

**Safety of Rwanda  
(Asylum and Immigration) Bill:  
A Rule of Law Analysis for House of Lords  
Second Reading  
Monday 29 January 2024**



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The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society -too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

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## About the Rule of Law Monitoring of Legislation Project

This Report is part of the Bingham Centre's Rule of Law Monitoring of Legislation Project. Rule of Law Monitoring of Legislation Reports subject provisions in Government Bills which have significant Rule of Law implications to robust independent scrutiny. They aim to explain relevant legal concepts and terms and describe the effect of provisions with significant implications for the Rule of Law. They test the Government's assertions about why the relevant provisions are necessary against the evidence base. They also examine the legal compatibility of the relevant provisions with the European Convention on Human Rights, the UK's other international legal obligations, and internationally recognised Rule of Law standards. They seek to explain these evidential and legal issues as accessibly as possible for a non-legal audience. The goal is to provide independent, high quality



expert analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation.

### About the author

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# Executive Summary

This Report summarises the Bingham Centre's Rule of Law analysis of the Government's Safety of Rwanda (Asylum and Immigration) Bill.

The purpose of this short Report is to inform the House of Lords consideration of the Bill at its Second Reading on Monday 29<sup>th</sup> January. It aims to assist the House by identifying the most significant Rule of Law issues raised by the Bill which will require detailed debate during the Bill's passage.

It identifies areas where amendments to the Bill will be required in order to make it compatible with the most basic requirements of the Rule of Law, but it does not at this stage suggest specific amendments. A further more detailed report will be published considering specific amendments to inform the Bill's later stages.

The Report applies a close legal analysis of the Bill's provisions, and considers the Government's explanation of the justification for them in the Explanatory Notes, and its explanation in the ECHR Memorandum of why the Bill's provisions are compatible with the Convention rights. It also considers the provisions of the Rwanda Treaty as explained in the Explanatory Memorandum prepared by the Home Office.

The Report's conclusion is that the central purpose of the Bill, to conclusively deem Rwanda to be a safe country in light of the recently concluded Rwanda Treaty, is contrary to the Rule of Law because it would amount to a legislative usurpation of the judicial function, contrary to the UK's constitutional understanding of the separation of powers, which requires the legislature to respect the essence of the judicial function.

It also concludes that certain provisions in the Bill are contrary to the Rule of Law because they are manifestly incompatible with the UK's obligations under international law, including the European Convention on Human Rights (ECHR) and the international law principle of non-refoulement which is enshrined in many sources of international law by which the UK accepts it is bound, including the Refugee Convention, and which is arguably also a principle of customary international law.

Conclusively deeming Rwanda to be safe is incompatible with Articles 2 and 3 ECHR, and with the core international principle of non-refoulement because it precludes judicial determination of the safety question that the non-refoulement principle requires courts to decide.

Legislating notwithstanding the UK's international obligations on this scale is unprecedented and represents a new departure in the UK's recent disregard for international law. The Rule of Law, as Tom Bingham made clear in his authoritative account of the concept, includes the requirement that States act compatibly with their obligations in international law.

Disapplying the Human Rights Act is incompatible with the right to an effective remedy in Article 13 ECHR. This is unlikely to be prevented by the Bill's preservation of the possibility of a declaration of incompatibility under s. 4 of the Human Rights Act, given the Government's evident determination to proceed with removals to Rwanda even in the face of such a declaration, which does not affect the legal validity of the Act.

Limiting suspensive remedies to cases in which the complaint is of the risk of ill treatment in Rwanda is also clearly in breach of the right to an effective remedy in Article 13 ECHR.

Conferring a ministerial power to choose not to comply with interim measures of the European Court of Human Rights is incompatible with the right of individual petition in Article 34 ECHR.

The House of Lords is being invited to approve legislation including provisions which on their face are incompatible not only with well established understandings of the separation of powers between the legislature and the judiciary, but with a number of the UK's international obligations, including under the ECHR.

In accordance with its well established constitutional function as a guardian of the Rule of Law in Parliament, the House of Lords should prepare to revise and amend the Bill to remove its flagrant incompatibilities with the requirements of that most fundamental constitutional principle.



