



**VICTIM OR SUSPECT –  
A QUESTION OF COLOUR**

RACIST DISCRIMINATION IN THE  
AUSTRIAN JUSTICE SYSTEM

**AMNESTY  
INTERNATIONAL**



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*Cover photo:* Police arrest an injured man during a protest against a party election rally of the right-wing Austrian Freedom Party in Vienna, Austria, 26 September 2008.

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# 1. INTRODUCTION

## “That’s how we live here: accused of everything and protected against nothing”

*K<sup>1</sup>* is an Austrian citizen of West African origin. She has lived in Vienna for over 20 years. She has never committed an offence. And yet this is how she described to Amnesty International her relationship, and the relationship of most persons of African origin, with the Austrian criminal justice system.

These sentiments are typical of the victims of the human rights violations recorded in this report, which documents cases of racist abuse and ill-treatment by the Austrian police as well as the failure of the broader criminal justice system to treat migrants and members of ethnic minorities as they would the majority population - whether as victims, suspects or perpetrators of crime. Incidents of this kind occur neither rarely, nor exclusively as a result of the errant behaviour of a handful of individual officials. Rather, the persistence of such cases points to a structural failure on the part of the Austrian criminal justice system to fulfil its functions in all cases without discrimination. Amnesty International believes that this failure is the result of institutional racism within the Austrian police force and other component parts of Austria’s criminal justice system.

Institutional racism has been described as “the collective failure of an organization to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin ... [It] can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.”<sup>2</sup>

The use of this phrase does not mean, nor does Amnesty International believe, that all Austrian police officers or representatives of judicial organs are racist, or even that a majority of them are. On the contrary, it is clear that a great many law enforcement officials are fully aware of their human rights obligations; Amnesty International representatives met with a number of them when preparing this report. What is meant, however, is that, firstly, common social prejudices and stereotypes regarding foreign nationals and different religious and ethnic groups also permeate law enforcement structures and that these result in a range of discriminatory practices, which the organizations concerned do too little to prevent and too little in response to. And, secondly, that the systems in place for responding to racist misconduct by the police and for ensuring a consistently appropriate response to crimes reported by members of ethnic minorities are inadequate.

Examples of the discriminatory practices included in this report range from overtly racist abuse and ill-treatment by individual police officers, to situations in which, consciously or otherwise, law enforcement officials or representatives of judicial bodies have failed to provide the same quality of service to members of ethnic minorities as would routinely be provided to white Austrians - for instance by failing to protect victims of racist attacks; failing diligently to investigate crimes they are victims of; failing to give proper weight to their testimony, or using excessive force when arresting them. Under international human rights law, all of these examples of discrimination constitute human rights violations. National authorities must not only prevent their occurrence, but also take appropriate action when they occur.

One of the most salient indicators of institutional racism within the Austrian law enforcement system is the repeated failure of the organizations concerned to respond appropriately to proven instances of racist behaviour on the part of their officials even when members of ethnic minorities are the victims of serious offences, including torture, committed by them. Amnesty International's research indicates that offending officials routinely avoid commensurate censure; even in serious, high profile cases, they typically receive minimal sentences and extremely lenient disciplinary sanctions and, often, continue to enjoy the public support of their administrative and political superiors. Amnesty International is concerned that the message conveyed is that racism does not matter.

Such a striking level of impunity for racist behaviour amongst law enforcement officials goes a long way to explaining the persistence of racist attitudes in Austria's criminal justice system, despite a number of positive developments in the last few years. Greater attention has been paid to the training of police officers in non-discrimination standards and in promoting an understanding of the different cultural norms of Austria's varied ethnic groups. A 2006 Ministerial Instruction stressed the need for police officers to be particularly attentive to allegations of racially motivated crime. In 2007, the Vienna Police launched its first recruitment drive targeting members of ethnic minorities. Ethnic profiling, a widespread police practice in the early part of the decade, has been reduced. All these developments are indicative of a growing sensitivity to the need to combat discrimination within the Austrian criminal justice system with greater vigour. While noting and welcoming these, Amnesty International considers that greater efforts and greater urgency are required for lasting success to be achieved. This report therefore concludes with a number of recommendations to the Austrian authorities.

In particular, Amnesty International recommends that steps are taken to

- ensure that all allegations of racist misconduct by law enforcement officials are effectively investigated and appropriately punished;
- improve the identification of, and institutional response to, patterns of racist misconduct on the part of law enforcement officials;
- increase the awareness of all law enforcement officials of their duty not to discriminate;
- ensure the effective investigation and prosecution of crimes reported by foreign nationals and members of ethnic minorities, including, in particular, possible racist motivations.

This report is based on existing research by public institutions<sup>3</sup> and non-governmental organizations<sup>4</sup>, as well as interviews conducted by Amnesty International delegates with lawyers, community leaders, anti-racism campaigners and representatives of the different

branches of Austria's criminal justice system. It also draws on a number of individual cases. Some of these cases have already received widespread media coverage. Others have also been reported on by other organizations. Several of these cases relate to initial events that took place some years ago. The point of their inclusion is, firstly, to show that concerns raised in this report have long roots and, secondly, to allow for an analysis of the treatment of members of ethnic minorities as their cases have gone through the many different stages of the criminal justice system, from the registering of the complaint, or the filing of charges, through to judicial proceedings, appeals, possible disciplinary measures and compensation.

One issue repeatedly revealed in the course of interviews with the victims of the human rights violations recorded in this report, is the strength of the sense of alienation and rejection that they feel as a result of their discriminatory treatment by law enforcement agencies and judicial organs, as institutions specifically created to defend and protect their rights, have, instead violated them. Of broader social concern, is that this corrosive sense of injustice is not limited to individual victims, but spreads contagiously throughout minority communities that come to perceive themselves as specifically targeted. One victim expressed this sentiment in the following way:

*"we are not worth anything in this country; we are worth less than dogs".*

## **CASE 1:**

H is an Austrian citizen of Polish origin. He has lived in Austria for over 20 years. The following is his account of what occurred at around 4am one night in June 2007. As H was returning home late from the Donauinsel Festival (an annual summer festival in Vienna), he maintains he came across a group of around 10 Polish speakers involved in an altercation with two other people. As a Polish speaker himself, H tried to diffuse the situation, but without success. In the resulting scuffle, H was also hit and thrown to the ground. The police arrived on the scene as the brawl was petering out. While they were tending to the injured and questioning those involved, H started to look for the pen-knife that had fallen from his pocket amongst some rucksacks lying on the ground. He was interrupted, however, by one of the officers, who had already found the knife, and who accused H of attempting to steal one of the bags. As H was talking to the officer, one of the injured victims accused H of joining in the attacks against him. Ignoring H's denials, the police officer began instead to insult him, reportedly with the words: "Watch what you're saying you stupid Pole."

Despite H's objections and the testimony of others that he had only been attempting to calm the situation down, the police officer continued to insult him, reportedly saying "sod off back to your mates, you stupid Pole". H pointed out that he did not in fact know them and asked for his knife back so that he could finally go home. When the police officer refused and accused him of wanting to steal one of the bags because he was a Pole, H asked for the officer's service number, but was refused it. When he asked the officer once again to desist from his racist comments, the officer punched him in the stomach, threw him to the ground and started kicking him. H was able to take his mobile phone out, however, and to call the emergency services. Though the officer kicked the phone from his hand, the line was not cut. The emergency call centre consequently recorded the landing of blows and the police officer saying "you little arsehole, you know what you've just done – resisting lawful authority ... [in the background "Ow"] ... grievous bodily harm, attempted resistance of lawful authority ... you'll end up in jail ..."<sup>5</sup>. H was then put in a police car, where he was allegedly hit some more and taken to a police station. On his release, he went to the hospital where his bruises and the presence of blood in his urine were confirmed.

H was subsequently charged with resisting lawful authority. He informed the prosecutor of his own complaints, but all charges against the police officer were dropped by the prosecutor in August 2007. Undeterred, H took his case to the Independent Administrative Tribunal (IAT)<sup>6</sup>, which, relying in large measure on the telephone records, found H's rights to have been violated. The judge forwarded his findings to the prosecutor, suggesting that the case against the officer be reopened. The charges against H were finally dropped after the ruling of the IAT.

## 2. AUSTRIA'S OBLIGATIONS UNDER INTERNATIONAL LAW

All human beings are born free and equal in dignity and rights.

All are equal before the law and are entitled without any discrimination to equal protection of the law.

Universal Declaration of Human Rights <sup>7</sup>

### 1. THE PROHIBITION OF RACIAL DISCRIMINATION

The prohibition of racial discrimination is enshrined in a number of binding human rights treaties that Austria has ratified, including the International Covenant on Civil and Political Rights (ICCPR)<sup>8</sup>, the International Covenant on Economic and Social Rights (ICESCR)<sup>9</sup> and the European Convention on Human Rights (ECHR).<sup>10</sup> Austria has also ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which defines racial discrimination as

*“... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>11</sup>*

The ICERD explicitly places a dual obligation on states to ensure that their agents do not discriminate themselves and to prohibit and eliminate racial discrimination by private persons, groups or organizations.<sup>12</sup> States parties are required to address the root causes of discrimination and secure adequate remedies for its victims.<sup>13</sup>

The prohibition of racial discrimination has particular implications for the administration of justice in general and the functioning of criminal justice systems in particular. International

human rights standards require all law enforcement agencies and judicial organs, including judges and prosecutors, to treat all persons equally regardless of their race, colour or ethnic origin. Foreign nationals and members of ethnic minorities have the right to equal protection against crime and, should they fall victim to it, the right to the same remedies as everyone else. They are also entitled to equal treatment and the same procedural rights when suspected, accused or convicted of crimes. ICERD, for instance, requires States parties to

*... prohibit and eliminate racial discrimination ... in the enjoyment of ...*

*(a) The right to equal treatment before the tribunals and all other organs administering justice; [and]*

*(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;<sup>14</sup>*

States are also required to prohibit, and diligently investigate and prosecute, racially motivated violence.<sup>15</sup> The European Court of Human Rights has stated that

*Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment.<sup>16</sup>*

Law enforcement and judicial organs must not only refrain discriminating themselves, therefore; they also have a crucial role to play in protecting the right to non-discrimination of all persons against infringement by private individuals and organizations.

## 2. THE PROHIBITION OF CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Austria is party to a number of international human rights treaties which impose obligations upon the Austrian authorities to prevent and punish ill-treatment by its agents and ensure redress and reparation to the victims of such treatment. These treaties include the ICCPR, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture), and the ECHR.

Article 1 of the UN Convention against Torture defines torture for the purposes of the treaty as

*... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official.*

The UN Convention against Torture also puts obligations on states in relation to

*... other acts of cruel, inhuman or degrading treatment or punishment which do not amount*

*to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official. ”<sup>17</sup>*

All forms of torture and other ill-treatment are expressly prohibited under international law, in all circumstances

Article 3 of the ECHR, Article 7 of the ICCPR and the UN Convention against Torture require the Austrian authorities to ensure that no person is subjected to torture or other ill-treatment. In the face of allegations or other reasonable grounds to believe that an act of torture or other ill-treatment has occurred, these treaties require the authorities to ensure that a prompt, independent, impartial and thorough investigation is conducted, and that any persons responsible for such acts are brought to justice. The treaties also require the Austrian authorities to ensure that victims of such treatment have access to an effective remedy and receive adequate reparation, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.

## 3. BACKGROUND

### 1. ETHNIC MINORITIES IN AUSTRIA.

With the exception of a few small traditional minorities<sup>18</sup>, Austria's ethnic minority population is overwhelmingly composed of post Second World War immigrants and their descendants. Official statistics place the number of foreign nationals legally resident in Austria at around 840,000 persons, or one tenth of the total population.<sup>19</sup> Taken together, foreign nationals and naturalized Austrian citizens make up almost 15 per cent of Austria's total population.<sup>20</sup> This is the highest rate of all western European countries bar Luxembourg.<sup>21</sup>

Austria's largest and longest established immigrant groups come from the former Yugoslavia and Turkey, with around 450,000 and 250,000 persons respectively.<sup>22</sup> The first wave of immigration from these countries took place in the 1960s and 70s as a result of active recruitment policies by the Austrian government.<sup>23</sup> Despite the scaling back of such labour programmes during the economic downturn of the late 1970s and early 80s, immigration from these countries continued, albeit at a lesser rate, throughout this period, primarily through family reunification. The Balkan conflicts of the 1990s resulted in a fresh wave of immigration from the former Yugoslavia, many of whose fleeing victims were granted temporary humanitarian status and have since obtained permanent residency conditional on their integration into the labour market. The 1990s also witnessed a new influx of immigrants from Africa and Asia, most of whom sought asylum. In 2008, the number of persons born in Asia and Africa legally residing in Austria stood at around 100,000 and 40,000 persons respectively. Of the almost 40,000 persons of African origin, around 60 per cent, or 24,000, are estimated to be of sub-Saharan origin.<sup>24</sup>

### 2. RACISM AND XENOPHOBIA IN AUSTRIA

As with other European countries with high levels of immigration, Austria has faced difficulties in extending genuine equality of opportunity to its new residents and confronting prejudice and xenophobic attitudes amongst the established population. These difficulties are reflected in range of attitudinal indicators collected by the European Union (EU). Of all EU member states, for instance, Austria has the lowest average indicator for the degree of comfort its residents feel with having a neighbor of a different ethnic origin.<sup>25</sup> Only three EU member states have a lower proportion of inhabitants with friends from other ethnic groups<sup>26</sup> and in only two do fewer people think that foreign nationals have enriched their country.<sup>27</sup> These figures go some way to explaining the rise in popularity of Austria's far-right parties from the late 1980s onwards.<sup>28</sup> Far right parties continue to play a prominent role in shaping the Austrian political landscape<sup>29</sup> and to nourish and exploit popular prejudices for political gain.

Members of ethnic minorities are subject to a range of negative stereotypes, which are widely reflected in political discourse and the mainstream media. Foreign nationals generally are frequently associated with criminality and the abuse of social benefits. In its campaign

literature for the 2008 Graz local council elections, for instance, the Alliance for the Future of Austria (Bündnis Zukunft Österreich, BZÖ) promised: "Begging, asylum abuse, foreigner crime – we'll cleanse Graz."<sup>30</sup>

In addition to such generalized xenophobia, different groups face further specific prejudices depending on their origin or religious beliefs. This is particularly the case for black people and Muslims. A 2001 government census recorded 339,000 Muslims living in Austria, most of who are of recent Turkish or Bosnian origin. Despite the long standing legal recognition of Islam, Austria's Muslim community has faced increasingly vocal public reproach over the course of the last decade for a perceived reluctance to integrate into Austrian society, which is often blamed on "primitive" customs and, in particular, the denial of women's rights. At a rally in the run up to the 2008 elections in Graz, a leading candidate of the Freedom Party of Austria (Freiheitliche Partei Österreichs, FPÖ), stated that Islam should be "thrown back where it came from, beyond the Mediterranean Sea" and that "there was widespread child abuse by Muslim men".<sup>31</sup> Between them, the FPÖ and the BZÖ registered 15 per cent of the vote in Graz.

Austria's small but growing black community has also had to endure widespread racial stereotyping; whilst black men are regularly perceived and portrayed as being violent, black women are popularly considered promiscuous. Explaining her views in the Austrian Parliament, an FPÖ member and former judge, stated "that blacks not only look different, but are different; in particular, they are especially violent. This is obviously in the nature of these people. They are mostly here illegally, mostly drug dealers, and they are unbelievably aggressive."<sup>32</sup>

### 3. THE INVOLVEMENT OF SUB-SAHARAN AFRICANS IN DRUG-RELATED CRIME

As evidenced by a number of the cases in this report, the view that all young black men are drug dealers is particularly widely held. In a pamphlet produced as part of their campaign for the 2005 municipal elections in Vienna, the FPÖ accused the governing party of "tolerating drug-dealers and prostitution" in the city<sup>33</sup>, stating that "10,000 black Africans have taken control of the Viennese drug scene".<sup>34</sup> As the total black population of Vienna is generally estimated at around 10 to 15,000, the implicit claim is that all of them were involved in drug dealing. Also in 2005, in its Annual Report on Drug-Related Crime, the Ministry of Interior estimated the market share of West African groups in the drug trade at no less than 60 per cent.<sup>35</sup> As the degree of involvement of the black African community in drug dealing is of particular significance for law enforcement activities these claims are worth examining in greater detail.

In 2005, when the reported involvement of West African gangs in the drug trade was near its peak<sup>36</sup>, 24,041 police reports (*Anzeigen*) alleging violations<sup>37</sup> of the Austrian Narcotics Act by 25,892 people were filed with the Austrian judicial authorities.<sup>38</sup> Twenty-three per cent, or 6,022, of these people were foreign nationals. The total number of persons from the 30 most represented foreign countries was 5,446 persons, of which 1,741, or about 31 per cent, were from sub-Saharan African countries. Dividing the total number of police reports alleging drug offences by this proportion, it would appear that, in fact, in 2005<sup>39</sup> only about 7 per cent of all persons reported by the police to have committed drug related offences were of sub-Saharan African nationality.<sup>40</sup>

The proportion of those ultimately convicted for offences under the Narcotics Act of sub-Saharan African nationality is higher. Taking the number of police reports from one year and the number of convictions the next, it is possible, as the judicial process takes some time, to work out a rough conversion rate from police report to conviction. The total number of persons convicted for drug related offences in 2006<sup>41</sup> was 5,795<sup>42</sup>, of which 1,767<sup>43</sup> were foreign nationals, indicating a conviction rate (relative to 2005 police reports) of around 25 per cent overall, 18 per cent for Austrian citizens and 29 per cent for foreign nationals. Nigerians alone, the only sub-Saharan group for which disaggregated statistics are provided, accounted for 439 or 7 per cent of all convictions in 2006, despite accounting for only 933, or 3.5 per cent, of all police reports the previous year.<sup>44</sup> If the approximate conviction rate relative to police reports of around 50 per cent for Nigerians is typical of other sub-Saharan African nationals, then the rough proportion of all those convicted for drug related offences of sub-Saharan African nationality would be around 16 per cent. Even if one ignores the possibility that the strong priority attached by the police to combating West African drug gangs has inflated their representation in recorded crime statistics relative to other groups, these rates suggest that the real involvement of sub-Saharan Africans in the drug trade falls far short of market domination. And this is even before the marked difference in conviction rates between Nigerians and Austrian nationals is taken into account.

