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Magnitsky Sanctions, Corruption, and Asset Recovery

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Abstract

This chapter examines Magnitsky sanctions from the perspective of international anti-corruption law, in particular the law governing asset recovery. A comparative analysis of the sanctions regimes adopted by Australia, Canada, the United Kingdom, and the United States provides the basis for this study of how Magnitsky sanctions function as an anti-corruption tool, and how or whether they align with international anti-corruption law. This comparative analysis shows that Magnitsky sanctions may effectively result in the indefinite freezing or blocking of the assets of targeted individuals, including in situations where the assets represent foreign public funds that have been misappropriated or embezzled by the sanctioned individual. This chapter argues that such an outcome is difficult to reconcile with international law on asset recovery, which is designed to enable the eventual confiscation and return of stolen public assets.

1. Introduction

Over the past decade, so-called 'Magnitsky sanctions' have emerged as a new and distinct instrument for combatting corruption as well as human rights abuses. From an anti-corruption perspective, such sanctions can be seen as a complement or alternative to criminal prosecution and civil confiscation proceedings. Magnitsky sanctions deserve consideration in this book because a number of states have added them to their arsenal of anti-corruption measures, and this number will mostly likely grow in the coming years. The purpose of this chapter is to survey a selection of Magnitsky sanctions regimes and to consider how these regimes align with existing international anti-corruption law, in particular the law governing asset recovery.

Sanctions themselves are hardly a new tool in international relations, but they are relatively new in the international anti-corruption field, and they do not fit neatly within the

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existing international anti-corruption legal regime. The United States initially adopted Magnitsky Sanctions in 2012, in response to a particular chain of events that unfolded in Russia, and they have spread since then through adoption by a number of other states around the world. Magnitsky sanctions, which represent a tool of both foreign policy and criminal justice, are used unilaterally by some states in response to acts of corruption and human rights violations that occur abroad.[1] They are 'targeted' sanctions in that they entail measures imposed against the individuals responsible for acts of corruption or human rights violations. Such sanctions are not imposed directly against the foreign state that tolerates or encourages corruption or human rights violations by its officials. Instead, the sanctioning state targets individuals by denying them entry and by freezing or blocking their assets. Through targeted interventions, the state imposing sanctions attempts to avoid collateral damage to the larger population of the foreign state.

Magnitsky sanctions are grounded in domestic laws and regulations that provide, among other things, for asset freezing. Although such measures to restrain assets are also addressed in international anti-corruption treaties, in particular the 2003 United Nations Convention against Corruption (UNCAC), it appears that Magnitsky sanctions have been developed separately from this international regime, and seemingly in pursuit of different a function.[2] Whereas UNCAC treats asset freezing as a means to preserve assets, with a view towards eventual confiscation, Magnitsky sanctions enable domestic authorities to pursue asset freezing or blocking as an end in itself. Such sanctions can result in asset freezing or blocking that is effectively indefinite and not necessarily associated with ongoing criminal or civil proceedings in the sanctioning state or the state of the targeted individual.

The effectively indefinite restraint of assets by states imposing Magnitsky sanctions is open to critique, especially where the measures are unaccompanied by related domestic criminal proceedings. While the indefinite restraint of assets has been critiqued in the context of counter-terrorism sanctions, this has been less of a focus of scholarship on Magnitsky sanctions.[3] In cases where the assets frozen or blocked by Magnitsky sanctions represent

[1] Anton Moiseienko, 'Crime and Sanctions: Beyond Sanctions as a Foreign Policy Tool', German Law Journal (*forthcoming*).

[2] United Nations Convention against Corruption (adopted on 31 October 2003, entered into force on 14 December 2005) 2349 UNTS 41 (UNCAC).

[3] For discussions of the indefinite character of sanctions in the counter-terrorism context, see, see Peter L. Fitzgerald, 'Smarter Smart Sanctions' Penn State International Law Review vol. 26 (2007) 37, 48-51; Iain Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' Nordic Journal of International Law vol. 72 (2003) 159, 188-190. For a discussion of the indefinite character of

misappropriated public funds, those assets should be confiscated and eventually returned to their state of origin so that they can be disposed of in a manner that benefits the public.[4] While indefinitely restraining the assets of foreign officials may allow states to further foreign policy goals, this practice is hard to reconcile with the existing international anti-corruption regime, particularly the rules governing asset recovery.

This chapter begins by describing the origins and the spread of Magnitsky sanctions (part 2). The following section explores the main features of Magnitsky sanctions by analyzing the Magnitsky sanctions regimes adopted by four common law countries: Australia, Canada, the United Kingdom, and the United States (part 3). The chapter then argues that these regimes conflict with at least the spirit, if not the letter of international anti-corruption law, especially the rules governing asset recovery (part 4). As other states weigh the adoption of their own Magnitsky regimes, they ought to considering how these sanctions can be brought into better alignment with both domestic and international anti-corruption law.

2. The Origins and Spread of Magnitsky Sanctions

Unilateral sanctions regimes typically represent a response to a general pattern or phenomenon, such as terrorism. Magnitsky sanctions were, however, originally a response to a specific chain of events involving Sergei Magnitsky, the head of the tax practice at a Moscow-based firm providing legal, tax, accounting and auditing services to foreign investors in Russia.[5] In 2007, the Russian state expropriated three Russian subsidiaries of the Hermitage Fund, which was then the largest foreign investment fund in Russia, and a client of Mr. Magnitsky.[6] William

Magnitsky sanctions, see Andrew Dornbierer, 'From Sanctions to Confiscation While Upholding the Rule of Law', Working Paper 42, Basel Institute on Governance (2023). The indefinite character of Magnitsky sanctions has not be the subject of significant commentary, other aspects of these sanctions regimes have been the subject of a substantial amount of secondary literature. See e.g., Lorenzo Pasculli and Ben Standford, 'Form and Flexibility: The Normalisation of "Magnitsky Sanctions" in the Face of the Rule of Law' Hague Journal of the Rule of Law vol. 15 (2022) 109; Anton Moiseienko, *Corruption and Targeted Sanctions: Law and Policy of Anti-Corruption Entry Bans* (Brill Nijhoff 2019); Tom Firestone and Kerry Contini, 'The Global Magnitsky Act' Criminal Law Forum vol. 29 (2018) 617; Tom Ruys, 'Reflections on the "Global Magnitsky Act" and the Use of Targeted Sanctions in the Fight against Grand Corruption' Revue Belge de Droit International vol. 50 (2017) 492; Emma Gilligan, 'Smart Sanctions Against Russia: Human Rights, Magnitsky and the Ukrainian Crisis' Journal of Post-Soviet Democratization vol. 24 (2016) 257.

