

Securing Human Rights? Exploring the Impact of the United Nations Security Council on  
Changing Norms Surrounding Counter-Terrorism

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## Abstract

This thesis argues that a tension exists between a new individualized norm of security within the counter-terrorism context and human security framework of the United Nations Security Council, focusing on the implications of the resolution 1267 counter-terrorism regime. This topic is of particular relevance as the threat of terrorism continues to grow and evolve. While the human security framework has been well studied, the individualization of security through counter-terrorism is a more recent development, and its tensions and implications have not been fully considered. This thesis uses a discourse analysis in order to demonstrate that counter-terrorism is constructed as a norm, and that there has been a shift in norms within the UN Security Council in relation to counter-terrorism and human rights. It will trace how a set of norms has emerged in order to make terrorism a part of the Security Council's agenda, and how and why these have changed. In order to trace these norms, terrorism has been separated into two stages: state-sponsored and international terrorism, where terrorism was viewed as a threat stemming from state-governments and; transnational terrorism, where it was viewed as a trans-border threat arising from individuals. Within these stages, the objectives, targets and tools of the Council's counter-terrorism policies will be studied in order to demonstrate how they work together to reinforce a norm. The analysis will be used to show how the case of *Kadi v. Council and Commission* came about in the transnational terrorism stage as a direct result of the Security Council's counter-terrorism regime and its alleged breach of human rights. The *Kadi* case demonstrates that a tension does exist between the norm of individualization of security within the counter-terrorism context and the human security framework.

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## Introduction

The case of *Kadi v. Council & Commission* resulted in a landmark decision from the European Court of Justice regarding the sanctions regimes established by the United Nations Security Council's resolution 1267, passed in 1999 in order to address perceived acts of terrorism. As an immediate response to the bombings of the United States embassies in August 1998 in Nairobi, Kenya and Dar es-Salaam, Tanzania conducted by Al Qaeda under the leadership of Osama Bin Laden, the 1267 regime's most fundamental component is the requirement of United Nations member states to "freeze the assets of, prevent the entry into or transit through their territories by, and prevent the direct or indirect supply, sale, and transfer of arms and military equipment to any individual or entity associated with Al Qaeda, Osama Bin Laden, and/or the Taliban." (Michaelsen, 2013, p. 14; Ginkel, 2010)

Specifically, these measures were implemented as a response to the Taliban's failure to stop providing both training and sanctuary for terrorist organizations in Afghanistan. The Security Council determined that these acts constituted a threat to international peace and security, and believed that the security measures implemented under the 1267 regime would prevent resources from reaching these terrorist organizations, and thus hinder their ability to organize and conduct attacks (Ginkel, 2010). The Security Council stated that the Taliban's failure to respond to their previous demands, specifically to turn in Osama bin Laden, constituted a threat to international peace and security (SC RES 1267, 1999). Furthermore, the Council strongly condemned the continued "use of Afghan territory, especially areas controlled by the Taliban, for the

sheltering and training of terrorists and planning of terrorist acts” and reaffirmed “that the suppression of international terrorism is essential for the maintenance of international peace and security” (SC RES 1267, 1999, p. 1). As is the case with all Security Council resolutions, it is mandatory for all United Nations Member States to comply with Resolution 1267 (Kadi, [2005]; Security Council 1267 Committee, 2015). Not only was it adopted under Chapter VII of the United Nations Charter, it was also adopted under Article 25, which states that Security Council resolutions must be implemented (Fassbender, 2011).

Resolution 1267 importantly saw the creation of the “1267 Committee”, a subcommittee of the Security Council, run and overseen by Council members. The Committee’s central purpose has been to oversee the targeted sanctions and implementation of resolution 1267, adopted unanimously by all fifteen Security Council member states. Originally directed towards the Taliban, the Council first imposed sanctions as a response to the Taliban’s refusal to stop providing sanctuary and training facilities for terrorists, as well as to hand over Osama bin Laden (SC RES, 1267, 1999). Resolution 1267 was then modified by resolution 1333 in 2000 to include individuals specifically associated with the Taliban and Osama bin Laden. In addition, resolution 1333 created what has come to be known as the ‘1267 Consolidated List’, with the names of these individuals and thus targeting them with financial sanctions (SC RES 1333, 2000). However it was resolution 1390, drafted in 2002, which further modified resolution 1267 and allowed for the Council to impose targeted sanctions on any individual deemed to be associated with terrorism and thus expanded the scope of the Consolidated List (SC RES 1390, 2002). Despite the fact that resolution 1267 has been

modified by subsequent resolutions, all of these resolutions fall under the “1267 sanctions regime.” Through the targeted sanctions adopted, the Council believed they would be able to more effectively stop those who support and provide funding for terrorists and terrorist organizations in an effort to significantly reduce their resources (Ginkel, 2010).

As the central component of resolution 1390 is the freezing of assets of individuals added to the 1267 Consolidated List believed to be involved in or associated with terrorism and/or terrorist organizations (Mendelsohn, 2014), UN member states were called upon to provide the 1267 Committee with information regarding the actions they have taken to implement the targeted sanctions regime against those individuals or entities placed on this Consolidated List (Security Council 1267 Committee, 2015). The list provides the names of the individuals and entities to be subjected to the freezing of funds and assets under resolution 1267. In particular, it was stated within the Council that the “primary tool against terrorism is that of sanctions. [The Council has] imposed sanctions against those who have carried out acts of terror and those who provide[d] haven to terrorists” (UNSC 4243, 2000, p. 17). Furthermore, targeted sanctions were described as actions taken in order to freeze funds and other financial resources in order to achieve a specific goal, in this case to end the threat of terrorism (SC RES 1267, 1999). Targeted sanctions have also been used to enforce travel and weapon bans, in addition to being more diplomatic in nature (Mendelsohn, 2014). At first, these targeted sanctions were aimed at state governments suspected of supporting and harboring terrorists, however resolution 1390 expanded the scope of these targeted sanctions to include individuals associated with terrorism, regardless of their country of citizenship or residence. The implementation of targeted sanctions was deemed necessary by the

Security Council in order to cut off terrorist financing and to maintain international peace and security by attempting to eliminate the threat of terrorism (SC RES 1390, 2002).

In March 2001, the 1267 Sanctions Committee published its first Consolidated List, which has since been periodically updated with the addition of new names. In October 2001, Yassin Abdullah Kadi was added to the list (Kadi, [2005]). Kadi, a Saudi Arabian national and businessman living in Jeddah, Saudi Arabia, with assets in European Union member states, was believed to have been involved in terrorist activities and to have given support to terrorism connected to Osama bin Laden. Upon being listed by the 1267 Committee, his assets were frozen. Kadi contested these charges, and before the European Court of First Instance (now referred to as the General Court) sought the annulment of his listing by the European Union under Resolution 1267. Kadi felt that his rights were violated upon immediately discovering his frozen assets. Prior to being listed, and throughout the time of his proceedings, Kadi had never been tried for or convicted of any criminal offences related to terrorism anywhere in the world (Kadi, [2010]). Kadi also claimed that three of his fundamental human rights had been breached: the right to a fair hearing, the right to respect for property and the principle of proportionality, and the right to effective judicial review (Kadi, [2005]). The Court of First Instance determined that “it does not fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or... to check indirectly the appropriateness and proportionality of those measures.” (Kadi, [2005], p. 284) Furthermore, the Court believed that to do so would result in their “trespassing” of the Security Council’s prerogatives in maintaining international peace and security (Kadi, [2005]).

After having his claims dismissed by the European Court of First Instance, Kadi appealed before the European Court of Justice, still claiming that his fundamental human rights had been violated by his listing under the 1267 sanctions regime. It was here where the court delivered a landmark decision by contesting the Security Council's counter-terrorism methods and determined that Kadi's cited fundamental human rights had, in fact, been violated. Specifically, the court stated that, as pertained to Kadi, the contested regulation:

“was adopted without any guarantee being given as to the communication of the inculpatory evidence against them or as to their being heard in that connection, so that it must be found that that regulation was adopted according to a procedure in which the appellants' rights of defence were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed.” (Kadi, [2008], p. 352)

The court also decided in favor of Kadi when considering the violation of his right to property, stating that the contested regulation “was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him.” (Kadi, [2008], p. 369) Therefore, according to the court, the freezing of Kadi's assets constituted an unjustified violation of his right to hold property. In making its decision, the ECJ also confirmed its jurisdiction to rule over the lawfulness of Security Council resolutions, stating that:

“the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the... full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.” (Kadi, [2008], p. 326)

As is demonstrated by the *Kadi* case, the 1267 regime is not without controversy. The most controversial aspect of this regime is the act of listing individuals. Once the individual has been added to the 1267 Committee's Consolidated List, they are immediately subjected to violations of the right to hold property (via the freezing of their assets) and their due process rights (via the lack of a fair hearing, the fact that the resolution did not permit listed individuals to see the evidence that had been submitted against them, and that the principle of proportionality was not respected). At the same time, the level of association a listed individual was required to have in order to be listed in the first place was not clearly defined by the Security Council and the 1267 Committee, therefore making the criteria for association very broad (Michaelsen, 2013).

As part of its decision, the European Court of Justice stated that the Security Council is bound by the principles of the United Nations, outlined in the United Nations Charter. Specifically, the ECJ stated that "the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act in accordance with the Purposes and Principles of the United Nations" (*Kadi*, [2005], para. 229). In particular, the ECJ was making reference to the UN's commitment to protecting human rights as outlined in the UN Charter, "to promote the principle of equal rights and self-determination amongst peoples..." (UN Charter, Art. 1). Therefore, the protection of human rights has always been an important aspect of the United Nations as a whole. The UN Universal Declaration of Human Rights defines human rights as "rights inherent to all human beings" regardless of nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status (GA RES 217 A, 1948). Furthermore, the Declaration includes a list of all the rights considered to fall

under the category of human rights. These rights include the right to life, liberty and security of the person; the right to be free of slavery, torture, and cruel and inhuman punishment; the right to equal protection from the law, including equal protection from human rights violations, the right to an effective remedy for acts violating human rights, the right to a fair hearing, and to be free from arbitrary arrest and so on (GA RES 217 A, 1948). The principle of promoting respect for fundamental human rights is binding on all member states of the United Nations, including its various bodies.

The controversy between Kadi and the actions required by UN member states under the resolution 1267 regime at core revolves around the listing of individuals on the Consolidated List. Prior to resolution 1267, only states had been targeted by economic sanctions. Now, however, individuals are being targeted as well. While targeted sanctions in general, as well as the consequences that arise from them, were not unprecedented prior to the adoption of 1267, the act of targeting individuals rather than state governments was unprecedented, with the repercussion of being listed as an individual suspected of committing acts of terrorism seen to constitute a violation of the UN's commitment to protecting individual human rights. As stated, once placed on the list, assets were frozen, travel bans were imposed, and the right to due process of law was immediately suspended. Moreover, the guidelines with regards to who exactly was to be listed were rather vague.

It appears that norms surrounding counter-terrorism have shifted towards the targeting of individuals. What is problematic however, is the fact that this shift has occurred within a context in which norms surrounding human rights have also become a question of security within the United Nations, and more specifically the Security

Council. While the human security framework has been well studied, the individualization of security through terrorism and counter-terrorism is a more recent development and its tensions and implications for the United Nation's understanding of security have not yet been fully considered. Therefore, this thesis will argue that a tension does exist between the new individualized norm of security in the context of counter-terrorism and the human security framework. It is this tension that allowed for the development of a case like *Kadi*. In addition, the ruling of the European Court of Justice in *Kadi* demonstrates that this tension exists, leading the Security Council to eventually make changes to their 1267 sanctions regime post-*Kadi*.

## **Context**

### **The UN and UNSC**

The United Nations, and thus the United Nations Security Council, was founded in 1945 following the end of World War II. Under Article 1(3) of the United Nations Charter, the United Nations as a whole was assigned the task of achieving international cooperation among member states “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” (UN Charter, Art. 1[3]); Fassbender, 2011, p. 2). Additionally, the UN Charter assigned the Security Council with the task of maintaining international peace and security, and provided the Council with the power to determine the existence of a “threat to the peace, breach of the peace, or act of aggression” (UN Charter, Art. 39; Shraga, 2011). The Charter further authorized the Security Council to take action by land, sea, or air, when absolutely necessary, in order to maintain or restore international peace and security, while requiring that UN member states make available the armed forces,

assistance, and facilities necessary in order for the Security Council to achieve its goal (UN Charter, Art. 42; Thakur, 2006). Therefore, on the one hand, the Security Council has its primary purpose of maintaining international peace and security. On the other hand, however, the Council, as an organ of the United Nations, must abide by the purposes and principles of the United Nations outlined in Article 1 of the UN Charter. One of these purposes is the promotion and encouragement of respect for human rights (UN Charter, Art. 1; Fassbender, 2011). However, there is no Charter-specific mandate, pertaining to the Security Council, for the promotion, protection, and enforcement for human rights, only for the maintenance of international peace and security. Therefore, the Security Council's requirement to respect human rights is only implied by the general mandate of the United Nations as a whole in Article 1 of the Charter (Shraga, 2011).

In light of the atrocities committed during World War II, the United Nations was founded in 1945 with the intention of maintaining international peace and security, and to achieve international cooperation (UN Charter, Art. 1). Within this founding mission, to the degree that there were atrocities committed during World War II, addressing and improving human rights worldwide became an immediate concern. The recognition of the ideological value of human rights principles by the great powers had sparked expectations throughout the world that human rights would become the legal and moral foundation of a postwar world order (Normand and Zaidi, 2008). The United Nations took on primary responsibility for the promotion and protection of human rights as a result of the strong demand for change to the world order in the aftermath of the war. Following its inception, the United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948, which marked the first international expression of

rights to which “all human beings are inherently entitled” (Normand and Zaidi, 2008, p. 188). However in 1948, at the time the Declaration was passed, consensus regarding the enforcement of human rights did not exist. As a result, the Declaration was formed “as a set of standards for humankind, with no enforcement mechanisms whatsoever” (Osiatynski, 2005, p. 296).

### **The UN, UNSC and Human Rights**

A major point of contention that was present throughout the drafting process of the UDHR was the status of economic, social and cultural rights, championed by the Soviet Union, and their relationship with Western notions of civil and political rights. Cold War tensions between the Soviet Union and the United States ensued in a ideological rivalry deepening the divide between those supporting human rights based on economic, social, and cultural rights and those who championed human rights based on civil and political rights and freedoms. The ideological rivalry plagued the Security Council, resulting in a virtual decades long stalemate on any issues with a human rights dimension (Genser and Stagno Ugarte, 2014; Osiatynski, 2005). The faction led by the United States believed that civil and political rights should be given a higher value. These countries were of the opinion that civil and political rights served as “protection against government encroachment on liberty and integrity (i.e., torture, detention without due process, restriction on speech and belief)” and were considered to be “absolute and immediately achievable through judicial means, whereas economic and social rights were relative and could only be gradually and progressively implemented through social policy” (Normand and Zaidi, 2008, p. 209). On the other side of the debate, the Soviet Union supported placing equal importance on civil and political rights and economic and

social rights, including minority rights, “and the right to self-determination but only through enhancing the government’s authority in these areas rather than accepting state accountability to individual rights...” (Normand and Zaidi, 2008, p. 201). Two separate covenants were eventually adopted: one on civil and political rights, the other on social, economic, and cultural rights (Normand and Zaidi, 2008).

As a result of this stalemate, during the Cold War period, there were very few important human rights developments in the Security Council (Forsythe, 2014). Despite the internal difficulties during the Cold War, the Council did manage to debate and pass several nonbinding resolutions pertaining to human rights issues, the most important of these resolutions addressing the White minority rule in both South Africa and Rhodesia. Specifically, Resolution 134 recognized “that the situation in the Union of South Africa [was] one that [had] led to international friction and if continued might endanger international peace and security” and therefore called on the South African government “to initiate measures aimed at bringing about racial harmony based on equality in order to ensure that the present situation does not continue to recur, and to abandon its policies of apartheid and racial discrimination” (Forsythe, 2014, p. 124). It is important to note, however, that the resolutions pertaining to both South Africa and Rhodesia did not make any explicit mention of human rights, instead focusing on the issues as threats to international peace and security in order to gain more support for the resolutions and to later enforce an arms embargo on South Africa (Genser and Stagno Ugarte, 2014). Therefore, during the Cold War “human rights were often idealistic aspirations obstructed by a deadlocked UN Security Council...” (Wilson, 2005, p. 3). As a result of the Cold War stalemate within the Council regarding the human rights debate, there were not

many attempts made to find a “conceptual basis” for treating the two sets of rights equally (Normand and Zaidi, 2008).

