

Brexit: The Impact of a 'No Deal' on Cross Border Crime in Ireland.

The Crimes

The nature and extent of cross border crime and the administration of criminal justice will be impacted by a 'no deal' Brexit, the three most relevant categories of crime being:

1. Rural organised crime – like the repeated thefts of cash machines or the kidnapping and torture of corporate personnel;
2. Smuggling - a regular feature of border life since the creation of the state from butter and milk to the now hugely profitable fuel and tobacco;
3. Paramilitary activity. Although reduced to a minimal level many border areas were previously ungovernable even with the assistance of enormous military infrastructure and aerial support.

Mutually beneficial overlap between these categories maximised the extent of criminal operations reducing detection and apprehension. When for over 20 years the IRA effectively drove the security forces from control of the ground in South Armagh the area thrived as a haven for smugglers and rural organised crime.

To successfully combat cross border crime requires effective mutual co-operation in policing and in the administration of criminal justice. Although both governments will undoubtedly hasten post Brexit to implement security measures to combat cross border crime there exists great public concern.

The fear is that the positive momentum in peace and civic stability will stall and revert to the hitherto vicious circle of spiralling violence. To understand the basis for this fear it is necessary to take a step back and to learn from the past.

The Past

This state has been a divided state with its border in dispute since inception. The authority to govern this part of the UK although accepted by the majority in NI has never really been accepted by the majority on the island with the very existence of the border at the core of the conflict. The policing and legal institutions of the North were seen by both sides, albeit from differing perspectives, as the political weaponry of the state. Claims for civil rights led to repressive policing and major insurgency led to repressive legislation and even more repressive policing – the extreme end of which involved systemic police and military participation in the killing of countless citizens.

The neutrality and impartiality of the entire administration of criminal justice in the North was not accepted by a significant proportion of the population. During highly publicised extradition cases allegations as to the conduct of the northern authorities were routinely broadcast to massed protesters at various courthouses or along the border. The nationalist population on the island did not trust the northern policing and judicial process and did not voluntarily assist the administration of justice. This had a profound and enduring impact on the ability of the state to govern.

The Good Friday Agreement [GFA]

In 1998 the GFA was negotiated between all sides as equals, with parity of esteem and the ECHR as integral parts and with mutual consent at its heart. It was endorsed in referendums by the vast majority on both sides of the border – the first political issue to unite a majority north and south since the creation of the state. It was followed by the Patton policing reforms and legal practitioners can testify as to the dramatic changes resulting therefrom, not only in actual practice but perhaps more importantly, in public perception. The burning policing issues of today involve pre GFA security force killings and collusion. Whilst there has been some recent violent paramilitary activity, criminal justice and policing responses have been sensitive and relatively successful, failing to fan any flames of discontent. The majority view on this island is that the GFA has created short term peace and stability and has made significant progress towards a lasting resolution of the conflict.

With peace, extradition, which had been a toxic contaminant in the public perception of the administration of justice, became the subject of a quiet and most effective revolution. On 1st January 2004 the Extradition Act 2003 came into force implementing the European Arrest Warrant [EAW] Framework Decision and replacing the 1957 European Convention on Extradition [ECE]. Importantly, its implementation was undertaken by a police force perceived to be striving towards impartiality and more importantly its authority was grounded in European, not British, jurisprudence perceived almost universally as independent of hostile political interference. Based on principles of mutual goodwill and confidence, Ireland, which has had close and amicable relations with major European states such as Spain, France and Italy for several centuries and which has prospered in its membership of the European club of equals, welcomed the EAW with open arms as a means of consigning the former costly, inefficient and politically damaging extradition procedures to history – or so it thought.

Even though the introduction of this fast track extradition process was accompanied by a host of human rights abuses, including its disproportionate use and delays there was no tangible opposition to its use in Ireland, and it ended the use of extradition

proceedings as propaganda tools for paramilitaries. Bringing a fugitive from Dublin to Belfast became almost as straightforward as from Derry to Belfast.

With vastly improved relations between PSNI and AGS and a public freed from politically based concerns, societal cooperation with requests for mutual assistance improved dramatically. The landscape for mutual assistance in the fight against organised crime had been transformed beyond recognition.

Additionally, membership of Europol and Eurojust, provided strong and effective instruments to combat cross border crime. Further assistance was derived from free-standing EU arrangements for exchanges of intelligence and information such as access to Passenger Name Records for intra EU flights [PNR], access to EU Criminal Records [ECRIS], access to DNA profiles, fingerprint and vehicle registrations [Primum] and real time alerts on wanted persons, objects or vehicles through the Schengen Information System [SIS II].

Whilst Ireland and Denmark have not as yet ratified the European Investigation Order provisions they will inevitably do so and it must only have been a matter of time before the protection afforded by the border to organised crime would have become negligible.

