

FAIR TRIALS INTERNATIONAL



THIRD PARTY INTERVENTION IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 6177/2010

Between

Cándido González Martín and Plasencia Santos

(Applicants)

And

Spain

(Respondent)

Written Comments

By Fair Trials International
January 2014

THIRD-PARTY INTERVENTION
APPLICATION 6I77/I0 (CÁNDIDO GONZÁLEZ MARTIN V. SPAIN)

About Fair Trials International

Fair Trials International ('Fair Trials') is a UK-based non-governmental organisation that works for fair trials according to international standards of justice. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

We pursue our mission by providing assistance, through our expert casework practice, to people arrested outside their own country. We also address the root causes of injustice through broader research and campaigning, and build local legal capacity through targeted training, mentoring and network activities. In all our work, we collaborate with our Legal Expert Advisory Panel, a group of over 120 criminal defence experts from 28 EU Member States.

Fair Trials is active in the field of EU criminal justice policy and, through our INTERPOL work, international police cooperation, extradition and asylum. Thanks to the direct assistance we provide to hundreds of people each year, we are uniquely placed to offer evidence of how international law enforcement systems affect individual rights.

Acknowledgment

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INTRODUCTION

PROCEDURE

1. These written comments are submitted by Fair Trials International ('Fair Trials'), with pro bono assistance from Matthew Ryder QC of Matrix Chambers, London, in accordance with the permission to intervene granted by the Registrar of the Third Section by letter of 19 December 2013 in accordance with Article 36(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'Convention') and Rule 44(2) of the Rules of the Court.

SUMMARY

2. From the moment criminal proceedings are initiated against a person, he is entitled under Article 6(3)(a) of the Convention to be informed promptly and in detail of the nature and cause of the accusation against him. This requirement – so crucial that it now finds expression in a recent EU directive – enables the defence to respond in timely fashion to the action taken against them.
3. In several EU Member States, the broad use of powers to restrict suspects' access to information about the investigation and/or case materials ('secrecy powers') deprives the defence of an effective opportunity to participate until the closure of the investigation. This places the defence at a substantial disadvantage which cannot effectively be made good by the provision of a fully detailed indictment and access to case materials when the case is sent for trial, as elaborated further below. The intended pre-trial benefit of Article 6(3)(a) is therefore lost.
4. The Court's usual approach to complaints under Article 6(3) of the Convention is to wait until proceedings are complete at the national level, so that it can assess whether any alleged violation has caused prejudice to the fairness of the proceedings as a whole. The Court has, however, departed from that general approach in respect of Article 6(3)(a) in *Casse v. Luxembourg*,¹ finding a violation of that provision prior to trial.
5. This intervention invites the Court to recognise again that Article 6(3)(a) has independent content which can be violated by the failure to provide information at the pre-trial stage. In outline, the intervention sets out: the requirement for the provision at the pre-trial stage and the importance of this requirement in enabling effective defence participation in pre-trial proceedings and the effective administration of justice (**Part A**); the broad use of secrecy powers in Spain and elsewhere in the European Union ('EU'), which results in suspects being deprived of an opportunity to participate effectively in pre-trial processes as envisaged by the Convention (**Part B**); the EU's response to this issue, namely, a directive specifically edifying the requirement to provide

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information and case materials to suspects, which underlines the need for better protection of the right to pre-trial information and which can be taken into account for the interpretation of Article 6(3)(a) (**Part C**); and legal arguments, informed by EU legislation and the Court's own case-law (in particular *Casse v. Luxembourg*), as to what the approach should be to alleged violations of Article 6(3)(a) at the pre-trial stage (**Part D**).