[4] For an empirical study of the aftermath and impact of Magnitsky sanctions, see Anton Moiseienko, Megan Musni, Eva van der Merwe, 'A Journey of 20: An Empirical Study of the Impact of the Magnitsky Sanctions on the Earliest Corruption Designees' (June 2023).

[5] European Court of Human Rights, *Magnitsky and Others v Russia*, Applications nos. 32631/09 and 53799/12, Judgment, 12 August 2019, para. 12.

[6] Ibid. paras. 12-13.

Browder headed the Moscow office of the Hermitage Fund.[7] In 2008, Mr. Magnitsky discovered that the subsidiaries of Hermitage had been fraudulently stolen by the Russian government so that the US$ 230 million in taxes paid by the subsidiaries in 2006 could be misappropriated by officers of the Russian Ministry of Interior.[8] A Russian special investigator opened a criminal investigation into Hermitage's allegations, and Mr. Magnitsky provided the special investigator with statements regarding the theft of the subsidiaries, the tax refund, and alleged misconduct by Russian officials.[9] In November 2008, Mr. Magnitsky was arrested on charges of tax evasion.[10] While in detention, Mr. Magnitsky was denied medical assistance for chronic conditions and subject to beatings, which led to his death on 16 November 2009, after a year in prison.[11]

Mr. Magnitsky's saga continued posthumously in courtrooms in Strasbourg and Moscow. In a 2019 judgment, the European Court of Human Rights found, among other things, that the Russian authorities' treatment of Mr. Magnitsky while in detention violated his right to life due to the failure of Russian authorities to provide him with proper and timely medical treatment.[12] Meanwhile, at the domestic level, Russian authorities decided in 2011 to reopen the criminal investigation into Mr. Magnitsky, which had been discontinued after his death.[13] These criminal proceedings culminated in 2013 with the convictions of both Mr. Magnitsky and Mr. Browder for tax evasion.[14] The emergence of Magnitsky sanctions is largely attributable to the advocacy of Mr. Browder, who has led the Global Magnitsky Justice Campaign since Mr. Magnitsky's death.[15] Magnitsky sanctions in the United States and elsewhere have emerged out of this campaign.

The United States led the way in 2012, with the passage of the Sergei Magnitsky Rule of Law Accountability Act.[16] This law had a relatively narrow scope, as it only enabled the

[7] Ibid. para. 12.

[8] Ibid. paras. 13-27.

[9] Ibid. paras. 26-28.

[10] Ibid. para. 34.

[11] Ibid. paras. 56-95.

[12] Ibid. para. 265.

[13] Ibid. paras. 139-141.

[14] Ibid. paras. 157-159.

[15] Bill Browder, Head, Global Magnitsky Justice Campaign, <https://www.billbrowder.com/bio/>.

[16] US, Sergei Magnitsky Rule of Law Accountability Act of 2012, 22 USC 5811.

imposition of sanctions against the individuals involved in the Magnitsky story, and persons responsible for gross human rights violations against individuals acting as whistleblowers in relation to illegal activities of Russian government officials or as human rights activists/defenders in Russia.[17] This law specifically provided for sanctions against persons who were 'responsible for the detention, abuse or death' of Mr Magnitsky; who participated in efforts to conceal his detention, abuse or death; who financially benefitted from his detention, abuse or death; or who were involved in the criminal conspiracy uncovered by him.[18] While the 2012 law enabled sanctions against Russian human rights violators in general, it did not enable sanctions against Russian individuals generally involved in corruption.[19] The legislation only enabled sanctions against the persons who were involved in the acts of corruption (i.e., 'the criminal conspiracy') uncovered by Mr. Magnitsky. When the 2012 law was enacted, US legislators appear to have been concerned with corruption only to the extent that corruption negatively impacts human rights. The law's preambular language, which sets out the findings of Congress, notes that Mr. Magnitsky's experience illustrates the 'negative effects of official corruption on the rights of an individual citizen', and appears to be emblematic of a broader disregard for human rights on the part of the Russian state.[20]

In 2016, the US Congress passed the Global Magnitsky Human Rights Accountability Act, which responded to criticisms that the 2012 Act focused solely on Russia.[21] The 2016 Act broadened the scope of US Magnitsky sanctions by making them global in reach rather than Russia-specific, and also by enabling sanctions against individuals involved in serious corruption, but not necessarily in relation to the Magnitsky incident.[22] A 2017 Executive Order further implemented and also expanded upon the 2016 Act by broadening the class of potential sanction targets to include perpetrators of 'serious' as opposed to 'gross' human rights

[17] Ibid. s. 404(a)(2).

[18] Ibid. s. 404(a)(1).

[19] The law enables sanctions against persons 'responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals seeking (A) to expose illegal activity carried out by officials of the Government of the Russian Federation; or (B) to obtain, exercise, defend or promote internationally recognized human rights and freedoms, such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic elections, in Russia'. Ibid. s. 404(a)(2).

[20] Ibid. s. 402(a)(12).

[21] Magnitsky sanctions with global reach were favored by some legislators in 2012, when the Sergei Magnitsky Rule of Law Accountability Act was passed. Congressional Research Service, 'The Global Magnitsky Human Rights Accountability Act: Scope, Implementation, and Considerations for Congress', 3 December 2021, p. 2; Firestone and Contini (n 3).

[22] US, Global Magnitsky Human Rights Accountability Act, 22 USC 2656.

violations, as well as secondary participants in human rights abuses and acts of corruption.[23] The term 'secondary participants' refers to individuals who have materially assisted, sponsored or supported individuals engaged in serious human rights abuses and acts of corruption.[24]

The US Magnitsky sanctions have inspired a number of other countries to adopt similar legislation. The global spread of such sanctions legislation appears to have been an explicit goal not only of Mr. Browder's Global Magnitsky Justice Campaign, but also the US government.[25] Since passage of the 2016 Global Magnitsky Act by the US Congress, comparable laws have been passed by the legislatures of a number of states, including close US allies (Canada, the United Kingdom, and Australia); the Baltic states (Estonia, Lithuania, Latvia); other European states (Kosovo and the Czech Republic); and British territories (Gibraltar, which is a British Overseas Territory, and Jersey, which is a Crown Dependency). While the European Union has adopted Global Human Rights Sanctions, global anti-corruption sanctions still remain under consideration.[26] The following analysis of Magnitsky sanctions focuses on the laws adopted in Australia, Canada, the United Kingdom, and the United States because these four states have similar legal systems, based in the common law, and their sanctions regimes are therefore particularly amenable to comparison.[27] The comparative analysis that follows in part 3 is intended to foreground the analysis in part 4 of how these regimes align (or fail to align) with international anti-corruption law.

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[23] US, Executive Order 13818, Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, 20 December 2017, s. 1(a)(ii), 1(a)(iii).

[24] Ibid. s. 1(a)(iii).

