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

James Brannan[1]

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Discussion of the right to language assistance in criminal proceedings has tended to focus more on interpretation, both in national systems and in the Strasbourg case-law, and written translation has often been neglected. The European Court of Human Rights has certainly laid down the principle that documents, in particular the indictment, are included within the scope of the relevant provisions of the European Convention on Human Rights (ECHR), but has often found that such documents could be translated orally or explained by counsel. It has also dismissed a complaint about the quality of a written translation even though it was clearly deficient. Directive 2010/64/EU, whilst providing for the translation of essential documents in a separate article, reflects to some extent the principles and the limitations/exceptions that already existed under the ECHR. But whereas an oral translation/summary seems usually to be acceptable for Strasbourg, this is supposed to be a last-resort solution under the Directive, which also lays more emphasis on quality. This paper will look at the scope of the right to written translation, first under the ECHR and Strasbourg case-law, then under the EU instruments (briefly mentioning two other Directives), analysing the different types of document that should be translated and the various situations that may arise. Looking to the future, it will be shown how the proper transposition of the EU legislation should strengthen guarantees in the area of written translation, ensuring more consistent and effective provision in criminal proceedings.

Issues surrounding the right to language assistance in criminal proceedings have more commonly been addressed in terms of court or police interpretation, 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 points out, even at the level of the European Union, with its various projects to improve such assistance in recent years, insufficient emphasis has been laid thus far on good practice in legal translation, and relevant academic research has tended to focus on interpretation[2]. A right to written translation has certainly existed for some time in European law[3], 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

[1] Senior translator, European Court of Human Rights, Strasbourg (former court interpreter/translator in Lyon, France). Associate member of EULITA. Any opinions are personal to the author. The author would like to thank Caroline Morgan and Mauro Miranda, of the European Commission, and Taru Spronken, formerly of Maastricht University, for providing useful information in connection with the EU legislation.

[2] http://www.eulita.eu/qualetra-0 : "Former and current EU projects mainly focus on legal interpreting, leaving behind legal translation". This point is also made by Herráez, Giambruno and Hertog, "Translating for Domestic Courts in Multicultural Regions", in Albi and Ramos (eds.), *Legal Translation in Context*, Peter Lang, 2013, pp. 89 and 99.

[3] European law is considered here in its broad sense: the two bodies of law under the respective supervision of the European Court of Human Rights in Strasbourg and the Court of Justice of the European Union in Luxembourg. The Strasbourg Court's jurisdiction extends to the 47 States of the Council of Europe, of which 28 are also Member States of the European Union. Denmark is the only EU State to have opted out of the directives referred to in this paper.

Convention on Human Rights (ECHR) itself[4]; 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, if at all. The lack of distinction between the professions of translator and interpreter is certainly reflected in the practices of many jurisdictions[5]. 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[6] 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 will clarify 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[7]. As the QUALETRA project brief indicates, 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"[8]. This paper, purely on the subject of written translation, will begin by looking at the relevant ECHR case-law[9], from which that Directive has derived its guiding principles, before analysing the added value, but also the limitations, of the recent EU legislation.

I. 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

[4] 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).

[5] See De Mas, "Interpreting and Translation: Meeting the Legal Rights of Non-Native Citizens", *In*: *Legal Translation: History, Theory(ies) and Practice*. Bern: ASTTI, 2000, p. 635-641; based on the results of a survey, the author comments (p. 640): "In most jurisdictions in Europe, the word interpreter and translator appear to be indistinguishable. Translators of all the lengthy documentation which makes up the dossier are often called upon to interpret and interpreters are asked to translate". See also Herráez et al, *op. cit.*, p. 99.

[6] Depending on the jurisdiction, the responsibility for providing translations may of course lie with the police, the prosecution service, an investigating judge (in continental countries such as France), a judge or other authority responsible for detention, a magistrate, etc.

[7] Thus fulfilling the Directive's aim of ensuring mutual trust between the Member States (see Recitals 3 and 4).

[8] The QUALETRA brief 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 in this paper at the end of the part on EU legislation.

[9] For a more comprehensive analysis of the relevant ECHR case-law (including interpretation), see Brannan, "Raising the standard of language assistance in criminal proceedings: from the rights under Article 6(3) ECHR to Directive 2010/64/EU", *Cyprus Human Rights Law Review*, 2012, no. 2, 128-156; and Fragkou, "La consécration du droit à l'interprétation et à la traduction au procès pénal à travers la jurisprudence de la Cour européenne des droits de l'homme : un processus évolutif", *Revue trimestrielle des droits de l'homme*, 92/2012, 837-860.

been interpreted by the Strasbourg Court over the years to cover the translation of written documents.

(a) Article 5 (right to liberty and security)

> "...
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> 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.
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> ...
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> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> ..."

It is not appropriate to look in any depth at the case-law under Article 5, basically because this Article is not confined to criminal proceedings as such; it deals with any situation of deprivation of liberty[10]. This Convention provision is clearly relevant, however, to three types of document that are provided for in Directive 2010/64/EU: the charge (whatever form it may take), 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, it was found that an oral explanation would suffice[11]. 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 v. Latvia*[12]. 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 a deportation case because the applicant had not received a written translation of the information explaining his rights[13]. Another violation was found in a criminal case in *Shannon v. Latvia*[14], 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[15]). It is noteworthy that whilst in English these provisions seem to make a distinction between "charge" (5(2)) and "accusation" (6(3)(a)), the French term is the same for both ("*accusation*").

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[10] For example, detention pending removal or deportation, confinement in a psychiatric institution, the practice of "kettling" by the police, etc. The difference in scope basically explains why Article 5 is not mentioned in the Preamble to Directive 2010/64/EU.

[11] *Delcourt v. Belgium* (Commission decision), no. 2689/65, 1967: the arrest warrant for a French-speaking person was in Dutch, but the Commission found that the requirement of Article 5(2) was complied with on the basis that the subsequent interview in which the reasons became apparent was conducted in French.

[12] Inadmissibility decision, no. 16870/03, 2006; the Court incidentally found here that more detailed information was necessary in criminal proceedings than in a deportation case.

[13] See *Rahimi v. Greece*, no. 8687/08, 2011.

[14] *Shannon v. Latvia*, no. 32214/03, 2009.

[15] See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2nd edition 2009, at 165: "In criminal cases, Article 5(2) also overlaps to some extent with the obligation in Article 6(3)(a) by which an accused person, whether detained pending trial or not, must be told promptly of the nature and cause of the accusation against him. For obvious reasons the information required by Article 6(3)(a) will be 'more specific and more detailed' than that called for under Article 5(2)".

