A Warranted Response

Brexit, human rights and the European Arrest Warrant

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ABOUT THE AUTHOR

David Clark was special adviser to Robin Cook MP at the Foreign Office 1997–2001. He is a senior fellow at the Institute for Statecraft and writes here in a personal capacity.

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Fabian Society, 61 Petty France, London SW1H 9EU

General secretary, Andrew Harrop
Deputy general secretary, Olivia Bailey
Editorial director, Kate Murray
Assistant editor, Vanesha Singh

Designed by Georgie Lowry, www.gslowrydesign.co.uk

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CONTENTS

SUMMARY

The UK's future extradition arrangements with the EU are among the many outstanding issues to be resolved as part of the negotiations over Brexit. While the UK remains within the EU, extradition to and from other member states is governed by the European Arrest Warrant, a fast-track procedure that came into force in 2004. This has reduced the expense and time involved in extradition proceedings by applying the principle of mutual recognition. Decisions are taken at a purely judicial level and courts are obliged to respect the rulings of their EU counterparts as if they were their own.

Gains in efficiency arising from the EAW have been offset by growing concern about its impact on human rights. Mutual recognition assumes that participating states adhere to the same high standards of justice. Yet cases handled under the EAW have thrown up numerous examples of significant human rights abuses, including instances of police brutality, the fabrication of evidence and conditions of detention that fail to respect international law. There have also been examples of EAWs being issued when cases were politically motivated. With democratic standards and judicial independence under threat from populist and authoritarian governments in a growing number of EU states, the challenge to human rights is likely to increase. Remaining part of the EAW will not be an option for the UK once it ceases to be an EU member. Third countries are not eligible to join and membership, in any case, is incompatible with the red lines established by the UK government, specifically that we must not be subject to European law. The UK therefore has broadly four options: to fall back on the minimalist provisions contained in the 1957 Extradition Convention; to negotiate bilateral extradition agreements with each EU member state, which offers maximum flexibility at a probable cost to consistency; to replicate the extradition agreement Iceland and Norway have signed with the EU, which means including some, but not all, of the EAW's pitfalls; or to seek a bespoke arrangement with the EU collectively.

With democratic standards in decline globally, including within the EU, the UK should give priority to its traditional role as a defender of human rights, whether it is an EU member state or not. That goal should not be compromised in the pursuit of judicial efficiency. While the UK should seek to maintain streamlined extradition procedures with the EU once it ceases to be a member state, it should no longer base that relationship on the flawed principle of mutual recognition. Instead, the UK should propose a bespoke extradition agreement with the EU that establishes a clear and efficient framework of cooperation consistent with respect for human rights.

INTRODUCTION

The debate about the UK's withdrawal from the European Union has focused heavily on the economic consequences of leaving the single market and the kind of trading relationship that ought to follow. Although this is understandable in view of the jobs and businesses at stake, it means that comparatively little attention has been given to the impact of Brexit on many other important areas of policy where the UK currently operates as part of the EU. Assuming Brexit goes ahead, that will need to change if the negotiations are to be completed in a way that takes full account of our interests.

Among the many issues that remain to be resolved as part of this process is the extent of the UK's ongoing relationship with the EU in matters of police and judicial cooperation. This has been one of the most ambitious and rapidly evolving areas of European integration over the last 25 years. Although the UK was initially reluctant to agree a treaty competence for the EU in this field, it has become increasingly involved in EU crime and justice policy as a result of concerns about terrorism and other emerging security threats. As recently as November 2014, following changes introduced by the Lisbon Treaty, the Conservative-led coalition decided to opt back in to 35 of the most significant measures, including the European police agency (known as Europol), the Schengen Information System and Eurojust, the body that facilitates joint criminal investigations.

The most far-reaching policy the UK has chosen to be part of is the European Arrest Warrant (EAW), the fast-track procedure designed to ensure that suspects and convicted criminals can be extradited between EU member states within weeks of a request being filed. Before the EAW entered force, extraditions sometimes took years to complete. As home secretary, Theresa May described the EAW as a 'vital' instrument of public safety and led for the government in making the case to opt back in.[1] In doing so, she faced significant opposition from Eurosceptics angry at the transfer of national sovereignty and from civil libertarians who complained that important human rights safeguards had been stripped away.

