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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

35th meeting
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DRAFT REPORT ON THE CONSEQUENCES OF THE SO-CALLED "DISCONNECTION CLAUSE" IN INTERNATIONAL LAW IN GENERAL AND FOR COUNCIL OF EUROPE CONVENTIONS, CONTAINING SUCH A CLAUSE, IN PARTICULAR

Document prepared by the Chair and Vice-Chair

Foreword

1. At its last meeting on 10-11 September 2007, members and observers of the CAHDI were informed about the forthcoming decision of the Committee of Ministers to give CAHDI terms of reference to report on the consequences of the so-called "disconnection clause" in international law in general and for Council of Europe conventions, containing such a clause, in particular.

2. The CAHDI asked the Secretariat to collect relevant background material and agreed that the Chair and Vice-Chair, with the assistance of the Secretariat, would prepare a first draft of a response to the Committee of Ministers' Deputies' request, for circulation to all participants by the end of January 2008, in good time before the March 2008 meeting of the CAHDI[1].

3. A draft report is enclosed and hereby submitted by the Chair and Vice-Chair. It is intended to serve as a basis for discussion at the forthcoming meeting of the Committee.

Action required

Delegations are requested to examine the draft in advance of the CAHDI meeting in March, with a view to discussing and adopting the report at that meeting. It would be helpful if delegations could submit comments in writing to the Secretariat for circulation in advance of the March meeting of the CAHDI.

[1] See also CAHDI (2008) 2 and CAHDI (2008) 3

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Draft report on the consequences of the so-called "disconnection clause" in international law in general and for Council of Europe conventions, containing such a clause, in particular

Introduction

4. In its decision of 12 July 2007, adopting the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, the Committee of Ministers' Deputies agreed to invite the Committee of Legal Advisers on Public International Law (CAHDI) to examine the consequences of the so-called "disconnection clause" in international law[2].

5. To this end, on 10 October 2007, the Committee of Ministers' Deputies adopted ad hoc terms of reference for the CAHDI[3] (see Appendix 1), calling upon the CAHDI:

> ***To examine the consequences of the so-called "disconnection clause"*** *as laid out in Article 43, paragraph 3 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and equivalent provisions of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) (Article 26, paragraph 3), the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) (Article 40, paragraph 3) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) (Article 52, paragraph 4)* ***in international law in general and for Council of Europe conventions, containing such a clause, in particular****, and report back to the Committee of Ministers, including on consultations under paragraph 5.*

Paragraph 5 of the terms of reference (*Working methods and structures*) state that*:*

> *In carrying out its work, the Committee shall consult the European Union/European Community and its member states as well as the Council of Europe's relevant services.*

6. At the 34th meeting of the CAHDI, on 10-11 September 2007, members and observers were informed about the decision of the Committee of Ministers' Deputies and, subject to the adoption of specific terms of reference to be given to CAHDI, requested the Secretariat to collect relevant background material, in good time before the 35th meeting of the CAHDI in March 2008, including examples of treaty texts relating to "disconnection clause" used in both Council of Europe and other international instruments, extracts from the

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[2] See CM/Del/Dec(2007)1002/10.1, 16 July 2007 :

The Deputies

1. adopted the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, as it appears at Appendix 13 to the present volume of Decisions;[2]

2. took note of the declaration made by the European Community and the member states of the European Union;

3. decided to open the Convention for signature on the occasion of the 28th Conference of European Ministers of Justice (25-26 October 2007, Lanzarote, Spain) ;

4. took note of the Explanatory Memorandum to the Convention as it appears in document CM(2007)112 add;

5. agreed to invite the Committee of Legal Advisers on Public International Law (CAHDI) to examine the consequences of the so-called "disconnection clause" in international law and invited their Rapporteur Group on Legal Co-operation (GR-J) to elaborate ad hoc terms of reference for that purpose at one of its forthcoming meetings.

[3] CM/Del/Dec(2007)1006/10.3, 10 October 2007.

International Law Commission's Study on Fragmentation of International Law, references to any articles written on the subject, and any other material which they considered relevant in light of the terms of reference.

7. The CAHDI further agreed that the Chair and Vice-Chair, with the assistance of the Secretariat, would prepare a first draft of a response to the Committee of Ministers' Deputies' request, for circulation to all participants by the end of January 2008, in good time before the March 2008 meeting of the CAHDI.

8. By circular e-mail of 24 October 2007 to CAHDI delegations (members and observers), the Secretariat informed the Committee of the Ad hoc terms of reference given to the CAHDI by the Committee of Ministers' Deputies at its 1006th meeting on 10 October 2007 and invited all delegations to send to the Secretariat any observations as well as any relevant background materials (see Appendix 2).

9. Taking into account the contributions received, the Chair and Vice-Chair together with the Secretariat prepared a draft report (document CAHDI(2008)1 prov), which was circulated to the delegations by circular e-mail of 30 January 2008 (see Appendix 3) together with a compilation of background materials prepared by the Secretariat (document CAHDI (2008) 2).

10. The CAHDI considered the draft report at its 35th meeting (6-7 March 2008) and adopted the present report in pursuance of the terms of reference given to it by the Committee of Ministers' Deputies.

Background

11. As requested by the Committee of Ministers' Deputies, the present report deals with the consequences of so-called "disconnection clauses". The focus is on their legal effects. Criticism of such clauses has usually been directed at their practical effects, which can only be considered on a case-by-case basis. Such policy issues are not within the scope of this report[4]. However, it is noted that criticism has also been generated by fears that any indiscriminate and frequent use of such clauses may inadvertently lead to the erosion of the object and purpose of important standard setting treaties, or inspire similar practices with regard to the relations *inter se* between States engaged in integration processes in other regions. Since the request by the Committee of Ministers' Deputies refers to consequences in international law in general, these aspects will therefore also briefly be addressed in the report.

12. The term "disconnection clause" is used to refer to a provision in a multilateral treaty which provides that the treaty (or particular provisions thereof) shall not apply between certain parties in respect of which other provisions on the same subject-matter are or will be in force. It is not a term of art in international law, and the legal and practical effect of each provision depends upon its wording and the context in which it appears. Thus, depending on how it is drafted, a "disconnection clause" may have an effect on the whole of a treaty or on a part thereof only. The question arises to the extent to which the "disconnection" covers all or only certain aspects of a treaty (substantive law, procedural law, individual rights, monitoring, etc). Appendix 4 gives examples of different kinds of "disconnection clauses", many of which appear in Council of Europe Conventions[5].

[4] Nor does the report examine *in abstracto* the relationship between EU/Community law and international law or between national and EU/Community law, but only to the extent that is relevant for this analysis. On these issues, please refer to document CAHDI (2008) 3 Part 1.

[5] It should be noted that a considerable number of these Conventions have not entered into force.

13. Council of Europe bodies and Secretariat Services, in particular the CAHDI and its predecessor, the CJ-DI[6], have considered "disconnection clauses" on earlier occasions[7].

14. In particular, the CJ-DI concluded in 1989 that the "issues that the CJ-DI could usefully take up include notably the following:

a. *admissibility of a "disconnection" clause in general, and in particular in the case of a standard-setting treaty or of a "residual" treaty;*
b. *admissibility of a "disconnection" clause in respect of future or only of pre-existing instruments;*
c. *impact of a "disconnection" clause on the substantive provisions of the treaty and on the procedural ones (communication of information, settlement of disputes, territorial application, etc.);*
d. *impact of a "disconnection" clause on the application of another treaty referred to in the treaty containing the clause;*
e. *degree of freedom of the Parties to "disconnect" from the treaty (specification of the alternative source of rules, or not);*
f. *requirement to notify the other Parties, through the Secretary General, of any implementation of the "disconnection" clause, and, where appropriate, effect of a notification received from only one Party of, for example, an EEC rule binding also other Parties*."[8]

15. More recently, the Secretariat of the Council of Europe provided informal comments regarding the EU Presidency proposal concerning the inclusion of the disconnection clause contained in the three Conventions adopted in May 2005, namely, the Council of Europe Convention on the Prevention of Terrorism, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism, and the Council of Europe Convention on Action against Trafficking in Human Beings.

16. This resulted in an agreement by the EU member States that the need for, and scope of, the "disconnection clause" should be clarified and ultimately in a declaration made by the European Community and the EU states when the Council of Europe's Committee of Ministers adopted the three conventions, on 3 May 2005, explaining how the disconnection clause would work, particularly in relations between EU states and other, non-EU members of the Council of Europe. The declaration stated as follows :

The European Community/European Union and its member states reaffirm that their objective in requesting the inclusion of a 'disconnection clause' is to take account of the

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For examples of provisions of multilateral conventions with declarations of competence in favor of the EU/European Community but not with a "disconnection clause" as such, please refer to document CAHDI (2008) 3 Part 2.

[6] The CJ-DI operated under the authority of the European Committee on Legal Co-operation (CDCJ) until the setting up of the CAHDI in 1991.

[7] See for example the following documents reproduced in CAHDI(2007)27:

CJ-DI(89)8, *The disconnection clause – Memorandum of the Secretariat General prepared by the Directorate of Legal Affairs,*

CDCJ(89)58, *Final Activity Report of the Committee of Experts on Public International Law (CJ-DI) – Question relating to public international law,* paragraphs 23-36,

CDCJ(89)66, *Meeting Report of the European Committee on Legal Co-operation (CDCJ)*, paragraphs 36-40 relating to the work of the CJ-DI

[8] CJ-DI(89)8, *The disconnection clause – Memorandum of the Secretariat General prepared by the Directorate of Legal Affairs*, p. 5

institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member states to the Community.

This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member states, inasmuch as the latter are also parties to this convention.

