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THE INTERNATIONAL LEGAL FORUM

A LEGAL REVIEW OF THE UK SANCTIONS REGIME

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One of the tools that the United Kingdom uses to advance and achieve its foreign policy goals is the designation of sanctions on individuals and entities – citizens of the UK as well as foreigners.

As the following report will show, the UK sanctions regime is generally ineffective in attaining the objective of deterring targeted countries and individuals from engaging in the activities that prompted the imposition of the unilateral sanctions, whether that be with respect to Russia or, more recently, in the State of Israel. Further, these ineffective, and often arbitrary unilateral sanctions, have unforeseen and damaging consequences on innocent persons (legal and natural) who have no influence over the state which is the true target of the sanctions.

The very broad sanctions which have been introduced on Russia following the country's invasion of Ukraine, set a dangerous precedent of becoming a highly politicized tool in other conflicts, which can already be observed by the application of sanctions against Israel.

The International Legal Forum and Dean Armstrong KC of Maitland Chambers advocate for a more robust and transparent system for promulgating sanctions regulations and designations, and submit that a transparent system of legal challenge on its own fails to meet the UK's legal duties towards the sanctions' designated and potential targets if the imposition of sanctions is opaque in the first instance.

These conclusions are justified on three grounds. First, the UK's unilateral financial sanctions are often in breach of well-established common law principles; second, they are arbitrary and often imposed based on the whims of politicians; and third, the financial sanctions fail in deterring the wrongful act but succeed in infringing the fundamental rights of members of the innocent population of the target state, conduit states and the sanctioning state.

The political decision-making process associated with sanctions is notably more arbitrary than the classical legal system, which predominantly operates through judicial proceedings.

The International Legal Forum which I lead, decided to engage with Dean Armstrong KC to review the sanctions regime in the UK following the Foreign Secretary's decisions – in February and May of this year – to sanction Israeli nationals who were described as "extremist settlers" as well as Israeli groups which the Foreign Office said were "known to have supported, incited and promoted violence against Palestinian communities in the West Bank."

This situation is particularly concerning for ILF when considering that depending on the identity of the government in the UK, Israel could quickly find itself facing a situation under which the sanctions regime applied to Russia is now applied to Israel. UK Jewish community or business leaders supportive of Israel could find themselves under sanctions by specific

politicians making arbitrary decisions without due process. The same would apply to elected officials in Israel.

What also raises concern is the decision by the same politicians who designated Israelis for sanctions, chose not to designate even one of the UK nationals who called for Jihad and Intifada on the streets of London during the mass protests over the last eight months.

As the report will show, once listed, a target cannot challenge the listing in a court of justice without first having applied for a ministerial review. Hence, the same institution of state, the government, which imposed the sanction is the one reviewing its merits when challenged. In the vernacular, it is Judge and jury.

This review procedure delays the target's right to a fair and clear procedure in a case with quasi-criminal repercussions. The courts' overturning of sanctions reviewed by ministers underlines the injustice suffered by the target and the illegitimate delay of the right to due process. Further, as the UK sanctions regime lacks any annual review – they seem to have taken a permanent, rather than a temporary, nature – raising further concerns about the punitive nature of the policy rather than the intended objective of "changing behaviour".

In its final section, the report makes a series of recommendations how to apply sanctions in a more effective and transparent manner.

First, unilateral sanctions regulations for purposes other than national security should describe their necessity and effectiveness and provide for an annual review phase by courts and/or a regulatory authority that has the statutory duty to represent the rights of UK and non-UK citizens.

Second, when designating individuals - there should be a clear evidential link established to the criminal standard between the target and the situation being addressed. Meaning that the targets have an actual link to the activities the sanctions are aiming to deter. Vague and subjective designations based on "association" or targeting of family members are arbitrary and not only violate the targets civil rights but can also discredit the concept of sanctions and accountability. Applying sanctions, unfairly and unproportionally broadly diminishes the responsibility from actors who actually commit grave violations of international law. If everyone is guilty, no one really is.

This inequality is especially apparent in the current sanctions against Israeli nationals. While they are sanctioned for alleged extreme acts in the West Bank, no UK national has been sanctioned for calling for Jihad on the streets of London. The argument that they are UK nationals does not hold since in the case of the Russian sanctions, a number of individuals with British citizenship were in fact sanctioned. In other words, when the designation was politically convenient (Russia) it was done and when it was not convenient (supporters of Hamas) it was not.

Third, the procedure for the designation of persons by name should have the default position that mandatory notification of the targeted person is presented by the appropriate Minister, be accompanied by a clear procedure for challenge, allowing for ample time and evidence necessary for an adequate defence before the designation is issued and provide the targeted person with full written reasons for the designation.

Fourth, the disclosure of non-classified information should be mandatory in all cases that are not related to national security. Where disclosure is denied for national security reasons, the state should inform the sanctioned person of those reasons and invite representations.

Fifth, any designation, whether by name or description, should be accompanied by a clear procedure that the targeted person can follow in order to cease committing the sanctioned behaviour. Sixth, an expert panel should be established to assist the Minister in the procedures of listing and reviewing the applications for de-listing.

Thank you for taking the time to read the report. I look forward to continuing the conversation.

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An examination of the lawfulness of the current UK sanctions regime

This examination is conducted by Dean Armstrong KC of Maitland Chambers in conjunction with The International Legal Forum.

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1. Executive summary

In short, it is our contention that the UK sanctions regime in general is ineffective in attaining the objective of deterring targeted countries from engaging in the activities that prompted the imposition of unilateral sanctions. Further, these ineffective unilateral sanctions have unforeseen and damaging consequences on innocent persons who have no influence over the target state. These conclusions are justified on three grounds. First, the UK's unilateral financial sanctions are often in breach of well-established common law principles (point 2 below). Second, they are arbitrary (point 3 below). Third, the financial sanctions fail in deterring the wrongful act but succeed in infringing the fundamental rights of members of the innocent population of the target state, conduit states and the sanctioning state. These unlawful sanctions also have the consequence of causing disfavour amongst the targeted states and uniting them against the UK and its allies (point 6 below). The very broad sanctions which have been introduced on Russia following the country's invasion of Ukraine, also set a dangerous precedent of becoming a highly politicized tool in other conflicts, which can already be observed by the application of sanctions against Israel.

