



The National Authority for Prosecution of Organised and Other Serious Crime
Att: Siri Frigaard, Regional Director
Postboks 8044 Dep,
0030 Oslo, Norway
Fax: + 47 23174210
Email: siri.frigaard@statsadvokatene.no

Oslo, 23 April 2014

Application for opening a criminal investigation of Russian Interior Ministry Officer Oleg Silchenko et. al.

The Norwegian Helsinki Committee (NHC) hereby requests that Norway's Prosecutorial Services open a criminal investigation into Russian citizen Oleg Silchenko for his role in the torture and killing of Russian tax lawyer Sergei Magnitsky in 2009. In addition, NHC requests investigations of the role of others, including Dmitry Markov and Oleg Kuznetsov, in the torture and killing of Sergei Magnitsky.

We propose that this investigation should be opened on the basis that Silchenko intentionally inflicted severe pain and suffering upon Sergei Magnitsky as defined under the Norwegian Penal Code (LOV 2005-05-20 nr 28, Sections 174 and 175) and the 1994 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The investigation should be conducted in order for Norway to establish a preparedness to further investigate and prosecute the persons in case they enter Norwegian territory or otherwise appear within the reach of Norway's jurisdiction.

There are several reasons why investigating the case should be prioritised.

Firstly, the torture and killing of Sergei Magnitsky was a crime of an extremely heinous character and it has gained a high profile internationally.

Secondly, the crimes committed against Magnitsky are, for a case of conceived torture, unusually well-documented.

Thirdly, The Magnitsky case is emblematic in that it represents an example of a wider problem of widespread corruption, torture and lack of justice in Russia.

Fourthly, Norway has applicable legislation, and Norway has a direct interest in promoting accountability for human rights violations in a neighbouring country of great importance to Norway. International law poses no legal impediment for Norwegian authorities to open an investigation into the case.

Fifthly, Norwegian authorities have strongly advocated principles of accountability for gross violations of human rights internationally and domestically. The likely consequence of opening such investigations would be both to send a strong signal that torture and other gross violations of human rights in Russia are crimes of international concern, and that Norway does not accept impunity for such grave abuses.

Sixthly, the opening of a criminal investigation would be of great international legal and political importance and an important support for the Justice for Sergei Magnitsky Campaign. It would be of outmost importance in the wider fight against impunity for the torture and killing of Sergei Magnitsky as well as for similar cases taking place in Russia or other countries.

With regard to the documented torture and the legal basis for Norwegian authorities to open a preliminary investigation into the case, the following can be noted. Norway and Russia are both state parties to the Convention against Torture; a global treaty for combating impunity for torture, and other cruel, inhuman or degrading treatment or punishment.

The purpose of the Convention has been described as “to set up a comprehensive scheme with the aim ultimately to end torture around the world through a broad range of measures including prohibitions in criminal law, strong principles of criminal responsibility, the elimination of certain defenses, regulations for security forces, training, duties to investigate and prosecute regardless of where the torture was committed, exclusion of statements obtained through torture, and procedures supplementing criminal proceedings to enable victims and their families to obtain civil reparations from those responsible for torture regardless where it was committed”¹

¹ Christopher Keith Hall, “The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad”, *The European Journal of International Law* Vol. 18 no. 5, pages 921-922. Available at: <http://www.ejil.org/pdfs/18/5/246.pdf>

In terms of the arrangement of provisions on universal jurisdiction and duty to prosecute in Articles 5 and 7, the Convention obliges parties to take effective measures to prevent any act of torture under their jurisdiction and to ensure that torture is an extraditable offense.² It could also be noted that the Convention's provision on universal jurisdiction, generally is considered as part of customary international law, as a facultative rule.

In this case the torture and killing took place on Russian territory, was performed by Russian state officials towards a Russian citizen, and none of the alleged torturers are present on Norwegian territory (or flagship or aircraft). However, there is no impediment in international law for Norwegian authorities to open a preliminary investigation into the case in order to be prepared for the extraditing or prosecution (as stated in Articles 5 (3) and 7 of the Convention, of the alleged offenders if they would appear on Norwegian territory or within the reach of Norway's jurisdiction in the future.

On the basis of the above and given strong international interest in achieving justice in this case, we ask for the National Authority for Prosecution of Organised and Other Serious Crime to open a criminal investigation in relation to Mr Silchenko and others (including Mr Markov, Mr Kuznetsov) involved in Mr Magnitsky's torture and unlawful killing.

Those who tortured and killed Sergei Magnitsky must not go with impunity.

Background on the case

Sergei Magnitsky was a 37-year-old Russian tax lawyer, employed by the British investment company Hermitage Capitals' office in Moscow, who discovered a tax fraud of historical proportions against the Russian state. When he testified against officials at the Interior Ministry, he was however himself arrested, imprisoned, tortured and killed.

The case started in 2007 when the police carried through a raid at the Hermitage Capitals' office in Moscow, bailing the company of its computers and company documents without legal permission and refusing to let any attorneys attend.

