LONGER-TERM FUTURE OF
THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND
THE EUROPEAN COURT OF HUMAN RIGHTS

Open call for information, proposals and views: **submission form**

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Relevant qualifications/ experience:	See www.justice.org.uk for full details of the work of JUSTICE.
Please indicate whether you are acting in an individual capacity or on behalf of an organisation; if the latter, please indicate which:	This submission is made on behalf of JUSTICE. Established in 1957, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. Our vision is of fair, accessible and efficient legal processes, in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the rule of law. JUSTICE is the UK branch of the International Commission of Jurists (ICJ). JUSTICE has seen and supports the joint submission by the ICJ and Amnesty International.
Check this box if you do not wish your contribution to be published by the Council of Europe:	
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Summary of the main points (200 words maximum):	The future of the Convention system must build upon the Brighton Declaration commitment to the right to individual petition and to supervisory function of the European Court of Human Rights. The goal of any further reform should be to enhance the protection of individual rights in Europe. This process must be evidence-based and should focus on achieving a truly shared responsibility for implementation of Convention rights. No further reform of the processes of the Court should take place until the impact of the latest round of changes can be fully assessed. The first priority should be commitment to more effective national implementation measures and better mechanisms for the implementation of judgments. Recent vocal criticism from some commentators within the UK should not dominate debate on the future of the Convention

	system. Nor should it detract from the contribution which the ECHR makes to the protection of individual rights within the UK.

Check the box(es) of the topic(s) that correspond most closely to the content of your contribution:	Future challenges to the Convention system	X
	Subsidiarity	X
	Implementation of the Convention at national level	X
	Execution of Court judgments	X
	Council of Europe technical support and assistance to States	X
	Mechanisms required at the European level to ensure effective protection of individual rights and authoritative interpretation of the Convention	X
	Margin of appreciation	X
	Interaction between the Court and national judicial systems	X
	Role of the Court in interpreting the Convention	X
	Right of individual application to the Court/ right to a judicial decision	X
	Admissibility criteria	X
	Clearly inadmissible applications	
	Repetitive applications	X
	Alternative dispute resolution	X
	Restoring the position of the victim of a violation (including the award of just satisfaction (compensation) by the Court)	
	Rules of Court	X
	Internal organisation of the Court (including the case-management system)	X
	Status and judicial composition of the Court	X
	Supervision of the execution of Court judgments: role of the Committee of Ministers	X
	Supervision of the execution of Court judgments: powers and procedure	X
	Other issues/ none of the above	X

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Longer-term future of the system of the European Convention on Human Rights and the European Court of Human Rights: Call for information, proposals and views

JUSTICE Submission[1]

Introduction

Future challenges to the Convention System

1. JUSTICE welcomes the opportunity to participate in consultation on the long-term future of the Convention System. We welcome the commitment to consider "the way in which the Court [the European Court of Human Rights] can best fulfil its twin role of acting as a safeguard for individuals whose rights and freedoms are not secured at the national level and authoritatively interpreting the Convention". The Brighton Declaration – and this consultation - also invites contracting parties to consider "more profound changes … with the aim of reducing the number of cases that have to be addressed by the Court". However, this process must build on the principles underpinning the Brighton Declaration, principally, the reaffirmation of all Contracting Parties to "secure to everyone within their jurisdiction the rights and freedoms defined in the Convention" and to protect "the right of individual application to the European Court of Human Rights ("the Court") as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention" and that "the States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity".[2] Yet, the Secretariat has explained that the respondents might consider proposals "as if the Convention didn't exist" and states that "every aspect of the system is up for grabs",

[1] We have seen a draft of the submission made by the International Commission of Jurists ("ICJ") jointly with Amnesty International, which we support. Where possible, in this submission, we draw on our experience of working with the Convention within the UK to comment upon criticism emanating from some UK commentators and suggestions for more radical change to the Convention system. We reference these concerns to assist the Committee in understanding the broader application and appreciation of the Convention, and the case law of the European Court of Human Rights, within the UK. Nothing in our commentary should be read as support for the underlying criticisms made by others. We would be pleased to assist the Committee further, as required.

[2] Articles 1 – 3, Brighton Declaration 2012.
https://wcd.coe.int/ViewDoc.jsp?Ref=BrightonDeclaration&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

inviting options which might be open to Contracting Parties if they were drafting the Convention anew.[3]

2. An open dialogue about the risks facing the Convention system is welcome, particularly in light of significant political challenges to its authority. However, this process should not ignore important developments in human rights law since 1950, and the significant role played by the Convention. Viable risks and challenges to this legacy must be taken seriously. However, consideration of any future change – particularly fundamental change – to the Convention system cannot realistically be a "blank-slate" exercise.

