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on the Work of its 69th Session

Cluster 1: Chapters I-V & XI (Crimes against humanity; Provisional application of treaties; Other decisions and conclusions of the Commission)

Statement by

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New York, 23 October 2017

In the interest of time I will deliver a shortened statement orally today, while recalling that the full version will be on record on the Papersmart Platform and will be submitted through the Secretariat for consideration by the ILC.

Mr. Chairman,

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.

Mr. Chairman,

The Austrian delegation commends the Commission for consolidating its work on the topic "**Provisional application of treaties**" by provisionally adopting draft guidelines 1 to 11 and the commentaries thereto. We also thank the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his continued work on this topic.

We welcome draft guideline 4 on 'Form of agreement' indicating the various ways in which provisional application may be agreed upon. However, we wish to point out that the agreement on provisional application by a separate treaty may have more stringent consequences than other forms of agreement on provisional application. This applies in particular to the termination of a provisional application.

We note and accept that draft guideline 6 addresses the "Legal effects of provisional application" which are, as the Commentary explains, the legal effects of the treaty applied provisionally and not the legal effects of the agreement to apply provisionally referred to in draft guideline 4. Draft guideline 6 states, however, that provisional application "produces the same legal effects as if the treaty were in force". While this is acceptable as a principle, it is not a principle without exceptions. The Commentary itself states that "provisional application is not intended to give rise to the whole range of obligations that derive" from a treaty in force, and that "termination and suspension" are not subject to the same rules as those applicable to treaties in force. We agree, but in that case one wonders if the generality in which draft guideline 6 refers to "the same legal effects" is not misleading.

This impression is only partly mitigated by the existence of a separate draft guideline 8 on termination, as this guideline does not address suspension at all and, as far as termination is concerned, only takes up the specific case addressed in Article 25(2) of the Vienna Convention on the Law of Treaties, namely termination of provisional application if a state notifies its intention not to become a party to the treaty. While this is one important example for the termination of provisional application, my delegation believes that other situations where provisional application may be terminated should also be considered in the draft guidelines, thereby going beyond Article 25(2) of the Vienna Convention. For example, it may be necessary, for political reasons, to terminate the provisional application of a treaty without definitely expressing the intention never to become a party to it. The Commission itself seems to be of the view that draft guideline 8 does not indicate the only possibility of a termination of a provisional application, as it mentions in the Commentary that this provision was adopted without prejudice to other methods of terminating provisional application. This should be reflected not only in the Commentary, but also in the text of the guidelines themselves.

We support, wherever possible, a flexible approach to the termination of a provisional application of a treaty. However, where a flexible approach is possible and more stringent rules do not apply, it would be advisable to provide for notifications and notice periods to ensure a minimum of stability of provisionally applied treaty relations. For this reason we regret the decision of the Commission not to include such safeguards in its current draft guidelines.

Mr. Chairman,

The Austrian delegation has taken note of the fact that one of the two topics for further deliberation by the ILC which were contained in the annexes to the Commission's report of 2016 was selected by the Commission to be dealt with as a new topic, namely the topic "Succession of States in respect of State Responsibility" which I shall address under Cluster III of this debate. However, the Austrian delegation would also like to draw attention to the second topic that had been presented in that report, entitled "**Settlement of international disputes to which international organizations are parties**", on which Sir Michael Wood had submitted an outline.

As a host state to many international organisations, Austria is particularly interested in this topic and would highly welcome if the Commission decided to appoint a Special Rapporteur who would venture into this field. This is a field of utmost practical importance, in particular if it were not limited to disputes and relationships governed by international law. As we all know, disputes with private parties, governed by domestic law, are most relevant in practice and have raised important questions. These questions include the scope of privileges and immunities enjoyed by international organisations and the requirement of adequate dispute settlement mechanisms. The investigation of this broad subject by a Special Rapporteur would continue the work of the Commission already performed in the field of the law of international organisations.

Mr. Chairman,

Turning now to the topic "**General principles of law**", which the Commission recommended this year for inclusion into its agenda, Austria favours the consideration of this topic by the Commission. The source of international law "general principles of law" is, for the time being, subject to the most divergent interpretations. Therefore, it needs urgent clarification. The Commission is undoubtedly the most appropriate body to embark on this issue.

It is widely acknowledged that the "general principles of law" mentioned in Article 38(1)(c) of the Statute of the International Court of Justice, which have already been recognised in the Hague Rules of 1899 and 1907, are an autonomous source of public international law. According to Sir Robert Jennings and Sir Arthur Watts, these principles are based on the application in the international sphere of "the general principles of municipal jurisprudence, insofar as they are applicable to relations of states".[1] *In other words, a rule qualifies as a general principle of law (a) if it is applied in the main systems of national law and (b) if it is "transposable" into international law.*

Irrespective of the vagueness of the substance of the general principles of law, they have to be clearly distinguished from the general principles of international law although they are frequently treated as identical. Whereas the general principles of international law are general normative concepts created by customary international law or by treaties, the general principles of law originally reside in the legal framework of national law and acquire their nature as sources of international law only through acknowledgment as such by the states.

The paper on general principles of law, prepared by ILC member Vázquez-Bermúdez and annexed to the Commission's report, refers to the view of Tunkin, who advocated an

[1] Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law, 9th ed., Longman, London, 1992, p. 37 (footnote omitted).

interpretation of principles of law as principles of international law. This view resulted from the Soviet ideology of international law which rejected any deduction of rules of international law from rules of national law, since, according to this view, the law of states with different social structures could not coincide and thus could not develop common legal principles. We do not believe that future work of the Commission on general principles of law should be based on this outdated view which most countries, including my own, do not share.

Tunkin belonged to those who deducted from the introductory sentence of Article 38 of the ICJ Statute a meaning of principles of law that corresponds to principles of international law. One has to point out, however, that the insertion of the particular reference that ICJ decisions were to be taken "in accordance with international law" into the chapeau of Article 38 of the ICJ Statute was only designed to explain that the sources of law to be applied by the Court are sources of international law.

The uncertainties inherent in the notion of general principles of law have impeded the ICJ to resort to these principles explicitly, which makes a clarification by the Commission most welcome. In this respect, it would first be necessary to define general principles of law, including the notion of principles as such, and to distinguish them from other concepts, such as rules or norms. Moreover, the Commission would have to address the origin of general principles of law, the method of their identification, their nature, their functions and their limits.

In sum, my delegation is convinced that this work of the Commission on general principles of law will substantially contribute to the clarification of a vague, but important source of international law.

We note that the Commission's report also contains a proposal for a further new topic "**Evidence before international courts and tribunals**" and a paper explaining the possible scope of this topic. Permit me to say that Austria is rather reluctant to support specific work of the Commission on this topic, as we believe that it is for the international courts and tribunals themselves to assess the value of evidence and that for this purpose no general rules elaborated by the Commission are necessary.