It is difficult to provide a precise estimate of the proportion of Austria's black population involved in drug related crime. Available statistics do, however, provide some indicators. In 2005 the police charged around 1,800 sub-Saharan African nationals with involvement in drug related crimes. Official estimates put the total number of sub-Saharan Africans *legally* resident in Austria in 2006 at around 24,000. As a proportion of this figure alone, the total proportion of sub-Saharan Africans charged with drug related offences in one year would not exceed 8 per cent. The real proportion is almost certainly lower, however, as this estimate does not take into account the many thousand asylum seekers and irregular migrants of sub-Saharan origin living in Austria. This proportion is also based only on police charges. If one considers convictions only, then, assuming once again that the estimated conversion rate of charge to conviction for Nigerians is the same for all sub-Saharan immigrant groups, the likely proportion of all foreign nationals of sub-Saharan origin convicted for drug related offences in any one year would not exceed 4 per cent. This is certainly high relative to indigenous Austrians and at least some other immigrant groups, but it falls very far short of justifying the popular association between sub-Saharan Africans and criminal drug related activity.

The very strong priority attached, in particular by the Viennese police, to countering West African street dealing has unquestionably been prompted by a real increase in drug related activity by sub-Saharan Africans during the last decade, which has required a concerted response.<sup>45</sup> Amnesty International is concerned, however, that certain sections of the media, prominent politicians and, indeed, the police themselves, have exaggerated the extent of the involvement of sub-Saharan Africans in drug related crime and have, as a result, stigmatized an entire community.

It is notable, in particular, that leading criminologists spoken to by Amnesty International, maintained that overall drug consumption in Austria has remained more or less stable over the last 15 years, even if the number of police charges has risen from around 17,000 a year in the late 1990s to around 25,000 in recent years. What has changed is the visibility of

some of the ways in which drugs are now being supplied to satisfy this market. Since the mid to late 1990s drug dealing is increasingly taking place in the street. Moreover, many of those dealing in this way stand out – because they are black.

Drug dealing, as a recognized criminal offence often associated with other criminal activity, attracts strong social disapproval. What is striking in the Austrian context, however, is the extent to which special opprobrium has been reserved for only one of the ethnic groups engaged in it. The viciousness and selectiveness of the disapproval of drug dealing by people of West African origin has not been limited to the media. A striking example of the extent to which people of West African origin have been singled out for special treatment by the state is provided by the very reports from which most of the statistics in this section have been taken – the Ministry of Interior's Annual Report on Drug Related Crime.

In the 2005 annual report, the involvement of sub-Saharan African criminal gangs in the drug trade was described in the following terms:

*They are absolutely ruthless in their pursuit of profit, they are totally indifferent to health and life of others (selling drugs to persons under age linked with sexual exploitation), they have no sense of responsibility whatsoever, an enormous conscience deficit, and a highly antisocial attitude, manifested amongst others things in exploitation of the social benefits and aliens policy to optimize their criminal objectives, especially financial profits from dealing with drugs.<sup>46</sup>*

Despite being the second most represented group of foreign nationals charged by the police with involvement in drug related crime that year (and occupying the first place today), the role of gangs from the former Yugoslavia was described as follows:

*Apart from the information obtained from police operations relating to Yugoslavs or persons of Yugoslav descent carried out in the previous years, no new intelligence has been gathered in 2005 for lack of in depth and coordinated structural investigations.*

## 4. RELEVANT PROVISIONS OF AUSTRIAN LAW

### 1. THE PROHIBITION OF RACIAL DISCRIMINATION IN AUSTRIAN LAW

The general framework for the prohibition of racial discrimination in Austria is provided by its obligations under international human rights law, in particular the ECHR, the ICCPR, the ICESCR and ICERD. A Federal Constitutional Act implementing the International Convention on the Elimination of All Forms of Racial Discrimination was adopted in 1973.<sup>47</sup> This Act specifically prohibits any form of discrimination on the grounds of race, colour, descent, or national or ethnic origin in Austrian law and in the policies and practices of its public authorities. More concrete protection against racial discrimination is provided by the 2004 Equal Treatment Act, which creates a right, enforceable in the courts, to non-discrimination on the grounds of ethnic origin and religious belief in the areas of employment and the access to goods and services, including housing and education, in both the private and the public sectors.<sup>48</sup>

### 2. THE PROHIBITION OF RACIALLY MOTIVATED OFFENCES

Austrian Criminal Law recognizes a number of offences with a racist element. Section 283 of the Austrian Penal Code (*Strafgesetzbuch*, StGB) criminalizes both incitement to racial or religious hatred<sup>49</sup> and disparaging national, ethnic or religious groups in a manner that violates their human dignity. Section 115 StGB, in conjunction with Section 117(3), prohibits publicly insulting a specific individual on account of their ethnic origin or religious belief.<sup>50</sup> Austrian law also criminalizes a range of acts relating to the founding, supporting and financing of National Socialist organizations and ideologies under the 1947 Prohibition Law (*Verbotsgesetz*) and the 1960 Law against Nazi Insignia (*Abzeichengesetz*)

Austrian law does not specifically criminalize racially motivated violence or criminal damage. Like many European countries, however, Austrian law treats racist motives as adding to the gravity of any crime. Under Austrian law, therefore, possible racist motives should always be examined in court and, if found to exist, be reflected in sentencing by an increase of up to 50 per cent on the standard penalty<sup>51</sup>.

Section IX,(1)(3) of the 1991 Introductory Provisions to the Code of Administrative Procedure (IPCAP) introduces a lesser administrative offence of subjecting persons to “unjustified discrimination on account of their race, skin colour, national or ethnic origin, religious denomination or any other handicap or [preventing] such persons from entering premises or from obtaining services available for general public use”, which is punishable by a fine of up to 1090 euros.

The Austrian criminal justice system is based on the principle of mandatory prosecution. This

means that prosecutors are obliged to do everything necessary to bring about the prosecution of offenders whenever they have received information relating to a criminal offence. Prosecutors should also seek to bring any possible racist motive to the attention of the court in order for it to be considered in sentencing. Prosecutors do have some discretion, however, as to whether to prosecute in that they may decide not to press charges where the accused individual's guilt is not significant and they agree to make restitution to the victim, pay a fine or do community service.<sup>52</sup>

### 3. THE PROHIBITION OF DISCRIMINATION BY LAW ENFORCEMENT AGENCIES

Article 1 of the Federal Constitutional Act for the implementation of ICERD, places an obligation on all public authorities not to discriminate on the grounds of race, skin colour, descent or national or ethnic origin in the exercise of their functions. This prohibition extends to all state actors in the criminal justice system, including the police, prosecutors and judges. Austrian law does not, however provide for a general equality duty on public authorities requiring them to promote equality of opportunity and good race relations, nor has such a positive duty been specifically created for judicial organs or law enforcement agencies.

Guidelines on Police Interventions contained in the Austrian Security Police Act (*Sicherheitspolizeigesetz*) place an additional obligation on members of the police force to "refrain from any action liable to give the impression of their being biased or that might be perceived as discrimination on the grounds of gender, national or ethnic origin, religion or sexual orientation"<sup>53</sup>.

### 4. THE PROHIBITION OF TORTURE AND OTHER ILL-TREATMENT AND ABUSE OF AUTHORITY BY LAW ENFORCEMENT OFFICIALS

Austrian law does not contain a definition of torture. Under section 312 StGB, however, any official who causes a detainee or any other person encountered in the course of their duties physical or mental anguish, or whose neglect results physical or mental harm, is punishable with up to two years' imprisonment or between two and five in the event of serious injury and 10 in the event of death. Section 302 StGB prohibits abuse of authority, whilst section 313 provides that public officials committing criminal offences in the course of their duties, or by abusing their public position, are liable to punishment of up to one and half times the normal sentence.

### 5. COMPLAINTS AGAINST LAW-ENFORCEMENT OFFICIALS

Depending on the nature of the complaint, Austrian law provides for three possible avenues of redress for victims of police abuses. Victims can complain directly to the police, to an Independent Administrative Tribunal or, via a public prosecutor, to the court.

Under Section 89(2) of the Security Police Act, individuals can complain of breaches of the Guidelines on Police Interventions directly to the police. The complaint will be reviewed by a supervising police official who will inform the complainant of the whether a violation is deemed to have occurred, but not of any disciplinary measure that may have resulted. The supervising police official can invite the complainant to a meeting, with or without the allegedly offending officer, to see if the complaint can be resolved amicably.<sup>54</sup>

Individual victims of police abuses constituting a criminal offence can complain either directly to the police, or to the Office of Public Prosecution. The police are obliged to forward such complaints to the Office of Public Prosecution within 24 hours<sup>55</sup>, which then becomes responsible for supervising the criminal investigation.

The new Code of Criminal Procedure, which entered into force on 1 January 2008, abolished the office of examining magistrates and made public prosecutors responsible for authorizing and supervising all stages of criminal investigations. Prosecutors are obliged to investigate all allegations of police misconduct constituting a criminal offence with a view to prosecution.<sup>56</sup> Prosecutors have the authority to conduct investigations and question suspects and witnesses themselves. However, prosecutors spoken to by Amnesty International conceded that, in practice, prosecutors rely heavily on investigations conducted by the police. This also applies to allegations of criminal misconduct by the police. Allegations of serious ill-treatment will typically be investigated by the Bureau for Internal Affairs<sup>57</sup>, which is a separate police unit that is not subject to orders from the Minister of Interior and which is responsible for investigating corruption and serious misconduct within the public administration, including the police.<sup>58</sup> Lesser offences will typically be investigated by the Office for Special Investigations of the Federal Police Directorate of Vienna (BBE)<sup>59</sup>, in Vienna, and, in the other Federal Districts, which do not have internal investigation units, by superior, or neighbouring, police units.

Complaints of irregular police conduct can also be brought before an Independent Administrative Tribunal (IAT) (*Unabhängiger Verwaltungssenat*). IATs are not part of the judiciary, but are independent public authorities competent to hear appeals against penalties imposed for administrative offences and the irregular use of public authority. Their decisions are binding, but can be appealed to both the Administrative Court and the Constitutional Court. Two kinds of complaints can be brought before IAT concerning alleged police misconduct.<sup>60</sup> Actions may be brought alleging either a breach of their individual rights (*massnahmenbeschwerde*) or a breach of the Guidelines for Police Interventions (*richtlinienbeschwerde*). In both cases, the function of the IAT is to establish whether or not there has been an irregularity on the part of the police as a public authority and not to determine the individual responsibility of particular officers, though this may be apparent from the description of the events provided in the judgment. The IAT has no power to impose any kind of penalty either on the police force concerned or on the individual officers involved; nor does it offer compensation or any other remedy to applicants whose complaints are upheld, though their position in relation to any possible claim for damages in civil courts will typically be strengthened by an IAT ruling in their favour. Legal representation is not required in proceedings before the IAT and legal aid is not available to applicants. Applicants whose complaints are not upheld are liable to pay the costs of the proceedings, which are usually in the region of 600 to 700 euros.

The new Code of Criminal Procedure significantly changed the complaints procedure by introducing a new avenue of complaint for persons whose rights have been violated in the course of criminal investigations (as opposed to preventive or security measures carried out by the police under powers conferred by the Security Police Law). Complaints of irregularities committed in the course of criminal investigations, including torture or ill-treatment, should now be brought directly to the court.<sup>61</sup> Individuals are required to address their complaint to the Office of Public Prosecution. A prosecutor<sup>62</sup> is then required to consider whether a

violation has in fact taken place and, if so, to inform the complainant as to how the breach arose and, if possible, remedy it immediately. If dissatisfied with the prosecution's findings or response, the complainant is entitled to oblige the prosecution to forward the complaint directly to a judge.

In the light of extensive discussions with police officers, prosecutors, judges and leading criminal lawyers, Amnesty International is concerned by a number of uncertainties in the application of this new procedure, in particular in so far as it relates to the possibility of bringing an action before the IAT. The right to bring an action before the IAT in respect of police misconduct in the course of operations undertaken uniquely under powers provided for by the Security Police Act and the Aliens Police Act is clearly not affected. Leading experts spoken to, however, considered that such an action would no longer lie in respect of police actions carried out in the course of criminal investigations under powers provided for by the Code of Criminal Procedure. Opinion was very much split as to whether an action would lie with *both* organs in the event of misconduct committed in the course of operations which fell under both powers, or whether a complaint could now only be made via a public prosecutor. As the dividing line between the respective powers is often unclear, this uncertainty affects a great many cases (for instance, security measures such as stops and searches can rapidly evolve into situations in which the police initiate investigative measures in accordance with Code of Criminal Procedure).

The suggestion made to Amnesty International by most of the experts spoken to was that applicants would be well advised to initiate proceedings before both organs. This would add significantly to their legal costs, however. Amnesty International is also concerned that a complaint alleging a breach of the Guidelines for Police Interventions (including the requirement that police officers refrain from any action that might be perceived as discriminatory), which can be brought before the IAT, could not be brought before the prosecutor under the new complaints procedure set out in the Code of Criminal Procedure, thereby limiting the redress available for this human rights violation.

In 1999, a Human Rights Advisory Board (*Menschenrechtsbeirat*) (HRAB) was established within the Ministry of Interior. Its functions are to monitor the respect for the rights of persons detained under the authority of the Ministry of Interior and, more generally, to review the policies and practices of the police in order to identify structural deficiencies. It is not mandated to hear individual complaints, but may examine and comment on individual cases that are of particular concern or illustrative of systemic short-comings.

In 2007 the Vienna Police introduced a Human Rights Coordinator to work on developing a stronger human rights culture within the organization and to act as a focal point for contacts with non-governmental organizations (NGOs). A positive practice has developed whereby NGOs can forward complaints they have received about police and receive a response as to steps that the Vienna Police is taking to address them.

# 5. INDICATORS OF INSTITUTIONAL RACISM WITHIN AUSTRIAN LAW ENFORCEMENT MECHANISMS

## 1. INCIDENTS OF RACIST ABUSE AND ILL-TREATMENT OF MEMBERS OF ETHNIC MINORITIES BY LAW ENFORCEMENT OFFICIALS

In discussions with the relevant authorities, Amnesty International was informed that no statistics on the ethnicity of complainants or even proven victims of police ill-treatment are kept by either the Ministry of Interior or the Ministry of Justice. Ministry of Interior officials also conceded that no records were kept of the number of complaints against police officers alleging racist abuse. In the absence of such statistics, it is difficult to obtain an accurate picture of the overall number of incidents of police ill-treatment and racist abuse affecting members of ethnic minorities and, therefore, the proportion they represent of all cases of verbal or physical police misconduct. However, both anecdotal evidence and such statistics as Amnesty International has been able to obtain from official sources, suggest that the number of incidents of police ill-treatment affecting members of ethnic minorities is disproportionately high and that, in many of these cases, the ill-treatment was, at least partially, racially motivated.

Over the last decade, the overwhelming majority of cases of police ill-treatment reported to and taken up by Amnesty International in Austria have involved members of ethnic minorities. As far back as 1999, Amnesty International was already expressing its concerns that “the majority of complaints [of ill-treatment of detainees by police officers] came from non-Caucasian foreign and Austrian nationals” and that “in a number of cases of alleged ill-treatment, police officers were alleged to have verbally abused detainees using racist language”.<sup>63</sup> 1999 was the year in which Marcus Omofuma, a rejected asylum seeker from Nigeria, died after being bound and gagged during his attempted deportation. His case was the first high-profile case of serious ill-treatment of a member of an ethnic minority. Further widely reported cases followed in 2003, with the death of Cheibani Wague in the course of an arrest in Vienna, and again in 2006, with the torture and racist abuse of Bakary J during a deportation attempt. Over the last few years there have been numerous other cases, many of which have received at least some media coverage and a number of which are documented in this report.

It obviously does not follow automatically from the fact that a member of an ethnic minority was ill-treated that the ill-treatment was racially motivated. However, an overt racist element is evident in the great majority of the cases recorded in this report. Nor, conversely, does it follow from the absence of racist statements that racist prejudices played no role at all.

Indeed in many of the few cases in which xenophobic statements were not made, racist prejudices, in particular the presumption that the individual confronted would respond aggressively, nonetheless played a significant role in the chain of events leading to the human rights violations recorded.

Such statistical data as is available results either from ad hoc investigations by official bodies or was obtained from official sources in response to specific questions presented by Amnesty International. Some indication of the proportion of incidents of abuse or ill-treatment directed at ethnic minorities can be gleaned from a 2007 report of the HRAB examining the handling of complaints of ill-treatment by law enforcement officials.<sup>64</sup> For the purposes of its report, the HRAB reviewed 193 complaints involving 202 alleged victims filed with prosecutors in Vienna and four other districts during the course of 2004. Of these 202 persons, 112<sup>65</sup>, or 55 per cent, were foreign nationals or of foreign origin, whilst 23, or 11 per cent, were of sub-Saharan African origin.

Statistics provided on request by the Ministry of Interior's Bureau of Internal Affairs (BIA) reveal that 252, or 23 per cent, of all the 1116 cases it dealt with in 2007 concerned abuses affecting foreign nationals or persons of foreign origin (*Personen mit Migrationshintergrund*). Most of these cases concerned allegations of physical ill-treatment, with the remainder alleging racist or discriminatory treatment at the hands of law enforcement officials. As only about half of all the cases investigated by the BIA concern allegations of ill-treatment, these statistics are broadly consistent with those recorded in the HRAB's study.

Whilst the number of complaints cannot be taken to equate with the number of actual victims,<sup>66</sup> these statistics do strongly suggest that members of ethnic minorities, and, in particular, persons of darker skin and eastern European origin, are disproportionately subjected to ill-treatment and misconduct at the hands of the police, as they constitute only one eighth of the population, and are reported as suspects in 29 per cent of investigated criminal incidents<sup>67</sup>, but account for approximately half of all complaints.

