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**The Transnational Regulation of NGOs:**  
**Revisiting the Council of Europe Convention**  
**on Recognition of the Legal Personality of**  
**International Non-Governmental Organisations**

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# **The Transnational Regulation of NGOs: Revisiting the Council of Europe Convention on Recognition of the Legal Personality of International Non-Governmental Organisations**

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## **Executive Summary**

There is no doubt that non governmental organizations have risen to a position of prominence in the international community. This has been manifested in a number of ways, including their participation in global negotiations alongside states. However, there is a paradox in the status that NGOs have acquired: their establishment and operation is not based on any common rules, in their other words they are not regulated actors. Indeed, it could be argued that this lack of regulation was one of the main reasons allowing them to achieve this position of prominence. For more than a century now there have been attempts at a multilateral level to formulate a set of rules to regulate the way NGOs are created and operate and to address such issues as their legal personality and capacity. Most of these attempts have not culminated to the adoption of any regulatory frameworks.

The present paper examines and analyzes one such successful attempt: the Convention on Recognition of the Legal Personality of International Non-Governmental Organisations, which was negotiated under the auspices of the Council of Europe and was concluded in 1986. The Convention was quite pioneering at the time and even today it remains one of the few multilateral instruments to deal specifically with NGOs. Unfortunately, the Convention has been shunned by the Member States of the Council of Europe and, despite its innovative content and the fact that it allows NGOs to expand their activities to other states with a minimum of procedural hurdles, it is not a very well known treaty. The present paper is an attempt to revisit the Convention and raise awareness to its salient features and the role it could play in promoting, in a regulated manner, the activities of NGOs in Europe.

## Introduction - The Problem of the International Regulation of NGOs

There is no doubt that the award of the Nobel Peace Prize to the *Médecins sans frontières* in 1999 was a turning point not only in recognizing but also cementing the growing importance that nongovernmental organizations (NGOs) and especially international nongovernmental organizations (INGOs) had been playing on the international plane. The Nobel Prize was awarded "in recognition of the organization's pioneering [humanitarian](#) work on several continents".<sup>1</sup> What is of direct interest to this paper is the fact that the Nobel Prize was awarded to the *Médecins sans frontières*, which was not viewed as a mere group of individuals but rather as an 'organization'. In other words, the recipients were not, strictly speaking, the people making up what is known as *Médecins sans frontières* in the 20 countries where it maintains offices but to an 'organization'. And by 'organization' we mean the vehicle through which these individuals carry out their mandate acting in unison, with a fixed structure and with pre-determined internal rules and regulations.

The dominating aspect of an 'organization' in the case of this Nobel Prize winner comes out strong when reading the Award Ceremony Speech, which was given by Professor Francis Sejersted of the [Norwegian Nobel Committee](#) in Oslo on 10 December 1999. He said, among other things, that:

Médecins Sans Frontières blazed new trails in international [humanitarian](#) work. The *organisation* reserved the right to intervene to help people in need irrespective of prior political approval (emphasis added)<sup>2</sup>

Like *Médecins sans frontières* there exist nowadays many tens of thousands of other entities all over the world, which understand themselves as INGOs,<sup>3</sup> which share the same principles and ideals, which carry out similar activities and offer similar services, and which operate in comparable ways. At the same time, they have something else in common: their establishment, their functioning and their evolution

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<sup>1</sup> See "The Nobel Peace Prize 1999". *Nobelprize.org*. Nobel Media AB 2013. Web. 30 August 2013. [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1999](http://www.nobelprize.org/nobel_prizes/peace/laureates/1999). Indeed humanitarian work and the promotion of human rights are the two most widely recognizable areas of NGO activities, see, generally, M. Tornquist-Chesuiet, "NGOs and International Law" [2004] 3 *Journal of Human Rights* 253, D. Weissbrodt, "The Role of Nongovernmental Organizations in the Implementation of Human Rights" [1997] 12 *Texas International Law Journal* 293, and D. Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings" [1994] 88 *American Journal of International Law* 611. See further United Nations General Assembly Resolution 53/144 titled 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms', which was adopted on 9 December 1998 without a vote, available at: [http://www.un.org/depts/dhl/resguide/r53\\_en.shtml](http://www.un.org/depts/dhl/resguide/r53_en.shtml).

<sup>2</sup> See [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1999/presentation-speech.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1999/presentation-speech.html).

<sup>3</sup> Generally, see A.C. Vakil, "Confronting the Classification Problem: Towards a Taxonomy of NGOs" [1997] 25 *World Development* 2057, and N. Sybesma-Knol, "Non-State Actors in International Organizations: An Attempt at Classification" in Netherlands Institute of Human Rights, *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors*, SIM Specials 19, Utrecht, 1997.

are not based on a set of common rules that have been laid down either by the legislative branch of government in the countries, where they have chosen to be located and where they perform their mandate, or by some transnational entity (e.g. an international organization like the United Nations entrusted with the task of making rules of general application).

To put it briefly: NGOs do not have a standard (or rather a standardized) legal status. Sovereign states, international organizations and institutions, multinational corporations, even liberation movements, they all have a legal (juridical) status, which has been acquired in a specific manner, is generally recognized and is not disputed. Moreover, the actions and acts of these players (be it decisions, resolutions, declarations, agreements, and the like) usually have consequences that go beyond the boundaries of the entity that adopted them. Thus, their actions and acts have internal but also external outcomes. The latter are a manifestation of the fact that they possess legal status and for this reason it is generally recognized that they have the capacity and the legitimation to adopt and implement them.

NGOs (broadly defined) have been active for more than a century now. A good number of them have managed to maintain an international presence and to participate in the global platform alongside other players, as for example the presence of NGOs along with states in international conferences so vividly demonstrates. NGOs have been recognized as actors on the international plane and have been included in the broad category called 'non-state actors'.<sup>4</sup> Despite their advanced role, it has still not been possible to agree to a set of common principles and doctrines to regulate their existence. This poses a paradox: on the one hand, there exist NGOs (their exact number is impossible to calculate) in almost all countries of the world (with the exception of those states where NGOs are expressly prohibited) and many of them, such as *Médecins sans frontières*, are active in more than one states simultaneously but, on the other hand, their legal status is vague and unclear and, where a legal status does exist, it is far from perfect.

Naturally, the existence of a legal status is tantamount to some form of regulation, in the sense that whoever is mandated to grant such status has the right, by necessary implication, to refuse it or to withdraw it. It could be argued that it is exactly this lack of regulation that has allowed NGOs to thrive and to have become a sizeable force in international relations (even though their precise impact may be difficult to evaluate). To pursue this argument further, if a regulatory framework (especially a strict one) had been in place, NGOs might not have achieved the prominence with which the global public opinion has associated them. True as this submission might be, presumably there comes a time when such a framework becomes a requirement in order to promote even further the role and the activities of NGOs. This was one of the main reasons that led in the early 1980s the Council of Europe, as will later be explained, to decide to draft and, later on, to adopt the Convention on Recognition of the Legal Personality of International Non-Governmental Organisations. The introduction of such a regulatory regime should not be regarded, *ab initio*, as an

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<sup>4</sup> Generally, see R.A. Higgott, G.R.D. Underhill & A. Bieler (eds), *Non-state Actors and Authority in the Global System*, Routledge, London, 2000.

obstacle to the *lesser faire, lesser passé* attitude that has characterized the workings of NGOs and has become one of their distinctive characteristics.

It should be clarified that the discussion in the present paper is not about domestic regulation (i.e. regulation within the confines of a single state) but about transnational regulation (i.e. regulation that concerns more than two states). Moreover, the discussion is not about a voluntary code of practice but about a set of rules with a legally binding force for both the NGOs and the states where they chose to be established and/or to carry out their activities.<sup>5</sup> It follows that these rules will be capable of enforcement by the competent state authorities. Thus, one does not have in mind codes of practice such as those negotiated and adopted to deal, for example, with multinational companies and transnational corporations.<sup>6</sup> In this field, the Organization of Economic Cooperation and Development (OECD) has played a pivotal role.<sup>7</sup> In particular, it has adopted, *inter alia*, the following two instruments, which soon became benchmarks in the respective fields: the OECD Guidelines for Multinational Enterprises,<sup>8</sup> and the OECD Principles of Corporate Governance.<sup>9</sup>

Notwithstanding the experience of the OECD, the negotiation and the adoption of codes of practice for multinational companies, i.e. legal entities with a global outreach whose legal status and form is far more concrete than that of NGOs, has not been an easy task. The best case in point is the failed attempt by the United Nations to elaborate a Code of Conduct on Transnational Corporations. As early as 1974, a Commission on Transnational Corporations was established by the Economic and Social Council (ECOSOC), one of the UN's principal organs. It was mandated with preparing a text to regulate the operation of multinational companies.<sup>10</sup> The first draft of the Code was finalized in 1982<sup>11</sup> and a text for deliberation among UN Member States was circulated the following year.<sup>12</sup> Five years later, the UN Secretary

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<sup>5</sup> For the handling of NGOs in international law, see, *inter alia*, P.-M. Dupuy & L. Vierucci (eds.), *NGOs in International Law – Efficiency in Flexibility?*, Edward Elgar, Cheltenham, 2008, A.K. Lindblom, *Non-governmental Organizations in International Law*, Cambridge University Press, Cambridge, 2005, and M. Bettati & P.-M. Dupuy, *Les ONG et le Droit International*, Economica, Paris, 1986.

<sup>6</sup> Generally, see J.K. Jackson, *Codes of Conduct for Multinational Corporations: An Overview*, Congressional Research Service, RS20803, 16 April 2013, available at <http://www.fas.org/sgp/crs/misc/RS20803.pdf>.

<sup>7</sup> K. Gordon, *The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison*, OECD Directorate for Financial, Fiscal and Enterprise Affairs, Working Papers on International Investment, Number 2001/5, December 2001, available at <http://www.oecd-ilibrary.org>.

<sup>8</sup> OECD Guidelines for Multinational Enterprises, 2011 edition, available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

<sup>9</sup> The OECD Principles of Corporate Governance were originally endorsed in 1999 and were revised in 2004 to take into account developments and state practice, available at: <http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf>.

<sup>10</sup> See United Nations, Economic and Social Council, Resolution 1913 (LVII) of 5 December 1974.

<sup>11</sup> See United Nations Document E/C.10/1982/6 (1982).

<sup>12</sup> See Commission on Transnational Corporations, Report on the Special Session (7-18 March and 9-21 May 1983), Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev. 1), Annex II, reproduced in United Nations Centre on Transnational Corporations, *The United Nations Code of Conduct on Transnational Corporations, Current Studies, Series A*, New York, United Nations publication sales No. E.86.II.A.15, ST/CTC/SER.A/4, 1986, Annex I, pp. 28-45.