For quite some time it was unclear to Hermitage Capital why the police was carrying off the documents. However, after extensive research Sergei Magnitsky discovered that the documents were used by people at the Interior Ministry to re-register the ownership of

² Also a range of other human rights instruments prohibits torture in all circumstances, including the 1966 International Covenant on Civil and Political rights and the 1950 European Convention on Human Rights.

companies to a person convicted of murder (Viktor Markelov), and apparently acting as goalkeeper for criminal government officials.

The purpose of the operation proved to be to defraud the Russian government of \$ 230 million in already paid taxes. The fraud worked through the companies' "new owners". In late 2007 corrupt officials at the tax authorities decided to return the \$ 230 million of paid taxes to those who had stolen the companies.

On 7 October 2008, Sergei Magnitsky testified about the matter before the Russian State Investigative Committee. He gave a detailed description of what had happened and which government officials were involved. But, instead of bringing the officials to justice, the Interior Ministry let the accused officials investigate the tax theft. A few weeks later, on 24 November 2008, Magnitsky was arrested in his home at the behest of those he accused.

What followed was a year of physical and mental degradation, and increasing suffering in appalling conditions in overcrowded cells. Magnitsky succeeded in documenting the time in captivity in detailed notes, letters and reports. He described 14 people sleeping in shifts in a room with eight beds, the lights were on around the clock, and chilly winds were sweeping in because the windows were permanently open. The food was often rotten and cold and taken at the toilet space.

Magnitsky was during imprisonment repeatedly pressed to plead guilty to tax fraud himself, but refused. After six months in prison, he had lost nearly 10 kg and started to become seriously ill, with severe abdominal pain. Doctors who were examining him noted gallstones and chronically inflamed pancreas and gall bladder. Although Magnitsky was promised ultrasound and surgery, he was moved to the notorious Butyrka prison which has no proper medical care. The pain was increasing and he and his attorney asked 20 times in writing to get urgent care. Documents were sent to all relevant instances, but each time the request was refused or simply ignored.

A few months later the officers of the jail pretended that they acknowledged that Magnitsky did need medical care. However, on 16 November 2009, when he arrived at a new institution with proper medical services, he did not get the promised medical attention. Instead, he was placed in solitary confinement by a group of guards, who locked him handcuffed to a bed and beat him to death with rubber batons. The doctors outside the room waited for over an hour. When they finally were permitted to enter, they found Magnitsky's dead body crouched in a corner of the room on the floor in a pool of urine, with fully visible traces of beatings all over the body.

The torture and mistreatment in prison that led to Magnitsky's death are documented by a Council of Europe Rapporteur, Andreas Gross,³ by the Russian Presidential Council for Civil Society and Human Rights in the Russian Federation, and by William Browder, owner of the London-based Hermitage Capital.⁴ The US so-called Magnitsky Act and Magnitsky list is also based on extensive documentation of the torture and killing of Magnitsky.⁵

There are, moreover, strong reasons to believe that those responsible for the fraud, the arrest, and the mistreatment of Magnitsky enriched themselves and their families with the \$ 230 million stolen from the Russian State.

No person in a leading role has yet been held accountable in the case, despite the fact that former President Dmitry Medvedev admitted that "certain crimes" were committed. The extensive documentation available has so far not convinced Russian authorities to review the case. On the contrary, documents and facts have been falsified, the family has been denied an independent autopsy of the body, and a criminal investigation of the repeated denials of Magnitsky's desperate calls for medical treatment has been dismissed.

When the Magnitsky case began to constitute a problem for Russian authorities, the prosecutor's office decided to counter attack. The prosecutor initiated a new criminal prosecution against the deceased Magnitsky; calling his widow and mother to questioning. This was enacted by government officials whom, according to Browder's documentation, themselves became multi-millionaires by the tax fraud and thereafter promoted.

A popular message after the 1990s chaos and predatory capitalism in Russia was that law and order now prevailed. Sergei Magnitsky was too young to have his own experience of the communist years. He believed in the law of the new Russia and had the courage to stand up to corruption. He thought that Putin's regime would punish those who stole from the common people.

For this, Magnitsky was instead himself tortured and killed.

There have been parliamentary initiatives in a number of countries, among them the United States, the Netherlands and Sweden, to call for accountability for those responsible and

³ Andreas Gross, "Refusing impunity for the killers of Sergei Magnitsky", available at: http://www.assembly.coe.int/Communication/ajdoc24_2013.pdf

⁴ See campaign website for documentation, <http://russian-untouchables.com/eng/>

⁵ <https://www.govtrack.us/congress/bills/112/hr6156>. 16 of 18 names on the current Magnitsky list were involved in Magnitsky case, http://thecable.foreignpolicy.com/posts/2013/04/12/us_government_releases_magnitsky_list

prevent their opportunities to travel abroad and send capital across borders. Legislative work primarily in the U.S. Senate (related to the Magnitsky Act) may be of great importance also in other similar cases.

The Parliamentary Assembly of the Council of Europe voted on 28 January 2014 with 81 % in favor of U.S. like Magnitsky Sanctions if Russian authorities continue to enjoy impunity.⁶

Norwegian prosecutorial services engaging in investigations in this case will add significantly to these efforts to fight impunity for those who killed Magnitsky, and in the wider fight against impunity for torture and other gross violations of human rights.

The case against Oleg Silchenko and the others mentioned in this letter is supported by extensive evidence; a summary of which is to be found in appendices to this letter.

