Justice Anthony Smellie
Chief Justice, the Supreme Court, Cayman Islands

I have been asked to speak to the hypothetical case[1] scenario with particular focus upon the position of offshore jurisdictions, coming, as I do, from the Cayman Islands.

One should begin by setting the context for the discussions. The true implications of the case scenario and the true nature of the position of offshore jurisdictions, can only properly be considered by acknowledging the increasing globalisation of crime.

While international crime is not a new phenomenon,[2] the increasing concern about cross-border crime of all kinds, and its implications for the international community, is clearly manifested in the very theme of this 11th U.N. Congress.

Modern economic and social conditions have combined to create a situation that is readily exploitable. The increased mobility of people across borders, the seemingly ungovernable technology of the internet, the creation of the free market in goods and services and the encouragement given to the free movement of capital, have all enabled the growth of cross-border criminality and the internationalisation of criminal enterprises. These concerns are for instance, clearly expressed in the European council's opening statement in its first 30-point action plan to combat organised crime;[3]

> *"Organised crime is increasingly becoming a threat to society as we know it and want to preserve it. Criminal behaviour is no longer the domain of individuals only, but also of organizations that pervade the various structures of civil society, and indeed society as a whole. Crime is increasingly organizing itself across national borders, also taking advantage of the movement of goods, capital, services and persons. Technological innovations such as the internet and electronic banking turn out to be extremely convenient vehicles either for committing crime of for transferring the resulting profits into seemingly licit activities. Fraud and corruption take on massive proportions, defrauding citizens and civic institutions alike".*

To this litany of weaknesses must regrettably now be added the ability of terrorist organisations to access the international financial system.

Offshore financial centres, as part of the phenomenal emergence of this new global economy, are by definition no more or no less prone to being abused by the organized criminal than other financial centres.

The Caribbean region encompasses several such jurisdictions.[4] It has therefore been important that the Caribbean regional response, in the form of the Caribbean financial action task force (the CFATF) as an offshoot of the financial action task force of the g15,[5] has been a signal success. Through its mutual evaluation process, all CFATF member states have been evaluated and now meet at least the minimum standards set by the FATF and the Vienna convention.[6]

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[1] See Annex 1 "Management of the Hypothetical Case".

[2] International cooperation and strategies for dealing with cross-border crime date back to at least the 17th century, and are commonly to be found in Treaty laws which establish or confirm them (see N. Boistev "Transnational Criminal Law" 2003 EJ1L).

[3] [1997] OJ C.251/1] Similar sentiments are expressed in the second version of the Plan which was created because of the problems created by lack of harmonization of laws and procedures across the member states of the E.U.: "The Prevention and Control of Organized Crime: A European Union Strategy for the New Millennium". Accompanying this, the Commission created a new scoreboard system to monitor the progress of the states in both of the Action Plans (http://www.ex.ac.uk/politics/pol).

[4] Within the Caribbean region, the Cayman Islands apart, the following countries have or are developing different levels of international financial services industries: Anguilla, the Bahamas, Barbados, the British Virgin Islands, the Netherlands Antilles (Aruba, Curacao), Costa Rica, Panama and the Turks & Caicos Islands. (Bermuda, which is a mid-Atlantic territory, is often referred to as one of the regions offshore centres).

[5] First convened in Aruba, June 1990 when the conference of representations of Caribbean regional states resolved to adopt the 40 recommendations of the G15 Financial Action Task Force on money laundering as well as 21 original recommendations (later reduced to 19) of their own.

[6] For a summary of the first mutual evaluation report on the Cayman Islands see www.1.oecd.org/fatf/FATdocs_en.htm.

The Cayman Islands assumed a leadership role in the formation of the CFATF and was the first member state to be evaluated.[7]

With the major international financial centres, including the Cayman Islands, having criminalised the laundering of the proceeds of crime and having adopted measures to ensure that mutual legal assistance can be given for the restraint and confiscation of the proceeds,[8] such centres can fairly be regarded as having taken important initial steps to combat and discourage economic crime. Indeed, experience has shown that the likelihood of criminal proceeds being restrained and confiscated is highly increased once they enter a well regulated jurisdiction such as the Cayman Islands.[9]

It is against this background, which for some will no doubt present a paradigm shift, that one should consider the position of offshore centres when examining the hypothetical case scenario which we have.

The term “offshore” is relative and properly understood in the context of global financial activity taken shorn of pejorative connotations means simply that a foreign jurisdiction is regarded as offering certain advantages typified by a low or preferential tax regime, relative to a local jurisdiction.

