Written evidence submitted by Dr Anton Moiseienko (IEF0004)

1. I am a Lecturer in Law at the Australian National University in Canberra. My main areas of expertise are economic crime law and the legal and policy aspects of targeted sanctions. Prior to my current job, I was a Research Fellow at the Centre for Financial Crime and Security Studies at RUSI in London, where I remain an Associate Fellow. This submission is made in a personal capacity and does not represent the views of any of these organisations.

2. The focus of this written evidence is the UK's corruption and human rights sanctions regime. I have a long-standing interest in the subject. In 2014-2018, I completed a PhD thesis on the limits that international law places on the implementation of corruption-related sanctions. This coincided with a period of major expansion and development in sanctions programmes worldwide, including the enactment of the Global Magnitsky Act 2016 in the US and the Sanctions and Anti-Money Laundering Act 2018 in the UK, both of which I studied in my work. My PhD thesis was published as a book entitled *Corruption and Targeted Sanctions* in early 2019. More recently, I have co-authored an entry on international sanctions in the Oxford Bibliographies in International Law.

3. In summary, this submission argues as follows:

    a. The primary objectives of corruption and human rights sanctions are best understood as punishment of (accountability for) past wrongdoing and disruption of ongoing wrongdoing. They can also have a secondary objective of expressing symbolic condemnation.
    b. By contrast, viewing corruption and human rights sanctions as a means of achieving behavioural change neither produces a satisfactory account of the current practice nor generates actionable prescriptions.
    c. For the most part, it is impossible to accurately measure whether the objectives of sanctions have been achieved. This does not mean these objectives are wrong, nor that sanctions should not be used to pursue them. Rather, the question should be: When are sanctions the best tool to punish and disrupt corruption and human rights abuse?
    d. In effect, this is a question about the relationship between sanctions and other tools of accountability and disruption, such as criminal prosecution and civil forfeiture. The best available answer can be summarised as follows:

        i. If a crime under UK law has been committed, criminal prosecution should be the default response to serious corruption or human rights abuse.
        ii. If no crime under UK law has been committed but the proceeds of overseas crime are in the UK, civil forfeiture should be the default response.
        iii. If either of the above is the case, but criminal prosecution or civil forfeiture respectively is unfeasible due to the lack of cooperation by a foreign government, targeted sanctions should be used.
        iv. If no crime under UK law has been committed and no proceeds of overseas crime are in the UK, targeted sanctions should be used.

e. One of the salient differences between UK corruption and human rights sanctions and comparable sanctions programmes overseas is that the former makes no provision for sanctions against primary targets' family members. The Committee may wish to consider the need for a rebuttable presumption that family members are also involved in the wrongdoing and therefore liable to sanctions.

Objectives

4. The question of whether sanctions are effective is linked to the question of what their objectives are, i.e. 'effective *at what*?'. This introduces complexity because there is no single, shared conception of the objective(s) of sanctions. Possible candidates include:

   a. Inducing behavioural change;
   b. Punishing the target;
   c. Disrupting the target's operations;
   d. Expressing symbolic condemnation; and
   e. Protecting the sanctioning state's financial integrity.

5. The objectives one pursues not only affect what effectiveness looks like, but also determine the selection of targets. For instance, an asset freeze and entry ban directed at someone with no assets in the UK and no desire to visit is unlikely to disrupt their activities but could be a useful way of signalling condemnation.

6. Some of these objectives are a better fit for corruption and human rights sanctions than others. For instance, the popular notion that sanctions should contribute **to behavioural change** is liable to produce **unrealistic expectations**. It originally developed in the context of economic sanctions aimed at pressuring governments into amending their policies, e.g. in the apartheid-era South Africa. Sensibly enough, whether those governments did in fact alter their stance was taken to be a metric of success, although one can only speculate to what extent sanctions were causal to such change.

7. By contrast, corruption and human rights sanctions generally target past behaviour. Well-known examples include the murders of Sergei Magnitsky, a Russian whistle-blower who uncovered a US$230 million fraud, and Jamal Khashoggi, a Saudi journalist. Both of these crimes led to sanctions designations in the UK and elsewhere. Both lie in the past and cannot be undone. It is therefore doubtful that resulting sanctions can be aimed, in any meaningful way, at changing the alleged perpetrators' behaviour.