We advocate for a less politicized and more robust and transparent system – and submit that a transparent system of legal challenge on its own fails to meet the UK's legal duties towards the sanctions' designated and potential targets if the imposition of sanctions is opaque in the first instance (point 7 below).

2. The UK sanctions regime opens the door to violations of well-established common law principles

The UK's sanctions regime, particularly the Sanctions and Anti-Money Laundering Act 2018 (SAMLA 2018), grants broad powers to the Executive to impose sanctions on state actors, sectors, and individuals. However, this regime lacks a clear legal basis under international law, as non-forcible sanctions are not regulated by any specific international treaty. The UK has been imposing unilateral sanctions without identifying a legal basis, justifying them based on the need for coercive power to change behaviour or communicate political messages. The effectiveness and impact of unilateral sanctions regimes are rarely assessed, despite historical examples of devastating effects on the sanctioned countries' populations. The UN sanctions against Iraq from 1991-2003 and the US sanctions against Cuba have been criticized for violating socio-economic and civil rights of individuals. It is submitted that the UK sanctions regime should be supplemented with provisions to align it with national and international laws, including three common law principles:

1. Natural Justice: Procedures before any tribunal acting judicially must be fair, and courts can supplement legislation if necessary to achieve justice.
2. Access to Independent Tribunal: Decisions determining civil rights and obligations must have access to an independent and impartial tribunal with full jurisdiction over the issues involved.
3. Right to be Heard: The Executive must give notice and an opportunity to be heard before exercising statutory power to a person's substantial detriment, in the absence of special facts.

When sanctions are not targeted at individuals directly responsible for specific actions but rather based on association or subjective reasoning, and the measure is not temporary, it infringes on the target's civil rights. Such individuals or entities should have access to an independent and impartial tribunal, which is currently lacking in the UK sanctions regime.

The most influential driver for any measure to be effective in law is for that measure to be clear, reasonable, properly accountable to due process and proportionately enforceable. The means to achieve those ends have classically, and remain, those that successfully meet the three elements set out above. The integrity of any nation’s legal system will rest on its ability to persuade other fair minded nations and individuals that its legal measures are drafted in accordance with those

classically principles. Whilst policy in and of itself, is outside of the scope of this legal analysis, a proper legal basis for policies designed to garner international support and respect is, it is submitted, essential. The current UK regime fails in that significant regard and will continue to leave it isolated and seen as an outlier. The ability to persuade others to follow in the same direction will significantly reduce its international standing.

3. Arbitrary and unnecessary

UK sanctions are largely arbitrary. Many provisions allow the UK to unilaterally determine what constitutes a violation and assign appropriate legal qualifications. Further, the standard of proof required, is well below the criminal standard which is concerning given the effect of the penal sanctions imposed.

SAMLA section 1(1)(a) grants a sanction-making power to an 'appropriate minister' to exercise it as they think fit. Sections 22-25 provide for a two-part process in challenging targeted sanctions, with a review by the relevant minister being a precondition for bringing a judicial challenge (SAMLA, sections 38-40). Thus, targeted sanctions under SAMLA may be imposed by political authorities that do not act as law enforcers and, presumably, are not guided by the duties of law enforcement. This exacerbates the risk that sanctions could be used as a political and diplomatic tool rather than in a bona fide attempt to further any agenda that transcends the sanctioning state's own interests. Whether this risk materializes is dependent on how any given government uses targeted sanctions and not on the current UK legislative framework. The political decision-making process associated with sanctions is notably more arbitrary than the classical legal system, which predominantly operates through judicial proceedings.

Thus, UK sanctions effectively act as a form of quasi-criminal liability without due process.

Under the Terrorist Asset Freezing Act 2010, designations have become very rare, with no new designations in the last two years. This has been blamed on the threshold for designation under section 2 – reasonable belief. SAMLA, however, has resolved this 'problem' by adopting a lower 'reasonable grounds to suspect' standard. Therefore, now, more persons can be classified as designated persons based on information that, alone, would be insufficient to reach the required criminal law standard for a successful conviction. The current regime is devoid of a strategy or set of principles that would determine the relationship between targeted sanctions and criminal justice measures. If sanctions are imposed in connection with an activity that is likely to

constitute criminal conduct, such as human rights abuse or corruption, a criminal justice response could be contemplated instead. For instance, if the UK freezes the targeted person's assets within its jurisdiction if those assets derive from the criminal activity in question, then a criminal prosecution for money laundering would constitute a more appropriate and lawful response.

The arbitrariness of financial sanctions is especially present in situations where the objective for imposing the sanctions is to limit the target state's access to a specific sector (for example, the banking sector) but the sanction is imposed only on some operators in that sector. For example, the UK (more specifically, the Treasury) prohibited all persons operating in the financial sector from 'entering into or continuing to enter into a transaction or commercial relationship' with Bank Mellat alone because of its alleged link with Iran's nuclear weapons and ballistic missile programmes.[1] The SC held that the Treasury's decision was discriminatory, arbitrary and disproportionate to the objective of preventing the Iranian nuclear programme. While this order was based on general considerations relating to the banking sector, it only targeted Bank Mellat, not the other Iranian banks. In other words, there was no evidence that the risk involved was specific to the targeted bank.

On a case-by-case basis, UK jurisprudence determines as follows: (1) whether the objective of the measure is sufficiently important to justify the limitation of a fundamental right; (2) whether there is a rational link with the objective pursued; (3) whether a less intrusive measure could be used; (4) finally, whether a fair balance has been struck between the rights of the individual and the interests of the community.

