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LA RELATION ENTRE LE PROJET SUR LES JUGEMENTS ET D'AUTRES INSTRUMENTS INTERNATIONAUX

préparé par Andrea Schulz, Premier secrétaire

* * *

THE RELATIONSHIP BETWEEN THE JUDGMENTS PROJECT AND OTHER INTERNATIONAL INSTRUMENTS

prepared by Andrea Schulz, First Secretary

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I. INTRODUCTION

1. Throughout the negotiations concerning a global convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters (the Judgments Convention), it has been stressed that a number of international instruments dealing with some or all of these issues already exist. It is therefore of great legal and practical importance to define the relationship of the new convention with other instruments. However, when one turns to legal doctrine for some enlightenment on this rather technical subject, one finds that publications dealing with it in general terms and not referring only to one or two particular treaties and their relationship, are scarce. Ian Sinclair, a leading commentator on the Vienna Convention on the Law of Treaties, consequently opens his respective chapter with the words:

> "A particularly obscure aspect of the law of treaties is the question of application of successive treaties which relate to the same subject-matter."[1]

2. This statement will certainly be shared by many. The purpose of this paper is therefore to describe the rules of public international law governing the relationship between successive treaties that overlap in whole or in part, both as to their content and/or as to the parties to them. This will be done in general terms, sometimes using particular treaties as examples. As the explanation of the general rules will show, this paper cannot indicate in detail for a large number of existing instruments what their respective relationship with a future Judgments Convention would be.[2]

3. It will be demonstrated that, as long as parties are still at the negotiating stage, it is first and foremost up to treaty negotiators to resolve any possible conflict between treaties by including an adequate compatibility rule in the conventions concerned. As the paper will show, public international law gives them a large discretion to include rules on the relationship between different international instruments into the latter. The paper describes possible limits set by public international law to their discretion (*infra* III), as well as the default rules provided by public international law in the absence of an explicit rule in one or more of the instruments concerned (*infra* II). Although the paper will show that it is advisable, or even necessary, to insert one or more clauses on the relationship with other instruments into the Judgments Convention, the description of the default rules governing such relationship in the absence of a clause is necessary because (1) many existing instruments which could overlap with the Judgments Convention do not contain a disconnection clause, and (2) the default rules also contain some limits to the freedom of the parties to a later treaty with regard to the content of a disconnection clause concerning an earlier treaty.

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[1] Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. 1984, p. 93. See also Sprudzs, Status of Multilateral Treaties – Researcher's Mystery, Mess or Muddle? *American Journal of International Law* (AJIL) 1972, p. 365 *et seq.*

[2] This is due, *inter alia*, to the complexity of the rules which will be identified in this paper, and in particular to the fact that their application to the relationship between any two particular treaties in question depends to a large extent on the identification of the (hypothetical or implicit) will of States parties. This has to be concluded from historical materials reflecting treaty negotiations, but also from a thorough examination of State practice under the Convention(s) in question, a task that by far exceeds the resources of the Permanent Bureau given the large number of existing instruments which might potentially overlap with the Judgments Convention.
However, a further paper on individual instruments and their relationship with the Judgments Project may follow as soon as the Permanent Bureau receives further replies from Member States to its request to be informed of any specific instruments to which States are parties and which they wished to be considered in both such a paper and in the disconnection clause.

II. DEFAULT RULES PROVIDED BY PUBLIC INTERNATIONAL LAW IN THE ABSENCE OF A CLAUSE IN THE TREATIES CONCERNED

A. The sources of public international law and solutions provided by them

4. The three classical sources of public international law, as listed in Article 38 of the Statute of the International Court of Justice, are "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States", "international custom, as evidence of a general practice accepted as law", and "the general principles of law recognized by civilized nations". All three sources are of equal value; there exists no hierarchy between them.[3]

1. The Vienna Convention on the Law of Treaties

a) Default rule in Article 30 concerning the relations between States parties to both treaties in question

5. Even in the absence of a hierarchy, however, a Treaty on the Law of Treaties is of course the most specific source to turn to. The Vienna *Convention on the Law of Treaties of 23 May 1969*[4] entered into force on 27 January 1980. As of 1 December 2003, 96 States were parties to it[5].[6]

6. The rule on the relationship of successive treaties is contained in Article 30 of the Vienna Convention and reads as follows:

> **Article 30 - Application of successive treaties relating to the same subject-matter**
>
> 1. Subject to Article 103[7] of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59[8], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:

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[3] Daillier / Pellet, *Droit international public*, 7e éd., 2002, p. 267 no 171.

[4] *U.N.T.S.* vol. 1155, p. 331; *AJIL* (1969) p. 875 *et seq.*

[5] The following 16 Member States of the Hague Conference are **not** parties to the Vienna Convention: Brazil, France, Iceland, Ireland, Israel, Jordan, Malta, Monaco, Norway, Portugal, Romania, South Africa, Sri Lanka, Turkey, United States of America and Venezuela.

[6] On the question of whether or to what extent the Vienna Convention may be considered to codify customary law, see *infra* paragraphs 38 *et seq*.

[7] **Charter of the United Nations, Article 103**
In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

[8] **Vienna Convention, Article 59 – Termination or suspension of the operation of a treaty implied by conclusion of a later treaty**

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
   (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
   (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

(a) as between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41[9], or to any question of the termination or suspension of the operation of a treaty under article 60[10] or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

7. The following paragraphs will first examine which one of several successive treaties will have to be applied under Article 30 of the Vienna Convention, if and as far as the parties are identical and none of the treaties in question contains explicit rules on the relationship with other instruments. The words "if and as far as the parties are identical" refers to Article 30(3) and (4)(a). In other words, it will be discussed which treaty prevails ***in the mutual relationship*** between States parties to ***all*** treaties in question in cases where either (1) all States parties to an earlier treaty are also parties to the more recent treaty, or (2) only some States parties to the earlier treaty are parties to the later treaty. If the rules described below lead to the result that a particular treaty "prevails", this means that a judge in a State party to both conflicting treaties in question would have to apply the prevailing one ***in the mutual relationship with the other State concerned which is equally party to both treaties***.[11] As the discussion below will

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[9] **Vienna Convention, Article 41 – Agreements to modify multilateral treaties between certain of the parties only**

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
   (a) the possibility of such a modification is provided for by the treaty; or
   (b) the modification in question is not prohibited by the treaty and:
      (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
      (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

[10] **Vienna Convention, Article 60 – Termination or suspension of the operation of a treaty as a consequence of its breach**

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
   (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
      (i) in the relations between themselves and the defaulting State, or
      (ii) as between all the parties;
   (b) a party specially affected by he breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
   (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:
   (a) a repudiation of the treaty not sanctioned by the present Convention; or
   (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4 The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

[11] See *infra* note 35 and the adjoining text for a discussion of when a case is limited to the mutual relationship of two States parties to both agreements, and when it would affect the rights of other States parties only to the earlier treaty.

