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Individual legal protection vs. anti-terrorist measures: the legal perspective (the saga of the Kadi cases, Hamas v. Council).

Streszczenie

Terroryzm stanowi jedno z najpoważniejszych zagrożeń we współczesnym świecie: nie tylko ze względu na efekty bezpośrednio podejmowanych akcji w postaci ofiar, lecz również ze względu na jego wykorzystywanie w celu ograniczania swobód obywateli w demokratycznych państwach. Zagadnienie to jest bezpośrednio powiązane z niemożnością ustalenia jednolitej, obowiązującej definicji terroryzmu przy jednoczesnej konieczności uregulowania problematyki penalizacji aktów terroru. Problemy te znajdują odzwierciedlenie w nadużywaniu przez demokratyczne państwa w walce z terroryzmem oraz próbom mu zapobiegania, metod, które stanowią zaprzeczenie wartości fundamentalnych dla demokracji. W związku z tym kluczowym staje się pytanie o rolę sądownictwa w kontroli przestrzegania rozlicznych aktów wprowadzających normy, sankcje i środki antyterrorystyczne. Analizowane orzeczenia, w sprawie Hamas oraz saga Kadi, stanowią przykłady prób racjonalizacji kierowanych strachem posunięć. Socjologizująca perspektywa pozwala zauważyć jak istotne, w związku ze specyfiką wojny prowadzonej z terroryzmem, jest jednoczesne zagwarantowanie przestrzegania zasad państwa demokratycznego.

Słowa kluczowe: Środki antyterrorystyczne, terroryzm, Hamas, Kadi.

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1. Introduction

We do indeed live in fear. Even though people are not eager to admit it, when asked to choose between security and freedom, the vast majority will prefer the former to the latter. This has been happening at least since the 18th century, when Benjamin Franklin included the following famous sentence in a letter to the British Governor: "Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety"[1]. Today the Western world is still facing the same dilemma.

In 2010, fifteen US citizens were killed in terrorist attacks all around the world. That same year 408 Americans were killed by police officers within the US; 718 died there just because they had fallen out of their beds[2]. Yet people agree to limit their freedom in the name of the war on terror rather than a war on beds. At the same time, the number of victims of terrorist attacks is growing – but not in Western countries. Instead, Iraq, Afghanistan and Nigeria are the leaders when it comes to the number of terrorism victims (see Figure 1 below)[3]. These numbers clearly depict what the heart of the 'terror issue' is – it is all about emotions rather than rationality.

[1] B. Franklin, *Pennsylvania Assembly: Reply to the Governor, November 11, 1755*, http://franklinpapers.org/franklin/framedVolumes.jsp?vol=6&page=238a, 23.11.2015.

[2] WHO, *Cause of Death Query online,* http://apps.who.int/healthinfo/statistics/mortality/causeofdeath_query/, 23.11.2015; U.S. Department of State, *Terrorism Deaths, Injuries, Kidnappings of Private U.S. Citizens, 2010*, http://www.state.gov/j/ct/rls/crt/2010/170267.htm, 23.11.2015.

[3] M. Chorley, *Revealed: Number of people killed by terrorists worldwide soars by 80% in just a year*, "Daily Mail", 17.11.2015, http://www.dailymail.co.uk/news/article-3322308/Number-people-killed-terrorists-worldwide-soars-80-just-year.html, 21.08.2016.

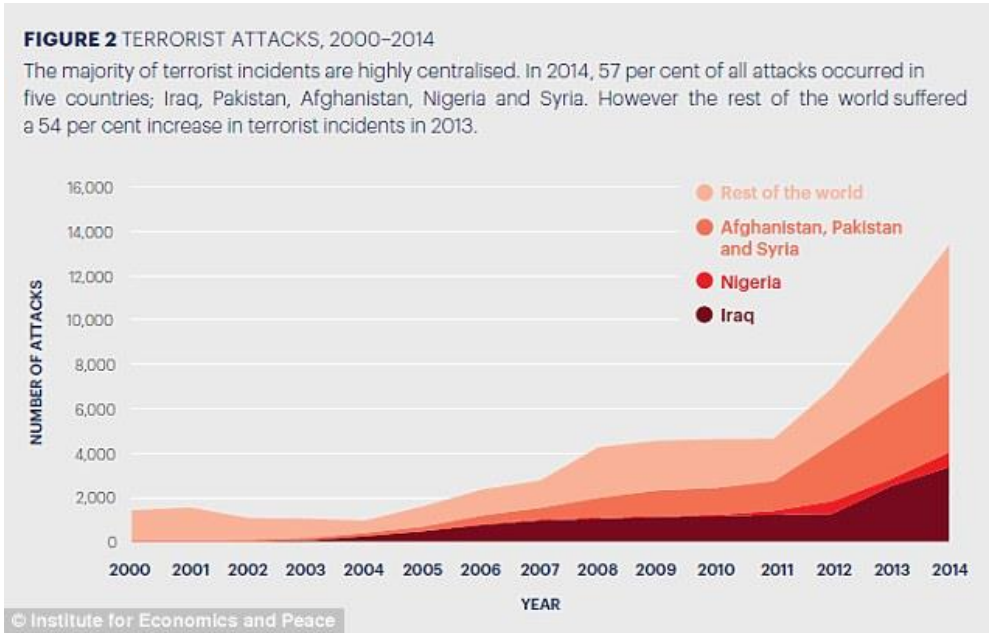

Figure 1: Terrorist attacks, 2000-2014. Source: Institute for Economics and Peace[4]

