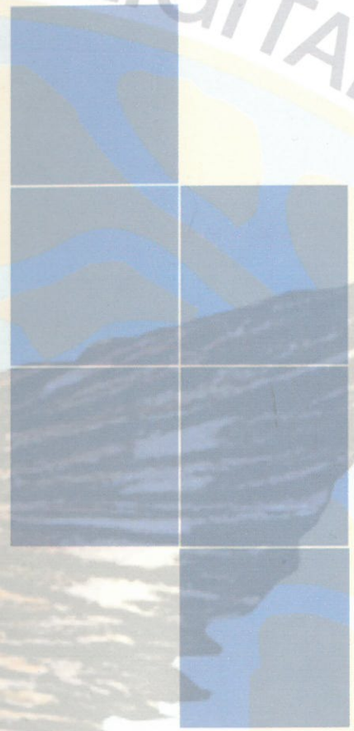

International Security Institute
Međunarodni institut za bezbednost

Magnitsky Act Srbija

LAW ON RESTRICTIVE MEASURES FOR SERIOUS VIOLATIONS OF HUMAN RIGHTS

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I. INTRODUCTION: MAGNITSKY LAWS

TARGETED SANCTIONS. Laws on restrictive measures and targeted sanctions for human rights violations, known as the so-called Magnitsky legislation, aims to impose personal and/or property sanctions on foreign persons who are directly or indirectly responsible for the most serious human rights violations. In the last ten years, an increasing number of countries, including the European Union, have decided to introduce some form of Magnitsky legislation into their legal system, either as special comprehensive laws (the so-called global Magnitsky laws), or in the form of amendments to existing laws. The essence of Magnitsky legislation is in targeted sanctions against foreign natural persons and legal entities who are responsible for serious and other human rights violations, or who are responsible for serious acts of corruption that result in human rights violations. Repressive measures in the form of targeted sanctions include the imposition of an individual "ad nominam" sanctions with specific designation of names and surnames of foreign natural persons, i.e., against specifically designated foreign legal entities responsible for serious violations of human rights.

SERGEI LEONIDOVICH MAGNITSKY. Magnitsky legislation was named after a Russian citizen, Sergei Magnitsky, –2009), who was an auditor at a law firm in Moscow. His arrest in 2008 and his death after eleven months in police custody provoked a reaction from the international public and launched investigations into corruption, theft and serious human violations of human rights in Russia. Magnitsky discovered and claimed that there was a theft of state property of enormous proportions, which was indirectly enabled or directly committed by state officials of the Russian Federation. Magnitsky died in prison seven days before the expiration of the one-year period until which he could be in custody without a trial. However, he was denied medical care in prison, and it was determined that he was physically assaulted just before his death in November 2009. The imprisonment and death of Sergei Magnitsky provoked an international reaction, and as a consequence, among other things, the US Congress adopted in 2012 the so-called Global Magnitsky Human Rights Accountability Act.

HERMITAGE CAPITAL MANAGEMENT (HCM) CASE. Magnitsky worked for the foreign investment fund Hermitage Capital Management (HCM). In 2007, the Russian authorities accused the HMC fund of tax evasion and ordered a search of the offices, during which the Russian police seized all the documents of this company and initiated a procedure for evading hundreds of millions of dollars in taxes. HMC entrusted Sergei Magnitsky, as the financial auditor, to verify the allegations. During the inspection, Magnitsky revealed that the material seized during the action was delivered by the police to members of organized criminal groups, who used the material to take control of three Russian companies managed by HCM, as well as to misappropriate about $ 240 million from HCM. Magnitsky, among other things, revealed that the documents seized during the search were used to falsify changes in the ownership of HCM. HCM informed the competent Russian authorities about the findings obtained by Magnitsky. However, instead of launching an investigation against the police officers who were involved in the case, Russian authorities arrested Sergei Magnitsky on charges of collaborating with HCM in tax evasion. Sergei Magnitsky was in prison for more than eleven months without

a trial. His family was not allowed to visit and he was denied medical assistance.

GLOBAL MAGNITSKY ACT (USA). The news on the arrest and the manner in which the Russian authorities treated Magnitsky, especially the news of his death in prison, provoked strong condemnation from the international community and a global reaction due to severe violations of human rights. The United States was the first country to impose targeted sanctions on individuals suspected of being responsible for Magnitsky's death, with a 2012 Law that became known as the Magnitsky Act. According to the Magnitsky Act, Russian state officials who were suspected of being involved in Magnitsky's death were banned from entering the United States and using the American banking system. This Magnitsky Act was amended in 2016 in order to extend its previous application only to Russia, now as the "Global Magnitsky Act", to all persons who commit serious forms of human rights violations, regardless of citizenship or nationality (among other things, on this basis, at the end of 2019, the United States imposed *ad nominam* sanctions on Slobodan Tešić and nine other citizens of Serbia for illicit arms trafficking). Magnitsky legislation, as a targeted introduction of sanctions for human rights violations in the Russian Federation, after the United States, has been extended to an increasing number of countries, including the European Union.

