RWA0009 Queen Mary University of London, School of Law and University of Bristol, School of Law[1]

Introduction to the submitting organisations and reasons for giving evidence

1. The Schools of Law at Queen Mary University of London (QMUL) and the University of Bristol have a strong focus on international law, immigration law and human rights law. This evidence was prepared by academic staff researching and teaching in these areas and affiliated with the Centre for the Legal Study of Borders and Migration at QMUL and the Centre for International Law at Bristol. As such, our evidence comes from experts in international refugee and human rights law, state responsibility, treaty-making, UK constitutional law and UK immigration law and practice. We submit this evidence in order to highlight the legally problematic nature of the UK-Rwanda Memorandum of Understanding (MoU) and the detrimental human rights consequences this policy is likely to have for those affected by it.

Summary of Evidence

2. Our evidence addresses Questions 1-4, and 6-8 of the call for evidence.

3. With regard to Question 1, we show that the UK-Rwanda MoU is indeed non-binding in international law but does reflect political commitments. As an agreement concerning refugee and asylum law, this non-binding form is not appropriate seeing as the MoU raises legal fundamental rights issues which normally require a legally binding framework, while, at the same time, precluding access to international dispute settlement.

4. On Question 2, we conclude that the major implication of the MoU becoming operational on signature is that the government circumvents normal parliamentary ratification processes, which raises concerns regarding transparency.

5. Regarding Question 3, we focus on inspection and monitoring, as well as access to legal assistance. In relation to inspection and monitoring, we point out that the lack of judicial independence, effective national human rights institutions and freedom of expression creates an environment where it is highly unlikely that proper inspection and monitoring can be guaranteed in Rwanda. In relation to legal assistance, we show that access depends on the availability of legal aid, which does not appear to be provided for asylum-seekers in Rwanda.

6. Our answer to Question 4 focuses on legal assistance available to individuals in immigration detention, in particular the Detention Duty Advice Scheme. We conclude that due to the circumstances under which the scheme operates, in

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particular problems obtaining legal aid, there is insufficient access to competent, free immigration advice.

7. Regarding Question 6, we show that the MoU is incompatible with a number of provisions in international human rights instruments, likely violating the prohibition of *refoulement*, the right to non-penalisation and non-discrimination of refugees, and certain articles of the Council of European Anti-Trafficking Convention, as well as the Global Compact on Migration.

8. With regard to Question 7, we conclude that the MoU does not impose any legally binding or enforceable obligations on either party and that neither state can have recourse to legal means of dispute settlement in case of non-compliance. Nevertheless, the UK retains responsibility for individuals transferred to Rwanda and may be complicit in any human rights violations occurring as a result of the transfer. Further, individuals affected by the MoU retain recourse under international refugee and human rights law.

9. On Question 8, we conclude that despite the UK government's attempt to minimise external oversight of its policies through the MoU, the agreement does not prevent recourse to domestic, regional or international legal mechanisms for breaches of the rights of the people transferred. Therefore, the impact of the MoU should be measured against its compliance with international human rights and refugee law.

Detailed evidence

Question 1: What are the implications of signing an agreement that asserts that it is not binding on either Party in international law? Is the MoU an appropriate vehicle for this agreement?

10. The mere title 'Memorandum of Understanding' does not automatically denote that the document is non-binding in international law, but an assessment is needed in each and every case. Article 2(1) of the Vienna Convention on the Law of Treaties (VCLT) defines a legally binding treaty as 'an international agreement concluded between States in written form and governed by international law …'. 'Governed by international law' means that: 1) international law is the applicable law to that agreement; and 2) the agreement is binding under international law.

11. There is no set form for international agreements to be binding, for example the Permanent Court of International Justice states in the *Austro–German Customs Regime* (1931) case stated: '*From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchanges of notes*.[2]' As such, there is nothing to say an MoU cannot create legally binding obligations, as we see in the Somalia v Kenya case: '*In light of the express provision of the MOU that it shall enter into force upon signature, and the terms of the authorization given to the Somali Minister, the Court concludes that this*

[2] *Austro–German Customs Regime* (1931) Permanent Court of International Justice (Advisory Opinion) para 35.

signature expressed Somalia's consent to be bound by the MOU under international law'.[3]

12. However, in order to assess if an MoU does create binding obligations on the parties, the International Court of Justice (ICJ) has looked to the intentions of the parties and the express wording of such agreements: '*The Court does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrian or... of Qatar. The two ministers signed a text recording commitments accepted by their Governments, some of which were given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a Statement recording political understanding and not to an international agreement'.*[4]

13. Signing a legally binding agreement has two fundamental implications: 1) a State is obliged to refrain from acts which would defeat the object and purpose of a signed treaty pending its entry into force (Article 18 VCLT); and 2) according to UK settled practice, the Government should not sign a treaty unless it has a reasonably firm intention of submitting it for Parliamentary approval.

