THE PROTECTION OF IRREGULAR MIGRANTS AND ASYLUM SEEKERS UNDER INTERNATIONAL LAW

CASE STUDY OF THE AGREEMENT BETWEEN RWANDA AND UK

By

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Kigali Independent University (ULK).

September, 2023

DECLARATION

I, **Uwase Flora**, hereby declare that to the best of my knowledge the work presented in this dissertation entitled "**The protection of irregular migrants and asylum seekers under international law: Case study of the agreement between Rwandan and UK**''is original and that it has not been previously submitted elsewhere for any academic qualification. Any references to other persons‟ works are acknowledged in the footnotes and in the bibliography.

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DECLARATION BY THE SUPERVISOR

I, Prof. **BIGIRIMANA Fructuose**, appointed supervisor of the work presented in this dissertation entitled "**The protection of irregular migrants and asylum seekers under international law: Case study of the agreement between Rwandan and UK**'' hereby confirm that I have supervised this thesis and that submission is made with my approval.

Date: _____/_____/2023

Signature: _____

Prof. BIGIRIMANA Fructuose

DEDICATION

I dedicate this Dissertation,

To my beloved Mom for her day-to-day prayers and moral support during this journey;

to the entire ULK LLM students, class of 2023;

&The Holly Spirit who kept my feet from straying.

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I would like to send my sincere gratitude and deepest appreciation to Almighty God who always strengthens me throughout the entire LLM journey. I praise him for enabling me to carry out this academic research particularly.

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UWASE Flora

ABBREVIATIONS AND ACRONYMS

AAPM:	Affirmative Asylum Procedure Manual
AEDH:	European Association for the Defence of Human Rights
AIDA:	Asylum Information Database
APA:	Asylum partnership arrangement
Art.:	Article
ASEAN:	Association of South East Asian Nations
CAT:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ECAT:	Europe Convention on Action against Trafficking in Human Beings
ECHR:	European Convention on Human Rights
ECOSOC:	The Economic and Social Council
ECRE:	European Council on Refugees and Axiles
ECtHR:	European Court of Human Right
ECtHR:	European Court of Human Rights
EU :	European Union
EXECOM:	Executive Committee
FIDH:	International Federation for Human Rights
GA:	General Assembly
GAOR:	General Assembly Official Records
ICCPR:	International Covenant on Civil and Political rights

IOM:	International Organisation for Migration
MINEMA:	Ministry in charge of Emergency Management
MOU:	Memorandum of Understanding
OAR:	Office of Asylum and Refugee
OAU:	Organisation of African Union
OG:	Official Gazette
Res.	Resolution
UDHR:	Universal Declaration of Human Rights
UK:	United Kingdom
UNESCO:	United Nations Educational, Scientific and Cultural Organization
UNGA:	United Nations General Assembly
UNHCR:	United Nation High commissioner of Refugees
USA:	United States of America
Vol.	Volume

ABSTRACT

Migratory movements occur across the world and particularly towards developed countries. To that end, every country has become either country of origin, transit or destination, or a combination of the three.[1]Migration in irregular situationsis currently taking serious dimensions and alarming proportions that may threaten peace, stability and security, as well as economy and must be addressed through a comprehensive approach.[2]

Migrants and asylum seekers are both protected under international law and domestic laws of the nations. Migrants are protected irrespective of their status or reasons of migrations,[3] while asylum seekers receive the general protection granted under international refugee law. Some countries such Denmark and recently UK attempted to change their migration policy to curb the issue of migration in irregular situation. Those policies are meant make it difficult for migrants and asylum seekers to gain entry into the United Kingdom.

The Memorandum of Understanding (MoU) between the UK and Rwanda for the provision of an Asylum partnership arrangement that is applicable to anyone who is deemed to have arrivedillegally in the UK since 1 January 2022 to be relocated to Rwanda, received much of criticism.[4] It has been controversial to resonate with the UK's New vison for refugees which included the processing of asylum seekers in transit states after arrival in the EU. The MoU was challenged by both UK High court and European Court of Human Rights which provided interim measures regarding the first flight plan. Both the decisions of the courts considered the MoU as being incongruent with international refugee and human rights laws , and thus shifting the UK respective obligations under those instruments to Rwanda.

Key words: Migrants/asylum seekers, safe third country, and first country of asylum, *non-refoulement*Asylum Partnership Arrangement

[1] African Union, *African common position on migration and development*, (African Union, 2006), p. 2.
[2] IOM report
[3] Art. 22, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Adopted by General Assembly resolution 45/158 of 18 December 1990.
[4] House of Lord, International Agreement Committee, *7th report of session 2022-23: memorandum of understanding between the UK and Rwanda for the provision of an asylum partnership arrangement,* (Authority of the house of Lords, 2022), p.2.

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CHAPTER ONE: GENERAL INTRODUCTION AND BACKGROUND OF THE STUDY

The 1990s era was characterized by the gradual growth of refugee claimants. The growth in global refugee numbers was fueled by a change in the nature of conflicts, as civil wars became increasingly prevalent and long lasting.[5] It has been argued that, not all of these refugees fled state-based persecution. They also fled from causes not defined by the refugee convention, including persecution by non-state actors, situations of generalized violence and state failure.[6]

The New York Declaration on Refugees and Migrants adopted in September 2016 which was articulated by almost 193 UN member States, increased the world's conviction that states have to safeguard asylum protection to its seekers.[7]The declaration reminded the international community that migrants need a certain level of international protection. The issue e of human trafficking and smuggling becomes alarming in the recent years.

Asylum seekers and migrants in irregular situation are not generally protected under international law as specific category of person in needy. Contrarywise, refugees are protected under international legal framework consisting of the 1951 convention and its 1967 protocol and related regional instruments.[8] However, it is complemented by other bodies of law, notably international human rights law[9], international humanitarian law as well as international criminal law.[10]

[5] Orchard P, *A right to flee: refugees, states, and the construction of international cooperation,* (Cambridge University Press, 2014), p. 203.
[6] Ibid.
[7]UN General Assembly, New York declaration for Refugees and Migrants, Resolution 71/1, 2016
[8] Nicholson F and Kumin J, *a guide to international refugee protection and building state asylum systems: a handbook for parliamentarians No 27,2017*, Inter-Parliamentary Union and UNHCR, 2017, P. 7.
[9] The most relevant are, the Convention against Torture and the Convention on the Rights of the Child are human rights instruments that provide important protections to asylum-seekers and refugees (see for example art. 3 of CAT and art. 22 of CRC convention).
[10]Goodwin-Gill G, McAdam J and Dunlop E, *The refugee in international law*, 4th Ed.(Oxford University Press, 2021), p. 841.

Bearing in mind the UK's exit from EU but remained member to the council of Europe, the present dissertation discusses the special protection owed to refugees by the states as duty bearers under international and regional human rights law and particularly refugee law with respect to the MoU concluded between Rwanda and United Kingdom (UK) of 14 April 2022.

According to Marrison, the 1951 Geneva Convention relating to refugee status is increasingly an inadequate instrument for dealing with "global people movement," which will become an ever bigger problem, but not for Convention related reasons- climate change, financial collapse, natural disasters or growing societal inequities - which he was concerned about.[11] Moreover, Klaus Neumann notes that "the absence of other instruments dealing with these more general risks forcing people to move are likely to lead to the Refugee Convention being abused as a surrogate.[12]The main message being disseminated is that there issomething not sufficient with what we have and there is a need for something more.[13]

Physical insecurity, legal insecurity, socio-economic insecurity and environmental insecurity are commonplace. Quite predictably as a result, so too is forced displacement and, with it, protection gaps.[14] while the 1951 convention only meant to protect refugees under the definition of its article, it does not comprehensively offer protection to the both categories of forcibly displaced persons. Thus, a number of other legal instruments would be adopted to adequately curb the remaining categories of forcibly displaced persons.

[11] Scott M, "A real solution: An international, regional and domestic approach to asylum policy." (speech to the Lowey Institute, Sydney, November 30, 2010).
[12] Klaus N, "Whatever happened to the right of asylum." (address to the Law and History Conference, Melbourne, December 13, 2010).
[13] Feller E, *The refugee convention at 60: still fit for its purpose?" protection tool for protection needs, workshop on the refugees and the refugee convention 60 years on: protection and identity*, (prato, 2011), p.1.
[14] Ibid. p. 3.

The study intends, in this entry, to provide a legal analysis of the Asylum partnership arrangement between the United Kingdom of Great Britain and Northern Ireland on the one hand, and the Republic of Rwanda on the other, to relocate migrants and asylum seekers to the Republic of Rwanda. In the analysis, I interrogate whether or not such a relocation is congruent and in consonance with the core principles of international human rights law, migrants laws as well as refugee law.

1.Background of the study

The principle of protection with regard to "Asylum seekers" entails the latter's enjoyment of rights to which they are entitled under international law. From the so renowned mother of human rights, that is Universal declaration on human rights, right to asylum was formally recognized under article 14.[15] It is provided that Everyone has the right to seek and to enjoy in other countries asylum from persecution which may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.[16]The UNHCR has consistently voiced that claims of asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them.[17] This is also in line with states 'general practice.[18]

Both UK and Rwanda are signatory parties of 1951 convention and 1967 addition protocol. In addition, UK is party to ECHR, party to the Council of Europe Convention on Action against

[15] Art. 14, Universal Declaration of Human Rights, UNGA Res. 217A(III), Dec. 10, 1948.

[16] Ibid.

[17]UNHCR, "Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, p. 1.

[18]NNHCR, "Protection Policy Paper: Maritime interception operations andthe processing of international protection claims: legal standards and policy considerations with respectto extraterritorial processing", accessed athttp://www.unhcr.org/refworld/docid/4cd12d3a2.html [18/02/2023].

Trafficking in Human Beings (ECAT) and Rwanda is also party to OAU convention governing specific aspect of refugees in Africa (OAU refugee convention). Of relevance, either of them has its own refugee legal framework. For example, Rwanda has 2014 refuge law and UK has 2002 nationality, immigration and asylum Act. Suffice to say, both countries should abide by the obligations from international and regional refugee protection regimes.

The Vienna convention on the law of the treaties of 1969 gives every state possesses the capacity to conclude international agreement and the obligation from latter must be fulfilled by the parties in good faith.[19] However, the present convention has never define the scope or the subject matter of the agreement between the states. The convention clearly states that it applies to treaties between states[20] provided that it complies with the universal respect for, and observance of, human rights and fundamentalfreedoms for all.[21]

Not only UNHCR has the responsibilities to protect refugees, but also states and other members of international community have a part to play in protecting refugees. Significantly, for States, refugeeprotection is both an individual and a collective responsibility.[22] The principle of protection accompany a refugee through his/her entire life of refugeehood.

2.Statement of the problem

At the heart of the international human right and refugee law regime are the fundamental principles of asylum, *non-refoulement*, non-discrimination and protection. In the context of initiatives involving the transfer of asylum-seekers from one country to another for the purpose of processing

[19] Art. 6 and 24 of the Vienna convention on the law of treaties.
[20] Ibid. art. 1.
[21] Preamble of Vienna treaty.
[22] UNHCR EXCOM, conclusion No 100 (LV) 2004.

their asylum claims, transferring States retain responsibilities under international refugee and human rights framework towards transferred asylum-seekers.[23] Importantly, UNHCR Executive Committee Conclusion No. 15 requires that even efforts among states to avoid gaps in the assignment of protective responsibility should observe the principle that *"[t]he intentions of the asylum-seeker asregards the country in which he wishes to request asylum should as far as possible be taken into account*".[24]

Both the international refugee/migrants protection system and international human rights recognize the principle that the migrants and asylum seekers need special protection. This includes admission and *non-refoulement*.[25]Asylum seekers should be admitted without any discrimination.[26] Moreover, the fundamental principle of *non-refoulement* which includes "non-rejection at the frontier" or "non-transfer to third country for asylum processing purposes" must be meticulously observed in all cases as such principle is defined under article 33 of the 1951 United Nations Convention relating to the Status of Refugees (1951 refugee convention).[27]

Rule 345 (c) of UK immigration rules provides that, "*when an asylum application is treated as inadmissible, the Secretary of State will attempt to remove the applicant to the safe third country in which they were previously present or to which they have a connection,* ***or*** *to any other "safe*

[23] UNHCR, *UNHCR analysis of the legality and appropriateness of the transfer of Asylum-seekers under the UK-Rwanda arrangement*, 2022, P. 2.
[24]UNHCR Executive Committee Conclusion No. 15, "RefugeesWithout an Asylum Country" (1979)
[25]*Asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the international set out principles and standards*, see UNHCR,UN refugees agency, "Protection of Asylum-Seekers in Situations of Large-Scale Influx
No. 22 (XXXII) – 1981"accessed http://www.unhcr.org/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html[1/3/2023]
[26] Such as discrimination based to race, religion, political opinion, nationality, country of origin or physical incapacity
[27]Convention relating to the Status of Refugees of 1951, United Nations General Assembly Resolution 2198 (XXI), 28 July 1951, 189 U.N.T.S. 150. Article 33 reads as follow: "*No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*"..

third country" which may agree to their entry.To that end,in 2022 Rwanda entered into Memorandum of understanding (MoU) with UK meant for the Provision of an Asylum Partnership Arrangement to strengthen shared international commitments on the protection of refugees and migrants.[28]

The MoU under Para 9.1.1. provides that, asylum claim will follow Rwandan procedures of asylum in accordance with the Refugee Convention, Rwandan immigration laws (…) Rwandan standards, (…) and to ensuring their protection from inhuman and degrading treatment and *refoulement*.[29] The refugee rights watchdog (UNHCR) consistently voiced that depriving asylum-seekers of access to a fair and efficient asylum determination and treatment in line with international standards is not permissible, as it may expose them to the risk of *refoulement* and other rights violations.[30]

From the above background, this research has ventured to investigate and extensively analyze the legality and relevance of the arrangement in question with specific reference to international refugee norms and principles, with particular concern to protection of migrants as articulated notably in the 1951 refugee convention, relevant international, regional and local instrument and relevantly the 2013 UNHCR Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers which sets the procedural guidance with respect to treatment of asylum seekers and their transfer to other country than that of first application as the case of UK-Rwanda situation.[31]

[28] Preamble of the agreement.
[29] Para 9(1)(1) of the memorandum of understanding between United Kingdom and Rwanda.
[30] Id., P.6.
[31] ‘
UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, para 3 VI.

3.Research Questions

- Does the agreement between Rwanda and UK comply with the international standards on refugee and migration framework?
- To what extent does international law protect the right of asylum seekers in case of relocation in the context of UK-Rwanda transfer/relocation agreement?

4.Objectives of the study

This study has general and specific objectives which are mentioned hereunder.

4.1.General objective

This study aimed at critically investigating the legality and the appropriateness of agreement between Rwanda and UK pertinent to the transfer of asylum seekers from UK territory to Rwanda.

4.2.Specific objectives

i. Analysis of existing refugee/asylum legal regime to which this agreement is built on and its legal implication to global refugee regime.

ii. Examination and understanding of contextual legal framework for transferring asylum seekers to third country in comparison to the concept of resettlement.

5.Significance of the study

The subject matter of the present study is therefore of interest not only with respect to the rights of asylum seekers regarding their choice of asylum state, but also because it will scrutinize states obligation towards the same in broad sense. It will also help to understand the core principles underlying migrants and refugee protection. Moreover, this study also has intended to discuss the in(congruent) with international refugee regime and states principles.

The output from this study will serve as a learning component for researcher and academics on the appropriate approaches needed to attain a successful level of relevant legal contemplation. It will therefore forge the way toward setting up the regime with cognizance of asylum seekers rights distinctively from the rights of refugees in general.

Finally, this study will serve as a supplement component to the existing literature to address the issue of limited and restrictive rights of migrants and asylum seekers under international human rights laws in general and particularly refugee regime.

6.Research Methodology and techniques

While examining the legality and appropriateness of MOU between UK-Rwanda with respect to asylum seekers, different techniques and methods will be employed to reflect to hypothesis of this study. With respect to methodologies, doctrinal[32] and non-doctrinal research methodologies are hereby used. Moreover, the documentary technique is used in collecting data from different written documents relevant to the topic including law texts, books, journal articles, among others.

[32] Doctrinal legal research employed to guide the preparation of this dissertation involves the extensive examination, review, and analysis of available relevant literature and legal instruments on the very similar topic. Those are International, regional, and domestic relevant legal instruments, textbooks, academic papers, and relevant reports as well as various other reliable scholarly publication

Nevertheless, exegetic, analytical, and synthetic methods are employed to attain the purpose of this research.

6.1.Documentary technique

Those are doctrinal and non-doctrinal research methodologies. In addition, the documentary technique is used in collecting data from different documents relevant to the matter in question including law texts, books, journal articles, reports, newspapers

6.2.Exegetic method

This dissertation has employed "exegetic method" that is meant to provide logical explanations of legal principles and interpretation of relevant laws . it shall consist in the provision of critical explanation and interpretation of the texts of legal documents. This can be done by giving both the "literal, purposive and contextual " meaning of the provisions of both domestic, regional and international legal instruments pertaining to refugees.

6.3.Analytic method

"Analytic method" is used through reading and "analysing" the existing primary and secondary sources of law pertaining to migrants and asylum seekers protection.

6.4.Synthetic method

This method was also used. It consists in summing up the findings in a logical, clear and concise manner aims at comprehensively reorganize the collected data in coherent manner.

The work involves the analysis of the existing literature on international refugee's rights and asylum seekers protection and an evaluation on the implication of decision to relocate migrants seeking asylum from UK to Rwanda who have entered UK unlawfully in recent years.

7.Structure Of The Study

This research is comprised of five chapters structured as follow; chapter one which is made of presentation of the topic and background of the study, problem statement, research questions, research hypothesis, objectives of the study, the research methodology and the outline of the study.

The second chapter deals with conceptual and theoretical framework pertinent to refugee and asylum seekers in general. It shall also elaborate much on origin and background of asylum as well as the foundation of asylum among others.

The third chapter is comprised of the legal framework pertaining to migrants and refugee law in general and in particular its relevance to asylum seekers. It contextualizes the existing legal framework and the obligations of states towards asylum seekers vis-à-vis human rights protection in international law and also role of actors involved in refugee protection arena.

The fourth chapter makes an analysis of the legality of memorandum of understanding between Rwanda and UK under international law, it also relates this agreement with the said principle to have a comprehensive understanding on the same.

And chapter five of this research encapsulates summary of findings and provides general conclusion and recommendations accordingly .

CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK ON IRREGULAR MIGRANTS AND ASYLUM SEEKERS UNDER INTERNATIONAL LAW

The current international migration trend has proven that a big number of migrants is migrants under irregular situation. They are sometimes named illegal migrants or unlawful migrants.[33] It is unquestionable that those migrants travel to Europe to which UK is part. Despite such situation, the commonly known adage is that states are more often motivated by self-interest than considering moral principle of humanity. The situation has provided a further reason for human rights activists to insist upon the right of asylum seekers and migrants in irregular situation across the world.[34]

This chapter further elaborates different features of the right of asylum including the historical foundation of asylum, States involvement in granting right of asylum to its seekers, the legal right of an individual to seek asylum; and the right of an individual to be granted asylum. In addition, the principle accrued to refugee and asylum regime are hereby discussed taking into consideration the current burning issue on the agreement between Rwanda and UK with regard to the transfer of asylum seekers. Both international, regional and national regimes are hereby reviewed to have an extensive and convincing pertinent instruments

2.1. Description of the Concepts

As far as international, regional and national regimes has differently define the underlying concepts, it is vital first and foremost to elaborately delineate the relevant key concepts that shall be frequently used to enable the readers easily understand them. This section meant to deepen the

[33] IOM, supra note 2.
[34] Roman B "the state of the right of asylum in international law" , accessed at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1342&context=djcil[12/12/2022].

details of this research thoughtful of general overview on the main subject. To that end, the concepts such as Refugee, Asylum Seekers, Asylum, *Non-Refoulement* have been described.

2.1.1.An overview on the concept of migration and migrants

While there is no universally agreed definition of migration or migrant, several definitions are widely accepted and have been developed in different settings, such as those set out in UN DESA's 1998 Recommendations on Statistics of International Migration.[35]The IOM definition is that migration is *'movement of a person or a group of persons, either across an international border (international migration), or within a state (internal migration), encompassing any kind of movement of people, whatever its length, composition and causes*."[36]

At the same time, At the international level, no universally accepted definition for "migrant" exists under international law. However, definition was developed by IOM for its own purposes is that , a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons.[37] The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.[38]

[35] IOM, World Migration report 2022.
[36] European Commission, "migration", accessed at https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/migration_en#:~:text=The%20International%20Organization%20for%20Migration,whatever%20its%20length%2C%20composition%20and [23/03/2023].
[37] IOM "who is a migrant", accessed at https://www.iom.int/who-migrant-0 [21/04/2023].
[38] Ibid.

According to IOM, there exist lawful, unlawful migrants, documented and undocumented migrants, economic migrants or migrant workers, environmental migrant.[39] It is of paramount importance to note that, the term "migrant" is overarching for those undertaking migration and not a legal term. There are asylum seekers and refugees as a subcategory of migrants, the protection and status of whom is regulated by international law.

The development of a protection regime under international refugee law has led to a negative definition of "migrants"[40]which maintains that migrants are, inter alia, those who are not refugees. The UNHCR defines a migrant as "a person who, for reasons other than those contained in the definition [of the 1951 Convention and the Protocol], voluntarily leaves his country in order to take up residence elsewhere. […] If he is moved exclusively by economic considerations, he is an economic migrant [...]".[41]

With respect to irregular or unlawful migration, the only aspect of irregular migration defined under international law is irregular entry which is defined under the smuggling protocol as "crossing borders without complying with the necessary requirements for legal entry into the receiving State.[42]

According to Lehmann, there is an ambiguous understanding of the term "migrant". The author argues that, on the one hand, migrant is an umbrella term covering all people undertaking migration. On the other hand, it stands in contrast to the term "refugees" and is often equated with

[39] IOM , International Migration Law: glossary on Migration, 2019.
[40] Karatani R "How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins", 17 *International Journal of Refugee Law* (2005), p. 517.
[41] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reedited, UN Doc HCR/IP/4/Eng/REV.1, January 1992, para. 62.
[42] Art. 3 (b), Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000.

economic migrant. The distinction is, on a practical level, blurred by mixed movements and motives, the fact that refugees increasingly use the same clandestine means of transport as irregular migrants, and by unfounded refugee claims.[43]

2.1.2. An overview of the asylum and asylum seekers

While there is no universal definition of the term "Asylum" under international law, the attempt to define asylum has brought the attention of scholars. It has been argued that asylum refers to international protection offered by States to people who migrated or fled persecution and human rights violation within their countries of origin.[44] According to *Gil-Bazo*, Asylum, understood as 'the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it.[45]

Accordingly, by the absence of international standards to solely provides for asylum and asylum seekers, with respect to their protection, and lack of definition of asylum seeker under the international refugee standards", the UNHCR *detention Guidelines* has attempted to delineate an "asylum seekers" as persons applying for refugee status -pursuant to the definition of a "refugee" in the 1951 Convention and 1967 Protocol or any regional refugee instrument- as well as other persons seeking complementary, subsidiary or temporary forms of protection.[46]

The Guidelines cover those whose claims are being considered within status determination procedures, as well as admissibility, pre-screening or other similar procedures. They also apply to

[43]Lehnann J "Rights at the frontier: border control and human rights protection of irregular international migrants" 3 *Goettingen Journal of International Law* (2011), p. 740.
[44]ECtHR, "asylum" , accessed at https://echr.coe.int/Documents/COURTalks_Asyl_Talk_ENG.PDF [22/12/2022].
[45] Gil-Bazo M, "asylum as a general principle of international law" 25(1) *International Journal of RefugeeLaw*(2015), p.1.
[46] Lambert H *Refugees, Asylum Seekers and the Rule of law: comparative perspectives* (Cambridge University Press, 2011), p. 34-52.

those exercising their right to seek judicial review of their request for international protection.[47] It is in other words the term used to refer to a person whose request for sanctuary has yet to be processed.[48]

While the MoU[49] definition of asylum seeker is that an "Asylum seeker" means a person seeking to be recognised as a refugee in accordance with the Refugee Convention or otherwise claiming protection on humanitarian or human rights grounds[50],The local context of asylum seeker in Rwandan (according to the law)is that an *asylum seeker* as a person applying for refugee status in Rwanda.[51]

The terms asylum seeker and refugee differ only in regard to the place where an individual asks for protection; meaning that asylum seeker asks for protection after arriving in the host country, a refugee can ask for and be granted protection status outside of the host country.[52] This for instance in case of refugee *surplace*. Moreover, an asylum seeker describes someone who has applied for protection as a refugee and is awaiting the determination of his or her status. While refugee is a term used to describe a person who has already been granted protection. Therefore, asylum seekers can become refugees if the local competent authority so designated deems them as fitting the international definition of refugee.

[47] UNHCR, "Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention', Geneva", accessed at http://www.un.am/up/library/Gudelines%20Related%20to%20Detention_eng.pdf, [22/11/2022]..
[48] Fonteneau G *the rights of Migrants, refugees or asylum seekers under international law* (IOM, 1992), p.4.
[49] Memorandum of understanding between Rwanda and United Kingdom on asylum seekers transfer
[50] Clause 1.1. b. of the MoU.
[51] Art. 2 (2), Law **N**°13ter/ 2014 OF 21/05/2014 relating to refugees (OGn° 26 of 30/06/2014***).***
[52]UNESCO, "Migrants, Refugees, or Displaced Persons?", accessed at http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/asylum-seeker/ [22/11/2022].

The author in her attempt to delineate the asylum seeker, has agreed with the definition found in the law that, an asylum seeker is a person applying for refugee status. However, the definition may be extended to cover those who has not yet completed the formal process, but his/her request was made. The alienation element found under the definition of refugee, should not be considered since a person can request asylum while in his/her country of origin prior reaching the territory of country of application.

Despite its long history and worldwide practice, the term asylum still has no commonly accepted definition. Professor Madsen as an authority in the area of refugee law voiced the common observation of scholars that, the term 'asylum' has no clear or agreed meaning. Even though this caution, even if the discussion turns from the meaning of asylum as a term to its meaning as a right, scholars should also be able to list concrete elements of that right. Indeed, the right of asylum has been said to comprise certain specific manifestations of state conduct such as:

1.To admit a person to its territory;

2.To allow the person to sojourn there;

3.To refrain from expelling the person;

4.To refrain from extraditing the person; and

5.To refrain from prosecuting, punishing, or otherwise restricting the person's liberty.

2.1.3. A refugee: universal and contextual overview

The term refugee is susceptible to several meaning taking into account the definition provided under international law vis-à-vis national laws. It is in this regard, it has been defined in various instruments among which include the 1951 refugee convention, doctrines and other materials.

The 1951 refugee convention defines the word "Refugee" as "the term applied to any person who; as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[53]

The African refugee regime has contextualized the term refugee as follow "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.[54]

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[55] In addition, Article 2(1) of the law relating to refugee in Rwanda has also summarily defined a refugee as the refugee as

[53] Art. 1(A) (2) of Convention relating to the Status of Refugees, *Supra* note 27.
[54] Art. 1 (1) of the of Organization of African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.
[55]Ibid. Art. 1 (2) .

person who has been granted an asylum in accordance with this law and international instruments relating to the status of refugees ratified by Rwanda.[56]

Normally, the conventionally agreed definition of refugee presents the following elements : *existence of persecution, well-founded fear, lack of protection, unwillingness to return to home country, and an element of alienation.* Generally, a refugee is a person who has fled his/ her own country and cannot return due to fear of persecution and has been given refugee status. The latter is given to applicants by the United Nations or by anasylum country which is party to relevant convention.[57]

2.1.3. Brief overview of the concept *Non-refoulement* vis-à-vis imposed return and expulsion

2.1.3.1. Non-refoulement

The term *non-refoulement* derives from the French *refouler* which means to drive back or repel, as of an enemy who fails to breach one's defences[58]. In the context of immigration control in continental Europe, *refoulement* is a term of art covering, in particular, summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission to those without valid papers[59].

The 1951 refugee convention provides that **"**No Contracting State shall expel or return *('refouler')* a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would

[56] Art. 2(1),LawN° 13 ter/ 2014 of 21/05/2014 relating to refugees (*O.G* no 26 of 30/06/2014).
[57]Kohler J "who is a refugee?" accessed at ,http://www.roads-to-refuge.com.au/whois/whois_definitions.html[22/11/2022].
[58] Goodwin-Gill G and McAdam J, *The Refugee in International Law,* 3rd Ed (Oxford University Press, 2007), pp.423-8..
[59] Ibid.

be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The standard of return is linked more to the principle of *non-refoulement* which applies not merely to those granted refugee status or an intermediate humanitarian status, but also to asylum seekers.[60]More details about this principle shall be discussed in the next chapters in relation to Rwanda-UK MoU.

2.1.3.2. Imposed return

Various literature has argued that the current refuges world is dominated by the decisions by authorities and leaderships followed by acceptance by the masses.[61] However, posits that, necessary efforts need to be made to democratize the world of refugees and asylum seekers before accepting that decisions of authorities and leaderships are in the best interests of persons of concern.

According to McNamara, imposed return has become necessary because of pressure from host states and lack of money to care for refugees. Those are among the reasons that justify why involuntary repatriation is coming to be so widely discussed and practiced in the Third world.[62]

2.1.2.3. Expulsion

Expulsions and deportations are a State's unilateral acts of ordering a person to leave its territory and, if necessary, of forcefully removing him or her. The terminology used at the domestic or international level is not uniform but there is a clear tendency to call expulsion the legal order to

[60] Chimni B, "from resettlement to involuntary repatriation: towards a critical history of durable solutions to refugee problems" , 23(3) *Refugee survey quarterly* (2004), P. 65.
[61] ibid.
[62] Ibid.

leave the territory of a State, and deportation the actual implementation of such order in cases where the person concerned does not follow it voluntarily. [63]

Expulsion is an act by a public authority to remove a person or persons against his or her will from the territory of that state. A successful expulsion of a person by a country is called a deportation.[64] The European court of human rights differentiated mass expulsion (*expulsion en masse)* from collective expulsion whereby the latter was explained as "any measure compelling non-nationals, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual non-national of the group" while mass expulsion may occur when members of an ethnic group are sent out of a state regardless of nationality.[65]

2.1.4. Notion of "First country arrival" and Safe Third Country"

2.1.4.1. First country of arrival concept

The ''first country of arrival'' principle purports to collectivize responsibility to protect refugees among a select group of participating states. The principle is also increasingly applied in the domestic laws of states in many parts of the world. It was given much impetus in Europe, whereby article 26 of APD has conceptualized it as follow:

63Walter K, "Aliens, Expulsion and Deportation", accessed at http://webcache.googleusercontent.com/search?q=cache:http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e745&num=1&strip=1&vwsrc=0[22/11/2022]..

64 Scholten A'International Law Aspects of Forced Deportations and Expulsions', Congress on Urban Issues, (Malaga, 2016)..

65 Art. 22, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families , *Supra* note 3.

"A country can be considered to be a first country of asylum for a particular applicant for asylum if: (a) s/he has been recognised in that country as a refugee and s/he can still avail him/herself of that protection; or (b) s/he otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement; provided that s/he will be re-admitted to that country. In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum Member States may take into account Article 27(1)."[66]

To that end, each state has an obligation to process the asylum claims if only those individuals who make first-asylum claims on their jurisdictional territory. Even this requirement is, however, a weak requirement. If asylum seekers have passed through other countries after leaving the state of departure, states reserve the right to return the asylum seekers to the 'first country of arrival' without processing asylum applications, or to a 'safe third country'.[67]

2.1.4.2. Notion of safe third country

concept of "safe third country" is defined with reference to Article 27 of the European original Asylum Procedures Directive and where appropriate with an EU list of safe third countries, as a country where there is no risks of serious harm and where the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected.[68] the applicant' life and liberty are not threatened, the principle of

[66] Art. 26,European Union: Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, accessed at https://www.refworld.org/docid/51d29b224.html [23/04/2023].
[67]Hathaway J, *The Rights of Refugees Under International Law*, (Cambridge University Press, 2005)pp. 323-8.
[68] Art. 36(d), Directive 2013/32/Eu of the European Parliament and of the Council of 26 June 2013.

non-refoulement is respected, the…. has the possibility to seek recognition as a refugee and, if recognised, enjoy protection in accordance with the Refugee Convention.[69]

The Spain Office of asylum and refugee (OAR) has increasingly applied the "safe third country" concept since 2016 until 2021. In 2020, the concept was also applied to Venezuelans as the authorities consider that any other South American country should be considered as a safe third country. The Government does not expressly refer to the "safe third country" concept, but the motivation of the dismissal of the application is essentially based on it. The concept has been applied in 2018 especially in cases of mixed marriage between Moroccan and Syrian nationals.[70]

2.1.4.2.1. The determinants of Safety under the meaning of refugee context

The Spain National court also known as the *Audiencia Nacional* has provided guidance about the matter. According to such court, the obligation to examine asylum applications on the merits "ceases to exist when the applicant can or should have presented the application in another country which is also signatory to the Geneva Convention, as the latter must also guarantee the application of the Convention.71 In principle, both the ratification and the application of the Geneva Convention are necessary conditions for the application of the safe third country concept.[72]

The application of "safe third country" concepts requires a factual assessment of whether it provides effective protection, which is based on the following criteria:

[69] Ibid. Art. 36 (e).
[70] AIDA, "Country report on safe third country: Spain" (21 April 2022), accessed at <https://asylumineurope.org/reports/country/spain/asylum-procedure/the-safe-country-concepts/safe-third-country/#:~:text=The%20concept%20of%20%E2%80%9Csafe%20third,as%20a%20refugee%20and%2C%20if >, [12/03/2023].
[71] *Audiencia Nacional*, Decision SAN 428/2018, 2 February 2018.
[72] *Audiencia Nacional*, Decision SAN 3183/2017, 29 June 2017.

"(1)no risk of persecution within the meaning of the 1951 Convention or serious harm in the previous state; (2) no risk of onward refoulement from the previous state; (3) compliance, in law and practice, of the previous state with relevant international refugee and human rights standards, including adequate standards of living, work rights, health care, and education; (4) access to a right of legal stay; (5) assistance of persons with specific needs; and (6)timely access to a durable solution (UNHCR 2002)".[73]

2.1.4.2.2. Application of the "first country of asylum" and "safe third county" principles

The Asylum Procedures Regulation should foresee that Member States do not apply the first country of asylum and safe third country concepts when examining the application.[74]The so-called 'first country of asylum' principle often justifies the decision to return asylum seekers to another country. i.e. a country can reject a person's asylum application if they have already been granted protection by another country. It is often referred to as 'safe third country' principlewhich includes other relationships between an asylum seeker and a third country where they are deemed safe.[75]

Nevertheless, Rule 345 (c) of UK immigration rules provides that, when an asylum application is treated as **i**nadmissible, the Secretary of State will attempt to remove the applicant to the safe third country in which they were previously present or to which they have a connection, or to any other safe third country which may agree to their entry. Moreover, Para 9.1.1. of the agreement provides thatasylum claim will follow Rwandan procedures of asylum in accordance with the Refugee

[73]Podkul J, Kysel I and Frelick B, *Op.cit*, P. 196.
[74] Art. 36(2) of Regulation (EU) Asylum Procedures Regulation.
[75] Anon, "Immigration Law: Safe Third Country Agreements" , accessed at https://fclawlib.libguides.com/immigrationlaw/safethirdcountry#:~:text=The%20so%2Dcalled%20'first%20country,'safe%20third%20country'%20principle [12/03/2023].

Convention, Rwandan immigration laws (…) Rwandan standards, (…) and to ensuring their protection from inhuman and degrading treatment and *refoulement*.[76]

2.2. Literature review on rights to asylum

2.2.1. From biblical concept to legal recognition

The history of asylum goes as far back as the known history of mankind itself. According to the bible, Adam and Eve were driven out of Eden and became thereby "refugees". Mary and Joseph had to seek asylum in Egypt with the child Jesus. Up through the ages human being have fled from their homelands to escape the wrath of tyrants, conquerors, and other oppressors.[77]The practice of giving asylum, helping people seeking refuge and protecting them from danger, has a long history. It was originally a religious obligation, common to many religions, to help strangers in need. Early concepts of asylum were always linked to a holy place or proximity to that place.[78]

The origin of the 'right to seek and to enjoy asylum from persecution in other countries' can be traced back to the 'right of sanctuary' in ancient Greece, imperial Rome and early Christian civilization.[79] Etymologically the word "Asylum" originated from Latin counterpart of the Greek word '*asylon*' which means the freedom from seizure. Historically asylum has been regarded as a place of a refuge where one could be free from the reach of a pursuer.[80] In other words, it refers to what is inviolable, and as such it invokes a higher power that offers protection.

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[76] Para 9(1)(1) of the memorandum of understanding between United Kingdom and Rwanda.
[77] Schnyder F *the status of refugees in international law* (A.W. Sijthoff-Leyden, 1966), p. 9.
[78]Anon, "history of asylum", accessed at https://www.asyluminsight.com/history-of-asylum#:~:text=The%20practice%20of%20giving%20asylum,or%20proximity%20to%20that%20place. [22/02/2023].
[79]Goldman R and Martin S, "International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law", (1983) 5(3) *HRQ* 302, p.309–310
[80] Roman B, *supra* note 35.