Whether this infringes upon the rights of ***other States who are only party to one but not to the other treaty*** is a question of State responsibility incurred by concluding two conflicting treaties, but it does not have any impact, under the Vienna Convention, on the fact that the (conflicting) obligations of the two treaties are both validly binding upon the State concerned. This issue will be dealt with separately, *infra*, under b).

show, in the absence of a clause the prevailing treaty would normally be the more specific one, no matter whether it is earlier or later than the more general treaty (see *infra* i). If none of the instruments concerned is more specific than the other, the more recent treaty will prevail in case of incompatibility of individual provisions (see *infra* ii).

i. Treaties "relating to the same subject matter"

8. Article 30(2)-(5) apply where successive treaties relate "to the same subject-matter" (Article 30(1)). This expression has to be construed narrowly,[12] meaning "the same degree of generality".[13] In deciding this, one has to consider the treaty as a whole and not any individual provision.

9. An example of treaties relating to the same subject matter is provided by the Conventions of Brussels[14] (1968) and Lugano (1988) on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, on the one hand, and the Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (1999), all three of them possessing the same level of generality.

10. According to the prevailing opinion, we are on the other hand not faced with two treaties that "relate to the same subject-matter" where a general treaty impinges indirectly on the content of a particular provision of an earlier, more specific treaty. Accordingly, a general treaty on the reciprocal enforcement of judgments does not affect the continued applicability of particular provisions concerning the enforcement of judgments contained in an earlier treaty dealing with third party liability in the field of nuclear energy.[15] This narrow interpretation of the words "relating to the same subject matter" is used because, although the rule *lex specialis derogat legi generali* is commonly recognised in public international law, it was not incorporated into the Vienna Convention explicitly as a counter-balance to the rule *lex posterior derogat legi priori*. Hence, by giving the words "relating to the same subject-matter" the narrow meaning described earlier, it is possible at the interpretation stage, and without having recourse to the rule giving precedence to the more recent treaty, to apply the unwritten rule of precedence of the more specific treaty.[16] Accordingly, the partial overlap described in this example would not be sufficient for the application of Article 30[17] but interpretation would lead to the conclusion that parties would want the more specific treaty to prevail in their mutual relations, although it is older.

11. Things become more difficult, however, when it comes to defining "generality" and "specificity" in cases where two ***specific*** treaties overlap in part. What, if one of the

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[12] Sinclair (*supra* note 1), p. 98.
[13] Daillier / Pellet (*supra* note 3), p. 271 no 173.
[14] Although the Brussels Convention is only open to Member States of the European Union (EU) (and at the same time part of the *Acquis communautaire*, adherence to which is compulsory for these States), it is still a treaty under public international law and not European Community law proper. While the Brussels Convention still exists and applies between Denmark, on the one hand, and all the other EU Member States, it has been replaced by the largely identical Regulation (EC) No 44/2001, OJ EC No L 12 of 16 January 2001, p. 1, in the relationship between all fifteen EU Member States with the exception of Denmark. This Regulation will be dealt with under B., where the position of secondary European Community law is being discussed. Like the Brussels Convention, the largely identical Lugano Convention is also a treaty under public international law.
[15] Sinclair (*supra* note 1), p. 98; see also Daillier / Pellet (*supra* note 3), p. 272 no 173 (2. a), who equally stress that the Vienna Convention does not contain any rule for this situation.
[16] Zuleeg, *Vertragskonkurrenz im Völkerrecht, Teil I: Verträge zwischen souveränen Staaten*, *German Yearbook of International Law* (*GYIL*) 20 (1977) p. 246 (257). See also *infra* paragraph 13.
[17] Others have a wider understanding of the notion "relating to the same subject matter", considering also, *e.g.*, a general treaty on recognition and enforcement in civil and commercial matters, and a treaty on the recognition and enforcement of maintenance decisions as treaties "relating to the same subject-matter", thus making their relationship a case where Article 30(3) would be applicable. Those who defend this position consider a partial overlap of two instruments to be sufficient for the application of Article 30. See, in particular, Volken, *Konventionskonflikte im internationalen Privatrecht*, 1977, p. 296-299. But see also *infra* note 18.

treaties in question is more specific in that it relies on a procedural element as the only criterion for jurisdiction (*e.g.* a choice of court clause) but covers a wide range of subject matters, while the other treaty relies on subject matter as the decisive element, *e.g.* a treaty regulating some intellectual property rights (containing substantive rules as well as rules on jurisdiction, with or without mentioning choice of court clauses)?

12. On the one hand, one could argue that the instrument focussing on jurisdiction based on choice of court clauses, and the recognition and enforcement of the resulting judgments, only, is more specific than a treaty dealing with substantive aspects as well as with a wider range of jurisdictional bases. But on the other hand, one could also look at the scope *ratione materiae* and argue that the latter is more narrowly defined in the instrument on intellectual property, thus making the latter the more specific one.

13. If one considers one of the instruments to be more specific, Article 30 of the Vienna Convention would not be applicable. As in the example given above, treaty interpretation would lead to the conclusion that the more specific instrument prevails, no matter whether it is earlier or later in time. If, however, one concludes that the two treaties are of the same level of generality, the further conditions for the application of Article 30 as described below will have to be examined.

14. To give another example: Would a treaty governing jurisdiction based on choice of court clauses for a wide range of subject matters be considered as relating "to the same subject-matter" as a treaty governing jurisdiction based on a general defendant's forum, submission, counter-claims, joinder (multiple defendants) for the same class of subject-matters? While as to the substantive law issue dealt with, both treaties do indeed possess the same level of generality, one is more specific when it comes to the range of jurisdictional bases, focussing only on choice of court agreements. If one focuses on this latter specificity, in their respective relationship, treaty interpretation would lead to the conclusion that the more specific instrument prevails.[18] If one focuses on the same level of generality as to subject-matters covered, this would be a case for Article 30 of the Vienna Convention, ultimately leading to the question whether there is compatibility between the two. Discussion of the latter (see *infra* under ii) will show that in case of incompatibility, normally the more recent treaty prevails.

