

## **Identifying written translation in criminal proceedings as a separate right: scope and supervision under European law**

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### **ABSTRACT**

Discussion of the right to language assistance in criminal proceedings has tended to focus more on interpretation, neglecting written translation. The European Court of Human Rights has certainly laid down the principle that documents, in particular the indictment, are covered by the relevant provisions of the European Convention on Human Rights (ECHR), but has often found an oral translation or explanation to be sufficient. Directive 2010/64/EU, whilst providing for the translation of essential documents in a specific article and emphasising the importance of quality, reflects to some extent the principles and limitations that already existed under the ECHR. This article will look at the scope of the right to written translation, first under the ECHR and Strasbourg case-law, then under the relevant EU directives, analysing the different types of document that should be translated and situations that may arise. The proper transposition of the EU legislation should strengthen guarantees in the area of written translation, as a separate right — provided the oral alternative remains an exception — ensuring more consistent and effective assistance in criminal proceedings.

### **KEYWORDS**

Criminal proceedings, European Convention on Human Rights, EU directives, written/oral translation.

## **0. Introduction**

Issues surrounding the right to language assistance in criminal proceedings have more commonly been addressed in terms of court or police *interpreting*, both in national systems and in the Strasbourg case-law, with the written translation of documents in the relevant contexts often being a secondary consideration. As the QUALETRA project description pointed out, even at the level of the European Union (EU), with its various efforts to improve such assistance in recent years, insufficient emphasis had been laid on best practice in legal translation: “Former and current EU projects mainly focus on legal interpreting, leaving behind legal translation” (see website; also Ortega Herráez *et al.* 2013: 89, 99). A right to written translation has certainly existed for some time under European law (considered here in its broad sense, extending to all 47 States of the Council of Europe, not limited to the EU), at least since the *Kamasinski v. Austria* judgment of the European Court of Human Rights in 1989 — and indeed under the domestic law of some States — but it has been subject to well-used exceptions and its implementation has varied widely. It is noteworthy that the right to written translation as such is not distinguished from the right to interpretation in the European Convention on Human Rights (ECHR) itself<sup>1</sup>; neither is that distinction always clear in the Strasbourg case-law. The Court tends to find it acceptable for a

document to be translated orally by an interpreter. The lack of distinction between the professions of translator and interpreter is certainly reflected in the practices of many jurisdictions (see comments by De Mas (2000: 640) and Ortega Herráez *et al.* (2013: 99)). Surveys have shown that in the majority of European countries to date, very few documents have actually been systematically translated in writing, by order and at the expense of the authorities, for the benefit of a defendant in criminal proceedings. Such translation has tended to be kept to a minimum, being seen as time-consuming and costly, or quite simply unnecessary. Written translation is probably more common in civil cases. The criminal courts may well have required translations of summonses or judgments *in absentia* to be served abroad, and of course the translation of case-file material or other documents, such as letters of request, for their own benefit, but the various documents that are essential for a foreign defendant to understand during the proceedings have often been neglected, or perhaps left to counsel to explain. Developments in the EU, as will be shown, ultimately led in October 2010 to the adoption of Directive 2010/64/EU with the identification of written translation as a separate right in criminal proceedings, providing (in Article 3) for autonomous and more effective guarantees under the heading “Right to translation of essential documents.” Subject to its effective transposition, this instrument clarifies the requirements under EU law and should remedy the wide variation in the level of written translation that has been observed in the Member States. As the QUALETRA project brief indicated, referring to various instruments of European law, “[t]he project proposal is situated in the context of the European Convention on Human Rights, the EU Charter, the Stockholm Programme and in particular responding to article 3, 5 and 6 of Directive 2010/64/EU”<sup>2</sup>. This paper will begin by looking at the relevant ECHR case-law (see also Brannan (2012) and Fragkou (2012)), from which that Directive has derived its guiding principles, specifically as regards the translation of documents, before analysing the added value, but also the limitations, of the recent EU legislation.

## **1. ECHR case-law on written translation in criminal proceedings**

Two articles of the European Convention on Human Rights are relevant to language assistance in criminal proceedings – Articles 5 and 6 – and it will be shown how their scope has been interpreted by the Strasbourg Court over the years to cover the translation of written documents.