COUNCIL OF EUROPE. The first reaction regarding the Magnitsky case in Europe followed in 2014 in the form of Resolution 1966 (2014) of the Council of Europe " Refusing impunity for the killers of Sergei Magnitsky".[1] This Resolution called on the competent authorities of the Russian Federation to investigate the circumstances of the death of Sergei Magnitsky and to consider the possibility of initiating criminal proceedings against the officials involved in his death. On that occasion, the Council of Europe, with this Resolution Article .) encouraged all member states of the Council of Europe to address the competent Russian authorities with a request to open an investigation into the case of Sergei Magnitsky. However, after assessing the level of implementation of these recommendations, the Committee on Legal Affairs and Human Rights of the Council of Europe found that the Russian Federation had not made progress in its implementation. In fact, the Russian authorities did just the opposite, continuing to put pressure on Magnitsky's colleagues and family members. Due to this situation, in 2019, the Council of Europe passed a new Resolution 2252 (2019) "Sergei Magnitsky and beyond - fighting impunity by targeted sanctions".[2] This Resolution reaffirms the Council of Europe's commitment to punishing those responsible for human rights violations and respect for the rule of law. The special significance of this Resolution is in the call to the member states to adopt laws that will punish those responsible for human rights violations who cannot be punished in the country of origin for political reasons and due to corrupt practices. The resolution proposes, as appropriate sanctions, the denial of visas and the property disposal restrictions (so-called freezing) to persons suspected of serious human rights violations.

EUROPEAN UNION. In addition to the Council of Europe, the European Union has joined

[1] For more details see: https://pace.coe.int/en/files/20409/html.
[2] For more details see: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25352&lang=en.

efforts to establish a common regime for punishing those responsible for human rights violations. In February 2019, the European Parliament adopted Resolution (2019/2580)[3] on a European human rights violations sanctions regime for those responsible for human rights violations. With this Resolution, the European Parliament strongly condemns human rights violations worldwide and calls on the EU Council to establish an autonomous, flexible and responsive EU-wide sanctions regime that individually targets each individual, state and non - state actor and other entities responsible for or involved in serious human rights violations. In response, in December 2020, the Council of the European Union adopted Decision (CFSP) 2020/1999[4] and Regulation 2020/1998[5] on restrictive measures against persons responsible for serious human rights violations. These two acts provide a legal basis for imposing restrictive measures against persons responsible for serious human rights violations in any country in the world. The Decision and the Regulation of the Council of the European Union represent the first global and comprehensive regime of targeted sanctions against those responsible for serious human rights violations adopted by the European Union, which especially emphasizes that the protection of human rights is a fundamental value and cornerstone of EU policy.

GLOBAL REGIME. The European Union Global Human Rights Sanctions Regime[6] does not target a particular country or its population. Instead, these sanctions target the specific policies and activities of foreign persons responsible for serious human rights violations and discourage sanctioned activities. The development of this global sanctions regime at EU level is a very complex process involving different actors. All decisions on the approval, amendment, removal or renewal of targeted sanctions are taken by the EU Council after a detailed examination by the relevant expert bodies of the Council. Thereafter, the European External Action Service communicates and cooperates with the member states to implement decisions and regulations in this area. Finally, bearing in mind that the global sanctions regime is most effective when implemented by a wide range of international partners, the European Union also cooperates with other countries that have similar views on those responsible for serious human rights violations, such as the US, Australia, Estonia, Canada, etc.

PRACTICE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION. The impact of the application of restrictive measures as targeted sanctions in cases of human rights violations is expressed both in practice and in cases decided by the Court of Justice of the European Union.