One possible explanation for this discrepancy might be that members of ethnic minorities are disproportionately inclined to complain of ill-treatment. This would not appear to be case, however. Ethnic minority community leaders and anti-racism organizations with whom Amnesty International spoke all agreed that ill-treatment against members of ethnic minorities was almost certainly under-reported, for a variety of reasons. Most significantly, they considered that foreign nationals and, in particular irregular migrants and asylum-seekers, preferred where possible to avoid the scrutiny of the state and the risk, real or imagined, of negative repercussions in the event of complaining in the form of counter-charges against them for resisting authority, the rejection of their asylum claim, or their expulsion from the country. Potential complainants with little money and precarious immigration status were further discouraged by the cost and time of initiating proceedings and the very low probability of succeeding.

It is to be noted that in almost all of the cases presented in this report, the individuals concerned were legally resident in Austria, employed and relatively well integrated. Many of the individuals have been naturalized and of those have not many have Austrian spouses. These are unlikely to be the persons most at risk of ill-treatment. They are, however, more

likely to be able and willing to complain about it. Beyond them there likely lies a further group of migrants for whom formal avenues of redress are remote abstractions.

As illustrated by the examples provided below, the racist attitudes of individual police officers can manifest themselves in variety of forms of misconduct. At their worst, they lead to physical violence.

### **CASE 2:**

In June 2006, P, a Mexican ambulance driver, was visiting the Donauinsel Festival in Vienna, when he got separated from his friends and lost his way. Seeing two policemen, P approached them to ask for directions to the nearest underground station. Instead of receiving assistance, P alleges that he was told to “piss off, shit foreigner”. P complained of his treatment and demanded to know the officer’s name and service number. Again, P maintains, he was told to “piss off”, this time with the further warning that he would otherwise be arrested. P then reminded the officers of their duties, whereupon P alleges that they grabbed him and forced him to the ground, causing a deep cut to his left hand and bruising to his left arm and right hip. P maintains that he was warned: “Don’t move, you shit foreigner”. The police officers then handcuffed him and took him to a temporary police station. There a senior officer ordered the loosening of the handcuffs and for P to be taken to Donaustadt police station. In the car on the way there P alleges that he was assaulted and racially abused. At 2 am in the morning P was allowed to leave the station and was given the service numbers of the two officers. The next day P went to the hospital and his injuries were recorded by a doctor. P subsequently received notification that he was being fined 140 euros for aggressive behaviour towards a police officer. Assisted by ZARA, a prominent national NGO, P filed a complaint against the officers with the Office of Public Prosecution. The prosecutor declined to bring charges, however, for lack of evidence. Charges were brought, however, against P for resisting lawful authority. A first, inconclusive hearing was held in May 2007. P was acquitted early in 2008, almost two years after the incident took place.

The misconduct may also take the form of racial insults, or derogatory forms of address.

### **CASE 3:**

K is a 50 year old Austrian citizen of Congolese origin. She lives in Vienna. On 26 August 2007 at around seven pm, K was travelling on the underground when she noticed a young black man being addressed by a white man in the foyer of a station. As she passed them, the black man appeared to say something to her. She stopped and, in German, asked the young man what he was trying to say, but he did not understand her. At this point, K alleges that the white man, who was wearing civilian clothes, turned round saying “Nigger, get lost I’m a policeman.” Having participated in the cultural exchange programme “Police and Africans”, K replied that she knew from senior police officers that police officers were not allowed to use the term “nigger”. The white man duly produced a police badge and proceeded to explain to K that he had been in the process of questioning the young man on suspicion of drug dealing. During this exchange, the young man made his exit, having left his identity card with the police officer. The officer proceeded to ask K to show her identity card and to accuse her of knowing and protecting the young man, and of being involved in drug dealing herself. He then called for back up. On their arrival, the police searched K’s bag, and checked her identity and criminal record; nothing was found and K was allowed to go. The plain clothes police officer, who, it subsequently transpires, was off duty, reportedly made no mention to anyone at this stage of any allegation that K had pushed or in any way assaulted him.

A few weeks later, however, K was charged with assaulting a police officer on the basis of a police report drawn up by the off duty officer two days after the event which described her as having approached him “screaming: ‘what has he done?’ ” and giving him a “strong shove such that [he] swayed sideways.” In the report the officer referred to K by her name only three times, when relating his own actions, such as requesting her to identify herself and informing her that he was charging her with assaulting an police officer. K is referred to on four occasions, however, as the “coloured woman” [die farbige Frau], each time when describing her alleged misconduct.

At a hearing on 26 March 2008 K was acquitted. Proceedings against the officer for abuse of authority under 302 StGB were opened by the Office of the Public Prosecutor, who requested an investigation from the Viennese Bureau for Special Investigations (BBE), which deals with complaints against the police. The investigation by the BBE consisted of securing a written statement from the officer concerned, repeating the essence of his earlier accusation. No other persons appear to have been questioned in relation to the incident. On the basis of this investigation, the Prosecutor closed the case. K appealed the decision to close the case to the Vienna Appellate Court (Oberlandesgericht). On 10 October 2008, however, her application was rejected.

Discrimination by police officers in Austria is not always overt. Rather, in some cases examined by Amnesty International, the discrimination may manifest itself in behavioural patterns based on underlying prejudices, such as the belief that young black men are aggressive, rather than the objective requirements of the situation confronting a particular police officer. In the case below, for instance, the officer involved immediately adopted a provocative attitude towards a black individual who had not himself showed any signs of aggression.

#### **CASE 4:**

One day in October 2007, at around 5 pm, Mr N, an Austrian citizen of Congolese origin, was being driven by his girlfriend to a training session with a local Viennese football club. N used to play football professionally. Having driven through a red light, they were pulled over by a police officer. N's girlfriend was asked to step out of the car and questioned. After about 15 minutes, N also got out of the car to ask why it was taking so long. He maintains he was told in aggressive tone: “Who said you could get out of the car? Get lost.” Feeling that he had done nothing wrong, N refused to get back in the car and was reportedly told to sit down on the pavement. Again N refused, whereupon the policeman threatened N with arrest and called for assistance. N maintains he asked for the reason for his arrest and was not given a reply. More policemen shortly arrived from a nearby police station, to which N was led away in handcuffs. N was detained for around four and a half hours and then released after being recognized by another officer. N later learnt that he was to be charged with resisting lawful authority. He was described in the police protocol as “having kept a threatening close distance”, “gesticulated” and having “almost struck” a police officer. He was alleged to have “hollered” and to have “disturbed the peace with his inappropriate loud shouting”.<sup>68</sup> On 15 January 2008, N was acquitted, with the judge qualifying the behaviour of the arresting police officer as provocative. N decided not to pursue a complaint against the officer concerned in the IAT, explaining to Amnesty International, that the expense and time involved in bringing a case was out of all proportion to the benefit, even in the unlikely event of success.

## 2. THE RESPONSE TO POLICE ILL-TREATMENT OF MEMBERS OF ETHNIC MINORITIES

The European Commission against Racism and Intolerance [...] recommends to the governments of member States [...] to take measures to make the police aware of the fact that acts of racial discrimination and racially-motivated misconduct by the police will not be tolerated.

### **Para.7, ECRI General Policy Recommendation No. 11**

The high proportion of complaints of police ill-treatment by member of ethnic minorities is only part of the picture. Amnesty International is also concerned by the frequently inadequate response to such complaints by police forces themselves and, more generally, by the judicial system. Whilst a number of avenues of redress are formally available, these do not consistently guarantee victims of police ill-treatment the redress that they are entitled to under international human rights law.

However well police officers are trained, and however comprehensive the preventive measures in place, individual instances of misconduct and ill-treatment will occasionally arise. Equally, for so long as racist sentiments permeate society as a whole, they will, on occasion, find expression in the actions of individual police officers. For these reasons, it is essential that there is an effective and thorough official response to demonstrable instances of racially motivated misconduct. This applies both to the identification of possible structural or institutional failures that contributed to the abuse and to identifying those personally responsible and taking appropriate disciplinary or other measures. Amnesty International is concerned that the Austrian law enforcement agencies and, more generally, the criminal justice system as whole, fail on both these counts.

It is certainly true that many of the difficulties faced by victims of police misconduct from ethnic minorities arise from general failings in the Austrian system for dealing with complaints against police officers that affect all persons alike, regardless of their ethnic origin. At the same time, the protective reflex of the Austrian criminal justice system as a whole is particularly strong when the victim is from an ethnic minority background.

As the HRAB has noted, the Austrian system largely leaves the business of investigating and punishing police misconduct to the criminal justice system.<sup>69</sup> As evidenced by many of the cases included in this report, this system faces many of the same difficulties as Amnesty International has recorded in other European countries. These include the failure to conduct prompt, thorough and impartial investigations by the police themselves, the failure by prosecutors to prosecute police officers despite compelling evidence, the tendency of judges to place undue weight on police testimony and the practice of filing counter-charges against complainants either for resisting authority<sup>70</sup> (*Widerstand gegen die Staatsgewalt*) or, less frequently, for deliberately accusing a police officer of committing a criminal offence in the knowledge that the accusation was false (*Verleumdung*).<sup>71</sup>

It is not the purpose of this report, however, to examine these general failings in detail. It is possible that the recent changes to the Austrian Code of Criminal Procedure placing greater responsibility on prosecutors to deal with complaints of ill-treatment will improve matters. The future of the Bureau for Internal Affairs, which has, at least, demonstrated an ability to

investigate high-profile complaints effectively, is also the subject of ongoing political debate. Generally speaking, however, Amnesty International believes that specialized independent police complaints mechanisms provide the most effective system of investigating and responding to police ill-treatment. Amnesty International accordingly recommends that the Austrian authorities give serious consideration to the establishment of such a body.

This report focuses on specific problems that regularly arise in the context of complaints made by members of ethnic minorities about police misconduct. These include the inadequate response by police forces and their political superiors to both individual allegations of misconduct and to the possible structural short-comings they reveal and specific failures on the part of the judiciary in the context of criminal proceedings.

Two particularly prominent cases reveal many of the most troubling features of the official reaction to complaints and incidents of police ill-treatment of members of ethnic minorities. These are the cases of Cheibani Wague and Bakary J.

### **CASE 5:**

On the night of 14 July 2003, Cheibani Wague, a Mauritanian legally residing in Austria, died in the course of his arrest by the Vienna police. Cheibani Wague had been arguing with his employer outside in the street. When he started behaving aggressively, his employer called the police and an ambulance. On their arrival Cheibani Wague, who was still behaving erratically, was wrestled to the ground by several police officers, one of whom was reported by a witness in court to have said: "You pig – haven't you had enough yet?"<sup>72</sup> Once on the ground, he was laid face down and his hands were cuffed. He was given an injection and was stood on, for over five minutes, by two police officers and a paramedic until, and for several minutes after, he ceased moving altogether. All the while, several other police officers and a doctor stood by. By the time the officials stepped off Cheibani Wague, he was already unconscious. Ankle cuffs were attached, however, before Cheibani Wague was transferred to a trolley, where he lay unattended for several more minutes before any attempt to resuscitate him was made. Cheibani Wague died before he reached the hospital. The entire scene, from the moment of his being brought to ground to his placing in the ambulance for resuscitation was captured on video from a neighbouring house, though this became known only a number of days after the incident through the investigation not of the police, but a journalist.

In striking contradiction to the video evidence, the police reports filed the next day claimed that Cheibani Wague continued to struggle on the ground. For several weeks, even after the video was released, the official reaction of senior police officers and the Minister of Interior was to strongly deny any wrong-doing at all. None of the police officers were suspended, or even transferred to other duties pending the outcome of the criminal investigation, in stark contrast to the Ministry of Health, which immediately suspended all of its implicated employees.

The first judicial investigation into the events surrounding Cheibani Wague's death took place in December 2003 before the IAT. Acting on instructions from their superiors, the police officers involved initially refused to testify. Only at a later hearing in January 2004, on the strong insistence of the judge did any of those involved give evidence. On 29 January 2004, the IAT judge declared the actions of the Viennese police to have been illegal and to have violated Cheibani Wague's human rights, in particular the rights to life and liberty. The official response of the Viennese Police was to describe the judgment as "incomprehensible".

The trial of the six police officers, three paramedics and the ambulance doctor did not begin until two and half

years later, on 19 July 2005. On 9 November 2005, the ambulance doctor and one of the police officers were convicted for causing death through negligence. They both received a seven month suspended sentences. In respect of the remaining police officers, the judge found that their inadequate training was ultimately to blame. No disciplinary measures whatsoever were taken by the Ministry of Interior. The sentence of the police officer was later reduced even further, to four months, on appeal on 15 March 2007. No official apology has ever been offered.

## CASE 6:

Bakary J was beaten, threatened and allegedly racially abused by three police officers from Vienna's elite WEGA<sup>73</sup> police unit following an unsuccessful attempt to deport him. His treatment and the subsequent trial received widespread media coverage.

On 7 April 2006, Bakary J, a Gambian citizen who had been convicted of the possession of drugs and had served his sentence, was taken from a pre-deportation detention centre and placed on a plane to Gambia. Once on board he was able to inform the flight staff that he was being transported against his will and that he had not been given the opportunity to tell his Austrian wife and their two children of his expulsion. Following the airlines' protocol, the pilot insisted on his removal. Instead of returning him to the pre-deportation detention centre, however, the three accompanying officers drove to an empty warehouse in Vienna used by the unit for training exercises, telling Bakary J that they had received instructions to kill him.

On their arrival, they were let into the warehouse by a fourth police officer who they had phoned in advance, and who joined them as they drove inside. Before getting out of the car, Bakary J alleges that one of the officers asked him if he knew who Hitler was and said that he hated blacks and Jews and killed six million of them; he [Bakary J] was going to be number six million and one. They took Bakary J out of the car and the three original officers began to punch and kick him on the floor. Then they stopped. One of the three officers got back in the car and reversed into Bakary J as he was lying on the floor, hitting him in the back and the neck. Given the seriousness of the injuries to his head, both hips, left shoulder and spine, the police officers decided to take him to hospital, where his injuries were treated. On the evidence of the three officers, the doctor recorded that the injuries were sustained whilst attempting to escape.

In the meantime, a friend of Bakary J's wife, who was also on board the plane to Gambia, had informed her of the attempted expulsion of her husband. She began to try and track him down and eventually found him at a detention centre for foreigners. She promptly filed charges and informed the media and Amnesty International of her husband's treatment. She raised the alarm and, as the story began to take hold in the press, the Bureau of Internal Affairs was called in to investigate. The denials and lies of the officers were gradually exposed and all four were suspended and charged with causing a detainee physical or mental anguish under section 312 StGB.

The trial began on 30 August 2006, with all four police officers pleading guilty. The testimony relevant to the determination of their sentences was rushed through in two morning sessions, with the judge asking a series of leading questions inviting pleas in mitigation.<sup>74</sup> They were sentenced on 31 August. The three original police officers received suspended sentences of eight months. The fourth officer received a suspended sentence of six months. All four officers received less than the one year sentences that would have resulted in their mandatory dismissal. The prosecutor did not make use of three reflection days allowed to consider whether or not to appeal against the

sentence, declaring immediately after the sentence was handed down that there would be no appeal.

In his summing up, the judge placed considerable weight on the previous good character of the officers, the stress and difficulty of their job and their “provocation” by Bakary J’s refusal to travel. The behaviour of the three officers was characterized as an understandable “slip up”<sup>75</sup>. No mention at all is made of their responsibilities as police officers, the obvious pre-meditation of the assault or the racial abuse.

All four police officers had been suspended pending the outcome of the trial. On the 15 December 2006, however, at a hearing of the Vienna Police Disciplinary Commission, their suspensions were lifted. The three police officers were fined five months’ wages, the fourth one month’s. Both the Ministry of Interior and the police officers appealed the decision. The next day, barely seven months after the torture of a detainee, they were back on the job, albeit not in posts entailing dealings with the public.

On 11 September 2007, the Disciplinary Appeals Commission (Disziplinar Oberkommission) upheld the appeals of the three of the police officers and reduced their fines. The Ministry of Interior appealed against this decision to the Administrative Court (Verwaltungsgerichtshof).

In a ruling of 18 October 2008, the Administrative Court ordered the Disciplinary Appeals Commission to review its decision, on the grounds that it had under-estimated the gravity of the breach of the officer’s professional obligations.<sup>76</sup>

As of January 2009, this hearing had not taken place. Nor had Bakary J received an official apology or compensation for the serious violation of human rights he suffered.

The net effect of these cases, and the others like them included in this report, is to create a general sense of impunity and indifference to violations of the human rights of members of ethnic minorities that serving police officers cannot fail to be sensitive to and which significantly undermines other more positive declarations and initiatives that have been made.

## 1. The response of the executive

### a. The reaction of political leaders and senior police officials to allegations of ill-treatment.

[N]o one must be left in any doubt concerning the commitment of the State authorities to combating impunity. This will underpin the action being taken at all other levels. When necessary, those authorities should not hesitate to deliver, through a formal statement at the highest political level, the clear message that there must be “zero tolerance” of torture and other forms of ill-treatment.

#### Para. 41, CPT General Report 14

Despite the frequent occurrence of cases of racially motivated misconduct by members of the Austrian law-enforcement bodies, there is a reluctance on the part of political leaders and senior police officials to acknowledge that such incidents result from an institutional failure

to combat racism within the police effectively. Individual incidents are generally blamed on the errant behaviour of individual officers. In high-profile cases, however, short-comings may not even be acknowledged at all. In the cases of Cheibani Wague and Bakary J, for instance, the pattern has rather been of staunch initial defence followed by a refusal to apologize in the face of undeniable misconduct.