Brexit means that these arguments should be considered afresh. Theresa May has said that the government will:

> "not seek to hold on to bits of membership as we leave".[2]

It is apparent, in any case, that the UK will not be allowed to remain part of the EAW as a non-EU state. Although most of the provisions of the EAW are set to continue in force during the transition period set out in the draft withdrawal agreement, the UK will cease to be part of it when that transition period ends on 31 December 2020. This raises important questions of national policy. Do we want a successor agreement that facilitates fast-track extradition between the UK and the countries of the EU? If so, what should it look like and in what ways might it differ from the EAW? What kind of replacement agreement might the EU be willing to negotiate? The Political Declaration published alongside the Withdrawal Agreement makes it clear that the UK and the EU wish to maintain close co-operation in this area post-Brexit on terms similar if not identical to the EAW.

Not everything the EU has done is worth clinging to at all costs

In formulating an approach, progressives should avoid reflexively favouring arrangements that most closely resemble continued EU membership. Not everything the EU has done is worth clinging to at all costs. If Brexit gives the UK more flexibility to pursue cooperation in a different way, it is worth asking whether there might be advantages in doing so, not only for the UK, but also for Europe as a whole. This report sets out an argument for why it would makes sense to negotiate in that spirit when it comes to the specific area of extradition policy.

Specifically, we must consider whether the need to establish fast-track extradition procedures – the understandable preoccupation of those who framed the EAW during the early stages of the war on terror – is the right priority in an era of populist and authoritarian ascendency. Does it make sense to continue extending the privileges of sovereignty sharing in judicial matters when some of the participating states no longer fully respect the democratic principles on which it supposed to be based? At the very least the terms of our cooperation need to be recalibrated to give renewed emphasis to the defence of democratic standards and the primacy of human rights.

Chapter One: Origins

The EAW is one of the most important and ambitious initiatives to have emerged from the EU's cooperation on police and judicial matters. The 1992 Maastricht Treaty created a formal competence in these areas when it established justice and home affairs (JHA) as a third pillar of EU policy-making, alongside the existing European communities (pillar one) and a new common foreign and security policy (pillar two). The then Conservative government reluctantly accepted this arrangement on the basis that the second and third pillars would be purely intergovernmental, with decisions taken by unanimity and no role for the EU's supranational institutions.

One of the earliest priorities under the new JHA framework was to streamline and harmonise extradition procedures between EU members, the 1995 convention on simplified extradition procedure and the 1996 convention on extradition between member states anticipated some of the measures later contained in the EAW, but they were much more limited in scope and national ratification proved to be very slow. The UK didn't ratify them until December 2001. The Tampere summit of EU leaders in October 1999 went further by agreeing that mutual recognition of judicial decisions "should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union" and instructing the European commission to bring forward proposals for a new fast track extradition procedure based on that principle.[3]

These proposals might have taken years to come to fruition had it not been for the galvanising effect of September 11. Ten days after al-Quaida's attack on America, an emergency summit of EU leaders met to formulate a strategy to combat terrorism. The first item on its list of agreed action points was a European arrest warrant, which the council of ministers was instructed to pursue "as a matter of urgency".[4] The EAW was adopted by the EU through the binding mechanism of a council framework decision on 13 June 2002 and entered into force on 1 January 2004. It was transposed into UK law via the 2003 Extradition Act.

An important change was introduced as a result of the 2007 Lisbon treaty, which abolished the EU's pillar structure agreed at Maastricht. This gave jurisdiction to the European court of justice (ECJ) to make preliminary rulings on the implementation of the EAW and empowered the European commission to bring infringement proceedings against member states that fail to comply with its provisions. Although this crossed the 'red line' established by the Major government – that police and judicial matters

should not be subject to supranational authority – the Conservative-led government of David Cameron chose to remain part of the EAW on the revised terms. This is relevant in the context of Theresa May's insistence that post-Brexit arrangements must not leave the UK subject to European law. Continued adherence to the EAW or a replica agreement would be incompatible with that red line.

