The Right to Translation and Interpretation in Criminal Proceedings: Providing a Common Code Between the Defendant and the Court

Chara Chioni-Chotouman*

I. Introduction

Noam Chomsky defined linguistic competence as an inherent capacity of native speakers.[1] The native speaker, through his linguistic competence, can be creative and easily produce new sentences in a way that allows the listener to understand them. Non-native speakers do not have this linguistic creativity and cannot fully understand the multitude of meanings expressed by a native speaker. The consequent inequality between native and non-native speaker defendants necessitates the presence of a linguistic mediator in the context of criminal proceedings, who facilitates communication between the defendant and the court.

This article examines the right to translation and interpretation in criminal proceedings at the European level. It is argued that the participatory and communicative character of this right defines both its scope and the conditions for its exercise. It is also stated that the right to translation and interpretation is more than a mere procedural right, playing an important role in the administration of justice. At the level of the European Union (EU), the European Convention of Human Rights (ECHR)—and specifically Article 6 paragraph 3(e)—is extensively analysed in light of the European Court of Human Rights (ECtHR)'s case law. Issues regarding the translation of documents and the quality of the services provided, as well as the exclusion of the defendant from the subsequent costs and the waiver of the right, are also addressed. Moreover, after specifying the reasons

* Ph.D. Candidate in Criminal Law and Criminal Procedure (National and Kapodistrian University of Athens), LL.M. in Criminal Law and Criminal Procedure (National and Kapodistrian University of Athens).

1 Noam Chomsky, Language and Mind (3rd edn, CUP 2006) 23.

behind the need for uniform regulation within Member States, I analyse the Directive 2010/64/EU in detail. Special attention is paid to the interpretation of attorney-client communication and to the autonomous character of the right to translation of documents. The issue of the non-inclusion of a list of essential documents and that of effective quality control are addressed. Furthermore, I allege that the relevant case law of the Court of Justice of the European Union (CJEU) has revealed the inefficiencies and ambiguity of the Directive, primarily because of the vague terminology and the wide margin of discretion left to Member States. Lastly, the ECHR and the Directive are compared and contrasted.

II. The Nature of the Right to Translation and Intrerpetation: a Communicative Procedural Right

The right of translation and interpretation is primarily linked to the right to be heard. The latter constitutes a fundamental right that derives from the acknowledgment that the defendant is a rational and responsible agent.[2] In the absence of this right, a defendant would not be considered a participant in the criminal procedure.[3] The physical presence of the defendant is not sufficient in itself; it is essential that his active and effective participation in the procedure is guaranteed. The right to translation and interpretation is inextricably linked to the right of the defendant to follow the proceeding. In this case, there is a lack of a common code between the sender and the receiver making it impossible for any message to be decoded. Thus, the defendant cannot fully understand the procedure nor express his views. If this right is not granted, the trial cannot be 'fair'.

The connection of the right to translation and interpretation with the fairness of proceedings is particularly evident in its interrelationship with other rights. The right to translation and interpretation is a requirement for the implementation of other procedural rights, such as the right of confrontation and the right against self-incrimination. A defendant who is not familiar with the language of the proceedings is more likely to answer in a self-incriminating manner.[4]

The right to translation and interpretation serves not only to enforce the right to a defense, but also acts as an essential condition for the proper administration of justice.[5] The presence of an interpreter serves all parties, but most of all the court itself, which cannot communicate with defendants who speak a different

[2] Sarah J Summers, Fair Trials (Hart Publishing 2007) 19.

[3] *Stanford v UK* App no 16757/90 (ECHR, 23 February 1994), para 26; *Roos v Sweden* App no 19598/92 (Commission Decision, 6 April 1994); *Lagerblom v Sweden* App no 26891/95 (ECtHR, 14 January 2003), para 49; *Murtazaliyeva v Russia* App no 36658/05 (ECtHR, 9 May 2017), para 70.

[4] Joshua Karton, 'Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony' (2008) 41 Vanderbilt Journal of Transnational Law 1, 3.

[5] Stefan Trechsel (with the assistance of Sarah J Summers), Human Rights in Criminal Proceedings (OUP 2005) 328.

language and therefore perform its work. It follows that the right to translation and interpretation is a communicative right. The trial is a procedure based on communication, where the defendant has the right to transmit his message to the court. On the other hand, the court must also be capable of receiving this message in order for the communication to be effective. This communicative aspect of the right impacts on certain facets of its implementation, such as the waiving of the right.

The right to translation and interpretation is therefore a procedural, rather than linguistic, right. This is crucial as the ECHR does not aim at protecting or promoting a language or a language-related identity. The native language and linguistic rights of minorities are not protected by Article 6 paragraph 3(e) of the ECHR.[6] The interpretation facilitates communication only for the purpose of safeguarding the fairness of the proceedings. It is not the mother tongue of the suspect (or accused as the case may be) that is protected *per se*. In cases where a defendant is familiar with the language used in court, an interpreter will not be provided (despite his mother tongue being different) as the communication will be deemed successful.[7] Finally, the interpretation can be provided either in his native language or in any other language he speaks or understands.[8]

III. Conditions for Exercising the Right

The presence of an interpreter depends on the linguistic competence of the suspect or accused. However, the measurement of language competence is a daunting task. Even if it is assumed that language skills can be measured, there are other factors that should also be considered in criminal proceedings. Besides the fact that the suspect or accused may not collaborate, making the review of his language skills impossible, the language used in court is a sub-language with great differences from that which a defendant uses in everyday life.

