

BACKGROUND

1. Fair Trials International ('Fair Trials') submits these written comments in accordance with the permission to intervene granted by the Registrar of the Grand Chamber by letter of 1 September 2015 in accordance with Article 36(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'Convention') and Rule 44(3) of the Rules of the Court.

INTRODUCTION

Context of the intervention

2. Police responding to urgent public security challenges may need to take urgent action to safeguard the lives of others and/or prevent substantial jeopardy to criminal proceedings. This may require them to question a suspect without a lawyer present. When derogations on access to a lawyer are validly applied for this preventive purpose, can the evidence so obtained be imported into the substantive criminal case and used to found the conviction against the accused?
3. The answer turns upon the principle in *Salduz v. Turkey*:¹ 'Article 6 § I requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction'² (we refer to this hereafter as the '*Salduz* principle').
4. The concept of 'compelling reasons' which might justify restrictions on access to a lawyer has been touched upon only cursorily since, and we know of no case where the test has been met.³ It has, consequently, not been made clear from the case-law whether evidence obtained in the absence of a lawyer pursuant to a restriction due to a compelling reason may be used to convict the accused without infringing the above principle. This intervention seeks to assist the Court on those points.

Scope of the intervention

5. Fair Trials will make the following submissions. The right of access to a lawyer is an essential safeguard extending beyond safeguarding the suspect's right to silence (**Part A**). However, this right is insufficiently protected in the EU, notably due to practices of questioning suspects without lawyers present without adequate justification and ineffective remedial action by the national courts (**Part B**). Accordingly, the EU adopted a Directive enshrining the right of access to a lawyer, limiting the possibilities of derogation from that right and imposing a general remedial duty upon national courts where derogations have been exercised; the Court is free to take this measure into account, irrespective of whether the Contracting State concerned is or is not an addressee of the

Directive (**Part C**). In light of its own case-law, national practice and EU law, the Court should make it clear that (1) derogations from the right of access to a lawyer should be limited and based on concrete risks identified case by case, and not be based upon inappropriate assumptions about possible collusion with criminal activity by lawyers, and (2) the rights of the defence will be irretrievably prejudiced if evidence obtained in the context of a derogation – even lawful – has a bearing of any kind (even if it is not decisive) upon a conviction (**Part D**).

6. Our submissions as above are based on our reading of the present legal situation. The Court applies the jurisprudence at the time of its judgment (see, for instance, *Brusco v. France*,⁴ relating to facts dating back to 1999 and decided in 2010 in light of *Salduz*, decided in 2008). This intervention therefore assumes the Court may take full account of the enhanced recognition of the right to a lawyer in the years since *Salduz*, as shown inter alia by the adoption of the EU Directive in 2013.

A – THE RIGHT TO A LAWYER

7. The Court has rightly recognised that the lawyer plays a key function in the early stages of criminal proceedings. Though it has noted that the lawyer's task is, 'among other things, to help ensure respect of the right of an accused not to incriminate himself',⁵ it has recognised that the role is broader than that. In *Dayanan v. Turkey*⁶ it referred to 'the whole range of services specifically associated with legal assistance', including 'discussion of the case', 'organisation of the defence' and 'preparation for questioning'.⁷ The Court has thus specified that the right to a lawyer and the right to silence are 'distinct rights'.⁸ Fair Trials underlines the importance of this distinction, which reflects the fact that prejudice may arise against a suspect in a variety of ways, aside the making of confessions, which may be countered only with the benefit of legal advice.
8. Of course, one way in which prejudice may arise is through the possibility of a suspect's silence being held against him, as in *John Murray v. United Kingdom*;⁹ the Court made clear that this 'fundamental dilemma' could be addressed only with the benefit of legal assistance. Equally, prejudice may arise from the use of exculpatory remarks made at the early stage. In *Saunders v. United Kingdom* the Court recognised that 'testimony which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case'.¹⁰ Though that case was decided by reference to the right not to incriminate oneself, the Court found a violation of Article 6(3)(c) in *A.T. v Luxembourg*¹¹ on the basis that exculpatory statements (denials of the allegations) made following a restriction on access to a lawyer were deployed later in proceedings to impugn the accused's credibility, confirming that the 'whole range of services' provided by the lawyer includes protection of the accused against this form of prejudice.
9. Fair Trials would therefore underline at this stage that the lawyer's presence serves not only to remind the accused of his right to silence, but more generally to help a suspect understand his legal

