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## Committee on Legal Affairs and Human Rights

### Refusing impunity for the killers of Sergei Magnitsky

#### Draft report

Rapporteur: Mr Andreas Gross, Switzerland, Socialist Group

#### A. Preliminary draft resolution

1. The Assembly reiterates its strong support for the fight against impunity and against corruption as a threat to the rule of law, in line with its Resolution 1675 and Recommendation 1876 (2009), and Resolution \*\*\* and Recommendation \*\*\* (2013), and for the protection of whistleblowers expressed in Resolution 1729 (2009) and Recommendation 1916 (2009).

2. It is appalled by the fact that Sergei Magnitsky, a Russian anti-corruption whistleblower, died in pre-trial detention in Moscow on 16 November 2009 and that none of the persons responsible for his death have yet been held to account.

3. Mr Magnitsky, a tax and accountancy expert with a Moscow-based law firm, had carried out investigations on behalf of a client on a massive fraud against the Russian fiscal authorities. The suspects he had designated had effectively obtained the reimbursement of taxes paid by his client's companies, which had been fraudulently re-registered in the names of known criminals.

4. The complaints Mr Magnitsky had helped prepare were addressed to senior representatives of Russian law enforcement bodies, but they were sent for investigation to the same Interior Ministry officials whom Mr Magnitsky had accused of complicity. They placed Mr Magnitsky in pre-trial detention, in increasingly harsh conditions. After six months in detention, Mr Magnitsky was diagnosed with pancreatitis. Shortly before his scheduled treatment, he was transferred to another prison without adequate medical facilities.

5. After almost one year in detention, on 16 November 2009, Mr Magnitsky, whose state of health had further deteriorated, was transferred back to a detention centre equipped with relevant medical facilities. Upon his arrival, he was beaten with rubber batons and died the same evening. Civilian emergency doctors called in by prison officials were kept waiting for more than one hour after which they found Mr Magnitsky's lifeless body on the floor of a holding cell.

6. The precise time and causes of Mr Magnitsky's death are still unclear. Contradictory testimony and official records have not yet been fully investigated.

7. Two prison officials were indicted for negligence. The proceedings against one of them were terminated on 2 April 2012 due to prescription, the other was acquitted in line with the prosecutor's request on 28 December 2012. None of the persons present at the time and place of Mr Magnitsky's death, or accused by his family of having orchestrated the pressures he had complained about, was ever indicted.

8. The trial of Mr Magnitsky, who is now accused of having participated himself in the fraud he had denounced and in alleged tax evasion by his client, is being pursued posthumously, despite numerous

protests of his widow and his mother. Russian law allows posthumous trials only exceptionally, at the request of the family, for rehabilitation purposes.

The lawyers who acted on behalf of the true owners of the fraudulently reregistered companies in order to help them regain control, are now being prosecuted for acting on false power of attorneys, as they had not obtained their powers from the false owners.

9. The Russian Public Oversight Committee (POC), mandated by the State to inspect all places of detention in the Russian Federation, carried out a full investigation of the circumstances of Mr Magnitsky's ill-treatment and death in detention. It pointed out numerous inconsistencies, omissions and contradictions in the official records concerning the case.

10. The Presidential Council on Human Rights, on the basis of the POC's findings, thoroughly evaluated the case of Mr Magnitsky and urged the competent Russian authorities to hold to account those responsible for his death.

11. Mr Magnitsky's former client, William Browder, is leading a world-wide campaign in favour of visa bans and account freezes against persons allegedly sharing in the responsibility of Mr Magnitsky's death and the ensuing cover-up. Following the adoption of the "Magnitsky Act" in the United States of America, he is campaigning for similar sanctions in Europe.

12. As a reaction to the "Magnitsky Act", the Russian State Duma adopted a law prohibiting the adoption of Russian orphans by American families, and senior Government representatives have publicly commended the officials covered by sanctions under the Magnitsky Act for their actions.

13. In view of the above, the Assembly urges the competent Russian authorities:

13.1 to fully investigate the circumstances and background of Mr Magnitsky's death and the possible criminal responsibility of all officials involved, in particular:

13.1.1. the contradictory testimony by prison officials and other witnesses concerning the events following Mr Magnitsky's arrival at the Matrosskaya Tishina pretrial detention centre on 16 November 2009 ;

13.1.2. the existence of two different versions of the "death report" of 16 November 2009 signed by Dr. Gaus and others;

13.1.3. the reasons for the move of Mr Magnitsky to Butyrka prison one week before the second ultrasound and surgery scheduled at Matrosskaya Tishina prison;

13.1.4. the assignation of a mere hygiene specialist to provide medical care for Mr Magnitsky, who had previously diagnosed with serious diseases such as pancreatitis;

13.1.5. the prescription and administration, to Mr Magnitsky, of the drug Dyclofenac which is suspected of, *inter alia*, aggravating pancreatitis, in certain circumstances;

13.1.6. the unavailability of CCTV footage of the arrival of Mr Magnitsky at Matrosskaya Tishina prison on the day of his death, in view of testimony according to which investigators had taken away the recordings;

13.1.7. the incompleteness of the legally required ledger of complaints made during a critical period at Butyrka prison, in view of testimony that the extracts of the ledger presented during the proceedings appeared to have been rewritten in one trait;

13.1.8. the personal relations existing between persons suspected of participating in the criminal conspiracy denounced by Mr Magnitsky, including certain officials and former officials of the Ministry of Interior, of the tax offices involved in the fraudulent tax reimbursement, the owner of the bank used in the laundering of the proceeds, and lawyers involved in the fictitious law suits, including instances of joint travel to Dubai, Cyprus and London;

13.1.9. the origin of the extreme wealth displayed by retired Interior Ministry and tax officials ;

13.1.10. the fraudulent law suits before the arbitration courts in St. Petersburg, Moscow and Kazan recognising the fictitious debts that purportedly annulled the profits of the fraudulently reregistered companies in preparation of the tax reimbursement fraud denounced by Mr Magnitsky;

13.1.11. the procedure followed by the two tax offices involved in the fraud denounced by Mr Magnitsky in approving reimbursements amounting to the equivalent of US\$ 230 million, within 24 hours of the application, in particular whether the required background checks with the Interior Ministry had taken place, given that the Interior Ministry had previously received detailed information prepared by Mr Magnitsky on the fraudulent reregistration of the companies asking for the reimbursement.

13.2. to fully cooperate with the competent authorities of all countries, including Switzerland, Estonia, Latvia, Lithuania, Finland, the Republic of Moldova and Cyprus, which have opened criminal investigations for money laundering in light of information received on suspect transfers of funds that can be traced back to the fraud denounced by Mr Magnitsky, or to similar crimes committed before or afterwards.

13.3. to hold to account for their acts and omissions all those who share in the responsibility for Mr Magnitsky's death, in particular those who ordered his frequent moves between prisons and cells, with ever-deteriorating conditions of detention, failure to provide necessary medical treatment, and, just before his death at Matrosskaya Tishina prison, the beatings and the manner in which Mr Magnitsky was left alone in a cell in apparently critical condition.

13.4. to close the posthumous trial against Mr Magnitsky and cease putting pressure on his mother and his widow to participate in these proceedings ;

13.5. to cease the persecution of other lawyers acting for the true owners of the fraudulently reregistered companies (cf. paragraph 10).

14. The Assembly commends the Russian Federation for having set up the robustly-mandated and independent Public Oversight Committee, which can serve as a model for many other member states of the Council of Europe. In order to further strengthen this valuable prison oversight instrument, the resources at its disposal should be increased and access by detainees facilitated for preventive purposes.

15. It encourages the competent Russian authorities to persist in fighting corruption at all levels by:

15.1. improving the coordination between bodies possessing relevant information, such as the Central Bank, and others who are empowered to carry out criminal investigations and to prosecute perpetrators ;

15.2. further promoting transparency in business relations, especially by improving public access to corporate information (beneficiary ownership, directors, balance sheets and court and tax records), and by obliging all banks to inform the Central Bank of all transfers of funds over and above a certain threshold.

15.3. promoting modern public service ethics based on transparency (including recruitments and promotions), fair pay and zero tolerance for extortion, bribe-taking and influence-peddling.

16. The Assembly invites all other member states of the Council of Europe to consider ways and means of encouraging the Russian authorities to hold to account those responsible for the death of Mr Magnitsky and to fully investigate the crime he had denounced, in the interest of Russia and of all her hard-working and tax-paying citizens.

17. Regarding the imposition of targeted sanctions against individuals (visa bans and account freezes, cf. paragraph 11), the Assembly considers these as a means of last resort. Recalling its Resolution 1597 and Recommendation 1824 (2007), it stresses that any such measures should be subject to a fair and transparent procedure.

## **B. Draft explanatory memorandum**

### **1. Introduction**

#### *1.1. Procedure to date*

1. The motion for a resolution on "Refusing impunity for the killers of Sergei Magnitsky"<sup>1</sup> was transmitted to the Committee on Legal Affairs and Human Rights for report by the Assembly on 5 October 2012 following a recommendation of the Bureau made on the same day. At its meeting on 12 November 2012, the Committee designated me as rapporteur.

2. On 21 January 2013, the Committee discussed an introductory memorandum<sup>2</sup> and authorised me to carry out fact-finding visits to Moscow, London, Cyprus and Bern.

3. In order to allow the Russian authorities to present me their official views on the different aspects of the case, I went to Moscow first, between 13 and 16 February 2013. Next, from 25 to 27 April, I travelled to London in order to meet both the competent UK authorities and Sergei Magnitsky's former client, Bill Browder. Already on 7 January, I met with the Swiss Prosecutor General and his Deputy and, on 29-30 April, with the competent Cypriot authorities. Finally, on 20-21 May 2013, I returned to Moscow in order to hear the Russian authorities' response to the issues raised by all the other interlocutors since my first visit.

4. I should like to use this opportunity to thank the Russian, United Kingdom, Cypriot and Swiss authorities for their cooperation. I regret nevertheless that it was not possible, in Moscow, to speak directly with the persons most immediately concerned by the allegations of criminal conspiracy, despite the fact that I had sent a list with the names of these persons in advance of the two information visits.

#### *1.2. Earlier work by the Assembly on the case of Sergei Magnitsky*

5. In reverse chronological order, the activities of the Assembly concerning the case of Sergei Magnitsky to date are the following:

##### *1.2.1. Monitoring Committee*

6. In view of the serious allegations made in connection with the case of Sergei Magnitsky, together with György Frunda, we asked a number of questions to the Russian authorities in our capacity as co-rapporteurs on the honouring of obligations and commitments by the Russian Federation for the Monitoring Committee. In May 2012, we submitted different questions to the Russian parliamentary delegation. As we explained in our report adopted during the October 2012 part-session<sup>3</sup>, the replies did not go beyond referring to the usual official position of the Russian authorities, such as those set out in the results of official investigations and court decisions. We did not and do not consider them to be satisfactory.

7. Given the unavoidably limited possibilities to enter into detail in the framework of monitoring reports, which must cover a wide panoply of democracy, rule of law and human rights issues in this immense country, it is precisely the purpose of this present, separate report to provide the opportunity for all sides involved to present and explain their positions in such a way that the Assembly can reach a factually and legally well-founded and balanced assessment of this problem, in the light of the Council of Europe's standards on the fight against impunity.

##### *1.2.2. Written declaration*

8. On 9 February 2012, 58 members of the Parliamentary Assembly signed a Written Declaration<sup>4</sup> referring to the findings of the Presidential Human Rights Council, calling on Russia to "immediately prosecute the people named in the Human Rights Council's report, cease the intimidation of Magnitsky's family and allow an independent evaluation in his case". The Declaration initiated by Pieter Omtzigt was accompanied by two written questions he addressed to the Committee of Ministers.<sup>5</sup>

<sup>1</sup> Assembly doc. 12909 of 24 April 2012.

<sup>2</sup> Doc. AS/Jur (2013)01 of 18 January 2013.

<sup>3</sup> Doc. 13018 of 14 September 2012, The honouring of obligations and commitments by the Russian Federation.

<sup>4</sup> Written Declaration no. 490 of 9 February 2012, Doc. 12744\_2nd edition, "The Sergei Magnitsky Case".

<sup>5</sup> Doc. 12809 of 13 December 2011, "Mr Magnitsky's case investigation", and Doc. 12688 of 11 July 2011, "Death of Sergey Magnitsky".

### 1.2.3. Round table hearing on 7 September 2011

9. On the margin of the meeting of the Committee on Legal Affairs and Human Rights in Oslo, in June 2011, Mr Browder, a client of the late Sergei Magnitsky engaged in world-wide lobbying efforts aimed at holding to account Mr Magnitsky's killers, made an intervention at a "parliamentary seminar" co-hosted by the Norwegian delegation to the Assembly and the Norwegian Helsinki Committee.

10. The Russian delegation expressed, at the Oslo meeting, its preference for a "round table" format, in the presence of representatives of all sides. Marieluise Beck (Germany/ALDE), Rapporteur on "Threats to the Rule of Law in Council of Europe member states – upholding the authority of the Parliamentary Assembly" responded by organising a round table on the Magnitsky case at the Committee meeting on 7 September 2011, in Paris with two persons who had carried out extensive research on the Magnitsky case: Ms Evgenia Albaz, journalist at the Moscow-based *Novoje Vremja* (New Times), and Ms Elena Panfilova, Director of Transparency International, Russia. The Russian delegation, though invited to do so by the Rapporteur, declined to nominate two experts to present the authorities' views.

### 1.2.4. Report on Politically-motivated abuses of the Criminal Justice System in Council of Europe member states (Rapporteur: Ms Sabine Leutheusser-Schnarrenberger, Germany, ALDE)

11. In her last report for the Assembly adopted in October 2009,<sup>6</sup> Ms Leutheusser-Schnarrenberger, now Federal Minister of Justice of Germany, summed-up the *modus operandi* of the alleged massive tax reimbursement fraud denounced by Sergei Magnitsky and, most importantly, demanded his release from pre-trial detention at a time when he was still alive, but already suffering from serious health problems.

### 1.3. Working method and objective

12. My working method has consisted in speaking openly with and carefully listening to all sides in order to obtain information from a variety of points of view. I have obtained much detailed information from the Russian "Public Oversight Committee" lead by Mr Borshev, whose team carried out an officially-mandated, in-depth investigation immediately after the death of Sergei Magnitsky, and from different investigative reporters, who succeeded in bringing to light the "money trail" for a sizeable part of the funds stolen from the Russian budget in cooperation with colleagues from several other countries. I have also received interesting materials and explanations from Bill Browder and his collaborators in London, as well as from the lawyers of Sergei Magnitsky's mother working on the application she has made to the European Court of Human Rights in Strasbourg and who are not connected with or funded by Mr Browder<sup>7</sup>. I am grateful for the information received from all sides and I have done my best to cross-check and verify it before assessing it, reaching the conclusions that are summed up in this report.

13. I should like to stress that I do not consider it as my task to reach a (quasi-judicial) "judgment" on the "case" of Sergei Magnitsky. Instead, along the lines of the work of former Assembly colleagues such as my compatriot Dick Marty or Christos Pourgourides, from Cyprus, or Sabine Leutheusser-Schnarrenberger, from Germany, who submitted strong "investigative-style" reports to the Assembly<sup>8</sup>, I am merely trying my best, with the help of the secretariat, to explore and expose the truth by assessing in an impartial and neutral manner the plausibility and credibility of all information received.

<sup>6</sup> Assembly document 11993 (2009), in particular paragraphs 87-90 and 108-112.

<sup>7</sup> Their work is funded by the Open Society Justice Initiative.

<sup>8</sup> See for example Dick Marty's reports on Renditions and Secret Detentions ("CIA reports"): Doc. 10957 of 12 June 2006 (available at: [http://assembly.coe.int/ASP/Doc/XrefDocDetails\\_E.asp?FileID=11527](http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=11527)) and Doc. 11302 of 11 June 2007 (available at: [http://assembly.coe.int/ASP/Doc/XrefDocDetails\\_E.asp?FileID=11555](http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=11555)) and on Inhuman treatment of people and illicit trafficking in human organs in Kosovo, Doc. 12462 of 7 January 2011 (available at: [http://assembly.coe.int/ASP/Doc/XrefDocDetails\\_E.asp?FileID=12608](http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=12608)) and Christos Pourgourides' reports on Disappeared persons in Belarus (Doc. 9783 of 10 April 2003, [http://assembly.coe.int/ASP/Doc/XrefDocDetails\\_E.asp?FileID=10456](http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=10456)) and "Fair trial issues in criminal cases concerning espionage or divulging state secrets" (Doc. 11031 of 25 September 2006, [http://assembly.coe.int/ASP/Doc/XrefDocDetails\\_E.asp?FileID=9149](http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=9149)) and Sabine Leutheusser-Schnarrenberger's reports on "Investigation of crimes allegedly committed by high officials during the Kuchma rule in Ukraine - the Gongadze case as an emblematic example" (Doc. 11686 of 11 July 2008, [http://assembly.coe.int/ASP/Doc/XrefDocDetails\\_E.asp?FileID=11981](http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=11981)) and on "The circumstances surrounding the arrest and prosecution of leading Yukos executives" (Doc. 10368 of 21 November 2004) and my own information note for the Assembly's Bureau on the suspicious circumstances of the death of former Macedonian President Boris Trajkovski (available at: [http://assembly.coe.int/CommitteeDocs/2007/20071120\\_Trajkovski\\_E.pdf](http://assembly.coe.int/CommitteeDocs/2007/20071120_Trajkovski_E.pdf))

14. As it is indicated in the title of the motion, the core issues for this report are the precise circumstances of and accountability for the death of Sergei Magnitsky in pre-trial detention. But in order to truly understand what happened to Mr Magnitsky, we must also look closely into the accusations that he had made before he was arrested and for which he was later blamed himself, together with his client, Bill Browder. It is necessary to follow the "money trail" in order to evaluate the credibility and plausibility of allegations and counter-allegations with respect to key players, including those accused of having ordered the maltreatment and possibly the killing of Mr Magnitsky in detention : money - we are talking of the equivalent of 230 million United States dollars (USD), which may only be the tip of the iceberg - and the desire to cover up an earlier crime are among the most prevalent motives for killings.

15. I will thus present my findings in the following way: describing what happened to Sergei Magnitsky from the time he was involved in this affair, I will deal with the controversial issues as they arise, presenting each time the "official version" first upheld by the Russian authorities, then the version defended by Mr Magnitsky's family and his former client, and then my own conclusions reached on the basis of the working method indicated above.

## **2. Sergei Magnitsky – what happened to him, and why?**

### *2.1. The viewpoint of Sergei Magnitsky's relatives*

#### *2.1.1. Sergei's widow - Natalia Zharikova*

16. I should like to begin by presenting the individual concerned, Sergei Magnitsky, and, with a glimpse of the ordeal he went through, a few observations about him, seen through the eyes of his widow, Natalia Zharikova. She is admittedly not an "objective" source, but she greatly impressed us during our meeting in London as a decent, modest, almost shy woman who clearly felt deeply for her deceased husband, with whom she had been in love since their common childhood in Nalchik, a provincial town in southern Russia not far from the troubled North Caucasus region of the Russian Federation.

17. Natalia described her husband as a smart, modest and idealistic person. They grew up together in Nalchik, Sergei had always been honest - according to Natalia, maybe a little too honest for his own good, at times - and often argued with teachers. He was a talented student and very interested in history. Sergei owned a full collection of Lenin's works and had joined the Komsomol movement as a matter of principle. He graduated from school in Nalchik in 1989 and went on to study at Moscow University, whilst Natalia stayed in Nalchik, attending the local University. In Moscow, as a student, Sergei lived very poorly, in a small room in a communal flat. After graduation, he began to work as an accountant, and in 1996, when they could finally afford it, Natalia moved in with him. Sergei had never been overly ambitious, he just wanted to do a good job.

18. Firestone Duncan, his employer, was a small company, but Sergei had no ambitions to move to a bigger one. He was not keen on getting involved in politics, and "he never took a client trying to bypass the law". Sergei always worked very long hours, but he was healthy, except for the occasional flu, he didn't use alcohol, only a little on social occasions. The diagnoses of hepatitis and diabetes made in prison were new to her. He never told Natalia about what was going on in the office. She was therefore totally surprised and shocked when the police came, at the end of November 2008, to search their flat for 12 hours and arrested Sergei at the end of the search. Sergei told her not to worry, he would be back the following day. But he never returned, and she was only able to see him during a court hearing relating to the extension of his detention, in a cage, without being able to speak with him. She had approached the investigators, but they refused to allow her to meet Sergei in prison, except once, after almost a year in pre-trial detention.

19. Sergei's mother moved from Nalchik to Moscow. They often bought food to bring to the prison. The distance from their flat, the fact that they did not own a car, and especially the burdensome procedures involving many hours of waiting each time meant that it took them a whole day every time - "only Matrosskaya Tishina prison was a little better organised". Sergei shared with his fellow inmates whatever food he received. After Sergei's death, on 16 November 2009, Natalia was not allowed to see her husband's body in the morgue of the pretrial detention centre. "They gave us the body only for the funeral, already prepared, dressed in clothes they had asked for in advance, and made-up. But his mother opened the blanket and still saw bruises on his knuckles, despite the passage of time and the make-up. When the case against Sergei was reopened posthumously, and she was summoned to appear before the authorities, Natalia and Sergei's mother were "shocked, scared and stressed", especially when they found out that the same investigators were again in charge. Natalia wrote to the investigators that she was "strictly against" re-opening the case, she also told a (female) investigator that she cannot understand how they can prosecute a dead man. Natalia agreed with Sergei's mother that these people could never be trusted to rehabilitate

Sergei. At the beginning of the ordeal, Natalya was "scared and kept her head low", whereas Sergei's mother had been more active. Now Natalya had decided to be more outspoken, too. She was proud that all Sergei's former friends and colleagues spoke so very highly of him.

### 2.1.2. Sergei's mother – Natalia Magnitskaya

20. I met Natalia Magnitskaya in Moscow in May 2013. We spoke for more than three hours. For the sake of helping to make the truth about her son better known, she went through the ordeal of reliving the nightmare of her son's death in detention, and his posthumous prosecution. Ms Magnitskaya is a soft-spoken woman, deeply affected by the loss of her son, but not tearful, determined to see those responsible for Sergei's death to be held to account, but not vengeful or aggressive.