General published the Draft Code of Conduct on TNCs.<sup>13</sup> Since then and despite discussions and proposals presented over the years, it has not been possible to agree to a compromise text and the efforts to conclude the Code have apparently been abandoned.<sup>14</sup> At any rate, a text whose life started 40 years ago, cannot have any relation to current state of affairs.

In the past there have been a number of attempts to prepare Codes of Conduct for NGOs.<sup>15</sup> However, for a number of reasons, they have not achieved the aim to lay down a specific framework catering for their basic functions. On the whole, these attempts have been rather limited in scope, they only concerned NGOs which were active in a given field of activities (e.g. humanitarian aid), they aimed more at laying down basic principles and values and not at creating an overall framework for their operation, they did not cover crucial issues (e.g. legitimacy, accountability,<sup>16</sup> and transparency) in a coherent manner, etc.

To substantiate this submission, reference could be made to the NGDO Charter - Basic Principles of Development and Humanitarian Aid NGOs in the European Union, which was adopted in March 1997 by the Liaison Committee of Development NGOs to the European Union.<sup>17</sup> The Charter has been described as an account of what the Development NGOs (NGDOs) participating in this Liaison Committee aspire and work towards to, which are their values, how they approach their mandate and which are their structures. As specifically stipulated in the text of the Charter, it is not meant to commit the totality of EU-based NGDOs to have all the characteristics or achieve the high standards laid down in the Charter at all times. Therefore, the Charter serves as a guide to the basic understandings of the term 'NGDO' and, if so desired by individual NGDOs, as a set of principles to be applied internally in running their own organizations.

The text of the Charter refers to issues which have to do with the structure of NGDOs. However, in doing so it has rather taken certain understandings for granted and has not elaborated further on their content. To offer an example: Principle C3, which reads: "[NGDOs] are legal entities", has been accompanied with this explanation: "Each NGDO is legally recognised as an organisation according to the appropriate laws of one of the 15 Member States of the EU". This statement presupposes that each and every of the then 15 EU Member States (it will be

<sup>13</sup> See United Nations Document E/1988/39/Add.1 (1988).

<sup>14</sup> Reference should also be made to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, which was adopted in 1977 by the International Labour Organization; generally, see R. Jenkins, *Corporate Codes of Conduct - Self-Regulation in a Global Economy*, United Nations Research Institute for Social Development (UNRISD) Programme Paper Number 2, April 2001, available at: [http://www.social-standards.info/inhalte/texte\\_grundlagen/jenkins\\_coc.pdf](http://www.social-standards.info/inhalte/texte_grundlagen/jenkins_coc.pdf).

<sup>15</sup> Generally, see J. Nelson, *The Operation of Non-Governmental Organizations (NGOs) in a World of Corporate and Other Codes of Conduct*, Harvard University, John F. Kennedy School of Government, Corporate Social Responsibility Initiative, Working Paper No. 34, March 2007, available at [http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_34\\_nelson.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_34_nelson.pdf).

<sup>16</sup> L. Jordan, *Mechanisms for NGO Accountability*, Global Public Policy Institute, GPPi Research Paper Series No. 3, Berlin, 2005, available at: [http://www.gppi.net/publications/research\\_paper\\_series](http://www.gppi.net/publications/research_paper_series).

<sup>17</sup> Text available at [http://www.dochas.ie/Shared/Files/2/ngdo\\_charter.pdf](http://www.dochas.ie/Shared/Files/2/ngdo_charter.pdf).



recalled that the Charter was adopted in 1997) did have domestic legislation regulating the setting up and the operation of NGOs. However, the reality was and still is quite different because only a small number of European countries have promulgated legislation that deals specifically with the legal status of NGOs. In the majority of states (including Greece) such legislation is still lacking and it is not expected that no relevant legislative instruments will be introduced in the foreseeable future.

It follows that, depending on the domestic law of the state where a NGDO has been established, what in the Charter is commonly understood as 'NGDO' might, in reality, be different (legal) entities, depending on the EU Member State where they were set up. To put it otherwise, the NGDOs coming under the ambit of the Charter may, for their own purposes, share the same understandings and principles but, from the point of view of the legal systems where they carry out their activities, they may be handled in dissimilar fashion. To offer an illustration: NGDO A may be able to operate in a certain way in Member State B, since it is allowed under the domestic law of Member State B to do so, but NGDO D, which has been established in Member State E, will not be allowed to act likewise because it is not in accordance with the legal system of Member State E.

The situation could become even more complicated if NGDO A and NGDO D wish to expand their activities in the territory of Member State F, which has a completely separate regulatory system from the other two states. Many questions arise vis-à-vis the relations of 'foreign' NGDOs and the host country: Should NGDO A and NGDO D require (prior) permission in order to operate in the territory of Member State F? Does Member State F have the discretion to recognize the legal personality of NGDO A and NGDO D as well as their capacity to pursue specific activities? Or is Member State F obliged to do so? If Member State F refused to grant recognition, could NGDO A and NGDO D seek judicial review before the competent domestic courts of justice? In other words, is the behaviour of the host Member State actionable before its courts?

From a regulatory perspective, in a closely knitted transnational institution such as the European Union, these and similar questions are invariably addressed by adopting a set of common rules applying equally to all participants without exceptions. This approach is faithful to the overarching prohibition of discrimination, which guarantees equality of treatment.<sup>18</sup> But in order to do so, the object of the regulation (in our case, the NGOs) must be coherent, namely to share common characteristics and attributes allowing the adoption of rules with uniform application. And here exactly lies the problem. As has been already explained, NGOs, as a group of like-minded organizations, exhibit so many different and diverse characteristics (sometimes they do not have a legal foundation but operate as unincorporated bodies) that it is very difficult (but, theoretically speaking, not impossible) to find enough common ground to ensure the adoption of a set of rules.

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<sup>18</sup> Cf. Article 18 of the Treaty on European Union and Article 21 of the Charter of Fundamental Rights of the European Union.

On the contrary, the European Union has found adequate common ground in another group of private entities, namely companies and undertakings. For many years now, a coherent regulatory framework has applied in the Member States laying down common rules, which have allowed companies and undertakings across the European Union to take advantage of a non-discriminatory regime. In its turn, this regime has led to companies being able to move across the borders of the individuals Member States, to set up subsidiaries and to offer their goods and services without obstacles.<sup>19</sup> Finally, this regime has been accompanied by the European Union's guarantee that all Member States will respect it and, if they happen to violate it, they might face strict infringement proceedings and, should they continue the violation, they could also face financial penalties.

### **A Short Historical Recount of the Efforts to Regulate NGOs at an International Level**

As has been mentioned above, there have been attempts over the years to regulate the activities and the operation of non-governmental organizations, although it is open to question how the notion of 'NGOs' was understood by states in the period before World War II. There is no doubt that the use of the term 'non-governmental organizations' was one of its novelties of the Charter of the United Nations (as indeed the use of the term 'human rights' in Article 1(3) of the Charter was another novelty). In particular, according to Article 71 thereof, the Economic and Social Council (ECOSOC) was endowed with the discretion to "make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence". This single provision changed the rather obscure position that NGOs had in international negotiations during the inter-war period,<sup>20</sup> they were put in the spotlight and were made into a partner for the new emerging universal political organization, the United Nations.<sup>21</sup>

ECOSOC has consistently interpreted the wording of Article 71 in a broad fashion.<sup>22</sup> Already during the first year of the United Nations' operation (1946), ECOSOC established the Committee on Non-Governmental Organizations, as one of its standing committees. This has allowed NGOs to take full advantage of the opportunity to participate and contribute in specific aspects of the work of the United Nations and often alongside Member States. Currently, there are hundreds of NGOs enjoying consultative status with ECOSOC and the benefits associated with it. However, the consultative status is not valid for an unlimited period of time: NGOs

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<sup>19</sup> See, inter alia, Articles 49 and 56 of the Consolidated Version of the Treaty on European Union.

<sup>20</sup> Generally, see T. Davies, *NGOs: A New History of Transnational Civil Society*, Hurst Publishers, London, 2013.

<sup>21</sup> Generally, see P. Willetts (ed.), *The Conscience of the World. The Influence of NGOs in the United Nations System*, Hurst & Company, London, 1996, D. Otto, "Nongovernmental Organizations in the United Nations System: The Emerging Role of Civil Society" [1996] 18 *Human Rights Quarterly* 107, and D. Otto, "Institutional Partnership or Critical Scapegoats? The Role of Human Rights NGOs in the United Nations" in M.A. Baderin and M. Ssenyonjo (eds), *International Human Rights Law. Six Decades after the UDHR and Beyond*, Ashgate, Farnham, 2010, p. 317.

<sup>22</sup> See United Nations, Economic and Social Commission, Resolution 1296(XLIV) (1968).

are required to continue fulfilling a number of criteria if they wish to maintain this status. To give an illustration, on 18 July 2013 ECOSOC decided to grant consultative status to 320 NGOs; to suspend for one year the consultative status of 154 NGOs; to withdraw consultative status in the case of 159 NGOs; to reinstate consultative status to 43 NGOs; and to terminate the consideration of requests for granting consultative status in the case of another 60 NGOs.<sup>23</sup> Thus, ECOSOC took decisions in the case of more than 730 NGOs.

In September 2012, the number of NGOs with consultative status in the ECOSOC had exceeded the impressive number of 3,700.<sup>24</sup> Considering that 12 years earlier the corresponding number of NGOs was 1,700,<sup>25</sup> one could wonder whether a maximum ceiling of NGOs admitted to the UN system ought to be adopted. It should be noted that while NGOs are capable of applying for consultative status with the ECOSOC not all NGOs are entitled to do so. Thus, the ECOSOC has limited the eligibility by laying down a number of prerequisites which must be fulfilled before a NGO is allowed to submit an application. Thus, the activities of the NGO must be relevant to the work of ECOSOC; it must have been in existence (as testified by an official registration pursuant to the applicable domestic legislation of a specific state) for at least two years; it must have in place a democratic decision making mechanism; and the major part of its funding must derive from contributions received from national affiliates and/or from individual members. The latter prerequisite presumably excludes receiving funding from governments and other state authorities.<sup>26</sup>

However, at the end of the day, the decisions to grant, to suspend or to withdraw consultative status as well as the interpretation of decisions relating to these matters are the prerogative of the UN Member States and are exercised through the ECOSOC and its Committee on Non-Governmental Organizations.<sup>27</sup> Moreover, it is up to the Member States to decide whether NGOs will participate in the work of the other principal UN organs and, in particular, in the Work of the General Assembly. The UN Secretary General, taking stock of the so-called Cardoso Report,<sup>28</sup> has advocated that

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<sup>23</sup> For further details and for the lists of the NGOs in question, see United Nations, Economic and Social Commission, *Report of the Committee on Non-Governmental Organizations on its 2013 regular session* (New York, 21-30 January and 8 February 2013), UN Doc. E/2013/32 (Part I) (11 February 2013); and *Report of the Committee on Non-Governmental Organizations on its 2013 resumed session* (New York, 20-29 May and 7 June 2013), UN Doc. E/2013/32 (Part II) (10 June 2013), both available at <http://www.un.org/en/ecosoc/docs/report2013.asp>.