The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community/Union, in order to indicate that European Union Member states cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member states on the one hand, and the other Parties to the convention, on the other; the Community and the European Union Member states will be bound by the convention and will apply it like any party to the convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the convention's provisions vis-à-vis non-European Union parties.[9]

17. This question was considered by Prime Minister Jean-Claude Juncker of Luxembourg in his report to the Heads of State and Government of the member States of the Council of Europe.[10] Mr Juncker noted that *the essential question here is how Community law, which transfers extensive powers, including many external powers, from member states to the EU, can be linked more effectively with international law, which is also evolving*.[11]

18. Against the background of rapid changes in Community law and less rapid, but substantial changes in international, convention-based law such as those drawn up by the Council of Europe he made a case for averting legal insecurity and major incompatibilities between Community and international law – particularly European law, whose *standard setting potential must remain a judiciously shared asset, and not become a cause of dissension and linking changes in Community law with changes in international law through consultation with the Council of Europe*.[12] He further recommended that "disconnection clauses", which are in fact simply "EU clauses" should be called just that.

19. This question has also be been considered recently by the United Nations International Law Commission (ILC)[13].

20. The 2005 ILC report describes a divergence of views on the effects of "disconnection clauses" in the following terms:

> *464. Some members felt that the proliferation of such clauses was a significant negative phenomenon. The opinion was even expressed that such clauses might be illegal inasmuch as they were contradictory to the fundamental principles of treaty law. Others, however, observed that whatever their political motives or effects, such clauses were still duly inserted in the relevant conventions and their validity thus*

[9] See, among others, explanatory report of the Council of Europe Convention on the Prevention of Terrorism, CETS n° 196, para. 272, http://conventions.coe.int/

[10] Council of Europe – European Union " A sole ambition for the European continent " - Report by Jean-Claude Juncker, 11 April 2006, pp. 15-16.

[11] Idem, p.15.

[12] Idem, p.16.

[13] See 2005 ILC Report, UN Doc A/60/10, Para. 463-465 and 2006 ILC Report, UN Doc A/61/10, Para. 251, *Conclusion 30.*

*followed from party consent. It was difficult to see on what basis parties might be prohibited from consenting to them. The Study Group [*on the "Function and scope of the lex specialis rule and the question of 'self-contained regimes'"*] agreed, however, that such clauses might sometimes erode the coherence of the treaty. It was important to ensure that they would not be used to defeat the object and purpose of the treaty. Nonetheless, it was felt impossible to determine their effect* in abstracto*.*

465. It was also pointed out that in some situations the result may not be as problematic, particularly if the obligations assumed by the parties under the disconnection clause were intended to deal with the technical implementation of the provisions of the multilateral convention or are more favourable than those of the regime from which it departs.

21. The 2006 report of the ILC Study Group on the Fragmentation of International Law[14], dealing with "conflict clauses" included in treaties that are designed to clarify the relationship between the treaty and subsequent or prior conflicting treaties, states:

292. Article 30 (2) of the VCLT provides that "when a treaty specifies that it is subject to, or that it is not be considered as incompatible with, an earlier or later treaty, the provision of that other treaty will prevail". This formulation covers also disconnection clauses. They are thus best analyzed as conflict clauses added to treaties with the view to regulating potential conflicts between Community law and the treaty. What may seem disturbing about such clauses is that they are open to only some parties to the original treaty and the content of the Community law to which they refer may be both uncertain and subject to change. Nevertheless, this is scarcely different from regular inter se amendments that also apply between some parties only and that may be subject to future modification.

293. Under what conditions is this type of clause (…) permissible? The starting-point is, of course, that the clause is agreed to by all the parties, so that no question of validity will rise. Nevertheless, it cannot be excluded that the other parties might not know of the real import of the disconnection clause because the rules referred to therein (the relevant EC rules) have been obscure, or modified or interpreted in a new way. In this case, the EC rules begin to resemble a new, successive treaty, covered by article 30 (4) VCLT. According to article 30 (5) VCLT "paragraph 4 [of article 30] is without prejudice to article 41". Through this means, an open-ended disconnection clause would become also conditioned by the requirements of article 41. During the preparatory work for the VCLT, the Chairman of the ILC confirmed that a right to an inter se modification should not be unlimited but that any modification would need to respect the object and purpose of the treaty. A similar position was taken by Pellet in context of reservations as he explained that an expressly authorized unspecified reservation must also fulfill the object and purpose test. Thus, while the scope and content of the disconnection clause is normally covered by the original consent, in case the regulation referred to in that clause will be modified, such modification may only be allowed to the extent that it does not "affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations [or] relate to a provision derogation of which is incompatible with the effective execution of the object and purpose of the treaty as a whole" as stipulated by article 41 (1) of the VCLT.

294. Like inter se modification, a disconnection clause makes it possible for a limited group of parties to enhance the objectives of the treaty by taking measures that

[14] See *Fragmentation of International Law*: Report of the Study Group of the ILC, finalised by Martti Koskenniemi, UN Doc. A/CN.4/L.682 of 13 April 2006 and Add.1 of 2 May 2006A/CN.4/L.702.

correspond to their special circumstances. But just like inter se agreements, this practice creates the possibility of undermining the original treaty regime. The actual effect of a disconnection clause depends on its specific wording. Their common point, however, is that they seek to replace a treaty in whole or in part with a different regime that should be applicable between certain parties only. The real substance of clause is not apparent on its surface, but lies in the regime referred to in the clause. It is the conformity of the substance of that regime with the treaty itself where the real point of concern lies. From the perspective of other treaty parties, the use of disconnection clause might create double standards, be politically incorrect or just confusing. To alleviate such concerns, some disconnection clauses are worded so as to be "without prejudice to the object and purpose of the present Convention". Nevertheless, even if they did not contain such a reference, the condition of conformity with object and purpose may, as pointed out above, derive from those laid down for the inter se modification. In assessing such conformity, two concerns seem relevant. First, a disconnection clause is agreed to by all the parties of the treaty. From this perspective, the practice seems unproblematic. The validity of a disconnection clause flows from party consent. On the other hand, it is not obvious that parties are always well-informed of the content of the regime to which the clause refers and that regime may change independently of the will or even knowledge of the other parties. In such cases, the criterion concerning conformity with object and purpose will provide the relevant standard for assessing the practice of the treaty parties. Like elsewhere, the consideration of whether the provisions to which the treaty refers are what Fitzmaurice called "integral" or "interdependent" provisions that cannot be separated from the treaty, seems relevant."

22. The ILC took note of the conclusions of the Study Group and commended them to the attention of the General Assembly[15]. Conclusion (30) reads as follows:

> *(30)* Conflict clauses*. When States enter into a treaty that might conflict with other treaties, they should aim to settle the relationship between such treaties by adopting appropriate conflict clauses. When adopting such clauses, it should be borne in mind that:*
>
> *(a) They may not affect the rights of third parties;*
> *(b) They should be as clear and specific as possible. In particular, they should be directed to specific provisions of the treaty and they should not undermine the object and purpose of the treaty;*
> *(c) They should, as appropriate, be linked with means of dispute settlement.*

The UN General Assembly took note of the conclusions and commended their dissemination (A/Res/61/34 of 4 December 2006, para. 4).

23. In addition, a number of authors have recently written about "disconnection clauses".[16]

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[15] See Report of the International Law Commission 2006, UN Doc A/61/10, Para. 251, *Conclusion 30.*

[16] See for instance: BAUME, T., *Competence of the Community to conclude the new Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters : Opinion 1/03 of 7*, German Law Journal n° 8, August 2006; BORRAS, A, *Les clauses de déconnexion et le droit international privé communautaire*, in Festschrift für Eric Jayme (herausgegeben von H.P. Mansel-T. Pfeiffer-H. Kronke-Ch. Kohler-R. Hausmann), Munich (Sellier), I, pp. 57-72; BRIERE, C., *Les conflits de conventions internationales en droit privé*, Bibliothèque de Droit Privé, L.G.D.J.,2001, p. 49; CAMERON, H. *"Disconnection" clauses – some reflections*, not yet published; CREMONA, M. and ECKHOUT, P., Community report, *External relations of the EU and the Member States : Competence, Mixed Agreements, International Responsibility and Effects of International Law*, Ed. Xenios Xenopoulos, FIDE 2006, pp. 319-360; DE SCHUTTER, O., *The division of tasks between the Council of Europe and the European Union in the promotion and protection of Human Rights in Europe: Conflict, Competition and Complementarity*, 15 January 2007; ECONOMIDES, C. & KOLLIOPOULOS, A. , *La clause de déconnexion en faveur du droit communautaire : une pratique critiquable*, in RGDIP 273 (2006);

Legal analysis of "disconnection clauses"

Validity of the clauses

24. If those negotiating a treaty agree to include a "disconnection clause" the latter will in principle be legally effective.

25. It should be recalled that the freedom to agree on the terms of a treaty is only limited by the rule that a treaty is void if it conflicts with a peremptory norm of general international law (*jus cogens*) (Article 53 of the Vienna Convention on the Law of Treaties). There is nothing in international law that precludes those negotiating a treaty from including a "disconnection clause" and there is considerable practice of negotiating such clauses and other similar provisions stipulating that different parties to a multilateral treaty have different rights and obligations there under.

26. The CAHDI considers that the four clauses referred to in the Ad hoc terms of reference do not pose a problem from the point of view of their validity.

Effects of the clauses

27. The effects of "disconnection clauses" cannot be assessed *in abstracto* but only on a case-by-case basis taking into account the terms of the Convention in which they are included. Consequently, in pursuance of the ad hoc terms of reference given to the CAHDI by the Committee of Ministers' Deputies, the present report concentrates on the specific effects of the "disconnection clauses" as set out in Article 26.3 of the *Council of Europe Convention on the Prevention of Terrorism* (CETS No. 196), Article 40.3 of the *Council of Europe Convention on Action against Trafficking in Human Beings* (CETS No. 197), Article 52.3 of the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (*CETS No. 198) and Article 43.3 of the *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* (CETS No. 201), namely:

> *Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.*

Nevertheless this analysis may contain elements applicable *mutatis mutandis* to other conventions.

28. At the outset, it should be noted that the "disconnection clause" is intended to cover "members of the European Union […], *in their mutual relations*" and not relations between these States and other States or individuals.