21. After Mr. Magnitsky was arrested, she left her home in Nalchik and moved in with her daughter-in-law in Moscow. She needed help with the children, especially the youngest boy, who had just started grade 2. She also wanted to visit her son in prison and bring him food, but she suffered from the same obstacles already described by her daughter-in-law. In his first place of detention (pre-trial detention centre no. 5), Sergei M did not have any health difficulties, just a flu, for which he was treated. He was not allowed to have visitors, but he wrote a lot of letters, asking about his wife and children, and other family members, and discussing books he read there. From the pretrial detention centre no. 5, he was moved to a temporary detention center and later, in April 2009, to Matrosskaya Tishina.

22. Until April 2009, Sergei M. wrote that he had to be released because he was innocent, not because of his state of health. Her son had always been healthy, a little overweight, but never seriously ill, with the exception of one stay in hospital for appendicitis. As of April 2009, he began to complain about stomach problems. At the request of a relative, who is a doctor, he described the symptoms in detail; they corresponded to the diagnosis made by the prison doctors in Matrosskaya Tishina, namely that he suffered from pancreatitis.

23. Soon after the diagnosis was made and despite the prescribed additional ultrasound examination and surgery Sergei M was moved to the harsh Butyrka prison. After he was moved there, he suffered a lot from not being allowed any reading materials. While he was in Butyrka, our contacts with Sergei were very limited, letters needed about two months each way, in four months, we received only two letters. When we asked the judge for permission to visit Sergei, the reply was that this would "not serve the purpose" – as in Alexander Solzhenitsyn's "Gulag Archipelago".

24. Ms Magnitskaya also said that she was never informed about her son's transfers to different prisons or cells and found out each time only when she came to the prison with food parcels.

25. Ms Magnitskaya indicated that the drug her son was given at Butyrka prison after he suffered more and more acute stomach pains – diclofenac – should be taken with milk or kefir in order to prevent more damage to the digestive system. But her son was never given any, and she was not allowed to provide it for him. Dr. Litvinova, his doctor at Butyrka prison, had first testified that Sergei had given her a paper from Moscow hospital no. 36 showing that he had been diagnosed with pancreatitis in March 2008, i.e. before his arrest. Dr. Litvinova changed her story after the hospital had confirmed that Sergei had never been there.

26. Ms Magnitskaya saw her son for the last time alive at the court hearing about the prolongation of his detention four days before his death, in November 2009. Sergei looked white and tired, and had lost a lot of weight, but he did not look like he was terminally ill. When she next saw him at the funeral, she pulled back the blanket covering his upper body, and she saw marks on his fingers and knuckles, both scratches and haematoma, and his hands were balled into fists, not folded as is customary. The family had to say farewell to Sergei in a dark prison morgue and was not allowed the use of a proper funeral home. She had also been twice refused permission to have independent experts perform an autopsy, despite all the contradictions resulting even from the official records of what had happened to her son. Ms Magnitskaya is convinced that her son was killed intentionally, at Matrosskaya Tishina, brutally beaten while he was in a fragile state of health, then left to die miserably alone in his cell, or even killed directly by one of several known methods of inducing heart failure.

27. The mother's nightmare still continued through the posthumous prosecution of her son and the public propaganda campaign against him and his former client, Mr Browder. She was grateful to Bill Browder, who had said to her that he felt personally guilty for what happened to her son. He was now part of the inner circle of the family. He did everything he could to help her and her family obtain justice. Not many would have taken responsibility in such a way.

## 2.2. The road to Sergei's arrest

### 2.2.1 Search and seizure raids on the Moscow offices of Hermitage Capital and Firestone Duncan: the "Kameya case"

28. On 4 June 2007, 25 officers of the Moscow Branch of the Interior Ministry, led by Lt. Col. Artem Kuznetsov, searched the offices of the investment company Hermitage Capital in Moscow, purportedly to obtain information concerning the tax situation of a Russian company called "Kameya", on the basis of a criminal case opened on 28 May 2007<sup>9</sup> against the Director of Kameya and Chief Operating Officer of Hermitage, Mr Cherkasov.

29. At the same time, representatives of the Moscow Branch of the Interior Ministry also raided the offices of Firestone Duncan, Sergei Magnitsky's employers. Hermitage had been a client of Firestone Duncan for legal and accounting services for many years. We were told that one of the lawyers working with Firestone Duncan, who tried to stop the investigators from seizing documents belonging to other clients unrelated to Kameya was severely beaten and had to spend two weeks in hospital. All of Firestone Duncan's computers were taken during the raid and two van-loads of client documents taken from the offices. A detail the importance of which will become apparent later is that many original corporate documents (seals, original corporate certificates and charters) for companies registered by this firm were removed<sup>10</sup>.

30. The background of the "Kameya case", serving as justification for the two above-mentioned "raids", was the following<sup>11</sup>: Kameya was accused of having underpaid dividend withholding tax amounting to 1.15 billion roubles (about 44 million USD), by unlawfully applying the double taxation agreement between Cyprus and Russia. The agreement foresees a withholding tax rate of 5%, whilst without the benefit of the agreement, the tax rate would have been 15%. Kameya was an investment company owned by a Hermitage client investing in stocks of Russian companies, over a period of seven years, during which the prices of the stocks detained rose, generating a profit for Kameya of about 12.3 bn roubles (472.2 million USD). In February 2006, Kameya paid the equivalent of 113.3 million USD in profit tax to the Federal Tax Service, at the 24% rate foreseen by law. After the tax payment, Kameya's sole shareholder (a Cyprus-based holding company) decided to distribute the remaining profit to itself. According to the double taxation agreement, a 5% withholding tax applied and was paid over to the Federal Tax Service on 24 April 2006, the remainder distributed to the Cyprus company. So far, this is undisputed.

31. The Interior Ministry's investigators then claimed that the double taxation agreement was applied incorrectly because Kameya's Cyprus-based holding company did not have the required certificate of Cyprus tax residency. But notarised copies of this certificate had indeed been submitted to the tax authorities, as confirmed by letters from the Russian Ministry of Finance dated 26 July 2007 and by the Federal Tax Service dated 15 October 2007, which both state that the 5% withholding tax rate was correct. In fact, on 13 September 2007, Kameya was informed by the Federal Tax Service that it had actually overpaid taxes by some 3.96 million roubles (or about USD 140 000). This was confirmed by a subsequent audit by Moscow Tax Authority No. 7.<sup>12</sup>

32. Another suspicious circumstance in relation to the Kameya case is a telephone conversation on 17 February 2007, i.e. three months before the opening of the criminal case, between Lt. Col. Kuznetsov and a partner of Hermitage capital. The Hermitage partner, whom we met in London, testified that Mr Kuznetsov referred to the visa request by Hermitage founder and CEO Bill Browder (who had been refused entry into Russia in November 2005 "in the interests of ensuring the security of the state, public order or public health"<sup>13</sup> after having travelled between the United Kingdom and Russia for many years as a successful investment fund manager specialising in investments in Russian companies). Mr Kuznetsov indicated that before any response could be given to Mr Browder's visa request, he needed to come to Hermitage's offices in order to obtain answers to a number of questions. Any decision concerning the visa "will depend upon how you behave ... and that ... the sooner we meet and you provide us what is necessary, the sooner your

<sup>9</sup> Case no. 151231.

<sup>10</sup> I was shown relevant written testimony of a lawyer with Firestone Duncan, Ms Liliya Guzheva.

<sup>11</sup> Details and exhibits corroborating the presentation presented in the Formal Criminal Complaint on Behalf of Glendora Holdings Limited and Kone Holdings Limited and the Other Entities Listed Dated 5 June 2008 addressed to the Cyprus Police Department by Paul Wrench on behalf of the boards of directors of Glendora Holdings and Kone Holdings, pages 6-9 (available from the secretariat).

<sup>12</sup> Letter attached to the Formal Complaint (note 12[CHECK later] above), pages 137-138.

<sup>13</sup> Article A27, paragraph 1 of Federal Law No. 114FZ; the text in inverted commas is a translation of this provision.



problems will disappear.”<sup>14</sup> Hermitage interpreted this as an extortion attempt and asked Mr Kuznetsov to provide all questions in writing, stating that Hermitage would be happy to answer any questions in the same way. Mr Kuznetsov declined.

33. The Russian authorities did not deny to us any of the information on the Kameya case, they merely stated, without substantiating, that the search and seizure actions on 4 June 2007 were motivated by a *bona fide* criminal case concerning underpayment of taxes by Kameya.

In view of the precise, substantiated and well-documented presentation of the facts on the Kameya case by the representatives of Hermitage, I conclude that the criminal case must have been opened for other reasons than the *bona fide* pursuit of criminal justice. One of the real reasons might well have been to justify the two “raids” on the offices of Firestone Duncan and Hermitage, during which items were taken by the investigators, which, as it is alleged, were later used in the commission of the tax reimbursement fraud denounced by Sergei Magnitsky. The idea for this crime may well have been developed after the perceived failed extortion attempt on 17 February 2007.

### 2.2.2. A word on the allegations against Hermitage Capital

34. In order to understand the background of the case and to assess the credibility of the two opposing “versions” – whether Sergei Magnitsky had blown the whistle on a criminal scheme by corrupt officials and was placed in detention in order to put him under pressure to change his testimony or whether Sergei and his employer Firestone Duncan aided and abetted Hermitage Capital and Bill Browder to commit tax evasion and precisely the tax reimbursement fraud that he had denounced on behalf of Hermitage – we need to look at the background of the business activities in which Sergei Magnitsky became involved before he was arrested. If these business activities were indeed unlawful, as my official Russian interlocutors have alleged, the credibility of the “Sergei the wronged whistleblower” version would be seriously undermined. The opposite would be true if these business activities were not unlawful, but had the potential of seriously annoying powerful interest groups in Russia. I can therefore not avoid discussing the allegations raised against Sergei Magnitsky’s client, Bill Browder, founder and CEO of Hermitage Capital, by the Russian authorities.

#### 2.2.2.1. A capitalist’s emotions

35. When I came to London, to meet with Mr Browder and his collaborators, I was in for a surprise. Bracing myself for meeting a hedge-fund manager, a hard-core capitalist out to defend his own business interests, I was impressed by Mr Browder’s deeply emotional reaction to the death of Sergei Magnitsky. Mr Browder’s family history may provide some explanation. He grew up in an unusual (in the United States) left-wing family as the grandson of the 1930s and early 1940s General Secretary of the U.S. Communist Party and decided to “become a capitalist” as his version of a young man’s rebellion against his family, which had nevertheless left a lasting imprint on his value system. He graduated from Stanford Business School and moved to London, to work for a large consulting firm, shortly after the fall of communism. When he discovered that Polish companies were selling at this time for barely more than their annual profits, compared to 10 or 20 times in more settled markets, he set up an investment company of his own, attracting funds first from friends and colleagues and soon snowballing into one of the largest investment funds in the region, in particular after moving into the Russian market.

36. But Sergei Magnitsky was after all “only” an employee of a law firm – Firestone Duncan – that had provided Mr Browder’s investment company with legal and accounting services. Why did his death so affect his client, Mr Browder? He explained to me that he had come to the conclusion that he was himself the intended victim of the conspiracy, which ultimately caused the death of Sergei Magnitsky. In other words, for Mr Browder, Sergei had died in his stead. For me, this goes a long way towards explaining the dogged, sometimes slightly overdone, world-wide lobbying campaign to obtain “justice for Sergei”. His characteristic radical, single-minded focus, if not obsession, with Sergei has led Mr Browder to remain focused on Russia even though his investment fund business orientated towards Russia was undermined to the point that – during our stay in London – the Hermitage Fund, which had already shrunk considerably since the raid on Hermitage’s offices in June 2007 and the fraud against his companies, was finally liquidated by HSBC, the manager of the Hermitage Fund. Hermitage Capital is now focused on investments in other international markets. This said, Hermitage’s investors were lucky enough that Mr Browder, who saw trouble for his business in Russia coming after the cancellation of his visa, liquidated and repatriated the Fund’s assets in good time for the investors to “miss” the general market downturn during the 2008/2009 financial crisis

<sup>14</sup> The partner’s account of this conversation is laid down in the Formal Criminal Complaint (note 12), pages 4-5; he provided more detail and background during our conversation in London.

triggered by the Lehman Brothers bankruptcy, a world-wide market downturn that hit Russia disproportionately hard.

*2.2.2.2. Mr Browder attempting to recuperate losses incurred in Russia?*

37. It is often said that Mr Browder "lost a lot of money" in Russia, and uses his campaign to try and recuperate it. In fact, Mr Browder's business consisted in managing other people's money, with varying success. During the very profitable period following the privatisation campaign in the mid-nineties he achieved a kind of cult status among investors. But Hermitage's investors, like all other Russian stockholders, suffered losses of 90% during the Russian financial crisis of 1998. Mr Browder still feels "stung" by the losses he could not prevent, which were, in his view, partly caused by the general debt crisis of the Russian Federation, and in part by what he called an "orgy of theft" by oligarchs ("persons appointed to be billionaires") who had given up trying to "behave themselves" for the sake of attracting investments from abroad when they realised that the state's financial crisis blocked access to foreign capital anyway. Nevertheless, the Hermitage Fund's figures show that those of their investors who held on and did not sell after the crash in 1999 recuperated their losses and even made some gains until the new troubles started in 2007. Over the long term, Hermitage beat the Russian stock market by a considerable margin. In view of the nature of Mr Browder's past business activities in Russia, I fail to understand in which way a campaign pushing for the prosecution of those responsible for Sergei Magnitsky's death can help him "recuperate" money he (or more precisely, the investors whose money he managed) may have lost in Russia.

*2.2.2.3. Hermitage minority shareholder activism: unlawful influence or even "greenmail"?*

38. The methods Mr Browder and his team used in order to increase "shareholder value" by investigating and publicising fraud and theft by the companies' own management and thereby increasing declared profits and consequently share prices, were much applauded in Western academic and business circles<sup>15</sup>. Mr Browder's team explained and documented several examples for me in some detail: how they exposed the fact that from one year to the next, Gazprom's electricity bill more than doubled – because a newly created "middleman" company siphoned off huge commissions; and how in the construction of the "South Stream" gas pipeline, the construction cost per meter of pipeline in Russia was double that in Turkey – whilst the Turkish contractors had been criminally convicted in their own country for overcharging. There are many more similar examples, which Mr Browder publicised aggressively at the time, even using them for "corporate electioneering" purposes, when a Hermitage representative ran for a seat on the Gazprom board as a representative of minority shareholders.

39. I heard from several Russian interlocutors that Mr Browder had tried to exercise "undue influence" on Gazprom and other Russian companies – I wonder if they meant these "naming and shaming" tactics. If that is so, I fail to see the problem: fighting corruption, waste and theft in companies, even "strategic" ones, is in the interest of all shareholders, including the Russian people, who through their state and as individual shareholders hold a majority of Gazprom shares.

40. I also heard from Russian interlocutors that Mr Browder's tactics constituted (unlawful) "greenmail". I learnt that the term "greenmail" generally refers to in-transparent business practices such as a minority shareholder trying to oblige the majority, respectively the company's management, to buy him or her out at above-market prices - in exchange for the said minority shareholder keeping silent about the "dirt" he or she dug out about management corruption or other corporate misbehaviour. In my view, such business practices constitute – unlawful - blackmail, as they involve making a threat aimed at obtaining something (i.e. the buyout at a premium) that the author of the threat was not legally entitled to, at the expense of others (i.e. of all other shareholders). Such an activity legally amounts to (unlawful) blackmail, even though the threatened action (publicising truthful information about corporate misbehaviour) is not unlawful as such. But in accordance with information at my disposal, this is not what Hermitage did: they did not threaten to make information on business malpractice public in order to be bought out at above-market stock prices – they published their findings as a matter of course, expecting to benefit (like all other shareholders) from an increase in the share price resulting from the corporate cleanup that could be expected to follow the exposure of the corrupt practices. Again, I fail to see why this is a problem, let alone a criminal matter.

<sup>15</sup> see on the "Hermitage effect" the Harvard case studies:

"Gazprom and Hermitage Capital: Shareholder Activism in Russia,"

[http://cb.hbsp.harvard.edu/cb/web/product\\_detail.seam;jsessionid=E80F4E93AC491FD55C4213251BFF9FD1?E=68188&R=1B36-PDF-ENG&conversationId=996390](http://cb.hbsp.harvard.edu/cb/web/product_detail.seam;jsessionid=E80F4E93AC491FD55C4213251BFF9FD1?E=68188&R=1B36-PDF-ENG&conversationId=996390);

"Hermitage Fund: Media and Corporate Governance in Russia,"

[http://cb.hbsp.harvard.edu/cb/web/product\\_detail.seam;jsessionid=E80F4E93AC491FD55C4213251BFF9FD1?E=43272&R=703010-PDF-ENG&conversationId=996390](http://cb.hbsp.harvard.edu/cb/web/product_detail.seam;jsessionid=E80F4E93AC491FD55C4213251BFF9FD1?E=43272&R=703010-PDF-ENG&conversationId=996390)).

41. But obviously, such business tactics earned Mr Browder the enmity of those who profited from the lack of transparency – in particular the “oligarchs”. Interestingly, it was rumoured in the markets for some time that Mr Browder was secretly in league with President Putin. Indeed, shortly after Mr Putin’s accession to the Presidency in the spring of 2000, he had given effect to some of Mr Browder’s research into theft and graft in the Russian economy, and used the opportunity of the scandals triggered by Mr Browder’s revelations to replace key players in the economy – presumably by persons President Putin found more reliable. Mr Browder told me that he never actually met President Putin in person. But he thought that there may have indeed been an objective “coincidence of interests” between them for some time. Clearly, at some point – according to Mr Browder, as soon as President Putin had safely established his position of dominance and Mr Browder’s business tactics started to annoy the new team in power itself – Mr Browder fell out of grace, as evidenced by the withdrawal of his visa in November 2005, on “national security” grounds. But the visa withdrawal gave rise to an international lobbying campaign by Mr Browder in favour of his visa being reestablished. It became clear to the authorities that the annoyance was not going to go away easily. This seems to have further hardened the authorities’ attitude towards Hermitage and all those working on its behalf, including Sergei Magnitsky.

#### 2.2.2.4. Alleged illegal acquisition of Gazprom shares

42. On 5 March 2013, the Russian authorities opened a new criminal case against Bill Browder concerning illegal acquisition of Gazprom shares. In fact, under a Presidential decree of 5 November 1992, direct foreign ownership of Gazprom shares was limited to 9% of all shares. Due to strong demand from foreign investors, the “foreign” shares soon traded at a considerable premium over the price of the “local” shares, creating an incentive for would-be foreign investors to devise ways and means to acquire “local” shares at “local” prices, using loopholes in the legislation, in particular by holding Gazprom shares through holding companies incorporated in Russia.

43. Another Presidential decree in 1997<sup>16</sup> on Gazprom share ownership required that Russian companies holding Gazprom shares could only be less than 50% foreign-owned. In reaction to this, the holding structures for so-called “grey market” Gazprom shares held for the benefit of foreign investors were further refined, with the depositary accounts assistance provided by Gazprom Bank, the officially designated “registrar” of Gazprom shares. According to Mr Browder, all market intermediaries developed structures for foreign investors to hold “local” Gazprom shares, including for example Gazprom Bank itself, United Financial Group/Deutsche Bank and Ruhrgas. The holding structure set up by Hermitage Capital in 1999 for a large U.S. client included a Cypriot (i.e. “foreign”) holding company (Zhoda Ltd. And its predecessor Peninsular Heights Ltd.) owning 49% of the capital of each of two Russian companies (Kameya LLC and Baikal-M LLC), which in turn owned 51% of each other’s capital, with Kameya holding the coveted “local” Gazprom shares. According to Mr Browder, who showed me copies of the relevant documents, Hermitage Capital fully disclosed this structure, including the foreign ownership element, to Gazprombank (Gazprom’s shares registrar), to the Russian Federal Tax Service and to the Russian “Unified Registry for Legal Entities” (i.e. the central companies registry). The Federal Tax Service, in a tax audit of Kameya LLC dated 2 November 2005, acknowledged Kameya’s (partial) foreign ownership and confirmed that the structure complied with the 1997 decree. Gazprom Bank and the Unified Registrar for Legal Entities also acknowledged Kameya’s ownership structure and did not raise any objections.

44. In August 2004, a member of the Russian State Duma, Mr Yuri Saveliev, requested the law enforcement authorities to investigate the illegal acquisition of Gazprom shares by non-residents through the “grey market” structures set up by UFG/Deutsche Bank. But on 18 October 2004, the General Prosecutor’s office publicly confirmed the legality of UFG’s Gazprom structures. Finally, by Presidential decree no. 1519 of 23 December 2005, all restrictions on foreign ownership of Gazprom shares were abolished. It should be noted that the only sanction foreseen in the 1997 decree for a breach of the prohibition on foreign ownership of Gazprom shares was the obligation to sell such shares within 3 months (when the Russian ownership of the company holding the shares fell below 50%, for example due to restructuring) or that the acquisition of shares was “null and void in the territory of the Russian Federation” (for example, when the company acquiring the shares did not meet the Russian ownership requirement in the first place). The decree foresees no other sanctions, let alone penal ones.

45. Consequently, the retrospective prosecution of the Hermitage executives for any violation of this decree would appear to violate the principle of “*nullum crimen, nulla poena sine legem*” enshrined in Article 7 ECHR, even if the holding structure used by Hermitage (and many other market intermediaries) violated the decree. Whilst these “grey market” structures were clearly designed to help foreign investors circumvent the

<sup>16</sup> Presidential Decree No. 529 dated 28 May 1997.

temporary "ring-fence" built around Gazprom by the 1993 and 1997 decrees (and abolished by the 2005 decree), they were obviously tolerated by the authorities, whatever their reasons might have been. In my view, the authorities cannot now change their minds retroactively, in addition solely to the detriment of one of the "grey market" participants and not the others: this would be a case of selective justice, which in the practice of the Assembly is often seen as an indication for the "political" motivation of criminal prosecutions<sup>17</sup>.

*2.2.2.5. Hermitage "seed money" allegedly stolen by Mr Browder from an IMF disbursement to Russia in 1998?*

46. Another allegation made against Hermitage Capital more recently is that much of the "seed money" used to jump-start their business in Russia was derived from an alleged large-scale theft of IMF funds disbursed to Russia under the SDR 3.6 billion (equivalent to USD 4.8 billion) loan disbursed in 1998. According to the recent Russian allegations<sup>18</sup>, the equivalent of USD 3.6 billion "disappeared" in a scheme in which a mysterious billionaire banker, Edmond Safra and his "Republic National Bank of New York," was allegedly involved alongside Bill Browder. My interlocutors even drew a link between Mr Browder and Mr Safra's death in a fire of his penthouse apartment in Monaco. Mr Safra died shortly after the sale of his bank to HSBC, which had reportedly been prompted by losses the "Republic National Bank" suffered in Russia.

