

AUSTRIA

Follow-up - State Reporting

i) Action by Treaty Bodies

CAT, A/61/44 (2006)

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CHAPTER IV. FOLLOW-UP ON CONCLUSIONS AND RECOMMENDATIONS ON STATES PARTIES REPORTS

38. In Chapter IV of its annual report for 2004-2005 (A/60/44), the Committee described the framework that it had developed to provide for follow-up subsequent to the adoption of the concluding observations on States parties reports submitted under article 19 of the Convention. It also presented information on the Committee's experience in receiving information from States parties from the initiation of the procedure in May 2003 through May 2005. This chapter updates the Committee's experience to 19 May 2006, the end of its thirty-sixth session.

39. In accordance with rule 68, paragraph 2, of the rules of procedure, the Committee established the post of Rapporteur for follow-up to concluding observations under article 19 of the Convention and appointed Ms. Felice Gaer to that position. As in the past, Ms. Gaer presented a progress report to the Committee in May 2006 on the results of the procedure.

40. The Rapporteur has emphasized that the follow-up procedure aims "to make more effective the struggle against torture and other cruel, inhuman and degrading treatment or punishment," as articulated in the preamble to the Convention. At the conclusion of the Committee's review of each State party report, the Committee identifies concerns and recommends specific actions designed to enhance each State party's ability to implement the measures necessary and appropriate to prevent acts of torture and cruel treatment, and thereby assists States parties in bringing their law and practice into full compliance with the obligations set forth in the Convention.

41. Since its thirtieth session in May 2003, the Committee began the practice of identifying a limited number of these recommendations that warrant a request for additional information following the review and discussion with the State party concerning its periodic report. Such "follow-up" recommendations are identified because they are serious, protective, and are considered able to be accomplished within one year. The States parties are asked to provide within one year information on the measures taken to give effect to its "follow-up recommendations" which are specifically noted in a paragraph near the end of the conclusions and recommendations on the review of the States parties' report under article 19.

42. Since the procedure was established at the thirtieth session in May 2003 through the end of the thirty-sixth session in May 2006, the Committee has reviewed 39 States for which it has identified follow-up recommendations. Of the 19 States parties that were due to have submitted their follow-up reports to the Committee by 1 May 2006, 12 had completed this requirement (Argentina, Azerbaijan, Czech Republic, Colombia, Germany, Greece, Latvia, Lithuania, Morocco, New Zealand, United

Kingdom, and Yemen). As of May, seven States had failed to supply follow-up information that had fallen due (Bulgaria, Cambodia, Cameroon, Chile, Croatia, Moldova, Monaco), and each was sent a reminder of the items still outstanding and requesting them to submit information to the Committee.

43. With this procedure, the Committee seeks to advance the Convention's requirement that "each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture ..." (art. 2, para. 1) and the undertaking "to prevent ... other acts of cruel, inhuman and degrading treatment or punishment ..." (art. 16).

44. The Rapporteur has expressed appreciation for the information provided by States parties regarding those measures taken to implement their obligations under the Convention. In addition, she has assessed the responses received as to whether all of the items designated by the Committee for follow-up (normally between three to six recommendations) have been addressed, whether the information provided responds to the Committee's concern, and whether further information is required. Where further information is needed, she writes to the State party concerned with specific requests for further clarification. With regard to States that have not supplied the follow-up information at all, she writes to solicit the outstanding information.

45. Each letter responds specifically and in detail to the information presented by the State party, which is given a formal United Nations document symbol number.

46. Since the recommendations to each State party are crafted to reflect the specific situation in that country, the follow-up responses from the States parties and letters from the Rapporteur requesting further clarification address a wide array of topics. Among those addressed in the letters sent to States parties requesting further information have been a number of precise matters seen as essential to the implementation of the recommendation in question. A number of issues have been highlighted to reflect not only the information provided, but also the issues not addressed but which are deemed essential in the Committee's ongoing work in order to be effective in taking preventive and protective measures to eliminate torture and ill-treatment.

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48. The chart below details, as of 19 May 2006, the end of the Committee's thirty-sixth session, the state of the replies with respect to follow-up.

