

Communication under rule 9.2

Submission to the Committee of Ministers for the forthcoming review of the case *Buntov v. Russia* (Application no. 27026/10)

On the behalf of:

The **European Prison Litigation Network (EPLN)**, Paris

Russian NGO **“Public Verdict” Foundation**, Moscow

The **Moscow Helsinki Group**, Moscow

“Social Partnership” Foundation, Moscow

The All-Russia movement **“For Human Rights”**, Moscow

NGO **“Russia Behind Bars”**, Moscow

NGO **“Siberia without Torture”**, Irkutsk

NGO **Legal Basis**, Yekaterinburg

Plan of the present communication

1. Description of the case and aim of the communication

1.1 Description of the case

1.2 Aim of the communication

2. PMCs, a key instrument for the effectiveness of the prohibition of torture

2.1. Monitoring mechanisms, an essential component of the positive obligation to prevent torture

2.1. A key instrument from the point of view of the effectiveness of remedies

3. The incapacitation of PMCs

3.1. The incapacitation of PMCs through the selection of their members

3.1.1. The circumstances of the ousting of human rights defenders

3.1.2. Normative deficiencies in the recruitment process

3.2. Alteration of the PMC mechanism by obstructing the conduct of its visits

3.2.1. Interference of the administration in the conduct of visits

3.2.2. Obstacles to the collection of evidence

3.2.3. Lack of material resources

3.3. The effects of recent developments: a paralysed system, the risk of torture increased dramatically.

Conclusion and recommendations

Preamble

This communication is devoted to the effectiveness of the current independent monitoring mechanism in Russia. In the Action Plan, the Russian authorities present this mechanism as one of the key and effective tools for ensuring the prohibition of torture in closed institutions in practice.

In fact, the mechanism has been seriously altered over the past three years by replacing its experienced members with 'front men'. It is essential from the point of view of the effectiveness of the prohibition of torture in Russian prisons that the Committee of Ministers takes a very firm position on this subject.

1. Description of the case and aim of the communication

1.1. Description of the case

1. In this case the Court concluded that the applicant was subjected to torture in January 2010 while held in an isolation cell in a correctional colony. It further held that the investigation carried out into his allegations was ineffective. The applicant alleged that he had come into conflict with a group of prisoners who assisted the prison administration in maintaining discipline and extorting money, and that at their request, he was put into an isolation cell as a protective measure. He claimed that between 27 and 29 January 2010 he was severely beaten in the isolation cell by prison officials and that a group of convicts put his hands into a clamp and tied his feet to a stool after which all his finger and toe nails were torn off with pincers. The ECtHR found the ensuing investigation flawed on a number of grounds (substantive and procedural violations of Article 3).

1.2 Aim of the communication

2. The purpose of this communication is to challenge the misleading presentation made in the action plan (25/02/2019, para 14.1) concerning the effectiveness of the external mechanism for the prevention of torture in Russia, and to make recommendations on the general measures to be taken in this area to eradicate torture in prison.

3. The government invokes the activities of the Public Monitoring Commissions (PMCs) in place to argue that the required torture prevention measures are already in place.

4. While the reference to PMC is relevant and although they have indeed been an important part of a structured strategy to eliminate torture in the prison system in Russia, they are now in a state of almost complete paralysis due to the expulsion of all their experienced members, as already stressed by the UN Committee against Torture and the Russian Presidential Council for Civil Society and Human Rights.

5. It is therefore crucial that the Committee of Ministers urge the Russian authorities to reintegrate qualified human rights defenders into the composition of the PMCs and provide them with the material and legal means to operate effectively.

2. The PMC mechanism, a key instrument for the effectiveness of the prohibition of torture

2.1. Monitoring mechanisms, an essential component of the obligation to prevent torture

6. There is a massive consensus both in penological and normative terms that independent prison monitoring mechanisms are the main instrument for the prevention of torture. The requirement for

the oversight of prisons by an independent authority is one of the 9 fundamental principles set out in the European Prison Rules. This requirement also occupies a prominent place in the CPT's standards. This requirement is taken into account by other international legal systems, such as the UN¹, OSCE and the European Union. The consensus is so high that the implementation of such an independent mechanism must be seen as a positive obligation resulting from the *jus cogens* rule of the prohibition of torture and inhuman and degrading treatment.

