PROSECUTORIAL CHALLENGES IN FREEZING AND FORFEITING PROCEEDS OF TRANSNATIONAL CRIME AND THE USE OF INTERNATIONAL ASSET SHARING TO PROMOTE INTERNATIONAL CO-OPERATION: THE NEED FOR GLOBAL STANDARDS

BY JUSTICE ANTHONY SMELLIE, Q.C.

CHIEF JUSTICE OF THE CAYMAN ISLANDS

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The worldwide adoption of laws which enable the confiscation of the proceeds of crime reflects the acknowledged importance of depriving the criminal of his profits.

These laws recognise that organised criminals use their proceeds of crime to insulate themselves, by the use of intermediaries, from detection and arrest. They acknowledge that the more profitable the crime, the more difficult it becomes for law enforcement to link the criminal to it. The proceeds of crime become the very means by which the bastions of organised crime can be created and sustained.

The recognition of this reality is not recent. It has been acknowledged in modern law enforcement since the successful prosecution of Al Capone for tax evasion[1]. The accepted account is that his more heinous crimes could not be proven because he was so well organised. Instead, the focus upon his elaborate lifestyle exposed the vulnerability that led to his downfall.

The moral of Al Capone's case (and one which seems to continue to enlighten American law enforcement[2]) is that the only sure way of putting the "Mr. Bigs" out of business is to confiscate their proceeds of crime. Other remedies, such as sanctions and blacklisting of

foreign states and persons deemed to be associated with “kingpins,” have been of little more than symbolic effect[3].

The more effective recourse - confiscation of assets - is also based upon acknowledged moral and social principles. The most fundamental of these is that no person should be allowed to become unjustly enriched at the expense of his victims or of society at large[4]. The extreme measures adopted by the criminal to obtain and keep his proceeds of crime have come to justify the draconian measures needed for effective law enforcement.

Throughout the common law world, laws enacted to enable the confiscation of the proceeds of drug trafficking, and in many cases the proceeds of all serious crimes, have withstood the challenges of constitutional validity. Courts have consistently held[5] that these laws, though draconian in nature, contain measures which are reasonable and necessary in a democratic society to combat the scourge of drug trafficking and organised crime[6].

The now-global applicability of the Vienna Convention[7] is proof of the obligation which states have accepted to ensure the confiscation of the proceeds of drug trafficking.
Shortly put, there is now global acceptance that the struggle against drug trafficking and organised crime cannot be won unless law enforcement can confiscate the profits.
Despite this global realization, however, it seems that only modest success has been achieved[8].

The reason for this modest success is a focus of this paper.

There are many prosecutorial challenges to be confronted in the efforts to freeze and confiscate the proceeds of transnational crime; far too many, in fact, to be identified in a single paper. The difficulties will vary from country to country and region to region.

There are, however, a number which are readily recognised. In the first part of this paper I will attempt to identify and speak to those. As I proceed, I will also speak to the Cayman Islands experience, looking at insights gained from some decided cases.

CONVICTION BASED CONFISCATION: THE MAIN OBSTACLE

The first and most common prosecutorial obstacle is the need to obtain a conviction for the predicate offence from which the proceeds must be shown to be derived. This requirement is still the state of the law in most countries including, to a large extent, the Cayman Islands[9]. It remains the general state of the law, notwithstanding the introduction in many countries of legislation which enables the confiscation of the proceeds of all serious crimes[10], not just drug trafficking.

The prerequisite of a conviction hinders the usefulness of the restraint or freezing provisions of laws because they, also, typically require a prima facie showing of a criminal case against a defendant in person, or of reasonable cause for belief that such a case exists[11].

The proposition which this paper advances is that the self-sustaining economy of organised crime is itself a compelling basis for civil and *in rem* measures for the freezing and confiscation of the proceeds of serious crime.

Such civil and *in rem* forfeiture measures have already begun to produce noticeable successes in some countries, such as the United States. From their genesis in the tax laws, they came, by a process of logical progression, to be applied in the United States to the proceeds of other serious crimes.[12] (I should at this point, record my doubt about the next step – the recognition of tax offenses as predicate criminal offences for confiscation purposes. This potential hindrance to international efforts to combat serious transnational crime will be considered further below.)

JUSTIFICATION FOR FORFEITURE LAWS

Having identified the most powerful justification for forfeiture laws – depriving the criminal of his ill-gotten gains - the concept is worth considering in detail.

Deprivation of the criminal involves at least three distinct considerations:

(i) preventing crime by reducing the means by which further criminal activity would be financed;

(ii) deterring further criminal activity by removing or reducing the actual or expected profitability; and

(iii) preventing the unjust enrichment of those who profit at the expense of society.

A number of other considerations which apply both to criminal and civil/*in rem* procedures are worth noting:

(iv) in many cases the immediate victims, such as victims of frauds, will also benefit by restitution from the proceeds without having to bring recovery actions of their own;

(v) the proceeds should also be available to compensate society for the harm, suffering, human misery and expense of remedial treatment caused by serious crime;

(vi) the agencies of the state have a claim for compensation for the enormous cost of detecting and prosecuting crime;

(vii) the proceeds may be applied by international asset sharing toward better co-operation in international efforts to combat crime;

(viii) the deprivation of the criminal engenders public confidence in the enforcement of the law by demonstrating that crime does not pay;

(ix) the confiscation of large amounts of the proceeds of crime will reduce the risks which such proceeds create for financial instability in financial markets;

(x) it will also reduce the incidence of corruption of officials (which itself can lead to instability in government); and

(xi) the confiscation of assets is believed to be the most effective measure for containing the destructive activities of terrorist organisations[13].

