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Poland's timid attempt at the Magnitsky Act

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In 2010, Polish lawmakers addressed the Sergei Magnitsky case for the first time. The Ministry of Foreign Affairs announced that it was considering introducing sanctions against the officials responsible for the death of the whistle-blowing Russian lawyer. Yet today, serious concerns have arisen about whether the Polish government is prepared to actually carry out these measures.

Polish public statements

On 16 December 2010 the Polish Parliamentary Commission on Justice and Human Rights, on the initiative of its President, Ryszard Kalisz, expressed its concerns regarding the Russian investigation into the death of Sergei Magnitsky and criticised the deterioration of basic human rights in Russia.¹ The Commission emphasised its hope that all circumstances of the death of Sergei Magnitsky would be fully investigated and made public in accordance

¹ "Stanowisko w sprawie śmierci adwokata Sergieja Magnitskyego" ("Position of the Justice and Human Rights Committee regarding the death of lawyer Sergei Magnitsky"), 16 December 2010, available at: <http://orka.sejm.gov.pl/SQL.nsf/stan?OpenAgent&6&SPC> (last accessed 30 July 2013)

with the rule of law.

This followed reports that the Minister of Foreign Affairs, in a letter to the Head of the Parliamentary Commission on Justice and Human Rights, declared the possibility of introducing an entry ban and freezing financial assets in Poland of the Russian officials responsible for the death of Sergei Magnitsky. The Minister also asserted that Poland would strive to bring the Magnitsky case to the Permanent Partnership Council between Russia and the European Union's forum.²

International debate

The context of these statements was the increasingly strong international condemnation of the systemic abuse of Sergei Magnitsky's rights by the Russian officials whom Magnitsky had implicated in the largest known corporate tax fraud in Russian history. The circumstances of the case were beginning to persuade lawmakers in the United States, the United Kingdom, Canada, and others in the European Union to propose visa and financial sanctions.

On December 16, 2010, the European Union passed a resolution urging the Russian judicial authorities to press ahead with the investigation of the death of Sergei Magnitsky.³ The European Parliament expressed its regret that, "...while human rights defenders are often subject to a harsh treatment and trials that ignore the Russian Federation's Code of Criminal Procedure ..., those guilty of aggressions against and even murder of human rights defenders, independent journalists and lawyers still too often enjoy impunity." Additionally, the European Parliament called on the Council to insist that the Russian authorities bring the perpetrators of Magnitsky's persecution of death to justice. Significantly, the European Parliament suggested an EU entry ban for the Russian officials involved in the case, and encouraged European Union law enforcement agencies to cooperate in freezing bank accounts and other assets of these individuals throughout the EU member states.

These initiatives were no doubt inspired by the United States' response to Magnitsky's death. In September 2010, Senator Benjamin Cardin submitted

2 "Polska uderzy w Rosję sankcjami?" (Will Poland attack Russia by sanctions?), TVN24, 4 October 2010 r., available at: <http://www.tvn24.pl/1,1676315,druk.html> (last accessed 9 May 2013).

3 European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0489+0+DOC+XML+V0//EN> (last accessed 9 May 2013), para. 120.

the draft “Sergei Magnitsky Rule of Law Accountability Act” (Magnitsky Act) for consideration by the US Senate. The bill proposed introducing visa bans and financial sanctions against the Russian officials involved in the Magnitsky case. Similar initiatives were also proposed in the parliaments of Canada⁴ and the United Kingdom⁵.

What has been done by Poland?

In light of the international debate, the Helsinki Foundation for Human Rights (HFHR) decided in February 2011 to ask the Polish Ministry of Foreign Affairs to present its position on the Magnitsky case.⁶ The HFHR asked the Ministry of Foreign Affairs what actions it had taken in order to fulfil the declaration of introducing visa and financial restrictions for several of the Russian officials.

The HFHR received a response from the Ministry of Foreign Affairs on February 1, 2012, to what was by that point a third letter of inquiry.⁷ The Ministry reiterated its position that Poland would work within the European Union to forge a strong position on the Magnitsky case. In the event that the Russian response to calls for a transparent and independent investigation of the case proved unsatisfactory, the Ministry indicated that Poland would be compelled to obtain a broad consensus among EU member states to apply visa and financial sanctions to the individuals implicated in Magnitsky’s death.

Thus far, Poland has been limited to the adoption of the Council of the European Union’s position in respect of the Magnitsky case on March 27, 2012.

Insufficient measures

The Polish attitude towards the Magnitsky case is clearly informed by sincere concern, but it is insufficient. As an increasing amount of damning evidence

4 Minutes of proceedings of the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development of the Canadian Parliament of 30 November 2010 are available at: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4848292&Language=E&Mode=1&Parl=40&Ses=3> (last accessed 9 May 2013).

