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ARTICLE

Crime and Sanctions: Beyond Sanctions as a Foreign Policy Tool

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Abstract

Targeted sanctions, namely asset freezes and travel bans, are no longer the province of foreign policy alone. They are increasingly often used by governments in response to crime, such as corruption, human rights abuse, cybercrime, drug trafficking, and transnational organized crime writ large. Such sanctions are imposed based on permissive evidential standards, such as that of "credible evidence" or "reasonable grounds to suspect." Their advent has added a new layer to a multi-tier system of state responses to crime. First, there is the traditional approach of criminal prosecution and conviction based on the criminal standard of proof. Second, one rung below is non-conviction based asset forfeiture, a notionally civil confiscation of supposed proceeds of crime that eschews the need for compliance with a suite of criminal trial safeguards. At the third level of this hierarchy are crime-based targeted sanctions, which vest the state with the greatest latitude in dealing with suspected criminals. Based on a wide-ranging analysis of international practice, this article contends that not only are crime-based sanctions de facto a criminal justice tool, but also that a coherent set of principles is required to determine their relationship with other responses to criminal behavior.

Keywords: targeted sanctions; corruption; human rights abuse; cybercrime; drug trafficking; transnational organized crime

A. INTRODUCTION

Targeted sanctions, namely asset freezes and travel bans, are increasingly often used by governments in response to crime, including corruption and human rights abuse,[1] cybercrime,[2] drug trafficking,[3] and transnational organized crime writ large.[4] They are imposed based on permissive evidential standards, such as that of "credible evidence" in the United States or "reasonable grounds to suspect" in the UK, which are far lower than either the criminal or civil standard of proof.[5] The sanctions thus adopted can inflict significant hardship on their

[*]This article has been updated since original publication. A notice detailing the change has also been published.

[1]*See, e.g.*, Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act (Magnitsky Act), 22 U.S.C. § 5811 (2012); Global Magnitsky Act, 22 U.S.C. § 10102 (2016); H.M. Treasury, *Consolidated List of Financial Sanctions Targets in the UK* (Aug. 12, 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1010455/Global_Anti-Corruption.pdf (UK); Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021 (Cth) (Austl.).

[2]Exec. Order No. 13,553, 75 Fed. Reg. 60,567 (2010); Cyber (Sanctions) (EU Exit) Regulations 2020 (UK); Autonomous Sanctions Act 2017, §3(3) (Cth) (Austl.).

[3]Exec. Order No. 12,978, 60 Red. Reg. 54,579 (Oct. 21, 1995); Foreign Narcotics Kingpin Designation Act 1999 21 U.S.C. § 1901.

[4]Exec. Order No. 13,581, 76 Fed. Reg. 44,757 (July 27, 2011).

[5]Global Magnitsky Act, § 10102(a); Sanctions and Anti-Money Laundering Act 2018 (UK), §§11(2); 12(5)(a).

addressees.[6] They commonly entail the freezing of the targeted person's assets and a ban on travel to the sanctioning state, as well as a range of concomitant effects such as reputational harm and exclusion from financial services.[7] All of this takes place by executive fiat, with only retrospective oversight by judicial authorities.[8]

Not all sanctions are imposed in connection with underlying criminal behavior. Some are borne of considerations that evidently pertain to foreign policy, such as U.S. sanctions against Cuba, Iran, or North Korea.[9] Even then, they tend to be justified by reference to some wrongdoing in a broad sense of the word. Other sanctions are expressly predicated on the target's criminal behavior and can be described as "crime-based sanctions."[10]

The advent of that latter type of sanctions has added a new layer to what is in effect a multi-tier system of state responses to crime. First, there is the traditional approach of criminal prosecution and conviction based on the criminal standard of proof of beyond reasonable doubt. Second, one rung below it is the mechanism, used in multiple countries, of non-conviction based asset forfeiture, a notionally civil confiscation of supposed proceeds of crime that eschews the need for a suite of criminal trial safeguards.[11] At the third level of this emergent hierarchy are crime-based sanctions, which vest the state with the greatest latitude in dealing with suspected criminals. That flexibility is due, in part, to the widespread view that targeted sanctions belong to the domain of foreign affairs, and therefore should not be treated on a par with (other) criminal justice measures.[12]

Based on a wide-reaching analysis of international practice, this article contends that not only are crime-based sanctions a criminal justice tool in everything but name, but also that a coherent set of principles is required to determine their relationship with other responses to criminal behavior. Suppose one asks when a government may legitimately resort to targeted sanctions as distinct from criminal prosecution or non-conviction based asset forfeiture. Whenever statutory requirements for imposing sanctions are met, one might say, but this is hardly a satisfactory answer. Sanctions laws are cast in broad terms and, in principle, enable governments to impose hardship on someone whom they may have wished to see prosecuted had it not been for

[6]*See* Iain Cameron, *EU Sanctions and Defence Rights,* 6 NEW J. EUR. CRIM. L. 335, 349–50 (2015); Douglas Cantwell, *A Tale of Two Kadis: Kadi II, Kadi v Geithner & U.S. Counterterrorism Finance Efforts,* 53 COLUM. J. TRANSNAT'L L. 652, 678 (2015); Thomas Biersteker, *Targeted Sanctions and Individual Human Rights,* 65 INT'L J. 99, 103 (2010). *Cf.* Erica Cosgrove, *Examining Targeted Sanctions: Are Travel Bans Effective? in* INTERNATIONAL SANCTIONS: BETWEEN WORDS AND WARS IN THE GLOBAL SYSTEM (Peter Wallensteen & Carina Staibano eds., 2005) 218, 218–20.

[7]For an empirical overview of the effects of corruption-related sanctions, *see* Anton Moiseienko, Megan Musni & Eva van der Merwe, A Journey of 20: An empirical study of the impact of Magnitsky sanctions on the earliest corruption designees, INTERNATIONAL LAWYERS PROJECT (2023). *See also* J.C. Sharman, THE DESPOT'S GUIDE TO WEALTH MANAGEMENT: ON THE INTERNATIONAL CAMPAIGN AGAINST GRAND CORRUPTION 192 (2017).

[8]*See, e.g.* Australian Government, *Australian Government Response to the Joint Standing Committee on Foreign Affairs, Defence and Trade Human Rights Subcommittee Report: "Criminality, Corruption and Impunity: Should Australia Join the Global Magnitsky Movement?* (Aug. 5, 2021) 10 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MagnitskyAct/Government_Response (making the case for sanctions as a foreign policy tool that should be wielded by the government as it will). For a critique of this approach, see Gavin Sullivan, THE LAW OF THE LIST: UN COUNTERTERRORISM SANCTIONS AND THE POLITICS OF GLOBAL SECURITY LAW (2020).

[9]*See* NIGEL D. WHITE, THE CUBAN EMBARGO UNDER INTERNATIONAL LAW (2015); RICHARD NEPHEW, THE ART OF SANCTIONS: A VIEW FROM THE FIELD (2017); and Stephan Haggard & Marcus Noland, HARD TARGET: SANCTIONS, INDUCEMENTS, AND THE CASE OF NORTH KOREA (2017) for book-length treatments of the respective subjects. *See also* LEE JONES, SOCIETIES UNDER SIEGE: HOW ECONOMIC SANCTIONS (DO NOT) WORK (2015) on South Africa, Myanmar, and Iraq.

[10]Anton Moiseienko & Saskia Hufnagel, *Targeted Sanctions, Crimes and State Sovereignty,* 6(3) NEW J. EUR. CRIM. L. 351 (2015).

[11]*See* Stefan D. Cassella, ASSET FORFEITURE LAW IN THE UNITED STATES (3rd edn., 2021) (for a US-focused study); Theodore S. Greenberg et al., STOLEN ASSET RECOVERY: A GOOD PRACTICES GUIDE FOR NON-CONVICTION BASED ASSET FORFEITURE (The World Bank, 2009) (for an international perspective).

[12]*See, e.g.,* Christina Eckes, *EU Global Human Rights Sanctions Regime: Is the Genie out of the Bottle?* J. CONTEMP. EUR. STUD. 255, 263 (2021); Francesco Giumelli, *Targeted Sanctions and Deterrence in the Twenty-first Century*, NETHERLANDS ANN. REV. MIL. STUD. 349 (2020).

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insufficient evidence. When they should make use of that power is, however, an entirely separate issue, which has not yet been addressed in the legal literature.[13]

A consistent and credible delineation of targeted sanctions from (other) instruments of criminal justice is of particular importance given the commitment of major sanctioning powers, such as the United States, the UK and the EU, to coordinate their sanctions designations to achieve maximum impact.[14] For this cooperation to be fruitful, a shared conception of what a "good" – or, at the very least, acceptable – target looks like is highly desirable, even though ad hoc agreements may be forged on specific persons in the absence of an overarching set of criteria.

This article is structured as follows. Following this introduction, the second section discusses the concept of "crime-based sanctions" and their objectives. The third section identifies four key factors in the use of such sanctions, namely the perpetrator's dependence on the sanctioning state; the impunity he or she enjoys; the seriousness of the wrongdoing; and the seniority of the perpetrator. Conclusions follow.

B. UNDERSTANDING CRIME-BASED SANCTIONS

I. Defining Crime-Based Sanctions

The genesis of targeted sanctions is in the transition from comprehensive measures of economic coercion that affected whole states, such as embargoes and blockades, to sanctions directed at specific individuals or groups.[15] This shift took place in the 1990s and was occasioned by a growing unease at the civilian hardship brought about by comprehensive sanctions.[16] While populations suffered, governments whose decision-making calculus comprehensive sanctions were intended to alter were either insulated from their impact or, worse still, exploited them as a profiteering opportunity.[17]

The first harbinger of change was the increased recourse by the UN and individual states to arms embargoes and bans on air traffic to or from sanctioned states.[18] This was followed by a

[13]This author is aware of only one paper examining the use of targeted sanctions against organized crime, which is focused on considerations of policy and impact, rather than law and principle: Cathy Haenlein et al., *Targeted Sanctions and Organised Crime: Impact and Lessons for Future Sanctions Use*, ROYAL UNITED SERVICES INSTITUTE (2022).

[14]For the United States, *see* Antony J. Blinken, *Elevating Anti-Corruption Leadership and Promoting Accountability for Corrupt Actors* (Dec. 9, 2021) https://www.state.gov/elevating-anti-corruption-leadership-and-promoting-accountability-for-corrupt-actors/ (announcing the establishment of the position of a Coordinator on Global Anti-Corruption). This follows an established sanctions policy: *Remarks of Secretary Lew on the Evolution of Sanctions and Lessons for the Future at the Carnegie Endowment for International Peace*, U.S. DEP'T OF TREASURY (Mar. 30, 2016) https://www.treasury.gov/press-center/press-releases/pages/jl0398.aspx. For the UK, *see* Foreign, Commonwealth & Development Office, *Global Anti-Corruption Sanctions: Consideration of Designations* ¶4 (Apr. 26, 2021) https://www.gov.uk/government/publications/global-anti-corruption-sanctions-factors-in-designating-people-involved-in-serious-corruption/global-anti-corruption-sanctions-consideration-of-designations [hereinafter *Global Anti-Corruption Sanctions*] and *Global Human Rights Sanctions: Consideration of Designations* ¶4 (Jul. 6, 2020) https://www.gov.uk/government/publications/global-human-rights-sanctions-factors-in-designating-people-involved-in-human-rights-violations/global-human-rights-sanctions-consideration-of-targets [hereinafter *Global Human Rights Sanctions*]. For the EU, *see Corruption and Human Rights: European Parliament recommendation of 17 February 2022 to the Council and the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy concerning corruption and human rights,* EUROPEAN PARLIAMENT, (Feb. 17, 2022) 15; *Basic Principles on the Use of Restrictive Measures (Sanctions)*, COUNCIL OF THE EUROPEAN UNION, 10198/1/04 (Jun. 7, 2004) 2.

[15]For a sweeping overview of the history of sanctions, see Nicholas Mulder, THE ECONOMIC WEAPON: THE RISE OF SANCTIONS AS A TOOL OF MODERN WAR (2022). For a concise summary of key policy issues, see Bruce W. Jentleson, SANCTIONS: WHAT EVERYONE NEEDS TO KNOW (2022).

[16]Daniel Drezner, *Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice,* 13 INT'L STUD. REV. 96 (2011); Kern Alexander, ECONOMIC SANCTIONS: LAW AND PUBLIC POLICY (2009).

[17]W. Michael Reisman, *Assessing the Lawfulness of Non-military Enforcement: The Case of Economic Sanctions,* ASIL PROC. 350, 350–351 (1995). *See also* Howard French, *U.S. Sanctions Against Haiti Seem Ineffective,* N.Y. TIMES (Apr. 26, 1992), http://www.nytimes.com/1992/04/26/world/us-sanctions-against-haiti-seem-ineffective.html.

[18]*See, e.g.,* Comprehensive Anti-Apartheid Act 1986, 22 U.S.C. § 5001 (1988) (U.S. sanctions against South Africa); UNSC Res. 748 (Mar. 31, 1992) UN Doc S/RES/748 (1992) (UN sanctions against Libya). *See also* Gary Hufbauer & Barbara Oegg, *Targeted Sanctions: A Policy Alternative?* 32 L. & POL'Y INT'L BUS. 11, 12 (2001).

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move toward what we now know as targeted sanctions, i.e. asset freezes and travel bans against members of antagonistic governments or terrorist groupings.[19] There are other types of not-quite-comprehensive sanctions too, such as the prohibition on providing debt financing to a certain sector of the targeted country's economy, but they need not detain us for present purposes.[20]

The reasons for the imposition of sanctions are legion. To name but a few from EU practice, they can rest on allegations of violent repression in Syria by Bashar Al-Assad's regime, unauthorized natural resource extraction by Turkey off the coast of Cyprus, or large-scale corruption and human rights abuse in Venezuela.[21] The traditional pattern of sanctions decision-making is to introduce "country" regimes that create a legal framework for designating malicious actors associated with that particular jurisdiction. A more recent phenomenon is the emergence of thematic, also known as "horizontal," regimes that enable designations based on activity rather than country.[22] Some thematic regimes are explicitly predicated on criminal activity, such as corruption, human rights abuse, drug trafficking, or cybercrime. Their origins lie with Bill Clinton's executive order that authorized asset freezes and travel bans against suspected Colombian drug traffickers in 1995,[23] followed by the better known, non-geographically constrained Foreign Narcotics Kingpin Designation Act 1999.[24]

The imposition of such sanctions presupposes a set of facts that would ordinarily be dealt with by means of criminal justice, if not by the sanctioning state, which may or may not have jurisdiction, then by the state where the alleged activity took place. This overlap between sanctions and criminal justice gives rise to the fundamental question of when crime-based sanctions should be used in preference to other criminal justice responses. This question is a multi-faceted one with both a policy aspect to it – that is, the issue of when will sanctions be most impactful, assuming one can measure their impact – and a civil liberties one, since it would be problematic if the safeguards at play in a criminal trial and, to a lesser extent, non-conviction based asset forfeiture proceedings could be sidestepped via the use of sanctions.

