COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

DECISION
ON THE COMPETENCE OF THE COURT
TO GIVE AN ADVISORY OPINION

STRASBOURG

2 June 2004

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ,
Mr A. B. BAKA,
Mr R. MARUSTE,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mr E. FRIBERGH, *Deputy Registrar*,

Having deliberated in private on 12 May 2004,
Decides as follows:

PROCEDURE

1. By a letter of 9 January 2002 addressed to the President of the Court, the Chairman of the Committee of Ministers of the Council of Europe requested the Court, by virtue of Article 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), to give an advisory opinion on the matter raised in Recommendation 1519(2001) of the Parliamentary Assembly of the Council of Europe, concerning "the co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights".

2. Pursuant to Rule 84 § 1 of the Rules of Court, the Registrar transmitted a copy of the request to all members of the Court. In accordance with Article 31(b) of the Convention, the request was assigned to the Grand Chamber of the Court. The composition of the Grand Chamber was determined in accordance with the provisions of Article 27 § 3 of the Convention and Rule 24 of the Rules of Court. The composition of the

Grand Chamber was subsequently modified in accordance with the provisions of Rule 24 §§ 2 and 3: on 19 March 2004 Mr Gaukur Jörundsson withdrew from the case and was replaced by Mr V. Zagrebelsky, on 14 April 2004 Mr J. Casadevall withdrew from the case and was replaced by Mr R. Türmen, on 3 May 2004 Mr L. Loucaides withdrew from the case and was replaced by Mrs E. Fura-Sandström, and on 5 May 2004 Mr E. Levits withdrew from the case and was replaced by Mr R. Maruste.

3. On 21 June 2002, the President consulted the Grand Chamber and by letter of 16 July 2002 the Registrar informed the Contracting Parties that the Court was prepared to receive their written comments (Rule 84 § 2), which should at that stage be limited to the question whether the request fell within the Court's advisory jurisdiction (see para. 21 below). The time limit for submission of written comments was set as 7 September 2002 (Rule 85 § 1).

4. Written comments were submitted by the Governments of ten of the Contracting Parties (the Czech Republic, Georgia, Germany, Malta, Moldova, Poland, the Russian Federation, Slovakia, Turkey and Ukraine). Copies of the written comments were transmitted to the Committee of Ministers and to each of the Contracting Parties, as well as to the members of the Court (Rule 85 § 2). The written comments are summarised below (paras. 22 and 23 below). A further six Governments indicated that they did not intend to submit written comments.

5. The President of the Court decided that it was not necessary to give the Contracting Parties which had submitted written comments an opportunity to develop them at an oral hearing (Rule 86).

6. A meeting of the Grand Chamber to consider the request in the light of the written comments was scheduled for 9 October 2002. However, the meeting was cancelled in the light of indications that the Committee of Ministers might withdraw the request. As no withdrawal request was subsequently made, the President decided that the Court should resume its consideration of the matter.

THE BACKGROUND TO THE REQUEST

I. The Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States

7. On 8 December 1991 the leaders of the Republic of Belarus, the Russian Federation and Ukraine signed in Minsk the Agreement on establishment of the Commonwealth of Independent States (“the CIS”). On 21 December 1991 the heads of eleven States signed in Alma-Ata a Protocol

to the Agreement, in which they stressed that the Azerbaijan Republic, the Republic of Armenia, the Republic of Belarus, the Republic of Kazakstan, the Kyrgyz Republic, the Republic of Moldova, the Russian Federation, the Republic of Tajikistan, Turkmenistan, the Republic of Uzbekistan and Ukraine on a basis of equality established the Commonwealth of Independent States. In December 1993 the Commonwealth was joined by Georgia. Thus, at present the CIS comprises 12 States which were former Soviet republics. The official language of the CIS is Russian.

8. The Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States ("the CIS Convention") was opened for signature on 26 May 1995 and entered into force on 11 August 1998. It has been ratified by Belarus, the Kyrgyz Republic, the Russian Federation and Tajikistan.

9. The CIS Convention comprises a preamble and thirty nine articles. Articles 1 to 29 set out a number of substantive rights and obligations. In particular, Articles 2 to 13, 19, 20, 22, 25, 26, 27 and 29 are expressed in broadly similar terms to rights and freedoms guaranteed by the Convention and the Protocols thereto.

10. The CIS Convention also provides for the establishment of a Human Rights Commission of the Commonwealth of Independent States ("the CIS Commission") to monitor the fulfilment of the human rights obligations entered into by the member States within the framework of the CIS Convention.