These are all compelling justifications for making forfeiture laws more effective.

THE CIVIL OR IN REM FORFEITURE METHOD

Even while acknowledging the need for a conviction based approach, different jurisdictions have recognised its shortcomings and have found varying ways of adopting the civil or *in rem* forfeiture approach.

Here are some illustrative examples.

The most direct approach is still that taken by the United States, where it has become a basic principle of law that civil forfeiture is an *in rem* proceeding directed at the subject property. It seems it has been settled, ever since *Pelham v Rose* 76 U.S. 103, 106 (1869), that the authority of the district court to enter a civil forfeiture order depends upon seizure and control of the property by the court. United States jurisprudence has become replete with cases entitled such as *The United States v All Funds On Deposit* (in such and such an account) or *The United States v One Rolls Royce Motor Car* 905 2d 89 (5th cir. 1990). As was said in *United States v U.S. Currency In The Amount of $23,481* 740 F. Supp. 950, 953 (E.D.N.Y. 1990):

> "… a grant of authority by Congress over a particular subject-matter or type of action is not enough for a court to exercise jurisdiction over a particular controversy. More is necessary … where the defendant is a "res" or thing, for the court to exercise jurisdiction the only essentials … are presence of the res within the borders, its seizure at the commencement of the proceedings and the opportunity of the owner to be heard." *Pennington v Fourth National Bank* 243 U.S. 269, 272 (1917).

Building on this established *in rem* jurisdiction, Title 21 U.S.C. has recently been expanded to allow jurisdiction over assets found abroad where the assets are forfeitable

under United States law. However, it seems that the government of the foreign state where the *res* is located must agree to allow the United States court to assert jurisdiction over the *res* before the United States court will have jurisdiction under the U.S.C. [14]

There have been examples of such requests for recognition and acceptance of jurisdiction over monies lying in bank accounts in the Cayman Islands, pursuant to treaty requests from the United States. These resulted in *in rem* forfeiture orders being enforced in the Cayman Islands[15].

The United Kingdom is not far behind, although slow off the mark. New provisions and procedures have been adopted there for the civil recovery of the proceeds of unlawful conduct[16].

Within the express asset recovery strategy which the new U.K. Act contains, important provisions appear under the heading "The International Dimension" which reveal the new philosophical approach and emphasize reliance upon the civil recovery method[17]. The Act emphasizes the importance of achieving an international system for the civil recovery of the assets of crime and of co-operation in that regard. Emphasis is also laid upon the use of asset sharing to secure international co-operation and the need to expand the number of asset sharing arrangements.

The U.K. legislation is less direct than the U.S. *in rem* approach. The subject property must still be shown to be property obtained through personal unlawful conduct. This is notwithstanding the provision (in section 240 (2)) to the effect that the recovery proceedings may be brought whether or not anyone has been charged with an offence to

which the property relates. What is required is proof of the unlawful predicate conduct to the civil standard of proof, and proof to the same standard that the defendant has a criminal lifestyle - see section 10. Thus, civil proceedings for an order for the recovery of property in the U.K. will still be taken against a respondent who holds recoverable property, rather than directly against the property itself[18].

The standard of proof in the U.K. legislation that the property is the proceeds of unlawful conduct is on the balance of probabilities (section 241). The conduct would be unlawful if it is so regarded under the laws of the United Kingdom or of a country outside the U.K. where it occurs. The form of unlawful conduct need not be specified, provided it can be shown that the property must have been obtained by some form of unlawful conduct (or combination of unlawful conduct) such as drug trafficking, fraud or theft[19]. Early restraint of proceeds can be achieved by the appointment of interim receivers over suspected property[20].

I also make brief reference to the Australian legislation. There, different states have taken differing approaches with mixed results, but with the same recognition of the need for civil based forfeiture measures in the light of the shortcomings of conviction based laws. Reports are that the New South Wales model has been the most successful.[21]

Building on the earlier Drug Trafficking (Civil Proceedings) Act 1990, the Criminal Assets Recovery Act of New South Wales ("C.A.R.A") provides that a person can be made to account for and explain assets and profits in a civil proceeding whether or not that person has been convicted and even if the person has been acquitted in a criminal court. The critical thing that must be proved is that it is more probable than not that the person engaged in serious crime.

Where a restraint order prior to confiscation is sought on the basis that the property is suspected to have been derived from crime, the court must make the order if it is satisfied that there are reasonable grounds for suspicion that it was so derived.

Undertakings in damages are required from the prosecution to indemnify an innocent respondent or third party who might be affected by the restraint.

The court must make a forfeiture order if it is satisfied on a balance of probabilities that the respondent engaged in some form of serious criminal activity during the previous six years, without the need to prove a particular offence. In addition or alternatively, the court may make an order for the assessment of the proceeds if it finds it more probable than not that the defendant engaged in serious criminal activity in the previous six years. If so satisfied, the court must assess the gross value of the proceeds derived from any illegal activity undertaken during that six-year period and order repayment to the state of that amount.

As in the case of the United Kingdom legislation, there are "rebuttable presumptions" regarding the acquisition of assets by means of crime during that period[22]. These are by no means peculiar to these two statutory schemes[23]. The justification for such "reverse onus" provisions is worthy of special consideration.

JUSTIFICATION FOR THE REVERSAL OF PROOF IN FORFEITURE CASES

Once the threshold test of criminal conduct or criminal lifestyle is satisfied on a balance of probabilities, the justification for the assumptions which reverse the onus of proof is not hard to find.

