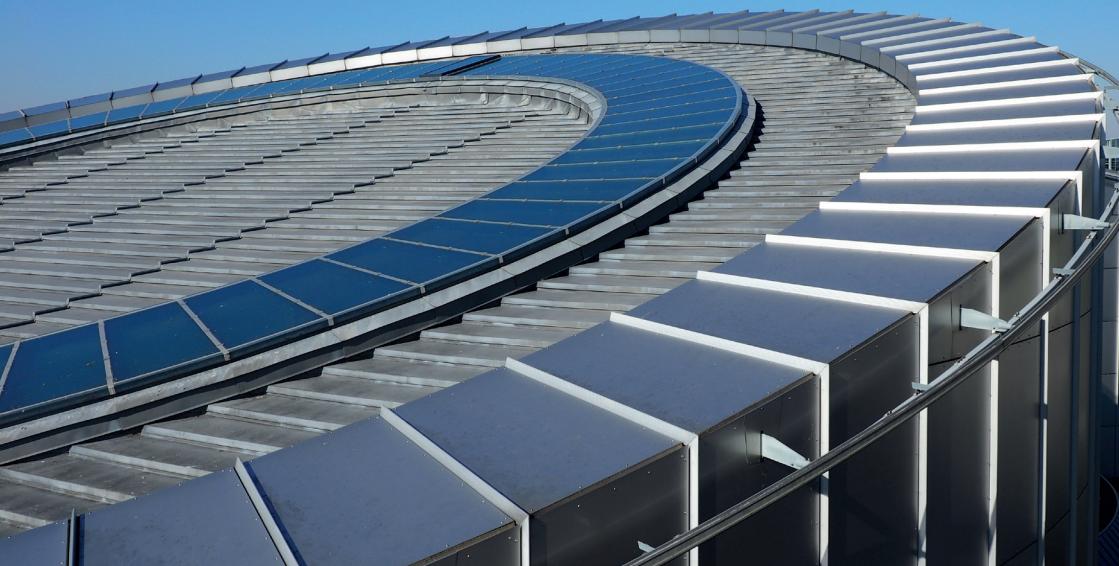


THE INDIVIDUAL APPLICATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS



- ▶ Linos-Alexandre SICILIANOS
- ▶ Maria-Andriani KOSTOPOULOU

PROCEDURAL GUIDE



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

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

The individual application under the European Convention on Human Rights

Procedural guide

Linos-Alexandre SICILIANOS
Maria-Andriani KOSTOPOULOU

French edition

*La requête individuelle en vertu
de la Convention européenne
des droits de l'homme –
Guide procédural*

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Acronyms and abbreviations

AFDI	Annuaire français de droit international
AIDH	Annuaire international des droits de l'homme
CDDH	Steering Committee for Human Rights
CEJEC	Centre d'études juridiques européennes et comparées
CETS	Council of Europe Treaty Series
CJEU	Court of Justice of the European Union
CM	Committee of Ministers
Convention	European Convention on Human Rights
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
D	Dalloz (Recueil)
dec.	Decision
ECHR	European Court of Human Rights
eComms	electronic communications service
ETS	European Treaty Series
GC	Grand Chamber
HRLR	Human Rights Law Review
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organisation
IMSI	Immediate and Simplified Communication
LGDJ	Librairie générale de droit et de jurisprudence
NGO	Non-governmental organisations
NJHR	Nordic Journal of Human Rights
NQHR	Netherlands Quarterly of Human Rights

PACE	Parliamentary Assembly of the Council of Europe
Rec	Recommendation
Res	Resolution
Rev. Aff. Eur.	Revue des affaires européennes
RTDH	Revue trimestrielle des droits de l'homme
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
WECL	Well established case law
WLP	Wolf Legal Publishers

Introduction

The European Convention on Human Rights (“the Convention”) is one of the most important international instruments for human rights protection.

It was signed in Rome on 4 November 1950 and entered into force on 3 September 1953.¹ The Convention is now binding on the 47 member States of the Council of Europe and reflects the core values inherent in the “European public order”, as well as principles that are integral to democracy and the rule of law. In the words of the European Court of Human Rights (ECHR), “democracy (...) appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.”²

As well as being one of the foremost international treaties, the Convention has also been incorporated into the legal systems of the contracting parties. More than 60 years after it entered into force and thanks to an extremely comprehensive body of case-law, the Convention now permeates most branches of domestic law in the States Parties. Not only, therefore, does it set out a number of constitutional rights, but it is also part and parcel of everyday legal practice at national level.

