RWA0016 Professor Theodore Konstadinides and Dr Anastasia Karatzia

The authors are academics at the School of Law, University of Essex. This evidence is submitted in a personal capacity.

Summary

1. MoUs are often referred to as *atypical acts* or *soft law* to point to their alleged lack of bindingness. The non-mandatory style of their wording as well as the usual absence of their registration give a strong presumption of something less than a legislative act. In this context, the MoU signed on 13 April 2022 between the UK Government and the Government of the Republic of Rwanda for an asylum partnership arrangement presents challenges for the government, especially with reference to the MoU's legal status, justiciability, and liability, as well as opportunities to clarify the breadth of the scope of international law in this quasi-legal context, especially the definition and categorisation of these instruments and their corresponding effects for the involved parties.

2. The submission primarily addresses issues arising from questions 1 (implications of signing agreement that asserts that it is not binding in international law and whether the MoU is an appropriate vehicle for this agreement); 2 (implications of MoU becoming operational on signature); 3 (regarding the assurances and safeguards included in the MoU) and 7 (on binding or enforceable obligations on parties).

An agreement that asserts that it is not binding on either Party in international law

3. In the international legal context, MoUs are often treated as atypical treaties or international agreements in that they constitute an expression of political will which regulate technical matters or set out bilateral operational arrangements under a framework international agreement.

The term 'soft law' appears attractive as a means of categorising MoUs *de jure* and distinguishing them from treaties proper. Indeed, in the absence of an overarching definition, MoUs have conveniently been categorised by legal scholars as bilateral instruments of soft law adopted by two parties with a view to clarifying issues of common political interest or setting out a general agreement on cooperation. Aust remarks that 'many soft law instruments can be regarded as MoUs in the sense that there is no intention that they should be legally binding'.[1] This of course begs the question of what is 'soft law' and whether describing MoUs as soft law instruments enhances our understanding of their character and nature.

4. What is common to all soft law instruments (and applies to MoUs) is that they are negotiated outside the legal contours and the ordinary law-making process used in a particular legal system for the adoption of regular acts. Yet, what makes soft law attractive as a concept makes it also limited as an overarching term to describe MoUs in general. The first limitation is that soft law is a concept without universal definition and MoUs are in themselves amorphous instruments to be examined under soft law lenses. The second limitation is that the mainstream interpretation of soft law suggests a lukewarm situation where the instrument in question is neither strictly binding nor lacking completely legal significance.

5. Against these limitations, and at the expense of legal certainty, we will use the soft law terminology here to generally gauge the duality of the character of MoUs as i) binding instruments / mandatory acts which generate certain obligations that must be complied with; and ii) non-legal norms in the form of mere guidance proposing a course of conduct, recommendations, policies etc. Soft law norms are not generally considered to be binding in the traditional legal sense. This feature has generated disagreement especially in terms of whether or not failure to abide with soft law constitutes a violation of a legal obligation. In addition to the difficulty with identifying whether breach of soft law is a violation of a legal obligation, there is also the difficulty of identifying an enforcement

[1] A. Aust, *Handbook of International Law* (Cambridge: CUP 2010), p.11

mechanism for soft law instruments: what body is the most appropriate to judge their legality and on what basis?

6. Initially, it appears that it is 'bindingness' that distinguishes soft law from hard law - the latter referring to formal legal instruments that unequivocally produce binding rights and responsibilities. For example, in the relation between United Nations (UN) and third parties (such as international bodies or Member States) pursuant to the UN Charter, the term 'Memorandum' can be used to denote a less formal or binding international instrument. As remarked, however, such an international instrument is capable of generating some 'effects'. Stefan contends that although generally non-binding, soft law instruments can produce a large array of legal effects such as creating legitimate expectations for individuals, clarifying the content of certain hard law provisions, and structuring the discretion of certain institutions.[2] Such legal effects could be produced by MoUs depending on the identity of the respective parties negotiating the respective MoU, the subject matter, content, and wording of the MoU, as well as the intention of the signatories. All these factors determine the intensity of the obligation to achieve a particular result and accordingly the respective legal effects and gravity of any potential breach that may occur after signature. In other words, at least theoretically, an MoU can produce legal effects despite the written intention of the signing parties. Having said that, a disclaimer in a Memorandum that it is not legally binding on either party is likely to be conclusive of its legal character.

