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# Preventive Human Rights Protection

## Human rights monitoring of the security authorities in Austria – changes resulting from the implementation of OPCAT



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To ensure that human rights are upheld, the security authorities in Austria have been preventively monitored and advised since 1999. Until 2012 that task was performed by the Human Rights Advisory Council (former HRAC), which was established within the Federal Ministry of the Interior (BMI), and by its commissions. In 2012, preventive human rights protection was extended considerably in Austria – a national mechanism for the prevention of torture was created and the Optional Protocol to the UN Convention against Torture (OPCAT) was then ratified. The Austrian Ombudsman Board (AOB) was tasked with acting as a national prevention mechanism. In addition to its previous duties, the AOB has since been entrusted with visiting and inspecting places of detention to protect and promote human rights, monitoring and inspecting the conduct of executive bodies authorized to directly issue orders and carry out coercive measures, and checking or visiting programmes and facilities for persons with disabilities. This paper explains the international law background to the change and the new duties, extended organizational structure and mandate of the AOB. It goes on to analyze the resulting changes to human rights monitoring of the security authorities. A key finding of the paper is that the visits and on-site monitoring performed by the commissions have barely changed. However, there have been fundamental changes to the systemic background and how the findings of the visits are handled. The method by which recommendations are developed, the discussion processes involved and the manner in which the recommendations are made to those responsible, in particular, are completely different. It can be assumed that those changes will also impact on the effectiveness of human rights work.

### I. DEVELOPMENT OF HUMAN RIGHTS MONITORING IN AUSTRIA

In 1999, based on a proposal of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT<sup>1</sup>) and following the death of the Nigerian national Marcus Omofuma during deportation by Austrian police officers, the Human Rights Advisory Council (formerly HRAC) was estab-

lished at the Federal Ministry of the Interior (BMI). It was tasked with advising the BMI on questions of upholding human rights, and had the duty of monitoring and inspecting the activities of the security authorities, other authorities subordinate to the BMI and executive bodies authorized to issue direct orders and carry out coercive measures (Art. 15a of the Police Act as amended by Federal Law Gazette I 1999/146, repealed<sup>2</sup>).

The former HRAC and the commissions set up for that purpose provided such advice on human rights and the associated monitoring and inspection until 30.06.2012. Upon the transfer of the majority of those duties to the Austrian Ombudsman Board (AOB; amendment set out in Federal Law Gazette I 2012/1), the former HRAC ceased its work or rather was integrated into the structure of the Ombudsman Board with new functions (see, in particular, Sections III.B.3 and IV.C.3 of this paper).

## II. OPCAT: OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

The UN Convention against Torture (United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT)<sup>3</sup> was ratified by Austria in 1987. The associated obligation to take preventive measures against torture is supplemented by the Optional Protocol to the Convention against Torture (OPCAT)<sup>4</sup>, which was adopted in 2002 and entered into force in 2006. The aim of OPCAT is to prevent or reduce the risk of torture or other cruel, inhuman or degrading treatment or punishment by means of a system of regular monitoring visits. The visits are carried out by independent international and national committees at places where people are or can be deprived of their liberty (Arts. 1 and 4 of OPCAT).

The international Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) was established by the United Nations for that purpose. It is subordinate to the UN Committee against Torture, which monitors implementation of the CAT. In addition, OPCAT obliges the signatories to create prevention mechanisms at the national level (Arts. 1 and 2 of OPCAT).

The prohibition on torture and the requirement to reduce the risk of torture

through preventive measures can be found in a number of sources of international law.<sup>5</sup> Preventive visits by an international committee were initially established in Europe by the European Convention against Torture in 1987.<sup>6</sup> What is new in OPCAT, however, is, first, that it set up a committee – the SPT – that performs visits to places of detention worldwide, rather than in a specific region only, and, second, that the signatories undertake to set up a system of visits at the national level as well<sup>7</sup>, with the signatories to OPCAT having the option to maintain, designate or create one or several independent national preventive mechanisms (hereinafter: NPM) (Art. 17 of OPCAT). OPCAT also sets out the fundamental criteria that such NPMs must fulfil and the powers they must be vested with in order to qualify as mechanisms pursuant to OPCAT (Arts. 18–23 of OPCAT).

Although established at the national level, the NPM is authorized and obliged to cooperate directly with the international SPT (Arts. 11, 12, 16, 20 of OPCAT). The NPM is obliged to refer not only to Austrian law, but also to the relevant norms of the United Nations when making its recommendations (Art. 19 of OPCAT). That construction not only represents a milestone in development of the role of national human rights institutions with respect to implementation of international law at a national level<sup>8</sup>, but also has the potential to show how the novel, systematic and systemic linking of the international and national levels of human rights protection can work<sup>9</sup>.

To comply with the provisions of OPCAT, in Austria the OPCAT Implementation Act<sup>10</sup> was passed (Federal Law Gazette I 2012/1) and OPCAT was subsequently ratified. The NPM was established by the OPCAT Implementation Act and began its work at 01.07.2012 when that Act came into force.<sup>11</sup> The Austrian Ombudsman

Board, as the Austrian version of the parliamentary ombudsman institute<sup>12</sup>, was entrusted with the duties of the NPM.