As amended by Protocol no. 11,³ Article 34 of the Convention recognises an individual right to petition whose exercise is no longer subject to a declaration confirming that it has been accepted by the States Parties. It is a procedural right in the true sense, therefore, one that is unique, as such, at international level and available to the 800-plus people who fall within the jurisdiction of the contracting parties. The recognition of an unconditional right of this kind, combined with the substantial enlargement of the Council of Europe, has led to exponential growth in the number of individual applications, presenting a major operational challenge for the system.

The main purpose of the Protocol No. 14⁴ to the Convention, which entered into force on 1 June 2010, was to simplify and speed up proceedings before the ECHR, as a way of addressing this problem. Since

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005).

² *United Communist Party of Turkey and Others v. Turkey* [GC], no. 19392/92, 30 January 1998, § 45.

³ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (ETS No. 155).

⁴ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No. 194).

then, boosted by the high-level conferences on the future of the Convention system,⁵ the Court has significantly improved its working methods, enabling it to bring the number of pending cases under control. Similar changes have been observed at the level of the Council of Europe's Committee of Ministers in the context of supervision of the execution of the Court's judgments.

All these moves have led the procedure under the Convention to become ever more sophisticated, and practitioners of the system can be forgiven if at times they feel slightly lost in the maze. The purpose of this contribution is to examine, in the simplest possible terms, the various phases of the procedure before the Convention bodies and to provide a practical guide for users, including, and indeed especially, for those representing applicants.

The present volume covers all the stages from preparing and lodging an application with the Court to full execution of a Court judgment and closure of the supervisory procedure by the Committee of Ministers.

In this context, brief mention will be made of the Convention bodies and their role in the functioning of the system (Chapter I), before going on to look at the procedure before the Court (Chapter II) and the Committee of Ministers (Chapter III).

⁵ See the Interlaken Conference (2010), the Izmir Conference (2011), the Brighton Conference (2012), the Brussels Conference (2015) and the Copenhagen Conference (2018).

Chapter I

Organs of the European Convention on Human Rights

The European Court of Human Rights is the main organ of the Convention (Section 1), while the Committee of Ministers ensures that the system is effective (Section 2). The other organs of the Convention (Section 3) are the Parliamentary Assembly of the Council of Europe, not least as it elects the Court's judges, the Secretary General of the Council of Europe, who has investigative powers, and the Council of Europe Commissioner for Human Rights, who has the right to intervene in the Court's proceedings. It is worth noting at this point that while the main Council of Europe institutions are also Convention bodies, the ECHR is not an organ of the Council of Europe. It is an international court, established and governed by an international treaty, the Convention, and is independent from the Council of Europe, institutionally and functionally speaking.

Section 1. European Court of Human Rights: the main organ of the Convention

Following the abolition of the European Commission of Human Rights with the entry into force of Protocol No. 11 on 1 November 1998, the Court became the main organ of the European Convention on Human Rights. The Court's operation is governed by Article 19 et seq. of the Convention. Article 19 establishes the Court and tasks it with ensuring compliance with the obligations arising for the contracting parties to the Convention and the Protocols thereto.

The Court operates on a permanent basis⁶ and is made up of a number of judges equal to the number of contracting parties,⁷ i.e. 47. Judges are elected for a single period of nine years. Their term of office shall expire when they reach the age of 70.⁸ All the judges meet in plenary to rule

⁶ Article 19 (2) of the Convention.

⁷ Article 20 of the Convention.

⁸ Article 23 of the Convention. See, however, Article 2 of the Protocol No. 15 to the Convention which provides that "Candidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly, further to Article 22". It should also be noted that "The judges shall hold office until replaced" (Article 23 § 3 of the Convention). This is an important provision insofar as it ensures continuity of the Court.

mainly on administrative and organisational matters⁹ (A). To enable it to operate more effectively and organise its work better, the Court currently consists of five Sections (B). To consider cases brought before it, the Court sits in four formations, namely a single-judge formation, committees of three judges, Chambers of seven judges and a Grand Chamber of seventeen judges¹⁰ (C).