The issue is stated quite succinctly by the Judicial Committee of the Privy Council in *McIntosh v Lord Advocate*[24]:

> "The essence of drug trafficking is dealing or trading in drugs. People engage in this activity to make money, and it is notorious that they hide what they are doing. Direct proof of the proceeds is often difficult, if not impossible. The nature of the activity and the harm it does to the community provide a sufficient basis for the making of these assumptions. They serve the legitimate aim in the public interest, of combating that activity. They do so in a way that is proportionate. They relate to matters that ought to be within the accused's knowledge, and they are rebuttable by him at a hearing before a judge on the balance of probabilities. In my opinion a fair balance is struck between the legitimate aim and the rights of the accused".

There is no basis for distinguishing between the proceeds of drug trafficking and other serious crimes for these purposes. Moreover, the arguments against the reversal of the onus in forfeiture cases on grounds of violation of human rights or other unconstitutionality have been unreservedly rejected by the courts[25].

There are other practical reasons which elaborate upon those recognised by the Privy Council in the passage quoted above:

(i) The clandestine nature of offences such as drug trafficking and arms dealing often results in no direct evidence of the source of the proceeds of those crimes or property acquired from them.

(ii) The ease with which money can be laundered in the electronic global economy means that the connection between the crime and the proceeds can be readily severed and covered up. Organised criminals have become particularly adept at doing this.

(iii) Details about the source of or acquisition of property will usually be peculiarly within the knowledge of the defendant and would be difficult, even if property is lawfully acquired, for the prosecution to establish.

(iv) Conversely, someone who acquires property lawfully should be able to establish that fact with relative ease, particularly as the standard is only the balance of probabilities.

The approaches taken in modern legislation of the United States, the United Kingdom, Australia, Canada, Ireland, and elsewhere all recognize the reality: without reversing the onus of proof and requiring the defendant to prove the lawfulness of the property on the balance of probabilities, forfeiture laws would become ineffective.

It is important to emphasise that reverse onus provisions applied in civil forfeiture proceedings do not jeopardise the liberty of the subject. One can well accept however, that provisions which purport to place the burden of proof of innocence – even if only on the balance of probabilities – upon a defendant in a criminal trial, might well be unconstitutional and in breach of fundamental human rights[26].

I will here say a few words about the Cayman Islands position. While the Cayman Islands forfeiture legislation is largely conviction based, there are aspects which may be regarded as being based upon civil forfeiture but which, as will be seen, do not rise to the state of the art elsewhere or to what is really needed.

- Under section 26 of the *Misuse of Drugs Law* an officer may seize and detain cash which is being imported into or exported from the islands if he has reasonable grounds for suspecting that it directly or indirectly represents a person's proceeds of drug trafficking. A magistrate, if satisfied to the civil standard (i.e., on a balance of probabilities) that the cash represents a person's proceeds of drug trafficking or is intended for use in drug trafficking, may order its forfeiture. This is a provision based on 1988 United Kingdom legislation, and which has reappeared in the U.K. Proceeds Of Criminal Conduct Act 2002[27].

- There is limited ability to enforce a foreign civil forfeiture order: *In The Matter Of Leon And Four Others* 2000 CILR 336. In this case, the Grand Court held that it had power under section 16(g) of the *Misuse Of Drugs (Drug Trafficking Offences) (Designated Countries) Order 1991, Third Schedule*, to grant restraining orders prohibiting dealings with funds in specified bank accounts after a request from the United States under the Mutual Legal Assistance Treaty ("MLAT")[28] to enforce an arrest warrant *in rem* against the funds.[29] The scope of the order which the Grand Court could make is limited to property specified in the external confiscation order. This power was held to exist notwithstanding the absence of equivalent provisions in the rest of the Misuse of Drugs legislation available for use against locally

derived proceeds of crime in civil proceedings. The other forfeiture provisions in this law are entirely conviction based (apart from section 26, discussed above).

- Section 5 of *The Proceeds Of Criminal Conduct Law 1996* ("the PCCL") permits restraint and confiscation of the proceeds of all indictable (serious) offences, apart from drug trafficking proceeds, which are dealt with under the *Misuse Of Drugs Law* (as discussed above). The PCCL is also conviction based. The court can make an order of forfeiture against an offender convicted of an indictable offence if he has benefited from the offence. Once benefit from the offence is proven, the court may order him to pay such sum as it thinks fit. There are ancillary powers to make restraint and charging orders[30] pending the trial of the accused.

- In a separate legislative scheme – the *Criminal Procedure Code* - section 190 contains widely framed provisions for the seizure of property where there is "reason to believe [it] has been obtained by or is the proceeds or part of the proceeds of any offence". The court may order that the property be kept "until some person establishes a right thereto to the satisfaction of the court". If no person establishes such a right within twelve months from the date of seizure, the property (or the proceeds thereof) shall vest in the Public Revenue of the islands. This provision is believed to be wide enough to enable civil or *in rem* forfeiture, but has never been tested. There is no case law on its meaning and effect.

These provisions of the Cayman Islands statutes thus give an amalgam of conviction based, civil, and, arguably, *in rem* forfeiture powers. The inconsistency (particularly between powers to enforce foreign *in rem* orders and the absence of clear powers to enable domestic civil or *in rem* forfeiture in drug cases) shows a clear need for reform. In keeping with the modern enlightened and effective use of civil and *in rem* provisions in other jurisdictions, it is clear that the Cayman Islands legislation needs revision.

CONCLUSION ON CIVIL/IN REM FORFEITURE

There are now confirmed results proving the usefulness of civil/*in rem* forfeiture as a crime fighting tool. The level of forfeiture has increased in every jurisdiction where such provisions have been adopted. They have enhanced the provisions which are conviction based.

