£AUSTRIA
@Torture and ill-treatment

(update to report of January 1990)

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Appendix I: Updates on individual cases mentioned in Amnesty International's 1990 report

Amnesty International December 1991 *AI Index: EUR 13/04/91*

Appendix II: Response by Austrian Government to Amnesty International's 1990 report

AUSTRIA
Torture and ill-treatment

(update to report of January 1990)

Introduction

On 9 January 1990 Amnesty International published a report, **Austria: Torture and Ill-Treatment**[1] (henceforth: "the 1990 report"), describing its concerns regarding allegations that people in police custody in Austria were sometimes subjected to unwarranted and deliberate physical violence. In some cases the incidents described amounted to torture[2].

Since the report the Austrian Government has announced a number of reforms to safeguard police detainees and the setting up of a Group of Experts to examine other proposals on preventing ill-treatment; Amnesty International and the Austrian Government have been engaged in extensive correspondence on the subject; and, in May 1990, the European Committee for the Prevention of Torture[3] visited Austria and submitted a report to the Austrian Government in November 1990 which confirmed many of Amnesty International's findings.

The present report describes these developments and considers Amnesty International's concerns in the light of them.

The present report does not aim to reproduce the findings of the 1990 report and reference should be made to the 1990 report for full details. As the nature of the alleged ill-treatment has remained essentially the same, only individual case histories which illustrate particular points of concern have been included. However, Appendix I contains updates, where relevant, on the cases mentioned in the 1990 report. In almost all the cases the complaints of the victims were dismissed by the Public Procurator or the courts did not find in favour of the alleged victims. As national statistics show[4] this is what usually happens.

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1 AI Index: EUR 13/01/89.

2 As in the 1990 report, for the sake of brevity the general term "ill-treatment" will be used to include both "torture" and other "cruel, inhuman or degrading treatment or punishment".

3 Henceforth: CPT. The CPT's full title is the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The CPT is a committee of experts provided for under the terms of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. This treaty was adopted by the Council of Europe and came into force on 1 February 1989. The CPT report on Austria was published together with the Austrian Government's comments on 3 October 1991. A separate response by the Interior Ministry to those findings of the CPT report within the ministry's responsibility was sent to Amnesty International by the Interior Ministry.

4 See below: p.6.

Government response

On 8 January 1990 Amnesty International received a five-page response to the 1990 report from the Austrian Government[1]. Its five main points were:

1) In a decree of 15 September 1989[2], the Ministry of Justice had issued instructions to the effect that accusations against police officers of ill-treatment should be promptly and impartially investigated by a judge, unless the accusations were manifestly unfounded[3].

2) The decree also contained guidelines to the public procurators and courts on the manner in which the UN Convention against Torture's[4] prohibition of the use of evidence obtained through torture should be put into practice[5].

3) The lodging of counter-complaints against complainants is "contrary to what is suggested in the [Amnesty International] report, definitely not the rule but the exception. Moreover, such criminal complaints very rarely lead to convictions..."[6].

4) "The Austrian Government regrets that Amnesty International's report is entitled **Torture and ill-treatment** when it really refers to allegations of such acts which largely have remained unsubstantiated or even were refuted by objective investigations of independent courts."

5) The Austrian Government will take Amnesty International's recommendations into account in its considerations on reform of the Code of Penal Procedure[7].

On 23 January 1990, the Austrian Interior Minister, Dr Franz Löschnak, announced a number of interim measures "to prevent human rights violations". They included:

! **improved training of police officers.** In February 1990 the Interior Ministry issued a seven-page decree drawing the attention of police officers to detainees' rights and the steps to be taken should any detainee suffer any physical harm. The government said

1 Reproduced in full in Appendix II.

2 Amnesty International had asked the Austrian Government for a copy of the decree on 21 September 1989. As it was not sent until 8 January 1990 its details were not able to be included in the 1990 report.

3 See below: p.10.

4 Full title: United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It was adopted by the UN in December 1984 and came into force in June 1987.

5 See below: p.23.

6 See below: p.10.

7 See below: p.21.

that the decree and the issues raised in it are to be incorporated into the basic training of police officers:

> *[The decree] should be seen as a contribution to a partly necessary process among police officers of new thinking and awareness...In the present phase of increased insecurity among police officers, which has been caused by partly exaggerated public criticism, the issue should be given as much attention as possible, including the possibility of discussion...[T]his decree should...be considered in all basic training programs, in all forms of in-service training and, as extensively as possible, in internal meetings.*

! **unannounced visits by police doctors to police stations to make on-the-spot examinations of detainees.** This was provided for in the above-mentioned Interior Ministry decree. As yet no details are available to indicate to what extent it has been carried out.

! **an information sheet, outlining detainees' rights to be given to every detainee.** A booklet has been produced by the Interior Ministry, the Justice Ministry and the Probation Service, providing information on the rights of young people when detained by the police. The booklet is to be handed to every person of under 19 years of age upon his or her detention. A similar booklet for adult detainees is being prepared. In the meantime an information sheet is available outlining the rights of adult detainees. According to the government it is handed to all adults upon detention. The CPT recommended that information on detainees' rights be translated into other languages; this recommendation was accepted by the Interior Minister.

! **changes in disciplinary procedures.** The Austrian Government has submitted a proposal to Parliament to alter the Civil Service Law so that the dismissal of a police officer no longer requires the unanimous agreement of the members of the second-instance disciplinary tribunal.

! **the setting up of a Group of Experts to examine proposals on preventing ill-treatment.** No findings have yet been published by the Group.

At the time of the 1990 report Amnesty International had received reports of 128 separate incidents of ill-treatment affecting a total of 201 people since December 1984. Since its publication Amnesty International has continued to receive allegations of ill-treatment of police detainees in Austria. By July 1991 Amnesty International had received allegations concerning a further 48 incidents involving 62 victims. The pattern of ill-treatment described in the 1990 report continued; for example the majority of all alleged acts of ill-treatment took place in the first 48 hours of detention and over one third were allegedly undertaken with a view to coercing the victim to confess, or provide evidence relative to, a criminal offence. Amnesty International stands by the title given to the 1990 report. Although the organization is not in a position to

confirm or reject the accuracy of each individual allegation of ill-treatment received by the organization, the consistency and general credibility of the allegations gives reason to believe that the problem is not one of a few isolated incidents.

In a letter[1] to the Austrian Government Amnesty International referred to an interview by the head of the Vienna Special Branch (Sicherheitsbüro) with **Der Standard** newspaper, in which he and his deputy were quoted as saying that they had given instructions that there should be "an end to beating during interrogations" and that "the water bucket should not be used". The Austrian Government stated[2] that it did "not see how a reference of police officers to blows and a water bucket during interrogations would prove the use...of suffocation with plastic bags." The government said that it was not "fair to make such allegations publicly as long as they have not been substantiated". Amnesty International pointed out that some allegations at least seem to have been substantiated by the head and deputy head of the Sicherheitsbüro and also expressed the view that no distinction should be made between attempted suffocation by means of placing a plastic bag over a detainee's head and attempted suffocation by forcing a detainee's head under water. Both practices warranted the description "torture" and should not be allowed to occur. Amnesty International has called on the Austrian Government to make an inquiry into the interrogation practices employed in the Vienna Sicherheitsbüro.

[1] 20 August 1990.

[2] In a letter to Amnesty International of 9 November 1990.