[3] For more details see: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0215_EN.html#def_1_21.
[4] For more details see: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2020:410I:FULL&from=ES#ntr1-LI2020410EN.01000101-E0001.
[5] For more details see: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2020:410I:FULL&from=ES#ntr1-LI2020410EN.01000101-E0001.
[6] For more details see: https://eeas.europa.eu/topics/sanctions-policy/423/european-union-sanctions_en.

a) KADI (C-402/05 P and C-415/05 P).[7] The Kadi case refers to a complaint of two persons against which the European Union has applied targeted sanctions, in particular restrictions on the disposal of property, after it was established that there was potential support for Al Qaeda. The court in this case found that the applicants' right to property had been violated. In this connection, the Court found, inter alia, that:

- the right to property is very important, but not absolute;
- the right to property should be viewed in relation to its function in society and may be restricted for reasons of public interest;
- the restriction, in relation to the reason for the restriction, should not be disproportionate and inaccessible so as to damage the essence of the property right;
- in order to assess the limits of property rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol I, Article 1, which provides for this right, should be considered;
- a balance must be established between the public and personal interests of the individual;
- in connection with a specific case, based on the request of the person, it may be decided not to limit the property necessary to meet basic needs such as: food, medicine, rent, taxes, etc.;
- the procedures applied should be such as to reasonably enable the suspect to resolve his interests before the competent authority.

b)YUSUF (T-306/01).[8] Similar to the Kadi case, the Yusuf case T-306/01)[9] refers to sanctions regarding connections with terrorist groups, which the European Union imposed against natural and legal persons and which referred to property disposal restrictions. On appeal, the Court found, inter alia, that:

- the right to property falls within the scope of international law;
- property disposal restrictions, unlike confiscation, do not substantially affect the right of ownership, but only the use of property;
- there are mechanisms for periodically reviewing the need for imposed sanctions;
- the sanction in this case is not arbitrary, inappropriate or disproportionate interference with the right to property.

[7] For more details see: http://curia.europa.eu/juris/document/document.jsf?text=&docid=67611&pageIndex=0&doclang=EN&m ode.
[8] For more details see: http://curia.europa.eu/juris/document/document.jsf?text=&docid=59905&pageIndex=0&doclang=en&m ode.
[9] For more details see: http://curia.europa.eu/juris/document/document.jsf?text=&docid=59905&pageIndex=0&doclang=en&m ode.

c)AHMED EZZI (T-256/11; C-220/14 P).[10] In the case of Ahmed Ezzi, the legality of the sanctions imposed on the person who is considered to have misappropriated Egyptian state funds was in question. According to the Council of the European Union, this abuse was so severe that it deprived the Egyptian people of the benefits of sustainable economic and social development and undermined the democratic process in the country. In the meantime, the Court has reached the following conclusions in this case regarding the right to property:

- the restrictive measures imposed must have a legal basis;
- the restriction should relate to an objective of general interest recognized as such by the European Union, which should be to support democracy, the rule of law and human rights, as well as the sustainable development of developing countries, with the primary objective of eradicating poverty;
- the restriction should be only as much as is necessary and proportionate to the aim pursued;
- the principle of proportionality should be followed when imposing restrictive measures.

d) ROSNEFT (T-715/14).[11] The Rosneft case is very important in the context of targeted EU sanctions. In this case the right to property but also the freedom to do business was discussed. The Russian company Rosneft appealed to the competent court of the European Union against the restrictive measures imposed on it. In this new case, the Court confirmed that:

- the right to property and freedom of business are not absolute and may be restricted for reasons of public interest;
- the principle of proportionality must be respected - the measures taken that affect property rights must be appropriate to the intended purpose and must not go beyond what is necessary.

The Rosneft case, in addition to the property rights, also refers to effective judicial protection. The applicant Rosneft pointed out that the imposed sanctions are not in accordance with the obligation to explain and, accordingly, ensure the right to an appropriate procedure and effective judicial protection. According to *Rosneft*, the explanations given in the act introducing targeted sanctions are not sufficient to ensure a review of the legality of the imposed sanctions. It was also pointed out that the sanctions were applied during the court proceedings. In this connection, the court found, inter alia:

- the explanation for imposing targeted sanctions should be elaborated in such a way as to allow a clear understanding of the reasons and an assessment of whether it is worth challenging the sanction imposed in court;

[10] For more details see: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011TJ0256&from=HR
[11] For more details see: http://curia.europa.eu/juris/document/document.jsf?text=&docid=205646&pageIndex=0&doclang=en& mode

- the circumstances of the case determine the basis for the imposition of sanctions;
- whether the justification is sufficient is assessed not only in terms of scope, but also in terms of content and all relevant legal rules;
- respect for the right to protection includes the right to be heard and the right to access documents within the limits of legitimate confidentiality interests;
- reasons relating to the security of the European Union or the Member States may limit the disclosure of information or evidence to the other party;
- the right to defense does not mean that all documents that are not confidential should be disclosed to the sanctioned party without a special request.

