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UK reform of its human rights legislation: consequences for domestic and European Human Rights protection

Report[1]
Committee on Legal Affairs and Human Rights
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Summary

The context of this report is the ongoing debate about the best way for the United Kingdom to protect human rights and the rule of law within its constitutional model. The UK Government has consecutively introduced two draft laws – the Bill of Rights Bill and the Illegal Migration Bill.

Concerns have been expressed that these two bills would, if enacted, jeopardise compliance with the rule of law – which includes international law – and would put the United Kingdom in breach of its international obligations, including under the European Convention on Human Rights, the United Nations Convention Relating to the Status of Refugees, the United Nations Convention on the Rights of the Child and the Council for Europe Convention Against Trafficking in Human Beings.

The report emphasises that it is primarily for States, under the principle of subsidiarity, to implement human rights at the national level. It highlights how the 1998 Human Rights Act has been remarkably effective at ensuring that human rights are given effect domestically, while retaining full respect for parliamentary sovereignty as one of the twin pillars of the UK Constitution, alongside the rule of law. This has resulted in the United Kingdom consistently having one of the lowest findings of violations against it, per capita, of all member States.

1. Reference to committee: Decision of the Bureau, Reference 4660 of 24 June 2022.

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A. Draft resolution[2]

1. The Parliamentary Assembly recalls that the aim of the Council of Europe is to achieve greater unity between its member States, based on common values of respect for the rule of law, democracy and human rights.

2. The Assembly reaffirms its commitment to these values, which are the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.

3. The Assembly emphasises that respect for the rule of law includes respect by States of their international legal obligations, including those under the European Convention on Human Rights (ETS No. 5).

4. The Assembly recalls that, in line with the principle of subsidiarity, Council of Europe member States are primarily responsible for the effective implementation and enforcement of international human rights norms they have signed up to, in particular those of the European Convention on Human Rights.

5. The Assembly recalls the importance of embedding human rights education and ensuring improved public understanding of the inherent value of core principles such as the rule of law, robust democratic institutions, and effective guarantees for the protection of human rights.

6. The Assembly considers that the UK system for giving effect to the European Convention on Human rights through the operation of the Human Rights Act is, in many respects, an excellent example of an effective domestic mechanism for ensuring that Convention rights are respected and fully implemented at the national level. It also ensures respect for the separation of powers and for democratic debate in determining how laws and rights should be developed and balanced. The Assembly commends many of the features of the Human Rights Act as good examples for member States looking to successfully embed human rights, and in particular the Convention rights, within their national legal systems. The Assembly therefore considers that it would be regrettable if the United Kingdom were to dispense with such an excellent system that has led to the UK having one of the lowest number of cases brought before the European Court of Human Rights, and in particular of findings of violations against it, of any State Party to the Convention.

7. Recalling its Resolution 1823 (2011) "National parliaments: guarantors of human rights in Europe", the Assembly is pleased that there are processes in place in the UK to consider the human rights and rule of law consequences of draft legislation before the UK Parliament, but considers that further thought might be given to ensuring that such processes and analysis benefit from sufficient independence, transparency and due consideration in the legislative process.

8. The Assembly is concerned that recent legislation introduced by the UK Government to Parliament, and in particular the Bill of Rights Bill and the Illegal Migration Bill, indicates an increased willingness on the part of the UK Government, and certain legislators, to legislate in a way that could risk breaching the UK's international legal obligations and thus the rule of law. The Assembly is extremely concerned at such developments, and in particular what signal that may send both domestically and internationally.

9. The Assembly, moreover, expresses concern that both the Bill of Rights Bill and the Illegal Migration Bill would increase legal uncertainty and conflicts between UK domestic law and the requirements of the European Convention on Human rights – as well as a number of other international conventions. The Assembly notes that these concerns have been similarly expressed by numerous civil society organisations, the Joint Committee on Human Rights of the UK Parliament, the UK's National Human Rights Institutions, the Commissioner for Human Rights of the Council of Europe, the Group of Experts on Action against Trafficking in Human Beings (GRETA), and the United Nations High Commissioner for Refugees.

10. The Assembly therefore calls on the UK Government and Parliament to:

10.1. ensure that robust processes are in place to ensure respect for the rule of law and in particular respect for the UK's international legal obligations, in legislation proposed to parliament. In particular, assessments of compatibility with the rule of law, including international law and human rights law, should be undertaken in respect of bills introduced into parliament. Such assessments should be undertaken by a body that is sufficiently independent from government to be able to provide objective advice on the rule of law, should be available early in the legislative process, and should be made public to fully inform parliament and the public so that the legislature can take an informed decision on the implications of legislation before it. Parliament must be allowed adequate time and information to assess the rule of law and human rights implications of the legislation before it;

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2. Draft resolution adopted unanimously by the committee on 22 May 2023.

10.2. carefully consider the content of the provisions that, were they to enter into force, could risk placing the UK in breach of its international obligations, including the provisions relating to:

10.2.1. positive obligations (clause 5 of the Bill of Rights Bill);

10.2.2. overseas military operations (clause 14 of the Bill of Rights Bill);

10.2.3. interim measures (clause 24 of the Bill of Rights Bill and clause 53 of the Illegal Migration Bill);

10.2.4. restrictions on the protections for victims of modern slavery and human trafficking under the Illegal Migration Bill;

10.2.5. the adequacy of safeguards against indefinite or arbitrary detention of migrants under the Illegal Migration Bill;

10.2.6. protections for children under the Illegal Migration Bill, including as concerns detention, removal and standards of care for children, including unaccompanied children;

10.2.7. protections for refugees and stateless persons under the Illegal Migration Bill;

10.2.8. the adequacy of due process, appeal rights and the availability of an effective remedy for individuals affected by decision-making under the Illegal Migration Bill.

11. The Assembly calls on all member States of the Council of Europe to:

11.1. ensure that the European Convention on Human Rights is fully embedded, applied and enforced within their domestic legal systems and to take adequate steps to support a culture of respect for human rights and the rule of law domestically;

11.2. put in place adequate mechanisms for ensuring that the human rights and rule of law implications of draft legislation are fully and transparently assessed before legislation is passed, by systematically verifying the compatibility of draft legislation with Convention standards;

11.3. ensure that adequate processes are in place to correct misunderstandings or misinformation relating to the rule of law and the impact of the European Convention of Human Rights system; and to make use of available information on the functioning of the European Convention on Human Rights system;

11.4. develop initiatives for education and training on human rights and the rule of law in order to foster culture which understands and respects the important role that the rule of law and human rights play in a healthy democracy.

12. The Assembly calls on members States and the instances of the Council of Europe to develop improved tools in order to counteract misinformation in relation to human rights and the rule of law more effectively. In this light, the Assembly welcomes initiatives such as the work to highlight the impact of the European Convention on Human Rights system and encourages greater use of such communications materials. The Assembly also encourages further reflection on how best to strengthen communication work in relation to the role of the European Court of Human Rights and the implementation of its judgments.

B. Explanatory memorandum by Mr Kamal Jafarov, rapporteur

1. Introduction

1. The work on this report is based on a decision of the Bureau, dated 24 June 2022. The Committee on Legal Affairs and Human Rights appointed me rapporteur at its meeting on 11 October 2022. The background to this work is recent draft legislation in the UK, specifically the Bill of Rights Bill and the Illegal Migration Bill, and concerns that these bills "contain provisions that openly flout the UK's obligations under the European Convention on Human Rights".[3]

2. At its meeting on 12 December 2022, the committee held an exchange of views with the Joint Committee on Human Rights of the UK Parliament (JCHR). The committee held a further hearing on 22 March 2023 with the participation of Ms Sanchita Hosali, Director of the British Institute for Human Rights, United Kingdom, and heard a presentation prepared by Baroness Hale, Former President of the Supreme Court of the United Kingdom, in her absence.

3. I undertook a useful visit to the UK on 28-29 March 2023 where I met with representatives from civil society organisations, academics, parliamentarians, members of the Equality and Human Rights Commission, Government officials from a number of different Government Departments and the Minister responsible for human rights. I was also grateful for information provided separately from the Scottish Human rights Commission, the Northern Ireland Human Rights Commission and civil society organisations.

4. I shall first set out some background principles in relation to the different ways that member States give effect to the European Convention on Human Rights (ETS No. 5), including the principle of subsidiarity – namely that human rights should, in general, be secured by domestic mechanisms rather than through reliance on the European Court of Human Rights. I then consider the way that the UK currently gives effect to the European Convention on Human Rights through the Human Rights Act 1998 (HRA); the key elements of the Bill of Rights Bill (BoRB), as introduced into the House of Commons on 22 June 2022; before considering the implications of the Illegal Migration Bill (IMB) currently before the UK Parliament from the perspective of compliance with international human rights standards, including the European Convention on Human Rights. For the purposes of this report, I have sought to focus on those proposals with the most relevance also for other States, for the respect of the rule of law (including respect for international law) and for the European Convention on Human Rights system.

