COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Strasbourg, 29 November 2022 COP(2022)07

CONSULTATION OF THE PARTIES TO THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM

7th Meeting

Strasbourg (France), 29 November 2022

Council of Europe
Agora, Room G01

Opening at 10 a.m., Tuesday
Closing at 5 p.m., Tuesday

LIST OF DECISIONS

Secretariat of the Counter-Terrorism Division
Information Society - Action against Crime Directorate, DG I

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The Consultation of the Parties to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) and its Additional Protocol (CETS No. 217) meeting on 29 November 2022, under the chairmanship of Mr Nicola PIACENTE (Italy), has decided to:

1. Opening of the meeting

Take note of the opening remarks by the Chair.

2. Adoption of the agenda*

Adopt the agenda.

3. Information provided by the Chairperson and by the Secretariat

Take note of the information provided by the Secretariat on the status of signatures and ratifications of the Convention on the Prevention of Terrorism (CETS No.196) and the Additional Protocol (CETS No.217), namely that:

I. Since the last COP meeting held last year on 25 November 2021, Andorra ratified the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No.217) on 18 October 2022, Armenia ratified the Additional Protocol to the Convention on the Prevention of Terrorism (CETS No.217) on 4 May 2022 and Belgium accepted the Convention on the Prevention of Terrorism (CETS No.196) on 7 January 2022;

II. The Convention on the Prevention of Terrorism now has 43 ratifications and 5 signatures, and the Additional Protocol has 26 ratifications and 16 signatures.

4. Discussion on possible changes to Rule 8 of the CoP Rules of Procedure*

Examine and hold a vote on the revised Rule 8 of the Rules of Procedure for the purpose of aligning it with practices of other similar bodies within the Council of Europe. Out of 25 members present, nineteen (19) voted in favour of the proposed changes to Rule 8, four (4) were against and two (2) abstained.

Adopt the revised Rule 8 as follows:

Rule 8 – Voting

1) Each Member of the Consultation of the Parties shall have one vote.

2) The Participants and the Observers shall not have the right to vote.

3) The adoption of the Rules of Procedure, as well as any subsequent proposal for amendments to the Rules of Procedure, and of agendas for meetings of the Consultation of the Parties shall be decided by a simple majority of votes cast.

4) Other decisions shall be adopted by two-thirds majority of votes cast.

Hold a second vote on whether the above changes would enter into force immediately and adopt the immediate entry into force of the revised Rule 8 with twenty-one (21) votes in favour, one (1) against and three (3) abstentions.

5. Discussion on the modalities of Participation of the Russian Federation in the Consultation of Parties to the CETS 196/217*

Took note of the explanation provided by the Department of Legal Advice and Public International Law (DLAPIL) of the Council of Europe, namely that the modification of participation of a party in a convention-based body and modalities of such modification presented in the document titled Modalities of participation of the Russian Federation in the Consultation of the Parties to CETS 196/217 do not run counter to international treaty law or the Council of Europe Convention on the Prevention of Terrorism (CETS No.196) itself.

Applying the adopted Rule 8 of the Rules of Procedure, examine and adopt, with twenty-one (21) votes in favour and one (1) against out of twenty-two (22) votes cast, the new Rule 2a "Restriction of participation of a Party" of the Rules of Procedure, as stated below, with immediate effect:

Rule 2a Restriction of participation of a Party

In an effort to ensure the proper functioning of the Consultation of the Parties and the conduct of its meetings, the Consultation of the Parties may decide to restrict the participation in its work of a Party that has ceased to be a member of the Council of Europe following the procedure launched under Article 8 of the Statute of the Council of Europe for a serious violation of Article 3 of the Statute. Similarly, measures restricting the participation of a Party can be taken in respect of any non-member state of the Council of Europe concerned by a Committee of Ministers decision restricting or suspending relations with it.

Such restriction may include, but is not limited to:
a) restriction of physical attendance at meetings (no attendance) or limitation only to on-line attendance. In case of no attendance, the Member concerned will have access to all materials of the meeting/s and will be able to provide comments in writing;
b) restriction of ability to run for positions in the Consultation of the Parties and its eventual sub-groups;
c) limitation of participation to providing information and explanation regarding compliance with the obligations under the Convention and the Additional Protocol conducted under Article 30, paragraph 1(a), and taking part in the discussions concerning the findings of the assessments on the implementation of the Convention and the Additional Protocol, but without the right to participate in the decision making and without the right to vote;
d) with respect to the other functions of the Consultation of the Parties as listed in Article 30, paragraph 1 of the Convention, limitation on the right to participate in the discussions

regarding the conformity of a refusal to extradite which is referred to the Consultation of the Parties in accordance with Article 20, paragraph 8 of the Convention.

The Chair, the Vice-Chair or a Member of the Consultation of the Parties can submit a reasoned proposal for such a decision to be taken. It will be deemed that the proposal has been accepted if it receives two thirds of the votes cast and the decision taken shall have immediate effect. No Participants shall be present during the Committee's examination of the matter.

Once the reasons for the imposition of the restriction or limitation cease to exist, a Member concerned can propose to the Consultation of the Parties that the restriction or limitation to participation is lifted. It will be deemed that the proposal has been accepted if it receives two thirds of the votes cast and the decision taken shall have immediate effect.

Restriction or limitation of participation in the Consultation of the Parties in no way prejudices the rights and obligations that stem from the Convention and its Additional Protocol for the Parties.

Take note of the statements delivered by Ukraine and the Russian Federation, and take note of the non-paper distributed on request of the delegation of the Russian Federation to the Consultation of the Parties concerning participation in open conventions (Annex I).