The sanctity of the temple or church provided a sanctuary from manmade jurisdiction and provided religious protection, or altar, protection. As the notion of state sovereignty began to grow, the power to grant asylum shifted from religious institutions to nation states.[81]

The right to asylum has long been religiously recognized. However, asylum has thus been inextricably involved in and affected by the development of certain branches of international, regional and municipal law, those are for instance, the law of asylum, the law relating to the treatment of aliens as the law of extradition.[82]

2.2.2. **Asylum as a matter of law**

It was only in the early 20th century that asylum began to be recognised as a human right in international legal instruments. This culminated in the UDHR and marked the acceptance of the ideological shift from asylum as a tool of the state to asylum as an individual right. Notably, initial drafting proposals that incorporated a correlative obligation 'to grant asylum' were not accepted.[83]By referring to Grotius and Suarez were of view that the right of asylum is the natural right of an individual entailing a corresponding state duty to grant asylum.[84]

The situation changed the image and the significant development of concept of asylum and refugee evolve during the 1stWW. Though the author mentioned the 1st but also the 2ndWW had much influence to the evolution of refugee law. It is in this regard that, after WW I the League of Nations commissioned the Norwegian explorer and humanitarian *Fridtjof Nansen* to assist in the

[81] Rabben L, *Sanctuary and asylum: a social and political history* (University of Washington Press, 2016), pp. 14-24.
[82] Schnyder F, *supra* note 78.
[83]Plender R and Mole N, 'Beyond the Geneva Convention: constructing a *de facto* right of asylum from international human rights instruments', in Nicholson F and Twomey P (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* , (Cambridge University Press, 1999), p. 81
[84] Paul Weis, "The United Nations Declaration on Territorial Asylum*",* 92 *CAN. Y.B. INTL L.* (1969), p.136.

repatriation of Russian refugees and other prisoners of war.[85] These steps were accompanied by numerous inter-governmental arrangements concluded in the 1920s which subsequently led to the adoption of 1933 *Convention relating to the International Status of Refugees*.[86]

The mass expulsions and persecutions before, during and after the Second World War, then, have shaped the contours of international refugee law until this very day. In 1938, a number of states*inter alia*:Great Britain and Ireland agreed on the *Convention concerning the Status of Refugees coming from Germany*.[87] During the Second World War, the emerging United Nations founded two agencies tasked with the relief of the European refugees namely: the United Nations Relief and Rehabilitation Administration established in 1943 and respectively the International Refugee Organization established in 1947. that preceded the Office of the UNHCR established in 1950.[88]

The most decisive development was the adoption of the 1951 refugee convention.[89]It has considerably accommodated with that respect, the Arrangements of 12 May 1926 and 30 June 1928, as well as those made under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.[90]

It has generally been described as 'the most comprehensive legally binding international instrument' in universal refugee law[91]and its key provisions remain applicable until this very day.

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[85] Crisp, 'Humanitarian Action and Coordination', in Weiss T and Daws S (eds), *The Oxford Handbook on the United Nations*, (Oxford University Press, 2007), pp. 479-481.
[86]Janik R, "A very short history of international refugee law", accessed at https://ralphjanik.wordpress.com/2017/11/04/a-very-short-history-of-international-refugee-law/#_ftn1[10/03/2023].
[87]*ibidem*
[88] Crisp, *Op.cit*, p. 481.
[89]Convention Relating to the Status of Refugees, *Supra* note 27.
[90]Ogata S, 'Foreword to the 1951 Geneva Convention's travaux preparatoires analysed with a commentary by P Weis', accessed at http://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html[10/03/2023].
[91] ibid.

This convention has influenced the development of the current refugee regime both regionally and locally. To that end, around 1969, Africa has adopted its contextualized convention and later on 1984 Cartagena declaration has been developed respectively to shape the American refugee system, followed by other continents worldwide.

According to, Ed West, that the 1951 United Nations relating to the Refugee Convention, did not solve any issue because the convention does not include a right to seek asylum in the same way as the UDHR, but instead protects asylum seekers against *refoulement*. Therefore, this Convention reflects the political context of the time and is a territorial solution.[92]

The refugee law has been developed over time. As mentioned above, article 14 of the UDHR of 1948 have opened the international community's mind to develop an universal instruments. That is 1951 convention relating to the status of refugee. However, such instrument did not respond the mixed flows of those in needy including migrants, forced displacement and other new drivers of forced displacement. Therefore, in 1967, the protocol was adopted to get the instrument updated.

Enormous literature argued that, 1951 convention pinpointed the baseline principles and restrictively delineate who is a refugee, it also protects a refugee against *refoulement*. However, the scope of refugee convention has long been identified as a limiting factor, narrow interpretation and exclude certain categories of people who can be at risks such gander. Such a convention was ostensibly made to fit western interpretation of refugee regime.

The need for modernized interpretation and application of the convention has led the international community to adopt regional refugee regimes that fit the regional context. Those are for instance

[92] Weis P, "Human rights and refugees" , 1 *Israel Yearbook on Human Rights* (1972). p.14.

the adoption of AU refugee convention, the Dublin regulation as well as Cartagena declaration to mention few.

The most international and regional legal instrument under which this right of asylum is provided are the following: One can say the Arab charter on human rights in Article 28 provides that every *citizen* who is subjected to persecution on political grounds has the right to seek and *obtain* asylum in any Arab country in accordance with the law and the provisions of this Charter.[93] Asylum rights protection is also found under the OAU refugee Convention which obligates it members to use their best endeavors *consistent with their respective legislations* to receive refugees.[94]

2.2.3. European Countries Mechanism of *non-entrée*

There is an ever-expanding array of ***non-entrée*** policies which rely on law to deny entry to refugees. These include the classic approach of imposing visa controls on refugee-producing states, enforced by carrier sanctions; deportation chains set in motion by ‘‘first country of arrival’’ and ‘‘safe third country’’ rules.

A second mechanism of ***non-entrée*** is the deportation chain that can be set in motion by ‘‘first country of arrival’’ and ‘‘safe third country’’ rules. Taken together, ‘‘first country of arrival’’ and ‘‘safe third country’’ rules have traditionally posed a legal barrier to the entry into Europe of very large numbers of refugees.[95] For example, during the early 1990s invocation of these rules resulted in the return of refugees by Greece to Turkey, Libya, and the Sudan, from where some were then returned to their countries of origin.[96] Similarly, Norway returned Kosovo Albanian asylum-

[93] Art. 28 of Arab Charter on Human Rights 2004.
[94] Article II (1) OAU Convention, *supra* note 55.
[95] Hathaway J, *Supra note 68*, p. 293.
[96] Papassiopi-Passia, Z, “International Academy of Comparative Law National Report for Greece”, 1994, p. 59.

seekers to Sweden (where their claims had already been rejected), with the knowledge that they would be returned by Sweden to Serbia.[97]

2.3. Individual universal human rights

The right to seek asylum is found in the Universal Declaration of Human Rights and the right to enjoy asylum is found in numerous international instruments. Even though States which seek to persecute their citizens often attempt to prevent those persons from leaving the state, the right to leave a state is a central element of international protection.[98]

The first aspect of the right of asylum is the right of an individual to seek asylum. This is an individual right that an asylum-seeker has *vis-à-vis* his state of origin.[99] Essentially, it is the right of an individual to leave his country of residence in pursuit of asylum. The basis for this right is the principle that "a State may not claim to 'own' its nationals or residents."[100]

Normally, this right is stipulated in several international and regional instruments. For instance, Universal Declaration of Human Rights asserts that, everyone has the right to leave any country, including his own.[101] Moreover, the Declaration has been said to be an authoritative expression of the customary international law of today in regard to human rights.[102] The right of an individual to leave his country can thus be seen as a part of modem customary international law. With the adoption of the International Covenant on Civil and Political Rights, the right of an individual to

[97] Tjore G, ‘‘Norwegian Refugee Policy,’’ 35 (193) *Migration* (2002), p.203.
[98] Council of Europe: European commission on human rights, *the right to leave a country*, Strasbourg, 2013, accessed at http://www.coe.int/t/commissioner/source/prems/prems150813_GBR_1700_TheRightToLeaveACountry_web.pdf[12/03/2023].
[99]Grahl-Madsen A, *Territorial Asylum*, (Almqvist & Wiksell International, 1980), p.50.
[100] Boed R, *The state of the right of asylum in international law*, (university of Lawrence), P. 6
[101] See art.13 (2) of the Universal Declaration of Human rights, *supra* note 15.
[102]Waldock H, **“**General Course of International Law”*106 Recueil des Cours* (1962), pp.32-33 **.**

leave his country became written law binding on the states parties to the Covenant. The Covenant states that, "[e]very one shall be free to leave any country, including his own".[103]

2.4. The role of states in asylum playground

Actually, on one hand international law recognizes a general right to exit from any state where individuals reside in, however, on the other hand it does not recognize a general right of entry in any country.[104] This is because UDHR recognizes that 'everyone has the right to freedom of movement and residence within the borders of each state'[105] and in its paragraph (2) it is read that 'everyone has the right to leave any country, including his own, and to return to his country'.[106] In other words, this means that an individual has no right to entry into the country of his/ her choice rather what he/she enjoys is only the right of exit.[107] Consequently, as a matter of fact under international law a State has the right to control entry of non-nationals into its territory.[108]

It is recognized that asylum is indeed a right that a state has to grant if it so wishes in the exercise of its sovereignty, rather than the right of person to be granted with it as it has been described in previous part of this section. Hence, the legal nature of asylum as a right of individuals remains one of the most controversial matters in refugee studies.[109]

The European parliamentary assembly on the draft for an article relating to the right of asylum to be included in the Second Protocol to the Convention for the Protection of Human Rights and

[103] See art. 12(2), International Covenant on Civil and Political Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Mar. 23, 1976.
[104] Kuosmanen J, *the Right to Asylum and its Protection* (University of Edinburgh, 2012), p.5.
[105] Art. 13 , Universal declaration on human rights, *Supra* note 15.
[106] Id. art. 13 para.2.
[107] *Ibidem.*
[108] *Abdulaziz, Cabales and Balkandali v. UK*, Judgment (merits) of 28 May 1985, Series A, No. 94, para.38
[109] Gil-Bazo M, *supra* note 46.

Fundamental Freedoms, it recommended that the political refugees should be accorded asylum in member states considering the tradition. Therefore, it was also recommended to give legal stature to the practice of granting asylum and they found that it is desirable that member States should confer upon such persons a right to seek, receive and enjoy asylum to the extent compatible with safeguarding their own legitimate interest.[110]Hence, European parliament recommended the following article to be included in the protocol on *ECHR:*

1. *Everyone has the tight to seek and to enjoy in the territories of High Contracting Parties asylum from persecution.*

2. *This right may not be invoked in the case of prosecutions genuinely arising from non-political offences.*

3. *No one seeking or enjoying asylum in accordance with paragraphs 1 and 2 of this Article shall, except for overriding reasons of national security or safeguarding of the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.*

4. *If a High Contracting Party rejects, returns or expels a person seeking or enjoying asylum in accordance with paragraphs 1 and 2 of this Article, it shall allow such person a reasonable period and the necessary facilities to obtain admission into another country.*[111]

[110] Anon, "Parliamentary assembly, right to asylum, recommendation 293 (1961) Assembly debate on 26th September 1961, Report of the Legal Committee", accessed at http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14330&lang=en[10/03/2023].
[111]*Ibidem.*

The idea of an individual's right to seek asylum developed alongside the more traditional concept of asylum as something states had the right to grant individuals. This is proven by the prohibition of signatory states from denying entry to refugees of neighboring states and from expelling refugees within their borders. The granting of asylum came to be understood not as a discretionary prerogative power, but as an obligation of states.[112]

States now had a responsibility to grant asylum to stateless persons or people persecuted by their own state. However, a further revision to this new understanding of right of asylum was included in article 14 of UDHR, whereby individuals were not guaranteed a right to receive asylum, but had a right to apply.[113]

2.5. Constitutional perspectives

Asylum is currently entrenched under the constitutions of most of the countries- article 28 of the constitution of Rwanda, see also article 18 of the UK constitution.[114] The value of this institution as one of the underlying principles in legal orders worldwide is clear. This situation represents a continuation in the ancient normative character of the institutions to inform conceptions of society for the wellbeing of individuals.[115] The modern literature argued Various scholars have drawn much about the constitutional nature of right to asylum such Grahl-Madsen believed that constitutions around the world laid down a more or less perfect right of asylum for individuals.[116]

[112] Hathaway J, *supra* note 686.
[113] art.14, Universal Declaration on Human Rights , *Supra* note 15.
[114] Every person has the right to seek and be granted asylum in the United Kingdom in accordance with the law of the United Kingdom and international conventions, if they are being pursued for political offences. 18.2 In no case may an alien be deported or returned to a country, regardless of whether or not it is their country of origin, if in that country their right to life or personal freedom is in danger of being violated because of their race,
[115]O'Boyle M and Lafferty M" Constitutions and General Principles as Sources of Human Rights Law" in Shelton D (ed), *The Oxford Handbook of International Human Rights Law* , 2013.

[116]Grahl-Madsen A, *Supra* note 100, p.24.

This right of asylum is also granted by Rwandan constitution which provides that the right to seek asylum is recognized under conditions determined by law.[117] Even though the right to asylum is provided in some countries' constitutions, the way the relevant provisions are crafted not meant to create legal obligations to these states. For example, German constitution provision on right to asylum was not written into the Constitutions out of a sense of legal obligation but rather out of the desire of the drafters, some of whom had themselves fled the Nazi regime, to place asylum "above changing political considerations of conveniences and public interest.[118]

In nutshell, some states give effect to their prerogative to grant asylum by creating in their municipal laws the right of an individual to asylum, such practice is far from general and, even where followed, does not constitute *opinio juris*.[119] It is therefore evident that the right of asylum in international law today consists of only the two components of rights namely (1) the discretionary power of a state to grant asylum, and (2) the right of an individual to seek asylum.[120]

Indeed the constitution rank of asylum speaks to its nature as ruling principle of the state itself.This normative value of asylum was elaborated upon by the Costa Rican Supreme Court in a judgment of 1998. The Court stated that a decision on the case in question required an analysis of the constitutional nature of asylum. The Court observed that:

"asylum is a legal principle of higher rank that ... turns the State's territory into an inviolable space for the protection of individuals of other countries when they are persecuted by reason of

[117] Art 28, The constitution of republic of Rwanda of 2003 as revised in 2015.
[118] Hailbronner H, *Molding a New Human Rights Agenda*, (WASH. Q. 1985), p.183.
[119]Goodwin-Gill, *the Refugee in International Law, (*Oxford University Press, 1998), p.121
[120] Grahl-Madsen, *supra* note 100, p.2.

their political or ideological preferences or actions, a principle enshrined in article 31 of the Constitution, and that as such it constitutes a fundamental right [emphasis added]".[121]

To sum up, international after having found that, a number of African origin seeking asylum in Europe and particularly in UK shall be unwillingly relocated to Rwanda. The principle underlying the refugee protection are being observed and respected in the country of relocation. It is clear that right to asylum seekers as protected under international human rights instruments and refugee laws should be observed. The right to asylum is fundamental right that can be accorded to every individual regardless of his/her community of origin.

Thus the central issue remains whether what have been planned to be done by UK towards African asylum seekers does not constitute the violation of international states obligation for the protection of person taken as asylum seekers. While much of politicians and UK house of lords have been critical to the agreement, the judicial position has proven otherwise. Thus, it is apart from describing the right to asylum and corresponding concepts in this chapter, the next chapter explores more on obligations of states towards asylum seekers vis-à-vis human rights protection in international law.

[121]*Leiva Durán v Ministro de Relaciones Exteriores y Tribunal Penal del Primer Circuito Judicial de San José*, Costa Rica Supreme Court, decisión No 6441–98, 4 Sept 1998.

CHAPTER THREE: OBLIGATIONS OF STATES TOWARDS MIGRANTS AND UK – RWANDA AGREEMENT

The New York declaration which was adopted by United Nations Member States reaffirmed that, all migrants are rights holders, regardless of status[122], and committed to improve the integration and inclusion of all migrants, with particular attention to access to education, health care, justice and language training.[123]Migrants can be both regular and irregular and the causes may vary accordingly.

While the MO between Rwanda and UK was generally made to curb the issue of asylum seekers and irregular migrants arriving at UK, There are many different situations that can cause an individual to become an irregular migrant such as when their asylum application is turned down.[124]

The right to asylum is not only protected under international human rights instruments, but also the constitutions of various countries also recognize such rights. It for instance under article 28 of the Rwandan constitution that provides that the right to seek asylum is recognised under conditions determined by law.[125]Globally non-binding UDHR provides for the right to seek and to enjoy in other countries asylum. Moreover, article 12 (2) of ICCPR has indirectly recognized such rights under the following wording, Everyone shall be free to leave any country, including his own.

According to Ed West,[126] the "concept of asylum [is] an outdated and unworkable relic from the mid-20th century." To that end, beside those universal protection of the right to asylum, that

[122] Para. 5, New York Declaration for Refugees and Migrants, *supra* note 7.
[123] Ibid. para. 39.
[124] IOM, "World Migration Report 2022", accessed at https://publications.iom.int/books/world-migration-report-2022 [15/04/2023].
[125] Art. 28, The Constitution of Republic of Rwanda of 2003 revised in 2015.
[126]Ed West, "It's not the Home Office's fault – the UN Convention on Refugees is not fit for purpose," *The Telegraph (*2011).

imposes obligation to states that are parties to the respective instruments, the regional contexts have been developed to make the respective regions fit their specific regimes. According to Cole Phil, The 1951 convention possesses three main challenges namely: "*the scope of the definition, what protection it offers, and its status in international law*".[127]

Within the framework of international law, there exists the concept of international refugee law. These terms are inextricably linked based on the fact that refugees are always fleeing from states wherefrom, a well-founded fear of persecution exists, to other safe countries. Notably, states are the primary subjects of international law, which encompasses various fields, and hence the evolution of the term international refugee law to deal only with the refugee aspect of international law. Additionally, refugees predominantly find protection in international law to the extent that, even where states have enacted laws dealing with refugee protection, the same is heavily influenced by the edicts and dictates of international law[128].

3.1 Principles and rights applicable to migrants and Asylum

At the heart of the international refugee law regime are the fundamental principles of asylum, *non-refoulement*, non-discrimination and protection. Critically, the international community has failed to reconcile the details of the deal to the core principles of refugee law. This section deals furthermore with the refugee law principles and apply them to agreement to assess their conformity to the agreement.

[127] Cole P "what's wrong with the refugee convention ?" 6 *E-international relations* (2015).
[128]Goodwin-Gill G and McAdam J, *Supra* note 59, p. 452.

