

Observations by Amnesty International on the Commission proposal for a Council Framework Decision on the right to interpretation and translation in criminal proceedings

On 8 July 2009, the European Commission presented a proposal for a Council Framework Decision¹ on the right to interpretation and to translation in criminal proceedings (the proposal). On 15 July the Swedish EU Presidency published a draft resolution² which contains directions for Member States with a view to promoting the effective implementation of the rights contained in the Commission's proposal (the resolution).

The following observations by Amnesty International are a contribution to the European Parliament consultation process.

I. General comments

- Amnesty International (Amnesty) has welcomed³ the step-by-step approach to procedural safeguards as envisaged by the Swedish Presidency's "roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings"⁴ (the roadmap) as a way to revive the debate on protection of suspected and accused persons in criminal proceedings.
- However, Amnesty underlines that, in order to be effective, the provisions on interpretation and translation will need to be considered in close relation with other rights referred to in the roadmap, in particular that of legal assistance. Amnesty reiterates that these measures do not exist in a vacuum, but complement each other in providing for a full set of rights.
- Amnesty recognizes the importance of the roadmap (to be endorsed as Council conclusions and possibly in the Stockholm Programme) in recalling the need for a **comprehensive approach** to the right to a fair trial. Nonetheless, if improvements in procedural safeguards are a priority for the Justice and Home Affairs Council, Amnesty encourages that the approach endorsed by the roadmap is **included in the recitals** of the Framework Decision in order to give it more binding force.
- Additionally, the Council is proposing a complementary non-binding resolution that aims to highlight best practices for implementation (the resolution). Amnesty has argued that to have the (right) principles in a binding text is already an important step to set benchmarks at EU level, reinforce the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and open the way to judicial scrutiny. We regret however that some aspects of interpretation and translation, such as the requirement for quality and registration of the translators and interpreters and the reference to their confidentiality are left out of the legislative proposal to only appear in the resolution.

¹ COM (2009) 338 final, 8.7.2009.

² Doc. 12116/09, 15.7.2009.

³ Amnesty International, Justice, Open Society Justice Initiative, Fair Trials International, Irish Council for Civil Liberties, *Joint Position on Procedural Safeguards*, 7.2009.

⁴ Doc. 11457/09, 1.7.2009.

II. Article-by-article comment

Article 1 - Scope

1. *This Framework Decision lays down rules concerning the rights to interpretation and translation in criminal proceedings and proceedings for the execution of a European Arrest Warrant.*

2. *Those rights apply to any person from the time that person is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence until the conclusion of the proceedings (the “suspect”).*

- Article 1.2 is too restrictive. The rights should apply from a very early stage, that is to say as soon as the person is actually questioned, arrested or detained, which may take place **before** the person is informed that he/she is considered to be a suspect. The reference to the “conclusion of the proceedings” could also be clarified in order to explicitly cover the proceedings until the “**final** appeal”.
- A possible redrafting of this provision would be: *“these rights apply to any person from the moment the person is questioned, arrested or detained in relation to a criminal offence by the authorities of a Member State until the final appeal.”*

Article 2 - The right to interpretation

1. *Member States shall ensure that a suspect who does not understand and speak the language of the criminal proceedings concerned is provided with interpretation, in order to safeguard the fairness of the criminal proceedings. Interpretation shall be provided during those proceedings before investigative and judicial authorities, including during police questioning, during all necessary meetings between the suspect and his lawyer, during all court hearings and during any necessary interim hearings.*

2. *Member States shall ensure that, where necessary, legal advice received throughout the criminal proceedings is interpreted for the suspect.*

3. *Member States shall ensure that a procedure is in place to ascertain whether the suspect understands and speaks the language of the criminal proceedings.*

4. *Member States shall ensure that there is a right of appeal against a decision finding that there is no need for interpretation.*

5. *The right to interpretation includes assistance of persons with hearing or speech impediments.*

6. *With regard to proceedings for the execution of a European Arrest Warrant, Member States shall ensure that any person subject to such proceedings who does not understand and speak the language of the proceedings shall be provided with interpretation during those proceedings.*

- Article 2.1 asserts the right to interpretation where the suspect does not **understand and speak** the language of the proceedings. In accordance with Articles 5⁵ and 6.3.e)⁶ of the ECHR, the article should rather say ‘or’ and Article 2.6 should be adapted accordingly.
- Also in Article 2.1, the reference to **necessity** should be removed. As the Council of Europe argued in the comments to the proposal submitted in July 2009⁷, this condition raises a question as to the criteria to be used when applying the necessity test and it should be clarified if what is meant is the necessity *for the purpose of ensuring the fairness of proceedings*⁸.
- In addition, Amnesty considers reasonable to mention in Articles 2.1 and 3.1 that the person should be provided with interpretation and translation **into his/her mother tongue or a language that he/she understands**, according to the above-mentioned Articles 5 and 6 of the ECHR.

⁵ Article 5.2 - Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

⁶ Article 6.3.e - (*Everyone charged with a criminal offence has the following minimum rights:*)(...) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

⁷ Doc. 12394/09, 27.7.2009.

⁸ Doc. 12394/09, 27.7.2009, pages 6 and 7.