11. The Regulations on the Human Rights Commission of the Commonwealth of Independent States ("the Regulations") form an integral part of the CIS Convention. Section I(2) of the Regulations provides that each of the Parties to the CIS Convention shall appoint its representative and deputy representative on the CIS Commission. Section III(1) empowers the CIS Commission to examine "individual and collective applications submitted by any person or non-governmental organisation concerning matters connected with human rights violations by any of the Parties and falling within the competence of the Commission". Section I(10) provides that the decisions of the CIS Commission shall take the form of understandings, conclusions and recommendations ("*фиксируются в виде договоренностей, заключений и рекомендаций в соответствующих документах на русском языке*..."). According to the information available, the CIS Commission has not yet been set up.

II. The Council of Europe's consideration of the co-existence of the CIS Convention and the European Convention

12. Concerns over the potential incompatibility between ratification of the CIS Convention and ratification of the European Convention were initially expressed by the Council of Europe in the context of discussions

leading up to Moldova's accession to the Council of Europe in 1995. In response to these concerns, the Secretary General of the Council of Europe requested two eminent experts in human rights law, Professors Antônio Augusto Cançado Trindade and Jochen A. Frowein, to carry out an analysis of the legal implications of States ratifying both Conventions (see SG/INF(95)17). The Parliamentary Assembly, when recommending to the Committee of Ministers that Moldova be invited to become a member of the Council of Europe, referred to Moldova's commitment, *inter alia*, "to withhold ratification of the CIS Convention on Human Rights until the implications of the co-existence of that Convention and the European Convention on Human Rights, especially as far as the control mechanisms are concerned, have been clarified by the Council of Europe; and furthermore not to ratify the said CIS Convention without the prior agreement of the Council of Europe" (Opinion No. 188(1995)). Similarly, in recommending that Ukraine be invited to become a member of the Council of Europe in 1995, the Parliamentary Assembly referred to Ukraine's commitment "pending further research on the compatibility of the two legal instruments, not to sign [the CIS Convention]" (Opinion No. 190(1995)). Finally, in recommending that the Russian Federation, which had already ratified the CIS Convention, be invited to become a member of the Council of Europe, the Parliamentary Assembly referred to the Russian Federation's commitment "to ensure that the application of the CIS Convention on Human Rights does not in any way interfere with the procedure and guarantees of the European Convention on Human Rights" (Opinion No. 193(1996)). Subsequently, at the request of the Parliamentary Assembly's Committee on Legal Affairs and Human Rights, the European Commission for Democracy through Law ("the Venice Commission") gave its opinion on the legal problems arising from the co-existence of the two conventions (see CDL-INF(1998)007).

13. In May 2001 the Parliamentary Assembly adopted Resolution 1249(2001) on the Coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights, in which it expressed its continuing concern about the compatibility of the two conventions. It considered, in particular, that the CIS Convention offered "less protection than the ECHR, both with regards to the scope of its contents, and with regard to the body enforcing it – the CIS commission cannot offer the guarantees of impartiality and independence offered by the European Court of Human Rights, nor do its recommendations enjoy the same enforceable character as judgments issued by that Court." The Parliamentary Assembly referred to its consistently held view that "no regional human rights mechanism – neither the CIS Convention nor the European Union's Charter of Fundamental Rights and Freedoms – should be allowed to weaken the unique unified system of human rights protection offered by the ECHR and

its European Court of Human Rights ... adherence to the ECHR system of protection should be mandatory and exclusive for members (and prospective members) of the Council of Europe." Reaffirming the "primacy and supremacy" of the Convention and the Court for all member States of the Council of Europe, the Parliamentary Assembly recommended member or applicant States not to sign or ratify the CIS Convention or, if they had already ratified it, to issue a legally binding declaration confirming that the Convention procedure shall not be in any way replaced or weakened through recourse to the CIS Convention procedure. It further recommended member States of both the CIS and the Council of Europe to keep their citizens informed about the difference in the legal nature of the mechanism of the Court and the mechanism of the CIS Convention.

14. On the same date the Parliamentary Assembly adopted Recommendation 1519(2001), which stated *inter alia*:

> "[T]he Assembly, taking into account the weakness of the CIS commission as an institution for the protection of human rights (from the point of view of its control mechanism; its political nature; the legal nature of its decisions; the impartiality, independence and competence of its members), and considering that the CIS commission should not be regarded as "another procedure of international investigation or settlement" in the sense of Article 35 paragraph 2.*b* of the European Convention on Human Rights, recommends that the Committee of Ministers request that the Court give an advisory opinion on the interpretation of Article 35 paragraph 2.*b* of the European Convention on Human Rights with regard to this specific issue."