The end of the Cold War brought renewed attention to human rights both within the United Nations and as a matter within international law more generally. With victory apparently on the side of the West, consensus has been that the stalemate within the Security Council over human rights was resolved in favor of civil and political rights (Cardenas, 2009; Normand and Zaidi, 2008). The end of the Cold War marked the beginning of an era where a debate over the changing nature of state sovereignty, as a result of the increasing importance of human rights, would quickly ensue. While a number of institutions dealing with human rights had developed after World War II, they quickly multiplied in the post-Cold War period, resulting in human rights norms changing and evolving (Cardenas, 2009). Landman and Carvalho (2010) argue that human rights have since become an “accepted legal and normative standard through which to judge the quality of human dignity” (p. 8). They specifically define human rights as “political norms dealing mainly with how people should be treated by their governments and institutions” (Landman and Carvalho, 2010, p. 9). These human rights norms have become entrenched within both international politics and international law, with the United Nations and its various organs becoming the main symbol of authority in the field of human rights. The goal of the international human rights regime since the end of the Cold War has become the regulation of state behavior towards matters that had previously been considered as internal state matters, however this regime is dependent on “norms that enable the human rights community to hold states accountable for those

actions that violate the dignity of individuals residing within their jurisdictions”

(Landman and Carvalho, 2010, p. 6).

In some ways, human rights and state sovereignty have always been at odds with one another. Following the Cold War, human rights was made much more of a priority with a unique link being drawn between human rights and security. Human rights have given individuals the legal personality to confront states engaging in violations, specifically as a result of the development of international conventions dealing with human rights. As a result, “sovereigns are no longer able to claim absolute immunity from other states’ interference within their own boundaries or even beyond their borders” (Clunan, 2009, p. 9). Furthermore, Wilson (2005) list two significant factors that led to the more prominent role of human rights in the “conceptualization and realization” of collective security concerns. First, “in the context of rapid economic and political globalization, a greater premium was placed on global solutions to international security, and a contingent consensus emerged that human rights could play a greater role in promoting stability” (p. 4). Second, the end of the Cold War brought about more scope for responses from the international community to prevent mass human rights abuses from occurring (Wilson, 2005). In the years leading up to the Cold War, the United Nations as a whole had placed a higher priority on state sovereignty over human rights, however this balance shifted in the 1990s as human rights became a much greater concern and priority (Kumar, 2011).

With this changing landscape within the Security Council following the end of the Cold War and the changing nature of state sovereignty also came a greater prioritization of human security. During this time, much of the Council’s policies regarding human

rights were in order to address issues pertaining to state sovereignty and deeming states in violation of state sovereignty to be threats to international peace and security (Landman and Carvalho, 2010). One of the main examples of the Council's prioritization of human security was the development and recognition of the responsibility to protect (R2P). The R2P doctrine was one of the most important shifts to take place in the 1990s with regard to the Council's policies on human rights within a human security framework. Badescu (2011) explains how the R2P framework addresses the "moral imbalance" between sovereignty and human rights by approaching the idea of sovereignty as responsibility. Furthermore, the right to interfere in a state where there are extreme violations of human rights taking place results from the state's failure to fulfill its responsibilities as a sovereign member of the international community (Badescu, 2011). Individual states began advocating for the right to intervene in order to stop mass human rights violations in response to the failure of the UN to react in an appropriate manner regarding the humanitarian issues in Rwanda, Burundi, Bosnia, Kosovo and elsewhere. "Their central concern [rested] with whether the UN's current regulations on the use of force [met] the challenges of the post-Cold War world, and in particular the demands of addressing humanitarian emergencies." (Badescu, 2011, p. 1)

The conflict in Kosovo has become an important case study regarding the Security Council, human security and the R2P framework, and human rights, and this issue was debated extensively amongst states and scholars throughout the 1990s and early 2000s. The situation in Kosovo consisted of a European state government "flouting the most fundamental rights of its citizens using disproportionate force to suppress dissidents," which had resulted in the killing of hundreds of civilians and forced hundreds

of thousands of people to leave their homes (UNSC 3988, 1999, p. 5). With the President of Yugoslavia refusing to comply with Security Council resolution 1199, which identified the conflict as a threat to international peace and security, called for the violence to stop immediately and for the immediate improvement of the humanitarian situation, the Member States of the North Atlantic Treaty Organization (NATO) felt as though they had no choice but to intervene, and the Council allowed this intervention to take place (SC RES 1199, 1998; UNSC 3988, 1999). NATO's intervention resulted in internal conflicts among Security Council Member States, with some states believing that NATO's actions were in violation of the United Nations Charter and occurred without the Council's authorization. Furthermore, the Russian delegate stated that "the members of NATO [were] not entitled to decide the fate of other sovereign independent states" (UNSC 3988, 1999, p. 2). In addition, other Council Member States expressed the view that the use of force should only be a last resort, and must be a result of a Security Council decision. On the other hand, Security Council Member States that were also a part of NATO expressed their firm belief that NATO's actions were the only way to stop the violence from occurring and to prevent an even greater humanitarian disaster from taking place (UNSC 3988, 1999). In June of 1999, the Security Council adopted resolution 1244, which authorized "Member States and relevant international organizations to establish the international security presence in Kosovo" with the purpose of maintaining civil law and order, as well as protecting and promoting human rights (SC RES 1244, 1999, para. 7-11). It is therefore believed that the R2P framework provided a "prescriptive framework" in order to address the protection of victims of mass atrocities (Ramcharan, 2011).

As a result, it can be argued that the post-Cold War era in the 1990s resulted in significant changes in the Security Council regarding how human rights, sovereignty, and security were dealt with. Through state interventions in situations such as that which occurred in Kosovo, the Security Council extended its powers under Chapter VII of the Charter of the United Nations “into matters that earlier belonged to the domestic jurisdiction of states” (Kumar, 2011, p. 968). State intervention through the use of military action taken without the consent of the host state government, proved to be a major challenge to both the United Nations and the Security Council’s traditional interpretation of sovereignty, where it was prioritized over human rights. As a result of this change in the 1990s, the case of Kosovo and the R2P framework demonstrate the conflict between both human rights and sovereignty that were present within the UN Charter (Kumar, 2011). Furthermore, the concept of human security throughout the 1990s consisted of a widening of the security agenda of the United Nations as a whole to include more than just military security, shifting away from a traditional state-centric view of security towards a focus on individuals (King and Murray, 2001; United Nations Development Programme, 1994). This new concept of human security included threats from hunger, disease and repression, in addition to “protection from sudden and hurtful disruptions in the patterns of daily life” and was fostered by the United Nations Development Program (UNDP) (Paris, 2001, p. 89; King and Murray, 2001). It was in the 1994 UNDP report where this concept was introduced for the first time, where human security was outlined as a “universal concern” that was “relevant to people everywhere, in rich nations and in poor” (United Nations Development Programme, 1994, p. 22). In addition, “the components of human security are interdependent” in the sense that “when

the security of people is endangered anywhere in the world, all nations are likely to get involved” (United Nations Development Programme, 1994, p. 22). Therefore, human security became a much larger priority for the United Nations following the Cold War.

### **The UN and UNSC in the Context of Terrorism**

At the same time that security became defined with a more human orientation, making the political and civil rights a matter of international peace and security, terrorism was becoming a more central concern for the Security Council. Although not a novel concern at first, the definition of terrorism and the objectives and courses of action within the Security Council’s efforts to counter terrorism have, over time, changed dramatically.

The end of the Cold War brought about changes within the United Nations and the Security Council regarding how to deal with terrorism. This thesis will show that there has been a progressive shift from terrorism being treated as a state-centric problem to terrorism as a transnational threat, and with it an individualization of the threat of terrorism. My analysis will focus on norms surrounding counter-terrorism policies and how these have impacted the definition of terrorism. The consequences of a progressive individualization on the human security paradigm raise questions about the Security Council’s counter-terrorism policies and their implications for human rights.

While terrorism has been a central concern, and evidenced in the concerted efforts through 1267, it was not always this way. Initially, terrorism was considered to be a domestic problem and therefore not something that the UN concerned itself with. While terrorism did eventually become a concern due to hostage-takings and aircraft hijackings, the concern surrounding terrorism was very different than the targeting of individuals

today. The thesis will explore this shift, how and through what mechanisms norms around terrorism change, and how these changes have resulted in the *Kadi* case.

In 1999, following the increasing popularity of the use of UN sanctions against Libya, Sudan and other states, the Security Council passed resolution 1267 as a means of combating international terrorism and imposed aviation and financial sanctions against the Taliban regime in Afghanistan. Resolution 1267 was passed in response to embassy bombings in August 1998 in Kenya and Tanzania, which were deemed to be acts of terrorism conducted by Al Qaeda and Osama Bin Laden (Ginkel, 2010). The purpose of these sanctions was to convince the Taliban regime to end its support of international terrorists. Specifically, these measures were implemented as a response to the Taliban's failure to stop providing both training and sanctuary for terrorist organizations in Afghanistan.

This decline in state-sponsored terrorism however, gave rise to a new form of terrorism: transnational terrorism. Instead of depending on certain states to provide them with safe havens, these transnational terrorist organizations would use weak or failing states as training bases. At the same time, these groups would rely heavily on financial support from a number of non-state actors throughout the world, including religious organizations, philanthropic foundations, and wealthy individuals. Since the 9/11 terrorist attacks, the perceived threat of transnational terrorism has greatly intensified, while states openly supporting terrorists has continued to decline (Heupel, 2007).

Within this already changing context, the terrorist attacks of 11 September 2001 (9/11) not only significantly changed the status of Security Council resolutions, as they were being adopted with a more general and abstract character, but also marked the

beginning of another change regarding norms of security. Throughout the 1990s, the focus of the United Nations and the Security Council was on the protection of human security and finding a balance with state sovereignty when taking action. While terrorism had been perceived by the Council to be a threat to international peace and security since the early 1990s, the use of unconventional weapons (for example, airplanes) required the Council to enforce new security measures in order to address these threats. As a result, terrorism has become one of the most important issues the Security Council has had to deal with since the end of the Cold War stalemate (Flynn, 2007; Freeman, 2005).

The Security Council determined immediately that the acts of the 9/11 terrorist attacks constituted a threat to international peace and security, and believed that the security measures comprising the 1267 regime would prevent resources from reaching these terrorist organizations (Ginkel, 2010). Therefore, the requirement of UN member states to freeze the assets of those individuals associated with Al Qaeda, Osama Bin Laden, and/or the Taliban was the most fundamental component of the resolution 1267 regime. In addition, the creation of the 1267 Sanctions Committee, a subcommittee of the Security Council, run and overseen by Council members with the purpose of overseeing the implementation of resolution 1267 and the targeted sanctions, was unprecedented (Mendelsohn, 2014). It was the Security Council's passing of resolution 1267 in 1999 that resulted in the adoption of subsequent resolutions modifying the 1267 sanctions regime in order to target individuals deemed to be "associated" with terrorism following the 9/11 terrorist attacks on the United States. It was the 1267 sanctions regime that resulted directly in the development of the *Kadi* case, which was a direct example of the tension surrounding norms of security. The *Kadi* case was chosen as a case study for this

thesis as a result of the case's focus on individuals, which was not as prominent in other cases like *Al Barakaat* and *Nada*. While *Al Barakaat* is often mentioned in conjunction with *Kadi*, it is a case about an organization for Somali refugees, therefore making it an entity and not an individual. In addition, with *Nada* the focus was on the actions of individual states and not on the Security Council, which is an important aspect of the thesis (Kokott and Sobotta, 2012). Furthermore, as a result of *Kadi*'s differing judgments at both the Court of First instance and the European Court of Justice, it was best positioned to allow for the exploration of a potential shift in norms.

Conducting a discourse analysis, the findings are that counter-terrorism policies have evolved over the last few decades in the UN Security Council. Furthermore, there has been an individualization of security that is conflicting with the notion of human security. There are three bases of analysis that will be used in this study that combine in order to show the construction and consolidation of a norm: objectives of counter-terrorism policy, targets of counter-terrorism policy, and tools for combatting terrorism. These three bases of analysis will be applied throughout two phases of terrorism that can be extracted from studying the Security Council's counter-terrorism policies. The first is the state-sponsored terrorism stage, where terrorism was seen as a global problem that required action and involvement from the Council. The second is the transnational terrorism stage, where terrorism has become perceived as operating through transnational networks instead of being supported by specific states. In the second stage, many more states had become targets of terrorism.

## Organization of the Thesis

This study will be organized into four chapters. Chapter one will start with a discussion of the theoretical and methodological framework and why this study draws on constructivist theory to conduct a discourse analysis through which it will analyze the development of norms surrounding counter-terrorism. Chapter two will analyze the development of the norm of the individualization of security through two stages of terrorism: state-sponsored terrorism and transnational terrorism. It will analyze the specific aspects of the Security Council's counter-terrorism policies that have shifted over time in order to allow for the development of this new norm. Chapter three will look at these changes in the Council's counter-terrorism policies within a human rights context in order to show the implications these policies have had for human rights. The *Kadi* case will be discussed as a case study that is a direct example of the nexus where security, both through human rights and counter-terrorism, has become "individualized." The final chapter will look at the implications of *Kadi*, and what these implications are for the UN Security Council, counter-terrorism, and world politics in general.

## Chapter 1: Theoretical Framework

### Constructivism

When discussing terrorism, Makinda (2006) discusses how both terrorism and the war on terrorism should be viewed as products of norms that have been socially constructed, as they are both constituted by ideas, cultures, and identities. Furthermore, he argued that security is considered to be the preservation of norms, rules, interests, institutions and resources, as well as the protection of people. While counterterrorism has emerged as a reaction to the threat of terrorism, it has become “a continuing practice that anticipates, prevents, or pre-empts terrorist activities,” and is therefore something that is conceived within norms, rules and institutions (Makinda, 2006, p. 27). Along these lines, this thesis will adopt a constructivist approach to the study of counter-terrorism and its implications for human rights. A constructivist approach will help with the understanding of how norms surrounding counter-terrorism have developed over time and how these norms have resulted in the *Kadi* case. More specifically, the constructivist approach will provide an understanding of how the UN Security Council’s counter-terrorism policies and practices express the development of new norms, thus allowing shifts in norms to be traced. This approach studies the world not as a set of objective practices, but as practices that shape the world. Within a constructivist approach, special attention is paid to the development, diffusion and disruption of norms. Therefore, constructivism is ideal in order to highlight a tension between norms of security through the norms around human rights and counterterrorism.

Reus-Smit (2004) provides three main points that are central to the constructivist approach. The first is that this approach views structures as shaping the behavior of

actors. Second, in order to understand an actor's behavior, it is important to grasp that their interests and actions have been shaped by their social identities. Finally, constructivists stress that these normative and ideational structures "only exist because of the routinized practices of knowledgeable social agents, which make them human artifacts amenable to transformation." (Reus-Smit, 2004, p. 22) Bjorkdahl (2002) states that norms in the constructivist framework are "intersubjective understandings and collective expectations regarding proper behavior of states and other actors in a given context of identity" (p. 15). Furthermore, norms are extremely important because they shape the goals of actors, the construction of state (and other actors') interests, and the means that are used to achieve these goals. Structure, order and stability in the world are provided by shared ideas, expectations, and beliefs about what appropriate behavior should be, according to constructivist theories. Furthermore, "in an ideational international structure, idea shifts and norms shifts are the main vehicles for system transformation" (Thakur, 2006, p. 12). As a result, the social identity of actors, in this case the Security Council, is constituted by collective norms which, at the same time, provide the rules for the regulation of this social behavior (Thakur, 2006). For constructivists in international relations, human consciousness is the origin of a socially constructed reality, which thus reveals both identity and interests. Within this branch of constructivism, identities are generated by international interactions in a "continuous causal relation," therefore both the identities and interests of actors are not necessarily given, and are not fixed (Bobulescu, 2011, p. 52).

Within the constructivist framework, meaning is socially constructed. Numerous constructivist theorists, like Kratochwil (1991), believe that the existence of relationships

and patterns are dependent on the practices and “webs of meaning” that constitute them in a socially constructed world (Reus-Smit and Snidal, 2009). Consequently, within the field of international relations, constructivism challenges a number of rationalist assumptions, specifically the notion of the unchanging reality of international politics (Zehfuss, 2002). An example of this challenge has been provided by Wendt (1992), who believes that anarchy does not have a fixed dynamic or logic. He demonstrates that anarchy is “what states make of it,” and therefore it is socially constructed (Wendt, 1992; Zehfuss, 2002). Furthermore, “conceptions of self and other, and consequently security interests, develop in interactions” (Zehfuss, 2001, p. 57). Another important example of a social construction is sovereignty. According to Reus-Smit and Snidal (2009), the powers and identities of states have changed over time, as well as the practice of sovereignty. Since 1945, the idea that international intervention is legally justified in situations where massive human rights violations have been committed by states, demonstrates that the idea of sovereignty is changing. In this example the autonomy of the rights violating rulers is reduced, while the autonomy of the potential interveners has been increased (Reus-Smit and Snidal, 2009). What distinguishes constructivism from other frameworks is that the influences surrounding the formation of interests are social (Reus-Smit and Snidal, 2009, p. 4). Realist and liberal approaches, on the other hand, place a stronger emphasis on explanations for compliance with norms that are more rational-actor oriented. Specifically, realists believe that norm-violating governments conform to norms “only when it is in their self-interest to comply with external pressures” (Shor, 2008, p.119).

