

Legal Experts Advisory Panel

FAIR TRIALS
INTERNATIONAL



**Fair Trials International and JUSTICE Response
to the Balance of Competences Review on police and
criminal justice**

Introduction

1. Fair Trials International (Fair Trials) is a non-governmental organisation (with offices in London and Brussels) that works for fair trials according to internationally recognised standards of justice. Fair Trials helps people to understand and defend their fair trial rights; addresses the root causes of injustice through its law reform work; and undertakes targeted training and networking activities to support lawyers and other human rights defenders in their work to protect fair trial rights. Fair Trials coordinates the Legal Experts Advisory Panel (LEAP), a pan-European network of over 150 criminal justice experts from all 28 EU Member States, of which JUSTICE is a member.
2. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
3. This response focuses on the civil liberties implications of EU cooperation in criminal justice matters and answers the questions posed by the Review from this perspective. Our answers are therefore given by way of questions 17 to 21.
4. While the Review has indicated that its assessment will focus on post-Lisbon Treaty measures, in our opinion it is necessary to consider the impact of pre-Lisbon measures as an indication of the effect EU cooperation is having on the fundamental rights of EU citizens, and the impetus for the establishment of EU minimum standards for suspects and accused persons and victims set out in Article 82(2) of the Treaty on the Functioning of the European Union (TFEU).

17. What are the advantages and disadvantages to the UK of EU action in the field of minimum standards in criminal law and procedure?

5. Mutual recognition measures were adopted prematurely. Experts agree that it was necessary to audit and improve the procedural safeguards for defendants and complainants across the member states before judicial cooperation could work. The EU Council of Ministers assumed that member states trusted each other's regimes,¹

¹ Developed during the UK Presidency of the EU in 1998, Cardiff European Council, Presidency Conclusions, 15 and 16 June 1998, SN 150/1/98 REV 1, pp 14 and 15; Commission Communication, *Mutual Recognition of Final*

but this was proven not to be as straight forward once the European arrest warrant began to operate and grounds of refusal were invoked.²

6. Minimum standards were confirmed to be necessary following a protracted negotiation commencing in 2002³ at the time the European arrest warrant was conceived.⁴ Many member states, including the UK, were not however convinced that EU action was necessary in this area due to en bloc membership of the European Convention on Human Rights (ECHR).⁵ Experience in a number of well-known cases, such as those of Garry Mann, convicted in a fast-track trial deemed unfair by a British court, and Andrew Symeou, detained in appalling conditions in Greece, highlighted the dangers of this assumption. In fact, detailed research over more than a decade has repeatedly shown that the ECHR is an insufficient tool to ensure effective protection of suspects' and accused persons' rights in the context of

Decisions in Criminal Matters, COM(2000) 495 final 2. This single market concept has been described as applying crudely given the different nuances and justifications for penal policy between the member states, see V. Mitsilegas, *The constitutional implications of mutual recognition in criminal matters in the EU*, CML Rev. 43 (2006) 1277-1311, and P. Craig, *The Lisbon Treaty* (OUP, 2010), p 373 and references at n. 134 therein. Nevertheless, the statement in the Presidency Conclusions explained that it intended:

Enhanced mutual recognition of judicial decisions and judgment and the necessary approximation of legislation would facilitate co-operation between authorities *and the judicial protection of individual rights*. (emphasis added)

And also the Commission Communication on Mutual Recognition confirmed that:

[I]t must therefore be ensured that the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the principle [of mutual recognition] but that the safeguards would even be improved through the process.

² G. Vernimmen-Van Tiggelen and L. Surano, Institute for European Studies, Université Libre de Bruxelles ECLAN – European Criminal Law Academic Network, *Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union*, EC DG JLS (20th November 2008), ; European Parliament, DG Internal Policies of the Union, Policy Dept C, Citizen's Rights and Constitutional Affairs, *Implementation of the European Arrest Warrant and Joint Investigation Teams at EU and National Level*, PE 410.6 (7th January 2009).

³ JUSTICE issued a briefing in 2002 calling for procedural safeguards, as well as other NGOs and the European Parliament. The Commission issued a green paper in response, COM (2003) 75 final, which led to a Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final.

⁴ Council framework decision, of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), O J L190/1 (18.7.2001).

