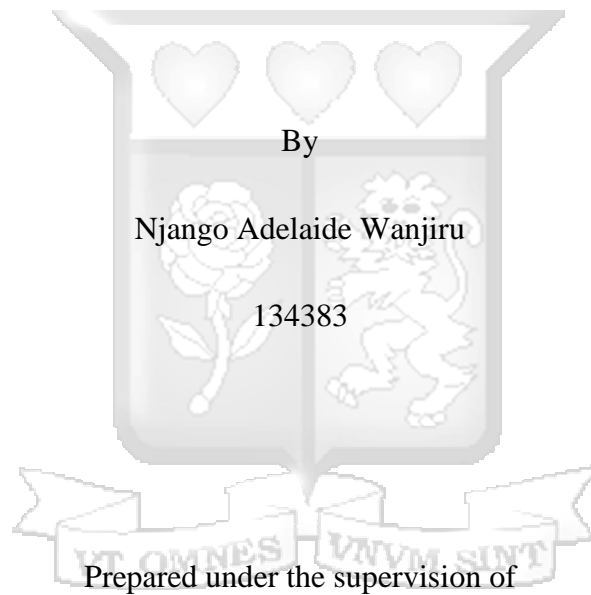


**The Halting Problem: A Study on The Adoption of Diplomatic Assurances in Kenya for  
Refugees and Asylum Seekers Who Are a Threat to Kenya's National Security**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore  
University Law School



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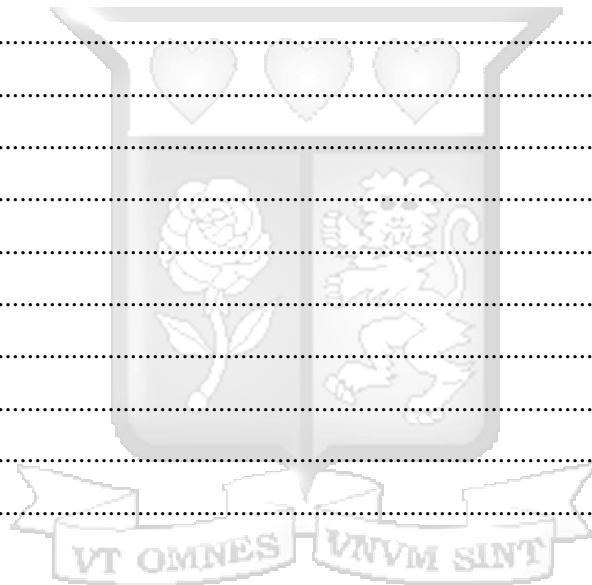
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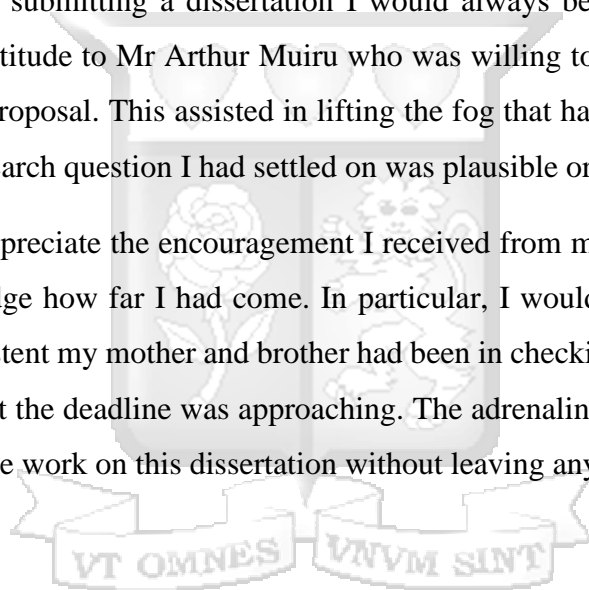


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## DECLARATION

I, NJANGO ADELAIDE WANJIRU, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: Thursday 11 January 2024

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:  .....

Mr. Allan Mukuki



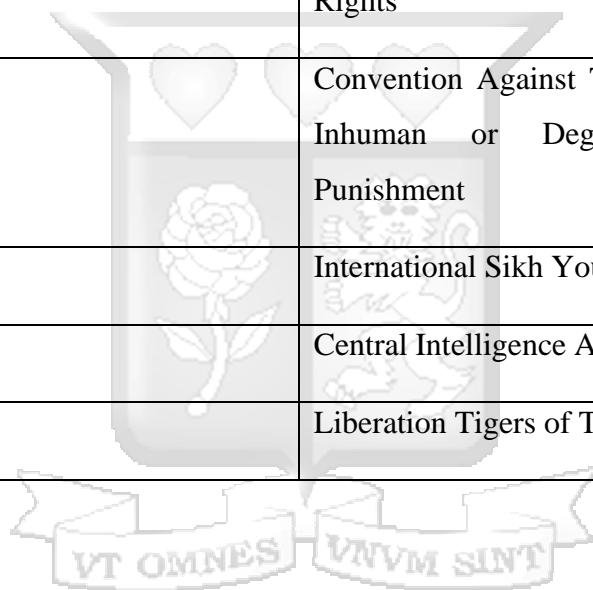
## ABSTRACT

The main objective of this dissertation is to show that diplomatic assurances can be adopted into Kenya's extradition laws to prevent further human rights violations that arise from renditions. The research will limit its study to looking at the fiduciary relationship states have with foreign nationals such as refugees and asylum seekers who have sought protection in a foreign state. This relationship will aid in the assessment of why states failed or succeeded while relying on diplomatic assurances to ensure that the subject of the agreement would not be exposed to mistreatment that would be defined as torture and ill-treatment. To replicate the lessons learnt from the successful and failed application of the agreements, the dissertation shall structure requirements that would aid in guiding a state to assess the validity of the assurances before approving the expulsion of the suspected terrorist. The methodology that will be relied on to aid in informing these desired discussions includes desk-oriented research, primary sources such as international authorities and secondary sources such as scholarly work. From the applied methodology, the main finding is that the degree of human rights violations rendered individuals are exposed to and the risk of compromising national security present an impossible situation to courts and the institution responsible for these matters. In conclusion, the balance required while questioning which of these two to protect gives a god-like power to the decision maker. To reduce the amount of pressure placed on the body in charge of deciding, the dissertation recommends the adoption of diplomatic assurances in cases that require a balance of the above issues.

## LIST OF ABBREVIATIONS

UDHR	Universal Declaration of Human Rights
ATPU	Anti-Terrorism Police Unit
USA	United States of America
MOU	Memorandum of Understanding
UK	United Kingdom
SIAC	Special Immigration Appeals Court
ICRC	International Committee of the Red Cross
VCLT	Vienna Convention on the Law of Treaties
UN	United Nations
UNSC	United Nations Security Council
UNC	United Nations Convention
ICISS	International Commission on Intervention and State Sovereignty
R2P	Responsibility to Protect
UNILC	United Nations International Law Commission
IHRL	International Human Rights Law
IHL	International Humanitarian Law
ECtHR	European Court of Human Rights
NATO	North Atlantic Treaty Organization
SRC	Supreme Revolutionary Council
SNM	Somali National Movement

USC	United Somali Congress
UNOSOM	United Nations Operation in Somalia
TNG	Transitional National Government
TFG	Transitional Federal Government
ICU	Islamic Courts Union
AMISOM	African United Mission in Somalia
ICCPR	International Covenant on Civil and Political Rights
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ISYF	International Sikh Youth Federation
CIA	Central Intelligence Agency
LTTE	Liberation Tigers of Tamil Eelam



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*Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

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*Salim Awadh Salim and Others v Commissioner of Police and 3 Others (2008) eKLR*. See also, *Omar Awadh Omar and others v. Attorney General (2011)*, Constitutional Court of Uganda.

*International Criminal Tribunal for the former Yugoslavia Prosecutor v Anto Furundzija*, ICJ Reports 1998.

*Y v SSHD (2005)*, The United Kingdom Special Immigration Appeals Commission.

*Bankovic and Others v Belgium and 16 Others*, ECtHR Judgement of 12 December 2001.

*Issa and Others v Turkey*, ECtHR Judgement of 16 November 2004.

*Chahal v The United Kingdom* ECtHR Judgement of 15 November 1996.

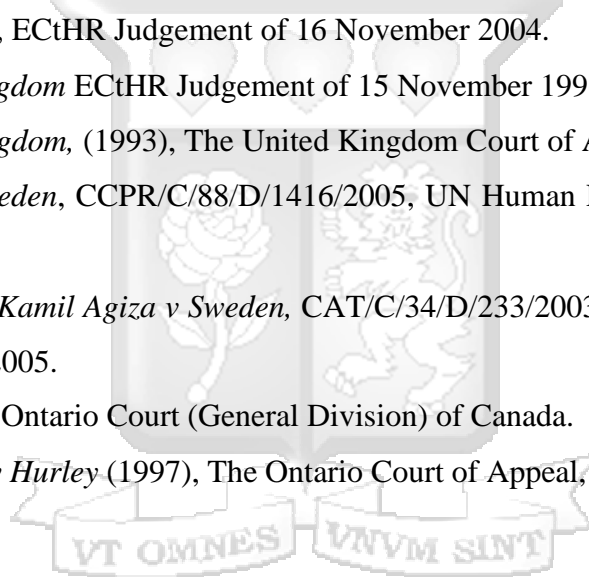
*Chahal v The United Kingdom*, (1993), The United Kingdom Court of Appeal (Civil Division).

*Mohammed Alzery v. Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee (HRC) (10 November 2006).

*Ahmed Hussein Mustafa Kamil Agiza v Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005.

*Suresh v Canada (1998)*, Ontario Court (General Division) of Canada.

*United States of Mexico v Hurley (1997)*, The Ontario Court of Appeal, 491.



## CHAPTER 1: THE HALTING PROBLEM

### INTRODUCTION

The war against terror in East Africa has seen most countries in the region coming together to help one another attain peace and harmony. In the mid-2000s, the state of national security in Somalia worsened as some of the members of the defeated Islamic Court Union regained control of the southern territory of the country. Through the instigation of strife and hate towards Ethiopian forces that were present in the country, the group gained support to push out the foreign country's military so that they could regain control over Mogadishu which is the capital of the state.

The backlash from communities that supported this eviction was merged with attacks from the ICU remnants who are currently known as the Al-Shabaab terrorist group. Over time, the group managed to gain control of the southern region and even instituted their own laws that aligned with the strict adherence of Sharia law. The Transitional National Government of Somalia publicly recognized the terrorist group and through this, the AMISOM was formed by the African Union to fight against the Al-Shabaab.

Countries, including Kenya, helped by sending their military to the territory of Somalia to help combat the threat. As the war grew, refugees from Somalia sought protection in neighboring countries such as Ethiopia and Kenya and as they accessed the borders of these states, members of the terrorist group did the same. As a result, Kenya's national security was in jeopardy as attacks against Kenyan citizens became easier due to the compromised access into the state. As the war in Somalia worsened, the retaliation by the terrorist group became more severe as seen in the Garissa University attack that claimed more than one hundred and forty lives, the Westgate Mall attack and the Mandera bus attack. After each attack, the Al-Shabaab would release a statement confirming their involvement. They would also include their reason for the attacks was communicating their disapproval of the involvement of the Kenyan military in the fight against them in Somalia.

In the past, Kenya fell victim to terrorist attacks in 1998 and in 2002 when the USA embassy was bombed and a hotel in Mombasa was also attacked. As a result of this, the Kenyan government formed the Anti-Terrorism Police Unit that was mandated with investigating terrorist activities

within the state and proceeding with the prosecution of the involved individuals. The mid-2000s presented a challenging period for the unit as more attacks were recorded. To gain an advantage over the attackers, the unit opted to act as though they were above the rule of law.

This was achieved by raiding the homes of suspects, detaining them for long periods without presentation to the court or communication of charges, and rendering them to states that had a history of subjecting suspected terrorists to torture and other ill-treatment. As renditions became more rampant, national and international organizations condemned the practice due to the human rights violations that were reported. Detained individuals who managed to escape claimed that they were subjected to physical and psychological torture, yet they informed their oppressors that they were innocent.

The use of such tactics to remove suspected terrorists from the state goes against the Bill of Rights that the 2010 Constitution of Kenya mandates all government institutions to observe. In addition to this, such practices prevent the realization of the ban against torture that is internationally recognized. As the situation worsened, the Open Justice Society published a report recording these violations and posed several recommendations to the unit including revising the mechanisms adopted to combat terrorism in Kenya especially those that constituted human rights violations. The International Committee of the Red Cross also suggested the adoption of diplomatic assurances to limit human rights violations upon expulsion of suspected terrorists.

The two recommendations resulted in the research objective of this dissertation which is examining the introduction of diplomatic assurances into Kenya's extradition laws in order to combat the human rights violations that arise from rendition exercises. The purpose of each chapter that follows is to discuss the different areas that affect the assessment of adopting such assurances especially when the current extradition process has been in practice since 1987.

Subsequent chapters will focus on the fiduciary theory of humanitarian intervention that explains the kind of duties Kenya has towards its beneficiaries who are the refugees and asylum seekers. This lens will be extended to chapter three where the research will offer an assessment of how Somalia's civil war gave rise to the Al-Shabaab and the formation of AMISOM whose presence in Somalia resulted in the terrorist attacks in Kenya. After this, the chapter shall bring up the objective of the whole dissertation by presenting it as a solution to the adopted practice of rendering

suspected terrorists from Kenya to Somalia. The subsequent chapter shall rely on cases to present the factors that aided in the success and failure of diplomatic assurances in different states and the requirements Kenya cannot forego while drafting such assurances.

After the above discussion is concluded the next chapter will deliberate on how diplomatic assurances can be introduced and merged with extradition procedures hence providing a theoretical view of the suggested solution. The final chapter will offer recommendations to the government of Kenya to enable the application of diplomatic assurance and realization of the international ban against torture.

## BACKGROUND

The Universal Declaration of Human Rights (hereinafter referred to as UDHR) enshrines the right to enjoy asylum by refugees and asylum seekers in Article 14.<sup>1</sup> In order to clearly identify refugees, the 1951 Convention Relating to the Status of Refugees (the 1951 Convention) offers a definition that has been adopted internationally. A ‘refugee’ is any individual, who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.<sup>2</sup> Contrarily, an asylum seeker is a person who has left his country for another in order to seek protection from persecution and human rights violations. Although individuals in either category share the same situation, asylum seekers differ in that they lack legal recognition as refugees and are awaiting a decision on their asylum application.<sup>3</sup>

In anticipation of the possibility that refugees and asylum seekers may be deported from the countries where they sought asylum, the principle of non-refoulement was introduced in the 1951 Convention.<sup>4</sup> It holds that ‘no contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontier 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

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<sup>1</sup> (1) Everyone has the right to seek and enjoy in other countries asylum from persecution.

<sup>2</sup> Article A(2), *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>3</sup> -<https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/>- on 1 December 2022.

<sup>4</sup> Article 33, *Convention Relating to the Status of Refugees*.

opinion'.<sup>5</sup> Consequently, this principle limits a state's power to evict individuals who have migrated into its territory in an irregular manner but claim protection as refugees.

While this principle is regarded as non-derogable,<sup>6</sup> it is not absolute due to permitted exceptions.<sup>7</sup> Of importance to this research is the limitation where the refugee or asylum seeker is suspected of being a threat to the national security of the host State.<sup>8</sup> Kenyan law defines national security as 'the protection against internal and external threats to a state's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests'.<sup>9</sup> Although this limitation is crucial to the safety of states, it has left refugees and asylum seekers vulnerable to rendition exercises. These are illegal deportations that are carried out in secret and constitute individuals being transported to states that employ interrogation techniques that the international community has characterized as human rights violations.

A notable example of such a situation occurred in Sweden. Ahmed Agiza sought refuge in Sweden in the year 2000; however, his application was rejected after the security community of the state was informed of his position in a terrorist group. On 18 December 2001, Ahmed Agiza was rendered from Sweden to Egypt where he had been sentenced in absentia after the Superior Court Martial found him guilty of being part of Al Jihad. After his arrival in Egypt, he was detained in the Mazraat Tora prison where he was subjected to torture and other ill-treatment.<sup>10</sup>

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<sup>5</sup> Article 33(1), *Convention Relating to the Status of Refugees*.

<sup>6</sup> Muriithi P, 'Reconciling Refugees Right to Non-Refoulement and Repatriation of Refugees as a Counterterrorism Measure intended to Uphold National Security in Kenya' 8(1) *Journal of Conflict Management and Sustainable Development*, 2002, 87.

<sup>7</sup> Article 1 (F) and Article 33(2), *Convention Relating to the Status of Refugees*. The principle shall not apply to persons who have committed crimes against humanity, war crimes, crimes against peace, serious non-political crimes outside the country of refuge before receiving admission as a refugee, or a person whose acts are found to be contrary to the principles and purposes of the United Nations. Furthermore, the principle cannot apply to refugees who are suspected to be a danger to the national security of the state they are seeking refuge or asylum in or have been convicted, by a final judgment, of a particularly serious crime.

<sup>8</sup> Article 33(2), *Convention Relating to the Status of Refugees*.

<sup>9</sup> Article 238, *Constitution of Kenya*, 2010.

<sup>10</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 2.3 – 2.10.

Similar cases have come up and governments have received advice, from various organizations and committees, to adopt safer measures to combat terrorism.<sup>11</sup> Some states tried to introduce new legislation and practices that would not harm the suspects,<sup>12</sup> but the weight of the situation resulted in the conclusion that harboring terrorists within their territory would result in them being a greater threat to their national security. Therefore, to ensure that the suspected terrorists could be moved without the state being held liable for subsequent treatment, some states adopted diplomatic assurances that act as agreements where the receiving State confirms that the suspect shall not be subjected to torture.

Other states such as Kenya refrained from this progression and maintained renditions as a counter-terrorism technique. The Kenyan Anti-Terrorism Police Unit (ATPU) was created in 2003 as a safeguard against future attacks similar to the 1998 USA embassy bombing and the 2002 attack on an Israeli-owned hotel in Mombasa.<sup>13</sup> When the unit was brought before the court, it justified these exercises by claiming that the national security of the state was threatened. The court weighed the human rights violations against the claimed threat and concluded that the renditions caused more harm than good and thus national security could not constitute a defense.<sup>14</sup>

Even after the court warned the unit about the impact such renditions had on the victims, the exercise was not halted. In subsequent years, reports highlight that in one year, eighty-five Somali refugees were secretly flown to Mogadishu where Kenyan authorities handed them over to Ethiopian military forces. While in the custody of the Ethiopian military, some of the refugees confirmed that they were psychologically tortured and threatened.<sup>15</sup>

Although Kenyan law has extradition procedures and deportation protocols that should be applied in such instances, the unit refrains from applying them due to the lengthy court procedures. In

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<sup>11</sup> Human Rights Watch, *Diplomatic Assurances Against Torture Questions and Answers*, 2.

<sup>12</sup> Adamson F, 'Crossing Borders: International Migration and National Security' 31(1) *International Security*, 2006, 1. In January 2004, the Department of Homeland Security of USA introduced biometric technology at all the immigration and border control points in the country.

<sup>13</sup> *UNHCR General Allegations*, 15 - 19 September 2014.

<sup>14</sup> *Salim Awadh Salim and Others v Commissioner of Police and 3 Others (2008) eKLR*. See also, *Omar Awadh Omar and others v. Attorney General* (2011), Constitutional Court of Uganda.

<sup>15</sup> "Why Am I Still Here?" The 2007 Horn of Africa Renditions and the Fate of Those Still Missing *Human Rights Watch*, 2008, 8 – 13.

addition, some officials in the ATPU believed that the courts are unreliable because of the difficulty that arises when gathering evidence and getting informants to appear in court. Therefore, the adoption of rendition exercises solves the problem at hand.<sup>16</sup> If one adopts this line of thought, the unit is correct. Renditions remove the problem from the territory hence disrupting any plans the terrorists may have set in motion. What the unit fails to consider is the reality awaiting the suspects once they land in Ethiopia or USA. This results in a reality that gives rise to the violation of the ban on torture.<sup>17</sup>

The prohibition from torture is part of customary international law and it has attained the rank of *jus cogens*,<sup>18</sup> hence it imposes an absolute ban on all States in the world.<sup>19</sup> Additionally, governments have an obligation to protect the rights of those within their jurisdiction.<sup>20</sup> This right extends to refugees and asylum seekers who are in the host State's territory.<sup>21</sup> Even so, the question that poses an issue is whether migrants, who have satisfied the limitation of being a threat to the national security of the host State, should be protected.<sup>22</sup>

This limitation creates a dilemma. On one hand, host States are supposed to ensure their national security, but on the other hand, they are supposed to protect the rights of migrants, whether they may pose a threat to their national security or not.<sup>23</sup> The second obligation is connected to there

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<sup>16</sup> Open Society Justice Initiative, *Human Rights Abuses by Kenya's Anti-Terrorism Police Unit*, 2013, 19.

<sup>17</sup> Article 1, *United Nations convention against torture and other cruel inhuman or degrading treatment or punishment*, 10 December 1984, 39/46.

<sup>18</sup> *International Criminal Tribunal for the former Yugoslavia Prosecutor v Anto Furundzija*, ICJ Reports 1998, 51 – 65. See also *Pinochet Ugarte re* (1999) The United Kingdom House of Lords.

<sup>19</sup> Article 53 and 64 of the *Vienna convention on the law of treaties*, 23 May 1969, 1155 UNTS 331. When read together, *jus cogens* norms prevail over treaty provisions and they rank higher than general customary rules.

<sup>20</sup> UNHCR, *International Human Rights Law UNHCR* -< <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>>- on 25 February 2023.

<sup>21</sup> UNHCR, *Protecting Refugees: questions and answers UNHCR*, 2002 -< <https://www.unhcr.org/publications/brochures/3b779dfe2/protecting-refugees-questions-answers.html>>- on 6 March 2023.

<sup>22</sup> Article 1 (F) and Article 33(2), *Convention Relating to the Status of Refugees*. The principle shall not apply to persons who have committed crimes against humanity, war crimes, crimes against peace, serious non-political crimes outside the country of refuge before receiving admission as a refugee, or a person whose acts are found to be contrary to the principles and purposes of the United Nations. Furthermore, the principle cannot apply to refugees who are suspected to be a danger to the national security of the state they are seeking refuge or asylum in or have been convicted, by a final judgment, of a particularly serious crime.

