

TACKLING TRANSNATIONAL CRIME: A SCOTTISH PERSPECTIVE

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Introduction

Last week the Scottish courts imposed lengthy prison sentences on nine men who are members of a significant organised crime group.

The operation of the group centred on the importation of very substantial quantities of cocaine and its wholesale to other organised crime groups in the United Kingdom. In that regard they are at the top of the chain of supply in Scotland and the UK as a whole. The group has also trafficked firearms to enforce by violence its own operations and for onward supply to its client crime groups.

Police searches at a number of premises in Scotland uncovered, among other things, a significant cache of firearms, including automatic weapons, sophisticated anti-surveillance equipment, and over £1.6 million in cash. Among the specific offences dealt with last week were abduction, assault, and the discharge of firearms, as well as involvement in serious organized crime.

This case is just one illustration of the nature of the challenge which law enforcement agencies face today, both nationally and internationally; and it illustrates too the connection, in the context of serious organised crime, between domestic criminality and transnational crime.

Transnational crime: introductory observations

Law enforcement agencies have always had to address cross-border issues: persons who commit a crime in one jurisdiction and flee to another; and crimes which cross jurisdictional borders. When I studied criminal law, the standard textbook¹ discussed the problem under reference to frauds committed by letters sent from one jurisdiction to another. And the leading Scottish authority discussed a case of murder committed by sending poison in an envelope from London to Edinburgh with a letter advising the recipient to take it as a medicine².

These examples now seem rather quaint. Today, technological, social and economic developments across the globe present law enforcement agencies with novel challenges: trafficking in goods, including illicit drugs; trafficking in human beings for sexual and labour exploitation; cybercrime – crime which takes place on, or is facilitated by, a technology which knows no jurisdictional borders; terrorism. And while most crime remains entirely domestic in nature, the mobility of people, goods and capital means that even in the context of traditional forms of criminality, a transnational dimension may not infrequently arise simply because the accused is in a different jurisdiction, or because evidence requires to be obtained from another jurisdiction.

An effective response to these challenges demands, in the first instance, robust and effective capabilities and action on the part of national criminal justice agencies. And it requires, also, effective arrangements for cross-border co-operation and, in appropriate cases, for collective action.

¹ GH Gordon, *Criminal Law*, 2nd edn, paras. 3-39 to 3-55.

² *John Thomas Witherington* (1881) 4 Couper 475, 489 per LJ-G Inglis.

Scotland

Scotland is one of three separate legal jurisdictions within the United Kingdom. So far as jurisdiction is concerned, Scotland and England are – as the leading case puts it – “to be considered as independent foreign countries, unconnected with each other”³. Scotland has autonomous criminal justice institutions – police⁴, prosecutors⁵ and courts⁶. It has its own substantive and adjectival criminal law⁷. And within the internal constitutional structure of the United Kingdom, justice issues are, generally speaking, within the legislative competence of the Scottish Parliament, although some matters, including extradition, national security and special powers and other special provisions for dealing with terrorism, are reserved to the United Kingdom Parliament⁸.

My own office of Lord Advocate long predates the formation of the United Kingdom⁹; the Lord Advocate has had universal title to prosecute

³ *Stuart v. Stuart and Moore* (1861) 4 Macq 1, 49 per Lord Campbell LC.

⁴ Police Scotland, established under the Police and Fire Reform (Scotland) Act 2012. The first organised police force was established in Glasgow in 1800 – 29 years before the establishment of the Metropolitan Police: see Lord Mackay of Clashfern, “The Relationship between the Police and the Prosecution” (1983) SLG 11.

⁵ Organised today within the Crown Office and Procurator Fiscal Service; for the organisation of the prosecution service on a national basis, see Stair Memorial Encyclopaedia, vol. 17, paras. 530-540, s.v. “Procedure”.

⁶ The courts of criminal jurisdiction in Scotland are the High Court of Justiciary, the sheriff courts and JP courts.

⁷ For the substantive law, see GH Gordon, *Criminal Law*, 3rd ed (ed MG Christie); for the law of evidence, see FH Davidson, *Evidence*; for the law of procedure, see Renton & Brown, *Criminal Procedure*, 6th edn (ed GH Gordon).

⁸ Under the Scotland Act 1998, the Scottish Parliament has the competence to make laws except insofar as its competence is limited by section 29 of that Act. Specific matters within the justice field which are reserved to the UK Parliament by Schedule 5 of the 1998 Act include Treason (Pt 1, para. 10); Money laundering (Section A5); Misuse of Drugs (Section B1); Firearms (Section B4); Special powers and other special provisions for dealing with terrorism (Section B8); and Extradition (Section B11).