⁵ UK House of Lords European Union Committee, *Breaking the deadlock: what future for EU procedural rights?*, 2nd Report of Session 2006-2007, HL Paper 20 (TSO, 2007) and UK House of Lords European Union Committee, *Procedural rights in EU criminal proceedings - an update*, 9th Report of Session 2008-2009, HL Paper 84 (TSO, 2009).

mutual recognition arrangements.⁶ Moreover, all member states (some considerably more than others) have been found by the European Court of Human Rights to repeatedly be in violation of rights pertaining to criminal justice procedure already set out in the ECHR.

7. Between 2009 and 2013, Member States were found to be in violation of the rights to liberty and a fair trial in 640 criminal cases.⁷ In 2013 alone, Bulgaria, Greece and Poland were found in breach of Articles 5 and 6 in over 50 criminal cases. Violations of Articles 5 and 6 in criminal cases made up the majority of the violations found by the ECtHR against them, suggesting standards lag behind in this area. This is borne out by practical experience: from 2011 to 2013, of the people who contacted Fair Trials International from EU countries, 1 in 5 reported being denied access to an interpreter or to translations of key documents, 1 in 10 reported being denied information about their rights or the reason for their arrest and 13% reported being denied access to a lawyer following their arrest.
8. It was therefore acknowledged in the signing of the Resolution for a Roadmap on procedural rights that the EU should enhance rights protection for suspected and accused persons within the EU.⁸ Recognition by the EU in the Lisbon Treaty and implementing law that these safeguards are necessary and the commitment made to introduce them is a positive and welcome advancement of EU competence.

⁶ See T. Spronken and M. Attinger, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, (University of Maastricht/ EC, DG JLS, 2005); Tilburg, Griefswald, *An Analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU*, Draft Introductory Summary, EC DG JLS/D3/2007/01, (2009); T. Spronken et al, *Effective Criminal Defence in Europe* (Intersentia, 2010); T. Spronken, *EU-wide Letter of Rights in Criminal Proceedings: Towards Best Practice* (University of Maastricht/Bundesministerium der Justiz, 2010); E. Cape and Z. Namoradze, Legal Aid Reformers Network, *Effective Criminal Defence in Eastern Europe* (Soros Foundation-Moldova, 2012); S. Schumann et al, *Pre-trial Emergency Defence* (Intersentia/NWV, 2012); J. Blackstock, *European arrest warrants: Ensuring an effective defence* (JUSTICE, 2012); Fair Trials International, *Advancing defence rights in the EU* (2012); J. Blackstock et. al, *Inside Police Custody: An Empirical Account of Suspect's Rights in Four Jurisdictions* (Intersentia, 2012).

⁷ See Fair Trials International, Stockholm's Sunset: New horizons for justice in Europe, March 2014, paragraph 14. Individual countries' performance can be viewed on Fair Trials' defence rights map at <http://www.fairtrials.org/justice-in-europe/>.

⁸ Resolution of the Council of 30 November 2009, *on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, OJ C 295/1 (4.12.2009).

9. The advantage of action in this field is that people living in and moving between EU countries will have the protection of certain minimum standards throughout the EU. For countries like the UK, which already has extensive procedural safeguards, this means that British nationals will be able to exercise more of the minimum protections available to them at home should they become embroiled in the criminal justice system in another member state.⁹ Promotion of fair trial rights can alleviate some of the concerns about the swift and cursory operation of mutual recognition decisions.
10. The only disadvantage to the UK of improved rights protection for suspects and accused persons is the possibility that some EU proposals enhance standards within the UK that are not yet available for people under existing law, and changes are therefore required to UK law. For example, in Scotland until 2010 it was not possible to receive the assistance of a lawyer during police detention. While a challenge taken to the UK Supreme Court established the right to legal assistance,¹⁰ its operation in practice is still very limited.¹¹ The EU Directive on the right to a lawyer¹² would ensure that the right is more effective and meaningful in practice than is currently the case, but the UK has not yet opted into this measure. Moreover, the EU Directive on the right to information¹³ requires the provision of a letter of rights to all arrested persons. Scotland did not provide this letter or notice until required to do so by the Directive,¹⁴ although a Notice of Rights and Entitlements has exists in England and Wales for many years.¹⁵

⁹ According to statistics of the Foreign and Commonwealth Office, in 2012/13 the number of arrests for all offences involving British nationals abroad was 5,435.

¹⁰ *Cadder v HM Advocate* [2010] 1 WLR 2601.

¹¹ As recorded in *Inside Custody*, note 6 above, chapters 6, 7 and 8.

¹² Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ (6.11.2013) L 294/1.

