

Twinning Light Project Romania, TF 2007/IB/JH 21 TL: "Support for setting up an efficient National Preventive Mechanism for an increased promotion and protection of human rights in the places of detention".



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The Austrian Human Rights Advisory Board

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I Introduction

Following its first two country visits to Austria in 1990 and 1994, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) had recommended the establishment of “an independent body to inspect on a regular basis the conditions of detention in police jails”¹. The Committee added that such a body would be most effective, if it was institutionally independent of and separate from the police and provided with the competence to receive complaints of detainees as well as conduct visits to places of police detention out of its own initiative.² In its response to the second report, the Austrian government found the suggestion worth to be considered, but thought it would need further examination particularly regarding the necessary legal and financial means to ensure effectiveness of the mechanism.³

The institution of a *Menschenrechtsbeirat (MRB)* [Human Rights Advisory Board (HRAB)] at the Ministry of Interior (MoI) was subsequently envisaged in the 1998 draft amendment to the *Sicherheitspolizeigesetz (SPG)* [Security Police Act (SPA)]. The ultimate establishment of the HRAB gained momentum with the tragic asphyxia of a Nigerian asylum seeker, Marcus Omofuma, who had died while being gagged with adhesive tape by Austrian police men on board of a plane during deportation in May 1999.⁴ In light of this tragic incident and mounting public pressure on the Minister of Interior, the HRAB was provisionally established on 30 June 1999 by a ministerial ordinance and subsequently legally enacted by Parliament in article 15a-c of the amended SPA in September of the same year.⁵

The mandate of the HRAB as established by the SPA turned out to be broader as envisioned by the CPT, as it comprises not only monitoring of police detention facilities, but also includes the review of police command and enforcement powers in general. With respect to its independence from the security authorities, however, the HRAB does not live up to the recommendations made by the CPT. In line with the Austrian tradition of Advisory Boards, the HRAB’s role was envisioned as consultative body to the Ministry of Interior (MoI). Going beyond the traditional role of advisory bodies, the HRAB was, however, also equipped with far reaching visiting competences to monitor and review the practice of the security authorities. The Advisory Board therefore finds itself situated between cooperation and control – a position, which determines the factors for its effectiveness with a view to

¹ Report to the Austrian Government on the visit to Austria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 May 1990 to 27 May 1990, CPT/Inf(91) 10 para 87.

² Rapport au Gouvernement autrichien relatif à la visite effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) en Autriche du 26 septembre au 7 octobre 1994, CPT/Inf (96) 28 paras 93/94.

³ Comments of the Republic of Austria on the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on its visit to Austria from 26 September to 7 October 1994, CPT/Inf (96) 29 p. 27.

⁴ Poeschl, Magdalena, “Der Menschenrechtsbeirat”, In: Journal fuer Rechtspolitik, 2001, pp. 47 ff; Nowak, Manfred, „Verhütung von Mesnschenrechtsverletzungen durch präventives Besuchssystem“, in Donatsch et. alt., Festschrift für Stefan Trechsel zum 65. Geburtstag, Zürich 2002, pp. 55-78.

⁵ Ibid..

improving the situation of human rights and necessarily shapes the working methods and practices developed in the more than ten years since its establishment in 1999.

With regard to non-judicial human rights protection in Austria, the HRAB forms part of a growing number of organs ("Boards", "Commissions", "Advocacies", "Ombudspersons" etc.) concerned with the rights of specific groups or persons (such as the rights of children or persons with disabilities) or dealing with certain substantive areas (such as data protection or non-discrimination).⁶ In the context of Austria's ratification of the Optional Protocol to the UN Convention against Torture (OPCAT)⁷, this "uncontrolled growth" of non-judicial legal protection of fundamental rights in Austria has spurred the debate about the creation of a National Human Rights Institution which could integrate the various bodies and function as a National Preventive Mechanism (NPM) in accordance with the relevant provisions of OPCAT.⁸ Due to its substantive area of competence and its considerable practice in monitoring places of police detention, the HRAB has been discussed as a model for the creation of an Austrian NPM.⁹ To what extent the current institutional design and legal mandate of the HRAB would fulfill the requirements of OPCAT will be discussed at the end of this study.

II Legal and Institutional Framework

1 Legal Basis

The HRAB is founded on section 15 lit a of the SPA, which stipulates that *the Minister of Interior shall be advised by the HRAB in all questions concerning the observance of human rights* within the sphere of competence of the MoI (consultative function). To this effect, the HRAB is tasked to *monitor and concomitantly control* the activities of security authorities and other subsidiary organs under the authority of the MoI, including all acts of direct administrative command and enforcement powers [*die Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt*] (monitoring function). The HRAB can take action out of its own motion (ex officio) or on the request of the Minister of Interior and is required to submit recommendations on the constant improvement of the human rights situation within the sphere of competence of the MoI.

While the SPA is part of statutory law, the amended Section establishing the Advisory Board was originally endowed with constitutional status, which granted the newly created body a maximum of institutional guarantee that could not be changed by simple legislative majority.¹⁰ However, during the general review of constitutional provisions in 2008, Section 15 lit a was subsequently reduced to the status of ordinary law.

⁶ For a recent overview of all existing bodies exercising various consultative and monitoring functions in Austria, see Buchinger, K./Kozma, J., Thematic Legal Study on National Human Rights Institutions and Human Rights Organisations – Austria, A study prepared for the Fundamental Rights Agency, September 2008. Not yet published.

⁷ Austria signed the OPCAT on 25. September 2003, but has not yet ratified.

⁸ Nowak/Tretter, "Vorschläge zur Errichtung einer nationalen Menschenrechtsinstitution in Österreich", in *Journal für Rechtspolitik* 15 (2007).

⁹ See e.g. Protocol of an International Expert Meeting on a National Preventive Mechanisms in Austria, 14. September 2007, published by the HRAB, available at: www.menschenrechtsbeirat.at.

¹⁰ See Nowak fn 5, who suggests however that the importance of the constitutional status has been overestimated, as it only applied to the existence of the HRAB, but not to its functions as visiting and monitoring mechanism.

Section 15 of the SPA also regulates the nomination procedure for the Advisory Board (lit. b) and defines the organizational structure, working methods as well as rights and duties of its members (lit c). The Rules of Procedure containing details on the working methods, the holding of regular sessions and the establishment of regional commissions, are regulated in Ordinance II 1999/395 [MRB-V], which was enacted after consultations with the Advisory Board upon its first constitution in July 1999.¹¹ According to the Rules of Procedure, the Advisory Board issued Guidelines for the structure and working methods of its Commissions, which detail appointment procedures, responsibilities, working methods as well as modalities for the remuneration of the individual Commissioners.¹²

2 Organizational Structure

The dual capacity as consultative organ and monitoring mechanism has found expression in the HRAB's organizational structure:

The consultative function is exercised through an *Advisory Board*, which advises the Minister of Interior on all aspects of human rights within his or her field of competence, with a view to identifying and correcting structural shortcomings. Apart from the Chairperson (and the vice-Chairperson), the Board's membership consists of an equal number of official representatives of the relevant line ministries and representatives of private non-profit organizations working in the field of human rights.¹³ This composition on the basis of parity follows the Austrian tradition of advisory boards [Beiräte] within the public administration, whose function is to facilitate *joint* consultations between public officials and external experts.¹⁴ The HRAB is therefore designed as a forum for an *institutionalized dialogue* between the authorities and representatives from civil society on structural issues relating to the protection and promotion of human rights within the sphere of competence of the MoI.

