ECHR case-law on the right to language assistance in criminal proceedings and the EU response

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It was in November 1950 that the European Convention on Human Rights ("the Convention") was adopted, with its well-known provisions on the right to language assistance in criminal proceedings. Some 60 years later, in October 2010, the Council of the European Union has adopted a Directive ("the Directive") on that very right, to some extent consolidating the findings of the European Court of Human Rights in Strasbourg ("the Court", set up in 1959).

The Convention rights are concise, so the case-law is all the more important and the Court has interpreted the relevant provisions to clarify various aspects, depending on the circumstances of each case. It has often referred to the Convention as a "living instrument", as its interpretation is adapted to contemporary realities. The European Union has now taken up the challenge to produce a more detailed and up-to-date normative instrument that will address a number of outstanding issues and oblige States – those of the Union – to maintain, and in some cases reinforce, the guarantee of quality language assistance. As the European Commission stated in its Green Paper of 2003 proposing a Framework Decision on procedural safeguards: "The difficulty is not in establishing the existence of this right, but is rather one of implementation".

ECHR rights

Articles 5 and 6 of the Convention read as follows:

> Article 5 § 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.
>
> Article 6 § 3 Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; ...
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 5 concerns liberty and security and goes beyond criminal matters: it covers the detention of persons of unsound mind and of immigrants with a view to deportation or extradition – neither of which are covered by Article 6. The relevant provisions of Article 6 apply to anyone who has been "charged" in the context of the "determination" of that charge, i.e. the criminal proceedings from start to finish. The notion of "charge" has been given a very broad meaning, as has "criminal offence". These are examples of autonomous concepts in the Court's case-law that do not

[1] The views expressed in this paper are personal to the author and the information is up to date until October 2010; the database of relevant case-law can be found at: http://www.echr.coe.int/echr/en/hudoc

necessarily correspond to the equivalent concepts in domestic legal systems[2]. The language-related provisions themselves have been described as "vague", for example by Wiersinga[3]:

> "Everything must be seen against the background of adequacy. Generally speaking, the rights guaranteed by Art. 6 ... have to be 'practical and effective'. This means that a lot of 'casuistics' can be modelled on this pretty vague, European standard."

Another writer, Trechsel, has described the application of the provisions as "vague"[4]:

> "... [the Court] prefers a vague reference to the proceedings as a whole and to fairness in general to the meticulous analysis of each guarantee ..."

The rights concerned are clearly intended to represent a minimum standard. It will nevertheless be shown how the Court has to some extent developed the provisions on language assistance through its case-law, in applying them to various situations.

Language issues have been raised in a surprisingly significant number of cases but most often incidentally, together with other complaints under Articles 5 and/or 6, sometimes in conjunction with Article 14 (prohibition of discrimination). Even though the Court has rarely found a violation solely on account of such issues, these cases have given it the opportunity to lay down the basic principles in passages that represent a consolidation of the applicable case-law, for example in *Kamasinski v. Austria* (19/12/1989) and more recently in the Grand Chamber case of *Hermi v. Italy* (no. 18114/02, 18/10/2006).

However there are certainly a number of "grey areas" in the protection that has to be guaranteed under the Convention. The following issues, for example, have not been conclusively addressed:

- translation of documents (evidence, judgments, etc.), the very use of "interpreter" in Article 6 being open to interpretation;
- whether all parts of the proceedings should be interpreted/translated and whether a summary or extracts are sufficient;
- whether an interpreter should be provided for communication with a lawyer;
- requirements of quality and competence.

The Convention provisions have been copied or adapted by the drafters of other international instruments[5], and corresponding rights are also guaranteed in the basic instruments of international criminal tribunals[6].