- On the other hand, given the confidential nature of the communications between a lawyer and his/her client, Amnesty International considers that Article 2 (on the right to translation) and/or Article 5 (on the quality of the interpretation and translation) should guarantee the **confidentiality** of the communications with the lawyer, which at present is only mentioned as an element to be included in the Code of Conduct and Guidelines on best practice for interpreters and translators, in §17 of the Council resolution.
- Furthermore, given the likelihood that a person suspected or accused of a criminal offence will need to speak with his/her counsel in the course of any proceedings in court, the reference to the need to have **more than one interpreter** in a given case, including during courtroom proceedings, could be usefully added in the future legislation.
- In addition, Article 2 should also ensure the presence of competent, qualified and independent interpreters free of charge for official contacts between the **detaining authorities** and a detainee who does not speak or understand the language used by the authorities, as enshrined in the Standard Minimum Rules for the Treatment of Prisoners⁹, in Rule 51.¹⁰
- Likewise, it is undeniable that one of the rights the person has and that should be **informed** of is the right to translation and interpretation. Nonetheless, questions might be raised on which language this information should be given. From a practical viewpoint, Amnesty argues that this information should be given at the earliest stage in the proceedings, possibly when the verification whether the suspect understands and speaks the language of the criminal proceedings takes place. Amnesty therefore believes it would be of added-value to add this clause to the provision in Article 2.3.
- Further, Articles 2.4 and 3.4 do not specify to whom the **appeal** of the decision of not providing for translation or interpretation can be made. Amnesty defends that a reference to a **judicial** authority would reinforce the guarantees of the fairness of the trial.
- At last, Article 2.5 makes reference to persons with **hearing and speech** impairments. Recognising the already important impediments being recognised and given a special attention to by the provision, Amnesty considers that these rights should be extended to cover other disabilities, including **mental** disability, to ensure that all persons are able to follow and participate effectively in the proceedings.

Article 3 - The right to translation of essential documents

1. Member States shall ensure that a suspect who does not understand the language of the criminal proceedings concerned is provided with translations of all essential documents in order to safeguard the fairness of the criminal proceedings.

2. The essential documents to be translated shall include the detention order depriving the person of his liberty, the charge/indictment, essential documentary evidence and the judgment.

3. The suspect or his lawyer may submit a reasoned request for translation of further documents, including written legal advice from the suspect's lawyer.

4. Member States shall ensure that there is a right of appeal against a decision to refuse translation of any documents referred to in paragraph 2.

5. With regard to proceedings for the execution of a European Arrest Warrant, Member States shall ensure that any person subject to such proceedings who does not understand the language in which the European Arrest Warrant is drawn up, shall be provided with a translation of the said document.

- From Amnesty's viewpoint, the reference made in Article 3.1 and 3.2 to "**essential documents**" raises questions. Already in 2003¹¹, Amnesty provided for a **non-exhaustive list of documents** which

⁹ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13.5.1977.

¹⁰ Rule 51.1 - The director, his deputy, and the majority of the other personnel of the institution shall be able to speak the language of the greatest number of prisoners, or a language understood by the greatest number of them. (2) Whenever necessary, the services of an interpreter shall be used.

¹¹ Amnesty International's Response to the Green Paper from the European Commission on Procedural safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM (2003) 75, 5.2003, p. 9.

included any indictment and/or written notice of charges, police reports, witness statements, statements of the suspect written in other than a language which they understand, orders of detention, and the custody record, among others. Amnesty considers that there is room for improvement by mentioning in this provision that the documents to be translated **should include but not limited to** a similar non-exhaustive list.

- A provision ensuring that translation is provided at the earliest stage of the proceedings and **as soon as practicable** should also be included.
- Additionally, Article 3 should also create an obligation for the **detaining authorities** to ensure that the rules of the place of detention and other key documents, which should be given to the detainee according to Rule 35 of the Standard Minimum Rules for the Treatment of Prisoners¹², are translated into a language which the detainee understands.

Article 4 - Member States to meet the costs of interpretation and translation

Member States shall cover the costs of interpretation and translation resulting from the application of Articles 2 and 3.

- Amnesty argues that this provision should make a clear reference to “whatever the **outcome** of the proceedings might be” in order to expressly exclude the possibility of the State asking for payment in case the person is convicted, as expressed in §18 of the Explanatory Memorandum.

Article 5 - Quality of the interpretation and translation

1. Interpretation and translation shall be provided in such a way as to ensure that the suspect is fully able to exercise his rights.

2. Member States shall offer training to judges, lawyers and other relevant court personnel in order to ensure the suspect's ability to understand the proceedings.

- This Article should, as the name would suggest, clearly strive for a **high level of qualification** for interpreters and translators, as referred to in §§6 and 20 of the resolution. Amnesty considers that this provision should include the requirements for proof of specific qualification, accreditation, independence and confidentiality for interpreters and translators employed in criminal proceedings for the purpose of having an adequate standard of interpretation and translation. Given that these characteristics are essential for the effectiveness of the translation and fairness of the proceedings, they should appear in the wording of the legislative proposal.

Article 9 – Recording the proceedings

Member States shall ensure that, where proceedings are conducted through an interpreter, an audio or video recording is made in order to ensure quality control. A transcript of the recording shall be provided to any party in the event of a dispute. The transcript may only be used for the purposes of verifying the accuracy of the interpretation.

- Finally, Article 9 of the original proposal presented in 2004¹³, provided for an **audio or video recording** and transcript to ensure quality control where proceedings were conducted through an interpreter. This is an important safeguard measure for a person submitted to criminal proceedings but it would be satisfactory if a reference to this measure appears in the Resolution.

¹² Rule 35.1 - Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.

¹³ COM (2004) 328 final, 28.4.2004.