



OPEN DIALOGUE

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INQUIRY INTO WHETHER AUSTRALIA SHOULD EXAMINE THE USE OF TARGETED SANCTIONS TO ADDRESS HUMAN RIGHTS ABUSES

Committee Secretary

Joint Standing Committee on Foreign Affairs, Defence and Trade

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The Open Dialogue Foundation hereby expresses its strong support for the initiative of the Joint Standing Committee on Foreign Affairs, Defence and Trade regarding the work on an equivalent of the Global Magnitsky law. We greatly appreciate the opportunity to share our experience on this topic, as well as offer some recommendations regarding legislation on targeted sanctions.

The Open Dialogue Foundation (ODF) was established in Poland in 2009 at the initiative of Ukrainian student and civic activist Lyudmyla Kozlovska (who currently serves as President of the Foundation). The Foundation has its permanent representative offices in Warsaw (Poland) and Brussels (Belgium). Since its founding, the statutory objectives of the Foundation include the protection of human rights, democracy and the rule of law in the post-Soviet region. The Foundation originally focused its attention primarily on Kazakhstan, Russia, Ukraine and – since 2016 – Moldova, but this area of interest was expanded in 2017 due to the rapid deterioration of democratic institutions in Poland and other EU member states affected by illiberal policies implemented by their governments.

ODF pursues its goals through the organisation of observation missions and monitoring mainly individual cases of human rights violations. The Foundation also has extensive experience in the field of protection of the rights of political prisoners and refugees. Based on its work, ODF publishes analytical reports and distributes them among the UN, EU institutions, the Organisation for Security and Cooperation in Europe (OSCE), the Council of Europe, and foreign ministries and parliaments.

1. THE EU-WIDE MAGNITSKY ACT ACCEPTANCE INITIATIVES

For several years, the Open Dialogue Foundation has been providing expertise and organising events and advocacy campaigns in the UN, the European Parliament, the Parliamentary Assembly of the Council of Europe, the Parliamentary Assembly of the OSCE, as well as in the national parliaments of democratic states. Our efforts are aimed, in particular, at promoting the use of sanctions for serious human rights violations and extending the number of states that have adopted the Global Magnitsky legislation.

Thus far, states, such as the United States, Canada, Estonia, Latvia, Lithuania and the United Kingdom, have adopted personal human rights sanctions regime laws – Magnitsky-type laws. ODF conducted an information campaign in the Italian Senate regarding the Global Magnitsky sanctions. In March 2019,

Italian senators submitted a legislative proposal to the Senate for the adoption of an Italian version of the Magnitsky Act.¹

On 10 December 2018, EU foreign ministers discussed a proposal to develop a European equivalent of the Magnitsky Act. On 22 January 2019 the Parliamentary Assembly of the Council of Europe voted in favour of a resolution with the title "Sergei Magnitsky and beyond — fighting impunity by targeted sanctions", exhorting its member states to integrate this mechanism into their legal system.²

On 14 March 2019, the European Parliament adopted a resolution on a European human rights violations sanctions regime (2019/2580(RSP)). The resolution notes that sanctions constitute an integral part of the EU's external relations toolbox. Over 40 different restrictive measures currently in place against 34 countries, including the majority of sanctions, have been imposed in support of human rights and democracy objectives.

The European Parliament called for *"a new sanctions regime to be established at EU level to impose asset freezes and visa bans on individuals involved in grave human rights violations. The list should include state and non-state actors who have contributed, physically, financially or through acts of systemic corruption, to such abuse and crimes, worldwide."*³ In July 2019, the European Parliament called on the EU to strengthen work on this issue without delay.⁴

An important event took place in December 2019: the EU Ministers of Foreign Affairs unanimously approved a proposal for the establishment of an EU Global Human Rights Sanctions Regime, based on the Global Magnitsky Act. The preparatory work for drafting the legislation has been launched. High Representative of the Union for Foreign Affairs and Security Policy Josep Borrell stated that this initiative would be a tangible step reaffirming the European Union's global lead on human rights.⁵ On 18 March 2020, European Commission President Ursula von der Leyen expressed her full support for the European Magnitsky Act.⁶

2. TARGETED SANCTIONS: A FOREIGN POLICY TOOL

In recent years, authoritarian and undemocratic regimes around the world have become stronger. The legislation about personal sanctions enables the country that adopted it to impose targeted personal sanctions on the world's worst human rights abusers and most corrupt foreign officials and oligarchs.

The sanctions are imposed when a potential target is enjoying impunity in his or her home country. Normally these are countries where there is no independent judiciary and no rule of law. Sanctions may be considered for foreign individuals and legal entities engaged in "serious human rights abuses" against any person, or engaged in grand corruption.

Each country that adopts a Magnitsky Act determines for itself the scope of serious human rights abuses and corruption that can trigger sanctions. For example, a ministry of internal affairs that orders the shooting of peaceful protesters, arrests and torture of members of the opposition: its victims have no venue to complain, and the minister not only enjoys impunity, but is also rewarded for his actions.