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[2] see, for example, *Engel and Others v. the Netherlands*, 8 June 1976; also G. LETSAS, "The Truth in Autonomous Concepts: How to interpret the ECHR", *EJIL* 15, 2005

[3] WIERSINGA in *Aequalitas*, Lessius Hogeschool 2003, at http://www.agisproject.com/ (Publications)

[4] TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford University Press 2006, p. 207 (Stefan Trechsel was the last President of the former European Commission on Human Rights until 1999)

[5] in particular, the UN International Covenant on Civil and Political Rights (1966) and the American Convention on Human Rights (1969)

[6] International Criminal Tribunal for the former Yugoslavia, Statute, Article 21 (4); International Criminal Court, Statute, Article 67

EU Directive rights

The acquired right to translation and interpretation in criminal proceedings is now enshrined and developed in a EU Directive[7]. A draft Directive was submitted in December 2009[8] by a group of Member States in the Council of the European Union (under the Lisbon Treaty, that had just entered into force), and the European Commission subsequently presented its own draft (March 2010). The first draft, incorporating a number of elements from the other, was approved by the European Parliament at First Reading on 16 June 2010 and was referred back to the Council, which formally adopted the Directive on 7 October 2010[9].

The Explanatory Memorandum (15/12/2009) stated: "This initiative for a Directive sets out the basic obligations and builds on the ECHR and the case-law of the ECtHR". The Preamble to the Directive specifically mentions the ECHR several times, declaring the need to implement the Article 6 rights and guarantees consistently and to develop, within the EU, the minimum protection already guaranteed under the Convention (see Recital 7). A "non-regression clause" (Article 8) stipulates that the Directive cannot have the effect of reducing existing protection. The Council of Europe provided observations on the draft and its compatibility with the Convention[10], emphasising the need for consistent interpretation of the rights set out in the Directive and the corresponding ECHR rights.

The Directive sets the scope of the rights as follows (Article 1 § 2):

> "The right [to interpretation and translation in criminal proceedings] shall apply to persons from the time they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings".[11]

The same Article (1 § 3) provides for an exception in the case of minor offences that are not initially dealt with by a criminal court (see also Recital 16). As stated in the above-mentioned Council of Europe observations, this seems to imply that the scope of application of the Directive could prove to be narrower than the scope of application of Article 6, in the light of the autonomous meaning of "criminal charge", which does extend to offences not necessarily classified as criminal in a given domestic system[12].

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[7] 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, published in the Official Journal of the European Union on 26/10/2010 (out of the 27 EU Member States, Denmark is the only one to which it does not apply).

[8] a previous draft Framework Decision had been abandoned

[9] The relevant documents can be found on the European Parliament's website http://www.europarl.europa.eu/oeil/file.jsp?id=5840482 and in the document database of the Council of the European Union: http://www.consilium.europa.eu/showPage.aspx?id=549&lang=EN (search using the interinstitutional file reference 2010/0801(COD))

[10] opinion of 29/01/2010 at http://register.consilium.europa.eu/pdf/en/10/st05/st05928.en10.pdf

[11] to be compared with case-law: "Whilst 'charge', for the purposes of Article 6 § 1, may in general be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect." (*Foti v Italy*, § 52, building on *Eckle v Germany*)

[12] see *Öztürk v Germany* 1984, where the Court found that free interpretation should have been provided to the applicant even though the traffic offence in question was classified as "regulatory"

(1) When does language assistance have to be provided?

The right to an interpreter at the time of arrest, under Article 5 § 2 of the Convention, has been acknowledged in a number of cases, for example, where the suspect was subsequently released (*Ladent v. Poland*, no. 11036/03, 2008) and where the applicant had been arrested with a view to deportation (*Galliani v Romania* no. 69273/01, 2008). In neither of these cases would it have been possible for the applicant to rely on Article 6, which applies to ongoing criminal proceedings, as will become clear. The Directive covers the Article 5 § 2 right to the extent that it refers to the translation of the European Arrest Warrant[13] and of detention orders in general. It also makes up for a shortcoming in ECHR protection by requiring (Article 2 § 7) that the executing State should provide interpreting "in proceedings for the execution of a European arrest warrant"[14]. The Directive does not deal, however, with the other aspects of Article 5 mentioned above in the introduction, and it is probably for this reason in particular that the Preamble does not specifically refer to Article 5 § 2[15].