### **1.1. Article 5 ECHR (right to liberty and security)**

“2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

This Article, although not confined to criminal proceedings as such, is clearly relevant to three types of document that have more recently been

earmarked in Directive 2010/64/EU: the initial charge (whatever form it may take) laid against an arrested person, the arrest warrant (if any) and any other decision depriving a person of liberty. In one early Strasbourg case concerning the translation of an arrest warrant, examined by the former European Commission on Human Rights (*Delcourt*), it was found that an oral explanation would suffice. There have been a few complaints in Strasbourg about the lack of a written translation of the reasons for arrest or detention, for example in the deportation case of *Vikulov and Others*. It is important for such a translation to be provided for the purposes of Article 5(4) (proceedings enabling the detainee to challenge the lawfulness of the measure), and a violation of that paragraph was found in another deportation case (*Rahimi*) because the applicant had not received a written translation of the information explaining his rights. A violation was also found, this time in a criminal case (*Shannon*), where the applicant, a US citizen, complained about delays in his appeal against detention orders caused by translation problems; the Court upheld the claim that the written translation of one order had been unduly delayed. Whilst Article 5(2) indeed guarantees the right to the translation of the “charge” upon arrest, the vast majority of relevant complaints in respect of criminal proceedings have been dealt with under Article 6(3)(a) (or sometimes both provisions in conjunction, as they clearly overlap, as explained by Harris et al (2009: 165)).

## 1.2 Article 6 ECHR (right to a fair trial)

3. Everyone charged with a criminal offence has the following minimum rights:
  - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - ...
  - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The meaning of sub-paragraph Article 6(3)(e) was first clarified in the 1978 case of *Luedicke, Belkacem and Koç v. Germany*, where the applicants had complained that they had been made to pay for the language assistance provided to them during the proceedings (mainly interpreting, but also a written translation of an indictment). The German Government had argued that the guarantee of “free assistance” applied to interpreting only at the trial but not necessarily at earlier stages of criminal proceedings. The Court found that the words “if he cannot understand or speak the language used in court” merely indicated the conditions for the granting of assistance, regardless of the stage in the proceedings. The guarantee thus extended to the “translation or interpretation of all those documents or statements in the proceedings instituted against [X] which it is necessary for [X] to understand in order to have the benefit of a fair trial” and the assistance in question should thus have been free of charge. Article 6 § 3 (e) (and now Directive 2010/64, Article 4) guarantees free assistance regardless of the outcome of the proceedings. The principles were developed some ten years later in

*Kamasinski v. Austria* (1989), even though no violation was found on account of language issues in that case. It was clarified that the right applied (§ 74) “not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings.” Once the Court had given an extensive interpretation of the temporal scope of the sub-paragraph in question, it was inevitable that certain documents would have to be translated under that provision also, going beyond the “charge” or “accusation” already provided for elsewhere. Trechsel (2006: 338) makes the point that: “the relationship between documentary evidence and oral evidence may vary in different jurisdictions – excluding [documents] from the right to free translation would create unjustified inequalities”. In general the Court has emphasised that the prosecution authorities must disclose all “material evidence” to the defence (*Edwards v. the UK*, § 36). However, the Court has never precisely indicated the documents that should systematically be translated in writing and has found more than once that there is no right to the translation of the whole case file, as Article 6(3)(e) “does not go so far as to require a written translation of all items of written evidence or official documents in the procedure” (*Kamasinski*, § 74; wording repeated in *Hermi*, *Protopapa* and *Hacioglu*). It could be inferred that the written translation of *some* evidence or other documents may on occasion be required. The rather vague test first applied in *Kamasinski* (§ 74) is that documents should be translated (or interpreted) where it is necessary for the defendant to “have knowledge of the case and defend himself, notably by being able to put before the court his version of the events” (similar wording is used in Directive 2010/64, Article 3(9)). Moreover, to the earlier wording “documents ... which it is necessary for him to understand,” the Court added “or to have rendered into the court’s language” (*Kamasinski*, § 74). This addition suggests that foreign-language documentary evidence in support of the defence case should be translated *into* the local language.

