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Should the 'Rule of Law' prevail in the fight against terrorism?: A look into the Western precedent that recurrently evades the international legal order

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To my family –*My greatest successes in life thus far can at their cores be attributed to the unwavering support and encouragement you offer me. I am forever grateful.*

To my fellow GEGPA colleagues -- *As we continue this amazing journey together, yet venture out on separate paths – I dedicate this paper to you; in hopes that when faced with arduous challenges, in times of fear and uncertainty, that we always choose respect for humanity so as to encourage others to do the same; no matter the circumstances.*

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INTRODUCTION

It is evident throughout the 'war on terror', specifically in regard to the countering of that terror, that the most violent of offenders to international law, international humanitarian law, and fundamental human rights arguably is the United States. The invasions of both Afghanistan and Iraq led by the US in their attempt to combat known terrorist groups such as al-Qaeda and the Taliban, were driven by a deep desire to hold Osama bin Laden and the Taliban accountable for the brutal and devastating attacks on September 11th, 2001 (Daalder et al., 2016). Though there remained a clear desire to ensure *accountability*, one of the primary principles of the Rule of Law; ironically, the United States and offenders alike, did not hold themselves to that same standard. By taking a step back to gain perspective on the correlational subject of counterterrorism and the Rule of Law over the course of the last half-century, it can be argued, however, that it indeed is not ironic at all. It is rather reflective of a precedent that has been set in the current multipolar world, by the hegemons themselves, that suggests that the rules do not *always* apply. Vast literature and studies by scholars, political theorists, and lawyers alike have delved into the extensive lengths the United States, its military, and its intelligence agencies have gone and will go, to as they claim, '*protect national security'* (Daalder et al., 2016). Given the significant research that has been done on the United States and for example, the controversial existence of the Guantanamo Bay Detention Center; the following argument will not focus specifically on the United States, but rather on other key players that epitomize Western power as it is today. Those key players include the United Kingdom, the European Union, and the international legal institutions in which their influence is most evidently exercised.

This thesis will explore relevant cases in which the State used methods beyond the statutes of the law to counter terrorism, be it domestic or international; in which those methods were in violation of individual human rights. Historian Ronald Wright said, "Each time history repeats itself, the price goes up" (Wright, 2004). This particular quote holds relevance in the context of this paper, as the first mode of analysis will specifically look into the past to gain perspective on the present. Wright's quote highlights the price paid by the human race, when they fail to learn from prior experience. In the context of this paper, the aim will be to evaluate that price; to assess

at what cost the state will use power to circumvent their responsibility to uphold the law as well as their justification in doing so, in order to conclude if the 'Rule of Law' should prevail regardless of circumstance. The first chapter of this thesis will explore two aspects; the first being, the United Kingdom's response to terrorism in Northern Ireland, the measures taken to counter that terrorism, and the associated laws that were specifically violated as a result. Examining past experience, as in this particular case of Northern Ireland and the IRA, will seek to shed light on how Western powers have acted and continue to act in the current fight against terrorism. The second aspect that will be evaluated in the case of Northern Ireland and the UK will be the individual roles both the Law and the Court played in what would eventually become part of the peace process between both states. Specifically, the legal case, *Ireland v. UK (1978)*, will seek to highlight Campbell and Connolly's take on the concept of *legal grey zones*, and the function of *interpretation* in states' actions (Campbell & Connolly, 2006). Analysing the combination of these two aspects of the state's interaction with the law and drawing parallels between countering terrorism fifty years ago versus the recent past [and present] will provide the underlying theme for the remainder of the argument and understanding the precedent that has been set.

The second chapter will take a slightly different approach in addressing the exhibition of unlawful state action in the attempt to counter terrorism. Set on a marginally larger stage, this particular case that will be analysed, compared, and contrasted, calls into question the state's responsibility to acquiesce to international law, despite the disregard for its supranational code of ethics. In addition to variance in level of law, the type of state action taken against the alleged terrorists, is significantly different than that of the conflict between Northern Ireland and the United Kingdom. Though both cases refer to violations of legal rights, in the case of *Ireland v. UK (1978),* the related violations also include that of a physical nature. In the second set of cases that will be evaluated, *Kadi v. Council and the Commission (2008, 2013)* and its proceedings, the violation of fundamental rights include those of a financial nature. In selecting these two forms of infringement, this paper highlights the notion that gross violations of the law do not have to be solely acts of a physical or psychological torture and can manifest in a multitude of ways that defy the major principles of the Rule of Law. The *Kadi proceedings* will contain three modes of assessment. The first will be to address who

Yassin Abdullah Kadi is, whom carried out the infringement of his fundamental rights and why his case is relevant to understanding how the West recurrently evades the laws written and implemented by themselves, in order to procure self-interest. The second mode of assessment will be to address the supposed infringement of rights as compared with the written law notwithstanding legal proceedings; to ascertain if the action would be deemed unlawful from a literal perspective. The final mode of assessment focuses specifically on the state's response and the final verdict of the Court.

Though *Ireland v. UK (1978)* and the *Kadi* proceedings took place decades a part, through in-depth analysis, it is important to take away two lasting effects. The first is that is that this Western precedent, evident during the conflict fifty years ago, still very much persists in present day. In 2014, a request was made to re-visit the judgment of *Ireland v. UK (1987).* From when that appeal was made, nearly ten years had passed since the sanctions were placed against Yassin Kadi and the *Kadi* proceedings began. Amnesty International claims the Court had the ability to "right a historic wrong" (Anon, 2018) in allowing justice to finally prevail for those wronged during the Northern Ireland conflict. As commonly said, history repeats itself, and that was the case for this appeal. This fact alone proves the Western precedent is still very much relevant**.** The second lasting effect to take from this seemingly polar comparison is despite the spirit of the law being upheld, it does not necessarily imply the letter of the law is upheld. While interpretation of the law is vital to maintaining peace in an ever-changing, modern society; when fundamental rights are involved there is a greater risk for the integrity of the Rule of Law to become threatened. It remains unacceptable for those whom created the law, with the expectation that all must comply, to take advantage of its margin of appreciation in a constantly evolving world. The rule of law must always be maintained, for without it the world has the possibility to erupt into chaos. The principles at the core of its foundation, though established long ago, were reinforced with the development of the international law as it exists today with the creation of the United Nations following World War II. It is the Rule of Law that allows society to function smoothly, that allows political and economic power to be bound by a system of checks and balances, and that assures accountability and justice above all else. It encompasses a human component that speaks to individual innate feelings and subjective reasoning. Though this argument is rooted in a legal framework, to determine

the essentiality of upholding the Rule of Law in every instance, that aforementioned element of humanity must be accounted for. While this does present a delicate balance between letter of the law and spirit of the law, the threat of anarchy does not excuse abuse of power. Beyond just being a widely known phrase, history proves to be retelling; hegemons rise and fall, the balance of power shifts. New threats will always develop, but fear or uncertainty surrounding the unprecedented cannot rule judgments; they cannot supersede the Rule of Law.

METHODOLOGY

The primary methodology used throughout this paper will consist of a comparative case study analysis between two specific case studies, *Ireland v. UK* (1978, 2018) and *Kadi v. Council and Commission* (2008, 2013). These case studies particularly address the use of state action in the attempt to counter imminent terrorist threats during their respective time periods. Though the subject matter of the incidents representing the legal claims brought before the Courts in *Ireland v. UK (1978, 2018)*, is significantly different than that of the *Kadi* proceedings, they both seek to analyse how state action to combat the threats of terrorism, resulted in a violation of the accused individuals' fundamental human rights. Each legal case will be analysed in three explicit ways. First, a brief background will be provided on the overarching situation, the supposed threat, and the state action taken to combat it. This will provide the necessary context in order to understand the following two points. The second subsection will seek to analyse if the measures taken to fight the aforementioned threats, specifically those that are being called into question for having violated fundamental rights, would be deemed violations based solely on the precise language of the regulation. In comparing the measures taken directly to the regulation claimed to have been violated; this section aims to exclude any semantics, interpretation, or extrajudicial powers from being taken into consideration, in order to properly discern if the Rule of Law was upheld. The third subsection of each case analysis will be used to discuss the legal discourse that ensued, including identification of the justifications made by the state, and ultimately the final judgments of the Court. This final point is designed to demonstrate that although a case may result in a particular judgment does not mean that; (1) the Rule of Law was maintained, and

(2) that the law ruled in favour of the party that was allegedly [or found to be] mistreated.

The final chapter will succinctly address the psychological impact that the notions of fear and uncertainty, and internal ethical obligation play in taking decisions. The second aspect of chapter three will address the notion of perception, and the role it plays in the Rule of Law. It will draw upon calculations from two indices; the World Bank's World Governance Indicators and the World Justice Project's Rule of Law Index. The two subsections will be evaluated in the context of countering terrorism, and will determine why, despite external circumstances, the Rule of Law should always prevail.

LITERATURE REVIEW

The extent to which counter-terrorism has been studied is significantly vast. The relevance of the content in today's context is not only extreme, but also volatile. Counter terrorism in the recent past, when considering the current War on Terror, began following the attacks in the United States on September 11th, 2001. The global response between governments, academics, human rights activists, and the general population has been nothing short of controversial. Given the complexities of the topic and the precarious nature surrounding the consistently shifting threat of terrorism, it was necessary to obtain an in-depth background on the thematic elements that remain consistent throughout the last half century as they pertain to both terrorism and countering it. Lang & Beattie's *War, Torture, and Terrorism: Rethinking the Rules of International Security* is a comprehensive work on the major topics of disagreement that are debated amongst scholars, including key points from theorists whom have developed specific concepts that seek to understand those continual points of contention. The various authors whom contributed to Lang & Beattie's work, have developed their own interpretations of concepts such as legal grey zones, torture warrants, the Gordion knot, and the crisis-response model, etc. These interpretations provide context to the complexities that accompany counter terrorism. Many of the primary arguments surrounding counter terrorism, in reality, correlate directly to people's subjective opinions and ethical codes. This multi-faceted dispute can be for argument's sake, be broken down into opposing sides; (A) Do whatever necessary to ensure national [or international] security, (B) Doing whatever necessary often results in violating human rights, which is wrong. As each individual has a different moral compass than their neighbor; and most likely lives an alternate existence than their neighbor. This ultimately contributes to their conflicting opinions, and eventual disagreement. This dissertation, however, is not designed to shed light on people's level of morality, nor to insert personal opinion surrounding a State's attempt to justify their actions; but rather to recognize how the state can succeed in making that justification, and why the law should not let it.