A. Plenary Court

The plenary Court is the Court's highest formation. It has jurisdiction to examine administrative and organisational matters related to the workings of the Court. Plenary sessions are normally convened by the President of the Court. They may also be convened if one third of the members of the Court so request and, in any event, take place at least once a year. The quorum required for the plenary Court is two thirds of the elected judges in office. If there is no quorum, the President will adjourn the sitting.¹¹ In practice, however, this hardly ever happens as turnout at the plenary sessions is always very high.

Article 25 of the Convention lists the main tasks of the plenary Court, namely electing the President, Vice-Presidents and Presidents of the Sections of the Court, setting up Sections,¹² adopting the Rules of the Court, electing the Registrar and Deputy Registrar of the Court, and asking the Committee of Ministers to reduce to five the number of judges of the Chambers.¹³ This list is not exhaustive, moreover, as the rules specifically mention other powers and responsibilities of the plenary Court, such as settling any disagreement that might arise between the President and judges regarding activities incompatible with the office of judge¹⁴ and dismissing judges who have ceased to fulfil the required conditions.¹⁵

In practice, the plenary Court is playing an increasingly prominent role, endorsing the Court's judicial policy guidelines, setting up internal committees and working groups and adopting their reports, preparing the Court's contribution to conferences on the future of the Convention system

⁹ Article 25 of the Convention and Rule 20 of the Rules of Court.

¹⁰ Article 26 § 1 of the Convention.

¹¹ Rule 20 of the Rules of Court.

¹² Article 25 (b) and (c) refers to "Chambers" of the Court but they are actually "Sections". See also Rules 8, 12 and 25 of the Rules of Court. On the difference between Chambers and Sections, see below, under B.

¹³ The possibility of making such a request is provided for in Article 26 § 2 of the Convention, as amended by Protocol No. 14. The provision has never been applied, however.

¹⁴ Rule 4 § 1 of the Rules of Court.

¹⁵ Rule 7 of the Rules of Court.

(such as the Interlaken, Izmir, Brighton or Brussels conferences), or determining the Court's position in negotiations on new Protocols to the Convention.

B. Sections: administrative units

The different Sections of the Court are not mentioned as such in the Convention. An invention of the Rules of Court, they are not to be confused with the Chambers. The Sections are essentially administrative units and there are currently five of them, three with nine judges and two with ten (making 47 judges in total). The composition of the Sections is designed to ensure, as far as possible, geographical and gender balance, while at the same time reflecting the different legal systems found in the States Parties. Two Sections are chaired by the Vice-Presidents of the Court and the other three by the three Section Presidents. Each Section elects its own Vice-President.

Unlike Sections, Chambers are judicial formations. Under Article 26 § 1 of the Convention, they always consist of seven judges. The Chambers operate within the Sections. The President of each Section takes part in all Chamber formations while the other judges in the Section take part in Chamber formations on a rota basis. That way, there are always two or three substitute judges for each judicial formation, thus obviating the need to adjourn cases if a judge suddenly becomes unavailable. If a judge is unable to attend owing to ill health, for example, he/she will normally be replaced by the first substitute (unless he/she is the judge elected in respect of a contracting State which is a party to the case, who sits as an *ex officio* member of the Chamber concerned).¹⁶ The President of the Court participates in one of the Sections that has ten judges. Owing to his/her workload, he/she participates only as a “national judge” in Chamber formations sitting in cases against the State in respect of which he/she was elected.

Like the Chambers, three-judge committees operate as judicial formations within the Sections.¹⁷ More generally, Sections are units within whose framework the performance of judicial functions is organised. The Sections also decide any administrative matters related to their own operation. They are assisted by a Registrar, a deputy Registrar, lawyers and other members of the Court's Registry.

¹⁶ Article 26 § 4 of the Convention.

¹⁷ See Article 26 § 1 of the Convention, which refers to “Chambers” of the Court, although they are actually “Sections”.

