Parliamentary Assembly
Assemblée parlementaire
https://pace.coe.int

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Doc. 11993
07 August 2009

Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member states

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Ms Sabine LEUTHEUSSER-SCHNARRENBERGER, Germany

Summary

The Committee on Legal Affairs and Human Rights recommends a series of steps to strengthen the independence of judges and prosecutors across Europe to end politically motivated interference in individual cases.

The draft resolution exposes ways that politicians can interfere in criminal proceedings in four countries representing the principal types of criminal justice system in Europe, analysing high-profile cases such as the dropping of the British Aerospace fraud investigation and "cash for honours" scandal in the United Kingdom, or the second Khodorkovsky trial and HSBC/Hermitage Capital and Politkovskaya murder cases in the Russian Federation.

Inter alia, the committee calls for:

– in the United Kingdom, a reform of the Attorney General's role to strengthen his or her accountability to parliament and a reversal of the erosion of Legal Aid funding to avoid "two-tier" justice;

– in France, reconsideration of the proposed abolition of the *juge d'instruction* or – if the abolition is to go ahead – at least a strengthening of the independence of prosecutors who will take over this role; an increase in the resources at the disposal of the judiciary as a whole and of defence lawyers in particular;

– in Germany, the setting-up of judicial councils – which exist in most other European countries – so that judges and prosecutors are given a greater say in running the judiciary, and a ban on the possibility for justice ministers to instruct the prosecution in individual cases;

– in the Russian Federation, a series of reforms to reduce the political and hierarchical pressures on judges and put an end to the harassment of defence lawyers in order to combat "legal nihilism" in the Russian Federation, as a precondition also for successful co-operation between Russian and other European law enforcement authorities.

1. Reference to committee: Doc. 11404, Reference 3385 of 23 November 2007.

Contents **Page**

A. Draft resolution 3
B. Explanatory memorandum by Mrs Leutheusser-Schnarrenberger, rapporteur 7
1. Introduction 7
2. Fact-finding visits to London, Paris, Moscow and Berlin: collecting relevant information on four distinct families of criminal justice systems 7
2.1. The English model 8
2.2. The French model 13
2.3. The German model 18
2.4. Attributing states to the first three models 20
2.5. Still a system sui generis: the criminal justice system of the Russian Federation 20
3. The notion of “politically motivated abuses” of the criminal justice system and the results of the four fact-finding visits 35
3.1. Discrimination 35
3.2. Public statements of senior representatives of the executive on the guilt of the accused 36
3.3. Poorly specified or constantly changing charges 36
3.4. Lack of independence of the court or prosecution 36
4. Consequences for the implementation of the Council of Europe’s conventions on mutual assistance in criminal matters and extradition 37
5. Conclusions 38

A. Draft resolution[2]

1. The Parliamentary Assembly stresses the fundamental importance, for the rule of law and the protection of individual liberty, of shielding criminal justice systems throughout Europe from politically motivated interferences.

2. Successful co-operation between member states of the Council of Europe in the field of criminal justice (in matters such a s extradition and obtaining evidence, as specified in pertinent conventions of the Council of Europe) depends on mutual trust in the basic fairness of the criminal justice systems of all member states and the absence of politically motivated abuses.

3. The independence of the judiciary, in law and practice, is the principal line of defence against such abuses.

3.1. The independence of the courts and of each individual judge is recognised, in principle, in all member states of the Council of Europe. This should also be reflected in their constitutions. True independence of judges also requires a number of legal and practical safeguards, including:

3.1.1. recruitment and promotion of judges must be based solely on merit (qualifications, integrity, ability and efficiency);

3.1.2. protection against unfair disciplinary sanctions (in particular, dismissal) must be effective;

3.1.3. salaries and allowances must permit judges and their families not to depend on the provision of housing and other amenities by executive authorities;

3.1.4. the independence of judges vis-à-vis court presidents and judges of superior courts shall be protected, inter alia, by the allocation of cases on the basis of predetermined, objective systems, by strict rules protecting judges from being taken off individual cases without reasons specifically defined by law and by ensuring that the assessment of a judge's performance is not determined by the ratio of judgments upheld or quashed by superior courts.

3.2. Prosecutors must be allowed to perform their tasks without interference from the political sphere. They must be shielded from instructions pertaining to individual cases, at least where such instructions would prevent an investigation from proceeding to court.

3.3. In order for the practical safeguards of judicial independence to be effective, a strong judicial council could play an important role in supervising the implementation of judicial independence.

3.3.1. Judicial councils must have a decisive influence with respect to the recruitment and promotion of judges and prosecutors, as well as concerning disciplinary measures against them, without prejudice to any judicial review mechanisms required by certain constitutions.

3.3.2. Elected representatives of judges and prosecutors should be at least equal in numbers with members representing other groups of society appointed by political bodies. The latter members should be representative of all main political currents in the country. The existing practice followed by many states of involving parliamentary committees in the process of appointing certain senior judges – also followed for the election of judges to the European Court of Human Rights – is also acceptable.

3.4. The division of labour between judges and prosecutors is a question of national legal traditions. The right balance, ensuring the best possible protection from politically motivated interferences, also depends on the degree of independence granted to prosecutors as well as the procedural rights and material resources available to the defence.

3.4.1. In countries such as the United Kingdom and Italy, where prosecutors enjoy a high degree of independence and the defence has access to the case file and to the suspect at an early stage, the role of judges may safely be limited to legal oversight and final decision-making.

3.4.2. In countries such as France and Germany, where prosecutors are more closely tied into their hierarchies, judges and defence lawyers must be able to play a more active role also during the investigation.

---

2. Draft resolution adopted unanimously by the committee on 23 June 2009.

3.5. The success of any changes to the system, such as the planned abolition of the *juge d'instruction* in France or the strengthening, in Germany, of the *Bundesanwaltschaft* under recent anti-terrorism laws, depends on maintaining the right balance between actors enjoying full independence (judges, defence lawyers) and the prosecution and the police. Such reforms may require the increase of the independence of the prosecution so as to safeguard the overall independence of the criminal justice system and to protect it from politically motivated interferences.

4. The situation in the four countries examined as examples of the principal types of criminal justice systems in Europe – the United Kingdom (England and Wales), France, Germany and the Russian Federation – is characterised by the following factors:

4.1. In the United Kingdom:

4.1.1. the adversarial character of the criminal justice system, is underpinned by considerable, though recently dwindling, resources available for legal aid to ensure equality of arms between the prosecution and the defence;

4.1.2. the long-standing culture of independence and professionalism among judges as well as prosecutors, is buttressed by their high social status and further enhanced by the recent establishment of the Judicial Appointments Commission;

4.1.3. Government's traditionally active supervision by Parliament and by the lively, pluralistic and free media scene;

4.1.4. recent cases (including British Aerospace and "Cash for Honours") have shown that the role of the Attorney General needs to be changed and clarified; a reform proposal to this effect is currently under discussion.

4.2. In France and Germany:

4.2.1. the traditionally inquisitorial criminal justice systems have taken on more adversarial elements; but in both countries there has been no commensurate increase of the resources available for legal aid; in addition, in France, defence lawyers have not yet obtained the same degree of access to the suspect and to the pre-trial investigation as their colleagues in the United Kingdom and in Germany;

4.2.2. the independence of judges is respected in law and practice, but their social status has been allowed to erode considerably;

4.2.3. in both countries, the independence of prosecutors is considerably less developed than in the United Kingdom; a marked regression in practice has recently been deplored by senior prosecutors and elected representatives of judges and prosecutors in France;

4.2.4. the French *Conseil Supérieur de la Magistrature*, which plays an important role in career and disciplinary matters for judges and, to a lesser extent, for prosecutors, still does not have an equivalent in Germany; in France, it was recently decided to double the number of members appointed by the President of the Republic and the presidents of the two chambers of parliament, thus placing elected representatives of judges and prosecutors in a minority;

4.2.5. the proposed abolition of the *juge d'instruction* in France and the transfer of most of their competences to the prosecution is widely suspected as being part of an attempt by the political authorities to increase their influence on the handling of sensitive cases;

4.2.6. in both countries, parliaments and independent media provide fairly solid safeguards against abuses of the criminal justice system by the executive powers.

4.3. In the Russian Federation:

4.3.1. strong improvements in the social status of judges and prosecutors in recent years have all but eliminated their dependence on executive bodies for housing and other basic needs and should help reducing judicial corruption;

4.3.2. legislative reforms taking into account European standards, including the creation of a federal council of judges in charge of career and disciplinary matters, have strengthened the status of judges in law;

4.3.3. the creation of the separate Investigative Committee, within the Prosecutor General's Office, may in time somewhat dilute the overwhelming influence of the latter over the criminal justice process;

4.3.4. the traditionally subservient attitude among many judges and prosecutors inherited from the past has not yet been fully overcome; on the contrary, after an encouraging new beginning in the early 1990s, judges are subjected to an increasing level of pressure aimed at ensuring convictions in almost all cases brought to court by the Prosecutor's Office;

4.3.5. the vectors of pressure still include old-style unofficial methods described as "telephone justice", but also official performance evaluation and disciplinary mechanisms. The number of judges dismissed from their functions on different grounds is comparatively high. Court chairpersons have disproportionate power over individual judges, in particular because of their power to decide on the distribution of cases. Legal protection for judges resisting such pressures is very limited, as the judges' councils have not yet developed sufficient independence and standing;

4.3.6. independent lawyers are frequently subjected to searches and seizures and other forms of pressure in violation of Russian and European legal provisions;

4.3.7. a number of high-profile cases, such as the second trial of M. Khodorkovsky and P. Lebedev, the proceedings against the managers and lawyers of HSBC/Hermitage, the investigation into the murder of A. Politkovskaya, the prosecution of Y. Samodurov and the dismissal of judge Kudeshkina and several other judges, give rise to concerns that the fight against "legal nihilism" launched by President Medvedev is still far from won;

4.3.8. parliament and the media still do not provide sufficient safeguards against abuses, though some recent, open debates in certain media give rise to hope for the future.

5. Noting that the criminal justice systems of all member states are exposed to politically motivated interferences, though to very different degrees:

5.1. The Assembly calls on all member states to:

5.1.1. further strengthen judicial independence and the equality of arms between the prosecution and the defence, in particular by providing sufficient resources to the courts system, including legal aid, by granting strong procedural rights to defence lawyers, including during the pre-trial investigation, and by strengthening judicial self-administration;

5.1.2. ensure that the instances competent for deciding on extraditions and other types of judicial co-operation take into account the degree of independence of the judiciary in the requesting state – in practice as well as in law – and refuse extradition whenever there are reasons to believe that the person concerned is unlikely, for political reasons, to be given a fair trial in the requesting state;

5.2. The Assembly calls on the United Kingdom to:

5.2.1. complete the reform of the Attorney General's role without further delay, strengthening his/her accountability before Parliament;

5.2.2. fully implement the Convention against Bribery of the Organisation for Economic Co-operation and Development, including its Article 5;

5.2.3. reverse the recent erosion of resources available for legal aid, in order to avoid the development of a two-tier justice system dependent on the suspect's ability to pay for an effective defence;

5.3. The Assembly calls on France to:

5.3.1. reconsider the proposed abolition of the *juge d'instruction*; in the event of abolition and the transfer of this institution's competences to the prosecution, to strengthen the independence of prosecutors, and to grant defence lawyers at least the same access to the pre-trial investigation by the prosecution, as is presently the case before the *juge d'instruction*;

5.3.2. gradually increase the salaries of judges and prosecutors to a level commensurate with the dignity and importance of their office until they reach the average of all European countries (in comparison with average earnings of the general population);

5.3.3. increase the resources available for legal aid commensurately with the introduction of more adversarial elements in the criminal justice system;

5.3.4. consider restoring a majority of judges and prosecutors within the *Conseil Supérieur de la Magistrature* or ensuring that the members appointed by political bodies also include representatives of opposition forces and making the *Conseil Supérieur de la Magistrature*'s opinion binding also for decisions concerning prosecutors;

5.4. The Assembly calls on Germany to:

5.4.1. consider setting up a system of judicial self-administration, taking into account the federal structure of the German judiciary, along the lines of the judicial councils existing in the vast majority of European states, as a matter of securing the independence of the judiciary in future;

5.4.2. gradually increase the salaries of judges and prosecutors and to increase the resources available for legal aid (as recommended for France in paragraphs 5.3.2. and 5.3.3. above);

5.4.3. abolish the possibility for ministers of justice to give the prosecution instructions concerning individual cases;

5.4.4. strengthen in law and practice the supervision by judges of the exercise of the prosecutors' increased powers, in particular in the fight against terrorism;

5.5. The Assembly calls on the Russian Federation to:

5.5.1. strengthen the independence of judges by ensuring that the evaluation of their performance is not based on the material content of their judicial decisions;

5.5.2. increase the independence of the judicial council and the transparency of its proceedings;

5.5.3. strengthen the system of allocation of cases among the courts and to individual judges or sections within the courts, in such a way as to exclude any "forum shopping" by the prosecutor's office and any discretion in this respect of the court chairpersons;

5.5.4. promote the development of a spirit of independence and critical analysis in legal education in general and in initial and continued training of judges and prosecutors in particular, and to robustly sanction any local, republican or federal officials that continue to try to give instructions to judges, as well as any judges who seek to obtain such instructions;

5.5.5. effectively protect defense lawyers from searches and seizures of documents pertaining to the privileged lawyer-client relationship and from other forms of pressure, including abusive prosecutions and administrative harassment;

5.5.6. strengthen the independence of the media and encourage them to investigate and publicise cases of suspected politically motivated abuses of the criminal justice system;

6. The Assembly calls on the European Commission for Democracy through Law (Venice Commission) and the European Commission for the Efficiency of Justice (CEPEJ) to continue upholding the independence of the judiciary throughout Europe and to speak out in support of colleagues in difficulty and against any politically motivated interferences, wherever they may occur.

7. The Assembly believes that the Committee of Ministers should review Council of Europe conventions in the field of legal co-operation with a view to ensuring that they cannot be misused for purposes of politically motivated prosecutions, as long as comparable standards of judicial independence have not been reached in law and practice in all member states of the Council of Europe.

8. Finally, the Assembly encourages the European Court of Human Rights to consider giving priority to applications pertaining to alleged violations of the independence of judges and politically motivated abuses of the criminal justice system. In view of the fundamental importance of independent courts for the protection of human rights at national level, such a policy could help stem the flood of applications to the European Court.

B. Explanatory memorandum by Mrs Leutheusser-Schnarrenberger, rapporteur

1. Introduction

1. The motion underlying the present report – abuse of the criminal justice system in Council of Europe member states – covers a vast field, both in terms of the subject matter and geographically. I therefore attempted in the introductory memorandum[3] to bring it down to a manageable volume that can reasonably be tackled in a report for the Parliamentary Assembly.

2. The formulation in the last paragraph of the motion introduced by Marie-Louise Bemelmans-Videc and others:

> *"to examine, on the basis of concrete examples, possible abuses of the criminal justice system in member states and their impact on the functioning of relevant legal instruments of the Council of Europe with a view to making recommendations to improve relevant legal instruments of the Council of Europe, as well as national rules and practices",*

is particularly helpful in this respect, as it acknowledges that we can only work on the basis of concrete examples. The first task at hand is therefore to develop objective criteria enabling us to select appropriate examples that are most likely to give rise to general conclusions – bearing in mind that we are looking for proposals to improve the Council of Europe's instruments in the field of judicial co-operation as well as national rules and practices.

3. As agreed by the Committee on Legal Affairs and Human Rights during the discussion of the introductory memorandum, I have made use of two sets of criteria enabling me to provide the most relevant examples, in the most objective and non-discriminatory way: by identifying distinct categories or groups of criminal justice systems in Europe, and by cross-referencing these categories with statistics concerning the number of complaints made and violations found by the European Court of Human Rights with respect to European Convention on Human Rights (ECHR) procedural safeguards, in particular the guarantee of a fair trial under Article 6 of the ECHR.

2. Fact-finding visits to London, Paris, Moscow and Berlin: collecting relevant information on four distinct families of criminal justice systems

4. As announced in the introductory memorandum, I have made use of a classification of criminal justice systems in Europe on the basis of their reliance on a more "adversarial" or more "inquisitorial"[4] system of procedure – the working assumption being that "adversarial" elements provide a greater degree of immunity from politically motivated or otherwise abusive interferences. I found this a useful approach to bring some order into the study of the diverse criminal justice systems in Europe. These can be categorised into four distinct groups: one that is predominantly adversarial, another that is predominantly inquisitorial, a third that is a mixture of inquisitorial and adversarial elements and, finally, a fourth, that is, whatever its formal characteristics, heavily influenced in practice by the Soviet legal tradition.

5. The systems that are described as adversarial are ones in which the parties – the accused (or more usually his or her lawyer) and the public prosecutor – have the responsibility of preparing the case for trial and the judge or adjudicator acts as an umpire, as in a football match, ensuring that the rules of the game (procedural requirements) are observed and deciding (or overseeing a jury's decision) on whether the accused is guilty or innocent solely by reference to the evidence adduced by the parties. In such systems, both the guarantees for the independence of the judiciary and the active role played by defence lawyers are seen as essential safeguards against the possible abuse of power by the executive. One weakness of this system is its reliance on the quality and the resources at the disposal of the representatives of the opposing parties.

6. Inquisitorial systems are ones in which judges play the dominant role both as regards the investigation and the calling and examination of witnesses at the trial, with the prosecution and the defence lawyers tending to have only a subsidiary role in the proceedings. There is an assumption in such systems that, as a result of safeguards for the judiciary's independence, the judicial system can generally be trusted to conduct a neutral investigation into the truth. That assumption does not always stand up to scrutiny.

---

3. AS/Jur (2008) 31.
4. See, for example, A. Sanders and R. Young, Criminal Justice, 3rd edition, 2007, p. 11.

7. Adaptations of these broad systems have occurred following concerns at the national level in the countries concerned – notably about abuse of the role played by the *juge d'instruction* at the investigative stage in inquisitorial systems; after all, the judges' qualities can be just as deficient as those of the parties' representatives in the adversarial system. Adaptations have also been motivated by the requirements of the ECHR, which undoubtedly lays down certain adversarial requirements in Article 6, notably as regards equality of arms.

8. An important point of difference between criminal justice systems is the prevalence, or otherwise, of the "principle of legality", in which the authorities have a duty to prosecute any criminal acts that have come to their attention. In the alternative, the judicial authorities have discretionary powers ("principle of opportunity of prosecution"). The difference is often not so important in practice, as countries using the legality principle as a starting point (such as Germany) have been obliged to allow for some flexibility in order to allow a rational use of judicial resources such as the *de minimis* rule, and the prosecution of certain offences only following a request of the victim, whereas those who allow for discretion (like France, England and Wales) have brought in codes of conduct or general guidelines to ensure the respect of the public interest and equality of treatment. But as we will see, any discretion always raises the question of whether "political" authorities have the possibility to influence its exercise in general terms (in principle, not a problem) or in individual cases (a potential gateway for politically motivated abuses).