The distinction between crime-based and other sanctions is fuzzier than might appear at first sight. It is not uncommon for "regime" sanctions to respond to wrongdoing by targeted governments. For instance, the EU's sanctions against Belarussian leadership were reinstated in 2020 following the allegations of widespread electoral fraud and ensuing human rights abuse.[25] This decision was at once political as it expressed condemnation of a foreign government's policy *and* oriented at reacting to what is universally deemed serious criminal wrongdoing. Likewise, first U.S. sanctions against Iranian ransomware groups were adopted pursuant to Iran-related

[19]*See, e.g.,* Strengthening Targeted Sanctions Through Fair and Clear Procedures, Watson Institute for International Studies 7, 9 (2006). The inaugural instance of UN-mandated targeted sanctions, in this case travel bans, was in relation to UNITA, an Angolan insurgent group: UNSC Res. 1127 (Aug. 28, 1997) UN Doc S/RES/1127 (1997), art. 4.

[20]*See, e.g.,* Cory Welt, Kristin Archick, Rebecca M. Nelson & Dianne E. Rennack, Cong. Rsch. Serv., R45415, U.S. Sanctions on Russia (2022) (for a detailed summary of U.S. sectoral sanctions on Russia); Charlotte Beaucillon, *The European Union's Position and Practice with Regard to Unilateral and Extraterritorial Sanctions*, in Research Handbook on Unilateral and Extraterritorial Sanctions 110, 118 (Charlotte Beaucillon ed., 2021) (for an overview of EU sectoral sanctions).

[21]Council Decision 2013/255/CFSP of 31 May 2013 Concerning Restrictive Measures Against Syria, 2013 O.J. L. 147 (EU); Council Decision (CFSP) 2020/275 of 27 February 2020 Amending Decision (CFSP) 2019/1894 Concerning Restrictive Measures in View of Turkey's Unauthorised Drilling Activities in the Eastern Mediterranean, 2020 O.J. L. 56I (EU); Council Decision (CFSP) 2021/276 of 22 February 2021 Amending Decision (CFSP) 2017/2074 Concerning Restrictive Measures in View of the Situation in Venezuela 2021 O.J. L. 60I (EU).

[22]Clara Portela, *Horizontal Sanctions Regimes: Targeted Sanctions Reconsidered? in* Research Handbook on Unilateral and Extraterritorial Sanctions, *supra* note 20, at 441.

[23]Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (Oct. 21, 1995).

[24]Foreign Narcotics Kingpin Designation Act 1999 21 U.S.C. § 1901.

[25]Council Implementing Decision (CFSP) 2020/1650 of 6 November 2020 Implementing Decision 2012/642/CFSP Concerning Restrictive Measures Against Belarus, 2020 O.J. L. 370I (EU); Council Implementing Decision (CFSP) 2020/1651 of 6 November 2020 Implementing Decision 2012/642/CFSP Concerning Restrictive Measures Against Belarus, 2020 O.J. L. 370I (EU).

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sanctions authorities but could also be viewed in the context of clamping down on cybercrime.[26] But perhaps the most striking instance of the blurring of the boundaries between "crime-based" and "regime" sanctions are the U.S., UK and EU sanctions against Syrian nationals accused of drug trafficking, including President Bashar Al-Assad's cousins Samer and Wassim, which were adopted in 2023 under general Syria-related sanctions authorities rather than those relating to organized crime specifically.[27]

Occasionally, pragmatism leads to further blurring of the lines between crime-based and other sanctions. For example, the cornerstone of U.S. corruption- and human rights-related sanctions is the Global Magnitsky Act 2016, which authorizes the imposition of asset freezes and travel bans on foreign officials involved in "gross violations of internationally recognized human rights" or "significant corruption."[28] In 2017, relying in part on his national security authorities under the National Emergencies Act (NEA) and International Emergency Economic Powers Act (IEEPA), President Donald Trump signed into law Executive Order 13818, which expanded his ability to impose Global Magnitsky sanctions (for instance, by omitting the requirement that corruption be "significant").[29] One other consequence of adopting Executive Order 13818 was that Global Magnitsky sanctions would not be affected by the potential expiry of the Global Magnitsky Act 2016 based on a 6-year sunset clause it originally contained.[30] This demonstrates how reasons may exist to adopt an effectively criminal justice-oriented sanctions program based on national security authorities. Indeed, technically speaking, Global Magnitsky designations are made based on Executive Order 13818, rather than the Global Magnitsky Act 2016.

As various considerations mix, isolating the *leitmotif* of a particular sanctions regime might be next to impossible. The objective of this article is not to do so, nor is it to draw a neat boundary between crime-based and other sanctions. It is, rather, to identify issues that ought to be borne in mind in the imposition of crime-based sanctions, wherever the line between them and other species of targeted sanctions may lie. There is no inconsistency in accepting that some of these considerations may also apply to certain "regime" sanctions.

There is also a category of sanctions that are predicated on involvement in crime but are so idiosyncratic that the analysis that follows – and indeed the idea of "crime-based sanctions" – does not extend to them. That is terrorism sanctions, which entered the mainstay of state practice following 9/11.[31] Such sanctions target those allegedly involved in perpetrating, planning, or financing terrorist activities. The freezing of terrorist assets is a vital terrorism prevention strategy as even modest amounts of money can fund a major terrorist attack.[32] These measures can be viewed as an adjunct to the larger counter-terrorist financing regime, one of whose purposes it is

[26]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Cyber Actors Backed by Iranian Intelligence Ministry (Sep. 17, 2020); Exec. Order No. 13,553, 75 Fed. Reg. 60,567 (2010).

[27]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Syrian Regime and Lebanese Actors Involved in Illicit Drug Production and Trafficking (Mar. 28, 2023) (imposed under the Caesar Syrian Civilian Protection Act of 2019); Press Release, Foreign, Commonwealth and Development Office, and Lord Ahmad of Wimbledon, Tackling the Illicit Drug Trade Fuelling Assad's War machine (Mar. 28, 2023) (imposed under the Syria (Sanctions) (EU Exit) Regulations 2019); Council Implementing Regulation (EU) 2023/844 of April 24, 2023 Implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria.

[28]Global Magnitsky Act, § 10102(a).

[29]Exec. Order No. 13,818, 82 F.R. 60839 (2017).

[30]Michael A. Weber, Cong. Rsch. Serv., R46981, The Global Magnitsky Human Rights Accountability Act: Scope, Implementation, and Considerations for Congress 1 (2021).

[31]*See* Nick Ryder, The Financial War on Terrorism: A Review of Counter-Terrorist Financing Strategies Since 2001 (2015); Francesca Galli, *Terrorism Blacklisting in the EU – The Way Forward: Quid of the New Legal Bases in the TFEU?* (2015) 6 New England L.R. 324; Peter Fitzgerald, *Managing Smart Sanctions against Terrorism Wisely,* (2002) 36 New England L.R. 957 (2002).

[32]Marieke De Goede, *Counter-Terrorism Financing Assemblages After 9/11*, in The Palgrave Handbook of Criminal and Terrorism Financing Law 755, 760 (Clive Walker, Colin King & Jimmy Gurulé eds., 2018); Jodi Vittori, Terrorist Financing and Resourcing 14 (2011).

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to constrict terrorists' access to financial resources. Thus, the implementation of UN-mandated terrorism sanctions is among the requirements set by the Financial Action Task Force (FATF), the global anti-money laundering and counter-terrorist financing rule-maker.[33] Other crime-based sanctions, such as those related to corruption, human rights abuse, or cybercrime, lack that preventative side to them, as discussed below.

Finally, one must end these preliminary remarks by highlighting the distinction between UN-mandated and unilateral sanctions. The former are binding on all UN member states by virtue of Article 25 of the UN Charter.[34] The latter are imposed by individual states or the EU, which makes sanctions decisions on behalf of its 27 member states.[35] Some states characterize *all* unilateral sanctions as presumptively unlawful, leading to an accumulation of UN General Assembly's resolutions that condemn unilateral sanctions regimes, even as on other occasions the General Assembly calls on countries to *adopt* unilateral sanctions.[36] The precise legal basis for such a blanket rejection of unilateral sanctions is difficult to discern. For instance, for them to qualify as an unlawful interference with another state's internal affairs, an element of coercion is necessary.[37] The preferable, and mainstream, view is that unilateral sanctions are compatible with international law unless they violate some identifiable rule, such as under trade or human rights treaties.[38] Save for terrorism sanctions, the UN has not resorted to any crime-based sanctions, hence this article is solely concerned with unilateral sanctions.[39]

[33]FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations (2022), Recommendation 6. For further context on the FATF and international law, *see* Anton Moiseienko, *Does International Law Prohibit the Facilitation of Money Laundering?* 36(1) Leiden J. Int'l L. 109 (2023); Cecily Rose, International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems 191–196 (2015).

[34]Charlotte Beaucillon, *An Introduction to Unilateral and Extraterritorial Sanctions: Definitions, State of Practice and Contemporary Challenges in* Research Handbook on Unilateral and Extraterritorial Sanctions, *supra* note 20, at 441.

[35]*See* Torbjörn Andersson, *Developing Multiple EU Personalities: Ten Years of Blacklisting and Mutual Trust, in* EU Sanctions: Law and Policy Issues Concerning Restrictive Measures (Iain Cameron ed., 2013); Takis Tridimas & Jose Guitierrez-Fons, *EU Law, International Law, and Economic Sanctions Against Terrorism: The Judiciary in Distress?* 32 Fordham Int'l L.J. 660 (2008).

[36]Rebecca Barker, *An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions,* 70 Int'l Comp. L.Q. 343 (2021). Pursuant to a resolution sponsored by Iran, the UN Human Rights Council has adopted a Special Rapporteur on unilateral sanctions. *See, e.g., Unilateral Coercive Measures: Notion, Types and Qualification, UN Human Rights Council*, UN Doc. A/HRC/48/59, (Jul. 8, 2021). For a critique of the Special Rapporteur's work, *see* Anton Moiseienko, *The Future of EU Sanctions against Russia Objectives, Frozen Assets, and Humanitarian Impact* 2 eucrim 130 (2022).

[37]Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. Rep. 14, ¶205 (Nov. 26). *See also* Philip Kunig, *Intervention: Prohibition of, in* Max Planck Encyclopedia of Public International Law ¶¶2, 5, 6 (2008); Robert Jennings & Arthur Watts, Oppenheim's International Law 430–434 (9th edn., 1992).

[38]Anton Moiseienko & Iain Cameron, *International Sanctions*, Oxford Bibliographies: International Law (2021). *Cf.* Daniel H. Joyner, *International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions*, in Economic Sanctions under International Law 83 (Ali Z. Marossi & Marisa R. Bassett eds., 2015). The alleged incompatibility of U.S. sanctions against Iran with a treaty on commerce and amity forms the subject matter of an ongoing dispute in the ICJ: Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran. v. U.S.), Provisional Measures, 2018 I.C.J. Rep. 623 (Oct. 3). On the consistency of unilateral sanctions with human rights law, *see* Dapo Akande, Payam Akhavan & Eirik Bjorge, *Economic Sanctions, International Law, and Crimes Against Humanity: Venezuela's ICC Referral,* 115(3) Am. J. Int'l L. 493 (2021). For an in-depth analysis of "secondary sanctions," which involve the imposition of sanctions on those who continue to do business with the primary target, *see* Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses To, US Secondary Sanctions,* 0(0) Brit. Y.B. Int'l L. 1 (2021).

[39]The Australian government has published a useful diagram depicting UN and unilateral sanctions regimes: https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes. The position will be similar in other major sanctioning powers, including the United States.

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II. Objectives of Crime-Based Sanctions

The best way to begin the examination of crime-based sanctions is by considering their objectives. On the one hand, there is a diverse array of views as to what sanctions in general can or should achieve. On the other hand, one of them – the notion that sanctions should lead to a change in the target's behaviour – has become prevalent even though, as discussed below, it is ill-suited to crime-based sanctions.

Sanctions have been memorably characterized as "between words and wars."[40] They empower a government to respond to wrongdoing more forcefully than a mere condemnation. But they can also be calibrated so as to avoid irreparable damage in relations with another state. The notion that sanctions express a degree of disapproval is the lowest common denominator in most analyses of what sanctions achieve.[41] Beyond it, a greater variety of approaches comes to the fore. For instance, the U.S. government ascribes three main possible objectives to sanctions, namely inducing behavior change (deterrence), constraining the target's malicious activities (disruption), and demonstrating the disapproval thereof (signaling).[42] It is easy to discount the value of signalling, but circumstances exist where a symbolic condemnation is one of the few available options.[43]

Some have sought to think in a more structured way about the melange of considerations involved in sanctions decision-making. One approach is to divide sanctions objectives into three categories: the primary ones are to do with achieving the desired change in the target's behaviour; the secondary ones are concerned with the sanctioning state's own domestic politics or bolstering its international reputation; and the tertiary objectives are related to maintaining the integrity of international rules and institutions.[44] Another commentator draws a distinction between the "purposes" of sanctions, or their envisaged effects on the target, and broader "objectives."[45]

1. The Doctrine of Behavior Change

Much of this nuance fades away in policy discourse, where the view of sanctions as solely a means of behavior change predominates. It is common to see statements such as this one by the EU:

> In spite of their colloquial name "sanctions," EU restrictive measures are not punitive. They are intended to bring about a change in policy or activity by targeting entities and individuals in non-EU countries, responsible for such malignant behaviour.[46]

Likewise, explanations abound to the effect that while sanctions might appear punitive, in truth they form levers of pressure for changing someone's behavior.[47] Every once in a while, the

[40]Wallensteen & Staibano, *supra* note 6.

[41]*See, e.g., Strengthening Targeted Sanctions Through Fair and Clear Procedures,* Watson Institute for International Studies, Brown University, 5 (2006); Christina Eckes, EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions, 156 (2009); *Trans-Pacific Symposium on Dismantling Transnational Illicit Networks: Final Report*, U.S. Bureau for Int'l Narcotics and Law Enforcement Affairs and EU European External Action Serv., 17 (2011).

[42]*Treasury 2021 Sanctions Review*, U.S. Dep't of Treasury 1 (2021) [hereinafter *Treasury 2021 Sanctions Review*] ("At their core, sanctions allow U.S. policymakers to impose a material cost on adversaries to deter or disrupt behavior that undermines U.S. national security and signal a clear policy stance.") *See also* Tom Ruys, *Reflections on the Global Magnitsky Act and the Use of Targeted Sanctions in the Fight against Grand Corruption*, 50 REV. BDI 492, 506 (2017).

[43]David Baldwin, *The Sanctions Debate and the Logic of Choice,* 41 Int'l Security 80, 102–103 (2000).

[44]James Barber, *Economic Sanctions as a Policy Instrument*,55(3) Int'l Affairs 367, 370–383 (1979).

[45]Francesco Giumelli, *The Purposes of Targeted Sanctions, in* Targeted Sanctions: The Impact and Effectiveness of United Nations Action 38 (Thomas Biersteker, Marcos Tourinho & Sue E. Eckert eds., 2016).

[46]*Frequently Asked Questions: Restrictive Measures (Sanctions)*, European Commission (Feb. 26, 2022) https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_1401.

[47]*See* Brian O'Toole & Samantha Sultoon, *Sanctions Explained: How a Foreign Policy Problem Becomes a Sanctions Program*, Brookings Institution (2019); Isabella Chase, Emil Dall & Tom Keatinge, *Designing Sanctions After Brexit: Recommendations on the Future of UK Sanctions Policy*, Royal United Services Institute 6-7 (2019); Kimberly Ann Elliott, *Trends in Economic Sanctions Policy: Challenges to Conventional Wisdom*, *in* International Sanctions, *supra* note 6. *See also* Peter Fitzgerald, *Drug Kingpins and Blacklisting: Compliance Issues with U.S. Economic Sanction* (Part 1), 4 J. Money Laundering Control 360 (2001).

