Ismailova S.R.♦

DOI: 10.25108/2304-1730-1749.iolr.2018.56.183-207

Political prisoners and human rights defenders in criminal process

Abstract: Resolution of PACE no 1990(2012) "Definition of political prisoner" does not conform to declared aims and does not resolve declared objectives.

Content of the resolution is contradictory on essence, politicized, and proposed tools of resolution are ineffective.

Resolution of PACE no. 1900(2012) is a means of interfering in the affairs of sovereign states and does not ensure international documents in an area of rights and freedoms of man.

Keywords: political prisoners; Resolution of PACE no 1900(2012) "Definition of political prisoner"; human rights defender; criminal process; European Court of Human Rights; fair trial.

It may conditionally consider that the next stage in epopee of definition 'political prisoner' passed by Resolution of PACE no. 1900(2012) "Definition of poitical prisoner", according to which this is a person who deprived personal freedom in the next cases:

"a) if the detention has been imposed in violation of one of the fundamental guarantees set out in the European Convention on Human Rights and its Protocols (ECHR), in particular freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association;

♦**Ismailova Sevinj Rauf qizi** – Doctoral Candidate of the Academy of Public Administration under the President of the Republic of Azerbaijan, PhD in Law (Azerbaijan). E-mail: sevism@rambler.ru

b) if the detention has been imposed for purely political reasons without connection to any offence;

c) if, for political motives, the length of the detention or its conditions are clearly out of proportion to the offence the person has been found guilty of or is suspected of;

d) if, for political motives, he or she is detained in a discriminatory manner as compared to other persons; or,

e) if the detention is the result of proceedings which were clearly unfair and this appears to be connected with political motives of the authorities." [3]

The Explanatory memorandum of rapporteur Mr Christoph Strässer, in basis of which the Resolution has been adopted, is said:

"3. **The notion of "political prisoner" as defined by the Council of Europe's independent experts and reconfirmed by the Committee on Legal Affairs and Human Rights**

5. Judge Stefan Trechsel presented his and his colleagues' findings regarding the definition and criteria for the term of "political prisoner" at a hearing before the Committee on Legal Affairs and Human Rights on 24 June 2010 in Strasbourg. The independent experts based their work on that carried out by Professor Carl Aage Nørgaard, then President of the European Commission of Human Rights, who had been invited by the United Nations Security Council to identify "political prisoners" in Namibia in 1989/90. Professor Nørgaard's close collaborator, Andrew Grotrian, was also among the experts testifying at the hearing on 24 June. The third expert at the hearing was Mr Javier Gómez Bermúdez, judge, President of the Criminal Chamber of the Audiencia Nacional (Spain). Following the discussion with the experts, the committee approved the conclusions of my introductory memorandum and invited me to continue working on the basis of these objective criteria.

6. During the discussion, agreement was reached among the experts that persons convicted of violent crimes such as acts of terrorism cannot claim to be "political prisoners" even if they purport that they have acted for "political" motives. Mr Gómez Bermúdez specified that this principle is applicable in democratic States with legitimate governments, where there could not be any talk of "legitimate resistance" such as that of the French Resistance during the Second World War. This argument is reinforced by Article 17 of the European Convention on Human Rights (ETS No. 5, "the Convention"), entitled "Prohibition of abuse of rights".

7. In short, the following framework has been developed by the independent experts and endorsed by the committee; it differs according to the nature of the offence for which the person in question is imprisoned.

3.1. Purely political offences

8. These are offences which only affect the political organisation of the State, including "defamation" of its authorities or similar misdeeds.