### III. THE OMBUDSMAN BOARD AS THE AUSTRIAN NPM

#### A. THE TASKS OF THE AUSTRIAN OMBUDSMAN BOARD

Since it was established in 1977, the chief task of the Austrian Ombudsman Board has been to inspect maladministration at the federal and federal state level (Art. 148a [1] and [2] of the Federal Constitutional Law, with the exception of Tirol and Vorarlberg, which have their own federal state ombudsman boards, Art. 148i [1] of the Federal Constitutional Law). It can act in response to complaints or ex officio on the grounds of suspected maladministration. In addition, anyone may complain to the AOB of delay by a court in taking a procedural step (Art. 148a [4] of the Federal Constitutional Law).<sup>13</sup>

In addition to such ex-post investigations into maladministration about which a complaint has been made or that is suspected, the AOB as of 01.07.2012 is also tasked with taking preventive action to promote human rights. The key provision on such preventive action is set out in Art. 148a (3) of the Federal Constitutional Law (expanded slightly in Art. 11 [1] of the AOB Act)<sup>14</sup>:

“To protect and promote human rights, the Austrian Ombudsman Board and its commissions (Art. 148h [3], within the federal sphere of administration, including the Federation’s activities as a holder of private rights, shall

1. visit and monitor places of detention,
2. monitor and inspect the conduct of executive bodies and officers authorized to issue direct orders and carry out coercive measures, and
3. inspect and visit facilities and programmes for persons with disabilities.”<sup>15</sup>

#### Concerning no. 1: Visits to places of detention

Visits to places of detention by an independent national body is the core mission of OPCAT (see Section II of this paper). For the definition of places of detention, Art. 11 (1) 1 of the AOB Act refers to Art. 4 of OPCAT, pursuant to which places of detention are places under the jurisdiction and control of a state where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.

It is undisputed that prisons, police detention centres, police stations with cells, psychiatric hospitals, psychiatric departments in hospitals and cells in barracks qualify as places of detention. However, it has been and is questioned whether facilities for the extra-familial accommodation of minors, old people’s homes, care homes and general hospitals come under the oversight mandate of the AOB.<sup>16</sup> The AOB itself qualifies these places as places of detention and visits by the commission are conducted there.

Whether primary care facilities for asylum seekers should qualify as places of detention was the subject of fierce debate at the beginning of the preventive inspections of the AOB. The AOB decided that as long as unlawful detention does not occur in those accommodation facilities, they are not to be deemed as places of detention and are therefore not subject to preventive oversight.<sup>17</sup> That, however, does not exclude the possibility of the commissions inspecting primary care facilities if a complaint has been filed about maladministration or if maladministration is suspected.<sup>18</sup>

#### Concerning no. 2.: Direct issue of commands and carrying out of coercive measures

The monitoring and inspection of the conduct of executive bodies that are autho-

rized to issue direct commands and carry out coercive measures goes beyond the scope of OPCAT. It involves in particular the monitoring and inspection of demonstrations, raids, deportations and similar.

### **Concerning no. 3: Facilities and programmes for persons with disabilities**

Visiting and monitoring facilities and programmes for persons with disabilities is based partly on OPCAT, since such facilities can be places of detention, and partly on Art. 16 (3) of the Convention on the Rights of Persons with Disabilities.<sup>19</sup> For reasons of efficiency, administrative cost-efficiency and law classification, according to the government bill it was deemed expedient to couple the NPM pursuant to OPCAT with the mechanism for the prevention of violence pursuant to the Convention on the Rights of Persons with Disabilities.<sup>20</sup>

## **B. ORGANIZATIONAL SETUP**

### **1. General**

New organizational units – the Human Rights Advisory Council (HRAC) and the commissions – were integrated into the existing system of ex-post oversight. Considered in general terms, the AOB is both organizationally and functionally an ancillary body of the legislative state function.<sup>21</sup> It is also a budget-managing body, which means it has to provide and finance its complete staff administration and budget administration itself.<sup>22</sup>

### **2. Members of the AOB**

#### **a) Composition and appointment**

The AOB is a collegial body with three members, one of whom acts as chair. The members of the AOB are elected by the National Council, with the three parties of the National Council with the most mandates/votes having the right to nominate

one member each (Art. 148g [2] of the Federal Constitutional Law). Although the intention is for the members to be elected by the National Council, with the parties having a right of nomination, this system in practice resembles a delegation right of the three parties with the most mandates/votes.<sup>23</sup> The term of office of the ombudspersons is six years, with reelection being permitted once (Art. 148g [1] of the Federal Constitutional Law).<sup>24</sup>

#### **b) Qualification requirements for members of the AOB**

In addition to the requirement that the members of the AOB must be eligible for election to the National Council, as of the amendment set out in Federal Law Gazette I 2012/1 they are also required to have knowledge of the organization and functioning of public administration and knowledge in the field of human rights (Art. 148g [5] of the Federal Constitutional Law). However, as a result of that imprecise rule, it remains unclear to what extent the members are required to possess such knowledge and how possession of such should be proven.<sup>25</sup>

#### **c) Recall/independence**

The independence of the AOB is laid down in the Constitution (Art. 148a [6] of the Federal Constitutional Law). No statutory possibility is provided for recalling the members of the AOB. The ombudspersons are subject to a general prohibition on holding secondary positions. In addition, the office of ombudsman is incompatible with membership of a general representative body or the European Parliament and, further, with membership of the federal government or any of the federal state governments (Art. 148g [5] of the Federal Constitutional Law).

**d) Duties/decision making**

The ombudspersons adopt their own Rules of Procedure (AOB Rules of Procedure)<sup>26</sup> and Allocation of Duties (AOB Allocation of Duties<sup>27</sup>; Art. 148h [4] of the Federal Constitutional Law). Collegial decisions adopted by majority vote are required in particular for formal recommendations, deadline applications and suggestions on measures of supervisory control, reports to the national Parliament and the federal state parliaments, applications to the Constitutional Court, positions during procedures assessing laws or regulations, specification of general inspection priorities, as well as the appointment and recall of commission members and members of the HRAC (Art. 1 of the AOB Act; Arts. 8 ff of the AOB Rules of Procedure). If collegial decision-making is not prescribed, the ombudspersons are required to perform their duties independently. The AOB Allocation of Duties specifies which tasks come under which field. Aside from collegial leadership by the three members of the AOB, the AOB is hierarchically structured within the various fields.