14. Paragraph 1(6) of the MoU stipulates that this 'Arrangement will not be binding in International law'. Hence, it does not evince a clear intention to establish rights and obligations between the two States and is therefore not legally binding. The formalities surrounding treaty-making do accordingly not apply to the Arrangement. This means that on an international level, signing the non-binding Arrangement has no wider legal implications. It does, however, entail certain political implications. Signing a non-binding agreement is mostly done to reflect political commitments where there is no requirement (or need) for a legally binding framework. This type of non-binding agreement can be useful for arrangements which have to be established quickly or operate flexibly, particularly on technical and/or administrative matters.

15. The fact that the arrangement is not legally binding is problematic for two reasons. First, it prevents either party from utilising international dispute settlement mechanisms, such as the ICJ or a specialist arbitral / adjudication mechanism that a binding instrument could set up, should the other party renege on their commitments. This means an arbitral body cannot hold the party in breach of their commitments legally responsible. Invocation of state responsibility would require the wrongful state to cease the conduct in breach of the obligation and to make full reparation for any injury caused through restitution, compensation or satisfaction.[5] However, due to the MoU's non-binding form, invoking state responsibility will not be available to either the UK or Rwanda should a breach occur.

16. Second, the fact that the MoU is not legally binding itself does not negate the extensive international legal framework that is implicated by the MoU, most

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[3] *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya) ICJ [2017] para 47.
[4] *Maritime Delimitation & Territorial Questions* (Qatar v Bahrain) ICJ [1994] para 27.
[5] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10).

notably international refugee and human rights law, that is binding on both parties and must be complied with when implementing the MoU. At the national level in the UK obligations under the European Convention on Human Rights (ECHR), as translated into domestic law by the Human rights Act 1998, continue to apply to transfer decisions. Further, at the international level the UK and Rwanda's obligations under the 1951 Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT), as well as regional treaties, continue to apply to the transfers and to the treatment of individuals seeking asylum in Rwanda (see also response to Question 6).

17. In summary, it is doubtful whether the UK-Rwanda MoU is an appropriate vehicle for this kind of arrangement as it concerns refugee and asylum law and carries fundamental human rights implications. It therefore goes beyond matters of a mere technical and/or administrative nature but concerns legal fundamental rights issues which normally require a legally binding framework. Agreements such as this should be legally-binding instruments, challengeable and enforceable in a court of law by any affected parties.

Question 2: What are the implications of a significant MoU, such as this, becoming operational on signature? In what circumstances should there be a gap between signature and "entry into force"?

18. The major implication of the MoU becoming operational on signature is that the government circumvents normal parliamentary ratification processes. The MoU therefore had immediate effect upon signature, without parliamentary approval. This means that anyone entering the UK irregularly, including those who arrived irregularly since 1 January 2022, could be relocated to Rwanda as of 13 April 2022.

19. According to Constitutional Reform and Governance Act 2010, a signed binding treaty must be laid before Parliament before ratification for 21 sitting days, known as the Ponsonby rule. Either House can object to ratification within this time period, although active consent is not needed. For legally binding agreements under international law, there is accordingly a gap (at least 21 days), between signature and entry into force, should ratification be consented to.

20. The UK-Rwanda MoU does not fall under the Constitutional Reform and Governance Act and does not have to be subjected to Parliamentary scrutiny. However, there are arguments to the effect that the Ponsonby rule should be extended to also apply to MoUs which entail significant consequences for individuals. The main issue is one of transparency: there is currently no central government record of existing MoUs. This creates a risk of allowing the government to enter into 'secret' arrangements and commit to 'secret' understandings. For instance, the House of Lords European Committee has put forward the view that Parliament should be informed of all 'agreements, commitments, and understandings by which the nation may be bound in certain circumstances, and which may involve obligations of a serious character, although no signed document may exist'.[6]

[6] House of Lords European Union Committee, 'Treaty scrutiny: working practices' 11th Report of Session 2019-

21. There is, accordingly, a plea that there should be a gap between signature and entry into force for any type of arrangement involving obligations/commitments of a serious character. That said, this view does not reflect current constitutional procedures, and the Constitutional Reform and Governance Act does currently not apply to MoUs of the type in question.

Question 3: How do you assess the assurances and safeguards included in the MoU, particularly those relating to inspection and monitoring, a relocated individuals' access to legal assistance, and data protection?