situation and the legal consequences of choices made at this stage. We have previously underlined in our intervention in *A.T. v. Luxembourg*¹² that the assistance of a lawyer encompasses aspects such as ensuring a suspect's rights as conveyed to him by the authorities have been understood, enabling him to make an informed decision as to whether and how to respond.¹³

10. We would observe here that this might extend to correcting inaccurate information about procedural rights given by police, e.g. if the wrong caution is used. A lawyer's assistance in early proceedings might, equally, include answering questions of the suspect as to the meaning of abstract phrases words such as 'anything you say may be given in evidence', the meaning of which is not necessarily self-evident to a lay suspect. The suspect may have questions about his procedural rights or the consequences of waiving them which he would be unwilling to ask a police officer in questioning, hence the importance of the private consultation with a lawyer prior to interrogation.¹⁴ On the basis of the above we take as our starting point for this intervention that it is only with the benefit of legal advice that a suspect can be deemed to be sufficiently aware of the consequences of his choices as to become responsible for any prejudice arising against him from those choices.
11. Of course, the lawyer's role extends beyond even matters relating to the conduct of the defence in criminal proceedings, such as acting as a safeguard against inhuman or degrading treatment and arbitrary detention. Essentially, even if no prejudice accrues to the fairness of a trial, limiting access to a lawyer is a serious thing, which should inform the Court's approach under Article 6.

B – DIFFICULTIES IN ACCESS TO A LAWYER

12. Given the importance of the right to a lawyer, it is significant that there are practices within the EU, either as a result of legal provisions or practical issues, resulting in questioning taking place in the absence of lawyers. We refer in this regard to communiqués summarising the content of meetings hosted by Fair Trials with criminal lawyers and other legal experts in 2012-13 under the series 'Advancing Defence Rights' ('ADR'). The documents are not intended to be exhaustive accounts of national law and practice, but flag up key defence rights issues as highlighted by practitioners, who participate pro bono in these initiatives. We have sought to complete the information with current legislative information in a few cases by contacting LEAP members.

Issue 1: legal regimes providing for questioning without lawyers present

13. One concern, chiefly relating to France, relates to the practice of proceeding with questioning despite the suspect's wish to be assisted by a lawyer when the latter does not arrive promptly,¹⁵ as provided for by the Criminal Procedure Code (current Article 63-4-2). Under that regime, once a suspect has expressed a wish to be assisted by a lawyer, questioning cannot take place without a lawyer before two hours from the point at which the duty lawyer / bar is notified. Questioning may then be interrupted at the request of the suspect if the lawyer arrives afterwards to enable suspect and lawyer to meet.¹⁶ Fair Trials notes that, other than the need of police to conduct

enquiries within the period of *garde à vue*, there appears to be no substantive justification for this practice. Given the consequence – questioning without a lawyer – we find this concerning.

14. A more prevalent issue in the ADR meetings related to national law foreseeing the restriction of access to a lawyer on substantive grounds linked to the need to prevent interference with evidence or harm to third persons, usually in more serious cases (we omit the United Kingdom, assuming that the parties to the case will be addressing the Court on the United Kingdom’s legislation):

