

**First report on the implementation of the Optional Protocol to the Convention
on the Rights of the Child (CRC) on the sale of children, child prostitution and
child pornography in Austria
(Federal Law Gazette III 93/2004)**

Article 3 paragraph 1 and 3

Firstly, with respect to the term “child” which is, for the purposes of the CRC, used in relation to persons under 18 years of age, several **concepts used in Austrian law** must be explained in more detail: according to Section 74 paragraph 1, subparagraph 1 and 3 Austrian Criminal Code (*StGB*) an under-age person (*Unmündiger*) is a person under 14 years of age, a minor (*Minderjähriger*) a person under the age of 18, while an adolescent (*Jugendlicher*) is a person who has completed the 14th year of age, but not yet the 18th year of age (Section 1, subparagraph 2 of the Youth Court Act [*Jugendgerichtsgesetz – JGG*]).

Article 3 paragraph 1 subparagraph a) sub-clause i)

According to Section 104 paragraph 1 StGB anyone who is **trafficking in slaves** (*Sklavenhandel*) is to be punished with imprisonment of ten to twenty years. Paragraph 2 of this section also makes punishable anyone who induces the enslavement of another person or causes it to be brought into a slavery-like situation or causes this person to submit to slavery or to a slavery-like position. The concept „slavery-like situation“ (*sklavereiähnliche Lage*) also comprises debt bondage (*Schuld knechtschaft*), serfdom (*Leibeigenschaft*) and forced or compulsory labour including forced or compulsory recruitment of children for the involvement in armed conflict.

Section 104a StGB expressly serves the purpose of **implementing Article 3 paragraph 1 subparagraph a) sub-clause i) in conjunction with Article 2 paragraph a) of the Optional Protocol** to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and already penalises certain acts and actions preparing a subsequent exploitation of a person. Under this section, anyone who **recruits, harbours or otherwise accommodates,**

transports or **offers** or **passes** a **minor** on to another person with the **intention** to **exploit** the minor **sexually** or by **removal of organs** or by exploiting his **labour**, is to be punished with imprisonment up to three years.

Anyone, who commits this offence using force or by serious threat, is to be punished with imprisonment of six months up to five years; if the offence has been committed against a **person under age** as a member of a **criminal organisation**, by using serious violence or in such a way, that the offence, either deliberately or by gross negligence, constitutes a danger for the victim's life or results in an particularly severe disadvantage for the victim, is to be punished with imprisonment of one up to ten years.

On account of the special vulnerability of under age persons, the Austrian government has decided to generally qualify the commission of a criminal offence against under-age persons as a circumstance increasing penalty.

Exploitation (*Ausbeutung*) means, that vital interests of the victim are suppressed to a substantial extent and with lasting effect; this connotes, that an offence constitutes the crime of **sexual exploitation** when minors are forced or induced to perform a sexual act or to be available for sexual acts which are harmful for their normal sexual and moral development. **Exploitation by removal of organs** means any retrieval of organs from a living person without consent and for the benefit of a third party, or if no such consent can be legally given (according to Section 90 StGB). No legally effective consent of the victim means therefore, that the consent (of the person entitled to child custody) was attained by force, threat or deceit, if it violates public morals or was not given at all. Of note is in this context, that under Austrian civil law persons under age due to the absence of full legal capacity can never give a legally effective consent to such acts of legal significance. In these cases, consent of the legal representative or, in relation to "other persons entitled to child custody", also a permission of the Guardianship Court (*Pflegeschaftsgericht*), is required.

Exploitation of labour (*Ausbeutung der Arbeitskraft*) means reckless exploitation of the victim. It thus criminalises any behaviour which does not yet constitute slavery or a position similar to slavery, yet however, is harmful to the vital interests of the victim, e.g. if labour is not or absolutely insufficiently remunerated, the permissible or

reasonable working hours have been excessively extended over a longer period of time, or the working conditions are unacceptable.

As with other offences, this provision does not only penalise offenders who act for their own benefit, but also exploitation by a third party.

As an accompanying measure, the sale of children by parents or the legal guardian can also constitute the offence of negligence of care, education or supervision which is punishable by imprisonment up to six months or fine of up to 360 daily rates under **Section 199 StGB**.

Since parents have a **guarantor's position** (*Garantenstellung*) concerning the physical and mental integrity of their children according to Section 2 StGB, also the approving acceptance of the sale of a child for the purpose of sexual exploitation, exploitation by removal of organs or by engagement in forced labour, may result in criminal liability by omission (Sections 2, 104a StGB) (if the parents are not already criminally liable as immediate or assisting offenders). As soon as a minor person under sixteen years of age is taken away from his/her legal guardian, the elements constituting the offence of child abduction (*Kindesentziehung*) under **Section 195 StGB** are fulfilled, as well.

Article 3 paragraph 1 subparagraph a) sub-clause ii)

Section 194 StGB expressly serves the purpose of **implementation of Article 3 paragraph 1 subparagraph a) sub-clause ii) of the Optional Protocol** to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Under **Section 194 paragraph 1 StGB** anyone who causes a **person entitled to consent, by granting an advantage** to that person or to a third party, to **consent to the adoption of a minor** by another person shall be sentenced to a term of imprisonment of up to two years. The offender must not grant an advantage by himself, the simple acting as an intermediary for granting an advantage by a third party, e.g. the prospective adoptive parents, to a person whose consent is required (Section 181 Austrian Civil Code (*ABGB*) or Sections 1 and 26 International Private Law Act (*IPRG*)) or to a third party is sufficient. The decisive circumstance is that the person entitled consents to the adoption because of the advantage granted to him, in other words: he consents to the sale of the child for adoption. The

constituent element of "advantage" has a wide meaning, it comprises not only material objects or pecuniary benefit (*Vermögensvorteil*), but, in addition, everything that may constitute an indirect – in some cases also only an (substantial) – immaterial advantage. The advantage must have been granted either to persons whose consent is required or to a third party, e.g. to a close relative. Paragraph 2 cit. law provides for a penalty increasing qualification: if the offender commits this offence with the intention (Section 5 para. 2 StGB) to derive a pecuniary benefit for himself or for a third party, he shall be punished with imprisonment up to three years.

