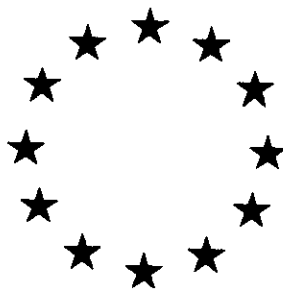


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EUROPEAN COMMITTEE FOR THE PREVENTION
OF TORTURE AND INHUMAN OR DEGRADING
TREATMENT OR PUNISHMENT

(CPT)

COMMENTS OF THE AUSTRIAN GOVERNMENT ON THE REPORT BY THE
EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR
DEGRADING TREATMENT ON ITS VISIT TO AUSTRIA
FROM 20 TO 27 MAY 1990

The Austrian Government has agreed to the publication of the CPT's report on Austria (CPT/Inf (91) 10) provided that the report is published together with its comments thereon. The above-mentioned comments are the subject of this document.

Comments
of the Austrian Government
on the Report
by the European Committee for the Prevention of Torture
and Inhuman or Degrading Treatment or Punishment
on its visit to Austria
from 20 May 1990 to 27 May 1990

In the spirit of the Charter of the United Nations, the Austrian Government is convinced that freedom, justice and peace in the world are based on the recognition of the equality and inalienability of the rights of all members of human society. Especially when a person is suspected to have committed an offense, it is particularly important to ensure his/her fundamental rights. The Austrian Government therefore welcomes the activities of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The Federal Ministries of the Interior and of Justice express their readiness and interest to conduct, within the meaning of the Committee's aim of prevention and in the spirit of cooperation (Art.3 of the European Convention for the Prevention of Torture, etc.), a dialogue on improvements required in the legal and actual situation of detainees.

1. Of particular weight and primary importance to the CPT Report is the observation that there is a serious risk of detainees being ill-treated while in police

custody (paras 48 and 99). The conclusion drawn by CPT is based on complaints about ill-treatment that were brought to its attention on the one hand, and its own assessment of existing - legal and actual - safeguards against misconduct by the police on the other. The Federal Ministers of the Interior and of Justice understand that this does not mean that the CPT wants to say that every detainee must actually fear ill-treatment. Such a generalization would not seem appropriate given the fact that the CPT visited no more than three establishments for which the Ministry of the Interior - namely, the Federal Police Directorates in Vienna, Schwechat and Salzburg - is responsible and that the cases reported by the CPT relate to only one establishment, i.e. the Federal Police Directorate in Vienna. Thus, the criticism expressed by CPT rather seems to point to the fact that existing control mechanisms are not adequate in providing for sufficient safeguards against ill-treatment. Notwithstanding the fact that it is necessary to clarify, whenever possible, each individual complaint of ill-treatment and to take the requisite disciplinary and penal action if necessary, the Federal Ministers of the Interior and of Justice are of the opinion that ill-treatment for the purpose of investigating crimes cannot only be attributed to the misconduct of individual persons but also indicates the existence of structural problems. It must be noted that the criticism referred to by the CPT is almost exclusively concerned with the criminal detention of suspects by the police (which lasts no longer than 48 hours). This requires to devote particular attention to the situation prevailing in the field of criminal police investigation. A working group set up in Fall 1989 by the Federal Minister of the Interior and including representatives of the Austrian judicial administration and criminologists to deal with crime development and necessary security

measures arrived at the conclusion that "the disproportionally large amount of personal evidence, in particular confessions, in comparison to factual evidence" must be seen as a specific characteristic of Austrian criminal police practice. The final report of the working group says in this respect:

"As a consequence of these circumstances, there is nothing left to the criminal police but to strive to obtain a confession. This, however, also lends plausibility to false allegations by accused persons of having been ill-treated, a fact that offers new possibilities for the defense in the light of the ban contained in Art. 15 of the UN Convention Against Torture (Fed.Law Gazette No.492/1987) on invoking evidence obtained under torture that has been incorporated into Austrian law. Over the medium term, this could even seriously impede the effectiveness of investigation activities. For this reason alone, it will be imperative to set up procedural regulations that will offer no grounds for complaints of ill-treatment."

In this connection the working group demanded that personnel and technical prerequisites would have to be created to increase the obtaining of factual evidence and also for investigation methods that require additional personnel, such as the surveillance of suspects. It also said that there was a lack of both technically trained staff and modern technical equipment. Although the Federal Ministry of the Interior has tried in recent years to satisfy the requirements identified in the report, it is still unrealistic to assume that the planned modifications of criminal police investigation procedures can be realized in the near future.