- a. In Malta, the law allows for compliance with a request for legal assistance to be delayed if a senior officer authorises such delay, where the latter has reasonable grounds for believing, *inter alia*, that the exercise of the right to a lawyer will lead to interference with evidence or physical injury to other persons, will lead to the alerting of other suspects or will hinder recovery of property. Once this authorisation is given, questioning may begin immediately. The delay in access to a lawyer may not exceed 36 hours from the time of arrest.¹⁷
- b. In France, the Criminal Procedure Code provides that access to a lawyer may be withheld for up to 12 hours upon the order of a prosecutor if this measure appears indispensable for ‘compelling reasons’ (*raisons impérieuses*)¹⁸ to enable urgent investigation to obtain or conserve evidence, or to prevent imminent harm to individuals.¹⁹ This may be extended to 24 hours upon application to a judge. Special provisions applicable in more serious cases provide for the possibility of access to a lawyer being withheld for 48 hours, or 72 hours in terrorism cases, again for compelling reasons (*raisons impérieuses*) linked to the conservation of evidence or the prevention of imminent harm to individuals. The *Conseil Constitutionnel* has underlined that these derogations must be justified by reference to the particular circumstances of the case.²⁰
- c. In Italy, in the course of preliminary investigations, access to a *private consultation* with the criminal lawyer may be suspended upon a reasoned order of the preliminary investigations judge on request of the prosecutor for a maximum of 5 days for ‘specific and exceptional precautionary reasons’, a power exercised by the prosecutor until the first judicial appearance if the person is arrested.²¹ This derogation does not apply to the rule regarding questioning, according to which the prosecutor must inform a lawyer 24 hours before any questioning or other investigative acts.²² Though that period may be reduced in case of absolute urgency, the requirement to notify a lawyer is not in itself derogable. Questioning itself thus cannot happen without a lawyer, unless (in theory) the latter chooses not to attend.

Issue 2: remedies and treatment of evidence obtained in absence of a lawyer

In general (when the right to a lawyer has been infringed)

15. Fair Trials recognises that rules concerning the admissibility of evidence are a matter for the Contracting States, but is mindful that these must in any case be such as to ensure proceedings are

ultimately fair.²³ The series of ADR meetings revealed a range of issues in relation to the remedies applied by the courts when there had been *violations* of the right of access to a lawyer.

16. In one ADR meeting, participants from Sweden noted that, in the absence of a clear exclusionary rule, the only remedy was to persuade the court to attach less credibility to the evidence; however, as written decisions did not visibly show what reliance was placed on the relevant evidence, it was difficult to assess whether this was done, and also precluded appeals on this basis.²⁴ In respect of Estonia, it was reported that there was no systematic exclusion of evidence obtained in breach of the right to a lawyer, meaning such evidence still had a bearing on decisions on the merits of cases; even if excluded, courts appeared from subsequent decisions to have been influenced by the evidence²⁵ (a point corroborated by the Court's own findings in *Martin v. Estonia*²⁶). Similarly, practitioners from Poland pointed out that evidence obtained in breach of the right to a lawyer can be considered by the courts, the only remedy lying in the reliability attached to that evidence.²⁷

In cases where derogations have lawfully been applied

17. We are unaware of specific legal provisions or litigation in relation to the question whether, in the jurisdictions mentioned in paragraph II above, evidence obtained in the context of a *derogation* on access to a lawyer may be used for the purposes of convictions. We would observe that in France, the general provision in the preliminary article, based upon the *Salduz* judgment, provides that a conviction may not be based *solely* on the basis of statements made without the assistance of a lawyer, indicating that (assuming derogations are lawfully applied, making the police custody formally valid) nothing prevents the evidence being taken into account by the trial court. Lawyers in the other jurisdictions mentioned confirmed that the point had not been specifically litigated.
18. On the basis of the above, we suggest to the Court that the dual question of (a) what justifications may be invoked for restricting access to a lawyer; and (b) the use made of evidence obtained in this context is a live issue in the EU and one upon which the Court's ruling may shed new light. As explained below, the Court should be aware that these matters are also regulated by EU law.

