

Rebecca Shaeffer

The EU has a right to claim to be a beacon for human rights across the globe

Rebecca Shaeffer is a law reform officer at Fair Trials International in London, where her current work focuses on the implementation of the EU's Roadmap on criminal procedural rights and on pre-trial detention. Rebecca has worked on criminal justice, detention and migration issues in many countries including the USA, Ecuador, El Salvador, South Africa, Zambia, and Egypt. Most recently prior to Fair Trials International, Rebecca was a fellow at Human Rights Watch.

“Peace is not mere absence of war, it is a virtue,” wrote Spinoza: “Pax enim non belli privatio, sed virtus est.” And he added it is “a state of mind, a disposition for benevolence, confidence, justice”.

Indeed, there can only be true peace if people are confident. At peace with their political system. Reassured that their basic rights are respected.

The European Union is not only about peace among nations. It incarnates, as a political project, that particular state of mind that Spinoza was referring to. It embodies, as a community of values, this vision of freedom and justice.”

José Manuel Durão Barroso, President of the European Commission, 10 December 2012¹

The EU's commitment to human rights was recognised in 2012 when it was awarded the Nobel Peace Prize for its contribution “to the advancement

¹ EUROPA, “From War to Peace: a European tale”, Address by Herman Van Rompuy, President of the European Council & José Manuel Durão Barroso, President of the European Commission, 10 December 2012, available at: http://europa.eu/rapid/press-release_SPEECH-12-930_en.htm.

of peace and reconciliation, democracy and human rights in Europe”.² This commitment is enshrined in the Treaty of Lisbon³ and the Charter of the Fundamental Rights of the European Union.⁴ It is directed not only at member states themselves, but is also at “the heart” of the EU’s external action policy.⁵ It is, therefore, right that the EU should play a key role in ensuring effective protection for the rights of those people who are most at risk of human rights abuses by states: people who, like Sergei Magnitsky, are accused of criminal offences and deprived of their liberty.

As an organisation which advocates for the protection of the right to a fair trial, according to international human rights standards, Fair Trials International (FTI)⁶ has followed closely the Magnitsky campaign and the debates surrounding the introduction and passage of the Magnitsky Law. The campaign has highlighted not only the abuses suffered by Sergei Magnitsky at the hands of Russian criminal justice, but is also emblematic of wider human rights abuses in criminal justice systems across the globe. The Magnitsky Law has also raised important questions about the proper response of democracies the world over to such abuses, when domestic accountability mechanisms show themselves to be palpably incapable of providing redress for victims and preventing future injustice.

Accountability for the abuse of suspects’ rights

The Magnitsky Law has highlighted the urgent purpose for which we work every day - to secure the human rights of criminal defendants. As a rare measure that seeks to hold accountable those who violate the rights of the imprisoned and criminally accused, the Magnitsky Law has the potential to raise awareness and promote meaningful reform of defence rights; an area of law enforcement too often neglected in international human rights and law reform efforts.

2 The Norwegian Nobel Committee, Announcement: The Nobel Peace Prize for 2012, 12 October 2012, available at: http://nobelpeaceprize.org/en_GB/laureates/laureates-2012/announce-2012/.

3 Treaty of Lisbon, s. 24, available at <http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/C2007306EN.01001001.htm>

4 Charter of the Fundamental Rights of the European Union, available at: http://www.europarl.europa.eu/charter/default_en.htm. In relation to fair trial rights, see particularly Chapter IV.

5 European Commission, Joint Communication to the European Parliament and European Council: Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach, December 2011, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0886:FIN:EN:PDF>; and Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12, 25 June 2012, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.

6 For more information about Fair Trials International’s work, see: <http://www.fairtrials.net/about-us/>

The rights of criminal defendants, like Sergei Magnitsky, are at the heart of the rule of law. Beyond the rights of individuals to bodily integrity and physical freedom, and the public interest in the accuracy of accusations and convictions, the rights of the accused implicate the principles of open justice, transparency, and the accountability of state enforcement mechanisms.

