GOVERNMENT RESPONSE TO THE HOUSE OF LORDS INTERNATIONAL AGREEMENTS COMMITTEE REPORT ON ITS INQUIRY: MEMORANDUM OF UNDERSTANDING BETWEEN THE UK AND RWANDA FOR THE PROVISION OF AN ASYLUM PARTNERSHIP ARRANGEMENT

The Government notes the House of Lords International Agreements Committee ("IAC" or the "Committee") report on its inquiry into the "Memorandum of Understanding between the UK and Rwanda for the provision of an asylum partnership arrangement", which was published on 18 October 2022.

Introduction

The Government has carefully considered the Committee's report and sets out below its response to the Committee's recommendations and conclusions. The Committee's findings are in bold, and the Government's responses are in plain text. For ease of reference, the paragraph numbering in this document follows the 'Summary of conclusions and recommendations' section of the Committee's Report (page 11). The Government apologises to the Committee for not issuing a formal response to the Committee's call for evidence.

The Government recalls a number of recent parliamentary inquiries which referenced the policy on non-legally binding instruments (NBIs), sometimes referred to as Memoranda of Understanding or MoU. In particular, we note our response (dated 25 September 2020 to the IAC's first report 'Treaty Scrutiny: Working Practices (July 2020) and our response (December 2021) to the IAC's second report 'Working Practices: One year on" (September 2021).

1. **The UK-Rwanda MoU is an important political arrangement, the implications of which may affect individual rights and which warrants Parliamentary scrutiny (paragraph 25).**

The Government agrees that the MoU with Rwanda – announced on 14 April 2022 – is a non-binding instrument setting out an important political arrangement. It is intended to address the shared international challenge of illegal migration and break the business model of the people smuggling gangs who 'sell' access to the UK. The Government is clear that access to the UK's asylum system should be based on need, not on the ability to pay people smugglers, and that decisive action is needed to tackle the criminal gangs who exploit the hopes of migrants, pushing them to make dangerous journeys to the UK with false promises that they can settle in the UK if they make it.

The domestic framework for giving effect to removals under this arrangement is already underpinned by domestic legislation which has previously been scrutinised in Parliament. The Immigration and Asylum Act 1999 (Section 10) enables the Home

Office to remove persons that require leave to be in the UK but do not have it. Those who are eligible for relocation to Rwanda are considered inadmissible to the UK asylum system. The UK does not consider inadmissible asylum claims. Asylum claims were previously deemed inadmissible under paragraphs 345A-D of the Immigration Rules and, for newer claims, under the Nationality and Borders Act 2022 if the person has a connection with a safe third country (for example this can occur when a person travels through safe countries to enter the UK). The MoU does not change individuals' rights as protected under international law – indeed it reiterates the Participants' obligations in this space through provision of assurances that these will be adhered to. All existing avenues to raise challenges to the Home Office's removal decisions are equally applicable in MEDP removals as they are in any other removal.

Given the importance of this arrangement, and in the interests of transparency, the Government decided to publish the MoU (on 14 April) alongside the then Prime Minister's announcement of the Partnership. Home Office ministers have made statements to Parliament regarding this arrangement, including but not limited to an oral statement by the (then) Home Secretary Priti Patel at the earliest available opportunity after the announcement on 19 April 2022 and a subsequent appearance before the Home Affairs Committee by the (then) Minister for Justice and Tackling Illegal Migration on 11 May 2022.

2. **We are concerned that the Government has concluded an agreement which appears to be entirely unenforceable. In practice this means that neither individuals, nor the Parties to the arrangement, can ensure the rights of those affected are fully protected (paragraph 33).**
3. **The UK Government should not have chosen an MoU to facilitate this arrangement. Agreements that raise fundamental questions about individual rights should not be entered into through an MoU, but through a formal treaty (paragraph 34).**

Responses to paragraphs 33 and 34 are answered together.

An NBI is a common mechanism for recording political commitments and arrangements between States.

It is important to note at the outset that adoption of a Treaty rather than a MoU would not have afforded individuals the right to raise disputes under the Treaty as the question implies.