9. The above-mentioned adaptations of the adversarial and inquisitorial systems of criminal justice have led to the identification of four broad categories of criminal justice systems, namely, the English, French, German[5] and Russian. The first covers to a great extent the common law jurisdictions in Europe,[6] the second is applied in many countries in Europe in addition to France as a result of the influence of the system dating back to Napoleonic times. The third represents a more recent approach embodying some significant departures from the French model (especially as regards the principle of legality, but without coming close to the purely adversarial system prevailing in England and Wales). The fourth is still struggling with the legacy of its Soviet past, which includes the overbearing role of the *Prokuratura* and problems relating to the independence of judges, in particular as regards actual practice.

2.1. The English model

10. The English system is one that is essentially adversarial in the sense already described, that is to say the parties have an indispensable role both as regards the collection and preparation of evidence at the pre-trial stage and its submission at the trial stage. The judge plays a neutral role, ensuring that rules as to procedure and the admissibility of evidence are observed during the trial, but is responsible for determining guilt or innocence (magistrates' courts), or for ensuring that the jury can make this determination in the most objective way. He or she may put questions to witnesses and experts, but this should be for purposes of clarification and should not dominate the proceedings. The personality of the judge, and his or her independence, is nevertheless of great importance for the functioning of the system.

11. During my visit to London in Ma rch/April 2009, I was impressed by the strong spirit of independence prevailing both in judicial circles and in the office of the Director of Public Prosecution (DPP). In reply to my standard hypothetical question of how he would react if he were to receive a phone call from Downing Street telling him what to do in a particular case, he replied without hesitation, in front of his senior collaborators: "I would refuse, and if my interlocutor would insist, I would resign from my office, and my senior colleagues would probably follow me. And there is a good chance that within a few days of our press conference explaining the reasons for our resignation, the government would fall …." His collaborators nodded in agreement. I was personally rather impressed by the director's outspoken personality. Several barristers and solicitors had commented that the very appointment of this lawyer, who is widely reputed for his steadfastness, is a demonstration of the government's political support for the independence of this office.

12. The general principles of the functioning of the Crown Prosecution Service (CPS) are laid down in "the code"[7] that guides all prosecutors, including the DPP himself, in their daily work. As it is readily available to the general public and drafted clearly and concisely, it is an important tool to ensure that fairness and transparency prevail, and are seen to prevail.

---

5. See J. Hatchard, B. Huber and R. Vogler, Comparative Criminal Procedure, The British Institute of International and Comparative Law, 1996.
6. In addition to England and Wales, these are, broadly speaking, Cyprus, Ireland, Malta, Northern Ireland and Scotland (the latter two being distinct jurisdictions from England and Wales within the United Kingdom).
7. The Code for Crown Prosecutors, Crown Prosecution Service, November 2004, available at: http://www.cps.gov.uk.

13. The same spirit of independence also thrives among English judges. Their status is traditionally very well protected from any political influence. In the light of my talks in London, I can confirm that the procedures for judicial appointments, promotion, and – in very rare cases – disciplinary action ensure a high degree of transparency and objectivity.

14. The creation, in 2006, of the Judicial Appointments Commission (JAC), as part of the implementation of the Constitutional Reform Act, further strengthens the principle of independence of the judiciary from political influence also in respect of the process of the appointment of judges. The promotion of judges is governed by a similar panel-based procedure. The JAC proudly reports in its last annual report[8] that in 2007 and 2008 it handled 2 535 applications and made 458 selections and that the Lord Chancellor accepted all their recommendations for appointment. I was informed at the ministry of justice that, whilst the Lord Chancellor may question the recommendations made by the JAC on very limited grounds, he or she cannot, under any circumstances, substitute a JAC-recommended candidate for one of his or her own choosing. The composition of the JAC, comprising a majority of judicial personalities and legal professionals, but also qualified lay persons such as academics and journalists (but not politicians), as well as its functioning in practice, is explained very well in the above-mentioned report. The creation of the JAC was intended to further increase the transparency of, and public faith in, a process that was already pervaded historically by a strong spirit of independence. It was also intended to set an example for other countries. In this context, I should like to add that the United Kingdom is also one of the small number of States Parties to the ECHR that has established a transparent procedure for the selection of candidates for the European Court of Human Rights.[9]

15. But in the English criminal justice system, there is another possible avenue for possible political influence in individual cases: the role of the Attorney General. This office combines legal administration, the provision of independent legal advice and the political duties of being a member of the government. The post holder is also superintendent of the prosecution services in England and Wales. When I asked the DPP for explanations as to the relationship between his office and that of the Attorney General, I was treated to a diplomatic non-reply, and a reference to a report of the House of Commons Constitutional Affairs Committee on the constitutional role of the Attorney General.[10] The committee noted that "[t]he evidence which we took relating to the BAE case was particularly instructive in showing the inherent tensions in the dual role of the Attorney General and in particular the sometimes opaque relationships with the prosecution services".[11]

16. The British Aerospace (BAE) case was in fact mentioned by all my interlocutors in London whom I asked for concrete examples of politically motivated interferences in the criminal justice system in the United Kingdom. The most prominent example of suspected political interference in the criminal justice system in recent years was the subject of judicial review proceedings brought jointly by Corner House and the Campaign against the Arms Trade against the decision of the Director of the Serious Frauds Office (SFO), Robert Wardle, not to prosecute BAE. The SFO investigation had focused on bribes allegedly paid by BAE to members of both the Saudi Arabian royal family and the Saudi Arabian Government in return for securing a series of lucrative contracts for the sale of arms by the United Kingdom to Saudi Arabia, often referred to as the Al Yamamah arms contracts.

17. These allegations of corruption were first published in a national newspaper in September 2003, which referred to the SFO as having been approached by a former employee of BAE in early 2001 with information about a £60 million "slush fund" which BAE allegedly used to finance the alleged bribes. Arrests followed in November 2004. In late 2005, BAE failed to comply with compulsory production order notices requiring it to disclose details of its offshore payments to the Middle East.

18. In late 2006, with the investigation threatening to last for at least another year, BAE began to negotiate a new contract for the sale of Eurofighter Typhoons to Saudi Arabia. The contract was believed to be worth somewhere between £6 and £10 billion with the potential for 5 000 to 10 000 jobs to be created for British nationals. Press speculation subsequently emerged that Saudi Arabia had given the United Kingdom ten days to suspend the SFO investigation on grounds of the public interest or the deal would be offered to France. A public relations campaign was mounted in response with a view to stressing the importance of securing the contract for British jobs.

---

8. Judicial Appointments Commission, "Annual Report and Accounts 2007-08, Selecting on Merit and Encouraging Diversity", The Stationery Office, 10 July 2008, p. 3.
9. See Doc. 11767 (2009) (rapporteur: Mr Christopher Chope, United Kingdom, EDG).
10. House of Commons, Constitutional Affairs Committee, Constitutional Role of the Attorney General, Fifth Report of Session 2006-07, report, together with formal minutes, and oral and written evidence, 17 July 2007.
11. Ibid., p. 3.

19. In December 2006, the Attorney General (Lord Goldsmith) announced that the investigation would be discontinued on grounds of public interest and in view of representations that had been made both to himself and to Mr Wardle concerning the need to safeguard national and international security. Lord Goldsmith stated in the House of Lords that: "no weight has been given to commercial interests or to the national economic interest". Prime Minister Tony Blair justified the decision not to prosecute by saying: "Our relationship with Saudi Arabia is vitally important for our country in terms of counter-terrorism, in terms of the broader Middle East, in terms of helping in respect of Israel and Palestine. That strategic interest comes first."

20. Others disagreed, notably the Organisation for Economic Co-operation and Development (OECD), which addressed a formal letter of complaint to the Foreign and Commonwealth Office seeking an explanation as to why the investigation had been discontinued. Transparency International and a number of MPs urged the government to re-open the investigation, and in a newspaper interview, Mr Wardle acknowledged that the decision not to prosecute may have damaged "the reputation of the United Kingdom as a place which is determined to stamp out corruption". In November 2007, two political campaigning groups (Corner House and the Campaign against the Arms Trade) were granted permission to commence judicial review proceedings to challenge the decision of the SFO to drop the investigation.

21. In the judgment at first instance in April 2008, the High Court ruled that the SFO had acted unlawfully by dropping the investigation.[12] The court was scathing in its criticism of the political pressure brought to bear upon the decision not to prosecute, commenting that "so bleak a picture of the impotence of the law invites at least dismay, if not outrage". The court condemned how ministers had "buckled" to "blatant threats" that Saudi co-operation in the fight against terror would end unless the investigation was dropped: it was, the Court said, as though Saudi Prince Bandar (one of the alleged recipients of the bribes) "went into No. 10 and said 'get it stopped'". To cave in to such interference, the Court said, "merely encourages those with power, in a position of strategic and political importance, to repeat such threats, in the knowledge that the courts will not interfere with the decision of a prosecutor to surrender". *The Times* newspaper described the ruling as "one of the most strongly worded attacks on government action".[13]

22. In terms of the nature and degree of the political interference, the following points identified by the High Court, and explored in the highly critical report of the OECD on the United Kingdom dated 16 October 2008,[14] are worth noting:

– the United Kingdom had made minimal efforts in implementing into domestic law the OECD Anti-Bribery Convention (the convention). Of particular concern was the lack of any specific requirement to follow Article 5 of the convention, which requires that considerations relating to the "national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved" should have no bearing on the decision whether to prosecute. The OECD noted that in some circumstances this requirement would appear to be inconsistent with the SFO's obligation to consider whether a prosecution is in the "public interest" under the domestic Code for Crown Prosecutors. Moreover, to adopt the language of Article 5, it was the United Kingdom's "relations with other states" that Tony Blair had referred to when attempting to justify the decision not to prosecute BAE, and it was the United Kingdom's "economic interests" which were widely speculated as providing the true motivation for that decision;

– the Criminal Justice Act 1997 had, so it would appear, been drafted to grant Lord Goldsmith, as the Attorney General, the power to supervise the decision-making process of the Director of the SFO in such a manner that was neither entirely independent nor accountable. As the court noted, Lord Goldsmith was himself subjected to political pressure from numerous sources. First, the prime minister took what the court described as the "exceptional step" of writing to him, generating the "suspicion" that the security justification subsequently trumpeted by both men was a "useful pretext" for ditching an SFO inquiry that was harming commercial interests. Second, ministers and other government officials (not prosecutors) wrote to Lord Goldsmith to advocate both the discontinuance of the investigation for reasons of the national economic interest and the non-applicability of Article 5 of the OECD convention. Third, as early as December 2005, BAE itself was writing letters to Lord Goldsmith in which he was encouraged to drop the investigation. These letters referred to meetings between Saudi officials and the United Kingdom Ambassador to Saudi Arabia, which were aimed at preparing the groundwork for the new Eurofighter Typhoon deals and a potential sales visit to Saudi Arabia by the United Kingdom's Defence Secretary. (Mr Cowper-Coles later informed Mr Wardle that British lives would be at risk from

12. See R (on the application of Corner House Research and others) v. Director of the Serious Fraud Office [2008] EWHC 714 (Admin).
13. http://www.timesonline.co.uk/tol/news/politics/article3724411.ece.
14. http://www.oecd.org/dataoecd/23/20/41515077.pdf.

terrorists if the case were not dropped.) Faced with this confluence of pressures, Lord Goldsmith's review of the national security threat appeared to become more compliant with the wishes of his political masters; the OECD refers to his review as "disjointed and somewhat incoherent";

– the court held that there was an apparent lack of any meaningful consideration given by Lord Goldsmith, Mr Wardle or indeed anyone in the government or the SFO as to legitimate alternative courses of action in response to the Saudi threats, for example, informing the Saudi authorities about the SFO's independence or making a reference to the UN Security Council about the threat to withhold anti-terrorism co-operation.

23. On 30 July 2008, the House of Lords unanimously overturned the High Court ruling, stating that the decision to discontinue the investigation had been lawful.[15] The House of Lords noted that the United Kingdom courts had historically demonstrated a general reluctance to review investigative and prosecutorial decision making. However, the High Court had bucked this trend by suggesting that the issue in the present case was the effect of the Saudi threats on the rule of law. The High Court had taken the view that, if the threat was one which affected the criminal jurisdiction in this country, the courts were bound to consider the steps that were needed to preserve the integrity of the criminal justice system. As noted above, the High Court had concluded that submission to a threat would only be lawful where it could be demonstrated that no legitimate alternative course of action was open to the decision maker.

24. This principle was rejected by the House of Lords on the grounds that it was not supported by authority and that it detracted from the right question, which was whether Mr Wardle had exceeded the extent of his discretion in weighing the public interest in continuing the investigation and the competing public interest in safeguarding British lives by discontinuing it. The House of Lords recognised that he had been confronted by the "ugly and obviously unwelcome threat" of Saudi Arabia withdrawing anti-terrorism co-operation which could have put British lives at risk. Accordingly, the decision not to prosecute involved "no affront to the rule of law" and "it may indeed be doubted whether a responsible decision maker could have decided otherwise".

25. Notwithstanding the decision of the House of Lords, many of the criticisms of the High Court and the OECD retain their force, in particular the OECD's concerns regarding the constitutional problems created by the Attorney General's sometimes contradictory political and legal functions, and the United Kingdom's notorious reluctance to implement the convention despite having ratified it. The conflicting decisions of the High Court and the House of Lords perhaps highlight the difficulty of balancing competing public interests when deciding whether to prosecute politically important cases. As the House of Lords recognised, the decision maker would be obliged to probe any evidence or advice in order to ascertain its accuracy and attach appropriate weight. However, it is not difficult to envisage the problems likely to be encountered by decision makers who are confronted with assertions regarding threats to national security. Such assertions often lack specificity and those who make them are unlikely to be willing to divulge a great deal about the factual basis of their claims, still less to provide decision makers with tangible evidence.

26. Whatever the precise combination of national security and commercial considerations which determined the Saudi threats, and in turn influenced the advice that Mr Wardle received, the investigation gained a new life in June 2007, when the United States Department of Justice launched its own investigation into Al Yamamah, examining allegations that a United States bank had been used to funnel payments to Saudi Prince Bandar. The United States investigation is ongoing.

27. The other high-profile case which contributed to triggering the inquiry into the role of the Attorney General is the "cash for honours" investigation.

28. "Cash for honours" was the name given to the political scandal in the United Kingdom in 2006 and 2007 concerning the connection between political donations and the award of life peerages. A loophole in United Kingdom electoral law means that, although anyone donating even small sums of money to a political party has to declare this as a matter of public record, those loaning money at commercial rates of interest do not have to make a public declaration. During the police investigation, various members of all three main political parties (including Tony Blair, the prime minister) were questioned and the Labour Party's chief fund-raiser, Lord Levy, was arrested twice. Ultimately the Crown Prosecution Service concluded that the matter should not be prosecuted: their decision stated that, while peerages may have been given in exchange for loans, it could not find direct evidence that this had been agreed in advance, which was a prerequisite for a successful prosecution.

15. See R (on the application of Corner House Research) v. Director of the Serious Fraud Office [2008] UKHL 60.

29. From the perspective of politicised criminal investigations, the scandal is relevant because both sides – the politicians being investigated and the investigating police officers – claimed illegitimate interference in the other's work. On the one side, some in the Labour Party were reported as complaining that the police investigation, which drained it of financial resources after the loans had to be repaid, had sought to damage the personal reputations of particular politicians and had been deliberately dragged out in order to hamper the party's campaigning efforts in the period immediately prior to Gordon Brown's becoming prime minister and potentially calling a general election. On the other side, the senior police officer in charge of the investigation told the House of Commons Public Administration Select Committee that some politicians had placed him under "intense pressure" and that they had treated the investigation as a "political problem, not a criminal one".

30. This mutual recrimination is perhaps inevitable where a criminal investigation focuses directly on the actions of politicians, whose legitimate interest in defending themselves against criminal charges can nearly always be portrayed by others as political interference in the criminal process. The scandal did, however, highlight once again the controversial actions of Lord Goldsmith, who insisted that he should play a role in deciding whether Tony Blair and other politicians should be charged, despite the potential conflict of interest generated by his close relationship with the prime minister and the Labour Party. Lord Goldsmith also sought to prevent the BBC from publishing a story on the scandal which revealed correspondence between Downing Street and Lord Levy concerning the donations. Although the e-mail was eventually publicised, albeit after the police had submitted its report to the Crown Prosecution Service, Lord Goldsmith's attempt to suppress it sparked widespread claims of a "cover up" of evidence incriminating the Labour Party and further criticism of the incompatibility of the Attorney General's political and legal roles.

31. On becoming prime minister in July 2007, Gordon Brown announced that "the role of the Attorney General, which combines legal and ministerial functions, needs to change". This led to an official public consultation into the Attorney General's role, aimed at ensuring that "the office retains the public's confidence". On taking over from Lord Goldsmith, the new Attorney General, Lady Scotland, also appeared to accept that her role should change. However, the Constitutional Reform Bill, which was reviewed by the House of Commons Joint Committee in early 2008 and is expected to be debated by the legislature later this year, appears to have made little difference: it is drafted so that the Attorney General still retains the power to prevent SFO investigations and to stop criminal prosecutions. Lord Falconer, a former Lord Chancellor, called the bill a "missed opportunity", adding that "the Attorney General's advice on public interest issues should be accountable to parliament so no political pressure can be seen to be applied on individual prosecutions".[16]

32. This rather timid reform proposal effectively maintains the Attorney General's prerogatives with regard to the supervision of the CPS and the SFO whose exercise may or may not transgress the "red line" of illicit political interference. It reflects the "government's response to the above-mentioned report on the constitutional role of the Attorney General,[17] which accepts some, but not all of the committee's recommendations. In particular, the government "proposes to legislate to provide expressly that the Attorney General has no power to give directions to prosecute or not to prosecute in any individual case (except where national security is involved)".[18] The legislation "will require the Attorney General to report any exercise of the power to parliament as soon as is practicable (except where a delay is itself required to protect national security)". As regards the "inherent tension" between the different roles of the Attorney General, the government finds that the "synergy between the functions of the Attorney General means that their concentration in a single office strengthens the exercise of each". In sum, the government "notes the concerns of the committee and some respondents that the combination of these roles gave rise to a perception that a conflict of interest may arise", whilst agreeing with those respondents who took the view that "mistaken perception is a weak foundation on which to base reform" (Lord Lloyd of Berwick).[19]

33. My own view is that the Attorney General's powers over individual cases are a potential cause for concern, even after the proposed reform enters into force. Whilst it will be clarified that these powers must be limited to exceptional cases, it is usually these "exceptional" cases, on the fringes of politics and corruption, which are the most tempting for "politically motivated" interference. State security is a concept that is wide-open to interpretation, and the House of Lords' views in the BAE case[20] grant the government much leeway.

