CAHDI
Committee of Legal Advisers on Public International Law

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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

(The report hereunder is reproduced without its appendices. The full text of the report, including appendices, is available on the CAHDI website)

Introduction

1. 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.[1]

2. To this end, on 10 October 2007, the Committee of Ministers' Deputies adopted ad hoc terms of reference for the CAHDI[2] (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.*

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

> *The Deputies*
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> *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;*[1]
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> *2. took note of the declaration made by the European Community and the member states of the European Union;*
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> *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);*
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> *4. took note of the Explanatory Memorandum to the Convention as it appears in document CM(2007)112 add;*
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> *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.*

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

Paragraph 5 of the terms of reference (*Working methods and structures*) states 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.*

3. At the 34th meeting of the CAHDI (10-11 September 2007), members and observers were informed about the decision of the Committee of Ministers' Deputies and requested the Secretariat to collect relevant background material, in good time before the 35th meeting of the CAHDI (6-7 March 2008), including examples of treaty texts relating to "disconnection clause" used in both Council of Europe and other international instruments, extracts from the 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.

4. 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.

5. On 24 October, 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 (10 October 2007) and invited all delegations, including the European Union (hereafter EU)/European Community (hereafter EC),[3] to send to the Secretariat any observations as well as any relevant background materials. A contribution was received from the EU (CAHDI (2008) 3); and comments were received from the Russian Federation (CAHDI (2008) 1 Add).

6. The Chair and Vice-Chair together with the Secretariat prepared a draft report (document CAHDI (2008) 1 prov, paras. 4-39), which was circulated to delegations, including the EU/EC, on 30 January 2008 together with a compilation of background materials prepared by the Secretariat (document CAHDI (2008) 2). Delegations were invited to submit any comments with a view to the next meeting of the CAHDI.

7. The CAHDI considered the draft report at its 35th meeting. Following further consultations, including with the EU/EC and relevant Council of Europe services, the Chair and Vice-Chair circulated a revised draft report, (CAHDI (2008) 1 rev.), which was considered by the CAHDI at its 36th meeting (7-8 October 2008).

8. The CAHDI adopted the present report at its 36th meeting, in pursuance of the ad hoc terms of reference given to it by the Committee of Ministers' Deputies.

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[3] For the purpose of the present report the EC/EU terminology should be considered in the light of Paragraph 3, Article 1 of the Treaty on European Union: "The Union shall be founded on the European Communities, supplemented by the policies and forms of co-operation established by this Treaty".

Background

9. As requested by the Committee of Ministers' Deputies, the present report deals with the consequences of so-called "disconnection clauses" in international law in general and for Council of Europe conventions in particular. The focus of the report 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, criticism has also been generated by fears that 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 are also briefly addressed.

10. The term "disconnection clause" is commonly used to refer to a provision in a multilateral treaty allowing certain parties to the treaty not to apply the treaty in full or in part in their mutual relations, while other parties remain free to invoke the treaty fully in their relations with these parties. 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 as 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 2 gives examples of different kinds of "disconnection clauses", many of which appear in Council of Europe conventions.

11. It should be noted that a number of Council of Europe governmental committees, in particular the CAHDI and its predecessor, the CJ-DI,[5] and the Secretariat have considered "disconnection clauses" on earlier occasions.[6]

12. 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;

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

[6] See, for example, the following documents reproduced in CAHDI(2008)2:

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

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."[7]

13. More recently, the Secretariat of the Council of Europe provided informal comments on this issue in response to an EU Presidency proposal to include the "disconnection" clause in the three Council of Europe conventions adopted in Warsaw in May 2005, namely, the Council of Europe Convention on the Prevention of Terrorism, the Council of Europe Convention on Action against Trafficking in Human Beings, and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

14. This resulted in an agreement by the EU member States that the need for, and scope of, the "disconnection clause" should be clarified. The EC and the EU states subsequently issued a declaration on the occasion of the adoption of the three above-mentioned conventions by the Council of Europe's Committee of Ministers (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 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*

[7] CJ-DI(89)8, above, p. 5.

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.[8]

15. There is a practice within the Council of Europe of producing detailed explanatory reports to accompany its conventions. These provide a good opportunity to set out the nature, scope and function of any disconnection clause. Examples are given in Appendix 2 to the present report.

16. The question of the "disconnection clause" was further considered by Prime Minister Jean-Claude Juncker of Luxembourg in his 2006 report to the Heads of State and Government of the member States of the Council of Europe.[9] 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*.[10]

17. Against the background of rapid changes in Community law and substantial changes in international, convention-based law, such as that drawn up by the Council of Europe, Mr Juncker 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*.[11]

18. This question has also been considered recently by the United Nations International Law Commission (ILC).[12] The 2005 ILC report described a divergence of views on the effects of "disconnection clauses":

> *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 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*

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[8] 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/

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

[10] Idem, p.15.

[11] Idem, p.16.