⁹ For the history of the office of Lord Advocate see GWT Omond, *The Lord Advocates of Scotland*, 1883.

crime in Scotland since 1587¹⁰. Today, as Lord Advocate, I am head of the system for the investigation and prosecution of crime in Scotland¹¹. For practical purposes, all criminal prosecutions in Scotland are undertaken by prosecutors in, or supported by, the public prosecution service, the Crown Office and Procurator Fiscal Service¹². And in Scotland, the investigation of crime by the police is subject to direction by the public prosecutor¹³. In these respects, our system is quite different from the systems which apply in England & Wales and in Northern Ireland, though they are consistent with the European norm¹⁴. As Lord Advocate, I am a member of the Scottish Government, but I exercise my prosecutorial functions independently of any other person¹⁵.

My responsibilities include specific statutory functions in relation to criminal justice co-operation – a responsibility to represent the requesting territory in extradition proceedings¹⁶, and responsibilities in relation to mutual legal assistance¹⁷. I routinely sign the certificates which are necessary to give effect to requests for mutual legal assistance and I now have responsibilities in relation to the EIO Directive. By way of example, last week I dealt with cases from Latvia, the Czech Republic, the Netherlands and the Republic of Ireland, all involving requests for assistance in recovering evidence in Scotland.

¹⁰ This was granted by an Act of the Scottish Parliament, APS 1587, c. 77.

¹¹ Scotland Act 1998, s. 48.

¹² Private prosecution, though competent, may be brought only with the consent of the Lord Advocate or with the approval of the Court. In practice, private prosecution is exceptionally unusual: see *Stewart v. Payne* 2017 SLT 159.

¹³ *R v. Stipendiary Magistrate ex parte Granada Television* [2001] 1 AC 300, 305B-F per Lord Hope of Craighead; Criminal Procedure (Scotland) Act 1995, s. 12; Police and Fire Reform (Scotland) Act 2012, s. 1793).

¹⁴ See WJ Wolffe, “A Constitutional Trust”, The James Wood Lecture 2017, forthcoming.

¹⁵ Scotland Act 1998, s. 48(5); reflecting well-established constitutional principle, as to which see J L J Edwards, *The Law Officers of the Crown*, Chs 10, 11.

¹⁶ Extradition Act 2003, s. 191.

¹⁷ Criminal (International Co-operation) Act 2003; Criminal Justice (European Investigation Order) Regulations 2017, SI 2017/730.

Brexit context

I am, of course, conscious that I am speaking to you at a time when the United Kingdom Government is negotiating the withdrawal of the United Kingdom from the European Union. I do not intend to comment on the politics of Brexit. But, lest there be any doubt about it, I would like to make clear the benefits, from the perspective of the investigation and prosecution of crime, which we, in Scotland, derive from our participation in the EU criminal justice co-operation regime. Our ability effectively to meet the challenges posed by transnational crime, would be materially diminished if we cease to be party to that regime – unless, of course, we have in place arrangements which are at least as effective in supporting our collective work in tackling crime and keeping our people safe.

Domestic approach

As I said a moment ago, an effective response to transnational crime starts with robust and effective capability and actions by national criminal justice agencies. So let me, before I return to cross-border co-operation, mention some features of our domestic arrangements in Scotland for dealing with serious organised crime and transnational criminality.

(1) Organisation on a national basis

First – organisation on a national basis. The national organisation of the Scottish prosecution service enables it to establish specialist units to deal with the complex casework with which we deal today. The Serious Casework Division of COPFS includes prosecutors who specialise in serious organised crime. And its International Co-operation Unit deals with extradition and cross-border co-operation. And Scotland has, since 2012, had a single national police force, Police Scotland, replacing the previous eight separate police

forces. I am in no doubt about the benefits which accrue from having a single national police force. It is the second largest force in the UK; and we see the advantages of a force with those operational capabilities can bring to bear in areas such as serious crime, counter-terrorism, economic crime and cybercrime.

(2) Effective inter-agency co-operation

Second - effective co-operation between different agencies. Central to that is the relationship between prosecutors and police which I described earlier; but it goes further. In 2014, the Scottish Government opened the Scottish Crime Campus, a state of the art facility which accommodates not only the national forensic science service for Scotland, but staff from all the relevant agencies involved in dealing with serious crime in Scotland. They include Police Scotland, the Serious and Organised Crime Unit of the prosecution service, the UK National Crime Agency, HMRC (the UK tax authority), and a number of other agencies. In a very short time, we have seen the material benefits of co-location on a single site - which has improved information sharing, and facilitated practical co-operation, between agencies, without compromising their operational independence and integrity.