15. To sum up, all examples given only demonstrate how urgent it is to actually include disconnection clauses into the treaties concerned, because treaty interpretation, already when it comes to deciding whether two treaties relate to the same subject matter and / or which one may be more specific, can lead to rather unpredictable results.

ii. Compatibility of the earlier treaty with the later one

16. Where the two treaties in question do relate to the same subject matter, and the issue of the relationship between them thus remains within the scope of Article 30 of the Vienna Convention, the next question to be answered is whether their provisions are "compatible" within the meaning of Article 30(2) and (3). At this level, the question has to be answered by looking at the individual provisions in the two treaties in question and the results that their application would produce in a particular case. Hence, this is no longer a matter of comparing the two treaties as a whole in abstract terms, as it was when identifying their respective subject-matter.

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[18] See Sinclair (*supra* note 1), p. 93, 98 on the rule *generalia specialibus non derogant*. Volken, *Konventionskonflikte* (*supra* note 17), p. 297-299, who favours the application of Article 30 of the Vienna Convention also in cases of partial overlap between two instruments, comes to the same result by stating that the typical conflict between legislative private international law treaties is not fully and appropriately dealt with by Article 30(2) of the Vienna Convention. In his example cited *supra* note 17, he therefore assumes that the will of the parties and the general principle of *lex specialis derogat legi generali* will let the special instrument on maintenance prevail.

17. The basic rule for successive treaties, to which Article 30(3) refers, is contained in Article 59[19] of the Vienna Convention. It states that normally, where the parties to a treaty conclude a later treaty relating to the same subject matter, in case of incompatibility the earlier treaty shall be considered as terminated. Only where the will of the parties leads us to assume that they wanted both treaties to coexist, Article 30(3) comes into play.[20]

18. Consequently, the point of reference is the ***later*** treaty: if it may be assumed that parties wanted both treaties to continue to apply, provisions of the earlier treaty only do so to the extent that they[21] are compatible with the provisions of the later treaty. In case of incompatibility, the *lex posterior* prevails (see *infra* under iii).

19. No incompatibility exists where the two or more instruments applicable to a certain factual situation would lead to the ***same*** result.[22] The Vienna Convention does not decide the rather academic question which of the instruments prevails in such a case. But not even the mere ***difference*** of results would necessarily mean that there is incompatibility:[23] only where (1) two or more conventions apply to the same factual situation[24] and (2) the pertinent legal rules in such conventions provide for ***contradictory*** results,[25] there is incompatibility calling for the application of Article 30(3) of the Vienna Convention and the precedence of *lex posterior*.

20. An example given on various occasions is the coexistence of an earlier regional instrument, negotiated among States between whom there is a high degree of mutual confidence, and another negotiated within the framework of a universal organisation. Where the parties to the earlier, regional treaty have granted each other wide rights based on mutual trust or even some approximation or integration of their legal systems, the circumstances or the intention of the parties might lead to the conclusion that in their mutual relations, this earlier, more generous treaty shall continue to apply between them, even if the same parties, together with others, have later agreed on a treaty on the same subject matter at a global level but providing for a more restricted regime.[26] Thus, although the results may be different when applying one or the other treaty, the wider rights granted by the earlier treaty are not incompatible[27] with the more restrictive regime adopted by the more recent global instrument. In this case, treaty interpretation would resolve the question of the relationship between the two instruments.

21. Another example along the same lines: Assuming that all States parties to the Conventions of Brussels and Lugano would become parties to a Judgments Convention in the form of the 1999 Draft relating to the same subject-matter[28] and in the absence of a

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[19] *Supra* note 8.
[20] Volken, *Konventionskonflikte* (*supra* note 17), p. 297 *et seq.*
[21] This decision may be taken separately for individual provisions within the treaties in question (Zuleeg (*supra* note 16), *GYIL* 20 (1977) p. 246 (273)).
[22] Volken, Conflicts between Private International Law Treaties, in: Heere (ed.), *International Law and The Hague's 750th Anniversary*, 1999, p. 149 (152, 155).
[23] Sinclair (*supra* note 1), p. 97 with further references from the negotiating history of the Vienna Convention.
[24] In order to determine this, one has to examine (1) the scope *ratione materiae*, (2) the scope *ratione personae*, (3) the scope *ratione loci* and (4) the scope *ratione temporis* (Volken, *supra* note 22, (155)). Only where all four elements are fulfilled for each of the treaties in question, there ***can*** be a conflict of conventions that needs to be resolved by public international law.
[25] Volken (*supra* note 22), p. 155.
[26] Sinclair (*supra* note 1), p. 97, 98, who gives the example of a consular treaty. In our opinion this would be all the more true where the regional agreement is a closed one, open only to a certain group of States parties, like the Brussels Convention of 1968, because States parties to it, if they wanted to have an – even identical – agreement on the same subject-matter with third States, could not simply invite the latter to join the existing treaty but needed to conclude a new one. While Daillier / Pellet (supra note 3), p. 272, no 173, 2. a), state that in a case as described by Sinclair, where the regional treaty is the earlier one, and in the case of silence of the subsequent global treaty, the *lex posterior* would prevail, they add that this would be "in conformity with the implicit will of the parties". Hence, everything depends on interpreting the treaties in question in order to identify that will.
[27] This is often difficult to decide and has to be determined by treaty interpretation (Zuleeg (*supra* note 16), *GYIL* 20 (1977) p. 246 (256)).
[28] See *supra* paragraph 9.

disconnection clause in the latter, application of the compatibility rule of the Vienna Convention would produce the following results:

22. The three texts are identical to a large extent, but where they are not, results may be slightly different (see, *e.g.*, minor differences such as domicile v. habitual residence as a general defendant's forum; differences in the jurisdiction rules on contracts and torts).