3. Over the past 60 years, the Convention system has been praised as one of the most successful mechanisms for the protection of human rights, incorporating both inter-Governmental and national mechanisms to secure better protection of individual rights in practice. The substantive rights protected by the Convention were the result of careful consideration, designed, together with the supervisory and interpretative role of the Court, to reflect the core fundamental rights enjoyed by us all, with roots in many of the existing legal and constitutional systems in Europe. They were designed to last, providing a principled framework capable of application to changing social, development and technological norms. Those rights have been duplicated and supplemented in subsequent international human rights treaties (including the International Covenant on Civil and Political Rights) and regional human rights instruments (for example, in the Charter of Fundamental Rights of the European Union). The case law of the European Court has not only helped improve the lives of individual applicants and change the shape of domestic law and policy across Europe, but it has helped judges across the world in better understanding the application of human rights principles in international law and in domestic constitutions.

4. Building on the commitments made in the Brighton Declaration, this process should follow three guiding principles:
    a. **A commitment to improvement and enhancement of the Convention system:** Any proposals considered must be designed to improve the protection of human rights within the Convention system, and to enhance individuals' ability to access a remedy for violations of the Convention;

[3] Podcast, David Milner, November 2013. http://www.humanrightseurope.org/2013/11/podcast-public-consultation-on-the-future-of-the-european-court-of-human-rights/ In light of the affirmed commitment of all parties to the Convention to the supervisory function of the Court and its important contribution to the Convention system, we particularly regret the suggestion that parties might be invited during this process to consider the operation of the Convention system without a Court. We reiterate our view, below, that the effectiveness of the Convention system would be significantly undermined if the supervisory role of the Court were significantly restricted.

b. **An evidence-based approach:** In the past decade, significant moves have been made to change how the European Court of Human Rights operates. Protocol 14 has come into force, albeit some years later than originally envisaged. Practical changes proposed in the Interlaken, Izmir and Brighton Declarations are beginning to take effect. Protocols 15 and 16 are yet to be implemented. We are concerned that any further changes should not be pursued until time has been taken to evaluate the impact of the existing reform process fully. If further change is proposed, it should be on the basis of considered evidence that the Convention system is failing, and that change will enhance the ability of the Convention system to protect individual rights in practice.

c. **A truly shared responsibility:** The Interlaken process began on the basis that together a renewed commitment to more effective national implementation and more effective procedures at the European Court of Human Rights would secure the future of the Convention. The Brighton Declaration reaffirms this twin-track approach. This approach – in contrast with calls for more drastic reform, including to the substantive function of the Court – is designed to respect the principle of subsidiarity while ensuring the effective protection of the substantive, universal rights in the Convention.[4] While clear and significant progress has been made in improving the operation of the Court, little or no evidence has been produced to illustrate a similar degree of commitment by Contracting Parties to the more effective domestic implementation of the Convention. The operation of the Convention system will work effectively only if States take seriously the responsibility to get rights "right" at home, with the Court providing a safety net when national systems fail. This new process of reflection presents an opportunity to focus anew on the commitment of member states to effective national implementation.

5. We urge the Committee to take a rational, long-term approach to identifying and tackling viable risks to the Convention system. A handful of risks already identified during the existing reform process must be examined closely before providing support for further reform:

a. **Efficiency, effectiveness and credibility of the Convention system**: Understandably, the focus of recent reform has been on the risk posed by the backlog of applications pending to the credibility of the Court and the broader Convention system. Changes wrought by introduction of the permanent Court, alongside the expansion of its jurisdiction to all 47 States and around 800 million people were not anticipated. However, in the past 5 years, since the start of the Interlaken process, a significant number of steps have been

[44] The twin-track approach to the effective operation of the Convention is considered in more detail by JUSTICE's Director of Human Rights Policy, in ***'Building on Brighton: a foundation for the future of the European Court of Human Rights?*, JUSTICE Journal, Vol 9 No 1, [2012], p32. Available online:** http://www.justice.org.uk/data/files/resources/346/JUSTICE-Journal-2012-vol9-no1.pdf

taken to increase the effectiveness of the Court and improve its efficiency, not least in the coming into force of Protocol 14 and the roll out of the single-judge system. In 2012, for example, the Court reported that its backlog of cases was reduced by 16%, with more than 70% increase in the number of inadmissible cases removed from its list. More substantive judgments were delivered and for the first time since 1998, the number of cases determined by the Court exceeded the number of new applications.[5] The Court has managed this significant turnaround on a relatively low budget. Serving a population of around 800 million, its budget has remained relatively static at around £50 million, compared to budget of around £12 million enjoyed by the UK Supreme Court, and around £300 million allocated to the Court of Justice of the European Union. The Court continues to receive a significant number of new applications each month. However, arguments about future effectiveness must fully analyse the impact of the reform measures already instituted. This analysis should include a consideration of the ability of the Court to continue to operate its existing efficiency measures within its existing budget while maintaining the quality of its decision making. We return to this issue, below.

b. **Austerity and challenges to Convention rights:** The Court met with national judges in early 2013 to discuss the impact of the wider economic crisis on the operation of the Convention. At this event, each of the judges speaking emphasised the role which the Convention – and human rights more generally – might play in the protection of individual rights within States facing extreme economic pressure and for the sustainable and longer term resolution of financial instability.[6] While the immediate pressures on State budgets may impact upon the ability of individual member states to comply with the Convention in practice, it would be regrettable and short sighted if the immediate economic crisis were used to support any argument in favour of longer-term reform. It would be particularly unfortunate if these arguments were to gain traction in Europe, while Contracting Parties

[5] European Court of Human Rights, Annual Statistics, 2012. Cumulative figures for 2013 were not available at the time of drafting, but month on month statistics suggest that the Court's progress towards increased efficiency continues.