In order to fulfill its task to monitor and control the activities of the security authorities the SPA provides for the establishment of regional *expert Commissions*. The Commissions serve as "the eyes and ears" of the Advisory Board through conducting routine visits to police stations and police prisons all over the country and monitoring acts of police command and enforcement powers during large scale police operations. The findings and recommendations of the six Commissions reported to the Advisory Board regularly serve as the basis for recommendations to the MoI or result in further in-depth examination of structural issues identified by on-site visits.

The Chairperson of the HRAB is supported by a full-time Secretariat, which currently consists of 7 staff members responsible for the substantive support in the preparation and follow-up of Council sessions, the maintenance of the reporting data base, and the administration of the HRAB's budget. In parallel, the MoI established a special Bureau responsible for coordinating the information exchange with the HRAB and the submission of requests and recommendations to the relevant departments within the MoI.

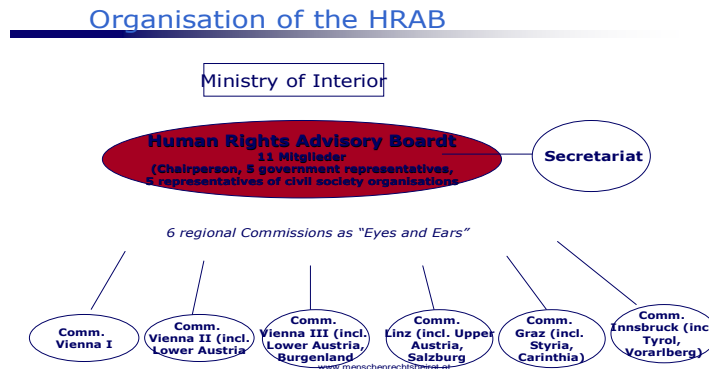
¹¹ The Rules of Procedure were subsequently modified and amended in July 2004 and January 2008.

¹² Issued by the HRAB in accordance with article 15 b para. 1 of the Rules of Procedure; hereinafter "Guidelines for the Commissions", available at: www.menschenrechtsbeirat.at.

¹³ Section 15 lit b Nr. 2 of the SPA.

¹⁴ Poeschl, p. 48.

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3 Institutional and Financial Autonomy

As advisory organ of the Minister of Interior, the HRAB is organizationally linked to the MoI, and its Secretariat is provided by and located within the premises of the Ministry. This organizational link may be practical for using synergies and strengthening the internal acceptance of the HRAB within the Ministry; on the other hand, the institutional integration of the HRAB into the MoI raises questions as to its independence and impartiality (see below).

In financial terms, the HRAB's budget is fully provided for by the MoI, which according to section 15 lit c Nr. 5 of the SPA has to allocate the necessary financial resources to ensure that the HRAB can properly fulfill its mandate. The HRAB therefore financially depends on the MoI, but is autonomous in the management of the budget provided to it and has to submit a budget proposal for the following year. Whereas membership in the Advisory Board is an honorary position (except for the Chairperson of the HRAB, who receives a remuneration for the fulfillment of his functions¹⁵), the Commissioners are remunerated for their services¹⁶. The only full-time staff employed within the framework of the HRAB are the 7 staff members of the Secretariat (the head of the Secretariat, four legal experts and two secretaries). As the Secretariat is located on the premises of the MoI, the establishment of the HRAB did not require considerable additional expenses. According to the first annual report of the HRAB, its overall budget in the first two years upon its establishment was set between 9,5 Mio ATS (2000) (approx. 690.039 Euros) and 16 Mio ATS (2001) (approx. 1,16 Mio Euros), with the

¹⁵ Section 15 b para 1 SPA, implemented in § 3a of the Rules of Procedure, which sets an hourly rate equivalent to those received by substitute members of the Constitutional Court (approx. 70 Euros per hour). Travel expenses are equally covered.

¹⁶ According to §15d of the Rules of Procedure, the remuneration of the heads of the Commissions is based on a certain percentage of the annual salary of administrative officials (the head of Commissions receive a quarterly remuneration of approx. 6.000 Euros for their work); the Commissioners are remunerated for each visits and according to the time invested (for visits under 4 hours, the per diem is approx. 300 Euros, for visits over 4 hours the per diem is approx. 500 Euros). In addition, each Commission is allocated a budget for administrative and secretariat-related tasks (approx. 11.000 Euros per year) by the MoI, for which the head of Commission signs a civil contract with the Ministry.

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initial number of 3 ½ staff members in the Secretariat to be found insufficient.¹⁷ In 2009, a preliminary budget of 946.000 Euros was allocated to the HRAB.¹⁸

4 Composition and Appointment Procedure

a) Advisory Board

The Advisory Board consists of eleven members and eleven substitute members, who are appointed by the Minister of Interior for a period of three years on a voluntary basis.¹⁹ The candidate for the office of the Chairperson of the HRAB is proposed by the President of the Constitutional Court, and has to be selected from among the members of the Constitutional and Administrative Courts or from the rank of academics teaching constitutional law at Austrian universities.

The Federal Chancellor and the Minister for Justice each have the right to propose one candidate. Five members (and deputy members) are proposed by private non-profit organizations working in the field of human rights; these organizations are designated by the MoI.²⁰ The remaining three members (deputy members) are appointed by the Minister of Interior without proposal, among them high ranking officials in the MoI, such as the current director general of public security.

The membership ends with the expiry of the term of office, but an extension for another three years is not prohibited. Furthermore, the Minister of Interior has the right to recall members of the Board from office at any time. According to the SPA, dismissal has to be effected based on a written justification (except for those members directly appointed by the MoI, who can be recalled without justification); however, the grounds for justification are not further specified and in strict legal terms the members of the HRAB have no legal remedy against arbitrary dismissal.²¹

b) Commissions

To ensure comprehensive monitoring of police custody and review of command and enforcement powers, six regional commissions have been established based on the geographic jurisdiction of the Higher Regional Courts (three Commissions cover the Federal States of Vienna, Lower Austria and the Burgenland; the Federal States of Styria and Carinthia, Upper Austria and Salzburg, Tyrol and Vorarlberg are respectively covered by one Commission). In accordance with the Rules of Procedure, the heads of the Commissions are appointed by the Minister of Interior upon nomination by the Advisory Board and chosen among eminent persons in the field of human rights.²² The Guidelines for the Commissions determine the responsibility of the heads of Commissions for the planning and coordination of the Commissions work, final approval of the fact-finding reports and representation of the

¹⁷ Annual Reports of the HRAB on its activities in the year 2000 and 2001. In its first year, the HRAB spent 3,4 Mio ATS (245.087 Euros) of the 9,5 Mio ATS (690.039 Euros) allocated to it, due to the relatively late start of work of the Commissions. In 2001, 513.700 Euros of the 1,16 Mio Euros were spent because the less budget had been spent on the staff of the Secretariat.

