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Submission

Response to the House of Commons Select Committee on Justice

Justice Issues in Europe

9 July 2009

About Fair Trials International

Fair Trials International (FTI) is a UK-based NGO that works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own.

FTI pursues its mission by providing individual legal assistance through its expert casework practice. It also addresses the root causes of injustice through broader research and campaigning and builds local legal capacity through targeted training, mentoring and network activities.

Although FTI usually works on behalf of people facing criminal trials outside of their own country, we have a keen interest in criminal justice and fair trial rights issues more generally. We are active in the field of EU Criminal Justice policy and, through our expert casework practice, we are uniquely placed to provide evidence on how policy initiatives affect defendants throughout the EU.

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1 Introduction

1.1 FTI welcomes this opportunity to provide our views to the Justice Select Committee on the Stockholm Programme and on how action taken at EU level has affected people, particularly in the area of criminal justice and the procedural rights of accused persons.

1.2 This paper will look at the opportunities presented by the Stockholm Programme and present arguments and case studies supporting the need to back the Swedish Presidency's efforts to prioritise minimum procedural defence safeguards for all EU citizens.

1.3 The paper will also show, again based on FTI's own casework, that certain enhancements could be made to EU mutual cooperation measures such as the European Arrest Warrant to ensure they deliver justice in combating and punishing serious cross-border crime, as originally intended, without undermining the core EU values of upholding the rule of law and guaranteeing the right to a fair trial for all citizens.

2 Executive summary

2.1 During the last ten years the EU has actively sought to build an area of justice, freedom and security within Europe. The dominant theme has been for member states to cooperate more effectively to bring to justice those convicted or suspected of criminal activity. The most notable development has been the creation of a fast-track system of extradition within Europe (the European Arrest Warrant or EAW). We believe this increased cooperation has resulted in real improvements in some areas of criminal justice, cutting down delays, increasing efficiency, and enabling serious organized crime that crosses national borders, such as human trafficking, money laundering and cyber-crime, to be tackled more effectively. These are laudable achievements.

2.2 We are, however, concerned that European cooperation in the fight against crime has forged ahead with insufficient regard for basic principles of justice and fairness. The Stockholm Programme must address this to enable member states to trust each other's systems to deliver justice to the necessary standard.

2.3 The Stockholm Programme aims to build on progress to date and go on increasing mutual cooperation in a highly diversified Union where over 500 million citizens live and over 8 million of them currently reside in another member state than that of their nationality. Clearly this presents challenges for justice and home affairs policy and makes mutual cooperation a necessity. However, it must not be at the expense of basic principles of fairness and justice. Sadly, there has been insufficient assessment of the human costs of existing measures such as the EAW and their potential misuse.

2.4 The EAW system has been in place long enough to demonstrate some of the dangers that can arise from mutual cooperation, where mutual trust is not yet in place. FTI wants to see the EAW system and other mutual cooperation instruments work properly, so that they uphold rather than undermine the justice, freedom and security that lie at the core of the EU's mandate. We suggest a number of concrete ways in which the EAW system could be strengthened to deliver greater justice without detracting from suspects' fundamental rights and without allowing the system to be abused through the issuance of unreasonable or improper extradition requests. We illustrate our suggestions with a selection of case studies.

2.5 The injustices we encounter in our own casework show us that more must be done under the Stockholm Programme to improve the delivery of justice for the benefit of all EU citizens, wherever they happen to live, work, study or travel within the Union. In particular, our cases illustrate the importance of minimum procedural defence rights being guaranteed. In practice, it can often be more difficult for non-nationals than nationals to receive a fair trial.

3 European Arrest Warrant

3.1 The EAW fulfils an important aim in ensuring mutual recognition of judicial decisions between states and enabling simpler extradition procedures within the European area of free movement. However, in order for the scheme to be deemed a real success it must be just and fair and respect the principle of proportionality and the rule of law. Below is a non-exhaustive list of the significant problems being encountered under the EAW system.

3.2 Main problems with the European Arrest Warrant

3.2.1 Authorities in some member states are not taking enough account of the burdensome effects of extradition on individuals. As a result there is an absence of sufficient safeguards against extradition on the basis of weak evidence or with respect to very minor offences. Domestic procedures to issue and execute warrants do not always respect the principle of proportionality.

