International Agreements Committee
UK-Rwanda asylum Agreement - Call for Evidence

Joint Evidence of JUSTICE and the Immigration Law Practitioners' Association

Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. The Immigration Law Practitioners' Association ('ILPA') is a professional association and registered charity, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession, and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official, and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

3. We are jointly responding to the Committee's Inquiry, as together we have legal expertise in matters relevant to the Committee's scrutiny of the Treaty. We welcome the opportunity to submit evidence and we are grateful to the Committee for its scrutiny. We have responded to Questions 1 to 4, and 6. The lack of detail or response to any specific question should not be taken as indicating that no issues arise in relation to the matter.

Summary

4. The UK's Supreme Court unanimously decided that individuals sent to Rwanda would face a real risk of ill-treatment.[1] It noted how the principle of *non-refoulement* (i.e. to not directly or indirectly send individuals to a country where there is a real risk their life or freedom would be threatened, they would be at a real risk of irreparable harm, or would be subjected to torture) was *'enshrined in several international treaties which the United Kingdom has ratified'* (§19), including the European Convention on Human Rights ('ECHR'), the 1951 Refugee Convention, and its 1967 Protocol, the 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ('UNCAT'), the 1966 UN International Covenant on Civil and Political Rights ('ICCPR'), and is given effect in numerous domestic statutes. Further, the Supreme Court stated it may form part of customary international law (§25). It has arguably reached the status of a peremptory norm, as it is a norm from which no derogation is permitted.[2]

[1] *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42.
[2] Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2016) in Heijer, M., van der Wilt, H. (eds) *Netherlands Yearbook of International Law* (T.M.C. Asser Press 2015) vol 46.

5. The *'assurances and commitments'* given, and the provisions of the signed 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 to strengthen shared international commitments on the protection of refugees and migrants ('the Treaty'), are very likely to be insufficient to overcome the concerns of our Supreme Court.

6. The addressing measures detailed in the Policy Statement[3] (which include the Treaty, as well as limited training provisions and monitoring mechanisms) do not suggest that the full extent of the risk has been sufficiently *'eliminated'* to enable the scheme to go ahead without placing the UK in breach of its legal obligations. They do not dispel concerns that the Rwandan system has had insufficient time, resources, and monitoring to properly change its culture and systems to eliminate the real risk of *refoulement*. They also leave unaddressed the practical reality of Rwanda's history of *refoulement*. Rwanda has ratified a number of international human rights conventions previously, but our Supreme Court found that Rwanda failed to comply with its international legal obligations *in practice*. It hardly seems an effective solution to agree to new international legal obligations, including that individuals can only be sent by Rwanda to the UK, in the hopes of preventing *refoulement,* when Rwanda could not fulfil prior and existing international legal obligations prohibiting *refoulement*.

7. It is crucial to note that the necessary capacity-building and cultural changes will not take place overnight, and are highly unlikely to have taken place in the short period since the Court of Appeal handed down its judgment on 29 June 2023 and the Supreme Court handed down its judgment on 15 November 2023. Therefore, significant concerns remain regarding whether both the newly proposed and untested 'First Instance Body' and 'Appeal Body' will be sufficiently trained and independent to address the concerns of the Supreme Court.

8. The Supreme Court noted that monitoring arrangements *'may be capable of detecting failures in the asylum system, and over time may result in the introduction of improvements'* but *'that will come too late to eliminate the risk of refoulement currently faced by asylum seekers removed to Rwanda'* (§92). This remains the case under the Treaty, and the monitoring mechanisms largely mirror those in the Memorandum of Understanding which the Supreme Court found to be insufficient to safeguard against *refoulement*. Furthermore, the Treaty's enforcement and new dispute resolution mechanisms are wholly insufficient. The Treaty lacks effective remedies for individuals should they *in fact* face breach of their human rights and *refoulement* in Rwanda. In the Bill before Parliament, the ousting of domestic judicial oversight – to examine whether facts on the ground have changed and whether Rwanda is safe as the Government purports it to be – reveals that the UK Government is not itself confident in Rwanda's assurances contained in this Treaty.

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[3] Safety of Rwanda (Asylum and Immigration) Bill. *Policy Statement: 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) <https://assets.publishing.service.gov.uk/media/657850ff254aaa000d050b07/Policy_Statement_-_Safety_of_Rwanda_Asylum_and_Immigration_Bill.pdf> ('Policy Statement') pp. 7 – 10, 20 – 21.

<u>Question 1:</u> 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?

9. In our respectful opinion, the asylum partnership arrangements made by the Treaty, including its legal form, do not meet the concerns of the Supreme Court regarding the inadequacies of Rwanda's asylum system, which were based on the particularly important expert evidence of the UN High Commissioner for Refugees ('UNHCR').

10. Fundamentally, the UK Government has not changed its approach, which was rejected by the Supreme Court. The Government still:

> *'relies on the assurances provided by the Rwandan government in the MEDP as meeting any concerns arising from the evidence about the past and present operation of the Rwandan asylum system. In essence, the Secretary of State submits that, notwithstanding any problems that there may have been in the past or that may remain at present, the MEDP sets out arrangements for the future which provide adequate safeguards against refoulement, and the Rwandan government can be relied on to fulfil its undertaking to process the claims in accordance with those arrangements'* (§46).

11. However, what has changed is the UK Government's willingness to permit the Supreme Court, or indeed any domestic court or tribunal, to undertake a fact-sensitive examination of whether the assurances in the new Treaty provide a sufficient guarantee against the risk of ill-treatment, per *Othman v United Kingdom* (2015) 55 EHRR 1. The Supreme Court identified that relevant factors in the consideration of assurances include:

    a. *'the disclosure of the terms of the assurances to the court,*
    b. *the general human rights situation in the receiving state,*
    c. *the receiving state's laws and practices,*
    d. *its record in abiding by similar assurances,*
    e. *the existence of monitoring mechanisms, and*
    f. *the examination of the reliability of the assurances by the domestic courts of the sending state'* (§48).

<u>Disclosure of the Terms of the Assurances</u>

12. The terms of the assurances are contained in the signed Treaty, but that was also the case with the Memorandum of Understanding ('MoU')[4] between the governments of the United Kingdom

[4] 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 (signed 13 April 2022) <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r> accessed 20 December 2023.

and Rwanda, entered into on 13 April 2022, and two diplomatic Notes Verbales regarding "the asylum process of transferred individuals" and "the reception and accommodation of transferred individuals", executed by the government of Rwanda on the same date, which were before the Supreme Court.

General Human Rights Situation in Rwanda

13. The Supreme Court's unanimous judgment identified a number of concerning issues in relation to the general human rights situation in Rwanda including:

    a. a 2017 Divisional Court finding that Rwanda was *'a state which, in very recent times, has instigated political killings, and has led British police to warn Rwandan nationals living in Britain of credible plans to kill them on the part of that state'* (§76);[5]

    b. that there remained *'profound human rights concerns*' in Rwanda which *'raises serious questions as to its compliance with its international obligations*' (§76);

    c. that the UK government had, in January 2021 at the United Nations Human Rights Council Universal Periodic Review of Rwanda criticised the Rwandan Government for *'extrajudicial killings, deaths in custody, enforced disappearances and torture'* (§76); and

    d. an incident in 2018 when the Rwandan police fired live ammunition at refugees protesting, resulting in at least 12 people being killed (§76).

14. While the Government argues that the *'Supreme Court's conclusions were based on the evidence submitted prior to the High Court hearing in September 2022 and did not consider subsequent and ongoing work*',[6] Human Rights Watch's report on *Rwanda: Events of 2022*, notes that '*political repression in Rwanda, continued throughout 2022'* as did '*attacks and threats by Rwandan government agents or their proxies on Rwandan refugees living abroad*'.[7] The summary to the Report states:

> *'The ruling Rwandan Patriotic Front (RPF) party continued to wage a campaign against real and perceived opponents of the government. Critics, including internet bloggers and journalists, were arrested, threatened, and put on trial. Some said they were tortured in detention. The authorities rarely investigated enforced disappearances or suspicious deaths. Arbitrary detention and ill-treatment in unofficial detention facilities were common, especially around high-profile visits or large international events such as the June Commonwealth Heads of Government Meeting held in Kigali.*
>
> *Abusive practices by Rwandan authorities stretched beyond the country's borders. In August, the United Nations Group of Experts on the Democratic Republic of Congo*

[5] The Supreme Court cited *Government of Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin) §370.
[6] Policy Statement, §12.
[7] Human Rights Watch, *Rwanda: Events of 2022* <https://www.hrw.org/world-report/2023/country-chapters/rwanda> accessed 21 December 2023.

reported "solid evidence" of Rwandan forces fighting alongside and providing other support to the M23 armed group. Rwandan refugees and members of the diaspora reported being threatened and harassed by Rwandan government agents or their proxies. Human Rights Watch received information about several cases of Rwandan refugees being killed, disappeared, or arrested in suspicious circumstances, including in Mozambique and Uganda.'