[25] US Department of State, 2017 Global Magnitsky Human Rights Accountability Act Annual Report, Federal Register, Vol. 83, No. 23, 2 February 2018, 4950, 4953 (explaining that the US 'consulted closely with the United Kingdom and Canadian government counterparts over the last year to encourage development and implementation of statutes' similar to the US Global Magnitsky Act); see also US Department of State, 2020 Global Magnitsky Human Rights Accountability Act Annual Report, Federal Register, Vol. 86, No. 1, 4 January 2021, 174, 178; US Department of State, 2019 Global Magnitsky Human Rights Accountability Act Annual Report, Federal Register, Vol. 84, No. 250, 31 December 2019, 72424, 72429-72430.

[26] Nathanael Tilahun, 'The EU Global Human Rights Sanctions Regime: between Self Help and Global Governance' International Community Law Review vol. 25 (2023) 3; Massimo Gordini, Katarzyna, Szczypska and Alinur Inalci, 'Including Grand Corruption in the EU Global Human Rights Sanctions Regime: Why It Matters' European View vol. 21 (2022) 82; Christina Eckes, 'EU Global Human Rights Sanctions Regime: Is the Genie out of the Bottle?' Journal of Contemporary European Studies vol. 30 (2022) 255; Christina Eckes, 'EU Human Rights Sanctions Regime: Striving for Utopia Backed by Sovereign Power?' European Foreign Affairs Review vol. 26 (2021) 219.

[27] Australia, Autonomous Sanctions Act 2011; Autonomous Sanctions Amendment (Magnitsky-Style and Other Thematic Sanctions) Act 2021; Canada, Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) SC 2017; United Kingdom, Sanctions and Anti-Money Laundering Act 2018; The Global Anti-Corruption Sanctions Regulations 2021.

3. Basic Contours of Magnitsky Sanctions

This section sketches the basic contours of Magnitsky sanctions legislation in Australia, Canada, the United Kingdom, and the United States. The features described in this section include: (1) the stated objectives of these sanctions regimes; (2) the conduct and people that are sanctionable; (3) what the sanctions entail; and (4) the procedures for listing and delisting. This section concludes by providing some figures about the use of these sanctions to date. While these four states have taken largely the same approach towards enabling sanctions against alleged perpetrators of corruption and human rights abusers, these regimes are not identical to each other. Where the differences are significant, this is noted in the discussion that follows.

a. Objectives of Sanctions Regimes

These four states have articulated a range of very broad objectives for their Magnitsky sanctions regimes, including punishment, prevention, and protection of the national financial system. In describing the objectives of these sanctions regimes, this discussion relies on the text of the laws and regulations, and in the case of Australia, on an explanatory memorandum accompanying the legislation.[28] Although these legal instruments articulate objectives, they do not indicate how sanctions would, at least in theory, help to advance these goals, nor do they provide for any follow-up evaluation of whether sanctions are, in fact, achieving these objectives (i.e., whether they are effective).[29]

The United States and Australia both identify punishment for perpetrators as an objective of these sanctions regimes. This punitive objective contrasts with the objectives of many other unilateral sanctions regimes, which typically aim not at punishment, but at changing behavior, disrupting or constraining criminal conduct, and signaling policy stances and/or disapproval.[30] The US executive order concerning Magnitsky sanctions indicates, however, that

[28] The Parliament of the Commonwealth of Australia, House of Representatives, Autonomous Sanctions Amendment (Magnitsky-Style and Other Thematic Sanctions) Bill 2021, Revised Explanatory Memorandum [Australia Explanatory Memorandum].

[29] But see s. 1264 of the US, Global Magnitsky Human Rights Accountability Act. The Secretary of State, in consultation with the Secretary of the Treasury, submits to Congress an annual report on the implementation of the Act and Executive Order 13818.

[30] See e.g., US Department of the Treasury, 'The Treasury 2021 Sanctions Review' (October 2021) p. 1; Moiseienko (n 1).

the objective of this regime is to 'impose tangible and significant consequences on those who commit serious human rights abuse or engage in corruption'.[31] For its part, the Australian legislation aims to 'penalise those responsible', while minimizing the adverse impact of sanctions on the general population of the foreign country whose nationals are being targeted.[32] By contrast, the UK legislation does not explicitly identify punishment as an objective, but instead broadly aims to 'prevent and combat serious corruption,' by which it refers to bribery or misappropriation of property.[33] Punishing perpetrators of corruption could, however, be understood as a primary means by which states combat corruption and also deter or prevent others from engaging in similar conduct. Only the US executive order explicitly identifies protecting the US financial system from abuse by perpetrators of corruption and human rights violations as an objective of the sanctions, along with punishment.[34]

Meanwhile, the objectives identified by the legislation of Canada include advancing its 'responsibility to protect activists who fight for human rights' and acknowledging and remembering the sacrifices made by Mr. Magnitsky and other victims of gross human rights violations.[35] Even though Canada's law enables sanctions against perpetrators of both human rights abuses and corruption, the stated objectives of its law are specific to perpetrators of human rights violations, and do not appear to be relevant for perpetrators of corruption, which does not necessarily entail human rights violations. This suggests that Canadian law-makers may have viewed targeting perpetrators of corruption as a secondary objective of the legislation.

Finally, even though these sanctions regimes target conduct that potentially generates victims, the regimes neither acknowledge the likely existence of such victims, nor identify victim compensation as an objective. This omission is explicable by virtue of the fact that these regimes are not geared towards bringing about the confiscation of assets that could be used to compensation victims. Asset confiscation is simply not the end goal of these sanctions regimes, though this could be an outcome if sanctions are accompanied by, for example, domestic criminal proceedings in the state imposing sanctions. Only the Canadian regime provides for forfeiture and eventual victim compensation, but the Canadian law does not indicate that victim

[31] US Executive Order 13818, preambular para. 2.

[32] Australia, Explanatory Memorandum (n 28) para. 2.

[33] UK, The Global Anti-Corruption Sanctions Regulations 2021, s. 4(1).

[34] US, Executive Order 13818, preambular para. 2.

[35] Canada, Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), preambular paras. 12-13.

compensation is an objective of the sanctions, as opposed to an ancillary benefit.[36] Canada's regime includes these provisions on forfeiture and confiscation because of amendments that it undertook in June 2022, following Russia's invasion of Ukraine. The amendments are designed to enable the freezing, confiscation and repurposing of Russian assets as compensation for Ukraine.[37] According to the Canadian law, the minister responsible for sanctions decisions may apply to a judge to obtain a forfeiture order, and the proceeds of such forfeited property may be used to compensate victims.[38] The Canadian law is silent, however, on a number of details, such as the circumstances in which forfeiture should be ordered, the evidentiary standard that a judge should use to determine whether a forfeiture order should be granted, how victims should be identified, and how damage should be calculated. Canada's power to confiscate assets frozen through Magnitsky sanctions is controversial in part because the amendments do not require a judicial finding that assets frozen through sanctions are the product of unlawful conduct, such as an act of corruption.[39]

b. Sanctionable Conduct and Sanctionable Persons

The Magnitsky laws and regulations of Australia, Canada, and the United States enable sanctions against alleged perpetrators of human rights violations as well as corruption. The United Kingdom is an outlier insofar as it addresses human rights and corruption through separate sanctions regimes that were adopted in 2020 and 2021, respectively.[40] In addition, the Australian regime addresses corruption and human rights in the same sanctions regime, but not necessarily as interlinked conduct, as Australian regulations also provide for other 'thematic' sanctions regarding the proliferation of weapons of mass destruction and involvement in 'significant cyber incidents.'[41]

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[36] See generally Dornbierer (n 3) pp. 14-15.