22. This answer will focus on the assurances and safeguards included in the MoU in regard to inspection and monitoring, as well as legal assistance offered in Rwanda.

23. Paragraphs 13 and 15 of the MoU provides assurances that an impartial Monitoring Committee will have unfettered access to relevant persons, records and places. However, due to issues with the independence of national human rights institutions and civil society, availability of due process and freedom of expression, the ability of inspection and monitoring mechanisms to operate effectively in Rwanda is seriously called into question.

24. National human rights institutions play a key role in monitoring the effective implementation of international standards at the national level. However, the 2021 Universal Periodic Review (UPR) Working Group report for Rwanda highlights the need to strengthen these national human rights institutions.[7] The 2016 report from the Committee on Civil and Political Rights (CCPR) demonstrates the challenges in ensuring the objectivity of the National Commission for Human Rights.[8] The Commission is reported to lack independence from the Rwandan government and has played a role in undermining the freedom of wider civil society organisations as well as attempting to influence the content of reports to the UPR and other UN human rights monitoring processes.[9] This lack of an effective and independent civil society, in particular of human rights institutions, impacts the ability to ensure rigorous inspection and reporting on human rights compliance.

21, (July 2020, HL Paper 97) <https://publications.parliament.uk/pa/ld5801/ldselect/ldeucom/97/97.pdf> (accessed 19 July 2022) paras 11-12.

[7] Human Rights Council, Report of the Working Group on the Universal Periodic Review, Rwanda (A/HRC/47/14) <www.ohchr.org/en/documents/country-reports/ahrc4714-report-working-group-universal-periodic-review-rwanda> (accessed 19 July 2022).

[8] Human Rights Committee, Concluding observations on the fourth periodic report of Rwanda (CCPR/C/RWA/CO/4) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsu6TPkCKzgpozbgBf1JMuskGqdPdoUqXoP88Lh304f6Pg75nbinT6Mrd%2B81fIIBWyxdX%2BDQmDBDvvm0HXtxz4TcOqR2R8B7NaeH1UAvgUPQP> (accessed 19 July 2022) 2.

[9] It actively undermined CSO discussions ahead of the latest UPR process; see Human Rights Watch (HRW), Submission to the Human Rights Committee in advance of the fourth periodic review of Rwanda (February 12, 2016) <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/RWA/INT_CCPR_CSS_RWA_23062_E.pdf> (accessed 19 July 2022); See also UN Committee on Civil and Political Rights, "Consideration of reports Submitted by States Parties", Concluding Observations, Rwanda, CCPR/C/RWA/CO/3 (2009) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fRWA%2fCO%2f3&Lang=en> (accessed 19 July 2022).

25. Further, the latest UPR report, as well as reports from international human rights institutions, highlight the worrying impunity and lack of oversight for enforced disappearances, extrajudicial executions, use of torture and ill treatment in detention as a result of the lack of judicial independence and due process.[10] Further, these reports demonstrate tight restrictions on freedom of expression and freedom of association remain in place in Rwanda, affecting political parties, independent civil society and media, as well as individuals who may hold views different from or critical of the government. There are serious concerns around the lack of freedom of opinion and expression[11] with reports of journalists and opposition politicians being murdered.[12] Without judicial independence, due process and a genuine freedom of expression the ability for transparent assessment of the implementation of the MoU is doubtful.

26. As a result, it is highly unlikely that proper inspection and monitoring can be guaranteed in Rwanda. This context will make it very difficult for the Monitoring Committee to access impartial assessments of the processes, treatment and conditions asylum seekers are experiencing. Evidence demonstrates that placing those seeking asylum 'offshore', away from scrutiny results in systematic inhumane treatment which the British government should not be a party to.[13] Offshore processing has been deemed unlawful by ICC[14] as well as an ineffective deterrent.[15] Whilst we commend the inclusion of a monitoring process in the MoU, we are concerned that it will not be able to ensure the rigorous scrutiny necessary to prevent systematic human rights abuses.

27. Turning to the issue of legal assistance, according to Paragraph 9.1.2 of the MoU, each relocated asylum seeker will have access to an interpreter and legal assistance at every stage of their asylum claim including the appeal stage. According to Paragraph 9.1.3, if a relocated individual's claim for

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[10] See Human Rights Council (n 7) 11; HRW, 'Rwanda: Spate of Enforced Disappearances' (16 May 2014) <www.hrw.org/news/2014/05/16/rwanda-spate-enforced-disappearances> (accessed 19 July 2022).

[11] UN Commission on Human Rights, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, Mission to Rwanda' A/HRC/26/29/Add.2 (2014) <http://freeassembly.net/wp-content/uploads/2014/06/A-HRC-26-29-Add2_en-final1.pdf> (accessed 19 July 2022) 10; See also Human Rights Council (n 7) 12.; see further Human Rights Committee (n 8) 7-8.