C – THE ACCESS TO A LAWYER DIRECTIVE

The Roadmap

19. Within the EU, concerns have arisen as to the failure of Member States to respect the Convention. As a result, in 2009, the EU adopted the Roadmap on strengthening procedural rights,²⁸ with the aim of providing stronger foundations for mutual recognition systems by building upon the protection ensured by the Convention through minimum rules on criminal defence rights.
20. The first two directives, Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings²⁹ and Directive 2012/13/EU on the right to information in criminal proceedings³⁰ (the 'Right to Information Directive'), are not of major relevance here. We would

however note in passing that the Right to Information Directive, which requires Member States to issue ‘letters of rights’ to arrested persons, insists upon ‘simple and accessible language’ about procedural rights.³¹ This reflects the fact that procedural rights are not self-evident concepts and underlining once again the importance of access to a lawyer in ensuring they are understood.

The Access to a Lawyer Directive

21. The third measure, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings³² (the ‘Directive’), is directly relevant to this case. Inspired by the Court’s *Salduz* judgment,³³ it lays down rules concerning the right of access to a lawyer, specific provisions on derogations and the application of remedies when derogations are applied or violations occur.
22. Article 3 enshrines the right to a lawyer. It requires that suspects or accused persons must have access to a lawyer without undue delay and in any case, ‘before they are questioned by the police or by another law enforcement or judicial authority’, upon the carrying out of an investigative step, and after deprivation of liberty. Article 3(3) specifies that the suspect must be able to meet in private with the lawyer prior to questioning; that the lawyer must be able to participate effectively in questioning; and that the lawyer be able to attend investigative and evidence-gathering acts.
23. Article 3 also permits derogations. Article 3(5) establishes a limited derogation, extending only to the timing of access to a lawyer, in cases of geographical remoteness. Article 3(6) establishes a more generalised derogation, providing that in ‘exceptional circumstances’, Member States may ‘temporarily derogate’ from the rights in Article 3(3) ‘to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons: (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings’. Article 8 also imposes ‘general conditions’ for the application of derogations: they should be proportionate, limited in time, not based only on the type or seriousness of the offence, must not prejudice the overall fairness of the proceedings and must be taken on a case-by-case basis by a judicial authority or subject to judicial review.
24. Article 12 of the Directive covers remedies, stating that ‘without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer *or in cases where a derogation to this right was authorised in accordance with Article 3(6)*, the rights of the defence and the fairness of the proceedings are respected’ (emphasis added). We return to these provisions in Part D of this intervention.

Interaction between the Directive and the Convention

25. It is well established that ‘the Convention must be interpreted in the light of present-day conditions’, having regard to changes in domestic legislation and international instruments. The Court regularly takes account of EU directives when interpreting provisions of the Convention.³⁴
26. The Directive’s recitals state that its provisions are intended to ‘[build] upon Articles 3, 5, 6 and 8 ECHR, as interpreted by [the Court], which, in its case-law, on an ongoing basis, sets standards on the right of access to a lawyer’. The Court is entitled to take account of it as an indication of what the Member States of the EU (a significant proportion of the Council of Europe) understand to be their essential obligations in this area, as informed by the Court’s own case-law.
27. Fair Trials made the same observation to the Chamber of the Fourth Section, including the current President of the Court, in *A.T. v. Luxembourg*, and notes that the Chamber referred to the Directive in emphasising the importance of a private consultation with a lawyer prior to questioning, noting that this was envisaged by Article 3(3) of the Directive.³⁵
28. The Directive will still be relevant if the case before the Court concerns an EU Member State not bound by the Directive due to opt-out provisions,³⁶ such as the United Kingdom. The Directive is no less an authoritative legal document relevant to the autonomous meaning of the Convention.
29. Equally, however, the Court’s interpretation of the Convention may, itself, impact upon the interpretation given to the Directive, due for transposition by November 2016. Recital 53 makes it clear that ‘provisions of the Directive which correspond to rights guaranteed by the ECHR are implemented consistently and as developed by the case-law of the [Court]’.