Since an inadmissibility decision of 2005 (*Husain v. Italy*, p. 5), the Court has observed that “the text of the relevant provisions refer to an ‘interpreter’, not a ‘translator’ [thus suggesting] that oral linguistic assistance may satisfy the requirements of the Convention.” *Husain* concerned an Arabic speaker who was tried *in absentia* as one of the organisers of a terrorist attack. A few years later he was arrested and extradited to Italy where a “committal warrant” was read to him with an interpreter at a police station. He complained under Article 6(3)(a) and (e) that there had been no written translation of that document. The Court found that the interpreter had been able to translate it orally and the fact that the applicant had not complained at the time “may have led the authorities to believe that he had understood [its] content.” The *Husain* wording was reiterated in *Hermi* (§ 70; see also *Baka*) where a complaint about the lack of a written translation was ultimately rejected by the Grand Chamber. The weight attached here to the strict sense of “interpreter” shows that the Court is still not open to the idea that the

Article 6(3)(e) guarantee should necessarily provide for a right to *written* translation.

### **1.3. Translation of the “accusation” (Article 6(3)(a) ECHR)**

More specifically, Article 6(3)(a) has been relied on in connection with the translation of an “indictment” (see, for example, *Kamasinski*, *Petuhovs* and *Mariani*) but also with other documents in which the “accusation” is set out (see, for example, *Brozicek*, *Husain*, *Horvath* and *Erdem*). In *Kamasinski* the Court emphasised that “[a] defendant not conversant with the court’s language may in fact be put at a disadvantage if he is not also provided with a *written* translation of the indictment in a language he understands” (§ 79, emphasis added). However, the Court then took the view that the applicant had been sufficiently informed as a result of the oral explanations given to him in his own language. Pointing out that Article 6(3)(a) did not actually require information in writing and that the charges in question were not particularly complex, it found that the absence of a written translation of the indictment had not prevented the applicant from defending himself.

The leading case under sub-paragraph 6(3)(a) is *Brozicek*, where the Court found a violation because the Italian authorities had failed to provide a translation of judicial notifications to a foreign defendant residing abroad, in spite of his requests. This case thus concerned specifically the translation of a document, but unlike the conclusion in *Kamasinski*, the Court found that a written translation should have been provided in the circumstances. Whilst most authorities today would probably have a document translated for service abroad, as a matter of course, the interest of *Brozicek* lies more in the finding about the burden of proof, which could be applied to other situations where language assistance is requested. The Court laid down the key principle that translation into the language requested by an arrested person should be granted unless there is evidence showing that the person understands the actual language of the proceedings. The authorities had made no attempt to check whether the applicant could understand Italian.

It can be said that the Court guarantees the right to the written translation of a document setting out the “accusation” if there is no other “oral” solution and provided it was requested at the time. The onus will be on the (judicial) authorities denying such request to prove that there is no need for a translation. With the formalising of requests for translations under Directive 2010/64/EU, the authorities will be obliged to give at least basic justification at the time of refusal, and their decision will then be on record in the event of a complaint to a higher domestic or European court.

To sum up, the question left open by the Strasbourg case-law is therefore whether, in respect of those documents that do require “translation,” this should necessarily be in writing or merely conveyed orally. Written

translation may of course be more essential in certain situations, in particular where the foreign national has returned to his or her own country (as in *Brozicek*) or where no lawyer is available (as in *Hermi*), but in most cases the Court has accepted compromise solutions in terms of how the information in such documents is conveyed. It will depend whether the proceedings were fair as a whole, taking into account a variety of factors, on the assumption that the essential information was available in one form or another. It is nevertheless apparent from the case-law that where a written translation has actually been provided – or should have been provided under domestic law – the Court examines the role of the “translator”, without finding such complaints inadmissible because the issue is not one of interpreting.