PART A – THE REQUIREMENT FOR PRE-TRIAL DEFENCE

AI. ARTICLE 6(3)(A) ENABLES PRE-TRIAL DEFENCE

6. Article 6(3)(a) entitles 'everyone charged with a criminal offence [...] to be informed promptly [...] and in detail, of the nature and cause of the accusation against him'. The function of the provision of information is to enable an effective defence to be developed. As the Court states, 'sub-paragraphs (a) and (b) of Article 6 § 3 are connected and [...] the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence'.²
7. There is, of course, a special emphasis in the Court's case-law on the provision of information to enable the accused to defend himself at the main trial where the charge will be determined. Thus, particular attention is paid to the act of indictment, which must contain the legal classification of the offence.³ Indeed, plainly, when a case goes to trial, full information must be provided to enable the preparation of a final defence.
8. However, the right to information in Article 6(3)(a) attaches from the point of 'charge' within the meaning of the Convention. As the Court has many times reiterated, the term 'charged' is interpreted broadly, such that the point at which a person becomes 'charged' occurs much earlier than trial, for instance upon arrest, the carrying out of a search or the initiation of criminal proceedings, the essential test being whether the person's situation has been 'substantially affected'.⁴ The provision of information becomes necessary at that point.

A2. THE IMPORTANCE OF PRE-TRIAL DEFENCE

9. This reflects the fact that criminal cases are, to a large extent, determined at the pre-trial stage. The Court has itself explained the pre-trial application of the guarantees established by Article 6(3) on the basis of 'the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial'.⁵

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10. Indeed, there are many ways in which the allegations finally submitted to a court are largely determined by the pre-trial proceedings, such that secrecy powers can impede the exercise of defence in a manner which cannot effectively be remedied later:
- a. Information about charges enables the suspect to establish whether to answer any questions, volunteer information, or exercise the right to silence. The Court has recognised this in relation to police interrogation,⁶ but it applies in general terms whenever an investigation is on-going;
 - b. Information regarding the nature of the charge enables preliminary discussion about its legal classification and/or the competence of the investigative authority. This may include negotiation of admissions of guilt by the suspect, enabling speedy resolution of the case;
 - c. Information as to the details of an alleged offence enables the defence to seek and/or provide exculpatory evidence (including alibi evidence) which may lead to the resolution of the case or its reclassification. Further, there is usually an interest in such evidence being obtained in timely fashion: witness memory may deteriorate, and physical evidence may be destroyed or disappear;
 - d. The provision of information regarding investigative steps as and when they happen (if not before, then soon after) enables the defence to challenge their legality promptly. This prevents subsequent actions being taken on the basis of unlawful acts or unlawfully uncovered evidence;
 - e. The on-going provision of information enables the defence to challenge the failure to pursue the investigation with due expedition (while the requirement for ‘special diligence’ applies only for detained persons, States are nevertheless under a duty to organise their justice systems in such a way as to achieve trials within a reasonable time⁷); and
 - f. Finally, the provision of information (if it indicates that little is being uncovered) may enable the person subject to investigation to seek the dismissal of the case, avoiding unnecessary prolongations of the situation of jeopardy in which they find themselves, or to challenge provisional measures such as asset freezes or restrictions on liberty imposed as conditions of release, justification for which may fall away as new information is uncovered.
11. Fair Trials therefore concludes that Article 6(3)(a), applicable from the point of charge, serves to enable the effective exercise of defence rights at the pre-trial stage. This serves to avoid the fairness of eventual trial proceedings being prejudiced, but also to provide legal certainty, enable challenges to the substantial effects on the suspect and ensure the effective administration of justice.