(b) Article 6 (right to a fair trial)

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

The EU bodies, in connection with the drafting of Directive 2010/64/EU and previous proposals, focussed on these Article 6 provisions and relevant case-law because of their specificity. The scope of paragraph 3 is specific to criminal proceedings – a notion that has been given an autonomous meaning by Strasbourg – so it does not cover civil cases or any other proceedings that do not concern the "determination of a criminal charge", thus excluding proceedings in connection with removal or deportation and the execution of an extradition order or European Arrest Warrant. The three sub-paragraphs quoted above all potentially cover the written translation of documents; these provisions form part of an enumeration of procedural safeguards, presented as "minimum rights". Article 6(3)(a), with its reference to the "accusation", is basically interpreted as referring to an indictment (or something broadly equivalent, whether oral or in writing)[16]. Sub-paragraph 3(e), even though it refers to "the language used in court", covers, according to the case-law, the entire pre-trial and investigative stage, including documentary material during that stage, as well as the trial itself and any appeal, thus potentially extending to the ensuing judgment(s). A complaint about the translation of pre-trial documents may well be examined under both sub-paragraphs, which are not necessarily clearly distinguished in all cases.

It should be added that, even though there is little case-law on the subject, it would seem logical for written translations to be provided for the purposes of other sub-paragraphs of Article 6(3) in particular 6(3)(b), guaranteeing facilities for the preparation of one's defence. A rare translation-related case on this point is *Plotnicova*[17], where the Court found a violation of Article 6(3) partly on account of a failure by a prosecutor to have documentary evidence translated from a third language (i.e. not that of the court or of the defendant), obtained through an international letter of request, which could have supported the defence case. The translation of statements by witnesses could also be necessary for the purposes of sub-paragraph 6(3)(d). A key principle in connection with fair-trial guarantees is that of the "equality of arms" between the prosecution and the defence, and this certainly comes into play in respect of written translation.

[16] The importance of the indictment under Article 6(3)(a) has regularly been reiterated; for basic principles see *Pélissier and Sassi v. France* [GC], no. 25444/94, ECHR 1999-II, § 51, and Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, pp. 192-207.

[17] *Plotnicova v. Republic of Moldova,* no. 38623/05, 2012, § 47.

(c) Extension of Article 6(3)(e) to documents

The term "language used in court"[18] in sub-paragraph Article 6(3)(e) was first clarified in the case of *Luedicke, Belkacem and Koç v. Germany*[19], where the applicants had complained that they had been charged for the language assistance provided to them during the proceedings (mainly interpreting, but also a written translation of an indictment). The German Government[20] had argued that the guarantee of "free assistance" applied to interpretation 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. The guarantee thus extended to the "translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial" and the assistance in question should thus have been free of charge[21]. The principles were developed some ten years later in *Kamasinski v. Austria* (1989)[22], even though no violation was found on account of language issues in that case. It was clarified that the right applied "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 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"[23]. In general the Court has emphasised that the prosecution authorities must disclose all "material evidence" to the defence[24]. However, the Court has never precisely indicated the documents that should systematically be translated in writing and has reiterated 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"[25]. 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* is that documents should be translated (or interpreted[26]) 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"[27]. 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". These findings would appear to suggest that foreign-language documentary evidence in support of the defence case should be translated *into* the local language.

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[18] The French wording here is more specific, "*la langue employée à l'audience*".
[19] *Luedicke, Belkacem and Koç v. Germany*, no. 6210/73, 1978, Series A no. 29.
[20] Ibid., §§ 45 and 48.
[21] The Convention provision guarantees free assistance regardless of the outcome of the proceedings, as does Directive 2010/64/EU (Article 4).
[22] *Kamasinski v. Austria*, no. 9783/82, 1989, Series A no. 168, § 74.
[23] See Trechsel, *op. cit.*, p. 338.
[24] See *Edwards v. the United Kingdom*, no. 13071/87, 1992, Series A no. 247-B, § 36: "The Court considers that it is a requirement of fairness under paragraph 1 of Article 6, indeed one which is recognised under English law, that the prosecution authorities disclose to the defence all material evidence for or against the accused."
[25] This finding in *Kamasinski* has been repeated, e.g., *Hermi v. Italy* [GC], no. 18114/02, ECHR 2006-XII, § 70; *Protopapa v. Turkey*, no. 16084/90, 2009, § 80; and *Hacioglu v. Romania*, no. 2573/03, 2011, § 88.
[26] As shown below; the wording in *Kamasinski* (§ 74) already introduced some ambiguity here by referring to "interpretation assistance" in a context of documents.
[27] *Kamasinski* (*op. cit.*), § 74; cf. test of quality in Directive 2010/64/EU Articles 2(8) and 3(9): so that the persons concerned "have knowledge of the case against them and are able to exercise their right of defence".

An indication of another "test" to ascertain whether a particular written translation is required can be found in the *Hermi v. Italy* judgments of 2005 and 2006. A Chamber first found that a written translation of a notice had been necessary, largely because of its complexity:

> "It has not been established ... whether and to what extent the applicant understood Italian and was capable of grasping the meaning of a legal document of some complexity. In that context, the financial, social and cultural situation of the person concerned, and the language difficulties likely to be encountered in a foreign country, are of relevance".[28]

Whilst the failure to provide that translation entailed a violation in the Chamber's view, the case was subsequently referred to the Grand Chamber, which came to a different conclusion based on the Government's indications that the applicant should have been able to understand the original Italian notice. It may at least be assumed that, if his knowledge of Italian had not been sufficient, a written translation would have been necessary in this case. The Grand Chamber reiterated the point that an assessment of need should be based not only on the person's language skills but also on complexity:

> "... in the context of the application of paragraph 3 (e), the issue of the defendant's linguistic knowledge is vital and [the Court] must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court".[29]

It goes without saying that the translation of any documents falling within the scope of Article 6(3)(e) has to be provided free of charge, as established in *Luedicke*, but some translations have been excluded as being unnecessary. In *Bocos-Cuesta*[30] the Court rejected a complaint that a letter had not been translated free of charge under the legal-aid scheme; its exclusion from legal aid was of course explained by the lack of necessity rather than its cost[31]. The economic factor is often particularly significant in relation to written translation in pre-trial proceedings, this being a huge burden for certain suspects and defendants that they would prefer the authorities to bear.