8. It may be argued that they seek to change the behaviour not of the alleged perpetrators but of the governments with the power to prosecute them. This speaks to an important feature of such sanctions, namely that they tend to be imposed in circumstances where the perpetrators benefit from impunity in their home countries. It is far from obvious, however, that sanctioning the *alleged perpetrators* effectively induces their *governments* to take credible action against them. It would also be perverse for sanctions to be *less* desirable if the foreign government was particularly recalcitrant and unlikely to change its behaviour.

9. Clarity about the objectives of sanctions is a matter of practical importance, not merely intellectual interest. For example, US policy is not to impose sanctions under the Global Magnitsky Act 2016 in respect of behaviour that took place over five years ago.[1] This

limitation is not found in the Act itself. However, the US government follows it as a matter of policy, on the grounds that the objective of behavioural change cannot be served by addressing conduct in the distant past. It creates an arbitrary cut-off date (why must heinous crime that happened six years ago remained unaddressed?) based on a premise that is open to doubt (a crime that has already occurred is a fait accompli, be it one or six years ago, so that no behavioural change is possible).

10. By contrast, the best account of sanctions is that of them being a tool of **punishment (accountability)** and **disruption**. It is often said that sanctions are a way of redressing impunity. The opposite of impunity is, of course, punishment. The (appropriate) punitive intent is particularly evident in Bill Browder's campaign that led to the adoption of the original Magnitsky Act 2012 in the US.

11. In some circumstances, sanctions can also be used to disrupt the ongoing operations of criminal networks. This is likely to be the case when two conditions are satisfied: (a) the wrongdoing is ongoing; and (b) its perpetrator is somehow dependent on the sanctioning state, e.g. through the use of its financial system.

12. Even if the UK has no practical leverage over the sanctioned person, the imposition of sanctions can be viewed as a **symbolic expression of condemnation**. This symbolic impact can be pure, where the only impact on the targeted person is the fact of the designation itself, or compounded by more tangible consequences, such as financial institutions exiting customer relationships with those targeted despite not being required to do so by law. In the latter case, the line between symbolism and punishment/disruption can be blurred.

13. Lastly, it is important to highlight the objective that sanctions *canno*t adequately fulfil. They are **unlikely to be an effective way of protecting the UK's financial integrity**, i.e. ensuring that the UK is not a safe harbour to the proceeds of crime. As the term itself suggests, corruption and human rights sanctions are *targeted*, selective measures that are only directed at a small number of 'worst offenders'. They are not, and have never been intended to be, a scalable tool that can be used as a go-to response to corruption or human rights abuse. By contrast, anti-money laundering and counter-terrorist financing regulation gives rise to a comprehensive compliance, reporting and supervisory regime aimed at preventing the investment of the proceeds of crime in the UK. It is essential that corruption and human rights sanctions be seen as neither a substitute for that regime nor an excuse for its deficiencies.

Effectiveness

14. In light of the above, the objectives of corruption and human rights sanctions can be summarised as follows:

    a. *Punishment* if the alleged wrongdoing already took place and the targeted person has significant UK connections, e.g. property in the UK that can be frozen;

[1] See, e.g., a reference to this policy in Human Rights First, *Global Magnitsky Sanctions: Frequently Asked Questions* 7 (2020) https://www.humanrightsfirst.org/sites/default/files/Global%20Magnitsky%20FAQs.pdf.

b. *Disruption* if the alleged wrongdoing is ongoing and the targeted person relies on the UK or its infrastructure, e.g. financial sector, to carry out their malicious activities; and
c. *Symbolic condemnation* in all other instances.

15. Of these three objectives, only disruption can be measured with any confidence, based on whether the targeted person ceased their wrongdoing. Even then, disruption to the targeted person's activities could be significant yet not result in their complete cessation. For example, someone might not be able to invest the proceeds of corruption in the UK but would continue to engage in corruption at home.

16. There are also different ways of looking at the 'effectiveness' of sanctions as symbolic measures. On the one hand, sanctions that produce no direct impact on the targeted person are manifestly less useful as tools of accountability or disruption. On the other hand, they provide a low-cost way of addressing malicious behaviour that might otherwise go wholly unaddressed. For that reason, 'symbolic' need not mean 'useless'.

17. In short, the effectiveness of corruption and human rights sanctions is largely impossible to ascertain. This is because they pursue objectives that are not amenable to measurement. It is important not to fall into the trap of thinking that such sanctions are therefore useless, and bear in mind why we are interested in effectiveness to begin with.

