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Russian Federation: The authorities must stop Sergei Magnitsky's posthumous criminal prosecution and bring to justice all those responsible for his death

On 8 April 2012, lawyer Sergei Magnitsky would have turned forty. He died over two years ago, after months of ill-treatment and having suffered multiple human rights violations. For many in Russia and beyond, his death in custody in November 2009 has come to symbolize the injustices associated with Russia's malfunctioning criminal justice system and widespread corruption. The justice system has not only failed to uphold and protect his rights, but it has also been abused since to continue to violate his, and now his family's rights in the form of his posthumous criminal prosecution, and by trying to force his close relatives to take part in this process.

Ahead of this date, Amnesty International is calling on the Russian authorities to take immediate steps to rectify these injustices and stop the posthumous criminal prosecution of Sergei Magnitsky, and bring all those responsible for his death to justice.

Arbitrary prosecution and arrest: an allegation never investigated

Sergei Magnitsky was a lawyer (auditor) working at a legal firm, Firestone Duncan. On 4 June 2007, the firm's office and the office of its client company, Hermitage Capital, were raided by police as part of a criminal investigation into alleged economic crime. During the raid, the original founding documents for several companies belonging to Hermitage fund were seized. With the help of these documents, ownership of three of these companies was then reportedly transferred to new owners (in a practice typically referred to as corporate raiding). At the end of that year, on 24 December, these companies received tax rebates on taxes paid in 2006, allegedly on the basis of forged documents, costing the state budget over USD 220 million.

In February 2008, a criminal case was opened in connection with this alleged tax fraud. Sergei Magnitsky was questioned as a witness in this case, during which he argued that the companies had been subjected to corporate raiding and used to defraud the state via an unlawful tax rebate, and linked this to the raid against Hermitage Capital and the seizure of its documents by police investigators. Shortly afterwards, Sergei Magnitsky himself was arrested in connection with alleged tax fraud and placed in a pre-trial detention centre (SIZO). Several of his colleagues were named suspects in the case too, but unlike Sergei Magnitsky they were not in Russia at the time and chose not to return.

The police investigator put in charge of this case was the same official who had been involved in the raid against Firestone Duncan and Hermitage Capital and had been named by Sergei Magnitsky in his allegations. It was the same official who requested Sergei Magnitsky's detention, and insisted on his continuous detention since. Thus, Sergei Magnitsky ended up in custody as a criminal suspect in a case based on his own allegations, which, in turn, was being investigated by the same police official against whom these allegations had been made. Numerous times, Sergei Magnitsky and his lawyers during his life, as well as his colleagues and supporters after, pointed to a clear conflict of interest resulting in his arbitrary criminal prosecution. However, his repeated requests that a different investigation team be appointed to investigate the case against him were declined, both by the investigation and prosecution

authorities themselves, and by court. Subsequent to his death, the allegations of his arbitrary prosecution have never been investigated.

Responding to continuing pressure urging the Russian authorities to investigate and prosecute officials complicit in the alleged unlawful prosecution and death of Sergei Magnitsky, the Office of the Prosecutor General reported on 30 May 2011 that it had conducted inquiries into the allegations and had not uncovered any violations on the part of members of the Ministry of the Interior (police investigators).

In July 2011, the Human Rights Council under the President of the Russian Federation published a report prepared by its experts who argued that Sergei Magnitsky had been unlawfully placed in detention and persecuted by corrupt police investigators, that he had been deliberately denied medical treatment, and that courts passed unlawful decisions sanctioning his arrest. The Ministry of the Interior immediately dismissed these findings and stated that there were no reasons to hold any further inquiries into any allegations made against its members.

Denial of medical care in custody, concealment of incriminating evidence and failure to investigate allegations of torture and ill-treatment

Following his detention on 24 November 2008, Sergei Magnitsky spent 358 days in pre-trial detention until his death on 16 November 2009. During this time, he sent numerous letters to the penitentiary administration, Ministry of the Interior, Prosecutor's Office, and court, complaining about his unlawful detention and criminal prosecution, of unveiled threats and pressure to force him to withdraw his allegations and to incriminate himself and his client in the crimes he himself had alleged. He complained of repeated unlawful placement in solitary confinement, ill-treatment and inhuman conditions in SIZOs, worsening health and denial of medical care.

The history of Sergei Magnitsky's ill-treatment is well documented. He kept a detailed diary of his complaints and the authorities' failure to respond to them. In the period of just two months between 27 July 2009 and 20 September 2009, he wrote 39 complaints about the conditions of his detention to the penitentiary administration, of which only six were satisfied, some only partially and all with delays. None of his most serious complaints, such as those relating to his deteriorating health and lack of adequate medical care, were answered by the authorities.