More recent literature has demonstrated the current War on Terror is reflective of a new wave of terrorism, an *unprecedented* threat. The fear and uncertainty that surround

weapons of mass destruction and the potential for mass casualties is warranted. Politicians are pressured and the populations are frightened. History shows that governments react quickly with the adoption of restriction-based resolutions, or issuance of Patriot Act like regulations. When the powers [West] are threatened, they answer with power. The discussion of this unprecedented type of threat, however, cannot be cited solely to post-9/11 terrorism. The legal judgments used in this paper show, the United Kingdom claimed their actions against alleged IRA prisoners in Northern Ireland to be 'preventive' measures. This claim was made nearly five decades ago; long before the European Union claimed the same upon implementing restrictive measures pertinent to UNSC Resolution 1267, against a series of individuals and organizations allegedly associated with known terrorist groups, such as Al-Qaeda or the Taliban of Afghanistan. It's easier in hindsight to understand wrongdoings; to look beyond moments of fear, frustration, or anger to see a clearer picture. This reasoning serves as a piece of the foundation as to why this thesis aims to discuss the present, but begins in the past. Many sources addressed throughout the course of this paper discuss how the conflict in Northern Ireland in the 1970s is exemplary in gaining perspective on countering terrorism today.

Theorist Colm Campbell discusses three suitable reasons why Northern Ireland serves as a perfect example of the relationship between international law and the state as displayed throughout this paper. The first reason he discusses is in regard to course of action taken by the British, that can provide distinct similarities between the Iraq-United States conflict and Afghanistan-US conflict, and the UK-Northern Ireland conflict. It is within these conflicts specifically that sensory deprivation techniques at the Guantanamo Bay Detention Center can be compared to that of the *Five Techniques* used on Northern Ireland prisoners by UK authorities. Campbell cites the second reason as "the UK is not a negligible actor in international fairs" (Campbell, 2005). This reasoning provides situational insight for any international hegemons with established power, such as the UK, US, or EU, who might be overtly scrutinized due to actions pertaining to counterterrorism that could be deemed unconstitutional by international standards. Campbell's third reason can be viewed as the attempted exoneration of state action in situations related to countering terrorism, as laid out in this paper thus far; claiming the 'beginning, middle, and end of conflict' justified actions because it

resulted in peace and resolution. The War on Terror applied to this particular context, might attempt to exonerate wrongful state action due to its *unprecedented* nature.

Beyond looking at the past to gain perspective on the present, the first component described above discusses how a State can find grounds in which to justify their actions. There is a second component to this thesis, however, that aims to discuss not how the law allows this; but why they should not let it. Though case judgments are not reported as matters of opinion, two legal cases used in this paper bring considerable insight to the role the law plays in aiding or impeding the State from justifying their actions. These cases were brought to the Courts on the grounds that the State violated an individual(s) fundamental human rights in the context of counter terrorism. The relationship between the Rule of Law and counter terrorism is frequently examined and researched. Many theorists have identified how these violations to human rights, such as interrogative torture, also violate the Rule of Law. Rather than compare the alleged violations of fundamental rights directly to morality surrounding the Rule of Law, this paper aims to first compare them to the literal law. In drawing a comparison to the literal law first, individual opinion and interpretation surrounding the ethical nature of the actions are eliminated. This aims to demonstrate that regardless of justification, executive order, or stretch of interpretation; the basis of a legal judgment can no longer imply the preservation of the Rule of Law. It is widely known that Western powers, like the US, the UK or the EU, have been known to exercise their power exhaustively in their fight against terrorism; yet never face the consequences they would be so quick to ensure are administered on someone else. What precedent has been set over the course of the last 75 years, that allows the West to consistently evade the Rule of Law, yet never be subject to the ramifications? Despite the evident standard that persists, the Rule of Law should always prevail; not just to ensure the fundamental human rights are always respected, but to save the legal order from the imminent threat it's facing.

CHAPTER ONE: CASE STUDY: NORTHERN IRELAND, THE IRA, AND THE UK'S RESPONSE TO INSURGENCY

The decades between nineteen-seventy and two-thousand mark a significant time of strife and divergence in Northern Ireland, specifically within the six particular counties that comprise the majority of the province of Ulster; Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone. The insurgents at that time, the Provisional Irish Republican Army (IRA), historically were violent in nature, dating back to the beginning of the twentieth century. Originally driven by the desire to produce change within politics, the IRA throughout the final three decades of the millennium were no different. Reminiscent of a colonial era, the root cause of that desire strived to remove and contest the control the British held over the territory. Governed by the Unionist party and comprised of a largely Protestant population, the Catholics residing within those counties expressed their upset regarding a series of systemic inequalities they faced on account of their Protestant counterparts. These disparities pertained to various sectors; including labour, housing, electoral processes, limited government representation, unjust arrests, etc. Leading up to the decades of which will be analysed, the nineteen-sixties contained a significant amount of societal unrest and rioting in the Republican's fight for civil rights between the Catholics and the Royal Ulster Constabulary (RUC), the police force in Northern Ireland for most of the twentieth century (Dorney, 2015). Given the increased violence between the authorities and its citizens; the British Army descended upon the province of Ulster to restore stability in the region. The end of the decade brought the Provisionals, a more combative division of the IRA, into full power of the rebellion.

Following that brief introduction to that environment of civil unrest, turned remarkably violent, and ultimately deemed *terrorism* [by the United Kingdom]; this chapter will address the following; 1) the responses of the governments, local and state, and their police and military forces to the aforementioned uprising and 2) the legal actions that were taken to the Courts to address the conflict, specifically, the legal case of *Ireland v. UK (1978)*. In addressing the first point, the aim is to underline the specific laws that were broken as a result of maltreatment and injustice by the state and/or its policing and military entities. It is important to note here, however, that these actions are to be

determined as violations based upon the precise language of the regulation, in order to avoid taking semantics or interpretation into account. In doing so, a clearer portrayal will be generated that suggest on the grounds of the state action [in this particular case], the 'Rule of Law' did not prevail. In then evaluating the corresponding legal action between Ireland, the United Kingdom, and the European Court of Human Rights; the focus is not to simply revisit the facts of the case. The emphasis is on how both the facts presented and the ultimate ruling can contribute to the notion that though the United Kingdom may have been in violation of the law; the defence presented on behalf of the UK litigators was found to be within the margins of that law. (Ireland v. The United Kingdom, 2018) Following those evaluations, the final point that will be introduced [regarding *Ireland v. UK (1978)*] will be the recent request by the Irish government in 2014 to revisit the judgment made by the ECHR in nineteen seventy-seven, the content of the request, and finally its outcome (Ireland v. The United Kingdom, 2018).

1.1 CONCEPTUAL OVERVIEW OF THE CONFLICT AND IMMINENT THREAT

Considering the events that occurred at the time on a global scale, few would contest that the nineteen seventies could be described as anything less than tumultuous. Highlights of the decade include oil embargoes implemented by OPEC and the rise of neoliberalism, the election of Margaret Thatcher as Prime Minister of the United Kingdom and the impeachment of Richard Nixon as the President of the United States. The epoch reflected political, economic, and social unrest in every corner of the world; with wars between Israel, Egypt and Syria, and the US and Vietnam. Nineteen-seventy-nine alone sparked the commencement of two major incidents; the invasion of Afghanistan by the Soviet Union and the start of the Iranian Revolution, that would leave a wake of chaos, forcefulness and violence spanning more than ten years. The conflict in Northern Ireland served as only a small part of the collective of global disarray. Though smaller in scale than some of its contemporaneous events; the struggles in the UK territory that sits directly above the Republic of Ireland, commonly referred to as 'The Troubles' (Lewis, 2019), endured for nearly thirty years. Prior to highlighting the state's response, the scope of the threat of terrorism must be described to both provide context to the conflict, as well as to draw the necessary parallels later

on. Despite the consistency and duration of the insurgency in the territory, based on the mortality rate, the terrorist driven conflict in Northern Ireland was never considered 'terrorism', in the context it is today, but it was at its core domestic terrorism in the eyes of the UK. As mentioned earlier, the Troubles, reflected a period of insurrection fuelled by the demand for civil rights and an end to discriminatory doings against the minority community present in the region at that time; recognized as Catholic and/or nationalist. (Lewis, 2019) Although prejudices targeted the Catholics, pinning them precisely against an ulterior sect of Christianity, the Protestants; the conflict was not that of a religious nature. The terminology remained, however, as the segregation between the two denominations was directly associated with their respective states; the United Kingdom and Ireland, or rather the population of Irish nationalists that wished control of the territory be given to their more culturally-associated, southern neighbour. (Dorney, 2015) Deployed from mainland UK in the nineteen-sixties, British military troops were initially present to aid the local authorities in containing the bouts of protests and riots that were occurring throughout the region. A series of events in the early years of the decade contributed directly to the explosivity in number of attacks; such as the Battle of Bogside, Falls Curfew and Operation Demetrius. Falls Curfew was a government authorized military search for IRA militant weaponry carried throughout a nationalist neighbourhood (Dorney, 2015). Though Operation Demetrius's legal pertinence will be discussed in specific detail when analysing *Ireland v. UK (1978)*; it is necessary to highlight primary facts as to what the operation entailed. Operation Demetrius was an offensive military operation in Belfast, which allowed for *suspected* militants to be subject to internment with no trial. (McLeery, 2015). It is estimated 350 individuals were arrested during this operation to be subjected to interrogation at one of holding centres in the region (Ireland v. The United Kingdom, 1978, para.39). These events, in addition to a numerous amount of smaller scale riots and discriminatory implementations such as blockades, no-go areas, and housing searches, led to the catalyst that would mobilize the IRA's cause like had never been done before. This catalyst is recognized as Bloody Sunday (Dorney, 2015). On January thirtieth, in nineteen-seventy-two, the British Army opened fire on a group of individuals whom were protesting against the internment established by Operation Demetrius. Thirteen unarmed protestors were murdered that day, and more than a dozen others were injured (McLeery, 2015). The brutal actions of that afternoon manifested into a much larger

revolt by the IRA and many new-found supporters throughout Northern Ireland and the Republic of Ireland. Just three days following Bloody Sunday, on February second, protestors burned the British Embassy in Dublin to the ground. Five months later on July twenty-first, what would become known as 'Bloody Friday'; more than twenty bombs were planted throughout Belfast and Derry in retaliation (Dorney, 2015). The *cycle of violence* is a well-known concept; one that can be summed up as a violent act being met with retribution, sparking another retributory act, followed by another, inciting a perpetual cycle of harm. This concept proved true in every sense, as that year was marked as the deadliest in the entirety of the multi-decade long conflict, amounting to nearly five hundred fatalities (Ireland v. The United Kingdom, 1978) In the initial attempt to control the IRA, the RUC and British military responded with violence, provoking further retribution from the republicans and their supporters, followed by additional punishment issued by state authorities. With the increasing threat looming, and a history of exertive power on their side, the British resorted to a series of unlawful deeds to counter the then existing terrorism (Ireland v. The United Kingdom, 1978).

