HOUSE OF LORDS
Library Note

Debate on 19 May: European Convention on Human Rights

This Library Note provides background reading for the debate to be held on 19 May 2011:

"To call attention to the European Convention on Human Rights"

The Note outlines the history of the Convention, before considering its relationship with the United Kingdom. Finally, the Note outlines recent discussion about the application of the Convention in the UK, particularly in the light of the 'votes for prisoners' judgment, and the possible introduction of a British Bill of Rights.

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1. Introduction

In 2010 the Convention for the Protection of Human Rights and Fundamental Freedoms, more generally known as the European Convention on Human Rights, celebrated its 60th anniversary. Originally signed by twelve States, today the European Convention on Human Rights ('the Convention' or ECHR) has jurisdiction in 47 member States, covering over 800 million people. Marking the occasion at a ceremony in Strasbourg, Thorbjørn Jagland, Secretary General of the Council of Europe, said:

> The unique strength of the European Convention on Human Rights and Fundamental Freedoms is that its master builders were determined, in the aftermath of a second terrible war in half a century, never again to permit state sovereignty to be a shield for perpetrators of crimes against humanity, from international liability.
>
> ... Today, 800 million Europeans can bring their case to the Court in Strasbourg if they believe their rights, as guaranteed by the European Convention, to be violated. The governments on the European continent can no longer hide behind State sovereignty.
>
> Their actions are no longer their exclusive jurisdiction.
>
> This is unprecedented in the history of mankind. It is a revolution in the meaning of individuality and the way it can be protected.
>
> (Council of Europe website, 'Speech by Thorbjørn Jagland', 19 October 2010)

The first section of this Library Note describes the main features of the Convention and outlines the development of the ECHR and the European Court of Human Rights (the European Court). It concludes by describing how the Convention and the European Court operate and discusses the impact of the ECHR more generally. The second section of this Library Note considers the relationship between the Convention and the UK. In so doing it outlines the ECHR's history specific to the UK and the impact of the Convention, with reference to the Human Rights Act 1998. In the context of last year's 'votes of prisoners' judgment, the third section presents some of the reactions to the European Court's decision that consider the broader relationship between the UK and the European Court. In view of the Government's proposal to introduce a British Bill of Rights, it then considers what it might contain and its likely effect. The Note concludes by assessing the Government's approach to reform the European Court through negotiation at the Council of Europe.

2. The European Convention on Human Rights

2.1 What is the Convention?

The Convention is an international treaty that outlines a number of rights that State signatories are legally obliged to secure and guarantee to all individuals within their jurisdictions. There are currently 47 members (see 2.2). The Convention contains provisions that include:

> ... the right to life, the right to a fair hearing, the right to respect for private and family life, freedom of expression, freedom of thought, conscience and religion and the protection of property. The Convention prohibits, in particular, torture and inhuman or degrading treatment or punishment, forced labour, arbitrary and unlawful detention, and discrimination in the enjoyment of the rights and freedoms secured by the Convention.
>
> (European Court of Human Rights, 'The ECHR in 50 Questions', October 2010)

The document is unrelated to the European Union, though the EU hopes to accede to the Convention (EU Members are already members of the Convention). Rights are enforced by decisions of the European Court, though its decisions are implemented at state level. Since 1998, recognition of the European Court of Human Right's jurisdiction has been a compulsory condition of membership of the Convention (see 2.4 below for more detail).

2.2 Members of the Convention

The table below presents the names of the current members of the Convention, together with information about when each signed and ratified it, and when it entered into force.

Table 1

States	Signature	Ratification	Entry into force	Notes
Albania	13/7/1995	2/10/1996	2/10/1996	
Andorra	10/11/1994	22/1/1996	22/1/1996	
Armenia	25/1/2001	26/4/2002	26/4/2002	
Austria	13/12/1957	3/9/1958	3/9/1958	
Azerbaijan	25/1/2001	15/4/2002	15/4/2002	
Belgium	4/11/1950	14/6/1955	14/6/1955	
Bosnia and Herzegovina	24/4/2002	12/7/2002	12/7/2002	
Bulgaria	7/5/1992	7/9/1992	7/9/1992	
Croatia	6/11/1996	5/11/1997	5/11/1997	
Cyprus	16/12/1961	6/10/1962	6/10/1962	
Czech Republic	21/2/1991	18/3/1992	1/1/1993	1
Denmark	4/11/1950	13/4/1953	3/9/1953	
Estonia	14/5/1993	16/4/1996	16/4/1996	
Finland	5/5/1989	10/5/1990	10/5/1990	
France	4/11/1950	3/5/1974	3/5/1974	
Georgia	27/4/1999	20/5/1999	20/5/1999	
Germany	4/11/1950	5/12/1952	3/9/1953	3
Greece	28/11/1950	28/11/1974	28/11/1974	2
Hungary	6/11/1990	5/11/1992	5/11/1992	
Iceland	4/11/1950	29/6/1953	3/9/1953	
Ireland	4/11/1950	25/2/1953	3/9/1953	

States	Signature	Ratification	Entry into force	Notes
Italy	4/11/1950	26/10/1955	26/10/1955	
Liechtenstein	23/11/1978	8/9/1982	8/9/1982	
Lithuania	14/5/1993	20/6/1995	20/6/1995	
Luxembourg	4/11/1950	3/9/1953	3/9/1953	
Malta	12/12/1966	23/1/1967	23/1/1967	
Moldova	13/7/1995	12/9/1997	12/9/1997	
Monaco	5/10/2004	30/11/2005	30/11/2005	
Montenegro	3/4/2003	3/3/2004	6/6/2006	4
Netherlands	4/11/1950	31/8/1954	31/8/1954	
Norway	4/11/1950	15/1/1952	3/9/1953	
Poland	26/11/1991	19/1/1993	19/1/1993	
Portugal	22/9/1976	9/11/1978	9/11/1978	
Romania	7/10/1993	20/6/1994	20/6/1994	
Russia	28/2/1996	5/5/1998	5/5/1998	
San Marino	16/11/1988	22/3/1989	22/3/1989	
Serbia	3/4/2003	3/3/2004	3/3/2004	4
Slovakia	21/2/1991	18/3/1992	1/1/1993	1
Slovenia	14/5/1993	28/6/1994	28/6/1994	
Spain	24/11/1977	4/10/1979	4/10/1979	
Sweden	28/11/1950	4/2/1952	3/9/1953	
Switzerland	21/12/1972	28/11/1974	28/11/1974	
FYR Macedonia	9/11/1995	10/4/1997	10/4/1997	
Turkey	4/11/1950	18/5/1954	18/5/1954	
Ukraine	9/11/1995	11/9/1997	11/9/1997	
UK	4/11/1950	8/3/1951	3/9/1953	

Notes:

(1) Dates of signature and ratification by the former Czech and Slovak Federal Republic.
(2) Ratification 28/3/1953—Denunciation with effect on 13/6/1970.
(3) Ratification by Saarland 14/1/1953—Saarland became an integral part of Germany on 1/1/1957.
(4) Dates of signature and ratification by the state union of Serbia and Montenegro.