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occasional corrective to the discourse may point to the potential of sanctions as a tool of disruption and constraint.[48] By contrast, punishment as a legitimate sanctions objective has very few proponents.[49]

This view of sanctions has practical consequences. For example, the U.S. government does not impose Global Magnitsky sanctions for activities that took place over five years ago.[50] The rationale for this limitation is that, sanctions being a tool of behavioral change, it would not be appropriate to use them by reference to conduct that lies many years in the past.[51]

This stance begs the question. A human rights violation or corruption offense cannot be undone regardless of whether it took place a month, a year or a decade ago. Meanwhile, even if the crime occurred over five years, its perpetrator may still be enjoying its proceeds or other benefits obtained. It is doubtful that depriving them of that ability should be objectionable, especially when other U.S. sanctions programs, such as corruption- and human rights-related visa restrictions known as "section 7031(c) sanctions" are unfettered by similar temporal restrictions.[52]

The main flaw of the behavior change doctrine is its unsuitability for identifying circumstances that merit the imposition of sanctions. If this rationale is taken in earnest, the use of sanctions in response to past wrongdoing requires logical gymnastics. One could argue that such sanctions aim to deter future perpetrators by making an example of the past ones, but this is also consistent with the punitive rationale, since one of the justifications of punishment is precisely to inhibit would-be wrongdoers.[53] Moreover, if one adheres strictly to the notion of behavior change, then sanctions should *not* be used against the most recalcitrant malicious actors who are least likely to modify their behavior.

One of the reasons why the behavior change doctrine has come to exercise such a powerful grip on public discourse is to be found in the political science literature on whether sanctions work.[54] Inquiring into the effectiveness of sanctions requires an objective by reference to which effectiveness is measured. The impact on the targeted government's decision-making calculus is one such point of reference.[55] This approach makes sense for sanctions imposed in pursuit of foreign policy objectives, such as those against the apartheid-era South Africa.[56] But the transposition of this principle to the field of counteracting crime is fraught with difficulty.

[48]Paul Massaro & Casey Michel, *Biden Might Stop a Sanctions Revolution*, Foreign Policy (Aug. 24, 2021).

[49]For an exception, *see* Kim Richard Nossal, *International Sanctions as International Punishment,* 43(2) Int'l Organization 301 (1989).

[50]Human Rights First, *Global Magnitsky Sanctions: Frequently Asked Questions* 7 (2020) https://www.humanrightsfirst.org/sites/default/files/Global%20Magnitsky%20FAQs.pdf.

[51]*Id.* The author has also heard a comment to that effect from a U.S. government official.

[52]Consolidated Appropriations Act 2023, Pub. L. No. 117-328, § 7031(c) (2022). For a detailed analysis of the "anti-kleptocracy" provisions in annual appropriation acts, *see* Anton Moiseienko, Corruption and Targeted Sanctions: Law and Policy of Anti-Corruption Entry Bans 41–46 (2019) [hereinafter Corruption and Targeted Sanctions].

[53]H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 1 (2nd edn., 2008) (critiquing "the old Benthamite confidence in fear of the penalties threatened by the law as a powerful deterrent").

[54]*See, e.g.*, Targeted Sanctions: The Impacts and Effectiveness of United Nations Action (Thomas Biersteker, Marcos Tourinho & Sue Eckert eds., 2016); Gary Hufbauer, Jeffrey Schott, Kimberly Ann Elliott & Barbara Oegg, Economic Sanctions Reconsidered (2007). *See also* Kimberly Ann Elliott, *The Sanctions Glass: Half Full or Completely Empty?* 23 Int'l Security 50 (2014); Robert Pape, *Why Economic Sanctions Do Not Work,* 22 Int'l Security 90 (1997).

[55]Thus, whether or not sanctions achieved behavior change is at the heart of a classic book on the effectiveness of sanctions: Hufbauer et al., *supra* note 54. This is also the focus of major databases that collate sanctions case studies: *see* T. Clifton Morgan, Navin A. Bapat, and Yoshiharu Kobayashi, *The Threat and Imposition of Economic Sanctions Data Project: A Retrospective*, in Research Handbook on Economic Sanctions 44 (Peter A.G. Van Bergeijk ed., 2021); Aleksandra Kirilakha et al., *The Global Sanctions Data Base (GSDB): An Update that Includes the Years of the Trump Presidency*, in Research Handbook on Economic Sanctions 62 (Peter A.G. Van Bergeijk ed., 2021). Some argue that greater attention should be paid to the question of what makes states change their behavior, and how formal sanctions, unilateral or multilateral, interact with non-legal sources of pressure such as reputational concerns: Niccolò Ridi & Veronika Fikfak, *Sanctioning to Change State Behaviour*, 13(2) J. Int'l Disput. Settl. 210 (2022).

[56]Agathe Demarais, Backfire: How Sanctions Reshape the World Against U.S. Interests 7 (2022).

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Another reason for the tenacity of the behavior change doctrine is the legal challenges that took place in the aftermath of the UN's foray into terrorism sanctions in the 1990s. Domestic and EU courts tended to accept that such sanctions were not criminal measures and therefore did not attract the full suite of criminal process protections, including the presumption of innocence.[57] The UN's Human Rights Committee has also embraced that view.[58] Had this approach not been taken, sanctions would have had to be struck down due to incompatibility with the presumption of innocence. That posed the question of how the non-criminal nature of sanctions could be best explained. One way of doing so was to present them as forward-looking means of behavior change, even though this does not sit well with sanctions that in effect penalize past conduct.[59]

2. The Punitiveness of Crime-Based Sanctions

A better explanation of the objectives of crime-based sanctions should take account of their punitive aspect. Its acknowledgment occasionally surfaces in the G20's and APEC's pledges to use sanctions to curb the "impunity" enjoyed by corrupt public officials.[60] As the term itself suggests, impunity can only be redressed through punishment. The same punitive undertone is evident in the frequent refrain of "name and shame" as a rationale for sanctions.[61] Tellingly, in 2017, the Parliament of Canada concluded that targeted sanctions were "essentially punitive in nature and should not be used arbitrarily or without providing the targeted individual an opportunity to defend themselves."[62]

The U.S. Magnitsky Act 2012, a paradigmatic example of a crime-based sanctions regime, is a case in point. To appreciate its objectives and effect, a brief overview of the circumstances surrounding the Act's adoption is helpful. It was enacted by Congress in response to the death of a Russian whistle-blower by the name of Sergei Magnitsky in a Moscow prison. Magnitsky reported an alleged $230-million fraud perpetrated by Russian law enforcement and tax officials against the company of his employer, British-American financier Bill Browder. This led to Magnitsky himself being arrested and investigated by the very officials whom he had accused of crime. Magnitsky died in pretrial detention after having been beaten by prison guards and denied medical assistance.[63] None of the officials involved faced prosecution, and Magnitsky himself was posthumously convicted of tax fraud in one of Europe's very few post-mortem trials since Pope Formosus's remains were exhumed and condemned in 897.[64]

[57]The best known of these was the businessman Youssef Kadi's efforts to overturn his terrorism-related listing in the Court of Justice of the European Union: Kadi v. Council and Commission, Court of First Instance, Case T-315/01 (Sep. 21, 2005); Kadi and Al Barakaat v. Council and Commission, Court of Justice, Joined Cases C-402/05 P and C-415/05 P (Sep. 3, 2008) (appeal against the first judgment); Kadi v. Commission and Council, General Court, Case T-85/09 (Sep. 30, 2012) (a first instance judgement following Kadi's relisting); and Council and Commission v. Kadi, Court of Justice, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P (Jul. 18, 2013) (appeal judgment following the relisting). A landmark case in the European Court of Human Rights is Nada v. Switzerland, App. No. 10593/08 (Sep. 12, 2012). Outside Europe, *see* Abdelrazik v. Canada (Minister of Foreign Affairs) [2010] 1 F.C.R. 267 (Canada).

[58]Sayadi and Vinck v. Belgium, U.N. Doc. CCPR/C/94/D/1472/2006, Communication No. 1472/2006 (Oct. 22, 2008), ¶5.9.

[59]*See, e.g.,* BT Telecommunications v. Council and Commission, General Court, Case T-440/11 (Dec. 9, 2014), ¶112; Sison v. Council, Court of First Instance Case T-47/03 (Jul. 11, 2007) ¶101; Ezz et al. v. Council, General Court, Case T-256/11 (Feb. 27, 2014) ¶¶70–84; Al Matri v. Council, General Court, Case T-545/13 (Jun. 30, 2016) ¶85; Mykola Azarov v. Council, General Court, Case T-215/15 (Jul. 7, 2017) ¶142.

[60]*Common Principles for Action: Denial of Safe Haven,* G20, (2012); *Fighting Corruption and Ensuring Transparency*, APEC, (2012).

[61]*See e.g.* H.L. Deb. May 1, 2018, vol. 640, col. 177 (remarks of Alan Duncan MP in the UK's House of Commons).

[62]*A Coherent and Effective Approach to Canada's Sanctions Regimes: Sergei Magnitsky and Beyond,* Parliament of Canada 32 (2017).

[63]Andreas Gross, *Refusing Impunity for the Killers of Sergei Magnitsky*, Doc. No. 13356 Add, Council of Europe's Parliamentary Assembly (Jan. 27, 2014).

[64]John Thornhill & Geoff Dyer, *The Magnitsky Law*, Financial Times (Jul. 27, 2012); Richard L. Cassin, *Russian Whistleblower Convicted in Bizarre Posthumous Trial*, FCPA Blog (Jul. 12, 2013), https://fcpablog.com/2013/07/12/russian-whistleblower-convicted-in-bizarre-posthumous-trial/.

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Magnitsky's death propelled his employer, Bill Browder, to launch a campaign seeking accountability for those responsible. It initially involved lobbying for them to be barred entry into the United States under Presidential Proclamation 7750,[65] which authorizes entry bans against those involved in corruption but provides for neither the freezing of their assets nor the publication of their names.[66] These limitations of Presidential Proclamation 7750 prompted Browder to advocate for what became the Magnitsky Act 2012. The Act authorizes the President to impose asset freezes and entry bans on those involved in Sergei Magnitsky's killing or other abuse of Russian whistleblowers. Between its enactment and April 2023, 58 individuals and two entities have been designated under the Magnitsky Act 2012.[67]

No fewer than three Congressmen who spoke in support of the Act in the House of Representatives explicitly referred to punishment, while one of its co-sponsors James McGovern spoke of "hold[ing] accountable" those covered by its provisions.[68] Consistent with this, Bill Browder's account of the run-up to the Act's adoption presents it as part of his quest to redress impunity enjoyed by Magnitsky's killers, "hardly commensurate" though this response might be to the magnitude of their wrongdoing.[69] Of course, any statute is a product of multiple – often divergent – opinions and interests on the part of those involved in its promulgation,[70] but one need not flounder in a philosophical discussion to conclude that punitive considerations played in a role in the birth of the Magnitsky Act 2012.

By contrast, the considerations of behavior change have less purchase here.[71] The strongest argument of that stripe is that the Magnitsky Act 2012 was to influence the Russian government's behavior and nudge it toward undertaking a credible investigation of Magnitsky's death. This would have been a positive outcome, but it is questionable why it should be best served by imposing sanctions on those directly involved in the Magnitsky affair rather than exerting other forms of pressure on the Russian government, like, say, the sanctions imposed following Russia's annexation of Crimea.

Corruption- and human rights-related designations under the Global Magnitsky Act 2016 further erode the appeal of the behavior change doctrine. The Global Magnitsky Act 2016 expanded the approach of the original Magnitsky Act 2012 to enable sanctions against targets anywhere in the world, as well as including significant corruption as sanctionable conduct. A typical pattern of Global Magnitsky designations is one or several individuals per country, with targets coming from multiple countries all over the world.[72] This "pinprick" approach belies the notion of Global Magnitsky sanctions as a serious attempt to influence the policy of respective countries' governments. However, the selection of targets does appear to be preoccupied with addressing impunity, such as by designating the Saudi officials allegedly responsible for the murder of journalist Jamal Khashoggi,[73] against the backdrop of public

[65]Proclamation No. 7750, 69 F.R. 2287 (Jan. 12, 2004).

[66]Bill Browder, RED NOTICE, Chapter 42 (2015).

[67]*Specially Designated Nationals and Blocked Persons List (SDN List)*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists (searched using the "MAGNIT" filter).

[68]158 C.R. E.594 (Apr. 19, 2012). See also statements by Representatives Dreier and Smith and Senators Baucus and Brown: 158 C.R. H.5136 (24 July 2012); 158 C.R. H.6408 (16 November 2012); 158 C.R. S.7433 (Dec. 5, 2012), and 158 C.R. S.7434 (Dec. 5, 2012) respectively.

[69]Bill Browder, RED NOTICE, Chapter 47 (2015).

[70]*See* Ronald Dworkin, LAW'S EMPIRE 43-65 (1986). *See also* Antonin Scalia and Bryan Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, Chapter 67 (2012).

[71]*See* Haenlein et al., *supra* note 13, at 20.

[72]SDN LIST, *supra* note 67.

[73]Press Release, U.S. Dep't of Treasury, Treasury Sanctions the Saudi Rapid Intervention Force and Former Deputy Head of Saudi Arabia's General Intelligence Presidency for Roles in the Murder of Journalist Jamal Khashoggi (Feb. 26, 2021) https://home.treasury.gov/news/press-releases/jy0038.

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debate as to whether those sanctions went up high enough the Saudi government's hierarchy.[74]

This is not to suggest that behavior change by criminals or rogue regimes is not desirable, nor that it should not be pursued through sanctions. It is simply not the sole permissible objective for their imposition. If other legitimate goals are left out of the equation, much is lost. Nor is there any contradiction between accepting that, on the one hand, sanctions pursue some punitive objectives but, on the other hand, they should not attract the same levels of due process protection as criminal charges.

Counteracting impunity is not the only plausible reason for crime-based sanctions.[75] Consider the U.S. designations of two Russian-based ransomware groups: Evil Corp in December 2019 and Trickbot, jointly with the UK, in February and September 2023. Their principal effect is not to punish Evil Corp and Trickbot members by freezing their U.S. assets, of which they may have none, or barring their entry to the United States, which those in their line of business are unlikely to seek, but to disrupt their criminal operations by precluding U.S. persons from paying ransom to them.[76] In the absence of an overarching legal prohibition on the payment of ransom to cybercriminals, the designation represents one of the U.S. government's most aggressive legal steps yet to undermine the commercial viability of ransomware operations.[77]

The disruption rationale is of particular relevance insofar as organized crime groups are concerned, as distinct from government-affiliated actors involved in corruption or human rights abuse. Sanctions designations impede criminal operations in at least two ways. The first of these is the risk that anyone dealing with the sanctioned person must accept as a result of engaging in a prohibited transaction. The second one is the notoriety that attends to a sanctions designation and makes the designee a more prominent target for law enforcement operations, as well as for investigations by financial institutions wishing to cut any ties with them.

The inability to make lawful payments to sanctioned entities acquires special importance in dealing with ransomware operators, such as Evil Corp and Trickbot. By recent estimates, ransomware remains a multibillion-dollar criminal industry, with hundreds of criminal organizations involved in it.[78] Sanctions designations create two tiers of such organizations: those to whom, no matter how reprehensible they are, sanctions payments can be lawfully made; and those to whom payments cannot be made on pain of criminal punishment. This may enable governments to use the threat of sanctions to police "red lines" such as the unacceptability of cyberattacks on critical infrastructure.