Statistics[1]

In the 1990 report Amnesty International expressed its concern that no official statistics about complaints of police ill-treatment and about the results of the complaints were published on a regular basis. Since the report the government has provided a large number of relevant statistics in correspondence with Amnesty International and in answer to parliamentary questions. However, it is not always possible to determine to what extent the statistics refer to allegations of physical violence and to what extent they refer to other unauthorized acts by the police. For example, in January 1991, in response to a parliamentary question, the Interior Ministry gave figures concerning complaints made about the "inadmissible use of force by police officers". However, complaints about "inadmissible use of force" not only include complaints unrelated to ill-treatment (for example actions such as unlawful arrest or unlawful house searches: see section 2.1 of the 1990 report), but it also seems that the term does not cover all cases of alleged physical violence by the police. For example the Interior Minister said in July 1989 that in 1987, 90 people had made criminal complaints about the "inadmissible use of force" by police officers in Vienna. Yet, according to the Justice Ministry, 99 people had made criminal complaints against police officers in Vienna in 1987 for causing them bodily harm[2].

In a decree issued on 31 May 1991 the Ministry of Justice has instructed public procurators to provide the ministry with annual statistics on the number of criminal complaints made against police officers for "causing bodily harm" and related offences[3], and for "torture or neglect of a detainee"[4]. The latest draft of the "Security Police Law"[5] proposes that statistics on complaints made to the Administrative Tribunals[6] and criminal complaints against the police be contained in the annual Report on Security presented to Parliament by the Interior Ministry. **Amnesty International welcomes this proposal and urges that the statistics collected as a result of the decree of 31 May 1991 be included in the Report on Security.**

Government statistics have been tabulated overleaf.

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1 See section 1.2.1 of the 1990 report.

2 Under Article 83(1) of the Penal Code. Information given in a letter to Amnesty International in November 1990.

3 Articles 83 ff. of the Penal Code.

4 Article 312 of the Penal Code.

5 The Security Police Law aims to regulate the organization and duties of the police.

6 See below: p.7.

OFFICIAL STATISTICS RELEVANT TO ILL-TREATMENT

Period	Complaints to Int. Ministry	Criminal complaints	Subject of complaint	Convictions	Disciplinary measures
1983-1985 (inc.)	813	459	"Inadmissible use of force"	20	14
Gendarmerie	219	128		12[2]	7
Federal Police[1]	594	331		8[3]	7
1986-1988 (inc.)[4]	844	530	"Inadmissible use of force"	6	9
Gendarmerie	232	88		5[5]	8
Federal Police	612	442		1[6]	1
1988-1990 (inc.)[4]	989	666	"Inadmissible use of force"	7	5[9]
Gendarmerie	184	123		4[7]	3
Federal Police	805	543		3[8]	2
1984-1989 (inc.)	2622	1142	"Encroachment on detainees"	33[10]	26[11]
Gendarmerie	432	230		22	18
Federal Police	2190	912		11	8

1 Includes the Federal Security Force and Criminal Investigation Department.

2 11 involved "causing bodily harm" under Article 83(1) of the Penal Code.

3 All involved "causing bodily harm" under Article 83(1) of the Penal Code.

4 The year 1988 is included twice because the corresponding figures on convictions and disciplinary measures refer to the three-year period as a whole.

5 Includes four cases of "causing bodily harm" under article 83(1) of the Penal Code.

6 Did not concern ill-treatment.

7 All for "causing bodily harm".

8 Two cases of "causing bodily harm"; the other case did not concern ill-treatment.

9 37 cases were pending at the time the figures were announced.

10 131 cases were pending at the time the figures were announced.

11 31 cases were pending at the time the figures were announced.

Methods of complaint[1]

In the 1990 report Amnesty International expressed its concern that none of the three main methods by which a member of the public can complain about ill-treatment complied fully with the aims and provisions of the United Nations Convention against Torture. The only method which has been changed is that of making a complaint to the Constitutional Court. Details of these changes, which came into effect on 1 January 1991, were given in section 2.3.1 of the 1990 report. Essentially, initial responsibility for complaints about ill-treatment was removed from the Constitutional Court and placed within the competence of "independent Administrative Tribunals"[2]. Amnesty International expressed its concern that under the proposed changes alleged victims would have less time in which to make their complaint. Previously the victim had to complain to the Constitutional Court within six weeks of the ill-treatment. It had been proposed to reduce this period to two weeks for complaints to the Administrative Tribunals. However, in June 1990 the Austrian Parliament passed amendments to the General Law on Administrative Procedure which maintained the period during which a complaint can be lodged at six weeks.

The Administrative Tribunals will not have the power to award compensation to a victim of ill-treatment. Unless the authorities agree to pay compensation without court action the victim must seek compensation through the civil courts. It is unclear whether a decision by an Administrative Tribunal will be binding on the civil courts.

Some doubt has been expressed about the impartiality of the Administrative Tribunals because of the requirement that at least one-quarter of their members must consist of public employees. The UN Convention against Torture requires that any individual who alleges that s/he has been ill-treated or tortured should have his/her complaint examined promptly and impartially[3]. Dr Heinz Bachler, a member of the Vienna Tribunal, has written[4]:

> ***At the end of their period in office, assuming that they are not reappointed, most Tribunal members will be employed again by those very authorities whose activities they were previously responsible for examining...,for at the end of their secondment they will return to employment which has been kept open for them...Thus it is not possible to speak of an independent decision by a Tribunal member, even if s/he acts conscientiously on the basis of all known facts...After all, would an observer not be forced to come to the conclusion that...a Tribunal member who wishes to return to his***

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1 See section 2 of the 1990 report.

2 A complainant may however lodge an appeal against a decision of an Administrative Tribunal to the Constitutional Court.

3 Articles 13 and 16.

4 *Öffentliche Sicherheit*, July/ August 1991.

previous employment with a public authority will take decisions which are particularly agreeable to that authority.

Some Tribunal members, like Dr Bachler, are seconded from the police authorities. In the case of *Belilos*[1] (Switzerland) the European Court of Human Rights concluded that where the member of an administrative tribunal, in this case a Police Board, was liable to return to departmental duties "[t]he ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues...In short, the applicant could legitimately have doubts as to the independence and organisational impartiality of the Police Board, which accordingly did not satisfy the requirement of Article 6(1) [of the European Convention on Human Rights] in this respect." Article 6(1) of the European Convention states that "[i]n the determination of his civil rights...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

Amnesty International believes that a considerable number of complaints of police ill-treatment are justified. In this light the statistics on the previous page show that the lodging of a criminal complaint by a victim of ill-treatment is not an effective means of complaint. Furthermore, on 2 October 1990 the Austrian Constitutional Court held Article 268 of the Code of Civil Procedure to be unconstitutional; Article 268 provides that decisions of criminal courts are binding on the civil courts (to which the victim of ill-treatment must turn should s/he wish to obtain compensation). Before this decision the victim of ill-treatment could be confident that s/he would not have to prove to the civil courts those facts which were established by the criminal court. As a result of the Constitutional Court's decision, a conviction following a criminal complaint will no longer bind the civil court to accept the findings of fact established in the criminal proceedings.

The other two main concerns are:

1) that there is evidence that the investigation of a criminal complaint or of a complaint to the Interior Ministry is not carried out impartially; and

2) that would-be complainants are intimidated into not making a complaint by the practice of counter-charges.