(d) Translation of the "accusation" (Article 6(3)(a))

Article 6(3)(a) has been specifically been relied on in connection with the translation of an indictment (see, for example, *Kamasinski*[32], *Petuhovs v. Germany*[33] and *Mariani v. France*[34]) but also with other documents in which the "accusation" is set out (see, for example, *Brozicek v. Italy*[35], *Husain v. Italy*[36], *Horvath v. Belgium*[37] and *Erdem v. Germany*[38]). 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

[28] *Hermi v. Italy*, no. 18114/02, § 41, 28 June 2005 (Chamber judgment).
[29] *Hermi v. Italy* [GC], *op. cit.*, § 71.
[30] See *Bocos-Cuesta v. the Netherlands* (decision), no. 54789/00, 2003.
[31] For a similar finding about translation not covered by legal aid, see *Montes and Lopez v. the United Kingdom*, no. 18077/91, Commission decision, 1992.
[32] *Kamasinski v. Austria*, *op. cit.*, §§ 78-81.
[33] *Petuhovs v. Germany* (decision), no. 60705/08, 2010.
[34] *Mariani v. France* (decision), no. 43640/98, 2003 (French equivalent of an indictment, the order of committal for trial before the Assize Court (*arrêt de renvoi*)).
[35] *Brozicek v. Italy*, no. 10964/84, 1989, Series A no. 167 (a letter notifying the charges).
[36] *Husain v. Italy* (decision), no. 18913/03, 2005 (a committal warrant).
[37] *Horvath v. Belgium* (decision), no. 6224/07, 2012 (a summons indicating the charges).
[38] *Erdem v. Germany* (decision), no. 38321/97, 1999 (case files).

indictment in a language he understands" (emphasis added)[39]. 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. The former Commission, at an earlier stage in the Strasbourg proceedings, had found that since the applicant had not actually requested a written translation he must have considered the explanations sufficient; six dissenting members had taken the view, however, that in the circumstances an oral statement did not suffice for the applicant to understand the charges and instruct counsel[40]. The Court, pointing out that Article 6(3)(a) did not actually require information in writing and that the charges in question were not particularly complex, found that the absence of a written translation of the indictment had not prevented the applicant from defending himself. In the more recent case of *Petuhovs*[41] the Court declared inadmissible a complaint about a failure to provide a written translation of an indictment because the requisite information had, again, been made known to the applicant by other means (mainly the oral translation of the arrest warrant and meetings with counsel, assisted by an interpreter). Moreover, the applicant had not explained how his defence rights had been affected by the lack of a translation.

The Court has also found in respect of case-file documents, to the extent that they constitute the "accusation" for the purposes of Article 6(3)(a), that it is sufficient for the lawyer to understand them even if the defendant does not, as this provision "does not provide for a general right of the accused to have the court files translated since the rights of the defence under Article 6(3) are those of the defence in general and not those of the accused considered separately"[42]. This statement in a 1999 inadmissibility decision was based on the 1975 Commission decision in *X v. Austria*[43], where the interpretation of the rights to language assistance was very restrictive in general. Whilst other findings in that early case seem to have evolved over the years, the point that Article 6(3) (both (a) and (e)) does not guarantee the translation of all the documents in the file has certainly been reiterated up to the present day[44], and helps to explain the similar restriction in Directive 2010/64/EU. For Strasbourg, it

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[39] *Kamasinski* (*op. cit.*), § 79; reiterated in other cases under 6(3)(e), see in particular *Hermi v. Italy* [GC], *op. cit.*, § 68: "A defendant not familiar with the language used by the court may be at a practical disadvantage if the indictment is not translated into a language which he understands"; the slightly different wording is presumably the result of back translation (from French back into English), with the result that it no longer refers to the possible need for a *written* translation.

[40] *Kamasinski v. Austria*, no. 9783/82, 1988, Commission Report 31; see also Stavros, *The guarantees for accused persons under Article 6 of the European Convention on Human Rights*, Dordrecht, Nijhoff, 1993, at 174: "an oral translation of the indictment should not be regarded as sufficient, especially in a case like *Kamasinski* which involved several counts of fraud and misappropriation".

[41] *Petuhovs v. Germany*, *op. cit.*: complaint in conjunction with sub-paragraph 3(b); cf. similar findings in *Husain* and *Horvath* (*op. cit.*) and *Pala v. France* (decision), no. 33387/04, 2007, where a police interview with an interpreter was sufficient for the purposes of Article 6(3)(a).

[42] See *Erdem v. Germany* (*op. cit.*); it is difficult to see, especially in the light of more recent case-law, how the latter finding can be applicable to sub-paragraph 3(a) in particular, being more pertinent under 3(b). This point is referred to by the Scottish authorities in their answer to a European Commission questionnaire: "The prosecution translates what it considers the accused will need, bearing in mind the ECHR case law which suggests that it will be enough if the accused has a general understanding of the nature of the charge and his lawyer receives the detail"; see Spronken and Attinger, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, European Commission/Maastricht University, 2005, p. 212, at http://arno.unimaas.nl/show.cgi?fid=3891.

[43] *X v. Austria*, no. 6185/73, 1975, Decisions and Reports 2, p. 68; the Commission found that the applicant had been able to read part of the case file and that it was sufficient for the lawyer to read the rest, without examining the nature of the latter documents; it must be said, however, that the applicant was given a translation of a detailed indictment.

[44] *X v. Austria* was cited by the Court recently in rejecting the complaint that a particularly voluminous case file (400,000 pages) had not been translated (see *H.K. v. Belgium* (decision), no. 22738/08, 2010).

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 elsewhere or in another form.

The leading case under sub-paragraph 6(3)(a) is *Brozicek*[45], 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 and the Court had seen no evidence to that effect. In conclusion, one can say 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, as will be shown below, 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.

(e) Alternatives to written translation

It is apparent from the case-law that the Strasbourg Court, where it does identify a document that should have been rendered into the applicant's language, leaves some leeway to the authorities as to the solution. It does not actually require a written translation, neither does it strictly require a full oral translation (or sight translation) of the document. If the information is available elsewhere (e.g. at a hearing, through an interpreter) or can be explained or summarised by a lawyer, the Court may find this sufficient. Already in *Kamasinski*, the Court rejected his complaint that "he was never provided with written translations of the records of his questioning by the police or the investigating judges so as to be able to check the accuracy of the records", finding no violation of sub-paragraph 3(e), because an interpreter had been present on each occasion[46]. Ideally, one could say that a translation of a *judgment* should be provided in writing for the purposes of appeal[47]. However, in *Kamasinski* the Court found that it had not been necessary to translate the judgment; oral explanations, with the assistance of counsel, had sufficed for the applicant to be able to lodge an appeal[48]. The issue whether a

[45] *Brozicek v. Italy*, *op. cit.*

[46] See *Kamasinski* (*op. cit.*), §§ 76 and 77: "Neither is the Court satisfied that, despite the lack of written translations into English, the interpretation as provided led to results compromising his entitlement to a fair trial or his ability to defend himself".

[47] As guaranteed in Article 2 of Protocol No. 7 to the Convention. This view is supported by Stavros, *op.cit.*, pp. 254-5: "In our view, a written translation of the judgment is necessary in cases where national law provides for a right of appeal. It also serves to ensure that the accused sees justice being done".

