

**UNDERVALUING THE RIGHT TO AN INTERPRETER: HOW SOCIETAL AND  
JUDICIAL INTERESTS THREATEN THE FAIRNESS OF MULTILINGUAL  
CRIMINAL PROCEEDINGS**

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**Abstract:** By its very nature, the right to a fair trial involves a balancing of competing interests. This paper examines how such a balancing process has undermined one particular fair trial right: the right to an interpreter under international law. In order to do so, the paper sets out the current contours of the right, highlighting and analysing the numerous trade offs that have been made in its development. The resulting analysis concludes that courts often prioritize judicial efficiency and economic frugality at the expense of the right to an interpreter with little or no understanding of the impact these decisions have on the effectiveness of the right. The end result is a balance that neuters the practical application of the right and undermines the fairness of criminal proceedings involving defendants who do not speak the language of the court.

**A. INTRODUCTION**

By its very nature, the right to a fair trial involves a balancing of competing interests. This is evidenced by the name of the right itself; individuals are not entitled to a ‘perfect’ trial, only a ‘fair’ one. Any quest for perfection must be balanced against the price that must be paid to attain it. Society does not extend an open line of credit to the criminal justice system, nor do judges have unlimited patience and tolerance. Societal and judicial desires to reduce costs, minimize disruptions and increase efficiency have combined to limit various aspects of the right to a fair trial. This trend can be most easily seen, and is perhaps most troubling, with respect to a fair trial right that is largely overlooked by the legal literature: the right to an interpreter.

In order to understand how the balancing of competing interests negatively affects the right to an interpreter under international law, this article begins with a brief explanation of court interpretation and its practical implications for criminal proceedings. It must be noted that this discussion only scratches the surface as to the negative impacts that court interpreters have on the fairness of a proceeding.<sup>1</sup> The focus here is on those features of interpreting that deter the appointment and usage of qualified interpreters, as it is these impacts that influence the balancing of interests so detrimental to the development of the right. Nor does space

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<sup>1</sup> For a comprehensive analysis of this subject, see John Dingfelder Stone, *Court Interpreters and Fair Trials* (Palgrave Macmillan – London 2018) (forthcoming).

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allow for an exhaustive review of the right to an interpreter. Rather, the article only addresses the specific aspects of the right that best highlight this balancing mechanism and its negative implications for the right. Incorporated into this discussion is an analysis of how the undervaluation of the right to an interpreter vis-à-vis societal and judicial interests has significantly weakened the protections granted by it.

Two final remarks must be made as to the terminology employed in this article. First, although translation and interpretation are often used interchangeably in modern society, they are not actually synonymous. Both refer to the transfer of meaning from one language to another, however translation deals exclusively with written documents while interpretation only involves oral content.<sup>2</sup> Having said that, for the purposes of readability, the terms are treated as fungible throughout. It must be emphasized, though, that this article only concerns itself with the ‘interpretation’ of oral content.<sup>3</sup> A second linguistic choice that has been made relates to gender. Throughout the article, an assumption is made that the accused is male, while the court interpreter is female. This usage is not meant as a slight to either sex, rather it simply mirrors the common reality of criminal proceedings while improving readability.

## **B. COURT INTERPRETATION AND ITS IMPACT**

### ***1. The nature of interpreting***

Court interpretation is not a recent phenomenon; judges have employed interpreters to break through linguistic barriers in the courtroom for centuries on an as-needed basis.<sup>4</sup> Their insertion into the legal process makes logical sense, as they allow the intricate and well-honed practices that make up criminal proceedings to accommodate an individual who would otherwise fail to linguistically understand those proceedings.<sup>5</sup> In short, court interpreters allow the other courtroom participants to continue doing what they traditionally do in a monolingual court environment. They are, as Morris states, viewed merely as a ‘reluctantly

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<sup>2</sup> Ruth Morris, ‘The Moral Dilemmas of Court Interpreting’ (1995) 1(1) *The Translator* 25. See also Roseann González, Victoria F Vásquez and Holly Mikkelson, *Fundamentals of Court Interpretation: Theory, Policy, and Practice* (Carolina Academic Press 1991) 295.

<sup>3</sup> For an explanation as to the right to translation under international law, see John Dingfelder Stone, ‘Assessing the Existence of the Right to Translation under the International Covenant on Civil and Political Rights’ (2012) 16 *Max Planck Yrbk UN L* 159.

<sup>4</sup> González (n 2) 5 (citing cases in the United States as early as 1808); Holly Mikkelson, ‘Court Interpreting at a Crossroads’ (Annual Conference of the National Association of Judiciary Interpreters and Translators 1999) <[http://works.bepress.com/holly\\_mikkelson/10/](http://works.bepress.com/holly_mikkelson/10/)> accessed 10 March 2017, 1 (citing cases as early as 1682).

<sup>5</sup> Lynn Davis and William Hewitt, ‘Lessons in Administering Justice: What Judges Need to Know about the Requirements, Role, and Professional Responsibilities of the Court Interpreter’ (1994) 1 *Harv Latino L Rev* 121, 144-45.

accepted practical necessity'.<sup>6</sup> However, the inclusion of a court interpreter into the otherwise well-regulated ecosystem of a criminal proceeding inevitably alters elements of that proceeding. Court interpreters are not a benign addition. They may create the illusion of normality, but it is only an illusion. The appointment of a court interpreter carries with it certain unavoidable costs.

Although judges and lawyers often consider court interpreters akin to machines, automatically converting one language into another, the reality is far more complex.<sup>7</sup> Interpretation is not like mathematics; a perfect, 'right' answer rarely exists.<sup>8</sup> Rather, interpreters are continuously confronted with an assortment of options for each word they must 'transform' and every option carries with it a perceptible difference in connotation or tone than the original word.<sup>9</sup> Choosing to translate a word as 'smash' as opposed to 'hit' influences the audience's perception of the event.<sup>10</sup> Even something as small as saying 'the dog' as opposed to 'a dog' creates a meaningful impact.<sup>11</sup> Far from being machines, court interpreters must exercise professional judgment in every detail of their interpretation, and their eventual choices unavoidably affect the proceedings.

## 2. *Hidden substantive errors*

As with virtually every profession, increased experience and training lead to better job performance. With respect to court interpreters, this expertise allows them to make the 'best' decisions given their available options, producing a more accurate interpretation.<sup>12</sup> Yet, errors are an inherent and inevitable side effect of the interpreting process itself.<sup>13</sup> This is due primarily to the immense complexity of interpretation,<sup>14</sup> which requires interpreters to work

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<sup>6</sup> Ruth Morris, 'The Gum Syndrome: Predicaments in Court Interpreting' (1999) 6(1) *Forensic Linguistics* 6, 9.

<sup>7</sup> Morris, 'Moral Dilemmas' (n 2) 27; Bente Jacobsen, 'Pragmatics in Court Interpreting: Additions' in Louise Brunette et al (eds), *The Critical Link 3: Interpreters in the Community* (John Benjamins 2003) 223-238, 224; Sandra Hale, *The Discourse of Court Interpreting: Discourse Practices of the Law, the Witness and the Interpreter* (John Benjamins 2004) 12.

<sup>8</sup> Michele LaVigne and Vernon McCay, 'An Interpreter Isn't Enough: Deafness, Language, and Due Process' (2003) *Wis L Rev* 843, 868.

<sup>9</sup> Daniel Gile, *Basic Concepts and Models for Interpreter and Translator Training* (Rev edn, John Benjamins 2009) 52. See also González (n 2) 239; and Morris, 'Moral Dilemmas' (n 2) 30-31.

<sup>10</sup> Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* (University of Chicago Press 1990) 25 (noting that studies have shown that individuals who were asked to estimate the speed two cars were travelling when they 'smashed into each other' produced a 'significantly higher' estimate than those who were asked how fast the cars were going when they 'hit each other').

<sup>11</sup> Elizabeth Loftus, *Eyewitness Testimony* (2nd edn, Harvard University Press 1996) 95 (noting that study subjects who were shown a video that did not depict a dog but subsequently asked whether they saw 'the' dog – as opposed to 'a' dog – were more likely to claim to have seen a dog that did not actually exist).

<sup>12</sup> Morris, 'Moral Dilemmas' (n 2) 42.

<sup>13</sup> Angela McCaffrey, 'Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters' (2000) 6 *Clin L Rev* 347, 393. See also Dingfelder Stone, 'Court Interpreters and Fair Trials' (n 1) (referring to various interpreter errors that can and do occur in trials).

<sup>14</sup> Elena De Jongh, 'Linguistic Presence v. Linguistic Absence' [July/August 2008] *Florida B J* 20, 25.