1.2 ALLEGED VIOLATIONS AND THE PRECISE LANGUAGE OF THE LAW

In discussing the explicit violations to the laws, as they are written, the specific regulations [used in this argument] will be drawn from criminal law and human rights law on the supranational level, the European Convention on Human Rights. The following will compare the particular act, to the law the act is claimed to be in violation of, as cited in *Ireland v. UK (1978)*. As mentioned earlier, it is important to note that this contrast is based on the language of the law, and is meant to exclude any interpretive action or exercise of extrajudicial powers; so as to determine if the act violates the law from a literal perspective. One of the primary exercises of abuse by the British authorities was that of *internment without trial* (Ireland v. The United Kingdom, 1978). Research shows that through the enactment of Operation Demetrius, the practice of arrest and imprisonment with no access to a judge or trial, was implemented and seemingly reinforced following 'Bloody Friday' (McLeery, 2015). This directly breaches Article 5.3 of the European Convention on Human Rights, which states that "*Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law*

to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial" (Art. 5 ECHR) and Article 5.4 of the ECHR, stating that, *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"*. (Art. 5 ECHR) The next unlawful exercise carried out by the authorities is with respect to the concept and function of *torture*. Though the rooted history of torture long surpasses twentieth century methodology, governments in the nineteen-seventies were beginning to use torture as a means of 'self-defence' or 'pre-emptive protection'. (Lang & Beattie, 2009) Those governments, some deemed amongst the most 'civilized', highlighting Shue's point, relied then and continue to rely on this practice for security purposes (Onuf, 2009). Though there are a multitude of former prisoners believed to have suffered a series of acts potentially equivalent to physical or psychological torture; among the most infamous methods of torture were those that came to be referred to as the *Five Techniques* (Kennedy-Pipe & Mumford, 2009). Used as a form of interrogation against IRA prisoners, there were fourteen individuals that were exclusively subjected to these horrific methods, whom came to recognized as the "Hooded Men". (Kennedy-Pipe & Mumford, 2009). The *Five Techniques* have been cited by witnesses as "(a) wall standing: forcing the detainees to remain for periods of some hours in a 'stress position', (b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during the interrogation; (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise; (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep; (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations" (Ireland v. The United Kingdom, 1978, para. 96) Throughout the legal proceedings, as described in detail below, the definition of torture has been examined in regard to the aforementioned techniques. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed" (A/RES/39/46) To draw attention to how the techniques could be

compared to that of infliction of physical or mental suffering, one could analyse further the technique "d) deprivation of sleep". Psychologist, Dr. Kelly Bulkeley finds that individuals suffering from sleep deprivation suffer significant declines in "cognitive function like accurate memory, coherent speech, and social competence" (Bulkeley, 2014) Taking into account the negative effect that consistent sleep deprivation has the potential to have on both the mental and physical health of the individual, to force it upon someone most certainly falls within the bounds of the definition of torture as described above. The *Five Techniques* directly violate Article 3 of the ECHR in which no individual *"shall be subjected to torture or to inhuman or degrading treatment or punishment"* (Art. 3 ECHR). Despite what the Court ultimately held in the judgment of *Ireland v. UK 1978*, through a literal inspection of the multiple infringements of fundamental rights as compared with the ECHR regulations they are alleged to have violated, it is evident that the authorities [the UK] exhausted measures beyond the statutes of the law. The third subsection of this chapter will seek to address the legal proceedings as brought before the European Court of Human Rights [ECtHR]. In evaluating the explicit violations prior to analysing the case judgment, the extrajudicial powers and use of interpretation of the law can be more easily highlighted within the written defence provided by the UK government. When the use of interpretation and extrajudicial powers to justify action are emphasized, they contribute to the precedent that continues to persist in the current fight against terrorism. Moving forward, it is important to note, the acknowledgment of this precedent does not just call into question solely the laws of the states [EU, US, UK] that constitute Western power, but also international law, given that those states most contributed to the establishment and maintenance of the international legal order as it stands today.

1.3 LEGAL PROCEEDINGS OF IRELAND V. UK AND THE FAILURE TO "RIGHT A WRONG"

The third individual aspect to be evaluated as it pertains specifically to the conflict between Northern Ireland and the United Kingdom, are the legal proceedings that would ultimately rule in favour of the UK, not once; but twice. While the next chapter will delve more explicitly into all details pertaining to the *Kadi proceedings*, the final section of this chapter will aim to view the primary details of the legal cases between

Ireland v. UK, while placing a particular emphasis on the most recent aspects of the case that resurfaced in the second decade of the millennium.

As described in sections one and two of this chapter, the conflict in between the UK authorities and the IRA in Northern Ireland, which carried on for more than a decade was recognized as a 'terrorist campaign' (Ireland v. The United Kingdom, 1978) by the UK. For reference, specific facts of the case as laid out in the parapgraph below will be indicated in relation to the excerpt in which they can be found, as all which are indicated can be sourced from the case judgement of Ireland v. The United Kingdom (1978). In December of 1971, the Irish Government, submitted an application with the European Commission of Human Rights against the UK. The case judgment of January 1978 reported that UK authorities present in NI, predominantly British, employed an amalgamation of extrajudicial powers beyond just the Special Powers Act regulations. These authorizations of actions outside the law, were enacted to be used against suspected terrorists from "August 1971 through December 1975" (para.11) Four of the extrajudicial powers, which essentially depraved individuals' liberty (para.79) and exercised by the authorities, can be cited in paragraph 34 as " (i) arrest for interrogation purposes during 48 hours (under Regulation 10); (ii) arrest and remand in custody (under Regulation 11 (1)); (iii) detention of an arrested person (under Regulation 11 (2)); and (iv) internment (under Regulation 12 (1))." Reasoning behind issuances of these powers can be identified as specifically relating to the threat to security the UK felt the IRA presented, and the *unprecedented* nature and scale of that threat (para.36). In chapter three, the correlation between of fear and uncertainty, and unprecedented threats will be evaluated to better understand their role in taking decisions. To handle the outbursts of violence and crossfire throughout 1971 and 1972, the Parliament issued what would become the Temporary Provisions Act which reduced the authorities' autonomy in NI, placing primary control of "executive and legislative" orders in the hands of the UK (para. 49). This transference of power is most relevant as it allowed for the aforementioned internment established by operations such as Operation Demetrius, to be stopped; in recognition of how power may have been abused within the confines of the Special Powers Act (para. 50) Despite efforts made, as violence from the Provisional IRA persisted, the UK felt they were unable to control the situation without finding an alternative method of minimizing the issue at hand. In response, the

Detention of Terrorists (Northern Ireland) Order of 1972 was implemented. The European Commission of Human Rights found the UK's reasoning to be acceptable which stated, "The fear of intimidation is widespread and well-founded. Until it can be removed and the personal safety of witnesses and their families guaranteed, the use by the Executive of some extrajudicial process for the detention of terrorists cannot be dispensed with" (para. 59) Though the attempt to revisit the case in 2014 was primarily in relation to "the Hooded Men", the initial request from forty years prior, brought before the Court by the Irish Government reflected 228 cases of alleged mistreatment of those both arrested and interrogated (para.93). Though not all were used within the case, of those accepted, the Irish submitted an application to the Commission claiming the alleged violations directly breached Articles 1,3,5,6 and 14 of the Convention (para. 145). Highlighting specifically the violations of Article 3; the Commission initially found the exercise of the Five Techniques on the alleged terrorists to be considered torture. The United Kingdom contested this before the Court, with claims the aforementioned acts though "inhumane and degrading" did not adhere to the classification of torture (para. 156). As laid out in the judgment categorized by Articles of the Convention alleged to be violated, the Court ultimately held in favour of the previous claim made by the UK. Though they found there were significant breaches made to Article 3, the Court's final judgment ruled it could not employ force upon the UK [the respondent State] "to institute criminal or disciplinary proceedings against those members of the security forces who have committed the breaches…and against those who condoned or tolerated" them [the breaches] (p. 86). Article 15, pertaining to *Derogation in time of emergency*, includes a clause which requires participating States to the Treaty, to present details of an existing derogation (Istrefi & Humburg, 2020), which can be defined as "a provision in a legislative measure which allows for all or part of the legal measure to be applied differently or not at all" (EurWork, 2007). The UK issued notices of derogations, corresponding to the timeframes in which violations to the convention were made. Those derogations from Articles 5 and 6, taking into account the atmosphere in NI recognized by the Court as a public emergency, were found to be in line with Article 15 (pg. 87 para.11-16) and found not to have" exceeded the extent strictly required by the exigencies of the situation" (Art 15.1 ECHR), despite the claim by the applicant Government [Ireland]. It was however, reiterated in this judgment that while the States have the ability to determine how and to what extent

protection is ensured when the threat to the public's security is imminent, their power is to be limited and not exercised in excess (para.207). Though the intention remains for the States' power to be regulated in this regard; to what extent the list of permissible circumstances in which these types of extrajudicial measures or derogations can be employed also remains in question.