Even where the objective of UK sanctions is sufficiently important to justify the limitation of someone's fundamental rights, the sanction would still be arbitrary if it is not necessary or cannot achieve the objective. An unnecessary unilateral measure that fails to take into account all relevant facts, is, we submit, on its face, unlawful and ought to be overturned by the judiciary if the sanctioned person brings legal proceedings. This is because UK case law suggests a proportionality review of the unilateral sanction in which the court considers all the material facts at the time of designation and at the time of the hearing to determine the merits of the sanction.[2] As has already been stated, the opportunity to bring proceedings of this nature is limited by virtue of the lack of equality of arms.

[1] *Bank Mellat v Her Majesty's Treasury* [2014] A.C. 700.
[2] Cf *R (on the application of Drax Power Ltd) v HM* Treasury [2016] EWHC 228 (Admin).

Ample evidence produced both by the UK and other states shows that unilateral sanctions against a state, for example, Russia, have failed in their aim to deter the behaviour that led to the imposition of unilateral sanctions, especially where the targeted state is not even sanctioned by the UN. Sanctions pressure on Russia has not collapsed its economy, just as it did not collapse the economies of other authoritarian regimes and did not lead to the dismantling of these regimes themselves – Saddam Hussein in Iraq, Muammar Gaddafi in Libya, Kim Jong-un in North Korea, Fidel Castro in Cuba, Chavez and then Maduro in Venezuela, the Ayatollahs in Iran. The sanctions against Belarus are almost entirely compensated for by economic assistance from and cooperation with Russia, in fact only strengthening the regime of Alexander Lukashenko.[3]

Where sanctions are arbitrary and unnecessary because they fail to achieve their object (which should be to deter the state from engaging in unlawful acts and not just to destroy that state's economy) their objective should be tried to be achieved through other means or, at least, offer a transparent process of imposing sanctions that allows the targeted person to prepare an adequate defence both when the sanction is imposed for the first time and when it is renewed. The sanctions system should also provide for adequate redress measures in the case of abuse, especially clear abuse where the issuing authority should not impose sanctions when there is ample evidence that the courts are likely to hold the imposition unlawful.

The potential for arbitrary sanctions under the UK domestic regime is exacerbated by the broad power to create new offences under SAMLA and the possibility of the renewal of offences without an adequate review. The power to create sanctions is, therefore, an extremely broad one, and concerns have been expressed that 'those who are given such powers may overreach themselves.'[4] In particular, the Act gives the Executive the power to create new criminal offences under secondary legislation carrying a maximum sentence of 10 years' imprisonment. Moreover, the statutory parameters for the creation of the offences, by reference to the objectives discussed above, are extremely vague. Even the House of Lords highlighted the constitutional implications of the Act and called the bill (before the Act was passed) a 'power grab', which allows delegating significant powers to the Executive branch with little Parliamentary oversight. While under SAMLA, the Executive has to lay before Parliament the Statutory Instruments it

[3] European Center for Current Challenges, 'Russia Under Non-Military Pressures: Expectations, Realities, and Lessons of Sanctions' (October 2023), page 6.
[4] HL Deb 1 November 2017, col 1381 (Lord Hope).

wants to adopt, in practice, Parliament has hardly ever declined to give its approval to a Statutory Instrument laid before it since doing so would mean declining the whole Statutory Instrument.

The appropriate Minister can use its discretionary powers to create sanctions unilaterally (i.e., for reasons other than compliance with a UN obligation or other international obligation) without considering and determining good reasons and it is reasonable to enact new sanctions regulations for the purposes in section 1(2) SAMLA.[5] Further, the appropriate Minister can amend sanctions regulations upon satisfaction of the following:

(i) to meet the conditions in section 1(2),
(ii) to be pursued for good reasons, and
(iii) to be in line with a reasonable course of action for that purpose.[6]

Where a person has been sanctioned by another relevant country, the appropriate Minister can sanction that person if they deem that it is in the public interest but without having reasonable grounds to suspect that the person is or has been involved in, or connected to, an activity specified in the relevant sanctions regime. Further, no designation procedure (standard or urgent) requires the designation to be appropriate considering the purpose of the sanctions regime and the likely significant effects of the designation on that person.

Persons temporarily sanctioned under SAMLA may, as a result of the Proceeds of Crime Act 2002 and the Criminal Finances Act 2017, end up with their property confiscated because it was obtained through 'unlawful conduct', which includes human rights violations in other countries. Law enforcement agencies use civil proceedings to effect recovery, and they need only prove their case to the civil standard of proof rather than the higher criminal one. The UK can confiscate what the Executive deems criminal property without first achieving a criminal conviction.

Victims whose property is confiscated under these Acts may be compensated for the loss suffered only if the court deems that the 'circumstances are exceptional.'[7] It is submitted that the

[5] Economic Crime (Transparency and Enforcement) Act 2022, section 57(2)-(3).
[6] Economic Crime (Transparency and Enforcement) Act 2022, section 57(4).
[7] Criminal Finances Act 2017, section 303W(3).

latter terms are arbitrary and enable unrestrained subjective decisions, leaving innocent victims without any remedy for the loss suffered.

4. Lack of due process

The designation procedure under SAMLA lacks the guardrails of due process because the listing is not subject to an adversary hearing, the targeted person is not informed of the information relied upon by the state, there is no prior notice of designation, and there is no procedure for confronting witnesses statements or other evidence.

These deficiencies in the sanctions regime are contrary to the UK's domestic law and international obligations to ensure the enforcement of every human's right to due process, including rights to cross examination, equality of arms and knowledge of the case the person facing the penalty, has to meet. Such a right cannot be guaranteed as long as unilateral sanctions can be imposed without fair and transparent procedures.

The targets that are not informed prior to their being listed are denied the chance to prevent it by demonstrating that their inclusion is unjustified. The existence of delisting procedures does not legitimise the denial of this opportunity.

