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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION

ON THE LEGAL PROBLEMS ARISING FROM THE COEXISTENCE OF THE CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF THE COMMONWEALTH OF INDEPENDENT STATES AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

adopted by the Venice Commission
at its 34th plenary session
(Venice, 6-7 March 1998)

on the basis of comments by
Mr G. Malinverni (Switzerland)

INTRODUCTION

On 4 July 1997, the President of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, Mr B. Hagård, submitted a request to the Venice Commission for an opinion on the legal problems arising from the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights.

The Venice Commission invited Mr Malinverni, Rapporteur, to prepare a preliminary opinion on this question. At its 33rd plenary session (Venice, 12-13 December 1997) the Commission held an exchange of views on the basis of this opinion. Following this discussion, the Rapporteur and the sub-Commission on International Law were charged with presenting a draft consolidated opinion on the question at the next plenary session.

The sub-Commission on International Law met in Venice on 5 March 1998. It decided to submit to the Commission the revised opinion of the Rapporteur (CDL (98) 17), with which Messrs Helgesen, Holovaty, Matscher and Suviranta declared themselves to be in agreement.

At its 34th plenary session (Venice, 6-7 March 1998), the Commission adopted the Rapporteur's opinion and decided to forward it to the Committee on Legal Affairs and Human Rights of Parliamentary Assembly.

I. THE CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF THE COMMONWEALTH OF INDEPENDENT STATES

On 26 May 1995, in Minsk, seven of the twelve member states of the Commonwealth of Independent States (CIS) signed a new Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as "the CIS Convention").

The CIS Convention, of which the Regulations on the Human Rights Commission of the Commonwealth of Independent States (hereinafter referred to as "the CIS Regulations") are an integral part, has not yet come into force. It will do so as soon as the Contracting Parties have deposited the third instrument of ratification (Article 38 of the CIS Convention).

Three CIS member states are also members of the Council of Europe: Ukraine, not a party to the CIS Convention, has been a member since 9 November 1995; Moldova, which has signed the CIS Convention, since 13 July 1995; and the Russian Federation, which has ratified the CIS Convention (in November 1995), since 28 February 1996[1].

Ukraine and Moldova have now ratified the European Convention on Human Rights (hereafter:

[1] *The forty member states of the Council of Europe in order of accession, situation as at 20 December 1996, RUDH (Revue universelle des droits de l'homme) 8 (1996), p. 340; A. Drzemczewski, CIS Convention on Human Rights, Minsk 1995, introductory remarks, HRLJ (Human Rights Law Journal) 17 (1996), p. 157. Although a number of states have signed the CIS Convention, it seems that it has not yet been ratified by enough states to come into effect.*

ECHR) and some of the protocols thereto and made declarations under Articles 25 and 46 accepting individual complaints and the compulsory jurisdiction of the European Court of Human Rights. The Russian Federation has signed the ECHR and stated its intention to ratify the convention in the future.

In a 1995 report on the conformity of the Russian Federation's legal system with Council of Europe standards a group of experts expressed doubts about the relevance of the CIS Convention, then in draft form, and its compatibility with the ECHR[2].

The Parliamentary Assembly of the Council of Europe shared the experts' concerns and raised the question of the legal consequences and implications if these states were to ratify both the ECHR and the CIS Convention. It asked two eminent human rights experts to prepare a legal opinion on the subject[3].

Subsequently, in its Opinions on Moldova, Ukraine and the Russian Federation's accession to the Council of Europe, the Parliamentary Assembly insisted on a commitment by Moldova that it would not ratify the CIS Convention until the problems of the convention's co-existence with the ECHR had been clarified and that it would not do so without the agreement of the Council of Europe (Opinion No. 188 (1995), para. 11 (e)). Likewise, the Parliamentary Assembly called on Ukraine to refrain from signing the CIS Convention in the present circumstances (Opinion No. 190 (1995), para. 12 i)[4], and asked the Russian Federation to ensure that the CIS Convention did not in any way interfere with the guarantees and procedure of the ECHR (Opinion No. 193 (1996), para. 10 xvi).