Coming four years after the tragic and much publicized death of Marcus Omofuma<sup>77</sup>, the case of Cheibani Wague is revealing for the repeated public defence of the police officers involved by senior police officials and the Minister of Interior. For several weeks, and even after the discovery of the video recording, the Minister of Interior continued to insist that that the police officers involved had behaved correctly and to defend them against their “outrageous prejudgment”<sup>78</sup> in the media, stating that “law enforcement officers that have behaved in accordance with the requirements of the situation deserve the loyalty of the Chief of Police, their minister and politicians.”<sup>79</sup> Referring to the opinion of the Chief of Police, the Minister went on to maintain that there was no need for any disciplinary measures to be taken<sup>80</sup>. Even after successive judicial findings of fault, the official reaction continued to be one of denial and defence. The response of the Chief of Police to the ruling of the IAT was to describe it as “incomprehensible”<sup>81</sup>. Five days after the conviction of the three police officers, the Minister of Interior delivered his own verdict: “these officers have my full loyalty, as I know how hard their job is”.<sup>82</sup> No official apology has ever been offered.

In 2004, in a case still pending at that time before the court in which a black woman had accused a worker in a holding centre for asylum applicants of having raped her, the then Minister of Interior dismissed the allegation as a “baseless accusation” in a sitting of the National Parliament<sup>83</sup>. By the time of the case of Bakary J, the initial reaction of the Ministry of Interior had improved, with senior officials and the Minister herself insisting on the need for judicial investigations prior to making any comments<sup>84</sup>. Following the judgment, however, the Minister refused to offer any form of apology, stating instead that: “it mustn’t be forgotten that this man had been convicted of a serious drug-related offence”.<sup>85</sup> Bakary J’s claim for compensation remained unresolved as of January 2009.

Such high-level defence of accused and convicted officials coupled with the continuing stigmatization of complainants, sends out a dangerous message of tolerance of wrong-doing and indifference to the suffering of victims both to serving officers and members of the ethnic minorities affected.

**b. The inadequate disciplinary reaction.**

Disciplinary proceedings provide an additional type of redress against ill-treatment, and may take place in parallel to criminal proceedings. Disciplinary culpability of the officials concerned should be systematically examined, irrespective of whether the misconduct in question is found to constitute a criminal offence.

...

Sanctions imposed following the determination of disciplinary culpability should be commensurate to the gravity of the case.

**Paragraphs 37 and 41, CPT General Report 14**

The apparent complacency in the occasional declarations of senior law enforcement officials is reflected at the institutional level by serious inadequacies in the disciplinary response by the Ministry of Interior to police ill-treatment of members of ethnic minorities.

As the outcome of disciplinary proceedings against police officers is not made public, and even complainants are not informed as to what kind of disciplinary proceedings have been initiated, it is impossible to carry out a detailed review of disciplinary measures taken in response to proven incidents of police misconduct. Indeed, the opacity of disciplinary proceedings is itself problematic as it operates as a protective veil behind which the law enforcement bodies can potentially react to misconduct as leniently as they see fit without incurring public censure. In a number of high-profile cases the results of disciplinary proceedings have become public, however, revealing a number of structural flaws in the disciplinary procedure and pointing to a strong protective reflex within the law enforcement bodies. The result is a strong message that misconduct in general, and racially motivated misconduct in particular, is tolerated within the police despite official protestations to the contrary.

Amnesty International is concerned that disciplinary proceedings are sometimes not initiated at all, despite strong evidence pointing to serious misconduct. It is particularly striking that none of the police officers involved in the case of Cheibani Wague faced any disciplinary response whatsoever. Although those who complain of police ill-treatment are not informed of the precise disciplinary measures resulting from any disciplinary proceedings, Amnesty International was informed by police officers that those who complain directly to the police are told subsequently whether their complaint has been considered justified and, if so, whether (unspecified) disciplinary measures have been taken. Few of the complainants referred to in this report, however, could recall having received such notification. In respect of one of the cases, the Indian student ill-treated in Graz (see below), the official reaction of local Security Director (*Sicherheitsdirektor*) when questioned as to whether there would be any disciplinary consequences following the finding of the IAT that the Indian man's rights had been violated by two policemen was to state: "We can't be expected to initiate disciplinary proceedings against every policeman".<sup>86</sup>

## CASE 7:

P, an Indian citizen studying at the University of Graz, was cycling home in the evening of 31 July 2006, when he was stopped by two police officers. His lights weren't working. P was asked to show his passport. Not having his passport on him, P suggested that the two officers accompany him to his nearby home, which they reportedly refused. Instead, they asked P show them contents of his bag.

At this point, the accounts of P and the two officers diverge. According to the police officers, P grew increasingly hysterical - throwing his wallet to the ground and screaming loudly before hitting one of the officers in stomach. According to the police officers, P was only pepper sprayed after repeated warnings, and in the light of his continuing aggressive behaviour. P, and two independent witnesses dispute this account, however. According to P, he was pepper sprayed in the face, wrestled to the ground and handcuffed in response to his questioning whether the officers were entitled to search his belongings and asking for their service numbers. The two witnesses stated that P's behaviour was more timid than aggressive and that the aggressors were, rather, the two police officers. Despite their testimony, P was charged with resisting authority and convicted in November 2006. He was fined 2,880 euros. During the trial, the two witnesses were told by the judge that whatever the police were up to was "none of their business"<sup>87</sup>.

P filed a complaint with the IAT, however, alleging that the police had acted illegally and that his right to be free from inhuman or degrading treatment under Article 3 of the European Convention on Human Rights had been violated. On 15 December 2006 the IAT found in his favour, concluding that the attitude and behaviour of the two officers had been marked by a “gross disrespect”<sup>88</sup>.

Despite the ruling of the IAT, the officers involved faced neither criminal charges nor any disciplinary reaction by the Graz police. The local Security Director (Sicherheitsdirektor) argued simply that “we can’t start disciplinary proceedings against every police officer.”<sup>89</sup>

Even when disciplinary proceedings are initiated against police officers, the current system does not always guarantee an appropriate penalty. In the case of Bakary J, for instance, the four offending officers were immediately suspended and disciplinary proceedings were initiated against them shortly after their conviction. Three years after the assault on Bakary J, however, the four officers remain in active service, albeit withdrawn from duties dealing with the public and despite the expressed desire of the Ministry of Interior to dismiss them. The difficulties faced by the Ministry of Interior in securing their dismissal results from a number of serious short-comings in the disciplinary law for police officers, for which the Ministry itself cannot be entirely absolved of all responsibility.

Disciplinary proceedings against policemen are conducted under the same procedures and governed by the same legislation as for all other public servants.<sup>90</sup> For police officers, dismissal is automatic only in the event of the officer receiving a custodial sentence of twelve months or more upon conviction for a criminal offence. If a lesser sentence is imposed the applicable penalty is, at first instance, decided by a disciplinary commission (*Disziplinarkommission*) within the Ministry of Interior.

It was suggested to Amnesty International by numerous interlocutors, including within the Ministry of Interior itself, that much of the difficulty in securing an appropriate disciplinary response in the case of Bakary J and, indeed, in other cases besides, resulted from the strong representation of regular police officers within the Disciplinary Commission. Under Austrian law, each Ministry establishes its own Disciplinary Commission, half of whose members must be representatives of the Ministry’s staff association (*Zentralausschuss*).<sup>91</sup> Moreover, the Disciplinary Commission sits in panels (*Senaten*) of three, one of whom must, again, be a representative of the relevant staff association.<sup>92</sup>

It is particularly troubling that serving police officers and/or other members of the Disciplinary Commission and the appellate Higher Disciplinary Commission (*Disziplinaroberkommission*) should have considered the offences of the police officers in the case of Bakary J to have merited only fines, with the officers concerned remaining in their posts. This is, in itself, a strong indicator of an entrenched protectionism within the police and indifference, on the part of many, to the serious violations of the human rights of members of ethnic minority communities.

As a unanimous decision is required for a public servant to be dismissed, the police officers sitting on the Commission have a veto on the dismissal of police officers in cases such as Bakary J, where serious misconduct is not punished by a custodial sentence of over 12 months. More generally, however, the Ministry of Interior has no formal guidance on professional standards and the appropriate disciplinary response to different kinds of misconduct to which the Disciplinary

Commissions should look when considering cases before it. Instead, it was acknowledged to Amnesty International by individuals working within the system, that the Disciplinary Commission decides each case on a case-by-case basis, loosely following its own jurisprudence. The result is that the police corps itself is able to play a pivotal role in dictating the terms of its own employment and the disciplinary response to the serious misconduct of its members.

The only guidance set out in the relevant disciplinary law relates to the penalties imposable by Disciplinary Commissions in the event of a prior criminal sentence. In such cases, the Disciplinary Commission may only impose a disciplinary penalty “in so far as this is additionally required to prevent the civil servant from further violating professional duties.”<sup>93</sup> The net result is that individuals are only reprimanded to the extent that the criminal sanction is not, in itself, considered a sufficient penalty. As it was explained to Amnesty International by various Ministry of Interior representatives only the “disciplinary remainder” (*Überhang*) is punished, in order to avoid imposing a double punishment.

Whilst this may apply to crimes committed by civil servants that are unrelated to their public functions, it is not appropriate for dealing with cases of ill-treatment by the police where the crime is committed while carrying out their public function and in direct contradiction to it. Officers who have been convicted of acts of torture or other ill-treatment should as a general rule not be permitted to remain in office, particularly because of the possibility that they may repeat such acts. Moreover, public confidence in the police cannot be maintained if police officers who are known to have committed serious human rights violations remain in office.

It is not enough for the Ministry of Interior to insist that such disciplinary matters are beyond its control because the Disciplinary Commissions are independent and the disciplinary system itself is governed by broader national legislation. The Ministry of Interior must remain ultimately responsible for ensuring that it sets clear standards on the behaviour expected of police officers and systems in place for ensuring that those standards are met and breaches appropriately punished. Any system that fails to meet these requirements is clearly a system in need of reform.

**c. The structural response of law enforcement bodies to cases of misconduct towards members of ethnic minorities.**

The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction. States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection.

**Para. 21, Committee Against Torture**

**General Comment No. 2 on the Implementation of article 2 by States parties**

In its 2007 report on the handling of complaints of ill-treatment by law enforcement officials,<sup>94</sup> the HRAB noted that “the investigation, elucidation and punishment of possible ill-treatment by law-enforcement officials is far too strongly determined by the criminal justice perspective.”<sup>95</sup> This led the HRAB to lament what it termed a more general “Folgenlosigkeit”, or lack of responsiveness, to such complaints by law enforcement agencies themselves.<sup>96</sup> Both in the event of convictions and, especially, in respect of cases closed for lack of evidence, or for falling short of the necessary criminal gravity, law enforcement agencies regularly failed to consider whether administrative measures might still be necessary<sup>97</sup>. Such measures should include disciplinary proceedings, ensuring appropriate reparation and an internal review of the case in order to establish what measures, such as further training or structural changes, need to be taken in order to reduce the likelihood of similar cases arising in the future.

This generalized lack of responsiveness also extends to ill-treatment of, or other misconduct towards, members of ethnic minorities. The often inadequate disciplinary response has already been discussed above. Equally notable, however, is the failure of the Ministry of Interior both actively to identify patterns of misconduct affecting members of ethnic minority communities and to take measures in response to them. This results, at least in part, from the conviction expressed to Amnesty International by senior police officers and officials within the Ministry of Interior that there is no such pattern to detect. Amnesty International’s own research, which is necessarily narrower than a review that the Ministry of Interior could itself conduct, would suggest otherwise, however. It is also the result of having no system at all in place for tracking the performance of the police in discharging their duties without discrimination.

In interviews with Amnesty International, Ministry of Interior representatives from the Directorate-General for Public Security (*Generaldirektion für die Öffentliche Sicherheit*), acknowledged that they kept no statistical data on allegations of misconduct lodged with the police or how they were dealt with. The only statistics that are collected concern allegations of criminal misconduct and are collected by the Office of Public Prosecution – which is itself symptomatic of the prevailing view that police ill-treatment is a matter of individual responsibility of officers and therefore essentially a matter for the criminal justice system to deal with. The statistics quoted above on the ethnic origin of complainants dealt with by the Bureau for Internal Affairs, were specifically, and promptly, provided to Amnesty International on request, suggesting that their collection more broadly, including in relation to more minor misdemeanours and, in particular, verbal abuse, would not constitute a significant burden on the Ministry of Interior’s resources.

As a public authority, law enforcement agencies have an obligation under Article 2(1) ICERD to eliminate all forms of discrimination. The elimination of discrimination requires first and foremost a robust system for identifying its occurrence and the different ways in which it manifests itself. This requires both the collection of statistical data and the regular reviewing of recorded complaints. Such statistics need not necessarily be made public, though this would undoubtedly contribute to raising the confidence of ethnic minorities that racism was being addressed. The failure of the Ministry of Interior to monitor the occurrence of racially motivated misconduct, even for internal administrative purposes, suggests that combating it is not the priority it should be.

This general failure is reflected in the absence of any procedure to ensure that the negative decisions of IATs are systematically reviewed in order to establish either whether disciplinary measures may be called for, or whether the case reveals structural short-comings that need to be addressed.

## **2. The treatment by judicial organs of cases of police ill-treatment of ethnic minorities.**

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

### **Article 12, UN Convention against Torture**

Whilst there are certainly instances, including in some of the cases referred to in this report, in which individual parts of the criminal justice system (whether senior police officers, police investigators, prosecutors or judges) react appropriately to allegations of racially motivated ill-treatment, Amnesty International is concerned that, on the whole, the pattern revealed is one in which at least one, and usually several, of these parts often fail to acknowledge and/or respond appropriately to racially motivated police misconduct.

#### **a. The failure to investigate and prosecute allegations of police misconduct affecting members of ethnic minorities.**

[W]here an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation [...] should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment [...] would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.

#### **Para. 102, Assenov and Others v. Bulgaria, European Court of Human Rights**

One of the most striking features of the cases reporting police ill-treatment recorded in this report is the failure to prosecute offending officers. For example, in the case of the Polish man (Case 1), the prosecutor declined to bring charges against the police officers involved despite the existence of recorded evidence of racially motivated ill-treatment. In the case of the Mexican ambulance driver (Case 2), no charges were brought against the police officers involved despite the medical evidence of the driver's injuries and his acquittal of charges of resisting lawful authority. In the case of the Indian student (Case 7), charges were brought against the student, rather than the police officers involved, despite the contrary evidence of independent witnesses and a ruling of the IAT condemning the behaviour of the officers. Most recently, in the case of K (Case 4), the prosecutor declined to indict an off-duty officer for abuse of authority (Section 302 StGB), despite very strong evidence to suggest that the

officer had given false information when pressing for charges to be brought against her.

Whilst the reluctance of prosecutors to indict police officers in such cases may result from the inadequacy of the investigations conducted by the police themselves, it remains the case that, under Austrian law, prosecutors have overall responsibility for the conduct of investigations. Such investigations are not always easy. Allegations of police ill-treatment are usually contested by the officers involved, who maintain that the use of force was required on account of the resistance offered by the complainant. Establishing the precise facts in such cases is often made harder by the absence of other witnesses. There is also a tendency for prosecutors to place greater weight on the testimony of police officers, with whom they work on a daily basis.<sup>98</sup> Amnesty International is concerned, however, that this necessarily close relationship can result in a tendency to protect police officers against criminal charges, particularly, as illustrated in the cases included in this report, when the complainant is from an ethnic minority background.

Statistics on the ethnic origin of complainants of police ill-treatment and those indicted for resisting lawful authority are not collected by the Ministry of Interior. Nor are statistics on the number of charges of resisting lawful authority forwarded by the police to the Office of Public Prosecution. It is not possible, therefore, to compare the conversion rate of complaint to indictment for allegations of police ill-treatment with that for charges of resisting lawful authority, either in general, or specifically in relation to the ethnicity of the civilian involved. However, criminal statistics for the year 2006 reveal that 898 complaints of police ill-treatment were filed with the Office of Public Prosecution, while only 20 cases<sup>99</sup> were ultimately brought before the courts.<sup>100</sup> In 2006, 2 police officers were convicted on charges relating to ill-treatment, whilst 15 were acquitted.<sup>101</sup> In the same year, 988 persons were indicted for resisting lawful authority; 846 trials involving charges for resisting lawful convictions resulted in convictions and 67 in acquittals.<sup>102</sup>

Whilst one would expect the number of indictments and convictions for resisting lawful authority to exceed those for police ill-treatment, the discrepancy in Austria is striking. The evidence of the cases included in this report suggests that police investigators, prosecutors and judges are, often, quicker to credit the version of events put forward by police officers than the testimony of members of ethnic minorities. The former are, as a result, far less likely to be indicted and convicted for ill-treatment or abuse of authority than the latter are for resisting lawful authority.

It is notable that while the Indian cyclist (Case 7), K (Case 4) and the Mexican ambulance driver (Case 2) were all indicted for resisting lawful authority, none of the police officers involved were charged with misconduct, even after the complainants' acquittal or a ruling in their favour in the IAT. This is to be compared with the case of Yussuf Khassim (below), in which charges against the police officers responsible for inflicting injuries in the course of a mistaken arrest were quickly dropped, following which Yussuf Khassim was prosecuted (and convicted) not only for resisting unlawful authority, but also for calumny (*Verleumdung*) under Section 297 StGB (accusing an individual of a criminal offence in the knowledge that the accusation is false), together with five of the witnesses who testified in his favour.

### **CASE 8:**

Yussuf Khassim is a 31 year old man from Burundi. He has lived in Austria for five years. Prior to this incident he had worked in a hotel in Linz for about four years. At around 8.30 pm on 28 June 2006 he was eating in a

restaurant called Little Afrika on Krempf Street in Linz, when seven plain clothes policemen reportedly grabbed him and pushed him to the floor in the course of an anti-drug raid. Yussuf Khassim maintains that the officers failed to introduce themselves or ask him any questions at all before using force against him and that they subsequently beat and kicked him as he lay on the floor. The officers involved in the raid deny these allegations. Yusuf Khassim was subsequently arrested and taken to a police station. He was soon released, however, following the acknowledgement that the police had mistaken him for someone else. No apology was offered. After the incident Yussuf Khassim went to hospital, where he was diagnosed with bruising to the head, shoulder and chest and a badly strained neck.

