



## **Explanatory Report to the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes**

Strasbourg, 25.I.1974

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I. The European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, drawn up within the Council of Europe, by the European Committee on Crime Problems, and adopted by the Committee of Ministers at its 222nd meeting on 30 May 1973, was opened for signature by the member States of the Council of Europe on 25 January 1974.

II. The text of the explanatory report prepared on the basis of that committee's discussions and submitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Convention although it may facilitate the understanding of the Convention's provisions.

### **I. Introduction**

1. In January 1965 the Assembly adopted Recommendation 415 (1965) on statutory limitation as applicable to crimes against humanity. It recommended that the Committee of Ministers should:

“(a) invite member governments to take immediately appropriate measures for the purpose of preventing that, by the application of the statutory limitation or any other means, crimes committed for political, racial and religious motives before and during the second world war, and more generally crimes against humanity, remain unpunished;

(b) instruct a Committee of Governmental Experts to draw up a Convention ensuring that crimes against humanity shall not be subject to statutory limitation.”

2. The Committee of Ministers considered this Recommendation at the 139th, 140th and 141st meeting of the Ministers' Deputies in 1965. With regard to paragraph (a) of the operative part of the Recommendation, the Deputies found that various member States had already adopted measures of the kind indicated by the Consultative Assembly.

The Committee of Ministers communicated this information in their Seventeenth Statutory Report to the Consultative Assembly for 1965 and also pointed out that statutory limitation did not exist in certain member States (Doc. 2046, Chapter IX, para. 242).

With regard to paragraph (b) of the operative part of the Recommendation, in view of the fact that certain United Nations organs had this item on their agenda, the Ministers decided to await the outcome of the work undertaken by the United Nations in this field.

3. On 30th September 1966, Mr. Housiaux, a representative in the Consultative Assembly put Written Question No. 123 to the Committee of Ministers asking, among other things, whether it still took the view that the work proposed in paragraph (b) of the operative part of Recommendation 415 should await the completion of the work of the United Nations.

In their reply to this Written Question (Doc. 2182 of 24th January 1967), the Committee of Ministers summarised the work undertaken by the United Nations in this field up to that date, and concluded that the United Nations appeared to be dealing successfully with the matter and that therefore since the object in view was the establishment of a rule of general international law, it seemed preferable that the negotiations should take place in the wider framework of the United Nations rather than being limited to the member States of the Council of Europe.

4. On 30th January 1968, Mr. Silkin, a representative in Consultative Assembly and others presented Written Question No. 128 which reads as follows:

“The undersigned ask the Committee of Ministers to inform them about the present state of implementation of Recommendation 415 on statutory limitation as applicable to crimes against humanity and, in particular, to indicate:

(i) as regards paragraph (a) of the Recommendation, the present state of measures adopted by member States of the Council of Europe and the precise nature of these measures;

(ii) as regards paragraph (b) of the Recommendation, what action the Committee of Ministers is now prepared to take, in view of the urgency of the matter and taking into account the fact that the work of the United Nations in this field has not made the progress envisaged in Resolution 1158 of the Economic and Social Council of the United Nations, on which the reply given by the Committee of Ministers to the Written Question No. 123 signed by Mr. Housiaux in January 1967, was based.”

5. As regards point (i) of this Question, the Committee of Ministers, in its reply, referred to the various provisions made in the domestic law of various member States and communicated the information available on this subject to the Consultative Assembly.

As to point (ii), the Committee of Ministers enumerated a number of activities pursued by the various organs of the United Nations, and in the light of them expressed the following opinion:

“From the above it is clear that negotiations for the establishment of rules of international law as regards the applicability of statutory limitation to war crimes and crimes against humanity are fairly well advanced in the framework of the United Nations. The high priority given to the matter, both by the UN General Assembly and by the UN Commission on Human Rights, makes it reasonable to hope that it will be possible to arrive, in the near future, at a solution of this problem.

In these circumstances, the Committee of Ministers is still of the opinion that it is preferable that this matter should be dealt with by the United Nations rather than by the Council of Europe.”

The Committee of Ministers continued in its reply to give the reasons for that view (Doc. 2409, p. 5). The first it gives is “it is clearly preferable to establish, if possible, a rule of “international law of general application” rather than a text elaborated by the Council of Europe.”

Secondly, the Committee of Ministers pointed out that the preparation of a Convention within the framework of the Council of Europe would inevitably lead to a duplication of work between the two organisations and, moreover, would place an unnecessary burden on the legal department of national governments.