[6] Dialogue between judges 2013, *Implementing the ECHR in times of crisis,* Jan 2013, pages 7-8. As the UN High Commissioner on Human Rights has stressed: "States can neither waive nor limit their obligation to upholding civil, cultural, economic, political and social human rights in times of crisis. Rather by fully integrating human rights principles and standards into law and practice Governments are able to respond to an economic downturn in a truly sustainable manner.[6] As Judge Laffranque emphasised: "It is true that effective human rights protection is expensive, but human rights are not an option, they are a fundamental value, and therefore measures taken to address the economic crisis should not be at the expense of the minimum standards in the Convention. No matter how difficult or unpopular preserving these standards might seem [eg the proposal in Ireland to remove the constitutional ban on reducing judges' salaries], there should be limits to budget cuts which threaten the proper functioning of democracy and the rule of law."

were proactively working on a global level to build respect for human rights standards, including, for example, through the latest revision of the Millennium Development Goals.

c. **Political commitment to the Convention system:** We are concerned that one of the most serious risks to the Convention system is a perceived lack of political commitment by some member states, particularly within the United Kingdom. A number of highly visible and vocal attacks on the Convention and the Court continue from number of high profile United Kingdom figures, including the Prime Minister.[7] Often repeated by the popular press, this politicised dialogue generally focuses on a limited number of leading, high profile cases which are politically contentious. While the long term future of the Convention is ultimately dependent on the political commitment of Contracting Parties, we are concerned that the future of the Court should not be determined by vocal criticism of a handful of cases which impact adversely on domestic policy. The value of the international system is to provide a universal set of fundamental rights standards, detached from the imperative of domestic politics and the popular majority. If every decision of the Court were popular, this would perhaps be a stronger argument in favour of substantive reform. Political criticism, while relevant, should not be determinative of the future scope and application of the Convention. We hope that this process will illustrate the benefits of the Convention system for all Contracting Parties, including the UK. We return to criticism and comment from the UK, below.

Subsidiarity and the margin of appreciation

6. Consideration of the principles of subsidiarity and margin of appreciation dominated the drafting of the Brighton Declaration. JUSTICE, expressed concern that the original draft Declaration misrepresented both principles and proposed codification of an approach inconsistent with the case law of the Court. This would greatly expand the discretion afforded to States in their implementation and application of the Convention. While this approach was rejected, Protocol 15 provides for the amendment of the Preamble to the Convention to incorporate references to subsidiarity and the margin of appreciation. We regret that the drafting of the Protocol remains overly broad, but welcome the clarification in Explanatory Notes that the principles are intended to be defined by reference to the existing jurisprudence.

[7] Most recently, we note that the Prime Minister has promised to "clip the wings" of the European Court of Human Rights, in opposition to its judgment on the current ban on prisoners' voting, in *Hirst v UK (No 2).* See Telegraph Online, 13 December 2013. http://www.telegraph.co.uk/news/politics/10515983/David-Cameron-I-will-clip-European-courts-wings-over-prisoner-voting.html

7. The principles of subsidiarity and the margin of appreciation are two of the cornerstones of the Convention system. However, we share the view of the Court, that the incorporation of these principles into the Convention was entirely unnecessary. We regret that the Preamble has been amended to include reference to these two jurisprudential principles in isolation. However, we commend the analysis of President Spielman on the potential impact of Protocol 15 to this review.[8] Both principles must remain firmly within the control of the Court. While individual states may be disappointed with the analysis of the Court in an individual case, this cannot justify allowing individual States to determine the precise scope of the margin of discretion afforded by the Court, in essence, determining the scope of application of the Convention. Such an approach would wholly undermine the supervisory function of the Court and the universal nature of the Convention.

Implementation of the Convention at national level

8. An effective network of recommendations on the implementation of the Convention at a national level exists. In 2004, the Committee of Ministers made a series of effective recommendations on the better domestic implementation of the Convention in domestic law and practice.[9] Reporting on the implementation of States of the 2004 package of recommendations remains limited. This package of proposals has been subsequently supplemented by a serious of further recommendations by both the Parliamentary Assembly of the Council of Europe (PACE) and the Committee of Ministers on the effective execution of judgments of the European Court of Human Rights and the role to be played by national Parliaments.[10] Compliance with this framework of recommendations and further initiatives in the Interlaken and Izmir Declarations was expected to play a significant role in the consideration of further reform during the negotiation of the Brighton Declaration. Yet, a round-table on national implementation at the Brighton Conference gave

[8] See for example, Speilman, *Allowing the right margin of appreciation,* January 2014; http://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf

[9] See for example, Rec (2004) 4 on the ECHR in university education and professional training; Rec (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR; Rec (2004) 6 on the improvement of domestic remedies.