A part of Sergei Magnitsky's ill-treatment in detention was being transferred between three pre-trial detention centres, apparently with the sole purpose of making his condition of detention progressively worse. In particular, between April and July 2009, he was held at the SIZO known as 'Matrosskaya Tishina'. It had better medical facilities than other SIZOs, and it was there that Sergei Magnitsky was diagnosed with a number of health problems and started to receive some medical help. One of these, an acute pancreatic condition, reportedly required a surgical operation which was planned at the internal hospital in SIZO 'Matrosskaya Tishina' on 1 August 2009. However, just before the planned operation, on 25 July 2009, he was unexpectedly transferred to another SIZO, 'Butyrka', which had no such medical facilities and where the doctors refused to recognize his earlier diagnosis. The operation never took place. Reportedly, it was the same condition which ultimately led to his death.

In August 2009, writing to his lawyers from SIZO 'Butyrka', Sergei Magnitsky complained of insufferable pain and pleaded for help. During his detention there, he and his lawyers sent 20 official complaints to the SIZO administration, investigators, the Head of Moscow City Penitentiary Service (FSIN), Prosecutor General, and court, demanding the necessary medical help. These complaints were left unanswered. On numerous occasions while appearing in court during this time, Sergei Magnitsky protested his innocence and asked to be placed under house arrest because of his poor health. These requests were all declined.

In his letters to the authorities written at the time, Sergei Magnitsky complained that his transfers between SIZOs were a form of pressure intended by the investigator to force him to withdraw his earlier allegations and stop insisting on his innocence. However, in spite of this pressure, until his final days he refused to withdraw his initial allegations and recognize any wrongdoing on his or his client's part.

Details of Sergei Magnitsky's last days tell a story of agony and despair. On 12 November 2009, still in SIZO 'Butyrka', he started complaining of severe pains, but it was not until 16 November that he was diagnosed with an acute pancreatic condition – the same for which medics in SIZO 'Matrosskaya Tishina' had planned to operate him. On that day he was urgently transferred back to 'Matrosskaya Tishina' for treatment at its internal hospital. He was brought there in an ambulance. However, upon arrival, allegedly he was not hospitalized but instead placed in a solitary cell, handcuffed and beaten with rubber batons by penitentiary officials. Copies of the reports written by the duty officer in charge, which have been made public later, confirmed that the staff had used handcuffs and rubber batons on Sergei Magnitsky and explained the need for this to prevent him from "committing suicide and self-mutilation". In testimonies provided to members of the Public Monitoring Commission, officials from 'Matrosskaya Tishina' claimed that upon arrival from 'Butyrka' Sergei Magnitsky was "psychotic", that restraining measures were applied and antispasmodic medicines administered, and that a psychiatric ambulance was called to deal with him. Their description of Sergei Magnitsky's behaviour suggests however, that he was in great pain and his restlessness and cries that he was going to be killed were the result of his genuine – and ultimately correct – fears for his life. The ambulance team which had been called reportedly arrived promptly, but according to its crew they were held up by the SIZO's administration for over an hour. They estimated that when they were finally allowed to see Sergei Magnitsky, he had already been dead some 15 minutes. They reported seeing him lying on the floor of a cell and not at the hospital as was later claimed by the SIZO medics.

Following Sergei Magnitsky's death, a number of senior officials from police and other agencies claimed that neither he nor his lawyers had complained of his worsening health and denial of medical care, and that the police investigators were not aware of these issues. Such claims were reported as made by police officials (Ministry of the Interior), the Prosecutor's Office, Investigative Committee, the Chair of Moscow City Court, and others. These claims were definitively disproved when copies of Sergei Magnitsky's numerous complaints to these authorities were made public by his legal team.

Allegations have arisen that the Russian authorities have not only falsely denied any knowledge of Sergei Magnitsky's acute health problems, but also deliberately obfuscated the causes of his death. The initial reports on these causes, according to Sergei Magnitsky's legal team, mentioned an acute pancreatic condition and internal head injuries. However, after an official post-mortem, these reports were allegedly changed to avoid all mention of the injuries, and citing a heart condition (which had never been diagnosed previously) as the cause of his death. The administration of SIZO 'Butyrka' has reportedly continued to insist that he had had no pancreatic condition. The allegations that Sergei Magnitsky's cause of death has been deliberately obfuscated have never been effectively investigated.