<sup>24</sup> See United Nations, Economic and Social Commission, *List of non-governmental organizations in consultative status with the Economic and Social Council as of 1 September 2012*, UN Doc. E/2012/INF/6 (5 April 2013), available at <http://csonet.org/content/documents/E2012INF6.pdf>.

<sup>25</sup> See P. Willets, "From Consultative Arrangements to Partnership: The Changing Status of NGOs in Diplomacy at the UN" [2000] 6 *Global Governance* 191.

<sup>26</sup> Further, see United Nations, Economic and Social Commission, Resolution 1996/31 (25 November 1996).

<sup>27</sup> *Ibid*, operating paragraph 15.

<sup>28</sup> United Nations General Assembly, *Report of the Panel of Eminent Persons on United Nations–Civil Society Relations*, UN Doc. A/58/817, 11 June 2004. The Report was named after Henrique Cardoso, the former president of Brazil, who chaired the Panel.

the General Assembly should be opened up more to NGOs.<sup>29</sup> It should be noted that the ECOSOC is not the only intergovernmental body that has attracted large numbers of NGOs participating in its activities. Other international institutions that have done so include the United Nations Educational, Scientific and Cultural Organization (UNESCO, headquartered in Paris),<sup>30</sup> the World Health Organization (WHO, headquartered in Geneva),<sup>31</sup> and the European Commission (headquartered in Brussels), which prefers to use the term 'civil society organisations'.<sup>32</sup>

To return to the historical account, the first call to have the legal status of NGOs recognized was apparently made during the First World Congress of International Associations, which took place in Brussels in 1910. One of the outcomes of the Congress was to found the Union of International Associations (*Union des Associations Internationales*, UIA), an institution which is still in existence and active. The UIA website describes the 1910 Congress in the following words:

[...] 137 international bodies and 13 governments were represented. [The Congress] was to provide services including management of relations between international associations, study of questions of common interest, creation of new organizations, international instruction, management of publications and documentation, and other general services.<sup>33</sup>

During the same period of time, the Institute of International Law (*Institut de Droit International*), another transnational entity still in operation and the product of a private initiative (it was established in 1873),<sup>34</sup> was discussing the draft Convention on the Legal Status of International Associations, which was presented by L. von Bar in 1912.<sup>35</sup> The essence of the von Bar proposals, as it became known, was that contracting parties would agree to confer legal personality to what he termed as 'international associations of public utility', subject to specific rules and procedures. The von Bar proposals were further developed by the renowned Greek international lawyer Nicolas Politis.<sup>36</sup> He presented a draft Convention on the Legal Condition of

<sup>29</sup> United Nations General Assembly, *Report of the Secretary-General in response to the report of the Panel of Eminent Persons on United Nations-Civil Society Relations*, UN Doc. A/59/354, 13 September 2004.

<sup>30</sup> See Article XI (4) of the UNESCO Constitution (November 1945).

<sup>31</sup> See Article 71 of the WHO Constitution (July 1946).

<sup>32</sup> Generally, see Commission of the European Communities, *Communication from the Commission, Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, COM(2002) 704 final, 11 December 2002; European Commission, *The Commission and Non-governmental Organisations: Building a Stronger Partnership*, Presented by President Prodi and Vice-President Kinnock, Commission Discussion Papers, Brussels, 2000, available at: [http://ec.europa.eu/transparency/civil\\_society/ngo/docs/communication\\_en.pdf](http://ec.europa.eu/transparency/civil_society/ngo/docs/communication_en.pdf).

<sup>33</sup> See <http://www.uia.org/history>.

<sup>34</sup> For further information, see <http://www.idi-iil.org>.

<sup>35</sup> See *Annuaire de l'Institut de Droit International*, Vol. 25, 1912, pp. 466-471. The text of this rather short draft Convention is available at <http://www.uia.org/archive/legal-status-4-1>.

<sup>36</sup> M. Papadaki, "The 'Government Intellectuals': Nicolas Politis – An Intellectual Portrait" [2012] 23 *European Journal of International Law* 221.

International Associations (*Projet de convention relative à la condition juridique des associations internationales*), which was unanimously approved during the fiftieth anniversary session of the Institute in Brussels in 1923.<sup>37</sup>

Until the outbreak of World War II, it would appear that no further action was taken on the draft Convention presented by Politis. The question of regulating NGOs was taken up again by the Institute of International Law in September 1950, when Suzanne Bastid submitted a report titled 'Les conditions d'attribution d'un statut international à des associations d'initiative privée'.<sup>38</sup> The essence of her proposal was to negotiate the text of a Convention where contracting parties would undertake to recognize that those associations and foundations of international concern, which meet a number of substantive and formal requirements, enjoy the rights to be defined in the Convention. The text of the draft Convention prepared by Bastid gave the following definition of NGOs:

[The] international organizations [covered by this Convention] are groups of people or communities, freely created by private initiative, exercising, without the motive of profit, an international activity of general interest and without being concerned for an order which is exclusively of a national character.

Regarding the treatment of NGOs coming under the scope of the draft Convention in the territory of all contracting parties, she proposed that they should benefit from the most favourable provisions of domestic legislation pertaining to national non-profit associations, especially with regard to the exercise of their activities, the collection of contributions from members, the acquisition and possession of movable and immovable property, the acceptance of donations and legacies, etc.<sup>39</sup> Again, it would appear that these proposals did not culminate to more concrete results.

However, some few years later and in the context of a different international institution the negotiations for concluding a multilateral instrument regulating private entities characterized by an international dimension were successful. In particular, the Convention concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions was concluded on 1 June 1956 under the auspices of the Seventh Session of the Hague Conference on Private International Law.<sup>40</sup> It was signed by five states (Belgium, France, The Netherlands,

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<sup>37</sup> The text is available at [http://www.idi-iil.org/idiF/resolutionsF/1923\\_bruux\\_02\\_fr.pdf](http://www.idi-iil.org/idiF/resolutionsF/1923_bruux_02_fr.pdf).

<sup>38</sup> Institut de Droit International, *Les conditions d'attribution d'un statut international à des associations d'initiative privée*, Rapport et projet de résolution présentés par Mme Suzanne Bastid, délibérations et projet de convention, Session de Bath, septembre 1950, *Annuaire de l'Institut de Droit international*, Volume 43, T. I, pp. 547-630, T. II, pp. 342-362, pp. 383-387. Further, see S. Bastid, «Perspectives d'un statut juridique pour les organisations internationales», *Bulletin de l'Union des Associations Internationales*, No. 4, April 1952, pp. 156-158.

<sup>39</sup> The text is available at [http://www.idi-iil.org/idiF/resolutionsF/1950\\_bath\\_02\\_fr.pdf](http://www.idi-iil.org/idiF/resolutionsF/1950_bath_02_fr.pdf).

<sup>40</sup> The Conference has existed since 1893, one of the earliest examples of successful multilateral cooperation. Currently, it brings together 73 states with different legal traditions as well as the European Union. Its primary goal has been to develop and to service Conventions in three broad areas of transnational private law: international protection of children, family and property relations;

Luxembourg, and Spain) and ratified by the first three of them, two short in order to enter into force under the terms of Article 11.<sup>41</sup>

Notwithstanding that it has never come into operation, the Convention has not been struck out and still features among the 39 'active' Conventions, which have been adopted under the auspices of the Hague Conference on Private International Law.<sup>42</sup> Arguably, the Convention was an instrument that preceded its era and would have had a different reception by states, if it had been concluded 15 or 20 years later. In particular, the Convention featured a number of innovative provisions, such as Article 6. It stipulated that if societies, associations and foundations, which, according to the law governing them, have not been given legal personality, they shall be given the legal status that is ordinarily granted to such entities by the domestic legal system in the territory of the other contracting states. To confer them a specific legal status was deemed necessary for principally two reasons: First, to ensure their ability to bring legal proceedings (i.e. to be recognized as judicial persons before the law) and, second, not to be handicapped in their relationships with creditors.

## **The Council of Europe Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations**

### **A. A Brief Introduction to the Council of Europe System of Law-Making through Treaties**

On 24 April 1986, the Council of Europe opened for signature in Strasbourg the Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (hereinafter the '1986 Convention'). Before analyzing its content, it is useful to explain a few things about how the Council of Europe has, ever since it was established in 1949, attempted to promote law-making between its Member States by negotiating and concluding multilateral treaties. The comments to be made in the following paragraphs apply to the 1986 Convention as well.

The Council of Europe is a unique international organization with a constituent of 47 Member States. It is mostly known for its landmark Convention for the Protection of Human and Fundamental Rights, which was signed in Rome on 4 November 1950 and set the standards for regional human rights instruments in other parts of the world (notably, the Americas and Africa). What is, however, not very known is that it has also adopted some 200 other multilateral instruments on an extremely wide range of topics falling into the ambit of private law and public law, including criminal

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international protection of children, family and property relations; as well as international commercial law and international finance law. For an overview, see H. van Loon, "The Hague Conference on Private International Law" [2007] 2:2 *Hague Justice Journal* 3.

<sup>41</sup> Text in [1952] 1 *American Journal of Comparative Law* 277.