15. At the 756th meeting of the Committee of Ministers in June 2001, the Ministers' Deputies decided to accept the advice of the Parliamentary Assembly. By a letter of 9 January 2002 addressed to the President of the Court, the Chairman of the Committee of Ministers requested the Court to give an advisory opinion on the matter raised in Recommendation 1519(2001).

THE DECISION OF THE COURT

I. The relevant provisions of the Convention and the Rules of Court

16. The Committee of Ministers has requested the Court to give an advisory opinion on "the co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights". The request was made under Article 47 of the Convention, which states:

"1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee."

17. Articles 48 and 49 of the Convention set out further provisions concerning advisory opinions of the Court:

Article 48 Advisory jurisdiction of the Court

"The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47."

Article 49 Reasons for advisory opinions

"1. Reasons shall be given for advisory opinions of the Court.

2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3. Advisory opinions of the Court shall be communicated to the Committee of Ministers."

18. In addition, Rule 87 of the Rules of Court provides:

"If the Court considers that the request for an advisory opinion is not within its consultative competence as defined in Article 47 of the Convention, it shall so declare in a reasoned decision."

19. The present request relates specifically to Article 35 § 2 of the Convention, the relevant part of which states:

" The Court shall not deal with any application submitted under Article 34 that

....

b is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

20. Finally, Article 55 of the Convention, referred to below, states:

"The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or

application of this Convention to a means of settlement other than those provided for in this Convention."

II. The written comments of the Governments

21. The Court observes at the outset that, although the Committee of Ministers has been empowered to request the Court to give advisory opinions since the entry into force of Protocol No. 2 to the Convention on 21 September 1970, this is the first time such a request has been submitted to the Court. The Court considers, in the light of Article 48 of the Convention, that it is required to examine, as a preliminary issue, whether it has jurisdiction to give the advisory opinion requested by the Committee of Ministers. The Court recalls in that respect that the letter by which the Contracting States were invited to submit written comments specified that any such comments should at that stage be limited to the following question:

> "Does the Court have jurisdiction to deal with the Committee of Ministers' request (Article 48 of the Convention and Rule 87)? In particular, does the request relate to a question which the Court might have to consider in consequence of any such proceedings which could be instituted before it in accordance with the Convention (Article 47 § 2 of the Convention), and more precisely, in the context of the examination of the admissibility of an individual application under Article 35 § 2 of the Convention?"

22. Six of the ten Governments which submitted written comments took the view that the Court did not have jurisdiction to give an advisory opinion on the matter submitted to it. The Governments of the Czech Republic, Germany and Ukraine considered that the issue clearly fell outwith the scope of the Court's advisory jurisdiction because it was covered by the second branch of the exception set out in Article 47 § 2, since it concerned a question "which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention", namely whether the procedure of the CIS Commission is "another procedure of international investigation or settlement" for the purposes of Article 35 § 2(b). The Government of the Russian Federation considered that while a positive answer to the Court's second question could serve as an additional argument confirming the lack of jurisdiction, the issue of the co-existence of the two conventions was not in any event a legal question concerning the interpretation of the Convention and Protocols thereto. The Government of Georgia similarly expressed the view that the Court did not have consultative jurisdiction to examine the co-existence of the two conventions, since the Court was not competent "to determine the legal role of other international instruments". They also referred to the possibility of the question arising in the context of

contentious proceedings. Finally, the Government of Moldova agreed, without specifying any reasons, that the Court did not have jurisdiction.

23. The four other Governments which submitted written comments were of the view that the Court did have jurisdiction to give an advisory opinion on the matter referred to it. The Government of Malta considered that the request did not deal with a question which might have to be considered by the Court or the Committee of Ministers in consequence of proceedings instituted in accordance with the Convention, since the question was not related to any particular case which had already been lodged with the Court or was being dealt with by the Committee of Ministers. They further considered that the matter concerned the interpretation of Article 55 of the Convention. The Government of Turkey also considered that the Court had jurisdiction, as the request was not related to any specific application. The Governments of Poland and Slovakia were generally favourable to the Court giving an advisory opinion, although they expressed certain reservations in the event that any cases raising the issue were actually pending before the Court. In this connection, the Government of Slovakia indicated that the Court's jurisdiction would not be excluded by Article 47 § 2 if the advisory opinion were "more general than concrete in its substance".