Examine and hold a vote on restricting the modalities of participation of the Russian Federation in the Consultation of the Parties to CETS 196/217. Due to a number of incomplete ballots in a first round of voting, to re-cast the votes on this matter with twenty-one (21) votes in favour and one (1) vote against to apply the newly introduced Rule 2a to the Russian Federation, and to apply the following modifications on the participation of the Russian Federation with immediate effect:

- Restrict physical attendance at meetings (no attendance), while retaining access to all materials of the meeting(s) and ability to provide comments in writing;
- Restrict ability to run for positions in the Consultation of the Parties and its eventual sub-groups;
- Limit participation to the provision of information and explanations regarding compliance with the obligations under the Convention and the Additional Protocol conducted under Article 30, paragraph 1(a), and to take part in discussions concerning the findings of the assessments on the implementation of the Convention and the Additional Protocol, without the right to participate in the decision making and without the right to vote;
- Limit the right to participate in the discussions regarding the conformity of a refusal to extradite which is referred to the Consultations of the Parties in accordance with Article 20, paragraph 8 of the Convention.

6. Discussion on the findings of the partial assessment of Art. 2 of CETS 217 (Question 1 of the assessment Questionnaire)*

Postpone the discussion on the Preliminary draft thematic assessment report to the next meeting of the Consultation of the Parties, and note that the Secretariat will distribute the second part of the Questionnaire for input by Members prior to the next meeting.

7. Any other business

Postpone to the next meeting.

8. Date of next meeting

Take note that the date of the next meeting will be communicated by the Secretariat in writing.

9. Adoption of the list of decisions*

Adopt the list of decisions.

APPENDIX

Non-paper concerning the continued participation of the Russian Federation in "open" conventions elaborated in the framework of the Council of Europe

I. Introduction

The present non-paper conveys the position of the Russian Federation as State Party to a large number of "open" conventions and protocols elaborated under the auspices of the Council of Europe. These treaties form a substantial *corpus* of international law which governs relations ranging from mutual safety and security to human rights and cultural co-operation. The Russian Federation continues to exercise its rights and fulfil its obligations under these instruments, the continuous and unimpeded operation of which is in the interests of all European nations and their populations.

With regard to the discussion in the Council of Europe concerning continued participation of the Russian Federation in the above-mentioned treaties, and in view of the relevant documents prepared by Council of Europe bodies, most particularly the Guidance note of the Committee of Legal Advisers on Public International Law (CAHDI) dated 4 May 2022, the official legal experts of the Russian Federation undertake to express the following opinion.

II. Effects of actions taken with regard to the Russian Federation's membership in the Council of Europe

As the question of continued participation of the Russian Federation in "open" conventions is being raised in the context of cessation of membership of the Russian Federation in the Council of Europe, it is important to consider the possible legal effect of this event on the operation of "open" conventions.

On 15 March, 2022 the Russian Federation notified the Secretary General of the Council of Europe of its withdrawal from the Organisation on the basis of Article 7 of its Statute.[1] This notification was confirmed by the Committee of Ministers.[2]

However, disregarding this statutory act of a Member State, the Committee of Ministers on 16 of March, 2022 adopted a decision "on the cessation of membership of the Russian Federation to the Council of Europe" "in the context of the procedure launched under Article 8 of the Statute of the Council of Europe".[3]

Under Article 8 of the Statute, taking a decision on cessation of membership is only possible after requesting the member State "to withdraw under Article 7", and only if such member does not comply with this request.[4]

Contrary to the express provisions of Article 8, the Committee of Ministers never requested Russia to withdraw from the Organisation. Consequently, there had been no legal basis for adopting the decision on cessation of membership under Article 8. By doing so, the Committee of Ministers acted

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[1] Statute of the Council of Europe, Article 7: "Any Member of the Council of Europe may withdraw by formally notifying the Secretary General of its intention to do so. Such withdrawal shall take effect at the end of the financial year in which it is notified, if the notification is given during the first nine months of that financial year. If the notification is given in the last three months of the financial year, it shall take effect at the end of the next financial year".

[2] Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, fifth paragraph: "Noting that by a communication dated 15 March 2022, the Government of the Russian Federation informed the Secretary General of its withdrawal from the Council of Europe in accordance with the Statute of the Council of Europe...".

[3] Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, sixth paragraph.

[4] Statute of the Council of Europe, Article 8: "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine."

ultra vires, in violation of the Council of Europe Statute, its own previous practice[5] and applicable rules of international law.[6] It amounted to a unilateral termination of the Statute as a treaty *vis-à-vis* one of its States Parties, without the consent of that Party and in direct contravention to the provisions of the treaty itself.

This unlawful act had direct consequences for treaty relations.

III. Application of international treaty law provisions on termination/suspension of treaties to the present situation

a) General principles of international law

The rule that treaties are binding on the parties and must be performed in good faith (*pacta sunt servanda*) is a fundamental principle of international law, enshrined not only in the Vienna Convention on the Law of Treaties (henceforth VCLT), but also in the Preamble to the UN Charter. When drafting the VCLT, the International Law Commission (ILC) has been guided by "the extreme importance of the stability of treaties to the security of international relations".[7] The danger for the security of treaties is particularly great if the ground invoked for termination or suspension of a treaty is based on the alleged material breach or fundamental change of circumstances, both of which can produce a substantial degree of subjectivity.[8]

CAHDI rightly states that "the international law of treaties... departs from the premise of consistency of treaty relations as enshrined in the principle of *pacta sunt servanda* and only exceptionally allows for a departure from this rule".[9] According to Article 42, par.2 of the VCLT, "the termination of a treaty... may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty". The International Law Commission in its commentaries to the draft VCLT stressed that "these words... are also intended to indicate that the grounds of... termination... and suspension provided for in the draft articles are exhaustive of all such grounds, apart from any cases expressly provided in the treaty itself".[10] In other words, there is no room for "innovative legal solutions".