The essential question is whether the coexistence of these parallel human rights instruments will improve the protection of victims of human rights violations. Extreme care must be taken to ensure that this is indeed the case. The credibility and utility of any new effort in the human rights domain must meet the test of whether the procedures created are victim-oriented, whether the framework of the universality of human rights is enhanced and whether other norms, treaties or regimes in the area are reinforced rather than undermined. It is in this context that the viability and utility of the CIS Convention must be judged.

II. COMPARISON OF THE SUBSTANTIVE PROVISIONS OF THE CIS CONVENTION AND THE ECHR

The civil and political rights guaranteed by the CIS Convention, which clearly draws on the

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[2] *Parliamentary Assembly of the Council of Europe, "Rapport sur la conformité de l'ordre juridique de la Fédération de Russie avec les normes du Conseil de l'Europe", RUDH 6 (1994), p. 328.*

[3] *Resolution No. 1126 (1997), paras. 5 and 6; A. Cançado Trindade and J. Frowein, Analysis of the legal implications for States that intend to ratify both the European Convention on Human Rights and its protocols and the Convention on Human Rights of the CIS, HRLJ 17 (1996), pp. 164 and 181 respectively.*

[4] *"… pending further research on the compatibility of the two legal instruments, [Ukraine should] not sign the Commonwealth of Independent States (CIS) Convention on Human Rights and other relevant documents, given the fact that individual applications submitted under this Convention might render impossible the effective use of the right to individual application under Article 32 of the European Convention on Human Rights…"; the Parliamentary Assembly's concerns are here voiced in clear terms.*

corresponding provisions of the ECHR, the United Nations Covenant on Civil and Political Rights and the American Convention on Human Rights, scarcely diverge from the rights guaranteed by the ECHR.

Roughly speaking, the main substantive differences are as follows[5]:

- The right to life (Article 2 of the CIS Convention; Article 2 of the ECHR; Protocol 6 to the ECHR)

Whereas Article 2, para. 2 of the ECHR sets out in full the cases of necessity in which deprivation of life shall not be regarded as a violation of this right, Article 2, para. 4 of the CIS Convention merely refers to cases of extreme necessity and necessary defence provided for in the national legislation of the member states. It is thus left entirely to the discretion of the respective legislatures to fix these cases. Protection of the right to life may therefore be more extensively curtailed under such national legislation than pursuant to the ECHR.

As regards capital punishment, it should be noted that the CIS Convention provides that women shall not as a rule be sentenced to the death penalty, and it absolutely forbids the imposition or execution of the death penalty in the case of pregnant women as well as its imposition for crimes committed before the perpetrator reached the age of 18 (Article 2, paras. 2 and 3). Protocol 6 to the ECHR abolishes the death penalty entirely. This Protocol has not yet been ratified by all the states parties to the ECHR. However, although protection of the right to life afforded under the ECHR may thus seem lower, at first glance, than that afforded by the CIS Convention, it must not be forgotten that the intention to ratify Protocol 6 has become one of the conditions of a state's accession to the Council of Europe.

- Deprivation of liberty (Article 5 of the CIS Convention; Article 5 of the ECHR)

Whereas Article 5, paras. 1 (a) to (f) of the ECHR restrictively lists the cases where detention is lawful, Article 5, para. 1 (b) of the CIS Convention merely requires that a person's arrest or detention be lawful, a concept referring to the legislation of the member states, which are apparently free to determine an unlimited number of cases where detention or arrest is possible. Personal freedom is therefore afforded far less protection by the CIS Convention than by the ECHR.

Furthermore, it is well established in the case-law of the European Court of Human Rights that the provisions of Article 5 para.1 of the ECHR must be interpreted narrowly, and account must also be taken of the fact that any deprivation of liberty must, as well as conforming with domestic laws, be in keeping with the purpose of Article 5 of the ECHR, which is to protect individuals against arbitrary deprivations of liberty. It is far from certain that such guarantees will exist under the CIS Convention.

As to an examination of the lawfulness of pre-trial detention, under Article 5, para. 3 of the CIS Convention such an examination depends on its being requested by the detained person, whereas under Article 5, para. 3 of the ECHR it is automatic, immediate and mandatory.