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B. Follow-up reply due May 2006 and November 2006

State party	Date due	Date reply received	Document symbol number	Further action taken/required
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Austria	November 2006			
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CAT, A/62/44 (2007)

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IV. FOLLOW UP ON CONCLUSIONS AND RECOMMENDATIONS ON STATES PARTIES REPORTS

46. In Chapter IV of its annual report for 2005 2006 (A/61/44), the Committee described the framework that it had developed to provide for follow up subsequent to the adoption of the conclusions and recommendations on States parties reports submitted under article 19 of the Convention. It also presented information on the Committee's experience in receiving information from States parties from the initiation of the procedure in May 2003 through May 2006. This chapter updates the Committee's experience to 18 May 2007, the end of its thirty eighth session.

47. In accordance with rule 68, paragraph 2, of the rules of procedure, the Committee established the post of Rapporteur for follow up to conclusions and recommendations under article 19 of the Convention and appointed Ms. Felice Gaer to that position. As in the past, Ms. Gaer presented a progress report to the Committee in May 2007 on the results of the procedure.

48. The Rapporteur has emphasized that the follow up procedure aims "to make more effective the struggle against torture and other cruel, inhuman and degrading treatment or punishment", as articulated in the preamble to the Convention. At the conclusion of the Committee's review of each State party report, the Committee identifies concerns and recommends specific actions designed to enhance each State party's ability to implement the measures necessary and appropriate to prevent acts of torture and cruel treatment, and thereby assists States parties in bringing their law and practice into full compliance with the obligations set forth in the Convention.

49. Since its thirtieth session in May 2003, the Committee began the practice of identifying a limited number of these recommendations that warrant a request for additional information following the review and discussion with the State party concerning its periodic report. Such "follow up" recommendations are identified because they are serious, protective, and are considered able to be accomplished within one year. The States parties are asked to provide within one year information on the measures taken to give effect to its "follow up recommendations" which are specifically noted in a paragraph near the end of the conclusions and recommendations on the review of the States parties' reports under article 19.

50. Since the procedure was established at the thirtieth session in May 2003, through the end of the thirty eighth session in May 2007 the Committee has reviewed 53 States for which it has identified follow up recommendations. Of the 39 States parties that were due to have submitted their follow up reports to the Committee by 18 May 2007, 25 had completed this requirement (Albania, Argentina, Austria, Azerbaijan, Bahrain, Canada, Chile, Czech Republic, Colombia, Croatia, Ecuador, Finland, France, Germany, Greece, Latvia, Lithuania, Monaco, Morocco, New Zealand, Qatar, Sri Lanka, Switzerland, United Kingdom and Yemen). As of 18 May, 14 States had not yet supplied follow up information that had fallen due (Bulgaria, Bosnia and Herzegovina, Cambodia, Cameroon, Democratic Republic of the Congo, Georgia, Guatemala, Republic of Korea, Moldova, Nepal, Peru, Togo, Uganda and United States of America). In March 2007, the Rapporteur sent a reminder

requesting the outstanding information to each of the States whose follow up information was due in November 2006, but had not yet been submitted, and who had not previously been sent a reminder.

51. The Rapporteur noted that 14 follow up reports had fallen due since the previous annual report (A/61/44). However, only 4 (Austria, Ecuador, Qatar and Sri Lanka) of these 14 States had submitted the follow up information in a timely manner. Despite this, she expressed the view that the follow up procedure had been remarkably successful in eliciting valuable additional information from States on protective measures taken during the immediate follow up to the review of the periodic reports. While comparatively few States had replied precisely on time, 19 of the 25 respondents had submitted the information on time or within a matter of one to four months following the due date. Reminders seemed to help elicit many of these responses. The Rapporteur also expressed appreciation to non governmental organizations, many of whom had also encouraged States parties to submit follow up information in a timely way.

52. Through this procedure, the Committee seeks to advance the Convention's requirement that "each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture ..." (art. 2, para. 1) and the undertaking "to prevent ... other acts of cruel, inhuman and degrading treatment or punishment ..." (art. 16).