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PART B – USE OF SECRECY POWERS IN SPAIN AND OTHER EU MEMBER STATES

12. Despite the crucial function played by the provision of information at the pre-trial stage, several Member States of the EU, including Spain, routinely limit disclosure of information to the defence until the completion of the investigation.
13. In October 2012, Fair Trials met with Spanish legal experts⁸ to discuss pre-trial detention in Spain. That discussion included a broad discussion of the use (not just in cases of detained persons) of the power, provided for by the second paragraph of Article 302 of the *Ley de Enjuiciamiento Criminal*, for the investigating judge to declare a criminal proceeding wholly or partially secret (referred to here as *secreto de sumario*).
14. Whilst the Spanish Constitutional Court has described this power as an exceptional one to be used sparingly where justified by the needs of the investigation,⁹ participants in the meeting explained that it was overused, in ways which prejudice defence rights:¹⁰
- a. *Secreto de sumario*, intended as a limited measure (hence the initial one month time limit), is routinely granted and extended (often for years at a time), without substantiation by objective factors relating to the needs of the investigation.
 - b. *Secreto de sumario* permits restrictions on access to both information regarding the allegation and the material evidence in the case-file, making it impossible, in practice, to take any of the actions listed in paragraph 10 above.
 - c. Oversight of *secreto de sumario* is insufficient, since it rests *primarily* in the hands of the investigating judge, practically, its renewal on a monthly basis cannot be repetitively challenged before higher courts).
 - d. In some cases, once the case-file is unsealed, it becomes clear that little evidence had in fact been gathered (or indeed little active investigation carried out) during the period of secrecy, and the case could have been dismissed at an earlier stage had the defence had access to sufficient information. In other cases, a great deal of prejudicial evidence had been gathered without the defence being able to suggest steps to obtain exculpatory information.
15. These concerns are reflected in the reports of respected international monitoring bodies. In the context of counter-terrorism prosecutions, the use of *secreto de sumario* has been criticised by the United Nations Human Rights Council,¹¹ the Council of Europe,¹² the International Commission of Jurists,¹³ and Human Rights Watch.¹⁴

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16. Concerns about the misuse of *secreto de sumario* have led to proposed reforms of the regime¹⁵ to place it under the supervision of a judge independent of the investigation. Whether or not such reforms are successfully implemented, their serious political consideration indicates acknowledgement of the problems inherent in the application of secrecy in the pre-trial period.
17. Problems associated with secrecy powers have not only been identified in Spain. During a series of expert meetings hosted by Fair Trials in 2012 and 2013 and attended by legal experts from 23 EU Member States,¹⁶ discussions highlighted the varied approaches adopted by EU Member States towards the provision of information to the defence during criminal proceedings, with complaints about access to information about the charge and to material evidence raised by participants from a number of jurisdictions, including Bulgaria,¹⁷ Estonia,¹⁸ Hungary,¹⁹ Latvia,²⁰ Lithuania,²¹ and Poland.²² These findings broadly reflect those set out in the European Commission's Impact Assessment²³ following the Proposal for an EU Directive on the Right to Information in Criminal Proceedings, discussed below.

PART C – THE RIGHT TO INFORMATION DIRECTIVE

CI. BACKGROUND & OVERVIEW

18. On 30 November 2009 the Council of the EU adopted a Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (the 'Roadmap'),²⁴ with the aim of providing stronger foundations for mutual trust between the judicial systems of EU Member States by building upon the protection ensured by the Convention and establishing a minimum standards on fair trial rights.
19. The second directive adopted under the Roadmap – Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (the 'Directive'),²⁵ which must be transposed into national law by 2 June 2014 – is of particular relevance to the present case. The Directive lays down rules concerning the right of suspects and accused persons to information on their rights in criminal proceedings and the accusation against them. Under Article 2, it applies 'from the time persons are made aware [...] that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings'. Most relevant here are the requirements of Articles 6 and 7 requiring the provision of information about the accusation and access to case materials.

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20. Article 6 of the Directive establishes a ‘right to information about the accusation’. Under Article 6(1) this includes a requirement to provide ‘suspects or accused persons’ with ‘information about the criminal act they are suspected or accused of having committed’, which must be provided ‘promptly and in such detail as to safeguard the fairness of proceedings *and* (emphasis added) the effective exercise of the rights of the defence’ (which, as we have argued, begins much earlier than trial). Notably, there is no derogation from this rule, and this information should be considered an absolute minimum. Article 6(3) requires Member States to ensure that ‘at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence’.
21. Article 7 of the Directive establishes a ‘right of access to materials of the case’, requiring firstly access to documents which are essential for challenging the lawfulness of detention, then requiring that access be granted to ‘all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons’.²⁶ This access must be granted ‘in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court.’²⁷ The Directive thus clearly envisages disclosure prior to the ‘red line’ drawn at the submission of the case to a court, to enable defence participation in pre-trial processes. Article 7(4) establishes an exception to the general right to materials of the case established in Article 7(2) where this is ‘strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation’.²⁸
22. Article 8(2) of the Directive establishes a ‘right to challenge ... the possible failure or refusal of the competent authorities to provide information in accordance with [the] Directive’, ensuring effective judicial protection of the rights in Articles 6 and 7 (including where they apply pre-trial).