The effectiveness of such sanctions is not a foregone conclusion. According to the cybersecurity firm Mandiant, it is likely that Evil Corp continues to operate under a new guise to evade U.S. sanctions.[79] Interestingly, another cybercriminal group, Conti, has reportedly had to resort to similar obfuscation tactics because businesses became increasingly reluctant to pay after connections were revealed between it and the FSB, Russia's domestic intelligence agency that is subject to U.S. sanctions.[80]

[74]David E. Sanger, *Biden Won't Penalize Saudi Crown Prince Over Khashoggi's Killing, Fearing Relations Breach*, N.Y. Times (Feb. 26, 2021).

[75]Massaro and Michel, *supra* note 48.

[76]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Evil Corp, the Russia-Based Cybercriminal Group Behind Dridex Malware (Dec. 5, 2019) https://home.treasury.gov/news/press-releases/sm845; Press Release, U.S. Dep't of Treasury, United States and United Kingdom Sanction Members of Russia-Based Trickbot Cybercrime Gang (Feb. 9, 2023) https://home.treasury.gov/news/press-releases/jy1256; Press Release, US Dep't of Treasury, United States and United Kingdom Sanction Additional Members of the Russia-Based Trickbot Cybercrime Gang (Sep. 7, 2023) https://home.treasury.gov/news/press-releases/jy1714.

[77]Ian Talley and Sadey Gurman, *U.S. Targets Russian 'Evil Corp' Hacker Group With Sanctions, Indictments*, Wall St. J. (Dec. 5, 2019).

[78]Chainalysis, The 2023 Crypto Crime Report (2023) 27–35.

[79]Mandiant Intelligence, *To HADES and Back: UNC2165 Shifts to LOCKBIT to Evade Sanctions* (Jun. 2, 2022) https://www.mandiant.com/resources/blog/unc2165-shifts-to-evade-sanctions.

[80]Chainalysis, *supra* note 78, at 31.

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Beyond sanctions evasion, whether the intended disruptive effect actually materializes may depend on multiple further variables, including the extent of the targeted person's connections with the sanctioning state. And, as the likely impact of sanctions is pivotal to the issue of whether they should be imposed in the first place, these determinants are by implication relevant to deciding whether sanctions should be applied. Such substantive considerations in the use of crime-based sanctions are discussed below.

C. SUBSTANTIVE CONSIDERATIONS

I. Dependence on the Sanctioning State

The targeted person's dependence on the sanctioning state, such as through property interests, one's own or one's family members' residence, is a crucial consideration for multiple reasons. First of all, it provides an indispensable part of the normative justification for imposing sanctions. From the sanctioning state's perspective, it can be morally and politically unpalatable to roll out the red carpet to someone involved in grand corruption or other similarly objectionable behavior overseas.[81] U.S. Senator Ben Cardin encapsulated this sentiment in a statement in support of the Magnitsky Act 2012:

> The legislation says, "Look, we are not going to let you have the fruits of your corruption. (. . .) We will not let you have a visa, a privilege, to visit our country, to visit your property in our country or your family in this country."[82]

But there is also a dilemma. The stronger the target's nexus with the sanctioning state, the more impactful the sanctions are likely to be. But, equally, the greater is the likelihood that more traditional criminal justice measures, such as a criminal prosecution or, failing that, non-conviction based asset forfeiture, could be utilized. If so, then opting for sanctions is a problematic choice. In particular, three sets of issues arise: (a) whether a state should opt for criminal prosecution, non-conviction based asset forfeiture, or sanctions; (b) if sanctions are utilized, what human rights guarantees should be provided; and (c) whether sanctions can legitimately be used for provisional restraint of assets with a view to their ultimate confiscation.

1. Opting for Sanctions

The strongest, and most obvious, type of connection between the targeted person and the sanctioning state is citizenship or permanent residency. In line with the genesis of sanctions as a foreign policy tool, states generally do not use them against their own citizens or permanent residents. However, this is not to say that they *cannot* be so used.

For instance, in the United States, major sanctions laws apply to "foreign persons."[83] That means "any citizen or national of a foreign state (including any such individual who is also a citizen or national of the United States)," which opens up possibilities for sanctions against dual

[81]Sharman, *supra* note 7, at 4 (arguing that a moral and policy norm has emerged that "'prohibit[s] countries from hosting money stolen by senior officials of another country"); Alexander Cooley & John Heathershaw, Dictators without Borders: Power and Money in Central Asia (2017) 222–231; Raymond Baker, Capitalism's Achilles Heel: Dirty Money and How to Renew the Free-Market System 162–206 (2005) (all talking in similar terms about the moral complicity of developed nations in corruption that befalls developing nations by virtue of hosting its proceeds). *Cf.* Peter Alldridge, Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime 29 (2003); Tina Søreide, *Democracy's Shortcomings in Anti-Corruption*, in Anti-Corruption Policy: Can International Actors Play a Constructive Role? 141–142 (Susan Rose-Ackerman & Paul Carrington eds., 2013).

[82]158 C.R. S.7437 (Dec. 5, 2012).

[83]International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1708 (2012); Global Magnitsky Act, § 10102(a).

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nationals.[84] A search of the U.S. Specially Designated National (SDN) list, which brings together information on designees under various programs, discloses several instances of individuals whose identifying details include a U.S. passport.[85] Most of these designations relate to terrorist activities carried out by U.S. citizens, with the exception of Joseph Duplan, a Haitian official and U.S. dual citizen allegedly involved in human rights abuse.[86]

Similarly, the UK's Sanctions and Anti-Money Laundering Act 2018, which governs UK sanctions after its departure from the EU, speaks of "persons," without limitation to foreigners. Nor is any such limitation present in the Global Anti-Corruption Sanctions Regulations 2021, adopted pursuant to that Act. Furthermore, the Global Human Rights Sanctions Regulations 2020, likewise adopted under that Act, make it clear that UK citizens are meant to fall within the reach of the human rights sanctions regime. Human rights abuse can be sanctionable if carried out "outside the United Kingdom by any person, or in the United Kingdom by a person who is not a United Kingdom person."[87] As of August 2023, the UK's Sanctions List features multiple UK citizens, most of them designated on terrorism grounds but also including a British video blogger publishing anti-Ukrainian content and multiple individuals associated with the Russian government or major Russian businesspeople.[88] None of these are instances of crime-based sanctions, but nor is there any bar for such sanctions to be imposed on British citizens.

Of the three High Court decisions involving challenges to the UK's autonomous sanctions, one pertained to a UK/US dual citizen who had emigrated from the Soviet Union and was never a Russian citizen.[89] The claimant's British citizenship was highlighted in the very first sentence of Garnham J.'s judgment, and it was common ground between the parties that it was of some relevance to the issues at hand.[90] The claimant's barrister, Lord (David) Anderson KC, widely known as a former Independent Reviewer of Counter-Terrorism Legislation, submitted that:

> [B]ecause the permissible grounds for designation are so broad, and so marginally satisfied here, and because the fundamental liberties of a citizen have been so markedly curtailed and will remain so for an indefinite period of time, it is (. . .) imperative for the Court to scrutinise with particular care any reasoned plea that a designation is disproportionate or discriminatory.[91]

The government's barrister, Sir James Eadie KC, did not reject the principle but argued that "the Secretary of State has had regard to the impact of sanctions on the Claimant and his family and has

[84]31 CFR § 595.304.

[85]SDN List, *supra* note 67. These include, as of August 24, 2023: Abu Mansour Al-Amriki; Mansour Arbabsiar; Joseph Pierre Richard Duplan; Mustafa Fawwaz; and Abdul Rahman S. Taha (all other aliases omitted for each of these individuals).

[86]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Serious Human Rights Abusers on International Human Rights Day (Dec. 10, 2020) https://home.treasury.gov/news/press-releases/sm1208.

[87]The Global Human Rights Sanctions Regulations 2020 (UK), Regulation 4(3).

[88]*The UK Sanctions List,* UK Government, (last updated Aug. 14, 2023) https://www.gov.uk/government/publications/the-uk-sanctions-list [hereinafter *UK Sanctions List*]. As of August 24, 2023, non-terrorism-related designations include Eugene Shvidler, a dual U.S.-UK national sanctioned because of his ties to the Russian businessman and politician Roman Abramovich (see the case he brought against the UK government discussed below); Nigina Zairova, a dual Uzbek-UK national allegedly associated with the Russian businessman Mikhail Fridman; Said Gutseriev, a dual Russian-UK national involved in the running of a major Russian financial company; Sanjar Ismailov, a national of four states including the UK and a nephew of the Russian businessman Alisher Usmanov; Graham Phillips, a British video-blogger promoting policies that destabilize Ukraine; Pavel Titov, a son of the Russian politician and businessman Boris Titov; and Asma Al-Assad, the wife of Syria's president Bashar Al-Assad.

[89]Dalston Projects Ltd. et al. v. Transport Secretary [2023] EWHC 1885 (Admin) (challenging the detention of a yacht owned by a Russian national); LLC Synesis v. Secretary of State for Foreign, Commonwealth and Development Affairs [2023] EWHC 541 (Admin) (challenging the designation of a Belarussian company); Shvidler v. Foreign Secretary [2023] EWHC 2121 (Admin) (challenging the sanctions imposed on Eugene Shvidler).

[90]Shvidler, supra note 89, ¶1.

[91]*Id.* ¶67.

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specifically acknowledged that their impact will be particularly acute because of the Claimant's British citizenship."[92] In the end, Garnham J. concluded that the claimant could not demonstrate that the UK government had failed to strike "a fair balance between the rights of Mr Shvidler and his family and the interests of the community."[93]

Likewise, Australia does not rule out the application of sanctions against its own citizens, although so far this possibility has not been put into practice.[94] In a review of the country's sanctions legislation published in 2020, the Australian Parliament recommended that sanctions not be applied to Australian citizens, but the government has not accepted this limitation on its powers.[95]

The legal position in those countries accentuates the question of the proper role of sanctions. One might accept ungrudgingly that a government can subject a foreigner to sanctions for serious crime outside its jurisdiction. That it should be able to place sanctions on its own citizens is far more problematic. However, the circumstances in which United States utilized its sanctioning powers against its own citizens supply a possible solution. Thus, in Duplan's case, the wrongdoing happened outside the United States and was carried out by a foreign public official who happened to also be a U.S. citizen. That he was one had no real bearing on the (very limited) U.S. ability to prosecute him. Likewise, even though one of the U.S. citizens on the SDN List, Manssor Arbabsiar, was subsequently convicted in the United States for his role in a plot to assassinate the Saudi ambassador,[96] there was no particular likelihood of that ever happening when he was first designated two years prior.[97]

The de facto rule followed in U.S. practice could be summed up as permitting sanctions against U.S. citizens as long as they are physically outside the United States and criminal prosecution is unfeasible. Admittedly, if one accepts the legitimacy of its approach, there is a certain artificiality about limiting it to dual citizens only. Whether or not a state is able to prosecute its citizen for overseas crime does not depend on their having a second passport. Nor is there any meaningful difference from the standpoint of international law between sanctioning a state's own citizen who is a dual citizen and one who is not.[98]

Beyond citizenship, other common links are the ongoing physical presence in the sanctioning state; the ownership of property, including but not limited to residential real estate; or familial connections in the sanctioning state. The ownership of property, in particular, may provide that state's authorities with the jurisdiction to launch non-conviction based asset forfeiture proceedings, as well as with the practical ability to inquire into the circumstances of the property's acquisition. The presence of family in the sanctioning state is less likely to supply such leverage.

Considerations of effectiveness (that is, the likely impact of sanctions) and due process (that is, an individual's ability to defend themselves against an unjustified allegation of involvement in crime) alike therefore point toward a descending scale of preference from criminal prosecution to crime-based sanctions:

[92]*Id.* ¶135.

[93]*Id.* ¶144.

[94]As of August 24, 2023, Australia's Consolidated List indicates that Australian citizens, including dual nationals, have only been subjected to sanctions twice, both in compliance with a UN Security Council decision. The list is available at https://www.dfat.gov.au/international-relations/security/sanctions/consolidated-list.

[95]Australian Government, *supra* note 8, at 7.

[96]Press Release, U.S. Dep't of Justice, Manssor Arbabsiar Sentenced in New York City Federal Court to 25 Years in Prison for Conspiring with Iranian Military Officials to Assassinate the Saudi Arabian Ambassador to the United States (May 30, 2013) https://www.justice.gov/opa/pr/manssor-arbabsiar-sentenced-new-york-city-federal-court-25-years-prison-conspiring-iranian.

[97]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Five Individuals Tied to Iranian Plot to Assassinate the Saudi Arabian Ambassador to the United States (Oct. 11, 2011) https://www.treasury.gov/press-center/press-releases/pages/tg1320.aspx.

[98]International law prohibits states from denying entry into their territory to their own citizens. In the case of dual citizens, sidestepping this prohibition is easier because it may be possible to deprive them of citizenship. Short of that extreme situation, there appears to be no relevant difference between "ordinary" citizens and dual citizens. *See* Corruption and Targeted Sanctions, *supra* note 52, at 162–171.

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- A criminal conviction has potentially grave consequences and can be presumed to be the most effective available tool of punishment and/or disruption. However, a criminal trial is also characterized by the most extensive suite of due process protections.
- Non-conviction based asset forfeiture results in a permanent deprivation of property but involves the proof of underlying crime to a civil standard.
- Sanctions only result in the temporary freezing of one's assets and – assuming they are used against a foreigner – inability to enter the sanctioning state, but rely on a lower standard of proof.

It is easy to conclude that non-conviction based asset forfeiture should only be used if a criminal prosecution is unfeasible, while sanctions should only be applied if non-conviction based asset forfeiture is unavailable. As an organizing principle, this must be correct. The difficulty is deciding when moving on to the next available option is justified. Whether a criminal prosecution is feasible is a function of not only the facts but the effort and resource put into investigation. It may therefore be tempting to go down the path of least resistance: or, in this case, sanctions. This is the critique that has often been made of the perceived prevalence in the United States of non-conviction based asset forfeiture.[99]

Here it is useful to revert to the concept of impunity. As discussed in greater detail below, the raison d'être of crime-based sanctions has been to address wrongdoing that is otherwise outside the sanctioning state's grasp. If we transform this from a *descriptive* statement of how sanctions tend to be used into a normative *prescription* as to how they should be applied, a reasonably complete account of the role of sanctions emerges. If suspicions of criminality exist but cannot be investigated or effectively prosecuted due to a foreign state's obstructionist stance, such as in the cases of grand corruption or overseas ransomware operators, sanctions are a proper response.