# Analysis

## (1) Conclusively deeming Rwanda to be safe

Clause 2 of the Bill contains the central provision, deeming Rwanda to be a safe country. It requires every decision-maker, including a court or tribunal<sup>1</sup> when considering a decision to remove a person to Rwanda, to “conclusively treat the Republic of Rwanda as a safe country.”<sup>2</sup>

The Bill spells out explicitly that this deeming provision means that a court or tribunal must not consider a review of, or an appeal against, such a decision to the extent that the review or appeal is on the grounds that Rwanda is not a safe country.<sup>3</sup>

In particular, a court or tribunal “must not consider” whether Rwanda will or may remove a person to another State in contravention of any of its international obligations (including under the Refugee Convention); whether a person will not receive fair and proper consideration of an asylum or other similar claim in Rwanda; or whether Rwanda will not act in accordance with the Rwanda Treaty.<sup>4</sup> These are the very questions considered by the UK Supreme Court when determining the lawfulness of the Government’s Rwanda policy.

These prohibitions on a court or tribunal apply notwithstanding any provision of domestic immigration law or any other provision of domestic law, the Human Rights Act (to the extent disapplied – see further below) or “any interpretation of international law by the court or tribunal.”<sup>5</sup>

The Government’s explanation for this conclusive deeming provision is that, having concluded the new treaty with Rwanda, the Government is satisfied that Rwanda is a safe country. It acknowledges, in its ECHR Memorandum, that the right to life in Article 2 ECHR and the prohibition on inhuman or degrading treatment in Article 3 ECHR are engaged by this deeming provision. However, it argues that Articles 2 and 3 ECHR will not be infringed because the deeming provision in clause 2 of the Bill must be read alongside the exceptions provided for in clause 4 of the Bill, whereby an individual is still able to claim that Rwanda would not be a safe country for them, based on their particular individual circumstances, and a court or tribunal can also consider that claim.<sup>6</sup>

The Government is of course entitled to invoke the provisions in its recent Rwanda Treaty as evidence that the concerns of the Supreme Court about Rwanda being a safe country have now been effectively addressed. What it cannot do, however, compatibly with the UK’s well established understanding of the separation of powers, is to turn the factual question of Rwanda’s safety into a matter for the legislature to conclusively determine, rather than for the courts to consider in any future challenges to the application of the policy.

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<sup>1</sup> Clause 2(2)(b).

<sup>2</sup> Clause 2(1).

<sup>3</sup> Clause 2(3).

<sup>4</sup> Clause 2(4)(a)-(c).

<sup>5</sup> Clause 2(5).

<sup>6</sup> ECHR Memorandum, para. 14.

As the EU's Dublin Regulation regime demonstrates, a rebuttable legislative presumption that certain third countries are "safe" is in principle permissible, but the Rwanda scheme is very different. The Bill introduces a conclusive deeming provision, subject to a very narrow exception, rather than a rebuttable presumption. It does so within weeks of a Supreme Court finding that Rwanda is not in fact safe, for reasons that are only capable of gradual change over time. And unlike the Dublin Regulation regime, the UK and Rwanda do not share the same "legal space" – Rwanda is not bound by the same international obligations such as the ECHR and ECAT, compared to Dublin Regulation countries. For all these reasons, the Dublin Regulation analogy does not hold.

As the Supreme Court's judgment made clear, the principle of non-refoulement, which it described as a "core principle of international law", requires that asylum seekers who face removal to another country have an opportunity to ask a court whether there are substantial grounds for believing that such removal would expose them to a real risk of ill treatment as a result of refoulement to another country, and the "the court must answer this question for itself, based on its assessment of the evidence before it."<sup>7</sup> The case-law on the non-refoulement principle is clear that the court is required to conduct a forensic examination of all the evidence, involving many different types of consideration, to reach an assessment of whether there is a real risk of refoulement. In the words of the Supreme Court:<sup>8</sup>

"In deciding that question, the court has to form its own view in the light of the evidence as a whole. In doing so, the court brings to bear its own expertise and experience: weighing competing bodies of evidence, and assessing whether there are grounds for apprehending a risk, are familiar judicial functions."

The principal mischief of the Bill, therefore, is not so much that it seeks to ignore or overturn the Supreme Court's very clear recent finding about the safety of Rwanda, but that it seeks to pre-empt any future consideration of that question by the courts in the light of the Rwanda Treaty.

**Whether the Supreme Court's concerns about the safety of Rwanda have been adequately addressed by the Rwanda Treaty is a factual question for future judicial not legislative determination. The Treaty and its implementation will of course be relevant to such future judicial determinations, but the judicial role cannot be completely excluded.**

Clause 2 is therefore incompatible with Articles 2 and 3 ECHR, in so far as it requires a court or tribunal to "conclusively treat the Republic of Rwanda as a safe country" and requires them not to consider whether Rwanda will or may remove a person to another State in contravention of any of its international obligations (including under the Refugee Convention); whether a person will not receive fair and proper consideration of an asylum or other similar claim in Rwanda; or whether Rwanda will not act in accordance with the Rwanda Treaty.