The Norwegian Helsinki Committee will be happy to follow-up with providing further documentary evidence if requested.

Sincerely yours,

Bjørn Engesland
Secretary General

⁶ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20409&lang=en>;
<http://www.assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=20345&lang=EN>

Appendix 1: Summary of evidence

I. Chronology (excerpts)

- 4 June 2007: Police raiding Hermitage Capitals' office in Moscow, confiscating documents and Computers;
- 3 December 2007: Hermitage lawyers using the information discovered by Sergei Magnitsky, acting on behalf of the trustee of Hermitage Fund, HSBC, filed three 255-page criminal complaints with Russian General Prosecutor Chaika, head of the Investigative Committee of the Prosecutor's Office Bastrykin, and head of the Internal Affairs Department of Interior Ministry Draguntsov requesting to open a criminal investigation into the misappropriation of Hermitage Fund companies and detailing the role of Lt Col Kuznetsov and Major Karpov in seizing the corporate documents and enabling the theft of the companies;
- 24 December 2007: Corrupt officials at the tax authorities decided to return the \$ 230 million of paid taxes to those who had stolen Hermitage Capital's companies;
- 5 June 2008 and 7 October 2008: Magnitsky testified about the matter before the Russian State Investigative Committee;
- 24 November 2008: Magnitsky was arrested in his home. Silchenko asked for court decisions on extension of pre-trial detention on 26 November 2008 and 19 January, 13 March, 15 June, 14 September and 12 November 2009. Every time the court decided in favour of extension;
- 24, 25 November 2008: Magnitsky is questioned by Silchenko. In addition he was questioned on 14 October 2009 by investigator Gritsai. Magnitsky signed a written protocol in front of Gritsai on this date; confirming the evidence he had presented. There were several attempts to pressure Magnitsky to testify without a lawyer present or in breach of other rules of procedure, such as on 24 February, 20 May, 22 May, 27 August, 17 September, and 7 October 2009. Magnitsky refused to give evidence in these circumstances, referring to his rights being violated. There is no record of any other questioning;
- 21 February 2009: Magnitsky was transferred from Matrosskaya Tishina detention centre to a temporary holding facility in Moscow at a time when Silchenko knew that Magnitsky's lawyers would be away from Moscow;
- 3 March 2009: Magnitsky is transferred back to Matrosskaya Tishina detention centre;
- 6 March 2009: Magnitsky and his lawyers filed complaints about Oleg Silchenko's order to secretly transfer Magnitsky from a pre-trial detention centre to a temporary detention facility with appalling facilities;
- 30 June 2009: Magnitsky requested that Silchenko recues himself from his role as Chief Investigator;
- 1 July 2009: Magnitsky is diagnosed to be seriously ill, suffering from pancreatitis and

Cholecystitis;

- 3 July 2009: The Tverskoi District Court upheld Silchenko's forced isolation of Magnitsky from his family, and rejected Magnitsky's lawyers' complaint against the numerous undisclosed transfers among cells and detention centres;
- 25 July 2009: Magnitsky is transferred to Butyrka detention centre; a maximum security detention centre. No medical service is available here, and planned surgery and medical treatment has to be cancelled;
- 11 September 2009: Magnitsky sends a letter to Silchenko, complaining of exertion of "physical and psychological pressure" on him to in order to force him to testify against Bill Browder;
- 15 September 2009: Magnitsky requested a review in court of his complaints about the deprivation of medical care in the presence of Silchenko;
- 12 October 2009: The Tverskoi District Court rejects a complaint from Magnitsky regarding the continued denial of contact with his family;
- 14 October 2009: Magnitsky made a formal statement to the investigation about the inhuman and degrading conditions he is subject to. On this date he is questioned by investigator Gritsai;
- 11 November 2009: Magnitsky made a formal complaint to Oleg Silchenko about fabrication of evidence. He also wrote a statement for the 12 November 2009 court hearing naming Silchenko as responsible for his persecution in conspiracy with other police officials, and explained their motivation;
- 12 November 2009: Magnitsky made a statement in court, raising issues of violations of Article 3 of the European Convention on Human Rights;
- 13 November 2009: Magnitsky made an application for medical help;
- 16 November 2009: Magnitsky transferred back to Matrosskaya Tishina detention centre;
- 16 November 2009: Magnitsky is beaten to death upon arrival, while doctors are waiting outside the cell to provide medical help.

II. Petitions, complaints and letters by Magnitsky and his lawyers; other documents showing the role of Silchenko

Magnitsky sent a series of petitions, complaints, testimonies and letters while in custody. Copies and in some cases originals have been kept by his lawyers. These documents testify to his increasing pain and suffering and the intentional infliction of pain and suffering by Oleg Silchenko and other investigators, in conjunction with detention centre officials, to break his will and force him to change his testimonies.

In his own words, Magnitsky repeatedly identified Oleg Silchenko as the individual responsible for his suffering. On 6 March 2009, Magnitsky and his lawyers filed complaints about Silchenko's order to

secretly transfer Magnitsky from a pre-trial detention centre to a temporary detention facility with appalling facilities. On 30 June 2009, he requested that Silchenko recues himself from his role as Chief Investigator, on the ground of his demonstrable bias and lack of impartiality, citing evidence of the falsification of evidence against him to organise his arrest and detention.