('Member States of the Council of Europe', as at 13 May 2011)

2.3 Developments (1948–1998)

The Convention was signed by twelve countries (Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Turkey and the UK) on 4 November 1950. Since then, as one commentator has described it, the Convention has become "the most effective system of international protection of human rights in existence" (Ed Bates, *The Evolution of the European Convention on Human Rights*, 2010, p 2). Box 1 provides an overview of its development since 1950.

Box 1: Chronology

5 May 1949
Creation of the Council of Europe
4 November 1950
Adoption of the Convention
3 September 1953
Entry into force of the Convention
21 January 1959
First members of the Court elected by the Consultative Assembly of the Council of Europe
23-28 February 1959
The Court's first session
18 September 1959
The Court adopts its Rules of Court
14 November 1960
The Court delivers its first judgment: *Lawless* v *Ireland*
1 November 1998
Entry into force of Protocol No 11 to the Convention, instituting "the new Court"
18 September 2008
The Court delivers its 10,000th judgment
1 June 2010
Entry into force of the Protocol No 14, whose aim is to guarantee the long-term efficiency of the Court

(European Court of Human Rights, 'The Court in Brief', 2010)

In 1949 the Council of Europe was established in reaction to the turmoil of the Second World War and its subsequent fallout. Its aim was to achieve greater unity between its ten Members and develop common principles. The Convention was born out of this, the desire of Western European states to avoid a repeat of the horrors of that war but also as a means to shield itself from Communist subversion (Jacobs, White and Ovey, *The European Convention on Human Rights*, 2010, p 4). However, the document that emerged in 1950—an "ambivalent document" according to Ed Bates (p 4)—was the product of compromise, with the assumption being that the signatories to the Convention already sufficiently upheld rights at national level. As a result, "to secure speedy acceptance of the text, the rights selected for inclusion were broadly uncontroversial and were related directly to events of the recent past" (Jacobs, White and Ovey, 2010, p 4). The Convention was designed as a 'floor' for the protection of individual rights, rather than a 'ceiling'.

It was expected that the main purpose of the Convention would be to act as an 'alarm' system, alerting Members of large-scale human rights abuses (Harris, O'Boyle and Warbrick, *Law on the European Convention on Human Rights*, 2009, p 1). When it entered into force in 1953 it was envisaged that should any cases materialise they were likely to be '*state* v *state*' (ie member states reporting other members for breaches). The mechanism put in place saw complaints brought before the European Commission of Human Rights, who would then issue an opinion on the case. The decision would then be determined by a political body, the Committee of Ministers. At this stage it was only optional to accept the jurisdiction of the European Court of Human Rights. Even then eight declarations were required for the European Court to come into being. Similarly, there was no right of individual petition, although Ireland and Denmark accepted both (Bates, 2010, pp 4–5).

Thereafter "for a generation or so after 1950 it seems that little was heard about the Convention outside the specialist academic literature" (Bates, 2010, p 6). Into the 1970s the Convention remained a largely symbolic document. France did not ratify the Convention until 1974 and Germany was the only large state to accept the optional clauses. The European Court started work in 1959 with a jurisdiction over a limited number of states (this included the UK from 1966 who also accepted individual petitions—see below for further details). Its first conclusive finding of a state violation came in 1968 when the Court found against Austria. By 1970 a total of six judgments had been delivered on merits (Bates, 2010, p 8).

By the end of the 1960s the number of Article 31 reports by the Commission—which were non-binding on Members—had increased. Though the number of cases remained

small (six declared admissible in 1974), the Commission had “started to develop the Convention into a human rights instrument of some (albeit limited) relevance for contemporary Europe” (Bates, 2010, p 8). The Convention was beginning to be interpreted as a ‘European Bill of Rights’ by the Commission and Court (this is the genesis of many of the UK’s issues with the Convention today). The Convention “received a series of boosts”: Italy accepted the optional clauses; and France and Switzerland ratified the Convention (the latter accepted both optional clauses, the former only accepting the European Court’s jurisdiction).

From the mid-1970s things changed “dramatically” with a number of high profile cases, particularly in 1975 and 1979 (Bates, 2010, p 11). Through a number of cases (for example *Engel* v *the Netherlands* ((1979–80) 1 EHRR 647), *Tyrer* v *United Kingdom* ((1978) 2 EHRR 1), *Guzzardi* v *Italy* ((1981) 3 EHRR 333)), the European Court “set down the key principles for the interpretation and application of the Convention and so delivered a sizeable contribution to the acquis conventionnel as Strasbourg lawyers would know it today” (Bates, 2010, p 12). Rather than judging on gross human rights abuses, the European Court adjudicated upon cases more akin to those dealt with by national constitutional supreme courts. An increasing number of cases with social policy dimensions were also found to contain violations.

During the 1980s concerns were raised about the European Court’s workload and ability to deliver its judgments efficiently. In 1983, *Pretto* v *Italy* ((1984) 6 EHRR 182) became the European Court’s 50th judgment since 1959. Significantly, the next 50 judgments came between 1983 and 1987. Over 100 judgments followed in the next 4 years. Although reform was suggested, no changes were forthcoming. In this period more countries ratified the Convention and accepted the European Court’s jurisdiction and the right of individual petition. By 1990 all member States had done so and in so doing confirmed the decision-making role for the Committee of Ministers—outlined in Article 32—had become less important, as the Commission’s role grew (Bates, 2010, p 15).

2.3 Reform and Operation since 1998

The significant rise in workload for the Commission and European Court prompted changes. In 1998 Protocol 11 to the Convention entered into force. This replaced, in Jacobs, White and Ovey’s terminology, the “old system of protection” (outlined above) which had been designed to deal with ‘gross’ human rights violations (2010, pp 12–13). The “new system of protection” aimed to simplify the structure. It dissolved the Commission and created a new, full-time, European Court where all applications would now go. Acceptance of European Court jurisdiction and the right of individual petition became compulsory features of membership. Finally, the Committee of Ministers was “denied the decision-making role that had been thought essential in 1950” (Bates, 2010, pp 16–17). Its “sole role in the process is now to supervise the execution of judgments” (Jacobs, White and Ovey, 2010, p 13).