15. The Executive Summary to the US Department of State's *2022 Country Reports on Human Rights Practices: Rwanda* similarly states:

> *'Significant human rights issues included credible reports of: unlawful or arbitrary killings; torture or cruel, inhuman, or degrading treatment or punishment by the government; harsh and life-threatening prison conditions; arbitrary detention; political prisoners or detainees; transnational repression against individuals located outside the country, including killings, kidnappings, and violence; arbitrary or unlawful interference with privacy; serious restrictions on free expression and media, including threats of violence against journalists, unjustified arrests or prosecutions of journalists, and censorship; serious restrictions on internet freedom; substantial interference with the freedom of peaceful assembly and freedom of association, including overly restrictive laws on the organization, funding, or operation of nongovernmental and civil society organizations; serious and unreasonable restrictions on political participation; and serious government restrictions on or harassment of domestic and international human rights organizations.*
>
> *The government took some steps to prosecute or punish officials reported to have committed human rights abuses and acts of corruption, including within the security services, but impunity involving civilian officials and some members of the state security forces was a problem.'*[8]

16. In his September 2022 annual report, the UN Secretary-General highlighted the '*intimidation and harassment*' against Noël Zihabamwe, a Rwandan refugee living in Australia, and individuals associated with him, following his engagement with the UN Working Group on Enforced and Involuntary Disappearances.[9]

17. The Policy Statement details that, in advance of agreeing the Migration and Economic Development Partnership ('MEDP') in April 2022, the UK Government's assessment was that

[8] US Department of State, *2022 Country Reports on Human Rights Practices: Rwanda* <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/rwanda/#:~:text=Significant%20human%20rights%20issues%20included,or%20detainees%3B%20transnational%20repression%20against> accessed 21 December 2023.

[9] OHCHR, 'A/HRC/51/47: Cooperation with the United Nations, its representatives and mechanisms in the field of human rights - Report of the Secretary-General' (14 September 2022) §90 <https://www.ohchr.org/en/documents/reports/ahrc5147-cooperation-united-nations-its-representatives-and-mechanisms-field> accessed 21 December 2023.

'there have been issues with [Rwanda's] human rights record around political opposition to the current regime, dissent and free speech.'[10] The UK Government provides no evidence that the human rights situation has changed, particularly in relation to political repression. In light of the clear and recent objective evidence regarding the continuing general human rights situation in Rwanda, we would submit that no greater weight can now be placed on Rwanda's assurances.

Rwanda's Laws and Practices

18. The Supreme Court highlighted that UNHCR had observed that Rwanda's principal legislation concerning refugees was *'fully compliant with international standards'* but its concerns were with how the *'system operates in practice'* (§92).

19. The Supreme Court identified the following inadequacies in Rwanda's asylum system:

    a. UNHCR evidence of 100% rejection rates for asylum claims of Afghan, Syrian and Yemeni nationals at Refugee Status Determination Committee ('RSDC') level, when such nationals have high grant rates in the UK (§85);

    b. systemic issues in the operation of Rwanda refugee legislation (§78) including the unlawful rejection of asylum claims at the Directorate General of Immigration and Emmigration in Rwanda ('DGIE') interview stage with failure to give written reasons and a right of appeal (§79);

    c. often *'perfunctory'* written reasons when the RSDC do consider and reject asylum claims (§80);

    d. difficulty in pursuing internal administrative appeal to the responsible minister (only five appeals since 2021), with no reasons provided for the minister's decision (§81);

    e. the untested route of appeal via the Rwandan High Court (§82)[11]; and

    f. concerns about the lack of independence of the judiciary, with the Divisional Court again having found evidence that *'judges might yield to pressure from the Rwandan authorities',* which appears to have been accepted by the Foreign Office (§82).

20. The Supreme Court found there to be a real risk of *refoulement*, and there was substantial, uncontested evidence of individuals seeking asylum being refouled by the Rwandan authorities, including:

    a. six cases from 2021 to 2022 of individuals who would have been refouled without direct intervention from the UNHCR (§87);

    b. 11 individuals from a non-African country with close bilateral relations with Rwanda were denied access to the Rwandan asylum system: *'[t]hree were peremptorily rejected by the*

[10] Policy Statement, §40.

[11] According to the UK Government, one appeal to the Rwandan High Court has now taken place and was successful. See Policy Statement, §31.

DGIE, three were forcibly expelled to the Tanzanian border, two were instructed to leave Rwanda within days, and another two were threatened with refoulement to their country of origin' (§86);

c. at least 100 allegations of *refoulement* or threatened *refoulement* cited by UNHCR in meetings with Home Office officials (§89); and

d. clear evidence of *refoulement* from the now-abandoned partnership with Israel (§97).

21. Furthermore, the Supreme Court found the Rwandan government to have an inadequate understanding of the requirements of refugee law including:

a. an *'imperfect understanding of the requirements of the Refugee Convention'* in relation to the risk of refoulement (§91);

b. *'ingrained attitudes of scepticism by officials towards claims made by Middle Eastern nationals'* (§92); and

c. UNHCR had observed that Rwandan officials had *'very limited or no understanding of how to assess refugee status'* (§91).

22. In relation to these issues, the Supreme Court did not doubt that the Rwandan authorities entered the MEDP in good faith, would have a strong reputational and financial incentive to comply, and would have been subject to monitoring by the UK Government and the UNHCR. Therefore, whilst placing assurances in a treaty is a further incentive, the past incentives proved insufficient to ensure compliance.

23. The Supreme Court stressed that *'intentions and aspirations do not necessarily correspond to reality'* (§102) and highlighted the *'scale of the changes in procedure, understanding and culture which are required*' to address their considerable concerns (§102). The Supreme Court noted that there is a real risk that the defective practices would not change '***at least in the short term***' (emphasis added) (§93) and required '*significant changes'* to Rwanda's asylum procedures, as they operate in practice, which *'may not be straightforward, as they require an appreciation that the current approach is inadequate, a change of attitudes and effective training and monitoring'* (§104).

24. In response, the UK Government maintains that the agreed Treaty has fully addressed the Supreme Court's concerns. Articles 10 and 11 of the Treaty, read together, state that no person removed to Rwanda shall face removal from Rwanda, except to the UK, even where their asylum or humanitarian protection claim is refused. The accompanying Policy Statement is emphatic in concluding that the Treaty, binding in international law, *'confirms that no individual relocated under the scheme is at risk of refoulement from Rwanda, whether or not their claim is successful.'*[12]

[12] Policy Statement, §18.

25. However, neither signing a new treaty, which contains assurances that the Supreme Court impartially concluded Rwanda could not fulfil, nor stating in the Safety of Rwanda (Asylum and Immigration) Bill ('the Bill') that Rwanda is safe, changes the facts on the ground and how the Rwandan asylum system will operate in practice.

26. **First and foremost**, the mere existence of the Treaty does not ensure that Rwanda will comply with these new bilateral treaty obligations, when it has failed to comply with multilateral treaty obligations in the past. As noted by the Supreme Court at §76, *'Since Rwanda has ratified many international human rights conventions, including UNCAT and the ICCPR, this raises serious questions as to its compliance with its international obligations'.* These obligations, with which it did not comply, were also part of Rwanda's domestic law under its Constitution.[13] If prior treaty obligations were insufficient to ensure Rwanda's compliance, it is unclear how new treaty obligations will remedy the failings identified by the Supreme Court, for example:

    a. To guard against *refoulement*, Article 10(3) seeks to ensure that individuals will only be returned to the UK. However, Rwanda already had international legal obligations not to *refoule* individuals, with which it could not comply under Article 3(1) of the UNCAT, the ICCPR, as interpreted by the United Nations Human Rights Committee, and Article 33(1) Refugee Convention.

    b. Article 3(1) of the Treaty requires '*that the obligations in this Agreement shall be met in respect of all Relocated Individuals, regardless of their nationality, and without discrimination.'* However, Rwanda already had a legal obligation not to discriminate, including under the International Convention on the Elimination of All Forms of Racial Discrimination,[14] Article 26 of the ICCPR, Article 3 of the Refugee Convention, and Article 16 of its own Constitution,[15] with which it failed to abide in the cases evidenced to the Supreme Court in relation to Middle Eastern individuals such as Afghan, Syrian and Yemeni nationals. Once more, given that Rwanda has failed to comply with its multilateral treaty obligations in the past, there is nothing to suggest it will be able to comply with these new bilateral obligations in the near future.