Yussuf Khassim subsequently sought to press charges against two police officers involved in the raid. The prosecutor declined to press charges, however, despite the statements of eight witnesses, all of whom were of African origin. Instead, Yussuf Khassim was charged himself with calumny and for resisting lawful authority. The trial took place on 24 November 2006. During the proceedings the duty doctor at the police station (Polizeiarzt) stated that the police officers had acknowledged during the medical examination that they had got the wrong person, but that "black people were, after all, all black." During cross-examination, the prosecutor characterised Yussuf Khassim's evidence as "rubbish" and "wildly inconsistent". When questioned by Yussuf Khassim as to why he did not believe him, the prosecutor replied: "We are not like you. We are not in Africa here. I have never heard such arrogance." Yussuf Khassim was found guilty on both counts and received a six month suspended sentence and a fine of 360 euros. Following Yussuf Khassim's trial, all eight of the witnesses were also charged with calumny and five were convicted, receiving fines in excess of 300 euros. Discouraged by his experience, Yussuf Khassim decided not to appeal.

The fear of incurring counter-charges of resisting lawful authority and for calumny under Section 297 StGB, was frequently raised by both lawyers and ethnic community leaders spoken to by Amnesty International as a highly dissuasive factor for members of ethnic minorities contemplating complaining about police ill-treatment. The recorded dialogue of the police officer whilst striking the Polish man in (Case 1), is a graphic indication of this issue in so far as charges of resisting lawful authority are concerned. Actual indictments for calumny under Section 297 StGB following accusations of police ill-treatment (28 in 2006<sup>103</sup>), are much rarer, but the widespread fear of such counter-charges nonetheless weighs heavily on potential complainants, particularly those with poor legal representation. Article 13 of the Convention against Torture requires states to take "Steps [...] to ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of his complaint or any evidence given". In the light of its research, Amnesty International is concerned that adequate steps have not been taken to prevent police officers from filing counter-charges against complainants of police ill-treatment.

**b. The failure of courts to deal appropriately with cases of police ill-treatment against members of ethnic minorities.**

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

**Article 4, Convention against Torture.**

It is axiomatic that no matter how effective an investigation may be, it will be of little avail if the sanctions imposed for ill-treatment are inadequate. When ill-treatment has been proven, the imposition of a suitable penalty should follow. This will have a very strong dissuasive effect. Conversely, the imposition of light sentences can only engender a climate of impunity.

**Para. 41, CPT General Report 14**

The European Commission against Racism and Intolerance [...] recommends to the governments of member States [...] to ensure effective investigations into alleged cases of racial discrimination or racially-motivated misconduct by the police and ensure as necessary that the perpetrators of these acts are adequately punished.

**Para. 9, ECRI General Policy Recommendation No. 11**

Under international human rights law Austria is obliged not only to ensure that all allegations of torture and ill-treatment are effectively investigated, but also that proven instances are adequately punished. Amnesty International is concerned that the Austrian criminal justice system fails to satisfy this requirement consistently. Even in cases of serious racially motivated ill-treatment, courts do not always impose penalties commensurate with the gravity of the offence, including its racist motivation.

Back in 2002, three police officers received eight month suspended sentences for causing the death of Marcus Omofuma as a result of ill-treatment in the course of an attempted deportation. The cases of Cheibani Wague and Bakary J, the final hearings of which took place in 2007 and 2006 respectively, show no positive development. In the case of Cheibani Wague the police officers were acquitted of all charges, despite video evidence of their continuing to stand on Cheibani Wague for several minutes after he had ceased moving altogether. Even though it should be obvious that standing on a prone individual for a considerable length of time is likely to cause asphyxiation, the judge excused the police officers on the grounds of their inadequate training

In the case of Bakary J, the three officers actively involved in his ill-treatment all received suspended sentences of less than a year, with the judge placing greater weight on the stresses of their jobs, than their responsibilities as police officers to uphold, and operate within, the law. Particularly striking in this case is the complete failure of the prosecutor to raise, and the judge to consider, the extremely offensive racist insults directed at Bakary J, in the determination of the officers' sentences in accordance with Section 33 (5) of the Austrian Penal Code.

International human rights law requires, however, that possible racial motivations are effectively investigated and, where identified, reflected in judicial decisions. The European Court of Human Rights has stated:

*“When investigating violent incidents and, in particular, deaths at the hands of State agents, States have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.*

*[...] The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence."*

The failure of lower courts, in particular, to consider or appropriately weigh racist insults by police officers is reflected in a number of higher court rulings. For example a ruling of the first instance criminal court in Linz<sup>104</sup> (*Bezirksgericht*) to the effect that the words "Shit Nigger" (*Scheiss Neger*), delivered by a police officer to a black man in the course of a routine traffic control, did not constitute a racist insult (*Ehrenbeleidigung*) under Section 117 StGB, was confirmed on appeal by the Linz District Court<sup>105</sup> (*Landesgericht*), although it was overruled by the Supreme Court in a judgment of 14 January 2004<sup>106</sup>. Similarly, the failure of an IAT<sup>107</sup> to consider the use of the term "nigger" in the course of a police search of a black man's flat in Vienna in November 2002 was found, in December 2007, to be unlawful by the Administrative Court.

### 3. ETHNIC PROFILING

The European Commission against Racism and Intolerance has defined ethnic profiling as "the use by the police, with no objective and reasonable justifications, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities."<sup>108</sup> There is considerable evidence to suggest that the Austrian police has engaged in widespread discriminatory ethnic profiling over the past decade, particularly in its efforts to counter drug-related crime. However, anti-racism NGOs, community leaders and many individual members of ethnic minorities spoken to by Amnesty International considered that its use had decreased over the last two years.

The most common form of ethnic profiling reported in Austria consists of random identity checks and searches of foreign-looking individuals, especially young black men. The main provisions on police stop and searches are set out in the Austrian Security Police Act. Under Section 35, police officers may conduct identity checks when there are reasonable grounds to suspect ("*auf grund bestimmter Tatsachen*") that an individual may be engaged in, or preparing, the commission of an offence. Under Section 40, police officers may search individuals, upon their arrest (under Section 45), in order to ensure that the detainee does not present a danger to themselves or other persons, or if the police have reasonable grounds to believe that the individual may be in possession of items connected with the commission of a criminal offence. Police officers may also conduct identity checks if they have reasonable grounds to suspect that an individual may be illegally present in the country. Representatives of the Ministry of Interior and police officers from the Vienna police that Amnesty International met with all strongly insisted skin colour alone could not constitute a reasonable ground of suspicion.

Amnesty International is concerned, however, that, in everyday practice, skin colour too often appears to constitute a determining ground for police interventions in Austria. The last few annual reports of the non-governmental anti-racism organisation ZARA contain many examples of police interventions apparently initiated on precisely this basis. The majority of individuals of African origin that Amnesty International met with insisted that random identity checks, often involving searches, were still, despite a notable improvement over the last two years, a routine part of their existence.

A particularly striking instance of racial profiling, ordered at the highest levels of the Vienna police took place in 2005. Following a series of violent robberies of postmen by two black men, the Director of the Vienna Police issued an instruction for an extensive police operation whereby wherever two black men were seen together they were to be stopped and searched. The original instruction was subsequently narrowed to cover two black men wearing “a light coloured anorak with a hood”<sup>109</sup>. The large-scale operation conducted on the 9 March 2005 across Vienna involved the entry into 10 flats, 13 betting shops and four restaurants. One hundred and thirty six black men were stopped and searched. The operation did not lead to the arrest of anyone in connection with the robberies, though six individuals were briefly detained for not having their papers in order.<sup>110</sup>

This striking incident drew sharp criticism, including from within the ranks of the police, and, as noted, an improvement has been recorded in the last few years. However, as illustrated by the case below, many police officers continue to associate foreign nationals, and black people in particular, with crime and take operational decisions on this basis alone.

### **CASE 9:**

At around 7.30 pm on 25 March 2007, a robbery in a park in Graz was reported to the police. The perpetrators were described as two black men of average height who had fled by bicycle. Arriving at the scene of the crime some 15 minutes later police officers noted two black persons on bicycles some 500m away and gave chase. The suspects separated. One was arrested, whilst the other got away, having last been seen, from some distance, heading towards a cross-road that was itself out of sight. Unable to establish the suspect's direction of flight beyond this point, the police officers continued their search in a restaurant owned by a black man and frequented by the African community in Graz. The restaurant, however, was a further five hundred meters from the cross-roads in a busy part of town in which the suspect could have fled in several possible directions and in which there were numerous other shops and restaurants, none of which were searched by the police. The six police officers involved proceeded to block the exits to the restaurant, to check some 20 customers, and search private parts of the restaurant, including the kitchen. Failing to find the suspect in question the officers then left.

In proceedings before the IAT, the judge found the temporal and geographical relationship between the restaurant and the possible avenues of flight of the suspect to be too slight to justify the search and identity checks carried out at the restaurant; the implication, which is not explicitly stated in judgment, is that the main reason for the search was that the restaurant was frequented by black people.

The owner of the restaurant told Amnesty International that his restaurant had been searched several times over the past five years, often involving the identity checking and photographing of his customers. On one other occasion he had also obtained a ruling from the IAT that a police raid on his restaurant had been illegal.

## **4 THE RESPONSE TO CRIMES AGAINST MEMBERS OF ETHNIC MINORITIES**

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, [...] in the enjoyment of [...]

a) The right to equal treatment before the tribunals and all other organs administering justice;

b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

**Article 5, International Convention on the Elimination of All Forms of Racial Discrimination**

Racially motivated misconduct on the part of the police is only one way, albeit the most obvious, in which Austrian law enforcement agencies discriminate against members of ethnic minorities. Of equal concern, and no less a violation of human rights, is the failure of law enforcement agencies routinely to extend the same level of protection to members of ethnic minorities when they are the victims of crime, including, in particular racially motivated offences. Discrimination in the response to crime manifests itself in a number of ways illustrated by the cases included below. These include the failure to protect victims of crime from further offences, the failure to give serious consideration to complaints from members of ethnic minorities, the failure to investigate offences effectively and impartially and, consequently, the failure to prosecute perpetrators of offences against members of ethnic minorities.

For historical reasons, the Austrian criminal justice system has had a strong tendency to address racially motivated crime through the prism of countering extreme right wing ideologies (*Rechtsextremismus*). This is reflected in the offences established in the Prohibition Law (*Verbotsgesetz*), and the fact that the primary responsibility within the Ministry of Interior for monitoring racist crime lies with the Federal Agency for State Protection and Counter Terrorism (*Bundesamt für Verfassungsschutz und Terrorismusbekämpfung*, BVT). The BVT produces an annual report on the Protection of the Constitution, which covers xenophobic crime. Combating racist offences linked to far right groups has long been a priority. This focus on organized and semi-organized racist crime has, however, come at the expense of a concerted response to individual criminal acts with a racist element, that are not obviously related to the activities of racist groups. An attempt has been made in recent years to increase the sensitivity of police and prosecutors to racist offences. Amnesty International is concerned, however, that racially motivated crime remains under-reported, under-recorded and, ultimately, under-prosecuted.

Speaking to Amnesty International about his initial treatment by the police as a victim of a crime, Y (Case 10, below) stated: “if you can’t rely on the police to protect you, who can you rely on?” All the victims of the unpunished crimes described below stressed the strong sense of alienation and rejection that resulted from the failure of law enforcement bodies to respond effectively to their complaints. The result of such cases is that the Austrian police has acquired a reputation amongst ethnic minority communities of being insensitive to their equal right to protection against crime as white Austrian citizens. This reputation is one that will require far greater and far more visible effort on the part of law enforcement agencies to shake off.

**1. The response of the police to crimes reported by members of ethnic minorities.**

The European Commission against Racism and Intolerance recommends [...] to the Governments of the member States [to] ensure that the police provide equal treatment to all members of the public and avoid any act of racism, xenophobia, anti-Semitism and intolerance.

**Section B, ECRI General Policy Recommendation No. 1**

At the most extreme end of the failure to respond adequately when called are instances of the police encouraging, or failing to put an immediate end to, offences upon their arrival at the scene of a crime.

### **CASE 10:**

Y is an Austrian citizen of Turkish origin. He has represented Austria at two Olympic Games. On 19 November 2006, Y was driving around Vienna with his wife looking for a parking space, when he noticed a car following him closely. After a while the car overtook him and a man got out with a baseball bat.

Y drove straight to a nearby police station, followed by the man with the bat. On his arrival outside the station he sounded his horn and was met by two police officers, one of whom reportedly said to him: "Keep your mouth shut and stay in the car. You don't have to shit your pants." The police breathalyzed the chasing man and established that he was well over the legal limit for driving. The police, by now four officers, took the man's details and also asked Y and his wife for theirs. When Y asked why this was necessary one of the officers reportedly shouted: "Shit Turks, piss out of Austria", and, turning to the chasing man, said: "why didn't you just hit him over the head three times." Reporting on the incident later, the officers initially denied that Y's follower was carrying a baseball bat at all.

Speaking to Amnesty International, Y stated: "My wife was trembling. I could not understand where such hatred came from. I can understand the man; he was drunk. But the policeman? How can someone in his position behave like that? If you can't count on the police to protect you, who can you count on?"

Y complained directly to the police and took his case to the media. It was widely reported. The Office of Special Investigations of the Viennese police investigated the case and quickly established the veracity of Y's account. The four officers involved were temporarily removed from duties involving contact with the public. Y also filed a complaint with the IAT, which found that his rights had been violated. As all disciplinary measures remain confidential, the precise repercussions for the individual officers are not known. Y was contacted by the Office of Public Prosecution, however, to establish whether he wished charges under Section 117 StGB to be brought against the officer who was accused of racially insulting him. More than two years later, the case against the officer is still pending.

### **CASE 11:**

Dr S has lived in Vienna for over 20 years. Originally he comes from Egypt. One summer's evening in 2006, he was severely beaten by two young men at a street festival in Stammersdorf. Though they ran away, Dr S spotted his attackers again later that evening and called the police, who arrived promptly. Dr S introduced himself and started to explain why he had called them out. Dr S maintains that he was interrupted by one of the officers who asked him whether he had bought his doctorate. Dr S ignored him, however, and continued with his account, following which the two youths were arrested. As they were all standing round, the two youths who allegedly attacked him reportedly began to racially insult him. Despite his request, the police officers did nothing to stop them. Dr S maintains that one of the youths then pushed him over, in response to which one of the police officers stated simply: "What are you still doing here? Just go home." Dr S maintains that he asked police to call him an ambulance and that this request was refused. Instead he was asked how long he had lived in Austria. Replying that he had lived in Austria for 20 years, he alleges that he was told that

he should go back to his country of origin, as he would live the next 20 better there. Dr S called an ambulance himself. At the hospital he was diagnosed with severe bruising.

The next day Dr S went to the police to complain about his treatment. He was told that the police officers concerned had recorded a different version of events, in which he had behaved hysterically and feigned injury. A few days later he received notification of a 310 Euro fine for disturbing the peace and obstructing the police. No charges were ever brought against those identified by Dr S as his attackers.

Though indicative of the racist attitude of certain police officers, such extreme cases are exceptional. More common, however, are reports of police officers failing to treat victims of crime from ethnic minorities with the appropriate respect and to investigate their complaints impartially and effectively, as illustrated by the cases below. Of particular concern, is the failure to record the details of alleged assailants and both the details and the testimony of available witnesses. Investigations into crimes committed against members of ethnic minorities are consequently often fatally undermined from the very outset, with the result that offenders are often not prosecuted, let alone convicted, even where the police have had every opportunity to establish their identity and the relevant circumstances of the incident.

## **CASE 12:**

Anselm Uche Njoug was born in west Africa and has lived in Austria for over 11 years. He has Austrian citizenship. He is currently working in Linz. On 2 December 2007, he was involved in an incident outside a night club at the Infracenter shopping mall. Anselm Njoug had driven to the centre to pick up a friend he believed to be inside the club. Unable to contact his friend by phone, Anselm Njoug double parked and asked the club's bouncer if he could quickly run inside to find his friend. With the bouncer's agreement Anselm Njoug entered the club, where he remained for approximately five minutes, before leaving without being able to find his friend. On leaving the club he found a couple waiting for him as he had blocked their car in. Apologizing to the woman who had politely asked him to move, Anselm Njoug moved to get into his car and drive away. At this point Anselm Njoug alleges that the man approached him saying, "is this your car, nigger?". Anselm Njoug maintains that he questioned the man as to whether he was drunk, whereupon the man grabbed him by neck. On being asked to let go, the man is alleged to have said that he would not obey a slave. Anselm Njoug maintains that he asked the man a second time to let him go, before threatening to retaliate if he did not finally loosen his grip, whereupon the man grabbed his finger and bent it back. Finally disengaging, Anselm Njoug called the police, keeping his car parked where it was in order to retain his assailant. On their arrival, Anselm Njoug and the other man were briefly questioned by two officers and told to report to the police station the next day. Whilst the bouncer offered to testify in Anselm Njoug's favour, he admitted to having seen very little of the incident. There were no other witnesses to the incident. Later that night, Anselm Njoug went to the hospital where he received a doctor's note confirming his badly sprained finger.

The next day, Anselm Njoug went to the police station, recounted his version of events and informed the police of his desire to press charges. In the first week of March 2008, however, Anselm Njoug was summoned to report back to the police station. There he learnt that he was being charged with threatening behaviour (gefährliche Drohung, Section 107 StGB), whilst his assailant was not going to be charged with anything at all. Anselm Njoug reminded the police that it was he who had called them and he who sustained injuries. To no avail. In the first week of April, however, Anselm Njoug received a letter from the district court (Landesgericht) informing him that the charges against him had been dropped. At no stage was Anselm Njoug ever interviewed by a prosecutor or judge.