The Article 6 § 3 (e) guarantee primarily covers all court hearings, from first instance to appeal. The accused[16] must be provided with the necessary assistance to ensure a fair trial and the test is whether enough is done to allow the accused fully to understand and answer the case against him – in other words to participate effectively in the proceedings. The Court found in *Hermi* (§ 72) that "the ultimate guardians of the fairness of the proceedings, encompassing ... the possible absence of translation or interpretation ... are the domestic courts". The State has a positive obligation, even if the applicant does not request an interpreter or, in some cases, waives that right, to ensure the proper administration of justice.

The wording "language used in court" has never been interpreted literally by the Court[17]. In the early case of *Luedicke, Belkacem and Koç* (28/11/1978) the German Government had argued that Article 6 § 3 (e) did not extend to pre-trial proceedings, especially as the French read "*la langue employée à l'audience*", but that argument was rejected. Trechsel makes the point that:

> "it would lead to unjustified inequality if in a country where the administration of evidence takes place during preliminary proceedings the accused had to pay a considerable amount for the interpreter's fees, while an accused living in a country where the evidence is examined at the trial hearing did not have to pay."[18]

Furthermore, it has recently been clarified that this guarantee extends to the very first questioning of a suspect after arrest. In *Diallo v Sweden* (no. 13205/07, 05/01/2010)[19] the Court did not accept the applicant's allegations about shortcomings in the

[13] in fact already provided for in the Framework Decision on the EAW

[14] A Spanish case *Monedero Angora* (no. 41138/05, 2008) confirms that Article 6 does not apply to EAW proceedings, which are comparable to extradition, and Article 5 would not necessarily apply to a related hearing in the executing State.

[15] The insertion of a reference to Article 5 had been proposed in an amendment (see Draft Report of 5/3/10, Amendment 3) but was rejected.

[16] Article 6 rights do not extend to third parties (see *C v France* 17276/90 and *Fedele v Germany* 11311/84)

[17] see G. ROYER, "Le droit à l'assistance d'un interprète", *Actualité Juridique – Pénal*, Dalloz, May 2007: "Le juge de Strasbourg a su dépasser cette insuffisance sémantique en consacrant une vision large du droit à l'interprète qui embrasse tout le procès pénal"

[18] TRECHSEL, *supra*, p. 337

[19] French citizen arrested by Swedish Customs officials and found to be carrying heroin

language assistance provided, but confirmed the right to an interpreter at that early investigative stage of the proceedings, drawing a parallel with the right to a lawyer in police interviews, as recently established in *Salduz v Turkey* (no. 36391/02, 27/11/2008).

Article 2 § 1 of the Directive guarantees the right to interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

The situation in *Amer v Turkey* (no. 25720/02, 13/01/2009) was similar to *Diallo* as regards the stage of the proceedings. It concerned a police interview where an Arabic speaker managed to communicate with the police in Turkish without an interpreter but could not understand the handwritten statement presented to him. The Court found that this had prejudiced his right to a fair trial, considering that even though the applicant understood the foreign language (Turkish) to some extent – enough to be able to express himself – he was not capable of reading texts. So he should have had an interpreter at least to retranslate his statements to him. The authorities had not made sure that he understood those statements (or the indictment). The Court thus found a violation in a case where the applicant could obviously speak the language a little but could not understand it in written form.

An accused who understands the language used in court cannot insist upon the services of an interpreter to allow him to conduct his defence in another language, e.g. a language of an ethnic minority of which he is a member. In *K v France*[20] the applicant wanted to conduct his defence in Breton but he was found to have no difficulty understanding or speaking French.