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at the extreme edge ('saturation point') of their cognitive abilities.<sup>15</sup> According to Gile, interpretation engages both non-automatic cognitive operations (those that involve conscious effort) and automatic cognitive operations (those that do not).<sup>16</sup> As interpreters gain experience and training, they 'automate' certain aspects of the interpreting process, allowing them to focus more of their limited cognitive capacity on the remaining non-automatic operations, consequently improving interpretive output and reducing the likelihood of errors.<sup>17</sup> This is similar to learning to ride a bicycle, which requires effort and concentration at first, but with time becomes second nature and allows one to simultaneously perform other actions. With that in mind, even the best-trained and most experienced interpreters make 'numerous' errors.<sup>18</sup>

Although such errors are unavoidable, they remain largely unnoticed by other courtroom participants, who generally only speak the language of the court and are thus privy to the interpreter's output but not the speaker's foreign language input. Without this frame of reference for comparison, courtroom participants overlook even the most egregious errors of interpretation because they are restricted to the end product, which appears flawless on its own. Furthermore, since these same courtroom participants think of interpreting as a mechanical process with a singular 'right' answer, they often fail to appreciate that such errors could even exist. As such, the negative impact of poor interpretation, although both inevitable and significant,<sup>19</sup> on criminal proceedings generally remains hidden from view. Yet, even though judges are ignorant of the true cost of courtroom interpretation, they are still generally reluctant to appoint court interpreters.<sup>20</sup> This has much to do with the more noticeable drawbacks associated with their appointment.

### **3. Subtle distortions of communication**

While courtroom participants may not be cognizant of the specific errors made in an interpretation, they are generally well aware that the employment of a court interpreter significantly changes the precision of communication in the courtroom. Telford Taylor, reflecting on his time as a Prosecutor at the Nuremberg Trials, likened working through an

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<sup>15</sup> Gile, *Basic Concepts* (n 9) 159, 182.

<sup>16</sup> *ibid*, 159.

<sup>17</sup> González (n 2) 333.

<sup>18</sup> Daniel Gile, 'Conference Interpreting as a Cognitive Management Problem' in Franz Pöchhacker and Miriam Shlesinger (eds), *The Interpreting Studies Reader* (Routledge 2002) 162-177, 163.

<sup>19</sup> Dingfelder Stone, 'Court Interpreters and Fair Trials' (n 1) 252-281.

<sup>20</sup> Williamson Chang and Manuel Araujo, 'Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant' (1975) 63 Cal L Rev 801, 802 (with respect to the US); Kathy Laster and Veronica Taylor, *Interpreters and the Legal System* (The Federation Press 1994) 96-97 (with respect to Australia).

interpreter to ‘conversation through a double mattress’.<sup>21</sup> Lawyers and judges in particular feel the impact of working with court interpreters, as they frequently use language as a tool to achieve a specific goal,<sup>22</sup> and many believe interpreters are ‘too blunt an instrument to accurately convey their exact intent across language barriers.’<sup>23</sup> There is an ‘inherent loss of meaning’ whenever a word or phrase is translated from one language into another, whether it takes on other connotations in the output language, loses those it originally possessed in the source, or perhaps both simultaneously.<sup>24</sup> Likewise, ambiguous language, which is purposefully employed by lawyers in the courtroom,<sup>25</sup> tends to lose its ambiguity in translation, as the interpreter must choose one of its associated meanings. For example, consider the different possible meanings of the question ‘Did you have anything to drink in the car?’ These more subtle shifts in meaning, when combined with the outright errors that remain hidden from view, produce an understandable but distorted communication.

Interpretation also unsettles courtroom communication through its complexity. Since interpreters struggle at the edge of their limited cognitive capacity, they often (understandably) prioritize accuracy of content over fluidity of speaking style.<sup>26</sup> However, interpreters also have a competing economic incentive to generate a comprehensible end product, since lawyers and judges regularly assess their competence based on the intelligibility of their interpretation.<sup>27</sup> This may lead interpreters to remove information they did not understand,<sup>28</sup> clarify concepts that were unclear or ambiguous,<sup>29</sup> or clean up inelegant or poorly formulated speech.<sup>30</sup> Each of these practices, though ultimately useful in producing

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<sup>21</sup> Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Doubleday 1992) 101.

<sup>22</sup> Hale, *Discourse of Court Interpreting* (n 7) 13. See also Yvonne Fowler, ‘The Courtroom Interpreter: Paragon and Intruder?’ in Silvana Carr, Roda Roberts, Aideen Dufour and Dini Steyn (eds), *The Critical Link: Interpreters in the Community* (John Benjamins 1995) 191-200, 194 (‘Lawyers design their questions in order to achieve a number of clearly identifiable ends. Accusations, challenges, justifications, denials, and rebuttals may all be packaged as questions and answers.’)

<sup>23</sup> Brandon Tuck, ‘Comment: Preserving Facts, Form, and Function When a Deaf Witness with Minimal Language Skills Testifies in Court’ (2010) 158 U Pa L Rev 905, 906.

<sup>24</sup> Frans Viljoen, ‘Look Who’s Talking, in the Courtroom, Too!’ (1992) 109 SALJ 64, 69.

<sup>25</sup> Elena De Jongh, *An Introduction to Court Interpreting: Theory & Practice* (University Press of America 1992) 116.

<sup>26</sup> See, for example, the coping strategies of transcoding (wherein the interpreter translates a word for which she cannot remember the exact analog) and form-based interpreting (wherein the interpreter interprets word-for-word what was said, without concern for whether the end result is comprehensible) that interpreters are taught, which prioritize preservation of content over style considerations. See Gile, *Basic Concepts* (n 9) 208-09.

<sup>27</sup> Sandra Hale, ‘Challenges of Court Interpreting: Intricacies, Responsibilities and Ramifications’ (2007) 32 Alt L J 198, 200.

<sup>28</sup> Gile, *Basic Concepts* (n 9) 210.

<sup>29</sup> González (n 2) 479-480.

<sup>30</sup> *ibid*, 27; Morris, ‘Moral Dilemmas’ (n 2) 38; Alejandra Hayes and Sandra Hale, ‘Appeals on Incompetent Interpreting’ (2010) 20(2) JJA 119, 121.

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the coherent interpretation that both judges and lawyers expect,<sup>31</sup> distort the precision of the end communication in ways that can be felt, even if not patently obvious.

**4. The issue of time**

The involvement of court interpreters also negatively impacts the efficiency of the courtroom in a variety of ways. At the outset, simply finding a suitable interpreter can delay proceedings, particularly with respect to rare languages where qualified interpreters can be difficult to find.<sup>32</sup> Such delays not only undermine the court's efficiency and scheduling (which is often a pet peeve of judges) but can also adversely affect the reliability and discoverability of evidence in the case.<sup>33</sup> Indeed, when faced with the prospect of such a delay, it is not unheard of for judges to appoint an unqualified or inappropriate court interpreter,<sup>34</sup> or even forge ahead without one.<sup>35</sup> Similar delays can also affect the work of investigators in the pre-trial phase.<sup>36</sup>

The act of interpreting itself likewise adds to the overall length of a trial. Most witnesses in domestic trials who do not speak the language of the court will be interpreted consecutively.<sup>37</sup> This means that the interpreter waits for the original speaker to finish before interpreting their speech.<sup>38</sup> As every speech segment is repeated twice, consecutive interpretation virtually doubles the amount of time necessary to question a witness.<sup>39</sup> Even simultaneous interpretation of the proceedings to a foreign language accused is not without its necessary delays; although the practice is often ignored at the domestic level, interpreters require breaks every 30-45 minutes in order to avoid an increase in errors from mental fatigue.<sup>40</sup>

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<sup>31</sup> González (n 2) 156; Beth Gottesman Lindie, 'Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations' (1993) 48 U Miami L Rev 399, 413; Hale, 'Challenges' (n 27) 200.

<sup>32</sup> Glen Craney, 'Language v. the Law' (1989-90) 16 Barrister 20, 22; Holly Mikkelsen, 'The Court Interpreter as Guarantor of Defendant Rights' (First European Congress on Court Interpreting and Legal Translation – Graz 1998) <[http://works.bepress.com/holly\\_mikkelsen/8/](http://works.bepress.com/holly_mikkelsen/8/)> accessed 10 March 2017, 6.

<sup>33</sup> 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* (Nijhoff 1993) 77.

<sup>34</sup> *Baytar v Turkey* App no 45440/04 (ECtHR Second Section, 14 October 2014) §19 (where the domestic court appointed a member of the accused's family as interpreter in order to continue with the proceedings).