3.2.2 The rules regarding the availability of legal aid for individuals subject to an EAW are unclear and vary from state to state. Legal aid to support legal representation (in both the requesting state and the executing state) is often limited. Given the serious impact extradition can have on an individual's personal and family life and the likely problems that person will face in following the proceedings in another language and culture, it is essential they should have representation and that if necessary this should be paid for by legal aid. This is all the more so given the abolition of the requirement on issuing states to show a *prima facie* case when issuing an EAW.

3.2.3 It is unacceptable that individuals in many EU countries have no means of ensuring EAW alerts against them are removed after a decision has been taken in one Member State to refuse to execute an EAW. This is particularly unacceptable in cases where the execution of an EAW has been refused due to passage of time, the mental or physical health of a defendant or one of the mandatory grounds for refusal as laid out in the Framework Decision on the EAW.

3.3 Suggestions for improvement to the European Arrest Warrant

The following is a non-exhaustive list of improvements needed:

3.3.1 Checks should be implemented to ensure EAWs are only issued when proportionate to the offence and in the interests of justice.

3.3.2 Domestic courts should be equipped with greater powers to refuse the execute a warrant where: execution will result in a breach of human rights; or the procedures leading to the EAW being issued were unfair, illegal or resulted from misconduct by police or investigating authorities.

3.3.3 The EU should introduce common rules on the provision of legal aid in relation to criminal proceedings, especially those relating to EAWs. Legal aid should be made available for legal representation in both the requesting and the executing state. Individuals should usually have lawyers representing them in each country. The duty to provide legal aid to individuals subject to an EAW should be appropriately shared by the requesting and executing state.

3.3.4 The system for *removing* EAW alerts from the Schengen Information System, Europol and Eurojust must be as efficient and reliable as the system for *issuing* EAW alerts.

3.4 **FTI Case Studies on EAW**

Fair Trials International has worked with many clients who have suffered injustice under the EAW system. Below are some summaries of FTI cases illustrating how the scheme has operated unfairly in ways which the above recommended changes would help to prevent. More information on many of these cases can be found at http://www.fairtrials.net/cases/.

Andrew Symeou

In 2007, Andrew, then a university student of exemplary character with a bright future ahead of him, was on holiday with friends in Zante, Greece. One night while Andrew was in Zante, another young Briton fell off an unguarded stage in a night-club, tragically dying two days later from his head injury. Andrew insists he was not even in the club at the time – and many witnesses have since confirmed this. He was never sought for questioning at the time, and knew nothing about the incident when he flew home at the end of his holiday.

A year later, he was served with an EAW seeking his extradition to Greece to stand trial for murder. Only during the course of his legal challenge has it emerged that the EAW is based on completely flawed evidence, much of it extracted through the brutal mistreatment of two witnesses who have since retracted their (word-for-word identical) statements. Our concern in this case is not only about Andrew's fate: if the Greek authorities had acted legally and diligently, the true assailant (who witnesses have described as bearing no resemblance at all to Andrew – although a friend who was with him that night does closely resemble Andrew) could be brought to justice.

Joseph Mendy

JM was just 18 when he went on holiday to Spain with two friends. While there, all three were arrested in connection with counterfeit euros. JM himself had no counterfeit currency on him or in his belongings when arrested and has no idea how the notes came to be on his two friends and in their rented apartment – in total, the police found 100 euros in two notes of 50. The boys were held in a cell for three nights, then on the fourth day they appeared in court and had a hearing lasting less than an hour, at the end of which they were told they were free to leave but might receive a letter from the authorities later.

They returned to the UK and heard no more about it until 4 years later when, as JM was studying in his room at university, officers from the Serious Organized Crime Agency arrested him on an EAW.

JM was extradited to Spain and held on remand in a maximum security prison in Madrid. Other inmates told him he might be in prison for up to two years waiting for a trial. Under immense pressure and fearing for his future, he decided to plead guilty, even though several grounds of defence were available and he would have preferred to fight the case on home ground, on bail, and with a good lawyer he could communicate with in English. None of this was possible, and he ended up spending 9 weeks in prison before coming home to commence his university career, his future blighted by a criminal record.

This is an example of how EAWs are being issued in a disproportionate way, wasteful of costs and having an unduly harsh effect on individuals' personal lives.