[37] See also amendments to the Special Economic Measures Act, s. 4. Government of Canada, 'Canada starts first process to seize and pursue the forfeiture of assets sanctioned Russian oligarch', 19 December 2022, <https://www.canada.ca/en/global-affairs/news/2022/12/canada-starts-first-process-to-seize-and-pursue-the-forfeiture-of-assets-of-sanctioned-russian-oligarch.html>.

[38] Canada, Justice for Victims of Corrupt Foreign Officials Act, s. 4.4.

[39] Dornbierer (n 3) pp. 14-15; Canada, Senate, 'Strengthening Canada's Autonomous Sanctions Architecture: Five-Year Legislative Review of the Sergei Magnitsky Law and the Special Economic Measures Act' (May 2023) pp. 44-45.

[40] UK, Global Human Rights Sanctions Regulations 2020; UK, Global Anti-Corruption Sanctions Regulations 2021.

[41] Australia, Autonomous Sanctions Regulations 2011, s. 6A.

Canada and the United States seem to address human rights and corruption together in part because of the specifics of the Magnitsky incident, which involved human rights violations against someone who could be described as an anti-corruption whistleblower. But the United States also seems to address human rights and corruption together because the two phenomena are considered to be intrinsically related to each other, as they both undermine good governance and the rule of law.[42] It is an open question whether the relationship between corruption and human rights is as straightforward as US laws suggest, and whether addressing these phenomena together, though the same sanctions regime, represents an optimal approach.[43] These questions, however, remain outside the scope of this chapter.

All of these sanctions regimes require a certain level of gravity in order for the conduct at issue to be sanctionable.[44] The human rights abuses or violations must be 'serious' or 'gross' and the acts of corruption must be 'serious' or 'significant.'[45] These qualifiers suggest that the sanctions regimes are designed, in part, to target 'grand corruption', which Transparency International has defined as 'a systematic or well-organized plan of action involving high-level public officials that causes serious harm, such as gross human rights violations'.[46] For the purpose of these sanctions regimes, however, the conduct at issue need not be committed by a government official, let alone a 'high-level official', in order to be sanctionable.

Although none of the laws and regulations define the terms 'serious', 'gross', or 'significant', Australia and the United Kingdom have developed qualitative criteria designed to guide assessments of the severity of the conduct at issue. The Australian regulation, for

[42] US Executive Order 13818, preambular para. 2 ('Human rights abuse and corruption undermine the values that form an essential foundation of stable, secure, and functioning societies; have devastating impacts on individuals; weaken democratic institutions; degrade the rule of law; perpetuate violent conflicts; facilitate the activities of dangerous persons; and undermine economic markets'). The US Secretary of State also has the authority to sanction both human rights and corruption under section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, which predates the US Magnitsky sanctions legislation. 8 USC 1182.

[43] See e.g., Anne Peters, 'Corruption as a Violation of International Human Rights' European Journal of International Law vol. 29 (2018) 1251; Cecily Rose, 'The Limitations of a Human Rights Approach to Corruption' International & Comparative Law Quarterly 65 (2016) 405.

[44] Although the 2016 Global Magnitsky Act requires corruption to be 'significant', the 2017 US Executive Order 13818 notably drops this requirement.

[45] Australia, Autonomous Sanctions Regulations 2011, Regulation 6(A)(4); Australia, Autonomous Sanctions Regulations 2011, Regulation 6(A)(5); Canada, Justice for Victims of Corrupt Foreign Officials Act, s. 2(c), s. 4(2)(a); UK, Global Anti-Corruption Sanctions Regulations 2021, s. 4(1); UK Sanctions and Anti-Money Laundering Act 2018, s. 1(7); US, Executive Order 13818, s. 1(a)(ii)(A); US, 2016 Global Magnitsky Act, s. 1263(a)(3).

[46] Transparency International, 'Grand Corruption', <https://www.transparency.org/en/our-priorities/grand-corruption>.

example, provides that the seriousness of an act of corruption depends on 'the status or position of the person or entity; the nature, extent and impact of the conduct of the person or entity; the circumstances in which that conduct occurred; and any other matters the minister considers relevant'.[47] For its part, the UK government considers the 'scale, nature and impact' of the corrupt conduct.[48] Relevant factors include the conduct's systemic character, including the involvement of high-level officials or political figures; the financial value of the corrupt transaction(s); the conduct's level of sophistication; and the involvement of foreign actors 'representing an external threat to the country or countries affected'.[49] While such factors bring some clarity to the meaning of terms like 'serious corruption', decision makers in these countries nevertheless retain a significant degree of discretion and can apply these sanctions regimes selectively, in keeping with foreign policy goals.

With respect to corruption, the sanctions regimes focus on two specific forms of corruption: bribery and the misappropriation of assets. The regimes of the United States and Canada go somewhat further, as they also cover 'the facilitation or transfer of the proceeds of corruption to foreign jurisdictions,' which appears to refer to money laundering. The US and Canadian regimes also specify that the sanctions cover corruption in the particular contexts of government procurement and natural resource extraction, in a notable departure from the specifics of the Magnitsky incident.[50] None of the sanctions regimes defines these acts of corruption by reference to existing international anti-corruption treaties, such as UNCAC, nor are these instruments mentioned.[51]

Concerning the issue of sanctionable persons, while these sanctions regimes appear to be primarily geared towards sanctioning foreigners, it is also possible for nationals to be sanctioned.[52] The Australian, UK and US regimes enable foreigners as well as their own

[47] Australia, Autonomous Sanctions Regulations 2011, Regulation 6(A)(6).

[48] UK, Policy Paper, 'Global Anti-Corruption Sanctions: Consideration of Designations', 26 April 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>.

[49] Ibid.

[50] The reference to natural resource extraction has its origins in US corruption and human rights sanctions that pre-date the Magnitsky sanctions. See Section 7031(c)(1)(A) of the US Consolidated Appropriations Act 2008.

[51] Open Society, European Policy Institute, 'Why the European Union Needs Anticorruption Sanctions: A Powerful Tool in the Fight Against Corruption' (2022).