5 The minutes of the debate of House of Commons of the British Parliament of 19 January 2011 is available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110119/debtext/110119-0004.htm#11011978000001> (last accessed 9 May 2013).

6 The HFHR letter of 15 February 2011, available at: <http://www.hfhrpol.waw.pl/precedens/images/stories/Magnitsky.pdf> (last accessed 9 May 2013).

7 The Ministry of Foreign Affairs letter of 1 February 2012, available at: http://www.hfhrpol.waw.pl/precedens/images/stories/Odpowiedz%20MSZ_Magnicki_7_02_2012%282%29.pdf (last accessed 9 May 2013). See also the HFHR letters of 13 June 2011 and 22 December 2011, available at: <http://www.hfhrpol.waw.pl/precedens/aktualnosci/helsinki-fundacja-praw-czlowieka-ponownie-apeluje-do-ministra-spraw-zagranicznych-w-sprawie-smierci-rosyjskiego-adwokata-s-magnitskyego.html> and http://www.hfhrpol.waw.pl/precedens/images/stories/magnitsky_skan.pdf (last accessed 9 May 2013).

becomes available, the limited action taken by Poland appears insufficient. The international community, Poland included, should undertake concrete, effective, and robust measures, similar to those undertaken by the United States with the passage of the Magnitsky Act on December 14, 2012. This precedent-setting law introduced concrete sanctions against the Russian officials responsible for Magnitsky's death, as well as any other human rights abusers from the Russian Federation. In addition to banning the issuance of new visas and rescinding visas already granted, the act empowers the President of the United States to freeze these individuals' assets and prevent any financial operations from occurring in the United States. The Magnitsky Act obliged the President to present a list of persons liable for the arrest, torture, and death of Sergei Magnitsky, as well as other grave human rights violations in Russia.

This legislation is an important tool in the fight against the corrosive effects of corruption, which pervade the highest levels of the Russian state. This phenomenon undermines the trust of citizens in democratic institutions, the rule of law, and the state's ability to protect their fundamental human rights. When a state deliberately breaches its international obligations, as clearly occurred in the appalling treatment of Sergei Magnitsky, it is no longer merely an internal matter.

Of course, the options to combat such violations within another state are somewhat limited and are necessarily indirect, which is what makes the sanctions embodied in the US Magnitsky legislation a reasonable way to communicate Poland's - and the EU's - intolerance of this type of behaviour. It would demonstrate our seriousness in dealing with corruption and human rights violations, and in holding states to account for breaches of their international obligations. Russia's refusal to deal with this case honestly, and its more recent attempts to retaliate against those who have sought justice for Sergei Magnitsky, increases the urgency of such measures. This hardening of Russia's approach is evident in the acquittal of physician Dmitry Kratov, who is the only person to have been charged in relation to the killing of Magnitsky, and can also be seen in the posthumous trial against Sergei Magnitsky, and the *in absentia* charges issued against Magnitsky's former employer and leader of the Magnitsky justice campaign, Hermitage Capital Management CEO William Browder.⁸

⁸ The HFHR cited this argument in its letter of 14 March 2013, available at: http://www.hfhrpol.waw.pl/precedens/images/stories/Magnicki_wyst%C4%85pienie_marzec%202013.pdf (last accessed 9 May 2013).

However, it remains unclear whether any steps to introduce these necessary measures will be undertaken by the Polish government. Sadly, the Magnitsky case is not perceived as a priority in Poland. In fact, undertaking any action in the current political context seems to be very problematic, as it will likely be received as an attack by Russia, and could complicate two crucial, unresolved issues between the two countries. The wreckage of the plane which killed passengers, including President Lech Kaczynski, has yet to be returned from Smolensk to Poland, feeding theories about the involvement of Russia in the crash, particularly among Russia's political opposition.⁹ Second, the case before the European Court of Human Rights lodged by the families of victims of the Katyń massacre is currently pending before the Grand Chamber. In early 2013, Polish Minister of Foreign Affairs, Radosław Sikorski, delivered a presentation to Parliament on the country's chief foreign policy priorities for the following year, with little reference to human rights. It is clear that there is no solid foundation in Polish foreign policy for promoting and protecting human rights, particularly in relation to the Magnitsky case.

⁹ On April 2010, Polish Air Force Tupolev TU 154M aircraft crashed near the Smolensk, Russia, killing high ranking Polish officials, including President Lech Kaczynski and his wife. The case has inspired controversy and debate in Poland. Some people believe that the crash was executed as an assassination plot by the Russian state. Russia's failure to return the wreckage to Poland has complicated bilateral relations.