Lee Yarrow and Michael Tonge

Michael Tonge and Lee Yarrow were arrested on holiday in Crete in 1999 after a nightclub fight in which Michael sustained injuries. Lee was released from police custody after 4 days but Michael was held on remand for 4 months, during which he was beaten, kicked, flogged with rope and denied food and medical treatment. He was then released and came back to England, only for both men to

receive EAWs in 2005, with no explanation for the delay. At their eventual trial in Greece, charges were dropped against Lee. Michael was convicted of assault, served a short sentence in Greece and was released and returned to the UK in August 2007.

Once again, an EAW was executed despite serious police misconduct and abuse and following unreasonable delay. The English Court should have been empowered to refuse extradition on the basis of justice, fairness and the rule of law, but under the new system it held that it had no discretion to refuse.

Michael and Brian Hill

In 1997 the Human Rights Committee of the UN reported that Michael and Brian Hill had been denied a fair trial in Spain following their arrest in 1985 and were entitled to a remedy "entailing compensation" as a result. But Spain failed to comply with this ruling. Instead, it issued an EAW seeking the brothers' extradition to Spain. In October 2005, Michael Hill was arrested in Portugal and extradited to Spain where he served 7 months for breach of parole conditions. They had already served three years in prison in Spain.

This is a clear abuse of process. Courts of executing states should be empowered to refuse extradition in such cases, rather than perpetuating the injustice of the original trial.

Ms X (anonymity requested)

In 1989, British citizen Ms X was arrested in France on suspicion of drug-related offences and held in custody. Her trial took place later in 1989. The court acquitted her of all charges, finding she had been set up by her then partner. She returned to the UK thinking that was the end of it.

But unbeknown to Ms X, her case was appealed by the French prosecution. She was not notified and the appeal went ahead without her knowledge in 1990. No lawyer represented her. The Appeal Court overturned the original verdict and sentenced Ms X to 7 years' imprisonment. Again, she was not informed.

In April 2005, an EAW was issued by the French authorities for Ms X to be returned to serve her sentence. Unaware of this, in 2008 she travelled to Spain and to her horror was arrested and taken into custody there pending extradition to France. Ms X refused to consent and spent a month in custody – away from her child and grand-children in England – waiting for an extradition hearing. Eventually the Spanish court refused to extradite her, given that nineteen years had passed since the alleged offences.

Ms X was released and flew home to the UK – only to be re-arrested on the same EAW by the British police at Gatwick airport. The City of Westminster Magistrates' Court refused the extradition in April 2009 given the passage of time.

This could happen again and again, until France removes Ms X's EAW from the EU-wide system. Ms X is virtually a prisoner in her own country, as any trip abroad could result in her arrest. She wants to visit her sick and elderly father in Spain but cannot risk it for the sake of her family.

Garry Mann– covered below in Section 6

4 Context of the Stockholm Programme and Roadmap

4.1 On 1 July the Swedish Presidency published a *"Roadmap with a view to fostering the protection of suspected and accused persons in criminal proceedings"* (Roadmap), a positive step which FTI welcomes.

4.2 In our day-to-day experience of cross-border EU criminal investigations and proceedings, we frequently see instances of injustice caused by an absence of adequate standards of fairness in defence procedures across member states. During the past ten years, EU legislation and policy has been geared towards mutual recognition and cooperation, with no adequate simultaneous measures to protect individuals' rights to a fair trial. Once the rule of law and the right to a fair trial are called into question, so too is the legitimacy of the ever stronger powers the EU and member states give to police and judicial authorities. If the Swedish Presidency is truly ambitious for change in this field, it (and the Working Group which has been set up to push forward on these safeguards) must ensure that the minimum rights contained in the Roadmap now receive the legislative attention they urgently require.

4.3 Previous attempts to build a sound basis for mutual trust between member states have notably failed. Instead of ensuring minimum fair trial standards across the Union, states have placed too much faith in the capacity of other legal systems in Europe to deliver justice. Part of the problem is the lack of public engagement in the area of defence rights and the almost total absence of political debate on the subject, particularly since the Madrid and London terrorist attacks. Recent emphasis has been on strengthening security and building cooperation in the fight against terrorism and serious crime. The fundamental rights of citizens have received almost no attention, but there is now an opportunity to put this right.