7. The view of MoUs as soft law instruments also aligns the perception regarding their enforceability and general legal consequences with international practice that applies to other binding agreements. More specifically, the legal effect of an agreement (binding or non-binding) seems to depend on the parties' intention to be bound by it as a matter of international law. The intention of the signatories to be bound is established by looking at the terms of the agreement and the

[2] O. Stefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' (2008) 14(6) *E.L.J.* 753.

circumstances in which it was drawn up. Based on this test, it has been argued that 'there is no reason to distinguish memoranda of understanding from any other form of agreement.' It follows that the name and form of the agreement are not decisive for establishing whether an international agreement is binding or not. Any form of dispute resolution mechanism mandated by the MoU itself or intervention by an international court can provide a careful consideration of any 'legal effects' that may spring out of the MoU in question.

8. A genuine attempt to resolve disputes arising *inter partes* or challenges by other natural or legal persons in this context should be without prejudice to the standard view that MoUs are devoid of any legal consequences. The above leads us to conclude that we shall be open-minded about MoUs creating grounds for legal obligations without being treaties themselves.

MoUs and implications for the UK

9. The UK's uncodified constitution remains silent in relation to MoUs, yet it contains different sources ranging from statute and common law to prerogative acts and international agreements which give international relations a legal basis. The omission of MoUs as sources is not, however, categorical as to whether MoUs are to be considered legal acts or not, or legally binding or not, for two main reasons. First, to the extent that an MoU includes an element of mutuality between two or more actors, it might be said to resemble international agreements. Second, it can be argued that the categorisation of legal acts is incomplete in the UK constitution and recognises other instruments developed through practice over time. In light of such incomplete categorisation, it becomes challenging to identify whether a legal instrument used by the government is legally binding or has legal effects or other legal consequences. Having said that, we need to be mindful of the dualist approach of the UK towards international law which requires the UK to expressly adopt international law as part of domestic law before it can be effectively enforced in domestic courts.

10. When it comes to whether the UK-Rwanda MoU imposes any binding or enforceable obligations on either Party it appears that on paper given that the arrangement asserts it is non-legally binding (including the wording of Article 2.2) there are no consequences if either Party were to breach any of their assurances under the arrangement. In reality, however, the enforceability of MoUs matters although the decision to treat Rwanda as a safe country raises 'serious triable issues'. This paradox is illustrated in the *NSK case* (2022/0090), where both the High Court and the Supreme Court expected that Rwanda would comply with the MoU although it was not legally binding, whilst at the same time recognising the absence of any legally enforceable mechanism for the applicant's return to the United Kingdom in the event of a successful merits challenge before the domestic courts.

11. In our opinion, an MoU is therefore not an appropriate vehicle for this agreement especially given i) the implications it has for individual rights, and ii) 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 which give rise to legitimate expectations as to the other party's conduct.

12. We argue, therefore, that the subject matter of an agreement, especially whether that agreement impacts on individual rights, should drive the choice of legal instrument by which it is concluded. Regarding the UK-Rwanda MoU, the legitimate expectations created among the MoU signatories could be better protected under a treaty which spells out the respective rights of individuals concerned in a manner which is consistent with the UK's obligations under international law and where individuals are entitled to reasonably rely on the state of affairs created by public authorities.