¹⁸ Annual Report of the HRAB on its activities in the year 2009, p. 36.

¹⁹ Sec. 15 lit. a Nr. 2 and lit. b Nr. 1-2 of the SPA.

²⁰ The five organisations currently being represented in the HRAB are: SOS Menschenrechte, Volkshilfe, Diakonie, Verein Menschenrechte Österreich, Caritas.

²¹ Poeschl, Section III, D; see also Nowak, p. 70.

²² § 15 a of the Rules of Procedure.

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Commissions in public.²³ The Guidelines also set out detailed procedures for the selection and nomination procedure of individual Commissioners.²⁴

The Commissions consist of five to eight experts from different professional groups, who are nominated by the HRAB in consultation with the head of the respective Commission and officially appointed by the MoI. The multidisciplinary membership ensures the availability of relevant expertise in the areas of law, human rights, public administration, sociology, social work and medicine/psychology. The Commissions' composition should also take into consideration a fair gender balance and adequate representation of minorities.²⁵ Experts who are part of the security authorities are legally prohibited from membership in the Commissions to avoid a conflict of interest.²⁶ The nomination procedure has to be preceded by a public call for applications and candidates are invited to a formal hearing before the decisions on the nominations are taken.²⁷ In practice, the six Commissions are composed of a multidisciplinary team of experts, who all have a record of human rights commitments, pro bono work or other voluntary commitments in different areas of social or public life;²⁸ the composition respects gender balance and some Commissions include members with migration background.

The heads of the Commissions and the Commissioners are appointed for a period of four years and act in their own capacity. The extension of their mandates is possible and used in practice; with respect to the replacement of Commissioners, consideration is given to the need for continuity on the one hand, and regular regeneration of personnel resources on the other to profit from the "fresh perspective" of in-coming experts; thus half of the Commissioners have to be replaced every two years by means of a rotational system. According to the Rules of Procedure Commissioners can be recalled, i.e. dismissed, upon a written and well-founded request for dismissal by the HRAB. In practice, this has never happened.

At the beginning, the Commissioners were contracted by the MoI on the basis of a service contract. This was however problematic as it made the Commissioners' term of office dependent on a civil law contract, that could be terminated at any time. Due to the lack of any legal or institutional guarantee for their offices, the contractual arrangements were criticized as seriously undermining the Commissioners' independence.²⁹ The revised Rules of Procedure were therefore explicitly amended in 2004 to include details on the nomination procedures, which now forms the legal basis for the appointment of the Commissioners by the MoI replacing the earlier contractual relationship. The remuneration for their services commensurate with the expenditure of the time for each visit has been considered crucial to maintain the high quality of monitoring and to secure membership of professional experts, who have to be able to afford the necessary time among other professional commitments.³⁰

c) Consultation of External Experts

²³ Article II, Nr. 2 of the Guidelines of the Commissions.

²⁴ Article I, Nr. 3 of the Guidelines in conjunction with § 15 a of the Rules of Procedure.

²⁵ Ibid..

²⁶ Section 15 lit c Nr. 2 of the SPA.

²⁷ Rules of Procedure, § 15a para 2; Guidelines for Commissions Art. 1 para 3 lit 3.4.

²⁸ For a current list of expert Commissioners see the website of the HRAB: www.menschenrechtsbeirat.at

²⁹ Poeschl, Section III, E. Funk, Bernd-Christian, Der Menschenrechtsbeirat – Präsentation und erste Ergebnisse, Zeitschrift für Verwaltung (ZfV) 26/2001, p. 570 ff.

³⁰ Kriebaum, p. 5.

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In addition to the members of the Advisory Board and the expert Commissioners, the HRAB is also empowered to consult external experts, including representatives of other civil society organizations not represented in the Board, on specific issues.³¹ In practice, external experts have been called upon to present expertise during the sessions of the Advisory Board on specific topics or have been asked to provide their expertise in the thematic working groups. The Commissions have the possibility of requesting support from professional interpreters; other expertise can usually be covered by the different professional backgrounds of the Commissioners (psychiatrists, specialized lawyers etc.).

5 Functional Independence and Impartiality

The question of independence of the HRAB is one of the most crucial and controversially discussed aspects of its legal foundation. Although the HRAB is not a judicial or quasi-judicial body, and was purposefully set up in the form of an advisory board, the criteria for the independence developed by the European Court of Human Rights under Article 6 of the ECHR can be useful in assessing to what extent the HRAB enjoys functional independence from the authorities it is mandated to advise and control. According to the standards developed by the Court, relevant factors are inter alia the manner of appointment, the duration of office, freedom from instructions in the discharge of duties, possibility of dismissal, guarantees against outside interference and the overall appearance of independence.³² In addition, the requirement of independence set out in the Paris Principles include financial and personal independence and emphasize the importance of transparent appointment procedures, resulting in an official act of appointment which guarantees stability of the mandate for a specified period of time.

a) Advisory Board

According to section 15 lit a) para. 2 of the SPA, the members of the Advisory Board are independent in the discharge of their duties. Its procedures and working methods have however been closely regulated in the Rules of Procedure which were issued by the Minister of Interior and leave little margin beyond the formalized procedures foreseen therein.³³ The composition of the Board's membership, as well as the appointment procedures and possibility of dismissal raise questions as to potential external influence and ultimately limit the functional independence of the Board from the authorities it is mandated to advise and control.

With respect to the composition of the Board, the equal representation of governmental officials and members from civil society is intended to guarantee a balanced membership, chaired by a "neutral" personality. The MoI, however, reserves the right to designate those NGOs who are then in turn allowed to nominate an individual to sit on the Board, which leaves room for excluding "disagreeable" NGOs or alternatively favoring those organizations with an affiliation to the MoI.³⁴ It is also obvious that the individuals directly chosen by the MoI, among them high ranking officials within the MoI (such as the director general for

³¹ Rules of Procedure, § 14 para 2.

³² For many others, see Jacobs/White, *The European Convention on Human Rights*, 4 ed. 2006, p. 181ff.

³³ See Poeschl Section III, D: in accordance with Sec. 15 lit c para 6 the Advisory Board had a right to be heard before the Rules of Procedure were formally enacted.

