

With regard to the topic “**Crimes against humanity**”, the Austrian delegation commends the Special Rapporteur Sean Murphy for his second report on this topic and extends its thanks to the Secretariat for the memorandum on existing treaty-based monitoring mechanisms that may be of relevance to the future work of the Commission.

The draft articles adopted provisionally this year by the Commission deal with some fundamental issues, such as jurisdiction and other matters that are of general significance. Although my delegation concurs with the majority of these draft articles, they nevertheless raise some points to be mentioned:

Before doing so, let me express my delegation’s support for the proposal made by Iceland on behalf of the Nordic states that, following the example of the Rome Statute, draft article 5 should explicitly exclude the imposition of the death penalty.

We support draft article 5 on “criminalization under national law”. With regard to its paragraph 4, which follows the wording of Article 33 of the Rome Statute on the International Criminal Court by stipulating that orders of a government or of a superior do not exclude criminal responsibility, we are of the view that such orders should be considered in the context of provisions on mitigating circumstances, to be elaborated at a later stage. We understand paragraph 26 of the commentary, which refers to “orders from a superior to serve as a mitigating factor at the sentencing stage”, to point in this direction.

Draft article 5 paragraph 7, which deals with the criminal and other liability of legal persons, leaves it to individual states to establish such a liability or not. This approach deviates from the Rome Statute, but we support the more flexible approach of the Commission. However, this paragraph must not be understood as affecting state immunity. *We wonder why the word “liability” was used instead of the word “responsibility” and would have appreciated some explanation of this in the commentary. We also wonder why in this particular context the draft article exceeds the framework of criminal law and ventures into the fields of civil and administrative law.*

According to draft article 6 paragraph 1 (a) on the establishment of national jurisdiction, a state has to establish its jurisdiction *inter alia* “when the offence is committed in any territory under its jurisdiction”. Under draft article 4, however, a state has to take “effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control”. We do not see a good reason for this discrepancy. Although paragraph 6 of the commentary on draft article 6 explains that the term “jurisdiction” has to be understood as also including *de facto* control, it seems that a harmonization of the wording, explicitly referring to “jurisdiction or control”, is necessary in order to avoid misunderstandings. However, we do not believe that draft article 4 should be revisited, as it is suggested in paragraph 6 of the commentary on draft article 6. Rather, the expression “jurisdiction or control” should be used throughout the draft articles, which would be in conformity with the use of this expression in human rights instruments.

Draft article 6 paragraph 3 should not be understood as permitting “the exercise of any criminal jurisdiction established by a State in accordance with its national law” in breach of applicable rules of international law.

A problem regarding the term “jurisdiction” arises also in connection with draft article 7 on “investigation”, according to which a state has to commence investigations “whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction”. In addition to the problem of “jurisdiction or control” mentioned before, there is also the question whether a state should not also be obliged to investigate if a crime was committed outside the territory under its jurisdiction, for example on a ship flying its flag or on board of an aircraft registered in it. A related question concerns the obligation to investigate if suspects are present on the territory of a state or if crimes have been committed by nationals as staff members of peace-keeping operations. *The resolutions of the General Assembly regarding the criminal accountability of United Nations officials and experts on mission, such as Resolution 69/114, encourage states to take the necessary measures in cooperation with the United Nations, which include investigation. To extend the obligation to investigate in this draft article to cover peacekeepers would enhance the objective of this General Assembly Resolution.*

Draft article 9 on “Aut dedere aut judicare” refers also to the surrender to international criminal tribunals; it is our understanding that these tribunals also comprise hybrid courts or tribunals that combine both national and international elements. My delegation concurs with the view expressed in the commentary that a reference to the recognition of the jurisdiction of the relevant international tribunal prior to the surrender of the suspect is unnecessary. The denial of the international tribunal to accept the suspect would trigger the obligation of the surrendering State to prosecute.

Draft article 10 on “fair treatment of the alleged offender” contains an inconsistency: Paragraph 1 addresses any person against whom measures are being taken, whereas paragraph 2 only relates to “any such person that is in the custody in a State that is not of his or her nationality”. It is our understanding that the rights of the persons mentioned in paragraph 2 are additional to those mentioned in paragraph 1. Moreover, in the interest of clarity, the reference in paragraph 3 to “laws and regulations of the States” should be reformulated to also include international obligations, since the rights in paragraph 2 are also based on international law.