Often, the criminal trial provides the only forum in which violations by police, prosecutors, and prison officials can be recognised. When a defendant's rights are violated in the course of a prosecution, the remedies are usually limited. Exclusion of evidence from use against the defendant is often the only available remedy⁷ and the only form of "accountability" for state abusers, with their only "punishment" being the frustration of having key evidence excluded. Actions against prosecutors, police, or judges who violate the rights of the accused are rare in most, if not all, jurisdictions across the globe.

Whilst the US version of the Magnitsky Law targets explicitly only the perpetrators of Magnitsky's unlawful treatment, unfortunately his case is not alone when it comes to serious fair trials violations. FTI sees hundreds of cases each year of criminal defendants around the world who are similarly detained pre-trial without sufficient legal basis, often in conditions which threaten their health and their ability to defend themselves, with little to no access to competent legal assistance, family members or even the evidence against them.

Whilst the torture and state-sponsored death of defendants like Sergei Magnitsky is extreme, it is unfortunately not unique, and is certainly not limited to Russia. FTI clients report being subjected to torture and ill-treatment across the globe:

Case study - Muhammad Geloo: In November 2006, Muhammad Geloo was arrested in Saudi Arabia where he was studying Arabic. He was held in prison for over five years, during which time he reports that he was tortured until he confessed to giving £300 to a fellow student, supporting the insurgency in Iraq. Muhammad never saw a court judgment but believes he was convicted of a criminal offence after a grossly unfair trial lasting minutes.

⁷ See, e.g. *Salduz v. Turkey* 36391/02 [2008] ECHR 1542, para 4-13 of joint concurring opinion of Judges Rozakis, Spielmann, Ziemele and Lazarova Trajkovska, on the concept of restitution in integrum in remedies for breaches of defendants' rights in the criminal trial: "Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."

What is rare about Magnitsky's case is that the world knows his name, thanks to the tireless campaigning of his colleagues and supporters and the creation of the bill which bears his name. For many ordinary criminal defendants, their abuses and even their deaths pass without notice, and without any accountability for their abusers. The UN Special Rapporteur on Torture has observed that it is usually "ordinary people" suspected of "ordinary" crime who are most commonly the victims of torture and other ill-treatment.⁸

The EU's track record on defence rights

Though overtly politically-motivated prosecutions are uncommon within the EU, subtler forms of bad faith exist behind commonplace violations. Lawyers from EU states such as Greece, whose prisons are overcrowded with unconvicted pre-trial detainees, have reported that prosecutors often rely on the poor conditions of detention to encourage defendants to plead guilty, rather than spend longer in prison contesting their case.⁹ This is just one example of the routine and repeated fair trials violations that we see on a daily basis, even within EU member states.¹⁰

Case Study – Anthony Reynolds: Anthony Reynolds spent four years in pre-trial detention under the "secreto de sumario" regime in Spain, with no access to his case file, and little ability to mount a defence. At trial, prosecutors were forced to admit there was little reliable evidence against either him or his 13 co-defendants and all of them were acquitted. Prosecutors had used the secrecy of the case file and the defendant's detention to cover up their lack of diligence in investigating and prosecuting him.

Abuses like these have undermined the EU's efforts to put in place effective mechanisms for judicial cooperation in criminal matters across the EU. For example, fast-track extradition procedures under the European Arrest Warrant system have contributed to human rights violations as they

8 UN Special Rapporteur on Torture, Manfred Nowak, Interim Report on torture and other cruel, inhuman or degrading treatment or punishment, A/64/215, submitted to the General Assembly August 3, 2009, at paragraphs 40/41. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39_AEV.pdf

9 Please reserve space for citation to forthcoming FTI communiqué following our Advancing Defence Rights meeting in Greece, April 2013.

10 For in depth information on FTI's findings on the state of defence rights in the EU, see "Defence Rights in the EU" (October 2012), available at: <http://www.fairtrials.net/publications/policy-and-campaigns/defence-rights-in-the-eu-report/>. Information from this report is digested in an interactive map on the state of defence rights in the EU, available at <http://www.fairtrials.net/justice-in-europe/>

are not accompanied by sufficient procedural safeguards.¹¹ Under this “no questions asked” system, people are being extradited to face trials which lack the hallmarks of fairness, including access to basic information and legal advice, or are subject to excessive periods of pre-trial detention.

