ASSOCIATE PROFESSOR CATHERINE BRIDDICK AND PROFESSOR CATHRYN COSTELLO – WRITTEN EVIDENCE (URA0015)

WRITTEN EVIDENCE TO THE HOUSE OF LORDS INTERNATIONAL AGREEMENTS COMMITTEE

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INTRODUCTION

1. We note the Committee's previous report of 18 October 2022[1] on the Memorandum of Understanding (MoU) between the UK and Rwanda.[2] We agree with the Committee's conclusions that MoUs are not suitable instruments to govern individuals' fundamental rights, given their non-binding character. However, the use of an international treaty does not mean that Rwanda is a safe country. International law requires

[1] International Agreements Committee, *Memorandum of Understanding between the UK and Rwanda for the provision of an asylum partnership arrangement* (7th Report of Session 2022-23, HL Paper 71, 18 October 2022).
[2] *Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement* (14 April 2022).

that the assessment of safety is an empirical matter, not a purely legal one. Although concluding an international treaty may make it more likely that the provisions of the agreement will be respected, that cannot be assumed.

2. The Supreme Court's factual findings in *R (on the application of AAA (Syria) and others)* (2023)[3] on Rwanda reflect the general approach in international law applied by courts and human rights bodies for decades – safety is an empirical, not a formal matter.[4] The factual findings did not turn on the legal form of the agreement then at issue, but rather on Rwanda's inability and unlikelihood of meeting its own international legal obligations under international refugee and human rights law.

3. The UK-Rwanda Agreement[5] does not make Rwanda a safe third country or offer individuals at risk of relocation sufficient protection from *refoulement* and other human rights violations. Instead, the Agreement enables the relocation of individuals in circumstances that risk breaching the UK's obligations under a range of international human rights and refugee law treaties, customary international law and arguably norms of *jus cogens*. Any attempt to relocate an individual pursuant to this Agreement is likely to be contested, not only before the ECtHR but also before a range of UN Treaty Bodies.

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[3] *R (AAA) v SSHD* [2023] EWCA Civ 745 [56]. For analysis, see Briddick, Catherine & Costello, Cathryn: *Supreme Judgecraft: Non-Refoulement and the end of the UK-Rwanda 'deal'?, VerfBlog,* 2023/11/20, https://verfassungsblog.de/supreme-judgecraft/, DOI: 10.59704/6ac71ea278f0af98.

[4] Gregor Noll 'Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law' (2001) *Nordic Journal of International Law*, *70*(1-2), 161-182.

[5] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Agreement to Strengthen Shared International Commitments on the Protection of Refugees and Migrants (Kigali, 5 December 2023) (UK-Rwanda Agreement).

4. The Agreement, or parts of it, may conflict with peremptory norms of international law, and indeed raises urgent questions about the status of the prohibition of *non-refoulement*.

5. The Agreement undermines international responsibility sharing for refugees, itself an implicit obligation under international refugee law.

6. In the paragraphs that follow we have, in the short time provided, sought to offer the Committee an assessment of the UK-Rwanda Agreement and some of its most evident shortcomings. Nothing should be read into our lack of comment on any particular element of the Agreement or its provisions, other than an inability, in the time available, to provide the more detailed analysis that this Agreement requires.

7. We focus on the principle of *non-refoulement*, which requires the sending state (in this case the UK) to assess risks facing transferred individuals in Rwanda and in any potential third or home country to which return might emerge. The prohibition also includes constructive non-refoulement, that is where protection seekers are exposed to such harsh or insecure conditions that they may be compelled to leave a jurisdiction. We do not consider in detail the international law on trafficking, except to note that the Agreement on its face countenances that victims of trafficking may be transferred, but does not acknowledge the UK's specific legal obligations in this field.

THE COMMITTEE'S QUESTIONS

What is your overall assessment of whether the changes to the asylum partnership arrangements made by the new Agreement, including its legal form, are likely to meet the concerns raised by the Supreme Court?

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8. The UK's international legal obligations to those in need of international protection derive from a range of international human rights treaties, international refugee law, customary international law and norms of *jus cogens*. Human rights treaty-based obligations are owed, at a minimum, to all those within the UK's territory or jurisdiction. It is well-established that all conduct and arrangements entailing the transfer of protection-seekers from one State to another engage the transferring states' international protection obligations.