<sup>35</sup> *Cuscani v UK* App no 32771/96 (2002) 36 EHRR 2, §17-18 (where the court went ahead with a sentencing hearing despite the unexpected absence of the accused's court interpreter).

<sup>36</sup> Catherine Namakula, *Language and the Right to Fair Hearing in International Criminal Trials* (Springer 2014) 13 (with respect to the ICTR, though the concern would be equally applicable to domestic authorities as well).

<sup>37</sup> González (n 2) 163; Davis and Hewitt (n 5) 130-31. The opposite is true of international criminal tribunals, where simultaneous interpretation of witnesses is the norm. See Namakula (n 36) 107.

<sup>38</sup> González (n 2) 379.

<sup>39</sup> Davis and Hewitt (n 5) 130; Namakula (n 36) 8.

<sup>40</sup> Marianne Mason, *Courtroom Interpreting* (University Press of America 2008) 9 (noting that studies show the

### **5. *A necessary loss of control***

In addition to lengthening criminal proceedings, court interpreters also upset the usual power dynamics of the courtroom. Patricia Wald, a former Judge at the International Criminal Tribunal for the Former Yugoslavia, admitted that she knew of ‘no judge...who does not acknowledge that he or she is totally at the mercy of the translator in the courtroom.’<sup>41</sup> The interpreter often has an unassailable chokehold on communications between the foreign language participant and the court. However, their control over the proceedings extends far beyond mere language issues; certain aspects of court interpretation require interpreters to exercise authority that normally belongs with the judge.

For example, where a speaker is too long-winded or does not speak clearly or loudly enough, the interpreter will interrupt the proceedings in order to alleviate the problem.<sup>42</sup> The same is true where two people talk at once, or someone speaks too quickly or too slowly.<sup>43</sup> Interpreters may also stop the proceedings to ask a speaker to clarify or repeat a statement.<sup>44</sup> In such circumstances the interpreter will also interrupt the judge,<sup>45</sup> an act about which the other courtroom participants would not even dare dream. Such interruptions make both lawyers and judges uncomfortable, as they represent an alteration to the traditional formalities and power structures of the courtroom. They can even lead to overt irritation between the interpreter and other participants.<sup>46</sup> Their impact however is not limited to questions of comfort and dominance. Studies have shown that interpreter interruptions undermine the credibility of an interrupted lawyer in the eyes of the fact finder,<sup>47</sup> while conversely increasing the credibility of witnesses who are interrupted.<sup>48</sup> In relation to interpreter performance, the act of interrupting a speaker has also been proven to increase an

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error rate for interpreters increases considerably after 30 minutes of continuous interpreting). See also Charles Grabau and Llewellyn Gibbons, ‘Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation’ (1996) 30 *New Eng L Rev* 227, 296.

<sup>41</sup> Patricia Wald, ‘Running the Trial of the Century: The Nuremberg Legacy’ (2006) 27 *Cardozo L Rev* 1559, 1571.

<sup>42</sup> Mason (n 40) 41; Berk-Seligson (n 10) 191.

<sup>43</sup> Debra Hovland, ‘Errors in Interpretation: Why Plain Error is Not Plain’ (1992-93) 11 *Law & Ineq J* 473, 476; Davis and Hewitt (n 5) 134.

<sup>44</sup> González (n 2) 395; Berk-Seligson (n 10) 66, 89.

<sup>45</sup> Roxana Cardenas, “‘You Don’t Have to Hear, Just Interpret!’: How Ethnocentrism in the California Courts Impedes Equal Access to the Courts for Spanish Speakers’ (Fall 2001) *Court Rev* 24.

<sup>46</sup> Morris, ‘Moral Dilemmas’ (n 2) 40. See also Cardenas (n 45) 24 (recounting how one interpreter who asked the judge to speak more loudly was told ‘[y]ou don’t have to hear, just interpret!’)

<sup>47</sup> Berk-Seligson (n 10) 187-88.

<sup>48</sup> *ibid*, 190-93.

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interpreter's error rate.<sup>49</sup> Thus, changes in courtroom dynamics brought about by the appointment of an interpreter present both noticeable and hidden costs.

**6. *The overall situation***

As can be seen from the above discussion, even leaving aside the more insidious (and largely unnoticed) interpreter errors that are beyond the remit of this paper, the utilization of a court interpreter negatively impacts courtroom participants in a variety of noticeable ways. Taken on their own, these adverse effects can simply be seen as part of the standard operating costs of an unusual criminal proceeding. However, in an effort to avoid or minimize these costs, judges have interpreted and implemented the right to an interpreter in ways that ultimately undermine the protection that it is meant to provide. To better understand this development, it is necessary to expand upon certain specific aspects of the right to an interpreter.

**C. THE RIGHT TO AN INTERPRETER UNDER INTERNATIONAL LAW**

**1. *Source and purpose of the right***

The right to an interpreter finds its origins in article 14(3)(f) of the International Covenant on Civil and Political Rights (ICCPR), which states that every individual facing a criminal charge is entitled to 'the free assistance of an interpreter if he cannot understand or speak the language used in court.'<sup>50</sup> The broad acceptance of article 14 ICCPR as customary international law signifies its position in this regard as the benchmark for the right to an interpreter.<sup>51</sup> Since article 6(3)(e) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) contains identical language,<sup>52</sup> interpretations by the European Court of Human Rights (ECtHR) offer highly persuasive authority as to the meaning of article 14(3)(f) ICCPR as well. Unfortunately, in this context, no other judicial mechanism or treaty body provides further meaningful assistance in the development of the right to an interpreter. The African Charter on Human and People's Rights does not contain an explicit right to an interpreter,<sup>53</sup> and while the Inter-American system clearly provides such a right, case law of the Inter-American Court of Human Rights on the subject is virtually

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<sup>49</sup> Mason (n 40) 46-47.

<sup>50</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>51</sup> See Patrick Robinson, 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY' (2009) 3 Berk J Intl L Publicist 1, 6-7. See also Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 60; and Jenia Iontcheva Turner, 'Nationalizing International Criminal Law' (2005) 41 Stanford J Intl L 1, 22.

<sup>52</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

<sup>53</sup> See African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 7.



non-existent.<sup>54</sup> Some case law exists in the international criminal tribunals, however these decisions are specific to the procedures and interpreter practices guaranteed in these courts, and are not sufficiently analogous to national proceedings to be of much use in this analysis. As such, this article focuses primarily on the provisions of the ICCPR and ECHR, since, taken together, much of the modern right to an interpreter arises from the interpretation of these two instruments.

Nevertheless, there is more to the right to an interpreter than explicitly granted by these instruments, since they only ensure the presence of an interpreter where the defendant himself lacks competence in the language of the court. Various other situations can arise that require the employment use of a court interpreter as a matter of right in order to ensure the overall fairness of the proceedings. For example, where a language-competent defendant wishes to present evidence from a foreign language witness as a part of his defence, his right to call and examine witnesses under article 14(3)(e) ICCPR and article 6(3)(d) ECHR naturally entitles him to use of a court interpreter on behalf of the witness even where his explicit 'right to an interpreter' would not. As such, an additional, secondary right to an interpreter arguably exists above the 'minimum guarantees' set out in article 14(3)(f) ICCPR and article 6(3)(e) ECHR.<sup>55</sup> When interpreting the right to an interpreter under international law then, one must look beyond the narrow confines of the text and consider the requirements of a fair trial overall.

The right to an interpreter is not a standalone right, but rather is meant as part of a larger package of guarantees designed to ensure the overall fairness of criminal proceedings. Within this larger framework, the right to an interpreter serves several purposes, and must be interpreted with these in mind. One such purpose, as stated by the UN Human Rights Committee (HRC) in its General Comment No. 13, is to remove any obstacles to the general right of defence that might arise from language difficulties.<sup>56</sup> This right of defence encompasses other fair trial rights, among them an accused's right to be present at, and participate in, criminal proceedings against him.<sup>57</sup> In this context, Trechsel argues that the right is part of the accused's 'right to be heard', which in his opinion signifies a right not just

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<sup>54</sup> See American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 8(2)(a).

<sup>55</sup> Human Rights Committee, General Comment No. 13: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Article 14) (13 April 1984) UN Doc A/39/40 at 143, §5 (stating that the 'requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing').

<sup>56</sup> *ibid.*, §13.

<sup>57</sup> Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (2nd edn, Engel 2005) 337-38.