23. Concerning their compatibility, it has to be borne in mind that one of the most important features of the Conventions of Brussels and Lugano is that judgments from another Contracting State shall be recognised by operation of law and declared enforceable without any further examination in all other Contracting States of ***whether the court of origin had jurisdiction under the Convention***. Therefore, it can be argued that by including a rule in the Judgments Convention (1999) obliging the judge in the requested State to examine jurisdiction of the court of origin (which is due to the concept of a mixed as opposed to a double convention), the States parties to the Conventions of Brussels and Lugano had not intended to terminate the more advanced system in place between them, which was based on further integration, harmonisation and confidence. Therefore, treaty interpretation would lead to the result, like in the example given *supra* in paragraph 20 , that results were different but not incompatible. The States parties to the earlier instrument would wish to continue to apply it to the recognition and enforcement of judgments from other States parties. Although this leads to precedence of the earlier treaty instead of the precedence of *lex posterior* as established by the Vienna Convention, the result can also be sustained under Article 30(3) because the wider-reaching provisions of the earlier treaty are not "incompatible" with the narrower regime covering a larger number of parties which is set up by the later treaty.

iii. Lex posterior *rule as default rule for remaining cases of incompatibility*

24. For the remaining cases where (1) the successive treaties relate to the same subject matter, *i.e.* are of the same degree of generality or specificity, (2) treaty interpretation leads to the conclusion that the earlier treaty was not intended to be terminated, and (3) treaty interpretation does not, as in the example just given, lead to the conclusion that the parties wanted the earlier treaty to prevail,[29] Article 30(3) and (4) establish the priority of the *lex posterior* as a default rule to the extent that the parties to both instruments are identical:

25. Paragraph 3 deals with ***full*** party identity (*i.e.* all parties to the earlier treaty are also party to the later treaty). Where treaty interpretation does not lead to any different conclusion,[30] the earlier treaty only applies to the extent that its provisions are compatible with those of the later treaty. In other words, in case of a conflict, the more recent treaty prevails.

26. As far as the ***mutual*** relations between States parties to both conventions are concerned, the same rule applies even in cases where not all parties to the earlier treaty are also parties to the later one (Article 30(4)(a)).

b) Further requirements established by Article 41[31] of the Vienna Convention concerning the relations between a State party to both, and a State party only to the earlier one of the treaties in question

27. Article 30(4)(b) clarifies the obvious, namely that States that are not party to ***all*** of the treaties in question remain unaffected by a treaty to which they are not a party. *E.g.*

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[29] Volken, *Konventionskonflikte* (*supra* note 17), p. 297 *et seq.,* reduces Article 30(3) to cases where both treaties only partially overlap (which is admittedly a typical case where the will of the parties would plead for continuing applicability of successive treaties). However, one may have doubts as to whether these cases are covered by Article 30 at all, given the prevailing narrow interpretation of the expression that the two treaties must relate to the same subject-matter (see *supra* paragraphs 10 *et seq*.).

[30] See previous paragraph.

[31] *Supra* note 9.

where out of 30 States parties to an earlier treaty, 20 enter into a new one, the old treaty still governs the relations among the 10 States not party to the new treaty, as well as between each of them and each of the 20 States parties to both treaties, respectively.

28. Article 30(5) states that paragraph 4 applies "without prejudice to Article 41", a provision which protects the interests of States parties only to the earlier treaty by establishing some conditions for the lawfulness of a modification of such treaty between some of the States parties only.[32] While an "amendment" is a formal change to a treaty intended to alter its provisions with respect to all the parties, a "modification" is an *inter se* agreement concluded between certain of the parties to a treaty only, and intended to vary provisions of that treaty between themselves alone. The modification of an existing treaty can therefore be similar to, if not identical with, the situation just described when discussing Article 30(4)(a). The application of an existing treaty can be changed by concluding an explicit agreement aimed at modifying this particular treaty, but the same effect can be created by just adding a subsequent treaty between (some of) the same parties, which would have an impact on the application of the earlier treaty between them. For this reason, if not all the parties to the earlier treaty are also parties to the later one,[33] any subsequent treaty having a direct impact on the *inter se* application of the earlier treaty between parties to both treaties has to comply with the conditions set out in Article 41 for the modification of a treaty in order to be lawful in relation to the other parties to the earlier treaty.[34]

29. These conditions are the following:

- Where the earlier treaty explicitly provides for the possibility of *inter se* modification between two or more States parties, this may be done (Article 41(1)(a));
- Where the earlier treaty does not explicitly provide for the possibility of *inter se* modification, but does not prohibit the modification in question, either (Article 41(1)(b)), and
  - the modification in question does not affect the enjoyment by other States parties of their rights under the treaty or the performance of their obligations (Article 41(1)(b)(i)), and

[32] See Sinclair (*supra* note 1), p. 106-107, and Articles 40, 41 of the Vienna Convention.

[33] Shortly after the adoption of the Vienna Convention, the succession of (different) treaties on the one hand (Article 30 of the Vienna Convention), and the amendment or modification of a particular treaty, on the other hand (Articles 39-41 of the Vienna Convention), were looked at as two separate issues. Zuleeg (*supra* note 16), *GYIL* 20 (1977) p. 246 (261), reduces Article 41 to cases where a sub-group of States parties to an earlier treaty concludes a modifying treaty. As soon as a State who is not party to the earlier treaty joins the later one, this is, according to Zuleeg, no longer a case for Article 41, even as far as the sub-group that was also party to the earlier treaty is concerned. This rather formalistic approach has nowadays been replaced by an approach looking at the content of the successive agreements rather than at the number of parties alone. A new stand-alone treaty can have the effect of amending the provisions of an earlier treaty between those States parties to both treaties even if there are additional States parties only to the more recent instrument.
Because Article 41 subjects the modification of an existing treaty in the *inter se* relations between some of the parties to some conditions while the freedom to conclude new treaties, backed up by the default rule giving precedence to the *lex posterior* in case of incompatibility in Article 30(3) and (4), seems almost unlimited, Sinclair (*supra* note 1), p. 109, stated: "In practice, it may be that would-be 'modifying' States will seek to overcome this difficulty by the simple device of concluding a completely new Convention". Volken, *Konventionskonflikte* (*supra* note 17), p. 300, therefore correctly states that the lines between treaty revision, *inter se* modifications and successive (separate) treaties are difficult to draw. Hence, the more recent interpretation, which therefore requires Article 41 to be applied in addition to Article 30, thereby preventing such circumvention, appears convincing.

[34] See, *e.g.*, Daillier / Pellet (*supra* note 3), p. 273 no 173. This opinion seems to prevail today, and is supported by the reference to Article 41 in Article 30(5). As will be demonstrated, however, in order to make the new treaty (*i.e.* the modification) unlawful and thus create some State liability of a State party to both treaties towards States parties to the earlier treaty only, the impact of the new treaty on relations between a State party to both, and a State party to the earlier treaty only must reach a certain level. A mere "affection" of the State party to the earlier treaty without touching upon its rights or obligations is not enough (Sinclair (*supra* note 1), p. 99).