9. At the core of the UK's international protection obligations is the prohibition of *refoulement*. *Refoulement* is prohibited by a range of treaties to which the UK is a party, including but not limited to the Refugee Convention,[6] the Convention against Torture,[7] the International Covenant on Civil and Political Rights (ICCPR),[8] the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),[9] and the European Convention on Human Rights (ECHR).[10] The UK is required by international law to fulfil its treaty obligations in good faith.[11]

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[6] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).
[7] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adoped 10 December 1984, in force 26 June 1987) 1465 UNTS 85 (CAT).
[8] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[9] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, in force 3 September 1981) 1249 UNTS 13.
[10] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entry into force 3 September 1953) ETS 5 (ECHR).
[11] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 26.

10. *Refoulement* is also prohibited by customary international law. Furthermore, there is "strong support" for the proposition that this prohibition has attained the status of a *jus cogens* norm.[12] Peremptory norms of international law, or *jus cogens* norms, are norms "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted… ."[13] Professor Dire Tladi, the International Law Commission's Special Rapporteur on Peremptory Norms of General International Law (Jus Cogens) and now judge-elect of the International Court of Justice, has reviewed a range of legal sources and concluded that the "principle of *non-refoulement* is another principle of international law whose candidacy for peremptory status has ample support."[14] Significantly, Tladi also affirms the arguments on this point made by Professor Costello and Professor Michelle Foster.[15]

11. According the Vienna Convention on the Law of Treaties "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."[16] The provisions of a treaty that is void have no legal force.[17] The parties to treaty that is void because it conflicts with a *jus cogens* norm have specific obligations,[18] including

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[12] *Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur UN doc A/CN.4/727 (31 January 2019)* [133].
[13] VCLT art 53.
[14] , *Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur UN doc A/CN.4/727 (31 January 2019)* [131].
[15] Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (T.M.C. Asser Press 2016) <https://doi.org/10.1007/978-94-6265-114-2_10> . "Costello and Foster undertake an excellent, in-depth analysis, looking at both arguments for and against, and come to the conclusion that the principle of non-refoulement is a norm of jus cogens.." , *Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur UN doc A/CN.4/727 (31 January 2019)* [133].
[16] VCLT art 53.
[17] Ibid art 69.
[18] Ibid art 71.

to "bring their mutual relations into conformity with the peremptory norm of general international law." [19]

12. The UK-Rwanda Agreement does not contain a general clause to ensure compliance with all aspects of the norm of *non-refoulement*. It is noteworthy that it does not contain any clause seeking to avoid breaches of other multilateral treaties in this field, merely acknowledging the 1951 Convention on the Status of Refugees, but not the range of instruments that protect against *refoulement*.[20]

13. Further, while the UK-Rwanda Agreement refers to both the Refugee Convention and "international human rights law", it does not contain a "saving clause" to ensure the *primacy* of the parties' obligations under these.[21]

14. Article 9(1) of the Agreement provides that asylum claims are to be determined in accordance with the Refugee Convention. It is unclear how claims for complementary / subsidiary or other forms of protection are to be determined. Art 10(2) refers to "humanitarian protection need", but the protection provided by this provision does not appear to correlate with the UK's broader *non-refoulement* obligations, including, for example, in relation to "flagrant breaches" of the ECHR[22] or violence against women pursuant to CEDAW.[23]

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[19] Ibid art 71(b).
[20] Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21(3) German Law Journal 355.
[21] See, for example, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (adopted 15 November 2000, entry into force 25 December 2003) 2237 UNTS 319 (UN Trafficking Protocol) art 14(1) which states "Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein."
[22] See, for example, *EM (Lebanon) v SSHD* [2008] UKHL 64, [2009] 1 All ER 559.
[23] General Recommendation No. 32 on the Gender-Related Dimensions of Refugee

15. We note that Rwanda also has pertinent obligations under the 1969 OAU Refugee Convention,[24] which are not acknowledged.

16. The Safety of Rwanda (Asylum and Immigration) Bill requires decision makers to treat Rwanda as a safe country (clause 2). The Bill also seeks to dis-apply sections 2, 3, 6-9 of the Human Rights Act 1998 (clause 3). It precludes courts and tribunals having regard to interim measures from the ECHR and provides for Ministers to decide whether or not to comply with them (clause 5). Finally, the Bill provides that those who are Rwandan will not be returned there (clause 7(2)).