53. The Rapporteur has expressed appreciation for the information provided by States parties regarding those measures taken to implement their obligations under the Convention. In addition, she has assessed the responses received as to whether all the items designated by the Committee for follow up (normally between three and six recommendations) have been addressed, whether the information provided responds to the Committee's concern, and whether further information is required. Each letter responds specifically and in detail to the information presented by the State party. Where further information is needed, she writes to the State party concerned with specific requests for further clarification. With regard to States that have not supplied the follow up information at all, she writes to solicit the outstanding information.

54. At its thirty eighth session in May, the Committee decided to make public the Rapporteur's letters to the States parties. These would be assigned a United Nations document symbol number and placed on the web page of the Committee. The Committee further decided to assign a United Nations document symbol number to all States parties' replies (these symbol numbers are under consideration) to the follow up and also place them on its website.

55. Since the recommendations to each State party are crafted to reflect the specific situation in that country, the follow up responses from the States parties and letters from the Rapporteur requesting further clarification address a wide array of topics. Among those addressed in the letters sent to States parties requesting further information have been a number of precise matters seen as essential to the implementation of the recommendation in question. A number of issues have been highlighted to reflect not only the information provided, but also the issues that have not been addressed but which are deemed essential to the Committee's ongoing work, in order to be effective in taking preventive and protective measures to eliminate torture and ill treatment.

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57. The chart below details, as of 18 May 2007, the end of the Committee's thirty eighth session,

the state of the replies with respect to follow up.

Follow up procedure to conclusions and recommendations from May 2003 to May 2007

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Thirty fifth session (November 2005)

State party	Information due in	Information received	Action taken
Austria	November 2006	24 November 2006 CAT/C/AUT/CO/3/Add.1	Response under review

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Follow-up- State Reporting
ii) Action by State party

CAT, CAT/C/AUT/CO/3/Add.1 (2006)

Comments by the Government of Austria* **to the conclusions and recommendations of the Committee against Torture

[24 November 2006]

Paragraph 7

1. Parliament responded extensively to the mentioned ruling of the Constitutional Court, which was delivered on 15 October 2004 and decided, *inter alia*, to meet the demand for regulation not by amending the Asylum Act but by creating a new Federal Asylum Act (Asylgesetz 2005 - AsylG 2005 - Asylum Act 2005), BGBl I 100/2005, so as to make the Act easier to read, especially since the Asylum Act 1997 had already been amended several times, the Constitutional Court had overruled provisions and EU law, in particular the so-called "Status Directive", was to be included.

2. In this process, established rules which the Constitutional Court has upheld were included and some detailed adjustments were carried out as a result of an evaluation. Since a new Aliens' Police Act was to be created at the same time, the opportunity was taken to identify provisions relating to aliens' police matters which had hitherto formed part of the Asylum Act and instead incorporate them in the Aliens' Police Act (Fremdenpolizeigesetz 2005 (FPG)), BGBl I 157/2005.

3. Regarding the committee's concern, Austria wishes to point out that in an appeal against a decision denying asylum the Asylum Act 2005 does indeed not provide for suspensive effect. Such negative decisions are decisions on procedure for which a suspensive effect is not foreseen, as the position of the asylum-seeker on appeal is not changed in the appellate procedure. However the Independent Federal Asylum Senate (Unabhängiger Bundesasylsenat) as appellate authority may still grant suspensive effect to the appeal in individual cases for possible non-refoulement reasons within seven days of filing.

4. If, on the other hand, an appeal is made against a decision in the subject matter, this has suspensive effect.

5. A number of additional detailed provisions in the Act enable the competent authority (the Federal Asylum Office or the Independent Federal Asylum Senate) to take all decisions in a family procedure at the same time. If, for example, one family member's appeal is granted suspensive effect, this shall automatically apply also to the corresponding appeals of the remaining family members.

Paragraph 8:

6. With regard to expulsions not carried out for the reasons outlined by the Committee, figures

are available only on the cases where the expulsion procedure was preceded by an asylum procedure. Asylum is granted on a case-by-case basis and the question of non-refoulement is considered only if no asylum is granted. In 2005, in 271 cases asylum was denied but a positive decision as regards non-refoulement issued. These 271 cases are not broken down statistically as regards reasons of torture, ill treatment or death penalty, but a breakdown by states of origin is available, as follows:

63 cases referred to nationals from Afghanistan, 56 from the Russian Federation, 37 from Iraq, 18 from Serbia and Montenegro, 15 from Georgia and 13 cases referred to stateless aliens. The remaining 69 cases involved 21 nationalities and were all reflected in single-digit figures.