47. After I was confronted with these allegations, I promptly contacted the IMF in order to obtain up-to date information. The answer I received in early June 2013 was that the IMF's legal services found no indication that Russian authorities have contacted the IMF in regard to the matter you described and no indication that the IMF has any information about the recent allegations against Browder and Hermitage. An IMF publication dated 13 September 1999 under the title of "Facts about IMF Lending to Russia"<sup>19</sup> commented on allegations in the press that IMF funds advanced to Russia "may have been diverted from their intended purpose and included in the flows of capital that left the country illegally". The then Managing Director of the IMF, Michel Camdessus, was cited as follows: "That there has been capital flight on this scale (from Russia) does not surprise us, but there is no proven link between this money and the loans released by the IMF". The statement stressed that neither the IMF nor the U.S. authorities had any evidence that IMF funds were misappropriated, and pointed out that under the \$ 4.5 billion programme approved in July 1999, all IMF money disbursed to Russia would be held in an account at the IMF and would be used only for Russia's debt service to the Fund. Regarding allegations of mishandling of the July 1998 disbursement, the IMF had insisted on the preparation and publication of investigations by the accounting firm PricewaterhouseCoopers (PwC), which also covered relations between the Central Bank of Russia (CBR) and one of its offshore subsidiaries (FIMACO) and the statistical reporting to the IMF by the CBR. According to the statement, "[t]he investigations found no evidence to support the allegations concerning misappropriation of funds."

48. There were indeed serious allegations raised at the time in the United States<sup>20</sup> and also in Russia<sup>21</sup> that IMF funds may have been misappropriated for the benefit of President Yeltsin's family and its trustees, powerful Russian oligarchs, including Roman Abramovich and Boris Berezovsky, and others in positions of influence in Russia. There were also allegations of the widespread use of, by the Russian Central Bank of FIMACO, a secret Jersey offshore company with a \$1,000 charter capital, to conceal Russian government assets and debts from the IMF and other foreign creditors.<sup>22</sup> After a period of investigating these allegations more or less robustly during 1999-2002, the Russian Prosecutor General's Office and the Russian Audit Chamber strongly denied, in 2004, that any misappropriation of IMF funds had occurred.

<sup>17</sup> see the statement of then Chairman of Gazprom and First Deputy Prime Minister Dmitry Medvedev: "The government would not be punishing such schemes, as they became possible due to the loopholes in the Russian legislation, and it was the government's direct fault." (New York Times, 2002) See also the quote of a source in the law enforcement bodies cited by Vedomosti on in March 2013: "There are no other criminal cases concerning trading Gazprom shares using grey schemes." (available at:

[http://www.vedomosti.ru/politics/news/9795161/brauderu\\_pripomnili\\_skupku\\_gazproma#ixzz20la11aqQ](http://www.vedomosti.ru/politics/news/9795161/brauderu_pripomnili_skupku_gazproma#ixzz20la11aqQ)).

<sup>18</sup> See eg, Russian state news agency Itar-Tass on 7 March 2013 (<http://www.itar-tass.com/c11/669480.html>); also referred to in the NTV program "Browder List" aired on 6 March 2013, generally presenting Mr Browder in a very unfavourable light.

<sup>19</sup> <http://www.imf.org/external/np/vc/1999/091399.HTM>.

<sup>20</sup> See [http://commdocs.house.gov/committees/bank/hba51201.000/hba51201\\_0f.htm](http://commdocs.house.gov/committees/bank/hba51201.000/hba51201_0f.htm);

[http://commdocs.house.gov/committees/bank/hba59889.000/hba59889\\_0f.htm](http://commdocs.house.gov/committees/bank/hba59889.000/hba59889_0f.htm).

<sup>21</sup> See <http://www.fas.org/news/russia/2000/russia/part08.htm>.

<sup>22</sup> See <http://online.wsj.com/article/SB935362161238969094.html>;

<http://www.nytimes.com/1999/09/02/world/us-seeks-details-on-russia-s-use-of-aid.html>;

<http://www.heritage.org/research/reports/1998/10/russias-meltdownnbsp-anatomy>;

<http://www.law.harvard.edu/programs/about/pifs/ilm/sp26.pdf>; <http://www.accessnorthga.com/detail.php?n=195710>;

[http://www.hm-treasury.gov.uk/foi\\_imfrussia\\_200.htm](http://www.hm-treasury.gov.uk/foi_imfrussia_200.htm).

49. The fact remains that the loan was transferred from the IMF directly to the Russian Central Bank's foreign account, not to private parties, and could not have been taken out of the Russian Central Bank's account without its instruction. Further, throughout the entire time, the Russian Central Bank had acted as the holder of the IMF funds. During 1999 - 2002, the Russian Central Bank had fully covered all its obligations to the IMF regarding the loan repayment.

50. In addition, I should like to point out that Mr Browder's business activities did not actually start at the time of the alleged theft of "seed money" in 1998, but much earlier, in 1996, and that according to Hermitage there were no new inflows in the two years following the July 1998 IMF loan and the August 1998 default. Given also that these allegations are made only now, 15 years after the alleged facts, I do not find them convincing.

#### *2.2.2.6. A word on the use of "off-shore" holding companies*

51. Having examined the materials provided by Hermitage, which include tables and drawings of holding structures and ownership schemes such as the one discussed above for the adaptation to the temporary "ring-fence" around Gazprom (point 2.2.2.4.), I could not help noting with some discomfort that off-shore tax havens such as Cyprus, the British Virgin Islands and Channel Islands, and the US State of Delaware were also used extensively by Hermitage. As a good Social Democrat, I asked the Hermitage people some hard questions about this practice. Is this not just a way of "cheating" high-tax countries out of their much-needed revenue? The answers received made me reconsider: Hermitage, whose business it was to invest other people's money, has indeed used off-shore tax havens (this is an "industry standard", a practice followed by most if not all investment companies). The reason is the need to minimize administrative red-tape, by letting the profits accrue in companies registered in countries with very low or even zero tax rates. These (untaxed or little taxed) profits are then paid out to investors in the form of redemption proceeds, which they have a legal duty to declare as income in their own countries. The alternative – the investment company itself paying high taxes and then helping investors obtain the refund or deduction of the taxes paid by the investment company from the person income tax they owe in their own country – would be much more complicated and not lead to a substantially different result, from the point of view of the investors' (high-tax) countries of residence.

52. Hermitage had over 6000 investors from more than 30 countries. Most of these have double taxation agreements among themselves and with Russia or the United Kingdom, but there are big substantive and procedural differences between them. Administering the correct application of these rules to each investor for the purpose of paying out redemption proceeds and avoiding double-taxation would be prohibitively burdensome.

53. In my view, the real problem with the use of off-shore tax havens by international investment companies lies in the fact that some of them tend to "aid and abet" tax evasion committed by dishonest investors by failing to fulfill their legal duty to declare income received from such holding companies in tax havens in their own countries. By refusing to cooperate with foreign tax authorities and communicating the income collected by the investors, hiding behind strict "banking secrecy" rules, they effectively make it quite easy for dishonest investors to evade taxation. Hermitage, competing with other investment companies, was in no position to deviate from the generally accepted "industry standard" to the detriment of its investors. It is up to us politicians in the "high-tax" countries to put enough pressure on all off-shore tax havens to cooperate with our fiscal authorities.

#### *2.2.3. Two criminal cases against Sergei Magnitsky: the grounds for his arrest and detention*

##### *2.2.3.1. Aiding and abetting tax fraud by Hermitage (the "Kalmyk case")*

54. On 28 November 2012, Sergei Magnitsky (posthumously) and Bill Browder (in absentia) were indicted for two separate counts of tax evasion concerning alleged underpayment of taxes due for 2001 by two investment companies belonging to the Hermitage Fund and registered in the Kalmyk Republic of the Russian Federation - Saturn Investments and Dalnaya Step. A criminal case against Mr Browder in this respect had first been opened in October 2004 and closed for "lack of any crime" on 5 May 2005. It was reopened against Mr Browder on 27 February 2008 and Mr Magnitsky was added as a co-defendant on 25 November 2008. The total alleged underpayments amount to the equivalent of about USD 17 million, of which USD 14 million concerned wrongful exemptions from Kalmyk local and regional taxes and USD 3 million fraudulently obtained tax benefits for the employment of disabled persons.

*i) Unlawfully obtained Kalmyk local and regional tax exemptions?*

55. The disputed Kalmyk local and regional tax exemptions were based on Federal Law No. 2118-1 on the "Basis of the Tax System of Russia", which allowed Russian regions to set their own tax rates in order to attract companies for registration, for the purpose of promoting regional economic development, and on two Kalmyk tax laws of 1995 and 1999<sup>23</sup>. In essence, the total tax burden of 35% was effectively reduced to 11% (the Federal tax) plus a negotiated "fee" or "contribution", which replaced the usual Municipal and Regional taxes set at 5% and 19% respectively. In response to these incentives, many important Russian companies registered their business in Kalmykia or other low-tax regions.<sup>24</sup>

56. The conditions set by law to qualify for the regional tax reduction are fourfold: (1) to obtain a "Tax benefit certificate" by the competent Kalmyk authorities; (2) to enter into a contract with the Government of Kalmykia on a contribution to an investment project listed in a "public offer" issued by the Ministry of Investment Policy; (3) registering with the Ministry of Investment Policy; and (4) making the agreed payments to keep the tax benefit current.

57. I have seen the documents establishing that in the case of Saturn Investments and Dalnaya Step, all four conditions were fulfilled. This does not appear to be disputed by the Russian authorities, which now claim instead that the Hermitage subsidiaries did not qualify for the Kalmyk regional tax advantages because they did not sign "additional investment agreements" in 2001. But the Kalmyk law requiring an additional agreement<sup>25</sup> came into force only in July 2002 and did not apply to the year 2001, during which the underpayment in question is alleged to have occurred. It would therefore appear that the accusation in question is legally unfounded.

*ii) Unlawfully obtained Federal tax reduction for employment of handicapped persons?*

58. The second tax fraud accusation concerns an alleged underpayment by Hermitage's two Kalmyk subsidiaries of the equivalent of USD 3 million corresponding to a reduction of the 11% Federal tax rate to 5.5% foreseen by law as an incentive for the employment of handicapped persons. The Russian authorities maintain that the employment of handicapped persons was fake, i.e. that they were not actually employed by the Hermitage subsidiaries. Video footage of testimony of several apparently mentally handicapped persons was shown on Russian television in March 2013, which as we were told in Moscow would also be used as evidence in the posthumous/in absentia trial against Sergei Magnitsky and Bill Browder. These persons state that they were never actually paid by Hermitage. The commentary called on viewers to judge themselves whether these persons could possibly have worked as "financial analysts" – the job title conferred upon them by Hermitage.

59. The representatives of Hermitage whom I met in London explained to me that their adviser Firestone Duncan cooperated with the Kalmyk Government's Foundation for Support of Small Businesses and the local Afghan War Veterans Association to identify suitable handicapped persons<sup>26</sup> for employment in Hermitage's Kalmyk subsidiaries and managing their employment. As their subsidiaries were investment companies with a very small staff it was not difficult to reach the 50% threshold of handicapped employees required to qualify for the tax break. The five persons were given a job title in line with the activities of the companies in question. One of the handicapped persons they hired on the advice of the War Veterans Association even had a relevant qualification, as a bookkeeper. All five were assigned fairly simple tasks, commensurate with their severe handicaps, which included following the regional print media and reporting on relevant developments to Hermitage in Moscow. Mr Browder stressed that the law did not specify any job specifications to be fulfilled by the handicapped employees. His subsidiaries might as well have recruited them as doormen, cleaners or any other job. Mr Browder had also viewed the video footage referred to above and was outraged by the public humiliation inflicted on these persons. He pointed out that they had

<sup>23</sup> Republic of Kalmykia Law No. 7-1-3 on "Tax benefits to a certain category of taxpayers" dated 28 January 1995 and Law No. 12-II-3 on "Tax benefits to enterprises investing in the economy of the Kalmyk Republic" dated 12 March 1999.

<sup>24</sup> Hermitage provided me with a list of such companies including Sibneft and TNK (oil) having registered companies in Kalmykia and Chukotka, Alfa Bank (finance) in Altai/Buryatiya, Rusal (metal) in Kalmykia. According to Mr Browder, no other business executive has to date been criminally prosecuted for using the regional tax reduction scheme – with one notable exception, namely that of Yukos oil, whose founder and CEO Mikhail Khodorkovsky had also fallen out of favour.

<sup>25</sup> Republic of Kalmykia Law No. 197-11-3 dated 10 June 2002 on "Tax benefits for the companies investing in the Republic of Kalmykia".

<sup>26</sup> i.e. persons having a "type three invalidity", which is "granted to people who are unable to carry out job-related duties due to medical conditions and need to be transferred to a job with a lower qualification. Among the recognised defects might be anatomical defects like stump limbs, significant limitation of joint movement, and paralysis of extremities, including those received during military service." (cited from a translation of the "Instruction on Specifying Invalidity Groups" dated 1 August 1956 made available by Hermitage).

obviously been pressured to testify that their salary had not been paid and showed us records that they were questioned at the regional headquarters of the FSB. The salaries of the five handicapped employees – set at five times the legal minimum wage – had been paid out in full, and they were kept on the payroll well beyond the abolition of the tax break in question. I was shown the wire transfers documenting the payments.

60. The accusation against Sergei Magnitsky and Bill Browder of having fraudulently obtained this tax reduction "at the expense of handicapped persons" is a very serious one and could undermine the general credibility and moral standing of both accused persons. We therefore asked Mr Browder many tough questions. The detailed and well-documented replies received have gone a long way to convince us that Hermitage did not violate the law. This was also confirmed by an audit carried out by the competent tax authorities in 2003 and by the closure in 2005 of an earlier criminal case opened in 2004 by the Kalmykian authorities for "lack of any crime".<sup>27</sup>

61. During my second visit to Moscow in May 2013, the representatives of the Prosecutor General's office handed me a large volume of documents purportedly showing that in another tax audit performed in 2004 the authorities had come to the conclusion that Hermitage's Kalmykian subsidiaries had after all underpaid their taxes and that in subsequent court cases, in which Sergei Magnitsky had appeared on behalf of Hermitage's subsidiaries, their appeals against the result of the new tax audit were rejected by the Kalmykian arbitrage courts. But these documents do not change my legal assessment of this case. The "repeat audit" of 31 December 2004 was taken into account and referred to in the 2005 decision to close the criminal case for "lack of any crime". Furthermore, according to the representatives of Hermitage Capital, with whom we discussed these documents upon our return from Moscow, Hermitage had not been informed of the purported new "repeat" tax audit at the time, whilst the law requires that the directors of the audited firms must be informed of the audit conclusions. Subsequently, the Russian Constitutional Court ruled that such "repeat audits" are unconstitutional as they were repeatedly used to harass and "destabilize" taxpayers.<sup>28</sup> According to Hermitage, the "repeat audit" (contrary to the full tax audit of Dalnaya Step concluded nine months earlier, in March 2004) even lists the wrong persons as directors. This raises their suspicion that these documents were not produced at the time indicated in their dates.<sup>29</sup>

62. The assessment of the use of this legal tax incentive from an ethical or moral standpoint depends to a large extent on the weight one is prepared to attach to the economic context and the social and political choices made at the time, by the Russian Government. The 1991 Law on "Corporate Tax of Enterprises"<sup>30</sup>, which foresaw a reduction of the tax rate from 11% to 5.5% on condition that at least 50% of the company's employees were disabled, was passed in traumatic circumstances. The State was practically bankrupt and was unable for some time to pay the salaries of teachers and policemen, let alone pensions and social welfare payments for handicapped persons, even war veterans. The legislator, instead of funding such vital expenses by general tax revenue, whose collection became increasingly difficult because of the general economic and financial crisis in Russia at this time<sup>31</sup>, apparently tried to "privatise" assistance to handicapped persons by promising tax advantages to companies paying them living wages. We do not think that this was a very good idea, in terms of costs and benefits: in the case of Hermitage's Kalmyk subsidiaries, for example, it cost the State USD 3 million in tax reductions to obtain the payment of wages to five handicapped persons and one non-handicapped "manager" for one year. Not surprisingly, therefore, the law was subsequently changed (as of 1 January 2002) once the State was again able to pay out salaries, pensions and welfare entitlements. But the tax incentive in question was still in legal force in 2001, and the management and advisers of Hermitage Capital<sup>32</sup> saw no reason to deprive their shareholders and investors of its benefit. With the benefit of hindsight, this does not look very elegant, but to the credit of Hermitage it

<sup>27</sup> I have received copies and translations of the relevant official documents and correspondence from Hermitage.

<sup>28</sup> See judgment of 17 March 2009, available at <http://www.legis.ru/misc/doc/6036/> (in Russian).

<sup>29</sup> During my second visit to Moscow, I also received documents from the prosecutor's office concerning bankruptcy proceedings in Kalmykia against Dalnaya Step, one of Hermitage's Kalmykian subsidiaries. These documents also appear to be irrelevant for the criminal case against Mr Magnitsky. In short, Hermitage had decided to move their Kalmykian subsidiaries back to Moscow after the abolition of the favorable regional tax regime. The Kalmykian authorities administratively resisted the change of registration, and a closure would have been even more cumbersome. Hermitage therefore sold the company's assets and transferred the empty shell to a local service provider for liquidation in due course. The service provider may well have abused the company for fraudulent activities, of which Hermitage had only been informed years later, precisely at the time when they started being "framed" by the authorities, as they see it.

<sup>30</sup> Federal Law No. 2116-I dated 27 December 1991.

<sup>31</sup> The price of oil, an important source of revenue for Russia at all times, was at a record low, at less than a tenth of recent levels.

<sup>32</sup> including Arthur Anderson and Firestone Duncan.

should be stressed that they kept the handicapped persons on the payroll for a considerable time even after the tax break was abolished<sup>33</sup>.

*iii) Unusual circumstances of the (re-) opening of this criminal case*

63. The tax evasion accusations are suspect also in light of the peculiar circumstances of the (re-) opening of the criminal case, which had been opened in 2004 on the basis of an FSB report and closed for "lack of any crime" on 5 May 2005<sup>34</sup>. Mr Browder showed me copies of internal flight records, which establish that on 26 February 2008, Ministry of Interior investigator Karpov and two subordinates of Lieutenant-Colonel Kuznetsov as well as an FSB official travelled to Kalmykia, just three weeks after one of the complaints made by Hermitage about the theft of their Russian investment companies, naming Mr Karpov and Mr Kuznetsov as suspects, led to the opening of a criminal case on 5 February 2008. One of the Russian lawyers working for Hermitage subsequently obtained confirmation from the Kalmyk official who had been in charge of the 2004/2005 criminal case that the officials who had flown in from Moscow had instructed him to re-open the case despite there not being any new evidence, on account of the "deterioration of relations between the Russian Federation and the United Kingdom". The flight records show that Mr Karpov and his colleagues returned to Moscow as soon as the case was re-opened.

*iv) Statute of limitations*

64. Legal pursuits for any tax underpayments concerning 2001 would also appear to be time-barred: the limitation period of three years for purposes of correcting the amount of taxes due ended at the end of 2004, and the 10-year statute of limitation for criminal prosecutions at the end of 2011. Consequently, the formal indictments dated 22 March 2013 and the posthumous trial against Sergei Magnitsky and the trial in absentia against Bill Browder appear to violate Russian law.

*v) Continuation of the prosecution of Sergei Magnitsky post mortem*

65. The case against Sergei Magnitsky is being pursued after his death, even at the trial stage. According to Russian law, which was explained to us in some detail in Moscow by the former Vice-President of the Constitutional Court of the Russian Federation, Ms Tamara Morshchakova, posthumous trials are only allowed at the request of the suspect's family, for purposes of rehabilitation. As Ms Morshchakova said, "if posthumous prosecutions were allowed, responsibility for a lot of crimes would just be assigned to dead people". Both Sergei M.'s widow and his mother have vigorously protested against the posthumous prosecution and trial, publicly<sup>35</sup> and in their meetings with us, because they do not believe that there is any chance of justice being done - especially as long as the same investigators, who had Sergei M. arrested and are in their view responsible for his death in detention, remain in charge: "they have a vested interest that Sergei is found guilty in order to escape responsibility for their own crimes", said his widow.

66. During my second visit to Moscow, I received copies of the court decisions refusing Ms Magnitskaya's appeal against the decision of the Prosecutor General's office to reopen the case against Mr Magnitsky. These decisions by the Ostankinsky District Court in Moscow and the Moscow City Court seem to violate Russian law as explained by the former Vice-President of the Russian Federal Constitutional Court.

*vi) Conflict of interest issues*

67. Regarding the conflict of interest issue alluded to by Sergei Magnitsky's widow with respect to the persons put in charge of the pursuit of the trial *post mortem*, we were told by the representatives of the Interior Ministry and of the Investigative Committee during our first visit in Moscow in February 2013 that Mr Kuznetsov and Mr Karpov did not have a conflict of interest because they had been involved in the original investigation concerning Mr Magnitsky only at the early stages of the procedure and because the accusations Mr Magnitsky made against them were "not serious". On the occasion of the same visit to Moscow, we asked Ms Morshchakova and Ms Natalya Polyakova, the Chair of the Russian Presidential Human Rights Council's Committee of Independent Experts, which had provided an expert analysis of the

<sup>33</sup> I was given a list of the names of the five handicapped persons and the non-handicapped manager from the Afghanistan War Veterans Association hired to coordinate their work, including the start and end dates of their employment showing that they were on the payroll for 2-4.5 years, well beyond the time during which the tax break was claimed, i.e. only for the year 2001.

<sup>34</sup> I was given copies of the order dated 4 October 2004 by Lt. - Col. D.D. Nushkinov to open criminal case no. 401052, which refers to a report from a "senior operative" of the FSB and of the order by the same senior investigator of 5 May 2005 to close the case "for lack of a crime".