7. At national level, almost all Council of Europe member states have ratified the OPCAT, which implies the obligation to set up an independent mechanism for visiting prisons. Although Russia is not signatory to the OPCAT, the Russian authorities themselves recognized the essential nature of an independent mechanism by creating the PMCs by the law of 10 June 2008. The Russian authorities have even considered public oversight as a major tool for eradicating ill-treatment practices and, more broadly, for bringing the prison system to break with its Soviet historical heritage, as it results from the *Concept for the development of the penal and correctional system of the Russian Federation until 2020*². The system was inspired by British boarding visitors. It consists of visitor commissions with regional competence. Their members are volunteers proposed by associations and appointed by the Civil Chamber (see below).

2.2 A key instrument from the point of view of the effectiveness of remedies

8. As the present case indicates, the Court's case-law, driven by the principles of effectiveness and subsidiarity, makes the effectiveness of domestic remedies an essential lever for solving structural problems in prison matters in the Russian Federation³.

9. For this strategy to be successful, it is crucial to take into account the key role played by PMCs in the formalization and routing of complaints to the prosecutor's office and the courts.

10. It is now well established by research in Europe that the proper functioning of appeal procedures requires that detainees be assisted by external organizations. This is the case even when the appeal systems are specially simplified to facilitate access to the judge.

11. This is fully true in Russia. In April 2015, PMC members, lawyers and NGO members from different regions conducted a systematic analysis of the obstacles to detainees' access to the judge⁴.

12. In view of the reprisals incurred in the event of complaints, and the low awareness of their rights on the part of detainees, external relays are an essential factor for accessing to the judge. Indeed, operational PMCs, i.e. composed of authentic human rights defenders: (1) inform detainees of the possibilities for redress; (2) identify situations where the administration prevents complaints from being forwarded to the prosecutor's office and/or the courts; (3) identify places where torture is routinely used; (4) bring cases of violations to the attention of NGOs, who can then intervene to initiate the required procedures or to obtain the intervention of a lawyer.

13. In very concrete terms, in the absence of a functional PMC, cases of violations are not or rarely brought before the domestic courts. Not only are PMC therefore not in a position to stop violations, but the process of gradually incorporating the requirements of the Convention into the practice of Russian courts is being hampered. In addition, this phenomenon affects the ability of the Strasbourg

¹ See also UN Special Rapporteur on torture Interim report, A/61/259, 14 August 2006

² Order of the Government of the Russian Federation No. 1772-r of 14 October 2010

³ References to pilot and quasi pilot judgments

⁴ Resolution of the participants of the IV Urals Human Rights University. Appendix 1

Court to tackle structural problems and influence the criminal and prison policy of the Russian Federation. In end effect, the positive dynamic generated by the development of the Court's case law risks being hindered by the closing off of the Russian prison system.

3. The incapacitation of PMCs

3.1. The incapacitation of PMCs through the selection of their members

14. The UN Committee against Torture has already expressed its concern about the transformation of PMCs:

*“It is (...) concerned at information that the revised rules governing the membership of public oversight commissions have resulted in the appointment by the Council of the Public Chamber of **a disproportionate number of members with law enforcement backgrounds and the exclusion of independent monitors, undermining the impartiality and independence of the commissions.**”⁵*

15. This position echoes that of the Russian Presidential Council for Civil Society and Human Rights on 14 December 2018 at the end of a work programme involving the Government, the Prosecutor General's Office, the Council of the Federation and the High Commissioners for Human Rights:

“Regional PMCs (...) experience an acute shortage of human rights defenders. During the formation of the 4th PMC in some regions, the most experienced, principled and active human rights defenders were not included in the commissions, and some PMCs were formed in a clearly insufficient composition (...) The [legal amendments in 2018] further complicated the work of PMCs, both in terms of their recruitment and in the conduct of their activities”⁶.