Inadequacy of investigations

Lack of confidence that the investigation by police of alleged ill-treatment by other police officers will be carried out thoroughly and impartially has been given as a reason for not

[1] *Eur. Court H.R., Belilos judgment of 29 April 1988, Series A no. 132.*

choosing to lodge a criminal complaint with the public procurator or to make a complaint to the Interior Ministry. The basis for this belief is the claim that police officers tolerate malpractice by other police officers and are therefore unlikely to investigate complaints seriously. This view was supported in the reports presented to the Austrian Parliament in 1988 and 1989 by the Ombudsman's Office[1]. The report presented by the Ombudsman's Office in March 1990 noted some improvement:

> *The Ombudsman's Office has the impression that allegations of police ill-treatment are no longer trivialized by the authorities and are not primarily [viewed as] opportunities to lodge a criminal complaint of defamation [against the alleged victim]. The objectively necessary police inquiries are carried out and the results are handed over to the prosecuting authorities for decision. In some cases the prosecuting authorities have shown tendencies toward bias in coming to decisions on such cases. However, the cases known to the Ombudsman's Office no longer give reason to believe that the police simply do not bother to investigate [allegations].*

An example of apparently inadequate investigation is the case of Mustafa Ali[2] who was pushed through a pane of glass by a police officer[3] in a police station in Vienna on 22 March 1989 and suffered cuts to the face as a result. On 12 March 1990 the Public Procurator decided to drop criminal proceedings against the police officers, after an investigation had been conducted by the Vienna Police Presidium into the incident, because the medical evidence and the contradictory statements of Mustafa Ali, a fellow detainee and the police did not show the cause of Mustafa Ali's injuries. However, the Constitutional Court took Mustafa Ali's complaint more seriously. The police version of events was that Mustafa Ali had thrown himself through the glass. After receiving a report from a member of the Constitutional Court sent to the scene of the incident the court concluded that "without doubt it would require considerable force to break the thick and relatively small piece of glass. It would hardly be possible to gather the necessary impetus for this in the two-meter wide corridor." The Constitutional Court concluded that Mustafa Ali had been pushed by an unidentified police officer. In order to come to a conclusion as to whether Mustafa Ali's constitutional rights had been violated the Constitutional Court did not need to establish the identity of the offending police officer[4]. However, his identity would have to be established in order to bring a criminal prosecution. The Constitutional Court established that a number of police officers were present at the time Mustafa Ali was pushed into the glass. It can only be supposed that the offending police officer's identity could not be established because the investigation by the Vienna Police Presidium was not undertaken with sufficient determination.

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1 See section 2.2 of the 1990 report.

2 See 1990 report, p.20.

3 Members of the Federal Security Force and Criminal Investigation Department are commonly referred to in Austria as "police" to distinguish them from the Gendarmerie which is found outside the large towns. As in the 1990 report the general term "police officer" will be used to describe a member of any of the three forces.

4 See 1990 report, p.10.

In the decree issued on 15 September 1989[1] the Ministry of Justice issued instructions to public procurators to the effect that accusations against police officers of ill-treatment should be promptly and impartially investigated by a judge, unless the accusations are manifestly unfounded. A representative of the Interior Ministry subsequently clarified this and said that an investigating judge would not only be responsible for the direction of the investigation but also for the collection and hearing of evidence. Amnesty International welcomed this clarification as its concern with the system of investigating complaints related not to who was in charge of such investigations but how they were carried out.

It is hoped that the decree will result in greater impartiality in investigations, but Amnesty International does not yet have sufficient information on which to base any firm conclusions.

Intimidation of complainants

Since the 1990 report the Austrian Government has consistently denied that complainants are exposed to intimidation. The 1990 report included evidence which suggested that many victims of police ill-treatment were reluctant to lodge a criminal complaint for fear of a counter-complaint from the police and prosecution by the public procurator. Government figures showed that in the period 1986 - 1988, 45 per cent of those who had made a criminal complaint about "inadmissible use of force" had been either investigated or indicted as a result of having made a complaint. Statistics provided in response to a parliamentary question in January 1991 show that in 1988 - 1990, 30 per cent had been investigated or indicted. The city of Vienna was not included in these statistics as, at the time the figures were announced, statistics for Vienna were not available. However, in a letter to Amnesty International in November 1990 the Foreign Ministry provided figures concerning criminal complaints alleging that the Viennese police had caused the complainant "bodily harm" under Article 83(1) of the Penal Code. In the period 1986 -1988 (inclusive) 305 such complaints had been made, only one of which resulted in the conviction of the police officer[2]. Forty-five of the complainants were investigated as a result of a counter-complaint of defamation. Four complainants were indicted; two were convicted. Even though Article 83(1) is not the only article under which a police officer may be charged if he has used or threatened to use unjustified physical violence and even though "defamation" is not the only counter-complaint used by the authorities, these figures suggest nonetheless that there is a great disparity between the level of protection from intimidation given to complainants in the capital compared to that provided to complainants outside Vienna.

Amnesty International's concerns in this area are illustrated by the two alleged victims of ill-treatment by the Vienna Special Branch (Sicherheitsbüro) who were identified in the 1990 report as "A" and "B" because they feared reprisals. Within three weeks of the report appearing the Vienna Special Branch had taken steps to identify the two complainants. They were unable

[1] See above: p.2.

[2] 32 cases were pending at the time the figures were announced.

to identify complainant A but identified B. On 31 January 1990 they reported his identity to the Vienna Public Procurator. As a result, B and the police officers alleged to have ill-treated him were questioned by the authorities. In June 1990 the Public Procurator dropped the investigation of B's allegations and immediately began investigation of B on suspicion that, by making the allegations, he had committed the criminal offence of "defamation"[1] and "perjury"[2]. On 13 March 1991 Amnesty International wrote to the Austrian Government to express its concern that the decision to investigate complainant B for defamation would increase the fear held by potential complainants that they will be subject to reprisal as a result of making a complaint. In May 1991 the Austrian Foreign Ministry informed Amnesty International that on 13 March the Public Procurator had decided to drop any further proceedings against B. Both the Foreign and Justice Ministries deny that the attempt to uncover the identities of the two confidential informants and the subsequent criminal investigation of one of them was motivated by a desire to intimidate them. The Foreign Ministry has justified the decision to discover the identities of Amnesty International's confidential informants by reference to an undertaking given by the Interior Minister, Dr. Löschnak, that all the allegations contained in the 1990 report would be investigated. At the time it was made, Dr. Löschnak's undertaking seemed to Amnesty International to be merely a reiteration of the Austrian Government's policy - as explained to representatives of Amnesty International by Austrian Government representatives in Vienna in November 1987 - that the Austrian authorities would investigate all individual allegations of police ill-treatment raised with the Austrian Government by Amnesty International. The Foreign Ministry's interpretation of this undertaking seemed to indicate that the policy of the Austrian Government was not merely to investigate those cases raised by Amnesty International with the Austrian Government but also to discover the identities of people who give information to the organization in confidence because otherwise they fear prosecution for defamation. In response to an inquiry by Amnesty International on this issue the Foreign Ministry stated that the "Austrian authorities certainly have no intention or policy to uncover the identity of those persons...who give information to Amnesty International". However, the Ministry also stated that the uncovering of the identity of complainant B was necessary to investigate his allegations. Amnesty International recognises that the Austrian authorities are required to investigate allegations of police ill-treatment. However, the organization believes that in a situation where potential complainants fear intimidation as a result of making a complaint the priority for the Austrian Government should be to build confidence in the complaints mechanisms available to those who allege police ill-treatment and not to take action which may decrease confidence. Amnesty International has suggested ways in which public confidence may be increased. For example, it has brought to the Austrian Government's attention Principle 33 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Paragraph 3 of Principle 33 states that "confidentiality concerning...the complaint [about ill-treatment] shall be maintained if so requested by the complainant." The aim of this

[1] Article 297(1) of the Penal Code.

[2] Article 288(1) of the Penal Code.

paragraph is essentially to protect prisoners from intimidation arising from the making of a complaint. Although someone making a complaint from a state of liberty about ill-treatment during a previous period of detention (as is usually the case in Austria) might not need the same degree of protection as a prisoner, the Principle reflects the fact that confidentiality is recognized as one means of taking steps, as required by Article 13 of the UN Convention against Torture, to protect complainants from intimidation. Amnesty International has also suggested that fear of counter-charges could be substantially reduced by an instruction from the Justice Ministry to public procurators only to prosecute complainants where there is persuasive corroborating evidence in addition to testimony of police officers.

Under Austrian law the public procurator is obliged to pursue all allegations of criminal acts brought to his/her attention[1]. Thus, if a counter-complaint of defamation is lodged by police officers accused by a detainee of ill-treatment, the public procurator has no choice but to order an investigation of the complaint. The investigation will normally be carried out by the police and this prospect in itself reportedly has an intimidatory effect on would-be complainants.

