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## **Consideration of the report submitted by Austria under Article 40 of the International Covenant on civil and political rights (CCPR/C/AUT/4)**

### **“Shadow” report submitted by Homosexual Initiative (HOSI) Vienna**

21 February 2007

We would like to draw the Committee’s attention to a series of human rights violations in Austria not covered by the above-mentioned report submitted by Austria.

Concretely, we would like to highlight the five following additional pieces of information reflecting our key human rights concerns:

#### **1. Article 19 – Right to freedom of opinion**

Since the submission of Austria’s third periodic report in 1997, the situation regarding freedom of expression and opinion has substantially deteriorated, especially in the late 1990s and during the period of the conservative/right wing (ÖVP/FPÖ) government from 2000-2006. Politicians of Jörg Haider’s “Freedom Party” (FPÖ) had filed hundreds of law suits for libel/defamation against critical journalists and representatives of other political parties. The sheer number is unbelievable.

This has also caused harsh criticism expressed in the 2000 report of the three wise men Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, mandated by Austria’s 14 European Union partners to examine thoroughly the commitment of Austria’s (then) Government to the common European values.

In paragraphs 93-103 of their report (attached), the three wise men actually describe and heavily criticise how the FPÖ had systematically used libel procedures and court cases to intimidate journalists and political opponents and, thus, to suppress criticism and freedom of opinion and expression. FPÖ party-leader Jörg Haider’s “personal” lawyer, Dieter Böhmendorfer, whose law firm was dealing with most of these libel suits, later became Federal Minister for Justice.

This intimidating practice was highlighted in one of the three wise men's general conclusions (para. 112 of the report).

The situation was aggravated by the fact that the government had "willing executioners" in the justice system, disguised as "independent judges". Again, this was strongly criticised by the three wise men (para. 99 of their report).

The avalanche of law suits against critical journalists and representatives of civil society and political opponents had a devastating impact on freedom of expression in the country. Only a few rich and powerful media could afford to get dragged into these costly and long lasting court cases – on an average, such a court case could easily cost 25,000 euros; and if a case has had to be brought to the European Court of Human Rights, the average duration of getting a final judgment in Strasbourg is around eight years. As a result of this systematic intimidation, many journalists and media exercised an extensive self-censorship and refrained from any critical reporting about the government in general and the FPÖ and their activities in particular. This situation has improved only recently with the Freedom Party and its split-off, the BZÖ, voted out of government in 2006.

In addition, the first judgments of the ECtHR in Strasbourg dealing with convictions by Austrian courts in such libel cases were recently handed down, and Austria was convicted, on a long series of occasions, for violating the European Human Rights Convention.

As a result of these many successful applications in Strasbourg, a debate has started as to amend the relevant legislation to give stronger legal guarantees regarding the right to freedom of opinion and expression, and to limit the discretion of the judiciary to interpret the libel provisions in the law. Moreover, too little has been done to train the judges to apply correctly the European Human Rights Convention with regard to this fundamental right, and to remove those judges from the judiciary who are unwilling and reluctant to respect the Convention.

We also want to mention a law suit filed by a Member of Parliament against our own organisation and its secretary-general, Kurt Krickler, for defamation. The background of the case is as follows:

On 2 March 2005, Austrian Parliament debated, in plenary, a motion tabled by the Green Party to set a deadline for finally putting their March 2003 motion to include homosexual victims in the Federal Nazi Victims Compensation Act (Opferfürsorgegesetz – OFG) on the agenda of the Parliament's social affairs committee where this motion had been parked since. Once again, the ÖVP/FPÖ majority defeated the motion.

MP Walter Tancsits, speaking in that debate on behalf of the People's Party (ÖVP), defended and justified his party's refusal to amend the OFG. As a reaction to this statement and the vote against the motion, HOSI Wien, in a media release dated 4 March 2005, criticised the position of the People's Party as "taking ideological views of the Nazis" ("vertritt nationalsozialistisches Gedankengut") in general and Tancsits' statement in particular: "It's a disgrace for the country that even today mental descendants of the brown Nazi myrmidons, such as Tancsits, are sitting in the Parliament."