2. The obligation to secure respect for human rights and to provide an effective remedy for a violation of human rights: the principle of subsidiarity and enforcement of the rights enshrined in the European Convention on Human Rights in the member States

5. All Council of Europe member States are contracting parties to the European Convention on Human Rights and, as such, are bound, as a matter of international law, to respect the obligations flowing from it in good faith. This includes the obligation of each State to respect the human rights set out in the European Convention on Human Rights of "everyone" within their jurisdiction (Article 1 of the Convention).[4] It also includes the obligation to provide an effective remedy to any person whose rights and freedoms have been violated by that State (Article 13 of the Convention).[5] The object of Article 13 of the Convention is to ensure that individuals can obtain relief at national level for violations of their Convention rights without having to set in motion the international machinery of complaint before the European Court of Human Rights. Article 13 requires a domestic remedy before a "competent national authority" affording the possibility of dealing with the substance of an "arguable complaint" under the Convention and of granting appropriate relief.[6] Contracting States are nevertheless afforded a margin of appreciation in determining how they comply with their

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3. "The UK vs the ECtHR: Anatomy of A Politically Engineered Collision Course", Alice Donald and Philip Leach. Concerns have even been expressed that, if enacted, these bills will increase tensions and thus the risk of withdrawal. Withdrawal from the Convention would obviously entail significant consequences for the UK, including in relation to its international reputation and international relations (in relation amongst others to trade, including with the EU), as well as domestically – with specific implications for devolution and Northern Ireland (including in relation to the Good Friday Agreement). However, as neither bill envisages withdrawal, I have not focussed on this in this memorandum and have instead focused on the specifics of the draft legislation.

4. Article 1 of the Convention (obligation to respect human rights) provides "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

5. Article 13 of the Convention (right to an effective remedy) provides "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

obligations under Article 13.[7] Where domestic remedies are ineffective and do not meet the requirements of Article 13, individuals are forced to refer complaints to the European Court of Human Rights that should have been addressed within the national legal system and the number of the European Court of Human Rights cases against a State will be more significant. Where the domestic system for enforcement of the rights enshrined in the European Convention on Human Rights – and in particular the right to an effective remedy – is effective, there will naturally be fewer cases brought before the European Court of Human Rights as well as fewer violations found against that member State. Recourse to the European Court of Human Rights (Article 34 of the Convention) should therefore only be necessary as a fallback supervisory jurisdiction.[8]

6. The primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention resides with the national authorities – not with the European Court of Human Rights. This requires action by the State to provide a system of effective practical enforcement of the rights enshrined in the European Convention on Human Rights domestically, including adequate avenues of redress where violations occur. The principle of subsidiarity is expressed in the new preambular paragraph to the European Convention on Human Rights, added by Protocol No. 15 (CETS No. 213), which provides: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

7. How States give effect to the European Convention on Human Rights will depend on their constitutions and their legal systems. Some member States have monist systems, meaning that they consider international law obligations to be directly binding in domestic law (usually providing that the treaty is "self-executing").[9] However, even in monist States, there can often be scope for further reflection on how best to give effect to the rights protected under the European Convention on Human Rights and ensure their practical enforcement. Other member States have dualist systems, in which international legal obligations need to be transposed or somehow incorporated into domestic law in order to have full legal effect domestically.[10] In reality, many States have a mixed type between monism and dualism. As has been noted in the explanatory memorandum to the report by Mr George Katrougalos, entitled "European Convention on Human Rights and national constitutions", "neither monism nor dualism provide a sufficient answer for determining the factors that influence the integration of human rights treaties into domestic law and States following either approach can be very successful in implementing the obligations flowing from such treaties".[11] It is important to note that irrespective of the system and the margin of appreciation, a State cannot adduce its domestic law, including its constitutional system, as a justification for its failure to respect its international law obligations under the European Convention on Human Rights.[12]

3. The UK Human Rights Act 1998

8. Prior to the Human Rights Act 1998, the UK had not directly incorporated the rights enshrined in the European Convention on Human Rights into domestic law.[13] Some rights were protected under domestic ordinary laws, or under the common law, and the European Convention on Human Rights had some effect under domestic law, but it was not directly enforceable.[14] It was therefore more common for individuals to

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6. *Boyle and Rice v. the United Kingdom*, 1988, para. 52; *Powell and Rayner v. the United Kingdom*, 1990, para. 31; *M.S.S. v. Belgium and Greece* [GC], 2011, para. 288; *De Souza Ribeiro v. France* [GC], 2012, para. 78; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], 2014, para. 148.

7. *Vilvarajah and Others v. the United Kingdom*, 1991, para. 122; *Chahal v. the United Kingdom*, 1996, para. 145; *Smith and Grady v. the United Kingdom*, 1999, para. 135. Article 13 does not require any particular form of remedy (*Budayeva and Others v. Russia*, 2008, para. 190). Article 13 does not require a State to have a remedy to challenge *in abstracto* non-compliant domestic legislation (*De Tommaso v. Italy*, para. 180).

8. Article 34 (individual applications) provides "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocol thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right". Applying to the European Court of Human Rights to seek to enforce one's rights is subsidiary to national systems safeguarding human rights. See the *travaux préparatoires* of the European Court of Human Rights; *Kudła v. Poland* [GC], 2000, para. 152; Article 13 of the Convention; the requirement to exhaust domestic remedies in Article 35(1); *Cocchiarella v. Italy* [GC], 2006, para. 38; and *Scordino v. Italy (no. 1)* [GC], 2006, para. 140.

9. Examples of this approach include France, Spain and many central and Eastern European States.

10. Examples of this approach include Finland, Hungary, Iceland, Ireland, Norway, Sweden, the United Kingdom.

11. European Convention on Human Right and National Constitutions, Explanatory Memorandum, para. 12.

12. *Grzeda v. Poland*, para. 340. See also the Vienna Convention on the Law of Treaties, 1969. It this respect it is also worth noting that judgments of the European Court of Human Rights can require and have required changes to a State's constitutional provisions (for example *Paksas v Lithuania*).

need to resort to the protection of the European Court of Human Rights in order to enforce their rights – which was both a lengthy and costly process. Moreover, due to the lack of incorporation, domestic courts only rarely considered the extent of the rights enshrined in the European Convention on Human Rights and thus only rarely had regard to the case law of the European Court of Human Rights, meaning that domestic courts and the European Court of Human Rights were often approaching cases using different methodology and reasoning.

9. The HRA sought to resolve these concerns and "bring rights home" through creating a better system of domestic enforcement of the rights enshrined in the European Convention on Human Rights, that was closely linked to the methodology of the European Convention on Human Rights system.[15] This approach allowed human rights claims to be brought in domestic courts and embedded human rights thinking into the policy making and operational actions of public authorities. In my introductory memorandum I set out the key elements of the HRA and how they function.[16] As set out by Baroness Hale, former President of the Supreme Court of the United Kingdom, in her statement to the committee, the HRA complies with the UK's obligation to have an effective domestic remedy to secure compliance with the Convention rights, by:

a. Making the Convention rights into rights in UK law;

b. Making it unlawful for any public authority to act in a way which is incompatible with the Convention rights;

c. Giving victims a remedy in UK courts and tribunals;

d. Requiring UK courts and tribunals to "take into account" the judgments and decisions of the European Court of Human Rights and other Council of Europe bodies;

e. Requiring everyone to "read and give effect" to UK legislation of all kinds and whenever passed in a way which is compatible with the Convention rights "so far as it is possible to do so";

f. If this is not possible, empowering courts and tribunals to ignore incompatible provisions in secondary (delegated) legislation but not in Acts of the UK Parliament, which remain valid;

g. Requiring a Government Minister who sponsors a Bill in parliament to state whether or not he or she believes that it is compatible with the Convention rights.[17]

10. Data on UK cases at the European Court of Human Rights illustrate the success of the HRA in ensuring effective enforcement of human rights domestically, requiring little recourse to the European Court of Human Rights' supervisory role in enforcing human rights. Recent statistics generally show the UK as having the lowest number of applications brought against it, per capita, of any member State, as well as the lowest number of admissible applications and the lowest number of violations.[18] Civil society organisations representing marginalised groups have also emphasised the importance of the HRA in enabling individuals to enforce their rights.

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13. In an application brought before the HRA 1998 had entered into force, the European Court of Human Rights found that Article 13 of the Convention did not require the incorporation of the Convention in domestic law. [*Smith and Grady v. the United Kingdom*, 1999, para. 135]. However, since then, all States parties have incorporated the Convention rights into their domestic legal order. There is thus perhaps a question as to whether this change in State practice could be of relevance in future case law of the European Court of Human Rights relating to Article 13 of the Convention.

14. Prior to the HRA, the European Convention on Human Rights was an aid to construction of domestic legislation in case of ambiguity (it being assumed in cases of ambiguity that parliament intended to legislate compatibly with the UK's international human rights obligations (*R v. Secretary of State for the Home Department, ex. Parte Brind* [1991] 1 AC 696). The European Convention on Human Rights could also inform the exercise of judicial discretion and it assisted in establishing the scope of the common law where that was developing and uncertain or incomplete (*R v. Lyons* [2003] AC 976 [13] per Lord Bingham).