A letter of 11 September 2009, addressed to the Oleg Silchenko, complains on the first page of the exertion of “physical and psychological pressure” in order to suppress his will and force him to testify against Bill Browder. It states that “investigators” [Silchenko himself and other investigators who worked for him on the Magnitsky case] have done this to Magnitsky. He complains of the unbearable and cruel conditions extraordinarily created for him in detention (including numerous transfers), and his continuing prosecution by Silchenko, despite Silchenko’s knowledge of Magnitsky’s innocence. He states: “I have never come across a single example when a detainee during nine months of his detention in custody has been moved between three pre-trial detention centers and transferred between an infinite numbers of cells.”

On 15 September 2009, Magnitsky requested a review in court of his complaints about the deprivation of medical care in the presence of Silchenko. The court refused to consider this request, deeming it irrelevant to the question of the prolongation of his detention.

On 14 October 2009, Magnitsky made a formal statement to the investigation, stating: “I believe that with the involvement of Investigator Silchenko or with his tacit consent the inhuman and degrading conditions were created for me in the pre-trial detention ward.” Of course, it is the factual basis for this belief which is evidence against Silchenko, as opposed to the belief itself.

On 11 November 2009, Magnitsky made a formal complaint to Oleg Silchenko about fabrication of evidence. He also wrote a statement for the 12 November 2009 court hearing naming Silchenko as responsible for his persecution in conspiracy with other police officials, and explained their motivation. On 12 November 2009, Magnitsky made a statement in court. He raised issues of violations of Article 3 of the European Convention on Human Rights. He had been chained by one hand to a radiator earlier in the day. At this hearing, the Judge made an order extending the period of detention from 15 November 2009 to 26 November 2009.

On 13 November 2009, Magnitsky made an application for medical help. This was not provided, and he died on 16 November 2009. On 16 November 2009, the day on which he was deliberately left to die in agony whilst doctors were refused access to him, Silchenko himself refused Magnitsky’s lawyers access to his medical file and any information about his state of health.

Russian court judgments

The Tverskoi District Court consistently enabled Silchenko to continue persecuting and torturing Magnitsky in detention. On 3 July 2009, the Tverskoi District Court upheld Silchenko’s forced isolation of Magnitsky from his family, and rejected Magnitsky’s lawyers’ complaint against the numerous undisclosed transfers among cells and detention centres. On 12 October 2009, the same court rejected another complaint from Magnitsky regarding the continued denial of family visits and Silchenko’s refusal to even permit Magnitsky to speak on the phone with his two young children. Throughout Magnitsky’s detention, the Tverskoi District Court routinely granted Silchenko his requested extensions in Magnitsky’s period of detention, prolonging the torture.

Oleg Silchenko's documented record of torture

Due to his status as a senior law enforcement officer in Russia, Oleg Silchenko has left a significant documentary record of his torture of Sergei Magnitsky. He arranged for the arrest and detention of Magnitsky on the palpably false pretext that Magnitsky was planning to flee the country, and, in particular, that he had applied for a UK visa. The UK Embassy in Moscow has confirmed that this was not the case.

Silchenko repeatedly rejected Magnitsky's requests for the most basic family visits without any justifiable ground. He routinely denied Magnitsky the ability to prepare his legal defence. This included numerous transfers, often at night, thereby inflicting degrading treatment upon Magnitsky.

After Magnitsky's 1 July 2009 diagnosis of pancreatitis and cholecystitis and the prescription for a subsequent ultrasound, Silchenko arranged for Magnitsky's transfer to a detention centre (Butyrka) that lacked an ultrasound machine and necessary medical facilities. Silchenko repeatedly rejected Magnitsky's subsequent requests for treatment until his death on 16 November 2009. All the statements and conduct referred to above clearly amount, in law, to acts and declarations in furtherance of the torture and the conspiracy to torture.

Medical records

Medical certificates from detention centres, some of which are available, make clear that from 1 July 2009 Magnitsky was seriously ill and known to be so by those responsible for his welfare. This includes Oleg Silchenko. The failure to act, in the face of the clear need for urgent medical treatment in order to prevent unbearable suffering and his imminent death, amounts to evidence of a conspiracy to torture Magnitsky by those responsible for his welfare.

Silchenko, having responsibility for permitting or withholding medical treatment, can be demonstrated to be one of the conspirators. Taken together with the remainder of Silchenko's conduct from the first application for a remand in custody to Sergei Magnitsky's death, such an inference is irrefutable.

Evidence taken from Magnitsky's funeral shows the trauma he endured during final days in detention. Significant bruising on his hands is unmistakable in photographs taken by those in attendance.

Statement from Chairman of Oversight Commission

A statement from the Chairman of the Oversight Commission, Mr Valery Borschev, who had sight of all relevant documents and whose Commission continues to have the right of access to documents, provides eye witness evidence of both contemporaneous documentation and of the appalling conditions in which Magnitsky was held.

Report on role of senior investigator in Russian legal system

A report by Jamison Firestone on the role and powers of the Senior Investigator shows that Silchenko was a person whose official position and actions make him directly responsible for the torture inflicted upon Magnitsky. The roles and powers of Senior Investigators are well-known public facts.