Campbell and Connolly overtly call out the Northern Ireland-UK conflict in stating, "In human rights and international humanitarian law, debate tends to be couched in terms of the need to challenge post-conflict immunity for those who have acted with impunity during conflict" (Campbell & Connolly, 2006). In doing so, however, two potential outcomes can be hoped for; the first being that present and future conflicts will not result in a similar manner in which those acting with impunity are held accountable for their actions, and the second being that if and when the occasion arises to correct a mistake, that opportunity will be acted upon. Though the courts do not always favour the innocent, the ECHR was given the chance to 'right' their wrong nearly fifty years later, and let the opportunity pass them by. Following an investigation carried out by the RTÉ Investigations unit, new and additional information was said to be exposed regarding the acts of torture suffered by 'the Hooded Men' in 1971 (Amnesty International, 2018). As mentioned briefly above, the 1978 ruling held that those fourteen men, were found to have undergone treatment that was recognized as both "inhuman and degrading" and subsequently breached Article 3 of the Convention. The Court held, however, that the treatment did not amount to torture (Ireland v. The United Kingdom, 1978). For reference, specific facts of the revision judgment as laid out in the parapgraph below will be indicated in relation to the excerpt in which they can be found, as all which are indicated as such can be sourced from the judgement of Ireland v. The United Kingdom (2018). In December 2014, Ireland submitted a request to the European Court of Human Rights to revisit the 1978 judgment in light of this illuminating evidence that apparently could have been made aware to the Court back when the judgment was held and could have influenced the final judgment (Pandeanu, 2018). The Rules of the Court [80 § 1] permits this request, so long as it is "within a period of six months after that party acquired knowledge of the fact, to revise the judgment" (para.45). The request was on the basis that that the Five Techniques did in fact amount to torture, beyond only inhuman and degrading treatment (para.8). Several

grounds were presented to support this request for revision; the first ground pertaining to documents that contained details of various settlements made as a result of individuals whom had suffered from the Five Techniques, brought their cases before the Court for damages, and were given reparations (para.21). The second ground pertained to documents revealing the Government's awareness of the interrogation methods being used, and that the use of those methods was approved by offices high up (para.28-32). The provided documents also exposed the Government's apparent recognition to advise that settling all civil cases was in the best interest of preserving the reputation of the Government and its authorities. The applicant Government [Ireland] claimed these documents were exemplary of the UK Government's prevention of "the Commission and the Court from accessing the full truth about the five techniques" (para.44). Refuting that claim, the respondent Government [UK] argued not only was no new information presented to the Court regarding the level of officials whom approved the use of the measures, but also contended that the applicant did not effectively obey the time requirements laid out in Rule 80 § 1 of the Rules of Court (para.46-60). Following deliberation, the Court, found the applicant did indeed submit the request for revision in the required timely fashion (para.95). Ultimately, the Court, however, dismissed the request for revision on the grounds that the facts presented were not deemed new information, nor could the Court rule if the alleged misleading of "the Commission as regards the effects of the five techniques" could have influenced the original judgment. (para 136-137). The men whom suffered these short- and long-term effects of the five techniques, assert they were robbed of their attempt to receive justice (RTE, 2018). Despite the verdict found in the Court, the previous section discusses extrajudicial orders, and derogations aside; when observing the law and the violation at face value; these men were tortured. This example set by such an influential world power indirectly enables other states whom yield similar amounts of power and influence to act with disregard for the law. In emphasizing the request for revision, it can be perceived that the government was aware of wrongdoings that occurred under their authority, indirectly or not, and refuse to take accountability for the miscarriage of justice that occurred.

CHAPTER TWO: THE EU, UN SANCTIONS, AND THE KADI SAGA

This next chapter, shifts significantly in several ways; in time period, in type of violated action with regard to the Rule of Law, who the players are, and in the roles international and state law play. In analysing the previous cases of *Ireland v. UK,* three things were achieved that are essential to bear in mind throughout the remainder of this paper ; 1) the happenings of the multi-decade long conflict, though considered 'domestic terrorism', set a historical tone that acknowledges the likelihood for the West to use power and influence to evade the law, 2) both supranational and international law were used to call into question state action with claims it violated the Rule of Law, 3) the verdict of the court, does not assert the Rule of Law was maintained, but rather means a compelling case was made to warrant such a verdict. The relevance between these two cases is not that factually they are the same, nor do they call into question the exact same concerns in regard to the Rule of Law. As mentioned above, *Ireland v. UK* (1978, 2018) began in the nineteen seventies, whereas *Kadi v. Council and Commission (2008)* began in the first decade of the two-thousands. It is evident the players were not the same, nor were the threats or actions taken to counter those threats. Though the relationship with the Rule of Law in terms of attempted justification of action on a state level, strongly persists within both cases; the United Kingdom and European Union respectively approached the relevance of international law in two different manners, as well as the role that regulatory bodies play in measures taken to counter terrorism and combat active threats. Despite these varied approaches, this paper will seek to highlight the significant similarities that can be identified between both *Ireland v. UK* (1978, 2018) and the *Kadi v. Council and Commission (2008, 2013)* proceedings, and the noteworthy parallels that can be drawn that represent the correlation between the state's reaction to the unprecedented and a subsequent violation of the fundamental human rights of the individual(s) alleged to be deserving of the actions taken against them.

Prior to analysing the various violations to the maintenance of the Rule of Law within the case proceedings of *Kadi v. Council and Commission (2008),* this chapter will first address the initial facts of the case and the primary legal discourse taken against Mr. Kadi and Al-Barakaat International Foundation. The chapter will then evaluate, as done with the case of Northern Ireland and the UK, whether the actions taken against Mr.

Kadi by the European Union, were a violation of individual fundamental rights and what specific laws, if any, were infringed upon. It is important to note here, as done earlier, that these actions are to be determined as violations solely based upon the precise language of the regulation, in order to avoid taking semantics, interpretation, or jurisdiction into account. The chapter will then analyse Mr. Kadi's defences and varied responses that he continuously reiterated throughout the remainder of the proceedings. In coordination with the aforementioned analysis, the chapter will also address the appeals made by the European Union [the Commission], and ultimately, the final verdict.

2.1 CONCEPTUAL OVERVIEW OF THE IMMINENT THREAT

In the late 1990s and 2000s, the United Nations Security Council developed an internal sector, known as the UN Sanctions Committee, that was designed to monitor and issue sanctions against individuals, entities, and organizations that were alleged to be not only associated, but be actively contributing to terrorist leaders and organizations, alike (S/RES/1267). To categorize these potential connections, the Sanctions Committee produced the *Sanctions Committee Consolidated List* [known as the Consolidated List moving forward], to be made publicly available to all (S/RES/1267). Members of the UN had the ability to submit a request for the addition or removal of a name(s) from the Consolidated List, pending approval by the Sanctions Committee, and later established in two-thousand nine through Resolution 1904, its designated department, the Office of the Ombudsperson (S/RES/1904). Though the Sanctions Committee handled all potential additions to the list, the Ombudsperson was appointed to aid the Sanctions Committee when requests were made to delist an individual or entity from the Consolidated List. This office and position were established to ensure that "an individual of high moral character, impartiality, and integrity with high qualifications and experience in relevant fields, including law, human rights, counter-terrorism, and sanctions" (para. 12) was responsible for taking such important decisions that could ultimately disregard one's fundamental human rights should the supposed allegations reveal to be false. The issuance of these sanctions falls directly in line with Article 39, 41, and 41 of the UN Charter, allowing the Security Council to determine what the appropriate measures are to be taken to identify and combat existing or potential threats

to international peace and security, excluding the use of armed force. (Charter of the UN, 1945). Resolution 1267, adopted on October 15th in 1999, highlights what those sanctions entail, inter alia, the 'freezing of assets' of the individuals, entities, and organizations found to be listed on the Consolidated List. (S/RES/1267) Resolution 1333, adopted one year later; highlighted the reaffirmation of commitments made in Resolution. 1267, with the addition of banning any and all military assistance provided to the Taliban of Afghanistan (S/RES/1333).

Known by several various aliases, Yassin Abdullah Kadi, was a Saudi Arabian born, wealthy resident whom demonstrated substantial success as an international businessman. He was known to have run in distinguished circles, and many of his ventures have been attributed to his apparent philanthropic nature (Thomas, 2008). As one might expect, his transnational success did not go unnoticed, and unfortunately for him, varying degrees of investigation led the international community and its authorities to react in what they claim to be a preventive nature. Like many others added to the Consolidated List, Yassin Abdullah Kadi [known as Mr. Kadi moving forward] was flagged by the United Nations Security Council for being a recognized associate and contributor to notorious terrorist leader Osama bin Laden, and the major known terrorist organizations, Al-Qaeda and the Taliban of Afghanistan. On October 17th, 2001, Mr. Kadi was placed on the Consolidated List, evoking immediate reaction from both the United States and the European Union later that month (European Commission and Others v. Yassin Abdullah Kadi, 2013). The European Union took action by adding Mr. Kadi to the list found in Annex I to Council Regulation (EC) No. 467/2001 [later replaced by Annex 1 to Council Regulation (EC) No 881/2002], which was designed to prohibit the export of specific goods and services from individuals or entities deemed to be associated with Al-Qaeda and the Taliban of Afghanistan (para.17). Mr. Kadi responded in a rapid manner, taking legal action to seek annulment of the two aforementioned regulations. On December 18th in that same year, he brought his case before the General Court [also known as the Court of First Instance (CIF)] on the grounds of "(a) infringement of the right to be heard, (b) the right to respect for property, (c) principle of proportionality, and (d) the right to effective judicial review". (para.18-21). On September 21st, 2005 the first judgment took place, *Kadi v. Council and Commission [2005] ECR II-3649.* This case, in addition to its appeal in 2008, can

commonly be referred to *Kadi I,* and it is on the claims made during this judgment that the remainder of the proceedings will be based upon, including the 2013 appeals made by the European Union [commonly referred to as *Kadi II*]. The General Court dismissed the presented action and dismissed the claim of Mr. Kadi's rights being infringed upon; holding that the EU had complied with the principles of maintaining the international legal order versus that of its supranational legal order (para. 19). In the context of this case, pertaining specifically to the requirement of the EU to implement the resolution issued by the UNSC, it was declared judicial review of internal lawfulness of EU was exempt due to the immunity from jurisdiction. It was also held, however, that the EU could be subject to rules within the scope of *jus cogens* (para. 20) an essential principle of accepted international law, which represents peremptory norms that cannot be overridden or subject to derogations; specifically, when pertaining to issues of human rights (Vos, 2013). As a result of these judgments and the time lapse between filings and trial dates, Mr. Kadi spent a majority of the first decade of the millennium subject to severely limited mobility within the confines of his residence in Saudi Arabia. In addition to sanctions issued by the European Union, Mr. Kadi's assets in the US were also frozen by the US Treasury's Office of Foreign Assets. (Thomas, 2008) A New York Times article reported that Mr. Kadi recognized he was not treated in the same undignified physical capacity that the detainees at Guantanamo Bay Detention Center have allegedly been subject to, but defended his "unfair position" stating "When it is classified… you can never defend yourself" (Thomas, 2008). With no charges brought against Mr. Kadi to imprison him, up until this point he remained unable to defend himself in a fair and equal trial.