Obviously, the statistics for 2001 in America were entirely different[5], and the tragedy of the World Trade Center should never happen again. But does this mean that the international community shall remain in a permanent state of war? In this paper we would like to discuss a few crucial issues concerning the global War on Terror. Major legal regulations in both the UN and EU systems will be presented along with their mutual relations. Special emphasis will be put on the issue of financing terrorism. We will also mention the impact of the Kadi and Hamas cases on the legal order. We will use the 1267, 1368 and 1373 Security Council resolutions, the Maastricht Treaty and the Hamas and Kadi judgements.

4 *Ibidem.*

5 2753 people; New York City Office of Chief Medical Examiner, *World Trade Center Operational Statistics*, http://www.nyc.gov/html/ocme/downloads/pdf/public_affairs_ocme_pr_WTC_Operational_Statistics.pdf. 23.11.2015.

To begin, first the term ‘terrorism’ should be defined. Since 2000, the United Nations General Assembly has been negotiating a Comprehensive Convention on International Terrorism. The definition of a ‘crime of terrorism’, which has been on the negotiating table since 2002, reads as follows:

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serious bodily injury to any person; or

(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or

(c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act[6].

In 1972 the UN General Assembly established the Terrorism Committee, which had one major goal to achieve – to prepare a precise, legal definition of terrorism. After one year of functioning the Committee closed down because of its permanent inability to define terrorism. Instead, the international community decided to define some particular crimes as different forms of terrorism[7]. Several conventions informed the international community that hijacking a plane, aggression against diplomats, bombings, nuclear crimes and many others were examples of terroristic activity. Yet the lack of a general definition of terrorism has made it impossible for the state to create a coherent and human-rights-friendly security system. Having no clue what terrorism actually is, we cannot predict how it will evolve in the future, thus we are not able to prepare for any potential attacks in a rational and efficient way.

[6] *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 Sixth session (28 January-1 February 2002), p. 12, www.un.org/documents/ga/docs/57/a5737.pdf, 23.11.2015.*

[7] H. Zięba-Załucka, T. Bąk, *Terroryzm a prawa człowieka*, Kraków, Rzeszów, Zamość 2012, p. 75; 11 out of 14 major terrorism conventions were passed after 1973.

Taking into account the difficulties connected with defining terrorism in a specific way, we would like to use linguistic analysis to measure the frequency of phrases commonly used to define terrorism, as conducted by B. Hoffman[8]. According to his study, there are 22 different categories of words which are present in 109 different definitions: violent activities (83.5% of all definitions), political character of the action (65%), causing fear (51%), etc. A more complex overview of attempts at defining terrorism in the historical perspective can be found in "Terroryzm jako zagrożenie współczesnego świata" by Jacek Dworzecki[9].

States and societies, overwhelmed with fear of the unknown, tend to overreact. In order to protect people from something undefined, the authorities run large-scale invigilation programmes such as PRISM or ECHELON, torture innocent people in Guantanamo prison or start ridiculous wars. We do not know what might happen in the future because the only thing we can do, instead of defining terrorism in an abstract way, is to enumerate all the types of attacks that have occurred in the past and call them forms of terrorism. Living in fear, we agree to limit our own and others' freedom in order to protect us from the unknown. It is obvious that in such an environment there is no more room for human rights and the rule of law.

As time goes by, more and more European countries have introduced more severe anti-terrorist measures. Since 2001, new laws have been adopted in France, Germany, the United Kingdom, Poland, etc. These acts have implemented expanded measures, such as eavesdropping powers to prosecutors, allowing them to tap phones, plant hidden cameras and analyse communication without judicial authorisation. The goal of our analysis is to present universal legal mechanisms. We want to depict the Western countries' reactions (or overreactions) to the threat of terrorism. Are their legal actions aimed at fighting terrorism or, perhaps, rather at increasing the level of control and the scope of a given state's power.

2. UN and European regulations on AT measures

[8] B. Hoffman, *Oblicza terroryzmu*, Warszawa 2001, p. 38.

[9] *See* J. Dworzecki, *Terroryzm jako zagrożenie współczesnego świata*, Zeszyt Naukowy "Apeiron" Wyższej Szkoły Bezpieczeństwa Publicznego i Indywidualnego, nr 5, Kraków 2011.

Even though there is a clear link between UN and EU anti-terrorism regulations systems, when it comes to the field of an individual's legal protection there is a huge gap between these two, as was pointed out by Armin Cuyvers[10]. In this chapter we would like to present the basic regulations of anti-terrorism measures, both on the UN and EU arena, in order to continue the analysis of the above-mentioned gap in the subsequent chapters.