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to participate, but also to be ‘understood’.<sup>58</sup> For its part, the ECtHR has grounded the right to an interpreter in the concept of equality, stating that the right was ‘specifically designed to attenuate’ the ‘disadvantages that an accused who does not understand or speak the language used in court suffers as compared with an accused who is familiar with that language’.<sup>59</sup>

The right to an interpreter fulfils several different functions within the overall fair trial scheme. Acknowledging its different roles, and the specific fair trial rights it is meant to support, is important to understanding the legal boundaries of the right, since the right itself has evolved in an attempt to satisfy these roles. In this context, identifying what the right is meant to accomplish is key to appreciating how courts routinely overvalue their own interests vis-à-vis the fulfilment of the right, since they mistakenly believe the right has been adequately protected simply because one isolated purpose has been satisfied.

## **2. *The appointment of a court interpreter***

### *a) Aspects of the right*

The first major aspect of the right to an interpreter that must be addressed is the appointment of the interpreter herself. For the purposes of this article, the discussion will focus only on the explicit textual guarantee of the right, which grants an accused individual an interpreter where he meets two basic requirements. First, he must be facing a criminal charge. Although slightly different in wording, both article 14(3) ICCPR (‘any criminal charge against him’) and article 6(3) ECHR (‘charged with a criminal offence’) make a criminal ‘charge’ the trigger mechanism for the attachment of an individual’s fair trial rights. In this context, a ‘charge’ must be autonomously defined, meaning that the existence of a charge is independently determined and is not reliant on any ‘formal classification under national law.’<sup>60</sup> As such, once the State has charged the accused with a criminal offence (or its actions ‘substantially affect the situation of the person concerned’),<sup>61</sup> a language-deficient individual is entitled to an interpreter. For its part, the ECtHR has also extended the right to an interpreter to the investigation stage.<sup>62</sup>

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<sup>58</sup> Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005) 328.

<sup>59</sup> *Luedicke, Belkacem and Koç v Germany* (1978) Series A no 29, §42.

<sup>60</sup> Nowak (n 57) 318. See also Pieter van Dijk, ‘Access to Court’ in Ronald St John MacDonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Nijhoff 2003) 345-379, 361.

<sup>61</sup> Nowak (n 57) 319.

<sup>62</sup> *Saman v Turkey*, App no 35292/05 (ECtHR Second Section, 5 April 2011) §30 (‘Finally, the Court has ruled that the assistance of an interpreter should be provided during the investigation stage unless it can be demonstrated in the light of the particular circumstances of the case that there are compelling reasons to restrict this right’). See also *Diallo v Sweden*, App no 13205/07 (ECtHR Third Section, 5 January 2010) §24-25.

Second, and of more relevance to this paper, the accused must not be able to ‘understand or speak the language used in court’.<sup>63</sup> In this regard, both article 14(3)(f) ICCPR and article 6(3)(e) ECHR create a threshold of language incompetence whereby the right to an interpreter is activated. The dilemmas here are: (i) establishing that threshold; and (ii) determining who is qualified to assess the accused’s language ability with respect to that threshold. Unfortunately, the ECtHR and HRC fail to provide any easy answers.

In *Guesdon v. France*, an admittedly French-speaking accused asserted his right to an interpreter in French courts because he and his witnesses preferred to express themselves in their native Breton language.<sup>64</sup> The HRC held that the accused was not entitled to an interpreter, since he and his witnesses were ‘sufficiently proficient in the court’s language’ so as to avoid any ‘difficulties in understanding, or expressing themselves in the court’.<sup>65</sup> As such, the right to an interpreter is only triggered where an interpreter is necessary for communication and understanding, not simply where the accused could more easily communicate through an interpreter. While this decision accords with the explicit language of the right, it fails to provide any guidance on the level of proficiency that would be ‘sufficient’. The ECtHR has, to a limited extent, helped in this regard by providing some basic guidelines. In *Hermi v. Italy*, the ECtHR noted that a determination as to the necessity of appointing an interpreter must consider ‘the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court.’<sup>66</sup> Thus, the threshold of language ‘sufficiency’ arguably changes based on the level of the language used in court itself.

*b) Analysis*

This is a somewhat troubling standard, as it requires the court (or investigating authorities) to anticipate the linguistic complexity of proceedings that have yet to take full shape. Regardless, the underlying concern in both *Guesdon* and *Hermi* is the communication and understanding of the accused during court proceedings as the guiding principle in the appointment of a court interpreter.<sup>67</sup> Or, put differently by Trechsel, ‘[t]he interpretation only

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<sup>63</sup> Art 14(3)(f) ICCPR and Art 6(3)(e) ECHR.

<sup>64</sup> *Dominique Guesdon v France*, Comm No 219/1986 (25 July 1990) UN Doc CCPR/C/39/D/219/1986 (1990) at §§2.1-2.2.

<sup>65</sup> *ibid*, §10.2.

<sup>66</sup> *Hermi v Italy*, App no 18114/02 (ECtHR, 18 October 2006) §71.

<sup>67</sup> See also Trechsel (n 58) 330.

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serves the communication.<sup>68</sup> Although this conception of the right faithfully tracks the plain language of both article 14(3)(f) ICCPR and article 6(3)(e) ECHR, it obviates one of the stated purposes of the right itself, which is to reduce any ‘disadvantages that an accused who does not understand or speak the language used in court suffers as compared with an accused who is familiar with that language.’<sup>69</sup> Surely, one of these disadvantages would be the inability to express oneself to the full extent of one’s inherent capabilities. In other words, while a native or fluent speaker of the court’s language may understand and communicate as fully as their intelligence will allow, this is not a luxury granted to an accused who is only ‘sufficiently proficient’ in the court’s language. To settle for ‘sufficiency’ (as opposed to ‘fluency’) is to set the bar fairly low.

Naturally, appointing a court interpreter every time an accused prefers to use a different language, or their language skills fall above ‘sufficiency’ but below ‘fluency’, would lead to increased financial costs, discomfort of other courtroom participants in the manners previously discussed, and delayed proceedings. Yet, to a large extent, these are the necessary costs of placing an accused on the same footing as other defendants (to say nothing of equality with a State representative who is surely a native or fluent speaker). For better or worse, the right to an interpreter as applied by both the ECtHR and the HRC seeks not to create such full equality, but rather only to ensure ‘sufficient’ communication and understanding of the process. This is a conscious decision to not only follow the strict language of the right, but also prioritize the efficient workings of the court over any interests of actual equality by not encumbering it with an ‘unnecessary’ court interpreter.

More problems and tradeoffs arise with respect to the application of the language threshold. Even where one knows that the accused must have ‘sufficient’ language competence, and even if one can figure out what level of language is ‘sufficient’ to achieve that threshold, the difficulty remains of actually assessing whether an accused has that level of language. Following *Hermi*, it must be accepted that language competence is a moving target, changing from case-to-case. Here, distinctions must be drawn between the complexity of the proceedings themselves (eg complicated tax fraud cases as opposed to simple theft charges), and the accused’s role within them (eg active versus passive participation in the proceedings). Each situation requires different linguistic abilities. However, while it may be commonly accepted that something more than ‘everyday language...is required’, accurately

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<sup>68</sup> *ibid*, 330.

<sup>69</sup> *Luedicke* (n 59) §42.

and objectively assessing an accused's linguistic competence is exceedingly difficult.<sup>70</sup> The Council of Europe, for example, spent over two decades debating and formulating the *Common European Framework of Reference for Languages*, and entire industries now exist to implement its six levels of language proficiency and the multitude of possible language assessment techniques it sets out.<sup>71</sup> Furthermore, it is not a given that the accused will even cooperate in the process,<sup>72</sup> or that he will honestly admit to any language deficiency for fear of appearing 'ignorant or unintelligent'.<sup>73</sup> Thus, the determination of language 'sufficiency' is problematic, and highly dependent on the specific context.

Perhaps for this reason, courts mainly employ a case-by-case approach, with the determination left up to the individual trial judge and their discretion.<sup>74</sup> While this solution has the obvious benefit of accommodating the necessity of a case-specific determination, it unfortunately suffers from several serious limitations. For instance, judges are trained in law, not in assessing an individual's linguistic proficiency. Perhaps due to this lack of training, judges make a number of faulty assumptions with respect to language, such as assuming that residents of a country necessarily have sufficient linguistic ability<sup>75</sup> and that individuals with normal conversational language skills are able to understand the sophisticated legal language used in criminal proceedings.<sup>76</sup> Judges also often underestimate the 'unique needs of the linguistic minority in the courtroom',<sup>77</sup> perhaps specifically because the courtroom (and the

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<sup>70</sup> Trechsel (n 58) 334.