There is, however, a further nuance. In U.S. practice, a two-pronged approach has emerged in response to cybercrime in particular, both state-sponsored and otherwise, that involves *both* criminal indictments and targeted sanctions. This forms part of the official U.S. policy, as explained by the Justice Department's Cyber Digital Task Force:

> The Department will continue to support sanctions under such authorities by helping the Treasury Department draft sanction nomination packages based on the information gathered during our investigations. Where, for example, investigations identify hackers who victimize U.S. individuals or companies, or those who profit from criminal hacking by using stolen personal information or trade secrets, the Department works with the Treasury Department to craft appropriate sanctions against those responsible.[100]

Instances of that approach being put in practice include U.S. responses to North Korea's attack against Sony Pictures Entertainment,[101] North Korean cybercrime-related money laundering,[102]

[99] *See, e.g.,* Jasmin Chigbrow, *Police or Pirates? Reforming Washington's Civil Asset Forfeiture System,* 96 WASH. L. REV. 1147 (2021); Erik Luna, *The Perils of Civil Asset Forfeiture,* 43(1) HARV. J.L. & PUB. POL'Y 23 (2020); Karis Ann-Yi Chi, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CAL. L. REV. 1635 (2002). Cf. Stefan D. Cassella, *Nature and Basic Problems of Non-Conviction Based Confiscation in the United States*, 16 VEREDAS DO DIREITA 41, 56–61 (2019).

[100] *Report of the Attorney General's Cyber Digital Task Force*, U.S. DEP'T OF JUSTICE 74 (July 2, 2018).

[101] The response included Exec. Order No. 13,687, 3 CFR 13687 (2015) and a criminal indictment against a prolific North Korean hacker allegedly involved in the cyber-attack: *Complaint and Affidavit in the Matter of United States v. Park Jin Hyok*, https://www.justice.gov/opa/press-release/file/1092091/download.

[102] Press Release, U.S. Dep't of Treasury, Treasury Targets Actors Facilitating Illicit DPRK Financial Activity in Support of Weapons Programs (Apr. 24, 2023) https://home.treasury.gov/news/press-releases/jy1435; Press Release, U.S. Dep't of Justice, North Korean Foreign Trade Bank Representative Charged in Crypto Laundering Conspiracies (Apr. 24, 2023) https://www.justice.gov/opa/pr/north-korean-foreign-trade-bank-representative-charged-crypto-laundering-conspiracies.

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Evil Corp's and Trickbot's cybercriminal activities,[103] the Iranian Mabna Institute's theft of intellectual property,[104] and several Iranian citizens' involvement in the SamSam ransomware campaign.[105]

At first sight, this development undermines the claim that sanctions and criminal prosecution have their distinct, well-delineated areas of application. However, since those indictments are issued against individuals in countries where any extradition attempt would be a fool's errand, they are best viewed as showcasing U.S. intelligence-gathering capability in the cyber domain, rather than a genuine attempt to bring about a criminal prosecution. As a result, it is sanctions that produce tangible consequences by cutting off those targeted from the U.S. financial system.[106]

Another example of the double-barreled use of sanctions and criminal prosecution is the issuance by the United States of a criminal indictment against Gulnara Karimova 1.5 years *after* U.S. sanctions were imposed and while she was already in prison in Uzbekistan.[107] This might be viewed as either an aberration or an attempt by the United States to validate the actions of Uzbekistan's domestic justice system by formally levelling its own criminal allegations against Karimova.

These difficult cases aside, the proposed division between the respective domains of criminal prosecutions and sanctions is consistent with the mainstay of U.S. sanctions practice. In particular, it avoids the trap of suggesting that the two simply pursue two wholly distinct sets of objectives, with criminal prosecutions being insulated from the exigencies of foreign relations while criminal justice considerations are irrelevant to sanctions. Indeed, the North Korean and Iranian examples above speak to how U.S. law enforcement efforts routinely support the government's overall foreign policy objectives, rather than being clinically separated from them.[108] This is even before one considers the more problematic but by no means non-existent instances of governments dropping law enforcement action out of foreign policy concerns.[109]

[103]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Evil Corp, the Russia-Based Cybercriminal Group Behind Dridex Malware (Dec. 5, 2019) https://home.treasury.gov/news/press-releases/sm845; Press Release, U.S. Dep't of Treasury, *United States and United Kingdom Sanction Members of Russia-Based Trickbot Cybercrime Gang* (Feb. 9, 2023) https://home.treasury.gov/news/press-releases/jy1256. Trickbot's example is noteworthy in that only one member of the group faced a U.S. indictment, which was issued in 2012 but only unsealed in February 2023: Press Release, U.S. Dep't of Justice, Russian National Charged with Bank Fraud Related to Hacking Campaign (Feb. 9, 2023) https://www.justice.gov/usao-nj/pr/russian-national-charged-bank-fraud-related-hacking-campaign.

[104]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Iranian Cyber Actors for Malicious Cyber-Enabled Activities Targeting Hundreds of Universities (Mar. 23, 2018) https://home.treasury.gov/news/press-releases/sm0332; Press Release, U.S. Dep't of Justice, Nine Iranians Charged With Conducting Massive Cyber Theft Campaign On Behalf Of The Islamic Revolutionary Guard Corps (Mar. 23, 2018) https://www.justice.gov/opa/pr/nine-iranians-charged-conducting-massive-cyber-theft-campaign-behalf-islamic-revolutionary.

[105]Press Release, U.S. Dep't of Treasury, Treasury Designates Iranian-Based Financial Facilitators of Malicious Cyber Activity and For the First time Identifies Associated Digital Currency Addresses (Nov. 28, 2018) https://home.treasury.gov/news/press-releases/sm556; Press Release, U.S. Dep't of Justice, Two Iranian Men Indicted for Deploying Ransomware to Extort Hospitals, Municipalities, and Public Institutions, Causing Over $30 Million in Losses (Nov. 28, 2018) https://www.justice.gov/opa/pr/two-iranian-men-indicted-deploying-ransomware-extort-hospitals-municipalities-and-public.

[106]*See* Ellen Pruitt, *Indictments Don't Deter Cyberattacks, So Why Does the U.S. Keep Using Them? An Analysis in Response to the U.S.'s Recent Indictment of Six Russian Hackers*, U. BALTIMORE L.R., https://ubaltlawreview.com/2021/02/26/indictments-dont-deter-cyberattacks-so-why-does-the-u-s-keep-using-them-an-analysis-in-response-to-the-u-s-s-recent-indictment-of-six-russian-hackers/.

[107]Press Release, U.S. Dep't of Justice, Former Uzbek Government Official And Uzbek Telecommunications Executive Charged In Bribery And Money Laundering Scheme Involving The Payment Of Nearly $1 Billion In Bribes (Mar. 7, 2019) https://www.justice.gov/usao-sdny/pr/former-uzbek-government-official-and-uzbek-telecommunications-executive-charged-bribery.

[108]For an analysis of the challenges arising from this fusion between criminal justice and foreign policy, *see* Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U.L.R. 340 (2019); Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L.R. 737 (2021).

[109]*See, e.g.,* R (Corner House Research) v. Director of the Serious Fraud Office [2008] UKHL 60; [2009] 1 AC 756, a UK case where the Serious Fraud Office controversially discontinued a bribery investigation into arms sales to Saudi Arabia on the grounds that carrying it out would jeopardize counter-terrorism cooperation.

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The division proposed here also aligns with the UK's current approach, which presents a unique example of a state articulating its policy on the interaction of sanctions with law enforcement activity:

> HMG [His Majesty's Government] will not automatically rule out designation due to a possibility of law enforcement action. However, HMG is likely to give particular attention to cases where the relevant jurisdiction's law enforcement authorities have been unable or unwilling to hold those persons involved in acts of serious corruption to account. Involvement in corruption falling within the UK's jurisdiction would normally be addressed through UK law enforcement measures. However, there may be exceptional cases where HMG will consider designating persons in cases where there may be UK jurisdiction, but UK law enforcement bodies are unable to pursue a case against those persons or their property, for example because a person is outside the UK and a foreign Government does not provide necessary cooperation.[110]

Alternatively, if no links exist between the sanctioning state and the targeted person, sanctions are likely to be the only available response to the latter's wrongdoing. In that case, as the targeted person has little if any dependence on the sanctioning state, only limited direct impact will be felt from the designations. Nevertheless, this does not preclude financial institutions and other businesses worldwide taking notice of the sanctions and reconsidering their business relationships with those affected.[111] This reputational impact of sanctions, as well as the potential long-term deprivation of assets if the targeted person does own property in the sanctioning state,[112] leads one to consider the issue of due process protections.

2. Ensuring Due Process

Suppose a foreigner is sanctioned by a state with whom he or she has an appreciable nexus, be it residence, ownership of property, or family ties. Depending on applicable law, the potential negative impact on the victim can be articulated in the language of human rights. The human rights ramifications of the freezing of property are self-evident. But even the inability to enter a state can have human rights repercussions. For instance, the European Convention on Human Rights (ECHR) guarantees everyone within state parties' jurisdiction the "respect for his private and family life, his home and his correspondence," and according to the European Court of Human Rights (ECtHR) these rights can be breached by an unlawful expulsion (deportation).[113]

It is much less certain whether denial of entry *to* a state can also breach the ECHR or other potentially applicable human rights treaties, such as the International Covenant on Civil and Political Rights.[114] It is arguable, though, that the presence of a an appreciable nexus between the sanctioning state and the targeted person should lead to the application of more stringent due process guarantees than would otherwise be the case. For instance, as proposed by Geoffrey Robertson KC for Australia, the civil standard of the balance of probabilities (or, in the United

[110] *Global Anti-Corruption Sanctions*, *supra* note 14. Analogous language is contained in *Global Human Rights Sanctions*, *supra* note 14.

[111] SHARMAN, *supra* note 7, at 192; WATSON INSTITUTE FOR INTERNATIONAL STUDIES, *supra* note 19, at 5 (2006).

[112] In Kadi II, faced with sanctions that had been in place for almost ten years, the EU's General Court suggested that at some point they might no longer be viewed as temporary and turn into punishment, but that point was not yet reached: Case T-85/09 (Sep. 30, 2010), ¶150.

[113] *See, e.g.*, Boultif v. Switzerland, App. No. 54273/00 (Aug. 2, 2011). For detailed analysis, *see* CORRUPTION AND TARGETED SANCTIONS, *supra* note 52, at 137–45.

[114] *Id.* at 145–49.

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States, preponderance of the evidence) could be utilized.[115] And, for any standard of proof to be meaningful, the imposition of sanctions should be subject to proper review.[116]

This approach would have the dual effect of protecting the targeted persons' rights and reducing, if not eliminating, the potential appeal of sanctions as an ersatz version of non-conviction based asset forfeiture, unencumbered by due process guarantees. Little would be gained by a government that opted for sanctions to de facto seize someone's property if the same standard of proof applied and the decision was subject to analogous legal scrutiny.

These are relatively early days of Magnitsky-style sanctions and, as of the time of this writing, barely five years has elapsed since the first Global Magnitsky designations in the United States. It may be tempting to say that few of the "rogues' gallery" sanctioned to date present any serious doubts as to whether they should have been listed, even if a higher evidentiary standard had been applied. Nor have many of those listed made compelling human rights cases. That may or may not be wholly accurate, but as the roster of sanctions expands, the possibility of mistakes and the need to safeguard against them cannot be discounted. This has been amply demonstrated in the operation of some anti-terrorism sanctions programs, such as one that involved a Stanford doctoral student from Malaysia mistakenly featuring on a U.S. "no fly" list and never being able to regain admission to the United States.[117]

The current experience of major sanctioning powers falls short as relates to due process. The U.S. legal framework is notoriously unfriendly to judicial challenges against sanctions.[118] The standards of proof under the Magnitsky Act 2012 and the Global Magnitsky Act 2016 are "credible information" and "credible evidence" respectively, and any prospective claimant faces a steep hill to climb in demonstrating that the government's determination falls foul of the requirements in the Administrative Procedure Act 1946, such as that its action not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [119] In the case of a travel bans unaccompanied by financial sanctions, no judicial review is available unless the plaintiff is present in the United States and is being deported based on a visa revocation.[120]

In the EU, review by the Court of Justice of the European Union (CJEU) holds out greater prospects for those seeking relief but is based on ascertaining whether the Council of the EU had complied with the vague, abstract standard of "sufficiently solid factual basis."[121] The virtual impossibility of articulating its meaning featured in its criticism by the UK House of Lords,[122] with the UK subsequently opting for the "reasonable grounds to suspect" standard under the Sanctions and Anti-Money Laundering Act 2018.

The first High Court judgment on the application of that standard to sanctions designations came out in March 2023.[123] In essence, it highlighted the uphill struggle that claimants face. In Mr.

[115]Geoffrey Robertson, *Magnitsky Act Submission for the Human Rights Subcommittee, Joint Standing Committee on Foreign Affairs, Defence and Trade* (2020), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MagnitskyAct/Submissions.

[116]Such a review should arguably be independent, impartial, and provide the targeted person with an opportunity to be heard, and result in a binding and enforceable decision. See Corruption and Targeted Sanctions, *supra* note 52, at 218.

[117]Ibrahim v. Department of Homeland Security, 669 F.3d 983 (9th Cir. 2012).

[118]Rachel Barnes, *United States Sanctions: Delisting Applications, Judicial Review and Secret Evidence, in* Economic Sanctions and International Law 678–684 (Matthew Happold and Paul Eden eds., 2016); Anton Moiseienko, *Due Process and Unilateral Targeted Sanctions*, Research Handbook on Unilateral and Extraterritorial Sanctions, *supra* note 20, at 411–415.

[119]Administrative Procedure Act 1946, 5 U.S.C. §551 et seq.

[120]*See, e.g.,* two cases involving challenges to U.S. corruption-related immigration sanctions: Bautista-Rosario v. Mnuchin, No. 20-cv02782 (D.D.C.) (Sep. 22, 2021) in relation to section 7031(c) sanctions and Castellanos v. Pfizer, Inc., No. 07-60646-CIV (S.D.Fla.) (May 28, 2008) in relation to Presidential Proclamation 7750.

[121]*See, e.g.,* Al-Aqsa v. Council and Netherlands v. Al-Aqsa, Cases C-539/10 P and C-550/10 (Nov. 15, 2012) ¶68. However, note that in many instances the EU re-imposes sanctions struck down by the CJEU. *See* Elena Chachko, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 44(1) Yale J. Int'l L. 1, 27–28; 37–40 (2019).

[122]*The Legality of EU Sanctions,* House of Lords, European Union Committee ¶32 (2017).

[123]LLC Synesis v. Secretary of State for Foreign, Commonwealth and Development Affairs [2023] EWHC 541 (Admin).

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Justice Lay's view, it is in fact more accurate to describe "reasonable grounds to suspect" as the decision-maker's *state of mind*, rather than a standard of proof as such.[124] Multiple sources and considerations can combine to give rise to that state of mind, including "'information which might be described as 'allegations', 'multiple hearsay' or (in the appropriate case) 'intelligence'."[125] In the meantime, the court's role is limited to "examine whether the Defendant's decision was either based on no evidence or was irrational."[126] That, as is evident from the discussion above, approximates the position in the United States.

If one accepts that greater human rights impact should be accompanied by more robust due process guarantees, the question arises of how sanctions should be handled in cases that do *not* feature any appreciable nexus between the sanctioning state and the targeted person. Using a laxer standard of proof, such as those currently used in the United States or the UK, could be entertained, with a higher standard reserved for cases involving such a nexus. However, the bifurcation this would create, with different legal standards applying depending on the targeted person's circumstances, could prove problematic. A particular challenge would arise in the United States and other major financial centers, where even an individual with no obvious nexus to the jurisdiction can be significantly affected by the inability to transact with its financial institutions.

In summary, there is a strong argument in favor of building a civil standard of proof by express legislative provision into all crime-based sanctions, so as to ensure that their potential impact is matched by available due process guarantees. This would constitute yet another step toward normalizing them as a mainstream tool of criminal justice rather than a mysterious creature of the netherworld between diplomacy and economic coercion.