15. Some provisions of the HRA are similar to approaches taken to giving effect to the European Convention on Human Rights in other States, although there are some innovations. Of note, some provisions in the Irish European Convention on Human Rights Act 2003 (ECHRA) are very similar to some of the provisions of the UK's HRA 1998. For example, the requirement to interpret the law compatibly with Convention rights "so far as is possible" in section 2 ECHRA is very similar to the interpretative obligation in s. 3 HRA. The requirement in section 4 ECHRA on Irish Courts to "take due account" of the principles laid down in judgments of the European Court of Human Rights, is similar to the requirement for UK Courts to "take into account" "relevant" judgments of the Court in s. 2 HRA. Section 5 ECHRA relating to declarations of incompatibility has a similar affect as s. 4 HRA, although interestingly s. 5 ECHRA also includes a reference to a possible *ex gratia* payment for harm suffered as a result of such a provision.

16. Introductory Memorandum, AS/Jur(2022)35, para. 10.

17. Remarks by Baroness Hale.

18. See written evidence from Judge Robert Spano, then President of the European Court of Human Rights and Judge Tim Eicke to the Joint Committee on Human Rights (HRA0011).

4. Reform of the UK Human Rights Act and the Bill of Rights Bill

11. For the last two decades there have been talks about reforming the HRA as I set out in my introductory memorandum.[19] Following the 2019 Conservative Party manifesto, the UK Government launched an Independent Human Rights Act Review (IHRAR) in December 2020, chaired by Sir Peter Gross. The Panel's report was published on 14 December 2021 and contained detailed analysis. The report suggested very minor changes to the HRA, noting that "the vast majority of submissions" it received "spoke strongly in support of the HRA."[20]

12. On 22 June 2022, the UK Government introduced the Bill of Rights Bill into the House of Commons, containing quite significant changes to human rights protection in the UK, in quite stark difference to what was recommended in the IHRAR Report.[21] The Bill has received little support and has still not progressed within parliament, and many doubt that it will.[22] The BoRB would repeal and replace the HRA. It would retain the same list of rights in the Schedule to the HRA and many of the provisions are very similar (if not identical) to the HRA. However, there are significant changes that seem to limit the protection of human rights in the UK in some respects. As such, it is a rare example of a Bill of Rights that seems to limit, rather than enhance, a system of rights protection.

13. Rather surprisingly, the BoRB contains a number of provisions that do not seem to achieve any meaningful change to the law, but potentially create a significant amount of confusion or legal uncertainty. As the JCHR has said, the BoRB "weakens rights protections, it undermines the universality of rights, it shows disregard for our international legal obligations; it creates legal uncertainty and hinders effective enforcement; it will lead to an increased caseload in Strasbourg; and will damage our international reputation as guardians of human rights."[23] The BoRB has been viewed as contentious from the perspective of devolution given the special role accorded to the HRA under the devolution settlements of Northern Ireland, Scotland and Wales – as well as the special role of human rights in the Northern Ireland peace process.[24]

14. In my introductory memorandum I set out the key elements of the BoRB and analysed how they would affect the implementation of human rights in the UK.[25] In the interest of brevity, I have not repeated all that analysis here. The major elements of note in the Bill of Rights (and difference to the current HRA) are that:

a. The bill would delink the interpretation of the rights enshrined in the European Convention on Human Rights from the case law of the European Court of Human Rights [clause 3 (former s. 2 HRA)].

b. It would repeal the interpretative obligation [s. 3 HRA] that requires the courts and public authorities to read legislation compatibly with the rights enshrined in the European Convention on Human Rights "so far as it is possible to do so" [See analysis in paragraph 16 below].

c. It would require "great weight" to be given to certain considerations, including free speech [clause 4] and public protection [clause 6], in a way that could upset a proper balancing exercise involving other qualified rights in the Convention.

d. The bill would reduce the ability of UK courts to enforce positive obligations on the State to protect human rights [clause 5] [See analysis in paragraphs 18-19 below].

e. The bill seeks to enhance the role of parliament over that of the Courts in relation to striking the balance in respecting human rights, with consequent risks that it would lead to results "inconsistent with the UK's obligations under the European Convention on Human Rights"[26] [clause 7], whilst seeming to weaken the ability of parliament to secure information from the executive in relation to human rights compatibility of draft legislation [repeal of s. 19 HRA], and establishing a specific obligation for the Secretary of State to notify parliament of an adverse judgment of the European Court of Human Rights against the UK or a unilateral declaration by the UK Government [clause 25].

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19. Introductory Memorandum, AS/Jur(2022)35, para. 12.
20. Independent Human Rights Act Review Report.
21. Bill of Rights Bill, as introduced.
22. See, for example, commentary by Joshua Rozenberg; the report of the JCHR, "Legislative Scrutiny: Bill of Rights Bill", which sets out the lack of support for the bill, para. 29.
23. "Legislative Scrutiny: Bill of Rights Bill", *op. cit.*, summary.
24. See for example, the "Advice on the Bill of Rights Bill" by the Northern Ireland Human rights Commission, the Statement of the Scottish Human Rights Commission or the Evidence of the Equality and Human Rights Commission to the JCHR inquiry.
25. Introductory Memorandum, AS/Jur(2022)35, para. 14.
26. Report of the JCHR, "Legislative Scrutiny: Bill of Rights Bill", paragraphs 145 and 146.

f. The Bill contains provisions in relation to two specific types of legal challenges relating to deportation. Clause 8 seeks to reduce the ability of a "foreign national offender" (non-British national sentenced to more than 12 months' imprisonment) to rely on the right to respect for private and family life (Article 8 of the Convention) when challenging the compatibility of deportation legislation. As the JCHR noted, it does this in a way that "would almost extinguish Article 8 rights entirely" and would be "likely to be incompatible with the procedural requirements of Article 8".[27] Clause 20 seeks to limit a court's power, in deportation with assurances cases, to allow appeals by a "foreign criminal" against deportation on grounds that would question the nature of assurances relating to the right to a fair trial. Whilst the impact of this clause is likely limited, the "failure to adequately assess the sufficiency of deportation assurances may amount to a violation of Article 6 and Article 13".[28]

g. Clause 14 would remove the ability of victims of human rights breaches arising from an overseas military operation from being able to enforce their rights under the Convention. However, this clause could not be brought into force ('commenced') unless the Minister was satisfied that it was compatible with the UK's human rights obligations [clause 39] [See analysis in paragraphs 21 and 22 below].

h. Clause 24 would provide that no account should be taken of any interim measures "for the purposes of determining the rights and obligations under domestic law" of a public authority or any other person. [See analysis in paragraph 23 below].

i. A number of provisions seek to limit access to litigation or to damages for those bringing challenges based on human rights violations. Clause 15 would introduce a new permission stage before proceedings could be brought based on the Bill of Rights, requiring the applicant to have suffered a "significant disadvantage" (unless there was an "exceptional public interest" in the case being brought) – this barrier would "undermine the UK's commitment to uphold human rights" and could "leave the UK in breach of its international obligations" under the Convention.[29] Clause 18 creates certain limitations to an award of damages in respect of a human rights violation, including having regard to the conduct of the victim, which would depart from the case law of the European Convention on Human Rights and seems to run up against the principle of the universal nature of human rights.

j. Other clauses affect specific rights. For example clause 9 provides that one of the ways in which the right to a fair trial (Article 6 of the Convention) is secured in the UK includes trial by jury, and clause 21 would make it more difficult for the courts to require disclosure of journalistic sources.

15. I would like to highlight specific concerns in relation to the repeal of the interpretative obligation in s. 3 HRA; the impact on positive obligations; human rights breaches arising from overseas military operations; and interim measures.

4.1. The repeal of section 3 HRA

16. The removal of the interpretative obligation [s. 3 HRA] that requires the courts and public authorities to read legislation compatibly with the rights enshrined in the European Convention on Human Rights, "so far as it is possible to do so" is worthy of further consideration. This provision is all the more relevant because similar provisions have subsequently been introduced in other bills before parliament, including clause 1(5) of the Illegal Migration Bill, and clauses 42, 43 and 44 of the Victims and Prisoners Bill, disapplying the interpretative obligation in s. 3 HRA to that legislation.

17. This provision seems unnecessary as "section 3 does not undermine parliamentary sovereignty".[30] Following repeal, the existing common law principles of interpretation would still apply and would help to ensure that ambiguous or unspecific provisions of legislation were interpreted so as to be compatible with the rights enshrined in the European Convention on Human Rights.[31] However, the repeal of s. 3 HRA would reduce the reach of the interpretative obligation to provisions that were ambiguous, uncertain, or unduly general. This would mean that it is likely that more legislation would be interpreted in a way that is incompatible with the rights enshrined in the European Convention on Human Rights, possibly requiring more

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27. Report of the JCHR, "Legislative Scrutiny: Bill of Rights Bill", paragraphs 285 and 286. See also, for example, the speech by Edward Fitzgerald KC, "The Bill of Rights, the Human Rights Act, and the Enemies of the European Convention".
28. Report of the JCHR, "Legislative Scrutiny: Bill of Rights Bill", para. 295.
29. Report of the JCHR, "Legislative Scrutiny: Bill of Rights Bill", para. 197.
30. Report of the JCHR, "Legislative Scrutiny: Bill of Rights Bill", para. 105.
31. For example, the principle set out in *ex parte Brind* that where there is any ambiguity or uncertainty, statute should be interpreted in a way that is compliant with the UK's international obligations; or the principle of legality (*ex parte Simms*) that fundamental rights cannot be overridden by general or ambiguous words.

declarations of incompatibility and applications to the European Court of Human Rights, and leading to more pressure on parliament and government to dedicate time to resolving such incompatibilities. It also introduces some confusion as to the status of pre-existing interpretations of statute based on s. 3 HRA.[32] This further adds to the risks of a period of legal uncertainty following the entry into force of the Bill of Rights. Whilst the BoRB may not enter into force, the equivalent provision in the Illegal Migration Bill and the Victims and Prisoners Bill may well do so, which would disapply the interpretative obligation in s. 3 HRA to those bills. This will lead to an increased risk of incompatible interpretations of these laws and the need for further litigation before both domestic courts and the European Court of Human Rights.