[12] HRW, 'Rwanda: Allow Independent Autopsy of Opposition Politician' (21 July 2010) <www.hrw.org/news/2010/07/21/rwanda-allow-independent-autopsy-opposition-politician> (accessed 19 July 2022); HRW, 'Rwanda: Stop Attacks on Journalists, Opponents' (26 June 2010) <www.hrw.org/news/2010/06/26/rwanda-stop-attacks-journalists-opponents> (accessed 19 July 2022).

[13] Amnesty International, 'Human rights risks of external migration policies' (2017) <www.amnesty.org/en/documents/pol30/6200/2017/en/> (accessed 19 July 2022); see for example the report on the Australian system here: UN High Commissioner for Refugees (UNHCR), 'Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Nauru' (March 2015) <www.refworld.org/docid/563860c54.html> (accessed 19 July 2022).

[14] Office of the Prosecutor, Letter to the independent MP, Andrew Wilkie (12 February 2020) <https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_(1).pdf> (accessed 19 July 2022).

[15] Kaldor Centre, 'Policy Brief 11, Cruel, costly and ineffective: The failure of offshore processing in Australia' (August 2021) <www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf> (accessed 19 July 2022); Matthew Rycroft CBE Permanent Secretary, Letter from Permanent Secretary to home Secretary (13 April 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1069388/AO_Letter_from_Matthew_Rycroft__to_the_Home_Secretary_-_MIGRATION_AND_ECONOMIC_DEVELOPMENT_PARTNERSHIP.pdf> (accessed 19 July 2022).

asylum is refused, that individual will have access to independent and impartial due process of appeal in accordance with Rwandan laws. According to Paragraph 13.3, relocated persons will have unfettered access to legal assistance including in their accommodation.

28. However, the MoU does not stipulate that the legal assistance will be free, so asylum seekers may struggle to access legal advice once they have been sent to Rwanda. The Rwandan Ministry of Justice has established access to justice bureaus for every district level, that operate as a decentralised service to assist 'citizens' to access legal aid free of charge.[16] As part of this service, 'citizens', the poor and the vulnerable are provided advice as well as legal representation in courts in relation to law-related issues.[17] However, there is no information on non-citizens like asylum seekers. Thus, under Rwandan law, it would appear that asylum seekers will have no access to legal representation, given that most asylum seekers tend to be destitute and therefore reliant on legal aid. Indeed, there have been reports of people finding it very difficult to access legal aid, including those that are vulnerable.[18] Legal aid was only introduced after 2017, so this may explain why people face problems in accessing it.[19]

Question 4: Given Article 5.1 of the MoU does not impose an obligation on the UK to provide legal assistance during the screening of asylum seekers before relocation to Rwanda, what mechanisms are there for legal advice to be provided to the individuals selected for relocation?

29. Legal assistance is available to individuals held in immigration detention through the Detention Duty Advice Scheme (hereafter 'DDAS') which has been running since 2010. Prior to 2010, although any legal aid solicitor could represent people held in Immigration Removal Centres (IRCs), it was difficult for detainees to make contact with solicitors. Since 2010, the DDAS has provided a more structured access to legal advice in IRCs.

30. The DDAS entails thirty minutes of free legal advice in IRCs. Detainees have to contact the welfare officer or the librarian to book an appointment. During the appointment, the solicitor/caseworker will ask the detainee about his/her immigration case and establish whether he/she can be offered free legal advice. This session is free of charge. If the solicitor/caseworker does decide to take the detainee's case, the detainee will not have to pay for their advice.[20] As a result, solicitors/caseworkers are under immense pressure to cover a

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[16] Republic of Rwanda, 'Legal Aid Services' <https://www.gov.rw/services/legal-aid-services> (accessed 17 July 2022).
[17] ibid.
[18] Nasra Bishumba, 'Does Rwanda Require a Legal Aid Law' (9 October 2019, The New Times), www.newtimes.co.rw/news/does-rwanda-require-legal-aid-law#:~:text=According%20to%20the%202014%20Lilongwe%20Declaration%20on%20Accessing,representation%2C%20education%2C%20and%20mechanisms%20for%20alternative%20dispute%20resolution (accessed 17 July 2022); The Legal Aid Forum, Rwanda, <https://legalaidrwanda.org/> (accessed 17 July 2022).
[19] Adam Moscoe, 'Legal Aid in Rwanda: Justice, Justice you Shall Pursue' (27 September 2017) <www.mindthismagazine.com/legal-aid-rwanda/> (accessed 17 July 2022).
[20] Legal Aid Agency, 'Clarification for Legal Advice in Immigration Removal Centres' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054571/Clarification_for_legal_aid_advice_in_Immigration_Removal_Centres.pdf> (accessed 16 July 2022).

vast amount of work during those 30 minutes. They have voiced concerns about the lack of time they can spend with detainees during the DDAS.