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[5] *For a more detailed analysis of the differences, see J. Frowein, op. cit. (see footnote 3 above), pp. 182 et seq.*

- Fair trial (Article 6 of the CIS Convention; Article 6 of the ECHR)

Whereas Article 6, para. 1 of the ECHR includes the interests of "national security in a democratic society" among the grounds for excluding the press and the public from all or part of a trial, Article 6, para. 1 of the CIS Convention uses the vaguer and doubtless far broader term "state secrecy" and leaves its interpretation to the member states' discretion. The rules governing proceedings *in camera* are therefore less strictly defined under the CIS Convention.

Article 6, para. 3 (d) of the ECHR confers on persons charged with a criminal offence the basic right to call and question prosecution and defence witnesses. On the other hand, Article 6, para. 3 (d) of the CIS Convention merely allows a person charged with an offence to make an application to the court to that end. Here, too, the guarantees afforded by the CIS Convention are less extensive than those of the ECHR.

- State of emergency (Article 35 of the CIS Convention; Article 15 of the ECHR)

Whereas under the ECHR exceptional measures can be taken only "in time of war or other public emergency threatening the life of the nation", the CIS Convention permits them "in time of war or other emergency situation threatening the higher interests of any Contracting Party", which is obviously a vaguer, far broader concept. The CIS Convention therefore allows measures derogating from its guarantees to be taken at what is clearly an earlier stage than is possible under the ECHR.

In more positive terms, it should be noted that the CIS Convention enshrines certain economic and social rights (the right to work, health protection, the right to social security, protection of disabled persons) or collective rights (protection of persons belonging to national minorities), which are not to be found in the ECHR.

In general, a comparison of the substantive provisions of the two conventions shows that the human rights guaranteed by the CIS Convention are less extensive and more open to restrictions than under the ECHR.

However, where the victim of an alleged human rights violation chooses to lodge an application with the European Commission of Human Rights, the most favourable treatment rule set out in Article 60 of the ECHR will make it possible to prevent the scope of the rights conferred by the ECHR from being diminished by the generally lower standards of protection afforded by the CIS Convention. Moreover, this most favourable treatment clause also appears in Article 33 of the CIS Convention, the wording of which is almost identical to that of Article 60 of the ECHR.

Nevertheless, the impact of such clauses is mainly negative: their effect is not to incorporate the most favourable provisions of one convention into another, but to preclude the scope of one instrument from being limited by the provisions of another[6].

[6] *L-E. Pettiti, E. Decaux and P-H. Imbert, "La Convention européenne des droits de l'homme", Paris 1995, pp. 900 et seq. on Article 60, of the ECHR.*

Accordingly, if the alleged victim applies to the CIS Commission, there is a risk that the latter will examine the case solely in the light of the lower protection standards of the CIS Convention.

The most favourable treatment principle also comes into play in obliging states parties to both conventions to amend their domestic laws so as to bring them into line with the convention setting the highest standards of protection. Whether states respect this obligation under the dual system is however at the discretion of national legislatures.

III. CONTROL MECHANISMS OF THE CIS CONVENTION

According to the CIS Regulations, which are an integral part of the CIS Convention (Article 34), the CIS Commission is composed of representatives of the Parties. These representatives are not elected but appointed by the parties (Section I, para. 2 of the CIS Regulations). Their absolute independence and impartiality therefore cannot be guaranteed.

Moreover, no judicial form of procedure is provided for in the case of applications from individuals. Section III, para. 3 of the CIS Regulations merely states that the Commission may, if it so wishes, hear applicants whose cases it is considering.

Inter-state applications concerning matters not resolved to the Parties' satisfaction may be referred to a special conciliatory sub-commission composed of representatives of the Contracting States. The sub-commission is required to submit its conclusions to the Commission for transmission to the interested Parties (Section II, para. 5 of the CIS Regulations).

Finally, the Commission's powers are reduced to a bare minimum. Its decisions "shall take the form of understandings, conclusions and recommendations". It is not specified whether such decisions are binding on the Parties; they are of a public nature "unless decided otherwise by the Parties" (Section I, para. 10 of the CIS Regulations).

In view of its membership and limited powers, there seem to be serious grounds for fearing that the CIS Commission will be unable to fulfil its role as an international supervisory body in the field of protection of human rights in a completely effective manner.

In conclusion, the intergovernmental and political nature of the CIS Commission raises serious doubts about its quasi-judicial status. In this respect it is very different from the European Commission of Human Rights. The two systems' dissimilarity becomes fully apparent when one considers that the CIS Convention does not provide for the setting up of a Court of Human Rights.