7. As for extradition cases, they lie within the jurisdiction of the regional courts and courts of appeal. If there are substantial grounds to believe that the proceedings in the requesting State will not comply or have not complied with the principles of Articles 3 and 6 of the Convention for the Protection of Human Rights (ECHR) or Article 3 of the UN-Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment the request is to be dismissed. As the domestic legislation on extradition (Section 19 of the Federal Law on Extradition and Mutual Assistance in Criminal Matters) directly refers to Article 3 ECHR - which forms part of the Austrian Constitutional Law - any court decision granting extradition has to take into consideration the prohibition of torture. Section 19 paragraph 2 of the Federal Law on Extradition and Mutual Assistance in Criminal Matters reads as follows:

"Extradition is prohibited if there is cause to suspect that the penalties or preventive measures imposed or expected in the requesting country would be enforced in a manner not consistent with the provisions of the Convention for Human Rights and Fundamental Freedoms, Federal Law Gazette No.210/1958".

8. Austria has never carried out an extradition on the basis of a diplomatic assurance. Therefore, so far no relevant practice of Austrian authorities exists.

9. Austria notes that attempts to define diplomatic assurances have as yet not produced results meeting uniform and general acceptance.

10. In the course of some extradition proceedings, Austria asked requesting states for additional information.

11. In relation to countries, where bilateral or multilateral treaties on extradition are applicable, Austria does not, in principle, deem it appropriate to ask for additional information (for example in order to ensure the rule of speciality, etc.), as the parties are obliged to observe the contractual obligations undertaken by them. In this regard, it is noted that bilateral treaties on extradition have only been negotiated with States where the respect for the rule of law and for human rights is granted. This is valid also for requesting States bound to rights enshrined in the ECHR or the UN-Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. In the vast majority of cases, extradition takes place in relation to countries where bilateral or multilateral treaties on extradition are in force. Nevertheless Austria may - according to domestic law - also grant

extradition based on the principle of reciprocity. In any event, the competent court has to dismiss a request of extradition if it considers that there is a substantial risk of torture; no room is left for diplomatic assurances.

12. In one recent case, concerning Egypt as the requesting State (to which Austria is not linked by any extradition treaty), Austria sought the fulfilment of a number of conditions:

13. After a hearing, the competent court granted the extradition request on condition that the sentence of imprisonment, which was issued by a special court of the requesting State (due to the fact that the person to be surrendered was suspected of belonging to an illegal association), be declared null and void and that the person concerned be retried before an ordinary court. Furthermore, the decision was subject to the condition that the person would not be persecuted or suffer restrictions on his personal freedom, or be extradited to a third country for an offence committed before his surrender and which was not covered by the extradition request. According to the findings of the court, there were no obstacles with regard to Articles 3 and 6 ECHR. The Minister of Justice approved the extradition subject to the conditions set out in the court's decision. Moreover he stated that the extradition would only take place on the further condition that the person concerned would be allowed to leave the territory of the requesting State within 45 days in case of acquittal. The wish was also expressed to allow Austrian officials to carry out a visit to the prison where the surrendered person is detained. Corresponding information was obtained by the requesting State. The extradition however has not taken place until now, as the person concerned filed an application with the European Court of Human Rights. Following an indication of the European Court to the Austrian Government under Rule 39 of the Rules of the Court, that the person concerned should not be extradited until further notice, extradition is suspended in the interest of the proper conduct of the proceedings before the Court. The question whether a violation of Article 3 of the ECHR must be feared when extraditing a person to the requesting State is determined primarily on the basis of topical reports published by renowned international organisations, which are easily accessible for courts on the website www.staatendokumentation.at.

14. In 2004 Austrian courts refused to extradite an Azerbaijan citizen to Azerbaijan, a Brazilian citizen to Brazil, an Uzbek citizen to Uzbekistan. In 2005 extradition of two Georgian nationals to Georgia was denied by invoking Section 19 of the Federal Law on Extradition and Mutual Assistance in Criminal Matters, as there was cause to suspect that the rights under Article 3 and 6 ECHR would not be fully respected.

