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COORDINATION ENTRE LE PROJET SUR LES ALIMENTS ET D'AUTRES INSTRUMENTS INTERNATIONAUX

Document établi par Philippe Lortie, Premier secrétaire

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CO-ORDINATION BETWEEN THE MAINTENANCE PROJECT AND OTHER INTERNATIONAL INSTRUMENTS

Document drawn up by Philippe Lortie, First Secretary

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à l'intention de la Commission spéciale de juin 2006
sur le recouvrement international des aliments
envers les enfants et d'autres membres de la famille

Preliminary Document No 18 of June 2006
for the attention of the Special Commission of June 2006
on the International Recovery of Child Support
and other Forms of Family Maintenance

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I. INTRODUCTION[1]

1. The inclusion of provisions dealing with the co-ordination of a new instrument and other international instruments is usually dealt with at the very end of the negotiations of the new instrument. It is only at this final stage that it will be possible to verify the co-ordination of the new rules of the new instrument with similar rules found in other international instruments. Such co-ordination is necessary in order to give effect, between different instruments in force between the same Contracting States, to the most effective rules of these instruments and to address possible conflicts upon the application of their different rules. Moreover, as the objective of the current negotiations is to modernise, improve and simplify the international system for the recovery of maintenance, the new instrument should achieve a sensible co-ordination between existing multilateral, regional and bilateral instruments. The new instrument will replace some of the old multilateral Conventions and provide the global framework within which such regional and bilateral instruments will operate. However, at the current stage of negotiations of a new instrument on the international recovery of child support and other forms of family maintenance, as most of the main characteristics of the new Hague regime[2] are known to the negotiators, it is possible to examine this complex issue[3] in advance of the Diplomatic Session which will be responsible for concluding this new text in the near future. Finally, this exercise will assist negotiators in identifying rules found in older instruments, such as the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance* (hereinafter the New York Convention of 1956), that have not yet been incorporated in the new Hague regime and that may be worth incorporating, if possible,[4] in order to reduce the need to co-ordinate in relation to these older instruments.

2. The new Hague regime[5] will most certainly contain: rules in relation to administrative co-operation,[6] including a provision to facilitate the obtaining of evidence,[7] another one to provide assistance in establishing parentage where necessary[8] and, possibly, a provision to facilitate service of documents;[9] rules regarding recognition and enforcement,[10] including a provision with regard to modifications of maintenance

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[1] See, A. Schulz, "The Relationship between the Judgments Project and other International Instruments", Prel. Doc. No 24 of December 2003, prepared for the attention of the Special Commission of December 2003 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, for a detailed analysis of the issue of relationship between instruments in relation to the Choice of Court Convention project. This document is available on the Hague Conference website at: < www.hcch.net >, under < Conventions >, < Convention No 37 >, and < Preliminary Documents >.

[2] In this document, reference will be made to the new "Hague regime" since it remains to be decided whether the new Convention will include a chapter on applicable law or if applicable law will be the subject of a separate protocol.

[3] Ian Sinclair, one of the leading scholars on treaty law, is of the opinion that "[a] particularly obscure aspect of the law of treaties is the question of application of successive treaties which relate to the same subject-matter". See I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester University Press, 1984, 149 p., at p. 93.

[4] See, *infra*, note 15.

[5] See, "Tentative draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance", Prel. Doc. No 16 of October 2005, prepared by the Drafting Committee which met in The Hague from 5-9 September 2005, for the attention of the Special Commission of June 2006, for the latest version of the text of the tentative draft Convention. This document is available on the Hague Conference website at: < www.hcch.net >, under < Work in Progress > and < Maintenance Obligations >.

[6] *Ibid*., Chapters II and III (*i.e*. Articles 4-13).

[7] *Ibid*., Article 6(2) *g)*.

[8] *Ibid*., Article 6(2) *h)*.

[9] *Ibid*., Article 6(2) *j),* in this case the provision is still between square brackets.

[10] *Ibid*., Chapters V and VI (*i.e*. Articles 15-31).

decisions;[11] and, rules concerning legal assistance.[12] Finally, rules in relation to applicable law could be available to States with an interest.[13]

3. In respect of all these subject-matters, the new Hague regime may need to be co-ordinated with a number of instruments such as:[14]

Global instruments of a specific nature concerning maintenance, for example –

- The New York Convention of 1956;[15]
- The *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children* (hereinafter the Hague Maintenance Convention of 1956 on Applicable Law);[16]
- The *Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children* (hereinafter the Hague Maintenance Convention of 1958 on Recognition and Enforcement);[17]
- The *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations* (hereinafter the Hague Maintenance Convention of 1973 on Recognition and Enforcement);[18]
- The *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* (hereinafter the Hague Maintenance Convention of 1973 on Applicable Law).[19]

[11] *Ibid*., Articles 14 and 18 *f)*.
[12] *Ibid*., Article 13, as defined in Article 3.
[13] See, "Proposal by the Working Group on the Applicable Law to Maintenance Obligations", Prel. Doc. No 14 of March 2005, Report presented to the Special Commission of April 2005 for the International Recovery of Child Support and other Forms of Family Maintenance. This document is available on the Hague Conference website, *supra*, note 5.
[14] The list of instruments presented does not pretend to be exhaustive. However, it will provide an adequate sample of instruments for the purpose of this study.
[15] The New York Convention of 1956, 268 *UNTS* 3, the scope of which extends to persons of any age, establishes a system of co-operation for the establishment and recovery of maintenance. It includes rules regarding legal assistance (Article 9) and letters of request (Article 7). It also provides that the Receiving Agency can represent the claimant (Article 6(1)); although not specifically mentioned in Article 6 of the tentative draft Convention this possible function of Central Authorities could be covered by Article 6(1) *b)*. It is important to note that the scope of the New York Convention can be modified by way of reservations (Article 17). See, W. Duncan, "Towards a New Global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance", Prel. Doc. No 3 – Appendices – of April 2003, Report drawn up for the attention of the Special Commission of May 2003, for the text of the Convention. This document is available on the Hague Conference website, *supra*, note 5.
[16] The Hague Maintenance Convention of 1956 on Applicable Law, the scope of which extends only to children below the age of 21, strictly deals with issues of applicable law. The text of Hague Conventions are available on the Hague Conference website at: < www.hcch.net >, under < Conventions >.
[17] The Hague Maintenance Convention of 1958 on Recognition and Enforcement, the scope of which extends only to children below the age of 21, includes rules on recognition and enforcement and legal assistance.
[18] The Hague Maintenance Convention of 1973 on Recognition and Enforcement, the scope of which extends to both children and adults, provides rules for recognition and enforcement, legal assistance and public bodies. It is important to note that it is possible to reserve under Article 26 of the Convention the right not to recognise or enforce a decision or settlement: *a)* for the benefit of a person above the age of 21; *b)* between persons related collaterally or by affinity; *c)* unless it provides for the periodical payment of maintenance.
[19] The Hague Maintenance Convention of 1973 on Applicable Law, the scope of which extends to both children and adults, provides rules for applicable law, including rules in relation to public bodies. As its sister Convention, it is possible to make similar reservation in accordance with Articles 13-15.