4.4 The Roadmap provides strong arguments for introducing minimum procedural safeguards. Pointing to the fact that the removal of internal borders has increased cross-border criminality and that as a result more individuals are finding themselves involved in foreign proceedings, the Roadmap acknowledges that this results in suspects knowing less about their rights than they would if arrested at home, as well as language barriers making meaningful participation in their defence more difficult. It also points out that introducing basic EU standards for the protection of procedural rights will enhance mutual trust in other states' systems, thus improving mutual cooperation.

5 FTI's concerns over Roadmap and Stockholm Programme

5.1 The European Commission's proposals for the Stockholm Programme published on 10 June highlight the need to put ordinary citizens' interests at the heart of the project but contain few concrete proposals about how to achieve this in the criminal justice context.

5.2 The Presidency's 23 June Work Programme also contains no detail on this point, referring to its "ambition to **balance** effective crime fighting with measures that **guarantee the rights of individuals** [emphasis in original]**"** and the need for the Programme to "strik[e] a better balance between measures to safeguard security and measures to preserve the rights of the individual".

5.3 While FTI welcomes the Swedish presidency's acceptance that more must be done in this area, what is needed is more than a *re-balancing* exercise. We fully accept the need for cross-border cooperation in the fight against crime, but there must be no "trade-off" between fundamental rights and the need to fight crime. The very cornerstone of EU values is the right of all within the EU to be treated fairly in criminal investigations and proceedings. This entails being allowed a full opportunity to defend themselves and participate meaningfully in their trial. These rights are not variables, to be weighed in the balance with other policy considerations. They are universal rights, which should now be restored to the centre of criminal justice policy.

5.4 This point is best made by looking at cases involving real people. This is done in section 6 below, which deals with various of the Roadmap's measures in turn. A single case often suffers multiple failures to respect basic rights, with for example the lack of access to a lawyer or legal aid being exacerbated by the lack of information on rights or on the prosecution case, or the lack of a quality interpreter or translations of important documents, or the inability of suspects to contact friends, family or consular officials as quickly as possible to help them avail themselves of these other basic measures quickly enough not to have their position irrevocably prejudiced.

5.5 This indicates that these minimum rights should be developed in a mutually coherent way, even though the Roadmap envisages a "right-by-right" approach so that *"focused attention can be paid to each individual measure, so as to enable problems to be identified and addressed in a way that will give added value to each measure".*

5.6 FTI is concerned at the absence of detail in the Roadmap about how or when legislation on minimum defence rights will be introduced. It is also concerning that it has not been expressly stated that the Roadmap safeguards will be developed within the framework of the Stockholm Programme. It seems the intention may be to run this project on a parallel track. On the other hand, the Programme is quite detailed and specific when dealing with, for example, increasing the powers of police and justice agencies even further to gather evidence across borders, strengthening support measures and training for judges and prosecutors, and for the principle of mutual recognition to apply at all stages of criminal procedure.

5.7 FTI's cases suggest that although these rights are enshrined in the European Convention on Human Rights and Fundamental Freedoms, they require further legislative force in order to become tangible for ordinary citizens. Only then can individuals depend on them with confidence wherever they happen to be in the Union, whether in their home state or another member state. This is implicitly recognised by the Swedish Presidency's statement in the Roadmap that *"there is room for further action of the European Union to ensure full implementation and respect of Convention standards, as well as, where appropriate, to expand existing standards or to make their application more uniform".*

5.8 We believe detailed and binding legislation on each measure is the best way to ensure this important aim is achieved.

6 Cases illustrating immediate need for legislation on Roadmap's Measures

Translation and Interpretation

<u>Case study: Teresa Daniels (TD), British national arrested in Spain</u>

In 1997, TD and her companion AB were arrested at Gran Canaria Airport: almost 4 kilos of cocaine was found in 2 suitcases belonging to AB. On arrest, AB told police that TD had no knowledge of the drugs. No drugs were found on her person or in her luggage. At the trial (less than three months after her arrest), TD was asked a few questions and after 1 ½ hours was told she could leave. She assumed throughout the trial that she was there as a witness. No interpreter was present to assist her and she could not follow the proceedings. AB maintained throughout the trial that TD had known nothing about his activities.

