



**International Convention for  
the Protection of All Persons  
from Enforced Disappearance**

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**Committee on Enforced Disappearances**

**Consideration of reports submitted by States  
parties under article 29 (1) of the Convention**

**Reports of States parties due in 2014**

**Austria\***

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## **I. Introduction**

1. The International Convention for the Protection of all Persons from Enforced Disappearance (hereafter “the Convention”) was adopted by the United Nations General Assembly on 20 December 2006, opened for signature in Paris on 6 February 2007 and signed by Austria on that day. The Convention entered into force on 23 December 2010, 30 days after the deposit of the twentieth instrument of ratification or accession. Austria ratified the Convention on 7 June 2012 and promulgated it in Federal Law Gazette (FLG) III No. 104 of 4 July 2012; the Convention came in force for Austria on 7 July 2012.
2. On the occasion of the deposit of the ratification document, Austria declared that it recognizes, in accordance with articles 31 and 32 of the Convention, the competence of the Committee on Enforced Disappearance (hereafter “the Committee”) to receive and consider communications from or on behalf of individuals or from a State party claiming that Austria has not fulfilled its obligations under the Convention.
3. This report is submitted to the Committee in accordance with article 29 (1) stipulating that States parties shall report on the measures taken to give effect to their obligations under the Convention within two years after its entry into force for the State party concerned.
4. The form and content of the report comply with the guidelines adopted by the Committee at its second session (26-30 March 2012).
5. It has been duly noted that, after considering the report, the Committee may issue comments and observations to be communicated to the State party in accordance with article 29 (3) and request it to provide additional information according to article 29 (4).

## **II. Framework under which enforced disappearances are prohibited**

6. The Republic of Austria is governed by the rule of law. Everyone in Austria enjoys comprehensive and effective protection from arbitrary treatment and use of force by the State. The Federation, Regions, municipalities, other bodies of public law and the social insurance institutions are liable under the provisions of private law for any damage to any person or any property caused by unlawful acts of persons at fault when implementing the law on behalf of such legal entities.

### **A. Adaptation of domestic law**

7. The normative framework is comprehensive and includes a number of international instruments to which Austria is party and which by virtue of their subject directly contribute to the prevention of enforced disappearances. Those instruments include in particular the following:

- (a) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950, whose protection mechanism, the European Court of Human Rights, has declared itself competent to hear cases of enforced disappearance on

the grounds of article 2 (on the right to life) of ECHR;<sup>1</sup> the ECHR has the status of constitutional law in Austria;

(b) International Covenant on Civil and Political Rights of 16 December 1966;

(c) European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987, establishing the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), entitled to unlimited access to places of detention and having to date carried out six visits in Austria;

(d) United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 and the Optional Protocol thereto of 18 December 2002, under which the Austrian Ombudsman Board has been set up as the national mechanism for the prevention of torture;

(e) Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977, insofar as they empower the International Committee of the Red Cross (ICRC) to visit prisoners of war;

(f) Rome Statute of 17 July 1998 on the creation of the International Criminal Court (ICC), article 7 of which characterizes enforced disappearances, when committed as part of a widespread or systematic attack directed against any civilian population and with knowledge of the attack, as a crime against humanity.

8. On the domestic level the Federal Constitutional Law of 29 November 1988 on the Protection of Personal Liberty guaranteeing everyone the right to liberty and security (personal liberty) has to be mentioned in particular. In the field of criminal law, the Federal Law amending the Criminal Code and the Code of Criminal Procedure, FLG I No. 106/2014 introduced, as a new section 312b, the offence of “Enforced disappearance of a person” into the Austrian Criminal Code (CC), which came into force on 1 January 2015. This law also incorporated the crimes set out in the Rome Statute into Austrian law. (The law implementing the obligation of cooperation with the International Criminal Court was already passed in 2002.) As part of this undertaking a new section 321a (“Crimes against Humanity”) was introduced into the Austrian CC, which also included a provision on enforced disappearances (section 321a (3)(5) CC).

9. Enforced disappearance is a crime according to section 312b CC and an even more serious crime when committed as part of a widespread or systematic attack directed against any civilian population (i.e. as a crime against humanity) according to section 321a (3)(5) CC.

10. The laws and provisions are explained in more detail below.

## **B. Cases of enforced or involuntary disappearance in Austria and implementation of provisions for the prevention and prosecution of that crime**

11. No criminal proceedings for enforced disappearance within the meaning of the Convention have been instituted in Austria.

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<sup>1</sup> Compare *inter alia* Grand Chamber judgment of 18 September 2009 in the case of *Varnava and Others v. Turkey*; Grand Chamber judgment of 21 October 2013, *Janowiec and Others v. Russia*; Grand Chamber judgment of 16 September 2014, *Hassan v. The United Kingdom*.

### III. Implementation of the provisions of the Convention

#### Article 1

12. Article 1 governs the purpose of the Convention, whereupon no one shall be subjected to enforced disappearance (para. 1). No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance (para. 2).

13. No legislative or regulatory provision adopted by Austria authorizes any enforced disappearance.

14. Before the creation of the specific offences in section 312b and 321a (2)(5) CC, the criminal conduct specified in articles 4 and 6 (2)(a) and (b) of the Convention was covered in Austrian law by the offences of deprivation of liberty according to section 99 CC and continuous use of violence according to section 107b CC as well as by section 302 CC (abuse of official authority) in connection with provisions in the general part of the CC, i.e. in section 2 CC (failure to act), section 12 CC (participation) and section 15 (attempt).

15. For the sake of completeness it might be mentioned that in Austria even negligent infringement of personal liberty by public officials is a criminal offence (section 303 CC).

16. According to article 1 of the Federal Constitutional Law of 29 November 1988 on the Protection of Personal Liberty everyone has the right to liberty and security (personal liberty). According to paragraph 2 of this provision no one may be arrested or detained on grounds other than those specifically mentioned in this federal constitutional law and in a manner other than in accordance with the procedure established by law.

17. Article 2 of this Law restricts the grounds for deprivation of the liberty of a person to the following situations:

(a) If judgment has been pronounced by reason of an offence to which a threat of penalty applies;

(b) If he/she is suspected of a particular offence to which a threat of penalty by a legal or fiscal authority applies:

(i) So as to end to aggression or to establish at once the actual circumstances in so far as the suspicion arises from the close link in time to the occurrence or is due to his/her possession of a specific item;

(ii) To prevent him/her from evasion of the trial or from interference with evidence; or

(iii) To impede him/her in the case of an offence to which a threat of substantial penalty applies from the commitment of a similar offence or the effectuation of such;

(c) For the purpose of bringing him/her before the competent authority on suspicion of being surprised in the commitment of an offence of administrative transgression if the arrest is necessary to ensure prosecution or for the prevention of further similar offences;

(d) To enforce compliance with a valid judicial ruling or the fulfilment of any obligation prescribed by law;

(e) If there is reason to presume that he/she is a source of danger for the spread of infectious diseases or due to psychic disorder endangers himself/herself or others;

- (f) For the purpose of necessary educational measures in the case of a minor;
- (g) If necessary to secure a proposed deportation or extradition.

18. According to article 3 of the Law only a court may pronounce upon a deprivation of liberty for a punishable offence. Provision may however be made for the imposition of a term of imprisonment or of alternative penalties by administrative authorities if the extent of the deprivation of liberty does not exceed six weeks or in so far as the decision rests with an independent authority three months. Moreover, if a term of imprisonment is not imposed by an independent authority or if the alternative penalty is not established by it, there must be the possibility to lodge a comprehensive appeal with suspensory effect with such an authority.

