# House of Lords International Agreement Committee

## Written Evidence from the Refugee Law Initiative, University of London - The UK/Rwanda MoU for an Asylum Partnership Arrangement -

Established in 2010, the Refugee Law Initiative (RLI) is a specialised independent academic centre, based at the School of Advanced Study, University of London, which serves as the foremost platform for bringing together leading refugee law researchers and practitioners from across the world.

Our evidence shares our viewpoint, as subject matter specialists in refugee law, on specific questions posed by the Committee, focusing on those that touch directly on the international law standards that we outlined in the 1st RLI Declaration on International Protection - 'Externalisation and Asylum' (adopted 29 June 2022).[1] This public Declaration provides general guidance to law- and policy-makers and others on the legality of externalisation measures impacting on access to asylum.

The UK/Rwanda MoU establishes an arrangement to externalise elements of the UK asylum system to Rwanda. It thus falls squarely within the framework of international law rules described by the RLI Declaration on Externalisation and Asylum, which defines 'externalisation' as '*the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole', outside its territory*' (para 2). The Declaration also clarifies that such '*externalised functions might be implemented by a State unilaterally, jointly with other States or entities* […] *or through partially or wholly delegating the functions to other States and/or entities*' (para 2).

The RLI Declaration on Externalisation and Asylum, and the accompanying RLI analytical paper that sets out the full legal basis for those standards,[2] can be accessed via links in footnotes 1-2 below. Extensive citations to the international law sources underpinning each of the international law rules set out by the RLI Declaration are provided in the RLI analytical paper and will not be repeated here.

**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? AND (3) How do you assess the assurances and safeguards in the MoU…?**

The MoU states '*This Arrangement will not be binding in International [sic.] law*' (para 1.6). However, several MoU provisions purport to create what seem to be legal obligations – for example, '*Rwanda will continue to comply with its obligations under … this Arrangement once it ceases to have effect*' (para 17.1). This creates a paradox: if the MoU is to bind the sovereign State of Rwanda to those obligations, then they must be binding as a matter of international (and not merely UK or Rwanda) law; but if the MoU is not intended to be binding under international law, then any such 'obligations' created by the MoU have no legal value, making the observance of new guarantees or safeguards established by the MoU merely voluntary and discretionary for Rwanda and the UK.

This fundamental legal ambiguity on the character of new guarantees and safeguards illustrates the general unsuitability of this kind of MoU as a vehicle for regulating forcible transfers under third country processing schemes. Not only does it pose a risk to the legal rights of refugee and asylum-seekers transferred pursuant to such arrangements. It also suggests that neither party to the MoU will be able to rely legally on new guarantees and safeguards apparently assumed therein by the other party, whether in bilateral disputes between the parties or in the face of legal challenges from third parties. In relation to such concerns, the RLI Declaration points out that: '*International agreements*

[1] 'Refugee Law Initiative Declaration on Externalisation and Asylum', adopted 29 June 2022; reproduced in (2022) *International Journal of Refugee Law*, eeac022 <https://doi.org/10.1093/ijrl/eeac022>.
[2] RLI analytical paper: D. Cantor et al, 'Externalisation, Access to Territorial Asylum, and International Law'; reproduced in (2022) *International Journal of Refugee Law*, eeac023 <https://doi.org/10.1093/ijrl/eeac023>.

*concerning third country processing must take a form suitable for protecting transferees' rights and ideally be binding under international law*' (para 17).[3]

**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 European Convention on Action against Trafficking in Human Beings?**

The MoU notes that Rwanda has been hosting '*hundreds of thousands of refugees*' and that the UK has '*resettled 25,000 vulnerable people from the Syrian conflict since 2015*' (preamble). Yet, despite the disparity in both the absolute and relative scale of refugee hosting by the two countries and their respective levels of economic development, the Arrangement aims '*to create a mechanism for the relocation of asylum seekers … to Rwanda*' (para 2.1). The provision to make arrangements, at some undetermined point, to '*resettle a portion of Rwanda's most vulnerable refugees*' in the UK (para 16.1) appears little more than an afterthought that is contingent on the principal objective.

In this regard, the RLI Declaration notes that: '*In general, international law principles suggest that States are allowed to externalise elements of their asylum functions to a State or entity outside their own territory only where this is done in a way consistent with their own legal obligations and for good faith reasons - to relieve an excessive burden on a country of first asylum in the context of mass influx, for example*' (para 25).[4] The principal objective of the Arrangement and the resulting operational features described in the MoU (as well as the token resettlement of refugees as a quid pro quo rather than on a solidarity basis) thus raise questions of compatibility with core legal principles of responsibility-sharing that underpin the global refugee regime.