These allegations are exacerbated by the family being denied the right to have an independent forensic examination of Sergei Magnitsky's body and the circumstances of his burial. The family of Sergei Magnitsky twice requested an alternative post-mortem examination prior to his funeral, and both times it was refused by the Prosecutor's Office which insisted that such examination was unnecessary because the original one had been as competent and independent as any alternative examination could be. Moreover, the authorities were allegedly putting pressure on the family to have Sergei Magnitsky buried promptly. Thus, according to the family's lawyers, the family were told at the mortuary where his body was kept that their refrigerators were not functioning well. However, when the family appealed to the mortuary administration and the Prosecutor's Office to have his body transferred to another mortuary

they were categorically refused, and were told that they could only have Sergei Magnitsky's body for an immediate burial and not for lying in repose.

Notably, at that time the family suspected ill-treatment but knew nothing about the handcuffing and beating of Sergei Magnitsky on his last day, which came to light later. There are photos of Sergei Magnitsky's open coffin being carried during his funeral, as is the tradition in Russia, and heavy bruising on his knuckles can be clearly seen. However, if there were any other injuries hidden under his clothes, the family was prevented from discovering these prior to his interment.

On 18 November 2009, the Investigative Committee refused to open a criminal case into Sergei Magnitsky's death. The Committee's senior member was quoted in the media as claiming that there were no reasons to open an investigation. However, a copy of a report allegedly written by one of the Investigative Committee's investigators, dated 19 November 2009 and made public by Sergei Magnitsky's legal team, described Magnitsky's death as suspected murder.

The Public Monitoring Commission conducted its own investigation into the circumstances of Sergei Magnitsky's death and published its findings on 28 November 2009. It concluded that he had been deliberately subjected to pressure and placed into "torturous conditions" which led to his death. The report was sent to the Investigative Committee, Prosecutor General's Office, Ministry of Justice, senior penitentiary officials, and the President, but no investigation into the allegations of torture and other ill-treatment of Sergei Magnitsky ensued. A leading human rights NGO, the Moscow Helsinki Committee, appealed to the Russian authorities to open criminal proceedings against police investigators it believed to be complicit in Sergei Magnitsky's death. However, the Investigative Committee refused to do so and in its reply dated 21 June 2010 claimed that "no crime had taken place" in relation to his death. The Chair of the Investigative Committee overturned this decision but already in September 2011 he agreed to have the newly opened investigation stopped.

After months of pressure and lobbying of the Russian authorities by human rights activists and the international community, a criminal case was opened in connection with the circumstances of his death and resulted in criminal charges of negligence against two medics from the SIZO 'Butyrka', from which Sergei Magnitsky had been transferred to SIZO 'Matrosskaya Tishina' several hours before his death. There has been no trial yet, and no other officials have been charged in connection with his death.

Posthumous criminal prosecution of Sergei Magnitsky

The criminal proceedings against Sergei Magnitsky were closed on 29 Nov 2009 in connection with his death as the existing law required. However, in summer 2011 these were reopened, on dubious legal grounds. The family of Sergei Magnitsky and his former colleagues regard this as a deliberate attempt by police investigation officials to put pressure on his close relatives and deflect responsibility from those responsible for the crimes he revealed and for his ensuing death.

A precursor to the renewed criminal prosecution of Sergei Magnitsky was a decision taken by the Russian Constitutional Court on 14 July 2011. The Court ruled that in cases where the suspect, or defendant, dies before the relevant criminal proceedings are completed such that there are closed as the law currently requires, the family have the right to insist that the investigation be completed and court hearing on the case be held in order to have the suspect/defendant rehabilitated, that is to have his/her good name cleared and relevant substantive rights restored, which are thereby recognized as the rights of the deceased person's close relatives also. The text of the decision emphasizes a number of times the deceased person's relatives' *right* to insist on the completion of the relevant criminal proceedings which would otherwise be closed. It does not compel the investigators,

prosecutors or the court to proceed with the prosecution and trial, nor does it mention that any of them has the right to do so against the will of the deceased person's family.