¹³ Directive 2012/13/EU on the right to information in criminal proceedings, OJ (1.6.2012) L 142/1.

¹⁴ See <http://www.scotland.gov.uk/Topics/archive/law-order/letterofrights>

¹⁵ Available at <https://www.gov.uk/notice-of-rights-and-entitlements-a-persons-rights-in-police-detention> The Directive also requires more information about the circumstances of the case against the arrested person to be provided during police detention so as to ensure that the person can effectively exercise their defence. The Home Office recently consulted to amend the Police and Criminal Evidence Act Codes of Practice to give effect to the Directive, see <https://www.gov.uk/government/consultations/revised-pace-codes-and-nores> The PACE Codes and Criminal Procedure Rules (and their equivalents in Scotland and Northern Ireland) were also amended to give effect to the Directive on the right to interpretation and translation, see <https://www.gov.uk/government/consultations/revised-pace-codes-of-practice-c-and-h>

11. We see these amendments as a positive step for improving the practical availability of rights for suspects and accused people in the UK rather than a disadvantage.

18. To what extent is EU action in this area effective in raising standards, or enhancing cooperation? And to what extent is it necessary? And to what extent is the EU the most appropriate level for action in the field of minimum standards in criminal law and procedure?

12. The EU has now passed three Directives¹⁶ binding upon most¹⁷ member states, that are enforceable by individuals through domestic courts and, if a reference is made to it, the Court of Justice of the European Union (CJEU). Three more are currently passing through the EU legislative process and should be adopted over the course of the next year.¹⁸ As to whether this has led to improved standards is difficult to assess at this stage, since the first Directive only came into force in November 2013, the second June 2014 and the third does not have to be implemented until 2016. The first three measures provide detailed, concrete provisions that clearly identify the procedural right and set out the steps necessary for member states' authorities to take in order to ensure that rights enacted can be effectively exercised. The level of prescriptive detail, and the possibility for individuals to invoke procedural safeguards during proceedings represents a clear benefit over nebulous ECHR principles, which leave it to a Contracting State to achieve overall fairness through its national law and procedure. These measures are essential to the raising of standards.

13. A simple example is provided by the issue of access to the case-file in Poland. The requirement to provide access to case documents necessary for challenging detention has long been part of ECtHR case-law. Poland (where many people are extradited from the UK) has been found in violation of this principle by the ECtHR on several occasions. Yet it is only through legislation taking effect on 2 June 2014, implementing the Right to Information Directive, that the practice of withholding the

¹⁶ Directives noted at 10 and 11 above, as well as Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings OJ (26.10.2010) L 280/1.

¹⁷ With some exceptions due to Protocols 21 and 22 to the Treaty on the Functioning of the European Union enabling the UK, Ireland and Denmark to opt out of laws relating to the Area of freedom, security and justice.

¹⁸ Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings COM(2013) 822/2; Proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings COM(2013) 824; Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings COM(2013) 821/2.

file was addressed in procedural changes.¹⁹ The prospect of Commission enforcement of a directive makes it much harder to ignore. This shows the added value of these measures.

14. As regards the subsequent three measures, which target important areas of the right to a fair trial, the UK has indicated (with the possible exception of the proposed directive on safeguards for children) that it will not participate. This is disappointing, as the UK could otherwise help shape their content. For instance, the measures currently contain broad, generalised principles and the UK could work to convert these into more practical, detailed provisions along the lines of the first three directives, which would be more readily invoked by individuals (not least UK citizens arrested abroad) and require less interpretation by the CJEU.
15. Measures adopted at EU level to enhance procedural safeguards are necessary, since other international and regional treaties or agreements have failed to ensure compliance with minimum standards across the member states. Moreover, the ECtHR has, on procedural matters offered a wide margin of appreciation to member states in terms of how they apply the ECHR. Findings of the Court are in any event not made until a considerable period of time after conviction due to the requirement for domestic remedies to be exhausted and the volume of cases before the court.

For example, access to a lawyer during police detention varies widely between EU nations. Article 6 ECHR sets out a clear right to be assisted by a lawyer, and a Grand Chamber judgment of the ECtHR declares that the right to a fair trial will be irretrievably prejudiced where access to a lawyer is denied during police detention.²⁰

16. Yet, across the EU, this right is not universally available in law or in practice. To take three similar Western countries, the UK, France and the Netherlands, there are three very different systems in place:
 - In the UK, the right applies to all persons from the point of arrest and encompasses private advice and active representation in interview.