The Austrian Government's initial view was to deny that there was a problem in regard to the intimidation of complainants[2] and to assert that the only person who has something to fear is the person who knowingly makes false allegations of ill-treatment:

> *According to Austrian criminal law a person is guilty of defamation if he exposes another person to the danger of official prosecution by falsely accusing him of...a punishable act or of breach of official duty, if he knows that the accusation is false...Criminal liability only exists if the suspect knows that his accusation is false. It is only seldom that the public procurator can prove this.*

However, in cases known to Amnesty International, proof of such knowledge has mainly been found in the evidence of police officers allegedly involved in the ill-treatment, or present at the time, who testify that the ill-treatment did not occur. Because eye-witnesses apart from the police officers and the alleged victim are rare, it is very difficult for the alleged victim to counter this testimony. Once the court has been satisfied that no act of ill-treatment took place, a victim who alleges that it did can only be assumed to "know" that his allegation was false[3].

The Austrian Government asserts that, by prosecuting only those persons whom the Public Procurator believes to have knowingly made false accusations, it is acting within the framework allowed by Article 13 of the UN Convention against Torture. Article 13 states:

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1 Code of Penal Procedure, Article 34(1).

2 See above: p.2.

3 See cases of Christian Scharkaroff (1990 report, p.37) and Mario Stangl (1990 report, p.16); cf. the case of Wilhelm Sommer (1990 report, p.4) who was acquitted because the court could not establish whether the act of ill-treatment had or had not taken place.

> *Each State Party shall ensure that any individual who alleges he has been subjected to torture[1] in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.*

Amnesty International believes that it is the institution of legal proceedings against a large number of complainants which intimidates would-be complainants from making well-founded complaints. Legal proceedings consist not only of trial, but also of investigation and prosecution. Reportedly, the prospect of further investigation dissuades some, and the mere possibility of prosecution (with attendant legal costs) dissuades others, from complaining. By their nature, both investigation and prosecution occur before the case comes to court and thus the intimidation begins at a stage before a court has adjudicated on the question of whether the complainant made knowingly false accusations.

On 31 May 1991 the Ministry of Justice issued a decree to public procurators which stated:

> *Amnesty International reproaches Austria with not fulfilling its obligations under Articles 13 and 16(1) of the UN Convention [against Torture] because of the intimidation of complainants by criminal proceedings being taken against them.*
>
> *The European Committee [for the Prevention of Torture] also took up this issue in its report...Its view was that measures should be taken so that people who have been ill-treated are not discouraged from complaining...*

The decree repeats the view that only where there is sufficient evidence to show that the complainant "knew" that his/her allegations against the police were false should s/he be charged with defamation. The decree also gives a number of other instructions to public procurators when they are faced with the possibility of instituting criminal proceedings against a complainant on suspicion that s/he may have committed the offence of defamation under Article 297 of the Penal Code:

1) In general, no criminal proceedings should be instituted while the complainant's allegations are being investigated by a judge in line with the Justice Ministry's decree of 15 September 1989[2]. "Any appearance that the complainant is being intimidated as a result of his allegations is to be avoided..."

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[1] By virtue of Article 16(1) of the UN Convention against Torture Article 13 applies not only to torture but also to other forms of cruel, inhuman and degrading treatment.

[2] See above: p.2.

2) Allegations which are manifestly incredible should not lead to a prosecution for defamation because such allegations do not expose the police officer to a real danger of official prosecution[1].

3) "Allegations which are made in the course of a defence to criminal prosecution, are to be treated tolerantly."

4) If, as a result of investigation in line with the Justice Ministry decree of September 1989, proceedings against the police officers are dropped for lack of evidence, then provided that the allegations were a possibility - even though they could not be proved -no criminal proceedings should be instituted against the complainant under Article 297 of the Penal Code.

Amnesty International welcomes the decree by the Justice Ministry of May 1991 but reserves further judgment until it considers the way it is put into effect. As Article 297 of the Penal Code is not the only article used to prosecute people who have made complaints about police ill-treatment, Amnesty International urges the Austrian Government to apply similar principles to other articles of the Penal Code, for example Article 288, "perjury". Amnesty International continues to believe that complainants should have recourse to at least one effective, impartial channel of complaint which provides adequate redress, including an enforceable right to fair and adequate compensation.

[1] Article 297 of the Penal Code states: *Whoever exposes another person to the danger of official prosecution by knowingly casting false suspicions that the person has committed a punishable act...shall be punished...*

Ill-treatment in the initial detention period[1]

The 1990 report said that of the 128 separate incidents of ill-treatment reported at that time to Amnesty International 106 were alleged to have taken place within the first 48 hours of detention. Despite reforms this pattern has continued. Of the further 48 incidents reported to Amnesty International 36 were alleged to have taken place within the first 48 hours of detention.

The CPT report says (page 7):

> *The CPT heard many allegations of ill-treatment of detainees during the initial period (i.e. up to 48 hours) of police custody. These allegations came from prisoners in the different establishments visited, from non-governmental organizations and from various other sources. The CPT was struck by the large number and the consistency of the allegations, as well as by the contrast with the almost total absence of allegations of ill-treatment in prison establishments (including police jails). Medical information consistent with certain of the allegations was made available to the CPT. Taking into account also the weaknesses in some of the basic safeguards against ill-treatment noted in the course of the visit, the CPT has reached the conclusion that there is a serious risk of detainees being ill-treated while in police custody.*

People detained on suspicion of committing a criminal offence can be kept in the custody of the police for a maximum of 48 hours before either being released or handed over to the custody of a court[2]. Like Amnesty International, the CPT received no reports of ill-treatment of detainees in the custody of a court. However, in regard to police custody the CPT report stated (page 22):

> *In the course of the interviews...a considerable number of allegations of ill-treatment by the police were made. Many prisoners spoken to stated that they knew of cases of ill-treatment by the police, and a sizeable minority reported that they themselves had been subjected to ill-treatment while in police custody. This ranged from slaps with the flat of the hand to punches, kicks or being struck with truncheons or heavy books during interrogations. A number of prisoners independently identified the interrogation holding cells of the Security Bureau (Sicherheitsbüro)[3] in Vienna as the scene of regular physical abuse. It was alleged that drug addicts in particular were subjected to ill-treatment. Allegations were also made of ill-treatment in police stations.*
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> *The [CPT] delegation saw files containing medical reports on injuries found on prisoners arriving at the Vienna Police Jail (after being taken to a police station) or after questioning at the offices of the Vienna Security Bureau (which is located in*

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[1] See section 3 of the 1990 report.

[2] From 1 January 1991 persons detained on suspicion of committing a minor misdemeanour governed by the Administrative Offences Code can only be held by the police for a maximum of 24 hours.

[3] Translated by Amnesty International both in this update and in the 1990 report as "Special Branch".

premises adjacent to the Jail). The delegation noted in particular the file of one prisoner who was diagnosed as having a perforated eardrum; it was alleged in the file that this was due to him having received blows to the side of the face at the offices of the Security Bureau. The medical report drawn up in April 1988 also mentioned contusions on the chest and in the lumbar region.

Safeguards against ill-treatment[1]

The 1990 report described a number of procedural and legislative changes introduced since 1988 to safeguard the rights of detainees during the initial period of detention. Its conclusion was that the continuing reports of ill-treatment during the first 48 hours of detention indicated that these safeguards may not always have been observed and may not be sufficient in themselves to provide detainees with adequate protection against abuses. The report pointed out for example that the provision that a detainee can renounce the right to inform a third person of his/her detention by signing a form to this effect was open to abuse. As some alleged victims of ill-treatment have stated that they signed confessions to criminal offences as a result of ill-treatment, it was not inconceivable that the police would use or threaten violence to force someone to sign a form renouncing the right to contact a third person. In this respect the CPT report states (page 26):

The delegation's talks with both prisoners in the Court of First Instance Prison[2] *and police officers raised doubts as to whether these provisions were being properly applied in all cases.*

Some prisoners alleged that they had not been informed of their right to have someone notified of their detention by the police, whereas others alleged that permission to notify someone had been expressly refused. Further, one prisoner alleged that he had been coerced into signing a form renouncing his right to inform someone of his arrest.