This study will assess the shaping and changing of terrorism and counter-terrorism norms using the tools and methods of discourse analysis. Discourse is defined as the “social processes and the systems of knowledge through which meaning is created, fixed, lived, experienced, and transformed” (Barnett and Duvall, 2005, p. 55). Discourse analysis will be used to study the three bases of analysis that work together in order to create a norm: objectives, which are the aims or goals of the Security Council’s counter-terrorism policies; tools, which are the methods or approaches used by the Security Council in order to achieve their objectives and implement their counter-terrorism policies, and; targets, which would be the states, individuals, or entities that were subject to the Security Council’s counter-terrorism policies. These three bases of analysis work together to create a norm through shaping identities and defining collective goals of political actors. They demonstrate collective agreement, created through both language and practices, on how terrorism is to be viewed and combatted in each of the two stages.

### **The Importance of Norms**

Norms are understood as “shared expectations about appropriate behavior,” which shape the identities and preferences of political actors, as well as define collective goals “and prescribe or prohibit certain kinds of behavior” (Shwarz, 2004, p. 200).

Specifically, Kratochwil (1991) goes more in depth and states that norms are more than just “guidance devices,” and that they are means that allow people to “pursue goals, share meanings, communicate with each other, criticize assertions, and justify actions” (p.11).

For scholars like Kratochwil and Reus-Smit, norms within the constructivist approach are expressed through language and argumentation; this “rhetorical argumentation” affects the choices that actors have (Solomon, 2006). Bjorkdahl (2002) takes the discussion a

step further, explaining that norms within the constructivist framework entail collective evaluation and future expectations of behavior regarding what ought to be done in specific situations. Overall, the contribution that constructivism has made to the study of ideas in international relations consists of social identities of actors being constituted by collective norms and understandings (Risse, 2000). The focus of this study will be on how norms are constructed, which in turn may shape the identities of other actors. Furthermore, “there is no pre-existing reality, or pre-existing structure to condition human action, either at individual or aggregate levels” (Bobulescu, 2011, p. 52). Other perspectives on constructivism include Kratochwil and Ruggie’s insight, where they draw attention to the fact that “the intersubjective quality of convergent expectations as the basis of regimes is not accessible to approaches that treat ideas as additional variables. Instead, the incorporation of ‘constructivist’ insights and methods is required for its explanation” (Bieler, 2001, p. 96).

### **What Makes Norms Matter: The Importance of Power and Legitimacy**

Legitimacy is an important term that has been mentioned consistently throughout the norms literature. Reus-Smit (2007) discusses the importance of legitimacy when discussing both the constructivist framework and norms. Specifically, he discusses norms, legitimacy, and institutions, and states that when an institution is rightful or legitimate, it means that norms (along with rules and principles) are “socially endorsed” (p. 159). Reus-Smit (2007) defines legitimacy as “a quality that society ascribes to an actor’s identity, interests, or practices, or to an institution’s norms, rules and principles” (p. 159). Furthermore, within the constructivist approach there is an emphasis placed on the search for legitimacy as one of the primary behavioral motives for institutional actors.

“States, like people, seek acceptance and legitimacy for their actions and comply with normative undercurrents of the world system... in order to ward off processes of international shaming and denunciation” (Shor, 2008, p. 120).

Legitimacy is considered to be a social phenomenon associated with power, and the term is often associated with being “rightful” or having the right to act in a certain way (Reus-Smit, 2007). Specifically, Reus-Smit (2007) defines legitimacy in the political arena as referring to an “entitlement of control,” or in other words, “an entitlement to issue authoritative commands that require compliance from those subject to them” (p. 158). Furthermore, “rights are socially ordained, and an actor has a right to act, rule, or govern only if it is socially sanctioned.” (Reus-Smit, 2007, p. 159) Therefore, when an institution is considered rightful, and thus legitimate, its norms, rules, and principles are considered as being socially endorsed. As a result, no action can be considered as being legitimate if it is not socially acceptable, or recognized as being rightful. According to Thakur (2006), only actors who are seen as legitimate possess the power to enforce authority. Additionally, “as power reinforces legitimacy, legitimacy expands power by buttressing its position and rendering its exercise more effective” (Thakur, 2006, p. 9).

Norms have power when they are considered to be legitimate, thus setting out actors’ expectations of what ought to happen and therefore translate those expectations into accepted actions (Reus-Smit, 2007). Reus-Smit (2007) proceeds to explain the three ways in which actors who command legitimacy are empowered. First, actors can draw on the active support of other actors, who invest their energy and resources in the project at hand. Second, other actors will behave in accordance with their rules, decisions, and commands. Finally, actors who command legitimacy may benefit from lower levels of

opposition. Therefore, an actor is not able “to act as its identity until the relevant community of meaning... acknowledges the legitimacy of that action, by that actor, in that social context” (Hopf, 1998, p. 178-179). Social practices are significant as a result of the fact that they possess the power to reproduce the international community, as well as the identities found within this broader international community (Hopf, 1998). This literature can be connected to the Security Council and how its ability to act and develop policies comes from legitimacy of norms surrounding counter-terrorism. The Security Council possesses the ability to “issue authoritative commands” and require UN Member States to comply with these commands, or policies (Reus-Smit, 2007). As a result, the Council’s norms and policies are also seen as legitimate, which then provides these norms with power.

Generally speaking, Barnett and Duvall (2005) define power as “the production, in and through social relations, of effects that shape the capacities of actors to determine their circumstances or fate” (p.42). Therefore, significance is attributed to the relationship between power and social relations. According to Hopf (1998), “the power of social practices lies in their capacity to reproduce the intersubjective meanings that constitute social structures and actors alike” (p. 178). Specifically, Barnett and Duvall’s (2005) discussion of productive power is of particular relevance to this study (cf. Foucault, 1978). They define productive power as “the constitution of all social subjects with various social powers through systems of knowledge and discursive practices of broad and general scope” (p. 55). Furthermore, productive power focuses on “systems of signification and meaning” and networks of social forces that shape one another, looking beyond structures (Barnett and Duvall, 2005, p. 55). In addition, in Sargiacomo’s (2009)

discussion on Foucault's work, he touches on the nexus between knowledge and power, and states that power produces knowledge. He added, "it is not the activity of the subject of knowledge that produces a corpus of knowledge... but power-knowledge, the processes and struggles that traverse it and of which it is made up that determines the forms and possible domains of knowledge" (Sargiacomo, 2009, p. 271) Therefore, power is not only when norms have legitimacy, but *power is also present in the creation of norms as being legitimate*. This nexus between knowledge and power is important for this study as it helps provide an understanding of how new practices and new terminology create a new understanding that becomes somewhat uncontested and taken as given, which in turn provides legitimacy.

### **Methodological Framework**

Discourses are considered to be locations of social relations of power, as they "situate ordinary practices of life" and define possible social fields of action. Generally speaking, "the bases and workings of productive power are the socially existing and, hence, historically contingent and changing understandings, meanings, norms, customs and social identities that make possible, limit, and are drawn on for action" (Barnett and Duvall, 2005, p. 55-56). Furthermore, according to Holzscheiter (2013), discourse is defined as "the space where human beings make sense of the material world, where they attach meaning to the world and where representations of the world become manifest" (p. 144). In addition, discourses are systems of meaning that can be traced through both language and practices.

As a result of the focus on the discursive construction of norms surrounding counter-terrorism, a discourse analysis approach will be adopted for this study. Discourse analysis

“broadly denotes methodologies that capture the creation of meanings and accompanying processes of communication. As long as words and activities are put into context, researchers can categorize, code, or count their use through many different- qualitative and quantitative- techniques. To make assessments of the relative importance of particular meanings requires some sort of comparison, across time or space, and a baseline or metric for gauging change.” (Klotz and Lynch, 2007, p. 19)

Changes in the “rules of the game” will create different roles for various actors, as well as alter their identities and interests. This transformation is displayed through major alterations within a discourse (Klotz and Lynch, 2007). Scotto di Carlo (2012) discussed the Security Council through the use of discourse analysis. In particular, this author looks at vagueness and the language contained within Security Council resolutions. She believes that this approach “allows going beyond the mere linguistic aspects of a text, especially to understand underlying intentionality.” (Scotto di Carlo, 2012, p. 695)

Discourse analysis is therefore important to this study because “studying the language of rules or norms starts with texts to show the existence (and possibly dominance) of particular intersubjective understandings” (Klotz and Lynch, 2007, p. 19).

Discourse analysis within the constructivist framework allows for an in-depth analysis of the language of the Security Council documents, and how the Council’s actions are connected to specific understandings surrounding terrorism and counter-terrorism, in order to determine whether or not there has been a gradual shift in norms. Through discourse analysis, the researcher is investigating the social and political effects that stem not only from using a specific vocabulary, but also from studying the effects that certain social constructions of reality have on the identity of individuals and groups.

Specifically within the constructivist framework and international politics, discourse analysis has been used to examine the creation and effect of norms, as well as to understand the process of how identity is built and shaped (Holzscheiter, 2013). Constructivists frequently turn to discourse analysis when attempting to understand, identify and operationalize “social facts such as ideas, identities, or norms and when they try to demonstrate that these facts are not natural but are both a result of discursive practices and constituted by socially shared meaning-structures...” (Holzscheiter, 2013, p. 145). Furthermore, discourse analysis allows for ideational factors such as identities and aspirations to be revealed, which in turn allows for the redefining of both interests and agency of political actors (Bobulescu, 2011). Discourse analysis is therefore valuable to use within a constructivist theoretical framework as a result of the fact that it allows for the assessment of both international institutions and the forums within which norms are debated, created, or rejected (Holzscheiter, 2013). Specifically for this study, discourse analysis will be used in order to assess how norms are created or gradually shift within the context of the Security Council and counter-terrorism. Furthermore, it will be used in order to understand how the Security Council’s counter-terrorism policies resulted in the *Kadi* Case, and whether or not the tensions surrounding both human security and counter-terrorism that are present in *Kadi* demonstrate that a new norm has been created.

Understandings surrounding terrorism and counter-terrorism become norms when they are considered standards of appropriate behavior. The objectives, targets and tools all reinforce a particular understanding of terrorism and counter-terrorism in each stage, thus making that particular understanding legitimate and setting out actors’ expectations, translating into accepted actions. In addition, new norms emerge from common practices

amongst actors. These three bases of analysis combine to show what the UN Security Council and Member States were doing in a particular stage of terrorism, as well as how and why. As each of these bases of analysis change from one stage to the other, the way the Security Council defines terrorism also changes. As a result, when the objectives, tools and targets become common practice for the Security Council and UN Member States, they become standards of appropriate behavior and a norm is thus created.

Discourse analysis relies on the study of primary source documents like archives of governments and non-governmental organizations, in combination with secondary source documents that supplement and contextualize these sources (Klotz and Lynch, 2007). In this study, the study of norms will rely specifically on primary source documents from the UN Security Council, including official resolutions and meeting transcripts. Such documents provide information with respect to the objectives, tools, and targets with regard to counterterrorism policies, thus allowing for the tracing of a norm to take place. Furthermore, information on how each of the four bases of analysis have changed over time and how they reflect changing understandings of terrorism and counterterrorism within the Security Council can also be extracted from the primary source documents. Specifically, this study will focus on resolutions and meeting transcripts beginning in 1970. The year 1970 is significant because it was when the Security Council first began to adopt resolutions dealing with civilian aircraft hijackings. This collection of documents over this timeframe also allows for the observation of how certain aspects of the Council's counterterrorism regime have changed and evolved from one stage of terrorism to the other. In addition, other documents such as the United Nations Charter and the Universal Declaration of Human Rights (UDHR) will be

explored. The UN Charter is important because it clearly outlines the mandate of both the United Nations as a whole and the UN Security Council, and how they are supposed to respond to both human rights and security issues. The UDHR further allows for the study of the nexus where security, both through human rights and counterterrorism, is becoming individualized. Since the *Kadi* case will be used as a case study in this thesis, the case of *Kadi v. Council and Commission* will also be an important source of data, as well as the appeal following the original case. The case is important because it provides a clear example of contending trends of human security and counter-terrorism within the Security Council. The analysis of this primary source data will be combined with analyses from secondary source books and journal articles.

When studying UN Security Council meeting transcripts and resolutions, particular attention was paid to how Council Members defined and described terrorism and how they believed terrorism should be dealt with internationally. This analysis was conducted across both stages of terrorism by looking at the three bases of analysis (objectives, tools and targets). This particular approach allowed for a much clearer picture of counter-terrorism norms across time and how they have evolved. Following the analysis of the Security Council's counter-terrorism policies, human rights were studied within the context of terrorism, by looking at how human rights were addressed and dealt with by the Council, both with regard to meeting transcripts and UNSC resolutions. Furthermore, the Council's treatment of both human rights and counter-terrorism were studied within the broader context of the Council's mandate under the UN Charter.

The analysis of the Security Council in relation to human rights and counter-terrorism was then applied to the *Kadi* case. The *Kadi* case study was analyzed by

looking at the rulings of the European Court of First Instance and the European Court of Justice, as well as the positions of the European Council and Commission and Kadi himself. A particular focus was placed on the discourse between these parties, paying particular attention to how these opinions and views related to the Security Council's counter-terrorism policies and the conversations Council Members were having. Furthermore, this approach was taken in order to understand why the *Kadi* case came about as a result of the Security Council's counter-terrorism policies.

### **Limitations**

Of particular interest to this study is uncovering what made the violation of individual human rights norms by the UN Security Council possible within the Council's counter-terrorism framework. This study will therefore not answer other legal questions arising from the *Kadi II* case that arose following the events of the original *Kadi* case in 2013, nor will it study the implications of this judgment. This second case focused primarily on removing Kadi from the 1267 Consolidated List, and is beyond the scope of this current analysis. This study focuses on the emergence of the first *Kadi* case as a result of Kadi's listing on the 1267 list and on the suspension of his fundamental human rights.

In addition, this study will also not answer specific questions surrounding the Security Council's subsidiary 1267 Sanctions Committee and 1373's Counter-Terrorism Committee, with regards to how they function and operate. Furthermore, analyzing specific practices of the Sanctions Committee and conducting a more in-depth analysis of how this committee works regarding listing and de-listing procedures provides an

opportunity for further research. This study will only look at these Security Council committees as tools used by the Council as part of their 1267 counter-terrorism regime.

There are also some limitations with regards to the primary source data used in this study. The most important of these limitations is accessibility to certain Security Council documents. While a number of these documents are easily accessible (like resolutions), some of the meeting transcripts are closed documents that are only accessible by authorized individuals. In particular, many of the meetings that took place towards the end of 2001 in the immediate aftermath of the 9/11 terrorist attacks are not accessible. However, the 2001 annual report, as well as certain meeting transcripts, are accessible. The year 2002 has the largest number of meeting transcripts and reports, and many of the discussions that take place in these documents are detailed enough to get a sense of what happened in those closed meetings and to understand the discussions that were occurring within the Security Council.