3. Restraining Assets

One drawback of opting for a higher standard of proof is that doing so would preclude imposing financial sanctions to temporarily restrain assets with a view to their ultimate confiscation. The application of sanctions as a de facto freezing order, in anticipation of a criminal investigation in a foreign state running its course, is another way in which sanctions can interact with conventional criminal justice. Intensely controversial at first, it has since become rather more normalized, particularly in the aftermath of Russia's full-scale invasion of Ukraine in February 2022.

Such use of sanctions dates back to the EU's measures in the aftermath of the Arab Spring. In 2011, following the revolutions in Egypt and Tunisia, the EU placed financial sanctions on a range of former public officials from these countries.[127] Known as "misappropriation sanctions," analogous measures were extended to former public officials from Ukraine after a regime change took place in 2014.[128] As the CJEU observed, this was to satisfy the perceived need for an immediate freezing of those officials' assets without awaiting mutual legal assistance requests from respective countries' new governments.[129]

The first challenge to such sanctions was brought by the Egyptian businessman and politician Ahmed Ezz and dismissed by the CJEU.[130] The critics of the judgment argued that the Council of the EU had arrogated unto itself the competence of domestic courts to deal with mutual legal

[124] *Id.* ¶73.

[125] *Id.*

[126] *Id.* ¶81.

[127] Council Decision 2011/72/CFSP of 31 January 2011 Concerning Restrictive Measures Directed Against Certain Persons and Entities in View of the Situation in Tunisia; Council Decision 2011/172/CFSP of 21 March 2011 Concerning Restrictive Measures Directed Against Certain Persons, Entities and Bodies in View of the Situation in Egypt.

[128] Council Decision 2014/119/CFSP of 5 March 2014 Concerning Restrictive Measures Directed Against Certain Persons, Entities and Bodies in View of the Situation in Ukraine.

[129] Ezz et al v. Council, Case T-256/11 (Feb. 27, 2014) ¶66.

[130] *Id.* The applicants were similarly unsuccessful in challenging the domestic implementation of EU measures in a UK court: R. (El-Maghraby and El Gazaerly) v. HM Treasury and Foreign and Commonwealth Office [2012] EWHC 674 (Admin).

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assistance and thereby took on the burden of deciding whether the third country's request was well-founded.[131] Despite that criticism, a spate of further cases arising from misappropriation sanctions was decided in line with Ezz.[132]

Over time, two developments occurred. First, investigatory efforts in the third countries concerned became mired in delays.[133] Secondly, the CJEU tightened its approach to the due diligence that the Council is expected to do on a third country's request: from its virtual absence in Ezz, to requiring that the Council "examine carefully and impartially the evidence provided to it" to whittle out evidence that is "irrelevant" or "beset with inconsistencies,"[134] all the way to mandating that the Council verify that the targeted person's "rights of the defence and the right to effective judicial protection" had been observed.[135]

As the purpose of misappropriation sanctions is precisely to move swiftly when the time is short, this increase in applicable due process standards could be their death knell. However, that depends on whether, should the need for misappropriation sanctions arise again, the CJEU will insist on the same legal safeguards being observed *at the point of imposition*, rather than in litigation taking place years later, once the third countries concerned will have had the chance to procure the evidence they promised.[136]

The debacle of EU misappropriation sanctions has not diminished the appeal of using sanctions as a prelude to permanent deprivation of property by other means. Following a raft of sanctions imposed on individuals and companies affiliated with the Russian government as a result of its war in Ukraine, the United States, the UK, and the EU have launched task forces mandated to secure the confiscation of those frozen assets that had been procured through crime.[137] Furthermore, legislative changes have been mooted in the United States and the EU to expand the grounds for their confiscation.[138] Canada's law already allows the government to apply to the court for confiscation of frozen property without any further preconditions beyond the property belonging to a sanctioned person – which, of course, is the prerequisite for that property having been frozen in the first place.[139]

[131]Scott Crosby, *The Ezz Case: Some Critical Observations: Case T-256/11 and on Appeal Case C-220/14 P* 6 NEW J. EUR. CRIM. L. 316 (2015).

[132]*See, e.g.,* Al Matri v. Council, Case T-545/13 (Jun. 30, 2016); Mykola Azarov v. Council, Case T-215/15 (Jul. 7, 2017); Arbuzov v. Council, Case T-221/15 (Jul. 7, 2017).

[133]Clara Portela, *Sanctioning Kleptocrats: An Assessment of EU Misappropriation Sanctions*, CIFAR – CIVIL FORUM FOR ASSET RECOVERY 27 (2019).

[134]CW v. Council, Case T-516/13 (Jun. 30, 2016) ¶142 and CW v. Council, Case T-224/14 (Jun. 30, 2016) ¶150; Ivanyushchenko v. Council, Case T-246/15 (Nov. 8, 2017) ¶152.

[135]Mykola Azarov v. Council, C-530/17 P (Dec. 19, 2018) ¶34.

[136]CORRUPTION AND TARGETED SANCTIONS, *supra* note 52, at 132–133 (2019). *See also* Anton Moiseienko, *Are EU Misappropriation Sanctions Dead?* VÖLKERRECHTSBLOG (Aug. 8, 2019) https://voelkerrechtsblog.org/are-eu-misappropriation-sanctions-dead/.

[137]Press Release, U.S. Dep't Justice, Attorney General Merrick B. Garland Announces Launch of Task Force KleptoCapture, (Mar. 2, 2022), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force-kleptocapture; Press Release, European Commission, Enforcing Sanctions Against Listed Russian and Belarussian Oligarchs: Commission's "Freeze and Seize" Task Force Steps up Work with International Partners, (Mar. 17, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1828.

[138]*Fact Sheet: President Biden's Comprehensive Proposal to Hold Russian Oligarchs and Elites Accountable,* The White House, (Apr. 28, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/28/fact-sheet-president-bidens-comprehensive-proposal-to-hold-russian-oligarchs-accountable/; *Questions and Answers: The Commission Proposes Rules on Freezing and Confiscating Assets of Oligarchs Violating Restrictive Measures and of Criminals,* European Commission (May 22, 2022), https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_3265. *See also* Tom Firestone, The New White House Proposal To Seize Russian Assets: A Legal Analysis (May 2, 2022), https://www.stroock.com/news-and-insights/the-new-white-house-proposal-to-seize-russian-assets-a-legal-analysis.

[139]Budget Implementation Act, 2022, No. 1 (S.C. 2022, c. 10) (Can.), §§440-441, amending the provisions of Special Economic Measures Act (S.C. 1992, c. 17) (Can.), §4(1)(b). *See also* Budget Implementation Act, 2022, §§446-449, amending the provisions of Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) (S.C. 2017, c. 21) (Can.), §5, so as to allow for the confiscation of assets frozen under Canada's corruption- and human rights-related sanctions regime.

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Subjecting the imposition of *all* sanctions to a civil standard of proof would have prevented these developments and impeded governments' ability to react to Russia's aggressive war. This article's argument, however, is that the civil standard of proof should apply to *crime-based* sanctions only, as distinct from sanctions put in place to address a political emergency, as in this instance.

That would give rise to the kind of bifurcation in legal standards applicable to various types of sanctions that, as discussed above, might prove unwieldy. Moreover, the line between political and crime-based sanctions can be blurred. However, since different sanctions programs already operate based on distinct designation criteria, it is not unthinkable that those predicated on criminal behavior should apply the civil standard of proof, while for all other programs a more lenient evidentiary standard can be appropriate.

Underlying this issue is the question of how one conceptualizes the role of crime-based sanctions. There are those who believe that using them to restrain assets is one of the significant benefits they offer.[140] Whether or not this is a permissible use of sanctions is in the eye of the beholder, but it is distinctly different from using sanctions to combat impunity. Instead, it is a way of facilitating law enforcement activity by relaxing the strictures of otherwise applicable criminal and civil procedural rules.

II. Perpetrator's Impunity

As argued above, a key concept for properly delimiting the province of crime-based sanctions is that of impunity. The application of sanctions is permissible – and, arguably, desirable – against alleged perpetrators who enjoy impunity in their home countries or other countries that would ordinarily have jurisdiction over the alleged offense. This is particularly relevant to cases of grand corruption, which is typically understood as large-scale corruption that subverts a state's decision-making capacity at the highest levels and neuters its capacity to tackle corruption.[141] In that connection, it is both notable and understandable that the UK's current Economic Crime Plan speaks in the same section of "combatting kleptocracy" and "driving down sanctions evasion," with sanctions clearly treated as a major anti-corruption tool.[142]

The quintessential example is an allegedly corrupt head of state, such as Nicolás Maduro, the Venezuelan president whom the United States first sanctioned for alleged corruption and later indicted on drug trafficking charges, which is emblematic of the overlap between sanctions and criminal justice.[143] Family members or close associates of those in positions of power can also benefit from impunity, as allegedly – according to the US government – does Dan Gertler, an Israeli businessman active in the Democratic Republic of the Congo who is associated with its former president Joseph Kabila.[144]

[140]Jonathan Fisher K.C. & Anita Clifford, *Anti-Corruption Sanctions, The Bribery Act and Unexplained Wealth Orders,* 1 Crim. L. Rev. 41, 46 (2022).

[141]Sharman, *supra* note 7, at 1–6; Tim Daniel & James Maton, *Is the UNCAC an Effective Deterrent to Grand Corruption? in* Modern Bribery Law: Comparative Perspectives 293 (Jeremy Horder & Peter Alldridge eds, 2013); Ben Bloom, *Criminalizing Kleptocracy? The ICC as a Viable Tool in the Fight Against Grand Corruption,* 29 Am. U. Int'l L. Rev. 627 (2014).

[142]H.M. Government, *Economic Crime Plan 2: 2023-2026,* 46–55 (2023).

[143]Exec. Order No. 13,692, 80 F.R. 12747 (2015); Press Release, U.S. Dep't of Justice, Nicolás Maduro Moros and 14 Current and Former Venezuelan Officials Charged with Narco-Terrorism, Corruption, Drug Trafficking and Other Criminal Charges (Mar. 26, 2020), https://www.justice.gov/opa/pr/nicol-s-maduro-moros-and-14-current-and-former-venezuelan-officials-charged-narco-terrorism. *See also U.S. Department of Justice Indicts Venezuelan Leader Nicolás Maduro on Narcotrafficking Charges* 114(3) Am. J. Int'l L. 511 (2020).

[144]Press Release, U.S. Dep't of Treasury, Treasury Targets Corruption Linked to Dan Gertler in the Democratic Republic of Congo (Dec. 6, 2021) https://home.treasury.gov/news/press-releases/jy0515.

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1. The Concept of Impunity

The concept of impunity is worth spelling out. It is not a legal concept, nor does it have any role in U.S. sanctions statutes or other countries' sanctions laws. Nevertheless, it has been central to policy developments in recent years. Conceptually speaking, impunity can be understood to mean the absence of an adequate criminal justice response to wrongdoing that significantly impairs its victim's fundamental rights. It constitutes a continuing failure to vindicate the victim's rights that were denied by the original violation, so that even though the immediate preoccupation is with imposing costs on the perpetrator, the underlying value is the protection of victims' rights. Since everyone's rights deserve equal protection, the denial of such protection, or impunity, constitutes an affront to equality before the law.[145]

The connection between impunity and human rights protection has been particularly evident in Europe, where the ECtHR has deduced the obligation to criminalize certain conduct as a corollary of human rights guarantees in the ECHR.[146] The more severe the violation, the greater normative force underlies a call for counteracting impunity. Geoffrey Robertson KC finds the genesis of Magnitsky-style sanctions in a sequence of policies whose lineage can be traced back to the post-Holocaust Nuremberg trials.[147]

This normative underpinning is essential to the legitimacy of crime-based sanctions. At the risk of stating the obvious, crime is not a new phenomenon, nor is the concept of a criminal trial as a means of assigning culpability. Like non-conviction based asset forfeiture, crime-based sanctions evince a belief that, bluntly put, criminal trial alone is not sufficient as *the* ex-post response to crime. This means that revered, time-tested policy choices that we tend to associate with a fair criminal trial are liable to reconsideration, such as the standard of proof necessary successfully to accuse someone of a crime. This criminal justice unorthodoxy requires justification, and the notion of impunity is central to it.

The cornerstone of sanctions is a sense that the perpetrator has improperly evaded accountability, normally due to being shielded by a government. (To draw a parallel with international criminal justice, think of the complementarity rule in the International Criminal Court, which will only intervene if respective states are unable or unwilling to investigate atrocities.)[148] Impunity is obvious in the case of the cover-up that formed the essence of the Magnitsky affair, but also in many an instance of grand corruption, state-directed human rights abuse, or ransomware attacks. In a departure from Blackstone's dictum that it is better for 10 guilty people to escape punishment than for an innocent one to be convicted,[149] contemporary sanctioning powers appear to be guided by the view that it is best to sanction all of the 10. This is not purely an ideological shift but a reflection of the changing circumstances that states confront. In Blackstone's scheme, the protagonists were the state and the accused, and their interactions unfolded within the borders of a single country. In present-day circumstances, governments must decide how, if at all, they deal with harms inflicted by those beyond their borders, and how to support – or, at least, signal support for – the victims.

[145]Rocío Lorca, *Impunity Thick and Thin: The International Criminal Court in the Search for Equality,* 35(2) Leiden J. Int'l L. (2022). *See also* Mark A. Drumbl, *Impunities*, *in* The Oxford Handbook of International Criminal Law 238, 253–55 (Kevin Jon Heller et al., eds., 2020).

[146]Natasa Mavronicola, *Taking Life and Liberty Seriously: Reconsidering Criminal Liability Under Article 2 of the ECHR,* 80(6) Mod. L. Rev. 2016 (2017) relying on, inter alia, Öneryıldız v.Turkey (2005) 41 E.H.R.R. 20, ¶93 (right to life) and Mahmut Kaya v. Turkey, App. No. 22535/93 (ECtHR, Mar. 28, 2000) (right to freedom from torture).

[147]Geoffrey Robertson, Bad People – and How to Be Rid of Them: A Plan B for Human Rights (2021).

[148]Article 17(1) of the Rome Statute of the International Criminal Court.

[149]*See* Fritz Allhoff, *Wrongful Convictions, Wrongful Acquittals, and Blackstone's Ratio* 43 Australasian J. Legal Phil. 39 (2018).

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2. Implications for Sanctions

If redressing impunity were accepted as a de facto criterion for imposing crime-based sanctions, this would entail a simple but meaningful limitation, namely that governments' sanctions energy should not be squandered on those whose wrongdoing has already been dealt with in their home countries. Although this precept is largely observed, there are notable deviations. One of the earliest designees under the Global Magnitsky program was Gulnara Karimova, the daughter of the late president of Uzbekistan.[150] By that time, Karimova had already been charged with multiple offenses in her home country, where she fell out of favor with the new government and was placed under house arrest.[151] Not only was she therefore being processed by the justice system of Uzbekistan, but she was also plainly incapacitated and prevented from carrying out any further (alleged) criminal acts.

Targeting Karimova might be a convenient way of sidestepping diplomatic sensitivities attached to sanctioning a high-ranking foreign official but it contributes little to counteracting impunity. The same objection can be levelled against the designation of Yahya Jammeh, the disgraced former president of The Gambia, as part of the first-ever tranche of Global Magnitsky sanctions.[152] The issue is not that the severity of the alleged wrongdoing does not merit sanctions, provided it can be proven, but that the added value of the designation seems negligible.