31. As a result of the Legal Aid Sentencing and Punishment of Offenders Act, many immigration matters are no longer in scope. Certain types of immigration cases are still eligible for legal aid, including asylum, asylum appeals, detention challenges, trafficking cases, judicial reviews and bail. If someone has a case that is out of scope, but their basic human rights would be threatened by refusal of legal aid, they can request their solicitor/caseworker to apply for Exceptional Case Funding (ECF).[21]

32. Apart from being in scope or eligible for ECF, there are also means and merits criteria that must be satisfied by individual clients to obtain various forms of legal assistance.[22] To hold a legal aid contract, a provider must hold a Law Society Immigration and Asylum Accreditation Scheme (IAAS) qualification to the required level and expected to maintain a threshold competence level if peer reviewed as well as hold the Specialist Quality Mark.[23] From September 2018 to June 2020, nearly 19,000 such appointments were made with DDAS providers by people in detention.[24] Previously, there were eight or nine firms that delivered the DDAS.[25] But most of the new providers had minimal experience of undertaking immigration removal centre work, so the expansion of the DDAS led to concerns about the quality of legal aid that was available in detention.

33. In the recent case of *R (Detention Action) v Lord Chancellor*,[26] the High Court dismissed a judicial review challenge in which it was argued that the advice under the DDAS was not fit for purpose. Mr Justice Calver dismissed the statistical evidence that demonstrated that several legal aid firms provided a poor service.[27] After the DDAS scheme was expanded in 2018, several providers had dropped out; but there were still 46 left.[28] Detention Action and Bail for Immigration Detainees (BID)[29] argued that a significant number of the new providers were incompetent and were thus unable to provide appropriate advice to detainees.[30] In particular, it was argued that many detainees were not advised on immigration bail.[31] The court heard some troubling statistics. Under the DDAS scheme, it is a red flag if providers represent less than 30 percent of detainees they interview for the initial half-hour consultation.[32] Three quarters of providers had conversion rates of less

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[21] Anna Lindley, '"Hit and Miss"? Access to Legal Assistance in Immigration Detention' (2021) 13(3) Journal of Human Rights Practice 629, 633-634.
[22] ibid 634.
[23] ibid.
[24] LAA Information Governance, 2019, Response to request by Mr Rudy Schulkind of Bail for Immigration Detainees. 'Freedom of Information Act Request – 190917019 (15 October 2019).
[25] BID, 'Research Paper: Autumn 2019 Legal Advice Survey' (February 2020) <https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1140/BID_Legal_Advice_Survey_.pdf> (accessed 19 July 2022) 5.
[26] [2022] EWHC 18 (Admin).
[27] ibid para 91.
[28] ibid para 19.
[29] Charities that conduct detention centre work.
[30] BID, 'Autumn 2019 Legal Advice Survey' (n 25) 6.
[31] ibid.
[32] ibid 27: since 2019 the Contract Management IRC Management Information Report has been designed to support contract managers in overseeing the providers' performances in IRCs.

than 30 percent and six firms which saw over 500 people took up no cases at all with a 0 percent conversion rate.[33]

34. Since November 2010, BID and the Independent Monitoring Board (IMB)[34] have been conducting yearly surveys on access to legal advice in detention. BID/IMB have constantly raised concerns about the lack of availability of legal advice under legal aid, including the 30-minute time limit for the DDAS.[35] BID's surveys on legal representation across the detention estate from 2010 until 2021 revealed that most of the detainees were aware of the DDAS, yet only a very small proportion of them were accepted as clients by legal aid firms (in most cases much less than half).[36]

35. Aside from private solicitors, who can assist asylum seekers, welfare officers and volunteer visiting groups often refer people to charities and pro bono law clinics—most prominently, BID prepares and presents bail applications with the assistance of barristers acting pro bono.[37] However, according to Legal Aid Agency data, non-profit providers of immigration and asylum advice dropped by 64 per cent between 2005 and 2018.[38]

36. Overall, there is a need for better access to competent, free immigration advice. This could help many people resolve their immigration status or make plans to leave the UK, letting people get on with their lives sooner and avoiding costly detention.

Question 6: Is the MoU consistent with the UK's obligations under international law, including (but not limited to) the 1951 Refugee Convention, the European Convention on Human Rights, and the Council of Europe Convention on Action against Trafficking in Human Beings?