D – COMMENTS ON ARTICLE 6(3)(c)

The correct approach to derogations from the right of access to a lawyer

30. As noted above, the Court has yet to bring significant clarifications to the concept of ‘compelling reasons’ which may justify a restriction on access to a lawyer. The only indications as to what ‘compelling circumstances’ are arise from the Court’s case-law prior to *Salduz*, in particular previous cases against the United Kingdom in which access to a lawyer was withheld. In *John Murray v. United Kingdom*, access to a lawyer had been restricted on the basis that the police had reasonable grounds to believe that the exercise of the right of access would, inter alia, interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent such an act, which the Court did not doubt amounted to a lawful exercise of the power to restrict access.³⁷ In *Magee v. United Kingdom*,³⁸ in which access to a lawyer had been delayed on the same basis, the Court did not comment upon the justification invoked, though the same statutory provision was at issue.³⁹ As a third party, we will not comment on the facts of this case, though we note that the Chamber judgment appears to take a similar approach.⁴⁰

31. We would further note that the national laws above also refer to risks relating to the conservation of evidence and harm to third persons, suggesting that there is a common understanding of what matters may provide justification. Article 3(6) of the Directive also provides an indication of consensus in limiting derogations to two substantive bases: an urgent need to avoid adverse consequences for the life, liberty or physical integrity of a person, and where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.
32. This provision evidences general agreement that suspects may have to be questioned without lawyers present if urgent questioning is needed to prevent serious harm to the person or interference with evidence. Fair Trials does not take issue with this in principle. We also recognise that the existence of such grounds is better assessed by national authorities and that, as a subsidiary body, the Court's review is more appropriately focused on how such derogations are applied (the decision-making process, presence of safeguard etc.). We would, however, underline two aspects which we believe should feature prominently in the Court's own assessment.
33. First, derogations must, as the Directive indicates (in line with the indications of the French *Conseil Constitutionnel*) be applied only on the basis of the particular circumstances of the case, and respect strict limitations such as those in Article 8 of the Directive, including limitation to that which is necessary, strict time limitation, and not based solely on the type of offence at issue. In principle, derogations should naturally be limited to the time it takes to secure the presence of a lawyer and arrange for a consultation with the suspect. Restricting the right beyond this point assumes that communication with the lawyer raises risks of information passing through the lawyer and, with that, leading to interference with evidence or harm to other persons.
34. Second, in that regard, any derogations regarding risks to evidence should not be based upon inappropriate assumptions as to potential collusion with criminal activity by lawyers. The Court should look for evidence and reasoning put forward at the time of the application of the derogation to show that the authorities were guided by concrete facts. Indeed, to return to the French example, a lawyer is prohibited by the Criminal Procedure Code from revealing to any person information obtained in conversations with the suspect or from consulting transcripts during the police custody period⁴¹ (breaches of the rule render the lawyer liable to criminal sanction) so a clear factual basis is needed to suppose the existing protections are insufficient. We would underline that if authorities have grounds to suspect unlawful activity by a lawyer of the suspect's choosing, proportionate steps (e.g. providing an alternative lawyer) may be taken without denying access to a lawyer altogether.

Remedies where access to a lawyer restricted

35. The question remains, what are the requirements of Article 6 when access to a lawyer is restricted by the application of a derogation? As explained below, (a) the approach is the same regardless of whether the lawyer is absent by reason of a lawful derogation or an unlawful restriction; and (b) a

conviction will be unfair within the meaning of Article 6 if evidence obtained in absence of a lawyer is used in any way for a conviction – whether decisively or not.

(a) *Lawful derogations and unlawful restrictions*

36. When a person is denied access to a lawyer, the Court is clear that the use of incriminating statements for a conviction will infringe Article 6, and there are many examples.⁴² However, as noted above, the Court has not explored in depth whether reliance upon evidence obtained in the context of a *derogation* on access to a lawyer will also lead to a violation of Article 6.

37. In the cases in which the Court appears to have accepted derogations, *John Murray v. United Kingdom* and *Magee v. United Kingdom*, the Court found that the restrictions had unduly prejudiced the rights of the defence due to the suspects' choices to remain silent (attracting adverse inferences later) and to make admissions (later used in the prosecution case). Is there a situation in which such derogations could be applied, statements be made by the suspect and those statements be used later against him, without the rights of the defence being unduly prejudiced?