The ECtHR leaves a wide margin of appreciation to Member States to decide whether or not an interpreter should be appointed. According to the ECtHR, a serious examination of the matter suffices.[9] However, in the important case of *Cuscani v UK*, the Court found that the applicant could not follow the proceedings

[6] *Isop v Austria* App no 808/60 (ECHR, 8 March 1962); *K. v France* (1983) 35 DR 203; *Zana v Turkey* ECHR 1997–VII.

[7] *Lagerblom* (n 3), paras 61,62.

[8] *Iovanovski v Republic of Moldova* App no 8006/08 (ECtHR, 5 January 2016), paras 18, 48.

[9] *S.E.K. v Switzerland* App no 18959/91 (Commission Decision, 12 January 1994); *Santa Cruz Ruiz v UK* App no 26109/95 (Commission Decision, 22 October 1997); *Galliani v Romania* App no 69273/01 (ECHR, 10 June 2008), para 54; *Czukowicz v Poland* App no 15390/15 (ECtHR, 24 January 2017), para 20.

despite having the assistance of his brother.[10] The complexity of the charges against the applicant played an important role in the Court's ruling.[11] In recent cases, the ECtHR has held that Member States must take into consideration the linguistic knowledge of the defendant, the nature of the offence with which he is charged, and any communications addressed to him by the domestic authorities to examine whether they were sufficiently complex to require a detailed knowledge of the language used.[12] Ultimately, the trial judge, being the ultimate guardian of the fairness of the proceedings, must examine the matter with scrupulous care.[13]

IV. The Content of the Right

A. The quality of the interpretation

Given that the rights enshrined in the Convention shall be both practical and effective, the competent authorities are obliged not only to appoint an interpreter, but also to examine the adequacy of the interpretation provided.[14] The interpretation must allow the defendant to be informed of the criminal charges against him and defend himself, primarily by presenting his own version of events.[15]

The question then arises regarding whether the defendant should complain about the quality of the interpretation provided in order for that matter to be examined. Indeed, it seems that the ECtHR links the obligation of examining the adequacy of the interpretation by national courts to their proper information about the deficiencies.[16] However, it must be assumed that the information about the deficiencies of the interpretation can come from anyone who is present, as the accused himself is not capable of recognising the errors of the interpreter.[17] Moreover, the court, as the ultimate guardian of the fairness of the proceedings, should evaluate indications of inadequate interpretation *proprio motu*. For instance, in cases where the interpreter does not keep notes while the accused is talking for

[10] *Cuscani v UK* App no 32771/96 (ECtHR, 24 September 2002).

[11] ibid paras 26, 38.

[12] *Hermi v Italy* ECHR 2006–XII 91, para 71; *Güngör v. Germany* App no 31540/96 (ECtHR, 17 May 2001); *Protopapa v Turkey* App no 16084/90 (ECHR, 24 February 2009), para 81; *Katritsch v France* App no 22575/08 (ECtHR, 4 November 2010), para 43.

[13] *Cuscani* (n 10), para 39.

[14] *Kamasinski v Austria* App no 9783/82 (ECHR, 19 December 1989); *Diallo v Czech Republic* App no 20493/07 (ECHR, 28 November 2011), para 23.

[15] *Protopapa* (n 12), para 80; *Katritsch* (n 12), para 42.

[16] *Protopapa* (n 12), para 83; *Katritsch* (n 12) para 42; Stephanos Stavros, The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: an analysis of the application of the Convention and a comparison with other instruments (Martinus Nijhoff 1993) 257.

[17] *Priplata v Romania* App no 42941/05 (ECtHR, 13 May 2014), para 93.

a long period of time or transfers a very long answer in a brief, summarised form, the court should be alarmed.

B. The right to an interpeter free of charge

Article 6 paragraph 3(e) of the ECHR clearly states that the accused must be provided with free interpretation. The question that arises is why the accused should be excluded from the interpretation costs, given that in criminal proceedings he is regularly making decisions that have financial repercussions. The answer is simple and demonstrates the specific nature of this right. If the accused, for fear of the financial impact, does not ask for or denies the services of an interpreter, the whole procedure is compromised, as the accused would not be able to understand the procedure nor express his own version of the facts. Thus, while trials may continue without the presence of a defence lawyer, they cannot do so without an interpreter, due to the impact of such an absence on the communication process. Finally, the right to translation and interpretation puts on equal footing an accused who is not conversant with the language of the court and an accused who does speak and understand that language.[18] If there was not such a provision for interpretation free of charge, the accused who is a non-native speaker would be at a disadvantage.

The ECtHR is strict with the implementation of the aforementioned provision. The accused shall not bear the costs in case of either conviction or acquittal.[19] The only instance in which the accused can be charged is in case of abuse of the right. If, for example, he requests the presence of an interpreter unnecessarily or he does not show up to the subsequent trial, he may bear the costs.[20]

C. Translation of documents

The right to translation of documents is not expressly laid down in the Convention. Article 6 paragraph 3(e) of the ECHR speaks of an interpreter and not a translator. However, in accordance with well-established case law, it is clear that the provision covers the translation of documents as well. The accused is entitled to a translation of all those documents or statements in the proceedings necessary to have a fair trial.[21] It would be insufficient to provide the accused

[18] *Luedicke, Belkacem and Koc v Germany* App no 6210/73 (ECHR, 28 November 1978), para 53; *Kamasinski* (n 14), para 75.