The Strasbourg system has greatly helped to "realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe"[7], and the European Court of Human Rights has become as it were, the

[7] *Decision by the European Commission of Human Rights in the case Austria v. Italy, Application No. 788/60, Yearbook, 1961, p. 116.*

constitutional court of Western Europe[8]. It seems that such will never be true of the CIS Convention system in view of the substantially inferior control mechanisms it provides in respect of the republics of the former Soviet Union.

The contrast between the two systems will only become greater with the entry into force on 1 November 1998 of Protocol 11 to the ECHR. As from this date all the supervisory functions of the European Court and Commission of Human Rights will be assumed by the European Court of Human Rights. The examination under the ECHR of alleged violations of human rights will thus be conducted entirely under a judicial form of procedure.

IV. EXHAUSTION OF DOMESTIC REMEDIES (ARTICLE 26 OF THE ECHR)

The question has been raised as to whether the control mechanisms established by the CIS Convention should be regarded as affording a domestic remedy within the meaning of Article 26 of the ECHR.

In the context of its examination of the conformity of the Russian Federation's legal system with Council of Europe standards, the above-mentioned group of legal experts was told during a meeting at the Institute of State and Law of the Russian Academy of Science that an individual complaint concerning a human rights violation should be dealt with under the CIS Convention system before being brought before the European Commission of Human Rights[9].

The group of experts expressed concern about the draft CIS Convention in so far as its implementation mechanism might in that event jeopardise the operation of the Strasbourg mechanism, especially if an approach to the CIS Commission were to be regarded as a prerequisite for the lodging of an application with the European Commission of Human Rights[10]. Such a requirement would in effect cause an unacceptable increase in the time taken to resolve cases of alleged violations of human rights.

However, the experts' fears scarcely seem founded. The requirement in Article 26 of the ECHR regarding the exhaustion of domestic remedies, which is a customary rule of international law, means that a state should not be held accountable for its actions at international level unless persons considering themselves prejudiced by one of its actions have unsuccessfully sought redress by all the means available to them under that state's domestic law. Such persons must therefore submit their cases to a domestic court, lodge an appeal if necessary, and then apply to the highest court in the country concerned[11].

The view has never been taken either in international practice or by legal writers that recourse to an international supervisory body is subject to exhaustion of another international remedy, even in the relationship between a regional system (such as that of the ECHR) and a universal system

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[8] *T. Bürgenthal and A. Kiss, "La protection internationale des droits de l'homme", Strasbourg, 1991, p. 79.*

[9] *Parliamentary Assembly of the Council of Europe, op. cit. (see footnote 2 above), p. 328.*

[10] *Parliamentary Assembly of the Council of Europe, op. cit. (see footnote 2 above), p. 366.*

[11] *T. Bürgenthal and A. Kiss, op. cit. (see footnote 8 above), p. 64.*

(such as that of the Covenants)[12].

This follows, in particular, from the lack of any hierarchy between the different human rights protection systems, from their complementary nature and from applicants' freedom to choose whichever system they consider to provide the most effective protection. Furthermore, the very existence of provisions such as Article 27, para. 1 (b) of the ECHR and Article 5, para. 2 (a) of the Optional Protocol to Covenant II shows that there is no hierarchy between the different human rights protection systems.

The rule regarding exhaustion of remedies has therefore always applied solely to a state's domestic remedies, not regional remedies. The wording of Article 26 of the ECHR is perfectly clear in this respect, as it provides that the European Commission of Human Rights can only deal with a matter after all domestic remedies have been exhausted.

It is therefore wrong to contend that an application from an individual must in all cases be lodged with the Commission of the CIS Convention before it can be examined by the European Commission of Human Rights.

V. *LIS ALIBI PENDENS* AND THE *NON BIS IN IDEM* PRINCIPLE (Article 27, para. 1 (b) of the ECHR)

The protection and control mechanisms established by the CIS Convention, which seem likely to be fairly ineffective and are already unsatisfactory in themselves, raise yet another problem: the risk that a complaint concerning an alleged violation of human rights may be found inadmissible by the European Commission of Human Rights if it has already been brought before the CIS Commission.

This is because under Article 27, para. 1 (b) of the ECHR the Commission may not accept an application that is "substantially the same as a matter which … has already been submitted to another procedure of international investigation or settlement…".

