International Agreements Committee, Written evidence from Dr Muin Boase, Lecturer in International Law, University of Derby

I. Summary of Evidence

1. This written evidence is primarily concerned with the question of whether the UK can externalise its obligations under the 1951 Refugee Convention (as amended by the 1967 Protocol) by outsourcing refugee status determination to Rwanda. In doing so, it addresses paragraphs 1, 6, 7 and 8 of Call for Evidence.

2. This new regime treats asylum seekers differently on the basis that they have crossed the border 'unlawfully'. It is said that processing these 'irregular' migrants in Rwanda, will 'deter' them from crossing The English Channel.[1] Those who are successful in their applications will be able to stay in Rwanda and those who are unsuccessful face removal to their country of origin.

3. Under the Refugee Convention, a state has an obligation to determine the refugee status of someone claiming asylum regardless of how such a person has arrived. The punitive treatment of asylum seekers based on 'how' they have arrived in the UK is therefore inconsistent with the Refugee Convention.

4. Whilst it is not unlawful to use a Memorandum of Understanding (MoU) to secure diplomatic assurances for an asylum seeker being returned, such assurances should not be used to return refugees to a place where human rights abuses are widespread. Serious concerns have been raised about MoUs being used to circumvent international legal obligations. The MoU itself has no legal status but is a 'political agreement'.

5. In my view, the determination of whether someone qualifies for refugee status is not something which should be 'outsourced' to another state where the sending state concerned can make such a determination itself. However, each situation of the externalisation of the determination of refugee status needs to be judged on its facts.

6. The MoU is an example of extra-legality in that a quasi-legal instrument is being used to evade the UK's responsibilities under the Refugee Conventions to determine refugee status. Given concerns raised about Rwanda's human rights record, and the views of the UNHCR on its system of asylum protection, it does not seem a suitable place to send migrants. It is my view, an attempt to shift responsibility that is inconsistent with international law.

II. The use of a Memorandum of Understanding and Extra-Legality

7. A Memorandum of Understanding is a political agreement employed by states, which are not legally binding.[2] One of the benefits of MoUs is that they are frequently not

[1] Home Affairs Committee, 'Asylum and migration oral evidence' HC 197, 11 May 2022, Evidence of Tom Pursglove MP (Home Office) in response to Question 6 asked by the Chair; Home Office, 'Memorandum of Understanding between the government of the UK and Rwanda for the provision of asylum partnership', 13 April 2022, Preamble.

[2] Anthony Aust, *Modern Treaty Law and Practice* (CUP, 2013) 28.

published so they may be used for national security matters where there is a need for confidentiality.[3] For example, in 2003 an MoU was signed between Iraq,

8. US, UK and Australia to ensure that any prisoners being transferred to the US would be treated in accordance with the Geneva Convention.[4] There is a need for scrutiny of MoUs to ensure that 'secrecy' does not become a cover for evasion of international legal commitments or 'extra-legal' behaviour.

9. The UNHCR itself regularly signs MoUs with states to assist them in fulfilling their mandate in response to crisis situations in processing asylum claims. Rwanda itself has an MoU with the UNHCR and the African Union in support of the 'Emergency Transit Mechanism' project for evacuating refugees from Libya.[5]

10. MoUs have also been used to ensure that a person being returned would not be tortured through the use of 'diplomatic assurances'. The leading judgment on the use of diplomatic assurances to remove the risk of torture is the case of *Othman v UK* in the European Court of Human Rights which concerned attempts to deport the radical cleric Abu Hamza to Jordan. The Court found that assurances were sufficient to mitigate against any real risk of ill treatment and therefore deportation did not violate Article 3 of the ECHR.[6]

11. Whether diplomatic assurances may be relied upon will depend on the circumstances. *Othman v UK* provides that in assessing assurances in an MoU, the court would consider first, the quality of those assurances and second, whether in light of the State's practices they can be relied upon to remove the risk of torture. In doing so, the Court gave a list of factors in terms of assessing the quality of assurances which may be summarised as follows[7]:

    (i) Public
    (ii) Specific
    (iii) Made by a person with authority to bind the receiving state
    (iv) If made by the central government, it is expected to be followed by local authorities
    (v) About conduct that was legal in the receiving state
    (vi) Made by a Contracting State
    (vii) Length and Strength of bilateral relations between the sending and receiving States and record in abiding by similar assurances

---

[3] In this instance the UK-Rwanda MoU has been published.
[4] 'An Arrangement for the Transfer of Prisoners of War, Civilian Internees, and Civilian Detainees between the Forces of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and Australia' 25 March 2003 in Qatar mentioned in *Rahmatullah (No. 1)* [2013] 1 AC 614.
[5] UNHCR, Joint Statement Government of Rwanda, UNHCR and African Union agree to evacuate refugees out of Libya, 10 September 2019. <https://www.unhcr.org/uk/news/press/2019/9/5d5d1c9a4/joint-statement-government-rwanda-unhcr-african-union-agree-evacuate-refugees.html> (Last Accessed: 26/08/22).
[6] *Othman (Abu Qatada) v United Kingdom* (App. No. 8139/09) Judgment, (2012) ECHR, para. 207. However, the court held that deportation would breach Article 6 the right to a fair trial because the use of evidence obtained by torture would render legal proceedings in Jordan unfair.
[7] Ibid, [189].

(viii) The existence of a monitoring mechanism with unfettered access to the applicant's lawyers to ensure compliance objectively.
(ix) Whether there is an effective system of protection against torture in the receiving State, including whether there is a willingness to cooperate with international monitoring mechanisms (including international human rights NGOs), and a willingness to investigation allegations of torture and to punish those responsible.
(x) Whether the applicant has previously been ill-treated in the receiving State.
(xi) Whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.

12. The use of diplomatic assurances in MoUs have also been widely criticised as inherently incapable of removing the risk of torture.[8] The fact that a sending country seeks diplomatic assurances in of itself demonstrates that the sending country perceives that there is a serious risk of a deportee being subjected to ill treatment.[9] The former UN Special Rapporteur on Torture considered that that, 'where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return', diplomatic assurances even with monitoring mechanisms 'are inherently incapable of providing sufficient protection against such abuse.'[10] Similarly the Joint Committee on Human Rights in 2006 concluded that reliance on diplomatic assurances in 'Memoranda of Understanding with Jordan, Libya and Lebanon present a substantial risk of individuals actually being tortured, leaving the UK in breach of its obligations' to prohibit torture.[11]Applying this the current situation, the risk is that the assurances in this MoU are inadequate to ensure that refugees will have their cases processed fairly, are treated in accordance with international standards, and are not returned to countries where they are risk of being tortured.

13. Diplomatic assurances will never be adequate in a country where ill treatment is 'endemic and persistent'.[12] An example of this was the case of *Agiza v Sweden* in which Sweden expelled an Egyptian back to Egypt after receiving assurances that he would not be tortured.[13] The Committee Against Torture found that it was 'known or ought to have been known' that Egypt resorted to consistent and widespread use of torture against detainees. The Committee found Sweden in breach of the obligation of

[8] Manfred Nowak, UN Special Rapporteur on Torture, condemned the practice of diplomatic assurances as 'nothing but attempts to circumvent the absolute prohibition of torture and non-refoulement' and are an 'unreliable and ineffective instrument for the protection against torture' in Manfred Nowak, *Report of the Special Rapporteur on torture, inhuman or degrading treatment or punishment*, Human Rights Council, 5 Feb 2010 (UN Doc A/HRC/13/39/Add.5) [243].
[9] UNCHR, Manfred Nowak, *Report of the Special Rapporteur on the question of torture* (UN Doc E/CN.4/2006/6) 23 December 2005 [31(b)].
[10] Nils Melzer, *Report of the Special Rapporteur on Torture to the Human Rights Council* 37th Session, (UN Doc A/HRC/37/50) [50].
[11] Joint Committee on Human Rights, 19th Report, 18 May 2006, [131].
[12] *Ismoilov v. Russia and Others* (App No 2947/06) (2008) ECHR [127].
[13] *Ahmed Hussein Mustafa Kamil Agiza v Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005.