27. **Second**, signing a treaty does not engender a culture of sufficient appreciation or understanding of obligations under the Refugee Convention, when these have not developed in the years that Rwanda has hosted refugees. It does not ensure a change of, what Lord Justice Underhill described at §156 and the Supreme Court repeated at §88, '*a culture of, at best, insufficient appreciation by DGIE officials of Rwanda's obligations under the Refugee Convention, and at worst a deliberate disregard for those obligations'.*

[13] Policy Statement, §26.

[14] Policy Statement, §34.

[15] Policy Statement, §36: 'The Constitution of Rwanda prohibits at Article 16 discrimination of any kind based on, amongst other things, ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability.'

28. The Policy Statement highlights some of the work done to address the Supreme Court's concerns (though we would note the limited time these were announced following the Supreme Court judgment being handed down on 15 November 2023) such as legal training provided from 20 to 24 November 2023, a newly created MEDP Coordination Unit for managing reception and accommodation arrangements, and a new Rwandan asylum law (which will be passed *'in the coming months'*).[16] Notably, there is no timetable for when such an overhaul of the Rwandan legal system will pass into law or become operational.

Rwanda's Record in Abiding by Similar Assurances

29. The Treaty does not do away with history, or render irrelevant the non-compliance of the Rwandan government under its recent international agreement with Israel, as assessed by our Supreme Court.

30. Lord Lloyd-Jones in *Zabolotnyi v Mateszalka District Court, Hungary* [2021] UKSC 14 at §46 held, and the Supreme Court upheld at §49, that *'past compliance or non-compliance with an earlier assurance will obviously be relevant. A state's failure to fulfil assurances in the past may be a powerful reason to disbelieve that they will be fulfilled in the future'.*

31. In *Sagitta v Ministry of Interior Administrative Appeal* 8101/15, the Israeli Supreme Court at §87 held the agreement included *'an explicit undertaking of [Rwanda] according to which the deportees will enjoy human rights and freedoms and that the principle of non-refoulement shall be complied with'*.[17] As the Supreme Court has said *'[a]lthough the terms of the agreement may well have been different'* (§100), there was *'no dispute that persons who were relocated under the agreement suffered serious breaches of their rights under the Refugee Convention*' (§96).

Existence of Monitoring Mechanisms

32. As is detailed in response to Question 3 below, the monitoring mechanisms in the Treaty are insufficient, undermined by the Rwandan government's suppression of criticism, and do not address the fundamental concern of the Supreme Court at §93:

> *'Such arrangements may be capable of detecting failures in the asylum system, and over time may result in the introduction of improvements, but that will come too late to eliminate the risk of refoulement currently faced by asylum seekers removed to Rwanda.'*

[16] Policy Statement, §§13-21, and for training, see also §117 showing 76 individuals trained in November and 28 individuals trained from 18 to 22 September 2023.

[17] *R (on the application of AAA (Syria) & Ors) v The Secretary of State for the Home Department (Rev1)* [2023] EWCA Civ 745 §102.

Examination of the Reliability of the Assurances by UK Domestic Courts

33. Our Supreme Court rejected the reliability of the previous assurances in the MEDP. If the Government truly believed the new Treaty addresses the concerns raised by the Supreme Court, it would not be legislating to prohibit UK domestic courts from independently examining the reliability of the new Rwandan assurances based on up-to-date factual evidence.

34. Additionally, the Government would not be seeking to abuse Parliament's role, and undermine the rule of law and judicial independence, by legislating that Rwanda is safe and:

    a. ousting the ability of our judges to consider any appeal or review, to the extent it is brought on the grounds that Rwanda is not a safe country, including any claim or complaint that:
        i. Rwanda will or may remove or send a person to another State, contravening its international obligations, including under the Refugee Convention;
        ii. a person will not receive fair and proper consideration of an asylum, or other "similar", claim in Rwanda;
        iii. Rwanda will not act in accordance with the Treaty;[18]

    b. limiting the jurisdiction of our courts, through broad 'notwithstanding' provisions that override rules of domestic law, the common law, the Human Rights Act 1998 ('HRA'), and 'any interpretation of international law by the court or tribunal';[19]

    c. giving Ministers the power to ignore interim measures indicated by the European Court of Human Rights, themselves binding under international law;[20] and

    d. restricting the test for our courts and tribunals granting any interim remedy delaying or preventing removal to Rwanda, to cases where *'the person would, before the review or appeal is determined, face a real, imminent and foreseeable risk of serious and irreversible harm if removed*',[21] and making such remedies only available to a narrow category of individuals who are not to be removed under the UK Government's flagship Illegal Migration Act 2023.

[18] Safety of Rwanda (Asylum and Immigration) Bill, Clause 2(3)-(4) and Clause 4(2).
[19] Safety of Rwanda (Asylum and Immigration) Bill, Clause 2(5).
[20] Illegal Migration Act 2023, Section 55; and Safety of Rwanda (Asylum and Immigration) Bill, Clause 5. The UK has an obligation under Article 34 ECHR responsibility not to hinder the effective exercise of individual application to the Court and an obligation under Article 1 ECR to protect the rights and freedoms set forth in the ECHR, see *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494 at §128.
[21] Safety of Rwanda (Asylum and Immigration) Bill, Clause 4(4).

Question 2: How strong and effective are the protections for persons relocated to Rwanda set out in the Agreement?

35. In addition to the issues with protections detailed in response to Question 1, the protections for persons who are relocated to Rwanda remain insufficient to address the Supreme Court's concerns. We provide eight examples of insufficient protection.

Refoulement in Practice

36. **First**, as detailed in response to Question 1, there is reason to believe that *refoulement* will, in fact, occur, contrary to Rwanda's obligations under Article 10(3) of this Treaty, as this has happened previously contrary to Rwanda's obligations under multilateral treaties.

37. *Refoulement* may occur under the guise of Article 10(5) of the Treaty, which states that nothing in Article 10 *'requires Rwanda to take steps to prevent a Relocated Individual from leaving Rwanda should the Relocated Individual so wish.'* To prevent this from occurring, Article 10(3) states, vaguely, that: *'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 returns to the United Kingdom and locating, and regularly monitoring the location of, the Relocated Individual.'* No further detail is provided, which is of considerable concern.

No Legal Remedy against *Refoulement*

38. **Second**, the Treaty does not secure any legal remedy under Rwanda's legal system if an individual is removed to Rwanda, and Rwanda *in fact* tries to *refoule* them.

39. However, the Bill prohibits UK domestic courts and tribunals from considering this possibility altogether. It restricts consideration solely to '*individual circumstances*' but requires '*compelling evidence*' and severely limits or excludes the granting of interim remedies. This, together with the disapplication of sections 6 to 9 of the Human Rights Act 1998 impedes an effective remedy under Article 13 of the European Convention on Human Rights, particularly if the claim is that due to the general situation in Rwanda, the individual would face treatment contrary to their Convention rights, such as those under Article 2 or 3 ECHR.[22] This will likely result in individuals being sent to Rwanda, contrary to the UK's international legal obligations.

40. Once in Rwanda, individuals will have no legal remedy under the Treaty to prevent their *refoulement* should Rwanda fail to properly process their asylum claim in their (as yet unfinalised) new asylum law regime. In addition to having no legal remedy in Rwanda, neither the Bill nor the Treaty provides a legal remedy in UK courts. As the Joint Committee on Human Rights states in relation to individual appeals in the UK at §13:

[22] Safety of Rwanda (Asylum and Immigration) Bill, Clause 4.

'Clause 4 [of the Bill] 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.'[23]

Access to Legal Representation

41. **Third**, the mere existence of a treaty does not ensure, *in practice*, that *'legal support'* in an asylum claim is *independent* if a matter becomes political, or that *effective* legal representation will be available at each stage of the process.