3.1.1. Principle of *Non- refoulement*

The principle of *non-refoulement* constitutes an essential component of asylum and international refugee protection.[129]Under international human rights law, the principle of *non-refoulement* guarantees that no one should be re-turned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm.[130]The principle of *non-refoulement* implies that asylum seekers should not be returned to a third country for a determination of their claim when the procedural safeguards of the "right to seek" are not met and when there is thus the risk of indirect *refoulement*. This is the case of APA, and here the *non-refoulement* should be extended from refugee legal context to apply migrants related convention.

While *non-refoulement* is concerned with the risk of a human rights violation in the state to which a person is deported, there are bars to the removal that are imposed by the violation of a right in and by the state that is deporting. Thus, although the prohibition of expulsion in the ICCPR is confined to aliens lawfully on the territory, the HRC notes in relation to expulsion in General Comment 15 that "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.[131]

The concept of *non-refoulement* is a concept thatprohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened

[129]UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, accessed at: https://www.refworld.org/docid/437b6db64.html [21/03/2023].

[130] OHCHR "the principle of *Non-refoulement* under international human rights law", accessed at https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf [21/01/2023]

[131] HRC, 'General Comment No. 15: The Position of Aliens under the Covenant' (11 April 1986).

on account of race, religion, nationality, membership of a particular social group, or political opinion.[132] This principle constitutes the cornerstone of in refugee protection. It is enshrined in Article 33 of the 1951 Convention, which is also binding on States Party to the 1967 Protocol.[133] In other words, *Non-refoulement* is a principle of customary international law prohibiting the expulsion, deportation, return or extradition of an alien to his state of origin or another state where there is a risk that his life or freedom would be threatened for discriminatory reasons.[134]

It should be acknowledged that it is now accepted that *non- refoulement* has attained the status of customary international law; nonetheless, this is still debated by some states and hence a less secure footing on which to base a protection need.[135]

> *"No Contracting State shall expel or return (''refouler'') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".*[136]

The principle of *non-refoulement* was emerged by the development of refugee protection law. It is under article 33 of 1951 Geneva convention on status of refugee which the application of this principle is aired from. The principle of *non-refoulement* is the cornerstone in international refugee protection regime.[137] Art. 33 of the Refugee Convention is the primary response of the international community to the need of refugees to enter and remain in an asylum state. In *Khawar*

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[132]Sebesta J, "the principle of *non-refoulement*, what is its standing in international law" (2018), accessed at http://www.elaw.cz/clanek/the-principle-of-nonrefoulement-what-is-its-standing-in-international-law, [16/03/2023].
[133] Art. I(1) of the 1967 Protocol provides that the States Party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention.
[134] Sebesta J, *supra* note, 133.
[135] Cathryn C and Michelle F, "*Non- Refoulement* as Custom and Jus Cogens? Putting the Prohibition to the Test" (2015) 46 *NYIL* p. 273.
[136] Art. 33 (1) of refugee convention, *Supra* note 27.
[137]Yonekawa M and Sugiki, A (Eds.), *Repatriation, insecurity and peace: a case study of Rwandan refugees* (Sipringer, 2020), p. XXii

case, Justices McHugh and Gummow of the High Court of Australia highlighted the ambiguous relationship between *Non-refoulement* and right of entry. They pronounced that *''[a]lthough none of the provisions in Chapter V [of the Refugee Convention] gives to refugees a right to enter the territory of a contracting state, in conjunction they provide some measure of protection''*.[138]

According to Hathaway, the duty of *non-refoulement* is not, however, the same as a right to asylum from persecution. He noticed that, even the (non-binding) Universal Declaration of Human Rights provides only that ''[e]veryone has the right to seek and to enjoy in other countries asylum from persecution'' a formulation which stops distinctly short of requiring states to grant asylum.[139] Perhaps most tellingly, not even a vague formulation of this kind made its way into the (binding) Covenant on Civil and Political Rights. This treaty provides only that ''[e]veryone shall be free to leave any country, including his own''[140]

The duty of *non-refoulement* only prohibits measures that cause refugees to ''be pushed back into the arms of their persecutors[141]. However, according to *Weis* the provision of article 33 does not affirmatively establish a duty on the part of states to receive refugees, rather it was said to be ''a negative duty forbidding the expulsion of any refugee to certain territories but [which] did not impose the obligation to allow a refugee to take up residence''.[142]

It deems that the language of the convention directs the applicability of this principle to recognised refugees.[143] Even though the standards defined also in the provision of Article 31 of the 1951

[138]*Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (Aus. HC, Apr. 11, 2002),
[139] Art. 14(1) Universal Declaration on Human rights , *Supra* note 15.
[140] Art. 12 (2), International Covenant on Civil and Political Rights, *supra* note 104.
[141] Statement of Mr. Chance of Canada, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, P. 7.
[142] Lauterpacht E and Bethlehem D, ''The Scope and Content of the Principle of *Non-Refoulement*,'' in E. Feller *et al*. eds., *Refugee Protection in International Law 87*, p.33.
[143] SChimni. B, "from resettlement to involuntary repatriation: towards a critical history of durable solutions to refugee problems", 23(3) *refugee survey quarterly*(2004), p. 65.

refugee convention[144] do not cover all aspects of the treatment of asylum seeker but the latter should be treated in accordance with the minimum basic human standards[145] when they have been admitted temporarily to a country pending arrangement for a durable solution.

Non-refoulement has been technically used under refugee legal system. With respect to the agreement between Rwanda and UK dubbed "Asylum Agreement Partnership", it involves both refugees and migrants that are claiming asylum in UK. It is of paramount importance to note that, refugees is a category of migrant under irregular situation. Hence, in accordance to New York declaration, refugees and migrants have the same universal human rights and fundamental freedoms.[146]

The APA has to that end obligated Rwanda, to ensure that at all times it will treat each Relocated Individual, and process their claim for asylum, in accordance with the Refugee Convention, Rwandan immigration laws and international and Rwandan standards, including under

[144] This article contains provisions regarding the treatment of refugees who have entered a country without authorization and whose situation in that country has not yet been regularized

[145] Among those standards, there included the following: **(a)** they should not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful; they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order; **(b)** they should enjoy the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights; **(c)** they should receive all necessary assistance and be provided with the basic necessities of life including food, shelter and basic sanitary and health facilities; in this respect the international community should conform with the principles of international solidarity and burden-sharing; **(d)** they should be treated as persons whose tragic plight requires special understanding and sympathy. They should not be subjected to cruel, inhuman or degrading treatment; **(e)** there should be no discrimination on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity; **(f)** they are to be considered as persons before the law, enjoying free access to courts of law and other competent administrative authorities; **(g)** the location of asylum seekers should be determined by their safety and well-being as well as by the security needs of the receiving State. Asylum seekers should, as far as possible, be located at a reasonable distance from the frontier of their country of origin. They should not become involved in subversive activities against their country of origin or any other State; **(h)** family unity should be respected; **(i)** all possible assistance should be given for the tracing of relatives; **(j)** adequate provision should be made for the protection of minors and unaccompanied children; **(k)** the sending and receiving of mail should be allowed; **(l)** material assistance from friends or relatives should be permitted; (**…)**

[146] Para. 6 of New York declaration, *supra* note 7.

international and Rwandan human rights law, and including, but not limited to ensuring their protection from inhuman and degrading treatment and *refoulement*.[147]

In the context of initiatives involving the transfer of migrants particularly asylum-seekers from one country to another for the purpose of processing their asylum claims, transferring States retain responsibilities under international refugee and human rights towards transferred asylum-seekers.[148] In the current case, neither the arrangement entered into between the UK and Rwanda nor the fact of transfers conducted under it would relieve the UK of its obligations under international refugee and human rights law towards asylum-seekers transferred to Rwanda.[149]

At a minimum, and regardless of the arrangement, thetransferring State (in this instance the UK) would be responsible for ensuring respect for the principle of *non-refoulement*.[150]Theobligations of *non-refoulement*would be triggered in case of a risk of persecution or ill-treatment in the state towhich the asylum-seekers would be transferred *(direct refoulement*), or of onward removal toanother country where they could face such risks (*indirect refoulement*).[151]

3.1.1.1.Non-refoulement as a principle of customary international law

It is frequently argued that the duty to avoid the *refoulement* of refugees has evolved at the universal level beyond the scope of Art. 33 of the Refugee Convention.[152]The principle of non-*refoulement*now forms part of customary international law.[153] Accordingly, even States that are

[147] Clause 9.1.1. of MOU.
[148] UNHCR, *supra* note 23.
[149] Ibid,
[150]UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, p3.
[151] UNHCR, *supra* note 23.
[152]Kälin W Caroni M, and Heim L, "Article 33, para. 1," in Zimmermann A ed., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary 1327* (2011), p.1.
[153]Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol (n 49) Preamble, para. 4, UNHCR, 'The Principle of *Non-Refoulement*as a Norm of Customary International Law' para. 5;

not parties to the relevant refugee and human rights treaties are bound by the principle and, on the whole, respect it.[154] in 2001, States parties to the Refugee Convention acknowledged that the principle of *non-refoulement*was 'embedded in customary international law' and a year later all the UN member States unanimously affirmed in a General Assembly resolution the importance of the principle generally.[155]

Costello and Foster similarly contend that, the principle of *non-refoulement* embodied in a wide range of treaties has the same fundamental core, albeit expressed in slightly different terms across different instruments.[156] To that end, contextually, In the 2009 Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa, member States of the African Union undertook 'to deploy all necessary measures to ensure full respect for the fundamental principle of *non-refoulement* as recognised in International Customary Law as enunciated in Article 33 of the 1951 refugee convention and in Article 2 of the 1969 OAU refugee Convention.[157]

3.1.1.1.1. Opinion juris

Some authors argued that *non-refoulement* is a mechanism to implement norms rather than a norm itself.[158] Lauterpacht and Bethlehem ground their claim of *opinio juris* for a universally binding duty of *non-refoulement* on a combination of, first, the "near-universal acceptance"[159] of a *non-refoulement* duty in various UN and regional treaties; and second, the unanimous adoption by the General Assembly of the 1967 Declaration on Territorial Asylum, coupled with the absence of

[154]Costello C and Foster M, "*Non-refoulement* as Custom and Jus Cogens? Putting the Prohibition to the Test," in M. den Heijer and H. van der Wilt eds., [2016] *Netherlands Yearbook of International Law* 273
[155]Loper K "Human Rights, *Non-refoulement*and the Protection of Refugees in Hong Kong" 22 *International Journal of Refugee Law*(2010), p. 404
[156]Costello and Foster, "Custom and Jus Cogens," at 283–285.
[157] Goodwin-Gill G, McAdam J and Dunlop E, *supra note 10*, p. 514.
[158] Hathaway J, *the rights of the refugees under international law*, 2nd ed(Cambridge university press, 2021), p. 441.
[159]Lauterpacht E and Bethlehem D, "The Scope and Content of the Principle of *Non-refoulement*," in Feller E, Turk V and Nichholson F (eds), *Refugee Protection in International Law: UNHCR Global consultation on international protection*, (Cambridge University Press, 2003), p. 209.

express opposition to the principle of *non-refoulement* by the states which neither signed a relevant treaty nor were present in the General Assembly when the 1967 declaration was adopted.

The unanimous adoption by the General Assembly of the 1967Declaration on Territorial Asylum, does have a common substantive core. Unfortunately for their project, the common core is limited to persons seeking "asylum from persecution," a group far smaller than that said by them to benefit from the customary norm.[160]

3.1.1.1.2. Consistent states practices

Even if *opinio juris* could be located, the next question that must be addressed is whether there is evidence of consistent and relatively uniform state practice that aligns with the putative norm (the second essential element for establishment of a customary law).[161] Sadly, there is in fact very significant empirical evidence that does exactly the opposite.[162]

As the analysis earlier in the chapter makes clear, there is a long-standing and extensive pattern of *refoulement* across the world, including complete border closures; unilateral, bilateral, and multilateral interdiction efforts; refusal of access to protection procedures; removal of refugees in consequence of practical deficiencies in processing systems; thinly disguised *refoulement* under the guise of "voluntary" repatriation; the creation of protection gaps by adoption of *non-entrée* policies, including visa requirements, first country of arrival rules, safe third country systems, and designation of countries of origin as presumptively safe; and formal excision of territory so as to avoid protection obligations.[163]

[160]UNGA Res. 2312 (XXII), adopted Dec. 14, 1967, preamble.
[161]Hudson M, 26 Year Book of the International Law Commission (1950).
[162] Hathaway J , *Supra* note 159, p. 450-454.
[163] Ibid.

3.1.2. Principles of asylum and protection

These principles are intertwined in the sense that once an immigrant has been granted asylum, protection ensues as a matter of right. Asylum connotes not only the welcoming of an asylum seeker to the frontiers of a new state, but also the protection granted by that state against any harm, specifically violation of human rights, and is linked to the goal of solutions.[164]

Under both the Refugee Convention and the UN General Assembly, Declaration on Territorial Asylum[165], member states are called upon to grant asylum and protection to persons fleeing their countries for reasons that they may be persecuted. The indication here therefore is that member states ought to, as a matter of right and priority receive asylum seekers and grant them protection, notwithstanding the manner of their arrivals. The present agreement, which is analogous to the one between the European Union and Turkey[166], as well as that between Australia and Nauru and Papua New Guinea[167], falls short of the principles of asylum and protection.

Further, under Article 3 of the UN General Assembly, Declaration on Territorial Asylum, where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State. That has not been the case with the UK as the consent of the United Nations or any of its agencies like the UNHCR has not been either sought or granted.

There has been no evidence from the UK government that the refugees it wishes to off-shore to Rwanda for asylum processing have failed to present themselves before the relevant authorities.

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[164] Wouters C, "International refugee and human rights law: partners in ensuring international protection and asylum", in Rodley N and Sheeran S (eds.), *Handbook on International Human Rights Law*, (Routledge, 2013), pp. 231-244.
[165] Article 2, the UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII)
[166] Anon, "what is the EU-Turkey deal?", accessed at https://eu.rescue.org/article/what-eu-turkey-deal [21/03/2023].
[167] Anon, "offshore processing" https://www.refugeecouncil.org.au/offshore-processing/ [21/03/2023].

The UK therefore has an obligation to not only welcome but also grant protection to the asylum seekers. The only option they have is to submit them to Refugee Status Determination in accordance with their domestic laws. On that score, the arrangement is not compatible with the principles of asylum and protection.

3.1.2.1. Protection of migrants unlawful in the country of asylum (non-expulsion)

The collective expulsion of aliens is prohibited. A removal order should only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned and it should take into account the circumstances specific to each case.[168]Among irregular migrants, many may indeed leave their country of origin for generalised economic conditions without those conditions being exacerbated by discrimination, or without circumstances precluding their removal outside the 1951 Convention and the Protocol or under wider *non-refoulement* obligations.[169]

Included among those irregular migrants may be rejected asylum seekers, who either lodged their application bona fide or who used an application for deceptive entry. Under international law, these individuals have no right to remain in a territory and may thus be removed. However, this is predicated on the existence of a system of refugee determination.[170]

[168] Guideline 3, Forced return twenty Guidelines adopted by the Committee of Ministers of the Council of Europe in 2005.
[169]Lehnann J "Rights at the frontier: border control and human rights protection of irregular international migrants" 3 *Goettingen Journal of International Law* (2011), p, 759
[170] Ibid.

There is however no right to be accepted into a particular country and every state has the right to regulate the entry of foreign nationals onto its own territory.[171] The exception to this is for refugees and others in need of international protection who enjoy the well-established and universally accepted right not to be returned to a country where they face a well-founded fear of persecution and thus get protected against *refoulement*.[172] A further exception to this is the right of a person, including an irregular migrant, not to be returned to a country where they will, for example, be subjected to torture or inhuman or degrading treatments or punishment, or where they risk, under certain circumstances, losing their life.[173]

With respect to refugees, art. 31 (2) of the refugee convention prohibits the state parties to remove the asylum seekers (by implication) on their countries on the reason that they entered unlawfully. The Contracting States shall not apply to the movements of [refugees coming directly from a territory where their life or freedom was threatened] restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.[174] The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.[175]

The APA was expressly and strongly by implication concluded with the aim of deterring the migrants in irregular situation to enter UK (i.e. irregular migration).[176]According to UN special rapporteur, the beneficiaries in the agreement are those people seeking international protection, fleeing conflict and persecution, and thus subject to right to seek and enjoy asylum as fundamental

[171] Committee on Migration, refugees and population, "Human Rights of irregular migrants, 2006" , accessed at https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11204&lang=EN [13/05/2023]
[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] Art. 31 (2), convention Relating to the Status of Refugees, *Supra* note 27.
[175]Hathaway J, *Supra* note 159, p. 963.
[176] Para. 7 of the preamble of MOU between UK and Rwanda.

tenet of international human rights and refugee law.[177] UK law society has advised that the APA would make profound and irreversible changes to the lives of refugees and migrants sent to Rwanda. However, argued that the safeguards in the deal are not binding or enforceable, and thus domestic and international law requirements do not apply to them.

3.1.3.Principle of Non-Discrimination

The Charter of the United Nations[178] and the Universal Declaration of Human Rights have affirmed the principle that humanbeings shall enjoy fundamental rights and freedoms without discrimination.[179]Most importantly,Almost if not all international, regional[180] as well as nation human rights system recognise this principle, including European convention on Human rights which prohibits discrimination under article 14.[181]

The principle of non-discrimination is constitutional recognized right worldwide. For example article 16 of the constitution of republic of Rwanda protects the persons from discrimination in addition to that being a fundamental principle covered by article 10 of the same. on the other hand, various universal convention and regional instruments embedded such principle in their respective texts, such as ICCPR under article 26, ICSCR under article 2 (2), see also art. 7 of UDHR to mention few.

In the context of migrants as far as the APA is partially concerned, the international instrument of the most direct relevance to irregular migrants is the United Nations International Convention on

[177] OHCHR, "UN expert urges UK to halt transfer of asylum seekers to Rwanda", accessed at https://www.ohchr.org/en/press-releases/2022/06/un-expert-urges-uk-halt-transfer-asylum-seekers-rwanda [12/04/2023].
[178] Art. 1 (4), Charter of United Nations (1945).
[179] Art. 2, Universal Declaration on Human Rights , *Supra* note 15.
[180] OAU convention governing specific aspect of refugee problems in Africa, *Supra* note 55.
[181] European Convention on Human Rights, [Art. 14].

the Protection of the Rights of All Migrant Workers and Members of Their Families. To that end, article 7 of CMW, reads as follow:

> "*States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status*."[182]

Bearing in mind the Brexit direct effect, the Stockholm programme strongly advocated for the protection of migrants and asylum seekers in equal manner under EU meaning in the following wordings;

> *"It is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome".*[183]

With respect to the APA and in relation to protection issues,The development of a migrant Policies and laws on Asylum, consideration should be taken on a full and inclusive application of the 1951 refugee convention and other relevant international treaties.[184]Hence apply the protection resulting

[182] Art. 7, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note.
[183] European Council, The Stockholm programme- an open and secure Europe serving and protecting citizens (2010/C 115/01., p. 35.
[184] Ibid.

from the 1951 refugee convention should not be ignored since the agreement involves not only migrants but also asylum seekers. Thus, express prohibition of discrimination under its article 3 the said convention on either ground is henceforth important under this discussion.[185] The principle of non-discrimination constitutes the core principle in the development of international human rights law, migrants laws and primary international refugee law.

