ESSAY

SANCTIONS RELATING TO MISAPPROPRIATION OF STATE FUNDS DURING POLITICAL TRANSITIONS

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I. POLITICAL TRANSITIONS AND MISAPPROPRIATED STATE FUNDS

In the aftermath of national political turmoil and transition, such as that witnessed during the Arab Spring, newly installed governments seek to recover state funds allegedly

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misappropriated by the outgoing kleptocratic leaders and their associates. Recovering misappropriated state funds requires international cooperation between the state whose funds are misappropriated (source state) and the state where the funds are located (destination state). Not coincidentally, this cooperation involves a global North-South relationship as misappropriated funds from developing states are often stored in global financial institutions of developed states.[1]

Immediately after the downfall of the long-time rulers of Tunisia and Egypt in 2011, important Western destination jurisdictions, namely Canada, the European Union,[2] Switzerland, and the United States, adopted assets-freeze sanctions against Tunisia's former president Zine el-Abidine Ben Ali, Egypt's Hosni Mubarak, and their families and associates. A similar template was followed later in 2014 to freeze the assets of Ukrainian politicians, including President Victor Yanukovych, following the popular uprising that removed the government.

These sanctions were adopted on the basis of foreign policy or constitutional emergency powers. The EU misappropriation sanctions are based on the EU Council's Common Foreign and Security Policy (CFSP) mandate.[3] The Canadian misappropriation regime, established by the Freezing Assets of Corrupt Foreign Officials Act (FACFOA), is grounded in the government's foreign affairs powers and administered by the corresponding ministry.[4]

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1. *See* JASON SHARMAN, THE DESPOT'S GUIDE TO WEALTH MANAGEMENT 1–2 (2017); for a recounting of major asset recovery cases, see MATHIS LOHAUS, ASSET RECOVERY AND ILLICIT FINANCIAL FLOWS FROM A DEVELOPMENTAL PERSPECTIVE: CONCEPTS, SCOPE AND POTENTIAL 43 (2019), https://www.u4.no/publications/asset-recovery-and-illicit-financial-flows-from-a-developmental-perspective-concepts-scope-and-potential.pdf [https://perma.cc/UJV2-KG2F].

2. The United Kingdom, another important destination state, has been implementing the three EU anti-misappropriation sanctions as an EU member, and has since transposed the regimes into its legal system. As it is a replication of the EU regime, there would not be separate discussion of the UK system in this paper.

3. Council Decision 2011/172/CFSP, 2011 O.J. (L 76) 63 (EU) (concerning restrictive measures directed against certain persons, entities, and bodies in view of the situation in Egypt); Council Decision 2014/119/CFSP, 2014 O.J. (L 66) 26 (EU) (concerning restrictive measures directed against certain persons, entities, and bodies in view of the situation in Ukraine); Council Decision 2011/72/CFSP, 2011 O.J. (L 28) 62 (EU) (concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia).

4. Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c. 10 (Can.) [FACFOA] (Canadian sanctions against Egyptian, Tunisian, and Ukrainian PEPs were subsequently

The Swiss misappropriation sanctions were initially built on the Swiss Federal Council's emergency powers.[5] Switzerland has since adopted a generalized legislative framework, known as Freezing Illicit Assets Act (FIAA).[6] The US misappropriation sanctions against Ukrainian PEPs (but not Egyptian or Tunisian) are grounded in the President's national and economic emergency powers.[7]

These misappropriation sanctions are different from other anti-corruption sanctions, as they focus specifically on political turmoil and transition in the source state. We can imagine them as super sanctions that are meant to be utilized in the infrequent instances of the downfall (but *not* during the reign) of corrupt national leaders. They are designed to tackle corruption not as an undesirable phenomenon on its own, but as a political stability or democratic consolidation problem. The EU sanctions, for example, explicitly framed the objectives of such a sanctions regime during the Arab Spring in terms of "peaceful orderly transition to a civilian and democratic government."[8]

But what precisely is the need for these misappropriation sanctions, not just in comparison to general anti-corruption sanctions, but also in light of the fact that ordinary inter-state cooperation in criminal matters is supposed to address the matter of freezing and recovering stolen state funds? The ordinary pathway for the freezing and recovery of misappropriated state funds is via inter-state mutual legal assistance (MLA) cooperation

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adopted as regulations under this legislation); Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations, SOR/2011-78 (Can.); Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations, SOR/2014-44 (Can.).

5. Ordinance of Feb. 2, 2011 on Measures Against Certain Persons from the Arab Republic of Egypt, SR 946.231.132.1 (Switz.); Ordinance of Jan. 19, 2011 on Measures against Certain Persons from Tunisia, SR 946.231.175.8 (Switz.). Switzerland has since adopted a generalized legislative framework, known as Swiss Federal Act on the Freezing and Restitution of Unlawfully Acquired Assets of Foreign Politically Exposed Persons, AS 2016 1803 (Switz.) [FIAA].

6. Federal Act on the Freezing and Restitution of Unlawfully Acquired Assets of Foreign Politically Exposed Persons, AS 2016 1803 (Switz.) [FIAA].

7. Exec. Order No. 13,660, § 1(a)(i)(C), 3 C.F.R. 226 (2014); Exec. Order No. 13,818, § 1(a)(ii)(B), 3 C.F.R. 399 (2017) (citing International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706; National Emergencies Act, 50 U.S.C. §§ 1601–1651).

8. *See, e.g.*, Council Decision 2011/172/CFSP, annex, 2011 O.J. (L 76) 63 (EU), recitals 1 & 2.

in criminal matters.[9] Historic cases of asset recovery involving deposed national leaders—such as Haiti's Jean-Claude Duvalier, Philippines' Ferdinand Marcos, and Nigeria's Sani Abacha—were dealt with through ordinary criminal cooperation.[10] Presently as well, nearly all asset recovery cases are processed through MLA cooperation: for example, the leading financial destination state, Switzerland, receives about 100 yearly asset recovery requests involving corruption from other states.[11] Therefore, these misappropriation sanctions, and indeed all anti-corruption sanctions regimes, are exceptions to the norm of a criminal justice pathway.

The misappropriation sanctions regimes relating to Egypt, Tunisia, and Ukraine are furthermore peculiar in that they are the only cases of application of such specialized sanctions regime—since then, no other geographically focused misappropriation sanctions have been adopted. It is perhaps a brief experiment in the middle of the 2010's that arose with the Arab Spring and subsided post-Ukraine.

Legislative preparatory documents and scholarly literature provide one prominent justification for the existence of these sanctions regimes: they were adopted because MLA mechanisms were not swiftly applicable in times of urgent need, for reasons connected to both the source and the destination state. With respect to the source state, the general explanation is that during tumultuous political transitions, the state structures of the source states are too destabilized or even completely broken down to process an MLA request in a manner that satisfies the evidentiary

9. *See* Dimitris Ziouvas, *International Asset Recovery and the United Nations Convention Against Corruption*, *in* THE PALGRAVE HANDBOOK OF CRIMINAL AND TERRORISM FINANCING LAW 591, 591 (Colin King, Clive Walker & Jimmy Gurulé eds., 2018); Mark V. Vlasic & Jenae N. Noell, *Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems*, 5 YALE J. INT'L AFFS. 106, 113–14 (2010); DAVID CHAIKIN & JASON C. SHARMAN, CORRUPTION AND MONEY LAUNDERING: A SYMBIOTIC RELATIONSHIP 176 (2009).

10. *See* Gretta Fenner and Kodjo Attisso, *Returning Stolen Assets — Learning from Past Practice: Selected Case Studies*, BASEL INST. ON GOVERNANCE (2013), https://baselgovernance.org/publications/returning-stolen-assets-learning-past-practice [https://perma.cc/57M6-BRXU].

11. *See* George Pavlidis, *Asset Recovery: A Swiss Leap Forward?*, 20 J. MONEY LAUNDERING CONTROL 150, 152 (2017).

and due process requirements of the destination state.[12] From the destination state's perspective, the sanctions are needed because in the absence of a formal MLA request from the source state, there is no other legal basis that allows a temporary freeze on foreign assets.[13] The idea is that political turmoil and transitions, particularly in authoritarian or kleptocratic regimes, present an urgent need to prevent misappropriated state funds—whether accumulated by the leaders while in power or looted from state treasuries upon departure—from dissipating. In this light, the misappropriation sanctions are adopted not as an ordinary anti-corruption measure as such, but as emergency measures to protect state funds during periods of transition.