This provision is directed against persons acting as intermediary in an intended adoption, where a person whose consent is required shall receive a benefit in return. This provision shall prevent the preparation or promotion of such adoptions by a third party. In order to prevent, that the partners in an adopting married couple are being considered as an intermediary in relation to each other, para. 3 cit. law explicitly excludes the adopter and also the adopted child from liability to penalty.

Ad Article 3 paragra. 1 subparagraph b)

Sections 206, 207 StGB penalise any sexual contact with persons under-age. Anyone who has sexual intercourse or performs a sexual act equal to sexual intercourse with an under-age person, or induces an under-age person to perform a sexual act or to have a sexual act performed on him, shall be sentenced to imprisonment of up to ten years under Section 206 StGB. The offence is qualified by bodily injury, pregnancy or the death of the under-age person, in the latter case the imposition of life imprisonment is also possible. Section 207 StGB penalises other sexual acts performed on under-age persons, the basic penalty is here an imprisonment of six months up to five years. If the offender performs such sexual acts by using force, deprivation of freedom or by serious threat, he fulfils, due to simultaneous commission of two or more offences during an illegal act (*Idealkonkurrenz*), also the elements constituting the offence of rape or sexual coercion (*geschlechtliche Nötigung*) under Sections 201, 202 StGB.

Under Austrian criminal law the uniform "protective age" (*Schutzalter*) for self-determined, consensual sexual acts by minors is fourteen years. However, the

Austrian law provides for a very extensive criminal protection of „under 18 year old persons“ from sexual exploitation.

Particularly of note is also Section 207b StGB which serves the protection of adolescents which have not yet completed the 16th or 18th year of age from sexual abuse. The said provision has been adopted to protect juveniles who, for certain reasons, are not sufficiently mature to understand the meaning of a sexual act or to act according to this understanding or whose capability to do so is clearly limited. Under para. 3 cit. law anyone who induces a minor person (under 18 years of age) to perform a sexual act or to have a sexual act performed on him by directly offering the minor money shall be sentenced to imprisonment of up to three years. Also worth mentioning is Section 208 StGB which should protect persons under 16 years from moral endangerment and Section 212 StGB which penalises the abuse of a position of authority (*Missbrauch eines Autoritätsverhältnisses*).

Section 214 StGB penalises procuring sexual contacts with persons under age in return for remuneration: anyone who, to gain a pecuniary or another advantage, arranges a personal contact between an under-age person and a third party for the performance of a sexual act, is to be punished with imprisonment of six months up to five years. If the person has reached the age of fourteen, the maximum term of imprisonment is reduced to two years.

Under Section 215 StGB anyone who induces a person to engage in prostitution is to be punished with imprisonment up to two years. According to Section 74 para. 1 sub-clause 9 StGB prostitution is defined as performing sexual acts or having sexual acts performed on oneself in exchange for remuneration with the intention to derive a continuous income for oneself or a third party from recurrent performance of this kind of activity. For the purposes of this provision, to “induce” a person to sth. means the exertion of strong influence targeted to change the whole life of the person causing it to submit to prostitution.

Section 215a StGB expressly serves the **implementation of Article 3 paragraph 1 subparagraph b) in conjunction with Article 2 subparagraph b) of the Optional Protocol** to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and penalises the **promotion of prostitution**

(Förderung der Prostitution) and **pornographic performances involving minors** (*pornographische Darbietungen Minderjähriger*): anyone who **recruits** or **offers** or **procures to a third party**, a minor person, regardless of whether such person already engages in prostitution, to engage in prostitution or to participate in a pornographic performances, or offers or procures such person to another person for that purpose, shall be sentenced to imprisonment of up to three years. The same punishment shall be imposed on anyone who exploits a **minor person** engaged in **prostitution** or participating in a **pornographic presentation** in order to obtain a **pecuniary benefit** for him- or herself or for a third party.

Anyone who commits a aforementioned offence as a member of a **criminal organisation**, by using **serious violence** or in such a manner, that the offence, either with **intent** or **gross negligence**, **jeopardises the life** of the person or results in a **particularly severe disadvantage** for the person, shall be sentenced to imprisonment from six months to five years. Anyone who commits such an offence against a person under age (under 14 years) shall be sentenced to imprisonment from one to ten years.

The aforementioned provisions serve the purpose of providing a very extensive protection from sexual exploitation to minors, by penalising not only persons offering children for sexual exploitation but also the consumers. The victim is not punishable as it is the object protected by this provision, its consent (e.g., on account of the remuneration received) is of no legal relevance.

"Recruiting" (*anwerben*) for the purposes of Section 215a StGB means to commit somebody to engage in prostitution or to participate in a pornographic presentation. "Offering" (*anbieten*) is the explicit or implied declaration of the willingness to arrange a personal contact between the potential "customer" and a minor for the professional, either active or passive, performance of a sexual act for remuneration (prostitution); the same is applicable to procuring participation in a pornographic presentation. An offer as such suffices, its acceptance is not required. Thus it is not only punishable to personally offer somebody a contact of aforementioned kind, but also to make such offers through advertisements. The term "procuring" (*vermitteln*) means arranging a contact of above mentioned kind as an intermediary. In case of procuring a sexual

contact without remuneration for the purpose of gaining a pecuniary benefit for oneself, Section 214 must be considered.

A pecuniary benefit can be money, but also real values (e.g., board and lodge). "Exploitation" (*Ausnützen*) means that the offender provides no or only negligible service in return for material advantages received which exceed the value of a tip. "Participation" (*Mitwirken*) means direct (active or passive) participation in a presentation which has to be considered pornographic. A person participates in a pornographic presentation if he or she performs a sexual act, which is reduced to itself and independent from any other expressions of life and serves the sexual stimulation of an observer, on him- or herself, on another person or with an animal, has such a sexual act performed on him- or herself by another person or presents his or her genitalia or pubic region in such manner (legal definition by para. 3 cit. law). "Performance" (*Darbietung*) means any kind of a live presentation targeted for being perceived by spectators, e.g. within the scope of a theatrical or dance performance, a striptease or a so-called "peep show".

A penalty increasing qualification applies, if the offence is committed as a member of a criminal organisation (*kriminelle Vereinigung*)¹, by using serious violence (*schwere Gewalt*)² or in such a manner, that the offence, either with intent or gross negligence, jeopardises the life of the presented minor person or results in a particularly severe disadvantage for the minor.