C. Judicial formations

1. Single judges

The single-judge formation was instituted by Protocol No. 14 to the Convention¹⁸ in order to simplify and speed up the processing of cases that are manifestly inadmissible or which can be struck out of the Court's list of cases "without further examination",¹⁹ a power previously exercised by three-judge committees. This move has had a major impact on the functioning of the Court, enabling it to drastically reduce the backlog of pending cases.²⁰

In principle, all the judges act as single judges. They are appointed by the President of the Court for successive 12-month periods. To ensure their impartiality, Article 26 § 3 of the Convention stipulates that when sitting as a single judge, a judge may not examine any application "against the High Contracting Party in respect of which that judge has been elected". Each single judge is tasked with examining applications against a predefined list of countries. They are assisted in their work by non-judicial rapporteurs, namely experienced lawyers from the Registry.²¹

The duties of single judge are performed alongside others stemming from each judge's involvement in a particular Section. In other words, the judges in question continue to examine applications within their Section. In addition, Rule 27A § 2 (a) of the Rules of Court allows Presidents of Sections to sit as single judges. This means that in practice, at the time of communicating an application to the respondent State, the Section President will dismiss any complaints that are manifestly inadmissible under Article 35 of the Convention.²² In this way, only that part of the application which raises questions that merit in-depth consideration is forwarded to the Government.

Similar observations apply, *mutatis mutandis*, with regard to the competences exercised by the Vice-Presidents of the Sections when considering requests for interim measures. In effect, the dismissal of such a

¹⁸ See Articles 6 and 7 of Protocol No. 14, which amended Article 26 and added Article 27 to the Convention. See also Rule 27A of the Rules of Court.

¹⁹ Article 27 § 1 of the Convention. See also the Explanatory Report of Protocol No. 14, § 67. Sicilianos, L.-A., "La 'réforme de la réforme' du système de protection de la Convention européenne des droits de l'homme", *AFDI*, vol. 49 (2003), p. 611-640.

²⁰ See the statistics contained in the Court's *Annual Reports*, in particular for the years 2014 and 2015.

²¹ Article 24 § 2 of the Convention and Rule 18A of the Rules of Court.

²² See also Rule 54 §§ 2 (b) and 3 of the Rules of Court.

request may go hand in hand with dismissal of the relevant application by the Vice-President, acting here as a single judge.²³

2. Committees

The committees consist of three judges who are appointed by rotation within the Sections, for renewable 12-month periods. The committees in question do not normally include Section Presidents. Each committee is chaired by the member having precedence in the Section.²⁴

Unlike the single-judge formation, three-judge committees existed before Protocol No. 14 to the Convention came into being. Protocol No. 14, however, gave them much wider powers. Hitherto, the committees could merely declare applications inadmissible or strike them out of the Court's list of cases. Protocol No. 14 introduced a new competence, allowing committees to declare applications admissible and to decide on their merits "if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court".²⁵ In other words, three-judge committees can now deliver judgments (and not just decisions) and, where appropriate, find that there has been a violation of the Convention.

The aim of this competence introduced by Protocol No. 14 was especially to make it easier to deal with the large number of "repetitive" cases. For when drafting the Protocol, it was observed that repetitive cases accounted for a high proportion of cases pending before the Court.²⁶ This realisation prompted the drafters of the Protocol to introduce a new arrangement for such cases, which are now handled not by Chambers of seven judges but rather by three-judge committees under a simplified procedure.

Guided by the same concern for simplification and efficiency, Protocol No. 14 introduced a provision that allows three-judge committees to be formed without the participation of the judge elected in respect of the High Contracting Party concerned, i.e. without the participation of the "national judge".²⁷ Clearly, this provision makes for greater flexibility in the formation and operation of committees, especially in the case of litigation originating from those countries which have the highest number of applications pending. That said, a committee can, at any stage of the

²³ See Rules 27A § 2 (b) and 54 § 4 of the Rules of Court.

²⁴ Rule 27 of the Rules of Court.

²⁵ Article 28 § 1 (b) of the Convention, as added by Article 8 of Protocol No. 14.

²⁶ See the Explanatory Report of Protocol No. 14, § 68.

²⁷ See Article 28 § 3 of the Convention, introduced by Article 8 of Protocol No. 14.

proceedings, invite the national judge to take the place of one of its members “having regard to all relevant factors”, including whether the respondent State has contested the application of the procedure introduced by Protocol No. 14, allowing committees to render judgments.