---

16. http://www.guardian.co.UK/politics/2008/may/22/constitution?gusrc=rss&feed=politics.
17. The Government's Response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General, presented to parliament by the Attorney General, April 2008.
18. Government's response (note 21), p. 3.
19. Government's response (note 21), pp. 5-6.
20. See paragraphs 16 ff. above.

The obvious remedy is transparency and accountability. It is therefore unfortunate that the proposed obligation of the Attorney General to report to parliament on the use of his or her prerogatives in a timely manner is again submitted to a "national security exception".

34. As is often the case in countries such as the United Kingdom, the legal system of which has grown on a case-by-case basis "since times immemorial", express statutory provisions are often less important in practice than the traditional culture of independence and the strength of the personalities entrusted with positions of authority, who discharge their responsibilities under the scrutiny of a parliament, which takes its supervisory role very seriously, and of vibrant, independent media. With this in mind, I find the situation in the United Kingdom generally acceptable. I nevertheless tend to support the conclusions of the Select Committee on Constitutional Affairs, and in the BAE case I would side with the High Court rather than the House of Lords – a position I should also like to see reflected in the Assembly's resolution.

2.2. The French model

35. In the French system, the investigation of the case and the collection of evidence in serious or particularly complex cases (about 5% of all criminal cases) is entrusted to a judge – the *juge d'instruction.* In these cases, the *juge d'instruction* interrogates the suspect and the witnesses, examines any other evidence, seeks expert advice and can require specialist inquiries. He or she will pass the case to the prosecutor when the case is ready to be tried. In the vast majority of cases, it is for the prosecutor to prepare the case for trial, again in an "inquisitorial" (*ex officio*) manner, with the help of the police (*police judiciaire*). The defence lawyer's role tends to be limited to issues of bail and custody, in addition to pleading in favour of the accused before judge and jury. The defence lawyers' access to the investigation file depends on whether or not a *juge d'instruction* is involved – only if that is the case has he access to the file and can ask for measures to be taken. During police inquiries without appointment of a *juge d'instruction*, defence lawyers have no access to the files, and not even to the suspect himself during his interrogation in police custody. Only after twenty hours of police custody does the suspect have the right to obtain the advice of a lawyer, for ten minutes.

36. During the trial – in which the professional judges may be joined by lay assessors or jurors whose role is not limited to deciding issues of fact – judges play an active role in establishing what happened but the defence and prosecution can also question witnesses. The defence is always the last to be heard.[21]

37. Career judges (*juges* or *magistrats du siège*) and prosecutors (*procureurs* or *magistrats debout/du parquet*) belong to a common professional category (*magistrats)* whose members have gone through the same training (*Ecole Nationale de la Magistrature*, in Bordeaux), and may (and often do) switch from one sub-category to the other during their careers. In fact, most of the senior *magistrats* I met during my visit to Paris had started their careers as *juges d'instruction*, which are traditionally seen as a certain élite among *magistrats,*[22] and crossed over between the functions of judge, prosecutor or ministerial civil servant several times.

38. In law and practice, judges (including the *juges d'instruction*)enjoy a high degree of independence, whereas prosecutors are submitted to a clear hierarchy with the minister of justice (*Garde des Sceaux*) at the top. But the Code of Criminal Procedure[23] and the *Statut de la Magistrature*[24] provide certain guarantees of independence for prosecutors, too. In particular, the minister's disciplinary powers are tempered by the obligatory involvement of the Conseil Supérieur de la Magistrature, the French judicial council; and the minister can give only general instructions, or, as far as individual cases are concerned, instructions to proceed with an investigation and to seize the competent court, but not to abstain from doing so. Finally, whilst any written statements by prosecutors must follow instructions given by hierarchical superiors, even the lowliest prosecutor may speak freely in court,[25] which includes the final pleadings asking the court for a particular sanction (*réquisitoire)* in order to allow the prosecutor to give proper consideration to the actual results of the court proceedings.

39. The separation of powers and the independence of the judiciary seem to be less than absolute in French political culture under the constitution of 1958, which, after the perceived chaos of the 4th Republic dominated by a fractious parliament, deliberately strengthens the role of the president of the republic. Several

---

21. See further J.-Y. McKee, "France", 2001, at: http://www.heuni.fi/12543.htm.
22. The former minister of justice Robert Badinter has forged the bon mot that the juge d'instruction cumulates the functions of Inspector Maigret and King Salomon.
23. Articles 30 ff.
24. Ordinance No. 581270 of 22 December 1958 incorporating the organic Law on the regulations applicable to the judiciary, consolidated version of 9 December 2007 (in particular, Articles 5, 48, 59, 65 and 66).
25. This is the essence of the traditional French saying "la plume est serve, mais la parole est libre".

of my French interlocutors drew my attention to the fact that the constitution, whilst speaking of the "powers" (*pouvoirs*) of the president, of the government,[26] and of parliament,[27] uses the term "authority" (*autorité*) when referring to the prerogatives of the judiciary.[28] It has been said that this deviation from the terminology going back to Montesquieu (who I was told is more popular abroad than in France) is not quite innocent.

40. My visit to Paris, in January 2009, took place just a few days after the announcement by President Sarkozy of a potentially far-reaching reform of the criminal justice system: the proposed abolition of the *juge d'instruction*, whose tasks would be entrusted to the prosecution. This proposal is seen as the culmination of a process which French judges and prosecutors' unions perceive as the government taking control of the justice system for the sole purpose of preventing the "little judges" from prosecuting (or, as some politicians see it, persecuting) political and business leaders for alleged corruption or other financial wrongdoings.[29] Another reform announced by the present government, the "decriminalisation" of certain business practices currently defined as criminal in the areas of company law and finance[30] is decried as completing this strategy as far as substantive law is concerned.

41. Relations between the current political leadership and the judiciary appear to be rather chilly. Judges' representatives quoted before me a public statement by the minister of justice in which she describes herself as the "superior" (*chef*) of all prosecutors, and states that the courts hand down their decisions "on behalf of the supreme authority of the president of the republic elected by the people".[31] The judges' and prosecutors' union representatives with whom I spoke were particularly disappointed by the lack of public outcry against these statements. They are painfully aware of enjoying a lesser degree of popular support than for example their Italian counterparts.[32] Whilst Italian judges and prosecutors are also constantly criticised by the current Italian political leadership, including Prime Minister Berlusconi himself, they enjoy a high degree of popular support since their successful fight against organised crime and corruption (the *mani pulite* campaign). Even though French judges have also scored spectacular successes in high-profile anti-corruption cases,[33] their popularity has seriously suffered from the perceived mishandling by a young *juge d'instruction* of the Outreau case. In this case, a large number of inhabitants of this small town, accused of sexually abusing children, were placed in preventive detention, but ended up being acquitted after spending up to three years in prison.[34] French judges are angry that the political leadership, on the one hand, starves the judiciary of necessary

---

26. Chapters II and III of the constitution of 4 October 1958 as at 23 July 2008, at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/texte-integral-de-la-constitution-de-1958.5074.html.
27. Chapter IV of the constitution (note 30).
28. Chapter VIII of the constitution (note 30).
29. Both the Union Syndicale des Magistrats (USM) representing about two thirds of judges and prosecutors and the smaller socialist-leaning Syndicat de la Magistrature (SM) use very strong language, such as mise au pas and caporalisation, normally used to describe military-style obedience. A frequently-cited example is that of the prosecutors at the court of Nantes, who were summoned by the prosecutor general of this court to explain why they applauded the speech of the president of this court at the official opening ceremony of the judicial year, in which she stressed the importance of judicial independence. Also, regional prosecutor generals have reportedly been summoned by the minister to explain why, in their district, judgments fell behind in the application of the so-called minimum sentences (peines plancher) in cases of recidivism instituted by the law of 10 August 2007.
30. On 20 February 2008, a detailed report on this subject was presented to the minister of justice by Jean-Marie Coulon, http://www.ladocumentationfrancaise.fr/rapports-publics/084000090/index.shtml.
31. Reuters, 4 September 2007, 12h12 cites the declaration of the minister of justice made on television as follows: "The judiciary is independent in its judgments … but I have an authority regarding the application of the law and of penal policies. I am the head of the prosecution, what does that mean? I am the superior of the prosecutors, they are there to apply the law and a penal policy. … The supreme legitimacy is that of the French who elected [Nicolas Sarkozy] in order to restore authority. Judges and prosecutors render justice in the name of this supreme legitimacy" (unofficial translation).
32. In an opinion poll commissioned by the CSM measuring public confidence in the judiciary, 51% found that the judiciary was not independent from politics; the judiciary arrives in sixth position (behind the hospitals, schools, the army, the police and the civil service) in terms of public confidence (see "'Le sondage qui juge les juges"), http://blog.france2.fr/justice-dominique-verdeilhan/index.php/2008/10/22/83383-le-sondage-qui-juge-les-juges.
33. For example, the investigating judges Eva Joly (Elf, Taiwanese frigates case; see La Force qui nous manque, Editions Les Arènes, 2007) and her article in Le Monde on 15 January 2009, in which she pleads against the reform proposal aimed at abolishing the function of investigating judge), Renaud van Ruymbeke (Clearstream case; see Fabrice Lhomme, Renaud Van Ruymbeke, le juge, Editions Privé, 2007), Eric Halphen (Paris and Hauts-de-Seine social housing cases; see Sept ans de solitude, Editions Gallimard, 2002).
34. See Florence Samson, Outreau et après, la justice bousculée par la commission d'enquête parlementaire, l'Harmattan, 2006; report of the parliamentary committee of inquiry at: http://www.assemblee-nationale.fr/12/rap-enq/r3125-t1.asp.

resources and, on the other hand, is quick to criticise it severely and publicly for any perceived or real shortcomings or failures which may well have been caused or aggravated by the very lack of resources – a situation that is likely to further destabilise the judicial system.

42. As far as resources are concerned, the contrast between the United Kingdom and France is indeed striking: in 2006, the legal aid budget for England and Wales alone[35] was almost as high as the total budget for the judiciary (including all courts, the prosecution service and legal aid) for the whole of France![36],[37] I was informed by justice ministry officials that the resources at the disposal of the judiciary were increased in recent years, including the recruitment of an additional 1 500 judges and prosecutors, but most of my interlocutors insisted that much still remained to be done.

43. The judges' representatives are convinced that the Outreau case, which has even given rise to a parliamentary committee of inquiry, is merely a convenient excuse for the political class to finally rid itself of the institution of the all-too independent *juge d'instruction* – something they say the current president's predecessors would have liked to do for a long time, but never dared. Interestingly, the parliamentary committee of inquiry into the Outreau case stopped short of recommending the abolition of the *juge d'instruction*, favouring instead the continuation of a reform process that had already begun earlier. In fact, the *juge d'instruction* no longer has the power to place a suspect in preventive detention – this is now the task of the *juge des libertés et de la détention* [38] instituted by a reform in 2000.[39] They also argue that the issue of the "solitude" of the *juge d'instruction* has already been addressed by a reform scheduled to enter into force at the beginning of 2010, which foresees that up to three *juges d'instruction* can be appointed in particularly voluminous and complex cases to enable them to work as a team. The judges' representatives argue that the effects of this measure should be tested at least for some time before the institution of the *juge d'instruction* is abolished altogether.

44. The proposed devolution of the *juge d'instruction'*spowers of inquiry to the prosecution is criticised not only by the elected representatives of judges and prosecutors,[40] but also by lawyers in private practice[41] who fear that their access to the case file will be further reduced. My interlocutors in the ministry of justice indicated that they were aware of the issue that lawyers had access to the case files and a right to be present at interrogations in the pre-trial procedure only if it was conducted by the *juge d'instruction*. But they were unable to reply to my question whether access would be extended in all criminal procedures, or only in the small number of cases previously handled by the *juge d'instruction*, and to what extent it would be extended. My interlocutors at the justice ministry also realised that additional resources would be required for legal aid to the extent that the reform would bring in a more adversarial procedure, increasing the need for the defence lawyers to perform investigative work themselves that is currently carried out by investigative judges. But they were unaware of the huge resources required for legal aid in a fully adversarial system such as that of England and Wales.[42]

45. On 6 March 2009, after my visit to Paris, the Léger Commission published its interim report on the preparatory phase of the criminal procedure. The view of the majority of the commission supports and further elaborates on the president's proposal to transform the *juge d'instruction* into a *juge de l'enquête et des libertés* who would exercise exclusively judicial functions, the investigative functions to be taken over by the prosecutor's office. The majority of the commission does not support the proposal to increase the independence of prosecutors, for example by aligning their appointment procedure to that applicable to judges; and it also does not favour the introduction of the "principle of legality", which would eliminate or reduce the prosecution's discretion as to whether or not to prosecute an offender. The majority of the commission considers the future *juge de l'enquête et des libertés* as sufficient to counter-balance the increased powers of the prosecutor's office. In addition, the commission makes fairly far-reaching proposals to

---

35. €3 020 104 244 (source: "Report on the European Judicial Systems – Edition 2008", European Commission for the Efficiency of Justice (CEPEJ), Document CM(2008)127 addendum 2 of 1 September 2008).
36. €3 350 000 000 (including €303 000 000 for legal aid).
37. The above-mentioned (note 39) comparative study by the CPEJ shows that the resources at the disposal of the French judiciary are indeed among the lowest among Council of Europe member states, with regard to the number of judges and prosecutors per 100 000 inhabitants, the support staff per judge and prosecutor, legal aid, and, last but not least, the salaries of judges and prosecutors as a percentage of the average income in each country.
38. The judge charged with protecting freedoms and deciding on detention.
39. Law No. 2000-516 of 15 June 2000 reinforcing the presumption of innocence and the rights of victims.
40. See communiqué of the USM's Bureau of 7 January 2009.
41. See Lyons Bar Association, "Faut-il supprimer le juge d'instruction? Le Barreau de Lyon réagit à la proposition du Président de la République visant à supprimer la fonction du Juge d'Instruction", at: http://www.barreaulyon.com/fr/Le-Barreau-de-Lyon/Actualites/Faut-il-supprimer-le-juge-d-instruction.
42. See paragraph 41 above.

increase the rights of the defence, but only for those suspected of more serious and complex offences ("*régime renforcé*" with strong adversarial elements); for the remaining cases ("*régime restreint*") the procedure remains essentially the same as in the present system in cases without the appointment of a *juge d'instruction.*[43]

46. The three representative judges and prosecutors' unions (USM, SM and AFMI) reacted to the interim report of the Léger Commission in a joint communiqué of 9 March 2009.[44] They found that the commission, which they say was made up of persons close to the president whose opinions were well known in advance, had unsurprisingly followed the president's directive to abolish the *juge d'instruction* without guaranteeing in return the independence of the authority that will be in charge of the investigation instead, and without foreseeing adequate rights and resources for the defence, whose proposed advances are subject to numerous exceptions. The judges' representatives consider the proposed *juge de l'enquête et des libertés* as an "alibi judge" without a clear statute, and without real powers to give impulses to and guide the investigation. Consequently, they demand the dissolution of the Léger Commission, which had in their view proven its partiality and incompetence.

47. The Conseil National des Barreaux *(*National Council of Bar Associations), in a resolution adopted unanimously at its general assembly on 14 March 2009, also strongly condemns the interim report of the Léger Commission, in particular as regards the rights of the defence.

48. On 21 March 2009, the Etats Généraux de la Justice Pénale*,*[45] under the chairmanship of former Justice Minister Robert Badinter, launched a series of consultations throughout France aimed at contributing to the ongoing discussions on the reform of the criminal justice system. The national appeal adopted at the launching conference denounces "the attacks on the principle of separation of powers, of which the announced transfer of all investigative functions to a prosecution service that is hierarchical and dependent on the executive is one of the recent manifestations". The appeal also stresses the need for the independence of the authority in charge of the investigation.

49. These strong adverse reactions from the relevant, representative professional bodies show that the Léger Commission still has some work to do, as it would surely be unwise to simply force the reform proposals onto those that must apply them in their daily work.

50. Another bone of contention between the government and the judiciary is the reform of the Conseil Supérieur de la Magistrature *(*CSM), the task of which it is to decide on disciplinary sanctions against judges and prosecutors, and to give opinions on judicial appointments. Whilst in the case of judges, the minister can generally not deviate from the CSM's opinion (procedure of *avis conforme*), the minister can do so in the case of the appointment of prosecutors (procedure of *avis simple*). We were told that, under the present government, the practice of ignoring the CSM's opinion (*passer-outre*) has much increased, to the point of putting into question the role of the CSM altogether.[46] My interlocutor at the CSM explained that another reform that will enter into force in 2010[47] will substantially change the balance of power in this body in that the representatives of the judges and prosecutors will be a minority. Until now, six judges or prosecutors[48] face

---

43. See interim report of 6 March 2009, 4th proposal: guarantee and strengthen the rights of the victim and of the suspect throughout the investigation, and 5th proposal: strengthen the respect for individual rights and freedoms during the preparatory phase of the criminal proceedings.

44. USM/SM/AFMI, Paris, 9 March 2009, press release: "Pré-rapport Léger: une claire menace pour l'indépendance sans véritable avancée pour les droits de la défense" (Pre-report Léger: a clear menace for independence without real advances for the rights of the defence).

45. The Etats Généraux are organised by different professional bodies representing judges, prosecutors, police officers, lawyers, legal academics and parliamentarians; another plenary meeting foreseen at the end of June 2009 will discuss the results of the national consultations.

46. One example that has particularly angered the judicial community is that of Bernard Blais, Prosecutor General at the Court of Appeal of Agen, who was put under intense pressure to request a move to another post, eight months before his retirement. The minister of justice justified her action by the need to vacate posts for women to achieve parity at the level of prosecutor general. All 21 judges and prosecutors of the Court of Appeal of Agen adopted a motion in support of Mr Blais, stating that the "absurd" decision demonstrates "the will of the political authorities to weaken the prosecution in order to take control of a judicial institution whose independence is annoying" (Mr Blais himself, in an open letter of 13 December 2007, and the two main judges' unions, USM and SM, in a rare joint communiqué (Reuters, 4 October 2007), came to the same conclusion). The CSM gave a negative opinion, but the minister announced at once that she would ignore it (AFP, 30 October 2007).

47. Law of 23 July 2008 changing the constitution; a loi organique (organisational statute) spelling out the changes in more detail was still outstanding at the time of the drafting of this report.