[19] *Ozturk v Germany* (1984) Series A no 73, para 57; *Isyar v Bulgaria* App no 391/03 (ECtHR, 20 November 2008), para 45; *Hovanesian v Bulgaria* App no 31814/03 (ECHR, 21 December 2010), para 51.

[20] *Fedele v Germany* App no 11311/84 (Commission Decision, 9 December 1987).

[21] *Luedicke, Belkacem and Koc* (n 18), para 48; *Akbingol v Germany* App no 74235/01 (ECtHR, 18 November 2004).

with only an interpreter, as documents play an important part throughout the proceedings, especially among civil law systems.

Evidently, the accused does not have the right to receive a translation of all the documents in the proceedings. Member States must provide translations of only those documents that are necessary for the accused to benefit from a fair trial.[22] Given that the rules regulating documents that must be translated vary among Member States, it is evident that the burden falls mainly on the defence attorney to request the translation of significant documents beyond those translated by the competent authorities. In addition, it is incumbent on the defence to demonstrate how the absence of a translated document had a negative influence on the fairness of the proceedings. To date, the ECtHR has found no breaches on this ground. Allowing Member States to solely provide the accused with an oral explanation of the necessary documents also demonstrates the relative character of the provision.[23]

V. Waiver of the Right

According to the ECtHR case law, rights enshrined in Article 6 of the ECHR can be waived. Such a waiver, however, cannot run counter to any important public interest.[24] The ECtHR has held that, for a waiver to be effective, it must be voluntary and established in an unequivocal manner.[25] It must also be attended by minimum safeguards commensurate to its importance,[26] such as the full knowledge of the waiver's consequences received by either the court or the defence attorney.[27] Finally, a waiver may be either explicit or implicit.[28]

Nevertheless, some remarks need to be made for cases where an accused does not understand the language of the proceedings. In order for a waiver to be effective, it is required that the accused is capable of understanding the charges laid against him, so that he can properly assess their significance and decide to waive his procedural rights.[29] Moreover, the right to translation and interpretation is more than merely a procedural right. The presence of an interpreter is a prerequisite for a successful communication between the accused and the court. This aspect of the

[22] *Lagerblom* (n 3), para 61.

[23] *Kamasinski* (n 14), para 85; *Husain v Italy* ECHR 2005–III 373; *Baka v Romania* App no 30400/02 (ECtHR, 16 July 2009), para 73; *Katritsch* (n 12), para 41; *Diallo* (n 14), para 23.

[24] Athanasia Dionysopoulou, The Defendant's Right to Examine the Witnesses against him: Article 6 par.3d ECHR (Nomiki Bibliothiki 2017) 112.

[25] *Colozza v Italy* App no 9024/80 (ECHR, 12 February 1985), para 28.

[26] *Poitrimol v France* App no 14032/88 (ECHR, 23 November 1993), para 31.

[27] *Hermi* (n 12), para 79.

[28] *Protopapa* (n 12), para 82.

[29] *Baytar v Turkey* App no 45440/04 (ECHR, 14 October 2014), paras 53–54; *Saman v Turkey* App no 35292/05 (ECHR, 5 July 2011), paras 32, 35.

right affects the possibility of a waiver. Even in case of a waiver, the court can *ex officio* appoint an interpreter to safeguard the fairness of the proceedings.

Furthermore, is must be pointed out that, although most of the rights enshrined in Article 6 of the ECHR are considered defence rights and the accused person and his attorney are being treated as a unity, the right to translation and interpretation cannot be replaced by the presence of a lawyer. The accused has a personal right to be assisted by an interpreter. Therefore, the presence of an attorney alone cannot be regarded as a waiver.

VI. EU Legislation and the ECHR

The regulation of procedural rights by EU law has been strongly debated. The main argument brought forward in this respect is the existence of the ECHR and of the ECtHR that processes and strengthens those rights. Indeed, all Council of Europe Member States are parties to the Convention and new members' compliance to the latter is strictly monitored. A closer examination of the Court's functioning and case law reveals why the protection provided is insufficient.

Firstly, according to Article 35 of the ECHR, there is an obligation to exhaust domestic remedies before lodging an application to the ECtHR. Thus, the protection of the Convention is granted only to those who have the financial means to appear before several domestic courts. Moreover, according to Article 35 of the ECHR, the Court may only deal with an application within a period of six months from the date on which the final decision was taken. This six-month rule diminishes the protection of victims. The potential applicant must, within this temporal limit, search for the appropriate legal representation and consider whether to lodge an application and on which grounds. As a result of the aforementioned restrictions, many violations remain unpunished because of the victim's lack of financial resources.

Furthermore, the inefficiencies of the Strasbourg Court have been revealed since early 2000. The increase in the number of Member States has resulted in an increase in its caseload.[30] It is also important to point out that the judgments are often ineffectively implemented; the Court rarely demands a change in law.[31] The very existence of repetitive cases demonstrates the Court's inability to change the legislative provisions of Member States through its case law. Although the Council, through the Committee of Ministers, monitors the execution of judgments, Member States are primarily responsible for the harmonisation of national legislation with ECtHR case law, having in practice a wide margin of discretion. Unresolved structural problems related to caseload and the lack of a common

[30] Caroline Morgan, 'Where are we now with EU procedural rights?' (2012) EHRLR 427, 430.