#### **1.4. Quality of written translation**

This analysis of Strasbourg case-law would not be complete without mention of one case – probably the only one under Article 6 – where the Court examined a complaint about the quality of a written translation. It should be pointed out that the very few cases concerning the quality of language assistance have mostly related to interpreting, being generally based on the principle in *Kamasinski* (§ 74) that “the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided”. In the case of *H.K.* a Lebanese national still facing trial on fraud charges had obtained a written translation into Armenian of the prosecutor’s final submissions but complained about the poor quality. The Court observed that, according to the experts whose opinion had been sought by the applicant himself, he must have understood the gist of the translation (this also being the conclusion of the Belgian courts), even though it was clearly far from accurate. The Court emphasised that the applicant had benefited from an interpreter in the proceedings, showing that as a whole the fair-trial requirements had been satisfied. The applicant’s appeal during the domestic proceedings was dismissed on the ground that the trial court would deal with issues of defence rights, so the complaint was not examined thoroughly at that stage. A number of the shortcomings that may be identified in the case of *H.K.* should, one hopes, be resolved with the transposition of Directive 2010/64/EU, as will now be discussed.

## **2. Developments in EU legislation: raising the standard**

### **2.1. Green Paper and Proposed Framework Decisions**

The European Commission’s Green Paper of 19 February 2003 (*Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*), paving the way for procedural rights legislation, had already identified written translation as a separate right in

criminal proceedings. The Commission emphasised the distinction between the two different professions: “Although they are often considered as one group, interpreters and translators, having different skills and different roles to play during the criminal proceedings, should be treated as two distinct professional groups.” It went on to say that it might be more efficient to have two separate national registers. Lastly, it recommended that written translation be provided not only for procedural documents (charge sheet, indictment) but also “all the statements of witnesses that are provided in writing, and evidence to be tendered by both sides” (Green Paper, 2003: 30). The relevant provision of the ensuing initial proposal for a Framework Decision, however, remained very general, referring simply to “free translations of all relevant documents”. The text of the subsequent 2009 proposal<sup>3</sup> was more developed, not much different from the ultimate text of the Directive in question. However, the enumeration of documents to be translated had then included “essential documentary evidence”, and the Explanatory Memorandum gave “key witness statements” as an example of such evidence. Lawyers tended to criticise the term “essential documentary evidence” as being imprecise and thus open to arbitrary restriction by the authorities; they would have preferred an even stronger guarantee<sup>4</sup>. By contrast, some governments, including that of the UK, found that the wording in question would excessively broaden the scope (and thus the cost) of the “documents” provision (see House of Commons report of 23/09/09, website).

## **2.2. Scope of written translation in Directive 2010/64/EU**

The initial proposal for a Directive, that of 11 December 2009 presented by 13 EU Member States, was rather minimalistic as regards written translation and did not even include the above-mentioned term “essential documentary evidence” in the enumeration of documents to be translated. The Commission attempted to rectify this shortcoming, among others, in its own proposal of March 2010. The two “competing” proposals were not actually merged, however, and in the co-decision process, despite support in the European Parliament, the States never agreed to the inclusion of “evidence” in Article 3. As Cras and de Matteis (2010: 159), who were involved in the negotiation process in the Council of the European Union, reveal: “it met with the firm opposition of a number of national delegations who were concerned about the financial impact of the need to proceed with translation of such material, which can be rather voluminous.” It was also proposed, for example, to include written legal advice from counsel, rules of detention (including how to seek information and make complaints), and, as Fair Trials International had previously suggested, an indexed and fully referenced summary of prosecution evidence. However, none of these suggestions ultimately found its way into the final text, which states merely that the essential documents “shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment” (Directive 2010/64, Article 3(2)).

The final text of Article 3 of Directive 2010/64/EU is thus not as ambitious as it might otherwise have been. The very general provision in 3(1) requiring written translation “of all documents which are essential to ensure that [those concerned are] able to exercise their right of defence and to safeguard the fairness of the proceedings” is circumscribed by the paragraphs that follow, and in any event remains open to interpretation, as certain documents may (or may not) be found essential on a case-by-case basis (see Article 3(3) and Recital 30). As Cape et al. (2010: 607) comment: “The proposal regarding which documents are to be translated gives member states a large degree of discretion in determining this, and falls short of putting the person who requires translation in the same position as a person who does not.” The Directive at least obliges the authorities to take a decision (“The competent authorities *shall*, in any given case, decide whether any other document is essential” (emphasis added)) and invites the person concerned or counsel to request specific translations. This provision was regarded as a crucial safeguard by the Council of Europe, in its observations on the draft<sup>5</sup>. Cras and de Matteis (2010: 159-60) suggest that certain “evidence,” even though this term was excluded from the wording of Article 3(3), will inevitably be considered “essential.” By contrast, the written translation of documentary evidence or pleadings *into* the local language does not seem to fall within the scope of the Directive; this view has recently been supported by the Court of Justice of the European Union in the *Covaci* case C-216/14 (see Brannan 2015, website). The Strasbourg case-law, however, does provide, albeit tentatively, for the free translation of evidence relied on by the defence, as shown above (*Kamasinski*; see also *Plotnicova*).