The swift applicability of sanctions, however, does not seem to be a sufficient explanation of why they were preferred over MLA as almost all of the anti-misappropriation sanctions mentioned earlier were utilized after, not before, the source states initiated a request for cooperation. Canada and Switzerland justified their measures based on the written requests they received from Tunisia and Egypt, and their respective misappropriation sanctions regimes require receipt of a formal request from the source state for sanctions designations (i.e., listings) to be considered.[14] In other instances, such as Egypt's request to the

12. *See* Evidence of Rob Nicholson, Minister of Justice and Attorney General of Canada, Before the H. Standing Comm. on Foreign Affs. & Int'l Dev., 40th Parl., 3d Sess. 1540 (Mar. 7, 2011), https://www.ourcommons.ca/DocumentViewer/en/40-3/FAAE/meeting-49/evidence [https://perma.cc/4PMX-6VAM]; Erin Shaw & Julian Walker, *Bill C-61: The Freezing Assets of Corrupt Foreign Officials Act*, Pub. No. 40-3-C61-E, Parliamentary Info. & Research Serv. (Can.), Mar. 24, 2011, https://bdp.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/40-3/40-3-c61-e.pdf [https://perma.cc/3GJP-J4JA].

13. *See* CLARA PORTELA, SANCTIONING KLEPTOCRATS: AN ASSESSMENT OF EU MISAPPROPRIATION SANCTIONS 17 (2019), https://cifar.eu/wp-content/uploads/2019/03/CiFAR_Sanctioning-kleptocrats.pdf [https://perma.cc/2D4K-VCKW].

14. *See* FACFOA § 4(1); *see also* Evidence of Rob Nicholson, Minister of Justice and Attorney General of Canada, Before the H. Standing Comm. on Foreign Affs. & Int'l Dev., 40th Parl., 3d Sess. 1540 (Mar. 7, 2011) https://www.ourcommons.ca/DocumentViewer/en/40-3/FAAE/meeting-49/evidence [https://perma.cc/4PMX-6VAM]; FIAA art. 4; Swiss Fed. Council, *Dispatch on the Federal Act on the Freezing and Restitution of Unlawfully Acquired Assets of Foreign Politically Exposed Persons*, (BBl 2014 5265), 5266, https://www.fedlex.admin.ch/eli/fga/2014/1134/de [https://perma.cc/KCD7-EM93] (noting the Swiss regime can be triggered with or without such request—the Swiss Tunisia

European Union, the assets-freeze request was explicitly framed as an enforcement of the United Nations Convention against Corruption (UNCAC), which requires signatory parties to afford each other MLA cooperation.[15] Moreover, the existence of a criminal investigation or prosecution in the source states was cited by EU authorities as a basis for the listing of individuals under the misappropriation sanctions. Indeed, whether the assets-freeze measure should have been taken as foreign policy sanctions or ordinary MLA cooperation was contested before EU courts by some applicants, who asserted that the EU Council does not have a mandate to adopt sanctions on an ordinary criminal law matter (i.e., corruption).[16]

The UNCAC, to which Egypt, Tunisia, Ukraine, and all four destination jurisdictions including the European Union are parties,[17] requests states-parties to offer "the widest measure"[18] of cooperation to each other to preserve assets. Furthermore, under Article 54(2)(c), it encourages states to take up assets-freeze as a pre-MLA temporary assistance measure.[19] In expounding on this UNCAC provision, the World Bank's Stolen Asset Recovery Initiative (STaR) has recommended that states adopt legal tools

misappropriation sanctions were adopted in response to request, but Egypt sanctions were adopted prior to receipt of request).

15. *See* United Nations Convention Against Corruption (UNCAC) art. 46, Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005). For general commentary, see THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A COMMENTARY (Cecile Rose, Michael Kubiciel & Oliver Landwehr eds., 2019).

16. *E.g.*, Case C-220/14 P, Ahmed Abdelaziz Ezz and others v. Council, ECLI:EU:C:2015:147 (Mar. 5, 2015).

17. Council Decision 2008/801/EC, 2008 O.J. (L 287) 1 (approving the United Nations Convention Against Corruption).

18. UNCAC, arts. 17 & 46(1). For analysis on scope and jurisdictional issues of the Convention, see Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, *The International Legal Framework against Corruption: Achievements and Challenges*, 14 MELB. J. INT'L L. 205 (2013), and Kimberly Prost, *International Cooperation under the United Nations Convention against Corruption*, *in* DENYING SAFE DESTINATION TO THE CORRUPT AND THE PROCEEDS OF CORRUPTION 6 (2006), https://www2.cifor.org/ilea/Database/Information/37574816.pdf [https://perma.cc/3SVB-HXF5]. For preparatory background of the Convention, see Philippa Webb, *The United Nations Convention against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191 (2005).

19. *See* KEVIN M. STEPHENSON ET AL., BARRIERS TO ASSET RECOVERY 43–44 (2011); *see also* Radha Ivory, *Asset Recovery, Art. 54: Mechanisms for Recovery of Property Through International Cooperation*, *in* THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A COMMENTARY 556–57 (Cecile Rose, Michael Kubiciel & Oliver Landwehr eds., 2019).

that allow their law enforcement bodies to adopt temporary (maximum seventy-two hours) administrative freezes in anticipation of an imminent formal MLA request from the source state, or that an "investigating magistrate or prosecutor" undertake a non-time bound pre-MLA freeze.[20] This means that where states lack legislation that provides for swift assets-freeze measures prior to formal MLA requests, they are encouraged to adopt one as a matter of ordinary criminal justice policy, not national emergency or foreign and security policy.

In addition to UNCAC, other international soft law standards, particularly anti-money laundering standards adopted by the Financial Action Task Force (FATF), require similar international cooperation for assets-freeze, among other measures.[21] The 2012 FATF Recommendation number 38 asks states to "take expeditious action" in response to a request to freeze criminal property.[22] The FATF defines "criminal property" as assets that are proceeds or instrumentalities of money laundering or predicate offences, which, in most countries, includes corruption or misappropriation of public funds.[23] It also requires states to respond to "requests made on the basis of . . . non-conviction based confiscation proceedings and *related provisional measures*, unless this is inconsistent with fundamental principles of their domestic law."[24] The "provisional measures" could be construed as including

20. KEVIN M STEPHENSON ET AL., *supra* note 19, at 55.

21. Financial Action Task Force (FATF) standards are technically non-binding, but their description as soft law is controversial given that their regulations are embedded within national legislation nearly universally and are endorsed by binding UN Security Council resolutions. *See* Nicholas W. Turner, *The Financial Action Task Force: International Regulatory Convergence Through Soft Law*, 59 N.Y. L. SCH. L. REV. 547 (2015); NATHANAEL TILAHUN, REGULATORY COUNTER-TERRORISM: A CRITICAL APPRAISAL OF DYNAMIC GLOBAL GOVERNANCE 119–25 (2018); Navin Beekarry, *International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: a Critical Analysis of Compliance Determinants in International Law*, 31(1) NW. J. INT'L L. & BUS. 158 (2011); *see also* DORON GOLDBARHST, GLOBAL COUNTER-TERRORIST FINANCING AND SOFT LAW: MULTI-LAYERED APPROACHES (2020).

22. FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM AND PROLIFERATION, THE FATF RECOMMENDATIONS 28 (2025), https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf [hereinafter FATF RECOMMENDATIONS].

23. *Id.* at 125.

24. *Id.* at 115.

temporary freezing measures. FATF Recommendation number 4 also requires states to adopt an assets-freeze measure as a provisional measure to the confiscation process, and Recommendation number 40 instructs states to undertake such measures both spontaneously and upon request. All source and destination states in the above cases are members of the FATF, or FATF-style regional bodies that have association agreements with the FATF containing a duty to implement the latter's standards.[25]

If an MLA pathway was theoretically also available, even in the cases of political transition, why did the above-mentioned destination jurisdictions choose to adopt misappropriation sanctions? In the following pages, I attempt to construct an account of the motivations that drive destination states to choose sanctions over MLA cooperation in times of political transition abroad. I suggest that these reasons might have more to do with the self-interest of destination states and the need to bypass legitimate safeguard processes in the pursuit of immediate political objectives.

The paper is structured as follows. Part II presents the main comparative analysis between sanctions and MLA within the context of political transitions in source states. This Part essentially shows that the reasons that sanctions are preferred over MLA cooperation have mainly to do with their utility in bypassing legal constraints and providing political flexibility for the destination state. Part III shows the indispensable role of MLA in achieving the end goal of assets-freeze, which is asset recovery to source states, regardless of how assets are frozen. In that light, it argues for complementarity between sanctions and MLA. Part IV provides concluding observations.