<sup>23</sup> Article 3, UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

being a risk that sending them back to their country could result in torture and/or other ill-treatment. With limited options and the apparent lack of time to come up with a solution that will ensure the safety of both national security and the migrant, States opt to settle for moving the suspects to the only country that is willing to have them irrespective of the likelihood of inhumane treatment.

Upon comprehension of the effect renditions have when it comes to relations on an international level, some countries introduced agreements that solve this dilemma. These agreements, as mentioned earlier, are referred to as diplomatic assurances. They may be binding or non-binding guarantees<sup>24</sup> given by a receiving State<sup>25</sup> to a host State<sup>26</sup> where there is suspicion that a person's human rights, once migrated to the territory of the receiving State, are at a risk of being violated. The agreement contains a word of honor from the receiving State that it will not violate the suspect's human rights.<sup>27</sup> Furthermore, these assurances serve the purpose of preventing any violation by the host State of its responsibilities under applicable human rights treaties, domestic legislation, including the constitution, and/or clauses in extradition law that would otherwise forbid the surrender of the subject.<sup>28</sup>

An example of the use of diplomatic assurances is evidenced where an assurance in the form of a memorandum of understanding (MOU) was offered by Algeria to the United Kingdom (UK) where refugees from Algeria were considered to be a threat to the national security of the UK.<sup>29</sup> The

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<sup>24</sup> Human Rights Watch, *Diplomatic Assurances Against Torture Questions and Answers*, 4.

<sup>25</sup> This is the State that will receive the suspected refugee or asylum seeker once they are moved from the host State's territory.

<sup>26</sup> This is the State that is currently hosting the refugee and asylum seeker before they are moved to the State that is requesting for them.

<sup>27</sup> Jones K, 'Deportations with Assurances: Addressing Key Criticisms' 57(1), *The International and Comparative Law Quarterly*, 2008, 184.

<sup>28</sup> S Kapferer, '*The Interface between Extradition and Asylum, UNHCR, Legal and Protection Policy Research*' PPLA/2003/05, November 2003.

<sup>29</sup> *Y v SSHD* (2005), The United Kingdom Special Immigration Appeals Commission. See also Jones K, 'Deportations with Assurances: Addressing Key Criticisms' 57(1), *The International and Comparative Law Quarterly*, 2008, 184 where the MOU is discussed in detail. The assurance was in the form of a Memoranda of Understanding in the style of Exchange of Letters between the president of Algeria and the former Prime Minister of the UK, Tony Blair. The MOU's contained understandings that once the parties were deported to Algeria their human rights would not be violated. It also included the agreement that the UK would send an independent rights monitoring body to monitor and ensure that the rights of the affected individuals were not violated.

Special Immigration Appeals Commission (SIAC) held that the existing MOU and its contents provided sufficient protection upon the removal of the Algerians. Therefore, the deportation would not go against the ban on torture and ill-treatment.<sup>30</sup> This case proved that the assurance provided two forms of protection. The first being that the UK ensured their national security was enforced from the Algerian refugees and the second was that the refugees and asylum seekers, once moved, would have their rights respected.

The threat the Algerian refugees posed to the national security of the UK has been reflected in Kenya for over two decades. This has become an inevitable problem due to the increased attacks from terrorists who gained access to the state by claiming refugee status and recruiting more members within the territory of Kenya. The cause of the refugee crises can be traced back to Somalia's civil wars and Kenya's military waging war against Al-Shabaab. These events have opened doors to Kenya being a home to many Somali refugees, some of whom are suspected terrorists hence them being considered to be threats to Kenya's national security. Due to the urgency created by their presence in Kenya, the ATPU and other authorities have silently permitted and conducted secret rendition exercises whose aftermath has been the human rights violations through torture and/or other ill-treatment. Appropriately, the international community has condemned Kenya for violating the relevant human rights laws.



## PROBLEM STATEMENT

Creating a balance between maintaining national security while guaranteeing the protection of the human rights of suspected terrorists who are also refugees and asylum seekers has proven to be difficult. The level of instability in some East African countries has resulted in Kenya becoming the host state for many refugees and asylum seekers. As they migrate into Kenya, terrorists have used them as a cover to gain access to the country and launch attacks in different areas such as Garissa, Nairobi and Mandera. The authorities have been mandated with the task of doing away with such threats, yet neither the international laws nor the national courts have approved of the methods adopted to carry out this task leaving the authorities with a dilemma. This research will

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<sup>30</sup> *Y v SSHD* (2005), The United Kingdom Special Immigration Appeals Commission.

focus on the use of diplomatic assurances to safeguard the human rights of refugees and asylum seekers who are suspected of being a threat to Kenya's national security and are to be moved to a State that is suspected of carrying out practices relating to torture and ill-treatment.

## JUSTIFICATION

Rendition exercises in Kenya have increased since 2007 due to the rise in terrorist attacks. There was even an instance where eighty-five Somali refugees, who were suspected terrorists, were subjected to a rendition exercise at once to Ethiopia where they were tortured and threatened. Such exercises have resulted in Kenyan authorities such as the ATPU violating the peremptory norm on the prohibition of torture. The defense adopted by members of the unit to justify these illegal deportations was the protection of Kenya's national security from terrorists. The outcome is the impasse as to whether the State should protect its national security or the human rights of the suspected refugees and asylum seekers. This study addresses the issue presented in the dilemma by providing a solution through reliance on guides from how other governments have resolved the deadlock. The benefit sought is enabling the research to steer lawmakers to amend policies that will fill the gap that is causing the problem while also introducing a provision of a method of post-return monitoring by the host State. This particular provision will enable the host state to continue communicating with those who have been moved to a different state so that the state can verify that the receiving state is not violating the agreement. It will also ensure that the ATPU can move the suspects out of Kenya's territory hence eliminating the possibility of their presence being a threat to Kenya's national security. Furthermore, Kenya's relations with the international community will be protected due to compliance with international human rights law, refugee law and customary international law.

## LITERATURE REVIEW

Previous studies in Kenya have focused on the unlawful nature of rendition exercises against refugees and asylum seekers which results in leaving them in jurisdictions where the likelihood of torturing them and practicing other human rights violations is high. This is depicted in the report

on human rights abuses by Kenya's ATPU where the focus of the study is cases of deportation that have been brought to light but have not been addressed.<sup>31</sup> In addition to this, the recommendations in the reports on similar activities have focused on the amendment of torture laws and the ratification of international policies, but they have not offered any further guidance to help legislators improve the relevant authorities.<sup>32</sup>

### On Effectiveness of Diplomatic Assurances

The Human Rights Watch in their article on 'Human Rights Watch: "Diplomatic Assurances" Against Torture' expressed their view that these assurances are worthless. They used a question-and-answer format to guide their critique against the use of diplomatic assurances where they held that countries use them to avoid their duties to these suspects - the main obligation under scrutiny being protection from torture and other forms of ill-treatment.<sup>33</sup>

To support their argument, they discussed four claims which this research paper disagrees with, but they are essential as they open up the discussion to other works that have introduced solutions to some of the aversions presented by the Human Rights Watch. The first submission was that the nature of torture makes it difficult for monitoring agencies to identify them and the case referred to in this particular explanation was the Ahmed Agiza case where the individual was deported from Sweden to Egypt in 2001.<sup>34</sup>

While explaining the forms of torture employed during Ahmed Agiza's detention, the illustration brought forward was mock drowning which cannot be identified by simply looking at the individual. In addition to this, most countries have internal medical personnel who monitor the abuses to ensure that if an external medical officer were to examine the detainee, they would not be able to detect any form of torture.<sup>35</sup> As a result, the Ambassador of Sweden was not able to note any signs of torture on the exposed parts of Agiza's body during his visits. Furthermore, the prison ensured that the meetings between the prisoner and Sweden's representative were never held in

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<sup>31</sup> Open Society Justice Initiative, *"We're Tired of Taking You to the Court"*, 2009, 42-46.

<sup>32</sup> Open Society Justice Initiative, *"Counterterrorism and Human Rights Abuses in Kenya and Uganda"*, 2013, 13. See also Redress and Reprieve, *Kenya and Counter-terrorism: A Time for Change*, 2007, 48 – 49.

<sup>33</sup> Human Rights Watch, *Diplomatic Assurances Against Torture Questions and Answers*, 1.

<sup>34</sup> Human Rights Watch, *Diplomatic Assurances Against Torture Questions and Answers*, 3.

<sup>35</sup> Human Rights Watch, *Diplomatic Assurances Against Torture Questions and Answers*, 3.

private. This limited Agiza's privacy and his confidence to report the ongoing treatment he was exposed to regularly.<sup>36</sup>

From the above point of contention, the Human Rights Watch offered insight that had been ignored by many countries that employed diplomatic assurances. This includes accepting the possibility that torture is not visible to the naked eye. Another example that can prove this is the adoption of psychological torture. In the background, psychological torture was mentioned as one of the techniques that was used by the Ethiopian forces while interrogating suspected terrorists. The beneficial factor that the above argument will play in this dissertation is connecting the weaknesses most assurances have. For such an agreement to have an effect that most states want it to have, this particular instance shows the depth and difficulty the international community has faced while trying to eradicate torture. As a result, this research shall heavily rely on this argument by transforming it to a requirement that states need to prove protection from for an agreement to be considered valid.

The second assertion was that most host State's know that the receiving country employs torture and other forms of ill-treatment.<sup>37</sup> This attestation is supported by the next argument presented by the organization where they held that most host governments do not have an incentive to ensure that the detainee is being tortured because of the blame that would fall on them.<sup>38</sup> Consequently, the victims are left in environments that promote torture and/or other ill-treatment and as a result the ban against such practices weakens in its application.

This dissertation uses the above assertion as a smoking gun. Clearly, torture and other ill-treatment are practices that have not been done away with and as the previous argument explained, the employed means are diverse and can be well hidden. As the subsequent chapters of this research highlights these important points, it also uses them as building blocks for Kenya in its application of diplomatic assurances.

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<sup>36</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, 3.4.

<sup>37</sup> Human Rights Watch, *Diplomatic Assurances Against Torture Questions and Answers*, 3.

<sup>38</sup> Human Rights Watch, *Diplomatic Assurances Against Torture Questions and Answers*, 4.

Courtesy of international organizations such as Amnesty International, countries are aware of states that have held on to the banned practice. Therefore, if Kenya combines the list of forms of torture and the list of countries that practice the banned act, it can use this as a disqualifying tool, hence denying the requesting state any assurance of deportation to its jurisdiction. This idea will be presented in chapter four as one of the requirements Kenya has to satisfy to deport an individual.

The final argument that will be discussed in subsequent chapters is that the post-monitoring mechanism that some host States and non-governmental organizations, such as the International Committee of the Red Cross (ICRC), employ is not helpful due to the restrictions placed by the receiving State.<sup>39</sup> This issue has resulted in the failure of diplomatic assurances because bodies are not able to gain feedback from the deportee once they are detained in the receiving state's facility of choice.<sup>40</sup>

In the past, this has been viewed as an impossible issue that cannot be resolved due to the authority states hold over their facilities. While appreciating the truth behind this view, this dissertation opts to revise the situation in order to view sovereignty from a different angle that will allow governments and bodies to carry out post-return monitoring without similar limitations. The theory that will be introduced in chapter two will offer the lens that the research will rely on while presenting solutions to the above issue. From the myriad of ideas that will arise from the discussion, the key point that will be made to solve the final problem presented by the Human Rights Watch is the change of the comprehension of sovereignty.

In the past, sovereignty was viewed as a limitation of power. This means that foreign states could not interfere with the practices of another state even in instances of bad governance. Currently, this is the issue that faces the ICRC. Due to the jurisdiction a state such as Jordan has, the ICRC has been denied access to those under its care.<sup>41</sup> To limit the authority of the state in similar instances, the dissertation will explain its understanding of sovereignty as the responsibility of a state to protect those within its jurisdiction and this care extends to allowing other bodies to confirm the same.

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<sup>39</sup> Human Rights Watch, *Diplomatic Assurances Against Torture Questions and Answers*, 5 - 6.

<sup>40</sup> Human Rights Watch, *Diplomatic Assurances Against Torture Questions and Answers*, 5 - 6.

<sup>41</sup> Human Rights Watch, "Diplomatic Assurances" against Torture: Question and Answers, 5-6.

Upon appreciation of the above, it is essential to shift focus to authors that support the use of diplomatic assurances so that the dissertation can prove that the application of such agreements is possible and successful. This change in atmosphere will be guided by the work of Sara Isman in her discussion on ‘Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?’. Here she provides a detailed study on the use of diplomatic assurances and their effectiveness in various cases.

The author is of the view that States have adopted the use of these assurances to avoid violating their international obligations<sup>42</sup> which is a view that is supported by this research paper. To succeed in achieving such an ambitious goal, some requirements have to be met. These include being assessed by a competent and effective authority on a case-by-case basis and the level of control the receiving State’s government has on the relevant institution the refugee or asylum seeker will be handed over to.<sup>43</sup> She extends this argument by claiming that the legally binding nature of the assurances on all parties is an essential requirement so that repercussions can be effective on both States.<sup>44</sup>

The last position held by Sara Isman is essential to this research paper because it will help direct the conversation to the legally binding nature of diplomatic assurances which has been an area of contention. Literature from authors such as Anthony Aust, Gregor Noll, and Jan Klabber have tried to determine what makes some assurances or all assurances binding from a legal perspective. Yet none has combined the discussed suggestions to form a compounded list. Sara Isman’s article will enable the expansion of this discussion to reach a desired list of what would constitute a legally binding diplomatic assurance.

The author’s paper will also constitute the foundation for the debate as to whether the assurances should align with international obligations arising from treaties that are against torture. This is in consideration of other works that have highlighted that some assurances could be used as

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<sup>42</sup> Isman S, ‘*Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?*’ unpublished, University of Lund, Lund, 2005, 23.

<sup>43</sup> Isman S, ‘*Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?*’ unpublished, University of Lund, Lund, 2005, 44.

<sup>44</sup> Isman S, ‘*Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?*’ unpublished, University of Lund, Lund, 2005, 60.

mechanisms to amend treaties<sup>45</sup> under Article 40 (1) (b) of the Vienna Convention on the Law of Treaties (VCLT).<sup>46</sup>

Sara Isman's optimism relating to the adoption of such assurances is also evident in Kate Jones' article on 'Deportations with Assurances: Addressing Key Criticisms'. The author believes that the protection of human rights is an indispensable part of the counter-terrorism effort most countries have adopted. It is also a means to end the use of torture and ill-treatment in some jurisdictions.<sup>47</sup> This is an angle that is supported in this dissertation because it promotes the attainment of the two aforementioned goals. The paper also presents an essential criticism that is expressed in this research paper to the organizations and authors who believe that these assurances are harmful rather than helpful, but they do not offer a solution.

### On the Involvement of Courts

Before discussing what authors have said about the involvement of the courts in the formation, approval, and contestation of diplomatic assurances, it is important to note that some organizations have suggested that suspected terrorists should be charged before domestic courts and have their case heard.<sup>48</sup>

Nina Larsaeus in 'The Use of Diplomatic Assurances in Prevention of Prohibited Treatment' presents multiple views from different sources on how courts have played a role in ensuring that

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<sup>45</sup> Larsaeus N, 'The Use of Diplomatic Assurances in Prevention of Prohibited Treatment' Refugee Studies Centre, RSC Working Paper Number 32, 2006, 20 - [https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/TonyEllis\\_3.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/TonyEllis_3.pdf) on 26 October 2023.

<sup>46</sup>(b) the modification in question is not prohibited by the treaty and:  
(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;  
(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

<sup>47</sup> Jones K, 'Deportations with Assurances: Addressing Key Criticisms' 57(1), *The International and Comparative Law Quarterly*, 2008, 193.

<sup>48</sup> Larsaeus N, 'The Use of Diplomatic Assurances in Prevention of Prohibited Treatment' Refugee Studies Centre, RSC Working Paper Number 32, 2006, 6 - [https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/TonyEllis\\_3.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/TonyEllis_3.pdf) on 26 October 2023.

diplomatic assurances are compatible with the European Court of Human Rights.<sup>49</sup> She has also taken strides to show that international courts have a role in determining the validity of diplomatic assurances and such decisions should be included in the criteria of determining whether an assurance is in line with the law or not. An example that is given is where international courts extend the principle of non-refoulement to instances where national security is in question.<sup>50</sup>

The author further extends their discussion to try and explain why prosecuting an individual in a domestic court is impossible. In her explanation, she uses the standard of proof that is applied in criminal proceedings and in refugee status determination. In the former, it is ‘beyond reasonable doubt’ while in the latter, it is ‘serious reasons for considering’. Upon further examination, it is evident that if one is suspected of being a terrorist, it may satisfy the standard of proof in the refugee status determination but not in criminal proceedings.<sup>51</sup>

The role played by courts is supported in this research paper and Nina Larsaeus offers key examples as to how the courts have helped the executive identify the shortfalls of the assurances that were being questioned. This will help in justifying the role the courts have played in the past and why courts should be involved when questioning the validity of the assurances being contested. The discussed article will also offer the answer as to why courts and the security community find it difficult to prosecute refugees and asylum seekers as the standard of proof varies.

Gregor Noll in ‘Diplomatic Assurances and the Silence of Human Rights Law’ gives a brief but informative explanation on the silence of the courts in cases involving diplomatic assurances. He begins by clarifying that courts operate on a national level hence their authority is limited. On the

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<sup>49</sup> Larsaeus N, ‘The Use of Diplomatic Assurances in Prevention of Prohibited Treatment’ Refugee Studies Centre, RSC Working Paper Number 32, 2006, 5 - [https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/TonyEllis\\_3.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/TonyEllis_3.pdf) on 26 October 2023.

<sup>50</sup> Larsaeus N, ‘The Use of Diplomatic Assurances in Prevention of Prohibited Treatment’ Refugee Studies Centre, RSC Working Paper Number 32, 2006, 6 - [https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/TonyEllis\\_3.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/TonyEllis_3.pdf) on 26 October 2023.

<sup>51</sup> Larsaeus N, ‘The Use of Diplomatic Assurances in Prevention of Prohibited Treatment’ Refugee Studies Centre, RSC Working Paper Number 32, 2006, 6 - [https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/TonyEllis\\_3.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/TonyEllis_3.pdf) on 26 October 2023.

other hand, diplomatic assurances operate on an international level, between the party States. Therefore, there is a need for a facilitator that can assure the judicial community that is responsible for the individual in question on the national level that he or she will be treated in accordance with the legal standards of the respective jurisdiction and international treaties. The facilitator is the diplomatic assurance in the respective cases.<sup>52</sup>

Gregor Noll's interpretation is in line with the idea being extended by this research paper as it gives a fresh perspective of the purpose of diplomatic assurances. His work will provide a different reason the assurances have to be questioned in court and which communities are affected by them. It will also provide answers as to why the security community is in charge of the detainee once they are moved to a different country.<sup>53</sup>

Sara Isman highlights that courts have developed their role when parties contest the validity of diplomatic assurances. The author has also highlighted how the courts have adopted this new form of agreements in a positive manner. From the analysis conducted by the author, the research will benefit from the examples provided to prove that courts have ensured that the assurances align with the international humanitarian laws and conventions.

This examination is also evident in the work of Kate Jones whose study focused on briefly showing how European courts have approached and responded to diplomatic assurances.<sup>54</sup> Her work provides proof of past practice of courts using their authority to strike down assurances that do not adequately protect migrants.<sup>55</sup> It is also stated that courts have not ruled out the use of diplomatic assurances and there may be certain circumstances when they are permissible.<sup>56</sup> These particular points from her paper are acknowledged in the research paper as they will help expand the roles

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<sup>52</sup> Noll G, 'Diplomatic Assurances and the Silence of Human Rights Law' 7(Issue) Melbourne Journal of International Law, 2006, 16.

<sup>53</sup> Noll G, 'Diplomatic Assurances and the Silence of Human Rights Law' 7(Issue) Melbourne Journal of International Law, 2006, 16.

<sup>54</sup> Isman S, '*Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?*' unpublished, University of Lund, Lund, 2005, 27. See also Jones K, 'Deportations with Assurances: Addressing Key Criticisms' 57(1), *The International and Comparative Law Quarterly*, 2008, 185.

<sup>55</sup> Isman S, '*Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?*' unpublished, University of Lund, Lund, 2005, 29.

<sup>56</sup> Isman S, '*Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?*' unpublished, University of Lund, Lund, 2005, 29.

the courts have and they will even show that diplomatic assurances can be permitted in certain instances that will be highlighted in the rest of the paper.

In general, all the mentioned authors provide insight on how courts have approached diplomatic assurances that have been questioned. They also open up the discussion on the legality of these assurances and function as an important body that counter checks these assurances to ascertain that the State is indirectly permitting acts of torture and ill-treatment. From the examples and analysis done, these authors' work offers sources of proof of the mentioned areas that will be used to propel the solution that is being presented in this research paper.

## RESEARCH OBJECTIVES

### Main Research Objective

To examine the adoption of diplomatic assurances into Kenya's extradition laws as a means to safeguard the human rights of refugees and asylum seekers who are suspected of being a threat to Kenya's national security.

### Research Objectives

1. To examine Kenya's and Somalia's history with regard to rendition exercises.
2. To examine the use of diplomatic assurances in the past and the limitations that the Executive arm of government will adhere to while drafting diplomatic assurances.
3. To examine when Kenyan national courts can be approached in disputes where diplomatic assurances are contested and what should be considered in the determination of the assurances' validity.

## RESEARCH QUESTIONS

### Overarching Research Question

How will diplomatic assurances be incorporated into Kenya's extradition laws to safeguard the human rights of deported refugees and asylum seekers who are suspected threats to Kenya's national security?

### Research Questions

1.
  - a) What gave rise to the need for rendition exercises in Kenya?
  - b) Why have Kenyan authorities opted to use rendition exercises to ensure national security in the past and what was the response of the Kenyan national courts and the international community?
2.
  - a) What kind of requirements will the assurances have in respective cases?
  - b) What are the limitations for the Executive when negotiating diplomatic assurances?
3.
  - c) Who can approach the court when diplomatic assurances are contested?
  - d) What criteria will the court use when determining the validity of approved diplomatic assurances?

## METHODOLOGY

The research will constitute:

### Desk-Based Research

The process will integrate gathering data from primary sources such as treaties, UN documents, domestic legislation, international and regional policy documents, and secondary sources such as organization reports, books, academic journals, and preparatory documents.

The above-mentioned sources will introduce ongoing debates on the topic as well as the proposed solution to the dilemma that has been identified which will resultantly contribute to the discussions in the research paper.

### Case Studies

Case studies from USA, Canada, and the Committee Against Torture will be utilized to narrow down the shortcomings of the diplomatic assurances. They will also show the jurisdiction of the court in matters involving questioning the validity of diplomatic assurances.