So, for instance, New York or London may be regarded as an alternative offshore centre for investments relative to states in mainland Europe; Singapore or Hong Kong relative to the rest of mainland Asia or the Cayman Islands relative to mainland America.

No less a body than the IMF has concluded that so-called “offshore” jurisdictions play an important role in managing and facilitating the flow of international capital and pose no threat to world economic stability.[10]

That being the relative position of offshore jurisdictions, it cannot be over-emphasised that the nature of the responsibility of offshore jurisdictions to interdict international crime or to assist in the recovery of assets or proceeds, is no different from that of the rest of the global economic community.

There can therefore be no question that offshore financial jurisdictions share the same universal

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[7] For a list of the rounds of evaluations through 2000 see “Mutual Evaluations” at the same web site.

[8] The Vienna Convention having been adopted by more than 150 countries and with Article 7 containing a form of mutual legal assistance arrangement in respect of drugs cases and the proceeds of drug trafficking, mutual legal assistance is now globally available in relation to such matters. The United States of America has MLATS with 33 other countries, including that between the United States and Great Britain on behalf of the Cayman Islands, which was the third such and was ratified by the Cayman Islands legislature in 1984.

[9] Apart from the mutual evaluation process of the CFATF and the rather less transparent “blacklisting” process of the FATF, the Cayman Islands has co-operated with and participated in several international or institutional initiatives for the enhancement of anti-money laundering and regulatory regimes. The most recent such initiative has been taken by the IMF which, in a two volume report on the Cayman Islands noted: “A sound legal basis and robust legal framework for combating money laundering and terrorist financing has resulted from major regulatory revisions and improvements in the past four years” and “An intense awareness of anti-money laundering and combating the financing of terrorism (AML/CFT) is supported by a sound supervisory programme. The Cayman Islands has been a leader in developing anti-money laundering programs throughout the Caribbean region”. Both volumes of the IMF Report on the Cayman Islands are available at www.imf.org or www.gov.ky. Offshore Financial Centres (OFCs), to date do not appear to have been a major causal factor in the creation of systemic financial problems....Not all OFCs are the same. Some are well supervised and prepared to share information with other centres, and co-operate with international initiatives to improve supervisory practices. (See Financial Stability Forum - Report of the Working Group on Offshore Centres, 5th April 2000 at www.fsforum.org/publications/OFC_Report_-_5_April_2000a.pdf).

[10] See Report of the FSF Working Group on Offshore Centers, 5th April 2000 at www.fsforum.org. See also address by the Cayman Islands Government to the OECD Forum on Harmful Tax Competition: Paris, France, 30 August 1999. The Cayman Islands is recognized as one of the leading offshore centres offering the following major advantages: (i) a competent and efficient public service; (ii) a competent, fair, flexible and unencumbering regulatory system; (iii) stable, democratic, even-handed and transparent government; (iv) a highly developed and sophisticated legal system based upon British common-law; (v) an independent and respected judiciary and judicial administration; (vi) a highly skilled and knowledgeable body of professional expertise; (vii) a sophisticated and knowledgeable private sector, providing all types of ancillary goods and services required by the financial sector; (viii) the presence of all the world’s major banks and financial houses; (ix)modern infrastructure; (x) geographic proximity to some of the world’s largest economies and; (xi) a relatively crime-free and hospitable social environment; (xii) and, of course, a competitive no tax regime including no tax on capital gains.

responsibilities and burdens for the interdiction and prevention of economic crimes.[11]

There are, however, often different dynamics at work in the manner that offshore jurisdictions become involved with economic crimes and these must be identified and recognised in order to ensure the best coordinated and most effective response, in conjunction with other jurisdictions.

Typically, as in the given hypothetical case scenario, the predicate crimes are committed elsewhere, and the proceeds sought to be kept in or laundered through an offshore centre, such as, in this case, the Cayman Islands.

The connection with the offshore jurisdiction will therefore typically arise because the proceeds have been transferred there in the hope of secreting them away or of laundering them through the international banking system for onward transfer to yet another jurisdiction or back to the first jurisdiction; with the origin of the proceeds being thus disguised.

Often, the predicate criminal will also seek to launder the proceeds through intermediaries - personal or corporate – both in the jurisdiction of origin of the proceeds and in the offshore jurisdiction.

He will seek to exploit the differences between the laws and enforcement regimes that exist from one state to the other. Often the victims of crime will be in one country, the perpetrators of the crime in a second country, the evidence required to prosecute or recover the proceeds in a third, whilst the proceeds themselves are in a fourth. This all points to one fundamental and common objective: the harmonisation of national laws and procedures to enable the prosecuting state to prosecute the offender, to secure the evidence and to recover the proceeds.