42. In relation to independence, the Court of Appeal judgment notes that:

> *'An FCDO (Foreign, Commonwealth and Development Office) comment on an FCDO draft document entitled "review of asylum processing: Rwanda" from April 2022 said that Rwanda was: "… the country of contradictions. For these cases I agree the legal support is likely to be independent … unless it gets political. Which may be farther down the road when refugees are in a process [of] settlement and make demands on certain things. The Rwandan legal system is not independent, is regularly interfered with and is politicised. Opposition/political cases do not receive a fair trial or support'.*[24]

43. Additionally, the Supreme Court noted at §84 that although the MEDP sought to address the issue of legal representation:

> *'representatives of the Rwandan government indicated that the contemplated arrangements* [for legal representation] *might not be straightforward to implement in practice. That seems to us to be a realistic view. The introduction of such a significant change of practice is liable to raise a number of issues, for example as to the role of the claimant's lawyer at each stage of the process, which may require time to resolve'.*

44. Assuring independent accessible legal representation at every stage of a claim and appeal is likely to be further complicated by the overhaul of the Rwandan asylum decision-making and appeal process promised in the new Treaty, and the forthcoming Rwandan asylum legislation mentioned in the Policy Statement.

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[23] Joint Committee on Human Rights, 'Chair's Briefing Paper: Safety of Rwanda (Asylum & Immigration) Bill' (11 December 2023) <https://committees.parliament.uk/publications/42515/documents/211416/default/> accessed 21 December 2023.

[24] *R (on the application of AAA (Syria) & Ors) v The Secretary of State for the Home Department (Rev1)* [2023] EWCA Civ 745 §100.

45. The Treaty only provides that each relocated individual shall be permitted to *'seek'* free legal advice or other counsel at all stages of the asylum application process *'from a legal professional member of the Rwanda Bar Association, qualified to advise and represent them in matters of asylum or humanitarian protection'*.[25] One may *'seek'* free legal advice, but fail to find it.

46. The Treaty goes further and ensures *provision* of legal assistance and representation during the appellate stages: *'Additionally, if an individual wishes to appeal to the Appeal Body or onward appeal court, they shall be provided with legal assistance and representation from a legal professional member of the Rwanda Bar Association, qualified to advise and represent in matters of asylum or humanitarian protection, free of charge.'*[26]

47. The Treaty states at §5.4 and §6.3 of Part 3 of Annex B that, *'Rwanda shall take all reasonable steps to ensure that there is sufficient capacity of appropriately trained legal advisors available to provide free legal assistance as described above. The Parties will cooperate in order to ensure that such capacity is available in all cases.'* However, it is wholly unclear how this will be assured and what *'reasonable steps'* will be taken *in practice.*

48. The Policy Statement makes clear that the Rwanda Bar Association had, as of 12 December 2023, only *'38 lawyers who provide legal assistance on matters relating to the asylum process and migration law'*.[27] Therefore, while the Ministry of Justice may have signed an agreement on 1 March 2023 for legal assistance in all appeal stages, it is unclear how 38 lawyers would be able to cope with such a large caseload, unless only a very small number of individuals were relocated to Rwanda and/or sought legal assistance and exercised their right of appeal. Moreover, it would appear from the Policy Statement that the agreement with the Rwanda Bar Association is only in relation to appeal claims and does not include making the first instance asylum or humanitarian protection claim: *'on 1 March 2023 MINIJUST signed an agreement with the Rwanda Bar Association to provide legal assistance to asylum seekers relocated under the MEDP at all appeal stages of their asylum claims.'*[28]

49. Similarly while the Policy Statement claims that *'Section 4 of the Asylum Processing SOP, paragraph 2.2.2 of the Refugee Status Determination SOP, and section 5 of the Ministerial Appeal SOP provide that asylum applicants are permitted to seek legal advice at all stages of the asylum application process, and that legal representatives are able to attend with an applicant and may assist and advise them throughout any interview'*, this too does not ensure that a sufficient number of legal representatives will *in fact* be able to provide this advice and assistance. As an example from this jurisdiction, while in the UK individuals seeking asylum may be entitled to legal aid advice, it is well documented that the legal aid deserts and chronic low capacity of

[25] Part 3 Annex B to the Treaty, §5.2.
[26] ibid §6.1.
[27] Policy Statement, §86.
[28] ibid.

representatives result in a large number of eligible individuals seeking asylum unable to access such advice and representation.[29]

Access to Facilities for Overseas Legal Proceedings

50. **Fourth**, Article 11(4) only requires Rwanda to take *'reasonable steps to facilitate a Relocated Individual's access to facilities'* including for private communication between an individual and their UK-based legal representative, conferencing, and giving evidence, for the purposes of legal proceedings in the UK or the European Court of Human Rights. This is insufficient assurance that an individual will be able to *effectively* access justice, including that they will be able to access confidential legal advice and actively participate in any hearing. The necessary facilities *must* be provided, and the Treaty contains insufficient obligation on the part of the Rwandan government to ensure that they are.

Ill-Treatment of Individuals in Rwanda

51. **Fifth**, the treaty arrangements do not erase Rwanda's *'poor human rights record'*[30] or the *'profound human rights concerns'*[31] that remain, including that refugees have been ill-treated, and may be ill-treated in Rwanda in the future, entirely aside from the risk of *refoulement*. For example, in February 2018, Congolese refugees were protesting against a 25% cut in food rations:

> *'Two days later, the Rwandan police fired live ammunition on protesting refugees killing at least 12 people. Between February and May 2018, 66 refugees were arrested, and many were charged with a range of offences including "spreading false information with intent to create a hostile international opinion against the Rwandan state" (article 451 of the Penal Code), "inciting insurrection or trouble amongst the population" (article 463 Penal Code), and participating in an illegal demonstration or public gathering (article 685 Penal Code). Human Rights Watch's investigation found that the refugees were unarmed and that the Rwandan police had used excessive force. Although Rwanda's National Commission for Human Rights expressed the view that the police responded as a last resort to a violent attack, the UNHCR has grave concerns that asylum seekers relocated*

[29] See, for example, the Law Society predicts that 39m people (66%) in England and Wales do not have access to a local immigration and asylum provider. The Law Society, 'Legal aid deserts' (29 August 2023) <https://www.lawsociety.org.uk/campaigns/civil-justice/legal-aid-deserts> accessed 21 December 2023; Jo Wilding estimated, 'At least 51% of asylum applicants in England and Wales – 37,450 people – are now unable to find a legal aid lawyer' based on data to 31 August 2023 in 'Over half the people seeking asylum are now unable to access a legal aid lawyer' (25 October 2023) *Free Movement* <https://freemovement.org.uk/over-half-the-people-seeking-asylum-are-now-unable-to-access-a-legal-aid-lawyer/> accessed 21 December 2023.

[30] This was the description provided by UK 'officials to ministers later in 2021, during the process of selecting a partner country for the removal of asylum seekers' per §76 of the Supreme Court's judgment.

[31] *R (on the application of AAA (Syria) & Ors) v The Secretary of State for the Home Department (Rev1)* [2023] EWCA Civ 745, per the Lord Chief Justice at §511.

under the MEDP would be at significant risk of harm and detention if they expressed dissatisfaction through protests in Rwanda.'[32]

52. While the Policy Statement argues that a person relocated under the Treaty would *'not be exposed to the type of circumstances which resulted in unrest in Kiziba*',[33] it does not assert that refugees who may be critical of the Rwandan government would be generally safe in Rwanda. In fact, it states that it is still working with Rwanda to address *'concerns around the limited space for political opposition and critical voices'* and that *'UK Government ministers and officials have regularly raised these issues, emphasising the need for a more open political space'*.[34] This would suggest that the Supreme Court's concerns regarding the Rwandan government's suppression of political dissent and criticism remain unresolved.

53. Additionally, the Policy Statement clearly accepts that, *'LGBTI persons may face some discrimination in practice in Rwanda*',[35] and yet the accompanying Bill does not exclude LGBTI persons as an entire cohort in the way that Clause 7(2) disapplies the Bill to Rwandan nationals.

Structural Issues with Employment and Mental Health

54. **Sixth**, the Treaty does not address the structural issues within Rwanda particularly in relation to employment opportunities, poverty, and mental healthcare.

55. The Policy Statement notes *'[u]pon arrival, Rwanda will process an individual's asylum claim and create a safe environment for migrants to start a new life, with education, employment, accommodation and integration support'* (§3). Article 10(1)-(2) of the Treaty secures support and accommodation listed in Part 2 of Annex A to individuals, who it recognises as refugees or with humanitarian protection needs, and children forming part of the family. Other individuals, under Article 10(3), are to receive support and accommodation in accordance with Part 1 of Annex A, from arrival in Rwanda until such a time as their status is regularised, when they can then access Part 2 support and accommodation. Under §9.3 of Part 2 of Annex A, support to a relocated individual is provided until *'the end of the period of five continuous years from the date of their arrival in Rwanda'*. However, to enable individuals to become *'self-sufficient'* they are provided with professional development training under §11.