Largely because of that country's longstanding *in rem* forfeiture provisions, criminal assets valued at in excess of US 500 million dollars have been confiscated on an annual basis over the last decade in the United States[31]. While this sum pales in comparison to the billions estimated to be laundered through the United States financial system each year[32], it is significantly more than could have been confiscated without the civil/*in rem* forfeiture laws[33].

It is reported that in Italy[34], where civil forfeiture laws have been in effect for a number of years, there have been significant successes because of them. In 1996, criminal assets valued at USD 374.2 million were confiscated under these laws.

The new philosophy underlying the Proceeds of Crime Act in the United Kingdom is a clear indication of the expected impact its civil forfeiture provisions will have on the confiscation of the proceeds of crime. It is illustrative that the Act establishes an assets recovery agency to be headed by a director who will be appointed by the Secretary of State. The agency must submit an annual plan projecting its objectives for each year[35].

The clearest indication of the new impetus of this U.K. legislation within the framework of the civil recovery procedures is section 317. This section empowers the director to invoke certain revenue enforcement functions where he has reasonable grounds to suspect that income, profits or gains arise or accrue to a person and are chargeable to tax as a result of the person's or another's criminal conduct. This allows both the director and the Inland Revenue Board to inquire into and assess the income of the target as being liable to tax. The Act thus reveals a "no holds barred" approach to the confiscation of ill-gotten gains[36].

The Australian experience is best illustrated by the comparative success of the New South Wales C.A.R.A. amendment[37]. Since its implementation, each year net realisable assets in excess of 10 million dollars in value have been recovered. It is also reported that[38] both the number of forfeiture orders made and the amounts recovered under C.A.R.A. have surpassed the combined totals under all other confiscation measures throughout Australia.

Not surprisingly, in June 2001, the Australian Federal Parliament introduced the Proceeds Of Crime Bill 2001, patterned after the New South Wales C.A.R.A. (and taking some policies from the even more draconian Western Australia model)[39]. The Australian

Federal Parliament declared that conviction-based laws "have failed to impact upon those at the pinnacle of criminal organisations" and that new measures are necessary "to remedy the unjust enrichment of criminals who profit at society's expense"[40]. This new Australian Federal legislation (which came into effect on 11 October 2002)[41] also contains *in rem* forfeiture provisions.

This brief comparative exercise shows that there are varying approaches to forfeiture of the proceeds of crime based on civil procedure which are more effective than conviction based legislation. Among the civil procedures themselves may be identified two basic approaches: the civil *in personam* procedure such as C.A.R.A. in new South Wales and the new U.K. Proceeds Of Crime Act, both of which require proof of criminality against a respondent to the civil standard in order to get to his proceeds of crime; and the pure *in rem* civil procedure, aimed at the illicit property itself. There is a distinct rationale - it applies to property which can only be found from all the circumstances to be derived from criminal conduct, and where it is not possible to identify or implicate the predicate offender. Some further examples are where the offender has absconded or where it is unknown who actually owns the property because no one has come forward to claim a lawful interest in it[42].

To conclude, the success of civil based proceedings is now well documented. They avoid the difficulty of proving crime to the criminal standard where the sole objective is to confiscate the proceeds. There is no reason in principle or fairness why forfeiture should not be based on the civil standard. The legal and philosophical rationale is clearly stated by the Australian Law Reform Commission:

> "it is incorrect to view the recovery of the profits of unlawful activity as a part of the criminal justice process and, as such, justifiable only on the

> basis of a prior finding of guilt according to the criminal standard of proof beyond reasonable doubt…the concept that persons should not be entitled to be unjustly enriched by reason of unlawful conduct is distinguishable from the notion that a person should be punished for a criminal offence, and the nature of that punishment, both of which are independent in principle from the right of the state to recover the unjust enrichment and vice versa"[43].

THE INSTRUMENTS OF TERRORISM OFFENCES: A SPECIAL CASE?

As the world struggles to recover in the aftermath of the embassy bombings in Nairobi and Dar Es Salaam, of September 11th 2001, of the attack in Bali, and faces a heightening threat of terrorist activities, the significance of civil and *in rem* forfeiture procedures as countermeasures should not be overlooked.

That significance has been recognised by specific provisions in the Australian Proceeds of Crime Act 2002. The Act enables the freezing and confiscation of property used in or intended to be used in or derived from terrorism offences. The Act also provides that the instruments of a terrorism offence may be restrained upon the reasonable belief of an authorised officer, and are amenable ultimately to forfeiture or confiscation in civil or criminal proceedings, as the case may be[44]. The same standard of proof (reasonable grounds for belief) that the proceeds are so derived applies to terrorism offences. These provisions of the Act are intended to implement Australia's obligations to the international community to combat terrorism[45].

OTHER OBSTACLES APART FROM CONVICTION BASED PROVISIONS

A number of evidential and procedural problems arise to impede transnational prosecutorial efforts to confiscate the proceeds of crime. In a phrase, these could be described as "jurisprudential mismatches" between the differing regimes of different countries.

Because the common objective is restraint and forfeiture of the proceeds of criminal conduct, there should be no objection to a global standard of procedures to overcome all such difficulties. The Vienna Convention is an example of law enforcement co-operation on a global scale (in the interdiction of drug trafficking). In Article 5, it requires the creation of comprehensive domestic and international forfeiture regimes, obliging each signatory state to implement all such measures "as are necessary" to confiscate the proceeds of drug trafficking[46].

The Convention leaves it to the signatory states to implement these measures and to do so "according to their domestic laws".