C2. RELATIONSHIP WITH THE CONVENTION

23. 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.²⁹ The Court regularly takes account of EU directives when interpreting provisions of the Convention.³⁰
24. The Directive’s recitals make clear that its provisions are intended to set out ‘detailed rules on the protection of the procedural rights and guarantees arising from the Charter and from the [Convention]’.³¹ The Court is therefore 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 minimum obligations in this area.

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25. While the Court of Justice of the EU (CJEU) has responsibility for interpreting the provisions of the Directive, the provisions should inform the Court's consideration in the present case because the Directive reflects the recognition among EU Member States that the provision of information, at all stages of criminal proceedings, is necessary in order to safeguard the fairness of proceedings and the effective exercise of defence rights consistent with the standards of both the Charter of Fundamental Rights of the EU (the 'Charter') and the Convention. More specific inferences can be drawn from the Directive as discussed further below.
26. Equally, however, the Court's interpretation of Article 6(3)(a) may itself influence the interpretation to be given to the provisions of the Directive and the Charter. The former states explicitly that 'the provisions of this Directive that correspond to rights guaranteed by the ECHR should be interpreted and implemented consistently with those rights, as interpreted in the case-law of the European Court of Human Rights'.³² Likewise, the Charter states explicitly that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [Convention], the meaning and scope of those rights shall be the same as those laid down by the said Convention [...]'.³³ Thus, the interpretation of EU law is likely to evolve in line with the case-law of the Court.

PART D – COMMENTS ON THE INTERPRETATION OF ARTICLE 6(3)(a)

DI. THE PRE-TRIAL APPLICATION OF ARTICLE 6(3)

27. The Court has stated that 'the *primary* purpose of Article 6 ... as far as criminal matters are concerned is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge"'³⁴ (emphasis added). In this context, it has long held that 'Article 6 – especially paragraph 3 – may be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its requirements'.³⁵
28. However, because of its nature as a subsidiary complaints mechanism, the Court usually waits until the completion of the national proceedings to assess alleged pre-trial violations of Article 6(3) retrospectively to determine whether they prejudiced the fairness of the trial proceedings. Thus, the failure to provide a lawyer at police interrogation will result in a violation of Article 6(3)(c) if incriminatory statements obtained in that interview were used for a conviction.³⁶ But if proceedings are ongoing, a complaint to the Court regarding that failure would not normally be admissible as this may still be remedied by (for instance) the exclusion of the relevant evidence at trial.³⁷

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29. The Court has also applied this approach to Article 6(3)(a). On the one hand, it has found violations in cases where applicants had been convicted without prior information being given to them such as to enable them to offer a defence at trial.³⁸ On the other hand, it has dismissed complaints under Article 6(3)(a) relating to the failure to provide information during investigations as inadmissible, on the basis that any violation can still be remedied later on in the proceedings³⁹ (though without specifying how this might be achieved).

D2. THE NEED TO ENSURE THE EFFECTIVENESS OF ARTICLE 6(3)(a)

30. In respect of the particular guarantee laid down by Article 6(3)(a), the Court should be prepared to review compliance at an earlier stage in order to ensure that the provision retains the ‘practical and effective’⁴⁰ value which Convention rights are intended to have.

31. As discussed in paragraph 10 above, the provision of information under Article 6(3)(a) at the pre-trial stage serves to enable a basic level of defence participation in pre-trial proceedings, which also ensures that the suspect’s case is handled promptly and effectively by the authorities. The failure to supply information at the pre-trial stage in application of secrecy powers deprives the suspect of that benefit. The defence may be unable to seek exculpatory evidence, challenge the lawfulness of investigative steps as and when they are taken, and ensure the progress or dismissal of the investigation. The pre-trial effect of Article 6(3)(a) and (b) is therefore significantly reduced.

32. However, the prejudice caused by this infringement of Article 6(3)(a) may be extremely difficult to measure and put right at the trial stage. For example, exculpatory evidence that was never collected due to the defence’s delayed access to knowledge of investigative acts, may not later be identified or considered by judicial authorities. In the context of a complex investigation, the Court’s assessment of the prejudice caused by the defence’s inability to influence the course of the proceedings will remain speculative at best.