<sup>35</sup> See below paragraphs 153-155.



case of Sergei Magnitsky for the Human Rights Council, for their opinion. Both stressed that Russian law, in line with ECHR standards, requires that criminal investigators must be taken off a case when they find themselves in a conflict of interest situation. The contrary position taken by the authorities was clearly against the law. Investigators Kuznetsov and Karpov had previously been denounced by Sergei Magnitsky in the criminal complaints by Hermitage, which he had prepared, of being personally involved in the very crime they were put in charge of investigating and which they now try to blame on Mr Magnitsky and his clients. They were presently accused of being responsible for the death of Mr Magnitsky in pre-trial detention and could not possibly be seen to be unbiased and neutral investigators in the same case.

68. I agree with Ms Morshchakova and Ms Polyakova. In particular, it cannot be said in earnest that the accusations against the investigators in the complaint were "not serious" – the 245-page complaint addressed simultaneously to the Russian Prosecutor General, the Head of the Investigative Committee and the Head of the Interior Ministry's Internal Security Department on 3 December 2007 presented ample detail and supporting documentation, which should have at least sounded the alarm bells. A criminal case was indeed opened in response to these complaints, on 5 February 2008. This is precisely where the conflict of interest began: the investigators accused of complicity in the complaint were put in charge of the investigation, and placed their accuser, Sergei Magnitsky, in pre-trial detention.

69. Mr Magnitsky's own statements in the months and weeks preceding his death in detention on 19 November 2009 complete the picture: on 11 September 2009, he accused the investigators of "organised physical and psychological pressure"<sup>36</sup>; on 14 October 2009, he pointed out their "vested interest in stopping my activity related to assistance to my client in the investigation of these crimes ... which became the reason for my persecution"<sup>37</sup>; on 11 November, he wrote: "I intend to bring to justice those who are responsible for it [the falsification of case materials]"<sup>38</sup>, and finally on 12 November, he wrote "Investigator Silchenko does not want to investigate those behind the [US\$ 230 million] theft, but wishes for me to stay behind bars and other lawyers outside the country."<sup>39</sup> One week later, Sergei Magnitsky died behind bars.

70. Were these not "serious" accusations, which put into doubt the objectivity of the investigators in question? The competent Russian authorities do not seem to think so.

71. In November 2012, the lawyer for Natalia Magnitskaya filed another conflict of interest complaint with the Russian Prosecutor General and the Russian State Investigative Committee pointing out the threat to victims and witnesses arising from the decision of the Investigative Committee to grant unlimited access to files of the ongoing investigation into Mr Magnitsky's death to the same Interior Ministry officials, who stand accused of having been involved themselves in the crimes investigated by the Investigative Committee.

#### *2.2.3.2. Did Sergei Magnitsky aid and abet the fraudulent reimbursement of USD 230 million in taxes paid by Hermitage?*

72. The second main accusation against Sergei Magnitsky, as well as Bill Browder, is that they were themselves the "criminal masterminds" behind the US\$ 230 million tax reimbursement fraud, which they had denounced in a detailed complaints addressed to the highest Russian law enforcement authorities.

73. When I met with the representatives of the authorities in Moscow in February 2013, I was informed that there were two main elements of proof against Mr Magnitsky and Mr Browder: (1) a handwritten "scheme" drawn up by Mr Magnitsky showing the complex "structure" of the criminal conspiracy and designating himself as its organiser, which was seized during a search of Mr Magnitsky's private apartment, and (2) the testimony of Mr Victor Markelov, who had been convicted on 28 April 2009 for having carried out the USD 230 million tax reimbursement fraud and sentenced to 5 years imprisonment, and who had accused Mr Magnitsky of having organised this crime. They dismissed the allegation that the persons accused by Hermitage of having fraudulently re-registered the three "stolen" Hermitage investment companies (Rilend, Parfenion and Makhaon) must have had the original company seals in their possession (which had indeed been seized by the accused Interior Ministry investigators during their search of the offices of Hermitage Capital and their lawyers, Firestone Duncan<sup>40</sup>): duplicates of the seals could have easily been reproduced, and would not have been distinguishable from the ones used in the re-registration of the companies.

<sup>36</sup> Translation of a complaint by Mr Magnitsky addressed to Prosecutor General Chaika, filed by his lawyers.

<sup>37</sup> Translation of a handwritten complaint by Sergei Magnitsky dated 14 October 2009.

<sup>38</sup> Translation of a handwritten complaint by Sergei Magnitsky dated 11 November 2009, copy filed with the court by Mr Magnitsky's lawyers on 13 November 2009.

<sup>39</sup> Translation of a handwritten complaint by Sergei Magnitsky dated 12 November 2009.

<sup>40</sup> See paras. 28 above.

74. During my second visit to Moscow, I was also given copies of judgments allegedly showing that the arbitration courts had recognized that Hermitage's companies had in fact not been "stolen" from them, but sold by Hermitage themselves to the company ("Pluton") owned by Mr Markelov, who was already convicted for the involvement in the USD 230 million tax reimbursement fraud.

75. The Representatives of Hermitage in London provided me with information, supported by documents, for the purpose of establishing that the true criminals were the "Klyuev group", which included the Ministry of Interior Investigators Lt. Col. Artem Kuznetsov and Major Pavel Karpov.

76. They admitted freely that Hermitage had reserve copies of the company seals seized during the raid in June 2007 – otherwise they could not have continued their compulsory tax and other statutory filings with the authorities. They insisted that this was standard practice<sup>41</sup>. But they stressed that in order to effect any change in the ownership of a company, and even a change of address, not only the company seals were needed, but also the originals (not photocopies, even certified ones) of the founding documents of the company (the company charter, the certificate of registration with the state company registry and the certificate of registration with the tax authorities). These originals, concerning Hermitage's Russian investment companies Rilend, Parfenion and Makhaon, had been seized by the Interior Ministry investigators named in Hermitage's criminal complaints and were in their custody at the time when they must have been used for the fraudulent re-registration of the companies in the name of their new "owner" and new "directors" (all with previous criminal records) to new tax offices (which would then approve requests for tax refunds totaling USD 230 million submitted by the new "directors" in one day).

77. Regarding the handwritten "schemes", there could be no doubt that Mr Magnitsky drew up some graphical visualisation of the fraudulent scheme that they had asked him to investigate. Whilst they had never seen a copy of this document, it did not appear plausible that Mr Magnitsky would have accused himself of being a participant in the scheme he had denounced.<sup>42</sup>

78. Regarding the arbitration judgments in question, they showed to the contrary that the theft had been recognised as such by the only Russian court which had dealt with the substance of the issue, namely the first instance arbitration court. The second and third instance failed to address the substantive issue because of a procedural trick used by the "company thieves".<sup>43</sup>

79. The testimony I heard in London of two Russian lawyers, Edward Khareitdinov and Vladimir Pastukhov, who have worked on this file, together with some additional factual elements concerning the actors of the tax reimbursement fraud and their "modus operandi" pointed out by the representatives of Hermitage, tend to underpin this version of the facts.

#### *i) The story of Edward Khareitdinov*

80. Edward Khareitdinov<sup>44</sup> was hired as an independent lawyer by Hermitage after the search-and-seizure at their offices in June 2007 in order to defend Mr Cherkasov against the accusations linked to the "Kameya" case (see above point 2.2.1. - this case had provided the justification for the previously-mentioned search-and-seizure raids). We had separate, lengthy meetings with him in London in February 2013. Here is his account of the events that ended up disrupting the comfortable life of a "society lawyer" he had enjoyed before<sup>45</sup>:

"I soon realized that the "Kameya" allegations were groundless. Repeated requests for clarification I had made with investigator Karpov and his colleagues had remained unanswered, properly, for about six months. I had become the main "channel of communication" between Hermitage and the authorities, and worked in close cooperation with Sergei Magnitsky, of Firestone Duncan, whose

<sup>41</sup> This was confirmed by a senior executive of the Novaya Gazeta newspaper in Moscow.

<sup>42</sup> I asked the Russian authorities for a copy of this document, and for any evidence they may have that the scheme was actually drawn up before the crime was committed. I have not received such documents.

<sup>43</sup> In brief, "Pluton" had re-sold the three Hermitage companies to another company, "Boily Systems", registered in the British Virgin Islands. After Hermitage obtained an injunction against "Boily" in the BVI courts, the proceedings before the Moscow arbitration court were successful until "Pluton" (which should normally not have been recognised as having legal standing to do so after selling the companies to "Boily") appealed the arbitration court judgment. The appeal was successful on the basis of the argument that since the (suspicious) liquidation of "Pluton" and subsequently, of the three Hermitage companies, the lawsuit had become "without object" –ignoring the fact that "Boily", the defendant in the original case, still existed.

<sup>44</sup> A former criminal investigator (1984 and 1987) and Moscow judge (1987 and 1992), member of the Moscow Bar since 1993.

<sup>45</sup> Based on our summary of the meeting, approved by Mr. Khareitdinov.

professionalism I held in great esteem. In October 2007, Hermitage received a "mysterious" telephone call from a bailiff in St. Petersburg, who asked about one of Hermitage's companies. The company had never been to court in St. Petersburg before. This call had prompted Sergei to immediately check Firestone Duncan's mailboxes, where he found correspondence addressed to the Hermitage companies, including claims for damages against them.

I received power of attorney from the true (HSBC) directors of Hermitage's three Russian companies<sup>46</sup> and took the overnight train to St. Petersburg on 18 October 2007. When I came to the Arbitrage Court and inspected the relevant files, I was shocked that the court had decided everything on the basis of simple photocopies. The claims had been filed by a Mr Strazhev, whose passport details (presented to the St. Petersburg court) were invalid, as I was able to confirm immediately with the immigration service. I also saw in court records powers of attorney issued by unknown persons authorizing unknown lawyers to defend Hermitage companies in court against multi-million dollar claims. However, instead of defending the companies the lawyers had accepted all claims against the companies they purported to defend, without any objection. Given the large amounts of the claims and the fictitious and/or unknown identities of involved persons, it all indicated a large-scale fraud. Sergei made a request to the Russian Companies House (companies registry) and discovered that changes had recently been made in the Registry, and new individuals were entered as companies' owners and directors. Sergei explained to me that such substantial changes to the Registry could not have been effected without the original certificates that had been seized by the Interior Ministry in the 4 June 2007 raids. We also noted that while changes naming new directors were made in the Registry in September 2007, these "new directors" issued powers of attorney authorising lawyers to appear in the St. Petersburg court even before that, already in August 2007. At this point I understood that the judges, the advocates appearing for both sides in this lawsuit, and investigators Karpov and Kuznetsov were involved in a crime against my client.

At a meeting with investigator Karpov on 29 November 2007, concerning the "Kameya" case, I asked Mr Karpov whether he knew that in the St. Petersburg arbitration court, copies of documents were used that he had in his custody, since the "Kameya" search and seizure raids at the Firestone Duncan and Hermitage offices. Mr Karpov immediately became white and told me it was Kuznetsov's initiative. He didn't say so verbally, but opened his laptop and typed several sentences to the following effect: "it is not my case, Kuznetsov is demanding that a number of other people are added from Firestone Duncan and Hermitage".

A few days after this conversation, we had prepared a criminal complaint of some 250 pages including appendices dated 3 December 2007 addressed to the Prosecutor General, Mr Chaika, the Head of the Investigative Committee, Mr Bastrykin, and one dated 6 December 2007 to the Head of the Department of Investigation of the Ministry of the Interior, Mr Draguntsov.<sup>47</sup> The reply from Mr Draguntsov's office, of two short paragraphs, was that the investigation of the alleged impropriety of Interior Ministry officers was not their remit. The Prosecutor General's office merely forwarded the complaint to the Moscow branch, who in turn forwarded it to the Interior Ministry. Mr Bastrykin's office, where I had also filed a complaint against the St. Petersburg judges involved in the fraudulent case, forwarded this complaint to its St. Petersburg branch, which refused to open a case, but kindly informed me that they had also refused to open a case for libel against me.<sup>48</sup> Two of the six complaints were sent for investigation to Mr Karpov, who had been named as a suspect. Mr Karpov then summoned me, an attorney who had filed on behalf of his client an application seeking to investigate Mr Karpov, for questioning as a witness - a gross violation of Russian law, but my complaint in relation thereto was rejected. A case on the companies' theft was only opened on 5 February 2008, sixty days after the complaint, instead of a standard three and maximum of ten days as required by law. Complaints on behalf of hermitage were filed three weeks before the USD 230 million budget theft occurred, on 26 December 2007. The delay gave the criminals ample time to launder the money - as we now know, the last transfer out from Mr Klyuev's Universal Savings Bank, which had received the fraudulent tax reimbursements, was made on 4 February 2008, a day before a case in response to Hermitage's complaint was finally opened.

This was followed by an elaborate plot to undermine Hermitage and the lawyers working for them. On 27 February 2008, the 'Kalmykia case' [see point 2.2.3.1. above] was opened, and on 4 May 2008, the

<sup>46</sup> He showed me the bilingual (Russian/English) affidavits signed by Paul Wrench and his colleagues affirming that they were the directors of the companies concerned (Rilend, Parfenion and Makhaon) and gave power of attorney to Mr. Khareitdinov.

<sup>47</sup> He showed me various receipts establishing that these complaints were deposited by him personally.

<sup>48</sup> Mr. Khareitdinov showed me the letters mentioned and their translations into English.

Interior Ministry sought to initiate a case against me and fellow lawyer Vladimir Pastukhov for allegedly acting with a false power of attorney – on the initiative of Mr Drozanov, a subordinate of Mr Kuznetsov. Mr Kuznetsov approved this "crime report" suggesting that we did not have genuine powers of attorney when making filings with courts and government bodies seeking to defend our client against the fraud in complaints naming him and Mr Karpov for abetting the fraud against our client. This was five months after I had filed the first complaints on behalf of Hermitage naming Mr Kuznetsov as a suspect in the fraudulent activity and seeking his investigation. I am now wanted for having acted on behalf of the companies' true owners and fighting against false liabilities used in a fraud against the State budget! Under this proceeding, Kuznetsov and other officers who persecuted me for my professional activity and my association with the "wrong" client, claimed that only the fraudulent directors – Mr Markelov, Mr Kurochkin and Mr Khlebnikov – had the right to issue me with "lawful" powers of attorney to fight the fraud against themselves. Despite the absurdity of this proposition, the criminal case against me remains open.

By mid-summer 2008, we had understood that the scheme was all about stealing the taxes Hermitage had paid the previous year. It was actually Sergei Magnitsky who first figured out that the sum of the damages judgments against the three Hermitage companies in the different courts (the equivalent of about USD 1 billion) roughly added up to the total of the companies' 2006 profits, and we therefore came to realize that the "empty" companies stolen from Hermitage had been used to steal the taxes paid by them previously.

This was explained in much detail in a new set of criminal complaints dated 23 July 2008 filed on 25 July 2008 with the heads of all relevant law enforcement bodies as well as the Audit Chamber, the Tax Ministry and the Central Bank. We received no reply for six weeks, except from the Audit Chamber, which informed us that they were not competent for dealing with the complaint about the USD 230 million theft from the Russian budget.

Strangely, on 20 August 2008, in my absence, and in breach of the legal rules protecting lawyers and granting them special status, Ministry of Interior officials searched my office and immediately seized a DHL package, which had just been delivered, the purported sender being the London office of Hermitage. My secretary said that she had put the package on my desk unopened. Mr Cherkasov (a Hermitage executive) told me that it was most unusual that such a package was sent to me, as Hermitage's London office would have sent any documents concerning their Russian companies to Mr Magnitsky at Firestone Duncan. The two men who sent the package were captured by CCTV at the DHL depot in London, carrying Russian-print plastic bags. The London police, at Hermitage's request, had established that they were not employees of Hermitage<sup>49</sup>. I was not informed of the content of the package. But soon thereafter, I read in the newspaper that in a police search of Edward Khareitdinov's law office, compromising materials concerning the fraudulent re-registration had been seized. Later, from the list of items composed by the Interior Ministry, I found out the content of the package, which allegedly included some original companies' documentation that we had asked for in the process of chasing after the stolen companies, which had been moved first from Moscow to Novocherkassk (in southern Russia) and then on to Khimki (in the Moscow region). The Khimki tax office had informed us that they had never received all the documents, whereas the Novocherkassk tax office informed us that their Moscow colleagues had sent some documents to them, but that these were only blank sheets of paper. Some of these 'lost' original company documents apparently 'turned up' in the DHL package from London. To me, the whole DHL package episode was a clumsy attempt to "frame" me and my clients. According to my secretary, the officials who came to search my office knew exactly what they were looking for. They had obviously tracked on DHL's website the progress of the package their accomplices had sent from London.

Following my complaint, the Moscow and International Bar Associations protested against the search of my law office, whereas Mr Gordievsky of the Investigative Committee opened the above-mentioned criminal case against me on the basis of Mr Kuznetsov's report alleging that I acted on a 'false' power of attorney, despite evidence to the contrary, including examinations confirming that the signatures and stamps on the powers of attorney issued to me were genuine and in spite of the affidavits from my clients who issued me the powers of attorney confirming they had indeed had done so in good faith. My application to the European Court of Human Rights against the unlawful decisions taken in this respect by the Russian courts, up to the Russian Supreme Court, is still pending.

At the end of August 2008, just a month after the complaints seeking to investigate the USD 230 million theft had been filed, all lawyers working for Hermitage were practically under siege. In addition

<sup>49</sup> I was given copies of the footage and the statement by the London police mentioned.

to the search of my law office and police summonses, I noticed surveillance. My wife received threatening phone calls. In October 2008, I travelled to London and discussed the situation including the on-going fraud and attempts to frame me with Mr Browder and other members of the Hermitage team. Taking into account all information and events that had occurred it was clear that it would be dangerous for me to return to Russia to continue to fulfill my professional duties.

On 27 October 2008, the HSBC-appointed Hermitage director wrote another complaint to Russian General Prosecutor Chaika, reiterating the facts about the criminal conspiracy - the frauds against Hermitage and the Russian treasury and the ongoing attempts to liquidate the stolen Hermitage companies and conceal the fraud. The complaint also raised specific complaints about the harassment of all lawyers who acted for Hermitage in Russia defending it against the fraud, including illegal searches of the lawyers' offices, summonses for questioning and baseless criminal proceedings. The complaint explained why the evidence provided by Mr Markelov, previously convicted for manslaughter and arrested for unlawful activity, on which the Russian authorities based their allegation in targeting Hermitage lawyers, was wholly unreliable. Finally, it posed a series of questions to assist with the investigation of the criminal conspiracy and seizing and preserving evidence. The complaint was never properly responded to.<sup>50</sup>

## ii) *The story of Vladimir Pastukhov*

81. Vladimir Pastukhov, a Ukrainian-born, soft-spoken intellectual with severely impaired eyesight, was a lawyer and professor of political science in different institutes of the Russian Academy of Science (Institute of Comparative Political Studies, Institute of Latin America, Moscow State University High School of Economics and others) and recently became a Fellow of St. Anthony's College at the University of Oxford. As a "starving scholar" in the mid-nineties, he joined the Moscow Bar and took on some legal work, including public-interest litigation sponsored by the European Union's TACIS programme in the Centre of Constitutional Legal Defense. In that context, he came across Hermitage, one of Russia's "most active shareholders". Around 2003, he successfully defended Hermitage's Vadim Kleiner against a lawsuit by Sberbank. He represented minority shareholders' interests (including Hermitage) in a lawsuit about the treasury shares of Surgutneftegaz. Mr Pastukhov also acted as a legal and strategic adviser for numerous high-level political and business institutions and public figures, including the Chairman of the Constitutional Court and was a consultant at the State Duma. We spoke with him at length in London, in February 2013. Here is his account of the events<sup>51</sup>:

"At the end of 2005, Hermitage Capital asked me for help concerning the cancellation of Bill Browder's visa. I noted that this matter should be resolved at the highest political level and no progress could be achieved at that time. In June 2007, Hermitage contacted me again, asking for advice following the search-and-seizure raids that had just taken place. I was to be the "strategic thinker" to analyse and coordinate the output of the lawyers dealing more directly with the cases. I soon found that there was a huge gap between the accusations of tax evasion and the Russian tax authorities' own position that there was in fact no problem with the tax payments. I explained that under Russian law, it is only for the tax authorities to evaluate tax issues. The first time I heard about the theft of Hermitage's companies was sometime in mid-October 2007, in a telephone call when I was in Helsinki at a conference with constitutional lawyers. The further fateful engagement in this case partly destroyed and partly rebuilt my life.

Hermitage told me about the fraudulent re-registration of Hermitage's Russian companies, and the strange lawsuits against them. My advice was: 1) file a criminal complaint, 2) start civil litigation to reverse the fraudulent re-registration and the fake judgments, 3) immediately send a lawyer to St. Petersburg to investigate what happened, and 4) hold a press conference. Unfortunately, only the first three pieces of advice were followed – the Western lawyers involved advised against going public at this stage. When my colleague Edward Khareitdinov returned from St. Petersburg, reporting that the claims for damages had obviously been fraudulent, we were shocked, but we did not feel threatened. We did not feel threatened because we didn't understand what really happened. Nobody could have imagined at that time what was the real purpose behind the companies' theft and the fraud against them – we just thought that someone had bribed the court in order to plunder the stolen companies' assets. No one doubts that in Russia, hundreds of thousands of cases are decided each year by the courts without any bribes. At the same time, there is a system of "parallel justice", which is partially controlled by the Government and provides judgments "on demand". But some things in this case

<sup>50</sup> Mr Khareitdinov showed me a number of documents corroborating his « story » and a copy of the 27 October 2008 complaint to Mr Chaika.

<sup>51</sup> Based on our summary of the meeting, approved by Mr. Pastukhov.

looked very strange. By that time, the Hermitage companies had sold practically all their assets. At that time, the estimated rate for a bribe needed to obtain such an extraordinary fake court judgment could be the equivalent of about USD 1 million<sup>52</sup>. Why would someone "invest" so much money in this affair? Only later we understood the real purpose pursued by the companies' thieves and saw that the strange judgments, which were still under appeal, had been accepted by the tax office as a basis for the reimbursement of the taxes Hermitage had paid on the profits purportedly annulled by the damages claims. Even then we were under the naïve impression that this was just a "local, limited criminal conspiracy" which could not go to the top. It was our biggest mistake at that time. We underestimated the threat to ourselves and relied too much on the anticipated positive reaction from the high authorities to which we had made our extraordinary disclosure.