The MoU was negotiated with close care and attention though a series of discussions between the UK and the Government of Rwanda. The commitments within it and the form it took were issues agreed between the two Participants. Whilst not legally binding in international law, the terms of the MoU – including the

monitoring arrangements – provide the assurances we, and Rwanda, need to confirm that the arrangement will be operated in line with international obligations and in a manner which ensures the welfare and safety of those people relocated under it.

The Committee will have noted that the MoU makes specific provisions for governance arrangements, to ensure the Partnership is closely managed. These include a Joint Committee, comprised of officials from the UK and the Government of Rwanda, which will provide direction and manage the application and interpretation of the Partnership and the implementation of the commitments set out in the MoU; and an independent Monitoring Committee.

The MoU guarantees that the Monitoring Committee - whose members are independent from the UK and Rwandan governments as well as the MEDP process - will be able to look at every part of the relocation process and will provide an independent assessment of conditions and delivery against the assurances set out in the MoU, as detailed in the formal diplomatic correspondence annexed to this response. These represent a more detailed exposition of the standards to be delivered under the MoU. The first, on reception and accommodation, outlines the support that individuals relocated to Rwanda will receive before and after their claim for asylum has been assessed. The second, on the asylum process, sets out the specific asylum process that will take place in Rwanda for those relocated under the Migration and Economic Development Partnership MoU.

The Monitoring Committee will also publish an annual report on their findings. The terms of reference for the Monitoring Committee, as well as information on its members, can be viewed here: Monitoring Committee: Migration and Economic Development Partnership - GOV.UK (www.gov.uk).

The Government's decision to underpin the arrangement with an NBI will allow the partnership to quickly respond to any issues raised by the Joint and/or Monitoring Committees. This allows the detail of the partnership to be flexible and the technical details to be adjusted or updated quickly, if needed, with the agreement of both partners.

4. **The arrangement does not appear to fall within the Government's own guidance of when an MoU may be used in place of a treaty. In the absence of written evidence from the Government, it is unclear on what basis it considered it preferable to conclude the agreement as an MoU— particularly, when practical considerations are balanced against the fact that the arrangement engages individuals' rights (paragraph 37).**

The Government does not agree with the Committee's suggestion that use of an NBI in this case is contrary to government guidance. As the Government has previously

set out, the examples offered in the Treaties and MoU Guidance do not form an exhaustive list and each decision on whether to use a treaty or a non-legally binding instrument reflects the intentions of the parties involved as to whether to create a legally or non-legally binding commitment, for example where there is a need for flexibility in the handling of the desired commitments.

5. **We call on the Government to set out why it decided to use an MoU for its arrangement with Rwanda (paragraph 38).**

The arrangement responds to the urgency and public interest in deterring unnecessary, illegal and dangerous journeys to the UK. As a non-legally binding instrument, it also has the benefit of allowing the detail of the partnership to be flexible and the technical details may be adjusted quickly, if needed, with the approval of both partners. This was considered helpful given the unique nature of the arrangement.

6. **We also call on the Government to publish clearer guidance and criteria as to when an instrument ought to be agreed as a legally binding treaty and when it may be concluded as an MoU. The current guidance gives Government Departments too much discretion in this regard. Their decision can have far-reaching consequences—both in respect of parliamentary scrutiny and the impact of arrangements on individuals (paragraph 39).**

The Committee's call to agree criteria defining when negotiators should accept a treaty or a NBI would restrict the Government's ability to exercise effectively its powers under the Royal Prerogative. The Government maintains its discretion to negotiate and conclude treaties and other international instruments in support of UK national interests. In doing so the Government continues to follow existing frameworks, including the Ministerial Code and the Cabinet Office Guide to Parliamentary Work (November 2022).

The key difference between a treaty and an NBI is that in agreeing a treaty, the parties intend to create legally binding international obligations in international law. A decision on which to use will depend on a non-exhaustive number of factors but it is the UK Government's practice to show clearly from the form of the document and its terminology if it intends to create legally binding obligations. The Government guidance published on gov.uk makes this clear.