It may be difficult to establish when a suspect or defendant "cannot understand or speak the language used in court". The Court found in *Brozicek v. Italy* (19/12/1989) and more recently in *Cuscani* that the burden of proof is on the (judicial) authorities to prove that the defendant sufficiently understands the language of the court, and not for the defendant to prove he did not. The Directive provides (in Article 2 § 4) for "a procedure or mechanism ... to ascertain whether the suspected or accused person understands and speaks the language of the criminal proceedings ...".

Lastly, as to whether language assistance should be provided for communication between the accused and counsel, there has been no clear finding but one could say that such a right is implicit in the case of *Güngör v Germany* (no. 31540/96, decision 17/05/2001), where the Court considered the issue but found that, in the circumstances, the applicant's knowledge of German was sufficient[21]. But even if an interpreter is desirable for such communication, when should the service be provided and should it apply to lawyers of the person's own choosing or just to assigned counsel[22]? The extension of the authorities' duty to such situations is provided for

[20] no. 10210/82, Commission decision of 1983 - see also *Bideault v France*, no. 11261/84

[21] the case of *Lagerblom v Sweden* (2003) also deals with this issue; the Court seems to have moved away from the Commission's restrictive interpretation in *X v Austria* (6185/73)

[22] on this issue see TRECHSEL, *supra*, p. 339, and HARRIS et al, *Law of the European Convention on Human Rights*, Oxford University Press, 2nd edition 2009, p. 328

specifically in Article 2 § 2 of the Directive, this being one of its noteworthy achievements[23]:

> "Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications."

(2) Is the translation of documents also an obligation?

As mentioned in connection with the varying importance of pre-trial proceedings, 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. It is obvious that in continental-type proceedings, where the file plays an important role, the right to have documents translated should be covered. The Court has never clearly enumerated such documents. By comparison the Directive (Article 3) provides for translation of "essential documents", to include the detention order, the charge or indictment and the judgment, together with any other documents regarded by the authorities as essential. However, there is no requirement to translate passages of such documents which are "not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them", thus leaving even more room for discretion.

The leading judgment on this subject is *Kamasinski v. Austria*, where the Court established the principle that Article 6 included written material, not just oral statements[24], but there are limitations to this principle. The Court added in *Kamasinski* that Article 6 did not require translation of all documents, only those necessary for the defendant "to have knowledge of the case and defend himself", and in particular the indictment. This was reiterated more recently in *Hermi v Italy*: "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". However, in both those cases the Court indicated that a written translation of the indictment was unnecessary if sufficient oral information as to its contents was provided[25].

As to a written translation of a judgment, the Court has again found that this is not absolutely necessary and oral explanations, with the assistance of a lawyer, should suffice to enable the defendant to lodge an appeal (*Kamasinski* § 85):

> "The Court agrees with the Commission that the absence of a written translation of the judgment does not in itself entail violation of Article 6 § 3 (e) ... it is clear that, as a result of the oral explanations given to him, Mr Kamasinski sufficiently understood the judgment and its reasoning to be able to lodge, ... an appeal."

[23] and apparently the reason why an exceptional 3-year transposition period was requested (see letter of 27/05/10 Council of the European Union, on-line database, *supra*)

[24] "all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial" (*Kamasinski*, § 74)

[25] when the *Kamasinski* case was examined initially by the Commission, some members had taken the view that an oral translation of the indictment was not sufficient

A similar situation arose in *Baka v. Romania* (no. 30400/02, 16/07/2009). In that case there was no translation of a judgment, neither written nor oral. The Court observed that the applicant had never requested one and must have understood the judgment after discussing it with his lawyer. Nevertheless, there is perhaps an implication here that if he had requested a translation and had been unable to discuss the judgment with his lawyer, such assistance would have been called for.