Migrants are protected against discrimination mainly and by implication on the basis of their entry status.[186]The agreement between Rwanda and UK reaffirms to be crafted and respecting the uphold of fundamental human rights and freedoms without discrimination as guaranteed by participants' national legislations. Moreover, the objective of the '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' (MoU) was "to create a mechanism for the relocation of asylum seekers whose claims are not being considered by the United Kingdom, to Rwanda.[187]

Alongside the MoU, the Home Office has set out in domestic policy that it will only remove to Rwanda those individuals whose asylum claims have been deemed 'inadmissible' on the basis that they could have claimed asylum in another country through which they passed *en route* to the UK.[188] However, this has been critical since the MOU shall not apply to all migrants or asylum seekers that arrive to UK as to whether it shall not discriminate in the context of entry status .

[185]Art. 4 , Convention Relating to the Status of Refugees. *Supra* note27.
[186] Art. 22, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 3.
[187] Clause 2.1. of the MOU.
[188]Anon " Refugee and Migrants Children's Consortium" https://committees.parliament.uk/writtenevidence/110698/html/#_ftnref2 [16/05/2023].

In state observations, the Committee has considered asylum procedures as a remedy against *refoulement* and voiced concerns about the availability of effective remedy in fast-track procedures. It has explicitly demanded that asylum seekers have sufficient time to file a claim.[189] In any case, the principle of non-discrimination remains applicable, which has also been confirmed by an individual case before the Committee on the Elimination of Racial Discrimination.[190]

3.1.4. Right to asylum

From the so renowned mother of human rights, that is Universal declaration on human rights, right to asylum was formally recognized under article 14.[191] It is provided that Everyone has the right to seek and to enjoy in other countries asylum from persecution which may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.[192]This is reconfirmed by the Vienna Declaration and Programme of Action of 1993.[193]

The UNHCR has consistently voiced that claims of asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them.[194] This is also in line with states 'general practice.[195]In the context of initiatives involving the transfer of asylum-seekers from one country to another for the purpose of processing

[189]Persaud S, '*Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights*' (November 2006), p. 15.
[190] Ibid.
[191] Art. 14 of Universal Declaration of Human rights, *supra* note 15.
[192] Ibid.
[193] Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights, UN Doc A/CONF.157/23, 12 July 1993, para. 23.
[194]UNHCR, "Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, p. 1.
[195]NNHCR, "Protection Policy Paper: Maritime interception operations andthe processing of international protection claims: legal standards and policy considerations with respectto extraterritorial processing", (November 2010), accessed athttp://www.unhcr.org/refworld/docid/4cd12d3a2.html[16/03/2023].

their asylum claims, transferring States retain responsibilities under international refugee and human rights towards transferred asylum-seekers.[196]

Importantly, UNHCR Executive Committee Conclusion No. 15 requires that even efforts among states to avoid gaps in the assignment of protective responsibility should observe the principle that *"[t]he intentions of the asylum-seeker asregards the country in which he wishes to request asylum should as far as possible be taken into account*".[197]Normally, migrants and refugees processed in Britain may be housed in stricter reception centres.

While in the meaning of safe country of choice UK should prevails, however, the APA presents otherwise. The preamble of the agreement considered that, Rwanda has willingly been hosting and giving shelter to hundreds of thousands of refugees, offering adequate systems of refugee protection, consistent with the principles of international solidarity that underpin the international refugee protection system, and committed to the notion that cooperation and burden-sharing with respect to refugee status claimants can be enhanced. [198] The reference has been made to the previous successful arrangement such as the MoU with the African Union (AU) and UNHCR establishing the Emergency Transit Mechanism (ETM) aiming to provide life-saving protection, assistance and long-term solutions to extremely vulnerable refugees trapped in detention in Libya, through temporary evacuation to Rwanda.[199]

The critical point with respect to the APA in relation to safe country is the fact that, while the asylum arrangement allows the UK to send some people to Rwanda who would otherwise claim

[196] UNHCR, *UNHCR analysis of the legality and appropriateness of the transfer of Asylum-seekers under the UK-Rwanda arrangement*, 2022, .. 2.
[197]UNHCR Executive Committee Conclusion No. 15, "RefugeesWithout an Asylum Country" (1979)
[198] Preamble of the MOU between Rwanda and UK.
[199] Ibid.

asylum in the UK, those removed to Rwanda and whose claims were successful would not be eligible to return to the UK but could settle in Rwanda as refugees. On the other hand, those with unsuccessful claims could be removed from Rwanda to a country in which they have a right to reside and will not be eligible to return to the UK.[200]

3.2 General situation of asylum/migrants in UK[201]

According to UNHCR statistics, as of November 2022 there were 231,597 refugees, 127,421 pending asylum cases and 5,483 stateless persons in the UK. The war in Ukraine drove a large increase from the previous year.[202]The UK's increasing rate of irregular migrants and asylum claims has been alarming. The number shows that the asylum claims received in2022 were estimated at 72,027and marked double compared to 2019's. [203]

With respect to immigrants, According to official data, the home office declared the estimate entries of 29,000 migrants arrived in the UK on small boats only between June and November 2022.[204]There were 35,000 irregular entries into the UK in 2021, the vast majority (28,526) by boat, while others arrived by air on false documents and stowed away in lorries and containers. previously, the number of such immigrants was estimated at 8,404 ,.[205]

The origin countries of asylum seekers generate many stress factors that prompt people to flee and venture into long and dangerous journeys. These factors range from the brutality of the conflicts in Yemen and Syria to authoritarianism and poverty in Eritrea, diffuse violence and absence of

[200] Clause 10 of the MOU.
[201] Maya G, *Hostile environment : how immigrations became scapegoats*, (Verso Books, 2019), p. 64. .
[202] UNHCR, *Supra* note 23.
[203] Ibid.
[204] Duvell F, *Transit migration in Europe* (Amsterdam University Press, 2014), p. 153-5.
[205] Pinto T "The UK-Rwanda deal: Risky attempt to curb illegal migration", accessed at https://www.gisreportsonline.com/r/uk-rwanda-deal/ [23/03/2023].

economic prospects in Chad, unemployment in Egypt or a combination of all these factors, as found in countries like Sudan.[206]

The answer to the question of whether *"Does the UK have more asylum-seekers than most countries*?"[207]has been absolutely "No". The justification for this statement should be a digit comparison of asylum claims made in the UK's neighboring countries such as Germany, UNHCR report highlighted that in 2021, Germany received almost 127, 730 asylum applicants to make the highest receiver with that respect.[208]

Poor conditions in neighboring countries such as Greece and Italy consistently encourage migrants to move further, making these transit countries . For instance, the study by Jordan and Duvell points out that refugees in Greece who had struggled to survive whilst trying to obtain refugee status, some eventually gave up hope and moved on to the UK.[209]

3.3.1.1. Historical framework of migration in UK

The period following World War II witnessed the largest wave of migration.[210] From the literature review, it does not appear that migrants necessarily follow specific routes to reach countries in Northern Europe. As was argued above, migrants migrate within the EU. The literature suggests that based on the number of asylum applications Germany, the United Kingdom, and Scandinavia are top destinations .[211]

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[206] ibid.
[207] UNHCR "Asylum in UK" https://www.unhcr.org/uk/asylum-uk [31/02/2013].
[208] Ibid.
[209] Jordan B and Duvell F, *irregular migration: dilemmas of transnational mobility* (Edward Elgar, 2002), p. 76.
[210] Vrachnas J *et al.,Migration and refugee law principles and practice in Australia* (Cambridge University Press, 2005), p.14.
[211] Siegel M, Kuschminder K and de Bresser J, *irregular migration to Europe and factors influencing migrants' destination choices* (Mastrich University, 2015), p.50.

Like other countries across Europe, the United Kingdom found itself grappling with the 2015 influx of asylum seekers in the aftermath of the Syrian civil war and its negative sentiments surrounding hosting these refugees contributed to its Brexit decision i.e. decision to leave the European Union.[212] Though now separate from the EU, the United Kingdom still contributes to the idea of fortress Europe, described as Europe's restrictive approach towards migration management as well as its exclusionary policies to deny asylum seekers their rights.[213]

3.3. General content of UK –Rwanda Agreement

The UK and Rwanda bilaterally agreed upon an asylum transfer partnership in April 2022. It was initially signed to last for five years as detailed in memorandum of understanding. The agreement has been signed by UK home secretary and Rwanda's Minister of Foreign Affairs respectively on UK and Rwandan sides.

3.3.1 Background of the UK – Rwanda Agreement.

The UK has increasingly received irregular migrants at alarming rate amounting to stinging political problem. Taking back control of the borders was the key promises of the Brexit campaigners. The APA deal has been critically compared also a Brexit product to the extent that it is part of a broader restructuring of the British refugee and asylum law that was not possible

[212] Adam K and Booth W, "Immigration worries drove the Brexit vote. Then attitudes changed", accessed at https://www.washingtonpost.com/world/europe/immigration-worries-drove-the-brexit-vote-then-attitudes-changed/2018/11/16/c216b6a2-bcdb-11e8-8243-f3ae9c99658a_story.html [01/05/2023].

[213] Knott K, "Moving people changing places: fortress Europe" , accessed at https://www.movingpeoplechangingplaces.org/migration-histories/fortress-europe.html [23/04/2023].

when the UK was in the European Union.[214] The UK's migratory pressure has pushed the UK in searching for the response to the crisis and thus arrangement was born to that end.

On the date of 14 April 2022, the UK and Rwanda announced a migration and economic development partnership.[215]The UK-Rwanda agreement was signed on 13th April 2022 under the title of "Memorandum of understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Republic of Rwanda". It intends to transfer of asylum seekers who arrive irregularly to the United Kingdom to Rwanda, who will then assume responsibility for both the asylum procedure and protection of those found to be refugees.[216]

This asylum partnership arrangement was made in form of the Memorandum of Understanding not in form of a treaty as *per see*, to mean that it is neither a legally binding agreement (that imposes obligations to the parties) nor justiciable agreement before the courts of justice. However, it provides for the commitments of each party. The non-binding nature of the MoU is explicitly stated, in that the MOU"does not create or confer any right on any individual, nor shall compliance with this Arrangement be justiciable in any court of law by third-parties or individuals".[217]

Furthermore, Rwanda will assume responsibility for the return or channelling into migration streams of persons found not to be in need of international protection. The MoU is set to run for five years, with the possibility of renewal[218] and includes resettlement of an unspecified number of refugees from Rwanda to the UK.[219]

[214] Pinto T, *Supra* note 206.
[215]Home Office, "World first partnership to tackle global migration crisis" (14 April 2022), accessed at https:// www.gov.uk/government/news/world-first-partnership-to-tackle-global-migration-crisis [30/03/2023].
[216] Para. 2.1 of the MOU.
[217] Para 2.2. of the MoU.
[218] Clause 23 of the MoU.
[219] Clause 16 of the MoU

As highlighted above, it does provide for parties' commitments not obligations since it was made with MoU status. Under the MoU, UK has accepted to send some people to Rwanda who would otherwise claim asylum in the UK. In turn, Rwanda will review the relocatees' application and accordingly decide their stay or return to their countries of origin. It is important to bear in mind that, those people are no longer eligible to return to UK.[220]

3.3.1.2. Historical framework of the agreement UK-Rwanda

On April 14, 2022 in the Rwandan capital of Kigali, UK Home Secretary, Priti Patel and Rwanda's foreign affairs minister, Vincent Biruta announced to the waiting media that the United Kingdom had concluded what was known as an Asylum partnership arrangement with the Republic of Rwanda. Under the terms of the agreement, the UK government would send asylum seekers to Rwanda wherefrom their applications would be processed.[221]

The "one-way ticket", as it has been colloquially referred to, allows the UK to offshore asylum applicants to Rwanda, where their applications will be processed in line with Rwandan national law and the Refugee Convention. The UK's legal responsibility for such individuals ends once they are relocated to Rwanda; individuals who are relocated are not allowed to return to the UK. whether or not their applications for refugee status are approved[222].

It is this agreement, which has drawn the rage of the international community, and human rights defenders and activists. The UK, in its defence, insisted the aim of the agreement was to improve the UK asylum system, which she said has faced "a combination of real humanitarian crises and evil people smugglers profiteering by exploiting the system for their own gains." When pressed on

[220] Ibid.
[221] Ibid.
[222] Clause 6 of the Memorandum of Understanding between the United Kingdom of Great Britain and Northern Ireland

the criteria to be used, the home secretary was hesitant, only indicating that any person who enters the UK illegally will be considered for relocation and resettlement to Rwanda. On its part, Rwanda was coy on the agreement only stating that it was happy to work with the United Kingdom.[223]

Two weeks after the agreement, the UK Nationality and Borders Bill was given royal assent[224]. The statute, whose purpose is to, ***inter alia,*** make provision about nationality, asylum and immigration; to make provision about victims of slavery or human trafficking; provides under paragraph 345 C of the Immigration Rules, that an applicant whose asylum application is treated as inadmissible may be removed to a "safe third country". An application may be treated as inadmissible for a number of reasons, including where an applicant passes through a safe third country and fails to make an application there.

3.3.2. Rationale of the agreement

The main purpose of the agreement between Rwanda and UK was (according to the MoU language), to develop new ways of addressing the irregular migration challenge, including bridging gaps in human capital, in order to counter the business model of the human smugglers, protect the most vulnerable, manage flows of asylum seekers and refugees and promote durable solutions.[225] The UK-Rwandan Asylum Agreement's rationale are to deter irregular entry facilitated by "criminal gangs," to protect safe and legal routes for those fleeing persecution, and

[223]Gigova R ,"UK announces controversial plan to send asylum-seekers to Rwanda" , accessed at https://edition.cnn.com/2022/04/14/europe/uk-rwanda-migrant-deal-gbr-intl/index.html [13/03/2023]
[224] Anon, "Nationality and Borders Bill passes Parliament and will become law as Labour peers decide it would not be appropriate for the House of Lords to attempt a fourth defeat" accessed at https://www.ein.org.uk/news/nationality-and-borders-bill-become-law-labour-decides-it-would-be-inappropriate-house [13/03/2023]
[225] Terry K, "The UK-Rwanda Agreement: Exporting Asylum", accessed at https://jia.sipa.columbia.edu/online-articles/uk-rwanda-agreement-exporting-asylum [23/04/2023].

to eliminate costs to British taxpayers. Before these objectives can be met and the deal realized, the agreement faces many legal challenges.[226]

The UK's main purpose for signing the MoU was to create a new fair and humane asylum system, deter illegal migration and create a safe and legal routes for those fleeing persecution and to that end, by "*creating a mechanism for the relocation of asylum seekers whose claims are not being considered by the United Kingdom, to Rwanda, which will process their claims and settle or remove (as appropriate) individuals after their claim is decided*".[227] The reason behind this MOUwas to reduce a huge number of asylum seekers and unlawful migrants traveling to UK by Boats.

3.3.2.1.UK's MOU Commitments

The UK government intended that the asylum arrangement applies to asylum seekers who arrive 'illegally, or by dangerous or unnecessary methods from safe countries' in the UK and are deemed inadmissible.[228] Through the APA (Asylum Partnership arrangement) will assume the operational costs of the program.

As stipulated, the United Kingdom would screen asylum seekers upon their arrival, and then provide Rwanda with their personal information. Rwanda would then have to adjudicate the asylum claim before each transfer.[229] Once approved, and in Kigali, each asylum seeker would be given accommodation, and be offered long-term housing.[230]

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[226] Ibid.
[227] Para 2.1. of the MOU.
[228] Tan N, "Externalisatio of asylum in Europe: unpacking the UK-Rwanda asylum partnership agreement", accessed athttps://eumigrationlawblog.eu/externalisation-of-asylum-in-europe-unpacking-the-uk-rwanda-asylum-partnership-agreement/?print=print[31/03/2023]..
[229] Clause 5.1 of the MOU.
[230] Clause 10.3.2. of the MOU.

3.3.2.2. Rwanda's MOU Commitments

Bearing in mind that, MoU is not a legal binding document and justiciable one before the courts of law. This impliedly entails that Rwanda is under no obligation to comply. Paragraph 14 of the MOU further provides "Rwanda will have regard for information provided about a Relocated Individual relating to any special needs that may arise as a result of their being a victim of modern slavery and human trafficking and will take all necessary steps to ensure these needs are accommodated."[231]

Rwanda commits to processing individual cases in accordance with its domestic law, the 1951 Refugee Convention (which it is a signatory to), and current international standards including international human rights law and assurances given in the MoU. The Rwandan government agrees that migrants approved under the agreement would also be "entitled to full protection under Rwandan law, equal access to employment, and enrollment in healthcare and social services." If their asylum claims are denied in Rwanda , however, they would be removed to a their countries of origin, or If there is no prospect of such removal occurring for any reason Rwanda will regularise that person's immigration status in Rwanda.[232]

The MoU aims at transferring asylum seekers who arrive irregularly to the United Kingdom to Rwanda, who will then assume responsibility for both the asylum procedure and protection of those found to be refugees.[233] Furthermore, Rwanda will assume responsibility for the return or channelling into migration streams of persons found not to be in need of international protection.

[231] Clause 14 of the MOU.
[232] Clause 10.4. of the MOU.
[233] Clause 2 (1) of the MoU.

3.3.2.3. The position of Migrants

The Migrants/asylum seekers who the agreement are made were not in agreement with the relocation decision. The manifestations against the APA have been occurred in UK, some prejudiced migrants contended that UK is not considering their individual circumstances and thus approached the courts for invalidating the agreement in that they violate their rights and the rights that the 1951 convention and other human rights accorded to them.