[31] See, for example, *Wolfmeyer v Austria* App no 5263/03 (ECtHR, 26 May 2005), para 32.

understanding among Member States on appropriate implementation measures demonstrate the inability of the Court to guarantee rights that are practical and effective.[32]

The European legislative initiative aims to ensure full implementation and respect of Convention standards. Enhancing procedural rights and guaranteeing their consistent application will also ease the burden on the ECtHR. Procedural rights that are important for the defendant will be guaranteed in a uniform manner at national level, leaving other important and innovative issues for the ECtHR.

VII. Directive 2010/64/Eu on the Right to Interpretation and Translation in Criminal Proceedings

The Directive 2010/64/EU[33] (the "Directive") was the first to address issues of procedural criminal justice following the Treaty of Lisbon's entry into force on 1 December 2009. At a general level, it followed the well-established case law of the ECtHR without hesitating to strengthen the protection. In this Part of the article, the aforementioned Directive will be analysed in an effort to highlight its importance and to address its weak points in a mutually beneficial way for both non-native speakers and the courts.

A. The scope of the directive

Article 1 of the Directive refers to the scope of the Directive, regulating both the type of proceedings it applies and its starting point. The Directive applies to criminal proceedings as well as proceedings for the execution of a European Arrest Warrant (EAW). It does not apply to minor cases such as traffic offences. In these cases, if an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions, it is not required to ensure all the rights provided for in this Directive.[34]

However, the notion of criminal proceedings is not clarified. According to Recital 33 to the Directive's Preamble, the meaning of "criminal proceedings" will be interpreted in light of the case law of the ECtHR, where it is treated as an autonomous concept.[35] As a result, the explicit reference to the EAW execution

[32] *Matthews v UK* ECHR 1999–I 251, para 34; *Čonka v Belgium* ECHR 2002–I 47, para 46.

[33] Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.

[34] Dir 2010/64/EU, preamble 16.

[35] *Maaouia v France* ECHR 2000–X 273, para 34.

procedure was necessary because extradition procedures are not included in the scope of Article 6 of the ECHR.[36]

The right shall have effect from the moment a person is made aware by the competent authorities that he is suspected or accused of having committed a criminal offence, until the conclusion of the proceedings, namely until *res judicata*. The Directive does not apply after the final determination of guilt. This is also a point where there is compliance with the case law of the ECtHR.[37]

Finally, it must be pointed out that according to Article 1 paragraph 3 of the Directive, in cases of minor offences, where an appeal can be brought before a court having jurisdiction in criminal matters, the Directive shall apply following such an appeal. Whereas this is a deviation from the ECHR, the ECtHR does not differentiate the offences. For determining whether a charge is a "criminal" one, and therefore within the scope of Article 6 of the ECHR, the Court uses the three criteria set out in *Engel*, commonly known as the "Engel criteria".[38] The question naturally arises about whether minor offences that constitute criminal charges according to the ECtHR can be exempted from the scope of the Directive, in view of paragraphs 8 and 32 of the Directive's Preamble.[39]

The scope of the Directive has already been the subject matter of a reference for a preliminary ruling.[40] In *Balogh*, Austria had issued a judgment which, according to the Hungarian law, had to be translated for the purposes of the procedure. According to Hungarian law, in the course of special procedures, the costs of the proceedings are to be paid by the accused if he has been ordered to pay the costs in the main proceedings. The judgment therefore had to be translated not for the protection of the procedural rights of the defendant, but in order for the procedure of recognition of the foreign judgment to be carried out. The question then arose of whether such a procedure can be characterised as a "criminal" one, with the consequence that the defendant shall not bear any costs.

The Court held that the aforementioned procedure could not be considered "criminal" within the meaning of the Directive because the special procedure of recognition of a foreign judgment comes after a final judgment. Therefore, according to Article 1 paragraph 2 of the Directive, it fell outside the scope of the Directive.[41] Moreover, given that Mr. Balogh had received a translated copy of the

[36] *Monedero Angora v Spain E*CHR 2008–IV 429; *Sardinas Albo v Italy* ECHR 2004–I 353.

[37] *Deweer v Belgium* App no 6903/75 (ECHR, 27 February 1980), paras 42, 46; *Eckle v Germany* App no 8130/78 (ECHR, 15 July 1982), para 73.

[38] *Engel and others v the Netherlands* App no 5101/71 (ECHR, 8 June 1976).

[39] See also Debbie Sayers, 'Protecting Fair Trial Rights in Criminal Cases in the European Union: Where does the Roadmap take Us?' (2014) 14 Human Rights Law Review 733, 740.

[40] Case C–25/15 *Proceedings brought by István Balogh* (9 June 2016).

[41] ibid, paras 37–40.

judgment by Austrian authorities, the non-imposition of costs could not be justified in the light of the objectives pursued by the Directive (namely safeguarding the fairness of the proceedings and exercising defence rights).