Cases from the Kenyan courts will be used to offer factual evidence of the practice of rendition exercises by Kenyan authorities and the stance of the courts on the same.

### Existing data

Information from secondary sources will be gathered from existing literature to aid in the achievement of the main research objective as well as the narrowed down objective areas.

## CHAPTER BREAKDOWN

Chapter One will serve as the introduction. It will consist of an overview of the whole research paper and a background that will briefly highlight the source of the problem and the suggested solution. This will be followed by a summary of the problem which will be the focus of the study. The section will also clearly point out the main objective and research objectives that will form the foundation of subsequent chapters and the questions that will guide the researcher to come back to the overarching claim. Lastly, the literature review, methodology and chapter breakdown shall offer insight on what authors have held regarding the same topic, how information was gathered and the expected course of the successive chapters.

The second chapter will discuss the theory that is meant to offer a lens that the researcher wishes to adopt so as to narrow down to the specific assumption that undergirds the research. The structure of the chapter will be made up of the fiduciary relationship states share with foreign nationals and how such a relationship arises, when it is supposed to be applied and its relevance to the study.

The third chapter will surrender its pages to the historical development of rendition exercises in Kenya. The purpose of this section is to show how such exercises came to be in the country and to prove that they are still a problem. This will be done by looking at the level of national security the state had during different periods and how Somalia's civil war aided in the war between Kenya's defense forces and Al-Shabaab. In addition to this, the chapter shall discuss the national courts' stance in relation to the renditions that were carried out by ATPU and the international communities' response to previous cases on the same in different countries.

The subsequent chapter will offer an elaboration on the requirements that should be taken into consideration in various circumstances where diplomatic assurances are utilized in Kenya. This particular section will rely on cases from other countries that applied assurances and either failed in doing so or succeeded. This will be followed by a discussion on what the Executive's role is when debating and drafting diplomatic assurances as the sending State. It will constitute who has authority to do so, the requirements of such agreements, national and international laws to be relied on and post-return monitoring requirements.

Upon completion of the above section, chapter five shall describe when diplomatic assurances can be introduced during extradition procedures, when validity can be contested and by whom. This will be done by breaking down the extradition procedure as explained in the Extradition (Contiguous and Foreign Countries) Act of 1987 so as to show how the application of diplomatic assurances will be merged with existing extradition laws.

The last chapter will offer the conclusions from the study and make recommendations on the way forward.

## CHAPTER 2: THE FIDUCIARY THEORY OF HUMANITARIAN INTERVENTION

### Introduction

Hugo Grotius' contribution to international law and practices, especially with regard to theories supporting humanitarian intervention, lay the foundation for successive writings on the same topic.<sup>57</sup> An example of such efforts can be seen in Evans Criddle's work on the fiduciary theory of humanitarian intervention that was coined from Grotius' guardianship theory.<sup>58</sup> The former theory advocates for the role states play when humanitarian injustices are inflicted on citizens of a foreign nation. The author argues that as part of the international community, states have a responsibility to protect all individuals irrespective of the oppressing state's jurisdiction.

This chapter sets out the basic foundation of Grotius' theories so as to offer a clearer foundation that guides the discussion to the development of the fiduciary theory of humanitarian intervention. Upon completion, the deliberation that shall follow shall connect the theory to the remaining chapters so as to show why the dissertation relied on this particular theory. In summary, the discussion intends to rely of Criddle's theory to form the theoretical framework for the subsequent chapters as it will explain why, when, and how diplomatic assurances should be used by the Kenyan government.

### Grotius' Theories of Humanitarian Intervention

Humanitarian intervention arises when members of the international community interfere with the actions of another state with the intention of alleviating extensive human rights violations.<sup>59</sup> This

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<sup>57</sup> Salter J, 'Sympathy with the Poor: Theories of Punishment in Hugo Grotius and Adam Smith' 20(2) *History of Political Thought*, 1999; Geddert J, 'Beyond Strict Justice: Hugo Grotius on Punishment and Natural Right(s)', 76(4) *The Review of Politics*, 2014; Criddle E, 'Three Grotian Theories of Humanitarian Intervention' William and Mary Law School, *Theoretical Inquiries in Law* 16.2, 2015. -

<[<sup>58</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention' 16-34. -](https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2824&context=facpubs#:~:text=7%20Under%20Grotius%20guardianship%20theory,benefit%20of%20a%20foreign%20people.>- on 6 November 2023.</a></p></div><div data-bbox=)

<[<sup>59</sup> Danish Institute of Humanitarian Affairs, \*Humanitarian Intervention Legal and Political Aspects\*, 1999, 11.](https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2824&context=facpubs#:~:text=7%20Under%20Grotius%20guardianship%20theory,benefit%20of%20a%20foreign%20people.>- on 6 November 2023.</a></p></div><div data-bbox=)

form of liberation was referred to as waging just war by Hugo Grotius who believed that such a war was permitted under the law of nature.<sup>60</sup> He explains in his publication, *Jure Belli ac Pacis* (which translates to *On the Law of War and Peace*), that natural law allows this form of disruptions to occur without judicial consequences if either of two instances presents itself. The first is when a state or states are executing a punishment for the violation of the law of nature.<sup>61</sup> Scholars have summarized this to be referred to as the theory of international punishment.<sup>62</sup>

Grotius defends this understanding by arguing that the absence of a higher-ranking superior who can deter and offer retribution in instances when the principles that guide natural justice are violated leaves a vacuum. Therefore, the international laws that are supported by natural justice and that were put in place to ensure that states interact in a civil manner with their citizens are not enforced by a particular body. To fill the vacuum, he places the duty on all states to impose punishments if any of the international laws is violated.<sup>63</sup>

Although the obligation falls on all states, the implementation can only be carried out by those who satisfy the requirements he laid out. As per his postulation, the state administering the penalty need not have suffered any injury due to the actions conducted by the offending state. It only needs to show that it does not have a history of practicing the crime in question and that it is of sound judgment.<sup>64</sup> In 2013, this theory was applied after a chemical weapon was used in Syria. The Syrian government of Bashar al Assad released a poisonous gas that caused the death of nearly 1500 people in Adra.<sup>65</sup> During this period, Syria was not a party to the Chemical Weapons Convention,<sup>66</sup>

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<sup>60</sup> Grotius H, 'On Punishments', in Book II *On the Law of War and Peace*, Batoche Books, Kitchener, 2001, 62 and 182.

<sup>61</sup> Grotius H, 'On Punishments', 207.

<sup>62</sup> Salter J, 'SYMPATHY WITH THE POOR: THEORIES OF PUNISHMENT IN HUGO GROTIUS AND ADAM SMITH' 20(2) *History of Political Thought*, 1999, 206; Chesterman S, 'JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW' 73(1) *British Yearbook of International Law*, 2001, 10-13; Criddle E, 'Three Grotian Theories of Humanitarian Intervention' 482.

<sup>63</sup> Grotius H, 'On Punishments', 185.

<sup>64</sup> Grotius H, 'On Punishments', 187-188.

<sup>65</sup> Shaheen K, 'Almost 1500 killed in chemical weapons' attack in Syria' *The Guardian*, 14 March 2016 - <<https://www.theguardian.com/world/2016/mar/14/syria-chemical-weapons-attacks-almost-1500-killed-report-uk-united-nations>>- on 5 November 2023.

<sup>66</sup> Organization for the Prohibition of Chemical Weapons, *Syria's Accession to the Chemical Weapons Convention*, 2013.

but the attack was considered to be a violation of the principles of international humanitarian law that were globally accepted to be binding even in non-international armed conflicts.<sup>67</sup>

Owing to this violation, the United States of America (USA) and the United Kingdom (UK) expressed the need to punish the Syrian government for its crimes. This was evident from the then president of the USA, Barack Obama, who stated that the USA was prepared to “order a limited strike against the Assad regime” in order to deter any future use of chemical weapons.<sup>68</sup> The sentiment received support from the then Prime Minister of the UK, David Cameron, who held that the problem they had with the Syrian government was related to the indiscriminate use of chemical weapons and the desired communication of deterrence from similar crimes to the rest of the world.<sup>69</sup>

The above situation shows how part of the international community agrees with Grotius' theory of international punishment. As evidenced by the statements from the head of state of the USA and the head of government of the UK, some states believe that infringement of international law ought to be punished and the duty of imposing the punishment falls on states. Another similarity the situation had to Grotius' international punishment theory is that both the USA and the UK had not experienced any form of injury from the chemical weapon attack, yet both claimed responsibility to impose a form of punishment against Syria.

The above-mentioned parallelism the USA and UK's response had to Grotius' theory ensued in criticisms that were delineated to the punishment theory extending to the positions held by the two states. Scholars such as Fernando Teson, Michael Reisman and Myres McDougal maintained that carrying out humanitarian intervention without the approval of the United Nations Security

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<sup>67</sup> Article 51, International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

<sup>68</sup> Crook J, 'CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW' 107(4) *The American Journal of International Law*, 2013, 900.

<sup>69</sup> Watt N, 'Cameron forced to rule out British attack on Syria after MPs reject motion' *The Guardian*, 29 August 2013 -<<https://www.theguardian.com/world/2013/aug/29/cameron-british-attack-syria-mps>>- on 5 November 2023.

Council (UNSC) was a violation of Article 2(4) of the United Nations Charter (UNC).<sup>70</sup> Article 2(4) of the UNC provides that “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.” The only known exceptions are in instances of self-defense as an individual state or as a collective,<sup>71</sup> or where the UNSC authorizes intervention for purposes of maintaining peace and security.<sup>72</sup> In the Syrian case, the UNSC authorization was lacking hence only the second exception was satisfied. Therefore, if the USA had proceeded with the intended military strike, it would have been a clear violation of Article 2(4); however, following Syria’s concession to place their chemical weapons under international control and to dismantle them, the military strike was averted.<sup>73</sup>

This correlation shows that the theory is practical; however, the international community is also aware of the consequences that may arise due to the level of authority states are given. The introduction of the UNSC authorization highlights an important factor that Grotius’ explanation lacked, and this is an authority to monitor the intervention. Considering that this will be discussed later in this chapter, it is important to note that some states have not aligned the goals of intervention with their own objectives. As a result, the number of casualties during ‘just wars’ and unnecessary destruction of civilian property has left much to be desired and has defamed the theory.

The second occurrence is intertwined with the international law premise that states have equal sovereignty. This principle is enshrined in the UNC,<sup>74</sup> and the meaning derived from it is that all states have equal rights, equal duties, and, in the international sphere, they are equal members of

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<sup>70</sup> Teson F, *Humanitarian Intervention: An Inquiry into Law and Morality* 2<sup>nd</sup>, Transnational Publishers, New York, 1988, 15-17; Reisman M and McDougal M, *Humanitarian Intervention to Protect the Ibsos* Palgrave Macmillan, London, 1973, 177.

<sup>71</sup> Article 51, United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>72</sup> Article 42, *Charter of the United Nations*.

<sup>73</sup> Smith-Spark L and Cohen T, ‘US, Russia agree to framework on Syria chemical weapons’ CNN politics, 15 September 2013 -<<https://edition.cnn.com/2013/09/14/politics/us-syria/index.html>>- on 6 November 2023.

<sup>74</sup> Article 2(1), *Charter of the United Nations*.

the international community, despite differences of a political, social, economic, or other nature.<sup>75</sup> The premise that this particular instance relies on contradicts the international punishment theory that constitutes viewing the offender as an inferior party to the one executing the punishment hence one is superior to the other.<sup>76</sup>

To defend this perspective, Grotius implied that parties are equal as long as they follow the law. However, if one or a few states opt to go against the law of nature, they have adopted actions that are contrary to what makes all states equal hence they tip the balance which results in the creation of inequality. As a result, harmony is lost. In order to regain the balance, the states that abided by the law are given the superior power to punish the inferior offending state or states and once an appropriate punishment has been executed by the offender, equality is regained.<sup>77</sup> This allows the states that abided by the law to have more power to reset the playing field while restricting the offenders from tapping into the same authority at that time.

In the past, the international community adopted a similar line of thought post World War I. After the end of the war, the Treaty of Versailles was introduced and signed by Allied Forces and Germany among others. In the Treaty, Germany and her allies were charged with full responsibility for all the inevitable loss and damage that ensued from the war.<sup>78</sup> As retribution, a list of varying forms of punishments that ranged from loss of sovereignty over certain regions to monetary compensation were provided to ensure that Germany would serve her sentence. Examples of such punishments include reimbursing the amount Belgium had borrowed from the allied forces until 11 November 1918 and the total combined a five percent interest that had accrued.<sup>79</sup> Also, she lost control over Alsace-Lorraine and Saar Basin to France,<sup>80</sup> and the Rhineland due to demilitarization of the area.<sup>81</sup>

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<sup>75</sup> UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV).

<sup>76</sup> Grotius H, 'On Punishments', 184.

<sup>77</sup> Grotius H, 'On Punishments', 184.

<sup>78</sup> Article 231, *Treaty of Peace with Germany (Treaty of Versailles)* (28 June 1919).

<sup>79</sup> Article 232, *Treaty of Peace with Germany (Treaty of Versailles)*.

<sup>80</sup> Article 45 and Article 51 read together with Article 55, *Treaty of Peace with Germany (Treaty of Versailles)*.

<sup>81</sup> Article 42 and Article 43, *Treaty of Peace with Germany (Treaty of Versailles)*.

The above case in point shows that the states that deemed themselves to have abided by the law were treated equally hence they did not have any punishment issues. Moreover, due to their conformity to the statutes, they gained control over who is to be punished and what kind of retribution was appropriate for the crime. As mentioned earlier, the purpose sought by Grotius was to ensure that the field would be made level again and the retribution Germany received was meant to do so. For example, Germany surrendering its territory in Rhineland enabled France to regain its coal mines which were destroyed during the war. Although on paper this would be viewed as a good plan, the result was the second world war hence the objective sought by the 1919 Treaty was lost.

Accordingly, many scholars believed that Grotius' position on the topic was flawed. According to some authors, the level of sovereign equality does not diminish even when good governance is questioned. Hence forcefully gaining access to another state's jurisdiction and/or simply interfering with its activities results in a violation of the sovereign equality and unforeseen retaliation that could cause more harm than the intended good.<sup>82</sup> This then poses the question, how are states to ensure the safety of foreign nationals in instances when their government is exposing them to harm? This will be answered while discussing the fiduciary theory of humanitarian intervention.

The second theory that Grotius alluded to was that of guardianship that relies on the fiduciary relationship between states and foreign nationals. According to him, a state may interfere with an oppressing sovereign's governance or practices when the safety of the latter's nationals is in question.<sup>83</sup> In his explanation of the theory, he acknowledged the existence of state sovereignty and the respect it deserves from other states.<sup>84</sup> However, the sovereignty can lack international recognition and respect when a ruler fails to care for his citizens by exposing them to inhumane treatment.<sup>85</sup>

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<sup>82</sup> Geddert J, 'Beyond Strict Justice: Hugo Grotius on Punishment and Natural Right(s)', 76(4) *The Review of Politics*, 2014, 565.

<sup>83</sup> Grotius H, 'The Causes of Undertaking War for Others', 247.

<sup>84</sup> Grotius H, 'The Causes of Undertaking War for Others', 247.

<sup>85</sup> Grotius H, 'The Causes of Undertaking War for Others', 244-247.

This conclusion is arrived at when one comprehends a sovereign as constituting the fiduciary relationship between rulers and citizens. The example Grotius uses to bring this point home is the court-appointed relationship fiduciaries share with their beneficiaries. In such a situation, the court expects the fiduciary to take care of the beneficiary, but if he fails to fulfill this duty, he loses his authority over the beneficiary and the relationship ceases to exist meaning it is no longer recognized by the rest of the world. Once this happens another fiduciary has to assume the role the former fiduciary played.<sup>86</sup>

Similarly, when a state exposes its nationals to human rights violations, it has failed to fulfill its obligation to take care of its citizens. Consequently, a vacuum is created where another authority is required to take up the task of ensuring that the citizens are safe. As a result, another state may intervene to protect the citizens from further harm from their government. This makes the foreign state the self-appointed guardian of the citizens.<sup>87</sup> The self-appointed nature of this role leaves a lot to be desired. For example, the validity of leaving such a heavy responsibility in the hands of the international community rather than including the community representatives of the citizens of the oppressing state in the decision-making process.

In his successive discussions, Grotius explains his response to the above-mentioned concern. He elaborates that many citizens are patriotic hence their loyalty to their sovereign may bar them from fighting for their natural rights.<sup>88</sup> He takes a step further to characterize this restriction to be of a personal nature which implies that it does not extend to other states that may wish to intercede on their behalf.<sup>89</sup> Therefore, other states are ‘level-headed’ and capable of stepping in and representing the plight of foreign nationals’ concerning their natural rights for purposes of ensuring unified self-defense.<sup>90</sup> In as much as this sounds plausible, many questions are left unanswered. One of them being the legal backing to support intervention for humanitarian purposes. This is one

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<sup>86</sup> Grotius H, ‘The Causes of Undertaking War for Others’, 244.

<sup>87</sup> Grotius H, ‘The Causes of Undertaking War for Others’, 247.

<sup>88</sup> Grotius H, ‘The Causes of Undertaking War for Others’, 247.

<sup>89</sup> Grotius H, ‘The Causes of Undertaking War for Others’, 247.

<sup>90</sup> Criddle E, ‘Three Grotian Theories of Humanitarian Intervention’ 483.

of the questions that Evans Criddle has tried to answer in his theory that will be discussed in the next section.

A strength the guardianship theory possesses that is missing from the international punishment theory is that its purpose complements the aim of humanitarian intervention which is ensuring the safety of foreign nationals from human rights violations.<sup>91</sup> The punishment theory fell short of achieving this purpose because its motivator was disciplining the wrong-doer which results in ignoring the victims.<sup>92</sup> Nevertheless, the guardianship theory shares some weaknesses with the punishment theory such as the reliance on natural law as the source of authority that states have in an era that is dominated by normative pluralism and international law positivism.<sup>93</sup> Grotius limited his source to natural law, which may have been acceptable when he released his work, however, the changes in law and its sources have limited the ability of his work to evolve with time.

The second incapacity that the theory presents concerns its manipulation to justify colonization. In 1532, Francisco de Vitoria held a lecture where he discussed when it would be permissible for a nation to invade another state for fiduciary purposes and when such an action would be considered a crime. According to him, if the first state practiced activities that violated the natural rights of the conquering nation and placed the citizens of the first nation in harm's way, the conquest would be permissible if the objective was to liberate the indigenous people. However, if the conquest was based on a false claim that the indigenous people were not the true owners of their land, yet it could be proven that they had moral agency, control over their public and private property, and it was evident that they were equipped with reason, the conquest would be deemed unjust and resultantly not centered around the fiduciary theory.<sup>94</sup>

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<sup>91</sup> Matthewman J, 'Humanitarian Intervention: An Exploration of its Justification and Best Practices' *E-International Relations*, 2012, 1-<https://www.e-ir.info/2012/01/30/humanitarian-intervention-an-exploration-of-its-justification-and-best-practices/>>- on 7 November 2023; Criddle E, 'Three Grotian Theories of Humanitarian Intervention' 483.

<sup>92</sup> Lewis C, 'The Humanitarian Theory of Punishment' 13(1) *Res Judicata*, 1954, 224.

<sup>93</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention' 485.

<sup>94</sup> Jahier A, 'Francisco de Vitoria and On the American Indians: A Modern Contribution to International Relations' *E-International Relations*, 2009, 4 -<[https://www.e-ir.info/2009/09/24/francisco-de-vitoria-and-on-the-american-indians-a-modern-contribution-to-international-relations/#google\\_vignette](https://www.e-ir.info/2009/09/24/francisco-de-vitoria-and-on-the-american-indians-a-modern-contribution-to-international-relations/#google_vignette)>- on 7 November 2023.

The justification of the European colonization of different continents and states relied on the guardianship theory to defend their actions. European colonizers claimed that they were acting as fiduciaries and salvaging members of the first state. This distortion gave rise to a different comprehension of the guardianship theory and the consequent expansion of Europe through the exploitation of those they colonized.<sup>95</sup> An example of such a situation can be traced back to the conquest of the Ottoman Empire during the nineteenth century.<sup>96</sup>

In anticipation of future manipulation of the theory, Grotius acknowledged that there was a risk of abuse of the power states wielded under this theory. Even so, he failed to offer mechanisms that would act as safeguards to limit such abuse.<sup>97</sup> Courtesy of history's events, the corruption of the theory stained it as a premise that supported neo-imperialist ambitions and due to this, it lacked enough support for it to be associated with humanitarian intervention as Grotius had intended.<sup>98</sup>

### The Fiduciary Theory of Humanitarian Intervention

Evans Cliff acknowledged that some of the qualities that the guardianship theory had were attractive,<sup>99</sup> and opted to use them to form the foundation of the fiduciary theory of humanitarian intervention. In spite of this, his theory differed in various ways such as abandoning the law of nature by shifting its spring to the fiduciary character of humanitarian intervention as understood between fiduciaries and the court as well as between fiduciaries and beneficiaries.<sup>100</sup>

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<sup>95</sup> Williams R, 'The American Indian in Western Legal Thought: The Discourse of Conquest' 35(3) *The American Journal of Legal History*, 1991, 344.

<sup>96</sup> Rodogno D, *Against Massacre: Humanitarian Interventions in the Ottoman Empire 1815-1914*, Princeton University Press, Princeton, 2011, 18.

<sup>97</sup> Grotius H, 'The Causes of Undertaking War for Others', 247.

<sup>98</sup> Linda A, 'The Problem of Speaking for Others' *Cultural Critique*, 1992, 16 - [https://www.jstor.org/stable/pdf/1354221.pdf?casa\\_token=WxDto7qcBOwAAAAA:gvRmd4JNwiD0hJx9c7wmvN0lbLVvIRult\\_GaS0NqI5Vv6-6tqKDeo8qtj7awvSkjOgKGIr-9g82oJGpblIsw0wIIoZCKn4z2T8EPuB3R6E-Ydt5N2UQ](https://www.jstor.org/stable/pdf/1354221.pdf?casa_token=WxDto7qcBOwAAAAA:gvRmd4JNwiD0hJx9c7wmvN0lbLVvIRult_GaS0NqI5Vv6-6tqKDeo8qtj7awvSkjOgKGIr-9g82oJGpblIsw0wIIoZCKn4z2T8EPuB3R6E-Ydt5N2UQ)>- on 6 November 2023.

