Geoffrey Robertson QC

Europe needs a Magnitsky Law

Geoffrey Robertson QC is founder and head of Doughty Street Chambers, Europe's largest human rights practice. He has argued many landmark human rights cases, was the first President of the UN War Crimes Court in Sierra Leone and a "distinguished jurist" member of the UN Justice Council, 2008-2012. He is a Master of the Middle Temple, a visiting professor in human rights law and author of "Crimes Against Humanity – the Struggle for Global Justice". He has acted for Bill Browder and the Magnitsky campaign.

The 27 nations of the European Union should recognise the value of a Magnitsky Law. The Union has recently adopted the EU Charter of Fundamental Rights, which goes further than the European Convention of Human Rights binding on the more numerous (47) Council of Europe countries. The very first provision of the Charter is that "the right of human dignity shall be inviolable". It was Sergei Magnitsky's human dignity that was violated by the prosecutors and judges who kept him for a year, uncharged and seriously ill, in a stinking cell waiting to be beaten to death, just as surely as the doomed Jews were crammed in the trains driven to Auschwitz and the gas chambers. It is the train-drivers to Auschwitz – those who become complicit in human rights abuses – who are targeted for naming, blaming and shaming under Magnitsky Laws.

A Magnitsky Law, which should be introduced both collectively for the EU and by national parliaments for each member country, prohibits foreign human rights violators from entering and freezes any bank accounts they may have. An effective law would actually place duties on banks to disclose the accounts of such people, and enable the state to confiscate the money in them. The Magnitsky Law does not, and in international law cannot, cover heads of State, ministers, diplomats and others who hold privileges and immunities. But it covers those who carry out their orders and who profit from crimes

against humanity, sufficiently to stash their ill-gotten gains in the more stable countries of Europe. The city of London is a particular favourite of violent and corrupt human rights perpetrators, who buy houses and send their children to private schools. Paris is much favoured by more refined criminals, Switzerland offers the requisite secrecy, whilst those from Russia in particular have tended to use Cyprus before its economic bust. The EU should be ashamed of the way that its members and their banks welcome assassins and blood-money. Although it has fallen to the US to pioneer a Magnitsky Law against Russian abusers, it will have less effect than a ban on them entering the places where they like to play and to keep their money – Cannes and Zurich, Helsinki, London, Jersey and Monaco.

There are different versions of the Magnitsky Law. The original US Act might be termed 'Magnitsky-lite' – it simply deploys existing State Department discretionary powers to deny visas and freeze bank accounts, and applies them to 18 out of 60 suggested suspects in relation to the persecutions of Magnitsky and to two other Russians suspected of human rights violations in Chechnya. Similar powers already exist for the Schengen Group of countries, and they could readily be adopted in the human rights context of a Magnitsky Law. But the EU could go a lot further, and set up a formal apparatus for identifying and penalising egregious human rights violators. Their children should be denied entry to European schools, their parents and dependants to European hospitals. It should be possible to confiscate any assets they possess and they should made available for a fund to compensate the relatives of those they have tortured and killed. As I shall explain, these more serious consequences would require more formal procedures, but the initiative would be all the better for relying upon judicial findings rather than State Department discretion.

One reason for not confining the law to the EU is that (of) the more numerous Council of Europe countries – Russia and Ukraine, and Belarus and Azerbaijan, to take just a few examples – have plenty of certifiable human rights abusers. Sergei Magnitsky died partly because his judges were state lickspittles, ignoring the evidence of both his innocence and his illness to keep him in prison as prosecutors wished. Similarly, malign jurists in the Ukraine have kept Yulia Tymosheko in prison on charges that do not even amount to a criminal offence. Four judges are on the US Magnitsky list, and they should also be stopped from entering France, Britain and even The Hague. Ukraine

has an unreal conviction rate of 99.8 percent, a statistic only possible when judges are puppets of the State. Many are bribed, and under a Magnitsky Law the money they have put in European banks would be revealed and frozen, and might be available to victims if they successfully brought legal action.

The law would potentially apply to all countries, not merely those in Eastern Europe. It is common for human rights violators in former colonial countries to set up bank accounts and buy houses in the old imperial capitals – in London and Paris, Lisbon, Madrid and Brussels. A Magnitsky Law could have a particular effect in countries of the old British Commonwealth. Take Sri Lanka, for example, where its army mass-murdered over 40,000 civilians and then 117 of its governing party MPs put down false charges that enabled them to sack the Chief Justice and to destroy the independence of the judiciary. Many of these MPs have bank accounts and investments in the UK, where they often put their children in expensive private schools and buy them cars and flats. In such cases, a law that denied children entry to take the place the corrupt parent had reserved for them at Eton and the like would have a real deterrent effect. Normally, sanctions try to avoid hurting children, but human rights violators, especially those who profit from the violation, are frequently motivated by a desire to benefit their children. Corrupt benefits should be stripped from the children in these circumstances. Denying the family (including grandparents) of abusers the right to enter other countries for medical treatment will also work as a deterrent.