Most (though not all) Council of Europe treaties do not contain special provisions on termination and/or suspension (as opposed to denunciation, which is normally regulated by the final clauses), thus leaving their regulation to VCLT. One important exception is the Statute of the Council of Europe itself: its lack of express provisions on denunciation in final clauses is compensated by the specific provisions on withdrawal and cessation of membership.

b) Article 62 of the Vienna Convention on the Law of Treaties (fundamental change)

The "risk of subjective interpretation and abuse" was high on the International Law Commission's mind when drafting Article 62, and so "it decided to emphasize the exceptional character of this ground of termination or withdrawal by framing the article in negative form: A fundamental change of

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[5] When Greece had been threatened with measures under Article 8 in 1969, its withdrawal under Article 7 was still fully recognized by the Committee of Ministers.

[6] Most specifically Article 65 of the Vienna Convention on the Law of Treaties and Article 33 of the UN Charter, which require a particular procedure to be followed whenever a ground for termination of a treaty is alleged to exist. This procedure was not followed by the Committee of Ministers in respect of the Russian Federation.

[7] Draft articles on the law of treaties, with commentaries. Yearbook of the International Law Commission, 1966, Vol.II. P.260.

[8] See: A.Aust. Modern Treaty Law and Practice. Cambridge University Press, 2000. P. 244.

[9] CAHDI Guidance Note to the Committee of Ministers on continued participation of the Russian Federation in "open" conventions elaborated in the framework of the Council of Europe. Document CM/Inf(2022)17-rev of 4 May 2022, par.11.

[10] Draft articles on the law of treaties, with commentaries. Yearbook of the International Law Commission, 1966, Vol.II. P.237.

circumstances... may *not* be invoked as a ground for terminating or withdrawing from a treaty *unless* etc.".[11] Therefore, the default position should always be that Article 62 is *not* applicable, unless the specific conditions enumerated therein are all satisfied and none of the exceptions apply.

Moreover, for some reason CAHDI elected not to address one of the basic requirements for application of Article 62 – namely, that it "may not be invoked... unless... the effect of the change is radically to transform the extent of obligations still to be performed under the treaty". The obligations under Council of Europe conventions that remain in force *vis-à-vis* the Russian Federation will remain the same in their substance, no new obligations will be added and no existing obligations will be abrogated, hence there is no ground for invocation of Article 62.

CAHDI rightly concludes that Article 62's logic "appears to suggest that the termination/suspension of or withdrawal from the treaty would occur in respect of the State(s) that invoke(s) the fundamental change of circumstances". In fact, this conclusion clearly stems from the express language of Article 62, and no doubts about this interpretation seem to exist in legal doctrine. The ILC commentary casually highlights this: "Paragraph 1 [of Article 62] defines the conditions under which a change of circumstances may be invoked as a ground for terminating a treaty or for withdrawing from a multilateral treaty" (i.e., application of Article 62 to a multilateral treaty implies withdrawal of the invoking State's from that treaty). Thus, Article 62 does not permit "selective termination" of a multilateral treaty in respect of a State Party which is not the invoking State.

CAHDI also validly notes the difficulties in proving that the existence of those circumstances which underwent change constituted an essential basis of the consent of the parties to be bound by the treaty.

c) Article 60 of the Vienna Convention on the Law of Treaties (material breach)

Article 60 has been called one of the most complex provisions of the Convention[12] and one of the most challenging and complicated issues in the law of treaties.[13] It is thus doubly important to approach it with care, and avoid possible abuse, especially with regard to multilateral treaties.[14]

The conditions of "material breach"

As expressly stated by the International Court of Justice, "only a material breach of the treaty itself, by a State Party to that treaty, [...] entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of customary international law... does not constitute a ground for termination under the law of treaties".[15]

The definition of "material breach" lies at the heart of Article 60. Only if material breach is established, the procedure for possible termination or suspension of a treaty, as described in paras.1, 2 of Article 60, may be launched. The definition is as follows:

"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

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[11] Draft articles on the law of treaties, with commentaries. Yearbook of the International Law Commission, 1966, Vol.II. Pp.258-259.

[12] F.Capotorti. L'éxtinction et la suspension des traits. Recueil des Cours (Collected courses of the Hague Academy of International Law) 134, 1971 III. P. 417; *Villiger,* p.751.

[13] M.Fitzmaurice. Material breach of treaty: some legal issues. Austrian Review of International and European Law 6 (2001) p.3.

[14] "...[I]t should not be too easy for States to turn a perhaps fictitious treaty violation into a pretext for terminating treaties they no longer approve for quite different reasons". O.Dörr, K.Schmalenbach (Ed.). Vienna Convention on the Law of Treaties: A Commentary (Second Edition). Springer-Verlag GmbH Germany, 2018. P.P.1097. See also: J.N.Moore. Enhancing compliance with international law: a neglected remedy. Virginia Journal of International Law, 39. P.887.

[15] ICJ *Gabčíkovo-Nagymaros* (1997). ICJ Report 7, para 106.

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."

For the purposes of Article 60, there is no "material breach" beyond these two alternatives.[16] The International Law Commission clarified that "the right to terminate or suspend must be limited to cases where the breach is of a serious character… a violation of a provision essential to the accomplishment of any object or purpose of the treaty".[17]

In its consideration of Article 60 CAHDI rightly concludes that it is not possible to use the situation in Ukraine "as an automatic, overarching justification to exclude the Russian Federation from all "open" conventions" to which it is a Party based on Article 60(3)(b) VCLT. However, its subsequent analysis raises serious questions.

With regard to repudiation, it means rejecting the treaty as a whole, for example through denunciation not justified by the Convention or the treaty itself.[18] This is manifestly inapplicable to the Russian Federation, which has not denounced or otherwise rejected in their entirety any of the Council of Europe's "open" conventions and protocols to which it is a Party.

Likewise, Russia did not violate any "essential" provisions of these treaties, continuing to fulfil its treaty obligations and fully permitting the accomplishment of their object and purpose.