[52] Canada, Justice for Victims of Corrupt Foreign Officials Act, s. 4(2); US, Executive Order 13818, s. 1(a)(ii).

nationals to be the targets of sanctions.[53] In addition, while the Canadian regime only allows foreign nationals to be sanctioned for human rights abuses and corruption, it also targets 'any person', including Canadians, who engages in transactions with a sanctioned foreign national.[54]

c. What the Sanctions Entail

The Magnitsky sanctions regimes enacted by Australia, Canada, the United Kingdom and the United States enable both financial and immigration sanctions for designated persons. Financial sanctions can involve direct measures to restrain assets through freezing or seizure, or indirect measures to block transactions with designated persons. The freezing and blocking of assets appear to have the same basic effect, in that the assets of the targeted person are no longer accessible or usable. Australia and the United States have adopted an indirect approach, by enabling the blocking of property of targeted persons.[55] When the assets of a targeted person are 'blocked', then transactions involving those assets are prohibited or restricted by banks and other financial actors. In other words, third parties cannot deal with the assets of designated persons that are within the jurisdiction of the state imposing sanctions.[56] Canada and the United Kingdom have pursued both direct and indirect approaches, by enabling both freezing as well as blocking.[57]

With respect to immigration-related sanctions, these four states have adopted various ways of preventing targeted individuals from being physically present in their jurisdictions. The US sanctions regime enables the government to deny visas or withdraw existing visas, while

[53] Australia, Autonomous Sanctions Regulations 2011, Regulation 6(A)(5); UK Sanctions and Anti-Money Laundering Act 2018, s. 9.

[54] Canada, Justice for Victims of Corrupt Foreign Officials Act, s. 4(3).

[55] Australia, Autonomous Sanctions Act of 2011, s. 10(1)(b); Australia, Autonomous Sanctions Regulations 2011, Regulation 7; US, 2016 Global Magnitsky Act, s. 1263(b)(2)(A); US Global Magnitsky Act, s. 1263(i) (the term 'foreign persons' refers to any citizen or national of a foreign state, and therefore encompasses dual nationals who hold the nationality of the US and another state).

[56] In its Global Magnitsky Human Rights Accountability Act Annual Reports, the US State Department explains that sanctioned persons appears on the 'Office of Foreign Assets Control's (OFAC's) List of Specially Designated Nationals and Blocked Persons (SDN List). As a result of these actions, all property and interests in property of the sanctioned persons that are in the United States or in the possession or control of U.S. persons, are blocked and must be reported to OFAC. Unless authorized by a general or specific license issued by OFAC or otherwise exempt, OFAC's regulations generally prohibit all transactions by U.S. persons or within (or transiting) the United States that involve any property or interests in property of designated or otherwise blocked persons.' US Department of State, 2022 Global Magnitsky Human Rights Accountability Act Annual Report, Federal Register, Vol. 88, No. 62, 31 March 2023, p. 19344, 19345.

[57] Canada, Justice for Victims of Corrupt Foreign Officials Act, s. 4(1)(b); 4(3); UK, Sanctions and Anti-Money Laundering Act 2018, ss. 3, 4; UK Global Anti-Corruption Sanctions, ss. 10-16.

the Australian and UK regimes enable those governments to refuse leave to enter or remain in Australia and the United Kingdom, respectively.[58] UK immigration law does, however, create an exception where refusal to enter or remain would be contrary to the UK's obligations under international human rights and refugee law.[59] In addition, under the Canadian regime, a listed person becomes 'inadmissible', unless they are a permanent resident of Canada.[60]

d. Procedures and Standards for Listing and De-Listing

From a procedural perspective, these four Magnitsky sanctions regimes raise questions about who decides to 'list' or sanction individuals, how those decisions are taken, and how an individual could eventually be 'de-listed' or removed from a sanctions list. As for who decides, each of these sanctions regimes authorizes cabinet- or ministerial-level officials in the executive branch to take sanctions decisions, sometimes in practice based on recommendations from or in consultation with other high-level executive branch officials. In the United States, the Secretary of the Treasury holds this authority, in consultation with the Secretary of State and the Attorney General.[61] In Canada, the Governor in Council takes these decisions, which are in practice based on recommendations of the Minister for Foreign Affairs.[62] In the United Kingdom, the Secretary of State exercises this authority.[63] In Australia, the Minister of Foreign Affairs holds decision-making authority, but must consult with the Attorney-General.[64]

Although high-level executive branch officials possess decision-making authority, in practice they may be acting on information received from sources both within and beyond the government. The United States is alone, however, in having created a formal mechanism through which members of Congress, civil society, and other countries, may effectively nominate individuals for sanctioning. The US Global Magnitsky Act obliges the President (but in practice the Secretary of the Treasury and Secretary of State) to consider information

[58] Australia, Autonomous Sanctions Regulations 2011, Regulation 6A(5)(b); UK, Immigration Act 1971, s. 8B; UK Global Anti-Corruption Sanctions, s. 17; US 2016 Global Magnitsky Act, s. 1263(b)(1)(A)-(B).

[59] UK, Immigration Act 1971(a), s. 8B(5A)(a).

[60] Canada, Immigration and Refugee Protection Act 2001, s. 35(1)(e).

[61] US, Executive Order 13818, s. 1(a)(ii). The list is reportedly also approved by the US National Security Council. Moiseienko (n 3) p. 47

[62] Canada, Justice for Victims of Corrupt Foreign Officials Act, s. 4(1); Justice for Victims of Corrupt Foreign Officials Regulations, SOR/2023-179, preambular para. 2.

[63] UK, Global Anti-Corruption Sanctions, s. 6(1).

[64] Australia, Autonomous Sanctions Act 2011, s. 10(5)(c).

provided by relevant congressional committees, as well as 'credible information obtained by other countries and nongovernmental organizations that monitor violations of human rights'.[65] In addition, when information is submitted by an appropriate congressional committee, the executive branch is required to respond within 120 days with a decision about whether to impose sanctions.[66] In the United Kingdom, although the sanctions regime provides no formal role for other actors, the law nevertheless indicates that parliamentary committees may informally make recommendations to the Secretary of State, who is obliged to document these recommendations and his or her response in their reports.[67]

In general, these four sanctions regimes provide decision-makers with little guidance as to how sanctions decisions ought to be, or must be made, thereby leaving such officials with a great deal of discretionary power. These laws and regulations do, however, give some indication as to the applicable evidentiary standard, according to which executive branch decision-maker must assess the available information. Although these sanctions regimes use different terms, they all provide for a quite low evidentiary standard. 'Credible' evidence or information is required in the United States, and 'reasonable grounds' in the United Kingdom.[68] In Australia, the minister must be 'satisfied' that the person at issue has engaged in, is responsible for or complicit in an act of corruption or human rights abuse.[69] The Canadian law does not articulate an evidentiary standard for the initial decision about sanctions, but instead merely provides that the Governor in Council may order sanctions if he or she is 'of the opinion' that a foreign national is responsible for or complicit in human rights violations or corruption.[70]

The terms 'credible', 'reasonable' and 'satisfied' resemble the evidentiary standard used in common law systems in the context of provisional measures involving seizure or freezing. These standards do not require a decision-maker to be persuaded beyond a reasonable doubt by the available evidence, as would be required in domestic criminal proceedings.[71] In addition, these standards appear to fall below the common law standards of 'balance of probabilities' and

[65] US, 2016 Global Magnitsky Act, s. 1263(c)(1)-(2).