<sup>42</sup> See <http://www.hcch.net>. Theoretically speaking, the Convention can still come into force but this likelihood should be discarded.

law.<sup>43</sup> Taken as whole, these treaties constitute an impressive corpus of rules and regulations featuring common provisions for adoption by the Member States.<sup>44</sup> Arguably, this corpus can only be rivaled by the so-called *acquis communautaire*, namely the corpus of legislation that has emanated originally from the European Economic Community and now from the European Union.<sup>45</sup>

In the Council of Europe, the driving force behind the project of law-making through the conclusion of treaties has been the European Committee on Legal Co-operation (CDCJ), which was created in 1963 by the Committee of Ministers, the highest-ranking organ of the Council of Ministers. The Committee describes itself as an "inter-governmental body ... responsible for the standard-setting activities of the Council of Europe in the field of public and private law [whose] main role is to draw up standards commonly accepted by the 47 member states and to foster legal co-operation among them".<sup>46</sup>

A not inconsiderable number of these treaties are not well known outside small interest groups and, unfortunately, they might have fallen into oblivion. And this despite the fact that, at the time of their conclusion, they had been of a pioneering nature, that they had managed, to a larger or smaller extent, to deal with complex issues, and that they have played a not always appreciable role in achieving a greater unity among the Member States of the Council of Europe. The latter is of course one of the principal aims of the Strasbourg Organization.

The successful (or not) outcome of these multilateral instruments depends mostly on the attitude shown by the Member States after their texts have been adopted by the Committee of Ministers, a political organ with the highest ranking in the Council of Europe. If its Member States fail to sign and, subsequently, to ratify the treaties in the numbers required by their terms, the treaties will not come into effect at all or will enter into effect but with considerable delay. However, even if they do become operative (often a minimal number of three ratifications is required to do so), their subsequent life and rise to prominence (the prime example being the European Convention on Human Rights<sup>47</sup>) will also depend on whether the vast majority of Member States are willing to become contracting parties, implement their provisions and give effect to the duties emanating from them. Considering that the purpose of these treaties is to create common rules for the entire membership of the Council of

<sup>43</sup> For the legal basis of these instruments, see Article 15 of the Statute of the Council of Europe, and the Resolution adopted by the Committee of Ministers at its 8th Session in May 1951, available at: <http://www.conventions.coe.int/Treaty/en/Treaties/Html/001.htm>.

<sup>44</sup> The entire list of adopted treaties and conventions can be found at: <http://www.conventions.coe.int>.

<sup>45</sup> There is an important difference between the two: while the European Union may only legislate in the areas laid down in its constitutive instruments, the Council of Europe may negotiate treaties in virtual any area, provided of course that the majority of its Member States is willing to adopt them.

<sup>46</sup> For the work of the Committee, see [http://www.coe.int/t/DGHL/STANDARDSETTING/CDCj/default\\_en.asp](http://www.coe.int/t/DGHL/STANDARDSETTING/CDCj/default_en.asp).

<sup>47</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms was signed in November 1950 and entered into force in September 1953. Even though it has undergone amendments as regards the rights and freedoms protected, it still encompasses only the so-called 'first generation of human rights', which is built on the political and civil rights.

Europe, it follows that their effectiveness will be greatly restricted if only a small number Members finally opts to become contracting parties.

It should not be forgotten that all treaties (including those negotiated under the auspices of the Council of Europe) have a given life span, which is often predetermined. Even if the treaties regulate a certain subject matter in the most comprehensive manner and even if they constitute examples of excellent draftsmanship, there are bound to be subsequent (sub-regional, regional and/or global) events and changes which cannot but restrict their importance. Depending on the circumstances, these treaties might even become of no relevance. If things come to that stage, it is submitted that there are two meaningful courses of action. The first is to negotiate and agree on significant amendments/revisions to the text of the treaties in question. The second is to replace them with a new, more dynamic, more relevant, treaty. If neither development occurs, the treaties in question will continue to exist (treaties could be open-ended instruments of inter-state agreements) but states will increasingly make less and less use of its terms. In all probability, states will choose to apply the provisions of other relevant multilateral instruments, which might have been concluded under the auspices of third international organizations and institutions, and abandon the Council of Europe's treaties. It should not escape one's attention that competition does exist between international organizations, while states are bound to be attracted by those multilateral institutions which offer services and benefits with an added value.

Even though, from a theoretical point of view, this state of affairs might be construed as a liability for the Council of Europe, the sheer magnitude of the project to negotiate and conclude multilateral agreements should not be underestimated. To that effect, it is a point of contention whether the Council of Europe is (or is not) in the position to ensure that all of these treaties are kept up to date and that their provisions are in line with the current state of affairs in the respective fields which they cover. Presumably, within its limited capabilities, the Council of Europe would prefer to revise the text of a treaty, which has attracted a large number of contracting parties, than a treaty that has not attracted the attention of Member States, even if the content of the latter is distinctive and no other comparable multilateral instrument exists. It is submitted that the 1986 Convention is a good example of the latter situation.

## **B. Analysis of the Convention**

### **a. An Overview of the Convention**

In 1981, the aforementioned European Committee on Legal Co-operation (CDCJ) recommended to the Committee of Ministers that the Council of Europe ought to address the fact that there was no transnational instrument in force with the specific aim to facilitate the activities of NGOs not at a domestic but at an international level. This recommendation should not have come as a surprise given the close links that the Council of Europe has promoted with NGOs ever since the beginning of its operations. In particular, in 1951 it recognized the importance that the NGOs have in



their respective fields of activities and the contribution that they could make in the work of the Council of Europe. It was also in 1951 that the Organization adopted a resolution laying down the procedure for consultation with NGOs on matters falling within its competences, as envisaged in the Statute.

The Committee of Ministers acted on the recommendation and mandated a select Committee of experts on international non-governmental organisations (CJ-R-OR) to prepare an instrument on promoting the activities of NGOs through intergovernmental action. In the period between 1982 and 1983 the select Committee held three meetings. The draft convention finally submitted by the Committee dealt with only one (albeit significant) aspect of the transnational operation of NGOs: the recognition of their legal personality. The draft convention was examined upon by the European Committee on Legal Co-operation and, together with commentary, it was forwarded for adoption by the Committee of Ministers. The latter did so on 24 October 1985 and the Convention was opened for signature by Member States on 24 April 1986.<sup>48</sup>

As has been indicated, the 1986 Convention does not rank among the multilateral instruments negotiated and concluded under the auspices of the Council of Europe that have met with success in terms of the number of contracting parties. Despite its very original character (both at the time it was adopted and even today) and the fact that it deals with one of the most multifaceted and difficult questions of NGOs (i.e. the legal personality and capacity allowing them to have a life separate from that of their members), on the whole Member States have shunned it. Thus, although the ratification by only three states was required to enter into force, it took more than four years to do so. It finally became operative on 1 January 1991, a decade after the proposal for adopting it had surfaced.<sup>49</sup> The original three ratifications, which secured its entry into force, were by the United Kingdom on 3 February 1989, by Greece on 30 June 1989, and by Belgium on 4 September 1990. Since then it has secured only eight further ratifications<sup>50</sup> bringing the total number of contracting parties to the rather low number of eleven.<sup>51</sup>

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<sup>48</sup> Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, Council of Europe Treaty Series No. 124, available at: <http://www.conventions.coe.int/Treaty/en/Treaties/Html/124.htm>. As is customary with Council of Europe treaties, the Convention was accompanied by an Explanatory Report, which, although it does provide an authoritative interpretation of the text of the Convention, it aims at facilitating the understanding of its provisions.

<sup>49</sup> For analysis of the Convention, see M.-O. Wiederkehr, "La Convention Européenne sur la Reconnaissance de la Personnalité Juridique des Organisations Internationales Non-Gouvernementales du 24 Avril 1986" [2007] *XXXIII Annuaire Français de Droit International* 749, and R.H. Ben-Ari, *The Normative Position of International Non-Governmental Organizations under International Law: An Analytical Framework*, Martinus Nijhoff Publishers, Leiden, 2012, pp. 76 et seq.

<sup>50</sup> In chronological order: Switzerland on 24 September 1990, Portugal on 28 October 1991, Austria on 27 April 1992, Slovenia on 16 September 1992, France on 26 November 1999, the former Yugoslav Republic of Macedonia on 13 July 2000, Cyprus on 17 March 2004, and The Netherlands on 21 February 2007.

<sup>51</sup> For the signature table and the ratification table, see <http://www.conventions.coe.int>.

At present, no other Member State has signed the Convention. Even though Member States could accede directly to the Convention without having first to sign it,<sup>52</sup> it is highly unlikely that it will happen in the future, not least given the considerable period of time that has lapsed since its adoption. Therefore, it can be expected that the number of contracting parties will remain unchanged. Finally, it is of some interest to note that, in accordance with Article 7 of the Convention, after its entry into force, the Committee of Ministers has the discretion to invite any state, which is not a Member of the Council of Europe, to accede to it, provided that the existing contracting parties have unanimously accepted the invitation. There is information as to whether this has ever happened.

The gist of the Convention is that an international NGO (INGO), which has been duly incorporated under the legal system of one of the contracting parties shall be automatically recognized as such in the territories of all other contracting parties. This regime of recognition could also be achieved in the context of bilateral agreements, in other words when one state concludes an agreement with another state and, on the basis of the principle of reciprocity, they agree to mutually recognize the legal personality of NGOs which have been formed under the legal system of either state. Thus, if state A would have liked to promote such a regime with, say, ten other states, it would have to conclude an equal number of agreements. Moreover, if, for the sake of argument, all eleven states wanted to have their NGOs recognized by the other states, each of them would have to enter into agreements with all other states. This is an onerous task and requires a lot of time and effort. It could be avoided if the interested states were to become contracting parties to a multilateral instrument such as the 1986 Convention. In other words, the 1986 Convention operates as a single instrument whose provisions apply in exactly the same fashion in all contracting parties.

The text of the Convention is very brief: it has only four operative Articles while the remaining seven Articles are of a procedural / administrative nature. In its Preamble, the Convention states that NGOs perform 'work of value' to the international community, particularly in the scientific, cultural, charitable, philanthropic, health as well as education fields, and that they make a contribution towards the achievement of the aims and the principles laid down in the Charter of the United Nations and in the Statute of the Council of Europe. The Convention does not attempt to give a definition of what constitutes a 'non-governmental organisation'. It rather takes it for granted that NGOs exist, that they do carry out their activities in specific areas, and that they perform their mandate on the international plane rather than domestically. For that reason, the text of the Convention employs the word 'NGO' as a generic term, which, at the same time, encompasses different entities and bodies. The latter are given in Article 1 as follows: associations, foundations and other private institutions (in the French text of the Convention: *associations, fondations et autres institutions privées*).

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<sup>52</sup> See Article 6(2) of the Convention.

It follows that the Convention creates a framework regulating the legal personality of those NGOs, which have decided to internationalize their activities. The Convention is not concerned with NGOs, which, for whatever reason, carry out their activities within the confines of a single contracting party. Even though the term 'international NGO' does not appear in the text of the Convention other than in its title, this is the first of five requirements that NGOs must fulfill in order to come under its ambit and take advantage of its terms. The content of other four conditions is analyzed later in the paper.

