

The Importance of Prosecuting Tax and Financial Crime

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It is a great privilege to be here today with the group of people who hold the future of Africa and Oceania in their hands. I say that because prosecution, especially of tax evasion and financial crime, is the key to achieving a society governed by the rule of law. It is the cornerstone of on which a prosperous and secure state is built. It is the key to controlling corruption. It is the essential tool to give the state the resources to provide basic public services and goods for its people.

The purpose of prosecution as you all know better than I, is deterrence. You prosecute the few to scare the many into staying honest. Absent the fear of prosecution a large number of otherwise ordinary and otherwise likeable citizens can become criminals. Throughout Africa, for far too many years that fear has been missing. The result has too often been extreme poverty and the failure of effective government.

When I first travelled to Africa thirty five years ago most countries lacked the human resources to tackle prosecution of financial crime. Now that has changed as evidenced by the group here today. You have the education and the resources to take the problems on and your role is key to the success of your countries.

Seen through the eyes of a criminologist, society is roughly divided into three groups; the people who are honest and would not commit crimes even if they had the chance and thought they would not be caught, people who would commit crimes if they thought they could get away with the crime but fear the consequences of being caught, and the relatively small group of sociopaths who are criminals and will behave as criminals no matter the circumstances. The sociopaths make up about ten percent or less of the population, the people who would be criminals if they thought they could get away with it about forty five percent, and the honest under all circumstances are the remaining forty five per cent.

These percentages hold true across all societies regardless of geography, ethnicity, race and culture. The famous criminologist, Professor Leon Radzinowicz, the late head of the Institute of Criminology at Cambridge University told the story of what happened when the Nazis invaded Denmark at the beginning of World War II. The Nazis were afraid that the Danish police would not support the invaders and as a result they arrested the entire Danish police force. The result was a crime wave the like of which Denmark had never seen. It was a case of the forty-five per cent I described running amok.

This story, by the way, is one to bring forward when people say the cause of corruption in Africa is cultural or even worse, a racial characteristic, a proposition that often arises on the underbelly of American politics.

Financial crime, especially tax evasion, is in my view the most important crime for modern prosecutors to focus on. In general financial crime is the most common form of crime and the least prosecuted form of crime. Financial crime is the least reported to law enforcement. That is because it is either not

in the interest of the victim to report the crime or the victim is too embarrassed to admit his or her victimization. For example many banks do not report computer fraud because they fear customers will worry about their own account or that the management will look stupid.

Other financial crime is not reported because there is no individual victim, as is the case with tax evasion. To use the title of a recent movie it is "Catch Me if You Can." Another problem is consensual financial crime - financial crime where all the parties are happy and the victim is the state. Sophisticated tax evasion that includes lawyers, accountants, and their clients is an example.

Even when the perpetrator is caught these crimes are hellish difficult to prosecute, as I am sure you all know. I have worked a part of the prosecution team in several U.S. tax cases. My introduction to each case was arriving in a conference room stacked with dozens cartons of documents and greeting revenue agents who then began diagramming the case using a white board that covered the walls of the conference room. My first reaction to the presentation was that the case was too complicated for a jury to understand. They would get bored, fall asleep, or the defense would confuse the situation in a way that would make a conviction impossible.

To make the cases winnable we had to spend days and even weeks simplifying the charges, picking out the key evidence and finding a witness who would bring the mountain of paper to life. However difficult and time consuming this work must be done.

In the United States very few prosecutors want to take on complex financial crime cases. They want the clean, short, drug conviction in which the evidence is an undercover taping of a drug deal and a conviction is assured in a matter of hours. But let me assure you there is nothing more important to your society and ours than bringing and making these cases.

I believe that tax evasion and grand scale corruption can rise and often does rise to being a crime against humanity.

I begin my argument by focusing your attention on the Universal Declaration of Human Rights. In relevant part the Declaration says:

1. A State has a duty to protect its citizens; (3)
2. A State has a duty to provide public goods for its citizens; (22, 23, 25, 26, 27)
3. A State may not discriminate in the provision of protection or provision for its citizens; (1, 2, 3, 7, 8, 10, 21)
4. The extent of the provision to be supplied by a State shall (subject to achievement of those rights inherent in the Universal Declaration) be determined by democratically elected governments; (21)
5. The right of a State to determine its will shall not be constrained by the actions of another State; (28, 29)

6. A State has the right to levy taxation; (implicit in the obligations imposed in Articles 3, 22, 23, 25, 26, 27 and 28 which could not be achieved if this were not true)
7. Any charge to tax must respect the right to hold private property; (17)
8. The charge to tax must not be arbitrary; (17)
9. Taxation must be imposed by law; (12)
10. All citizens of a State shall be subject to the same taxation laws; (1, 2, 7)
11. Each citizen has the duty to pay the tax due by them; (the corollary of 21 and implicit in 29)
12. The citizen shall have the right to appeal against any charge to tax; (8, 10)
13. The State may only oblige a citizen to disclose that data required by law when requesting information for the purposes of assessing their liability to tax; (12)
14. A citizen shall have the right to leave the State and its protection and shall as such deny themselves the right to its provision but be relieved of the obligation to contribute to its upkeep. (13, 28, 29).