Global instruments of a specific nature relating to specific rules included in the new Hague regime, for example –

- The *Hague Convention of 1 March 1954 on civil procedure* (hereinafter the Hague Civil Procedure Convention);
- The *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (hereinafter the Hague Service Convention);
- The *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (hereinafter the Hague Evidence Convention);
- The *Hague Convention of 25 October 1980 on International Access to Justice* (hereinafter the Hague Access to Justice Convention).

Regional instruments of a general nature, for example –

- The *Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, as amended (hereinafter the Brussels Convention of 1968);[20]
- The *Lugano Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, as amended (hereinafter the Lugano Convention of 1988);[21]
- The *Minsk Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters*, as amended on 28 March 1997 (hereinafter the Minsk Convention of 1993);[22]
- *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (hereinafter the EC Brussels I Regulation).[23]

Regional instruments of a specific nature concerning maintenance, for example –

- The *Inter-American / Montevideo Convention of 15 July 1989 on Support Obligations* (hereinafter the Montevideo Convention of 1989);[24]

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[20] The Brussels Convention of 1968, which is in force between Denmark and the "old" 14 Member States of the European Union, includes rules on jurisdiction (Articles 2-24), recognition and enforcement (Articles 25-49), and legal aid (Articles 44-45) in civil and commercial matters including maintenance obligations. The texts of European norms are available on the website of the European Union at: < http://eur-lex.europa.eu/en/repert/19.htm#192000 >.

[21] The Lugano Convention of 1988 is modelled on the Brussels Convention of 1968. It applies between the 15 "old" EU Members States, Iceland, Norway, Poland and Switzerland.

[22] The Minsk Convention of 1993, which concerns family matters, includes rules regarding legal assistance (Articles 4-19), taking of evidence (Articles 9 and 13-14), service (Articles 10-12), jurisdiction – including establishment of parentage – (Article 31), and recognition and enforcement (Articles 51-55). The French and English text of the Minsk Convention can be found in Annex II of E. Gerasimchuk, "The Relationship between the Judgments Project and certain Regional Instruments in the arena of the Commonwealth of Independent States", Prel. Doc. No 27 of April 2005, prepared, for the Permanent Bureau, for the attention of the attention of the Twentieth Session of June 2005 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. This document is available on the Hague Conference website, *supra*, note 1.

[23] The EC Brussels I Regulation, which is in force between all the Member States of the European Union with the exception of Denmark, includes rules on jurisdiction (Articles 2-31), recognition and enforcement (Articles 32-58), and legal assistance (Article 50 and 51) in civil and commercial matters including maintenance obligations. See Prel. Doc. No 3 – Appendices, *supra*, note 15, for the text of the relevant Articles.

[24] The Montevideo Convention of 1989, the scope of which is limited to children below the age of 18 and to spouses or former spouses from a matrimonial relationship, includes rules on applicable law (Articles 6-7), jurisdiction (Articles 8-10), recognition and enforcement (Articles 11-18), and legal assistance (Article 14). It is important to note that the definition of creditor and debtor under that Convention is governed by the law which is most favourable to the creditor (Article 6). See Prel. Doc. No 3 – Appendices, *ibid*., for the text of the Convention.

– *Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations* (hereinafter the future Brussels Regulation on Maintenance).[25]

Regional instruments of a specific nature relating to specific rules included in the new Hague regime, for example -

– *Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters* (hereinafter the EC Service Regulation);

– *Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters* (hereinafter the EC Evidence Regulation);

– *Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes* (hereinafter EC Access to Justice Directive);

– The *Inter-American / Panama Convention of 30 January 1975 on the Taking of Evidence Abroad* (hereinafter the Panama Convention of 1975).[26]

Bilateral instruments of a general nature, for example –

– The *Ottawa Convention of 10 June 1996 between Canada and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters and on Mutual Assistance in Maintenance*, (hereinafter the Canada-France Convention).[27]

Bilateral instruments of a specific nature concerning maintenance, for example –

– United States Model Agreement for the Enforcement of Maintenance (Support) Obligations (hereinafter the US Model Agreement);[28]

– Agreements for the Reciprocal Enforcement of Maintenance Orders (hereinafter REMO).[29]

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[25] The future Brussels Regulation on Maintenance, the scope of which extends to maintenance obligations arising from family relationships or relationships of a comparable effect, will likely include rules on jurisdiction (Articles 3-11), applicable law (Articles 12-21), public bodies (Article 16), service of documents (Article 22), recognition and enforcement (Articles 25-38), legal assistance (Article 29), co-operation (Articles 39-43), and access to information (Articles 44-47). Please note that the text of the future Regulation may have changed since it was distributed in January 2006.

[26] The text of this Convention is available on the website of the OAS at: < www.oas.org >.

[27] The Canada-France Convention, which is not in force, contains mutual legal assistance provisions for the recovery of maintenance (Articles 10-16). The text of this Convention is available on the website of the Uniform Law Conference of Canada at: < www.ulcc.ca >.

[28] The US Model Agreement contains rules on co-operation (Articles 3-5), recognition and enforcement (Article 7), applicable law (Article 8), legal assistance (Article 6) and the establishment of parentage (Article 5). See Prel. Doc. No 3 – Appendices, *supra*, note 15, Annex No 4, for a copy of the US Model Agreement.

[29] REMOs, which are reciprocity agreements, rest in great part on the application of domestic law in the States concerned. They may encompass a mixture of rules such as rules on co-operation, jurisdiction, applicable law, recognition and enforcement, modification of decision and establishment of parentage. For additional information on REMOs, see paragraphs 115-118 of W. Duncan, "Towards a New Global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance", Prel. Doc. No 3 of April 2003, Report drawn up for the attention of the Special Commission of May 2003 for the International Recovery of Child Support and other Forms of Family Maintenance. This document is available on the Hague Conference website, *supra*, note 5.

4. Furthermore, a number of bilateral international judicial co-operation instruments that may encompass a mixture of rules concerning jurisdiction, applicable law, recognition and enforcement, service of documents, taking of evidence and legal assistance, could also be taken into consideration.[30]

5. It is important to note that the scope *ratione personae* of all the instruments listed may not always coincide as some can be limited to children or when they embrace other forms of family maintenance their scope can be limited by way of reservation. Finally, as these instruments are not all part of public international law, such as the European Regulations and the reciprocity schemes based on REMO, their co-ordination will have to take into account their different character.