Chapter Two: How it works

The EAW is unlike any other multilateral or bilateral extradition agreement because it involves a much deeper level of integration. The basic principle on which it is built is mutual recognition, meaning that the judicial authorities of participating countries are obliged to respect each others' decisions as if they were their own. The assumption underpinning this principle is that all EU countries respect the same democratic values and apply the same high standards of justice set out in various international treaties and instruments, such as the EU charter of fundamental rights and the European convention on human rights. Participating states are expected to act on the basis of that assumption except in the most exceptional circumstances.

The effect of applying the principle of mutual recognition is that decisions to grant EAW requests are taken at a purely judicial level, without political or executive input. Requesting countries are not required to provide prima facie evidence of guilt to support their applications and judicial authorities in the executing states are expected to act without looking into the facts and circumstances that have given rise to an EAW. The reasons behind each request are assumed to be valid. Another important feature of the EAW is that participating countries are obliged to act on requests to surrender their own citizens.

The judicial authorities of participating countries are obliged to respect each others' decisions as if they were their own

The process of extraditing someone under the EAW is designed to be as rapid as possible. The requested person is arrested on receipt of an EAW from a designated judicial authority (sometimes before in urgent cases) and brought to court within 48 hours. If the requested person does not consent to be surrendered, an extradition hearing is set, normally within 21 days of the arrest. Provided none of the statutory bars apply, extradition is ordered. The decision can be appealed in the high court and a further appeal can be taken to the supreme court if leave is given to contest a point of law. The whole process is supposed to take no more than 90 days from the issuing of the EAW to the surrender of the requested person.

The EAW contains certain limitations. The requested person must be wanted for offences punishable with imprisonment for a maximum of at least 12 months in the requesting state or, if already convicted, to serve a prison sentence of at least four months. There are three mandatory grounds for refusing an EAW: where the executing state has jurisdiction to prosecute, but has already declared an amnesty for the offence in question; where the requested person has been tried for the same offence in another EU country, provided that any resulting sentence has been served; and where the requested person is below the age of criminal responsibility in the executing state.

There are additional grounds on which the executing state has discretion to refuse an EAW request. For example, a request can be refused if the executing state has jurisdiction and has decided either to prosecute or not to prosecute the requested person for the same offence. The executing state may also refuse to surrender one of its own citizens or residents to serve a prison sentence if it agrees to enforce the sentence itself. However, several traditional constraints on extradition no longer apply under the terms of the EAW. The 'dual criminality' rule that allows countries to refuse extradition for acts that are not illegal under their own laws has been restricted by the inclusion of 32 broad categories of offence for which the rule cannot be applied, as long as the act in question carries a maximum prison sentence of at least three years in the requesting state.

One of the most controversial aspects of the EAW has been its impact on the willingness of the courts to refuse extradition on human rights grounds. Although the main body of the council framework decision does not confer a specific right of refusal on the basis of human rights considerations, the preamble does state:

> "No person should be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[5]

A ruling by the ECJ in July 2018 extended to the courts of member states an exceptional right to delay extradition under the EAW in cases where there was 'a real risk of a flagrant denial of justice'. However, the bar was set deliberately high. A risk that the right to a fair trial might be breached would not, on its own, be enough to override the obligation of mutual recognition. Also, there must be evidence that the requested individual was specifically at risk of a flagrant denial of justice.[6]

The 2003 Extradition Act deals with the human rights dimension by requiring judges hearing EAW cases to refuse extradition if it would be incompatible with the defendant's rights under the European convention on human rights (ECHR). [7] The problem comes with the relative weight British courts give to human rights when set against the obligations of mutual recognition. According to written evidence submitted to the 2011 extradition review panel by Fair Trials International:

The problem comes with the relative weight British courts give to human rights when set against the obligations of mutual recognition

> "Mutual recognition virtually always "trumps" fundamental rights concerns, regardless of the human rights records of our European fast-

> track extradition partners. Although the Extradition Act contains a human rights bar to extradition, the UK's courts are not, in practice, willing to exercise it. Courts seem to fear that, if they were to do so, the concept of extradition based on mutual recognition would fail."[8]

To illustrate the point, the submission quoted the reasons given by one high court judge for rejecting human rights concerns in an EAW case involving Lithuania:

> "When prison conditions in a convention category 1 state [ie an EU state] are raised as an obstacle to extradition, the district judge need not, save in wholly extraordinary circumstances in which the constitutional order of the requesting state has been upset – for example by a military coup or violent revolution – examine the question at all."[9]

In other words, it should be assumed, as a matter of course, that all EU states meet their ECHR obligations and provide adequate legal protection for their citizens. This sets the threshold for even considering human rights evidence extremely high. As we shall see, the confidence judges are expected to show in the human rights performance of some EU countries under the EAW's mutual recognition principle is sometimes impossible to reconcile with the facts.

