RUSSIAN FEDERATION

NGO REPORT

On the implementation of the ICCPR

(prior to the adoption of the List of issues)

Committee Against Torture (Russia)

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With the support of :

CCPR Centre for Civil and Political Rights

Interregional Non-governmental Organization

"COMMITTEE AGAINST TORTURE"

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Note on situation with human rights prescribed by selected articles of International covenant on civil and political rights in Russia.

Description of the organization presenting data.

INGO Committee Against Torture is the oldest NGO that provides highly qualified legal assistance in the region. At the moment Committee Against Torture is considered by professional society and by mass media as an expert organization in the field of human rights protection.

Interregional Non-governmental Organization "Committee Against Torture" is the first Russian human rights organization that specializes in monitoring of a torture problem in Russia, investigation of torture claims and medical rehabilitation of torture victims. Many years of professional experience in work with torture claims gives us a unique opportunity to make a careful and comprehensive research and analysis of prevalence of torture and other forms of ill treatment, reveal the reasons for it and on the basis of this information we develop the methods of prevention of torture.

More information about the organization is available at the official web-site www.pytkam.net.

Article 7 – prohibition of torture:

In the 6th periodic report of the Russian Federation in the chapter on article 7 of the Covenant (prohibition of torture), you can find statistics (cl.63) in relation to jurisprudence of Russian courts under article 117 of the RF Criminal Code (torment/ torture).

However, judicial statistics on convictions under article 117 of the RF CC is not an indicator that shows the real practice of bringing to criminal responsibility for application of

tortures. The point is that the RF Criminal Code does not have the notion of torture as it is interpreted in international law. The definition of the word "torture" is given in the comments to article 117 of the CC: *"By tortures in this and other articles of the present Code we mean infliction of physical or moral sufferings in order to make someone give testimony or perform other actions against his will, as well as to punish someone or for other purposes."* Article 117 of the RF Criminal Code itself reads as follows:

1. Infliction of physical or moral suffering by means of systematic battery or other types of violent treatment, if such treatment does not lead to consequences described in articles 111 and 112 of the present Code, -

is punished by imprisonment for a term up to three years.

2. The same treatment:

a) applied to two or more individuals;

b) applied to an individual and the individual's relatives in connection to the individual's official activities or performance of public duty;

c) applied to a woman if the guilty party is aware of her pregnancy;

d) applied to a minor, an individual in a helpless state or an individual economically or otherwise dependent on the guilty party, as well as an individual who is abducted or taken hostage;

e) with application of torture;

f) used by a group of people, a group of people by previous concert or by an organized group;

g) used by a paid contractor;

h) resulting from political, ideological, racial, ethnical or religious hatred or hostility and used against a social group, -

is punished by imprisonment for a term from three to seven years.

It is evident that the concept of "torture" used in the Russian Criminal Code does not contain the major classification attribute – an act is recognized as torture (according to the notion of torture used in international covenants and treaties) only when it is undertaken by state representatives. It should be mentioned that article 117 of the RF Criminal Code is not applied when we speak about torture as such, i.e. violent treatment for a special purpose/ with an intention (compulsion of evidence, etc.) and other types of violent treatment applied by a state agent.

Article 117 is applied when actions defined as tortures are exercised by citizens who are not "special parties" of a crime, i.e. who are not state agents (state representatives), or who are state agents but do not act in their official capacity at the moment of committing a crime.

As for state representatives, in accordance with the legislation, in the abovementioned cases state agents (officials) are held responsible under cl. «a» p.3 art. 286 of the RF Criminal Code for abuse of official powers with violent treatment:

Article 286. Abuse of official powers

1. Actions of officials (state agents) clearly exceeding their official powers and causing substantial violations of individual's or organization's rights and legal interests or public and state interests protected by law -

are punished either by a fine up to eighty thousand roubles or amounting to the guilty party's income/ salary for the period up to six months, or by deprivation of the right to serve in a certain capacity for a term up to five years, or by arrest from four to six months, or by imprisonment for a term up to four years.