17. In *R (on the application of AAA (Syria) and others)* (2023)[25] the Supreme Court affirmed that the UK's right to control the entry and residence of migrants is limited by international law and in particular, the prohibition on *refoulement*.[26] The Court identified as relevant prohibitions on *refoulement* in a range of treaties to which the UK is party, including those listed above. Indeed, the Supreme Court does not only mention the UK's ratification of these Conventions, but also the considerable number of other State Parties to them. The emphasis on the principle's place in the system of international legality is also evident in the fact that the Supreme Court acknowledges the likely customary character of *non-refoulement*.[27] The Court concludes that the prohibition on *refoulement* is:

Status, Asylum, Nationality and Statelessness of Women (14 November 2014, CEDAW/C/GC/32) (CEDAW's GR 32) [23].

[24] Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (OAU Convention).

[25] *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42. The analysis here draws on Catherine Briddick and Cathryn Costello, 'Supreme Judgecraft: Non-Refoulement and the End of the UK-Rwanda 'deal'?' (*VerfBlog*, 20 November 2023) <https://verfassungsblog.de/supreme-judgecraft/> accessed 23 November 2023.

[26] *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department* [19]

a core principle of international law, to which the United Kingdom government has repeatedly committed itself on the international stage, consistently with this country's reputation for developing and upholding the rule of law. [28]

18. Rwanda is also bound by a number of treaties that prohibit *refoulement*, including the Refugee Convention and OAU Refugee Convention.[29]

19. The Supreme Court's analysis of the situation in Rwanda was detailed and comprehensive. As the Committee is aware, significant concerns were raised about both the quality of asylum decision-making and a lack of independence, in relation to the legal profession, judiciary, and court system.[30] Significantly, the Supreme Court identified a "practice of *refoulement*"[31] and a failure to understand the substantive legal content of its prohibition.[32] Finally, the Court found it relevant that Rwanda had failed to meet obligations it had assumed in other, similar, agreements, notably with Israel.[33] Here, the Court concluded that:

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[27] Ibid [25].
[28] Ibid [26].
[29] OAU Convention.
[30] *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department* [82]-[83]. As the Court noted: "UNHCR's evidence shows 100% rejection rates at RSDC level during 2020-2022 for nationals of Afghanistan, Syria and Yemen, from which asylum seekers removed from the United Kingdom may well emanate. This is a surprisingly high rejection rate for claimants from known conflict zones. By comparison, Home Office statistics for the same period show that asylum claims in the United Kingdom were granted in 74% of cases from Afghanistan, 98% of cases from Syria, and 40% of cases from Yemen. UNHCR attributes the refusal of such claims by the Rwandan authorities to a view that persons from the Middle East and Afghanistan should claim asylum in their own region." [85]
[31] Ibid [87].
[32] Ibid [91].
[33] Ibid [100].

[t]here is no dispute that persons who were relocated under the agreement suffered serious breaches of their rights under the Refugee Convention.[34]

20. The Supreme Court found that the Secretary of State's policy to remove protection seekers to Rwanda pursuant to the Memorandum of Understanding (MoU) was unlawful. Rwanda is not, the Court concluded, a safe third country ('STC'). Instead the Supreme Court found, "substantial grounds for believing that there is a real risk that asylum claims will not be determined properly, and that asylum seekers will in consequence be at risk of being returned directly or indirectly to their country of origin." [35] Should this occur "refugees will face a real risk of ill-treatment in circumstances where they should not have been returned at all." [36]

21. The Supreme Court's judgment did not turn on the robustness, or not, of the MoU. Nor did it turn on the fact that the agreement at issue was a MoU rather than one that created legal obligations. At the heart of the judgment was the Court's *factual* determination that Rwanda does not have the "practical ability"[37] to fulfil the legal obligations is has assumed. In this respect, the Supreme Court ruling is entirely consistent with the well-established approach to assessing the permissibility of any transfers of protection-seekers, namely it must be an empirical, rather than legal assessment. Irrespective of the legal form of the designation of the 'safety' of a third country, IHRL demands that courts assess safety in the individual case for the particular transferee. In other words, legal presumptions must be rebuttable.

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[34] Ibid [96].
[35] Ibid [105].
[36] Ibid [105].
[37] Ibid [102]

22. In light of the above, the arrangements put in place are unlikely to meet the Court's "concerns". The concerns are based on an assessment, informed by UNHCR's expert views, of Rwanda's current capacity and approach. While Rwanda's commitment in the Agreement may indicate an intention to change its approach, the Agreement in itself cannot be taken to demonstrate that such change has, in fact, occurred. As the Court explains "risk is judged in the light of what has happened in the past, and in the light of the situation as it currently exists, as well as in the light of what may be promised for the future."[38] If, as here, risk arises because the State is unable to meet its obligations, this risk cannot not be cured by the assumption of new obligations on paper.