(3) Novel legal tools

Third - the traditional model of post hoc prosecution, central though it remains to the criminal justice response to serious organised crime, does not exhaust that response. Through the Scottish Government's Serious Organised Crime Task Force, we seek to reduce the harm caused by serious organised crime by multiple actions aimed at diverting people from becoming involved in organised crime, deterring serious organised crime groups by supporting organisations to protect themselves and each other, detecting and prosecuting those involved in serious organised crime, and disrupting serious

organised crime groups¹⁸. Let me mention two particular legal weapons which we may deploy: asset recovery and serious crime prevention orders.

(a) Asset recovery

We operate two asset recovery regimes: a conviction-based confiscation regime¹⁹; and a non-conviction based regime which attaches and confiscates assets which have been obtained through unlawful conduct regardless of whether any individual has been convicted of an offence²⁰. Since these regimes were introduced in 2002, we in Scotland have seized over £100 million; and applied those funds for the benefit of communities across Scotland. The aim of an effective asset confiscation regime is simple - to ensure that crime does not pay, by stripping the proceeds of crime from those who would benefit from crime. These powers are, in my view, of particular value when dealing with serious organised crime. They attack the profita which are the distinctive purpose of serious organised crime. And they may disrupt criminal enterprises by depriving them of the cashflow which funds their illicit activities.

(b) Serious Crime Prevention Orders

The serious crime prevention order or SCPO is an order, of the nature of a civil interdict or injunction, which is designed to protect the public by preventing, restricting or disrupting involvement by the person concerned in serious crime in Scotland²¹. The Court may make a SCPO if it is satisfied – to a civil standard of proof - that a person has been involved in serious crime (whether in Scotland or elsewhere) and it has reasonable grounds to believe

¹⁸ See *Scotland's Serious Organised Crime Strategy*, 2015.

¹⁹ Proceeds of Crime Act 2002, Part 3.

²⁰ Proceeds of Crime Act 2002, Part 5.

²¹ Serious Crime Act 2007, Part 1.

that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in Scotland.

SCPOs may impose a wide range of restrictions. They may prohibit the person against whom it is directed from associating with particular individuals. They may restrict the ownership of communication devices. They may contain requirements as regards the ownership of assets, including bank accounts, and as regards residence and travel. They may impose obligations to disclose information to the police, and require that communication devices and bank accounts be subject to police monitoring. Where such an order is made following conviction, it can neutralize the ability of the accused to return to serious organised crime following release from prison.

(5) Cybercrime

Let me touch on the major and growing threat of cybercrime. Whilst we will vigorously pursue a criminal justice response to cybercrime where we can, the nature of the threat demands a focus on resilience. The Scottish Government is driving forward its cyber-resilience strategy, with partners across the public and private sectors. The UK's National Cyber Security Centre supports the sharing of relevant information across agencies including in Scotland. And Police Scotland is reviewing its own cybercrime capability, with a view to responding to the significance of on-line criminality, both cybercrime in the strict sense, and cyber-assisted criminality, other crimes which are facilitated or committed on-line.

Cross-border co-operation

If a robust and effective domestic capability is one of the foundations for responding to the challenges which I described at the outset of this address, the other is an effective regime or regimes for collective action and for cross-border co-operation. I say regimes because our interest in

transnational criminal justice co-operation extends to any jurisdiction where relevant evidence or an accused person may be located; or which may be able to assist us in tracing and securing assets which are subject to criminal or civil confiscation; and to any jurisdiction which requires our assistance in relation to its own criminal justice system.

It will not surprise you to learn that, within the United Kingdom, we have understood this for a very long time. Without affecting the autonomy of the three jurisdictions of the UK or harmonizing our substantive and procedural law, we have developed effective mechanisms for the investigation and prosecution of crime across those jurisdictional boundaries²² – legal provisions which support effective police work across those boundaries²³, provisions facilitating the enforcement across the UK of arrest and search warrants and other orders issued in one part of the UK²⁴, and provisions for the transfer of offenders between different parts of the UK. And criminal justice agencies in Scotland benefit from close and productive relationships with their counterparts and colleagues in England & Wales and Northern Ireland.

And of course we also have plenty of practical experience of the value of effective co-operation across international boundaries. Let me give you a few concrete examples from our own experience in Scotland.