3.1.1. The circumstances of the ousting of human rights defenders

16. The PMCs have been turned over in several stages. The members of the first two terms of office were, in general, devoted and professional human rights defenders. After several compromising revelations were made by PMCs, some persons within the prison system have started to consider the composition of PMCs being an issue⁷. And then, the third term of PMCs brought in a large number of former law enforcement agencies. The selection of members of the fourth term in October 2016 marked a turning point. In 42 regions, or one-half of the country, the rights activists who had done most of the work in prisons, were denied membership⁸.

⁵ Committee against Torture, Concluding observations on the sixth periodic report of the Russian Federation, 28 August 2018 CAT/C/RUS/CO/6

⁶ Recommendation of the special session “openness and legality are the main guarantees of respect for human dignity in penitentiary facilities, 14 December 2018, <http://president-sovet.ru/documents/read/629/#doc-1>

⁷ The role of the PMC in uncovering a racketeering system based on systematic torture in Colony No. 6 in Kopeysk in 2012-2013 sent a shock wave, conducting to the dismissal of the Deputy Director of the Federal Prison Service. But it was probably the fact-finding mission carried out by the PMC of Moscow on the death in prison of S. Magnitsky that marked a turning point in terms of acceptance of PMCs, due to the international reasoning of this case, and especially the US Sergei Magnitsky Rule of Law Accountability Act of 2012.

⁸ See Zoya Svetova, *How the State Hijacked Russia's Only Independent Prison Watchdog*, The Moscow Times, Nov 3, 2016, available online: <https://www.themoscowtimes.com/2016/11/03/how-the-state-hijacked-russias-only-independent-prison-watchdog-a55988>

17. In addition, the Public Chamber, which is competent in this area, has significantly reduced the number of members (the law sets a minimum of 5 and a maximum of 40) in many regions.

18. The selection of PMC members caused a resounding scandal. On 8 December 2016, at the solemn meeting chaired by Vladimir Putin, the Presidential Council for Human Rights alerted the President to the fact that public control had been "killed in 42 regions" and that the number of complaints registered by them concerning ill-treatment and poor detention conditions had suddenly dropped drastically.⁹

19. President Putin has ordered that the problem be solved. It was decided that a complementary recruitment process would be conducted. A law was quickly adopted in this perspective¹⁰.

20. The Presidential Council for Human Rights, supported by the High Commissioner for Human Rights, recommended that the process be conducted in 63 regions considered problematic from the point of view of the composition of the PMCs¹¹. The Public Chamber opposed this, limiting recruitment to only 30 committees that had agreed to conduct such a process.

21. The process was intended to address the fact that the October 2016 selection had led to the exclusion of almost all human rights defenders. To ensure that experienced human rights defenders are qualified, a working group was set up, with the aim of recommending candidates to the "PMC Council", which appoints members of the PMC. The working group was formed on the basis of parity of representatives of the Presidential Human Rights Committee, the High-Commissioner for Human Rights and the Public Chamber.

22. Invoking the Personal Data Act, the Public Chamber limited information on candidates, thus preventing any consideration of their experience in the defence of human rights, or the analysis of incompatibilities linked to their professional backgrounds¹².

23. The Public Chamber ultimately selected 75 candidates out of the 230 applications received¹³. Of the 84 candidates supported by the Presidential Council for Human Rights, only one third were selected. As explained by Andréi Babushkin, member of the Presidential Council and of the tripartite working group before the Public Chamber, the support of the Presidential Council actually penalized the candidates¹⁴. In an article published in the Pravda newspaper, another member of the working group explained that his "*recommendations as chairman of the PMC of Moscow, along with those of the members of the Presidential Human Rights Council headed by Mikhail Fedotov and Anton Tsvetkov, chairman of the PMC of Moscow Region, are a "black mark" for the members of the Council of the Public Chamber. None of the human rights defenders we have recommended were included in the PMC of Moscow*"¹⁵.