Articles 2 and 3 ECHR require a judicial determination of the question of safety where an individual claims that there is a substantial risk of refoulement by the country to which they are being sent. Safety is a factual question which cannot be

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<sup>7</sup> UK Supreme Court judgment paras 44-49.

<sup>8</sup> *Ibid* at para. 55.



conclusively determined in advance, for all cases, by the legislature. **Enacting a conclusive deeming of Rwanda as a safe country is a legislative usurpation of the judicial function.**

The very limited exceptions provided for in clause 4(1) of the Bill, where an individual claims that Rwanda is not a safe country for them because of their particular individual circumstances, are not sufficient to prevent the incompatibility with Articles 2 and 3 ECHR. Clause 4(2) expressly precludes decision-makers, including courts or tribunals, from considering whether Rwanda will or may remove the person to another State in contravention of its international obligations, including the Refugee Convention – the very question which the non-refoulement principle requires to be judicially determined.

A statutory provision deeming factual questions to have been conclusively established, notwithstanding the principle of non-refoulement, is incompatible with that principle, in whatever source of law it is acknowledged.

## **(2) Overriding the UK's international obligations**

When a Government minister admitted to Parliament in 2020 that a provision in the UK Internal Market Bill breached international law “in a specific and limited way”, the full strength of the UK's commitment to the Rule of Law principle that the UK abides by its international obligations was revealed. There was significant political and public reaction to the Government deliberately breaching international law. The Government published a [“Statement on notwithstanding clauses”](#), explaining the very limited circumstances in which the relevant clauses in the UK Internal Market Bill would be used. In amendments to the Bill led by the former Lord Chief Justice, the late Lord Judge, the House of Lords removed the offending provisions from the Bill.

The “notwithstanding clauses” in the current Bill are of a completely different order of magnitude. They assert that the provisions of the Bill override not only provisions of domestic law, but “any interpretation of international law” by a court or tribunal. “International law” is defined expansively in the Bill to include all possible relevant sources of what the Supreme Court called “the core international law principle of non-refoulement”.<sup>9</sup>

Parliament should be in no doubt about the enormity, from a Rule of Law perspective, of what it is being asked to approve in the “notwithstanding clauses” in the Bill. The endorsement of such wide ranging notwithstanding clauses, overriding the UK's international legal obligation, will indicate to international partners that the UK can no longer be relied upon to uphold its side of international treaties, or to promote the rules-based international order which has been at the heart of UK foreign policy since 1945.

During the House of Lords debates on the UK Internal Market Bill, the late Lord Judge commented wryly on the Alice in Wonderland-like quality of the Government's position in relation to complying with international law, simultaneously claiming to

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<sup>9</sup> Clause 1(6).

comply with the UK's international legal obligations at the same time as taking powers to breach them. There is a similar dissonance between the contents of this Bill and the UK's expressions of its commitments to international legal obligations, including in refugee law and human rights law, in the Rwanda Treaty and its accompanying Explanatory Memorandum.

The Preamble to the Rwanda Treaty includes the following reference to both the UK's and Rwanda's commitments:

**HAVING** regard to the Parties' commitment to upholding fundamental human rights and freedoms without discrimination, as guaranteed by the Parties' national legislation, by their strong histories of implementing the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees and by their other respective international legal obligations,

The objectives of the Treaty are described in Article 2(3)(a) as being secured by:

creating a mechanism for the relocation to Rwanda of asylum seekers whose claims are not being considered by the United Kingdom, and by providing a mechanism for an asylum seeker's claim for protection to be determined in Rwanda in accordance with the Refugee Convention and current international standards, including in accordance with international human rights law;

The Explanatory Memorandum accompanying the Treaty states that the "primary purpose" of the Agreement is to ensure that the UK's international human rights obligations are met, with the aim of ensuring compliance in particular with the Refugee Convention and Article 3 ECHR:

### **Human Rights**

- 8.1 The purpose of the Agreement is to ensure that protection claims of Relocated Individuals which are being determined outside the United Kingdom, will receive full protection from risk of persecution or serious harm and refoulement. The primary purpose of the Agreement is therefore to ensure that the United Kingdom's international human rights obligations are met by ensuring ECHR compatible treatment of relocated individuals within Rwanda. This is with the aim of ensuring compliance, in particular, with the Refugee Convention and Article 3 ECHR (prohibition of ill-treatment).