³⁴ For example, one of the organisations currently designated for membership in the Board has been routinely criticised, because it is predominantly financed by the MoI. Cf. in 2009 a parliamentary inquiry by the Green party raised questions as to the monopolisation of MoI funding for one organisation represented in the Advisory Board, 2909/J XXIV. GP (13.7.2009).

public security) – though acting in their individual capacity and not bound by instructions – cannot be considered independent as they are simultaneously subject to the same authority they are supposed to advise and control. As conflicts of interests are unavoidable in this constellations, the Paris Principles explicitly provide that governmental representative should only participate in an advisory function – a criteria not fulfilled by the HRAB.³⁵ In fact, as a former substitute Chairman of the Board noted, the composition of the Board provides the MoI with a considerable potential to influence the outcome of the Board's work, as the respective members who work for the Ministry "have a head start concerning information and enjoy an institutionally founded authority, which can be transformed into influence on the Councils decisions trough mechanisms of group dynamics".³⁶

With respect to the other members of the Board, the main criteria for their functional independence lays in the existing institutional guarantees for their term of office, i.e. the question of irrevocability.³⁷ As already mentioned above, the Minister of Interior has broad powers to discharge the members of the Board at any time, limited only by the requirement of a written justification. For the members of the Board, it is therefore not unthinkable, that the way in which they exercise their functions could lead to their dismissal – a fact which seriously restricts their functional independence.

The institutional and financial set up of the HRAB is in line with the tradition of advisory boards, who are usually situated at and financed by the institution they are to advise. For a monitoring body, however, such a constellation raises questions as to the necessary institutional independence to exercise effective control functions. In particular, the close organizational link of the HRAB and its Secretariat with the MoI and its financial dependence on sufficient budgetary allocations by the Ministry leave room for exerting political influence. In order not to jeopardize good and cooperative working relationship "within the house", there is a certain likelihood that controversial topics might be postponed or dealt with in an informal manner as both sides, the HRAB and the MoI, might be inclined to avoid open conflicts.

b) Commissions

The Commissions on the other hand are nominated by the Board following a public application procedure which ensures a multidisciplinary and pluralistic composition of highly qualified experts that act in their individual capacity. Members of the security authorities are excluded from membership in the Commissions. Due to their pluralistic composition and the public selection procedure, the Commissioners exercise their monitoring and fact-finding independently of external influence. Their legal status however leaves room for the authorities to exert influence. As mentioned above, in the initial Rules of Procedure there was no legal basis for the Commissioners' term of office and their offices depended solely on a civil contract with the MoI, which in 2003 led to controversies over attempts to influence the work of the Commissions by reducing their terms of office.³⁸ This lack of institutional guarantee

³⁵ Principle 4 lit. e of the Paris Principles.

³⁶ Funk, quoted in Kriebaum p. 6.

³⁷ Poeschl, Section III, D.

³⁸ In January 2003, the HRAB was paralysed due to a the controversy arising after the then Minister of Interior, Ernst Strasser (ÖVP), had proposed to limit the service contracts with individual Commissioners to the period of one and a half years. In the midst of the dispute, the Chairman of the HRAB resigned from his duties. See: Der Standard, "Abschied vom Menschenrechtsbeirat", 10 January 2003, at: <http://derstandard.at/1177024> (accessed: 7.4.2010).

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has been remedied with the revised Rules of Procedure in 2004.³⁹ The mandate is now fixed for a period of four years, with a rotational system that allows renewal of half of the members of each Commission every two years. As a weak point remains the possibility of dismissal upon suggestion of the HRAB, for which, like with the members of the Advisory Board, no further grounds are specified.

In conclusions, it can be said that although the HRAB is not bound by instructions in the exercise of its functions, the Board cannot be considered independent of the MoI due to the legal provisions governing the appointment procedures, the direct personal link of some members with the Ministry and the close organizational and institutional dependency. As for the Commissions, their relative institutional and functional independence has been consolidated with the regulation of a fix term of office.

III Mandate and Jurisdiction

1 Substantive Scope

In accordance with section 15 of the SPA, the substantive mandate of the HRAB as consultative organ to the MoI is – broadly speaking - limited to those questions and issues relating to the observance of human rights within the sphere of competence of the MoI. In accordance with lit a, this includes all activities of the security authorities, other subsidiary authorities (e.g. asylum authority) and all organs empowered to exercise administrative command and enforcement powers. Most actions considered by the HRAB fall within the regulatory scope of the SPA and the Alien Police Act (APA) [*Fremdenpolizeigesetz (FPG)*], and concern the actions of the police and other law enforcement authorities. Issues of concern have also arisen under residence and asylum laws, or were related to acts of command and enforcement powers in the areas of right of assembly, use of fire force and fire arms or search and seizure. As the focus of the HRAB's work is to detect structural deficits, which lead to the occurrence of human rights violations, it also considers issues relating to the organizational structure, training and work conditions of the police as well as how complaints against members of the police are handled by the security authorities. While the HRAB is not an individual complaints instance, individual complaints or cases of human rights violations often serve as the starting point for further inquiry into the structural deficits behind the case.

In order to fulfill their mandate, section 15 lit c of the SPA empowers delegations⁴⁰ and Commissions of the HRAB to have access to all duty stations of the security forces and all locations where command and enforcement powers are exercised. The mandate of the Commissions more specifically foresees regular and country-wide monitoring of all places, where persons are deprived of their liberty under the control of the police. In practice, regular inspection visits to places of police detention and the monitoring of police command and enforcement powers during large scale operations, such as in the course of demonstrations, high-risk football matches, raids and traffic controls are carried out by the Commissions. According to a decree issued by the MoI in 2004⁴¹, the Commissions have to be informed in

³⁹ On the discussions to strengthen the Commissioners' independence from contractual negotiations see also E. Felzmann, "Menschenrechtsbeirat – ein ausbaufähiges Modell?" 2005, p. 7, available at: www.menschenrechtsbeirat.at.

⁴⁰ In urgent cases or where an on-site visit or a specific examination is considered necessary, the Board can also set up Delegations consisting of a minimum of two of its members, who can take actions in the period between the sessions and report back to the plenary (§ 14 of the Rules of Procedure).

⁴¹ Decree Zi. 51.099/537-II/2/04, issued on 11. June 2004 by the Minister of the Interior.

due time of any planned large scale police operation by the responsible police department in order to enable the Commission to compose an observation team. The Commissions also regularly monitor deportation procedures including the initial notification of the persons concerned of their imminent deportation, transfer to the airport and the boarding of the plane/bus; the date and time of the deportations are disclosed beforehand by the authorities.