Once listed, the target cannot challenge the listing in a court of justice without first having applied for a ministerial review. Hence, the same institution of state, the government, which imposed the sanction is the one reviewing its merits when challenged. In the vernacular, it is Judge and jury. This review procedure delays the target's right to a fair and clear procedure in a case with quasi-criminal repercussions. The courts' overturning of sanctions reviewed by ministers underlines the injustice suffered by the target and the illegitimate delay of the right to due process.

By comparison to the imposition of UN Sanctions—which arguably have a higher level of legitimacy and a more robust legal fundament than unilateral sanctions—the denial of the unilaterally sanctioned target's right to a court hearing immediately after the listing has been held to constitute a 'denial of legal remedies' for the target. Such a denial is contrary to the principles of international human rights law, according to which '[e]veryone must be free to

show that he or she has been unjustifiably placed under suspicion and that therefore [for instance] the freezing of his or her assets has no valid foundation.'[8]

According to Art 6(1) ECHR, procedural due process implies the element of legal certainty. This element of legal certainty is missing from the UK sanctioning regime's procedures of imposing and reviewing sanctions because, first, they lack general rules that would oblige the Minister to sanction or not. Second, while targets can request a delisting from the sanctioning body, the legal rules that would oblige the body to approve the delisting request if specific criteria are met are missing too.[9] Hence, the regime lacks the mandatory due process guardrails because it fails to ensure the required legal certainty under Art 6(1).

Further by comparison to UN sanctions, the UK unilateral regime is non-compliant with internationally-agreed minimum standards of compliance with due process rights because, first, it lacks a set of specific criteria for ordering a listing or delisting and second, it allows for the imposition of sanctions without prior notice to the target, depriving the latter of its right to challenge the imposition of the sanction.[10]
The legal uncertainty is exacerbated by the fact that the sanctioned person is not provided with the information relied upon by the state and a statement of reason for imposing the sanction.

A. Lack of disclosure of non-classified information

In *Bank Mellat*, where the issue of notice prior to and post the listing was considered, the SC held that 'Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms required information to be provided by the Treasury, not only to enable the claimant to deny what was said against it, but also in sufficient detail to enable it to refute the case against it. That can be achieved by "article 6 gisting".'[11] The default position is for the targeted person to be given notice, with the only exception being where the notice could be

[8] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2003) 90, quoted in Bardo Fassbender, 'Targeted Sanctions and Due Process The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter' (20 March 2006) 5 <https://www.un.org/law/counsel/Fassbender_study.pdf> accessed 13 April 2024.
[9] Christian Tomuschat, *Human rights between idealism and realism* (2008) 132.
[10] Bardo Fassbender, 'Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure That Fair and Clear Procedures Are Made Available to Individuals and Entities Targeted with Sanctions under Chapter vii of the UN Charter, Study Commissioned by the United Nations Office of Legal Affairs' (2006) 4 <https://www.un.org/law/counsel/Fassbender_study.pdf> accessed 13 April 2024.
[11] Bank Mellat v Her Majesty's Treasury (No 2) [2014] A.C. 700, 712.

counterproductive to the designation purpose. This exception is to be judged on a case-by-case basis.

In addition to the right to prior notice, the SC held that the defendant bank also had the right to make representations against the listing prior to the making of the order.

The Courts do scrutinise the Executive's decision and, in practice, exercise deference only with respect to national security decisions.[12] Hence, for all the other cases that do not relate to national security, the UK sanctions regime lacks provisions providing for mandatory notice and clear guidelines on departing from this default stance. Only with these guidelines in place can the sanctions legal framework comply with the requirement of due process by offering sufficient transparency and certainty.

B. Lack of statement of reasons

English law provides for safeguards against the arbitrary power of the Executive. While these safeguards are not expressly named 'due process', they are grounded in the principle of natural justice. The English courts have interpreted the natural justice principles of '*audi alteram partem*'[13] and '*nemo debet esse judex in propria sua causa or Nemo judex in re sua'*[14] *as including the right to a statement of reasons and the right to prior notice of the charges*.

Similarly, US courts held that 'constitutional due process [requires] notice of the reasons for a designation to be provided in addition to disclosure of the unclassified record.'[15]
Hence, to comply with due process requirements, the UK sanctions regime should mandate the Executive to provide its reason for listing a person/entity. The law should also provide clear guidelines for when the Executive can depart from this default obligation of providing its reasons.

5. Unlawful measures against non-state actors

Given that no specific treaty regulates the deployment of non-forcible measures, including

[12] Cf R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department [2014] UKSC 60, [2014] 2 WLR 1404, 1418–1426 per Lord Sumption JSC citing Bank Mellat (No 2) para [21].
[13] Meaning, 'hear the other side.'
[14] Meaning, 'no one shall be a judge in his own cause.'
[15] Cf People Mojahedin Organization of Iran v United States Department of State 613 F.3d 220, 225 (D.C. Cir. 2010); and Al Haramain Islamic Foundation v US Treasury Dept 686 F 3d 965, 986 (9th Cir 2012).

unilateral sanctions, states have deployed without restrained sanctions against other states for alleged violations of international law or agreements or to prevent such violations.

The UK's unrestrained use of unilateral sanctions is exemplified by the introduction of SAMLA. When the UK introduced this legislation, it did not assert any international legal ground for the legality of unilateral measures. The only possibility would have been to rely on the framework for countermeasures, but this would have brought to the fore the state's legal limitation on taking non-forcible measures against non-state actors.

The UK appears to have given itself broad and unregulated powers to impose sanctions, powers that surpass those conferred by the limited right to take countermeasures, which must be temporary and proportionate and taken as a result of a violation of international law. This view on the UK's sanctions regime is supported by the UK Government's description of sanctions as an important foreign policy and national security tool', which 'can be used to coerce a change in behaviour, to constrain behaviour by limiting access to resources, or to communicate a clear political message'."[16]

However, there are some principles that must be respected by states that use such measures aimed at changing the behaviour of another state. Different types of measures fall under different classes. The legality of a measure depends on its category and the international legal prerequisites for that specific category. It is well established that in international law, sanctions must be a reaction to illegality.[17] The term sanctions includes countermeasures and reprisals. Retorsions, on the other hand, are lawful acts used by states to influence the behaviour of other states and do not require a prior violation of international law. The UK sanctions regime includes many measures that are *de facto* countermeasures and must, therefore, fall within the framework of legal countermeasures to avoid being an illicit use of power by the state.