2. The same actions committed by an individual occupying public office at the federal, regional or municipal level of the Russian Federation, -

are punished either by a fine from one hundred to three hundred thousand roubles or amounting to the guilty party's income/ salary for the period from one to two years, or by deprivation of liberty for a term up to seven years with a prohibition to serve in a certain capacity for a term up to three years or without such a prohibition.

3. Actions mentioned in the first and second paragraphs of the present article if they are committed:

а) with violent treatment or a threat of violence;

б)with application of weapon or special tools;

в) causing grave consequences -

are punished by deprivation of liberty for a term from three to ten years with a prohibition to serve in a certain capacity for a term up to three years.

Consequently, in order to get a general idea about the practice of tortures, inhuman or degrading treatment in Russia one should study the judicial statistics under cl. «a» p.3 art.286 of the RF Criminal Code. However, you should remember that it is only cl.«a» p.3 art.286 that deals with application of torture (in some cases it can be accompanied by «b» and «c» p.3 art.286, as well as by other articles of the RF Criminal Code taken jointly), because p.1 of art.286 of the RF Criminal Code covers many other actions that are not related to tortures.

In order to assess the reaction of investigation bodies towards citizens' complaints of tortures more objectively, one should also study the statistics dealing with refusals to start criminal proceedings (under cl. «a» p.3 art.286 of the RF CC), as well as the statistical data dealing with reversal of unlawful procedural decisions under torture cases (refusals to instigate criminal proceedings, decisions to suspend or terminate criminal cases).

Having analyzed this data, it is possible to get a very general idea about the ratio between submitted applications and opened/ taken to court/ adjudicated upon/ suspended/ terminated criminal cases, as well as an idea about the quality of official investigations (about the number of cancelled unlawful procedural decisions taken under torture complaints).

The analysis of statistical data available in relation to unlawful procedural decisions resulting from an official investigation allows us to evaluate the quality of official investigations under applications dealing with tortures.

Besides, it is also interesting to look at the statistics of what disciplinary measures are applied towards investigators issuing unlawful procedural decisions that are cancelled afterwards. It is the lack of disciplinary penalties (or insufficient usage of disciplinary punishment) that leads to the fact that investigators do not feel the responsibility for the decisions they issue, especially unlawful ones.

Article 9 – liberty and security of person:

In 2007-2008 lawyers of INGO "Committee against Torture" registered several cases when the right to liberty and security of person was violated by the actions of prison administrations. This encompasses refusals of remand prison (SIZO) administrations to release an individual immediately on the basis of a court decision providing for an immediate release. In some cases such violations occurred due to incompliance of enactments of the Ministry of Justice with the federal law, and sometimes because certain issues are not clearly regulated by law. Anyway, remand prison administrations do not give priority to human rights and liberties.

The Nizhny Novgorod office of INGO "Committee against Torture" deals with the case of Mr. Andronov. Since January 2007 lawyers of the Committee have been trying to restore Mr. Andronov's rights (who at the moment of violation was underage) who complained about unlawful actions of the police and the Nizhny Novgorod region prosecutor's office.

On 26 February 2007 the Pavlovo city court fixed a restriction measure (custodial placement) for underage D.A. Andronov suspected of committing a crime under art.131 of the RF Criminal Code. Since 26 February 2007 г. till 02 March 2007 Mr. Andronov was detained in a remand prison under the Pavlovo Directorate of the Interior, on 02 March 2007 he was transferred to remand prison IZ-52/1.

On 09 March 2007 the criminal division of the Nizhny Novgorod region court considered the appeal of Mr. Andronov's lawyer and ruled to cancel the decision providing for detention and release Mr. Andronov immediately. That decision was issued around 15:00 on 09 March 2007.

At 16:00 on the same day Mr. Andronov's legal representative and lawyer delivered the cassation decision of the criminal division of the Nizhny Novgorod region court to remand prison IZ-52/1. Besides, a court worker also delivered that decision to remand prison IZ-52/1.