Sergei Magnitsky's family have always insisted on his innocence, and has been asking for those responsible for his unlawful persecution and death to be brought to justice. However, they have never requested that the criminal case against him be reopened to rehabilitate him, and since its reopening they have repeatedly called for the posthumous prosecution to be halted and attempted to challenge it in court. They have pointed out that Sergei Magnitsky is innocent in virtue of the presumption of innocence, and no court decision is needed to confirm this. Nonetheless, the authorities have proceeded with their attempts to have Sergei Magnitsky criminally prosecuted, demanding that his close relatives participate in the investigation and stand in the trial as his representatives. Thus, in a letter to Sergei Magnitsky's mother, a senior police investigation official explained that the criminal proceedings against her son had been reopened "in essence with an immediate purpose to establish in the course of the investigation as well as ... [in] court all the circumstances of the case against S.L. Magnistky and to decide on that basis the question of his guilt or innocence in relation to the crimes he is being incriminated with".¹ The same letter stated that in the context of the renewed criminal proceedings against Sergei Magnitsky his mother had the procedural status of a "legal representative of the deceased defendant." No such status exists in the Russian criminal procedure law. Moreover, the investigator has repeatedly attempted to summon Sergei Magnitsky's mother for an interrogation and threatened her that she could be forcibly brought in for an interrogation or face a fine if she failed to attend.

In a letter to her dated 28 September 2011, a senior police investigator explained the need to have the criminal case against Sergei Magnitsky reopened in connection with the Constitutional Court's above decision and stated that the "investigation under this criminal case has been renewed in connection with the need to establish the view of [Sergei Magnitsky's] close relatives on the possibility of termination of this criminal case". However, their views have always been well-known. The family believe that the implied purpose of the renewed criminal prosecution of Sergei Magnitsky is to force them to recognise his guilt and stop insisting on his innocence.

Already in early August 2011, the press service of the Ministry of the Interior was quoted as claiming that the investigation had already been completed: "the guilt of Sergei Magnitsky in the crime has been fully proven by the evidence gathered within the criminal case, which has enabled the investigators to charge him with two incidents of crime under the article 'Tax evasion' of the Criminal Code."² In a more recent media interview, a spokeswoman for the Ministry of the Interior explained that the investigation has already been completed and Sergei Magnitsky's close relatives should now familiarize themselves with the materials of the case so that it can be heard in court. She reportedly added that "[i]f they and their lawyers refuse to familiarize themselves with the case, then other lawyers will be appointed [by the state]. They have no choice. There is a Constitutional Court's decision which requires us to complete the case and send it to court so that it can assess the findings of the investigation. The relatives insist that Magnitsky is innocent. The investigation in contrast believes that it has sufficient proof to speak about his guilt and not rehabilitation... Magnitsky's relatives' position is unclear. If you state that he is innocent then prove this in court."³

Sergei Magnitsky's relatives' position is clear however. They – and Russian and international human rights law – regard him as innocent in virtue of the principle of presumption of innocence, and no court decision is needed to confirm this. His family have no substantive

¹ Notably, the Constitutional Court explained in its above-mentioned decision (point 6) that if the ensuing court trial does not subsequently find the defendant not guilty, the case must be closed without passing the guilty verdict.

² *Vzglyad*, 'SK pril MVD: Vina Magnitskogo dokazana', 4 August 2011, available at <http://www.vz.ru/news/2011/8/4/512514.html>.

³ Zoya Svetova, 'Sud posle smerti. Sergei Magnitsky snova obvinyaemyi', *The New Times*, 13 February 2012, available at <http://newtimes.ru/articles/detail/49709/>.

interest (that is, no material claims – no intention to insist on the restitution of material and moral losses incurred) arising in connection with Sergei Magnitsky's previous criminal prosecution. In virtue of the above-mentioned Constitutional Court's decision, they have the right to insist on having the criminal proceedings against him completed. Equally, they have the right to insist on his innocence without having to prove it in before a judge, investigator or anybody else.

Sergei Magnitsky's mother has repeatedly attempted to appeal the prosecution's and the Ministry of the Interior's decisions to have a criminal case against him reopened, in letters to these agencies and in court. However, her appeals have been repeatedly and consistently declined. Both the district court in Moscow on 22 December 2011, and on 27 February 2012 the Moscow City Court on appeal declined Sergei Magnitsky's mother's request that the criminal case against him be closed, and ruled that the criminal proceedings against the deceased lawyer are lawful.

The Russian authorities' intention to proceed with the criminal prosecution of Sergei Magnitsky after his death violates his fundamental rights even after his death, in particular the right to defend himself in person, which along with other rights relating to fair trial standards are inalienable and cannot be exercised by a deceased person. The trial of a deceased person and the forcible involvement of his relatives in such a trial would create a dangerous precedent and open the way to further abuses.

The posthumous criminal prosecution of Sergei Magnitsky must stop, and the pressure on his family in connection with their objections to this must cease.

The circumstances of Sergei Magnitsky's death as well as the allegations of his arbitrary criminal prosecution must be immediately, effectively and impartially investigated, and all those found responsible brought to justice.

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