[66] US, 2016 Global Magnitsky Act, s. 1263(d)(1).

[67] UK, Sanctions and Anti-Money Laundering Act 2018, s. 32(1)(c).

[68] UK, Global Anti-Corruption Sanctions, s. 6(1)(a); US, 2016 Global Magnitsky Act, s. 1263(a), (c)(2).

[69] Australia, Autonomous Sanctions Regulations 2011, Regulation 6A(5)(a).

[70] Canada, Justice for Victims of Corrupt Foreign Officials act, s. 4(1).

[71] Jean-Pierre Brun et al, 'Asset Recovery Handbook: A Guide for Practitioners, Second Edition' (StAR 2021) p. 60-61.

'preponderance of the evidence', which would be applied in the context of confiscation proceedings, whether conviction or non-conviction based.

Another important procedural issue concerns the review and termination of sanctions, including the process by which individuals can seek a review of the initial sanctions decision. In general, these sanctions regimes contain relatively few provisions governing such review processes, although the UK's regime goes the furthest in ensuring that listed persons have a right to review. In the United Kingdom, a sanctioned person has an initial right to review by the Minister, who may vary or revoke the decision.[72] In addition, unlike the other sanctions regimes, in the United Kingdom sanctioned persons have a right to judicial review, as they may appeal a decision by the Minister to the High Court (or in Scotland, the Court of Session).[73] In the United Kingdom, the Minister must also review all sanctions decisions every three years, to decide whether to vary, revoke or take no action with respect to existing designations.[74]

The sanctions regimes in Australia and Canada are similar to the UK regime in that they allow sanctioned persons to seek a review of the decision by the relevant minister, but they do not provide for judicial review, or for mandatory periodic review of all sanctions decisions by the government.[75] The US Global Magnitsky Act notably omits any provision expressly regulating a right of review for sanctioned persons, though the State Department has indicated that Magnitsky designations are subject to the same (very minimal) review process that governs economic sanctions in general, under the Administrative Procedure Act.[76] The US regime does, however, govern the termination of sanctions in more detail than Australia, Canada, and the United Kingdom.[77] Sanctions may be terminated by the executive branch in a number of specific circumstances, including where 'credible information exists that the person did not engage in the activity for which sanctions were imposed,' and where 'the person has been prosecuted appropriately for the activity for which sanctions were imposed'.[78] Sanctions may

[72] UK, Sanctions and Money Laundering Act 2018, s. 23(1).

[73] UK, Sanctions and Money Laundering Act 2018, s. 38.

[74] UK, Sanctions and Money Laundering Act 2018, s. 24.

[75] Australia, Autonomous Sanctions Regulations 2011, Regulations 10, 11; Canada, Justice for Victims of Corrupt Foreign Officials Act, s. 8(1), 16(3).

[76] CarrieLyn D. Guymon (ed), *Digest of United States Practice in International Law 2013*, Office of the Legal Adviser, United States Department of State, pp. 505-506; Rachel Barnes, 'United States Sanctions: Delisting Applications, Judicial Review and Secret Evidence' in Matthew Happold and Paul Eden (eds) *Economic Sanctions and International Law* (Hart 2016); Moiseienko (n 3) p. 60.

[77] US, 2016 Global Magnitsky Act, s. 1263(g).

[78] US, 2016 Global Magnitsky Act, s. 1263(g)(1)-(2).

also be terminated where this is in the national security interests of the United States, and where a person has credibly demonstrated a significant change in behavior, accompanied by the payment of an appropriate consequence and a credible commitment not to engage in sanctionable activity in the future.[79] The last circumstance, involving a behavior change, is arguably of limited relevance in the context of Magnitsky sanctions, which are designed to target individuals who have been involved in discrete acts of corruption or human rights violations, as opposed to ongoing misconduct.

e. Figures on the Use of Magnitsky Sanctions

To date, the United States has been by far the most active in sanctioning individuals under its Magnitsky sanctions regime. As of May 2023, the United States' Magnitsky sanctions list includes 212 individuals, as well as 258 entities and 157 vessels; Canada's list includes 70 individuals; the United Kingdom's list includes 35 individuals; and Australia's list includes 15 individuals.[80] Thus far, Australia has only targeted Russian individuals who were allegedly involved in the Magnitsky case, whereas the other three states have targeted individuals and entities from countries around the world, and not solely in connection with the Magnitsky case.

4. Relationship of Magnitsky Sanctions to Existing International Legal Regimes

Magnitsky sanctions can be viewed from many different perspectives and academic disciplines, including international relations and law. From the perspective of international law, the sanctions regimes studied in this chapter give rise to numerous questions, such as the human rights of targeted individuals who may remain on a sanctions list indefinitely, the manner in which executive branch officials gather and assess evidence, and the de-coupling of asset restraint from asset confiscation and the return of proceeds of corruption. The following analysis focuses on the last of these issues, which it approaches from the perspective of the

[79] US, 2016 Global Magnitsky Act, s. 1263(g)(3)-(4).

[80] Australia, 'Australia's first Magnitsky-style sanctions' <https://www.foreignminister.gov.au/minister/marise-payne/media-release/australias-first-magnitsky-style-sanctions#:~:text=In%20this%20first%20tranche%2C%20the,of%20his%20abuse%20and%20death>; Canada, Consolidated Canadian Autonomous Sanctions List, <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/consolidated-consolide.aspx?lang=eng#dataset-filter>; UK, The UK Sanctions List, <https://www.gov.uk/government/publications/the-uk-sanctions-list>; US, Office of Foreign Assets Control, Sanctions List Search, <https://sanctionssearch.ofac.treas.gov> (programme name GLOMAG).

United Nations Convention against Corruption. This section explains why asset confiscation and return should be key elements of any sanctions regime that aims to punish or prevent corruption and protect financial systems.[81]

For the most part, the laws and regulations reviewed in this chapter provide only for freezing or blocking assets, to the exclusion of asset confiscation and asset return. This is not to say that confiscation and return could not be a possible outcome, however, as the sanctioned individuals can, of course, be subject to criminal or civil proceedings in the sanctioning state, or in another state, including their state of nationality. But this is neither the objective of these sanctions regimes, nor do the laws and regulations make any mention of this possibility, though, for example, cross-references to other aspects of the domestic legal framework. Canada is the exception in this regard, as its law provides for forfeiture and eventual compensation, for reasons that are specific to the armed conflict in Ukraine.