2.1. Regulations on AT measures: the UN system

A fundamental regulation in the international law system, which could be classified as an anti-terrorist measure, is the UN Charter. Its article 51 grants the inherent right of individual or collective self-defence against an armed attack. Yet the question arises whether this rule should be applied to all terrorist attacks? When the UN Charter was created, terrorism was rather a misty memory than a current problem. Nowadays, one could ask what it means to conduct an armed attack? Is setting a few bombs on trains or buses enough? What is more, it is not obvious what the acceptable scope of the self-defence is. Is it possible on the grounds of Article 51 to kill individuals or to treat them in an inhuman or degrading way? These are the cases of Usama Bin Laden's assassination in 2011 or the still-operating Guantanamo prison. Anthony Clark Arend and Robert J. Beck have tried to answer these questions. They analysed in what ways states use their inherent right of self-defence after terrorist attacks. Arend and Beck slightly clarified this complex matter by mentioning four major patterns. The first one is the kidnapping of suspects. The second one is the assassination of terrorists, which for many years was Israel's domain. The third possibility is military action against a terrorist infrastructure, i.e. their training camps (the 1998 Afghanistan and Sudan air raids). The last one is an invasion of a terrorism-supporting state (2001 in Afghanistan, the 1993 Iraq air raid)[11].

[10] *See* A. Cuyvers, *Give me one good reason: The unified standard of review for sanctions after Kadi II*, "Common Market Law Review", vol. 51, no 6, Hague 2014, p. 1759-1788.

[11] Clark Arend A., Beck R.J., *International law and the use of force. Beyond the UN Charter paradigm*, New York 2013 [after:] M. Lech, *Ochrona prawna społeczności międzynarodowej wobec zagrożenia teroryzmem*, Gdańsk 2014, p. 114.

The way Western countries execute their right to self-defence leaves no doubts. Terrorists, be it individuals or organised groups, are treated as if they were regular subjects of the international legal order. They can conduct aggression against the states as well as become the objects of the states' military reaction.

In the UN system one can find three more regulations of significance here – the Security Council's resolutions 1267, 1368 and 1373. The first one, imposed in 1999 after the attacks in Kenya and Tanzania, establishes sanctions against Al-Qaida, Usama Bin Laden, the Taliban and all subjects connected to them. The most severe one is asset freezing. At the same time the resolution creates a list (Consolidated List) onto which all suspected individuals as well as entities shall be entered. The list is run by the UN Sanctions Committee[12].

In Resolution 1368, passed on 12 September 2001, the SC classified the attack on the WTC as a threat to the international peace and security. What is more, the act mentions the state's right to self-defence. Still, the resolution lacks a clear statement on the SC's attitude towards a possible invasion of Afghanistan. The terms "threat to the international peace and security" and "right to self-defense", combined and used in one document, lead us to an intriguing conclusion. The SC accepts a military reaction aimed at a terrorist organisation. This interpretation made it possible for the US to claim that the 2001 Afghanistan invasion was an execution of the Charter's article 51. The same point of view was presented by the international community at that time. Some researchers have stated that by interpreting the UN Charter in such a broad and unclear way the SC narrowed the scope of its own authority by leaving much discretional power to the states[13]. One could ask whether this is an infringement of the rule of law principle or not? In our opinion, issues of such great importance as drawing the boundaries of what is and what is not a threat to the international peace and security shall not be in the states' gesture. The SC should consider each situation individually and, after a profound scrutiny, should give the international community a clear answer.

[12] After the 1988 and 1989 resolutions the Committee split into two separate committees – the Al-Qaida Committee and the Taliban Committee.

[13] M. Marcinko, *ONZ wobec terroryzmu międzynarodowego*, Kraków 2008, p. 148.

The 1373 resolution repeated and re-implemented the regulations from 1267 and 1368. It states that the states are obliged to: penalise all forms of financial support of terrorism, strengthen control of their territories in terms of terroristic activity and develop international cooperation. This resolution is unique for the number of its ratifications, i.e. 192, which, compared to 1267 (24 ratifications), creates a clear image of how the states' attitude towards combating terrorism changed after 9/11.

B. Fassbender claims that an analysis of the SC's reactions to terrorist activity leads to three fundamental conclusions. First, that in the War on Terror conducted after 9/11 the SC does not want to play a major role, thus leaving it for the US. Second, that in the future it would be the SC that would be the leader of counter-terrorist actions after every single attack. Third, that in the future only the US would be able to react to the terrorists' aggression independently while all other countries would require international coordination and assistance[14]. Let us now juxtapose these ideas with the rule of law principles. Could one point to any connections?

In our opinion the distribution of power between the SC and states acting as individuals is remarkably important. We assert that the more power and latitude in combating terrorism a state has, the more probable it is that human rights will be infringed. The crucial problem here is domestic legislation which has different provisions for both citizens and non-citizens. In the Patriot Act (US) and the Anti-terrorism, Crime and Security Act (UK), one can find regulations that allow the authorities indefinite detention of non-citizen suspects. Fortunately, these regulations are no longer in force, but for a few years they enabled the functioning of such places as the Guantanamo prison. The international legislation of the UN system may seem to be less effective, but it is free from laws that severe.

2.2. Regulation on AT measures: the European system

[14] B. Fassbender, *The UN Security Council and International Terrorism*, passim, [in:] *Enforcing International Law Norms Against Terrorism*, ed. A. Bianchi, Y. Naqvi, Portland 2004.

