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The definition of political prisoner

Report[1]
Committee on Legal Affairs and Human Rights
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Summary

The notion of political prisoners was elaborated within the Council of Europe in 2001 by the independent experts of the Secretary General mandated to assess cases of alleged political prisoners in Armenia and Azerbaijan, in the context of the accession of the two States to the Organisation.

The general criteria put forward by the independent experts were approved by all stakeholders at the time, including the Council of Europe's Committee of Ministers and the Parliamentary Assembly.

The Committee on Legal Affairs and Human Rights reaffirms its support for these criteria, summed up in the draft resolution and explained in more detail in the explanatory memorandum, specifying that those deprived of their personal liberty for terrorist crimes shall not be considered political prisoners if they have been prosecuted and sentenced for such crimes according to national legislation and the European Convention on Human Rights.

The committee invites the competent authorities of all member States of the Council of Europe to reassess the cases of any alleged political prisoners by application of the above-mentioned criteria and to release or retry any such prisoners as appropriate.

1. Reference to committee: Doc. 11922, Reference 3618 of 20 November 2009.

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A. Draft resolution[2]

1. The Parliamentary Assembly recalls that the notion of political prisoners was elaborated within the Council of Europe in 2001 by the independent experts of the Secretary General, mandated to assess cases of alleged political prisoners in Armenia and Azerbaijan in the context of the accession of the two States to the Organisation.

2. It notes with satisfaction that the general criteria put forward by the independent experts were approved by all stakeholders at the time, including the Council of Europe's Committee of Ministers and the Parliamentary Assembly.

3. The Assembly reaffirms its support for these criteria, summed up as follows:

"A person deprived of his or her personal liberty is to be regarded as a 'political prisoner':

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;

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." (SG/Inf(2001)34, paragraph 10)

4. Those deprived of their personal liberty for terrorist crimes shall not be considered political prisoners if they have been prosecuted and sentenced for such crimes according to national legislation and the European Convention on Human Rights (ETS No. 5).

5. The Assembly invites the competent authorities of all the member States of the Council of Europe to reassess the cases of any alleged political prisoners by application of the above-mentioned criteria and to release or retry any such prisoners as appropriate.

2. Draft resolution adopted by the committee on 26 June 2012.

B. Explanatory memorandum by Mr Strässer, rapporteur

1. Introduction

1. This report is based on a motion for a resolution, "The definition of political prisoners",[3] for which I was appointed rapporteur on 16 December 2009.

2. On 24 June 2010, this rapporteur mandate was initially merged by the Committee on Legal Affairs and Human Rights with the related topic of "Follow-up on the issue of political prisoners in Azerbaijan",[4] for which I had already been appointed as rapporteur on 24 March 2009. For a variety of reasons, which at one stage included a change of title of the merged reports,[5] the committee recently decided to invite me to submit a separate report on the present subject.

2. The historical context of the issue of political prisoners in the Council of Europe: the accession of Armenia and Azerbaijan

3. The issue of political prisoners in the Council of Europe dates back to the negotiations on the accession of Azerbaijan to the Organisation. Azerbaijan undertook, *inter alia*, "to release or to grant a new trial to those prisoners who are regarded as 'political prisoners' by human rights protection organisations".[6] In November 2000, the Committee of Ministers adopted Resolutions Res(2000)13 and Res(2000)14 inviting simultaneously Armenia and Azerbaijan to become member States of the Council of Europe, to be confirmed when the date of the accession was fixed. In order to help reticent member States overcome their reluctance, at the time, to accept the accession of these two countries, a compromise solution was found within the Committee of Ministers, whereby it was also decided, in November 2000, that the Committee of Ministers would monitor, on a regular basis, democratic developments in both countries. Armenia and Azerbaijan joined the Council of Europe on 25 January 2001. The Committee of Ministers subsequently approved, on 31 January 2001, the Secretary General's initiative to appoint three distinguished "independent experts"[7] who would examine lists of cases of alleged political prisoners drawn up by Armenian and Azerbaijani human rights non-governmental organisations (NGOs).[8] Before so doing, the independent experts, acting in a quasi-judicial capacity, undertook the task of determining who could "be defined as a political prisoner on the basis of objective criteria in the light of the case law of the European Court of Human Rights and Council of Europe standards".[9] They then examined 716 cases listed with a view to determining whether or not the detainees in question were indeed "political" prisoners, on the basis of a set of pre-established criteria to which all relevant Council of Europe bodies, including the Azerbaijani authorities, agreed. Twenty-three cases on the original list of 716 were given priority and dealt with by the independent experts as so-called "pilot cases". By April 2003, many of the 716 cases were resolved and the list was reduced to 212 cases, which were the subject of the experts' second mandate. In July 2004, the experts submitted their final report to the Secretary General. In addition to the 20 opinions on the pilot cases, they adopted 104 opinions concerning the 212 cases referred to them. They concluded that 62 persons were political prisoners, whereas 62 were not, or no longer.[10]

4. Since 2001, when Azerbaijan joined the Council of Europe, the Parliamentary Assembly has considered the issue of political prisoners in Azerbaijan on four occasions: in January 2002, June 2003, January 2004 and June 2005[11] – always triggered by the situation in Azerbaijan and on the basis of the objective criteria developed by the Secretary General's independent experts.