Operation Zelezny was an investigation into the activities of an organised crime group involved in the trafficking of males for exploitation and labour from Poland to the United Kingdom. The suspects recruited men in Poland with a promise of work in the UK. Upon arrival the victims were kept locked within the work premises in poor conditions, and were forced to work long hours for little or no pay.

²² See *R v. Stipendiary Magistrate ex parte Granada Television* [2001] 1 AC 300, 305F-306B per Lord Hope of Craighead

²³ These include provisions giving relevant powers to constables: Criminal Justice and Public Order Act 1994, ss. 137-140.

²⁴ Summary Jurisdiction (Process) Act 1881, s. 4; Criminal Justice and Public Order Act 1994, s. 136.

The victims and suspects were in Poland, but the physical evidence was in Scotland. As part of a Joint Investigation Team, Polish prosecutors and police attended the relevant sites in Scotland. Scottish and English prosecutors decided to transfer jurisdiction to Poland. Evidence was collected in Scotland by Scottish police and transferred to Poland, which conducted a successful prosecution against the suspects.

In that case, we were able to assist our Polish colleagues. In other cases, we benefit from the help of our counterparts elsewhere. Last year, for example, the surrender from Germany of a man wanted for murder in Scotland since 1993 was facilitated by close co-operation between Scottish, German and French authorities, with the assistance of Europol. The accused was arrested on a European Arrest Warrant while transiting from India through Frankfurt to his residence in France.

And in Operation Screenplay, agencies in other jurisdictions provided us with assistance which was invaluable in securing significant drug trafficking convictions in Scotland. The case concerned a Tanzanian-registered vessel with a predominantly Turkish crew, which was intercepted in the North Sea, 100 miles off the coast of Aberdeenshire. A search of the vessel disclosed more than 3.2 tonnes of cocaine in a concealed compartment, with an estimated potential street value of £512 million – the largest ever seizure of Class A drugs in the UK.

We issued letters of request to the authorities of Guyana, Spain, Tanzania, Denmark, Norway and the US, and all of them provided relevant assistance and evidence. During the course of a twelve week trial in Glasgow, evidence was taken by live video link from witnesses including law enforcement officers in Guyana and Spain. The captain and first mate of the vessel were convicted and sentenced to 22 and 20 years in prison respectively.

As these examples illustrate, we co-operate effectively with jurisdictions across the globe. But, within the EU, we benefit from our participation in a regime of legal and practical arrangements which is particularly effective and which materially enhances our capabilities. I need hardly labour the point, but let me make a few observations.

The first is that I know from my own professional experience the practical benefits of the European Arrest Warrant. Since 2009, over 1000 individuals have been surrendered by other Member States to the UK; and some 8,000 individuals have been surrendered from the UK to other Member States. The average time taken from receipt of an EAW to surrender is 42 days; compared with an average of 9-10 months for jurisdictions outside the EU. The relative speed of the process is, in my view, significant: it is justice which benefits if individuals are brought to trial, in the appropriate forum, within a reasonable time.

The EAW system has facilitated the prosecution of crimes committed in Scotland. For example, following the notorious murder of Moira Jones in Glasgow, the perpetrator, Marek Harcar, fled to Slovakia. He was arrested there within one day of the extradition request from Scotland, and surrendered swiftly to face trial in Glasgow. It is not in our interests to be or to become a safe haven for fugitives from justice in other countries; and the EAW also allows us to promote public safety in Scotland, by removing potentially dangerous individuals to face justice elsewhere - like Mariusz Sikora who was arrested in Scotland in 2010, the day after his extradition was requested, and returned to Poland to face a charge of murder.

In light of our experience of the EAW, I am optimistic that the European Investigation Order will also secure a speedier, more consistent and more effective system for securing mutual assistance in the investigation of crime.

The second point is the importance of data sharing. As the UK Government Paper on Security, Law Enforcement and Criminal Justice,

published last year, observes²⁵: “The increasingly international nature of crime makes the swift and efficient availability of data essential in modern law enforcement, subject to appropriate safeguards”. That paper noted, for example, that between April 2016 and the end of March 2017, over 13,100 UK-issued alerts on the Schengen Information System (SIS) II received hits across Europe; while over 9,500 alerts from other States received hits in the UK²⁶. Following the implementation of SIS II in the UK, we saw a 25% increase in UK arrests of individuals subject to European Arrest Warrants²⁷. And the alerts available through SIS II have been used to support human trafficking investigations; and to identify the movements of, and manage the risks posed by, registered sex offenders. And we benefit too from the other data sharing arrangements, including ECRIS.