In 1998, the UK passed the Human Rights Act (see below for further details) and Russia ratified the Convention. The latter became a significant signatory; symbolic that the evolution of the Council of Europe was no longer exclusively Western. As Bates puts it “the Convention was eyed by many of these new democracies as a document they should subscribe to, to demonstrate the seriousness of their break with their pasts and their commitment to a democratic future”. Excluding Belarus and the Vatican, the whole of Europe is now within the Convention system of protection (Bates, 2010, p 18). However, as figures below show, the number of applications made and judgments delivered have doubled in the last 5 years. In spite of the 1998 reforms, the Convention system is struggling to keep up.

2.4 Workload of the European Court

Table 2 gives the number of applications allocated to a judicial formation and the number of judgments delivered between 1958 and 2010. As at 1 January 2011, approximately 139,650 applications were pending before a judicial formation. More than half of these applications had been lodged against one of four countries: Russia, Turkey, Romania or Ukraine.

Table 2

Year	Applications	Judgments
1958–98	45000	837
1999	8400	177
2000	10500	695
2001	13800	888
2002	28200	844
2003	27200	703
2004	32500	718
2005	35400	1105
2006	39400	1560
2007	41700	1503
2008	49900	1543
2009	57100	1625
2010	61300	1499

(ECHR, 'Violation by Article and by Country', 2011)

2.5 Member's Violations of Convention Rights (1959–2010)

Table 3 presents the number of violations of Convention rights between 1959 and 2010 found by the European Court (or other Convention institutions prior to 1998) as at 31 December 2010. Decisions by the European Court on cases before it are made through interpretation of the Convention's object and purpose. This is achieved through a number of tools and concepts, which include (and is by no means limited to) viewing the Convention as an evolving instrument, by referring to national and international standards, striking a proportional balance between individual and communal rights, and the margin of appreciation doctrine (Harris, O'Boyle and Warbrick, 2009, pp 5–15). The latter is of particular relevance to the UK's view of the European Court and is explored further below.

The largest subject of the violations between 1959 and 2010 was the length of proceedings (Article 6: 26.37 percent), followed by the right to a fair trial (Article 6: 21.10 percent) (European Court of Human Rights, '50 Years of Activity: The European Court of Human Rights, Some Facts and Figures', April 2010, p 6). In 2010, more than a third of the judgments delivered by the European Court concerned four of the Council of Europe's forty-seven member States: Turkey (278 judgments), Russia (217 judgments), Romania (143 judgments) and Ukraine (109 judgments). Of the total number of judgments it delivered in 2010, the European Court found at least one violation of the Convention by the respondent state in over 85 percent of cases (European Court of Human Rights, 'The European Court of Human Rights: In Facts and Figures 2010', 2011, p 6).

Table 3

1959-2010	Total No Judgments	At least 1 violation	No violations	Friendly settlements/ Striking out	Other**
Albania	27	23	1		3
Andorra	4	2		1	1
Armenia	25	24	1		
Austria	287	215	36	23	13
Azerbaijan	42	38		2	2
Belgium	162	113	19	16	14
Bosnia Herzegovina	14	14			
Bulgaria	375	343	19	5	8
Croatia	191	154	8	26	3
Cyprus	60	50	4	3	3
Czech Republic	158	142	5	8	3
Denmark	34	13	9	11	1
Estonia	23	19	3	1	
Finland	151	119	21	9	2
France	815	604	116	62	33
Georgia	39	32	6	1	
Germany	193	128	47	9	9
Greece	613	541	14	20	38
Hungary	211	200	4	6	1
Iceland	12	9		3	
Ireland	25	15	5	1	4
Italy	2121	1617	51	351	102
Latvia	45	37	5	3	
Liechtenstein	5	5			
Lithuania	65	52	7	6	
Luxembourg	36	29	4	3	
Malta	31	25	2		4
Moldova	196	178	1	2	15
Monaco	1	1			

1959-2010	Total No Judgments	At least 1 violation	No violations	Friendly settlements/ Striking out	Other**
Montenegro	3	3			
Netherlands	128	73	28	16	11
Norway	28	20	8		
Poland	874	761	61	40	12
Portugal	206	138	7	56	5
Romania	791	719	21	23	28
Russia	1079	1019	39	13	8
San Marino	11	8		2	1
Serbia	49	46	2		1
Slovakia	248	218	5	21	4
Slovenia	233	220	10	3	
Spain	91	56	31	2	2
Sweden	95	47	22	23	3
Switzerland	102	71	24	5	2
FYR Macedonia	78	72	3	3	
Turkey	2573	2245	55	204	69
Ukraine	717	709	4	2	2
United Kingdom	443	271	86	65	21
Sub Total		11438	794	1050	428
Total	13697*				

* Including 13 judgments which concern two respondent States: France and Spain (1992), Turkey and Denmark (2001), Hungary and Greece (2004), Moldova and Russia (2004), Romania and Hungary (2005), Georgia and Russia, (2005), Hungary and Slovakia (2006), Hungary and Italy (2006), Romania and the United Kingdom (2008), Romania and France (2008), Albania and Italy (2009), Montenegro and Serbia (2009), and Cyprus and Russia (2010).
** Other judgments: just satisfaction, revision judgments, preliminary objections and lack of jurisdiction.

(Source: European Court of Human Rights, 'Table of Violations 1959–2010', 2011)

2.6 The European Convention: Achievements

Jacobs et al have described the Convention as having attained a "leading place in the development of international human rights protection" (2010, p 573). On a small budget (€58 million in 2010), they argue it has contributed to the international law of human rights through:

> ... the establishment of a formal system of legal protection available to individuals covering a range of civil and political rights, which has become a European standard. As arguably the most developed system of legal protection worldwide, it has also contributed to the development of a global definition and understanding of the substantive content of the rights it protects. It has been the model for the American Convention on Human Rights of 1969 and was a key text to which reference was made in the drafting of the African Charter on Human and Peoples' Rights.
>
> (p 574)

In so doing it has generated "the most sophisticated and detailed jurisprudence in international human rights law and its enforcement mechanisms are unrivalled in their effectiveness and achievements" (Harris, O'Boyle and Warbrick, 2009, p 30).