### **CASE 13:**

A was born in Ghana, but has lived and worked in Vienna for many years. One afternoon, in October 2006, he was walking home from work through the 16th District when a man appeared from a nearby apartment block and started taking pictures of him. On being asked by A to desist, the man reportedly refused, saying "You're all drug dealers, I'll get you." A then tried to grab the camera from him. At this point the wife of the man with the camera reportedly rushed out of the apartment block and pepper sprayed A. A maintains that whilst he was collapsed on the ground, the man went into the apartment block and came out with a baseball bat. At this point, two passers-by intervened and restrained the man and called the police. The police duly arrived, but reportedly paid little attention either to the attacking couple, or the witnesses of the attack, who they told to leave without taking their details. A, however, was asked to show his papers and then taken by the police to a hospital. Without any witness statements to go on as a result of the police response which had focused exclusively on A, proceedings against the couple alleged to have attacked him were rapidly dropped. A was informed that if he wished charges to be brought he would have to continue with an 'associated prosecution' (Subsidiäranklage), under Section 72 StPO. Not having enough funds, and with very limited prospect of success, A dropped the matter.

### **CASE 14:**

On the night of 28 April 2007, Joseph Abbas, who is half Sudanese and half Austrian, went to a pub called Paddy's in central Vienna for a few drinks with his girlfriend, Wanda Oberhammer, and some friends. After spending some time there, he was told by the bouncer to leave the pub because he was allegedly behaving suspiciously. Joseph Abbas maintains that as he was collecting his things to go, the bouncer started pushing him and putting pressure on him to leave quickly. His girlfriend wanted to intervene but was reportedly pushed aside by the bouncer. A group of skinheads who were inside the pub also started threatening him. When Joseph Abbas went out of the pub, the skinheads followed him.

Outside, the group of skinheads reportedly began to attack him. Joseph Abbas alleges that one of them hit him with a baseball bat on the back of his head, on both arms and all over his body. One of Joseph Abbas' friends who tried to intervene was also beaten by the skinheads, leaving him with a black eye and bruised rib. When Joseph Abbas saw his girlfriend being attacked as well, he smashed a window of a nearby building in the hope of attracting attention. In the meantime, an independent witness to the treatment of Joseph Abbas and Wanda Oberhammer by the bouncer, but not the skinheads, had called the police. After the police arrived, Joseph Abbas, who could barely stand and had blood running down his face, was reported for criminal damage. Although the group of skinheads and a few witnesses were still at the scene, only the identities of Joseph Abbas, his girlfriend and the witness who had called the police, were recorded by the two police officers. Wanda Oberhammer wanted to lodge a complaint against the skinheads but she was reportedly told to go away by the officers, who also refused her request for their service numbers. After recording the complaint against him for breaking the window, the officers left without calling an ambulance for Joseph Abbas, who was bleeding and dizzy.

Joseph Abbas then took a taxi with his girlfriend, but after a short drive, the driver told them to get out because he was staining the seat with blood from his wounds. They then had to walk home the rest of the way. When they finally got home, Wanda Oberhammer called the ambulance which arrived together with the police. Only then were Joseph Abbas and Wanda Oberhammer able to lodge a complaint for physical injury against

persons unknown. They were then taken to the hospital by the ambulance. A doctor's report records that Joseph Abbas suffered blows to the back of the head, a bruised kidney and cut hand, whilst Wanda Oberhammer suffered injuries to her neck, knee and ribs.

Amnesty International is informed that in the afternoon of the following day, Joseph Abbas received a call from the police station at Deutschmeisterplatz 1 and was instructed to report there on the following day, Monday 30 April 2007, in order to see the medical officer. On Monday 30 April Joseph Abbas, together with his mother and his girlfriend, went to the police station but found that the medical officer didn't work on Mondays, a fact which the counter clerk had forgotten. A police officer then informed them that they could get the service numbers of the two officers who had arrived at the scene of the incident from the police station at Am Hof. They consequently went to Am Hof where Joseph Abbas' mother, Margit Reichholf, met with the two officers.

According to information given to Margit Reichholf by the two officers, Joseph Abbas had reportedly not requested that they call an ambulance and therefore they had not done so. They stated that it was so dark that they did not notice that he was bleeding. No-one had, according to them, demanded to see their service numbers on the night of the incident and both Joseph Abbas and Wanda Oberhammer had allegedly not said anything apart from that they wanted to go home. The officers then reportedly told Margit Reichholf to stay calm as it was after all not them who had beaten her son.

As the skinheads' identities were not recorded no charges have been pressed against Joseph Abbas' attackers. On 11 October 2007, Joseph Abbas was informed by the Office of Public Prosecution that the charges against the bouncer were also to be dropped.

All of these cases highlight alleged failings by individual law enforcement officials when responding to crimes against members of ethnic minorities. Amnesty International is concerned that they reflect, a failure on the part of the Austrian authorities to take effective measures to eliminate racism amongst police officers. Amnesty International is also concerned by the structural shortcomings in the response to racially motivated crime in particular that often deny members of ethnic minorities the protection they are entitled to, without obvious misconduct on the part of individual law enforcement officials.

## **2. Identifying and prosecuting racially motivated crimes**

The European Commission against Racism and Intolerance recommends [...] to the Governments of the member States [to] Ensure that criminal prosecution of offences of a racist or xenophobic nature is given a high priority and is actively and consistently undertaken.

### **Section A, ECRI General Policy Recommendation No. 1**

The European Commission against Racism and Intolerance [...] recommends to the governments of member States [...] to ensure that the police thoroughly investigate racist offences, including by fully taking the racist motivation of ordinary offences into account.

### **Para. 11, ECRI General Policy Recommendation No. 11**

[W]hen investigating violent incidents, State authorities have the additional duty to take all reasonable steps

to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.

**Para. 119, Stoica v Romania, European Court of Human Rights**

Despite having a penal code that prohibits a wide range of racist offences and that provides for racist motives to be taken into account when sentencing, it was widely acknowledged by NGOs, lawyers, criminal justice experts and even police officers and prosecutors spoken to by Amnesty International that these provisions are under-used in Austria. There are a number of reasons for this. Firstly, victims, who are not encouraged to report racist crimes, and who do not always have confidence in the police, often fail to take their complaints to them. Secondly, as noted above, police officers themselves are not always as sensitive to racially motivated crime as they should be. Thirdly, there is not an effective system in place to ensure that police investigators record possible racist motivations when drafting crime reports. Prosecutors and judges in turn often fail respectively to present and consider possible racist motivations in court, particularly in relation to sentencing.

There is some evidence to suggest that Austria has lower levels of racially motivated crime than other comparable European countries. A survey conducted for a 2005 report commissioned by the European Monitoring Centre on Racism and Xenophobia<sup>111</sup> revealed that around 8 per cent of immigrants in Austria believed that they had been the victim of some form of hate crime<sup>112</sup>, compared to a European Union wide average of around 10 per cent<sup>113</sup>. Detailed international comparisons are hard to make, however, as the comprehensiveness of statistics on racist crime varies considerably from country to country. Austria's own recording of racist offences, in terms of complaints, indictments and convictions, is also partial and an accurate picture of the extent of racially motivated crime is, therefore, hard to obtain.

As specific offences, crimes under the Prohibition Law, incitement to racial hatred (Section 283 StGB) and racist insults (Section 117 StGB) are much easier for the police to record in police reports (which require reported incidents to qualified under specific offences), and more straightforward for prosecutors to prosecute, than the aggravating factor of a racist motivation for other regular crimes. Despite this, there is some indication that police and prosecutors are reluctant to qualify reported incidents in particular under Section 283, but also under 117(3) StGB.

In order for an act to fall within Section 283(1) StGB, the incitement of a hostile act against members of a particular ethnic group or religious community must be likely to endanger public order. According to both anti-racism organizations and prosecutors spoken to by Amnesty International, successful prosecutions are rare as this last requirement is difficult to show. Section 283(2) StGB, however, is easier to satisfy and requires only public disparagement in a manner violating human dignity. Publicly visible graffiti declaiming "Niggers out" would, therefore, be covered by section 283(2) StGB. Austrian anti-racism

organizations<sup>114</sup> have, however, regularly voiced their concern that these provisions, and Section 283(2) StGB in particular, are under-used. As an example, the anti-racism organization SOS-Mitmensch informed Amnesty International that of over 500 cases of racist graffiti forwarded to the police only 34 were recorded by the police as criminal incidents under Section 283 StGB.

Similar concerns have been expressed by NGOs about the application of Section IX (1)(3) of the 1991 Introductory Provisions to the Code of Administrative Procedure, provides for the administrative offence of "subjecting persons to unjustified discrimination exclusively on the grounds of their race, skin colour, national or ethnic origin, religious denomination or disability, or preventing such persons from entering premises or from obtaining services available for general public use". Following a complaint filed by the anti-racism organisation ZARA, the Austrian Ombudsperson issued a report (*Missstandsfestellung*), criticising the inconsistent and ineffective application of this provision by the Viennese Magistrate District Court (*Magistratische Bezirksämter Wiens*) and the fact that a high number of established offences under Section IX (1)(3) EGV B were considered either unimportant, or pardonable by judicial authorities who consequently dropped proceedings against the perpetrators.<sup>115</sup>

Particular difficulties arise in relation to the prosecution of ordinary offences, such as assault, that have a racial motivation. A 2004 report prepared by Austria's National Focal Point of the European Monitoring Centre on Racism and Xenophobia noted that the "aggravating factor relating to racist motives (Section 33(5)) is rarely applied"<sup>116</sup>. Many of those interviewed by Amnesty International, including police officers, prosecutors and NGO representatives, acknowledged that even when crimes against members of ethnic minorities were reported, investigated and prosecuted, possible racist motives were not always followed up on or appropriately reflected in sentences.

In Austria, as elsewhere in Europe, police and prosecutors are responsible for identifying the potential aggravating factor of racial motivation, with the ultimate decision on its presence being a matter for the courts. In practice, however, these different parts of the criminal justice system are not always as sensitive to their responsibilities as they should be. Austria is not alone in this. A 2005 report on Policing Racist Crime and Violence in the European Union concluded that "In some countries, despite the formal legal responsibility of the police and prosecutors in the matter, there is a practical or moral perception that – at least on the issue of racial motivation – it is up to the victim to press for the issue to be addressed, and to show that racial motivation was present."<sup>117</sup> This attitude is very much in evidence in Austria.

When questioned by Amnesty International on how racist motives were recorded and raised in court, police officers, prosecutors and judges all said much the same thing – namely that it was obvious from the facts, or that it came out in the telling of the story. In many cases this is no doubt true, but the regularity of this reply from all branches of the criminal justice system strongly suggests that the onus is placed, as in the above quote, on individual victims themselves "to press for the issue to be addressed."

Amnesty International is concerned that a failure to recognize the need to be proactive in the identification of possible racial motives persists within the Austrian police force despite the

adoption in 2006 of guidelines<sup>118</sup> instructing police officers to pay particular attention to possible xenophobic, racist or anti-Semitic motives. The guidelines also require officers to inform the responsible Regional Office for the Protection of the Constitution and the Fight against Terrorism<sup>119</sup> (*Landesamt für Verfassungsschutz und Terrorismusbekämpfung*) (LVT) immediately about cases in which there is such a motive behind an offence, or where such a motive can be assumed to be likely.

Whilst it is certainly a positive development that police officers have been instructed to pay particular attention to possible racist motives and inform the relevant LVT, this last requirement is in some respects indicative of the prevailing view that racist incidents should be considered through the prism of countering far-right extremism and, thus, dealt with by a special agency. Amnesty International is concerned, however, that there is a real need to ensure that ordinary police officers are aware of the importance of routinely investigating and recording reported racist incidents themselves and ensuring that they are brought to the attention of prosecutors.

Amnesty International also considers there to be a need to improve the awareness of the 2006 guidelines. In a meeting with representatives of the Vienna Police, for instance, they were not referred to at all when discussing their response to racially motivated crime. Rather, the officers met with noted the absence of a specific section on police reports in which possible racist motives could be highlighted, unless the incident could be classified under a specific racist offence, such as incitement to racial hatred, or as a racist insult. As a result, racist motives were often overlooked altogether, or, at best, recorded only in passing in the description of the incident. Having such a box would oblige officers recording reported crimes specifically to consider whether there was a racist motive, and signal it in a manner that would explicitly bring it to the attention of the prosecutor.

Increasing the sensitivity of police officers to the importance of investigating and recording racist crime will also encourage more victims to report it. There are other ways of doing this that are also under-developed in Austria. The first relates to the definition of a racist incident for the purposes of police records. Currently, no provision is made for police to highlight alleged racist motives either on standard police reports or, another possibility, on separate Racial Incident Forms. Police officers are, however, required to notify the relevant LVT of all incidents in which a racist motive is likely, and it is on this basis that such statistics as are currently available are kept. The definition of a racist incident contained in the instruction to the police to report incidents to the LVT is based on a definition provided by the European Union's Council for Justice and Home Affairs to the effect that "xenophobic/racist/anti-Semitic offences are offences against persons or groups of persons who - on account of an attitude of intolerance - are denied the right to stay or live in a residential area or the entire country by the co-offenders on grounds of their actual or alleged nationality, ethnic origin, race, colour of skin, religion or origin, or offences that are committed against other persons/institutions/objects, where the offenders act on account of xenophobic/racist/anti-Semitic motives."<sup>120</sup>

Whilst this definition is, in itself, perfectly adequate such incidents are only noted if the recording officer believes these conditions to have been met. For the purposes of police recording, however, it is suggested that the recording of racist incidents, either on police reports, or in a separate Racial Incident Form, on the basis of the perception of victims would

have significant benefits. ECRI recommends that a racist incident should be defined as: “any incident which is perceived to be racist by the victim or any other person.”<sup>121</sup> Such a definition would improve the initial identification of possible racial motivations, encourage victims to report racist offences, and provide a more revealing public measurement of developments in racist crime. Such a reporting system would not, of course, alter the fact that, ultimately, prosecutors and courts must decide for themselves whether to raise an alleged racial motivation in court, or to reflect it when sentencing, but it would, certainly, significantly reduce the likelihood of racial motivations going unrecorded and unpunished.

In a further indication of the relatively low priority attached to combating racist crime, there is no specialized system of support or counseling for victims of racist crime, nor any programmes for encouraging victims to report incidents. Such initiatives have, however, proven successful in a number of European countries in building confidence in ethnic minority communities in the criminal justice system<sup>122</sup>.

Amnesty International is concerned that such improvements as there have been in recent years in improving the responsiveness of the criminal justice to racist crime do not yet go far enough. Greater efforts are required to ensure that police officers, prosecutors and judges are more proactive in the identification, prosecution and sentencing of racist crime and that victims receive the protection, support and remedies that they are entitled to.

### 3. The statistical recording of racist crime

The European Commission against Racism and Intolerance [...] recommends to the governments of member States [...] to establish and operate a system for recording and monitoring racist incidents, and the extent to which these incidents are brought before the prosecutors and are eventually qualified as racist offences.

#### Para. 12, ECRI General Policy Recommendation No. 11

The European Commission against Racism and Intolerance recommends [...] to the Governments of the member States [to] Ensure that accurate data and statistics are collected and published on the number of racist and xenophobic offences that are reported to the police, on the number of cases that are prosecuted, on the reasons for not prosecuting and on the outcome of cases prosecuted.

#### Section A, ECRI General Policy Recommendation No. 1

Shortcomings in the recording and public availability of statistics on racist crimes have been commented on in a number of places in this report. Collectively the available statistics on racist crime offer only a partial picture of its true extent in Austria and the effectiveness of the criminal justice system in addressing it. Amnesty International is concerned that the lack of detailed statistics on racist crime is symptomatic of the relatively low priority it is accorded.

In respect of offences under the Prohibition Law and Section 283 StGB (incitement to racial hatred) only the annual number of filed police reports<sup>123</sup> (*Anzeigen*) and convictions<sup>124</sup> are recorded. Offences under Section 117(3) StGB (racist insult) are not disaggregated from

other verbal offences in Sections 115-118 StGB in respect of police reports, indictments or convictions and there is consequently no way of monitoring its application. It has already been noted that police reports do not record racist incidents that are not classifiable under specific racist offences. Nor do judicial statistics record the application of Section 33(5) StGB requiring racial motivation to be taken into account in sentencing. In 2001, however, the Ministry of Justice issued guidelines requiring prosecutors to report on cases involving possible racial motivations in order to include them in the annual reports (*Wahrnehmungsberichte*) prepared by the principal public prosecutor's office (*Oberstaatsanwaltschaften*). Cases under section 117 StGB and those involving the possible application of Section 33(5) should, therefore, be captured and capable of being monitored by the Ministry of Justice. These reports do not, however, collate this information on individual cases to present a comprehensive statistical overview. Nor are they available to the public.

The Ministry of Interior does publish a statistical overview of racist incidents registered by the police in its Annual Report on the Protection of the Constitution (*Verfassungsschutzbericht*). It provides for an annual breakdown of recorded incidents (*Tathandlungen*) categorized under "extreme right", "xenophobic/racist", "Anti-Semitic", "Islamophobic" and "other". It also records the number of police reports (*Anzeigen*) filed each year against specific individuals under the categories "Prohibition Law", "Incitement to racial hatred" (283 StGB), "Other Offences", the "Law against Nazi Insignia" (*Abzeichengesetz*) and "Section IX 1 (4) IPCAP".

Since the introduction of the 2006 guidelines referred to above, the Annual Report on the Protection of the Constitution also records the number of recorded incidents of racially motivated violence (37 in 2007). It is also notable that following the adoption of these guidelines the number of recorded incidents and police reports both increased substantially (from 240 to 371 and 419 to 752 respectively), suggesting that the guidelines have had a positive effect<sup>125</sup>.

Despite these recent improvements, it remains the case that the system for recording and monitoring racist crime in Austria is incomplete. This shortcoming has been commented in successive reports by the European Commission on Racism and Intolerance, which has recommended that the "Austrian authorities ... collect statistical data on the implementation of all criminal law provisions against racism and xenophobia, including Section 33.5 of the Criminal Code. These data should include information on complaints filed, charges brought, convictions and acquittals".<sup>126</sup> Amnesty International considers that such a comprehensive recording system would assist in ensuring that an effective monitoring and response to racially motivated crime. It would also send a message to police officers, victims and would-be perpetrators that combating racist crime is a priority.