B. The right to interpretation

According to Article 2 paragraph 1 of the Directive, the services of an interpreter shall be provided to anyone who does not speak or understand the language of the proceedings. This provision applies during police questioning, examination by investigative and judicial authorities, court hearings, and any necessary interim hearings. The interpreter shall be provided without delay, namely within a reasonable period of time.[42]

Moreover, according to Article 2 paragraph 2 of the Directive, the communication between the suspect or accused and his attorney shall be interpreted. Given that until now all the provisions of the Directive grant the same or similar rights with the ECHR, it is evident that this provision was a sticking point. Member States' provisions vary significantly in terms of providing such a right.[43] In some Member States, the communication between the suspect or accused and his attorney is guaranteed in nearly all cases while, in others, restrictions are applied. Cost and time are two key factors that lead Member States to impose restrictions. The defence may sometimes choose to ask for interpretation only to delay the procedure. Furthermore, in some Member States, interpreters are deemed to be in the service of the courts, and therefore should facilitate only the communication between the accused and the court.[44] According to the Directive, the communication between the attorneys and their clients shall be free of charge to safeguard the fairness of the proceedings. The last sentence of Article 2 paragraph 2 of the Directive, however, constitutes an attempt to prevent abuses of the right. The communication shall be interpreted only when it is directly linked to inquiries, hearings, or the lodging of an appeal or other procedural applications. However, when examining the Directive's Preamble, and in particular Paragraphs 19 and 20, it is evident that the same right is there broadly interpreted. An interpreter shall be provided to allow a suspect or accused to explain his version of the events to his attorney, point out any statements with which he disagrees, and make his attorney aware of any facts he wishes to be put forward in his defence. According

[42] Preamble, para 18.

[43] Laurens van Puyenbroeck and Gert Vermeulen, 'Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU' (2011) 60 ICLQ 1017, 1034.

[44] Caroline Morgan, 'The New European Directive on the Rights to Interpretation and Translation in Criminal Proceedings' in Sabine Braun and Judith L Taylor (eds), Videoconference and Remote Interpreting in Criminal Proceedings (University of Surrey 2011).

to that interpretation, it is evident that communication between the suspect or accused and his attorney is typically regarded as relevant in the aforementioned circumstances. Most of the time, it will at least include elements falling within the scope of the right, making the presence of an interpreter necessary.

But the question of when the presence of an interpreter is necessary remains. An interpreter is necessary when the suspect or accused is completely unfamiliar with the language used in court. This lack of knowledge of judicial language can be easily traced. In those cases, the appointment of an interpreter also serves the court, because without the presence of a "linguistic intermediary" any contact or communication is impossible. The problem arises when the suspect or accused speaks, or at least has a limited understanding of, the language. How can his language competence be measured to decide whether or not he is capable of following the proceedings and having a fair trial?

First, a basic knowledge of the language used in court is insufficient. The fact that the suspect or accused can communicate in everyday life does not guarantee that he can understand the questions posed to him in their totality or even the charges themselves, considering they are formulated in indecipherable legal language. The language of the court constitutes a sub-language according to sociolinguistics and is vastly different from the one used in other phrasal contexts. The vocabulary is entirely distinct, and even grammar and syntax differ as it is a formal context. Even native speakers have difficulties understanding it. The non-native speaker must therefore be competent enough to understand the jargon used. The nature of the charges plays an important role in this assessment; for example, in a case of theft or defamation, a good knowledge of the language would be sufficient whereas, in cases of complex economic crimes, only a thorough knowledge of the language is acceptable. However, the suspect or accused will often deny to cooperate or deliberately provide incorrect answers. In such cases, the court will have to examine witnesses and documents to evaluate the language proficiency of the suspect or accused. However, this is a time-consuming and expensive procedure prone to failure. In acknowledgement of the inherent difficulties of this procedure, the ECtHR seems to be satisfied with a serious examination of the issue.[45]

The ECtHR takes into account objective criteria, such as the time a person spent in a country, any contact with the educational system, type of work, and the years of residence in a country.[46] While these constitute valuable indicators, they likely will not lead to certainty. The knowledge of a foreign language may require the acquisition of the mechanisms that give productivity and perception, but it does not guarantee an accurate use of the language. It must be also taken into consideration

[45] *Trechsel* (n 5) 334.

[46] *Hermi* (n 12), para 90; *Marzohl v Switzerland* App no 24895/06 (ECHR, 6 March 2012).

that any language difficulties are multiplied in stressful environments such as police departments or courtrooms.[47] Given that the communication between the suspect or accused and the court is also a key factor in guaranteeing the fairness of the proceedings, interpretation shall always be on the suspect's or accused's requests and there are objective indicators that this demand may be justified. The fact that the interpretation is not required to be provided in the native language of the suspect or accused also supports this view. Therefore, if (a) the suspect or accused requests interpretation; (b) there are elements to suggest that his demand is justified; and (c) the interpretation is provided in a language that does not considerably delay the proceedings, an interpreter must be appointed. This solution has the added advantage of resolving the issues related to appointing an interpreter at an early stage in the process. Given that, according to the Directive, an interpreter must be provided during police questioning, who is indeed responsible for deciding at this stage that interpretation is not required and on what grounds? This question cannot wait until the whole issue is examined by the court. If a court assesses for the first time during trial that interpretation is necessary, everything that occurred in pre-trial would be discredited as it can be presumed that the accused was unable to understand not only the procedure, but also the charges against him. Finally, if we also consider that, according to the Directive, communication technology such as videoconferencing, telephone, or the Internet can be used, objections regarding the costs and the delay of the proceedings disappear.

C. The right to translation

The translation of documents in criminal proceedings was also a field where the practice of Member States was disjointed. In some Member States it was not a statutory right whereas in others, provisions varied greatly on what had to be translated. In the Directive, the right to translation is an autonomous right despite not being expressly laid down in the ECHR.