## **Documents Consulted**

### **Court Cases**

Kadi v Council & Commission (Common foreign & security policy) [2005] EUECJ T-315/01

Kadi v Council & Commission (Common foreign & security policy) [2008] EUECJ C-402/05

### **Security Council Meetings**

U.N. Security Council, 51<sup>st</sup> Year, 3627<sup>th</sup> Meeting, UN DOC S/PV.3627 (31 January 1996)

U.N. Security Council, 51<sup>st</sup> Year, 3660<sup>th</sup> Meeting, UN DOC S/PV.3660 (26 April 1996)

U.N. Security Council, 51<sup>st</sup> Year, 3690<sup>th</sup> Meeting, UN DOC S/PV.3690 (16 August 1996)

U.N. Security Council, 54<sup>th</sup> Year, 3988<sup>th</sup> Meeting, UN DOC S/PV.3988 (24 March 1999)

U.N. Security Council, 54<sup>th</sup> Year, 4053<sup>rd</sup> Meeting, UN DOC S/PV.4053 (19 October 1999)

U.N. Security Council, 55<sup>th</sup> Year, 4125<sup>th</sup> Meeting, UN DOC S/PV.4125 (7 April 2000)

U.N. Security Council, 55<sup>th</sup> Year, 4243<sup>rd</sup> Meeting, UN DOC S/PV.4243 (6 December 2000)

U.N. Security Council, 56<sup>th</sup> Year, 4413<sup>th</sup> Meeting, UN DOC S/PV.4413 (12 November 2001)

U.N. Security Council, 57<sup>th</sup> Year, 4453<sup>rd</sup> Meeting, UN DOC S/PV.4453 (18 January 2002)

U.N. Security Council, 57<sup>th</sup> Year, 4513<sup>th</sup> Meeting, UN DOC S/PV.4513 (15 April 2002)

U.N. Security Council, 57<sup>th</sup> Year, 4561<sup>st</sup> Meeting, UN DOC S/PV.4561 (27 June 2002)

U.N. Security Council, 57<sup>th</sup> Year, 4618<sup>th</sup> Meeting, UN DOC S/PV.4618 (4 October 2002)

U.N. Security Council, 58<sup>th</sup> Year, 4710<sup>th</sup> Meeting, UN DOC S/PV.4710 (20 February 2003)

U.N. Security Council, 58<sup>th</sup> Year, 4752<sup>nd</sup> Meeting, UN DOC S/PV.4752 (6 May 2003)

U.N. Security Council, 58<sup>th</sup> Year, 4798<sup>th</sup> Meeting, UN DOC S/PV.4798 (29 July 2003)

U.N. Security Council, 59<sup>th</sup> Year, 4976<sup>th</sup> Meeting, UN DOC S/PV.4976 (25 May 2004)

U.N. Security Council, 64<sup>th</sup> Year, 6164<sup>th</sup> Meeting, UN DOC S/PV.6164 (17 July 2009)

### **Security Council Resolutions**

SC RES 286, 1552<sup>nd</sup> Meeting, UN DOC S/RES/286 (9 September 1970)

SC RES 579, 2637<sup>th</sup> Meeting, UN DOC S/RES/579 (18 December 1985)

SC RES 635, 2869<sup>th</sup> Meeting, UN DOC S/RES/635 (14 June 1989)

SC RES 660, 2932<sup>nd</sup> Meeting, UN DOC S/RES/660 (2 August 1991)

SC RES 661, 2933<sup>rd</sup> Meeting, UN DOC S/RES/661 (6 August 1991)

SC RES 731, 3033<sup>rd</sup> Meeting, UN DOC S/RES/731 (21 January 1992)

- SC RES 748, 3063<sup>rd</sup> Meeting, UN DOC S/RES/748 (31 March 1992)
- SC RES 883, 3312<sup>th</sup> Meeting, UN DOC S/RES/883 (11 November 1993)
- SC RES 1044, 3627<sup>th</sup> Meeting, UN DOC S/RES/1044 (31 January 1996)
- SC RES 1054, 3660<sup>th</sup> Meeting, UN DOC S/RES/1054 (26 April 1996)
- SC RES 1070, 3690<sup>th</sup> Meeting, UN DOC S/RES/1070 (16 August 1996)
- SC RES 1244, 4011<sup>th</sup> Meeting, UN DOC S/RES/1244 (10 June 1999)
- SC RES 1267, 4051<sup>st</sup> Meeting, UN DOC S/RES/1267 (15 October 1999)
- SC RES 1333, 4251<sup>st</sup> Meeting, UN DOC S/RES/1333 (19 December 2000)
- SC RES 1373, 4385<sup>th</sup> Meeting, UN DOC S/RES/1373 (28 September 2001)
- SC RES 1390, 4452<sup>nd</sup> Meeting, UN DOC S/RES/1390 (16 January 2002)
- SC RES 1730, 5599<sup>th</sup> Meeting, UN DOC S/RES/1730 (19 December 2006)
- SC RES 1822, 5928<sup>th</sup> Meeting, UN DOC S/RES/1822 (30 June 2008)
- SC RES 1904, 6247<sup>th</sup> Meeting, UN DOC S/RES/1904 (17 December 2009)
- SC RES 1989, 6557<sup>th</sup> Meeting, UN DOC S/RES/1989 (17 June 2011)

### **United Nations Documents**

United Nations, *Charter of the United Nations*, UNTS XVI (1945)

*Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948)

## **Chapter 2: Terrorism and the Security Council**

### **Introduction**

Historically, the Security Council's decisions regarding terrorism expressed the view that terrorism was a domestic problem that should be solved by the individual state that was affected by it (Yordan and Messmer, 2009). Furthermore, according to Kramer and Yetiv (2007), "for most of the history of the United Nations, states have treated terrorism as a matter of national and local concern and have decided not to bring it to the attention of the UN," which appears to be in contrast to the Security Council's focus today (p. 411). Throughout the 1970s and 1980s, there was a growing number of aircraft hijackings, attacks on diplomatic personnel, airports, and ships, which resulted in the Council being required to take greater action and pass more resolutions condemning terrorism. It was during this time that terrorism was placed more centrally on the agenda of the United Nations and the Security Council (Yordan and Messmer, 2009; Blumeneau, 2014). However, although these resolutions and actions taken by the Security Council condemned terrorism in principle, they required very little action from UN Member States (Yordan and Messmer, 2009).

It can be observed that terrorism was treated as a domestic problem primarily in its absence from Security Council resolutions and discussions, where there was no explicit discussion of the threat of terrorism. In 1970, the Security Council adopted resolution 286 in response to civilian aircraft hijackings that had been occurring more frequently by groups looking to disrupt air travel and take hostages for political gains. Resolution 286 was extremely short in length, and only expressed the Council's "grave concern at the threat to innocent lives from the hijacking of aircrafts and any other

interference in international travel” (SC RES 286, 1970, p. 16). Furthermore, the Council appealed generally “to all parties concerned for the immediate release of all passengers and crews without exception, held as a result of hijackings and other interference in international travel” and called upon “all States to take all possible legal steps to prevent further hijackings or any interference with international civil air travel” (SC RES 286, 1970, para. 1-2). While the word “terrorism” was never explicitly stated in relation to civilian aircraft hijackings, it was later referred to as being about deterring terrorism, and thus in hindsight, can be seen as the first resolution adopted by the Council dealing with terrorism.

Although resolution 286 was the Security Council’s first significant step towards combatting acts of terrorism, their appeal in this resolution was not very effective. The Council was unable to address specific terrorist strikes or to organize a collective response to the problem of terrorism as a result of the Cold War stalemate within the Council (Luck, 2006). Primarily, this stalemate was a result of the conflict between the United States and the Soviet Union, along with their allies. Such a divide within the Council prevented them from reaching an agreement on many Cold War related issues. In addition, the lack of attention given to terrorism by the Council leading up to the 1990s was a demonstration of many Member States’ preoccupation with other issues (Kumar, 2011). Following the Cold War, Council members even admitted to being unproductive during that time, and stated that “the work of the United Nations was for many years conditioned by the ideological confrontation of the Cold War. This prevented both an unequivocal condemnation of international terrorism and the drawing up of drastic measures to combat it” (UNSC 4053, 1999, p. 3). During this time, Western perspectives

did not view terrorism “as a direct threat to Western security at home” (Blumeneau, 2014, p. 65). Most of these incidents of terrorism were aimed towards Western and Israeli targets in the Middle East, and states like the Soviet Union had very little interest in seeing the Security Council tend to these matters. On the other hand, the United States was preoccupied with issues arising directly from the Cold War that they believed to be more pressing state-to-state concerns, specifically fighting communism and the global threat of an expansionist Soviet empire (Luck, 2006).

Following the Council’s adoption of resolution 286 in 1970, terrorism was not discussed directly by the Council until 1985 and the adoption of resolution 579 on hostage-taking. Resolution 579 was significant because it was the first time the Council used the word “terrorism” in a resolution. Resolution 579 expressed how the Council was “deeply disturbed at the prevalence of incidents of hostage-taking and abduction, several of which [were] of protracted duration and have included loss of life” (SC RES 579, 1985, p. 24). In addition, the Council considered “that the taking of hostages and abductions [were] offences of grave concern to the international community, having severe adverse consequences for the rights of the victims and for the promotion of friendly relations... among states” (SC RES 579, 1985, p. 24). Furthermore, through this resolution the Council urged “the further development of international co-operation among States in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abductions as manifestations of international terrorism” (SC RES 579, 1985, p. 24). Therefore, what was unprecedented about resolution 579 was the

fact that, for the first time, a specific act (hostage-taking) was explicitly referred to as an act of “terrorism”.

In 1989, the Security Council adopted resolution 635 on the issue of plastic and sheet explosives. This resolution was important because it officially established the United Nations Security Council as a venue for dealing with terrorism and explicitly mentioned the word “terrorism” in the resolution. In this resolution, the Council stated that it was

“conscious of the implications of acts of terrorism for international security; Deeply concerned by all acts of unlawful interference against international civil aviation, [and]; mindful of the important role of the United Nations in supporting and encouraging efforts by all States and intergovernmental organizations in preventing and eliminating acts of terrorism, including those involving the use of explosives” (SC RES 635, 1989, p. 18).

In a departure from how terrorism was previously treated by the Council, where it had not been officially identified as a threat to international peace and security, resolution 635 made the assertion that terrorism was in fact a threat to international peace and security, thus falling under the mandate of the Security Council (Kramer and Yetiv, 2007).

Specifically, the Council stated that it was “conscious of the implications of acts of terrorism for international security” in addition to being “mindful of the important role of the United Nations in supporting and encouraging efforts by all States and intergovernmental organizations in preventing and eliminating all acts of terrorism...” (SC RES 635, 1989, p. 18).

In the aftermath of the adoption of resolution 635 in 1989, terrorism was perceived by the Security Council to be a much greater threat than it had been during the Cold War. This chapter will further explore the evolution of the Council’s perception of the threat of terrorism and how it is expressed through the objectives, targets and tools

used throughout the 1990s and 2000s, in order to trace the development of a norm of the individualization of terrorism. It will focus on the shifts from a notion of state-sponsored terrorism throughout the 1990s and the transition from this set of principles and practices to the perception and definition of a more transnational form of terrorism.

## **State-Sponsored and International Terrorism**

### **Context**

The early to mid-1990s saw the increased perception of state-sponsored terrorism as a threat to international peace and security. State-sponsored terrorism involved state governments providing support to individual terrorists to commit acts of terrorism. As part of the Security Council's effort to take a tougher stance against terrorism at the beginning of the 1990s, the Council imposed sanctions on both Libya and Sudan in order to address these countries' support of international terrorism. The sanctions imposed on Libya in 1992 marked the first time sanctions were used by the United Nations specifically as a means for combatting terrorism (Cortright and Lopez, 2000). The sanctions imposed against Libya served two purposes. First, they were intended to bring two indicted Libyan suspects to trial for their involvement in the bombing of civilian airliners. Second, they were to serve as a deterrent against future acts of terrorism internationally, and as a way of encouraging the Libyan government to end its support of terrorism (SC RES 748, 1992; SC RES 843, 1993). The sanctions were specifically targeted against aviation and armaments, and were therefore early examples of the use of selective sanctions. While these sanctions had minor impacts on Libya's economy, the pressure on the Libyan government that resulted was sufficient enough to cause serious inconvenience (Cortright and Lopez, 2000).

On the other hand, the sanctions imposed by the Security Council against Sudan were more diplomatic in nature. These sanctions were implemented in response to an assassination attempt on the life of Egyptian President Hosni Mubarak in 1995. Adopting resolution 1044 in 1996, the Security Council condemned the “terrorist assassination attempt” and called upon the Sudanese government to extradite the three suspects wanted in connection to the assassination attempt in order for them to face prosecution. The Council also encouraged the government of Sudan to stop assisting terrorist activities and providing terrorists with shelter (Cortright and Lopez, 2000; SC RES 1044, 1996; UNSC 3627, 1996, p. 8). By April 1996, the Sudanese government had still not complied with the Council’s request for the extradition of the suspected terrorists. At this time, the Council met to adopt a resolution that would strengthen the measures implemented against Sudan in an attempt to force the government to surrender the terrorists. These measures outlined in resolution 1054 included diplomatic sanctions that required Member States to reduce the number of staff in embassies and consulates throughout Sudan, as well as restrict the entry of Sudanese government officials into their territories. Additionally, international institutions and organizations were required to refrain from holding conferences in Sudan (UNSC 3660, 1996; SC RES 1054, 1996; Cortright and Lopez, 2000). In an August 1996 Security Council meeting, Sudan’s failure to comply with resolution 1054 resulted in the Council passing resolution 1070, which strengthened the sanctions to prevent Sudanese aircrafts from taking off from, landing in, or flying over the territories of United Nations Member States (UNSC 3690, 1996; SC RES 1070, 1996). These steps implemented through resolution 1070 were aimed at increasing the

pressure placed on the Sudanese government to comply with the Council's request (Cortright and Lopez, 2000).

In this stage of state-sponsored terrorism, especially following the incidents that took place in Sudan, Council Members began to recognize the growing threat of terrorism internationally. While discussing the situation in Sudan, it was recognized that "terrorism, if not dealt with strongly and resolutely, [would] jeopardize international peace and security" and that it was a threat that was faced by all Member States (UNSC 3627, 1996, p. 15). Furthermore, Council Members attempted to define terrorism in their own words, agreeing on a number of key points. According to the Council, "terrorism is the antithesis of democracy. It abhors dialogue and has no respect for the opinions and lives of others. It thrives on fear and hatred, and preys on ignorance and prejudice... Terrorism must be fought with skill, determination and effective legal means" (UNSC 4053, 1999, p. 2). In addition, it was recognized that terrorists reject the norms of "civilized behavior" and pose a challenge to the rule of law (UNSC 4053, 1999, p. 5).

The emergence of the state-sponsored terrorism stage can be observed by looking at the objectives, targets, and tools of counter-terrorism policy and the perspectives of the Security Council on international terrorism. In this stage, the Council recognized terrorism as a threat to international peace and security, thus shifting the Council's perspectives towards one of punishing state governments that were in support of acts of terrorism. Furthermore, the Council recognized in this stage that no State was immune to the threat of terrorism, as it was an issue that affected the entire global community. The shift in the Council's objectives, targets, and tools reinforce the general understanding

that state-sponsored terrorism was considered to be a threat to international peace and security.

## **Counter-Terrorism Policy**

### ***Objectives***

In 1992, the Security Council adopted resolution 731 in response to the Libyan government's alleged support of numerous civilian aircraft hijackings, referring to these hijackings as acts of terrorism. The Council expressed in resolution 731 that it was "deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and jeopardize the security of States" (SC RES 731, 1992, p. 51). Furthermore, the council also expressed that it was "determined to eliminate international terrorism" (SC RES 731, 1992, p. 51). It was through this resolution where the Council made a clear commitment to the fight against terrorism and treating it as a threat to international peace and security and not solely an issue of domestic law and order, thus falling under the Council's mandate. Following Libya's failure to respond to resolution 731, resolution 748 determined that "the Libyan Government must commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups and that it must promptly, by concrete actions, demonstrate its renunciation of terrorism" (SC RES 748, 1992, para. 2). These actions taken by the Security Council against terrorism in Libya marked a departure from how the Council lacked concern for terrorism during the 1970s and 1980s.

Through adopting resolution 1044 in 1996 in response to state-sponsored terrorism in Sudan, the Security Council condemned the "terrorist assassination attempt"

of Egyptian President Mubarak and called upon the Sudanese Government to extradite the three suspects wanted in connection to the assassination attempt in order for them to face prosecution (SC RES 1044, 1996). The Council also called upon the Government of Sudan to

“undertake immediate action to extradite to Ethiopia for prosecution the three suspects sheltering in the Sudan and wanted in connection with the assassination attempt... [and] desist from engaging in activities of assisting, supporting and facilitating terrorist activities and from giving shelter and sanctuaries to terrorist elements and act in its relations with its neighbours and with others in full conformity with the Charter of the United Nations...” (SC RES 1044, 1996, para. 4 [a], [b]).

Furthermore, the Council stated that it was “convinced that the suppression of acts of international terrorism, including those in which States are involved, is an essential element for the maintenance of international peace and security” (SC RES 1044, 1996, p. 1). Under resolution 1054, which was adopted a few months later, the Security Council determined “that the non-compliance by the Government of Sudan with the requests set out in paragraph 4 of resolution 1044 (1996) constitutes a threat to international peace and security” (SC RES 1054, 1996, p. 2).

Therefore, the Security Council perceived terrorism to be an international concern during this phase. The Council’s objective was to take overall stronger action against international terrorism, which was becoming an increasingly greater threat as a result of the increase in civilian aircraft hijackings and increased support of state governments towards acts of terrorism. These incidences were occurring in states that were not under the jurisdiction of the targeted state governments, thus contributing to the more international nature of the threat of terrorism. Therefore, terrorism had become much more of a priority for the Council.

### *Targets*

A shift to the state-sponsored terrorism stage from how terrorism was previously viewed as a domestic problem can be observed by looking at the targets of the Council's counter-terrorism policies. Prior to this stage, there were no real targets of terrorism, as it had not yet been defined as a threat to international peace and security. Furthermore, the Council's actions were directed towards implied acts of terrorism, only asking states to take action to prevent civilian aircraft hijackings and other interferences with international travel (Luck, 2006; Kramer and Yetiv, 2007). However, the Council never explicitly referred to these aircraft hijackings as acts of terrorism until dealing with state-sponsored terrorism in Libya in the 1990s.

By contrast, rather than dealing with acts of terrorism strictly as a domestic problem within states' own borders, state governments were sponsoring (through providing weapons, training grounds, safe havens, etc.) other terrorist actors to commit acts of terrorism on a much more global scale, thus expanding the reaches of terrorism beyond state borders.