3.4.International community's position on the agreement

Irrationally, UNHCR refers this MOUas having an externalization nature of international protection and stresses that it should be unlawful since it is regarded as an attempt to shift responsibilities to Rwanda as opposed to the principle of burden sharing. Moreover, UNHCR further elucidates that the MOU is pure inappropriate and does not possess the element of necessary safeguard within the meaning of the 1951 convention.[234]

Various scholars such as Maya Goodfellow, have critically pointed out that, with reference to Australia model and Denmark system with that respect, the MOUis modern system of externalization policies and strategy.[235]

According to Sturridge *et al*, the deal was not new since EU has ventured the like that outsource migration and border management to countries of origin and transit, such as Libya, Turkey and Niger. He argues however, that this partnership differs from those. Critically, Sturridge highlight that, the deal is not just about reinforcing transit borders to deter migrants from arriving, nor is this

[234] UNHCR *Supra* note 23, p. 2.
[235] Ibid.

just another example of the offshore processing of asylum seekers should they arrive in the UK. This deal represents the wholesale transfer of the UK's asylum responsibility to another country.[236]

The UK-Rwanda agreement's potential scope of application is thus very broad, with high levels of discretion as to who the UK will select for transfer built into the agreement. It is of worth mention that, the application of the agreement only to 'irregularly' arriving migrants and asylum seekers raises questions of non-penalisation under the Refugee Convention, though presumably the UK government will seek to justify the approach by arguing that asylum seekers crossing the English Channel are not 'coming directly from a territory where their life or freedom was threatened' as envisaged by article 31(1) of the Refugee Convention, contrary to both international and UK jurisprudence..[237]

The literature have compared the arrangement with Australia's policy meant to forcibly transfer asylum seekers, or those who enter it without valid visas to Nauru or Papua New Guinea for processing and that the only difference is that, Australia's boat turn-backs policy means that few asylum seekers actually reach its shores to claim asylum. Contrarywise, in the UK situation, those being threatened with transferal to Rwanda have already arrived and claimed asylum.[238]

According to International committee of Red cross 's view, processing offshore results in considerable human and financial cost. It has been argued that, given that the overwhelming

[236] Sturridge C, Anna B and Becca H "The UK-Rwanda deal is a crisis of responsibility, not a crisis of migration" , accessed at https://odi.org/en/insights/the-ukrwanda-deal-is-a-crisis-of-responsibility-not-a-crisis-of-migration/#:~:text=The%20deal%20represents%20a%20crisis,leverage%20migration%20for%20political%20ends. [4/04/2023].
[237] Tan N, *Supra* note 229.
[238]Sturridge C, Anna B and Becca H, *supra* note 255.

majority of those who come to the UK to seek asylum are granted status, this wholesale transfer reflects a complete abdication of responsibility for asylum seekers in the UK.[239]

According to the *United Nations human rights commission*, the expert stressed that the UK should halt plans to transfer asylum seekers to Rwanda and expressed serious concern that the country's asylum partnership arrangement violates international law, and risks causing irreparable harm to people seeking international protection. UNHRC special rapporteur highlighted that "[t]here are serious risks that the international law principle of non-refoulement will be breached by forcibly transferring asylum seekers to Rwanda."[240]

The chapter has brought the attention of the author to the descriptively scrutiny of the agreement between Rwanda and UK. The focus has brought to the general background of the agreement, rationale and content of the agreement and relates it to the international norms pertaining to refugee system.

It started by investigating on the principles globally underlying asylum and refugee protection regime, the rights that are attached to asylum system with particular focus on rights to seek and receive asylum protection under international law.

It finally ventured to tackle the APA's parties commitments with respect to the transfer of asylum to Rwanda. The next chapter shall thus venture to examine the entitlements of rights of asylum and relates it to the states exigence to protect those seeking asylum. It is in the view to analyse the

[239]Ibid.
[240] UNHRC, "UN expert urges UK to halt transfer of asylum seekers to Rwanda" https://www.ohchr.org/en/press-releases/2022/06/un-expert-urges-uk-halt-transfer-asylum-seekers-rwanda [14/05/2023].

in(congruency) extent of the APA to both international human rights law and principles pertaining to asylum and refugee regime.

3.5.Researcher's position

The preamble of the 1951 convention relating to the status of refugees recognises that without international cooperation, satisfactory solution to the problem of refugees cannot be achieved. On the other hand, UNHCR believes that Asylum seeking should primarily be treated by their first country of asylum. However, UNHCR requires that such arrangements should aim at enhancing burden- and responsibility-sharing and international/regional cooperation, and not be burden shifting and should ideally contribute to the enhancement of the overall protection space in the transferring State, the receiving State and/or the region as a whole. Additionally, arrangements between States for the transfer of asylum-seekers should be governed by a legally binding instrument, challengeable and enforceable in a court of law by the affected asylum-seekers. [241]

The MOU in question is generally acceptable under International refugee law basing on the mechanisms of international cooperation and burden sharing. However, as above mentioned, the United Kingdome seems to escape from its obligations as a state and shift the responsibility to Rwanda, additionally the arrangement provides that the memorandum of Understanding cannot be challenged in court by any third party which is questionable under international law.

The right to asylum is also considered as a Human right basing on the Universal Declaration of Human rights and other Human rights instruments. To that end, migrants under the agreement in

[241] UNHCR, "Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers", accessed at https://www.refworld.org/docid/51af82794.html [04/09/2023].

question are entitled to the right, as well the United Kingdom as duty bear, should be under the obligation under international law to offer asylum to migrants seeking asylum therein.

The memorandum of understanding between the United Kingdom and Rwanda deems to find its basis on burden sharing and international cooperation in refugee problem solutions. However, considering the developmental and financial capacity of the United kingdom, the agreements seems to be a way for the United Kingdom to shift its responsibilities but also discourage asylum seekers in their country.

CHAPTER FOUR: CRITICAL ANALYSIS OF UK-RWANDA AGREEMENT OF MIGRATION TRANSFER

It is not illegal for refugees to cross international boundaries and the manner in which they find themselves in the frontiers of other states is not material in international refugee law, though the practices in migration framework is contrary. Currently, not only the international, regional and local media, but also international community as whole have been criticizing the MOUbetween UK and Rwanda on the transfer/relocation of asylum seekers and irregular migrants on the UK

territory to Rwanda.[242]Admittedly the MOU would "put an end to [the] deadly trade in people smuggling" as the new policy will deter illegal entry.[243]

Earlier in June 2022, the domestic courts of the UK have already dismissed applications and appeals seeking to stop the process of relocation of migrants and asylum seekers in accordance to the MOU, on the ground that such transfer/relocation is consistent with public interest.[244] Subsequently however, the European Court of Human Rights issued last-minute injunctions to stop the deportation of the handful of people on board, until three weeks after the delivery of the final UK domestic decision in pending judicial review proceedings.

This chapter has critically analyzed the agreement by viewing agreement in international human rights framework.

4.1. The legal protection of migrants and asylum seekers under international law

During the New York Declaration, the Heads of State and Government and High Representatives reaffirmed the human rights of all refugees and migrants, regardless of status, and pledged to fully protect such rights. They recalled that: "Though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental

[242] Clause 2 of the MOU.
[243]Devine l "UK and Rwanda sign agreement to remove asylum seekers" https://www.lauradevine.com/news/uk-and-rwanda-sign-agreement-to-remove-asylum- [16/03/2023].
[244] Hallen N "UK court says flight taking asylum seekers to Rwanda can go ahead" https://www.aljazeera.com/news/2022/6/13/uks-plan-to-deport-refugees-to-rwanda-faces-last-gasp-challenge [12/12/2022].

freedoms." [245]

The United Nations committee on Economic, Social and Cultural Rights statement246, voiced that All people under the jurisdiction of the State concerned should enjoy Covenant rights. That includes asylum seekers and refugees, as well as other migrants, even when their situation in the country concerned is irregular.[247]This means that states have immediate obligation steaming from the covenant upon reception of migrants .

The underlying principle of *non-refoulement* governs the questions if and to where a state may expel persons. Irrespective of the answers to these questions, IHRL further imposes obligations in respect of all other treatments towards migrants and thus in respect of measures of border control. Although it may be lawful under IHRL to treat irregular migrants differently in some respects than those lawfully residing or entering the territory,[248] the overwhelming majority of human rights law applies to irregular migrants irrespective of migration status when a person is in the jurisdiction of a state party to a respective instrument.[249]

4.3. Duties of States in international migration and refugee legal framework

The precise meaning of the right to seek asylum is not entirely clear. However, article 14 of UDHR was reconfirmed by the Vienna Declaration and Programme of Action of 1993 serves as the basis

[245] Para 6, New York Declaration, *supra* note 7.

[246] Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights

[247] Para. 3, CESCR, The Duties of States Towards Refugees and Migrants under the ICESCR, February 2017.

[248] See for instance the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, in which rights granted to irregular migrants are less extensive then those granted to regular migrants

[249] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03. Inter-American Court of Human Rights (2003) Series A, No. 18;

on the matter of asylum. But , as it stands, these documents are not legally binding and the wording may be understood to merely restate states' right to grant asylum, without a correlative duty.[250]

To that end, the notion of a right to seek asylum has been argued to reflect customary international law as a procedural right,[251] because it is implicit in the 1951 Convention, and because one of its aspects, the prohibition of *refoulement*, has acquired that status.

Hence, processing asylum case is an individual country's discretion. The right of states to grant asylum prevails over the right of individuals to receive it.[252] The fundamental humanitarian principle in the global migration structure that is supposed to protect the right to asylum is the *non-refoulement* principle, the expression which is found in various international instruments universally and regionally adopted and is generally accepted by almost all states.[253]This principle has been discussed in the previous parts of this research.

The legal language expresses that, the existence of a right entails the existence of duty bearer in order to enforce such right. Henceforth, it is crucial to assess how is the right of asylum enforced which leads to know the duty bearers. Unless it can be more conclusively shown which agents have the responsibility to protect the right to access to asylum, why, and to what extent, the right to asylum remains an empty 'manifesto right' without recognizable duty-bearers.[254]

Under international law the right of a state to grant asylum follows from the fact that every sovereign state is presumed to have exclusive control over its territory and hence over persons present in its territory which falls under the doctrine of state sovereignty.[255]Therefore, this doctrine

[250] Goodwin-Gil G & McAdam J, *supra note 59*, pp. 360-361
[251]Goodwin-Gill G, "Asylum: The Law and Politics of Change", 7 *International Journal of Refugee Law* (1995), p.4.
[252] Haddad E, *The Refugee in International Society: Between Sovereigns*, (Cambridge University Press,2008), p. 79.
[253] UNHCR Executive Committee No 6(XXVIII) of 1977 on the principle of *Non-refoulement*,
[254] Weis P, *supra* note 93, p. 342.
[255] Morgenstern F, "The Right of Asylum*"*), *BR rr. Y.B. INT'L L (1949)*, pp.327, 327

implies that every sovereign state has the right to grant or deny asylum to persons located within its boundaries.[256] Even though the right of asylum is sacred, people are not fully allowed to enjoy it because it rested on moral and humanitarian grounds which were freely recognized by receiving countries but with certain essential limitations.[257]

David Miller in supporting the argument in above paragraph, contends that while refugees 'have a very strong, but not absolute, right to be admitted to a place of safety', this does not take away from the fact that states are entitled to 'considerable autonomy to decide how to respond to particular asylum applications'.[258] Therefore, a state admitting the asylum seeker is not obliged to grant him refugee status, and may even expel him to another country willing to admit him.[259]

4.4. In(congruence) of the Agreement with International Law

In order to reach a finding on the compatibility or otherwise of the agreement with international law particularly, those pertaining to human rights, it is worth noting that, Ordinarily, states are free to choose which country/countries to contract with and that chiefly that member states to the 1951 Refugee Convention have the discretion to enact domestic laws governing how they process asylum seekers including whether to process them internally or offshore.

[256]Grahl-Madsen, *Supra* note 100, p. 23.
[257] Weis P, *the refugee convention of 1951: the travaux preparatoires analyzed with a commentary*, combridge documentary series, Vol. 7 (combridge university press, 1995), p.329.
[258] Miller D, *National Responsibility and Global Justice,*(Oxford University Press, 2007), p. 227
[259]*Ibid.*

Under International legal system on migrants, "collective expulsion of aliens, including irregular migrants, is prohibited".[260] Theright to respect for private and family life should be observed. Removal should not take place when the irregular person concerned has particularly strong family or social ties with the country seeking to remove him or her and that the removal is likely to lead to the conclusion that expulsion would violate the right to private and/or family life of the person concerned.[261]

There is no binding international refugee/migrants legal framework to govern the contested agreement between Rwanda and UK. However, despite the absence of such binding forum, the respect for human rights, dignity and freedom is *prima facie* requirement in all matter involving human being. Although States may make arrangements with other States to ensure international protection, such arrangements must, as the Preamble of the 1951 Convention provides, advance international cooperation to uphold refugee protection, enhance responsibility sharing and be consistent with the widest possible exercise of the fundamental rights and freedoms of asylum seekers and refugees.[262]

The UK Home Office's newly released guidance takes a particularly narrow view on this point, with its assessment of the rights of asylum seekers and refugees in Rwanda seemingly limited to compliance with Article 3 ECHR. For example, limits on restrictions on freedom of movement for asylum seekers and recognised refugees in Rwanda are assessed only in terms of Article 3 ECHR and not with reference to Article 26 of the Refugee Convention.[263]

[260] Art. 22 (1), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 3.
[261] CESCR, The Duties of States Towards Refugees and Migrants under the ICESCR, February 2017.
[262] UNHCR, *supra* note 23, P. 2.
[263] Tan N, *Supra* note 229.

The MoU has provided that, an asylum seekers recognised as refugees will remain in Rwanda. To that end, the agreement would seem to be contradictory on its terms, *clause 10.1*of the APA provides on the one hand that, Rwanda will provide recognised refugees with the 'same level of support and accommodation as a Relocated Individual seeking asylum'. On the other hand, the same paragraph goes on to state that recognised refugees will receive treatment 'in accordance with the Refugee Convention and international and Rwandan standards'.[264]

The UNHCR Expert Meeting on International Cooperation to Share Burdens and Responsibilities held at Amman, Jordan, on 27 and 28 June 2011[265] proposed the development of a common framework on international cooperation to share burdens and responsibilities and to explore the ways in which cooperation can be enhanced. Looking at the agreement, vis a vis the criteria set forth in recommendations of the expert meeting above, the set of understandings on international cooperation as well as the operational toolbox to facilitate the conclusion of bilateral and multilateral agreements it can be rightly concluded that the agreement falls short of the recommended guidelines.

4.5. MOU's In(compliance)with principles under refugee and migration framework

The general principles pertaining to refugees/asylum seekers has been previously discussed under the previous chapter. In order to reach a finding on the compatibility or otherwise of the agreement with the fundamental principles of refugee law, an examination of both the principles and the enabling provisions of the law is important.

[264] Clause 01.1. of the MoU.
[265] Nweland K, "Cooperative Arrangements to Share Burdens and Responsibilities in Refugee Situations short of Mass Influx", (Discussion Paper prepared for a UNHCR Expert Meeting on International Cooperation to Share Burdens and Responsibilities) https://www.refworld.org/docid/4e9fed232.html [12/12/2022].

To be able to ascertain whether the agreement between the UK and Rwanda is sound in law, one needs to look at the Memorandum of Understanding between the two countries. For a determination to be made as to whether or not the agreement is compatible with the principle of *non-refoulement*, emphasis has to be placed on the concept on international cooperation and burden sharing[266]. The 1951 refugee convention and other instruments also place particular emphasis on the need for international cooperation in light of the international scope and nature of refugee challenges.[267] These instruments, however, do not specify how international cooperation is to be implemented in practice

4.5.1. The MoU's in(compliance) with principle of *non-refoulement*

In relation to the principle of *non-refoulement*, two issues are particularly pertinent. First, there is the need to identify refugees in mixed flows, as well as those with mixed motives or claims related to socio-economic deprivations. Second, there is the need to ensure that measures aimed at curbing irregular migration do not prevent refugees from submitting claims for the recognition of refugee status.[268] with respect to migrant framework, the principle of non-refoulement should be red together with the provision of article 67 of the CMW which provide that, States must take measures regarding the orderly return of migrant workers and members of their families to their state of origin.

Clause 9.1. of the MOU reads as follow;

[266]Suhrke A and Hans A, "responsibility sharing " in Hathaway J (ed), *reconceiving refugee law*, (Nijhoff, 2007), p. 67.
[267] Preamble, 1951 Convention Relating to the Status of Refugees, *supra* note 27.
[268] UNHCR, *Discussion Paper. Refugee Protection and Durable Solutions in the Context of International Migration* (19 November 2007), para 25.

> "*at all times it will treat each Relocated Individual, and process their claim for asylum, in accordance with the Refugee Convention, Rwandan immigration laws and international and Rwandan standards, including under international and Rwandan human rights law, and including, but not limited to ensuring their protection from inhuman and degrading treatment and refoulement*"[269]

The MOU also prohibit the sharing of the information of beneficiary given that, it may lead to violation of implied non-refoulement obligation of states under ICCPR and its optional protocol.[270] However, this is prohibition or MOU clause is not an explicit prohibition of non-refoulement since the MOU also grants the discretionary power to determine who should be treated under the Refugee framework and those to be regulated under ordinary migration framework.[271]

The right to asylum and *non-refoulement* should be respected in the context of the present agreement under discussion. an irregular migrant being removed from the country should be entitled to an effective remedy before a competent independent and impartial authority. The remedy should have a suspensive effect when the returnee has an arguable claim that, if returned, he or she would be subjected to treatment contrary to his or her human rights. Interpretation and legal aid should be available.[272]

According to Committee on Migration, refugees and population, an irregular migrant being removed from the country has the right to an effective access to the European Court of Human

[269] Clause 9.1.1. of the MOU.
[270] Clause 25.5.1.3. of the MOU.
[271] Clause 10.2 of the MOU.
[272] Committee on Migration, refugees and population, "Human Rights of irregular migrants, 2006" , accessed at https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11204&lang=EN [13/05/2023]

Rights by lodging an individual application with the Court under Article 34 of the European Convention on Human Rights.[273]

In the present research, the UK argues that it wishes to secure its borders as well fight off the illegal migration, across the English Channel of migrants, ostensibly from safe third world countries. Lauterpacht and Bethlehem argue that "the threat contemplated in Article 33(1) [may be] broader than simply the risk of persecution . . . [including] a threat to life or freedom [that] may arise other than in consequence of persecution.[274]However, Article 31(1) of the Refugee Convention exempts refugees from penalisation for irregular entry, thus explicitly recognising that most refugees have no choice but to travel irregularly. Treating the asylum claim of a refugee who enters irregularly as inadmissible constitutes a penalty.[275]

According to Terry,[276]*Non-refoulement* granted by article 33 of the 1951 convention, guarantees that asylum seekers will not be returned to a country where their lives or freedom would be threatened: this applies to Rwanda. Yet, governments, including the United Kingdom, often skirt this principle by designating a nation as a "safe-Third Country" in order to circumvent their responsibility and comply with the Convention on the surface.[277]

Within the framework of international refugee law therefore, *non-refoulement* connotes more than the forcible return of a refugee from the frontiers of the state that they have fled as it obvious that they harbour a well-founded fear of persecution in the state that they have fled. It encompasses as

[273] Ibid.
[274]Lauterpacht and Bethlehem, *supra* note 143, p. 127.
[275]Goodwin-Gill G, *Supra* note 120.
[276] Terry K, *supra* note 226.
[277] Ibid,

well, the forcible return of refugees to frontiers of territories where they are likely to suffer persecution[278].