19. Apart from a strict timeframe, articles 4 to 6 of this Act provide for several safeguards. For example everyone arrested shall at the earliest opportunity, if possible at the time of his/her arrest, be informed in a language which he/she understands of the reasons for his/her arrest and of any charge against him/her. The rights accorded by constitutional law to the autochthonous ethnic groups remain unaffected. He/she is entitled to have at his/her request a relative and a legal adviser of his/her own choosing notified without unnecessary delay of the arrest as well as to take proceedings in which a court or other independent authority decides on the lawfulness of the deprivation of liberty and, if the detention is not lawful, orders his/her release.

20. There are no exceptions from these rules, not even under circumstances as described by article 1 (2) of the Convention. The Austrian legal system basically knows only one emergency measure in the form of emergency regulations issued by the Federal President according to article 18 (3) of the Austrian Federal Constitution. Such regulations may, however, not contain amendments to provisions of federal constitutional law (article 18 (5) of the Austrian Federal Constitution). Since no other types of emergency legislation or measures exist in Austria, the Federal Constitutional Law on the Protection of Personal Liberty may not be supplemented by any emergency measure. Therefore, enforced disappearances may not be "legalized" under any circumstances.

21. According to article 20 (1) of the Austrian Federal Constitution public officials are bound by the instructions of their superiors. According to the last sentence of this provision, however, the subordinate officer can refuse compliance with an instruction if the instruction was given by a public official not competent in the matter or if compliance would infringe a criminal law provision (see also section 44 (2) of the Federal Public Service Law which contains the same rule).

22. Likewise, section 6 of the General Service Rules for the Austrian Armed Forces Military Superiors prohibits military superiors to give orders that would infringe criminal law provisions and section 7 of these Rules prohibits compliance with such orders. Moreover, section 3 of the Austrian Military Criminal Law explicitly stipulates that soldiers will be held criminally responsible for offences even if they have been committed at command.

## **Article 2**

23. Section 312b CC defines the offence of enforced disappearance as the abduction or any other form of deprivation of liberty of another person on behalf of or with the acquiescence of the State or a political organisation, followed by the concealment of the fate or whereabouts of the disappeared person.

24. Apart from mostly stylistic variations without legal consequences, this definition is widely identical to the one contained in article 2 of the Convention.

25. In terms of this definition, section 312b CC covers individual acts without any systematic interrelation as well as the extensive and systematic practice of enforced disappearance. With a view to article 5 of the Convention as well as to article 7 (2)(i) of the Rome Statute of the International Criminal Court, section 321a (3)(5) CC establishes in addition to section 312b CC a crime against humanity for situations when enforced disappearance is committed as part of a widespread or systematic attack directed against any civilian population.

26. Compared to the definition of article 2 of the Convention, the Austrian legislator refrained from explicitly mentioning “the refusal to acknowledge the deprivation of liberty” as an element of the offence of section 312b CC; firstly because it may be considered to be implicitly contained in the element of concealing the fate or whereabouts of the disappeared person, and secondly because explicitly mentioning this element was considered to be in a relationship of tension if not in conflict with the right not to be compelled to testify against oneself or to confess guilt as provided by article 14 (3)(g) of the International Covenant on Civil and Political Rights and by article 6 ECHR, which has the rank of constitutional law in the Austrian legal system as mentioned before.

27. With a view to article 3 of the Convention, according to which each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorisation, support or acquiescence of the State and to bring those responsible to justice, but insofar also influenced by article 7 (2)(i) of the Rome Statute, the definition of section 312b CC also covers disappearances enforced on behalf or with the acquiescence of political organisations different from the State. In addition, according to the constant jurisprudence of the European Court for Human Rights, parties to the ECHR have to comply with their comprehensive obligations in particular under articles 2, 3 and 6 ECHR concerning the effective conduct of investigations.

### **Article 3**

28. According to article 3, each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorisation, support or acquiescence of the State and to bring those responsible to justice. This provision complements article 2, because acts committed without such authorisation would not be covered by the definition of enforced disappearances.

29. As has been already pointed out, influenced by article 7 (2)(i) of the Rome Statute Austria added to its definition in section 312b CC the authorization, support or acquiescence by political organisations different from the State as an alternative to the authorization, support or acquiescence by the State.

30. In addition, any unlawful deprivation of liberty constitutes a (general) offence according to section 99 CC (deprivation of liberty).

31. Therefore, enforced disappearances committed on behalf of or with acquiescence of the State may be investigated and prosecuted under section 312b CC, irrespective whether the offender is a public official or not. The same goes for enforced disappearances committed on behalf or with acquiescence of a political organisation. “Enforced disappearances” committed on behalf of or with acquiescence of another entity or person or without any endorsement by another person or entity may be investigated and prosecuted under section 99 CC (or — if the disappearance is used as a means to coerce a third person to do something or refrain from doing something — as extortive kidnapping under section 102 CC).

32. All relevant offences have to be investigated ex officio by the competent authorities (criminal police and public prosecutor) pursuant to section 2 Code of Criminal Procedure (CCP).

#### Article 4

33. The Federal Law amending the Criminal Code and the Code of Criminal Procedure (FLG I No. 106/2014), introduced as a new section 312b the offence of “Enforced disappearance of a person” into the Austrian CC.

34. The provision reads as follows:

**“Enforced disappearance of a person**

§ 312b. Whoever abducts another person or deprives him/her in any other way of his/her personal liberty on behalf of or with acquiescence of a state or a political organisation and conceals his/her fate or whereabouts shall be punished with imprisonment from one year up to ten years.”

35. The new offence entered into force on 1 January 2015.

#### Article 5

36. Article 5 points out that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

37. The very same law that introduced section 312b (“Enforced disappearance of a person”) into the Austrian CC also incorporated the crimes set out in the Rome Statute into Austrian law. (The law implementing the obligations of cooperation with the International Criminal Court was already passed in 2002.)

38. The new section 321a CC (“Crimes against Humanity”) follows closely article 7 of the Rome Statute. It therefore picks up all the offences enumerated there and is applicable when they are committed as part of a widespread or systematic attack directed against any civilian population. Concerning enforced disappearances section 321a (3)(5) CC, however, has not made use of the definition provided by article 7 (2) (i) of the Rome Statute, which seems to be more narrow than the one provided by the Convention, but simply refers to section 312b instead. Therefore it is not necessary to establish that the perpetrator has acted with the intention of removing a disappeared person from the protection of the law for a prolonged period of time.

39. Apart from the fact that to constitute a crime against humanity the enforced disappearance has to be committed as part of a widespread or systematic attack directed against a civilian population, there is no difference between the conducts of section 312b CC and section 321a (3)(5) CC. The main difference lies in the level of punishment. The maximum penalty for “stand-alone” enforced disappearance under section 312b CC is ten years of imprisonment. When committed as a crime against humanity the punishment provided is five to fifteen years of imprisonment and ten to twenty years of imprisonment or imprisonment for life if the offender (negligently) has caused the death of the disappeared person. If the offender causes the death of the disappeared person intentionally there is no choice but life imprisonment.