We had to act fast: around the new year 2007/2008, the cover-up had started, the stolen companies were moved away from Moscow, we needed to regain control and understand what happened with them. On 29 January 2008, we launched a court case to return the companies to Hermitage, having received power of attorney from their real directors, at HSBC. As part of the claim, we requested the court to disclose files of the stolen companies from the tax offices (it would have shed some light on the story of their fraudulent re-registration). But a few days later we were informed that on 30 January 2008 – the day after our court application was filed! – all requested files of the stolen companies had been "lost" by the tax office. On 5 February 2008, a criminal case was finally opened, following our complaint filed in December 2007. We were quite naïve considering this as our partial victory. But later it turned out that the case was actually targeting us. At the end of the same month, after an old criminal case against Mr Browder concerning purported tax evasion in Kalmykia was reopened on 27 February 2008, I started to understand that we had encountered a much more serious problem than we had suspected before. The resources used against Hermitage were disproportional and exceeded everything I have come across before in my professional life.

Between December 2007 and March 2008, the fabricated judgments in St. Petersburg against the stolen companies were annulled upon our appeals. The appeals court judges made aware of our story were wide-eyed and shocked by the decisions made by their colleagues from the first instance courts. To our surprise, at this stage, there was no resistance to our work in the court from the criminals. Nobody from their side appeared in court and we easily obtained judgments reversing the fraudulent multi-million dollar awards. This only strengthened our illusions about the localised nature of the fraud. But on 24 March 2008, we met in the St. Petersburg court a young lady who claimed before the court that she alone was mandated to act on behalf of the Hermitage companies, whereas Mr Khareitdinov's and my own powers of attorney were "fake". But the court did not support her assertion and issued a decision in our favour. Around the same time, more identical fraudulent decisions in other regional arbitration courts against Hermitage companies were uncovered. It became clear that Hermitage needed a bigger team of lawyers who can handle all this litigation. That was why new lawyers stepped into the case, and I reverted to my previous role as a "strategy advisor". In July 2008, when I was on another trip to St. Petersburg, I received a call from Hermitage asking me to come to London, as they had found through the analysis done by Sergei Magnitsky of the documents obtained by the lawyers that the company thieves had stolen the taxes paid by Hermitage. After another examination of the evidence, Hermitage finally went public.

In mid-August 2008, just a few days after my return from medical treatment in Munich, I received phone calls from a number of lawyers, including Mr Khareitdinov, who said that their offices had been "visited". I was still not too worried. But then I was summoned for interrogation at the police station in Kazan (Tatarstan), on a Saturday evening. The Kazan police station is notorious for rapes and beatings. As I was not a specialist in criminal law, I decided to discuss this with Edward Khareitdinov. I accepted his advice, warning me that I would probably end up spending the weekend there in custody (because I wouldn't be able to call for assistance before Monday). I also knew that police interference with the duties of an attorney and the attempt to question an attorney about their professional advice and the circumstances of the case were illegitimate, and my rights were protected by the Law on attorneys and their activities. So I didn't go to Kazan, and instead called the investigator in Kazan, explaining that Russian law prohibits the questioning of a lawyer concerning his client's case. I have a transcript of this conversation, in which the investigator said that he "did not care about this law". He also refused to meet me in Moscow, where I was based. The stress during this period provoked the detachment of my retina. I underwent medical treatment abroad and after that for a further consultation to London, where I also discussed with Hermitage the next steps to be taken in defence against the

<sup>52</sup> Mr Pastukhov handed us the printout of a « price list » for bribes required for different types of official acts published in Russian internet: [http://www.mirinvestizij.ru/load/tarifj\\_na\\_korupcionnye\\_uslugi\\_dlja\\_biznesa\\_v\\_rossii/12-1-0-551](http://www.mirinvestizij.ru/load/tarifj_na_korupcionnye_uslugi_dlja_biznesa_v_rossii/12-1-0-551), and a report by Center for Studies of Regional Problems (<http://www.rf-region.ru/projects/1065.htm>).

fraud Bill Browder had kept calling me, urging me to leave Russia. But that was not so easy for a man in my position. Mr Browder failed to persuade me. But he found in London one of my elder Russian friends whose opinion was very important for me and briefed him about the situation. That worked. In London I found out that a criminal case had been opened against me for "use of a false power of attorney". I succeeded in having this case closed again<sup>53</sup>, contrary to Mr Khareitdinov, who had done exactly the same as I – acting for the true owners against the company thieves. But I still prefer to stay in London for the time being."

*iii) Other factual elements concerning the actors and the modus operandi of the USD 230 million tax reimbursement fraud*

*- The suspiciously fast approval and disbursement of the tax refund*

82. On 21 and 24 December 2007, the newly registered directors of the stolen Hermitage companies Rilend (Mr Kurochkin), Parfenion (Mr Markelov), and Makhaon (Mr Khlebnikov) filed requests for refunds of the equivalent of USD 230 million of taxes previously paid by Hermitage with the Moscow tax offices no. 25 and 28, to which these companies had been re-registered earlier by Messrs. Markelov, Kurochkin and Khlebnikov. These "directors" requested from the tax authorities the refund of the equivalent of USD 230 million to accounts opened by Messrs. Markelov, Kurochkin and Khlebnikov less than two weeks before the application, in two small Moscow banks: Intercommerz and Universal Savings Bank. The tax refund applications claimed that losses equivalent to USD 973 million cancelled out the previous year's profits of the same amount<sup>54</sup>. Despite the fact that some of the judgments granting these damages had not yet come into legal force and some were already under (ultimately successful) appeal, the refunds, amounting to the largest tax refund in Russian history, were approved within one day of the application, and paid out only two days later<sup>55</sup>. Before making the refund, the tax authorities had inquired with the Moscow Branch of the Interior Ministry about the applicants and received confirmation of the existence of the legal entities and their relationships<sup>56</sup>. Just three weeks earlier, the Interior Ministry had received the first detailed criminal complaint by Hermitage about the fraudulent re-registration of their companies, which could only be achieved using original corporate documents that were in the custody of the previously named Interior Ministry investigators at the relevant time. The complaints named Mr Markelov as the new, unlawful owner, through a holding company ("Pluton") registered in Kazan (Tatarstan), which was fraudently registered as the 100% owner of all three Russian Hermitage companies (Rilend, Parfenion and Makhaon). They also pointed out that the three new "directors" (MM. Kurochkin, Mr Markelov and Mr Khlebnikov) all had serious criminal records, including manslaughter, burglary and theft. The Interior Ministry nevertheless gave the confirmation requested by the tax office<sup>57</sup>.

*- The mild sentence imposed on Mr Markelov*

83. On January 24, 2009, Mr Markelov came to the Russian Interior Ministry in Moscow and gave himself in for the theft of \$230 million from the budget that occurred a year before. In January-February 2009, Mr Markelov gave evidence to the Interior Ministry "admitting his guilt" stating that he acted under instruction from a Mr Gasanov. In particular, in his testimony to the Interior Ministry on 25 February 2009, Mr Markelov said:

<sup>53</sup> Mr. Pastukhov explained to me off the record how he achieved this.

<sup>54</sup> Rilend's 2006 profits stood at the equivalent of USD 321 million (taxes paid: USD 75 million), Parfenion's at USD 581 million (taxes: USD 139 million) and Makhaon's at USD 71 million (taxes: USD 16 million). The collusive lawsuits referred to by Mr Khareitdinov and Mr Pastukhov (see above, paras. 80 and 81) before the arbitration courts in St. Petersburg (against Makhaon, by "Logos Plus") Moscow (against Rilend, by "Instar") and Kazan (against Parfenion, by "Grand Active"), added up exactly to each defendant's profits of the previous year, plus an identical lawsuit against Rilend by Logos Plus in St. Petersburg and several other, smaller lawsuits. I was shown translations of extracts from the courts' records including the judgments and statements from Mr Andrei Pavlov, purporting to act for Rilend, confirming that the defendant understands the charges, does not have any objections and fully accepts the claims Judge Orlova, of the St. Petersburg arbitration court, in the Logos Plus claim against Parfenion, is on record for having stated that the acceptance of the claim by the defendant releases the plaintiff from the requirement to prove the case. Extensive detail on these court cases and the circumstances of the alleged "company theft" is provided in the "Formal criminal complaint" dated 5 June 2008 addressed to the Cypriot law enforcement authorities (available from the secretariat), pages 9-28.

<sup>55</sup> Source: bank records obtained by Hermitage, Russian Central Bank Data Base.

<sup>56</sup> According to a statement made on 29 July 2008 by Olga Viktorovna Tsymai, Head of Audits Division No. 1 of Moscow Tax Inspection No. 28 (source: materials from case no. 3/3-560/2008 at the Vakhitov Court in Kazan, obtained and translated into English by Hermitage).

<sup>57</sup> According to the same statement (note 56 above).



"I opened a bank account in Russian rubles for OOO Parfenion in CB "Intercommerz"...The account I opened under instruction of O.G. Gasanov..The documents necessary to open an account for OOO Parfenion in CB "Intercommerz" I received from Gasanov. He also told me what to do and where to go to." In another testimony to the Interior Ministry on 20 March 2009, Mr Markelov said: "I confirm the previously given testimony during the course of the preliminary investigation. On the request from my acquaintance Gasanov Oktai Gasanovich in 2007 I bought in my name OOO "Pluton", which later on became a shareholder in OOO Makhaon, OOO Parfenion and OOO Rilend. I became the general director of OOO Parfenion; my acquaintance Kurochkin Valery Nikolaevich became the general director of OOO Rilend; my acquaintance Khlebnikov Vyacheslav Georgievich became general director of OOO Makhaon. Gasanov and persons unknown to me produced a package of documents on behalf of OOO Parfenion, OOO Makhaon and OOO Rilend, which I, Khlebnikov and Kurochkin submitted to tax inspections No 25 and 28 in Moscow...As far as I understood, on the basis of these documents money from the budget were wired to OOO Parfenion, OOO Makhaon and OOO Rilend. How this money was taken from the accounts of OOO Makhaon and OOO Rilend, I don't know; for OOO Parfenion I signed the wire transfers to make payments from the account. I don't know to what accounts the money was transferred later on. As a result of my participation this money was stolen from the budget, however, I myself did not receive anything from that money."<sup>58</sup>

84. On 10 April 2009, Russian Deputy Prosecutor General Grin signed an indictment of Mr Markelov for the USD 230 million theft (Article 159 of the Russian Criminal Code). On 28 April 2009, he was convicted by Tverskoi Court in Moscow and sentenced to a prison term of five years. The judgment imposed neither a fine, nor a duty to reimburse the State. The judgment merely mentioned that he had worked together with "unknown co-conspirators", without referring to the evidence adduced by Hermitage in their criminal complaints lodged in December 2007 and July 2008 against numerous other suspects. Instead, the conclusions of the accusation<sup>59</sup> appear to believe Mr Markelov's testimony that he opened a new bank account for Parfenion with Intercommerz Bank in mid-December on an instruction from a Mr Gasanov, who had been dead since 1 October 2007.<sup>60</sup> Such inconsistencies tend to undermine the credibility of Mr Markelov's new testimony that Sergei Magnitsky was the one who gave him his instructions.

85. Apparently, he knew in advance about the mild sentence he could expect. I learnt during my first visit to Moscow in February 2013, from one of the lawyers, that Mr Markelov had bragged about being about to receive a sentence of "five years, at a million dollars a year" to fellow inmates before the sentence was actually pronounced. He was apparently released early, for good behaviour, on 4 March 2012. In a country known for very tough sentences even for fairly minor offenses, his treatment by the law enforcement bodies is remarkably favourable<sup>61</sup>.

- *Alleged earlier connections between Mr Markelov and Interior Ministry investigators Karpov and Kuznetsov*

86. The favourable treatment of Mr Markelov in this case may be linked to a prior relationship with the Interior Ministry investigators Messrs Karpov and Kuznetsov. Fyodor Mikheev, a Russian industrialist kidnapped for purposes of an extortion of the equivalent of USD 20 million, and his wife alleges publicly that Mr Markelov held Mr Mikheev hostage in a house outside of Moscow on instructions from Lt. Col. Kuznetsov. In the materials of the kidnapping case,<sup>62</sup> Major Karpov is also mentioned as a suspected participant in the kidnapping operation. Mr Mikheev and his wife have publicly<sup>63</sup> alleged that after Mr Kuznetsov was released from his captors, he was soon re-arrested, and Mr Kuznetsov visited him in custody and pressured him to give false testimony that the kidnapping had never happened, exonerating him and Mr Markelov, which Mr Mikheev refused to do.

87. Without speaking with Mr and Mrs. Mikheev and analysing the case file myself, I dare not take position on the credibility of these allegations, even though the BBC found them serious enough to include them in their documentary on police corruption in Russia.

<sup>58</sup> Transcript and translation made available by Mr Magnitsky's family's lawyers.

<sup>59</sup> signed by Deputy General Prosecutor Grin.

<sup>60</sup> Death certificate issued on 2 Oct 2007, available at: <http://russian-untouchables.com/rus/docs/D510.pdf>. (death in Moscow, from cardiosclerosis on 1 October 2007).

<sup>61</sup> I had asked for a meeting with Mr Markelov, but this proved to be impossible.

<sup>62</sup> Case no. 452570 opened on 27 August 2006.

<sup>63</sup> In an interview for a documentary of the BBC aired on 15 November 2010 (available at: <http://news.bbc.co.uk/1/hi/programmes/newsnight/9179684.stm>).



- *Earlier connections between some of the principal suspects: Cyprus, Dubai, Switzerland, the United Kingdom, Turkey and Spain as common travel destinations*

88. Dmitry Klyuev was, at the time of the transfers in question, the beneficial owner of Universal Savings Bank,<sup>64</sup> which is strongly suspected of having laundered the proceeds of the USD 230 million tax reimbursement fraud (and others). On 28 April 2007, five weeks before the search and seizure raid on Firestone Duncan and Hermitage, Mr Klyuev flew to Larnaca (Cyprus) in his private jet, with Lt. Col. Kuznetsov on board, who is strongly suspected of being behind the seizure of the Hermitage corporate documents used in the fraud. On 5 April 2006, Mr Klyuev also travelled to Cyprus with Mr Kuznetsov's collaborator, investigator Pavel Karpov, and a colleague, investigator Anton Golyshev.<sup>65</sup>

89. According to Russian Border Control Service records, Ms Olga Stepanova, the Head of Moscow tax office no. 28, which had just approved the fraudulent tax refund, travelled together with Mr Klyuev to Dubai (departure on 1 January 2007, return on 3 January 2007) and Geneva (departure on 16 January 2007, no return date available). These trips took place precisely at the time when the fraudulent reimbursements received from the tax authorities by Mr Klyuev's bank were being laundered by numerous outbound transfers (see "money trail", below).

90. The lawyers, who had purported to act on behalf of the fraudulently re-registered companies and readily accepted the damages claims wiping out the Hermitage companies 2006 profits, in preparation for the tax reimbursement fraud, Mr Andrei Pavlov (lawyer for Rilend) and Ms Mayorova (lawyer for Makhaon), also travelled extensively with Mr Pavel Karpov, one of the police officers suspected of involvement in the conspiracy. Russian border control records establish joint trips to London (1 - 5 January 2007), Larnaca (30 April - 5 May 2007), Istanbul (1 - 4 January 2008), Madrid and Barcelona (1 - 7 January 2009) and again London (outbound 1 January 2010, return flights unavailable). Ms Mayorova's UK visa application even stated expressly that she was travelling with MM. Pavlov and Karpov.<sup>66</sup>

91. These prior connections between some of the key suspects in the conspiracy may, of course, be just a coincidence. But Russia is a big country.

- *The "money trail" and the sudden riches of the officials suspected of complicity*
  - *Investigations by Novaya Gazeta and Hermitage*

92. Investigative journalists of the Novaya Gazeta, working together with colleagues of the Organised Crime and Corruption Reporting Network (OCCRP) have followed the "money trail" beginning with the suspect tax reimbursements and leading to any number of exotic destinations. I had the privilege of meeting two of these reporters during my first visit to Moscow, in February 2013. They explained their working methods to me – following the trail of a long list of tax reimbursements made by certain tax offices during a certain period of time, checking out the owners, directors and activities of the recipient companies. In a large number of cases adding up to the equivalent of USD 1 billion (including part of the tax reimbursements made in the Magnitsky case), they found out – using publicly available databases – that the recipient companies had no other business activity than the receipt and onward transfer of the tax reimbursements; their "directors", sought out by the reporters, were in many cases poor persons whose identity papers had been used without their knowledge, and the money was transferred on to foreign destinations, in smaller batches aimed at confusing the trail. The journalists followed the transfers meticulously, with the help of foreign colleagues, again accessing publicly available databases and registries, over many stations, and established the final destinations for considerable amounts of money, which had originally been stolen from the Russian people. Novaya Gazeta published a summary of their findings in 2012<sup>67</sup> and made their findings available to the competent authorities.

93. In parallel, Hermitage has done research of their own, making use of information provided to them by inside "whistleblowers".

<sup>64</sup> I received copy and an English translation of an extract from the testimony of Mr Klyuev made on 4 August 2005 in the "Mikhailovsky GOK" case confirming his ownership of Universal Savings Bank.

<sup>65</sup> This trips are established by Russian "flight manifests" and border control records obtained by Hermitage. During my fact-finding visit to Cyprus, at the end of April 2013, I asked the competent authorities for confirmation of these data from the Cypriot side, and possible additional information on their stays in Cyprus. I received the requested confirmation in June 2013.

<sup>66</sup> Copy of the visa application made available to me by Hermitage.

<sup>67</sup> Link to the article available: <http://www.reportingproject.net/proxy/en/following-the-magnitsky-money>; <http://www.novayagazeta.ru/inquests/53950>.

94. I have learnt a lot thanks to the detailed explanations received from the Russian journalists and Hermitage, trying to understand the painstaking and meticulous work needed in order to follow the "money trail". One important lesson is that (serious) money cannot disappear, it always leaves an indelible digital "trail" – the exception being cash, but the amounts that can be physically transported and hoarded in this form are insignificant in relation to the amounts in question in this case, or in any other large-scale organised criminal activity<sup>68</sup>. The details of all bank transfers (sender, recipient, amount) are kept for many years in electronic form, and the Central Banks keep copies. The deletion of information on individual transfers is impossible – the global financial system functions like a gigantic digital balance sheet; if individual entries were deleted on one end, the whole "cascade" would collapse. The money trail is out there, it just needs to be followed. In the Magnitsky case, this work is ongoing, and some astonishing results have already been obtained. But they were obtained mostly through the work of investigative journalists and private investigators, with the help of whistleblowers and not – so it would appear – by the authorities whose job it is to investigate crimes and go after the perpetrators and their loot.

95. I have received complete documentation of a "money trail" leading from the Russian treasury via the "stolen" Hermitage companies, via a total of five Russian companies and banks, two Moldovan companies and banks and one Latvian company to two British Virgin Island companies' accounts at Credit Suisse in Zurich and then on to the Credit Suisse account of another company owned by Mr Vladlen Stepanov, the (ex-) husband of Ms Olga Stepanova, head of Moscow tax office 28 (which had authorised the transfers from the treasury in question).

96. Another "money trail" has been reconstituted leading from the reimbursement of the taxes paid by Hermitage by the Russian treasury via the "hijacked" Hermitage companies (Parfenion, Rilend and Makhaon) and many other way-stations, including in Moldova, to a UBS account in Zurich of a Cypriot company owned by Mr Denis Katsyv, the son of the former Minister of Transport and Vice-Governor of the Moscow Region, Mr Piotr Katsyv, and Mr Litvak.

97. Additional convoluted "money trails" coming from the Russian treasury ultimately lead to corporate accounts with FBME Bank in Cyprus beneficially owned by Mr Klyuev and other accounts connected to him and Mr Pavlov with other Cypriot banks.

• *Reactions of the Russian authorities*

98. In light of this information, the attitude shown by the Russian authorities so far is not really convincing. Shortly after the tax theft allegations in the Magnitsky case became known, the spokesperson of the Ministry of the Interior, Ms Dudukina, publicly stated that the whereabouts of the tax money fraudulently paid into Universal Savings Bank could no longer be established because a truck transporting the bank's documentation had accidentally burnt.<sup>69</sup> My interlocutors at the Ministry of Interior and at the Investigative Committee evaded my question when I enquired about the credibility of this statement.<sup>70</sup> Regarding the treasury funds ending up in Mr Stepanov's account, I was told that this had been verified and that the funds in Mr Stepanov's account could be explained by his successful business activities, including building tunnels in Russia. Also, the couple had been divorced many years ago. But in my view, this does not explain that the same treasury funds, whose disbursement had been authorized by Ms Stepanova, ended up in her husband's or ex-husband's<sup>71</sup> account, via the complicated path described above. If the treasury funds in question were really disbursed for the payment of tunnels built by Mr Stepanov in Russia, why were they not transferred to him directly, without the elaborate detours that raise suspicions of money-laundering?

<sup>68</sup> I have a lot of sympathy for the proposal to abolish the € 500 note, which would further reduce the possibility of transporting and hoarding black money in cash.

<sup>69</sup> Available at:

[http://online.barrons.com/article/SB50001424052970204569604576259313266852054.html#articleTabs\\_article%3D1](http://online.barrons.com/article/SB50001424052970204569604576259313266852054.html#articleTabs_article%3D1).

<sup>70</sup> The Chairman of the Russian Central Bank, Mr Ignatiev, whom we met on 21 May 2013, explained to us in detail how the Central Bank is regularly informed, in electronic form, of interbank transfers and in particular, of transfers to foreign banks. But his answer to my specific question regarding the credibility of Ms Dudukina's statement was also not quite clear to me. He did not exclude that in some cases of trickery by very small banks information on transactions can get lost for good. This was the reason for a recent law designed to improve information security in such cases.

<sup>71</sup> I was told that Mr Stepanov and his wife were divorced by court order in 1992. But the Stepanovs gave effect to the court order only in November 2010, by registering the court order with the state matrimonial registrar. Since the purported 1992 divorce, they've extensively traveled abroad together, including on many occasions during 2006-2010. In addition, they have had a joint Swiss bank account which was opened in 1999, and continued to jointly manage it beyond 2004. The account documents refer to their joint place of residence in Moscow.