6. The objective of this document is to examine the need for the inclusion in the new Hague regime of provisions to co-ordinate its relationship with other instruments.[31] This will be achieved by assessing the result of the relationship between the new Hague regime and the different instruments listed above in the absence of such a provision in the new Hague regime. This will be conducted using the rules of public international law in this respect.

7. In the absence of a co-ordinating provision in the new Hague regime, one will look for a similar clause in the other instrument in order to assess their co-ordination. In the absence of any clause in the two instruments, one could apply Article 30 of the *Vienna Convention on the Law of Treaties*[32] (hereinafter the Vienna Convention) which deals with the application of successive treaties relating to the same subject-matter. Alternatively, if both States Parties are not Parties to the Vienna Convention or if its application is inconclusive, one could try to interpret both instruments, especially the later one, in order to determine which one can be applied.[33] Treaty interpretation includes certain principles to determine priority such as the *lex specialis* rule according to which a specific set of rules has priority over a general set of rules as the former is supposed to be an elaboration of the more general rules.[34] The interpretation of the treaty could also be undertaken in accordance with Articles 31 and 32 of the Vienna Convention. In that respect, it will be possible to have recourse to the *travaux préparatoires*, the circumstances of the conclusion of the treaty or statements of the Parties that could indicate how the relationship between the instruments is to be resolved.[35] If the interpretation of the instrument is inconclusive for both States Parties, the *lex posterior* rule should be applied in the last resort.[36]

8. In conclusion, the analysis will show that the inclusion of provisions to co-ordinate the new Hague regime vis-à-vis existing and future instruments is highly advisable.[37]

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[30] Examples of such instruments are the bilateral Civil Procedure British Empire Treaties of the 1930s which include rules on the service of documents and the taking of evidence.
[31] Article 30(2) of the *Vienna Convention on the Law of Treaties*, (1969) 1155 *UNTS* 331, provides an example of such a provision: "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".
[32] *Ibid*.
[33] J. Mus, "Conflicts between Treaties in International Law", *NILR* (1998), pp. 208-232, at p. 231.
[34] PCIJ 30 August 1924, judgment (*Mavromatis Palestine Concessions*), *PCIJ* (1924), Series A, No 2, at p. 31.
[35] J. Mus, *supra*, note 33, at pp. 218-219.
[36] This is the conflict rule found in Article 30(4) and (5) of the Vienna Convention. See, *infra*, paragraph 26.
[37] See, *infra*, paragraphs 32-35.

II. PRESENCE IN THE EARLIER INSTRUMENT OF A PROVISION TO CO-ORDINATE THE RELATIONSHIP WITH OTHER INSTRUMENTS

9. During the negotiations of the Vienna Convention, the International Law Commission proposed a definition of a conflict clause or what is also known as a provision to co-ordinate the relationship between different instruments. It is "[a] clause [in a treaty] intended to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty deals. Sometimes the clause concerns the relation of the treaty to a prior treaty, sometimes its relation to a future treaty and sometimes to any treaty past or future."[38] Most of the global and regional instruments listed in the introduction contain such a clause[39] with the exception of the Hague Civil Procedure Convention and the Hague Maintenance Convention of 1956 on Applicable Law; only one of the bilateral instruments examined contains this clause.[40] However, it is important to note that in the case of the EC Regulations[41] and the Access to Justice Directive,[42] the provisions contained therein only address the issue of competence of the EC over the subject matter. In this respect, the EC instruments prevail over other provisions contained in instruments concluded by the EU Member States and allow the Member States to conclude between them enhanced agreements on the same matter as long as they are compatible with the EC instrument.

10. At least four elements will have to be taken into account to decide whether the new Hague regime will require the inclusion of a provision to co-ordinate its relationship with the provisions of prior instruments. First, it will be important to identify possible conflicts between the new Hague regime and existing instruments. It will also be necessary to analyse whether existing instruments are "without prejudice to future instruments" (*i.e.* the new Hague regime). If the co-ordination of their relationship is limited to past instruments, their relationship with future instruments could be addressed expressly in the new Hague regime. Secondly, it will be necessary to verify whether these prior instruments only address their relationship with instruments on the same subject-matter *per se* or if they encompassed relationships with instruments containing provisions regarding the same matters.[43] This is an important issue since very few of the instruments that are the subject of this analysis cover strictly in the general sense the same subject-matter. If it is the intention of the future Contracting States to the new Hague regime to make the best use of other rules found in other international instruments –not strictly on the same subject-matter- in combination with the new instrument, it will have to be addressed specifically. This brings us to the third element. It may be possible to devise some explicit rules that would point persons using the new Hague regime to the more effective rules available. Finally, the fourth element will consist of examining whether the new Hague regime should replace older Conventions between the same Contracting States.

A. Co-ordinating the relationship with existing and / or future instruments – Identification of possible conflicts

11. It appears that only one conflict, leading to different results, could arise between the new Hague regime and the existing instruments. In relation to the recognition of decisions, it is to be noted that the new Hague regime will include a special rule limiting the circumstances in which a debtor may modify a maintenance decision made in a

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[38] International Law Commission, 858th Meeting, *ILC Yearbook* (1966), Vol. II, p. 214.
[39] All these provisions can be found in Annex A to Prel. Doc. No 18 – Appendices – of June 2006.
[40] That is the Canada-France Convention. However, we cannot pretend to have examined all the bilateral instruments that could directly or indirectly relate to this subject-matter.
[41] See Article 20 of the EC Service Regulation, Article 21 of the EC Evidence Regulation both in Annex A, *supra*, note 39.
[42] See Article 20 of the EC Access to Justice Directive in Annex A, *ibid*.
[43] The issue of 'same subject-matter', which constitutes one of the limits of the Vienna Convention, will be examined more closely, *infra*, paragraph 24.