As regards the few documents that are mentioned in Article 3 of the Directive, there will inevitably be some uncertainty as to what actually constitutes a “charge or indictment”<sup>6</sup> and even a “judgment” in the various legal systems. The “decision depriving a person of his liberty” should cover situations other than detention, for example house arrest or electronic tagging. Specific provision is made in Article 3(6) for the European Arrest Warrant (EAW). The written translation of the EAW was already provided for in the initial Framework Decision of 13 June 2002 (Article 8(2)), but only into the language of the executing State or another language accepted thereby; the Directive now guarantees such translation into the actual language, if different, of the person to be surrendered.

### **2.3. Potential limits to written translation of documents**

The right to written translation is limited to some extent by paragraphs 4, 7 and 8 of Article 3. First, Article 3(8) provides for the possibility of waiving the right to translation altogether, subject to certain conditions that are consistent with Strasbourg case-law, such as prior legal advice (conditions that did not appear in the original draft). It is noteworthy that the possibility of a waiver is not envisaged in the Directive for interpretation, only for translation.

Secondly, under Article 3(4), passages which are not “relevant” do not need to be translated – and this is *not* presented as an exception (unlike the provision in Article 3(7)). It has been suggested that this would largely apply to passages that do not directly concern the suspect or defendant (Cras and De Matteis 2010: 160). The Council of Europe, in its observations on the draft directive (cited above, p. 5) pointed to a risk of non-compliance with Strasbourg case-law: “while this principle is not *per se* incompatible with Article 6 ECHR, the clauses allow for a margin of appreciation about what is ‘important’ in each case.” This will certainly lead to challenges by defendants, who may well want to know what has been omitted and why, and it will also create difficulties for the translators, as the omission of “irrelevant” passages will no doubt usually be decided by non-linguists: court or prosecution officials or even judges.

Thirdly, Article 3(7) allows an “oral translation or oral summary of essential documents,” a possibility that was important for the Member States, on the ground that it would be advantageous in reducing both delays and costs. The States in question argued that this was also consistent with Strasbourg case-law, relying precisely on the above-mentioned wording from the *Husain* decision attaching weight to the term “interpreter” in Article 6(3)(e) ECHR. However, as the Commission pointed out, whilst an oral translation *may* in some cases be satisfactory, by converse implication it *may not* satisfy Convention requirements, i.e. if there would be a breach of defence rights. The Directive thus provides that the use of an interpreter to translate – or merely summarise – a document orally will remain an “exception to the general rule,” but the authorities are left with significant discretion in this respect. Criticism of the oral translation alternative was expressed by the French MEP Mélenchon: “It is no longer acceptable that we can propose an oral translation instead of a written translation. Every suspect must be able to restudy all the elements of his or her file at leisure”<sup>7</sup>. The solution has also been criticised by academics: Monjean-Decaudin (2012: 150) fears that it will open the way for States to negate the important new autonomous right to the translation of documents. The Council of Europe expressed concerns about the provision in its observations on the draft (cited above, p. 6), pointing to the risks of violations of Article 6 ECHR: “As the cases and circumstances in which an ‘oral summary’ could be, as a matter of principle, a valid substitute for a written translation seem quite limited, this Article should be applied in very specific circumstances.” The test as to whether an oral rendering would or would not “prejudice the fairness of the proceedings” will no doubt give rise to interpretation in national courts and in the Court of Justice of the European Union.