**3. The Human Rights Advisory Council of the AOB**

As an independent body for fulfilment of the duty to protect and promote human rights, the HRAC assists the AOB in its function as an NPM.<sup>28</sup> The former HRAC was taken as a model when establishing the current HRAC. However, the duties and functions of the former HRAC and the HRAC of the AOB are completely different (see Section IV of this paper).

**a) Composition**

The HRAC consists of a chair, deputy chair and a further 16 members and 16 substitute members (if none of the federal states had declared the AOB responsible for the field of federal state administration, it would be

14 members and 14 substitute members) (Art. 148h [3] of the Federal Constitutional Law; Art. 15 of the AOB Act).<sup>29</sup> Even though all members are appointed by the AOB itself, it is bound by rights of nomination: half of the members and substitute members are nominated by ministries and federal states, while the other half are nominated by non-governmental organizations. The AOB can determine which non-governmental organizations have a right of nomination.<sup>30</sup>

**b) Recall**

The AOB may only recall a member or substitute member of the HRAC before expiry of their term of office a) at the member's or substitute member's request; b) if the member or substitute member can no longer perform their duties owing to their state of health; or c) if they have grossly violated their duties (Art. 15 [6] of the AOB Act, Art. 28 [4] of the AOB Rules of Procedure).

**c) Duties/decision making**

The key task of the HRAC is to advise the AOB on matters set out in Art. 11 (1) of the AOB Act (Art 148a [3] of the Federal Constitutional Law). In addition to consultation on the specification of general inspection priorities and before recommendations and statements of maladministration are made, the HRAC is tasked with making proposals to ensure uniform courses of action and inspection standards, as well as advising the AOB on evaluation of the fulfilment of its duties (Art. 14 of the AOB Act; Art. 26 [1] of the AOB Rules of Procedure). In addition, the Human Rights Council must be consulted in the event of appointment or recall of commission members and commission heads.

**d) Independence and funding**

None of the members of the HRAC may

be bound by instructions when exercising their functions (Art. 148h [3] of the Federal Constitutional Law). The necessary funds are provided by the AOB (Art. 26 [2] of the AOB Rules of Procedure).

#### 4. The commissions

##### a) Composition

For performance of its tasks pursuant to Art. 148a (3) of the Federal Constitutional Law, the AOB is obliged to set up at least six commissions, to be structured according to regional or professional criteria (Art. 148h [3] and Art. 11 [2] of the Federal Constitutional Law). Currently there are six commissions, structured according to regional areas of competence, with a total of 54 part-time commission members.<sup>31</sup>

The commissions are conceived as collegial bodies: decisions are made by a majority of votes. If the vote is tied, the head of the commission casts the deciding vote (Art. 23 [5] of the AOB Rules of Procedure). The heads of the commissions are tasked in particular with coordinating all the duties and providing administrative support to the respective commission (Art. 21 [2] of the AOB Rules of Procedure).

##### b) Appointment and term of office

The members are appointed by the AOB following consultation with the HRAC. Persons performing activities that could cause doubt about their independent exercise of their office as a member of the commission may not be appointed (Art. 12 [2] of the AOB Act). The members are appointed for six years; reappointment (including several times) is permitted (Art. 12 [3] of the AOB Act). The commission members are entitled to remuneration for the performance of their tasks (Art. 12 [6] of the AOB Act; Art. 13 [3] of the AOB Act; Art. 24 [1] of the AOB Rules of Procedure).

##### c) Recall

The AOB may recall a member before the expiry of their term of office with written justification a) at the member's request; b) if the member can no longer perform their duties owing to their state of health; c) if they have grossly violated their duties; or d) if the member carries out an activity that causes doubt about their independence (Art. 12 [4] of the AOB Act; Art. 19 [5] of the AOB Rules of Procedure). The HRAC must be consulted before recall of a member (Art. 19 [5] of the AOB Rules of Procedure).

##### d) Duties

The key task of the commissions is to carry out visits and inspections, performed by one or more members determined by the given commission, for the AOB (Art. 13 [1] of the AOB Act). They are tasked with proceeding routinely and comprehensively, taking into account the general monitoring priorities of the AOB, as well as in individual cases on the basis of circumstances that have become known (Art. 13 [3] of the AOB Act).

The commissions of the AOB then report on their observations in the form of records and make recommendations for statements of maladministration and recommendations and suggestions for measures of supervisory control (Art 13 [2] of the AOB Act; Art. 22 [5] of the AOB Rules of Procedure).

#### C. MANDATE OF THE AUSTRIAN OMBUDSMAN BOARD

The AOB and its commissions must be provided with all necessary information and be allowed to inspect all documents (including documents concerning cases of illness, Art. 11 [5] of the AOB Act) required for performance of its tasks. The commission members have the right to access all facilities of places of deten-

tion and may speak confidentially with detainees, staff or other informants (Art. 11 [3] of the AOB Act). Nobody may be penalized or otherwise disadvantaged for providing information to the AOB and its commissions (Art. 18 of the AOB Act).

All federal, federal state, municipal and municipal association bodies are obliged to support the AOB and its commissions in the performance of their duties, to grant them access to files and to provide them with information on request (Art. 148b [1] of the Federal Constitutional Law). The official confidentiality obligation does not apply with respect to the Ombudsman Board and its commissions (Art. 148b [1] of the Federal Constitutional Law). The AOB, its commissions and the HRAC are subject to the same official confidentiality obligation as the inspected body (Art. 148b [2] of the Federal Constitutional Law).

In order that the AOB can fulfil its mandate of monitoring and inspecting bodies during direct issue of commands and exertion of coercive measures, the bodies of the law-and-order service are obliged by decree of the BMI to inform the AOB about focal campaigns, major raids, large-scale events, gatherings and deportations by air and land. In addition, the AOB must also be notified if claims of mistreatment are made against bodies of the public security authorities or if deaths or attempted suicides occur in police detention.<sup>32</sup>

The visits and monitoring of the commissions are usually unannounced in order to serve a preventive purpose and to gain as realistic an impression as possible of circumstances on site. The commissions, however, are obliged to have consideration for the operational requirements of the facilities during their visits (Art. 11 [4] of the AOB Act).