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3. Doc. 11922, Reference 3618 of 20 November 2009.
4. Doc. 11468, Reference 3518 of 26 January 2009.
5. As explained in paragraphs 2 to 5 of the explanatory memorandum to my draft report on "Follow-up to the issue of political prisoners in Azerbaijan (Document AS/Jur(2012)22).
6. Paragraph 14.4.*b* of Assembly Opinion 222 (2000).
7. Messrs Stefan Trechsel, former President of the European Commission of Human Rights and judge on the International Criminal Tribunal for the former Yugoslavia (ICTY), Evert Alkema, former member of the Dutch Council of State and of the European Commission of Human Rights, and Alexander Arabadjiev, formerly a judge on the Bulgarian Constitutional Court and presently member of the Court of Justice of the European Union.
8. For more details, see the document issued by the Secretary General of the Council of Europe, SG/Inf(2001)34, and addenda thereto. The small number of cases concerning Armenia was rapidly resolved at the time.
9. See Committee of Ministers decision of 31 January 2001 (document SG/Inf(2001)34, Addendum I, p. 93).
10. See document SG/Inf(2004)21. Again, for additional information on this subject, consult document AS/Jur (2012) 22, especially paragraphs 7-9.
11. See: Resolution 1272 (2002) and Doc. 9310; Doc. 9826; Resolution 1359 (2004) and Doc. 10026; Resolution 1457 (2005), Recommendation 1711 (2005) and Doc. 10564.

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.[12] 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[13] 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".[14]

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.[15] But there are cases in which political speech exceeds the limits set by the Convention, for example when it incites violence, racism or xenophobia.[16] 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.

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12. For a thorough presentation, see, Stefan Trechsel, "The notion of 'political prisoner' as defined for the purpose of identifying political prisoners in Armenia and Azerbaijan", *Human Rights Law Journal*, Vol. 23, pp. 293-300 (December 2002). (French version in Vol. 14, *Revue Universelle des Droits de l'Homme* (2002), pp. 169-76.)

13. See document AS/Jur (2010) 28, especially paragraph 17.

14. The full text of Article 17 of the Convention stipulates: "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention". See also paragraph 10 below.

15. See the judgments of the European Court of Human Rights cited by Stefan Trechsel, op. cit., footnote 12.

16. See authority quoted by Stefan Trechsel, op. cit., footnote 12. More recently, the Court has found acceptable the conviction of far-right French politician Jean-Marie Le Pen for xenophobic speech (see inadmissibility decision of 7 May 2010 in the case of *Le Pen v. France* (Application No. 18788/09); but the Court also found the conviction of the authors of a particularly virulent, slanderous criticism of Mr Le Pen as acceptable under the Convention (see the Grand Chamber judgment of 22 October 2010 in the case of *Lindon, Otchakovsky, July v. France*, Applications Nos. 21279/02 and 36448/02).

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:[17]

> *"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.[18]

3.5. Summary of the criteria[19]

14. "A person deprived of his or her personal liberty is to be regarded as a 'political prisoner':

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;

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."

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17. Ibid., p. 299.

18. See, for example, the judgments of the European Court of Human Rights in the cases of *Orhan v. Turkey* of 18 June 2002 (Application No. 25656/94), paragraph 266, *Timurtaş v. Turkey* of 13 June 2000 (Application No. 23531/94), paragraphs 66 and 70, and *Khashiyev and Akayeva v. Russia* of 24 February 2005 (Applications Nos. 57942/00 and 57945/00), paragraph 137.

19. SG/Inf(2001)34 of 24 October 2001, "Cases of alleged political prisoners in Armenia and Azerbaijan, I. Information provided by the Secretary General, II. Report of the Independent Experts, Messrs Stefan Trechsel, Evert Alkema and Alexander Arabadjiev", paragraph 10.

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".[20] At its 765th meeting on 21 September 2001,[21] 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".[22] The Parliamentary Assembly's subsequent resolutions were also based on the generally accepted criteria developed by the independent experts.[23]

19. During my present rapporteur mandate, several attempts were made at committee level to reopen the question of the definition of political prisoners.[24] 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".[25]

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.[26]

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20. Ibid., paragraph 11.
21. Document CM/Del/Dec(2001)765bis, item 2.4, 21 September 2001.
22. SG/Inf(2004)21 of 13 July 2004, paragraph 8.
23. See for example Resolution 1359 (2004), paragraph 3 *in fine*: "The Assembly considers that the objective criteria adopted to define 'political prisoners' in Armenia and Azerbaijan are valid"; Resolution 1457 (2005), paragraphs 4 and 11.
24. At the committee's meetings on 24 June 2010, 8 March 2011, 5 October 2011 and 26 January 2012.
25. Document AS/Jur (2012) 22. Needless to add, the Assembly has always worked on the premise that it may consider issues/cases also raised before the European Court of Human Rights: see paragraph 16 and footnote 19.
26. See Doc. 12840: "The situation in Belarus" (rapporteur for opinion: Ms Marieluise Beck, Germany, ALDE); the summary of the criteria as presented in paragraph 14 above is appended to the opinion, which was approved unanimously by the committee.

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.