The Court has recently confirmed its case-law that an oral translation of written material is usually sufficient, depending of course on the circumstances. In *Husain v. Italy* (no. 18913/03, decision 24/02/2005) the Court stated: "it should be noted that the text of the relevant provisions refers to an 'interpreter', not a 'translator'. This suggests that oral linguistic assistance may satisfy the requirements of the Convention"[26]. A written translation may obviously be desirable for the purposes of an appeal and in situations where no oral assistance is available, but there have been no test cases on this issue to date.

The Directive (Article 3 § 7) stipulates that the use of an oral translation or an oral summary of essential documents, instead of a written translation, should remain exceptional, and above all must not affect the fairness of the proceedings. It also allows for the possibility of an unequivocal waiver of the right to translation of documents (Article 3 § 8), which appears to be consistent with case-law[27].

(3) Should language assistance be provided free of charge?

In *Luedicke* (cited above), Germany had tried to obtain the reimbursement of interpreting costs from the applicants after their conviction (as then provided for by domestic law). The Court held that Article 6 guaranteed free assistance and "it does not follow that the accused person may be required to pay the interpretation costs once he has been convicted". It interpreted free (*gratuitement*) as a "once and for all exemption" from paying costs[28]. Any contrary interpretation would be inconsistent with the object and purpose of Article 6 – to ensure a fair trial for all accused persons – since an accused might forgo his right to an interpreter for fear of financial consequences. The obligation to provide free assistance is therefore unqualified and does not depend on the accused's means. The services of an interpreter are part of the facilities required of a State in organising its system of criminal justice. However, the Court appears to have left open the question whether it would be a breach of Article 6(3) for a State to require an accused to pay certain costs associated with the gathering of evidence[29].

The Directive (Article 4) provides that Member States must cover the costs of language assistance "irrespective of the outcome of the proceedings".

[26] this wording has since been repeated in the *Hermi*, *Baka* and *Kajolli* judgments

[27] see *Kamasinski* § 80 – translation of indictment waived by defendant and counsel; however, the Directive does not mention in Article 2 the waiving of the right to an interpreter (unlike the Court in, for example, *Sardinas Alba v Italy* no. 56271/00 (decision 2004) and *Baka*)

[28] see also *Işyar v. Bulgaria*, no. 391/03, 20/11/2008, § 48, and STAVROS, *The guarantees for accused persons under Article 6 of the European Convention on Human Rights*, Nijhoff, 1993, pp. 252-56

[29] no violation was found where the applicant had been charged after his conviction for the translation of intercept evidence for the prosecution (see *Akbingöl v Germany* 2004); nor where the applicant had failed to appear for trial (*Fedele v Germany* 1987).

(4) Choice of interpreter/translator

The Court has indicated (albeit implicitly) that the authorities should appoint a competent interpreter/translator, but not necessarily one that is registered in accordance with the national system. However, there are few cases illustrating this point. The case-law does not actually indicate any limits as to who can serve as an interpreter – what matters is that the accused can understand and make himself understood sufficiently to be involved effectively in the proceedings. In *Kamasinski* some of the interpreting had been done by a police officer, and even a prisoner had interpreted for a police interview in the absence of a sworn translator, but the Court did not find a violation[30], stating that it was "not called upon to adjudicate on the Austrian system of registered interpreters as such, but solely on the issue whether the interpretation assistance ... satisfied the requirements of Article 6" (§ 73).

In *Coban v. Spain* (no. 17060/02, decisions of 06/05/2003 and 25/09/2006) a Turkish national had been convicted in Spain for drug trafficking and complained, among other things, about the choice of interpreter/translator. One complaint was that his interpreter before the investigating judge was not "registered". He also stated that the prosecution had relied on intercept evidence which had been translated from Turkish in summary form by an "unregistered" translator. The Court found that even a non-official translator would be adequate if he had a "sufficient degree of reliability as to knowledge of the language interpreted"[31], further observing that the Spanish Code of Criminal Procedure did not require an official qualification for that task and that a summary translation was acceptable. It also pointed out that only the conversations in Spanish had been relied on by the court, not the translated evidence.