**In the UK's case, all of the commitments referred to in these provisions in the Treaty and the Explanatory Memorandum are covered by the notwithstanding clause in clause 2(5) of the Bill which expressly overrides them.**

### **(3) Disapplying the Human Rights Act**

Clause 3 of the Bill, which disapplies the most relevant provisions of the Human Rights Act, apart from the power in s. 4 to make a declaration of incompatibility, engages the right to an effective remedy in Article 13 ECHR. Section 3 of the HRA

(the interpretive obligation) has been disapplied in two previous recent Bills, but this is the first time a Bill has sought to disapply the central provisions of sections 6 to 9 HRA, which include the duty on public authorities to act compatibly with Convention rights.

The Government's ECHR Memorandum acknowledges that the disapplication of the HRA, and in particular sections 6 to 9, "go to the question of whether the UK will still provide an 'effective remedy'". It argues that clause 3 is compatible with Article 13, principally on the basis that a declaration of incompatibility under s.4 HRA (which is not disapplied) is sufficient to provide an effective remedy for challenges to decisions under the presumption of safety in clause 2.

A declaration of incompatibility under the HRA is not considered to be an "effective remedy" by the European Court of Human Rights which must first be exhausted before making an application to the Court.<sup>10</sup>

It is clear from the Government's own explanatory material accompanying this Bill that were a declaration of incompatibility to be made in respect of any part of the legislation the Government would rely on the fact that such a declaration does not affect the legal validity of the legislative provision, and would proceed to treat the legislation as valid and of legal effect.

The disapplication of key provisions of the Human Rights Act in relation to certain decisions concerning the removal of people to Rwanda amounts to differential treatment of a group of people who are within the UK's jurisdiction which affects the enjoyment of their Convention rights including the right to an effective remedy, which also raises questions under Article 14 ECHR, the prohibition of discrimination in the enjoyment of Convention rights.

**Disapplying all the relevant provisions of the HRA but for s. 4 does not ensure compatibility with the right to an effective remedy under Article 13.**

#### **(4) Restricting interim remedies**

The Bill significantly restricts the power of a UK court or tribunal to grant interim remedies to prevent a person from being removed to Rwanda.

Such interim remedies are only available under the Bill in cases where an individual is claiming that Rwanda is not a safe country for them *in their particular individual circumstances*, rather than claiming that their removal exposes them to a substantial risk of refoulement. In such cases, interim remedies can only be granted if the court or tribunal is satisfied that the person would otherwise face a real, imminent and foreseeable risk of serious and irreversible harm if removed to Rwanda.

The ECHR Memorandum argues that such restricted interim remedies are still compatible with the right to an effective remedy in Article 13 ECHR because the legally binding commitments given by Rwanda in the Rwanda Treaty, not to remove

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<sup>10</sup> *Burden v UK* (App no. 13378/05) (29 April 2008).

any person received from the UK to a third country, mean that there is no real risk of onward refoulement.<sup>11</sup>

However, clause 4(2) of the Bill would preclude any consideration by the court of whether, notwithstanding the paper commitment in the Treaty, there is in fact a real risk of refoulement if the person were removed to Rwanda. The Strasbourg case-law is clear that suspensive relief must be available in such cases. The lack of access to an interim remedy in such circumstances is a clear breach of the right to an effective remedy in Article 13 ECHR.

The effect of the Bill's restrictions on interim remedies is that UK courts would have no power to suspend removals to Rwanda pending determination of a legal challenge to the compatibility of the new legislation with the Convention rights, seeking a declaration of incompatibility under s. 4 of the Human Rights Act which is not disapplied, or a legal challenge to the legislation in Strasbourg.

**The lack of a suspensive remedy pending the determination of such legal challenges is therefore manifestly incompatible with Article 13 ECHR.**

## **(5) Disregarding interim measures from the European Court of Human Rights**

Clause 5 of the Bill provides that where the European Court of Human Rights indicates interim measures in proceedings related to the intended removal of a person to Rwanda, it is for a Minister of the Crown exclusively to decide whether the UK will comply with the interim measure.<sup>12</sup> A court or tribunal “must not have regard to the interim measure” when considering any application or appeal relating to a decision to remove a person to Rwanda.<sup>13</sup> In short, the Bill would give the Government the power to decide not to comply with interim measures, and would direct courts to disregard them.