Chapter Three: Costs and benefits

The main argument for introducing the EAW was that it would make the administration of justice across European borders quicker and more efficient. There is no doubt that it has been successful in those terms. Figures published by the National Crime Agency show that between 2004 and 2015 the UK surrendered 8,286 requested persons to the rest of the EU under the EAW and secured the surrender of 1,248 requested persons in return.[10] These figures include a large number of individuals suspected of committing the most serious offences, including murder, rape and drug trafficking. The government has estimated that it takes, on average, three months to extradite someone using the EAW compared 10 months for non-EAW extraditions.[11]

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There have been notable gains for the UK as a result. Operation Captura, launched in 2006, has led to the arrest and return of dozens of wanted fugitives from Spain, previously one of the most difficult countries to extradite from. The EAW was used to secure the return of Hussain Osman, one of the 7/7 bombers, eight weeks after his arrest in Italy. His case has been contrasted with that of Rachid Ramda, convicted of involvement in the 1995 Paris Metro bombing, who managed to delay extradition from the UK to France for more than 10 years.

These arguments are persuasive, though not decisive. A case made on the basis of efficiency cannot take precedence over other important considerations of justice. One of these is the presumption in favour of the defendant summarised in the famous Blackstone principle that "it is better that 10 guilty persons escape than that one innocent suffer". Dismissing well-founded concerns about fundamental rights to speed the extradition process effectively inverts this central tenet of liberal justice. Another principle at stake is the absolute prohibition on torture or inhuman or degrading treatment as set out in Article 3 of the ECHR. The European Court of Human Rights ruled in the 1989 that extradition should be barred where a real risk of such treatment exists. The desire of countries to improve the efficiency of extradition arrangements does not relieve them of their responsibilities in this area.

The basic assumptions on which the EAW and its principles of mutual trust and mutual recognition are based is that violations of the ECHR within the EU are rare and that national legal systems provide effective remedy on the few occasions when they occur. Unfortunately, the figures tell a different story. In 2016 alone there were 360 rulings in which the European Court of Human Rights identified at least one violation of the ECHR by an EU member

state. These included 86 cases of inhuman and degrading treatment (mostly to do with conditions of detention) and 74 cases in which the right to a fair trial was denied. Two countries accounted for more than half of the cases of inhuman and degrading treatment – Romania (28) and Greece (17). Romania (16) was also the worst offender in denying the right to a fair trial, followed by Bulgaria (9).[12] The fact that national courts often fail to provide effective remedy is evident in the large number of cases reaching Strasbourg. Although the European Court of Human Rights does offer some hope of redress, it can take several years to get a ruling. This is hardly consistent with the principle of fast-track justice that the EAW is meant to advance.

Chapter Four: Criticisms

One major criticism of the way the EAW operated following its introduction has already been addressed. This concerns the number of requests to extradite people from the UK in connection with relatively minor and trivial offences. Examples cited by the House of Commons home affairs committee include exceeding a credit card limit, piglet rustling and the theft of a wheelbarrow.[13] A particularly large number of such requests have come from Poland where custodial sentences are more common and the authorities are under an obligation to prosecute. To take account of this, the government amended the Extradition Act in 2014 to include a new proportionality test. The National Crime Agency and the British courts can now refuse an EAW request that is deemed to be disproportionate.

More serious concerns, however, have not been adequately dealt with. These largely arise from the fact that, contrary to the EAW's presumption in their favour, requesting states often fail to meet basic standards in the administration of justice. The most serious involve the failure to respect due process in the conduct of prosecutions and the poor state of prison conditions. To this must be added the emerging risk of criminal justice being used as a tool of political persecution.

Requesting states often fail to meet basic standards in the administration of justice

(i) Infringements of due process

The EAW has thrown up numerous cases in which individuals have been sought and extradited despite obvious procedural abuses committed by the requesting state. These include the use of forced confessions, the failure to provide adequate translation for defendants, the denial of adequate legal representation, trial in absentia without notification and the fabrication of evidence.