In the present legal framework arising out of both the Refugee Convention as well as the optional protocol, the principle of *non-refoulement* has not been addressed to provide a clear mechanism of defining when and how a refugee can be at risk of persecution when forcibly returned to frontiers of other territories, neither have other human rights instruments like the Convention Against Torture (CAT), under whose aegis the forcible return of refugees to unsafe areas would fall as it amounts to inhuman and degrading treatment. which States have therefore circumvented this and usually hide behind the veneer of illegal entry or the case of stowaways to forcibly turn away or return refugees from their respective states of origin[279.]

To put this in to perspective for instance, the agreement does not have a comprehensive agreement on what happens to refugees whose applications have been rejected, since it is a "one-way ticket", neither is the UNHCR involved as is required under such arrangements. Additionally, in the absence of evidence on the safety of the refugees in Rwanda, the agreement is in breach of the principle of *non-refoulement* as the practice amounts to shifting burden as opposed to burden sharing.

4.5.2. MoU's in(compliance) with article 31 prohibition of expulsion and article 3 (non-discrimination)

Article 31 of the 1951 Refugee Convention provides that the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a

[278]Towle R,"Processes and critiques of the Indochinese Comprehensive Plan of Action: an instrument of burden-sharing?" 18*International Journal of Refugee Law* (2006), p.89.
[279]Vibeke E, *Mass Refugee Influx and the Limits of Public International Law* (Nijhoff Publishers, 2002),pp.34-65.

territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[280]

The MOU contains some clause that seems discriminatory in their nature. The wording in clause 2 which states the objectives of MOU that: "*The objective of this Arrangement is to create a mechanism for the relocation of asylum seekers whose claims are not being considered by the United Kingdom, to Rwanda…*,"[281]

The agreement only applies to individuals "whose claims are not being considered by the United Kingdom," and whose application are deemed inadmissible because of their entry method.[282]Various scholars have viewed this as a violation and incompliance of the APA with the mentioned article 31 of the Convention, which exempts refugees from penalization for irregular arrival.[283] Notable penalties administered by other nations have included indefinite detainment, family separation, and criminal prosecution to mention few. In the United Kingdom's instance, treating the asylum claims of those who enter the territory irregularly as inadmissible and therefore transferrable to Rwanda constitutes a penalty. While there is no formal punishment for violating Article 31, the UN High Commissioner for Refugees admonished European governments' unlawful policies towards asylum seekers.[284]

With respect to the principle of non-discrimination that is advocated by article 3 if the 1951 convention. It has been mentioned that this principle is central principle under refugee protection

[280] Art. 31 of the 1951 refugee convention, *supra* note 27.
[281] Clause 2 of the MOU.
[282] Clause 2 of the MOU.
[283] Terry K, *supra* note 226.
[284] Anon "Greece: UN calls for end to deplorable migrant pushbacks" https://www.dw.com/en/greece-un-calls-for-end-to-deplorable-migrant-pushbacks/a-60863744 [1/05/2023].

system. Hence, with respect to the APA, the critics brought by international community, particularly the opponent of the arrangement is that, the APA is to be applied without discrimination based on race, religion, or country of origin. However, most of the arrivals to Britain are single-men from Iran: the UK-Rwandan deal blocks their entry into the United Kingdom because men from areas affected by conflict, and detached from a family unit are often seen, by virtue of their gender and nationality, as security threats.[285]

4.6.Two school of thoughts about the MoU

Even though the MoUacknowledges problems facing irregular migrants, smuggled and trafficked persons and that, they are amongst the victims of modern slavery and human trafficking.[286]The MoU has been viewed from different perspectives, including opponent and proponent with respect to the MoU. It is of worth mentioning that in both perspectives, MoU is always a controversial issue. This section begins with proponent perspectives before continuing to opponent viewpoints.

4.6.1.The UK government's school of thought

From the UK government perspectives, the agreement made in form of MoU is perfect and the assessment made has proven positive with respect to relocation of asylum seekers. The House of Lords has published a report in addition to questions asked to the government on the matter. In the response of UK government to the House of Lords questions, the former has clearly elaborated the concept as follow:

[285] Terry K, *Supra* note 226.
[286] Clause 14, MOU.

> *[MoUs] are used where it is appropriate to conclude a statement of political intent or political undertaking, and where there is no requirement for a legally binding framework. They can be useful tools for arrangements to be established quickly or operate flexibly, for detailed provisions which change frequently, for primarily technical or administrative matters, or for situations where confidentiality is required, for example in defence matters or technology*.[287]

Thus the agreement has been positively received by the member of the government, since it does not confer any obligation under the international law of treaty. In Johnson's statement of 2021, Rwanda "restricts civil and political rights and media freedom,"[288] and his subsequent reversal, hailing Rwanda as "one of the safest countries in the world, globally recognized for its record of welcoming and integrating migrants," highlights this contradiction.[289]

4.6.2.House of Lords' school of thought

While the government side was the proponent to the agreement on one hand, The UK's House of Lords international agreement committee was the opponent on the other hand. In its published report, House of Lords unfolds the side that UK government should have been taken on the matter.

[287] Brown T "International agreements committee report on improving te framework for the parliamentary scrutiny of treaties : treaty scrutiny, working practices", 2022, pp.7-8.
[288] BBC "One-way ticket to Rwanda for some UK asylum seekers" https://www.bbc.com/news/uk-politics-61097114 [23/04/2023].
[289] UK Prime Minister's Office "PM speech on action to tackle illegal migration: 14 April 2022" , accessed at https://www.gov.uk/government/speeches/pm-speech-on-action-to-tackle-illegal-migration-14-april-2022 [23/04/2023].

It stated that the MoU is an "important political agreement", with implications that "may affect individual rights and which warrants Parliamentary scrutiny".[290]

The committee has consistently insisted that the government had concluded an agreement which "appears to be entirely unenforceable". The report stated that, in practice, this means that "neither individuals, nor the parties to the arrangement, can ensure the rights of those affected are fully protected".[291] However, the court of justice has seen the situation contrary.

The report continued:

The UK government should not have chosen an MoU to facilitate this arrangement. Agreements that raise fundamental questions about individual rights should not be entered into through an MoU, but through a formal treaty. And further the committee concluded that:

> *"It is unacceptable that the government should be able to use prerogative powers to agree important arrangements with other states that have serious human rights implications without any scrutiny by Parliament.*"[292]

Unsupported Critics of the agreement cite that Rwanda's human rights record is appalling and that there has been evidence of violations of human rights. The only way to ascertain whether that is the case would depend ultimately on evidence adduced in a court of law and that hasn't so far been the case.

4.6.3.Rwanda's position

While the government's side, the position was positive, on the side of opposition, the agreement has been viewed otherwise. According to green party' representative, "*wealthy country such as*

[290] ibid. p. 11.
[291] Ibid.
[292] Ibid.

UK should not shift their international obligation to receive refugees and transfer them to third countries" just because they have the money to influence and enforce their will".[293]

4.7.The agreement before the Jurisdictions

Earlier in June 2022, UK high court already dismissed applications seeking to halt the process of relocation of refugees, on the ground that the relocation is consistent with public interest[294]. Subsequently however, the ECtHRhas been involved and viewed the previous decision otherwise. Bearing in mind that, the role of the judiciary was only to ensure that the law has been properly understood and observed, and that the rights granted by the parliament are respected.

4.7.1.UK High Court

Ordinarily, member states to the Refugee Convention have the discretion to enact domestic laws governing how they process asylum seekers including whether to process them internally or offshore. It is under that framework that the UK has contracted with Rwanda to relocate asylum seekers for the processing of their status in Rwanda. It has been thus controversial and the prejudiced persons and members of civil society have approached the court to intervene.

Starting from the high court of UK, The individuals who are claimants in these proceedings travelled in small boats from France to England and claimed asylum on their arrival in the UK. They contend that the arrangements made by the Home Secretary to relocate asylum seekers to Rwanda are unlawful, and that the Secretary did not consider their circumstances properly.

[293] Burke J " Rwandan Opposition criticizes deal to accept UK's asylum seekers: UK accused of shifting international obligations and Rwanda of ignoring issues causing its own refugees"https://www.theguardian.com/world/2022/apr/14/rwandan-opposition-criticises-deal-to-accept-uks-asylum-seekers [04/09/2023].
[294] Hallen N, *supra* note 243.

The court has concluded that, it is lawful for the government to make arrangements for relocating asylum seekers to Rwanda and for their asylum claims to be determined in Rwanda. before the court, the government has made arrangements with the government of Rwanda which are intended to ensure that the asylum claims of people relocated to Rwanda are properly determined in Rwanda. In those circumstances, the relocation of migrants and asylum seekers to Rwanda is consistent with the Refugee Convention and with the statutory and other legal obligations on the government including the obligations imposed by the Human Rights Act 1998.[295]

The applicants did not only refer to international human right laws and refugee law but also they invoked the provision of 82 (2) (a)(i) of UKof the Nationality, Immigration and Asylum Act 2002 permits the person to lodge a complaint to Tribunal (Immigration and Asylum Chamber) if the that person's removal from UK would breach the United Kingdom's obligations under the Refugee Convention.[296] However, following the high court's endorsement of the executive decision to relocate refugee to Rwanda, the decision was also upheld by the court of appeal.[297]

4.7.2. Court of Appeal

All of the claimant asylum-seekers other grounds of appeal against the Rwandan plan have been dismissed. This is a summary of the Court′s conclusions.

First, as to the effect of the Refugee Convention, the Court of Appeal concludes, in agreement with the High Court, that Article 31 does not in principle prevent the UK from removing asylum seekers to a safe third country.

Second, as to retained EU law, the Court of Appeal concludes, in agreement with the High Court, that EU law, which only permits asylum-seekers to be removed to a safe third country where they

[295]*N.S.K. v. the United Kingdom*, ECtHR 197(2022) 14.06.2022.
[296] Nationality, Immigration and Asylum Act 2002, [s.82 (2)(a)(i)].
[297]Ciara D, "UK court of appeal upholds first migrant deportation flight to Rwanda", accessed athttps://www.jurist.org/news/2022/06/uk-court-of-appeal-upholds-first-deportation-flight-to-rwanda [17/12/2022].

have some connection to it (none of the claimant asylum-seekers have a connection with Rwanda), ceased to be a part of EU law as a result of primary legislation following Brexit.

Third, in agreement with the High Court, the Court of Appeal concludes that the use of guidance to case workers to treat Rwanda as a safe third country, rather than formal statutory designation, was not unlawful.

Fourth, in agreement with the High Court, the Court of Appeal concludes that removals to Rwanda are not themselves made unlawful by breaches of data protection law.

Fifth, as to procedural fairness, whilst the Court of Appeal finds that the Government needs to give guidance to caseworkers emphasizing the need for flexibility in granting extensions to the seven-day time limit where fairness requires, they conclude that the seven-day period does not render the decision-making process "structurally unfair and unjust".[298]

The result of the Court of Appeal′s judgment is that the High Court′s decision that Rwanda was a safe third country is reversed and that unless and until the deficiencies in its asylum processes are corrected removal of asylum-seekers to Rwanda will be unlawful.[299]

4.7.3.European Court of Human rights

While the UK is party to the Council of Europe but not to EU, it is bound by the obligation under the European Convention on Human rights. This give the European Court of Human Rights (ECtHR), the power to entertain matters concerning the violation of Human rights in UK. To that end, the asylum arrangement which was critical for violation of human rights of migrants and asylum seekers,was petitioned by prejudiced parties to the UK High Court which as has been

[298] https://freemovement.org.uk/court-of-appeal-finds-rwanda-plan-unlawful-as-rwanda-is-not-a-safe-third-country/
[299] https://www.judiciary.uk/wp-content/uploads/2023/06/AAA-v-SSHD-judgment-290623.pdf

mentioned above, did not rule in their favour. The case has been thus taken tothe ECtHR to which UK is party by the mere fact of being member of the council of Europe.

On 13 June 2022 the ECtHR received a request to take an urgent "interim measures" to the UK Government to stop the UK plan to send migrants and asylum-seekers to Rwanda, under Rule 39 of the Rules of Court, ECtHR granted interim measuresin favour of the claimant, an Iraqi national who, having unsuccessful claimed asylum upon arrival in the UK on 17 May 2022, has been facing removal to Rwanda on the evening of 14 June 2022.[303]The ECtHR has immediately granted urgent interim measures on 14/06/2022, and thus order to stop the first flight plan to Rwanda.[304]

The ECtHR decided to issue an order to stop the relocation of the applicant to Rwanda until three weeks from the delivery of theUK courts final decision on judicial review. In coming to this decision, the Court gave great weight to concerns expressed by the UN High Commissioner for Refugees "that asylum-seekers transferred from the United Kingdom to Rwanda will not have access to fair and efficient procedures for the determination of refugee status."[305]

The Court concluded that it was necessary to grant the measure requested "[i]n light of the risk of treatment contrary to the applicant's Convention rights as well as the fact that Rwanda is outside the Convention legal space (and is therefore not bound by the European Convention on Human Rights) and the absence of any legally enforceable mechanism for the applicant's return to the United Kingdom in the event of a successful merits challenge before the domestic courts."[306]

[303] Justine S "ECtHR halts UK deportations to Rwanda under New Agreement" https://www.asil.org/ILIB/ecthr-halts-uk-deporations-rwanda-under-new-agreement [23/04/2023].
[304]*N.S.K. v. the United Kingdom* (application no. 28774/22), ECtHR 197(2022) of 14.06.2022.
[305] Ibid.
[306] Ibid.

At the end of June, on 29th June 2023, the UK court ruled that, that a government plan to send asylum seekers on a one-way trip to Rwanda is unlawful, delivering a blow to the Conservative administration's pledge to stop migrants making risky journeys across the English Channel In a split two-to-one ruling.[307]

It is inconceivable to imagine that any legal recourse can be sustained against either country as countries are free to accept to host refugees as long as it within their capacity and ability so to do. The UK on the other hand is a signatory to various international instruments that deal with refugee issues. These include the ICCPR, the CAT, the ECHR, which the UK was the first nation to ratify in March 1951. The Human Rights Act of 1998 enshrined the convention into British law, allowing the rights guaranteed by the convention to be enforced in UK courts.

Under the APA, reception conditions are narrowly framed in general terms. According to para 8.1, Rwanda is responsible for providing open reception arrangements in 'accommodation that is adequate to ensure the health, security and wellbeing' of the individual throughout the asylum procedure. Rwanda bears responsibility for additional 'support', though no further details are provided as to what this entails. Freedom of movement is further provided 'in accordance with Rwandan laws and regulations'

In Australia, the High Court in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*[308], unanimously rejected a challenge to the constitutional validity of the sections of thelaw which give the immigration minister the power to designate regional processing countries.

[307] Niklas H "British court of appeal rules deporting migrants to Rwanda "illegal"" https://www.africanews.com/2023/06/29/british-court-of-appeal-rules-deporting-migrants-to-rwanda-illegal// [18/07/2023].
[308] ibid.

Despite the huge outcry from the international community. To that end, the transfer of those migrants will ultimately be appropriate and legal in the sense of refugee law arena, burden sharing, ease access to third countries solutions as advocated under the global compact on refugees.

Though not legally binding, the document provides the understanding between the two states and the procedures and obligations of each country. The document is filled with nomenclature that is endearing to the ordinary reader and on cursory perusal, it promises that refuges relocated to Rwanda will be well taken care of before their applications for refugee status are processed.

In nutshell, the MoU has been vaguely formulated. This is due to the fact that, it does not provide the details as to the rights afforded to asylum seekers during this phase, such as access to education, employment or medical assistance. Nor does the MoU include specific guarantees for vulnerable persons subject to transfer (such as children or persons with medical needs), with the sole exception being victims of trafficking

This agreement may set a precedent on the way that, globally, in addition to UK, Australia and Denmark has adopted migration restriction policy and bill respectively. Danish aliens act allows for a transfer of asylum seekers to a third country outside the European Union. The international community has considered Danish bill that it breaches international agreements regarding refugee protection.[309]

Russia has also passed legislations allowing the relocation of asylum seekers to third countries outside Europe. On 03 June 2021, Denmark's parliament passed bill L 226, a legislative

[309] Larsen M *Denmark's alien act and the issue of refugee protection: case study of bill L 226, a legislative amendment allowing for the transfer of asylum seekers outside the EU and the externalization of asylum procedures and refugee protection,* (LLM Dissertation, Aalborg University, 2022), p.2.

amendment allowing for the transfer of asylum seekers to third country outside the EU for the purpose of both asylum processing and protection of refugee in the third country. [310]

Though other European countries, most notably Austria and Denmark, have eyed the option of offloading the responsibility for (spontaneously arriving) asylum seekers to third countries, the UK-Rwanda arrangement announced earlier this month shifts this policy ambition from a so far theoretical, still abstract, option to a seemingly tangible, ready-to-go program.[311]

4.8.General Overview on the Durable Solutions

UNHCR was established on 1st January 1951 by United Nations General assembly resolution 319(IV). According its establishing statutes, UNHCR's work is humanitarian, social and non-political. Both the statute, subsequent resolutions from UNGA and the ECOSOC mandated the agency to provide international protection to refugees and other persons of concern to the office and -as a consequence- to seek permanent or durable solutions to their problem.[312]

The refugee problems/situation require durable solutions often called permanent solutions or lasting solutions. Article 4 of the UNHCR statute directs high commissioner to seek permanent solution for problem of refugees.[313] The key question is however, what do we mean by permanent solution? what are the permanent solutions? the durable or permanent solutions have been defined

[310] Anon "Denmark's legislation on extraterritorial asylum in light of international and EU law", 15th November 2021, accessed at https://eumigrationlawblog.eu/denmarks-legislation-on-extraterritorial-asylum-in-light-of-international-and-eu-law/#:~:text=On%203%20June%202021%2C%20Denmark's,refugees%20in%20the%20third%20country. [23/03/2023].

[311] Migration policy institute, "The UK-Rwanda Agreement Represents Another Blow to Territorial Asylum" https://reliefweb.int/report/united-kingdom-great-britain-and-northern-ireland/uk-rwanda-agreement-represents-another-blow [23/03/2023].

[312] Para 1 of the UNHCR statute states that, UNHCR "*shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments … to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities".*

[313] Para 1,Statute of the office of the United Nations High Commissioner for Refugees.

as lasting solutions enable refugees to stay for long time.[314] The permanency nature of the solutions is critical, one may critically refer to recurrent internal conflicts in DRC which are on and off for long time. Those repatriated may fled again. This is a challenging realistic of the existence of durable solutions.

The durable solutions were not expressly provided under the refugee convention. It was under article 34 of the convention which provides that the Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.[315]

It is of paramount importance to take a quick read to the UNHCR constitution, when one needs to understand the foundation of durable solutions whereby at least voluntary repatriation, assimilation and resettlement are abstractly provided to be facilitated by the UNHCR. This section shall briefly describe those durable solutions.[316] This will enable the researcher to apply the test of durable solutions in comparison to the agreement between Rwanda and UK.