non-refoulement, notwithstanding the 'diplomatic assurances' which in this case had no effective enforcement mechanism.[14]

14. This MoU is not a legally binding document. Clause 1.6 of the MoU makes it explicit that: 'This Arrangement will not be binding in international law', thereby making it clear that this is a political agreement, not a treaty commitment with no intention to create legal relations. Any repercussions for breaching the MoU will remain in the diplomatic rather than the legal sphere. There are no legal sanctions in the event of a breach of MoU. An individual has no recourse if assurances are violated and is specifically excluded from contesting breaches of assurances in the MoU.[15] Finally, no details are given on how members of the 'monitoring committee' will be appointed or funded to ensure their independence.

15. In her book, *Non-Legality in International Law*, Fleur Johns defines the term 'extra-legality' as the legal crafting of that which lies outside of international law.[16] Examples of 'extra-legality' might include instruments that facilitated 'extraordinary rendition'[17] and 'pushback policies'[18] This MoU is an example of 'extra-legality' because it is an instrument designed to circumvent the UK's treaty obligations under the Refugee Convention by removing refugees to another jurisdiction. In doing so, it limits the ability of refugees to have their cases properly determined and their rights respected. In this sense, the 'form' that the agreement takes is less important than its effect. In other words, the use of a legally binding treaty instead of an MoU does not change the fact that it is an attempt to limit and circumvent treaty commitments under the Refugee Convention.

III. The Legality of Externalising the Determination of Refugee Status

16. This Section considers the legality of outsourcing the determination of refugee status. The central issue correctly identified by the UNHCR is whether such measures have been taken to assist in the protection of asylum seekers or limit their rights. Does the agreement 'share' or 'shift' responsibility?

17. The obligations of the Refugee Convention come into play when a refugee lands on the territory of a state party or falls under their control.[19] The obligation of non-refoulement (Art 33) and the other substantive protections in the Refugee Convention necessitate that asylum seekers have fair and effective procedures to assess their claim

[14] Ibid, [13.4].
[15] UK-Rwanda MOU, 13 April 2022, Clause 2.2.
[16] Fleur Johns, *Non-Legality in International Law: Unruly Law* (CUP, 2013).
[17] Tom Bingham, *The Rule of Law* (Penguin, 2010) 138; The use of secret agreements by the United States facilitated rendition to legal blacksites in the war on terror. See *Husayn (Abu Zubaydah) v Poland* (App. No. 7511/13) (2014) ECHR [425].
[18] Italy and Libya Bilateral Agreement to combat clandestine migration, 29 December 2007, and the Additional Protocol, 4 February 2009 were intended strengthen bilateral cooperation in the fight against clandestine immigration. *Hirsi Jamaa and others v Italy* (App. No. 27765/09) ECHR (2012) declared Italy's pushback policies of returning intercepted refugees back to Italy unlawful.
[19] *Hirsi Jamaa and others v Italy* (App. No. 27765/09) 23 Feb 2012, [185].

for refugee status.[20] Under the principle of *pacta sunt servanda*, a state which has ratified a treaty is under a good faith obligation to honour its treaty commitments.[21]

18. The nature of human rights obligations found in multilateral human rights conventions such as the Refugee Convention 1951, European Convention of Human Rights 1950, International Covenant on Civil and Political Rights 1966, and Convention Against Torture 1984, are of a different nature to other agreements between states because they are obligations owed to individuals rather than obligations based on reciprocity.

19. This distinction is important because international human rights law recognises individuals as subjects of international law. A 'refugee' is an individual subject who flees their country of origin on the basis of a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion. Inherent in the process of seeking asylum is an element of autonomy as refugees seek out places with which they have a connection or can settle. This agreement, on the other hand, treats those refugees who have entered the UK irregularly as 'objects' rather than autonomous subjects seeking protection.