"Since 11 September 2001, 239 EU anti-terrorism measures have been introduced: 26 action plans and strategy documents, 25 Regulations, 15 Directives, 11 Framework Decisions, 25 Decisions, 1 Joint Action, 3 Common Positions, 4 Resolutions, 111 Council Conclusions, and 8 international agreements"[15] – that number is slightly too much to discuss in one paper, therefore, we chose just some of the acts. The most important ones are the Treaties and the Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93). The Maastricht Treaty prepared a legal framework of anti-terrorist cooperation by enlisting it as an element of the 'third pillar'.

This treaty also created the EUROPOL – European Police Office. Its main aim is to co-ordinate cooperation in the field of criminal policy between member states. It includes combating terrorism as well. Another worth mentioning institution founded by the EU law is the European Arrest Warrant. Introduced by the 2002/584/JHA of 13 June 2002 framework decision[16], in fact allows extradition without the double criminality. Obviously, it is working only between the Member States.

The choice, to focus on the financial aspect of fight against terrorism, is justified by two arguments. Firstly, by the character of the European Union as an organisation, which in its roots was strictly economical. Therefore considering the community's anti-terrorism measures financial sanctions should be the first component to be analysed. Second, implementation of financial sanctions due to their preventive nature becomes a permanent element of the legal system and leads to creation of a fixed system of institutions and instruments. Fighting the terrorism, which is usually connected to direct violence, is broadened to the level of indirect influence.

It should be noted that even though negotiations on the Comprehensive Convention on International Terrorism have been deadlocked since 2001[17], some of the sectoral conventions

[15] Association of Accredited Public Policy Advocates to the European Union, *EU Anti-Terrorism Measures*, http://www.aalep.eu/eu-anti-terrorism-measures (23.11.2015).

[16] M. Lech, *op. cit.*, p. 174.

[17] T. Deen, *Despite 13-Year Deadlock, U.N. Makes Headway Fighting Terrorism*, Inter Press Service, www.ipsnews.net/201401/despite-13-year-deadlock-u-n-makes-headway-fighting-terrorism/ 23.11.2015.

on anti-terrorist measures have a significant number of ratifications, such as the International Convention for the Suppression of the Financing of Terrorism, which has been effective since 10 April 2002 and has 132 signatories[18]. In the 2nd article of the Convention[19], the treaty implements regulations on the financial participation of individuals in terrorist acts. The treaty defines a catalogue of offences which should be punished, but the detailed regulations regarding effective, proportionate and dissuasive criminal, civil or administrative sanctions depend on the domestic law. Therefore, to circumscribe the specifics of an individual's position when facing accusations of committing one of the prohibited acts, as mentioned in the Convention, we should analyse a specific state's law.

On 15 November 1999 the Council of the European Union released the Council Common Position concerning restrictive measures against the Taliban (1999/727/CFSP[20]) which confirmed that funds and other financial resources held abroad by the Taliban under the conditions set out in Resolution 1267 (1999) would be frozen. Moreover, on 14 February 2000 Council Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources with respect to the Taliban of Afghanistan was resolved. A subsequent Security Council Resolution on anti-terrorist measures, 1333 (2000), was also somehow adapted by the Council's Common Position 2001/154/CFSP and replaced Council Regulation No 337/2000 with 467/2001. The dualism of the implemented solutions is even more striking if we notice that the Committee's Sanctions List became an annex to the Council's Regulation 467/2001 (what is interesting to note is that the Regulation was accepted on 6 March 2001, i.e. two days before the combined Sanctions List of the Committee).

[18] See *United Nations Treaty Collection*, https://treaties.un.org./Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&Lang=en, 23.11.2015.

[19] *International Convention for the Suppression of the Financing of Terrorism*, adopted on Dec. 9, 1999, G. A. Res. 54/109 (1999) Annex, U.N. Doc. A/54/109/Annex (Dec. 9, 1999). See *United Nations Treaty Collection:* https://treaties.un.org/doc/db/Terrorism/english-18-11.pdf, 23.11.2015.

[20] *Council Common Position concerning restrictive measures against the Taliban* 1999/727/CFSP, http://www.sipri.org/databases/embargoes/eu_arms_embargoes/taliban/727, 23.11.2015.

As may be suspected, the preventive nature of financial sanctions may result in tension between the fact of enlisting individual and observing human rights. According to the "Guidelines of the Committee for the Conduct of its Work", "States are advised to submit names as soon as they gather the supporting evidence of association with Al-Qaida. A criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventive in nature"[21]. Article 12 of the International Convention for the Suppression of the Financing of Terrorism claims that "any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law"[22].

The contradiction between these two regulations forces us to put a question tag on Walter Schwimmer's statement as formulated in "Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies", in which he stated that: "It is perfectly possible to reconcile the requirements of defending society and the preservation of fundamental rights and freedoms"[23] According to A. Cuyvers as mentioned above, there is systematic tension between the UN an the EU anti-terrorist strategies in terms of human rights' protection.

As is presented above, the oppressive part of these two strategies is fully complementary, i.e. the EU introduced the UN's mechanisms of sanctioning individuals and collective organisations, however, there is a significant dissonance in the standards concerning an individual's legal protection. On the one hand, the European legal system grants several basic rights to

[21] Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and Associated Individuals and Entities, *Guidelines of the Committee for the Conduct of its Work. Adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, 9 December 2008, 22 July 2010, 26 January 2011, 30 November 2011, and 15 April 2013*, http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf, 23.11.2015.

