ill-treatment.

Optional Protocol to the Convention on Torture

Amnesty International continues to urge Austria to ratify and implement the Optional Protocol to the Convention Against Torture. The organization has called on the authorities to re-organise the existing Human Rights Advisory Board (HRAB) with a view to ensuring its independence and to extending its mandate to cover all places of detention. The HRAB was established in 1999, following the death of Marcus Omofuma during his deportation to Nigeria and in response to repeated recommendations by the CPT in this regard. The HRAB consists of 11 members and the same number of deputy members, who are appointed by the Federal Minister of the Interior for a term of three years, acting on an honorary basis. The mandate of the HRAB includes the monitoring and observation of all activities of the security services, the authorities under the Minister of the Interior and all bodies with power of direct command and compulsion. On the basis of its substantive and conceptual work with regard to the protection of human rights, it issues recommendations to the Minister of the Interior. For the conduct of ad hoc visits of places of detention, six expert committees have been set up which monitor all places of detention under the authority of the Ministry of the Interior. However, currently the HRAB does not monitor facilities under the authority of the Ministry of Justice or other facilities such as psychiatric institutions.

Treatment of persons deprived of their liberty (Article 10)

Detention conditions in judicial institutions

Amnesty International is concerned about reports of deteriorating conditions in Austrian detention facilities caused by overcrowding and lack of staff. Amnesty International is also concerned about the failure of the Ministry of Justice to address deficiencies in the prison system with regard to the care of mentally ill inmates, which were highlighted in an internal Ministry of Justice report in 2001.

Conditions of detention pending deportation

In the report of its 2004 visit to Austria, the CPT voiced concern about the practice of detention of foreign nationals pending deportation in police detention centres that were designed and staffed as holding facilities for criminal and administrative offenders. It called upon the Austrian authorities to give a high priority to the creation of holding facilities specifically designed for the accommodation of

foreign nationals deprived of their liberty under aliens legislation (see paragraph 61 of the report, <http://www.cpt.coe.int/documents/aut/2005-13-inf-eng.pdf>). The CPT also recommended that the authorities step up their efforts to ensure that foreign detainees are duly informed about the state of their case and stressed in this context that the fact that outside bodies have been contracted to help foreign detainees does not discharge the state from its responsibility for providing information and assistance to such persons (see paragraph 58). In addition the CPT raised concern about the lack of confidentiality of medical examinations and medical records of detained persons and the inadequate provision of professional psychological and psychiatric support of foreign nationals held in police detention centres.

Hunger-strike in detention pending deportation:

In relation to the high incidence of foreign nationals in police custody in Austria going on hunger strike, the CPT further stressed that hunger strikes should be treated from a therapeutic rather than a punitive standpoint. In the course of its 2004 visit to Austria the CPT had observed a certain difference in approach to persons on hunger strike at the police detention centres visited. At some of the establishments, detainees on hunger strike were placed in a segregation cell and subjected to a more restrictive regime; at others, such detainees remained in their usual cells (see paragraph 51 of the CPT report).

Amnesty International is concerned about recent reports that indicate harsh and disproportionate treatment of detainees who go on hunger strike pending their deportation. These concerns arise from the death of a detainee in Linz in 2005 and serious medical consequences for another detainee in Vienna in 2006. In addition, these cases raise concerns regarding the duty to ensure the welfare of individuals in custody.

Amnesty International assesses critically the new provision of Article 79, paragraph 6, of the Aliens Police Act. This provision, which entered into force on 1 January 2006, was introduced in response to cases where detainees pending deportation were to be released on grounds of ill health as a result of their hunger strike. Under the new provision of the Aliens Police Act, people awaiting deportation who are on hunger-strike can continue to be kept in detention in order to be force-fed, while, in recognition of medical ethics, doctors are not legally obliged to force-feed the detainee. As a result of inherent inconsistencies following the entry into force of the new law hunger strikers may be detained until they die or, as in the case of Geoffrey A. referred to below, suffer serious damage to their health, without adequate medical supervision.

In its recently published analysis on the provision of medical treatment for persons detained pending deportation, which was initiated on the occasion of the death of Yankuba Ceesay (see below), the Austrian Human Rights Advisory Board (HRAB) recommended that the Ministry of the Interior ensure persons on hunger strike are released before they suffer adverse affects to their health and that subsequent medical treatment is guaranteed (the study was published on 12 February 2007 and is available in German at:

http://www.menschenrechtsbeirat.at/cms/index.php?option=com_content&task=view&id=275&Itemid=74).

Case examples:

Yankuba Ceesay: On 23 September 2005, 18 year-old Yankuba Ceesay, an asylum-seeker from Gambia who was detained pending deportation, went on hunger strike. Medical documentation dated 4 October claimed that his weakness was “simulated”. However he was taken on 4 October to a general hospital for medical examination. When he allegedly kicked a nurse while a blood sample was taken, he was returned to a detention centre and locked in a so-called 'safety cell'. At 12:50 he was found dead in the cell.

Geoffrey A: At the end of August 2006, Geoffrey A., a Nigerian national, went on hunger strike while he was held in detention pending his deportation. He was transferred to prison under the provisions of the Aliens Police Act. After 41 days on hunger strike he was released in a very weakened state. No-one was notified that he would be freed and therefore he was not met upon his release. He collapsed on the street on his way home and was taken to an intensive care unit of a Vienna hospital. According to information available to Amnesty International no investigations into his case have been initiated by the Ministry of the Interior or the Ministry of Justice. While Geoffrey A. was undergoing further medical treatment and rehabilitation at the beginning of 2007 he was still facing deportation. An appeal against his deportation has been filed by his lawyer and is currently still pending.

Right to equality before the law (Articles 2 and 26), right to respect of privacy (Article 17)

Discriminative criminal provision on consensual sexual activity

Amnesty International welcomed the adoption of Article 207b of the Austrian Criminal Code, paragraph 1, setting the age of consent at 16 years for women and men equally. This article replaced Article 209 of the Austrian Criminal Code which set the age of consent for homosexual men at 18 years of age, while the age of consent was 14 for heterosexuals and homosexual women. This law reform followed several judgments of the European Court for Human Rights ruling that criminal convictions of men for homosexual conduct with persons between the ages of 14-17 under Article 209 (which was punishable by imprisonment of up to five years) violated the prohibition of discrimination and the right to respect for private life enshrined in the European Convention.

While compensation has been paid to successful applicants to the European Court of Human Rights following such judgments, others convicted under Article 209 before its amendment have not received compensation and still have a criminal record with serious consequences to their private and professional lives. Also, Amnesty International has received complaints by homosexual men as well as their lawyers that despite the neutral text of Article 207b, the provision might still be applied in a discriminatory manner. This concern is supported also by statistical data provided by the Ministry of Justice in response to a parliamentary inquiry. Amnesty International considers that the Ministry of Justice should initiate a comprehensive analysis of the application of Article 207b of the Austrian Criminal Code and make the findings publicly available. Such a study should include an analysis of statistics about the sex of persons charged by the Public Prosecutor under Article 207b and of those convicted.