According to Article 3 of the Directive 2010/64/EU, Member States shall ensure that suspects or accused are provided, within a reasonable period of time, with a written translation of all documents essential to enable them to exercise their right to a defence and to safeguard the fairness of the proceedings. Paragraph 2 clarifies the notion of "essential documents" to include at least any decision depriving a person of his liberty, any charge or indictment, and any judgment. During the transposition of the Directive in each Member State, the content of those notions should be specified in accordance with national law. For example,

[47] Ikuko Nakane, 'Problems in Communicating the Suspect's Rights in Interpreted Police Interviews' (2007) 28 Applied Linguistics 87.

it shall be clarified if the notion of a decision depriving a person of his liberty includes only the pre-trial detention or also covers non-custodial alternatives.

The Directive follows the proposal for a Framework Decision put forward by the Commission[48] regarding the explicit reference to the essential documents. There is, however, an important distinction: documentary material is not included in the essential documents that must be translated. Unlike the Commission's proposal, the Directive states that essential documents do not include relevant documentary material such as key witness statements. The Directive resulted from the proposal of thirteen Member States, which in some points offered a narrower protection in comparison to the one drafted by the Commission.[49] Member States opposed the inclusion of documentary material in essential documents that shall be translated, expressing concerns regarding the financial implications of such a provision.[50] Finally, a minimalist version of the provision was adopted, with the documents proposed by the Commission ultimately not being included in the Directive. The position of the United Kingdom was adopted, which emphasised the limited role of documents in common law system.[51] The fact that, in common law systems, there may not even be a "judgment" to be translated possibly explains the use of the word "any" ("*tout*") rather than the definite article "the".[52]

However, access to key documents is important for the suspect or accused to be able to effectively prepare his defence. It is on the basis of the documents constituting the case file that the suspect or accused in civil law systems will call witnesses and gather evidence. Moreover, the knowledge of essential documents can be regarded as serving the sufficient knowledge of the case against him. Therefore, it is difficult to imagine how the rights of the defence can be exercised effectively without the knowledge of important documentary evidence.

Article 3 paragraph 3 of the Directive partially addressed the aforementioned issue. Suspected or accused persons or their legal counsel may submit a reasonable

[48] Commission, 'Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings' COM (2009) 338 final.

[49] Initiatives of the Member States, 'Initiative of the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden with a view to the adoption of a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings' (Preparatory acts) 2010/C 69/01.

[50] Steven Cras and Luca de Matteis, 'The Directive on the Right to Interpretation and Translation in Criminal Proceedings' (2010) 4 Eucrim 153, 159.

[51] European Scrutiny Committee, Interpretation and Translation Rights in Criminal Proceedings (HC 2009–10, 5–vii) para 7.16.

[52] James Brannan, 'L'article 3 de la directive 2010/64/UE: la traduction écrite en matière pénale devient un droit à part entire' (2016) 3 Études de linguistique appliquée 281.

request to competent authorities requesting the translation of documents that are essential. Nevertheless, determining whether a document is essential to a specific case is left to the competent authorities, which are not provided with specific guidelines. Such an open provision, leaving a wide margin of discretion for Member States, is hardly aligned with the aim of harmonising the administration of justice between Member States.

The absence of a list of potential essential documents[53] is addressed by the provision granting the right to the suspect or accused to challenge a finding that there is no need for the translation of documents (Article 3 paragraph 5 of the Directive). It must be noted, however, that the suspect or accused must challenge a decision denying the translation of a document to which he does not have access, so as to evaluate its significance. The protection provided relies then on the presence of an attorney who will be capable of evaluating the importance of a document and provide arguments on behalf of the suspect or accused.[54] Moreover, Article 3 paragraph 5 of the Directive provides for a rather vague right to challenge the decision denying the translation of a document. In the Commission's proposal, Member States had to provide a right of appeal against a decision refusing the translation of the documents explicitly mentioned.[55] The Directive, however, includes a right to challenge ("*droit de contester*") in line with the desire of Member States, and in particular of the United Kingdom, not to establish a separate mechanism or complaint procedure for challenging such decisions.[56]

Furthermore, according to Article 3 paragraph 4 of the Directive, there is no requirement to translate passages of essential documents that are not relevant for the purposes of enabling suspects or accused to have knowledge of the case against them. In this way, even the right to translation of the essential documents explicitly mentioned in the Directive is restricted. There is also the possibility to exceptionally replace the written translation of essential documents with an oral translation or oral summary, on the condition that the fairness of the proceeding will not be prejudiced. The oral translation of the essential documents is undoubtedly cost and time-effective. This provision is also in line with the ECtHR's jurisprudence.[57] Nevertheless, it can lead to abusive behavior on the part of Member States. It also deprives the suspect or accused of the possibility to review the relevant

[53] See also Richard Parry, 'Language Rights in Criminal Proceedings and BREXIT: What have we got to lose?' (2017) 2 European Human Rights Law Review 155, 159.

[54] Richard Parry, 'The Curse of Babel and the Criminal Process' (2014) 11 Crim LR 802, 804; Parry (n 53) 159.

[55] COM (2009) 338 final (n 48) Article 3 para 4.

[56] European Scrutiny Committee (n 51).

[57] *Hermi* (n 12), para 70.

information.[58] For those reasons, national provisions should explicitly state the circumstances where an oral translation is exceptionally allowed. The existence of exceptional circumstances and the need to avoid affecting the fairness of the proceedings will undeniably present a challenge for the CJEU.