A Magnitsky Law is an important and exciting tool to force powerful people and government servants in foreign countries to recognise that violating human rights is a game not worth the candle. The stigmata of being on a Magnitsky list will of course ruffle feathers: Putin was furious when Obama signed the original law and he reacted in a puerile way by banning American couples from adopting Russian orphans (and, rather more sensibly, by demanding the closure of Guantanamo Bay). This draws attention to the need for a fair and independent process to identify potential targets and for an impartial tribunal to find that their human rights culpability has been proved. A process designed to deter unfair behaviour by officials must itself be fair. This fundamental principle has not been recognised by the US, whose Magnitsky targets are listed after a secret designation by the State Department and have no way of challenging a decision which may severely impact their own money and their movements. A quasi-judicial determination is a sine qua non of a

Magnitsky Law. There must be a transparent process, with the target entitled to take part in the proceedings (at least by video-link), and to put his case and his evidence before the Tribunal. If placed on the list, he should be entitled in due course to request his removal.

Although the US Magnitsky Law has been applied to persons, there is no reason why it could not be applied to corporations, many of which have been involved in illegal renditions, abuse of indigenous people and use of children for slave labour. They would have their bank accounts frozen (or emptied) and would be denied any right to undertake economic or financial activity within the EU.

The standard of proof the Tribunal should apply is the "balance of probabilities" test (guilt being "more likely than not") rather than listing persons merely on the strength of suspicion or rumour. On the other hand, it should not be necessary to prove guilt "beyond reasonable doubt" – a difficult test to apply in relation to foreign suspects if their offences are being covered up by their governments.

This points to another precondition for the application of Magnitsky procedures, namely that the listed suspects should not be the subject of genuine proceedings in their own countries. The need for international sanctions in the case of Magnitsky was because the Russian State had taken no action to investigate and prosecute those responsible for his death, or against those officials responsible for the massive tax fraud which he exposed. The Interior Ministry and its law enforcement officials were bent on covering up the crimes committed by their colleagues, and they went so far, as part of that cover-up, to prosecute Sergei Magnitsky posthumously, in order to pretend that their original persecution of him had legal justification. This was despite the fact that independent bodies in Russia, such as the President's Human Rights Council, had demanded action against those responsible for Magnitsky's death. It would be inappropriate for the EU to invoke Magnitsky procedures at a time when the State in question was undertaking proper inquiries or had already begun prosecutions. Such action would be perceived as putting pressure on prosecutors and infringing the suspect's rights to a presumption of innocence.

There is plainly much work to be done to ensure, once a Magnitsky Law

is in place, that fair and appropriate procedures are installed for activating and implementing it. In the US, of the original 60 suspects on US Senator Cardin's list alleged by human rights groups to have been responsible for the lawyer's plight, only 18 were eventually listed by the State Department, without explaining either the reasons for inclusion or why 42 suspects had been excluded. The decision to designate, especially if it is to have the serious consequences that I recommend – not merely denial of entry and banking facilities, but confiscation of assets and denial of entry to close family members as well – must be fair to those who are listed. That means a fact-finding tribunal of experienced judges, who are independent of any state or of EU bureaucracy. It must have a sufficient budget for its "prosecutor" to investigate allegations and for hearings at which suspects can be represented (should they so choose), and a procedure by which they may subsequently challenge their listing.

That a Magnitsky Law could be potentially effective, there can be no doubt – the over-the-top Kremlin reaction to the mild US law is proof positive that this shows the way to hurting and hence deterring human rights abusers. Russia even issued its own reprisal list of US officials involved in Guantanamo, who would be denied entry and banking facilities in Russia – as if they would ever want them. More significantly, and despite government demonisation of the US Magnitsky Law, polls showed that 40 percent of Russians actually supported the law, no doubt as a foreign measure deterring the official corruption that internal bodies refuse to challenge. An EU Magnitsky Law would be much more effective than the US variety, especially if it incorporated the principle of fairness suggested above and was extended to confiscation and bank deposits and entry bans to prevent access by close family members to schools and hospitals.

It is astonishing that some weak politicians in Europe are unable to understand this: the UK Minister for Europe, David Lidington, recently rejected a call for a Magnitsky Law made by five former secretaries of foreign affairs, on the disingenuous ground that the UK already bans human rights violators (it does not) and the ignorant ground that it was "unlikely to contribute to achieving justice" – evidently the Foreign Office made no enquiry of Magnitsky's mother and wife, or of anyone who knows anything about human rights. The Financial Times, where journalists are much better informed than Mr Lidington and his Foreign Office apparatchiks (who tend to advise Ministers on the basis of their own wish for a quiet life) correctly

concluded, in January 2013:

> "The Kremlin clearly hopes, in part, to persuade other countries not to follow the US. They should not be cowed. For Moscow's reaction also reflects just how these [Magnitsky] measures have hit home. Many Russian officials hold property and assets in the West, travel back and forth, and send their children to school there. So a visa ban and asset freeze on those with at least prima facie cases to answer over rights abuses or criminal activity is a highly effective sanction."

Implementing an effective Magnitsky Law will take time and money. But it is a worthwhile EU project if it is to fulfil the promise of the Fundamental Charter. It is never easy for international and regional institutions to do more than bemoan human rights abuses beyond their shores, and when they do, they are accused of colonialist or racist exercises of power, or of seeking exorbitant jurisdiction for their courts. But a Magnitsky Act is well within EU rights: it is a statement of its commitment to fundamental liberties and of its determination not to allow its own territory to be utilised for the profit and pleasure of human rights abusers.