18. The primary reason for thinking about effectiveness is to identify in what circumstances, if any, corruption and human rights sanctions should be used. In light of this, it is helpful to reframe the question as follows: When are sanctions the best way to punish malicious actors, disrupt their operations, or signal the UK's condemnation of them? This must be answered in light of the other tools that the UK has at its disposal to pursue these objectives, which calls for considering the relationship between sanctions and those other tools.

Relationship to other measures to counter illicit finance

19. There are three main types of measures the UK government can use in response to credible allegations of corruption or human rights abuse:

    a. *Criminal prosecution,* which requires the proof of wrongdoing beyond reasonable doubt;
    b. *Civil forfeiture,* which enables confiscation of the proceeds of crime based on the civil standard of proof (balance of probabilities); and
    c. *Sanctions*, which can be imposed if there are 'reasonable grounds to suspect' a person is involved in wrongdoing.

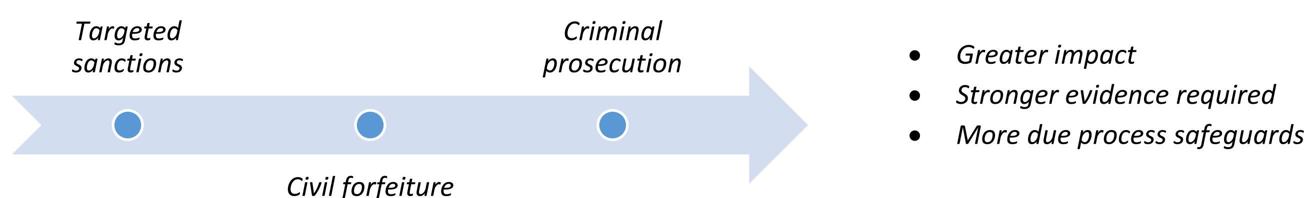
20. These three types of measures can be brought to bear in similar circumstances. The case of Teodoro Obiang, the Vice-President of Equatorial Guinea, is a case in point. The UK sanctioned him as one of the first designees under its corruption sanctions regime. France prosecuted and convicted him for money laundering.[2] The US used civil forfeiture to

[2] S. Pouget and K. Hurwitz, 'French Court Convicts Equatorial Guinean Vice President Teodorin Obiang for Laundering Grand Corruption Proceeds' *Global Anticorruption Blog* (30 October 2017)

confiscate $30 million worth of his allegedly ill-gotten assets.[3] These three different approaches stem from broadly the same set of allegations regarding Obiang's involvement in corruption.[4]

21. Proper delineation between targeted sanctions, civil forfeiture and criminal prosecution is profoundly important. To ensure the UK's use of these tools is credible, it needs to be consistent. Each of them produces different impact on the targeted person and involves varying evidentiary standards and due process safeguards. This can be summarised, as per Figure 1 below, as a progression from lesser to greater impact, evidence required and due process safeguards.[5]

Figure 1: Difference between targeted sanctions, civil forfeiture and criminal prosecution



22. The Foreign, Commonwealth & Development Office (FCDO) has published the following explanation of the relationship between sanctions and law enforcement action in the context of corruption:

> HMG 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.[6]

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https://globalanticorruptionblog.com/2017/10/30/french-court-convictsequatorial-guinean-vice-president-teodorin-obiang-for-laundering-grand-corruption-proceeds/.

[3] *US v One Michael Jackson Signed Thriller Jacket et al*, Case No 2:11-cv-03582-GW-SS (CD Cal 10 October 2014), Stipulation and Settlement Agreement.

[4] See, e.g., United States Senate, Permanent Subcommittee on Investigations, *Keeping Foreign Corruption out of the United States: Four Case Histories* (Washington 2010) 18–25.

[5] In some cases, the difference in impact may be attenuated. For example, if someone is convicted of a crime in the UK yet is outside the UK territory, has no property in the UK and no intention to visit the country, the impact of a criminal conviction is potentially not too dissimilar from that of targeted sanctions.

[6] Foreign, Commonwealth & Development Office, *Global Anti-Corruption Sanctions: Consideration of Designations* ¶4 (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.

23. Analogous explanation is provided with respect of UK human rights sanctions.[7]

24. These statements are right to prioritise law enforcement action, i.e. criminal prosecution and civil forfeiture. Otherwise there is a risk of targeted sanctions being used as a type of 'criminal justice light' that prioritises ease of use at the expense of both impact and due process. The focus on impunity – i.e. a foreign government withholding cooperation – in the FCDO's statement is consistent with the history of corruption and human rights sanctions as a response to the Magnitsky affair and other instances of governments wilfully shielding perpetrators from law enforcement.