<sup>99</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention', 487.

<sup>100</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention', 488.

For one to understand the aforementioned fiduciary character on a state level, Cliff introduced two events that must intersect for a state to gain authority to intervene.<sup>101</sup> The first is championing the legal right of oppressed people to defend themselves,<sup>102</sup> and the second is the utilization of the UNSC's power to authorize interventions in order to restore peace and security.<sup>103</sup> By basing his authority on positive international law, specifically Article 51 and Article 42 of the UNC respectively, Cliff was able to adapt his theory to the current governing laws that are in practice unlike Grotius' theories that were based on natural law that is no longer the main source of law. Apart from this difference, the requirement for states to seek authorization from the UNSC provides a limitation as to when and how states may intervene. This form of authority and legal backing was lacking in Grotius' guardianship theory hence the ease in its manipulation and use as a defense for colonization.

To further limit the power states wield, Cliff discussed three defining features that he believed should characterize humanitarian interventions. He claims that the exercise should be carried out in a manner that is other-regarding, purposive and institutional.<sup>104</sup> This means that humanitarian interventions are legally exercisable and limited to benefit foreign nationals while intervening states ensure that their forces uphold humanitarian objectives during the operation. As a result, the intervention is supposed to give rise to an enhanced institutional relationship between the state or regional organization and the foreign people.<sup>105</sup>

To tie the features back to the theory, one is supposed to be able to see the fiduciary relationship in the institutional exchange between the state and the citizens. The example one can rely on is similar to that of the guardianship theory: if a fiduciary abuses his power by exposing the beneficiary to danger, the beneficiary loses faith in the beneficiary. As a response, the court takes

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<sup>101</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention', 489.

<sup>102</sup> Bellamy A, 'Responsibility to Protect and the Problem of Military Intervention' 84(4), *International Institute Affairs (Royal Institute of International Affairs)*, 2009, 636; Criddle E, 'Three Grotian Theories of Humanitarian Intervention', 489.

<sup>103</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention', 489.

<sup>104</sup> Criddle E and Fox-Decent E, 'A Fiduciary Theory of Jus Cogens' *The Yale Journal of International Law*, 2009, 349-<<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2565&context=facpubs>>- on 10 November 2023.

<sup>105</sup> Criddle E and Fox-Decent E, 'A Fiduciary Theory of Jus Cogens' *The Yale Journal of International Law*, 2009, 349-<<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2565&context=facpubs>>- on 10 November 2023.

away the fiduciary's power over the beneficiary and appoints another guardian to mend the damage and ensure the safety of the beneficiary.<sup>106</sup> Similarly, if a government fails to protect its citizens, they lose faith in the institution and the international community may have to intervene to restore order and mend the relationship between the two groups.

To justify the relationship states share with foreign nationals to permit them to intervene on their behalf, Cliff directs the conversation to the relationship between the fiduciary theory and the Responsibility to Protect (R2P). R2P is a concept that was introduced in 2001 by the International Commission on Intervention and State Sovereignty (ICISS). The birth of this doctrine was as a result of the North and South divide regarding humanitarian intervention and its application. The former supported the application of humanitarian intervention while the latter failed to see its benefit especially after no form of assistance under it was offered during the Rwandan genocide.

Upon confirmation of the division, Kofi Annan who was the then head of the UN asked the South whether there was another concept that could improve the international community's response to similar crises. As a result, ICISS introduced the aforementioned concept. From the report it was evident that one of the main distinguishing factors when it came to the two doctrines was their appreciation of sovereignty. Humanitarian intervention viewed sovereignty as a limitation that denied other states access to the jurisdiction of another country irrespective of the state of affairs. In the R2P doctrine, this understanding was abandoned and the new one that was adopted was that sovereignty is a responsibility. This means that states have a duty to protect those within its territory by providing security in all forms that are deemed necessary.<sup>107</sup>

As a result of this shift, three pillars emerged that supported the doctrine: the responsibility of each state to protect its citizens; the responsibility of the international community to assist states to protect their population; and the responsibility of the international community to protect foreign

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<sup>106</sup> Benvenisti E, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' 107(2) *The American Journal on International Law*, 2013, 296.

<sup>107</sup> *We the peoples: role of the United Nations in the 21<sup>st</sup> Century*, Millennium Report of the Secretary General, 2000, UN Doc A/54/00.

nationals when their state has clearly failed to protect them.<sup>108</sup> Although the pillars were well explained, critics question the source of the obligations and authority states claim to have when applying this concept and the legality of an intervention under the doctrine. In an attempt to settle this debate, Cliff uses the fiduciary theory to fill in the abovementioned gaps.

When discussing the first issue regarding obligations and authority, Anne Orford notes that R2P acts as a doctrine that acknowledges the authority the UNSC has under Article 42 of the UNC rather than it being a duty imposing rule.<sup>109</sup> Therefore, it cannot express the obligations of states, but it recognizes the body that confers power to states to carry out humanitarian interventions. This is in line with the second and third pillar of R2P that summarize the fiduciary relationship states share with foreign citizens. As newly appointed guardians, foreign states have a responsibility to help another state or to fully take over and care for the safety of foreign nationals in instances where the mother state is either unable or unwilling to do so. This obligation is directly connected to the expected fiduciary duty imposed on states by the R2P doctrine.

While answering the second question on the legality of R2P, Evans Cliff relied on Alex Bellamy's work to elaborate on the answer. Bellamy explains that the principle, through the second and third pillars, is not limited to the national jurisdiction of a state in instances where human rights are violated.<sup>110</sup> Therefore, when this reasoning is aligned to the pillars' aims, it is evident that the jurisdiction of states can be extended to other territories in instances where assistance is needed in a state that is not fully capable of preventing harm or when a state is completely lacking in its capacity to offer protection to its nationals. Even so, the authority supporting this can be traced back to the convergence Cliff referred to. According to the fiduciary theory, the duty to intervene arises when both Article 51 and 42 of the UNC are satisfied hence, they provide the legal backing for intervention under R2P.

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<sup>108</sup> 'The Responsibility to Protect' *UN Chronicle*, 2016, -<<https://www.un.org/en/chronicle/article/responsibility-protect>>- on 7 November 2023.

<sup>109</sup> Orford A, '*International Authority and the Responsibility to Protect*' 23(1) *European Journal of International Law*, 2012, 46-48.

<sup>110</sup> Bellamy A, '*Responsibility to Protect and the Problem of Military Intervention*' 13-14.

## Enacting the Fiduciary Theory of Humanitarian Intervention

### Deliberative Engagement

The first measure Criddle introduced to make the fiduciary theory more credible is deliberative engagement which relates to the foreign people on whose behalf the international community is intervening. According to Criddle, intervening states need to ensure that they respect the right of self-determination by confirming that their actions are a representation of the foreign peoples' preferences. This can be achieved by states consulting foreign individuals' before going ahead with the intervention.<sup>111</sup> This particular precaution differs from Grotius' guardianship theory because he viewed human right-holders as objects of state concern rather than individuals who are autonomous and capable of having values and preferences that are to be respected.<sup>112</sup> Therefore, there was no need to confirm whether their desired outcomes were in line with those of the intervening state's.

This measure is supported by advocates of the R2P doctrine who have focused on restructuring humanitarian intervention by shifting the focus to local empowerment. To achieve this shift, the community needs to refocus and look at the problem from the victim's point of view instead of focusing on international military action. The intended goal is to realize the second pillar of R2P that requires the strengthening of a state's ability and commitment to ensure the protection of its citizens' human rights.<sup>113</sup> A practical way state forces could do this is by considering the impact military intervention would have on the foreign nationals and their protected interests.<sup>114</sup> This aligns with Criddle's fiduciary theory because it satisfies the duty of care that fiduciaries should take into account.<sup>115</sup>

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<sup>111</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention' 494.

<sup>112</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention' 495.

<sup>113</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention' 495.

<sup>114</sup> Burke E, 'The French Revolution, in Burke's Politics: Selected Writings and Speeches of Edmund Burke on Reform, Revolution, and War' 76(1) *The Cambridge Press*, 2014, 277, 397 and 398.

<sup>115</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention' 495-496.

An alternative approach that the international community could adopt is confirming the preferences of the foreign citizens then honoring them. This differs from the previous suggestion because it relies solely on the fiduciary duty of loyalty and the fiduciary duty of care. The duty of loyalty requires custodians to seek the informed consent from beneficiaries when there is a conflict of interest. The duty of care requires fiduciaries to engage constituents and consult them while assessing the preferred course of action within the public fiduciary domain.<sup>116</sup> Summarized, the duties call for intervening states to showcase care and concern when deliberating on the preferred means of action that the foreign nationals wish to adopt.<sup>117</sup>

These two approaches have received international recognition where both the UN International Law Commission (UNILC) and the Declaration on the Rights of Indigenous Peoples acknowledged the fiduciary relationship on a national and international level respectively. In the Draft Articles on Diplomatic Protection with Commentaries, Article 19(b) details that “where states claim to institute legal claims on behalf of their nationals, they should ensure that they consider the perspective of the injured people when discussing diplomatic protection and the compensation to be sought.”<sup>118</sup>

Article 19 of the Declaration on the Rights of Indigenous Peoples extends the fiduciary relationship between states and indigenous individuals to the international community. It provides that “states should consult indigenous people through their respective representative institutions and cooperate with them in good faith so as to obtain their consent that is free, informed and prior to adopting and implementing legislative or administrative measures that may affect them.”<sup>119</sup> These two examples align with Francisco de Vitoria’s aforementioned lecture where he held that the true dominion of indigenous people alongside their reason and moral agency should be respected and cannot be set aside in the name of state intervention for fiduciary purposes.

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<sup>116</sup> Ponet D and Leib E, ‘Fiduciary Law’s Lessons for Deliberative Democracy’ 91(1249) *Boston University Law Review*, 2011, 1257.

<sup>117</sup> Criddle E, ‘Three Grotian Theories of Humanitarian Intervention’ 496.

<sup>118</sup> Article 19(b), International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, 2006.

<sup>119</sup> Article 19, *UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.*

Although the theory's application is currently in practice as shown in the previous paragraph, there is a situation where its application may seem impossible. During the 2013 war in Syria, lives were being jeopardized by the attacks instituted by the Assad regime. This resulted in war crimes and crimes against humanity such as the discussed chemical weapon attack in Adra. To counter these violations, several anti-government factions were formed, and they represented different values hence it was difficult to determine which faction best represented the preferences of the Syrian people.<sup>120</sup> To work around this, Robert Sitkoff and Jesse Dukeminer counseled intervening states to communicate their desired form of action to the public which should be based on humanitarian rationale. In addition to this, the intervening states should also engage a large number of diverse stakeholders who will offer informed and rational decisions that reflect the same sentiments as the general public's.<sup>121</sup>

### Right to Life

The fiduciary theory also extends its application to how states can be held accountable for abusing their discretionary power. During a humanitarian intervention in Libya, NATO's military proceeded to attack Libyan forces and infrastructure that were not communicated to have any aiding effect to the existing conflict. They also went ahead and provided arms to rebel militia groups, and this resulted in a regime change.<sup>122</sup> In his paper, Evans Cliff introduced International Human Rights Law (IHRL) and International Humanitarian Law (IHL) as the authorities that can govern a state's actions during humanitarian interventions. While introducing IHRL, he relied on the human right to life<sup>123</sup> and for IHL, he banks his authority on the principle of proportionality.<sup>124</sup>

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<sup>120</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention' William and Mary Law School, (16)473, 2015, 498.

<sup>121</sup> Sitkoff R and Dukeminier J, '*Wills, Trusts and Estates*' 9th ed, Aspen Publishers, Boston, 2013, 657-658.

<sup>122</sup> Green M, 'To What Extent Was the NATO Intervention in Libya a Humanitarian Intervention?' *E-International Relations*, 2019, 3, -<<https://www.e-ir.info/2019/02/06/to-what-extent-was-the-nato-intervention-in-libya-a-humanitarian-intervention/>>- on 8 November 2023.

<sup>123</sup> Article 3, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>124</sup> Chapter 4, Rule 4, International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, 2005, Volume I: Rules.

The right to life intertwines with humanitarian intervention because during wars, civilians and combatants are placed in harm's way which may result in their demise. In IHRL, the right to life prohibits the use of lethal force unless this is absolutely necessary to maintain legal order or to protect the life of other human beings.<sup>125</sup> On the other hand, the principle of proportionality in IHL permits forces to conduct attacks that result in collateral damage, such as “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof”, but the damage should not be evidently excessive when compared to the military objective the attack was meant to achieve.<sup>126</sup>

The contradiction caused by these two fields of law is resolved by Criddle’s theory when he points out that the fiduciary role states play in humanitarian intervention requires the interplay of the two fields. According to him, the fiduciary relationship between states and foreign nationals requires states to employ care when interacting with their beneficiaries. The level of care is in line with IHL as it constitutes not inflicting unnecessary harm and providing basic security to those they claim to represent.<sup>127</sup> Such practices would be in line with the intended goals of humanitarian intervention because the protection of human rights is the desired outcome of the interference.

Even though from Criddle’s explanation it is clear that the interaction between the two fields is necessary, courts initially took a different approach. In the case of *Bankovic v Belgium*, the European Court of Human Rights (ECtHR) was presented with an issue on state responsibility. NATO had attacked radio and television facilities in Belgrade, and this resulted in the loss of sixteen lives and a similar number of individuals were seriously wounded. The court held that for a state to be held liable through state responsibility, effective control over the territory and inhabitants in question had to be proven. Therefore, due to the lack of proof of effective control, NATO’s attack was deemed to not fall under the European Convention’s scope.<sup>128</sup>

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<sup>125</sup> Article 2(2) Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

<sup>126</sup> Article 51(5)(b), International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609.

<sup>127</sup> Criddle E, ‘Three Grotian Theories of Humanitarian Intervention’, 500.

<sup>128</sup> *Bankovic and Others v Belgium and 16 Others*, ECtHR Judgement of 12 December 2001.

This decision went against the fiduciary theory since the latter requires states conducting humanitarian intervention to automatically assume human rights obligations towards the aggrieved individuals. Such a duty is irrespective of whether or not the state has effective control over the area in question.<sup>129</sup> Over the years, the ECtHR has adopted fragments of the fiduciary theory as seen in the case of *Issa v Turkey*.<sup>130</sup>

## The Security Council

Referencing the above mentioned NATO intervention in Libya, the unsanctioned attacks resulted in critics noting the need for the UNSC to become a more effective oversight body for humanitarian intervention.<sup>131</sup> The UNSC's decision making structure has been criticized over the years due to the veto power held by its five permanent members. The power wielded by these states inhibits the body's authority to cut short interventions that could result in the intervening state abusing its power.<sup>132</sup>

NATO's actions are an example of such a situation and due to this particular event, other member states fail to believe in the ability of humanitarian interventions being used to achieve their initial objective.<sup>133</sup> In addition, this particular shortfall regarding NATO has also left room for critics to present their claims that humanitarian intervention is a cover for the new method of powerful states growing their domination.<sup>134</sup> To solve these issues, Criddle presents three suggestions.

The first one is derived from a proposal Brazil made after NATO's intervention in Libya. A standardized reporting procedure followed up by a review process was suggested to facilitate UNSC's role concerning monitoring military activity. These two systems will also help in assessing the activities of intervening military forces in order to determine whether the orders and

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<sup>129</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention', 501.

<sup>130</sup> *Issa and Others v Turkey*, ECtHR Judgement of 16 November 2004.

<sup>131</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention', 494-495.

<sup>132</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention', 502.

<sup>133</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention', 502.

<sup>134</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention', 502.

actions of the forces are in accordance with the objectives of the intervention.<sup>135</sup> The second option that aligns with Brazil's suggestion is that the UNSC establishes its own independent monitoring body that would carry out investigations based on complaints that the military from the intervening states has stayed away from the intervention's mandates.<sup>136</sup>

The third suggestion further addresses the issue related to the intervention in Libya. Once a state has received approval to conduct an intervention, there is a possibility that mission creep may compromise the operation. Although IHL and IHRL were suggested to offer a body of laws that could be used to prosecute states that use humanitarian intervention to satisfy their own objectives, there is a need to bar the progress of such missions by the UNSC once it is realized that it is a possibility, or it is happening.

The proposed means of action is the inclusion of sunset provisions in the humanitarian intervention mandate documents. These provisions will be used to introduce a fixed expiry date when state forces have to evacuate the territory of an invaded country.<sup>137</sup> If the objective of the mission has not been met by the stipulated expiration date, states may seek reauthorization from the UNSC.

During the application stage for the reauthorization documents, the intervening military has to account for the time it has spent in the respective territory. Assuming the forces cannot do so or they cannot show how their activities have been carried out with the intent of achieving the mission's objective, the UNSC may use either issue as grounds for denial of reauthorization or the body could opt to revise the mandate so as to clearly explain the objective of the mission.<sup>138</sup> This suggestion is an alternative to combating the veto-power by introducing a provision to UNSC resolutions that permits the body or a separate committee to authorize humanitarian intervention by a simple majority vote.<sup>139</sup>

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<sup>135</sup> UN Security Council, Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, 9 November 2011, S/2011/701 and Nuruzzaman M, "Responsibility to Protect" and the BRICS: A Decade After the Intervention in Libya' 2(4) *Global Studies Quarterly*, 2022.

<sup>136</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention', 502.

<sup>137</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention' 503.

<sup>138</sup> Criddle E, 'Three Grotian Theories of Humanitarian Intervention', 504.

<sup>139</sup> Criddle R, 'Three Grotian Theories of Humanitarian Intervention', 503.

## Application of Fiduciary Theory of Humanitarian Intervention

### Overarching Research Question

The relevance of this theory to the subsequent chapters of this research is seen in its contribution to the foundation of the main research question and the respective research questions that will be answered in chapter three, four and five. The overarching research objective is how diplomatic assurances will be incorporated into Kenya's extradition laws to safeguard the human rights of deported refugees and asylum seekers who are suspected threats to Kenya's national security.

Diplomatic assurances can be viewed as tools that pave the way for states to ensure they hold other states accountable where they are known to be at fault. An example of a situation that would require such an agreement would be where states practice torture. Countries such as Jordan and Morocco are known to go against the international ban against practices that constitute torture and other forms of ill-treatment in their detention facilities.<sup>140</sup> Such actions are illegal and fall under human rights abuses that would constitute humanitarian intervention; however, the nature of torture limits the number of cases that are reported due to the unique forms that can be employed to harm the individual while hiding visible scarring. Mock drowning has been recorded as one of the ways this is achieved because the damage it causes is not physically visible.<sup>141</sup>

The number of reported cases of such abuses is low because many individuals fear retaliation if authorities found who reported them.<sup>142</sup> Torture has maintained a recognized but low record that has not received any form of intervention to ensure an end to its use. Nonetheless, the second pillar of the R2P doctrine provides that states have a responsibility to ensure that they equip fellow states in diverse ways so that they can protect those within their authority from human rights violations, which includes torture. This can be achieved through the use of diplomatic assurances because

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<sup>140</sup> Human Rights Watch, *Diplomatic Assurances Against Torture Questions and Answers*, 5.

<sup>141</sup> Human Rights Watch, *Diplomatic Assurances Against Torture Questions and Answers*, 3.

<sup>142</sup> Human Rights Watch, *Diplomatic Assurances Against Torture Questions and Answers*, 5.

such agreements permit states to monitor the operations of another consenting state to ensure that the violations are no longer in practice. The fiduciary theory as explained by Evans Cliff helps in proving the legality of R2P which makes its pillars lawful. Moreover, this extends the justification to the legality of diplomatic assurances that characteristically and theoretically ensure that states are held accountable for the agreed rights the assurance refers to.<sup>143</sup>

In addition to this, the theory explains the relationship states have with foreign individuals that are subjected to human rights violations. The theory shows that through the second and third principle of R2P, authority in matters concerned with human rights protection is not restricted to the national level, but scales to the international level. This further justifies why in instances of torture and ill-treatment, states have an obligation to intervene through diplomatic assurances, with the affairs of another state.

### Research Question

The first research question is ‘why have Kenyan authorities opted to use rendition exercises to ensure national security in the past and what were the responses of the Kenyan national courts?’ The fiduciary theory is used to highlight why states have a responsibility to uphold the rights of all individuals within its territory. This applies to refugees and asylum seekers who have sought protection within the borders of Kenya. Through the elaboration of the duties of a fiduciary, the theory sets the pace to highlight the obligations states have towards refugees and asylum seekers.

To answer the research question, reference will be made to the fiduciary responsibility the Kenyan government has towards its citizens. The dilemma that has resulted in the main research question is balancing national security and the human rights of the suspected terrorists in Kenya. Balancing these two places the authority on a tight rope and the choice that the ATPU has repeatedly fallen back on is ensuring national security at the expense of the rendered suspects. To put an end to this

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<sup>143</sup> Larsaeus N, ‘The Use of Diplomatic Assurances in Prevention of Prohibited Treatment’ Refugee Studies Centre, RSC Working Paper Number 32, 2006, 3 - [https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/TonyEllis\\_3.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/TonyEllis_3.pdf)>- on 26 October 2023.

and any justifications the unit has relied on to support their actions, the theory presents a view that has been abandoned by the unit. This is viewing the suspects as beneficiaries.

As this discussion pours into the next chapters, the relationship between the fiduciary, meaning the unit, and the beneficiaries, who are the rendered suspects, will be referred to while arguing that the state has a responsibility to protect them even when they pose a threat to Kenya's national security. This particular discussion will open the door for national and international laws that support the same stance so that the theory can gain backing from appropriate authorities.

The second question concerns 'how diplomatic assurances will vary in application when the subject is a refugee and when they are asylum seekers and the kinds of requirements the assurances will have to provide in these instances.' The requirements for each case shall have to align with IHRL because the government is relying on the agreements to communicate that the human rights of the subject shall be respected.

Another necessity is the need for post-return monitoring. The theory presents the argument that the jurisdiction of states is not limited nationally when human rights are violated; therefore, the introduction of post-monitoring mechanisms can be justified under this rationale. Moreover, the need for post-monitoring is also justified in the suggestions Criddle makes for the UNSC to improve its oversight duty. This suggestion will also be extended to the role the Kenyan government has to play to ensure that the receiving state is held accountable for the promises made when it has signed the agreement.

The third and fourth research questions relate to who within the Executive will negotiate the terms of the assurances and the limitations of the powers the Executive will have when negotiating. IHRL will play a major role in determining the limitation of the powers of the Executive and it will also be relied on for grounds of prosecution if the Kenyan Executive is found to have placed a deported refugee or asylum seeker in harm's way even after warning or evidence of past actions carried out by the receiving state.