Amnesty International recommended, and continues to recommend, that the Austrian authorities ensure that present safeguards are strictly observed and that they should not place exclusive emphasis on procedural and legislative safeguards but also look at additional practical measures to prevent ill-treatment during the initial detention period. Examples given in the 1990 report were: the audio or visual tape-recording of questioning; closed circuit television monitoring of the questioning of suspects; routine medical examination of a detainee immediately after detention and immediately before release or immediately after transfer to the custody of a court; and observation holes in the doors of rooms used for questioning suspects. The Interior Minister has made no comment on these suggestions except to express reluctance to introduce a system of tape-recording interviews with detainees. In response to the same recommendation by the CPT the Interior Minister said that it was not

[1] See section 3.1 of the 1990 report.

[2] "Landesgerichtliches Gefangenenhaus" - translated by Amnesty International in the 1990 report as "Provincial Court Prison".

a recommendation which could be achieved in the short-term and that the proposal needs to be considered within the context of reform of penal procedure. In the light of the fact that the introduction of tape-recording interrogations is a measure which would be relatively simple and not costly to implement, the Interior Minister's reluctance to act on the proposal is difficult to understand.

The Austrian Government has not expressed any view on the proposal for more systematic medical examination of detainees. In its decree of February 1990[1] the Interior Ministry reminded police officers of the requirement that all detainees be examined by a police doctor no longer than 24 hours after detention with a view to assessing their physical fitness to remain in detention. Despite this decree, the CPT were informed in May 1990 that in Vienna there was no systematic medical examination of police detainees. **Amnesty International continues to believe that the Austrian Government should look at the possibilities of offering detainees the right to be medically examined immediately after detention and immediately before release or immediately before being handed over to the custody of a court. This is particularly important in those institutions, such as the Vienna Sicherheitsbüro, about which a large number of serious allegations have been made.**

The CPT recommended that a police detainee should have the right to be examined by a doctor of his/her choice if s/he wished. In response the Interior Minister has announced that in future it will be possible for the detainee to have a doctor of his or her choice present at any examination carried out by a police doctor. However, such examinations would not necessarily take place immediately after detention and immediately before release.

To combat the problem of ill-treatment in the initial period of police custody the CPT also recommended (*inter alia*) the introduction of guidelines for the conduct of interrogations by the police and that a systematic record be kept of the interrogation of any detainee. This resulted from the Committee's concern that there were no such guidelines in existence. The CPT report states (page 29):

> *...police officers would appear to have a considerable degree of discretion on such matters as informing the detainee of the identity of police officers present during the interview, the length of a given interview, rest periods between interviews, the place(s) in which an interview may take place, whether the detainee may be required to stand while being questioned, etc.*

The Interior Minister replied:

> *It might be possible to introduce guidelines on the conduct of (criminal) investigations through the use of the Interior Minister's right to issue decrees (in agreement with the Justice Minister) which is provided for in the Security Police Law proposed by the government.*

[1] See above p.3.

In its comments on the CPT report the Austrian Government announced a "new custody record" which would "show all significant details of a person's detention".

Inadequate judicial supervision of criminal investigations[1]

As in the 1990 report, none of the cases of ill-treatment reported to Amnesty International since the report have taken place in the presence of a public procurator or investigating judge. In the 1990 report Amnesty International noted that contrary to the provisions of the Code of Penal Procedure the police often undertake the sort of investigation which should take place within the framework of "preliminary inquiries" or "preliminary investigation" and without the supervision of a public procurator or investigating judge. The organization concluded that if the Code of Penal Procedure was put into practice, to ensure adequate judicial supervision of the process by which detailed evidence is obtained from a suspect, this would reduce incidents of ill-treatment. In particular Amnesty International recommended that the ability of the police to hold a person in custody for 48 hours without written authority should be reserved for exceptional cases; and that it should be made clear to the police that the first 48 hours in custody without judicial supervision should not be viewed as an opportunity to gather detailed evidence or to conduct an intensive investigation of the kind envisaged during the *preliminary inquiries* or *preliminary investigation* procedures. These recommendations are consistent with the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment which states:

> *Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority*[2].

As Amnesty International had received reports that ill-treatment had also taken place during *preliminary inquiries* and *preliminary investigation* when the suspect had been handed back to the police for questioning (under the public procurator's or investigating magistrate's authority, but not in their presence), the organization recommended that, wherever possible, interrogation of a suspect during *preliminary inquiries* or *preliminary investigation* should take place in the presence of a public procurator or investigating judge. The CPT report described the case of one person who had been ill-treated after being handed back to the police for questioning (pages 22 - 23). The case also shows the value of systematic medical examination of detainees[3]:

> *The case of a prisoner whom the delegation met in the Vienna Court of First Instance Prison also deserves particular mention. This prisoner had been admitted to the prison on 14 November 1989, but had been returned to police custody on 10 January 1990 for*

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1 See section 3.2 of the 1990 report.

2 Principle 4.

3 See above, p.18.

further questioning. He alleged that he had been physically ill-treated by the police (punched and struck on the head with a heavy book) on that occasion. The prisoner's medical file in the Court of First Instance Prison - to which the delegation was granted access - is consistent with this allegation; whereas the medical report drawn up when the prisoner was first admitted to prison recorded no injuries, injuries were noted in the course of a medical examination carried out by a prison doctor on 11 January 1990 following the prisoner's return from police custody.

The medical report (dated 19 January 1990) stated that bruising had been found on the right hand side of the prisoner's chest, large red marks on both his kneecaps and bleeding on the outside of both his thighs. This part of his body was very painful when touched. The prisoner complained of headaches. The top of his head was painful when touched and a slight swelling was found on his scalp.

According to a report dated 12 January 1990 consulted by the delegation, the prisoner said that when he was questioned at the Lower Austria Security Bureau he received blows to the head, the chest, the kidneys and the legs, that he was forced to kneel for a long period and was dragged by his hair, that he eventually lost consciousness and that when he recovered consciousness, he was examined by a police doctor, after which the questioning renewed [sic], and that at no time was he served any food.

The prisoner instituted legal proceedings concerning his treatment and the matter is currently before the Austrian courts.

In the course of the delegation's talks with the Director and medical personnel of the Court of First Instance Prison, accounts of the numbers of prisoners admitted to the prison with injuries varied somewhat (one per month, one per week, sometimes several a week). In any event, the delegation detected during these talks a general uneasiness about the treatment received by prisoners while in police custody.

The Director of the Vienna Police Jail said there were one or two cases a month of prisoners received from the Vienna Security Bureau who displayed injuries.

The Justice Ministry has proposed to legalize the present practice by which the police undertake the sort of investigation which should take place within the framework of *preliminary inquiries* or *preliminary investigation*. In its most recent contribution[1] to the debate on reform of the Code of Penal Procedure the Justice Ministry has proposed that there should be three forms of investigation:

1) Police inquiries. This would be sub-divided into two stages. The first stage would be the general collecting of information to establish, for example, whether there are sufficient grounds to suspect an individual of a crime. Any statements made by a detainee during this first stage

[1] Dated 5 March 1991.

would be inadmissible in court as evidence. The second stage, "preliminary proceedings by the police", would be conducted by a "director of investigations". The detainee would be warned that s/he is accused of an offence and would be given information about his/her rights. Any statements made during this second stage would be admissible in court as evidence. The second stage could be completed during the first 48 hours in police custody - the period during which detainees are most at risk from ill-treatment.

2) Preliminary proceedings by the Public Procurator. This would occur when inquiries are made by the "director of investigations" on behalf of the Public Procurator. Statements made by the detainee would be admissible in court as evidence.