25. In light of this, it would be desirable for this Committee to build on the FCDO's statements and affirm that it expects HMG to use corruption and human rights in the following manner:

    a. If a crime under UK law has been committed, criminal prosecution should be the default response to serious corruption or human rights abuse.
    b. If no crime under UK law has been committed but the proceeds of overseas crime are in the UK, civil forfeiture should be the default response.
    c. If either of the above is the case, but criminal prosecution or civil forfeiture respectively is unfeasible due to the lack of cooperation by a foreign government, targeted sanctions should be used.
    d. If no crime under UK law has been committed and no proceeds of overseas crime are in the UK, targeted sanctions should be used.

Possible improvements to the current UK use of sanctions

26. One of the differences between the UK's corruption and human rights sanctions and other countries' sanctions programmes is that the former make no provision for sanctions against the family members of targeted persons.

27. This is an area where strong views have been expressed, and consistency is sometimes lacking even across different sanctions regimes in the same country. For example, in the US, sanctions against family members of primary perpetrators are *required* under so-called section 7031(c) corruption-related immigration sanctions,[8] but are not allowed under the Magnitsky Act 2012 or Global Magnitsky Act 2016. Australia's newly created sanctions regime allows but does not require the imposition of sanctions on immediate family members of individuals sanctions for 'serious violations or serious abuses of human rights' or 'serious corruption'.[9]

28. There are two principal arguments in favour of extending sanctions to family members. First, wealth may be transferred to them in anticipation of sanctions, in which case failing to designate them will undermine the effect of sanctions. Second, benefitting one's family

[7] Foreign, Commonwealth & Development Office, *Global Human Rights Sanctions: Consideration of Designations* ¶4 (6 July 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.
[8] Section 7031(c) of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260.
[9] Regulation 6A(8) in the Autonomous Sanctions Regulations 2011.

members can be a significant motivating factor for involvement in wrongdoing, so that accountability requires divesting them of the ability to enjoy the proceeds of crime.[10]

29. However, a blanket imposition of sanctions on family members is incompatible with the notion of individual responsibility. One may be a family member of someone involved in significant corruption or human rights abuse yet draw no benefit from it – think of an estranged son or daughter.

30. One way of resolving the dilemma is to introduce a rebuttable presumption that family members benefit from their wrongdoing and are therefore liable to sanctions. This is the approach once taken by the lower instance court in the Court of Justice of the European Union, although it was later reversed on appeal because applicable EU regulations did not allow for such a presumption.[11] On the other hand, it has been suggested that presumption-based sanctions listings are undesirable because they detract from the government's obligation to collect sufficient evidence to justify each designation.[12]

31. It must be emphasised that nothing in the current legislation prevents the UK from sanctioning someone because they facilitated a family member's involvement in corruption or human rights abuse. One of the UK's corruption designations is that of Zineb Jammeh, the former first lady of The Gambia and Yahya Jammeh's wife. Her placement on the sanctions list is not wholly derivative but rather a consequence of her own wrongdoing as she 'used a charitable foundation and charities as cover for the illicit transfer of funds between herself and the Former President'.[13] The issue at hand is whether, in a similar situation, sanctions would have also been appropriate based on a rebuttable presumption in the absence of direct evidence of the family member's involvement.

32. In recognition of the importance and complexity of the matter, it is worth considering, as part of the Committee's inquiry, whether such a rebuttable presumption should be introduced in the UK. If so, it may be desirable to further study whether this can be done without amending the Sanctions and Anti-Money Laundering Act 2018. For example, it is conceivable that one may presume there are 'reasonable grounds to suspect' family members of primary targets of involvement in handling the proceeds of the latter's activities.

15 February 2022

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[10] Discussed further in A. Moiseienko, *Corruption and Targeted Sanctions: Law and Policy of Anti-Corruption Entry Bans* (Brill 2019) 149–151.

[11] *Tay Za v Council*, Case T-181/08 (19 May 2010); *Tay Za v Council*, Case C-376/10 P (12 March 2012).

[12] European Union Committee, *The Legality of EU Sanctions* (HL 2016–17, 102) ¶100.

[13] UK Government, *The UK Sanctions List* (last updated Feb. 4, 2022) https://www.gov.uk/government/publications/the-uk-sanctions-list. The point was also made in C. Loudon and C. Kmiotek, *Year One in Numbers: UK Global Human Rights Sanctions*, Redress (20 July 2021) https://redress.org/news/year-one-in-numbers-uk-global-human-rights-sanctions/.