⁹ <http://kremlin.ru/events/president/news/53440>

¹⁰ Federal act of June 7, 2017 No. 112-FZ "On amendments to article 10 of the Federal act "On public monitoring of human rights in places of detention and on assistance to persons in places of detention"

¹¹ In the view of the "*mass complaints about violations committed during the formation of PMCs by the Public Chamber of Russia, difficult conditions in which the Commissions operate, and the need to improve the efficiency of PMCs*". See СПЧ инициировало донabor в ОНК. <https://an-babushkin.livejournal.com/690616.html>

¹² <https://www.novayagazeta.ru/articles/2017/09/27/73977-shou-s-maskami>

¹³ <https://www.oprf.ru/press/news/2017/newsitem/43341>

¹⁴ <http://president-sovet.ru/presscenter/news/read/4309/>

¹⁵ Горшенин, *Донabor в ОНК: Зачем Общественная палата позорится на всю страну?* <https://www.pravda.ru/politics/1361926-donaborvonk/>

24. In short, as expressed by the Presidential Council for Human Rights at its last meeting with the President of the Russian Federation, « we now have almost no human rights defenders left in our public monitoring commissions »¹⁶.

3.1.2. Normative deficiencies in the recruitment process

25. In its resolution of December 2018, the Presidential Council made a damning analysis of the procedure for selecting members of the PMCs:

« *The selection process for PMCs is becoming less and less transparent. For several years, in the process of reappointment, many experienced representatives of PMCs were unable to join the new commissions for no apparent reason. The selection procedure itself is not aimed at forming truly effective PMCs.* »

26. At the normative level, the problems related to the composition of PMCs are due to (1) the body in charge, (2) the insufficient precision of the qualification criteria and (3) the opacity of the procedure, (4) legal obstacles to the participation in PMCs of human rights defenders.

27. (1) The law confers the competence to appoint the members of the PMCs to the Council of the Public Chamber. However, the Public Chamber has no real expertise in the field of human rights, unlike the institutions of the High Commissioner for Human Rights in the Russian Federation or the Presidential Council for Human Rights. The persons called upon to rule on the applications have no competence in human rights matters and even less in terms of monitoring places of detention. Clearly, the composition of the Council of the Public Chamber does not comply with the Paris Principles¹⁷, which are relevant to the prison monitoring system¹⁸.

28. (2) The wording of the law regarding the selection criteria is not sufficiently precise¹⁹. The law provides that members of commissions must have work experience in the field of defending citizens' rights, but it does not provide for the conditions under which this experience is assessed. In addition, the law excludes public officials from the composition of the PMCs. However, the law does not expressly provide that this exclusion includes persons who have retired from these institutions. This means that GoNGOs (such as associations of veterans of the prison service, the army or the security services) can present candidates, often former law enforcement officials, with no experience in defending human rights, contrary to what is required by law.

29. (3) The procedure for examining applications is defined by the Public Chamber itself and, above all, is completely opaque. The Public Chamber stated that 25% of the applications submitted in the autumn were inadmissible because they did not include the required documents. It was not possible to verify the merits of this review, as the rejection decisions were not reasoned. With regard to the substantive examination, the Public Chamber refused to make public the conditions for examining the candidatures and the information provided to the Council. The press and then the litigation

¹⁶ <http://www.president-sovet.ru/events/meetings/read/15/>

¹⁷ Principes prévus par la Résolution 48/134 adoptée par l'Assemblée générale le 20 décembre 1993. La composition du Conseil de la Chambre civile, et de la Chambre civile en général, ne permet pas une « *représentation pluraliste des forces sociales (de la société civile) concernées par la promotion et la protection des droits de l'homme* »

¹⁸ See in this respect OPCAT, Article 18.