As described above, in the case of recommendations, and suggestions and

observations concerning regulations, the AOB first receives suggestions from the commissions and must also consult the HRAC (Art. 14 of the AOB Act). It is, however, not bound by either the suggestions of the commissions or those of the HRAC.

The AOB is a body that belongs to the legislature according to prevailing thought<sup>33</sup>. As such it can make reports on individual observations to the National Council and Federal Council and is obliged to submit annual reports on its activities to them (Art 148d of the Federal Constitutional Law). All reports must be published after submission to Parliament (Art. 3 [3] of the AOB Act). The AOB must also fulfil its obligation to submit reports to the Subcommittee for the Prevention of Torture (Art. 23 of OPCAT; Art. 3 [3] of the AOB Act). In addition to publishing such reports, the AOB is also obliged to inform the public about its activities and to cooperate with scientific and academic institutions, schools and other educational institutions (Art. 7 [3] of the AOB Act).

#### **IV. HUMAN RIGHTS MONITORING OF THE SECURITY AUTHORITIES – A COMPARISON OF THE FORMER HRAC AND THE AOB**

The mandate of human rights monitoring as described above (Sections I and III) was transferred from the former HRAC to the AOB by the amendment set out in Federal Law Gazette I 2012/1. Below is a comparison of the system of the former HRAC and its commissions with the system of the AOB and its commissions. The analysis is limited to selected changes to human rights monitoring with respect to the security authorities.

##### **A. SYSTEMIC BACKGROUND**

###### **1. Background in international law**

Although establishment of the former

HRAC was prompted by the CPT, it was a purely national institution, whereas the AOB has an international law background in the form of OPCAT. That is reflected in interpretation of the text of the law.<sup>34</sup> The AOB not only has domestic reporting obligations, but also reporting obligations towards the SPT (Art. 3 [3] of the AOB Act). That basis in international law provides the AOB system with stronger legitimacy than the system of the former HRAC.

The AOB has always investigated human rights violations as the most severe form of maladministration and taken further steps in the event of such.<sup>35</sup> Since the amendment set out in Federal Law Gazette I 2012/1, however, human rights violations are explicitly set out in the Constitution as a reason for filing a complaint with the AOB and human rights are expressly named as an inspection criterion (Art. 148a of the Federal Constitutional Law). Human rights were also the inspection criterion of the former HRAC (Art. 15a of the Police Act as amended in 1999, repealed). However, there was disagreement as to whether that only meant constitutionally guaranteed subjective rights<sup>36</sup>, i.e. only domestic “human rights”, or also human rights codified in international law and soft law standards<sup>37</sup>. All human rights guaranteed in international treaties and ratified by Austria are to be used by the AOB as inspection criteria. Since the “Explanatory Remarks” to the government bill refer to human rights standards “including, but not limited to” the SPT and CPT, comparable standards such as the European Prison Rules or the UN Statements of Principles can also be included as human rights inspection criteria.

## 2. Mandate

The mandate of the AOB is significantly broader than that of the former HRAC.<sup>38</sup> The number of facilities to be inspected

has risen fourfold to over 4,000 compared to those to be checked by the former HRAC.<sup>39</sup> The aim of the former HRAC was for all authorities subordinate to the BMI to engage more intensively and sustainably with human rights. The former HRAC was authorized to make preventive visits to all sites of the security authorities, as well as other authorities subordinate to the BMI, such as the Federal Asylum Office.<sup>40</sup> The main field of duties of the former HRAC was transferred to the AOB in the scope of its preventive work of inspecting places of detention and monitoring and inspecting direct issue of commands and performance of coercive measures.<sup>41</sup> The limitation that authorities subordinate to the Federal Ministry of the Interior that are not places of detention do not come under the preventive oversight of the AOB barely has any impact in practice.

## 3. From internal to external oversight body

While the former HRAC could make suggestions for improvements as an internal oversight body of the Federal Ministry of the Interior<sup>42</sup>, the AOB as an external oversight body is tasked with detecting maladministration and making recommendations. The statutory mandate of the AOB goes well beyond the advisory mandate of the former HRAC in that respect.

The institutional integration of the former HRAC was both an advantage and a disadvantage. As a result of direct cooperation of high-ranking representatives of the Federal Ministry of the Interior in drawing up the recommendations it can be assumed that the recommendations also had increased legitimacy within the ministry.<sup>43</sup> However, the involvement of high-ranking representatives of the law-and-order authorities also posed a threat to the former HRAC’s independence.<sup>44</sup>

Without more detailed analysis, the question cannot be answered as to which of the two organizational forms of human rights monitoring results in changes that are quicker, greater in number, of higher quality or more substantial.

#### **4. Independence**

A major criticism of the former HRAC was its lack of independence from the Federal Ministry of the Interior.<sup>45</sup> The AOB is organizationally independent from the facilities and bodies that it inspects, and its financial independence is also ensured. The three members of the AOB cannot be recalled and are appointed for a period of six years.

The general debate about independence of the AOB revolves around the question of whether the current method of appointing the members of the AOB (see Section III.B.2 of this paper) is a sufficient guarantee of the independence of the AOB.<sup>46</sup> To be able to answer that question definitively, it would be necessary to study both the criteria of independence required by OPCAT and the criteria necessary for the fulfilment of the duties of the AOB, in order to then measure the Ombudsman Board by those criteria.

### **B. THE COMMISSIONS AND THEIR VISITS**

#### **1. Composition of the commissions**

The composition of the commissions has changed as a result of the extended mandate. Unlike previously, the commissions now include experts in the field of disability, as well as in child and youth affairs. Overall, the commissions can be said to be less geared towards jurisprudence. That naturally impacts on the observations and resulting recommendations of the commissions. Greater attention, for instance, is paid to barrier-free access to

police stations (which is frequently inadequate).