The problem is that most states can forfeit the proceeds of crime only where there is a prior conviction. Nor do the laws of most states enable the enforcement of foreign civil or *in rem* forfeiture orders. Some states (such as the Cayman Islands) can enforce foreign *in rem* orders but the courts cannot make such orders in domestic proceedings[47]. Still other states, such as the United States, are unable to enforce any foreign forfeiture orders at all and can only confiscate property if the American court can assume jurisdiction because of a connection to a crime committed within its jurisdiction.[48]

MLATs

Mutual Legal Assistance Treaties (such as that which exists between Britain (on behalf of the Cayman Islands) and the United States)[49] have proven to be very useful avenues of legal assistance and co-operation. They have, however, some significant shortcomings as instruments for the transnational restraint and forfeiture of the proceeds of crime.

Typically, MLATs provide for execution of requests "in accordance with the laws of the requested country". This is the same provision found in the Vienna Convention. Where domestic law does not enable a particular course of action to be taken, the enabling provisions of the MLAT become redundant and are only hortatory in effect.

The MLAT standards also vary. For example, the courts of Switzerland will issue restraint orders to freeze assets upon a showing by the United States of "reasonable suspicion" that the assets are the proceeds of crime. Other countries, such as the Cayman Islands, will require a showing of "reasonable grounds for belief". Still other jurisidictions will require the showing of "a *prima facie* case" for granting assistance.

These varying approaches show the clear need for a settled international evidential standard for the restraint of the proceeds of crime.

Similarly, and as we have seen, there is a need for a global standard (not provided by the MLATs) for the application of reverse onus or presumptive evidential standards of proof that assets are the proceeds of crime.

Further, in many jurisdictions, time limits are imposed upon restraint orders made at the request of foreign governments. This is no less so because an MLAT is in place.[50] Where restraint orders are made prior to proceedings being instituted, such time limits will require the institution of proceedings in the foreign court within the deadline set. They may also require the obtaining of a final order of forfeiture within a specified time, failing which the restraint order will be discharged and the assets allowed to take flight. While such time limits are important to safeguard the interest in property of innocent persons, they can be so short as to be unworkable for the foreign investigators and prosecutors.

Another shortcoming (arising from the Cayman Islands experience) has been the inability to obtain restraint orders where the MLAT request is based upon a matter which is only at the stage of investigation in the United States. As the local law empowers the court to make restraint orders only where a final forfeiture order is expected, the Cayman Court has held[51] that there is a prerequisite of proceedings having been instituted against the owner of the Cayman Islands property (or against the property itself) in the United States. The basis for this ruling is the MLAT reference to such powers "as are allowed by the local law".

There are other obstacles which hinder modern international efforts to forfeit the proceeds of crime:

- The failure by many countries to make transparent the true beneficial ownership of assets. Despite the various international initiatives,[52] corporate vehicles and trusts are still allowed to be used to mask the criminal nature of assets. It is axiomatic that the corporate veil should not be allowed to protect

assets where the necessary *prima facie* link to criminal conduct is shown. Corporate assets should, in those circumstances, be as amenable to civil or *in rem* forfeiture as assets held in the names of individuals.

- The inability to use information in respect to a particular prosecution in some other criminal or civil action has proven to be unduly obstructive in many cases. Once there is a settled international standard for the provision and use of information for the prosecution of crime and the restraint and forfeiture of the proceeds, there is no reason to confine its use to a single prosecution or civil action.[53]

TAX EVASION AS A PREDICATE OFFENCE FOR MONEY LAUNDERING AND THE MAKING OF CONFISCATION ORDERS

In the quest for global standards for the restraint and forfeiture of the proceeds of crime, the question of tax evasion poses a major impediment. The reason for this (which the present day Euro-Socialist governments in particular[54] seem unable or unwilling to recognize) is fundamental: tax evasion is not an offence *jure gentium*; it is not an offence against the law of all humanity. While it is criminal and rightly punishable at the domestic level, it is not amenable to international standards, the rules being as variable as the regimes from which they spring. It is an offence which is, therefore, not amenable to universal definition. Not only is there no readily identifiable mutual criminal basis for enforcement of fiscal measures, commonwealth courts have long declared that they have no obligation to enforce the fiscal measures of foreign countries.[55]

Whatever the merits or demerits of the perennial arguments, it is clear that tax evasion and other purely fiscal offences are unlikely to be accepted universally as predicate offences for the transnational interdiction of the proceeds of crime. All right-thinking people will agree that tax cheating is wrong but not all soveriegn states are likely to forego the fiscal benefits which their different tax systems allow (at least without treaties which provide reciprocal benefits).[56]

Any attempt to treat fiscal offences as predicate crimes for the purpose of inclusion in global standards for the restraint and forfeiture of proceeds of all serious crimes would instead create barriers to the attainment of the highly desirous and badly needed initiatives discussed in this paper. I can conclude my brief remarks on this issue by adopting the words of the Council of the Caribbean Financial Action Task Force: "initiatives relating to tax evasion and tax avoidance should not be allowed to compromise the genuine anti-money laundering efforts of the CFATF"[57].

ASSET SHARING

The fact that drug trafficking and other organized crimes are crimes against all humanity is itself the justification for international asset sharing arrangements. In the same way that each state shares the obligation to the international community at large to take "all steps necessary" to combat such crimes, each state has a moral right to claim a share in the forfeited proceeds.[58] The justification for forfeiture laws discussed above has universal applicability. To the extent that all nations suffer the same consequences of serious crime, all nations have a need for resources to rehabilitate victims, enforce their

laws and deter further criminal conduct. Asset sharing should not be seen merely as a political tool to buy co-operation in the struggle against crime.