In addition, the Code of Criminal Procedure deals only rudimentarily with criminal investigation. The activity of the security authorities in criminal matters is therefore not governed by clear-cut legal regulations but is based primarily on the understanding by the security services of what their

task is. In this, they naturally give high priority to efficiency in criminal investigations.

Such problems, however, can only be solved appropriately within the framework of regulations governing criminal and, in particular, police investigation procedures. These should give equal priority both to the efficiency of police investigations and to the need for legal protection of the persons concerned. In this context, particular consideration will have to be given to the effective control of the conditions in which an arrested person charged with a criminal offense is interrogated. The draft bill - which is currently being discussed in Parliament concerning the duties and powers of the police (No.148 of the annexes to the stenographic protocols of the National Council, XVIII GP) - grants specific rights to anyone affected by the exercise of police power within the framework of the security services. This includes, in particular, the right to consult in the course of an official act a person he trusts as advisor, as well as the right to be informed, at his request, of the grounds and objectives of the intervention. Although this provision is not directly applicable to criminal proceedings, it establishes a standard of legal safeguards which Parliament will have to take into account when adopting new regulations concerning the activity of the police in criminal matters.

2. Several recommendations made by the CPT correspond to long-term endeavours by the Federal Ministry of the Interior to ensure that detainees are fully informed about their legal situation by means of an "Information Notice for Arrested Adults". This Information Notice is designed at the same time to preclude any complaints that such information, as provided for by law, did not occur. The initial

version of this Information Notice was distributed to all police departments for testing already by decree of the Federal Ministry of the Interior of August 29, 1990. Based on the test results, the text of the Information Notice has been revised accordingly.

This Information Notice will be handed over to every German-speaking detainee immediately after arrest and is included in a new "custody record". This record serves not only to document that all contacts the detainee wished to have were actually established but also to show all significant details of a person's detention (in particular when and why he was arrested; that he was informed about his rights; that he could contact a person of his confidence as well as a legal counsel; any contact with his legal counsel at the police station; information of his consular representative; time and place of interrogation; time and place of a medical check and its result; time of meals).

This will also make it easier to reconstruct the details of a person's arrest at a later stage and, if necessary, to respond to unjustified complaints on a well-founded basis.

By decree of the Federal Ministry of the Interior of July 19, 1991, the Information Notice and the custody record as well as guidelines on how to use them have been introduced temporarily for another testing period until the end of the year. The guidelines contain important clarifications and instructions for the establishment of contact with a person of confidence and a legal counsel, in particular

- that the statutory requirement of establishing contact applies without restriction and must thus be met in any case where this is practically feasible;

- that establishment of such contact may be deferred only under specific conditions and must be kept as short as possible;

- that in any case where such contact is not established within 12 hours after a person's arrest or not at all this must be entered in the custody record accordingly and must be signed by the immediately superior officer.

At present, the translation of the text of the Information Notice into a variety of languages is under preparation.

3. The Federal Ministers of the Interior and of Justice have tried to exploit every opportunity available under Austrian law to enable any person arrested by the police to contact a person of his confidence as well as a legal counsel. For this purpose, the ministers decreed joint guidelines in May 1989 concerning the information of third parties of a person's arrest by the public security service as well as any contact with his legal counsel. These guidelines are also designed to ensure that within some 24 hours after police interrogation a detainee may talk to his legal counsel. The Information Notice referred to under 2 will inform a detainee of his right to contact his legal counsel quickly and, in particular, of the existence of a legal standby service in several of the Austrian States. Any contact with the detainee's legal counsel must be entered in the custody record. More far-reaching defense rights can be considered only in the course of the reorganization of investigation proceedings in criminal matters.

4. By decree of the Federal Ministry of the Interior of February 6, 1990, the offices of the Federal Gendarmerie were instructed to make spot checks of cells in the presence of a doctor without prior notice at irregular intervals. A pertinent regulation was issued for the Federal Police Directorates on February 16, 1990. The above-mentioned guidelines for the use of the Information Notice and the custody record furthermore provide that in future any detainee is free to have a doctor of his choice present when being examined by the police doctor.

5. The draft bill concerning the duties and powers of the police provides that the Federal Minister of the Interior must issue by decree guidelines for police interventions in order to ensure both an effective and uniform modus operandi as well as a reduction of the risk of conflict with a detainee. As soon as the bill becomes law, considerations will have to be made to issue, on the basis of the Interior Minister's right to decree regulations, guidelines for police interrogations that will also be applicable to police activities in criminal matters.

6. The draft bill on the duties and powers of the police will furthermore make it incumbent on the Federal Government to submit a yearly report on internal security to Parliament. This report will also contain statistics on the complaints raised against members of the police force in each year under disciplinary and penal law. This is to take account of numerous demands calling for comprehensive statistics on alleged violations of fundamental rights.