However, in breach of p.2 art.22 of the RF Constitution, according to which an individual can be detained only on the basis of a court order, and p.1 of art.5 of the European Convention on Human Rights and Fundamental Freedoms, according to which everyone has the right to liberty and security of person, the administration of remand prison IZ-52/1 did not release D.A. Andronov. Mr. Andronov's legal representative and lawyer insisted that Mr. Andronov should be released immediately, but representatives of remand prison IZ-52/1 (acting remand prison head – A.F. Tarasov, duty warrant officer owho refused to introduce himself, and assistant duty

officer - Salnikov) refused to do so, they motivated their refusal by saying that "the business day was over" and stated that they would release D.A. Andronov on Monday morning, that is on 12 March 2007, i.e. at least 65 hours after the court delivered the decision to release Mr. Andronov from custody.

The same day, on 09 March 2007 Mr. Andronov's legal representative applied to the Nizhny Novgorod region prosecutor's office.

The next day, on 10 March 2007 at 8:30 Mr. Andronov's legal representative and lawyer, Mr. O.V. Yakimshin, repeatedly delivered the cassation decision of the criminal division of the Nizhny Novgorod region court to remand prison IZ-52/1. At 10 a.m. on 10 March 2007 representatives of remand prison IZ-52/1 released Mr. Andronov in presence of an official from the Nizhny Novgorod region Prosecutor's office. Thus, A.D. Andronov was unlawfully detained for almost 20 hours.

On 21 September 2007 the Sovietskiy district court sustained the claim of Ms. M.G. Andronova (D.A. Andronov's legal representative) for compensation of moral damage incurred to Mr. Andronov by unlawful detention.

The court decision read as follows: "the failure of the remand prison staff to perform the judicial decision providing for an immediate release violated D.A. Andronov's personal non-property right to liberty … which according to art. 5 p.5 of the European Convention on Human Rights and Fundamental Freedoms and art.151, 1099-1101 of the RF Civil Code is a basis to award compensation of moral damage since there were no legal grounds for further detention".

On 18 December 2007 the civil division of the Nizhny Novgorod region court supported the abovementioned decision and it entered into force. (the decision is attached)

Unlike the court that admitted the fact of violation, workers of the Prosecutor's office did not reveal any violations in the actions of IZ-52/1 personnel.

The Prosecutor's office carried out a check under the application of INGO "Committee against Torture" in connection with unlawful detention of underage D.A. Andronov. Upon the results of the check, on 23 March 2007 it issued a refusal to start criminal proceedings. The court ruled that decision unlawful and unmotivated on 18 May 2007 and cancelled it. Basing upon the results of an additional check, the Prosecutor's office again refused to start criminal proceedings on 10 February 2008. Moreover, the investigator characterized the actions of the remand prison administration (SIZO no.1) as "lawful and motivated".

Specialists of INGO "Committee against Torture" believe that Mr. Andronov's rights were violated due to the lack of proper internal regulations on the issue of release from custody in off-work hours.

According to p.5 art.388 of the RF Criminal Procedure Code, "cassation judgments ordering immediate release of detainees shall be enforced instantly if the detainee takes part in the cassation court hearing. In other cases a copy of the cassation judgment or an extract from the operative part concerning immediate release shall be delivered to the remand prison administration for prompt enforcement".

The Criminal Procedure Code presupposes two forms of participation in a cassation hearing for detainees: personally or by means of teleconference (p.3 art.376 of the RF Criminal Procedure Code: "An individual kept in custody who wishes to take part in the hearing or be present at the proclamation of the verdict shall have the right to participate in the hearing directly or outline his position by means of teleconference").

Mr. Andronov took part in the cassation hearing by means of videoconference. This fact is documented in the judgment. Thus, D.A. Andronov was to be immediately released from custody. However, he was not released.

Moreover, under art.49 of Federal law of 15.07.1995 no. 103-FZ "On detention in custody of suspects and individuals charged with criminal offenses", one of the grounds to release a suspect or indictee from custody is "a court decision delivered in accordance with the procedure prescribed by law".