- does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole (Article 41(1)(b)(ii)),

inter se modification is equally permitted.

30. In other words, any modification of an existing treaty may only have relevant legal effect *inter se*, *i.e.* in the mutual relationship between States parties to both the original treaty and the modification in order to be lawful. As soon as the modification impinges on the rights of States parties to the original (or earlier, in the terms of Article 30) treaty but not to the modification (or to the later treaty, in terms of Article 30), or derogates from a core provision, derogation from which is incompatible with the effective execution of the object and purpose of the earlier treaty as a whole, this is contrary to Article 41(1)(b)(i) and a breach of the earlier obligation.

31. ***Whether*** the modification does indeed affect rights of States that are parties to the earlier treaty only, is – just like the question of (in)compatibility of successive treaties between the same parties - not easy to determine. It is a question of interpretation and depends very much on the nature and purpose of the (earlier) treaty in question, and on the context in which is to be seen.[35] One would have to clearly identify the "rights" granted or protected by the earlier treaty before being able to assess whether a particular modification affects their enjoyment.

32. But even where the modification (or the later treaty) does not affect the "enjoyment of a right" of a State party to the earlier treaty only, it can still be in breach of that treaty under Article 41(1)(b)(ii) of the Vienna Convention because it relates to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

33. If the example described in footnote 35 does not fall into the first category of violating a right, it will at least fall into the second category of hampering the effective execution of the object and purpose of the earlier treaty as a whole by replacing one exclusive jurisdiction by a different one, where this interferes with an exclusive basis of jurisdiction legitimately claimed by a State party only to the earlier agreement.

34. It is important to note, though, that in light of what was said under Article 30[36], the modification would not be invalid, even if it was in violation of the conditions set out in Article 41. Where there is an incompatibility of the two successive agreements and the conclusion of the modifying agreement represents a breach of Article 41 towards third States party to the earlier instrument only because it necessarily affects their rights (*e.g.*

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[35] Zuleeg (*supra* note 16), *GYIL* 20 (1977) p. 246 (257). One could take the example of a number of States which have concluded a treaty on jurisdiction, recognition and enforcement, and the only basis of (exclusive) jurisdiction is the nationality of a particular person (*e.g.* of the child in cases of child protection measures). Let us assume that later, some of the States parties enter into a new agreement doing away with nationality and focusing on the habitual residence instead, and in addition accept to recognise and enforce decisions from other States parties to this more recent agreement without examining whether the State rendering the decision had jurisdiction under the instrument. If States A, B and C are parties to the earlier treaty, and only States A and B are parties to the later one, could State C claim a violation of its rights where the courts of State A take a child protection measure concerning a national of State C, basing their jurisdiction on the habitual residence of the child, and then State B recognises this decision under the later treaty? Both treaties relate to the same subject matter, and assuming that they both provide for exclusive jurisdiction, albeit on a different basis, it may be assumed that they are incompatible, and therefore the more recent treaty would prevail ***in the relations between A and B***. But is the case given as an example really a case only between A and B, where the child has the nationality of State C, and C has a treaty with A and B under which it can claim exclusive jurisdiction over that same child which is its national? C is not a party to the new treaty, so between A and C, and B and C, the old treaty would continue to apply. Does it give C a right to have its jurisdiction based on nationality respected by the other parties? One could well be of this opinion. Or would A and B assume that a judgment rendered in State A on the basis of the habitual residence of the child (regardless of him or her being a national of State C) and enforced in State B (because it originated in State A) did only concern the mutual relationship of A and B?

[36] See also Article 61(2) of the Vienna Convention.

where it is practically impossible for the State that concluded the conflicting treaties to comply with two opposing duties), the Vienna Convention rule still gives precedence to the (albeit illicit) *lex posterior* while holding the State concerned liable for the breach.[37]

35. No existing treaty which overlaps with the Judgments Convention and explicitly permits *inter se* modification would strike one's eye.[38] In fact, Conventions often[39] tend to be silent on this. So the decisive questions to be answered on a case-by-case basis (*i.e.* for each Convention and its relation to the Judgments Convention individually) would be whether the envisaged modification would affect the enjoyment by other States Parties of their rights under the treaty, or the performance of their obligations; or whether it relates to a provision, derogation from which would be incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. International customary law

36. There are several reasons why, despite the existence of the Vienna Convention on the Law of Treaties, it is worthwhile to equally examine the respective rules contained in international customary law: (1) Not even all Member States of the Hague Conference are parties to the Vienna Convention, let alone all States of the world. The Judgments Convention, however, would probably be open to any State, including non-Member States of the Hague Conference. It is therefore likely that States who are not parties to the Vienna Convention may become parties to the Judgments Convention. (2) As has been shown, even in relations between States parties to the Vienna Convention the narrow interpretation given to the requirement that the successive treaties must relate to "the same subject matter" very quickly leads us outside of the scope of Article 30 of the Vienna Convention, and into other sources of public international law. (3) Since Private International Law (PIL) treaties were not explicitly covered by the preparatory work preceding the elaboration of the Vienna Convention, some of its provisions may seem to

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[37] This rule, however, has been largely – and, since Article 41 only has a residuary character, also legitimately - obviated by State practice. In fact, States concluding a modifying agreement – or a separate later treaty – which may be contrary to an earlier treaty obligation, often include a clause into the new instrument to the effect that the rights of third States parties to the earlier treaty are *not* affected (which can mean a suspension of some of the effects of the new instrument), and a clause obliging States party to the more recent agreement to take the necessary steps to bring their conflicting obligations in line. As long as this has not been done, the earlier instrument then remains unaffected by the new one. See the examples given by Daillier / Pellet (*supra* note 3), p. 274 no 173, in particular the example of Article 307 of the EC Treaty. Although the authors plead for the "affirmation" of the precedence of the earlier treaty if the later one is in breach of it, it seems, that this plea is aimed at affirmation by the parties concerned, by way of including the said clauses into the second treaty, and not at automatic invalidity of the later treaty by operation of law.
Since this paper is intended to inform treaty negotiators of their possibilities, it is for them to ensure that they include an appropriate compatibility clause. If they fail to do so, a practitioner having to decide which of the conflicting treaties to apply would have to observe the rules set out in Article 30, regardless of whether the second treaty might constitute a breach of Article 41.