[22] *International Convention for the Suppression of the Financing of Terrorism*, *op. cit.*

[23] *Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies*, p. 5, https://www1.umn.edu/humanrts/instree/HR%20and%20the%20fight%20against%20terrorism.pdf, 23.11.2015.

people, all of whom are secured by judiciary control at both the domestic and European level. Yet, on the other hand, the very same EU participates in a UN-inspired sanctioning programme which infringes some of the fundamental principles of the rule of law, such as the right to a fair trial.

Additionally, it is worth mentioning the European Convention on the Suppression of Terrorism (27 January 1977) and the protocol amending the European Convention on the Suppression of Terrorism (Strasbourg, 15 May 2003). These acts of the Council of Europe are the 'third pillar', which together (with UN and EU regulations) creates the legal framework of cooperation on anti-terrorism measures. They are accompanied by strategies and declarations, which are not the topic of our analysis as they do not provide systematic legal solutions 24.

3. The General Court and the Court of Justice of the European Union sentences and their consequences

The proceeding T-315/01 versus the Council and Commission, which was continued before the Court of Justice as C-402/05 P and C-415/05, the proceeding versus the Commission (T-85/09) and its appeal (C-584/10 P joined with the proceedings United Kingdom versus Kadi – C-593/10 P and Council versus Kadi – C-595/10 P) were the result of enlisting Yassin Abdullah Kadi and the Al Barakaat International Foundation on the above-mentioned sanctions list annexed to the Council's Regulation 467/2001.

Altogether, the file containing sentences concerning the Kadi case is more than 200 pages long. The proceedings lasted from 18 December 2001 until 18 July 2013 and, in the opinion of Juliane Kokott, Advocate General at the Court of Justice, and Christoph Sobotta, it was "perhaps the most visible and interesting case of the European Court of Justice (CJEU) for

[24] For a full list, see: http://www.antyterroryzm.gov.pl/CAT/antyterroryzm/wspolpraca-zagraniczna/unia-europejska/559,Unia-Europejska.html (21.08.2016).

external relations in recent years. The Court essentially had to decide whether a United Nations Security Council resolution should enjoy primacy over EU law"[25].

The grounds for this question was action brought forth by Mr. Kadi and the Al Barakaat Foundation who decided to seek the annulment of the Council's Regulation, mainly by raising the allegation of violation of the right to be heard, the right to respect property and the right to effective judicial review[26]. Due to the high complexity of the Kadi case and the vast literature on its topic, we propose to focus on three issues connected with the CJEU's sentence. The first issue is a question regarding the competences of the European Union, the United Nations and particular states regarding sanctions aimed at individuals and entities as a result of their possible connections with terrorist organisations. The second issue is focused on human rights and their importance in the case of conflict between them and values such as public order or security. The third issue are the consequences of the Kadi judgement for the legal order, which could be metaphorically stated as the question: "What did the CJEU try to say via the Kadi judgement and how was it understood?", which we will be looking for the answer for in our final remarks.

3.1. Supremacy of European Union law – how should the "rule of law" be understood in a situation of conflict between international law and European Union law?

One of the questions that the GC and CJEU were bound to analyse regarding the Kadi case was the responsibility of the European Union for implementing sanctions framed by the Security Council's Resolution. The sentence of the GC contains the thesis that: "The institutions and the United Kingdom are therefore right to maintain that the Council was competent to adopt the contested regulation which sets in motion the economic and financial sanctions

[25] J. Kokott, Ch. Sobotta, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*, The European Journal of International Law, vol 23, no 4, 2012, p. 1015.

[26] *See* Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [ECR 2005 II – 03649], at para. 59.

provided for by Common Position 2002/402, on the joint basis of Articles 60 EC, 301 EC and 308 EC"[27].

However, the above-mentioned basis did not provide sufficient grounds for implementing the SC Resolution, and in the sentence it is clearly expressed that adopting such measures as an element of the Common Foreign and Security Policy should also be considered in the context of the general aims of the European Union, i.e. it "is justified for the sake of the requirement of consistency laid down in Article 3 EU"[28]. Moreover, according to the CJEU findings, article 308 EC should not be considered as one of the bases for such regulations[29], even though anti-terrorist measures, especially considering economic sanctions, may be the subject of regulations at the community level.

The second aspect of this problem is the possibility of treating the SC Resolution or, in general, the UN system, as a source of specific legitimisation of instruments which may not be entirely coherent with, in this case, the fundamental rights of the individual. This perspective was used as an argument by the Council in the Kadi case and was supposed to eliminate the possibility of the illegality of adopted solutions[30]. As Cian C. Murphy puts it, "for the General Court, any review of the restrictive measures against EU human rights standards would amount to an indirect review of the actions of the UN Security Council against those standards. Such an indirect review was not compatible with international law and was therefore not appropriate. For the Court of Justice, in contrast, the matter war entirely an internal one"[31]. This point should lead us directly to the question regarding the role of the CJEU as the human rights guard.

[27] Case T-315/01, *op. cit.*, at pata 135.

[28] *Ibidem*, at para. 128.

[29] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al. Barakaat International Foundation* [ECR 2008 I-06351] at para. 235.

[30] *See* Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [ECR 2005 II – 03649] at para. 161.

