COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

European Treaty Series - No. 124

Explanatory Report to the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations

Strasbourg, 24.IV.1986

I. The European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, drawn up within the Council of Europe by a select committee of experts under the authority of the European Committee on Legal Co-operation (CDCJ), was opened for signature by the member States of the Council of Europe on 24 April 1986.

II. The text of the explanatory report prepared by the select committee of experts and submitted to the Committee of Ministers of the Council of Europe, as amended and completed by the CDCJ, does not constitute an instrument providing an authoritative interpretation of the text of the Convention, although it might be of such a nature as to facilitate the understanding of the provisions contained therein.

I. Introduction

1. Since 1945 the number of international non-governmental organisations (NGOs) has increased considerably. The variety of their aims has also multiplied. However, NGOs, unlike associations, foundations or other private institutions having aims and activities limited to one country, pursue their activities in several countries, hold meetings in diverse places, employ personnel of various nationalities, etc., because of the international nature of their aims. All these "transnational" activities naturally create problems, and thus the difficulties encountered by NGOs are greater and more complicated than those faced by domestic associations, foundations or other private institutions. Although several attempts have been made to alleviate their difficulties at international level, there is as yet no international instrument in force.

2. The Council of Europe recognised, as early as in 1951, the importance of the NGOs, each in its particular field, and of their contribution to the activities of the Organisation. It therefore adopted a resolution providing for consultation of NGOs on matters within the competence of the Council of Europe. This was followed by guidelines for granting consultative status to a group of NGOs in 1954 and finally in 1972 the Committee of Ministers of the Council of Europe adopted Resolution (72) 35 containing new rules on the Council of Europe's relations with NGOs, irrespective of whether they enjoy consultative status or not.

3. The Committee of Ministers of the Council of Europe, being equally aware of the absence of any international instrument in force aimed at facilitating the activities of NGOs at international level, charged in 1981, on the proposal of the European Committee on Legal Co-operation (CDCJ), a committee of experts with an exploratory mandate to study the possibility of an intergovernmental action in this field at European level. Acting on a CDCJ report based on the committee's work, the Committee of Ministers charged a select Committee of experts on international non- governmental organisations (CJ-R-OR) with the task of drawing up an appropriate instrument on NGOs.

4. The CJ-R-OR held three meetings in 1982 and 1983 and submitted a draft European convention on recognition of the legal personality of international non-governmental organisations to the CDCJ for approval. This draft convention, after being approved with some amendments by the CDCJ, was adopted by the Committee of Ministers on 24 October 1985 and the Convention was opened for signature by member States in Strasbourg on 24 April 1986.

II. Commentary on the articles of the Convention

Article 1

5. This article sets out to define the conditions which en international non-governmental organisation must satisfy in order to qualify for the advantages conferred by the Convention.

These conditions, which have to be satisfied permanently as a fundamental requirement for continuing to benefit from the recognition provided for in the Convention are as follows:

a. Nature of the NGO

6. The NGO must be an association, a foundation or other private institution. In the law and practice of member States, an association means a number of persons uniting together for some specific purpose and which, when it has legal personality, also has separate identity to take legal action, to acquire property, to enter into contracts, etc. A foundation is an identified property devoted to a given purpose. The term "other private institution" is added to cover certain institutions with legal personality (for example, religious congregations, trade unions, mutual companies) which in certain States have aims and structures similar to those of associations but which are not legally considered as such.

7. The introductory sentence to Article 1 makes it a requirement that associations, foundations and other institutions should be "private". It follows that the Convention covers any entity which, whatever the legal nature of the provision of domestic law whereby an NGO is created (public law or private law in States where this distinction exists), does not exercise prerogatives of a public authority.

b. Non-profit-making aim of international utility

8. An NGO must not have a profit-making aim. This condition distinguishes NGOs from commercial companies or other bodies which exist to distribute financial benefits among their members. However, an NGO may make a profit, without altering its character, in connection with a given operation (for example, by renting a property, selling a publication, etc.) if that operation is to serve its non-profit-making aim. Furthermore, the aim of an NGO must be of international utility and not simply of national or local utility, that is, it must be of benefit to the international community. This would therefore exclude political parties and other political organisations whose aims and activities are centred on the domestic problems of a given country.

9. The Convention does not define the expression "international utility". However, the Preamble to the Convention affords a number of useful pointers to its interpretation, since it refers to "work of value to the international community", the requirement that it should contribute to achieving the aims and principles of the United Nations Charter and the Statute of the Council of Europe, and the scientific, cultural, etc., nature of the activity. This last-mentioned element also makes it easier to circumscribe the concept of "non-profit-making aim".

c. Establishment by an instrument governed by internal law

10. In order to be covered by the Convention, the instrument whereby an NGO is established must be governed by the internal law of a State. Consequently, organisations and institutions set up by treaties or other instruments governed by public international law are excluded. This provision is justified by the fact that such entities are subject to public international law and not to the domestic law of a contracting State, so that the problem of recognition by other states does not arise.

d. Activities carried on in at least two States

11. This is the logical consequence of the international nature of the non-profit-making aim of an NGO. The important point here is that there is no requirement for activities to be carried on in at least two Council of Europe member states, but simply in two different states. Therefore NGOs established in a member state and carrying out their activities in another State which is not a member of the Council of Europe (for example, to fight famine in a third world country) are not excluded.

e. Statutory office in a contracting State

12. Sub-paragraph *d* lays down two conditions for the NGO to benefit from the Convention: it must have its statutory office in a contracting State and the central management and control in that State or another contracting State. The first requirement is developed in Article 2, which is the fundamental article of the Convention (see paragraphs 13-15 below). The second requirement was adopted in order to protect the interests of persons concluding contracts with an NGO by ensuring that some of its assets are located in a contracting State.