A word must be said here about CAHDI's baffling shift in terminology: in paragraph 14.c of its report, when the concept of material breach is introduced, initially it is correctly tied to the treaty's "object and purpose" – however, mid-paragraph comes a switch to "principles and values", which the treaty "protects".

The concept of a treaty's "object and purpose" is well-known in international law; this term is featured throughout VCLT, including in Article 60 (see above). The term "principles and values", however, is not mentioned in the Vienna Convention even once. Neither is it used by the International Law Commission in its official commentary. Nor is it featured in the "open" conventions themselves. International legal doctrine similarly appears to be ignorant of this term, at least in the context of treaty law. There should be no substitution of the Vienna Convention terminology with obscure, non-conventional language that might provoke misinterpretation and misapplication of the Convention.

A ready example of such misinterpretation comes from CAHDI's claim that for conventions on extradition or mutual legal assistance "to be applied in practice it is by nature necessary that the respect of the principles and values [sic] enshrined in the European Convention on Human Rights (ECHR) by the other party can be guaranteed. Whether this is still the case with regard to the Russian Federation that will cease to be a Party to ECHR… can be questioned".[19]

The claim that participation in ECHR is somehow necessary for being a party to the European Conventions on Extradition and Mutual Legal Assistance in Criminal Matters, of course, has no legal basis: these conventions do not contain any reference to the ECHR or its "principles and values", as a condition for participation or otherwise. It is further disproved by State practice: these conventions count four other non-Member States, besides Russia, among their States Parties[20] – none of which are parties to the ECHR, and some haven't even abolished the death penalty.

With regard to protecting human rights – which is of course an important element of international legal co-operation in the criminal law field – the conventions themselves contain a number of guarantees that aim to preserve the rights of individuals falling under their application (see below on this). Additionally, the Russian Federation remains a Party to many other human rights instruments, including,

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[16] O.Dörr, K.Schmalenbach (Ed.). Vienna Convention on the Law of Treaties: A Commentary (Second Edition). Springer-Verlag GmbH Germany, 2018. P. 1103.

[17] *Ibid.*, p. 255.

[18] *Villiger,* p.742.

[19] CAHDI Guidance Note, footnote 23, p.5.

[20] Chile, Israel, Republic of Korea, South Africa.

but not limited to, the International Covenant on Civil and Political Rights, Convention against Torture, Convention on the Rights of the Child, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, etc. – which provide a robust framework for protecting human rights in the course of international legal co-operation.

As a result, CAHDI's analysis seems deficient in this regard.

In any event, as explained by the International Law Commission, "a breach of treaty, however serious, does not *ipso facto* put an end to the treaty, and... it is not open to a State simply to allege a violation of the treaty and pronounce the treaty at an end".[21]

The "unanimous agreement" requirement

While Article 60's paragraph 1, dealing with bilateral treaties, is relatively uncontroversial, paragraph 2, particularly littera (a), is considered problematic by scholars: it is not reflective of customary international law[22] and may result in an "unjustified abrogation" of a treaty.[23] To counter-balance its far-reaching character, application of 2(a) requires obtaining "a unanimous agreement" among all other Parties to the multilateral treaty. This unanimity "should be interpreted strictly in the sense of positive unanimity and not only of absence of objections",[24] and is a "rigorous condition".[25]

For some reason, CAHDI chose to gloss over this fundamental rule, and does not mention unanimity even once when analyzing Article 60 in its report, opting instead for a vague term "collective act". Such an "act" would have to be in the form of an express and unanimous agreement between all other States Parties to a treaty in order to satisfy the stringent requirement of paragraph 2(a).

Whether even such unanimity is a sufficient guarantee from abuse is questioned by many legal scholars, who insist that procedural rules of Article 65 must be applied here to protect against arbitrariness.[26]

Treaties of a humanitarian character - the case of criminal law conventions

However, after correctly establishing that human rights treaties do not fall under Article 60 VCLT, CAHDI apparently assumes that this exception covers only treaties *primarily* focused on human rights – whereas, of course, human rights and humanitarian provisions may also exist in sectoral treaties mainly dealing with other issues. A good example is found in criminal law conventions, which cover both rule of law and human rights matters.

In a landmark case concerning extradition and human rights, *Soering v. United Kingdom*, the European Court of Human Rights stated:

> "[I]nherent in the whole of the [European] Convention [on Human Rights] is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders who flee

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[21] Draft articles on the law of treaties, with commentaries. Yearbook of the International Law Commission, 1966, Vol.II. P.254.

[22] See *Villiger*, citing Fitzmaurice, Capotorti, Haraszti, Simma, Verdross and Akehurst (M.E.Villiger. Commentary on the 1969 Vienna Convention on the Law of Treaties. Martinus Nijhoff Publishers, Leiden, 2009. P.750).

[23] B.Simma. Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law. Österreichische Zeitschrift für öffentliches Recht (und Völkerrecht) 20, 1970. P. 66; I.Sinclair. The Vienna Convention on the Law of Treaties, 2nd edition, 1984. P. 188; statements and proposals of the delegations of Australia and United Kingdom at the Vienna Conference (

[24] Simma and Tams, 2011, Art 60 MN 28.

[25] M.E.Villiger. Commentary on the 1969 Vienna Convention on the Law of Treaties. Martinus Nijhoff Publishers, Leiden, 2009. P.744.

[26] Aust (2013), p. 259; Jennings and Watts (1992), p.1302; Sinclair (1984), p. 189.

abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extraditions."

Indeed, combating crime (including its particularly dangerous and insidious forms such as terrorism, drug trafficking, money laundering, corruption) has a direct bearing on the efficiency of protecting human rights in society as a whole. International co-operation in the criminal law field is aimed at fighting impunity and protecting the population from infringements upon their basic rights; robbing such co-operation of its legal basis will serve to worsen the human rights situation in all countries involved. For many Council of Europe Member States, the Organisation's criminal law conventions are the only international legal basis for co-operation with the Russian Federation, due to frequent absence of bilateral treaties and narrow nature of universal criminal law instruments (such as UN conventions).