38. Fair Trials believes that the answer is no. As explained above, defence choices cannot be held against an accused who did not have the benefit of legal advice despite his wish to receive it. The fact that the lawyer was not present due to a lawful derogation, as opposed to a simple breach, does not make any difference to this. Indeed, Article 12 of the Directive treats both situations alike, requiring a remedial response in the treatment of evidence obtained in breach of their right to a lawyer *or* in cases where a derogation under Article 3(6) was applied.

39. This makes sense. When playing a preventive, security-related role (e.g. to avoid potentially imminent harm) or when seeking to preserve the integrity of an investigation, police act outside the scope of the criminal investigation against the specific suspect. Questioning without a lawyer is done for this purpose and is not attended the safeguards applicable to criminal investigative questioning of the suspect. Information obtained in the context of such a derogation, if it becomes evidence in criminal proceedings, is therefore equivalent in status to evidence obtained in criminal proceedings in breach of the safeguards applicable to those proceedings (in particular under Article 6(3)(c) in its pre-trial limb). Both, logically, will adversely affect the fairness of the trial unless a remedy is offered in the course of proceedings, e.g. in exclusion of the evidence.

(b) *The remedial obligations following from the Salduz principle*

40. In relation to remedies, Fair Trials would observe that while the *Salduz* principle appears clear, there appears to be some doubt in the Court's case-law as to whether convictions can be based, to a limited extent, on evidence obtained without a lawyer if other safeguards are present.

41. One approach – the most relaxed – is where the court finds a violation only when the tainted evidence is the 'central platform' for the prosecution's case or the eventual conviction. This was the

approach taken in *Dvorski v. Croatia*,⁴³ where no violation was found on the basis that the convicting court relied on a complex body of evidence, contrasting with *Magee v. United Kingdom* where the incriminating statement had been the ‘central platform’ of the conviction.⁴⁴

42. *Dvorski v. Croatia* is currently before the Grand Chamber, a dissenting opinion of two judges in the Chamber noting that although other evidence was adduced and the tainted confession was not the sole evidence, the latter nevertheless played a decisive role,⁴⁵ suggesting the ‘sole or decisive’ test used in other areas of the Court’s case-law is thought relevant. Other cases also suggest this. For instance, in *Shabelnik v. Ukraine*,⁴⁶ the violation was established on the basis that the conviction rested ‘to a decisive extent, if not solely’ on the incriminating statement.⁴⁷
43. In other cases – taking a more rigorous approach – the court has found violations even when the incriminating statement was not central to the conviction. In *Khayrov v. Ukraine*,⁴⁸ the violation was found on the basis that the evidence ‘had a bearing’ upon the final conviction.⁴⁹ In *Gök and Güler v. Turkey*,⁵⁰ the Court noted that the convicting court had ‘attached weight’ to the statements, such that the applicants were ‘undoubtedly affected’ by that restriction.⁵¹ The Court has in fact underlined in *Leonid Lazarenko v. Ukraine*⁵² that ‘the extent to which the applicant’s initial confession affected his conviction is of no importance. That it irretrievably prejudiced the right of defence is presumed once it is established that it had some bearing on the conviction’.
44. At its most scrupulous, the Court’s case-law suggests that a violation will be found unless the national decisions show that the decision on the merits of the case is free of any contamination by the earlier breach. In *Martin v. Estonia*, the Court found that the exclusion of pre-trial statements by an appeal court had not ‘completely undone’ the earlier breach of the suspect’s right to a lawyer of his choosing, as some indirect reliance was placed on the evidence obtained in the context of that breach, despite that court carefully founding its decision on other evidence.⁵³
45. Article 12 of the Directive, which refers in general terms to safeguarding the rights of the defence, brings no further guidance on this point. Rather, the Court’s ruling here will influence the interpretation of that provision, by the Member States and/or the Court of Justice of the EU.
46. Fair Trials believes the Court should have no hesitation in settling for the stricter approach in *Martin v. Estonia*. Where national courts take into account evidence obtained in absence of a lawyer, even tangentially, to found a conviction, this does not amount to a proportionate limitation on fair trial rights in respect of which the Court can apply a detached supervisory control, accepting it if sufficient safeguards are present in the national decisions. Rather, it does what *Salduz* sought rule out – the use of incriminating statements collected in the absence of a lawyer for a conviction – and with that irretrievably prejudices the rights of the defence.