[38] The 1971 *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, *e.g.*, is rather restrictive. In order to become operative in the bilateral relations between two States parties, it requires the conclusion of a bilateral Supplementary Protocol, and the issues that may be addressed in such Agreement are listed exhaustively in the Convention itself (see Articles 21 and 23). But even in the absence of a Supplementary Agreement, Article 25 of the Convention limits the freedom of the Contracting Parties to conclude between themselves other Conventions relating to the recognition and enforcement of Judgments within the scope of the 1971 Convention "unless they consider it necessary, in particular, because of economic ties or of particular aspects of their legal systems". It seems, however, that this restriction can be overcome (1) because of the limited number of States parties to the 1971 Convention and (2) the opening clause contained in Article 25, allowing States parties to conclude other agreements if "they consider it necessary".
The 1965 *Hague Convention on the Choice of Court* does not contain any similar limitation.

[39] Examples of provisions allowing for bilateral or multilateral agreements among some Contracting States which would modify the original treaty are provided outside the area concerning the Judgments Project by Article 6 of the 1954 *Hague Convention relating to Civil Procedure*, Articles 3(2) and 8 of the 1961 *Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, Articles 11, 20 and 25 of the 1965 *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* , Article 36 of the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*, and Article 39(2) of the 1993 *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

take very little account of PIL treaty specificities. The PIL treaties are legislative treaties, not treaties dealing with direct transactions between States. Hence, some doubt that PIL treaties as such are covered by the Vienna Convention. (4) The Brussels Convention of 1968, which is an important instrument to be disconnected from the Judgments Project – and there are others – predates the Vienna Convention which, according to its Article 4, only applies to treaties concluded after its entry into force (January 1980).

37. International customary law is created by a constant and uniform usage practiced by the States in question, combined with their *opinio juris*.[40]

38. At the time the Vienna Convention on the Law of Treaties was being negotiated, no general common State practice on the thorny issue of "conflicts of conventions" could be identified.[41] Therefore, although the Vienna Convention is considered to be largely a codification of customary public international law, so that many rules contained in the Convention also apply to States which are not parties to it, this is only partly[42] the case in the area of conflicts between conventions.

39. Some principles embodied in Article 30 of the Vienna Convention, however, may be regarded as principles of international customary law:

40. At the time of negotiation of the Vienna Convention, reference was made to the case-law of the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ), in particular in order to resolve the dispute *de lege ferenda* as to whether the conclusion of a more recent treaty which violated obligations that a State party to it had undertaken towards another State in an earlier treaty, should lead to the invalidity of the new treaty, or just create some liability of the infringing State.[43] The decisions mentioned plead in favour of validity, thus following the same lines as the rules adopted in the Vienna Convention.[44] Therefore, the fact that a more recent treaty is in breach of an earlier one does not make the more recent treaty invalid. This means, consequently, that it has to be decided which one to apply in the individual case.

a) Party identity

41. As to the question which of two successive treaties would prevail in case of a conflict and in the absence of clauses dealing with this question in the treaties concerned, treaty interpretation is the first step when trying to resolve the question. A customary interpretative principle – which even has to be applied within the scope of the Vienna Convention because the latter does not contain any rule on this[45] - is the principle *lex specialis derogat legi generali*. ***As far as all parties to successive treaties are identical***, it may be assumed that it reflects their will to give precedence to the more specific instrument.[46]

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[40] *Asylum Case (Colombia v. Peru)*, Judgment, 20 November 1950, *I.C.J. Reports* (1950), p. 266 (276 *et seq.*); Brownlie, *Principles of Public International Law*, 6th ed. 2003, p. 6 *et seq*.

[41] See, *e.g.*, the description of varying State practice within different international organisations by Sinclair (*supra* note 1), p. 94-95. This existing variety led to the inclusion of the last part of Article 5 of the Vienna Convention, preserving practices within any such international organisation.

[42] See Zuleeg (*supra* note 16), *GYIL* 20 (1977) p. 246 (247, footnote 4) on the opposed views even within the International Law Commission during the elaboration of the Vienna Convention as to whether the latter only codified existing customary law in this area, or whether it established new rules.

[43] See in this respect, *e.g.*, Permanent Court of International Justice, Opinion 8 December 1927 No 14 – *European Commission of the Danube*, *P.C.I.J. Series B* (1927), p. 22 (23); Judgment 12 December 1934 No 63 - *Oscar Chinn*, *P.C.I.J. Series A/B* (1934), p. 66 (80). The dissenting Judges van Eysinga (p. 135) and Schücking (p. 149) had claimed nullity of the later treaty because of its conflict with the earlier one but the Court did not follow this approach.

[44] Zuleeg (*supra* note 16), *GYIL* 20 (1977) p. 246 (249 *et seqq*.). Although the decisions emanating from these two courts are only binding on the States parties to the proceedings, it is recognised that the decisions can contribute to the emergence of new State practice and, consequently, new customary international law.

[45] Zuleeg (*supra* note 16), *GYIL* 20 (1977) p. 246 (256 *et seq.*).

[46] See, *e.g.*, Zuleeg (*supra* note 16), *GYIL* 20 (1977) p. 246 (256 with further references to the case-law of the P.C.I.J. in footnote 44).

42. In the same situation of full party identity, where none of the instruments is more specific, but they do relate to the same subject-matter and possess the same level of generality, the rule *lex posterior derogat legi priori* is to be applied in case of incompatibility.[47]

b) Not all parties to the earlier treaty are parties to the later one

43. Concerning the amendment or modification of a treaty, it was noted already when the Vienna Convention was negotiated that State practice diverged to some extent from what was often asserted to be the rule of customary international law, namely, that a treaty may not be revised without the consent of all the parties.[48] Hence, also in cases where there is ***no identity of all the parties to both treaties***, as far as there is party identity and the mutual relations of these States are concerned, the same rules as above may be applicable at least to some extent, depending, however, very much on the interpretation of the treaties in question. This seems to be true for the *lex specialis* rule.