HOFFMEISTER, F., *The contribution of EU practice to international law*, in: *M. Cremona (ed.), Collected Course of the Academy of European Law*, Oxford, OUP, 2007, forthcoming; LAVRANOS, N., *Topic 3 External relations of the EU and the Member States*, FIDE Conference 2006, Dutch European Law Society, Report for the Netherlands, p.2; LEIN, E., *La compétence externe de la Communauté*, Etudes Suisses de Droit Comparé, 2006-2; MANGILI, F., *Avis 1/03 de la Cour de Justice*, Centre d'Etudes Juridiques Européennes, Avril 2006; POLAKIEWICZ, J. "*Treaty Making in the Council of Europe"*, Council of Europe Publishing, Strasbourg, 1999; SCHULTZ, A. *Reflection Paper to Assist in the preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*; TELL, O., *Disconnection clause*, proceedings of the Seminar UIA Edinburgh; VOLODYN, I. *The European Union's participation in the activities of the Council of Europe: Legal problems*, Master thesis, Université Robert Schumann, not yet published.
N.B.: This list has been compiled by the Secretariat bearing in mind also the contribution from the EU (cf. CAHDI (2008) 3 Part 3).

29. This being said, the impact of the clauses mentioned above depends first and foremost on their wording. In this case, they refer to a legal order which is distinct from both the domestic legislation of the member states and from the Council of Europe conventions, i.e. the legal order of the European Community/European Union, which is specific and complex.[17] It may however also be noted that in a number of important fields of law there is a close relationship between this legal order and the European Economic Area Agreement, which the EFTA Court has characterized as having created a distinct legal order of its own.[18] Moreover, in other regional contexts than the European one, there are on-going integration processes that might in the future lead to similar needs being invoked.

30. As underlined in the report of the Study Group of the International Law Commission, the hypothesis that certain states might not have any knowledge of the actual impact of the disconnection clause at the moment of its adoption, due to the complexity of EC/EU rules which are the origin of the disconnection clause, cannot be excluded. This is all the more true in view of the fact that these rules can develop rapidly and are subject to changing interpretation or that they can include technically complex wordings.

31. Therefore, while the impact on the field of application *ratione personae* of the conventions is rather obvious, this is not the case with regard to the field of application *ratione materiae* where the application of the clauses could constitute an obstacle for states not members of the EU in respect of their accessibility to and the possibility to foresee the scope of the EU member states' domestic law in the areas concerned.

32. This also constitutes an obstacle to the assessment of the conformity of the "disconnection" process with the object and purpose of the Council of Europe conventions concerned and may be prejudicial to legal certainty, which is crucial to the relations between the Parties.

33. However, the wording of the "disconnection clauses" in the four conventions mentioned above provides a guarantee with regard to the scope of application *ratione materiae* of those texts. These clauses include the following formula: "*without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties*". This wording ensures that EC/EU rules on matters subject to the disconnection will respect the minimum standards and procedures set out by the conventions concerned. Any EC/EU rule below these conventional standards would have to be regarded as being in breach of the object and purpose of the treaty. Likewise, the disconnection could not detract from the monitoring mechanism provided by the Convention for this would be contrary to the object and purpose of the Convention and its overall efficiency.

34. At the same time, it should be borne in mind that, in order to be effective, the analysis of pertinent EC/EU rules can only be done in collaboration with the member states. However, the "disconnection clauses" in question do not contain any obligation to notify the depositary of this procedure nor of the applicable EC/EU rules. Nor is anything said in this respect in the explanatory reports of the conventions concerned. The application of these clauses is then, in all probability, automatic.

35. Certain authors[19] have criticised this automaticity, underlining, in order to corroborate their thesis, that there are examples of international conventions involving "disconnection

[17] The EC/EU legislation relevant to the Council of Europe Conventions in question is included in Appendix 5, submitted by the EU.

[18] Case E-7/97, 1998 Rep. EFTA Ct., 127, Sveinbjörnsdottir, paragraph 59.

[19] ECONOMIDES, C. and KOLLIOPOULOS, A., above, p. 275.

clauses" which are not necessarily applied automatically, for instance Article 13.3 of the *Unidroit Convention on stolen or illegally exported cultural property*.[20]

36. Therefore the CAHDI considers that when it is necessary to include "disconnection clauses" in future conventions, consideration should be given to establishing a means to allow all the Parties to the treaty to identify the applicable EC/EU rules so as to allow each Party to ascertain the extent of each of the respective Parties' commitment. Further consideration should be given to this matter, in particular the modalities, e.g. a possible conventional requirement, incumbent on the EU member state holding the Presidency of the EU, to declare at regular intervals the applicable EC/EU law[21]. This process would facilitate above all the determination of the scope, material as well as temporal, of the clauses and would also facilitate the assessment of its conformity with the object and purpose of the treaty concerned and would contribute to legal certainty and clarity for non-EU member states parties as to the accessibility and forseeability of the regime applicable in place of the convention, whether EC, EU or domestic law.

37. While the effects of the application of a "disconnection clause" in respect of the treaty concerned could thus be limited to guaranteeing a certain legal stability, such a clause could nevertheless bear other indirect implications. As mentioned above, concerns have sometimes been expressed that a broader practice may emerge in international law. Reference is in this context also made to questions pertaining to Federal Clauses or to vague references to other legal systems. CAHDI therefore recommends that careful consideration is given in each particular case to whether a disconnection clause is actually necessary and, if so, whether the treaty concerned should also be opened for participation by the EU or relevant international organizations.[22] It is assumed that in a number of cases such awareness will be useful in order to circumscribe such clauses to actual needs and avoid creating precedents as to lack of clarity and scope. In some cases it is assumed that the object and purpose of the treaty concerned does not exclude the conclusion of particular *inter se* legal arrangements between particular States Parties, e.g. where their legal effects would not apply to third Parties and the treaty concerned does not purport to establish a particular standard.

Title of the clauses

38. At its meeting of 18-19 September 1989, the CJ-DI (the CAHDI's predecessor) already questioned the pertinence of the title of the so-called "disconnection" clause, finding the term "*misleading*"[23] and that it reflected "*neither the real nature nor the purpose of the*

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[20] As the authors underline, this is on the condition, however, that each member state has the freedom to make or to not make such a declaration, in accordance with the terms of Article 13 of this Convention which reads as follows:

"1) This Convention does not affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States bound by such instrument.

(2) Any Contracting State may enter into agreements with one or more Contracting States, with a view to improving the application of this Convention in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary.

(3) In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply. the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules." (Secretariat's emphasis)

[21] See also Explanatory Report of the Cybercrime Convention, para. 307 reproduced in Appendix 4.

[22] An example of such a treaty is United Nations Convention on the Law of the Sea, see its Annex IX concerning intergovernmental organizations constituted by States to which member States have transferred competence over matters governed by the Convention.

[23] CDCJ (89) 58, above, p. 10, para. 33.

clause".[24] The Committee recommended a more appropriate title and made suggestions such as "*special relations*", "*special agreements*" and "*inter se agreements*".

39. As noted above, this issue was picked up again in the *Juncker Report* of 11 April 2006. Mr Juncker asked whether it would not be more appropriate to rename this type of clause and proposed, as an example, "*EU clauses*".[25]

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[24] Ibid, para. 36.

[25] Council of Europe – European Union : "A sole ambition for the European continent", Report by Jean-Claude Juncker, above, p. 16.

Appendix 1

Council of Europe www.coe.int Committee of Ministers

1006th meeting – 10 October 2007

Appendix 15
(Item 10.3)

Decision No. CM/874/10102007

Ad hoc terms of reference for the Committee of Legal Advisers on Public International Law (CAHDI) with a view to examining the consequences of the so-called "disconnection clause" in international law

1. Name of Committee:

Committee of Legal Advisers on Public International Law (CAHDI)

2. Source:

Committee of Ministers

3. Completion date:

These terms of reference shall expire on 31 December 2008

4. Terms of reference:

To examine the consequences of the so-called "disconnection clause" as laid out in Article 43, paragraph 3 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and equivalent provisions of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) (Article 26, paragraph 3), the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) (Article 40, paragraph 3) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) (Article 52, paragraph 4) in international law in general and for Council of Europe conventions, containing such a clause, in particular, and report back to the Committee of Ministers, including on consultations under paragraph 5.

5. Working methods and structures:

In carrying out its work, the Committee shall consult the European Union/European Community and its member states as well as the Council of Europe's relevant services.

Related Documents

Meetings

1006th meeting of the Ministers' Deputies / 10 October 2007

Other documents

CM/Del/Dec(2007)1006/10.3E / 12 October 2007

Appendix 2

BENITEZ Rafael

From: BENITEZ Rafael
Sent: Wednesday 24 October 2007 16:58
To: [CAHDI members and observers distribution list BCC]; BENITEZ Rafael
Cc: LEZERTUA Manuel; OVCEARENCO Albina; KREUTZER Gerhard; NAAS Francine; DANIELL Saskia
Subject: Council of Europe - Conseil de l'Europe / CAHDI / Disconnection Clause - Clause de déconnexion


CAHDI connection E.pdf (2


CAHDI connection F.pdf (27

Dear members of the CAHDI,

Please find attached the Ad hoc terms of reference for the Committee of Legal Advisers on Public International Law (CAHDI), which the Committee of Ministers (Deputies) gave to the CAHDI at its 1006th meeting on 10 October 2007, instructing the CAHDI to examine the consequences of the so-called "disconnection clause" in international law (Decision No. CM/874/10102007).

As indicated at the last meeting of the CAHDI, the Chair and Vice-Chair of the CAHDI, with the assistance of the Secretariat, will now prepare the preliminary draft reply, which will be circulated to delegations at the end of January 2008, with a view to its discussion in the March 2008 meeting of the CAHDI.

To this end, delegations are kindly invited to send to the Secretariat any observations as well as any relevant background materials (e.g. examples of treaty texts relating to 'disconnection' clauses used in both Council of Europe and other international instruments, extracts from the ILC Fragmentation Study, references to any articles written on the subject, etc.) by 15 December 2007.

The Secretariat remains at your disposal should you require any further information.