9. Not all offenders who are imprisoned for such offences are "political prisoners". The test is whether the detention would be regarded as lawful under the European Convention on Human Rights as interpreted by the European Court of Human Rights ("the Court"). As a rule, "political" speech, even very critical of the State and the powers in place, is protected by Article 10 – there is no "pressing social need" in a "democratic society", in the terms of Article 10, to suppress such speech. But there are cases in which political speech exceeds the limits set by the Convention, for example when it incites violence, racism or xenophobia. It should be noted that, whenever the Court has found the repression of such speech acceptable under the Convention, the penalties handed down by the national courts were largely symbolic. As the Convention must be interpreted coherently, without contradictions, a person punished in accordance with Article 10, paragraph 2, of the Convention cannot be seen as being held unlawfully under Article 5 and could

therefore not be considered as a political prisoner. But it is understood that punishment for political speech that is in principle not protected by Article 10 can still be a violation of the Convention (and thus give rise to the prisoner in question being "political") when the punishment meted out is disproportionate, discriminatory or the result of an unfair trial.

3.2. Other political offences

10. These are offences where the perpetrator acts with a political motive (and not one of personal gain), and the offence does not only damage the interests of the State, but also those of other individuals – for example, acts of terrorism. Obviously, the State under whose jurisdictions such acts were committed is not only entitled, but is even under a positive obligation, to prosecute such offences. Consequently, persons who are serving a sentence for such an offence or detained on remand on suspicion of having committed such an offence are not political prisoners. But the same exceptions as above can arise, where the punishment meted out is disproportionate, discriminatory or the result of an unfair trial.

3.3. Non-political offences

11. Persons who are imprisoned in connection with non-political offences (that is, all other offences where neither the actus reus nor the mens rea has a political connotation) are, as a rule, not political prisoners. Again, there are exceptions to this rule. A person convicted of a non-political offence can be a political prisoner when there is a political motive on the side of the authorities to imprison the person concerned. This can become apparent when the sentence is totally out of proportion to the offence and/or when the proceedings are clearly unfair.

3.4. Burden of proof

12. The distribution of the burden of proof is particularly important in such an area where much depends on the "political" or other motivation of either the perpetrator or the authorities. The agreed approach of the Council of Europe's

independent experts was the following: it is in the first place for those alleging that a specific person is a political prisoner to present a prima facie case. This material is then submitted to the State concerned, which will in turn have the opportunity to present evidence refuting the allegation. As summed up by Stefan Trechsel: "unless the respondent State succeeds in establishing that the person concerned is detained in full conformity with ECHR requirements as interpreted by the European Court of Human Rights, as far as the merits are concerned, that the requirements of proportionality and non-discrimination have been respected and that the deprivation of liberty is the result of fair proceedings, the person concerned will have to be regarded as a political prisoner."

13. Those mandated to establish the political character of a detention can also apply, mutatis mutandis, the Court's case law on factual inferences in cases in which the respondent State fails to co-operate by making available documents or other information that is in the exclusive possession of the authorities.

15. The allegation that a person is a "political prisoner" must be supported by prima facie evidence; it is then for the detaining State to prove that the detention is in full conformity with requirements of the Convention as interpreted by the European Court of Human Rights in so far as the merits are concerned, that the requirements of proportionality and non-discrimination have been respected and that the deprivation of liberty is the result of fair proceedings.

16. A good look at the criteria shows that someone recognised as a "political prisoner" is not necessarily "innocent". The "political" aspect of a case may reside, for example, in the selective application of the law, or in disproportionately harsh punishment in comparison with persons without a "political" background convicted of a similar crime, or finally in unfair proceedings which may nevertheless have resulted in the conviction of a guilty person. Recognition of a prisoner as "political" does not therefore necessarily require his or her immediate release – a new, fair trial may well be the most appropriate remedy. This said,

given the length of time many such prisoners have already spent in prison, their urgent release, even if they are actually "guilty" of the crimes they were accused of, is now often the sole means to dispel the suspicion that the person is being treated particularly harshly for "political" reasons.

3.6. General acceptance of the independent experts' criteria

17. The criteria summed up above were provided to all concerned. As is stated in the Secretary General's information document on the results of the work of the independent experts, "[n]o substantial objections were raised to these criteria". At its 765th meeting on 21 September 2001, the Deputies "welcomed the Secretary General's independent experts' report on alleged political prisoners and Armenia and Azerbaijan as it appears in document [SG/Inf(2001)34 and Addenda I and II] …" and adopted the following declaration on this matter:

"The Committee of Ministers of the Council of Europe welcomes the news that the President of the Republic of Azerbaijan has issued on 17 August 2001 a decree pardoning 89 political prisoners, 66 of whom have been released and 23 of whom have had their sentences reduced …" (bold added to underline that the term "political prisoner" was used by the Committee of Ministers itself).