37. It should be noted that the compatibility of the MoU with international law is partly a question of fact, related to, among other things, the human rights situation in Rwanda and the availability of legal assistance there (see response to Question 3). That said, there are a number of indications for the MoU's incompatibility with international law:

38.a) Non-refoulement

The MoU may violate the prohibition of *refoulement*, i.e. the fundamental principle in international law protecting individuals against being returned to countries where they would experience persecution, torture, or other serious ill-treatment. This prohibition is contained in Article 33(1) of the Refugee

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[33] ibid 37a-b.

[34] The IMB members are established under the Prison Act 1952, its members are unpaid and they monitor the day-to-day life in both prisons and IRCs.

[35] Stephen Shaw, 'Review into the Welfare in Detention of Vulnerable Persons' (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf> accessed 19 July 2022) 132.

[36] BID, 'Draft Summary: Survey of Levels of Legal Representation for Immigration Detainees Across the UK Detention Estate' (2014) <https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/156/BID_Legal_Advice_Surveys_1-8-_Summary_Findings.pdf> (accessed 19 July 2022) 1-4.

[37] Lindley (n 21) 645.

[38] Refugee Action, 'Tipping the Scales: Access to Justice in the Asylum System' (2018) <www.refugee-action.org.uk/wp-content/uploads/2018/07/Access-to-Justice-July-18-1.pdf> (accessed 16 July 2022).

Convention, as well as in human rights law, for example in Article 3(1) of the CAT, and is implied in other human rights provisions, such as Articles 2 and 3 of the ECHR or Articles 6(1) and 7 of the ICCPR, protecting the right to life and freedom from torture, inhuman and degrading treatment.

39. Concretely, a risk of *refoulement* exists for individuals who are likely to face persecution or other serious ill-treatment in Rwanda, such as Rwandan nationals or members of the LGBTQI+ community,[39] and for those who may be subject to 'chain-*refoulement'*,[40] for example as a result of inadequate asylum procedures in Rwanda.

40. b) Non-penalisation and non-discrimination

Although the MoU does not state this explicitly, when read in conjunction with the Home Office guidance on third country cases, it becomes clear that those targeted for removal are individuals who have entered the UK irregularly, i.e. whose journey was 'dangerous'.[41] This creates a potential conflict with the Refugee Convention, which in Article 31(1) prohibits penalising refugees for their irregular entry. Article 31(1) applies to asylum seekers by virtue of the fact that anyone meeting the definition in Article 1A(2) of the Convention is a refugee even if no formal status determination has yet been conducted. It is generally accepted in academic and judicial commentary that a penalty for the purpose of Article 31(1) need not constitute a criminal penalty and can include measures such as frustrating access to the asylum procedure.[42]

41. What is more, treating refugees who arrive irregularly differently from those arriving regularly, e.g. Ukrainians who have access to visa schemes, may constitute discrimination prohibited by Article 3 of the Refugee Convention. This Article states that all provisions of the Refugee Convention must be applied to refugees without discrimination as to race, religion or country of origin. However, imposing penalties on some refugees but not others based on their mode of arrival may constitute such discrimination as ability to travel to the UK regularly is directly linked to an individual's nationality – i.e. her country of origin – and, as a result, indirectly also to her race and religion.

42. c) Anti-Trafficking Law

The MoU is also incompatible with the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT). Article 10 ECAT obliges the UK to identify trafficked persons and to not remove individuals from the territory for whom there are reasonable grounds

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[39] The Home Office's own guidance on the general human rights situation in Rwanda admits that LGBTQI+ individuals are at risk of serious human rights violations in Rwanda, such as arbitrary detention, inhuman and degrading treatment, and denial of access to justice, see Home Office, 'Review of asylum processing Rwanda: country information on general human rights' (May 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073960/RWA_CPIN_Review_of_asylum_processing_-_human_rights_information.pdf> (accessed 14 July 2022) section 9.3.

[40] Chain-*refoulement* describes a situation in which an individual is returned to an allegedly safe country, with that country then returning that individual to an unsafe country.

[41] Home Office, 'Inadmissibility: safe third country cases' (June 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1084315/Inadmissibility.pdf> (accessed 14 July 2022) 17.