The RLI Declaration also describes the international standards that apply to forcible transfers of asylum seekers pursuant to third country processing arrangements such as the UK/Rwanda MoU:[5]

> *18. Prior to the transfer of any asylum seeker to a third country pursuant to such an agreement, an individual assessment of the legality of the individual transfer is required. […]*
>
> *19. For each individual, this pre-transfer procedure must assess whether any of the following elements are present that would render the transfer contrary to international law:*
>
> *i. Any real risk of direct or indirect* refoulement *as a result of the transfer;*
> *ii. Any existing legal basis for the person to enter or remain in the transferring State, or other legal rules which would prevent their transfer out of the territory;*
> *iii. Any real risk that reception or other arrangements in the receiving State would breach international human rights or refugee law standards applicable in the transferring State, including prohibitions on arbitrary detention and arbitrary restrictions on movement.*
>
> *20. Such pre-transfer assessments should also consider the following practical elements in order to evaluate whether the individual transfer of the asylum seeker is reasonable on the facts:*
>
> *i. Any risk that the asylum seeker will not be admitted to the receiving country;*
> *ii. Any lack of prior connection of the person with the receiving country, especially where the arrangement envisages the provision of asylum in the receiving State;*
> *iii. Any special needs of the person, including on the basis of their gender or other protected characteristics, and the capacity of the receiving State to meet those needs;*

[3] The legal basis for this statement in the Declaration is set out in the RLI analytical paper, at pages 25-26.
[4] The legal basis for this statement in the Declaration is set out in the RLI analytical paper, at pages 32-33.
[5] The RLI analytical paper sets out their legal basis at pages 27-32.

*iv. Wider conditions in the receiving country and their stability, including any armed conflict or generalised violence, exposure to serious disasters and/or patterns of widespread violations of human rights, especially if on a discriminatory basis pertinent to the person concerned.*

*21. Asylum seekers subject to third country processing arrangements must be afforded access to a fair and efficient procedure in line with international standards, in both the pre-transfer evaluation in the transferring State and the asylum determination process in the receiving State.*

*[…]*

*23. Where a State transfers asylum seekers into the hands of another State for the purpose of third country processing but retains no jurisdiction thereafter, then it may be required to ensure that the basic international law guarantees applicable to asylum seekers in its own territory are respected in law and in practice in the receiving State, regardless of whether or not the receiving State is a party to relevant treaties. Applicable international human rights law standards in the receiving State must continue to be observed in all circumstances.*

*24. Where third country arrangements extend to the provision of international protection by the receiving State, transferred asylum seekers must receive ongoing protection against* refoulement *in the receiving State. Applicable international human rights law standards in the receiving State must also continue to be observed in all circumstances. If the transferring State is a party to the Refugee Convention, then the full set of international law guarantees contained therein must be respected in law and practice in the receiving State, even if the receiving State is not a party to the Convention.*

On the face of the MoU, it is not clear that the procedures detailed in the MoU comply fully with these standards in a number of key areas, as the following exemplary points illustrate.

The nature of the pre-transfer procedures in the UK raises serious concerns:

- The MoU states that the UK '*will not be obliged to make any request for relocation under this Arrangement*' (para 3.1). But there is no acknowledgment of the obligation on the UK to assess whether any elements are present in individual cases that might render the transfer contrary to international law, or practically unreasonable (see RLI Declaration above, paras 19-20).

- Although it is not mentioned in the MoU, the UK will also need to ensure that its pre-transfer assessment procedures comply with duties of fairness and effectiveness in line with international standards (RLI Declaration, para 21), especially given the risk that unfair or ineffective assessments may lead to individuals being exposed to direct or indirect *refoulement* or to breaches of their human rights, contrary to the UK's international obligations, as a result of inadequate assessment in the pre-transfer stage.

- In the interests of fairness and legality, the UK will also need to clarify the procedures (and timescales) to be followed for the taking in the UK of decisions about whether to request a transfer to Rwanda and what happens where a requested transfer is not possible.

Equally, alongside a host of well-documented doubts about the relative quality of asylum processing, reception and stay arrangements in practice in Rwanda, specific aspects of the post-transfer legal framework described in the MoU also raise concerns about compatibility with international law. The MoU states that Rwanda will treat relocated individuals, and process their asylum claims, '*in accordance with the Refugee Convention, Rwandan immigration laws and international and Rwandan*

*standards*' (para 9.1). The UK appears to consider those standards as sufficiently close to its own international obligations towards asylum-seekers to allow it to transfer them there. However, in several key areas, the legal standards prevailing in Rwanda do not appear to be substantively equivalent to those in the UK, but rather offer lesser protection that may result in a breach of the UK's obligations towards the persons transferred (RLI Declaration, paras 23 and 24):

- Rwanda has entered a reservation to Article 26 of the Refugee Convention (reserving '*the right to determine the place of residence of refugees and to establish limits to their freedom of movement*') whilst the UK does not – this discrepancy has the potential to significantly disadvantage refugees transferred from the UK to Rwanda in their enjoyment of that basic legal right under international refugee law. In this regard, the MoU, which states that a '*Relocated individual will be free to come and go… from accommodation that has been provided, in accordance with Rwandan laws and regulations as applicable to all residing in Rwanda*' (para 8.2) does not oblige Rwanda to recognise the right conferred under Article 26 of the Refugee Convention. Not only are there questions about whether the MoU is binding on Rwanda (see above), but Articles 23-25 of the 2014 Rwandan refugee law appear to provide only for the settlement of refugees and asylum-seekers in camps, from which they may not relocate without prior authorization of the Minister.[6]