Underlying the asset sharing policy of some countries is the realisation that the transfer of confiscated property or proceeds provides an incentive for greater international co-operation. There is also the realisation that asset sharing supplies countries with resources to augment their law enforcement efforts.[59] In its ratification and enforcement of the Vienna Convention and in its asset sharing agreement with the United States pursuant to the MLAT, these are obligations which the Cayman Islands acknowledges and actively fulfills[60].

CONCLUSION

Political sanctions and blacklists against other states might assuage political sensitivities and the local need to appear to be "doing something", but they are ineffective and short-sighted. No jurisdiction can claim not to have its own organised criminality and money launderers who contribute to the magnitude of the global threat.

The Vienna Convention and other multi-lateral treaties and conventions against drug trafficking and organised crime have been useful tools but have not provided the truly effective solution – the wholesale confiscation of the proceeds of crime.

There is now a clear need for the implementation of civil/*in rem* forfeiture measures on a global scale.

Such measures should be based upon common legal principles, such as evidential assumptions reversing the onus of proof. The balance of probabilities should be the standard of proof. In all of this, fundamental rights of innocent persons must be safeguarded.

There should be common procedural requirements designed to avoid unnecessary obstacles to international co-operation.

The new standards should contain an obligation to share recovered proceeds with other countries involved in or assisting in their recovery.

The global threats presented by drug trafficking, organised crime and terrorism can only be overcome by co-operation and co-ordination of law enforcement authorities of the entire world community.

END NOTES

[1] See "The Power to destroy" by Roth & Nixon; Atlantic Monthly Press New York 1999; chap. 8 for an interesting account of the history of the development of the powers of the IRS (CID).

[2] The first statutory scheme for the forfeiture of criminal assets was enacted in the Racketeer Influenced and Corrupt Organisations Statute 1970 (RICO) 18 USC 1961-1968. This scheme is conviction based. The main civil and *in rem* forfeiture provisions are now in the criminal Money Laundering Control Act 1986 (18 USC 981) on which more below.

[3] For example, The Foreign Narcotics KingPin Designation Act of the United States was enacted on 3rd December 1999 as part of the Intelligence. Authorization Act for fiscal year 2000. It calls for the impositions of economic and fiscal sanctions on "foreign narcotics traffickers, their related organizations and foreign persons who support their activities". It has been able to achieve little more than the stigmatization of foreign organizations in the form of political sanctions.

[4] The centuries-old principle followed by the common law courts and expressed in the Latin maxim "ex turpi causa non oritur actio: " no-one can rely upon an illegal title to property; the courts will not assist someone by enforcing a title so obtained (*Holman v Johnson (1975*)) 1 Cowp 341 per Lord Mansfield; *Singh v Ali [1960]* 1 All. E.R. 269 P.C. and *R. v Collis [1991]* LRC (crime) 866 New Zealand.

[5] See text to footnote 22 below.

[6] *Austin v United States* 113 S.ct. 2801, 125 L. Ed 488 (1993) gives the United States judicial perspective.

[7] Full title: The United Nations Convention against illicit traffic in Narcotics Drugs and Psychotropic substances which more than 140 States have acceded and ratified.

[8] See The Walker model of global money laundering cited, further below at f.n. 32.

[9] With certain exceptions to be discussed below.

[10] In the Cayman Islands, the *Proceeds of Criminal Conduct Law (2000R),* which is based upon the U.K. Criminal Justice Act 1988, deals with all indictable offences; while the *Misuse of Drugs Law* - also based upon the U.K. Drug Trafficking Offences Act 1986 - deals with drug trafficking offences.

[11] As examples from the Cayman Islands jurisdiction (to be discussed below) will demonstrate. See especially text to end note 51.

[12] The modern U.S. statutory all-crimes forfeiture legislation is in 18 USC 981.

[13] See Report of the United States International Crime Control Strategy (ICCS) available at www. whitehouse.gov-iccs-flrm.html. (at page 3) and reports of the Congressional debate on the passing of the USA PATRIOT Act 2001. Full title: the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001". This act contains specific provisions which enable the U.S. Government to monitor the activities of financial institutions and to prevent them from doing business with other institutions which are believed to be connected to terrorist activities.

[14] See Title 21 US.C. Section 881 (j) and 18 U.S.C Section..981 (H)

[15] See for example *In the matter of Leon and four others 2000* CILR 336; and *In Re Kubosh (1993)* unreported.

[16] The Proceeds of Crime Act 2002 UK Part 5.

[17] See Attachment I (Taken from Appendix II of the Proceeds of Crime Act 2002 U.K.) as an expression of the UK's commitment to the creation of a Europeanised model.

[18] There are however 4 important rebuttable assumptions upon which the prosecution can rely to prove that the respondent leads a criminal lifestyle and has obtained the assets from that lifestyle: section 10 (2) (3) (4) and (5).

[19] This is a concept originally recognised by the U.K Courts in the construction of the provisions under the Criminal Justice Act 1988 as to the meaning of "proceeds of crime": See the case of *R v El Kurd [2001]* Crim. L. R. 506 adopted and applied in the Cayman Islands in *R v Stewart, Cunha et al 2002* CILR 420

[20] Section 246.

[21] See for instance "Civil Forfeiture of Proceeds of Crime in Australia" by David Lusty, Journal of Money Laundering Control Spring 2002; Institute of Advanced Legal Studies London p.345.

[22] See Lusty: Civil Forfeiture of Proceeds of Crime in Australia; op cit.

[23] They also appear in *the Cayman Islands Misuse of Drugs Law(2000R)* (based upon the U.K. Drug Trafficking Offences Act 1986).