In a judgment issued six months later, TD was sentenced to 10 years. AB received the same sentence and was taken to prison to start his sentence; TD was allowed to go free pending her appeal. She was not sent the judgment or an English translation of it. She heard nothing further and was unaware that her appeal was in fact unsuccessful and her sentence had been reconfirmed. A letter from the Spanish authorities in response to a query from her MP suggested she had been

discharged. However, an extradition request was later made by Spain and granted in October 2005 by the UK, resulting in TD's extradition, to serve her sentence in a Madrid jail. She was ultimately granted a royal pardon and released in January 2009.

When we became involved in the case (after the appeal) it became clear that the court had based its decision on a single entry in TD's personal diary about an expected payment she was looking forward to receiving. This in fact referred to a few thousand pounds' compensation for a personal injury claim relating to a car accident she had suffered, as she could have established if she had had a fair trial. The court relied on its own unofficial 'translation' of the relevant entry, which was later shown to be largely inaccurate. An official translation of the diary, carried out by a qualified translator, was also supplied to the court prior to trial, yet inferences were made by the prosecution and the court to the detriment of the defence based on the first, unreliable, translation. The official, accurate, translation was ruled inadmissible for being adduced out of time. The appeal court upheld the original decision in full.

In this case, having an interpreter at court throughout trial and being allowed to insist on official translations of key prosecution evidence in good time before the trial could well have prevented a gross miscarriage of justice.

(See also cases of the Stow brothers and of Garry Mann below. These cases also involved significant damage to the individuals' trials, caused by lack of interpreters and translations.)

Information on Rights and Information about the Charges

<u>Case study: Andrew and Graham Stow (A and G), British nationals arrested in Portugal</u>

A and G were considering opening a diving school. In July 1999 their dive boat was subjected to a thorough routine search by Portuguese customs officers in Faro and nothing was discovered. A few days later the Harbour Master in Faro asked the brothers to move their boat 250 metres down the wharf to make way for a larger boat. The next day one of the men dived below the boat and discovered boxes scattered over the sea bed. He began bringing the boxes up and around 15 minutes later officers from the Policia Judiciária arrived. A and G assisted the police in bringing up the boxes. They maintain they were completely unaware of their contents. Shortly thereafter they were arrested at gunpoint and accused of importing hashish into the harbour.

Immediately after their arrest, they were interrogated in Portuguese with no interpreter or legal adviser present. They were pressurised into signing confessions in Portuguese.

They did not see the charges against them in writing until a whole year after their arrest. The charges were in Portuguese. As their defence lawyer did not speak English, A and G had to rely on other remand prisoners to help them understand the document. Throughout the trial, the court-appointed lawyer only worked for the benefit of the court; the court proceedings were not translated for A and G; and only their responses to the judge were translated into Portuguese.

They eventually won a retrial only for the appeal to uphold the original decision. They served six years in jail in Portugal and nine months in a British prison following a transfer. They are now awaiting a decision from the European Court of Human Rights under Article 6.

<u>Spanish cases</u>

A number of our clients facing charges in Spain have complained about the *Sumário Secreto* procedure whereby the prosecution does not have to disclose any details about their investigation until as late as 10 days before the closure of the investigation. This seriously hampers the

preparation of the defence. In many cases it results in the refusal of bail applications and the loss of any chance to prepare a defence case in good time, for example, by taking witness statements from possible defence witnesses while their recollection is still good, or adducing other evidence which could assist the defence.

Access to basic information about the charges and the prosecution's case must be given at a much earlier stage than this. Often the damage is done by the time the person knows his/her rights, particularly where lengthy pre-trial detention is a feature of the relevant member state's system, as is the case in Spain. It is also impossible to make proper bail applications without this basic information.

(See also under Garry Mann's case below regarding the damage caused by not being informed of legal rights, for example the right to seek a stay of proceedings in order to prepare a defence.)

Legal Aid and Legal Advice

Case study: Garry Mann (GM), British national detained in Portugal

On 15 June 2004 GM, a British national, was with friends in a bar in Albufeira, Portugal, when a riot took place in a nearby street. GM was arrested along with other suspects some 4 hours after the alleged offences. He was tried and convicted – along with 13 other defendants – less than 24 hours after his arrest. He had been attending the Euro 2004 football tournament and was arrested under temporary legislation in place at the time. The object of the legislation had been to allow for a fast track procedure to convict and deport foreign nationals caught "red-handed". This was clearly inappropriate in GM's case, where identification was in issue.