- The 2014 Rwandan national refugee law also interprets certain key elements of the refugee definition more narrowly than the UK, e.g. Rwanda also interprets the crucial Article 1A(2) Refugee Convention ground of 'political opinion' more narrowly than the UK by restricting it to '*political opinion different from the line of the country of his/her nationality*' (in Article 7(1) of its national law), an approach not in accordance with the 'one true meaning' established in UK refugee law.[7] In this vein, Rwanda allows for the exclusion of refugees on a much wider range of grounds than the UK (which limits exclusion to the grounds established in Article 1F of the Refugee Convention) – this results from Rwanda's incorporation of the much wider grounds for exclusion set out in Article I(5)(c) of the Organization of African Unity Refugee Convention (as incorporated by Article 14(2) of its national law).

- Rwanda is bound internationally by the *non-refoulement* obligations in the Convention Against Torture and implicit in the International Covenant on Civil and Political Rights (to which it is party). However, Rwanda does not apply the European Convention on Human Rights understanding of standards on *refoulement* and – more importantly - appears to lack a provision in its national law/policy that expressly requires it to refrain from *refouling* a non-refugee to a country where they face a serious risk of torture, inhuman or degrading treatment or punishment, as required in the UK by established interpretations of the 1998 Human Rights Act.[8]

- Other than victims of trafficking (para 14 of the MoU), the MoU does not include specific guarantees in Rwanda for vulnerable persons who may be subject to transfer (such as children or persons with medical needs etc).

[6] Law No. 13 ter/2014 of 21/05/2014 relating to refugees, Official Gazette No. 26 of 30 June 2014, page 71; reproduced at <https://www.refworld.org/docid/53fb08cd4.html>.

[7] See, for example, the broad interpretation advanced in Regulation 6(1)(f) of the Refugee or Person in need of International Protection (Qualification) Regulations 2006, i.e. '*the holding of an opinion, thought or belief on a matter related to the potential actors of persecution and to their policies or methods, whether or not that opinion, thought or belief has been acted upon*', as well as in the settled jurisprudence of the UK courts (e.g. *RT (Zimbabwe) & Ors v SSHD* [2012] UKSC 38 (25 July 2012);

[8] See also the provisions relating to humanitarian protection in part 11 of the UK Immigration Rules, which partly reflect the Article 3 ECHR *non-refoulement* duty.

**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?**

The MoU states '*This Arrangement will not be binding in International [sic.] law*' (para 1.6). It adds that '*For the avoidance of doubt, the commitments set out in this Memorandum are made by the United Kingdom to Rwanda and vice versa and do not create or confer any right on any individual, nor shall compliance with this Arrangement be justiciable in any court of law by third-parties [sic.] or individuals*' (para 2.2).

Further to our comments on para 1.6 of the MoU in response to Question 1 above, we consider that even if the commitments in the MoU were not directly justiciable in a court of law (a position on which we do not take a view here), the implementation of this MoU will result in acts (and omissions) by the UK (and Rwanda) that will be justiciable in their own right, in the same way as any other acts or omissions that impinge on the individual rights and other legal benefits accorded to the subjects under domestic and international law. At least in respect of the guarantees provided to refugees and asylum seekers in the UK under international law, it is simply not possible to oust them through a bilateral agreement between governments, especially one that purports to have no force under international law (as per para 1.6). In this regard, the RLI Declaration notes that: 'Any arrangements to externalise asylum functions [through third country processing schemes] remain regulated by applicable rules of international law' (para 16).[9]

Moreover, the RLI Declaration notes that: '*International agreements concerning third country processing must … include an effective supervision mechanism to ensure that the legal rights of transferred asylum seekers are respected during implementation and to correct the situation if they are not. These agreements should be published and open to scrutiny by democratic and judicial mechanisms*' (para 17).[10] In this respect, the MoU does establish an independent Monitoring Committee with a mandate to monitor the '*entire relocation process*' (para 15) and affirms that Rwanda will '*take all reasonable steps*' to make a relocated individual available for return to the UK should the UK make this request (para 11.1). However, the Monitoring Committee is not vested with a power to suspend removals to Rwanda during the pre-transfer assessment nor to request the return of individuals to the UK where breaches of international law are uncovered. The MoU also omits a mechanism for the Monitoring Committee to report its findings in a public and transparent way. Thus, it is doubtful whether these provisions are fully compliant with international standards.

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[9] The legal basis for this statement in the Declaration is set out in the RLI analytical paper, at pages 4-12.
[10] The legal basis for this statement in the Declaration is set out in the RLI analytical paper, at page 27.