In both international anti-corruption law and domestic criminal law, however, the preservation of assets through freezing or seizure is designed to be a temporary measure that ensures that assets are not dissipated by the alleged perpetrator before further criminal or civil proceedings can be pursued and brought to completion.[82] In other words, measures to restrain assets represent a means to an end, but not an end in itself.[83] Asset freezing or seizure represents a step in the middle of the asset recovery process, which involves identifying and tracing proceeds, followed by freezing or seizure, and then eventually confiscation and return or disposal.[84] The eventual confiscation of assets is designed to punish perpetrators of corrupt acts, to remove proceeds that might otherwise be used to engage in further corrupt or otherwise criminal conduct, and to deter others from engaging in similar behavior.

Legislators in Australia, the United Kingdom, and the United States have, however, de-coupled asset restraint from the logically and legally related questions of asset confiscation and return. This approach has to be understood in the larger context of sanctions regimes in the post-Kadi era, which have been expressly limited to non-punitive, temporary, and precautionary

[81] For a similar argument made with respect to the EU misappropriations sanctions, see Civil Forum for Asset Recovery (CiFAR), 'Sanctioning Kleptocrats: An Assessment of EU Misappropriation Sanctions' (2019).

[82] Brun et al (n 71).

[83] Lucia Cizmaziova, 'Sanctions as a Tool for Asset Recovery: A Global Perspective', CiFAR Research Paper (2021) p. 26.

[84] Ibid.

measures, like asset freezing, so as to insulate such measures from legal challenges.[85] In the case of Magnitsky sanctions, however, both the non-punitive and the temporary character of the measures is dubious. The regimes do not set out robust provisions concerning the termination of sanctions, whether at the initiative of the sanctioned person or the government itself. As discussed in section 3.d, only the UK's sanctions regime expressly addresses judicial review and also requires the executive branch periodically to review its sanctions decisions. Yet, the UK's regime does not set out any criteria that govern termination decisions—only the United States provides such criteria. The other sanctions regimes contain provisions on termination that are relatively weak and underdeveloped. They do not require the executive branch periodically to review sanctions decisions, and the United States, in particular, does not create a robust procedure by which a sanctioned person could challenge his or her designation. The result is that many sanctions designations may become semi-permanent, with assets remaining indefinitely frozen or blocked. Governments need not review their decisions, and sanctioned persons may face significant practical and legal obstacles in challenging their listings.

From the perspective of international anti-corruption law, indefinite asset restraint is especially problematic where the frozen or blocked assets represent stolen public funds. All of these sanctions regimes target, in part, the embezzlement or misappropriation of public assets, which is one of the most prominent or common types of corruption, along with bribery.[86] Magnitsky sanctions partly target situations that involve public assets that have been misappropriated by a government official and then transferred, through money laundering, to another jurisdiction, i.e., the 'destination state'. In the context of Magnitsky sanctions, the states applying sanctions represent destination states (e.g., the United States), and the sanctioned persons are typically government officials of 'states of origin', from which funds have been stolen (e.g., Russia).

Under international anti-corruption law, the targeting of misappropriated public funds raises legal issues concerning their ownership and return. According to UNCAC, a state of origin, from which funds are stolen, has a presumptive 'ownership claim' over such

[85] *Kadi v Commission*, Case T-85-09, 30 September 2010, paras. 150-151. This case concerns counter-terrorism sanctions, which were imposed by the European Union against Mr Yassin Abdullah Kadi, and gave rise to multiple, complex rounds of litigation before the Court of Justice of the European Union.

[86] UNCAC Art. 17.

misappropriated public assets.[87] The stolen assets represent funds that belong to the state of origin, and could, at least in theory, be used for public purposes, such as the provision of social services, infrastructure, etc. Their theft potentially harms not only the government itself, but also the population at large, or segments of the population.

Destination states may not have a legal obligation to return stolen assets, as UNCAC only mandates the return of stolen assets in a relatively narrow set of circumstances that are unlikely to be met in these situations.[88] But the indefinite retention of stolen assets by destination states nevertheless runs against the general thrust of UNCAC, which makes 'asset recovery'—*not* asset freezing/seizure—a fundamental principle of the treaty, and provides that states parties 'shall afford one another the widest measure of cooperation and assistance in this regard'.[89] The indefinite retention of stolen assets by a destination state may not be strictly contrary to international law, but it runs against this fundamental principle of UNCAC, and also represents a politically controversial approach. In the context of Magnitsky sanctions, however, the confiscation and return of misappropriated public funds to the state of origin raises difficult political questions because many of the sanctioned individuals have stolen money from states, like Russia, that garner little sympathy in the destination countries applying these sanctions.

The indefinite restraint of assets that represent the proceeds of bribery also runs counter to international anti-corruption law, in particular the notion that compensation should be paid for damage suffered as a result of corruption.[90] Although states of origin typically cannot assert an 'ownership claim' over proceeds of bribery, acts of bribery can cause financial damage in the state of origin, and can be the subject of compensation. Unlike embezzled public funds, the proceeds of bribery are usually not 'owned' by the state of origin. Bribery proceeds represent an undue advantage given by a briber, who is typically an actor in the private sector, to a bribe recipient, who would usually be a public official in the context of Magnitsky sanctions. Bribery proceeds therefore typically originate in the private sector, not in the public sector of the state

[87] UNCAC Art. 57; Legislative Guide for the Implementation of the United Nations Convention against Corruption (UN, 2nd ed., 2012), paras. 779-782.

[88] According to UNCAC Art. 57(3), two conditions must be fulfilled: (1) a confiscation must have been executed in accordance with Article 55 of UNCAC, which governs international cooperation for purposes of confiscation; and (2) the confiscation must have been on the basis of a final judgment in the requesting state party (i.e., the state of origin.

[89] UNCAC Art. 51.

[90] UNCAC Art. 35.

of origin. Because states of origin usually cannot assert an ownership claim over bribery proceeds, destination states are not bound by any mandatory obligation to return those proceeds.

In situations where the return of proceeds of misappropriation and bribery are not mandatory, a destination state nevertheless has an obligation to consider returning those assets and to cooperate accordingly with the state of origin. UNCAC's provisions on asset recovery contemplate the return of confiscated proceeds of corruption to a range of actors: the state of origin, prior legitimate owners, and victims of the act of corruption.[91] Destination states are not bound to return bribery proceeds to the state of origin, or to ensure that victims are compensated, but indefinitely freezing the proceeds of corruption runs counter to the obligation to 'give priority consideration to returning confiscated property' to this range of actors. By indefinitely freezing or blocking assets, states imposing Magnitsky sanctions never even reach the confiscation stage, where this obligation to give priority consideration would come into play. It may be that confiscation on the basis of civil or criminal proceedings is not even a viable option in many sanctions cases, as the evidentiary standard required in such proceedings would be higher than that required for the imposition of sanctions.