Contracting State. Article 14 of the tentative draft Convention stipulates the substantive rule where as Article 18 *f)* safeguards the rule at the recognition stage by incorporating a special ground for refusing recognition and enforcement of a decision if the rule contained in Article 14 is violated. Therefore, if a person is to make use of other recognition and enforcement provisions under another instrument or domestic law it should be "without prejudice to Article 18 *f)* of the Convention".[44]

12. Furthermore, it appears that some of the older instruments only have rules governing their relationship with earlier instruments. The Minsk Convention of 1993 uses the term "international agreements to which Contracting States are parties".[45] The New York Convention of 1956 is less clear when using the expression "any remedies available under municipal or international law".[46] It could be interpreted as being remedies available either at any moment in time or at the time the Convention was adopted. Finally, the Hague Maintenance Conventions of 1958 and 1973 on Recognition and Enforcement make use of the expression "in force between the Contracting States".[47] Here again this could be interpreted as being in force either at any moment in time or at the time of the adoption of the Convention. It seems that the relationship of these older instruments with a future Hague regime could be addressed expressly in the new Hague regime by a provision that could read:

> *This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by this Convention.*[48]

13. Most of the other instruments refer to earlier and later instruments by making use of a somewhat similar expression that reads "Conventions to which Contracting States are, or will become, Parties".[49] In this respect, the new Hague regime should also take

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[44] Another conflict, leading to different results, could appear in relation to the applicable law rules of the Montevideo Convention of 1989. These rules of the Montevideo Convention of 1989 are different from the rules found in the existing Hague Conventions and the rules of the future Hague regime may also differ from the Montevideo rules. The applicable law designated under the Montevideo Convention of 1989 is whichever is the law the competent authority finds the most favourable to the creditor: either the law of the State of domicile or habitual residence of the creditor or the law of the State of domicile or habitual residence of the debtor. In that respect, it is possible that there would be a conflict, leading to different results, between the two instruments. As the applicable law rules of the new Hague regime will most likely be optional and the Montevideo Convention of 1989 is a regional instrument, it may not be necessary to resolve this possible conflict. It may be that States Parties to the Montevideo Convention want to benefit from the application of the optional applicable law rules of the new Hague regime among themselves or with third Parties. However, if in the latter case they want to reserve the application of the Hague optional rules between themselves this would need to be addressed specifically.

[45] See Article 82 of the Minsk Convention of 1993 in Annex A, *ibid*.

[46] See Article 1(2) of the New York Convention of 1956 in Annex A, *ibid*.

[47] See Article 11 of the Hague Maintenance Convention of 1958 on Recognition and Enforcement and Article 23 of the Hague Maintenance Convention of 1973 on Recognition and Enforcement both in Annex A, *ibid*.

[48] This suggested draft provision is inspired by the following Hague Conventions precedents, which can be found in Annex B to Prel. Doc. No 18 – Appendices – of June 2006: Article 18 of the *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, Article 19 of the Hague Maintenance Convention of 1973 on Applicable Law, Article 20 of the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*, Article 21 of the *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, Article 22 of the *Hague Convention of 14 March 1978 on the Law Applicable to Agency*, Article 25 of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, Article 52 of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, and Article 48 of *Hague Convention of 13 January 2000 on the International Protection of Adults*.

[49] See Article 19 of the Hague Maintenance Convention of 1973 on Applicable Law, Article 25 of the Hague Service Convention, Article 32 of the Hague Evidence Convention, Article 21 of the Hague Access to Justice Convention, Article 57 of the Brussels Convention of 1968 (as amended), Article 57 of the Lugano Convention of 1988 (as amended), Article 71 of the EC Brussels I Regulation, Article 30 of the Montevideo Convention of 1989, Article 14 of the Panama Convention of 1975 and Article 17 of the Canada-France Convention, which in this latter case only deals with future instruments, all in Annex A, *supra*, note 39.

into consideration the possibility of co-ordination vis-à-vis future instruments. In that case, the example provided above, could be adjusted to read:

> *This Convention does not affect any international instrument to which Contracting States are, or will become, Parties and which contains provisions on matters governed by this Convention.*

14. It is important to note that the new Hague regime already includes in Article 43 of the tentative draft Convention a provision with regard to supplementary agreements. This provision which reads as follows could be integrated with the previous provision:

> *Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Convention between or among themselves, provided that such agreements are consistent with the objects and purpose of this Convention. The States which have concluded such an agreement shall transmit a copy to the Depositary of the Convention.*[50]

B. Instruments on the same subject-matter *per se* or containing provisions on the same matters

15. It is interesting to note that none of the global or regional instruments listed in the introduction make reference to "other treaties relating to the same subject-matter" in their provisions concerning co-ordination with other instrument; thus resolving to a large extent the lack of clarity resulting from the use of this expression in Article 30 of the Vienna Convention.[51] The co-ordination of these instruments is not limited to those "on the same subject-matter" but rather to those that contain provisions on the same matters. Even the earlier instruments provide for this flexible approach and make reference to provisions available both under international and domestic law. The New York Convention of 1956 states that "[t]he remedies provided for in this Convention are in addition to and, not in substitution for, any remedies available under municipal or international law." The Hague Maintenance Convention of 1958 on Recognition and Enforcement in turn stipulates that "[n]othing precludes the creditor to make use of another provision with regard to the recognition of a decision either under domestic law or under a Convention in force between the Contracting States."[52] Finally, the Inter-

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[50] This suggested draft provision is inspired by the following Hague Conventions precedents, which can be found in Annex B, *supra*, note 48: Article 52 of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, and Article 49 of the *Hague Convention of 13 January 2000 on the International Protection of Adults* for similar examples.

[51] See, *infra*, paragraph 24. Article 30 of the Vienna Convention and other relevant Articles in relation to the application of successive treaties relating to the same subject-matter can be found in Annex C to Prel. Doc. No 18 – Appendices – of June 2006.

[52] See the Hague Maintenance Convention of 1973 on Recognition and Enforcement, Annex A, *supra*, note 39, provides similarly in Article 23. However, during a certain period, the Hague Conventions limited the reference to "matters governed by the Convention" only to other Conventions by using the following formula: "[…] the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties." See, for example, Annex A, *ibid*, Article 19 of the Hague Maintenance Convention of 1973 on Applicable Law, Article 25 of the Hague Service Convention, and Article 32 of the Hague Evidence Convention for similar wording. However, it is interesting to note that the *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations* made reference to "rules of law" instead of "domestic law or […] a Convention", see Annex B, *supra*, note 48, Article 17 of the *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations* for a complete text of the provision. Under Article 21 of the Hague Access to Justice Convention reference was made to "law of a Contracting State" and "Convention": "[…] nothing in this Convention shall be construed as limiting any rights in respect of matters governed by this Convention which may be conferred upon a person under the law of any Contracting State or under any other convention to which it is, or becomes, a party." Similar wording is used in regional instruments. See, for example, Article 57 of the Brussels Convention of 1968 stipulates that "[t]his Convention shall not affect any conventions to which the Contracting States are or will be Parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments." Article 57 of the Lugano Convention of 1988 and Article 71 of the EC Brussels I Regulation borrow the same language, see Annex A, *ibid*. The Minsk Convention of 1993 uses a very direct formula which provides that