III. Detention of Magnitsky

Magnitsky was detained in a number of pre-trial detention centres from 24 November 2008 until his death on 16 November 2009. The orders for his detention and arrest were issued by Silchenko. As with other such orders, these amount in law to acts and declarations in furtherance of the alleged offences. It can be demonstrated that Magnitsky's arrest was undertaken in retaliation for testimony he gave on 5 June and on 7 October 2008 about the possible involvement of two Interior Ministry Officers, Lt Col Artem Kuznetsov and Major Pavel Karpov, in the theft of 5.4 billion roubles, organized by way of an illegal tax refund. The taxes had been paid by the Hermitage Fund, which Magnitsky's firm represented. Magnitsky was charged with a tax crime under Article 199 of the Russian Criminal Code, a charge which carries a maximum penalty of six years imprisonment.

Article 109 Para 1 of the Russian Criminal Procedural Code sets the maximum period of detention without trial at 2 months. Even for grave crimes (defined *inter alia* as crimes carrying a maximum penalty over 5 years), release is mandatory after 12 months (Article 109 Para 2). Extension to 18 months is allowed in a case such as this only if time is needed to view pre-trial investigative documents (Article 109 Paras 3, 8, 10). Article 109 Para 7, a key paragraph on grounds for extending pre-trial detention beyond 12 months in order to be able to view investigative documents, provides for how the investigator may apply for extension.

Role and powers of Oleg Silchenko

Lt Col Silchenko was the Senior Investigator in this case. The evidence shows that the Senior Investigator has wide-ranging powers within the Russian legal system. In particular:

- (i) Lt Col Silchenko had the power to seek the summons for Magnitsky's arrest and to seek extensions of the periods of detention (which he did on 19 January, 13 March, 15 June, 14 September and 12 November 2009);
- (ii) Silchenko's consent was required for Magnitsky to have telephone and personal access to his family: Articles 17 and 18 Russian Federation Law No. 103 on Keeping in Custody Suspect and Accused of Committing Crimes;
- (iii) Silchenko had the power to make a decision to transfer Magnitsky to a temporary detention centre: Article 13 Russian Federation Law No. 103 on Keeping in Custody Suspect and Accused of Committing Crimes;
- (iv) Silchenko had the power to intervene to require medical treatment for a detainee, and a duty to do so: See Article 24 Russian Federation Law No. 103 on Keeping in Custody Suspect Accused of Committing Crimes.

No logical reason has been provided as to why Silchenko did not carry out his duties in relation to Mr Magnitsky.

Pain and suffering

There is the clearest possible evidence to demonstrate that during his detention, Magnitsky endured physical and mental pain and suffering within the meaning of Sections 174 and 175 of the Norwegian Penal Code (LOV 2005-05-20 NR 28), and Article 96 of the Norwegian Constitution.

Some of the most important evidence comes from letters written by Magnitsky himself. He was a particularly meticulous lawyer with a strong belief in the rule of law. This is a relevant characteristic for the purposes of assessing the effect that this treatment had upon him. The following treatment was made worse by the fact that it was imposed in order to exert pressure on the lawyer representing clients in a politically-motivated prosecution.

The treatment complained of comprises the following actions:

1. Subjection to arrest on grounds which were false and known to be so by Silchenko and by Magnitsky;
2. Pre-trial detention on grounds which were false and known to be so by Silchenko and by Magnitsky;
3. Numerous failures to afford Magnitsky procedural rights;
4. Detention and transfers between detention centres without any purported justification, as a means of exerting pressure on Magnitsky;
5. Sleep deprivation;
6. Handcuffing without justification;
7. Denial of contact with his family by Silchenko as an obvious and direct means of inflicting mental suffering. From the start of his detention until his death, Magnitsky was refused meetings with his mother without any rational grounds. From the beginning of his detention until two weeks before his death, he was refused meetings with his wife. For the entire period of his detention, he was refused telephone contact with his minor children. These groundless refusals clearly demonstrate Silchenko's systematic cruelty towards Sergei Magnitsky throughout the time of his increasingly tortuous detention;
8. Denial of medical treatment for pancreatitis and cholecystitis at Butyrka detention centre, where Magnitsky was transferred on 25 July 2009, until his death on 16 November. Magnitsky had been diagnosed with these painful illnesses on 1 July 2009. Silchenko knew that medical treatment was prescribed by doctors and had been refused by detention centre officials. On 16 November 2009, for one hour and 18 minutes before his death, Magnitsky was kept without medical care or supervision in a cell, while doctors waiting outside the cell to administer urgent treatment were prevented from seeing him. The pain and suffering in the months prior to Magnitsky's death are both medically identifiable and are described by Magnitsky himself in letters, in which he refers to the mental and physical torture he was subjected akin to being put through a meat grinder.