### **CASE 15:**

F is a Nigerian national who has lived in Graz for several years. On 5 August 2007, he was walking along the Murradweg when two middle aged men approached from the opposite direction and addressed some words to him. Convinced that they had called him "shit nigger", F stopped and asked them if they were talking to him. At this point one of the pair sprayed F in the face with pepper spray. Whilst reeling from this attack, F picked up a stick. The two individuals maintain that they were struck (on their hands and forearms) as he wielded the stick threateningly in front of him. F does not believe that he made contact with his attackers and that, if he

did, it was not intentional, but rather out of self-defence. F then left the scene to clean his face in a nearby café, from which he called the police. Simultaneously alerted by a nearby resident who had heard screams, the police shortly arrived on the scene, to which F had returned and which the two men had not yet left. F maintains that on their arrival the police ignored him and spoke first to the two men, despite F's protestation that it was he who had called the police. The two men reported to police that they believed F had tried to sell them drugs and that they had been scared. F in turn maintained that he had been the victim of an unprovoked racist attack.

F was subsequently summoned twice to the police station for questioning. Parallel charges were initially filed against both F and the two men for assault under section 83 of the Austrian Penal Code. The charges against the two men, however, were quickly dropped by the prosecutor for being of insufficient gravity or consequence (mangelnde strafwürdigkeit) under Section 43 of the Austrian Code of Criminal Procedure. A few days before the trial of F was due, the charges against him were also dropped.

The two men continued to pursue F in an associated prosecution (Subsidiäranklage), under Section 72 stop, alleging assault. At the end of May 2008, F was convicted required to pay 500 Euros compensation to both men, their legal costs, the court fees and the cost of a translator. The total cost reached 3500 Euros. Neither the alleged racial insult, nor the acknowledged fact that that the two individuals had pre-emptively attacked F with pepper spray out of fear rather than in response to any attack on his part, were considered by the judge – not even in mitigation, let alone as pointing to the fact that F may have been acting in self-defence.

## 6. THE RECRUITMENT OF POLICE OFFICERS FROM ETHNIC MINORITY COMMUNITIES

The European Commission against Racism and Intolerance [...] recommends to the governments of member States [...] to recruit members of under-represented minority groups in the police and ensure that they have equal opportunities for progression in their careers.

### **Para. 17, ECRI General Policy Recommendation No. 11**

In countries with large ethnic minorities, multi-ethnic law enforcement agencies are essential for ensuring effective policing, combating racism with the police corps and ensuring the confidence of ethnic minorities in the criminal justice system. For many years, however, the Austrian police has been of essentially monoethnic composition, despite growing numbers of naturalized and second-generation immigrants. In Vienna, only about 50 out of a total of around 6000 police officers, are of non-Austrian origin, despite such minorities constituting around 30 per cent of the city's population.<sup>127</sup>

Acknowledging the serious under-representation of ethnic minorities in the police force, the Ministry of Interior began a recruitment drive in 2007 to encourage applications from naturalized and second-generation immigrants for the Vienna police. It was announced at the time that the intention was to ensure that each of Vienna's 100 police stations should have at least one serving officer from an ethnic minority<sup>128</sup>. Though clearly a positive initiative, senior representatives of the Ministry of Interior speaking to Amnesty International in 2008 expressed only partial satisfaction with the results, regretting both the relatively low number of applicants and the fact that many faced difficulties in passing the entrance exams, notably on account of poor literacy. They also stated that the extent to which the initiative would be replicated elsewhere in Austria would depend on its ultimate success in Vienna. The recruitment drive was not repeated in 2008 and has not yet been extended to other regional police forces. It would, certainly, be hugely regrettable if this initiative were not pursued and expanded in the longer term. Attracting larger numbers of able applicants from ethnic minority communities will inevitably take time; a campaign of one season cannot hope to inspire a consistent stream of applicants believing that their presence in the police is truly welcomed. It is clear that ethnic minority recruitment drives need to be maintained annually and pursued more aggressively to ensure that the proportion of police officers from ethnic minorities more accurately reflects the proportion of the population.

## 7. THE TRAINING OF LAW ENFORCEMENT OFFICERS

The European Commission against Racism and Intolerance [...] recommends to the governments of member States [...]

to train the police in human rights, including the right to be free of racism and racial discrimination, and in the legal provisions in force against racism and racial discrimination;

to train the police in policing a diverse society.

### **Paragraphs 6 & 16, ECRI General Policy Recommendation No. 11**

This report has documented a variety of attitudinal and structural shortcomings in the efforts of the Austrian police both to combat racism within its own ranks and to extend equal treatment to victims of crime from ethnic minorities. It is notable, however, that an obvious inadequacy in the training of new police officers is not one of them. Since 2003, on the recommendation of the HRAB, the Ministry of Interior has developed a fairly comprehensive human rights training programme for new recruits that also focuses on discrimination. Trainee police officers receive 24 hours of training specifically on human rights norms and a further 32 hours in which human rights issues arise in a cross-cutting manner. This core training is supplemented by seminars organized by the Anti-Defamation League under the programme “A World of Difference”.<sup>129</sup> These three day long seminars aim to combat prejudice and are obligatory for new recruits. Also available to interested serving officers, around 4,500 of Austria’s 20,000 police officers have so far participated in these courses to date. On the recommendation of the HRAB in 2007, these seminars now include elements on the language used by police officers and on tackling hate crime.

Further training events offered in particular to officers serving in multi-cultural districts include programmes on “Police Action in a Multi-cultural Society” and a study course on “Intercultural Conflict Management” in cooperation with the Austrian Integration Fund. A specific, but limited, programme on “Police and Africans” has been set up together with organizations working in the black community, to encourage greater mutual understanding.

Amnesty International considers that a number of improvements to the anti-discrimination training of police officers could be made, however. Firstly, the continuous training events are offered on voluntary basis, and, as a result, do not necessarily attract those that most need them. The UN Human Rights Committee has specifically recommended that Austria introduce “mandatory police training aimed at preventing discrimination against all vulnerable groups”<sup>130</sup>. All police officers, and not just new recruits, should receive such training. Secondly, for all its broad coverage, the anti-discrimination training provides limited training on dealing with victims of racist crime.

It is perhaps worth concluding with some reflections that were raised on a number of occasions by police officers and criminal justice experts in discussions with Amnesty International. These considered that whilst adequate training was certainly essential, the main determinant of the culture of a police force were the attitudes and practices that new officers picked up from their longer-serving colleagues. These in turn were heavily influenced by who was seen to be promoted, and who was reprimanded for what kind of misconduct. Only when both these components are fully in place – comprehensive training and the reinforcement of standards through their consistent internal application – will real progress be achieved in eliminating lingering prejudices and bad practices.

## 8. CONCLUSION

Amnesty International is concerned that the Austrian criminal justice as a whole, and the police in particular, are failing to provide the same level of service to foreign nationals and members of ethnic minorities, as it routinely provides to white Austrian citizens. This failure is reflected in, but is not reducible to, individual incidents of racially motivated misconduct. It is also reflected in structural shortcomings in the response to such cases and, more generally, in the manner in which incidents reported by foreign nationals and members of ethnic minorities are handled. Amnesty International is concerned that despite a number of positive developments in recent years, there is, still, an institutional failure to ensure that combating discrimination in the criminal justice system is accorded the necessary priority.

There are, certainly, many senior officials within the Austrian criminal justice system who are sensitive to the need to improve the quality of the service provided to foreign nationals and members of ethnic minorities. So far, however, the measures taken to this end have been too few, and too hesitantly implemented, to have a significant effect. Some of the easier steps have been taken, including improved training and guidelines, slight advances in the recording of racist offences and a modest attempt to recruit more ethnic minority police officers. A reduction in the frequency of identity checks and searches on the sole grounds of ethnicity constitutes a significant improvement.

However, many of the harder steps that are necessary to change entrenched institutional cultures have not been taken, including, in particular, ensuring that racially motivated misconduct on the part of law enforcement officials is effectively investigated, appropriately reprimanded and properly remedied. Greater efforts are also required to encourage the reporting of racially motivated crimes and to ensure that such incidents are, routinely, recorded, investigated and prosecuted effectively.

Taking these steps will require greater, and more public, commitment on the part of senior officials and political leaders. They also require the recognition that there is a problem that goes beyond the errant behaviour of individual officials. The failure to acknowledge the need for structural change, and to make this change a priority, is to do a huge disservice especially to the members of the ethnic minorities affected but also to the many regular police officers and criminal justice officials conscientiously fulfilling their duties. Until such time as combating discrimination in the Austrian criminal justice system is made a real priority, many more human rights violations will result.

## 9. RECOMMENDATIONS

### Amnesty International recommends

#### 1. ON ELIMINATING RACISM AND DISCRIMINATION WITHIN THE POLICE

*The Austrian Government should:*

- a.** Introduce into a national legislation a positive duty on Austrian law enforcement agencies, as public authorities, to have due regard to the need to eliminate racial discrimination and promote good relations between persons from different ethnic backgrounds in the exercise of their functions;
  
- b.** Deliver the clear message to law enforcement officials as well as the general public, and instruct senior law enforcement officials to do the same, that ill-treatment of detainees and racist misconduct are absolutely prohibited in all circumstances and will be subject to criminal and disciplinary investigation and sanctions as appropriate.

*The Ministry of Interior should:*

- c.** Make increasing the trust and confidence of foreign nationals and members of ethnic minorities in the Austrian police a greater priority.

#### 2. ON IDENTIFYING AND RESPONDING TO RACIST MISCONDUCT BY LAW-ENFORCEMENT OFFICIALS

*The Austrian Government should:*

- a.** Give careful consideration to the creation of a fully resourced independent mechanism to investigate allegations of serious human rights abuses by law enforcement officials. Such a mechanism should have the power to order disciplinary proceedings to be instigated against law enforcement officials and to refer a case directly to the judicial authorities where appropriate.

*The Ministry of Interior should:*

- b.** Ensure that police investigations into alleged criminal misconduct by law enforcement officials, including towards foreign nationals or members of ethnic minorities are conducted in a prompt, thorough, independent and impartial manner;

- c.** Immediately initiate disciplinary proceedings against any law enforcement official who is reasonably suspected of racist misconduct, even in the absence of an express complaint, and alert the judicial and prosecuting authorities to any possible criminal acts;
- d.** Establish clear standards on the professional conduct expected of law enforcement officials and the imposable sanctions in the event of their breach. Disciplinary sanctions available for racist misconduct should reflect the seriousness of the offence and include provision for dismissal without the possibility of reinstatement;
- e.** Reform the disciplinary law for law-enforcement officials to ensure that the expected standards of police behaviour are rigorously enforced in disciplinary proceedings;
- f.** Ensure that victims of police misconduct, including racially motivated misconduct, are informed of the results of related disciplinary proceedings;
- g.** Ensure that both judicial decisions and the rulings of Independent Administrative Tribunals relating to misconduct by law enforcement officials are systematically reviewed in order to identify whether disciplinary proceedings should be initiated, or whether practices and policies giving rise to the recorded breach need reviewing;
- h.** Establish a robust system for recording and reviewing incidents of racist misconduct and identifying racist attitudes within law enforcement agencies, including the retention of statistical data, in order to monitor trends and ensure an appropriate institutional response.

*The Ministry of Justice should:*

- i.** Ensure that prompt, thorough and impartial investigations are carried out into all allegations of serious human rights violations by law enforcement officials including towards foreign nationals or members of ethnic minorities;
- j.** Immediately initiate criminal proceedings against any police officer, irrespective of rank, who is reasonably suspected of committing a serious human rights violation, even in the absence of an express complaint;
- k.** Ensure that possible racist motives are raised in judicial proceedings and appropriately reflected in sentences in accordance with Section 33(5) StGB;
- l.** Ensure that sentences for ill-treatment are commensurate with the grave nature of the offence;
- m.** Establish and implement effective measures to ensure that people who bring complaints of human rights violations by law enforcement officers are protected against intimidation. Such measures should include the careful scrutiny by the prosecuting authorities of police charges that detainees have resisted state authority, particularly those which are filed only after complaints of ill-treatment have been made;

**n.** Where complaints are filed simultaneously by a detainee alleging human rights violations by police officers and by police officers alleging resistance to state authority, ensure that neither complaint is used to undermine the investigation of the other.

### 3 ON RESPONDING TO CRIMES REPORTED BY FOREIGN NATIONALS AND MEMBERS OF ETHNIC MINORITIES

*The Ministry of Interior and the Ministry of Justice should:*

- a.** Ensure that all allegations of offences targeting foreign nationals and members of ethnic minorities are promptly, thoroughly and impartially investigated, including by strengthening and increasing the awareness of relevant guidelines for police officers and prosecutors;
- b.** Improve the statistical recording of racist incidents at all stages, including:
  - complete and disaggregated statistics on the number of recorded incidents, prosecutions and convictions under Section 283 and 117(3) StGB, and
  - statistics on the use of Section 33(5) StGB on racist motivation as an aggravating circumstance in specified offences.

*The Ministry of Interior should:*

- c.** Ensure that racist motives are always highlighted in police reports and that all racist incidents are recorded for the purposes of public statistics. This could be achieved either through the introduction of separate "Racist Incident Forms" or by providing for a designated section on standard police report forms;
- d.** Define "racist incident" for the purposes of police reports and statistical records as "any incident which is perceived to be racist by the victim or any other person";
- e.** Ensure that all reported incidents of incitement to racial hatred (Section 283 StGB) and racist insult are recorded, even where the perpetrator may be unknown;
- f.** Introduce measures to encourage the reporting of racist incidents, including awareness raising programmes and greater outreach work with relevant non-governmental and community-based organizations;
- g.** Develop guidelines for police officers on the handling of victims of, and witnesses to, racist incidents; ensure that police officers are made of aware of support programmes available to victims of racist crimes and explain their availability to potential victims.

*The Ministry of Justice should:*

- h.** Ensure that any evidence of a racist motivation constituting an aggravating circumstance for the purposes of sentencing under Section 33(5) StGB is raised in court and appropriately reflected in judicial sentences;
- i.** Introduce a strong presumption to the effect that the discretion of prosecutors under Section 198 of the Austrian Code of Criminal Procedure to waive prosecution should not be exercised in cases presenting evidence of racist motivation;
- j.** Ensure the effective prosecution of reported incidents falling under Section 283 (on incitement to racial hatred), Section 117(3) StGB (on racist insult) and Section IX of the 1991 Introductory Provisions to the Code of Administrative Procedure on unjustified discrimination preventing persons from entering premises or from obtaining services available for general public use;
- k.** Develop specific victim support programmes tailored to the needs of victims of racist crime.

#### 4 ON POLICE TRAINING

*The Ministry of Interior should:*

- a.** Introduce mandatory training in racism awareness and cultural diversity for police officers, including those already in active service;
- b.** Develop specific training for police officers on dealing with victims of racist crime.

#### 5 THE RECRUITMENT AND RETENTION OF POLICE OFFICERS FROM ETHNIC MINORITY BACKGROUNDS

*The Ministry of Interior should:*

- a.** Take steps to ensure that the membership of police authorities reflects so far as possible the cultural and ethnic mix of the local population;
- b.** Introduce targets for the recruitment, progression and retention of minority ethnic staff and continue and extend recruitment drives amongst ethnic minority communities.

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<sup>1</sup> As with other cases in this report where the victim is referred to by a letter alone, the full name has been withheld on the request of the individual to protect their privacy.

<sup>2</sup> The Stephen Lawrence Inquiry, February 1999, para. 6.34. The Stephen Lawrence Inquiry was ordered by the Home Secretary (Minister of Interior) of the United Kingdom "to inquire into the matters arising from the death of Stephen Lawrence on 22 April 1993 to date, in order particularly to identify the lessons to be learned for the investigation and prosecution of racially motivated crimes."

<sup>3</sup> In particular the Human Rights Advisory Board (*Menschenrechtsbeirat*)

<sup>4</sup> In particular ZARA, Helping Hands Graz, and numerous other community-based organisations.

<sup>5</sup> See ZARA Racism Report 2007, p.37.

<sup>6</sup> For a description of the functions of Independent Administrative Tribunals see p.14

<sup>7</sup> UDHR, Articles 1 and 7.

<sup>8</sup> ICCPR, Articles 2(1) and 26.

<sup>9</sup> ICESCR, Article 2(2).

<sup>10</sup> ECHR, Article 14.

<sup>11</sup> ICERD, Article 1(1).

<sup>12</sup> ICERD, Article 2(1).

<sup>13</sup> ICERD, Articles 6 and 7.

<sup>14</sup> ICERD, Article 2

<sup>15</sup> ICERD, Article 4(a): "States Parties ... Shall declare an offence punishable by law ... all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin ...".

<sup>16</sup> *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII

<sup>17</sup> Article 16 UN Convention against Torture.

<sup>18</sup> An official 2001 census put the number of Slovenian, Croatian and Hungarian Austrians at 14,000, 25,000 and 20,000 respectively.

<sup>19</sup> Statistik Austria: "Population (annual average) since 1981 by sex, age groups and nationality" available at [http://www.statistik.at/web\\_en/static/results\\_overview\\_population\\_annual\\_average\\_028624.pdf](http://www.statistik.at/web_en/static/results_overview_population_annual_average_028624.pdf)

<sup>20</sup> UN World Population Policies 2005.

<sup>21</sup> A great many of Luxembourg's foreign residents come from and continue to work in neighbouring countries.

<sup>22</sup> Austria's Government Statistics Office, Statistik Austria, put the number of Turkish and former Yugoslavian citizens resident in Austria in 2008 at around 110,000 and 290,000 respectively. Around a further 150,000 Turkish citizens and 150,000 citizens of the Ex-Yugoslavian countries have been naturalised since 1985.

<sup>23</sup> Austria signed bi-lateral agreements with Turkey and the then Yugoslavia in 1964 and 1966 respectively to establish recruitment offices in these countries. By 1973 178,000 Yugoslavs and 27,000 Turks were living Austria.