Garry Mann was arrested on a trip to the Euro 2004 football tournament in Portugal after a riot broke out close a bar where he was drinking with friends. He was put on trial within 48 hours of his arrest and given only five minutes to consult his lawyer. A professional interpreter was not provided, so a friend of the judge's wife translated the proceedings into English. Convicted and sentenced to two years in prison, Mann accepted immediate deportation back to the UK and was told that he wouldn't have to serve his sentence unless he returned to Portugal. The Portuguese authorities subsequently changed their minds and submitted an EAW request in 2009 to enforce his sentence. Despite describing the case as 'an embarrassment' and acknowledging strong evidence of 'serious injustice', the judge in his

appeal hearing was forced to grant extradition. Mann served a year of his sentence in Portugal and a further three months in the UK.

Andrew Symeou was extradited to Greece in 2008 to stand trial for murder. He had been on holiday there the previous year when another British tourist died after an incident in a nightclub. Symeou was named as a suspect after his return to the UK even though witnesses said he was somewhere else when the fatal incident occurred. It subsequently emerged that witness testimony implicating him had been obtained through police brutality. On his return to Greece, he was denied bail and spent a year on remand in a filthy and overcrowded prison. He spent a further year on bail in Greece awaiting trial before being acquitted in 2011. All of the evidence used to prove his innocence was available before his extradition, but the UK courts that heard his EAW case were not allowed to consider it.

(ii) Prison conditions

The flawed assumption of equivalence behind the principle of mutual recognition becomes fully apparent when conditions of detention are considered. Standards vary considerably across the EU with a significant number of countries regularly found to be in breach of their international obligations. The European Court of Human Rights has produced a large body of case law for assessing compliance with the ECHR's prohibition on inhuman or degrading treatment. For example, multi-occupancy cells must provide at least three metres squared of space per prisoner. Other standards cover hygiene, privacy and access to medical treatment. The court found 15 EU countries guilty of inhuman or degrading treatment in 2016.

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The Council of Europe's committee on the prevention of torture has issued a series of scathing reports about prison condition in several member states. A 2016 report on Greece condemned the failure to respond to repeated criticism in the following terms:

> "The situation has now deteriorated to the point where over and above the serious ill-treatment concerns there are very real right to life issues in as much as vulnerable prisoners are not being cared for and, in some cases, are being allowed to die."[14]

A report published following a visit to Romania a year earlier said that:

> "Numerous credible allegations consistent with physical ill-treatment

> (punches, including with reinforced gloves, kicks with the knee and feet and blows with a truncheon) were received by the delegation". It also noted "an overall high level of overcrowding, with barely two metres squared of living space per person in Târgsor Women's Prison."[15]

Despite case law prohibiting extradition where there is a real risk of inhuman or degrading treatment – upheld in relation to EAW cases by the European court of justice (ECJ) in 2016 – UK courts have found a way to approve EAW requests from problem countries. They seek and receive assurances from the relevant authorities that the requested person will be treated according to their ECHR rights. The high court approved three extraditions to Romania in November 2016 on the basis of such assurances, even though the Romanians admitted breaking previous assurances concerning individuals extradited from the UK. Approval was given despite the fact that the Romanian minister of justice had just admitted lying to the European Court of Human Rights about plans to improve prison conditions. the reason for being so accommodating was explained in the court's ruling:

> "Here the assurances are from a country which has been a convention state since 1993 and a member of the European Union since 2006. The mutual respect which exists between the two countries goes a long way in the court's evaluation of the assurances from the Romanian authorities."[16]

The alacrity with which the courts have allowed a requesting state to lie repeatedly without serious consequence is one of the most troubling aspects of the EAW.

(iii) Political justice

Political developments within the EU give grounds for concern that some member states are departing from accepted democratic principles, including the rule of law, judicial independence and the separation of powers. In Hungary and Poland, the ruling parties have interfered in judicial appointments and attacked the independence of the courts.[17] The European Commission initiated infringement proceeding against Poland in July 2018 and the European parliament referred Hungary under Article 7 of the treaty on European Union two months later. In Romania, judges complain increasingly about improper pressure from prosecutors and the covert role of the intelligence services within the legal system.[18] In some of the newer

Some member states are departing from accepted democratic principles, including the rule of law, judicial independence and the separation of powers

member states the law has become a battleground in which the durability of democratic change is being tested. This poses questions about the extent to which it is currently safe to share sovereignty in judicial matters.