Intentional infliction through Silchenko's acts, omissions or conspiracy

Silchenko's intentional infliction, alone or in conspiracy with others, can be inferred through the following evidence:

1. Involvement prior to charge with persons accused by Magnitsky and continued involvement with them;

2. Pre-trial detention for a period (one year) out of all proportion to the maximum penalty (6 years) for the offence with which Magnitsky was charged;
3. A failure to progress the purported reason for detention through interrogation or investigation:
 - a. Magnitsky was questioned on 24 and 25 November 2008, following his arrest, by Silchenko and then, almost 11 months later, on 14 October 2009 by investigator Gritsai. There is no record of any other questioning. This fact was relied upon in appeals by Magnitsky's lawyers against his continued detention and transfers for the ostensible purpose of questioning;
 - b. The maximum period for pre-trial detention in a case such as this is 12 months (with an extension to 18 months available in exceptional cases). Extensions were sought and obtained by Silchenko on 26 November 2008, on 19 January, on 15 June, on 14 September 2009 and on 12 November 2009. Each extension was applied for on grounds which are either palpably false or objectively unsustainable. These applications, therefore, are powerful evidence of Silchenko's intention to torture Sergei Magnitsky. They provide contemporaneous evidence of both *actus reus* and *mens rea*;
4. Bad faith in the exercise of his role as a senior investigator in repeatedly asking for extensions of detention when the reasons given for continued detention do not withstand scrutiny:
 - a. On 25 November 2008, Silchenko made two submissions which he claimed justified Magnitsky's detention. Both are demonstrably false:
 - i. The first submission claimed that Magnitsky had applied for a visa from the UK and was therefore a flight risk. A letter from the UK Embassy subsequently (in March 2009) showed this to be untrue.
 - ii. The second submission claimed that Magnitsky had obstructed the search. In fact, the official record of the search made no reference to obstruction.
 - b. It is important to note that, had Silchenko not told these lies, there would have been no purported justification for Magnitsky to be remanded in custody, thereby providing the means for Silchenko and others to torture him until he died. These are crucial acts and declarations in furtherance of the crimes committed by Silchenko.
 - c. On 13 March 2009, the reason given for the extension of Magnitsky's detention was the supposed need to carry out the same pre-trial investigative actions given as a reason to detain Magnitsky in the first place;
5. Knowledge from an early stage that Magnitsky was suffering psychologically and (at the latest from April 2009) physically;
6. The ability to take steps to end the suffering, for example by providing medical treatment and the application of due process, and the failure to do so;
7. Treatment which was not beneficial but even harmful; i.e. repeated transfers, not only between detention centres but between cells, and worsening conditions in response to applications by Magnitsky. There was no good reason for these transfers. In some cases the transfers occurred at night and caused sleep deprivation. It will be apparent from the evidence that the sole or predominant purpose of these transfers was to exert psychological and physical pressure on Magnitsky. This is the only inference which can be drawn from the timing of such transfers. In particular:
 - a. On 21 February 2009, Magnitsky was transferred from Matrosskaya Tishina detention centre to a temporary holding facility in the same city Moscow at a time when Silchenko knew that Magnitsky's lawyers would be away from Moscow. This transfer was by order of Silchenko on 17 February 2009, and only Silchenko (or a judge) had the authority to order this. Magnitsky was detained in the temporary

facility until 3 March, the last possible day he could have been kept there. This is a centre to which detainees are transferred for the purpose of an initial holding of suspects. Conditions are even worse than in other detention centres. Magnitsky was not officially questioned during his period in the temporary facility about the offence with which he had been charged, but there was an attempt on 24 February 2009 to question him as a witness in a different case – the embezzlement of \$230 million of public funds that he had testified about prior to his arrest, and for which he was neither under arrest or in detention. This was an attempt to place Magnitsky under pressure to implicate himself and others and change his testimonies against police officials;

- b. On 25 July 2009, Magnitsky was transferred from Matrosskaya Tishina to Butyrka, a maximum security detention centre. This was despite the fact that he was due to undergo a second ultrasound and an operation one week later. This transfer had been prescribed as confirmed by V. Stepanov, Head of the Medical Unit, and by D. Vasiliev, Colonel of the Internal Service of Matrosskaya Tishina detention centre. The reason given to the Oversight Commission by Mr Prokopenko, head of Matrosskaya Tishina detention centre, was that the centre needed to carry out renovations and that Silchenko had given his consent for the transfer. However, as the Oversight Commission pointed out, only five people on the relevant floor were transferred (which begs the question of why an ill inmate needed to be among those five individuals), and there was no sign of any renovations at the time of their inspection in November/December 2009. The transfer can only have been made in order to torture Magnitsky. The Oversight Commission concluded that the initiative to transfer him was supported by Silchenko.

IV. Violence before death

On 16 November 2009, the day of Mr Magnitsky's death, Silchenko refused to provide his counsel with information on his medical condition and to disclose his medical diagnosis. Lawyers were not allowed to see Mr Magnitsky on the ground that he could not leave his cell. Yet, he was transferred secretly from lawyers and family, from Butyrka to Matrosskaya Tishina detention centre.

The alleged purpose of this transfer was to urgently hospitalize Mr Magnitsky due to acute pancreatitis and cholecystitis. Yet, upon arrival to Matrosskaya Tishina he was placed in an isolation cell, handcuffed, and beaten with rubber batons. The persons in charge on scene at Matrosskaya Tishina were aid to head of Matrosskaya Tishina Mr Markov and deputy aid Mr Kuznetsov. Doctor on duty Ms Alexandra Gaus left Magnitsky for an hour and eighteen minutes until he was found dead in his cell by two civilian medics.