56. Multiple sources set out in Asylos' Rwanda COI compilation, published in August 2022, indicate that despite efforts to currently assist refugees to find employment, managing to gain a

[32] ibid §103.
[33] Policy Statement, §43(b).
[34] Policy Statement, §45.
[35] Policy Statement, §43(c).

sustainable livelihood remains very difficult, and that there is very limited access to mental healthcare services.[36]

Employment

57. For example, the US Department of State's *2022 Report on Rwanda* states: *'No laws restrict refugee employment, and the government continued to support employment programs and financial inclusion initiatives benefiting both refugees and their host communities. Many refugees, however, were unable to find local employment. A 2019 World Bank study found local authorities and businesses often were unaware of refugees' rights with respect to employment.'*[37]

58. In the Joint Strategy on Economic Inclusion of Refugees and Host Communities in Rwanda 2021-2024, of the Government of Rwanda and UNHCR, it is stated *that 'some de facto structural challenges have been identified that hinder refugees to become full productive members of the Rwandan society. These challenges and sometimes non-legal barriers include the lack of awareness among some employers about refugees' right to work and the process of hiring refugees, insufficient access to finance for refugee entrepreneurs, limited access to tertiary and vocational education*'. Challenges reported by refugees in that Strategy document include:

    a. *'Limited employment opportunities for refugees who have finalized their studies at various levels (senior six, university degree and masters). However, unemployment is not limited to refugees only as it is applicable to the general population in the country including host communities'*.

    b. *'Some refugees also reported that the skilled refugee workers are not getting competitive market wage rates.'*

    c. *'Limited access to market-based vocational training and start-up capital/kits are also a general challenge for both refugees and host communities.'*

    d. *'Limited access to land for farming or livestock as there is general land scarcity in the country but also most refugees do not own land and livestock for cultivation (except a few ongoing joint farming projects between refugees and host communities operational in some marshlands)'.*

    e. *'Limited access to energy/power for productive use and other infrastructures (e.g., Markets and roads), which are generally very expensive.'*[38]

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[36] Asylos, Rwanda: COI Compilation Asylum System (August 2022) <https://www.asylos.eu/Handlers/Download.ashx?IDMF=75559e3f-deeb-494c-8869-626d0f3382d5> accessed 21 December 2023, p 88 and 117.

[37] (n 8) above.

[38] Ministry in charge of Emergency Management and UNHCR, 'Joint Strategy on Economic Inclusion of Refugees and Host Communities in Rwanda 2021-2024' (19 August 2021) pp 11-12 <https://reliefweb.int/report/rwanda/minema-and-unhcr-joint-strategy-economic-inclusion-refugees-and-host-communities> accessed 21 December 2021.

59. Poverty and difficulties finding employment were also faced by those relocated under the Israel - Rwanda agreement.[39] For example, All Africa reported that '*Many of those deported to Rwanda have consistently struggled with lack of documentation and poverty, and have mostly fled the country and attempted to return to Europe. Facing international and national criticism, the Israeli program was later abandoned.'*[40] The Conversation reported that an Eritrean refugee stated: *'We had been promised by the Israelis we could live and work, but it didn't happen'.*[41]

Mental Healthcare

60. §4.2 of Part 1 of Annex A to the Treaty states that '*Each Relocated Individual shall have access to quality preventative and curative primary and secondary healthcare services that are at least of the standard available to Rwandan nationals, including',* at §4.2.5, *'mental health services'*. §4.3 further states that: '*Each Relocated Individual shall have access to mental health support services, including experience-sharing sessions and therapeutic sessions.'* It is stated in §4.5 that expenses and fees for accessing these services will be paid for by Rwanda. In §132 of the Policy Statement it is said that the *'Protection Team may refer vulnerable individuals for external support, which may include medical and/or psychosocial support'*.

61. However, the objective evidence suggests there would be significant barriers to accessing mental healthcare:
    - *'the current provision of mental health resources in Rwanda is extremely limited, with only 12 psychiatrists working in the country (0.10 per 100,000 people), no child psychiatrists, and only two psychiatric hospitals." "Sending asylum seekers from the United Kingdom to Rwanda may further reduce the availability of already scarce specialist services to the people of Rwanda.'*[42]
    - *'By 2019, only 12 psychiatrists were registered in Rwanda, and no child psychiatrists were reported as practicing*.'[43]
    - Additionally, according to the *'Rwandan statistical year book by 2015 Rwanda counts 208 psychiatric nurses and 103 psychologists who work in public institutions'*, and the number of trained psychiatrists had increased from *'1 to 7'*, where they are *'rotated in different referral hospitals like Centre Hospitalier Universitaire de Butare (CHUB), Centre Hospitalier*

[39] ibid, 117-119.
[40] Tazreena Sajjad, 'Western Countries Are Shipping Refugees to Poorer Nations in Exchange for Cash' *All Africa* (28 July 2022) <https://allafrica.com/stories/202208020006.html> accessed 21 December 2023.
[41] Martin Plaut, 'Threat of expulsion hangs over thousands of Eritreans who sought refuge in Israel and the US' (23 November 2017) *The Conversation* <https://theconversation.com/threat-of-expulsion-hangs-over-thousands-of-eritreans-who-sought-refuge-in-israel-and-the-us-87898> accessed 21 December 2023.
[42] Sen, P., Crowley, G., Arnell, P., Katona, C., Pillay, M., Waterman, L. Z., & Forrester, A., 'The UK's exportation of asylum obligations to Rwanda: A challenge to mental health', *Medicine, Science and the Law* (14 June 2022) <https://journals.sagepub.com/doi/full/10.1177/00258024221104163> accessed 21 December 2023.
[43] Lordos, A., Ioannou, M., Rutembesa, E., Christoforou, S., Anastasiou, E., & Björgvinsson, T., 'Societal Healing in Rwanda: Toward a Multisystemic Framework for Mental Health, Social Cohesion, and Sustainable Livelihoods among Survivors and Perpetrators of the Genocide against the Tutsi', *Health and Human Rights Journal* (June 2021) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8233024/> accessed 21 December 2023.

Universitaire de Kigali (CHUK), Ruhengeri and Ndera Hospital'. The *'community health workers'* only receive *'basic'* training on mental illness'.[44]

Children Removed to Rwanda

62. **Seventh**, contrary to the best interests of children which must be taken into account as a primary consideration,[45] the Treaty not only contemplates that children in families may be removed to Rwanda,[46] but it envisages that unaccompanied children may be erroneously relocated to Rwanda, have ongoing proceedings in relation to their age, then be deemed by a court or tribunal in the United Kingdom to be a child, and returned to the United Kingdom.[47] This is clearly contrary to the Committee on the Rights of the Child's recommendation, urging the United Kingdom 'to ensure that children and age-disputed children are not removed to a third country'.[48]

63. Notably, under §1.3 of Part 1 of Annex A to the Treaty, if a UK court or tribunal orders that a child must be treated as a minor, and if they are without a parent or guardian, the child does not receive, until such time as they are returned to the UK, accommodation under §1.2, which children in families receive, and includes under §1.2.1.2 *'a designated and separate sleeping area / room for the Family not accessible by other individuals outside the Family*'. This may place children in unsafe situations, and it is unclear from the Treaty and the Policy Statement if such a child would be required to share sleeping areas with adults. Such a court-ordered child would only receive '*access to safe indoor and outdoor recreational facilities*'.[49] It is also unclear whether they will still be provided with a mobile telephone and SIM card to access the internet, as §3.1.3 says they are only provided to '*any Relocated Individual who is 18 years old or above*'.

