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The Securitization of Asylum: A Review of UK Asylum Laws Post-Brexit

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ABSTRACT

Understanding the role of external actors is essential to understanding the United Kingdom's (UK) securitization agenda in the field of asylum. Whilst the internal dynamics of securitization in migration and asylum and its links to the Brexit referendum have been extensively analysed, the externalization of asylum and its connection to the so-called 'hostile environment' policy have received less attention. This article addresses this gap, and focuses on how the Nationality and Borders Act 2022 and the UK–Rwanda Memorandum of Understanding for the relocation of asylum seekers advance the externalization of asylum post-Brexit. It examines how these reforms reinforce the securitization that characterizes the UK's asylum and migration policy and evaluates how they exclude asylum seekers from access to basic human rights, in violation of the 1951 Refugee Convention and the European Convention on Human Rights.

1. INTRODUCTION

Asylum and immigration are essential to understanding the United Kingdom's (UK) legislative agenda over the last two decades. Since 9/11, these areas have been characterized by an increasing securitization that conceives asylum and migration movements as security threats.[1] From the indefinite detention of non-British terrorist suspects to attempts to criminalize the seeking of asylum, the UK has implemented a series of reforms to curb migration, restrict the rights of non-British nationals, and limit the rights of asylum seekers.[2] This goal was explicitly formulated with the so-called 'hostile environment' policy implemented by the Home Office in

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1 On the securitization of migration post-9/11 in Europe, see Sarah Léonard and Christian Kaunert, 'The Securitisation of Migration in the European Union: Frontex and Its Evolving Security Practices' (2022) 48 Journal of Ethnic and Migration Studies 1417; Krzysztof Jaskulowski, 'The Securitisation of Migration: Its Limits and Consequences' (2018) 40 International Political Science Review 710; Lena Karamanidou, 'The Securitisation of European Migration Policies: Perceptions of Threat and Management of Risk' in Gabriella Lazaridis and Kursheed Wadia (eds), *The Securitisation of Migration in the EU: Debates since 9/11* (Palgrave Macmillan 2015).

2 ibid.

2012.[3] In her role as Home Secretary, Theresa May introduced a series of reforms aimed at creating an environment that would dissuade undocumented immigrants and asylum seekers from settling in the UK, by limiting their access to basic services and involving private actors, such as landlords, schools, hospitals, and employers, in immigration checks.[4]

More recently, the implementation of the Nationality and Borders Act 2022 and the UK–Rwanda Memorandum of Understanding (UK–Rwanda MoU) for the relocation of asylum seekers[5] has changed the priorities of the 'hostile environment' policy. This article argues that these reforms point to a shift in the Home Office's securitization agenda that now focuses on externalizing asylum policy and restricting who is entitled to international protection in the UK. Although the Home Office considers fixing asylum laws a new priority, this article shows that the association of asylum and security which characterized 'hostile environment' policies remains essential to understanding these reforms that exclude asylum seekers from access to basic human rights.[6]

The analysis proceeds as follows. Part 2 considers the process of securitization and its impact on asylum and immigration laws in the UK. Part 3 begins with an analysis of the Nationality and Borders Act and how it reinforces the securitization of asylum law, and then evaluates the human rights implications of this securitization process, including the increasing tendency to criminalize asylum. Part 4, in turn, analyses how the Act facilitates the externalization of asylum obligations through bilateral agreements such as the UK–Rwanda MoU. It considers how such agreements further the securitization framework developed by the Home Office, and explores their compatibility with the 1951 Refugee Convention[7] and human rights law.

2. THE SECURITIZATION OF MIGRATION AND ASYLUM

Since 2000, political discourses linking migration and asylum to national security have become increasingly common.[8] This trend, known as 'securitization', has become a feature of immigration and asylum policies in most Western States and is particularly salient in Europe. In this region, authorities have adopted military practices, such as the use of sensors, satellites, and drones, to control migration and to police national borders.[9] European Union (EU) Member States and Frontex have increased their cooperation through a range of measures, including the European Border Surveillance system (EUROSUR), which facilitates the exchange of information and the monitoring of EU borders.[10] Its primary goal is to prevent 'cross-border crime' and 'irregular migration' (these terms appear to be linked in Frontex's definition) through enhanced

3 On the 'hostile environment' policy in the UK, see Frances Webber, 'On the Creation of the UK's Hostile Environment' (2019) 60 Race & Class 76; Melanie Griffiths and Colin Yeo, 'The UK's Hostile Environment: Deputising Immigration Control' (2021) 41 Critical Social Policy 521; Michael Goodfellow, *Hostile Environment: How Immigrants Became Scapegoats* (Verso Books 2020).

4 ibid.

5 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 (13 April 2022) (UK–Rwanda MoU) <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda> accessed 31 October 2023.

6 Anand Menon and Alan Wager, 'Taking Back Control: Sovereignty as Strategy in Brexit Politics' (2020) 8 Territory, Politics, Governance 282, 282–83.

7 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

8 Natasha Saunders, 'Paradigm Shift or Business as Usual? An Historical Reappraisal of the "Shift" to Securitisation of Refugee Protection (2014) 3 Refugee Survey Quarterly 69, 70.

9 On the measures used to securitize the European borders, see Huub Dijstelbloem, Albert Meijer, and Michiel Besters, 'The Migration Machine' in Huub Dijstelbloem and Albert Meijer (eds), *Migration and the New Technological Borders of Europe* (Palgrave Macmillan 2011); Mark Latonero and Paula Kift, 'On Digital Passages and Borders: Refugees and the New Infrastructure for Movement and Control' (2018) 4 Social Media + Society 1; Stephan Scheel, *Autonomy of Migration? Appropriating Mobility within Biometric Border Regimes* (Routledge 2019).

10 Commission Implementing Regulation (EU) 2021/581 of 9 April 2021 on the situational pictures of the European Border Surveillance System (EUROSUR) [2021] OJ L124/3.

collaboration between border management authorities.[11] These measures have resulted in the development of 'fortress Europe', a term that explains how the EU has developed a securitized border policy that excludes migrants and asylum seekers from accessing basic human rights.[12] As an EU Member State until 31 January 2020, the UK participated in this securitized framework and the country is now redesigning this policy post-Brexit, as the following sections demonstrate.

2.1 The securitization of immigration in the UK

UK immigration rules have been described as restrictive, complex, and punitive owing to their tendency to criminalize undocumented migrants.[13] The clearest example of this legislative framework appears in the so-called 'hostile environment' plan, which seeks to create an unwelcoming environment for undocumented migrants by increasing the participation of private actors in the enforcement of tougher immigration rules.[14] Before the implementation of this plan, the enforcement of immigration laws was driven by the State, with the occasional participation of private actors such as employers, who had the obligation to check employees' immigration status under the Asylum and Immigration Act 1996.

It is difficult to define the precise components of the 'hostile environment' policy, as there is no White Paper clarifying the laws or policies adopted under this umbrella. Nevertheless, academics and legal practitioners tend to agree that there are some measures approved since Home Secretary May presented the plan that clearly fulfil its main goal: to discourage people from entering the UK and to create an unwelcoming environment for undocumented immigrants so that they voluntarily choose to leave.[15] For instance, the Immigration Act 2016 increased the penalties for employing illegal workers. It also reformed the 'right to rent' created by the Immigration Act 2014 that made landlords responsible for checking the immigration status of tenants and, for the first time, criminalized those who failed to do so. At the same time, the National Health Service (NHS) Regulations 2015 introduced new fees and routine immigration checks on patients by hospital staff, whilst data-sharing agreements were set up between the NHS and the Department of Health and Social Care to obtain the personal information of patients suspected of not having immigration status in the UK.[16] The school system was also involved in this process with the implementation of a memorandum of understanding in 2015 that facilitated the sharing of the personal details of schoolchildren (nationality, names, and addresses), gathered by the Department of Education, with the Home Office.[17] These initiatives sought to identify undocumented immigrants and exclude them from accessing basic services, and used private actors to achieve this goal.