#### **2. Frequency of the visits**

The commissions of the AOB have four times as many facilities to inspect and visit as the commissions of the former HRAC. Nevertheless, it was assumed in the government bill that the number of visits of the commissions would only rise from approx. 550 to approx. 700.<sup>47</sup> In fact, 530 inspections were performed in 2013, i.e. not more than by the commissions of the former HRAC.<sup>48</sup> In other words, the frequency of visits to offices of security authorities has decreased significantly. Concerns were voiced in advance that it could lead to a deterioration of the observation of human rights by the security authorities. So far that assumption has been neither proved nor disproved.

#### **3. Feedback**

Following their visits, the commissions of the former HRAC gave the visited offices or monitored bodies direct feedback about their impressions and made suggestions for improvement.<sup>49</sup> The commissions of the AOB also give feedback about their observations and make suggestions for improvement during the closing discussions. Those recommendations voiced directly by the commissions have the advantage of contributing to quick and unbureaucratic problem solving. However, they also pose the risk of lack of coherence (both within a given commission and nationwide) and may also – since they are made without in-depth analysis and discussion – be made prematurely and be of lesser quality.

### **C. RECOMMENDATIONS**

#### **1. Forms of recommendation**

The former HRAC was tasked with advising the Federal Ministry of the Interior and

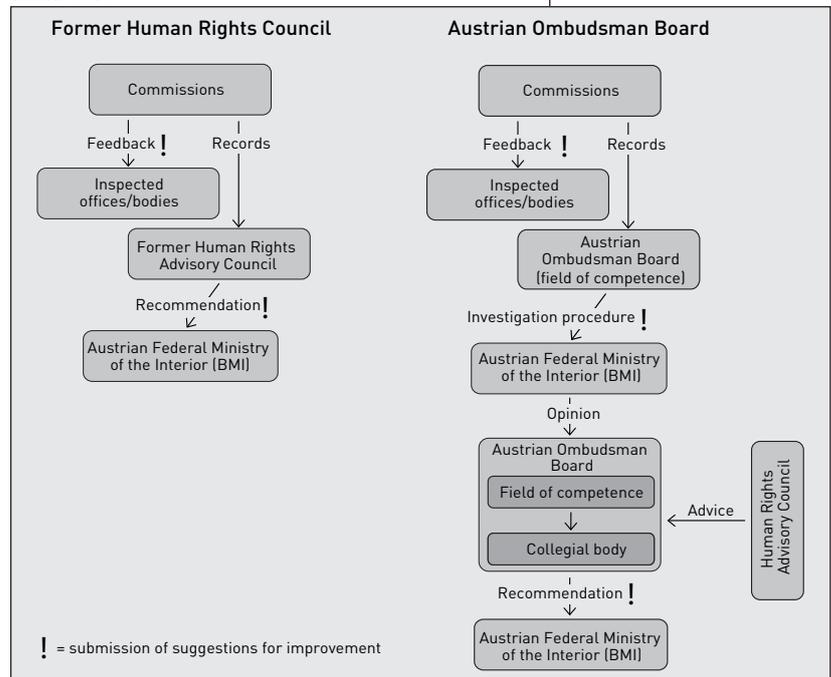
providing it with suggestions for improvement (Art. 15a [1] of the Police Act as amended by 1999, repealed). Those suggestions for improvement were termed recommendations by the former HRAC itself.<sup>50</sup> The AOB – even before the amendment set out in Federal Law Gazette I 2012/1 – has the constitutionally guaranteed power to make recommendations to the highest public administration bodies (Art. 148c of the Federal Constitutional Law). The body in question must comply with the recommendation within eight weeks or provide justification in writing for failure to comply with the recommendation (Art. 6 of the AOB Act).

The following diagram compares the processes of developing recommendations and providing suggestions for improvement in the two systems.

The diagram makes it clear that the path to a collegial recommendation by the AOB is significantly longer than for recommendations or suggestions by the former HRAC. At the level of commissions, direct feedback and associated suggestions for improvement were and are made to the competent offices or bodies following direct issue of commands or carrying out of coercive measures. That was already the case in the system of the former HRAC (see Section IV.B.3 of this paper).

In the former HRAC system the records of the commissions were then viewed; all recommendations were developed and discussed by all members of the Council before being made to the Federal Ministry of the Interior and published. In the AOB system, the records of the commissions are similarly sent to the AOB. On that basis, if deemed necessary by the relevant ombuds-person or their staff and the observations of the commissions are sufficiently substantiated, an investigation procedure is first launched, within the scope of which suggestions for improvement are made to

Source: Ritter



**Monitoring of the law enforcement authorities – comparison of the former HRAC and the AOB; development of recommendations and stages at which suggestions for improvement can be made**

those responsible. As the diagram shows, a formal statement of maladministration and recommendation by the AOB would only be the next stage. Before it is made, the HRAC needs to be consulted and the statement or recommendation needs to be adopted by the three ombudspersons as a collegial body.

In figures, the former HRAC made 384 recommendations during the 13 years of its existence.<sup>51</sup> That corresponds to 29 recommendations per year on average. By comparison, the AOB in the past five years<sup>52</sup> has made between one (2014) and twelve (2010) collegial recommendations and statements of maladministration per year. The extension of the mandate has not led to any discernible increase in collegial recommendations and statements of maladministration (2012: 7, 2013: 6, 2014: 1). If solely those figures are considered, one would come to the conclusion that the AOB makes significantly fewer recommendations and suggestions for improve-

ment than the former HRAC. However, since the AOB has a completely different system from the former HRAC, the figures are not comparable.