Covaci was the first time a case was brought before the CJEU in relation to the Directive, after a reference for a preliminary ruling by a German Court.[59] The Amtsgericht Laufen (the local court) had imposed a fine on the accused via a simplified procedure that did not require a hearing or a trial *inter partes*. In this procedure, the decision becomes definite two weeks after its service. The sentenced person is able to lodge an objection securing a trial *inter partes* within the aforementioned time frame. The objection may be lodged either in writing or by a statement recorded by the registry. Mr Covaci lodged an objection in writing using his mother tongue and not German, as he should have done under German law. The question that arose was whether the competent authorities had an obligation to translate the application of Mr Covaci to be admissible and lead to a hearing.

The objection of Mr Covaci cannot be included in the essential documents that should always be translated according to Article 3 paragraph 2 of the Directive. It is not a judgment, a decision depriving a person of his liberty, a charge, or even a document drawn up by judicial authorities. Thus, it remains to be seen if it constitutes an essential document that guarantees the exercise of defence rights and the fairness of the proceedings. National competent authorities are free to evaluate if a document can be characterised as essential, balancing the rights of the suspect or accused with the need to save time and reduce costs. In this case, the CJEU acknowledged that—because the Directive only guarantees minimum rights—Member States are free to expand the list of documents that are considered essential. Therefore, the Court considered the German provision to be compatible with the Directive.

There are, however, a few observations to be made. In this case, there is a distinction drawn between the right to interpretation and the right to translation. According to the CJEU, if Mr Covaci chose to orally lodge a complaint at the registry of the competent court, he would have been provided with an interpreter.[60] Nevertheless, if he had chosen to exercise the same right in writing, a translation would not be provided. There is an inconsistency within the system of the Directive caused by the arbitrary distinction between translation and interpretation. It is an inequality that does not appear to adhere to the spirit and purpose of the

[58] *Brannan* (n 52).
[59] Case C–216/14 *Criminal proceedings against Gavril Covaci* (15 October 2015).
[60] ibid, para 42.

Directive.[61] This inconsistency was also pointed out by Advocate General Bot, who rightly emphasised that, so far as the assistance of an interpreter is guaranteed when an appeal is lodged orally, such assistance must equally be guaranteed where the latter is lodged in writing.[62]

The restriction of essential documents to only three categories of documents drawn up by judicial authorities, and the existence of a wide margin of appreciation in evaluating if a document can be characterised as essential, will certainly raise further issues. A bold jurisprudence by the CJEU, which has to define and elaborate the notion of essential documents, is necessary and will serve as a guideline for Member States. The adoption of a more proactive stance on behalf of the Member States shall also help to ensure that the minimum protection offered by the Directive will trigger a comprehensive protection of the rights of defendants who speak a different language within national provisions.

D. The quality of translation and interpretation provided

According to Article 2 paragraph 8 and Article 3 paragraph 9 of the Directive, the translation and interpretation provided must be of a quality sufficient to safeguard the fairness of the proceedings. The suspect or accused should be capable of exercising his right to a defence and have knowledge of the case against him. Whether the quality of the translation and interpretation provided is sufficient will be judged based on a rather vague concept, such as the suspect's or accused's knowledge (most likely in broad terms) of the case against him and his ability to exercise his right to a defence. Thus, this is a field where subjective judgments prevail. It is also for Member States to decide on the appropriate measures guaranteeing the quality of translation and interpretation. The only condition is that they have to be concrete.[63]

An effort towards the establishment of minimum quality standards for translation and interpretation is made through provisions that demand for the establishment of a register of independent translators and interpreters. Those professionals must be appropriately qualified and must respect the principle of confidentiality. However, the use of the term "independent" is intriguing. In connection with the call to respect the principle of confidentiality, it can be argued that the Directive does not leave room for attorneys or police officers to serve as interpreters/translators. Moreover, the call for respect of the confidentiality principle is the forerunner for a Code of Conduct that will delineate the tasks and establish sanctions in case of malpractice. The respect for the principle of confidentiality would be further reinforced through the creation of a professional

[61] Parry (n 53) 161.
[62] Case C–216/14 *Covaci* (15 October 2015), Opinion of AG Bot, para 80.
[63] Dir 2010/64/EU, Article 5 para 1.

secrecy. Although client-attorney interpretation could be covered by legal privilege,[64] an explicit provision would resolve the issue that goes beyond the client-attorney communication uniformly.[65]

Finally, the Directive introduces an obligation for Member States to ensure that the suspect or accused can complain about the quality of the services provided. In particular, this obligation derives from Article 2 paragraph 5 and Article 3 paragraph 5 of the Directive. But whilst the quality control procedure appears relatively simple in cases of translation (with the appointment, for example, of a second translator who will check the first), how is the quality of interpretation controlled, especially in view of the fact that it is not videotaped or audio-recorded? It could be argued that the suspect or accused has to complain about the quality of the interpretation at the moment it is provided, so as to address this issue quickly and effectively. However, in some cases, the poor quality of the interpretation provided can only be determined *ex post*. In this case the suspect or accused will note obvious divergences between the translated judgment received and the answers that he has given as a result of the interpreter's fault. It is only the obligation to record the interpretation, by audio or video means, that can solve the aforementioned issue and guarantee the fairness of the proceedings.

E. Waiver of the Right

The Directive explicitly states that the suspect or accused may waive the right to translation at any time. According to Article 3 paragraph 8 of the Directive, a waiver of the right to written translation of documents is possible if the person concerned has received prior legal advice or has otherwise obtained full knowledge of the consequences of such a waiver. In line with the case law of the ECtHR, it must also be given voluntarily and in an unequivocal manner.