Deciding that a targeted person enjoys impunity overseas involves second-guessing the operation of another country's justice system. This can be problematic on two levels. First, there is the principled question of whether it is acceptable for one state ever to pass judgment on the operation of another state's legal system. Second, the practical challenge arises of distinguishing between the proper conclusion of an investigation that ran its course and a bad-faith attempt to shield those involved from liability.

Sometimes, this will pose no difficulty as no investigation will have been undertaken in the state concerned, as in respect of allegedly corrupt Cambodian military officials sanctioned by the US.[153] In other cases, a judgment call will have to be made by the sanctioning state's authorities, such as with regard to a Hezbollah-linked organized crime group that was originally investigated by Paraguayan authorities – to no avail – before being sanctioned by the United States on the grounds of involvement in significant corruption in August 2021.[154]

In the latter instance, sanctions galvanized Paraguayan law enforcement agencies into action as no later than a month after the designations they acted on the U.S. extradition request and arrested the leader of the group, Kassem Mohamad Hijazi.[155] This is history repeating itself following one of the earliest instances of U.S. crime-based sanctions successes, namely the designation of Cali Cartel-affiliated individuals and enterprises under the Foreign Narcotics Kingpin Designation Act 1999, which is credited with significantly constricting the Cartel's opportunities for money laundering and, with time, pressuring the Colombian government into assenting to its leaders' extradition to the United States.[156]

[150]Press Release, U.S. Dep't of Treasury, United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe (Dec. 21, 2017) https://home.treasury.gov/news/press-releases/sm0243 [hereinafter First Global Magnitsky Designations Press Release].

[151]Ivan Nechepurenko, *Uzbekistan Reveals That Ex-Leader's Daughter Is in Custody*, N.Y. Times (Jul. 28, 2017).

[152]First Global Magnitsky Designations Press Release, *supra* note 150.

[153]Press Release, U.S. Dep't of Treasury, Treasury Targets Corrupt Military Officials in Cambodia (Nov. 10, 2021) https://home.treasury.gov/news/press-releases/jy0475.

[154]Henry Pope, *U.S. Sanctions Corruption Networks Worth Approximately $1 Billion*, Organized Crime and Corruption Reporting Project (Aug. 26, 2021), https://www.occrp.org/en/daily/15073-u-s-sanctions-corruption-networks-worth-approximately-1-billion; Press Release, U.S. Dep't of Treasury, Treasury Targets Corruption Networks in Paraguay (Aug. 24, 2021) https://home.treasury.gov/news/press-releases/jy0332.

[155]Emanuele Ottolenghi, *Coordinated Law Enforcement and Treasury Action Against Money Launderers in the Tri-Border Area*, Foundation for Defense of Democracies (Aug. 25, 2021) https://www.fdd.org/analysis/2021/08/25/money-launderers-tri-border-area/.

[156]For a detailed discussion, *see* Haenlein et al., *supra* note 13, at 27–35. *See also Impact of Sanctions on the Rodriguez Orejuela Business Empire,* U.S. Dep't of Treasury (undated) https://home.treasury.gov/system/files/126/rodriguez_orejuela_timeline.pdf.

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That speaks to how sanctions can prompt another government into action. It is through this lens that U.S. sanctions against allegedly corrupt networks in allied nations, such as Bulgaria and Kosovo, should be viewed.[157] In Latvia, a prominent businessman and politician was convicted of money laundering two years after the United States sanctioned him under the Global Magnitsky authorities, although the investigation had already been ongoing by the time of the designation.[158] Another example concerns the lifting of U.S. sanctions against several Honduran companies after the country's authorities "seized or took control over multiple entities and properties" associated with the U.S.-sanctioned drug trafficking group.[159]

Finally, a sui generis instance of using sanctions for criminal justice purposes concerns a truly cooperative designation where the sanctioning government acts hand-in-hand with that of the territorial state. For example, the U.S. government's further designation of Sinaloa cartel members in November 2023 highlighted the collaborative nature of this action:

> This action was coordinated closely with the Government of Mexico, including La Unidad de Inteligencia Financiera (UIF), Mexico's Financial Intelligence Unit. (. . .) Today's action would not have been possible if not for ongoing collaboration with the Federal Bureau of Investigation's (FBI) Tucson – Organized Crime Drug Enforcement Task Force (OCDETF), the Drug Enforcement Administration's (DEA) Phoenix Field Division Group 16 DEALERS, the DEA Nogales District Office Group 51, the DEA Mexico City Country Office, and Homeland Security Investigations' Tucson Office.[160]

Such sanctions are best seen as a mode of international law enforcement cooperation aimed at restraining alleged perpetrators' assets and constricting their access to the formal financial system, analogous to the "misappropriation sanctions" discussed above. In this unusual case, it does not make sense to speak of any impunity nor of any attempt to influence a foreign government's behavior.

There is, therefore, a broad variety of circumstances where sanctions can usefully be imposed in the context of serious crime. Save for collaborative designations, the notion of impunity appears to serve as a relatively reliable policy guide to identifying situations where sanctions may be an appropriate response. What this does *not* mean, however, and what none of the practice surveyed here would support, is the notion that sanctions should not be imposed simply because they stand no chance of influencing a foreign government's course of action. This would mean, for example, that sanctions imposed by the United States on Chinese and North Korean human rights abusers are inappropriate.[161]

Once one accepts the limitations of the "behavior change" idea, the precept that sanctions program must be reversible, and the related notion that only contemporary wrongdoing can be sanctionable, become untenable.[162] Consider the example of Prince Yormie Johnson, a Liberian senator sanctioned under the Global Magnitsky authorities on the international anti-corruption

[157]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Influential Bulgarian Individuals and Their Expansive Networks for Engaging in Corruption (Jun. 2, 2021) https://home.treasury.gov/news/press-releases/jy0208; Press Release, U.S. Dep't of Treasury, Treasury Targets Corruption Networks Linked to Transnational Organized Crime (Dec. 8, 2021) https://home.treasury.gov/news/press-releases/jy0519.

[158]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Corruption and Material Support Networks (Dec. 9, 2019) https://home.treasury.gov/news/press-releases/sm849; *Lembergs found guilty, sentenced to 5 years*, Latvian Public Broadcasting (Feb. 22, 2021), https://eng.lsm.lv/article/society/crime/lembergs-found-guilty-sentenced-to-5-years.a393858/.

[159]Press Release, U.S. Dep't of Treasury, Treasury Delists Former Honduran Money Launderer and Associated Companies (Aug. 25, 2020), https://home.treasury.gov/news/press-releases/sm1106.

[160]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Sinaloa Cartel Network Flush with Illicit Fentanyl on Southwest Border (Nov. 7, 2023), https://home.treasury.gov/news/press-releases/jy1887.

[161]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Perpetrators of Serious Human Rights Abuse on International Human Rights Day (Dec. 10, 2021) https://home.treasury.gov/news/press-releases/jy0526.

[162]*Treasury 2021 Sanctions Review*, *supra* note 42, at 4. *See also* Lori Fisler Damrosch, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts,* 37 Berkeley J. Int'l L. 249, 261–262.

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day (December, 9) in 2021.[163] Johnson is a former warlord involved in Liberian civil war atrocities and known for torturing and executing the then-Liberian president Samuel Doe in 1990, which he videotaped and broadcast across the country.[164] He was sanctioned on corruption grounds due to his alleged ongoing involvement in embezzling public funds and vote-selling. While it is appropriate that his continuing prominence in Liberian public life drew the spotlight onto him, the seriousness of his past human rights abuse would render him a suitable sanctions target in any event. Or, if the 69-year-old Johnson decided to retire from politics tomorrow and enjoy the rewards of his career, it is far from clear what considerations would require the United States to reconsider the listing, in view of the seriousness of his past wrongdoing.

III. Seriousness of the Wrongdoing

It is a truism to say that sanctions are applied in response to serious rather than trivial crime. In thinking through what makes a crime sufficiently serious, two key issues arise, namely the *types* of crime that typically merit a designation and the *magnitude* of the perpetrator's wrongdoing.

As regards the former, there is a connection between the emergence of sanctions programs and governments' foreign policy priorities. To take the United States as an example again, one of its earlier financial sanctions efforts was that under the Foreign Narcotics Kingpin Designation Act 1999. This constituted an escalation in the U.S. project to disrupt the finances of drug trafficking that was manifested in the adoption of the world's first anti-money laundering law in 1986.[165] The sprouts of U.S. corruption-related sanctions appeared in 2004 with the adoption of Presidential Proclamation 7750, signed by George W. Bush during the Special Summit of the Americas in Monterrey. This happened at a time when the United States dramatically increased the resources dedicated to enforcing the Foreign Corruption Practices Act 1977 (FCPA), shortly before the adoption of the National Strategy to Internationalize Efforts against Kleptocracy in 2006.[166] In a cyclical development, the steady drumbeat of corruption designations under the Global Magnitsky authorities had presaged the Biden administration's announcement that corruption constituted a key national security threat in June 2021, followed by the publication of the U.S. Strategy on Countering Corruption in December 2021.[167] Likewise, ransomware-related sanctions against Evil Corp were imposed after the United States repeatedly highlighted the threat ransomware posed to critical infrastructure and exhorted non-cooperative states, in particular Russia, to address the challenge.[168]

By contrast to the United States, the EU has not yet extended its sanctions regime to corruption but announced its intention to do so in September 2022.[169] Beyond this temporary omission of corruption as a ground for sanctions, it is difficult to say whether there remain types of crime that major sanctioning powers should include in their sanctions programs but have not

[163]Press Release, U.S. Embassy in Liberia, U.S. Treasury Sanctions Prince Yormie Johnson Under Global Magnitsky Act (Dec. 9, 2021) https://lr.usembassy.gov/u-s-treasury-sanctions-prince-yormie-johnson-under-global-magnitsky-act/.

[164]Jonathan Paye-Laleh, U.S. *Sanctions Liberia's Ex-Warlord and Senator Prince Johnson*, ABC News (Dec. 11, 2021) https://abcnews.go.com/International/wireStory/us-sanctions-liberias-warlord-senator-prince-johnson-81670953.

[165]Mark Pieth, *The Wolfsberg Process, in* Anti-Money Laundering: International Law and Practice 93, 95 (Wouter Muller et al. eds., 2007).

[166]*See* George W. Bush, *Address to the Third Global Forum on Fighting Corruption,* The White House (2003); Juan Zarate, Treasury's War: The Unleashing of a New Era of Financial Warfare 198–199 (2013).

[167]*Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest*, White House (Jun. 3, 2021); *United States Strategy on Countering Corruption: Pursuant to the National Security Study Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest*, White House (Dec. 2021).

[168]Dan Mangan, *Biden Takes Shot at Putin as He Touts REvil Ransom Seizure, New Criminal Cyberattack Cases*, CNBC (Nov. 8, 2019), https://www.cnbc.com/2021/11/08/revil-ransomware-2-arrested-for-international-cyberattacks.html.

[169]Ursula von der Leyen, *2022 State of the Union Address by President von der Leyen* (Sep. 14, 2022) https://ec.europa.eu/commission/presscorner/detail/ov/speech_22_5493. This has since been reaffirmed in May 2023. *See* Press Release, European Commission, Anti-corruption: Stronger Rules to Fight Corruption in the EU and Worldwide (May 3, 2023) https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2516.

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yet done so. Human trafficking, arms trafficking, and environmental crime are some of the many types of crime that wreak tremendous harm on their victims and could be addressed via sanctions. However, corruption and human rights sanctions already act in a catch-all manner apt to encompass most government-approved or -tolerated crime, whether economic or violent, which is precisely the kind of crime that sanctions are useful in addressing. This is evident, for instance, in one of the earliest Global Magnitsky designations, that of a Pakistani surgeon involved in organ trafficking.[170]

The magnitude of the wrongdoing, for its part, is a criterion whose relevance is obvious. There is no shortage of people involved in serious corruption, human rights abuse, or cybercrime. As a result, the difficulty lies less in identifying those who fit the bill than in prioritizing the worst offenders. That goes to the heart of consistency, integrity, and credibility of sanctions programs. (The same problem of selectivity exists has been raised in connection with proposals to expand the application of universal jurisdiction, i.e. prosecution of certain serious crimes in the absence of a nexus to the state bringing the prosecution).[171]

So far the governments' answers to this challenge, especially in the United States, have tended to be procedural. That is to say, as best we know, crime-based sanctions programs do *not* ordinarily involve a proactive attempt by governments to draw up a list of the worst offenders. Instead, information is gathered from non-governmental organizations and embassies and assessed as to whether a designation is warranted.[172]

This understandable, if somewhat haphazard, approach results in "pinprick" designations discussed above, which involve several targets sanctioned per country, with no claim to comprehensive coverage of everyone involved in similarly reprehensible conduct. An alternative way of handling sanctions is to extend them to a broad range of individuals responsible for a particular crime, so that dozens of people per country end up on a sanctions list. An illustration of this would be the U.S. designations of Russian officials under the original Magnitsky Act 2012, as well as Canadian sanctions against 19 Venezuelan government officials under its own Global Magnitsky law in November 2017.[173] That can be described as the "shotgun" pattern, if only in the sense of characterizing the concentration of designations, rather than implying superior impact.

The prevalence of the "pinprick" approach demonstrates that the magnitude of the wrongdoing tends to act as a threshold criterion, in that the wrongdoing has to be of sufficient seriousness in order to be sanctioned but there is no expectation that *all* wrongdoing of the same level of severity will be sanctioned. That constitutes another difference between crime-based sanctions and traditional criminal justice measures, where the precept of like cases being treated alike, while not absolute in practice, holds greater weight. Or, put another way, once the initial threshold of the seriousness of a crime is satisfied, crime-based sanctions are characterized by an extreme amount of discretion.

This is particularly evident in relation to U.S. sanctions programs predicated on drug trafficking and transnational organized crime. In addition to the abovementioned Cali Cartel, organizations sanctioned under the transnational organized crime authorities include (most recently) the Central American gang MS-13, the Mexican cartel Los Zetas, the Yakuza, the Camorra, and even the "Thieves-in-Law," described by the Treasury as a "Eurasian crime syndicate" but more accurately thought of as an honorific rank bestowed upon some organized

[170]First Global Magnitsky Designations Press Release, *supra* note 150.

[171]For discussion, *see* Robert Cryer, Prosecuting International Crimes: Selectivity and the International Criminal Law Regime 95–101 (2005).

[172]David Powers, Julia Guttman & Laura Davis, *Fighting Back Against Corrupt Foreign Officials*, LAW360 (Feb. 5, 2010), https://www.law360.com/articles/147498.

[173]Press Release, Global Affairs Canada, Justice for Victims of Corrupt Foreign Officials – Case 2 (Nov. 6, 2017) https://www.canada.ca/en/global-affairs/news/2017/11/case_2.html.