The fifth and the sixth questions relate to who is permitted to approach the court when questioning the validity and applicability of these assurances and how the court is to decide such a case. The fiduciary theory will be pivoted on in this section as the court is viewed to play a similar role to the UNSC. The courts are supposed to determine whether the assurances are valid and applicable using an appropriate criterion that constitutes IHRL principles that relate to respective cases. Similarly, the UNSC has the authority to approve or disapprove humanitarian intervention if it deems it appropriate or inappropriate. In summary, both bodies decide whether a state can progress with its intent or not.



## CHAPTER 3: THE CAUSE AND NATURE OF COUNTERTERRORISM IN KENYA

### Introduction

The Kenyan Anti-Terrorism Police Unit (ATPU), which is part of the state's security community, was formed to counter terrorist activities in Kenya.<sup>144</sup> The intended goal of the unit was the prevention of another attack such as the embassy bombing of 1998 or the Kikambala terror attack of 2002.<sup>145</sup> After investigations were carried out, it was publicly communicated that the Al-Qaeda terrorist group was responsible for the aforementioned attacks in Kenya.<sup>146</sup> As a result, tension in Kenya grew especially with regard to the level of security along the border between Kenya and Somalia.<sup>147</sup> Somalia's history of civil war and inter-clan armed conflict created a favorable environment for terrorists and this made Kenya even more vulnerable to terrorist attacks.<sup>148</sup> The lack of trust along the border was heightened when the Kenyan government closed the border.<sup>149</sup>

While trying to put an end to these attacks, the ATPU fought against suspected terrorists who lived in Kenya. The means employed were rushed, unreasonable and illegal which led to the lack of trust between the Muslim members of society and the Kenyan government.<sup>150</sup> It also led to the creation of a rift between Kenya and Mombasa because communities residing in the coast were the targeted audience.<sup>151</sup> Consequently, the level of national security in Kenya plummeted further

<sup>144</sup> Directorate of Criminal Investigations, *ANTI-TERRORISM POLICE UNIT (ATPU)*, - <https://www.cid.go.ke/index.php/sections/formations/atpu.html>- 7 January 2023.

<sup>145</sup> Directorate of Criminal Investigations, *ANTI-TERRORISM POLICE UNIT (ATPU)*, - <https://www.cid.go.ke/index.php/sections/formations/atpu.html>- 7 January 2023.

<sup>146</sup> Zernike K and Kaufman M, 'The Most Wanted Faces of Terrorism' The New York Times, 2 May 2011-< <https://www.nytimes.com/2011/05/02/world/02osama-bin-laden-obituary.html>>- on 9 December 2023.

<sup>147</sup> Amnesty International, *Kenya: Denied Refuge: The effect of the closure of the Kenya/Somalia border on thousands of Somali asylum seekers and refugees*, 2007, 1.

<sup>148</sup> Dersso S, 'The Somalia Conflict: Implications for peacekeeping and peacekeeping efforts' Institute for Security Studies, ISS Paper 198, 10-< <https://www.files.ethz.ch/isn/105908/P198.pdf>> on 6 December 2023.

<sup>149</sup> Amnesty International, *KENYA: Denied Refuge: The effect of the closure of the Kenya/Somalia border on thousands of Somali asylum-seekers and refugees*, 2007, 1.

<sup>150</sup> Open Society Justice Initiative, "We're Tired of Taking You to the Court" HUMAN RIGHTS ABUSES BY KENYA'S ANTI-TERRORISM POLICE UNIT, 2013, 48.

<sup>151</sup> Horowitz J, 'Assassinations, Disappearances and Riots: What's Happening in Mombasa' Open Society Justice Initiative, 29 August 2012 -< <https://www.justiceinitiative.org/voices/assassinations-disappearances-and-riots-what-s-happening-mombasa>> on 23 November 2022.

than ever before because the government viewed some of its citizens as terrorists. In addition to this, terrorist activities increased and claimed more lives than expected as shown in the aftermath of the Westgate bombing and the attack on Garissa University.<sup>152</sup>

This chapter takes up the task of showing how Somalia's civil war placed Kenya in harm's way and how Kenya tried to reduce the impact of the war in its territory. The research takes a step further to analyze how the Al-Shabaab terrorist group emerged in Somalia and why the Kenyan government believes that Al-Qaeda and Al-Shabaab were responsible for the terrorist attacks in Kenya. After this assessment is completed, the formation and illegal actions of the ATPU will be discussed so that the next section can break down each case and show which national and international laws were infringed upon. Lastly, a discussion on the R2P doctrine will guide the research to show the line Kenya's government crossed due to the activities of the ATPU.

## Somalia's Inter-Clan Dispute and Civil War

### Mohamed Siad Barre's Regime (1969-1991)

Somalia gained its independence on 1 July 1960 from Italy and Britain.<sup>153</sup> The independence government that came into power was led by President Aden Abdullah Osman Daar.<sup>154</sup> On 21 October 1969, Mohamed Siad Barre led a military bloodless coup through the Supreme Revolutionary Council (SRC), which was a military junta,<sup>155</sup> and they managed to overthrow the independence government.<sup>156</sup> Mohamed Siad Barre's government supported the Soviet Union hence the adoption of a scientific socialist system that consisted of nationalizing industries and the

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<sup>152</sup> Almasy S and Leposo L, 'Kenya mall attack: military says most hostages freed, death toll at 68' CNN, 23 September 2013-< <https://edition.cnn.com/2013/09/22/world/africa/kenya-mall-attack/index.html>>- on 8 January 2023.

<sup>153</sup> Ware G, 'Somalia: From Trust Territory to Nation, 1950-1960' 26(2) *Phylon* (1960-), 1965, 173.

<sup>154</sup> African Commission on Human and Peoples' Rights, *Federal Republic of Somalia*, 2023.

<sup>155</sup> Minorities at Risk Project, *Chronology for Isaaq in Somalia*, 2004.

<sup>156</sup> Lewis I, 'The Politics of the 1969 Somali Coup' 10(3) *The Journal of Modern African Studies*, 1972, 394.

implementation of policies that centralized power. An example of such a policy was the adoption of a one-party state system.<sup>157</sup>

In 1977 to 1978, the government of Somalia, through its military, invaded the Ogaden region located in Ethiopia.<sup>158</sup> This gave rise to the Ogaden war whose history was composed of ethnic and territorial factors. The area was predominantly occupied by ethnic Somalis and over the years, the Somali government expressed claims that the territory should be united with the rest of Somalia so that all ethnic Somalis may be under one political power.<sup>159</sup> Upon the invasion, Ethiopia, led by Mengitsu Haile Mariam, mobilized its forces to defend the Ogaden region.<sup>160</sup> The international community offered support to both countries, and this resulted in Somalia losing the war. In addition to this loss, the Soviet Union withdrew its support from Somalia,<sup>161</sup> and this contributed to the decline in Somalia's economy.

While the war was ongoing, white-collar crimes became popular among members of the political sector. Politicians were known to instigate inter-clan wars and strife to attain results that ranged from minimal gains to international crimes. Some examples of such atrocities include circulating counterfeit currency to cause inflation, having secret detention facilities, piracy, embezzling foreign aid funds, and the destruction of reservoirs among others.<sup>162</sup> This resulted in the rampant spread of corruption among leaders, the internal dissent of the state and the increased opposition of the government.<sup>163</sup> To silence those who resisted, the government employed tactics that

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<sup>157</sup> Sheik-Abdi A, 'Ideology and Leadership in Somalia' 19(1) *The Journal of Modern African Studies*, 1981, 164.

<sup>158</sup> Sheik-Abdi A, 'Ideology and Leadership in Somalia' 163.

<sup>159</sup> Clarke W, 'THE ESAYI DREAM: A FOOTNOTE TO THE OGADEN WAR' 13(1) *Northeast African Studies*, 1991, 29.

<sup>160</sup> Stanford University, 'Ogaden Area recaptured by Ethiopian Forces with Soviet and Cuban Support -International Ramifications of Ethiopian-Somali Conflict - Incipient Soviet and Cuban Involvement in Ethiopian Warfare against Eritrean Secessionists -Political Assassinations inside Ethiopia' 1978, 5.

<sup>161</sup> World Peace Foundation, *Somalia: Fall of Said Barre and civil war*, 2015.

<sup>162</sup> Menkhaus K, 'State Collapse in Somalia: Second Thoughts' 30(97) *Review of African Political Economy*, 2003, 412; Africa Watch, *SOMALIA: A Government at War with Its Own People*, January 1990, 2; United States Bureau of Citizenship and Immigration Services, Somalia. *Things Fall Apart*, 1 January 1993.

<sup>163</sup> United States Bureau of Citizenship and Immigration Services, *Somalia. Things Fall Apart*, 1 January 1993.

involved violence and displacement through the indiscriminate use of landmines, bombing of villages, and holding captured individuals in secret detention facilities.<sup>164</sup>

To add onto this, the government continued to implement policies that resulted in food shortage. By centralizing the government, the agricultural sector pursued collectivization which was in line with the socialist ideals that were being adopted. This caused a decrease in productivity and the subsequent collapse of the sector because it was not prepared for such a major change.<sup>165</sup> There was also a prolonged drought and erratic rainfall that led to the death of livestock, crop failure and reduced agricultural productivity.<sup>166</sup> Cumulatively, these factors resulted in humanitarian crises as famine affected a large part of the population.

By the end of the 1980s, the economic decline and authoritarian government had stirred up civil unrest. Grievances such as the government's failure to address the humanitarian crises resulted in clan-based opposition such as the Somali National Movement (SNM) and the United Somali Congress (USC) challenging the central government's authority.<sup>167</sup> Furthermore, Mohamed Siad Barre's military support withered as conditions in the country worsened and affected them. On 26 January 1991, Mogadishu fell to the USC and the guerrilla groups from the Hawiye clan, Isaak clan, Darod sub-clan among others targeted the President who escaped with a few supporters.<sup>168</sup>



### Post-Mohamed Siad Barre's Regime

After the collapse of the government in 1991, a power vacuum was left which led to violent wrangles over the control of Somalia. From 1991 to 1995, Mogadishu became a battleground for warlords such as Ali Mahdi Mohamed and Mohamed Farrah Aidid.<sup>169</sup> During this period, the UN launched a peacekeeping operation, the United Nations Operation in Somalia (UNOSOM), whose aim was to facilitate humanitarian aid delivery that had become difficult to achieve due to the civil

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<sup>164</sup> Menkhaus K, 'State Collapse in Somalia: Second Thoughts', 417.

<sup>165</sup> Minorities at Risk Project, *Chronology for Issaq in Somalia*, 2004.

<sup>166</sup> International Committee of the Red Cross, *A drought so severe it has a name*, 2019.

<sup>167</sup> United States Bureau of Citizenship and Immigration Services, *Somalia. Things Fall Apart*, 1 January 1993.

<sup>168</sup> Minorities at Risk Project, *Chronology for Issaq in Somalia*, 2004.

<sup>169</sup> WRITENET, Somalia: Update to End August 1996, 1 September 1996.

war.<sup>170</sup> The other goal of the operation was the restoration of peace.<sup>171</sup> During the operation, two USA Black Hawk helicopters were shot down by Somali militia and eighteen American soldiers died while over a hundred Somalis were killed.<sup>172</sup> The response from the USA constituted the withdrawal of its troops from the region in 1994 which gave rise to a security vacuum.<sup>173</sup>

In addition to this, the cemented enmity that settled among the Somali clans during Mohamed Siad Barre's regime continued to bear fruit in the form of inter-clan armed conflicts which became worse than before. These conflicts gave rise to the recruitment of militias who would fight for their clan. The inter-clan war was similar to tribal wars in the pre-colonial era as the aim was to claim hundreds of kilometers of territory in a day of fighting. For the militia, the purpose of this form of conquest was looting and pillaging because whatever was recovered was used to compensate them. Over time, the character of the armed conflict changed to a destructive one. Instead of the two clans fighting against each other for territory and possessions, the Darod and Hawiye clans waged deadly internal struggles.<sup>174</sup> An example of this was the prolonged war between the intra-Hawiye clans; Abgal and Haber Gedir in Mogadishu.<sup>175</sup>

As the length of the feud spilled over to 1995, it became localized, less violent, unpredictable, and the clashes would last for shorter periods. This was because clan members lost sight of any reasonable purpose in the conflict hence those who wanted to continue fighting lost support from their relatives. Furthermore, elders were able to regain their authority and status in society and this placed them in a better position to manage the conflict. Another supporting factor was that due to the prolonged conflict and the struggling economy, ammunition was scarce and impossible to purchase. The state of the economy also affected the pay militia men received. This reduced the

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<sup>170</sup> Human Rights Watch, *SOMALIA FACES THE FUTURE: HUMAN RIGHTS IN A FRAGMENTED SOCIETY*, April 1995.

<sup>171</sup> Dobbins J, McGinn J, Crane K, Jones S, Lal R, Rathmell A, Swanger R, and Timilsina A, 'SOMALIA' in Dobbins J, McGinn J, Crane K, Jones S, Lal R, Rathmell A, Swanger R, and Timilsina A (ed) *America's Role in Nation-Building*, 1<sup>st</sup> ed, RAND Corporation, 2003, 65.

<sup>172</sup> Air University Press, *The Battle of Mogadishu*, 2018, 276 – 281.

<sup>173</sup> Air University Press, *The Battle of Mogadishu*, 2018, 291.

<sup>174</sup> Menkhaus K, 'State Collapse in Somalia: Second, 412.

<sup>175</sup> Menkhaus K, 'State Collapse in Somalia: Second, 410.

number of people attracted to that source of income and even those who stayed often switched sides depending on where their source of income came from.<sup>176</sup>

Other clans opted for a peaceful transition from the collapsed government and even went as far as declaring autonomy to ensure that their territory was not involved in the war. In 1991, the northern region of Somalia which was inhabited by the Isaak clan declared itself to be an independent state known as the Republic of Somaliland. Seven years later, Puntland, which is located in the northeastern region of Somalia declared itself to be independent from Somalia under the leadership of Abdullahi Yusuf Ahmed.<sup>177</sup>

### Formation of a Central Government

In the year 2000, the Arta Conference was held in Djibouti to restore the central government of Somalia. During the conference, representatives from Somali factions, civilian societies and warlords came together and formed a new government known as the Transitional National Government (TNG), which was led by President Abdiqasim Salad Hassan.<sup>178</sup> The fragmentation of Somalia resulted in various challenges when TNG came into power which limited its recognition and its efforts to unite Somalia.

The clan fragmentation resulted in loyalties to one's clan superseding one's loyalty to the nation. This gave rise to individuals not supporting agendas that would benefit the whole nation. This was also seen where the leaders constituting TNG fought for control over the territory so that their clan could gain influence over the region. Another issue was that not all the citizens of Somalia supported TNG. This was evident when some people shared sentiments concerning the government being considered foreign due to its formation in a foreign state. The lack of recognition

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<sup>176</sup> Menkhaus K, 'State Collapse in Somalia: Second, 411.

<sup>177</sup> Hansen S, 'Private Security and Local Politics in Somalia' 35(118) *Review of African Political Economy*, 2008, 585.

<sup>178</sup> AMISOM, *Somalia: IRIN Focus on the Djibouti peace conference*, 23 August 2000.

undermined TNG's authority and enabled warlords and factions to gain control of some regions including Mogadishu.<sup>179</sup>

The conflict on the faction level and among warlords was also supported by neighboring countries which contributed their support in multiple ways. This further worsened the existing lack of recognition of TNG. Lastly, the government lacked the financial capacity to support basic services the citizens required such as healthcare and education. This insufficiency also extended to the inability of the government to aid its citizens with regard to the humanitarian crises they were facing and the level of insecurity that was present.<sup>180</sup> Consequently, Somali citizens lost their trust in the government.

To revive the government, a conference was held in Nairobi in 2002 whose aim was to bring together all Somali factions so that an inclusive government could be established.<sup>181</sup> The conference gave rise to the Transitional Federal Government (TFG), which was led by Abdulkassim Salat Hassan who sat as the interim president. During its early stages, the government faced similar challenges to TNG such as internal division where leaders stole foreign aid,<sup>182</sup> and the rise of Islamist groups that caused chaos.<sup>183</sup>

To establish the government, the peace process in Nairobi was moved to Mogadishu in 2004. The aim of the process was to expand the TFG institutions so that they could become more inclusive. With this as the intent, the TFG parliament was established, and it was made up of members who represented the different clans and subclans in Somalia. During the same year, elections were held and the former president of Puntland, Abdullahi Yusuf Ahmed, was voted in as the president of TFG.<sup>184</sup>

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<sup>179</sup> Menkhaus K, 'State Collapse in Somalia: Second, 407.

<sup>180</sup> Menkhaus K, 'State Collapse in Somalia: Second, 409.

<sup>181</sup> Menkhaus K, 'Governance without Government in Somalia Spoilers, State Building, and the Politics of Coping' 31(3), *International Security*, 2006/2007, 74.

<sup>182</sup> Menkhaus K, 'State Collapse in Somalia: Second, 418.

<sup>183</sup> Anzalone C, 'Al-Shabaab Setbacks in Somalia' (4)10 *CTC SENTINEL*, 2011, 22.

<sup>184</sup> United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 2005 - Somalia*, 8 March 2006,

## Rise and Fall of Islamic Courts Union

Islamic courts, which were originally clan-based, emerged in the early 2000s in different parts of Somalia to ensure that order was maintained through settling disputes and enforcing Islamic law.<sup>185</sup> This was before the central government was formed. Over the years the courts gained momentum and later formed the Islamic Courts Union (ICU) that sought to have a legal and political system that was based on Islamic principles.<sup>186</sup> The courts started gaining control of regions and by 2006, the union had control over Mogadishu and other key cities such as Kismayo and its port, Jowhar, Baidoa which was the stronghold of the Transitional Government, and Beledweyne among others.<sup>187</sup>

The strategic expansion of its territory resulted in wars with warlords and factions that occupied the regions they extended their control to.<sup>188</sup> Tension grew in East Africa, particularly in Ethiopia which feared that it would share its border with an Islamic state and saw this as inevitable as ICU continued to gain control of important cities. To ensure that its fears would not be realized, Ethiopia intervened in December 2006 by aiding the TFG forces in fighting the ICU. The outcome was the defeat of the ICU and gaining control over Mogadishu.<sup>189</sup> After a period of time, a number of the ICU members regrouped and fought against the TFG and Ethiopian military which fueled anti-Ethiopian sentiments from citizens of Somalia who feared that this war would result in more harm than good on their part.

A prolonged conflict ensued, and this is when the Al-Shabaab terrorist group emerged with an aim to establish its version of an Islamic state in Somalia.<sup>190</sup> To gain support, it exploited the grievances of various groups in the country, and it managed to gain control of territories in the Southern and

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<sup>185</sup> Menkhaus K, 'State Collapse in Somalia: Second, 409.

<sup>186</sup> Ahmad A, 'Taliban and the Islamic Courts Union: How They Changed the Game in Afghanistan and Somalia' 6(2), *Policy Perspectives*, 2009, 59.

<sup>187</sup> Congressional Research Service, *Somalia: Current Conditions and Prospects for a Lasting Peace*, 16 December 2010,

<sup>188</sup> Ahmad A, 'Taliban and the Islamic Courts Union: How They Changed the Game in Afghanistan and Somalia' 60.

<sup>189</sup> Ahmad A, 'Taliban and the Islamic Courts Union: How They Changed the Game in Afghanistan and Somalia' 59.

<sup>190</sup> Ahmad A, 'Taliban and the Islamic Courts Union: How They Changed the Game in Afghanistan and Somalia' 69.

central areas of the state. In these regions, it established control and strict Sharia law for everyone to follow.<sup>191</sup>

## Al-Shabaab and Kenya

After Kenyan forces were sent to Somalia to help fight the Al-Shabaab, retaliation by the terrorist group was in the form of attacks such as the recorded thirty grenade and explosives attacks in Kenya that claimed the lives of seventy-six people in 2012.<sup>192</sup> In addition to this, there have been four other attacks that have claimed over 250 lives in less than a decade. The first attack was in 2013 at the Westgate Shopping Mall. From 21 September 2013 to 24 September 2013, the extremist group targeted men, women and children who were in the mall.<sup>193</sup>

The attackers used different weapons such as firearms and explosives to ensure that the Kenya's security forces could not access the building. This resulted in a prolonged standoff that ended on 24 September 2013 when the Kenyan forces communicated that they had regained control over the mall. By then more than sixty people were killed and hundreds were injured.<sup>194</sup> The next attack was in 2014 in Mandera where Al-Shabaab militants ambushed a bus that was travelling to Mandera and separated the passengers based on their faith. Then they continued to execute those who were Christians and justified their attack as their response to the Kenyan military's involvement in the African Union Mission in Somalia (AMISOM).<sup>195</sup>

Following this was the Garissa University attack in 2015 where armed terrorists attacked the institution and targeted Christian students.<sup>196</sup> Over 140 students were killed, and more were left

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<sup>191</sup> Royal United Service Institute, *THE ROLE OF FINANCE IN DEFEATING AL-SHABAAB*, 2014, 3-4.

<sup>192</sup> US Department of State, *Travel Warning (Kenya)*, 2013.

<sup>193</sup> Howden D, 'Terror in Nairobi: the full story behind al-shabaab mall attack' *The Guardian*, 4 October 2013- <<https://www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya>> on 10 December 2023.

<sup>194</sup> Howden D, 'Terror in Nairobi: the full story behind al-shabaab mall attack' *The Guardian*, 4 October 2013- <<https://www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya>> on 10 December 2023; International Centre for Counter-Terrorism, *Westgate Attack*, 1 December 2020, 3.

<sup>195</sup> International Federation of Red Cross and Red Crescent Societies, *Kenya: Mandera Bus Attack*, 2015,

<sup>196</sup> United States Army War College, *Al-Shabaab: The Threat to Kenya and The Horn of Africa*, 2014, 9.

injured.<sup>197</sup> The last attack that will be discussed in this dissertation is the DusitD2 Complex attack in 2019. The complex housed restaurants, a hotel, and offices. During the attack, civilians and security personnel were targeted and killed or injured using explosives, guns, or grenades. At least twenty-one people were killed.<sup>198</sup>

After each attack, the Al-Shabaab always communicated that they were responsible for them and in all of them, they claimed that their motivation was the involvement of Kenya's military in AMISOM.<sup>199</sup> The result was the growth of tension between Kenya's anti-terrorism unit and the Muslim community and the creation of a rift between Muslims and Christians.<sup>200</sup>

## Conclusion

The above sections highlight the state of insecurity Somalia has faced since Mohamed Siad Barre overthrew the independence government. These conflicts took place during different times, but they managed to build a momentum that has affected the African continent as a whole, especially in East Africa. The division between the Hawiye and Darod clans was heightened after Barre ensured that the Darod clan formed the government and oppressed the other clans including Darod sub-clans.