II. SANCTIONS OR MUTUAL LEGAL ASSISTANCE? SPECIAL CONSIDERATIONS DURING POLITICAL TRANSITIONS

The most obvious explanation for the existence of misappropriation sanctions is that although international

25. Canada, the European Commission, Switzerland, and the United States are FATF members. Egypt and Tunisia are members of Middle East and North Africa Financial Action Task Force (MENAFATF). Ukraine, as a member of the Council of Europe, is subject to Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL). A list of FATF member countries and regional bodies available at FATF website, https://www.fatf-gafi.org/en/countries.html [https://perma.cc/DRN2-5PMP].

instruments require states to take precautionary assets-seizure measures even without receiving a satisfactory formal MLA request, most states do not have a domestic legal basis to take such action. In other words, those obligations are not transposed into domestic legislation, and therefore there is a legal gap concerning cooperative action or preventative measures that precede a formal MLA request.

But this reasoning seems to be begging the question: why is it not possible for states to adopt laws that allow the taking of asset-freezing actions through judicial or law enforcement channels, rather than through the political offices of the executive? Why does such legislation not enable judicial or law enforcement authorities to freeze assets swiftly and more easily as soon as the said political transitions abroad occur or are underway? In other words, what is the rationale that automatically consigns swift asset-freezing action to political organs, instead of judicial or administrative ones? Judiciaries, for example, are commonly mandated to undertake temporary measures, such as interim measures and injunctions, in most legal systems.

The absence of a legal basis is not a straightforward or sufficient explanation if we start from the premise that there is nothing inherently un-judicial or un-administrative in exercising an assets-freeze measure in advance of a full-fledged MLA process, possibly based only on a request of a source state. In practice, almost all the anti-misappropriation sanctions were adopted following, and not in the absence of, a request for cooperation from the source states. In the case of Canada especially, as discussed earlier, a prior MLA request is even a requirement for triggering the sanctions. This calls for a more critical account of why destination states choose sanctions over MLA. This Part unpacks four main plausible lines of explanation. These lines thread along the key points of divergence between sanctions and MLA processes, which are: *treaty preconditions*, *criminal justice requirements, evidentiary threshold,* and *foreign policy instrumentality*. The discussion illuminates to what extent and under which circumstances each of these factors lead destination states to choose sanctions over MLA to enforce assets-freeze.

A. Treaty Preconditions

MLA cooperation follows an agreement of reciprocity between the requesting and requested states, often formalized through a treaty,[26] whereas an act of sanctions is a unilateral act that does not require reciprocity. Once political turmoil begins in a source state and the need to freeze assets arises, there would not be adequate time to enter into reciprocity agreements afresh, as such instruments require legislative assent from both sides. The need to enforce assets-freeze measures in cases where there is no pre-existing agreement on reciprocity, therefore, could appear to favor the choice of unilateral sanctions over the MLA process. However, an examination of the current international normative framework and the above-mentioned cases show the limited role reciprocity plays in the choice between these two pathways.

At the time of the political transition, Ukraine had MLA agreements with Canada[27] and United States,[28] but not the European Union and Switzerland. However, all four jurisdictions resorted to adopting sanctions, prima facie showing that the existence of an MLA agreement is not a determining factor in the choice between sanctions and ordinary MLA cooperation. This is further substantiated by the fact that even with respect to the European Union and Switzerland, the absence of MLA agreement at the time would not have posed an obstacle to cooperate with Ukraine.

The EU-Ukraine association agreement specifically provides for MLA between the parties, particularly with regard to corruption.[29] As the Ukraine misappropriation cases arose before the entry into force of the association agreement, it is understandable that the European Union initially resorted to sanctions to freeze the assets of Ukrainian politically exposed

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26. *See generally* Martin Böse, *International Law and Treaty Obligations, Mutual Legal Assistance, and EU Instruments*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS 609 (Darryl Brown, Jenia Turner & Bettina Weisser eds., 2019).

27. Treaty Between Canada and Ukraine on Mutual Assistance in Criminal Matters, Can.–Ukr., Mar. 25, 1994, E101647–CTS 1999 No. 7.

28. *See* Treaty Between the United States of America and Ukraine on Mutual Legal Assistance in Criminal Matters, Jul. 22, 1998, S. Treaty Doc. No. 106–16.

29. *See* Association Agreement between the EU and its Member States, and Ukraine of the Other Part, arts. 24(3), 459, 2014 O.J. (L 161) 3.

persons (PEPs). However, the European Union could have subsequently transferred such measures onto the MLA framework, especially given the fact that the association agreement came into effect a mere couple of months after the sanctions were adopted. The EU Council, despite asserting in oral proceedings before the EU General Court that the assets-freeze measures are autonomous EU measures and not MLA cooperation, invoked the association agreement with Ukraine to justify its reliance on findings of Ukrainian courts as the evidentiary basis for the sanctions.[30] The European Union could have utilized the association agreement as a basis for the asset freeze itself, or as a way to shorten the life of the CFSP sanctions regime. This means that the absence of an MLA treaty with Ukraine may justify the initial adoption, but not the continued existence of EU misappropriation sanctions.

Likewise, Swiss law allows for MLA cooperation in the absence of an MLA agreement in certain exceptional situations, one of which is when the competent authority finds it advisable based on "the type of offence or the necessity of combatting certain offences."[31] Given that Swiss courts have affirmed that fighting dirty money is a matter of "national interest,"[32] the government could have logically deemed it advisable to extend cooperation in the absence of an MLA agreement in the case of misappropriation offenses. This shows that the absence of an MLA treaty was not a determining factor that forced a choice in favor of sanctions.

With respect to Egypt and Tunisia, which did not have MLA agreements in place with the destination states, the MLA provisions of the UNCAC could have served as a basis for cooperation, as the European Union, Switzerland, Canada, and United States are all parties to the treaty. The UNCAC provides that for parties that precondition pre-confiscation freezing of foreign assets upon the existence of an MLA treaty arrangement, the convention itself shall be deemed to constitute such treaty.[33]

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30. *See* Case T-286/19, Mykola Yanovych Azarov v. Council, ECLI:EU:T:2020:611, ¶ 121 (Dec. 16, 2020).

31. Federal Act on International Mutual Assistance in Criminal Matters, art. 8(2)(a), SR 351.1 (Mar. 20, 1981) (Switz.).

32. PORTELA, *supra* note 13, at 18 (citing Tribunale federale (TF) [Federal Supreme Court] Dec. 5, 2013, B-4797/2012, and Tribunale federale (TF) [Federal Supreme Court] Apr. 7, 2017, B-2682).

33. *See* UNCAC, *supra* note 15, art. 55(6).

Legislation in the other destination states shows us that international cooperation for assets-freeze is possible even when there is no reciprocity arrangement with source states through an MLA agreement or treaties such as UNCAC. Reciprocity requirements in some national legislative materials are quite porous, leaving room for exceptions. For example, the Swiss MLA law makes such an exception in cases where it "seems advisable due to the type of offence or to the necessity of combating certain offences."[34] By characterizing misappropriation of state funds, particularly in developing states, as an offense that necessitates special cooperation, the Swiss government could have utilized this exception to cooperate with source states without reciprocity. Indeed, in the *Andrew Wang and others v. Swiss Office of Justice* case of 2004, the Swiss Supreme Court showed the way by deciding that "the general interest of Switzerland not to be seen, or considered, as a destination for criminal evidence and the proceeds of crimes" was a sufficient basis for Switzerland to provide MLA cooperation without a cooperation agreement existing with the source state.[35]

In practice, Switzerland has shown flexibility even when applying its MLA law. Where the MLA law makes reciprocity mandatory, the government has been willing to accept "informal declarations of reciprocity" instead of formal agreements to fulfil the requirement.[36] It has also undertaken MLA cooperation without requiring reciprocity where even the international recognition of the source state was in doubt.[37] And in any event, Switzerland had an MLA agreement at least with Egypt, and has been a party to the UNCAC since 2009, which vitiates the need for an MLA agreement for inter-state cooperation in this matter. Similarly, the Canadian MLA Act allows international cooperation based on an "administrative arrangement" when there is no formal agreement with the source state, albeit for a short period of time (six months).[38] These facts, therefore, cast doubt on the relevance

34. Federal Act on International Mutual Assistance in Criminal Matters, *supra* note 31, at art. 8(2)(a).

35. *See generally* Marc Henzelin, *Mutual Assistance in Criminal Matters between Switzerland and Taiwan: the Andrew Wang and others Case,* 3 J. INT. CRIM. JUST. 790, 793 (2005); TF Dec. 5, 2013,B-4797/2012; TF Apr. 7, 2017 B-2682.