Rwanda Fails to Meet Minimum Standards to Eliminate Trafficking

64. **Eighth**, under the Treaty and Bill, victims of modern slavery and trafficking are among those who face forced removal to Rwanda.[50]

65. While the Treaty includes, as the Memorandum of Understanding did, an initial screening, Siobhán Mullally, the UN Special Rapporteur on trafficking in persons, especially women and

[44] Nkundimana Balthazar, 'Challenges Encountered by Mental Health Workers in Rwanda; Current Situation and Future Needs' Volume 4, Issue 1, *Journal of Quality in Health care and Economics* (12 January 2021) <https://medwinpublishers.com/JQHE/challenges-encountered-by-mental-health-workers-in-rwanda-current-situation-and-future-needs.pdf> accessed 21 December 2023.
[45] UNCRC, Article 3.
[46] Articles 9(3) and 10(1) of the Treaty, for example.
[47] Article 3(4) of the Treaty.
[48] Committee on the Rights of the Child, 'Concluding observations on the combined sixth and seventh periodic reports of the United Kingdom of Great Britain and Northern Ireland' (CRC/C/GBR/CO/6-7, 22 June 2023) §54 <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhskHOj6VpDS%2F%2FJqg2Jxb9gneCSVxGVjVOkzNqKQlfqkpWhZZ88oYLh6GgITPdojzFi9IFi3B7SPVgM%2BQqVUVvYZqvGm3fRTpchvuK%2F4tcpdyq> accessed 21 December 2023.
[49] Part 1 of Annex A to the Treaty, §1.2.2.
[50] See, for example, Treaty, Article 13(2) and Illegal Migration Act 2023, s 5(1)(c).

children, on 17 June 2022 stated that an *'initial screening was not sufficient to identify and recognise the specific protection needs of asylum seekers, including victims of trafficking*'.[51]

66. Article 13(2) of the Treaty, however, specifically envisages Rwanda receiving individuals for whom the UK has made a positive reasonable grounds decision, before the UK has made a conclusive grounds decision. This scheme, together with provisions in the Illegal Migration Act 2023, will deprive victims of their rights to recovery, expose them to re-exploitation, and facilitate the work of traffickers who will use this scheme to trap individuals in exploitation or cause further exploitation. The lack of any incentive to come forward as a victim of trafficking will also prevent victims assisting in police investigations into their traffickers, thereby facilitating rather than stopping trafficking.

67. Article 4 ECHR and European Convention on Action against Trafficking ('ECAT') both prohibit slavery and trafficking and place positive obligations on the UK to protect victims of trafficking and to prevent their exploitation. Article 4 ECHR is not a right from which the UK can derogate in times of emergency.[52] States are obliged to set up a '*spectrum of safeguards [which] must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking*'.[53] The positive 'protection' duty has *'two principal aims: to protect the victim of trafficking from further harm; and to facilitate his or her recovery'*. [54] Crucially, Rwanda is not a party to either of these Conventions. The Bill also requires decision-makers to treat Rwanda as safe, 'notwithstanding' both the ECHR and ECAT.

68. Article 13 of the Treaty states that Rwanda will have 'regard' to information about the special needs of victims of modern slavery or human trafficking, and take '*all necessary steps to ensure that these needs are accommodated*'. However, Rwanda, according to the US Department of State *2023 Trafficking in Persons Report: Rwanda*, did not meet the minimum standards for the elimination of trafficking: *'The government continued to lack specialized SOPs to adequately screen for trafficking among vulnerable populations and did not refer any victims to services. The government provided support to and coordinated with the March 23 Movement (M23) armed group, which forcibly recruited and used children.'*[55] Key recommendations of the US Department of State included:

- Systematically and proactively screen and identify trafficking victims, especially among vulnerable populations, including among GBV victims, persons in commercial sex,

[51] UN OHCHR, 'UN expert urges UK to halt transfer of asylum seekers to Rwanda' (17 June 2022) <https://www.ohchr.org/en/press-releases/2022/06/un-expert-urges-uk-halt-transfer-asylum-seekers-rwanda> accessed 20 December 2023.

[52] Article 15(2) ECHR.

[53] *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [284].

[54] *VCL and AN v UK* (App. Nos. 74603/12 and 77587/12) [159].

[55] US Department of State, *2023 Trafficking in Persons Report: Rwanda* <https://www.state.gov/reports/2023-trafficking-in-persons-report/rwanda/> accessed 21 December 2023.

LGBTQI+ individuals, children experiencing homelessness, and migrants residing at government transit centres.

- Expand trafficking victim identification and protection measures for Rwanda's refugee population.

69. The scant provisions in the Treaty do not ensure that the Rwandan asylum and trafficking support infrastructure has been developed and quality-assured to protect victims of trafficking and prevent their exploitation. This is not surprising, given the haste with which the UK Government has entered into this Treaty in response to the Supreme Court's judgment of 15 November 2023. The US Department of State report notes that the Rwandan *'government did not report referring any victims to services compared with one victim referred in the previous reporting period*'. We contend that, notwithstanding the intention of Article 13 of the Treaty, the UK risks breaching its multilateral international legal obligations through these bilateral arrangements.

<u>Question 3:</u> 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?

70. It is extraordinary that the Treaty confers no meaningful mechanism for oversight and enforcement of the vast obligations and powers it introduces.

71. As we explain in response to Question 1, the Bill explicitly ousts the oversight of the UK's courts and tribunals from considering the operation of the Treaty, save in extremely narrow circumstances turning on an assessment of the asylum seeker's individual risk in Rwanda. Additionally, there is a mandatory statutory obligation on the UK's decision-makers, including its courts and tribunals, to conclusively treat Rwanda as a safe country when considering removal to Rwanda. This duty applies notwithstanding the factual reality at the time of the decision. We reiterate our view that this is contrary to the rule of law, and risks letting executive authority go unchecked.

<u>Monitoring Arrangements</u>

72. Articles 14 and 15, read together, provide for the operation of the Treaty to be reviewed by a Joint Committee (consisting of both parties) and an independent Monitoring Committee, just as was the case under the MoU.

73. The monitoring arrangements in Article 14 of the Treaty merely replicate those in §13.1 and §§13.4-13.5 of the MoU, with the narrow addition of Article 13(1)(h) providing the Monitoring Committee with access to '*interviews, hearings and appeals proceedings of Relocated Individuals or interviews, hearings and appeals proceedings of individuals whose claim is being assessed under the same rules, laws or procedures as Relocated Individuals*.' Article 15(6) parallels §13.2 of the MoU.

74. The Joint Committee provisions in Article 16 of the Treaty closely parallel §§21.1-21.5 of the MoU, with no additional safeguards. The Monitoring Committee provisions in Article 15 of the Treaty slightly expand on §§15.1-15.3.4 of the MoU. It is not apparent how the Monitoring Committee's members are to be selected, but it would appear from the Policy Statement that there is not to be any change in its composition since September 2022, when limited details of four members proposed by each of the UK and Rwanda were last announced.[56] The Monitoring Committee has an advisory function. While it can monitor the process, report its findings, and make recommendations to the Joint Committee, there is no requirement for the Joint Committee to act on the Monitoring Committee's recommendations, and even the Joint Committee's recommendations regarding application and implementation of the agreement remain non-binding (Article 16(2)(b)). The only additional provisions in the Treaty appear to be that the Monitoring Committee can engage a support team (Article 15(8)), shall develop a system for confidential complaints (Article 15(9)), and that there shall be 'an enhanced initial monitoring period for a minimum period of 3 (three) months' (Article 15(7)).

75. However, during the '*enhanced*' three month period of monitoring, the minimum levels of assurance include only two visits to the UK to see the selection process, observing two boarding and two disembarkations, three induction sessions, weekly visits to accommodation and reception centres and monthly visits to health facilities and education.[57] There is no stipulated number of interviews or appeal hearings that must be observed.

76. Under the MoU, the members of the Monitoring Committee were also to be *'independent'*. Nevertheless it was still of concern to the Supreme Court that '*the suppression of criticism of the government by lawyers and others is liable to discourage the reporting of problems, and so undermine the effectiveness of monitoring'* (§93). Therefore, if individuals fear complaining to the Monitoring Committee members, the effectiveness of monitoring will remain undermined, regardless of the promised confidentiality. It would appear unlikely that the culture shift needed to dispel fears will be in place from the outset of the new complaint system, or have taken hold in the short period since the Supreme Court's decision was handed down, particularly in light of the continuing general human rights situation in Rwanda (detailed in response to Questions 1 and 2) and the Rwandan government's suppression of criticism. Crucially, the Monitoring Committee will only review a sample of '25% complaints' during the enhanced phase, and there is only certainty the Monitoring Committee will investigate a complaint, during the three-month period, if it is received *directly*.[58]

[56] Policy Statement, §102. Home Office, 'Monitoring Committee members – Rwanda' (2 September 2022) <https://www.gov.uk/government/publications/monitoring-committee-migration-and-economic-development-partnership/monitoring-committee-members-rwanda> accessed 20 December 2023; and Home Office, 'Monitoring Committee members – United Kingdom' (2 September 2022) https://www.gov.uk/government/publications/monitoring-committee-migration-and-economic-development-partnership/monitoring-committee-members-united-kingdom accessed 20 December 2023.