Even beyond this general impact on human rights, Council of Europe's criminal law treaties enshrine many specific protections and guarantees for human rights when conducting international co-operation. For instance, the European Convention on Extradition provides guarantees against persecution for political offences, double responsibility for the same offence (*non bis in idem*), imposition of capital punishment, and other rules aiming to safeguard the rights of individuals.[27] In the absence of a multilateral treaty guaranteeing these rights, co-operation in the criminal law field may still continue on the basis of bilateral agreements (where they exist) or national law (where permitted, *e.g.* on the basis of reciprocity) – however, these regimes might not provide the same level of protection as a Council of Europe treaty.[28]

Furthermore, termination or suspension of criminal law conventions would affect the legal status of persons who have previously been the subjects of application of these treaties and were benefiting from the treaties' continuous protection (such as prohibition of extradition to third states, or of prosecution for crimes other than those listed in the extradition request, or the application of the *non bis in idem* rule, or even the non-imposition of capital punishment), which may no longer apply after the treaty has been terminated or suspended. Individual rights arising from treaties do not persist past their termination.[29]

The interplay between human rights and international legal co-operation in the criminal law field has long had the attention of legal scholars.[30] Claiming that criminal law conventions do not have a human rights dimension is legally unsound and politically short-sighted.

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[27] European Convention on Extradition of 13 December 1967 (ETS 24), Articles 3, 8, 9, 11 etc.

[28] See the above-mentioned *Soering v. the United Kingdom*, ECtHR Judgment of 7 July 1989, concerning extradition of a German national by Britain to the United States under a US-UK bilateral extradition treaty. The Court famously found a violation of Article 3 of the Convention (prohibition of torture) should the extradition be performed, due to application of the death penalty not being sufficiently ruled out. Notably, the bilateral treaty contained a safeguard provision (Article IV) which allowed refusal of extradition, should the requesting Party fail to provide satisfactory assurances to the requested Party that the death penalty will not be carried out. Had such a provision been absent, a conflict of law would have ensued for the UK, putting the rights of the accused in jeopardy.

[29] In its commentary to VCLT's Article 70, paragraph 1(b), which provides that termination of a treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination", the International Law Commission "wished to make it clear that paragraph 1(b)... is not in any way concerned with the question of the "vested interests" of individuals". Legal doctrine agrees: "rights and obligations of individuals... are not covered" by this provision; "subpara. 1(b) does not concern the treaty provisions themselves which grant rights... [a]ccording to subpara. 1(a), these treaty provisions will lapse with the termination of the treaty" (*Villiger,* p.873; citing also Aust, Nollkamper and statements made at the Vienna Conference).

[30] See, e.g.: R.Currie. Human Rights and International Mutual Legal Assistance: Resolving the Tension. Dalhouse University, Schulich School of Law, 2000.

IV. Participation of the Russian Federation in the work of bodies charged with functions under Council of Europe treaties

As CAHDI rightly states, "it follows from the principle of *pacta sunt servanda*, as enshrined in Article 26 VCLT, as well as the principle of equality of parties, that the Russian Federation will, as a general principle, retain its right to participate in the monitoring activities of those conventions to which it remains a Party after the cessation of its membership in the Council of Europe".[31]

Thereafter, however, CAHDI makes an unsupported assumption that this participation, which stems from the rights and obligations of a State Party to a treaty, could somehow be "adjusted" unilaterally by the Committee of Ministers or by a group of States Parties in respect of the Russian Federation.

To be sure, neither the Committee of Ministers nor a conventional body can take a decision to strip a State Party from its rights under the convention. Indeed, CAHDI does not provide any legal basis for such a decision – because no such basis exists. Preceding practice of the Council of Europe firmly supports this with regard to the only existing other case of a State's cessation of membership in the Organisation – the withdrawal of Greece in 1970:

> In cases where Greece remains a Contracting Party to a European Convention or Agreement after 31 December 1970, it will retain all its rights under that Convention or Agreement as regards participation of Contracting States in the work of bodies set up under the provisions of the said Agreements.[32]

Practical examples offered by CAHDI in support of its view (T-PD, cultural committees, GRECO) do not stand up to scrutiny (see below).

Convention on Protection of Personal Data

According to CAHDI, "partial limitations of participation rights… can already be justified whenever a monitoring body is entrusted, by the Committee of Ministers, with tasks not directly mandated by the respective convention, e.g., with standard-setting activities".[33] The Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD) is offered as an example of such a body.

CAHDI's basic premise is faulty: membership in a conventional committee such as T-PD is not conditional on the substance of work performed by this committee. On the contrary, such membership – and all related participation rights – is an inalienable right of a State Party to the convention. Denying a State Party its rights under the convention would be tantamount to breach of treaty.

Furthermore, the T-PD specifically is not entrusted with any tasks outside of its conventional competence. Its role under the Convention necessarily involves coordination with other Council of Europe bodies engaged in related tasks, but in doing so it acts as a body of Convention 108, expressing the position of States Parties to that Convention within the remit established by the Convention. This is supported by the fact that T-PD does not have special terms of reference adopted by the Committee of Ministers (as do committees established under CM *acquis*)[34] and does not follow working methods adopted by the CM for its committees and subordinate bodies. Instead T-PD works on the basis of the Convention and its own Rules of Procedure drawn up subject to the provisions of

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[31] CAHDI, par.21, p.7.

[32] Memorandum on Legal and Financial Consequences of the Withdrawal of Greece from the Council of Europe. Document CM(70)121 of 25 Septembet 1970. P.17. This position was confirmed by the Committee of Ministers in its Resolution (70)34 of 27 November 1970, according to which "the withdrawal of Greece from the Council of Europe shall not affect her position as a Contracting Party" to the "open" conventions of the Council of Europe.