[24] Per Lord Hope reported at [2001] Cr. App R. 490 at 509-510. The Privy Council is the final Appellate Court for the Cayman Islands.

[25] See for instance *Lee Kwang-Kut v AG of Hong Kong [1993]* A.C. 951 (Privy Council) *R v Rezvi [2002]* 1. All E.R. 801 (UK House of Lords); *R v Benjafield [2002]* UKHL 815; *Gilligan v Criminal Assets Bureau [1998]* 31 R 185 (Irish High Court) *Phillips v U.K* ECHR App NO: 41087/98, 5 July 2001.

Moreover, reverse onus provisions are expressly encouraged by Article 12 (7) of the UN Convention against Transnational Organised Crime and Article 5 (7) of the Vienna Convention.

[26] This was the conclusion reached by the Canadian Supreme Court in respect of the provisions in the Narcotic Control Act RSC 1970 .N-1, section 8 – *The Queen v Oakes [1986]* 1 S.C.R. 103

[27] Section 215.

[28] Following and applying *(Restraint Order: External Confiscation Order), (1996)* Q.B. 272; *sub nom Re Londono (1995)* 4 All. E.R. 159; cited above and in which the English High Court enforced a United States *in rem* Order pursuant to the equivalent English legislation upon which the Cayman Islands law is based. The same conclusion was reached in relation to other *in rem* proceedings taken in the U.S. and brought to the Cayman Islands for enforcement of the *in rem* forfeiture Orders in *A.G. V Carbonneau and Hartog* [*2001* CILR note 11].

[29] *In re Leon (supra)*, Sanderson J adopted the reasoning of the English Court of Appeal in *In re S-L sub nom Londono [1995*] 4 All E.R. 159 to the effect that, for the purposes of the legislation enforcing external confiscation orders, the word "defendant" was not to be construed as meaning only a defendant *in personam* and that "proceedings against the defendant was to be construed as including proceedings *in rem* in which the standing of persons with a financial interest in the outcome was plainly recognised" (at page 344 2000 *CILR* 336).

[30] The PCCL – sections 5, 10 and 11.

[31] FATF Review of Anti-Money Laundering Systems and Mutual Evaluation Procedures 1992 – 1999, 16th February Annex I.

[32] See Walker J.; "How Big is Global Money Laundering" Journal of Money Laundering Control, Vol. 3, no. 1 pp 25 – 35 (1999); where the author projects global totals of USD 2.8 trillion and USD 528 billion in the United States. Although the author develops an arithmetic model for his projections these are at best educated guesstimates.

[33] Per Mr. Stan Morris, Head of FINCEN, U.S. Treasury, in a Report to the FATF Mutual Review Team, Dec 1996.

[34]Lusty op.cit. p 345 citing the FATF Review of Annual Review 1996 – 1997 June, Annex. B appendix I.

[35] While all Government departments must submit such a plan, its application to the A.R.A. must be indicative of targets to be set and achieved. That is also made clear from Appendix II of the Act "Asset Recovery Strategy," page 10, under the heading "Delivering Results": "The Strategy should lead at each stage to the setting of challenging measurable targets".

[36] Although one school of thought is that this particular approach gives rise to moral and philosophical concerns because it "legitimizes" the criminal's ill-gotten gains by treating them as lawful income for the purposes of taxation and, in so, doing blurs the line of proof between civil and criminal conduct. Citing the example of Al Capone here, the further argument is that the prosecution of more serious criminal conduct will be overlooked in favour of tax collection measures. See for example "Are Tax Evasion Offences Predicate Offences for Money Laundering Offences", Alldridge, op.cit. (See below at note 56).

[37] The New South Wales Crime Commission's Annual Reports.

[38] Lusty, op. cit, at p354.

[39] The Criminal Property Confiscation Act 2000, of Western Australia.

[40] Williams, Commonwealth House of Representatives, 20th September 2001, at 30978.

[41] The date it received Royal Assent but with different commencement dates for different provisions: Part 1, Section 2.

[42] See for example *NCA v Flack (1998)* 86 FCR 16 (U.S.A.)

[43] ALRC ref. At Chap. 4 (2000) Confiscation That Counts, Report No. 87 regarding the Proceeds of Crime Bill 2001.

[44] See the revised Explanatory Memorandum to the Proceeds of Crime Bill 2002 available at www.search.aph.gov.au.

[45] The International Convention for the Suppression of the Financing of Terrorism; and Resolutions of the United Nations Security Council, relevant to the seizure of terrorism related property.

[46] A similar exhortation is to be found in the U.N. Convention Against Transnational Organised Crime, Article 12.

[47] See earlier discussion above and *In the Matter of Leon and others 2000* CILR 336.

[48]See "International Forfeiture: Federal Prosecutor's Manual, page 9, published by the U.S. Department of Justice, Criminal Division, Offices of Professional Development and Training, October 1991.

[49] Enforced in the Cayman Islands by the *Mutual Legal Assistance (United States of America) Law 1986.* As at August 2004 there have been about 2 requests received and granted from the United States by the Cayman Central Authority, several involving the restraint and forfeiture of the proceeds of crime and the sharing of those proceeds. As at Spring 2001, the United States had entered into 41 MLATs with other

countries, that with the Cayman Islands being the 6th; signed on 3rd July 1986 and commencing on 19th March 1990. As at spring 2001, there were some 13 others awaiting ratification. See: "Globalisation of Law Enforcement Efforts"; Aronica, Muktyar and Coon: Journal of Money Laundering Control, Spring 2001, Appendices A & B.