With respect to reviewing the treatment of persons in police custody, the restriction of the monitoring activities to the premises of the security authorities as provided for in the SPA was found to be problematic in practice. This limitation excluded persons in remand detention who were only recently transferred from police facilities to remand prisons under the authority of the Ministry of Justice. An agreement was therefore reached with the Ministry of Justice, which allows the Commissions to conduct visits to remand prisons (subject to prior notification of the head of the prison concerned) to interview pre-trial detainees about their treatment during detention on premises of the security authorities.⁴²

In accordance with its legal mandate, the HRAB and its Commissions review compliance of the security authorities with human rights standards. Reference is therefore made to the norms and standards concerning fundamental rights of persons deprived of their liberty codified in domestic law as well as the European Convention on Human Rights (ECHR), which has been incorporated into national law and endowed with constitutional status. Given the historical origins of the HRAB in the recommendations of the CPT, and the Committees' expertise in this area, the CPT's standards for conditions of detention are also regularly consulted. Based on the extensive practice of the Commissions, the Secretariat of the HRAB has published a compilation of standards for conditions of police detention and treatment of persons deprived of their liberty, which combines international standards, provisions in Austrian law and the observations and recommendations produced by the HRAB over the years. To detect underlying structural deficits, the Commissions regularly inquire into individual cases, review their legal status and the documentation concerning the circumstances of their detention. Inquiry into judicial proceedings and legal representation of individual cases is however not covered by the Commissions' mandate, and detainees are always informed that the Commissioners can not give legal advice on individual cases.

2 Rights and Duties

In accordance with section 15 lit c para. 4 of the SPA, the HRAB and its Commissions have access to all premises of the security authorities and have the right to conduct private interviews with detainees. The security authorities concerned are obliged to cooperate with the HRAB and the head of the visited police station or detention facility has to grant access to all relevant information necessary to the proper fulfillment of the Commissions' mandate, including access to the files of detainees and information on organizational matters of the respective duty station.

According to the Rules of Procedure, the Commissions' on-site visits can be carried out without prior announcement (§ 16 para 1). In practice, all inspections are unannounced except for visits to penitentiary institutions under the Ministry of Justice, which are notified to the head of prison beforehand. For organizational reasons, observance of large scale police operations are usually notified to the authorities, and the inspection teams are provided with a contact person on the site. The provision of a contact person during the operation can be

⁴² Annual Report of the HRAB 2002, p. 42.

necessary to inform the Commissioners of ongoing developments, the number of arrests etc., as it is usually impossible to be present at all locations where command and enforcement powers are exercised in the course of the operation.

All members of the HRAB and its Commissions are legally required to sign a confidentiality agreement and are not obliged to disclose the identity of sources or to report criminal acts brought to their attention in the course of their work.⁴³ The latter privilege is particularly important for the confidentiality of interviews with detainees and other sources and to protect the Commissioners against accusations of concealment of criminal behavior.

IV Working Methods

The working methods of the HRAB conform to its two-fold mandate: the advisory function is exercised by the Advisory Board through regular sessions and recommendations made to the Minister of the Interior on the improvement of human rights compliance by the security authorities. The on-site monitoring and fact-finding, which forms the basis of the review of law enforcement practices, is carried out by the Commissions.

1 Advisory Board

a) Plenary Sessions

The Advisory Board convenes on average every six weeks in closed sessions. In addition to the official members (and substitute members) of the Board, the heads of the Commissions (observer status), and, depending on the agenda, external experts from the authorities and/or civil society are invited to join discussions on specific agenda items.⁴⁴ The agenda is suggested by the Chairperson.⁴⁵ Agenda items include current developments relevant to the mandate of the HRAB, such as draft laws or current political developments in the competence of the MoI, progress reports and final reports of working groups, as well as urgent reports and quarterly activity reports submitted by the Commissions. The Minister of Interior can also directly ask the Advisory Board to consider specific topics in its sessions. In accordance with the Rules of Procedure, decisions in the plenary are taken by majority vote (§ 10 para 2); the Chairperson has the decisive vote in case of a tie. In practice, consensus is the prevailing form of decision making.

b) Recommendations

The Advisory Board is legally mandated to make recommendations to the Minister of Interior if it considers that a specific issue or problem reveals structural deficits that need to be addressed by the MoI. Recommendations constitute the strongest “instrument” the Board has at its disposal and are therefore carefully discussed and formulated as concretely as possible to identify the specific measures to be taken. Since its establishment, the Advisory Board has passed approximately 350 recommendations addressing all areas relevant to its work. The implementation of the recommendations is evaluated after a certain period of time by a permanent working group designated for this task (see below).

⁴³ Sec. 15 lit c para 3 of the SPA stipulates that members of the HRAB and consulted experts are subject to the adherence to official secrecy [*Wahrung des Amtsgeheimnis*].

⁴⁴ § 6 of the Rules of Procedure.

⁴⁵ The procedural aspects of the sessions are regulated in detail in the Rules of Procedure (§§ 5 – 12).

Twinning Light Project Romania, TF 2007/IB/JH 21 TL: "Support for setting up an efficient National Preventive Mechanism for an increased promotion and protection of human rights in the places of detention".

The Board can institute thematic working groups if it considers it necessary to conduct further in-depth studies into a topic before formulating recommendations.⁴⁶ The working groups are set up of members (and substitute members) of the Board and selected Commissioners, and are free to seek consultations with external experts. In most cases, the working groups produce thematic reports which summarize existing legal standards and observations made in practice in order to analyze in-depth the identified deficits and come up with a set of recommendations, which are submitted to the Board for consideration and decision-making. For example, a considerable number of reports produced by the working groups of the HRAB deal with the conditions in custody pending deportation and the deportation procedures itself;⁴⁷ others address the integration of human rights into police training (2005), the language used by police officials vis-à-vis detainees (2004), the handling of complaints and allegations of ill-treatment against members of the security forces (2007), or the regime governing detention of vulnerable groups (eg women (2001) and children (2000)).⁴⁸ Currently, the Board has established working groups dealing with a diverse range of topics, including inter alia racism and ethnic profiling in police operations, the use of tasers, legal protection of deportation detainees and occupational facilities in police prisons. In order to adopt a more long-term and pro-active approach, a permanent working group on "planning" was tasked in 2001 to elaborate a set of criteria and corresponding list of topics which the HRAB should deal with as a priority. Until the present, the working group makes suggestions regarding the strategic choice of topics as priority of the HRAB's work in the subsequent year, based inter alia on the key observations made by the Commissions.

c) Publicity

While the Rules of Procedure require the work of the Board to be carried out in closed sessions and all members to respect confidentiality, the recommendations made to the MoI, as well as the thematic reports produced as a result of the discussions in the working groups are publicized and available on the HRABs website. On the occasion of new draft laws falling within its mandate, or in exceptional individual cases of official misconduct, the HRAB also issues public statements. In addition, the HRAB publishes annual reports, detailing the activities of the Board, its working groups, the priorities set and recommendations made to the MoI. The annual reports are presented in a joint press conference by the Chairperson and the heads of Commissions.

In general, however, the communication strategy pursued by the Board is defensive and emphasis is put on establishing and maintaining informal channels of communication and cooperation with the MoI and subsidiary authorities. In meetings between the Chairperson and relevant representatives of the security authorities issues of concern to the Board are addressed and future cooperation discussed. According to the Rules of Procedure, the Chairperson is also responsible for the representation of the HRAB's work in public and the operation of media contacts.