<sup>71</sup> Council of Europe, 'Common European Framework of Reference for Languages: Common European Framework of Reference for Languages (CEFR)' homepage <[http://www.coe.int/t/dg4/linguistic/cadre1\\_en.asp](http://www.coe.int/t/dg4/linguistic/cadre1_en.asp)> accessed 10 March 2017. See also Council of Europe, *Common European Framework of Reference for Languages: Learning, Teaching, Assessment* (CUP 2001).

<sup>72</sup> Trechsel (n 58) 334.

<sup>73</sup> LaVigne and McCay (n 8) 920.

<sup>74</sup> Taru Spronken and Marelle Attinger, *Procedural Rights in Criminal Proceedings: Existing Levels of Safeguards in the European Union* (European Commission 2005) <<http://arno.unimaas.nl/show.cgi?fid=3891>> accessed 10 March 2017, 44-52 (noting from a survey that the vast majority of states in the European Union leave the assessment of the accused's language abilities to the judge); Michael Shulman, 'No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants' (1993) 46 Vand L Rev 175, 179 (with respect to the US); Laster and Taylor (n 20) 95-97 (with respect to Australia). See also Trechsel (n 58) 334 (noting the European Commission as 'ready to accept the findings of the domestic authorities' concerning such determinations).

<sup>75</sup> *Hermi* (n 66) §90 (where the court cited the accused's 10-year residence in Italy as evidence of his proficiency in Italian); *Katritsch v France*, App no 22575/08 (ECtHR Fifth Section, 4 November 2010) §45 (where the court noted the accused's 6-year residence in France as evidence of his proficiency in French); Chang and Araujo (n 20) 802-03; Trechsel (n 58) 334-35. See also Mary Phelan, 'Legal Interpreters in the News in Ireland' (2011) 3(1) Translation & Interpreting 76, 83 (quoting one Irish Judge as stating that it was 'absolutely ridiculous' that someone living in Ireland for five years could not speak English).

<sup>76</sup> McCaffrey (n 13) 374; Laster and Taylor (n 20) 89-90; Randall Shepard, 'Access to Justice for People Who Do Not Speak English' (2007) 40 Ind L Rev 643, 643.

<sup>77</sup> Davis and Hewitt (n 5) 121.

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language used therein) is an environment with which they are intimately familiar. In short, judges lack the necessary background and ability to effectively fulfil this role.

It is understandable why the right to an interpreter has developed in this manner; empowering the trial court judge to make this assessment is the cheapest and most efficient option. To require a qualified linguist to assess every foreign accused for language proficiency would result in both additional expenses and further delays. Naturally, an expert linguist would make a more accurate determination, but both the HRC and the ECtHR obviously believe that any gain in accuracy would be outweighed by the aforementioned negatives. This indicates a gross undervaluing of the right to an interpreter, making access to the right secondary to minor considerations of cost and efficiency. Moreover, what access does exist is made contingent on the discretion of an individual manifestly unqualified to make such an assessment alone. This is akin to allowing a judge to rule independently on the mental capacity of an individual because consulting a psychiatrist would be too expensive and take too long – a result the ECtHR would find unthinkable.<sup>78</sup> That appellate courts, which have the time and opportunity to accurately assess the accused's linguistic ability through expert opinions submitted by both parties after the fact, then defer to the trial court's judgment on the issue, adds insult to injury.<sup>79</sup>

**3. *The competence of the court interpreter and/or interpretation***

*a) Aspects of the right*

The mere appointment of a court interpreter does not fulfill an accused's right under international law – some minimum level of quality is implied by the entitlement to a court interpreter.<sup>80</sup> As such, the question of competence applies not just to the accused's language abilities, but also to the court interpreter and her eventual interpretation. Although neither the ECtHR nor the HRC have provided much in the way of guidance as to the quality level that must be attained, some useful fragments of assistance can be gleaned from the limited case law that exists.

In *Kamasinski v. Austria*, the ECtHR held that the defendant's right to an interpreter had not been violated since it was not convinced that the final interpretation compromised the

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<sup>78</sup> *X and Y v Croatia*, App no 5193/09 (ECtHR First Section, 3 November 2011) §85 (holding that although the judge, and not a physician, makes the final determination as to the mental capacity of an individual, 'any decision based on the assessment of mental health has to be supported by relevant medical documents').

<sup>79</sup> Dingfelder Stone, 'Court Interpreters and Fair Trials' (n 1) 39; Glenn Bergenfield, 'Trying Non-English Conversant Defendants: The Use of an Interpreter' (1977-78) 57 Or L Rev 549, 559.

<sup>80</sup> Nowak (n 57) 344.

fairness of the defendant's proceedings.<sup>81</sup> The ECtHR found this to be the case despite the fact that the accused had been questioned several times by authorities using, among others, an unregistered interpreter and a fellow prisoner of limited linguistic skill.<sup>82</sup> Thus, from the perspective of the ECtHR, the identity of the interpreter (and her specific qualifications and training) is of minimal concern in determining the accuracy of the eventual interpretation. Such a practice is of little use to trial judges who are tasked with appointing court interpreters but, absent a working time machine, are unable to assess their eventual interpretation beforehand. Given this limitation, the ECtHR has recognized that national court trial judges only have a duty to supervise and verify the adequacy of the interpreter's skills.<sup>83</sup>

There is as yet no agreed upon way for States to verify the competence of their court interpreters. National courts mostly focus on the actual qualifications of the interpreter, though this takes a variety of forms. In some States, such as the United States of America (the federal system)<sup>84</sup> and Denmark,<sup>85</sup> mandatory certification regimes have been instituted to ensure that only those interpreters that have been certified through an examination process are technically allowed to interpret in court. Other States either use a non-mandatory certification system (such as Australia),<sup>86</sup> devolve the maintenance of a certification regime to the individual courts within the State (such as Belgium),<sup>87</sup> leave the assessment of interpreter qualifications to the trial judges themselves (such as Canada),<sup>88</sup> or have no quality assurance standards at all (such as Spain<sup>89</sup> and Israel<sup>90</sup>). As such, a number of different systems have been implemented to verify the competence of court interpreters before their appointment. However, neither the HRC nor the ECtHR have expressed any preference or standards for States in this regard. The ECtHR has even gone so far as to say that it did not

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<sup>81</sup> *Kamasinski v Austria* (1989) Series A no 168, §77.

<sup>82</sup> *ibid.*, §11-12.

<sup>83</sup> *Diallo* (n 62) §29; *Baytar* (n 34) §57.

<sup>84</sup> Court Interpreter's Act of 1978 (United States) 28 USC §1827(b)(2); De Jongh, 'Linguistic Presence' (n 14) 25. It must be noted however that the various US State Court systems each employ their own various standards and rules on the use of interpreters.

<sup>85</sup> Nancy Schweda-Nicholson and Bodil Martinsen, 'Court Interpretation in Denmark' in Carr, Roberts, Dufour and Steyn (eds), *The Critical Link: Interpreters in the Community* (John Benjamins 1995) 259-270, 262. See also Erik Hertog and Yolanda Vanden Bosch, 'Access to Justice across Language and Culture in the E.U.' in Hertog (ed), *Aequitas: Access to Justice across Language and Culture in the EU* (Lessius Hogeschool 2001) 5-21, 13.

<sup>86</sup> Sandra Hale, *Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals: A National Survey* (AIJA 2011) xi; Hayes and Hale (n 30) 123 (noting that courts lack interest in interpreter qualifications); Laster and Taylor (n 20) 34-36.

<sup>87</sup> Hertog and Vanden Bosch (n 85) 11.

<sup>88</sup> David Heller, 'The Language Bias in the Criminal Justice System' 37 (1994-95) CLQ 344, 368.

<sup>89</sup> Anne Martin and Juan Miguel Ortega Herráez, 'Interpreting in the Dock' (2011) 50(4) *The Linguist* 14, 14.

<sup>90</sup> Ruth Morris, 'Justice in Jerusalem – Interpreting in Israeli Legal Proceedings' (1998) 43(1) *Meta* 110, 7.