Kind regards,

_____

Chers membres du CAHDI,

Veuillez trouver ci-joint le mandat occasionnel du Comité des conseillers juridiques sur le droit international public (CAHDI), confié par le Comité des Ministres (Délégués) au CAHDI à sa 1006e réunion le 10 octobre 2007, chargeant le CAHDI d'étudier les conséquences de la clause dite « de déconnexion » en droit international (Décision No. CM/874/10102007).

Tel qu'indiqué à la dernière réunion du CAHDI, le Président et le Vice-Président du CAHDI, assistés du Secrétariat, vont préparer un avant projet de réponse qui sera envoyé aux délégations à la fin du mois de janvier 2008, afin d'être discuté à la réunion du CAHDI de mars 2008.

A cet effet, les délégations sont priées d'envoyer au Secrétariat avant le 15 décembre 2007 toute observation ainsi que tout document de référence (p.e.: des exemples de textes de traités relatifs aux clauses de « déconnection » utilisés à la fois dans des instruments du Conseil de l'Europe et d'autres instruments internationaux, des extraits de l'étude de la CDI sur la fragmentation, des références à des articles sur le sujet, etc.).

Le Secrétariat est à votre disposition pour tout renseignement complémentaire.

Sincères salutations,

Rafael A. Benitez
Secretary of the CAHDI - Secrétaire du CAHDI
Council of Europe - Conseil de l'Europe
Tel. +33388413479 Fax +33388412764
rafael.benitez@coe.int

Appendix 3

BENITEZ Rafael

From: BENITEZ Rafael
Sent: Wednesday 30 January 2008 16:51
To: BENITEZ Rafael
Cc: OVCEARENCO Albina; KAUTZMANN Jean-Etienne; KREUTZER Gerhard; NAAS Francine; DANIELL Saskia
Subject: FW: Council of Europe - Conseil de l'Europe / CAHDI

Importance: High

Attachments: CAHDI _2008_ 1 Rapport Deconxion F.pdf; CAHDI _2008_ 1 Report Disconxion E.pdf


CAHDI _2008_ 1 Rapport Deconxi...


CAHDI _2008_ 1 Report Disconxi...

Dear members of the CAHDI,

Following my e-mail of 24 October 2007 regarding the terms of reference instructing the CAHDI to examine the consequences of the so-called "disconnection clause" in international law (Decision No. CM/874/10102007), please find attached a draft report prepared by the Chair and Vice-Chair (document CAHDI (2008) 1).

Delegations are kindly invited to send to the Secretariat any observations they may have as soon as possible. I would also draw your attention to documents CAHDI (2008) 2 and 3, also posted on the restricted CAHDI website.

The Secretariat remains at your disposal should you require any further information.

Kind regards,

———————

Chers membres du CAHDI,

Faisant suite à mon courriel du 24 octobre dernier relatif au mandat chargeant le CAHDI d'étudier les conséquences de la clause dite « de déconnexion » en droit international (Décision No. CM/874/10102007), veuillez trouver ci-joint un projet de rapport préparé par les Président et Vice-présideent (document CAHDI (2008) 1).

Les délégations sont priées d'envoyer au Secrétariat dans les meilleurs délais toute observation sur ce document. Par ailleurs, j'attire votre attention sur les documents CAHDI (2008) 2 et 3 affichés également sur le site restreint du CAHDI.

Le Secrétariat est à votre disposition pour tout renseignement complémentaire.

Sincères salutations,

Rafael A. Benitez
Secretary of the CAHDI - Secrétaire du CAHDI
Council of Europe - Conseil de l'Europe
Tel. +33388413479 Fax +33390215131
rafael.benitez@coe.int
www.coe.int/cahdi

Appendix 4

Examples of Conventions containing a disconnection clauses

COUNCIL OF EUROPE

European Convention on Social Security (CETS No.: 078)

Open for signature by the member States and for accession by non-member States in Paris on 14 December 1972

"DISCONNECTION" CLAUSE

Article 6

1 The provisions of this Convention shall not affect obligations under any convention adopted by the International Labour Conference.

2 This Convention shall not affect the provisions on social security in the Treaty of 25 March 1957 establishing the European Economic Community nor the association agreements envisaged under that Treaty nor the measures taken in application of those provisions.

EXPLANATORY REPORT

"*General considerations*
(…)

18. The Convention does not affect:

- obligations under any convention adopted by the International Labour Conference,

- the provisions on social security in the Treaty of 25 March 1957 establishing the European Economic Community or in association agreements concluded under that treaty; or the measures taken for the application of those provisions.

19. However, the Convention will apply in all cases where the institution of a Contracting Party not a Member of the Communities is called upon to intervene and in cases which, for other reasons, are not covered by Regulations on social security of the Council of the European Communities. (1)

Thus the Convention could apply in the following cases:

1. the institution of a Contracting Party not a Member of the European Communities is called upon to intervene even where a national of a member State of the European Communities is in question;

2. the person concerned is a national of one of the Contracting Parties who has spent his working life wholly in member States of the European Communities but is not a national of any member State of the Communities;

3. the person concerned is a national of a Community member State who, having completed his whole working life in the member States of the Communities, has exercised therein at

least one occupation subject to a social security scheme not affected by the Regulations on social security of the Council of the European Communities.

(…)

Article 6 – Exceptions to the principle established in Article 5

(…)

Paragraph 2

54. This paragraph contairis a clause designed to avoid clashes between the Convention and the social security provisions of the Rome Treaty."

Convention on Mutual Administrative Assistance in Tax Matters (CETS No. 127)

Open for signature by the member States of the Council of Europe and the Member countries of OECD in Strasbourg on 25 January 1988.

"DISCONNECTION" CLAUSE

Article 27 – Other international agreements or arrangements

[…]

2 Notwithstanding the rules of the present Convention, those Parties which are members of the European Economic Community shall apply in their mutual relations the common rules in force in that Community.

EXPLANATORY REPORT

"*Article 27 – Other international agreements or arrangements*

[…]

Paragraph 2

259. At the request of the European Economic Community and its member States, the need has arisen to introduce a specific provision regulating the relationships between this Convention and those rules on administrative assistance in tax matters which exist or may exist in the future among the said States. This is achieved through a general derogation from the Convention: the Parties which are members of the European Economic Community apply in their relations with each other the rules in force in the Community and thus apply the rules deriving from the Convention only insofar as no Community rule exists on the same matter."

European Convention on Transfrontier Television (ETS No. 132)

Open for signature by the member States of the Council of Europe and the other States party to the European Cultural Convention, and by the European Economic Community, in Strasbourg, on 5 May 1989.

"DISCONNECTION" CLAUSE

Article 27

1 In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.

2 […]

EXPLANATORY REPORT

"Article 27 – Other international agreements or arrangements

361. This article specifies the relations between the Convention and other international agreements or arrangements under which the Parties may agree to establish between them particular regimes, which are either derogatory in relation to the rules arising from the Convention or which extend the scope of those rules. It only concerns, therefore, such agreements or arrangements and not, more generally, all other treaties by which the Parties to this Convention may be bound (see in this context, the comments on Article 4, paragraphs 119 to 123 above).

362. Paragraph 1 is designed to cover the particular situation of those Parties which are members of the European Community. It states that, in their mutual relations, those Parties shall apply Community rules and shall not therefore apply the rules arising from the Convention except in so far as there is no Community rule governing the particular subject concerned. Since it governs exclusively the internal relations between the Parties members of the European Community, this paragraph is without prejudice to the application of this Convention between those Parties and Parties which are not members of the European Community."

Protocol to the Convention on Insider Trading (ETS No. 133)

Open for signature by the member States of the Council of Europe signatories to the Convention, in Strasbourg, on 11 September 1989.

"DISCONNECTION" CLAUSE

Article 1

The following provision shall be inserted in the Convention:

> "Article 16 *bis*
> In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned."

EXPLANATORY REPORT:

"Article 16 bis is designed to cover the particular situation of those Parties which are members of the European Economic Community. It states that, in their mutual relations, those Parties shall apply Community rules and shall not therefore apply the rules arising from the Convention except in so far as there is no Community rule governing the particular subject concerned. Since it governs exclusively the internal relations between the Parties members of the European Economic Community, this paragraph is without prejudice to the application of this Convention between those Parties and Parties which are not members of the European Economic Community."

European Convention on Certain International Aspects of Bankruptcy (ETS No. 136)

Open for signature by the member States of the Council of Europe, in Istanbul, on 5 June 1990.

DISCONNECTION CLAUSE

Article 38 – International conventions and arrangements

1. This Convention shall not prejudice the application of international conventions to which a Party is, or becomes, a Party.

2. In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention, except in so far as there is no Community rule governing the particular subject concerned.

EXPLANATORY REPORT

"*Article 38 – International conventions and arrangements*

170. The term international conventions also covers other international arrangements such as those existing between Nordic states. Furthermore, this term also covers EEC rules, as well as the provisions of the domestic law of EEC member States implementing these rules (see paragraph 80)."

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141)

Open for signature by the member States of the Council of Europe and non-member States which have participated in its elaboration, in Strasbourg, on 8 November 1990.

"DISCONNECTION" CLAUSE

Article 39 – Relationship to other conventions and agreements

1. This Convention does not affect the rights and undertakings derived from international multilateral conventions concerning special matters.

2. The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

3. If two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in this Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention, if it facilitates international co-operation.

EXPLANATORY REPORT

"95. Article 39 is intended to ensure the coexistence of the Convention with other treaties – multilateral or bilateral – dealing with matters which are also dealt with in the present Convention.

Paragraph 1 concerns, *inter alia*, the United Nations Convention. It is possible that a request made under the present Convention might be dealt with under either of the two conventions. The same is valid for requests which might fall within the scope of application of both the present Convention and the Mutual Assistance Convention or the Validity Convention. Paragraph 2 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements relating to matters dealt with in the Convention. The drafting permits the *a contrario* deduction that Parties may not conclude agreements which derogate from the Convention. Paragraph 3 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention, for instance in the Nordic co-operation."

European Convention on the Protection of the Archaeological Heritage (Revised) (ETS No. 143)

Open for signature by the member States of the Council of Europe and the other States party to the European Cultural Convention, in Valetta, on 16 January 1992.