The Convention has also influenced national law, acting as a "catalyst for legal change that has furthered the protection of human rights" but also indirectly contributing to more harmonised laws across Europe (Harris, O'Boyle and Warbrick, 2009, p 31). Every Article of Section 1 has created a body of case-law, which provides new protection for prisoners, for mental patients and for transsexuals (Jacobs et al, 2010, p 576). The Netherlands amended its legislation on children born out of wedlock following the result of *Marckx* v *Belgium* ((1979–80) 2 EHRR 330). The Convention "radiates a constant pressure for the maintenance of human rights standards, for example member states now draft legislation with a view to it being 'Strasbourg proofed'. The consequences of one judgment may be to impact on forty or more national jurisdictions" (Harris, O'Boyle and Warbrick, 2009, p 32). As Jacobs et al put it: "there is a hardly an area of state regulation untouched by standards which have emerged from the application of Convention provisions" (Jacobs et al, 2010, p 576).

Finally, it is argued by placing the individual at the centre of its rights enforcement mechanism, the Convention allows individuals an opportunity to remedy their situation where national courts may have failed (Harris, O'Boyle and Warbrick, 2009, p 32). As the statistics (table 2) show, the number of applications has risen since the acceptance of individual petition and, as mentioned above, an individual can have far reaching impact through one single case.

3. The Convention and the UK

The United Kingdom was one of the founders of the Convention and among its first signatories in 1950. David Maxwell–Fife, a prosecutor at the Nuremberg trials and a subsequent Lord Chancellor, was rapporteur to the committee drafting the Convention. In his memoirs he writes of the result of his, and the UK's, involvement in the drafting: "... we had succeeded in doing what the United Nations had failed to do, namely to create an enforceable convention guaranteeing democratic rights" (Earl of Kilmuir, *The Memoirs of the Earl of Kilmuir: Political Adventure*, 1964, p 184).

3.1 History (1950–1998)

At the outset, however, the UK was one of several states opposed to the creation of a European Court and individual petition on the grounds of their implications for state sovereignty (Bates, 2010, p 6). This has been a recurring theme for the UK. In 1966 the UK accepted both the jurisdiction of the European Court and the right of individual petition. The legal advice of Lord Gardiner, the Lord Chancellor, persuaded the then Labour Government to do so because he thought they "would have little influence on domestic law" (Bates, 2010, p 8). The UK's acceptance of these optional clauses is now seen as "a major event in the history of the Convention", as of the judgments a "significant number have concerned the UK" (Bates, 2010, pp 8–9). Box 2 provides an example of cases in each of the three main categories: due process, minority rights and civil liberties.

Box 2: Examples of cases involving the UK by category

Due Process: *Brogan* v *United Kingdom* (1988) 11 EHRR 117

Minority Rights: *Golder* v *United Kingdom* (1979–80) 1 EHRR 524

Civil Liberties: *Sunday Times* v *United Kingdom* (1979) 2 EHRR 245

(Turpin and Tomkins, *British Government and the Constitution*, 2007, pp 268–9)

Following the *East African Asians* v *United Kingdom* (3 EHRR 76) case in 1973, which concluded that the Commonwealth Immigrants Act 1968 was discriminatory, debates took place in Whitehall as to whether the Government should consider withdrawing from the (still) optional provisions of the Convention (Bates, 2010, p 11). This was subject of debate again the following decade:

> ... the UK's continued acceptance of the optional clauses was debated by the Thatcher Cabinet in late 1980, when it was reported that the Court was 'interfering with the exercise of parliamentary sovereignty' and 'limiting [the UK's] freedom of action' (accusations which are being repeated today). Nonetheless, in 1981, as in subsequent years, the optional clauses were accepted for five more years.
>
> (Ed Bates, 'What was the point of the European Convention on Human Rights?', Human Rights Blog, 21 March 2011)

The impact of the Convention on British law is evident. The Contempt of Court Act 1981, passed following the *Sunday Times* v *United Kingdom* ((1979) 2 EHRR 245) case, is one of several examples where the Government have amended its legislation in response to European Court rulings. Other examples include the Interception of Communications Act

1985, the Mental Health Act 1983 and the Special Immigration Appeals Commission Act 1997 (Turpin and Tomkins, *British Government and the Constitution*, 2007, p 269). By the 1970s English courts had started to apply "the 'prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations': *Salomon* v *Customs and Excise Comrs* [1967] 2 QB 116, 143 (Diplock LJ)" (Turpin and Tomkins, 2007, pp 270–1). By 1990 the UK's view that the Convention merely symbolised human rights already amply protected at state level was contradicted by the statistics. At this point the UK had been found in violation of the Convention more than any other member State (Bates, 2010, p 18).

3.2 Human Rights Act 1998

In 1998, the then Labour Government legislated to make rights from the Convention enforceable in domestic courts. Prior to the enactment of the Human Rights Act in the UK, the Convention had no internal legal effect and was not enforceable. Following the judgment in the 'Brind' case (*R* v *Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696), as Turpin and Tomkins note, until the Human Rights Act 1998 "it could not be argued in a domestic court that Government ministers or other public authorities had acted unlawfully solely because they had acted in a way that was in breach of a Convention right" (2007, p 271). A Government publication, *A Guide to the Human Rights Act 1998* (October 2006), explains the Act's purpose:

> 2.2 First, it requires all legislation to be interpreted and given effect as far as possible compatibly with the Convention rights. Where it is not possible to do so, a court may quash or disapply subordinate legislation (such as Regulations or Orders) or, if it is a higher court, make a declaration of incompatibility in relation to primary legislation. This triggers a power that allows a Minister to make a remedial order to amend the legislation to bring it into line with the Convention rights.
>
> 2.3 Second, it makes it unlawful for a public authority to act incompatibly with the Convention rights and allows for a case to be brought in a UK court or tribunal against the authority if it does so. However, a public authority will not have acted unlawfully under the Act if as the result of a provision of primary legislation (such as another Act of Parliament) it could not have acted differently.
>
> 2.4 Since the Human Rights Act came into force, people have been able to argue that a decision violated their rights by being, for example, a disproportionate interference with the right to respect for private or family life. So the language of human rights is becoming more and more a common way of judging whether a public authority has acted unlawfully.
>
> 2.5 The Courts will look, with "anxious scrutiny", to see if the interference with the right in question was really necessary to achieve one or more of the stated aims recognised by the Convention. If the answer is no, the Courts will find that the public authority has acted unlawfully. The Courts will not, however, simply replace the decision maker's view with their own, and so their role is still one of "review" rather than a full redetermination of the original decision. It is just that the nature of the review is now more intensive.
>
> 2.6 Third, UK courts and tribunals must take account of Convention rights in all cases that come before them. This means, for example, that they must develop the common law compatibly with the Convention rights. They