The state of inequality gave rise to the need for Islamic Courts that fought against the TFG and gained support from the growing Al-Shabaab clan that supported an extremist interpretation of an Islamic state. With time and with support from other terrorist groups such as Al-Qaida and Al-Jihad, Al-Shabaab grew and recruited more people who helped them fight members of AMISOM. The group also took advantage of the instability it caused in Kenya and Somalia and recruited

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<sup>197</sup> Namwaya O, 'Wounds of Garissa Attack, Four Years On' Human Rights Watch, 8 April 2019- <<https://www.hrw.org/news/2019/04/08/wounds-garissa-attack-four-years>> on 11 December 2023.

<sup>198</sup> International Centre for Counter-Terrorism, *DusitD2 Attack*, 1 December 2020, 11.

<sup>199</sup> Branch D, 'Why Kenya Invaded Somalia: The Opening of an Aggressive New Chapter,' *Foreign Affairs*, 15 November 2011 -<<https://www.foreignaffairs.com/articles/africa/2011-11-15/why-kenya-invaded-somalia>> on 11 December 2023.

<sup>200</sup> Open Society Justice Initiative, *We're Tired of Taking You to the Court: HUMAN RIGHTS ABUSES BY KENYA'S ANTI-TERRORISM POLICE UNIT*, 47.

more people in various areas such as Mombasa and Nairobi to carry out their mission which was to retaliate against the Kenyan military assistance in Somalia.

## Rendition Exercises by Kenya's ATPU

As a response to the fears expressed by Kenyan leaders and the international community after the 1998 and 2002 terror attacks, Kenya established the ATPU in 2003. The purpose of the unit was to alleviate terrorist activities in the country by conducting investigations relating to all terrorism matters. To achieve this, its assigned roles included ensuring public awareness of terrorism, updating databanks of profiles for suspected terrorists, sharing information with stakeholders, and monitoring and reviewing the security of vital installations among other tasks.<sup>201</sup>

The stakes were raised after the Kenyan military was sent to Somalia to help fight the Al-Shabaab. Retaliation by the terrorist group was in the form of attacks that claimed a slew of innocent lives. In response, the ATPU has used questionable tactics that can be characterized as robust and gruesome. Consequently, scholars and the international community have cautioned the unit due to the number of IHRL and IHL laws it had violated.<sup>202</sup>

### Rendition Exercises

In this dissertation, a rendition exercise is the practice of illegally removing refugees and/or asylum seekers from the country they are currently occupying and deporting them to territories that are not safe hence violating the procedural element and/or the substantive dimension of the principle of non-refoulement. In the case of *Salim Awadh Salim and ten others v Commissioner of Police and three others* it was recorded that the applicants were apprehended by Kenyan authorities and arbitrarily detained. They were not brought before a court within twenty-four hours, and they were

<sup>201</sup> Directorate of Criminal Investigations, *ANTI-TERRORISM POLICE UNIT (ATPU)*, - <https://www.cid.go.ke/index.php/sections/formations/atpu.html>- 7 January 2023.

<sup>202</sup> Open Society Justice Initiative, "We're Tired of Taking You to the Court" HUMAN RIGHTS ABUSES BY KENYA'S ANTI-TERRORISM POLICE UNIT, 2013.

denied access to the proper extradition or deportation procedures that were implemented in Kenyan law.

After being held under police custody for three weeks, the individuals were flown to Somalia; however, their families were not informed of this. During an interview with one of the individuals, the Human Rights Watch recorded that:

“When the planes landed in Mogadishu and Baidoa, Kenyan authorities handed the detainees over to Ethiopian military forces. As one detainee described the scene in Mogadishu: “The plane was surrounded by the Ethiopian military when we got off. We were brought to an open area near the plane and blindfolded. Two soldiers grabbed me and yelled at me: “You are a terrorist. We will kill you. We will sell you.” Then they took me to a dusty room in the airport with the others where we spent two nights.”

From other interviews it was noted that a number of the rendered individuals were flown to Addis Ababa where they were held in detention centres, but they were not charged. The group that remained in Mogadishu was moved to Baidoa where they were tortured by men who were wearing the Ethiopian military uniform. They were later moved to Ethiopia, specifically a military detention facility in Awasa and then later moved to a military detention facility in Ambo, Ethiopia where they were tortured.<sup>203</sup> Upon questioning, the former head of the ATPU, Nicholas Kamwende, agreed that he conducted the rendition exercise in order to ensure that national security was maintained.<sup>204</sup> Even so, he did not confirm that any practices of torture or other forms of ill-treatment took place.

In other cases, such as *Hassan Elijuma Agade v Commissioner of Police and Others*<sup>205</sup>, *Zuhura Suleiman v Commissioner of Police and others*<sup>206</sup>, *Aisha Suleiman v Commissioner of Police and*

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<sup>203</sup> Human Rights Watch, “*Why Am I Still Here?*” *The 2007 Horn of Africa Renditions and the Fate of Those Still Missing*, 2008, 8-13.

<sup>204</sup> *Salim Awadh Salim and ten others v Commissioner of Police and three others* (2008), para. 22-23.

<sup>205</sup> *Hassan Elijuma Agade v Commissioner of Police and Others* (2010).

<sup>206</sup> *Zuhura Suleiman v Commissioner of Police and others* (2010).

*others*<sup>207</sup>, and *Isa Ahmed Luyima and others v Attorney General*,<sup>208</sup> the applicants were rendered from Kenya to Uganda as suspects of the 11 July 2010 World Cup bombing. In the first case, Idris Magondu's house was raided on 23 July 2010 by police officers who did not have a warrant. They searched the house then took him to the headquarters of the ATPU and after being held in various locations without being charged or being presented to a Kenyan court, he was taken to the town of Malaba which lies at the Kenya-Uganda border where he was handed over to Ugandan police officers. Prior to his rendition, he was threatened by ATPU officers that he would be handed over to Ugandan authorities who would torture him, kill him, and kill his family.

### Kenyan Judiciary's Stance and the International Community's Position on Renditions by ATPU

In the case of *Salim Awadh Salim and ten others v Commissioner of Police and three others* that has been explained above, Nicholas Kamwende held that the renditions were conducted to ensure national security in Kenya. Furthermore, the government averred that they had a constitutionally appointed mandate to arrest, detain petitioners and even issue orders for deportation if national security was threatened. Although the ATPU was formed to sustain national security in instances where terrorism was a threat, the court held that threats concerning national security do not constitute a valid reason to violate the constitutional rights of any individual.

Similarly, in the case of *Mohamed Aktar Kana v Attorney General*, the court held that the rights awarded to individuals by the 2010 Constitution of Kenya should not be limited to a specific group of people. If this were done, it would result in the corruption of the constitution at a very tender age. In addition to this, it would be an infringement of the freedom from discrimination. To reinforce these positions, the High Court Justice Aggrey Muchelule in the 2010 case of *Zuhura Suleiman v Commissioner of Police and others*, was of the opinion that renditions were wrong no matter who the individual was. He believed that no matter the crime, constitutional rights cannot be eroded because they are the sources of protection that the individual can seek against oppressors.

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<sup>207</sup> *Aisha Suleiman v Commissioner of Police and others* (2010)

<sup>208</sup> *Isa Ahmed Luyima and others v Attorney General* (2011), Constitutional Court of Uganda.

He also held that while fighting against terrorism, the police should adopt methods that are compatible with the rights held by all citizens.

These sentiments were also shared by the international community that correctly pointed out that Kenya's human rights obligations arise from its constitution and international conventions that it has ratified.<sup>209</sup> Of importance to this research are the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the African Charter on Human and Peoples' Rights (African Charter), and the Convention relating to the Status of Refugees (The 1951 Convention).

The principle of non-refoulement as explained in the 1951 Convention can be limited under Article 33(2) and Article 1F of the same convention. Article 33(2) provides that:

“The benefit of the present provision (non-refoulement) may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

While Article 1F holds that:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.”

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<sup>209</sup> Article 2(6), *Constitution of Kenya* (2010).

The gap created by the limitations concerning the application of the principle of non-refoulement is filled by other conventions. One of the conventions that addresses this is Article 2(2) of the CAT that maintains that:

“No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

This has been interpreted to mean that the principle applies to everyone including refugees who are also suspects and/or criminals.<sup>210</sup>

Other international laws have also supported the above view as seen in:

Article 7 of the ICCPR that holds that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation;” and

Article 5 of the African Charter:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman, or degrading punishment and treatment shall be prohibited.”

When read together, CAT, ICCPR and the African Charter require states to ensure that those they are responsible for are not exposed to torture or other forms of ill-treatment. Therefore, for a state to move an individual from its territory to another state where they are tortured, they would have violated the above-mentioned laws.

With this in mind, it is clear that the ATPU and the Kenyan government as a whole has violated the ban on torture under the above-mentioned provision of CAT, ICCPR and the African Charter. This violation gives rise to the weakening of the application of the ban and the disruption of the fiduciary relationship the state of Kenya has with the rendered suspects. The fiduciary relationship

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<sup>210</sup> *Chahal v The United Kingdom* ECtHR Judgement of 15 November 1996 at para. 79.

arises from the government assenting and/or ratifying the aforementioned international and regional treaties which automatically form part of the laws of Kenya.

Although such a relationship exists, the state is left with an issue of how to safely deport the individuals who pose a threat to national security while respecting its relationship with the individual or group. If the refugee's presence in the territory of a state is a high security risk, deportation laws or extradition laws may be followed to remove the individual from the state.<sup>211</sup> This however requires the procedural aspect of the principle of non-refoulement to be applied. The procedural aspect requires states to ensure that there is an appeal option if there are reasons to believe that their removal from the territory would expose them to torture or other forms of ill-treatment.<sup>212</sup> This is in line with Article 3(2) of CAT that provides that:

“For the purpose of determining whether there are such grounds, the competent authorities shall consider all relevant considerations including, where applicable, the existence of a consistent pattern of gross, flagrant or mass violations of human rights;”

From the above international law provisions, it is clear that the Kenyan anti-terrorism unit violated both national and international laws once they rendered the refugees and the asylum-seekers. By failing to present the detainees before a court within twenty-four hours after their detention, denying them access to appropriate deportation or extradition procedures, and rendering them to countries that had a high likelihood of exposing them to torture, the unit acted as though it was above the rule of law by placing individuals, some of whom were not proven to be terrorists, in harm's way.

## The Doctrine of R2P

The R2P doctrine was introduced in 2001 by the International Commission on Intervention and State Sovereignty (ICISS) to address concerns relating to crimes and mass atrocities against

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<sup>211</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, 2.

<sup>212</sup> *Mohammed Alzery v. Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee (HRC) (10 November 2006).

humanity.<sup>213</sup> Before its introduction, the concept of humanitarian intervention was in place; however, its implementation fell short due to various factors such as the comprehension of sovereignty. According to the proponents of humanitarian intervention, sovereignty was relative to non-interference hence states could not intervene without the host state's approval in instances where mass atrocities against citizens were in question. This reasoning gave rise to the uninterrupted Rwanda genocide and the Srebrenica massacre in Bosnia.

To navigate around this limitation, ICISS introduced another approach to how sovereignty can be viewed. Under R2P, sovereignty lacks the absolute control that humanitarian intervention advocates for, instead, it constitutes a responsibility states have to their citizens to protect them from crimes against humanity.<sup>214</sup> This concept is of importance to this study because it aligns with the first element of R2P; the responsibility to protect the population residing within the territory of the state,<sup>215</sup> and it also shows why renditions in Kenya are illegal.

In Kenya's case, the ATPU conducted renditions of individuals who resided in Kenya as citizens and as refugees or asylum seekers. This resulted in them being deported to territories that exposed them to torture and other forms of ill-treatment which are characterized as crimes against humanity.<sup>216</sup> When compared to the responsibility of the nation as understood under the R2P doctrine, the government failed to protect these individuals from an unruly police unit and subsequent human rights violations.

To ensure that the failure on the government's part is not repeated, this dissertation recommends the introduction of diplomatic assurances. These are agreements between states that permit the deportation of individuals to other states as long as the receiving state does not violate the subject's human rights and accommodates any other requirements from the sending state such as post-return

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<sup>213</sup> *The Responsibility to Protect Report*, International Commission on Intervention and State Sovereignty (ICISS), 2001.

<sup>214</sup> ICISS, *The Responsibility to Protect Report*.

<sup>215</sup> UN Chronicle, *The Responsibility to Protect*, 2016.

<sup>216</sup> Article 7, UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6.

monitoring.<sup>217</sup> The nature of such agreements is simple hence they can be easily modified on a case-by-case basis to align with the needs of the subject and the circumstances and history of the receiving state with regard to human rights violations.

The subsequent chapter will explain the nature of these assurances and when they are applicable. It shall also explain how countries can be assessed to determine whether they are viable as receiving states. A deeper analysis shall be offered to understand what has made such assurances succeed and fail in the past and how the Executive arm of government of Kenya can avoid the mistakes of the past. In addition to this, national and international laws shall be referred to as they shall offer the limitations of the role the Executive arm of government can play.



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<sup>217</sup> Human Rights Watch, Diplomatic Assurances Against Torture Questions and Answers, 5-6.

## CHAPTER 4: THE HIDDEN VIRTUE

### Introduction

The reputation that diplomatic assurances against torture and other ill-treatment has garnered over the years has left next to nothing to be desired. Some organizations such as the Human Rights Watch and Amnesty International have maintained the position that such agreements are means for states to avoid their responsibility to protect individuals from torture and other ill-treatment.<sup>218</sup> Their opinion is well founded due to the number of reported cases where upon deportation to the receiving state, the subject to the assurance reported being subjected to various acts that constitute torture or other ill-treatment.<sup>219</sup>

This dissertation is of the view that the requirements placed while drafting these assurances alongside the available laws of a country have played a key role in opening doors for the aforementioned violations upon deportation. In the subsequent sections, the history of the use of diplomatic assurances will be discussed while referring to cases and the criticisms regarding each case will also be assessed. After this, limitations for the Executive arm of Government of Kenya will be discussed so as to show how to avoid the mistakes of other governments that used diplomatic assurances.

### Historical Development of Diplomatic Assurances

Diplomatic assurances are agreements brokered between states at a diplomatic level<sup>220</sup> where the sending state defines the rights and freedoms a receiving state should respect once an individual

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<sup>218</sup> Human Rights Watch, “*Diplomatic Assurances*” against Torture: *Questions and Answers*, 1; Amnesty International, ‘Diplomatic Assurances against Torture – Inherently Wrong, Inherently Unreliable’ 2017, 1.

<sup>219</sup> *Ahmed Hussein Mustafa Kamil Agiza v Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005; *Chahal v The United Kingdom*, ECtHR Judgement of 15 November 1996.

<sup>220</sup> Human Rights Watch, “*Diplomatic Assurances*” against Torture: *Questions and Answers*, 4.

has been released to the jurisdiction of the latter.<sup>221</sup> Assurances that focus on the prevention of torture and other ill-treatment are drafted where there are substantial grounds for believing that the receiving state practices torture and/or other ill-treatment, and due to this practice,<sup>222</sup> there is a high likelihood that the deportee will be subjected to torture or other ill-treatment.<sup>223</sup>

The increase in the use of diplomatic assurances against torture and/or other ill-treatment became noticeable once the war on terrorism began.<sup>224</sup> The 11 September 2001 attack on the USA sparked the war as terrorist attacks became more rampant and claimed more lives.<sup>225</sup> Over the years terrorist activities became a household conversation and governments turned against individuals who were either suspected or proven to be part of terrorist groups.<sup>226</sup> As a result of this undertaking by governments, individuals were captured by special units, such as the ATPU in Kenya, and illegally moved to various facilities, such as Guantánamo Bay in Cuba, where they would be detained and tortured for answers.<sup>227</sup>

The international community condemned the USA, Austria, Canada, Morocco, Egypt, among others, for practicing torture because of the non-derogable nature of its prohibition.<sup>228</sup> This crime

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<sup>221</sup> Stefanovska V, 'Diplomatic Assurances and the State's Responsibility When Considering Extraditing a Person Whose Human Rights May Be Violated' 19(2) *Journal of Criminal Justice and Security*, 2019, 167.

<sup>222</sup> Larsaeus N, 'The Use of Diplomatic Assurances in Prevention of Prohibited Treatment' Refugee Studies Centre, RSC Working Paper Number 32, 2006, 3.

<sup>223</sup> *A.R.J. v. Australia*, CCPR/C/60/D/692/1996, UN Human Rights Committee (HRC), 11 August 1997, para. 6.9.

<sup>224</sup> Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide since September 22, 2012*, 6. The term 'war on terrorism' has been used to describe the global counterterrorism movement led by America.

<sup>225</sup> Burrige T, 'Spain remembers Madrid train bombings 10 years on' BBC News, 11 March 2014-<https://www.bbc.com/news/world-europe-26526704> on 17 December 2023; Llewellyn A, 'Q&A: Bali bomber on crime, punishment, and what motivated deadly attack' Al Jazeera, 11 November 2013-<https://www.aljazeera.com/news/2023/11/11/qa-bali-bomber-on-crime-punishment-and-what-motivated-deadly-attack> on 17 December 2023; Theuri C, 'Terrorists hit Paradise Hotel after elaborate planning' Daily Nation, 10 November 2013-<https://nation.africa/kenya/life-and-style/dn2/2002-terrorists-hit-paradise-hotel-after-elaborate-planning-913752> on 17 December 2023; European Union, *JHA Council Declaration on the EU Response to the London Bombings*, 13 July 2005, 11158/1/05 Rev.1; Radio Free Europe/Radio Liberty, *Pakistan puts leading figure in 2008 Mumbai attacks under house arrest*, 31 January 2017.

<sup>226</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005; *Daljit Singh v. Canada*, CCPR/C/86/D/1315/2004, UN Human Rights Committee (HRC), 28 April 2006; *Suresh v R* (1998), the Provincial/Territorial Superior Courts of Canada; *Chahal v Secretary of State for the Home Department* (1995), The United Kingdom Court of Appeal.

<sup>227</sup> Amnesty International, *Amnesty International Report 2015/16 - United States of America*, 24 February 2016.

<sup>228</sup> Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, 15 April 2005.

constituted capturing and detaining refugees and asylum seekers who were suspected to be terrorists and rendering them to different countries such as Ethiopia where they would be subjected to cruel interrogation techniques.<sup>229</sup> International organizations took up the role to fight such practices by coordinating with whistleblowers to show how countries are neglecting their responsibilities towards their citizens and foreign nationals when it comes to protecting them from acts that could constitute torture and other ill-treatment.<sup>230</sup>

In some cases, states employed the use of diplomatic assurances to supplement extradition treaties in instances where the sending government believed that the subject would be exposed to harm due to unique circumstances. This is evident in the 1997 case of *United States of Mexico v Hurley*.<sup>231</sup> In this case, the applicant was to be deported from Canada to Mexico because he was a fugitive. The two governments had an extradition agreement that was applied in this particular case; however, there were substantial grounds to believe that due to Mr Hurley's sexual orientation, the extradition would give rise to his persecution as there was a hostile climate towards homosexuals during that period.<sup>232</sup> Therefore, the extradition would have been in violation of Article 3(1) of the CAT that provides that:

'No State shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

Consequently, to assure the Canadian government of Mr Hurley's safety upon his return to Mexico, a diplomatic assurance was drafted containing an agreement with regard to this. The agreement included a letter from the Minister explaining the steps that had been taken to ensure that the terms of the assurance would be followed. This included a communication to the Minister of Foreign Affairs in Mexico to express, in writing, his agreement with the surrender warrant, which acted as the diplomatic assurance, prior to the extradition.<sup>233</sup>

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<sup>229</sup> *Salim Awadh Salim and ten others v Commissioner of Police and three others* (2008) eKLR.

<sup>230</sup> UN General Assembly, *2005 World Summit Outcome : resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, para. 138.

<sup>231</sup> *United States of Mexico v Hurley* (1997), The Ontario Court of Appeal.

<sup>232</sup> *United States of Mexico v Hurley* (1997), The Ontario Court of Appeal, 422.

<sup>233</sup> *United States of Mexico v Hurley* (1997), The Ontario Court of Appeal, 491.

The above case is an example of the appropriate use of diplomatic assurances and has been noted to be a good example of a strong assurance.<sup>234</sup> Below are some cases where states employed the use of diplomatic assurances in an inappropriate manner, and this resulted in the torture and/or ill-treatment of victims.

### Chahal v The United Kingdom

Mr Chahal had entered the UK illegally in 1971, but he applied to the Home Office to have his stay regularized and this gave rise to him being granted an indefinite leave to remain.<sup>235</sup> In 1984, the applicant traveled to India, to visit his relatives. During his visit, he met Sant Bhindranwale who was a religious and political leader in Punjab. The applicant became involved in organizing passive resistance in Punjab which led to his arrest by Punjab officers. He was detained without charge for twenty-one days, during which he claimed he was subjected to electrocution, beatings, and mock execution.<sup>236</sup>

He was able to return to the UK in 1984 where he became a leading figure in the Sikh community. The International Sikh Youth Federation (ISYF) was formed by Mr Jasbir Singh Rode while the applicant played an important organizational role. The purpose of the federation was to act as the overseas branch of the All-India Sikh Students' Federation which was forbidden by the Indian government before mid-1985. After Mr Rode was excluded from the UK he was arrested in India. During this period, he changed his views and after his release, he argued that Sikhs should pursue their cause through constitutional means. This led to the divide of the ISYF in the UK into two; the North that supported Mr Rode and the South who maintained their support for an independent homeland.<sup>237</sup>

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<sup>234</sup> *Chahal v The United Kingdom*, (1993), The United Kingdom Court of Appeal (Civil Division).

<sup>235</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996, para. 12.

<sup>236</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996, para. 17-18.

<sup>237</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996, para. 18 - 22.

In 1985, Mr Chahal was detained in the UK on suspicion of his involvement in the conspiracy to assassinate the then Prime Minister of India during his official visit to the UK. In May 1986, he was arrested and convicted in the UK for affray and assault at the East Ham gurdwara in London and once the case was heard, he was sentenced to six and nine months in prison which he served concurrently. On 16 August 1990, he received a letter from the Secretary of State for the Home Department that explained that his presence in the UK was uncondusive for the public good.<sup>238</sup> Mr Chahal claimed asylum under Article 32 of the 1951 Convention on the Status of Refugees that holds that:

‘1. No contracting State shall expel or return a refugee lawfully in their territory save on grounds of national security or public order.’