[12] Report of the International Law Commission 2005, UN Doc A/60/10, para. 463-465 and Report of the International Law Commission 2006, UN Doc A/61/10, para. 251, *Conclusion 30.*

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.

19. The 2006 report of the ILC Study Group on the Fragmentation of International Law,[13] 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 fulfil 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*

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

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 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."*

20. The ILC took note of the Conclusions of the Study Group and commended them to the attention of the General Assembly.[14] 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.

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

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

21. In addition, a number of authors have recently written about "disconnection clauses".[15]

Legal analysis of "disconnection clauses"

Validity of the clauses

22. If those negotiating a treaty agree to include a "disconnection clause" the latter will in principle be legally effective. There is nothing in international law that precludes states or organisations negotiating a treaty from including in the text of the treaty 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.[16]

23. The CAHDI therefore considers that the clauses included in the four conventions 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

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[15] 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; 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); HOFFMEISTER, F., *The contribution of EU practice to international law*, in: *M. Cremona (ed.), Developments in EU external relations*, Oxford, OUP, 2008, pp. 37-127; 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, pp.68-70; 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; VOLODIN, I. *The European Union's participation in the activities of the Council of Europe: Legal problems*, Master thesis, European Institute of Public Administration – Antenna Luxembourg, 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).

[16] Article 53 of the Vienna Convention on the Law of Treaties, which provides that "[a] treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of international law", has no role in this context since no question of *jus cogens* arises.

24. 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, the present report concentrates on the effects of the particular "disconnection clause" contained 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). This reads:

> *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 forms of the "disconnection clause" and to other conventions.

25. At the outset, it should be stressed that the "disconnection clause" is intended to cover "members of the European Union […], *in their mutual relations*" and not in their relations with other states or individuals.

26. 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 EC/EU, 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.

27. As underlined in the report of the Study Group of the International Law Commission[19], 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.

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[17] The EC/EU legislation relevant to the Council of Europe Conventions in question is included in Appendix 3, submitted by the EU.

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

[19] Para.19 above.

28. 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.

29. 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.

30. However, the wording of the "disconnection clause" in the four conventions mentioned above provides some assurance 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 should help to ensure that EC/EU rules on matters subject to the disconnection respect the minimum standards and procedures set out by the conventions concerned. The application of any EC/EU rule below these conventional standards instead of the application of the convention standards could well be regarded as being in breach of the object and purpose of the treaty. Likewise, the "disconnection clause" should not detract from the monitoring mechanism provided by the convention since this could well be regarded as contrary to the object and purpose of the convention and its overall efficacy.

31. Thus, the "disconnection clause" as formulated in the four conventions mentioned above uses more precise language compared with earlier versions, in that it mentions that the clause is without prejudice to the object and purpose of the convention or to its full application with the other parties. Moreover, the EU declaration made at the time of adoption by the Committee of Ministers of the three 2005 Warsaw Conventions[20] further clarifies that the "disconnection clause" is only applicable to the provisions that fall within EU competence and that as a result, EU Member States could not invoke the respective conventions directly among themselves but would be bound by them in their relations with third parties (i.e. non-EC States), which obviously remain free to invoke the provisions of the conventions in their relations with EU Member States. In this connection, the respective explanatory reports also mention the possibility for third parties (non-EU States) to be informed of the division of competence between the EU/EC and its member states.

32. 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.

[20] Para. 14 above.

33. The CAHDI draws attention to the importance of ensuring, when it is necessary to include "disconnection clauses" in future conventions, that all the parties to the convention are able to identify the applicable EC/EU rules so as to allow each party to ascertain the extent of each of the respective parties' commitment.

34. During the CAHDI's discussions concerning the preparation of the present report, the EU reiterated the underlying reasons for the inclusion of a "disconnection clause", i.e., to take account of the institutional structure of the EU, including the unique relationship between the EU legal order and the domestic legal systems of the member states, without prejudice to EC and its member states' full respect of the conventions in question.[21]

35. The CAHDI welcomed with satisfaction the EU's willingness to provide full transparency for non-EU member states on the scope *ratione materiae* of the clause, including during negotiations of future instruments. The CAHDI further welcomed with satisfaction the relevant EU *acquis* submitted in pursuance of the mandate given to CAHDI to prepare the present report[22] and of its readiness to provide updates, in an appropriate form, to States Parties of any substantive developments of the EU *acquis* after their entry into force.[23]

36. The CAHDI underlines the importance of pursuing consideration of these matters, in particular the possibilities for ensuring legal certainty among the Parties about the applicable law.[24] This would facilitate above all the determination of the scope, material as well as temporal,[25] of the clauses. It 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. The CAHDI notes that a number of multilateral treaties concluded within various international fora, including the United Nations, foresee the possibility of participation by "regional economic integration organisations" and prescribe that such organisations shall, when expressing their consent to be bound by the treaty, make a declaration specifying the scope of their competence over the issues covered by the treaty. In such cases, a "disconnection clause" is usually not included.[26] The European Community is a

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[21] Introductory remarks by the Presidency of the Council of the European Union on CAHDI Agenda Item 5 (Disconnection Clause), 6 March 2008.