Also of note is Section 216 StGB – procuration (*Zuhälterei*) – which penalises exploitation of a prostitute (this provision is construed neutrally as to gender) and Section 217 StGB – transborder trafficking for prostitution (*grenzüberschreitender Prostitutionshandel*) – which serve the protection of persons, irrespective of age or gender or whether the person is already engaged in prostitution or not, from being procured or recruited for prostitution in a foreign state.

¹) a criminal organisation is an association of two or more persons formed over a long period with the aim of committing an offence or offences, other serious violent crimes against life and limb(...), either by one or by several of its members. (Section 278 paragraph 1 StGB).

²) serious violence is the use of superior physical strength which reaches a high level of intensity or dangerousness, with the aim to overcome real or only expected resistance by the victim.

Ad Article 3 para 1 subparagraph c)

Section 207a StGB expressly serves **the implementation of Article 3 paragraph 1 subparagraph c) in conjunction with Article 2 subparagraph c) of the Optional Protocol** to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and criminalises all forms of production of as well as **trade in pornographic representations of minors** as well as the **acquisition and possession of these representations** (imprisonment up to three years). Under this provision, anyone who, for the purpose of dissemination, produces or imports, transports or exports or offers, procures, makes available, presents or otherwise makes accessible to a third party any pornographic material involving a minor, commits a punishable offence. This provision thus penalises **absolutely any kind of child pornography traffic and dissemination**. A pornographic representation involving minors (*pornographische Darstellung Minderjähriger*) is, according to Austrian criminal law, defined as realistic representations of a sexual activity performed on an under-age person (person under 14 years) or of an under-age person on him- or himself, on another person or with an animal, as well as realistic representations of activities involving an under-age person which, due to their circumstances, produce the impression of showing a sexual activity performed on an under-age person or a sexual activity performed by the under-age person on him- or herself, on another person or with an animal. In addition, also all realistic representations of genitals or the pubic area, as far as they are distorted to arouse sensation, reduced to itself and independent from any other expressions of life, and serve the sexual stimulation of an observer, and, finally, all visual representations which – as a result of a modification or not – under given circumstances convey the impression to be a representation of aforementioned kind.

As far as minors who have reached the age of consent (14 -18 years of age) are concerned, generally the same applies as to minors under age of consent, only that in this case the representation of the aforementioned sexual activities or aforementioned actions must be in the same way distorted to arouse sensation, reduced to itself and independent from any other expressions of life, and serve the sexual stimulation of an observer to fulfil the elements constituting this offence.

The method, medium, material or storage device of the representation is legally irrelevant. This connotes that the relevant representation may be a photograph, slide, an other kind of visual representation or film, but also a computer disk, CD-ROM, DVD, computer game and a similar object. The term "representation" comprises unmodified representations of real activities or real events with real persons or representations of real persons, as well as virtual pictures, i.e. representations which are based on a representation of real things and have been correspondingly altered or generated completely artificially. The Austrian law penalises also the offence of "simulated pornography" (*Anscheinspornographie*), i.e. representations of real events which involve a minor person in such a way that an objective observer receives the impression of a real sexual activity, even when the offender knows that, in actual fact, no sexual act has been performed.

A penalty increasing qualification applies, if the offence is committed on a commercial basis (*Gewerbsmäßigkeit*) as a member of a criminal organisation (*kriminelle Vereinigung*)³, in such a manner, that it results in a particularly severe disadvantage for the minor, or if the offender produces the pornographic material involving a minor by using serious violence (*schwere Gewalt*)⁴ or if he or she, either with intent or by gross negligence, jeopardises the life of the depicted minor person when producing the pornographic material.

The **own private use (*Eigengebrauch*)** of pornographic representations of minors is punishable as far as **obtaining and possession constitutes a criminal offence** (imprisonment up to one year in case of minors at the age of consent, and up to two years in case of minors under the age of consent, respectively). Also obtaining such representations on the Internet and their storage on a storage medium is punishable under the aforementioned provision. Importing, transporting and exporting for own use is punishable, as well. The **punishability** of production and possession of pornographic representations of **minors at the age of consent** is **excluded** when it is targeted for the personal use by the minor person and done **with his/her free consent**. Same applies to production and possession of virtual pornographic materials showing minors at the age of consent, if **no real pornographic material**

³) a criminal organisation is an association of two or more persons formed over a long period with the aim of committing an offence or offences, other serious violent crimes against life and limb(...), either by one or by several of its members. (Section 278 paragraph 1 StGB).

⁴) serious violence is the use of superior physical strength which reaches a high level of intensity or dangerousness, with the aim to overcome real or only expected resistance by the victim.

has been used in the process of production, and if targeted **for own private use**, provided that the act does not entail the risk of this representation becoming disseminated.

Article 3 paragraph 2

According to Section 12 StGB, not only the immediate offender, but also anyone who instigates another person to commit an offence, as well as any person who contributes to its commission by aiding and abetting, will face the same level of punishment. The Austrian Government thus has decided to stipulate, that every person, which causally contributes to the commission of an offence, is considered an offender, even if the different forms of participation are defined separately in the respective provision. The liability to penalty of two or more involved persons is independent of each other. Assisting offenders are thus also punishable if the immediate offender is exempted from criminal liability due to, e.g., insanity defence (*Schuldunfähigkeit*), or is under the age of criminal liability (*Strafmündigkeit*) etc. (monistic model of perpetration (*funktionale Einheitstäterschaft*)). Every offender is criminally liable for the committed offence by his individual guilt; his activity must fulfil particular elements of criminal intent defined for the respective criminal offence.

Pursuant to Section 15 StGB the criminal liability for intentionally committed offences does not only refer the completed, but also the attempted offence and participation in an attempt. The attempt is thus, generally speaking, punishable like a completed offence. The fact that an attempted offence has not been completed is only a mitigating circumstance according to Section 34 subparagraph 13 StGB. The punishability of an attempt (*Strafbarkeit des Versuchs*) does not only apply to the person who directly undertook the attempt, but also to every person participating in the attempt. Inducing somebody to and assistance in an offence, which does not get beyond the stage of attempt, is punishable as an attempt to commit an offence. In addition, also the attempted committal of an offence as well as the attempt to induce somebody to commit an offence is punishable; however, under Austrian law, the attempt to assist in the commission of an offence is not punishable, provided that the actual committal has not been “at least” attempted (impunity of attempted assistance (*Beitragsversuch*)).