48. Five judges and one prosecutor dealing with judges' matters, and five prosecutors and one judge in matters concerning prosecutors.

four lay representatives appointed, respectively, by the president of the republic, the presidents of the two chambers of parliament and the State Council (Conseil d'Etat), with the president, deputised by the minister of justice, in the chair. After the entry into force of the reform, the president, the speakers of the two houses and the State Council will appoint two representatives each, whilst the CSM will be chaired by the First President of the Court of Cassation or the prosecutor general at the same court, so that there will be seven judges or prosecutors and eight "political" appointees instead of six versus five (counting the chairpersons). This reform, which will also allow individual citizens to seize the CSM with regard to alleged disciplinary offences by judges or prosecutors, is intended to deflect the reproach of "corporatism" against judges and prosecutors who are perceived as deciding among themselves on each other's promotions and disciplinary sanctions. The judges' and prosecutors' unions as well as the CSM itself are opposed to this reform,[49] pointing out that judicial independence is threatened when appointees of the political majority of the day determine the careers and possible disciplinary sanctions for judges and prosecutors. They also cite "European standards" which require that there should at least be parity between judges and prosecutors on the one side and "political" appointees on the other.[50] They finally point out that the ordinary courts (*juridictions judiciaires*) are treated less favourably than other tribunals such as the administrative tribunals and the courts of accounts whose superior councils have a majority of judges.[51]

51. The Venice Commission, whose opinion the Assembly requested upon my proposal, has taken the following view:

> *"To sum up, it is the Venice Commission's view that at least in new democracies it is an indispensable guarantee for the independence of the judiciary that an independent judicial council has decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission also recommends that old democracies which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges elected by their peers."*[52]

52. My own views on the various reform proposals are centred around the need to safeguard the independence of the judiciary both in actual fact and in appearance. If it is decided in France to abolish the investigating judge and to transfer these functions to the prosecutor's office, some basic requirements should be met in order to avoid any impression that the purpose is in reality the self-protection of the political class from judicial scrutiny. These requirements would include, in particular, a much larger degree of autonomy of the prosecutor's office in practice than what seems to be the case at present.[53] Very importantly, access of the defence counsel to the file of the prosecution and to the questioning of suspects and witnesses should be extended to the same level as is currently the case before the investigating judge – in all cases, not just for the small number of files presently managed by investigating judges. A higher dose of adversarial procedure would also require a substantial increase in the resources available for legal aid – otherwise, a two-tier criminal justice system risks evolving, with equality of arms only for those who can afford it. Finally, as far as the CSM is concerned, I am in favour of maintaining at least parity between judges and prosecutors on the one hand and lay appointees on the other. As far as the lay appointees are concerned, it would seem reasonable that not all of them should be appointed by the political majority, as is presently the case in France, but that the political forces of the opposition should also be represented.

---

49. The CSM advocates parity, as I was told by my interlocutor at the CSM, Jean-Michel Bruntz; the unions favour a majority of judges or prosecutors, see, for example, USM Flash Info No. 379 of 10 March 2008.

50. See Recommendation No. R (94) 12 of the Council of Europe's Committee of Ministers of 13 October 1994; the European Charter on the Status of Judges (July 1998); and Opinion No. 10 of the Consultative Council of European Judges to the Committee of Ministers of the Council of Europe (November 2007).

51. Administrative tribunals: eight judges, two representatives of the state, and three lay members appointed by the president of the republic and the presidents of the two houses of parliament (Article L 232-2, Code de Justice administrative); and Court of Accounts: 14 judges and three lay members appointed by the political authorities (Article L112-8, Code des Juridictions financières).

52. Study No. 494/2008, CDL(2009)055, draft report on "The Independence of the Judicial System: Part I: The Independence of Judges", approved by the Sub-Commission on the Judiciary in Venice on 12 March 2009 and debated at the June 2009 Plenary Session, on the basis of comments by Mr G. Neppi Modona (Italy), Ms A. Nussberger (Germany), Mr H. Torfason (Iceland) and Mr V. Zorkin (Russia); henceforth cited as: Venice Commission study.

53. The European Court of Human Rights, in Medvedyev and Others v. France (No. 3394/03, judgment of 10 July 2008, paragraph 61) refused to recognise the French prosecutor's office as a "judicial authority" as it lacked the independence from the executive authorities required for such a qualification under its case law.

2.3. The German model

53. The investigation at the pre-trial stage in the German system is carried out by the police under the supervision of the prosecutors' office. The law enforcement authorities have a duty to look for both inculpatory and exculpatory evidence, but the defence also plays an active role in the proceedings. Contrary to the present situation in France, defence lawyers have full access to the suspect and to the file of the prosecution even during the pre-trial procedure. The "supervision" of the police by the prosecutor is intended to ensure the respect of legal limits placed upon the police. Certain investigative acts that are particularly sensitive with respect to human rights (in particular, arrests, searches and seizures, etc.) must be authorised by a judge, called *Ermittlungsrichter* (investigation judge – a concept that is close to that of the *juge de l'instruction* who may take the place of the French *juge d'instruction* following the reform proposals discussed above).[54]

54. German prosecutors are not "independent" in that they are part of an administrative hierarchy under the authority of the minister of justice of their *Land* (federal state). The justice ministers have the possibility, as part of their right of oversight over the prosecution, to give not only general instructions to ensure equality of treatment in the administration of justice, but also ones that concern individual cases. This possibility foreseen by law[55] is rarely used in practice, but it exists. Ministerial instructions are limited by the requirement that they must not be in breach of the law, in particular of the "principle of legality" (*Legalitätsprinzip*),[56] according to which, as a rule, all criminal acts that come to the attention of the authorities must be investigated and prosecuted. The principle of legality is in effect tempered by a number of exceptions laid down in successive legislative reforms, which have introduced a strong dose of the "principle of opportunity of prosecution" (*Opportunitätsprinzip*) for trivial or other offences where the public interest in prosecution is limited. But a police officer, prosecutor or any other official who interferes in the normal course of justice is liable to serious criminal sanctions.[57] The issue of instructions to the prosecution concerning individual cases is hotly contested in Germany. The defenders of the *status quo* argue that the principle of democratic control requires full ministerial responsibility for any acts or omissions of the prosecution before parliament.[58] Proponents of reform, first and foremost the German federation of judges and prosecutors, argue that the very possibility of instructions on individual cases, however rarely used in practice,[59] creates a public perception that politicians manipulate the judicial process for their own purposes and undermines public trust in the objectivity and independence of the criminal justice system.[60] My interlocutors in Berlin argued that it would even be in the best interest of the ministers themselves not to have the instrument of individual instructions at their disposal: depending on the perspective of the commentator, ministers can become targets for criticism for making use of this instrument, but also for failing to do so. Also, the very possibility that, for example, a decision to terminate proceedings against a politician accused of minor wrongdoings could be based on such a "political" instruction undermines the intended effect of such a decision to rehabilitate the accused.

55. At the trial stage, the court itself – which may have a lay element – has the duty to establish the facts. The court, whose judges enjoy full independence (including life tenure and immovability) and to whom cases are allocated automatically, following objective criteria that are fixed in advance (*Geschäftsverteilungsplan*), can and often does call evidence *ex officio*; but both the prosecution and the defence are entitled to make requests, including the presentation of witnesses. The court can reject such requests (*Beweisanträge*) only for limited reasons. The defence is able to participate actively in the proceedings before the court, including participation in the selection of experts and the questioning of witnesses. The German system might thus be seen as starting from an inquisitorial premise,[61] focused on establishing the material truth, but it is significantly tempered by adversarial elements, in particular a strong role for the defence, from the beginning of the proceedings. This is to some extent reflected in the resources made available for legal aid: Germany spends considerably more than France, which has a strongly inquisitorial system, but still much less than the United Kingdom with its purely adversarial system.[62]

---

54. See paragraphs 40 ff.
55. Sections 146 and 147 of the Law on the Organisation of the Courts (Gerichtsverfassungsgesetz).
56. Laid down in paragraph 152, StPO (Strafprozessordnung/Code of Criminal Procedure).
57. Strafvereitelung im Amt, paragraph 258a, StGB (Strafgesetzbuch/Criminal Code).
58. It is said that there must not be a "space exempt from ministerial control" ("ministerialfreier Raum").
59. During my term of office as minister of justice, I did not make any use of this possibility.
60. See draft law on the modification of title 10 of the Law on the Organisation of the Courts (Gerichtsverfassungsgesetz) proposed by the German federation of judges and prosecutors, Section 147, paragraph 3, and the explanatory report (pp. 9-11), available (in German) on the website of the DRiB.
61. The principle of inquiry ex officio (Amtsermittlungsgrundsatz) is laid down in paragraphs 160 and 244 II, StPO.
62. According to the CEPEJ study referred to above (note 39), Germany spent €557 million on legal aid, compared to €303 million in France and €3 billion in England and Wales.

56. Regarding the issues of particular relevance to this report, the German system is rather behind the British and French in that it does not foresee an independent institution governing the appointment, promotion and disciplinary measures concerning the members of the judiciary such as the Judicial Appointments Commission or the Conseil Supérieur de la Magistrature. The *Richterräte* (judges' councils) and the *Präsidialräte* (presidents' councils) foreseen in the federal and *Länder* laws on the status of judges (*Richtergesetze)* do not have a comparable role. The Deutscher Richterbund(German Federation of Judges), the most representative professional organisation of judges and prosecutors in Germany, is lobbying for the introduction of a system of self-government of the profession modelled on the judiciary councils that exist in most other European countries.[63] Germany is the "odd man out" in this respect: in the European network of chairpersons of high judicial councils, Germany has only observer status, without the right to vote, and was, significantly, represented until recently by an official of the federal ministry of justice.[64] The German federation of judges and prosecutors finds that the lack of judicial self-administration in Germany may well be one of the reasons why the judiciary is so underfunded in comparison with other European countries – a point that recent comparative studies at the level of the Council of Europe tend to underscore. Even such a "mundane" issue as the level of remuneration of judges and prosecutors is seen as having an impact on the independence of the judiciary from "undue outside influences".

57. I should like to point out that the potential impact of issues such as the independence of the prosecution from ministerial instructions and the absence of judicial self-administration as regards recruitment and promotion decisions is attenuated by the federal structure of the German judiciary. The courts of first and second instance as well as the prosecution services attached to them are under the responsibility of the individual *Länder*, whereas the federal government is in charge of the federal courts (including the Bundesgerichtshof*,* the Supreme Court for civil and criminal cases, and the Federal Constitutional Court). The risk of one political faction taking control of the judiciary and abusing it for purposes of cementing its hold on power and undermining the opposition is not as high as it might be in centralised countries with similar rules. The political responsibility for, and potential influence on, the judiciary is divided between the ministers or senators of justice of 16 *Länder* and the federal minister of justice. The *Länder* have different traditions and legal rules governing the appointment and promotion of judges and prosecutors, and different, and frequently changing, political majorities. Some have already introduced progressive mechanisms akin to judicial self-administration and placed limits on the powers of the ministerial administration in personnel matters. Others have already decided to do so, and others are still in the early stages of reflection. The current federal minister of justice, Mrs Zypries, stated publicly at a conference in May 2009[65] that she is not yet convinced of the desirability of judicial self-administration in accordance with "European standards". She argues that Germany should export rather than import standards in the judicial sphere, as its judiciary enjoys an excellent reputation for quality, efficiency and integrity. This said, she declared herself open to the arguments of the proponents of reform.

58. My own views, following the meetings with senior representatives of the judiciary, the federation of bar associations and the federal ministry of justice,[66] are in fact fairly close to those of the German federation of judges and prosecutors.

59. As regards judicial self-administration, I take seriously the arguments that such a reform could favour a "closed shop" mentality, a corporatist attitude cutting the judiciary off from society at large, and to a loss of democratic accountability. But these dangers can be counteracted within a "judicial council" model that ensures the representation of all sectors of society, as the United Kingdom seems to have done with success. Contrary to Minister Zypries, I also take seriously the argument that judicial self-administration corresponds to European standards. While I agree with her that the independence of the judiciary is presently fairly well respected in practice in Germany, legal structures must be such that they can prevent abuses even if the instruments in question fall once again into "unsafe" hands. The so-called "old democracies" should refrain from giving advice to "new democracies" that they are not prepared to implement themselves. Such double

---

63. See the "two pillar model" advocated by the Deutscher Richterbund in its resolution of 27 April 2007, presented on its website at: http://www.drb.de/cms/fileadmin/docs/sv_modell_070427.pdf.

64. The German delegation now also includes a representative of the federation of judges and prosecutors.

65. At a conference on 11 May 2009 in Berlin, co-organised by the Friedrich Ebert Foundation, the German Federation of Judges and Prosecutors and the federal ministry of justice, on the topic of "Justice requires a strong judiciary" (available on the website of the federal ministry of justice, http://www.bmj.de).

66. In addition to my ongoing contacts with judicial circles in Germany, I have had special meetings in Berlin in view of the preparation of this report on 11 June 2009 with the President of the German Federation of Judges and Prosecutors, Mr Christoph Frank, Dr Heide Sandkuhl, member of the criminal law committee of the German Federation of Bar Associations (DAV), Dr Hans-Holger Herrnfeld, Head of the Division for International Criminal Law, European and Multilateral Co-operation in Criminal Matters of the federal ministry of justice, and Mrs Sabine Hilgendorf-Schmidt, Head of the Division for Law on the Status, Remuneration and Training of Judges of the federal ministry of justice.

standards are unacceptable[67] and undermine the efforts of the Council of Europe to strengthen the independence of the judiciary everywhere. I therefore sympathise with the attitude of the United Kingdom that recently created the Judicial Appointments Commission[68] not so much because the independence of the British judiciary was in doubt but to avoid setting a bad precedent that could be invoked by others.

60. As regards the right of individual instructions to prosecutors, I fully support the proposal to abolish this possibility. In my own experience as minister, I can only confirm that this instrument is a double-edged sword that can do as much harm as good, both to those who use it and those who are at the receiving end. This is particularly true in view of the widespread and recently partly "legalised" practice of "deal-making" between the prosecution, the court and the defence[69] – if the prosecution has to follow "political" instructions, the whole procedure can easily turn into a farce.

61. As regards remuneration, I agree with the judges and prosecutors' representatives that decent pay is a necessary component of protection from undue outside influences. When the level of remuneration is allowed to drop too far, the danger of corruption looms – and corruption is a disease that is much harder to cure than to prevent. Also, without decent remuneration at all levels of the judiciary, junior judges and prosecutors may feel economically pressured to jockey for promotions by pleasing the powers that be.

62. A final recommendation that follows from my conversations in Berlin is that the supervisory role of judges concerning investigative measures that interfere with the fundamental rights (such as detention on remand, the authorisation of searches and seizures, wire-tapping, etc.) needs to be strengthened by providing additional resources to courts in order to avoid that because of a lack of time, judges are reduced to rubber-stamping such requests made by prosecutors. This is particularly true in the framework of the fight against terrorism, which has led to an increase in the powers and resources of (*de lege lata* less independent) prosecutors without a commensurate increase in the supervisory capacities of judges.

2.4. Attributing states to the first three models

63. A formal analysis of the different criminal justice systems of member states might suggest that they can all be placed in one of the foregoing three categories, albeit that each obviously possesses specific distinctive features. Austria, Denmark, Finland, Italy, Iceland, Liechtenstein, Norway, Portugal and Sweden might best be regarded as falling within the German model, while Andorra, Belgium, Greece, Luxembourg, Netherlands, Monaco, San Marino, Spain, Switzerland and Turkey as conforming more to the French one. Furthermore, and subject to what has already been noted above, Cyprus, Malta, Northern Ireland and Scotland can be attributed to the English one.[70] Among the central and eastern European countries, the criminal justice systems of Albania, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Montenegro, Poland, Romania, Serbia, Slovenia and Slovakia tend to follow the German model, while Croatia – with provision for an investigating judge – ought to be regarded as following the French one.[71]

2.5. Still a system sui generis: the criminal justice system of the Russian Federation

2.5.1. Historical roots

64. The Russian Federation appears to represent a distinct fourth category of criminal justice system influenced in different ways by the tradition that was forged during the existence of the Soviet Union. This analysis seems appropriate for countries such as Armenia, Azerbaijan, Georgia, Moldova, the Russian Federation and Ukraine but less so for those member states that were at one point communist but were not

67. Christos Pourgourides informed me that he made this point forcefully on behalf of the Assembly at the meeting of the Venice Commission on 12 June 2009 dealing with the adoption of the opinion on European standards on the independence of the judiciary, which our committee requested in the framework of the preparation of this report.
68. See paragraph 14 above.
69. The practice of "deals" (the same word is used in German) has developed informally; the federal legislator has recently attempted to regulate the practice and set certain limits.
70. See the country reports prepared for the "World Factbook of Criminal Justice Systems" (www.ojp.usdoj.gov/bjs/abstract/wfcj.htm) and see also M. Joutsen, R. Lahti and P. Pölönen, "Finland"; D. Spinellis and C. D. Spinellis, "Greece"; A. Manna and E. Infante, "Italy"; P. J. P. Tak, "The Netherlands"; J. Martin-Canivell, "Spain"; and B. Svensson, "Sweden" (all National Criminal Justice Profiles published by HEUNI).
71. See further M. Joutsen, "Albania"; B. Tankov, "Bulgaria", Karabec, Dibilová and Zeman, "Czech Republic"; Horvatic and Derencinovic, "Croatia"; G. Svedas, "Lithuania"; A. Viasceanu and A. Dorobant, "Romania"; and K. G. Sugman et al., "Slovenia" (all National Criminal Justice Profiles published by HEUNI).

part of the Soviet Union or only part of it after the Second World War as either elements of the former tradition endured or were resurrected or changes made before and since the communist period would appear to be more substantially entrenched in practice.

65. During the Soviet period, the *Prokuratura* was the dominant force in the criminal justice system, with the courts playing a subordinate and almost confirmatory role, and lawyers for the defence virtually irrelevant.[72] Although considerable efforts have been made in former Soviet countries to increase the standing of the courts in the criminal process and to ensure that defence lawyers can participate at both the investigation and trial stages, the prosecutor continues to exert a very strong influence over the process. This is a consequence not only of many of the personnel continuing in the same organs in the criminal justice system (despite the formal change in responsibilities) but also of the prosecutor's office retaining a formidable influence in the legal order generally,[73] with an extensive supervisory role over many activities, including outside the realm of criminal justice – a state of affairs that has repeatedly been criticised by the Council of Europe.

66. During my visit to Moscow I was going to discuss structural issues, such as the recent creation of the Investigative Committee, "split off" from the prosecutor general's office, as well as concrete examples of the alleged dysfunctioning of the prosecutorial authorities with senior representatives of these offices. Whilst meetings with the deputy prosecutor general and the Deputy Head of the Investigative Committee were scheduled in the last version of the official programme of my visit that I was handed in Moscow, they were subsequently cancelled at short notice. Upon my return from Moscow, I addressed a letter to the prosecutor general and to the Head of the Investigative Committee offering to meet them at another time and including a list of questions that they could alternatively reply to in writing. The written reply by the prosecutor general's office[74] (PGO) stresses the PGO's complete independence from any political, administrative or other interferences or influences, according to the constitution and the laws of the Russian Federation. Any attempts to interfere with the prosecutors' work would give rise to criminal liability. As to the PGO's relations with the newly created Investigative Committee, there could be no talk of competition, as the respective responsibilities were well defined and in case of disagreement, the prosecutor general had the last word. This was very instructive and gave rise to some additional questions, which I asked in another letter that has so far remained without reply.