[10] See for example, *Memorandum of the President of the European Court of Human Rights to the States with a view to Preparing the Interlaken Conference* (3 July 2009); Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference, SG/Inf(2009)20 (18 December 2009); "Prevention of human rights violations is necessary through systematic implementation of existing standards at national level", *Memorandum of the Commissioner for Human Rights in view of the High Level Conference on the future of the European Court of Human Rights*, CommDH(2009) 38rev (7 December 2009); Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, *The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process* (2009). See also, PACE Resolution 1516 (2006), *Implementation of judgments of the European Court of Human Rights,* adopted by the Parliamentary Assembly on 2 October 2006.

States an opportunity to highlight select initiatives, but gave little opportunity for effective consideration or for constructive peer review. Effective steps towards encouraging better measures towards national implementation could improve the Convention system dramatically. There remains much work to do in ensuring the effective implementation of the Convention by Contracting Parties. Good practice can be highlighted and disseminated by both the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, but without significant investment of time and political will by Contracting Parties, little progress will be made. We hope that the Committee will take this opportunity to revisit the existing framework for national implementation and consider practical incentives towards compliance, including through technical assistance and the dissemination of good practice. The existing framework for national implementation could be, for example, simplified and elaborated upon in new guidance compiled by CDDH and promulgated by the Committee of Ministers.

Mechanisms required at the European level to ensure effective protection of individual rights and authoritative interpretation of the Convention

9. JUSTICE considers that the formal mechanisms for the effective protection of individual rights and the authoritative interpretation of the Convention at a European level were designed to effectively meet the political challenges of ensuring the right to an effective individual remedy, while respecting the national sovereignty of individual Contracting Parties. While this model has been significantly challenged by the expansion of the Convention's jurisdiction, we consider it remains sustainable. However, greater practical steps should be taken by the institutions of the Council of Europe to encourage more effective national implementation of the substantive rights guaranteed by the Convention.

10. A number of recommendations for more radical change emanate from UK sources, principally critics of the operation of the Convention and the domestic human rights settlement in the HRA 1998. These proposals range from recommendations which appear, to JUSTICE, to be premature to those which are appear designed to shield domestic decisions from effective scrutiny. In our view, each is likely to reduce the effectiveness of the Convention system:

    a. The Commission on a Bill of Rights appointed by the Coalition Government concluded that, despite measures taken by the Court to reform its processes; the Court was hearing many more cases than originally intended. The Commission recommended that the Convention admissibility criteria be amended to limit the court's jurisdiction to cases involving a "serious" violation or claims with a wider European impact. This recommendation was made in tandem with a recommendation that steps be taken to

improve national systems of implementation, if necessary by amendment of the Convention to make failure to provide such systems a substantive violation of the Convention. The Commission recognised that this model could lead to some individuals being left without access to a remedy, but it argued that the Convention was designed to be implemented primarily by individual States. Unfortunately, as we explain below, we consider that this more "constitutional" model would, in current circumstances, undermine the protection of individual rights within Europe. Individuals in many States across Europe currently rely on the right of individual petition not only to secure an individual remedy, but as a lever to try to secure wider national change. If the oversight mechanism is significantly constrained, we do not believe that the political and diplomatic processes pursued by the Committee of Ministers and by PACE can provide an appropriate substitute.

b. During the negotiation of the Brighton Declaration, an alternative formulation was proposed to significantly limit the jurisdiction of the Court. This would have deemed inadmissible any case where the domestic court had not "manifestly erred" in the application of the Convention. This would shift the Court's jurisdiction to one more akin to judicial review in the United Kingdom. This form of review could significantly diminish the range of the Court's engagement with individual cases. It was unclear how far the Court would be required to examine the decision making processes of the domestic courts and whether the substantive consideration of any violation would shift from the merits consideration to the consideration of admissibility. If so, this would not improve the effectiveness of the Court. If not, this cursory examination would significantly reduce the effectiveness of the Court and the ability of the Convention to secure the protection of individual rights whether nationally or internationally. This draft was rejected by Contracting Parties considering the final Declaration.

c. More extreme alternative suggestions have included, for example, the provision of a "democratic override" for national parliaments in some cases.[11] This clearly flawed mechanism would allow States to "pick and choose" when to comply with the judgments of the European Court of Human Rights and would undermine the universal nature of Convention standards. We reiterate the view of Sir Nicolas Bratza that the adoption of this kind of mechanism would be "totally destructive" to the Convention system.[12]

[11] Measures should, in its view, be taken to reduce the number of cases considered annually to "hundreds" rather than "tens of thousands". http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf

[12] In a separate letter to the UK Government, the Chair of the Commission on a Bill of Rights explained that this was a view expounded by some of its members, with the override to be exercised by national parliaments or