Countermeasures may be lawful only if imposed by an injured state.[18] Given that the UK has not

[16] HM Government, 'Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions', April 2017, 6, <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/609986/Public_consultation_on_the_UK_s_future_legal_framework_for_imposing_and_implementing_sanctions__Print_pdf_version_.pdf>.
[17] H Kelsen, The Law of the United Nations: A Critical Analysis of its Fundamental Problems (New York, Praeger, 1950) 706; and H Kelsen, Allgemeine Theorie der Normen (Vienna, Manz, 1979) 115.
[18] ASR, Art 49.

been injured by Russia, for example, or Israel —if it were to impose sanctions against Israel — the sanctions are unlawful. The measures against Russia may be lawful only if they were Reprisals.

However, the UK-Russia unilateral sanctions targeted at individuals do not fall within the classification of retorsions, which could be legal. Instead, these measures fall within the class of countermeasures, which are unlawful unless the following requirements are met.

The illicit measures must be directed against a state for its prior unlawful behaviour.[19] While comprehensive sanctions are directed against a state, unilateral targeted sanctions are also used against persons and entities that lack connections to the sanctioned state.
While travel bans may be classified as retorsions (and thus lawful), asset freezes may not be so classified and can pose the risk of violating human rights. Hence, asset freezes may constitute an illegal action on the part of the imposing state, which would need to target them against state officials or those with a clear connection to the state in order to fall within the countermeasure class and potentially justify their legality. [20] Further, the target of an asset freeze (or other forms of countermeasures) must be listed for a violation of international law.

A person or entity's unlawful conduct in their private, 'non-state' related capacity does not engage another state's responsibility under international law and, hence, cannot justify that state's countermeasures. A foreign state's direct responsibility is not engaged even if that person or entity's conduct contributed to an internationally wrongful act. A person's private capacity may change to a state-related one if a state acknowledges and adopts responsibility for that person's conduct or the person acted under the direction of the state.[21] Such a direction or control cannot be assumed and must be demonstrated.

6. Unintended consequences of the sanctions regime

The current UK sanctions regime leads to unnecessary bureaucracy, overcompliance, and unpredictable and unintended consequences. There are no guidelines or leading academic articles on the issue of 'causation' and the responsibility of states that impose sanctions in contravention of international law. However, a sanctioning state's implication in the alleviation of its sanctions'

[19] ARSIWA, Articles 49(1) and 53.
[20] ARSIWA, Part I, Chapter II.
[21] ARSIWA, Articles 8 and 11.

consequences is suggestive of its realisation that the dire effect on innocent people is the result of its sanctions. Hence, one can attribute the negative consequences of sanctions to the sanctioning state, and the law should require a framework governing the use of sanctioning powers that are obliging to minimise interference with human rights. There are humanitarian exceptions in sanctions resolutions, but these often empower the sanctioning state to take further advantage of the sanctioned state or the state of the sanctioned person by controlling the supplies of goods and services to that country. In turn, this eventually gives rise to black markets, which may provide further grounds for the sanctioning state to escalate and prolong the sanctions. A robust framework that controls the use of sanctioning power is missing from the UK's sanctions regime, which, as it stands, can give rise to numerous unintended and unnecessary consequences.

First, it is well established under English law[22] that sanctions have profound, draconian effects not only on the listed persons (who may not have been criminally charged) but also on their families and other closely related persons. In the case of designated commercial or charitable entities that are listed, the effects are dire also for the parties who depend on that entity either because they are hired by it or derive other benefits from it, such as educational or medical ones.

In *Ahmed v HM Treasury*, Lord Brown, referring to the UK's counter-terrorism sanctions law, stated that '[t]he draconian nature of the regime imposed under these asset-freezing Orders can hardly be overstated. […] [T]hey are scarcely less restrict of the day-to-day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing'. Lord Hope described listed persons as 'effectively prisoners of the state'.

The extraterritoriality of unilateral sanctions has an unjustified, dire effect on innocent British nationals and their businesses and families.[23] The UK sanctions regime fails to coerce the targeted person or entity to change its behaviour but unjustifiably interferes with the fundamental rights of its citizens in breach of UK's emphasis on its humanitarian priorities justifying the application of sanctions.[24] Given this effect that clearly breaches the purpose of imposing sanctions, UK law has to be reformed so that it affords a transparent and predictable mechanism

[22] In *Ahmed v HM Treasury* [2010] UKSC 2, the SC pointed to the draconian effect of counter-terrorism sanctions.
[23] SAMLA, section 21.
[24] <https://assets.publishing.service.gov.uk/media/65d720cd188d770011038890/Deter-disrupt-and-demonstrate-UK-sanctions-in-a-contested-world.pdf>.

for imposing unilateral sanctions and forces the Executive to adequately consider and justify the necessity of new sanctions regulations and designations that impact UK citizens.
Second, in written evidence to the House of Lords External Affairs Sub-Committee's inquiry into sanctions policy post-Brexit, Dr Erica Moret noted that the creation of the UK's new autonomous sanctions framework under what was then the Sanctions Bill would.

add another complex layer of bureaucracy to an already highly confusing environment for businesses, when facing multiple autonomous sanctions regimes, sometimes overlapping with UN measures. It could lead to over-compliance in some cases, with associated unintended consequences.[25]

Third, the implied hierarchy in punitive practices can trigger resentment within the target against the sender. Resentment is an emotion that arises, inter alia, when one's sense of status is not respected. Rather than induce compliance with the demands of the sender, resentment may motivate a target to reject stigma and to find a means through which it can circumvent the costs imposed until it is able to change the situation it finds itself in. The resentful actor would be inclined to seek support from third parties and impose counter-costs. Moscow seems to be following both strategies when it adopted countersanctions and as it seeks support from third states while pointing to the EU's and US' own 'normative shortcomings', particularly when it accuses them of adopting unlawful unilateral sanctions in violation of the UN Charter and WTO law. The issue regarding the impact of sanctions on the target's behaviour draws our attention to the conditions of suitability – whether sanctions are the appropriate means to achieve the objective – and necessity – whether the objective can only be achieved through the sanction. The UK appears to impose many sanctions, for example against Russia, on a unilateral basis that are not rooted in the vindication of a UK's rights infringed by Russia directly.