Such a waiver, however, is not provided for in relation to the right of interpretation. The Directive does not leave any room for waiving this right. This is completely at odds with the jurisprudence of the ECtHR that accepts a waiver in both cases. This choice demonstrates that interpretation is not treated as another defence right, but as a prerequisite for effective communication between the suspect or accused and the court. It is even more important than the presence of an attorney, because the defendant who speaks a different language is in a vulnerable position. The isolation experienced by defendants who cannot understand the language of the proceedings is so severe that it has been compared with patients

[64] *R (Bozkurt) v South Thames Magistrates Court* [2001] EWHC Admin 400.
[65] Parry (n 53) 158.

who have suffered a stroke leading to aphasia; they see that a conversation is taking place, but they cannot participate in any way.[66]

F. Costs

According to Article 4 of the Directive, Member States shall meet all costs of interpretation and translation irrespective of the outcome of the proceedings. This provision is of paramount importance, ensuring that a suspect or accused will not hesitate to ask for an interpreter to fully understand the charges against him and to defend himself.

G. Concluding remarks

The above analysis has demonstrated that there is an extensive use of abstract terms. Key concepts such as "criminal procedure", "essential documents" and "without delay" are not defined in the text of the Directive. Those terms cannot even be interpreted according to national procedural rules, given that there is no express reference to the law of Member States. Those terms could be treated as autonomous concepts.[67] The CJEU has consistently held that a term of a Community law provision which makes no express reference to national provisions for the purpose of determining its meaning and scope must be given an autonomous and uniform interpretation throughout the Community.[68] In the area of procedural rights, the use of autonomous concepts unifies the different national systems, because in every Member State those terms will not be interpreted according to their national arrangements, but according the findings of the CJEU. It also increases the protection for the individual. As Advocate General Bot pointed out, rules adopted on the basis of Article 82(2) of the Treaty on the Functioning of the European Union (TFEU) must be interpreted broadly. Such an interpretation will strengthen the protection of rights as well as mutual trust.[69] In the light of the considerations set out above, the use of general and broad terminology can enhance protections in the area of procedural rights.

[66] Peter Jan Honigsberg, 'Linguistic Isolation: A New Human Rights Violation Constituting Torture, and Cruel, Inhuman and Degrading Treatment' (2014) 12 Northwestern University Journal of International Human Rights 1.

[67] Valsamis Mitsilegas, EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe' (Hart Publishing 2016) 178.

[68] Case C–327/82 *Ekro BV Vee-en Vleeshandel v Produktschap voor Vee en Vlees* [1984] ECR I–107, para 11; Case C–195/06 *Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk* (ORF) [2007] ECR I–08817, para 24; Case C–316/05 *Nokia Corp. v Joacim Wärdell* [2006] ECR I–12083, para 21.

[69] *Covaci* (n 59) Opinion of AG Bot, para 33.

VIII. Concluding Remarks on the Case Law of the ECtHR and the Directive's Provisions

The Directive on the right to translation and interpretation undoubtedly followed the case law development of the right by the ECtHR. Article 32 of the Directive's Preamble explicitly states that the level of protection should never fall below the standards provided by the ECHR as interpreted in the case law of the ECtHR. Accordingly, Article 8 of the Directive states that nothing in the Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards ensured under the ECHR. Thus, the Directive at least confers the same rights as the ECHR, with the important difference that it imposes them directly on Member States. The Directive does not only impose a mere *ex post* control, but Member States are invited to amend their national provisions. Outlined below are the provisions where the Directive followed the case law of the ECtHR and the ones that provide greater protection.

The Directive gave regulatory autonomy to the right of translation. Although the enshrining of the right, with some restrictions, reflects the necessary adjustments made at negotiations, the fact that the right is explicitly guaranteed constitutes a great difference. Moreover, in line with the case law of the ECtHR, the Directive states that all costs should not be borne by the defendants. The protection of this financial aspect of the right is absolute both in the Directive and the ECHR, and is a feature of the right to translation and interpretation on which no restrictions can be imposed. In all other aspects of the right, restrictions can be imposed. In the ECtHR's case law, such restrictions are examined *ad hoc* as part of an overall approach. The Directive also leaves a margin of discretion to Member States in establishing the mechanism that will define who requires the services of an interpreter. Furthermore, although it is stated that the interpretation provided must be of sufficient quality to safeguard the fairness of the proceedings, the decision is left to national courts (considering whether the suspect or accused had knowledge of the charges against him and was capable of defending himself). In relation to the right of translation, Member States shall provide a translation of all essential documents. However, there is a great difference with documents explicitly referred to in Article 3 paragraph 2 of the Directive (*i.e.* judgments), whose protection is absolute. For example, in case of the translation of a judgment, there is no room for weighing in order for the competent authorities to conclude if there was a breach of defence rights. In the case of any other document that may be considered "essential", but it is not explicitly mentioned in Article 3 paragraph

2 of the Directive, the competent authorities have the opportunity to weigh the costs and the delay involved with the fairness of the proceedings.

Guaranteeing the right of interpretation in relation to attorney-client communication is also an innovation introduced by the Directive. An effort to establish a minimum quality of interpretation services has also been made through administrative measures (Articles 5 and 6 of the Directive).

Nevertheless, the vague terminology used and the wide margin of discretion left to Member States is a daunting issue. Therefore, the transposition of the Directive and the approach of the CJEU will be of paramount importance.