The targets of sanctions were accordingly singled out as state governments (like Libya and Sudan) that were suspected of supporting acts of terrorism. Targeted governments were identified as those not complying with handing over the wanted terrorists in order to face prosecution, therefore providing these terrorists with safe haven, as the cases of Libya and Sudan demonstrate. The Council's targeting of state governments marks a departure from the previous protocols, where terrorism was left for individual state governments to deal with independently of the Council. It is important to note that in each of these scenarios the sanctions were only implemented as a direct

response to specific events that had occurred. For instance, in the Council's discussion regarding Sudan, it noted that

“Sudan regularly abuse[d] the prerogatives of sovereign States by giving out Sudanese passports, both diplomatic and regular, to help non-Sudanese terrorists travel freely, as documented in cases involving Ethiopia, Egypt, and Tunisia. It use[d] Sudanese Airways to transport terrorists and their weapons... it [made] financial resources and safe refuge available to terrorists; and it provide[d] the very weapons terrorists use to inflict their horror, as in the Mubarak assassination attempt” (UNSC 3627, 1996, p. 21).

Therefore, the targets of counter-terrorism policy reinforce the understanding of terrorism as an international threat, requiring greater action from the Security Council.

### ***Tools***

The preferred tactic for addressing terrorism became the use of sanctions, specifically targeting state governments who were suspected of supporting international terrorism. Sanctions were implemented with the goal of ensuring that the targeted state governments cooperated with the Council's requests to surrender the wanted terrorists and to end their support of terrorism. Specifically, the Council utilized diplomatic sanctions (which consisted of closing embassies and reducing embassy staff), sanctions against aircrafts, and weapons and armament bans.

While many states were immediately on board with implementing these types of sanctions, other States needed convincing. In a Council discussion surrounding how to deal with state-sponsored terrorism in Sudan, it was stated that “the arbitrary application of sanctions is essentially flawed when there are no clearly formulated criteria and conditions governing their imposition and their lifting” (UNSC 3627, 1996, p. 14-15).

Furthermore, when sanctions were implemented regardless of this hesitation, some Council members were frustrated, stating that “in order to satisfy short-term interests, the voices were ignored of those... who strongly objected to the unsound practice of

imposing sanctions on the basis of vague, and therefore hard-to-meet demands, without clearly formulated criteria and conditions for their imposition and lifting” (UNSC 3690, 1996, p. 10). On the other hand, some Member States believed that the sanctions that were imposed against Sudan would not be sufficient in order to “convince the Government of Sudan to cease its sponsorship of international terrorism and return to the fold of responsible, law-abiding nations” and that the sanctions implemented should therefore be even stronger (UNSC 3627, 1996, p. 20).

The language used in the Security Council’s discussions of state-sponsored terrorism and how to deal with these States were expressed in the resolutions drafted during this stage, especially where the implementation of sanctions were outlined. Resolution 748 called for the Libyan Government to cease all forms of terrorist support and implemented sanctions that would remain in place until Libya complied with the Security Council’s requests. These sanctions consisted of denying permission of Libyan aircrafts to take off from, land in or fly over Member State territory, prohibiting the supply of aircraft components or materials, and prohibiting the sale of weapons and military equipment (SC RES 748, 1992). However, twenty months after the adoption of resolution 748, Libya had still not complied with the Security Council’s request to cooperate with the investigations and failed to surrender the terrorist suspects. As a result, the Council adopted resolution 883 which strengthened the sanctions imposed against Libya. In addition to the above-mentioned sanctions, Member States were prohibited from supplying large pumps and motors that could be used for transporting gas or oil, equipment for oil terminals, and any type of refining equipment (SC RES 883, 1993).

The measures outlined in resolution 1054 pertaining to Sudan included diplomatic sanctions that required Member States to “significantly reduce the number and level of the staff at Sudanese diplomatic missions and consular posts and restrict or control the movement within their territory of all such staff who remain” (SC RES 1054, 1996, para. 3 [a]). Additionally, international institutions and organizations were required to refrain from holding conferences in Sudan under resolution 1054 (SC RES 1054, 1996). Sudan’s failure to comply with resolution 1054 resulted in the Council drafting resolution 1070, which strengthened the sanctions to prevent Sudanese aircrafts from taking off from, landing in, or flying over the territories of United Nations Member States (SC RES 1070, 1996)

In contrast to the approach of the Security Council prior to the state-sponsored terrorism stage, where there were no tools used in order to combat terrorism, the use of sanctions as a means to address terrorism as a growing threat to international peace and security was intended to punish state governments suspected of supporting terrorism. These sanctions were justified on the basis of providing these terrorists with safe haven and refusing to surrender them to the appropriate authorities upon request of the Council, as was the case in both Libya and Sudan. Therefore, terrorism had become an international concern, which can be reinforced through the objectives, targets and tools of counter-terrorism policy and can now be treated within the rubric of the Security Council’s mandate, thus legitimating this norm.

Furthermore, the Council also had the objective of deterring future acts of terrorism from occurring, which is evidenced further by the Council's tools used in order to combat state-sponsored terrorism.

### **Shift in Norms**

The objectives, targets and tools present throughout the state-sponsored terrorism stage work together to reinforce the norm of international terrorism. At this point in time the threat of terrorism was viewed by the Security Council as originating from state governments, who were supporting individual terrorists. The fact that terrorism was viewed as an international threat required the Council to take greater action against terrorism than it had in the past. As a result, state governments were the targets of the Council's counter-terrorism policies in order to force them to comply with turning over the perpetrators and halting their support of terrorism. In order to accomplish this task, the Council implemented sanctions of both an economic and diplomatic nature against these state governments, demonstrating further that terrorism had become a state-based and international concern.

### **Resolution 1267 as a Turning Point for Counter-Terrorism Policies**

State-sponsored terrorism was still the framework in place in 1998, when two United States Embassies were bombed in Tanzania and Kenya (see Appendix A for a timeline of important events and resolutions). These bombings significantly increased the concern of the Security Council over the situation in Afghanistan, where the Taliban regime was harboring terrorists from the Al Qaeda network and allowing them to train within their borders. Osama bin Laden, leader of the Al Qaeda terrorist group, had taken responsibility for the embassy attacks (SC RES 1267, 1999). It was these events and

discoveries that led to the Security Council's adoption of resolution 1267 in 1999 on Afghanistan.

In resolution 1267, the Council strongly condemned “the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and planning of terrorist acts...” (SC RES 1267, 1999, p. 1). Furthermore, through resolution 1267, the Council was seeking retribution for Osama bin Laden for orchestrating the bombings of two U.S. Embassies in Kenya and Tanzania, while taking action against the Taliban for their failure to turn over bin Laden (SC RES 1267, 1999). In addition, when dealing with the Taliban's support of terrorism in Afghanistan, the Council expressed that they were “particularly disturbed by the Taliban's refusal to comply with the Security Council's demand that it turn over the international terrorist Usama bin Laden... and by training in Taliban-controlled territory of mercenaries to carry out terrorist activities in neighboring and other countries” (UNSC 4125, 2000, p. 9). According to the Council, “such actions by the leadership of the Taliban represent[ed] a blatant challenge to the entire international community and flagrant interference in the internal affairs of other states” (UNSC 4125, 2000, p. 9). Finally, under resolution 1267, the Security Council required all states to impose sanctions on the Taliban in Afghanistan, this time much more severe and consequential than those implemented against Libya and Sudan a few years prior. The resolution decided that all states were to “deny permission for any aircraft to take off from or land in their territory if it is owned, leased or operated by or on behalf of the Taliban...” (SC RES 1267, 1999, para. 4 [a]). Additionally, and most significantly, states were required to “freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking

owned or controlled by the Taliban... and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban..." (SC RES 1267, 1999, para. 4 [b]).

Resolution 1267 also saw the creation of the 1267 Sanctions Committee, which was given the task of seeking further information from Member States regarding the actions they have taken in order to implement resolution 1267 within their own borders. At the same time, the Committee was tasked with seeking "from all States further information regarding the action taken by them with a view to effectively implementing the measures imposed..." by resolution 1267 (SC RES 1267, 1999, para. 6 [a]). In addition, the Committee was also "to consider information brought to its attention by States concerning violations of the measures imposed [by resolution 1267] and to recommend appropriate measures in response thereto..." (SC RES 1267, 1999, para. 6 [b]). Although the creation of committees to oversee the implementation and assess the efficacy of Security Council resolutions was common, the 1267 Committee marked a shift in the power given to a Security Council Committee. In the past, committee activities were limited to monitoring the implementation of Council resolutions amongst Member States, and past committees did not have the power to enforce sanctions against states (Hudson, 2007).

On the one hand, resolution 1267 targeted the Taliban, the ruling government of Afghanistan at the time, directly. On the other hand, it targeted the Taliban as a result of the actions of the Al Qaeda terrorist network. The Council's targeting of Al Qaeda was important, as it marked a shift in the targets of counter-terrorism policies. Previously, the focus had been on targeting state governments for supporting terrorism. Now, not only was a state government being targeted, but also an independent terrorist organization. In

addition, the acts of terrorism related to the situations in both Libya and Sudan were committed by smaller groups of individuals, and not large trans-border terrorist networks.

In this light, Resolution 1267 was in one respect the consolidation of the Security Council's understanding and approach to terrorism as an issue of international peace and security, requiring collective action in the form of sanctions *against* states. However, in another, it also marked the beginning of a different conceptualization of the challenges of terrorism through a transnational network, resulting in a different set of understandings and objectives, and different specifications for the appropriate tools and tactics to combat terrorism.

### **Post-1267 Regime: Terrorism as a Transnational Threat**

#### **Context**

One year after adopting resolution 1267, which enforced a sanctions regime against the Taliban in Afghanistan as a result of their support of terrorism, the Security Council adopted resolution 1333 on the situation in Afghanistan. Resolution 1333 included significant modifications for the 1267 regime in response to the Taliban's failure to comply with resolution 1267. Most significantly, resolution 1333 required all States "to freeze without delay funds and other financial assets of Usama bin Laden and *individuals* and entities associated with him as designated by the Committee, including those in the Al-Qaida Organization..." (SC RES 1333, 2000, para. 8 [c]). It is important to note however, that the individuals targeted by resolution 1333 were only those who were known members of Al Qaeda, and who were associated with Osama bin Laden himself (SC RES 1333, 2000). Furthermore, the resolution requested that the 1267 Committee maintain an up to date 'Consolidated List' of the individuals deemed to be in

association with Osama bin Laden and Al Qaeda. This Consolidated List would be drawn up based on information provided by UN Member States (SC RES 1333, 2000).

Soon after the adoption of resolutions 1267 and 1333, the 11 September 2001 attacks on the World Trade Centre and Pentagon in the United States became a further catalyst about the priority of terrorism and how best to counter it. In response to the 9/11 terrorist attacks, the Security Council adopted resolution 1373 on threats to international peace and security caused by terrorist acts, which was aimed at ensuring that all states were on the same page regarding the implementation of counter-terrorism policies and ensuring that states criminalized terrorism within their own borders and enforced counter-terrorism measures of their own. Furthermore, resolution 1373 determined that all states were required to suppress the financing of terrorist acts by criminalizing the provision of funds, for any reason, to any individual or entity who plans to commit an act of terrorism, in addition to freezing the assets of these individuals (SC RES 1373, 2001). In January 2002, the Council adopted resolution 1390 on Afghanistan, which expanded the scope of the 1267 regime in order to allow for the targeting of “Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them...” (SC RES 1390, 2002, para. 2).

Although by the end of the 1990s terrorism was perceived to be more than a domestic problem but a threat to international peace and security, the 11 September 2001 attacks required the Security Council to reconsider the adequacy of security measures in order to address the evolving threat of terrorism. The 9/11 terrorist attacks presented a threat that was novel from previous concerns about civil aviation. These attacks were committed by a large international terrorist organization, and involved mass casualty

attacks through the use of hijacked aircrafts as weapons. In addition, the threat of terrorism was becoming more international and no longer viewed as stemming from state governments, and not constrained to a specific state or region of the world. The 9/11 terrorist attacks on the United States marked a significant turn in the Security Council's approach to counter-terrorism, building on the 1267 counter-terrorism regime.

## **Counter-Terrorism Policy**

### ***Objectives***

Following the Security Council's adoption of resolution 1267, there was a flurry of activity within the Council in relation to terrorism and counter-terrorism policies leading up to, and following, the terrorist attacks of 11 September 2001. This increased activity significantly modified the 1267 regime, beginning with resolution 1333 establishing the 1267 Consolidated List and the targeting of individuals associated with Osama bin Laden and the Al Qaeda network (SC RES 1333, 2000). Within just a few months of the 9/11 attacks, the Council had adopted resolutions 1373 and 1390. These resolutions modified the 1267 regime significantly and further expanded its scope. In addition, terrorism was the primary focus of most of the Council's meetings moving forward. The 9/11 terrorist attacks revealed a "previously unknown dimension of the terrorist threat" and thus required a shift in the Council's perspectives on terrorism and how it should be treated (Hilpold, 2009, p. 146). Furthermore, what was new following the U.S. Embassy bombings in Africa and the adoption of resolution 1267 was "the degree of sophistication of terrorist acts and terrorism's increasingly globalized character. The enormous financial gains from illicit transactions, the abundant availability of small

arms and the sophisticated weaponry alike, as well as easy access to technology help to create an ever more dangerous type of terrorist...” (UNSC 4053, 1999, p. 6-7).

Within this new perspective on terrorism, the Council began to recognize that the threat of terrorism had morphed from its understanding as a state-sponsored activity. Unlike the actions against Libya and Sudan, following the 9/11 attacks Security Council Members acknowledged that there was a new “danger” to the nature and scope of terrorism (UNSC 4413, 2001). Specifically, it noted that “international terrorism in its present form,” has “far-flung its networks”, extending “throughout the whole world.” Unlike threats that could be contained within – or perhaps more precisely – located as emanating within a particular state, this new kind of terrorism, it remarked was better understood as “an insidious and sometimes elusive enemy”, one with no nationality or clear territorial affiliation (UNSC 4413, 2001, p. 11). The threat, the Council concluded, was more ‘enormous’, made larger “in view of terrorism’s increasingly trans-border nature and its growing use of high-technology methods” (UNSC 4213, 2000, p. 10) Furthermore, this new perception of terrorism marks a shift from how the Council previously viewed the threat of terrorism. Throughout the 1990s, terrorism was seen as a threat originating from the support of state governments. Following 9/11, terrorism had come to be perceived as a transnational threat, arising from terrorist networks that could operate from any place in the world, without the support of a state government.

### ***Targets***

Terrorism as a transnational threat not located in any one place resulted in the targeting of members of terrorist networks, not the state apparatus. Accordingly, with the adoption of resolution 1333 in 2000, the Security Council made the groundbreaking shift

to targeting specific individuals, requiring all States “to freeze without delay funds and other financial assets of Usama bin Laden and *individuals* associated with him... including those in the Al-Qaida Organization...” (SC RES 1333, 2000, para. 8 [c]). This resolution was groundbreaking not just in terms of a break with previous protocols and practices, but the very principles of the international system, which at the time of the founding of the United Nations and the Security Council, assumed states to be the primary actors and thus key agents of priority — both as the sources of threat and also the apparatus through which efforts to enhance international peace and security could be facilitated. The targeting of individuals overturned this assumption clearly expressing the view that individuals could be sources of international peace and security, and those individuals need not express that threat on behalf of any given state.

The scope of the 1267 counter-terrorism regime was expanded even further with the adoption of resolution 1390 in 2002 on the situation in Afghanistan. The most significant modification of resolution 1390 was the decision that

“all States shall take the following measures with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and *other individuals*, groups, undertakings and entities *associated* with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) to be updated regularly by the Committee established pursuant to resolution 1267 (1999)...” (SC RES 1390, 2002, para. 2).

Furthermore, the measures to be taken by all states included the requirement to

“freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets, or economic resources are made available, directly or indirectly, for such persons’ benefits, by their nationals or by any person within their territory” (SC RES 1390, 2002, para. 2 [a]).

In addition, States were also required to implement travel bans on these individuals, as well as “prevent the direct or indirect supply, sale and transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related material of all types including weapons and ammunition, military vehicles and equipment... to the aforementioned...” (SC RES 1390, 2002, para. 2 [c]). Therefore, the targeting of individuals outlined in resolution 1390 further solidified individuals as a transnational threat, allowing any individual suspected of being “associated” with terrorism to be targeted by the 1267 regime. As the level of association required for an individual to be targeted as a terrorist was not clearly stated, individuals could be targeted anywhere in the world simply by being deemed to be in association with any terrorist.