44. However, where none of the treaties in question is more specific, at an abstract and general level, neither precedence of the *lex prior* nor of the *lex posterior* have been generally accepted as default rules of unwritten public international law. The same is true for a number of further approaches.[49]

45. Although a treaty like the Vienna Convention, even where it does not reflect existing customary law at the time of its adoption, can lead to a change of practice and, as a consequence, to the generation of new international customary law,[50] this has not happened in the area discussed here either - *inter alia* because the Vienna Convention only contains default rules which apply unless provided otherwise by the parties,[51] thus leaving the issues largely to party autonomy of the Contracting States which has allowed a wide variety of State practice to continue to flourish.[52] Although there are doubts whether the rule already amounts to customary law, one of the few things which seem to be established in State practice by now, as mentioned above, is the fact that a multilateral treaty may in practice be amended by another multilateral treaty which comes into force only for those States which become bound by it, thus not requiring agreement among all the parties to the earlier treaty.[53] The rule of *pacta sunt servanda*, as well as the so-called relativity of treaty relationships, would moreover lead to the application of the treaty to which both States are party in their mutual relationship, no matter whether one of them has engaged in – possibly incompatible – obligations with (a group of) other States.

46. Where practical compliance with both treaties is factually impossible in case of a conflict between different treaties involving not fully identical parties, in the absence of explicit clauses it is left to the State bound by the two conflicting treaties vis-à-vis different partners to make a ***policy choice*** which duty to comply with. Public international law does not give any guidance as to which treaty prevails in this situation.[54]

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[47] Zuleeg (*supra* note 16), *GYIL* 20 (1977) p. 246 (256 with further references in footnotes 45 *et seq*).
[48] Sinclair (*supra* note 1), p. 106 with further references in footnote 98.
[49] See, for an overview, Zuleeg (*supra* note 16), *GYIL* 20 (1977) p. 246 (265-267).
[50] See, in particular, the judgment of the ICJ in the *North Sea Continental Shelf* case, Judgment 20 February 1969, *I.C.J. Reports* (1969), p. 3 (41 *et seq.*).
[51] Sinclair (*supra* note 1), p. 97.
[52] See, *e.g.*, the examples given by Volken, *Konventionskonflikte* (*supra* note 17), p. 303.
[53] Even at the time of negotiations of the Vienna Convention, it was current State practice to bring amending agreements into force as between those States willing to accept the amendment, while at the same time leaving the existing treaty in force with respect to the other States parties to the earlier treaty, thus blurring the distinction drawn in the Convention between "amendment" between all of the parties, and "modification" between only some of them (see Sinclair (*supra* note 1), p. 106-107).
[54] This will bring about State liability towards the parties to the other treaty (see Zuleeg (*supra* note 16), *GYIL* 20 (1977) p. 246 (262-268)).

47. Lastly, it is worth mentioning that, although Article 5 of the Vienna Convention preserves usages developed within international organisations, one cannot speak of a uniform practice developed in Hague Conventions to this effect. Whether a rule on the relationship with other instruments is added in a new Hague Convention, and its possible content, depend very much on the individual situation and the treaties in question.[55]

c) Conclusion

48. To sum up: In the absence of any rules established by the States parties to a particular treaty, customary public international law in general and the varying practice – depending on the subject matter of the treaty in question - developed within the Hague Conference in particular[56] do not add anything to the residual rules established by the Vienna Convention. As far as the parties to the successive treaties are identical, the general rules are largely identical with the rules embodied in the Vienna Convention. Where no party identity is to be expected, this leaves us with the urgent need to include appropriate clauses governing the relationship of the instruments in question because public international law does not provide any default rule.

3. General principles of public international law

49. The principles embodied in the Vienna Convention that were discussed in the paragraphs on customary international law are considered by others to form part of the generally accepted principles of public international law: the principles of *pacta sunt servanda* (see Article 26 of the Vienna Convention), *lex specialis derogat legi generali*, and *pactum tertiis non nocet*. However, while the label attributed to them by some authors – "general principles" or "customary international law" - may be different, the content is not. Reference is therefore made to the content of these principles as just described *supra* under 2.

B. How does European Community law fit into the rules described?

50. Public international law writers stress that, at the global level, secondary legislation of the European Community (in particular directives and regulations) appears as a certain type of "internal law" as opposed to international treaty law[57] because it creates harmonised rules applying to a sub-group of States parties to a global treaty which replace those States' national laws. And while the Court of Justice of the European Communities (European Court of Justice – ECJ) strongly reaffirms community law's "particular" character, in relations with third States it also respects the precedence of international law with regard to its own "internal" Community regime. Consequently, an international treaty prevails over secondary Community law, no matter whether the treaty is older[58] or more recent[59] than the Community law in question, unless explicitly provided otherwise.

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[55] See, for a more detailed discussion, Volken, *Konventionskonflikte* (*supra* note 17), p. 303.

[56] For an overview of history and development of disconnection clauses in Hague Conventions, see Volken (*supra* note 22), p. 154. It was in the Hague Convention of 15 April 1958 on the Law Applicable to Transfer of Title in the International Sale of Goods that, for the first time ever, a clause on the relationship with other – existing and future (!) - instruments was introduced into a law-making convention on private international law (Volken, *ibid*., p. 154 *et seq.*).

[57] See Daillier / Pellet (*supra* note 3), p. 277 no 176; p. 281 no 181.

[58] Daillier / Pellet (*supra* note 3), p. 283-284 no 181, mentioning that this is also reflected in the diplomatic practice of the European Communities, *e.g.* in the declaration attached to the Warsaw Protocol of 1982 to the Gdansk Convention of 1973 concerning fishing in the Baltic Sea, OJ EC No L 237 of 26 August 1983, p. 12. See also ECJ, 12 December 1972, cases 21-24/72 (joint), *International Fruit Cy*, ECJR 1972, p. 1219 (No 11); ECJ 10 September 1996, case 61/94, *Commission* v. *Germany*, ECJR 1996-I, p. 3989 (Nos 39, 44, 45, 52); ECJ 16 June 1998, case 162/96, *A. Racke GmbH & Co v. Hauptzollamt Mainz*, ECJR 1998-I, p. 3655 (Nos 5, 7, 8, 29 *et seqq*).

[59] Daillier / Pellet (*supra* note 3), p. 283-284 no 181; see also implicitly ECJ 30 April 1979, case 181/73, *Haegemann v*. *Belgian State*, ECJR 1974, p. 449.