DISCONNECTION CLAUSE

Article 11
Nothing in this (revised) Convention shall affect existing or future bilateral or multilateral treaties between Parties, concerning the illicit circulation of elements of the archaeological heritage or their restitution to the rightful owner.

EXPLANATORY REPORT

"*Article 11*
The basic legal and practical problems involved in preventing unlawful trade in elements of the cultural heritage are very complex. These problems are beyond the scope of a convention dealing basically with treatments of sites and archaeological investigation. Consequently, the Convention, in Article 11, states that nothing within it is to be taken as affecting existing or future bilateral or multilateral treaties dealing with these problems. In other words, this Convention cannot be used to interpret, minimise or expand any such treaties.

Instruments existing when the revised Convention was opened for signature should be mentioned, namely the European Convention on Offences relating to Cultural Property, prepared by the Council of Europe and opened for signature in 1985. Another major convention is the Unesco Convention on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 November 1970). As of April 1991, there were sixty-nine States party to this Convention, including, among the members of the Council of Europe, the following: Cyprus, Czechoslovakia, Greece, Hungary, Italy, Portugal, Spain and Turkey. Of the five States with special guest status within the Council of Europe, three - Bulgaria, Poland and Yugoslavia - are party to the 1970 Unesco Convention.

Central and eastern European States may be affected by the Agreement between the Socialist States on Co-operation and Mutual Aid Concerning the means of Detention and the Return of Cultural Property Illicitly transported across State Borders, 1986.
Other international draft agreements are under consideration at the time of opening for signature of the present revised Convention."

European Convention on Cinematographic Co-Production (ETS No. 147)

Open for signature by the member States of the Council of Europe and the other States party to the European Cultural Convention, in Strasbourg, on 2 October 1992.

"DISCONNECTION" CLAUSE

Article 2 – Scope

[…]

3. The provisions of bilateral agreements concluded between the Parties to this Convention shall continue to apply to bilateral co-productions.
In the case of multilateral co-productions, the provisions of this Convention shall override those of bilateral agreements between Parties to the Convention. The provisions concerning bilateral co-productions shall remain in force if they do not contravene the provisions of this Convention.

4. In the absence of any agreement governing bilateral co-production relations between two Parties to this Convention, the Convention shall also apply to bilateral co-productions, unless a reservation has been made by one of the Parties involved under the terms of Article 20.

EXPLANATORY REPORT

"*Article 2 – Scope*

[…]

3. In the case of a bilateral co-production, the provisions of the bilateral agreements are fully applicable. In the case of multilateral co- productions, the provisions of the bilateral agreements between States Parties to the convention are applicable only if they do not contradict the provisions of the Convention. If there is a discrepancy, the provisions of the Convention are directly applicable and override the conflicting provisions of the bilateral agreements".

Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS No. 150)

Open for signature by the member States of the Council of Europe, the non-member States which have participated in its elaboration and by the European Economic Community, in Lugano, on 21 June 1993.

"DISCONNECTION" CLAUSE

Article 25 – Relation between this Convention and other provisions

1. Nothing in this Convention shall be construed as limiting or derogating from any of the rights of the persons who have suffered the damage or as limiting the provisions concerning the protection or reinstatement of the environment which may be provided under the laws of any Party or under any other treaty to which it is a Party.

2. In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.

EXPLANATORY REPORT

"*Article 25 – Relation between this Convention and other provisions*

87. The first paragraph of this article is based on Article 60 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The paragraph lays down the principle that the Convention shall not take precedence over the internal law of the Parties or the international agreements by which they may be bound whenever the provisions of the Convention are less favourable to persons suffering damage. The notion of a person who has suffered damage should be interpreted in the light of the definition of the notion of damage in Article 2, paragraph 7.

This concerns provisions which exist at the time when the Convention enters into force, as well as provisions established afterwards.

The same principle applies to provisions concerning the protection or reinstatement of the environment.

88. The second paragraph is a provision which has been recently used in other international conventions which provide for the membership of the European Economic Community.

Its purpose is twofold. In the first place it aims at permitting the EEC Member States, when a Convention contains subjects for which the Community has exercised its competence, to sign and ratify the Convention together with the Community without the need to make declarations about the division of their competence.

The second purpose is to make sure that the EEC Member States and the Community would not have to abstain from becoming a Party to the Convention in the case of possible minor

discrepancies between the provisions of the Convention and Community rules during the period needed to bring these rules in conformity with the provisions of the Convention.

The clause would also apply in cases where only one Member State would be affected. However, in their relations with third countries, Parties to the Convention, the EEC Member States would have to apply the provisions of the Convention itself.

Therefore, if the incident occurs on the territory of State A, which is a member State of the EEC, and damage is suffered on the territory of State B, which is not a member State of the EEC, liability for the damage suffered in State B would be regulated by the Convention."

European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite (ETS No. 153)

Open for signature by the member States of the Council of Europe and the other States party to the European Cultural Convention, and by the European Community, in Strasbourg, on 11 May 1994.

"DISCONNECTION" CLAUSE

Article 9 – Other international agreements or arrangements

1. In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention, except in so far as there is no Community rule governing the particular subject concerned.

2. Parties reserve the right to enter into international agreements among themselves in so far as such agreements grant to authors, performers, producers of phonograms or broadcasting organisations at least as extensive protection of their rights as that granted by this Convention or contain other provisions supplementing this Convention or facilitating the application of its provisions. The provisions of existing agreements which satisfy these conditions shall remain applicable.

3. Parties which avail themselves of the faculty provided for in the preceding paragraph shall notify the Secretary General of the Council of Europe who shall transmit this notification to the other Parties to this Convention.

EXPLANATORY REPORT

There is no explanatory report for this Convention.

Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances (ETS No. 156)

Open for signature by the member States of the Council of Europe which have already expressed their consent to be bound by the Vienna Convention, in Strasbourg, on 31 January 1995.

"DISCONNECTION" CLAUSE

Article 30 – Relationship to other conventions and agreements

1. This Agreement shall not affect rights and undertakings deriving from the Vienna Convention or from any international multilateral conventions concerning special matters.

2. The Parties to the Agreement may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Agreement, for the purpose of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it and in Article 17 of the Vienna Convention.

3. If two or more Parties have already concluded an agreement or treaty in respect of a subject dealt with in this Agreement or have otherwise established their relations in respect of that subject, they may agree to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Agreement, if it facilitates international co-operation.

EXPLANATORY REPORT

"99. Article 30 is intended to ensure the co-existence of the agreement with other treaties dealing with matters which are also dealt with in the present agreement. In particular, it is clear that the interpretation and operation of the Vienna Convention remains unaffected. The "special matters" referred to in paragraph 1 concern, for instance, mutual assistance in criminal matters or extradition. As provided for by Article 2, paragraph 1, the agreement should be interpreted in conformity with the international law of the sea. Action taken under the agreement shall not interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea (see Article 2, paragraphs 1 and 3)."

European Social Charter (revised) (ETS No. 163)

Open for signature by the member States of the Council of Europe, in Strasbourg, on 3 May 1996.

"DISCONNECTION" CLAUSE

Article H – Relations between the Charter and domestic law or international agreements

The provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected.

EXPLANATORY REPORT

Nothing relevant

Convention on the Recognition of Qualifications concerning Higher Education in the European Region (ETS No. 165)

Open for signature in Lisbon on 11 April 1997

"DISCONNECTION" CLAUSE

Article II.3

Nothing in this Convention shall be deemed to derogate from any more favourable provisions concerning the recognition of qualifications issued in one of the Parties contained in or stemming from an existing or a future treaty to which a Party to this Convention may be or may become a party.

(…)

Article XI.4

1 Parties to this Convention which are at the same time parties to one or more of the following conventions:
European Convention on the Equivalence of Diplomas leading to Admission to Universities (1953, CETS No. 15), and its Protocol (1964, CETS No. 49);
European Convention on the Equivalence of Periods of University Study (1956, CETS No. 21);
European Convention on the Academic Recognition of University Qualifications (1959, CETS No. 32);
International Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in the Arab and European States bordering on the Mediterranean (1976);
Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region (1979);
European Convention on the General Equivalence of Periods of University Study (1990, CETS No. 138),

a. shall apply the provisions of the present Convention in their mutual relations;

b. shall continue to apply the above mentioned conventions to which they are a party in their relations with other States party to those conventions but not to the present Convention.

2 The Parties to this Convention undertake to abstain from becoming a party to any of the conventions mentioned in paragraph 1, to which they are not already a party, with the exception of the International Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in the Arab and European States bordering on the Mediterranean.

EXPLANATORY REPORT

"*Article II.3*

Modelled on ETS No. 32 European Convention on the Academic Recognition of University Qualifications (1959), Article 9 (a), this Article states the principle that the present Convention shall not affect any existing bilateral or multilateral conventions or agreements between Parties containing more favourable provisions than the present Convention, nor shall it preclude the future conclusion of such conventions or agreements between Parties. Such conventions or agreements may, for example, be found within the framework of the European Union, the Nordic Council of Ministers or the Commonwealth of Independent States."

[…]

Article XI.4

This article defines the relationship between this Convention and previous Council of Europe and UNESCO Conventions on the recognition of higher education qualifications in the European region.

The article underlines the function of this Convention as a *replacement Convention*, in that any

Party to the present Convention, ceases to apply any of the previous Council of Europe and UNESCO Conventions mentioned in this Article to which it is a party, but only with regard to other Parties to the present Convention. Parties shall still be bound by the previous Conventions to which they are a party with regard to other parties to those Conventions, but not to the present Convention. The instances of concrete application of the previous Conventions will thus be reduced as the number of Parties to the present Convention increases. It is hoped that the present Convention will eventually replace the previous Conventions.

In addition, the Parties to the present Convention undertake to abstain from becoming parties to the previous Conventions. An exception is made with regard to the International Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in the Arab and European States bordering on the Mediterranean. The Parties to the present Convention may accede to the Mediterranean Convention with a view to their relations with Mediterranean and Arab States not Party to the present Convention. As stated in Article XI.4.1.a, the Parties to both the present Convention and to the Mediterranean Convention would apply the present Convention in their relations with other States party to both Conventions."