67. Mr Pavel Krashenninikov, the Chairman of the State Duma Committee on Civil, Criminal, Arbitration and Procedural Legislation, whom I met for a very constructive discussion in Moscow, has reserved his judgment as regards the practical effects of the creation of the Investigative Committee. Whilst some competition between the two offices could be healthy, good co-operation between the two offices was vital for the efficiency of law enforcement. He also considered it too early to be able to reply to my question whether the possible weakening of the prosecutor general's office could improve the protection of the rights of citizens in the criminal justice system. Mr Krashenninikov was well aware of key weaknesses of the Russian criminal justice system, including judicial corruption, overcrowding of prisons, and the all-too frequent recourse to pre-trial detention instead of alternative measures of restraint.[75]

68. Mr Krashenninikov also stressed his continuing support, and that of his committee as a whole, for a legislative proposal he had spearheaded, which aims at counting double the time spent in pre-trial detention in consideration of the particularly difficult situation in the remand prisons, and in response to criticism of the European Court of Human Rights. This draft law has reportedly also been welcomed by the presidential administration, the Supreme Court and the Government of the Russian Federation. However, independent experts told me in Moscow that the government had recently withdrawn its support for the proposal, because it might benefit Mr Mikhail Khodorkovsky. They predicted that the law, which shall benefit only prisoners sentenced to less than ten years in prison,[76] will only be allowed to enter into force after Mr Khodorkovsky is convicted in his second trial, and presumably sentenced to a term of imprisonment over ten years.[77] Mr Krashenninikov confirmed that the draft law still had to clear some bureaucratic hurdles, which may take some time.

---

72. See, for example, R. J. Terrill, World Criminal Justice Systems A Survey, 5th edition, 2003, and W. J. Wagner, "The Russian Judicature Act of 1922 and Some Comments on the Administration of Justice in the Soviet Union", Indiana LJ, 41, 420, 1966.

73. While there, I heard it jokingly said that under the Soviet system, the prosecutor general had only the Politburo above him, but that now the Politburo no longer exists.

74. Dated 1 June 2009 (in Russian).

75. On the invitation of Chairman Lebedev, I attended with great interest a plenary session of the Supreme Court of the Russian Federation dedicated to the examination of proposals to replace pre-trial detention by other measures of restraint. The Supreme Court appears to be well aware of this problem and ready in principle to act on judgments of the European Court of Human Rights criticising the existing practice.

76. Mr Khodorkovsky received a sentence of nine years at his first trial.

2.5.2. Pressures on judges – Pressure for conviction

69. In many instances the pressure for conviction seems to be very great and, rather than acquit, courts tend to refer the case back for further investigation. I raised the issue of pressure for conviction in my talks that I held in Moscow in early April, and I have come to accept that such pressures do exist, including as a factor for the assessment of the "efficiency and effectiveness" of judges for purposes of their promotion, or even removal from office. I have met with a former judge, Mr Melichov (criminal court judge at the Dogobomila District Court in Moscow), who explained in a coherent and detailed way how he was put under strong pressure to refrain from rejecting applications for pre-trial detention,[78] and from "occasionally" pronouncing acquittals.[79] After many tribulations, he ended up being dismissed – on the strength of complaints lodged by the chair of the Moscow City Court (not his own court's chair).[80]

70. A former judge at the Supreme Court, Mr S. A. Pashin, a renowned legal expert who was in charge of judicial reform in the presidential administration under President Boris Yeltsin, and who presented me with insightful analysis during my visit in Moscow, was himself fired and reinstated as a judge several times. Mr Pashin finds that he owes his reinstatements to the fact that the then Russian state agent before the European Court of Human Rights had warned the authorities that an application to this Court by Mr Pashin may well succeed.

71. In this context, I should like to mention that I met again with Judge Kudeshkina,[81] who was in excellent spirits after her provisional court victory in Strasbourg. She said that the Court's judgment in her favour had given much hope to other embattled judges. Mrs Kudeshkina also welcomed the fact that the chamber judgment was referred to the Grand Chamber, as this would give the Court an opportunity to address in even more depth the problems of Russian judges' lack of independence and their ever closer control by the courts' chairpersons.

72. Another former judge I met in Moscow is Mrs Gratchova. She had worked as a judge for nineteen years and had always had excellent professional assessments, which is why she was about to be promoted to the rank of deputy chairperson of her court (in the town of Korolyov in the Moscow region). She had declared a local election as void, because of several violations of the law. During the hearing, she had been threatened by a lawyer that she would have "great problems". A new chairman appointed to her court shortly thereafter began "harassing" her and withdrew his predecessor's support for Ms Gratchova's promotion. He also began to overburden her with criminal cases (in which she had no experience), in addition to her existing load of civil cases. Health problems ensued, as well as a trumped-up charge brought by the lawyer who had threatened her, concerning a small compensation[82] received for helping during her spare time in organising an election. She felt that the procedure concerning her case in the Supreme Qualifications Collegium was grossly manipulated, and that her court chairperson had said in open court that she "ought to be shot".[83] After refusing a proposal to quit her job at her own request (thus maintaining her pension rights), she was finally

---

77. Other pundits thought that the law was originally tailor-made to help the new president solve the "Khodorkovsky problem" – it would have required setting him free in the near future without the need for a potentially conflictual presidential pardon. The hastily opened new trial and the "freezing" of the legislative proposal in question is interpreted as a move by the "anti-Khodorkovsky faction".

78. He said he had rejected 5% to 10% of applications (the "norm" being zero rejections), for which he said he was criticised in public by the Chair of the Moscow City Court, Mrs Egorova. After he spoke up to justify himself, Mrs Egorova warned him that she would "remember his name".

79. Mr Melichov said he had pronounced seven acquittals in 300 to 400 cases (the norm being, again, zero acquittals); he had also sent back a pile of files to the traffic police, which had prepared the accusations following an earlier version of law, not taking into account relevant changes. The police had complained to Mrs Egorova, who then complained to his own court's chairperson.

80. Following the reorganisation of the Moscow courts in 2003 and 2004, he was one of 13 judges whose names were missing on the presidential decree assigning all judges to their new courts. After three months, they were heard by the Supreme Qualifications Collegium and 10 (including Mr Melichov) were invited to step down voluntarily, in exchange for 80% of their salary for life. Mr Melichov was the only one who refused this offer, as he thought he had nothing to fear: he had committed no violations of the law, his assessment before his confirmation for life tenure was excellent; and the small number of judgments Mrs Egorova (not his immediate superior) had found too "soft", which dated back as far as 1998, had all come into legal force (that is, were not appealed or were upheld). He had even won his first appeal against the decision of the Supreme Qualifications Collegium. Upon his reinstatement, he was again removed on the request of Mrs Egorova, and lost his further appeals. A case before the European Court of Human Rights is still pending.

81. I first met her during my fact-finding visit to Moscow in 2003 concerning the report on the prosecution of leading Yukos officials (see Doc. 10368, paragraph 61, note 13).

82. The equivalent of €50.

83. A month later, her house was indeed shot at by an unknown person, but the police refused to open a case because the damage (from a shotgun) was too insignificant.

dismissed (implying the loss of her rights). After she lost all her internal appeals against the dismissal, the European Court is her last hope. Meanwhile, according to Mrs Gratchova, the new chairperson of the district court appointed in 2008 had severely criticised the methods used by the chairperson of her former court.

73. Another illustration of the weakness of the protection afforded to judges in the Russian Federation is that of Judge Vasiliy Petrovich Savelyuk, who had worked for ten years at the Buterskiy court in Moscow. Irina Kadyrova, his wife, who said she had become a lawyer in order to save her husband, told me his story in much detail. In essence, Judge Savelyuk had the bad luck of being accused of having participated in a highly publicised property scam involving several Muscovite judges at a time when the fight against judicial corruption had publicly been given highest political priority. Shortly after the President of the Moscow City Court[84] had publicly taken credit for having solved this case and called the accused judges fraudsters, Mr Savelyuk was sentenced to twelve years in prison on the basis of very scant evidence[85] and following a highly questionable procedure that lasted eight years.[86] The European Court, once again, is the last hope for this former judge and his young family, who have already suffered three and a half years of Mr Savelyuk's imprisonment in severe conditions.[87]

74. Prior to my departure for Moscow, I was informed of two other cases of judges allegedly having received "instructions", both concerning the ToAZ case. As reported by the *Moscow Times*,[88] Yelena Valyavina, First Deputy Chair of the Higher Arbitrazh Court, gave startling evidence in defamation proceedings against the well-known radio news host Vladimir Solovyov before the Dorogomilovsky District Court in Moscow. During his radio show, Mr Solovyov had directly accused senior Kremlin official Valery Boyev of having given orders to the Higher Arbitrazh Court.[89] Mr Boyev sued him for defamation, and Judge Valyavina confirmed as a witness in the defamation case that Mr Boyev had indeed told her that she would not be returned to her post after her initial term if she refused to change her position in cases being heard by her.[90]

75. The second case linked to ToAZ is that of Judge Nadezhda Kostyuchenko, formerly of the Samara Oblast Arbitrazh Court, who has taken her case to the European Court of Human Rights in Strasbourg. She fell victim to the authorities following her rulings in favour of ToAZ in 2005.[91] This case was first publicised in 2006, when Kostyuchenko's dismissal was mostly presented as a result of the fight against judicial corruption.[92] In more recent articles, the tone is noticeably different. Anatoliy Ivanov, the Russian State Duma Deputy for Togliatti (United Russia), stated in an article in the *Parliamentary Gazette*[93] that Mrs Kostyuchenko was "unlawfully deprived of her appointment" in March 2006 and regretted that she was forced to apply to the

---

84. Mrs Egorova.

85. Mrs Kadyrova explained that her husband's signature was found on 20 fraudulent documents; the court's handwriting expert had found that 15 of the signatures had clearly been forged, for three he was not sure, and two he found authentic. The court had refused all requests for a second expertise, including by a particularly well-known handwriting expert, Mrs Volodyna, who had seen at first glance that all the signatures were forged and had waited for three days in front of the courtroom in order to be allowed to testify. The fraudsters themselves had identified other judges as their accomplices, but had categorically discharged judge Savelyuk, despite a "deal" offered to one of them in return for testifying against him.

86. For example, systematic rejection of requests for evidence by the defence; refusal of all requests by the defence to correct the record of the hearings, including one which was identical to a request made by the prosecution, which the court had granted; artificial separation of the cases against the accused judges and the other fraudsters, who had already been convicted before the beginning of the judges' trial; a tactic designed to short-circuit defence rights that is also being used in the case against Mr Khodorkovsky and Mr Lebedev (see paragraph 95 below); reliance on testimony by key witnesses of the accusation made in a separate criminal case and during the preliminary investigation rather than the testimony of the same witnesses during the trial itself.

87. As Mr Savelyuk is still in reasonably good health, he did not apply for priority to be granted to his case by the already overburdened Strasbourg Court.

88. Natalya Krainova, "Judge Tells of Kremlin Threat", Moscow Times, 14 May 2008.

89. Solovyov had said on the Solovyiniye Treli programme on Serebryany Dozhd radio that there were "no independent courts in Russia", but that there were "courts dependent on Boyev", "that very Boyev who gives orders to the Higher Arbitrazh Court".

90. The newspaper Kommersant (article by Olga Pleshanova, in: Kommersant, No. 79 of 13 May 2008) has published an excerpt of the evidence given by Mrs Valyavina. She had told the court that Boyev asked her in autumn 2005 to change her ruling regarding the proper ownership of a share package in Tolyattiazot, the country's largest ammonia producer. She said Boyev made his threat when she refused to comply. She also told the court that Boyev "as the representative of the President's administration, participates in the meetings of the Supreme Qualifications Collegium of Judges".

91. See, for example, "An Ex-Judge from Samara is Trying to Restore her Position through the Strasbourg Court", IA Regnum, 23 June 2008, at: http://www.regnum.ru/news/1018369.html.

92. See, for example, Aleksandr Odintsov, "Waiting for a New Court", Izvestiya, 1 September 2006, at: http://www.compromat.ru/main/titov/smarts.htm.

93. "Strasbourg Check-up on Soundness", Parlamentarskaya Gazeta, Nos. 43 and 44, pp. 2295-2296.

European Court for the protection of her rights. Another State Duma Deputy, Gennadiy Gudkov, Deputy Chairman of the State Duma Committee on Security, is quoted in an article in *Nezavisimaya Gazeta*[94] as saying that Mrs Kostyuchenko's complaint to Strasbourg bears witness to serious problems in the Russian judicial system. For Mr Gudkov, there is at the present time a tendency to cut "inconvenient" judges out of court cases. Journalist Vladimir Solovyov has commented on both cases extensively[95] and noted that no criminal proceedings or any other official inquiry has yet started vis-à-vis Mr Boyev despite the evidence Judge Valyavina had given in court.

76. I did not have the opportunity during my stay in Moscow to speak with Mr Solovyov, Mrs Valyavina or Mrs Kostyuchenko, nor with the two Duma Deputies who reportedly supported them in public. Some independent experts, whom I asked if this case could be a "swallow announcing the spring" were sceptical, in view of Mr Solovyov's usual strong pro-government stance. I consider the very fact that a senior judge dared to confirm in public that a Kremlin official had tried to give her instructions as an encouraging sign for the increasing assertiveness of Russian judges; and the fact that a "mainstream" news programme host took up this case shows that there is some public, if not "official" support for such judges. It will be up to the Council of Europe to work with such forces in order to further strengthen this trend, this "little swallow", as one of my sceptical interlocutors grudgingly agreed.

2.5.3. The views of the leadership of the Supreme Court of the Russian Federation

77. During my meeting at the Supreme Court of the Russian Federation, Chairman Lebedev eloquently presented the advances made by the Russian judiciary during the past years. Considerable pay increases, bringing Russian judges' salaries up to almost triple the French or German levels (compared to the mean income of workers in the three countries),[96] have much reduced the dependence of judges on "favours" by local authorities such as the provision of apartments. I consider decent salaries as a necessary (though not sufficient) contribution to the fight against corruption, including in the judiciary.

78. The chairmen of the Council of Judges of the Russian Federation, Mr Zedarenko, and of the Supreme Qualifications Collegium for judges, Mr Kusznetsov, stressed the advances made in the functioning of the bodies over which they preside, whose task it was to secure the independence of the judiciary "not only in words, but also in reality". Supreme Court Chairman Lebedev stressed his court's "sensitivity" regarding independence and the importance of his court's role in advising the government and the State Duma on the further improvement of procedural and substantive laws aimed at speeding up and further "professionalising" the work of the courts, without violating any rights. Chairman Lebedev also welcomed the move to self-administration of the judiciary, since 1998, by shifting the competence for the administration of the courts away from the ministry of justice towards the "central directorate for the administration of justice" within the Supreme Court itself. The general director of this department, who has ministerial rank, is appointed by the Chair of the Supreme Court, after consultation with the chair of the judges' council. The composition of the Supreme Qualifications Collegium (29 members) includes nine judges of the civil and criminal courts, nine judges of the *arbitrazh* courts, ten members appointed by the Federation Council and one by the President of the Russian Federation. Mr Kusznetsov mentioned that the Supreme Qualifications Collegium had succeeded in fighting off attempts to change its composition by invoking European standards, which foresee that at least half the members must be judges. Candidatures for vacant judgeships (including in higher courts, to be filled by way of promotion) are invited through the media. Decisions and recommendations of the collegium must be motivated, a requirement recently stressed by the Constitutional Court of the Russian Federation. Chairman Lebedev also pointed out that he does not have a right to vote in the Supreme Qualifications Collegium. He had declined a proposal made by a group of judges to change this state of affairs as he thought that the collegium could work in a more serene, flexible way without him.

---

94. Andreiy Kulikov, Nezavisimaya Gazeta, 1 July 2008, at: http://www.ng.ru/politics/2008-07-01/4_femida.html.

95. See Vladimir Solovyov, "The Judicial Desert. The European Court of Human Rights Has Received for Consideration and Is Checking the Legality of the Dismissal of Judge Kostyuchenko for Her Decisions on Togliatti-Azot", Treli.ru, 24 June 2008, at: http://www.compromat.ru/main/mix/mahlaykostuchenko.htm; Solovyov claims having obtained copies of the transcript of the Supreme Qualifications Collegium meeting on 1 February 2006, where phone taps were allegedly referred to, confirming the complaints made by Judge Kostyuchenko.

96. See European Commission for the Efficiency of Justice (CEPEJ), "European Judicial Systems – Edition 2008", Tables 91 and 92: at the beginning of their careers, judges earn 0.9 times the average annual salary in Germany, 1.2 in France, 3.2 in Russia and 4 in the United Kingdom (England and Wales). Senior judges earn 2.1 times the average annual salary in Germany, 3.5 in France, 7.5 in Russia and 6.5 in the United Kingdom. In most European countries, judges earn between 2 and 3 times the national average salaries in the lower courts, and about double in the higher courts.

79. The institutional structure as summed up above looks fairly progressive, also in direct comparison with the other countries I have visited: the United Kingdom, France and especially Germany.[97] My interlocutors' replies to my questions aimed at assessing the actual functioning of these bodies have created a slightly different impression.

80. In reply to questions as to the methods of ensuring the coherence and unity of the judgments of different courts in the Russian Federation, Chairman Lebedev explained eloquently the tradition followed "for decades" in which each court's chairperson, including himself at the Supreme Court, held meetings and conferences with their judges, collaborators and advisers during which topical cases were discussed. Even video conferences were used to reach out to courts in other republics and regions. They also served to disseminate the judgments of the European Court of Human Rights concerning the Russian Federation. But any such contacts with judges concerning pending cases would be "wrong". Mr Lebedev referred to a television programme, years ago, in which a Duma Deputy said that he had asked him (Mr Lebedev) to influence a particular judgment. He had replied that he must not do such a thing, having had to "control his anger". In response to my question concerning the Kudeshkina case, he refused to pre-empt the final decision of the European Court.

81. The answers to my questions regarding the criteria for assessing judges' competences for purposes of promotion or, possibly, dismissal remained somewhat unclear. Reference was made to the collegium taking into account whether judges have "taken the right decisions", and "legal violations" committed by judges that could lead to disciplinary consequences seemed to include cases in which judgments were invalidated upon appeal – but not "mechanically", but following the analysis of the judgments in question. Mr Kusznetsov, in response to a request for clarification, stated that the collegium did not assess the fairness or legitimacy of a judgment, but only legal mistakes committed by the judge, such as overlooking a change in the law, or passing openly unlawful judgments. Chairman Lebedev added that the work of judges is assessed at half-yearly or yearly intervals. If it turns out that a judge is not apt to exercise this function, the chairperson of the court can request disciplinary measures to be taken by the Supreme Qualifications Collegium. Problems of delays can lead to dismissals, as well as insufficient quality (such as several judgments having been quashed by a higher court). It was not necessary that a violation of the law was committed intentionally. Sometimes judges had to be made to understand that they had chosen the wrong profession.

