

Commentary: The Magnitsky Act – A Bold Step Forward, but Changes Needed

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Commentary by CCIJ

The Canadian Centre for International Justice (CCIJ) applauds the Government of Canada and the Canadian Parliament for granting unanimous consent to the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* on October 4.

The Act enables the government to take measures against foreign nationals who are responsible for or complicit in corruption and gross violations of internationally-recognized human rights and freedoms.

This long-awaited legislation fills a vacuum in Canadian law, creating sanctions and remedies. It serves as a much-needed tool against impunity for human rights violations and corruption, and for the rule of law and accountability in free and democratic societies.

CCIJ also applauds the Raoul Wallenberg Centre for Human Rights and its chair, Irwin Cotler, who have shown tremendous leadership in promoting this legislative initiative in Canada.

We recognize that there are trade-offs inherent in innovative legislation of this kind, especially where they deal with extraterritorial acts and appear to target other sovereign nations.

Having said that, there are areas where the Act can be significantly improved. Significant aspects of the human rights portions of the Act are ambiguous and drafted in a manner that restricts the operation of the Act. The result is a lack of internal coherence that threatens the laudable objectives of this innovative legislation.

First, the short title of the Act refers specifically to a particular individual, Sergei Magnitsky. The result is that the Act is symbolically associated with a particular country. While we recognize the desire to honour Mr. Magnitsky's legacy and have the utmost respect for his memory and what it represents, the focus on a particular country in legislation that is designed to ensure universal accountability may actually minimize its international effectiveness.

Second, the Act provides for Ministerial discretion in the exercise of powers that are likely to affect fundamental rights, notably section 7 Charter rights. While the Act does provide for a procedure for challenging a decision by the Minister, this aspect of the legislation increases the Act's vulnerability to Charter challenges.[1]

Third, there are several concerns about the awkward wording of and limitations in provisions dealing with human rights. The short title of the Act only speaks to corruption. More substantively, the list of human rights violations may unintentionally exclude other serious human rights violations.[2] In short, by only specifically mentioning torture and extrajudicial killings, which are mentioned in s. 4(2)(a), followed by "other gross violations" in that provision of the Act, the text fails to adopt the usual practice of referring generally to violations of internationally human rights and freedoms that are recognized as crimes under international law. The Act also appears to exclude by omission reprisals against those who seek to exercise social, economic and cultural rights under international law. The illustrative language of "such as" in s. 4(2)(a)(ii) may open the door to other types of rights, but if that were the intention, then it is not clear why specific rights are listed at all, or why the rights that are listed are limited to civil and political rights.

The application of the Act to serious human rights violations against large groups but not a single individual or identifiable individuals is not clear. This would be the case, for example, for genocide or for reprisals that governments have perpetrated in many countries over the last decade against large numbers of people in mass demonstrations who exercise their rights to protest and dissent.

The drafting would also appear to exclude reprisals against the families and associates of targeted individuals.

Fourth, we also note lack of consistency in legislative drafting when compared to other laws involving extraterritorial crimes of a serious nature. This lack of consistency leaves the Act susceptible to problems in interpretation and undermines overall policy coherence. For example, s. 4(2) of the Act refers to foreign nationals who are "responsible for, or complicit in" certain human rights violations, whereas other legislation, such as the *Crimes against Humanity and War Crimes Act* (SC 2000, s c. 24) and the *Criminal Code* use the more conventional term "conspires or attempts to commit" which includes all forms of complicity (see, e.g., s, 21 of the Criminal Code.)

Similarly, the *Crimes against Humanity and War Crimes Act* provides for inchoate forms of commission, including conspiracy, attempt to commit, and being an accessory after the fact. In short, the notion of the word “responsibility” in the Act is vulnerable because of its lack of judicial interpretation, at least in the contexts mentioned above. While we recognize that the Act is not criminal legislation, nonetheless, its extraterritorial application and engagement of fundamental international human rights law point to the need for legislative coherence.

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References

1. See e.g., *Canada (Attorney General) v. PHS Community Services Society,* 2011 SCC 44.

   Section 4 (1) The Governor in Council may, if satisfied based on reliable and appropriate evidence that the circumstances described in subsection (2) have occurred,

   (a) make any orders or regulations with respect to the restriction or prohibition of any of the activities referred to in subsection (4) in relation to the foreign national’s property that the Governor in Council considers necessary; and […]

   Circumstances

2. (2) The circumstances referred to in subsection (1) are the following:

   (a) a foreign national is responsible for, or complicit in, extrajudicial killings, torture or other gross violations of internationally recognized human rights committed against individuals in any foreign country who seek

   (i) to expose illegal activity carried out by government officials, or

   (ii) to obtain, exercise, defend or promote internationally recognized human rights and freedoms, such as freedom of conscience, religion, thought, belief, opinion, expression, peaceful assembly and association, and the right to a fair trial and democratic elections.