40. Finally, when committed as a crime against humanity, according to sections 57 (1) and 59 (1) CC enforced disappearance is not subject to the statute of limitations, neither

concerning the investigation and prosecution of such crime nor concerning the execution of a sentence for such crime.

## Article 6

41. Persons who commit, order, solicit or induce the commission of or are accomplices to or participate in an enforced disappearance may be held criminally liable according to section 12 CC of the general part of the CC. According to this general rule not only the actual perpetrator commits an offence, but also anybody who instigates another person to carry it out or who contributes in any other way to its commission.

42. A person who attempts to commit an enforced disappearance may be held criminally responsible according to section 15 CC. According to this general rule the penalties do not only apply to the completed offence but also to the attempt as well to any participation in an attempt.

43. Criminal liability for the conduct described in article 6 (1)(b) of the Convention is also established, but it depends on the circumstances of the concrete case, which provisions would apply. If the conduct of the superior would qualify as endorsement of what is going on, he or she might be held responsible as a contributor to the offence for the psychological support lying in this endorsement. If it belongs to the duties of the superior to intervene and stop his/her subordinates and he or she nevertheless remains idle he/she may be held responsible for the offence by the general provision of section 2 (failure to act). In any case the superior could be held responsible for the offence of abuse of official authority according to section 302 CC, possibly also in connection with section 2 CC (failure to act).

44. For cases where enforced disappearances are committed as crimes against humanity section 321g CC — in conformity with article 6 (1)(b) of the Convention — states that a superior who refrains from preventing or stopping a subordinate who is under his/her effective authority and control from carrying out such an offence shall be punished like a perpetrator of the offence committed by the subordinate.

45. As provided in article 6 (2), an offender under Austrian law may not invoke any unlawful order or instruction from a superior to justify such action. As has been already mentioned with respect to article 1 of the Convention, according to article 20 (1) of the Austrian Federal Constitution public officials are bound by the instructions of their superiors. According to the last sentence of this provision, however, the subordinate officer can refuse compliance with an instruction if the instruction was given by an official not competent in the matter or compliance would infringe a criminal law provision. Section 44 (2) of the Federal Public Service Law contains the same rule. Likewise, section 6 of the General Service Rules for the Austrian Armed Forces Military Superiors prohibits military superiors to give orders that would infringe criminal law provisions, whereas section 7 of these Rules prohibits compliance with such. Moreover, section 3 of the Austrian Military Criminal Law explicitly stipulates that soldiers will be held criminally responsible for offences even if they have been committed at command. Section 321j CC which provides for a limited exception from criminal responsibility in cases of war crimes does not apply if the subordinate realized that the order was unlawful or if its unlawfulness was obvious and is not applicable at all in cases of crimes against humanity (including section 321a (3)(5) CC).

46. The Federation, Regions, municipalities, other bodies of public law and the social insurance institutions are liable under the provisions of private law for any damages to any person or any property caused by unlawful acts of persons at fault when implementing the law on behalf of such legal entities.

## Article 7

47. Pursuant to article 7 (1), the offence of enforced disappearance shall be made punishable by appropriate penalties taking into account its extreme seriousness. This requirement is met by the penalty provided for by section 312b CC (imprisonment of one year as a minimum up to imprisonment of ten years) and the more so in cases of enforced disappearances as crimes against humanity according to section 321a (3)(5) (where the penalty is five to fifteen years of imprisonment or ten to twenty years or imprisonment for life if the disappearance has negligently caused the death of the victim).

48. Article 7 (2)(a) leaves it to the State Party to establish mitigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance. Pursuant to section 34 CC it shall be considered as mitigating if someone makes a serious effort to make good the damage caused, or to prevent further negative consequences (section 34 (1)(15) CC), or e.g. confessed remorsefully, or by his/her statements essentially contributed to finding the truth (discovering other perpetrators) (section 34 (1)(17) CC).

49. Pursuant to article 7 (2)(b), aggravating circumstances may be established, in particular in the event of the death of the disappeared person or the commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons. In the case that the death of a victim actually was caused by intentional killing (section 75 CC – murder), the very penalty (prison term of ten to twenty years or life-long imprisonment) constitutes a more severe punishment. Section 33 (7) CC provides for a special aggravating reason, if during commission of the crime the defencelessness or helplessness of another person was taken advantage of. This applies in particular to the persons specified in article 7 (2)(b) of the Convention.

## Article 8

50. According to article 8 (1) it must be ensured that the term of limitation for criminal proceedings is of long duration, is proportionate to the extreme seriousness of this offence (article 8 (1)(a) and commences from the moment when the offence of enforced disappearance ceases (article 8 (1)(b)).

51. The term of limitation for enforced disappearance of a person under section 312b CC is ten years pursuant to section 57 (3) CC. Taking into account its continuous nature, according to section 57 (2) the term of limitation commences only when the enforced disappearance has ceased.

52. Pursuant to article 8 (2) the right of victims of enforced disappearance to an effective remedy during the term of limitation shall be guaranteed. Everyone who has gained knowledge that a punishable action has been committed (including the victim) has the right under section 80 CCP to report such action to the criminal police or the public prosecutor. A report by the victim, however, is not necessary, nor are victims' rights dependent on cooperation with law enforcement authorities. According to section 2 CCP the competent authorities have to initiate investigations ex officio. Once initiated, the time of investigation and prosecution until the final termination of the criminal proceedings is not included into the term of limitation which means that the expiration of the term of limitation is discontinued as long as the proceedings last, pursuant to section 58 (3) CC.

53. Moreover, if the perpetrator commits another offence based on the same inclination, the term of limitation may not expire until it has also expired for the latter offence (section 57 (2)).

54. During criminal proceedings the victim is granted extensive rights pursuant to sections 65 *et seq.* CCP, ranging from information rights to the right to claim damages in the course of the criminal proceedings.

55. Article 8 applies “without prejudice to article 5” and thus implies that the statute of limitation does not apply in cases of enforced disappearances which have been committed as crimes against humanity. Accordingly, section 57 (1) excludes crimes against humanity (including section 321a (3)(5) CC) from limitation.

## Article 9

56. Pursuant to article 9 (1) jurisdiction must exist, when the offence is committed in any territory under the State Party’s jurisdiction or on board a ship or aircraft registered in that State (subpara. a), or when the alleged offender is one of its nationals (subpara. b), or when the disappeared person is one of its nationals and the State Party considers it appropriate (subpara. c). The wording of article 9 follows the wording of article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Austria has ratified in 1987 (FLG No. 492/1987).

57. Domestic jurisdiction for the offences specified in article 9 (1)(a) is provided by sections 62 and 63 CC.

58. Jurisdiction for offences specified in article 9 (1)(b) and (c) is provided by section 64 (1)(4c)(a) CC. As introduced by the law amending the CC and the CCP which came into force on 1 January 2015, Austria has jurisdiction in these cases irrespective whether the offence is also punishable in the country where it has been committed (double criminality is not necessary). It is also provided without any exception, in particular it is not restricted to cases Austria would consider “appropriate”.

59. Pursuant to article 9 (2) such measures shall be taken as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized (“*dedere aut iudicare*”). Jurisdiction in such cases is provided by section 64 (1)(4c)(c) second alternative.