Case study – Andrew Symeou: Andrew Symeou, a 20-year-old student, was extradited to Greece in July 2009 to face charges in connection with the death of a young man on a Greek island. Andrew was extradited despite evidence that the charges were based on statements extracted by Greek police through the violent intimidation of witnesses, who later retracted their statements. FTI has grave concerns over the conduct of the police investigation which was built on mistaken identity and conflicting evidence. After spending over ten months in terrible conditions¹² in a Greek prison, Andrew was finally released on bail but was unable to leave Greece. He was finally acquitted in the summer of 2011, after both his and his family’s lives had been turned upside down.

In recent years, cases like Andrew Symeou’s have persuaded the EU to reassess the state of defence rights protection within the EU. FTI has encouraged the development of the EU’s “Roadmap on Procedural Rights” – a series of directives aimed at protecting the rights of criminal suspects, and more specifically, the right to interpretation and translation,¹³ the right to information¹⁴ and the right to legal advice.¹⁵ Plans are also in place for further

11 Council Framework Decision 2009/299/JHA, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009F0299:EN:NOT>; amended version of Council Framework Decision 2002/584/JHA on the European Arrest Warrant and surrender procedures between member states, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:NOT>

12 Korydallos Prison, where Andrew was detained, has been repeatedly criticised by international organisations. The European Committee for the Prevention of Torture (CPT) “observed a steady deterioration in the living conditions and treatment of prisoners... compounded by the severe overcrowding”, and stated that the conditions in Korydallos “are especially worrying” [CPT Public statement concerning Greece, 15 March 2011, available at <http://www.cpt.coe.int/documents/grc/2011-10-inf-eng.htm>]. After repeated criticism from EPT, Amnesty International and other human rights bodies, the Greek Minister of Justice stated in 2008 that Korydallos will be closed down; this has not yet happened [Amnesty report on Europe and Central Asia, July–December 2007, available at <http://www.amnesty.org/en/library/asset/EUR01/001/2008/en/297fab1c-78fb-11dd-8e5c-43ea85d15a69/eur010012008en.pdf>]

13 Directive 2010/64/EU, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF>. See also Fair Trials International, Improving defence rights in Europe: the right to interpretation and translation in criminal proceedings, available at: <http://www.fairtrials.net/publications/defence-rights-in-europe-the-right-to-interpretation-and-translation-in-criminal-proceedings/>.

14 Directive 2012/13/EU, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF>. See also Fair Trials International, Improving defence rights in Europe: the right to information in criminal proceedings, available at: <http://www.fairtrials.net/publications/defence-rights-in-europe-the-right-to-information-in-criminal-proceedings/>.

15 Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings, COM/2011/0326 – COD/2011/0154; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011PC0326:EN:NOT>. See also Fair Trials International, Towards an EU law guaranteeing the right to a lawyer and to communicate with consular staff and others on arrest, August 2012, available at: <http://www.fairtrials.net/publications/defence-rights-in-europe-towards-a-law-guaranteeing-the-right-to-a-lawyer-and-to-communicate-with-consular-staff-and-others-on-arrest/>.

crucial measures to deal with the right to protection for vulnerable suspects and there is now growing support for EU-level action on pre-trial detention.

Human rights abuses and international cooperation

As with the EU, countries and regional institutions committed to human rights and the rule of law cannot, of course, be complacent about human rights abuses at home. However, on its own, tackling these issues is not enough. In an increasingly globalised and interconnected world, countries must work together to fight serious crime. As the EU has now recognised - albeit belatedly - effective cross-border cooperation relies on countries being able to trust in the fairness of each other's legal systems. Without this, countries quickly become embroiled in human rights violations abroad.