Tancsits sued the association and its secretary-general in court. They were acquitted in the first instance, but Tancsits appealed this decision. The appeal court quashed the acquittal and remitted the case to the first instance for re-examination. In April 2006, Krickler and HOSI Wien were convicted. They, in return, appealed this judgment, and the case is now again pending at the appeal court. The International Helsinki Federation for Human Rights, which had sent an observer to both court trials, criticised the conviction in a public statement on 5 May 2006 (see attachment).

***We strongly believe that this conviction in court is a violation of the European Human Rights Convention.***

***We also strongly believe that there is a structural problem here, and the right to freedom of opinion and expression must be more clearly defined and guaranteed by Austria's legislation – and in line with the case law of the European Court of Human Rights.***

## **2. Article 20 – Incitement to hatred**

The Austrian criminal code limits the scope of its “incitement to hatred” provision to hatred motivated by religious, racial or ethnic grounds. Statistical data on such incidents or hate crimes are only collected if these have a (supposedly) xenophobic, right-extremist or anti-Semitic background.

***We feel that legal protection from incitement to hatred must be extended to cover hatred motivated by other reasons, such as homophobia.***

## **3. Article 23 – Marriage and Family**

In July 2003, the European Court of Human Rights published its judgment in the case of *Karner v. Austria* (application no. 40016/98). Karner challenged a provision in the Austrian Rent Act that would exclude a domestic partner of the same sex from the right to succeed to the tenancy of a deceased partner – a right granted to non-married partners (“life companions”) of the opposite sex. The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for home) of the European Human Rights Convention. The Court reiterates its findings that “differences based on sexual orientation require particularly serious reasons by way of justification” (para. 37 of the judgment).

This judgment has a vast impact. Since there are no “serious reasons” imaginable to argue a different treatment of non-married same-sex and non-married opposite-sex partners in any legal matter, Austria must be expected to grant equal rights to all non-married (domestic) partners and, therefore, to extend any legal right of non-married opposite-sex couples to non-married same-sex couples. As a consequence, in November 2005, the Federal Constitutional Court ruled that a different treatment of non-married same-sex partners in the public social security system (i. e. co-insurance of a non-married partner who is not covered by an own social health insurance) is unconstitutional.

Still, the Austrian Government and Parliament have failed to this very day to bring all relevant legislation in line with the ruling of the Strasbourg Court in *Karner v. Austria*.

Moreover, such discriminatory treatment of same-sex and opposite-sex non-married couples is also a violation of the CCPR – cf. decision of the UN Human Rights Committee in *Young v. Australia*, *Communication No. 941/2000*, U.N. Doc. CCPR/C/78/D/941/2000 (2003).

***A series of relevant laws in Austria still need to be amended to grant the same legal rights to same-sex domestic partners that are already granted to opposite-sex domestic partners.***

#### **4. Article 23 – Marriage and Family**

Moreover, Austria discriminates against same-sex couples by reserving certain rights to married couples while, at the same time, restricting marriage to two partners of different sex, and not even providing same-sex partners with the opportunity to enter into an alternative legal institution that would guarantee the same rights as marriage.

***Failing to offer such legal provisions, Austria is violating Articles 23 and 26 of the Covenant.***

#### **5. Article 26 – Equality**

Austria implemented the two European Union anti-discrimination directives into the new federal Equal Treatment legislation (cf. para. 396 + 399 of Austria's report, document CCPR/C/AUT4) only in a minimal fashion, thus transposing, into Austrian legislation, the hierarchy in the protection from discrimination created at European level. While protection from discrimination on the grounds of sex, age, religion and belief, disability, and sexual orientation is limited to employment and occupation, protection from discrimination on the grounds of race or ethnic origin is also granted in areas such as social protection, social benefits, education, access to and provision of goods and services, including housing (cf. para. 401 + 402 of Austria's report).

This unequal level of protection is not only unconstitutional but also a violation of Article 26 of the Covenant which reads as follows: *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination...*

***It is obvious that the current legislation does NOT treat “all persons” as equal before the law as they are NOT entitled “to the equal protection of the law”, and that the law does NOT prohibit any discrimination and does NOT guarantee to all persons EQUAL protection against discrimination.***

While this hierarchy and discrimination in the protection from discrimination was created by the two EU directives, they do not prevent any member state from implementing an equal standard and level of protection at the national level.

***We strongly feel that this discriminatory situation must be remedied.***