36. *See* Henzelin, *supra* note 35, at 796.

37. *Id.*

38. Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.), § 6(1) (Can.).

of treaty precondition in choosing sanctions over MLA cooperation to freeze funds.

B. Criminal Justice Requirements

Requirements concerning the nature and handling of the criminal offense in question are also a factor in choosing between sanctions and MLA. MLA cooperation requires the existence of underlying criminal proceeding (investigation, prosecution, or other judicial proceedings) in the source state. Another MLA precondition is dual criminality, meaning that the act must be a criminal offense in both source and destination states. Both preconditions, however, do not automatically make sanctions more preferable than MLA with respect to misappropriation of state funds, as the following discussion shows.

1. Underlying criminal proceeding

The freezing of assets, being a coercive action, commonly falls under the judicial cooperation aspect of MLA, not law enforcement cooperation. Therefore, the request for such a measure must be backed by a court order or administrative decision from the source state. To obtain such orders or decisions, a criminal proceeding must be ongoing in the source state. The Canadian MLA Act, for example, requires that a written request be issued by a criminal court of the source state, and the targeted person be charged with an offense (instead of merely suspected or investigated) before an assets-freeze takes place.[39] Other legal systems do not require a judicial order from the source state, but only a criminal proceeding which would then be relied upon to obtain judicial order for an assets-freeze in the destination state. The Swiss Federal MLA Act falls in this category, requiring that "proceedings [be] carried out in criminal matters" in the source state, which includes both prosecutions of offenses and administrative measures against an offender.[40] Moreover, carrying out criminal proceedings entails identification of the specific proceeds of crime. Assets-freeze cooperation would then be sought with respect to funds

39. *See id*. § 9(3).
40. Mutual Assistance Act [IMAC], Mar. 20, 1981, SR 351.1, art. 63 (Switz.).

specifically identified as misappropriated, but not funds that are legitimately acquired by the offender.

In this regard, sanctions could provide a more convenient avenue to freeze assets more quickly and without having to distinguish between legitimate and tainted assets. The anti-misappropriation sanctions regimes do not precondition the assets-freeze measure on the existence of criminal proceedings in the source state. Canada's FACFOA regime, for example, simply requires that the source state "assert" in writing that the target has misappropriated state funds.[41] The Swiss sanctions regime also allows the adoption of assets-freeze prior to the submission of MLA requests, upon determination by the Federal Council that the asset in question is "likely acquired through corruption, bad business conduct or other crime."[42] Illustratively, as mentioned earlier, Switzerland adopted sanctions against Egyptian PEPs only a half hour after Mubarak was deposed, certainly far earlier than any criminal proceeding could be assembled together by the new Egyptian authorities.[43]

These sanctions are also enforced with respect to all funds and entities owned or controlled by the designated PEPs, without identifying tainted assets specifically. With respect to entities, the threshold of ownership commonly applied is the "fifty percent rule," i.e., entities that are at least fifty percent owned by designated PEPs become subject to sanctions.[44] The blanket application of sanctions-based assets-freeze gives maximum assurances to authorities that suspected PEPs would not be able to move around or dissipate any asset during the process of criminal investigation and prosecution.

In most of the cases, however, sanctions did in fact follow an MLA request from the source states, which had initiated criminal proceedings against the targets. This contradicts the idea that the absence of an underlying criminal proceeding necessitated a non-criminal justice pathway (i.e., foreign policy sanctions) to freeze

41. FACFOA § 4(1).

42. FIAA art. 3(2)(c).

43. *See* LOHAUS, *supra* note 1, at 43.

44. The United States applies the aggregation method; that is, if the combined share of two or more designated PEPs in an entity reaches fifty percent, the entity becomes subject to sanctions, even if the individual PEP's stake falls below fifty percent.

assets. In the case of the European Union, for example, although the existence of criminal proceeding in the source state is not a criterion for imposing sanctions, it was applied in practice. In all three of the European Union's anti-misappropriation sanctions regimes, the only justification provided in the statement of reasons next to a designated person's name is a reference to an existing "investigation" or "criminal proceedings,"[45] "judicial investigation,"[46] or "judicial proceedings" in the source states.[47] With the Ukraine sanctions in particular, the EU courts have rejected some designations of targets where the Council relied only on a letter from Ukraine's prosecutorial authorities that did not concretely and convincingly show that criminal proceedings were started with respect to the specific suspects of misappropriation.[48] This means that even where the sanctions regime is fully autonomous and based on foreign policy powers, an underlying criminal proceeding is still needed to substantiate individual designations under such regime. This practically renders the sanctions regimes subject to the same underlying criminal case requirement as MLA cooperation.

Indeed, as mentioned earlier, some applicants argued before the EU General Court that the assets-freeze the source state requested is one of MLA cooperation, which falls outside of the Union's CFSP mandate.[49] Applicants drew on comparable judgments by national courts in Switzerland and Lichtenstein, rendered in the context of MLA proceedings, to request annulment of the EU measures.[50] The Court rejected the applicants' claim on a

45. Council Decision 2014/119/CFSP, annex, 2014 O.J. (L 66) 26 (EU) (concerning Ukraine).

46. Council Decision 2011/72/CFSP, annex, 2011 O.J. (L 28) 62 (EU) (concerning Tunisia).

47. Council Decision 2011/172/CFSP, annex, 2011 O.J. (L 76) 63 (EU) (concerning Egypt).

48. *See generally* Case T-245/15, Oleksandr Viktorovych Klymenko v. Council, ECLI:EU:T:2017:792 (Gen. Ct. Nov. 8, 2017); Case T-246/15, Yuriy Volodymyrovych Ivanyushchenko v. Council, ECLI:EU:T:2017:789 (Gen. Ct. Nov. 8, 2017). For a similar test applied in Tunisia sanctions, see Case T-149/15, Sirine Ben Ali v. Council, ECLI:EU:T:2017:693 (Gen. Ct. Oct. 5, 2017) and Case T-175/15, Mabrouk Ben Ali v. Council, ECLI:EU:T:2017:694 (Gen. Ct. Oct. 5, 2017).

49. *See* Case C-220/14 P, Ahmed Abdelaziz Ezz and others v. Council, ECLI:EU:C:2015:147, ¶ 32 (CJEU Mar. 5, 2015).

50. *See* Case T-288/15 Ahmed Abdelaziz Ezz and others v. Council ECLI:EU:T:2018:619, ¶ 100 (Gen. Ct. Sept. 27, 2018).

different ground (by establishing a connection between the offenses at stake and the CFSP objectives), but the applicant's core argument stands to reason—in reality, the EU sanctions were triggered, similar to MLA, following a criminal proceeding in the source state.[51] The Swiss sanctions against Egyptian and Ukrainian PEPs were, in this regard, an exception, as all the other anti-misappropriation sanctions, including Switzerland's own sanctions in the case of Tunisia, were adopted following the initiation of criminal proceedings in the source state.[52] Moreover, in the case of Swiss sanctions against Ukrainian PEPs, the Swiss government itself launched an investigation into money laundering charges against Yanukovyich the same day as announcing the sanctions.[53] These facts indicate that the absence of a criminal proceeding is not a determining factor in favor of instituting a misappropriation sanctions regime.

However, choosing the sanctions route might have enabled authorities not to consider whether a criminal proceeding exists altogether. As sanctions are imposed on autonomous foreign policy grounds, there is no need to undergo any criminal justice groundwork before imposing an assets-freeze. Furthermore, as sanctions are applicable with respect to all assets and entities owned or controlled by the designated PEPs, it enables authorities to cast a wider net of preventive freezes compared to MLA. As such, sanctions allow the reversal of the process so that assets are frozen first and investigated later. Switzerland has pushed this even further by shifting the burden of proof onto PEPs.[54] The Swiss FIAA

51. *See generally* Scott Crosby, *The Ezz Case: Some Critical Observations: Case T-256/11 and on Appeal Case C-220/14 (2015*), 6 NEW J. EUR. CRIM. LAW 316 (2015).

52. Evidence of Rob Nicholson, Minister of Justice and Attorney General of Canada, Before the H. Standing Comm. on Foreign Affs. & Int'l Dev., 40th Parl., 3d Sess. 1615 (Mar. 7, 2011), https://www.ourcommons.ca/DocumentViewer/en/40-3/FAAE/meeting-49/evidence [https://perma.cc/4PMX-6VAM].