In the wording of Article 1 of the Convention, the use of the term 'private' alongside the term 'institutions' should be deemed to accompany the terms 'associations' and 'foundations' as well. According to the Explanatory Report, the term 'private' covers any entity, which, irrespective of the legal stipulations in the domestic law of the state where the NGO was established, does not exercise prerogatives of a public authority. Arguably, the Convention has failed to deal satisfactorily with delineating which NGOs should be deemed 'private' in the present circumstances; to put it otherwise, which entities and bodies should be recognized as 'private' NGOs for the sole purpose of taking advantage of the Convention's provisions.

The text of the Convention does not cover those instances where an NGO might not 'exercise prerogatives of a public authority' but, at the same time, it could receive the bulk of its funding from the state coffers or from public / semi-public authorities. To illustrate this argument, suppose that, for various reasons, a state might not wish to be engaged in handling specific types of activities (for example, offering assistance and housing to victims of violent crimes and/or to asylum seekers) but prefers to finance 'private' NGOs, which undertake to provide such services acting, as it were, *in lieu* of the competent state entities. Or suppose that a state, in order to fulfill its international obligations, does supply such services through its competent state entities but, at the same time, it funds 'private' NGOs offering similar services to specific population groups or to foreigners. In these circumstances, it is submitted that the NGOs in question should not be deemed to be 'private' NGOs, especially if the funding they receive from the state constitutes their only or the single most important source of income. In other words, the fact that the NGOs in question rely on the state and not on private individuals or legal persons for their revenue alongside the fact that they exercise, to a degree, state functions should be adequate reasons not to be treated as 'private institutions'.

The view expressed by one commentator complicates matters even more. In attempting to explain why the first nine Member States of the Council of Europe chose to become contracting parties to the 1986 Convention, he had this to say about Greece's motivation: "Greece, where so many foreign archaeological institutes are active".<sup>53</sup> It is highly debatable whether archaeological institutes (or Schools as they sometimes prefer to be called) are, first, NGOs and, secondly, 'private' NGOs, in

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<sup>53</sup> See F. Hondius, "Recognition and Protection of NGOs in International Law", *The International Journal of Not-for-Profit Law*, Volume 2, Issue 2, December 1999, at <http://www.icnl.org/research/journal/archives.html>. As regards Cyprus, he claimed that its signing the Convention was motivated by that country's strong attachment to Europe.

the meaning of the provisions of the Convention. This is especially so in the case of those institutes having (at least) part of their expenses and running costs covered by the government of the state in which they have been set up or whose interests they represent abroad.

According to a list compiled by Wikipedia, there are currently 17 foreign archaeological institutes operating in Greece. Each of them is the institute/school invariably representing the government of the state where it was set up.<sup>54</sup> It is outside the scope of the present paper to describe the formal status of these institutes. Suffice to mention that the status of the French School of Athens (*École française d'Athènes*) is that of an 'Établissement public à caractère scientifique, culturel et professionnel', while the British School of Athens was established in the 19<sup>th</sup> century as an educational charity but now forms part of the network of institutes and societies, which are sponsored by the British Academy (the so-called BASIS). The British Academy describes itself as "[t]he British Government's principal channel of financial support to a set of institutions engaged in fieldwork and research in the humanities and social sciences".<sup>55</sup>

#### **b. The Four Conditions that NGOs Must Observe and Fulfill**

Although there is a degree of uncertainty as to the which NGOs are actually covered by the 1986 Convention, the other four conditions laid down in Article 1 do shed some light as to which bodies and entities are excluded. Thus, the Convention is applicable to those NGOs which satisfy the following four conditions:

- a. They have a non-profit-making aim of international utility;
- b. They have been established by an instrument governed by the domestic law of a contracting party;
- c. They carry on their activities with effect in at least two states; and
- d. They have their statutory office in the territory of a contracting party and the central management and control in the territory of that contracting party or in the territory of a different contracting party.

Although the Convention does not expressly provide that all four conditions must be met in a cumulative fashion, it follows from its overall structure but also from its stated aims that this is the case. Therefore, all four conditions must be fulfilled at all times so as to allow NGOs to benefit from the Convention's provisions.

<sup>54</sup> See [http://en.wikipedia.org/wiki/List\\_of\\_Foreign\\_Archaeological\\_Institutes\\_in\\_Greece](http://en.wikipedia.org/wiki/List_of_Foreign_Archaeological_Institutes_in_Greece). The 17 institutes are: the [American School of Classical Studies at Athens](#) (ASCSA); the [Australian Archaeological Institute at Athens](#) (AAIA); the [Austrian Archaeological Institute at Athens](#) (ÖAI Athens); the [Belgian School at Athens](#) (EBSA); the [British School at Athens](#) (BSA); the [Canadian Institute in Greece](#) (CIG-ICG); the [Danish Institute at Athens](#) (DIA); the [Finnish Institute at Athens](#) (FIA); the [French School at Athens](#) (EfA); the [Georgian Institute at Athens](#); the [German Archaeological Institute at Athens](#) (DAI Athens); the [Irish Institute of Hellenic Studies at Athens](#) (IIHSA); the [Italian School of Archaeology at Athens](#) (SAIA); the [Netherlands Institute in Athens](#) (NIA); the [Norwegian Institute at Athens](#) (NIA); the [Swedish Institute at Athens](#) (SIA); and the [Swiss School of Archaeology in Greece](#) (ESAG/SASG/SEAG).

<sup>55</sup> See <http://www.britac.ac.uk/intl/index-basis.cfm>.

### The First Condition

That the NGOs coming under the ambit of the Convention must be of a 'non-profit-making aim', as stipulated in Article 1(a), is an obvious requirement. Arguably, it distinguishes NGOs from other 'private' entities, which take the form of commercial undertakings, enterprises, partnerships, companies and the like. However, the condition of a 'non-profit-making aim' should not be construed to mean that such NGOs may not have a commercial aim and/or that it is prohibited to make a profit from the activities carried out in accordance with their mandate. Rather, the meaning is that, were the NGOs to make a profit (net income), they are not allowed to distribute it in any form of financial benefit to their members. Thus, any profit to be made must stay with the NGOs. Given that the legal personality of NGOs is separate from that of their members, the profits will have to be used to further finance the goals of the NGO in question or be invested again for the benefit of the NGO itself, etc. Naturally, any profit to be made could also be donated to good causes.

The second requirement contained in the first condition is that the aims of the NGOs must be of an 'international utility'. It is clear that this term should be understood as the opposite of a national utility or a local utility. However, as the Explanatory Report admits, "[t]he Convention does not define the expression 'international utility'". According to the Explanatory Report, the content of this term could be inferred from a number of useful pointers in the Preamble, especially the reference that NGOs provide "work of value to the international community" and that they ought to contribute to achieving the aims and principles of the Charter of the United Nations as well as the Statute of the Council of Europe. It is submitted that these are not very helpful indications for the proper interpretation of this term, not least because the constitutive instruments of both the United Nations and the Council of Europe are addressed to sovereign states (namely, their Member States) and not to 'private' entities and bodies. The fact that the latter are legally incorporated in the Member States is of no relevance as the aims and principles of these two intergovernmental organizations.

Arguably, 'utility' is an outdated term. It probably reflects the phraseology of a bygone era. For example, in 1843 [Jeremy Bentham in Essay I of his Principles of International Law \('Objects of International Law'\)](#) referred to 'utility' when he posed the following question:

[If a citizen of the world had to prepare an universal international code, what would he propose to himself as his object?](#)

[Which he answered thus:](#)

[It would be the common and equal \*utility\* of all nations: this would be his inclination and his duty. \(emphasis added\)](#)

The term 'utility' was still used in the beginning of the 20th century: as has been mentioned, when in 1912 van Bar presented his draft Convention on the Legal Status of International Associations, he had in mind the 'international associations of public utility'. It will be submitted that today the term 'international utility' should be understood as 'international or global public goods'. For present purposes, the concept of 'global public goods', which has emanated principally from the economics literature,<sup>56</sup> could be understood as encompassing such goods as human rights and fundamental freedoms, peace and security, and environmental protection.<sup>57</sup> Even though the concept of global public goods is still underdeveloped,<sup>58</sup> arguably it serves to understand much better the content of 'international utilities'.<sup>59</sup> Presumably, whether an NGO fulfills the criterion of international utility can only be examined on a case to case basis. For example, NGOs whose mandate is to promote and safeguard the rights of the victims of violent and heinous crimes with an international dimension (e.g. terrorism, trafficking in human beings, etc.) should be regarded as falling within the scope of this criterion. But which should be the answer for NGOs aiming, for the sake of argument, at promoting the global use of nuclear power? Is the use of nuclear power an 'international utility'?

Of particular interest is the content of the Declaration made by France when it deposited its instrument of ratification of the Convention on 26 November 1999. France seems to have overcome this condition by declaring that NGOs falling into the following three categories will be assumed to have satisfied the Article 1(a) conditions for applying the Convention. The first category concerns international NGOs having a consultative status with the Council of Europe. The second category concerns NGOs having a consultative status with the international institutions of the United Nations system. The third category concerns NGOs having observer status in the Council of Europe steering Committees for intergovernmental co-operation.<sup>60</sup> It goes without saying that there might be NGOs coming under the ambit of more than one of these categories, provided of course that they carry out their activities in two or more states (to satisfy the requirement that they are 'international').

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<sup>56</sup> Generally, see I. Kaul, I. Grunberg & M.A. Stern (eds), *Global Public Goods: International Cooperation in the 21<sup>st</sup> Century*, United Nations Development Programme/Oxford University Press, Oxford, 1999; I. Kaul, P. Conceicao, K. Le Goulven, & R.U. Mendoza (eds), *Providing Global Public Goods: Managing Globalization*, United Nations Development Programme/Oxford University Press, Oxford, 2003; and S. Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods*, Oxford University Press, Oxford, 2007.

<sup>57</sup> For the proposition that international institutions should offer global public goods, see M. Gavas, *The EU and Global Public Goods: Challenges and Opportunities*, Overseas Development Institute, DIIS Report 2013:05, London, March 2013, available at: <http://www.odi.org.uk>.

<sup>58</sup> Cf. D. Long & F. Woolley, "Global Public Goods: Critique of a UN Discourse" [2009] 15 *Global Governance* 107.

<sup>59</sup> Generally, see Independent Evaluation Group World Bank, *Annual Review of Development Effectiveness 2008. Shared Global Challenges*, Washington, D.C., 2008, pp. 39 et seq., available at: <http://www.worldbank.org/ieg>.