e)GOOD LUCK SHIPPING (T-423/13).[12] In the Good Luck Shipping case, the Court found that the Council had not provided reasonable grounds for deciding to restrict the disposal of the assets of a Dubai-based private transport company. In this judgment, the Court confirmed that the party should be informed of the reasons for which it has been included in the list of targeted sanctions and that it has the right to express its position effectively on the matter. The court also found that:

- it is the duty of the competent body of the European Union to determine, in the event of an objection, whether the reasons on which it relied when imposing restrictive measures against the person concerned are well founded;
- as a rule, the legality of the disputed measures can be assessed only on the basis of the elements of facts and laws on the basis of which they were imposed, and not on the basis of information obtained from the European Union institutions after the adoption of these measures.

f)MAYALEH (T-307/12, T-408/13).[13] The Mayaleh case refers to the legality of restrictive measures imposed on an individual who was considered responsible for providing economic and financial support to the Syrian regime as the governor of the Central Bank of Syria. In this connection, the Court found, inter alia:

- the entity imposing restrictive measures is obliged to inform the person for whom the measures are intended about the specific reasons why the measures against him had to be approved and to determine the factual and legal issues that form the legal basis for the measures in question;
- for security reasons it is allowed to prohibit the disclosure of certain information;
- The Council delivers its decision to the sanctioned person, with the reasons for listing either directly, if the address is known, or by publishing a notice, giving

[12] For more details see: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62013TJ0423&from=EN
[13] For more details see: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012TJ0307&from=EN.

him the opportunity to express his views;
- according to court practice, respect for the right to a defense, and in particular the right to be heard, in relation to restrictive measures, does not require the European Union authorities to communicate reasons to natural or legal persons before listing them with restrictive measures;
- the right to be heard before the adoption of acts containing restrictive measures against persons already covered presupposes that the Council has obtained new evidence against those persons.

II. MODEL

LAW ON RESTRICTIVE MEASURES FOR SERIOUS VIOLATIONS OF HUMAN RIGHTS

I. BASIC PROVISIONS

Subject of the Law

Article 1

(1) This Law prescribes restrictive measures against designated foreign natural and legal persons due to serious violations of human rights and regulates the procedure for their designation.
(2) This Law also regulates the establishment of the register of designated persons, the competence of the body for the introduction of restrictive measures, as well as the rights and obligations of natural and legal persons regarding the application of this Law.

The Purpose of the Law

Article 2

(1) The aim of this Law is to introduce restrictive measures as targeted sanctions against designated foreign natural and legal persons for serious human rights violations.
(2) The reason for introducing restrictive measures as targeted sanctions directed individually against a specific natural or legal person for serious human rights violations is to eliminate the basic shortcomings of general international sanctions for serious human rights violations that affect all, mostly innocent citizens of a country.

Jurisdiction

Article 3

The Government of the Republic of Serbia, (hereinafter: The Government), shall decide on the introduction of restrictive measures against designated foreign natural and legal persons due to serious violations of human rights.

Application of the Law

Article 4

(1) This Law shall apply to the territory of the Republic of Serbia, including its airspace, as well as to all aircrafts and all vessels under its jurisdiction.
(2) This Law applies to any foreign natural person on the territory or outside the territory of the Republic of Serbia.
(3) This Law shall apply to any legal entity on the territory or outside the territory of the Republic of Serbia that is established or registered in accordance with the law of the Republic of Serbia, as well as to those legal entities that fully or partially perform activities in the territory of the Republic of Serbia.

The Principle of Legality and Fairness

Article 5

(1) The introduction of restrictive measures against designated foreign natural and legal persons for serious human rights violations must be lawful and fair and in accordance with the purpose for which they are introduced.
(2) Natural and legal persons against whom restrictive measures are introduced have the right to judicial and other legal protection and defense in accordance with the law.

The Principle of Transparency and Proportionality

Article 6

(1) Any action or decision in the process of imposing restrictive measures against foreign designated natural and legal persons due to serious human rights violations must be publicly available, thoroughly reasoned and easy to understand.
(2) When an obligation is imposed on a natural or legal person, the prescribed measure that is more favorable shall be applied if the purpose determined by this Law is also achieved.

The Principle of Accuracy and Data Protection

Article 7

(1) The data in the register of designated foreign natural and legal persons against whom restrictive measures have been imposed due to serious human rights violations must be accurate, complete and up-to-date.
(2) The data in the register of designated foreign natural and legal persons must be protected from illegal or accidental destruction, loss or alteration of data, any unauthorized access to data or their unauthorized disclosure or other forms of