Article 3 paragraph 4

The Austrian Law on Criminal Liability of Enterprises Having Legal Personality (*Verbandsverantwortlichkeitsgesetz – VbVG*), entered into force on 1 January 2006, established the criminal liability of enterprises (legal entities and certain joint partnerships (*Personengesellschaften*)) for every punishable offence, thus also considering all offences prohibited by Article 3 paragraph 1. The *VbVG* establishes the criminal liability of decision makers, on the one hand, and of employees on the other hand. Sanctions provided by the aforementioned Act are fines based on the economic capacity of the liable enterprise. Proceedings against entities are carried out under the Code of Criminal Procedure (*StPO*).

Article 4

The provisions of the Austrian penal code are, according to Section 62 StGB, applicable to all offences which have been committed in Austria. According to Section 63 StGB they also apply to offences committed on board of an Austrian ship or aircraft, no matter where it is located.

In addition, according to Section 64 paragraph 1 subparagraph 4 StGB, **irrespective of the law of the territory in which the offence has been committed**, also offences committed **abroad** are punishable under the Austrian criminal code, particularly in cases of slave trafficking (Section 104 StGB), **trafficking in human beings (Section 104a StGB)** or trans-border trafficking for prostitution (Section 217 StGB) and if the offence violates Austrian interests or the culprit can not be extradited. Austrian interests are affected, for example, if the criminal offence has been committed against an Austrian national. The extradition is not possible, if, for example, the offender is an Austrian national or a national of a foreign State and all efforts towards his extradition have remained fruitless. Under subparagraph 4a cit. law, the **Austrian law provisions**, regardless of the law provisions in the territory in which the offence has been committed, apply also to **criminal offences which** have been committed **abroad** if they constitute an aggravated sexual abuse of under age persons (Section 206 StGB), sexual abuse of under age persons (Section 207

StGB), **pornographic representations involving minors under Section 207a para 1 and 2**, or sexual abuse of minors under Section 207b para 2 and 3 or **the promotion of prostitution and pornographic performances involving minors (Section 215a StGB) or pornographic representations involving minors (Section 207a paragraph 1 and 2 StGB)** and the **offender is Austrian national and has his habitual residence (*gewöhnlicher Aufenthalt*) in Austria**. According to this provision, also Austrian nationals who have their habitual residence in Austria are criminally liable if they, as sex tourists, buy a sexual contact with persons under age, even if these activities are not punishable under the laws of the respective foreign country. Same applies to the sexual abuse of minors under 16 years of age (Section 207b para 2) if the offender exploits a situation of distress of the victim, e.g. drug addiction, illegal stay, homelessness (*Ausnützung einer Zwangslage*).

As far as Austrian jurisdiction is not already established on ground of aforementioned provisions, also (in case of offences committed abroad) the general provisions of Section 65 StGB may apply: under this provision Austrian nationals as well as foreign nationals caught in Austria who cannot be extradited on other ground than the character of their offence, are, provided that the principle of double criminality applies, subject to Austrian jurisdiction also for offences committed abroad.

Article 5

With respect to this article no special measures were required since international conventions are, according to Austrian law, self-executing on ratification.

Concerning para 2 it is noted, that Austria does not make the extradition conditional on the existence of a treaty.

Concerning para 5, reference is made to relevant provisions of Section 65 StGB (see information concerning Article 4).

Article 6

Austria can afford mutual legal assistance on the basis of numerous bilateral and multilateral treaties and arrangements, in particular the Council of Europe Convention

on Mutual Assistance in Criminal Matters, 20.04.1959 and its 1st additional protocol, as well as the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29.05.2000. Also in the absence of a treaty or arrangement judicial assistance can be afforded if the principle of reciprocity applies.

Article 7

Section 26 StGB provides for **the confiscation of items** (*Einziehung von Gegenständen*) used or intended to be used to commit an offence or resulting from an offence, provided that the items, due to their specific character, represent the risk of being used for the commitment of new punishable offences (e.g., falsified documents, counterfeit money).

The **confiscation of proceeds of crime** (*Abschöpfung der Bereicherung*) under **Section 20 StGB** provides for the seizure and confiscation of property which the offender derived from criminal activities. A confiscation may also be imposed on **persons who have not committed an offence**, yet however, received an economic advantage from criminal offences and thus benefited from proceeds of crime, since it is legally insignificant, if a person did actually know about the criminal origin of the property. The confiscation of proceeds of crime can also be applied to legal persons. This provision does not require the property derived from offences to be still directly accessible. It can already also have been converted by money laundering into other form of property. In addition, also property controlled by a criminal organization or deriving from an offence which is not punishable under Sections 62 to 65 StGB, may be declared forfeited (*verfallen*) under Section 20b StGB.

Article 7 subparagraph b)

Requests by another State Party for seizure or confiscation can be executed on the basis of the European Convention on Mutual Legal Assistance in Criminal Matters of 20 April 1959, Federal Law Gazette No. 41/1969, and from Member States of the EU also on the basis of the Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, Official Journal of the European Union L 196 of 2 August 2003, or the Framework Decision of 6 October

2006 on the application of the principle of the mutual recognition to confiscation orders, Official Journal of the European Union L 328 of 24 November 2006 (implementation term concerning the latter not yet expired!). In the absence of an treaty or other arrangement, such requests may be executed on the basis of Section 56 et seq. and 64 et seq. of the Law on Extradition and Mutual Judicial Assistance (ARHG), provided that the principle of reciprocity applies.