6. In October 1966 the efforts undertaken in this field by the United Nations led to the adoption of a draft Convention in the Third Committee of the United Nations General Assembly (see Doc. AS/Jur (20) 21), which was itself adopted in the United Nations' General Assembly in December 1968 ("Convention on the non-applicability of statutory limitation to war crimes and crimes against humanity"). When it came to the vote in the General Assembly, only one member State of the Council of Europe (Cyprus) voted in favour of the Convention, whereas one member State of the Council of Europe (the United Kingdom) voted against and the other member States abstained (the Federal Republic of Germany and Switzerland are not Members of the United Nations).

The major objections formulated by the governments of certain member States of the Council of Europe with regard to the United Nations Convention are its lack of precision, particularly regarding the definition of crimes against humanity, and the fact that the UN Convention covers all war crimes irrespective of their degree of gravity; that it refers (in the English text) to "statutory or other limitations"; and that it seems to impose on the Contracting States an obligation to make punishable in their domestic law all the violations mentioned in the Convention. Moreover, the UN Convention would apply retroactively even to crimes where the period of statutory limitation had already expired at the time of its entry into force. Finally, there was the fact that it includes matters which do not have their proper place in a Convention whose aim consists simply of dealing with non-applicability of statutory limitation to war crimes and crimes against humanity.

7. In view of the developments within the United Nations, the Chairman of the Legal Affairs Committee of the Consultative Assembly, Mr. Silkin, presented a motion on 20th September 1968 in favour of a Recommendation. Its operative part proposed that the Committee of Ministers should invite all member States of the Council of Europe to ensure that statutory limitation should not apply to crimes against humanity, and for this reason to take appropriate measures on three levels: first, the national level; second, within the framework of the United Nations; and third, if the United Nations were not to be successful, also within the framework of the Council of Europe.

8. In view of the fact that the United Nations' Convention was not accepted by most of the Council of Europe's member States, the Consultative Assembly adopted, on 30th January 1969, Recommendation 549 (1969) in which it proposes that the Committee of Ministers:

"(a) invite member governments to take immediately appropriate measures for the purpose of preventing that, by the application of the statutory limitation or any other means, crimes committed for political, racial and religious motives before and during the second world war, and more generally crimes against humanity, remain unpunished;

(b) instruct a committee of governmental experts to draw up as soon as possible a European Convention on the non-applicability of statutory limitations to crimes against humanity, taking into account the criticism raised against the United Nations Convention by the representatives of several European States."

9. Following an examination of this Recommendation, during its meeting in June 1969, the Committee of Ministers decided:

"to include the subject of statutory limitation as applicable to war crimes and crimes against humanity in the intergovernmental Work Programme, for examination by the European Committee on Crime Problems. This examination should begin in 1970".

10. According to this decision, the ECCP set up a Working Party which undertook, in the light of the deliberations of the Committee of Ministers, a study on the feasibility of a European Convention, taking as its starting point an examination of the United Nations Convention.

11. The Working Party, composed of experts from Austria, Cyprus, France, the Federal Republic of Germany, Italy, the Netherlands, Norway and the United Kingdom met in Strasbourg from 11th-13th March 1970 and prepared a report on this question for the European Committee on Crime Problems. In this report, the Working Party concluded that a European Convention would be feasible, although it was for the Committee of Ministers to decide upon the desirability of the elaboration of such a Convention. The Working Party outlined the problems to be solved, such as the definition of crimes and the retroactivity of the principle of non-applicability of statutory limitation. It also emphasised in paragraph 8 of its report the importance of examining the problems concerning extradition and jurisdiction and the various forms of complicity in war crimes and crimes against humanity.

It proposed that a Convention should apply:

- (a) to violations of the laws of war specified in the 1949 Geneva Conventions;  
to offences specified in the United Nations Genocide Convention;  
to any other offence of special gravity specified as a war crime by international law or regarded by the States as a crime against humanity;
- (b) equally to statutory limitation of proceedings and to statutory limitation of penalties;
- (c) only to periods of limitation not expired by the time of its entry into force.

12. When considering this report, the ECCP decided that it was not appropriate for it to express any opinion on the desirability of a European Convention. In addition, it discussed the extent of retroactivity. It took the view that a Convention should provide for a possibility of enabling the Contracting States to make reservations regarding the principle of non-applicability of statutory limitation in these cases where the period of prescription had not expired at the time of the entry into force of the Convention.

13. The report of the Working Party and the opinion of the ECCP on it were discussed by the Committee of Ministers at the 192nd meeting of the Ministers' Deputies. Regarding retroactivity, some representatives emphasised the need for avoiding any provision that would entitle States to restrict the application of the Convention to those cases where the period of prescription had not expired at the time of its entry into force. The Committee of Ministers authorised the EECPC:

- to draft a Convention on the subjects proposed by the Working Party with the exception of those mentioned in paragraph 8 of its report;
- to set up a Sub-Committee of not more than eight members for the first stage of the work.