### ***Tools***

In the aftermath of resolution 1267, the Security Council maintained that the “primary tool against terrorism is that of sanctions” (UNSC 4243, 2000, p. 17). Accordingly, following the 9/11 attacks, and the perceived harboring and support of the Al Qaeda network by the Taliban, sanctions were directed at the governmental structure of Afghanistan. However, the 9/11 terrorist attacks and the more transnational threat of terrorism required the Security Council to modify their use of sanctions in order to respond to this new perception of terrorism. In particular, sanctions against the government of any given country proved to be ill suited to the evolving understanding of terrorism as a transnational threat operative through networks of connected individuals. This shifting focus on individuals raised concerns about terrorist financing and where these terrorist networks were receiving financial support. Sanctions were thus not

dropped, but modified to include the freezing of assets of individuals, travel bans, and weapon bans. As a result of the growing perception that terrorists had greater global reach as a result of significant advances in science and technology, the Council was forced to turn their focus towards terrorist financing. The Council believed that cutting off the financial flows of terrorist networks would significantly reduce their ability to operate, referring to terrorist financing as “the oxygen of terrorist groups” (UNSC 4710, 2003; UNSC 4413, 2001, p. 16). Furthermore, the Council explicitly stated that “stopping the financing of terrorism... is at the heart of international efforts to disrupt, combat and eventually defeat terrorism” (UNSC 4798, 2003, p. 7). The Security Council outlined their priorities with regards to terrorist financing in the following way:

“the areas that deserve priority treatment are first, to track all of the financial resources that are available to the terrorist networks and to take them out of their reach; secondly, to exchange information which will help in the dismantling of terrorist networks; and thirdly, to ensure that no State provides a haven to anyone associated with the terrorist networks” (UNSC 4413, 2001, p. 9).

The targeting of terrorist financing was directly related to the new perception of terrorism as a transnational threat, as these networks were not state-based (Vlcek, 2009). As a result, the Council was required to change their approach to target individuals through their refined focus on terrorist financing because state governments were no longer providing funding to terrorists.

In order to address the shift in focus towards terrorist financing, the Security Council adopted resolution 1373 in 2001, just weeks after the 9/11 terrorist attacks. Resolution 1373 decided that all states were required first and foremost, “to prevent and suppress the financing of terrorist acts” (SC RES 1373, 2001, para. 1[a]). In addition, States were required to “criminalize the willful provision or collection, by any means,

directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts” (SC RES 1373, 2001, para. 1[b]). Furthermore, the Council believed that resolution 1373 was a “critical step forward” for counter-terrorism policy, as it fundamentally changed the way the international community responded to terrorism going forward (UNSC 4413, 2001; UNSC 4453, 2002). Resolution 1373 required States to cut off the financial resources of terrorist groups, which has resulted in a much stronger approach to sanctions used for combatting terrorism (UNSC 4413, 2001).

The cutting off of terrorist financing under this new perception of terrorism as a transnational threat was unprecedented because of resolution 1373’s mandate “to change fundamentally how the international community responds to terrorism,” requiring cooperation in order to “target terrorists’ ability to solicit and move funds, to find safe haven, to acquire weapons and to move across international borders” (UNSC 4413, 2001, p. 16). While previous resolutions, like 1267 and 1333, had required UN member states to implement sanctions against Osama bin Laden, individuals associated with him specifically, and known members of Al Qaeda, they were not implemented explicitly with the aim of cutting off terrorist financing. According to Hudson (2007), the modified 1267 sanctions regime was significant and unprecedented in four important ways: first, the regime was binding on all states under Chapter VII of the Charter of the United Nations; second, the Council awarded unprecedented law-making powers to one of its sub-committees; third, as previously mentioned, the obligations that the sanctions regime placed on all states was beyond that of previous sanctions regimes in the sense that all states, not just UN Member States, were required to implement these sanctions; finally,

the sanctions regime remains in force indefinitely and does not have a clear end date or goal in sight.

Of particular note is the Counter-Terrorism Committee (CTC), established within the framework of Resolution 1373. The CTC was established specifically to monitor state implementation of resolution 1373, including measures taken to prevent and suppress terrorist financing, and required states to submit periodic reports to the CTC in order to further monitor implementation. According to the Council, the CTC was formed in order to provide a “benchmark for the international community as it assesses its ability to combat terrorism” (UNSC 4413, 2001, p. 2). The CTC differs from the 1267 Committee in the sense that the CTC was established to specifically monitor the implementation of states to combat terrorist financing, while the 1267 Committee’s responsibility is to maintain the 1267 Consolidated List. Furthermore, the CTC is mandated to raise the “average-level of government performance against terrorism” and to upgrade “the capacity of each nation’s legislation and executive machinery to fight terrorism” (UNSC 4453, 2002, p. 4). Resolution 1373 required all states to take significant action to contribute to the fight against terrorism, and the CTC is responsible for ensuring that states honor their obligations. Therefore, the establishment of the CTC through resolution 1373 was an expression of the Security Council’s desire to strengthen counter-terrorism measures, and to monitor the implementation of these measures (SC RES 1373, 2001).

Prevention also played an important role in the Security Council’s counter-terrorism policies in response to the threat of terrorism becoming transnational. The events of 9\11 resulted in “the globalization and standardization of efforts to prevent and deter terrorism” (Luck, 2006, p. 102). Through the implementation of resolutions 1373

and 1390, the Council was increasing their effort to stop acts of terrorism from occurring before they happen. Through the maintenance of the 1267 Consolidated List, individuals were having their assets frozen in order to prevent them from accessing their funds and potentially committing an act of terrorism, or from providing financial resources to a terrorist or terrorist organization. In addition, the Council expressed the belief that “no state is immune from the threat of terrorism or from the threat that its territory could be used to support terrorist activities elsewhere. For these reasons, international cooperation is essential in the fight against terrorism...” (UNSC 4243, 2000, p. 14). Therefore, in this stage, terrorism was perceived to be a new and much more severe threat to international peace and security than it had been in the past, demanding more “resolute and concerted” action by the international community as a whole through the implementation of targeted sanctions and through the requirement that all states contribute to the fight against terrorism (UNSC 4710, 2003, p. 3). In addition, one of the goals of the Security Council’s counter-terrorism policies was to “enhance the ability of the members of the international community to combat terror over the long term... There is no deadline in this struggle, no foreseeable end to it” (UNSC 4513, 2002, p. 8).

### **Shift in Norms**

The objectives, tools and targets in the transnational terrorism stage all work together to reinforce the norm of the individualization of terrorism. Here, terrorism is no longer viewed as stemming from state governments, and the Security Council has recognized that terrorism can operate from anywhere in the world, as the threat of terrorism is coming from transnational terrorist networks. This transnational threat resulted in the Council’s targeting their counter-terrorism policies towards individuals,

since acts of terrorism were now being committed by individuals who were not acting on behalf of a specific state. Furthermore, these individuals could be targeted simply for being “associated” with terrorism in any way, and without committing or attempting to commit any terrorist act. As a result, the Council was required to modify its sanctions regime in order to combat terrorist financing, reinforcing the focus on individuals through implementing asset freezes and travel bans against these targeted individuals.

## **Conclusion**

The two phases of terrorism that were present throughout the Security Council’s counter-terrorism history demonstrate how much has changed since the Council’s inception. Until the state-sponsored phase, terrorism in general was not a major priority for the Security Council. Terrorism was absent from Security Council resolutions and discussions until the 1970s and 1980s when civilian airline hijackings and hostage-taking were becoming issues of increasing concern. In addition, the stalemate within the Council that was produced by the tensions of the Cold War contributed to the lack of concern showed towards terrorism by the Council, therefore resulting in issues of terrorism being left for states to deal with domestically.

The first phase of state-sponsored terrorism demonstrated a shift in norms from terrorism as a domestic concern to terrorism as an international concern. Following the Cold War, the Security Council was forced to deal with state-governments, like Libya and Sudan, supporting terrorism. As a result, the Council took significant action in the form of economic and diplomatic sanctions implemented against these state governments in order to force compliance with Council requests to surrender the suspected terrorists to

face prosecution for their actions, in addition to preventing all states from supporting terrorism.

The second phase of transnational terrorism resulted in another shift in norms towards the individualization of terrorism. During this phase, terrorism was viewed as a transnational threat arising from terrorist networks, and thus individuals, that could operate from anywhere in the world. The focus was no longer on targeting state governments, and sanctions were modified in order to target individuals and combat terrorist financing through freezing assets of individuals deemed to be “associated” with terrorism. In addition, these modified sanctions were implemented with the goal of preventing future acts of terrorism from occurring, by cutting off the financial resources of suspected terrorists before they could lend any form of support to terrorist organizations. As a result, those targeted by the preventive sanctions have had certain individual human rights suspended under the Council’s counter-terrorism regime. It was the tension between these preventive sanctions and the suspension of human rights that ultimately resulted in the case of *Kadi v. Council and Commission*.

## **Chapter 3: Human Rights and the Security Council within the Context of Terrorism**

### **Criticisms of the Security Council's Counter-Terrorism Regime**

One of the challenges resulting from the emergence of terrorism as a threat to international peace and security was human rights considerations. At this point in time, although no formal definition of terrorism existed, the Security Council consistently referred to terrorism as “a violation of human rights” and “a threat to the public freedoms that reign in a State of law and establishes an atmosphere of psychosis, fear and terror among the peoples who are its victims” (UNSC 4053, 1999, p.11). While terrorism was viewed by the Council as a mass violation of human rights, the way in which the Council dealt with the protection of human rights following the 9/11 attacks changed significantly. As a result, the focus shifted towards preventing individuals from committing acts of terrorism, and protecting the larger global population from mass human rights violations that could occur at the hands of terrorists.

The terrorist attacks of September 11, 2001 significantly changed the way the Security Council viewed both international security and human rights. Following the 9/11 attacks, the Security Council's primary objective for combatting international terrorism became preventing future acts of terrorism from occurring by targeting individuals and cutting off terrorist financing (Johnstone, 2008; Yordan and Messmer, 2009). As a result of this shift in objective with regard to counter-terrorism policies, there was a shift in the Council's overall objectives for human rights in the fight against terrorism. The conversations that were held within the Security Council that took place following the 9/11 terrorist attacks, in addition to the language used in the Council's counter-terrorism resolutions, demonstrated this shift where individuals had become the targets of counter-

terrorism policy and where preventative sanctions were used against them, suspending certain fundamental rights. Furthermore, while the Council had taken a great deal of action towards combating terrorism, it has been criticized for how it dealt with individual human rights in the process. Beginning with the adoption of resolutions 1373 and 1390 soon after 9/11, which made significant modifications to the 1267 sanctions regime, the Council began an intensive program in order to cut off terrorist financing while implementing ambiguous guidelines regarding which individuals could be labeled as terrorists (Luck, 2006; Michaelsen, 2010).

While the Security Council as a whole was very supportive of the work of both the 1267 Committee and the Counter-Terrorism Committee, as well as the 1267 sanctions regime, numerous scholars throughout the international community were critical of the work of the Security Council and its sub-committees with regards to combatting international terrorism. One of the biggest criticisms of both the 1267 regime and the 1267 Committee had been the alleged breach of due process rights, in particular the right to a fair hearing. Many scholars were critical of this counter-terrorism regime because they believed that the Security Council, as a principle organ of the United Nations, had an obligation to comply with standards of due process (Hudson, 2007; Fassbender, 2006). Once an individual was placed on the 1267 Consolidated List, their rights of due process were taken away, and it became very difficult for a listed individual to contest their listing under this regime. Prior to 2006, there was no formal process allowing for listed individuals to be removed from the Consolidated List (Hudson, 2007).

The lack of due process for targeted individuals that resulted from the 1267 regime was considered to be a human rights concern. This concern resulted from the fact

that rights of due process are included in the Universal Declaration of Human Rights. Article 10 states “ Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations and of any criminal charge against him” (GA RES 217 A, 1948, Article 10). Therefore, principles of due process have been an essential component for the protection of fundamental human rights thus making the listing of individuals a controversial aspect of the 1267 regime, as the targeting of individuals had a direct impact on these individuals’ rights and freedoms (Fassbender, 2006). Specifically, many scholars have called for guidelines regarding the listing of individuals to be much more specific in particular because of the potential human rights violations of listed individuals, which is the aspect of the regime that has been criticized most. Commentators have criticized both resolution 1267 and the 1267 Committee for human rights violations with regards to due process of law, and the difficulty these listed individuals have had for challenging the sanctions implemented against them (Uruena, 2007). Furthermore, it has been argued that the 1267 Consolidated List “unduly restricts due process of individuals, as (a) the burden of proof for listing is not demanding enough; (b) there is no procedure for the independent review of a listing decision; (c) there is no legal remedy available for listed individuals; and (d) individuals lack legal standing before the Committee to challenge listings” (Uruena, 2007, p. 326).

### **Human Rights in the Age of Terrorism**

The Security Council had stated on numerous occasions that international terrorism was a mass violation of human rights (UNSC 4053, 1999). Following the 9/11 attacks, Council members explicitly stated that “it is essential to remember that the fight

against terrorism is above all a fight to preserve fundamental rights and sustain the rule of law” (UNSC 4618, 2002, p. 4). Therefore, by fighting terrorism the Council believed it had also taken action in order to protect and preserve human rights. Furthermore, the Council stated that “the action of terrorists is an attack on human rights and individual rights, and the fight against terrorism is itself an extension of human rights” (UNSC 4561, 2002, p. 21). Regarding terrorism specifically, the Council’s objective became to fight terrorism through cutting off terrorist financing under resolutions 1373 and 1390, resulting in the targeting of certain individuals who were deemed to be associated with Osama bin Laden or Al Qaeda (SC RES 1373, 2001; SC RES 1390, 2002). Specifically, the Council decided that “all States shall take the following measures with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them...” and these measures included the obligation to “freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities...” (SC RES 1390, 2002, para. 2-2[a]). Specifically, human rights concerns stemmed from the targeted individual’s lack of a right to due process once they had been targeted and placed on the 1267 Consolidated List. These counter-terrorism policies therefore demonstrated that counter-terrorism and international security were being placed on a higher level of priority than certain individual human rights concerns. Furthermore, the Council had been contradictory regarding these human rights concerns, specifically recognizing that “there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary... in the long term, we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against

terrorism” (UNSC 4453, 2002, p. 3). Furthermore, Council Members stated that sacrificing other key priorities, such as human rights, in the fight against terrorism would be “self-defeating” (UNSC 4453, 2002, p. 3). Therefore, it became evident that there was a tension within the Council when it came to striking an effective balance between human rights and counter-terrorism. The Council had also stated that the protection of human rights was not their primary responsibility, and that the responsibility for human rights lay with other UN bodies (UNSC 4453, 2002). By making this claim, the Council was contradicting its human security framework from the 1990s, where the protection of individual human rights (specifically, civil and political rights) were the primary focus of the Council’s security policies. Furthermore, respect for human rights were not mentioned in these resolutions regarding the targeting of terrorist financing (SC RES 1390, 2002).

The targets of the Security Council’s counter-terrorism policies were those who had committed acts of terrorism. However, as a result of resolution 1390, those targets also included individuals deemed to be “associated” with terrorists, and these associated individuals have in turn had their human rights suspended as a result of their right to due process of law being taken away upon being placed on the 1267 Consolidated List (SC RES 1390, 2002). The Council’s actions here have demonstrated a shift in the Council’s approach towards human rights. Previously, the Council was focused on targeting state governments who had committed human rights abuses against their own citizens. However, the Council was now targeting individuals as a preventative measure in the sense that they were targeting these individuals without any sort of state or territorial affiliation for acts of terrorism they may or may not commit in the future.

During this time, the Security Council had made an effort to protect human rights despite these evolving counter-terrorism policies. These counter-terrorism policies were enacted to protect against what the Council has referred to as “mass human rights violations” at the hands of terrorists and the Council has stated frequently that States must abide by human rights regulations when implementing their counter-terrorism measures. “...We should not underestimate the importance of ensuring that human rights are respected in the fight against terrorism. Addressing human rights is fundamental to addressing some of the root causes of terrorism. Moreover, ensuring that international human rights... are respected adds to the legitimacy of the sanctions regime and how it is perceived” (UNSC 4976, 2004, p. 15). However, while Council members have expressed the importance of respecting human rights in their meetings regarding counter-terrorism measures, this respect for human rights was not expressed within the Council’s counter-terrorism policies. Resolutions 1373 and 1390, as well as other resolutions drafted in order to modify the 1267 regime, did not explicitly state that States were required to respect human rights while implementing counter-terrorism measures (SC RES 1373, 2001; SC RES 1390, 2002).