In *Cuscani v. the United Kingdom* (no. 32771/96, 24/09/2002), however, the Court did find a violation in a judgment purely about the choice of interpreter. The applicant was an Italian national who had been the manager of "The Godfather Restaurant" in Newcastle upon Tyne – the name of his business seems to have attracted the attention of the authorities! He was prosecuted and ultimately convicted of fraud. Owing to his "considerable difficulty in communicating, save in very simple concepts, in English", the judge had instructed that an interpreter be found for the sentencing hearing but none was present. Instead of adjourning the hearing to make sure an interpreter was found, the judge was prepared to rely on the applicant's brother to interpret if need be. It held that subparagraph (e) had been infringed as, although aware of the applicant's difficulty in following the proceedings, the judge was persuaded by the barrister, without consulting the applicant, that it would be possible to "make do and mend" with the assistance of the "untested language skills" of the applicant's brother in a sentencing hearing that led to a four-year prison sentence and a 10-year disqualification as company director[32]. It is noteworthy that the Court, however,

[30] see also *Baka v Romania*, where the Court accepted the Government's argument that the applicant had waived his right to a sworn interpreter, and *Diallo v Sweden* where the applicant was questioned in her own language by a Customs officer

[31] "*ayant un degré suffisant de fiabilité quant à la connaissance de la langue qu'il interprète"*

[32] contrast *Berisha & Haljiti v. "the former Yugoslav Republic of Macedonia"*, Decision 2007; where one of the applicants had served as interpreter (in Albanian) for the other, who, according to the Government, had waived his right to a court interpreter

refrained from making any award by way of just satisfaction as it could not speculate as to what the sentence would have been if an interpreter had been present[33].

Admittedly, it would perhaps be difficult for the Court to impose particular formalities and insist on sworn, certified or registered interpreters in every case and at every stage of the proceedings. Trechsel points out, referring to "rare languages" in particular:

> "It may be difficult to find anybody capable of serving as an interpreter. It may, moreover, be downright impossible to find anybody with formal qualifications. Here the effectiveness of the administration of justice must take precedence over circumstances which while desirable cannot be considered as essential"[34].

In the case of *Sandel v. "the former Yugoslav Republic of Macedonia"* (no. 21790/03, 27/05/2010) the Court indeed found that the authorities had wasted time (two and a half years!) trying to find a Hebrew interpreter, when it was clear from the outset that an interpreter in English, Serbian or Bulgarian would have been sufficient at that stage of the proceedings. The case appeared to have been delayed mainly because there were no suitably authorised interpreters and it was prohibited to recruit a court interpreter from a foreign country. In the circumstances, the Court did not need to examine the potential systemic issue, i.e. whether such a restriction might entail a violation of Article 6, but this issue may well arise again in the future. The Directive (Recital 22) states that language assistance can be provided in "any other language that [the suspect or accused persons] speak or understand", so it also allows for a compromise solution.

It is most unusual for a case to deal with a suspicion of bias or lack of independence on the part of an interpreter, but this was one of the issues in *Uçak v the United Kingdom* (decision 2002)[35]. Mr Uçak complained that Ms O., a Turkish interpreter in Scotland, did not speak his language (Kurdish) and was prejudiced against him. His main complaint, however, was that she was not appointed independently of the police and the prosecution. As he associated the interpreter with the police, who had called her to the police station, he claimed that this intimidated him and made him unable to talk freely with his solicitor. He also was upset, after the trial, to discover that the interpreter was listed as a witness by the prosecution. The Court, however, found that there was no evidence of unfairness – the applicant had not complained at the time and some of his allegations were unfounded. It further stated that, although there is no formal requirement that an interpreter be independent of the police or other authorities, the assistance provided must be "effective" and "not of such a nature as to impinge on the fairness of the proceedings". In a more recent case, *Özkan v Turkey* (Decision 2006) the Court accepted that a problem of impartiality might arise (concerning a police officer), although in the particular case the applicant had apparently waived his right to a new interpreter.