A central justification for the adoption of the 'hostile environment' policies was national security, which demanded a reduction in net migration and greater control over national borders.[18] The discourse that linked immigration and national security extended beyond undocumented

11 ibid arts 15, 17, 21.

12 Markus Rheindorf and Ruth Wodak, *Sociolinguistic Perspectives on Migration Control: Language Policy, Identity and Belonging* (Multilingual Matters 2020) 116.

13 Griffiths and Yeo (n 3) 524–25; Goodfellow (n 3).

14 On the role of private parties in immigration policy in the UK, see Griffiths and Yeo (n 3); Lucinda Hiam, Sarah Steele, and Marin McKee, 'Creating a "Hostile Environment for Migrants": The British Government's Use of Health Service Data to Restrict Immigration Is a Very Bad Idea' (2018) 13 Health Economics, Policy and Law 107.

15 Griffiths and Yeo (n 3); Hiam, Steele, and McKee (n 14); Sheona York, 'The "Hostile Environment": How Home Office Immigration Policies and Practices Create and Perpetuate Illegality' (2018) 32 Journal of Immigration Asylum and Nationality Law 735.

16 Memorandum of Understanding between the Home Office, NHS Digital and the Department of Health (2017).

17 Home Office, Memorandum of Understanding between the Home Office and Department for Education in respect of the Exchange of Information Assets (December 2015).

18 James Kirkup and Robert Winnett, 'Interview with Theresa May' *The Telegraph* (London, 25 May 2012) <https://www.telegraph.co.uk/news/0/theresa-may-interview-going-give-illegal-migrants-really-hostile/> accessed 25 October 2022.

immigration and fed into the 'take back control' rhetoric that drove the Brexit campaign.[19] This campaign was characterized by a strong anti-immigration sentiment that did not distinguish between the EU, international migration, or asylum seeking, and focused on the need to control national borders.[20] The years leading up to the Brexit referendum were characterized by discourses that focused on the high numbers of EU immigrants and associated these numbers with security risks.[21] The political solution to these security risks emphasized the need to control immigration, reinforcing the links between national security and immigration.[22] The Brexit campaign was, following Bello's definition, an example of a 'spiralling securitization' discourse in which multiple actors contributed to construing immigration as a security threat.[23] This discourse replicated the ideas that underpinned the adoption of the 'hostile environment': the need to curb immigration numbers in order to guarantee national sovereignty and national security.

This rhetoric changed after the UK left the EU, partly because of the change in immigration dynamics. Since 2016, the number of EU citizens living in the UK has fallen sharply, as non-EU migrants fill the skills gap left by this process.[24] At the same time, the perception of immigration as a 'security concern' has declined.[25] This tendency has been accompanied by a reform of the immigration system modelled upon Australia's point-based immigration model, which grants visas according to the number of 'points' obtained based on different considerations, such as skills, education, and salary.[26] This immigration system enables the UK to choose the kind of immigration that it accepts. These changes, nonetheless, have not modified the UK's conception of national sovereignty and border control as a security issue, a conception that underpinned the 'hostile environment'.[27] Rather, the securitization concerns that characterized those policies have now shifted towards asylum.[28]

2.2 The securitization of asylum

The Home Office's priority in the field of asylum is to fix a system that it considers 'broken' due to the high numbers of asylum applications.[29] The mechanisms to achieve this goal include

19 On the impact of the 'taking back control' rhetoric of new immigration policies adopted post-Brexit, see Andrew Gamble, 'Taking Back Control: The Political Implications of Brexit' (2018) 25 Journal of European Public Policy 1215; Helena Wray, 'The "Hostile Environment": How Home Office Immigration Policies and Practices Create and Perpetuate Illegality' (2018) 32 Journal of Immigration, Asylum and Nationality Law 124; Ben Bowling and Sophie Westenra, '"A Really Hostile Environment": Adiaphorization, Global Policing and the Crimmigration Control System' (2020) 24 Theoretical Criminology 163.

20 ibid.

21 On the representation of European migrants in the wake of the Brexit referendum, see Agnieszka Radziwinowiczówna and Aleksandra Galasińska, '"The Vile Eastern European": Ideology of Deportability in the Brexit Media Discourse' (2021) 10 Eastern and Central European Migration Review 75; Bianca Fox, 'Making the Headlines: EU Immigration to the UK and the Wave of New Racism after Brexit' in Ecaterina Balica and Valentina Marinescu (eds), *Migration and Crime* (Palgrave Macmillan 2018); Mathew J Creighton and Amaney A Jamal, 'An Overstated Welcome: Brexit and Intentionally Masked Anti-Immigrant Sentiment in the UK' (2022) 48 Journal of Ethnic and Migration Studies 1051.

22 Eamonn McConnon, 'People as Security Risks: The Framing of Migration in the UK Security–Development Nexus' (2022) 48 Journal of Ethnic and Migration Studies 1381, 1394.

23 Valeria Bello, *International Migration and International Security: Why Prejudice Is a Global Security Threat* (Routledge 2017) 54.

24 Jonathan Portes, 'Between the Lines: Immigration to the UK between the Referendum and Brexit', DCU Brexit Institute, King's College London, Working Paper No 12 (2020).

25 ibid.

26 HM Government, 'The UK's Points-Based Immigration System: Further Details', CP 258 (July 2020) 28 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899755/UK_Points-Based_System_Further_Details_Web_Accessible.pdf> accessed 2 January 2023.

27 On the 'hostile environment' policy in the UK, see Cathy A Wilcock, 'Hostile Immigration Policy and the Limits of Sanctuary as Resistance' (2019) 7 Social Inclusion 141; Liz Fekete, 'Coercion and Compliance: The Politics of the "Hostile Environment"' (2020) 62 Race & Class 97.

28 Joseph Maggs, 'The "Channel Crossings" and the Borders of Britain' (2019) 61 Race & Class 78; Stuart N Hodkinson and others, 'Fighting or Fuelling Forced Labour? The Modern Slavery Act 2015, Irregular Migrants and the Vulnerabilising Role of the UK's Hostile Environment' (2021) 41 Critical Social Policy 78; Webber (n 3).

29 Home Affairs Committee, *Oral Evidence: Work of the Home Office* (22 June 2022, HC 200) Q351.

plans to deter false claims of asylum, increase the efficacy of the asylum process, and tackle the entry of individuals who might then claim asylum in the UK.[30] However, the Home Office has provided little evidence as to how these initiatives would address the existing issues within the UK asylum system. Home Office data show that asylum applications have remained at similar levels since 2004, despite a slight increase in 2021 after the end of the COVID-19 lockdowns.[31] Asylum applications reached a peak in 2001 and have decreased since then.[32] Nor do Home Office statistics support allegations of an increasing number of false asylum claims. Rather, the available evidence indicates that the failings of the asylum system are to be found in the extended processing times and the backlog of pending applications, due to shortages of personnel and the use of inadequate software.[33] These failures delay the handling of asylum applications and result in a large number of pending applications that the Home Office cannot process within a reasonable timeframe.

Nevertheless, the Home Office justifies its claims that the asylum system is 'broken' by focusing on the number of individuals crossing the English Channel.[34] These numbers have risen sharply since 2018, whilst attempts to enter the UK irregularly have decreased overall.[35] The reasons for this increase are unclear, but restrictive rules that limit the possibilities to claim asylum in the UK may be behind the rise. The tightening of controls around the Eurotunnel, greater border cooperation with France, and the number of conflicts around the world resulting in growing numbers of displaced individuals may also explain this increase.[36] However, the Home Office presents these higher numbers as evidence that the asylum system is being abused, as most of those crossing the Channel apply for asylum in the UK.[37] This has fuelled a securitization discourse that targets asylum seekers and blurs the differences between them and undocumented immigrants. As a result, asylum seekers are depicted as threats to national stability that should be managed through increasingly punitive approaches,[38] displacing original conceptions of asylum as a humanitarian phenomenon.[39]

Channel crossings have been linked to people smugglers and human traffickers who operate, according to the Home Office, in both France and the UK to facilitate these crossings.[40] This criminality is presented by the Home Office as evidence of the operation of organized crime in the UK, which constitutes a threat to the security of the country and the sustainability of its asylum system. In this discourse, asylum seekers are presented as the victims of organized crime rather than as a 'security threat' themselves. However, the use of increasingly punitive measures to deal with Channel crossings turns asylum seekers into victims of a securitization strategy.