The preventive monitoring activities of the commissions were integrated into the system of inspection procedures that had been used for many years for ex-post oversight. That means that an investigation procedure is launched either on the grounds of a complaint or the report of a commission if the complaint or observations are sufficiently substantiated. In the case of the security authorities, during the inspection procedure, the Federal Ministry of the Interior is confronted directly with the observations and suggestions for improvement of the commissions through the competent field, without a mandatory prior decision of the HRAC or the collegial body of the three ombudspersons. In the practice of the AOB, as the diagram on page 13 shows, recommendations are made at three levels of the AOB: at the level of the commissions, by the competent field during the investigation procedure and as formal recommendations by the collegial body of the three members of the AOB.

In the 2012, 2013 and 2014<sup>53</sup> reports there is no listing of formal recommendations made pursuant to Art. 148c of the Federal Constitutional Law. It is merely noted that six recommendations were made in 2013, seven in 2012 and one in 2014, which were associated with inspections of maladministration, rather than preventive activities. No formal recommendations were made by the collegial body on the basis of its preventive activities during that period. It remains to be seen whether that phenomenon is due to the NPM still being under development in 2012 or whether that instrument will barely be used in the future in the context of preventive activities.

## 2. Consequences of the AOB system

Even with the former HRAC there was a risk that the direct recommendations of the commissions were not coherent across Austria.<sup>54</sup> That problem was reduced in the case of the AOB by the statutorily prescribed coordination between the heads of the commissions (Art. 13 [4] of the AOB Act). Nevertheless, owing to the many commission members and the lack of strong networking across Austria, there is a risk that the coherence of the suggestions for improvement are not ensured and that contradictory suggestions for improvement may be submitted.

The fact that the AOB system has more stages than the system of the former HRAC poses the risk of increasing sifting of suggestions. In practice it can certainly happen that suggestions or recommendations of the commissions are deemed irrelevant or insufficiently substantiated by the relevant ombudsperson or their staff and are not pursued further, without extensive debate.

Comprehensive discussion about the observations of the commissions and the resulting suggestions for improvement only takes place within the AOB system in exceptional circumstances, since the HRAC only has to be consulted if formal recommendations are made and only those require a decision to be taken by the collegial body.<sup>55</sup>

Based on the statistical data concerning the recommendations of the AOB, in most cases the recommendations and suggestions of the commissions (providing they meet with the approval of the relevant division head or of the ombudsperson) are made directly to the Federal Ministry of the Interior in the context of the investigation procedure without an institutionalized discussion process. That poses the risk that suggestions are made to those responsible too hastily. It can be deemed an advantage that those

responsible are included in a process of discussion and reflection from the start.

When comparing the two systems, it should also be borne in mind that the process for formal recommendations of the former HRAC was described as cumbersome.<sup>56</sup> The suggestions for improvement made directly by the competent field to the Federal Ministry of the Interior within the context of the investigation procedure are less cumbersome, but the process for formal recommendations within the AOB system is even more extensive than in the old system.

### 3. Institutionalized dialogue

Institutionalized dialogue between representatives of authorities and representatives of NGOs was seen as a great strength of the former HRAC system. The establishment of the HRAC as part of the AOB system was aimed at integrating that proven system into the AOB.<sup>57</sup> As explained above, a comparison of the former HRAC system and the HRAC within the AOB system is only possible to a very limited extent since they have very different functions despite sharing the same name. While the former HRAC itself made recommendations based on the records, the HRAC within the AOB system solely has the function of advising the ombudspersons, who form the body that makes recommendations. It has to be consulted before (the very infrequent) formal recommendations are made but is not responsible for drawing up such recommendations. Whether the quality of institutionalized dialogue of the former HRAC has managed to be integrated into the AOB system in the form of the new HRAC is doubtful.

### 4. Publication of findings

The proposals of the former HRAC were required to be included in the annual security report, together with minority

dissenting opinions and the measures taken by the Federal Ministry of the Interior (Art. 93 [2] as amended in 1999).<sup>58</sup> The AOB also has the option of issuing observation reports and the duty of writing a report each year, to which a minority report can be appended (see Section III.C of this paper). Since neither the former HRAC nor the AOB had or has any enforcement mechanisms<sup>59</sup>, the publication of its recommendations and the resulting reactions of those responsible is the only means of pressure available.

Since 2014 the AOB also publishes all proposals made in the context of investigation procedures and also a list of suggestions of improvement made by the AOB and its commissions on its homepage.<sup>60</sup>

### 5. Evaluation of implementation of the recommendations

In terms of its preventive work, the former HRAC placed great importance on evaluation of implementation of its recommendations.<sup>61</sup> How the implementation of recommendations (both formal recommendations and the direct suggestions for improvement made by the commissions or in the context of investigation procedures) will be evaluated systematically by the AOB is unclear. Since it is an important element of preventive work, sufficient attention should be paid to that question in future.

## V. CLOSING REMARKS

A significant difference between human rights monitoring by the former HRAC and the AOB lies in the international law background of the preventive work of the AOB as an NPM pursuant to OPCAT. The practical on-site human rights monitoring of the security authorities has barely changed given that the concept of commissions was adopted from the system of the former HRAC. The only real differences are that

some new or different topics are investigated owing to the commissions consisting of a different range of experts, and that visits and monitoring at the sites of the law-and-order authorities are less frequent.

Significant changes have, however, occurred to the systemic structure of human rights monitoring of the security authorities. The method by which recommendations come about and the discussion process involved have changed considerably. Formal recommendations are barely made by the AOB in comparison to the former

HRAC. Instead the majority of the suggestions for improvement are made in the context of investigation procedures. That results that the majority of suggestions are made without comprehensive discussions and an institutionalized dialogue. While the former HRAC placed great importance on evaluation of the suggestions for improvement, it remains unclear how the AOB will perform such evaluation in the future.

Very close analysis would be needed to determine the impact of these changes on the effectiveness of human rights work.

<sup>1</sup> Art. 87 of the CPT (1991).