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consider it ‘appropriate ... to lay down any detailed conditions concerning the method by which interpreters may be provided to assist accused persons.’<sup>91</sup>

Regardless of the appointment procedures employed by the State, the focus at the appellate level remains not on the qualifications of the interpreter but rather on her performance. As the ECtHR noted in *Kamasinski*, national courts are ultimately responsible for the ‘adequacy of the interpretation provided’ where they are ‘put on notice’ as to its possible inadequacy.<sup>92</sup> What qualifies as ‘adequate’ in this context though is a matter of serious debate and remains highly unsettled. *Kamasinski* remains the leading ECtHR case in this area, wherein the Court asserted that the ‘interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.’<sup>93</sup> In *Kamasinski* however, the ECtHR held that the accused’s right to an interpreter had not been violated even though the accused was afforded only a summary interpretation of his trial, and indeed parts of his trial were not interpreted for him at all.<sup>94</sup>

*b) Analysis*

Taking *Kamasinski* at face value suggests that a summarized version of the proceedings is sufficient to fulfil an accused’s right to an interpreter. Summary interpretations hold some benefit for a court, such as reducing disruptions to the power dynamics of the courtroom, as it eliminates any need to reproduce a word-for-word account of the proceedings and reduces the need for the interpreter to interrupt in order to clarify specific points. Likewise, it marginalizes both the interpreter and the foreign language participant to the extent that the court no longer needs to worry about them and can proceed as normal. Since summary interpretation does not require the accuracy or completeness of other forms of interpreting,<sup>95</sup> the drain on the cognitive resources of the interpreter is less, which likely removes the necessity of giving the interpreter breaks for fatigue. Thus, summary interpretation allows the court to protect its traditional, monolingual procedures from the normal disruptions associated with court interpretation.

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<sup>91</sup> *Ucak v UK* App no 44234/98 (ECtHR Third Section, 24 January 2002) 10. See also *Kamasinski* (n 81) §73 (where direct frontal challenge to Austria system was ignored/rebuffed).

<sup>92</sup> *Kamasinski* (n 81) §74. See also *Hermi* (n 66) §70.

<sup>93</sup> *Kamasinski* (n 81) §74.

<sup>94</sup> *ibid*, §83.

<sup>95</sup> De Jongh, *An Introduction to Court Interpreting* (n 25) 49.



The price paid, however, is quite high. Summary interpretation is not as accurate as either simultaneous or consecutive interpretation.<sup>96</sup> For this reason, scholars (and some judges) have argued that an accused is entitled to a complete, non-summarized version of the proceedings in order to achieve a fair trial.<sup>97</sup> Anything less than this would call into question the accused's ability to truly understand and participate in the finer details of the proceedings.<sup>98</sup> The practice at the international level, including the International Criminal Court and several of the *ad hoc* criminal tribunals, also adheres to this standard,<sup>99</sup> as do many prominent national court systems.<sup>100</sup> Similarly, interpreting associations frown upon the practice of summary interpretation,<sup>101</sup> and the modern trend is away from its utilization.<sup>102</sup> Given the weight of opinion against summary interpretation, the ECtHR's holding that an accused is not entitled to more accurate methods of interpretation is especially troubling as it represents a decision that the court's interest in efficiency outweighs the necessity of an accurate interpretation. If the interpretation need not be accurate, then there is little point in having a right to an interpreter. Moreover, *Kamasinski* evidences a fundamental misunderstanding of court interpretation by the ECtHR; to hold that an interpretation may be simultaneously 'competent' and 'summarized' is to speak in contradictions.

On a positive note, there is some doubt as to the whether *Kamasinski* truly creates a legal precedent endorsing summary interpretation. It is also possible that the failure of the accused to file a formal objection to the interpretation, a point emphasized by the ECtHR in its holding and often (as will be seen shortly) considered a form of waiver on the accused's part, may have negated any concerns about the deficient interpretation that was given.<sup>103</sup> Although the ECtHR in *Kamasinski* appears to endorse the 'adequacy' of summary interpretation, this issue is far from settled either logically or legally.

Another area in which the development of the right to an interpreter has prioritized efficiency and costs over the effectiveness of the right concerns the loose standards by which

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<sup>96</sup> *ibid.*

<sup>97</sup> Nowak (n 57) 343; Trechsel (n 58) 337; Grabau (n 40) 282.

<sup>98</sup> Trechsel (n 58) 337.

<sup>99</sup> Namakula (n 36) 107, 131.

<sup>100</sup> See *United States v Joshi*, 896 F2d 1303 (11th Cir 1990) (United States) 1309 (with respect to the United States); *R v Tran* (1994) 2 Supreme Court R 951 (Canada) §§61-62 (with respect to Canada); *De La Espriella-Velasco v The Queen* (2006) 197 Fed Law R 125 (Court of Appeal, Western Australia) 144-145 (with respect to Australia).

<sup>101</sup> See, for example, National Association of Judiciary Interpreters & Translators, 'NAJIT Position Paper: Summary Interpreting in Legal Settings' (NAJIT 2005) <<https://najit.org/wp-content/uploads/2016/09/SummaryInterpreting200609.pdf>> accessed 10 March 2017, 1 ('Modern professional standards forbid summary interpreting in the courtroom and other legal settings in almost all instances').

<sup>102</sup> Holly Mikkelsen, *Introduction to Court Interpreting* (St. Jerome Publishing 2000) 73.

<sup>103</sup> *Kamasinski* (n 81) §83.

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an individual may be considered an ‘interpreter’ for the purposes of the right. As Trechsel notes, the ‘case-law does not indicate any limits as to who can function as an interpreter.’<sup>104</sup> While this summary sounds bad enough, it actually undersells the problem: ECtHR case law tacitly sanctions the appointment of manifestly unqualified individuals. In *Kamasinski*, the ECtHR ruled that a fellow prisoner with only ‘limited knowledge’ of the accused’s language was a sufficiently competent interpreter.<sup>105</sup> Similarly in *Baytar v. Turkey*, the ECtHR implicitly left open the possibility that a ‘member of the applicant’s family waiting in the corridor’ would have been a competent interpreter.<sup>106</sup> Unfortunately, the ECtHR’s attitude in this regard is not unique. In many national courts, simply being bilingual is often considered sufficient for appointment as an interpreter.<sup>107</sup> This approach to court interpretation leads courts to appoint individuals without regard to their qualifications, experience or actual skills, simply because they are available at the time. Stories abound of janitors,<sup>108</sup> courthouse clerks,<sup>109</sup> local language teachers,<sup>110</sup> children,<sup>111</sup> law enforcement officers, prosecution witnesses, and co-defendants in the same case<sup>112</sup> being appointed as court interpreters. There are even a few instances of the accused being asked to interpret for the victim he allegedly assaulted.<sup>113</sup> Perhaps even more unfortunate is that the ECtHR has openly abandoned any requirement for interpreters to be impartial or independent.<sup>114</sup>

The acceptance of such individuals as ‘competent’ interpreters makes sense only if one believes that interpreters are indeed machines that simply perform a mechanical function. In this vein of thinking, every bilingual individual is competent to interpret simply because

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<sup>104</sup> Trechsel (n 58) 339.

<sup>105</sup> *Kamasinski* (n 81) §§11, 77 (holding that the accused’s right to an interpreter during pre-trial questioning had been fulfilled because an ‘interpreter was present on each occasion’, even where the role of interpreter on one occasion was ‘provided by a prisoner who [...] had only limited knowledge of English’).

<sup>106</sup> *Baytar* (n 34) §57 (holding that the court violated the right to an interpreter by failing to verify the family member’s interpretation skills).

<sup>107</sup> Virginia Benmaman, ‘Legal Interpreting: An Emerging Profession’ (1992) 76 *Mod Language J* 445, 448; González (n 2) 51; Charles Grabau, ‘Court Interpreting: View from the Bench’ (1996) 20(1) *State Ct J* 6, 6; Hale, *Interpreter Policies* (n 86) 15; Laster and Taylor (n 20) 91; R H Moeketsi, ‘Redefining the Role of the South African Court Interpreter’ (1999) 8(3-4) *Proteus* 12.

<sup>108</sup> Barbara Serrano, ‘Courts Shy on Interpreters to Help Immigrants, Jurors’ *The Seattle Times* (Seattle, 30 November 1990) C1, 1; Shepard (n 76) 646.

<sup>109</sup> Shepard (n 76) 646.

<sup>110</sup> Louise Taylor, ‘Attorneys, Some Judges Say Poor Interpretations Botch Convictions’ *Lexington Herald Leader* (Lexington, 22 April 2002) A1, 1.

<sup>111</sup> ABC Radio National, ‘Interpreters in the Courtroom’ (Radio Show Transcript – 16 September 2008) <<http://www.abc.net.au/radionational/programs/lawreport/interpreters-in-the-courtroom/3184678>> accessed 10 March 2017, 1 (statement from Sandra Hale); Craney (n 32) 22; Shepard (n 76) 646.