The postmortem was carried out by an expert with less than one year experience. The requests from Mr Magnitsky's family for an independent postmortem were refused. At the funeral in Moscow held on 20 November 2009, Magnitsky's relatives discovered visible injuries on his hands.

One of the available acts of death compiled by Matrosskaya Tishina staff contains a suspicion of a closed cerebral injury.

The Oversight Commission concluded that prison staff gave contradictory explanations and concealed circumstances of Magnitsky's death.

V. Domestic impunity and public interest in a Norwegian proceeding

The torture of lawyer Sergei Magnitsky has been the subject of a number of reports condemning the conduct of the officials involved, including reports by the US State Department, UK Commonwealth and Foreign Office, Amnesty International, the UK Law Society and others. It has been widely reported in the press, both within and outside Russia. None have resulted in any criminal charges by the Russian State.

The family's request for an independent autopsy, following Magnitsky's death, was denied.

On 28 December 2009, following a six week investigation, the Public Oversight Commission for Human Rights Observance in Moscow Detention Centres issued its report on the Conditions of the Detention of Sergei Magnitsky in the Pre-Trial Detention Centres in the City of Moscow. One of its authors will give evidence.

The references to Silchenko at pages 14-15 of the Report by the Public Oversight Commission are of particular importance. What was the position of investigator Silchenko in this matter? In his reply to the request, which was sent to him by the advocates of Sergei Magnitsky in accordance with Article 11 of the Criminal Conduct Code of Russia, requesting that he compel the administration of the pre-trial detention ward to "conduct the ultrasound examination of abdominal section of the suspect – Sergei Magnitsky..." he stated that the request had been considered and that "on August 31, 2009 he issued a full denial to such request ...as the current legislation does not empower an investigator to control the health condition and treatment of a detained suspect."

Taking into account the whole history regarding the ultrasound examination, which had lasted more than three months, Silchenko's statement was purely cynical, demonstrating his failure to comply with Article 11 of the Russian Criminal Procedural Code, which clearly states that: "The courts, the Prosecutor's Office, and the investigator or operating officer must provide all required explanations to a suspected person and/or an accused person, and/or a victim or any other civil claimant or defendant, or any other participants in the criminal court proceeding their lawful rights, responsibilities and provide them with ability to utilize their rights."

In this case, Silchenko did not wish to "provide [Sergei Magnitsky] with ability to utilize [his] rights."

Silchenko also ignored the provisions of Article 122 of the Russian Criminal Procedural Code, which requires an investigator to convey his reply to the suspect. Bodies conducting preliminary investigations are required to provide a copy of their reply or statement to a claimant, or establish a time for the claimant to be acquainted with such reply or statement, in order to provide the claimant with the opportunity to consider the lawfulness of the reply or statement and to have the opportunity to challenge it in the court, in accordance with the current legislation. In Magnitsky's case, Silchenko did not give this to either Magnitsky or his advocates. Therefore, provisions of Articles 7 and 11 of the Criminal Procedural Code were breached by the investigator, further breaching Magnitsky's right to appeal.

The actions of Silchenko demonstrate either extreme negligence or a deliberate intent to conceal the motivation of his refusal to provide a medical examination, which was requested in the appropriate complaint by Magnitsky on August 31, 2009.

On 26 March 2010, the Moscow Helsinki Group, Russia's oldest independent human rights group, issued an application with the Russian State Investigative Committee to open a criminal case against Silchenko and other Interior Ministry Officials for, *inter alia*, the torture in custody of Magnitsky.

On 26 April 2010, Silchenko was included on a list issued by the US Commission for Security and Cooperation in Europe (the Helsinki Commission) of corrupt Russian Officials to whom entry to the United States must be denied.

On 30 June 2010, the Moscow Bar Association filed a petition with General Prosecutor Yuri Chaika to charge Silchenko with fraud and falsification of evidence, and with obstructing the activities of the attorney for the Hermitage Fund.

Since Magnitsky's death, there has been widespread international condemnation of the tortuous treatment of Magnitsky at the hands of the Russian judicial and penal system, and in particular, at the hands of Silchenko, including the references to the case by the UN Rapporteur against Torture and by the UN Committee against Torture. However, the Russian authorities protected Silchenko (and others acting in concert and in conspiracy with him) from any accountability.

On 25 December 2009, President Medvedev and his Justice Minister, Alexander Konovalov, discussed the investigation of Magnitsky's death. In response to President Medvedev's question as to why this had been allowed to happen, Minister Konovalov referred to the "corruption factor" in "investigative judicial practice."

In September 2010, Silchenko was promoted from Major to Lieutenant-Colonel.

In November 2010, Silchenko was awarded "Best Investigator" honour by the Russian Interior Ministry.

In May 2011, Deputy General Prosecutor of Russia concluded that there were no violations of law in the acts of Interior Ministry officers, including Silchenko, who investigated Magnitsky, blocking the possibility for further criminal investigation. The Magnitsky family's applications seeking to reverse this decision was declined on the ground that it did not affect their interests.

On 12 April 2013, Silchenko was sanctioned by the US Government for his role in the Magnitsky case under the Sergei Magnitsky Rule of Law Accountability Act of 2012. Sanctioned persons under this Act are prohibited from visiting and banking in the USA.