[48] See *Kamasinski* (*op. cit.*), § 85: "the absence of a written translation of the judgment does not in itself entail violation of Article 6 § 3 (e)".

judgment should have been translated (at all) has arisen in a number of other cases[49]. In *Baka v. Romania*[50] there had been no translation of a judgment, neither written nor oral; the Court observed that the applicant had never requested one and must have understood it after a discussion with his lawyer. The Court has thus rejected complaints about the lack of written translation in respect of various types of document[51]. Arguably, it may be implied in some of these cases that if the applicant had requested a translation of a given document at the time and had been unable to obtain the same information by other means, the provision of a written translation might have been called for under the Convention.

Further justification for the use of oral rather than written translation was first given in the 2005 inadmissibility decision in *Husain*[52], where the Court noted that "the text of the relevant provisions refer[red] to an 'interpreter', not a 'translator' [thus suggesting] that oral linguistic assistance may satisfy the requirements of the Convention". That case concerned an Arabic speaker, who was tried *in absentia* as one of the organisers of a terrorist attack on an Italian cruise liner. 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 warrant. The Court found that the interpreter had been able to translate the document orally and the fact that the applicant had not complained at the time "may have led the authorities to believe that he had understood the content of the document concerned". The *Husain* wording was reiterated in *Hermi*[53], where a complaint about the lack of a translation was ultimately rejected by the Grand Chamber, as shown above. It could be argued that the weight accorded to the strict sense of "interpreter" runs counter to the broad scope of the Article 6(3)(e) guarantee in the case-law and it is rather surprising that such a finding has emerged only in more recent years.

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*[54]) or where no lawyer is available (as in *Hermi*[55]), but in most cases the Court has accepted compromise solutions in terms of how the information in such documents is conveyed. It is nevertheless clear 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"[56], without finding such complaints inadmissible *ratione materiae*. As regards the right to written translation under Article 6(3)(e), there have not been any "test cases", that is to say, no cases where the Court has said affirmatively that, in the circumstances, a written translation should definitely have been provided. As Trechsel remarks: "Here, the applicant faces the difficulty that he or she must show, at least *prima facie*, that his or her defence was hindered by the fact that one or several documents were not translated. So far, no case has been brought successfully on this basis"[57]. The case-law

[49] See also *Vakili Rad v. France*, no. 31222/96, Commission decision, 1997; this issue is mentioned in Cape, Namoradze, Smith and Spronken (eds.), *Effective Criminal Defence in Europe*, Antwerp, Intersentia, 2010, at 570.
[50] See *Baka v. Romania*, no. 30400/02, 2009, § 76; see also *Hacioglu* (*op. cit.*), § 90.
[51] Under Article 6(3)(e), see also *Hacioglu* and *Pala* (*op. cit.*).
[52] *Husain v. Italy*, *op. cit.*
[53] *Hermi v. Italy* [GC], *op. cit.*; also in *Baka v. Romania*, *op. cit.*
[54] *Brozicek v. Italy*, *op. cit.*, already discussed under Article 6(3)(a).
[55] *Hermi v. Italy* [GC], *op. cit.*.
[56] See, for example, *H.K. v. Belgium*, *op. cit.*
[57] Trechsel, *op. cit.*, p. 338.

specifically under that sub-paragraph is thus not as conclusive as under 3(a) with the *Brozicek* precedent, one of the reasons apparently being that 3(e) contains the term "interpreter" rather than "translator".

(f) 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[58] – where the Court examined a complaint about the quality of a written translation, albeit not in great depth. 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* 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"[59]. In *H.K. v. Belgium* (2010)[60] the applicant, 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[61]. 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[62]. 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; this is consistent with its holistic approach to Article 6 rights. In response to a further complaint under Article 13 that there had been no effective remedy in connection with a refusal to provide him with other translations of case-file material (e.g. statements referred to in the prosecutor's submissions), the Court pointed out that the applicant had been able to request them, albeit unsuccessfully. However, the effectiveness of the remedy in question, in the context of pre-trial proceedings, appears somewhat doubtful. His 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.

II. Recent developments in EU legislation: raising the standard

(a) Green Paper and Proposed Framework Decisions

The first attempt to enshrine the right to language assistance in criminal proceedings in an instrument of EU law was the Commission's proposal in 2004 for a Framework Decision on a number of procedural safeguards. When that attempt failed, the Commission decided to adopt a step-by-step approach, thus proposing a specific Framework Decision on the right to interpretation and translation in 2009. This second proposal "lapsed" (the process had not

[58] A complaint was made under Article 8 (right to respect for private and family life) about the quality of a translation of intercept evidence in *Coban v. Spain*, no. 17060/02, decisions of 2003 and 2006.
[59] *Kamasinski*, *op. cit.*, § 74; the Court has never addressed the issue of qualifications or registers, finding in the previous paragraph that this was beyond its remit – any quality assurance is therefore of a downstream nature.
[60] Inadmissibility decision, *op. cit.*; the domestic proceedings in question were conducted in Dutch.
[61] He also complained about the delay in obtaining this translation of 228 pages, namely 15 months after requesting it, but the Court found no problem of fairness as he was still awaiting trial when he received it.
[62] The Court noted in particular (French only): "le sens général du texte des réquisitions est accessible dans une langue qu'il comprend même si la précision de certains termes a pu lui échapper".

quite been completed) when the Lisbon Treaty entered into force (on 1 December 2009), thus changing the legal basis for legislation in criminal matters: instead of a Framework Decision it became possible to propose a Directive. Article 3 of Directive 2010/64/EU (translation of essential documents) can thus be traced back, with some variation, to the 2004 and 2009 proposals.

The European Commission's Green Paper of 2003[63], paving the way for procedural rights legislation, had already identified written translation as a separate right in criminal proceedings. On the basis of a questionnaire sent out to Member States, it observed (p. 28): "The rules on how much material is translated vary from one Member State to the next and also in accordance with the nature of the case. This variation is acceptable as long as the proceedings remain 'fair'". The Commission then 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 this distinction should be taken into account for national registers and 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" (p. 30). The relevant provision of the ensuing proposal for a Framework Decision, however, remained very general, referring simply to "free translations of all relevant documents"[64]. The text of the subsequent 2009 proposal[65] was more developed, not much different from the ultimate text of the Directive in question. However, the enumeration of documents to be translated 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. Fair Trials International, for example, made the following observation:

> "Whilst we fully appreciate that translations of every document in the proceedings would not be necessary in order to fulfil this objective [that of Article 6(3)(a) ECHR], it would be preferable if further detail were provided in the proposed legislation about what represents 'essential documentary evidence'. In particular, an indexed and fully referenced summary of the prosecution evidence should be provided in translation well before trial, to enable the defendant to consider with his legal adviser whether a formal request for a translation of any particular piece of evidence referred to in the summary should be made".[66]

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[67].