It will thus be observed that a State Party to the Convention can be found to be in breach of its international obligations by an international judicial formation in which the national judge played no part. This is a small revolution in international law, inspired by EU law and the procedure before the CJEU.

Nowadays, the use of three-judge committees is becoming increasingly common. The committees’ activities are no longer confined to merely endorsing friendly settlements or approving the terms of unilateral declarations²⁸ and striking applications out of the list of cases, or to declaring cases inadmissible or delivering judgments in straightforward cases concerning the length of proceedings. By adopting a broader definition of “well-established case-law”, the Court has sought to further exploit the potential of Protocol No. 14, using the committees to deal with cases concerning a growing number of rights enshrined in the Convention and its Protocols. The details of the procedure before three-judge committees will be discussed later. For now, though, it is important to emphasise that a formation which was once merely of secondary or residual importance at the European Court of Human Rights is now becoming – quantitatively speaking, at any rate – the norm.

3. Chambers

The Court’s Chambers currently consist of seven judges.²⁹ They handle cases that do not fall within the competence of either single judges or three-judge committees. In other words, the Chambers deal with cases which require further examination concerning their admissibility and/or their merits. This is especially true for cases which reveal systemic problems or which raise issues of principle for the domestic legal order, for applications which raise new issues relating to the interpretation and application of the Convention or which arise in a new factual context and, lastly, for cases that require a delicate balancing exercise, particularly with regard to the principle of proportionality.

²⁸ On unilateral declarations see below, under chapter II, Section 9 B.

²⁹ It will be noted that the plenary Court can request the Committee of Ministers to reduce to five the number of judges of the Chambers (Articles 25 (f) and 26 § 2 of the Convention), but that it has yet to exercise this power.

The Chambers operate within the five Sections of the Court. They are presided over by the Section President, unless he/she is the judge elected in respect of the State Party concerned, in which case the Chamber formation is presided over by the Vice-President of Section. Unlike three-judge committees, which can be formed without the participation of the judge elected in respect of the respondent State, the latter sits as an *ex officio* member of any Chamber which is called upon to try a case against that State. If the national judge is not part of the Section to which the case is assigned in accordance with Rules 51 and 52 of the Rules of Court, he/she will be invited to sit as an *ex officio* member of the Chamber under Article 26 § 4 of the Convention.³⁰ Furthermore, if the national judge is absent or unable to sit, the President of the Court will choose someone from a list submitted in advance by the State concerned, to sit in an *ad hoc* capacity.³¹ In the interests of cost-effectiveness and procedural convenience, the State in question may designate another Court judge to sit as an *ad hoc* judge.

Apart from the Section President and the national judge (or the *ad hoc* judge), the other five members of the variously composed Chambers are appointed by rotation from among the judges in the Section. The remaining judges act as substitutes, who can be called upon to sit if a member is unable to sit.

4. Grand Chamber

The Grand Chamber is composed of seventeen judges, plus, generally speaking, three substitute judges (and three reserve judges).³² The Grand Chamber examines cases which raise a serious question affecting the interpretation or application of the Convention, serious issues of general importance and questions whose resolution before the Chamber might have a result inconsistent with a judgment previously delivered by the Court.³³ In other words, cases are referred to the Grand Chamber only in exceptional circumstances and its primary role is to ensure consistency in the Court's case-law.

³⁰ See also Rule 26 § 1 (b) of the Rules of Court.

³¹ Article 26 § 4 of the Convention, Rules 29 and 26 § 1 (a) *in fine* of the Rules of Court.

³² Substitute judges participate in hearings and may be called upon to take the place of an ordinary member who is unable to sit. This avoids procedural complications, such as adjourning the hearing, and obviates the need to hold another hearing if the circumstances which prevent an ordinary member from attending to his/her duties arise after the hearing but before the judgment has been adopted. The reserve judges must be ready to act as substitute judges should the need arise.

³³ Articles 30 and 43 § 2 of the Convention, Rules 72 and 73 of the Rules of Court.

