

With regard to the topic "**Crimes against humanity**" Austria commends the Special Rapporteur, Mr. Sean Murphy, for his extensive third report addressing such important issues as extradition, mutual legal assistance, monitoring mechanisms and dispute settlement. We congratulate him and the Commission on the elaboration of the whole set of draft articles and commentaries. Now the text is completed in first reading and will be submitted to states for their written comments. Austria intends to provide such comments in time.

Already today and speaking generally, I would like to express Austria's support for the elaboration of an instrument, preferably a convention, regarding extradition and mutual legal assistance in cases of crimes against humanity. However, we all are also aware of other relevant international initiatives concerning legal cooperation with regard to the prosecution of atrocity crimes. In order to avoid duplication, the Commission should be fully informed about these initiatives to be able to take them into account.

Permit me nevertheless already now to turn to some specific comments regarding the new draft articles 11 to 15 and the annex. Concerning draft article 11 on the "Fair treatment of the alleged offender", Austria has doubts relating to the present drafting of para. 3 addressing the relationship between the rights of persons in prison, custody or detention and the laws and regulations of the state exercising its jurisdiction. Para. 2 defines the rights of these persons, such as the right to communicate without delay with the nearest representative of their state of nationality. Para. 3, on the other hand, states that such rights "shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended". We are aware that this wording is based on Article 36(2) of the Vienna Convention on Consular Relations as well as on other important international instruments; nevertheless, practice has shown that this wording does not exclude an interpretation according to which national laws and regulations might prevail over the rights of the detainees. Therefore, para. 3 should either be deleted or replaced by a clear rule protecting the rights of the detainees against restrictions based on national law, such as, for instance, that the national laws and regulations "must enable the full exercise of the rights accorded under paragraph 2".

Concerning draft article 13 on "Extradition", Austria interprets para. 6 stating that "[e]xtradition shall be subject to the conditions provided for by the national law of the requested State" as allowing states to refuse the extradition of their own nationals if such refusal is required by their national law. In Austria, constitutional law excludes the extradition of Austrian nationals, apart from extradition in certain cases governed by European Union law. However, non-extradition in a case of a crime against humanity would not lead to impunity, as such crimes are now punishable in Austria under the specific provision of Section 321a of the Criminal Code, introduced in 2016.

As explained in the ILC Commentary to draft article 13(6), other conditions an extradition could be made dependent upon are the exclusion of the death penalty or the respect for the rule of speciality, according to which a trial can be conducted in the requesting state only for the specific crime for which extradition was granted. However, according to the ILC Commentary, certain grounds for the refusal of an extradition based on national law are impermissible, such as the invocation of a statute of limitation in contravention of draft article 6(6) or other rules of international law. It would be interesting to know which other grounds for an impermissibility of a refusal of an extradition based on national law the Commission had in mind, since it mentioned the statute of limitation contravening international law as the only example.

Concerning the ILC Commentary to draft article 13(9), which excludes the obligation to extradite if extradition would lead to a prosecution or punishment based on discrimination, we have doubts relating to para. 26 of that Commentary. The penultimate sentence of this paragraph states that "Third States that do not have such a provision explicitly in their bilateral [extradition] agreements will have a textual basis for refusal if such a case arises." This sentence seems to imply that the multilateral agreement to be concluded could affect the scope of application even of future bilateral extradition treaties. Did the Commission assume that the multilateral agreement would always prevail over future bilateral treaties?

With regard to draft article 14 regarding "Mutual legal assistance", Austria wishes to underline that mutual legal assistance has to be rendered with due respect for the national laws and regulations concerning the protection of personal data. The "without prejudice to national law-clause" of draft article 14(6) offers the basis for such an interpretation.

Although draft article 15 on "Settlement of disputes" follows traditional patterns of dealing with this subject, we wonder, however, why para. 2 does not set a time limit for the negotiations before a case can be submitted to the International Court of Justice? This omission could be used to unduly protract the settlement of a dispute. While the present text leaves the decision as to whether the condition of negotiations has been met or not to the International Court of Justice or to arbitration, a fixed time limit, such as a limit of six months, would undoubtedly facilitate the implementation of this provision.

As regards draft article 15(3), the time for making a declaration to opt out of compulsory dispute settlement should be specified. As in other conventions, it should be stipulated that such declaration may be made no later than at the time of the expression of the consent to be bound by the future convention.

As to the Annex relating to requests for mutual legal assistance where no bilateral agreement applies, we would like to state the following relating to point 8 of this Annex: In our view, mutual legal assistance may be refused not only if the request is not in conformity with the provisions of the draft annex, but also if it is not in conformity with the draft articles themselves.

Finally, I would like to reiterate Austria's understanding that the term "international criminal courts" used in these draft articles includes also hybrid courts.