[33] *CAHDI*, par. 23(a), p.7.

[34] Programme and Budget 2022-2025 – Terms of Reference of Intergovernmental Structures. Document CM(2021)131-addfinal.

the Convention under its Article 20(4),[35] pursuant to its own Work Programme,[36] and performs functions stemming from the Convention. This is confirmed by T-PD itself:

> "The functions, operations and activities of the Committee derive from Articles 19 and 20 of Convention 108, as well as from the Rules of Procedure. As defined in Paragraph 85 of the Explanatory Report [to Convention 108], the Committee is to "facilitate the smooth running of the convention and, where necessary, to perfect it".[37]

The ability to "make proposals with a view to facilitating or improving the application of the Convention" is directly provided by the Convention (Article 19). According to Article 9bis of the T-PD's Rules of Procedure:

> "The Committee shall exercise the functions set out in Articles 19 and 20 of the Convention. In particular, the Committee: [...]
>
> 2. shall draw up draft legal instruments [namely conventions or agreements and recommendations] with a view to their adoption by the Committee of Ministers;
>
> 3. shall adopt opinions and reports".

Thus, "standard-setting functions" of the T-PD derive not from a mandate of the Committee of Ministers (as claimed by CAHDI), but from the Convention itself. This is confirmed by the language of the instruments adopted by the T-PD, such as various guidelines, which are rooted in the application of the Convention.[38]

European Cultural Convention

CAHDI claims that "concerning follow-up undertaken by other bodies or organs of the Council of Europe, e.g. by the Committee of Ministers itself or via intergovernmental committees or a governing body of a partial agreement, the cessation of membership in the Organisation entails the loss of rights to participate in the work of such organs or bodies".[39]

The only example of such "intergovernmental committees" offered by CAHDI concerns "three steering committees acting as successor follow-up mechanisms to the European Cultural Convention: the Steering Committee for Education (CDEDU), the Steering Committee for Culture, Heritage and Lanscape (CDCPP) and the European Steering Committee for Youth (CDEJ)". However, CAHDI itself is hesitant about this example, admitting that "an additional level of complexity in this regard is present in cases in which a right of representation of the Russian Federation in an intergovernmental committee is stemming directly from the convention... this is the case with regard to Article 6(2) of the European Cultural Convention".[40]

The Convention in its Article 3 provides that "the Contracting Parties shall consult with one another within the framework of the Council of Europe with a view to concerted action in promoting cultural activities of European interest". According to Article 6, paragraph 1 of the Convention, "proposals for the application of the provisions of the present Convention and questions relating to the interpretation thereof shall be considered at meetings of the Committee of Cultural Experts of the Council of Europe". Paragraph 2 of the same Article 6 stipulates: "Any State not a member of the Council of Europe [...]

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[35] See document T-PD(2017)Rules, adopted by the T-PD on 21 June 2017.

[36] See Work Programme for the 2022-2025, adopted by the T-PD at its 41st Plenary meeting (28 t 30 June 2021). Document T-PD(2021)WP2022-2025.

[37] *Ibid.*, p.3.

[38] See, e.g. Guidelines on the Protection of Individuals with regard to the Processing of Personal Data by and for Political Campaigns (adopted by the T-PD on 19 November 2021), par.2.1: "These Guidelines **apply the data protection principles of Convention 108+** to the processing of personal data carried out by political campaign organisations..." (emphasis ours).

[39] *CAHDI,* par.23(b), p.7.

[40] *Ibid.*, par.23(b) and footnotes 38, 40. P.7.

may appoint a representative or representatives to participate in the meetings provide for in the preceding paragraph" (i.e. paragraph 1).

This mechanism is fundamental to the functioning of the Convention. Excluding States Parties from membership in these bodies or otherwise denying them participation in the work related to the functioning of the Convention, would be in direct violation of Article 3 and Article 6 of the Convention.

This position was previously accepted by the Council of Europe regarding the only other case of a State's withdrawal from the Organisation:

> "According to paragraph 2 of the same Article [6], any State not a member of the Council of Europe which has acceded to the Convention may be represented at the meetings provided for in the first paragraph of the Article. It therefore appears that it was the intention of the authors of the Convention to give each Contracting Party, whether or not a Member of the Council of Europe, the right to full participation in the Committee responsible for the implementation of the Convention... From this it appears that Greece, a non-member State of the Council from 1 January 1971, but still a Contracting Party to the Convention, must still be accepted on the [Council of Cultural Co-operation] for the activities carried out by that body by virtue of the Convention".[41]

It was confirmed by the Committee of Ministers:

> "As a Contracting Party to the European Cultural Convention... Greece may continue to sit on the Council of Cultural Co-operation (CCC) exercising the functions which fall upon it under the terms of the said Convention".[42]

CAHDI's supposition that "it is arguable to question whether the Council for Cultural Co-operation as established under the European Cultural Convention was indeed directly succeeded by the three steering committees" mentioned above does not hold water. Firstly, the Convention established not the Council for Cultural Co-operation (CCC), but the Committee of Cultural Experts, to which the CCC later became a successor. This change of nomenclature was specifically noted as not affecting rights of participation of States Parties to the Convention, when dealing with the withdrawal of Greece.[43]

Secondly, existence of the Committee of Cultural Experts or analogous structure(s) capable of performing functions under the Convention, with equal participation of all States Parties to the Convention, is a treaty obligation that is independent of the Statute of the Organisation or any decision of the Committee of Ministers. In other words, the Committee of Ministers has no authority to eliminate this conventional body, or to change its composition in a manner that would infringe upon equality of States Parties to the Convention. Mere change of nomenclature does not (and cannot) change this *status quo*. The previous restructurings of the Committee, including the splitting of its competence between several bodies (dealing separately with different aspects of cultural cooperation – education, sport and youth), still provided for equal participation of all States Parties through their Terms of Reference.