Resolution 1373 also saw the creation of the Security Council’s Counter-Terrorism Committee, which was created in order to monitor State implementation of counter-terrorism measures. Since its creation, the CTC has been criticized as its work raises a number of concerns relevant to human rights. When specifically discussing the CTC, Roele (2013) summarized the Committee’s work as using “disciplinary power to control the activities of states with the aim of eliminating terrorism as a threat to international peace and security” (p. 57). Furthermore, she claims that the Committee has

developed techniques of surveillance and coercion in order to ensure the normalization of states, through reports, country visits and other means of data collection. As a result, she believes that “the boundary between the normal and abnormal is marked by those states willing and able to undertake their international responsibilities of financial regulation, border security and transboundary cooperation and those obdurate or failing states which are not” (Roele, 2013, p. 57). Furthermore, Roele (2013) criticizes the CTC regarding how it exercises its power, claiming that the CTC’s actions were “neither unauthorized nor bloody, nor can it be viewed as a direct attack on sovereign consent” (p. 60). In addition, she believes that the Committee has made a large amount of progress in its attempt at normalizing states through the obligations outlined in resolution 1373, but has done so “in a way that jeopardizes its commitment” to the guiding principles of the Security Council and the United Nations as a whole “and that operates by way of surveillance and correction” (p. 60). These comments are contrary to how most of the Security Council members see the CTC. In an April 2002 Council meeting, the delegate from Russia best expressed the view of the Council regarding the CTC, and how the Council had a clear understanding that the CTC “should not, and will not, function as a repressive organ or in any way go beyond the limits of its mandate” (UNSC 4513, 2002, p. 17). As a result of the drafting of resolution 1373 and the development of the Counter-Terrorism Committee, many scholars and human rights activists have called for a fair balance between collective security and human rights, and argued for the recognition that “the protection of some human rights can endanger other human rights or values other than human rights” (Freeman, 2005, p. 46).

As the Security Council had turned the focus of their counter-terrorism policy towards targeting individuals, they began implementing resolutions that may have negative implications for human rights in an effort to combat terrorism. While it had been mentioned that human rights were important and that a fair balance must be struck between human rights and international security, no resolutions explicitly mention this balance. Some scholars have claimed that both the UN and the Security Council have taken a step back with regards to human rights, in the sense that terrorism is seen as a violation of human rights, however counter-terrorism measures are arguably also infringing on human rights (Hicks, 2005). As a result, a tension has emerged between the two norms of security that emerged in the 1990s: the individualization of security within the human security framework and the individualization of security within the counter-terrorism framework. This tension specifically arises between the Council's primary objective to protect individual human rights within the human security framework, and the Council's objective to target individuals within the security framework surrounding counter-terrorism. In a June 2002 meeting, the President of the CTC addressed the Security Council and finally engaged in conversations around human rights concerns and the importance of balancing collective security and counter-terrorism with human rights. However, the President did not intentionally start this conversation, and only engaged in the discussion as a result of human rights concerns being raised by other states (specifically, Mexico and the European Union). In this meeting, the CTC President stated that human rights were not the CTC's major function, and that he believed the Committee had done a good job at balancing counter-terrorism and human rights. Furthermore, the President admitted that a shadow is constantly placed over human rights by excessive

security, but also that a shadow is still placed over human rights with inadequate security measures. However, the President did mention that what the CTC was promoting must be compatible with human rights (UNSC 4561, 2002; UNSC 4618, 2002).

Although human rights considerations were important to the Security Council, the lack of due process rights under the 1267 regime created a tension between counter-terrorism strategies and human rights provisions. This tension came to the fore in the *Kadi* case.

## **The *Kadi* Case and Norm Contestation**

### **The Case of *Kadi v Council and Commission***

The case of *Kadi v Council and Commission* was brought before the European Court of First Instance in 2005. Yassin Abdullah Kadi, a native of Jeddah, Saudi Arabia, was a businessman with significant financial assets in the European Union. He was placed on the resolution 1267 Consolidated List in 2001 following the 9/11 terrorist attacks, under suspicion that he was somehow associated with the Al Qaeda network and Osama bin Laden. As a result, Kadi's assets were frozen immediately without notice, and without communication of the grounds for his inclusion on the list, and he proceeded to file an application to the Court of First Instance in December 2001 (Kadi, [2005]). Before the Court, Kadi claimed that the regulations adopted by the European Community implementing resolution 1267 should be annulled, in so far as they relate to Kadi's particular case. In order to support this claim, Kadi put forward three grounds for annulment in his application, all alleging breaches of his fundamental rights. These grounds included alleged breaches of the right to a fair hearing, the right to respect for property and of the principle of proportionality, and the right to effective judicial review

(Kadi, [2005]). On the other hand, the Commission argued that the sanctions implemented against Kadi were appropriate and that “the promotion of international security, both within the Union and without, must be regarded as forming part of the general framework of the provisions of the EC<sup>1</sup> Treaty” (Kadi, [2005], para. 76). Furthermore, through the EC Treaty, the contracting parties of Europe confirmed “the solidarity which binds Europe and the overseas countries- in accordance with the principles of the Charter of the United Nations- and declared themselves resolved to strengthen peace and liberty” (Kadi, [2005], para. 76). Kadi specifically argued that according to relevant case law, fundamental rights “recognized and guaranteed by the constituents of the Member States...form an integral part of the Community legal order” (Kadi, [2005], para. 138). Furthermore, Kadi argued that Security Council resolutions did not give the Council and Commission the right to revoke fundamental rights without proper justification before a court and producing proper evidence: “As a legal order independent of the United Nations, governed by its own rules of law, the European Union must justify its actions by reference to its own powers and duties vis-à-vis individuals within that order” (Kadi, [2005], para. 140).

With regard to his right to property, Kadi argued that the Community institutions did not possess the power to assess the evidence and considerations that could rightfully justify these sanctions being implemented against him and claimed that the institution did not consider any of the evidence against him. As a result, Kadi believed that the institutions had not submitted any evidence to the court that proved the evidence against him had been considered in order to justify these sanctions (Kadi, [2005]). Furthermore,

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<sup>1</sup> By EC, the Court is referring to the European Community

Kadi believed he had “been accused of the most serious form of criminal wrongdoing, involvement in a terrorist organization responsible for the attacks of 11 September 2001...” that his reputation had been destroyed and his property frozen “without limit in time or as to quantum, all of which has happened in circumstances in which, first, the Council [had] not considered the evidence against him; second, the Council [was] unwilling to provide him with any opportunity to dispute the freezing of his assets and [was] not in a position to do so and, third, the Council assert[ed] that the Court cannot take any action to investigate the correctness of the decision to freeze his assets” (Kadi, [2005], para. 149).

According to the Council and Commission, they were honoring their obligations as Member States of both the European Union and the United Nations by implementing resolution 1267 and its subsequent, amending resolutions. Furthermore, the Commission stated that the measures aimed at freezing funds and assets of individuals suspected of involvement in terrorism and terrorist organizations could not be viewed as “widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole...” (Kadi, [2005], para. 81). Furthermore, they believed that the institution’s intention was merely to honor and give effect to their obligations as Member States of the United Nations under Article 25 of the Charter of the United Nations “by means of the automatic transposition into the Community legal order of the lists of individuals or entities drawn up by the Security Council or by the Sanctions Committee in accordance with the applicable procedure” (Kadi, [2005], par. 155). Therefore, the Council and Commission maintained that as Member States of the United Nations, they had agreed to carry out the decisions of the Security Council without reservation, with the

higher goal of the maintenance of international peace and security, as they claimed that obligations imposed on Member States under Chapter VII of the Charter of the United Nations must prevail over other subjected international obligations. Since the Community itself is not a member of the United Nations, the Community's own Member States are Members of the United Nations. Therefore, the Community was required to act in such a way that would allow its Member States to fulfill their obligations as a result of their belonging to the United Nations.

Specifically, the Council and Commission was of the belief that even if the Court determined that the regulations in question were in violation of Kadi's fundamental rights, the circumstances in which those regulations were adopted made it impossible for there to be any unlawful conduct on the part of the Council and Commission (Kadi, [2005]). This means that as a result of the fact that the regulations were adopted from the Security Council's 1267 regime, actually implementing this regime and carrying out the regulations could not make the Council and Commission's conduct unlawful. According to the Council and Commission, "when the Community takes measures for the purposes reflecting the desire of its Member States to perform their obligations under the Charter of the United Nations, it necessarily enjoys the protection conferred by the Charter and, in particular, the effect of legality" (Kadi, [2005], para. 161). Furthermore, the Council argued that the Community had no investigative powers, no discretion, and no room for political evaluation and were simply required to implement the measures adopted by the Security Council in their resolutions aimed at maintaining international peace and security. As a result, the Council claimed that they had absolutely no power to provide any mechanism through which to review those measures (Kad, [2005]).

After evaluating the arguments of both parties, the European Court of First Instance found that the application submitted by Kadi should be dismissed. The Court found that resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations are binding on all Member States of the European Community. As a result, the Court determined that the Community had a responsibility to take all measures necessary in order to ensure that those resolutions were implemented and put into effect (Kadi, [2005]). Furthermore, when discussing the alleged breach of the right to property and the principle of proportionality, the Court found that the Security Council's regulations regarding targeted sanctions do allow for some exemptions. Unless the Sanctions Committee specifically objects, national authorities may declare the freezing of certain funds inapplicable when those funds are necessary to cover basic expenses such as food, rent, medicine, and taxes (Kadi, [2005]). "Thus, in so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law, it is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*" (Kadi, [2005], para. 242). The Court determined however, that in this situation, it was very clear that Kadi had not been deprived arbitrarily of that right. Also, it was determined that the temporary freezing of funds was simply a precautionary measure which the Court felt was not as harsh as confiscation and therefore did not affect the substance of an individual's right to property and only effected their use of financial assets (Kadi, [2005]). When discussing the alleged breach of Kadi's right to be heard, the Court determined that the Community was required to implement resolutions adopted by the Security Council and decisions made by the Sanctions Committee that did not authorize the Community to provide any form of mechanism in order to examine

individual cases and situations. The Court found that mechanisms for examination fell strictly within the jurisdiction of the Security Council and the Sanctions Committee, and “the principle of Community law relating to the right to be heard cannot apply in such circumstances, where to hear the person concerned could not in any case lead the institution to review its position” (Kadi, [2005], para. 258). Therefore, the Court decided that Kadi’s alleged infringement of the right to be heard by the Council with regard to the contested regulation must be rejected. Additionally, the Court believed that Kadi did not have the right to be heard by the Sanctions Committee regarding his inclusion on the Consolidated List because no such right is provided in resolution 1267 and any of its subsequent, modifying resolutions (Kadi, [2005]). Finally, the Court determined that “in the circumstances such as those of this case, in which what is at issue is a temporary precautionary measure restricting the availability of the applicant’s property, the Court of First Instance considers that observance of the fundamental rights of the person concerned does not require the facts and evidence adduced against him to be communicated to him, once the Security Council or its sanctions Committee is of the view that there are grounds concerning the international Community’s security that militate against it” (Kadi, [2005], para. 274).

The Court of First Instance therefore ruled against Kadi and in favor of the Council and Commission.

Following the decision of the European Court of First Instance, Kadi appealed the decision before the European Court of Justice in 2008. Kadi put forth two grounds of appeal. First, he alleged that there was a lack of any legal basis for the contested regulation from resolution 1267, and second that the Court of First Instance breached a number of rules of international law and as a result, this breach led to the improper assessment of his argument relating to the infringement of his fundamental rights (Kadi, [2008]). Upon considering the arguments of both Kadi and the Council and Commission, the European Court of Justice determined that the case should be decided in favor of Kadi

and the previous decision of the Court of first Instance would be overturned. The court of Justice found that according to previous case law, fundamental rights “form an integral part of the general principles of law whose observance the Court ensures” (Kadi, [2008], para. 283). Furthermore, the Court determined that the inclusion of Kadi’s name on the Consolidated List did not allow for his right to be heard, that his right to effective judicial review was not respected, and that the grounds for Kadi’s inclusion on the list should have been communicated to him. As a result, Kadi was not in a position where he was able to make his point of view of the situation heard, and therefore his right of defense was not respected (Kadi, [2008]). With respect to Kadi’s claim of the alleged breach of his right to property, the court determined that according to European case law, a reasonable relationship of proportionality must exist between the measures implemented and the aim of these measures. The Court must then decide whether a fair balance has been struck “between the demands of the public interest and the interest of the individuals concerned” (Kadi, [2008], para. 360). While the Court believed that the right to property is not absolute, and that restrictive measures placed on an individual’s property are justified, the fact that the contested regulation did not provide Kadi with a reasonable opportunity for “putting his case to the competent authorities,” the Court determined that the contested regulation constituted an unjustified restriction of Kadi’s right to property (Kadi, [2008], para. 368-370).

### **Problems Arising from *Kadi***

By the time the *Kadi* case was brought before the European Court of First Instance, the norm of the individualization of security with regards to the Security Council’s counter-terrorism policies was developing and becoming a more accepted

practice, as can be seen by the adoption of resolutions 1373 and 1390 especially. This new norm was in direct conflict with norms surrounding human security that had emerged during the 1990s, in particular the individualization of security surrounding the protection of human rights, resulting directly in the *Kadi* case. The ruling in *Kadi* demonstrated problems in the way that both the United Nations and the Security Council were managing the broader human rights role of the United Nations, along with the more terrorism based security practices of the Security Council.

The *Kadi* case raised some contradictions with regard to norms surrounding human security that are important to take note of. First, the Security Council is an organ of the United Nations, which over time, has placed importance on the protection of human rights as a question of security. Specifically, this view of human rights as a question of security was part of the Responsibility to Protect (R2P) and human security doctrine that was significant throughout the 1990s, at the same time as the adoption of resolution 1267 and leading up to the 9/11 terrorist attacks. During this time, human rights had been accepted as both legal and normative standards, through which the quality of human dignity would be judged (Landman and Carvalho, 2010). Following the end of the Cold War, the goal of the international human rights regime became the regulation of state behavior towards matters that had previously been considered as internal state matters. Furthermore, this regime was dependent on “norms that enable the human rights community to hold states accountable for those actions that violate the dignity of individuals residing within their jurisdiction” (Landman and Carvalho, 2010, p. 6). This shift in human rights policies as a result of the R2P doctrine also had important implications for state sovereignty. First, certain human rights were now considered to be

universal, therefore the legitimate scope of all states' sovereignty had been reduced, "shrinking the exclusive jurisdiction of the state and increasing their accountability to other states" (Clunan, 2009, p. 9). Second, human rights had given individuals the legal personality to confront states engaging in violations, specifically as a result of the development of international conventions dealing with those human rights (Clunan, 2009). Therefore, the R2P doctrine placed a high value on the protection of human rights as a necessary component for maintaining international peace and security as it was protecting the broader global community from human rights abuses taking place at the hands of state governments

Following the adoption of resolution 1267 and subsequent resolutions modifying the 1267 counter-terrorism regime, protecting the broader international community from individuals became the Security Council's top priority in order to maintain international peace and security. The shift towards individuals resulted from the new transnational nature of terrorism, where terrorists were not constrained by any territorial boundary or connection, bringing about a threat that would be ever present. As was demonstrated by the events of *Kadi*, the measures enforced by the Council under the 1267 regime with regard to the listing of individuals on the 1267 Consolidated List for their alleged association with terrorism, the due process and property rights of these individuals were not respected. These rights formed part of the broader collection of human rights, listed under the Universal Declaration of Human Rights, that the UN sought to protect with the R2P doctrine in the 1990s. Security had become individualized as a result of the Council's counter-terrorism policies, resulting in a contradiction of the perspective on human rights that was present throughout the 1990s.

Although the individualization of security was present through R2P in human rights, most of this was still focused on sovereignty. The criticisms of both *Kadi* and the 1267 counter-terrorism regime demonstrate that it is not enough to simply just hold states accountable, the United Nations needs to be held accountable as well. With the *Kadi* case, the issue is not just about state governments, it is also about the actions of the UN. Furthermore, through the 1267 regime, the Security Council was taking a more proactive approach in the sense that they were telling states what to do in order to combat terrorism. In this new phase of transnational terrorism, the Security Council is developing guidelines and benchmarks that states must follow and implement in order to help the Council enforce its counter-terrorism regime and implement their targeted sanctions.

According to the case law, the Commission submitted “that any decision to remove or alter the [1267] list as adopted by the Security Council might seriously disrupt the international relations of the Community and its Member States” and that the 1267 regime measures are “designed to protect all States against terrorist acts”(Kadi, [2005], para. 163). This statement by the Commission demonstrates that knowledge regarding counter-terrorism and how it should be treated is being accepted and not questioned by UN Member States following the lead of the Security Council. In addition, the Council and Commission believed that placing Kadi on the Security Council’s list under resolution 1267 meant that they would be honoring their commitment to counter-terrorism as UN Member States (Kadi, [2005]). This belief stems primarily from the fact that the 1267 regime had the status of law. In resolution 1333 all States and international and regional organizations, including the United Nations and its specialized agencies,

were called upon to “act strictly in accordance with the provisions of this resolution...”

(SC RES 1333, 2000, para. 17). In addition, under resolutions 1373 and 1390,

“the obligation was placed on all Member States to implement in full [the resolutions], including with regard to any member of the Taliban and the Al-Qaida organization, and any individuals, groups, undertakings and entities associated with the Taliban and the Al-Qaida organizations, who have participated in the financing, planning, facilitating and preparation or perpetration of terrorist acts or in supporting terrorist acts” (SC RES 1390, 2002, para. 4).