Fourth, over time, the effects of sanctions can morph unpredictably. For example, asset freezes intended as temporary measures can, first, metamorphose into de facto expropriation. Second, they can have dire unintended consequences on the safety of consumers in the targeted nation. For example, in the case of Syrian sanctions, banks tend to refuse funding to humanitarian organisations seeking to operate in the country, including leading non-governmental

[25] Dr Erica Moret, written evidence to the House of Lords External Affairs Sub-Committee, 31 July 2017 <data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-sanctions-policy/written/70456.pdf> accessed 26 Feb 2024.

organisations (NGOs) and some UN bodies, in spite of exemptions in place, making their work challenging and costly. In other cases, over-compliance among banks makes it hard for business relations to resume in cases where some or all sanctions have been lifted (such as in the case of Iran); risking jeopardising the success of the diplomatic initiatives underlying the sanctions.

Through its unilateral sanctions, the UK causes all the aforementioned determinantal consequences despite the ineffectiveness of unilateral coercive measures imposed by state A against another 'hostile' state B, whose effect is limited to the economic relationship of these two states. The sanctioned state continues to trade with other states. With the exception of unilateral secondary sanctions, such as those imposed by the US, the effect is limited because the sanctions do not affect the economic ties of 'neutral' states with the sanctioned 'hostile' state.[26] Hence, unilateral sanctions are prone to fail to achieve their objective of 'deter[ring] or dissuad[ing] states from pursuing policies which do not conform to accepted norms of international conduct.'[27]

The UK sanctions regime absolutely fails to attain its foreign policy objective of changing the behaviour of the sanctioned person or constraining the target.[28] Two years after the Ukraine-Russia conflict, Western sanctions (including UK sanctions) have failed in their key objective of stopping the human casualties and ending the conflict. UK's arbitrary unilateral sanctions, which lack any legal fundament (such as the need for compliance with a court ruling or UN sanction against Russia), have had the unintended effect of increasing Russia's trade with China, India and other countries not subscribing to the nebulous Western measures. Avoidance of sanctions has created an elaborate retaliatory programme. The UK designs measures to hurt Russia, but the latter eventually adapts, forcing the UK to re-evaluate its measures. The only ones who are constrained and coerced are the innocent people of the target state and those with a nexus to that state.

By way of example, several states imposed unilateral sanctions against Russia as a result of the annexation of Crimea. In turn, Russia has imposed its own sanctions on the states that sanctioned

[26] Cf Iryna Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind* (Brill 2022).
[27] Margaret Pamela Doxey, *Economic Sanctions and International Enforcement* (2nd ed., Macmillan Press 1980) 9.
[28] <https://www.gov.uk/government/publications/financial-sanctions-general-guidance/uk-financial-sanctions-general-guidance>.

it.[29] Several years later, in direct response to the latest import sanctions imposed on Russia, the Russian government swiftly enacted the so-called 'parallel import' legislation just one month after the onset of hostilities. This legislative action permitted both Russian entities and individuals to import a wide range of goods from any global source without requiring manufacturer authorization. This effectively dismantled the previously rigorous import control mechanisms overseen by agencies such as Rosstandart, Rospotrebnadzor, and Rostechregulirovanie, which mandated compliance with Russian technical standards and required Russian-language user manuals and consumer information. On the one hand, the initiative proved highly effective in rendering the sanctions useless, catalysing a surge of imports funnelled through various intermediaries and shell companies in over 40 countries. Industrial equipment and large-scale goods predominantly arrived via Turkey, the UAE, and Hong Kong, while consumer goods were largely sourced through Kazakhstan, Armenia, Kyrgyzstan, and Georgia. On the other hand, Russian consumers faced increased risks. For example, UK, EU and US regulators' willingness to maintain sanctions have already resulted in catastrophic outcomes, such as a series of fatal aircraft crashes. Aircraft failures in Russia have more than doubled in 2023 compared to pre-war times, indicating that a crisis may be imminent. Third, third countries that are not directly sanctioned but are deemed as conduit countries may suffer too. For example, in June 2023, the EU introduced legislation allowing for the halt of sanctioned goods shipments not only to Russia but also to countries serving as conduits for these goods into Russia. However, in comparison to the UK, for the EU such a decision requires unanimous approval from all 27 EU member states and as of now, no actions have been taken under this directive, which was initially described as an exceptional, last resort measure.

If the UK imposes penalties on what it unilaterally deems as conduit countries (for example, countries like Kazakhstan or Armenia) for reselling goods to Russia, there's no guarantee that

[29] 'The Decree of the President of the Russian Federation on 6 August 2014, No. 560 'On the application of certain special economic measures to ensure the security of the Russian Federation' (Указ Президента Российской Федерации от 06.08.2014 г. No. 560 'О применении отдельных специальных экономических мер в целях обеспечения безопасности Российской Федерации'); Resolution of the Government of the Russian Federation No. 778 of 7 August 2014 'On measures concerning the implementation of the Presidential Decree as of 6 August 2014 No. 560 On the application of certain special economic measures to ensure safety of the Russian Federation.' (Постановление Правительства Российской Федерации N 778 от 7 августа 2014 года 'О мерах по реализации указа Президента Российской Федерации от 6 августа 2014 года N 560'). Later additional trade restrictions were enacted' cited in Iryna Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind* (Brill 2022) 37.