Convention for the protection of environment through criminal law (ETS No. 172)

Open for signature by the member States of the Council of Europe and the non-member States which have participated in its elaboration, in Strasbourg, on 4 November 1998.

"DISCONNECTION" CLAUSE

Article 16 – Relationship with other conventions and agreements

1 This Convention does not affect the rights and undertakings derived from international multilateral conventions concerning special matters.

2 The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

3 If two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in this Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention, if it facilitates international co-operation."

EXPLANATORY REPORT

"*Article 16 – Relationship to other conventions and agreements*

In conformity with the 1969 Vienna Convention on the law of treaties, this Article is intended to ensure the co-existence of the Convention with other treaties – multilateral or bilateral – dealing with matters which are also dealt with in the present Convention. Paragraph 2 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements (cf. the conventions referred to in the commentary under Article 12) relating to matters dealt with in the Convention. The drafting permits the a contrario deduction that Parties may not conclude agreements which derogate from the Convention. Paragraph 3 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention, for instance in the Nordic co-operation."

Criminal Law Convention on Corruption (ETS No. 173)

Open for signature by the member States of the Council of Europe and the non-member States which have participated in its elaboration, in Strasbourg, on 27 January 1999.

"DISCONNECTION" CLAUSE

Article 35 – Relationship to other conventions and agreements

1 This Convention does not affect the rights and undertakings derived from international multilateral conventions concerning special matters.

2 The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

3 If two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in this Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention, if it facilitates international co-operation.

EXPLANATORY REPORT

"140. (…)In conformity with the 1969 Vienna Convention on the law of treaties, Article 35 is intended to ensure the co-existence of the Convention with other treaties – multilateral or bilateral – dealing with matters which are also dealt with in the present Convention. Such matters are characterised in paragraph 1 of Article 35 as "special matters". Paragraph 2 of Article 35 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements relating to matters dealt with in the Convention. The drafting permits to deduct, a contrario, that Parties may not conclude agreements which derogate from the Convention. Paragraph 3 of Article 35 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention, for instance in the Nordic co-operation."

Civil Law Convention on Corruption (ETS No. 174)

Open for signature by the member States of the Council of Europe, the non-member States which have participated in its elaboration as well as the European Community, in Strasbourg, on 4 November 1999.

DISCONNECTION CLAUSE

Article 19 – Relationship to other instruments and agreements

1 This Convention does not affect the rights and undertakings derived from international multilateral instruments concerning special matters.

2 The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it or, without prejudice to the objectives and principles of this Convention, submit themselves to rules on this matter within the framework of a special system which is binding at the moment of the opening for signature of this Convention.

3 If two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in this Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate these relations accordingly, in lieu of the present Convention.

EXPLANATORY REPORT

"100. In conformity with the 1969 Vienna Convention on the law of treaties, Article 19 is intended to regulate the relationship of the Convention with other treaties - multilateral or bilateral – or instruments dealing with matters which are also dealt with in the present Convention. Paragraph 2 of Article 19 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements, or any other international instrument, relating to matters dealt with in the Convention. The drafting makes clear, however, that Parties may not conclude agreements which derogate from the Convention. It is possible that the Parties submit themselves, without prejudice to the objectives and principles of this Convention, to rules on this matter within the framework of a special system which is binding at the moment of the adoption of this Convention.

This special regime applies to the European Community and to its member States, as well as to future member States from the date of their accession to the European Union. Paragraph 3 of Article 19 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention, for instance in the European Community or in the Nordic co-operation."

European Convention on the Promotion of a Transnational Long-Term Voluntary Service for Young People (ETS No. 175)

Open for signature by the member States of the Council of Europe and the non-member States Parties to the European Cultural Convention, in Strasbourg, on 11 May 2000.

"DISCONNECTION" CLAUSE

Article 19 – Relationship to other treaties and Community law

1 The provisions of this Convention shall not affect the provisions of international treaties which are already in force or may come into force, under which more favourable rights are, or would be, accorded to volunteers.

2 In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.

3 The Parties may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for the purpose of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

EXPLANATORY REPORT

"*Article 19 – Relationship to other treaties and Community law*

In paragraph 1 this article describes the relationship between the convention and other international treaties or agreements under which certain Parties have agreed, or may agree, to establish particular systems in respect of the rules deriving from the Convention, extending the scope of volunteers' rights. Therefore it only relates to such treaties and agreements and not, as a rule, to any other treaty by which the states Parties to the present convention may be bound.

Paragraph 2 is designed to cover the particular situation of those Parties which are members of the European Community. It stipulates that in their mutual relations these Parties shall apply Community rules and shall therefore apply the rules arising from this convention only if there is no Community rule governing the particular subject concerned. This paragraph covers only the internal relations between the member states of the European Community and in no way affects the application of the convention between Community members and Parties which are not members of the European Community.

The aim of paragraph 3 is to enable Parties to conclude other international agreements to supplement or strengthen the provisions of the Convention or facilitate the application of the principles embodied therein."

European Landscape Convention (ETS No. 176)

Open for signature by the member States of the Council of Europe, in Florence, on 20 October 2000.

DISCONNECTION CLAUSE

Article 12 – Relationship with other instruments

The provisions of this Convention shall not prejudice stricter provisions concerning landscape protection, management and planning contained in other existing or future binding national or international instruments.

EXPLANATORY REPORT

"*Article 12 – Relations with other instruments*

77. The wording of this article is based on model provisions already used in other international conventions in order to deal with the problem of linking up conventions concerned with similar fields.

78. The present Convention is distinct from the Unesco Convention concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972 both formally and substantively. The two conventions have different purposes, as do the organisations under whose auspices they were drawn up. One is regional in scope, the other world-wide. The Council of Europe Convention can be regarded as complementary to the Unesco one. As regards its substantive scope, the Council of Europe Convention covers all landscapes, even those that are not of outstanding universal value, but does not deal with historic monuments, unlike the Unesco Convention. Similarly, its main objective is not to draw up a list of assets of exceptional universal value, but to introduce protection, management and planning rules for all landscape based on a set of principles. Thus each convention has its distinctive features. To co-ordinate action under the two conventions, consideration could be given to scientific co-operation between the Unesco World Heritage Committee and the Committees of Experts mentioned under Article 10 of the European Landscape Convention, under Article 13.7 of the Unesco Convention of 16 November 1972, and as suggested in Article 7 of the present Convention.

79. Article 12 of the European Landscape Convention seeks to avert difficulties with other international legal instruments by stating that it does not preclude application of any stricter provisions of other instruments that treat landscape even more favourably."

European Convention on the legal protection of services based on, or consisting of, conditional access (ETS No. 178)

Open for signature by the member States of the Council of Europe and the other States party to the European Cultural Convention, and by the European Community, in Strasbourg, on 24 January 2001.

DISCONNECTION CLAUSE

Article 11 – Relationship with other conventions or agreements

1 This Convention does not affect the rights and undertakings derived from international multilateral conventions concerning special matters.

2 The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

3 If two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in this Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention, if it facilitates international co-operation.

4 In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.

EXPLANATORY REPORT

"*Article 11 – Relationship with other conventions or agreements*

50. In conformity with the 1969 Vienna Convention on the law of treaties, Article 11 is intended to ensure the co-existence of the Convention with other treaties - multilateral or bilateral - dealing with matters which are also dealt with in the present Convention. Such matters are characterised in paragraph 1 of Article 11 as "special matters". Paragraph 2 of Article 11 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements relating to matters dealt with in the Convention. The drafting permits to deduct, a contrario, that Parties may not conclude agreements which derogate from the Convention. Paragraph 3 of Article 11 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention. The situation of States Parties to the Agreement on the European Economic Area (EEA) will therefore be covered by this paragraph.

51. Paragraph 4 of Article 11 is designed to cover the particular situation of those Parties which are members of the European Community. It provides that, in their mutual relations, those Parties shall apply Community rules and shall not therefore apply the rules arising from the Convention except in so far as there is no Community rule governing the particular subject concerned. Since it governs exclusively the internal relations between Parties which are members of the European Community, this paragraph is without prejudice to the application of this Convention between those Parties which are not members of the European Community, as well as between these and those European Union member States which are Parties to the Convention."

Convention on Information and Legal Co-operation concerning "Information Society Services" (ETS No. 180)

Open for signature by the member States of the Council of Europe, the non-member States which have participated in its elaboration and the European Community, in Moscow, on 4 October 2001.

DISCONNECTION CLAUSE

Article 6 – Relationship to other instruments and agreements

1 This Convention shall not affect any international instrument which is binding on the Parties and which contains provisions on matters governed by this Convention.

2 The European Community shall equally fulfil the obligation to notify the texts transmitted to it by its member States in pursuance of the provisions of paragraph 1 of Article 4, and shall transmit to them the observations received by the other Parties, in pursuance of the provisions of paragraph 3 of Article 4.

EXPLANATORY REPORT

"23. In the light of Article 6 paragraph 1, the member States of the European Community and of the Economic European Area do not apply the present instrument in their mutual relations concerning matters governed by this Convention.

24. In accordance with Article 6 paragraph 2, the European Community, in pursuance of the provisions of paragraph 1 of Article 4, shall equally fulfil the obligation to notify the texts transmitted to it by its member States.

25. As a consequence, the drafts already initiated by the member States of the European Community are to be submitted to the Secretary General through the European Commission. This practice allows each national point of contact currently operating within the framework of Directive 98/48/EC to continue to make one single notification (through the European Commission, who then transmits the draft to the Secretary General of the Council of Europe) in accordance with the Directive. Moreover, the national receiving authorities of these States will receive, through the European Commission, the texts sent by the Council of Europe originating from the Parties other than the member States of the Economic European Area and may submit observations to the European Commission, so as to enable it to transmit them, under paragraph 3 of Article 4, to the Secretary General of the Council of Europe. This means in practice that the central authorities and the procedures already established by the European Community Directive will be used in the framework of this Convention."