Typically, personal sanctions can include:

- Asset freezes (e.g., freezing bank accounts or making it impossible to sell assets, including real estate);

¹ <http://www.senato.it/leg/18/BGT/Schede/FascicoloSchedeDDL/ebook/51417.pdf>

² <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25352&lang=en>

³ https://www.europarl.europa.eu/doceo/document/TA-8-2019-0215_EN.html

⁴ https://www.europarl.europa.eu/doceo/document/TA-9-2019-0007_EN.pdf

⁵ https://eeas.europa.eu/headquarters/headquarters-homepage/71725/remarks-high-representativevice-president-josep-borrell-press-conference-following-foreign_en

⁶ <https://twitter.com/swsjoerdsma/status/1240280177608925186?s=21>

- A prohibition on dealing with sanctioned persons (e.g., making it illegal for any national or other entity of the country to conduct any kind of business with a sanctioned person);
- Travel bans or revocations of visas.

Experience has shown that sanctioned persons become financial pariahs: the international financial system does not want to deal with them.

So, the Magnitsky Act is a foreign policy tool making it possible to punish human rights violators from outside their home country. As noted in the study of the European Parliament from April 2018, *"rather than affecting the state as a whole, bans nowadays are targeted at individuals identified as responsible for the abuses"*.⁷ Sanctions are an incentive for perpetrators to change their policies and modify their behaviour.

The Global Magnitsky Act:

- allows the imposition of targeted personal sanctions against those who have enjoyed impunity;
- enables the punishment of human rights violators and those who participate in corruption, without punishing their country or the people of their country;
- complements and strengthens the existing international mechanisms for protecting human rights and countering impunity around the world;
- is a foreign policy tool that facilitates the targeting of individuals while minimising damage to bilateral relations;
- can provide added leverage in diplomatic discussions and can be a very effective tool in a foreign policy package.

The procedure for providing evidence and considering candidates for the imposition of sanctions is conducted confidentially, but after that, and according to each national legislation, decisions are usually announced publicly. This affects the reputation of the sanctioned perpetrators, which may cause them to lose the support of their allies, domestic or external actors.

Typically, the sanctioned persons may file an application to argue why he/she should be excluded from the sanctions list. One can try to appeal through the courts, but this is not often pursued because sanctions are deemed to be left to the discretion of the government. And therein lies the effectiveness of the Global Magnitsky Act: the sanctions are not implemented in the courts of any country, but rather in the domains of foreign relations.

The cases due to which personal sanctions are introduced illustrate systemic institutional problems as well as a broader picture of abuses and pattern of repression. Targeted sanctions demonstrate a clear message that such violations will not be tolerated by the democratic community.

Non-democratic states, which are often rich in natural resources, benefit from economic and investment cooperation with democratic states. The latter, in turn, are interested in reliable and predictable business partners. However, authoritarian states, where gross violations of human rights are committed with impunity, are not predictable in terms of partnership; furthermore, they pose additional security risks in the regions.

In the short term, perpetrators may not respond to the sanctions imposed on them. In the long run, however, this will have a positive impact on bilateral relations, the business climate and security issues in the region.

⁷ [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU\(2018\)603869](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2018)603869)

3. METHODS OF DETERMINING PERPETRATORS

Magnitsky sanctions are generally focused on the worst of the worst. In many cases, personal sanctions are imposed on perpetrators who are responsible for, or are complicit in, or have been directly or indirectly engaged in serious human rights abuses, or who have been leaders or officials of governmental entities that have engaged in, or whose members have engaged in serious human rights abuses.

Examples might include:

- the head of a security agency that tortures dissidents;
- the head of the agency that runs a country's prison system;
- judges or prosecutors responsible for imprisoning political prisoners;
- heads of government-sponsored death squads;
- oligarchs involved in grand-scale corruption and linked to corrupt political leaders;
- high-profile corrupt state officials.

When providing evidence of the guilt of senior officials, it is necessary to take into account their role in the organisational structure of the institution and their control over the immediate perpetrators. An analysis of centralised decision-making processes in law enforcement agencies helps establish the responsibility of their managers for serious human rights abuses.

Magnitsky-type laws are criteria-based sanctions. Practice shows that in order to increase the effectiveness of the Magnitsky law, it is necessary to identify clear, transparent and distinct criteria and procedures. The evidence base should have a high evidentiary standard and be based on verifiable and well-documented information.

Long experience in the fight against human rights violations indicates the need to include, in the legislation on the Global Magnitsky Act, a mechanism of sanctions against officials of individual states (usually undemocratic) who ignore the decisions of the UN, the European Court of Human Rights and other conventional bodies, since this dangerous tendency spreads and diminishes existing achievements in the field of human rights protection.

One striking example is Russia, which has cancelled the priority of international law over domestic law at the legislative level. In particular, legislative changes allow Russia not to comply with the European Court of Human Rights decisions.