<sup>60</sup> The aforementioned European Committee on Legal Co-operation (CDCJ) is such a steering Committee.

Regarding the consultative status with the Council of Europe, it should be noted that, as of 2003, the Organization has changed it by upgrading it to participatory status.<sup>61</sup> This was decided in recognition of the increasingly active role that international NGOs (INGOs) have played. Currently, 400 INGOs hold this status. It is granted to selected INGOs, which are particularly representative in their fields of competence at European level and through their work are capable of supporting the Council of Europe's aim to achieve closer unity among its Member States by contributing to its activities and by publicizing its work among European citizens.

### **The Second Condition**

The Convention covers only those international NGOs, which have been set up by an instrument governed by the domestic law of one of the contracting parties. It follows that the Convention requires that the NGOs have already undertaken a procedure for their legal incorporation according to the rules in force in the respective contracting party. The Convention is not interested in the form that this (constitutive) instrument will take. This is considered to be an internal matter to be regulated by the contracting parties themselves. For example, in the case of Greece, the Civil Code does not require that the instrument establishing a NGO, which will operate as a society or as an association (in Greek 'somateio'), must take the legal form of a document drawn up by a notary public.<sup>62</sup> Even though a document drawn up by a notary public has a number of advantages (e.g. ensuring that it has the required content<sup>63</sup>), Article 79 of the Civil Code stipulates that in order to register a society or an association (and consequently to acquire legal personality and legal capacity) its founders or the persons entrusted with its administration must file an application with the competent Court of First Instance and the application must be accompanied by the constitutive instrument.

If the Greek legislator had preferred that the constitutive instrument of a NGO having the structure of a society or of an association be a notarized document, he would have expressly stated this requirement in the Civil Code. Indeed, this condition applies in case a NGO has been given the structure of a foundation (in Greek 'idryma'). In particular, Article 108 of the Civil Code defines a foundation in the following terms: if by virtue of a founding act, property (estate) was destined in order to serve a specific purpose, the foundation shall acquire (legal) personality by virtue of a presidential decree, which will approve the establishment of the foundation. According to Article 109 of the Civil Code, if the act creating the foundation took the form of a legal transaction, while the owner of the property (estate) was alive, the transaction in question must take the form of a document

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<sup>61</sup> See Committee of Ministers, Resolution (2003)8 on a participatory status for international non-governmental organisations, 19 November 2003, available at [https://www.coe.int/t/ngo/Articles/Resolution\\_2003\\_8\\_en.asp](https://www.coe.int/t/ngo/Articles/Resolution_2003_8_en.asp). The rules for being granted participatory status were laid down in the Annex to the Resolution.

<sup>62</sup> Cf. Article 78 of the Greek Civil Code: "An association of individuals, which has a nonprofit aim, acquires (legal) personality by virtue of its entry into the special register maintained by the Court of First Instance where the association has its seat".

<sup>63</sup> See Article 80 of the Greek Civil Code.



drawn up by a notary public.<sup>64</sup> Notwithstanding that there are compelling reasons why, especially in the case of foundations, the constituent instrument requires the involvement of a notary public, the point made here is to emphasize the need to distinguish among the different treatment of similar situations.

The Greek Civil Code treats, on the one hand, societies and associations and, on the other hand, foundations as legal persons in order to distinguish them from the natural persons who act as founders and/or as members. The Civil Code does not seem to allow such legal persons to participate in other legal persons, irrespective of whether the latter already exist or not. This argument follows from the provision of Article 62 thereof, which stipulates: “The capacity of a legal person does not extend to legal relationships, which require the faculty / status of a natural person”. Given that, as already explained, societies and associations as well as foundations are set up by individuals, it follows that legal persons do not have the capacity to establish another legal person even if they collaborate with natural persons. Furthermore, Article 63 of the Civil Code lays down the rule that the constituent instrument or the statute or the memorandum of association of all legal persons must be drawn up in writing. This is a rule of general application and will apply to all legal persons irrespective of the form chosen by the founder or founders. Thus, when Article 107 of the Civil Code allows the establishment of associations of individuals to pursue a specific purpose without being regarded as societies or associations, the requirement of having their constitutive instrument in writing applies to them as well.

In conclusion, the second condition is to be interpreted and applied in accordance with the relevant stipulations in the domestic legislation in each and every of the contracting parties. This condition does not expressly require that the instrument establishing an INGO must be drawn up in writing and/or take the form of a notarized document. However, if an INGO, which wishes to take advantage of the Convention, happens to have its seat in Greece, it is compulsory that its constitutive instrument, depending on its legal form, be in writing or be drawn up by a notary public.

### **The Third Condition**

To be covered by the terms of the Convention, INGOs must carry on their activities in at least two states. It is clear from the wording of this provision that these two states need not be at the same time contracting parties to the Convention. Therefore, the minimum requirement is that they pursue their activities in a contracting party (namely, the contracting states where their seat is located) and at another state, not necessarily a Member State of the Council of Europe; it could very well be a country in Africa or in Asia. The existence of the third condition is justified by the fact that, as

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<sup>64</sup> Note that a foundation can also be set up by a will. In this case, the legal form of the will must follow the relevant stipulations of the Civil Code. Generally, see K. Magliveras, “The Greek Law of Succession” in D. Hayton (editor), *European Succession Laws*, Third Edition, Jordans, Bristol, 2002, p. 271.



already explained, the Convention is not concerned with NGOs whose actions are confined within a single state but solely with international NGOs.

However, a closer examination of the third condition would reveal that it is of no real consequence that the NGOs in question are not required to pursue their activities in a different contracting party but in any other state. This argument is based on the purpose of the Convention, namely to allow NGOs, which have already been set up in a contracting party, to have their personality automatically recognized in the other contracting parties. Arguably, a NGO would contemplate invoking the terms of the Convention if it sought to expand its activities specifically in the territory of one or more of the remaining contracting parties. Therefore, once the formalities have been completed and the NGO's legal personality has been recognized in a different contracting party as well (the relevant stipulations are laid down in Article 3 of the Convention which is analyzed later), the requirement to have a presence in at least two states has been (automatically) fulfilled. Thus, the third condition appears to be superfluous. In further support of this argument, it should be noted that the Convention does not require INGOs to show and to prove that they carry out their activities in another state as well (i.e. in a state other than the contracting party in which their seat is located).

#### **The Fourth Condition**

The fourth condition reinforces the argument made in the previous paragraph, namely that, by definition, NGOs coming under the ambit of the Convention will have a presence in (at least) two of the contracting parties. Thus, it requires that NGOs have their statutory office (in other words the seat as envisaged in the constituent instrument) in the territory of a contracting party and their central management and control in that same party or in the territory of a different contracting party. It follows that it is not permitted for such NGOs to have their headquarters in a contracting state and the office, which is responsible for their central administration, in a non contracting state. This arrangement might be preferable to INGOs because their activities (e.g. in the field of humanitarian aid) are carried out in countries outside Europe.

According to the Explanatory Report, the requirement that NGOs have their central administration and control in the same contracting party where their statutory office is located or in another contracting party was adopted so as to protect the interests of those persons who might enter into contracts with a NGO by ensuring that some of its assets will be located in the territory of a contracting party. In effect, the purpose of the Convention is to protect the rights of an NGO's creditors, who, in case the NGO does not fulfill its contractual obligations and/or defaults, they could seek satisfaction from its assets.

#### **c. The Automatic Recognition of NGO's Legal Personality**

The main theme of the Convention is laid down in the first paragraph of Article 2: the legal personality and capacity, which has been acquired by a NGO according to the

rules and procedures in a contracting party (this being the state where the NGO has its statutory office), shall be recognized as of right in all other contracting parties. Effectively, this leads to automatic recognition in the territory of all other states that have currently ratified the Convention. This quite innovative provision was bound not to be applied without contracting parties having the ability to control it and be allowed to curtail it. To put it otherwise, one could not have expected that in the mid 1980s the Member States would have allowed an unlimited and unrestricted operation of NGOs originating from other countries. On the contrary, the curtailment of the effects of automatic recognition was to be expected. However, given that all Member States of the Council of Europe are (or at least they are supposed to be) run by constitutional and democratic regimes observing the rule of law, this curtailment cannot lead to situations akin to imposing a blanket prohibition on the operation of NGOs.

The drafters of the Convention chose to enshrine provisions restraining the exercise and the effects of the right to recognition both in Article 2 and in Article 4 (the latter, whose content is of more general application, is examined on its own later in the paper). In particular, the second paragraph of Article 2 stipulates that if 'essential public interest' so require, the contracting state/s where recognition of a NGO is sought may impose restrictions, limitations and special procedures in the exercise of the rights which arise from the NGO's legal capacity. The same provision goes on to restrict the ability of contracting parties to impose such limitations, since it stipulates that these restrictions are "provided for by the legislation of the Party where recognition takes place". This stipulation is a manifestation of the principle of non-discrimination: contracting states are not allowed to discriminate against NGOs whose personality has already been recognized in other contracting party by imposing rules which are not at the same time applicable to those NGOs set up under their own legal system. In other words, the Convention does not condone the existence of separate regimes: one for 'domestic' or 'home' NGOs and one for 'foreign' NGOs. Thus, the same limitations, which are required by the 'essential public interest', shall be applied to both categories.

According to the Explanatory Report, the second paragraph of Article 2 leads to an additional application of the principle of non-discrimination.<sup>65</sup> In particular, if the legislation of a contracting party lays down general limits, which are applicable to all foreigners, the NGOs, which have obtained legal personality in another party, shall be subject to these limits. In this case, the principle of non-discrimination does not apply to the relationship between 'home' and 'foreign' NGOs but to foreigners as a whole and (presumably) irrespective of the legal form under which they operate.

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<sup>65</sup> Note that the Explanatory Report does not refer specifically to the principle of non-discrimination. However, it is obvious from the content of Article 2(2) that this is the principle applied here. In the European Convention on Human Rights this principle is enshrined in Article 14 and concerns the rights and freedoms guaranteed in the Convention and in Protocol 12 thereof prohibiting discrimination in relation to 'enjoyment of any right set forth by law'. Protocol 12, which was concluded in November 2000 and entered into force in April 2005, has not met with acceptance by the Council of Europe membership: currently only 18 Member States have ratified it. Generally, see European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law*, Publications Office of the European Union, Luxembourg, 2011.

Although the Explanatory Report does not offer examples, one could think of instances where the contracting party receiving the 'foreign' NGO prohibits foreigners from engaging in or from carrying out activities in such fields as religious affairs or minority issues. Pursuant to Article 2(2), this exclusion will also apply to 'foreign' NGOs whose legal personality and capacity have been recognized in the receiving contracting party.