The willingness of some member states to abuse the EAW for political purposes was illustrated by Spain's attempt to extradite the leaders of the Catalonian government responsible for 2017 independence referendum on charges of rebellion and misuse of funds. This included Carles Puigdemont, the Catalan president, arrested in Germany in March 2018, and Clara Posanti, the Catalan education minister, served with an EAW in Scotland at the same time. The Spanish authorities were effectively allowed to use the courts of other EU countries to pursue a partisan dispute – one that ought to have been settled by exclusively political means – through a process of judicial persecution. A German court ruled that Puigdemont could be extradited for misuse of funds, an offence with a prison sentence of up to 12 years. Only a change of government in Madrid led to the EAW being withdrawn at the last minute.

Another case that highlights the nature of this political risk concerns Alexander Adamescu, a German citizen who became the subject of an EAW request from Romania in July 2016. Two years earlier, Adamescu's father, who owned one of Romania's most established national newspapers, was charged and convicted of bribery in a process that revealed an underlying political motive. His arrest was announced two weeks in advance in a politically hostile statement made by the sitting prime minister. Other media owners were arrested around the same time. The elder Adamescu's trial featured countless procedural abuses and he died in January 2017 of an illness contracted in cramped and unsanitary prison conditions.[19] Moves to serve Alexander Adamescu with an EAW began shortly after he initiated international arbitration proceedings against the Romanian state over the destruction of the family business. Evidence of political motivation in his prosecution is compelling.

Chapter Five: The UK after Brexit

One consequence of Brexit is that it allows the UK to look again at these issues from first principles. The EU's role in promoting police and judicial cooperation developed in tandem with moves towards a borderless Europe, which required action to prevent criminals exploiting free movement to break the law and evade justice. Since a major reason for leaving is the desire to adopt a more restrictive approach to the movement of people coming into the UK, at least part of the argument for participating in the existing arrangements is open to revision. An end to free movement would, for example, strengthen the UK's ability to refuse entry to people with a criminal record. It may also make sense for the terms of the UK's future cooperation with the EU on police and judicial matters to be adapted to take account of other considerations that may define our post-Brexit role. The test should be whether it adds value in helping the UK to attain its national and international objectives.

The question of the UK's future relationship with the EU cannot be separated from wider global developments. One of these is the emergence of populist movements and authoritarian regimes committed to reversing the democratic gains of the post-cold war era. Key transition states like Russia, emerging nations like Turkey and fledgling democracies like Egypt have all succumbed to this trend. Most troubling of all has been the reversion to pre-democratic practices in some of the newer EU member states, particularly Hungary and Poland, where populist governments are undermining foundations of political freedom. The rise of Donald Trump and growing strength of far right populism in France, Germany, Italy, Austria, Sweden and the Netherlands show that authoritarian and illiberal movements are now capable of challenging for power in some of the most established western democracies.

Future cooperation on police and judicial matters should be considered in this light, not least because the EU has proved to be largely ineffective in holding some its own members to account for declining democratic standards. The UK should naturally want close cooperation with other European countries, but it should always give higher priority to the defence of democratic values, even at the cost of breaking with the European consensus. It certainly shouldn't enter into open-ended commitments based on mutual trust when there are good reasons for believing that that trust will be abused for purposes that are contrary to the common interests of Europe. Constraints that were accepted as a necessary part of wider EU membership should not automatically carry over if a different approach would be better suited to the requirements of justice and the need to defend human rights.

The EU has proved to be largely ineffective in holding some its own members to account for declining democratic standards

Extradition arrangements based on mutual recognition made sense at a time when European countries appeared to be converging around a shared set of democratic norms. The aim now, in an era of resurgent authoritarianism, must be to uphold the primacy of human rights and ensure that the UK is able to provide refuge to those facing injustice abroad. There is a precedent for this in our past. In the years of conservative reaction that followed the failed revolutions of 1848 and the fall of the Paris Commune in 1871, London became home to a large and diverse community of foreign political exiles. The most famous among them included Giuseppe Mazzini, Karl Marx and Alexander Herzen. Although public and government alike often disapproved of their views and activities, there was firm support for the principle of asylum, even to the point of facing down threats and pressure from other European powers.