Article 8 paragraph 1 subparagraph a) to d) and g) and paragraph 3

According to Austrian Code of Criminal Procedure (StPO) witnesses in pre-trial proceedings (*Vorverfahren*) are basically heard by the investigating judge without presence of the parties or other witnesses (*Ausschluss der Parteienöffentlichkeit*). Every witness, however, has the right to have a trusted person being present during interrogation (Section 162 paragraph 2 StPO). In case of an examination of persons under 14 years of age the presence of a trusted person is generally required, as far as this serves their interests (Section 162 paragraph 3 StPO). If charges are filed, the witness has to appear before the court at the main trial and to give evidence again (principle of immediacy), to wit generally in presence of all parties involved. Nevertheless, according to Section 250 paragraph 1 StPO the court (presiding judge) may temporarily exclude the accused from the courtroom exceptionally while a witness/co-defendant is testifying. This provision shall give the witness/co-defendant the opportunity to give evidence (more) without fear or favour. There is a similar provision for juvenile defendants (cf Section 41 Juvenile Court Law - *JGG*). According to Section 229 paragraph 2 StPO the court may, *ex officio* or on request, exclude the public from the main hearing if details from the private or intimate sphere of the defendant, witness or a third party should be discussed and the protection of vulnerable interests so requires.

The Austrian procedural criminal law does not define any age limit allowing or requiring a child to be heard as witness in court. Hence, it lies in the discretion of the respective court and its consideration of evidence to assess the capacity of a witness to give evidence in court (Section 151 paragraph 1 subparagraph 3 StPO). According to established precedents, children from an age of 5 years are considered capable of being examined (in presence of a child psychologist). However, this jurisprudence does not exclude in general the capability or capacity of even younger children to

testify. Since child victims are often times the only person, that can, from his or her own perception, give evidence about circumstances of a crime, their examination is usually necessary to establish the material truth. The failure to examine a child victim as a witness may even constitute a ground of nullity under Section 281 paragraph 1 subparagraph 4 StPO - violation of the rights to defence (Article 6 paragraphs 1 and 3 subparagraph d. of the European Convention on Human Rights).

Nevertheless, in order to prevent that children are required to describe, in presence of the accused/defendant, humiliating and painful treatment they have suffered, the Criminal Procedure Amendment Act (*Strafprozessrechtsänderungsgesetz*) adopted in 1993, Federal Law Gazette. No. 526/1993, provides for the instruments of adversary and considerate witness examination (Section 162a StPO).

The Criminal Procedure Amendment Act of 1998 (Federal Law Gazette. I No. 153/1998) further intensified and extended the range of application of the adversary examination and considerate examination. This was not only, on the one hand, a crucial step to improve the examination of children in court, which always means a great emotional strain and distress for the young witnesses, but, on the other hand, it was also a vital contribution to improve the process of establishing the material truth, particularly since witness statements of the victims are in many cases decisive in a court trial.

An adversary examination (*kontradiktorische Vernehmung*) under Section 162a paragraph 1 StPO has to be conducted in such a way that opportunity is given to the public prosecutor, the accused and his defender as well as the private participant (*Privatbeteiligter*) to take part in the examination and to put questions to the witness. An adversary examination is required if there are reasons for the assumption, that an examination of the witness in the main hearing will not be possible for reasons of fact (e.g., illness) or law (e.g., right to refuse to give evidence). This measure provides the victim with the opportunity to make a statement – having still a vivid recollection of the criminal act and with living emotions – while avoiding an immediate confrontation with the accused.

The so called “considerate” examination (*schonende Vernehmung*) provided for by Section 162a paragraph 2 StPO is a special form of the adversary examination and allows the witness to stay in a separate room when questioned by the public

prosecutor, the defendant and his defence counsel, without violating the rights of the accused and the public prosecutor under Article 6 paragraphs 1 and 3 lit d European Convention on Human Rights. Such “restricted” examination is mandatory in relation to under age victims of criminal offences that may have been harmful to their sexual sphere. This connotes, that persons under age have the right, in the course of a judicial proceeding only once, to be examined by the investigating judge and an expert in presence of a trusted person (e.g. mother or other relatives) in a considerate way and with restricted participation of the parties involved, and to refuse thereafter to testify again, in particular in the main hearing (Section 152 paragraph 1 subparagraph 3, Section 252 paragraph 2a StPO). In addition, Section 162a paragraph 3 StPO provides for the right to considerate examination to all other under-age victims, witnesses which are relatives of the accused and all other persons who may have been harmed by a criminal act in their sexual privacy (Section 152 paragraph 1 subparagraph 2a StPO) if they so request.

In order to improve the implementation of this regulation, appropriate examination rooms for children have been established with Provincial Courts (*Landesgericht*). In these rooms children can be, in surroundings suitable for children, informed about their rights by an expert (a child psychologist, child psychotherapist or child psychiatrist) in a language suitable for children in presence of the judge and questioned about the circumstances of the offence. The public prosecutor, the defence counsel and the accused have the opportunity to follow the examination and to ask supplementary questions in a separate room using audio-visual equipment. The record of this examination can be read out and the respective video tape recording can be shown in the main hearing (Section 152 paragraph 1 subparagraph 3, Section 162a paragraph 2, Section 252 paragraph 1 subparagraph 2a StPO; the video tape recording is, according to Section 271a last sentence of paragraph 2 StPO, part of the court file and may not be deleted). The considerate examination is also applicable (Section 250 paragraph 3 StPO) in the main hearing.. This provision shall reduce the risk of exposing traumatised persons to secondary victimisation to a minimum.

In addition, victims which may have been harmed by a criminal act in their sexual sphere, have a relative right to refuse to give evidence, i.e. they can refuse to answer questions relating to unbearable details of the criminal offence or their very private sphere (Section 153 paragraph 2 StPO) - however, the court may require a victim to

testify when his or her statement is crucial for the trial (paragraph 1 cit. law). An additional measure to protect the privacy of the witness provided for by the Austrian Code of Criminal Procedure is to allow the witness to choose if he wishes to declare his or her permanent residence or another address, suitable for the serving of summons. The witness is thus not required to declare his residential address; also the accused has no unconditional right to learn the place of residence of the witness.

The Federal Act of 1 January 2006 amending the Code of Criminal Procedure 1975, the Public Prosecution Act (*Staatsanwaltschaftsgesetz*) and the Act on the Erasure of Convictions and Limitation of Information (*Tilgungsgesetz*), Federal Law Gazette. I No. 119/2005, was another crucial step towards the improvement of the rights of the victim. It provides for the unconditional right of the victim and the obligation of all authorities involved in criminal proceedings to treat the victim with respect and dignity, give due consideration to his rights and interests and instruct him on his rights in criminal proceedings as well as on the possibility to receive compensation or assistance throughout the legal process. In addition to that, victims of violent or sexual crimes have a right to receive psychosocial and legal assistance and must be informed about this right during their initial examination taking reference to specialised victims of crime support organisations (*Opferschutzeinrichtungen*).