53. *Swiss Investigate Yanukovych for Money Laundering*, SWISS INFO (Feb 28, 2014), https://www.swissinfo.ch/eng/swiss-politics/swiss-investigate-yanukovych-for-money-laundering/38057740 [https://perma.cc/2VVK-HT4X]; Press Release, Swiss Fed. Dep't of Foreign Affs., Federal Council blocks all assets Viktor Yanukovych and his entourage might have in Switzerland (Feb. 28, 2014), https://www.eda.admin.ch/eda/en/fdfa/fdfa/aktuell/news.html/content/eda/en/meta/news/2014/2/28/52177 [https://perma.cc/9RMR-84XX].

54. Comparable to Unexplained Wealth Orders rendered under the UK Criminal Finances Act 2017, c. 22, § 1 (UK).

regime requires PEPs to demonstrate the lawful acquisition of frozen assets, failing which the assets would be subject to confiscation without the government needing to make an affirmative case of misappropriation of state funds.[55]

2. Dual criminality

Dual criminality is normally a factor that frustrates MLA cooperation, but not with respect to misappropriation offenses. This is because the UNCAC provides a shared legal basis for dual criminalization of offenses. Articles 15 to 28 of the UNCAC enumerate definitions of corruption offenses, including misappropriation of state funds (Article 17), and require states parties to criminalize these offenses in their legal systems.[56] Furthermore, the UNCAC requires signatories to loosen the requirement of dual criminality in their domestic MLA legislations to allow for a "conduct-based approach."[57] That is, states should assess whether the conduct underlying the offense in question is proscribed in both legal systems, and not whether the exact term or category of the offense matches.

States are also increasingly required to criminalize misappropriation of state funds or corruption broadly under other international regimes. In this regard, the anti-money laundering regime of the FATF is pertinent, as it is applicable with respect to all of the destination and source states mentioned in the examples earlier. The FATF requires states to fully implement the UNCAC [58] and apply a conduct-based approach to dual criminality.[59] It also indirectly includes misappropriation (by way of corruption[60]) as a

55. Frank Meyer, *Restitution of Dirty Assets: A Swiss Template for the International Community*, *in* CHASING CRIMINAL MONEY: CHALLENGES AND PERSPECTIVES ON ASSET RECOVERY IN THE EU 211, 222, 226–27 (Katalin Ligeti & Michele Simonato eds., 2017); LOHAUS, *supra* note 1, at 26.

56. *See generally* UNCAC arts. 15–28.

57. ORG. FOR ECON. COOP. & DEV. (OECD), TYPOLOGY ON MUTUAL LEGAL ASSISTANCE IN FOREIGN BRIBERY CASES 20 (2012), https://doi.org/10.1787/a61063e4-en [https://perma.cc/P66B-VRYS].

58. FATF RECOMMENDATIONS, *supra* note 22, Rec. 36.

59. FATF RECOMMENDATIONS, *supra* note 22, Rec. 37.

60. The FATF defines corruption broadly as incorporating offenses such as bribery and 'theft of public funds', which is merely another name for misappropriation. *See* CORRUPTION: A REFERENCE GUIDE AND INFORMATION NOTE, FATF 2 (2012), https://www.fatf-gafi.org/content/dam/fatf-

predicate offense to money laundering by requiring that the latter should be applied to "all serious offences, with a view to including the widest range of predicate offences."[61] Corruption is now firmly established as one of the "designated categories of offences" FATF uses in assessing states' compliance with its recommendation regarding criminalization.[62]

These normative frameworks ensure that misappropriation of state funds is criminalized virtually universally, and hence, following a conduct-based approach, dual criminality should not pose an obstacle for MLA cooperation between states. Furthermore, the UNCAC encourages parties to grant MLA requests even in the absence of clear dual criminality. It also allows states to deny MLA requests in such cases, as Kimberley Prost puts it, "only after taking into account the purposes of the convention."[63] The purpose corresponding with the assets-freeze measures is provided under Article 1(b) of the Convention, which is promoting, facilitating, and supporting "international cooperation . . . in the prevention of and fight against corruption, including in asset recovery."[64] Although the obligation to provide assistance in the absence of dual criminality is limited to non-coercive action, hence excluding assets-freeze,[65] the Convention encourages states parties to consider rendering a wider scope of assistance than is obligatory.[66]

C. Evidentiary Threshold

Another factor that could explain the choice of sanctions over MLA is the need to circumvent the evidentiary threshold involved

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gafi/brochures/reference%20guide%20and%20information%20note%20on%20fight%20against%20corruption.pdf.coredownload.inline.pdf [https://perma.cc/YRV4-P2LK].

61. FATF RECOMMENDATIONS, *supra* note 22, Rec. 3, Interpretive Note.

62. FATF RECOMMENDATIONS, *supra* note 22, Rec. 3 & glossary; METHODOLOGY FOR ASSESSING TECHNICAL COMPLIANCE WITH THE FATF RECOMMENDATIONS AND THE EFFECTIVENESS OF AML/CFT SYSTEMS, FATF 34, 173–74 (2024), https://www.fatf-gafi.org/content/dam/fatf-gafi/methodology/FATF-Assessment-Methodology-2022.pdf.coredownload.inline.pdf [https://perma.cc/P5QW-7Y56].

63. UNCAC art. 46(9)(a); Prost, *supra* note 18, at 9.

64. UNCAC art. 1(b).

65. *See* UNCAC art. 46(9)(b); U.N. OFFICE ON DRUGS & CRIME, REPORT OF THE INFORMAL EXPERT WORKING GROUP ON MUTUAL LEGAL ASSISTANCE CASEWORK BEST PRACTICE 9 n.4 (2001), https://www.unodc.org/documents/legal-tools/lap_mlaeg_report_final.pdf [https://perma.cc/7MYW-NLPA].

66. *See* UNCAC art. 46(9)(C).

in the latter. Owing to their basis in foreign policy, security, or emergency powers, sanctions are subject to lower evidentiary threshold than MLA measures.

The question of evidentiary threshold is most extensively dealt with by the EU courts, compared to other destination states. The EU General Court underscored the evidentiary threshold variance between sanctions and MLA measures when it stated that the:

> [R]equirements the EU Council must fulfill with regard to the evidence underpinning a person's entry [on the sanctions list] . . . cannot be treated in the same way as those of a national judicial authorities of a Member state in the context of asset-freezing criminal proceedings initiated, in particular, in the context of international cooperation in criminal matters.[67]

It reasoned that the sanctions-based assets-freeze have "no criminal law aspect" and therefore cannot be subject to the same procedural safeguards that apply when assets-freeze is undertaken in the course of criminal proceedings.[68]

Broadly, in the EU legal system, there exists a duty to "carefully and impartially" examine all relevant aspects of a case, but there is no codified evidentiary standard applicable in the case of sanctions listings.[69] The courts have crafted a loose threshold of "sufficiently solid factual basis to assess the EU Council's listing decisions."[70]

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67. *See* Case T-545/13, *Fahed Al Matri* v. *Council*, ECLI:EU:T:2016:376, ¶¶ 64, 66 (Gen. Ct. Jun. 30, 2016); *see also* Case T-288/15, Ahmed Abdelaziz Ezz and others v. Council ECLI:EU:T:2018:619, ¶ 77 (Gen. Ct. Sept. 27, 2018).

68. *See* Case T-545/13, Fahed Al Matri v. Council, ECLI:EU:T:2016:376, ¶ 64 (Gen. Ct. Jun. 30, 2016).

69. *See* Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Kadi v. Commission, [Court of Justice] EU:C:2013:518, ¶ 99 (CJEU July 18, 2013); *see also* Case T-545/13, Fahed Al Matri v. Council, ECLI:EU:T:2016:376, ¶ 58 (Gen. Ct. Jun. 30, 2016).

70. Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, Commission and Others v. Kadi, EU:C:2013:518, ¶ 119; Joined Cases C-539/10 P & C-550/10 P, Al-Aqsa v. Council & Netherlands v. Al-Aqsa, ¶ 68; Oral evidence on legality of E.U. sanctions, House of Lords, Select Comm. on the Eur. Union, EU Justice Subcomm. (Oct. 11, 2016) (U.K.), https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/eu-sanctions/oral/41152.html [https://perma.cc/HX6J-A4Y3]. For comparison, the threshold in the UK legal system is "reasonable grounds to suspect." *See* Youssef v. Sec'y of State for Foreign & Commonwealth Affs., [2016] UKSC 3 (appeal taken from Eng.).