2.2 ALLEGED VIOLATIONS AND THE PRECISE LANGUAGE OF THE LAW

As previously carried out in the example of Northern Ireland and the UK above, in addressing the explicit violations to the laws, as they are written, the specific regulations [used in this argument] will be drawn from human rights law on the supranational level, the European Convention on Human Rights. To reiterate the methodology used in the previous analysis, the following will compare the particular act, to the law the act is claimed to be in violation of. In addition, this contrast is based on the language of the law; so as to determine if the act violates the law from a literal perspective, setting aside

interpretation and circumstance. The articles of the European Convention of Human Rights that will be used for comparison will be Articles 5 and 6. Respectively, these articles exist to protect an individual's *Right to Liberty and Security* and *Right to a Fair Trial.* For reference, Article 5 states that *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."* (Art.5 ECHR) Accordingly, Article 6 states that *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."* (Art.6 ECHR) In carrying out Res. 1267; Mr. Kadi's assets were frozen, and his rights to property were severely imposed upon. Furthermore, in addition to the fact that Mr. Kadi was never arrested or detained, he was disregarded the right to obtain a full disclosure of the reasoning and its evidentiary support behind his placement on the Consolidated List, as well as the implementation of Res. 1267 by the European Union (Kadi v. Council and Commission, 2005). Consequently, he was unable to effectively defend himself and his rights in an open court prior to placement upon the Consolidated List, and prior to implementation of the aforementioned resolution. These two facts, disregarding interpretation or the argument of jurisdiction, display a direct breach of the European Convention on Human Rights when compared directly with the statutes laid out above.

The European Union, as suggested in the aforementioned case, throughout its associated legal proceedings and its appeals, defended primary claims that the EU was expected to comply and implement measures issued by the United Nations Security Council Sanctions Committee against those listed on the Sanction Committee's Consolidated List (European Commission and Others v. Yassin Abdullah Kadi, 2013). As the EU member states are members of the UN, they argued that their actions against Mr. Kadi as discussed in detail below, were indeed lawful, and should be subject to reception of immunity from jurisdiction (European Commission and Others v. Yassin Abdullah Kadi, 2013). Article 103 of the UN Charter states that, "in the event of a conflict between the obligations of the Members of the United Nations under that Charter and their obligations under any other international agreement, their obligations under that Charter are to prevail" (Art. 103 Charter of the UN, 1945). While this fact was used in

the defense of the European Union and it does hold relevance in abiding by mandate issued by the UNSC, it is necessary to underline the following articles of the UN Charter when attempting justify actions that violate fundamental rights. In accordance with Article 24(1) and 24(2) [of the UN Charter], it is the responsibility of the United Nations Security Council to maintain 'international peace and security', while acting in 'accordance with the purposes and principles of the UN' (Charter of the UN, 1945). This includes ensuring the respect of fundamental human rights, a primary feature of the Rule of Law.

In the interest of including international statutes, given the relevance of the UNSC within this case, the acts against Mr. Kadi as listed above, will also be compared with that of the United Nations Declaration on Human Rights, specifically pertaining to Articles 12 and 17. Article 12 of the UNDHR explicitly states that *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks"*, and Article 17.2 states that, *"No one shall be arbitrarily deprived of his property"* (Art. 12, 17 UNDHR). In freezing his assets, Mr. Kadi's businesses could not continue to function at full capacity, and inclusion of his name on the Consolidated List, in addition to the assertions made against Mr. Kadi in regard to reasoning behind it, resulted in injury to his livelihood, his family's livelihood, and his reputation professionally and personally (Thomas, 2008). These two articles laid out and evaluated exclusively with the actions taken against Mr. Kadi in mind, determine that they specifically violate the United Nations Declaration on Human Rights, as well as the ECHR. This exhibits further that despite Article 103 substantiating the claim that the European Community was required to implement UNSC resolutions [namely 1267 and 1333], Mr. Kadi's fundamental rights were infringed upon, both on a domestic and international level, when taken solely from a literal standpoint. To reiterate an important point, as has been made consistently throughout this paper; allowing for interpretation and providing context in regard to practicing law is necessary to ensure all sides of an argument or circumstance are assessed appropriately and without bias; however, allowing for too much interpretation by those whom are supposed to protect and enforce the law, can create an uneven balance of power. Accountability is of utmost importance within the principles of the

Rule of Law. In the event of a misuse of power, regardless of intention, the misuser must be held accountable. As will be portrayed below, often trials do not always rule in favor of the innocent. While it does occur, the fight to preserve accountability cannot end. The theory of checks and balances, is not meant to be a one-time practice. Because subjective opinions will never cease to play their role in casting judgment, the theory of checks and balances should rather be applied a recurrent basis to ensure that accountability. Following the case proceedings and Court judgments, the notions of subjectivity and interpretation, as mentioned briefly in this chapter and the previous one, will be analysed further to shed light on the role of ethics in the Rule of Law and how legal frameworks have adapted to accommodate them.

3.3 LEGAL PROCEEDINGS OF KADI V. THE COUNCIL AND COMMISSION AND THE EXONERATION OF MR. KADI

The Kadi proceedings, though all pertaining to the same initial judgment taken by the Court of First Instance in 2005, took place over the course of twelve years. Each individual case and appeal were thematically rooted by the same set of actions; the adoption of UNSC Resolutions 1267 and 1333 and their further implementation by the European Union. While the United States Department of Treasury also took part in executing measures against Mr. Kadi as briefly introduced earlier in this chapter, their legal proceedings are beyond the scope of analysis in this paper, and contribute to a much larger exhibition of the US's obvious questionable and problematic position in the global War on Terror. To reiterate the initial appeal filed in December of 2001 to the EU CIF; Mr. Kadi sought to challenge the listing of his name on the EU's Annex I list; which represents the implementation of UNSC Resolution 1267 and 1333 (European Commission and Others v. Yassin Abdullah Kadi, 2013). For reference, specific facts of the judgment as laid out in the parapgraph below will be indicated in relation to the excerpt in which they can be found, as all which are indicated as such can be sourced from the judgement of European Commission and Others v. Yassin Abdullah Kadi, 2013/C 260/02. His appeal was founded upon his claim of his inability to receive proper due process (para. 18-19). In September of 2005, the court dismissed Mr. Kadi's appeal, in favour of the European Union and their responsibility to maintain UN agreements above their own; asserting the review of internal lawfulness by the EU was not

compulsory, nor contemplated at the time of action due to obligation to implement UNSC resolutions (para. 19-20) In direct response to this judgment, Mr. Kadi appealed to the higher court, the EU Court of Justice. Three years later, two cases were joined [C-402/05 P and C-415/05 P] that would come to be recognized as 'the *Kadi* Judgment', *Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I-6351* (para.21). Mr. Kadi, one of the appellants of the joined case, presented his argument on the same basis in which his initial appeals were made. The EU Court of Justice following review of *Kadi v. Council and Commission [2005]*, ultimately found favour in Mr. Kadi on the grounds that though the EU is bound to implementation of measures adopted in UN Resolutions and agreements, those resolutions or agreements "cannot have the effect of prejudicing constitutional principles of the EC Treaty" (para. 22-26). The EU Court of Justice held that as Mr. Kadi received no communication by the EU regarding the evidence relied on for (1) placing his name on the list in Annex I of the Council Regulation (EC) No 881/2002, (2) freezing Mr. Kadi's assets; that Mr. Kadi rights to receive effective judicial review and to present a proper defense, were infringed upon (para.22-26). The Court promptly annulled Regulation No 881/2002, as it pertained specifically to Mr. Kadi, relying specifically on the EC Treaty that no immunity can be applied as there is no finding of it within the framework (para. 22-26). Following the judgment of the Court, the EU Council was given a time period of three months to "remedy the infringements found" (para. 26). It is here in this instance, as pointed out earlier in the request to revisit the verdicts of *Ireland v. UK*, that suggests the EU Council had the opportunity to 'right a wrong' and take responsibility for the ramifications that ensued from their actions against Mr. Kadi. Rather than seize opportunity, however, the EU Commission maintained their stances, and proceeded by carrying out a series of reactive measures as a mechanism of defense. In October of that same year, the UNSC Sanctions Committee authorized a communication to Mr. Kadi of a summarized compilation of their reasoning behind placing him on the Consolidated List (para.27-36) It was then, that Mr. Kadi was finally presented with an opportunity to provide his remarks, and subsequent contestations, on those reasons. The UN cited a series of explanations as to why Mr. Kadi was deemed qualified to be placed on the Consolidated List by the Sanctions Committee. Their evidence was rooted in his professional associations and former colleagues, both of whom he worked with but also employed (para.27-36). The Muwafaq Foundation, to which Mr. Kadi is a trustee was

believed to have had a direct relationship with Makhtab Al-Khidamat/Al-Kifah, an organization founded by Osama bin Laden in the eighties in Afghanistan. Mr. Shafiq Ben Mohamed Ben Mohamed Al-Ayadi [referred to as Mr. Al-Ayadi moving forward] was a Tunisian man, whom had also been placed on the Consolidate List by the Sanctions Committee (para.27-36). Recommended by a known financier for Al-Qaeda, Mr. Wa'el Hamza Abd Al-Fatah Julaidan [referred to as Mr. Julaidan moving forward], Mr. Kadi hired Mr. Ayadi to serve as the European Director of the Muwafaq Foundation in the early nineties (para.27-36). Though removed from the Consolidated List in 2011 Mr. Al-Ayadi was believed to have significant ties to Osama bin Laden throughout the decade [nineties] given his alleged involvement as a leader in the Tunisian Islamic Front, as well as a bank which was speculated to have been the location where an attack against a United Sates entity was organized (Fitzgerald, 2011) Within the allotted time of a few weeks, Mr. Kadi issued a response to the Commission disputing the reasonings behind the allegations, on the grounds that not only was much of the evidence ambiguous, but that in the past he had always been able to refute claims that were brought against him based on the evidentiary support he supplied. He cited example relating to the fact that authorities from Albania, where Mr. Kadi's firms located there were alleged to serve as financial funnels overseen by Mr. Kadi and Mr. Al-Ayadi, as well as authorities from Switzerland and Turkey found Mr. Kadi to be unworthy of criminal investigations related to his supposed involvement and financial backing of terrorist affiliated organizations and known affiliates (para.31). Despite Mr. Kadi's attempt to submit substantial evidence against the allegations put forth in the summary of reasons behind his placement on the Consolidated List, the European Union readopted the contested regulation, which re-placed economic sanctions and a travel ban against him (para.32). The EU was able to proceed in such a way for they provided Mr. Kadi with the UN's reasoning for placement, they gave him the opportunity to reply with his perspective, and assessed his comments prior to coming to a decision. As he remained on the Sanction Committee's Consolidated List, this measure remained applicable, and was implemented to backdate to apply from May of 2002 (para. 33(9)). The legal proceedings cite that the reinstated, formerly contested regulation, supports their decision based upon the appellant's relationship to Al-Qaeda and that the freezing of assets is to represent a 'preventive' course of action (para. 33(6)). In February of the following year, in a similar response to the first listing, Mr. Kadi brought to the EU

General Court, new challenges to the recent EU action calling for annulment of the reinstated regulation, as it pertains to him. Nearly a year and a half later, a judgment was made by EU General Court in favour of Mr. Kadi (European Commission and Others v. Yassin Abdullah Kadi, 2013). As done so in the first decade of the proceedings, Mr. Kadi approached the court with five different pleas. The written judgment specifically highlights pleas two and five, pertaining to the "breach of Mr. Kadi's rights of defense" (para.37-46). The General Court determined that Mr. Kadi was unable to efficiently defend himself or his rights before the Court as he did not have sufficient access to the evidence against him and that the EU failed to remedy the infringement of his rights called for in the prior judgment [*Kadi judgment]* (para.37-46). Taking into consideration the length of time and the severity of the limitations placed on Mr. Kadi, the General Court rule the contested regulation as it pertained to his "right to respect for property, entailed a breach of the principle of proportionality" (para.45) Therefore, the contested regulation was annulled, again, as it pertains to Mr. Kadi's involvement (para.46).