60. In addition to those cases where the Convention requires jurisdiction, Austria provides for jurisdiction in cases of enforced disappearance where (other) Austrian interests (than the offender or the victim being one of its nationals) are infringed (section 64 (1)(4c)(b)) and also in cases where the offender is a foreign citizen but has his common residence in Austria (section 64 (1)(4c)(c) first alternative CC). Like in the other cases, jurisdiction in these cases, too, is mandatory and double criminality is not required.

61. These rules also apply to cases of enforced disappearances as crimes against humanity (section 321a (3)(5) CC).

## Article 10

62. Pursuant to article 10 (1), after an examination of the information available, that the circumstances so warrant, a person suspected of having committed an offence of enforced disappearance shall be taken into custody, or such other legal measures shall be taken as are necessary to ensure his or her presence. The custody may be maintained only for such time as is necessary to ensure the person's presence at criminal, surrender, transfer or extradition proceedings.

63. The obligation specified in article 10 (1) is fulfilled by the provisions of sections 173 *et seq.* CCP, inasmuch as a strong suspicion exists that the perpetrator has committed such a punishable act and pre-trial detention complies with the principle of proportionality (section 5 CCP). As the individual case may be, the presence of the suspect may also be ensured by applying more lenient measures pursuant to section 173 (5) CCP (without imposing pre-trial detention). Relevant provisions for extradition and surrender detention are contained in section 18 of the Federal Act on Judicial Cooperation in Criminal Matters with Member States of the European Union (hereinafter EU-JZG), FLG I No. 36/2004 and in section 29 Extradition and Mutual Assistance Act (hereinafter ARHG), FLG No. 529/1979.

64. Pursuant to article 10 (2), a preliminary inquiry or investigation to establish the facts shall be immediately carried out, and the States Parties referred to in article 9 (1) shall be notified of the measures taken, including detention and the circumstances warranting detention. Also the findings of the preliminary inquiry or investigation have to be communicated, indicating whether the State Party intends to exercise its jurisdiction. In Austria, criminal prosecution authorities in cases of detention are subject to a special requirement of rapid action (section 9 (2) CCP), which provides that investigations have to be initiated with top priority. Concerning extradition and surrender proceedings, relevant provisions are contained in sections 31 *et seq.* ARHG or in sections 20 *et seq.* EU-JZG.

65. Pursuant to article 10 (3), any person in custody pursuant to paragraph 1 may communicate immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides. Communication of nationals of the sending State with consular representatives is regulated already in article 36 of the Vienna Convention on Consular Relations (FLG No. 318/1969). In general, prisoners are entitled under domestic law to send and receive letters, postcards or telegrams (section 87 Penal Service Act (hereinafter StVG)). Moreover, written communications with consular representatives are even possible in sealed envelopes, unless there is a concrete suspicion of an unlawful dispatch, which cannot be dispelled otherwise (section 90b (4)(3) StVG); in such a case, the envelope needs to be opened in the presence of the inmate. For telephone communications, section 96a StVG postulates consideration of exceptional circumstances, which also have to include the communication rights granted by the Convention.

## Article 11

66. Article 11 (1) governs the case that jurisdiction was based on the principle of "*dedere aut iudicare*" (see also explanations concerning article 9 (2)), which requires to submit the case to the State Party's competent authorities for the purpose of prosecution. The competent authorities shall become active according to the provisions of the CCP.

67. Article 11 (2) clarifies that decisions shall be taken in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party and that the suspect must receive no special treatment. Such equal treatment emerges from the very

principle of equal treatment guaranteed by the Austrian Federal Constitution, which also applies to the provisions of CCP without any restrictions.

68. The same is true for the principle of fair trial formulated in article 11 (3), which is achieved by compliance with 6 ECHR in criminal proceedings.

69. Any person prosecuted for an indictable offence is guaranteed equal treatment at all stages of the proceedings; and any person tried in Austria is entitled to a fair trial before a competent, independent and impartial court established according to the law. It is incumbent upon the national courts and the European Court of Human Rights to ensure strict respect for that right in line with article 6 (1) ECHR, whose content is similar to that of article 12 (3) of the Convention.

## **Article 12**

70. The obligation to receive reports about alleged offences and their impartial examination contained in article 12 (1) and (2) is fulfilled on the one hand by section 80 CCP (see explanations concerning article 8 (2)) and on the other hand by the principle of ex officio responsibilities enshrined in section 2 CCP (inasmuch as an initial suspicion in the meaning of section 1 (3) CCP exists) in connection with the principle of objectivity pursuant to section 3 CCP. Concerning witness protection, there are corresponding witness protection programmes and the options of anonymous testimony (section 162 CCP) or contradictory interrogation (section 165 CCP), in order to protect victims from grave dangers and to enable as considerate an interrogation as possible.

71. Pursuant to article 12 (3), prosecuting authorities must have the necessary powers and resources to conduct investigations effectively, including access to the documentation and other information relevant to their investigations (see para. 3(a)) and — if necessary with prior authorisation by a judicial authority — have access to any place of detention or any other place where there are reasonable grounds to believe that the disappeared person may be present (see para. 3(b)). The authorisations so described are covered by CCP, either through the surrender of relevant documents by way of administrative or legal assistance pursuant to section 76 CCP or through investigative measures, such as the searching of locations and objects pursuant to sections 119 *et seq.* CCP.

72. The obligation mentioned in article 12 (4) to investigate cases of enforced disappearance in an objective and unrestricted manner emerges from the very principle of ex officio responsibilities (section 2 (1) CCP); under this principle criminal police and public prosecutors are obligated to resolve ex officio each suspicion of a punishable act they have knowledge of. In compliance with the obligation to observe objectivity (section 3 CCP) investigations shall be conducted by organs which are considered unbiased (section 47 (1)(1) CCP).

73. Every executive police organ is obliged to inform the head of his or her department of any criminally relevant conduct, so that the latter is in a position to report to the prosecutorial authorities. If an official refrains from the measures he/she is obliged to take to keep the interest of the state in prosecuting and punishing criminal conduct, he/she commits the crime of abuse of official authority according to section 302 CC.

## **Article 13**

74. This article lays down a comprehensive obligation to extradite, in order to guarantee effective prosecution of the crime under discussion.

75. Pursuant to paragraph 1, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone. However, paragraph 7 clarifies that extradition is inadmissible if the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons.

76. The so-called extradition asylum is guaranteed by section 19 (3) ARHG.

77. By paragraphs 2 to 6 it is intended to enable extraditing suspects of having caused enforced disappearance to the largest extent, and they therefore provide that the offence of enforced disappearance be included as extraditable offence in any extradition treaty concluded between them. In addition, paragraph 3 requires the State Parties to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently concluded between them. Pursuant to paragraph 4, this Convention shall be considered as the necessary legal basis, if a State Party makes extradition conditional on the existence of a treaty, which is not the case for Austria, and receives a request for extradition from another State Party with which it has no extradition treaty. Through paragraph 5 the State Parties undertake to recognise the offence of enforced disappearance as an extraditable offence between themselves. Paragraph 6 clarifies, that individual extraditions shall be subject to the conditions provided for by applicable extradition treaties or the national law of the requested State Party.

78. The offence of "Enforced disappearance of a person" according to section 312b CC is punishable with imprisonment between 1 and 10 years. This offence is thus in conformity with all relevant multilateral conventions on extradition (above all the European Convention on Extradition of 13 December 1957) and all of Austria's bilateral extradition treaties, including with Australia, Canada and the United States of America. Finally, it also constitutes an extraditable offence for non-treaty-based extradition (see section 11 (1) ARHG), and is covered by Austrian legislation to implement Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States of the European Union (section 4 (1) EU-JZG).