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[63] Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, Green Paper, 19 February 2003, COM(2003) 75 final, at 26.

[64] The 2004 Explanatory Memorandum, like the Commission's Green Paper, referred to the *Kamasinski* case-law in this connection.

[65] The proposed Framework Decision on the right to interpretation and to translation in criminal proceedings (9 July 2009, Council doc. 11917/09); see http://register.consilium.europa.eu/pdf/en/09/st11/st11917.en09.pdf.

[66] Fair Trials International's submission to the 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.

[67] See report of House of Commons, European Scrutiny Committee, prepared on 23 September 2009 http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xxvi/1913.htm (point 11.16): "... the oral tradition of domestic criminal proceedings means that there is less emphasis on written documents. The Government is also concerned that the term 'essential documents' is too broad, and the Minister comments further that '[a]lthough not expressly specified in the ECHR, the right to translation has been touched upon in

(b) Scope of written translation in Directive 2010/64/EU

The initial proposal for a Directive, that of 11 December 2009 presented by 13 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[68]. 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 (of 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"[69]. Some further amendments of interest were proposed in the context of the Civil Liberties (LIBE) Committee of the European Parliament, under the leadership of Baroness Ludford. It was 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[70]. 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". The report of the House of Commons European Scrutiny Committee shows that the UK Government were content with the text of Article 3 as proposed: it was sufficiently specific, whilst making allowances for the oral tradition of the common law system, where, for example, there might not be a written judgment to be translated (as reflected in the wording "any")[71]. The Committee, like the Government, was against a more definitive list of documents, finding that the competent officials could decide on a case-by-case basis. Its report indicates the views of the Ministry of Justice as to how the Directive should be transposed, specifically mentioning the translation of documents[72].

The final text of Article 3 of Directive 2010/64/EU is thus not as ambitious as it might have been. The very general provision in 3(1) requiring written translation "of all documents

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ECHR case-law. We will want to make sure that there is consistency between that jurisprudence and the wording of the provision'".

[68] See the original draft in the Annex to this paper (the Explanatory Memorandum specifically referred to the "charge sheet").

[69] See Cras and de Matteis, "The Directive on the Right to Interpretation and Translation in Criminal Proceedings - Genesis and Description", *EUCRIM* (The European Criminal Law Associations' Forum) 2010/4, 153-162; http://www.mpicc.de/eucrim/archiv/eucrim_10-04.pdf, at 159.

[70] For the UK Government, this would create a right to information.

[71] House of Commons, European Scrutiny Committee, documents considered on 20 January 2010 http://www.publications.parliament.uk/pa/cm200910/cmselect/cmeuleg/5-vii/509.htm (point 7.16); the original draft (see Annex hereto) read "where such documents exist".

[72] The Ministry of Justice's Explanatory Memorandum of 30 December 2009 had made the following points (ibid., point 7.8) "The Minister does not anticipate that the Directive would have a significant legislative or financial impact on the UK because regional legal systems already afford free access to interpretation during the investigative and trial stage. So far as translation is concerned in England and Wales there may however be a need to set out clearly which essential documents are to be translated. The Government would expect this may be done in part through amendment to the PACE Code C, which could also make provision for review of police decisions. The Government will also consider looking at the existing guidance in the National Agreement on arrangements for the use of interpreters and translators. It does not rule out the possibility 'to embed more firmly' the above best practices, as applied through the common law, into some future legislation – although this would be considered regardless of the existence of EU law on the subject."

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. 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"[73]. 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[74]. Cras and de Matteis suggest that certain "evidence", even though this term was excluded from the wording of Article 3(3), will inevitably be considered "essential"[75]. However, the written translation of documentary evidence *into* the local language does not seem to fall within the scope of the Directive. The Strasbourg case-law provides, albeit tentatively, for the free translation of evidence relied on by the defence, as shown above[76], but does not extend to prosecution evidence[77]. Where a key document has already been translated by the prosecution, there may be serious consequences if poor quality proves detrimental to the defence case[78], and one could argue that it should therefore be "back translated" (on the basis that the translation itself is an "essential document" for the purposes of Article 3), to ensure that the defendant has full knowledge of the prosecution case. However, it will be for the defence to challenge such translations like any other prosecution evidence adduced against any defendant (not just foreign nationals), and it is more likely that in such a context the cost of any linguistic verification or re-translation will have to be borne by the defendant.

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"[79] 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

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[73] Cape et al., *op.cit.*, p. 607.

[74] 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 document 5928/10): "In Article 3.2 the list of specific documents for which translation shall be required has been reduced in comparison with the version of the draft on which the Council of Europe provided its earlier comments [i.e. 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."

[75] Cras and de Matteis, *op.cit.*, pp. 159-60.

[76] Under Article 6(3)(e) (see wording of *Kamasinski*, § 74), but also under 6(3)(b) (right to facilities for defence), see *Plotnicova*, *op. cit.*; this is consistent with the "equality of arms" principle.

[77] See *Akbingöl v Germany*, inadmissibility decision, no. 74235/01, 2004.

[78] Fair Trials International, referring to the case of Teresa Daniels, a British national arrested in Spain, stated: "It's crucial that enough time is allowed for the defence to assess the quality of the prosecution's translations. ... a private diary belonging to Teresa was heavily relied on by the court as evidence of her intention to import drugs, but one entry had been poorly translated. As a result its relevance was misunderstood by the court - with devastating consequences for Teresa" (presentation by C. Heard, 27/11/09, at EULITA launch conference).

[79] 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.

another language accepted thereby; the Directive now guarantees such translation into the actual language, if different, of the person to be surrendered (see below).

(c) Potential limits to written translation of documents

Whilst Article 2(4) of the Directive provides for a "procedure or mechanism" for the purposes of ascertaining whether the person concerned needs an *interpreter*, no such provision is included under Article 3 in relation to the need for translation (i.e. the need in general, not for specific documents). The author understands, from discussions with Commission staff, that this was not a deliberate omission or one that would give rise to an *a contrario* interpretation. No such provision had appeared in the various proposals and it was probably not seen as an issue on the ground that the procedure/mechanism under Article 2 would also serve the purpose of establishing whether the person needed translation, in addition to interpretation. In most cases, such an assumption may be sufficient, although it cannot be excluded that a defendant may not need an interpreter but may require translation of documents[80]. It is unfortunate that a provision similar to that of Article 2(4) does not feature in Article 3 for the sake of clarity and for the avoidance of doubt. Of course, States are free to introduce such a test to verify at the outset whether a suspect can understand a document and it would make sense to combine it with the Article 2(4) test. A related question that then arises is whether a translation may be provided in another language, other than the person's mother tongue, and how the understanding of that other language is to be verified (i.e. to what standard). This option is provided for in Recital 22 of the Directive, having been deleted from the original draft of Article 3(1) (see Annex hereto), but particular caution would surely be called for in the case of written translation.