Under art.50 of Federal law of 15.07.1995 no. 103-FZ "On detention in custody of suspects and individuals charged with criminal offenses", "suspects and indictees shall be released from custody by the detention facility head upon receipt of a relevant court decision or investigator's, prosecutor's or investigation body decree". The court decision ordering Mr. Andronov's release was delivered to remand prison IZ-52/1 by a court worker. This fact was also documented during the hearing.

The court underlined in its decision that "on 9 March 2007 remand prison IZ-52/1 staff had unlawfully refused to accept the decision of the criminal division according to which underage A.D. Andronov was to be released from custody".

During the hearing, representatives of remand prison IZ-52/1 referred to the Rules of special service groups for remand prisons and penal institutions of the Russian Federation approved by order no. 94-dsp of the Ministry of Justice dated 23.06.2005 regulating the issues of release from custody, in particular.

Paragraph 93 of these Rules presupposes that a document providing for someone's release delivered to the remand prison (prison) when the business day is over is to be executed not later that the first half of the next day.

During the hearing the representative of remand prison IZ-52/1 specified that "the document providing for D.A. Andronov's release had not been accepted because it had been

delivered on 9 March 2007 after the end of the business day when duty officers in charge of releases had already left".

According to the logic of the remand prison representative, Mr. Andronov could be released only on a business day. In our case it means that he could be released only on Monday morning, although the court decision was delivered to the remand prison on Friday. However, the Rules cited above (paragraph 93) say that that an individual is to be released "not later that the first half of the next day", i.e. not the next business day, but the next calendar day.

So, we witness a situation when in the remand prison there is no mechanism to execute regulatory documents and implement the law upon the whole. Paragraph 93 foresees a possibility to release an individual when the business day is over, in practice there is no chance for such decision-making because people in charge are absent. In the specified case the decision was finally taken in the off-work hours (10 March 2007, Saturday), but it happened only thanks to the efforts of Mr. Andronov's representatives and specialists of INGO "Committee against Torture" who managed to attract the attention of the Nizhny Novgorod prosecutor's office administration to the problem.

Besides, the phrasing contained in paragraph 93 of the Rules is rather puzzling. The fact that a document providing for someone's release delivered after the end of the business day is to be executed "not later that the first half of the next day" seems not clear. In reality this phrasing means that an individual can stay in custody for almost an additional day after the decision to release him is issued. This situation seems especially puzzling if you keep in mind that in remand prisons individuals can be placed in custody immediately at any time of day and on every day of the week.

The situation with Mr. Andronov is not unique, of course, because such violations are preconditioned by the defects of the regulatory control.

The position of the Nizhny Novgorod Prosecutor's office is very illustrative. In his reply to the address of the Committee against Torture the deputy prosecutor of Nizhny Novgorod region underlined that there were no violations found in the actions of remand prison IZ-1 administration. And the check conducted by an investigator from the Investigation Committee under the RF Prosecutor's office resulted in a refusal to open a criminal case, as it was mentioned earlier. Neither the Prosecutor's office, nor other competent authorities reacted to the violation of the underage individual's rights.

Thus, despite the fact that violation of Mr. Andronov's right to liberty was evident and there was a valid judicial decision establishing the fact of violation, the prosecutor's office refused to admit the fact of violation and to analyze whether internal regulations of remand prison IZ-52/1 comply with regulatory acts of the Ministry of Justice and laws, and to respond to the situation.

It should also be mentioned that this is a common example of how human rights violations are ignored by the prosecutor's office and other authorities. Such judicial decisions are not studied and generalized, the Prosecutor's office does not react to such violations, and as a result, human rights are violated against and again.

A similar thing happened to Mr. Atayev complaining about unlawful detention in a remand prison contrary to a court decision.

The circumstances of the case are as follows:

Convict Atayev filed a motion for a release on parole. The first instance court sustained the motion.

In the operative part of the decision the court held: *"The defense lawyer's motion… for Mr. Atayev's release on parole … is sustained, Mr. Atayev shall be released on parole… The decision enters into force from the moment of proclamation and can be appealed against at the Krasnodar regional court through the Oktyabrskiy district court within 10 days from the moment of adjudication"*.