‘2. The expulsion of a refugee shall only be in pursuance of a decision reached in accordance with due process of law...’

and Article 33 that provides that:

‘1. No Contracting State shall expel or return 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.’

‘2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’

He based his asylum claim on the belief that upon his return to India, he would be subjected to torture due to his political affiliations. To prove that there were substantial grounds to believe that he would be in danger, he relied on the torture claims from his detention in Punjab in 1984, his political activities in the UK in relation to ISYF, evidence that his relatives were tortured to reveal his location, the death of those who associated with him in police custody, and Amnesty International reports on the persecution of Sikhs in India. Even after presentation of this evidence, his request for asylum was rejected twice by the Secretary of State for the Home Department due to the threat the applicant posed on the public good.<sup>239</sup>

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<sup>238</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996, para. 25.

<sup>239</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996, para. 26.

The applicant appealed the first denial of his asylum claim to an independent advisory panel that ruled that it had no jurisdiction to allow legal representation. This was followed by the deportation orders being signed on 25 July 1991. Mr Chahal made an application for leave to apply for judicial review to quash the deportation order, the first rejected asylum claim and the decision to deport him. The leave was granted, and the application was before Popplewell J on 2 December 1991. Popplewell held that the asylum decision could not stand because the Secretary did not consider the grounds Mr Chahal had presented as reasons for his asylum claim. He further advised the Secretary to reconsider his decision in light of his judgment. This resulted in the second rejection of the asylum claim.<sup>240</sup>

Mr Chahal applied for a judicial review which was approved by the High Court and heard before Potts J who rejected the application. The next appeal was in the Court of Appeal where the court held that when considering the relevant provisions of the 1951 Convention on the Status of Refugees and rules 173, 161, and 167 of the Immigration Rules that respectively hold that:

‘A deportation order will not be made against a person if the only country to which he can be removed is one to which he is unwilling to go owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.’<sup>241</sup>

‘Where a person is a refugee full account is to be taken of the provisions of the Convention and protocol relating to the Status of Refugees. Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments.’<sup>242</sup>

‘In considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case.’<sup>243</sup>

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<sup>240</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996, para. 34 and 35.

<sup>241</sup> Rule 173, *Immigration Rules 1994*, 23 May 1994.

<sup>242</sup> Rule 173, *Immigration Rules 1994*, 23 May 1994.

<sup>243</sup> Rule 173, *Immigration Rules 1994*, 23 May 1994.

The Secretary of State for the Home Department was only required to weigh the threat that the applicant would face against the danger he would cause to the national security of the UK if he was permitted to stay.<sup>244</sup> The court believed that the Secretary has taken into account the grounds for the asylum claim and compared them to the risk of national security hence his decision could not be disputed. In addition to this, the court was of the opinion that the letter from the Indian High Commissioner in the UK to the Parliamentary Under-Secretary for Foreign & Commonwealth Affairs dated 29 June 1992 that provided that:

“We have noted your request to have a formal assurance to the effect that, if Mr Chahal were deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities. I have the honor to confirm the above.”<sup>245</sup>

was proof that Mr Chahal would be safe from persecution, torture, and/or other ill-treatment. Furthermore, the court found no grounds for doubting the contents of the assurance.<sup>246</sup>

The applicant contested this by claiming that the assurance provided by the Indian government offered minimal protection seeing that the state was unable to control the security forces in Punjab.<sup>247</sup> This led to the court stating that the assurance fell short of providing an adequate guarantee of safety.<sup>248</sup>

This case shows that the authority a state has over the existing problem should always be considered when diplomatic assurances are being used. In Mr Chahal’s case, the Indian government was unable to control its security forces and members of the community who supported the persecution of Sikhs, especially in Punjab. This resulted in a national crisis of a humanitarian nature that affected the political Sikh supporters and those close to them such as Mr Chahal’s family. As a result, the applicant feared that his deportation to India would aid in his capture by Punjab officers, torture, and death.

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<sup>244</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996, para. 41.

<sup>245</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996, para. 37.

<sup>246</sup> *Chahal v The United Kingdom*, (1993), The United Kingdom Court of Appeal (Civil Division).

<sup>247</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996, para. 93.

<sup>248</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996, para. 105.

Although the Indian government presented an assurance that communicated that the applicant would be afforded legal protection by the state, the courts questioned whether such protection would suffice. To reach a conclusion, the court considered the evidence presented by Mr Chahal and from these, it was clear that the government's authority was limited. The ongoing mistreatment and murder of Sikhs in Punjab evidenced the lack of control over the area and the potential lack of protection if the applicant was deported.

This shows that diplomatic assurances are not meant to act as documents that communicate what is impossible. They are legally binding documents that reinforce the trust one state has in another with regard to a suspect's or criminal's safety. Furthermore, these agreements are meant to convince the Minister or leader in charge of the deportation that the compassionate circumstances presented as grounds for an asylum claim are settled for the benefit of the applicant.

### Ahmed Hussein Mustafa Agiza v Sweden

Ahmed Agiza was arrested in 1982 due to his relationship with his cousin who was suspected of having taken part in the assassination of Anwar Sadat who was the former president of Egypt. In 1991 he left Egypt for Saudi Arabia because of security concerns and then moved to Pakistan. He left Pakistan for Syria in 1995 after the Egyptian embassy refused to renew his passport and those of his family. In 1998, he was tried in a Superior Court in Egypt for terrorist activities and was found guilty in absentia and sentenced to twenty-five years imprisonment without the possibility of appeal. To avoid being caught, he moved to Canada with his family in 2000 and claimed asylum in Sweden in the same year.<sup>249</sup>

In his asylum claim, he referred to the hearing that was held in his absents on account of him being linked to Al Jihad and being sentenced to penal servitude for life. He argued that if he was returned to Egypt, he would be executed as others in the same proceedings had been murdered. While deliberating on the asylum claim on 30 October 2001, the Migration Board was informed by the

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<sup>249</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 2.1 - 2.3.

Security Police that Ahmed Agiza held a leading position in an organization that was found guilty of terrorist acts. Prior to receiving this information, the Migration Board saw it fit to grant asylum to the complainant; however, the findings of the Security Police swayed the decision. Upon further deliberation, the Board opted to forward the case to the government for a strength of the decision as required under Chapter 7 section 11(2)(2) of Sweden's Aliens Act.

The Alien Appeals Board whose opinion was sought by the government agreed with the latter decision reached by the Migration Board and informed the government that it would be best to deport Ahmed Agiza to Egypt to ensure their national security. On 18 December 2001 the government rejected the complainant's asylum claim and that of his wife and an order for the complainant and his spouse to be deported immediately followed.<sup>250</sup>

After his return to Egypt, Ahmed Agiza was detained in Mazraat Tora prison where the Swedish Ambassador to Egypt visited him on 23 January 2002. This was followed by a visit from his parents on the same day who claimed that he was being supported by a warden and he was hardly able to shake his mother's hand. He allegedly told his mother that during his flight from Canada, he was placed in Egyptian custody who bound him by his hands and feet. Upon their arrival in Egypt, they subjected him to intense interrogation techniques such as the use of electric shocks, and he was threatened by the Egyptian authorities that the guarantees their government had offered to Sweden would not save him.

On 16 April 2002, the complainant's parents visited him again and he told his mother that the electric shocks were still being applied, his hands and legs had been tied, he was not allowed to visit a toilet and that he had been held in solitary confinement. On 5 March 2003, the Swedish Ambassador visited the complainant with a human rights representative from the Ministry of Home Affairs of Sweden. During this visit, the complainant stated for the first time that he was being subjected to torture. When he was asked why he did not mention this before, he said that it did not matter because he would still be treated in the same way.<sup>251</sup>

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<sup>250</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 2.4 -2.5.

<sup>251</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 2.8 - 2.10.

While considering the case, the UN Committee Against Torture held that the measures taken by states to fight terrorism are important and legitimate; however, applicable rules of international law must be observed when executing these measures.<sup>252</sup> The issue that was presented before the court was whether the removal of the complainant from Sweden was a violation of Article 3 of CAT that disallows the expulsion or deportation of an individual to a state where there are substantial grounds for believing that they would be at a risk of danger. With regard to this particular issue, the Committee was of the opinion that the decision was to be based on what the state knew at the time of removal.<sup>253</sup>

The Committee evaluated whether under Article 3 of CAT, substantial grounds were present for believing that Ahmed Agiza would have been subjected to torture and/or other ill-treatment if deported to Egypt in 2001. This required more than historical proof of the violation because evidence had to be submitted attesting to the likelihood that the threat would affect the complainant.<sup>254</sup> Therefore, although Egypt had a tainted past when torture and ill-treatment was in question, this was not sufficient to satisfy the substantial grounds required by CAT.

The Committee concluded that the state of Sweden violated Article 3 because at the time of removal, there were reports that detainees were subjected to acts of torture and other ill-treatment. However, this mistreatment was not common among all prisoners because guards targeted detainees who were imprisoned for supporting political opinions that differed with those of the current government.<sup>255</sup> This applied in Ahmed Agiza's case because the Egyptian government believed that due to his relationship with his cousin, he supported groups that opposed Anwar Sadat's regime.

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<sup>252</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 13.1.

<sup>253</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 13.2.

<sup>254</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 13.3.

<sup>255</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 13.4.

This violation was further supported by the referral of his asylum claim case to the government of Sweden for a decision at the highest executive level. Such a structure of hearing asylum cases denied applicants a chance to seek an alternative decision if their claim was rejected. Due to this limitation on the applicant's end, they were denied a chance to defend their case further.<sup>256</sup>

In addition to this, after the decision of the government was announced, the complainant was expelled from Sweden within a few hours. This was made possible by the Central Intelligence Agency (CIA) that communicated its interest in the complainant to the Swedish Security Police by offering an aircraft to aid in the immediate expulsion of Ahmed Agiza. The Committee was of the opinion that having two states, apart from Sweden, that had shown interest in the complainant should have signaled the Swedish government that he was in danger upon removal from their jurisdiction.<sup>257</sup>

Before boarding the aircraft, the complainant among other expellees had a security check. This exercise consisted of cutting up their clothes using scissors, searching their bodies, and having their hands and feet fettered before receiving overalls and having their heads covered using loosely fitting hoods.<sup>258</sup> Upon examination of this procedure, the Committee found that the state of Sweden had violated Article 16 of CAT that provides that:

“1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman, or degrading treatment or punishment.”

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<sup>256</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 2.4 and 3.4,

<sup>257</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 12.28.

<sup>258</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para 10.2.

“2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman, or degrading treatment or punishment or which relates to extradition or expulsion.”

The above cited section required states to ensure that those within its borders are treated fairly by respecting their human dignity. This was violated when the security check was carried out because the activities the expellees were exposed to failed to meet the threshold of humane treatment. The process of cutting up their clothes in order to search them deprived them of their privacy while binding their feet and hands without presenting reasons for doing so shifted the act from it being a security measure supported by protocol to it being characterized as a cruel, inhuman, and degrading treatment.

This case offers a different angle for contesting the validity of diplomatic assurances. In Mr Chahal’s case, he had not been deported hence his case took place before deportation. In Ahmed Agiza’s context, expulsion had taken place and the guarantees in the assurance had been violated. Therefore, his case gives insight on how complainants can dispute their return to a country after the violation of the ban on torture under Article 3.

Although a diplomatic assurance was available and a representative of Sweden carried out post-return monitoring, the fear instilled in the complainant halted the purpose of such visits which was to confirm that the guarantees in the agreement were followed. This shortcoming aligns with the argument presented by the Human Rights Watch in Chapter One where they held that post-return monitoring was not effective because of the authority states had over their detention facilities.

While explaining how this was possible, the organization noted that countries could influence the outcome of the visits by ensuring that they monitored conversations and threatened detainees or even denied representatives from other nations access to the prisoners. In Ahmed Agiza’s case, the Egyptian government applied the first two methods to influence the reports that the complainant would give the Ambassador during their meetings. This delayed confirmation of torture and other ill-treatment which impeded the ability of Sweden to take appropriate action against the Egyptian government.

The above summary shows why many organizations withhold their support for the use of diplomatic assurances even if they extend a promise to confirm that the respective authorities will abide by the guarantees therein. The purpose of discussing these cases is to show the limitations that cripple an idea that can improve the means employed to fight terrorism in all countries while respecting the human rights of suspected terrorists. By highlighting the issues through the above case summaries, the research can proceed to give a detailed explanation of the incapacities then offer appropriate requirements that may aid in the strengthening of such agreements.

### State Failure with regard to Diplomatic Assurances

The above cases show how some states use diplomatic assurances to assure the safety of foreign citizens while other states use these agreements as a defense mechanism in instances of breach. This section will focus on the issue that arises from the three cases that resulted in the success and failure of the diplomatic assurances.

### Substantive Breach of Article 3 of CAT

As explained in the three cases that were summarized in the previous section, Article 3 of CAT requires states to assess the possibility of torture and/or other ill-treatment through the use of substantial grounds. Such grounds may arise from historical evidence such as the torture of detainees by the Egyptian government and the reports on the persecution of Sikhs by Amnesty International. Although historical records may help prove one's argument, it fails to determine whether there is a likelihood that the individual in question will be tortured. The Committee Against Torture clearly explained this in Ahmed Agiza's case when it held that the essential part of this requirement is providing evidence that the applicant or complainant is in danger if expelled because the developments in the receiving state have focused on the individual.<sup>259</sup>

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<sup>259</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 13.3.

An example of this is shown in the case of *Suresh v Canada*<sup>260</sup> where the applicant, Mr Suresh, was a member of the LTTE. This was a Tamil organization that had revolted against the Sinhalese government of Sri Lanka and Mr Suresh's involvement had resulted in the possibility of his expulsion from Canada to Sri Lanka. The applicant claimed that he was personally at risk of torture and/or other ill-treatment if expelled to Sri Lanka due to his position in the LTTE. He referred to the comment made by the Minister of Foreign Affairs in Sri Lanka where he referred to the applicant as a "big fish" due to his lethal activities. The court found that although the same Minister claimed that the applicant would be safe, the atmosphere created by the government towards members of the LTTE failed to prove this.

In Mr Chahal's case, he provided four reasons why he believed that if he was returned to India, he would be subjected to torture and other ill-treatment. His first justification was his detention in a Punjab police station in 1984 where he was held without charge and tortured for twenty-one days. He also informed the court that his parents and relatives had been captured and tortured from 1982 to 1989. The inhumane treatment they were subjected to was done with the aim of gaining information as to what Mr Chahal's next attack would be. His counsel also presented the Amnesty International report that detailed how Sikhs in India were persecuted and all these pieces of evidence were corroborated by the statement from a Mr Khaira who had visited India in 1989. In his statement he informed the court that the Indian government viewed the applicant as a terrorist and wanted him back in India. It was Mr Khaira's opinion that upon return, Mr Chahal would have been tortured and/or killed upon detention by the Indian authorities.<sup>261</sup>

In Ahmed Agiza's case, the substantive grounds piled up over time, but they were sufficient before his expulsion. The complainant had initially informed the Canadian authorities responsible for his asylum claim that he had been found guilty of being part of Al Jihad, yet he was not present for his case, hence he could not present his defense before the Superior Court of Egypt. Furthermore, he argued that if he was expelled to Egypt, he would have been at a risk of execution because those who had been accused in the same proceedings had been killed. His fears were proven by reports that the political detainees in Egypt had reported being tortured in detention facilities. Lastly, the

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<sup>260</sup> *Suresh v Canada* (1998), Ontario Court (General Division) of Canada.

<sup>261</sup> *Chahal v The United Kingdom*, (1993), The United Kingdom Court of Appeal (Civil Division).

Committee Against Torture added that the interest shown by more than one state in his expulsion from Sweden should have raised an alarm with regard to his subsequent treatment upon return.

The above situations show how states failed to carry out appropriate investigations to confirm the allegations made by the respective applicant and complainant before expulsion. Due to the discussion on the same, the dissertation is able to show that the purpose of such an investigation is to confirm that the safety of an individual is assured even if the state of affairs of the receiving country are still dire. This enables the sending state to confirm the allegations and if they are true, the state can then apply its fiduciary responsibility to protect the suspect from possible human rights violations. To achieve this, states may rely on the second pillar of the R2P doctrine that requires countries to aid foreign governments that are unable to prevent or put a stop to human rights violations. By denying the request for expulsion, the host government is able to accomplish its task through limiting the access the receiving state has to the suspect, and subsequent human rights violations that would have followed if the request was successful.

However, if the investigations show that the environment is hostile but, protection promised by the receiving state is possible, it enables the judicial system of the receiving state to take over. This can result in the prosecution of the suspect in a safer atmosphere so that appropriate repercussions can be applied. Consequently, the legal process sought by the expulsion, which is national security, will be achieved alongside protecting the subject of the agreement from human rights violations.

In relation to the main research question, this discussion shows the importance of questioning the validity of diplomatic assurances to avoid the possibility of relying on them as a false agreement. It also connects the grievances presented by the Human Rights Watch with relevant cases to prove that if such agreements are not supported by appropriate requirements, they shall be viewed as void as evinced in Ahmed Agiza's case where he was informed that the assurance would offer him no protection. With these in mind, the next section shall explain how to make such assurances valid if applied in Kenya. This will constitute combining the requirements presented by Gregor Noll, Anthony Aust and Jon Klabber who believed that the legally binding nature of diplomatic assurances could be achieved if certain features were included.

## Limitations for the Executive Arm of Government of Kenya

### Authority

As seen in previous cases, diplomatic assurances are created by various leaders of a state such as the Minister of Foreign Affairs<sup>262</sup> or the High Commissioner.<sup>263</sup> The requirement is that they have authority to control the treatment the detainee is exposed to. If they lack this authority, or if it is limited, they should ensure that those holding that power have agreed to abide by the terms of the assurance. This was seen in *United States of Mexico v Hurley* where the Minister requested his colleagues to submit in writing their agreement to uphold the conditions that were set out in the surrender warrant.<sup>264</sup>

In Kenya's case, this research is of the opinion that the leading authority to negotiate these assurances would be the head of the Executive arm of government. The Executive is headed by the President whose roles constitute appointing high commissioners, ambassadors, diplomats, and consular representatives,<sup>265</sup> directing and coordinating the functions of ministries,<sup>266</sup> and ensuring that the actions of Cabinet Secretaries are in line with Kenya's international obligations.<sup>267</sup> These appointed representatives and public servants have been highlighted in the above-mentioned cases as the authorities that arranged diplomatic assurances for their state and carried out post-return monitoring. Even so, they did not execute their duties as independent leaders, but as the representatives of their head of state.

Similarly, irrespective of the representative negotiating for Kenya, they are acting on behalf of the President who appointed them. Therefore, the contents of the agreements should be in line with the head of state's requirements. In instances where a Minister is in charge of the negotiation, for

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<sup>262</sup> *Suresh v Canada* (1998), Ontario Court (General Division) of Canada, para.

<sup>263</sup> *Chahal v Secretary of State for the Home Department* (1995), The United Kingdom Court of Appeal, para. 15.

<sup>264</sup> *United States of Mexico v Hurley* (1997), The Ontario Court of Appeal, 491.

<sup>265</sup> Article 135 (2)(3), *Constitution of Kenya* (2010).

<sup>266</sup> Article 135 (3)(b), *Constitution of Kenya* (2010).

<sup>267</sup> Article 135 (5), *Constitution of Kenya* (2010).

example if the Minister of Foreign Affairs was the one negotiating, his directives would come from the President who is constitutionally mandated to direct and coordinate the functions of the ministries. As a result, the function of negotiating the terms of diplomatic assurances would be under the President but delegated to the Minister.

The reasoning adopted by this dissertation to support this position is the authority of the head of state. The President of Kenya is the Commander-in-Chief of the Kenya Defense Forces that is made up of the army, the navy, and the air-force.<sup>268</sup> These three make up Kenya's security community that is further divided into different units such as the ATPU under the Kenya Police Service. Through this chain of command, the head of state of Kenya has the authority to seek confirmation from any member of the defense force that he or she will handle the deportation of a suspected terrorist safely without the use of torture.

## Limitations

The limitations that the President or his representative will abide by include the authority of the negotiator of the receiving state, international law, post return mechanism, and historical records of diplomatic assurances. This list is not exhaustive due to the varying nature of torture and the unique qualities in each case, but the stated requirements constitute what most states have applied that have made some assurances successful.

In relation to the first requirement, authority is essential as explained above because one has to ensure that the undertaking the receiving state is presenting has the appropriate influence to support it. An assurance from the befitting authority may constitute a written agreement from the Head of State and/or from other leaders who have access to giving direct orders to those executing the transfer and accommodating the detainee in a detention center for example wardens in prisons.

The second limitation is made up of requirements arising from international law. The first one is that states should ensure that there is no substantial ground for one to believe that the subject of

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<sup>268</sup> Article 131 (1)(c), *Constitution of Kenya* (2010).

the assurance will be tortured.<sup>269</sup> The next requirement is that states should ensure there are laws that enable the subject of the diplomatic assurance to challenge the validity of the agreements with regard to his safety.<sup>270</sup> This is in line with the third international law requirement which is that states have to investigate claims of torture made by the subject of the assurance.<sup>271</sup>

The third limitation applies to monitoring the detainee after they have arrived in the receiving state. It constitutes representatives of the sending state visiting the detainee to confirm whether any of the guarantees in the agreement have been breached. In the case of *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, this was not effective because the detainee could not meet the Ambassador of Sweden in private to discuss his treatment in prison. Furthermore, his parents' complaints about the treatment their son received was not investigated after informing the appropriate representatives.<sup>272</sup>

To avoid this, the diplomatic assurances should include clauses that explain how post-return monitoring should be carried out and the level of privacy required in order to ensure that the detainee is free to communicate with the state representative. In addition to this, relatives of the detainee should be protected during this period to ensure that if the prisoner confirms a breach in the agreement, retaliation is not focused on relatives or close associates. This will also improve the detainee's confidence in the agreement because they cannot be threatened by the receiving state's authorities using their relatives.

The last limitation concerns the history of states abiding by the provisions of previous diplomatic assurances. States such as Jordan and Egypt have been found to violate their assurances after the subject has been transferred to their territory. Examples of such violations include denying the ICRC access to detention facilities in Jordan to ensure that the detainees are in good health,<sup>273</sup> and

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<sup>269</sup> Article 3(1), UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

<sup>270</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996.