33. This leaves the individual in a position where there is no easy way to insist upon the pre-trial protection which Article 6(3)(a) is intended to provide. The EU’s creation of an enforceable right to pre-trial information demonstrates this. Article 6(I) of the Directive specifically entitles ‘*suspects or accused persons*’ to detailed information regarding the criminal act they are alleged to have committed ‘in such detail as is necessary to safeguard the fairness of the proceedings *and the effective exercise of defence rights*’ (emphasis added), underlining the need for an effective opportunity to respond to allegations at the pre-trial stage. Article 8(2) of the Directive, requiring judicial protection of this right, further underlines its importance. Article 6(3)(a) of the

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Convention, which serves the same function, should be interpreted in a similar manner such that it can be violated (and the Court's own competence engaged) at the pre-trial stage.

34. The Court's case-law shows that it is competent to make such a finding. In *Casse v. Luxembourg*,⁴¹ the Court considered the case of a person who had been the subject of a search order in the context of a criminal investigation and who had, as a result, become 'charged' within the meaning of Article 6 of the Convention because an order had been given to a bank to search and freeze accounts in his name. Despite this, the investigating judge brought no formal charges against the applicant. By the time the Court considered the complaint, this situation had prevailed for almost ten years. In these circumstances, the Court considered that a violation of Article 6(3)(a) was established.⁴²
35. Although no detailed reasoning is provided for this finding, it appears clear that the Court considered it incompatible with Article 6(3)(a) for the applicant to be effectively 'charged' without being notified as to what he had allegedly done wrong or given any opportunity to respond. Bearing in mind the 'prominent place'⁴³ held by the right to a fair trial in a democratic society, Article 6(3)(a) can thus be read as a free-standing requirement ensuring basic standards in the administration of justice, legal certainty for the individual and effective defence participation at the pre-trial stage. It can therefore be breached independently of the trial as a whole.
36. Fair Trials submits that this conclusion applies *a fortiori* in view of the impact suffered by a person prior to trial. Those subject to criminal proceedings, even if not detained, may be on strict bail conditions with potentially irreversible effects such as suspension from the exercise of a professional activity, have their assets frozen, or suffer health effects. Just as the 'dramatic impact' of deprivation of liberty brought about by pre-trial detention proceedings requires that procedures for challenging detention meet the standards of a fair trial,⁴⁴ the punitive impact of pre-trial proceedings requires that the affected person have at least some possibility to respond to the suspicions justifying this interference with their fundamental rights during the pre-trial phase.⁴⁵ This is ensured by the provision of information under Article 6(3)(a).

D3. A PROPOSED APPROACH TO ARTICLE 6(3)(a)

37. As reflected in Article 6(1) of the Directive, the provision of detailed information as to the criminal act a person is alleged to have committed is a minimum requirement from which no derogation is possible. Equally, when a case is referred for trial, a fully specified allegation must be provided along with all material evidence, as reflected by Articles 6(3) and 7(2) and (3) of the Directive. Between those points, the requirement to enable effective defence participation should

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lead the authorities to disclose, in principle, as much information as possible unless there are good grounds to restrict this.

38. In particular, it would seem logical that just as the initial ‘charge’ triggers the right to prompt information, subsequent investigative acts which further ‘substantially affect’ the situation of the person should trigger the provision of further information, ensuring the suspect is provided with incremental detail as the hardship affecting him extends over time.
39. This requirement may not necessarily require disclosure of case materials. The Court has recognised ‘the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice’.⁴⁶ Equally, the Court has stated that ‘the notification of the accusation required by Article 6(3)(a) should *not necessarily* be attended by the disclosure of supporting evidence to enable the accused to prepare for trial [...] The existence of such evidence may still be dependent on the results of an on-going investigation’⁴⁷ (emphasis added). It is clear that national courts are entitled to limit access to information if the concrete needs of the investigation justify it. However, as soon as this is understood as a restriction on the right guaranteed by Article 6(3)(a), it follows that it should be justified and should only be used sparingly.
40. Accordingly, the Court should verify whether national authorities have (i) supplied sufficient information to enable effective defence participation and (ii) limited access to information on acceptable grounds and on an exceptional basis. We propose the following guideline principles:
- a. Restrictions on disclosure should be applied as narrowly as possible. For example, if the prosecution is concerned that the suspect will interfere with certain witnesses, details about the identity and whereabouts of those particular witnesses might be withheld for some period of time. Such a concern would not, however, justify restrictions on access to the entire file, nor less details of the charge.
 - b. Restrictions should be maintained for the shortest time period necessary. Concerns about tampering with evidence, for example, will only be valid until that evidence has been duly collected and documented. Judicial authorities should take an active role in setting specific and concrete goals and timelines for investigative acts that must happen in secrecy, and should require that progress be made before restrictions on access are extended further. Judicial review of restrictions on access (as envisaged by Article 8(2) of the Directive) should therefore be