In this context psychosocial assistance includes preparation of the victim for the trial and the emotional stress inherent to it, accompanying him/her to examinations in the preliminary proceedings and main trial, legal assistance includes legal advice as well as representation by a counsel (Section 49a StPO). The particularly urgent concern of improving the rights of the victim has been considered by implementing a legal right to psychosocial and legal assistance (*psychosoziale und juristische Prozessbegleitung*) to victims of deliberate offences which exposed them to serious violence or serious threat and may have been harmful to their sexual integrity, as well as to close relatives of a person whose death could have been caused by a criminal offence, or other relatives who have been a witness of an offence (Section 49a first sentence of paragraph 1 StPO). A person is entitled to receive this assistance if this is required for the protection of his or her rights as a victim of an offence, a fact that has to be assessed by the respective institution. In addition, victims now have, regardless of their respective position as an injured party or private participant, at every stage of proceedings the right to access to files (Section 49a last sentence of paragraph 1 StPO).

Other essential measures to improve the protection of victims included the extension of the obligations to inform and notify the victim about certain facts. Thus all authorities involved in a criminal proceeding have the duty (Section 47a paragraph 1 subparagraph 1 StPO) to inform the victim of compensation or assistance he or she may be entitled to receive, e.g. under the Victims of Crime Act (*Verbrechensopfergesetz*) as well as of the requirements to receive psychosocial or legal assistance and about respective victims of crime support organisations, to wit before the first examination (Section 47a paragraph 1 subparagraph 2 StPO). In addition, victims of sexual offences must be instructed on their right to considerate examination in preliminary proceedings and main hearing, on the possibility to refuse to answer certain questions, as well as on their right to request exclusion of the public from the main hearing (Section 47a paragraph 2 in conjunction with Section 229 paragraph 2 StPO). But also the duties of the public prosecutor's offices and courts have been expanded in this area. Now these authorities have the duty to inform the victim in case of an early termination of criminal proceedings in minor or less severe cases under Title IXa (*Diversions*) or in case of a termination or discontinuation of the proceeding against a known offender or a continuation of the proceeding. In addition, victims which are entitled to psychosocial or legal assistance must be notified about the release of the suspect/accused from custody (Section 177 last half sentence of paragraph 2, Section 195 StPO). On top of that, victims have the right to free assistance by a translator or interpreter, as far as this is required for the protection of their rights in criminal proceedings, in particular their right to join the proceeding as a private participant (Section 47a paragraph 4 in conjunction with Section 38a paragraph 1 StPO). Also the costs of psychosocial or legal assistance are now included in the catalogue of procedural costs to be borne by the accused (Section 381 paragraph 1 subparagraph 9 StPO).

Article 8 paragraph 1 subparagraph e)

Protection of the identity of victims is provided for by Section 7a Austrian Media Act (*Mediengesetz*), Federal Law Gazette No. 314/1981, amended by Federal Law Gazette I No. 151/2005. According to this provision, in particular cases the disclosure of the identity of a person by the media is prohibited. Under paragraph 1 subparagraph 1 of the aforementioned regulation, where publication is made of the

name of a criminal victim, his or her image or other particulars which are likely to lead to the disclosure of his or her identity, the victim shall have a claim against the owner of the medium (publisher) for damages for the injury suffered. The additional requirement of Section 7a paragraph 1, namely that the publication must injure legitimate interests of the person concerned, will generally be always fulfilled according to Section 7a paragraph 2 subparagraph 1 in case of child victims of offences mentioned under Article 3 of the Optional Protocol. The latter provision stipulates, that legitimate interests of the person concerned are in any case injured if the publication is such as to give rise to an interference with the victim's strictly private life or to his or her exposure.

Also relevant in this context is Section 56 paragraph 1 subparagraph 7 Security Police Act (*Sicherheitspolizeigesetz - SPG*) according to which security authorities may transmit personal data, in particular to victims of crime support organisations and media enterprises, only for very specific purposes defined in this Act..

Article 8 paragraph 2

The Austrian criminal procedure follows the principle that the police and the prosecution authority (*Offizialprinzip*) have a legal duty to investigate and prosecute criminal offences (*Legalitätsprinzip*) as well as the principle of establishing the material truth (*materielle Wahrheitsforschung*) (Section 2, 3 and 34 StPO). Offences liable to public prosecution (*Offizialdelikte*) fall under the remit of the public prosecutor (exclusive right to institute criminal proceedings - *Anklagemonopol*). The public prosecutor has the duty, on the basis of suspicious facts established during the investigation, to decide whether to bring a criminal charge against the suspect or not. However, a charge is to be brought only if it is likely that the accused will be sentenced. In order to assess this probability, evidence gathered in the course of investigation must be evaluated by the public prosecutor. Under Section 3 in conjunction with Section 34 paragraph 3 StPO, the public prosecutor is officially obliged to take every measure to establish the material truth (the same applies to other authorities involved in criminal proceedings). He has the duty of taking every measure likely to throw light on the truth or falsehood of the suspicion.

Article 8 paragraph 4

Within the scope of advanced training schemes for judges and public prosecutors, the Austrian Federal Ministry of Justice offers already for three years a seminar on „victims of violent criminal offences before the court“; this seminar is intended particularly for judges and public prosecutors having a special competence for proceedings concerning sexual abuse of children and adolescents. In this seminar, experts from different fields of psychology focus on issues relevant in connection with court examination of minor victims of violence and the resulting consideration of evidence. It includes, inter alia, aspects of the psychosocial background of sexual violence; the psychodynamics of children and adolescents who have been exposed to sexual and/or mental violence; the abuse dynamics and the abuse cycle; the consequences of these dynamics on the willingness to testify and the behaviour of victims of violence as witnesses in judicial proceedings; the characteristics of a social-environmental situation which allows the victim to file a complaint and the consequences of a complaint for the victim and his or her environment; the meaning of examinations by experts as well as of the approach of providing the victim with psychosocial and legal assistance throughout the legal process.