[31] *See* C. C. Murphy, *Counter-Terrorism Law and Judicial Review: The Challenge for the Court of Justice of the European Union* [in:] *Critical Debates on Counter-Terrorism Judicial Review*, ed. F. F. Davis, F. de Londras, Cambridge 2014, p. 283-301.

3.2. The Solange argument and the role of the European Court of Justice as a guard of human rights?

In 2001, when Mr. Kadi was enlisted on the Sanction's Committee list, there were no procedures guaranteeing the individual possibility of defence in a case of false accusation resulting from being enlisted. This gap in the sanctions system made it possible to refer to the Kadi case in the reasoning of the German Federal Constitutional Court when attempting to define the relationship between German constitutional law and acts of the EU. Having learnt its lesson from the Germans, the CJEU decided to use this argument to define the relationship between the United Nations system and the European Union. The CJEU sentence, pointing out the GC's error in law, includes the statement according to which the "Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the reviews, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law"[32].

What is crucial at this point is the adjective "full review" understood as one which "should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in that measure are based"[33]. Soon after the CJEU sentence, on 22 October 2008 Mr. Kadi was provided with information, received from the Sanction's Committee, regarding the grounds for enlisting him on the sanctions list and on 28 November 2008 the Council Regulation, according to which Mr. Kadi was once again enlisted, was published. The grounds given in abovementioned acts were based on copying and pasting the piece of information received from the Sanctions Committee and they did not fulfil the CJEU's expectations regarding standards of abiding to the fundamental rights.

[32] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al. Barakaat International Foundation* [ECR 2008 I-06351] at para. 326.

[33] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v Kadi* [Reports of the cases: not yet published] at para. 40.

A fact that should not be omitted is the very broad accommodation of the idea of fundamental rights within the European legal order. The GC and CJEU indicated its roots not only in constitutional traditions common to the Member States but also noted the special significance of the European Convention for the Protection of Human Rights and Fundamental Freedoms in this matter (in the Kadi case these were especially articles 6 and 13 regarding the principle of effective judicial protection) as well as the Charter of Fundamental Rights of the European Union (article 47). We could only wonder to what's extent suggestive was mentioning the Charter of Fundamental Rights in a judgement delivered almost one year prior to the document that was actually entered into force. The meaning of its presence in the Kadi judgement should be seen in the right context. This context is the lack of vital for the human rights protection instruments on UN's level, regarding the mechanism of enlisting individuals and entities by the Sanctions Committee which was essential for whole case.

3.3 The Kadi judgement's consequences

The consequences of the Kadi judgement can be split into two groups, i.e. what actually changed in the matter of implementing anti-terrorist measures and what is supposed to change in relations between legal orders according to the opinions of scholars. To begin with the examples from the first group, it should be noticed that: "The Security Council responded to Kadi I by creating an Office of the Ombudsperson to provide help to individuals aggrieved by their listing, and subsequently made the Ombudsperson's recommendations regarding delisting more robust. In October, 2012, the Committee delisted Kadi after a recommendation by the Ombudsperson. In Kadi II, the CJEU held that the sanctions regime was still infirm because it did not provide for an independent adversarial hearing on each asset freeze"[34]. From this point of view, not only was the Kadi case initial inspiration for providing individuals with the possibility of questioning arbitrary decisions but it can also be seen as a stimulant for improving solutions. This thesis finds support in the CJEU's response to the Commission's remark that Mr. Kadi had the possibility of having his case re-examined within the procedure before the Sanctions Committee, in which the CJEU distinguishes between re-examination

[34] P. Margulies, *Aftermath of an Unwise Decision: The U.N. Terrorist Sanctions regime After Kadi II*, Amsterdam Law Forum, spring 2014, vol. 6:2, p. 53.

and judicial protection[35]. Acknowledging the fact that the final delisting of Mr. Kadi from the UN list on 5 October 2012 was the result of the Ombudsman's action can be interpreted as an example of a moderate juridification of a UN system that was previously in the realm of international relations[36].

However, the judgement is also an object of critical opinions concerning the possible consequences of such a sentence. First, doubts can appear if we consider the teleology of implementing financial sanctions in Resolution 1267: "However, the CJEU failed to pay sufficient heed to the delicate balance between fairness and efficacy in counterterrorism sanctions. Kadi I prompted reforms, including the establishment of the Office of the Ombudsperson that enhanced the alignment of fairness and efficacy. Minding that balance in Kadi II required a measure of deference to the Security Council's comprehensive framework. Without major changes, Kadi II will be remembered as a hollow victory for due process and an expensive monument to the obstacles facing effective global counterterrorism policy"[37].

This perspective, presenting Kadi as an element eroding the construction of different levels of law orders, has an even more questionable aspect concerning the extent of violations of a rule of law. According to the CJEU, a violation regarding the right to be heard and the right to judicial protection is defined as "promptly not respected"[38]. Broadening the possibility of claiming the damages was noticed by the scholars as suggesting that such use of language may result in understanding the violation of human rights simply by a manifest and clear disregard for the limits of discretionary powers, not necessarily being connected with the seriousness of the violation[39]. Keeping in mind the fact that the CJEU decided to annul the GC view on the matter of justification of Mr. Kadi's right to property and to enclose this aspect

[35] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al. Barakaat International Foundation* [ECR 2008 I-06351] at para. 322.

[36] *See* C. C. Murphy, *op. cit.*, p. 283-301.