Securitization strategies in the field of asylum may use internal or external measures, or a combination of both.[41] Internal securitization measures include the increased use of surveillance tools, the creation of shared border management practices, and the militarization of

30 Home Affairs Committee, *Oral Evidence: Work of the Home Office* (22 September 2021, HC 625).
31 House of Commons Library, 'Asylum Statistics', Research Briefing, SN01403 (2022) 10.
32 ibid.
33 Home Affairs Committee, *Channel Crossings, Migration and Asylum* (First Report) (2022–23, HC 199) paras 4–7.
34 Home Office, 'Nationality and Borders Bill: Factsheet' (Policy Paper) (6 July 2021).
35 Home Office, 'Irregular Migration Statistics year ending December 2021' (May 2022). In 2018, the overall number of Channel crossings was 299, but this number has increased yearly to reach over 28,000 people in 2021.
36 Home Affairs Committee, *Channel Crossings, Migration and Asylum* (n 33) paras 19–20.
37 ibid paras 21–22.
38 Sarah Léonard and Christian Kaunert, 'De-centring the Securitisation of Asylum and Migration in the European Union: Securitisation, Vulnerability and the Role of Turkey' (2022) 27 Geopolitics 729, 731.
39 On the departure from humanitarian aims in asylum law, see eg Scott D Watson, *The Securitization of Humanitarian Migration* (Routledge 2009); Violeta Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The "Rescue-through-Interdiction/Rescue-without-Protection" Paradigm' (2018) 56 Journal of Common Market Studies 119.
40 Home Office, 'Taking Action to Tackle Channel Crossings: Factsheet' (12 November 2021) <https://homeofficemedia.blog.gov.uk/2021/11/12/taking-action-to-tackle-channel-crossings/> accessed 26 October 2022; Home Affairs Committee (n 29) Q171.
41 Léonard and Kaunert (n 38) 731; Ole Waever, 'Securitization and Desecuritization' in Ronnie D Lipschutz (ed), *On Security* (Columbia University Press 1995).

border security. Other practices relate to the role that external actors play in this securitization process. These include the organization of 'regional protection zones' situated near conflict zones to address and process asylum claims; the creation of offshore detention and processing centres; and other policies that involve the protection of external borders by non-State actors and foreign States.[42]

Internally, the Home Office has developed a military response to Channel crossings that includes the use of coastal patrols and warships and the deployment of drones and surveillance tools, together with the appointment of the so-called 'Small Boats Commander'.[43] This new position, more formally known as the 'Clandestine Channel Threat Commander', liaises with French authorities to tackle crossings into UK waters.[44] Its priority is to fight people smuggling and prevent the loss of life that occurs during Channel crossings.[45] In the context of this new securitization agenda, the Home Office has also considered the creation of 'blockade tactics' in the Channel, whereby ships would be physically prevented from entering UK territorial waters.[46]

The Nationality and Borders Act also assists the use of external securitization measures, such as the relocation of asylum seekers.[47] This Act covers the gaps left by the Dublin Regulation (Dublin III),[48] an EU instrument that regulates the responsibility of EU Member States for processing asylum applications and enables intra-EU transfers of asylum seekers. After the UK left the EU, it lost access to the Dublin Regulation that facilitated the return of asylum seekers who crossed the Channel to the EU States of departure. The Nationality and Borders Act, in turn, introduces securitization measures to achieve similar results through the externalization of asylum processing to 'safe third countries'. This permits the creation of agreements that regulate how the UK may transfer its responsibility for the processing of asylum seeker applications to third countries, such as the UK–Rwanda MoU.[49] The following parts focus on these externalization devices and examine how they contribute to reinforcing the securitization strategy initiated under the 'hostile environment' policies and now in use in the asylum field.

3. SECURITIZING ASYLUM THROUGH THE NATIONALITY AND BORDERS ACT 2022

The Nationality and Borders Act, which entered into force on 28 June 2022, is the most recent effort to overhaul the UK asylum system.[50] It deals with three different areas: citizenship and citizenship deprivation, immigration, and asylum, and the clearest securitization efforts appear in the field of asylum. The preamble of the Act seeks to link security and asylum policy and reinforces the need to 'fix' the asylum system as instrumental to combating organized crime, particularly people smuggling.[51] Through this rhetoric, the Nationality and Borders Act connects

42 Patrick Hayden, *Political Evil in a Global Age: Hannah Arendt and International Theory* (Routledge 2009) 86.

43 Independent Chief Inspector of Borders and Immigration, 'An Inspection of the Home Office's Response to In-Country Clandestine Arrivals ("Lorry Drops") and to Irregular Migrants Arriving via "Small Boats" (May–December 2019)' 2 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/931422/2020_10_20_Formal_Response_ICIBI_Report_Clandestine_Entry.pdf> accessed 21 October 2022.

44 ibid.

45 ibid.

46 Letter from French Interior Minister, Gérald Darmanin, to UK Home Secretary (9 September 2021).

47 See parts 3 and 4 below.

48 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L130/81 (Dublin Regulation).

49 Part 4 analyses the human rights implications of the UK–Rwanda MoU and its compatibility with the Refugee Convention.

50 Priti Patel, Home Secretary, '2021 Speech to Conservative Party Conference' (Manchester, 5 October 2021) <https://www.ukpol.co.uk/priti-patel-2021-speech-to-conservative-party-conference/> accessed 29 December 2022.

51 Home Office, 'Explanatory Notes to the Nationality and Borders Bill', Bill 141–EN, para 1.

the arrival of asylum seekers with the operation of cross-border crime in the UK and justifies the adoption of securitized asylum policies. Nevertheless, the following sections show that this approach focuses on asylum seekers rather than on people smugglers, by prioritizing asylum seekers' removal to third countries and their criminalization,[52] which raises questions about the compatibility of these measures with the Refugee Convention[53] and the European Convention on Human Rights (ECHR).[54]

3.1 The creation of a two-tier asylum system

The Nationality and Borders Act reforms asylum in the UK through the creation of a two-tier system that distinguishes between so-called Category 1 and Category 2 asylum seekers, and facilitates the relocation of Category 2 applicants to third countries. The UK bases this system on a restrictive interpretation of whether asylum seekers arrive in the UK 'directly' from countries where their life or freedom may be at risk (Category 1 applicants), or whether they transit 'safe third countries' before reaching the UK (Category 2 applicants).[55] The UK government considers that article 31(1) of the Refugee Convention facilitates this differentiation.[56] This provision prohibits penalising refugees for their unlawful entry or presence subject to certain requirements, including that they come directly from a country where their life or freedom was threatened.

The existence of 'safe third countries' through which asylum seekers transit before arriving in the UK is central to the distinction between Category 1 and Category 2 asylum seekers.[57] Accordingly, section 16, which modifies sections 80B and 80C of the Nationality, Immigration and Asylum Act 2002, permits the rejection of an asylum claim when the person has a 'connection' with a safe third country. 'Connection', under this provision, is recognized in very broad terms and covers anything from a third country that has granted the asylum seeker refugee status or subsidiary protection,[58] to the claimant being present in a safe third country where it was reasonable that they could claim asylum and failed to do so.[59] Consequently, merely transiting through what the UK considers a 'safe third country' or stopping over for a brief period would result in the asylum seeker not 'coming directly' from a country where their life or freedom was threatened and thus being classed as a Category 2 applicant. The Home Office justifies this differentiation on the assumption that people smugglers enable asylum seekers who transit through safe third countries, generating an unjustifiable security risk that requires the adoption of different solutions for those entering the UK directly and those transiting third countries.