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crime figures in post-Soviet countries.[174] Given the sheer number of organized crime groups worldwide, it is difficult to see this as anything but an acknowledgment of the special seriousness of these groups' wrongdoing. It is notable, also, that members of each of them have, at various points, faced U.S. indictments, thus providing a further example of the "double-barreled" use of indictments and sanctions discussed above.[175] Likewise, the United States has both sanctioned and indicted the "Los Chapitos," the alleged leaders of the Sinaloa Cartel in the aftermath of the conviction of Joaquin "El Chapo" Guzman Loera.[176]

Another recent transnational crime designation speaks to the highly discretionary, and therefore occasionally controversial, nature of organized crime-related sanctions. It concerns the Wagner Group, a Russian state-affiliated mercenary outfit credibly accused of war crimes in Ukraine, Mali, the Central African Republic, and Syria.[177] The Wagner Group's activities have become the focus of considerable attention in the United States, including proposals to designate it as a "foreign terrorist organization."[178] According to some commentators, the primary benefit of such a designation, compared to a transnational crime one, is the broader jurisdictional reach of the offense of providing material support to terrorist groups, compared to the offense of breaching a sanctions law.[179] Since both offenses involve broad and vaguely defined jurisdictional assertions, any conclusive opinion on that issue would require detailed comparative analysis of respective provisions.[180]

[174]For MS-13, *see* Press Release, U.S. Dep't of Treasury, Treasury Sanctions MS-13-Affiliates for Drug Trafficking and Contract Killings in Central America and the United States (Feb. 8, 2023) https://home.treasury.gov/news/press-releases/jy1253. For the rest, *see* Annex to Exec. Order No. 13,581, 76 Fed. Reg. 44,757 (Jul. 27, 2011). On "thieves-in-law," *cf.* Mark Galeotti, THE VORY: RUSSIA'S SUPER MAFIA (2018).

[175]For MS-13, *see* Press Release, U.S. Dep't of Justice, Ten MS-13 Gang Members Indicted on Murder and Racketeering Charges (Aug. 25, 2022) https://www.justice.gov/opa/pr/ten-ms-13-gang-members-indicted-murder-and-racketeering-charges. For Los Zetas, *see* Press Release, U.S. Attorney's Office, Eastern District of Texas, Two High-Ranking Los Zetas Cartel Members Latest Sentenced to Federal Prison for Drug Trafficking in the Eastern District of Texas (Nov. 16, 2022) https://www.justice.gov/usao-edtx/pr/two-high-ranking-los-zetas-cartel-members-latest-sentenced-federal-prison-drug. For the Yakuza, *see* Press Release, U.S. Dep't of Justice, U.S. Attorney Announces Arrests Of A Yakuza Leader And Affiliates For International Trafficking Of Narcotics And Weapons, Including Surface-To-Air Missile (Apr. 7, 2022) https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-arrests-yakuza-leader-and-affiliates-international. For a thief-in-law, *see* Press Release, U.S. Dep't of Justice, "Thief-In-Law" Razhden Shulaya Sentenced In Manhattan Federal Court To 45 Years In Prison (Dec. 19, 2018) https://www.justice.gov/usao-sdny/pr/thief-law-razhden-shulaya-sentenced-manhattan-federal-court-45-years-prison.

[176]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Fourth Member of "Los Chapitos" and Expands Targeting of Deadly Fentanyl Supply Network (May 9, 2023) https://home.treasury.gov/news/press-releases/jy1467.

[177]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Russian Proxy Wagner Group as a Transnational Criminal Organization (Jan. 26, 2023) https://home.treasury.gov/news/press-releases/jy1220. *See also* Elian Peltier, *Wagner Group May Have Committed War Crimes in Mali, U.N. Experts Say*, N.Y. TIMES (Jan. 31, 2023) https://www.nytimes.com/2023/01/31/world/africa/mali-wagner-civilian-killings.html.

[178]*See, e.g.*, Press Release, Ben Cardin, *Cardin, Wicker, Colleagues Lead Legislation to Designate Wagner Group As a Foreign Terrorist Organization* (Feb. 15, 2023) https://www.cardin.senate.gov/press-releases/cardin-wicker-colleagues-lead-legislation-to-designate-wagner-group-as-a-foreign-terrorist-organization/.

[179]James Petrila & Phil Wasielewski, *The Case for Designating Wagner Group as a Foreign Terrorist Organization Is Still Compelling*, LAWFARE (Jan. 18, 2023) https://www.lawfareblog.com/case-designating-wagner-group-foreign-terrorist-organization-still-compelling. *Cf.* Naman Karl-Thomas Habtom, The Potential Consequences for Africa of an FTO Designation of the Wagner Group, LAWFARE (Mar. 7, 2023) https://www.lawfareblog.com/potential-consequences-africa-fto-designation-wagner-group.

[180]Material support to designated "foreign terrorist organizations" is criminal under 18 U.S. Code § 2339B. The provision expressly specifies its jurisdictional reach in § 2339B(d), including circumstances in which the offense "occurs in or affects interstate or foreign commerce." For further detail, *see, e.g.*, John De Pue, Fundamental Principles Governing Extraterritorial Prosecutions–Jurisdiction and Venue, 55(2) U.S. ATT'YS BULL. 1, 5–7 (2007). The general offense of violating U.S. sanctions is found in 50 U.S. Code § 1705. For an analysis of its jurisdictional aspects, *see* Dennis Boyle, *Who is a "U.S. Person?" Are there any limits to American Jurisdiction Under the International Emergency Economic Powers Act?* IR GLOBAL (Jun. 18, 2020) https://irglobal.com/article/who-is-a-us-person-are-there-any-limits-to-american-jurisdiction-under-the-international-emergency-economic-powers-act/.

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As all the groups mentioned above would have already operated in a clandestine manner, whether those designations had any tangible impact is anyone's guess. However, in at least one instance, a recent designation under U.S. transnational organized crime authorities has apparently made a difference. In April 2022, the United States sanctioned the Kinahan Organized Crime Group, a drug-trafficking ring composed predominantly of Irish citizens living at large in the UAE.[181] A year after the designation, *The Times* published an interview with a self-professed professional money launderer hired by the Kinahans to invest £200 million, who complained that in the aftermath of the sanctions "all meetings were called off and everybody scattered," leaving him unpaid.[182] This is a prime example of the publicity effect of sanctions, quite apart from the immediate consequence of asset freezes and travel bans.

IV. Seniority of the Perpetrator

The seniority of the perpetrator is a factor that presents the decision-maker with a difficult choice. Serious crime, be that grand corruption or human rights abuse, can only be carried out by extensive, networked groups of people with different modes of involvement. Those at the top bear the greatest moral responsibility for the crime, are likely to have generated most income through their wrongdoing, and, to the extent that sanctions serve deterrent purposes, are those whom it is most important to deter from further wrongdoing. Thus, Australia's sanctions regulations list "the status or the position of the person or entity" as the first one among the factors that "may" be taken into account in imposing corruption-related sanctions:

> "(a) the status or position of the person or entity;
>
> (b) the nature, extent and impact of the conduct of the person or entity;
>
> (c) the circumstances in which that conduct occurred;
>
> (d) any other matters the Minister considers relevant."[183]

Sanctions laws tend to be crafted so as to enable sanctions against those who head up criminal organizations. In the United States, that was one of the achievements of expanding Global Magnitsky sanctions by adopting Executive Order 13818. Executive Order 13818 enables sanctions against those found "to be or have been a leader or official of" an entity, including a governmental entity, engaged in either corruption or human rights abuse.[184]

However, the United States has generally avoided targeting heads of states or government ministers. As an example, one of the first Global Magnitsky designations was that of the son of Russia's prosecutor general for involvement in corruption, whereas the prosecutor general himself was not designated.[185] It is possible that this merely reflects the available information, but it may also evince a certain reluctance to target the top brass. Equally, the U.S.

[181]Press Release, U.S. Dep't of Treasury, Treasury Sanctions Notorious Kinahan Organized Crime Group (Apr. 11, 2022) https://home.treasury.gov/news/press-releases/jy0713.

[182]John Mooney, "The Kinahan gang hired me to launder £200m. Here's what happened", The Times (Apr. 9, 2023) https://www.thetimes.co.uk/article/kinahan-gang-drug-cartel-launder-200-irish-organised-crime-2023-ws0699ggt. The article offers a rare glimpse into the operation of a professional money launderer. *Cf.* FATF, Professional Money Laundering (2018); Michael Levi, *Making Sense of Professional Enablers' Involvement in Laundering Organized Crime Proceeds and of Their Regulation*, 24 Trends in Organized Crime 96 (2021).

[183]Autonomous Sanctions Regulations, Regulation 6(6).

[184]Exec. Order No. 13,818, 82 F.R. 60839 (2017).

[185]First Global Magnitsky Designations Press Release, *supra* note 150.

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announcement of sanctions against a spate of Nicaraguan officials made allusion to endemic corruption under its respective government but no sanctions were imposed against the country's president.[186]

That said, even heads of state are not wholly unassailable. The United States, the UK, and the EU have all sanctioned the president of Belarus Alexander Lukashenko, while the United States has targeted Venezuela's president Nicolás Maduro with both sanctions and criminal charges.[187] Both of these heads of state are not viewed as such by the sanctioning states, the former due to electoral fraud and repression that secured his latest purported reelection, and the latter because of civil strife in which the United States acknowledged Maduro's opponent as the legitimate president.[188] Outside the context of crime-based sanctions, Russia's president Vladimir Putin became subject to U.S., EU, UK and other sanctions regimes in February 2022.[189]

Some argue that official immunities preclude the designation of heads of state, but this is only true to a degree.[190] While freezing the property of an individual benefitting from official immunities is likely to be in breach of international law, the same concern does not apply to the imposition of a travel ban, nor to the designation itself as long as no attachment of the assets follows.[191] In fact, expressing displeasure with a foreigner by means of barring him or her from entry is such a well-established fixture of diplomatic life that the CJEU allowed an EU member state to designate as inadmissible the president of another EU member state where doing so in respect of a private citizen would be incompatible with the EU's freedom of movement.[192]

For these reasons, the caution of states in sanctioning top officials of foreign governments is best explicable as a product of weighing the diplomatic equities involved, not legal constraints. As a matter of principle, the seniority of the perpetrator militates *in favor* of adopting sanctions rather than *against* them. This is because, generally speaking, seniority is correlated with the potential for greater seriousness of the wrongdoing as well as impunity, which are central to the need for sanctions as a criminal justice tool.

[186]Press Release, U.S. Dep't of State, New Sanctions Following Sham Elections in Nicaragua (Nov. 15, 2021) https://www.state.gov/new-sanctions-following-sham-elections-in-nicaragua/.

[187]Ben Smith et al., *EU, UK, U.S. and Canada Coordinate on Further Sanctions Against Belarus*, BAKER MCKENZIE (Dec. 6, 2021) https://sanctionsnews.bakermckenzie.com/eu-uk-us-and-canada-coordinate-on-further-sanctions-against-belarus/; Exec. Order No. 13,692, 80 F.R. 12747 (2015).

[188]Press Statement, U.S. Dep't of State, Recognition of Juan Guaido as Venezuela's Interim President (Jan. 23, 2019) https://2017-2021.state.gov/recognition-of-juan-guaido-as-venezuelas-interim-president/index.html; *Belarus: Declaration by the High Representative on Behalf of the European Union on the So-Called 'Inauguration' of Aleksandr Lukashenko,* COUNCIL OF THE EU (Sep. 24, 2020) https://www.consilium.europa.eu/en/press/press-releases/2020/09/24/belarus-declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-so-called-inauguration-of-aleksandr-lukashenko/. *See also United States Recognizes the Opposition Government in Venezuela and Imposes Sanctions as Tensions Escalate,* 113(3) AM. J. INT'L L. 601 (2019).

[189]*See* the sanctions tracker at https://nowheretorun.org/. As of August 2023, Vladimir Putin is subject to sanctions at least in the United States, the EU, the UK, Australia, Canada, Japan, and Switzerland.

[190]Paola Pillitu, *European "Sanctions" against Zimbabwe's Head of State and Foreign Minister: A Blow to Personal Immunities of Senior State Officials?* 1 J. INT'L CRIM. JUST. 453 (2003); Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion* 17 EUR. J. INT'L L. 881 (2006); Geoffrey Robertson, *Europe Needs a Magnitsky Law, in* WHY EUROPE NEEDS A MAGNITSKY LAW: SHOULD THE EU FOLLOW THE US? 163 (Elena Servettaz ed., 2013).

[191]*See* CORRUPTION AND TARGETED SANCTIONS, *supra* note 52, at 243–56.

[192]Hungary v. Slovak Republic, Case C-364/10 (Oct. 16, 2012).

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D. CONCLUSION

The objective of this article has been to clarify the principles that should govern the imposition of targeted sanctions in response to crime. This exercise has been based on two premises, namely that an account of these principles should be generally consistent with existing sanctions practice as well as convincingly explain the added value of crime-based sanctions compared to a suite of conventional criminal justice measures, including criminal prosecutions and non-conviction based asset forfeiture.

It is evident that the much-vaunted notion of behavior change as the keystone of sanctions policy is problematic. There is no good reason to maintain that someone involved in serious crime, such as grand corruption, becomes any less suitable as a sanctions target if they are particularly unlikely to mend their ways. By contrast, punishment and disruption – for past conduct and ongoing conduct, respectively – present a compelling set of objectives for crime-based sanctions. With the behavior change doctrine displaced from its throne, some of its prescriptions likewise lose sway, such as the idea that sanctions must be reversible or that they can only be applied to contemporaneous conduct.

There are four key factors that account for the imposition of crime-based sanctions, encapsulated in the DISS formula: *dependence* of the targeted person on the sanctioning state; *impunity* of the perpetrator; *seriousness* of the wrongdoing; and *seniority* of the perpetrator. These variables are sufficiently general to serve as a framework that can apply across various categories of criminal behavior, but at the same time they are enough to provide clarity and consistency. For instance, "seriousness" in the context of ransomware attacks may mean attacks on critical infrastructure that would set apart sanctionable ransomware organizations from their less outrageous competitors, while in relation to grand corruption the amounts involved, and the effects on the provision of public services, would likely be determinative.

The first of these factors ("dependence") is determinative of the likely impact of sanctions, as the stronger the nexus between the sanctioning state and the prospective target, the greater the effect on that target. Meanwhile, the remaining three factors ("impunity," "seriousness," and "seniority") go to the heart of identifying situations that are sufficiently egregious yet not effectively addressed by conventional criminal justice tools. Those other tools, specifically criminal prosecution and non-conviction based asset forfeiture, should generally take priority, unless the alleged perpetrator is being improperly shielded by a foreign state, which is why the notion of impunity is central to crime-based sanctions.

As with any other criminal justice measure, the effect of sanctions on the targeted person's life raises human rights and due process concerns. On this front, existing practices fall short, as they heavily prioritize governments' freedom to impose sanctions and create the risk of sanctions being used as "criminal justice light," or coercive measures that can be imposed with limited oversight and accountability. To mitigate this, this article endorses the calls to subject crime-based sanctions to the civil standard of proof by express legislative provision.

The overarching ambition behind these recommendations is to normalize crime-based sanctions as a novel but increasingly important criminal justice measure. Notwithstanding the origin of sanctions as a foreign policy tool, insistence on *all* sanctions being *nothing more than* an extension of a government's diplomacy overlooks the need for a set of principles that will ensure the consistency, integrity, and credibility of crime-based sanctions programs.

This is not to negate the role of foreign policy considerations. Sanctions are typically administered by executive agencies rather than law enforcement authorities, and are likely to remain that way. Some designations that would otherwise have taken place may be forestalled due to foreign policy sensitivities. None of this is objectionable, but nor should it obscure the fact that a legal tool that addresses criminal misconduct should be used, first and foremost, with criminal justice objectives in mind.

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