Also, this problem is typical, for example, for Kazakhstan. For more than 10 years, the Open Dialogue Foundation has presented expert opinions on human rights in this country. Kazakhstani authorities had long ignored the decisions of UN bodies to immediately release political prisoners and victims of torture Iskander Yerimbetov⁸ and Mukhtar Dzhakishev.⁹ At the same time, the authorities refuse to comply with UN recommendations to reconsider these case, as well as the decision of the UN Working Group on Arbitrary Detention on the release of human rights activist Max Bokayev.¹⁰

Kazakhstan is an authoritarian state in which the human rights situation has seriously deteriorated in recent years. In March 2018, the Kazakhstani court labelled the peaceful¹¹ opposition movement 'Democratic Choice of Kazakhstan' (DCK) an 'extremist' organisation. Based on this decision, according to official data and data from human rights defenders, in 2018–2020, the authorities of Kazakhstan

⁸ https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session83/A_HRC_WGAD_2018_67.pdf

⁹ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f115%2fd%2f2304%2f2013&Lang=en

¹⁰ https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session78/A_HRC_WGAD_2017_16.pdf

¹¹ https://www.europarl.europa.eu/doceo/document/TA-8-2019-0203_EN.html

subjected more than 6,000 participants of peaceful assemblies to gross arbitrary detention, which is unprecedented in the history of Kazakhstan.^{12,13}

In February 2020, the politically motivated assassination of a well-known DCK activist and blogger Dulat Agadil took place in Kazakhstan. On 25 February 2020, the police reported his death at the detention centre. One of the video recordings of Agadil's body shows injuries that appear to be bruises and abrasions – supposedly traces of torture. The prosecutor's office filed criminal charges against the eyewitnesses who recorded this video, for 'dissemination of knowingly false information'. The authorities conceal the circumstances of Agadil's death, which may indicate an attempt to cover up a crime. Such a crime is one of the bases for the introduction of personal sanctions.

One example of the successful efforts of human rights defenders and activists was the introduction of targeted sanctions for grand corruption against powerful Moldovan oligarch Vladimir Plahotniuc, who had been the head of the ruling Democratic party of Moldova. Over the previous six years, he and his party managed to establish control over key state bodies, and usurped power in the state, turning Moldova into a captured state. Today, following the collapse of Plahotniuc's regime, many of its agents and allies continue to maintain political and economic influence in the country. For example, some politically motivated criminal cases, which were initiated by law enforcement agencies previously controlled by Plahotniuc, remain open.¹⁴

On 13 January 2020, United States Secretary of State Michael Pompeo announced the imposition of personal sanctions against Plahotniuc due to the fact that his "*corrupt actions undermined the rule of law and severely compromised the independence of democratic institutions in Moldova*".¹⁵ Sanctions against Plahotniuc were also imposed by Switzerland and Liechtenstein. This example illustrates the need for personal sanctions for grand corruption that undermines the stability of countries and creates the preconditions for increasing numbers of economic refugees.

4. THE ROLE OF CIVIL SOCIETY IN THE IMPOSITION OF TARGETED SANCTIONS

In the U.S., there are two ways in which a person can be added to the Magnitsky sanctions list:

- First, the U.S. government can, on its own, based on its own priorities and information, investigate and add someone to the Magnitsky list.
- Second, outside parties (like a coalition of NGOs) can provide information to the U.S. government (specifically to the State Department) recommending that a person be investigated for potential inclusion on the Magnitsky list.

On a case-by-case basis, the U.S. government will confidentially decide if it wishes to investigate a person and, subsequently, to add that person to the list.

At the legislative level, we suggest that one of the important sources in the process of evaluating and listing human rights abusers should be reports and studies produced by NGOs. As the state considering the introduction of sanctions has limited resources, the help of NGOs is indispensable here. As they specialise in specific countries, cases and human rights issues, they can provide objective and complete expertise. Such consultation would also strengthen the position of civil society and its ability to directly influence the restoration of justice for victims of gross human rights violations.

¹² <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24620&LangID=E>

¹³ <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=28063&lang=EN&search=Y2F0ZWdvcnlfnc3RyX2VuOjJXb3JraW5nIGRvY3VtZW50Ijg==>

¹⁴ <https://en.odfoundation.eu/a/26593-has-the-state-been-captured-yet-again-corruption-and-political-persecutions-in-moldova/>

¹⁵ <https://www.state.gov/public-designation-due-to-involvement-in-significant-corruption-of-former-moldovan-official-plahotniuc/>

In its resolution of March 14, 2019, the European Parliament encouraged the establishment of an advisory committee made up of representatives of civil society at EU level.¹⁶

The sources of information for Global Magnitsky Submissions may include: documents on criminal cases; court decisions; decisions of investigative bodies; testimonies; responses of the authorities to inquiries; medical reports; interviews with victims of politically motivated persecutions, as well as their lawyers and relatives; results of international human rights monitoring missions; as well as reports and statements by UN bodies, democratic states and human rights NGOs.

Democratic countries need to close ranks in defence of the values on which the global democratic community is built. The greater the number of states that adopt the legislation on targeted sanctions to address human rights abuses, the less space there will be left for perpetrators to feel comfortable and carry on with impunity. This would also increase the effectiveness of the sanction policies.

We are convinced that the adoption of targeted sanctions legislation in order to address human rights abuses legislation would help Australia strengthen its position in the region as the most powerful human rights actor.

Respectfully yours,

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¹⁶ https://www.europarl.europa.eu/doceo/document/TA-8-2019-0215_EN.html