4.2. Positive obligations

18. The bill would reduce the ability of UK courts to enforce positive obligations on the State to protect human rights. Clause 5 would prohibit the UK courts from applying any new positive obligations developed by the case law of the European Court of Human Rights after the enactment of the Bill of Rights. This provision seems to run clearly counter to the living instrument doctrine. It would freeze the development of positive obligations, such that, in time, no new positive obligation could not be directly enforced in the UK without amendment to UK legislation. Clause 5 would also require the Courts, in applying any existing positive obligations, to give "great weight" to avoiding specific concerns, including the need to avoid having an impact on the ability of any public authority to perform its functions, to avoid an interpretation that would determine police operational priorities or would require an unreasonable standard of inquiry or investigation, or would conflict with issues relating to allocation of resources.[33] This would also restrain the application of existing positive obligations in UK domestic law.

19. Clause 5 seems to encourage a more limited application of positive obligations than that set out in the case law of the European Court of Human Rights. As the JCHR stresses, "the positive duties arising from the Convention are expressly or impliedly contained within the Convention rights and are an important mechanism for securing rights protection for all persons within the jurisdiction of the State", noting their importance in protecting those experiencing domestic violence, 'honour-based' violence or stalking. It then concludes that clause 5 is "highly likely" to lead to divergences between interpretations of the Convention rights in the UK and by the European Court of Human Rights, as well as uncertainty and increased litigation.[34] As noted by Baroness Hale, this is "particularly troubling in relation to the absolute and non-derogable rights in articles 2, 3 and 4" – not to kill, torture or enslave – each of which have a series of positive obligations "to have a system of laws and regulation to protect the right, to investigate possible breaches and to bring the perpetrators to justice, and in certain circumstances to protect potential victims from risk".[35] The potential impact on victims of domestic violence, violence against women, or those at risk of targeted attacks has been raised as a matter of concern.[36]

20. There is a significant risk that this provision would therefore result in the need for litigation before the European Court of Human Rights in order for individuals to enforce their rights, and an increase in adverse judgments against the UK in the European Court of Human Rights.

4.3. Overseas military operations

21. Extra-territorial jurisdiction in a conflict situation outside of the European territorial space has been viewed as controversial due to practical challenges in ensuring human rights in an area over which a State has limited control, and due to the differences between international human rights law and the *lex specialis*,

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32. Clause 40 contains a power for the Secretary of State to "preserve" interpretations that the UK courts have made using the interpretative obligation under s. 3 HRA. However, there is significant confusion as to how many such s. 3 HRA interpretations the UK Courts have made under the HRA and what their content was – not least as there is no central list of such interpretations and because some judgments are not clear as to whether the court relied solely on s. 3 HRA in reaching its interpretation.
33. The examples given in the government documentation to support the inclusion of this clause tend to relate more to the application of Convention rights by UK authorities rather than a problem with the law, or positive obligations, themselves. For example, much is made of the extent of police resource dedicated to Osman warnings in respect of criminal gang members (these are warnings from the police that an individual's life may be at risk). The complaint is that too much resource is dedicated to giving such warnings to gang members during gang conflicts. However, this relates in part to how the police have chosen to apply their positive Article 2 duties, rather than an inherent problem with positive obligations. Some commentators have thus suggested that clause 5 is hitting the wrong target and is merely creating further problems.
34. Report of the JCHR, "Legislative Scrutiny: Bill of Rights Bill", paragraphs 83-86.
35. Remarks by Baroness Hale.
36. "The Bill of Rights, the Human Rights Act, and the Enemies of the European Convention", op. cit.

international humanitarian law. However, given the case law of the European Court of Human Rights on Article 1 relating to "extra-territorial jurisdiction", it is clear that excluding liability for the actions of State agents in military operations overseas in clause 14, without putting in place an alternative mechanism for access to an effective remedy, would not be compatible with the UK's obligation to provide a mechanism for access to an effective remedy (Article 1, 13 of the Convention etc) in respect of breaches of a Convention right.

22. As Edward Fitzgerald KC put it "this is flatly contrary to the requirements of the Convention and international law, and would create dissonance between [the UK's] obligations under treaty conventions and domestic law".[37] It is notable that the Independent Human Rights Act Review[38] and the UK Government's consultation paper[39] both seem to suggest that the UK Government may wish to start a debate relating to the extent of jurisdiction under Article 1 of the Convention in relation to overseas military operations. However, the correct way to do this, while respecting the rule of law, is to seek to have such discussions at the international level rather than seeking to legislate unilaterally in a way that suggests an intention not to comply with international law. Including within primary legislation a provision such as clause 14, that, if brought into force, would breach the UK's international law obligations under the European Convention on Human Rights, is problematic in terms of respect for the rule of law and human rights.

4.4. Interim measures

23. Interim measures are designed to prevent irreparable damage in a case pending before the European Court of Human Rights and are issued by the European Court of Human Rights where it considers that there is an "imminent risk of irreparable damage" that would either prevent an applicant bringing a claim or render that claim pointless. Interim measures are not explicitly mentioned in the European Convention on Human Rights, however, the European Court of Human Rights has developed case law and practice under which interim measures, issued under Rule 39 of the Rules of the Court, are binding as a matter of international law in order to give full effect to the right of individual application under Article 34 of the Convention.[40] Article 34 of the Convention has not itself been incorporated into UK domestic law, however, the UK Government has procedures in place to comply with interim measures as a matter of international law.[41] The UK Government has a good record of complying with interim measures and seems to accept that they are binding as a matter of international law, notwithstanding some political opinions expressed on this topic. Clause 24 BoRB would provide that no account should be taken of any interim measures "for the purposes of determining the rights and obligations under domestic law" of a public authority or any other person. This provision could be read as merely a strong assertion of dualism, indicating no real change to the UK's future conduct in respecting interim measures. However, there are concerns that it could indicate a different approach, and optically it has caused confusion as to whether this is an indication that the UK would no longer comply with interim measures. Former judge at the UK Supreme Court, Lord Mance, said that "it is extraordinary to see legislation proposing to forbid any domestic court in future taking any account of any interim measure issued by the European Court of Human Rights".[42] The clause seems to achieve little other than creating confusion and suggesting a potential disregard for the rule of law. Further confusion has been created by a clause recently inserted into the Illegal Migration Bill on this topic (see paragraph 47-49 below).

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37. Idem.
38. Chapter 8, Independent Human Rights Act Review Report, which concluded that the extra-territorial and temporal scope of the European Convention on Human Rights was "troublesome" and should to be addressed by a "national conversation" relating to the application of law in situations of armed conflict, together with "governmental engagement" with States parties to the Convention on "reform of the Convention" to develop a "new Protocol to the Convention setting out a clear, logically coherent; well thought-out approach to its territorial and temporal scope, together with the Convention's relationship with IHL [international humanitarian law]".
39. The UK Government's consultation paper stated that "it is clear from the travaux préparatoires to the Convention that the drafters intended the Convention to apply only to States parties' territories". The government argued that "the extension of human rights law to armed conflict has … created considerable legal and therefore operational uncertainties for our armed forces".
40. *Mamatkulov and Askarov v. Turkey* (2005).
41. A recent domestic judgment has however referred to the interim measures indicated by the European Court of Human Rights in the case of *K.N. v. the United Kingdom* (no. 28774/22) on 14 June 2022 concerning an Iraqi asylum-seeker facing imminent removal to Rwanda. In this case, the European Court of Human Rights indicated to the UK Government that the applicant should not be removed to Rwanda until three weeks after the delivery of the final domestic decision in his ongoing judicial review proceedings. The UK Government has respected this interim measure.
42. The Thomas More Lecture 2022, para. 22.

