The proposed alternative to the European Arrest Warrant is not satisfactory

I am afraid that David Davis's scheme for a new European Arrest Warrant is not at all satisfactory as it stands. Here is the essence of it:

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Under the proposal a new "ad hoc" legal commission would replace the European Court of Justice (ECJ) which currently rules on extraditions.

The new panel would have a Supreme Court judge, an ECJ judge and one from a third neutral country to rule on each extradition.

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This proposal as it stands is merely cosmetic, and here is why:

Any oversight by a superior body, whether our own Supreme Court or even more so by a new ad hoc mixed legal commission can only see and ensure that the current EAW legislation is applied by the lower courts.

And the main problem is that it is not proposed here to alter the current EAW legislation, which says that prisoners must be surrendered at a bald, unsupported, demand from the requesting State, with no examination by a court of the requested State of evidence of whether there is a serious case to answer or not.

It is – wrongly and wrongfully – ASSUMED by many in Britain that the EU states will all have assembled evidence of guilt

and will be “prosecution-ready” before they issue an EAW (as is the normal practice in Britain). Indeed according to the Treaty we are bound to trust them blindly to have done so, under the doctrine of “mutual confidence and recognition”.

Our politicos and legal eagles, not to mention pundits, are still – willfully? – ignoring the fact that the practice in States ruled under the Napoleonic-inquisitorial dispensation is to arrest a suspect FIRST, and only AFTER they have him under lock and key, do they try to build a case and seek evidence against him. This often takes months, while the unfortunate rots in duress vile with no public hearing, as we have seen happen all too often.

This is not – as our own people assume – due to the sloppiness of continentals in applying standards that we in Britain consider to be right and normal; it is the way their system functions normally, and is supposed to function. They do not work to our standards, but to their own, which are completely different from, indeed alien to, ours.

I have been through the historic reasons, going back 800 years, for this profound difference elsewhere and shall not do so again here.

Whether the grounds for suspecting, and for arresting, a particular person amount to serious evidence of a case to answer, or flimsy evidence that would not stand up to serious scrutiny, or no evidence at all but merely clues, or just a hunch, or even a prejudice, on the part of the investigators, is sorted out in Britain by our Habeas Corpus.

This provides a right for a prisoner to be brought into a public hearing in open court within HOURS or at most a few days after arrest. And there he can demand to be shown the evidence on which he was arrested. He must there be “charged”, and in Britain and other English-speaking nations a charge must be based on hard evidence, already collected, of a case

to answer. No right to any such speedy public hearing exists in continental States, where six months, extensible, in prison "pending investigaton" with no public hearing, is considered a normal limit (for many categories of cases, not only extreme terrorism cases), as per the Corpus Juris proposal for a single unified criminal code for all Europe.

Some years ago an attempt by our own government to introduce 42-day detention without charge nor public hearing in terrorist cases was resisted and opposed on principle by none other than David Davis himself, who nobly resigned his seat and stood for re-election on this very point, and was returned again by his electorate who clearly shared his concern to keep our traditional safeguards of the liberty of the subject. Has he forgotten this? How can it have escaped his notice that the EAW as it stands brings in not just six weeks, but six months, in the case of Andrew Symeou eleven months, detention without charge or public hearing?

The European Convention on Human Rights provides no remedy. Its article 6 merely says that a prisoner must have a public hearing within a "reasonable" time after arrest, and the continentals will say that it is "reasonable" for them to take six months to investigate a person and assemble evidence against him of a case to answer.

One solution could be to force the continental States to hold a Habeas Corpus public hearing within hours of receiving a prisoner to show that there is a case to answer, or to release him. We have already seen that this would not be accepted by them for it goes against their whole legal culture. Indeed in 2002 the late Neil McCormick QC MEP presented a motion to the EU Parliament to set up a "Euro-Habeas Corpus" to go with the EAW, but it was overwhelmingly voted down.

So it will have to be our own courts who demand that an EAW, or indeed a warrant received from any foreign State, must be accompanied by evidence of a case to answer which can be

examined by a UK court with the power to reject it if considered insufficient. This is what happened before the European Extradition Act of 1989. The delays complained about were largely due to the foreign authorities, who are quite unaccustomed to having to investigate first and arrest after. They prefer to do it the other way round. Under our previous legislation, they had to do it our way. Now we have to do it their way.

At present the UK is forced to conform to the continentals' yardstick. This flies in the face of Magna Carta (clause 38). But people on British soil (even if not British citizens) must be entitled to the protection of British laws. This always used to be the case, and it must be restored.

The renewal of border checks will enable the UK to keep out known foreign criminals whose identities have been flagged up to us by foreign authorities. So the garish scare-mongering about "Britain becoming the Costa del crime" and the "honeypot for criminals" argument can be laid to rest.

The practical argument that supporters of the EAW cannot answer is: if no substantial evidence of guilt is collected BEFORE arrest, how can the authorities know that they have got the right person to accuse? Indeed the record of the EAW's application shows many cases where perfectly innocent people (including even a British judge – Colin Dines!!) were targeted and made to suffer forced transportation and often lengthy imprisonment, thus allowing the truly guilty parties to escape scot-free.

Even if we had our own Supreme Court to oversee the application of the EAW, it can only do so on the basis of the legislation as it stands. However sympathetic it might be towards an obviously innocent victim of a monstrous judicial muddle, or even of persecution on a trumped-up charge, as long as the doctrine of "mutual recognition" remains on our Statute book, the Supreme Court cannot do anything other than apply

it. Willy-nilly. Judges in our lower courts have even been embarassed about EAW cases like this, but have been powerless to do anything other than apply the law as it stands. The Supreme Court would be in a like position.

So a reform of the EAW needs to insist that when foreign authorities send us a warrant to arrest someone on British soil, they must also send an indication of the evidence of a prima facie case to answer. Otherwise we cannot prevent them from using the EAW as a tool for fishing expeditions.