[57] Policy Statement, §108.

[58] Policy Statement, §108.

77. Furthermore under §15 of Part 3 of Annex A, a complaint in relation to accommodation and delivery of support is to be made to the *'representative of the Government of Rwanda who is responsible for handling such complaints.'* Similarly, in §8 of Part 3 of Annex B, complaints about *'about any element of the processing of their asylum claim'* are to be lodged with *'a representative of the Government of Rwanda responsible for handling such complaints'*, and this includes *'in relation to the legal representative allocated to them'.* Therefore, it is unclear how the '*confidential complaints*' process directed to the Monitoring Committee interacts with the complaints processes detailed in the Annexes. It remains likely that the suppression of criticism will undermine monitoring, as complaints under the Annexes would go to a representative of the Rwandan government.

78. Accordingly, it appears unlikely that the complaints procedure would be an effective remedy to urgently prevent *refoulement* of an individual relocated under the Treaty.

79. Fundamentally, the monitoring arrangements are insufficient as a safeguard, as our Supreme Court expressed at §93:

> *'Such arrangements may be capable of detecting failures in the asylum system, and over time may result in the introduction of improvements, but that will come too late [...]. It is also unclear whether the monitoring arrangements could provide a solution to problems emanating from the Rwandan government's interpretation of its obligations under the Refugee Convention, or from a lack of independence in the legal system in politically sensitive cases'*.

<u>Dispute Resolution</u>

80. Article 22, contains a dispute resolution process. Despite the public law substance at the heart of the Treaty's function, and the powers and duties conferred, disputes arising from the Treaty are to be considered by the non-independent Joint Committee in consultation with the Governments of the UK and Rwanda, and if they remain unresolved, the forum for resolution is limited to private arbitration proceedings. Given the profound exercise of state power in the decisions made pursuant to the Treaty – decisions concerning removal and asylum, human rights, including life and liberty – a closed circuit of private oversight and arbitral proceedings is insufficient to monitor the operation of the Treaty.

81. The proposed accountability mechanisms suggest a thin conception of the requirement to enforce and monitor the lawfulness of the Treaty – i.e. compliance with the basic terms of the Treaty – rather than the substantive and profound obligations the terms of the Treaty actually impose (and place at risk) in light of domestic and international human rights law. Such substantive and profound obligations should be subject to the full jurisdiction of UK domestic courts. If the UK Government was confident in the lawfulness of the Treaty and the Bill, it would not prohibit judicial scrutiny of them. The comparatively light scrutiny provided for by the Treaty means that the profound duties engaged by the parties do not receive the attention they are owed.

82. Moreover, the dispute resolution process entails 14 working days for the Joint Committee to meet, discuss, and seek resolution. A further 21 working days is allocated for commencement of consultations between the Parties if not settled by the Joint Committee. Only after a further 21 working days will the matter be referred for arbitration, with resolution within 60 working days following the panel being constituted. Therefore, dispute resolution is unlikely to result in an effective mechanism to urgently prevent *refoulement* or other imminent harm if that is the matter to which the dispute relates. The Treaty details no urgent interim injunctive process, in the event of its breach.

83. The International Court of Justice ('ICJ') has no jurisdiction to hear cases brought by non-state actors, including individuals and non-governmental organisations. Individuals relocated under this Treaty would need to rely on a State to bring the lengthy proceedings. Rwanda has not declared that it recognises the jurisdiction of the International Court of Justice as compulsory. Therefore, litigation before the ICJ is unlikely to be an effective mechanism to prevent imminent *refoulement* or other harm resulting from breaches of this and other Treaties.

84. The Treaty envisions its subsistence to at least 13 April 2027.[59] The Articles of the Treaty do not detail any penalties for breaches; nor do they sufficiently detail the power(s) of either Committee to ensure accountability and enforceability on either or both parties. In the absence of the UK courts' purview of the operation of the Treaty, this effectively renders actions and omissions under the Treaty unaccountable in any meaningful sense.

85. Although the decisions of the Rwandan authorities in relation to the processing of asylum claims are made by a (yet to be established) First Instance Body and subject to the review of a (similarly, yet to be established) Appeal Body, it is doubtful whether the Supreme Court's concerns as to the effectiveness of the Rwandan asylum system, its compliance with international legal requirements, and the independence of the Rwandan judiciary have been sufficiently addressed to eliminate the risks of breach of international law, including *refoulement*, arising from the operation, including any breach, of the Treaty.

Question 4: 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?

86. The Court of Appeal and Supreme Court identified serious deficiencies in the Rwandan asylum system, which require long-term sustainable solutions – that ought to be developed by Rwanda, for Rwanda, not superimposed by the United Kingdom for the circumvention of its international legal obligations and global responsibility sharing.

87. Our Supreme Court had concerns *'about the willingness of the judiciary to find against the Rwandan government'* (§82), noting that, in an application for the extradition of a number of individuals to face charges arising out of the 1994 genocide, the Divisional Court found that the

[59] Article 23(1).

evidence points to some risk that *'judges might yield to pressure from the Rwandan authorities'*.[60] Our Court of Appeal noted that the *'lack of independence of the Rwandan judiciary in "politically sensitive cases" was also called into question by Human Rights Watch in a letter dated 11 June 2022 to the Home Secretary, a view essentially accepted by the Foreign Office'*.[61] This is particularly concerning given the Policy Statement states that the *'constitution of Rwanda provides for an independent judiciary'*.[62] This suggests that Rwanda has also been unable to abide by its own Constitution, in light of the findings of our courts.

88. The new decision-making and appellate process is contained in Annex B to the Treaty.

89. It includes a new 'First Instance Body' for decision-making, and, for the first six months, the Treaty requires a caseworker to seek, consider, but not necessarily accept, advice from a '*seconded independent expert*'.[63] It requires members of the First Instance Body to be appropriately trained, and yet it is unclear from the Policy Statement how many individuals who would be members of that Body have received training in the two sessions that have run to date: 18 to 22 September 2023 and 20 to 24 November 2023.[64] In total, assuming there is no cross-over in the individuals attending the training, only 104 people across the DGIE, Ministry of Emergency Management, MEDP Coordination Unit, Rwanda Bar Association, Judiciary, Ministry of Justice, and National Human Rights Commission have been trained over one of these five-day periods. While well-reasoned, independent, good decision-making would, of course, be welcome, it seems unlikely that the Supreme Court's systemic concerns have been resolved through such minimal training over such a short period of time. It also remains unclear how the so-called *'seconded independent experts'* will be found and how it will be ensured that they have the necessary independence and expertise, including in the relevant Rwandan domestic law and the forthcoming changes to Rwandan asylum law.

90. A new 'Appeal Body' will have two co-Presidents, one Rwandan and one of another Commonwealth nationality, for at least the first five years, and be composed of an international judiciary the co-Presidents select.[65] One of the co-Presidents must hear each appeal, on a panel with two other judges. Additionally, for only the first 12 months, the Appeal Body must also receive, take into account, but again, not necessarily accept, the opinion of an independent expert in asylum and humanitarian protection law. It is unclear how long it will take for this process to be operationalised, given the Treaty states, *'[a]ll judges who are not of Rwandan nationality*,' must first, '*receive training on Rwandan law and judicial practice, and all judges shall, as necessary, receive training on asylum and humanitarian law and practice, on the Agreement and*

[60] *Government of Rwanda v. Nteziryayo* [2017] EWHC 1912 (Admin) §374.
[61] *R (on the application of AAA (Syria) & Ors) v The Secretary of State for the Home Department (Rev1)* [2023] EWCA Civ 745 §515.
[62] Policy Statement, §31.
[63] Treaty, Part 2 of Annex B, §3.3.3.
[64] Policy Statement, §117.
[65] Part 2 of Annex B to the Treaty, §4,2.

its implementation'.[66] Furthermore, the onward appeal court has no power to remake the decision, and must remit the matter back to the same Appeal Body for a fresh hearing.[67]

91. Regardless of whether or not foreign judges and 'independent' experts are sent to assist a to-be-established 'Appeal Body', the Supreme Court's concern stands: *'The system is therefore untested, and there is no evidence as to how the right of appeal would work in practice'* (§82).

<u>Question 6:</u> Are there any other aspects of the Agreement which you would like to draw to the attention of the International Agreements Committee?