4.5. General comments on the Bill of Rights Bill

24. There has been significant criticism and scepticism of the Bill of Rights Bill, with most if not all civil society organisations in the UK expressing significant concern and opposition to it, many referring to it as a "rights removal bill".[43] Sir Peter Gross, who chaired the IHRAR Panel's work, has said "Typically, a bill of rights reflects fundamental, enduring values and is an uplifting document, requiring and commanding wide-ranging consensus. The Bill of Rights Bill is not a bill of rights. Labelling it as such only serves to encourage cynicism".[44]

25. Some of the clauses seem likely to have little real impact but would be highly likely to create legal uncertainty and potential barriers to enforcing human rights. Other clauses are more obviously problematic, such as those placing limits on the enforcement of positive obligations, or on the consideration of human rights violations relating to overseas military conflicts. Indeed, there have been doubts expressed as to whether the bill complies with the European Convention on Human Rights. Lord Pannick QC has said "No serious person can sensibly suggest that the proposed Bill of Rights complies with the European Convention on Human Rights".[45]

26. Lord Mance has noted a number of pertinent concerns with provisions of this Bill, whilst highlighting the important role to be played by the rule of law, alongside parliamentary sovereignty, as the two pillars of British democracy. He notes concerns that the bill seems to "require or influence the courts to 'diverge more freely' from Strasbourg", and that at "the international level the Bill would change this country's relationship with the European Convention on Human Rights and with the European Court of Human Rights in particular".[46] The provisions of the BoRB are overall likely to increase the number of adverse European Court of Human Rights judgments against the UK, and to increase the extent to which UK legislation is incompatible with human rights (and delays in resolving such incompatibilities). Given the potentially confusing nature of some of the provisions (for example the clause relating to interim measures) and the overall increase in adverse judgments, it is likely that the main impact of the bill will be to impede the effective enforcement of human rights in the UK and to increase political tensions relating to human rights. As Baroness Hale noted, the bill "will reduce the protection currently given to the Convention rights in UK law, uncouple UK human rights law from Strasbourg human rights law, and make it questionable whether UK law does indeed provide an effective domestic remedy for breach of the Convention rights".[47]

27. Much has been written about the bill, I commend in particular the analysis and conclusions of the JCHR on this topic.[48] It is welcome that the UK Parliament has such a detailed analysis of the human rights impacts of legislation before it. Such an approach is in line with Resolution 1823 (2011) "National parliaments: guarantors of human rights in Europe", which, at its paragraph 6.4, "calls on all member states to provide for adequate parliamentary procedures to systematically verify the compatibility of draft legislation with Convention standards and avoid future violations of the Convention".

28. There is perhaps scope for ensuring that the analysis initially provided to parliament when a government bill is introduced is both sufficiently independent from the government and its political priorities, and is sufficiently frank and transparent. Whilst the Attorney General's Office performs a role internal to government in considering the compatibility of government bills with the rule of law, including international law, the objectivity of such advice could be perceived as being affected by the attitude of the Minister (the Attorney General) responsible for that department at the relevant time. Moreover, the fact that the Attorney General's advice is not published does not assist the legislature in its role in determining whether draft legislation before it will risk offending the rule of law. The analysis that is then published by the government in the European Convention on Human Rights memorandum (or the explanatory notes) thus risks being seen as only a partial picture that could be politically motivated – and may be unduly focussed on the rights enshrined in the European Convention on Human Rights omitting other important rule of law and human rights considerations. Whilst parliamentary committees, including the JCHR, try to make up for this lack of objective analysis, thought might be given to how best to improve the impartiality and transparency of the analysis initially provided. Other States have alternative solutions with, for example, a 'Conseil d'Etat' providing, usually published advice, on draft laws. A more independent and transparent approach can provide greater comfort in

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43. See, for example statements by Equally Ours, Amnesty International, Liberty, British Institute of Human Rights. See also concerns expressed by the Commissioner for Human Rights of the Council of Europe, "United Kingdom: backsliding on human rights must be prevented", and the Country Report.
44. "The Independent Human rights Act Review (IHRAR) and beyond", speech by Sir Peter Gross, November 2022.
45. In oral evidence to the JCHR.
46. The Thomas More Lecture 2022, para. 44.
47. Remarks by Baroness Hale.
48. Report of the JCHR, "Legislative Scrutiny: Bill of Rights Bill", para. 197.

demonstrating that an appropriate level of analysis has been undertaken to ensure that the rule of law implications of legislation have been fully thought through. This is arguably all the more important in a country without a written constitution where a rule of law analysis thus performs an even more important function.

29. The UK Parliament and Government may wish to consider whether there could be improved mechanisms for ensuring the independence, transparency and timeliness of assessments as to the rule of law and human rights implications of draft legislation. The Houses of Parliament may additionally wish to consider how best to ensure that such assessments relating to the rule of law and human rights impacts of bills, including in the form of existing helpful reports of parliamentary committees, can be given due and timely consideration when parliament legislates.

5. The Illegal Migration Bill

30. The Illegal Migration Bill was introduced into the House of Commons on 7 March 2023. Whilst migration matters are for the specialist consideration of the Parliamentary Assembly's Committee on Migrants, Refugees and Displaced Persons, the IMB raises a number of fundamental issues relating to compliance with international law, including the European Convention on Human Rights, which have links to the themes relating to the reform of the UK's human rights legislation.[49] Moreover, whereas the BoRB seems to have stalled in its progress through parliament, the IMB has been progressing at some speed. It is therefore opportune to consider some aspects of this bill within this work.

31. The IMB contains provisions covering, in particular, removal; suspensive and non-suspensive claims and appeals; restrictions of the rights of victims of modern slavery and human trafficking; inadmissible asylum claims; interim remedies and interim measures; detention; children; restrictions on entry, leave to remain, and obtaining citizenship; safe and legal routes. Many of the provisions of the IMB (including that relating to interim measures) were introduced as "holding clauses" (namely the actual clauses were introduced at a later stage in parliamentary consideration of the bill) thus impeding effective parliamentary scrutiny.

32. The IMB raises concerns of compatibility with the European Convention on Human Rights, the 1951 Convention on the Status of Refugees and its 1967 Protocol (the UN Refugee Convention), the Council of Europe Convention on Action Against Trafficking in Human Beings (CETS No. 197) and the UN Convention on the Rights of the Child.[50] As the United Nations High Commissioner for Refugees (UNHCR) has said "The Bill, if enacted, would breach the UK's obligations under the Refugee Convention, the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention for the Reduction of Statelessness and international human rights law."[51] Moreover, there have been suggestions that "the Bill is being used as a pretext for creating a dispute with the European Court of Human Rights over implementation of any adverse judgments, or declarations of incompatibility in the domestic courts, which may precipitate proposals to withdraw from the Convention".[52]

33. The UK Government has expressed understandable concern at the number of asylum seekers resorting to dangerous journeys, often on small precarious boats, across the Channel. Such journeys themselves pose a risk to the right to life (Article 2) given their perilous nature in one of the world's busiest shipping channels and often in rough seas.[53] However, it is important that any steps taken to tackle such concerns themselves respect human rights, including the rights of children, refugees and those exploited by human traffickers. As has been noted by the UNHCR, one way of achieving this could be to ensure fast, fair and effective decision making within the asylum system.[54]

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49. Related to the government's proposed changes in the Bill of Rights Bill, the IMB contains a provision to disapply the obligations in s. 3 HRA to interpret legislation compatibly with the Convention rights "so far as it is possible to do so" [clause 1(5)]; it similarly seems to create a conflict with the obligation to comply with interim measures indicated by the European Court of Human Rights.

50. Remarks by Baroness Hale who said that "It can readily be argued that some of its provisions are incompatible with our obligations under the United Nations Refugee Convention, the Council of Europe Convention on Action against Trafficking in Human Beings, and the European Convention on Human Rights". See also, for example, the briefing by the British Institute for Human Rights. See also concerns expressed in a letter from the Commissioner for Human Rights.

51. "UNHCR Legal Observations on the Illegal Migration Bill", para. 4.

52. House of Commons Library briefing on the Illegal Migration Bill 2022-23, chapter 7.4. "The UK vs the ECtHR: Anatomy of A Politically Engineered Collision Course", *op. cit*.

53. See also the 2016 New York Declaration for Refugees and Migrants, unanimously adopted by the United Nations General Assembly which states "We are determined to address unsafe movements of refugees and migrants, with particular reference to irregular movements of refugees and migrants. We will do so without prejudice to the right to seek asylum. We will combat the exploitation, abuse and discrimination suffered by many refugees and migrants."

54. "UNHCR Legal Observations on the Illegal Migration Bill," para. 19.

34. The Assembly Committee on Migrants, Refugees and Displaced Persons has already expressed concern at the implications of the Illegal Migration Bill in a statement unanimously adopted on 24 April 2023.[55] In that statement it said "The provisions of this bill are a wilful distortion of core UN and European conventions which the UK itself contributed to designing. Its provisions would jeopardise the right to an effective remedy, breach the non-refoulement principle, endanger victims of forced labour and modern slavery, and strip international protection seekers of their right to seek asylum, with no regard for the best interest of the child". It went on to note that "Non-discrimination, non-penalisation and non-refoulement are the pillars of the Refugee Convention, requiring effective access to fair and individualised procedures. In practice, applying such core principles may prove challenging to State and local authorities in seeking to determine individual applications fairly. Nevertheless, the repeated legislative changes in the UK are resulting in removing much-needed protection for refugees and victims of trafficking, severely disrespecting fundamental human rights standards. Such measures are not a valid policy response to the issues at stake." I fully share these concerns.