<sup>24</sup> Interview with Dr Gustav Lebhart from Statistik Austria. Available on Afrikanet at [http://www.afrikanet.info/index.php?option=com\\_content&task=view&id=642&Itemid=2](http://www.afrikanet.info/index.php?option=com_content&task=view&id=642&Itemid=2)

<sup>25</sup> Special Eurobarometer Report: "Discrimination in the European Union: Perceptions, Experiences and Attitudes", July 2008, p.41. Available at [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_296\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_296_en.pdf)

<sup>26</sup> Special Eurobarometer Report: "Discrimination in the European Union: Perceptions, Experiences and Attitudes", July 2008, p.155. Forty-one per cent of Austrian respondents claimed to have friends from other ethnic backgrounds to themselves, compared to an EU average of 55 per cent. Only the Czech Republic, Malta and Poland recorded lower levels.

<sup>27</sup> Special Eurobarometer Report: "Discrimination in the European Union", January 2007, p.9. 46 per cent of Austrian respondents answered favourably, compared to an EU average of 65 per cent. Only Cyprus and Malta scored lower. Available at [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_263\\_sum\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_sum_en.pdf)

<sup>28</sup> The far-right Freedom Party of Austria (FPÖ) recorded 9.7 per cent of the vote in national parliamentary elections in 1986, 26 per cent in 1999 and 11 per cent in 2006.

<sup>29</sup> The FPÖ obtained 17.5 per cent of the vote in the 2008 parliamentary elections. The Alliance for the Future of Austria obtained a further 10.7 per cent.

<sup>30</sup> "Bettlerunwesen, Asylmissbrauch, Ausländerkriminalität – Wir säubern Graz!"

<sup>31</sup> Interview published in the national newspaper Österreich, 14 January 2008. The politician in question was subsequently charged with inciting racial hatred under Section 283 StGB.

<sup>32</sup> "Sie schauen nicht nur anders aus ....sondern sie sind auch anders, und zwar sind sie ganz besonders aggressiv. Das liegt offensichtlich in der Natur dieser Menschen. Sie sind meist illegal da,.....meist Drogendealer und ...ungeheuer aggressiv." Partik-Pable, Stenogr. Protokolle des NR, XX. GP, 168. Sitzung, 10. Mai 1999.

<sup>33</sup> "Duell um Wien" available at [http://www.hcstrache.at/downloads/folder\\_duellumwien.pdf](http://www.hcstrache.at/downloads/folder_duellumwien.pdf).

<sup>34</sup> The entry continues "Thanks to Haupl's SPÖ, asylum seekers can now legally go on the game". [„Asylantinnen können in Wien „dank Häupl's SPÖ“ legal auf den Strich gehen.“] The correlation between prostitution and persons of colour is implicit, but perfectly clear.

<sup>35</sup> The Ministry of Interior's Drug-related Crime Report for 2007 puts the figure at least 50 per cent.

<sup>36</sup> Official statistics suggest that the involvement of sub-Saharan in drug crime peaked between 2003-2005. Only 70 police reports (*Anzeigen*) were recorded against Nigerians in 2000, compared to 1171 in 2004, 938 in 2005 and 522 in 2007. See the Ministry of Interior's Annual Reports on Drug Related Crime for the respective years.

<sup>37</sup> Including both crimes and misdemeanours.

<sup>38</sup> Annual Report on Drug Related Crime, 2005, p. 4, available at [http://www.bmi.gv.at/downloadarea/sg\\_berichte/drug\\_report\\_2005.pdf](http://www.bmi.gv.at/downloadarea/sg_berichte/drug_report_2005.pdf)

<sup>39</sup> Annual Report on Drug Related Crime 2005, p.32,

<sup>40</sup> The number of drug related criminal incidents involving foreign nationals recorded by the police in 2007 was 5140. 933 out of the 4631 police reports drafted in respect of incidents involving nationals of the 30 most represented countries came from sub-Saharan African countries. In 2007 therefore, approximately 20per cent of all drug related crime by foreign nationals involved sub-Saharan Africans, resulting in a proportion of overall drug-related crime reports of about 5per cent. See the Annual Report on Drug Related Crime, 2007, p.37, available at [http://www.bmi.gv.at/downloadarea/sg\\_berichte/Suchtmittelbericht\\_2007\\_eng.pdf](http://www.bmi.gv.at/downloadarea/sg_berichte/Suchtmittelbericht_2007_eng.pdf)

<sup>41</sup> The conviction rates are taken from 2006 as a police report will typically take some time to work its way through the judicial system.

<sup>42</sup> Annual Security Report (*Sicherheitsbericht*) 2006, p.419. Available at [http://www.parlament.gv.at/PG/DE/XXIII/III/III\\_00114/fname\\_100251.pdf#](http://www.parlament.gv.at/PG/DE/XXIII/III/III_00114/fname_100251.pdf#)

<sup>43</sup> Annual Security Report 2006, p. 427.

<sup>44</sup> Annual Security Report 2006, p. 429.

<sup>45</sup> See the Annual Reports on Drug Related Crimes for the years 1999 to 2005.

<sup>46</sup> Annual Report on Drug-Related Crime 2005, p.10.

<sup>47</sup> Federal Constitutional Act dated 3rd July 1973 for the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. This complements Article 7 of the Austrian Constitution which provides for the equality of all Austrian nationals before the law and prohibits “privileges based on birth, estate, class or religion”.

<sup>48</sup> Discrimination on the grounds of religious belief is prohibited only in the area of employment, but not in the access to goods and services.

<sup>49</sup> Section 283(1) provides that “whoever publicly induces or incites – in a manner likely to endanger public order – the commission of a hostile act against a church, or religious community existing in the state or against a group determined by the appurtenance to such a church or religious community, race, nation, ethnic group or state, is liable to punishment of two years imprisonment.”

<sup>50</sup> Offences under Section 117(3) are punishable by a custodial sentence of up to three months.

<sup>51</sup> Section 33(5) StGB.

<sup>52</sup> Austrian Code of Criminal Procedure, Section 198.

<sup>53</sup> Section 31(5) of the Security Police Act.

<sup>54</sup> Section 89(3) Security Police Act.

<sup>55</sup> Erlass 64.000/231-II/20/00 of Ministry of Interior, 10 November 2000.

<sup>56</sup> The Ministry of Justice has issued guidelines for prosecutors investigating allegations of police ill-treatment. See Erlass JMZ 880014/37/II/3/99. Increasingly, allegations of criminal offences committed by police officers are being transferred to prosecutors from neighbouring districts to the scene of offence, to investigate and decide whether to prosecute. Thus allegations of criminal offences by Viennese police

office are increasingly being dealt with by prosecutors from Wiener Neustadt.

<sup>57</sup> Erlass 85.603/100-BIA/03 "Buro for Interne Angelegenheiten (Abt. IV/6), Einfuhrungserlass – Adaptierung", Ministry of Interior, 5 March 2003. The Bureau for Internal Affairs must be informed of all complaints of police ill-treatment. The Bureau for Internal Affairs can then decide whether to take over the investigation itself, or request to be kept informed of the results of internal investigations carried out by the police station concerned.

<sup>58</sup> The status and composition of the Bureau for Internal Affairs is currently being reviewed by the Austrian Parliament in the light of a number of scandals involving corruption and abuse of authority by senior police officers within Austrian police force.

<sup>59</sup> The BBE must be informed by the relevant Chief Police Officer (*Abteilungskommandant*) of all allegations against officers from the Vienna Police (*Bundespolizeidirektion Wien*). See Instruction P707/a/02 of the Bundespolizeidirektion Wien of 23 January 2003, entitled "Amtspflichtverletzungen, Misshandlungsvorwürfe, Buro for Besondere Ermittlungen" and the Supplementary Instructions of the Landespolizeikommando Wien of 23 January 2006 (LPK-APLS-PA 3-2121a/16-06).

<sup>60</sup> Security Police Act Sections 88 and 89.

<sup>61</sup> Austrian Code of Criminal Procedure, Section 106.

<sup>62</sup> Where the investigation is already being conducted under the authority of the Office of Public Prosecution, the responsibility to examine the complaint will lie with the prosecutor responsible for supervising the criminal investigation against the individual concerned or in the course of which the rights of someone other than the person under investigation were violated.

<sup>63</sup> Amnesty International, *Amnesty International Report 2000*.

<sup>64</sup> "Polizei als Täter? Umgang des Staates mit Misshandlungsvorwürfen." Available at [http://www.menschenrechtsbeirat.at/cms/index.php?option=com\\_content&task=view&id=294&Itemid=74](http://www.menschenrechtsbeirat.at/cms/index.php?option=com_content&task=view&id=294&Itemid=74)

<sup>65</sup> Of these 112, only seven were from other western European countries. See pages 42 and 65.

<sup>66</sup> Only six of 193 cases examined by the HRAB made it to trial and only one resulted in the conviction of a police officer.

<sup>67</sup> Police criminal statistics for the year 2005-2006 provided in "Kriminalanalyse, -Statistik, -Prävention", 8 January 2007.

<sup>68</sup> "bedrohlich kurzen Abstand" ... "gestikuliert" ... "fast gestreift".

<sup>69</sup> See, for instance, the HRAB report "Polizei als Täter? Umgang des Staates mit Misshandlungsvorwürfen", available at [http://www.menschenrechtsbeirat.at/cms/index.php?option=com\\_content&task=view&id=294&Itemid=74](http://www.menschenrechtsbeirat.at/cms/index.php?option=com_content&task=view&id=294&Itemid=74)

<sup>70</sup> Section 269, Austrian Criminal Code.

<sup>71</sup> Section 297, Austrian Criminal Code.

<sup>72</sup> „Du Sau, hast du immer noch nicht genug?“

<sup>73</sup> The Wiener Einsatzgruppe Alarmabteilung, commonly referred to by its acronym WEGA, is the counter-

terrorist SWAT unit of the Austrian federal police, for the Vienna territorial division.

<sup>74</sup> Such as asking whether the police officers wished to let out their frustration (“Na, wolltat’s a bissl den Frust rauslassen?”).

<sup>75</sup> Ausrutscher

<sup>76</sup> “Die Schwere der Dienstpflichtverletzungen als zu gering eingeschätzt”

<sup>77</sup> Marcus Omofuma died on 1 May 1999 in the course of an attempted deportation, during which he was bound and gagged by the accompanying police officers.

<sup>78</sup> Neue Kronen Zeitung, 24 July 2003.

<sup>79</sup> SicherheitswachebeamtenInnen, die sich “[...] der Situation angepasst verhalten, haben den Anspruch auf Loyalität seitens des Polizeipräsidenten, ihres Ministers und der Politik.” Neue Kronen Zeitung, 24 July 2003.

<sup>80</sup> Neue Kronen Zeitung, 24 July 2003.

<sup>81</sup> Neue Kronen Zeitung, 24 July 2003.

<sup>82</sup> “Diese Beamten haben meine volle Loyalität, weil ich weiß, wie schwer ihr Beruf ist.” Profil, 14 November 2005.

<sup>83</sup> Falter, 11 May 2005.

<sup>84</sup> Die Presse, 18 April 2006.

<sup>85</sup> “Man muss schon auch klar sehen, dass dieser Mann wegen eines schweren Drogendelikts bestraft war.”; Interview with Austrian TV station ORF 1.

<sup>86</sup> “Man kann doch nicht gegen jeden Polizisten ein Disziplinarverfahren einleiten”; Falter, 19 September 2007.

<sup>87</sup> “Es hat Sie nicht zu interessieren, was die Polizei macht”.

<sup>88</sup> “gröbliche Missachtung des Betroffenen als Person”.

<sup>89</sup> Falter, 19 September 2007.

<sup>90</sup> Beamten Dienstrechtsgesetz 1979.

<sup>91</sup> Beamten Dienstrechtsgesetz 1979, Section 98(3).

<sup>92</sup> Beamten Dienstrechtsgesetz 1979, Section 101(2).

<sup>93</sup> Beamten Dienstrechtsgesetz 1979, Section 95(2).

<sup>94</sup> Report of the HRAB, “*Polizei als Täter? Umgang des Staates mit Misshandlungsvorwürfen*”. Available at

[http://www.menschenrechtsbeirat.at/cms/index.php?option=com\\_content&task=view&id=294&Itemid=74](http://www.menschenrechtsbeirat.at/cms/index.php?option=com_content&task=view&id=294&Itemid=74)

<sup>95</sup> Ibid, p. 7: "Das österreichische System der Untersuchung, Aufklärung und Sanktionierung von möglichen Misshandlungen durch die Sicherheitsexecutive viel zu sehr von strafrechtlichen Gesichtspunkten determiniert ist."

<sup>96</sup> Ibid, p. 7: "Aus menschenrechtlicher Sicht steht nicht die Straflosigkeit von Misshandlungen und sonstigem Fehlverhalten der Polizei im Vordergrund, sondern ihre Folgenlosigkeit".

<sup>97</sup> Ibid, p. 8: "Erst nach der Klärung des Sachverhalts mit allen polizeilichen Ermittlungsbefugnissen (...) sollten in einem weiteren Schritt die möglichen Folgen eines festgestellten Fehlverhaltens von Angerhörigen der Sicherheitsexecutive diskutiert und aus den zur Verfügung stehenden Optionen die im konkreten Fall als am besten geeignet erscheinenden Massnahmen ausgewählt werden."

<sup>98</sup> It is to be welcomed, however, that criminal investigations into allegations of police ill-treatment are increasingly being conducted by prosecutors from neighbouring administrative districts.

<sup>99</sup> The statistics cover cases worked on by prosecutors in the year in question. Some of the 20 indictments may relate to proceedings initiated in the previous year (when 1047 complaints of police ill-treatment were registered with the Office of Public Prosecution).

<sup>100</sup> In same year, 576 cases were closed by Prosecutors without any judicial proceedings [*"Ohne gerichtliches Vorverfahren"*].

<sup>101</sup> Annual Security Report, Ministry of Interior, p. 445.

<sup>102</sup> Statistics provided to Amnesty International by the Ministry of Justice.

<sup>103</sup> Annual Security Report 2006, p. 445.

<sup>104</sup> Judgment of 20 Feb 2003, GZ 17 U 440/02z-11.

<sup>105</sup> Judgment of 21 May 2003, AZ 20 BI 37/03 (ON16).

<sup>106</sup> Judgment of 14 January 2004, 130s154/03.

<sup>107</sup> Judgment of 5 September 2003, ZI. UVS-02/43/11008/2002/26.

<sup>108</sup> ECRI, General Policy Recommendation No.11, para. 1.

<sup>109</sup> "Einer hellen Daunenjacke mit Kapuze"

<sup>110</sup> Falter, Number 30/05, 27 July 2005.

<sup>111</sup> Now the Fundamental Rights Agency.

<sup>112</sup> Respondents were asked whether they had fallen victim to any crime because or partly because of their nationality, race or colour, religious belief or sexual orientation in 2004.

<sup>113</sup> Research Report: A Comparative Analysis of the European Crime and Safety Survey (EU ICS) 2005, p.53. Available at [http://www.gallup-europe.be/euics/Xz38/downloads/EUICS\\_The%20Burden%20of%20Crime%20in%20the%20EU.pdf](http://www.gallup-europe.be/euics/Xz38/downloads/EUICS_The%20Burden%20of%20Crime%20in%20the%20EU.pdf)

<sup>114</sup> See for instance, page 31 of ZARA's 2007 Racism Report.

<sup>115</sup> Missstandsfeststellung und Empfehlung (GZ. W/536–LAD/06) of 30 August 2007.

<sup>116</sup> Ludwig Boltzmann Institute of Human Rights, *National Analytical Study on Racist Violence and Crime*, 2004, p.27.

<sup>117</sup> *Policing Racist Crime and Violence: a Comparative Analysis*, prepared by Dr Robin Oakley on behalf of the EUMC, September 2005, p. 21.

<sup>118</sup> Decree of the Federal Minister of the Interior dated 29 June 2006.

<sup>119</sup> This office is then responsible for communicating its report to the Federal Office for the Protection of the Constitution and the Fight against Terrorism.

<sup>120</sup> Doc. 11768/94 JAI 78 of the Council for Justice and Home Affairs of 3 December 1994.

<sup>121</sup> ECRI, General Recommendation No. 11, para. 14.

<sup>122</sup> In Europe, the United Kingdom, Spain and Portugal have all offer specialised victim support for victims of racially motivated crime.

<sup>123</sup> In the annual Report on the Protection of the Constitution (*Verfassungsschutzbericht*) presented by the Office for the Protection of the Constitution and the Fight against Terrorism.

<sup>124</sup> In the Annual Security Report (*Sicherheitsbericht*), presented by the Ministry of Interior.

<sup>125</sup> The number of police reports exceeds the number of reported incidents, as any incident may involve more than one suspect.

<sup>126</sup> ECRI, Third Report on Austria, Adopted on 25 June 2004 CRI (2005) 1, p. 11.

<sup>127</sup> Der Standard, 23 November 2007.

<sup>128</sup> "Mehr Migranten bei der Polizei", [www.wien.orf.at](http://www.wien.orf.at), 2 July 2007.

<sup>129</sup> Through its World of Difference Institute, the Anti-Defamation league provides anti-bias education and diversity training programs to a range of organisations and institutions across the world.

<sup>130</sup> Concluding observations of the Human Rights Committee, CCPR/C/AUT/CO/4,

30 October 2007, para. 9.





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## **VICTIM OR SUSPECT – A QUESTION OF COLOUR** **RACIST DISCRIMINATION IN THE AUSTRIAN JUSTICE SYSTEM**

Racist abuse and beatings by police officers; inadequate investigations into racially motivated crimes and the failure to prosecute their perpetrators – these are just some of the forms discrimination takes under the criminal justice system in Austria.

Migrants and members of ethnic minorities are more likely to be suspected of crime than white Austrians and less likely to have their rights respected when they fall victim to it. They are regularly denied their right to equal treatment by the police and the judicial system.

This report is based on detailed case studies. It analyzes the policies that are currently in place to prevent and respond to entrenched racist attitudes, and finds them inadequate. It concludes that the Austrian police and judicial organs fail to provide the same quality of service to all persons, regardless of their origin or skin-colour, and that this is the result of institutional racism.

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