13. Could the MoU in the UK-Rwanda case (currently a 'soft law' instrument) become 'hard law by implication'? Scholarship remains inconclusive about the extent to which soft law instruments have legitimately replaced hard law in certain cases - for instance resorting to MoUs instead of binding

bilateral agreements. Klabbers has been most critical about the drawbacks of soft law and rejects the function of soft law instruments, arguing that they often operate as treaties in disguise.[3] Looking at the EU legal order, Wessel appears cautious about the extent to which resort to soft law in the context of EU law forms a secret passage to 'stepping outside' the EU established legal framework (e.g. art. 218 TFEU) and, therefore, disregarding the EU *acquis* of EU external relations.[4] Similarly in the context of a state using MoUs the risk is that recasting more familiar hard sources into soft law instruments undermines the democratic process and distorts the demarcating line that separates an instrument that may produce legal effects from one that has both *de facto* and *de jure* legally binding force.

14. An MoU such as the UK-Rwanda presents problems both regarding accountability and transparency. To begin with, it is not subject to Parliament's statutory role in scrutinising treaties as set out in Part 2 of the Constitutional Reform and Governance Act 2010. Regarding transparency, government has signed MoUs with third parties both at the domestic and international level, yet unlike treaties only a few MoUs are published. One published MoU is a 2013 Memorandum between the Government and the UK devolved administrations setting out the principles which underlie their relations. What is more, a selection of international MoUs including the UK-Rwanda MoU and MoUs on collaboration on civil space activities with various countries is published on the GOV.UK website, while a number of MoUs are published on GOV.UK as news stories. The recent UK-Singapore MoU on collaboration in the design and delivery of digital government is published only as a news story on the same website while other MoUs such as the UK's MoU with Iceland on transitional migration arrangements that was to apply in the event of a "no deal" Brexit are available both as news stories and in full.

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[3] See J. Klabbers, 'The Undesirability of soft law' (1998) *Nord.J.Int'l L.* 381; J. Kalbbers, 'The redundancy of soft law' (1996) *Nord.J.Int'l L.* 167.

[4] R.A. Wessel, 'Soft' International Agreements in EU External Relations: Pragmatism over Principles?, Draft paper, presented at the ECPR SGEU Conference, Panel *Hard and Soft Law in the European Union*, Paris 13-15 June 2018, p.4.

15. The 2022 FCDO Guidance on Treaties and Procedures states that confidentiality is one of the reasons why an MoU is used in certain cases: "An MoU is used where it is considered preferable to avoid the formalities of a treaty - for example, where there are detailed provisions which change frequently or the matters dealt with are essentially of a technical or administrative character; in matters of defence or technology where there is a need for such documents to be classified; or where a treaty requires subsidiary documents to fill out the details."[5] Even so, the lack of a comprehensive MoU database or even a list of names of the UK's international MoUs raises serious transparency concerns as public knowledge of their existence depends on whether the government of the day would decide to publish them online.

16. As we mentioned above, the subject matter of an agreement should be a key factor in whether or not that agreement will be concluded in the form of a Treaty or a Memorandum. There is a big difference between an agreement of a technical or administrative character and one engaging individual rights. This distinction becomes even more important in light of the FCDO's statement that "[I]t is UK practice to show clearly by the form of the document and its terminology the intention either to create legally binding obligations, or not, i.e. either a treaty or an MoU. There is no hybrid."[6]

17. Last but not least, the UK-Rwanda MoU was only published on 14 April 2022 when it became operational on signature which left no space for any type of review or revisions by Parliament, input from academics, or the general public, despite the significance of the matter. On the premise that transparency is key to proper accountability of Government, we propose that there is a gap between signature and "entry into force" to allow sufficient time for scrutiny and publication.

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[5] Foreign, Commonwealth and Development Office, Treaties and MOUs: Guidance on Practice and Procedures, (22 March 2022) available at: https://www.gov.uk/government/publications/treaties-and-mous-guidance-on-practice-and-procedures.

[6] Foreign, Commonwealth and Development Office, Treaties and MOUs: Guidance on Practice and Procedures, (22 March 2022) available at: https://www.gov.uk/government/publications/treaties-and-mous-guidance-on-practice-and-procedures.