<sup>271</sup> Article 3(2) UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

<sup>272</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 3.4.

<sup>273</sup> Human Rights Watch, "Diplomatic Assurances" against Torture: Questions and Answers, 5 - 6.

the torture and ill-treatment of Ahmed Agiza at Mazraat Tora prison outside Cairo.<sup>274</sup> Such a history should sway the Kenyan government from signing a diplomatic assurance with either nation to ensure that the detainee is safe from the risk of torture and ill-treatment.

These limitations act as a safety net for Kenyan authorities to have dangerous criminals being held in high-security detention facilities away from the Kenyan territory as investigations continue being carried out but not at the expense of national security.

## Conclusion

The purpose of this chapter is to show how easy it is for states to corrupt an agreement that is meant to benefit them and the suspected criminal. Aside from this, the cases that have been relied on indicate the importance of ensuring that the agreement is in line with relevant laws as they are meant to guide the representatives who are drafting it to achieve a mutually beneficial goal. To ensure that Kenya achieves this in its application, the chapter summarizes the content into five key requirements that all states should consider while drafting similar agreements.

These necessities are meant to act as obstructions that restrain the authority wielded by the Executive while drafting the agreement. As the constraints deter manipulation, they direct the power of the leader in charge of the diplomatic assurance to the uninhabitable environment of the receiving state. Through this change, the representative is able to negotiate changes that need to be made before deportation can be approved.

Furthermore, courtesy of the above discussion, the chapter creates an avenue to discuss the roles that courts play in determining the validity of the agreements. Through the extensive deliberation on the decisions arrived at by the ECtHR and the Committee Against Torture, it is evident that courts have acted as the appropriate authorities to ensure that the subjects of diplomatic assurances are not involuntarily moved to areas that heighten their exposure to harm.

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<sup>274</sup> *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 3.4.

The subsequent chapter shall carry on with the analysis of how courts can be approached when an individual wishes to make an application to contest the strength an assurance has when it comes to providing adequate protection. This will constitute describing a normal extradition procedure in Kenya while highlighting the stages when diplomatic assurances may be introduced. The next section will provide an explanation of how one can contest an assurance whose success would give rise to the protection of national security but would also expose the suspected terrorist to human rights violations such as torture.



## CHAPTER 5: THE COURTS' ROLES IN DETERMINING THE VALIDITY OF DIPLOMATIC ASSURANCES

### Introduction

The adoption of diplomatic assurances into Kenya's extradition laws requires careful consideration because the expulsion process has been in practice for a while. This chapter will focus on the deportation procedure as detailed in the Extradition (Contiguous and Foreign Countries) Act of 1987 by setting out to explain how the established procedure and other relevant laws, will incorporate the application of these agreements. To offer a detailed description of the procedure, the contents of this chapter shall constitute an assessment of when diplomatic assurances may be presented to the subject, how a claim against the validity of an assurance may be presented before the courts, who can present the application and which applicable laws support such a claim.

Upon completion of this section, the next part will explain what courts should consider when hearing an application regarding the above-mentioned claim. International laws, some provisions from the 2010 Constitution of Kenya and relevant cases will be relied on to show that such a claim has legal backing and that courts in other jurisdictions have dealt with similar applications. The essence of this chapter is to highlight the place of courts once diplomatic assurances are introduced into Kenya's extradition laws.

### How to Institute a Claim Against Invalid Diplomatic Assurances

#### Extradition of Fugitives

For an extradition claim to arise, a diplomatic representative or consular officer of the receiving state has to present a requisition for surrender to the Minister of State in Kenya.<sup>275</sup> The requisition details the identity of the fugitive and the crime he has either been convicted for or is suspected of

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<sup>275</sup> Section 5 (1), *Extradition (Contiguous and Foreign Countries) Act* (No. 76 of 1987).

having committed. The Minister has discretion to determine whether the crime referred to in the requisition for surrender is of a political nature and therefore decide whether the fugitive may be discharged from custody or signify the magistrate to issue an arrest warrant for the fugitive.<sup>276</sup>

If the Minister decides to signify the magistrate to issue the warrant, an assessment has to be conducted to draft the diplomatic assurance that would be applicable in each case. This particular stage will constitute an assessment of the nature of the crime, hence considering whether it is political and thus the climate individuals convicted for such a crime are exposed to in the receiving state. The next issue will look at whether the detention facility the individual will be sent to upon extradition is safe. Safety in this case would be determined by the reports on torture and other ill-treatment from international organizations such as Amnesty International and ICRC, and the ranking of the state when it comes to the well-being of detainees.

The reports will help in forming the requirements Kenya will include in the assurances and the relevant laws that support them. Upon communication of the provisions in the assurance, the Minister will request written agreements from relevant authorities in the receiving country to confirm that the human rights of the fugitive will be respected. Furthermore, proof of documentation containing the steps taken to ensure the realization of the communicated requests shall also be sought in order to satisfy the Minister that appropriate changes have been made to accommodate the requirements. The completed draft shall be sent alongside the confirmation of the issuance of the arrest warrant to the magistrate and the arrest of the fugitive will follow.

The above step assumes that the warrant was issued after the magistrate received authorization from the Minister. This may not always be the case. In some instances, the magistrate is permitted to issue a warrant before receiving authorization from the Minister. This may occur when the magistrate has received a complaint and/or evidence that would justify the issuance of the warrant. If such a situation arises, the law requires the magistrate, after issuing the warrant, to send the complaint, or evidence and information, or certified copies thereof, alongside a report of the fact of the issue to the Minister who may approve the warrant or order its cancellation and the

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<sup>276</sup> Section 5 (2), *Extradition (Contiguous and Foreign Countries) Act* (No. 76 of 1987).

subsequent release of the fugitive.<sup>277</sup> However, if the warrant is approved, the fugitive should be brought before the magistrate as soon as possible.<sup>278</sup> In Kenya, this is before the lapse of twenty-four hours after the arrest or by the end of the next court day.<sup>279</sup>

Before presentation to the court, the countries, meaning Kenya and the receiving state, should ensure that they forward the evidence they will rely on to the fugitive.<sup>280</sup> This includes the diplomatic assurance so that if the judgment supports extradition, the fugitive is aware of the requirements in the agreement. During the hearing, the law mandates the magistrate to determine whether there is evidence proving that the foreign warrant authorizing the arrest of the criminal is duly authenticated. If it is, the state has to demonstrate that the detention of the fugitive for trial if the crime was committed in Kenya is justified.<sup>281</sup> This means that if the crime was committed in a foreign country and the criminal avoided fair trial by escaping to Kenya, evidence has to be presented proving that the crime the foreign state claims was committed in its jurisdiction is also considered a crime in Kenya. If it is concluded that the alleged crime is an offense in Kenya, the magistrate shall commit the criminal to prison.<sup>282</sup>

Also, if evidence is presented to the court verifying that the alleged offense is a crime in Kenya and that the fugitive had been convicted in the receiving state for the same crime, the magistrate in Kenya shall commit the criminal to prison.<sup>283</sup> After committal, the law requires the magistrate to inform the criminal that they have fifteen days before being surrendered to the custody of the receiving state. During these days, the fugitive is permitted to exercise his right to apply for ‘the issue of directions in the nature of *habeas corpus*.’<sup>284</sup> This right arises from the Constitution of Kenya that provides that all individuals may institute court proceedings where they believe that a

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<sup>277</sup> Section 6 (2), *Extradition (Contiguous and Foreign Countries) Act* (No. 76 of 1987).

<sup>278</sup> Section 6 (3), *Extradition (Contiguous and Foreign Countries) Act* (No. 76 of 1987).

<sup>279</sup> Article 49 (1) (f), *Constitution of Kenya* (2010).

<sup>280</sup> Section 69, *Evidence Act* (No. 80 of 2010).

<sup>281</sup> Section 8 (1), *Extradition (Contiguous and Foreign Countries) Act* (No. 76 of 1987).

<sup>282</sup> Section 8 (1), *Extradition (Contiguous and Foreign Countries) Act* (No. 76 of 1987).

<sup>283</sup> Section 8 (2), *Extradition (Contiguous and Foreign Countries) Act* (No. 76 of 1987).

<sup>284</sup> Section 9 (1), *Extradition (Contiguous and Foreign Countries) Act* (No. 76 of 1987).

right or fundamental freedom from the Bill of Rights has been violated,<sup>285</sup> and such a claim may be instituted under a petition for an order of *habeas corpus*.<sup>286</sup>

When instituting the claim, the rights that may be relied on are the freedom from torture and cruel and degrading treatment and punishment,<sup>287</sup> the right to have one's human dignity respected,<sup>288</sup> the freedom and security of the person,<sup>289</sup> and the freedom of conscience, religion, belief and opinion.<sup>290</sup> The above rights may be referred to if the fugitive believes that their detention and subsequent extradition to the receiving state would result in the violation of any of the above mentioned rights. Furthermore, the fugitive may express concern as to the strength of the diplomatic assurance because it would fall short of offering adequate protection to the criminal. Doubt as to the strength of diplomatic assurances may originate from various sources including the inability of a government to control human rights violations within its jurisdiction hence limiting the application of the promised protection in the assurance.<sup>291</sup>

If directions in the nature of *habeas corpus* are issued and an application for an appeal is granted, the fugitive may claim through the appeal substantial grounds for believing that he would be exposed to a risk of harm if surrendered to the custody of the receiving government.<sup>292</sup> This would be supported by Kenya's national and international duty to protect those within its territory from torture, cruel, inhuman or degrading treatment and the subsequent requirement to investigate the fugitive's substantial grounds.<sup>293</sup> The next claim would contest the validity of the diplomatic assurance. The validity of the agreement could be based on the proof provided by the receiving

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<sup>285</sup> Article 22 (1), *Constitution of Kenya* (2010). See also Article 25 (d), *Constitution of Kenya* (2010).

<sup>286</sup> Article 51 (2), *Constitution of Kenya* (2010).

<sup>287</sup> Article 25 (a), *Constitution of Kenya* (2010).

<sup>288</sup> Article 28, *Constitution of Kenya* (2010).

<sup>289</sup> Article 29, *Constitution of Kenya* (2010).

<sup>290</sup> Article 32, *Constitution of Kenya* (2010).

<sup>291</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996, para. 93.

<sup>292</sup> Article 3 (1), UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

<sup>293</sup> Article 25 (a), *Constitution of Kenya* (2010); Article 7, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; Article 3 (2), UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

government to show the steps that it has taken to ensure the safety of the criminal upon surrender. These steps include written agreements from relevant authorities confirming that they will abide by the human rights requirements in the agreement, written approvals concerning private post-return monitoring, and reference to the relevant international laws that support the provisions and repercussions for breach of any requirement in the assurance.

This section offers a detailed account of the current extradition procedure that is applied in Kenya if a suspect or criminal is to be deported under the Extradition (Contiguous and Foreign Countries) Act of 1987. The merge the research offers between the procedure and the introduction of diplomatic assurances presents a look at the practical application of the agreements in Kenya. This opens the discussion to areas such as when the application will be drafted, which representative is in charge of negotiating the terms of the agreement, when the assurance will be presented before the court and to the suspect or criminal, and lastly when one can contest the application.

The purpose of this discussion is to enable the research to connect to the current workings of extraditions. In as much as the solution has been discussed in detail in previous chapters, the content therein lacked a transition to the realm of how plausible the solution is to the current state of affairs. Therefore, this particular section presents the required transition to the mentioned discussion.



## Extradition of Fugitives Considered Terrorist Threats to National Security

The extradition of fugitives who are suspected of being a threat to Kenya's national security would be similar to the above process save for a few amendments. If a foreign state wished to detain a fugitive within its territory, its government would have to inform the Minister of State of Kenya of the fugitive's presence or suspected presence in Kenya and the suspected crime or convicted crime through a requisition for surrender. This will be followed by a letter from the national security community confirming the threat posed by the presence of the criminal in Kenya. If the Minister is satisfied by the two documents, he may proceed to negotiate and draft the diplomatic assurance that would accompany the confirmation order for the issuance of an arrest warrant. This

process may take longer if the two documents do not satisfy the Minister who may request for more information.

In an instance where the magistrate issues a warrant before receiving authorization from the Minister, the precaution applied in the above subsection would be adopted in this situation. During the hearing stage, the process will remain as explained above; however, a change may arise in two instances. The first would be when the evidence presented is not sufficient to prove that the fugitive committed the crimes he is charged with, but there is sufficient confidential evidence to conclude that the suspect's presence in Kenya bares a significant risk to the country's national security. In the second instance, the evidence the states are relying on is confidential hence it cannot be presented before the court.

These instances were evident in *Chahal v United Kingdom* where the Secretary of State for the Home Department confirmed that the applicant posed a threat to the national security of the UK, but the evidence he relied on to come to this conclusion was confidential and could not be presented before the court.<sup>294</sup> In such a situation the confidential information cannot be examined by the applicant or his representative. However, courts such as the European Court of Human Rights introduced a third party to examine the material and advise the court on the strength of the evidence.<sup>295</sup>

If a similar strategy is adopted by Kenyan courts, confidential information may be assessed by the court through an advisor and an informed judgment may be reached. This will help solve the problem of informants not coming before the court to testify against suspected terrorists due to the fear of subsequent attacks from fellow terrorists.<sup>296</sup> Such information can be obtained on a confidential level to maintain the anonymity of the witnesses and therefore keep them safe. As a result, renditions conducted by the ATPU may reduce because courts in Kenya will be able to rely on all the evidence the unit has gathered.

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<sup>294</sup> *Chahal v The United Kingdom*, (1993), The United Kingdom Court of Appeal (Civil Division).

<sup>295</sup> *Chahal v The United Kingdom*, ECtHR Judgement on 15 November 1996, para. 144.

<sup>296</sup> Open Justice Society Initiative interview with Kenyan Intelligence official on 31 May 2013.

It is the opinion of this research that the fugitive should be awarded fifteen days to apply for the issue of directions in the nature of *habeas corpus* so as to offer him a chance to contest any violated rights and/or freedoms and the validity of the diplomatic assurance. This will ensure that the state of Kenya is also offered a chance to amend the diplomatic assurance or reject the requisition if the investigations of substantial grounds give rise to confirmation of a risk of harm upon extradition of the criminal to the receiving state.

This particular section answers most of the queries presented by the ATPU when members of the unit were asked why they avoided court proceedings. The purpose of diplomatic assurances is to ease the delayed court proceedings in order to permit the unit to continue with its investigations while the suspect or criminal is legally restricted from interacting with fellow members of the terrorist group, they are suspected to be a part of. In addition to this, the state is assured that it can present confidential evidence before the court without exposing the information to the public hence circumventing the possibility of interfering with ongoing investigations. This includes presenting key witnesses while withholding their identity.

### Assessing Substantial Grounds

As explained in the previous chapter, Article 3 of CAT requires states to investigate any substantial grounds that may result in the conclusion that upon extradition, the individual would be subjected to torture and/or other ill-treatment. The importance of this provision and obligation on states is to prevent the violation of the international ban on torture and to respect the human dignity of all individuals under the care of a state. The following paragraphs explain what constitutes torture and what a state should look for when investigating practices that could be considered torture.

Article 1 of CAT has been relied on to form the basis of defining acts that may amount to torture. It provides that:

“the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third

person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

The above broad definition offers four elements that states may rely on to determine whether an action constitutes torture. The first element is the nature of the act. The word ‘act’ has been given a wide range of interpretations to allow courts to weigh the impact of the action on the individual. In *Denmark v Greece*, the European Court of Human Rights found that an act that constituted torture included the denial of food. This definition was viewed to be a wide interpretation of the term torture hence showing that there is no limitation in determining whether an act may constitute torture.

The second element is the intention of the perpetrators who conducted the acts. This element requires states to consider whether the perpetrators’ sought to inflict pain and suffering or whether another intention resulted in the act. If it is proven that the intention sought was inflicting pain and suffering, the act will be correctly deemed to be torturous. The next element is the purpose of exposing the detainee to pain and suffering. For the motivation to amount to torture, it may fall within the purposes mentioned in the CAT such as extraction of confessions, discrimination, punishment, among others or it may satisfy the court or an investigating authority to constitute an intent that amounts to torture.<sup>297</sup>

The final element is the involvement of public officials. The term public officials have been defined as either elected public officials, individuals representing public officials or leaders within communities who have gained the status of public officials. The UN Voluntary Fund for Victims of Torture concluded that if either of these individuals was found to have conducted or instructed others to proceed with an exercise that inflicts pain and suffering on another individual, it amounts to torture due to the authority the individual has over the victim.<sup>298</sup>

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<sup>297</sup> Novak M, *UN Convention against Torture*, Oxford University Press, Oxford, 2008, 75.

<sup>298</sup> UNVFVT *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, 2009, 4-6.

This section breaks down the elements Ministers, the security community and Kenyan courts can rely on to determine whether the history of a state presents substantial grounds for concluding that torture is a common practice. In addition to this, the requirement for states to investigate whether the substantial grounds affect the subject of the assurance in particular aligns with the above elements because they show whether the intention and purpose of torture that is currently being practiced by the state would align with the reason behind the request for the extradition of the individual to the receiving state.

Therefore, if either of these elements is satisfied during an authority's investigation of torture and/or other ill-treatment, torture will be deemed to be a practice within a receiving state. Consequently, a court of law cannot permit the extradition of an individual unless the assurance is capable of providing sufficient protection.

## Conclusion

This chapter highlights the importance of courts in protecting fugitives from torture and/or other ill-treatment through a *habeas corpus* application. This enables the criminal to request further investigation on the validity of an assurance by claiming that substantial grounds have not been assessed when considering the requirements included in the diplomatic assurances. Through this discussion, the chapter enables the dissertation to guide the discussion to how these diplomatic agreements will be introduced to Kenya's extradition laws. This is done by giving a step-by-step description of the current extradition process and where diplomatic assurances will come in. Aside from this the chapter also extends the discussion to how these assurances solve the issue of illegal renditions conducted by the ATPU.

The next chapter will offer a conclusion of all the chapters by describing how they connect with each other to answer the main research question. This will be done by referring to all the research objectives of each chapter and showing how each objectives' research questions were answered. In addition to this, recommendations will be made to the Kenyan ATPU and legislators to offer

some guidance on how their practices and passed laws could be amended to accommodate the proposed solution.



## CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

This dissertation sought to prove that diplomatic assurances can be adopted into Kenya's extradition laws to aid in preventing human rights violations that arise from rendition exercises. This objective came up as a solution to the torture allegations the ATPU was claimed to have committed while trying to promote national security. Upon further research, it became evident that this issue had been faced by various countries that were fighting against terrorism and the adoption of procedures that were not in conformity with the law created disparity between some members of the community and the government.

As various international organizations have pointed out, there is a need to refrain from such practices because they go against the desired outcome of creating a global community that does not practice torture. Although this recommendation is justified, many states have responded with the claim that such a solution has not been realized. To counter this argument, the ICRC recommended the use of diplomatic assurances by states to ensure that the human rights of the expellees would be respected and upheld upon deportation to the receiving state.

### Conclusion

This research supports the view of the ICRC and through a broken-down explanation of the history of Kenya's national security, the successes and failures of assurances and its application in extradition laws, the dissertation is able to uphold the aforementioned research objectives.

### Chapter 2

The second chapter introduces the fiduciary relationship between states and foreign nationals. According to the proponent of the fiduciary theory of humanitarian intervention, states are responsible for protecting foreign citizens in instances when their state is unable or unwilling to do so. The form of protection is not explained so as to enable a wider interpretation of the theory, but one can conclude that in instances of harm of an excessive manner, states owe foreign nationals some form of protection that involves disrupting the ongoing state of affairs.

From this understanding, the dissertation connects the protection states could offer to include the use of diplomatic assurances. These agreements are able to influence the environment individuals are exposed to so that it can be altered to become conducive and favorable. This was seen in the case of *Harley v United States of Mexico* where the assurance detailed that although the atmosphere towards homosexuals was hostile, the government was willing to introduce a higher level of security to Mr Harley to ensure that the mistreatment of homosexuals would not be extended to him.

### Chapter 3

The third chapter is broken down into two important sections. The first part focuses on the history of Somalia. This breakdown gives the origin and development of the terrorist group known as Al-Shabaab that has waged war in Kenya through random attacks in various places. These attacks have resulted in the use of renditions to remove suspected terrorists from Kenya in order to safeguard national security. As a result of this precaution, the state has been criticized for enabling countries that go against the ban on torture.

Due to this breakdown, the research is able to show the problem being addressed in this research hence the suggestion of the use of diplomatic assurances at the end of the chapter.

### Chapter 4

This chapter takes up the role of assessing how Mexico has successfully applied a diplomatic assurance to ensure the safe return and detention of Mr Harley. The section also summarizes two different cases that relied on the same assurance, but the outcome was recorded as a failure. From the discussion, the dissertation was able to narrow down the key international provisions and requirements that were appreciated in Mexico but ignored by the UK and Sweden and as a result, the achievement of the set goal was either affirmed or not.

From this chapter, the research presents Kenya with the features that would enable the state to apply these agreements successfully and in line with respective national, regional, and

international instruments. This then proves that the assurances can be structured in a manner that supports their success hence they can achieve the desired outcome as stated in the main objective.

## Chapter 5

This is the final chapter that discusses the practical application of diplomatic assurance after the previous chapter defended the probability of success if states apply it. From this section, it is evident that these agreements are not only practical, but they are quite flexible to enable states to structure them in a manner that accommodates specific requirements. As a result, the chapter is able to show when diplomatic assurances are supposed to be introduced and by whom, when the suspect or criminal can gain access to it and confirm the contents therein, and when its validity can be contested.

From the above discussion, the chapter is able to conclude that the adoption of such assurances would aid in the prevention of rendition of suspected terrorists to areas that expose them to human rights violations.

## Recommendations

From the extensive discussions held from chapter one to chapter five, this dissertation is of the opinions that several recommendations need to be made and whose positive response to them would give rise to a conducive environment for ease in the adoption of diplomatic assurances. The recommendations are as follows:

- Ensure there are protocols put in place that require the ATPU to disclose individuals who are a high security threat to higher ranking units to enable them to detain and prosecute the individuals instead of rendering them to other countries where they undergo advanced interrogation that is characterized as inhumane treatment.
- Require the ATPU to work alongside the Independent Police Oversight Authority while detaining the suspects to ensure that they are not subjected to torture within or outside the territory of Kenya.
- Parliament to pass an anti-torture Act aligns with relevant international laws.

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