7. **There is a substantial lacuna in the parliamentary scrutiny of international agreements as significant MoUs are not subject to any formal scrutiny processes (paragraph 44).**

The Government's view is that the use of NBIs does not create a scrutiny gap. The Government considers that existing frameworks are sufficient. To construct a new

framework for NBIs would be unworkable and unwieldy, and restrict inappropriately the Government's ability to act on the international stage under the Royal Prerogative. NBIs are not a cohesive category as they cover a wide range of issues. The Government has previously indicated that it may be appropriate to draw Parliament's attention to NBIs that raise questions of public importance. This is considered on a case-by-case basis.

8. **The Government's approach in this case has meant that Parliament has had no opportunity to consider whether the MoU is compatible with the UK's obligations under international law; whether the policy objectives are coherent and achievable, the financial implications, the basis in domestic law for its implementation; or whether any safeguards ought to have been introduced (paragraph 45).**

As noted earlier in this document, given the importance of this arrangement, and in the interests of transparency, the Government decided to publish the MoU (on 14 April 2022), and Home Office ministers have made statements to Parliament regarding this arrangement, including an oral statement by the (then) Home Secretary Priti Patel on 19 April 2022 and an appearance before the Home Affairs Committee by the (then) Minister for Justice and Tackling Illegal Migration on 11 May 2022. Further, the Home Office Permanent Secretary and Second Permanent Secretary also provided information on the Partnership with Rwanda during their appearances before the Public Accounts Committee on 25 April and 23 May respectively.

The Government has noted the Committee's concern, set out at paragraph 45 of the report, that it has not had an opportunity to consider the detail of the arrangement, including compatibility with domestic and international law. Whilst the Government cannot comment on ongoing legal proceedings, we believe the MoU is consistent with our domestic legislation and fully complies with all national and international law, including the UN Refugee Convention and European Convention on Human Rights. Each decision to relocate an individual under the MoU will be made after a detailed case-by-case assessment to ensure that it is appropriate to relocate them to Rwanda. The arrangement requires Rwanda to process claims in accordance with the UN Refugee Convention, national and international laws, including ensuring protection from inhuman and degrading treatment or being refouled.

9. **It is unacceptable that the Government should be able to use prerogative powers to agree important arrangements with other states that have serious human rights implications without any scrutiny by Parliament (paragraph 46).**

Various factors are taken into account when considering the need for a formal arrangement with another state or states. As noted above, a decision on whether to

use a treaty or NBI will depend on a non-exhaustive number of factors but it is the UK Government's practice to show clearly from the form of the document and its terminology if it intends to create legally binding obligations. The Government guidance published on gov.uk makes this clear. Ultimately, the decision will be based on whether there is a need for legal certainty or whether a non-legally binding commitment would be appropriate. NBIs should not include any commitments or language which could be interpreted as legally binding.

10. **As noted earlier in this report, MoUs should not be used instead of treaties if they raise fundamental questions about the rights of individuals. Where it is not possible to enter into a formal treaty, we call on the Government to ensure that any such MoU be deposited for parliamentary scrutiny in the same way as a treaty, including the submission of an Explanatory Memorandum. This would mean allowing for a gap of at least 21 sitting days between deposit of the MoU and its implementation and facilitating a debate if requested (paragraph 47).**

As the Committee notes in its report, NBIs are not treaties and are therefore not subject to Part 2 of the Constitutional Reform and Governance Act 2010. The Government recalls its previous statements that there has never been a convention in the UK whereby NBIs are routinely submitted for parliamentary scrutiny and that it is established United Kingdom Government practice not to routinely publish non-legally binding instruments and arrangements. However, the Government remains committed to engaging with Parliament, through other means, on this matter.

The Government has also previously set out that it does not agree it is necessary to publish a set of criteria for NBIs to be notified to Parliament. The relevant circumstances around each case will vary according to the arrangement in question, including consent from the international counterpart to the instrument. Therefore, as noted above, the Government may consider it appropriate, on a case-by-case basis, to draw Parliament's attention to NBIs when they raise issues of public importance through existing frameworks, for example through a Written Ministerial Statement. Any request for a debate must be balanced against other demands on parliamentary time