¹⁹ Article 12 part 1 of the law 76-FZ states that “A member of the public supervisory commission may be a citizen of the Russian Federation who has reached the age of 25 and has work experience in the field of protection of citizens' rights”.

proceedings initiated revealed that the Council had decided on the basis of the only non-reasoned recommendation of the Public Chamber. The Public Chamber stated that the recommendations of the Presidential Human Rights Council had reached it after the vote, although a tripartite working group had been set up specifically to take this assessment into account. Finally, the courts before them refused to review the legality of the decisions rendered or invoked procedural grounds of inadmissibility as a reason for not ruling.

29. (4). In July 2018, a revision of the Federal Law on Public Control was passed²⁰, which prohibited organizations included in the register of foreign agents from participating in the activity of a PMC²¹. An indication of the ban is included in Article 10(3) of the Federal Law-76.

3.2. Alteration of the PMC mechanism by obstructing the conduct of its visits

3.2.1. interference of the administration in the conduct of visits

30. The revised version of Law 76-FZ introduced norms that allow for interference in the course of monitoring. They were detailed in the form of amendments to the Order of the Federal Service for the Execution of Punishment of the Russian Federation of 28 November 2008 No. 652, which was amended and published on 18 March 2019. The Order states that "If commission members discuss issues unrelated to the rights of suspects and accused persons or violate the internal regulations of institutions, the conversation is immediately interrupted" (para. 13). Thus, the new provisions give the prison administration the right to control the content of discussions between PMC members and prisoners, as well as the broad powers to terminate the monitoring procedure.

This undermines the very principle of independent monitoring. International standards in this area provide that interviews shall always be confidential.

31. In addition, Point 11 of the Rules was amended by provision that all PMC visit should be videotaped by a prison officer. This provision also contravenes the principle of confidentiality of the meeting. In particular, it contravenes Article 23 part 2 of the Penal Code, according to which PMC members may talk to prisoners while representatives of prison administration may see but not hear them. Now, staff can know the content of conversations just by watching the videotapes.

3.2.2. Obstacles to the collection of evidence

32. The introduction of audio and video recording equipment and cameras into the possession of PMCs has been a very sensitive issue since their creation. Indeed, given the extent of the use of torture in Russian prisons and the omerta imposed by the administration, the commissions need to immediately record signs of ill-treatment and testimonies. In the version resulting from the revision of 18 March 2019, the commissions may only use their equipment if the facility does not have it or it is out of use (Point 15). Commissions are therefore now dependent on the administration from this point of view.

33. Point 15.7 of the Rules states that head of prison administration or other authorized officer together with the PMC members review tapes and photos. Copies of materials attesting violation of prisoners' rights should be provided to PMCs members. In other words, prison administration has a

²⁰ Federal Law No. 203-FZ of 19 July 2011

²¹ Article 10(3) of the Federal Law-76 in its present wording.

power to (1) check the recordings and photographs and (2) determine whether they are relevant to the protection of the rights of detainees.

3.2.3. Lack of material resources

34. The law provides that the activity of PMC members is voluntary. Regardless of whether it is possible to carry out this mission effectively on a voluntary basis, the operation of a PMC involves multiple costs: travel to settlements often located many hours away from cities, work and administrative costs for recording complaints, sending letters, producing reports and accounting tasks, etc.

35. As the Presidential Council explained it in December 2018, *“the state authorities of the constituent entities of the Russian Federation and local self-government bodies are entitled to provide (...) support to PMCs. Analysis of the activities of PMCs shows that regional and local authorities are reluctant to exercise this right. The provision of support to PMCs is an exception rather than a rule.”*

36. Federal funds, including the presidential grant, that may be requested to conduct activities under the PMCs have been reduced in recent years. On the other hand, NGOs that in the past took on some of this work can no longer do it. The funds available to them have been drastically reduced, particularly as a result of the Law on Foreign Agents and the Law on Unwanted Foreign Organisations.

3.3 The effects of recent developments: a paralysed system, the risk of torture increased dramatically.

37. The public control of prisons in Russia, which was a decisive step forward, is now facing a fatal risk. This consists essentially in the denaturing of monitoring visits: the mechanism suffers from a dramatic decrease in expertise, and inspections are now more often purely formal in nature. While Russia had established a system of highly qualified specialists in prison matters and prison control, PMCs today are very largely composed, on the one hand, of people who are though of good will, ignorant of prison issues and unable to carry out useful inspections, and on the other hand, of people participating in the PMC to protect the interests of the prison administration and who are indifferent or even hostile to the very principle of the protection of prisoners' rights.