However, this distinction facilitates the creation of two categories of asylum seekers whose rights are different. Category 1 applicants include 'privileged' asylum seekers who 'arrive directly' in the UK, according to the UK's narrow definition of this requirement, and may be eligible for asylum if they do not have any connection to a safe third country.[60] In contrast,

52 Waever (n 41) 55.
53 UNHCR, 'Observations on the Nationality and Borders Bill, Bill 141, 2021–2022' (September 2021) <https://www.unhcr.org/uk/sites/uk/files/legacy-pdf/6149d3484.pdf> accessed 27 October 2023.
54 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (European Convention on Human Rights) (ECHR).
55 'Explanatory Notes to the Nationality and Borders Bill' (n 51) paras 142–54.
56 ibid para 19.
57 Amreen Qureshi and Lucy Mort, 'Nationality and Borders Bill: The Proposed Reforms Will Further Frustrate an Already Problematic Asylum System' (*LSE Blog*, 21 July 2021) <https://blogs.lse.ac.uk/politicsandpolicy/nationality-and-borders-bill/> accessed 9 October 2023; Dagmara Kuzniar, 'The British Nationality and Borders Bill and the International Protection of Refugees in the Light of the Concept of Community Interest in International Law' (2022) 49 Review of European and Comparative Law 253; Monish Bhatia and Ronit Lentin, 'Migration and Racist State Violence: Introduction' (2022) 11 State Crime Journal 5.
58 Nationality, Immigration and Asylum Act 2002, s 80C(1).
59 Nationality and Borders Act 2022, s 16.
60 ibid.

Category 2 applicants are asylum seekers who arrive in the UK after transiting through a third State (such as Belgium or France, before crossing the English Channel), who may find their asylum applications denied under section 16 of the Nationality and Borders Act. The Home Office argues that this distinction is intended to prevent asylum seekers from initiating dangerous journeys across the Channel when their lives and freedom are not threatened, and, at the same time, to tackle the people smugglers who assist their entry. Whilst the existence of people smugglers who operate in the English Channel may justify new initiatives focused on tackling cross-border crime, it is unclear how restricting the rights of Category 2 asylum seekers fulfils this goal. Indeed, some of the evidence presented to the Home Affairs Committee shows an increase in the influx of asylum seekers despite the more restrictive asylum rules adopted over the last decade that target, primarily, asylum applicants who transit third countries before entering the UK.[61]

Furthermore, this differentiation is inconsistent with the UK's obligations under international law. The Refugee Convention does not require that the asylum seeker claim asylum in the first 'safe country' that they transit. Article 1A(2) of the Convention contains a unitary definition of who qualifies as a refugee, granting all refugees (and, to the extent that its provisions apply to asylum seekers as well) equal rights without any distinctions based on origin or countries transited.[62] For this reason, UNHCR has highlighted that the two-tier regime set up by '[the Nationality and Borders Act] is fundamentally at odds with the government's avowed commitment to upholding the United Kingdom's international obligations under the Refugee Convention'.[63] UNHCR has also criticized this system for its impracticability, as recent trends requiring asylum seekers to claim asylum in the first safe country available impose an unmanageable burden on countries neighbouring conflict zones and border countries within Europe.[64] Globally, low- and middle-income countries host over 83 per cent of asylum seekers, with over 70 per cent of these countries neighbouring the countries of origin of these asylum seekers.[65] In Europe, this difference appears in southern European States, which host more asylum seekers than the UK and have seen a rapid increase in asylum applications following the 2015 migration crisis.[66]

The UK government, nonetheless, maintains that the Nationality and Borders Act is compatible with article 31(1) of the Refugee Convention and the 'refugee' definition. According to the Explanatory Notes to the Nationality and Borders Bill, 'coming directly' under article 31(1) means that only asylum seekers who enter the UK without transiting or stopping over in safe third countries would be entitled to all the protections granted by the Refugee Convention.[67] However, this interpretation of article 31(1) is questionable.

The Convention does not explicitly exclude the possibility that asylum seekers will transit through third countries, and article 31(1) can be interpreted as merely providing an additional layer of protection to those who are unable to secure authorization to enter any country in emergency circumstances. Furthermore, this provision does not exclude other applicants from international protection and does not modify the unitary definition of who is a 'refugee' under

61 Home Affairs Committee, *Channel Crossings, Migration and Asylum* (n 33) paras 14, 20.
62 UNHCR, 'Observations on the Nationality and Borders Bill' (n 53) para 8.
63 ibid.
64 ibid para 5.
65 UNHCR, 'Figures at a Glance: Refugee Statistics (2021)' <https://www.unhcr.org/figures-at-a-glance.html> accessed 26 October 2022.
66 For UNHCR figures for refugees and asylum seekers in Europe, see Refugee Data Finder (Europe Region) 2020 <https://www.unhcr.org/refugee-statistics/download/?url=6IeDGl> accessed 23 November 2023; for Eurostat population figures, see <https://ec.europa.eu/eurostat/databrowser/view/demo_pjan/default/table?lang=en> accessed 9 October 2023, and European Asylum Support Office (EASO), 'Annual Report on the Situation of Asylum in the European Union 2021' 137–39.
67 'Explanatory Notes to the Nationality and Borders Bill' (n 51) para 19.

article 1. UNHCR has supported this interpretation, noting that article 31(1) does not remove or restrict the rights that all refugees enjoy under the Refugee Convention, including those who transit through other States before requesting protection.[68] The only exception applies to those who have settled in another country and have obtained protection in that third country.[69]

This interpretation is consistent with the aims of the drafters of the Refugee Convention. The *travaux préparatoires* of the Convention show that the insertion of the expression 'coming directly' was not intended to deny protection to asylum seekers who transit 'safe third States'.[70] Analysis of the *travaux préparatoires* indicates that this clause was inserted under the initiative of the French delegation, which was concerned about the number of refugees who had settled and obtained protection in neighbouring countries and could potentially move to France and claim asylum. Consequently, the French delegation demanded the insertion of a clause that would exclude them from entering France and being eligible for international protection in the country.[71] It wanted to ensure that France could return these refugees to the country where they had settled without such a decision being deemed an 'unlawful penalty' under the Refugee Convention. A reading of these explanations in the *travaux préparatoires* shows that the drafters did not intend article 31(1) to limit access to international protection for those who briefly transit through or stop over in third countries or who cannot find effective protection in the countries that they transit. This provision would only exclude those who find asylum or settle, temporarily or permanently, in another country before arriving in the country of destination.[72]

The Nationality and Borders Act's narrow interpretation of 'coming directly' under article 31(1) of the Convention also contradicts UK case law in this area. UK courts have traditionally supported UNHCR's definition of 'coming directly' and have provided a rather broad interpretation that includes persons who have transited through, stopped over, or stayed in other countries whilst travelling to the UK.[73] This appeared clearly in *Adimi*,[74] which relied on the Convention's *travaux préparatoires* to conclude that article 31(1) granted some choice to asylum seekers as to where they might claim asylum and concluded that short-term stays whilst in transit to the UK could not deprive the refugee of the protection of article 31.[75] The Nationality and Borders Act, in turn, would modify this interpretation to restrict the number of asylum seekers eligible for international protection in the UK.[76]

However, this restrictive interpretation of who is entitled to international protection under article 31(1) is not new. Similar interpretations of concepts such as 'safe third countries' and 'coming directly' appear in other externalization agreements concluded by EU Member States and the EU itself, for example, the statement of cooperation between the EU and Turkey (the EU–Turkey Agreement), concluded whilst the UK was an EU Member State.[77] The EU–Turkey Agreement, for instance, permits all irregular entries into the EU (including asylum seekers,