23. Moving to the substance of the Treaty, we note that it follows the same general structure of the MoU, with some expansions and additions. Reference is, for example, made to Rwanda's ability to meet its obligations "in practice" and "in fact" (art 3(2)). Acknowledgement of the potential for there to be a gap between the assumption of an obligation and its performance is not, however, the same as performance, nor does it guarantee it.

24. On *refoulement*, the most significant change from the MoU is article 10(3) of the agreement which states that:

> No Relocated Individual (even if they do not make an application for asylum or humanitarian protection or whatever the outcome of their applications) shall be removed from Rwanda except to the United Kingdom in accordance with Article 11(1). The Parties shall cooperate to agree an effective system for ensuring that removal contrary to this obligation does not occur, which includes systems (with the consent of the Relocated Individual as appropriate) for

[38] Ibid [94]

returns to the United Kingdom and locating, and regularly monitoring the location of, the Relocated Individual.

25. Article 10 also requires relocated individuals to be granted some form of permission to remain in Rwanda and states that such individuals are be free to leave Rwanda voluntarily.

26. This provision seems to return, in modified form, to an argument rejected by the Supreme Court. In submissions before the Court, the Secretary of State argued that notwithstanding issues relating to the quality of decision-making, *refoulement* was not a concern, because Rwanda did not have relevant return agreements in place. The Court characterised this argument as "somewhat surprising" on the basis that the "absence of such agreements has not prevented *refoulement*, direct or indirect, from occurring in practice."[39] The Court's disposal of this argument seems pertinent to the Committee's scrutiny of article 10(3). Rwanda's failure to guarantee residence rights is well-documented, as is the ensuing risk of constructive *refoulement*.[40] The presence in the Agreement of an express requirement on non-removability may not, to draw on the words of the Court, remove the risk of refoulement, direct or indirect, from remaining in practice.

[39] Ibid [94]
[40] International Refugee Rights Initiative (IRRI), *"I was left with nothing": "Voluntary" departures of asylum seekers from Israel to Rwanda and Uganda* (8 September 2015)

How strong and effective are the protections for persons relocated to Rwanda set out in the Agreement?

What is your view of the enforcement mechanisms in the Agreement including the dispute settlement procedure, the enhanced independent Monitoring Committee, and the provision for lodging individual complaints? Do you consider that there are any essential supplementary conditions for this to be an effective process?

The Agreement establishes a new asylum appeal body with co-presidents and judges of mixed nationality. What are your views on the design of this body and how it might function in practice?

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27. The ECtHR has been consistent in requiring that the ECHR, a "living instrument," be interpreted and applied in a manner that renders its guarantees "concrete and effective and not theoretical and illusory."[41] The Committee may wish to have this standard, that of effectiveness, in mind when scrutinising the Agreement and its purported protections.

28. One of the key contributions of *R (on the application of AAA (Syria) and others)* (2023) is the Supreme Court's clarity on the role and primacy of Courts in protecting individuals from *refoulement*.[42] The "protections" provided in the Agreement have to be scrutinised with this in mind and alongside provisions in the Safety of Rwanda (Asylum and Immigration) Bill (set out above) which, amongst other things, seek to prevent both national and international courts from fulfilling this role. Centrally, if the UK Government had confidence that the "protections" discussed briefly below operated as such, it would not be

[41] *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR GC, 23 Feb 2012) [175].
[42] *R (AAA) v SSHD* [56].

attempting to insulate itself from legal challenges before domestic courts or the ECtHR.

29. Articles 15 and 16 on the Monitoring Committee and Joint Committee respectively require detailed consideration. Of concern is that:

(a) Article 15(4) provides for the Monitoring Committee to report and make recommendations to the Joint Committee. There is, however, no obligation for these to be made publicly available.
(b) Article 15(9) refers to the creation of a process to enable relocated individuals to lodge complaints to the Monitoring Committee. It is, however, unclear whether or not this process would be available to all those who are relocated or how any complaint received would be resolved. Notably, this mechanism appears subordinate to the parties' domestic legal systems (see, for example, article 15(10)). Consequently, it is difficult to see how such a process could resolve any deficiencies within these systems.
(c) Article 16 provides for the Joint Committee to monitor and review the Agreement. However, this Committee is only empowered to make non-binding recommendations (per 16(2)).