14. The ECCP entrusted Sub-Committee No. XV with this task. This Sub-Committee met in Strasbourg from 20th-23rd April 1971 and elaborated a preliminary Draft European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes. The Sub-Committee felt compelled to ask for the opinion of the ECCP, i.e. for the view of all the delegations represented therein, on two substantive questions which arose during its discussion on the definition of offences not subject to statutory limitation:

- (a) whether or not an act should be regarded as being “of a particularly grave character” for the purposes of the future Convention, if the consequences of that act were not foreseeable when it was committed;
- (b) whether or not the State having jurisdiction should explicitly be entitled to decide on the special gravity of an act which although also forbidden by another international instrument to which it is a Party, might, or might not, fall within European Convention.

The replies by the various national delegations to those questions were communicated to the Sub-Committee, at its second meeting.

15. The Sub-Committee met in Strasbourg from 11-15 October 1971 for its second meeting. It proceeded to a second reading of the preliminary draft Convention and adopted the text reproduced hereafter in Part B of this document. Moreover, it established and adopted the draft explanatory report thereon.

16. The ECCP, at its XXI plenary meeting held in Strasbourg from 24-28 April 1972, approved both the draft Convention and the explanatory report thereon and decided to transmit them to the Committee of Ministers.

## II. Commentary on the text of the draft Convention

### Preamble

1. The Preamble contains four paragraphs, each of them indicating what kind of considerations and motives played a particular role in the elaboration of this Convention.

2. Human dignity is the guiding principle and overriding objective for the elaboration of this Convention. This is set out in the first paragraph of its Preamble. According to this provision, human dignity as a fundamental value is to be safeguarded as well in time of war as in time of peace.

The second paragraph of the Preamble states that crimes against humanity and the most serious violations of the laws and customs of war constitute a serious infraction of human dignity. Recommendation 549 of the Consultative Assembly<sup>1</sup> referred only to crimes against humanity. Nevertheless, the Committee of Ministers, when it considered this recommendation, decided that consideration should be given to the non-applicability of statutory limitation to war crimes as well as to crimes against humanity. The Convention, therefore, deals with the non-applicability of statutory limitation to both crimes against humanity and war crimes. (The term “war crimes” in this report is not used in a restricted sense which would confine it to violations of the rules applicable to a declared war; but it includes violations of the humanitarian law in armed conflict and occupation, unless, of course, the international instrument concerned is restricted to a declared war.)

3. Concern for the protection of human dignity inevitably leads to concern for the punishment of any attack on human dignity in time of war and in time of peace.

The purpose of this Convention is “to ensure that the punishment of those crimes is not prevented by statutory limitations”. For this reason, both the prosecution of those offences, and the enforcement of the sentences i.e. the punishment imposed therefore, must be barred from statutory limitation. Paragraph 3 of the Preamble makes this clear.

4. Paragraph four of the Preamble refers to the Statute of the Council of Europe and, thus, indicates the wider context within which this Convention is concluded and its general goal. It is stated here that in order to achieve a greater unity between the member States of the Council of Europe, it is essential to promote among them a common standard on the non-applicability of statutory limitation.

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(1) Supra, I. para. 8.

## Article 1

5. The Sub-Committee dealt principally with the question of the definition of the offences to which a Convention should apply. Such definition implies the necessity to stipulate with sufficient precision the offences to which the Convention would be applicable. There is also the possibility of a future enlargement of the concept of war crimes and crimes against humanity in international law.

(a) As to the necessity for precise definition, various possible solutions were considered:

(i) There have been various definitions of war crimes for instance in the Charter of the Nurnberg International Military Tribunal and by the United Nations' International Law Commission. The Sub-Committee considered that emphasis should be placed on the element of particular gravity which for it was the factor which justified a departure from the rule of statutory limitation, and those attempts did not lay sufficient stress on that element. The Sub-Committee considered whether there would be advantage in making an exhaustive list of the gravest war crimes for the purpose of the Convention envisaged. However, it came to the conclusion that there was no purpose in establishing a new list of concepts or offences which might not accord with those already recognised in international law and that the best course was to define the offences by reference to what was already established in international law.

(ii) The definition of crimes against humanity did not raise particular problems. The crimes listed in the United Nations' Convention on the Prevention and Punishment of the Crime of Genocide were considered to be all of sufficient gravity to justify a departure from the rule of statutory limitation. Moreover, the desire to keep to an already existing definition in international law could best be met by making a reference to this Genocide Convention.

(b) As to the desirability of allowing room for a further enlargement of the concept of war crimes and crimes against humanity, provision has been made to ensure that in the future other crimes of the same kind and gravity could be covered by this Convention.