REFERENCES

¹ *Salduz v. Turkey* App. No 36391/02 (Judgment of 27 November 2008).

² *Salduz v. Turkey*, paragraph 55.

³ A search for cases citing *Salduz* and the words “compelling reasons” or the French equivalent (“raisons impérieuses”) returns the following cases:

<i>Pishchalnikov v. Russia</i>	Notification of constitutional rights separately did not justify proceeding without a lawyer.
<i>Todorov v. Ukraine</i>	No justification offered or established on facts.
<i>Kaciu and Kotorri v. Albania</i>	Not pleaded let alone demonstrated.
<i>Pashkaev v. Russia</i>	Systematic restriction does not establish compelling reasons.
<i>A.V. v. Ukraine</i>	Mere unavailability did not enable the Court to discern any compelling reason.
<i>Borotyuk v. Ukraine</i>	No compelling reason if no waiver.
<i>Yerokhina v. Ukraine</i>	Mere failure to secure the presence of a lawyer did not enable Court to discern any compelling reason.
<i>Zamferesko v. Ukraine</i>	No compelling reason found on the facts.
<i>Afanasyev v. Ukraine</i>	No compelling reason found on the facts.
<i>Khayrov v. Ukraine</i>	No compelling reason found on the facts.
<i>Petrenko v. Ukraine</i>	No compelling reason found on the facts.
<i>Grinenko v. Ukraine</i>	No compelling reason found on the facts.
<i>Chopenko v. Ukraine</i>	No compelling reason found on the facts.
<i>Smirnov v. Ukraine</i>	No compelling reason found on the facts.

⁴ *Brusco v. France* App. No 1466/07 (Judgment of 14 October 2010).

⁵ *Salduz v. Turkey*, paragraph 54.

⁶ *Dayanan v. Turkey*, App. No 7377/03 (Judgment of 13 November 2009).

⁷ *Dayanan v. Turkey*, paragraph 32.

⁸ *Navone and Others v. Monaco* Apps. Nos 62880/11 and others (Judgment of 24 October 2013) paragraph 74.

⁹ *John Murray v. United Kingdom* App. No 18731/91 (Judgment of 8 February 1996).

¹⁰ *Saunders v. United Kingdom* App. No 19187/91 (Judgment of 17 December 1996).

¹¹ *A.T. v. Luxembourg* App. No 30460/13 (Judgment of 9 April 2015).

¹² *A.T. v. Luxembourg*, cited above note 11. The Court’s summary of Fair Trials’ intervention is at paragraphs 58-61.

¹³ Fair Trials intervention in *A.T. v. Luxembourg*, available at <http://www.fairtrials.org/wp-content/uploads/AT-v-LUX-Intervention.pdf> (**Annex I**) paragraph 6(c).

¹⁴ See *A.T. v. Luxembourg*, paragraph 86.

¹⁵ Communiqué issued after the ADR meeting in Paris, 14 June 2013, available at <http://www.fairtrials.org/wp-content/uploads/Paris-ADR-communication.pdf>, paragraph 47 (**Annex II**).

¹⁶ See Article 63-4-2 of the Criminal Procedure Code, first and second paragraphs.

¹⁷ Criminal Code, Book Second, Laws of Criminal Procedure, Article 355AT(3)-(6).

