The "political offence exception" and extradition of terrorists: the problem of correlation

Hromivchuk Ivanna, associate professor in the Department of International Law at the National Aviation University, Kyiv

The institute of extradition is a keystone of international cooperation in penal sphere. But extradition is not absolute. In particular, modern legal regulation and the practice of extradition are based on universally recognized "political offence exception" concept, according to which extradition is restricted by general crimes. At the same time there is no definition of a "political crime" or some harmonized list of such crimes. That's why states use so called negative method of exception – a number of actions are removed from the category of political crimes. For example, this method was applied to the crime of terrorism.

Terrorism and terrorist acts are the most serious and dangerous crimes of present time. Thereby N.A. Safarov indicates, that cruel character of terrorist crimes allows to deem them as non political crimes [2, p. 105]. Such an approach is realized in modern international anti-terrorist documents. For example, the article 11 of the International Convention for the Suppression of terrorist bombings (1997) says, that "none of the offences set forth in the article 2 shall be regarded, for the purpose of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives". The same rule is defined in article 14 of the International Convention for the Suppression of the Financing Terrorism (1999) and article 15 of the International Convention for the Suppression of Acts of Nuclear Terrorism (2005). European Convention on the Suppression of terrorism (1977) and especially the adoption of Protocol, amending the European Convention on the Suppression of terrorism (2003) serve to be one more example of "depolitization" of terrorist crimes in international law. UN Security Council also accents that states should deny safe haven to those who finance, plan, support, or commit terrorist acts (Resolutions 1373, 1566 etc).

Analysis ex facte of both these universal, regional anti-terrorist documents and the Model Treaty on extradition (adopted by General Assembly in 1990) makes an impression that the problem of application of "political offence exception" to the majority of terrorist crimes is solved. But practice nevertheless indicates the contrary. In particular: a) on the one hand, despite the extradition of terrorists, rejections still have place and b) on the other hand, mentioned provisions of international conventions are often criticized for endanger for political criminals and deprivation them of fundamental rights to protection.

Because of these problems and some confusion in anti-terrorist provisions, the practice of so called diplomatic guarantees (as one of the ways of protection from cruel treatment after extradition) has become very popular in struggle against terrorism. But these guarantees were criticized by international human rights organizations, such as Human rights watch and REDRESS, and by Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Manfred Novak [6]. The case "Agiza v. Sweden" is a key example of this problem in practice. The Committee against torture in this case determined that "the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk" (par.13.4) [3].

So, we can say that the problem of correlation of "political offence exception" and extradition of terrorists is still open. We see next key reasons of this.

First of all, anti-terrorist documents qualify terrorist crimes as non political crimes. At the same time, as we have already mentioned, there is no definition of a "political crime" or some harmonized list of such crimes. Such an indetermination grants states a big field for variations.

Besides, after examination of the nature of terrorism, we have a question: is the crime of terrorism really a purely non political crime, as it is defined by the anti-terrorist conventions? Concerning this question Ronald Christenson wrote that political criminals differ from "traditional" criminals: they often declare their intentions, call in question the "legality" of the very laws, they don't have the goal of acquisition and at the same time they appeal to high morality [4, p. 565]. Don't

these words actually pass to modern terrorists? Moreover it should be said, that the majority of scientists in the sphere of international law actually don't treat terrorism as purely general, non political crime. For example, dutch scientists A.P. Schmid and A.J. Jongman, having analyzed basic components of 109 scientific and official definitions of "terrorism", made a conclusion that 65% of those definitions contain political goals [5, p.5-6]. J.I. Gilinskij also emphasizes, that there are two key features in numerous definitions of terrorism: the threat or use of violence and its political motivation [1, p.245]. But unfortunately modern anti-terrorist conventions don't note motivation at all. Thereafter it results some problems while their realization – in particular in the aspects of extradition.

Secondly, there is also an opposite side. None of legal institutes, that is called for the protection of individuals, shouldn't be used for encouragement of impunity of criminals. We know that the practice of states in this problem is very diverse, because it's up to them to decide, if an action is political or non political. Such a diversity of practice and the gaps in anti-terrorist provisions allow criminals to insist on political character of a crime, harboring and extradition rejection. It's a perfect chance for them to use extradition as a loophole.

That's why we think, that international law needs some changes to be able to solve the problem of correlation "political offence exception – extradition of terrorists". In our opinion, international antiterrorist law needs more specific mechanisms, which would prevent from impunity for terrorist crimes and at the same time guarantee protection from discriminating persecution. For example, the conclusion of a treaty on extradition of terrorists, that could provide unified procedure of extradition without dependence on political will of states but with adherence to necessary norms and principles in the sphere of human rights, could be one of the ways of the solution of this problem.

Reference list:

1. Гилинский Я.И. Криминология. Теория, история, эмпирическая база, социальный контроль / Я.И.Гилинский . – СПб.: Питер, 2002. – 377 с.

2. Сафаров Н. А. Экстрадиция в международном уголовном праве: проблемы теории и практики. Extradition in International Criminal Law: Problems of Theory and Practice / Н. А.Сафаров. – М.: Волтерс Клувер, 2005. – 416 с.

3. Agiza v. Sweden, Comm. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, A/60/44 (2005) Annex VIII at 197 (CAT May 20, 2005) . - [Электронный ресурс]. – Режим доступа: http://www.worldcourts.com/cat/eng/decisions /2005.05.20_Ahmed_Hussein_Mustafa_Kamil_Agiza_v_Sweden.htm.

4. Christenson R. A Political Theory of Political Trials / R. Christenson // Journal of Criminal Law and Criminology. – Northwestern University School of Law, 1983. – P. 547-577.

5. Schmid A.P., Jongman A.J. Political terrorism / A.P. Schmid, A.J. Jongman. – Amsterdam: North-Holland Publishing company, 1988. – 417 p.

6. Torture and other cruel, inhuman or degrading treatment or punishment - Note by the Secretary-General, 30.08.2005, A/60/316. – [Электронный ресурс]. – Режим доступа: http://www.unhcr.org/refworld/docid/43f30fb40.html.