American instruments also make reference to provisions of existing and future instruments but, in addition, they mention the more favourable practices observed by States in this area. Article 30 of the Montevideo Convention of 1989 reads "[t]his Convention shall limit neither the provisions of existing or future bilateral or multilateral conventions on this subject entered into by the States Parties, nor the more favourable practices that those States may observe in this area."[53] This latter part of the provision could be making reference to domestic law. It also makes reference to something known as the "most effective rule".[54]

C. Most effective rule co-ordination provision

16. The result of this analysis demonstrates that a number of rules provided in the new Hague regime may be without prejudice to other rules provided for in other instruments. They will include rules on co-operation,[55] recognition and enforcement,[56] legal assistance,[57] establishment of parentage,[58] obtaining of evidence[59] and maybe service of documents.[60] However, in the light of the complexity of this area and taking into account all the multilateral, regional and bilateral instruments, reciprocity schemes and domestic laws to which it is possible to have recourse in relation to the recovery of maintenance, it may be advisable to indicate specifically to the persons using the future Hague regime that it is possible to make use of certain of these other rules. This will certainly be useful during an interim period when several instruments will have to continue to live together. However, over time, as the new Hague regime will provide a global framework within which regional and bilateral instruments will operate, a "most effective rule" co-ordination provision should be used less frequently.

17. As the new Hague regime will clearly set the global framework for administrative co-operation with the most comprehensive and modern rules it may not be necessary to provide a "most effective rule" co-ordination provision in respect of administrative co-operation. As the Central Authorities designated under the new Hague regime are likely to be the same as the ones instituted under the New York Convention of 1956 and / or under bilateral schemes their co-ordination should be self-regulated in order to appropriately guide the persons having recourse to their services. However, in relation to the rules regarding recognition, enforcement and legal assistance, where these rules may be equally available to persons either by applications through the assistance of Central Authorities or through direct applications to the foreign competent authority, it may be advisable to expressly indicate what should be the most effective rule in that respect. On the other hand, rules available in the new Hague regime on parentage, evidence and service are limited to applications through Central Authorities. These rules are not meant to be comprehensive or limitative or to replace existing mechanisms where they are in force such as the Hague Service and Evidence Conventions or other bilateral instruments

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"[t]his Convention shall not affect the provisions of other international agreements to which the Contracting States are Parties."

[53] Similar wording can be found in Article 14 of the Panama Convention of 1975, see, Annex A, *ibid*.

[54] On "most effective rule", see F. Majoros, *Les Conventions internationales en matière de droit privé – Abrégé théorique et traité pratique I*, Pedone, 1976, 470 p., at pp. 253, 281, 291 and 371.

[55] See Prel. Doc. No 16, *supra*, note 5, Chapters II and III (*i.e.* Articles 4-13).

[56] *Ibid*., Chapters V and VI (*i.e.* Articles 15-31).

[57] *Ibid*., Article 13.

[58] *Ibid*., Article 6(2) *h)*.

[59] *Ibid*., Article 6(2) *g)*.

[60] *Ibid*., Article 6(2) *j)*, in this case the provision is still between square brackets.

which could be used in the course of direct applications.[61] Therefore, there would be no need to co-ordinate the most effective rule in relation to these matters.[62] In summary, a provision in the new Hague regime to co-ordinate the most effective rule could read:

> *This Convention shall not prevent the application of an international instrument in force between the requesting State and the requested State or other law in force in the requested State that provides for –*
>
> *a) broader bases for recognition of maintenance decisions, without prejudice to Article 18* f) *of the convention;*
>
> *b) simplified or more expeditious procedures on an application for recognition or enforcement of maintenance decisions;*
>
> [*c) more beneficial legal assistance*][63].[64]

D. Replacing older instruments

18. Special Commissions of the Hague Conference on Private International Law were held in November 1995 and April 1999 to examine the operation of the four Hague Maintenance Conventions and of the New York Convention of 1956. The second of these Special Commissions was asked to examine "the desirability of revising those Hague Conventions, and the inclusion in a new instrument of rules on judicial and administrative co-operation".[65] The Special Commission of April 1999 reached the following unanimous recommendation –

> *"The Special Commission on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance,*
>
> – *having examined the practical operation of these Conventions and having taken into account other regional and bilateral instruments and arrangements,*
>
> – *recognising the need to modernise and improve the international system for the recovery of maintenance for children and other dependent persons,*
>
> – *recommends that the Hague Conference should commence work on the elaboration of a new worldwide international instrument.*
>
> *The new instrument should:*
>
> - *[…]*

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[61] Furthermore, it is to be noted that contrary to the Hague Service and Evidence Conventions whose application is limited to cross-border matters, the rules of the new Hague regime on parentage, evidence and service will have a domestic application like for example in relation to the establishment of a maintenance decision where the Central Authority acts as legal representative of the foreign applicant.

[62] The Explanatory Report could clarify this point.

[63] The issue of legal assistance still requires discussion by the Special Commission.

[64] Article 11 of the Hague Maintenance Convention of 1958 on Recognition and Enforcement, see, *supra,* paragraph 15, or Annex A, *supra*, note 39, and Article 17 of the *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations* which provides that "[t]his Convention shall not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign divorces and legal separations" served as examples in this respect. Article 27 of the Hague Evidence Convention was also used as a precedent, see, Annex B, *supra*, note 48.

[65] See Final Act of the Eighteenth Session of the Hague Conference on Private International Law, 19 October 1996, under Part B, 7.

– *be comprehensive in nature, building upon the best features of the existing Conventions, including in particular those concerning the recognition and enforcement of maintenance obligations,*

– *take account of future needs, the developments occurring in national and international systems of maintenance recovery* […]*,*

– *be structured to combine the maximum efficiency with the flexibility necessary to achieve widespread ratification.*[66]

19. It appears from this recommendation that there is an intention to replace the existing Hague Maintenance Conventions. This was somewhat the same situation in 1973 when the new Hague Maintenance Conventions replaced those of the 1950s.[67] However, the termination of the earlier Hague Maintenance Conventions could not be implied as there was no complete party identity between the different Conventions.[68] Furthermore, as some of the Contracting States to the earlier Hague Maintenance Conventions were attracted to the new Hague Maintenance Conventions in relation to adults only, it was important to safeguard the application of the earlier Conventions and to co-ordinate their application with the new Conventions in relation to adults only. This gave rise to the reservation with regard to the scope *ratione personae* of the new Conventions. It was necessary to exclude from their application children below the age of 21 and maintenance obligations vis-à-vis collaterals, the former being the age limit of a person falling under the scope of the earlier Conventions and the latter being excluded from their scope of application. A similar co-ordination could be envisaged between the new Hague regime and the existing Hague Maintenance Conventions. However, drafting such provision could prove to be difficult since the scope of application of the new Hague regime, which may be subject to a possible reservation under Article 44 of the tentative draft Convention,[69] may not always coincide with the scope of application of the older Hague Conventions. For instance, in its present form, the new Hague regime would apply to a child under the age of 18. In that case, a State also Party to the Conventions of the 1950s may want to continue to apply them to children between the ages of 18 and 21. Moreover, under the new Hague regime, it will be possible to reserve the right not to apply the Convention, or parts of it,[70] to any specified family relationships or relationships based on affinity where under the existing Maintenance Conventions the reservations in relation to these relationships were specific.[71] That being said, it appears that at this stage of the negotiations of the instrument the new Hague regime is compatible with the existing Hague Maintenance Conventions as it incorporates all the rules of these instruments. A provision co-ordinating the relationship between the new Hague regime and the old Hague Maintenance Conventions could read as follows:

> *In relations between the Contracting States, this Convention replaces the* Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations *and the* Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards

[66] See "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", drawn up by the Permanent Bureau in December 1999.
[67] See Article 29 of Hague Maintenance Convention on Recognition and Enforcement, and Article 18 of Hague Maintenance Convention on Applicable Law in Annex B, *supra*, note 48.
[68] On the issue of termination or suspension of the operation of a treaty implied by conclusion of a later treaty, see Article 59 of the Vienna Convention in Annex C, *supra*, note 51.
[69] It is to be noted that the text of Article 44, in which appear several square brackets, still requires discussion by the Special Commission.
[70] This is one of the issues that remain to be discussed by the Special Commission.
[71] It is important to note that under the Hague Maintenance Convention of 1973 on Recognition and Enforcement, it is possible, under Article 26(3), "[to] reserve the right not to recognise or enforce […] a decision or settlement unless it provides for the periodical payment of maintenance". The new Hague regime does not include such reservation.

children *in so far as their scope of application as between such States coincides with the scope of application of this Convention.*[72]

In relations between the Contracting States, this Convention replaces the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations *and the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children in so far as their scope of application as between such States coincides with the scope of application of this Convention.*[73]

III. DEFAULT RULES PROVIDED BY PUBLIC INTERNATIONAL LAW IN THE ABSENCE OF A CO-ORDINATING PROVISION IN THE INSTRUMENTS CONCERNED[74]

20. As indicated earlier, some global instruments such as the Hague Maintenance Convention of 1956 on Applicable Law do not contain any provisions co-ordinating their relationship with other instruments. It could be the same for many bilateral agreements such as the United States Model Agreement for the Enforcement of Maintenance (Support) Obligations. One does not need to examine them all. It would take only one to trigger the application of the default rules of public international law regarding the relationship with other instruments[75] if the new Hague regime was not to include a clause to this effect.[76]

21. That being said, it would appear that if the provisions suggested under Part II, above, were included in the new Hague regime the instruments mentioned in the preceding paragraph could coexist without any difficulty. However, as mentioned before, the objective of this study is to highlight possible consequences of not including in the new Hague regime any provision to co-ordinate its relationship with other instruments.

A. The *Vienna Convention on the Law of Treaties* – default rule in Article 30 concerning the relations between States Parties to both treaties in question

22. Even though the Vienna Convention is in force for more than 100 States, 16 of the Member States of the Hague Conference are not Parties to it.[77] Therefore, recourse to it by Contracting States to the new Hague Regime could be limited.[78]

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[72] This suggested draft provision is inspired by the following Hague Conventions precedents, which can be found in Annex B, *supra*, note 48: Article 22 of the Hague Service Convention, Article 29 of the Hague Evidence Convention, Article 29 of the Hague Maintenance Convention on Recognition and Enforcement, Article 18 of the Hague Maintenance Convention on Applicable Law, Article 22 of the *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, Article 22 of the Hague Access to Justice Convention, Article 51 of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, and Article 48 of *Hague Convention of 13 January 2000 on the International Protection of Adults*.

[73] *Ibid*., this draft proposal for the Hague Maintenance Conventions on Applicable Law is without prejudice to the form of the rules on applicable law (*i.e.* optional chapter or separate Protocol).

[74] See, Prel. Doc. No 24, *supra*, note 1, paragraphs 4-49, for a detailed analysis of the default rules provided by public international law in the absence of a co-ordinating provision in the instruments concerned.

[75] The rules of public international law regarding the relationship between instruments are found in "international conventions, whether general or particular, establishing rules expressly recognised 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". See, Article 38 of the Statute of the International Court of Justice. All three sources are of equal value; there exists no hierarchy between them. See, P. Daillier, A. Pellet, Quoc Dinh, *Droit international public*, 7th ed., L.G.D.J., 1999, 1455 p. at p. 267, No 171.

[76] J. Mus, *supra*, note 33, at pp. 211-212.

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

[78] Furthermore, it is interesting to note that in 1969, with more than 75 years of convention-making practice and 22 Conventions concluded, private international law Conventions were not explicitly covered by the preparatory work leading to the Vienna Convention. Thus, the Vienna Convention may not reflect Hague Conference convention-making practice. See, Prel. Doc. No 24, *supra*, note 1, paragraph 36.

23. The rules concerning the relations between States Parties to successive treaties relating to the same subject-matter are found in Article 30 of the Vienna Convention.[79] It is important to note that the rules in Article 30 are residual, though not expressed as such.[80] They will operate unless the relationship with other treaties is provided otherwise by the treaty, by the Parties by agreement, or by a different intention. Thus, the principle of party autonomy is preserved.[81] Some experts are of the view that these rules are not a codification of customary law.[82] Other experts have a different view.[83] However, it may not be a codification of the practice of international organisations regarding their development of Conventions.[84] In the light of these preliminary comments, it is clear that it will be preferable to include a provision to co-ordinate the relationship between instruments whenever possible.[85]

1. Treaties "relating to the same subject matter"

24. The meaning of the expression "relating to the same subject-matter", as it is found in Article 30, is not clear.[86] According to the prevailing opinion, it should probably be construed strictly, so that the Article would not apply when a general treaty impinges indirectly on the content of a particular provision of an earlier treaty.[87] The expression has also been interpreted as meaning the "same degree of generality".[88] Therefore, if one of the treaties has a special character vis-à-vis the other treaty, the *lex specialis* should prevail, in application of the maxim *generalia specialibus non derogant*,[89] unless it results implicitly or expressly from the later treaty that the Contracting States have decided to retain the reverse solution.[90] Things could become more difficult and lead to unpredictable results when defining "generality" and "specificity" where two specific treaties overlap in part.[91]

2. Compatibility of the earlier treaty with the later one

25. If two treaties in question relate to the same subject-matter, thus falling under the scope of Article 30, the next question to be examined is whether their provisions are "compatible" in accordance with Article 30(2) and (3). To answer this question, it is necessary to compare between the treaties in question the result of application of individual provisions in a particular case. There will be no incompatibility where the