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- ¹⁸ Article 706-73 ; the phrase corresponds to the French version of the ‘compelling reasons’ in the paragraph 55 of the *Salduz* judgment, cited in paragraph 2 of this intervention.
- ¹⁹ Article 63-4-2, fourth and fifth paragraphs.
- ²⁰ Décision n° 2014-428 QPC du 21 novembre 2014 (**Annex III**), paragraph 8.
- ²¹ Criminal Procedure Code, Article I04.
- ²² Criminal Procedure Code, Article 365.
- ²³ See, inter alia, *Schenk v. Switzerland* App. No I0862/84 (Judgment of 12 July 1988), paragraphs 74-75.
- ²⁴ Communiqué issued after the ADR meeting in Amsterdam, 20 September 2013, available at <http://www.fairtrials.org/wp-content/uploads/Amsterdam-ADR-Communique.pdf>, paragraph 60 (**Annex IV**).
- ²⁵ Communiqué issued after the ADR meeting in Vilnius, 9 May 2013 (‘Vilnius ADR Communiqué’), available at <http://www.fairtrials.org/wp-content/uploads/Fair-Trials-International-Lithuania-ADR-communique.pdf>, paragraph 58 (**Annex V**).
- ²⁶ *Martin v. Estonia* App. No 35985/09 (Judgment of 30 May 2013).
- ²⁷ Vilnius ADR Communiqué, paragraph 74.
- ²⁸ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings (OJ 2009 C 295, p. I) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF>.
- ²⁹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. I), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF>.
- ³⁰ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. I), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF>.
- ³¹ Article 4 of Directive 2012/13/EU, cited above note 30.
- ³² Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 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 2013 L 291, p. I), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:EN:PDF> (**Annex VI**).
- ³³ See the European Commission’s Proposal for a Directive of the European Parliament and of the Council for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (COM(2011) 326 final) available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011PC0326>, explanatory memorandum, paragraph 13.
- ³⁴ See, for instance, *M.S.S. v. Belgium and Greece* App. No 30696/09 (Judgment of 21 January 2011), paragraph 251; see also the concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić Souza in *Ribeiro v. France* App. No 22689/07 (Judgment of 13 December 2012); see *Sufi and Elmi v. United Kingdom* Apps. Nos 8319/07 and 11449/07 (Judgment of 28 June 2011), paragraphs 220-226.
- ³⁵ *A.T. v. Luxembourg*, cited above note 11, paragraph 87.
- ³⁶ Such as Protocol (No 21) to the Treaty on the Functioning of the European Union (‘TFEU’) on the position of the United Kingdom and Ireland with regard to the area of freedom, security and justice, according to which measures adopted

under Chapter III, Title V of the TFEU apply to the United Kingdom or Ireland. Those states may notify the Council of their wish to participate in a measure. The United Kingdom has exercised this option in respect of the first two directives mentioned in paragraph 20 of this intervention, but it has not done so in respect of the Directive.

³⁷ *John Murray v. United Kingdom*, cited above note 9, paragraphs 64 and 65.

³⁸ *Magée v. United Kingdom* App. No 21835/95 (Judgment of 6 June 2000).

³⁹ *Magée v. United Kingdom*, cited above note 38, paragraphs 44 and 45.

⁴⁰ *Ibrahim and Others v. United Kingdom* Apps. Nos 50541/08 and others (Chamber Judgment of 16 December 2014), paragraphs 197-203.

⁴¹ Article 63-4-4.

⁴² See, for example, the cases mentioned in note 3 above.

⁴³ *Dvorski v. Croatia* App. No 25703/11 (Judgment of 28 November 2013).

⁴⁴ *Magée v UK*, cited above note 38, paragraph 106.

⁴⁵ See *Dvorski v. Croatia*, cited above note 43, dissenting opinion Judges Berro-Lefèvre and Laffranque, penultimate paragraph.

⁴⁶ *Shabelnik v. Ukraine* App. No 16404/03 (Judgment of 19 February 2009)

⁴⁷ Paragraph 106.

⁴⁸ *Khayrov v. Ukraine* App. No 19157/06 (Judgment of 15 November 2012).

⁴⁹ Paragraph 78.

⁵⁰ *Gök and Guller v. Turkey* App. No 74307/01 (Judgment of 28 July 2009).

⁵¹ Paragraph 57.

⁵² *Leonid Lazarenko v. Ukraine* App. No 22313/04 (Judgment of 28 October 2010).

⁵³ *Martin v. Estonia*, cited above note 26, paragraph 96.