¹⁹ See Helsinki Foundation for Human Rights, *Abuse of pre-trial detention in Poland as a result of the limited access of suspects and defence lawyers to case-files*, November 2013.

²⁰ *Salduz v Turkey* (2009) 49 EHRR 19. The ECtHR has underlined that: 'the accused person is particularly vulnerable given the stage of proceedings and complexity of the law. In most cases this can only be compensated by a lawyer whose task, amongst other things, is to ensure respect of the right not to incriminate oneself', at [54].

- In France, the right applies to all persons from the point of arrest, and encompasses private advice but only presence in interview. The lawyer can only make representations after the interview has concluded.
- In the Netherlands, the right to advice prior to interview applies to all persons from point of arrest. Only children are entitled to active representation in interview, either by a lawyer or their parent or guardian.²¹

In many other member states a right of some kind exists, but the police do not effectively facilitate the exercise of that right such that they have completed their interview, investigation, charged the suspect or even taken them to court before a lawyer is informed that their assistance has been requested.²²

17. This is one, basic example of the differences between member states. Experts' meetings held by Fair Trials have pointed to various other common issues such as inadequate assessment of interpretation needs, poor quality interpretation, inadequate notification of procedural rights, restricted access to case materials (even when a person is detained pre-trial) and unreliable 'waivers' of the right to a lawyer.
18. There is a particular need for improvement amongst EU member states to ensure that EU citizens receive at least a minimum standard of rights protection wherever they travel or mutual recognition instruments are applied. The EU is the most appropriate body to achieve action in this area because the need has been created by the agreement and application of mutual recognition instruments. This is the legal basis set out in article 82(2) TFEU. The European arrest warrant has graphically demonstrated the difference in regimes between member states and led, particularly in the UK, to protracted litigation regarding the human rights standards applied in other member states, with regard to fair trial rights and conditions of detention in particular. In order for mutual recognition instruments to operate effectively and fairly for the affected person, it is appropriate for the EU to take steps to ensure procedural rights are available and effectively protected across the EU.

19. Could the EU use its existing competence in this area in a different way which would deliver more in the UK national interest?

²¹ See *Inside Police Custody*, note 6 above, chapter 2.

²² See the Effective Defence Rights and Fair Trials International studies recorded in note 6 above.

19. As set out above, in our view it is in the UK's interest for the EU to exercise its competence through adopting binding directives that aim to create minimum procedural safeguards. For one thing, it is a fundamental principle of UK common law that people receive a fair trial and are able to effectively exercise their defence. Where research demonstrates flaws in that system, it is appropriate that they be addressed, be it under the auspices of EU legislation or through national instigation. In our view, the only way of ensuring that the rights of British citizens are protected in other EU countries is through the adoption of binding common EU standards.
20. We do not consider that recommendations or other soft law measures carry sufficient weight to encourage member states to improve their systems. This is demonstrated by the dismissal of measures already taken to improve the EAW regime.²³ It is also demonstrated by the repeat violations of the ECHR and failure to implement decisions of the ECtHR, which do not require national legislation to be interpreted in conformity as EU law does.

20. What future challenges do you see in the field of minimum standards in criminal law and procedure and what impact might this have on the national interest?

21. The continuing challenge in this area has two aspects: (i) ensuring the protection of defence rights remains a priority, and (ii) ensuring existing mutual recognition systems incorporate more effective opportunities for individuals to invoke refusal grounds.
22. First, ensuring that procedural safeguards continue to be a priority on the EU Justice and Home Affairs agenda, and that instruments adopted are implemented effectively across the member states, will enable wholesale minimum standards to actually be achieved. In a time of austerity, the enhancement of suspect's rights is not a priority for national governments. Some of the proposals will be costly, such as the provision of suitably qualified interpreters and translators. The continued progress towards adoption of further procedural safeguards is already under pressure with the most recently proposed directive on the right to legal aid containing very limited requirements, and the proposed directive on special safeguards limited to children. It is important to retain some ambition so as to achieve the objective of more effective

²³ See notes 21, 22 and 23 above.

procedural rights protection which the UK and other Member States agreed upon in 2009 as essential to making mutual recognition work.