• *Sudden riches of suspect officials*

99. In addition, shortly after the fraudulent disbursements, Ms Anisimova and Ms Tsareva, working at Moscow tax office no. 28, received USD 569 000 and USD 591 000 respectively<sup>72</sup>. On a website dedicated to the Magnitsky case<sup>73</sup> details of the riches amassed by different players in the alleged conspiracy, including Ms Stepanova,<sup>74</sup> Lt.-Col. Kuznetsov<sup>75</sup> and Major Karpov are published, including villas in Dubai, luxury apartments in Moscow, Cyprus and elsewhere, and fat bank accounts in well-known off-shore havens. The allegations appear to be well-documented by extracts from land registries, bank statements, wire transfers, photographs etc. The entry documenting the lifestyle of Mr Karpov<sup>76</sup>, whose salary as a modest Interior Ministry official was the equivalent of about USD 6000 – annually! – is quite impressive, including the acquisition of real estate and luxury cars totaling USD 1.3 million (even if the Porsche is registered in the name of his elderly mother), world-wide travel, and more. It would appear that much of the information is actually gleaned from Mr Karpov's own "Facebook"-like Russian webpage. When I was told by the representatives of the Ministry of Interior that Mr Karpov (and his former colleague, Mr Kuznetsov) had retired from active service (at the age of 36 and 38), I asked whether Russian pensions allow such young retirees to live in such luxury. The answers received – that police pensions are indeed quite generous, that service done in Chechnya counts double for pension purposes and that Mr Karpov might have additional sources of income from business activities – have not convinced me. Neither has the additional information received in May 2013 that Mr Karpov's mother had made a large profit re-selling an apartment originally bought for the equivalent of USD 20 000 and later resold at USD 100 000, which she had then invested in the Moscow penthouse referred to in the internet publications. This does not explain more than a small fraction of Mr Karpov's and his immediate family's recent wealth.

100. During 2011 and 2012, Sergei Magnitsky's former employer, Jamison Firestone, filed a number of lawsuits with the Moscow courts<sup>77</sup> seeking to compel a criminal investigation into suspicious wealth accumulated by Russian tax officials allegedly involved in the fraudulent tax refunds. Reportedly, Olga Tsareva and Elena Anisimova, of Moscow Tax Office No. 28, were named in Firestone's complaint for having bought foreign properties worth about USD 2 million each, paid with funds from Swiss bank accounts. In January 2012, Firestone also filed a complaint against high-ranking officials of the General Prosecutor's Office and the Ministry of the Interior for covering up crimes allegedly committed by officials associated with Dmitry Klyuev. In November 2012, the Interior Ministry responded by saying that they found no evidence of complicity of law enforcement or tax officials in the USD 230 million tax reimbursement fraud against the Treasury<sup>78</sup> and that there was also no data indicating the involvement of officials in laundering the USD 230 million<sup>79</sup>.

101. In August 2012, Jamison Firestone filed further complaints with the Russian Investigative Committee seeking investigation of the suspicious enrichment of Interior Ministry investigators Kuznetsov and Karpov (as earlier complaints made since the summer of 2010 had remained unanswered).

102. The Russian Deputy Minister of the Interior pointed out to me that Mr Karpov is now suing Mr Browder for libel in a London court. Mr Karpov did indeed appear on Russian TV, complaining that Mr Browder had not turned up to defend himself. Mr Browder confirmed that Mr Karpov had indeed launched a lawsuit, and had hired hugely expensive London lawyers for this purpose. Mr Browder's lawyers advised to seek to strike out Mr Karpov's application on the ground of it being an abuse of the court process by a nominal claimant (i.e. effectively by a front man on behalf of other interests).

103. I was told by the Russian authorities, in Moscow, that investigations were still ongoing in order to identify the recipients of the stolen funds and prosecute them, and that a case had been opened against Ms Stepanova. But this needed still more time, and the cooperation of the authorities of the countries to which the funds had been transferred. There are quite a few such countries – Hermitage has by now filed complaints to the law enforcement authorities of Austria, Cyprus, Estonia, Finland, Hong Kong, Latvia, Lithuania and Switzerland, and many of them have already opened formal criminal investigations.

<sup>72</sup> I have received copies of wire transfers dated 17 and 18 January 2008.

<sup>73</sup> <http://www.russian-untouchables.com>.

<sup>74</sup> <http://russian-untouchables.com/enq/olga-stepanova/>.

<sup>75</sup> <http://russian-untouchables.com/enq/ariem-kuznetsov/>.

<sup>76</sup> <http://russian-untouchables.com/enq/pavel-karpov/>.

<sup>77</sup> Investigative Committee case no. 344212.

<sup>78</sup> Interior Ministry case no. 152979.

<sup>79</sup> Interior Ministry case no. 6785400.

• *The mysterious death of an informer*

104. Some of the information facilitating the investigation of the "money trail" was provided to Hermitage by a Russian whistleblower, Mr Perepilichny, who had fled to the United Kingdom, where he died mysteriously in November 2012 in front of the door of his house in Surrey – an apparently healthy man in his forties.

105. He had also been questioned by and provided information to the Swiss law enforcement authorities. This was publicly confirmed by the Swiss Federal Prosecutor's office<sup>80</sup>, which also pointed out, with respect of the consequences of Mr Perepilichny's death on the ongoing criminal proceedings, "that our strength resides in our ability to minimise the influence of such a regretful event on our investigation."<sup>81</sup>

106. The investigations into the cause of Mr Perepilichny's death are still ongoing, and I was unable to obtain any information from the competent UK authorities. The representatives of Hermitage are convinced that the authorities, intentionally or not, have done an imperfect job so far. In their view, the local police failed to understand the role that Mr Perepilichny had played in providing information on some "dangerous people", including some of the suspects in the "Mnitsky case". He had been involved with managing funds and transactions that are subject of the ongoing Swiss investigation. When he lost a big amount of his "customers" money during the financial crisis in 2008/2009, he felt threatened and fled to England, taking with him documentation on financial transactions on behalf of his "customers". Responding to an appeal by Hermitage to potential whistleblowers, he decided to share this information with Hermitage, which in turn transmitted it to the competent authorities in the countries concerned. As soon as Hermitage found out about Mr Perepilichny's death, their lawyers immediately contacted the police to urge them to be particularly diligent in establishing the cause of death. Unfortunately, according to Mr Browder, it took the police several days to react to these exhortations and request toxicology tests and it may well be that too much time had passed in order to establish or exclude "foulplay" with certainty.

107. During my meetings with the Russian authorities in Moscow, insinuations were made on several occasions that the suspicious death of Mr Perepilichny (as well as that of Mr Mnitsky himself, and of other possible accomplices) may well serve Mr Browder's interests. I do not find these insinuations convincing at all, given that Mr Browder had strongly pushed the UK police, through the media and political channels, to commence robust and timely investigations into possible "foulplay" in a death that was first found to be caused by a heart attack by local police officers. Similarly, his powerful public campaign against "impunity for the killers of Sergei Mnitsky", at a time when the authorities were trying to minimise this death as an unfortunate coincidence, caused at most by the negligence of some lowly prison officials, would not make any sense if he had somehow been involved in Sergei Mnitsky's death.

• *Meetings with the Swiss, Cypriot and UK authorities*

108. As authorised by the Committee, I have spoken with the Swiss Federal Prosecutor and his Deputy<sup>82</sup> in Bern, and with the Cypriot Attorney General and the head of the Cypriot anti-money laundering unit (MOKAS)<sup>83</sup> in Nicosia. They have indeed received extensive documentation, from Hermitage, establishing "money trails" starting with the fraudulent tax reimbursements by the Russian treasury and leading to banks in their countries.

109. My impression was that the Swiss authorities, which have already opened a criminal case, heard a key informer (Mr Perepilichny, see above paras. 104-107), ordered the freeze of suspect funds and addressed a request for mutual assistance to Russia (which had recently also addressed a similar request to them) have acted with due diligence. The same would appear to apply, in principle, to the Cypriot authorities. An apparent administrative mishap or breakdown of communication following the transmission of an initial complaint in 2008 on behalf of Hermitage concerning the "company thefts" (with Cypriot links) unfortunately delayed the start of the investigation considerably. But my impression is that – contrary to what Hermitage

<sup>80</sup> See for example the reports on 28 November 2012 in the Independent: Alexander Perepilichny: Supergrass who held key to huge Russian fraud is found dead in Surrey; Swiss Prosecutors say death of Russian whistle blower will not derail huge fraud investigation; and on 27 November 2012: A \$ 230 million fraud – and a trail of death that just keeps growing; Timeline of the Mnitsky scandal: the fraud that cost two lives (all available at <http://www.independent.co.uk>); Tagesanzeiger of 3 January 2013 (cover page): Verdacht auf Geldwäscherel: Bund blockiert Millionen; im Fall Mnitski lassen die Ermittler Konten bei der CS und anderen Banken einfrieren.

<sup>81</sup> Cited from a copy of a public statement made by the Swiss Federal Prosecutor's office immediately after the death of Mr Perepilichny.

<sup>82</sup> Mr Lauber and Ms Bino.

<sup>83</sup> Mr Clerides and Ms Papakyriacou.

seems to believe<sup>84</sup> – the Cypriot authorities did not wait for any “green light” from Moscow in order to begin their investigation. At the same time, it seems to me that Cyprus, like other small countries with a limited investigative capacity, experiences difficulties in carrying out the numerous, complex investigations of suspected instances of money laundering that come with the country's role as a popular location for so-called “letterbox companies” holding assets controlled by foreign businesses and wealthy individuals. It may well be that Cyprus and other small countries in a similar position need to further increase their investigative resources in order to maintain or strengthen their credibility as financial centres subjected to the rule of law.<sup>85</sup>

110. On 25 April 2013, a meeting took place at Europol in The Hague to exchange information and coordinate the investigations by anti-money laundering experts of a number of countries concerned by transfers of funds originating in the tax reimbursement fraud denounced by Sergei Magnitsky.<sup>86</sup> I can only applaud Europol for organising such a meeting, which should in my view mark the beginning of a coordinated action by the competent authorities to follow the “money trail” wherever it leads. The competent Russian authorities should be at the forefront of such an action, as it is the money of the Russian people that was stolen. But international cooperation requires a minimum of mutual trust, which is likely to suffer when serious allegations of corruption against law enforcement officials are not investigated robustly and without undue delay. I received confirmation of such distrust in London. The Head of the UK Central Authority<sup>87</sup> told me at our meeting in February 2013 that a request for legal cooperation received from Moscow in March 2012 was so “blatantly politically motivated” that the British authorities could not possibly accede to it.

• *The similarity of the modus operandi used in the Magnitsky case and in the Rengaz and other frauds.*

111. A very strong argument against blaming the USD 230 million tax reimbursement fraud on Sergei Magnitsky himself is the fact that similar tax reimbursement frauds were committed before and after Mr Magnitsky was taken into custody, and even after his death<sup>88</sup>. Thanks to the above-mentioned investigations on the “money trail”, it has been shown that the same suspects (the so-called “Klyuev group”), using the same modus operandi (annulling a fraudulently re-registered company's profits of the previous year through sham damages claims and then obtaining the reimbursement of the taxes which had been paid by the company's real owners), using the same Moscow tax offices no. 25 and 28 and the same money-laundering paths beginning with newly-opened accounts in Mr Klyuev's Universal Savings Bank and a new bank which replaced it at a later stage. In the Rengaz fraud, which took place in 2006, a year before the USD 230 million fraud, the perpetrators even used the same arbitrage courts in Moscow and Kazan in order to obtain the damages judgments annulling Rengaz's profits. The lawsuits in Kazan in the Rengaz case were brought by the same lawyer as in the case denounced by Mr Magnitsky (i.e. Mr Pavlov), on behalf of the same plaintiff (Mr Sheshenia); similarly, the lawsuits in Moscow were brought by a Mr Plaksin as plaintiff, and again Mr Pavlov as his lawyer. The perpetrators of the Rengaz fraud even used the same “templates” for their sham damages claims as in the fraud denounced by Mr Magnitsky, consisting of a “Framework Agreement”, a “Sale-Purchase-Agreement” and a “Cancellation Agreement.”<sup>89</sup> In both cases, the defendant companies immediately accepted the claims in full, and the judges released the plaintiffs from the requirement to prove the case. In my view, all these similarities cannot be mere coincidences.

<sup>84</sup> I was informed of an exchange of letters between Hermitage and the Cypriot authorities following an interview with Ms Papakiriadou in the Daily Telegraph. My Cypriot interlocutors found that the public pressure exercised by Hermitage was both unnecessary and unwarranted.

<sup>85</sup> This impression seems to square with the findings of the report published in May 2013 of the joint evaluation mission by the Council of Europe (Moneyval) and Pricewaterhousecoopers, which reportedly found that Cyprus was “surprisingly vulnerable” to money laundering (see for example EU Observer, 20 May 2013, Leaked report damns Cyprus on money laundering, available at: <http://euobserver.com/economic/120167>; Spiegel online 17 May 2013, Insufficient efforts: report faults Cyprus on money laundering, available at: <http://www.spiegel.de/international/business/deloitte-audit-prevention-of-money-laundering-in-cyprus-is-inadequate-a-900593.html>).

<sup>86</sup> I undertook not to reveal the participating countries and any other detail pertaining to this meeting.

<sup>87</sup> Ms Price.

<sup>88</sup> See “Tax Scam Points to Complicity of Top Russian Officials,” Financial Times, 12 April 2012.

<http://presscuttings.ft.com/presscuttings/s/3/articleText/58807111#ixzz1rua1MrxA>;

“VAT. We've Solved the Magnitsky Case. How Billions Left Russia. Schemes, Names, Banks,” 1 April 2012

<http://www.novayagazeta.ru/inquests/51924.html>;

Complaint from Hermitage to Russian Investigative Committee seeking to investigate \$240 million in suspicious refunds via tax offices No 25 and No 28 to Universal Savings Bank during 2006-2008, 13 October 2009, <http://russian-untouchables.com/docs/D61.pdf>;

After Universal Savings Bank's voluntary closure in 2008, VAT rebates continued to Benefit bank – see “Magnitsky Files”, at 16:30 sec. <https://www.youtube.com/watch?v=mL9b5LP4Ubc>.

<sup>89</sup> I have received copies of the “contracts” in question and translations of key passages from Hermitage.

*iv) Assessment of the accusations against Sergei Magnitsky concerning the USD 230 million tax reimbursement fraud*

112. In view of the factual elements presented above, i.e. in particular:

- the powerful testimony of the lawyers, who had worked on the case, MM. Khareltdinov and Pastukhov;
- the fact that Mr Magnitsky had played a key role in preparing the criminal complaints by Hermitage denouncing the conspiracy before the fraud was actually completed;
- the suspiciously fast approval of the tax refunds, which Mr Magnitsky and Hermitage could not have controlled;
- the mild sentence imposed on Mr Markelov, suspected as the "straw man" or "fall guy" of the criminal conspirators;
- the previous connections between Mr Markelov and other key suspects, including the Interior Ministry Investigators Lt.-Col. Kuznetsov and Major Karpov, whom Mr Magnitsky had accused of being co-conspirators, and who were effectively put in charge of the investigation against themselves, and between the police officers and the lawyers involved in the sham lawsuits and the owner of one of the banks involved in the fraud, Mr Klyuev ;
- the unbroken "money trail" leading directly to key suspects accused by Mr Magnitsky and Hermitage and members of their family, including Ms Stepanova, the head of one of the tax offices involved in the fraud, two of her collaborators, Mr Klyuev ;
- the well-documented wealth of key suspects, living far beyond the means afforded by their official salaries or pensions, and the lukewarm reaction of the authorities thereto ;
- the similarity between the case now blamed on Sergei Magnitsky and other tax reimbursement frauds carried out before and after Sergei's arrest and even after his death.

113. I am personally convinced that this crime was not committed or in any way aided or abetted by Mr Magnitsky, but by a group of criminals, including the persons he had accused before these persons took him into custody, where he died in the circumstances that we are now going to look at in some more detail.

*2.3. Sergei Magnitsky's ordeal in pre-trial detention – pressure until death*

*2.3.1. The undisputed facts*

114. On 7 October 2008, Sergei Magnitsky testified before the Russian State Investigative Committee about the suspected involvement of Interior Ministry officials Lt. Col. Kuznetsov and Major Karpov and others in the fraudulent re-registration of Hermitage companies and the USD 230 million tax reimbursement fraud. On 6 November 2008, General Logunov, Deputy Head of the Interior Ministry's Investigative Department, assigned the case to Lt. Col. Kuznetsov and three of his subordinates to investigate the crime denounced by Mr Magnitsky. On 12 November 2008, General Logunov of the Interior Ministry assigned the same officers to the case against Hermitage/Magnitsky.<sup>90</sup> Both investigative groups (consisting of the same persons) were headed by Interior Ministry Investigator Major Oleg Silchenko.

115. Less than two weeks later, on 24 November 2008, Sergei Magnitsky was arrested at his home, following a search, by two subordinates of Lt. Col. Kuznetsov following an order by investigator Oleg Silchenko. He was first held at "IVS-1", a Temporary Detention Centre in Moscow assigned to the Moscow Branch of the Interior Ministry, then transferred to Moscow Detention Centre No. 5, then back to IVS-1, back to Detention Centre No. 5 and after that to Matrosskaya Tishina (henceforth MT) pre-trial detention centre, where he fell ill by June 2006, losing 40 pounds and suffering from severe abdominal pains. According to medical records of the MT detention centre dated 13 July 2009, he was diagnosed with pancreatitis, cholecystitis and gallstones, based on an ultrasound examination on 1 July 2009<sup>91</sup>. He was prescribed surgery within one month, after another ultrasound examination. This was confirmed in a letter addressed to Mr Magnitsky's lawyers by D. Vasiliev, acting Head of MT, in the following terms: "hereby to confirm that Sergei Magnitsky was examined on 1 July 2009 and diagnosed with calculous cholecystitis, prescribed with an ultrasound examination within a month and a scheduled surgery."

<sup>90</sup> Copies of the Interior Ministry decisions of 6 and 12 November 2008 were obtained from Hermitage.

<sup>91</sup> A worrisome detail regarding the diagnosis of pancreatitis is the statement by Dr. Guseinov included in the First Medical Commission Report of 12 May 2010 (exhibit E 23 of the application to the ECHR by Natalia Magnitskaya). Dr. Guseinov had expressed concern that Mr Magnitsky had been prescribed the drug Diclofenac, which "would have an adverse effect and may cause acute pancreatitis". According to Ms Magnitskaya's application to the Strasbourg Court (para. 476), the authorities failed to investigate this further to establish whether the drugs prescribed by the prison authorities might have in fact caused Mr Magnitsky's illness.



116. On 25 July 2009, a week before his scheduled examination and surgery, Mr Magnitsky was suddenly transferred to Butyrka prison, a maximum security detention centre, which had no facilities to perform an ultrasound examination or surgery. The transfer was coordinated with Interior Ministry investigator Oleg Silchenko and approved by the Deputy Head of the Federal Penitentiary Service, General Petrukhin.<sup>92</sup> At Butyrka, Mr Magnitsky's state of health continued to deteriorate.

117. On 16 November 2009, Dmitry Komnov, Head of Butyrka, ordered his subordinates to transfer Mr Magnitsky back to MT, due to the "need for urgent admission to a hospital with a diagnosis of acute pancreatitis and cholecystitis". The transfer was approved by General Davydov, the Head of the Moscow Penitentiary Service. Upon arrival at MT, Mr Magnitsky was placed in an isolation cell and handcuffed to a bed.<sup>93</sup> A civilian emergency medical team was called to MT prison by duty officers. It arrived at 8 pm but was not allowed into Mr Magnitsky's cell for one hour and 18 minutes. Sergei died the same evening at the MT detention centre.

### 2.3.2. *The disputed facts*

#### 2.3.2.1. *Did Sergei Magnitsky complain about his detention conditions and lack of medical care?*

118. Officials in Moscow (representatives of the Interior Ministry and of the Prosecutor General's office) told me that Sergei Magnitsky had neither complained about his detention conditions, nor about lack of health care provided to him in detention.

119. Mr Magnitsky's mother and Hermitage provided me with a long list of the complaints made by Mr Magnitsky and his lawyers on his behalf, as well as copies of the complaints and translations into English, complete with the replies given by the authorities to these complaints:

- on 9 and 11 August 2009 to D. Komnov, Head of Butyrka prison: "I hereby urgently request to be seen as the nature of my rights violations endangers my health".
- on 19 August 2009 O. Silchenko, Interior Ministry Investigator: "Please allow to carry out the medical examination of Sergei Magnitsky, who had been diagnosed with pancreatitis and cholecystitis."
- on 31 August 2009 to V. Davydov, Head of the Moscow Penitentiary Service: "For a week I was deprived of any access to clean and hot water, which I require given my abdominal illnesses."
- on 11 September 2009 to Y. Chaika, General Prosecutor: "Medical care has been denied, no medical examination and no operation have been performed. Please intervene."
- on 14 September 2009, to Judge A. Krivoruchko, at the Tverskoi District Court: "I request to review my complaints about the unbearable conditions of my detention and the denial of all medical care."
- On 12 November 2009, to Judge E. Stashina, at the Tverskoi District Court: "I request to review my medical records, ultrasound examination results, requests for medical care, complaints about my conditions in detention, described in the complaint filed with the European Court of Human Rights."

120. The replies speak for themselves:

- on 2 September 2009 from investigator O. Silchenko: "I deny in full the request for a medical examination of Magnitsky."
- on 14 September, from Judge A. Krivoruchko: "Request to review complaints about withholding of medical care and cruel treatment is denied."
- on 7 October 2009 from V. Davydov, Head of the Moscow Penitentiary Service: Magnitsky received his boiler. The hot water supply is centralized."
- on 7 October 2009 from D. Komnov, Head of Butyrka: "Based on his medical records, Magnitsky can be detained."
- on 9 October 2009 from A. Pechegin, of the Prosecutor General's office: "No pressure was exerted. There is no reason for the prosecutor to intervene."
- on 12 November 2009 from Judge E. Stashina: "Deny request to review the medical records and conditions of detention as irrelevant."

121. The investigators of the Public Oversight Committee (POC), mandated by the President of Russia to inspect any places of detention at any time and speak freely with prison employees and inmates, carried out

<sup>92</sup> According to letters addressed by Mr Oleg Silchenko to Mr Prokopenko, head of MT, on 2 July 2009 and by General Petrukhin to Mr Vasiliev, Acting Head of MT, on 22 July 2009.

<sup>93</sup> According to a report signed by O.G. Kuznetsov (Deputy aid on duty to the Head of MT) and F. Tagiev (Head of MT Detention Centre).

visits to the Butyrka and Matrosskaya Tishina detention centres beginning on the day after Mr Magnitsky's death. At my meeting in Moscow with the POC team led by Mr Valery Borshov, I was told that they were shown the official log (ledger) of complaints at Butyrka prison, which did not include complaints from Mr Magnitsky. But the log had looked manipulated in that the entries for the relevant time were all made in the same handwriting and using the same pen, apparently in one trait, instead of the separate entries after each complaint prescribed by law. Officials later told Mr Borshov that the log had never been properly kept. Mr Borshov told us in Moscow that he too was told, by Mr Komnov (the Head of Butyrka prison), and in the presence of a person who had actually responded to such a complaint, namely General Davydov, that Mr Magnitsky had never complained.