82. In reply to my question, Mr Kusznetsov said that the dismissal of judges is "extremely rare" – he gave the figure of 56 "early termination of judges' powers" (dismissals). I find this number quite high, given the utter stability of employment (life tenure) that judges normally enjoy. In view of the testimony of former judges presented above, the number of judges who resign "voluntarily" after such a proposal is made to them (in order to save their pension rights) could well be even higher.

83. In the light of the meetings with senior representatives of the Supreme Court, on the one hand, and leading independent experts, former judges and lawyers, on the other, my impression is that Russian judges are – still, and maybe even increasingly so – under serious pressure to "function" as expected by the powers that be. Several independent observers told me that the practice of "telephone justice" – a term reportedly used in late 2008 by the minister of the interior, Mr Rashid Nurgaliev,[98] to describe instances in which judges receive calls telling them how to decide in individual cases – has indeed evolved, but not in the sense of greater independence: judges desperate to correctly anticipate the wishes of their "superiors" increasingly tend to pick up the phone themselves in order to ask for instructions rather than suffer the consequences of a wrong guess. My own impression, also in view of the sizeable number of judges removed from office in agreement with the Supreme Qualifications Collegium and the strong weight attached to the content of the judgments in the process of the assessment of judges' performance, is that Russian judges continue to work in an atmosphere akin to that of a lifelong "probation period" and that the Supreme Qualifications Collegium has yet to find its rightful role of protecting the independence of all judges, including those who dare to take decisions that may displease the powers that be. Judges who in this climate play their role in full independence still run a serious risk of losing their jobs and deserve all the support they can get from within Russian society as well as from the Council of Europe.

97. See paragraphs 57 to 59 above.

98. See Mikhail Falaleyev, "Cleaning the Uniform. Rashid Nurgaliyev: There Will Be No More Corrupt Officials, Rossisskaya Gazeta, 14 October 2008, at: http://www.rg.ru/2008/10/14/mvd.html.

2.5.4. Jury trials – A key reform under threat?

84. The introduction of jury trials in some instances may have led to a more critical approach to the evaluation of evidence – with a corresponding rise in acquittals – but most cases continue to be dealt with by career judges and lay assessors. Recent legislative proposals aim at further reducing the possibility for defendants to request a jury trial – by excluding them in cases involving terrorism, treason, violations of state security and secrecy, and "extremism". This proposal is seen by reformists as a step in the wrong direction, in particular in conjunction with concurrent legislative proposals to further widen the scope of relevant provisions in the Criminal Code.

2.5.5. Defence lawyers – A high-risk profession?

85. Although defence lawyers formally have been given a greater role in the criminal justice system, problems remain in practice to ensure that they are of sufficient quality and standing.[99]

86. Moreover, in "sensitive" cases, they are also frequently victims of intimidation and reprisals.[100] I have already described the tribulations of the lawyers representing Mr Khodorkovsky and Mr Lebedev during their first trial.[101] Unfortunately, the pressure on them is continuing unabated during their new trial. In particular, Mr Khodorkovsky's lawyer, Karinna Moskalenko, found a small amount of liquid mercury in her car in Strasbourg, in November 2008,[102] a dose that was not meant to be lethal, but that put her own health and that of her family, including two young children she had recently adopted, at serious risk.[103] Lev Ponomarev, a leading Russian human rights activist, outspoken defender of Mr Khodorkovsky, and father of lawyer Elena Liptser, another key member of Mr Khodorkovsky's legal team, was severely beaten on the way home from a meeting he had with me in Moscow in his NGO office.[104] These attacks are indeed perceived by those concerned as warnings and acts of intimidation aimed at weakening their resolve to defend their clients. I cannot help sharing their interpretation, and I am shocked that the authorities are either unwilling or unable to protect these courageous lawyers and their relatives.[105]

87. During my visit to London and again Berlin, before my departure to Moscow, I was briefed in much detail by the United Kingdom-based lawyers of the Hermitage Fund/HSBC on the almost unbelievable (but well-documented) story of the attack, apparently implicating senior officials, on what was until 2006 the largest foreign investor in the Russian stock market. In particular, all lawyers acting for HSBC/Hermitage in the Russian Federation have been intimidated and targeted by police with searches and questioning as witnesses – in violation of the lawyer-client privilege. On 20 August 2008, police raided the Moscow offices of all law firms representing HSBC and Hermitage, in particular those of the Moscow-based United States firm Firestone Duncan, and those of independent lawyers, Eduard Khairetdinov, Vladimir Pastukhov and Vadim Gorfel.[106] During the searches, powers of attorney authorising the lawyers to represent HSBC in court hearings scheduled for that week were seized by police in what appeared to be an attempt to obstruct HSBC's efforts to frustrate ongoing frauds.[107]

---

99. R. Vogler, A World View of Criminal Justice, 2005.

100. See Christian Lowe, "Russian Defence Lawyers in Hazardous Profession", Reuters, 23 July 2007, at: http://www.reuters.com/article/inDepthNews/idUnited StatesL2171073820070723.

101. See Doc. 10368 (2005), "The circumstances surrounding the arrest and prosecution of leading Yukos officials", paragraphs 20 to 42.

102. An overview with links to additional articles can be found at "Times Topic", New York Times, 19 May 2009, at: http://topics.nytimes.com/top/reference/timestopics/people/m/karinna_moskalenko/index.html.

In April 2009, Mrs Moskalenko gave me a detailed account of this incident and the current state of the investigation by the French authorities.

103. Investigations by the French police are not yet completed, but it appears that the thesis put forward at the beginning of a thermometer broken in the car by the previous owner at the beginning of the summer is not compatible with the amount found in the car in October, given the evaporation rate of liquid mercury.

104. See my statement on this incident published on the Assembly's website at: http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4527.

105. I had asked the PGO about the results of the investigation into the attack on Mr Ponomarev, but the reply was limited to indicating that a case has been opened and appropriate investigative measures taken.

106. The warrant had reportedly been obtained by an interior affairs investigator who was not authorised to do so due to the fact that lawyers' premises were the target of the search.

107. A strange coincidence is also the delivery, less than an hour before the search of Mr Khairetdinov's premises, of a suspicious DHL parcel to the selfsame office. This parcel had been dispatched from a DHL depot in south London by two Russian-speaking men, who paid cash (as reportedly evidenced by CCTV footage on record with the London police). The package falsely stated the London office of Hermitage Capital as the sender's address, the name of a fictitious person as the sender and contained forged documents. The HSBC/Hermitage lawyers consider this as a clear attempt to frame Mr Khairetdinov and his clients.

88. At the end of August 2008, all lawyers independently representing HSBC/Hermitage – Mr Khairetdinov, Mr Pastukhov and Mr Gorfel, who had succeeded in uncovering fraudulent claims against the HSBC companies and who were in the process of challenging false bankruptcy proceedings – received summonses from the Kazan police to appear for questioning as witnesses – in violation of Article 8 of the Russian Law on Lawyers which prohibits the questioning of lawyers regarding cases in which they provide legal assistance.

89. On 24 November 2008, independent lawyer Sergei Magnitskey, who had helped HSBC/Hermitage to expose frauds and abuses of office, was arrested and placed in pre-trial detention. On the same day, his law office was searched by police, and, in breach of Russian procedural law, the firm's lawyer was allegedly not allowed to be present during the search. According to Mr Magnitskey's lawyers, he has not been questioned even once during the four months since his detention was sanctioned by the court on 26 November 2008; the detention, in inhuman and degrading conditions,[108] was extended for another three months on 13 March 2009 on the basis of the need to carry out the same pre-trial investigative actions that were given as a reason to detain him in the first place.[109] Against another lawyer working for Hermitage/HSBC, Mr Eduard Khairetdinov, a criminal case was opened at the end of November 2008 for allegedly using an invalid power of attorney, disregarding earlier judgments and testimony from HSBC directors that recognised his power of attorney. On 2 April 2009, a criminal case on the same grounds was opened against Mr Pastukhov.

90. I had included questions on the alleged harassment of HSBC/Hermitage lawyers and the detention of Sergei Magnitskey in my letters to the head of the Investigative Committee and to the prosecutor general.[110] The reply from the Investigative Committee confirmed that Mr Magnitskey was heard as a witness in one particular criminal case[111] but insisted that no coercive measures had been taken against him and, in particular, that he was "not detained". Having checked this reply with Mr Magnitskey's lawyers, who had provided me with documentary evidence proving the fact of his detention, it turned out that Mr Magnitskey was detained under another case number[112] also concerning the Hermitage complex. The Investigative Committee's answer was, to say the least, easily prone to being misunderstood. In view of this reply, and of the precise indications (dates, places and persons involved, including on the side of the law enforcement bodies) received from the lawyers acting on behalf of HSBC/Hermitage, I am not convinced that I can accept without further questions the additional statement in the reply that "lawyers working for the HSBC/Hermitage company have not been questioned", which may once again have been limited to a particular case number. The answer received from the prosecutor general's office regarding this case is more precise in that it recognises the fact of Mr Magnitskey's detention and indicates on what charges he is being held – a criminal case lodged on 4 October 2004 by investigators of the ministry of internal affairs of the Kalmykh Republic for tax evasion. But it does not explain why he was arrested in November 2008 and was not interrogated once for several months. Contrary to the Investigative Committee's reply, the PGO acknowledges that criminal cases were opened against lawyers working for HSBC/Hermitage, including Mr Magnitskey, Mr Khairetdinov and Mr Pastukhov (the latter also for "use of forged documents").

91. Mr Genri Markovich Rezhnik, the Chairman of the Moscow Bar Association, informed me that he had written to the Head of the Investigative Committee to demand that those responsible for the persecution of the Hermitage lawyers shall be held to account. A committee for the protection of lawyers was recently set up within the Moscow Bar Association in order to fight against the unlawful persecution of lawyers. Several prominent human rights lawyers spoke very highly of Mr Rezhnik and his track record of actively protecting lawyers, for example by refusing to support accusations of the prosecutor general's office before the Bar Association's Qualification Board for lawyers.

92. Another well-publicised case of retaliation against a lawyer is the murder of Mr Markelov on 19 January 2009, which had given rise to a public statement by the Committee on Legal Affairs and Human Rights adopted on 27 January 2009.[113] Mr Markelov had just left a press conference in which he announced that he

---

108. According to his lawyers, he is detained in a crowed cell with cockroaches, with more inmates than beds, the light switched on all the time, no privacy for using the toilet, a shower only once a week for ten minutes, lack of ventilation in the cell, and the possibility to walk in a closed courtyard measuring only 3 x 5 metres for less than an hour per day.

109. Ruling of the Tverskoi District Court in Moscow, on the basis of the application of investigator O. F. Silchenko of 3 March 2009 (copy and translation on file); the application is based, inter alia, on the need to intensify the search for Mr William Browder, whose whereabouts (in London) are perfectly well known to the authorities.

110. See paragraph 66 above.

111. Case No. 374015.

112. Case No. 153123.

113. At: http://assembly.coe.int/CommitteeDocs/2009/20090127_DeclarationTchetchenie_E.pdf; see also statement by North Caucasus rapporteur Dick Marty (Switzerland, ALDE) on 20 January 2009 (at: http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=2115.

would appeal on behalf of the victim's family against the early release from prison of Colonel Budanov, who had been convicted of the rape and murder of a young girl in Chechnya. Colonel Budanov has reportedly become a hero figure to militant fascist groups in the Russian Federation.

93. Lawyer Boris Kuznetsov had, *inter alia*, discovered that his client, a member of the Federation Council, had been unlawfully wire-tapped. His first complaint to the Supreme Court was not even treated. He then appealed to the Constitutional Court, attaching copy of a memorandum showing that the eavesdropping had indeed taken place. As the memorandum was classified as secret, Mr Kuznetsov was prosecuted for the violation of a state secret, and forced to flee abroad. The lawyer informing me of this case stressed that Mr Kuznetsov did not make the memorandum public – he had merely submitted it to the Constitutional Court as evidence for a violation he complained against on behalf of a client.[114] The prosecutor general's reply to my questions in this regard is limited to quoting legislation according to which lawyers, too, must respect official secrets they come in contact with in the course of their work, and insisting that such secrets are "divulged" if that information enters the domain of "other people" – which, by implication, include the members of the Constitutional Court of the Russian Federation.

2.5.6. Lack of safeguards during the trial against irregularities at the investigative stage

94. The trial process may still not provide appropriate safeguards with respect to irregularities at the investigative stage.[115] The defence lawyers' lack of access during pre-trial investigations can have serious repercussions on the fairness of the trial itself. I came across a concrete example in the courtroom at the first trial against Mr Khodorkovsky and Mr Lebedev in 2004. I personally observed how a witness of the prosecution, who was about to change his deposition in the courtroom compared to the one he had made in the absence of the defence lawyers during the investigative stage, was intimidated by the prosecutor into agreeing to have his oral testimony replaced by a reading of the minutes of his pre-trial interrogation.[116]

95. Also, the prosecution tactics consisting of the artificial separation of cases against different persons accused of being involved in the same incriminated acts are still very much in use, including in the new trial against Khodorkovsky and Lebedev. These tactics are designed to circumvent the privilege against self-incrimination as well as the protection afforded by law to the communication between lawyers and their clients and finally to create facts or "precedents" that can be "imported" into later trials against other alleged participants without proper participation of the defence in the later trial. Such tactics appear to undermine the right to a fair trial (Article 6 ECHR).[117]

2.5.7. "Legal nihilism" – Two emblematic cases

96. Recently, the new President of the Russian Federation, Mr Medvedev, has acknowledged that the Russian criminal justice system, and the *Prokuratura* in particular, still has structural defects that lead to the accusation and conviction of many innocent persons.[118] The term of "legal nihilism" used by the president struck a cord with all my interlocutors in Moscow.

97. The term of "legal nihilism" also came to my mind when I was briefed, in much detail, about two emblematic cases: the second trial of Mr Khodorkovsky and Mr Lebedev, and the tribulations of the Hermitage Fund.

---

114. The case recalls that of lawyer Mikhail Trepashkin, who was prosecuted for the alleged violation of state secrets as a means to prevent him from representing his clients in a particularly sensitive case (case covered in the report by Mr Pourgourides on "Fair trial issues in cases involving espionage and state secrets", Doc. 11031 (2007), paragraphs 36 to 39).

115. See, for example, the concerns of the United Nations Human Rights Committee about torture or ill-treatment, especially during informal interrogations in police stations when the presence of a lawyer is not required and the failure to prosecute law enforcement officials in Concluding Observations of the Human Rights Committee: Russian Federation, CCPR/CO/79/RUS, 6 November 2003. See also cases finding violations of Article 3 of the Convention during interrogation such as Maslova and Nalbandov v. Russia, 839/02, 24 January 2008, and Mammadov (Jalaloglu) v. Azerbaijan, 34445/04, 11 January 2007.

116. See Doc. 10368 (note 86 above), paragraph 44.

117. The PGO in its reply of 1 June 2009 acknowledges the use of this tactic and defends it as being in conformity with Article 154 of the Russian Code of Criminal Procedure.

118. See James Rodgers, BBC News, Moscow, 27 May 2008; Rossiya TV/Interfax/Russia, 11 June 2008 (http://home.coe.int/Wires/WiresLectureE.asp?WiresID=101800).

2.5.7.1. The Yukos-related cases – Mikhail Khodorkovsky, Platon Lebedev and others

98. I had the opportunity to attend the opening of the new trial against Mr Khodorkovsky and Mr Lebedev at the Khamovniki Court in Moscow on 31 March 2009.[119] The courtroom was very small – there was really only room for 23 members of the public, whilst many others were waiting on the staircase. I felt slightly embarrassed for being given privileged access, at the insistence of the defence lawyers. But a number of journalists were allowed to cram in at the beginning of the session, even some carrying cameras (I was later told that this may have been linked to my presence, as this was no longer allowed in later sessions). As in the first trial, the atmosphere was rather tense, and the accused were still kept in a sort of "cage" (made of Plexiglass instead of the steel rods of the cage used in the first trial in 2003). But contrary to 2003, the judge allowed me to speak with the accused, for ten minutes at the beginning of the lunch break – at the request of the defence lawyers and upon verification of my mandate as rapporteur of the Parliamentary Assembly. My impression was that the two accused are in good spirits. They expressed their gratitude for the attention their case has received from the Parliamentary Assembly, and their sorrow about the suffering of many of their former collaborators and lawyers, including Mr Aleksanyan[120] and Mrs Bakhmina.[121] I assured them that in the framework of my mandate, I would continue to observe carefully the observance of European human rights standards also in these cases.

99. The legal justification of the new criminal cases against Mr Khodorkovsky and Mr Lebedev has me perplexed. I should like to stress from the start that I am not trying to play the role of a judge – but I am trying to understand the reasoning behind the accusations. As a matter of fair trial, any accusation must fulfil minimum standards of logic in order for a meaningful defence to be at all possible. It is of course up to the courts to establish the underlying facts and to apply the law to these facts, as the prosecutor general's office rightly pointed out in its reply to my written questions.[122] But the facts, whatever they may be, must, at least arguably, constitute a criminal offence in order for a criminal trial to make any legal sense at all. I consider that my mandate as parliamentary rapporteur covers the possibility of making such an abstract assessment. The defence lawyers have stressed the fundamentally illogical nature of the new charges and the failure of the prosecution, so far, to even identify any specific acts or omissions of the accused to which the charges shall be attached. The trial itself, so far, consists in reading out, apparently at random, short passages of corporate and other documents without any discussion of their significance, even from the point of view of the accusation. The demand of Mr Lebedev "that the prosecutors explain which evidence corresponded to which episode and charge" seems reasonable to me, as does the insistence of the defence lawyers that "the documents should be not only read out but also examined".[123] To me, this should go without saying in any trial.

100. To the extent that it is at all clear what the new charges imply,[124] they would appear to be in contradiction of Mr Khodorkovsky's and Mr Lebedev's first conviction. The first judgment, in essence, found the two former Yukos executives criminally guilty of fraud and tax evasion, based on the following facts: according to the court, they artificially inflated the profits of the trading companies domiciled in low-tax areas of the Russian Federation that were not affiliated with Yukos but were said to be "dummy companies" controlled by Khodorkovsky and Lebedev. This was said to be at the expense of the parent company domiciled in

---

119. I also attended a court session during the first trial against the same defendants in 2004 (see Doc. 10368 (2007), paragraphs 44 and 47).