2 Commissions

a) Visits and Observations

⁴⁶ §13 of the Rules of Procedure.

⁴⁷ Problematic Deportation (1999), Minors in Detention Pending Deportation (2000), Medical Care in Detention Pending Deportation (2007), Legal Protection of Detainees Pending Deportation (2008).

⁴⁸ For a complete overview of topics and issues dealt with by the HRAB, see the report on the occasion of the tenth anniversary, "Themenschwerpunkte des Menschenrechtsbeirates 1999 – 2009", or consult the website: www.menschenrechtsbeirat.at.

Twinning Light Project Romania, TF 2007/IB/JH 21 TL: "Support for setting up an efficient National Preventive Mechanism for an increased promotion and protection of human rights in the places of detention".

The country-wide monitoring of police detention facilities by the Commissions is based on quarterly visiting plans drawn up by the heads of Commissions and discussed during quarterly coordination meetings with the respective Commissioners. According to the Guidelines for the Commissions, the visiting plan should encompass a set of routine visits to ensure regular coverage of all duty stations within the respective geographic area of competence. Priority may also be given to "problematic" police stations and police prisons are visited at least once every three months (with the exception of the two large police prisons in Vienna, which are visited approximately once a month). Furthermore, the Commissions can be tasked by the HRAB to examine specific thematic issues in more depth, or can set visiting priorities out of their own motion if it is deemed necessary to review certain practices on a more regular basis. In addition, the Commissioners can take action upon relevant information brought to their attention by civil society organizations or other sources on specific grievances in relation to police detention facilities. Observances of deportation procedures and large scale police operations are carried out on a case by case basis upon notification by the respective authorities.

Each visiting or observation team has to consist of a minimum of two Commissioners to ensure adherence to the four-eye principle. This also facilitates note-taking during interviews with detainees and police officials, guarantees availability of relevant expertise and ensures balanced observations. Each visit to detention facilities usually starts with an introductory conversation with the officer in charge (or his representative) to inquire into the number of detainees currently held and the occurrence of special incidences since the last visit. The Commissions have developed a set of routine questions to be followed during each visit to ensure comprehensiveness and comparability. The issues routinely examined include, for example, the physical conditions of detention, availability of medical personnel and treatment, accuracy of documentation in the custody register, detention of vulnerable groups, occurrence of special incidences (such as suicide attempts or other forms of deliberate self-harm), use of force and weapons or disciplinary measures as well as issues relating to the physical and operational working conditions of the police. To this effect, the visiting team requests access to relevant documentation and files and always seeks to speak to detainees currently present on the premises. Interviews with detainees strictly follow international monitoring standards, including adherence to the principle of informed consent and the strict privacy and confidentiality of the interviews, unless otherwise requested by the detainee. For example, some grievances or complaints mentioned during the interviews are directly addressed with the responsible officers, if the person concerned so wishes. At the end of each visit, a final discussion takes place with the respective police officers to share the Commissioners' main observations, clarify open questions and address the shortcomings identified during the visit.

In general, the working practices of the Commissions reflect their efforts to find solutions to the identified shortcomings on-site or at the lower level of the institutional hierarchy (duty station, district level [*Bezirksleitstellen*]), unless the problems observed concern issues to be directly regulated by the Ministry (ie through issuing a decree or internal guidelines). To this end, the Commissions maintain contacts with security officials at the district and regional level through regular meetings. For example, the two Commissions responsible for the City of Vienna meet with the head of the police and other high ranking officials twice a year to exchange experiences and raise issues of concern. These working contacts with officials at different levels of the security authorities have contributed to fostering the acceptance of the Commissions' work and established good overall cooperation of officials with the inspection teams.

In principle, the Commissions cover all police stations in the nine Federal States of Austria; in practice, however, visits are usually focused on those premises, which have detention cells or where persons can be deprived of their liberty. In addition, monthly or bi-monthly visits are paid to police prisons, where administrative detention and detention pending deportation is executed. Visits to other duty stations and meetings with specific security officials take place on a case by case basis and where the Commission has prior information that a complaint or problem has occurred that would merit an on-site inspection. Through a system of routine visits, the Commissions accomplish a high density of controls: in the first ten years (1999 – 2009) of its existence, the six Commissions have conducted 4.548 visits and observations, including 3.015 visits to police stations, 964 to police prisons, and 569 observances of deportations and large scale police operations.⁴⁹ In 2009 alone, 19 visits were conducted to penal institutions under the Ministry of Justice, where remand prisoners were detained pending trial.

b) Reporting Procedures

The Commissions are under a reporting duty vis-à-vis the Advisory Board. Upon each inspection visit or observation, a report is prepared in accordance with a predefined reporting structure, which contains all aspects observed, concluded by a legal analysis of identified shortcomings with a view to identifying relevant human rights concerns. Based on the preceding analysis, the report can also contain preliminary recommendations submitted to the Advisory Board for discussion and adoption.

In urgent cases, the Commissions can submit urgent reports, which are directly considered by the Board in its next session and simultaneously transmitted to the MoI for its comments and reactions. Urgent reports are usually concerned with the observance of serious problems or concrete human rights violations, often based on individual cases, which reflect structural shortcomings that in the opinion of the Commissions need to be immediately addressed by the authorities to avoid recurrence in the future.

All other reports are summarized in the quarterly activity reports of the Commissions to the Advisory Board, which give an overview of the inspections and observations carried out in the reporting period, followed by an analysis of the identified problems and suggestions for potential recommendations to the security authorities. The activity reports are adopted by the Board and transmitted to the MoI for its reactions and comments; a separate decision is taken on each proposed recommendation. In order to ensure adherence to joint standards and address issues of common concern, all six Commissions convene for an annual meeting to exchange experiences and agree on joint strategies. In addition, the six Commissions are required to submit a joint annual report, which is published as Annex to the annual report of the HRAB.

Based on the described reporting system, a considerable part of the agenda items of the Board's sessions is based on observations made by the Commissions in their quarterly reports and issues raised in the urgent reporting procedures. The Commissions have therefore been described as the "eyes and ears" of the Board, which provide the factual basis upon which the Board can exercise its consultative function. If, however, the Board decides to postpone an issue raised by the Commissions because no consensus can be reached, or a vote resulted in

⁴⁹ See the report of HRAB on the first ten years of its existence: "Themenschwerpunkte des Menschenrechtsbeirates 1999 – 2009, p 51; and the annual report 2009: "Bericht des Menschenrechtsbeirates über seine Tätigkeit im Jahr 2009", p. 41.

the repudiation of the proposed recommendations, the Commissions have no other means at their disposal except for taking the issue up again in subsequent reports.

c) Publicity

The monitoring and fact-finding of the Commissions is subject to strict confidentiality. The individual reports and quarterly activity reports are only transmitted to the Board and the MoI, but are not made available to a wider audience. According to the Guidelines for the Commissions, visiting reports can be shared with the police stations or security officials concerned to ensure prompt reactions to the shortcomings observed.⁵⁰ In practice, the attendant officers in the police stations visited have often asked for transmittal of the reports, which has proven to enhance cooperation due to greater transparency of the Commissions' work. By means of their joint annual report, the Commissions have a possibility to inform the public directly about their monitoring work, shortcomings identified and recommendations for their improvement submitted to the Board.