[42] See e.g. James C Hathaway, *The Rights of Refugees Under International Law* (2nd edn, CUP 2021) 515-516; Cathryn Costello and Yulia Ioffe, 'Non-Penalisation and Non-Criminalization' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (OUP 2021) 921-922; *B010 v Minister of Citizenship and Immigration* 2015 SCC 58, [2015] 3 SCR 704.

to believe that they have been trafficked until the identification process has been completed (Article 10(2) ECAT). These individuals are then entitled to a recovery and reflection period of at least 30 days and shall not be removed from the territory during this time (Art 13(1) ECAT). Further, individuals conclusively identified as having been trafficked may be eligible for a residence permit, leading to lawful residence, which, in turn, entitles them to medical assistance and access to the labour market (Arts 12(3) and 12 (4) ECAT), with the Convention not foreseeing for this assistance to trafficked persons being outsourced to other countries.

43. Importantly, clarifying the interplay between the ECAT and the ECHR, the UK Supreme Court has stated in *MS (Pakistan)* that a trafficked person cannot be removed from the UK while an investigation of her trafficking experience is ongoing or where such an investigation has not yet been conducted.[43]

44. d) The Global Compact on Migration

Finally, it should be noted that the MoU is also incompatible with the UK's obligations under the Global Compact for Safe, Orderly and Regular Migration (GCM).[44] Although the Compact is a non-binding soft-law instrument, it is based on binding human rights provisions and best practice standards and, importantly, contains a commitment to non-regression with regard to those standards. This can, essentially, be considered to constitute a standstill clause, obliging states which have endorsed the GCM not to adopt measures which are more restrictive than those in force in 2018, the time the Compact was endorsed at the UN General Assembly.[45] The MoU, however, is clearly regressive with respect to asylum-seekers' human rights.

Question 7: Does the agreement impose any binding or enforceable obligations on either Party? Given the arrangement asserts it is non-legally binding, and the wording of Article 2.2, what are the consequences if either Party were to breach any of their assurances under the arrangement, and what recourse would be available to those affected?

45. The Arrangement does not impose any legally binding or enforceable obligations on either state. It is carefully drafted in language which signals that it is not a legally binding treaty, using terminology such as 'having decided', 'accept', 'arrangement', 'commitment', 'will', and 'participants', as opposed to 'agreement', 'agree', 'obligations', 'parties', 'shall' and 'have the right to'.

46. Article 2(2) sets out that only the two states can make claims of non-performance and/or transgression. Individuals can under no circumstances claim any rights under the agreement, nor make a claim for the enforcement of the agreement in any court or tribunal. Given that the MoU records international commitments in a form and wording which expresses an intention that it is not to be binding as a matter of international law, it

[43] *MS (Pakistan) v SSHD* [2020] UKSC 9, [2020] Imm AR 967; for a discussion of the judgement see Maja Grundler, 'Expanding the Right to Remain as a Trafficked Person under Article 4 ECHR and the ECAT' (2021) 84(5) Modern Law Review 1093.
[44] Global Compact for Safe, Orderly and Regular Migration, UN doc A/RES/73/195 (19 December 2018).
[45] Elspeth Guild, Kathryn Allinson, and Nicolette Busuttil, 'The UN Global Compacts and the Common European Asylum System: Coherence or Friction?' (2022) 11(2) Laws 35.

appears that neither state can have recourse to legal means of dispute settlement (arbitration/adjudication) in case of non-compliance. This is also recognised in Paragraph 22(1) of the MoU, which stipulates that the 'Participants will make all reasonable efforts to resolve between them all disputes concerning this Arrangement. Neither Participant will have recourse to a dispute resolution body outside of this'. It seems, therefore, that in case of non-compliance, the two participants can only make use of non-judicial avenues by having recourse to bilateral negotiations seeking to resolve any disputes on compliance with the Arrangement.

47. Since the MoU is non-binding, no state responsibility can arise for breaches of commitments made within the MoU. However, state responsibility can still arise for other breaches of international law that occur as a result of implementing the MoU.

48. The deeply concerning implications of the MoU, as outlined in our answers to Questions 3 and 6, on *refoulement*, discrimination, procedural safeguards and access to legal assistance, as well as access to proper asylum procedures[46] and the protection of rights once in Rwanda,[47] raises questions as to the recourse to due process and accountability mechanism for breaches of individual rights. The intention set out in the MoU is that 'the UK's legal obligations end once an individual is relocated to Rwanda, and the Government of Rwanda takes on the legal responsibility for that individual and for processing their claim in line with the Refugee Convention…[48]'. Paragraph 2.1 states that the detention facilities and reception centres in Rwanda will not be under the UK's jurisdiction. However, this obscures the reality of the UK's on-going responsibility for those affected by the MoU in two ways.