30. On the specific question on the "new asylum appeal body", we note the provisions of Annex B are dependent on legislation being passed in Rwanda. The UK Government states that this will take place "in the coming months".[43] It appears that individuals could be relocated pursuant to the UK-Rwanda Agreement before this legislation is either passed or implemented. Of relevance here is article 9(2), which

[43] *Safety of Rwanda (Asylum and Immigration) Bill: Evidence of the safety of the Republic of Rwanda for the purposes of relocating individuals under the terms of the Migration and Economic Development Partnership* (12 December 2023) para 21.

specifically refers to the processing of claims (rather than, or including, appeals).

31. The UK-Rwanda Agreement is also silent on the timeframe in which its other purported "protections" are to be implemented. This includes in relation to article 10(3) (discussed above) which only requires the parties to "cooperate" to agree to some form of monitoring system and the article 15(9) complaints procedure. Again, it appears that individuals could be relocated while the parties are so co-operating, but before any monitoring system is in force.

32. We are not aware of any precedent for arrangements of the kind briefly discussed here. On the basis of the above we do not, however, believe that the dispute settlement procedure, Monitoring Committee or complaint process can be characterised as either "protections" or "enforcement mechanisms." They are certainly no substitute for the protection that is provided by national and international courts and treaty bodies.

Although offshore processing is not new, are there precedents for requiring that claims must be for asylum in a third country?

33. The Supreme Court's judgment was not concerned with the legality of STCs generally. Three observations relating to such agreements can, nonetheless, be made, that warrant the Committee's further attention.

34. First, there is no obligation on a protection-seeker to seek asylum in the first safe country they are able to access. The Refugee Convention does place obligations on refugees, so this omission may be significant.[44] References to refugees "coming directly" from the State in which their

[44] Refugee Convention, art 2.

life or freedom may be threatened may only be found in the Convention's non-penalisation provision, itself a protective provision in a protective Convention.[45]

35. Second, those seeking international protection should generally have their claims determined in the State in which they arrive or which otherwise has jurisdiction over them. This position is in line with the views of UNHCR[46] and is consistent with the majority of State practice.

36. Third, where States enter into agreements with other States, such arrangements should, in accordance with the preamble of the Refugee Convention (a) assure refugees the widest possible exercise of their rights and freedoms, without discrimination; (b) advance international co-operation; to (c) ensure that responsibility for protecting refugees is shared. These arguments are consistent with those of UNCHR which has maintained that "primary responsibility" for assessing protection needs rests with the State in which an asylum-seeker arrives, or with whose jurisdiction it engages.[47] Similarly, STC agreements should guarantee minimum rights and "contribute to the enhancement of the overall protection space… ."[48]

37. There is, of course, precedent on States' use of STC agreements, these include the Dublin III Regulation[49] and the US-Canada agreement. While criticised on a number of different bases, these rest

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[45] Ibid, art 31 see further Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees* (UNHCR Legal and Policy Protection Series PPLA/2017/01, July 2017).
[46] UN High Commissioner for Refugees (UNHCR), *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (May 2013).
[47] UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the "Externalization" of International Protection* (28 May 2021) [9].
[48] UN High Commissioner for Refugees (UNHCR), *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* [3].
[49] REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) OJ L 180/31 (Dublin III).

on the notion that one means by which responsibility may be shared is through the return of an asylum seeker to a safe country in which they could have sought protection.

38. The preamble of the UK-Rwanda Agreement refers to "cooperation and burden-sharing". In substance, however, the UK-Rwanda Agreement shifts responsibility for recognising and protecting refugees from the UK to Rwanda (article 2), a state that, as the preamble explains "has willingly been hosting and giving shelter to hundreds of thousands of refugees." This is significant, because when the Supreme Court of Canada reviewed the legality of Canada's agreement with the US, it took into account the role of that agreement in sharing responsibility for claims in accordance with international law.[50] In deporting protection-seekers to a country to which they have no connection, the Agreement also departs from those discussed above, including that which the UK participated in when it was a member of the EU.

39. In addition to considering the above on responsibility sharing, we would urge the Committee to scrutinise the Treaty by reference to the:

(a) Refugee Convention's prohibitions on discrimination and non-penalisation.[51]
(b) ECHR's prohibition on discrimination and *refoulement*.
(c) The legal status of the requirement (currently clear in EU law, but arguably a more general requirement) that there be a prior connection between the protection seeker and the third country in question. We note the Supreme Court's observation that "[n]o question has been raised in these proceedings as to whether the

[50] *Canadian Council for Refugees v Canada (Citizenship and Immigration)* 2023 SCC 17, [39], [128].
[51] Refugee Convention art 3 and 31.

removal of asylum seekers to a state with which they have no connection is compatible with the ECHR.[52]

Are there any other aspects of the Agreement which you would like to draw to the attention of the International Agreements Committee?