The third point is the value of practical mechanisms which promote and facilitate direct co-operation – in particular, from my point of view, direct co-operation between the key Scottish agencies and their counterparts in other European jurisdictions. Police Scotland is one of only two UK police forces which have a dedicated liaison officer working full-time at Europol. In relation to cybercrime, Police Scotland benefits from the expertise of the European Cybercrime Centre. The Head of my International Co-operation Unit is an Assistant Member at Eurojust. We in Scotland make particular use of the European Judicial Network. I understand that the majority of EJM criminal requests from the UK come from Scotland. My lead prosecutor for cybercrime attends the European Judicial Cybercrime Network, and has been asked to chair a subgroup on covert internet investigations. And Scottish criminal justice professionals are also engaged in a variety of informal networks such as the Nadal Network of Prosecutors at the Supreme Judicial Courts of the Member States and the Association of Law Enforcement Forensic Accountants.

²⁵ Para. 21.

²⁶ Para. 13.

²⁷ Para. 13.

The fourth point is that the combined effect of the various measures is greater than the sum of their individual parts. SIS II, for example, supports the Arrest Warrant system. And our use of the formal mechanisms of co-operation is facilitated by the informal contacts which, through the Judicial Network and through Eurojust, we have with our colleagues in other jurisdictions. For example, it was direct contact between Scottish prosecutors and their Polish colleagues through the Judicial Network which facilitated the arrest in Poland within five hours of the issue of an arrest warrant of Gregorz Gamla, who carried out a violent murder in Edinburgh in 2012.

The final point is the importance, in this connection, of the shared commitment to the protection of fundamental rights within which the EU regime operates. We know, from our experience of co-operation across jurisdictional boundaries within the UK, the importance of mutual trust in providing a sound foundation for mutual recognition and practical co-operation. A commitment to fundamental rights, a commitment to minimum procedural rights, a commitment to effective data protection – all of these facilitate, indeed help to underpin, co-operation in the field of criminal justice.

Against that background, let me say something about the challenge, from a criminal justice perspective, which the prospect of the United Kingdom's withdrawal from the EU presents to us. Withdrawal from the EU would mean, in the absence of agreement, that the legal framework which currently underpins co-operation in this field would no longer apply to the UK.

In that event, we would lose the benefits of participation as a Member State in Europol and Eurojust; and the benefits of the data sharing arrangements such as SIS II and ECRIS. In the field of extradition and mutual legal assistance, we could fall back on Council of Europe Conventions – at least in relation to Member States which retain legislation which supports the use of those Conventions in respect of the UK – but by comparison with the EAW and the EIO, those arrangements are more restrictive and more cumbersome. And it goes without saying that we would not be able to

participate in the current work which is under way with a view to enhancing and improving the regime, far less any future developments.

I recognise of course that there are various third country arrangements in relation to some of these measures, but none of the existing third country arrangements would replicate the full range of benefits which we currently enjoy - far less guarantee our continued participation in future developments in this field.

That is why I said earlier that our ability effectively to meet the challenges posed by transnational crime, would be materially diminished if we cease to be party to that regime – unless, of course, we have in place arrangements which are at least as effective in supporting our collective work in tackling crime and keeping our people safe. From a criminal justice perspective, I believe that we have a common interest in maintaining our capabilities in the face of those challenges.

Certainly, from my point of view, as head of the system of prosecution of crime in Scotland, I can say this. First, that we benefit materially from the EU regime of criminal justice co-operation and value our ability to contribute actively to it. We have no wish to lose those benefits, or, indeed, to lose the ability to participate actively in future improvements which serve our common interest in tackling transnational crime. And, secondly, we wish to maintain and to enhance, so far as we can, our direct links with our colleagues in other European jurisdictions in this field - links which are important to us now and which will continue to be important to us in the future.

May I finally set my observations in the context of our shared commitment to the rule of law and to fundamental rights.

The rule of law, if it is to be a reality and not just an empty phrase, implies that the law will be effectively and consistently enforced. The work of police and prosecutors in enforcing the criminal law, effectively and fairly, is essential in making good our commitment to the rule of law.

And the effective and fair investigation and prosecution of crime advances and protects fundamental rights. It is an essential component of the system through which the State fulfills its positive obligations to protect people from harm, while at the same time defending the rights of suspects and persons accused of crime.

In the context of the world in which we live today – and the challenges which I mentioned at the outset of this address - the establishment and maintenance of effective mechanisms, founded in law, for criminal justice co-operation across jurisdictional boundaries serve those same commitments. They are an expression of our solidarity, one with another, in protecting our societies and our people from harm; and of our common commitment to the effective and fair administration of justice.