11. We regret that the current criticism of the Convention within the UK might detract from the important role which the Convention has played in securing individual rights within the UK. From the right of journalists to protection their sources to the right of adopted people to find out about their family history; from the right of innocent people not to have their DNA kept by the police without justification to the imposition of legal limits on the power of the police and other national authorities to bug our homes, the Convention has changed our domestic legal framework for the better.[13] The HRA 1998 brings those rights home by giving individuals a right to a remedy in our domestic courts, by allowing our courts to more directly contribute to the development of Convention jurisprudence, and by requiring public authorities to put Convention rights at the heart of their decision making processes. That the HRA 1998 and the safety net provided by the right to individual petition is deemed unpopular and politically inconvenient by some is deeply disappointing to many working to protect the rights of individuals within the UK.

The right of individual application to the Court

12. JUSTICE would oppose any proposal that the right of individual petition should be further restricted, altered or significantly diminished. The right of individual petition lies at the heart of the Convention system and without a right of individual access to the Court, the universal nature of the rights guaranteed by the Convention will be endangered. The right of individual petition and the associated political mechanism for the supervision of the execution of individual judgments provides a domestic and international imperative for the examination of domestic law, policy and practice which is inconsistent with the Convention. Many high profile examples can be used to illustrate how individual cases have contributed to the promulgation of improved protection for many vulnerable groups. To take one, the Court's decision in *Dudgeon v UK* has provided a solid foundation for the decriminalisation of homosexuality and has paved the way for the

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the institutions of the Council of Europe on request: http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-chairs-letter.pdf

[13] Guardian Online, *Bratza bemused by UK's disdain for human rights,* January 2012. See http://www.theguardian.com/law/2012/jan/31/joshua-rozenberg-interviews-nicolas-bratza. For a fuller consideration of the arguments presented on the relationship between the UK and the ECHR, see Colm O'Cinneide, Human Rights and the UK Constitution, The British Academy, 2013 https://www.britac.ac.uk/policy/Human-rights.cfm. Notably, the analysis used to call for more significant reform regularly hinges on the view expressed by some that the "living instrument" doctrine is applied to afford an "activist" interpretation of the Convention. In this piece, O'Cinneide explains that this approach is consistent with the approach of international courts to the interpretation of human rights instruments, see pages 31-32. JUSTICE was involved in the Peer review of this project and would endorse this analysis.

development of anti-discrimination law. [14] We support the detailed submissions of the ICJ and Amnesty International on this issue.

13. Yet, during the Brighton Conference and beyond, some criticism has suggested that the Court has expanded the right to individual petition, hearing cases that should not be heard, and acting as a fourth instance court of appeal. For example, in his speech to the Parliamentary Assembly of the Council of Europe (PACE) in January 2012, the Prime Minister explained his view that the Court was at risk of hearing cases which were properly determined at a domestic level, and it should not allow itself to become either a small claims court or an immigration tribunal.[15] We regret the language that has been used in this debate, and would challenge the suggestion of our Prime Minister – repeated subsequently by other commentators - that any significant proportion of the Court's case-law is made up of trivial matters better dealt with domestically. For example, the statistics show that across all 31% of its case law deals with the rights to liberty and security and the right to a fair trial (Articles 5 & 6). A further 26% deals with the length of proceedings.[16]

14. The coming into force of Protocol 14 and with new measures proposed in Protocol 15, the Court has a broad power to control the admissibility of claims.[17] Where – as the Prime Minister suggested – a matter has been dealt with adequately by a domestic court or other mechanism, in a manner compatible with the Convention, it will clearly be open to the Court to declare that case inadmissible. We have seen no evidence to support the case for curtailing the jurisdiction of the Court yet further. We regret that some of the suggestions mooted by critics – and during the drafting of the Brighton Declaration –would, in our view, significantly undermine the universal nature of the Convention and damage the credibility of the system irreparably.[18] Without

[14] 4 October 2007. Application No. 7525/76

[15] http://www.newstatesman.com/politics/2012/01/human-rights-court-national

[16] ECHR, Statistics 1959 – 2010. It is notable that, of the 1,094 cases determined by the Court in 2012, 24 cases alone were decided in cases against the UK, with violations identified in only 10 cases. In those 10 cases, the Court considered issues as diverse as the right to be free from inhuman and degrading treatment, the prohibition on forced labour, the right to freedom of association and the right to freedom of religion and the prohibition on discrimination. A significant number of these cases are "leading cases", for example on the scope of religious freedom at work.

[17] This includes express provision for claims "manifestly ill-founded" or where the applicant has suffered "no significant disadvantage" to be inadmissible. We recommend that clear guidance can be provided to applicants on the scope of the Court's understanding of both "manifestly ill-founded" and "significant disadvantage" cases as its practice continues to develop. The disposal of cases under these heads must be consistent and transparent.