23. In particular, in our view, action at EU level is needed to restrict the unjustified use of pre-trial detention and address unsuitable conditions, a problem demonstrated in detailed evidence to the Commission.²⁴ This is the primary area in need of reform. Overcrowding is a significant problem across Europe and people should not be surrendered or transferred to overcrowded cells. Her Majesty's Chief Inspector of Prisons recently expressed concern that almost all prisons in England and Wales are overcrowded.²⁵ A major driver of the overcrowding problem is the excessive recourse to pre-trial detention resulting from inadequate decision-making in each case, something flagged as a major issue in experts meetings held by Fair Trials over the course of 2012-13 in six EU countries.
24. Secondly, the challenge is to ensure that mutual recognition and legal assistance instruments themselves provide mechanisms for affected persons to make representations and invoke postponement or refusal grounds where it is appropriate to do so. Improvements by way of harmonised procedural safeguards will have minimal effect unless the instruments that, by virtue of article 82(2) TFEU, they seek to enhance include the opportunity for the affected person to be heard on the application against them. Only the European arrest warrant expressly requires the provision of access to a lawyer and a hearing before a judicial authority.²⁶ Yet the operation of the enhanced extradition regime provided by the European arrest warrant has revealed numerous procedural problems. Recommendations for reform have been made by the EU Council,²⁷ the Commission,²⁸ and the Parliament,²⁹ none

²⁴ The Commission issued a 'green paper on the application of EU criminal justice legislation in the field of detention', 30.11.2011 to which it received considerable response from the member states and NGOs, all of which, and an analysis of the replies, are available here:

http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm

²⁵ See BBC news report and statistics highlighted therein: <http://www.bbc.co.uk/news/uk-politics-27875259>

²⁶ Pursuant to articles 11 and 14.

²⁷ EAW Handbook at 17195/1/10, 17 December 2010; Council, *Final report on the fourth round of mutual evaluations - The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States*, 8302/2/09, 28 May 2009, and the Presidency *Follow-up report to the evaluation reports*, 15815/1/11, 18 November 2011.

²⁸ *Report from the Commission to the European Parliament and Council, on the implementation since 2007 of the Council Framework Decision of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States*, COM(2011) 175 final, 11 April 2011.

²⁹ European Parliament, *Report with recommendations to the Commission on the review of the European arrest*

of which have yet made a difference to the operation of the warrant in practice. The UK has sought to address concerns expressed by practitioners about the operation of the warrant and its effect upon requested people from the UK through amending the national implementing legislation.³⁰ While this may afford greater scrutiny and refusal powers to UK judges of incoming requests, this unilateral action could be criticised by other member states and may make mutual recognition of the EAW difficult.

25. A multitude of other mutual recognition instruments provide no mechanism by which the affected person can be heard, and leave this to national law to provide. Even the European Investigation Order, which demonstrates the success of co-decision and the experience of mutual recognition in practice, by way of its scrutiny mechanisms, only provides for 'legal remedies'.³¹ It is not clear how these will operate. It seems clear to us that only common legislative action at EU level will ensure member states actually make the changes that have been repeatedly recommended to give requested and affected persons a fair process.
26. We also believe that the legal tests for refusal of requests on human rights grounds are in need of review as the courts have not inferred meaningful safeguards. The 'flagrant denial of justice' test applicable in the UK for refusal of an EAW where the requested person argues that a fair trial will not be possible in the issuing state for instance, is essentially theoretical, having never been successfully invoked in ten years of practice as far as we know. This is despite the EU adopting procedural safeguards directives on the acceptance of inadequate protection of fair trial rights in the EU. A more effective challenge to execution would involve not just the availability of an avenue of challenge supported by legal assistance, but a more realistic assessment of rights-based arguments, with compliance with the Directives in the issuing state the obvious yardstick.
27. Unless these instruments afford a voice and effective procedural safeguards to individuals, there will continue to be inequality of arms between prosecuting authorities and those affected. The UK should be prioritising these measures above

warrant, A7-0039/2014, 22.1.2014.

³⁰ Extradition Act 2003, as amended by Part 12 of the Anti-Social Behaviour, Crime and Policing Act 2014.

³¹ Article 14 of Directive 2014/41/EU regarding the European Investigation Order in criminal matters OJ (1.5.2014) L 130/1 provides for legal remedies equivalent to those available in a similar domestic case.

all other work in the Justice and Home Affairs field, to ensure that mutual recognition and assistance is provided in circumstances where it is just and appropriate to do so.