The present court decision was submitted to the remand prison where the convict was kept in custody. The remand prison head refused to release Mr. Atayev and sent a request to the court that had issued the decision in order to obtain explanations as for the decision's entry into force.

In reply to that, the court issued the following explanations: "*the time of entry into force mentioned in the operative part of the decision – the moment of proclamation – is correct and fully complies with articles 401, 311, p.3 art.391 of the RF Criminal Procedure Code that regulates the procedure of immediate release from custody in cases connected with defendant's or convict's dispensation from imprisonment.*

Part 1 of article 391 of the RF Criminal Procedure Code regulates the general procedure of entry into force for first instance court judgments in connection with releases from custody or dispensations from imprisonment.

The right to lodge a cassation appeal and the limitation period are mentioned in the decision and do not contradict the obligation of immediate enforcement in terms of release from custody".

The Assistant head of the State Directorate of the Federal Penitentiary Service for Krasnodarskiy Kray gave the following comments: "On 5 August this year the decision of the Oktyabrskiy district court of Krasnodar to release convict Atayev on parole was delivered to remand prison no. 1.

The remand prison staff considered it contradictory in terms of its effective date because the court had not taken into account the requirements of art. 391, p.1 of the RF Criminal Procedure Code.

Therefore, the remand prison requested a clarification and legal foundation from the Oktyabrskiy district court that again referred to the provisions of the RF Criminal Procedure Code regulating criminal proceedings.

The same day the Krasnodar region prosecutor's office filed a cassation appeal to the Krasnodar regional court in relation to the decision of the Oktyabrskiy district court in respect of Mr. Atayev.

This decision can not enter into force before the cassation appeal is tried on the merits".

Lawyers of the Committee against Torture believe that Mr. Atayev's right to liberty has been violated. It should be mentioned as well that the Committee's position is based on the expert opinion and report prepared by specialists from the Independent Legal Expert Council.

Analysis of article 391 of the RF CPC allows us to claim that this article does not regulate the issue explicitly, because it does nor say directly that the decision to release an individual on parole presupposes immediate enforcement in the part of release from custody.

However, this gap is bridged by a similar law– p.3 art.311 of the RF CPC. This norm obliges the court to release a convict from custody immediately if the court relieves the convict from serving the sentence, irrespective of the time when the judgment enters into force. Release on parole, according to art. 79 of the RF CPC, is also a type of relief from punishment. Therefore, in this situation all guarantees of p.3, art.311 are applicable.

According to art.392 of the RF CPC, a court verdict, judgment and decision that have entered into force shall be compulsory for all state bodies and state representatives and are to be strictly executed on the territory of the Russian Federation.

It follows from p.3 art. 391 of the RF CPC that the above mentioned regulation on compulsory execution of procedural court decisions also covers those judgment parts that are subject to immediate execution, even though the judgment as a whole is not yet in force. Otherwise, provisions of art.391 of the RF CPC on immediate execution of court decisions have no sense at all.

So, a court decision to release an individual on parole that is not yet in force is compulsory for execution in the part of immediate release from custody.

Non-execution of a court decision by state bodies or officials (in this particular case) entails criminal responsibility under art.315 of the RF CPC.

Besides, the RF Criminal Procedure Code does not stipulate that the court should issue any "explanation" of the decision contents. P.16 of art.397 of the RF CPC presupposes only that "dubieties and ambiguities arising when interpreting the verdict" shall be explained by the court by means of a document prepared in course of a special court hearing. Consequently, the actions of the remand prison administration targeted at obtaining some "explanations" from the court are unlawful and cannot be the ground not to enforce the decision in the part of Mr. A.A. Atayev's immediate release from custody.

Having analyzed the situation described above in the context of European Court practice, we may conclude that the refusal of the remand prison administration to release Mr. Atayev immediately amounts to violation of his rights under article 5 of the European Convention on Human Rights and Fundamental Freedoms and article 9 of the International Covenant on Civil and Political Rights.