As a general rule, the Grand Chamber is presided over by the President of the Court, unless he/she is elected in respect of a contracting State which is a party to the case, in which case it is presided over by the Vice-President having precedence. The composition of the Grand Chamber is (in part) different for each case. In effect, the members of the Court's Bureau – namely, the President of the Court, the Vice-Presidents and the Section Presidents – sit as *ex officio* members of the Grand Chamber,³⁴ thereby ensuring a degree of stability in its composition. The national judge also sits as an *ex officio* member, on the same terms as in the Chambers.³⁵ The other judges are chosen in accordance with the Rules of Court, i.e. by a drawing of lots.³⁶ This drawing of lots is performed by the President of the Court.

When a case is referred to the Grand Chamber under Article 43 – i.e. by referral following a Chamber judgment – no judge from the Chamber which rendered the judgment may sit in the Grand Chamber, “with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned”.³⁷ Latterly, the President of the Chamber has refrained from sitting in the Grand Chamber so as to better ensure its objective impartiality. Where a Chamber relinquishes jurisdiction in favour of the Grand Chamber under Article 30 of the Convention, all the members of that Chamber sit as members of the Grand Chamber, but the Chamber will not have delivered its judgment in that case so the issue of objective impartiality does not arise.

Section 2. Committee of Ministers: ensuring an effective system

The Committee of Ministers is a key Council of Europe body. It meets at various levels: at ministerial level, at the level of the Permanent Representatives of the Council of Europe member States and at the level of the Ministers' Deputies. The composition and powers of the Committee of Ministers are set out in Chapter IV of the Council of Europe Statute.³⁸ Its primary objective is to safeguard the values on which the Council of Europe is based and in that context it supervises compliance with the obligations entered into by member States.

³⁴ Article 26 § 5 of the Convention, Rule 24 § 2 (a) of the Rules of Court.

³⁵ Article 26 §§ 4 and 5 of the Convention, Rule 24 § 2 (b) of the Rules of Court.

³⁶ Article 24 § 2 (e) of the Rules of Court.

³⁷ Article 26 § 5 of the Convention, Rule 24 § 2 (d) of the Rules of Court.

³⁸ Council of Europe Statute (ETS No. 001).

As well as being a Council of Europe institution, the Committee of Ministers is a major organ of the Convention and has been since 1950 when the original text of the Convention assigned the Committee two roles, judicial and diplomatic.

Even though it was essentially a political body, being made up of representatives of the Governments of Council of Europe member States, the Committee of Ministers also exercised judicial powers in connection with the reports produced by the former European Commission of Human Rights. Under Article 32 of the original text of the Convention, the Committee of Ministers was required to examine the Commission's reports. If it approved them while at the same time finding that there had been a violation of the Convention, the Committee could award just satisfaction to the injured party under Article 50 of the Convention (current Article 41). Since, however, these decisions require a two-thirds majority in order to be adopted by the Committee of Ministers,³⁹ there was always a risk that this procedure might not produce a binding result.⁴⁰

That the Committee of Ministers should have been vested with judicial powers was understandable in the circumstances. The mechanism provided for in the Convention was unprecedented, revolutionary even, in international law, especially where recognising the right to lodge individual applications was concerned. By assigning the Committee a judicial role, it was hoped to allay States' fears by affording them a degree of control over the way the system operated. The Committee of Ministers' competence in the judicial sphere was also perceived, however, as a conflict of powers which had the potential to undermine the credibility of the system, so Protocol No. 11 to the Convention, which entered into force on 1 November 1998, abolished the European Commission of Human Rights and, with it, the Committee of Ministers' judicial role.

Since then, the Committee has focused on its powers and responsibilities in the political and diplomatic spheres, which essentially involve supervising the execution of the Court's judgments and the terms of friendly settlements between States and applicants. More specifically, and in accordance with Article 46 § 1 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to

³⁹ See Article 9 § 4 of the Rules of Procedure for the meetings of the Ministers' Deputies.

⁴⁰ It will be recalled here that the first three inter-state cases brought by Cyprus against Turkey failed to produce a Committee of Ministers decision regarding the reports of the former European Commission of Human Rights. See Committee of Ministers, Resolution DH (79) 1 (concerning the first two inter-state applications) and Resolution DH (92) 12 (concerning the third inter-state application).