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frequent and meaningful, with reasoned decisions to extend secrecy based on a fresh review of objective facts.

- c. The defence should be able to make submissions opposing secrecy and to complain that secrecy is overbroad, unjustified, or has lasted too long, before an independent authority or body who is not involved in the investigation.
- d. If national authorities fail to demonstrate that they have applied these safeguards on an on-going basis throughout the application of restrictions to the defence's access to information, a finding of violation of Article 6 should be found.

REFERENCES

¹ App. No 40327/02 (Judgment of 27 April 2006).

² See, among many others, *Pélissier and Sassi v. France* App. No 25444/94 (Judgment of 25 March 1999), paragraph 54.

³ *Pélissier and Sassi v. France*, paragraphs 51-52; the original focus on the 'indictment' was established in *Kamasinski v. Austria* App. No 9783/82 (Judgment of 19 December 1989), paragraph 79.

⁴ See *Polz v. Austria* App. No 24941/08 (Judgment of 25 October 2011), paragraph 44; *Deweer v. Belgium* App. No 6903/75 (Judgment of 27 February 1980), paragraph 46.

⁵ *Salduz v. Turkey* App. No 36391/02 (Judgment of 27 November 2008), paragraph 54.

⁶ *Haxhia v. Albania* App. No 29861/03 (Judgment of 8 October 2013), paragraph 131; *Niculescu v. Romania* App. No 25333/03 (Judgment of 25 June 2013), paragraph 119.

⁷ See, among many, *Niederboster v. Germany* App. No 39547/98 (Judgment of 27 February 2003), paragraph 43.

⁸ Carlos Gómez-Jara, the applicant's representative, was one of the participants at that meeting.

⁹ Constitutional Court Judgment 176/1988, available as Annex I.

¹⁰ The meeting communiqué is available as Annex II.

¹¹ Human Rights Council, Working Group on the Universal Periodic Review, 3-4 May 2010, A/HRC/WG.6/8/ESP/2, para 34, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/110/89/PDF/G1011089.pdf?OpenElement>.

¹² Report by the Counter-Terrorism Task Force, "Respect for Human Rights in the Fight Against Terrorism," 12 December 2006, page 6, available at: [http://www.coe.int/t/dlapil/codexter/Source/Working_Documents/2007/CODEXTER%20\(2007\)%20I4%20E%20PACE.pdf](http://www.coe.int/t/dlapil/codexter/Source/Working_Documents/2007/CODEXTER%20(2007)%20I4%20E%20PACE.pdf).

¹³ ICJ Submission to the UN Human Rights Committee's 5th Periodic Review of Spain, 10 October 2008, page 6, available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICJ_Spain_94.pdf.

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¹⁴ Human Rights Watch, “Setting an Example: Counter Terrorism Measures in Spain,” 27 Jan 2005, relevant section “Limitations on the Right to an Effective Defense”, available at: <http://www.hrw.org/node/11860/section/9>.

¹⁵ The reforms have been proposed in the context of the on-going elaboration of a new Criminal Procedure Code in Spain. The proposed legislation is available at : http://www.fiscal.es/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadernameI=Content-disposition&blobheadervalueI=attachment%3B+filename%3DCodigo_procesal_penal.pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1246969773746&ssbinary=true.