<sup>2</sup> Police Act Amendment 1999, Federal Law Gazette I 1999/146, Art. 15a–c of the Police Act, repealed on 30/06/2012. A regulation of the Federal Ministry of the Interior was subsequently passed on the rules of procedure of the Human Rights Advisory Council (HRAC Rules of Procedure, Federal Law Gazette II 1999/395), which was repealed on 30.06.2012, for reasons including lack of statutory basis.

<sup>3</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/Res/39/46 (1984), Federal Law Gazette 1987/492 as amended by Federal Law Gazette III 2013/290. Ratified by Austria in 1987.

<sup>4</sup> OPCAT, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/57/199 (2002), Federal Law Gazette III 2012/190 as amended by Federal Law Gazette III 2013/290.

<sup>5</sup> In addition to CAT, international prohibitions on torture of the United Nations are also set out in Art. 5 of the Universal Declaration of Human Rights, A/RES/217 (1948) and Art. 7 of the International Covenant on Civil and Political Rights (ICCPR [1966], Federal Law Gazette 1978/591 as amended by Federal Law Gazette III 2014/28). The position of the UN Special Rapporteur on Torture was also created by the UN Commission on

Human Rights by resolution no. 1985/33. The Special Rapporteur is tasked with documenting cases of torture worldwide and reporting on them annually. He/she uses, inter alia, the methods of fact finding missions, i.e. on-site investigations into torture.

<sup>6</sup> The key regional convention against torture with respect to Europe is the European anti-torture convention of the Council of Europe (Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf/C [2002] 1 [EN] – Strasbourg, 26.11.1987, Federal Law Gazette 1989/74 as amended by Federal Law Gazette III 2002/199), by which the European Com-

mittee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) was also established. There is also an identically worded prohibition on torture in Art. 3 of the European Convention on Human Rights, 1950, Federal Law Gazette 1958/210 as amended by Federal Law Gazette II 2010/47, and in Art. 4 of the Charter of Fundamental Rights of the European Union (2010/C 83/02).

<sup>7</sup> The SPT has the same rights to make visits, inspect documents and rights to information as the AOB and its commissions – the Austrian NPM (Arts. 11 ff. of OPCAT; Art. 17 of the AOB Act).

<sup>8</sup> Carver (2011) 1.

<sup>9</sup> Suntinger (2007) 50 ff.

<sup>10</sup> Federal Act on Implementation of the Optional Protocol of 18 December 2002 to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, OPCAT: Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Federal Law Gazette I 2012/1.

<sup>11</sup> The term “National Prevention Mechanism” (NPM) is not found in either the Austrian Constitution or the AOB Act. By revising the regulations on the Austrian Ombudsman Board the conditions were created for ratifying OPCAT and designating the Austrian Ombudsman Board an NPM under international law (Kucsko/Stadlmayer [2013] 915).

<sup>12</sup> Kofler (2008) 319.

<sup>13</sup> Since this aspect is not of relevance to the work of law enforcement authorities, it is not described below.

<sup>14</sup> Federal Act on the Ombudsman Board (AOB Act) Federal Law Gazette 1982/433 as amended by Federal Law Gazette I 2012/1.

<sup>15</sup> This article has already been published in German. The original quotation is in German language.

<sup>16</sup> The inclusion of old people’s homes and care homes under the term “places of detention” pursuant to OPCAT was questioned by Georg Schärmer (Caritas director of the diocese of Innsbruck) at a conference on treatment of patients with dementia titled “Demenzfreundlich statt gewALTig überfordert” (04.06.2014). Video link: <http://www.gewaltim.alter.eu/index.php?mact=News%2Ccntnt01%2Cdetail%2C0&cntnt01articleid=13&cntnt01pagelimit=5&cntnt01returnid=58> (02.09.2014).

<sup>17</sup> Volksanwaltschaft (2013) 51.

<sup>18</sup> Kucsko-Stadlmayer (2013) 917 ff.

<sup>19</sup> Convention on the Rights of Persons with Disabilities, CRPD, <http://www.un.org/disabilities/convention/conventionfull.shtml>, A/61/611 (2006), Federal Law Gazette III 2008/155 as amended by Federal Law Gazette III 2013/280.

<sup>20</sup> RV1515 BlgNR XXIV. GP, 4. Since this task of the AOB is not related to the activities of the law enforcement authorities, it is not detailed below.

<sup>21</sup> Hiesel (2013) 245.

<sup>22</sup> RV 1515 BlgNR XXIV. GP, 5.

<sup>23</sup> Thienel (2002) 7.

<sup>24</sup> The ombudspersons currently in office are Günther Kräuter (Social Democratic Party of Austria), Gertrude Brinek (Austrian People’s Party) and Peter Fichtenbauer (Freedom Party of Austria). Ombudsmen Kräuter and Fichtenbauer have been in office since July 2013; ombudswoman Brinek is in her 2<sup>nd</sup> term.

<sup>25</sup> Hiesel (2013) 246 f. In practice former MPs tend to be “delegated” as ombudspersons, as is the case with the ombudspersons currently in office. The qualification requirements, at least judging by the summary CVs, do not seem to be set very high in practice, especially in the field of human rights.

<sup>26</sup> Rules of Procedure of the Ombudsman Board, its Commissions and the Human Rights Advisory Council (AOB Rules of Procedure 2012), Federal Law Gazette II 2012/249.

<sup>27</sup> Allocation of Duties of the Austrian Ombudsman Board, its Commissions and the Human Rights Advisory Council (AOB Allocation of Duties 2014), Federal Law Gazette II 2014/70.

<sup>28</sup> For a detailed discussion of the HRAC within the AOB system, see Vogl (2013) 679 ff.

<sup>29</sup> The chair is currently Renate Kicker, associate professor of law at the University of Graz and member of CPT for many years. The deputy chair is Andreas Hauer, professor of law at the Johannes Kepler University Linz.