## **Article 14**

79. Article 14 (1) requires States Parties to afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance. Thereby it is made clear, that such legal assistance shall be subject to the conditions provided for by applicable treaties on mutual legal assistance or by the domestic law of the requested State Party (see para. 2).

80. In cases of enforced disappearance, Austria can provide the types of mutual legal assistance referred to in this provision, in particular, on the basis of the following treaties:

- European Convention on Mutual Assistance in Criminal Matters of 20 April 1959
- Additional Protocol thereto of 17 March 1978
- Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between Member States of the European Union.

81. In addition, Austria has concluded bilateral treaties with several States including the United States of America, Canada and Australia.

82. Mutual legal assistance is possible even in the absence of such an instrument, on the basis of domestic law, provided solely that the foreign authority is ready to reciprocate in comparable cases (see section 3 ARHG). Austria can provide such mutual legal assistance to any State Party on a non-treaty basis pursuant to sections 50 *et seq.* ARHG.

### **Article 15**

83. Article 15 obliges the State Parties to cooperate with each other and afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains. The scope of this obligation is covered by the existing conventions on mutual legal assistance.

84. As far as is known, to this date, the Austrian authorities have received no request for assistance in helping victims of enforced disappearance or in locating or ensuring the release of such persons, nor have the Austrian authorities addressed similar requests to a foreign country.

### **Article 16**

85. Pursuant to article 16 (1), no person shall be expelled, returned, surrendered or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

86. Article 3 ECHR, which has the status of constitutional law in Austria, prohibits, as interpreted by the European Court of Human Rights (starting with the judgement of 7 July 1989 in the case of *Soering v. the United Kingdom*) the deportation of aliens exposed to risks of torture or inhuman or degrading treatment in their country of origin, regardless of the legal basis or form of such deportation (removal, expulsion, extradition or surrender). The same applies for the deportation of aliens to states where domestic law does not provide for the possibility of a review of a life sentence which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds (see Grand Chamber judgment of 9 July 2013, *Vinther and Others v The United Kingdom*).

87. Moreover, the obligation stemming from this article accordingly covered by section 19 ARHG, under which extradition may not be executed, if principles of the rule of law would be violated. A similar provision is contained in section 25 EU-JZG for the surrender. Also migration law provides for an examination of this obligation (see section 45a and 50 Aliens Police Act (hereinafter FPG), FLG I No. 100/2005 as amended by FLG I No. 87/2012). The circumstances mentioned in article 16 (2) have to be taken into consideration accordingly.

### **Article 17**

88. Pursuant to article 17 (1), no one shall be held in secret detention. Concerning the (non-authentic) German translation it should be noted, that the binding languages of the Convention use the same term in article 2 and article 17 (English “detention”, French “detention”), which in the German version was translated in article 2 with “Entzug der Freiheit” [deprivation of liberty], but in article 17 (1) with “Haft” [detention]. For this reason and in connection with article 17 (“deprivation of liberty” in article 17 (2) and (3) it

may be assumed that article 17 (1) not only refers to detention in the narrower sense of the word, but in general to any deprivation of liberty.

89. Pursuant to article 17 (2), conditions shall be established under which orders of deprivation of liberty may be given (subpara. a), the authorities authorised to order the deprivation of liberty shall be indicated (subpara. b), a guarantee shall be given that any person deprived of liberty shall be held solely in officially recognised and supervised places of deprivation of liberty (subpara. c), a guarantee shall be given that any person deprived of liberty shall be authorised to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law ( subpara. d), guaranteed access shall be given to the competent and legally authorised authorities and institutions to visit the places where persons are deprived of liberty (subpara. e) a guarantee shall be given that any person deprived of liberty or, if need be, the relatives of the persons deprived of liberty, their representatives or their counsel, shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty (subpara. f).

90. Article 17 (3) provides for the State Party to assure the compilation and maintenance of official registers and/or records of the persons deprived of liberty.

91. As described above with respect to article 1 of the Convention, the Austrian legal provisions on the deprivation of liberty are very rigorous. Depending on the grounds for the relevant decision and on whether it is taken by a judicial or an administrative authority, deprivation of liberty is governed by different sets of rules. In Austria, no one may be deprived of his/her liberty otherwise than through a lawful decision and by an authority empowered by the law, in accordance with the provisions of article 5 ECHR. Therefore secret detention is not allowed and there are effective prevention mechanisms in place.

92. Execution of pre-trial and criminal detention, as well as enforcement of measures are governed by the CCP, FLG No. 631/1975, as amended by FLG I No. 112/2015 (sections 173 *et seq.* CCP) or the StVG, FLG 144/1969 as amended by FLG I No. 13/2015 (sections 131 *et seq.*, 157 *et seq.* StVG). The obligations contained in article 17 (2)(a) to (c) are fulfilled by the provisions of CCP, which prescribe under which conditions and how long a person may be detained, or which authority is responsible for ordering and authorising such detention. StVG determines the location (penal institutions and court prisons) where the prison term shall be served (see sections 8 *et seq.* StVG). Concerning contact of prisoners with the outside world (para. 2(d)), the relevant provisions are contained in sections 86 *et seq.* StVG; the contact of remand detainees is also covered by section 188 CCP. Concerning access of competent and legally authorised bodies, section 188 CCP in connection with section 96 StVG applies for remand detainees and section 96 StVG applies to sentenced prisoners. Concerning the obligation described in subparagraph f, reference is made to the explanations concerning article 12. The major part of data mentioned in article 17 (3) about inmates of Austrian penal institutions and court prisons are available from the electronically managed Integrated Administration of the Penitentiary System (hereinafter IVV) and can be retrieved anytime from anywhere in Austria. Moreover, the institution in which a person is detained keeps a personal file for each inmate, which contains all further details mentioned. These data are also accessible to the competent criminal prosecution authorities and to the courts.

93. For persons in police detention (including those detained for migration related reasons) the police database for persons in detention (ADVW) was set up in accordance with section 58b (1) SPG. The database may be accessed by police posts and security authorities in Austria and provides up to date information as required in accordance with article 17 (3) of the Convention.

94. Since 1 July 2012, the Austrian Ombudsman Board (Volksanwaltschaft) is fulfilling together with its commissions the function of an Austrian National Preventive Mechanism (NPM) pursuant to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Through regular visits to places where persons are deprived of their liberty and recommendations, if necessary, to the competent superior authority, the mechanism contributes largely to strengthening effectiveness and efficiency of the Ombudsman Board's activities concerning safeguarding human rights. This covers not only prisons and police stations, but also military barracks, psychiatric institutions, old people's and nursing homes, crises centres and flat-sharing communities for juveniles. A total of 4,000 public and private institutions are being monitored on a regular basis. By virtue of its subject, this mechanism is directly contributing to the prevention of enforced disappearances.

95. Concerning freedom restricting measures, which mentally ill persons in psychiatric hospital wards can be subjected to, the requirements of article 17 are met by the provisions of the Federal Act on Hospitalisation of Mentally Ill Patients (Hospitalisation Act – UbG), FLG No. 155/1990 as amended by FLG I No. 18/2010, as well as by sections 38a et seqq. Federal Act on Hospitals and Sanatoria (hereinafter KAKuG), FLG No. 1/1957 as amended by FLG I No. 61/2010.