¹⁶ During 2012 and 2013, Fair Trials hosted two series of expert meetings in EU Member States, the first of which addressed practices relating to pre-trial detention in 6 EU Member States (Spain, Poland, Hungary, Greece, Lithuania and France), and the second of which gathered the views of legal experts from 23 Member States on fair trial rights issues more generally at five meetings (held in Hungary, Lithuania, France, UK and the Netherlands). All communiqués are available at www.fairtrials.org.

¹⁷ Fair Trials International Communiqué following the meeting ‘Advancing Defence Rights in Europe’, Budapest, Hungary, 20 February 2013, para 16, available at: http://www.fairtrials.org/wp-content/uploads/Hungary-ADR-Communiqu%C3%A9_Final.pdf.

¹⁸ Fair Trials International Communiqué following the meeting ‘Advancing Defence Rights in Europe,’ Vilnius, Lithuania, 10 May 2013, para 28, available at: <http://www.fairtrials.org/wp-content/uploads/Fair-Trials-International-Lithuania-ADR-communique.pdf>.

¹⁹ Fair Trials International Communiqué following the Hungarian Local Experts’ Meeting on Pre-Trial Detention, para 7, 21 February 2013, available at <http://www.fairtrials.org/wp-content/uploads/Hungary-PTD-communique.pdf>.

²⁰ Fair Trials International Communiqué following the meeting ‘Advancing Defence Rights in Europe’, Vilnius, Lithuania, 10 May 2013, para 32. See also, Fair Trials International Communiqué following the meeting of the Local Experts’ Group, Poland on Pre-Trial Detention, 13 February 2013, para 7, <http://www.fairtrials.org/wp-content/uploads/Poland-PTD-communique.pdf>

²¹ Id at para 38.

²² Id, paras 41-44.

²³ Available at Annex II.

²⁴ Available at Annex III.

²⁵ Available at Annex IV.

²⁶ Art 7(1),(2).

²⁷ Art 7(3).

²⁸ Recital 32 of the Directive confirms, however, that ‘Any refusal of such access must be weighed against the rights of the defence of the suspect or accused person, taking into account the different stages of the criminal proceedings. Restrictions on such access should be interpreted strictly and in accordance with the principle of the right to a fair trial under the ECHR and as interpreted by the case-law of the European Court of Human Rights.’

²⁹ See, for instance, *Marckx v. Belgium* App. No 6833/74 (Judgment of 13 June 1979), para 41.

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³⁰ 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.

³¹ See Recitals 6-8 of the Directive.

³² See Recital 42 of the Directive.

³³ Article 52(3) of the Charter.

³⁴ *Imbrioscia v. Switzerland* App. No 13972/88 (Judgment of 24 November 1993), para 36.

³⁵ *Zaichenko v. Russia* App. No 39660/02 (Judgment of 18 February 2010), para 36.

³⁶ *Salduz v. Turkey*, cited above, note 5, para 55.

³⁷ See, to that effect, *Dikme v. Turkey* App. No 20869/92 (Judgment of 11 July 2000), paragraphs 106-112; *Caracet v. Moldova* App. No 16031/10 (Decision of 29 May 2012), paras 46-47.

³⁸ Usually in cases relating to the reclassification of offences by trial or appeal courts, such as *Pélissier and Sassi v. France*, cited above.

³⁹ For example, *Voicu v. Romania* App. No 22015/10 (Decision of 7 June 2011), para 37.

⁴⁰ *Airey v. Ireland* App. No 6289/73 (Judgment of 9 October 1979), para 24.

⁴¹ App. No 40327/02 (Judgment of 27 April 2006): see paras 74 and 75.

⁴² *Id.*, para 75.

⁴³ See, among many, *Perez v. France* App. No 47287/99 (Judgment of 12 February 2004), para 64.

⁴⁴ *García Alva v. Germany* App. No 23541/94 (Judgment of 13 February 2001), para 39.

⁴⁵ The more so because, as provisional measures which do not 'determine' civil rights or obligations or any criminal charge, Article 6 will not apply to any individual decision imposing such measures. Nor is there any independent remedy, since this is subsumed in the trial as a whole.

⁴⁶ *Chruschinski v. Poland* App. No 22755/04 (Judgment of 6 January 2007), para 56.

⁴⁷ *Haxhia v. Albania*, cited above, note 6, para 131.