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 ECHR case-law, such as prior legal advice (conditions that did not appear in the original draft – see Annex hereto). 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[81]. One commentator, however, has criticised this provision, saying that it is bound to lead to debate about what is and is not relevant, potentially leading to an unsatisfactory "patchwork" translation[82]. Moreover, the Council of Europe, in its observations on the draft directive[83], 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

[80] See *Amer v. Turkey*, no. 25720/02, 2009, where the applicant did not need an interpreter for the police interview but could not understand his written statement (violation of Article 6(1) in conjunction with 6(3)(e)).
[81] See Cras and de Matteis, *op. cit.*, p. 160; this is already the practice in the Czech Republic (see Spronken and Attinger, *op. cit.*, p. 180).
[82] See Monjean-Decaudin, *La traduction du droit dans la procédure judiciaire*, Paris, Dalloz, 2012, p. 150.
[83] Observations by the Council of Europe Secretariat, 29 January 2010, *op. cit*.

why, and it will also create difficulties for the translators, as the omission of passages will no doubt usually be decided by non-linguists: court or prosecution officials or even judges[84].

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 and was also consistent with Strasbourg case-law[85]. The States in question relied precisely on the above-mentioned wording in *Hermi* and *Husain* and the absence of any test for a decision on the issue, but as the Commission pointed out, whilst an oral translation *may* in some cases be satisfactory, by converse implication it *may not* satisfy Convention requirements, subject always to the condition laid down by the Court[86]. 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 certainly have some discretion in this respect. A proposal to delete this provision was rejected, so Baroness Ludford did her best to strengthen the relevant safeguards. In her First Reading introductory speech before the European Parliament she announced "We secured the right to limit recourse to partial translation, so all essential material must be translated and oral exceptions must indeed be exceptions, ...". Criticism of the oral translation alternative was nevertheless 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"[87]. The solution has also been criticised by academics: Monjean-Decaudin fears that it will open the way for States to negate the important new autonomous right to the translation of documents[88]. The Council of Europe expressed concerns about the provision in its observations of January 2010: "this provision raises concerns and risks of violations of Article 6 in its implementation at the domestic level. 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"[89]. 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 Luxembourg.

(d) Emphasis on quality

In order to compensate, to some extent, for the more negative points analysed above, Article 3 importantly emphasises the issue of quality – one that is indeed crucial to the Directive 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

[84] The French transposition Bill estimates that, in cases of partial translation, judges will need 5 minutes to decide which passages are relevant! See *Projet de loi* 20 February 2013, at http://www.assemblee-nationale.fr/14/pdf/projets/pl0736.pdf, p. 70.

[85] Cras and de Matteis, *op. cit.*, p. 160, reveal that "[t]he debate on this point in the Council's preparatory bodies was very lively and led to some brilliant exchanges".

[86] Namely that "the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself" (*Hermi v. Italy* [GC], *op. cit.*, § 70, from *Kamasinski*); see Justice Forum Meeting on Procedural Rights, Background Document, 9 November 2009: http://www.ecba.org/extdocserv/projects/JusticeForum/JF_PR_background.pdf.

[87] European Parliament, 16 June 2010, Explanations of Vote (A7-0198/2010).

[88] See Monjean-Decaudin, *op. cit.*, p. 150.

[89] Observations by the Council of Europe Secretariat, 29 January 2010, *op. cit.* The Council further suggested that the explanatory memorandum should provide additional details and possibly examples of situations in which the provision could be applied without affecting the fairness of the proceedings; such examples were never indicated, however.

the Article (see Annex hereto), 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[90], 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 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[91]. Another positive point is the indication in Article 3(1) that translations must be provided "within a reasonable period of time".

Generally speaking, Article 3 of the Directive can be seen as one of the major achievements of this legislation in relation to the previous uncertainty about the right to written translation. It clearly goes further than the case-law of the Strasbourg Court, which, at best, has required the translation of a charge or indictment where it is absolutely necessary to provide the information in writing, without clearly distinguishing this from the right to interpretation. As Monjean-Decaudin observes, the Directive renders each right autonomous and more visible in European law[92] by identifying them and providing for each one separately.

(e) Two other 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[93]. 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"[94] (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[95], incidentally reproducing the provisions on the right to written translation in Directive 2010/64/EU.

[90] 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".

[91] Including the rather unfortunate use of "adequacy", in Recital 24 as in Article 5(2); other terms could have been used in the Directive, such as "accuracy" (in 2004 proposed Framework Decision) or even "high quality", proposed in an amendment that was rejected.

[92] See Monjean-Decaudin, *op.cit.,* p. 149.

[93] 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 L 142, 1 June 2012).

[94] This term "accusation" was ultimately adopted, rather than "charge", as it was considered to be more generic, but the Preamble (Recital 14) states that it is intended to describe the same concept as "charge" as used in Article 6(1) ECHR; it is also clear from the same Recital that the Directive builds on the relevant rights in both Article 5 and Article 6 ECHR as interpreted by the Strasbourg Court.

[95] States are not obliged to use it, and in any event, should align its content with their national rules, ultimately making it available in translation, 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[96] (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/EU: there is no need to translate "irrelevant passages" and an oral translation or summary may be acceptable.

III. Looking to the (near) future: ensuring effective transposition of Directive 2010/64/EU

(a) Previous limits to provision of written translations

Research sponsored by the European Commission in 2009[97] concluded that there was no automatic or absolute right to written translation in 5 Member States of the EU (Austria, Bulgaria, France, Latvia, Portugal); in other words, it was only occasionally provided in those countries upon request. In the States where the right was guaranteed, there was a considerable variation in the documents concerned: the charge *or* indictment were translated in the majority, the reasons for detention and final judgment in less than half[98]. Only a small number of States (six) provided for the translation of parts of the case file. Few States had a procedure by which to establish the need for written translation. A study by Cape and others[99] looked at a selection of EU States plus Turkey and found many limitations in the area of written translation, also identifying a wide range of practices. It was found that in some jurisdictions the judgment was never translated in writing; in the case of Italy, for example, because it was a public document (only documents specifically addressed to the accused would be translated), or because it was expected that the lawyer would explain it, as in Germany. As regards the translation of documents in the UK the study observes: "there appears to be no set procedure for determining whether translation is necessary, for arranging translation or for determining who bears the cost, and there is no specific requirement that a charge or indictment be translated"[100]. However, the cost of written translations could be claimed back under legal aid where appropriate. In France the existing situation regarding written translation was even less clear; even though defendants in general were to be provided with certain documents during the pre-trial proceedings, those documents were very rarely translated[101] and, if so, only on request.