A state without revenue cannot meet its obligations to its citizens. No government can function without revenue. Taking foreign assistance and borrowing from international lending institutions are not substitutes for tax revenue. In fact, borrowing makes matters worse. The IMF acts as the collection agency for international debt and it forces governments to squeeze their citizens harshly to repay what has been borrowed.

The failure to meet the obligations in the Universal Declaration is a violation of human rights. If the failure to meet these obligations is the result of criminal behavior, I believe it rises to the status of a crime against humanity. Unchecked disease, lack of clean water, high infant mortality and all criminal acts when they are the result of tax evasion and grand scale corruption.

You know better than I which states have failed to provide the basics of life for their citizens despite having great natural resources and mineral wealth. You know better than I what has happened when the head of a state views the national wealth as his to plunder.

The only way to stop these crimes is to "scare people honest" through prosecution and through asset recovery. Everyone in a position of authority, be it in public or private life, must have the prospect of prosecution somewhere in his or her head as they consider their behavior. Absent that, basic criminology tells us they will behave badly. And when there is no prosecution at all we know that the amount of bad behavior will wreck the society. Again, you know better than I examples of countries that have fallen into a state of total disrepair because everyone in power believes that they can get away with anything.

I want to stress the importance of asset recovery and the collection of taxes and penalties owed. An important motivation for crime is the criminal's belief that he can enjoy his loot. A law school classmate of mine became the Chairman of a Bank in Miami and picked it clean. He

used the depositor's money to buy a yacht, old master paintings, fancy furnishings, and an unimaginably wealthy life style. He was caught, prosecuted and went to federal prison for 10 years. The problem was he has set up an offshore "retirement" trust with some \$500,000,000 in depositor's money. The government never was able to recover that money and as far as I know he is living in the lap of luxury today. I am sure he views the situation as having been paid \$50,000,000 a year to live in a federal prison. To make deterrence work, I argue, recover the money.

I want to return to the problem of tax prosecution, tax avoidance, and tax evasion. High on the list of issues is the problem of the offshore tax haven. Over the last thirty years the perpetrators of financial crime have come to believe that they can avoid personal responsibility by committing the crime through a corporation set up in a secrecy jurisdiction that does not cooperate with law enforcement and where there are few if any records and certainly no witnesses. These same offshore havens have been used to hide the proceeds of crime.

Despite treaties and agreements on the exchange of information, obtaining information remains very difficult and expensive. Asset recovery cases take years and very often succeed in recovering a fraction of what was stolen. Some of the failures in this arena have been shocking.

I represented the Republic of Nigeria in the Halliburton case. My job was to obtain mutual legal assistance as required by the treaty so that the government of Nigeria could prosecute the individuals responsible for criminal activity in Nigeria. Despite repeated requests the United States refused to cooperate. The excuses for no-cooperation were lame at best.

You, as prosecutors, have an obligation to join the now growing debate on the use of offshore secrecy jurisdictions. You also have an obligation to make the asset recovery discussion that goes on in the meetings of the implementation group of the United Nations Convention Against Corruption a serious discussion. All too often these discussions have been left to diplomats who have never prosecuted a case, who have never tried to obtain evidence from a foreign jurisdiction and who are more interested in a flowery declaration at the end of the meeting than in concrete results that will help you in your day to day work.

You, the prosecutors, should go to the meetings. You should bring the concrete examples of problems they must solve, and you must complain when the diplomats focus on shimmering syntax that is meaningless as a meeting work product.

You must also head an assault on the sham corporation. For reasons I cannot understand the world treats corporations in secrecy jurisdictions that have nominee officers, directors, and shareholders, as real. Many of these corporations are not required to keep records and you can go to the place of incorporation and find nothing. This system is a major impediment to tax prosecution.

In closing I return to my focus on the need to go forward with the difficult cases of financial crime and tax evasion. If you are to create societies that are stable and where the rule of law prevails there is no more important work. You must keep that 40-45 per cent of people who would be crooks without the threat of prosecution honest by taking on the difficult cases and putting real fear in their hearts.