Paragraph 10 b:

15. In the case "Cheibani WAGUE", the emergency physician and a police officer were found guilty of the offence of negligent homicide (Section 80 Austrian Penal Code) on 9 November 2005 and were convicted to seven months imprisonment each. The sentence was conditionally suspended. The other accused persons were acquitted. The public prosecutor's office in Vienna has lodged an appeal against the acquittals, the two convicted persons have done the same. The decision of the Higher Court of appeal has not yet been rendered.

Paragraph 12:

16. Following the recommendation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment to establish "a fully fledged and properly funded system of legal aid for persons in police custody who are not in a position to pay for a lawyer" "as a matter of urgency and be applicable as from the very outset of police custody", the Austrian Ministry of Justice has already entered into a process of consultations with representatives of the Austrian Bar Association.

17. It is the aim of these talks to establish a system of legal aid for persons in police custody that should apply immediately after the arrest. However, the Ministry of Justice believes that it ought to be possible at this stage of the proceedings that the arrested person can abstain voluntarily from being assisted by a defence council after being informed of this right. Before such a waiver, the arrested person should have the right to contact a defence lawyer and discuss the matter with him or her.

18. In any case, the system to be established will not alter the existing law concerning legal representation of a person to be detained or already in detention by a defence counsel.

19. That means that legal representation will - after the implementation of a legal aid system for persons in police custody - still become mandatory, as soon as and as long as a person is remanded in judicial custody (compulsory assistance by a defence counsel, "notwendige Verteidigung").

20. When implementing such a system of legal aid for persons in police custody, the involvement of the Austrian Bar Association and their active support of the system to be implemented are important for several reasons. The most relevant in the given context is the fact that in some Austrian provinces (Bundesländer) the local Bar Associations already organise legal aid to indigent suspects during police custody (in terms of an on-call legal service by defence lawyers, according to which a first guidance via telephone is normally free of charge). Although the factual situation might not be comparable between all provinces and these systems often lack adequate financial funds and 24- hours availability, experiences gained thereby should be taken into account when establishing a nation-wide system.

Paragraph 15 b:

21. Data on cases where the aggravating factors as stated in Section 33 of the Austrian Penal Code have been invoked in the context of ill-treatment are unfortunately not available.

Paragraph 17a:

22. The agreement between the Federal Government and the provinces pursuant to Art. 15a B-VG (Federal Constitutional Act) about joint measures for providing preliminary basic assistance to aliens in need of help and protection (asylum-seekers, persons entitled to asylum, displaced persons and other persons who cannot be deported for legal or factual reasons) in Austria (Grundversorgungsvereinbarung - Art. 15a B-VG) was adopted in December 2003 between the Federal Government and all provinces. Upon ratification by the respective legislative bodies of these

parties to the agreement it took effect as at 1 May 2004.

23. Transposition into provincial law was effected in the following provinces at the following dates:

Vienna - 13 October 2004, Styria - 19 October 2005, Vorarlberg - 25 January 2006 and Tyrol - 1 March 2006.

24. In the remaining five provinces the provincial laws are currently being drafted or are already being appraised and in all probability will take effect still in 2006.

25. The agreement on basic assistance to aliens in need of help and protection therefore ensures that the target group's basic needs are protected.

Paragraph 17b:

26. The amendment of the Federal Assistance Act (Bundesbetreuungsgesetz) included a change in the title of the act and now reads "Federal Act Regulating Basic Assistance to Asylum-Seekers in the Admission Procedure and to Specific Other Aliens" (Grundversorgungsgesetz - Bund 2005 - GVG-B-2005).

27. This Federal Act does not reduce the guarantee of the basic needs but, rather, considerably extends it. As of admission to the asylum procedure, i. e. when responsibility for providing assistance to the target group shifts to the provinces, the Federal Government may provide such assistance for a maximum period of 14 days to close a possible supply gap if immediate admission to provincial care cannot be ensured. In transposing EU law, any decision on the withdrawing or granting of services with conditions attached must not restrict access to medical emergency care, and this unrestricted access is guaranteed.

* To consult the Committee's conclusions and recommendations see document CAT/C/AUT/CO/3

** In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.