[33] "The Court considers that it cannot speculate on the level of sentence which would have been imposed on the applicant had he benefited from the services of an interpreter at the sentencing hearing. It therefore disallows the applicant's claim for pecuniary damage" (*Cuscani*, § 47).

[34] see TRECHSEL, *supra*, p. 339; this comment, however, is given after the example of *Kamasinski*, which did not concern a "rare language".

[35] see also Commission case *C v France* 1992 (inadmissible for other reasons)

The Directive goes much further than the Strasbourg case-law and provides (in Article 5 § 2) for a register of "independent translators and interpreters who are appropriately qualified", to be made available to the authorities and legal counsel[36]. This is of course an obligation that professionals have been advocating for a long time[37], but it remains to be seen whether such registers will be harmonised across the EU and whether EU-wide recruitment by courts will ultimately be possible.

(5) Quality assurance

In a few cases before the Court the applicant has complained about the "quality", rather than the absence, of language assistance. The Court has stated that the authorities (usually the domestic courts) are required to react downstream if they are made aware of a problem of "adequacy" (the Court does not usually refer to "quality" as such), but the applicant has to have "put them on notice" at the time. However, the Court has tended to find such complaints improper, belated or imprecise; where they are valid, it is difficult to assess the damage actually caused.

In *Husain* (cited above) the applicant complained before the Court that there had been no control over the quality of the interpretation or the efficiency of the assistance given by the interpreter. But it was too late to complain about quality: the fact that he had not complained at the time was accepted as an indication by the Court that there was no real problem as "this may have led the authorities to believe that he had understood the content of the document concerned".

Another practical issue is whether it is possible to assess the quality of interpretation, i.e. whether there is a recording. The Court has never found that there is an obligation to record interviews or hearings – both the original language and interpreted versions – for the purposes of quality control. It has simply referred, in two cases, to the lack of "information on which to assess the quality of the interpretation provided"[38]. In reality, the Court would not usually have the time to assess quality in detail and it relies on the assessment by the domestic court[39]. In one case it did take into account the recording of a hearing but found that, despite certain problems with the interpreting, there was no evidence of unfairness[40]. The Directive does not in fact provide for systematic audio or video recording when an interpreter is present[41]. It merely states that the authorities must record, according to their national procedure, the fact that an interpreter has been present (Article 7).

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[36] The European Commission's proposed Directive referred in this context to its report of March 2009 "Reflection Forum on Multilingualism and Interpreter Training", see http://eulita.eu/sites/default/files/Reflection%20Forum%20Final%20Report.pdf; see also Recital 31

[37] Article 5 apparently entailed "tough negotiations" – see Eulita news posted 11/06/2010 at http://www.eulita.eu/fr/archive

[38] see *Protopapa v Turkey* 24/02/2009 and *Strati v Turkey* 22/09/2009

[39] as MÄSTLE comments: "it is more than doubtful that the judges of the ECtHR would be inclined to review ... recordings, given their overloaded dockets" (in *Aequilibrium*, ITV Hogeschool 2005, at http://www.agisproject.com/ (Publications))

[40] see *Panasenko v. Portugal* (no. 10418/03, 22/07/2008), § 63. There had been a violation, however, on account of a lack of legal assistance for the applicant's appeal to the Supreme Court: he had missed a deadline partly because the time-limit ran from service of the judgment in Portuguese and not from that of the translation.

[41] a provision to this effect was dropped from an earlier draft

The Court has often found that the domestic authorities have sufficiently addressed any complaints about quality. For example, in *Khatchadourian v. Belgium* (no. 22738/08, decision 12/01/2010), where the applicant complained about the poor quality of an Armenian translation of the public prosecutor's submissions against him, the Court relied on the finding of an expert's report that the applicant had understood the "gist" even though the translation was somewhat inaccurate. In *Diallo v Sweden* (cited above) it found that the domestic court had exercised "a sufficient degree of control of the adequacy of [the] interpretation[42] skills". In short, the Court has never found a violation on account of poor-quality interpreting or translation as such – only the more general absence of such language assistance, where required.