III. The advisory jurisdiction of the Court

24. The Court notes firstly that requests under Article 47 of the Convention may relate only to legal questions concerning the interpretation of the Convention and the Protocols thereto. It considers that although the request of the Committee of Ministers refers in general terms to the co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights, the Court is not called upon to examine in the abstract whether the CIS system or the CIS Commission are compatible with the Convention or how recourse to them might hinder access to the Court. It is clear from the terms of Parliamentary Assembly Recommendation 1519 (2001), to which it makes specific reference, that the request relates essentially to the concrete question whether the CIS Commission may be regarded as "another procedure of international investigation or settlement" within the meaning of Article 35 § 2(b) of the Convention. Indeed, the Recommendation proposes that the Committee of Ministers request an advisory opinion "on the interpretation of Article 35 paragraph 2.*b* of the European Convention on Human Rights with regard to this specific issue". The Court is therefore satisfied that the request for an advisory opinion concerns a legal question concerning the interpretation of the Convention.

25. The Court must next ascertain whether its jurisdiction to give an advisory opinion is excluded by Article 47 § 2 of the Convention on the

ground that the request raises a question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto or any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention. The Court considers it self-evident that the question raised in the request does not relate to the content or scope of the rights or freedoms defined in the Convention and Protocols. However, it finds it necessary to examine whether the question is one which the Court or the Committee of Ministers might have to consider in connection with proceedings instituted under the Convention.

26. The Court recalls that it has been set up to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto (Article 19 of the Convention) and that, by virtue of Article 32 § 1, its jurisdiction extends to "all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47." In the Court's view, it is clear that the "proceedings" referred to in Article 47 § 2 are those instituted by the introduction of an application under either Article 33 (inter-State cases) or Article 34 (individual applications) of the Convention.

27. The Court further observes that Article 35 of the Convention sets out the conditions for the admissibility of applications lodged under Articles 33 and 34 and that pursuant to paragraph 4 of Article 35 the Court "shall reject any application which it considers inadmissible under this Article". Consequently, it is part of the Court's task, in conducting proceedings instituted under the Convention, to examine whether the application falls foul of any of the grounds for inadmissibility and, in particular, with regard to individual applications submitted under Article 34, whether substantially the same matter has already been submitted to another procedure of international investigation or settlement. The Court therefore considers that the phrase "any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention" includes questions concerning the admissibility of applications lodged under Articles 33 and 34 of the Convention. It observes in this connection that "any other question" can only refer to questions not relating to the content or scope of the rights or freedoms defined in the Convention and Protocols, since the Court's advisory jurisdiction in that respect is specifically precluded under the first branch of Article 47 § 2.

28. The Court finds support for this approach in the *travaux préparatoires* to Protocol No. 2 to the Convention, from which it transpires that the intention in conferring advisory jurisdiction on the Court was to complement the Court's existing judicial jurisdiction under former Article 48 of the Convention, that is its competence to examine individual

applications or inter-State complaints (which at that time could only be referred to it by a State Party or by the former European Commission of Human Rights ("the Commission")). Thus, a distinction was drawn between matters which fell within the Court's existing jurisdiction, which by virtue of former Article 45 extended to "all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48", and other questions concerning the interpretation of the Convention, which could not arise in connection with the examination of such cases. The aim was to confer on the Court "a general jurisdiction to interpret the Convention, which would therefore include matters arising out of the application of the Convention but not resulting from 'contentious proceedings'" (see AS/Jur(11)8, AS/Jur(11)25 rev. and Doc. 1061). The examples which were given of issues which might come within this general jurisdiction concerned primarily procedural points such as the election of judges, the duties of the Secretary General of the Council of Europe under the Convention and the procedure of the Committee of Ministers in exercising its role in the execution of judgments. Furthermore, the commentary on the draft Protocol No. 2, prepared in June 1962, stated that the object of the limitations on the Court's jurisdiction to give advisory opinions was "to prevent exercise of the consultative competence of the Court in questions which could come within the Court's primary function, namely, its judicial function" (see CM(62)147 rev.). In that connection, it was added, with specific reference to the reasons for the inclusion of the second branch of the limitations, that "the Court or the Committee of Ministers might, in consequence of the institution of proceedings, have to consider questions other than those concerning the content or scope of rights and freedoms." By way of explanation, it was stated that the intention was to exclude, *inter alia*, "questions of competence or of procedure which might come before one of the bodies provided for by the Convention in consequence of the institution of proceedings." Thus, "the consultative competence of the Court does not extend to questions regarding the conditions of admissibility of applications" (*ibid.*). The Court notes in this connection that while at that time the Court had ultimate jurisdiction with regard to the interpretation and application of the Convention, including admissibility criteria, admissibility issues fell primarily within the competence of the Commission, whereas the Convention now confers on the Court itself the responsibility of examining the admissibility of applications.