Brexit

Enter Brexit – to torpedo the era of unprecedented international security and criminal justice cooperation. The decision to leave the European Union, seen as the protector of minority rights and cultures, was made against the will of the majority, north and south, the consent principle enshrined in the prized GFA rendered impotent to membership of the European project. Thereafter the UK Government, co-signature of the GFA, purportedly committed to impartiality, aligned its implementation of Brexit to one side of the NI divide, the DUP. Post Brexit, the political authority the source of future extradition requests or international letters of request to an Irish government, will be perceived as staunchly partisan and unionist.

We have not been told what form the border hardening will take in the event of a 'no deal' Brexit. In security briefings the Chief Constable has stated that hard infrastructure, customs posts howsoever described or disguised will be the target of attacks by dissident republicans - the border, once again in the media and social spotlight, a red flag target. Violence begets violence regardless as to whether there is implementation and further use of draconian legislation and it is certain that there are organised paramilitaries who will seek to exploit the border issue to raise the level of politically related violence. Whether they can make the border areas ungovernable to

the same extent as before, certainly in the short term, seems highly unlikely but any success in a concerted campaign will adversely affect policing. Yesterday the Chief Constable confirmed that the PSNI could not presently effectively police the border. Any diminution in the effectiveness of policing will further facilitate the organised rural crime gangs and professional smugglers.

The imposition of WTO tariffs on all goods will mean that the smuggler can turn his hand to a much broader range of goods making detection even more difficult. A convicted smuggler said to me – “sure they’ll never put dye in the milk”! A ‘no deal’ Brexit is commonly perceived as a smuggler’s dream and it would seem highly likely that they are amongst the most Brexit ready businesses in the country. Unsurprisingly a ‘no deal’ is the favoured outcome of the cross border criminal.

So if the UK PM has his way, as we pass from the feast of all souls to all saints the UK will have launched its rocket to reverse the positive progress of the peace process thereby delivering ripe conditions for an upsurge in crime, political, financial and what is known in these parts as ordinary decent crime.

With no clear guidance, information or contingency planning for this upsurge can it be constrained?

The Future ?

The immediate practical consequences of ‘no deal’: On November 1st the UK will cease to be a member of any of the specialist EU agencies and will no longer be eligible to access data held or to participate in data exchange arrangements. It will be unable to initiate or participate in cross-border police investigations under EU instruments. It will no longer be part of the EAW or EIO schemes, Europol or Eurojust, PNR, ECRIS, Primum or SIS II agreements.

Its ability to counter a crime upsurge will be significantly undermined and although both governments and criminal justice authorities will be determined to combat criminal activity, the British state will not be viewed by many in Ireland as neutral and community support to assist its authorities will be diminished. It faces a multi-faceted information deficit.

Suspects sought by UK authorities will require to be extradited under the 1957 provisions. Requests will not be issued by an independent judicial office authorised by the European Project but by a political officer tarnished with perceived prejudice by a significant portion of the population. This will further detract from the trust, goodwill

and perceived impartiality, painstakingly and patiently established by the creators and implementers of the GFA and the EAW process.

The reversion to the 1957 provisions have been described as a “*catastrophic outcome*” by the UK House of Commons Home Affairs Select Committee and is something which, in the view of the UK House of Lords European Union Committee “*cannot adequately substitute for the European Arrest Warrant*”

Extradition requests will be subject to increased challenge, the resurrected grounds to include, critically, political offences. Whilst there is some debate as to whether the UK will disembark from the ECHR and European Charter of Fundamental Rights, should the UK so disembark, sacrificing existing human rights safeguards will precipitate many entangling challenges. After more than 15 years of extradition based upon “mutual trust and confidence” the return to the comparative complexities and uncertainties of the 1957 provisions giving rise to costly, lengthy and highly politicised public extradition hearings, whilst unpalatable, appears as inevitable.

Despite the significant difficulties extradition requests in high profile cases will continue to be made and, following the airing of the UK ‘dirty washing’ in public, for the most part ultimately granted. However the cost and complexity of proceedings will lead to many lesser cases simply not being pursued – leaving criminals free to do what they do best - crime.

Lest it should be thought that a new extradition treaty can be conjured up at short notice it should be borne in mind that a streamlined extradition arrangement between the EU and members of the European Free Trade Association and the Schengen border-free zone, Norway and Iceland, although agreed in principle in 2006 was followed by 13 years of negotiations before approval by the EU in 2014.

What is certain is that the UK’s ability to secure effective cooperation in support of criminal investigations and prosecutions will be substantially and adversely impacted. This will be exploited by criminal gangs and anti-state organisations and the greatest burden will be borne as usual by the populace at large.

No person in this jurisdiction under the age of 22 has experienced violent conflict with its devastating and savage realities. For hundreds of years every generation in Ireland has experienced these grim truths. Will the political selfishness of Westminster and its elite compel another generation in this land to relive the tragedies of the past? At present it appears so.

Michael Duffy B.L.

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