3 Cooperation with Civil Society Organizations

Apart from the members of the Advisory Board that are appointed on an "NGO-ticket", no formalized cooperation of the HRAB with NGO is foreseen. In the framework of the working groups established by the Board, external experts from NGOs working in relevant areas can be consulted in their individual capacity or be invited to provide expert opinions on specific agenda items. In his representative function, the Chairman can officially meet with civil society representatives, but so far meetings have taken place on an ad hoc basis and have not translated into a more regular cooperation. Exchange of experiences between NGO representatives and Board members therefore only exists through informal channels of existing networks.

With respect to the monitoring activities of the Commissions, civil society organizations provide an important source of information on particular grievances or problematic cases, upon which the Commissions are free to undertake ad hoc visits. The degree of cooperation differs, however, depending on the regional context and is restricted by the Commissioners' obligation to treat any information received during their inspections with confidentiality. The participation of NGO representatives in visits and observations is not foreseen.

V Effectiveness of the HRAB

1 Consultative function

The HRAB has made use of its broad mandate to address a considerable range of topics in its ten years of existence, formed working groups and issued an impressive number of recommendations. The composition of the Advisory Board has provided the opportunity for bringing together ministerial and outside expertise in a highly qualified forum. Discussions in the Board have resulted in raised awareness among the security authorities on human rights concerns and have produced fruitful mid- and long-term solutions to existing structural shortcomings in certain areas (e.g. conditions of police detention, introduction of standards for reporting of alleged misconduct etc). On the other hand, the Board's lack of independence and the different interests of Board members have also prevented the HRAB from taking proactive actions in other areas.

⁵⁰ Article III, para 2 of the Guidelines.

One of the weak points of its institutional and legal framework is certainly the complete lack of any obligatory right of the HRAB to a hearing by the Minister of Interior and the absence of any enforcement powers. The Minister of Interior may, but does not have to avail himself/herself of the Board's advice and apart from the general duty to cooperate with the HRAB, the MoI is also not obliged to inform the HRAB prior to the enactment of changes to regulations and ordinances within its sphere of competence. Therefore, and notwithstanding the HRAB's right to take actions *ex officio*, there is a certain risk, that the Board can be sidelined by deliberately withholding relevant information or providing information at a late stage, thereby limiting the Advisory Board's possibility to provide advice. This is particularly regrettable in light of the HRAB's task to identify and give advice on structural deficits in the observance of human rights, which should merit obligatory consultations prior to regulatory changes to avoid that structural shortcomings are perpetuated rather than improved. In practice, the HRAB has been consulted by the MoI on specific issues prior to the enactment of regulations, but information flows depend on the willingness of the officials concerned to involve the HRAB at an early stage and the respective cooperation on both sides.

In sum, the effectiveness of the Advisory Board as consultative organ fulfilling internal "controlling" functions is dependent on good cooperation and mutual trust between the HRAB and security authorities, regular information flow and the willingness on the part of the MoI to avail itself of the Board's expertise. As could be observed from the beginning, the close institutional and organizational link with the MoI has contributed to establishing a climate of trust and the membership of high security officials in the Board has facilitated a certain degree of identification with and legitimacy of the Board among the members of the security authorities.⁵¹ This constellation, however, becomes problematic, where conflicts of interest occur between the maintenance of cooperation and the necessity to address disagreeable issues arising from the fulfillment of the HRAB's control and monitoring functions. In these situations, the Board lacks the necessary independence and competences to insist on the improvements regarding the human rights situations in the face of unwillingness of the authorities to cooperate.

2 Recommendations by the HRAB

Whether acting upon the request of the MoI or *ex officio*, the right to make recommendations for the improvement of human rights compliance by the security authorities, as foreseen in the SPA, constitutes the strongest "instrument" the HRAB has at its disposal. These recommendations have no binding force, but the MoI is obliged to report all recommendations made by the HRAB together with relevant measures taken to the Austrian Parliament as part of its annual security report.⁵² This enables the legislative branch to review to what extent the security authorities have responded to potential shortcomings identified by the HRAB or have neglected its recommendations.

The Advisory Board has also adopted several practices designed to enhance the effectiveness of its recommendations: recommendations are used as a means of "last resort" (i.e. other attempts to find a solution to the identified shortcoming have been exhausted) and have to be as specific as possible. In addition, every recommendation is published immediately upon adoption by the Board on the HRAB's website. In 2003, a permanent working group was

⁵¹ Nowak, p. 64 and 69.

⁵² Section 93 para 2 of the SPA.

Twinning Light Project Romania, TF 2007/IB/JH 21 TL: "Support for setting up an efficient National Preventive Mechanism for an increased promotion and protection of human rights in the places of detention".

tasked with evaluating the implementation of the recommendations after a certain time lapse.⁵³ To this end, the working group identifies specific topics on which recommendations have been adopted by the HRAB over the years, and requests information from the MoI on the concrete measures taken to implement these recommendations. In parallel, the Commissions are asked to review the implementation of these recommendations during their routine visits and report back to the Advisory Board on the situation found in practice. Based on this information, the working group evaluates the current status of implementation and reports back to the Board. The results of the evaluation procedure are published in the annual reports of the HRAB. Depending on the outcome of the evaluation, the Board discusses further activities to enhance the compliance with its recommendations, such as entering into a thematic dialogue with the relevant authorities or establishing a thematic working group to conduct an in-depth study into how to improve the situation in that particular area of concern.

3 Monitoring Function

Due to their pluralistic composition and the highly qualified and multi-disciplinary expertise of its members, the Commissions exercise their functions with considerable independence and authority. One of the major strengths of the HRAB's organizational set up is the regional division of competence, which allows the Commissioners to establish continuing cooperation with local and regional authorities within their respective geographic area. Based on sufficient human resources (currently 42 acting Commissioners) and the regional division of competence, the Commissions are able to maintain a high density of regular visits to all relevant duty stations of the security authorities and to observe a considerable number of police operations. Whereas the possibility of unannounced visits to police stations has in itself a preventive effect, the impact of regular monitoring visits is decisively strengthened by the possibility of regular follow-up visits. Although regional differences may occur with respect to the focus of the monitoring activities depending on the local circumstances, all Commissions adhere to a common system of reporting and follow the principles of impartiality and objectivity, which ensure a continuously high standard of monitoring.