It must be acknowledged that returning proceeds of misappropriation or bribery to a state of origin with high levels of corruption may be a politically unacceptable prospect for destination states with Magnitsky sanctions. Destination states may be concerned, for example, that any funds returned directly to the state will again be the subject of corruption. In addition, the return of assets to the state of origin may run contrary to the larger purpose of targeted sanctions, which allow the sanctioning state to coerce or pressure another state, but in a manner that targets individuals and therefore helps to avoid unintended consequences for the larger population. Returning funds to the state that is arguably the ultimate target of the sanctions would in many, but not all cases, represent an untenable path forward.

Returning funds directly to the state of origin is not, however, the only possible solution. There are other options that ought to be pursued by destination states, in lieu of indefinitely freezing proceeds of corruption, especially where those proceeds represent stolen public funds. Other options include returning funds not to the state of origin, but to an international organization or non-governmental organization, for disposal in the state of origin in a manner that benefits the population, or segments of the population that were specially affected by the act of corruption. For example, the United States recently concluded a civil

[91] UNCAC Art. 57(3)(c).

forfeiture settlement with Teodoro Ngueme Obiang Mangue (Obiang Mangue), the First Vice President of Equatorial Guinea, who allegedly engaged in acts of corruption and money laundering.[92] The terms of the settlement provided for the return of US$ 19.25 million not to the government of Equatorial Guinea, but to the United Nations for the purchase and distribution of COVID-19 vaccines for the benefit of the people of Equatorial Guinea.[93] In the case of misappropriated Russian assets, another solution might be pursued, namely the use of those assets for eventual compensation of Ukraine, at the end of the armed conflict there.[94] Solutions such as these ought to be built into the Magnitsky sanctions regimes, which could go beyond simply freezing or blocking assets, and could instead foresee confiscation and eventual return.

It is arguably incumbent upon states with Magnitsky sanctions regimes to go beyond just freezing corrupt proceeds, given that their financial systems failed in the first place to prevent the entry of proceeds of crime. Australia, Canada, the United Kingdom and the United States are able to pursue Magnitsky sanctions because they are jurisdictions with major financial centers, where proceeds of crime tend to find a home. The fact that proceeds of corruption are present in the jurisdictions of these destination states necessarily means that they failed to prevent the use of their financial systems for money laundering by the alleged perpetrators. Sanctions that freeze or block these assets should therefore be followed by money laundering investigations and prosecutions in the destination state.[95] A successful prosecution could then provide the basis for an eventual confiscation of the assets at issue. Such investigations and prosecutions would acknowledge the role that destination states play in facilitating acts of corruption, and would enable the both confiscation and the return of assets as compensation for damage caused by corruption.

[9292] US Department of Justice, $26.6 Million in Allegedly Illicit Proceeds to Be Used To Fight COVID-19 and Address Medical Needs in Equatorial Guinea, 20 September 2021, <https://www.justice.gov/opa/pr/266-million-allegedly-illicit-proceeds-be-used-fight-covid-19-and-address-medical-needs>.

[93] Ibid.

[94] See generally Dornbierer (n 36); Oona Hathaway, Maggie Mills, and Thomas Poston, 'War Reparations: the Case for Countermeasures' Stanford Law Review vol. 76 (2024) (forthcoming); Redress, 'Sanction. Confiscate. Compensate. Briefing: Comparative Laws for Confiscating and Repurposing Russian Oligarch Assets' (2022); Sara Dill and Layla Abi-Falah, 'Sanctions in the Ukraine-Russian War: Proposed Solutions for the Peace Process and War Crimes Prosecutions' <https://www.lcil.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.lcil.cam.ac.uk/ukraine/dill_and_abi-falah_sanctions_peace_negotiations_final_website.pdf>.

[95] See also Moiseienko (n 3) p. 56; Jackson Oldfield, 'The Challenges of Asset-Freezing Sanctions as an Anti-Corruption Tool', Transparency International Anti-Corruption Helpdesk Answer' (2022) pp. 14, 16-17.

Limited existing research suggests that in the case of US Magnitsky sanctions, asset freezing has largely been unaccompanied by domestic civil or criminal proceedings.[96] This is a subject, however, that requires much more extensive empirical research. One exception to this general trend concerns the former president of The Gambia, Yahya Jammeh, who was sanctioned in 2017, following his fall from power, for human rights abuses and the misappropriation of state funds.[97] This was followed by a 2020 civil forfeiture complaint filed by the United States regarding his property in Maryland, and ultimately culminated in asset forfeiture in 2022.[98] When the US Department of Justice announced the civil forfeiture, it also signaled its intention to use the proceeds from the sale of this property, valued at approximately USD 3.5 million, 'to benefit the people of The Gambia harmed by former President Jammeh's acts of corruption and abuse of office'.[99] It appears that the ultimate forfeiture of the assets at issue in this case may have been enabled partly by the fact that Mr. Jammeh had fallen from power, and the Gambian government was engaged in its own efforts to freeze his assets in The Gambia. The apparent willingness of The Gambia to cooperate with the United States may have been a key factor that boosted the capacity of the United States to not only freeze, but also to confiscate and potentially return stolen assets.

5. **Conclusion**

This chapter has analyzed Magnitsky sanctions from the perspective of international anti-corruption law, in particular the rules governing asset recovery. Magnitsky sanctions are a tool that allow states like Australia, Canada, the United Kingdom and the United States to target individuals allegedly responsible for acts of corruption and human rights violations. These sanctions regimes effectively provide for the indefinite restraint of assets, without being formally linked to money laundering prosecutions, confiscation and eventual return. This approach is fundamentally contrary to international anti-corruption law, according to which states of origin have an ownership claim over misappropriated assets, and the damage caused

[96] Moiseienko (n 4).

[97] US Department of the Treasury, Press Release, 'United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe', 21 December 2017, <https://home.treasury.gov/news/press-releases/sm0243>.

[98] US Department of Justice, Press Release, 'Justice Department Secures Forfeiture of Maryland Property Purchased with $3.5 Million in Alleged Corruption Proceeds Linked to Ex-President of The Gambia', 26 May 2022, <https://www.justice.gov/opa/pr/justice-department-secures-forfeiture-maryland-property-purchased-35-million-alleged>.

[99] Ibid.

by corruption ought to be compensated. As other states and the European Union consider adopting their own versions of Magnitsky sanctions, much more attention ought to be devoted to considering how these sanctions regimes could brought into alignment with both domestic and international anti-corruption law.