18. Three years later, at the close of the independent experts' second mandate, the Secretary General's information document reiterates that "[t]hese criteria were accepted by the Azerbaijani authorities and all Council of Europe instances". The Parliamentary Assembly's subsequent resolutions were also based on the generally accepted criteria developed by the independent experts.

19. During my present rapporteur mandate, several attempts were made at committee level to reopen the question of the definition of political prisoners. But I continue to hold the view that any such attempt at "reinventing the wheel" would merely deflect from the important task at hand of assisting Azerbaijan in solving, at long last, its problem of political prisoners, as highlighted in my draft report entitled "Follow-up on the issue of political prisoners in Azerbaijan".

4. Conclusions

20. I am fully convinced that the independent experts' criteria, which have already been applied to hundreds of cases, with the acceptance of all sides, have proved to be legally sound, fair and operative. They are founded on and reflect basic standards of the European Convention on Human Rights and on the case law of the European Court of Human Rights. They are also non-discriminatory; in particular, they are not country-specific, even though they were developed and first applied in the context described above of the accession of two new member States to the Council of Europe. More recently, they were applied by the Committee on Legal Affairs and Human Rights in its opinion on the situation in Belarus adopted during the January 2012 part-session.

21. Any definition includes elements which require an evaluation, or an assessment, of facts and thereby some subjective elements. Definitions and criteria are only tools, they must be applied by human beings. If we were to demand a "definition" that could be fed into a computer, which would automatically produce "objective" results for each individual case, we would fundamentally misunderstand the nature of the Assembly's work.

22. It would be a grave mistake for the Assembly to renege on the acquis of the existing definition and to enter into an endless, theoretical general discussion. This would clearly be a step backwards, which would raise suspicions, however unjustified, about the real reasons for opening such a debate which is potentially endless and most likely fruitless.

23. In this context, I would like to repeat, for the benefit in particular of our Spanish and Turkish colleagues, that it is perfectly clear that terrorists, whether they belong to ETA, to the PKK or any other terrorist organisation, do not fall under the definition of political prisoners, even if they claim that they have committed their heinous crimes for "political" motives. However, persons accused of terrorist crimes who were, for political motives – this time on the side of the

authorities – convicted on the basis of an unfair trial using tainted evidence (such as "confessions" obtained under torture, or witnesses acting under duress) may well be presumed "political" prisoners if there are sufficient indications that such violations have indeed taken place.

24. I therefore call on the Assembly to reaffirm the existing definition of political prisoners as proposed in the draft resolution" [3].

The proposal (amendment) of the group of deputies, according to which the authorities to determine a concrete persons as political prisoners would be transferred to jurisdiction of the European Court of Human Rights (ECHR), were not adopted.

Let's try to consider how explanation of memorandum of Mr. Christoph Strasser is correlated with provisions of criminal process.

So, according to assertion of the rapporteur, political prisoners might be recognized practically all persons including those who committed terroristic acts (see section 3.2 of the memorandum), if their punishment is disproportionate, discriminatory or the result of unfair trial (see also sections 3.2 and 3.3 of the memorandum).

And this despite the fact that par. 4 of the criteria says: "According to national legislation and European Convention on Human Rights, persons, who deprived a personal freedom for terroristic crimes, are not considered to be as political prisoners due to bringing to a trial and condemnation for such crimes".

As it known, punishment is assigned by the court within the limits of sanctions stipulated by criminal law. It is clear that if the sanction provides maximum 5 years imprisonment punishment, and person is sentenced more then the punishment might be considered as disproportionate to the law.

In all the rest cases to consider the punishment as disproportionate is interference in the justice. There is no precedent here since well-known that it

cannot be existence of completely the same people, their deeds, consequences etc., at least from temporal parameters of being: all things are in the flux.