The purpose of this provision is to rule out duplication of international proceedings. It is not confined to the "non bis in idem" principle but also covers cases of "lis alibi pendens" since, for the Commission to declare an application inadmissible, it suffices that the same application, relating to the same facts constituting an infringement of the same rights, should previously or simultaneously have been lodged with another international institution by the same person[13].

The following have so far been regarded as institutions affording procedures of international

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[12] *One dissenting opinion has nevertheless been expressed, concerning the link between regional remedies (the ECHR and ACHR) and applications to the United Nations Human Rights Committee -see T. Meron, "Human Rights in International Law", Oxford, 1984, p. 394: "The Optional Protocol, however, may be interpreted as giving precedence to regional procedures (…) Perhaps … regional remedies should also be exhausted unsatisfactorily before the matter can be submitted to the UN Human Rights Committee."*

[13] *L-E. Pettiti, E. Decaux and P-H. Imbert, op. cit. (see footnote 6 above), p. 627 in respect of Article 27 of the ECHR; G. Cohen-Jonathan, "La Convention européenne des droits de l'homme", Aix-en-Provence, 1989, p. 143.*

investigation or settlement within the meaning of Article 27, para. 1 (b)[14]:

- the International Court of Justice, in The Hague,

- the UN Human Rights Committee established by the Covenant on Civil and Political Rights,

- the Committee set up under the United Nations Convention on the Elimination of All Forms of Racial Discrimination,

- the Committee set up under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

- the institutions established within the International Labour Organisation,

- and, last, at regional level, the Court of Justice of the European Communities, in Luxembourg.

The concept of "procedure of international investigation or settlement" therefore encompasses a variety of procedures functioning in widely differing ways and providing the parties with very unequal guarantees.

In particular, although the crucial factor is not whether or not the procedure concerned is judicial in nature, the institution in question should at least have the means to conduct a thorough, objective investigation without hindrance, or even to apply a regulated conciliation procedure without being restricted by political considerations or hamstrung by irrefutable objections based on respect for sovereignty[15].

To this extent, given the non-independence of the members of the CIS Commission, who are mere appointees of the states parties to the CIS Convention and representatives of those states (Section I, para. 2 of the CIS Regulations), and the fact that the Commission's decisions are not binding (Section I, para. 10 of the CIS Regulations), added to the non-judicial nature of the Commission's procedure, it might be argued that the CIS Commission does not qualify as an institution operating a procedure of international investigation or settlement within the meaning of Article 27, para. 1 (b) of the ECHR[16].

This possible interpretation of Article 27, para. 1 (b) of the ECHR would be a means of preventing the CIS Convention system from constituting an obstacle to applicants wishing to have their human rights complaints examined by the European Commission of Human Rights.

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[14] *H. Golsong and W. Karl, "Internationaler Kommentar zur Europäischen Menschenrechtskonvention", Cologne, 1996, on Article 27, Nos. 31 ff.*

[15] *-E. Pettiti, E. Decaux and P-H. Imbert, op. cit. (see footnote 6 above), p. 627; G. Cohen-Jonathan, op. cit. (see footnote 13 above), p. 150.*

[16] *A. Cançado Trindade, op. cit. (see footnote 3 above), p. 170.*

However, the argument based on the non-judicial nature of the control procedure set up by the CIS Convention does not appear decisive if the procedures currently deemed to be covered by the expression "another procedure" are taken into account.

It is therefore highly probable that the European Commission of Human Rights will indeed consider that, despite its inadequacies, the CIS Commission should be regarded as "another procedure of international investigation or settlement" and will refuse to deal with applications that have already been or are currently being examined by it[17].

It should be noted that Section III, para. 2 (a) of the CIS Regulations contains a provision similar to that of Article 27, para. 1 (a) of the ECHR. An application lodged simultaneously with the CIS Commission and the European Commission of Human Rights will therefore be declared inadmissible by both these institutions.

VI. THE NEED FOR CO-ORDINATION BETWEEN THE CONTROL MECHANISMS OF THE CIS CONVENTION AND THE ECHR

Difficulties due to the coexistence of different international human rights protection systems arose even in the 1970s, with the adoption of the Optional Protocol to the United Nations Covenant on Civil and Political Rights. The solutions recommended by the Council of Europe in that connection, imbued with a concern to avoid duplication of proceedings, may indicate an answer to the problem of the coexistence of the CIS Convention and the ECHR.