Furthermore, it was reinforced by the Security Council that resolution 1373 “imposes binding obligations on all States to suppress and prevent terrorism.” (UNSC 4453, 2002, p. 4). Therefore, it makes sense that the European Council and Commission submitted this statement to the courts in *Kadi*:

“In this case the general interest of the Community and its Member States in compliance with the obligations imposed by the Security Council, in order to ensure that individual’s assets cannot be used to promote terrorism, could not be clearer. The measures taken by the Community, which are limited to implementing binding decisions of the Security Council, were dictated by the importance of that objective and they did not strike an unfair balance between the requirements of the public interest and those relating to the protection of the individual’s fundamental rights. In those circumstances, the Council holds the view that the measures taken, even if severe for the applicant, cannot be regarded as inappropriate or disproportionate” (Kadi, [2005], para. 169).

This statement by the Council and Commission demonstrates their strong belief that the targeting of individuals under counter-terrorism policy was acceptable, and necessary in order to protect international peace and security. In addition, it demonstrates a departure from the human security framework that sought to protect individual human rights, which are now being contested in *Kadi* under the 1267 counter-terrorism regime.

The European Council and Commission was attempting to protect individuals from human rights abuses in the form of terrorism through their implementation of the 1267 regime. However, they were now only protecting certain human rights for certain individuals under this regime in the sense that they believed the violations of Kadi’s

rights were justified in order to protect the broader population from terrorism (Kadi, [2005]). Furthermore, the fact that the European Court of First Instance agreed with the Council and Commission and upheld these measures, demonstrated that the targeting of individuals had become a norm and a standard of appropriate behavior. Both the CFI and the Council and Commission believed that Kadi's suspension of rights under the 1267 regime were justified, primarily as a result of the fact that "the objective pursued by the sanctions assumes considerable importance... to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts. The measures in question pursue therefore an objective of fundamental public interest for the international community" (Kadi, [2005], para. 247). Furthermore, their belief was a direct example of how the individualization of security had become a norm. The targeting of individuals along with the freezing of their assets had become "normal" and accepted practices. The *Kadi* case was a direct result of these states becoming "normalized" from being in compliance with the Security Council's counter-terrorism resolutions (Roele, 2013). The suspension of Kadi's rights were a direct result of the Council's preventative policies with regard to counter-terrorism, and were a response to the fact that the threat of terrorism was ever present and not constrained by space or time (Hilpold, 2009). As a result, the Court of First Instance agreed with the Security Council and the European Council and Commission that the suspension of Kadi's rights were justified in order to protect the human rights and security of the broader international community through combatting terrorism.

The biggest problem raised by the European Court of Justice regarding *Kadi*, was the fact that there was no formal process in place for Kadi to contest his listing before the

Security Council. This issue was originally raised by Kadi himself before the Court of First Instance in contestation of his listing, which he believed violated his right to due process of law. Furthermore, the focus of the ECJ was the fact that Kadi did not have the opportunity to have his case heard before the competent authorities (Kadi, [2008]). However, regarding Kadi's right to property, the Court essentially determined that the actual sanctions themselves resulting from the Security Council's 1267 regime that Kadi claimed violated his right to own property, were justified. The ECJ stated that an individual's right to own property is not considered absolute, therefore restrictions on an individual's property are justified (Kadi, [2008]). Therefore, for the ECJ, the fact that Kadi was not provided with a formal process to contest the sanctions imposed against him and the violation of his right to property, is what made the sanctions unjust (Kadi, [2008]). As a result, the most important issue for the ECJ was not so much the content of the sanctions, but the fact that Kadi did not have access to a formal process through which to contest his listing, and through which his right to due process would be respected. Therefore, had Kadi been provided with the proper process to contest his listing under the 1267 regime, before the Security Council and the 1267 Sanctions Committee, the Court may have delivered a different judgment.

Hilpold (2009) perfectly summarizes the contradictions that were exposed as a result of the European Court of Justice's decision in the *Kadi* case, stating that "the need to protect national security may justify some limitations of fundamental rights. At the same time, however, these limitations may not go beyond what is strictly necessary to achieve this goal and it must also be assured that non-derogable rights are not jeopardized" (p. 158). Rights of due process were determined to be non-derogable rights

by the ECJ, meaning that these fundamental rights may not be violated by counter-terrorism measures, contrary to property rights whose suspension were deemed to be permissible under certain circumstances and if proper legal measures were followed (Kadi, [2005]). Furthermore, Article 25 of the Charter of the United Nations outlines that “the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter” (Hilpold, 2009, p. 159; UN Charter, Article 25). In Article 1 of the UN Charter, it is stated under the purposes and principles that the United Nations as a whole is to promote and encourage respect for human rights (UN Charter, Article 1). As a result, the Security Council has a commitment to protect human rights under the Charter of the United Nations, despite the fact that the Council itself is not bound by any human rights covenants. Furthermore, while the Council has repeatedly expressed the view, since 9/11, that the protection of human rights is not the primary concern of the Security Council, the protection of human rights were most definitely a priority throughout the 1990s within the human security framework. Therefore, with regard to the Council’s counter-terrorism policies under the 1267 regime, their mandate of maintaining international peace and security has come into conflict with the broader human rights agenda of the United Nations and has resulted in major contradictions within the Security Council’s policies regarding its mandate of maintaining international peace and security.

## Implications and Conclusion

### Implications of *Kadi*

As a result of the European Court of Justice's decision in *Kadi*, the Security Council followed with a series of modifications to the 1267 sanctions regime in an effort to rectify listing guidelines and procedures that were deemed to be too harsh and detrimental to certain fundamental rights, in particular rights of due process.

Prior to *Kadi*, there were no means for listed individuals to contest their listing on the 1267 Consolidated List. The fact that there were no means for listed individuals to bring their case before the appropriate authorities in order to contest their listing, and thus the freezing of their assets and suspension of their rights, was the primary issue that the ECJ had with the 1267 sanctions regime (*Kadi*, [2008]). Eventually, the Council implemented guidelines with regards to an individual requesting to be de-listed from the 1267 list, however the respective individual or entity was dependent completely on their home state's "willingness to exercise diplomatic protection" (Hilpold, 2009, p. 150). These guidelines for de-listing were first implemented with the adoption of resolution 1730 in 2006. In resolution 1730, the Security Council stated that it was "committed to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions" (SC RES 1730, 2006, p. 1). First, the individual must petition for a review of their case to their government of residence or citizenship. The government will then decide if it chooses to support the petition for review, and if so will then approach the government that proposed the individual's listing. Next, the government of the individual's residence or citizenship may decide whether or not to submit a formal request to the 1267

Committee (Hudson, 2007). However, “the Committee makes all decisions on the basis of consensus, so any one member of the Committee effectively has the ability to veto a request for de-listing” (Hudson, 2007, p. 208). Furthermore, Committee meetings were held privately and Committee members were not required to provide reasons for their objections towards the individual’s request for removal from the Consolidated List (Hudson, 2007). While the final decision does rest with the Sanctions Committee, the attitude initially taken by the individual or entity’s state of residence or citizenship is of significant importance. According to Hilpold (2009), “the decision to forward a petition for delisting to the Sanctions Committee is, to a large extent, a political one and may depend, to a considerable measure, on the political relations between the proponent state and the state of residence or citizenship” (p. 150). Resolution 1730 did not make any modifications for the requirements for an individual to be placed on the 1267 Consolidated List. It is important to note that this resolution was adopted in 2006, after the European Court of First Instance had delivered its decision against Kadi, justifying his inclusion on the list and thus the suspension of his rights. The European Court of Justice had not yet heard Kadi’s appeal of the case at the time this resolution was passed, however resolution 1730 did not have any affect on the *Kadi* case. Furthermore, the ECJ did not believe that the measures that were in place as a result of 1730 were adequate (Kadi, [2008]).

It was not until 2008 when the Security Council made the most significant improvements to the 1267 sanctions regime. These main improvements were brought about by resolution 1822 which reaffirmed the need to combat terrorism as a threat to international peace and security, and to do so “in accordance with the Charter of the

United Nations and international law, including international human rights, refugee and humanitarian law...” (SC RES 1822, 2008, p.1). Furthermore, this resolution reiterated the sanctions implemented with resolution 1390 and once again did not clarify the level of “association” required of a particular individual in order to be included on the 1267 list. However under resolution 1822, when submitting a name to the sanctions committee for inclusion on the list, Member States are required to provide a detailed statement of case, and furthermore “that for each proposal Member States shall identify those parts of the statement of case that may be publicly released, including for use of the [sanctions] Committee... for the purpose of notifying or informing the listed individual or entity, and those parts which may be released upon request by interested States” (SC RES 1822, 2008, para. 12). Furthermore, under this resolution the Council demands that Member States take all possible measures in order to notify an individual or entity of their listing under the 1267 sanctions regime and to include a copy of the statement of case that is made publicly available, including the reasons for the individual’s listing (SC RES 1822, 2008). These new measures are significant in the sense that the procedures that led to the listing of Kadi did not allow for him to be provided with his reasons for being listed. It is important to note however, that determining which aspects of a statement of case are made publicly available, and thus available to the listed individual, are left to the discretion of the Member State requesting that an individual or entity be listed. With regards to de-listing procedures, the Council “directs the Committee to continue to work, in accordance with its guidelines, to consider petitions for the removal from the Consolidated List of Members and or/associates of Al-Qaida, Usama bin Laden, the Taliban who no longer meet the criteria established in the relevant resolutions” (SC RES

1822, 2008, para. 21). In addition, the Council directed the Committee to review all the names on the Consolidated List by 30 June 2010 in order to ensure that the List is up to date and accurate (SC RES 1822, 2008).

The year 2009 saw the Security Council take further action towards modifying the resolution 1267 sanctions regime by creating an ombudsperson through the adoption of resolution 1904. During this time, the Council was very much concerned with the failure of numerous states to provide adequate reports on the measures they had taken to combat international terrorism and comply with resolutions 1267 and 1373 (UNSC 6164, 2009). Resolution 1904 stressed that “terrorism can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all states, and international and regional organizations to impede, impair, isolate and incapacitate the terrorist threat...” (SC RES 1904, 2009, para. 1). Furthermore, through this resolution the Council urged all United Nations Member States to actively participate in both maintaining and updating the 1267 Consolidated List by contributing additional information that would assist in identifying individuals and entities associated with terrorism. Most importantly however, resolution 1904 provided de-listing procedures and created an independent and impartial ombudsperson, with the duty of reviewing requests from individuals, groups, undertakings, or entities seeking removal from the 1267 Consolidated List (SC RES 1904, 2009; Office of the Ombudsperson of the Security Council’s 1267 Committee, 2016). Additionally, the resolution required the Sanctions Committee to complete a thorough review of all names included on the Consolidated list within one year, and implemented a requirement that the Committee review annually all the names that had not been reviewed in three years or more (SC RES 1904, 2009).

In 2011, the powers and mandate of the ombudsperson were increased as a result of the Security Council's adoption of resolution 1989, while the 1267 sanctions regime was renewed and reaffirmed once more. Specifically, the resolution determined that the Office of the Ombudsperson that was previously established in resolution 1904 would be extended for another eighteen months, while also deciding that the ombudsperson would continue to receive requests for delisting of individuals, groups and entities who feel as though they no longer meet the requirement to be included in the Consolidated List, and shall continue to do so in a manner that is both independent and impartial (SC RES 1989, 2011). Furthermore, the Security Council decided that "the Ombudsperson shall present to the Committee observations and a recommendation on the delisting of those individuals, groups, undertakings or entities that have requested removal from the Al-Qaida Sanctions List through the Office of the Ombudsperson, either a recommendation to retain the listing or a recommendation that the committee consider delisting" (SC RES 1989, 2011, para. 21).

The Security Council's changes to the 1267 regime following *Kadi* demonstrated the Council's recognition that certain rights were being unfairly violated, and therefore modifications needed to be made in order to protect certain fundamental rights of listed individuals and to honor a commitment to human rights outlined in the Charter of the United Nations. However, despite these changes, many were still concerned about the implications this regime will continue to have for human rights. Scholars like Hudson (2007), predict that a "clear trend towards a denial of rights has been established" (p. 223). Despite the changes that have been made, the 1267 regime has become a precedent and its scope continues to be expanded. Hudson (2007) urges the Council to reform the

1267 sanctions regime to make it more accommodating towards individual human rights, stating that “the sanctioning regime needs to be amended not only to ensure its compliance with the right to a fair hearing, but also to address other serious problems that are undermining the regime’s objectives” (p. 224). Issues like the vagueness surrounding what constitutes being in “association” with terrorists, as mentioned in resolution 1390, have still not been modified. Therefore, the guidelines regarding who qualifies to be listed under the 1267 Consolidated List are still unclear, despite the fact that new delisting and review procedures have been implemented. As a result, the root of the problem is still the vague requirements for actually placing an individual on the 1267 List. Once these individuals become listed, it is ultimately still at the discretion of the 1267 Sanctions Committee to determine whether or not an individual can be removed from the list. As a result, it is possible that important information may still be withheld from the individual. Therefore, the norm of security surrounding the individualized nature of counter-terrorism is winning out. However, human rights are still very much a concern and many still believe that more work needs to be done in this area.

## **Conclusion**

This thesis used a discourse analysis in order to show that there has been a shift in norms within the Security Council in relation to counter-terrorism and human rights, arguing that a tension does exist between a new individualized norm of security within the counter-terrorism context and the human security framework. In addition, it demonstrated that terrorism and counter-terrorism is constructed as a norm in general through tracing how a set of norms emerged in order to make terrorism a part of the Security Council’s agenda, and both how and why these have changed. Within this

discourse analysis of primary source Security Council resolutions and meeting transcripts, the Council's history with regards to counter-terrorism was separated into two stages: the state-sponsored and international terrorism stage and the transnational terrorism stage. Within each of these stages of terrorism, the objectives, targets and tools of the Council's counter-terrorism policies were identified and studied in order to demonstrate how each of these bases of analysis work together in order to reinforce a norm around terrorism.

Prior to the first stage of state-sponsored and international terrorism, terrorism was not treated as a major concern by the Security Council, and was left for state governments to define and deal with on their own. A shift occurred once terrorism could no longer be ignored by the Council as a result of increased civilian aircraft hijackings and hostage-takings. State sponsored terrorism then emerged in the 1990s following the end of the Cold War, when the threat of terrorism had become understood as a more international threat. State governments were suspected of supporting terrorism and were thus targeted through the implementation of economic and diplomatic sanctions with the goals of stopping state support of terrorism and to force these states to surrender terrorists for prosecution.

Another transition point occurred when resolution 1267 was adopted by the Security Council in 1999. Resolution 1267 signified a shift from state-sponsored terrorism to a more transnational understanding of terrorism. While 1267 was targeting a state government (the Taliban) for supporting terrorism, it was also targeting Osama bin Laden himself who was the leader of a growing, trans-border terrorist organization. After 9/11, the 1267 regime was modified by resolution 1373 and 1390 so that the regime could

target individuals “associated” with terrorism. The sanctions that were previously implemented against state governments were modified in order to be implemented against individuals, and to target terrorist financing. In the transnational terrorism stage, the norm became individualized terrorism as the threat was coming from transnational networks operating from anywhere in the world, and no longer from specific state governments. This transnational nature of terrorism resulted in a new focus on prevention, as the goal of the sanctions against individuals was to prevent acts of terrorism from occurring before they are even attempted.

The shift in transnational terrorism resulted in a tension between this new individualized notion of terrorism and the individualization of security through the human security framework. As a result of the targeting of individuals under the Security Council’s counter-terrorism policies, certain fundamental human rights were suspended, specifically rights of due process. This tension came to a head with the *Kadi* case, where the European Court of Justice determined that Kadi’s rights were unjustly violated under the 1267 regime.

The decision in *Kadi* demonstrates that a tension does, in fact, exist between individualized notions of security pertaining to both human rights and counter-terrorism. Throughout the 1990s, the Security Council prioritized the protection of civil and political rights, which included the right to due process of law, as part of a human security framework. At the same time, the Council’s counter-terrorism policies were emerging as a priority in order to combat state-sponsored terrorism throughout the 1990s. After the 9/11 terrorist attacks however, these policies resulted in the right to due process being suspended for those individuals who were listed under the 1267 sanctions regime.

It was the tension between the protection of human rights as part of a human security framework and the protection from and prevention of terrorism within the Council's individualized counter-terrorism security framework that allowed for the development of a case like *Kadi*.

### **Prognosis and Long Term Implications**

The threat of terrorism continues to grow and evolve, with terrorists consistently finding new ways to launch attacks and maneuver around existing security measures. With advancements in technology, especially social media, it is becoming increasingly easier for individuals to access extremist propaganda and become radicalized anywhere in the world. As the threat from ISIS continues to grow dramatically, so too will the need to monitor and target individuals. The fact that the Security Council did make some modifications to the 1267 regime following *Kadi* demonstrates that they are willing to take human rights into consideration, however not extensively. Furthermore, with the ever growing and evolving threat of terrorism, it seems as though it will become more and more difficult for human rights to be maintained, as efforts pertaining to the prevention aspect of counter-terrorism regimes and the targeting of individuals will continue to be strengthened.

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## Appendix A