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40. This UK-Rwanda Agreement and the accompanying Bill raise profound issues of international legal and constitutional significance.

41. From an international perspective, this Agreement enables the relocation of individuals in circumstances that risk breaching the UK's obligations under a raft of other treaties and under customary international law. Any attempt to relocate an individual pursuant to this is, therefore, likely to be contested not only before the ECtHR but also before a range of UN Treaty Bodies. The Committee may want to consider the impact of relocations under such circumstances on the individuals themselves and on their families. It may also want to consider the impact of the ensuing legal challenges on the UK's reputation and the international rule of law. Finally, our brief discussion of *jus cogens* norms and *non-refoulement* and may prompt the Committee to consider whether or not the Agreement itself, or parts of it, conflict with a peremptory norm of international law and what the consequences of any such conflict could be.

42. The Committee may be concerned that the Agreement does not provide a legal remedy to a relocated individual that Rwanda was, in fact, trying to *refoule*, whether directly or constructively. When considering the "protections" offered by the Agreement, the Committee may want to consider this lacuna alongside clause 4 of the Safety of

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[52] *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department* [16].

Rwanda (Asylum and Immigration) Bill, which limits individual challenges to removal/relocation from the UK. On this clause, the Joint Committee on Human Rights has observed:

> Clause 4 would not, however, be of assistance to an individual who is removed to Rwanda but who subsequently becomes at risk due to a change of circumstances in the laws of Rwanda or the factual situation on the ground after their removal. Even if Rwanda breached its own international legal obligations and the international human rights standards required by its treaty with the UK, it would seem that that individual would have no route to retrospectively challenge or undo their removal via UK courts.[53]

43. As the Committee is aware, section 19 of the Human Rights Act 1998 requires the minister responsible for a bill to make a statement before its second reading that it is either compatible with ECHR-protected rights (section 19(1)(a)) or, that they are unable to make such a statement, but the Government nonetheless wishes Parliament to proceed (section 19(1)(b)). If Rwanda was safe, the Home Secretary would have been able to make a section 19(1)(a) statement on the Safety of Rwanda (Asylum and Immigration) Bill. He was not able to do so. Significantly, a section 19(1)(b) statement was made in respect of both the Bill and the legislation on which it builds, the Illegal Migration Act 2023. We submit that the making of two such statements within months and in relation to consecutive pieces of legislation, indicates a move away from legislating in accordance with the UK's international obligations.

44. There are many issues that we have been unable to address in our evidence. The treatment of (accompanied) children and victims of trafficking, the relocation of both being envisaged by the Agreement,

[53] Joint Committee on Human Rights, *Chair's Briefing Paper: Safety of Rwanda (Asylum and Immigration) Bill* (11 December 2023) [13].

are two such issues. Members of both of these groups may be entitled to international protection under the Refugee Convention or IHRL.

45. The Committee may, therefore, be concerned that no *substantive* reference is made to the Convention on the Rights of the Child, or its requirement that in "*all* actions concerning children" the "best interests of the child shall be a primary consideration." [54] Instead, the best interests of children is only referred to in one limited context: that concerning the status to be given to the parents/guardian of a child who has been recognised as a refugee or granted humanitarian protection (art 10(6)).

46. Similarly, the Agreement provides for the relocation of those who have been trafficked or who are "likely" to be victims of trafficking (art 6(2)). No reference is made, however, to the UK's obligations to such individuals under the Council of Europe's Trafficking Convention.[55] Relevant obligations here include the identification of victims, the provision of certain forms of assistance, the provision of reflection and recovery periods, and in some circumstances, the provision of residence permits.[56] Whether and how the removal of trafficking victims pursuant to this Agreement and their subsequent treatment in Rwanda (see article 13) accords with these obligations is unclear.

29 December 2023

[54] Convention on the Rights of the Child (adopted 20 November 1989, in force 2 September 1990) 1577 UNTS 3, art 3 (emphasis added).
[55] Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entry into force 1 February 2008) CETS 197 (Trafficking Convention).
[56] Ibid art 10, art 12, art 13 and art 14.