1. With regard to inter-state applications, Article 62 of the ECHR may be said to mean that, failing a special agreement, the Contracting Parties are under an obligation to submit disputes arising from the interpretation or application of the ECHR solely to the supervisory bodies established under that convention[18]. This interpretation has, however, been criticised and sometimes deemed incompatible with the universal nature of human rights.

These uncertainties led the Committee of Ministers of the Council of Europe to stipulate that any states parties to the ECHR that have also recognised the right of communication under Article 41 of the United Nations Covenant on Civil and Political Rights should normally utilise only the procedure established by the European Convention in order to complain of another state's violation of a right guaranteed by both the Covenant and the Convention[19].

It is therefore clear that the Council of Europe wished to give precedence to the regional system of the ECHR and emphasise its independence in relation to other international institutions, thus making the European Court a sovereign tribunal whose judgments are final[20]. This solution is

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[17] *J. Frowein, op. cit. (see footnote 3 above), p. 183, according to whom the CIS Commission undoubtedly amounts to "another procedure of international investigation or settlement" within the meaning of Article 27, para. 1 (b), of the ECHR.*

[18] *J. Velu and R. Ergec, "La Convention européenne des droits de l'homme", Brussels, 1990.*

[19] *Committee of Ministers of the Council of Europe, Resolution (70) 17 of 15 May 1970.*

[20] *L-E. Pettiti, E. Decaux and P-H. Imbert, op. cit. (see footnote 6 above), p. 914 in respect of Article 62 ECHR.*

designed to prevent an applicant state from choosing between the two procedures and obviate the risk of duplication of proceedings[21].

The CIS Regulations, for their part, provide that they shall not "… prevent the Parties from resorting to other procedures for settling disputes on the basis of international agreements applying to them" (Final Section, para. 1 of the CIS Regulations). In the case of inter-state applications, therefore, it does not seem that the control mechanism of the CIS Convention should interfere with the European Convention's system.

However, given the absence of a hierarchy of norms as between the two conventions, it would be desirable if any states parties to the ECHR that consider they should nevertheless ratify the CIS Convention were to make an interpretative declaration when doing so, giving absolute priority to the ECHR's tried and tested control mechanisms so as to avoid weakening them and, above all, prevent duplication of proceedings.

2. As for applications from individuals, the Committee of Ministers, referring to the co-existence of the ECHR and the Optional Protocol to the United Nations Covenant on Civil and Political Rights, took the view that victims of a violation of a right covered by both instruments should be fully free to submit the matter to whichever international procedure they chose.

At the same time, the "lis alibi pendens" and "non bis in idem" principles set forth in Article 27, para. 1 (b) of the ECHR expressly preclude the duplication of proceedings[22]. It follows that an application lodged by the complainant with the CIS Commission either earlier or simultaneously will be declared inadmissible by the European Commission.

It would be highly desirable to prevent the far from perfect CIS Convention system from standing in the way of an examination by the ECHR institutions violation of a right covered by both conventions. In a word, the main problem arising from the coexistence of the two conventions lies in this risk of the ECHR control mechanism being blocked - and hence weakened - by the lodging of an application with the CIS Commission. In view of the terms of Article 27, para. 1 (b) of the ECHR, it is difficult to eradicate this possibility of the Strasbourg system being excluded.

From a theoretical point of view, it is doubtless reassuring to assume that the freedom of choice of a procedure enjoyed by the applicant, who will have to bear the consequences of that choice, combined with the most favourable treatment principle (Article 60 of the ECHR; Article 33 of the CIS Convention) will enable the scope for conflicts of rules between the two systems to be

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[21] *G. Cohen-Jonathan, op. cit. (see footnote 13 above), p. 144.*

[22] *The Committee of Ministers has constantly been concerned to prevent duplication of proceedings. To rule out the possibility of individual applications being simultaneously or successively lodged with the European Commission and the United Nations Committee, the Committee of Ministers suggested in 1968 that states parties which signed or ratified the Optional Protocol to the United Nations Covenant should specify in a reservation or an interpretative declaration that the provisions of paragraph 2 of Article 5 of the Optional Protocol were construed as meaning that the Committee should not examine any communication from an individual without having ascertained that the same issue was not being examined or had not already been examined under another international investigation or settlement procedure.*

reduced[23].