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[79] Article 30 of the Vienna Convention and other relevant Articles in relation to the application of successive treaties relating to the same subject-matter can be found in Annex C, *supra*, note 51.
[80] I. Sinclair, *supra*, note 3, at pp. 66-67. A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, 443 p., at pp. 174 and 181. J. Mus, *supra*, note 33, at p. 213, note 25. E. Vierdag, "The time of the Conclusion of a Multilateral Treaty: Article 30", *BYIL* (1988), at pp. 90-111.
[81] I. Sinclair, *ibid*, at p. 7.
[82] M. Zuleeg, "*Vertragskonkurrenz im Völkerrecht, Teil I: Verträge zwischen souveränen Staaten*", *German Yearbook of International Law* (GYIL) 20 (1977) at p. 247.
[83] I. Sinclair, *supra*, note 3, at pp. 8-21.
[84] Article 5 of the Vienna Convention provides that "[it] applies to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation".
[85] A. Aust, *supra*, note 80, at p. 181.
[86] It applies to Article 30(2)-(5).
[87] I. Sinclair, *supra*, note 3, at p. 68. A. Aust, *supra*, note 80, at p. 183. E. Vierdag, *supra*, note 80, at pp. 90-111. For example, a general treaty on the enforcement of judgments would not affect the application of a specific provision concerning the enforcement of judgments contained in an earlier treaty concerning third party liability in the field of nuclear energy. *Ibid*., A. Aust, A., at p. 183.
[88] P. Daillier, A. Pellet, Quoc Dinh, *supra*, note 75 at p. 266, No 172.
[89] *I.e.*, general provisions would not create an exception to the specialised provisions.
[90] P. Daillier, A. Pellet, Quoc Dinh, *supra*, note 88.
[91] For example, which of the new Hague regime and a maintenance bilateral agreement including exactly the same type of rules will be more specific? Will it be the bilateral agreement because it is specific to two States or will it be the new Hague regime because the rules therein are more elaborate?

application to a certain situation of two or more treaties would lead to the same result[92] or a mere difference.[93] They would be incompatible if the results were contradictory.[94] Incompatibility could also result from the fact that in a particular situation it is not possible to establish parentage when applying the rules of the new Hague regime where it would be possible under a bilateral or regional instrument. 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.[95] However, treaty interpretation could reverse this result if it can be concluded that the Parties to the later treaty (*i.e.* the new Hague regime) did not want it to prevail since the earlier treaty was based for example on special regional ties or provided for more integration.

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

26. With regard to the situation described in the preceding paragraph in relation to incompatible treaties, unless treaty interpretation would lead to the termination of the earlier treaty or to the conclusion that the Parties to the earlier treaty wanted it to prevail, the later treaty would prevail in accordance with the *lex posterior* rule. This rule is incorporated in both paragraph (3) of Article 30, which concerns the situation of full party identity, and sub-paragraph (4)(a), which concerns cases where not all Parties to the earlier treaties are Parties to the later one. Article 30(4)(b), provides for the obvious; States that are not Party to all of the treaties in question remain unaffected by a treaty to which they are not a Party.[96]

B. International customary law

27. Recourse could be made to international customary law because some Contracting States are not Party to the Vienna Convention, the treaties in question do not relate to the same subject-matter or many of the instruments at issue predate the Vienna Convention.[97]

28. Under international customary law, where a more recent treaty is in breach of an earlier one, it does not make the more recent treaty invalid. In that case, it will have to be decided which treaty to apply to a particular issue. Where all Parties to successive treaties are identical, it may be assumed that their intention is to give precedence to the more specific instrument (*i.e.* the *lex specialis* interpretation principle).[98] In the same situation, but where none of the instruments is more specific, the latest treaty is to be applied in case of incompatibility (*i.e.* the *lex posterior* conflict rule). This conflict rule is only meant as a last resort when treaty interpretation has failed to determine priority.[99] It appears that the *lex specialis* rule would apply where not all Parties to the earlier

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[92] P. Volken, "Conflicts between Private International Law Treaties", in: W.P. Heere, (ed.), *International Law and The Hague's 750th Anniversary*, 1999, 466 p., at pp. 152 and 155.
[93] I. Sinclair, *supra*, note 3, at p. 97.
[94] P. Volken, *supra*, note 92, at p. 155.
[95] It is the date of adoption of the text that will be retained in order to determine which instrument is the "earlier" and the "later" and the rule will apply if the instruments are in force. A. Aust, *supra*, note 80, at pp. 182-183. E. Vierdag, *supra*, note 80, at p. 93.
[96] Article 30(5) provides that paragraph (4) applies "without prejudice to Article 41". See Annex C, *supra*, note 51, for the text of Article 41. Article 43 of the tentative draft Convention is an example of a provision falling under the scope of Article 41 of the Vienna Convention. Article 43 allows the modification of the Hague regime by agreement concluded between specific Contracting States only. Some may be tempted to describe the new Hague regime as the conclusion of an agreement modifying earlier treaties in accordance with Article 41 of the Vienna Convention (it is important to note that Article 41 does not cover bilateral treaties; it is specifically limited to multilateral treaties). This would not be the case since the conclusion of the new Hague regime is not limited to certain States; More than 100 States have been invited to participate to the development of the new Hague regime. Furthermore, the new Hague regime will most probably be open for signature and accession by all States, contrary to agreements concluded in accordance with Article 41 that are closed to other States. This last issue remains to be discussed by the Special Commission.
[97] It is important to note in that respect that the Vienna Convention does not have retroactive effect.
[98] *Mavromatis Palestine Concessions*, *supra*, note 34, at p. 31.
[99] J. Mus, *supra*, note 33, at p. 219.

treaty are Parties to the later one or where there is no identity of all the Parties to both instruments. "However, where none of the treaties in question is more specific, at an abstract and general level, neither precedence of the *lex prior* or *lex posterior* have been generally accepted as default rules of unwritten public international law."[100] In that case, the inclusion of a provision to co-ordinate the relationship between the instruments would be highly recommended.

C. General principles of public international law

29. "The principles embodied in the Vienna Convention that were discussed in the paragraphs on international customary law are considered to form part of the generally accepted principles of public international law: the principles of *pacta sunt servanda* and *lex specialis derogat legi generali* […]. However, while the label attributed to them by some authors – 'general principles' or 'international customary law' – may be different, the content is not."[101]

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

30. Public international law specialists are of the view that secondary legislation of the European Community (*i.e.* directives and regulations) appears as a type of "internal law" as opposed to international treaty law[102] because it creates harmonised rules applying to a sub-group of States Parties to a global treaty that replace those States' national laws. While the European Court of Justice strongly reaffirms the 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[103] or more recent[104] than the Community law in question, unless explicitly provided otherwise in the treaty.