When considering the dynamics of economic crime, these concerns bring into sharp focus the importance of three specific factors:

(i) The ability of the legal and law enforcement systems of the original or first jurisdiction to interdict the predicate offence and to prevent its financial system from being used for money laundering;

(ii) The ability of the international banking systems – operating as between all the affected jurisdictions – which are used for the transfer of the proceeds, to detect and prevent money laundering; and

(iii) The ability of the offshore jurisdiction at the receiving end of the spectrum, also to detect and prevent money laundering, as well as to restrain and recover the proceeds of crime and to honour requests for international legal assistance.

The point to be emphasised is that the greater the lack of symmetry between the laws and the enforcement capabilities of countries, the greater is the potential for the exploitation of the international financial system by the criminal.

Our hypothetical case provides a useful practical scenario that brings together for discussion, many of those concerns described above. The central core of the facts of the hypothetical case actually represents the facts of a real case, dealt with between the United States and the Cayman Islands. It was a case which engaged the Cayman Islands authorities and went as far as the Cayman Islands Court of Appeal, over a period of some three

[11] Apart from this principle now being reflected in the universal adoption of the Vienna Conventions, of the FATF 40 original recommendations and the widening adoption of the U.N. Convention.
"Offshore" jurisdictions have through, the Offshore Groups of Banking Supervisors formed in 1980, long since adopted the Bash Concordat of 1992 in "Minimum Standards for the Supervision of International Banking Groups and their Cross-Border Establishments". In the Bash Committee's Report of 8th October 1996, 29 further recommendations were adopted designed to strengthen the effectiveness of the supervision by home and host-country authorities of banks which operate outside their national boundaries. For this Report at www.bis.org/publ/bcb585.htm.
The view was taken at the United Nations Offshore Forum held in the Cayman Islands on 30th - 31st March 2000 and hosted jointly by the UNODCCP and the Cayman Islands Government, that the responsibility to adopt and enforce counter-measures against financial crimes is globally the same. The implementation of international standards and compliance thereto are all issues with which the well regulated offshore centres, like the Cayman Islands, have already been addressed: See FATF Twelfth Annual Report on Money Laundering, Paris, 22nd June 2001.

years. Many lessons were learnt from it, not least the importance of ensuring that international requests for assistance by way of the restraint and forfeiture of the proceeds of crime, are properly grounded; and this was both in terms of the law of the requesting state, as well as that of the requested state.

The Circumstances of the Case

Mr. and Mrs. McCorkle were the perpetrators of a bold tele-marketing fraud in the United States. Through the use of "infomercials" and seminars, the McCorkles promised potential customers that they would partner them in real estate transactions by providing the capital necessary to purchase such properties. The McCorkles offered a 30 day money-back guarantee in relation to the introductory video-tape, the price of which was USD69.00. They sold tens of thousands of these tapes. But the McCorkles failed to provide the capital for the real estate ventures as promised and frequently failed to honour the 30 day money back guarantee. When complaints were made, the introductory video-tape turned out to be nothing but a fraudulent misrepresentation by which the McCorkles enticed people to part with their money. Investigations in the United States showed that the McCorkles had wire-transferred millions of dollars of the proceeds of their fraudulent telemarketing activities to the Cayman Islands, through the international banking system.

By use of further information provided by the Cayman authorities pursuant to a request under the mutual legal assistance treaty (MLAT) between the United States and the Cayman islands - these monies were traced to accounts which had been opened with the Royal Bank of Canada by the McCorkles in the Cayman islands, using corporate entities and in their own names.

The request from the United States for assistance in the case fell within the ambit of Art. 1 Para 2 (g) and (h) of the MLAT which is enforced by the mutual legal assistance law of the Cayman Islands.

This reads:

> "for the purposes of Paragraph 1. Assistance shall include ...
> (g) immobilising criminally obtained assets;
> (h) assistance in proceedings related to forfeiture, restitution and collection of fines ..."

No detailed provisions are set out in the treaty for the implementation of these forms of assistance. However Art. 16 states:

> "1. The central authority of one party may notify the central authority of the other party where it has reason to believe that proceeds of a criminal offence are located in the territory of the other party.
>
> 2. The parties shall assist each other to the extent permitted by their respective laws in proceedings related to;
> (a) the forfeiture of the proceeds of criminal offences.
> ...".

The request for restraint of the bank accounts came to the Cayman Islands from the United States in early 1997, shortly after the enactment of legislation in December 1996, which makes it a crime to launder the proceeds of all serious crimes and which gives power to the courts of the Cayman Islands, to restrain and ultimately to forfeit such proceeds. Legislation had been in place from 1986 enabling the restraint and forfeiture of the proceeds of drug trafficking[12] but as these were the proceeds of the McCorkles' fraud, the new 1996 law, the Proceeds of Criminal Conduct Law ("the PCCL") applied to the case.