28. We also consider it worth pointing out that any future legislation in this area will be the result of careful reflection anchored in the real needs of mutual recognition. The Strategic Guidelines³² recently adopted are brief. They cover future activity in the area of freedom, security and justice and are in stark contrast to the Stockholm Programme³³ and its action plan³⁴ for the period 2009-2014, which set out an ambitious legislative programme. They place the onus upon implementation of the existing *acquis* following a period of heavy legislative activity. Where further legislative action proves necessary, it will be to ensure the functioning of mutual recognition systems – with detention a likely candidate given its impact upon mutual confidence – and thus unlikely to be otherwise than in the national interest and that of UK citizens arrested abroad.

21. Are there any other general points in relation to this area that you wish to make which are not captured above?

29. On the international stage, UN Guidelines have been agreed on various aspects of these rights that all EU member states have signed up to, and in many respects there are now more advances than in EU provisions.³⁵ Likewise, third country agreements, dialogue with third nations, and diplomatic negotiations are taking place with the aim of improving human rights standards. The UK continues to be looked upon as a country with one of the best law enforcement systems as well as procedural rights protections in the world, and is an example to countries around the world that it is possible to combine the two endeavours. Internationally the UK seeks the

³² European Council Meeting 26/27 June Conclusions, EUCO 79/14, (Brussels, 27 June 2014), available at: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf, see pages 5 and 6.

³³ European Council, the Stockholm Programme — an open and secure Europe serving and protecting citizens (2010/C 115/01), OJ (4.5.2010) C 115/1.

³⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 April 2010 – Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme, COM(2010) 171 final

³⁵ See United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UNGA Resolution 67/187 20 December 2012 (UNODC, 2013); Basic Principles on the Role of Lawyers, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 118 (1990); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA Resolution 43/173 (1988).

improvement in standards. But these are of course unenforceable. By contrast, in the EU, where rights are enforceable, the UK is increasingly reluctant to engage in the advancement of procedural safeguards. We are concerned that UK disengagement in the EU may weaken its position in attempting to improve standards in non-EU countries.

30. We are also concerned at the UK's reluctance to engage in the provision of procedural safeguards amongst EU member states. While the UK may be reluctant to engage in further cooperation measures, ensuring procedural safeguards are in place in respect of existing measures is a clear priority. Yet the UK approach to newly proposed measures appears to be to review whether they conflict with existing UK law, rather than whether UK law could be enhanced to meet the envisioned enhanced standards.³⁶ We believe this is an unhelpful approach. The proposals provide an impetus and justification to raise standards that otherwise would not be a domestic priority, acknowledging evolving standards across Europe and substantial research to indicate that certain procedures are inadequate.
31. Subsequent to the agreement of the Lisbon Treaty there has been an improvement in decision making as a result of co-decision, producing much more concrete, clear and robust instruments. The EIO is a prime example of this. The strength of the final measure from a fairness perspective is a result of the involvement of the EU Parliament, but also member states drawing on experience of the EAW and the need for greater scrutiny of requests, and human rights refusal grounds. Significantly, the UK led a successful push for improved procedural safeguards in the measure.³⁷ It also called for a practical measure to ensure the right of access to a lawyer is effective in the recently adopted Directive, through facilitation of a request for legal assistance.³⁸

³⁶ For a recent example, see the debate on the three proposals for directives on the presumption of innocence, legal aid and child suspects, HC Debates, 18 March 2014, cols 726-746.

³⁷ The documentation showing member states' specific involvement is not publicly available, but the issues of concern were raised early in discussions and are summarised in a 'Follow up Document' to a meeting of the criminal law working party held 12-13 July 2010, ref 12201/10 (Brussels, 20 July 2010), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012201%202010%20INIT> with other relevant documents available through a search of the documents stored on the Consilium website.

³⁸ Again, there are no public documents recording this concern, but it is clear that it was discussed from the documentation that has been published, see 'Selected Outstanding Issues' paper, ref 9270/12 (Brussels, 3 May 2012), available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209270%202012%20INIT>

32. But by repeatedly failing to engage, the UK cannot continue to influence other member states as forcefully to improve their standards to reach those that already exist in the UK. For example, where the child was not present at the trial determining their guilt, article 16 of the proposed directive on procedural safeguards for children affords the right to be present 'at a procedure', but only requires examination of new evidence. This would not comply with the conditions of a re-trial required by UK law in section 20(8)(b) Extradition Act 2003.³⁹ If the UK were fully engaged with the directive, it would be able to seek clarity over this provision resulting in stronger defence rights. That would improve the position for British people facing re-trial in countries such as Italy and Romania where only a review of the conviction is possible.

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³⁹ Which includes the right to defend oneself and examine witnesses.