35. The Migration Committee statement follows the adoption of Resolution 2408 (2021) "70th anniversary of the 1951 Refugee Convention: the Council of Europe and the international protection of refugees", in which the Assembly emphasised "the urgent need to strengthen Council of Europe member States' commitment to upholding fundamental rights of those who flee persecution for reasons specified in the 1951 Refugee Convention".[56] The same year, the Assembly, in its Resolution 2379 (2021) "Role of parliaments in implementing the United Nations global compacts for migrants and refugees" reiterated its call "to protect and promote the rights of people on the move, in line with the international standards of humanitarian protection, human rights, democracy and the rule of law."[57]

36. The IMB is the third time since the entry into force of the HRA that a Government Minister has made a "section 19(1)(b) statement" that the Minister is "unable" to make a statement that the provisions of the Bill are compatible with Convention rights.[58] The government has explained that this does not mean that the provisions of the bill are incompatible with Convention rights, but that there is more than a 50% chance that they may be incompatible.[59] Importantly and unusually, the section 19(1)(b) statement is not solely in respect of one complex or problematic issue. Rather the European Convention on Human Rights Memoranda produced by the Home Office make it clear that there are a number of different provisions of the IMB that have caused the government to be unable to say that the bill complies with the UK's obligations under the European Convention on Human Rights. Substantial questions of compatibility with a number of different Convention rights have been raised. This indicates a more substantial appetite within the UK Government for non-compliance with the rule of law. The bill moved from the House of Commons to the House of Lords on 27 April 2023, following a number of amendments, and it is this version of the bill on which I base my considerations below.[60]

37. The UK Government's European Convention on Human Rights Memoranda set out the analysis of the compatibility of the IMB with international human rights standards.[61] The government considers that the rights to life (Article 2), the prohibition on inhuman or degrading treatment (Article 3), the prohibition of slavery (Article 4), the right to liberty and security (Article 5), the right to a fair trial (Article 6), the right to respect for private and family life (Article 8), the right to an effective remedy (Article 13), the prohibition of discrimination (Article 14) and the right to education (Article 2 of the additional Protocol to the Convention (ETS No. 9)) are relevant to an analysis of the bill. It is a welcome practice that the UK Government provides an analysis to Parliament in respect of government bills. This facilitates an informed discussion as to the extent to which proposed legislation does or might not comply with the UK's international obligations, and in particular its human rights obligations including those flowing from the European Convention on Human Rights. This

55. Statement by the Committee on Migration, Refugees ans Displaced Persons.
56. Resolution 2408 (2021).
57. Resolution 2379 (2021).
58. The previous occasions were: (1) a repetition of s. 28 Local Government Act 1988 which prohibited the promotion of homosexuality and was repealed shortly thereafter; and (2) the Communications Act 2003 due to the uncertainty as to whether or not the UK's ban on political advertising would be compatible with Article 10. This was subsequently found to be compatible with Convention rights in *Animal Defenders International v. United Kingdom*.
59. For more information as to what has been said in respect of the s. 19(1)(b) statement, see the House of Commons Library briefing on the Illegal Migration Bill 2022-23, chapter 7.2.
60. For the latest information and text of the Bill, see here. Two improvements of the bill since introduction in the House of Commons are (i) the removal of the provision that would have enabled the detention and removal of people from the UK on the basis that their family members had entered the UK without the required authorisation, which would have raised obvious concerns from the perspective of fairness, refugee law and human rights; and (ii) the requirement to provide a report in relation to "safe and legal" routes to enter the UK and access protection. Other clauses, however, raise concerns.
61. Memorandum and Supplementary European Convention on Human Rights Memorandum, in which the Government produces human rights compatibility analysis to explain its statement under s. 19 HRA.

practice might be encouraged as good domestic practice across Council of Europe States. However, I reiterate my comments from paragraphs 28 and 29 that further thought might be given, within the UK constitutional system, as to whether this mechanism could be further improved to ensure the independence and transparency of such assessments, particularly in light of the absence of any other "control of constitutionality" or "rule of law" control within the UK's constitutional system.

5.1. Removal

38. The bill would create a duty to make arrangements to remove people who enter the UK without the required permission and who have not "come directly" from a territory where their life or liberty was threatened (which is defined as excluding people who have passed through or stopped in a "safe" country).[62] They would be removed "as soon as is reasonably practicable", either to their home country, the country from which they arrived, or a country where they will be admitted – provided it is considered to be a country that is safe in general.[63] This means that there would not be any individualised assessment as to whether removal to that country would be safe for that particular individual, raising concerns that human rights and refugee law could be breached in individual cases.[64] On this note, I recall the Resolution and the Recommendation adopted by the Parliamentary Assembly in October 2022 on safe countries for asylum seekers in which the Assembly emphasised that "no absolute presumption of safety can be made" and encouraged the development of procedural requirements at the level of the Council of Europe in order for asylum seekers to have a fair possibility to rebut the presumption of safety.[65]

39. This duty to remove in the IMB applies irrespective of any asylum claim, human rights claim, slavery or human trafficking claim.[66] Separate from the concerns in relation to serious harm that a person may face on return or to the impact on victims of slavery or human trafficking, there are well-documented concerns about the compatibility of this provision with the right to seek asylum under the Refugee Convention[67] and human rights law.

5.2. Suspensive and non-suspensive claims and appeals

40. The bill would restrict the ability (and the time-limits) for people to appeal against removal to a safe third country, and would make most appeals non-suspensive (namely a person can be removed pending their appeal). This could raise concerns in relation to the compatibility of these provisions with human rights, including the right to an effective remedy under Article 13 of the Convention.

41. Where there is a "real, imminent and foreseeable risk" of "serious and irreversible harm" then a person can make a "serious harm suspensive claim" within eight days of receiving their removal notice. This provision is intended to ensure that removals do not breach the requirements of the Refugee Convention, in particular the principle of non-refoulement, and the European Convention on Human Rights (in particular Articles 2 and 3), and the test is intended to mirror the threshold applied by the European Court of Human Rights for granting interim measures.[68] However there are concerns that this may not be compatible with the requirements of human rights law, for example in relation to a real risk of serious and irreversible harm to a person's health outcomes.[69] A person may also make a "factual suspensive claim" against removal, that a mistake of fact was made in deciding that the person met the removal conditions.

42. The normal deadline for the Secretary of State to determine such claims is 4 days and, if successful, the person would then not be removed.[70] There is a possibility of appeal to the Upper Tribunal in respect of a decision as to whether a claim is suspensive (which requires permission to appeal in a case which is certified

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62. Clause 2 IMB. The bill includes specific provision in relation to removing unaccompanied children.
63. Clause 5 IMB as read with Schedule 1.
64. See concerns expressed in the "UNHCR Legal Observations on the Illegal Migration Bill", para. 15. In particular, Article 32 of the Refugee Convention prohibits the expulsion of refugees that are lawfully on a State's territory, and Article 33 prohibits the return or expulsion of a refugee (refoulement) to a territory where their "life or freedom would be threatened" on account of their race, religion, nationality, social group or political opinion.
65. Recommendation 2238 (2022), and Resolution 2461 (2022).
66. Clause 4(1) and 21 IMB.
67. See, for example, "UNHCR Legal Observations on the Illegal Migration Bill", *op. cit*.
68. Home Office European Convention on Human Rights Memorandum, para. 63. It seems that the similarity to the test for interim measures is an effort to avoid potential clashes where a person might successfully obtain interim measures against removal – however the linkage is not made explicit in the legislation, only in the explanations.
69. Contrast clause 38 IMB with the case law of the European Court of Human Rights in *Paposhvili v. Belgium* [GC], 2016, indicating the circumstances in which removal would breach Article 3 of the Convention due to a lack of a certain standards of available healthcare in the country of removal.

as "clearly unfounded") – such an appeal process should in total take less than 30 days.[71] There are procedural barriers to raising new arguments, information or evidence during the various appeal stages, unless there are "compelling reasons" for such delay in raising new arguments. A person may not be removed during the time periods for considering and appealing the suspensive claim application.[72] There are concerns that the removal of some layers of appeal (for example judicial review) could be incompatible with Article 13 of the Convention.[73]

5.3. Restrictions of the rights of victims of modern slavery and human trafficking

43. The duty to remove applies irrespective of whether the person is a victim of modern slavery or human trafficking.[74] The bill also restricts the assistance and support that would otherwise be available to such people as victims of modern slavery or human trafficking. However, the provisions restricting such assistance and support have a "sunset clause", which indicates that they may be intended as temporary measures.[75]

44. Article 4 of the Convention (prohibition of slavery and forced labour) applies to human trafficking[76] and requires States to (i) put in place a legislative and administrative framework to protect against violations of Article 4; (ii) take operational measures (for example to protect and support victims, and to prevent those seeking to exploit victims); and (iii) investigate alleged breaches of the prohibition on slavery. Similar protections are found in detailed provisions of the Council of Europe Convention on Action Against Trafficking in Human Beings. The bill would risk breaching these obligations to take steps to protect victims and to investigate crimes. The bill seeks to detain and remove the victims (potentially to locations where they could be re-trafficked) – thus preventing meaningful protection of victims and investigative and punitive action against traffickers. As the Group of Experts on Action against Trafficking in Human Beings (GRETA) has said "if adopted, the bill would run contrary to the United Kingdom's obligations under the Anti-trafficking Convention, to prevent human trafficking, and to identify and protect victims of trafficking, without discrimination".[77]

45. The UK Government argues that it can take this action to remove victims of human trafficking and modern slavery on the grounds that they are a "threat to public order, arising from the exceptional circumstances relating to illegal entry into the UK".[78] The fact that an individual was trafficked into the UK does not make that individual a threat to public order. Moreover, the reference to "public order" relates to Article 13(3) of the Council of Europe Convention Against Trafficking in Human Beings, not to the protection afforded to victims of slavery and trafficking under Article 4 of the Convention. The UK Government argues that the provision is nonetheless compatible with Article 4 of the Convention as a person need not be removed if they are co-operating with an investigation (although there would have to be "compelling circumstances" requiring them to be present in the UK for this to bite); a claim may be suspensive if the person would face a "real risk of serious and irreversible harm"; and the government would ensure that receiving countries could investigate trafficking claims and support victims themselves.[79] In sum, there are doubts that, taking the provisions together, the new law would adequately protect victims of modern slavery or human trafficking, in line with the UK's obligations under Article 4 of the Convention and the Council of Europe Convention Against Trafficking in Human Beings.