these measures will be effective in achieving the original objective, and there is a high likelihood that the conduit country will suffer unnecessary harm. There is also no guarantee that the sanctions would compel the conduit country to implement stricter controls, leading to harm limited only to the innocent people of that country. It is inevitable that unnecessary sanctions that are arbitrary and lack proportionality and effectiveness are likely to have a negative effect on the civilian population's human rights. Even if the sanctions are targeted, which are theoretically designed to be adopted so as not to harm the population of the sanctioned country, they have the potential to be as harmful as comprehensive sanctions. This was the result of the sanctioned regime against Qatar and Venezuela. There, measures harmed the civilian population by causing indirect human rights violations. Here it is strongly arguable that they are disproportionate. As such, sanctions, unfairly and proportionately applied to the wrong targets, often discredit the idea of accountability for the grave violations of international law.

In addition to being disproportionate, the sanctions are ineffective because substitutions can easily be found by the targeted nation of the direct sanctions if the conduit country is barred from selling to the latter. Targeting intermediary companies is also challenging, given their transient nature—they can appear and disappear overnight.

An example of an ineffective regulation passed under SAMLA is the Global Human Rights Sanctions Regulations 2020 (S.I. 2020/680) (henceforth, the Regulations). The Regulations have the objective of providing a legal basis for the imposition of sanctions on individuals and entities, including state actors, responsible for human rights violations and corruption committed worldwide. However, the Regulations lack a robust international legal foundation; provide for unfettered, arbitrary power to impose unsubstantiated sanctions; and fail to attain their objective for the following three reasons.

First, the subject of the sanctions can be arbitrarily chosen. The Regulations envisage sanctions not only on those responsible or complicit in abuses but also to 'leaders or officials' of organisations involved in such abuses, even if those individuals are not directly responsible for them, and to anyone who has facilitated corruption or human rights abuses, for example, by providing legal or accounting services. Further, there is no longer a requirement for people to know or suspect they breached sanctions law to receive a monetary penalty for such breaches.[30]

[30] Economic Crime (Transparency and Enforcement) Act 2022, section 54.

Second, the Regulations are vague about standards of evidential sufficiency, allowing scope for designations to be based on intelligence and open-source information. Whilst reasons must be stated when sanctions are imposed, the statements are superficial, and the UK is allowed to refrain from divulging classified information. Designated persons are ill-informed of the offences that they are accused of and the actions they need to take to get delisted. This lack of transparency renders sanctions ineffective because (i) it increases the chances of sanctions being overturned and (ii) decreases the incentives of the legislation targets to cease committing the sanctioned behaviour. For example, the UK government has imposed asset freezes and travel and visa bans against Israeli settlers accused of committing human rights abuses against Palestinians. The targeted Israelis face quasi-criminal consequences without a court trial, and the only justification for the government's nebulous decision is a cursory public statement.[31] As recently as 3rd May 2024, the UK Foreign Secretary, Lord Cameron, posting on X, formerly Twitter, announced further sanctions aimed at Israelis who he termed as "extremist settlers …undermining security and stability and threatening prospects for peace. This recent example underlines, in a nutshell, the significant strands that demonstrate the unlawful, politically motivated and arbitrary nature of the UK sanctions regime. The pronouncement by an ex-Prime Minister and current senior member of the Government, appears to be made without an evidential foundation, in the absence of any criteria and a failure to observe natural justice. This, coupled with recent examples of "sides being taken' as to, on the one hand, peaceful protest and, on the other, behaviour deemed to be unlawful due to the side supported.

Third, the effectiveness of the sanctions is loosely monitored, and the courts have no power to award damages for sanctions wrongly imposed where the government has acted negligently.[32] The UK government is **not** required to lay a report before Parliament explaining, amongst other things, why sanctions are a reasonable course of action, to report on sanctions reviews to Parliament every year and to review certain sanctions every three years.

7. Suggested changes to the sanction's regime

The issuing of sanctions consists broadly of two steps: issue (step 1) and challenge (2).

[31] <https://www.gov.uk/government/news/uk-sanctions-extremist-settlers-in-the-west-bank#:~:text=The%20Foreign%20Secretary%20has%20announced,Bank%20over%20the%20past%20year.> and <https://www.gov.uk/government/news/joint-statement-on-west-bank-settler-violence>.
[32] Economic Crime (Transparency and Enforcement) Act 2022, sections 62-64.

Whilst the 2024 UK Sanctions Strategy report suggests that the UK's sanctions regime (in particular SAMLA) provides a transparent and robust system of legal challenge and review, this would mean that only step 2 in the imposition of sanctions is lawful and democratic.[33] Step 1, which deals with the imposition of sanctions, is opaque and affords the UK government discretionary powers that can be exercised arbitrarily.

We submit that even if (which we contend is the case)persons targeted by sanctions have access to a transparent process for legal challenge, that is not enough when the very imposition of sanctions is opaque and causes irreversible damage to the sanctioned person or entity (including state actors).

Hence, we submit that the framework governing the imposition of sanctions (including regulations and designations) ought to be amended as follows.

First, unilateral sanctions regulations for purposes other than national security should:

1. adequately describe their necessity and effectiveness in light of their unintended but reasonably foreseeable consequences and objectives, and
2. provide for an annual review phase by courts and/or a regulatory authority that has the statutory duty to represent the rights of UK and non-UK citizens. During this period, the regulation would have only an interim status.

Second, the procedure for the designation of persons by name should:

1. have the default position that mandatory notification of the targeted person is presented by the appropriate Minister,
2. be accompanied by a clear procedure for challenge, allowing for ample time and evidence necessary for an adequate defence before the designation is issued (when the default position mentioned above applies),
3. the targeted person should be provided with full written reasons for the designation.

Third, the disclosure of non-classified information should be mandatory in all cases that are not related to national security. Where disclosure is denied for national security reasons, the state should inform the sanctioned person of those reasons and invite representations.