#### **2.4. Emphasis on quality**

In order to compensate, to some extent, for the more negative aspects analysed above, Article 3 importantly emphasises the issue of quality –

one that is indeed crucial to Directive 2010/64 as a whole. The quality provision now in paragraph 9, together with the possibility of complaining about poor quality in paragraph 5, had been missing from the original draft of the Article, so these inclusions were achieved through the negotiation process. The “test” of quality echoes the Strasbourg case-law, although it may likewise be criticised for its vagueness<sup>8</sup>, leaving States considerable discretion as to how the guarantee should be achieved and monitored. The quality of written translation under Article 3(9) is referred to again under the “Quality” heading in Article 5(1), which requires “concrete measures” to ensure such quality and relates quality to the issue of registers (and thus to the requirements of qualifications and independence). The wording of Recital 24 of the Directive, recommending “downstream” quality assurance (of both interpretation and translation), is taken directly from the *Kamasinski* case-law. Another positive point is the indication in Article 3(1) that translations must be provided “within a reasonable period of time.”

## 2.5. Two other EU directives

This study of the relevant EU legislation would not be complete without mentioning the two other important new directives that provide for written translation in criminal proceedings, starting with the second step in the area of procedural safeguards (known as measure “B” under the Stockholm Roadmap), namely Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings. This Directive, in addition to providing for a “Letter of rights” by which suspects are informed of their rights after arrest, enshrines the right to information about the “accusation” (Article 6) and the right to have access to the “materials of the case,” including material evidence in the case file (Article 7). Recital 25 of the Preamble states that translations (or interpretations) of such information may be called for where appropriate. A model Letter of Rights is appended to this Directive, incidentally reproducing the provisions on the right to written translation in Directive 2010/64. States are required to align the content of the Letter with their national rules, ultimately making it available in translation, and not just in EU languages.

Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (building on a Framework Decision of 2001), provides for written translation mainly under Article 7. This legislation is part of the Budapest Roadmap (Resolution of 16 June 2011). The documents to be translated under this Directive include (“at least”) any decision ending the criminal proceedings in question. On request the victim must also be provided with the reasons for the decision, where possible; also with notification about when and where the trial is to take place. Other documents may be provided on request. In addition, under Article 5(3) victims must receive a translation of the written acknowledgement of their complaint. Article 7 contains two provisions that are similar to the exceptions in Directive 2010/64: there is

no need to translate “irrelevant passages” and an oral translation or summary may be acceptable.

### 3. Concluding comments

Certain practical questions have been or will have to be addressed in the context of the transposition of Article 3 of Directive 2010/64/EU but it is too early to judge how effective the domestic solutions will prove. It will be necessary, for example, to establish, at the various stages of the proceedings, which authority has to find a translator and at what point. The possibility of complaining about a translation, or the lack thereof, will have to be ensured, but not necessarily before a court. As regards the crucial issue of quality, it will surely be necessary to involve professional linguists. One wonders how a judge would be able to settle such a dispute, as has been proposed in France<sup>9</sup>, without being fluent in the foreign language concerned. Then there is a danger that implementing legislation might provide systematically for partial or oral translation in certain situations and treat these options as the norm rather than as exceptions. In the Netherlands, for example, it appears that the indictment will be translated in full only in the more complex cases and that it will be sufficient for a judgment to be translated orally by an interpreter unless the defendant is absent from the hearing<sup>10</sup>.

As the Strasbourg case-law has shown, the onus will often be on the defendant’s lawyer to ensure the proper provision of language assistance, even though the judge or court is the “ultimate guardian of the fairness of the proceedings” (see *Cuscani*, § 39, and *Hermi*, § 72). Under the Directive, “legal counsel” will have a key role in respect of documents, being entitled to request specific translations, in addition to those that must be provided even if not requested. Whilst Strasbourg has often concluded from a failure to request translation, or the lack of any complaint, that such assistance could not therefore have been necessary, the Directive obliges the authorities to be proactive and ensure systematic provision of certain translations. Defendants might not have formally complained about the quality of a translation because there was no suitable opportunity to do so – a situation that should now be remedied by the Directive. Failure to request or complain may also be explained precisely by a person’s language difficulties and, in any event, cannot be interpreted as a waiver of the relevant rights.