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[96] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime (OJ L 315, 14 November 2012; to be transposed by 16 November 2015).

[97] Spronken, Vermeulen, de Vocht and van Puyenbroeck, *EU procedural rights in criminal proceedings*, European Commission/University of Maastricht, 2009, pp. 90-95; at http://arno.unimaas.nl/show.cgi?fid=16315; a follow up to Spronken and Attinger, 2005, *op. cit.* See also Herráez et al., *op. cit.*, pp. 105-6.

[98] Charge: 12 States; indictment: 13 States; detention order/reasons: 9 States; final judgment: 11 States.

[99] See Cape et al., *op. cit.*, esp. pp. 592-96.

[100] See Cape et al., *op. cit.*, p. 148.

[101] See Cape et al., *op. cit.*, p. 239, referring to Article 279 of the Code of Criminal Procedure (Assize Court proceedings) and French case-law to the effect that not all documents have to be translated. The Code also provides that an interpreter will translate documents during the trial itself (Articles 344 and 407).

In France, although the official lists of *experts* for each Court of Appeal do make a distinction between interpreters and translators (since 2004), the vast majority of linguists are to be found under both headings (as most candidates themselves no doubt prefer). In some countries no such distinction is made at all in practice. As Herráez, Giambruno and Hertog point out:

> "The fact that translation and interpreting ... are different activities requiring different skills, may have important implications for accreditation practices ... , for the provision of language services and for the recruitment of professionals. However, within domestic courts, both activities are performed by the same professionals (or non-professionals) in response to the specificities of the institutional setting in which these activities take place."[102]

The authorities' assumption often seems to remain that someone who is an interpreter can translate and *vice versa*. Whilst this may be true in respect of some professionals (and it may even be advantageous to use the same linguist for both interpretation and translation in a given case), the distinction between translators and interpreters should be meaningfully reflected in the requisite national registers, by providing not only for separate categories but also for separate qualification, training or experience requirements (and even a separate accreditation procedure)[103]. In some States the translation of documents is entrusted to special agencies, whether private or public, or is even carried out by staff translators working for the prosecution[104] or the court[105]. The question then arises whether such a system is compatible with the indication under Article 5(2) of Directive 2010/64/EU that registered translators should be "independent".

Some States may of course have had better guarantees for written translation in some respects and their standards will not be undermined by Directive 2010/64/EU, which stipulates that it lays down *minimum* rights, without prejudice to any "higher level of protection" (Article 8 and Recital 32) that a given State may already provide.

(b) Which documents will be considered "essential"?

It should be noted that, in accordance with Article 1(4) of Directive 2010/64/EU, the right to translation applies only to documents that would, under national law, already be available to a suspect or defendant. To the extent that some documentary evidence will inevitably be included among the essential documents to be translated, European jurisdictions already have very different approaches to disclosure at the pre-trial stage and it will also depend on the type of case[106]. In any event, requests for written translation should be considered by reference to the right to fair trial and not in terms of potential cost[107]. The list in Article 3(2) of the Directive is merely indicative, as has been shown, and various other documents should no doubt be regarded as essential, in particular at the pre-trial stage, such as: statements by complainants and witnesses (especially if they are to be produced as exhibits during the trial); the suspect's own statement to the police[108]; notices of hearings (the issue in *Hermi*); key experts' reports; documents explaining the defendant's rights and procedures, including how

[102] See Herráez et al., *op. cit.*, pp. 98-99.
[103] See the European Commission's recommendation in the 2003 Green Paper (above).
[104] Finland (private certified translation offices), Hungary (a public authority) and Latvia (staff of the prosecution office); see Spronken and Attinger, *op. cit.*, pp. 182, 185 and 188.
[105] For example in Spain and Estonia (see Herráez et al., *op. cit.*, p. 102).
[106] Access to material in the case file is, as shown above, provided for by Directive 2012/13/EU.
[107] Recommendation of Cape et al., *op. cit.*, p. 629.
[108] See *Amer v. Turkey*, *op. cit.*; also the subject of a complaint in *Kamasinski*, *op. cit.*, where the applicant had specifically requested a written translation of his statement (§ 76) to be able to check its accuracy.

to lodge an appeal[109]; decisions discontinuing or suspending proceedings, releasing a defendant on bail or under police supervision, etc. The requisite information about the charge could be summarised in a summons, notice, police report or charge sheet or developed in more depth in a judicial order imputing the offence to the defendant, such as a committal order. The impact assessment in the French Bill provided a comprehensive list of documents that might potentially have to be translated[110]. As written translation for the benefit of the suspect or defendant was lacking in France, there is bound to be a certain increase in such work[111]. However, the details that have since emerged about the Directive's transposition in France suggest that the essential documents earmarked for written translation will remain limited.

As mentioned above, under Directive 2010/64/EU (Article 3(6)) there may be a need to translate a European Arrest Warrant (EAW) into a third (non-EU) language[112], although in practice this should be relatively rare. In a paper on the subject of implementing the Directive in EAW cases, Nicholas Evans, District Judge at Westminster Magistrates' Court, made the following observations based on his experience:

> "Currently we do not translate EAWs. The Judicial Authority in the requesting state provides the EAW (in its own language) and their English translation (the quality of which is generally good but sometimes poor). The vast majority of EAWs are seeking surrender of the Judicial Authority's own nationals so no further translation is required. Perhaps in one in a hundred cases does the Requested Person not understand either of the languages of the EAW. In such cases the interpreter provides an oral translation. If the Directive requires a translation in writing to be provided by the requested state, then, quite apart from the cost and inconvenience, that will introduce further delay into a scheme that is intended to process requests for surrender speedily. It will also provide a translation of a translation and for that reason may not reflect accurately the original."[113]

Evans also queried whether his own decision as to the execution of the warrant, translated by an interpreter at the hearing, should also be translated in writing despite the delay that this would cause, to the extent that it constituted a "judgment" for the purposes of Article 3(2). A Commission representative took the view, in the ensuing discussion, that there was no requirement for such a written translation, since under the Directive the EAW was provided for as a separate situation and would be covered only by those provisions specifically referring to it. It should also be pointed out that Article 3(6) does not require the translation of any supporting documents from the file at the execution stage. This issue was in the news when the lawyer representing Julian Assange, in his challenge against the execution by the

[109] The translation of appeal instructions is provided for in Germany, and in the Netherlands the Ministry of Justice has brochures in a number of language explaining procedures (see Spronken and Attinger, *op. cit.*, pp. 184 and 191).

[110] *Projet de loi* 20 February 2013, at http://www.assemblee-nationale.fr/14/pdf/projets/pl0736.pdf.