The EU Council is required to ascertain only whether the evidence on which the sanctions decision rests is sound. Ascertaining the soundness of the Council's decision only involves investigating (i) whether there is sufficient evidence showing that the designee is subject to investigation or prosecution in the source state for acts that could be characterized as misappropriation of public funds (and not, e.g., unlawful handling or laundering of private funds)[71] and (ii) whether the investigation or prosecution show acts of the designee that fulfil the specific listing criteria of the sanctions regime in question (i.e., depriving public authorities of the source state public funds).[72]

In making these determinations, the EU Council does not assess whether the target is indeed responsible for the offense, or whether the underlying judicial investigation in the source state is well-founded.[73] In other words, the Council is not required to verify the "accuracy and relevance" of the facts that source state authorities rely on in undertaking the investigations.[74]

This has led to much contestation before EU courts.[75] The courts have established that the Council itself is not responsible for verifying whether the investigation or proceeding in the source state relating to the target is well founded, but it becomes so obliged once an applicant brings "objective, reliable, specific and consistent evidence" that challenges the observance of their rights in those proceedings.[76] In other words, the Council can confer a

71. *See, e.g.*, Case T-133/12, Mehdi Ben Ali v. Council, ECLI:EU:T:2014:176 (Gen. Ct. Apr. 2, 2014); *see also* Case T-200/11, Fahed Al Matri v. Council, ECLI:EU:T:2013:275 (Gen. Ct. May 28, 2013); Case T-187/11, Mohamed Trabelsi and Others v. Council, ECLI:EU:T:2013:273 (Gen. Ct. May 28, 2013); Case T-188/11, Mohamed Ben Salah Chiboub v. Council, ECLI:EU:T:2013:274 (Gen. Ct. May 28, 2013).

72. *See* Case T-545/13, Fahed Al Matri v. Council, ECLI:EU:T:2016:376, ¶ 65 (Gen. Ct. Jun. 30, 2016).

73. *See* Case C-220/14 P, Ahmed Abdelaziz Ezz and others v. Council, ECLI:EU:C:2015:147, ¶ 77 (CJEU Mar. 5, 2015).

74. *See* Case T-545/13, Fahed Al Matri v. Council, ECLI:EU:T:2016:376, ¶ 66 (Gen. Ct. Jun. 30, 2016).

75. *See* Written Evidence from Maya Lester QC, Matrix Chambers, to the House of Lords EU Justice Sub-Committee, *Inquiry into the Legality of EU Sanctions* (2016) http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/eu-sanctions/written/41026.html [https://perma.cc/8QPK-9DXU].

76. Case T-288/15, Ahmed Abdelaziz Ezz and others v. Council, ECLI:EU:T:2018:619, ¶ 70 (Gen. Ct. Sept. 27, 2018). Furthermore, see comparable expressions in C-599/16,

rebuttable presumption of appropriateness upon the judicial process in the source state, unless specifically and credibly challenged otherwise. EU courts have, in various occasions, annulled the renewal of listings on the ground that the Council has not undertaken sufficient verification, even after such challenge was raised by the targets. For example, in annulling re-listings in the Ukraine sanctions, the General Court reasoned that the right to fair trial is inadequately respected in the source state, as the targeted individuals were subjected to a prosecutorial or investigative decision that was by law not subject to appeal.[77] In another instance, the Court annulled re-listing of targets on the ground that the Council has failed to make appropriate inquiries with the source state when applicants presented evidence indicating protracted delay in the underlying criminal justice process.

The sanctions regimes in the other destination states stipulate an even lower evidentiary threshold for listing than those applicable in the European Union. The Swiss sanctions regime conditions listing only on a satisfactory assessment by the Federal Council as to whether it "appears *likely*" that assets were misappropriated, or, in cases where MLA proceedings have already been initiated, whether the source state is not able to satisfy MLA requirements due to the failure of its state structures.[78] There is no further benchmark to determine the "likelihood" of assets being misappropriated, leaving it to the Federal Council's wide discretion. The FIAA also explicitly states that the assets-freeze sanctions may be used when the criminal proceedings in the source state "do not satisfy the essential principles" of the Swiss MLA law.[79] These principles have mainly to do with the procedural

Oleksandr Viktorovych Yanukovych v. Council, ECLI:EU:C:2017:785, ¶¶ 69, 72 (EUCJ Oct. 19, 2017); Case T-545/13, Fahed Al Matri v. Council, ECLI:EU:T:2016:376, ¶ 58 (Gen. Ct. June 30, 2016); Case T-149/15, Sirine Ben Ali v. Council, ECLI:EU:T:2017:693, ¶¶ 145–46. (Gen. Ct. Oct. 5, 2017).

77. *See, e.g.*, *Azarov*, Case T-286/19; *Klymenko*, Case T-245/15; Case T-289/19, Sergej Arbuzov v. Council of the European Union, ECLI:EU:T:2020:445 (Sept. 23, 2020), https://curia.europa.eu/juris/liste.jsf?num=T-289/19&language=EN [https://perma.cc/CK48-HL9P]; Case T-291/19, Viktor Pavlovych Pshonka v. Council of the European Union, ECLI:EU:T:2020:448 (Sept. 23, 2020), https://curia.europa.eu/juris/liste.jsf?num=T-291/19&language=EN; Case T-292/19 [https://perma.cc/RWZ2-V6KW].

78. FIAA arts. 3(2), 4(2).

79. FIAA art. 4(3).

integrity of the proceedings in the source state but have evidentiary implications as well. For example, one of the principles is that the proceedings must not be conducted to persecute or punish one's political opinion or other social identity. Proceedings conducted to persecute political opponents, for example, are often trumped-up charges that do not have a sufficient evidentiary basis. The literal application of the Swiss sanctions allows the freezing of assets in such cases, precisely because requests based on such charges would not have been granted under regular MLA law. The Canadian FACFOA regime sets an even lower evidentiary threshold for listing, requiring the Governor in Council to make factual assessments of only whether the designee is indeed a PEP in the source state, and the source state is in "internal turmoil or uncertain political situation . . . ."[80] Determination of PEP status is a relatively clerical process of ascertaining formal positions, and declaring if a state is in governmental turmoil or uncertainty is a political assessment that does not lend itself to evidentiary benchmarking. Needless to say, these sanctions regimes, as much as they allow swift action to preserve potentially criminal assets, also open the doors for abuse.

Assets-freeze measures, being provisional measures, are subject to a relaxed evidentiary threshold even when undertaken as MLA cooperation. Nevertheless, the MLA pathway still involves a higher threshold than sanctions-based assets-freezes. The UNCAC does not explicitly precondition the granting of assets-freeze cooperation on requirements regarding the integrity of the criminal justice process in the source state. It leaves room for national substantive and procedural rules to regulate that assessment.[81] However, it stipulates substantive criteria that the requested state should assess. These criteria are: (i) whether there is a freezing order by a court or competent authority of the source state and (ii) whether the requested state has "reasonable basis to believe" that there are sufficient grounds for taking the action and that the asset will eventually be subject to confiscation.[82] The threshold of "reasonable basis to believe" is a higher threshold than not only the demonstrably lax anti-misappropriation

80. FACFOA § 4(2).
81. UNCAC art. 55(4).
82. *Id*. art. 54(2)(a).

sanctions discussed above but also the higher evidentiary standard of "reasonable grounds to suspect" applicable in some jurisdictions.[83]

D. Instrumentality to Foreign Policy

Yet another explanation as to why the destination states chose the sanctions pathway over MLA could be the flexibility that sanctions offer for pursuing foreign policy objectives.[84] MLA is designed to facilitate cooperation in ordinary criminal proceedings. As such, it provides a broader basis for cooperation with respect to most crimes, above the customary *de minimis* threshold. As MLA is tied to the criminal justice process, the actors it targets are also restricted to those who are suspected or convicted of an offense. On the contrary, sanctions, which are based in emergency or foreign relations law, ordinarily cover a narrower set of offenses (i.e., offenses that fall under foreign policy mandate of the sanctioning government), but can target a wider set of actors (i.e., not only those suspected or convicted of an offense, but also their associates and families).

While the UNCAC requires MLA with respect to a variety of financial offenses that have both private and public dimensions, such as bribery, embezzlement, misappropriation, money laundering, and abuse of function,[85] anti-misappropriation sanctions regimes specifically focus on corruption or misappropriation offenses, which are committed by public officials. Misappropriation is defined in the EU sanctions regime as "the illegal use of funds or assets belonging to, or under the control of, a public person for a purpose contrary to that for which those funds or assets were intended, particularly for private purposes . .