96. A freedom restricting measure in the meaning of section 3 Federal Act on the Protection of Personal Freedom during Residence in a Nursing Home or in other Institutional Care and Support Facilities (Nursing Home Residence Act – hereinafter HeimAufG), FLG I No. 11/2004 as amended by FLG I No. 18/2010 has been imposed, if a change of location of a person who is cared and supported in a nursing home or a comparable institution or in a (non-psychiatric) hospital (hereinafter resident) against or without his/her consent is being prevented by physical means. It has to be assumed that the term deprivation of liberty in articles 2 and 17 also includes freedom restricting measures pursuant to the HeimAufG. In connection with freedom restricting measures pursuant to the HeimAufG, public service tasks are delegated to the sponsors of nursing homes and similar institutions. The delegation of sponsors of such tasks imposes an “obligation” on them. This means, they are employed to fulfil public service tasks by official decision, here legal obligation. A person authorised to order freedom restricting measures pursuant to section 5 HeimAufG “is made accountable”. In a wider sense, freedom restricting measures pursuant to the HeimAufG are therefore also imposed by “employees of the State” (see article 2 of the Convention). Under the HeimAufG, each resident at any time is entitled to a free choice of his/her place of residence (moving to another nursing home or into any other form of private care, or even returning home with or without care by relatives), and he/she may at any time — of course not against his/her will — receive visits by relatives, and no obstacles may be imposed upon confidential communications (by letter, by telephone, by electronic means).

97. The HeimAufG fulfils the requirements of article 17 (1) and (2). Each freedom restricting measure has to be reported to the residents' representation pursuant to section 7 (2) HeimAufG (and if necessary to further representatives of the resident), and cannot therefore be considered “secret” in the meaning of paragraph 1. In particular the residents' representation pursuant to section 8 (2) HeimAufG — which is located with organisations for guardianship, patient ombudsmen and residents' representation — constitutes an effective legal assistance for residents also in the meaning of article 17 (2)(f). Pursuant to section 9 HeimAufG, the residents' representation has far-reaching supervisory powers, and it may at any time visit any institution subject to the HeimAufG in an abstract sense, which meets the requirements of article 17 (2)(d) and (e) of the Convention. Court review procedures – to be requested by the resident or his/her representative are governed by sections 11 *et seq.* HeimAufG and meet the requirements of subparagraphs a, b and f. As mentioned before, any freedom restricting measure has to be reported to the residents'

representation — which is under the supervision of the Federal Ministry of Justice — and which for administration purposes keeps relevant “registers”. Therefore, one can speak of an “official register” in the meaning of article 17 (3) of the Convention. The contextual guidelines of paragraph 3 are fulfilled to a large extent, for that matter.

98. Under military law, deprivation of liberty is only allowed pursuant to section 11 Military Authorisation Act (hereinafter MBG), FLG I No. 86/2000 as amended by FLG I No. 181/2013, and section 44 Military Disciplinary Act 2014 (hereinafter HDG 2014), FLG I No. 2/2014. Deprivations of liberty under MBG and HDG are sufficiently regulated in terms of content (conditions, responsibility, purpose, maximum duration 24 hours, information of a person of trust or legal counsel) and can be monitored through various institutions for legal protection (in particular the Administrative courts) or in the framework of service supervision.

99. The obligations contained in article 17 (2)(a) to (c) are fulfilled in the area of migration law by the provisions of the Act concerning the Procedures of the Federal Office for Immigration and Asylum, FLG I No. 87/2012 as amended by FLG I No. 84/2015, (hereinafter BFA-VG) and the FPG, which determine under which conditions and how long a person may be arrested and detained (cf. respectively section 40 BFA-VG and sections 39 and 76 *et seq.* FPG), or which body is competent for ordering or authorizing detention (see respectively section 3 BFA-VG and section 6 FPG in connection with section 2 (2) Security Police Act, hereinafter SPG). The obligation of article 17 (2)(f) is met by the review of arrest and pre-deportation detention foreseen in respectively section 22a BFA-VG and sections 82 *et seq.* FPG.

100. Pursuant to article 4 (7) Federal Constitutional Law on the Protection of Personal Freedom, FLG No. 684/1988 as amended by FLG I No. 2/2008, any detainee is entitled, upon his/her request and without any unnecessary delay, to inform either a relative or legal counsel of his/her detention.

101. In the scope of application of BFA-VG and FPG these rights are implemented respectively by section 41 BFA-VG and by section 40 FPG (Information of the person concerned on the reasons for detention, and information of consular representatives) as well as by section 41 BFA-VG or section 40 FPG in connection with section 36 (4) VStG), FLG No. 52/1991 as amended by FLG I No. 33/2013 (access for legal counsel and consular representatives) and section 47 SPG, FLG No. 566/1991 as amended by FLG I No. 43/2014 (information about detention to legal counsel and relatives). In order to enable the person concerned to exercise his/her rights, he/she shall be informed about such rights during arrest by the public security organs, or such information shall be provided immediately upon arrival of a provided interpreter. The person concerned shall be handed out information sheets (in a language he/she understands). If the alien is arrested for reasons of BFA-VG or FPG (see section 40 BFA-VG or section 39 FPG), he/she shall receive the “information sheet for detainees (FPG)” or the “information sheet for detainees (BFA-VG)”. These sheets are both available in German and forty other languages. For persons in pre-deportation detention (section 76 FPG), an additional information folder has been prepared. This information folder i.a. points out under item 1.2. (May I inform anybody about my pre-deportation detention? Am I entitled to inform legal counsel and/or a family member?) also the communication rights of the person concerned. In additional folders for police detention centers also issues such as the opportunity to receive visits, to use the telephone, to write or receive letters are dealt with.). The folder is available in German and 25 other languages and made available to every person in pre-deportation detention. These folders are also available for download in German and English on the homepage of the Federal Ministry of the Interior.

102. For the purpose of completeness, it must be pointed out that the option created by the decree of the Federal Ministry of Justice of 27 July 2001 concerning Babynest and anonymous births in Austria (JMZ 4600/42-I 1/2001) for mothers in special emergency situations giving birth to her child and leaving it in the care of a youth welfare organisation, without revealing her identity, does not constitute any deprivation of liberty.

## Articles 18 and 20

103. Article 18 (1) ensures that any person with a legitimate interest in information about the deprivation of liberty (legal counsel, relatives) has access to the information described in detail.

104. If a person is kept in pre-trial detention, the accused or a representative may gain knowledge of this information by inspecting the relevant files (section 51 CCP). Relatives who are no legal representatives generally have no right to inspect the files, but in case of a legitimate legal interest pursuant to section 77 CCP they may obtain insight at the public prosecutor's office or at the court. In line with article 20 (1), this right to information shall be restricted if the purpose of the investigations would thereby be endangered (section 51 (2) CCP). If such information is withheld during investigation proceedings, any person so affected may lodge a complaint for violation of rights pursuant to section 106 CCP – in line with article 20 (2). In the course of the main trial a plea for nullity pursuant to section 281 (1)(4) CCP shall be raised if either during the preparatory period before the main trial or during such main trial certain files could not be inspected.