Generally speaking, Article 3 of Directive 2010/64/EU can be seen as one of the major achievements of this European legislation in relation to the previous uncertainty about the scope – or even existence – of a right to written translation that is separate from the right to an interpreter, in criminal proceedings. It clearly goes further than the case-law of the Strasbourg Court, which, at best, has required the translation of a document containing the “accusation” where it is absolutely necessary to provide this information in writing, but without clearly distinguishing this

form of assistance from the alternative of interpretation in many cases. As Monjean-Decaudin (2012: 149) observes, the Directive renders each right autonomous and more visible in European law by identifying them and providing for each one separately.

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- *Horvath v. Belgium* (decision), no. 6224/07, 2012
- *Husain v. Italy* (decision), no. 18913/03, 2005.
- *Kamasinski v. Austria*, no. 9783/82, 1989 (Series A no. 168).
- *Luedicke, Belkacem and Koç v. Germany*, no. 6210/73, 1978 (Series A no. 29)
- *Mariani v. France* (decision), no. 43640/98, 2003
- *Petuhovs v. Germany* (decision), no. 60705/08, 2010
- *Plotnicova v. Republic of Moldova*, no. 38623/05, 2012
- *Protopapa v. Turkey*, no. 16084/90, 2009
- *Rahimi v. Greece*, no. 8687/08, 2011
- *Shannon v. Latvia*, no. 32214/03, 2009
- *Vikulov and Others v. Latvia* (decision), no. 16870/03, 2006

## Biography

**James Brannan** has been a senior translator at the European Court of Human Rights, Strasbourg, since 2005, having also worked at the International Court of Justice and as a court interpreter/translator in Lyon, France. He holds degrees in French Studies and in EU and Comparative Law. He has lectured and written articles on the right to language assistance in criminal proceedings. Member of EULITA.

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## Notes

<sup>1</sup> By contrast, in the American Convention on Human Rights of 1969, Article 8(2)(a) provides for: “the right of the accused to be assisted without charge by a *translator* or interpreter” (emphasis added).

<sup>2</sup> The QUALETRA project description (see website) further refers to two other EU legislative proposals which have since been adopted as Directives, one on the right to information, the other on the rights of victims; they both contain provisions on written translation and are referred to below.

<sup>3</sup> The proposed Framework Decision on the right to interpretation and to translation in criminal proceedings (9 July 2009, Council of the European Union doc. 11917/09).

<sup>4</sup> Fair Trials International’s submission to the UK House of Commons European Scrutiny Committee, 9 September 2009, p. 6. Similar criticism was expressed, for example, by JUSTICE in a briefing paper of July 2009, and by an ECBA representative at the EULITA launch conference, Antwerp, November 2009.

<sup>5</sup> Observations by the Council of Europe Secretariat on the Initiative for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings, 29 January 2010 (Council of the European Union doc. 5928/10): “In Article 3.2 the list of specific documents for which translation shall be required has been reduced in comparison with the [2009 draft Framework Decision]. Having regard to Article 3.3, the importance of an evaluation of the ‘necessity’ of a translation which is consistent with Article 6 ECHR becomes therefore crucial in order to ensure the effective exercise of the right of defence in this respect.”

<sup>6</sup> It is of interest here to look at other official translations of the Directive, which was originally drafted in English. Two of the language versions do *not* give separate translations for “charge or indictment”: the Spanish just has “*escrito de acusación*”, the German only “*Anklageschrift*”; the French translation of “charge” as “*charges*” is misleading, as it usually refers to incriminating evidence.

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<sup>7</sup> European Parliament, 16 June 2010, Explanations of Vote (A7-0198/2010).

<sup>8</sup> The quality has to be “sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence”.

<sup>9</sup> See the transposition Bill before the French Parliament (20 February 2013, Assemblée nationale XIV<sup>e</sup> législature, doc. n<sup>o</sup> 736, p. 23): “*Le juge devra vérifier la qualité de l’interprétation et de la traduction ...*”

<sup>10</sup> Explanatory Memorandum, Bill before the Dutch Parliament (Implementatie van richtlijn nr. 2010/64/EU, Memorie van Toelichting, Tweede Kamer der Staten-Generaal 2011-12, 33 355, no. 3, p. 14).