This problem has dogged the world's largest police cooperation body, Interpol, which has been misused by some of its 190 member countries to give added international reach and weight to politically-motivated prosecutions. International law enforcement cooperation mechanisms such as Interpol have never been more widely used by state police and prosecutors.¹⁶ Interpol issues thousands of "red notices" each year, each carrying with it the potential to deprive people of their liberty and reputation. "Red notices" act as international wanted posters and make it easier to enforce foreign arrest warrants. This system plays an important and politically popular role in international police cooperation, but our cases have repeatedly demonstrated that it is open to abuse.

Interpol has no effective mechanisms to prevent authorities from abusing the "red notice" system to harass and threaten activists who manage to escape their borders. Russia, for example, though certainly not alone, is an active user of the "red notice" system against, amongst others, activists.

Case study - Petr Silaev: In July 2010, Petr Silaev, an activist, musician and writer from Moscow, helped convene a group of 150 people to support the environmentalists defending Khimki forest against destruction by developers. He was accused of "hooliganism" (the same vague offence used to prosecute the punk band Pussy Riot) and forced to seek asylum in Finland, where he was granted refugee status on the basis of the political prosecution against

¹⁶ Statistics made available by Interpol indicate that use of the red notice has increased steadily over the course of the last decade, with 7,678 issued last year. Source: Interpol Annual Report 2010-2011. Available at: www.Interpol.int/News-and-media/Publications/Annual-reports/2011.

him. Russia continues to pursue Petr through Interpol, and in 2011, he was arrested in Spain pursuant to the information available through Interpol. Spain refused to comply with the request from Russia on the basis that it was politically motivated, but he has since been forced to stay in Spain, unable to travel as long as his information remains available to national authorities through Interpol.

Why should the European Union care?

For pragmatic and principled reasons it is in the EU's interest to use its resources to improve respect for human rights beyond its internal borders. Advancing human rights is, of course, at the heart of the EU's mission and, as it works to increase respect for basic defence rights within the region, the EU has an increasing right to claim to be a beacon for human rights across the globe. Improving respect for basic rights will also make it easier to work with the rest of the world to tackle serious cross-border crime and terrorism.

The EU's European External Action Service (EEAS) uses various forms of diplomacy in seeking to influence the improved protection of human rights by other countries, ranging from the publication of statements – such as that issued by EU High Representative for Foreign Affairs and Security Policy, Catherine Ashton, urging Russia to thoroughly investigate and prosecute those responsible for Magnitsky's death¹⁷ – to the imposition of sanctions (or “restrictive measures”) against Al-Qaeda, Belarus, Iran, North Korea and Zimbabwe, among others.¹⁸ The policy on sanctions envisages a wide-range of restrictions, including those relating to travel and financial freedom, similar to those found in the US Magnitsky Act.¹⁹

In September 2012, the Foreign Affairs Committee of the European Parliament called on the European Council to draw up a list of officials responsible for the death of Magnitsky and to impose EU-wide travel restrictions on them and to freeze both their financial assets and those of

17 Statement by EU High Representative Catherine Ashton, A 154/13, 20 March 2013, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/136361.pdf

18 For a full list of sanctions in force, see http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf (accessed on 10 May 2013)

19 See, e.g., Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus, including sanctions on travel and financial transactions by targeted individuals responsible for human rights abuses, as well as restrictions on weapons trading to Belarus: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:285:0001:0052:EN:PDF>

their families' in the EU.²⁰ Unfortunately, merely communicative acts have not been sufficient to compel Russia's compliance with the international demands for justice for Sergei Magnitsky.