[111] An official of the French Ministry of Justice comments that a number of domestic law provisions will have to be adapted, including "l'obligation de traduction gratuite de documents, qui n'existait que très peu voire pas du tout et qui sera très coûteuse pour l'Etat" (see Schaller, "Langue, linguistique et droit à la traduction et à l'interprétation", in *Droit pénal, langue et Union européenne*, Mauro and Ruggieri (eds.), Brussels: Bruylant, 2013, p. 235); the Bill estimates the total cost of written translation at (at least) 23 million euros for one year.

[112] The issuing State is responsible for the original translation of the EAW and this provision of the Directive only applies to translation by the executing State.

[113] Nicholas Evans, "Implementing the Directive: the right to interpretation and translation in proceedings concerning the European Arrest Warrant – practical concerns", Seminar of 18-19 November 2010 "Guaranteeing Procedural Safeguards in the EU – a First Step Taken?", Academy of European Law (ERA). His last point is based on the assumption that the warrant would be translated into a third language from the English, but it may sometimes be possible to obtain a translation from the original.

UK of a Swedish EAW, complained about his client having to pay for translations[114], with reference to Swedish documents which he believed should have been translated into English at that stage. It is unlikely, however, that any such translations could reasonably be expected from the issuing State, still less from the executing State, prior to the execution of the EAW.

It is not quite clear which documents would have to be translated at the police custody stage, apart from the Letter of Rights, translated only once into each language, adapting to the domestic system the model appended to Directive 2012/13/EU[115]. As this is a situation of deprivation of liberty, specifically mentioned in Article 3(2), the most relevant other document would be one explaining the reasons for the police custody, to the extent that such a document exists: for example an arrest warrant or a police custody notice or order. Such an order has been mentioned as an essential document in connection with transposition in the Netherlands, where the use of standard forms is recommended to facilitate such translation[116]. In some jurisdictions there might be a police statement summarising the offence. In the UK it was already the role of the custody officer to arrange for language assistance and the transposition of the Directive has entailed amendments to PACE Code of Practice C, as expected by the Ministry of Justice (see above), with specific reference to the documents that have to be translated[117]. In some countries any relevant translations, especially the charges and, ideally, a back-translation of the suspect's own statement[118], will no doubt be provided at a later stage, in view of the limited time for written translation during police custody.

(c) 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[119]. 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 without being fluent in the foreign language concerned[120]. Then

[114] See *Daily Telegraph*, 24 February 2011, "Julian Assange attacks European arrest warrant after extradition ruling", quoting Assange's lawyer to the effect that "the cost of translating material alone [has amounted] to more than £30,000" and that this is a "cost the prosecution should be bearing ... The prosecution should be translating everything into a language he understands"; also John Pilger in the *New Statesman*, 15 December 2010: "For three months, Assange and his lawyers have pleaded with the Swedish authorities to let them see the prosecution case. This was denied until 18 November, when the first official document arrived – in the Swedish language, contrary to European law".

[115] As regards third languages, the European Commission has indicated that it could coordinate the translation of the model, as adapted to domestic systems.

[116] Explanatory Memorandum, Bill before Dutch Parliament (Implementatie van richtlijn nr. 2010/64/EU, Memorie van Toelichting, Tweede Kamer der Staten-Generaal 2011-12, 33 355, no. 3, p. 13: referring to "het bevel tot inverzekeringstelling" from Article 59 of the Dutch Code of Criminal Procedure).

[117] Police and Criminal Evidence Act 1984 (PACE), "Code of Practice for the detention, treatment and questioning of persons by police officers"; see Annex M: "Documents and records to be translated" (table of essential documents).

[118] In the UK the written interview record is created contemporaneously, in the foreign language, so that the person can check and sign the original statement on the spot. In France, for example, the suspect is asked to sign the French *procès-verbal* containing his or her statement.

[119] The UK in particular was against the idea of a "review" (term used in original draft) or "appeal", on the ground that in a police context the matter would be dealt with by a higher police authority rather than a court; hence the use in the Directive of the more neutral terms "challenge" and "possibility to complain".

[120] This is indeed the suggestion in the French Bill, *Projet de loi*, *op. cit.*, p. 23.

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[121].

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"[122]. 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 foreign national's language difficulties and, in any event, cannot be interpreted as a waiver of the relevant rights.

In conclusion, one can say that Article 3 is one of the hallmarks of Directive 2010/64/EU, but that the effective transposition of its provisions in all States is far from certain, at least in the short term, until such time as relevant domestic or European case-law emerges.

[121] Explanatory Memorandum, Bill before Dutch Parliament, *op. cit.*, p. 14.
[122] See *Cuscani v. the United Kingdom*, no. 32771/96, 2002, § 39, and *Hermi v. Italy* [GC], *op. cit.*, § 72: "encompassing ... the possible absence of translation or interpretation".

ANNEX

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 L 280 (26 October 2010): http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010L0064:EN:NOT

ARTICLE 3 – Right to translation of essential documents

Final text	*Original draft of December 2009*
1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, **within a reasonable period of time**, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.	1. Member States shall ensure that a suspected or accused person who does not understand the language of the criminal proceedings concerned is provided with a translation, **into his native language or into another language that he understands**, of all documents which are essential in order to safeguard his right to fair proceedings, **or at least the important passages of such documents**, provided that the person concerned has the right of access to the documents concerned under national law.
2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.	2. The competent authorities shall decide which are the essential documents to be translated under paragraph 1. The essential documents to be translated, in whole or the important passages thereof, shall include at least detention orders or equivalent decisions depriving the person of his liberty, the charge or indictment and any judgment, **where such documents exist.**
3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.	3. The suspected or accused person, or his legal counsel, may submit a reasoned request for translation of further documents which are necessary for the effective exercise of the right of defence.
4. There shall be no requirement to translate passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them.	
5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the **right to challenge a decision** finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the **possibility to complain that the quality of the translation is not sufficient** to safeguard the fairness of the proceedings.	4. Member States shall ensure that at some stage in the proceedings, in accordance with national law, **there is the possibility of a review** if translation of a document referred to in paragraphs 2 and 3 is not provided. Such review does not entail the obligation for Member States to provide for a separate mechanism in which the sole ground for review is the challenging of such finding.

6. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European arrest warrant is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document.	5. In proceedings for the execution of a European Arrest Warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European Arrest Warrant is drawn up, or into which it has been translated by the issuing Member State, with a translation of that document.
7. As an exception to the general rules established in paragraphs 1, 2, 3 and 6, an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.	6. Provided that this does not affect the fairness of the proceedings, an oral translation or an oral summary of the documents referred to in this Article may, where appropriate, be provided instead of a written translation.
8. Any waiver of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily.	7. A person who has a right under this Article to translation of documents may, at any time, waive this right.
9. **Translation provided under this Article shall be of a quality 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.**	