3) Judicial preliminary investigation. This would take place under the responsibility of an investigating judge and would only occur when the investigation is expected to be "especially difficult" or "especially extensive". The investigating judge would only undertake the investigation personally in "exceptional circumstances"; otherwise the collection of evidence would be the responsibility of the director of investigations. Evidence so collected would be admissible in court.

The director of investigations would be a "police official". Normally s/he will be expected to have "substantial knowledge of criminal law and criminal procedure". For cases of particularly serious crime the director of investigations will be someone who has completed a course of study in law.

The Justice Ministry believes that the director of investigations will "guarantee that evidence is collected in a proper way and thus cut the ground from under the constantly reiterated allegation that ill-treatment has been used by the police to coerce certain statements." Amnesty International does not believe that there is any evidence to support this conclusion. As the reforms effectively legalize present practice, there is no reason why the pattern of reported abuses which take place under present practice would not continue. The fact that some members of the police force will be designated "directors of investigation", empowered to collect evidence, will not in itself provide a guarantee that detainees will no longer be ill-treated to obtain evidence. **If the Austrian authorities wish to reform the Code of Penal Procedure so that investigating magistrates and public procurators are relieved of much of their present formal responsibility for conducting investigations, additional safeguards must be provided for detainees, for example by banning the use of uncorroborated confessions[1] or providing detainees with the right to be accompanied by a lawyer during interrogation. If such safeguards are not provided there is no reason to believe that allegations of police ill-treatment to coerce evidence would not continue.**

[1] See below: p.27.

The CPT recommended that the Austrian Government should give urgent attention to the possibility of allowing the detainee's lawyer to be present during any interrogation. The Interior Minister stated that such a proposal could only be considered in the process of reform of the Code of Penal Procedure. The response by the Austrian Government to the CPT report stated that the Federal Ministers of Justice and the Interior intended "to make provision for more effective participation by the defence counsel at earlier stages of the proceedings" as part of this reform.

Evidence obtained through torture and ill-treatment[1]

As in the 1990 report, over one third of the reports of ill-treatment received since the report have alleged that the ill-treatment was carried out with a view to coercing information, often confessions. The CPT reported one such case (page 23):

> *...one of the two persons being held at the Vienna Police Jail at the time of the delegation's visit for the purposes of questioning by detectives of the Security Bureau, stated that he had been slapped in the face several times in the course of his interrogation. The first interrogation, according to the detainee, lasted only ten minutes. He was informed that his interrogation would start the next day and that without a confession from him, he would be seriously beaten. The detainee indicated to the delegation that he had not been ill-treated during this subsequent interrogation, having made a "complete confession".*

In the 1990 report Amnesty International stated its concern to be the relative ease with which evidence obtained through torture and ill-treatment could be produced in court. Amnesty International argued that this was contrary to international standards including Article 15 of the UN Convention against Torture which states that "any statement which is established to have been made as a result of torture shall not be invoked in any proceedings..."

The Justice Ministry's decree of 15 September 1989[2] contained guidelines to public procurators and courts on the way in which the prohibition in the UN Convention against Torture on the use of evidence coerced through torture should be put into practice. The guidelines are binding on the public procurators but - because of the independent status of the judiciary - they are not binding on the courts as they have not been enacted as law.

The guidelines recommend that in cases where it is alleged that statements have been coerced through torture or ill-treatment, the clarification of this allegation - through an investigation - should be given priority. In general, the public procurator should wait until the allegation has been clarified before drawing up an indictment against the person to whom the allegedly coerced evidence relates.

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[1] See section 3.3 of the 1990 report.

[2] See above, p.2.

The guidelines further recommend that a public procurator should oppose the use in court of any evidence obtained through torture and ill-treatment and - if such evidence is accepted by the court - to appeal for the annulment of the verdict.

In the 1990 report Amnesty International expressed its concern that although international human rights instruments such as the UN Convention against Torture were, in theory, directly enforceable in Austrian law, practice suggested that any attempt to base a defence or appeal directly on provisions of this Convention would fail[1]. While the Austrian Government does not deny that some provisions of the Code of Penal Procedure in effect preclude such a defence or appeal, it believes that in practice the provisions of the UN Convention against Torture are already provided for by the Code of Penal Procedure and therefore there is no need for direct reliance on the Convention:

> *The fact that an infringement...of Article 15 of the UN Convention against Torture cannot be contested by seeking an annulment [of the verdict] should of course not lead to the conclusion that the provisions of the Convention are not practically applicable in the Austrian legal system. Statements which are established to have been made as a result of torture are subject to the [provisions] of Article 15 of the Convention and may therefore not be read out or produced [in court] according to Article 245(1), fourth sentence of the Code of Penal Procedure[2], or Article 252(1) & (2)[3] nor be used as evidence in a conviction of the ill-treated person. Should however a court use such a statement in criminal proceedings, the accused - or also the Public Procurator - can oppose the hearing of the evidence and, if necessary, appeal against the verdict according to Article 281(1)(4) of the Code of Penal Procedure[4].*

The view that the current provisions of the Austrian Code of Penal Procedure are sufficient to exclude evidence obtained through torture is contentious. The opinion of a leading authority on Austrian criminal law, Dr. Christian Bertel, is:

> *In general, improperly obtained evidence...can be read out in the trial and assessed in the judgment; except in those not very numerous cases where the law declares the improperly obtained evidence to be "invalid"[5].*

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1 See 1990 report, pps. 33 & 34.

2 "In this case [if the accused makes a statement in court at variance with his previous statements]. . .the President [of the court] can read out the transcript of his previous statements in full or in part."

3 Article 252 (1) lists the occasions on which statements made by co-accused and witnesses may be read out, including when in court they make statements at variance with previous statements made to the investigating authorities. Article 252(2) provides that other evidence of importance for the case must be read out unless both prosecution and defence forego the provision.

4 Quotation from an Austrian Government letter to Amnesty International dated 9 November 1990.

5 *Bertel*, Strafprozeßrecht (1990), p.88.

Article 202 of the Austrian Code of Penal Procedure states that "promises, misrepresentations, threats and means of coercion may not be used to make the accused provide confessions or other information". However the Code does not declare a statement obtained contrary to Article 202 to be "invalid".

The Austrian Government's view is that Article 281(1)(4) is adequate to cover situations where coercion has been used to extract evidence. Article 281(1)(4) allows for annulment of the verdict in the following circumstances:

> *Mistakes in the trial are grounds for annulment of the verdict...if the court infringes a provision which protects the interests of the prosecution or the defence, and if the appellant has already objected to the mistake during the trial*[1].

That it was not widely understood that Article 281(1)(4) could be used in this way can be seen in the Justice Ministry's decree of 15 September 1989[2]. The decree states that at the time of Austria's ratification of the UN Convention against Torture, July 1987, "the Austrian legal system did not provide for a prohibition of evidence in the sense of Article 15 of the Convention." Yet Article 281(1)(4) was already in existence at that time. The decree then goes on to say that this was the reason why, when it ratified the Convention, "the Republic of Austria declared *inter alia* that it viewed Article 15 as the legal basis for the provision that statements which have been established to have been made as a result of torture shall not be invoked [as evidence]." The decree instructs public procurators to appeal on the basis of Article 281(1)(4) should they have reason to believe that evidence had been accepted by the court in contravention of Article 15 of the Convention.