68 UNHCR, 'Observations on the Nationality and Borders Bill' (n 53) paras 23–24.
69 ibid; UNHCR, 'Observations on the New Plan for Immigration Policy Statement of the Government of the United Kingdom' (May 2021) Annex, para 12.
70 Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection' (paper prepared at the request of the Department of International Protection for UNHCR Global Consultations, October 2001) paras 103–04.
71 Paul Weis, *The Refugee Convention, 1951: The Travaux Preparatoires Analysed with a Commentary by Dr Paul Weis* (UNHCR 1990) 198; Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalisation, Detention, and Protection' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 192.
72 Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, 'Summary Conclusions: Article 31 of the 1951 Convention' (8–9 November 2001) para 10.
73 *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] EWHC Admin 765, para 18; *R and Koshi Pitshou Mateta* [2013] EWCA Crim 1372, para 21(iv); *R v Asfaw* [2008] UKHL 31, para 15.
74 *Adimi* (n 73).
75 ibid para 18 (Brown LJ).
76 Home Affairs Committee, *Channel Crossings, Migration and Asylum* (n 33) paras 2, 49.
77 Council of the European Union, 'EU–Turkey Statement, 18 March 2016', Press Release 144/16 (18 March 2016).

particularly those of Syrian origin) to be returned to Turkey. This agreement is possible due to a restrictive interpretation of article 31(1) of the Convention that the Court of Justice of the European Union (CJEU) has declined to examine until now.[78] Overall, the ambiguity surrounding what 'coming directly' means has permitted the development of restrictive interpretations of who is entitled to protection under article 31(1) and the externalization of asylum obligations within and beyond the UK.

3.2 The externalization of asylum under the Nationality and Borders Act 2022

A further reference to 'safe third countries' appears in section 29 and schedule 4 of the Act. These sections regulate the removal of asylum seekers, particularly Category 2 asylum seekers, to 'safe third countries'. This provides the basis for the externalization of the UK's asylum policy that is further developed through bilateral agreements such as the UK–Rwanda MoU, which is examined in part 4 of this article.

The externalization of asylum processing has become an essential securitization measure that nonetheless raises numerous questions from a human rights perspective, due to the low levels of transparency and accountability involved.[79] In principle, inter-State transfers of asylum seekers do not violate the Refugee Convention or the ECHR, if specific and stringent safeguards are met. UNHCR has stated that inter-State transfers of asylum seekers may be lawful, if governed by a formal, legally binding, and public agreement, which sets out the responsibilities of each State involved, along with the rights and duties of the individuals affected.[80] Furthermore, UNHCR notes that these agreements should be guided by principles of solidarity and burden sharing.[81] In these cases, the responsibility for ensuring that the rights of transferred asylum seekers are respected by the third country lies with the transferring State.[82] The transferring State must ensure that the relocation does not deprive asylum seekers of the rights to which they are entitled under the Refugee Convention and regional human rights instruments, such as the ECHR.[83] For these reasons, it would be incompatible with the UK's obligations under the ECHR to remove the person to a third State where the right to life (article 2 of the ECHR),[84] the prohibition of torture or degrading treatment (article 3 of the ECHR),[85] or the prohibition of slavery (article 4 of the ECHR)[86] may be at risk.

Initial drafts of the UK Nationality and Borders Bill did not contain any of the transferring guarantees required by UNHCR or the ECtHR's case law.[87] After the UK Joint Committee on Human Rights highlighted this limitation,[88] the Bill was modified to include some of these safeguards in section 1 of schedule 4 of the Act, which modifies section 77 of the Nationality, Immigration and Asylum Act. Under this provision, a safe third State is one that does not threaten the person's race, religion, nationality, or membership of a particular social group or

78 C-481/13 *Qurbani* ECLI: EU: C: 2014: 2101. In this decision, the CJEU declined to provide an interpretation of art 31(1) of the Refugee Convention due to the lack of connection between the domestic proceedings to determine access to international protection and EU law.

79 Amy Nethery and Rosa Holman, 'Secrecy and Human Rights Abuse in Australia's Offshore Immigration Detention Centres' (2016) 20 The International Journal of Human Rights 1018, 1019.

80 UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No 27* (UNHCR 2017) 237–38; UNHCR, 'Legal Considerations regarding Access to Protection and a Connection between the Refugee and the Third Country in the context of Return or Transfer to Safe Third Countries' (April 2018).

81 ibid.

82 ibid.

83 ibid.

84 *MSS v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011).

85 ibid.

86 *RC and VC v France* App No 76491/14 (ECtHR, 12 July 2016).

87 Nationality and Borders Bill 2021, Bill 141.

88 See Joint Committee on Human Rights, *Legislative Scrutiny: Nationality and Borders Bill (Parts 1, 2 and 4)* (Twelfth Report) (2021–2022, HL 143, HC 1007) paras 120–22 <https://committees.parliament.uk/publications/8549/documents/86371/default> accessed 23 October 2022.

political opinion; has ratified the Refugee Convention; and provides guarantees that rights under article 3 of the ECHR will not be breached. Although the safeguards under section 1 of schedule 4 are a positive development when compared with the government's initial proposal, they do not include other guarantees, such as article 4 of the ECHR protections, which are essential in deportation cases. Additionally, the requirements are somewhat vague and lack adequate benchmarks by which they may be evaluated. For instance, a country may be considered 'safe' even if the applicant is subject to a real risk of human rights violations there that fall short of threats to life and liberty.[89] Moreover, there is no established mechanism by which to verify these requirements, which will have to be clarified through the implementation of individual relocation agreements that may (or may not) include adequate oversight mechanisms.

3.3 The criminalization of seeking asylum

The securitization of asylum is also characterized by the use of criminal law instruments.[90] Through strategies that conceptualize asylum as a security matter rather than a humanitarian issue, asylum seekers are portrayed as security risks or deviant actors. As a response to these threats, States may use punitive measures, such as the imposition of detention, community service penalties, and administrative fines or, in extreme cases, criminal offences to dissuade asylum seekers from crossing national borders.[91] These measures reinforce the idea that asylum seekers fleeing conflict zones may generate internal destabilization and have to be 'managed' through criminal law instruments.

There are many examples of States adopting legislation that criminalizes the seeking of asylum, in violation of their obligations under the Refugee Convention and regional and international human rights norms. Within the EU, some Member States have implemented reforms that criminalize entering into a country without leave or assisting someone to do so, which includes criminalizing the work of non-governmental organizations (NGOs) that provide humanitarian aid to asylum seekers and migrants.[92] To an extent, the EU's asylum mechanism, which limits the secondary movements of asylum seekers (inter-State movements within the EU) through the creation of a sanctions regime and strengthened police cooperation, can be considered an example of how seeking asylum is criminalized within the EU.[93] The regulation of asylum in the UK has followed this trend and benefited from the EU's restrictive asylum framework when it was an EU Member State.

The current political discourse in the UK, in turn, portrays asylum seekers as security risks and then justifies the use of punitive and retributive sanctions in this area. These measures include, *inter alia*, increased border controls, the creation of a criminal offence of entering the UK without a valid passport or documentation (which excludes those who subsequently claim

89 UNHCR, 'Updated Observations on the Nationality and Borders Bill, as amended' (January 2022) Annex, para 140.

90 See 8 USC § 1325; Peter Billings, *Crimmigration in Australia: Law, Politics, and Society* (Springer 2019); Alice Bloomfield, 'Alternatives to Detention at a Crossroads: Humanisation or Criminalisation?' (2016) 35 Refugee Survey Quarterly 29.

91 Didier Bigo, 'Criminalisation of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion' in Barbara Bogusz and others (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff Publishers 2004) 61–62.