38. As a result, the visits carried out are irrelevant, either because they are unable to uncover cases of torture or because they are deliberately carried out in a manner that is complacent towards the prison administration. According to the Presidential Council, *“It is not uncommon for visits to be of a touristic nature and not aimed at identifying problems and violations, or for visits to be spotted and aimed at 2-3 people who have submitted complaints”*.

39. From the perspective of prisons, the incapacitation of PMCs inevitably means an increase in the use of torture and deliberate ill-treatment. It means that facilities operate away from outside scrutiny. The fact that, unlike what is provided for in many States, doctors belong to the Federal correctional service is very unfavourable in this context.

40. According to A. Babuchkin, a member of the Presidium of the Presidential Council and an authority in this field, the number of complaints of human rights violations received in 2017 by the Civil Rights

Committee over which he presides has evolved as follows²²: +340% for IVS (establishments of the Ministry of the Interior); +227% for violence or degrading practices after police arrest; +153% in pre-trial detention centre (SIZO); +154% in correctional facilities. As the Presidential Council soberly points out, "*the activities of PMCs have not yet become a factor in preventing and detecting human rights violations in all FSIN facilities in Russia*"²³.

Conclusion

41. While Russia had established in 2008 a system of highly qualified specialists in prison matters and prison monitoring, this system is now on the verge of collapse, as a result of the replacement of human rights defenders by people without skills or affiliated to the prison administration. This state of affairs, denounced internally by the Presidential Council for Human Rights and internationally by the UN CAT, increases the risk of torture in Russian prisons.

42. The country has an important pool of people highly qualified in the prevention of torture. The PMC mechanism could very easily be restored to its previous operational capabilities. It is therefore crucial that the Committee of Ministers bring the Russian authorities to give the necessary political impetus to this process.

43. The timing is decisive since the Public Chamber is called upon to decide in the autumn 2019 on the composition of PMCs in 42 regions. The survival of the mechanism is therefore at stake today.

44. The seriousness of the effects of the incapacitation of PMCs, and the risk that it entails of amplifying the type of violations found in the *Buntov v. Russia* case, fully justifies the adoption by the Committee of Ministers of an interim resolution calling on the Russian authorities to take the necessary measures to reintegrate human rights defenders into the PMCs and provide them with the legal and practical means to operate effectively.

General measures that the Russian authorities should take regarding PMCs:

45. Taking into full account the requests made by the Committee against Torture (Concluding observations on the sixth periodic report of the Russian Federation, CAT/C/RUS/CO/6, paragraph 23), the Russian authorities should immediately put the PMCs in a position to act effectively:

- Entrust the competence to appoint the members of the PMCs to a human rights body that respects the Paris Principles, whether it is the Presidential Council for Human Rights or the High Commissioner for Human Rights;
- Establish legal criteria to ensure that PMC members have the necessary skills to effectively monitor places of deprivation of liberty and carry out their duties in a fully independent manner;
- Ensure transparency in the selection process for PMC members and guarantee the possibility of appealing against decisions taken;

²² Е. Масюк, ОП — стоп, Почему новости об аресте членов ОНК не удивляют тех, кто знаком с процедурой их отбора Общественной палатой,

<https://www.novayagazeta.ru/articles/2017/12/09/74856-op-stop>

²³ Recommendation of 14 December 2018, prev.

- Ensure that visits by PMCs are carried out without interference from the administration and under conditions that guarantee the strict confidentiality of exchanges with detained persons;
- Ensure that PMCs systematically have the equipment required to record evidence, in strict compliance with confidentiality requirements ;
- Provide the PMCs with the budgetary means to ensure that their missions are carried out under satisfactory conditions in all the institutions in their region.

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Liège, 18 August 2019



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