However, Amnesty International's main concern was not that it was theoretically impossible to appeal on the basis that the appellant had given a statement as a result of being ill-treated, but that those involved in the administration of justice in Austria did not implement adequately the UN Convention against Torture and that Article 15 of the Convention had an ambiguous position in Austrian penal procedure given the Austrian courts' reluctance to allow some international human rights to be directly invoked in court[3]. That this continues to be the case seems to be confirmed by the case of Qani Halimi-Nedzibi where the court did not even recognize the possibility of excluding evidence obtained through physical coercion. Qani Halimi-Nedzibi was arrested on 19 April 1988 on suspicion of committing drug-related offences. On 19 and 20 April he was questioned by detectives from the Lower Austria Drugs Squad. He was then handed over to the custody of the Vienna Provincial Court. In the following days he was taken back to the offices of the Lower Austria Drug Squad for further questioning. He alleges that a police officer ill-treated him in order to force him to sign a confession which had been

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1 *Bertel*, p.218.

2 See above p.2.

3 See case of Norbert Kritsch, 1990 report, p.33.

prepared by the police. He alleges that he was beaten around the head, punched in the stomach and that his head was forced into a bucket of water. The police officer denies ill-treating Qani Halimi-Nedzibi.

Qani Halimi-Nedzibi was convicted of various drug-related offences by Vienna Provincial Court on 4 July 1990 and sentenced to 20 years' imprisonment. Four witnesses alleged that the same police officer had used similar ill-treatment to force them to give evidence relevant to the prosecution of Qani Halimi-Nedzibi. Qani Halimi-Nedzibi's lawyer requested that statements obtained by the police officer should be struck from the record and not considered in court as there was *prima facie* evidence that they might have been obtained by the use of physical duress. The court refused this application because, *inter alia*, "Austrian law does not recognise such a procedure"[1]. Qani Halimi-Nedzibi's lawyer appealed against this decision because he believed that it conflicted with the provisions of Article 15 of the UN Convention against Torture. On 4 July 1991 the Supreme Court in Vienna (Oberster Gerichtshof) rejected his appeal[2].

Amnesty International welcomes the Justice Ministry decree of September 1989, but - in light of the continuing ambiguous position of Article 15 of the UN Convention against Torture in legal practice - continues to urge that the provisions of Article 15 be made an express part of the Code of Penal Procedure.

In correspondence with Amnesty International the Austrian Government has repeatedly drawn attention to the fact that under Article 15 of the UN Convention against Torture it is only evidence which has been established to have been made as a result of torture which is prohibited from being invoked as evidence. In the government's view any such evidence would not be considered by a court. However, the 1990 report pointed out that in the light of the fact that eye-witnesses to ill-treatment are rare, apart from the victim and the police, it is clearly difficult for the victim to "establish", that is prove to the court, that s/he was ill-treated. The report recommended that the Austrian authorities look at ways of addressing this difficulty, for example by a provision that in any cases where there is *prima facie* evidence that the accused or witnesses were subject to ill-treatment to induce them to make statements, the court should not consider those statements unless the public procurator can satisfy the court that ill-treatment did not take place. The government has not commented on this recommendation nor otherwise indicated that it intends taking steps in this direction. However, in a recent case a court did not accept the validity of a confession because it regarded the victim's allegations of torture as a

[1] The other reasons given by the court for rejecting the application were that: "...we are concerned here with people who are involved in these criminal proceedings, most of them are being, or have been, subject to criminal prosecution, and during the collection of evidence these allegations [of ill-treatment] have already been examined." However, a substantial number of the allegations were made for the first time during the trial itself and therefore could not have been investigated.

[2] At the time of going to press the written judgment of the Supreme Court was not available.

"possibility [which] could not be excluded". The case concerned an 18-year-old[1] who was detained by police officers in January 1990 on suspicion of attempted theft. The victim alleged that five or six police officers made him undress completely, secured his hands behind his back, pushed sharp objects underneath his fingernails, burned him with a lighted cigarette and beat his genitals with a ruler. He alleges that this treatment lasted from between approximately 6.00pm and 7.00pm until "late at night" and that other police officers who did not take a direct part in the alleged torture watched and imitated his cries of pain.

As a result of the alleged torture the victim agreed to sign a confession in which he implicated himself and two friends in a number of break-ins and attempted thefts.

When he was handed over to the custody of the Vienna Juvenile Court he was questioned by an investigating judge who noticed signs of injury on the victim's body and ordered that he be medically examined. The examination was carried out the same day by two doctors from the Institute of Forensic Medicine of Vienna University. The examination established six marks of second to third degree skin burns on the left side of the victim's back. On the second and fourth fingers of one hand signs of bleeding beneath the nails were established. A bruise and swelling were found on the penis, which were considered by the examining doctors to be the effects of being beaten with a blunt instrument. The examination also established scratch marks in the centre of the chest. The doctors found that the injuries could have occurred during the time the victim was held in police custody. At the victim's trial police officers stated that he had not been injured when they arrested him. The police officers involved in the accused's interrogation denied having ill-treated the victim in any way. However, the court found that the detainee had been forced to remain naked for a period "much longer than that necessary to conduct a search of him or his clothing".

Apart from the confession there was no material evidence, so that once the court refused to accept the validity of the confession the victim could only be convicted of those offences to which he admitted in open court.

The Vienna Juvenile Court also declined to accept the public procurator's application to extend the indictment to include the accusation that the defendant had committed the offence of "defamation" (under Article 297 of the Penal Code) by making the allegations of torture.[2]

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[1] Who does not wish to be publicly identified.

[2] Preliminary inquiries were made into the victim's allegations, a total of four police officers being suspected of ill-treating him and giving false testimonies in court. Criminal proceedings against two other police officers also included in the allegations were dropped at the end of June 1990 owing to lack of evidence. As a result of these preliminary inquiries the Vienna Public Procurator brought charges on 16 January 1991 against three of the four police officers for the crimes of coercion and aggravated coercion (Articles 105 and 106 of the Penal Code), torture or neglect of a detainee (Article 312) and perjury (Article 288). The fourth police officer was charged with perjury only. The police officers were acquitted on 25 July 1991. The Public Procurator initially appealed against the acquittal but later, after examining the written verdict of the court, withdrew the appeal.

The 1990 report drew attention to the sometimes excessive reliance placed on confessions in securing convictions. This has been criticized by some, including a representative of the Interior Ministry, as one of the causes of ill-treatment. In a recent interview[1] the Justice Minister said that he thought that in Austria a confession by the accused was given too much importance in solving crime, that the confession should only be seen as one of a number of means of solving crime and that statements by the accused should not be given an exaggerated importance.

In the light of the fact that a large number of alleged victims of ill-treatment have stated that the ill-treatment was used to extract information from them, Amnesty International recommends that, unless and until adequate safeguards are in place to address the concerns detailed above about the coercion of confessions and other statements, the Austrian Government should consider banning or restricting the uncorroborated use of confessions in court.

[1] *Salzburger Nachrichten*, 6 April 1991.

Conclusion

The record of the Austrian Government on the concerns expressed in the 1990 report has been mixed. On the one hand the Ministry of Justice has introduced legal reforms in an effort to protect the rights of detainees and reduce counter-complaints against complainants. On the other hand the reforms seem to be sometimes ignored or to be inadequate, in themselves, to reduce incidents of ill-treatment. The CPT's conclusion that "there is a serious risk of detainees being ill-treated while in police custody" lends weight to this view.

Amnesty International believes that the Austrian Government should give priority to ensuring that reforms are implemented, improving public confidence in the complaints mechanism and building a system of practical safeguards against ill-treatment to complement the legal safeguards.

The specific recommendations made in this update are:

! complainants should have recourse to at least one effective, impartial channel of complaint which provides adequate redress (see page 15);

! the introduction of practical safeguards against ill-treatment, such as the tape-recording of interrogations (see page 17);

! the right of detainees, especially those held in police stations which have a record of complaints of ill-treatment, to be medically examined immediately after detention and immediately before release or immediately before being handed over to the custody of a court (see page 18);

! amendments to the Code of Penal Procedure making Article 15 of the UN Convention against Torture an express part of the Code (see page 25); and

! the banning or restricting of the use of uncorroborated confessions in court (see pages 22 and 27).