[18] For further commentary on the draft Brighton Declaration and suggested amendments to the jurisdiction of the Court, please see Angela Patrick**, '***Building on Brighton: a foundation for the future of the European Court of Human Rights?*, JUSTICE Journal, Vol 9 No 1, [2012], p32. Available online: http://www.justice.org.uk/data/files/resources/346/JUSTICE-Journal-2012-vol9-no1.pdf**.** Contemporaneous

evidence of further effective measures to secure the protection of individual rights domestically, or evidence that the Court is unable to cope despite significant reform, we do not consider that significant curtailment of the right of individual petition should be considered.

The role of the Court in interpreting the Convention

15. The role of the Court has consistently been two-fold, both exercising supervisory jurisdiction in individual cases and providing an authoritative interpretation of the Convention. In this latter role, the Court ensures consistency of application of the minimum universal standards in the Convention which should, in principle, assist member states in discharging their primary responsibility for implementing the Convention at a national level. The impact of this authoritative function is clear in connection with systemic issues affecting a large number of people. However, it is also crucial in cases where the scope of the law is unclear, where society or technology is in a state of evolution. Where none of the States in Europe have yet grappled with the facts at issue in an application – for example, the application of the right to respect for private life guaranteed by Article 8 ECHR to the collection and retention of DNA material – it is exceptionally important to have an authoritative, international interpretation, unaffected by the nuances of domestic policy. The only alternative would be an acceptance that the minimum standards required by the Convention would by necessity vary from State to State, not necessarily by reason of legal justification.

16. The number of repetitive applications considered by the Court, including in cases involving long established case-law or pilot judgments issued in clear terms, remains high. So, as at end 2012, the proportion of repetitive cases far outweighed the number of leading judgments (with 9668 cases determined on the basis of well established case law, including clone or repetitive claims and 1431 'leading' cases). We consider that the continued failure of States to act, even after the Court has provided clear guidance, vitiates against the Court adopting a model closer to a "constitutional court" function, where it acts subject only to a discretionary power to decide a limited number of leading cases according to its own choosing. Without the leverage provided by multiple applications and the associated oversight of the Committee of Ministers, we regret that there would be significantly less incentive on States to rectify a wide-spread or systemic problem, if the only risk were a one-off declaratory judgment. Instead, many of those applicants would be left without any remedy for the violation of their rights at home.

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commentary on the draft is available, here: http://ukhumanrightsblog.com/2012/04/22/the-brighton-declaration-and-the-meddling-court/

Interaction between the Court and national judicial systems

17. The relationship between the Strasbourg court and national judicial systems has been a particular focus of recent commentary within the UK. A number of senior judges have spoken extra-judicially about the status of European Court of Human Rights case law. Unfortunately, some of this commentary appears to present an inaccurate picture of the relationship between the Strasbourg Court and national judicial systems, and in particular, the responsibility of the judiciary in the UK to "take account" of the case law of the ECHR, under Section 2 HRA 1998.[19] Others however express continued support for the function of the ECHR and its role within the domestic constitutional settlement. It is clear that, in domestic law, as a dualist state, the Supreme Court remains our highest court. While Article 46 ECHR binds the UK in international law to give effect to binding judgments of the Court in UK cases, this obligation does not, under the settlement envisaged in the HRA 1998, tie our judiciary to the jurisprudence of the ECHR.[20] As has been illustrated on a number of occasions, in cases where the law is unclear, there is scope for a healthy dialogue between both the domestic and international jurisdictions, to the benefit of the development of both domestic and ECHR law. A recent paper, prepared by the Court, gives examples of a similar judicial dialogue with courts in a number of States, including Germany.[21] This dialogue depends heavily upon judicial comity and an understanding of the range of cases where the case-law of the Court is long established and the scope of the Convention is clear. In cases where domestic courts are bound to follow domestic precedent over Convention case-law, the obligation on States to implement a judgment remains under Article 46 ECHR. That this obligation is enforced through international law and not through the direct effect of Strasbourg judgments ultimately leaves the Parliament of the UK in a position to determine how best to implement a judgment. This suits the UK constitutional settlement under the HRA 1998, which makes Convention rights justiciable within the UK but protects the sovereignty of Parliament.

18. Arguments utilised by some critics of the Convention that Article 46 ECHR trumps domestic courts' competence or usurps the sovereignty of Parliament are, in our view, ultimately ill-founded. In our view, the careful settlement determined by the HRA 1998 clearly allows our domestic judiciary to develop its own interpretation of Convention rights, and in keeping with the principle of subsidiarity, to give the primary interpretation of the Convention in any individual domestic case. This has allowed our judges to make a significant contribution to the development