<sup>112</sup> Nancy Schweda-Nicholson, ‘Ad Hoc Court Interpreters in the United States: Equality, Inequality, Quality’ (1989) 34(4) *Translators’ J* 711, 713-714.

<sup>113</sup> McCaffrey (n 13) 375; Taylor (n 110) 2.

<sup>114</sup> *Ucak* (n 91) 10 (noting that an ‘interpreter is not part of the court or tribunal...and there is no formal requirement of independence or impartiality as such’).

they are bilingual. However this mistakes possession of a tool (bilingualism) with the competence to use that tool for a specific, defined purpose (to interpret).<sup>115</sup> As has been discussed, interpreters must exercise their professional judgment with every choice of word and phrase, as very few ‘perfect’ answers exist.<sup>116</sup> Errors are not an aberration; they are common, even for the most experienced and well-trained interpreters.<sup>117</sup> Bilingual speakers without the benefit of training or experience can be expected to make significantly more, to the extent that their utilization substantially threatens the efficacy of the right to an interpreter.<sup>118</sup> The acceptance and endorsement of such interpreters by courts as fulfilling an accused’s right to an interpreter seriously diminishes the right’s value in practice.

The question then becomes how to ensure that competent individuals are appointed as court interpreters. If judges are unqualified to assess an accused’s language proficiency, as argued above, they can hardly be expected to adequately evaluate a court interpreter’s professional skills,<sup>119</sup> regardless of the expectations set out by the ECtHR in *Baytar*.<sup>120</sup> Indeed, judges have a particularly bad track record worldwide when it comes to appointing untrained and inexperienced individuals as court interpreters, and generally lack the ability to distinguish between good and bad interpretation.<sup>121</sup> Even where the judge is bilingual, they will likely lack the training to understand the subtleties of the interpreter’s professional choices, not to mention that the judge can hardly be expected to simultaneously supervise both the legal and linguistic aspects of the proceedings.<sup>122</sup> One practical solution to this problem would be certification standards: requiring interpreters to prove their competence in a regulated manner before their appointment. However the ECtHR has explicitly refused to

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<sup>115</sup> Cardenas (n 45) 26; Luis Navarro, ‘Commentary: The Need for Interpreters in South Carolina Courts’ (5 June 2006) SC Lawyers Weekly 2.

<sup>116</sup> Gile, Basic Concepts (n 9) at 52; González (n 2) 239; Morris, ‘Moral Dilemmas’ (n 2) 30-31.

<sup>117</sup> Gile, ‘Conference Interpreting’ (n 18) 163.

<sup>118</sup> Dingfelder Stone, ‘Court Interpreters and Fair Trials’ (n 1) 252-281. See also LaVigne and McCay (n 8) 889 (arguing that a bad interpreter is worse than no interpreter at all).

<sup>119</sup> Mikkelson (n 102) 16; Tuck (n 23) 940.

<sup>120</sup> *Baytar* (n 34) §57 (requiring trial courts to ‘verify the skills’ of an interpreter before appointment). See also *Diallo* (n 62) §29.

<sup>121</sup> Among others, see Carlos Astiz, ‘But They Don’t Speak the Language: Achieving Quality Control of Translation in Criminal Courts’ (1986) 25 *The Judge’s J* 32, 34 (United States); González (n 2) 20 (‘In short, the use of underprepared or non-proficient persons as interpreters is pervasive’ in the United States); Hale, *Discourse of Court Interpreting* (n 7) 1, 28-29 (noting that in Australia ‘the vast majority of court interpreters are not trained’ specially as court interpreters and that worldwide it appears most appointed interpreters rely more on ‘intuition rather than theory’); Gulazat Tursun, ‘The Protection of Minorities in Court Proceedings: A Perspective on Bilingual Justice in China’ (2010) 9 *Chinese JIL* 537, 562 (China); Hertog and Vanden Bosch (n 85) 6, 10 (with respect to the various Member States of the European Union).

<sup>122</sup> See Tuck (n 23) 940.

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impose any certification or registration requirements on national courts as a part of the right to an interpreter,<sup>123</sup> and the HRC has provided no guidance in this area.

Here again, concerns over impeded efficiency and increased costs can be seen to outweigh the practical protection of the right to a competent interpreter. Certification procedures are expensive to establish and maintain,<sup>124</sup> to the extent that even for large nations like the United States it is only considered cost efficient to certify interpreters in a few select languages.<sup>125</sup> Furthermore, certification programmes limit the number of available interpreters, thereby driving up the cost of employing those that are actually qualified.<sup>126</sup> The reduction in the pool of interpreters also makes it more difficult to find and schedule a qualified interpreter, adding to potential delays in the proceedings. Indeed, the problem is pervasive enough that many programmes also contain loopholes and exceptions that give judges the discretion to avoid lengthy and costly postponements.<sup>127</sup> Whatever the faults of certification systems, their ability to ensure a higher level of court interpretation cannot be questioned. The explicit abandonment of any formal competency standards as a part of the right to an interpreter leaves the right highly ineffectual, and evidences once again a victory for judicial efficiency and decreased financial costs at the expense of effective legal protection.

#### **4. Appellate Oversight of the Right**

##### *a) Aspects of the Right*

It is important to note that the right to an interpreter consists of (and is limited by) procedural elements as well. The accused may be substantively entitled to ‘adequate’ interpretation, but to vindicate this right at the appellate level he must first clear certain procedural hurdles. One obvious example arises from the language in *Kamasinski*, which only holds States responsible for an inadequate interpretation where they were previously ‘put on notice’ as to the inadequacy of the interpretation at trial.<sup>128</sup> In other words, the accused must formally object (or at least complain) about the interpretation during the proceedings and allow the

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<sup>123</sup> *Ucak* (n 91) 10. See also *Kamasinski* (n 81) §73.

<sup>124</sup> Mikkelson (n 102) 18.

<sup>125</sup> See Flo Messier, ‘Alien Defendants in Criminal Proceedings: Justice Shrugs’ (1999) 36 Am Crim L Rev 1395, 1410; Bruno Romero, ‘Here Are Your Right Hands: Exploring Interpreter Qualifications’ (2008-09) 34 U Dayton L Rev 15, 29; Laura Abel, ‘Language Access in the Federal Courts’ (2013) 61 Drake L Rev 593, 632.

<sup>126</sup> For example, fees for certified interpreters in the United States federal court system are roughly double those of non-certified interpreters. See <<http://www.uscourts.gov/services-forms/federal-court-interpreters>> accessed 10 March 2017.

<sup>127</sup> See, for example, Laster and Taylor (n 20) 30-37 (detailing the advantages and disadvantages of the Australian and American certification systems).

<sup>128</sup> *Kamasinski* (n 81) §74.

trial court to fix the problem, otherwise he will have waived his right.<sup>129</sup> The HRC has ruled similarly. In *Griffin v. Spain*, the HRC refused to entertain the accused's legitimate complaints of an inadequate interpretation since he failed to complain to the trial court during the proceedings.<sup>130</sup> Therefore, even where the substantive obligations of the right to an interpreter have not been fulfilled, the accused may not be entitled to relief due to procedural requirements.

Nor is the necessity of a contemporaneous complaint the only procedural limitation on the right, as the accused must also show that the inadequate interpretation actually led to his conviction. In *Panasenko v. Portugal*, the ECtHR was provided a recording of the trial showing the inadequate interpretation, and even after admitting that problems with the interpretation existed, ruled that the accused had failed to show how the faulty interpretation had affected the fairness of the proceedings.<sup>131</sup> The opposite result occurred in *Baytar*, where the ECtHR found a violation '[e]ven though the conviction was based on a number of factors', since 'it is nevertheless established that the statements obtained ... without the assistance of an interpreter were also relied upon when the applicant was found guilty.'<sup>132</sup> The conclusion to be reached from these cases is that an inadequate (or non-existent) interpretation on its own is not a violation. Rather, it is only where that interpretation contributes to the conviction of the defendant that the right to an interpreter has been violated. In essence, the ECtHR has created a harm standard, whereby the accused must shoulder the burden of proving that the substantive infringement of his right to an adequate interpretation has in some way undermined the fairness of the proceedings.

*b) Analysis*

On some level it makes perfect sense that the accused, who is in the best position to know whether or not he understands the proceedings, bears the burden of notifying the court of this

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<sup>129</sup> *Özkan v Turkey*, App no 12822/02 (ECtHR Second Section, 21 November 2006) 8 (holding that the accused's failure to request a change of interpreter constituted a waiver of his right); *Protopapa v Turkey*, App no 16084/90 (ECtHR Fourth Section, 24 February 2009) §83 (where the Court emphasized that the accused failed to challenge the interpretation at trial or request a different interpreter). See also *Ucak* (n 91) 8 (noting that the accused failed to object to the 'continuation of proceedings on the basis that the trial was unfair due to the conduct of the interpreter').