92. This Treaty and the Safety of Rwanda (Asylum and Immigration) Bill, building on the Illegal Migration Act 2023, *prima facie* place the United Kingdom at risk of breaching its international legal obligations under a raft of multilateral treaties, including the European Convention on Human Rights; the 1951 Refugee Convention, and its 1967 Protocol; the 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the 1966 UN International Covenant on Civil and Political Rights, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness; the UN Convention on the Rights of the Child; and the European Convention on Action against Trafficking.

93. If Rwanda was truly safe the Home Secretary would have been able to make a statement that, in his view, the provisions of the Safety of Rwanda (Asylum and Immigration) Bill are compatible with Convention rights—he was not able to do so.[68]

94. Clause 1(4) of the Safety of Rwanda (Asylum and Immigration) Bill states *'(a) the Parliament of the United Kingdom is sovereign, and (b) the validity of an Act is unaffected by international law'.* Parliament's sovereignty does not prevent the UK Government from breaching international law. This will not stop our courts from finding the Bill, built on assurances in the Treaty, to be incompatible with rights under the ECHR and issuing declarations to that effect.[69] Whilst preventing domestic courts from revisiting their findings on Rwanda being a safe country for the purposes of Article 3 ECHR, the legislation does not prevent applications to and the final binding decisions from the European Court of Human Rights ('ECtHR'). Given the Supreme Court's unanimous findings, and the inadequacies of the Treaty to address those issues, it is extremely likely that the ECtHR will agree with the decision of the Supreme Court and maintain that the policy is a breach of the ECHR. It will place the Government on a direct collision course with domestic courts, the ECtHR, the Council of Europe, and other international bodies. The UK will continue to be responsible for these breaches on the world stage. Compliance with the ECHR is

[66] ibid §4.4.
[67] ibid §4.6.
[68] The Bill was accompanied by a statement from James Cleverly, under section 19(1)(b) of the Human Rights Act 1998.
[69] Human Rights Act 1998, section 4.

also critical to the Good Friday Agreement,[70] the UK-EU Trade and Cooperation Agreement,[71] and the Windsor Framework,[72] as JUSTICE has previously highlighted.

95. It is wholly inappropriate for the United Kingdom to sign and ratify one international legal agreement in order to break other international legal agreements.

96. Moreover, there is a logical inconsistency in the UK Government stressing the binding nature of the Treaty under international law as clear evidence that the Rwandan government will comply, and yet having a reckless approach to the UK's required compliance with its own international treaty obligations. For example, the Bill specifically ousts our courts and tribunals '*notwithstanding*' any '*interpretation of international law by the court or tribuna*l'; it is accompanied by a statement that the Home Secretary cannot say it complies with rights under the ECHR; and it has also led to a situation where the Prime Minister claimed[73] he wanted to go further in breach of international law but was held back by the Rwandan Government. This also raises questions about the likelihood the UK Government will enforce provisions of the Treaty which are said to ensure that the Rwandan government does not breach international human rights standards. Shortly after the proposed emergency legislation accompanying this Treaty was laid before Parliament, Vincent Biruta, the Minister of Foreign Affairs and International Cooperation in Rwanda, released the below statement:

> *'It has always been important to both Rwanda and the UK that our rule of law partnership meets the highest standards of international law, and it places obligations on both the UK and Rwanda to act lawfully… Without lawful behaviour by the UK, Rwanda would not be able to continue with the Migration and Economic Development Partnership.'*[74]

[70] The UK affirmed 'mutual respect, the civil rights and the religious liberties of rights of everyone in the community', and agreed that 'the British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention. See the Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland (April 1998, Cm 3883) 16, para 2.

[71] It threatens the withdrawal arrangements with the European Union, including in trade and law enforcement, as the UK-EU Trade and Cooperation Agreement allows the EU to suspend or terminate the agreement as a whole if there is a 'serious and substantial failure' by the UK to respect human rights and the international human rights treaties to which both are parties'. See Articles 763(1), 771, 772.

[72] Article 2 ensures no diminution of rights. See the Protocol on Ireland/Northern Ireland to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

[73] Letter of the Prime Minister, Rishi Sunak MP, to Robert Jenrick MP (6 December 2023) <https://assets.publishing.service.gov.uk/media/6570dfc1739135000db03c49/The_Rt_Hon_Robert_Jenrick_MP.pdf> accessed 21 December 2023.

[74] Caitlin Doherty, 'Rwanda Wouldn't Agree To Migrant Deal "Without Lawful Behaviour By The UK"' *Politics Home* (6 December 2023) <https://www.politicshome.com/news/article/government-publishes-new-rwanda-legislation-declaring-country-safe> accessed 20 December 2023.

97. There are also a number of issues that remain unclear in the Treaty and Policy Statement, but are fundamental to understanding how it will work in practice. For example:

a. Article 4 details that the United Kingdom can determine the timing of requests, but that Rwanda is required to approve requests prior to any relocation. Nowhere in the Treaty or the Policy Statement is there any agreement or commitment regarding the number of transfers Rwanda may be able or willing to approve. Therefore, the deterrent effect, this scheme is intended to have, is entirely reliant on a matter that remains unstated in the Treaty. As is made clear from Article 5(5), *'Nothing in this Agreement obliges Rwanda to approve the transfer of a Relocated Individual'*.

b. Article 5(1) states that *'The United Kingdom shall be responsible for the initial screening of Relocated Individuals, before relocation to Rwanda occurs in accordance with this Agreement*.' As a fundamental issue, it does not secure that such individuals will have effective *access* to legal advice and representation, including on a publicly funded basis where eligible, during that initial screening and before the process of relocation is to start. Section 56 of the Illegal Migration Act 2023 only ensures access to non-means non-merits tested advice *after* an individual receives a removal notice, not *before* it. The in-scope civil legal services in paragraph 30 of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 do not include attendance at an adult's screening interview if they are not detained.[75] In any case, *eligibility* for legal aid does not secure capacity and availability of or effective access to a legal aid representative, particularly in light of the current above referenced systemic issues facing civil, particularly immigration and asylum, legal aid. Furthermore, the Bill contemplates the removal of individuals under the other 'Immigration Acts',[76] and not just under the Illegal Migration Act 2023. However, it does not contain any additional legal aid provision. Given the inadequate safeguards and remedies available once an individual is involuntarily removed to Rwanda, it is crucial that the process in the UK is fair. Nevertheless, the Bill seeks to inhibit the ability of individuals to access the courts and, through them, a remedy and justice.

c. Article 11(1) leaves entirely unclear the circumstances in which the United Kingdom will make a request for the return of a 'Relocated Individual'. However, it has been reported that individuals convicted of a crime, and sentenced to more than five years in prison, could be returned to the UK from Rwanda, as Rwandan law requires their removal.[77] This is not made explicit in either the Treaty or the Policy Statement. The Policy Statement states only that, *'Circumstances where the UK would request return would be, for example, where a court in the UK orders it*.' Article 4(4) indicates that this would be the

[75] The Civil Legal Aid (Immigration Interviews) (Exceptions) Regulations 2012.

[76] See UK Borders Act 2007, section 61(2), listing Acts from 1971 to 2023.

[77] See for example, Alexandra Rogers, 'Asylum seekers jailed in Rwanda could be sent back to UK under deal, minister admits' *Sky News* (6 December 2023) <https://news.sky.com/story/asylum-seekers-jailed-in-rwanda-could-be-sent-back-to-uk-under-deal-minister-admits-13023928> accessed 19 December 2023.

case for '*[a]ny unaccompanied individual who, subsequent to relocation, is deemed by a court or tribunal in the United Kingdom to either be under the age of 18 or to be treated temporarily as being under the age of 18, shall be returned to the United Kingdom in accordance with Article 11 of this Agreement'.* For Parliament's scrutiny of the Treaty, it is crucial that the UK Government explain the circumstances in which it envisages Article 11(1) might be employed.

Conclusion

98. For the above reasons, it is the conclusion of ILPA and JUSTICE that the assurances contained in this Treaty, and the evidence put forward in the Policy Statement, are insufficient to dispel the Supreme Court's concerns that there is a real risk of *refoulement* in Rwanda. The decision-making, appellate, and monitoring procedures it would introduce are novel and remain untested. We are further concerned that the Treaty cannot sufficiently protect the human rights of individuals removed to Rwanda, a country whose human rights record remains unaltered since the Supreme Court's assessment, particularly as the Treaty lacks proper enforcement mechanisms and is unlikely to provide adequate protections for individuals against *refoulement*. The corresponding Bill before Parliament additionally ensures that individuals' rights cannot be properly upheld by our courts and tribunals, as it severely restricts their oversight.

Immigration Law Practitioners' Association
JUSTICE

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