31. That being said, now that the European Community has competence or will soon have competence in relation to most of the rules included in the new Hague regime,[105] with maybe the exception of the establishment of parentage, it could accede to the new Hague regime. It would appear that the draft provisions proposed in Part II above would be appropriate to co-ordinate the new Hague regime with European Community legislation – a disconnection clause would not be necessary[106] – as long as the term "law"

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[100] See, Prel. Doc. No 24, *supra*, note 1, at paragraph 44. In practice, States often conclude instruments containing provisions on matters governed by other treaties. The rule of *pacta sunt servanda* (Article 26 of the Vienna Convention) would lead to the application of the instrument to which both States are Party in their mutual relationship notwithstanding whether one of them has concluded obligations with other States that could be incompatible.

[101] *Ibid*., at paragraph 49.

[102] P. Daillier, A. Pellet, Quoc Dinh, *supra*, note 75, at p. 277 No 176; and at p. 281, No 181.

[103] *Ibid*., at pp. 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 seq.*).

[104] P. Daillier, A. Pellet, Quoc Dinh, *ibid*., at p. 283-284, No 181; see also implicitly ECJ 30 April 1979, case 181/73, *Haegemann* v. *Belgian State*, ECJR 1974, p. 449.

[105] According to the Opinion 1/03 of the ECJ (full court) of 7 February on the Competence of the Community to conclude the new *Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, at paragraph 126, "Where the test of 'an area which is already covered to a large extent by Community rules' (Opinion 2/91, paragraphs 25 and 26) is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law in the area in question but also its future development insofar as this is foreseeable at the time of the analysis (see to that effect, Opinion 2/91, paragraph 25)."

[106] In Opinion 1/03, *ibid*., the ECJ opined in paragraph 155: "Furthermore, as the Commission pointed out, a disconnection clause in an international agreement of private international law has a particular nature and is different from a classic disconnection clause. In the present case, the purpose is not to ensure that Regulation No 44/2001 is applied each time that that is possible, but rather to regulate in a consistent manner the relationship between that regulation and the new Lugano Convention." What counts here is to regulate in a consistent manner the relationship between the new Hague regime and European Community legislation.

would cover this type of legislation as it is proposed in the draft provision suggested under paragraph 17, above. Furthermore, the addition to Article 43 of the tentative draft Convention,[107] or to an Article to the same effect, of a provision that would read as follows would probably be sufficient:

> *The preceding paragraph also applies to reciprocity schemes, regional norms or uniform laws based on special ties between the States concerned.*[108]

IV. CONCLUSION

32. It is clear from the previous analysis that the inclusion of provisions to co-ordinate the new Hague regime vis-à-vis existing and future instruments is highly advisable. It could address the situation where earlier instruments do not contain such provisions; therefore ensuring their coexistence with the new Hague regime. In addition, it could allow the co-ordination of the instruments not in general terms but rather at the more specific rule level. In so doing, the co-ordination could guide the persons making use of the instruments to the application of the most effective rule. Furthermore, the provisions to co-ordinate the relation between the new Hague regime and other existing and future instruments could address potential conflicts. Finally, the provisions could deal with the replacement of older Hague Conventions regarding maintenance.

33. The inclusion, in the new Hague regime, of provisions to co-ordinate its relation with other instruments is equally important since the default rules of public international law regarding the relationship between instruments are far from being satisfactory in relation to the new Hague Regime. First, the Vienna Convention on the Law of Treaties may not be applicable for different reasons. Almost half of the Member States of the United Nations are not Party to it. In addition, a good number of the instruments that may relate directly or indirectly with the new Hague regime predate the Vienna Convention. Moreover, many of these instruments would fall outside the scope of the Convention, as they are not norms of public international law per se, and / or of the scope of Article 30 of that Convention because they don't relate to the "same subject-matter". Secondly, where applicable, the rules of the Vienna Convention could lead to some unexpected and even unwanted results when applying the "compatibility" test, the *lex specialis* interpretation rule and the *lex posterior* conflict rule. Finally, the same can be said in relation to the application of the default rules of international customary law and of general principles of public international law.

34. On the basis of this analysis, and the draft provisions suggested in Part II above, it would be advisable to include in the new Hague regime a set of provisions, all based on Hague Convention precedents, along the following lines:

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[107] Reproduced under paragraph 14, *supra*.

[108] See Annex B, *supra*, note 48, Article 23 of the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* and Article 52 of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* for similar examples.

Article A – Co-ordination with prior Hague Maintenance Conventions

1. In relations between the Contracting States, this Convention replaces the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations *and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children in so far as their scope of application as between such States coincides with the scope of application of this Convention.*

2. In relations between the Contracting States, this Convention replaces the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations *and the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children in so far as their scope of application as between such States coincides with the scope of application of this Convention.*

Article B – Co-ordination of instruments and supplementary agreements

1. This Convention does not affect any international instrument to which Contracting States are, or will become, Parties and which contains provisions on matters governed by this Convention.

2. Any Contracting State may conclude with one or more Contracting States agreements, which contain provisions on matters governed by this Convention, with a view to improving the application of this Convention between or among themselves, provided that such agreements are consistent with the objects and purpose of this Convention and do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention. The States which have concluded such an agreement shall transmit a copy to the Depositary of the Convention.[109]

3. The preceding paragraph also applies to reciprocity schemes, regional norms or uniform laws based on special ties between the States concerned.

Article C – Most effective rule

This Convention shall not prevent the application of an international instrument in force between the requesting State and the requested State or other law in force in the requested State that provides for –

a) broader bases for recognition of maintenance decisions, without prejudice to Article 18 f) *of the Convention;*

b) simplified or more expeditious procedures on an application for recognition or enforcement of maintenance decisions;

[*c) more beneficial legal assistance*][110]*.*

[109] This paragraph, which follows the structure of Article 52 of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, and Article 49 of the *Hague Convention of 13 January 2000 on the International Protection of Adults*, which can be found in Annex B, *ibid*., is proposed as a replacement of Article 43 of the tentative draft Convention.

[110] The issue of legal assistance still requires discussion by the Special Commission.

35. In summary, these provisions will simplify the co-ordination of the new Hague regime with other instruments containing provisions on the same subject-matter. However, this may still not be sufficient. Where appropriate the Explanatory Report should provide further guidance. Finally, a Guide to Good Practice on implementing measures might address further the issue of co-ordination of instruments and offer guidance to States in the future to conclude agreements under Article B(2) above, instead of parallel independent instruments, thus giving full life to the global framework of the new Hague regime.