> must take account of Strasbourg case law. For example, the Human Rights Act has been relied on to determine cases involving the competing interests of privacy and freedom of expression. Several well-known people have used Article 8 of the Convention (the right to respect for private life) to seek injunctions against newspapers to prevent them publishing personal stories about them.
>
> (Department for Constitutional Affairs, *A Guide to the Human Rights Act 1998*, October 2006, p 7)

The Human Rights Act therefore allows people access to enforcement of Convention rights in UK courts. Section 2 of the Act requires UK courts and tribunals to take account of the Convention in making decisions: the late Lord Bingham of Cornhill and Baroness Hale of Richmond have both made statements that have said national courts 'keep pace' with Strasbourg jurisprudence (Bradley and Ewing, *Constitutional and Administrative Law*, 2011, p 408). Although domestic courts cannot strike down legislation that conflict with human rights, the Supreme Court (formerly the House of Lords) can issue a declaration that certain legislation is incompatible. To date, "27 declarations of incompatibility have been made under section 4 of the Human Rights Act 1998 since it came into force on 2 October 2000", covering legislation on issues such as anti-terrorism, mental health and housing (HC *Hansard*, 26 April 2011, col 144W). A recent example of a case saw the Supreme Court deciding that denying sex offenders the right to appeal over registering with the local police was incompatible with their human rights. Theresa May, the Home Secretary, said she was "appalled" and the Government would do the minimum to comply with the decision (BBC News, 'Sex offender registration appeals to go ahead', 16 February 2011).

4. Response to European Court 'Votes for Prisoners' Judgment

Box 3: The Court and the United Kingdom on 1 January 2011

Total number of judgments: 443
Violation judgments: 271
No violation judgments: 86
Other judgments: 86
Inadmissibility decisions: 14029
Pending applications: 3172

(European Court of Human Rights, 'Country Fact Sheets: 1959-2010', March 2011, p 58)

Box 3 shows that the number of cases in which the European Court found violations of the Convention by the UK stood at 271 at the turn of 2011. Of the founder members, this was fewer than Italy (1617) and France (604) but more than Germany (128). As discussed above though the UK has been the recipient of several high profile judgments since accepting the jurisdiction of the European Court in 1966. However, last year one particular case created fresh controversy: votes for prisoners.

In November 2010, the European Court ruled that the UK had failed to amend its law to allow prisoners to vote, following a 2005 ruling on a case brought by John Hirst. The European Court found in the cases of *Greens and MT* v *the UK* (Application nos 60041/08 and 60054/08—Chamber judgment) the UK was judged to be in violation of Article 3 of Protocol No 1 (right to free elections) (European Court of Human Rights, 'Factsheet—Prisoners' right to vote', February 2011). In answer to an urgent question about the implications of the judgment, Mark Harper, Minister for Constitutional Affairs, told the House of Commons that:

> The Government accept, as did the previous Government, that as a result of the judgment of the Strasbourg Court in the Hirst case, there is a need to change the law. This is not a choice; it is a legal obligation. Ministers are currently considering how to implement the judgment, and when the Government have made a decision, the House will be the first to know.
>
> (HC *Hansard*, 2 November 2010, col 771)

Following the statement announcing the Government's response to the European Court's judgment in November 2010, many of the questions from MPs focused on the practical effects of the ruling, for example whether different categories of prisoner would still be denied a vote. On a broader point a number of MPs raised questions about the implications of such judgments on parliamentary sovereignty:

> Mr Charles Walker (Broxbourne) (Con): We in this place have a duty to represent the people who elect us and, almost to a man and woman, they will be saying, "No, no, no." What is the point of having a sovereign Parliament if we have to bend down to the European Court on this? Surely we can help the Minister by having a vote and sending a strong message that we do not want this, and then he can go and negotiate it away.
>
> (HC *Hansard*, 2 November 2010, col 775)

In response Mark Harper, the Minister, made clear that the Government were unhappy with the judgment and were only undertaking their legal obligations under the Convention. He told the House of Commons: "we do have a sovereign Parliament but that about 60 years ago it signed up to the European Convention on Human Rights and effectively made that part of our law and our legal obligations. The Government are following the judgment of the European Court in implementing our legal obligations—nothing more and nothing less" (HC *Hansard*, 2 November 2010, col 775). The

Government's reluctance to implement the ruling was reinforced when David Cameron said at Prime Minister's Questions: "It makes me physically ill even to contemplate having to give the vote to anyone who is in prison" (HC *Hansard*, 3 November 2010, col 921). It was also suggested that the Prime Minister privately supported David Davis's motion that reiterated the predominance of parliamentary sovereignty during a backbench debate about prisoners voting on 10 February 2011 ('Britain's mounting fury over sovereignty', *Economist*, 10 February 2011). The motion was later agreed at a division (234 votes to 22) (HC *Hansard*, 10 February 2011, cols 493–584).

The Government have since reiterated that they will only do the minimum to comply with the ruling. Lord Wallace of Tankerness told the House of Lords that the Government "have also requested that the European Court's judgment in the case of *Greens and MT* v *UK* should be referred to the Grand Chamber of the European Court. If the Grand Chamber agrees to the referral, it will look at the case again and issue its own judgment" (HL *Hansard*, 24 March 2011, col 845). He had earlier explained the procedure:

> ... if a Chamber of the European Court of Human Rights gives a judgment against the United Kingdom, we may request referral of the case to the Grand Chamber. Grand Chamber judgments and Chamber judgments that have become final because there has been no request for referral, or because a request has been rejected, are binding on the parties and not subject to any further challenge.
>
> (*ibid*, col 844)

The rest of the Library Note looks at the Government's response to the ruling in relation to the broader issue of parliamentary sovereignty and reform of the European Convention. Further information about the prisoner voting issue is available in the House of Commons Library Standard Notes, *European Court of Human Rights rulings: Are There Options for Governments?* (18 April 2011, SN/IA/5941) and *Prisoners' Voting Rights* (27 April 2011, SN/PC/1764)

4.1 The Commission on a Bill of Rights: Weaker or Stronger Rights?

Before votes for prisoners returned to prominence on the political agenda, the Government had already made a commitment in the Coalition Agreement to establish a Commission to investigate a British Bill of Rights (HM Government, *The Coalition: Our Programme for Government*, 2010, p 11). The idea itself spans the political divide: the previous Labour Government had proposed to introduce one (Ministry of Justice, *The Governance of Britain*, July 2007, Cm 7170, pp 60–1) and at the last general election the Conservatives had pledged to replace the Human Rights Act with a Bill of Rights "[t]o protect our freedoms from state encroachment and encourage greater social responsibility"(Conservative Party, *An Invitation to Join the Government of Britain*, 2010).