49. First, UNHCR have made clear that 'the primary responsibility to provide protection rests with the State where asylum is sought'[49] and that 'transfer arrangements would not be appropriate where they represent an attempt by a 1951 Convention State party to divest itself of responsibility; or where they are used as an excuse to deny or limit jurisdiction and responsibility under international refugee and human rights law.'[50] Clearly, the MoU and letter from the Permanent Secretary demonstrate this is precisely the intent of the UK government. However, UNHCR have clarified that the 'transferring States retains responsibilities under international refugee and human rights law towards transferred asylum-seekers. In the current case, neither the arrangement entered into between the UK and Rwanda nor the fact of transfers conducted under it would relieve the UK of its obligations under international refugee and human rights law towards asylum-seekers transferred to Rwanda.'[51]

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[46] UN High Commissioner for Refugees (UNHCR), 'UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum- Seekers under the UK-Rwanda arrangement' (8 June 2022) <www.unhcr.org/publications/legal/62a317d34/unhcr-analysis-of-the-legality-and-appropriateness-of-the-transfer-of-asylum.html> (accessed 19 July 2022).
[47] See for example Human Rights Council (n 7), Human Rights Committee (n 8), and HRW (n 9).
[48] See n 15.
[49] UNHCR (n 46) 2.
[50] ibid 3.
[51] ibid 2.

50. Second, in addition to the fact that the UK could maintain responsibility for people transferred under the MoU, the UK may also be complicit in any human rights or refugee law abuses that occur in Rwanda.[52] A State will be responsible for aid or assistance, i.e. be complicit, in the commission of a breach of international law when the aid and assistance knowingly facilitated the breach.[53] The aid and assistance must make some contribution to the wrongful act, though this need not be essential, it must *significantly* affect the occurrence of the wrongful act.[54] The MoU outlines that the UK will pay Rwanda significant sums of money as part of the Partnership and will facilitate the transfers of asylum seekers. As a result, claims have already been made that the UK is involved in trafficking refugees to Rwanda.[55] The UK has thus clearly made a significant contribution to any human rights or refugee law breaches that then occur against people transferred under the MoU. Secondly, aid and assistance must be rendered with knowledge of the circumstances.[56] The UK is aware of the potential for human rights abuses and asylum procedure breaches in Rwanda as these have been extensively documented.

51. Thus, recourse is available to affected individuals under other commitments undertaken by the UK, for instance the 1951 Refugee Convention, as well as a number of human rights instruments, such as the CAT, the ICCPR and the ECHR.

Question 8: How, in practice, should the impact of the MoU be evaluated, and against which measures?

52. The MoU continues the current government trend in attempting to minimise external oversight of its policies. Signing an MoU that explicitly states that it is not binding on either party and prevents recourse to dispute resolution mechanisms ensures that judicial oversight, at either the international or national level, is minimised. However, the impact of this on both parties' obligations should not be overstated. Whilst the MoU prevents access to dispute settlement for breaches of the obligations between parties, this does not prevent recourse to domestic, regional or international legal mechanisms for breaches of the rights of those people transferred under the terms of the MoU. As such, the impact of the MoU should be measured against its compliance with international human rights and refugee law. If it is implemented in a manner that remains compliant with these international

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[52] For further discussion, see K Allinson, 'What accountability is there for breaches of the human rights of asylum-seekers transferred to Rwanda?' Border Criminologies Blog (*forthcoming*) <https://blogs.law.ox.ac.uk/border-criminologies-blog/122>; Kate Nahapetian, 'Confronting State Complicity in International Law' (2002) 7 Journal of International Law & Foreign Affairs 99; Sabine Michalowski, 'No complicity liability for funding gross human rights violations' (2012) 30(2) Berkeley Journal of International Law 451.

[53] As defined by Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts; see James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 399.

[54] Giuseppe Pascale, 'Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?' (2019) Question of International Law 35, 49.

[55] Maayan Niezna, '"Traded Like Commodities and Transferred Abroad for Processing": Legal and Political Claims Against the UK-Rwanda Deal' Border Criminologies blog (10 May 2022) <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2022/05/traded> (accessed 19 July 2022).

[56] Crawford (n 53) 399.; See also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia),* International Court of Justice (ICJ), 26 February 2007*,* paras 419-420.

obligations, from arrival in the UK, through the transfer to Rwanda, to refugee determination (and stay or return) therein, then the MoU has been effective. If the rights of transferred individuals are breached in the implementation of the MoU, then it is ineffective, is in breach of international law and risks further exacerbating tensions in the refugee situation in the UK, the East Africa region and within the Mediterranean region, as evidenced by the failure of the Rwanda-Isreali agreement.[57]

[57] Hotline for Refugees and Migrants, 'Deported to the Unknown' (December 2015) <https://hotline.org.il/wp-content/uploads/2015/12/Deported-To-The-Unkown.pdf> (accessed 19 July 2022); Niezna (n 55).