III. LIMITS ESTABLISHED BY THE VIENNA CONVENTION FOR THE CONTENT OF A DISCONNECTION CLAUSE

51. Many provisions of the Vienna Convention are expressed as residuary rules which operate only unless the treaty provides otherwise. Thereby, a large degree of autonomy is left to States to agree on specific rules governing the relationship of international conventions,[60] as long as the limits set by Article 30(4) and (5) and Article 41 of the Vienna Convention are respected in cases where not all parties to the earlier treaty become parties to the more recent one. While it is always possible to include a clause in the more recent treaty giving priority to the earlier one, the more recent treaty may only claim precedence under the conditions set out in Article 30(5) and Article 41 of the Vienna Convention, as described above,[61] unless the earlier treaty itself allows for subsequent instruments to prevail (Article 30(2)). Where States do not comply with these conditions, they may be liable for breach of the earlier treaty unless they include a clause into the more recent treaty that temporarily suspends some of its effects and obliges them to enter into negotiations with parties to the earlier treaty in order to resolve the conflict.

IV. CONCLUSION

52. Whenever States are negotiating a new convention that might have an impact on the application of an earlier treaty, it is advisable to include one or more clauses into the new convention which define explicitly the relationship with other existing (and, if States so wish, future) instruments.

53. To sum up what applies in the absence of a clause, and which kind of clause is permissible in the new treaty: In general it can be said that the first step to be undertaken is the interpretation of the treaties in question, and here the general presumption is that the parties would want the more specific instrument to prevail. In case all treaties concerned possess the same level of generality, individual provisions of two different treaties would apply to the same factual situation and lead to incompatible results, there is a presumption in favour of the *lex posterior*, which is slightly softened in cases where not all parties to the earlier treaty become parties to the later one and as far as the relations with them are concerned. The rights of those States who are only parties to the earlier treaty need to be respected.

54. While it is easy to identify which is the earlier and which the later instrument,[62] specificity can be a more difficult question: In the area of jurisdiction in particular, specificity may be difficult to define where, *e.g.*, one instrument is more specific *ratione materiae* while the other is more specific *ratione personae*, *ratione loci* or *ratione temporis*. And even the mere notion of *ratione materiae* is difficult to apply: would a treaty dealing with patents only (*i.e.* with a certain subject matter, in both substance and procedure) be more specific than a treaty dealing with jurisdiction based on choice of court clauses (*i.e.* a – narrowly defined - procedural topic which could, however, cover more than one subject matter)?

55. Therefore, one may be inclined to advise States parties to include explicit rules into every instrument they negotiate. What applies in the absence of a clause, and which kind of clause is permissible in the new treaty, depends first of all on whether all States parties to the earlier treaty also join the later one.

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[60] See Article 30(2) Vienna Convention; Sinclair (*supra* note 1), p. 97-98.
[61] *Supra* paragraph 27 *et seqq*.
[62] According to Sinclair (*supra* note 1), p. 98; Zuleeg (*supra* note 16), *GYIL* 20 (1977) p. 246 (256), it is the date of the adoption of the text and not that of its entry into force which is decisive.

A. All parties to the earlier treaty are party to the later treaty

56. Where this is the case, independent of whether the old treaty contains a clause on the relationship with future instruments, in general States are in principle[63] free to change their will. Hence, also their freedom as to what clause to include into the new treaty is unlimited.

57. In the absence of a clause, it is the presumption of the Vienna Convention that they have terminated the old treaty and replaced it by concluding a new treaty on the same subject-matter.

58. If treaty interpretation leads to the conclusion, however, that the States parties wanted the old treaty to continue to apply, it would first of all depend on a clause in the new treaty which one prevails. In the absence of a clause, the presumption is that the *lex posterior* prevails in case of incompatibility. But any clause to a different effect would equally permissible.

59. Where the two treaties in question do ***not*** relate to the same subject-matter within the narrow meaning of the Vienna Convention, the presumption of termination of the earlier treaty does not apply. Treaty interpretation will then lead to the conclusion that the more specific treaty prevails in the absence of a clause. Otherwise, the parties are free to agree on a different effect by inserting an appropriate clause into either treaty.

B. Not all parties to the earlier treaty become party to the later treaty

60. In cases where not all parties to the earlier treaty become party to the later treaty, the solutions are the same to the extent that the parties to the earlier and later treaty are identical. The application of successive treaties ***in their mutual relationship*** therefore follows the rules described above. This means, in particular, that treaty interpretation would suggest that the more specific treaty prevails. Where none of them is more specific and the treaties in question do relate to the same subject-matter, treaty interpretation can lead to the conclusion that the earlier treaty shall continue to apply (*e.g.* where it is more generous), but in other cases the default rule of *lex posterior* will lead to precedence of the later treaty in case of incompatible results produced by individual provisions in the two treaties concerned, as applied to a particular factual situation.

61. The application of the rules just mentioned, as well as the freedom of the parties to the later treaty as to how to regulate the relationship between the two instruments in question by including a clause into the later treaty is limited to some extent because the rights of parties to the earlier treaty only have to be respected.

62. As far as those States, who are parties only to the earlier but not to the later treaty, are concerned, they can still rely on the earlier treaty in their relations with any State party to it, independent of whether the latter has subsequently entered into another treaty on the same subject matter with some other States equally party to the earlier treaty.

63. Moreover, Article 41 establishes some rules on the lawfulness of concluding a subsequent treaty, thereby setting a framework of State responsibility in case of a breach. The validity of the successive engagements, however, is not affected.

64. Where the old treaty contains a clause on the relation with future instruments, this has to be respected in the relations with States parties to the earlier treaty only. Where it does not contain any such clause, and States party to the later treaty would like it to prevail in their mutual relationship over the old treaty, they may insert a clause to that effect if the modification in question does not affect the enjoyment by other States parties of their rights under the earlier treaty or the performance of their obligations, and

[63] With the exception of *jus cogens*.

does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the earlier treaty as a whole.

65. One may conclude by stating that, even where at first sight, specificity and generality seem to be easy to attribute to the various Conventions in question, things are not that obvious. It has been described above that in most cases of overlap of scope of the Judgments Convention and any instrument governing a specific subject matter including, *inter alia*, rules on jurisdiction and enforcement for it, it would be difficult and doubtful to try to define one as more specific than the other. This paper shows, moreover, that even where the new instrument might be considered more specific, there can be cases where the parties would be likely to wish the older instrument to continue to apply between them.

66. The only conclusion to be drawn is that it is advisable to include explicit rules into any international instrument that govern the relationship with other existing and future instruments as well as any possibility for modification, where necessary (temporarily) limiting the application of the new instrument in order to take account of the rights and legally protected interests of States parties to an earlier instrument but not to the new instrument. The latter requires a careful examination of the earlier treaty in question in order to determine which rights and interests of States parties to those instruments might be affected by the later instrument without a clause appropriately dealing with the relationship of the two treaties.