#### **d. The Procedural Aspects of Recognition of NGOs in Receiving Contracting Parties**

The procedural aspects of contracting parties recognizing the legal personality of NGOs established in another contracting state (the receiving parties) are laid down in Article 3 of the Convention. The first and obvious step would be for the receiving state to demand proof that the requesting NGO has acquired legal personality and capacity in the contracting party where it was set up. Thus, Article 3(1) stipulates that proof of acquisition of legal personality and capacity shall be furnished by presenting the NGO's memorandum and articles of association or any other constitutive instrument. As has been explained, these instruments should have been drawn up in accordance with the legislative rules in the contracting party where the NGO was established (the state of origin). Moreover, they shall be accompanied by the necessary documents to ascertain that the administrative authorization, registration or any other form of publicity in the state, which granted the legal personality and capacity and where the NGO has its statutory office, have been fulfilled. In case the state of origin has no publicity procedures in place, the requesting NGO must furnish a copy of its constituent instrument, which has been duly certified by a competent authority.

Each contracting state is required at the time that it signs, ratifies or accedes to the Convention to inform the Secretary General of the Council of Europe which this 'competent authority' shall be. It need not necessarily be a judicial authority but any entity or body which exercises state powers and functions. Thus, in the case of Greece, the competent authority has been designated as the One-Member Court of First Instance (in Greek 'Monomeles Protodikío') of the place where the NGO has filed its constitutive instrument. In the case of The Netherlands, the Chambers of Commerce and Industry have been designated and in the case of Austria it is the Federal Ministry of the Interior. It should be noted that not all contracting parties have made the declaration required by Article 3(1).

An issue of some importance, which has not been expressly addressed in Article 3, is whether the receiving party has the obligation or only the discretion to ascertain whether the NGO's legal personality and capacity was obtained lawfully and in accordance with the applicable rules of the contracting state where the NGO has its statutory office. To transpose this issue from the point of view of NGOs, the question could be asked whether requesting NGOs have to simply furnish a duly certified copy of their constitutive instrument (and possibly any other document required under domestic law) or whether they are mandated to furnish additional evidence proving that their legal personality was indeed lawfully obtained. It is submitted that the

Convention ought to have dealt with this matter, not least because, as will be explained in the next paragraph, contracting parties should have a uniform approach and not regulate it in different (and possibly conflicting) ways.

The Explanatory Report does address this issue but rather insufficiently considering the lack of an express provision in the text of the Convention. In particular, it explains that, when a contracting party is asked to recognize a NGO, which has its statutory office in another contracting party, it “does not have to ascertain whether the legal personality has been validly obtained ... [t]he control should be directed to see whether the proofs mentioned in Article 3 have been produced”. This statement could be interpreted as meaning that receiving parties do not have a duty to investigate the acquisition of legal personality of NGOs set up in the territory of the state of origin. However, this is not tantamount to saying that, if they so wish, receiving states are prevented from undertaking all necessary steps to ascertain it and this could lead to their liaising with the 'competent authority' envisaged in Article 3(1).

In conclusion, it would appear that receiving parties have a very wide discretion as to how they will be satisfied on the acquisition of legal personality and capacity by requesting NGOs. However, given that there is no recorded practice by states on the application of the Convention, it is impossible to reach more concrete conclusions. To this extent, it is of some interest to cite again the text of the Declaration contained in the instrument by virtue of which France ratified the Convention in November 1999. In particular, France claimed that, in several respects, the Convention had been applied differently in those states, which had already ratified it, and, for the purpose of harmonization, it recommended the negotiation of an amendment to clarify the margin of interpretation that contracting parties should have. It is not known whether the French proposal was ever pursued.

#### **e. Instances Permitting the Non-Application of the Convention**

As was explained when examining the content of Article 2 of the Convention, the very innovative character of the Convention at the time it was adopted (and even today for that matter) meant that Member States would have expected or even demanded the existence of clauses allowing them to restrict or prevent, in certain instances, the application of its provisions. However, the content of these restrictions could not have been such that would have negated the object of the Convention. On the contrary, contracting parties would be able to apply the restriction in specific situations, which would have been pre-determined in the text of the Convention. Some of these situations were laid down in Article 2 and have already been examined. The provision of Article 4 of the Convention augments the scope and ambit of exceptions. It stipulates that all contracting parties reserve the right to exclude the application of the Convention but are allowed to do so only if the NGO asking to benefit from its terms comes under one or both of the following instances. The first instance is that the NGO in question has (a) a purpose or an object contravening the national security and the public safety of the receiving party; or (b) its actions are detrimental to the prevention of disorder or crime or to the

protection of health or morals or to the protection of the rights and freedoms of others in the territory of the receiving party. The second instance is that the activities of the NGO in question jeopardize the relations between the contracting state where recognition is sought and another country (irrespective of whether the latter is a Member State of the Council of Europe or not) or jeopardize the maintenance of international peace and security.

Arguably, the drafters of the Convention, in an attempt to ensure that the largest possible number of Member States will find the terms of the Convention appealing so as to sign and ratify it, inserted in its text very broad reasons to allow contracting parties to legitimately refuse the application of the Convention. Acceptable as this might be, it is submitted that the drafters have overdone it when, for example, they envisaged that the activities of a NGO might endanger the maintenance of international peace and security. For this risk to materialize, the NGO in question must have acquired in the global community a position of such prominence so that its activities could have the result of endangering international peace and security. To date, no NGO has achieved this status and it is unlikely that it will happen in the foreseeable future.

On the other hand, there is no doubt that contracting parties have the right to control the application of the Convention *vis-à-vis* NGOs seeking recognition in their territory. This right can be exercised on a number of grounds which are based on the following triptych: public order, public (national) security, and public health. At a European level, this triptych is generally accepted as constituting valid reasons for state intervention in all kinds of dealings and also when individuals having the citizenship of another state or entities having their registered seat in another state are involved. Its legal foundation could be traced to the law of European Economic Community (now the European Union), which, since the 1950s, has applied this triptych to regulate the free movement of goods, of services, of persons and of capital as well as the unhindered establishment of undertakings in the territory of the original six (now twenty-eight) Member States.<sup>66</sup> Two things should be noted. The first is that these grounds constitute exceptions to the principle of free movement, which remains the formidable rule guiding the relations among EU Member States.<sup>67</sup> The second is that often their precise content and application in specific circumstances have become the subject of disputes between the European Commission, the guardian of the EU Treaties, and Member States. The Court of Justice of the European Union has, over the years, delivered many judgments, which have played a significant role in clarifying and setting limits to the margin of appreciation<sup>68</sup> that Member States enjoy when they invoke and apply these grounds.<sup>69</sup>

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<sup>66</sup> See Article 4(2) of the Consolidated Version of the Treaty on European Union.

<sup>67</sup> See Articles 36, 45(3), 52, 65(1)(b) and 202 of the Consolidated Version of the Treaty on the Functioning of the European Union.

<sup>68</sup> In the present context, the margin of appreciation (in French 'marge d'appréciation', in German 'Ermessensspielraum') could be explained as the space for maneuvering that an international institution and its organs are prepared to allow to the authorities of Member States when the latter fulfill the obligations and the duties they have assumed by participating in the institution in question

According to the Explanatory Report of the Convention, the drafters made a deliberate decision not to refer generically to 'public policy' (*ordre public*), a term which, arguably, encompasses public (national) security and public health as well. On the contrary, the drafters, in an attempt to specify the grounds on which a refusal to recognize a NGO's legal personality in another contracting state may be based, followed the example of Article 11 of the European Convention on Human Rights. This is the provision which guarantees the right to freedom of peaceful assembly as well as the freedom of association with others, including the right to form and to join trade unions for the protection of their interests. According to the second paragraph of Article 11, states are not allowed to place any restrictions to the enjoyment of these rights other than the limitations laid down in their domestic law but subject to the condition that such limitations "are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others".

To put it schematically, Article 11 of the European Convention on Human Rights, on the one hand, and Article 4 of the Convention, on the other hand, create the following regime: while, in the beginning, they stipulate the application and the enjoyment of a specific right (respectively, the right to assembly and to association and the right to recognition of a NGO's legal personality), they go on to lay down a number of exceptions to these rights and, finally, prescribe limitations to these exceptions, which have the effect of reinforcing again the almost absolute nature of the original rights.

While the above observations concern the theoretical framework for invoking exceptions and limitations in the right of NGOs coming under the ambit of the Convention to have their legal personality and capacity recognized by another contracting state or states, the practical application of Article 4 still needs to be examined. According to the Explanatory Report, the provisions of Article 4 will come into play in the case of a NGO, which has been registered and allowed to operate in a contracting party, even though "it is common knowledge that the aim of that NGO is to engage, either in the [contracting party] in question or in another [contracting party], in activities which would damage the latter". To put it otherwise, Article 4 would come into play in the case of NGOs whose activities would be legal in the contracting state where they maintain their statutory office but the same activities would harm the contracting state/s where recognition is sought pursuant to the

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and/or when they implement binding legal instruments adopted by that institution and, especially, when harmonization of domestic legislation to the terms of the legal instrument is required.

<sup>69</sup> Given that only two out of the eleven contracting parties to the Convention are not at the same time Member States of the European Union (namely, Switzerland and the FYROM) but Switzerland participates with the other EU Members in the European Economic Area (EEA), which has a legal system similar to the EU, the references to EU law made in this paragraph are of relevance to analyzing the Convention. Thus, an international NGO having its statutory office / registered seat in one of these ten states should be able to invoke the rules of EU law, if it takes the view that the contracting state in which it seeks recognition has misapplied the exceptions and the restrictions envisaged in the Convention.

terms of the Convention. In these instances, the latter state/s should be able to invoke the protection of their national security and/or the protection of the rights and freedoms of the population and, on these grounds, block the recognition of the NGOs in question.

Even though the Explanatory Report does not offer any actual examples, the following illustration could serve to clarify these instances. Suppose that in contracting state X a small part of the population regards themselves as members of an ethnic minority but the official policy of state X is to refuse to accept it, even though it recognizes other ethnic minorities. Suppose further that in contracting state Y, where this ethnic minority constitutes a much larger part of the population and is recognized, members of that minority have lawfully set up the NGO Z. The purpose of NGO Z is to force governments of other states (including state X) to accept the existence of the minority in question and to grant specific rights to it. Moreover, suppose that the NGO Z has acquired an international character by establishing itself lawfully in the territory of non-contracting state A, where the minority in question constitutes the largest part of the population. Suppose, finally, that the NGO Z now seeks to have its legal personality and capacity recognized in contracting state X. In these circumstances, state X should be able to block it by invoking the provisions of Article 4 of the Convention. In particular, state X would argue that the purposes and objects of the NGO Z contravene national security and public safety and that, if it were allowed to act freely in its territory, it would lead to serious disorder.