83. *E.g.*, UK Sanctions and Anti-Money Laundering Act 2018, art. 12(5)(a); LORD AHMAD OF WIMBLEDON, FOREIGN, COMMONWEALTH & DEVELOPMENT OFF., REPORT UNDER § 2(4) OF THE SANCTIONS AND ANTI-MONEY LAUNDERING ACT 2018 ¶ 12 (2020), https://www.legislation.gov.uk/uksi/2020/1468/pdfs/uksiod_20201468_en.pdf [https://perma.cc/978T-XYSQ].

84. Case T-731/15, Sergiy Klyuyev v. Council, ECLI:EU:T:2018:90, ¶ 107 (Gen. Ct. Feb. 21, 2018).

85. UNCAC arts. 15–25.

. ."[86] The US sanctions on Ukrainian PEPs, while using a similar concept of misappropriation, also cover non-state funds. But it does so in a limited sense, covering only misappropriation of assets of "economically significant entities"[87] in Ukraine, a term not defined in the Executive Order No. 13660. In light of the preamble of the Executive Order that sets forth the preservation of "Ukraine's assets" (not strictly Ukraine's state assets) as its objective, the term could be interpreted as referring to both private and public entities that play significant economic roles, such as utilities, extractive industries, etc.[88] Some states attach further political qualifiers to corruption or misappropriation offenses in order to activate sanctions. Canadian sanctions requires the existence of political turmoil or transition in the source state and the interest of international relations.[89] In fact, Canada has another general anti-corruption sanctions regime (commonly known as Sergei Magnitsky Law[90]) apart from the FACFOA, which reflects the fact that the FACFOA is applicable with respect to a specific category of corruption that has implications for the political stability of the source state. According to Canada's Governor in Council, these are cases where the source state's treasuries are "looted by fallen governments . . . ."[91] Similarly, the Swiss regime allows the taking of assets-freeze sanctions only upon demonstration of an actual or imminent loss of power by the government, a "notoriously high" level of corruption in the source state in general, and Swiss interests in doing so.[92] Overall, these sanctions apply under specific conditions of urgency and national or international interest, however the latter concepts are defined by the sanctioning governments.

86. Case T-149/15, Ben Ali v. Council, ECLI:EU:T:2017:693, ¶ 106 (Gen. Ct. Oct. 5, 2017); Case T-545/13, Al Matri v. Council ECLI:EU:T:2016:376, ¶ 94 (Gen. Ct. Jun. 30, 2016).

87. Exec. Order No. 13,660, § 1(a)(C), 79 Fed. Reg. 13,493 (Mar. 6, 2014).

88. Countering America's Adversaries Through Sanctions Act, 22 U.S.C. § 8907(a)(3) (2018).

89. FACFOA § 4(2).

90. Justice for Victims of Corrupt Foreign Officials Act, S.C. 2017, c. 21 (Can.).

91. Regulations Amending the Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations, SOR/2016-41 (Can.), Canada Gazette, Part II, Vol. 150, No. 6 (Mar. 23, 2016).

92. FIAA art. 3(2).

Although circumscribed in terms of offenses, sanctions offer greater flexibility than MLA in terms of targeting actors. MLA-based assets-freeze is tied to eventual confiscation proceedings. The generally accepted practice is that confiscation takes place only after a judicial judgment to that effect, whether in criminal or civil (non-conviction-based) proceedings.[93] For this reason, MLA-based assets-freeze can only apply to properties that are likely to be subjected to confiscation, which are those derived from crime (proceeds) or used to support crime (instrumentalities).[94] On the other hand, sanctions-based assets-freeze does not need to be attached to investigation, prosecution, or other judicial proceedings relating to defined offenses. As sanctions emanate from emergency or foreign relations powers, they could target a wide array of actors, regardless of whether they fall under established legal categories of liability, pursuant to the policy objectives of the sanctioning government.

Another policy-related explanation could be sanctions' advantage in giving the destination state more control over the operation of the assets-freeze. That is, sanctions could be adopted, modified, and terminated based on an assessment as to whether the factual developments in the source state have satisfactorily achieved the policy objectives of the sanctions regime. Often this assessment involves political evaluations without a specific evidentiary requirement. For example, the Canada sanctions could only be adopted if the government deems it to be "in the interest of international relations," which is quite an amorphous yardstick by the standards of the country's other sanctions regimes that require some form of independent or international evidence to substantiate such assessments.[95] In applying the Special Economic Measures Act, for example, the interest of "international peace and security" is in practice most often substantiated by reference to a preceding United Nations' or other international organizations'

93. *See generally* Anton Moiseienko, *The Ownership of Confiscated Proceeds of Corruption under the UN Convention against Corruption*, 67:3 INT'L COMP. L.Q. 669 (2018); JEAN-PIERRE BRUN ET AL., ASSET RECOVERY HANDBOOK: A GUIDE FOR PRACTITIONERS (2d ed. 2020).

94. *See, e.g.*, UNCAC art. 55(1).

95. Bradley Crawford, *The Freezing Assets of Corrupt Officials Act: A Critical Analysis,* 56 CAN. BUS. L.J. 407, 408, 411 (2015).

resolution regarding the specific threat to peace and security in question.[96] In the case of the FACFOA, however, the drafters have indicated that this term is indeed a "fairly widely cast provision" that allows the Canadian government to make all sorts of political choices and even legal determinations, such as whether a request from the source state was "improperly made . . . or for vindictive purposes" and should be denied.[97]

The Swiss FIAA regime similarly allows the Federal Council to impose assets-freeze when the safeguarding of "Swiss interests" demands it.[98] The Swiss Federal Administrative court, in dealing with cases arising out of the FIAA Egyptian designations, has construed these interests to mean "legitimate interests protected by the Constitution . . . in particular protecting the financial system and reputation of Switzerland as well as furthering sustainable development and the fight against impunity."[99] It also stated in a case involving Ukrainian designees that "Switzerland's interests are inherently jeopardized should it permit assets misappropriated from third countries to flow through its financial system."[100] But, of course, the judiciary's and executive's interpretation of national interest could vary, and the construction of the national interest is a political question that courts often refrain from encroaching.

In the EU sanctions, although such a political yardstick is not included in the listing criteria, the Council necessarily reads it into the latter. Sanctions fall under the European Union's CFSP competence, and therefore the subject matter (i.e., misappropriation) needs to be linked to foreign policy objectives. EU courts have articulated that these sanctions fall under the CFSP objective of supporting and consolidating "democracy, the rule of law, human rights and the principles of international law" found in Article 21(2)(b) of Treaty on European Union.[101] Consequently,

96. *Id*.

97. Sabine Nolke, Dep't of Foreign Affs. and Int'l Trade, Testimony Before the Standing Comm. On Foreign Affs. & Int'l Dev. (Mar. 7, 2011), https://www.ourcommons.ca/DocumentViewer/en/40-3/FAAE/meeting-49/evidence [https://perma.cc/CK69-Y7JZ].

98. FIAA art. 3(2).

99. PORTELA, *supra* note 13, at 18.

100. *Id*.

101. *See* Case T-731/15, Sergiy Klyuyev v. Council, ECLI:EU:T:2018:90, ¶ 105 (Gen. Ct. Feb. 21, 2018).

inclusion in EU anti-misappropriation sanctions is dependent on the Council's manifestly political assessment of whether the target's act threatens any of the above-mentioned objectives in the source state. Because the concepts of democracy, the rule of law, human rights, and the principles of international law are broad and indeterminate, interpreting a set of facts as a threat to any of these items involves choices tainted by one's political vision. For example, it is debatable whether the popular toppling of a democratically elected but corrupt leader would threaten or foster democracy and rule of law. The unconstitutional toppling erodes the rule of law, but one could argue that corruption in leadership is also antithetical to the rule of law and popular uprising is a form of democratic expression. In such instances, the choice between foreign policy values at stake is not a straightforward matter.