122. Here are some examples of Mr Magnitsky's complaints about his detention conditions, quoted from a handwritten statement addressed to the court on 19 January 2009:

- "Cells are overcrowded. 14 people can be kept in a cell with eight beds. We have to take turns to sleep."
- "At the same time, freezing wind comes from the permanently opened window."
- "I have to eat in the same space as the toilet. There is constant smoke in the overcrowded cell."
- "Hot food is provided essentially only once a day, at lunch time, at breakfast we get porridge with insect larvae, and at dinner – rotten boiled herring, just the smell of which causes nausea. Sometimes there is no food at all."
- "I am kept in a cell with defendants and those already convicted for violent crimes like burglary, murder and battery."

123. He had also complained about being kept for several days in a cell in which the toilet, situated inside the cell, overflowed so that the floor was covered with excrements<sup>94</sup>.

124. Sergei Magnitsky cried for help in a dramatic letter to his lawyer Mr Kharitonov of 25 August 2009, which formed the basis for his lawyers to form numerous formal complaints, including on 11 September 2009 to Prosecutor General Yuri Chaika and to the head of the Interior Ministry's Investigative Committee, General Anichin.

"On 23 August 2009 at 4.30 pm I felt excruciating pain at the solar plexus ... I laid down and struggled with it ... a bit later the pain started to increase again even harder than earlier ... to stand against it could only be possible by sitting in a crouched position, the pain was so hard I could not even breathe ... On 24 August around 4 pm a pain attack started again. I could not lay down this time, as it was hard to sustain it and again I was crouching ... My cell mate ... started pounding on the door crying for help, but no one came ..."

125. The complaint was assigned for review to Major Silchenko, who recommended it to be "archived" as this complaint was "not within our competence". Mr Silchenko's recommendation was approved by his superior, Colonel Karlov<sup>95</sup>.

126. On 12 November 2009, at his last court appearance, his detention was prolonged again. According to Butyrka prison doctor Ms Litvinova, Mr Magnitsky was upset with the prolongation of his detention. In a handwritten complaint dated 13 November 2009, Mr Magnitsky described that he was suffering from acute pain and requested urgent medical assistance, recalling once more that he had been scheduled for an ultrasound in July at Matrosskaya Tishina but was transferred to Butyrka just before the scheduled examination. Having again and again complained about his ill health, he had been told that he could get treatment when he got out.

127. The Investigators of the Public Oversight Committee (POC) confirmed that in Russia, in their experience, substandard detention conditions are commonly applied during pre-trial detention on the instruction of the investigators in charge of the case in order to "break" inmates and oblige them to confess or otherwise cooperate with the investigators. The "standard bag of tricks" commonly used in Butyrka included overflowing toilets, broken windows in winter, and aggressively violent new cell mates. Mr Borshov also pointed out that the fact that Mr Magnitsky was moved five times between prisons, and more than twenty

<sup>94</sup> See link to Mr Magnitsky's letter (In Russian) at:  
<https://dl.dropboxusercontent.com/u/150724736/M/magnzhalobaflood.pdf>.

<sup>95</sup> Major Silchenko's recommendation available in Russian here:  
<https://dl.dropboxusercontent.com/u/150724736/D1698.pdf>.



times between different cells (including eight times in the final three months) was another typical indication of pressure being exerted on him<sup>96</sup>.

128. Mr Borshov also pointed out that the initiative for moving Mr Magnitsky from Matrosskaya Tishina to Butyrka (a prison without the required medical facilities) in July 2009, a week before the scheduled treatment, had come from investigator Silchenko.<sup>97</sup> The Governors of Matrosskaya Tishina and Butyrka prisons would have been duty-bound to refuse the transfer if they could not provide the required treatment. The planned renovation of Mr Magnitsky's cell at Matrosskaya Tishina, which was officially given as the reason for the transfer, had still not begun when Mr Borshov carried out his inspection visit after Mr Magnitsky's death in November. It was well-known that withholding necessary medical treatment was a frequently used method of putting pressure on pre-trial detainees.

129. In light of the well-documented, specific complaints reproduced above, I find it downright cynical that the authorities now say that Sergei Magnitsky never actually complained about his treatment in detention and the lack of medical treatment, and that the conditions of detention for criminals held in Russian prisons had improved a lot; while they were still not pleasant, especially for persons used to a more comfortable life, this was inevitable (*"dura lex sed lex"*). In my view, this is unacceptable: Sergei Magnitsky was a healthy young man when he was taken into custody, presumed innocent by law. He was not allowed to talk to his wife and children even once, for almost a year. Being kept deliberately in miserable, unhealthy conditions, he developed serious diseases, for which he was not given adequate treatment. Less than a year after his arrest, he died in still unclear circumstances. This is not *"dura lex sed lex"*, this is a violation of Russian law and of the European Convention of Human Rights.

130. During my second visit to Moscow, the representatives of the Investigative Committee put into doubt the family's assertion that Mr Magnitsky was in good health when he was arrested<sup>98</sup>. When I mentioned this to Ms Magnitskaya and Mr Borshov, whom I met the following day, they informed me that Ms Litvinova (the prison doctor, really trained as a "hygiene specialist", who treated Mr Magnitsky at Butyrka prison) had first testified that Mr Magnitsky had given her a paper from Moscow hospital no. 36 saying that he had been diagnosed with pancreatitis or some other stomach problem, in March 2008 (i.e. well before his arrest). But a reply from hospital no. 36 was received and added to the file of the case on Mr Magnitsky's death according to which Mr Magnitsky had never been diagnosed or treated at this hospital.

*2.3.2.2. Was Sergei Magnitsky beaten upon his arrival at Matrosskaya Tishina prison on 16 November 2009 prior to his death, and why?*

131. I was told by several representatives of the authorities that Mr Magnitsky was not beaten upon his arrival at MT prison.

132. But the use of "special measures" including handcuffs and rubber batons against Mr Magnitsky because of a "nervous breakdown" was expressly mentioned in a report signed by a "D.F. Markin"<sup>99</sup> and two "witnesses", inspectors Larin and Borovkov, and sanctioned by the Head of MT prison, Mr F. Tagiev<sup>100</sup>. I am not convinced by the explanations given to me during my second visit in Moscow that this document is "out of context" and that the mentioning of rubber batons as part of the special measures used against Mr Magnitsky was purely "automatic".

133. According to Mr Borshov, Chair of the Public Oversight Committee, Russian law does not allow the use of batons in the case of a nervous breakdown. Also, according to a psychiatric expertise ordered by investigator Lomonosova for the judicial proceedings brought against certain prison officials, Mr Magnitsky was not in an unusual mental state. According to testimony of prison guards referred to by Mr Borshov,

<sup>96</sup> The UN Special Rapporteur on Torture had previously pointed out that these were commonly used pressure tactics in Russia (see UN Commission on Human Rights, Follow-up to the recommendations made by the Special Rapporteur, 21 March 2006, UN Doc. E/CN.4/2006/ADD.2 at paragraphs 251 and 264.

See also the judgment of the European Court of Human Rights, in a case concerning a detainee of Butyrka prison, in which the Court found a violation of the right to an effective and accessible remedy in view of the complaint by the detainee that "the administration would start transferring him to a new cell every second day, as had happened to other detainees. In that way, he would have been completely deprived of sleep because he would have lost his place in the 'sleeping queue'" (Sudarkov v. Russia, judgment of 10 July 2008, at paragraph 18).

<sup>97</sup> He handed me copy of a letter from Mr Silchenko to MT to this effect (the move would "serve the purpose" of the detention).

<sup>98</sup> They promised to send me documents establishing that Mr Magnitsky had been diagnosed with pancreatitis before his arrest.

<sup>99</sup> Which would appear to be an erroneously spelt signature of D.F. Markov, the Aid on duty to the Head of MT.

<sup>100</sup> A copy of this report was made public by the Public Oversight Committee.

Mr Magnitsky had fully cooperated with the prison staff putting on the handcuffs and followed them to the holding cell voluntarily.

134. In addition, the autopsy, the testimony of Mr Magnitsky's mother<sup>101</sup> and photographs taken by family members when they were first permitted to see the body confirms that Mr Magnitsky had visible injuries on his body that had never been explained, including bruising on the knuckles of both hands and deep marks on both wrists that could not be explained by the normal use of handcuffs. The explanation given by Dr. Alexandra Gaus, namely that the bruises were caused by throwing around the cot (bed) to which he was handcuffed, was dismissed by Mr Borshov, who pointed out that the cots in the cells are bolted to the floor. The Second Medical Commission report No. 555/10 also notes that the formation of the injuries found on the body of Mr Magnitsky "does not exclude the possibility that part of the injuries formed based on the traumatic impact of the rubber truncheon."<sup>102</sup>

135. It is therefore clear for me that Sergei was indeed beaten shortly after his arrival at MT prison, whereas the reason mentioned in the official report about the use of batons – a nervous breakdown – is doubtful both for legal and factual reasons.

#### 2.3.2.3. *Where, when and how exactly did Sergei Magnitsky die?*

136. Dr. Alexandra Gaus, the MT prison doctor had seen Mr Magnitsky upon his arrival at MT and filled in his arrival papers. She diagnosed a "mental breakdown" of Mr Magnitsky, who shouted that "someone is trying to kill me" and "someone is going through my personal belongings".

137. The POC report gives the following account of the testimony given to them by Dr. Gaus:

"During the survey, his abdomen was tense, he felt pain in both the left and right parts of the area which is an obvious symptom of pancreatitis. In the medical records, she read about the prescription to undergo a repeat ultrasound examination. During the survey, Magnitsky had twice a desire to vomit (with no actual vomiting), and she gave him a hygienic [plastic] bag. Initially, he was calm, agreed to a hospitalization and signed on the medical record. ... He then sat down and covered himself with the plastic bag and said that they want to kill him. It continued for a short period of time and he hit twice the floor with the cot, then put it back and got scared and started to hide behind the plastic bag again, which she gave to him. According to her opinion, it looked like acute psychosis and delirium of persecution. They called for psychiatric emergency."<sup>103</sup>

138. Mr Borshov pointed out that 250 pages from Mr Magnitsky's diary had indeed gone missing. Regarding the plastic bag, Mr Borshov suspects that it was another measure of restraint and pressure that is habitually used against detainees. Another indication for "foulplay" at this stage was that the video recordings of the arrival mandated by law had been "unavailable" to the POC inspectors, but also to Ms Lomonosova, the first Investigator in charge of the investigation of Mr Magnitsky's death. On the video recording made at Butyrka prison at his departure, which Mr Borshov was shown, Mr Magnitsky appeared calm and sufficiently well to walk by himself, carrying two bags with his belongings. Earlier in the same day (16 November 2007), his acute pancreatitis had apparently required emergency treatment. An emergency call was placed at 2.29 pm and an ambulance arrived at Butyrka prison at 2.57 pm. But the ambulance team were then kept waiting for 2 hours and 35 minutes, with no explanation given for this delay. Regarding the recordings of Mr Magnitsky's arrival at Matrosskaya Tishina prison, Mr Borshov had been told by the Head of MT, Mr Taghiev, at a meeting three days after Mr Magnitsky's death that the recordings had been taken away by investigators. Later, Mr Taghiev fell in line with the official version according to which there were no recordings. Mr Magnitsky's family's lawyers had asked for Mr Taghiev to be summoned as a witness in court, but this request was denied.

139. Because of Mr Magnitsky's "mental breakdown", Dr. Gaus called in the civilian "psychiatric emergency" doctors as well as a group of eight prison security staff headed by Mr Markov, who used "special means" against Mr Magnitsky (see above paras. 131-135). The security officers took Mr Magnitsky into another cell (no. 4), where he was left without medical assistance or any medical observation. Fifteen minutes later, at 8 pm, the civilian emergency doctors, led by Dr. Kornilov, arrived at the prison gate, but they were kept waiting for over an hour, according to Dr. Kornilov's testimony. When they were allowed to enter cell no. 4, at about 9.15 pm, they found Mr Magnitsky's lifeless body on the floor. According to Dr. Kornilov,

<sup>101</sup> Who told me that she pulled back the blanket covering the upper body, but did not "rip open" her son's shirt, as a representative of the Investigative Committee had said during our meeting in May.

<sup>102</sup> Copy made available by Mr Magnitsky's mother's lawyers.

<sup>103</sup> <http://russian-untouchables.com/docs/Public-Oversight-Commission-Report.pdf>, page 17.

who had carefully examined the body, Mr Magnitsky had already been dead for more than fifteen minutes. Dr. Kornilov called in the time of death to the headquarter of the Medical Emergency Service, where it is officially documented.<sup>104</sup> The lawyers for Mr Magnitsky's mother pointed out that Dr. Kornilov's testimony is consistent with that of Captain Pluzhnikov of the MT prison, who stated that he had received two calls at about 9 pm to prepare for receiving a detainee "who was in a grave condition", and another call from Major D.F. Markov shortly thereafter asking him to "write a report on the detainee's death".<sup>105</sup> Again with respect to the time of death, Major Markov stated that between 8.15 and 8.20 pm, he received a message from the duty officer's room that Mr Magnitsky was "bad" and went to the cell where he found him unconscious on a stretcher. At 8.50 pm, Dr. Gaus had called him to tell him that Mr Magnitsky was dead.<sup>106</sup> But Dr. Gaus testified that she received a call at about 9.20 pm that Mr Magnitsky "felt bad" and went to cell no. 4. By contrast, Dr. Kornilov said that while he and his emergency team were waiting to see the patient, the medical officer came back "to say that the patient was dead". By contrast, Dr. Gaus stated that when she entered the cell at 9.20 pm, she found nurse Semenov attempting resuscitation, that "Dr. Nafikov ran in to perform resuscitation procedures" and that on examining the patient herself she found a pulse "only on the carotid artery. Mr Borshov told me that nurse Alexander Semenov looked scared when he and his colleagues had tried to interview him about the circumstances of Mr Magnitsky's death.

140. The official prison medical record states that Mr Magnitsky was still alive at 9.15 when Dr. Kornilov and his assistant Mr Morozov arrived at cell no. 4. The records describe Mr Magnitsky as "sitting on the cot", "sweating and experiencing difficulty breathing" and note that "during the examination performed by the psychiatrist", Mr Magnitsky's condition "suddenly and sharply worsened, and the patient lost consciousness". By contrast, Dr. Kornilov himself testified that when he came to the cell just before, at 9.15 pm, there was "no pulse, no heart beating, no breath, and no arterial tension". Whilst Dr. Kornilov stated that he had reported the fact that the patient had died before the arrival of the first-aid team to the two medical officers of the detention centre who were present, this was not mentioned by Drs. Gaus and Nafikov. These astonishing contradictions between the witness testimonies and official records about the time of death have still not been investigated, let alone resolved.

141. What about the cause of death? Natalia Magnitskaya is convinced that the prison staff deliberately killed her son. She bases herself on the evidence of the use of rubber batons against her son (see above para. 132), who had clearly been in a critical medical condition even before, and the fact that he was left without medical attention for the last hours before his death, whilst the civilian emergency team was kept waiting outside. In the morning of 17 November 2009, Mr Magnitsky's lawyers were informed by MT staff that their client had died from pancreonecrosis, rupture of the abdominal membrane and toxic shock. On the same day at noon, the spokesperson of the Interior Ministry, Ms Irina Dudukina, stated that the cause of death was heart failure and that there were no signs of violent death.<sup>107</sup>

142. The official death certificate ("act of death") of 16 November 2009 prepared on the day of Mr Magnitsky's death signed by Dr. Gaus, Major Markov and Captain Pluzhnikov and bearing an official stamp includes as one of the (possible) causes of death, in addition to "heart failure", a "closed craniocerebral injury". A copy of this document in its original form was obtained by the Public Oversight Committee, Mr Borshov. But it was later amended, for unexplained and uninvestigated reasons, as shown by documents made available by Ms Magnitskaya's lawyers. Whilst the date, the layout and the signatures remained unchanged, the (abridged) reference to the "closed craniocerebral injury" (which had appeared at the end of a paragraph) disappeared.<sup>108</sup>

143. When I raised this apparent manipulation with the representatives of the Investigative Committee, during my second visit to Moscow, I was told that the document had been referred to out of context and was legally irrelevant, because Dr. Gaus was not qualified to make an assessment of the causes of death. The causes of death could only be determined by a proper autopsy, which had been done by highly qualified experts subsequently. When I asked why the document, if it was legally irrelevant, was nevertheless altered in such an unusual way, I was not given any meaningful reply. Mr Borshov commented that the possibility of a head injury indicated in the original version of the "act of death" should at the very least been investigated and commented on during the official autopsy.

<sup>104</sup> According to Mr Borshov, who also told us about his initial difficulties in being put in contact with Dr. Kornilov, for whom he expressed high esteem.

<sup>105</sup> Quotations from the First Medical Commission Report (No. 40-10) of 12 May 2010, made available by Natalia Magnitskaya's lawyers.

<sup>106</sup> D. F. Markov, Record of Interrogation, 19 January 2010 (made available by Natalia Magnitskaya's lawyers).

<sup>107</sup> See <http://ria.ru/incidents/20091117/194205926.html#ixzz2TTDwizZv>;

<http://new-region-2.livejournal.com/48309756.html>.

<sup>108</sup> I obtained copies of both versions (in Russian and with a translation into English).

### 2.3.3. Reactions and judicial proceedings following Mr Magnitsky's death

144. At the end of November 2009, then Russian President Dmitry Medvedev ordered prosecutors and the Ministry of Justice to investigate the death of Sergei Magnitsky.

145. However, the initial reaction of the Russian authorities was to downplay wrongdoings. The Head of the Investigative Committee of the Ministry of the Interior, Mr Aleksey Anichin, at a press conference on 23 December 2009, even described Mr Magnitsky as "guilty" of committing the crimes he was taken to prison for. The Minister of Justice, Alexander Kononov, whilst admitting serious problems in pre-trial detention facilities, said that more evidence was needed to show that Mr Magnitsky had not received adequate medical care. In the opinion of the head of the Moscow Investigative Committee, Anatoly Bagmet, there was no justification for starting a criminal case against officials<sup>109</sup>. By contrast, the Chairperson of the Moscow Helsinki Group, Ms Lyudmila Alekseyeva<sup>110</sup>, and Human Rights activists from several countries appealed to President Medvedev to push for criminal proceedings against the suspects, following an independent investigation carried out by the Moscow Public Oversight Commission chaired by Mr Valery Borshch<sup>111</sup>.

146. Bill Browder's campaign also established a list ("Magnitsky list") of persons suspected of wrongdoings in this context and is lobbying for these persons to be subjected to "targeted sanctions" (visa bans, asset freezes).<sup>112</sup> The Russian Foreign Ministry considers such measures as an attempt to pressure investigators and interfere in the internal affairs of another state and that such sanctions would violate the presumption of innocence. President Putin, shortly after his re-election, has even included fighting off such sanctions ("to work actively on preventing unilateral extraterritorial sanctions by the US against Russian legal entities and individuals"<sup>113</sup>) in the list of priority foreign policy objectives for the Russian Federation.

147. In January 2011 the United Nations Special Rapporteur on Torture, Juan E. Mendez, opened an investigation into Mr Magnitsky's treatment and death. However, the Russian Foreign Ministry turned down the request to provide information about the investigation into Mr Magnitsky's death to the UN Human Rights Council.

148. On 6 July 2011, the Presidential Human Rights Council presented a report to President Medvedev finding that Sergei Magnitsky had been mistreated and denied adequate medical care in prison, particularly in the last days and hours of his life. "There is also reason to suppose that his death was provoked by beating", the report added. The Council singled out a number of officials as being at fault for neglect over his death. The President reportedly commented that "[p]eople should not die in prison. If they are ill, they should get out for treatment."<sup>114</sup> The report asserts that "this conflict of interest testifies either to negligence or to a particular interest on the part of those leading the investigation."<sup>115</sup> Another report published in July 2011 by the National Anti-Corruption Committee, chaired by Mr Kyrill Kabanov, reportedly found that there was no way Mr Magnitsky himself could have organised the theft of \$ 230 million.<sup>116</sup>

<sup>109</sup> See BBC news 23 November 2009 (available at: <http://news.bbc.co.uk/2/hi/business/8372894.stm>).

<sup>110</sup> English translation of Ms Alekseyeva's letter to Mr Bastrykin, Chairman of the Investigative Committee in the Russian Prosecutor General's office dated 26 March 2010 available at: <http://www.scribd.com/doc/31987889/Complaint-filed-by-Lyudmila-Alekseyeva-29-Mar-2010>.

<sup>111</sup> See Aldrick, Philip (28 Dec 2009). "Sergei Magnitsky: independent investigation into death of lawyer slams Russia". *Telegraph* (London); English translation of the report available at: <http://lawandorderinrussia.org/2009/report-of-the-public-oversight-commission/>.

<sup>112</sup> The European Parliament, in a resolution adopted on 16 December 2010, calls for 60 officials believed to be connected to Magnitsky's death to be banned from entering the European Union; the Canadian parliament's subcommittee on international human rights adopted a resolution on 30 November 2010 calling for a visa ban and asset freeze (resolution available at: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4848292&Language=E&Mode=1&Parl=40&Ses=3>).

In the United States, Senator Benjamin Cardin introduced the *Justice for Sergei Magnitsky Act* in the US senate with a similar objective; on 29 June 2011, the Dutch Parliament condemned the treatment of Magnitsky and opened the door to sanctions on named individuals involved in his persecution.

<sup>113</sup> See the President's "Executive Order on measures to implement foreign policy" of 7 May 2012, available at: <http://eng.kremlin.ru/acts/3764>.

<sup>114</sup> See BBC News Europe on 5 July 2011, Medvedev: Criminal Acts killed Russian Lawyer Magnitsky (available at: <http://www.bbc.co.uk/news/world-europe-14037362>).

<sup>115</sup> Preliminary Conclusion of the working group on the study of circumstances of Sergey Magnitsky's death, the working group on civic engagement in judicial reform, the working group on citizen participation in prevention of corruption and public safety of the Presidential Human Rights Council, page 1, paragraph 3 (cited from the unofficial English translation attached hereto).