With regard to Russia, however, the EU is not alone. Despite Russia's membership of both the OSCE and the Council of Europe, and, more specifically, its accession to the European Convention on Human Rights, the European institutions tasked with overseeing human rights issues have not been able to successfully hold Russia accountable for its repeated and gross abuses. Of the 47 member states of the Council of Europe, Russia is one of just six states responsible for 70 percent of complaints to the European Court of Human Rights (ECHR).²¹ 94 percent of the cases brought against Russia have resulted in a finding of at least one human rights violation.²²

Sadly, this pattern of violations has not shocked Russia into action on human rights. At the end of 2011, there were 1,087 unexecuted judgements against Russia pending before the Committee of Ministers,²³ which is responsible for overseeing the execution of ECHR decisions. Most cases pending before the ECHR that relate to Russia refer to systemic problems, including political interference with the judiciary, unacceptable conditions and length of detention – particularly pre-trial detention – often with the Russian judicial authorities providing a lack of sufficiently reasoned judgment.²⁴ The European Parliament in 2011 listed Russia amongst the worst performers in implementing decisions by the ECHR.²⁵

Conclusion

This pattern of abuse, together with Russia's failure to respond effectively to improve standards, requires Europe to think about new ways of ensuring

20 <<http://www.europarl.europa.eu/news/en/pressroom/content/20120917IPR51526/html/MEPs-call-for-sanctions-against-Russian-officials-involved-in-the-Magnitsky-case>>.

21 The other five states being Italy, Poland, Romania, Turkey and Ukraine.; Helsinki Foundation for Human Rights report, 'Execution of ECHR decisions: Recommendations of the Working Group "Human Right and the Rule of Law"', p. 1, available at <http://www.europapraw.org/files/2011/12/Execution-of-ECHR-decisions-%E2%80%93-recommendations-of-the-Working-group-%E2%80%93Human-Rights-and-the-Rule-of-Law%E2%80%9D-.pdf>

22 European Court of Human Rights Statistics 1959-2010, p. 13, available at http://www.echr.coe.int/NR/rdonlyres/E6B7605E-6D3C-4E85-A84D-6DD59C69F212/0/Graphique_violation_en.pdf

23 Open Society Justice Initiative submission to the Council of Europe Steering Committee for Human Rights, p. 6, available at <http://www.opensocietyfoundations.org/sites/default/files/echr-reform-implementation-10232012.pdf>

24 Explanatory memorandum by Mr Pourgourides, Rapporteur on Legal Affairs and Human Rights, Para. 2.2.7, available at <http://www.assembly.coe.int/ASP/XRef/X2F-DW-XSL.asp?fileid=12589&dlang=EN>

25 PACE Resolution 1787 (2011), Implementation of judgments of the European Court of Human Rights. Available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1787.htm>

compliance with basic human rights to ensure that justice is guaranteed and impunity eradicated. Any mechanism adopted must, of course, take care to ensure that its own criteria and procedure for ending the impunity of alleged abusers, for example, through listing and de-listing, complies with the demands of due process and the presumption of innocence. Such criteria and procedures must be transparent, provide a process through which targeted individuals may challenge their inclusion and allow for removal of such individuals upon a successful challenge.²⁶

Individual member states' initiatives can make a difference – in particular, visa restrictions by a state member of the Schengen Area may affect travel to other member states – but a common policy adopted at EU level would carry the most practical and moral weight. However, the weight of international cooperation would also add to the success of any project.

The EU has the opportunity, when crafting a response to the campaign for accountability for the death of Sergei Magnitsky, to improve upon the American model. EU adoption of visa and financial sanctions would pull the Magnitsky Law away from allegations that it is a remnant of US-Russian Cold War politics and such sanctions should also not just focus on Russia. The US Senate's version of the Magnitsky Law, in contrast to the version finally adopted, had a wider scope than just Russia, with the potential to target abusers from anywhere in the world. The EU may have a special responsibility to Russia, due to Russia's involvement in European institutions such as the ECHR, the Council of Europe, and the OSCE, and due to the frequency with which potential Russian targets of human rights-related sanctions work, vacation, bank and attend school in European member states. However, given the interests of universal justice, a more international scope should be considered, given that Russia is certainly not alone in its disregard for the rights of suspects and vocal critics of its policies.

26 The US bill provides for an open listing process, with the possibility of removal of names, but still reserves the right to keep part of the list secret in the interests of national security. See Sec 404, HR 6156 (2012). Available at : <http://www.gpo.gov/fdsys/pkg/BILLS-112hr6156enr/pdf/BILLS-112hr6156enr.pdf>.