In addition to the indeterminacy of the CFSP objectives as listing criteria, at times the Council has defined the EU's foreign policy in a manner inconsistent with those stated objectives. For example, the Council terminated the misappropriation sanctions against Egyptian PEPs ten years after their adoption. The Council declared the sanctions regime had "served its purpose" and cited the promotion of "EU-Egypt partnership" as the end goal of the sanctions regime at a time when the military government in Egypt increasingly became indistinguishable from its authoritarian predecessor that necessitated the sanctions.[102] This signals that the return of the assets to the Egyptian state or the promotion of liberal democratic CFSP objectives in Egypt was not the ultimate purpose of the sanctions regime.[103]

The foreign policy instrumentality of sanctions also comes with a challenge. As adopting anti-misappropriation sanctions signifies the elevation of financial offenses into a national security or foreign relations concern, it requires higher-level political will and assessment, as opposed to lower-level prosecutorial or judicial decision-making under MLA. In the case of the European Union, in

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102. *Freedom in the World 2021: Egypt,* FREEDOM HOUSE (2025), https://freedomhouse.org/country/egypt/freedom-world/2021 [https://perma.cc/AS2H-JGAM]; Council of the EU Press Release, Egypt: EU revokes sanctions framework and delists 9 people (Mar. 12, 2021), https://www.consilium.europa.eu/en/press/press-releases/2021/03/12/egypt-eu-revokes-sanctions-framework-and-delists-9-people/ [https://perma.cc/R2Z2-QHG3].

103. *See* Council Decision (CFSP) 2021/449, 2021 O.J. (L 87) 137.

particular, adopting sanctions requires a unanimous vote at the ministerial Council, which is not an easy feat given that any single member state not onboard with the change of government in the source state could frustrate the decision-making process.

III. COMPLEMENTARITY BETWEEN SANCTIONS AND MUTUAL LEGAL ASSISTANCE

Assets-freeze is not an end in and of itself. Its purpose is, whether undertaken through sanctions or MLA, preserving assets for eventual recovery by the source state.[104] The purpose of eventual assets recovery is particularly important when the source state is a developing country where a significant amount of public wealth is misappropriated by outgoing kleptocrats.

Anti-misappropriation sanctions help preserve assets expediently. As the preceding analysis shows, however, the expediency has more to do with factors internal to the destination states than the source states. That is, sanctions enable the destination state to bypass its domestic legal constraints to freeze assets and also pursue its political preferences more liberally in doing so. It is believed that assets-freeze sanctions are activated by destination states autonomously when the source state is paralyzed by political turmoil and unable to request regular MLA cooperation in criminal matters. The complete breakdown of state structures in the source state to the extent that the government is unable to request cooperation in criminal proceedings is an exceptionally high bar that hardly materializes. As seen in the case of Egypt, Tunisia, and Ukraine, even during tumultuous political transitions, source states have managed to initiate criminal proceedings against outgoing corrupt leaders and request assets-freeze cooperation. Sanctions, instead, help the destination state nimbly respond to political change abroad by avoiding internal inconveniences to expediency, such as procedural complexity, legal obstacles to locating assets, and evidence-gathering. They

104. PORTELA, *supra* note 13, at 5; Andreas Boogaerts, *Short-term Success, Long-term Failure? Explaining the Effects of EU Misappropriation Sanctions Following Revolutionary Events in Tunisia, Egypt and Ukraine*, 23 J. INT'L REL. & DEV. 67, 91 (2020); Case T-731/15, Sergiy Klyuyev v. Council, ECLI:EU:T:2018:90, ¶ 107 (Gen. Ct. Feb. 21, 2018). Analogously, Directive 2014/42/EU, on intra-EU assets-freeze cooperation, states that "since property is often preserved for the purposes of confiscation, freezing and confiscation are closely linked." Recital 27 & art. 8(3), 2014 O.J. (L127) 39.

also allow destination states to target a wider set of perpetrators and prolong the assets-freeze for much longer than would have been possible under ordinary criminal proceedings (for years, as opposed to days under MLA).

Unlike the precautionary measure of assets-freeze, ultimate asset-recovery involves the permanent deprivation of property from individuals. As such, it takes place only after a judicial order for confiscation. Confiscation could follow criminal conviction of individuals, or it can also be non-conviction based (NCB), which the UNCAC and FATF encourage.[105] NCB confiscation could take place as a result of a civil proceeding against the property directly, or as part of an action for recovery brought in connection with a criminal proceeding against individuals. Whether with or without a criminal conviction, confiscation necessarily requires a final judicial decision to that effect. Normally, the judicial decision is undertaken by the courts of the source state. In some cases, a confiscation proceeding could be initiated in the courts of the destination state, either by the authorities of the source state directly or by authorities of the destination state.[106]

Ensuring asset-recovery, therefore, necessarily involves an active role by the source state in the form of investigating, prosecuting, or undertaking other judicial proceedings relevant for confiscation. Furthermore, the realization of asset-recovery requires the recognition and enforcement of a confiscation order from the source state's court or production of such an order in the courts of the destination state. These steps entail MLA cooperation in the form of judicial assistance. In other words, even if assets-freeze is enacted by sanctions, the asset-recovery process will ultimately rest on MLA cooperation between states.

Assets-freeze that is not followed up by successful confiscation will ultimately be terminated, at which point the property returns to the suspects, as has happened on several occasions.[107] Sanctions being speedy and unilateral actions (i.e., requiring no action by the source state) means that destination states can take freezing measures proactively to prevent the dissipation of funds while source states are navigating tumultuous

105. *See* UNCAC art. 54(1)(c); *see also* FATF RECOMMENDATIONS, *supra* note 22, Rec. 4.
106. *See* UNCAC arts. 53, 55(1)(a).
107. For examples from Switzerland, see Ivory, *supra* note 19, at 42.

transitions. However, to ultimately realize asset-recovery, active MLA cooperation is required, particularly in the context of political transitions. Although source states in political transition may be able to initiate criminal proceedings against outgoing PEPs, they may not have sufficient stability and focus to undertake full investigations and prosecutions. In other cases, the source state may request cooperation with respect to suspect PEPs but possess insufficient evidence or intelligence regarding misappropriated assets. The developed destination states are best situated to assist with the completion of the asset-recovery process as they not only possess better material capability, but also only they (and not the source state) can obtain financial intelligence regarding misappropriated assets located within their territories. Such cooperation could take the form of proactively supplying financial intelligence on PEPs assets, providing technical assistance, and forming joint investigative teams, if necessary, as the UNCAC encourages.[108]

IV. CONCLUSION

The wave of sanctions adopted between 2011 and 2016 to tackle the misappropriation of state funds following political rupture in Egypt, Tunisia, and Ukraine has been a peculiar experiment in how centers of global finance navigate the fallout of regime collapse in source states whose leaders are suspected of misappropriating public funds. The measures were seen as decisive demonstrations of global finance's political will to turn on client autocratic leaders and their kleptocratic circles just as much as they have been doing business with them in times of regime stability. The special sanctions regimes freezing the funds of deposed leaders were undertaken as foreign policy measures of ensuring the political stability or democratic consolidation of the new regimes in the source states—and not as ordinary inter-state criminal justice cooperation in fighting corruption. The choice for the sanctions pathway, as opposed to criminal justice cooperation, is defended as a nimbler and more expedient recourse for freezing misappropriated state funds. It is also accepted that sanctions are needed to fill a legal gap where the destination state does not have legislative basis to act on its own. This is especially so when a

108. UNCAC art. 49.

source state delays a request of cooperation, or even when there is no request forthcoming due to the collapse of the source state structures. True, sanctions could be useful in such circumstances of dysfunction or breakdown in the source state machinery; as a stopgap measure, they buy time for the source state to get on its feet. But scenarios of total governmental incapacitation seem at odds with the actual cases when the sanctions have been used; in all but one case of anti-misappropriation sanctions regimes adopted so far, the source states were able to initiate domestic investigation or prosecution, present a list of names for assets-freeze, and request cooperation prior to the adoption of the sanctions.

I argue in this paper that the more plausible utility of anti-misappropriation sanctions is in enabling global financial destinations to selectively respond to claims of looted state funds with minimal due process constraints. In other words, the MLA pathway is less preferable than sanctions not due to legal technicalities of MLA cooperation (such as the existence of reciprocity agreements, criminal proceedings, and dual criminality) but rather because it presents limitations on the practical and political maneuvers states seek to retain. The latter includes lax evidentiary threshold required to impose assets-freeze, flexibility in scope and duration of said measures, and the possibility to impose and lift the measures in line with the political preferences of the government in the destination state.

The purpose of assets-freeze is to preserve assets until the confiscation process is complete. As such, anti-misappropriation sanctions and MLA could be conceived as interlinked stages within the same continuum of asset-recovery. In this light, anti-misappropriation sanctions that are not accompanied by active MLA cooperation remain a merely symbolic exercise on the part of destination states that want to signal support to political transition in the source state, but are not poised to meaningfully realize the recovery of assets stolen by outgoing leaders. In other words, sanctions, while appearing as extraordinary gestures of support to source states, might also end up disguising destination states' recalcitration to recover stolen assets.