105. The basis for requesting data access during a prison term (see explanation concerning article 17 (3)) is constituted by the Duty to Grant Information Act, FLG No. 287/1987 as amended by FLG I No. 158/1998, whereby in accordance with the proviso contained in article 20 (1) facts provided for by law (e.g. confidentiality obligation concerning information to relatives) might preclude such information. If pursuant to the Duty to Grant Information Act any information is withheld, one may request that a decision be issued (comp. section 4 Duty to Grant Information Act), which may then be contested.

106. In the scope of migration law the right to inform a lawyer and a relative of the detention is foreseen in Article 4 (7) of Federal Constitutional Law on the Protection of Personal Liberty as well as the FPG and BFA-VG (see the statements regarding article 17). Furthermore every person detained according to the BFA-VG is provided with a publicly paid legal advisor free of charge. The person themselves, the legal advisor chosen by a detained person as well as the publically provided legal advisor have access to the files concerning his/her case in accordance with section 17 of the Code on the Administrative Procedure (hereafter AVG).

107. There is no necessity in Austria to take the measures mentioned in article 18 (2), as adequate protective mechanisms such as the right to receive visits and other communication rights exist to prevent negative consequences for the persons affected.

108. Anybody who intimidates or forcibly sanctions persons who demand access to the information specified in Article 17 of the Convention may be held criminally responsible of coercion pursuant to section 105 *et seq.* CC. If physical attacks take place, the general provisions of the Criminal Code for the protection of physical integrity will apply (in particular: sections 83 *et seq.* governing bodily harm).

109. In terms of disciplinary consequences, civil servants are released from service by law if they are sentenced by an Austrian court of ordinary jurisdiction with final and binding effect to a term of imprisonment of more than one year for an intentional offence or of more than six months in cases of unconditional sentences (section 27 (1) 1 and 2 CC). Furthermore, pursuant to section 91 of the Federal Public Service Law, FLG No. 333/1979

as amended by FLG I No. 65/2015, public officials have to face disciplinary proceedings if there are reasons to suspect that a disciplinary offence has been committed. Such proceedings can lead to dismissal from the civil service.

## Article 19

110. For the data mentioned in article 19 the Security Police Act (sections 53 *et seq.* SPG) contains relevant regulations. For finding disappeared persons, the establishment of DNS is also permissible (section 67 (1a) and section 75 (1) SPG). Genetic information obtained through police identification measures may only be put to limited use (cf. sections 71 and 75 SPG). The respective regulations of SPG are compatible with the rights granted by the Austrian Federal Constitution, as required by article 19 (2).

111. Concerning data protection the Austrian Data Protection Act 2000 (DSG 2000), FLG I No. 165/1999 as amended by FLG I No. 83/2013, should be mentioned which guarantees the right of data protection as individual constitutional right (section 1 DSG) and i.a. provides for the establishment (see sections 35 *et seq.* DSG 2000) of the independent (see section 37 DSG 2000) Data Protection Authority. The independent Data Protection Authority i.a. is responsible for the control of data protection as well as for complaints in this field (see sections 30 *et seq.* DSG 2000).

## Article 21

112. Pursuant to article 21, necessary measures have to be taken to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released. Furthermore, necessary measures must also be taken to assure the physical integrity of such persons and their ability to fully exercise their rights.

113. The rather general obligation in this provision is fulfilled by the rules for terminating pre-trial detention (section 177 CCP) and by the provisions concerning the release from penal service (sections 148 *et seq.* StVG). The physical integrity is achieved on the one hand by prohibiting mistreatment during deprivation of liberty (Austria has signed the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and ratified this Convention with effect of 17 October 1987 (FLG No. 492/1987). Subject matter of this Convention is the infringement by State organs. It obliges the Contracting States to effectively prevent, resolve and prosecute such crimes), and on the other hand by the obligation to provide medical care during penal service pursuant to section 66 StVG.

114. Apart from section 312b, the Austrian CC contains several relevant provisions concerning the physical (and mental) integrity of detained persons in particular, namely

- Section 312 CC: “Tormenting and neglect of prisoners”
- Section 312a CC: “Torture”
- Section 321a (3) 3: torture as “Crime against humanity”
- Section 321b (3) 1: torture as “War crime against a person”.

115. The release data of prisoners are collected in their personal files and in the electronically managed Integrated Administration of the Penitentiary System Data Base for person in detention, and are therefore adequately documented. The rights of the released person will not be restricted.

116. Pursuant to section 25 of the Order by the Federal Ministry of the Interior on Detention of Persons by Security Authorities and Organs of the Public Security Services (Detention Order – hereinafter AnhO), FLG II No. 128/1999 as amended by FLG II No. 439/2005, each detainee has to be issued a written confirmation about the duration of detention, when he/she is released from the detention premise of the authority (Confirmation of Imprisonment). The AnhO is applicable to cases of detention under the FPG and BFA-VG as well (section 1 AnhO in connection with section 79 (1) FPG in connection with section 53c (6) VStG).

117. In involuntary hospitalization cases pursuant to the Federal Act on Hospitalisation of Mentally Ill Patients (Hospitalisation Act – UbG), the court has to limit the duration of psychiatric care when permitting hospitalisation (in cases where the court does not permit involuntary hospitalisation the patient has to be released immediately). The maximum duration according to section 26 (2) UbG is three months. Renewal of hospitalization beyond this limit is only allowed under specific circumstances.

## **Article 22**

118. Pursuant to article 22, obstructing or delaying the remedies referred to in article 17 (2)(f), and article 20 (2)(a), failure to record the deprivation of liberty, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate (para. b) and the refusal to provide information on the deprivation of liberty, or the provision of inaccurate information, even though the legal requirements for providing such information have been met (para. c), shall be prevented and prosecuted.

119. These obligations are met by Austrian law, which subjects such action to penalties. The prevention of obstructing or delaying legal remedies mentioned in paragraph a corresponds to the crime definition of section 302 CC, if the conduct constitutes a deliberate misuse of official authority and causes damage. The same is also true, if the refusal to provide information (para. c) is caused by malice aforethought. In any case, official duties are thereby infringed upon, which would have to be punished by appropriate disciplinary measures.

120. In the same manner, maintaining personal files of inmates and entry of data in the electronically managed Integrated Administration of the Penitentiary System (plus maintaining registers by the public prosecutors and by the courts) serving the function of an inmate register, constitutes an official duty, violation of which shall be punished by disciplinary measures or under criminal law, for that matter (section 302 CC). The same applies for the Police database for persons in detention (ADVW) concerning detention by authorities under the umbrella of the Ministry of the Interior.

121. In conclusion it should be pointed out concerning article 22, that an obligation to initiate criminal proceedings does not appear necessary. Whereas the English version of article 6 mentions “criminally responsible” and article 25 “punish under its criminal law”, article 22 only cites “impose sanctions”, so that punishment by administrative penal law or by disciplinary measures would appear sufficient.

## **Article 23**

122. Pursuant to article 23 (1), it must be ensured that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information.

123. This obligation is met by the on-going training of judges and public prosecutors on issues of protecting fundamental rights; furthermore, all personnel active in the penitentiary system are comprehensively trained for their work in terms of compliance with the law and of carefully maintaining the relevant registers.

124. Pursuant to section 2 (6) Judicial Service Agency Act, FLG I No. 101/2008 as amended by FLG I No. 40/2014, the Judicial Service Agency is obliged to provide the necessary training and further education in terms of penal service for the employees of the penitentiary system. This obligation also includes the medical staff employed in the framework of the Judicial Service Agency.