Denying a State Party its right of participation in the work of structure(s) performing functions under the European Cultural Convention would be beyond the competence of the Committee of Ministers, and if taken, would be an illegal act contravening not only the Convention itself, but also the Statute of the Council of Europe as well as rules of general international law governing treaty relations enshrined in the Vienna Convention on the Law of Treaties.

The direct link between the composition of the committees and their role with regard to the European Cultural Convention exists also for the Ad Hoc European Committee for the World Anti-Doping Agency (CAHAMA). Its current terms of reference specify among the main tasks of the

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[41] Memorandum on Legal and Financial Consequences of the Withdrawal of Greece from the Council of Europe. Document CM(70)121 of 25 Septembet 1970. P.17.

[42] Committee of Ministers' Resolution (70)34 of 27 November 1970, par.10.

[43] Memorandum on Legal and Financial Consequences of the Withdrawal of Greece from the Council of Europe. Document CM(70)121 of 25 Septembet 1970, para. 32, p.17.

committee "to develop and co-ordinate the positions of all States Parties to the European Cultural Convention".[44] This reflects the vision of the nature of this committee which the Committee of Ministers had when it has set up the committee in 2003 (as the European Co-ordination Forum for the World Anti-Doping Agency).

According to the decisions of 849th meeting of the Deputies (16 July 2003), item 8.1, (i) the European Co-ordination Forum for the World Anti-Doping Agency was set up as an ad hoc Committee of Experts "for the co-ordination of parties to the European Cultural Convention with regard to questions relating to the World Anti-Doping Agency (WADA)".[45] This was fully in line with the Conclusions of the Ad hoc consultation meeting of the Parties to the Convention.[46]

Issue of privileges and immunities

While CAHDI expresses concern about protecting privileges and immunities of monitoring delegations on the territory of the Russian Federation,[47] it remains silent on the subject of immunities of Russian delegates participating in the work of Council of Europe bodies, both at the Organisation's headquarters and at other locations, who obviously have to be protected as well. Remarkably, the Committee of Ministers has rejected a ready solution to both these issues, which had been successfully employed with regard to Greece: namely, the continued application of the General Agreement on the Privileges and Immunities of the Council of Europe and protocols thereto, to the extent the former Member State remains involved in the activities of the Council of Europe.[48] Despite the opinion of the Council of Europe's Legal Service, which advocated for a similar extension of GAPI with regard to Russia, the Committee of Ministers only allowed it in relation to the European Convention on Human Rights (namely, concerning judges of the ECtHR).[49] This short-sighted action resulted in endangering the status of experts participating in Council of Europe monitoring activities.

V. Participation of the Russian Federation in negotiations on amendments

Amendment procedure under the Vienna Convention on the Law of Treaties

The Vienna Convention provides "default" rules for amendment of treaties that apply when the treaty itself does not contain specific provisions on its amendment,[50] which is often the case for Council of Europe treaties.[51]

CAHDI correctly states that Article 40(2) VCLT grants *all* Contracting Parties with the right to take part in the negotiation and conclusion of any agreement on amendments to the treaty.[52] The doctrinal interpretation of Article 40 is straightforward: it "expressly envisages the treaty's amendment "as between *all* the parties"; "any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States"; "each contracting State [is granted] the right to take part in the amendment procedures"; "all contracting States may participate in the negotiation and conclusion

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[44] Document CM(2021)131-addfinal, p.75.
[45] Document CM/Del/Dec(2003)849/8.1, par. iii.
[46] Document CM(2003)77 of 30 April 2003.
[47] *CAHDI,* para.22, p.7.
[48] "Greece shall continue to be bound by the obligations placed on the Contracting Parties by the General Agreement on the Privileges and Immunities of the Council of Europe and the First, Second and Fourth Protocols thereto and to benefit from the rights deriving therefrom in favour of these Contracting Parties, to the extent to which she will remain involved in the activities of the Council of Europe or exercised in connection with it". Committee of Ministers' Resolution (70)34 of 27 November 1970, para. 12.
[49] Resolution CM/Res(2022)3, para.8.
[50] See Articles 39, 40(1) VCLT.
[51] "Many Council of Europe treaties do not contain any express regulations regarding amendments". J.Polakiewicz. Treaty-making in the Council of Europe. Council of Europe publishing, 1999. P.161.
[52] *CADHI,* para.16, p.6.

of any agreement for the amendment of the treaty"; "all contracting States are to be treated on an equal level and the amendment procedures must be transparent".[53] The International Law Commission confirms that "it sought… to lay down strict rules guaranteeing the right of each party to participate in the process of amendment".[54]

However, CAHDI's claim that "even where a clause concerning amendments has been omitted from a Council of Europe convention, the application of Article 40(2) is not mandatory" is ill-founded. On the contrary, the Vienna Convention clearly envisages mandatory application of Article 40 in cases when the treaty itself does not contain provisions on its amendment:

"The rules laid down in Part II apply to such an agreement [on amendment of a treaty] except insofar as the treaty may otherwise provide"; "Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs".[55]

The sole doctrinal source quoted by CAHDI in support of its position, though admittedly ambiguously worded, likely references the possibility of later inclusion of amendment clauses into a treaty which did not contain them at the outset[56] - such amendment, of course, necessitating the application of Article 40 VCLT in the first place.

That is not to say that States Parties cannot in principle agree on a different procedure to be used for amending their treaty – however, such an agreement would have to be unanimous.[57]

Amendment procedure under the Council of Europe conventions

CAHDI correctly recognizes that States Parties which are not members of the Council of Europe, including the Russian Federation, "have a convention based right to participate in meetings" of Consultations of the Parties, conventional committees or steering committees when these bodies are required to provide an opinion to the Committee of Ministers on proposed amendments.[58]

However, with regard to convention clauses which require consultations with non-member States Parties on amendment proposals, CAHDI seems to interpret the term *consultation* restrictively, excluding "any more far-reaching right on their part to be included in the negotiation process, e.g., at the expert level in intergovernmental committees, or at the stage of the decision-taking by the Committee of Ministers". This interpretation is not in line with the International Law Commission's understanding of *consultation* in this context as identical to the rules of Article 40(2) VCLT – *i.e.* as including the right to be notified and to take part in negotiation and conclusion of any amending agreement.[59] In essence, application of a Council of Europe convention clause on consultations in the context of amendment is tantamount to application of Article 40(2).