92 See Case C-821/19 *Commission v Hungary* ECLI:EU:C:2021:930; Judit Tóth, 'Hungary at the Border of Populism and Asylum' in Sergio Carrera and Marco Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union* (Routledge 2020); Liz Fekete, 'Migrants, Borders and the Criminalisation of Solidarity in the EU' (2018) 59 Race & Class 65.

93 On the criminalization of secondary movements of asylum seekers within the EU, see Sergio Carrera and others, 'When Mobility Is Not a Choice: Problematising Asylum Seekers' Secondary Movements and Their Criminalisation in the EU', CEPS Paper No 2019–11 (December 2019) <https://www.ceps.eu/download/publication/?id=26027&pdf=LSE2019-11-RESOMA-Policing-secondary-movements-in-the-EU.pdf> 15 October 2022; Valsamis Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer 2014).

asylum), and the use of detention against asylum seekers. These initiatives respond to the traditional aims of criminal punishment, such as retribution and deterrence, rather than fulfilling the humanitarian principles that underpin asylum law.[94]

Of all the measures mentioned above, the detention of asylum seekers is the one that most clearly demonstrates the increasingly punitive approach being taken towards asylum seekers in the UK. Until 1999, this measure was rarely used for asylum seekers and undocumented immigrants in the UK,[95] but this changed with the implementation of the Immigration and Asylum Act 1999, which expanded the use of detention in immigration and asylum and facilitated the opening of new detention centres. Since then, detention has become an 'essential element' of UK immigration and asylum law.[96] Even though detention in these cases must be used 'sparingly and for the shortest period necessary',[97] the detention of asylum seekers is commonplace in the UK.[98] In the year ending June 2022, there were 24,004 people detained under immigration powers, and most of them (the Home Office does not provide the exact figure) were asylum applicants.[99] Asylum applicants are usually detained in order to establish their identity or to assess the basis of their asylum claim, but the maximum time that they can be held in detention is not legally established.

Under the current circumstances, asylum detention presents an additional problem due to the extended processing times for asylum claims that the Home Office faces at present. This, together with the lack of a maximum period that an individual may spend in immigration detention, led to extended periods of detention for asylum seekers in 2020 during the COVID-19 pandemic. To cope with the increasing numbers of asylum seekers and undocumented immigrants held in immigration detention, facilities were extended to include military sites.[100] Complaints about the poor conditions of these facilities and the lengthy periods of detention imposed on asylum seekers reached the High Court, which ruled that conditions in the military barracks used did not meet minimum standards for asylum accommodation, according to section 96 of the Immigration and Asylum Act.[101] Additionally, the court held that the prolonged detention of asylum seekers breached the right to liberty under article 5 of the ECHR.[102] This decision highlighted the two main problems surrounding asylum detention: the poor conditions of some of the facilities used and the lack of proportionality in the detention periods imposed on asylum seekers.

Lastly, the imposition of sanctions upon those who arrive in a country without clearance, when such a requirement exists, constitutes another example of punitive measures adopted in breach of the Refugee Convention. This sanction was included in clause 39 of the Nationality and Borders Bill but was removed during the vote by the House of Lords on 2 March 2022, after the Parliament's Joint Committee on Human Rights,[103] UNHCR,[104] professional bodies,[105] and

94 Dallal Stevens, *UK Asylum Law and Policy* (Sweet & Maxwell 2004) 11.
95 Michael Welch and Liza Schuster, 'Detention of Asylum Seekers in the US, UK, France, Germany, and Italy: A Critical View of the Globalizing Culture of Control' (2005) 5 Criminal Justice 331, 337.
96 Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (Cm 5387, 2002) para 4.74.
97 Home Office, 'Enforcement Instructions and Guidance', Chapter 55: Detention and Temporary Release, para 55.1.3.
98 For statistics available for the year ending June 2022, see Home Office, 'National Statistics: How Many People Are Detained or Returned' (September 2022) <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2022/how-many-people-are-detained-or-returned> accessed 22 October 2022.
99 ibid paras 1.1, 1.3.
100 Independent Chief Inspector of Borders and Immigration, 'An Inspection of Contingency Asylum Accommodation: HMIP Report on Penally Camp and Napier Barracks (November 2020–March 2021)'.
101 *R (NB) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin) paras 171–73.
102 ibid para 324.
103 Joint Committee on Human Rights (n 88) para 122.
104 UNHCR, 'Observations on the Nationality and Borders Bill' (n 53) para 43.
105 Law Society of England and Wales, 'Stakeholder Submission to the UN Human Rights Council's Universal Periodic Review – United Kingdom 41st Session' (November 2022) paras 26–28.

NGOs[106] noted that this amendment was incompatible with the UK's obligations under the Refugee Convention and the ECHR. Nevertheless, this has remained a priority in subsequent Home Office policy documents, together with proposals to facilitate deportation orders and limit the right to access effective remedies.[107] This makes analysis of this proposal necessary.

Clause 39 of the Nationality and Borders Bill proposed the elimination of the difference between 'arriving in' and 'entering in' the territory of the UK that exists today in the Immigration Act 1971.[108] In the first case, 'arriving in' the UK is equivalent to reaching a UK border without disembarking from the vessel (if outside a commercial port or airport) or crossing the immigration control area (in the remaining cases). 'Entering in' occurs when the person disembarks from the vessel and, if it exists, crosses the immigration control area. This difference is relevant, since only 'entering in' the UK without leave or clearance is an offence under section 24 of the Immigration Act. This would enable asylum seekers to file asylum applications before crossing the immigration control area or disembarking from the vessel, excluding any liability. Clause 39 sought to replace this provision by equating 'arriving in' with 'entering in' the UK without clearance, limiting the possibilities of lawfully seeking asylum.

According to the Bill's Explanatory Notes, the goal of this provision was to 'allow prosecutions of individuals who are intercepted in UK territorial seas and brought into the UK who arrive in but don't technically "enter" the UK'.[109] This would include people smugglers who are intercepted in the Channel but have not entered the UK at the time of arrest and could be charged under clause 39. Nevertheless, the wording of this provision did not distinguish between asylum seekers and smugglers and consequently criminalized victims of human trafficking and people smuggling for not obtaining a visa prior to arrival.[110] After the implementation of the distinction between Category 1 and Category 2 asylum seekers, which restricts the number of asylum seekers entitled to protection, criminalizing entry into the UK without clearance would have almost completely banned the seeking of asylum.[111] The only viable route for asylum seekers to enter the UK legally would be through resettlement schemes that are applicable to only a limited number of individuals and do not offer a response to the situation of imminent danger that asylum seekers face when they have to flee their own countries.[112]

Although clause 39 was rejected, it constitutes a further step in the punitive discourse that underpins Home Office policies in the asylum context. This discourse blurs the distinction between asylum seekers and individuals holding other migration statuses, equating them all with 'illegal immigrants'.[113] This justifies the securitization discourse that considers asylum seekers as threats and demands their criminalization, in violation of article 31 of the Refugee Convention, which prohibits the imposition of penalties on asylum seekers 'on account of their illegal entry or presence', provided that they present themselves to the authorities 'without delay' and provide 'good cause for their illegal entry or presence'.[114] Furthermore, this new criminalization proposal showed how security discourses have displaced humanitarian principles in asylum policy,

106 See Refugee Action, 'All Punishment, No Protection: Why the Anti-Refugee Bill Should Be Scrapped' (November 2021) <https://www.refugee-action.org.uk/wp-content/uploads/2021/11/All-Punishment-No-Protection-Report.pdf> accessed 25 October 2022.

107 Priti Patel, Home Secretary, 'New Plan for Immigration: Policy Statement' (29 March 2022) <https://www.gov.uk/government/consultations/new-plan-for-immigration/new-plan-for-immigration-policy-statement-accessible> accessed 25 October 2022.

108 Immigration Act 1971, s 11(1).

109 'Explanatory Notes to the Nationality and Borders Bill' (n 51) para 388.