7. As far as the issue of instituting criminal proceedings against persons is concerned who allege ill-treatment while in police custody and the resultant risk that people who were actually

ill-treated could be discouraged from filing pertinent actions, the Federal Ministers of the Interior and of Justice are of the opinion - just like the CPT - that a police officer, like everybody else, should have the possibility of defending himself if false accusations are raised against him and he is thus exposed to the risk of unjustified prosecution. Random samples made by the Federal Ministry of Justice have shown that in the majority of cases in which ill-treatment, bodily injury or anything similar had been claimed, no criminal prosecution on the ground of a suspicion of defamation was instituted, let alone the fact that the number of complainants convicted of defamation was close to zero.

However, the Federal Ministers of the Interior and of Justice share the CPT's view that the point in such cases is to strike a fair balance between conflicting interests. Therefore, the Federal Ministry of Justice, in a detailed decree of May 31, 1991, about how public prosecutors should proceed in such cases, drew up guidelines pointing out that the slightest indication must be avoided that a complainant was intimidated on account of his having raised complaints or is prosecuted for this reason in any other way. This decree, which was also discussed on June 28, 1991, at a meeting the heads of the four Senior Public Prosecutor's Offices held with senior officials of the Federal Ministry of Justice, will pave the way that in future the institution of criminal proceedings on grounds of suspected defamation by means of complaints will be dealt with restrictively in cases of alleged ill-treatment.

The decree of May 31, 1991, also instructed public prosecutors to submit in future detailed yearly reports (in the form of statistics) on all cases where criminal proceedings were instituted against members

of the police force on the ground of alleged ill-treatment on the one hand, and criminal proceedings for defamation against persons that raised such allegations, on the other.

8. The activity of the police in criminal matters, as already said above, including the interrogation of persons, is regulated very insufficiently and inappropriately within the framework of the Austrian Code of Criminal Procedure, that dates back to 1873. According to the declared intention of the Austrian Federal Government, criminal procedural law is to be entirely reorganized, putting in particular investigation proceedings, which at present are conducted largely independently and on their own responsibility by the police authorities, on a modern legal basis that corresponds to the principles of the European Convention on Human Rights. The lively professional debate that has taken place of late at the initiative of the Federal Ministry of Justice has led to a general consensus - although opinions varied in detail - on the fact that a structural reform of investigation proceedings is necessary on the condition that the procedural rights of the person charged are appropriately laid down in the law. A draft reform law on investigation proceedings in criminal matters as envisaged by this general consensus is under preparation and to be completed in 1992.

We must point out, however, that the Federal Ministry of Justice's attempts are aimed at a comprehensive reform of criminal procedural law, which necessitates the preparation of further drafts on other stages of criminal proceedings and putting these drafts together into an overall draft, as well as further intensive discussions. Such a wide-ranging reform project, of course, cannot be realized in the short run but only on a step by step basis.

Both the Federal Ministers of the Interior and of Justice are of the opinion that the reorganization of investigation proceedings must be linked to the creation of an adequate legal protection system, particular attention being paid to provisions governing the arrest of persons who are suspected of having committed an offence. Even though such a legal protection system is not yet elaborated in full detail, the Federal Ministers of Justice and the Interior are of the opinion that it must of course be formulated along the lines of the provisions of Articles 5 and 6 of the Human Rights Convention and take it for granted to make provision for more effective participation by the defence counsel at earlier stages of the proceedings. It is with great interest that the two federal ministries take note of the recommendations and suggestions by CPT in this respect and will consider thoroughly in what form and to what extent it will be possible to put them into reality. In doing so, relevant developments of legislation and legal practice in other Member States of the Convention and a "European standard", as far as it develops, will be taken into consideration.

The same applies to CPT's recommendation to consider if it is possible to introduce a free and independent legal counseling service for persons in police custody. In this context, however, it must be noted that under the present legal aid system and in view of the availability of lawyers for such purposes as well as the required costs, basic conditions for introducing such services in the near future are currently lacking. An important initial step, however, was made recently by setting up the mentioned standby service of lawyers in several States.

9. Also in future, the Federal Ministers of the Interior and of Justice intend to gradually improve the legal and practical situation of arrested and detained persons and to continue the policy that has been pursued in recent years, i.e.

- to make improvements, on the basis of applicable law, of an organizational nature and to create more favourable conditions for exercising existing rights, and

- to prepare, at the same time, a structural reform of criminal procedural law, in particular of the provisions governing police investigation procedures in criminal matters.

The Federal Ministers of the Interior and of Justice consider the observations and recommendations by the CPT as valuable suggestions for this development that have been and will be taken into consideration in the process of the formulation of objectives and decision-making in Austria.