The willingness of Victorian Britain to offer a refuge of last resort to those fleeing persecution arguably paved the way for the democratic transformation of Europe in the century that followed. That tradition has been revived at various times since, most notably during the second world war and the cold war. It is, unfortunately, no longer far fetched to imagine the UK being called upon to play that role again. There is already an established pattern of authoritarian regimes abusing the Interpol red notice system to harass and persecute their political opponents abroad. The further erosion of democratic standards within the EU could see the EAW routinely abused in the same way. As a non-EU state, one of the few ways for the UK to resist this trend would be to limit judicial cooperation with populist and authoritarian governments determined to weaken the rule of law. Uncomfortable as it may be for internationally minded progressives to contemplate, asserting an exception in this area could be among the most important contributions the UK makes to the preservation of Europe's democratic inheritance.

Chapter Six: Future options

The UK has a variety of options that could be pursued in negotiating a post-Brexit extradition regime with the EU. One that isn't on offer is to remain part of the EAW. That would require the UK to continue accepting the jurisdiction of the ECJ something that the prime minister categorically ruled out in her speech of 17 January 2016. Regaining control over our own laws means that a different kind of arrangement is inevitable. It is clear, in any case, that our EU partners are not willing to extend EAW membership to an outsider. That leaves broadly four options: to fall back on the provisions of the 1957 council of Europe extradition convention; to negotiate new bilateral extradition agreements separately with all 27 EU partners; to seek an EAW-like agreement with the EU similar to the one signed by Iceland and Norway; or to seek a bespoke arrangement with the EU on a different basis.

(i) Revert to the 1957 Council of Europe extradition convention

This agreement provided the framework for multilateral cooperation on extradition in Europe prior to the EAW and could again become the basis of cooperation with EU countries following Brexit. There are, however, several major drawbacks. Extradition under the terms of the convention is more cumbersome, protracted and restricted. For example, signatories can choose not to surrender their own nationals. Time taken to complete extraditions would again be measured in months or years rather than weeks. There is also some legal uncertainty about the current status of the convention post-Brexit. The EAW is supposed to have replaced all preceding agreements and several EU states have amended or repealed the legislation that enacted the convention. Reviving it as the basis for UK-EU cooperation may require legislative action by several countries.[20]

(ii) Negotiate new bilateral extradition agreements with each EU state

Putting together individual agreements with EU partners on a country-by-country basis would offer maximum flexibility, but it would be a lengthy and difficult undertaking. The result would be a complex patchwork of arrangements that would increase the administrative and financial burden of extraditions to and from the UK. Negotiations would take many years to complete and the political will of different countries to reach a satisfactory agreement could vary enormously. There is a risk that major gaps in

extradition coverage would once again create safe havens for British criminals to evade justice.

(iii) Replicate the Norway-Iceland extradition agreement with the EU

Norway and Iceland have an agreement with the EU that mirrors the main features of the EAW and the UK could, in theory, seek something similar. The agreement accepts the principal of mutual recognition, but contains two important exceptions. Signatory countries are not obliged to surrender their own nationals or individuals accused of 'political offences'. Another major difference is that the ECJ does not have jurisdiction in settling disputes. However, agreement has been made easier by the fact that Iceland and Norway are both part of the Schengen area and accept free movement. There is some doubt that the EU would be willing to agree the same terms with a country that intends to re-establish full migration controls.

(iv) Negotiate a bespoke extradition agreement with the EU

It may be possible for the UK and the EU to reach a deal tailored to the needs and concerns of both parties post-Brexit. The EU already has a bilateral extradition agreement with one other country – the United States. Although it is not a treaty and its scope is minimalist in comparison to the EAW, it does show that a bespoke arrangement is possible. This still leaves considerable uncertainty about the substance of any UK-EU agreement and how quickly it could be negotiated and put into operation. The EU's agreement with the US took two years to negotiate in the aftermath of September 11 and a further seven years to enter into force. The more substantive agreement with Iceland and Norway took 13 years to negotiate and has still not entered into force.