Seemingly as though history was repeating itself in a short amount of time, in February of 2011, three cases were joined; C-584/10 P, C-593/10 P and C-595/10 P, in which the Commission, the Council, and the United Kingdom submitted forms of order, on behalf of various members of the EU (para. 49). All three argued that the previous judgment should be set aside, Mr. Kadi's application for annulment should be dismissed, and that he should be required to provide compensation to cover the costs associated with all proceedings of this appeal and before the General Court for the Council and Commission, as well as the costs accrued by the UK before the Court of Justice (para. 49-54). In an expected fashion, Mr. Kadi expressed his contention to the petitions, calling for dismissal of all appeals, assurance the judgment under appeal will be maintained, and that all costs accrued by Mr. Kadi should be paid back to him in full. (para. 55-57). In April 2013, Mr. Kadi's request that the oral procedure be reopened to ensure all arguments and facts be presented and argued by both parties in open Court was denied (para. 58). The Court [Grand Chamber] deliberated that adjudication was possible based on the already existing and adequate information (para. 57-58). In regard to the appellants contestation, there were three grounds on which the Commission, the Council, and the United Kingdom laid their support; "(1) an error of law in that the

contested regulation was not recognized as having immunity from jurisdiction, (2) errors of the law relating to the level of intensity of judicial review defined in the judgment under appeal, (3) errors committed by the General Court in the examination of the pleas for annulment based on infringement of the rights of the defence, the right to effective judicial protection and the principle of proportionality" (para. 60-69). The European Union argued in defence of the first ground of appeal that the measures taken against Mr. Kadi should receive immunity from jurisdiction based on their international responsibility to carry out UNSC resolutions. In addition, despite the EU's legal code requiring international law [distinguished by UN bodies] to prevail in the interest of maintaining peace and ensuring security globally; EU law also requires that the same be applied to safeguarding fundamental human rights (para.60-69). This defense was previously argued in the *Kadi judgment*, as Mr. Kadi pointed out in recalling the principle of *res judicata*, in which the EU Court of Justice ultimately held no such immunity from jurisdiction can be found in the TFEU, and could not be deemed applicable (Kadi v. Council and Commission, 2008). As a result, the first ground was rejected. The second and third grounds of appeal were also found to be overruled; which pertain explicitly to the Court's decision which held that Mr. Kadi's fundamental rights, as written above, were found to be infringed upon (art. 70-89). Though the appellants defence claimed the judgment under appeal not only disregarded the complexity of the circumstance, as well as the EU's obligation to exhibit discretion given whom adopted the Resolutions [in reference to exercising effective judicial review]; Mr. Kadi argued the GC's ruling on his right to effective judicial review as it pertains to the *Kadi judgment*, is not to address lawfulness of the Resolution or the international regulatory body [the UN], but rather directly reviews the regulation itself [effects of placement on Annex I list] (para 87-89). Mr. Kadi reiterated his contention that the EU legal framework demands each individual's fundamental rights, including that of effective judicial review, a primary component of the Rule of Law, be acutely respected; including review of the lawfulness of a state regulation that reflects an international regulation (para.75-80) He also challenged that in regard to placement on the Consolidated List, Annex I list to Regulation No 881/2002, and all requests for delisting of the name of an individual or organization, that the UN Sanctions Committee, and European Union offered "no guarantee of judicial protection" (para. 95). Despite the adoption of UNSC Resolution 1989 [2011] referenced in paragraph 84 of the contested

judgment, which "confirms the desire [of the UN] constantly to improve the process for dealing with requests for removal from the Sanctions Committee Consolidated List"; Mr. Kadi disputed the effectiveness of the *ex officio* re-examination, the Ombudsperson, and their inability to remedy the insufficiencies in providing judicial protection for those on the Consolidated List, as well as their lack of exercised influence associated with their recommendations (para. 97). Paragraph 131 of the final judgment emphasizes the significance of judicial review stating it is "indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned" and finally accentuating those principles to be mutually held by both the United Nations and European Union (para.131). Though the Court further evaluated the ambiguity of the details supporting the reasons for Mr. Kadi's addition to the Consolidated List provided by the UN Sanctions Committee; the purpose of this thesis is to focus specifically on the actions of the European Union as they pertain to implementation of the UNSC resolutions through Regulation No 881/2002, not deliberately call into question the value or validity of UN Sanctions. The necessary takeaway from this judgment by the Grand Chamber, as it pertains to Mr. Kadi's fundamental violated by means of the European Union; is that the restrictive measures adopted by the EU, were not deemed justified based on the allegations listed in the Sanction Committee's summary (para 163). All appeals resulted in dismissal, and all appellants were required to pay the associated monetary costs (para. 168).

Though the authorities were unable to prove true the accusations made against Mr. Kadi, and were forced to bear the monetary costs; the infringement of rights endured for nearly a decade by Mr. Kadi, cannot be reimbursed. Time cannot be repaid, regardless of whether in this particular instance the Court [finally] ruled in favor of the mistreated party. It was described earlier that modifications were made at both the EU and UN level in regard to ensuring judicial protection for individuals, organizations or entities subject to placement on the Consolidated List or in the Annex I. The Court held in the judgment, however, that the regardless of the modifications applied, the listed party cannot rely on that protection they are entitled to by law. This suggests the likelihood that others' fundamental rights have been infringed upon, as Mr. Kadi was certainly not the only suspected Al-Qaeda affiliate to be listed. In the introduction of this paper, it

was proposed that a precedent exists in which Western powers have and are likely to evade the law for self-serving interests, especially in the context of counter-terrorism. Given the duration and extensiveness to which the *Kadi proceedings* persisted, as well as the eventual judgments; it is logical to speculate the number of other instances that potentially exist in which the Rule of Law did not prevail, but rather this *precedent* did.

CHAPTER THREE: ETHICS, THE THREAT OF THE UNPRECEDENTED, AND THE PERCEPTION OF THE RULE OF LAW

3.1 THE ROLE OF ETHICS IN THE RULE OF LAW

The United Nations Human Rights Declaration, in accordance with the European Convention on Human Rights, and International Human Rights law worldwide, at their cores are reflective of widespread social and cultural norms; but more specifically, those of the West. They were primarily designed and furthermore established by institutions influenced by western powers; namely the United Nations, with a moral element in mind. Their structure speaks to the innate *human* component that lives in the fabric of each being. Within the overarching argument, of whether or not the 'Rule of Law' should prevail in the fight against global terrorism; that moral element is not only important, but rather is a necessity in order to evaluate the associated ethical perspectives that emphasize why the 'Rule of Law' must be maintained, particularly by those that created the system. The 'Rule of Law' as stated earlier is based on a series of principles that include ensuring the protection of individual, fundamental human rights. The World Justice Project underlines four specific principles; (1) Accountability, (2) Just Laws, (3) Open Government, (4) Accessible Justice (WJP, 2020). While the third and fourth principles contribute significantly to the functionality of the Rule of Law in society, this paper exclusively stresses the vitality for the first and second principles, as they are bound in the foundation of democracy; more specifically Western democracy. Successful democracies are founded upon good governance practices, and denounce regimes led by authorities whom deem themselves as above the law. (Bond & Gostyńska-Jakubowska, 2002) They denounce autocracy and authoritarianism. Their mutual exclusivity was reasserted at a 2012 UN General Assembly meeting when it was stated that, "Human rights, the rule of law, and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the UN" (Tommasoli, 2012). Democracy and good governance encompass the Rule of Law, and the Rule of Law encompasses the protection of fundamental rights by the political parties in power (Bond & Gostyńska-Jakubowska, 2002).

Colonomos introduces this distinct interconnectedness with the concept of the "Gordian Knot" when discussing its relationship to 'preventive action'. (Colonomos, 2009) He identifies the 'knot' as a complex intertwining of politics, ethics, and the law. In his description of the knot, he relates it specifically to justification of action through the use of law and ethics (Colonomos, 2009). Ethics in this particular case is used in the opposite defence, implying that those who exercise preventive measures as described earlier, or in his case a preventive war, will draw upon ethics to support their justification. This can also be identified in the widely recognizable, *ticking time bomb* example in which an individual in custody is believed to be withholding information pertaining to the location of a bomb that could potentially result in mass harm or fatality among civilians (Campbell & Connolly, 2006). The scenario presents the question; is it justifiable to exercise methods of torture on this individual to extract information, even if it is not guaranteed the pertinent information will be revealed? Though it is a thought-provoking question, it can never produce a definitive answer; as each individual who attempted to answer would rely on subjectivity and their own ethics to come to a conclusion. This paper argues that it is ethically reprehensible with regard to the Rule of law. Certainly, Colonomos' description is relevant to the role of ethics in the Rule of Law, however, the purpose of this paper seeks to draw on the alternative aspect of ethics presented in relation to the Gordian Knot. While the states, as referenced in the *Ireland v. UK* and the *Kadi proceedings,* may have relied upon their own 'ethical' judgments, as suggested by Colonomos, to justify their decisions to infringe upon the rights of the suspected terrorists involved in their respective conflicts; this paper contradicts that justification by highlighting that the alleged terrorists were eventually exonerated, yet had endured gross violations to their fundamental rights.