[50] An example of this arose under the *Cayman Islands PCCL (2000 R)*, para.22 and 5(2) of the Schedule, which imposed a time limit of 7 days after restraint for the institution of proceedings leading to forfeiture in the foreign Court. As a result, a restraint order was discharged before the U.S. prosecutor (South District of Florida) was able to file proceedings. After the order was discharged, a fresh restraint was made by the Court because of the clear showing of criminal proceedings: *In re McCorkle* 1998 CILR 224. The law was subsequently amended to provide a 21 day time limit. *(See PCCL (2001R)*

[51] *In the matter of Sherman and four others 1996* CILR 33, a decision of the Grand High Court which has not been tested on Appeal. It is a decision which may be criticized for having overlooked the Court's inherent jurisdiction to restrain the proceeds of crime at the instance of the prosecution so as to allow the State to fulfill its local or international law enforcement obligations; including the assistance under the MLAT required to be given at the investigatory stages. See *Chief Constable (Kent) v V. [1983]* Q.B. 34; [1982]. All E.R. 36 and a further Cayman Islands case: *In the Matter of Global Investment Brokers Ltd* 1997 CILR 544. These cases follow the principle that the Courts will restrain proceeds at the request of the police pending local charges being brought which could result in forfeiture orders. The further difficulty, however, is that as forfeiture in the Cayman Islands will be conviction based (unless there is a foreign *in rem* order to be enforced), orders of restraint will only be made where there is a prima facie showing of grounds to conclude that the criminal case will be proved beyond reasonable doubt, resulting in the necessary conviction. This was the view of the PCCL taken by the Grand Court in *Cause No. PCCL 1/99 and 2/2 In the Matter of Eurobank (in liquidation) and In the Matter of Crystal Ltd.*
Henderson J. said "where there are no reasonable grounds for thinking than an essential element of the case will or can be proved beyond a reasonable doubt, than a precondition for the making of a restraint order is absent" 2002 CILR 497, at Pgs. 506-507, Para. 24.

[52]Most notably in this regard, the FATF Revised Recommendations; The Council of Europe Directions; and the OECD's Corporate Governance Committees Report, summer of 2001, on the Misuse of Corporate Vehicles.

[53]This has been achieved as between the Cayman Islands and the United States by the simple exchange of letters without the need for formal treaty requests; for instance where information provided to the Department of Justice pursuant to its formal treaty request was needed by the Securities Exchange Commission to enable civil proceedings for the recovery of the proceeds of security frauds.

[54]They are the force behind the E.U. tax initiatives and the OECD initiative for the elimination of "harmful" tax competition which seek to compel non-member states to adhere to those initiatives.
The E.U. initiatives, by means of Draft Directives, would include the requirement that their member states impose the rules for withholding tax on savings or the automatic and spontaneous disclosure of "tax" information upon their Overseas Territories; even where those territories are not themselves associated states of the E.U. The Cayman Islands filed a challenge to the vires of this Draft Directive before the European Council. When that failed the Cayman Islands government applied to the European Court of First Instance (*See Government of the Cayman Islands v. Commission of the European Communities* 2003 CILR 91) . The Court held that there was no obligation on the part of the UK government to impose the Directive on the Cayman Islands since the European parliament had no competence to adopt legislation which extended beyond the territory of the Community to the Overseas territories. However, the UK government could adopt and Order in Council to impose such a Directive.
The OECD tax competition initiatives would require all states deemed by it to be carrying on "harmful tax competition" to eliminate all aspects of their financial systems which allow it. For an incisive examination of the initiatives and their pitfalls see "Harmful" Tax Competition and the Future of Offshore Financial Centres by Dwyer: Journal of Money Laundering Control, Spring 2002 p.302.

[55] *Holman v Johnson (1775)* above at p. 343 and *Government of India v Taylor [1955]* 1 All E.R. 292.

[56] See for example: "Are Tax Evasion Offences Predicate Offences for Money Laundering Offences;,"Alldridge – Journal of Money Laundering Control, Spring 2001, Vol 4 No. 4 I.A.L.S. London (page 350); "Tax Evasion and Money Laundering An Open and Shut Case?"; Bridges and Green; Journal of Money laundering Control, Vol.3.No. 1 Summer 1999 I.A.L.S.; "Tax evasion and Money Laundering: A Personal View", Howard Flight, MP. (Shadow Paymaster General U.K.) Journal of Money Laundering Control, Spring 2002, page 323. This author points out in clear and compelling terms, reasons why the United States, (by means for example, of Delaware corporations and tax exemptions for bank accounts held by foreigners) and the U.K. (by use of London as an offshore center for the Eurobank market) would not be

willing to forego the competitive regulatory advantages which they enjoy by being tax havens. The Cayman Islands has entered into a Tax Information Exchange Treaty with the U.S.A and is committed to enter into similar bi-lateral treaties with other OECD members. This will still be a far cry from the enforcement of their tax laws by forfeiture and restraints.

[57] At the 9th CFATF Council meeting held at Grand Cayman, November 1998, a resolution was passed to study the proposed linkage (forged in the FATF Directive issued on 2.7.99 in the form of an "Interpretative Note" to its 40 recommendations) between tax evasion and money laundering, ie: "the fiscal excuse loophole". The subsequent report of the CFATF Study Group included this quoted recommendation which was adopted by the CFATF plenary.

[58] This expectation is also recognised by the Vienna Convention: Article 5 (b).

[59] Both objectives are expressly recognized by the United States Department of Justice's policy statements on asset sharing: See Federal Prosecutors Manual op.cit., 1991 (page 15).

[60] Pursuant to the MLAT, Article 16, an exchange of letters embodies the asset sharing agreement between the Cayman Islands and the United States. Several millions of dollars have been shared with the United States. A pending case will involve sharing with Canada.