GM was sentenced to 2 years' imprisonment on 16 June 2004 but, two days later, voluntarily agreed to be deported after being told he would not have to serve his sentence provided he did not return to Portugal for a year.

The trial was grossly unfair in a number of ways but perhaps the most striking is that GM had no time to prepare his defence, instruct a lawyer of his own choosing, or seek legal aid to help pay for his own lawyer or interpreter. Unbeknown to GM at the time, it now appears, based on information from the Portuguese ministry of justice, that the temporary legislation contained a provision allowing suspects to request a one month stay of the proceedings to prepare their defence. Had a lawyer informed him of this, he could have taken advantage of it.

There were only two court-appointed lawyers for the 14 defendants and they were not given the time or opportunity either to cross-examine prosecution witnesses or to call witnesses for their own clients who could support their alibis and offer character evidence. The court-appointed interpreter translated for all 14 defendants, communicating with one, who would then convey the information to the others as best he could.

Garry Mann's EAW

For reasons that are entirely unclear, GM is now threatened with extradition to serve his sentence, having been served with a European Arrest Warrant in March 2009, despite never having returned to Portugal and having been in no trouble since. He is challenging his extradition.

In part because of his inability to instruct his own lawyer properly in good time before his trial and his unawareness of his legal right to a one month stay of proceedings, GM now faces a real risk of having to serve a jail sentence in Portugal for a crime he did not commit. This conviction was branded by

District Judge Stephen Day[1] as having been "*obtained in circumstances that are so unfair as to be incompatible with the Respondents' right to a fair trial under Article 6 ... [inter alia, because they] ... had inadequate time to instruct lawyers to conduct their defence appropriately*".

FTI believes that extradition in these circumstances would amount to an abuse of process. The extradition hearing will take place on 29 July 2009 at 2pm at the City of Westminster Magistrates Court.

Communication with Relatives, Employers and Consular Authorities

In a number of cases we have seen unacceptable delays in allowing suspects to speak to family or consular officials. This causes prejudice to their ability to organise legal representation as well as unnecessary vulnerability to them and concern to their relatives. If they are absent from employment without explanation this can also cause problems for them. It is important to remember in this context that suspects are just that: they are entitled to a presumption of innocence and denying them basic communication rights is not consistent with this.

Green Paper on the Right to Review of the Grounds for Detention

Case study 1: Klaas Jan Bolt (KB), Dutch national detained in France

KB, a lorry driver, was hired by a Dutch transport company to make several trips between Spain and Netherlands in late 2004 and early 2005. During one such journey, he noticed he was being followed by a van. He stopped, checked his load and found cannabis hidden inside one of the containers. He immediately notified the Spanish police but was unable to make himself understood. He next telephoned his wife, who contacted the Dutch police. They advised him to abandon the lorry and return to the Netherlands and he followed their advice. Meanwhile, KB's former boss was arrested in France for possession of 4 tons of cannabis. Subsequently, KB was arrested in the Netherlands under a European Arrest Warrant and was extradited to France in the spring of 2005, having been falsely accused by his former boss of being part of the drug-smuggling operation. His accuser has since admitted he lied about KB's involvement in letters of apology written to KB's family, but this has unfortunately not led to KB's release.

Having been extradited to France in Spring of 2005, KB's trial was not conducted until Spring 2008. During this 3 year period he was remanded in custody, hundreds of miles from his family and unable to earn a living or provide for them. (He was ultimately convicted and sentenced to five years: there were serious concerns expressed over the adequacy of interpreting and legal representation.)

Case study 2: Joseph Mendy (JM), British national detained in Spain

The case of JM, referred to above in the context of the EAW, is another example of how suspects' personal lives can be severely blighted by the threat of needlessly lengthy pre-trial detention: in this young man's case, leading to pressure to plead guilty when he would have preferred to fight the charges.

[1] In an unsuccessful application for a football banning order brought by the Commissioner of Police against Garry Mann in July 2005

Conclusion

FTI is grateful for this opportunity to provide our initial views on the Stockholm Programme and illustrate them with some of our clients' experiences. We would be delighted to deal with any queries on this Submission: contact details are provided on page 2.

Fair Trials International **9 July 2009**