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70. Clauses 37-42 IMB.
71. Clauses 43-49 IMB. There are also specific appeals to the Upper Tribunal foreseen in respect of decisions as to whether a claim is clearly unfounded, out of time claims, and concerns new matters. Appeals are to the Special Immigration Appeals Commission in cases where the Secretary of State certifies that information relied upon should not be made public due to reasons of national security, international relations or the public interest (clause 51).
72. Clause 46 IMB.
73. Home Office, European Convention on Human Rights Memorandum, para. 65.
74. Clause 21 IMB.
75. Clause 22-25 IMB.
76. See *S.M. v. Croatia* [GC], European Court of Human Rights.
77. GRETA Statement.
78. Home Office, European Convention on Human Rights Memorandum, para. 45.
79. Home Office, European Convention on Human Rights Memorandum, para. 46.

5.4. Inadmissible asylum claims

46. The IMB provides that protection and human rights claims from those subject to removal, having not come directly from a territory where they were threatened, are inadmissible – as are claims by nationals of certain Council of Europe States.[80] As the UNHCR stated, this would "all but extinguish the right to claim asylum in the UK" and would effectively deny refugees the protection they need, whilst potentially leaving them in limbo if they cannot, in fact, be removed from the UK".[81]

5.5. Interim measures and interim remedies

47. Clause 52 prevents a domestic court from granting any interim remedy that would prevent or delay a person's removal from the UK. Clause 53 provides that where the European Court of Human Rights has indicated interim measures related to a person's removal from the UK under the IMB, then a Minister may decide (having regard to any matter the Minister considers to be relevant, including the interim measures process and the likely timing of such a measure) not to remove that person. The duty to remove a person does not apply pending a decision by the Minister as to whether or not to make a determination following the indication of interim measures [clause 53(9)]. Unless the Minister disapplies the removal obligation, then the executive and courts are expressly prevented from having regard to the interim measure when processing decisions relating to that person's removal from the UK. As set out above, the European Court of Human Rights has made clear that a failure to abide by interim measures, such as those preventing a person's removal where they could face a real risk of serious harm, is itself a breach of Articles 1 and 34 of the Convention. Clause 52 therefore runs a clear risk of placing the UK in breach of its obligations under the Convention.

48. In a Joint statement issued on 26 April 2023, George Katrougalos (Greece, UEL), rapporteur for "The European Convention on Human Rights and national constitutions" and Constantinos Efstathiou (Cyprus, SOC), rapporteur for "Implementation of judgments of the European Court of Human Rights", raised concerns that clause 52, if enacted, would "place on the statute book a provision that contemplates the UK Government deliberately breaching its international obligation to comply with interim measures".[82] They stated that "It is of grave concern that this draft legislation foresees the UK breaching international law, thus undermining the rule of law. If such a provision becomes law, this would send a negative message, not only in the UK but also internationally." I fully support their statement and share their concerns.

49. Some commentators have suggested that the criteria to which a Minister may have regard in coming to a determination as to whether or not to disapply the duty to remove following the indication of interim measures by the European Court of Human Rights, seem like an effort at "negotiation by legislation", similar to concerns expressed relating to the overseas military operations clause of the BoRB.[83] Whilst States must be able to actively engage with the instances of the Council of Europe to improve processes, negotiation by legislation does not appear to be an approach supportive of the rule of law, but rather heading towards a conflict of laws. Unilaterally legislating in a manner that would risk placing that State in breach of its obligations under the European Convention on Human Rights does not seem like the best method for approaching constructive and genuine dialogue on such matters. Nor would it comply with a State's obligations to implement its treaty obligations in good faith.[84]

5.6. Detention

50. The bill provides for the detention of people who enter the UK without the required leave, having not "come directly" from a territory where their life or liberty was threatened and who would thus be potentially subject to removal under the IMB. Detention is for potentially lengthy periods of time pending their removal (or a determination).[85] Whilst individuals can apply to the Secretary of State for bail, they cannot challenge any

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80. Clause 4(2)-(5) and clause 57 IMB. The latter inserts a provision which lists 32 Council of Europe member States as "safe states" from whose nationals' asylum or human rights claims will be inadmissible absent "exceptional circumstances" (such as a derogation from the European Convention on Human Rights or the instigation of the EU's Rule of Law mechanism under Article 7 of the Treaty on European Union). Of note, the UNHCR has expressed concern that Albania is on this list, noting the "certain groups of Albanian citizens may be at risk of persecution" – "UNHCR Legal Observations on the Illegal Migration Bill", para. 17.
81. "UNHCR Legal Observations on the Illegal Migration Bill", paras. 11, and 20-36.
82. See Joint Statement.
83. See, for example, Joshua Rozenberg, "Interim measures: Negotiation by legislation or legislation by negotiation?".
84. Vienna Convention on the Law of Treaties, see for example Article 31.
85. Clause 11 IMB.

refusal to grant immigration bail before the courts for the first 28 days of detention – although they may apply for a writ of *habeas corpus* to challenge their detention.[86] It is important to note in this context ongoing concerns in the UK in relation to the appropriateness of the conditions of some types of detention.[87]

51. These detention powers clearly engage the right to liberty under Article 5 of the Convention and there are concerns that detention could thus be determined without sufficiently independent procedural guarantees. Whilst it can be hoped that a challenge by way of an application for a writ of *habeas corpus* will enable the courts to challenge the lawfulness of detention, there are questions as to whether this will allow the courts adequately to assess compliance with Article 5. It does seem unusual that more modern and adapted methods for challenging immigration bail decisions have been removed for these cases in preference to the *habeas corpus* method for challenging unlawful detention that dates from the twelfth century. This method would arguably need to be "developed" by the courts having regard to their obligation under s. 6 HRA to act compatibly with Convention rights, in order to adequately comply with the UK's obligations under Article 5 of the Convention. Moreover, given the anticipated difficulties in finding a country to which to remove detainees, there are real risks that many people (including children, pregnant women and vulnerable adults) will be subject to effectively indefinite detention. There are thus significant concerns relating to the compatibility of these provisions with the right to liberty protected in article 5 of the Convention.

52. There are also powers to search and seize electronic material in relation to a detained person [clauses 14, 60(2) and Schedule 2]. There may be questions as to whether their use validly falls within one of the justifications under Article 8(2) of the Convention.[88] Indeed, these provisions are one of the reasons that the Home Office Minister has been unable to make a statement that the bill is compatible with the European Convention on Human Rights (and in particular the right to respect for private life (Article 8 of the Convention) and the right to peaceful enjoyment of one's possessions (Article 1 of the additional Protocol to the Convention).

5.7. Children

53. Various of the provisions specifically affect children.[89] This includes the duty to make arrangements for removal, which is optional (not a duty) in respect of unaccompanied children (but becomes obligatory when they turn 18), and is a duty in respect of accompanied children. Detention affects children and can have profound negative impacts on their development. Careful thought is needed to consider whether the rights of the child, as protected under the UN Convention on the Rights of the Child, can be met by detaining that child for immigration purposes. The Home Office European Convention on Human Rights Memorandum notes that a number of human rights could be engaged by the detention of children (and pregnant women) but concludes that "family groups will be detained together in appropriate accommodation, pregnant women and unaccompanied children will be detained in appropriate accommodation and appropriate provision will be made for educational and any relevant support needs".

54. The disapplication of the duty to consult the Independent Family Returns Panel in relation to children subject to removal under the bill is purportedly to enable the prompt removal of children and their families, but obviously has the potential to lessen procedural safeguards and protections for children. There are also provisions relating to accommodation and support for unaccompanied children and provisions concerning age assessments.

55. Of particular note, the Home Office states that the Minister was "unable to make a statement" of compatibility with the European Convention on Human Rights in respect of clause 55 (which limits appeals for age assessments for those subject to removal) due to the risk that it may not be compatible with Article 6 of the Convention even though the Government "is satisfied that the provision is capable of being applied compatibly with Article 6 of the Convention".[90] Similar concerns would appear to arise in respect of the compatibility of this provision with the right to an effective remedy under Article 13 of the Convention.

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86. Clause 12 IMB.
87. See concerns about the Marston detention facility in 2022; concerns relating to 404 unaccompanied asylum-seeking children going missing from Home Office accommodation during 2022, of which around half remain missing [see the Parliamentary question on this]; as well as related concerns such as the standard of healthcare available in such accommodation.
88. See Home Office Supplementary European Convention on Human Rights Memorandum, paras. 31-45 and in particular paras. 37 and 40.
89. Clauses 3, 10, 13 (see explanation in para. 32 of the European Convention on Human Rights Memorandum), 15-20, 55-56 IMB.
90. Home Office Supplementary European Convention on Human Rights Memorandum, at para. 24.