[22] See Appendix 3.

[23] *Ibid*.

[24] See also Explanatory Report of the Cybercrime Convention, para. 308 reproduced in Appendix 2.

[25] ECONOMIDES, C. and KOLLIOPOULOS, A., note 16 above, p. 275, have criticised the 'automaticity' of the clauses, pointing out that there are examples of international conventions involving "disconnection clauses" which are not necessarily applied automatically, for instance Article 13.3 of the *Unidroit Convention on stolen or illegally exported cultural property* (see Appendix 2).

[26] 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.

party to more than a dozen such conventions. A similar approach could, in appropriate cases, be adopted within the Council of Europe.

38. 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 have other indirect implications such as the possible emergence of a wider practice in international law, for example if these clauses begin to be included in multilateral treaties referring, in vague terms, to a range of other legal systems. The CAHDI therefore recommends that careful consideration be given in each particular case to whether a "disconnection clause" is actually appropriate, and if so to the precise scope of the clause. As the ILC Study Group recommended,[27] such clauses should be as clear and specific as possible. This will be useful in order to limit their use to circumstances where they are actually needed 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, for example where their legal effects would not apply to third parties and the treaty concerned does not purport to establish a particular standard.

39. Concerns have also been expressed about possible cases where the EC cannot or does not become party to a convention to which some or all of its Member States are parties. In such cases, questions of the liability of the EC Member States that are parties may arise under Community law, when they are acting in an area of Community law. As a matter of international law, with respect to non-EU states, the situation remains unchanged. Non-EU states can demand the full application of the convention in question from those EC Member States parties, but of course not from the Community, which is not a party.

40. The situation is special as regards *erga omnes* or standard-setting obligations. It was noted that such obligations are normally implemented not in mutual relations between parties but rather by each party individually in its domestic legal order. In this context, the clauses should be understood as leaving it to the EU and its Member States to decide whether the relevant treaty provision is to be implemented through national or EU/EC legislation. However, in order for EU Member States to comply with the convention in question, such EU/EC legislation should be in conformity with the convention. Otherwise, EU Member States could find themselves in a situation of non-compliance with the convention. Such situations could be avoided if the Community itself participates in the convention, a matter to be considered on a case-by-case basis.

Term used to refer to the clauses

41. The CAHDI was invited to consider the term "disconnection clause" which has often been used to refer to the provisions in question. The CAHDI notes that any term used will not be a term of art, but merely a convenient way of referring to a number of provisions that occur in a variety of forms and in various contexts. Therefore, from a

[27] See above, para. 20.

legal point of view the term used is not important. Any significance attached to the term will be political.

42. At its meeting of 18-19 September 1989, the CJ-DI (the CAHDI's predecessor) already questioned the appropriateness of the term "disconnection clause", finding it "*misleading*"[28] and that it reflected "*neither the real nature nor the purpose of the clause*".[29] The Committee recommended using a more appropriate expression and made suggestions such as "*special relations*", "*special agreements*" and "*inter se agreements*".

43. 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*".[30] However, this term is already in use for various other types of clause, and does not reflect the fact that the "disconnection clause" may be in general terms and not specific to the EU.

44. One possibility that has sometimes been mentioned and that would reflect the effect of the clause without the unnecessarily negative implications of the term "disconnection clause" is "transparency clause".

Conclusions

45. On the basis of the foregoing considerations, the CAHDI draws the following conclusions:

i. The existing "disconnection clauses" are legally valid.

ii. They do not cover the relations between EU Member States and other parties to conventions. Therefore, they may not be interpreted or applied in a way that would change the contents of rights and obligations of EU Member States vis-à-vis other parties.

iii. Recent versions of the clauses stipulate that any EU regime that is different from the one established by the convention in question shall be without prejudice to the object and purpose of the convention. In order to assess whether it is the case, it is advisable to ensure that all parties to a convention are able to identify the applicable EU/EC rules. Given the practice within the Council of Europe of producing detailed explanatory reports to accompany its conventions, the nature, scope and function of any "disconnection clause" should be set out in the explanatory report.

iv The need for, and precise scope of, any "disconnection clause" should be assessed on a case-by-case basis, taking into account the nature and content of the convention in question.

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[28] CDCJ (89) 58, note 6 above, p. 10, para. 33.

[29] Ibid, p.11, para. 36, vi.

[30] Note 9 above, p. 16.

v. The experience of EC participation in UN conventions may be helpful. Where the Community participates in a convention alongside its Member States, the need for a disconnection clause may fall away. Community participation may help to ensure the coherence of the relevant treaty regime; the fact that both the Community and its Member States are parties would ensure that the convention would be fully implemented. Community participation should therefore be encouraged in appropriate case.