4.8.1.Voluntary Repatriation

Neither Rwandan refugee law nor international refugee convention has provided the definition of voluntary repatriation. However, Voluntary repatriation is defined by various authors as the return from asylum of a refugee to his or her country of origin to resume the full national protection of

[314] Migration policy Institute, *Supra* note, 299.

[315] Art. 34 of the refugee convention., *Supra* note 27.

[316] Para 1&8 of UNHCR statute with regard to voluntary repatriation, para 9 of UNHCR statute,

that country as a result of a decision made voluntarily by that refugee. It is in other words, a return to refugee's home country.[317]

It has been argued that repatriation is lawful only if it is ''voluntary,'' and if it can be accomplished ''in safety, and with dignity.''[318] There is no international treaty which explicitly provides for voluntary repatriation even 1951 refugee convention. However, the justification for the same should be article 13(2) of UDHR which provides for right to return to someone's own country. Article 5 of the OAU refugee convention provides for the repatriation. In addition, para 2(d) the UNGA resolution No 428(V) of 1950 which adopted UNHCR statute provides for the same solution.

There is strong support for regarding voluntary repatriation as the best solution to refugeehood. It has been noticed, for instance, by UNHCR' s executive committee that, while voluntary repatriation, local integration and resettlement are the traditional durable solutions for refugees… voluntary repatriation is the preferred solution, when feasible.[319]

Voluntary repatriation is an approach proposed by High commissioner in the post-conflict situations in countries of origin. It is an approach that brings together humanitarian and development actors and funds. The aim is that greater resources should be allocated to create a conducive environment inside the countries of origin so as to, not only prevent the recurrence of mass outflows, but also facilitate sustainable repatriation.[320]According to Operational principles,

[317]Chimni B, *Supra* note 61.
[318] Principle 3, Lawyers' Committee for Human Rights, ''General Principles Relating to the Promotion of Refugee Repatriation'' (1992).
[319] UNHCR executive committee conclusion No 89, conclusion on the international protection, 2000, (preamble), accessed at www.unhcr.ch [16/03/2023].
[320] UNHCR, *Framework for durable solutions for refugees and persons of concerns*, (UNHCR, 2003), p. 5.

repatriation should be voluntary, which includes two elements: freedom of choice and an informed decision with respect to voluntariness and repatriation should take place under conditions of safety and dignity.[321]

it is said that "in the era of mass movements the doctrine of individual expression of free will to return has been less relevant and less used (as a term). What we see are decisions by authorities and leaderships followed by acceptance by the masses".[322]The relevant literature, however, seems to suggest that there is a need to question whether " leaderships" always represent the interest"[323]

4.8.2.Local Integration

Local integration is described a process by which refugees are absorbed within the population of the host country. This solution is discretionally offered by host country without being forced to do so. It involves planning by the host country since there is an increase of population by local integration.[324]

The 1951 refugee convention requires the contracting parties without imposing to facilitate the integration or naturalization of refugee.[325] The same is required under para 2(e) of the UNGA resolution 428 whereby the High commissioner was mandated to promote assimilation/local integration of refugee. Paragraph (f) of Excom conclusion No 104 (LV) of 2005 also provides for the same. It is of paramount importance to note that local integration does not change the status as refugees for integrated persons, rather they remain refugees.

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[321] Ibid.
[322] Dennis McNamara made this point in his presentation to the Princeton workshop, p.6.
[323] Harrell-Bond B "Humanitarianism in a Straightjacket", 84 *African Affairs* (1985), p. 12.
[324] Low A, "local integration: a Durable solution for refugees?", 25 *forced migration review*(2006), p. 64.
[325] Art. 34, Refugee convention *Supra* note 27.

With regards to cases where local integration of refugees in countries of asylum is a viable option, the High Commissioner has proposed a strategy called **"**Development through Local Integration (DLI)". In situations where the State opts to provide opportunities for gradual integration of refugees, DLI would solicit additional development assistance with the aim of attaining a durable solution in terms of local integration of refugees as an option and not an obligation.[326] Although there is some authorities for the proposition that a recognized refugee has an expectation of 'asylum', in the sense of admission to residence, the practice of states also provides evidence of resistance to local integration, particularly in the situation of mass influx. Indeed, this has led some to describe it as the forgotten[327], under-reported[328] or evaded solution.[329]

4.8.3.Resettlement to third country

The resettlement is another durable solution meant for achieving a more equitable sharing of burdens and responsibilities and to build capacities toreceive and protect refugees and to resolve their problems on a durable basis. It is argued that resettlement is an effective tool for international community to share refugees responsibilities.[330]Resettlement is about refugees moving from a country of first asylum or transit to another, or 'third', State.[331] Resettlement policy aims to achieve a variety of objectives, the first and perhaps most fundamental being to provide a durable solution for refugees unable to return home or to remain in their country of immediate refuge.[332]

A further goal is to relieve the strain on receiving countries, sometimes in a quantitative way, at

[326]Kanamugire C, Local integration as durable solution for refugees in South Africa, 12 *Juridica* (2016), p.67
[327]Jacobsen K, *The Forgotten Solution: Local Integration for Refugees in Developing Countries' UNHCR New Issues in Refugee Research*", Working Paper No. 45 (2001).
[328]Fielden A, '*Local Integration: An Under-reported Solution to Protracted Refugee Situations' UNHCR New Issues in Refugee Research*, Research Paper No. 158 (2008).
[329] Goodwin-Gill G, McAdam J and Dunlop E, *Supra* note 59,p. 936.
[330]Fielden A, *Op.cit.*
[331] Goodwin-Gill, G., McAdam, J. and Dunlop, E., *Op.Cit.* p. 942.
[332]UNHCR Resettlement Handbook (2011).

other times in a political way, by assisting them in relations with countries of origin. Resettlement is described in the GCR as 'a tangible mechanism for burden- and responsibility-sharing and a demonstration of solidarity, allowing States to help share each other's burdens and reduce the impact of large refugee situations on host countries'.[333] Recently, some States have additionally portrayed resettlement as a means of 'reducing the irregular and dangerous routes that are used to obtain … protection, [and] preventing the smuggling networks to profit from it'.[334]

4.9.The relevancy of the durable solutions to the agreement in question

The traditional durable solutions for refugee problems are Voluntary repatriation, local integration as well as resettlement as elaborately discussed in previous paragraphs. This section has ventured to apply the MoU between UK and Rwanda to those durable solutions to unfold which part it fits if any or position it under the international refugee regime.

4.10. European Externalization strategy of migration management

By externalization in the context of migration controls, It entails extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims.[335] These actions include unilateral, bilateral, and multilateral state engagement.[336] Externalisation in the context of refugee regime, implies the

333 United Nations, *Global Compact on Refugees*, (United Nations, 2018), para. 90.
[334]Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No. 516/2014 of the European Parliament and the Council, COM/2016/0468 final— 2016/0225 (COD). P. 2.
[335] Podkul J, Kysel I and Frelick B, "The impact of externalization of migration controls on the rights of slyum seekers and other migrants" 4(4)*Journal on Migration and Human Security* (2016), p. 193.
[336] Thomas G, *Access to asylum: international refugee law and the globalization of migration control* (Cambridge University Press, 2011), p.

practices of shifting asylum responsibilities elsewhere and evading international obligations.[337] It is with a view to prevent asylum seekers and other migrants from reaching their borders. Such practices undermine the rights of those seeking safety and protection, demonize and punish them and may put their lives at risk. [338]

Enormous scholars have commented on the agreement between UK-Rwanda. Most of them have qualified the agreement incompatible with international law and thus system of migration externalization.[339] The very known techniques of externalization are like visa requirement, carrier sanctions, or pushbacks. The question of whether the asylum seekers in question are within the jurisdiction of the externalizing state could not be less contentious when it comes to asylum seekers who have arrived in the UK irregularly. These individuals are clearly within the jurisdiction of the UK and therefore benefit from the UK's obligation under refugee and human rights law.[340]

With respect to the agreement in question, *Frowin Rausis* and *KonstantinKreibich* argued that the plan is by no means a new idea rather a reflection of the latest aspiration to externalize the refugee protection.[341]They stressed that different countries have toyed with it for years and failed consistently.[342]

The Government domesticated and enshrined the contents and principles of the aforementioned documents in the revised Refugee Law of 2014 and corresponding regulations. Rwanda ratified

[337] UNHCR, "UNHCR warns against "exporting" asylum, call for responsibility sharing for refugees, not burden shifting", accessed at https://www.unhcr.org/en-au/news/press/2021/5/60a2751813/unhcr-warns-against-exporting-asylum-calls-responsibility-sharing-refugees.html [20/03/2023].
[338] Speech by Gillian Triggs, NHCR's Assistant High Commissioner for Protection, https://eumigrationlawblog.eu/the-uk-rwanda-deal-and-its-incompatibility-with-international-law/ [16/03/2023].
[339] Grundler MandGuild E, "the UK_Rwanda deal and its incompatibility with international law", accessed at https://eumigrationlawblog.eu/the-uk-rwanda-deal-and-its-incompatibility-with-international-law/ [16/03/2023].
[340] Ibid.
[341] Rausis F and Kreibich K, "externalizing refugee protection: less a vision than a mirage" , accessed at https://theloop.ecpr.eu/externalising-refugee-protection-less-a-vision-than-a-mirage/ [20/03/2023].
[342] Ibid.

the OAU refugee convention in 1979, and respectively is a party to the "Kampala Convention").[343]Moreover, Rwanda also acceded to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness in 2006.[344]

Having analysed the MoU, this chapter has briefly summarized the court's ruling with respect to the APA whereby UK high court blessed the government proposal since it found that the APA was in no way violating the human rights or UK's international obligations under refugee regime. Contrarywise, the ECtHR has seen the APA otherwise, and surprisingly issue an interim measures to stop the first flight which was about to take off.

In a nutshell, without appearing to be iconoclast, it has been viewed that, the APA does not violate any international, regional or national laws. Unless otherwise seen by the justice sector independently, otherwise, the APA has been legally and procedurally signed to the extent that, it has no adverse effect to the both beneficiaries side and the contracting parties.

[343] 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa
[344] Hathaway J, *Supra* note 68.

CHAPTER FIVE: GENERAL CONCLUSIONAND RECOMMENDATIONS

5.1.Summary of finding of precedent chapters

It is inconceivable to imagine that any legal recourse can be sustained against either party to the contract as countries are free to accept to host refugees as long as it within their capacity and ability so to do. The UK on the other hand is a signatory to various international instruments that deal with refugee issues. These include the ICCPR, the CAT, the ECHR, which the UK was the first nation to ratify in March 1951. The Human Rights Act of 1998 enshrined the convention into British law, allowing the rights guaranteed by the convention to be enforced in UK courts.

The MoU was seen as problematic in the eyes of the international community with respect to 1951 refugee convention and other international convention to which UK is party to such as CAT, ICCPR, ISCER and ECHR. According to *Grundler and Guild*, the MoU has been identified selective for the following reasons: First of all, the MoU applies only to individuals 'whose claims are not being considered by the United Kingdom', i.e. are declared inadmissible because of their irregular entry into the UK.

While the government has opined and convinced that the MOU was concluded in accordance to international and local standards, the House of Lords has viewed it contrarywise. The international community, refugees watchdogs (UNHCR, IOM, Red Cross) to just mention few, were of the view that, the APA constitutes a new and precedent externalization strategy and policy which differs from the Australia anti-migration policy but relates to some extent.

While almost all headline of 2023 journals and new, the MOU has predominated, with various appellations such as Migration and economic development agreement, externalization of asylum

in Europe to mention few, it is our view that the agreement as was concluded has neither violated an international law nor regional obligations.

The transfer of asylum seekers to third country is neither a new concept nor a new practice, the anti-migration policies have been developed in Australia, while transfer of asylum seekers to third countries have been incorporated into laws of different countries such as Denmark and Russia and current UK immigration act. However, there is a lack of common international document or legal instrument to regulate the matter and standardize the it. This leaves the gaps and provides room to states to discretionally determine and attend to the matters at their own interests.

The right to asylum is a right recognized in international law. Like other human rights, the enjoyment of right to asylum needs to be enforced. The problem arises with regard to enforcement of this right, in case persons from given country flee to another country without passing through the legal procedures of migration, in order to seek international protection for fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group and most likely, they cannot return home or are afraid to do so. Thus, there must be duty bearers of any right under international law. Hence, the states as the primary duty bearers of international human rights should have significant role in the light of asylum seekers.

In this case, these persons seek asylum in the host state but they are mostly denied this right to be granted asylum. This is because it is generally argued that states have a right, rather than a duty to grant asylum which follows from their sovereign right to control entry admission into territory. This results in violation of rights of asylum seekers by virtue of obligations of states towards rights of asylum seekers. It is due to the fact that the states are only bound by the principle of prohibition of *refoulement* whereby the states must not return or deport the asylum seekers to the place where

their life can be under the risk of persecution or any other violence or to a third state like what UK intended to deport the asylum seekers in Rwanda.

The right to asylum, is provided under various legal instruments; either international, regional or domestic instruments. It is also protected under different supreme laws i.e. constitutions of any countries if not all. It comprises three components namely; the right of a state to grant asylum, the right of an individual to seek asylum, the right of an individual to be granted asylum. However, considering the rights provided under international instruments, the right to asylum is not an individual right rather it is a right accorded to the state. Therefore, in its implementation even though the individual has right to seek asylum, but the state has discretionary power to grant asylum or not.

It is important to remark that, the current right of asylum in international law in today is comprised of only the first two components; the right of a state to grant asylum, and the right of an individual to seek asylum; the asylum seekers right *vis-à-vis* his state of origin. Unfortunately, no international instrument or custom vests the individual with a right to be granted asylum, a right *vis-à-vis* the state of refuge.

The beneficiaries were not happy of the APA and some organized demonstrations to that end. As has been encapsulated above, the judicial involvements have controversially provided their viewpoints about the case. While UK local courts were supportive, the regional courts namely ECtHR was of the other views. The issuance of interim measures by the latter has been seen as substantial evidence that may lead the APA to death without being effected.

Since, the APA signature in April 2022, a year has elapsed, so far nothing done to provide a clear evidence of the its viability. Maybe the diplomatic discussions are still on, however, the

involvement of judicial bodies which independently assess point by point the APA shall provide final and clear guidance to the appropriateness and legality of the MoU in question.

5.2.Answers for the research questions

5.2.1. Does the agreement between Rwanda and UK comply with the international standards on refugee and migration framework ?

The above question was answered throughout the document, and particularly in chapter four whereby the incompliance of the MOU with international standards was examined. It was therefore found that, backing the asylum seekers to country of Africa would be taken to some extent as refoulement in case, there is for instance a Rwandan migrant or asylum seekers.

The fact that, the MOU will apply to those not admitted asylum seekers, through screening procedures, this may result to some extend to discrimination since, this may lead to family separation in case for instance two applicants are from different nationalities, and one is admitted to UK while another is transferred to Rwanda.

5.2.2. To what extent does international law protect the right of asylum seekers in case of relocation in the context of UK-Rwanda transfer/relocation agreement?

The above question was responded in chapter three whereby the rights of asylum seekers and migrants in irregular situation are highlighted with particular focus to MOU between rwanda and UK. Moreover, this chapter has examined the obligations of states towards protection and granting the asylum to its seekers and international commitments of countries to protect immigrants especially those who entered illegally in the country of destination.

5.3.Recommendations

From the above conclusions and after discussing issues related right of asylum and the issue of refugees and asylum seekers in UK, the following are the recommendation to be presented under international law,

The Refugee convention does no longer fit the current refugee state of affairs and global movement. It has been long criticized to become outdated fit to the refugee situation. To that end, should be amended to fit the current emerging system of refugeehood, and encompass the modern and current appearing type of asylum seekers.

It is difficult to the extent of inoperative to invoke the provisions of refugee convention of 1951 and its protocol when dealing with matters of asylum seekers. Therefore, the international community should adopt the worldwide legal instrument that clearly define the asylum seeker, provide the clear responsibilities of each state with that respect. Since the application of refugee convention to asylum seekers proved the endless gaps.

There should be developed an international standards that is meant to govern the transfer of asylum seekers to third countries, that provides an elaborate procedure and requirements to meet when engaging in such actions by states.

While there is lack of any standard or guiding principles, the UK-Rwanda agreement should elaborate on the rights and limitations thereto that asylum seekers will enjoy after have arrived to Rwanda, such as right to education, right to employments, access to health facilities etc.

While the diplomatic , political discussions show that those who will be relocated to Rwanda shall be resided in Hotels, it is not clear as to what extent hotel shall provide all necessary equipment compared to what they have been receiving in UK. The parties to the agreement

should provide clear guidance and a detailed implementation plan on how the hosting facilities shall be equipped to meet the required standards.

The selective nature of APA should be diminished, not only those who are not admitted to UK procedures, should be sent to Rwanda since both countries apply the same international law to attend to the refugee status determination. Rather, it should be established a clear and appropriate mechanism to apply the APA to all applicants claiming the asylum in UK. This is due to the fact that, this may lead to separation of families if one is admitted to UK and another is sent to Rwanda. Therefore, there should be established a careful screening procedure.

Consideration should be given to the strengthening of existing mechanisms and, if appropriate, the setting up of new arrangements, if possible on a permanent basis, to ensure that the necessary funds and other material and technical assistance are immediately made available. Thus, there should be a committee in charge of monitoring the international convention on refugees. In a spirit of international solidarity, Governments should also seek to ensure that the causes leading to irregular migration that consequents asylum seekers are as far as possible removed and, where such influxes have occurred, that conditions favorable to voluntary repatriation are established.

5.4.Contribution of the present dissertation in the area of research

The subject matter of the present study is therefore of interest with respect to the protection of rights of migrants in irregular situation and asylum seekers' rights regarding their choice of asylum state. Moreover, it will shed some light on the states obligation towards the same in broad sense. The output from this study will serve as a learning component for researchers and academics on the appropriate approaches needed to attain a successful level of relevant

legal contemplation. It will therefore forge the way toward setting up the regime with cognizance of rights to migrants in irregular situation and asylum seekers distinctively from the rights of refugees in general.

Finally, this study will serve as a supplement component to the existing literature to address the issue of limited and restrictive rights of migrants and asylum seekers under international human rights laws in general and particularly refugee regime.

5.5.Scope for further research

While much of this study focused on the appropriateness of agreement between Rwanda and UK with respect to transfer or relocation of migrants in irregular situation in UK and those seeking asylum to the same country, it would be of interest for future researchers in the same field to investigate on the impact of lack of clear nexus between asylum seekers' rights and state obligations to protect the economic migrants seeking for asylum in developed countries.

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