This is corroborated by the provisions of Council of Europe treaties and their practical implementation: consultations in the context of treaty amendment are generally understood as involving examination

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[53] *Villiger,* pp.522-523; citing also Dupuy and Reuter. Similarly, Dörr, K.Schmalenbach (Ed.). Vienna Convention on the Law of Treaties: A Commentary (Second Edition). Springer-Verlag GmbH Germany, 2018. P.770-772.

[54] Draft articles on the law of treaties, with commentaries. Yearbook of the International Law Commission, 1966, Vol.II. P.232.

[55] Vienna Convention on the Law of Treaties, Article 39 and Article 40, paragraph 1, respectively.

[56] "[N]othing prevents the parties to a multilateral treaty that have not included clauses concerning its amendment **at the outset** to **later** come to an agreement on a different procedure than the one provided for in Article 40 of the 1969 Convention" (emphasis ours). K.Ardaut, D.Dormoy. "Article 40". In: O.Korten, P.Kleins (editors). The Vienna Convention on the Law of Treaties – A Commentary. Vol.II, Oxford University Press. P.981.

[57] "It does not follow that any specific rules in a treaty would prevent the parties for agreeing **unanimously** on a different procedure for adoption of amendments… An amending agreement can take whatever form the parties of the original treaty choose. If they are **unanimous**, they may decide not to use the procedures foreseen in the original treaty" (emphasis ours). J.Polakiewicz. Treaty-making in the Council of Europe. Council of Europe publishing, 1999. P.167.

[58] *CAHDI,* para. 17, p.6.

[59] Draft articles on the law of treaties, with commentaries. Yearbook of the International Law Commission, 1966, Vol.II. P.233.

and adoption of such amendments.[60] States Parties to the treaty which are not members of the Council of Europe are typically invited to participate as members of the body charged with negotiating the amendments.[61]

Finally – and perhaps most importantly – in its analysis CAHDI misses a critical element of amendment clauses in many Council of Europe conventions: namely, the requirement of unanimous approval of the amendments by all States Parties before their entry into force.[62] A State Party which was denied its right to participate in the negotiation and adoption of amendments will likely be disinclined to accept any amendments thus elaborated without its participation, effectively preventing such amendments from ever coming into force.

VI. Conclusions

In light of the above analysis of the CAHDI Guidance Note to the Committee of Ministers and relevant sources of international law and practice, the following conclusions may be reached.

a) Decisions of the Committee of Ministers regarding cessation of membership of the Russian Federation in the Council of Europe were contrary to the Statute of the Council of Europe, general international law, and preceding practice of the Organisation.

b) Provisions of Articles 60 (material breach) and 62 (fundamental change of circumstances) of the Vienna Convention on the Law of Treaties are inapplicable to the present situation. CAHDI did not fully consider the numerous requirements stipulated in these Articles. The Russian Federation continues to perform its obligations under the Council of Europe "open" conventions which remain in force for Russia.

c) An outbreak of hostilities does not *ipso facto* create a ground for termination or suspension of Council of Europe treaties in respect of the Russian Federation. Even in the event of hostilities, treaties of humanitarian, non-political, or technical character are expected to continue operation (which includes, effectively, all Council of Europe "open" conventions and their protocols currently in force for the Russian Federation).

d) Application of Articles 60 or 62 would in any event necessitate the application of procedure established by Articles 65-68 VCLT, which cannot proceed without involvement of all Parties.

e) The Russian Federation's right of participation in the work of all bodies engaged in performing functions under Council of Europe treaties to which it is a Party is of a non-statutory, conventional nature and thus not subject to revocation or limitation by the Committee of Ministers or by other States Parties. Examples relied upon by CAHDI (T-PD, committees performing functions under the European Cultural Convention) all support this view.

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[60] E.g.: "According to the new Article 31 [of the European Convention on the Protection of Animals, ETS No.171, 1998], the amendments will be examined and adopted during **multilateral consultations**... any amendment will enter into force twelve months after its adoption at a **multilateral consultation**..." (emphasis ours). *Polakiewicz,* p.172.

[61] See, for example, Terms of Reference of the Ad hoc committee on data protection (CAHDATA), set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe to finalize the draft amending protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No.108). According to these Terms of Reference, governments of non-member States that are Parties to Convention 108 were entitled to appoint their representatives as members of CAHDATA on par with Council of Europe member States. (Document CAHDATA(2016)ToR of 30 March 2016).

[62] "A standard clause which has been introduced in a number of [Council of Europe] treaties provides that amendments prepared by a conventional committee are formally approved by the Committee of Ministers. Their entry into force requires that all parties to the convention inform the Secretary General of their acceptance" (*Polakiewicz,* p.163).

f) The Russian Federation's right of participation in negotiations on amendments to conventions and protocols to which it is a Party stems both from international treaty law and specific provisions of Council of Europe treaties. Moreover, typically entry into force of amendments to Council of Europe treaties requires their approval by all Parties, including the Russian Federation.

In the interests of stability of treaty relations, which is instrumental to the security of international relations as a whole, radical measures such as termination or suspension of treaties must be approached responsibly. Fragmentary or obfuscating narratives that do not provide the full picture create unnecessary, avoidable risks to the operation of international legal norms. The above analysis serves to "fill in the gaps" which, perhaps inadvertently, might have formed during consideration of this topic both at the expert and political level in the Council of Europe.