However, being conviction based, the PCCL required the showing of a prima facie case that a conviction would be obtained against the McCorkles and a confiscation order thus likely to be obtained against them, before a restraint order over the accounts could be obtained.[13] This involved showing that criminal proceedings would be brought against the McCorkles themselves, not just civil "in rem" proceedings for the recovery of the proceeds of their fraud.

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[12] The Misuse of Drug Law, which also contained provisions (prior to the advent of the Vienna Convention) for the restraint and forfeiture of drugs proceeds in aid of a foreign request from a designated country, including in respect of foreign *in rem* proceedings.

[13] See Attorney General v Carbonneau et al [2001 CILR Note 11].

The PCCL further required at that time, that the United States authorities, if they did not already have such proceedings instituted against the McCorkles, must have, within 7 days of the restraint order being obtained in the Caymans, instituted such proceedings.

When, after the passage of more than 7 days after the making of the restraint order by the Cayman court, the U.S. authorities had not managed to institute proceedings against them; the McCorkles sought and obtained an order discharging the restraint orders.

The Grand (high) Court held that the restraint order being in place for more than 7 days without the institution of criminal proceeding in the United States exceeded the jurisdiction given by the PCCL.[14] The court of appeal agreed.[15] The provision in the MLAT which required that assistance be given, including for the restraint and forfeiture of criminal proceeds, could operate only insofar as allowed by local law. Orders for costs were also made in favour of the McCorkles against the Cayman Attorney General, albeit without his opposition.

Fortunately, however, the United States authorities were able to institute proceedings against the McCorkles and re-submit a request under the MLAT for restraint orders, before the McCorkles were able to transfer the funds out of the Cayman Islands.

The accounts were restrained again and, when the McCorkles entered into a plea agreement with the U.S. authorities, most of the funds in the Cayman Islands - approximately 7 million dollars - were immediately returned to the U.S. authorities for restoration of the victims.

As it transpired, further funds totalling over USD2.5 million which the McCorkles had given over in trust to their attorneys in the Cayman Islands to be used as their “legal defence fund”; became the subject of more protracted litigation. Their lead attorney in the United States was charged for refusing to pay over much of that trust money, which the Cayman attorneys had paid to him, purportedly as legal fees for his representation of the McCorkles. Only after his imprisonment for contempt did he reluctantly relinquish the fund.

Still further sums of money (approximately $450,000) came to light much later when it was discovered that the McCorkles had opened other accounts with the banks in the Cayman Islands and those sums of money were only recently - more than 6 years later - returned to the United States authorities.[16]

Another point of interest arising in the Cayman Islands from the McCorkle case had to do with the non-retrospectively of the PCCL which had come into effect only so shortly before that case came to light. On behalf of the McCorkles, it was argued that the provisions of that law could not apply to their case because the monies had been in the accounts in the Cayman Islands before the law came into effect and, as the PCCL was expressed in section 2 (4) not to have retrospective effect, the powers could not be used to restrain or forfeit the accounts. The Court of Appeal held that although the law did not have retrospective effect, since the McCorkles’ criminal activity of laundering the proceeds within the Cayman Islands was an ongoing scheme of deception, both before and after the commencement date of the PCCL, a purposive construction could be applied to permit assistance being given to the United States authorities under the law.[17]

At the end of the day, and after the matter of restoration of the victims of the fraud was settled, there turned out to be a significant amount of the McCorkles’ proceeds of crime available to be shared between the U.S. Department of Justice and the Cayman Islands authorities.

Such proceeds are to be applied, in keeping with the spirit (if not the letter) of the U.S. – Cayman asset sharing agreement; to drug rehabilitation, law enforcement and justice administration programmes.[18]

It will be apparent from the McCorkle case that there are many lessons to be learned:

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[14] See In re McCorkle 1998 CILR 1.

[15] Affirmed by the Court of Appeal. See 1998 CILR 224.

[16] By Order of the Cayman Island Grand Court dated 4th November 2003 (containing $330,000 of which the Legal Defence Fund contained $300,000) and 10th August 2004 (containing $121,000).

[17] 1998 CILR 224 at 235 lines 5-12.

[18] This sort of statement of intention is now standard rubric in Asset Sharing Agreements.

1. The importance of due diligence to prevent the misuse by criminals of the financial system at all levels and stages of transactions: domestic, international and offshore.

2. Equally, the importance of ready access to financial records generated at all levels and stages of the financial systems in order to be able to trace, restrain and recover the proceeds of crime.