The Political Declaration on the future EU-UK relationship suggests a preference of both parties for arrangements similar to the EAW, although presumably shorn of its supranational components. It calls for: "swift and effective arrangements enabling the United Kingdom and Member States to extradite suspected and convicted persons efficiently and expeditiously, with the possibility to waive the requirement of double criminality, and to determine the applicability of these arrangements to own nationals and for political offences."[21] In being willing to consider waiving a political offences exception and extraditing own nationals, the Declaration hints at an agreement that goes somewhat further than the EU's agreement with Iceland and Norway.

Chaper Seven: Conclusion

There is no ideal solution for the UK in framing its extradition relations with the EU once it ceases to be a member. Defaulting to the 1957 convention would slow down the extradition process, separate bilateral agreements with each EU state could leave significant gaps and an off-the-peg agreement that tried to replicate the EAW would fail to address many of the concerns about its operation this report has highlighted. Since all of the available options would require further negotiation and legislative action, there is great uncertainty about how quickly any of them would be in place. Without clarity and urgency there is a risk that a new extradition agreement will not be ready by the end of the transition period, creating either a legal vacuum or the need for some interim arrangement.

Taking all options into consideration, the best approach for the UK would be to try to negotiate a new collective agreement with the EU that sought to retain many of the mutual benefits of the EAW without carrying over its most problematic features. In other words, the UK should seek a bespoke solution.

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This obviously raises the question of what priorities should be pursued in attempting to negotiate such an agreement. Clearly it would be desirable to maintain a high degree of administrative simplicity and efficiency in the execution of extradition requests. Most cases should continue to be handled at a purely judicial level, except where there are serious human rights implications, and reasonable time limits for the completion of proceedings should be agreed.

New safeguards would need to be put in place to prevent abuses. The proportionality test adopted by the UK should be written into the agreement so that it also becomes a responsibility on the requesting state. In the current international climate, it would also be prudent to adopt a political offences exception similar to the one contained in the EU's agreement with Norway and Iceland. However, the UK should not aim to exempt its own nationals from extradition, provided that other EU countries are willing to reciprocate and more effective human rights safeguards are put in place.

Many Eurosceptics assume that removing the jurisdiction of the ECJ would solve the main problem, but the Luxembourg court's influence over the operation of the EAW has, if anything, been positive from a human rights point of view. The more important question to resolve is whether or not the new agreement should be based on the principle of mutual recognition at all. This is tricky because mutual recognition is both a source of the EAW's relative efficiency and one of the main reasons for being concerned about

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its impact on human rights. At the time of the 2011 extradition review a number of suggestions were put forward to strengthen safeguards while retaining mutual recognition. Fair Trials International suggested amending the Extradition Act to lower the human rights threshold in EAW cases and justice proposed adding a reference to the EU charter of fundamental rights.[22]

It is impossible to know whether the addition of new human rights language would have the desired effect without it being tested in court. If the UK decided to remain in the EU, it would certainly be the best way to reconcile human rights with the obligations of membership. Even with that, it is possible that UK courts would continue to give precedence to mutual recognition over other factors. The alternative would be an EU-level review of the EAW and the principles underpinning it that took account of deteriorating standards of governance, as some NGOs have urged. That might lead to a strengthening of human rights safeguards in the future, although there is no official sign that such a review is under consideration.

Short of that, the safest option would be for new UK-EU extradition arrangements to dispense with the principle of mutual recognition altogether. That would allow the UK to restore the requirement on requesting states to provide prima facie evidence of guilt and allow courts to give full consideration to the human rights implications of each case. There would be an inevitable reduction in the speed with which extradition requests could be processed, but the gain in the UK's ability to provide a haven of liberty at a time of rising authoritarianism would more than justify it.

KEY RECOMMENDATIONS

- The UK and EU should negotiate a bespoke extradition agreement
- The principle of mutual recognition should be abandoned. The UK should be able to require states to provide prima facie evidence of guilt and to allow courts to fully consider the human rights implications of each case
- Most cases should continue to be handled at a purely judicial level, except where there are serious human rights implications
- Reasonable time limits for the completion of proceedings should be agreed
- The new arrangements should include a proportionality test and an exception for political offences, but there should be no bar on extraditing UK nationals provided the EU reciprocates.

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