110 UNHCR, 'Observations on the Nationality and Borders Bill' (n 53) para 43.

111 Joint Committee on Human Rights, *Oral Evidence: Legislative Scrutiny: Nationality and Borders Bill* (20 October 2021, HC 588) Q7.

112 ibid.

113 Sara Buchanan, Bethan Grillo, and Terry Threadgold, *What's the Story? Results from Research into Media Coverage of Refugees and Asylum Seekers in the UK* (Article 19 2003) 12.

114 Section 3.1 above discusses the scope of the application of art 31(1) of the Refugee Convention.

characterizing those who flee areas in which their life may be at risk as threats to the State's national security and causes of destabilization.

4. EXTERNALIZING ASYLUM UNDER THE NATIONALITY AND BORDERS ACT 2022

4.1 The aims of externalization in the UK–Rwanda MoU

The UK–Rwanda MoU shows how the Nationality and Borders Act[115] assists the creation of bilateral agreements that externalize asylum processing. Although this memorandum of understanding has not yet resulted in any successful transfer, the High Court's decision deeming the relocation of asylum seekers under the UK–Rwanda MoU lawful[116] enables future transfers of asylum seekers under this agreement.[117] This section examines the UK–Rwanda MoU and how the Home Office is prioritizing external securitization agreements to 'fix' an asylum system that it considers 'broken', and evaluates the compatibility of such agreements with international refugee and human rights law.

As the analysis in section 3.2 showed, relocation agreements such as the UK–Rwanda MoU are commonplace and may be lawful if they aim at strengthening cooperation and burden sharing and meet stringent requirements.[118] According to the title of the UK–Rwanda MoU, the parties commit to creating an asylum partnership that strengthens shared international commitments and cooperation between Rwanda and the UK, including commitments under the Refugee Convention. Nevertheless, it remains unclear how the transfer of asylum seekers to Rwanda could achieve such a goal, in light of existing doubts about the compatibility of this externalization strategy with international refugee and human rights law.[119] The strengthening of shared commitments under the Refugee Convention is not mentioned again in the agreement, and most of the preamble focuses on the need to combat 'illegal' migration and to 'fix' the UK asylum system.

This justification is consistent with Home Office papers that consider externalization a solution to the existing backlog in the processing of asylum applications.[120] In other words, burden shifting rather than cooperation seems to be the aim of the UK–Rwanda MoU which, in turn, is instrumental to achieving one of the key priorities of the Home Office: reducing the number of individuals who can claim asylum in the UK. This goal is facilitated by the broad discretion that the UK has to relocate asylum seekers under the agreement, which affects any asylum seeker whose claim is deemed 'inadmissible' under UK law (including Category 2 asylum seekers under the Nationality and Borders Act).[121] Inadmissible asylum claims include applications filed by individuals who transit, or have connection with, a safe third country, including those who cross the English Channel, even if they may be entitled to protection under the Refugee Convention. Rather than a measure designed to enhance cooperation and strengthen international commitments under the Refugee Convention, this decision pursues a mixture of dissuasive and punitive aims. On the one hand, it punishes asylum seekers who are ineligible for asylum in the UK, even if they are entitled to international protection under international

115 See section 3.1 above.
116 *AAA v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin).
117 This case has been appealed and is now being heard before the Supreme Court. See *R (on the application of AAA) v Secretary of State for the Home Department.*
118 UNHCR, 'Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers' (May 2013).
119 See section 4.2 below.
120 Home Office, 'Inadmissibility: Safe Third Country Cases' (28 June 2022) 7 <https://www.gov.uk/government/publications/inadmissibility-third-country-cases> accessed 17 November 2022.
121 Nationality, Immigration and Asylum Act (n 58) s 80B, 80C.

law, for example those who have transited safe third States before arriving in the UK.[122] On the other hand, it tries to dissuade asylum seekers and undocumented migrants from entering the UK without leave. Ultimately, reducing the numbers of asylum seekers and undocumented migrants arriving in the UK is a security issue for the UK, and relocation has become a means by which to achieve this goal.[123]

Individuals relocated to Rwanda under the UK–Rwanda MoU will be able to apply for asylum there but will have no option to return to the UK.[124] Those whose applications are not successful may be given an alternative immigration status in Rwanda or removed to a third country.[125] Rather than strengthening cooperation and burden sharing,[126] this mechanism shifts the UK's responsibility to process asylum claims to Rwanda. This strategy fits with trends in European States to externalize their obligations to States in the global South.[127] The global South already hosts the majority of the world's refugee population who are usually found in countries neighbouring conflict zones, despite the more limited capacities of such countries to resettle asylum seekers.[128] Only a small percentage of these refugees move into Europe, and an even smaller fraction of them arrive in the UK.[129] Contrary to the declared aims of the UK–Rwanda MoU, these transfers do not strengthen solidarity or cooperation, as countries chosen under these so-called 'partnership' agreements already host significant numbers of asylum seekers despite the limited resources of their asylum systems.[130] At the same time, increasing the pressure that a State such as Rwanda may experience when managing increased migration and refugee flows raises new questions about its capacity to guarantee the rights of the asylum seekers relocated within its territory.[131]

4.2 The use of non-binding agreements to restrict the rights of asylum seekers

The UK–Rwanda MoU consolidates another concerning trend in migration and asylum agreements: the use of non-binding agreements to restrict the rights of asylum seekers and limit their capacity to access effective remedies.[132] According to UNHCR, relocation agreements should be contained in legally binding instruments that can be challenged and enforced by a court.[133]

122 See section 3.1 above for discussion of 'coming directly' and the protection afforded to asylum seekers who transit through or stop over in third countries.

123 For an analysis of how the UK–Rwanda MoU, together with the Nationality and Borders Act, reduces the number of asylum seekers who might access protection, see Miranda Butler, '*AAA and ors v Secretary of State for the Home Department* [2023] EWHC 55 (Admin): A Practitioner's Critique' (2023) 3 European Human Rights Law Review 260, 266–68.

124 UK–Rwanda MoU (n 5) para 9.

125 ibid para 10.

126 UNHCR, 'Note on the "Externalization" of International Protection (Executive Summary)' (28 May 2021) para 3.

127 On externalization practices that deflect asylum flows to States in the global South, see Thomas Faist, 'Contested Externalisation: Responses to Global Inequalities' (2019) 7 Comparative Migration Studies 1; Ana Aliverti and Celine Tan, 'Development and the Externalisation of Border Controls' in Jarret Blaustein and others (eds), *The Emerald Handbook of Crime, Justice and Sustainable Development* (Emerald Handbooks 2020); Amanda Bisong, 'Migration Partnership Framework and the Externalization of European Union's (EU) Migration Policy in West Africa: The Case of Mali and Niger' in Glenn Rayp, Ilse Ruyssen, and Katrin Marchand (eds), *Regional Integration and Migration Governance in the Global South* (Springer 2020).

128 See UNHCR, 'Refugee Population Statistics Database' <https://www.unhcr.org/refugee-statistics/> accessed 26 October 2022.

129 ibid; Eurostat, 'Annual Asylum Statistics 2021' <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics&oldid=558,844#:~:text=%3A%20Eurostat%20(migr_asyappctza)-,Main%20destination%20countries%20%E2%80%93%20Germany%2C%20France%20and%20Spain,36%20700%2C%20or%206.9%25> accessed 26 October 2022.

130 UNHCR, 'Note on the "Externalization" of International Protection' (n 126) Annex, paras 3–4.

131 UNHCR, 'Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK–Rwanda Arrangement' (8 June 2022) para 11.

132 See Sandra Lavenex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control' (2006) 29 West European Politics 329; Carole Billet, 'EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration. An Assessment after Ten Years of Practice' (2010) 12 European Journal of Migration and Law 45; Mariagiulia Giuffré, 'Readmission Agreements and Refugee Rights: From a Critique to a Proposal' (2013) 32 Refugee Survey Quarterly 79.