On 27 April 2013, two weeks after the U.S. sanctions were imposed; Oleg Silchenko was welcomed by the Russian Interior Minister at a widely televised audience and thanked for a job "well done".

Appendix 2. Legal framework (not exhaustive)

A. International law provisions and practice

The UN Convention against Torture, Article 1(1) provides:

“For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Article 1(1) of the UN Convention against Torture makes it clear that limited pain and suffering does not fall within the scope of the offence:

“[Torture] does not include pain or suffering arising **only from, inherent in or incidental to lawful sanctions.**” [emphasis added]

This is however a very limited exception. It would not apply where pain and suffering exceed the inevitable result of lawful sanctions or where the sanctions themselves are not imposed according to law.

This is consistent with Strasbourg case law. In *Saadi v Italy* (application 37201/06, the Strasbourg Court held at #135:

“135. In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV).”

On the other hand, the prohibition on torture is absolute. In *Saadi v Italy* (application 37201/06), the Strasbourg Court held at #127:

“Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation (see *Ireland v. the United Kingdom*, judgment of 8 January 1978, Series A no. 25, § 163; *Chahal*, cited above, § 79; *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V; *Al-Adsani v. The United Kingdom* [GC], no. 35763/97, § 59, ECHR 2001-XI; and *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 335, ECHR 2005-III). As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct (see *Chahal*, cited above, § 79), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *Indelicato v. Italy*, no. 31143/96, § 30, 18 October 2001, and *Ramirez Sanchez v. France* [GC], no. 59450/00, §§ 115-116, 4 July 2006).”

The Court further held at #134-136:

“134. According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of

health of the victim (see, among other authorities, *Price v. the United Kingdom*, No. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; and *Jalloh v. Germany* [GC], no. 54810/00, § 67, 11 July 2006).”

The Court (sitting as a Grand Chamber) held further in *N v United Kingdom* 26565/05 at #29: “According to the Court’s case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among many other authorities, *Jalloh v. Germany* [GC], No. 54810/00, § 67, ECHR 2006). The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (*Pretty v. The United Kingdom*, 2346/02, § 52, ECHR 2002-III; *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI; *Keenan v. the United Kingdom*, no. 27229/95, § 116, ECHR 2001-III; 9 *Price v. the United Kingdom*, no. 33394/96, § 30, ECHR 2001-VII).”

In this case, the public interest of justice comprise exceptional characteristics that Magnitsky was a legal advisor with a firm commitment to the rule of law who deeply felt that he was acting both morally and in the interests of justice by testifying about Russian police corruption. Further, that he was arrested and persecuted by the very police officers he accused, despite their clear conflict of interest.

Further, that he was well aware of what procedures and rules of law were being breached in order to induce him to comply with his malign interrogators and deprived of any access to legal remedies. Such abuse of the law and systematic perversion of justice by the very officials whose office bound them both to observe and enforce it can be shown in his own writings to have caused him grave psychological suffering.

He was intentionally deprived of all family contact for over 11 months, which caused him severe emotional suffering. He was subjected to extraordinary additional cruelty in detention in the form of numerous unnecessary and carefully chosen and timed transfers between detention centres and cells, often at night, and the deliberate deprivation of sleep, food and drink.

Finally, from July 2009 when suffering from acute pancreatitis and cholecystitis, he was deliberately and callously left untreated for four months, causing his death at the age of 37. All of the above instances of cruelty and suffering can be shown to be the responsibility of Silchenko, both acting alone and with others.

It should be noted that the conditions in the Matrosskaya Tishina Remand centre in which Magnitsky was detained from April 2009 have been found by the Strasbourg Court to be a breach of Article 3: *Vlasov v Russia* Application n78146/01 at #81-85.

The essential point is that the conditions to which Magnitsky was subjected furthered the purpose of Silchenko and in particular at obtaining information or an implication from Magnitsky of himself or others. This is shown in particular by the timings of some of the transfers (to ever worsening conditions) and by the knowledge which Silchenko had of the effects of his actions on Magnitsky.

B. Norwegian law

Prohibition of torture is outlined in Sections 174 and 175 of the Norwegian Penal Code (LOV 2005-05-20 NR 28), which provide the following proscriptions:

174: Torture

Punishments of up to fifteen years imprisonment for public officials who cause another person injury or severe physical or mental pain—

- a) With intent to obtain information or a confession;
- b) With the intent to punish, threaten or coerce any; or
- c) Because of the person's religion or belief, colour, national or ethnic origin, sexual orientation, disability or gender.

The public official is defined in this provision as anyone

- a) In state or local government service; or
- b) Engaged by the state or municipality to perform service or work.

Also regarded as torture are acts, as mentioned in the first paragraph, committed by a person acting at the request or with the express or implied consent of a public official.

175: Coarse torture

Coarse torture is punishable by imprisonment of up to 21 years.

In deciding whether torture is gross, particular importance shall be given to whether it has led to the loss or risk of loss of life.

Article 96, Constitution of the Kingdom of Norway

Article 96 of the Norwegian Constitution contains an explicit prohibition of torture: "No one may be convicted except according to law, or be punished except after a court judgment. Interrogation by torture must not take place."