Joseph Raz suggests a grander threat to the Rule of Law may not just be varying degrees of ethics, but rather distinctly claims that "the Rule of Law defends against threats coming from the law itself" (Raz, 2009, p.224) The basis of the legal argument described in detail throughout the first two chapters, demonstrates the validity of this claim, in a series distinctive ways. One can be demonstrated by reiterating a statement made earlier, that Court judgments do not always conclude that the Rule of Law was upheld, but rather support the idea the party whom was favoured presented a more compelling argument. In addition to the Courts ruling judgments based on whom

prepares the most convincing argument and presents the most substantial evidence; often the vagueness of the law from a literal perspective allows for authorities to proceed with actions based on their presumed ability to make a case for their 'interpretation', if ever brought before the Court. The functionality of *legal grey zones*, execution of extrajudicial powers, and issuance of executive orders support the claims made above, as they represent when the law is used to defend those that circumvent it. It is also observed by many that an act such as torture, used as a method of interrogation, is both predictable and likely to occur in order to ensure international peace and security. Dershowitz suggests the implementation of *torture warrants*, a form of legalizing the practice (Dershowitz & Blitzer, 2003). Though it is clear within his literature he disapproves of the practice, he suggests that to legalize it, has the ability to a degree, to regulate its use. Ultimately, it reduces the opportunity for torture's ambiguous nature in regard to its legal limitations, to be interpreted negatively or overextended by its manipulators. Similar is said for *legal grey zones*. Lang and Onuf also contend that the institutionalization of the law and the function of legitimacy, allow things such as *legal grey zones* to exist (Lang & Beattie, 2009). They argue that in defining the laws that bind them, [the laws] allow them to use interpretation to serve the self-interest of the state (Lang & Beattie, 2009, pp.25-36) This suggests that if more precise confines are implemented, the use of interpretation or *legal grey zones* could cease to exist in the same manner in which they currently do, providing a more ethical approach to control inevitable tactics. The law is supposed to maintain a system of checks and balances, specifically when relating to those that practice it; however, there must be something that then places checks and balances upon the legal system. Colonomos argues that the UNSC "is a structure controlled by the most powerful" and that "its rules will reflect the interests of the powerful and can be reshaped in their interest in moments of crisis" (Lang & Beattie, 2009 pp.11-12).

3.2 THE CORRELATION BETWEEN HYPOTEHTICALS AND THE UNPRECEDENTED

The literature on terrorism, countering it, and the role of the 'Rule of Law' plays in both *repression* and *justification* of it, is heavily reliant on qualitative data for it represents the hypothetical. In hypothetical scenarios, ultimately the decision-making process in

unprecedented situations comes down to 'judgement calls'. The primary issue with relying on judgement is what fuels that judgement. Even the most notably impartial, most educated, and most experienced of scholars, politicians, lawyers, etc. may use the legal discourse as a foundation for weighing benefits and risks; but when required to finalize the verdict, their judgment, fueled by emotions, morality, or perhaps that intuitive "gut feeling" will supersede any list of pros and cons. Yes, it is, however, necessary to place the responsibility of taking those types of decisions into the hands of the aforementioned, *most notably impartial, most educated and most experienced*, in the hope that the arguably 'most informed' verdict will result in the best possible outcome. It is important to note, however, that conclusions based on hypothetical, high risk circumstances, can often result in the worst expected outcome, maybe as far as producing the opposite of desired effects, such as the example of retaliation and increased public support for the *terrorist* as explained in the case of Northern Ireland mentioned above. The world today reflects an environment that promotes 'moral meaningfulness' and condemns torture. The contemporary world supports modernized convictions and progressive ideals within social constructs that include considering individual moral compasses, equality, and social justice.

Unprecedented scenarios as introduced briefly above, elicit two feelings that drive emotion and intuition when making decisions; fear and uncertainty. When fear and uncertainty about possible outcomes that are beyond those calculated as 'imaginable'; individuals rely on their intuition to guide them. They rely on innate feelings, regardless of whether those feelings are combined with logical reasoning, to determine the best course of action. This speaks directly to the crisis-response model suggested by Campbell and Connolly. For example, terrorism creates crisis, which creates a demand for response (Campbell & Connolly, 2006). Due to the subjectivity of human beings and their ability to process both information and happenings; varying viewpoints, interpretations, and actions often lead directly to disagreements and are consistently subject to what Lang refers to as, 'slippage' (Lang & Beattie, 2009, p.34). Arising in the wake of unexpected circumstances accompanied by varying degrees of motivation, Lang describes the concept of '*functional slippage'* as situations when "..institutionalized practices and moral sensibilities seem most at odds.." that "rules seem to become looser, vaguer, more qualified and themselves inconsistent" (Lang &

Beattie, 2009, p.34) Lang's concept refers directly to the rhetoric of the slippery slope in which one action could ultimately result in a catastrophe or a series of intolerable events. (Lang & Beattie, 2009) While the ability to adapt is vital for smoothly transitioning through a period of unexpected circumstances, the sovereign and those who govern it, must trust in the system that it has built, on a national level and international level, to maintain rule and order. One may always be able to make a case for the 'ticking bomb' scenario as mentioned above; however, allowing hypotheticals to take precedent over the law in every case serves to discredit the functionality of the law; and in turn weakens the legal order.

Terrorism as a concept is unprecedented. It provokes those aforementioned feelings associated with the unprecedented; of fear and uncertainty. The human response to these unexpected feelings needs to rash decision making, thinking beyond the scope of logical reasoning. This course of action could directly result in establishing law and regulation that justify those options, for example series of extra judicial powers. The only reason one might establish regulation to justify action is because there is a degree of internal acknowledgment and awareness that the aforementioned action is both immoral or in these cases be on the statute of the law. It can be argued, however, that "the non-territorial nature [of terrorism] as well as its hidden nature changes the threat picture" (Lang & Beattie, 2009, p.81) warranting a newly developed interpretation of anticipatory self-defense. What constitutes what measures are taken to exercise this newly developed anticipatory self-defense? What constitutes when a potential or imminent threat warrants a *state of exception*? (Campbell and Connolly, 2006) Can a state serve as judge, jury and executioner against an individual, organization or entity who has not proven guilty, solely because the potential, unpredictable consequences could be of a calamitous nature?

An important claim made by the aforementioned appellants [the Commission, the Council, and the UK] during the *Kadi* proceedings was in regard to the disapproval of the Court's suggestion to equalize the designated restrictions, as placed on Mr. Kadi, to those of a criminal offense. They express further that the effects of the sanctions endured by Mr. Kadi are of a 'preventive' nature and are designed to be only temporary and "accompanied by derogations" (European Commission and Others v. Yassin

Abdullah Kadi, 2013, p.75) to protect from potential threats with the primary goal of maintaining peace and security. To be regarded as a criminal offense, would imply punishment for an already committed crime that was in violation of the law. Mr. Kadi immediately refuted this claim, arguing that these 'preventive measures', given the extensive time duration of their implementation, as well as their intensity; nullify their ability to be considered as preventing anything, but rather as punishment for a crime he was not charged for.

Looking back nearly fifty years ago to the case of *Ireland v. UK*, as discussed in the first chapter; this notion of 'preventive action' surfaced when an attempt was made to justify the exhaustive and torturous methods of interrogation used by the UK against assumed IRA prisoners in Northern Ireland. Given the rise of this apparent new, unprecedented threat; intense tactics were said to have been exercised as a means to prevent further mobilization and potential attacks. Former US President George Bush's Preventive War was based on the rationalization that in order to effectively provide protection to international security; military action accompanied by pre-emptive strikes (Daalder et al., 2016) were the only options available to combat the volatility that post-9/11 terrorism presented (Lang & Beattie, 2009). This particular example was highlighted as it reaffirms two concepts; the first being that history does indeed repeat itself, especially when pertaining to Western power, and the second being that 'preventive techniques' have and can be used to battle unprecedented threats; however, the mere unpredictability of those threats suggests the measures needed for adequate prevention are unknown; and therefore, do not warrant consistent disregard of the Rule of Law based on untested hypotheses.

3.3 WHY THE RULE OF LAW SHOULD ALWAYS PREVAIL AND THE RELEVANCE OF PERCEPTION IN THE WESTERN PRECEDENT

This final section, though brief will hold significant importance in understanding why the Rule of Law should always prevail, but particularly within the fight against terrorism. This point will introduce the Rule of Law from a more methodological and analytical perspective focusing exclusively on two globally recognized indices; the World Governance Indicators and the 'Rule of Law Index'. These two indices highlight

the critical nature of maintaining the Rule of Law, as they are essentially based upon perception of the population, ranging from the average citizen to the field expert, regarding the presence of the Rule of Law in their respective countries. The WGI, established by the World Bank, are calculated annually to determine the level of governance trends for each country in the world. The World Bank defines governance as "the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored, and replaced; the capacity of the government to affectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them" (Kaufmann et al., 2010). Given the relationship between good governance and the Rule of Law as mentioned in the beginning of this chapter; it is unsurprising that one of the primary indicators measures the Rule of Law. In particular this aggregate indicator is used to measure the various perceptions of how the rules of society are not only followed, but also the extent and practice of how they're enforced (Kaufmann et al., 1999). As the regional filters do not reflect solely the European Union, for the purpose of examining declines in the Rule of Law as perceived by the population, the United Kingdom will be analysed. For this brief exercise, two years spanning a twenty-year period have been selected for comparison; 1998 and 2018. 2018 was selected as it was in that year that a request to revisit the judgment of *Ireland v. UK* was submitted (Ireland v. The United Kingdom, 2018), and 1998 marks two decades after the initial judgment was made and two decades prior to when the final judgment was made regarding the revision (Ireland v. The United Kingdom, 1978). The WGI show that in 1998, the perception of the Rule of Law received a percentile rank of 95. Percentile rank, scored 0-100, "indicates rank of country among all countries in the world. 0 corresponds to lowest rank and 100 corresponds to highest rank" (World Bank, 2020). In 2018, that percentile rank dropped to 91.83. In observing two additional indicators, Government Effectiveness and Regulatory Quality, the 1998 percentile ranks were 94.82 and 99.48 respectively. Twenty years later, the WGI reports the ranks have fallen to 87.98 and 96.15. (World Bank, 2020) Given the UK's hegemonic status and global advocacy for Western democracy, despite the presence of their constitutional monarch, it is expected that they hold the Rule of Law to this highest standard. What is unexpected, however, is the consistent decline in not only the Rule of Law, but also in relation to their other aggregate indicators mentioned.