[37] P. Margulies, *op. cit.*, p. 63.

[38] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al. Barakaat International Foundation* [ECR 2008 I-06351] at para. 344.

[39] *See* P. Takis Tridimas, Jose A. Gutierrez-Fons, *EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress*, Legal Studies Research, 2009, no 11, p. 40.

to the violations of his right to be heard and his right to effective judicial review, this direction of interpreting the CJEU judgement seems to be justifiable.

To examine what actually changed after the Kadi case, it is necessary to mention examples of other cases in which the rules formulated in the Kadi case became the grounds of the CJEU's judgement. An analogical case was one concerning the enlisting of Mr. Chafiq Ayadi, who brought forth an application to annul the EU implementation of the UN listing in 2002 which he then lost before the Court of First Instance in 2006 (T-253/02) and later won on appeal to the CJEU (C-399/06 P and C-403/06 P). Moreover, as Maya Lester notices[40], lately the GC has decided to apply the Kadi sentence also in cases related to Syria while annulling the inclusion of Hamcho, Kaddour and Jaber (Case T-43/12 Hamcho v Council, Case T-654/11 Kaddour v Council and Case T-653/11 Jaber v Council) on the EU sanctions list.

One of the GC's motivations for such a solution to these cases was the fact of not applying Article 47 of the EU Charter of Fundamental Rights (the right to a fair trial and effective remedy). According to Maya Lester: "the Court confirmed that where the reasons provided for a person's listing are challenged, it is for the Council to prove the reasons, with evidence, and not for the listed person to disprove them"[41]. These cases prove the importance of the Kadi judgement – but was it the importance in the matter of hierarchy of different law orders?

3.4. Hamas vs. Council: right to a fair trial

A very similar case was brought to the CJEU regarding financial sanctions aimed at restraining Hamas' activity. In December 2014 the General Court: "annulled, on procedural grounds, the Council measures maintaining Hamas on the European list of terrorist organizations"[42]. As mentioned above, the legal order of the EU includes an official list of terrorist

[40] *See* M. Lester, *EU Court Applies Kadi 2 to Syria Sanctions – Annuls Inclusion of Hamcho, Kaddour and Jaber*, http://europeansanctions.com/2014/11/23/eu-court-applies-kadi-2-to-syria-sanctions-annuls-inclusion-of-hamcho-kaddour-and-jaber/, 23.11.2015.

[41] *Ibidem.*

[42] *General Court of the European Union Press Release No 178/14*, Judgement in Case T-400/10 Hamas v Council, http://curia.europa.eu/jcms/jcms/P_152426/, 23.11.2015.

organisations. Hamas has been on the list since 2002. In 2010 it brought an appeal to remove itself from the list. According to the Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, the Council was obliged to carry out a specific procedure.

Its main point is to collect facts which have been concretely examined and confirmed in the decisions of national, competent authorities. All of this is done to make sure that an individual or an entity is actually connected with a given type of terroristic activity. Hamas brought forth several claims, mainly of a procedural nature, e.g. about the way they were notified after the Council's decision or about the inappropriate language in which the documents were prepared. The Court's decision was as follows: the Council conducted the factual examination in an impaired way by using mainly press and Internet releases. That is why the procedural requirements were not fulfilled and the Council's decision was annulled.

This is a clear example of how one of the rules of law principles, i.e. procedural justice, is being executed. Even though the Court claims that its decision has nothing to do with "any substantive assessment of the question of the classification of Hamas as a terrorist group"[43], it is not that simple. In order to prepare the judgement, the Court had to weigh two values – procedural justice and safety of the European citizens. It is impossible that the judges did not realise what the real effect of their ruling would be. They decided to unblock Hamas' assets to protect the right to a fair trial.

4. The Polish perspective: the new regulations

As the new act on terrorism was introduced to the Polish legal order in June 2016, it seems necessary to mention how the issues described in this article are connected to Polish regulations.

[43] *Ibidem.*

Case K 44/07 (30 September 2008), concerning the attempt of implementing regulations allowing, in case of terrorist attacks, to shoot down civilian aircraft, provides us with the basic judgement on anti-terrorism measures in the Polish context[44]. Not only does it summarise international law regulation with respect to civilian aircraft but it also relates to the more general, systematic issues regarding anti-terrorist measures. Unfortunately, the rules laid down in the Constitutional Court's verdict had no influence on creating a new anti-terrorist act.

The Polish anti-terrorist act fits the pan-European stream of tightening anti-terrorist legislation. Generally speaking, the act broadens the scope of power of the national counter-terrorist agency (ABW). It entitles them to conduct total surveillance of foreigners without judicial control, based only on the Prosecutor General's permission. Also, the freedom of speech is endangered as the ABW is allowed to shut down chosen websites. Even though there is judicial control of this action, it takes place after the blocking and, what is even more dangerous, the website's administrator is not allowed to lodge an appeal and challenge the court's decision. On the contrary, the right to lodge an appeal is granted to the ABW.

These examples alone provide us with proof that the relation between the legal protection of an individual and the anti-terrorist measures is still not sufficiently balanced. We claim that while creating these measures, more attention should be given to the protection of human rights[45].