European Convention for the protection of the Audiovisual Heritage (ETS No. 183)

Open for signature by the member States of the Council of Europe, by the other States Parties to the European Cultural Convention and by the European Community, in Strasbourg, on 8 November 2001.

"DISCONNECTION" CLAUSE

Article 21 – Relations between the Convention and Community law

In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.

EXPLANATORY REPORT

"66. A clause concerning the relations between the Convention and Community law is also inserted in the Convention. It contains a formula used in other agreements and conventions of the Council of Europe."

Convention on Cybercrime (ETS No. 185)

Open for signature by the member States of the Council of Europe and by non-member States which have participated in its elaboration, in Budapest, on 23 November 2001.

Disconnection clause

Article 39 – Effects of the Convention

1 The purpose of the present Convention is to supplement applicable multilateral or bilateral treaties or arrangements as between the Parties, including the provisions of:

– the European Convention on Extradition, opened for signature in Paris, on 13 December 1957 (ETS No. 24);

– the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg, on 20 April 1959 (ETS No. 30);

– the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg, on 17 March 1978 (ETS No. 99).

2 If two or more Parties have already concluded an agreement or treaty on the matters dealt with in this Convention or have otherwise established their relations on such matters, or should they in future do so, they shall also be entitled to apply that agreement or treaty or to regulate those relations accordingly. However, where Parties establish their relations in respect of the matters dealt with in the present Convention other than as regulated therein, they shall do so in a manner that is not inconsistent with the Convention's objectives and principles.

3 Nothing in this Convention shall affect other rights, restrictions, obligations and responsibilities of a Party.

EXPLANATORY REPORT

"308. Article 39, paragraphs 1 and 2 address the Convention's relationship to other international agreements or arrangements. The subject of how conventions of the Council of Europe should relate to one another or to other treaties, bilateral or multilateral, concluded outside the Council of Europe is not dealt with by the Model Clauses referred to above. The usual approach utilised in Council of Europe conventions in the criminal law area (e.g., Agreement on Illicit Traffic by Sea (ETS N° 156)) is to provide that: (1) new conventions do not affect the rights and undertakings derived from existing international multilateral conventions concerning special matters; (2) Parties to a new convention may conclude bilateral or multilateral agreements with one another on the matters dealt with by the convention for the purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it; and (3) if two or more Parties to the new convention have already concluded an agreement or treaty in respect of a subject which is dealt with in the convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the new convention, provided this facilitates international co-operation.

309. Inasmuch as the Convention generally is intended to supplement and not supplant multilateral and bilateral agreements and arrangements between Parties, the drafters did not believe that a possibly limiting reference to "special matters" was particularly instructive and were concerned that it could lead to unnecessary confusion. Instead, paragraph 1 of Article 39 simply indicates that the present Convention supplements other applicable treaties or arrangements as between Parties and it mentions in particular three Council of Europe treaties as non-exhaustive examples: the 1957 European Convention on Extradition (ETS N° 24), the 1959 European Convention on Criminal Matters (ETS N° 30) and its 1978 Additional Protocol (ETS N° 99). Therefore, regarding general matters, such agreements or arrangements should in principle be applied by the Parties to the Convention on cybercrime. Regarding specific matters only dealt with by this Convention, the rule of interpretation *lex specialis derogat legi generali* provides that the Parties should give precedence to the rules contained in the Convention. An example is Article 30, which provides for the expedited

disclosure of preserved traffic data when necessary to identify the path of a specified communication. In this specific area, the Convention, as *lex specialis*, should provide a rule of first resort over provisions in more general mutual assistance agreements.

310. Similarly, the drafters considered language making the application of existing or future agreements contingent on whether they "strengthen" or "facilitate" co-operation as possibly problematic, because, under the approach established in the international co-operation Chapter, the presumption is that Parties will apply relevant international agreements and arrangements.

311. Where there is an existing mutual assistance treaty or arrangement as a basis for co-operation, the present Convention would only supplement, where necessary, the existing rules. For example, this Convention would provide for the transmission of mutual assistance requests by expedited means of communications (see Article 25, paragraph 3) if such a possibility does not exist under the original treaty or arrangement.

312. Consistent with the Convention's supplementary nature and, in particular, its approach to international co-operation, paragraph 2 provides that Parties are also free to apply agreements that already are or that may in the future come into force. Precedent for such an articulation is found in the Transfer of Sentenced Persons Convention (ETS N° 112). Certainly, in the context of international co-operation, it is expected that application of other international agreements (many of which offer proven, longstanding formulas for international assistance) will in fact promote co-operation. Consistent with the terms of the present Convention, Parties may also agree to apply its international co-operation provisions in lieu of such other agreements (see Article 27(1)). In such instances the relevant co-operation provisions set forth in Article 27 would supersede the relevant rules in such other agreements. As the present Convention generally provides for minimum obligations, Article 39, paragraph 2 recognises that Parties are free to assume obligations that are more specific in addition to those already set out in the Convention, when establishing their relations concerning matters dealt with therein. However, this is not an absolute right: Parties must respect the objectives and principles of the Convention when so doing and therefore cannot accept obligations that would defeat its purpose.

313. Further, in determining the Convention's relationship to other international agreements, the drafters also concurred that Parties may look for additional guidance to relevant provisions in the Vienna Convention on the Law of Treaties."

Council of Europe Convention on Contact Concerning Children (CETS No. 192)

Open for signature by the member States, the non-member States which have participated in its elaboration as well as of the European Community in Strasbourg on 15 May 2003.

"DISCONNECTION" CLAUSE

Article 20 – Relationships with other instruments

[…]

3 In their mutual relations, States Parties which are members of the European Community shall apply Community rules and shall therefore not apply the rules arising from this Convention, except in so far as there is no Community rule governing the particular subject concerned.

EXPLANATORY REPORT

" *Article 20 – Relations with other instruments*

(…)

128. The Convention contains a specific reference in paragraph 3 of Article 20 to Community rules and provides that States Parties, which are members of the European Community, shall not in their mutual relations apply the Convention unless there is no Community rule governing the particular subject concerned. Of particular importance in this context is the Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matter of parental responsibility for children of both spouses."

Council of Europe Convention on the Prevention of Terrorism (CETS No.: 196)

Open for signature by the member States, the non-member States which have participated in its elaboration and by the European Community, and for accession by other non-member States in Warsaw on 16 May 2005.

"DISCONNECTION" CLAUSE

Article 26 – Effects of the Convention

[…]

3 Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.

EXPLANATORY REPORT

"272 Paragraph 3 relates to the mutual relations between the Parties to the Convention which are members of the European Union. In relation to this paragraph, upon the adoption of the Convention, the European Community and the member States of the European Union, made the following declaration:

"The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a "disconnection clause" is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.

This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union Party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.

The disconnection clause is necessary for those parts of the Convention which fall within the competence of the Community/Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention

directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any Party to the Convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union Parties."

As an instrument made in connection with the conclusion of a treaty, within the meaning of Article 31, para. 2(b) of the Vienna Convention on the Law of Treaties, this declaration forms part of the "context" of the Convention.

273 The European Community would be in a position to provide, for the sole purpose of transparency, necessary information about the division of competence between the Community and its Member States in the area covered by the present Convention, inasmuch as this does not lead to additional obligations placed on the Community."

Council of Europe Convention on Action against Trafficking in Human Beings (CETS No.: 197)

Open for signature by the member States, the non-member States which have participated in its elaboration and by the European Community, and for accession by other non-member States in Warsaw on 16 May 2005.

"DISCONNECTION" CLAUSE

Article 40 – Relationship with other international instruments

[…]

3 Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.

EXPLANATORY REPORT

"375. In relation to paragraph 3 of Article 40, upon the adoption of the Convention, the European Community and the member States of the European Union, made the following declaration:

"The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a "disconnection clause" is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.

This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.

The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community / Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community / Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community / Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union parties."

As an instrument made in connection with the conclusion of a treaty, within the meaning of Article 31 paragraph 2(b) of the Vienna Convention on the Law of Treaties, this declaration forms part of the "context" of this Convention.

376. The European Community would be in a position to provide, for the sole purpose of transparency, necessary information about the division of competence between the Community and its Member States in the area covered by the present Convention, inasmuch as this does not lead to additional monitoring obligations placed on the Community. "

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.: 198)

Open for signature by the member States, the non-member States which have participated in its elaboration and by the European Community, and for accession by other non-member States in Warsaw on 16 May 2005.

"DISCONNECTION" CLAUSE

Article 52 – Relationship to other conventions and agreements

[…]

4 Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.

EXPLANATORY REPORT

"306. In conformity with Article 30 of the 1969 Vienna Convention on the Law of Treaties, Article 52 is intended to ensure the coexistence of this Convention with other (including existing) international legal instruments dealing with matters which are also dealt with in this Convention. Article 52, paragraph 4, relates to the mutual relations between the Parties to the Convention which are members of the European Union. In relation to paragraph 4 of Article 52, upon the adoption of the Convention, the European Community and the member States of the European Union, made the following declaration:

"The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a "disconnection clause" is to take account of the

institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.

This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.

The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community / Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community / Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community / Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union parties."

As an instrument made in connection with the conclusion of a treaty, within the meaning of Article 31, paragraph 2(b) of the Vienna Convention on the Law of Treaties, this declaration forms part of the "context" of the Convention.

307. The European Community would be in a position to provide, for the sole purpose of transparency, necessary information about the division of competence between the Community and its Member States in the area covered by the present Convention, inasmuch as this does not lead to additional monitoring obligations placed on the Community."

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No.: 201)

Open for signature by the member States, the non-member States which have participated in its elaboration and by the European Community, and for accession by other non-member States in Lanzarote on 25 October 2007.

DISCONNECTION CLAUSE

Article 42 – Child child ***Relationship with the United Nations Convention on the Rights of the and its Optional Protocol on the sale of children, child prostitution and pornography***

This Convention shall not affect the rights and obligations arising from the provisions of the United Nations Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography, and is intended to enhance the protection afforded by them and develop and complement the standards contained therein.