133 UNHCR, 'Guidance Note on Transfer Arrangements' (n 118) para V.

This requisite guarantees that the rights of those relocated are safeguarded by a court of law. These agreements should also contain safeguards prior to transfer, particularly for vulnerable groups;[134] guarantees that relocated individuals will be protected against *refoulement* and will be admitted by the receiving State;[135] and a mechanism to guarantee that they will be treated according to international human rights standards and have access to asylum and/or durable solutions if they are entitled to international protection.[136] The transferring State must also ensure that there are safeguards that guarantee that the receiving State will implement fair and efficient procedures in the determination of refugee status.[137]

The use of memoranda of understanding fails to meet these standards. These political agreements lack any legally binding character, and their fulfilment relies on the goodwill of the parties.[138] Such political agreements have become widespread in migration partnership agreements, with some specialists arguing that they have now become the norm.[139] States may favour the use of memoranda of understanding in asylum externalization agreements owing to the lower levels of scrutiny that they involve and the fact that they do not have to be made public. Nevertheless, the use of political agreements in this area falls short of the standards required by UNHCR and seems to contradict Foreign Commonwealth and Development Office (FCDO) guidance.[140] According to FCDO guidelines, memoranda of understanding should only be used when 'it is considered preferable to avoid the formalities of a treaty'.[141] This usually concerns technology or defence matters in which documents need to be kept classified, or matters of a technical or administrative nature. Although some may argue that a memorandum of understanding may be preferable to avoid the formalities of treaties in relocation agreements, the complexity of this area and the capacity of these agreements to affect human rights would recommend the use of a binding agreement that is scrutinized by Parliament and meets the standards set by UNHCR.

Conversely, the use of political agreements in this area presents a significant obstacle for asylum seekers who may be forcibly transferred to third countries (in this case, Rwanda) and not offered a judicial remedy if their rights are violated.[142] The diplomatic assurances against torture or ill-treatment contained in the UK–Rwanda MoU lack any binding character and are particularly weak, as Rwanda is not a signatory to the ECHR, which leaves the relocated asylum seeker with no remedy available. The European Court of Human Rights (ECtHR) issued interim measures during the first attempt to relocate asylum seekers to Rwanda on 14 June 2022 and raised this concern.[143] The court noted that the lack of an enforceable agreement hampers access to courts if human rights breaches occur after individuals are transfered to Rwanda and thus fails to guarantee their right to effective remedies.[144] The UK government has sought to minimize these concerns, stating that the UK–Rwanda MoU includes a Monitoring Committee,[145] which is made up of independent professionals reporting to a Joint Committee comprised of representatives of the UK and Rwanda.[146] Although the incorporation of independent professionals

134 UNHCR, 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)', EC/GC/01/12 (31 May 2001).
135 UNHCR, 'Guidance Note on Transfer Arrangements' (n 118) para VI.
136 ibid.
137 UNHCR, 'Summary Conclusions on the Concept of "Effective Protection" in the context of Secondary Movements of Refugees and Asylum-Seekers', Lisbon Expert Roundtable (9–10 December 2002) <http://www.unhcr.org/refworld/docid/3fe9981e4.html> accessed 17 October 2022.
138 UK–Rwanda MoU (n 5) para 2.2.
139 Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press 2013) 29.
140 FCDO, 'Treaties and MoUs: Guidance on Practice and Procedures' (15 March 2022).
141 ibid.
142 House of Lords, 'Memorandum of Understanding between the UK and Rwanda for the Provision of an Asylum Partnership Arrangement (18 October 2022): Written Evidence from the Law Society of England and Wales' (RWA0018).
143 *KN v United Kingdom* App No 28774/22 (ECtHR, 14 June 2022) Interim measures granted.
144 UNHCR, 'Global Consultations on International Protection/Third Track' (n 134) para 14.
145 UK–Rwanda MoU (n 5) para 18.
146 Home Affairs Committee, *Oral Evidence: Asylum and Migration* (11 May 2022, HC 197) Q65.

is an interesting development that may improve the oversight of the UK–Rwanda MoU and contribute to settling disputes, it does not remedy the non-binding character of the agreement or the lack of enforcement powers of this body. Hierarchically, the Monitoring Committee reports directly to the Joint Committee, which is a political organ that has no obligation to accept the former's recommendations.[147] Furthermore, the establishment of the monitoring body, its membership, reporting obligations, and accountability mechanisms have not been clarified, despite the entry into force of the UK–Rwanda MoU. In any case, a monitoring body appointed by the executive of the two cooperating States would not guarantee the right to an effective remedy under article 13 of the ECHR. In the interim measures delivered in the case of *KN v United Kingdom*,[148] the ECtHR reinforced the centrality of this provision and its connection with the existence of a binding agreement that can be challenged before a court of law.[149] In this respect, the court has noted 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'.[150]

The Home Office's goal of extending its externalization policy beyond the UK–Rwanda MoU risks generalizing these practices that leave asylum seekers without adequate human rights safeguards or enforcement mechanisms. This use of non-binding agreements is commonplace in other migration cooperation arrangements in Europe[151] and beyond,[152] and increases the risk that asylum seekers and migrants will not have access to effective remedies post-transfer, in violation of the standards set by UNHCR and the ECtHR.

5. CONCLUSION

This article has examined recent legislative reforms adopted in the field of asylum in the UK and has considered how they reinforce the securitization agenda that has characterized this area since 9/11. This new legal framework is primarily articulated through the Nationality and Borders Act 2022 that creates a two-tiered asylum system and facilitates the externalization of asylum processing in a majority of cases, for example in cases involving asylum seekers who transit third countries before arriving in the UK. This externalization policy treats Category 2 asylum applicants as second-class asylum seekers and exposes them to relocation under non-binding, bilateral agreements, such as the UK–Rwanda MoU. This facilitates their relocation to countries to which the individual may have no connection, with limited rights to access effective remedies, and ineffective oversight mechanisms. As examined in this article, these externalization strategies are inconsistent with the UK's obligations under the Refugee Convention and the ECHR, as they expose asylum seekers to the risk of human rights violations, whilst systematically denying them access to international protection.

Nevertheless, these reforms must be considered within the broader securitization attempts that have characterized UK asylum and immigration law since Theresa May presented her plan for the creation of a 'hostile environment' for undocumented migrants and asylum seekers. The policies and legislation adopted under this umbrella seek to blur the differences

147 ibid.
148 *KN* (interim measures) (n 143).
149 ibid.
150 ibid para 3.
151 Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic (2 February 2017); Agreement between the Kingdom of Spain and the Kingdom of Morocco on Cooperation on Security Matters and the Fight against Crime (13 February 2019).
152 Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia relating to the Settlement of Refugees (26 September 2014); Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues (3 August 2013).

between undocumented immigrants and asylum seekers to consider both as security risks that must be managed through an increasingly restrictive (sometimes punitive) legal framework. In the Nationality and Borders Act, the security risks generated by asylum seekers who transit third countries are linked to the human traffickers and people smugglers who allegedly facilitate asylum seekers' arrival in the UK. Although the operations of these criminal organizations should not bring into question the rights of their victims, who may be entitled to international protection under the Refugee Convention, the Nationality and Borders Act exposes them to re-victimization by criminalizing them and transferring them to third States, without the provision of an adequate human rights framework. This strategy is consistent with other bilateral asylum agreements concluded by other States in the global North[153] that use external actors to deflect their international obligations regarding asylum processing and to deter asylum seekers, in violation of the humanitarian principles that underpin international refugee law.

153 See other agreements, such as Asylum Cooperative Agreement between the United States of America and Guatemala (26 July 2019); Asylum Cooperative Agreement between the United States of America and El Salvador (20 September 2019); Asylum Cooperative Agreement between the United States of America and Honduras (25 September 2019); Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia (n 152); Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia (n 152).