For the reasons explained in detail in this earlier [Bingham Centre Report](#) on what is now s. 55 of the Illegal Migration Act 2023, it is well established that interim measures are binding on States in international law and that the European Court of Human Rights has jurisdiction to indicate such binding measures. The UK has voluntarily accepted, in Article 32 of the Convention, that the jurisdiction of the Court extends to all matters concerning the interpretation as well as the application of the Convention, and that “in the event of dispute as to whether the Court has jurisdiction, the Court shall decide.”

It is also well established in the case-law of the Court that any failure to comply with interim measures of the European Court of Human Rights is automatically a breach of the right of individual petition in Article 34 ECHR – in other words, it prevents individuals from having meaningful access to the Court by depriving them of the protection afforded by interim remedies. As the President of the European Court of

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<sup>11</sup> ECHR Memorandum, para. 26.

<sup>12</sup> Clause 5(1) and (2).

<sup>13</sup> Clause 5(3).

Human Rights reiterated at the [Court's annual press conference](#), there is “a clear legal obligation under the Convention for States to comply with [interim] measures.”

The binding nature of interim measures has long been accepted by consistent State practice across the Council of Europe's 46 member states, including by the UK, not merely by complying in practice but also in frequent intergovernmental statements. The UK has always complied with interim measures from the Strasbourg Court, except in one case in which it was physically impossible for it to comply, and in which the UK Government expressed its pride at having always complied with interim measures. The UK Government has never argued before a UK court that the court should disregard interim measures.

Section 55 of the Illegal Migration Act gives the Government a discretion to disregard interim measures in proceedings relating to the intended removal of a person from the UK under the Act. At the time of the passage of the Illegal Migration Act, the Government told Parliament that the justification for taking this power to itself was that there were certain procedural deficiencies in the way in which the European Court of Human Rights made decisions about interim measures. Section 55(4) and (5) of the Act require the Minister to consider, in particular, “the procedure by reference to which the interim measure was indicated.”

The European Court has recently announced [a package of procedural improvements](#) to the granting of interim measures which address all of the UK's concerns about the process. For example, the identity of the judges who decide interim measures requests will be disclosed. Reasons for interim measures decisions will be provided. Formal judicial decisions will be sent to the parties. Where the urgency of the request permits, parties will be invited to submit information to the Court to assist its examination of the request.

The principal premise on which Parliament was asked to confer the exceptional power to disregard interim measures in s. 55 of the Illegal Migration Act therefore no longer subsists. It follows that *any* ministerial decision not to comply with interim measures from the European Court of Human Rights will therefore clearly be in breach of the Convention.

The Government's ECHR Memorandum claims that clause 5 is compatible with the Convention on the basis that “the provision is capable of being operated compatibly with Convention rights, in the sense that it will not necessarily give rise to an unjustified interference of those rights, meaning that the legislation itself will not be incompatible.”<sup>14</sup>

Conferring a power on a minister to decide not to comply, rather than requiring them to decide not to comply, does not prevent the clause from being incompatible on its face with the right of individual petition, just because the Minister might choose to comply. The conferral of a power not to comply, which will always breach the Convention if exercised, is a facial incompatibility.

Notwithstanding the requirement in the Ministerial Code that ministers must comply with the law, which the Court of Appeal has clarified includes complying with international law, the Government made clear to the Commons that, if Parliament gives it that power, it intends to use it, and civil servants (including presumably

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<sup>14</sup> ECHR Memorandum, para. 29.

Government lawyers) will be [directed by ministers](#) to give effect to their decision and act in disregard of the Court's order. In the words of the Minister:

“Colleagues have confirmation that we have the power, we would use the power, and the civil service will give effect to it. If a plane is sitting on that runway, this Government will not stop until it takes off.”

If this clause remains unamended by the Lords, the draft guidance to the Civil Service will say:

“In the event that the Minister ... decides not to comply with a Rule 39 indication, it is the responsibility of civil servants – operating under the Civil Service Code – to implement that decision. This applies to all civil servants.”

The House of Lords may wish to press the Minister on how this guidance can be reconciled with the professional obligations of Government lawyers.

The [Provisional Measures](#) issued by the International Court of Justice today in relation to Israel's actions in Gaza<sup>15</sup> demonstrate the fundamental importance of interim measures to the international Rule of Law. The UK Government's contempt for the European Court of Human Rights which clause 5 displays is impossible to reconcile with a credible belief in the rules-based international order.

**Clause 5 of the Bill is incompatible with Article 34 ECHR in so far as it confers a discretion on the Government to decide whether the UK will comply with interim measures of the European Court of Human Rights and directs courts to disregard them.**

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<sup>15</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel).



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