Article 2

13. Paragraph 1 of the article lays down the rule of recognition as of right in all contracting States of the legal personality and capacity acquired in one contracting State. Consequently, no special procedure has to be followed to obtain recognition of legal personality.

The principle is that the law which governs the substance of the NGO's legal personality and capacity is the law of the State in which the statutory office of the NGO, as stated in the memorandum and articles of association, is situated.

14. The fundamental criterion of the statutory office was adopted for two main reasons. The first of these is the fact that in deciding on its statutory office the NGO manifested a wish to be subject to a given system of law, and that wish should be respected. The second reason is an essentially practical one, since this principle makes it possible to avoid any break in continuity in the legal personality of an NGO when its real seat changes because the newly elected president or secretary general resides in another State.

15. The principle of the statutory office does of course entail an important change in the law of States where the rules of private international law are based on the concept of the real seat.

Such a change is justified not only on practical grounds (to avoid situations in which the applicable law changes too often when the administrative seat changes) but also by the fact that the Council of Europe is a community where respect for human rights and democratic principles constitutes the unifying element, that is, a homogeneous legal grouping characterised by a measure of mutual recognition as between legal systems. In addition, the economic reasons underlying the principle of the real seat in the case of commercial companies are less important in the case of NGOs, which pursue non-profit-making aims.

16. The principle of the statutory office means that the NGO will have the same legal capacity and personality in all the contracting States as are required in the State where that office is located.

17. However, it was recognised that such a rule could not be an absolute one. In some States, important public interests are at the root of some restrictions or special procedures applied to, the exercise of rights which together constitute legal capacity. For example, some States require that authorisation be granted for the acquisition of real estate. These restrictions, limitations or special procedures laid down by domestic law for national entities analogous to foreign NGOs may be applicable to the latter by virtue of paragraph 2 when they are required by essential public interest.

It should be noted that these must be restrictions or limitations not on the legal capacity per se but on the "exercise" of the rights through which legal capacity manifests itself.

18. Furthermore, if a State lays down general limits applicable to all foreigners, an NGO which has obtained legal personality in another State will be subject to those limits.

Article 3

19. This article deals with the question of proof of the NGO's existence to be presented to the authorities of the State in which the NGO wishes to be recognised. When it seeks recognition in another State an NGO is to supply evidence that it has already been established in the State of its statutory office and enjoys legal personality and capacity.

20. It should be noticed that the State in which the NGO wishes to be recognised does not have to ascertain whether the legal personality has been validly obtained in accordance with the law of the State of the statutory office. The control should be directed only to see whether the proofs mentioned in Article 3 have been produced.

21. Since legal requirements and procedures to establish an NGO differ from State to State the proof to be supplied to this effect cannot be the same in all cases. Some States require registration, publicity, or an authorisation for the acquisition of legal personality or capacity, while in some States just a written agreement between founder members would suffice. In the former cases the production of registration, publicity or administrative authorisation would be enough, but in States where a simple agreement in writing of founder members is sufficient for the acquisition of legal personality it is necessary that such an agreement be supplemented by an additional act which is evidence that the agreement has in fact been concluded at a given time. The Convention requires for this purpose a certification by an authority which the State concerned will indicate at the moment of the signature or ratification of the Convention. This is intended to avoid confusion and possible refusal on the grounds of insufficient proof and thus facilitate and expedite the recognition.

22. In order to make it easier for NGOs to function, paragraph 2 provides for the possibility of a State establishing an appropriate form of "publicity". The advantages of such a system to an NGO are obvious, since it will be obliged to furnish the proof required by paragraph 1 only at the time when the "publicity" requirement is to be satisfied. Subsequently, it will be able simply to make use of the "publicity" as proof of its legal personality.

However, it should be noted that this "publicity" must not be constructive in character, that is, recognition of legal personality must not be made subject to the production of that "publicity".

Article 4

23. This article constitutes a guarantee clause designed to counterbalance the effects of automatic recognition of legal personality.

It should be noted that the application of this article is independent of the application of Article 1.

24. Article 1 (see paragraph 5 et seq. above) sets out the conditions which have to be satisfied in order to invoke the Convention. These conditions must be met not only at the time when the NGO is seeking recognition but also throughout the period of that NGO's activity in a State. Failure to satisfy any of these conditions automatically removes the right to invoke the Convention.

On the other hand, Article 4 can apply even if the conditions of Article 1 are met.

25. It was decided not to refer generically to the "public policy" (*ordre public*) of the State but, following the example of Article 11, paragraph 2, of the European Convention on Human Rights, to specify the grounds on which a refusal of the recognition of legal personality in another State can be based.

26. This was done in order to avoid using the expression "public policy" (*ordre public*) which can give rise to difficulties where NGOs are concerned. In some States the concept of public policy is twofold: the first meaning encompasses all binding national rules, while the second concept refers only to the fundamental legal principles of the legal system (this second concept being "public policy as defined in private international law").

The first concept would mean that an NGO which did not satisfy any binding provision of domestic law could not be recognised. If the second concept were employed, recognition could only be withheld for infringement of a fundamental principle of the legal system.

27. The concept of public policy as defined in private international law could of course have been used in Article 4, but it is not a concept known to the legal systems of all States. Consequently, the enumeration based on Article 11 of the European Convention on Human Rights has been adopted.

28. In order to complete the grounds contained in sub-paragraph *a*, which are of an internal character, sub-paragraph *b* introduces an international element.

It would in fact be unacceptable, in view of the ideals of peace and democracy enshrined in the Council of Europe's Statute, for an NGO to be accepted in a State where its activities would be legal when it is common knowledge that the aim of that NGO is to engage, either in the State in question or in another State, in activities which would damage the latter. This would run counter to the development of peace and good relations between States.