The Directive should provide a basis for the development of more quality-related mechanisms. In its preamble it uses the Court's language from *Kamasinski*, that the authorities "if put on notice" have to exercise control over the "adequacy" of the interpretation and translation, and recommends that the interpreter be replaced if necessary[43]. It envisages complaints on grounds of quality (Articles 2 § 5 and 3 § 5). It also provides for upstream quality assurance, emphasising in Article 5 that "Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required", namely "a quality sufficient to safeguard the fairness of the proceedings" (Articles 2 § 8 and 3 § 9). There is little indication, however, as to how quality should be assessed in practical terms. Under the heading "Quality", Article 5 only mentions a register (see above) and the duty of confidentiality, which relates more to ethics; however, a "best practice" Recommendation is apparently being prepared[44].

CONCLUSION

The European Court of Human Rights has thus reviewed and guaranteed the implementation of the right to language assistance in criminal proceedings, broadening the scope of the basic provisions to cover various aspects that are essential to ensure a fair trial. The Court's treatment of these issues depends on the circumstances of the case and, admittedly, some questions have been left open; nevertheless, as this paper has sought to show, some clear and basic principles have emerged from its case-law. And now, after a lengthy gestation period and some tough negotiations, the European Union has a much more detailed instrument that will serve to consolidate and develop that right further in the relevant Member States. It will be interesting to follow the implementation of the Directive and, ultimately, the findings of the Luxembourg court, which will also have a role to play (albeit a different one) in ensuring that shortcomings in language assistance do not result in miscarriages of justice.

[42] although the issue did not actually concern an interpreter, but a customs officer speaking the suspect's language

[43] see Recital 26: "When the quality of the interpretation is considered insufficient to ensure the right to a fair trial, the competent authorities should be able to replace the appointed interpreter"

[44] see Eulita news posted 06/07/2010 at http://www.eulita.eu/fr/archive

Alphabetical list of relevant cases - see http://www.echr.coe.int/echr/en/hudoc

Akbingöl v. Germany (decision), 2004
Amer v. Turkey, 2009
Baka v. Romania, 2009
Berisha & Haljiti v. "the former Yugoslav Republic of Macedonia" (decision), 2007
Bideault v. France (Commission decision), 1986
Brozicek v. Italy, 1989
C v. France (Commission decision), 1992
Coban v. Spain (decisions), 2003 and 2006
Conka v. Belgium, 2002
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Delcourt v. Belgium (Commission decision), 1967
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Galliani v. Romania, 2008
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Husain v. Italy (decision), 2005
Işyar v. Bulgaria, 2008
K v. France (Commission decision), 1983
Kajolli v Italy, 2008
Kamasinski v. Austria, 1989
Khatchadourian v. Belgium (decision), 2010
Ladent v. Poland, 2008
Lagerblom v. Sweden, 2003
Luedicke, Belkacem & Koç v. Germany, 1978
M.S. v. Finland (decision), 2001
Özkan v. Turkey (decision), 2006
Öztürk v. Germany, 1984
Pala v. France (decision), 2007
Panasenko v. Portugal, 2008
Protopapa v. Turkey, 2009
Sandel v. "the former Yugoslav Republic of Macedonia", 2010
Sardinas Alba v. Italy (decision), 2004
Shannon v. Latvia, 2009
Strati v. Turkey, 2009
Tabaï v. France (decision), 2004
Tabesh v. Greece, 2009
Tiemann v. France and Germany (decision), 2000
Uçak v. the United Kingdom (decision), 2002
Vakili Rad v. France (Commission decision), 1997
X v Austria (Commission decision no. 6185/73), 1975