Appendix I - Updates on individual cases mentioned in Amnesty International's 1990 report

This appendix contains updates on individual cases mentioned in the 1990 report. It does not contain updates on all the individual cases as in some there have been no further developments since the report. An update on the case of Mustafa Ali is given in the main body of the text[1]

Unless otherwise indicated quotations are from information provided to Amnesty International by the Austrian Government.

Ernst Dotzler [2]

Ernst Dotzler, a violinist with the ORF (Austrian Radio) Symphony Orchestra, alleged that he had been beaten by two police officers in the early hours of 22 March 1989. Hospital doctors had subsequently diagnosed bruising under the right eye and a perforated ear drum.

Investigation (Vorerhebungen) of Ernst Dotzler on suspicion of "defamation" and "resistance to state authority" was dropped because "the police officers' portrayal of the facts seemed implausible".

The Vienna Public Procurator indicted the two police officers alleged to have ill-treated Ernst Dotzler for "bodily harm"[3] and "grievous bodily harm"[4]. On 6 February 1991 they were acquitted by Vienna Provincial Court. The court's view was that there was insufficient evidence to convict.

Walter Jedinger [5]

Walter Jedinger alleged that in October 1987 he was kicked and nearly suffocated with a plastic bag by police officers in order to force him to sign a confession to a number of criminal offences.

Walter Jedinger submitted an application to the European Commission of Human Rights in Strasbourg alleging ill-treatment by the police. In March 1991, the Commission, by a majority, declared his application to be inadmissible for lack of evidence.

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1 See above: p. 9

2 See 1990 report, p.15.

3 Article 83(1) of the Penal Code.

4 Article 84(1) of the Penal Code.

5 See 1990 report, p.34.

Miklos Kovacs [1]

Miklos Kovacs alleged that in September 1987 he had been ill-treated by police officers in the Vienna Special Branch offices (Sicherheitsbüro) in an attempt to force him to sign a confession. He alleged that he had been beaten and given electric shocks. His lawyer reported seeing wounds on his back, shoulders and neck five days after the alleged ill-treatment had taken place.

In June 1989 his criminal complaint about the ill-treatment was dismissed by the Public Procurator. A major reason for the dismissal of the complaint was a medical examination carried out on the instructions of the Public Procurator. However, according to Amnesty International's information, this examination took place in December 1988, 15 months after Miklos Kovacs had made his allegations known to the authorities. The Austrian Government recognizes that "the medical examination took place too late and, as a result, proved inconclusive". However, the Austrian Government believes that such delay will not occur in the future because of the decree issued by the Ministry of Justice on 15 September 1989 which provides for the prompt investigation of allegations of ill-treatment unless they are manifestly unfounded[2].

Norbert Kritsch [3]

During a court hearing in May 1989 Norbert Kritsch had alleged that police officers from the Vienna Special Branch had beaten him and placed a plastic bag over his head until he made a statement admitting to handling narcotics. These allegations were rejected as incredible by the court and in subsequent appeals.

Norbert Kritsch's allegations were re-examined by an investigating judge at the Vienna Provincial Court. According to information received from the Federal Ministry for Foreign Affairs the investigating judge halted the investigation on 5 December 1990 after another judge from Vienna Provincial Court had stated that when Norbert Kritsch's co-defendant (who had also made allegations of ill-treatment) had been handed over to the custody of the court he had shown no signs of injury.

Amnesty International informed the Federal Ministry for Foreign Affairs that it had in its possession a document signed by the investigating judge responsible for ordering that Norbert Kritsch's co-defendant be kept in investigative detention (Untersuchungshaft) which confirms that he did show signs of injury at that time (13 November 1988). A reply[4] from the Federal

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1 See 1990 report, p.31.

2 See above: p.2.

3 See 1990 report, p.33.

4 Dated 9 October 1991.

Ministry of Foreign Affairs containing information passed to it from the Federal Ministry for Justice cleared up the confusion: although the judge named by Norbert Kritsch's co-defendant as the official who had questioned him had at first confirmed seeing signs of injury, it was later established that the judge had made a mistake - he had not been on duty on the day in question. He was therefore able to state to the investigating judge at the Vienna Provincial Court that he had not seen the injuries to which Norbert Kritsch's co-defendant referred. Further inquiries revealed that the investigating judge who had actually questioned Norbert Kritsch's co-defendant had indeed noted signs of injury. He did not recall, however, any allegations that these had been caused by ill-treatment.

Babür Partener [1]

Babür Partener lodged a criminal complaint against the police following an incident in April 1989, during which he alleges he was beaten by several police officers in the Leopoldsgasse police station. As a result of a criminal complaint by the police Babür Partener was indicted for attempted "resistance to state authority"[2], "causing bodily harm to a state official"[3] and "criminal damage"[4]. He was tried and acquitted on all charges by Vienna Provincial Court on 17 October 1989. The Public Procurator decided not to appeal against this acquittal because the evidence provided by Babür Partener was "credible" while that of the police officers involved in the incident was "contradictory and implausible".

Preliminary inquiries were made into the behaviour of six police officers. On 6 September 1990 the Vienna Public Procurator brought charges against four of the officers on suspicion of "abuse of authority"[5] and "causing bodily harm while in a position of authority"[6]. In addition one officer has been charged with making false charges against Babür Partener by alleging that he injured a policeman, broke a window and caused undue disturbance. Proceedings have not yet been concluded.

Babür Partener also made a complaint to the Austrian Constitutional Court which is pending.

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1 See 1990 report, p.23.

2 Articles 15 and 269(1) of the Penal Code.

3 Articles 83(1) and 84(2) of the Penal Code.

4 Article 125 of the Penal Code.

5 Article 302(1) of the Penal Code.

6 Articles 83(1) and 313 of the Penal Code.

Ronald Ribitsch [1]

Ronald Ribitsch was questioned on 31 May and 1 and 2 June 1988 in connection with the drugs-related deaths of two men in Vienna. Ronald Ribitsch alleges he was severely beaten by police officers at the Vienna Special Branch (Sicherheitsbüro) in an attempt to coerce him to confess to supplying the dead men with heroin. He was released when it was established that he had nothing to do with the supply of drugs to the dead men. Medical reports were consistent with his allegations.

Three police officers were indicted and on 13 October 1989 were tried by Vienna District Court. Two were acquitted for lack of evidence and the third given a two months' prison sentence suspended for three years for "causing bodily harm while in a position of authority"[2]. He was acquitted on appeal on 14 September 1990 by Vienna Provincial Court. After reassessing the evidence examined by the District Court and after taking new evidence of its own, the Provincial Court held that there was insufficient evidence to convict.

Ronald Ribitsch also made a complaint to the Constitutional Court. The Constitutional Court declined to investigate the part of his complaint which concerned his alleged ill-treatment because it did not believe that further investigation by the Constitutional Court would add anything to the information obtained as a result of the trials of the police officers.

Mario Stangl [3]

As a result of his allegation that he had been beaten by two police officers in Leobersdorf on 23 July 1988 Mario Stangl was given a six-month suspended prison sentence by the Wiener Neustadt District Court in June 1989 for "defamation"[4] and "perjury"[5].

The Public Procurator had stopped investigation of the police officers on the basis of a medical report which, according to the Austrian Government, concluded that "from a medical point of view there was insufficient evidence to find that the injuries could have resulted from the 15 to 20 blows alleged by Stangl to have been administered to his head and upper body." This evidence was also a significant factor in Mario Stangl's conviction by Wiener Neustadt District Court. Amnesty International asked the Austrian Government for a copy of the medical report. The government was unable to comply with Amnesty International's request because the provision of a copy was the exclusive responsibility of the court.

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1 See 1990 report, p.28.

2 Articles 83(1) and 313 of the Penal Code.

3 See 1990 report, p.16.

4 Article 287(1) of the Penal Code.

5 Article 288(1) of the Penal Code.

Appendix II - Response by the Austrian Government to Amnesty International's 1990 report