<sup>30</sup> The criteria for the composition of the HRAC and the qualification requirements for the chair, the deputy chair and the HRAC members are set out in Arts. 27, 28 (2) and 31 (1) of the AOB Rules of Procedure and Art. 15 (2) of the AOB Act.

<sup>31</sup> The precise regional fields of competence are set out in Art. 7 of the AOB Allocation of Duties. The members and heads of the commissions are listed in the organigram of the Austrian Ombudsman Board online: <http://volksanwaltschaft.gv.at/downloads/blega/organigramm-20160303.pdf> (15.03.2016). For the qualification requirements and criteria for composition of the commissions, see Art. 12 of the AOB Act and Art. 18 of the AOB Rules of Procedure.

<sup>32</sup> Volksanwaltschaft (2013) 38 f.

<sup>33</sup> Öhlinger/Eberhard (2012) 306; Walter et al (2007) 580.

<sup>34</sup> Reference is made, for instance, to the OPCAT for interpretation of “places of detention”.

<sup>35</sup> Hiesel (2013) 231.

<sup>36</sup> Hauer/Keplinger (2001) 170.

<sup>37</sup> Nowak (2002) 62.

- <sup>38</sup> *Klaushofer (2014) 104.*
- <sup>39</sup> *Volksanwaltschaft (2013) 39.*
- <sup>40</sup> *Nowak (2002) 61; Pöschl (2001) 57. The Federal Office for Immigration and Asylum replaced the Federal Asylum Office on 01/01/2014.*
- <sup>41</sup> *Klaushofer (2014) 104.*
- <sup>42</sup> *Nowak (2002).*
- <sup>43</sup> *Nowak (2002) 69; Klaushofer (2014) 105.*
- <sup>44</sup> *Nowak (2002) 70.*
- <sup>45</sup> *Nowak (2002) 68 ff.*
- <sup>46</sup> *For a highly critical look at the method of appointment of the members of the AOB, see, for example Nowak (2012). The Ludwig Boltzmann Institute of Human Rights also voiced extensive criticism of the method of appointing the members of the AOB and their lack of independence (BIM [2011] 6 ff). According to Mayer (Mayer [2007] 516), the method of appointment does not guarantee objective, neutral oversight sufficiently, since the large political parties also dominate the top of the federal administration. Geistlinger argues that independence of the AOB is fully ensured by the current method of appointment in his position on the ministerial draft for the OPCAT Implementation Act (Geistlinger [2011]).*
- <sup>47</sup> *RV1515 BlgNRXXIV. GP, 3.*
- <sup>48</sup> *Volksanwaltschaft (2014) 10.*
- <sup>49</sup> *Klaushofer (2014) 106.*
- <sup>50</sup> *All reports, positions, recommendations and analyses of the former HRAC are available online on the website of the Federal Ministry of the Interior [http://www.bmi.gv.at/cms/BMI\\_MRB/start.aspx](http://www.bmi.gv.at/cms/BMI_MRB/start.aspx) (02/09/2014).*
- <sup>51</sup> *For the precise listing of the recommendations, see [http://www.bmi.gv.at/cms/BMI\\_MRB/mrb/empfehlungen/files/empfehlungen\\_gesamt\\_juni\\_2012.pdf](http://www.bmi.gv.at/cms/BMI_MRB/mrb/empfehlungen/files/empfehlungen_gesamt_juni_2012.pdf) (29.08.2014).*
- <sup>52</sup> *See the parliamentary reports of the Austrian Ombudsman Board, <http://volksanwaltschaft.gv.at/berichte/berichtebund> (14.03.2016). *Volksanwaltschaft (2015a), *Volksanwaltschaft (2015b).***
- <sup>53</sup> *Volksanwaltschaft (2014); *Volksanwaltschaft (2013).**
- <sup>54</sup> *Klaushofer (2014) 106 f.*
- <sup>55</sup> *The HRAC can also be consulted by the AOB independently of formal recommendations. There is also the possibility for the HRAC to proceed without a request by the AOB.*
- <sup>56</sup> *Klaushofer (2014) 105.*
- <sup>57</sup> *Kucsko-Stadlmayer (2012).*
- <sup>58</sup> *The former HRAC wrote a yearly report about its activities and those of the commissions, which also included the reactions of the law enforcement authorities (Art. 17 of the HRAC Rules of Procedure). The reports are available at [http://www.bmi.gv.at/cms/BMI\\_MRB/mrb/jahresberichte/start.aspx](http://www.bmi.gv.at/cms/BMI_MRB/mrb/jahresberichte/start.aspx).*
- <sup>59</sup> *Kucsko-Stadlmayer (2013) 914.*
- <sup>60</sup> *See: [http://volksanwaltschaft.gv.at/downloads/1046g/missstandfeststellungen\\_der\\_volksanwaltschaft\\_-\\_bundesverwaltung\\_-\\_2016-februar.pdf](http://volksanwaltschaft.gv.at/downloads/1046g/missstandfeststellungen_der_volksanwaltschaft_-_bundesverwaltung_-_2016-februar.pdf) (15.03.2016), [http://volksanwaltschaft.gv.at/downloads/evrqv/missstandfeststellungen\\_der\\_volksanwaltschaft\\_-\\_bundesverwaltung-1.pdf](http://volksanwaltschaft.gv.at/downloads/evrqv/missstandfeststellungen_der_volksanwaltschaft_-_bundesverwaltung-1.pdf) (15.03.2016) and <http://volksanwaltschaft.gv.at/downloads/34ck2/Empfehlungsliste%2010%2007%202015%20neu.pdf> (15.03.2016).*
- <sup>61</sup> *See the website of the Federal Ministry of the Interior: [http://www.bmi.gv.at/cms/BMI\\_MRB/mrb/evaluierungen/start.aspx](http://www.bmi.gv.at/cms/BMI_MRB/mrb/evaluierungen/start.aspx) (08.09.2014).*
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