

**Austrian comments on the draft revised General Comment No. 1 (2017) on the implementation of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in the context of Article 22 (CAT/C/60/R.2)**

Austria welcomes the opportunity to provide comments on the draft revised General Comment on the implementation of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In particular it would like to submit the following comments regarding Para. 20 of the draft relating to the use of diplomatic assurances which reads as follows:

*"The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported are contrary to the principle of "non-refoulement", provided for by article 3 of the Convention, and they should not be used as a loophole to undermine that principle, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State."*

As explained in 2010 in Austria's written reply to the list of issues prior to the examination of the Fourth and Fifth Periodic Report of Austria on the implementation of CAT<sup>1</sup>, Austria is firmly committed to the absolute prohibition of torture and the full respect for the obligations of states in relation to the question of extraditions, in particular under Article 3 of CAT and Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which clarify that an extradition to a third country is permissible only when it can be ascertained that the person to be extradited would not be subjected to torture or inhuman or degrading treatment. Consequently, any concern that a person to be extradited might be subjected to torture or inhuman or degrading treatment cannot be compensated by diplomatic assurances.

This position of Austria equally applies to all other forms of transfer of a person to another state referred to in Article 3 of CAT.

In its judgment of 15 April 2015<sup>2</sup>, the Austrian Supreme Court confirmed, in consideration of the relevant case law of the European Court of Human Rights (ECtHR), that diplomatic assurances are insufficient means to guarantee adequate protection against torture or ill-treatment if objective sources indicate that methods contrary to the ECHR are being used by the receiving state. As a consequence, the Supreme Court explicitly ruled out the acceptance of diplomatic assurances in such cases.

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<sup>1</sup> CAT/C/AUT/Q/4-5/Add.1, Para. 56.

<sup>2</sup> 13 Os 27/15t.

In other cases, however, where this is envisaged by international or European law, Austria uses diplomatic assurances, e.g. to exclude the application of the death penalty, in accordance with Article 11 of the European Convention on Extradition or other extradition treaties. Diplomatic assurances are also used to establish specific conditions to be respected by the receiving state: In the case of extraditions this may relate to the assurance that a retrial takes place before an ordinary court as foreseen in Article 3 of the Second Additional Protocol to the European Convention on Extradition. In other cases of transfer of persons to another state, this may relate to assurances that persons who are in a particularly vulnerable situation would be received in conditions compatible with international obligations, e.g. concerning medical care or adequate housing.

In accordance with the ECtHR ruling in the case of *Othman (Abu Qatada) vs. The United Kingdom*<sup>3</sup>, Austria considers that diplomatic assurances can, in certain cases where objective sources do not indicate that methods contrary to Article 3 ECHR are being used by the receiving state, be a legitimate way to ensure adequate protection against the risk of ill-treatment. It agrees with the ECtHR ruling that the extraditing state has an obligation to assess the quality of assurances given and to determine whether, in light of the receiving state's practices, they can be relied upon. According to the ECtHR this is the case if, inter alia, the following criteria are fulfilled:

- the assurance is specific and not general and vague
- the person who has given the assurances can bind the receiving state
- if the assurances have been issued by the central government of the receiving state local authorities can be expected to abide by them
- there are long and strong bilateral relations between the sending and receiving states and the receiving State has followed diplomatic assurances in similar cases
- the compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers
- there is an effective system of protection against torture in the receiving state, it is willing to cooperate with international monitoring mechanisms including non-governmental organizations and it is willing to investigate allegations of torture and to punish those responsible.

Austria fully agrees that diplomatic assurances must not be used as loopholes undermining the principle of *non-refoulement* where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment in the state to which she or he is expelled, returned or extradited. However, the diplomatic assurances could be a legitimate way to ensure adequate protection against or the prevention of the risk of ill-treatment contrary to Article 3 CAT if they comply with the strict requirements set out by the

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<sup>3</sup> Application No. 8139/09 of 17 January 2012.

ECtHR and can be effectively implemented and monitored. Austria considers, therefore, that generally excluding diplomatic assurances as being contrary to Article 3 of CAT under all circumstances would be too restrictive. Consequently, it would welcome the following rewording of Para. 20 of the draft revised General Comment which takes this position into account:

*"The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported are contrary to the principle of "non-refoulement", provided for by article 3 of the Convention, **if in that specific case** there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State."*