The terms outlined in the Coalition Agreement commit the Government to a Bill of Rights that builds on those rights protected in the Convention. On this Ken Clarke, the Justice Secretary, was clear when he told the House of Commons last year: "The coalition Government do not intend to withdraw from the European Convention on Human Rights" (HC *Hansard*, 23 November 2011, col 154). This commitment was confirmed on 18 March 2011 when the Government announced the terms of reference of the Commission. A written statement set these out:

> The Commission will investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties. It will examine the operation and

> implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties.
>
> (HC *Hansard*, 18 March 2011, col 32WS)

It is unclear what any Bill of Rights that emerges would look like. The Commission's terms presuppose "an 'ECHR-plus' model: that is, one that goes beyond protecting only the Convention rights" and "the possibility arises, for instance, of augmenting those rights with peculiarly British ones, the right to trial by jury being perhaps the most obvious example". Other possible additions include removing the obligation in the Human Rights Act that domestic courts interpret national law in line with the Convention, perhaps as a remedy to domestic court decisions, such as the sex offenders case (Mark Elliott, 'A British Bill of Rights? Sounds great, until you remember that we are in Europe', *Parliamentary Brief*, 28 April 2011).

Contributions to the debate on what a Bill of Rights would contain have largely advocated more, rather than fewer, rights and protections. For example, in evidence to a Joint Committee on Human Rights (JCHR) inquiry in 2007–08, Robert Blackburn, Professor of Constitutional Law at UCL, envisaged a Bill of Rights that:

> … would enhance the existing state of affairs by providing a higher standard, and more sophisticated version, of a British citizen's fundamental rights and freedoms to those drafted for the international purposes of the European Convention on Human Rights (incorporated in the Human Rights Act 1998).
>
> (JCHR, *A Bill of Rights for the UK?*, July 2008, HC 150–II, Ev 95)

In the report that followed, the JCHR concurred that any Bill of Rights should not dilute any of the current rights enjoyed in the UK under the Human Rights Act or retract any of the Convention rights (JCHR, *A Bill of Rights for the UK?*, 2008, HC 150–I, pp 93–4). The Committee suggested further rights, including the case for rights for children and other groups (2008, p 5). The recommendations of Justice—in their report *A British Bill of Rights: Informing the Debate* (2007)—also saw a Bill of Rights as going further than the rights currently protected domestically in the Human Rights Act and internationally in the Convention. The future of the Human Rights Act is less clear, with the Conservatives previously pledging to abolish it. In the House of Lords, Lord Wills pressed the Government on this. Lord McNally responded for the Government:

> I do not think of the decision to go ahead with a commission on the working of the Human Rights Act as any dark plot to repeal it.
>
> (HL *Hansard*, 24 January 2011, col 676)

Ken Clarke has also said that any Bill of Rights must build on the UK's obligations under the Convention and "ensure these rights continue to be enshrined in UK law" (HC *Hansard*, 8 July 2010, col 425W).

4.2 Bill of Rights: Possible Implications

Earlier this year Lord Hoffman, who retired as a Law Lord in 2009, said in "the last few years, human rights have become, like health and safety, a byword for foolish decisions by courts and administrators". In the foreword to a report published by Policy Exchange, Lord Hoffman argued that "the Strasbourg Court has taken upon itself an extraordinary power to micromanage the legal systems of the member states of the Council of Europe (or at any rate those which pay attention to its decisions) culminating, for the moment, in

its decision that the UK is not entitled to have a law that convicted prisoners lose, among other freedoms, the right to vote" (Policy Network, *Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK*, April 2011, p 7).

The Government have hinted that the proposed British Bill of Rights would render such European Court judgments "less likely, if not inconceivable" (Mark Elliott, 'A British Bill of Rights? Sounds great, until you remember that we are in Europe', *Parliamentary Brief*, 28 April 2011). The Government have not stated where they envisage a Bill of Rights would sit in the hierarchy of laws in relation to the Convention or how judgments by the European Court would become less likely. This was the subject of questions from Bill Cash MP (Conservative) in a debate on a Bill of Rights. He asked:

> At its apex, will the Bill of Rights be supreme in UK law, enforceable and enforced by the Supreme Court, as against, contradictory to and, if necessary, inconsistent with the European Court, and the assertions of certain members of the Supreme Court that they have ultimate authority? Will that be the case notwithstanding the European convention, the charter of fundamental rights and the European Communities Act 1972 and all treaties under that? If the Bill of Rights is to be effective, I want it to be a real Bill of Rights and not simply a rather obscure version of an amalgamation of those other charters and conventions.
>
> (HC *Hansard*, 17 March 2011, col 165WH)

David Heath, the Deputy Leader of the House of Commons, replied that the Government had set up a Commission and "there is a package of considerations and I will not pre-empt any conclusions, but I hear what the hon. Member for Stone has said. I am sure that other colleagues in the Government will have heard his comments as well. It is probably safest if I leave it at that" (col 179WH).

In 2006 David Cameron told an audience at the Centre for Policy Studies how his party saw a Bill of Rights working better than the current arrangements:

> The European Court, through what is known as the "margin of appreciation", tends to defer to any clearly set out domestic constitutional doctrine.
>
> But Britain has neither a reservation against the ECHR; nor a clearly set out constitutional doctrine, like the Germans.
>
> So the European Court of Human Rights has nothing to go on except its own previous rulings.
>
> Examples from elsewhere in Europe therefore point us in the right direction.

He also said that just abolishing the Human Rights Act would do nothing to stop the European Court getting involved (*Guardian*, 'Balancing Freedom and Security: A Modern British Bill of Rights', 26 June 2006).