5. Closing remarks

The Kadi case seems to be the most influential case in terms of the CJEU's sentences regarding terrorism. Due to its fundamental meaning for defining, or perhaps rocking, the

44 *See* Wyrok z dnia 30 września 2008 r. Sygn. akt K 44/07. http://trybunal.gov.pl/fileadmin/content/omowienia/K_44_07_PL.pdf (21.08.2016).

45 *See Rzecznik Praw Obywatelskich skarży ustawę antyterrorystyczną do Trybunału Konstytucyjnego* https://www.rpo.gov.pl/pl/content/rzecznik-praw-obywatelskich-skar%C5%BCy-ustaw%C4%99-antyterrorystyczn%C4%85-do-trybuna%C5%82u-konstytucyjnego (21.08.2016).

relations between the law orders, the initial topic of the case slightly descends into the background of the vast quantity of articles and opinions on this subject. What we would like to discuss is the attempt of interpreting the Kadi judgement closely to the source of its initial problem, which would be the approach to terrorism and, consequently, to anti-terrorist measures. Therefore, we would like to propose to consider the issue by asking why the CJEU judgement provided such a controversial solution.

First, as we have already mentioned above, attempts to limit terrorism to its definitions in the juristic approach has created much discussion. In this matter the political and sociological aspects are vital factors influencing the state's attitude towards this phenomenon. Due to this fact, the juristic perspective, implementing strict limitations regarding the possibility of defining acts as terroristic, has undoubtedly significant meaning for marking the boundaries of acts considered as terroristic. However, it must not be forgotten that regulations implementing anti-terrorist measures are the effect of combining a political, sociological and juristic mosaic.

Regarding the political discourse on terrorism, we cannot omit the fact that we are talking about war – not regular, old-fashioned war but war without a precisely specified enemy and with nothing other than a global battlefield. It was first declared by the Reagan administration in 1984 and was supposed to legitimise the freezing of assets. For our analysis, much more important is the fact of returning to this term in the context of the attack on the World Trade Center. As a consequence, what was noticed by sociologists was that war became the new order[46]. We find here a strong analogy to the War on Drugs as declared by the Nixon administration in 1971. Both 'wars' started with a strong political statement from the US President. They both had vast support of the American society. They both cost a lot. They both have their own institutions – the Drug Enforcement Administration and the Department of Homeland Security. They both spread across the globe. The question is – will the War on Terror fail just as the War on Drugs did?

[46] *See* A. Appadurai, *Fear of Small Numbers. An Essay on the Geography of Anger*, London 2006, passim.

What should be considered as a state of emergency not only determines the state's policy and shapes international relations but also appears to infiltrate everyday life in its littlest aspects. This leads us straight to our second conclusion and, simultaneously, to our interpretation of the Kadi judgement. For ages, *ius in bello* has been separated from *ius pacem*. The unpredictable nature of terrorism makes it almost impossible to continue this division. However, in our opinion one of the aspects that the CJEU tried to say via the Kadi judgement was that implementing financial sanctions as an anti-terrorist measure is not identical with introducing a state of war on a full scale.

The catalogue of fundamental rights, being an immanent part of European countries' constitutional rules as well as the subject of regulations adopted by European intergovernmental organisations, should not undergo any lawless limitations covered under the term of a "war on terrorism". Moreover, there is a high possibility that the CJEU is signalising that by implementing anti-terrorist measures we should be careful not to use terrorist methods. A much more drastic example would be CIA prisons, which demonstrate how fragile and dynamic the relation based on the victim-executioner schema is and how easily it is possible to reverse it. Therefore this (over-?) sensitivity regarding fundamental rights should also be seen as a warning sign of the above-mentioned possibility.

Of course, this point of view may be criticised by pointing out that such a judgement makes it more difficult to fight against terrorism. But do we even know who we are fighting with? Restraining civic liberties and spending billions of dollars on military action does not change the unpredictability of terrorist attacks. The Kadi case could be, and was, criticised for eroding the international security system, which is the only possibility of carrying out a united action against terrorism. Has this system itself not been, for over 30 years now, criticised for its insufficiency? Does the situation in Syria or Ukraine not prove that being oversensitive regarding human rights when implementing SC resolutions is not the most difficult problem as it comes to the world's peace and the UN system? Perhaps the Kadi judgement is not that special but, being used to thinking of terrorism as a war have we not forgotten about the values we are supposed to defend?

* * *

Individual legal protection vs. anti-terrorist measures: the legal perspective (the saga of the Kadi cases, Hamas v. Council).

Summary: Terrorism is one of the gravest threats in the modern world, both because of the victims of its actions and the fact that it is used to restrain citizens' liberties in democratic countries. This issue is directly linked with the inability to determine a unified, binding definition of terrorism while at the same time facing the necessity of regulating the question of penalisation of acts of terror. These problems are visible in the democratic countries' abuse of methods which are contrary to the fundamental values of democracy when fighting or trying to prevent terrorism. In view of all this the key question concerns the role of the courts in controlling whether various acts introducing norms, sanctions and counter-terroristic measures are being observed. An analysis of rulings in the Hamas and Kadi cases serve well as examples of attempts at rationalising actions governed by fear. The sociological perspective allows one to realise how important it is, due to the distinct character of the war on terror, to guarantee the following of rules in a democratic country.

Key words: Anti-terrorist measures, terrorism, Hamas, reforms, Kadi.