[19] See for example, Lord Judge, 13 December 2013; http://www.ucl.ac.uk/constitution-unit/constitution-unit-news/constitution-unit/research/judicial-independence/lordjudgelecture041213/
[20] See for example, Lord Mance, 14 December 2013; http://supremecourt.uk/docs/speech-131214.pdf
[21] Seminar Background Paper, *Implementation of Judgments of the ECHR: a shared judicial responsibility?* , para 28 – 29. http://www.echr.coe.int/Documents/Seminar_background_paper_2014_ENG.pdf

of Convention case-law in practice. However, were a judgment of the domestic courts to significantly depart from the accepted case law of the ECHR, the applicant would retain the ability to take his case to Strasbourg, with the likelihood that a violation will be identified and the Article 46 ECHR obligation engaged. In JUSTICE's view, this mechanism preserves the domestic constitutional settlement and permits for a fuller engagement of our judges in the protection and development of Convention rights.[22]

Internal organisation of the Court (including the case-management system), repetitive applications and alternative dispute resolution

19. We support the recent measures taken by the Court internally, and as a result of Protocol 14, to deal with its backlog and to more effectively utilise its time. The prioritisation mechanism for disposing of cases using the single judge mechanism seems thus far to be wielding significant results, particularly in connection with inadmissible cases or claims due to be struck out. We continue to support the Court's use of the Pilot Judgment procedure to provide additional guidance to States on systemic cases with a view to diverting as many cases as possible in favour of a national remedy. However, a significant proportion of outstanding cases remain subject to the process for substantive consideration and disposal.

20. JUSTICE welcomed the proposal of Sir Nicolas Bratza during the preparation for the Brighton Conference that it would be open to the Court to develop a form of default judgment, to allow the Court to dispose expediently with groups of cases which are straightforward and easily determined according to the well established case law of the Court. The Court has since adopted a form of this procedure where States are invited to consider groups of cases for friendly settlement or unilateral declaration on recommendation of the Court, with a remedy to be provided within a set period. If the Government refuses or fails to comply within the timescale suggested, judgment is made in favour of the applicants, in keeping with the well established case-law highlighted by the Court.[23] We welcome this procedure, which should, in practice, improve the Court's ability to deal with applications where a clear solution can be found in the case law of the Court and where a national remedy should clearly have been provided. These cases, which are admissible and which would otherwise await determination by a Committee or a Chamber of

[22] For a fuller consideration of the domestic constitutional settlement and its relationship with the ECHR see JUSTICE's submission to the Commission on a Bill of Rights: http://www.justice.org.uk/data/files/resources/309/JUSTICE-BORC-Response-November-2011-FINAL.pdf

[23] See the description of this procedure in CDDH (2013) R 78 Addendum III, *Report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court*, 28 June 2013, para 27 et seq.

judges, are numerous. Notably, in May 2013, the prioritisation category which covers cases arising from systemic or repetitive issues stood at 45,970 applications. Importantly, the Registry estimates that there has been a 92% increase in this type of case since 2010. These statistics appear to support the case for greater focus on enforcement of judgments, expansion of pilot judgments and, ultimately, greater political commitment to national implementation measures by individual States. Consideration should be given to the formalisation of the "default" or "well-established case law" procedure, in consultation with the Court. At this stage, the Court considers that this process presents a valuable mechanism for shifting the burden of repetitive cases away from the Court and onto the respondent State. It should, if States engage with the process and/or it is developed aggressively by the Court, significantly reduce the time taken by the Court to process these cases.

21. A significant number of procedural changes have been made which have altered the operation of the Court, with more to come. The introduction of prioritisation and the single judge procedure, changes to admissibility criteria and rules on the format and delivery of applications are already in place. Further changes to the admissibility criteria, shorter application deadlines and the introduction of an advisory jurisdiction are yet to come. While we support the efficiency measures introduced by the Court thus far, we are concerned that the quality of the Court's work should be maintained in the long-term. It is important to ensure that efficiency measures complement the processes of the Court and allow sufficient time for the consideration of complex cases. It would be counterproductive if in the longer term the Court were allocating undue resources to clearing weak or inadmissible cases while the consideration of important and significant violations were delayed. We are aware that processes exist within the Court for the review of its working practices. The Court may wish to consider publishing a regular review of its own analysis of the effect of reform on its working practices and making provision for periodic independent review of the impact of its procedures and working practices on its work and the accessibility of the Court. We note that provision for periodic reflection has necessarily formed part of the Interlaken, Izmir and Brighton processes. However, provision for periodic, independent qualitative assessment conducted on a longer timescale (perhaps every 3 – 5 years) could usefully supplement the information provided by the monthly publication of statistics and could better inform the long-term effectiveness of the Court and its contribution to the Convention system.

22. Without significant evidence that further reform of the jurisdiction of the Court remains necessary, after full analysis of the impact of each of the measures above, and steps taken to improve national implementation, for the reasons explained above, JUSTICE would not support further restriction of the right of individual petition.

Rules of Court

23. We share the view expressed in the response prepared by the ICJ and Amnesty International that, as an independent judicial body, the Court must retain its powers in connection with the setting of the Rules of Court. We reiterate that the power to make interim measures in Rule 39 is an essential corollary of the right of individual petition. Without the power to make such requests within the Rules of Court, the substance of that right would be vitiated in cases where a State would be free to act in a way which might damage an individual's rights irreparably before the case could be considered. The case-law of the Court covers the need for domestic remedies – including judicial remedies – to be effective and not merely illusory.