One of the outcomes of the theoretical scenario described in the previous paragraph would be the creation of a dispute between the NGO Z and the authorities of contracting state X, if the former were to dispute the legality of the latter's act to refuse recognition under the Convention. The situation would become more complicated, if another contracting party, state Y, were to intervene in the dispute in favour of the NGO Z. In all countries subscribing to democratic ideals, good governance and the rule of law (all Member States of the Council of Europe are meant to subscribe to them) there should be provision to solve disputes in an independent and objective manner. On the other hand, often the text of multilateral treaties sets out the procedure to be followed in case of disputes relating to their interpretation and application (the dispute arising from the above scenario would fall into this category of disputes). The Convention is silent on any dispute settlement mechanism and, therefore, the methods envisaged in the domestic legal system of contracting state X for the resolution of disputes would have to apply.

However, depending on the specific circumstances of the case, there might be two other avenues open. The first avenue is that the NGO Z might argue that the refusal of contracting state X constitutes a violation of the aforementioned Article 11 of the European Convention on Human Rights and, provided that the procedural conditions are met, bring an action against state X before the European Court of Human Rights.<sup>70</sup> The second avenue will be open if contracting state X happens also to be a

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<sup>70</sup> Note that all Member States of the Council of Europe have accepted the European Convention on Human Rights and the jurisdiction of the European Court on Human Rights to rule on actions brought

Member State of the European Union, in which case the NGO Z might be able to invoke the rules of EU law on free movement and the right of establishment. If (and it is a big if) the case ever reached the Court of Justice of the European Union, contracting state X would have to defend its refusal to recognize the legal personality of the NGO Z. However, it would have to justify it on the basis of the relevant rules of EU law and not on the basis of the terms of the Convention, because the latter is not part of the EU legal system.



## Conclusions

When it was negotiated and adopted in the mid 1980s, the Council of Europe Convention on Recognition of the Legal Personality of International Non-Governmental Organisations was a pioneering multilateral treaty. Almost 30 years later it still retains its originality not least because in the meantime there has not been any other binding text regulating the transnational activities of NGOs. It is very interesting that, despite the small number of Member States that have ratified the Convention, the European Commission for Democracy through Law (better known as the Venice Commission) has considered that its terms serve as legal standards for the regulation of NGOs at a European level. In particular, the Commission held that the requirement in the legislation of a certain Member State of the Council of Europe (not a contracting party to the Convention) requiring international NGOs to set up local branches and representatives and have them registered was questionable on the ground that it was incompatible with the standards laid down in the Convention.<sup>71</sup>

There is no doubt that the terms of the Convention allow international NGOs to expand their activities in the territory of other states in a straightforward manner, which saves them of cumbersome, lengthy and costly procedures. To that end, the Convention could be seen as an ally of bona fide INGOs allowing them to increase their role and expand their impact in their fields of activity. The Convention is based on the *laissez faire laissez passé* principle. Notwithstanding that states can never be compelled to participate in a treaty, the fact that vast majority of the Member States of the Council of Europe have not even signed the Convention is troublesome and worrisome. And this because, on the one hand, they have not adopted any other comparable instrument and, therefore, have postponed the creation of a regulatory regime for INGOs and, on the other hand, Member States have often accepted the work performed by the INGOs as complementary to the activities pursued by their public authorities. In October 2007, the Committee of Ministers, i.e. the organ made up of the Member States' foreign ministers, approved a Recommendation on the legal status of NGOs in Europe.<sup>72</sup> Even though one of the reasons behind the adoption of the Recommendation was the 'desirability of enlarging the number' of the Convention's contracting parties, it should be noted that the Recommendation lays down principles and conditions pertaining to both domestic and international NGOs. While the content of the Recommendation is without doubt a very comprehensive framework, it remains a political instrument which, at best, could serve as guidelines and best practices for Member States without, however, obliging them to follow its stipulations.

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<sup>71</sup> See European Commission for Democracy through Law (Venice Commission), Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, adopted by the Venice Commission at its 88th Plenary Session Venice (14-15 October 2011), Opinion no. 636 / 2011 CDL-AD(2011)035, available at <http://www.venice.coe.int>

<sup>72</sup> See Committee of Ministers, Recommendation CM/Rec(2007)14 of the Committee of Ministers to Member States on the legal status of non-governmental organisations in Europe, adopted on 10 October 2007

But one should not only examine the attitude of states towards the Convention. The Council of Europe should also be criticized. To simply negotiate and conclude the text of a treaty under its auspices is not enough. There must also be follow up action. Member States should be persuaded on the advantages of the conventions that have been adopted and, especially in the case of treaties that have attracted a small number of ratifications, concerted efforts ought to be undertaken in order to increase participation. The Council of Europe is not unique among international organizations facing this problem. However, what distinguishes it from other intergovernmental institutions is the sheer number of the adopted conventions. Other international organizations, including the United Nations and the African Union, have addressed this problem by organizing treaty signing events on a regular basis and giving high publicity to those states which opt to sign conventions during these events. Perhaps it is high time that the Council of Europe resorted to such solutions.

## References

Barrett, S. (2007) *Why Cooperate? The Incentive to Supply Global Public Goods*, Oxford: Oxford University Press.

Bastid, S. (1952) "Perspectives d'un statut juridique pour les organisations internationales", *Bulletin de l'Union des Associations Internationales*, No. 4, April.

Ben-Ari, R.H. (2012) *The Normative Position of International Non-Governmental Organizations under International Law: An Analytical Framework*, Leiden: Martinus Nijhoff Publishers.

Bettati, M. and Dupuy, P.-M. (1986) *Les ONG et le Droit International*, Economica, Paris.

Davies, T. (2013) *NGOs: A New History of Transnational Civil Society*, London: Hurst Publishers.

Dupuy, P.-M. and Vierucci, L. (2008) *NGOs in International Law – Efficiency in Flexibility?*, Cheltenham: Edward Elgar.

European Union Agency for Fundamental Rights and Council of Europe (2011) *Handbook on European non-discrimination law*, Publications Office of the European Union.

Gavas, M. (2013) *The EU and Global Public Goods: Challenges and Opportunities*, London: Overseas Development Institute, DIIS Report 05.

Gordon, K. (2001) *The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison*, OECD Directorate for Financial, Fiscal and Enterprise Affairs, Working Papers on International Investment, Number 2001/5, December.

Higgott, R.A., Underhill, G.R.D. and Bieler, A. (2000) *Non-state Actors and Authority in the Global System*, London: Routledge.

Hondius, F. (1999) "Recognition and Protection of NGOs in International Law", *The International Journal of Not-for-Profit Law*, 2(2).

Independent Evaluation Group World Bank (2008) *Annual Review of Development Effectiveness 2008. Shared Global Challenges*, Washington, D.C..

Jackson, J.K. (2013) *Codes of Conduct for Multinational Corporations: An Overview*, Congressional Research Service, RS20803, 16 April.

Jenkins, R. (2001) *Corporate Codes of Conduct - Self-Regulation in a Global Economy*, United Nations Research Institute for Social Development (UNRISD) Programme Paper Number 2, April.

Jordan, L. (2005) *Mechanisms for NGO Accountability*, Global Public Policy Institute, GPPi Research Paper Series No. 3.

Kaul, I., Grunberg, I. and Stern, M.A. (1999) *Global Public Goods: International Cooperation in the 21<sup>st</sup> Century*, Oxford: United Nations Development Programme/Oxford University Press.

Kaul, I., Conceicao, P., Le Goulven, K. and Mendoza R.U. (2003) *Providing Global Public Goods: Managing Globalization*, Oxford: United Nations Development Programme/Oxford University Press.

Lindblom, A.K. (2005) *Non-governmental Organizations in International Law*, Cambridge: Cambridge University Press.

Long D., and Woolley, F. (2009) "Global Public Goods: Critique of a UN Discourse", *Global Governance*, 15: 107.

Magliveras, K. (2002) "The Greek Law of Succession" in D. Hayton (ed.) *European Succession Laws*, Third Edition, Bristol: Jordans.

Nelson, J. (2007) *The Operation of Non-Governmental Organizations (NGOs) in a World of Corporate and Other Codes of Conduct*, Harvard University, John F. Kennedy School of Government, Corporate Social Responsibility Initiative, Working Paper No. 34, March.

Otto, D. (1996) "Nongovernmental Organizations in the United Nations System: The Emerging Role of Civil Society", *Human Rights Quarterly*, 18: 107.

Otto, D. (2010) "Institutional Partnership or Critical Scapegoats? The Role of Human Rights NGOs in the United Nations" in M.A. Baderin and M. Ssenyonjo (eds) *International Human Rights Law. Six Decades after the UDHR and Beyond*, Ashgate, Farnham.

Papadaki, M. (2012) "The 'Government Intellectuals': Nicolas Politis – An Intellectual Portrait", *European Journal of International Law*, 23: 221.

Shelton, D. (1994) "The Participation of Nongovernmental Organizations in International Judicial Proceedings", *American Journal of International Law*, 8: 611.

Sybesma-Knol, N. (1997) "Non-State Actors in International Organizations: An Attempt at Classification" in Netherlands Institute of Human Rights, *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors*, SIM Specials 19, Utrecht.

Tornquist-Chesuier, M. (2004) "NGOs and International Law", *Journal of Human Rights*, 3: 253.

Vakil, A.C. (1997) "Confronting the Classification Problem: Towards a Taxonomy of NGOs", *World Development*, 25: 2057.

van Loon, H. (2007) "The Hague Conference on Private International Law", *Hague Justice Journal*, 2(2):3.

Weissbrodt, D. (1997) "The Role of Nongovernmental Organizations in the Implementation of Human Rights", *Texas International Law Journal*, 12: 293.

Wiederkehr, M.-O. (2007) "La Convention Européenne sur la Reconnaissance de la Personnalité Juridique des Organisations Internationales Non-Gouvernementales du 24 Avril 1986" *Annuaire Francais de Droit International*, XXXIII: 749.

Willetts P. (1996) *The Conscience of the World. The Influence of NGOs in the United Nations System*, London: Hurst & Company.

Willetts, P. (2000) "From Consultative Arrangements to Partnership: The Changing Status of NGOs in Diplomacy at the UN", *Global Governance*, 6: 191.

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