120. A senior legal adviser at Yukos. He was only released from pre-trial detention after the third injunction to this effect from the European Court of Human Rights, on humanitarian grounds (he is suffering from Aids, cancer and several other life-threatening diseases which could not be treated properly in detention); see Alexanyan v. Russia (Application No. 46468/2006), judgment of 22 December 2008, in particular paragraphs 75 to 86 on the repeated application of Rule 39 by the Court.

121. A legal department employee sentenced to seven years in prison for aiding and abetting tax evasion, who is widely considered as being held "hostage" in revenge for the escape to the United Kingdom of a more senior colleague; she is the mother of several young children, one of whom she was obliged to give birth to in prison (see http://www.rferl.org/articleprintview/1504658.html).

122. Reply received (in Russian) on 1 June 2009.

123. See ITAR-TASS (Moscow) newswire of 2 June 2009 (quotations from Mr Lebedev and Mrs Moskalenko).

124. ITAR-TASS (note 127 above) quotes the spokesperson for the prosecutor general's office as follows:

"It was established during the preliminary investigation that the defendants acting in an organised group involving the main shareholders of YUKOS OJSC and other persons committed a theft by embezzling shares of subsidiaries of the Eastern Oil Company OJSC from November 6 to June 12, 1998 in the amount of 3.6 billion roubles, legalised the stolen shares of the subsidiaries of the Eastern Oil Company OJSC between 1998 and 2000 in the same amount, committed a theft by misappropriating oil belonging to YUKOS OJSC's subsidiaries between 1998 and 2003 and oil belonging to Samaraneftegaz, Yuganskneftegaz and Tomskneft of the Eastern Oil Company OJSC in the amount of more than 892.4 billion roubles, and legalised some of this money in 1998-2004 in the amount of 487.4 billion roubles and 7.5 billion United States dollars."

higher-taxed Moscow and occurred by making the production subsidiaries sell the oil at a low price to the trading companies, which re-sold it at (higher) world market prices. I do not wish to comment on the legal issues raised by this conviction, including the fact that all resource-based companies had reportedly used the same tax "loophole", which had been closed – with retroactive effect[125] – many years after the transactions in question, or the selective nature of the prosecution against the former Yukos executives.[126] But it is clear that the first judgment did not even question the legality of the extraction and sale of the oil and the disposal of the proceeds, which were in part reinvested in the company, and in part distributed to the shareholders – the dispute was about whether Yukos had legally avoided ("optimised") its taxes or committed criminal tax evasion.[127]

101. Mr Khodorkovsky and Mr Lebedev complained during their first trial of a parallel investigation taking place by the general prosecutor's office. They complained that they should have been notified of all charges against them at the very latest at the start of the first trial in 2004 in accordance with Article 6 of the ECHR. Some three years later, just as they were becoming eligible for parole, they were charged as a consequence of that parallel investigation. The parallel investigation concerning related allegations of impropriety should have been concluded, disclosure made and a decision reached as to whether further charges could or should be brought, before the start of the first trial. Mr Khodorkovsky and Mr Lebedev argue that it was an intolerable abuse of process that the prosecution should seek to conduct more than one investigation into essentially the same alleged misconduct.

102. The new charges accuse Mr Khodorkovsky and Mr Lebedev of embezzling all oil produced by the three Yukos production subsidiaries for six years; embezzling shares held by a Yukos subsidiary in one of the production companies and five other companies, and "laundering" the proceeds of the sale of the allegedly embezzled oil and the shares in the indirect subsidiaries. The "oil theft" count seems bizarre: it would imply the criminalisation of the openly and generally followed business practice described above – the "losses" suffered by the production subsidiaries being the difference between the Rotterdam spot market prices perceived by the trading subsidiary and the lower price paid to the production company; and the criminalisation as "money laundering" of the disposal of all the regular company revenue for regular company purposes (investment and payment of dividends, in accordance with transparent, audited financial statements).[128] The charge that Mr Khodorkovsky and Mr Lebedev could have "stolen" the oil or otherwise misappropriated assets of Yukos for their personal profit also seems to be contradicted from the outset by a comparison of the following numbers:[129] between 1998 and 2003, Yukos booked operational revenues of US$55.2 billion; during the same period, it paid, *inter alia*, US$21.8 billion in operating expenses (including at the exploration and production company level), US$16.9 billion in taxes, and US$9 billion in capital expenditures. The differences between revenues and expenditures being less than US$8 billion, how can the accused have "embezzled" for their personal benefit US$25.3 billion?[130] Where would this money have come from?

103. In response to my sceptical question whether there could not be an issue of minority shareholders having been placed at an unlawful disadvantage, I was informed that all minority shareholder disputes had been settled many years ago and that even the prosecution does not allege any violations of minority shareholder rights. In essence, Yukos, in effect its senior executives, is therefore accused of stealing its own oil and of committing the crime of money laundering by selling it on the world market and using the proceeds for normal company purposes.

---

125. The PGO, in its reply to my written questions, referred in abstracto to the prohibition of retroactive criminalisation of actions that were legal at the time they were carried out, but failed to comment on the concrete issue of the retroactive closure of the tax loophole.

126. It is interesting to note in this context that the European Court of Human Rights, in its admissibility decision of 7 May 2009 in the case of Khodorkovsky v. Russia (Application No. 5829/04), also declared admissible the allegation of a violation of Article 18 of the ECHR (implying that the Court does not exclude the possibility of a finding that Mr Khodorkovsky's arrest, detention and persecution were politically motivated).

127. For reasons of space, I have omitted the additional charge of fraud to the detriment of APATIT.

128. Vladimir Milov, President of the Institute of Energy Policy and former Deputy Minister of Energy of the Russian Federation, reportedly addressed this point as follows: "… the investigator's conclusions are based, in the end, on fundamentally flawed assumptions about the organised principles of the modern oil industry … A student-economist would be kicked out for making mistakes like these" (see "Questions and Answers about the Second Trial of Mikhail Khodorkovsky and Platon Lebedev", Question 3, at: http://www.khodorkovskycenter.com/news-resources/stories/questions-answers-about-second-trial-mikhail-khodorkovsky-and-platon-lebedev.

129. Ibid., Question 3.

130. The equivalent of the 892.4 billion roubles mentioned by the prosecutor general's spokesperson, note 128 above.

104. The second new charge – embezzlement of shares and laundering of the proceeds – is slightly more complicated, but appears to be equally contradictory to the previous attitude of the authorities. The prosecution alleges that the accused embezzled the shares held by a Yukos subsidiary (VNK), a holding company that owned a controlling interest in six operating companies. The prosecution alleges that the accused embezzled shares in these operating companies by improperly causing VNK to enter into agreements with Yukos to exchange Yukos' shares for VNK's shares in its operating subsidiaries.[131] The defence stresses that the share swap agreements were a means of lawful protection of VNK's assets (threatened by then ongoing litigation triggered by fraudulent actions of VNK's previous management), thus benefiting also the Russian Federation, which at the time held 37% of the shares of VNK. The minister for state property was aware of and approved the share swap. After the dispute in question was resolved, and after intensive investigations of the Yukos/VNK share swap agreements between 1999 and 2001, the Russian Federation decided in 2002 to sell Yukos its remaining shares in VNK. The defence argues that the authorities cannot now argue that Yukos had improperly attempted to gain control of VNK's assets through the swaps in question.

105. In addition, and in apparent contradiction of the first judgment against Mr Khodorkovsky and Mr Lebedev, the new charges of oil embezzlement and money laundering appear to be based on the very same facts – the extraction of oil by Yukos' wholly owned subsidiaries and its sale on the world market through the parent company run by the accused. The *ne bis in idem* rule (Article 4, paragraph 1, of Protocol 7 to the ECHR) obviously comes to mind, as the new charges apparently amount to attaching a different legal qualification to the same facts rather than prosecuting the accused for a different set of facts.[132]

106. Another Yukos-related prosecution ended in a life sentence, almost completely unnoticed by the general public: that of Mr Alexey Pichugin, a head of division in Yukos' internal security service, formerly a career KGB/FSB officer. In my 2005 report on "the circumstances surrounding the arrest and prosecution of leading Yukos officials", I described some apparent anomalies in the pre-trial proceedings against Mr Pichugin, which had then just begun.[133] I was particularly worried about information according to which Mr Pichugin had been threatened with retaliation for refusing to give false testimony against senior Yukos executives, and that his trial would be held in total secrecy. I also reported on the testimony given by a lawyer acting on behalf of a man named Reshetnikov who, according to his lawyer, had been wrongfully convicted of the attempted murder, on behalf of Yukos, of a businessman named Rybin, who had in reality fabricated the assassination attempt for the purposes of promoting his interests in a lawsuit against Yukos in Austria. Mr Reshetnikov had at the time been transferred to Lefortovo prison, where he was reportedly offered a "deal" of freedom against false testimony against Yukos officials. On the advice of his lawyer, who also described to me the difficulties he had had to gain access to his client, Mr Reshetnikov, at the time, he refused to accept this "deal".[134] During my recent visit to Moscow, a young woman introducing herself as Mr Pichugin's "public defender" handed me a paper summing up the case of her client. I was rather taken aback when I saw that, according to this paper, Mr Pichugin was sentenced for, *inter alia*, the attempted murder of Mr Rybin on the strength of two pieces of evidence: the testimony of Mr Reshetnikov, and a handwritten note found in Mr Pichugin's apartment with Mr Rybin's address (Mr Pichugin denied that the note had been written by him, and the defence's request for a graphological expertise had been denied by the court). Another troublesome element in Mr Pichugin's trial is the way in which witness testimony was "completed" in the second attempt to overcome the doubts which led the Supreme Court to quash the first guilty verdict of 17 August 2006. In fact, in the first trial, Mr Reshetnikov had testified that he received the murder commission from Mr Pichugin and Mr Nevzlin via a (deceased) middleman. The defence had protested against the use of such "hearsay" evidence. In the second trial, the witnesses suddenly remembered that Mr Pichugin and Mr Nevzlin were themselves present at this conversation. Also, in the first trial, contradictions reportedly remained unresolved between the appearance of the (dark-haired) Mr Reshetnikov, accused of carrying out the murder in question, and numerous witnesses who had seen a blonde person at the crime scene. In the second trial, Mr Reshetnikov and the other crown witness remembered for the first time that they were wearing blonde wigs at the time.

107. These elements, which I came across more or less by coincidence, make me fear that Mr Pichugin may have also fallen victim to the unrelenting campaign against all those related to Yukos and its leading executives.

---

131. See "Questions and Answers" (note 132 above), Questions 1 and 2.
132. The PGO in its written reply of 1 June 2009 refers in abstracto to the ne bis in idem rule, but fails to comment on the concrete issue that the business transactions underlying the first judgment and the new charges appear to be the same.
133. See Doc. 10368 (2007), paragraphs 8 to 10.
134. See Doc. 10368 (2007), paragraph 49, footnote 9.

2.5.7.2. HSBC/Hermitage Capital

108. The second emblematic case is that of Hermitage Capital, an investment company specialising in equity investments in Russian businesses. Before the events described below, Hermitage Capital was the biggest foreign investor in the Russian stock market, and one of the biggest taxpayers in the Russian Federation. Its strategy – adopted purely on business grounds, without any ideological or political agenda – included the introduction of western-style accounting methods in the companies in which Hermitage invested and thus the fight against corruption. The Hermitage Fund has become the victim of the corruption and collusion of senior police officials and organised criminals, which resulted in the misappropriation ("company theft") of its three investment companies owned by HSBC Bank (Rilend, Mahaon and Parfenion), the fabrication of the equivalent of US$1.26 billion in false liabilities against them and the fraudulently obtained reimbursement by the Russian fiscal services of US$230 million in taxes that the three companies had paid. The "theft" of the companies took place with the help of original statutory corporate documents which were seized without legal justification by Moscow police officers during a search of the company premises. With their help, new directors[135] were appointed, who quickly "recognised" the above-mentioned fabricated claims[136] – but the legitimate directors had already succeeded in taking the stolen companies' assets out of the Russian Federation. The false directors then made money from this corporate raid by demanding the reimbursement of taxes paid on profits which they told the tax office were retroactively wiped out by the newly surfaced claims against the companies. They obtained from the fiscal services decisions to reimburse the equivalent of US$230 million within twenty-four to seventy-two hours.[137] I dare not speculate how long a claim for the reimbursement of overpaid taxes, even for a much more modest amount, normally takes in the Russian Federation, but in Germany, this would be a matter of months, not hours.

109. So far, this just looks like just another example for a Russian-style "corporate raid" (or "hostile takeover") that has been reported many times.[138] But in addition to the sheer size of the corporate victim and its international repercussions, this case is special in that the management of HSBC/Hermitage Fund, when it attempted to defend itself against these massive frauds with the help of the competent authorities, became itself the victim of systematic retaliatory measures that must have the support of senior law enforcement officials; and these apparent retaliatory measures involve international mechanisms of legal co-operation, whose functioning in the face of alleged politically motivated abuses I am mandated to look into.

110. Mr William Browder, a British citizen, Chief Executive Officer of Hermitage Capital, was suddenly refused the renewal of his entry visa to the Russian Federation, despite interventions in his favour at the highest political level.[139] The frauds against Hermitage Capital were documented in complaints addressed to the Prosecutor General of the Russian Federation on 3 December 2007, 23 July 2008 and 27 October 2008. According to the lawyers acting on behalf of Hermitage, there has been no substantive response to these complaints. A key official who was the subject of the complaints was assigned to the investigation against

---

135. Including a convicted murderer (I have received copies of documents corroborating their criminal records).

136. These claims appear to be legally and factually absurd (I was shown corroborating documentation).

137. Two applications to refund a total of about 1.8 billion roubles in relation to Rilend were filed with Tax Authority No. 25 on 21 December 2007 and decided on 24 December 2007; five applications in relation to Makhaon and Parfenion totalling 3.7 billion roubles were filed with Tax Authority No. 28 on 24 December 2007 and decided on the same day! Again, I have seen supporting documentation for this.

138. See, for example, Francesca Mereu, "Corporate Raiders use Cash, Friends", Moscow Times, 13 February 2008 (at: http://www.cdi.org/russia/johnson/2008-31-29.cfm). The article makes for chilling reading, see the following extracts:

"Raiders here use their links to corrupt officials to illegally seize businesses, often with the aim of acquiring prime real estate. The raiders often include former intelligence officers, policemen, lawyers and people with ties to well-placed state officials. On their payrolls are judges, prosecutors and bureaucrats on all levels. Through them, the raiders can order a search of a business, gather information about the owner, and falsify whatever documents they need to take over the business.

"Unfortunately, raiders are people who work for the system, and through it they can falsify anything they want," said Gennady Gudkov, former head of a working group that tracked the issue in the previous Duma.

There are no exact figures for how many raider attacks occur annually. Gudkov said his working group registered about 1 000 cases per year in Moscow and a similar number in the Moscow region. But these, he said, "were only the tip of the iceberg". The real figure is probably four to five times higher, he said. Media reports have put the countrywide figure at around 70 000.

Other than Moscow and the surrounding Moscow region, the favorite targets for raiders are in St Petersburg and the Leningrad region. Real estate commands top prices in these areas, and competition is brutal for the few properties that are available for legal purchase.

Many businessmen, police officers and other officials interviewed for this report spoke on condition of anonymity, citing the sensitivity of the issue and fear of reprisal. The businessmen also asked that their former companies not be identified. They said they had not complained to police, prosecutors or the Federal Security Service because they believed the raiders had links to these agencies."

himself, and the Southern District of Moscow division of the Investigative Committee of the prosecutor's office quickly dismissed the case that had been opened in response to the HSBC/Hermitage complaints. Instead of taking action against the corporate "raiders", the authorities began intimidating all lawyers acting for HSBC/ Hermitage in the Russian Federation and targeting them through police searches and questioning as witnesses. In particular, independent lawyer Sergei Magnitskey, who had helped to expose the frauds and the abuses of office, was arrested on 24 November 2008 and has since been detained,[140] others have been forced to seek refuge in the United Kingdom. The same law enforcement officials accused in the HSBC/ Hermitage complaints of being involved in these massive frauds are now involved in persecuting its executives and lawyers through charges that seem far-fetched and in contradiction of the authorities' previous actions. Essentially, the authorities now appear to accuse the legitimate directors of the HSBC/Hermitage companies of having themselves masterminded the "theft" of their own companies and the recognition of the fabricated claims in order to defraud the Russian State. I have spent many hours being briefed by the lawyers acting on behalf of HSBC/Hermitage and questioning them. I have also written to the Russian prosecutor general and the Head of the Investigative Committee in order to be informed of their points of view.[141] The answers that I have received from the Investigative Committee have not been satisfactory. In particular, the statement that a reply to the complaint introduced on behalf of Hermitage/HSBC could not be sent because the lawyer introducing the complaint had not given his address does not seem to be credible in view of the high stakes and the professionalism of the lawyers involved, many of whom I have met personally. The denial of the involvement of a particular official in the investigation of complaints in which he is designated as one of the suspects is contradicted by a long list of correspondence concerning this case signed by the self-same official, copies of which were put at my disposal by the Hermitage/HSBC lawyers. The answer received from the prosecutor general's office that the official in question (a lieutenant-colonel) has "no supervisory functions whatsoever" is not helpful; and the PGO's denial of having received the complaints from HSBC "dated 3 December 2007, 27 October 2008 or any other date" has me wonder whether there has been a breakdown in internal communication or mail delivery at some point – accidental or not.[142]

111. Of course I am still not in any position to "judge" on who is right or wrong, and such is not the purpose of this report. But in the light of the numerous strange coincidences and contradictions, in particular regarding the chronology of the events in relation to the defensive actions taken by HSBC/Hermitage and to retaliatory measures taken against its executives and lawyers, and finally in the light of the complete failure, for many months, of the law enforcement authorities to react even to such massive frauds, whose victims include the Russian State itself, I cannot help suspecting that this co-ordinated attack must have the support of senior officials. These appear to make use, for their own purposes, of the persisting systemic weaknesses of the criminal justice system in the Russian Federation.

112. In my view, a proper investigation of this emblematic affair, holding to account the perpetrators of the frauds as well as the law enforcement officials who appear to have helped them, is indispensable. It may also be a good test for the new structures involving a separation and division of labour between the services of the prosecutor general's office and those of the Investigative Committee, which should facilitate the investigation of suspected abuses committed by elements of one structure performed by members of the other.

2.5.7.3. Other cases of suspected political interference in the criminal justice process

113. During my meeting with Lev Ponomarev,[143] I was informed about several other cases in which political interferences in the criminal justice process seem very likely. For reasons of space, I can only touch upon them very briefly.