29. The Court recalls that the question whether a matter raised in an individual application had already been submitted to another procedure of international investigation or settlement has in fact been addressed in the context of individual applications on a number of occasions in the past by the Commission in relation to the similar provision which was contained in former Article 27 § 1(b) of the Convention. In several decisions the

Commission concluded that the matter was not "substantially the same" and consequently did not find it necessary to examine whether the other procedure at issue fell within the terms of former Article 27 § 1(b) (see *Council of Civil Service Unions v. the United Kingdom*, no. 11603/85, decision of 20 January 1987, Decisions and Reports ("DR") 50, p. 228, concerning the Committee on Freedom of Association of the International Labour Organisation (applicants not identical); and *Pauger v. Austria*, no. 16717/90, decision of 9 January 1995, DR 80, p. 24 (issue not the same), and *Peltonen v. Finland*, no. 19583/92, decision of 20 February 1995, DR 80, p. 38 (applicant not the same), both concerning the United Nations Human Rights Committee). In other cases, however, it accepted, albeit implicitly, that the other procedure to which the same matter had been submitted was indeed "another procedure of international investigation or settlement" (see *Calcerrada Fornieles and Cabeza Mato v. Spain*, no. 17512/90, decision of 6 July 1992, DR 73, p. 214, *Pauger v. Austria*, no. 24872/94, decision of 9 January 1995, DR 80, p. 170, and *C.W. v. Finland*, no. 17230/90, decision of 9 October 1991, unreported, all concerning the UN Human Rights Committee; and *Cereceda Martin v. Spain*, no. 16358/90, decision of 12 October 1992, DR 73, p. 120, concerning the Committee on Freedom of Association of the International Labour Organisation, all of which were declared inadmissible in application of Article 27 § 1(b)).

30. More significantly, in two other cases the Commission made it clear that the mere fact that the matter had been submitted to another procedure of international investigation or settlement did not suffice in itself to exclude the Commission's competence and that a qualitative assessment was also necessary in order to ensure that the procedure fulfilled certain criteria. Thus, in the case of *Lukanov v. Bulgaria* (no. 21915/93, decision of 12 January 1995, DR 80, p. 108), the Commission had to consider whether the procedure for examination of the applicant's situation by the Human Rights Committee of the Inter-Parliamentary Union could be regarded as "another procedure of international investigation or settlement". In reaching the conclusion that it could not, the Commission expressed the view that the term "another procedure" referred to "judicial or quasi-judicial proceedings similar to those set up by the Convention" and that the term "international investigation or settlement" referred to institutions and procedures set up by States, thus excluding non-governmental bodies, which it considered the Inter-Parliamentary Union to be. Similarly, in the case of *Varnava and others v. Turkey* (nos. 16064-66/90 and 16068-73/90, decision of 14 April 1998, DR 93, p. 5), which concerned the United Nations Committee on Missing Persons in Cyprus, the Commission not only asserted that the procedures envisaged referred to those instituted by way of a "petition" lodged formally or substantively by the applicant but also took into account the limited nature of the committee's investigative capacity and the fact that

the committee could not attribute responsibility for the deaths of any missing persons. In these cases, therefore, the Commission adopted the approach of ascertaining, in the context of its examination of admissibility, whether a particular procedure fell within the scope of former Article 27 § 1(b) of the Convention.