Within the scope of the four-year-course (carried out for the second time) for ADR judges (*Außerstreitrichter*) and family judges (*Familienrichter*), organised by the Association of Austrian judges, professional group for Appropriate Dispute Resolution Law (*Außerstreitrecht*) and Family Law (*Familienrecht*) and the Federal Ministry of Justice, family judges are trained how to deal with children who became a victim of sexual abuse.

In addition to that, the Federal Ministry of Justice and the presidents of the higher regional courts (*Oberlandesgerichte*), also in cooperation with various victims of crime support organisations, offer on a continuous basis advanced training schemes intended to improve the understanding of judges and public prosecutors for the situation and behaviour of traumatised crime victims.

Also concerning trafficking in human beings (including child trafficking) advanced training schemes are offered on a regular basis.

Article 9 paragraph 1

In addition to legal measures adopted directly in the process of implementing the Optional Protocol, the Protocol has been discussed by an inter-ministerial working group on the preparation of a National Action Plan for the Rights of Children and Adolescents (*NAP*). This Programme adopted by the Federal Government on 22 November 2004 provides for a package of measures to prevent offences referred to in the Optional Protocol.

Furthermore, on the 28th of March 2007, the Austrian government adopted the National Action Plan (*NAP*), which draws its attention to child-specific aspects. This *NAP* has been worked out by the Task Force “Human Trafficking”, which was founded in the year 2004. In May 2007, the Task Force decided to set up an operative “sub-Task Force” to identify concrete demand-oriented measures for victims of child trafficking.

From the perspective of the **civil law** it can be reported as follows: **Section 146 a last half sentence of Austrian Civil Code (*ABGB*)** renounces any type of physical or mental abuse of children as a means of education; the legal provision is perfectly clear stating that the use of violence and the infliction of physical or mental harm by parents as means to discipline children are unlawful. This applies not only to bodily harm and the causing of physical pain, but to every other treatment that violates human dignity, even if such treatment is not perceived by the child to be negative.

In case of any unreasonable treatment, by parents or other persons with right to custody, that is harmful to the well-being of the minor child – as for example a continuous violation of the absolute prohibition of violence as a form of education as set out in Section 146a last half sentence *ABGB* – the court has the duty, according to **Section 176 *ABGB***, to undertake measures required for the protection of the well-being of the child. In particular, the court may in such cases withdraw or restrict custody rights to the child. Proceedings related to measures imposed under Section 176 *ABGB* can be initiated either *ex officio* or on application by certain persons explicitly mentioned in the law.

An entity entitled to file such an application is, according to Section 176 paragraph 2 ABGB, for example a youth welfare institution (*Jugendwohlfahrtsträger*). According to **Section 215 paragraph 1 ABGB** it has the legal duty to apply for child custody related court orders required to protect the welfare of minor persons. This connotes that it is obliged, as soon as circumstances which require child custody related legal measures to protect the minor's well-being come to its notice, to file relevant applications. Concerning matters of child care and education the competent youth welfare office may, in case of imminent danger (*Gefahr im Verzug*), provisionally apply the necessary measures itself, and in this case, these so imposed measures remain in effect until the issuance of a court order (for which it has to apply within 8 days).

Article 9 paragraph 2

Major objectives of sexual education at schools are to strengthen the minor's own competence, build-up relationship and communication abilities and to prevent exposure of pupils to sexual violence:

Mein Körper gehört mir (*My body belongs to me*)

The Federal Ministry of Education, the Arts and Culture launched the project „My body belongs to me“. The heart of one project is an interactive stage play for elementary schools. Child protection organisations provide professional assistance. Accompanying events – a parents' evening and a school staff meeting – complete the project.

Teaching materials „Hör auf dich – lass dein Selbst laut werden“ (*„Listen to yourself – allow your self to speak out loudly“*)

These teaching materials for female pupils in 1st grade through 12th grade serve the prevention, explain strategies used by offenders and take intercultural aspects into consideration.

Information booklet „Beziehungsraum und Begegnungsraum“ (*„A room for relations, a room to meet“*)

Target group are teachers, educators and parents.

The booklet informs about the possibilities and chances of the school community and class community to support and fulfil protective functions.

The educational and school psychological service centres/psychological student service centres serve as low-threshold counselling institutions and assists teachers and parents in cases of suspected child abuse or sexual exploitation with advice and guidance. The school psychological service centers closely cooperate on local networks as for example with Child and Youth Advocate Offices (*Kinder- und Jugendanwaltschaften*), specialised advice centers and other competent authorities.

The Federal Ministry of Health, Family Affairs and Youth informs and supports activities promoting public awareness in this field by competent NGOs, for example by promoting the exhibition “Hinschauen statt wegschauen” (“*Look – not look away*”) organised by ECPAT Austria (platform against commercial sexual exploitation of children). The exhibition calls attention to sexual exploitation of children by tourists. It was first shown (2005) at the Wien-Schwechat airport, now also at other commonly frequented places in Austria.

The In-flight-Video "Child abuse is not a peccadillo" launched by the Federal Ministry of Health, Family Affairs and Youth is shown on Austrian Airlines flights to Southeast Asia.

The brochure „(K)ein sicherer Ort“ (“*An (un)safe place*”) promotes awareness-raising on sexual violence and offers information on possible aid for children and young people exposed to violence.

The website of the Federal Ministry of Health, Family Affairs and Youth www.kinderrechte.gv.at offers disseminators and adolescents comprehensive information on the Convention on the Rights of the Child and the Optional Protocol.

The Federal Ministry of Health, Family Affairs and Youth supports facilities devoted to the protection of child victims of violence.

Article 9 paragraph 3 and 4

Under the Victims of Crime Act (*Verbrechensopfergesetz*) victims of sexual abuse are entitled to receive, among other things, therapeutic treatment financed by the state.

In addition, victims of mental, physical and sexual violence are entitled to receive support from youth welfare institutions operated by Federal Provinces.

Child protection centers which are open to all child victims of violence receive approx. 200,000 € of financial support from the Federal Ministry of Health, Family Affairs and Youth.