8. The first sentence of Article 1 states that "a State Party to the present Convention undertakes to adopt any necessary measures to secure that statutory limitation shall not apply...". This provision makes clear what kind of obligation the Convention imposes on the Contracting States. The States Parties are under an obligation to make sure that in their domestic law there is no statutory limitation for certain offences already punishable in their law and specified in the Convention. It was pointed out, on the one hand, that the Convention did, thus, not impose any particular obligation on States which do not know of the principle of statutory limitation in their domestic law. On the other hand, the Convention does not itself impose on States the obligation to make punishable under their domestic law any of the offences referred to in Article 1.

As has already been pointed out above, statutory limitation includes both the prosecution of the offence and the enforcement of the sentence imposed therefore.<sup>1</sup>

7. Article 1(1) provides that the crimes against humanity specified in the UN Convention on Genocide be exempt from statutory limitation. It has already been pointed out that the Sub-Committee considered all the crimes referred to in that Convention to be of sufficient gravity, particularly by reason of the intentional elements inherent in the definition of genocide, to justify a departure from the rule of statutory limitation.

<sup>(1)</sup> Supra, II. para. 3.

8. Article 1(2)(a) provides that statutory limitation should not apply to crimes specified in certain provisions of the 1949 Geneva Convention when the specific violation is of a particularly grave character by reason of its factual and intentional elements or of the extent of its foreseeable consequences.

In making a reference to these articles in the Geneva Convention (as in the reference to the violations referred to in Article 1(2)(b) – see paragraph 9 below), the majority of the Sub-Committee considered that it was necessary to introduce the requirement of special gravity in determining the offences which should be exempt from the principle of statutory limitation. Thus, the provision reproduced was adopted, notwithstanding the full awareness of the undeniable difficulties which the interpretation of the notion of an offence of special gravity represented. The solution put forward was considered, however, to be preferable to any other theoretically possible solution.

Also already mentioned in the historical introduction, the question arose whether the crimes could be of special gravity by virtue of the extent of their consequences or only by virtue of the extent of their foreseeable consequences. This question was referred to the national delegations of the European Committee on Crime Problems. The text, as reproduced, was adopted as a result of the preference of the majority. It was however agreed in this respect that the problem of whether or not in a given case the consequences of an act were “foreseeable” was to be solved by the application of an objective standard.

9. Article 1(2)(b) refers to violations of comparable provisions of international law of war not specifically dealt with in the 1949 Geneva Conventions mentioned in Article 1(2)(a). It appeared, indeed, to the Sub-Committee that those Geneva Conventions were exclusively concerned with the protection of certain aspects of the law of war (as set out, for instance, in the 1899 and 1907 The Hague Conventions) not covered by the 1949 International Red Cross Conventions.

The Sub-Committee considered that also as regards those offences it was essential that they were of a particularly grave character in order to justify in a specific case their exemption from the principle of statutory limitation.

10. As it could not be excluded that in the future other crimes of a comparable nature would be established in international law, or that the concept of war crimes (as defined in para. II. 2 above) or crimes against humanity would change, the possibility of a future enlargement was taken into consideration as being very likely. This led to the insertion of Article 1(3). In order to be covered by the principle of non-applicability of statutory limitation the new crimes should also be of a comparable nature as those referred to in paragraph (1) or (2) of Article 1. This paragraph provides an option for the State concerned of deciding whether the Convention shall extend to a war crime or a crime against humanity which may be established in future international law. Provision is made in Article 6 whereby States may make a declaration when they accept that the Convention extends to such a new crime.

## **Article 2**

11. According to the text of this article, exemptions to a statutory limitation apply to:

- offences committed after the entry into force of the Convention in the State concerned;
- offences committed before the entry into force of the Convention, provided that the statutory periods of limitation are not yet expired.

12. The second paragraph of this article takes account of the importance for certain States of the principle of statutory limitation. This would be affected were the Convention to be applied to offences where the period of statutory limitation had expired. The Sub-Committee therefore concluded that the Convention should only be applicable in cases where the statutory periods of limitation had not expired at the time of the entry into force of the Convention.

At the XIXth Plenary Session of the ECCP some experts considered that even such prolongation of the limitation period “would run counter to the fundamental legal principles recognised in the legislation of the States which they represented. If a Convention was to be drafted it should presumably provide the possibility for these States to make an appropriate reservation”. Within the Committee of Ministers (192nd meeting of the Ministers’ Deputies) it was, however, also stated that any provision allowing for such a reservation should be avoided.

13. The “Model Final Clauses of Agreements or Conventions” as approved by the Committee of Ministers (Ministers’ Deputies at their 113th meeting in 1963) are textually reproduced in the draft Convention i.e. Articles 3, 4, 5, 7 and 8 of the Convention subject to the modifications mentioned above in paragraphs 10 and 12 of the present Commentary. Those articles of the draft Convention, therefore, do not call for any special commentary.