This is one side of a matter of disproportionate, and other is concluded in the fact that this notion envisages availability of standards of proportionality, which cannot be belonging to political party, oppositional activity, dissent with decisions and actions of the party and government etc.

Law clearly makes a proviso the circumstances, aggravating punishment (what is more the list is exhaustive) and the circumstances, mitigating punishment, the list of which might be extended independence on circumstances of a case [4, p. 93-96].

As for the problems of fair trial, then they are relatively clear and in full outlined in Article 6 of the European Convention on Human Rights [2, p. 9-10].

In case the European Court recognizes violations of Article 6 of the European Convention, the national legislation (chapter LIII of the CCP of Azerbaijan Republic) provides for mandatory procedures for reviewing the decisions that recognized as inconsistent with the international obligations of the state [5, p. 459-462].

What do political prisoners have to do with it?

Now it is about burden of proof, according to which the state obliged to refute "…those, who alleging that a specific person is a political prisoner to present a prima facie case" (see section 3.4 of the memorandum).

As rule, assertions on belonging a person to political prisoners come from human rights activists, in our point of view, authorised by the UN "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" of 09.12.1998 [1].

However, Code of Criminal Procedure does not provide a status of human rights activists, and therefore they need to act through defence counsels or representatives that complices with world practice in this area.

In addition, human rights activists involve their resources (mass media, appeals, pickets, petitions to heads of state and government etc.), that, in our point of view, fits the requirements of section 3.4, though some believe these actions unlawful impact on justice.

On logic of Mr Ch. Strasser, the documents, which presented in criminal process, should have evidential significance and conform to requirements that brought by criminal procedural law to the proofs.

If so, then the bodies, which carrying out criminal process, are obliged to accept them form the participants, which will be a defence counsel or representative of potential political prisoner or he himself. However, according to the national legislation, the right to submitting the documents-proofs limited with a certain stages of criminal proceedings.

Discarding such a 'trifle' as the requirements of national legislation, we will consider in details in the stage, when "appropriate we documents on case" transmitted to the state, and it provided the proofs, which refute the assertions of applicants, and both sides do not give a whit from their positions.

We agree that if a state does not respond then this casts doubt on the objectivity and legality of decisions taken by its organs, however, when it gives response and along with this there is no appropriate decision of the European Court, it is formed a vicious circle, which can be only broken by the European Court.

However, as stated above, the PACE resolution does not allow such a development of the situation.

Indeed, why did the supporters of PACE Resolution 1900(2012) not follow the logically correct way and did not transmit the question of recognizing a person

as political prisoner for consideration by the European Court, but voluntarily or unwittingly included it in a knowingly insoluble situation?

Would it not be true and quicker to address the appeal of interested persons or organizations to the European Court about the simultaneous recognition of the fact of violation of the Convention and recognition of a person as a political prisoner than endless gatherings, even well-directed ones? Moreover, the European Court has the right to accept the appeal at any time, without waiting for the final decision of the national authorities.

It seems that situations where one can speak, write, address, picket, etc. up to the right time and in the right moments, someone is more comfortable than the quick and, most importantly, legal solution of the issue. And, it seems, that it is necessary to interfere in the internal affairs of sovereign states, and not to solve real and imaginary problems.

References

1. UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Adopted by General Assembly resolution 53/144 of 9 December 1998. [Internet resource]. Available at: https://www.ohchr.org/en/professionalinterest/pages/rightandresponsibility.aspx

2. European Convention on Human Rights. [Internet resource]. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf

3. Resolution of PACE no. 1900(2012). [Internet resource]. Available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18995&lang=en

4. Ugolovnyi kodeks Azerbaijanskoyi Respublik [Criminal Code of Azerbaijan Republic] (with suppl. And alter. on 07.06.2018). Baku, 2018, 736 p.

5. Ugolovno-protsessual'nyi kodeks Azerbaijanskoyi Respubliki [Code of Criminal Procedure of Azerbaijan Republic] (with suppl. And alter. on 07.06.2018). Baku, 2018.