56. In UK law, section 55 of the Borders, Citizenship and Immigration Act 2009 requires that any government functions in relation to immigration, asylum or nationality must be discharged "having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom". This should help to ensure that the best interest of the child is a primary consideration in all government decision making affecting children (as required by Article 3 of the UN Convention on the Rights of the Child). However, given some of the requirements, for example to detain or remove children, further detailed consideration may be necessary to ensure that the welfare of children is indeed adequately protected when dealing with child migrants.

57. Ensuring respect for the rights of child migrants has been a concern for the Assembly.[91] Most recently, the Assembly, in its Resolution 2449 (2022) "Protection and alternative care for unaccompanied and separated migrant and refugee children", called upon member States "to respond adequately to the needs of unaccompanied or separated migrant or refugee children by providing them with assistance that preserves family unity and keeps them with relatives or other caregivers. To this end the member States should adopt alternatives care solutions as interim measures, until the time when children can be reunited with their family members."[92]

5.8. Restrictions on entry, leave to remain, and obtaining citizenship

58. The bill would permanently bar people who enter the UK without the required leave, having not "come directly" from a territory where their life or liberty was threatened from lawful re-entry to the UK, from obtaining leave to remain or settle in the UK, or from securing citizenship through naturalisation or registration.[93] These provisions are subject to caveats relating to compliance with obligations under the European Convention on Human Rights.

5.9. Safe and legal routes

59. The Home Secretary is required to publish a report on safe and legal routes by which people may enter the UK and must fix an annual number of people to be admitted for settlement via safe and legal routes.[94] In this light it is important to note that, according to the UNHRC, "the reality is that for most asylum-seekers there are no safe and legal routes to enter the UK", and moreover that "nothing in the Bill proposes the creation of any such 'safe and legal' routes".[95] Given the government's condemnation of refugees who arrive in the UK through irregular means, more thought should perhaps be given to providing such individuals with safe and legal routes. This should include careful consideration by both the French and UK Governments as to why people risk their lives through crossing the Channel from France, and what better mechanisms could be put in place, in both France and the UK, to protect refugees facing such dilemmas.

5.10. Terminology

60. Refugees rarely have safe and legal routes for leaving their country of persecution. It is for this reason that the Refugee Convention foresees that refugees should not be penalised on account of their "illegal entry or presence" where they are "coming directly from a territory where their life of freedom was threatened", provided they "present themselves without delay to the authorities and show good cause for their illegal entry or presence" [Article 31 Refugee Convention]. However, the bill speaks about "illegal migration" and the European Convention on Human Rights memorandum talks about "immigration crime". Whilst it is normal that States should want to control their borders, it is deeply unhelpful to conflate migrants and refugees with

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91. The Assembly addressed the protection of the rights of migrant and refugee children in Resolution 2354 (2020) and Recommendation 2190 (2020) "Effective guardianship for unaccompanied and separated migrant children", and Resolution 2195 (2017) and Recommendation 2117 (2017) "Child-friendly age assessment for unaccompanied migrant children".

92. Resolution 2449 (2022). When such family reunification is not possible, member States should develop and implement a range of suitable quality alternative care that responds to the specific and individual needs of unaccompanied or separated migrant or refugee children. Recalling the United Nations Guidelines for the Alternative Care of Children, the Assembly called on member States to provide the following alternative care models: kinship care, whereby children live with an adult member of their extended family; foster care, whereby children are formally placed in the domestic care of suitable adults acting as foster parents; and emergency and transit shelters, in exceptional circumstances while the situation that caused the family separation is assessed and addressed. If minors are placed in emergency and transit shelters, they should not be placed together with adults.

93. Clauses 29-36 IMB.

94. Clauses 58-59 IMB.

95. "UNHCR Legal Observations on the Illegal Migration Bill", para. 8.

criminals. Migrants and refugees may find themselves in an irregular situation with regard to immigration documentation; that does not make them criminal. To confuse immigration status with criminality is a dangerous pathway to dehumanising some of the most vulnerable people in society. Refugees deserve to be treated with humanity. States and public actors should desist from using terminology that conflates the plight of refugees with criminality.

6. Conclusions

61. Some of the provisions of the BoRB may never become law, and others may end up being read by the courts in a way that is not as harmful to human rights as might otherwise be the case. But the general tenor of some of these recent reform proposals is a cause for concern, not least the apparent appetite to run counter to the UK's international legal obligations. As Baroness Hale put it "this is, to say the least, surprising in a country which has always prided itself on upholding the international legal order".

62. It is important to recognise the central importance of the principles of subsidiarity and margin of appreciation in terms of how member States choose to give effect to their obligations as Parties to the European Convention on Human Rights, as well as to recognise the different constitutional legal systems of the Council of Europe member States. Nonetheless, all States can benefit greatly from learning more about each other's systems for giving effect to human rights protected under the European Convention on Human Rights.

63. The UK's system under the HRA for giving effect to the human rights protected under the European Convention on Human Rights is clearly an effective one, given that the vast majority of human rights concerns are being adequately addressed at the domestic level, with the benefits of greater understanding of domestic laws, practices and sensitivities that treatment at the domestic level implies. As a result the UK has one of the lowest number of findings of violations of the European Convention on Human Rights by the European Court of Human Rights in relation to population. Elements of the HRA that are particularly interesting in achieving this result relate to the relationship between the domestic case law and the case law of the European Court of Human Rights; the obligation on public authorities to act compatibly with the rights enshrined in the European Convention on Human Rights; and the obligation to read legislation, so far as it is possible to do so, compatibly with the rights enshrined in the European Convention on Human Rights. Whilst there is no legal requirement on the UK to retain this method for giving effect to human rights, it would be regrettable to lose a system that is obviously working so well as a model, also for other countries, for effective enforcement of human rights at the national (rather than international) level. It may be asked what sort of a precedent this sets internationally for the respect of human rights, and the rule of law – including respect for international law.

64. In this light I commend the process for parliamentary engagement with human rights analysis in the UK, both through the information provided to the parliament by the government, and the human rights analysis undertaken by the UK Parliament's human rights Committee. Such an approach could be a source of inspiration for other countries in assessing the compliance of domestic legislation with international human rights standards during its passage through the legislature. I would, however, suggest that further thought might be given, including in the UK, to ensuring that the initial assessments provided to parliament are sufficiently independent and transparent, and that there are more structured methods for ensuring that full account is taken, during the legislative deliberative process, of this useful work of considering the international human rights compatibility of draft laws. Such an approach could help to improve respect for the rule of law, which necessarily includes respect for international law.

65. Certain clauses in the Bill of Rights Bill would, if passed into law, be of particular concern, and would require a particular focus, including (i) the compatibility of clause 5 and the respect for positive obligations; (ii) the compatibility and justification for clause 14 relating to overseas military operations; and (iii) the justification and intended impact of clause 24 relating to interim measures. More generally, however, the BoRB risks creating a period of legal instability and uncertainty during which the national courts would have to interpret and apply the new provisions which can risk impeding the effective enforcement of human rights.

66. In the course of this work I have also been struck at the seeming lack of understanding of the inherent value of central principles such as the rule of law, robust democratic institutions and effective guarantees for the protection of human rights. This seems to be combined with a significant amount of disinformation in relation to human rights and the rule of law.

67. More might therefore be done to embed human rights education including by developing initiatives for education and training on human rights and the rule of law in order to foster culture which understands and respects the important role that the rule of law and human rights play in a healthy democracy. This should

include improved tools for better explaining what the European Convention on Human Rights and the HRA have achieved so far, including for the UK, and how these achievements can best be preserved and further developed.

68. In particular, I consider that more might be done by both member States and the Council of Europe to ensure that adequate processes are in place to correct misunderstandings or misinformation relating to the rule of law and the impact of the European Convention of Human Rights system; and to make use of available information on the functioning of the European Convention on Human Rights system.

69. In this light, I welcome initiatives such as the work to highlight the impact of the European Convention on Human Rights system, and encourage greater use of such communication materials. I also encourage further reflection on how best to strengthen communication work in relation to the role of the European Court of Human Rights and the implementation of its judgments.

70. In relation to the Illegal Migration Bill, there are clearly numerous concerns around its compatibility with international law, including the UN Refugee Convention, the European Convention on Human Rights, the Statelessness Convention and the Council of Europe Convention on Action against Trafficking in Human Beings. In this report, I have not considered the minutiae of the bill – migration matters are addressed in greater detail by the Committee on Migrants, Refugees and Displaced Persons, and moreover the details of the bill are necessarily a domestic matter for the UK authorities. However, there are obviously significant concerns, expressed not least by the UNHCR, that this Bill will place the UK in breach of its international obligations. On that subject, I feel it appropriate to highlight that the refugee crisis is an international matter, and perhaps one best solved by international methods for resolving shared challenges. Unilateral attempts to legislate away one's internationally binding obligations are unlikely to result in much progress for international peace and co-operation, nor the protection of some of the world's most vulnerable. In this light, it is important to remember that international law is part of the rule of law and is something we must all endeavour to value and to approach in a spirit of good faith. Whilst this report has focussed on the UK legislation, the general points I have raised are, I hope, of equal relevance to all States seeking to consider the best methods for protecting human rights.