31. The Court itself has been called on to examine questions under Article 35 § 2(b) in only a handful of cases (see *Yağmurdereli v. Turkey*, no. 29590/96, decision of 13 February 2001, in which the Court noted that since Turkey had not ratified the Optional Protocol to the International Covenant on Civil and Political Rights, the same matter could not have been submitted to the UN Human Rights Committee, and *Smirnova v. Russia*, nos. 46133/99 and 48183/99, decision of 3 October 2002, in which the Court found that the matter referred to the UN Human Rights Committee was not "substantially the same"; see also *Hartman v. the Czech Republic*, no. 53341/99, decision of 17 December 2002, in which the matter was not addressed, as the complaint was declared inadmissible on another ground, and *Folgerø v. Norway*, no. 15472/02, communicated to the respondent Government on 4 December 2003, both concerning the UN Human Rights Committee). Nevertheless, the Court endorses the approach of the Commission and considers that the decisions of the Commission – in particular, those in the cases of *Lukanov* and *Varnava* – amply demonstrate that in the context of proceedings instituted under Article 34 of the Convention an examination of the question whether the same matter has already been submitted to another procedure of international investigation or settlement may be required and that this examination is not limited to a formal verification but extends, where appropriate, to ascertaining whether the nature of the supervisory body, the procedure which it follows and the effect of its decisions are such that the Court's jurisdiction is excluded by Article 35 § 2(b). Consequently, the question whether a particular procedure comes within the scope of Article 35 § 2(b) is a question which the Court might have to consider in consequence of proceedings instituted in accordance with the Convention and its advisory jurisdiction is in principle excluded.

32. Turning to the specific procedure established by the CIS Convention, namely the examination of applications by the CIS Commission, the Court notes that one of the States Parties to the Convention, namely the Russian Federation, has also ratified the CIS Convention, while five further States Parties to the Convention are also member States of the Commonwealth of Independent States, namely Armenia, Azerbaijan, Georgia, Moldova and Ukraine. Three of these (Armenia, Georgia and Moldova) have signed the CIS Convention. The CIS Convention has entered into force. Moreover, many substantive provisions of that Convention echo those which the Court has the task of interpreting and applying. In these circumstances, the Court considers that it cannot be excluded that the question whether the procedure

before the CIS Commission can be regarded as "another procedure of international investigation or settlement" within the meaning of Article 35 § 2(b) might have to be considered in the future in the context of the Court's examination of an individual application lodged under Article 34 of the Convention. Moreover, as noted above this would entail an analysis of, *inter alia*, the independence and impartiality of the CIS Commission, the nature of its proceedings and the effect of its decisions.

33. The Court notes finally that certain of the Governments which submitted written comments considered that the Court was not precluded from giving an advisory opinion as long as the request was not related to any specific application pending before it. In the view of the Court, this approach to the interpretation of Article 47 § 2 does not reflect the wording of that provision, which speaks of "such proceedings as *could* be instituted in accordance with the Convention" [emphasis added] and not to proceedings which have in fact been instituted. Furthermore, the commentary on the draft Protocol No. 2 expressly stated that the proceedings referred to were "past, present, future or merely hypothetical" (see CM(62)147 rev.). The Court considers that the purpose of the provisions excluding its advisory jurisdiction is to avoid the potential situation in which the Court adopts in an advisory opinion a position which might prejudice its later examination of an application brought under Articles 33 or 34 of the Convention and that it is irrelevant that such an application has not and may never be lodged. In this respect, it again refers to the *travaux préparatoires*, in which it was stated that it was necessary "to ensure that the Court shall never be placed in the difficult position of being required, as the result of a request for its opinion, to make a direct or indirect pronouncement on a legal point with which it might subsequently have to deal as a main consideration in some case brought before it" (see CM(61)91). The Court considers therefore that it suffices to exclude its advisory jurisdiction that the legal question submitted to it is one which it might be called upon to address in the future in the exercise of its primary judicial function, that is in the examination of the admissibility or merits of a concrete case.

34. The Court notes finally the view of the Government of Malta that the Court is in effect being called upon to give an interpretation of Article 55 of the Convention and to determine the relationship of another regional arrangement with the Convention. In that respect, the Court refers to its conclusion above (para. 24) that the request submitted to it by the Committee of Ministers is in fact limited to the more specific question whether the CIS system can be regarded as "another procedure of international investigation or settlement" for the purposes of Article 35 § 2(b). The Court considers, therefore, that the request does not seek to obtain an advisory opinion on the general issue of the co-existence of the two Conventions and that it is consequently not called upon in the context of the

present decision to address any issues arising out of Article 55 of the Convention.

35. In conclusion, the Court finds that the request for an advisory opinion relates to a question which the Court might have to consider in consequence of proceedings instituted in accordance with the Convention and that it therefore does not have competence to give an advisory opinion on the matter referred to it.

For these reasons, the Court unanimously

Decides that the request for an advisory opinion is not within its competence as defined in Article 47 of the Convention.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 2 June 2004.

Luzius WILDHABER
President

Erik FRIBERGH
Deputy Registrar