114. The case of the murder of journalist Anna Politkovskaya, according to the victim's family's lawyer, is an example of the professional ineptitude of the prosecution authorities, which had grown used to obtaining condemnations practically at will, without the need to properly investigate a case and put strong evidence before the court. This case, according to the lawyers, is a textbook example of the lack of support by the

---

139. In a letter of 2 May 2009 (copy on file), Prime Minister Gordon Brown states that the United Kingdom Government has "continued to make clear our concerns to the Russian authorities about Mr Browder's case, noting that it has the potential to affect the confidence of British and other investors doing business in Russia and that, while complex legal proceedings are in progress, it is important that the law is applied and is seen to be applied fairly and rigorously".

140. See paragraphs 89 to 90 above.

141. See paragraph 66 above.

142. The HSBC/Hermitage lawyers have provided me with copies of the receipts showing that these complaints were indeed deposited.

143. Lev Ponomarev fell victim to a vicious attack on his way home from our meeting. I publicly expressed my shock as soon as I heard about the attack, while I was still in Moscow, (see: http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4527).

prosecutor general's office, in court, of cases investigated by the Investigative Committee, which is widely regarded as a shameful defeat for both structures. Valuable time had been lost in the search for the real perpetrators and instigators of the crime. The lawyers of the victim's relatives had requested on an almost weekly basis that concrete investigative steps be undertaken in order to avoid the loss of evidence, but to no avail. They also found it strange that one of the accused, FSB Colonel Ryagusov, had not been accused of participation in the murder, but only for passing on Mrs Politkovskaya's address. The question arises as to why the case against Mr Ryagusov was separated from that against the other participants and then suspended, despite the strong evidence against him. An important victory of the lawyers on both sides was the public character of the trial, which, in their view, enabled all to see how badly the investigative authorities had worked. The lawyers now fear that without continued pressure from the international community, the actual perpetrators of the crime will never be found, let alone the instigators and organisers.

115. In their replies to my questions on this case, both the Investigative Committee and the PGO insisted that they had collected enough evidence to convict the accused and stressed that during the court proceedings (including the appeals proceedings), they are precluded by law from continuing their investigations in order to strengthen their case. The PGO therefore found my question "highly inappropriate". I beg to differ: I did not ask them what they were doing to collect more evidence against those presently accused of the crime (and who may well be innocent), but what they were doing to find the real killer(s) and, more importantly, the instigators and organisers of this crime.

116. As former rapporteur on the Gongadze case in Ukraine,[144] I cannot but agree with the lawyers of the victim's family that time is of the essence. It will be up to the Assembly to continue to pay close attention to this case, too.

117. The case of Yuri Samodurov, the director of the Sacharov Museum, shows how the abuse of the criminal justice system can pose a threat to the freedom of expression. Mr Samodurov was already convicted once for an art exhibition vandalised by angry Orthodox believers, upset by some of the works of art exposed – it should be noted that the organiser of the exhibition, not the vandals, were sanctioned. A new exhibition at the Sacharov Museum entitled "Forbidden Art 2006" shows works dating back to the Soviet era depicting religious symbols as "anti-Soviet". The Sacharov Museum exhibition mocks Soviet reality by depicting Soviet symbols being "adored" as if they were religious ones. In order to avoid any risk of offending anyone's religious feelings, the works of art were shielded from view by a wall and could be viewed through holes in that wall that could only be reached by climbing up a ladder, past a warning sign – in my view a humorous way to heed the age-old saying *volenti non fit inuria.* Nevertheless, some Orthodox believers climbed up the steps, peaked through the hole and felt "insulted" – and put pressure on the prosecutor's office to prosecute Mr Samodurov. In the new trial, which began on 3 April 2009, Mr Samodurov is accused of "extremism", which means that he had to resign from his job running the Sacharov Museum in order to avoid it being closed down in case of a conviction. The maximum penalty is five years in prison, and the trial alone casts a dark shadow over freedom of (artistic) expression.

118. In his reply to my questions on this case, the Head of the Investigative Committee stated that "citizens abiding by the traditional cultural values of the Russian people and particularly those professing the Orthodox faith or expressing a preference for Orthodox Christianity and most of all the visitors to the exhibition were subjected to the most severe mental trauma at the sight of the exhibits directly undermining their personal integrity and their established view of the world, which constituted a traumatic event and powerful stress factor, causing them moral suffering and stress, as well as a feeling that their personal dignity had been degraded".

119. For me, "undermining the established view of the world" is part of the very definition of art. The law enforcement authorities in the Russian Federation seem to see it as an aggravating factor justifying the criminalisation of artistic expression. In response to the *volenti non fit injuria* point, the Investigative Committee argued that the organisers of the exhibition maliciously exploited human curiosity, as they "were aware that the visitors would look through the opening in the shielding wall not because they agreed with or approved of the views of the artists and exhibition organisers but merely because they had come to the exhibition for the fundamental purpose of seeing what was exhibited".

120. The prosecutor general's office noted that the principle of *volenti non fit injuria* does not constitute in Russian law a ground for ruling out the criminality of an act. While it is certainly true in all legal systems that some legally protected interests (such as life and health) are not even at the disposal of the protected persons

144. See my report on "Investigation of crimes allegedly committed by high officials during the Kuchma rule in Ukraine: the Gongadze case as an emblematic example", Doc. 11686, and Resolution 1645 (2009) and Recommendation 1856 (2009).

themselves, other interests clearly are. If I give away a piece of my property, the recipient of the gift is not a thief. And if I knowingly choose to expose myself to artworks that may shock me or even undermine my established view of the world, I cannot complain if precisely that happens.

121. The cases of the two scientists condemned to long prison sentences for violations of state secrets following obviously flawed proceedings, Mr Sutyagin and Mr Danilov, were the subject of Christos Pourgourides' report on fair trial issues in espionage cases.[145] My NGO interlocutors in Moscow urged me to recall that, despite the Assembly's appeal to free the two men, they are still in prison, and their health is deteriorating rapidly. I should like to reiterate the Assembly's appeal to free the two men as soon as possible, as a matter of justice as well as on humanitarian grounds.

3. The notion of "politically motivated abuses" of the criminal justice system and the results of the four fact-finding visits

122. The notion of "politically motivated abuse" of the criminal justice system is central to this report. Whilst it is clear that any politically motivated manipulation of a criminal case must be considered as an abuse, the difficulty lies in establishing the manipulation as such (that is, as a deviation from the normal procedure due to an outside intervention), and the "political" motivation of such a manipulation.

123. In order to go beyond mere speculation and supposition, it will be necessary to develop objective criteria and indications allowing us to draw conclusions as to the presence, or absence, of politically motivated abuses. Here are some possible criteria or indications:

3.1. Discrimination

124. An important indicator for the presence of a politically motivated abuse can be that a given person (political opponent, competitor) is treated significantly more harshly than others who have acted in a similar way. The harshness of treatment can be reflected in the outcome, that is, in the punishment meted out by the court, or in the procedure itself, that is, the (length of) pre-trial detention, (lack of) respect for the rights of the defence, pressure on defence lawyers, etc., or even in both.

125. Examples of such discrimination (unjustified difference in treatment) unfortunately abound among the cases I have looked into in the Russian Federation: the behaviour of the prosecution authorities described in my earlier report on the prosecution of former senior Yukos officials[146] is continuing in the new trial against Mr Khodorkovsky and Mr Lebedev:[147] no other oil industry executive in the Russian Federation has been accused of embezzling all the oil produced by his company and laundering the proceeds of the sale for having made use of the same vertically -integrated business structure that is the standard of the industry. The harshness of the treatment of the young mother working for the Yukos legal department, Mrs Bakhmina,[148] and of the terminally ill lawyer, Mr Aleksanyan,[149] in the latter case even ignoring several injunctions of the European Court of Human Rights, far exceeds normal law enforcement practices. The case of Mr Pichugin, first convicted to eighteen years in prison, then to life imprisonment after the first judgment had been quashed following his appeal based on serious flaws of the investigation and of the court proceedings, also fits into this category.[150] All Yukos-related cases are also characterised by excessive length of proceedings and of pre-trial detention, and the systematic intimidation and persecution of the lawyers and human rights activists that dare to stand in the way of the authorities.[151]

126. The tribulations of the executives and lawyers of HSBC/Hermitage[152] provide additional examples. The prolonged pre-trial detention, in abject prison conditions, of a senior independent lawyer, Mr Magnitskey, and the opening of a criminal case against two others, Mr Khareytdinov and Mr Pastukhov – both accused of using false powers of attorney for continuing to work on behalf of HSBC/Hermitage and refusing to recognise the "authority" of the new directors appointed by those against whom they have lodged criminal complaints for having "stolen" the companies in question – speak for themselves.

127. I have found no comparable abuses in any of the three other countries that I have visited.

---

145. Resolution 1551 (2007) and Recommendation 1792 (2007); Doc. 11031.
146. PACE Doc. 10368.
147. See paragraphs 98 ff. above.
148. See paragraph 98 above, note 127.
149. See paragraph 98 above, note 128.
150. See paragraph 106 above.
151. See paragraph 86 above.
152. See paragraphs 88 ff. above.

3.2. Public statements of senior representatives of the executive on the guilt of the accused

128. Whilst this method of influencing an ongoing criminal procedure is rather crude and easily detectable, it still occurs surprisingly often.

129. Several examples for this are presented in the report by Christos Pourgourides on fair trial issues in cases involving the violation of state secrets or espionage.[153] The prosecution of judge Savelyuk is another blatant example.[154]

3.3. Poorly specified or constantly changing charges

130. Unclear charges, either in terms of the legal classification of the crime of which a person is accused or in terms of the acts or other facts which a person has allegedly committed, or else frequently changing charges – after the original accusations reveal themselves as untenable – are typical indications of motivations on the side of the prosecution that go beyond neutral enforcement of criminal justice.

131. The report of Rudolf Bindig on the case of environmental whistle-blower Grigory Pasko[155] is a striking case in point, as are those of MM. Sutyagin, Danilov, Trepashkin and Moiyseev covered in Mr Pourgourides' report on "Fair trial issues in cases involving espionage and violations of state secrecy".[156]

132. The new charges against Mr Khodorkovsky and Mr Lebedev are also poorly specified: despite the constant exhortations of the defence, the prosecution has so far failed to set out which facts it intends to prove by which evidence, and what their significance shall be in terms of criminal responsibility. Stating that Mr Khodorkovsky and Mr Lebedev embezzled all the oil produced by Yukos over a given period and randomly designating huge volumes of company documentation as "evidence" does not seem to be sufficient. The new charges, concerning essentially the same business transactions as those covered by the first judgment, also seem to reflect a considerable change in the legal assessment by the prosecution – from evasion of taxes on otherwise legal sales of oil to the embezzlement of the same oil. In addition, the prosecution seems to be intent on accumulating the two apparently contradictory and mutually exclusive assessments, in an attempt to keep the accused in prison beyond the term to which they were already convicted on the basis of the tax evasion charges.

3.4. Lack of independence of the court or prosecution

133. Whilst specific instructions (the infamous "telephone call") are difficult to prove in individual cases, certain structural problems of the criminal justice system relating to a lack of independence of judges and prosecutors have been proved, by way of comparison among legal systems. Such lack of independence is a necessary, albeit not sufficient, condition for politically motivated abuses in individual cases.

134. The comparison between the British, French, German and Russian models has yielded several conclusions.

135. The first is that the actual independence of the criminal justice system depends not only on the legal and administrative structures, but also – and to a large extent – on the personalities of individual judges and prosecutors, at all levels, and on their personal stature, courage and determination to ward off any politically motivated interferences. The United Kingdom, for instance, has only recently set up an independent judicial appointments board, and Germany so far – though I am proposing some improvements – has a comparable mechanism only for the highest judicial appointments at federal level. The "climate" of independence among judges, supported by public opinion in both countries, is nevertheless very sound in both countries, and also in France. The Russian Federation, by contrast, seems to have all the right legal structures in place, but my impression, based on the cases examined above,[157] is that judges are still subjected to fairly strong pressures compromising their independence in deciding individual cases and contributing to the maintenance of a work climate that could be compared to a permanent "probation period" – judges' careers and even their continued employment depending on "functioning as expected". If criminal procedures must almost always end in conviction, as is still the case in the Russian Federation, the power of prosecutors – who enjoy far less independence from the political authorities – to put people behind bars is in reality almost unchecked.

---

153. PACE Doc. 11031.
154. See paragraph 73 above.
155. PACE Doc. 9926.
156. See note 120 above.
157. See paragraphs 69 to 76.

136. In France, the balance between fiercely independent judges, prosecutors submitted to a strict hierarchy, and defence lawyers whose role is very limited at the investigative stage is very fragile. Whilst I was impressed by the stature of the senior prosecutors I met and their *esprit de corps* as an integral part of an independent criminal justice system, it may indeed be necessary to strengthen the independence of the prosecution as part of the general reform package currently under preparation following which important functions currently exercised by the *juge d'instruction* may be transferred to the prosecution. An equally important part of this package should be the strengthening of the role of the defence lawyers, by providing them with greater access to the file during the investigative stage and increasing the resources available for legal aid. This is the path that Germany has taken when more adversarial elements were introduced into the criminal procedure – though the limited legal aid funds are still an unresolved problem.

4. Consequences for the implementation of the Council of Europe's conventions on mutual assistance in criminal matters and extradition

137. As mentioned in the motion underlying this report, judicial co-operation between Council of Europe member states, including in matters of extradition, evidence, etc., as foreseen in the relevant Council of Europe conventions, requires a high level of mutual trust. Effective co-operation requires the existence of a comparable level of legal guarantees of independence and professionalism in all the countries concerned.

138. The conventions on mutual assistance in criminal matters and extradition stipulate that assistance shall be refused when the underlying prosecution is for the purpose of punishing someone on account of their "race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons".[158]

139. As we have seen in the concrete examples examined in this report, this is not merely a hypothetical possibility. I am convinced that, in such cases, for example, those concerning current and former employees and lawyers working for Yukos or HSBC/Hermitage, it would be wrong to extradite a person who has succeeded in leaving the country in time. I have much respect for Mr Khodorkovsky and Mr Lebedev, who refused to leave the Russian Federation when they still could and accepted to stand trial in order to prove their innocence, despite the risk of unfair treatment that they were aware of. But the same courage and readiness for sacrifice cannot be expected from everyone.

140. The forum for arguing whether a reason for denying international co-operation exists are courts outside of the state in which the alleged manipulation of the criminal justice system is thought to have taken place. While there is a presumption among member states that signatories to the convention have acted in good faith according to its terms, the very existence of exclusionary clauses such as the one quoted above shows that this presumption is rebuttable.

141. Over the past years, courts in many member states of the Council of Europe have refused to extradite persons sought by the Russian authorities – in addition to numerous Yukos-related cases,[159] refugees from Chechnya have also benefited from doubts – which are in my view still well-founded – as to the fairness of their intended trials in the Russian Federation. The very real possibility that a certain number of persons guilty

---

158. For example, Article 3, paragraph 2, of the European Convention on Extradition, ETS No. 24.

159. For example, the judgment of the Bow Street Magistrates Court (London) dated 23 December 2005 refusing the extradition of Mr Temerko (successor of Mr Khodorkovsky in managing Yukos); judgment of the Czech High Court dated 31 July 2007 upholding the refusal of a lower court to extradite a Russian former employee of Yukos (Ms Vybornova); judgment of the Federal Tribunal of Switzerland dated 13 August 2007 removing freezing orders of Yukos-related assets and releasing seized documents, finding that "all these elements clearly corroborate the suspicion that this criminal proceeding was orchestrated by the powers that be in order to subordinate the class of rich 'oligarchs' and do away with potential or sworn political opponents"; judgment of the Vilnius Regional Court dated 31 August 2007 refusing the extradition of former Yukos employee Mr Brudno; judgment of the District Court of Amsterdam dated 31 October 2007 refusing to recognise the legitimacy of the bankruptcy proceedings against Yukos due to "a violation of the fundamental principles of due process of law"; judgment of the City of Westminster Magistrates' Court dated 19 December 2007 refusing the extradition of Mr Azarov, a shipping executive allegedly linked to Yukos; judgments of the Harju County (Estonia) Court dated 27 February 2008 refusing the extradition of Mr Zabelin (who contended that he had to flee because he refused to give false testimony against the Yukos leadership); Mr Zabelin's extradition from Germany had previously been refused by a court in Brandenburg in December 2007; judgment of the Nicosia District Court dated 10 April 2008 refusing the extradition of Mr Kartashov, a former Yukos employee; judgment of the Supreme Court of Israel dated 14 May 2008 refusing the extradition of Mr Nevzlin, a former senior Yukos executive accused of conspiracy to commit murder; judgment of the United Kingdom High Court dated 3 July 2008 refusing an application to litigate a commercial dispute involving Mr Deripaska in Russia instead of in the United Kingdom, holding that because of the closeness of the link between Mr Deripaska and the Russian State there was a significant risk of improper government interference and that

of serious crimes may escape their just punishment because of the continuing distrust of Western courts vis-à-vis the Russian criminal justice system[160] should be a strong incentive to ensure that the root causes for this distrust are eliminated by a genuine "climate change" throughout the Russian judiciary – and not by the construction of "Potemkin villages" imitating the shape and form of the European standards on judicial independence aptly summed up by the Venice Commission at our request,[161] but without implementing their spirit.

142. The relevant Council of Europe conventions date back to a period in which there was a much greater degree of uniformity between the member states' political and judicial systems. They may require updating in order to ensure their efficacy in present-day conditions. The same applies to the existing Europol and Interpol mechanisms, which may need to be overhauled in order to make sure that they cannot be abused for politically motivated persecution.

5. Conclusions

143. My conclusions are summed up in the text of the draft resolution (Part A above). Beginning with an unequivocal condemnation of all politically motivated abuses of the criminal justice system, the text sets out that judicial independence is the key to preventing undue influences. Addressing all member states, the text recalls the relevant European standards, as presented by the Venice Commission. The draft resolution then sums up the situation in the four countries examined as examples (United Kingdom, France, Germany and the Russian Federation) and addresses specific recommendations to these countries to remedy the shortcomings identified. Finally, the draft resolution addresses recommendations to other Council of Europe bodies, as well as the European Court of Human Rights, to prevent politically motivated abuses of the criminal justice system and to enhance the independence of the judiciary.

---

justice would not be done; judgments of the City of Westminster Magistrates Court dated 8 and 22 December 2008 refusing the extradition of four Russian citizens none of whose cases had any links to Yukos but who had business interest in the shipping of oil.

160. At the end of 2008; the Russian Prosecutor General handed to our committee chair, Mrs Däubler-Gmelin, a long list of pending extradition requests addressed by the Russian Federation to the United Kingdom, which Mrs Däubler-Gmelin transmitted to me in view of the preparation of this report. I had intended to obtain additional information on the cases on this list and discuss them with the prosecutor general's office at the meeting in Moscow, which was cancelled at short notice.

161. See paragraph 51, note 58.