3. The unending ingenuity of the money launderers in the creation and use of artifices for the laundering and even the apparent alienation of proceeds of crime from themselves. Witness for instance the use of the McCorkles of different corporate entities and even the legal defence trust fund, in their attempt to put proceeds beyond the reach of the authorities. This ingenuity calls not only for due diligence, but also hand in hand with due diligence, constant study and analysis of the methodologies and typologies of money laundering.[19]

4. The importance of having in place effective mutual legal assistance arrangements for the provision of information to trace and restrain and ultimately, to forfeit the proceeds of crime.

5. That point noted, the importance also of compliance with any deadlines or other requirements of foreign law in the place where the restraint and forfeiture of the assets are to take place. In the ultimate spirit of cooperation, it is pleasing to note that the 7 day deadline imposed by the Cayman law was recognised by the Cayman government as imposing too short a response time for the U.S. authorities for the institution of proceedings; and so the PCCL was amended to allow 14 days from the making of the restraint order.

6. Nonetheless such deadlines, as well as the ultimate requirement upon the requesting state, to be able to provide a conviction based order of forfeiture before the proceeds can be forfeited in the requested state, are unnecessary obstacles to the proper and final objective of depriving the criminal of the proceeds of crime. Those requirements point to the need for the adoption of international standards for the civil *in rem* forfeiture of the proceeds of crime. And thus, without the need, in the first place, to obtain a conviction against anyone for the predicate crime which produced those proceeds or for laundering them. Several states, including a number of the G8 countries; have adopted such civil *in rem* provisions for forfeiture.[20] The universal adoption of the civil in rem provisions to enable direct recourse against the proceeds of crime would be a most significant step towards the ultimate objective of harmonisation of laws and procedures relating to the confiscation of such proceeds.

7. The need where anti-money laundering legislation is being introduced or updated, to recognise that money laundering is a continuing offence and so allow for the restraint and forfeiture of the proceeds which were in the banking system before, but which continued in it, after the law came into effect and after the money laundering offence was created.

8. Such legislation must also of course allow for the restraint and forfeiture of proceeds based upon a foreign request and for the enforcement of the forfeiture orders (including ideally foreign in rem orders) of foreign courts.

   The Cayman Islands legislation now allows for this where the orders come from courts of foreign countries which are specifically designated under the law.[21]

9. As to the matter of legal costs, it is important in the public interest that the authorities in a requested state should not be at risk of having to pay the legal and other costs of the alleged criminals or money launderers resulting from an unsuccessful but bona fide attempt to enforce a foreign request to restrain or forfeit the proceeds of crime.

   Costs were ordered against the Crown in the McCorkle case when the restraint orders were at first discharged, but that order was unopposed by the Attorney General.

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[19] A fact which is recognized by the CFATF and the FATF in their annual programmes of analysis. See “Money Laundering Methods and Trends”: www1.oecd.org/fatf/fatdocs_en.htm#trends.

[20] For a survey of the adoption of this type of provision, see Smellie: “Prosecutorial Challenges in Freezing and Forfeiting Proceeds of Transnational Crime and the use of International Asset Sharing to Promote International Co-operation,” Journal of Money Laundering Control, Vol. 8. No. 2. November 2, 2004, Henry Stewart Publications.

[21] See Cayman Islands Proceeds of Criminal Conduct Law (2003 Revision) Section 29 and The Misuse of Drugs Law (1999 Revision), Section 48.

Since then, such orders have been repeatedly refused by the courts of the Cayman Islands on the basis, as was stated in the latest such judgment:

> *"Having received the request from France, the Attorney General's obligation was to carry the matter forward and seek a ruling, as he did. I think he would have opened himself to justifiable criticism if he had said to the French government that he was refusing to bring the application [(for restraint of certain bank accounts)].*
>
> *These are matters which I can and should take into account when exercising my discretion on the subject of costs. When acting at the behest of a foreign government the Attorney General is not "a litigant like any other" [(quoting the standard dictum applied in costs ruling)] —- I have concluded that it would be inappropriate to award costs against the Attorney General on the present application".*

Per Henderson J. In cause 10 of 2003, in the matter of an application by the Attorney General pursuant to the proceeds of criminal conduct law (2001 revision), in the matter of a request by the French government, and in the matter of Pierre Falcone (defendant), judgment given on 11th February 2004.

10. Finally, the importance of asset sharing as a means of enhancing international co-operation and law enforcement is not to be overlooked. The McCorkle case is but one example of many cases in which asset sharing has taken place as between the United States and the Cayman Islands in respect of assistance given in the tracing, restraint and recovery of the proceeds of crime.