The second index, is the World Justice Project's Rule of Law Index. Also conducting measurements annually, the WJP's index delves deeper into the principles of the Rule of Law and their translation to daily life using eight major factors each with their individual sub-factors; (1) Constraints on Government Powers, (2) Absence of Corruption, (3) Open Government, (4) Fundamental Rights, (5) Order and Security, (6) Regulatory Enforcement, (7) Civil Justice, and (8) Criminal Justice. In relation to the two legal cases analysed in this paper, the factors most notably relevant are *Constraints on Government Powers, Fundamental Rights, Regulatory Enforcement and Criminal Justice*. (WJP, 2020) Each of these factors and one or more of their sub-factors address one of the violations demonstrated in the previous conflicts. To draw a comparison between this index and the WGIs, the scores given to the UK by the WJP will also be examined, however the years that will be compared will be 2018 to correlate with above index, and 2020 to display movement, if any, since then. For *Constraints on Government Powers,* the UK scored a .84 on a 0-1 scale, in 2018, which decreased to .82 in 2020. The *Fundamental Rights* factor displayed a score of .81 in 2018, falling three points to .79 in 2020. In 2018 the perception of *Civil Justice*, was equivalent to a score of .84, but also fell in 2020 to .81. The lowest scores across the board for the UK are related to the factor of *Criminal Justice*. Strikingly low in comparison to other factors, 2018 saw a score of .74 and 2020 witnessed the score drop further to .72. Overall, the UK's Rule of Law score has decreased from .81 in 2018 to .79 in 2020. (WJP, 2020) The scores presented by both indexes, also correlate to many of the global trends occurring, especially in relation to other Western powers. The WPJ reported in 2020 that of the three factors that countries are most likely to see declines in annually, two of them are *Constraints on Government Powers* and *Fundamental Rights*. (WJP, 2020) Arguably two of the strongest western democratic powers, aside from the UK, are the United States and France. The index shows that the US, with their score declining from .73 in 2018 to .72 in 2020; fell beneath the top 20 countries for the first time since the index's inception. (WJP, 2020) Similarly, France's overall Rule of Law score declined from .74 to .73; which indicated a drop in rank from 18 to 20 globally. (WJP, 2020) With all of the world's democratic hegemons in decline, specifically in regard to the Rule of Law, perhaps their complacency in believing the rules do not apply to them is no longer going unnoticed.

These indices may raise the question as to how perception of the Rule of Law could substantiate the necessity for upholding it. Research presents two explanations; the first being that these perception indices indicate a general consensus across the population regarding the governments' effectiveness with regard to exercise of power, regulatory enforcement, respect for fundamental rights, etc. This implies if a country's ranks are declining or are low in score, the governments' perceived likelihood to uphold the Rule of Law and practice good governance is also declining or low. The second is that when citizens lose faith in their governments to effectively and efficiently rule while maintaining their individual rights and representing their best interests, a larger disrespect for the rules is formed and chaos is likely to ensue should people disregard it altogether (Guay, 2017). That being said, if a particular country or set of countries, perhaps the most associated with Western power, appear to be declining in scores across the eight factors; it is logical to inquire why these countries are still able to exercise the power in which they do; and could ultimately result in expressed dissent of the government by its population.

In addition, if a country's population perceives their government [including the authorities designated to enforce laws and policies] as one that is unlikely to efficiently govern them within the confines of the law; how can any other country also be expected to either? While this paper has demonstrated that from a legal perspective, the West has and continues to exercise action beyond the statutes of the law; this apparent and revealed perception factor only reaffirms that precedent. Cambridge Dictionary defines a precedent as "an action, situation or decision that has already happened and can be used as a reason why a similar action or decision should be performed or made". An action, as a result of something that has already occurred, is based fundamentally upon the perception of that previous action. To remain consistent with the scores presented above, if it is perceived that the UK authorities are likely to carry out actions that disrespect citizens' fundamental rights in relation to the law because in the past they have been successful in doing so without repercussions; it is possible those authorities or other observers will act in a similar manner under the presumption they also will face no ramifications. This example demonstrates how precedents are set, and why

perception can be used as a significant indicator of existing circumstances, as well as a foreshadower of potential situations.

CONCLUSION

The world's environment continues, as it has done for the past three decades, to become increasingly volatile and precarious. As the multi-polarity of the world shifts; so, do its influences. Nationalism and protectionism will not be catalysts of protecting national security and international security, but rather the detriment of both. Nationalist and protectionist ideals and policies exist to protect the *state*, but when the only concern of the *state* is to protect itself; contribution to international integration and peace no longer sits at the forefront of top priorities in foreign affairs. This thesis argues the Rule of Law should prevail in the fight against terrorism; for without it, the world will continue to progressively move back toward an anarchic nature. If those who developed the international system and established the laws that serve as its foundation are *those* states that are most prone to disregard it for personal interest; how can the remainder of states subject to international law be expected to comply? If the existing primary international institutions, such as the UN, or supranational institutions, such as the ECHR. cannot rely on *accountability* and *the judiciary* to regulate individual state action, there is no means to maintain their credibility. Without credibility and accountability, the 'Rule of Law' holds no ground from a global perspective and the international legal order will cease to serve any real purpose; but will exist as a mere suggestion.

So, the questions remain; should the 'Rule of Law' prevail in the fight against terrorism and what does the West's apparent, global precedent symbolize moving forward? The case studies laid out above embody three notions in relation to that precedent in the context of counter-terrorism. The first notion is that over the course of the last fifty years, states representative of Westernized power and standard of democracy, have consistently violated the statutes of the law, be it domestic or international; in their efforts to counter terrorist threats, including threats regarded as both *internal* and *foreign* insurgency. The second notion is that those states, as discussed above, systematically utilized legal grey zones, extrajudicial powers, and their individual interpretations of the law to justify the alleged violations of the law [and subsequently, the violations of fundamental human rights]. Though the Courts evidently found favour in the United Kingdom's defence both in 1978 and in 2018; it is important to recognize two things; that, though seemingly unfair, the UK's plea contained compelling evidence

within the confines of the law. It must also be understood that this thesis aims to focus on whether or not the 'Rule of Law' should prevail in the fight against terrorism; not whether the law has always ruled in favour of the party that has been allegedly [or found to be] mistreated.

Given the complexity of the subject matter, the final notion embodied within the case studies analysed above can also be broken into several fragments. The first fragment being that though the aforementioned states may have not acted within the margins of the law; [for some] an effective case was presented to the Court that protected those actions. Thus implying, the Rule of Law did prevail in the eyes of the Courts, regardless if the same cannot be perceived on the grounds of the actions of the state. The second point to make refers back to the question, which I will reiterate; *Should the 'Rule of Law' prevail in the fight against terrorism?*. Prior to explaining why it *should* prevail, I will first emphasize a statement made earlier that domestic law and international law pertaining to sectors including but not limited to criminality, the rules of war and human rights, were established by institutions made up of what today represents Western powers and their ideals. As identified, the threats linked to terrorism today are significantly different in geographical scale, intensity of weaponry, potential magnitude of damage, and unpredictability, than they were perceived to be fifty years ago. What cannot go unnoticed, however, is that while threats have transformed and states' action have arguably worsened; the legal discourse that is in place to regulate those actions has not. Laws and regulations, perhaps, should be re-evaluated to reflect this new wave of terrorism and its associated threats that have begun to decimate the credibility of regulatory bodies worldwide. A potential example of this was presented in the third chapter with the suggestion of 'torture warrants' by Dershowitz. Ultimately, as the case of Northern Ireland displays, and the *Kadi* proceedings affirm, the precedent that the rules do not *always* apply, specifically to the West, strongly persists.

This directly correlates to the *should* debate that has arisen several times throughout the course of this paper. The state *should* comply with the 'Rule of Law', as *should* the international courts protect it. In the event that the state does not comply, the Court *should* be able to rely on enforcement of the 'Rule of Law' to ensure justice and accountability in the wake of injustice. Given the ethical perspectives explored earlier, it

is important to recognize the intertwined relationship between the 'Rule of Law' and morals. It was argued that ethics serve as the basis for the 'Rule of Law' and that to alter the law, or to rely on *legal grey zones* for coming to conclusions in decision-making processes, is in and of itself, unethical. Numerous arguments exist regarding both legal discourse and using ethics and morality in the methods states use to combat terrorism. The argument here, however, is not intended to imply whether or not my personal outlook reflects one action to be just versus immoral. The objective of this thesis is to identify why the 'Rule of Law' should always prevail regardless of circumstance by presenting the apparent precedent that has been set by the West, which aids them in evading international law for the purpose of individual self-interest. The Kadi proceedings displayed how the European Union implemented restrictive measures based on international regulation [UNSC Resolutions] that were a direct infringement on Mr. Kadi's fundamental rights, namely his right to respect for property and right to an effective judicial review. Though the Court did ultimately find favour in Mr. Kadi, he was subject to that infringement for nearly a decade, in which his assets remained frozen and was banned from travel. The conflict in Northern Ireland, which signifies a different era of terrorism, exposes the United Kingdom's battle with not only the IRA, but also their confrontation with the law. Representative of a colonial style methodology, the United Kingdom resorted to tactics that go beyond the rules of war, rules of engagement, and policing criminality; to gain intel and exercise punishment regardless of proved innocence. As discovered earlier, this methodology initially resulted in extreme backlash from fragments of the population deemed to be uninvolved; ultimately creating a hostile environment where the *terrorists* became the receivers of sympathy, occasionally even the victims, and their cause became a movement. Infringement of the rule of law is suggested by Beattie to be directly related to increased insurgency; to generate anarchy (Lang & Beattie, 2009). There is no direct route to anarchy; nor a clear depiction of what an anarchic world would or has the potential to portray. Following a period of widespread lawlessness; whether or not the world would find its way back to meaningful order or the eruption of a third world war would decimate the human race, is a matter of hypothetical opinion. Brining the focus back to hypotheticals, that type of scenario lays solely within the *what-if* concept and cannot truly be conclusive. One could argue then that any conceivable situation within the confines of the future; scientifically, philosophically, or otherwise, cannot be

considered definitive given the numerous external or unpredictable factors that could play a part. If that is the case, then why not let the world explode into a chaotic state of disarray? What purpose does the establishment and enforcement of law and order serve? Centuries of history, various empires and civilizations, emphasize that for survival, the human race must rely on mandate, regulation of that mandate, and the reliability of that regulation, in order to avoid the insurmountable greed, hunger for power, and collateral damage both of those desires produce; human lives.

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ABBREVIATIONS

a.i.	ad interim
AG	Advocate General
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
CoE	Council of Europe
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
EUCO	European Council
GC	General Court
HRC	Higher Regional Court (?)
IRA	Irish Republican Army
NI	Northern Ireland
OFAC	US Dept. of Treasury Office of Foreign Asset Control
RES	Resolution [*in reference to the UNSC resolutions*]
RUC	Royal Ulster Constabulary
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNDHR	United Nations Declaration on Human Rights
UNSC	United Nations Security Council
US	United States of America