Status and judicial composition of the Court

24. The Brighton Declaration recognises that the success of the right of individual petition is closely linked to the judges' ability to continue to produce high quality, well-reasoned and sound judgments on the application of the Convention.[24] In light of the changes introduced by Protocol 14, we consider that the quality of the judges sitting on the Court, and the support offered to them by the Registry will be crucial. Increasingly, cases will be determined by a single judge formation. Albeit that those cases allocated to a single judge will be simple and mostly inadmissible, the judges considering the majority of the cases received by the Court will be sitting alone. The responsibility on the individual judge and the Registry lawyers advising him will be significant. Equally, while judicial terms are now longer, individuals will no longer sit for consecutive terms. Institutional memory amongst sitting judges will be shorter. While judges will be at a reduced risk of growing institutionalised, they will also have a shorter time in which to gain experience. A reduced upper limit for sitting ages may mean that people apply earlier in their careers for consideration.

25. Numerous instruments of both PACE and the Committee of Ministers set out standards of judicial appointment which require that an independent domestic mechanism is established to identify the national short-list of individuals for appointment to the Strasbourg Court.[25] Yet, both academic and Council of Europe research suggests that little progress has been made to ensure consistent practice across member states to ensure that appointment mechanisms meet the standards

[24] Articles 21-25, Brighton Declaration.
[25] See for example, CM (2012) 40 final, Committee of Ministers Guidelines on the selection of candidates for the post of judge to the European Court of Human Rights; and Resolution 1764 (2010) PACE, *National procedures for the selection of candidates for the European Court of Human Rights*.

expected of an appointment to high judicial office.[26] While the bulk of this research precedes the Committee of Ministers Guidelines promulgated as part of the Interlaken process, there is little evidence that the Guidelines have themselves shifted practice. Post Protocol 14, the rotation of judges is likely to become more frequent. States should be encouraged to effectively implement the Guidelines including through the promulgation of good practice and technical assistance if necessary.

26. The responsibility for the appointment of judges is shared between domestic authorities and PACE. UK tabloid criticisms laid against the judges due to their "unelected" status is inaccurate and misleading.[27] The safeguard on effective appointment to the Court lies with the elected representatives appointed to the Parliamentary Assembly. If a list of three candidates provided by a State fails to meet the criteria set for judicial appointment, the Parliamentary Assembly should be encouraged to exercise its power to return the list, with no judicial appointment made until candidates of sufficient calibre are sourced. We welcome the appointment of an Expert Advisory Panel to advise PACE on the quality of candidates for appointment. However, close consideration, in consultation with PACE, should be given to whether the Panel is given adequate resources and opportunity to examine candidates before presenting their advice.

Execution of judgments: supervision, powers and procedures

27. JUSTICE has encouraged the consideration of more compulsory powers for the Committee of Ministers, including the possibility of financial sanction. However, we share the view expressed by CDDH and reiterated by the ICJ and Amnesty International that while further steps must be taken to improve the speedy national execution of judgments; diplomatic consensus on more compulsory powers for the Committee of Ministers is unlikely until all of the existing mechanisms available have been explored. The Committee of Ministers has been reluctant to use its power to refer a case back to the European Court of Human Rights, under Article 46(4) ECHR. We regret that CDDH has recently described this mechanism as an option of "last resort".[28] As the Court

[26] Appendix AS/Jur(2008)52 of Report 11767 of the Committee on Legal Affairs and Human Rights of the Assembly, 1 December 2008, the 2006 selection process did not respect any of the above principles: there was no call for candidates in the specialised press, the selection process was not made public and lacked any formal legal basis, and there was no assessment of candidates' linguistic abilities, no consultation with civil society bodies and no involvement of a panel of independent experts. Further concern was expressed in similar terms in 2009.

[27] For examples, see the reference to "unelected judges" during the coverage of the UK debate on prisoners' voting rights in the Daily Mail (http://www.dailymail.co.uk/news/article-1355640/Prisoners-vote-MPs-reject-European-courts-ruling.html) and "unelected dictators" in The Sun (http://www.thesun.co.uk/sol/homepage/news/sun_says/3407431/The-Sun-Says.html).

[28] CDDH (2013) R 79, Addendum I

clears its backlog, it is clear that a significant proportion of its workload concerns a few limited, systemic issues raised in an identifiable number of countries, where domestic reform is sorely needed. There are clearly cases subject to enhanced supervision where further consideration of the Court could assist by lending clarity, perhaps, for example, by testing a proposed solution by a State which appears inconsistent with the guidance of the Court. This review should consider a recommendation to the Committee of Ministers that further guidance is required on the utilisation of the new Article 46(4) power, to supplement and highlight the Explanatory Notes which accompany Protocol 14 ECHR. This should reiterate that this power applies when a State – by its conduct - demonstrates a refusal to comply with a decision not only when it expressly refuses to do so.