[33] <https://www.skadden.com/-/media/files/publications/2024/03/uk-publishes-first-sanctions-strategy/sanctions_strategy_deterdisruptanddemonstrateuksanctionsinacontestedworld.pdf?rev=c9d53c0da66346d39262b705afd812a2&hash=054BCE2B423BF538E78BB9354239D709>.

Fourth, any designation, whether by name or description, should be accompanied by a clear procedure that the targeted person can follow in order to cease committing the sanctioned behaviour.

Fifth, an expert panel should be established to assist the Minister in the procedures of listing and reviewing the applications for de-listing. For example, at an international level, the intense criticism of the UN sanctions regime's non-compliance with the requirement for due process led to the establishment of the Office of the Ombudsman in 2009, whose main duty is the review of a specific set of de-listing requests.[34] The other set of sanctions is reviewed by the 'focal point.'[35]

Particular suggestions to reset the UK approach based upon its most recent designation activity.

In addition to the general and broader suggestions relating to the regime, our research has uncovered various particular issues which are pertinent to the recent imposition of sanctions on the Russian regime. These particular matters serve as examples of how the UK regime is failing in practice as a result of its lawful shortcomings.

Designation of "involved person".

The definition of "involved person" in the Regulations is overly broad. As outlined above, but with specific reference to the recently imposed sanctions on Russia, many people with no connection to the Russian government or the conflict in Ukraine are potentially liable to designation.

In order to seek to meet this, the definition could be narrowed in the following ways without prejudice to the effectiveness of the sanction's regime:

"Associated/Involved person"
An 'involved person' currently includes any person associated with another involved person (Reg. 6(2)(d)), and "associated with" includes (a) obtaining a financial benefit or other material benefit from that person, or (b) being an immediate family member of that person (Reg. 6(6)).

[34] UNSC Res 1904 (17 December 2009) UN Doc s/ res/ 1904.
[35] UNSC Res 1730 (19 December 2006) UN Doc s/ res/ 1730.

In order to bring this in line with our 5 general suggestions set out above, and to begin a practical process to aid reform and secure a lawful regime, it is submitted that. an exhaustive list of categories of 'associated persons' should be set out;

a materiality qualification should be added to the financial/other benefit test;

and the "immediate family member" limb should be removed.

In terms of association, it is submitted that a clear evidential link to the criminal standard be established between the DP and the current situation in Ukraine, meaning that the association is linked to the destabilizing activities of Russia in Ukraine.

What ought to constitute a "benefit from the Government of Russia"

As currently drafted, a person is "involved in obtaining a benefit from or supporting the Government of Russia" if they are (among other things) carrying on business as a Government of Russia-affiliated entity, or a business of economic or strategic significance to the Government of Russia.

It is submitted that the "business of economic significance" limb should be removed as it is vague and very broad. The lack of clarity is not conducive to ensuring effective focus and (2) a materiality qualification or exception should be added to "Government of Russia-affiliated entity", to ensure that unintended individuals/entitles are not caught.

Definition of funds and overlap with provision of documents.

The definition of "funds" (which DPs are prohibited from dealing in) includes "documents evidencing an interest in assets". Although likely targeted at the capture of documents such as an original physical share certificate, the drafting is sufficiently broad as to arguably apply to documents with no legal effect such as bank statements and receipts (as these evidence an interest). The definition should be amended to make clear that purely evidential documents are excluded and that photocopies and electronic versions of documents that come within the category are also excluded as they have no inherent, transactional, or instrumental value.

Practical issues Licencing leading to detrimental legal consequences.

The licensing regime is complex and burdensome both for those seeking licences and for OFSI. The delays in OFSI issuing specific licences (due to OFSI being under-resourced) risks

undermining the ability of Designated Persons (DPs) to retain lawyers and incur other necessary expenses. The significant delays in law firms receiving licences/payment means certain firms won't act for DPs, and even firms that do act face significant problems in respect of cash flow and working capital etc.

Timing.

OFSI should be subject to a statutory obligation to determine licence applications within a given timeframe (e.g. six months).

It is submitted that OFSI should do the following:-

When an application is submitted provide the applicant at the outset the approximate amount of time it thinks it will need to determine the application;

Set 'response service levels', regarding when OFSI aims to respond with queries on applications;

Fast-track a licence if the application is based on the same/similar information/workstreams/rates approved by OFSI in prior licence applications.

Assessment of professional fee applications.

OFSI's assessment should be limited to whether the work undertaken and time spent was reasonable. It is not OFSI's function to determine whether a commercial agreement for legal rates/properly incurred professional services is reasonable.

General Licences.

Further General Licences should be issued to reduce the number of licence applications made in respect of routine activities (for example, routine litigation expenses etc.) and there should be greater engagement by OFSI with practitioners to ensure that General Licences work in practice.

Defamation.

OFSI will generally not licence professional fees for defamation claims. This unlawfully restricts a DPs ability to protect themselves from false and reputationally harmful allegations leading to a practical lack of ability of a DP to challenge such injurious conduct.

Conclusion

In contrast to sanctions decided by competent international bodies that are inherently lawful, unilateral sanctions imposed by states are inherently unlawful. The latter may be justified only if imposed as a response to a breach of international law and in accordance with the international legal framework for countermeasures.

Hence, the imposition of unilateral sanctions, bringing with it the ability to cause irreversible harm to sanctioned economies, must be, we submit, approached as a last resort, ensuring that due process, proper evidential standards, and availability of resources are achieved. We submit that the UK regime, often driven by individual ministers, lacks consistency, clarity of process and proportionality and fails to achieve its aims in punishing bad actors. Instead, unforeseen consequences are apparent, whereby the flawed regime impacts innocent individuals and entities which bind them extraterritorially. The UK unilateral financial sanctions regime needs to be altered as proposed to have at least some alignment with the rights of its (potential) targets.

31st May 2024

Dean Armstrong KC

International Legal Forum