Article 43 – Relationship with other international instruments

[…]

3 Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties."

EXPLANATORY REPORT

"Article 42 – Relation to the United Nations Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography

273. The purpose of Article 42 is to clarify the relationship between the Convention and the *United Nations Convention on the Rights of the Child and the Optional Protocol to it on the sale of children, child prostitution and child pornography*.

274. Article 42 has two main objectives: (i) to make sure that the Convention does not interfere with rights and obligations deriving from the provisions of the *United Nations Convention on the Rights of the Child* and the Protocol to it and (ii) to make clear that the Convention reinforces the protection afforded by these United Nations instruments and develops the standards they lay down.

Article 43 – Relation to other international instruments

275. Article 43 deals with the relationship between the Convention and other international instruments.

276. In accordance with the 1969 *Vienna Convention on the Law of Treaties*, Article 43 seeks to ensure that the Convention harmoniously coexists with other treaties - whether multilateral or bilateral - or instruments dealing with matters which the Convention also covers. This is particularly important in the case of international instruments which ensure greater protection and assistance for child victims of sexual exploitation and abuse. Indeed, this Convention is designed to strengthen the protection of children against all forms of sexual exploitation and abuse. It is also designed to assure victims of sexual exploitation and abuse of assistance. For this reason, Article 43, paragraph 1 aims at ensuring that this Convention does not prejudice the rights and obligations derived from other international instruments to which the Parties to this Convention are also Parties or will become Parties, and which contain provisions on matters governed by this Convention. This provision clearly shows, once more, the overall aim of this Convention, which is to protect the rights of child victims of sexual exploitation and sexual abuse and to assure them of the highest level of protection.

277. Article 43, paragraph 2 states positively that Parties may conclude bilateral or multilateral agreements - or any other legal instrument - relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from this Convention.

278. Following the signature of a Memorandum of Understanding between the Council of Europe and the European Union on 23 May 2007 the CDPC took note that "legal co-operation should be further developed between the Council of Europe and the European Union with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions. This does not prevent Community and European Union law from adopting more far-reaching rules."

279. In relation to paragraph 3 of Article 43, upon the adoption of the Convention, the European Community and the member States of the European Union, made the following declaration:

"The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a "disconnection clause" is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.

This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.

The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community / Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community / Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community / Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union parties."

As an instrument made in connection with the conclusion of a treaty, within the meaning of Article 31 paragraph 2(b) of the Vienna Convention on the Law of Treaties, this declaration forms part of the "context" of this Convention.

280. The European Community would be in a position to provide, for the sole purpose of transparency, necessary information about the division of competence between the Community and its Member States in the area covered by the present Convention, inasmuch as this does not lead to additional monitoring obligations placed on the Community."

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OTHER

Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995 (UNIDROIT)

"DISCONNECTION" CLAUSE

Article 13

[…]

(3) In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply. the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.

EXPLANATORY REPORT

"*Article 13 – Paragraph 3*

At the request of the delegation that held the Presidency of the Council of the European Union at the time, a so-called "disconnection clause" was inserted to enable those States that are members of economic integration organisations or regional bodies to declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of the Convention the scope of application of which coincides with that of those rules. While originally intended for the member States of the European Union, already linked among themselves by EEC Council Directive 93/7 (which also applies between the member States of the Agreement on the European Economic Area), it was felt that it was also of relevance to any other organisation of economic integration or regional body already concerned or which might become so under future agreements.

Contracting States that are also members of economic integration organisations or regional bodies are free to decide whether or not to bring the disconnection clause into play in respect of the Convention, by making a declaration to that effect. Failing further specification, declarations to this effect may be made at any time and take effect in accordance with the provisions of Article 15(3).

Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, Kiev, (Ukraine), 21 May 2003 (UNECE)

"DISCONNECTION" CLAUSE

Article 20
Relationship between the Protocol and the rules of the European Community on jurisdiction, recognition and enforcement of judgements

[…]

2. In their mutual relations, Parties which are members of the European Community shall apply the relevant Community rules instead of articles 15 and 18.

Appendix 5

Council of Europe Conventions and Related Council Acts, which might fall within the scope of the conventions referred

I	**Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse**				
No	**Council Acts and Other Measures**	**Legal Base**	**Deadline of Implementation**	**OJ reference**	**in force**
1	**Council framework Decision 2004/68/JHA** of 22 December 2003 on combating the sexual exploitation of children and child pornography	TEU Art 29, Art 31, Art 34	20 January 2006	*OJ L 13, 20.1.2004, p. 44–48*	of effect: 20/01/2004
2	**Council Resolution** on the contribution of civil society in finding missing or sexually exploited children (**2001/C 283/01**)			*OJ C 283 , 09/10/2001 P. 0001 - 0002*	of effect: 09/10/2001
3	**Council Decision** of 29 May 2000 to combat child pornography on the Internet	TEU Art 34		*OJ L 138, 9.6.2000, p. 1–4*	of effect: 29/05/2000
II	**Council of Europe Convention on action against trafficking in human beings**				
No	**Council Acts and Other Measures**	**Legal Base**	**Deadline of Implementation**	**OJ reference**	**in force**
1	**Council Decision** of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community (**2006/619/EC**)	TEC Art 62, Art 63, Art 66, Art 300,		*OJ L 262, 22.9.2006, p. 51–58*	of effect: 24/07/2006
2	**Council Decision** of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community (**2006/618/EC**)	TEC Art 179, Art 181a, Art 300		*OJ L 262, 22.9.2006, p. 44–50*	of effect: 24/07/2006
3	**Council Directive 2004/81/EC** of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities	TEC Art 63	of transposition: 05/08/2006	*OJ L 261, 6.8.2004, p. 19–23*	of effect: 06/08/2004
4	**Council Resolution** of 20 October 2003 on initiatives to combat trafficking in human beings, in particular women (**2003/C 260/03**)			*Official Journal C 260 , 29/10/2003 P. 0004 - 0005*	of effect: 20/10/2003
5	**Council Framework Decision** of 19 July 2002 on combating trafficking in human beings (**2002/629/JHA**)	TEU Art 29, Art 31, Art 34	of transposition: 31/07/2004	*OJ L 203, 1.8.2002, p. 1–4*	of effect: 01/08/2002

6	**Council Decision** of 3 December 1998 supplementing the definition of the form of crime 'traffic in human beings' in the Annex to the Europol Convention	TEU Art K.3		*OJ C 26, 30.1.1999, p. 21–21*	of effect: 01/01/1999
III	**Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism**				
No	**Council Acts and Other Measures**	**Legal Base**	**Deadline of Implementation**	**OJ reference**	**in force**
1	**Council Framework Decision 2006/783/JHA** of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders	TEU Art 31, Art 34	24 November 2008	*OJ L 328, 24.11.2006, p. 59–78*	of effect: 24/11/2006
2	**Directive 2005/60/EC** of the **European Parliament** and of the **Council** of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing	TEC Art 47, Art 95	of transposition: 15/12/2007	*OJ L 309, 25.11.2005, p. 15–36*	of effect: 15/12/2005
3	**Council Framework Decision 2005/214/JHA** of 24 February 2005 on the application of the principle of mutual recognition to financial penalties	TEU Art 31, Art 34	of transposition: 21/03/2007	*OJ L 76, 22.3.2005, p. 16–30*	of effect: 22/03/2005
4	**Council Framework Decision 2005/212/JHA** of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property	TEU Art 29, Art 31, Art 34	of transposition: 15/03/2007	*OJ L 68, 15.3.2005, p. 49–51*	of effect: 15/03/2005
5	**Council Framework Decision 2003/577/JHA** of 22 July 2003 on the execution in the European Union of orders freezing property or evidence	TEU Art 31, Art 34	of transposition: 02/08/2005	*OJ L 196, 2.8.2003, p. 45–55*	of effect: 02/08/2003
6	**Directive 2001/97/EC** of the **European Parliament** and of the **Council** of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering - Commission Declaration	TEC Art 47, Art 95	15/06/2003	*OJ L 344, 28.12.2001, p. 76–82*	of effect: 28/12/2001
7	**2001/500/JHA: Council Framework Decision** of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime	TEU Art 31, Art 34	of transposition: 31/12/2002	*OJ L 182, 5.7.2001, p. 1–2*	of effect: 05/07/2001
8	**1999/235/JHA: Joint Position** of 29 March 1999 defined by the **Council** on the basis of Article K.3 of the Treaty on European Union, on the proposed United Nations convention against organised crime	TEU Art K.3, Art K.5		*OJ L 87, 31.3.1999, p. 1–2*	of effect: 29/03/1999
9	**98/699/JHA: Joint Action** of 3 December 1998 adopted by the **Council** on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime	TEU Art K.3		*OJ L 333, 9.12.1998, p. 1–3*	of effect: 09/12/1998
10	**Council Decision** of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information **(2000/642/JHA)**	TEU Art 34		*OJ L 271, 24.10.2000, p. 4–6*	of effect: 17/10/2000
VI	**Convention on prevention of terrorism**				
No	**Council Acts and Other Measures**	**Legal Base**	**Deadline of Implementation**	**OJ reference**	**in force**
1	**Council Joint Action 2007/501/CFSP** of 16 July 2007 on cooperation with the African Centre for Study and Research on Terrorism in the framework of the implementation of the European Union counter-terrorism strategy	TEU Art 14		*OJ L 185, 17.7.2007, p. 31–34*	of effect: 16/07/2007; end of validity: 16/07/2008

2	**2007/124/EC,Euratom**: **Council Decision** of 12 February 2007 establishing for the period 2007 to 2013, as part of General Programme on Security and Safeguarding Liberties, the Specific Programme Prevention, Preparedness and Consequence Management of Terrorism and other Security related risks	TEC Art 308, TEAEC Art 203		*OJ L 58, 24.2.2007, p. 1–6*	of effect: 01/01/2007
3	**Council Common Position** of 27 December 2001 on combating terrorism **(2001/930/CFSP**)	TEU Art 15, Art 34		*OJ L 344, 28.12.2001, p. 90–92*	of effect: 27/12/2001