However, this thought will seem somewhat less soothing if one remembers the CIS member states' low level of legal culture, their under-developed legal institutions, their lack of competent judges and lawyers, their lack of experience of systematic judicial protection of human rights and freedoms and, in general, the fact that the very concept of the rule of law is far from having gained acceptance in their territories[24]. There is a genuine risk that parallel institutional mechanisms affording fewer guarantees than those provided by the ECHR will confuse victims in the post-Soviet states who barely understand the rights they have acquired, and will act as a further obstacle to redressing alleged abuses.

In such circumstances it seems illusory to assume that alleged victims will be sufficiently well informed and advised to be able to choose to submit their complaints to the international body offering the best level of protection and effectiveness, ie the European Commission of Human Rights. As to the most favourable treatment principle, because of its mainly negative effect it will not help to raise standards of protection under the CIS Convention.

VII. CONCLUSIONS

The following conclusions can be drawn from the above analysis:

- The fundamental rights set forth in the CIS Convention are generally more limited in scope than the corresponding rights under the ECHR, which affords higher standards of protection.

- The control mechanisms established by the CIS Convention appear inadequate for guaranteeing effective compliance with the human rights obligations entered into by states parties and are very different from the judicial machinery of the ECHR.

- An application lodged with the CIS Commission should not be regarded as a domestic remedy to be exhausted under Article 26 of the ECHR.

- The CIS Commission should undoubtedly be deemed another procedure of international investigation or settlement within the meaning of Article 27, para. 1 (b) of the ECHR; the European Commission will therefore declare inadmissible an individual application

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[23] *A. Cançado Trindade, op. cit. (see footnote 3 above), p. 179.*

[24] *A. Ametistov, "A propos de la mise en oeuvre interne de la CEDH en Union Soviétique: perspectives et problèmes" in RUDH 4 (1992), p. 388; see also the report of 30 January 1995 by M.S. Kovalev, a member of the Russian parliamentary delegation to the Council of Europe, who had the following to say about the lack of respect for the rule of law in Russia: "… The cause lies not only, or not so much, in ill will from the part of the authorities, whether local or federal. Nor does the problem lie merely in unsatisfactory laws. It is rooted above all in the extremely low level of legal awareness of both the authorities and the people. After all, what is the point of proclaiming civil rights and freedoms in the Constitution if the people are incapable of ascertaining them and unaccustomed to doing so? What purpose is served by good laws if the individual citizen is not prepared to obey them? What is the point of reforming judicial procedures if people prefer not to go to court but to defend their interests through other, often criminal, channels? It would take years of intensive work before the majority of the population arrived at the necessary level of legal awareness", cited in HRLJ 17 (1996), p. 189.*

lodged earlier or simultaneously with the CIS Commission pursuant to that article.

- It would be desirable if CIS member states were, if they choose to ratify the CIS Convention, to make an interpretative declaration or reservation giving the ECHR system clear precedence over that of the CIS Convention in the case of inter-state applications.

Regional cooperation – a pursuit generally to be encouraged – has little or no worth unless the result of the cooperation is to create improvements in the domain which is the subject of actions taken. As a general rule, in the field of human rights, a regional convention is meaningful only if it adds something new to the universal human rights protection system, whether from the point of view of the law (new substance) or from that of implementation (new procedure)[25]. The above analysis shows that this is not the case with the CIS Convention which indeed has rather the effect of lowering the existing standards.

For those States which are members of the Council of Europe or candidates to become members, adherence to the ECHR is mandatory and the ECHR should have priority over other European systems for protection of human rights.

For CIS countries which are not and will not become candidates for Council of Europe membership, the CIS Convention provides for international protection of human rights at the regional level.

In the light of these comments, it is desirable that CIS member states which have acceded to the Council of Europe, which ratify the ECHR and also sign or ratify the CIS Convention, fully inform the people within their jurisdiction, including those people working in relevant professional milieus, lawyers and non-governmental organisations, that the guarantees provided by the ECHR system are more complete than those provided by the CIS Convention.

[25] *K. Vasak, "La dimension internationale des droits de l'homme", Paris, 1980, p. 35.*