Others dispute that the European Court would respond in this way. Rosalind English, co-editor of the Human Rights Blog, has argued that a Bill of Rights would be a "massive fudge":

> It is pure wishful thinking to suggest that a "Bill of Rights" would somehow create more respect for British law in Strasbourg, winning a few inches on our margin of appreciation. In any event there would be nothing to stop a case being brought in Strasbourg where whatever has been drafted in to a document could not be

> easily trumped by those rights in the Convention. In that case, the Strasbourg court would, on past form at least, be very likely to assert the primacy of its rights over "British" rights.
>
> (Rosalind English, 'Withdrawal from the European Court of Human Rights is not a legal problem', *Guardian*, 9 February 2011)

Adam Wagner, a barrister and fellow co-editor of the Human Rights Blog, agrees with this assessment:

> … the suggestion that adopting a British Bill of Rights would somehow convince European judges to leave us alone is somewhat fanciful. The new Bill of Rights commission has been ordered to leave the Convention in place, so we would still be under the ambit of the European Court in Strasbourg. Saying we have our own Bill of Rights would not protect our government from another debacle along similar lines to the prisoner voting case.
>
> (Adam Wagner, 'Will Stoking Euro Anger Help?', *Human Rights Blog*, 19 April 2011)

There are also wider implications of the introduction of a Bill of Rights. Professor Francesca Klug, of the London School of Economics, in evidence to the JCHR told the Committee that the evidence showed a general consequence of a Bill of Rights would be the likely increase in activity of domestic courts:

> In jurisdictions that had additional Bills of Rights, as well as incorporating the Convention, the courts tended to… let the Government off the hook far less frequently, they were far more diligent and rigorous in their application of the fundamental rights that were in their Bills of Rights, they took a more strenuous approach to the proportionality principle which is in play in security versus individual freedom cases.
>
> (JCHR, *A Bill of Rights for the UK?*, 2008, HC 150–I, p 18)

She added that only a Bill of Rights that contained 'stronger' rights than those set out in the Convention could possibly reduce the intervention of the European Court:

> … I think this idea that having your own Bill of Rights somehow means that you get Strasbourg off your back is not based on any evidence or research. I think quite the contrary, Strasbourg will only, if you like, exercise a greater margin of appreciation when a state has its own Bill of Rights if it considers that that Bill of Rights goes beyond the Convention rather than resiles from it in any way, or is narrower in any way… I am not aware… of any Bill of Rights in the modern world, post 1948, where there has ever been a discussion about introducing one on the basis of wanting to curtail a human rights instrument or Bill of Rights that is already in place.
>
> (*ibid*)

There is also the issue of the practical impact a British Bill of Rights would have if it removed or restricted the access of individuals to domestic remedies in human rights cases and/or removed the obligation of domestic courts to refer to European Court judgments. In the case of the latter, Lord Hoffman has asserted that "since the Convention rights were incorporated into UK law by the Human Rights Act 1998, the UK courts have followed in the wake of Strasbourg, loyally giving effect to its rulings and the

principles (where discernible) laid down in its jurisprudence" (Policy Exchange, *Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK*, April 2011, p 7). A report by Policy Network has said the obligation "encourages judges to stretch the meaning of legislation beyond reasonable limits and gives Parliament no ready recourse short of repeal" (*ibid*, p 72). Mark Elliott has said that the effect of these reforms would be to weaken individual access to domestic justice but not reduce the role of the European Court:

> Anything that required UK courts to reach conclusions at odds with those that the ECtHR [the Court] would (subject to the margin of appreciation) reach would invite those with the means to do so to take their case to Strasbourg, while denying those without the necessary means effective enjoyment of rights that were lawfully theirs.
>
> All of this reduces to a very simple point: that those within the UK's jurisdiction are entitled to the rights laid down in the Convention, a fact that will remain unchanged whatever the terms of a British Bill of Rights, and whatever the extent of domestic courts' powers to protect Convention rights.
>
> (Mark Elliott, 'A British Bill of Rights? Sounds great, until you remember that we are in Europe', *Parliamentary Brief*, 28 April 2011)

Moving beyond these considerations, Lord Woolf, the former Lord Chief Justice, has said that he has general concerns about the idea of a Bill of Rights and its effect on domestic courts. He told the BBC's Today programme: "If you have a further convention—a British Convention—there's going to be a complication in the position, because you're going to have two conventions to which the courts are going to have a regard" (BBC News, 'Lord Woolf warning over UK Bill of Rights', 21 February 2011). David Erdos, of Oxford University, has said that any "attempt to draft a generally stronger indigenous Bill of Rights may have problematic implications for European Convention compliance; there is, for example, no certainty that such an instrument would balance the rights included in the Convention in the same way as currently". Pressures to reassert primacy of freedom of expression against right of privacy may conflict with ECHR jurisprudence (David Erdos, 'Smoke but No Fire? The Politics of a 'British' Bill of Rights', *Political Quarterly*, 2010, vol 2, p 192).

Due to commitments contained in international obligations like the Convention, any Bill of Rights may only be limited in application. It could, as the JCHR has said, provide a forum in which people understand human rights more and seek to define themselves through a statement of British values (JCHR, *A Bill of Rights for the UK?*, 2008, HC 150–I, page 5). It could not though be the last word on UK citizens' rights as some would like to see. As Mark Elliott puts it:

> In the absence of withdrawal from those arrangements, respect for human rights—including by parliament itself—is legally required. The fact that the UK parliament is, as a matter of orthodox domestic constitutional theory, legally sovereign is today of less practical importance than the fact that the ECHR and EU law place real restrictions upon parliament's legislative freedom.
>
> (Mark Elliott, 'A British Bill of Rights? Sounds great, until you remember that we are in Europe', *Parliamentary Brief*, 28 April 2011)

4.3 Reforming the European Court

At the Council of Europe level the Government have said though that they would like to see, and would like to lead, debate on how to reform the European Court, both in terms of its workload but also the scope of its decisions. In the written statement announcing the formation of the Commission, Mark Harper, Minister of State, confirmed this approach and also announced it would be asking advice from the Commission in support of this objective:

> The UK will be pressing for significant reform of the European Court of Human Rights, building on the reform process underway in the lead up to our Chairmanship of the Council of Europe later this year. We will be pressing in particular to reinforce the principle that states rather than the European Court of Human Rights have the primary responsibility for protecting convention rights.
>
> … [The Commission] should provide interim advice to the Government on the ongoing Interlaken process to reform the Strasbourg Court ahead of and following the UK's Chairmanship of the Council of Europe.
>
> (HC *Hansard*, 18 March 2011, col 32WS)

In a Ministry of Justice statement in April 2011, Ken Clarke elaborated the Government's thinking behind the push for these reforms ahead of a ministerial conference at the Council of Europe. He said:

> The UK has always been a strong supporter of the European Court of Human Rights. But at times the Court has been rather too ready to substitute its own judgment for that of national courts, without giving enough weight to the strength of the domestic legal system, or allowing for genuine differences of national approach. There is also an urgent need to make sure that the Court's efficiency is improved so that its vast backlog of cases is reduced, and for States to send the best possible judges to serve on the Court.
>
> (Ministry of Justice press release, 'Clarke: European Court should allow for genuine differences of national approach', 26 April 2011)

He also told the House of Commons ahead of the conference that he would like the domestic debate to "concentrate on what is more immediately attainable, which is sensible reform of the Court in Strasbourg" (HC *Hansard*, 29 March 2011, cols 167–8). Following the conclusion of the conference, Priti Patel (Conservative) asked a written question about the outcome of the Conference on the future of the European Court of Human Rights. Answering for the Government, Ken Clarke said that the conference adopted the Izmir Declaration:

> …The Government welcome the declaration which, among other things:
>
> calls for a stricter approach by the European Court of Human Rights to its use of interim measures under rule 39 of the convention, with the Court intervening only exceptionally if cases have been considered by fair and effective national procedures;
>
> reinforces the importance of subsidiarity, the principle that the convention should be implemented primarily at national level;
>
> calls for further consideration of the Court's admissibility criteria; and

> calls also for continued reflection on the selection procedures for candidates for judges of the Court.
>
> (HC *Hansard*, 5 May 2011, col 904W)

Lord Woolf though has expressed scepticism about the UK's chances of getting such changes to the scope of European Court decisions. He said:

> We have got a stark option: either we accept the European Convention, or we don't accept it and decide to leave the Council of Europe.
>
> It's very difficult to do what Mr Clarke indicated he would like to do when he's chairman of the relative body, because there are 47 signatories in Europe which are signatories to the European Convention as well as ourselves. To try and amend that is a virtually impossible task.
>
> (*Daily Telegraph*, 'Europe's human rights laws can't be reformed, Tories are told', 22 February 2011)

Some have argued that the UK should simply withdraw from the Convention. In a piece published in the *Daily Telegraph*, Daniel Hannan, the Conservative MEP, advocated withdrawal from the Convention. Noting that "the customary justification is that British withdrawal would 'send out the wrong signals'", Hannan argued:

> Some individuals have certainly benefited. IRA terrorists won a number of cases. Illegal immigrants regularly reach for the Convention to overturn repatriation orders. Prisoners have used it to secure their right to have twigs in their cells for use in pagan rituals and access to fertility treatment. And, of course, lawyers have done tremendously well out of it: whole chambers have sprung up, deriving their livelihoods from the growing corpus of human rights jurisprudence.
>
> For the country as a whole, however, the balance is surely negative. It's hardly as though we suffer from a massive breakdown of civic freedoms from which only a foreign court can rescue us. The ECHR degrades our democracy without enhancing our liberty.
>
> (Daniel Hannan, 'Britain should withdraw from the European Convention on Human Rights', *Daily Telegraph*, 12 February 2011)

In a piece published by the *Guardian*, Geraldine Van Bueren, Professor of International Human Rights, disagreed. She said:

> If Britain were to withdraw from the ECHR, or even just to rebalance the relationship between national courts and the European court, it would become the first country in Europe to do so. The ramifications of this would be immense. It would also irreparably damage our reputation as a supporter of democracy and human rights globally.
>
> When Britain takes over the chairmanship of the Council of Europe in November, the government should focus on constructively helping the European court of human rights to deal with its huge caseload, rather than weakening its authority.
>
> (Geraldine Van Bueren, 'Don't Scapegoat Europe's Court of Human Rights', *Guardian*, 21 February 2011)

A paper by Policy Exchange, written by Michael Pinto-Duschinsky, suggests an alternative, which advocates withdrawing from the European Court's jurisdiction as a last resort. Arguing for the UK to adopt a more robust negotiating stance, it recommends:

> The UK should open time-limited negotiations with the Council of Europe to make substantial reforms to the way that the Court is run and its caseload managed. Such reforms would include new procedures to assure the judicial competence of new judges and the greater efficiency of the Court. The negotiations would seek to find agreed ways to ensure that the judges at Strasbourg give greater discretion to the domestic judges of each member state.
>
> If such negotiations are unsuccessful, the UK should consider withdrawing from the jurisdiction of the European Court of Human Rights in Strasbourg and establishing the Supreme Court in London as the final appellate court for human rights law. In that case, the UK would continue to incorporate the European Convention on Human Rights into its domestic law.
>
> (Policy Exchange, *Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK*, April 2011, p 11)

Responding to these arguments, Mark Elliott has expressed doubt as to whether they are viable:

> The ECHR makes no provision for states to extract themselves from the Court's jurisdiction, meaning that any attempt to do so would be contingent upon negotiation with other states. And the position is complicated by the UK's membership of the European Union. Even if it withdrew from the ECHR (or from the Strasbourg Court's jurisdiction), the UK would remain bound, in areas to which EU law applies, by EU human rights law, the sources of which include the ECHR itself and the (in some respects) more extensive EU Charter of Fundamental Rights…
>
> Alongside the legal complications of withdrawal are the broader, including reputational, implications of explicit renunciation of a pan-European system of human rights protection.
>
> (Mark Elliot, 'A British Bill of Rights? Sounds great, until you remember that we are in Europe', *Parliamentary Brief*, 28 April 2011)

In a piece published on Halsbury Law Exchange, a legal think tank website, Tom Zwart has made a number of further suggestions for a new role for the Committee of Ministers:

> Britain could lead the other Contracting States in intensifying the standard setting role of the Committee of Ministers. Through its recommendations the Committee has already pronounced itself frequently on the scope and meaning of the European Convention. The Court has often referred to these resolutions. Since the Committee of Ministers is the authoritative voice of the states parties to the Convention, under the law of treaties these pronouncements should even be regarded as informal amendments to the Convention, which trump any interpretation by the Court.
>
> To ensure that the Court becomes more responsive to its activities in this area, the Committee should engage in setting standards which ought to guide the Court in its interpretative activities. It could copy the American practice of putting together so-called 'restatements', which describe the developments in the case

law in a particular area. These restatements are highly regarded and serve as authority in court cases.

(Tom Zwart ,'How to rebalance the European Convention System', Halsbury Law Exchange, 16 March 2011)

Further information about proposals to reform the Court's working practices can be found in the House of Commons Library Standard Note, *The European Convention on Human Rights and the Court of Human Rights: Issues and Reforms* (14 April 2011, SN/IA/5936).

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