<sup>116</sup> See V. Ruvinsky, Inside Russia, new light shines on Magnitsky case, Russia beyond the Headlines, 11 July 2011, available at: [http://rbth.ru/articles/2011/07/11/inside\\_russia\\_new\\_light\\_shines\\_on\\_magnitsky\\_case\\_13133.html](http://rbth.ru/articles/2011/07/11/inside_russia_new_light_shines_on_magnitsky_case_13133.html).

149. The Presidential Human Rights Council noted that "the officials accused by Sergei Magnitsky of implication in illegal tax refund and involved in the investigation on his case, were not brought to criminal responsibility but promoted afterwards".<sup>117</sup> Following the release of the Human Rights Council's findings, President Medvedev reportedly acknowledged that a crime had been committed in this case. But despite the fact that the Council named specific officials as being responsible for Mr Magnitsky's illegal arrest and torture in detention, no criminal investigation has been opened against the said officials and none of them have been charged. To the contrary, the Russian Interior Ministry formally rejected as inadmissible the Presidential Council's findings.

150. On 13 July 2011, "Physicians for Human Rights", an NGO supporting torture victims, published an independent evaluation of Magnitsky's medical records, calling his ill-treatment in custody "deliberate, calculated and inhumane".<sup>118</sup>

151. On 18 July 2011, the Russian Investigative Committee indicted a prison doctor at Butyrka, Ms Litvinova, and the former deputy head of the prison, Mr Kratov, of negligence leading to the death of Mr Magnitsky.<sup>119</sup>

152. On 30 July 2011, Deputy Prosecutor General Victor Grin ordered the opening of a posthumous criminal case against Sergei Magnitsky.<sup>120</sup> It was assigned to Interior Ministry investigators O. Silchenko and M. Sapunova, who were members of the investigative team on the case against Mr Magnitsky prior to his death.

153. In August and September 2011, Magnitsky's mother and widow were summoned for questioning as witnesses under the posthumous case opened against the deceased. They objected to the reopening of the case and to the psychological pressures exerted upon them by the same officials they believe had tortured Sergei Magnitsky in custody.

154. In September and October 2011, the Interior Ministry refused petitions from relatives to stop Mr. Magnitsky's posthumous prosecution and to remove the investigators from the case who were suspected of being involved in Mr. Magnitsky's ill-treatment and death – refusals that were confirmed by the Prosecutor General's Office in November 2011. In January 2012, the Interior Ministry insisted that the family should either participate in the posthumous prosecution or waive their right to Mr Magnitsky's rehabilitation. In February 2012, Mr. Magnitsky's mother filed new complaints with respect to pressure placed on the family, by the Russian Interior Ministry, in connection with the posthumous prosecution of her son. On 2 March 2012, she also complained to the Presidential Human Rights Council about the intensive pressure and intimidation the family suffered from. In April and May 2012, more appeals by the mother against the posthumous prosecution of Sergei Magnitsky were rejected by Russian courts. On 4 April 2012, Amnesty International supported the mother's appeals.<sup>121</sup>

155. In February 2012, the Moscow City Court refused an appeal from Mr. Magnitsky's mother against the refusal by the Russian Investigative Committee to investigate mid- and high-ranking officials of different law enforcement bodies for the false arrest, torture and murder of her son.

156. In March 2012, the Investigative Committee appointed a new investigator, Mr Strizhov<sup>122</sup> to continue with investigating an overall case of Mr. Magnitsky's death<sup>123</sup>. But investigator Strizhov has since then refused numerous petitions of the family seeking access to information about the investigation and closed the case in March 2013 for "lack of crime". Between June and October 2012, the Investigative Committee,

<sup>117</sup> See Preliminary Conclusions (note 1 above), page 1, paragraph 2.

<sup>118</sup> Available at: [https://s3.amazonaws.com/PHR\\_Reports/magnitsky-report-july2011.pdf](https://s3.amazonaws.com/PHR_Reports/magnitsky-report-july2011.pdf); on 6 May 2012, Physicians for Human Rights issued another statement on the Magnitsky case, calling the destruction of tissue samples a "deliberate and calculated attempt to prevent justice". (available at: <http://physiciansforhumanrights.org/press/press-releases/destruction-of-samples-in-magnitsky-case-appears-to-be-a-deliberate-and-calculated-attempt-to-prevent-justice.html>).

<sup>119</sup> <http://www.itar-tass.com/en/c142/188404.html>.

<sup>120</sup> Interior Ministry case no. 311578, severed from and then merged again with case no. 153123 and later severed as case no. 679591.

<sup>121</sup> Amnesty International, « Russian Federation: The authorities must stop Sergei Magnitsky's posthumous criminal prosecution and bring to justice all those responsible for his death. », available at:

<http://www.amnesty.org/en/library/asset/EUR46/015/2012/en/e69ba520-0094-41f8-b6c9-7f3530f3c15/eur460152012en.pdf>.

<sup>122</sup> whom we met in Moscow in February 2013.

<sup>123</sup> Investigative Committee case no. 366795.

according to the lawyers, had refused several other petitions to question essential eye witnesses and collect available documentary evidence concerning this case.

157. Also in March 2012, the UN Special Rapporteur on Torture, Mr. Juan E. Mendez, published the results of his review of the case of Sergei Magnitsky, which had been requested by the UK-based NGO "Redress" specialising in accountability for torture victims. Mr. Mendez called the Russian Government's response "unpersuasive" and stressed that Russia had failed to comply with international obligations under the UN Anti-Torture Convention and with the UN Principles on Extralegal and Arbitrary Executions.<sup>124</sup>

158. On 2 April 2012, the Investigative Committee dropped the charges against Dr. Litvinova, one of the two prison employees charged for negligently causing Mr. Magnitsky's death by "improper fulfilment of professional duties".<sup>125</sup> Following legislative changes introduced in early December 2011, the limitation period was reduced to two years. This made the charges brought in December 2011 time-barred.

159. In May 2012, the Investigative Committee opened a criminal case connected to the tax refund of a portion of the equivalent of USD 230 million via the Moscow Tax Office no. 28 in which Mr Magnitsky was posthumously named as a perpetrator of the crime he had exposed. Complaints from the Magnitsky family lawyer against this posthumous accusation were rejected.<sup>126</sup> I was told that in Moscow in February 2013 that the investigations were still ongoing. This case was opened in addition to another case (No 678540) opened on 1 July 2011 by the Russian Interior Ministry by the order of Deputy General Prosecutor Grin to investigate the money laundering in relation to the USD 230 million theft, in which Mr Magnitsky was also posthumously named as an accomplice. Deputy General Prosecutor Grin also issued conclusions exonerating all Interior Ministry officials who were responsible for the proceedings against Mr Magnitsky, finding no violations in their actions. According to the Magnitsky family's lawyers, the General Prosecutor's office refused to disclose his conclusions and their reasons to them.

160. In October 2012, during the trial of Dr. Dmitry Kratov, deputy director of Butyrka prison in charge of medical services, Natalia Magnitskaya (Mr Magnitsky's mother) drew attention in her testimony to the roles of numerous other officials, none of whom had been charged. During the same trial, in November 2012, a witness, former prison official Olga Grigorieva, reportedly stated in court that she had received death threats against her mother and son several weeks before her testimony, that she was told that the case was "ordered" and everything was "decided" and that she should not "talk".

161. In November 2012, the UN Committee against Torture (UNCAT) noted that the case of Sergei Magnitsky was "indicative" of a pattern of intimidation and killings not followed by adequate investigations. In its final observation, the Committee states: "In this regard, although authorities revived a closed criminal investigation into the 2009 death in custody of Mr Sergei Magnitsky following a report of the Moscow POC, only one relatively low-level prison official has been prosecuted in connection with his death to date, despite the fact that the POC report concluded that a number of investigators and penitentiary officials, including the lead investigator in the criminal case against Mr Magnitsky, should have been investigated as well (articles 2 and 11)."<sup>127</sup>

162. Finally, in Moscow, on 28 December 2012, Dr. Dmitri Kratov, the former Deputy Director in charge of medical services at Butyrka Prison, who had been charged with involuntary manslaughter from negligence, was acquitted by the Tverskoy court in Moscow. On 24 December 2012, as the trial neared its end, the prosecutor conducting the trial against Dr. Kratov had suddenly reversed course and sought acquittal. This reversal followed a press conference of the President on 20 December 2012 where he reportedly stated: "Magnitsky died. Died not from torture. He was not tortured. He died from a heart failure."<sup>128</sup>

163. On 27 April 2013, all main TV channels in Russia showed the Minister of Interior, Mr Kolokoltsev, praise officers Karpov, Kuznetsov, Tolchinsky, Silchenko, Vinogradova and Draganov for the good job done on the Magnitsky/Hermitage case and state that they should not be concerned with the fact that their names were on the American "Magnitsky list". On the same day, the Minister of Justice, Mr Konovalov, praised Mr Prokopenko (Head of Matrosskaya Tishina prison) and Mr Komnov (Head of Butyrka prison) for the job well done in relation to Magnitsky.

<sup>124</sup> See Article of the Moscow Times, 28 March 2012, available at: <http://www.themoscowtimes.com/news/article/un-official-slams-russia-on-magnitsky-case/455582.html>.

<sup>125</sup> Investigative Committee case no. 713112.

<sup>126</sup> Investigative Committee case no. 461115 (by separating materials of case no. 344212).

<sup>127</sup> Advance unrevised report available at: <http://www2.ohchr.org/english/bodies/cat/cats49.htm>.

<sup>128</sup> <http://www.echo.msk.ru/blog/echomsk/973316-echo/>.

#### 2.3.4. Global assessment of the causes for Sergei Magnitsky's death

164. In light of the above, it is clear that Sergei Magnitsky's tragic death has many causes, including the health problems caused by the terrible detention conditions and the failure to provide necessary medical treatment, which had become particularly acute on the day of his death, combined with the beatings he suffered on his last evening following his arrival at Matrosskaya Tishina and the subsequent lack of medical attention. Whether the combination of all these factors ultimately caused heart failure and/or potentially lethal head injuries may never be established with certainty. But there is no doubt that some of the causes of Mr. Magnitsky's death were created deliberately, by identifiable persons, others by negligence. The refusal to grant Mr. Magnitsky necessary medical treatment was decided by the investigator in charge of the case for which Mr. Magnitsky was placed under arrest, Mr. Silchenko<sup>129</sup>, precisely at the time at which, according to a previous diagnosis, he should have been given another ultrasound, followed by surgery. Mr Magnitsky had previously given testimony accusing two colleagues of Mr Silchenko of complicity in the crimes he had denounced, and which are now blamed on him. This would be a strong motive for increasing the pressure already denounced by Mr Magnitsky to make him change his testimony. When this pressure did not produce the desired result, did the investigators then decide to silence Mr Magnitsky altogether? What happened in the evening of 16 November 2009 at Matrosskaya Tishina – the seriously sick man was beaten without any valid grounds<sup>130</sup>, and then left without medical or any other attention until he died, all in the presence of such powerful motives for foul play as those described in this report – was this murder, or was it “only” yet another case of the usual brutality against pre-trial detainees with a tragic, but ultimately unintended outcome? In my view, the manipulation of the initial “death act” is a strong indication for an official cover-up. So is the rejection of the two requests for an independent autopsy made by Mr Magnitsky's family on 17 and 19 November 2009, and the testimony I received from one of Mr Magnitsky's lawyers that a member of the Federal Prison Service he had invited to testify in court refused to do so because she had been threatened. I feel that I still do not know all there is to know<sup>131</sup>, and it is in any case not my role to pass judgment on individual persons.

165. But those whose role it was to ensure that judgment be passed have done a dismal job, as I see it. The belated, sluggish, and contradictory investigations led only to indictment of two Butyrka doctors, one of them for negligently failing to diagnose diseases that Mr Magnitsky never actually had, whilst exonerating all others – including all those who were present when Mr Magnitsky died at Matrosskaya Tishina, those responsible for the failure to treat his actual, diagnosed diseases, those responsible for the beatings and for the numerous cover-ups. To top it all up, the proceedings against one of two indicted persons, Ms Litvinova, were terminated due to a newly shortened limitation period, and Mr Kratov was acquitted on 28 December 2012 after a last-minute reversal of the position of the prosecutor's office, against the political background of the angry reaction of the highest Russian authorities to the adoption of the “Magnitsky Act” by the US Congress.

166. This result – complete “impunity of the killers of Sergei Magnitsky”, as it is formulated in the title of the motion underlying this report – is simply unacceptable. The official position, which I heard again at the Prosecutor General's office in May 2013, namely that Mr Magnitsky's death is merely the tragic consequence of his being unable to withstand the normal rigours of detention, is unacceptable. This is true also of the slightly nuanced view I heard at the Investigative Committee, namely that Ms Litvinova was not actually exonerated of the accusation of negligence by the fact that the proceedings were terminated because of the statute of limitation.

167. This result should first and foremost be unacceptable for the Russian people and the Russian State. Sergei Magnitsky had denounced a gigantic robbery whose victim was Russia herself. He died because he refused to give in to the pressure that corrupt mid-level officials had put on him in order to get away with their crimes. Why, then, does the Russian State, and at such a high level, try so hard to cover up this crime? Why do the competent authorities not simply investigate and expose the criminal conspiracy, put the perpetrators behind bars and follow the “money trail” to get the stolen taxes back?

<sup>129</sup> See above para. 120, reply by Mr Silchenko dated 2 September 2009.

<sup>130</sup> See above point 2.3.2.2.

<sup>131</sup> In particular, I would have liked to speak with the prison doctors, guards, the members of the civilian psychiatric emergency team and others whose testimony I could only refer to through written sources and thanks to the information provided by the POC team and Mr Magnitsky's lawyers. I had provided a detailed list of these persons to the Russian authorities already before my first visit in February 2013, and again before my second visit, in May. These meetings never materialised, despite several attempts from my side.



168. I have heard three possible explanations for the strange behaviour of the Russian authorities described throughout this report. I should like to say right from the start that I do not subscribe to any of them, but I presently have no other ideas myself.

169. The first is Mr Browder's fairly simple thesis: in a mafia-style structure, the "boss" – on pain of losing his position at the top – can never allow that his "underlings" are held to account by the Law, for whatever they have done, as long as they remain loyal to him. This also explains in his view President Putin's anger directed at his lobby campaign in favour of targeted sanctions against corrupt officials.

170. The second approach, which I heard from other interlocutors, is somewhat more sophisticated: in this view<sup>132</sup> Russia has a huge "parallel budget", involving massive "black funds" used for stabilising and expanding the elite's power, in Russia and beyond, especially in the territory of the former Soviet Union: power "purchased" in the style of Aldous Huxley's "Brave New World", versus power "enforced" as in George Orwell's "1984". Such a parallel budget needs to be fed. According to my interlocutors, the funding methods include large-scale tax reimbursement frauds (of the sort denounced by Mr Magnitsky), "contributions" of 20-30% collected from bidders obtaining public procurement contracts, payments made by candidates for potentially lucrative posts in the public sector, "off balance sheet contributions" by state-controlled firms (of the sort that Hermitage tried to stop as a minority shareholder), and other methods. Sergei Magnitsky merely had the bad luck to stumble on an operation (the USD 230 million tax reimbursement fraud denounced by him) that was part of this "system", which had previously been threatened by the "Hermitage effect" (i.e. minority shareholder activism denouncing inefficiency and graft).

171. Such an explanation would partly square with the astonishing statement by the outgoing head of the Russia Central Bank,<sup>133</sup> Mr Ignatiev, who said that according to Central Bank records, the equivalent of about USD 49 billion annually were transferred out of Russia illicitly, half of this apparently being the work of one well-organised group. The "money trail" research done by the Novaya Gazeta journalists also confirms that tax reimbursement fraud is very wide-spread – the relatively narrow sample of tax reimbursements they investigated yielded the equivalent of USD 1 billion in fraudulent tax reimbursements.

172. During my meeting with Mr Ignatiev on 21 May 2013, he essentially confirmed what he had said in the above statement, specifying that whilst the companies set up as initiators and final beneficiaries of money laundering operations were frequently changed, the intermediary "way stations" often remained the same over a long time, possibly for fear of the crooks to get lost in their own mazes. Efficient action by the State against such fraud was hampered by the fact that information and competences to act were spread among numerous state bodies, which had difficulties in coordinating their work. Whilst he had never heard of the notion of a "parallel budget" or "black budget", he seemed to agree with me that many Russian civil servants still lack the sense of duty and loyalty towards their State, which they often treated as a mere cash cow.

173. The third possible explanation for the apparent official cover-up of the Magnitsky case is one that I heard in political and diplomatic circles: the Russian leadership is so angry about the interference by Mr. Browder in the internal affairs of their country that they reacted in an irrational, even spiteful way. How else, I was told, could it be explained that the adoption of Russian orphans (mostly handicapped children who have little chance of adoption in Russia) by American families was blocked in retaliation for the "Magnitsky Act"? A well-known Russian human rights defender thought that it would have made a lot more sense for the Russian Duma to pass a "Guantanamo Act" imposing visa bans and account freezes against American officials involved in the human rights violations committed there. But it would appear that orphans and their would-be adoptive parents are still the preferred object of retaliation: I heard from an Irish fellow parliamentarian that Russia had recently dissuaded the Irish parliament from supporting targeted sanctions modelled on the "Magnitsky Act" by threatening to extend the adoption ban also to Irish families. But I was also reminded that the high-level cover-up began right after Mr Magnitsky's death, long before Mr Browder's campaign in favour of sanctions had gained any traction.

<sup>132</sup> Supported by "anecdotal evidence" received off the record.

<sup>133</sup> References to the interview Bloomberg Business week, 20 February 2013, "Russia 2012 illegal outflow was \$ 49 bn, Central Bank says", available at: <http://www.businessweek.com/news/2013-02-20/russia-2012-illegal-outflow-was-49-billion-central-bank-says>; Financial Times 20 February 2013, "Russia's missing billions revealed"; available at: <http://www.ft.com/intl/cms/s/0/cf4fc11e-7b7e-11e2-95b9-00144feabdc0.html#axzz2W74q2XjZ>



### 3. Conclusions

174. As indicated in my introductory memorandum in January, I still see the case of Sergei Magnitsky in the context of the need to fight corruption in the Russian Federation, of which this case would appear to be a particularly impressive and well-documented example.<sup>134</sup> The objective of this report is therefore not only to help shed more light on the fate of Sergei Magnitsky and the responsibilities of different officials in this respect, but also to contribute to a better protection of individuals against lawless behaviour of state officials in future. The Magnitsky case is just one emblematic example of how helpless individual citizens are once they are taken into custody. Many nameless detainees have suffered a similar fate without having had the country's best lawyers and a wealthy hedge fund manager to back them up. It is for the sake of these nameless victims that the international community must not accept the outcome of this case so far. In the interest of the Russian people themselves and of their State, corrupt officials must not be allowed to plunder State property whilst brutally silencing those standing in their way, with impunity.

175. Should we send a strong message in this sense by supporting the call for targeted sanctions against officials suspected of involvement in the crime and its cover-up? The argument put forward by well-known Russian journalists and human rights and anti-corruption activists is interesting: if you really want to interest our corrupt elites in turning Russia into a better place, you must sentence them to 'life in Russia', by preventing them from taking out of the country what they value most: their money and their families.

176. But the publication of a list of "corrupt officials" who would be subjected to visa bans and account freezes runs into considerable practical and legal difficulties: it would be necessary to establish a fair procedure, implemented by an independent, quasi-judicial body giving suspected persons a fair chance to defend themselves. The Parliamentary Assembly has recently found that the procedure in force at the UN Security Council's sanctions committee entrusted with establishing an "anti-terrorism black list" does not fulfil minimum standards of procedural fairness. The European Court of Justice in Luxembourg censured the Council of the European Union for similar violations<sup>135</sup>. If we were to propose similar "targeted sanctions against individuals, we would have to do better than that. To make a concrete proposal in this respect would, in my view, exceed the scope of this report. I would therefore propose that we limit ourselves to a more general appeal to member states to carefully consider putting into place what I would call "intelligent sanctions", taking into account different possible approaches, including informal ones such as that apparently followed by the United Kingdom<sup>136</sup>.

177. The preliminary draft resolution also spells out clearly the areas in which investigations are still lacking and should therefore be undertaken urgently, as a matter of the "duty to investigate" postulated by the case law of the European Court of Human Rights in the presence of allegations of unlawful killings and torture.<sup>137</sup>

178. I should like to finish on a positive note: the vigorous reaction by Russian public opinion<sup>138</sup> and civil society, and especially the professional and fearless work of the Public Oversight Committee (POC) headed by Mr Valery Borshov, strongly supported by the Presidential Human Rights Council, are as many reasons for hope. The robust public mandate and independence of the POC, following a UK model, is an achievement that Russia can be proud of. Clearly, the outcome, to date, of the Magnitsky case, is not.

179. I therefore call on the Committee and the Assembly to send a clear signal to the Russian authorities that the cover-up must be reversed and the true culprits must be held to account, by supporting the draft resolution preceding this report.

<sup>134</sup> See U.S. State Department Country Reports on Human Rights Practices for 2011 (available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>) (published in May 2012); the report on Russia states in its Section 4 on Official Corruption and Government Transparency: "Corruption was widespread throughout the executive, legislative, and judicial branches at all levels of government. [...] When whistleblowers complained about official corruption, sometimes the same government official who was the subject of the complaint was asked to investigate, which often led to retaliation against the whistleblower, generally in the form of criminal prosecution. A prominent example is that of Sergey Magnitskiy, who was prosecuted by the same Internal Affairs Ministry officers he implicated in the theft of five billion rubles [...] through a fraudulent tax rebate scheme."

<sup>135</sup> See Resolution 1597 and Recommendation 1824 (2011) and report by Dick Marty (Switzerland/ALDE) on "UN Security Council and EU blacklists", doc. no. 11454 (2011), available at: <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=11749&Language=EN>

<sup>136</sup> The UK's policy is to deny visas of entry to any persons suspected of having committed serious crimes and/or human rights violations. But the authorities have so far refrained from publishing a list of such persons.

<sup>137</sup> As the Assembly did in its report on the Gongadze case in Ukraine (Resolution 1645 (2008), doc. No. 11686 (note 6 above), Rapporteur: Sabine Leutheusser-Schnarrenberger (Germany/ALDE).

<sup>138</sup> Reportedly, more than 3 500 articles appeared in the Russian press between 22 November 2009 and 22 November 2011 alone.