The reports prepared upon each individual visit are fed into a data base, which allows comparability between the observations made in different regions. Once a year, the six Commissions come together for an exchange of experience while the Secretariat of the HRAB functions as administrative link between the Commissions throughout the year and coordinates the setting of priorities and the collection of input from the Commissions on specific agenda items for the Board Sessions. The Commissions have, however, no vote in the Board and whether grievances observed by the Commissions ultimately result in a recommendation to the MoI or are dealt with in more depth depends exclusively on the decision of the Board.

This "bottleneck" situation can limit the effectiveness of the HRAB's monitoring activities in two ways:⁵⁴ on the one hand, the Commissions submit a considerable number of reports containing useful data and observations, which, however, have to be processed with the limited resources the (non-permanent Board) has at its disposal. Therefore, not all issues identified by the Commissions are dealt with by the Board in a speedy manner due to limited

⁵³ See the Website of the HRAB on the specific methods and evaluation criteria employed by the working group, at: http://www.menschenrechtsbeirat.at/cms15/index.php?option=com_content&view=category&id=53&Itemid=16 (7.4.2010).

⁵⁴ Kriebaum, p. 17.

time and resources. On the other hand, the lack of independence of the HRAB can also limit the effectiveness of the Commissions' work if shortcomings identified are not taken up by the Board or recommendations are stalled due to lack of consensus. The cooperation between the Board and its Commissions therefore remains crucial to ensure that the fact-finding carried out by the Commissions translates into actions taken by the Board.⁵⁵ In reality, the issues brought up in the Commissions' monitoring reports are usually duly considered by the Board, but not all of the proposed recommendations are eventually adopted.

VI Concluding Observations: the HRAB as Model for an Austrian NPM?

In the context of the ongoing political discussions on the ratification and implementation of the OPCAT in Austria, the achievements, strengths and weaknesses of the HRAB have received renewed attention. The central question has been to what extent the HRAB in its current form can serve as a model for a National Preventive Mechanism in accordance with Article 4 of the Protocol and thus constitute an institutional starting point for the implementation of OPCAT.

With respect to its monitoring functions, the achievements of the HRAB, particularly the system of routine visits and regular reporting procedures are considerable, and, in light of the high density of fact-finding, probably unprecedented in the domain of the security authorities. The establishment of six regional Commissions, each responsible for a specified geographic area, turned out to be a major advantage, as it enabled the building of expertise relevant to specific regional circumstances and the maintenance of contacts with officials on the regional level. As the OPCAT leaves it open, whether the NPM has to follow centralized or decentralized structures, the advantages of the regional organization of the Commissions should be incorporated in a future NPM. Regarding their working methods and visiting rights, in particular the practice of unannounced visits, right of access to all places of detention and all relevant information, as well the right to private interviews and the protection of sources, the Commissions meet the requirements as set out in Article 20 of OPCAT. In addition, the multi-disciplinary and pluralistic composition of the Commissions, ensuring the availability of necessary expertise is also in the line with Article 18 OPCAT in conjunction with the standards set by the Paris Principles.

In terms of substantive competence, the current limitation of the HRAB's mandate to the ambit of the MoI would have to be broadened in line with Article 4 in conjunction with Article 19 of OPCAT to encompass all places where persons are deprived of their liberty (including prisons under the Ministry of Justice, military detention facilities, psychiatric and other care institutions, where persons are held against their will). On the other hand, the current mandate of the HRAB goes beyond the monitoring of places of detention in that it also encompasses control over the exercise of command and enforcement powers – another added value of the HRAB, which should be maintained under the new NPM. Another advantage of the HRAB, which should be maintained by a future NPM, is the fact that it monitors compliance of police work with all human rights, not only with a view to torture and CIDT, as foreseen by OPCAT.

The major issues, however, where the current institutional and legal set up of the HRAB falls short of fulfilling the requirements of Article 18 of OPCAT relate to its lack of functional,

⁵⁵ Kriebaum warns that the Board otherwise operates as a "black hole where a lot of knowledge disappears", p. 20.

personnel and financial independence. In particular, the close institutional and organizational linkage with the MoI as consultative organ, with a Secretariat that is integrated into the organizational structure of the MoI, as well as the equal representation of governmental officials and civil society representatives in the Advisory Board do not guarantee the functional independence of the HRAB. With regard to the independence of its personnel, the members of the Board enjoy freedom from instructions, but are appointed by the Minister of Interior, who can dismiss them at any time. Thus, the HRAB does neither have the necessary institutional independence nor guarantee of tenure for its members. Finally, the HRAB does not enjoy financial independence as it depends entirely on the MoI for the allocation of sufficient resources to function properly.

In order to meet the requirements of OPCAT it would be necessary to liberate the HRAB from its institutional link with the MoI and establish it as a separate body. One suggestion has been to establish a new organ under the direct authority of Parliament endowed with constitutional guarantees.⁵⁶ As the creation of a new autonomous administrative organ is rather unlikely, other proposals have envisioned the new NPM as autonomous part of an extended Ombudsoffice [*Volksanwaltschaft*].⁵⁷ More recently, the Ombudsoffice has been commissioned by the Government to make suggestions of how to integrate the HRAB into their institutional structure. The challenge is, however, to preserve the advantages and good practices developed by the HRAB, and avoid mere absorption under the numerous other tasks of the Ombudsoffice.

One of the main concerns in relation to the Ombuds-Model is that instead of increasing the autonomy and strengthening the powers of the future NPM, it will be downsized to a subsidiary organ with its effectiveness being dependent on the Ombudsoffice. While the ombudspersons are elected by Parliament, each of the three political parties with the largest number of votes in Parliament is entitled to nominate one candidate, which in practice has made this function highly political. The ombudspersons enjoy constitutionally guaranteed independence and cannot be dismissed during their term of office. However, due to the nomination procedure, they cannot be considered politically independent. To create a future NPM as subsidiary mechanism, subject to the decision-making of the Ombudspersons would therefore risk that politically disagreeable outcomes of the NPM's work could fall prey to political bargaining. In addition, one of the factors of the effectiveness of the current HRAB is the direct access to high officials within the MoI. As subsidiary organ of the Ombudsoffice, the new body would operate on a lower level, which would limit its influence and authority rather than strengthening it. As the discussions stand at present, the most desirable option would be to establish an NPM as an autonomous body within the Ombudsoffice (which would offer administrative and substantive synergies⁵⁸), with a separate budget and separate reporting duties vis-à-vis Parliament, which would continue to work in the dual organizational structure of regional Commissions on the one hand, and a Council (instead of an Advisory Board) on the other.

⁵⁶ Nowak, Nationale Menschenrechtsinstitution, p. 7.

⁵⁷ Nationaler Präventionsmechanismus, in, Öffentliche Sicherheit 1-2/2008, p. 13.

⁵⁸ For example, all complaints relating to treatment in detention currently addressed to the Ombudsoffice could also be handled by the NPM, as they will have the necessary expertise and contextual knowledge.