20. In my view, it is inconsistent with the UK's treaty commitments under the Refugee Convention to outsource the determination of refugee status to Rwanda whose system for determining refugee status is, in the words of the UNHCR, 'still in development' and 'primarily geared towards asylum seekers from neighbouring countries'.[22] The UK itself, in Rwanda's Universal Periodic Review, raised serious concerns about Rwanda's human rights record.[23] This suggests that Rwanda is not an appropriate forum to determine refugee status.

21. Arrangements with other countries to process asylum seekers should seek to maximise refugee protection. They cannot be used by a state to 'divest itself of responsibility' or 'as an excuse to deny or limit jurisdiction and responsibility' under the Refugee Convention.[24] Agreements that attempt to limit and shift responsibility are inconsistent with the object and purpose of the Refugee Convention.

---

[20] Guy Goodwin and Jane McAdam (eds), *The Refugee in International Law* (OUP, 2022) 316.
[21] Vienna Convention on the Law of Treaties 1969, Art. 36 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'
[22] UNHCR, *Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement*, 8 June 2022, 4-6. <https://www.unhcr.org/publications/legal/62a317d34/unhcr-analysis-of-the-legality-and-appropriateness-of-the-transfer-of-asylum.html> (Last Accessed: 26/08/22). The UNHCR does not consider that such transfers would be legal given concerns about shortcomings in the capacity to determine refugee status and is concerned that returnees would not be treated in accordance with accepted international standards; I would distinguish this situation from the EU Dublin Regulation (III) 604/2013 which established a European wide approach to establishing the criteria and mechanisms for determining which Member State has responsibility for examining an asylum application of third country nationals.
[23] 37th Universal Period Review: UK statement on Rwanda <https://www.gov.uk/government/speeches/37th-universal-periodic-review-uk-statement-on-rwanda> (Last Accessed: 26/08/22). For example, concerns have also been raised about the arbitrary detention of 'deviant' people at the 'Gikondo transit centre'.
[24] UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, 3.

22. In *MSS v Belgium and Greece,* Belgium was found in breach of the prohibition of torture, inhumane or degrading treatment in Article 3 ECHR by sending an asylum seeker back to Greece, where there were systematic deficiencies in the processing of asylum procedures and by exposing the applicant to detention and living conditions amounted to degrading treatment.[25] Given the deficiencies of the asylum system identified by the UNHCR, there is a real risk that asylum seekers will not be processed fairly and treated in line with international human rights standards.

IV. Punitive Measures Against Refugees based on their method of Arrival

23. The Refugee Convention says that states shall 'not impose penalties, on account of their illegal entry' provided a refugee presents themselves to the authorities without delay and shows good cause for their illegal entry or presence.[26] The MoU is being used to treat asylum seekers who have crossed the English Channel illegally differently from other refugees by sending them to Rwanda. The preamble to the MoU states that the arrangement will 'contribute to the prevention and combating of illegally facilitated and unlawful cross border migration' and that this will 'deter illegal migration'.[27] Sending refugees to Rwanda based on how they have crossed into the UK, is in my view, a punitive measure, which is inconsistent with Article 31 of the Refugee Convention.

V. Conclusion

24. In conclusion, the MoU attempts to limit the UK's treaty commitments under the Refugee Convention and impose a punitive measure on refugees based on how they have entered the UK. Outsourcing refugee determination to Rwanda is in this instance inconsistent with the UK's treaty commitment to assess the claims of refugees, which must be determined to ensure that they are protected by the Convention and the obligation of non-refoulement. Given concerns that have been raised about Rwanda's adherence to binding commitments in international human rights law, there are serious doubts about whether there would be adherence to non-binding commitments. There is a need for greater scrutiny of MoUs that create spaces of 'extra-legality' or attempt to 'circumvent' international legal commitments.

25. If the Government is confident that the MoU is consistent with its international legal obligations and given the public interest set by this new precedent, the Government should publish the legal advice underpinning the decision, and the Committee should request this.

26 August 2022

---

[25] *MSS v Belgium and Greece,* (App. No. 30696/09) (2011) ECHR [344] - [368].
[26] Refugee Convention 1951, Art 31.
[27] UK-Rwanda MOU, 13 April 2022, Preamble.