125. In the case of a (military) deployment, during which soldiers are authorised to arrest or guard detainees, the training contents mentioned in article 23 shall be taught by competent professional staff members reporting to the Ministry of Defence. For this purpose, adequate training time shall be made available during career training and during direct preparation for the deployment.

126. In accordance with section 11 of the Security Police Act, hereinafter SPG, FLG No. 566/1991, as amended by FLG I No. 5/2016, the Sicherheitsakademie (Police Academy) of the Federal Ministry of the Interior is the main institution for police training affairs, both on the basic and the advanced level. Following the training architecture, students are acquainted with Human Rights issues and specifically with police interventions in the sphere of the basic right of freedom — both from the legal as well as the ethical aspect — from the beginning of their studies onwards; thus their knowledge is deepened and permanently brought up-to-date during the entire path of their career. Furthermore, their expertise is even more enhanced by specific training modules provided under the umbrella of the further training programme and the various curricula that come with it. Within this scope the Sicherheitsakademie provides several trainings dealing with issues of persons falling in the area of the Convention, such as the correct application of the Code of Criminal Procedure, the Alien Police Act or on topics related to persons with mental disorder.

127. The obligation mentioned in article 23 (2) is adequately ensured by the crime definition of 302 CC (see also the explanations concerning article 6). Nor is non-compliance with an instruction directed at unlawful deprivation of liberty punishable, as illicit instructions need not be followed.

128. The obligation mentioned in article 23 (3) is adequately implemented by section 78 CCP, whereby an authority or public office is obligated to report any suspicion having come to their knowledge of a crime having been committed, involving their legal scope of competence. Furthermore, such authority — upon having come to such knowledge — must use best efforts necessary to protect the victim or other persons from danger (section 78 (3) CCP).

## **Article 24**

129. The definition of “victim” provided in article 24 of the Convention and the rights of victims under the same article is fully guaranteed under Austrian law.

130. Article 24 (1) refers to “victim” as the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance. This concept of “victim” is in line with that of section 65 (1)(a) and (c) CCP. Concerning the right to know the truth stipulated in article 24 (2) reference is made to the explanations in articles 18 and 20. Pursuant to section 66 (1)(2) CCP victims may inspect their files; pursuant to section 66 (1)(4) CCP they have to be kept informed about the progress of the proceedings.

131. Concerning the obligation foreseen in article 24 (3), to take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains, the regulations of SPG on the one hand foresee comprehensive options. Inasmuch as the suspicion that a punishable act has been committed exists, the provisions of CCP apply on the other hand (investigative measures such as the search of locations and objects).

132. The provisions of article 24 (4) to (6) are covered by the governing Austrian Civil Code and Public Liability Act. As already mentioned, the Federation, the Provinces, municipalities, other bodies of public law and the institutions of social insurance are liable under the provisions of Civil Law for any damage to any person or any property caused by unlawful acts of persons at fault when implementing the law on behalf of such legal entities. In the case of intentional deprivation of liberty, section 1329 Austrian Civil Code as amended by FLG I No. 87/2015, in connection with sections 1 et seqq. Public Liability Act, FLG No. 20/1949 as amended by FLG I No. 122/2013, covers all damages mentioned in article 24 Abs. (5) – including a right to compensation for non-material damage and a guarantee of non-repetition of “enforced disappearance”. In such a case, dependent relatives may claim compensation according to the last sentence of section 1329 Austrian Civil Code (for the loss of their allowance). Whether they are entitled to raise further claims – e.g. “compensation for immaterial damage” for the disappearance of a person close to them, will depend upon whether they (comp. also article 24 (1)) have suffered any harm as a direct result of an “enforced disappearance”, e.g. have fallen ill because of the uncertainty about the fate of such person. Austrian civil legislation appears quite sufficient in that case.

133. Irregularly staying migrants whose detention was found to be unlawful must be released immediately after such a finding by the court (section 22a BFA-VG). The person shall receive compensation for the unlawful detention via civil proceedings (about 100 Euros per day of unlawful detention) as well as compensation for the costs of the proceedings.

134. Also persons subject to the Nursing Home Residence Act (hereinafter HeimAufG) and having suffered harm as a direct result of an enforced disappearance, have a claim to just and adequate compensation; corresponding provisions are foreseen in section 24 HeimAufG. If a freedom restricting measure has been imposed in the meaning of article 2 “followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person”, such a freedom restricting measure — if no report to the residents’ representation pursuant to section 7 HeimAufG was made — is unlawful in terms of section 24 (1) HeimAufG and therefore triggers public liability – including also compensation for immaterial damage.

135. The rights guaranteed in article 24 (7) to form and participate freely in organisations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance are on the one hand already complied with by already existing victim protection associations. In Austria the right to freedom of association (article 12 Basic Law on the General Rights of Citizens and article 11 ECHR) is constitutionally guaranteed. Therefore the establishment of additional associations and organisations can be prohibited in very limited cases only.

136. Currently a draft bill has been elaborated by the Federal Ministry of Justice aiming at further improving victims’ rights in line with the EU Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime. The expected date of entry into force is 1 April 2016.

## Article 25

137. Pursuant to article 25 (1), further actions shall be made punishable, with the criminalisation obligation contained in article 25 (1)(a) already covered in domestic law by section 302 CC, whereas the general offence of section 195 CC (child abduction) is being superseded by section 302 CC.

138. Falsification, concealment or destruction of documents with a view to the abduction of children, as described in article 25 (1)(b), are already punishable by section 302 CC, inasmuch as an intention to cause damage beyond punishable actions against the reliability of documents and deeds (section 223 *et seq.* CC) can be proven. If not, sections 223 *et seq.* CC apply as such: According to section 223 CC (forgery of documents) persons who produce a forged document, or who alter a genuine document, with the intention that it will be used in legal procedures to prove a right, a legal relationship or a fact shall be punished by a maximum prison term of one year; the same punishment applies to persons who use a forged or altered document in legal procedures in order to prove a right, a legal relationship or a fact. According to section 224 CC (forgery of documents that are afforded special protection) persons who commit one of the offences punishable pursuant to section 223 CC in relation to a domestic public document, a foreign public document if it has become equivalent to a domestic public document by way of law or bilateral agreement, a last will and testament, or certain securities shall be punished by a maximum prison term of two years. According to section 229 CC (suppression of documents) anybody who destroys, damages or suppresses a document, which he/she is not entitled to dispose of, with the intent to impede its use in legal procedures to prove a right, a legal relationship or a fact shall also be punished by a maximum prison term of one year.

139. The prosecution authorities shall comply with the obligation contained in article 25 (2) to search for and identify the children referred to in paragraph 1(a) and to return them to their families of origin. For this purpose, also international legal assistance (para. 3) may be requested.

140. The option pursuant to article 25 (4) to review, and where appropriate, to annul adoptions, is guaranteed by section 201 Austrian Civil Code and sections 91a *et seq.* Non-Contentious Proceedings Act (hereinafter AußStrG), FLG I No. 111/2003 as amended by FLG I No. 111/2010. The inclusion of the child in the proceedings foreseen in paragraph 5 is guaranteed by section 90 (1) (1) and section 91b (3) AußStrG.

141. As a general rule, Austrian law fully guarantees consideration of the best interests of the child and, where appropriate, of the child's views, in accordance with the Convention on the Rights of the Child of 20 November 1989, to which Austria is a party.

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