The Child and Youth Advocate Offices (ombudsmen services) on federal level (Federal Ministry of Health, Family Affairs and Youth) and, in particular, their counterparts in the nine federal provinces offer assistance to children and minor persons exposed to violence, however, they also promote public awareness through information and other appropriate means.

In cases of suspected use of violence, child protection groups established in all children's hospitals in Austria offer counselling services by multidisciplinary teams and provide support in preparing assistance measures.

In Vienna the so called "Kinderdrehscheibe" ("Children's Roundabout") takes care of victims of child trafficking and returns them to a youth welfare institution in their homeland. The "Children's Roundabout" also supports relevant local organisations in Romania and Bulgaria in the development of adequate facilities as well as in staff training.

Children and minor persons who became victims of sexual and/or physical violence, receive professional assistance in legal proceedings which is also supported by the Federal Ministry of Health, Family Affairs and Youth through financing of training and advanced training schemes in the field of psychological and legal assistance to girls, boys and adolescents, who became victims of sexual abuse (evaluation from 2002; also see Article 8).

Article 9 paragraph 5

Under Section 281 StGB anyone who incites, in a publication, through broadcasting media or by another means making it accessible to a wide general public, general disobedience of a law, is punishable by imprisonment of up to one year. It therefore constitutes a criminal offence, irrespective of the motive, if a person incites to generally and basically ignore a particular law (in the formal sense). If the incitement,

however, relates to the commitment of a punishable criminal offence, Section 281 is subsidiary to Section 282 paragraph 1 StGB. The latter sanction penalises on the one hand the incitement to commit a punishable offence, and on the other hand to express approval of an already committed criminal act. If the offender has incited to commit a particular concretized criminal offence, he or she – depending on the respective penalty range – may be criminally liable as an inducing offender (*Bestimmungstäter*) under Section 12, 2nd case StGB in conjunction with the respective provision of criminal law, as well as under Section 282 paragraph 1, 1st case StGB.

There are no specific regulations contained in the Broadcasting Acts (*Rundfunkgesetze*) which would explicitly prohibit the dissemination of child pornography. However, both Section 10 paragraph 11 of the Federal Law on the Austrian Public Service Broadcaster ORF - (*ORF G*) as well as Section 32 paragraph 1 of the Law on Private Television – (*PrTV-G*) stipulate that broadcasted programmes may not contain pornography. The same is provided for by Section 16 paragraph 3 Private Radio Act (*PrRG*). According to present interpretation of law, the prohibition of pornography relates to the criminally relevant concept of pornography defined in the Pornography Act (*Pornographiegelgesetz*), cf, e.g., the decision issued by the regulatory authority KommAustria, KOA 2.100/03-49 of 5 November 2003).

In addition, under Section 10 paragraph 11 *ORF G*, any broadcasts which are harmful to the physical, mental or moral development of minor persons are prohibited. Concerning programmes which (only) impair the physical, mental or moral development of minor persons, Section 10 paragraph 12 *ORF-G* stipulates that the broadcasting company shall make sure, by choosing an appropriate broadcasting time or by other measures, that these programmes are not commonly seen or listened to by minor persons. Both provisions may relate to material which does not fall under the criminal concept of pornography.

The legal situation under the Private Television Act (*PrTV-G*) is comparable to that under the *ORF-G*. However, broadcastings which are mainly reduced to the "unreflected representation of sexual acts", or contain such elements, must, on top of that, be encrypted according to Section 32 paragraph 4 *PrTV-G*.

It must also be mentioned, that according to Section 14 paragraph 1 subparagraph 1 *ORF-G* and Section 37 subparagraph 1 *PrTV-G* advertisements may not injure human dignity. It can thus be assumed that – in addition to the already mentioned prohibitions – spots that make child pornography a subject of the advertisement in a way injuring human dignity are likewise inadmissible.

Article 10 paragraph 1

Austria has signed no bilateral or multilateral arrangements to strengthen international cooperation in criminal cases which are especially related to the offences described in the Protocol; however, it must be mentioned in this context that Austria is state party to several bilateral and multilateral arrangements on extradition and legal assistance in criminal matters which, at any time, are applicable also to the criminal offences described in the Protocol.

Article 10 paragraph 3 and 4

Child trafficking:

1) "Transnational Action against Child Trafficking" (TACT III) (EUR 350.000,-): Project against exploitation and abuse of children in Albania as well as for their protection and reintegration of trafficked children. Interventions are taking place on local levels in order to establish an effective child protection program.

2) "Call for proposals" for a project against trafficking in human beings in South-East Europe (EUR 378.984,-): Invitation for submission of applications for a two-year project which has the aim to support young women in Bosnia-Herzegovina making self-confident decisions.

3) "Call for proposals" for a project against trafficking in women and child trafficking in Albania (EUR 350.000,-): scope: granting rights of trafficked women, victims of white slavery and other high risk groups of human trafficking (like orphan) and enforcing access to preventive and protective measures, including reintegration. These

measures should also make contribution to strategies concerning protecting-systems of children and families in Albania.

4) Project of police cooperation between Austria and several countries of South-East Europe to fight trafficking in human beings (1.9 mln EUR): training schemes and development of capacities;

5) Programme for the protection of children and juveniles in Moldova: a training programme which serves indirectly also the purpose of protecting children from human trafficking. The programme represents a new and comprehensive approach in the protection of especially vulnerable children and juveniles in the republic of Moldova (fight against institutionalisation, disregard and abuse of children and adolescents, trafficking in human beings, poverty and poor education).

Child prostitution:

Submission of the international NGO ECPAT/Respect: exposition, established in 2005, touring across several countries; sensitisation of the tourism industry.

Two projects are carried out. They are committed to lobbying for a "Code of Conduct" against child prostitution in the tourism; one project in Kenya and one on the Black Sea coast (Romania / Bulgaria):

1) Measures against the sexual abuse of children and adolescents in the tourism in Kenya, financial support provided by the Austrian Development Cooperation and Cooperation with Eastern Europe (OEZA) in the tune of 73.000 EUR (total project costs: 146,060.50 EUR)

2) Implementing a Code of Conduct against child trafficking and child prostitution, financial support provided by OEZA in the tune of 61.000 EUR (total project costs: 123,295.84 EUR).