<sup>130</sup> See *Gerald John Griffin v Spain*, Comm No 493/1992 (4 April 1995) UN Doc CCPR/C/53/D/493/1992 (1995) §§2.3-2.7, 9.5.

<sup>131</sup> See *Panasenko v Portugal*, App no 10418/03 (ECtHR Second Section, 22 July 2008) §63. See also *Kuvikas v Lithuania*, App no 21837/02 (ECtHR Second Section, 27 June 2006) §54 (where the ECtHR held that, even though the accused was not given translations of inculpatory evidence, there was 'no evidence that the applicant's conviction was based on any document which had been written in a foreign language and which had not been translated into Lithuanian').

<sup>132</sup> *Baytar* (n 34) §58-59. See also *Amer v Turkey*, App no 25720/02 (ECtHR Second Section, 13 January 2009) §§79, 84 (finding a violation where statements taken from the accused without the presence of an interpreter were 'heavily relied on by the trial court in convicting him').

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deficiency as it occurs.<sup>133</sup> It allows the court to immediately repair the deficiency and prevents the accused (or his counsel) from purposefully letting an appellate issue ripen. However such a policy leaves the obligation of assertion and protection of the right to an individual who, by definition, does not actually understand what is going on in the courtroom.<sup>134</sup> Moreover, if he does not comprehend the proceedings or does not speak the language of the court, and likely has little knowledge of court procedures, it is highly doubtful that the accused will be aware that such an assertion is necessary or even possible. Nor can it be assumed that the accused will know that the interpretation is inadequate, since interpreter error is not always obvious to parties that only have linguistic access to one side of the communication.<sup>135</sup>

Additionally, since the court interpreter has a monopoly on communication between the court and the accused, any complaint as to the inadequacy of the interpreter must, by necessity, flow through the interpreter herself. Given that many or most interpreters are untrained and inexperienced, it places a great deal of faith in the integrity of such individuals to assume that they will automatically pass on a complaint about their own incompetence. This is especially true when one considers that some of the interpreters implicitly or explicitly approved by the ECtHR have been a family member,<sup>136</sup> a fellow prisoner,<sup>137</sup> and a customs official,<sup>138</sup> each of whom likely had their own interests and motivations, and none of whom were legally required by the ECtHR to be independent or impartial.<sup>139</sup> Furthermore, not every accused will be willing to make a contemporaneous complaint against their interpreter, who is probably the only person in the courtroom with whom they can converse. Regardless of their logic when applied to other substantive fair trial rights, enforcing a waiver doctrine in these circumstances to increase the efficiency of the court represents a needless weakening of the right to an interpreter.

Requiring the accused to prove after the fact that inadequate interpretation led to his conviction is likewise an illogical, and in some situations even impossible, task. It is no coincidence that in nearly every case where the ECtHR has found a violation of the right to

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<sup>133</sup> Celia Brown-Blake, 'Fair Trial, Language and the Right to Interpretation' (2006) 13 Int'l J Minority & Group Rights 391, 402-03.

<sup>134</sup> *Bergenfield* (n 79) 560.

<sup>135</sup> *LaVigne and McCay* (n 8) 920; *Hayes and Hale* (n 30) 130.

<sup>136</sup> *Baytar* (n 34) §57.

<sup>137</sup> *Kamasinski* (n 81) §§11-12.

<sup>138</sup> *Diallo* (n 62) §§11, 29.

<sup>139</sup> *Ucak* (n 91) 10.

an interpreter, the violation arose because no interpreter was actually present.<sup>140</sup> Under such circumstances, it is easy to show that the interpretation was inadequate because it never existed. On the other hand, proving the inadequacy of an interpretation that occurred is virtually impossible for the simple reason that the only record of the proceedings will be monolingual.<sup>141</sup> In other words, there will be no record of the foreign language, only the language of the court, and very few interpreter errors are so blatant as to be immediately noticeable in a monolingual record.<sup>142</sup> Unable to look at a foreign language record of the trial and identify every possible error of interpretation, the accused has no chance to show the consequences of these mistakes on his eventual conviction and therefore no evidence with which to meet the harm standard imposed by the courts. Attempting to assess the adequacy of an interpreter's work with only a one-sided record of the interpretation is akin to judging the accuracy of a reproduction painting without ever having seen the original. It is, to be blunt, impossible.

The provision of a bilingual record documenting both sides of the interpretation would remove this hindrance by allowing for objective evaluation of the interpreter's work after the fact. However the provision of such records is rare, and for defensible reasons. At the outset, the practical difficulties in creating a bilingual record are substantial.<sup>143</sup> Either a second court reporter must be engaged or extensive audio recording equipment must be acquired and overseen by trained technicians.<sup>144</sup> Both of these options create added costs and the potential for increased courtroom disruptions and delays. Moreover, there has been a very real concern expressed by scholars that the provision of a foreign language record would open a Pandora's box of increased appellate complaints with respect to interpreter competence.<sup>145</sup> Leaving these apprehensions aside, the provision of a bilingual record in interpreter cases may well be a necessary part of the right to appeal. In *Lumley v. Jamaica*, the UNHRC held that an applicant was entitled to a trial transcript because without such a

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<sup>140</sup> *Cuscani* (n 35) §39; *Saman* (n 62) §36; *Baytar* (n 34) §58; *Amer* (n 132) §§82-83.

<sup>141</sup> De Mas, Sarah, 'Translation, Interpreting & Legal Rights within the European Union: The Law & Reality' (International Conference: Critical Link 3 – Interpreting in the Community: the Complexity of the Profession – Montreal 2001) <[http://www.criticallink.org/s/CL3\\_deMas.pdf](http://www.criticallink.org/s/CL3_deMas.pdf)> accessed 10 March 2017, 4; Steven Kahaner, 'The Administration of Justice in a Multilingual Society – Open to Interpretation or Lost in Translation?' (2008-09) 92 *Judicature* 224, 226; *Messier* (n 125) 1408; *Morris*, 'Justice in Jerusalem' (n 89) 4; *González* (n 2) 17. Note also that many nations do not even preserve a verbatim record in the language of the court. See Hertog and van Gucht (eds), *Status Quaestionis: Questionnaire on the Provision of Legal Interpreting and Translation in the EU* (Intersentia 2008) 197.

<sup>142</sup> *LaVigne and McCay* (n 8) 920; *Hayes and Hale* (n 30) 130.

<sup>143</sup> See generally *Berk-Seligson* (n 10) 47-50 (for a discussion as to the practical difficulties of recording [audio] criminal proceedings).

<sup>144</sup> *Hertog and van Gucht* (n 141) 199.

<sup>145</sup> *Shulman* (n 74) 194; *Hertog and van Gucht* (n 141) 199.

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document he would lack the evidentiary material necessary to prosecute his appeal.<sup>146</sup> Where an accused in an interpreted case seeks to challenge the quality of the interpretation he was afforded, a bilingual record would serve the same purpose as a trial transcript in a monolingual proceeding. Thus, failure to provide bilingual records in such cases, especially if only due to cost concerns and fears of increased disruption, would not only be bad policy that undermines the right to an interpreter, but also likely a violation of the right to an appeal.

#### **D. CONCLUSION**

Where one of the courtroom participants does not understand or speak the language of the court, the appointment of a competent court interpreter is in the best interests of everyone involved. As Trechsel notes, it is an ‘essential prerequisite for the proper functioning of the administration of justice.’<sup>147</sup> Yet the jurisprudence of the ECtHR and the HRC with respect to the right to an interpreter has placed such a heavy implicit emphasis on the reduction of costs, disruptions and delays, that the right itself has been left virtually ineffective.

There is no defined standard for who should be given an interpreter, and the amorphous standard (‘sufficiently proficient’) that does exist is implemented by a judge who has no training in how to accurately assess the language capability of an accused. There are no limitations for who may be appointed as an interpreter, which has led to an epidemic of untrained and inexperienced individuals being employed who are almost guaranteed to be incapable of performing the task adequately. By seemingly defining ‘adequacy’ to include summary interpretation, there is apparently no real interest in guaranteeing that the interpretation given by these individuals is actually ‘adequate’ for the accused to understand and participate in the proceedings. Moreover, it is left up to the accused, the most vulnerable person in the courtroom and, by definition, the only one person who does not understand what is happening, to complain about any inadequacy, or risk losing the chance to enforce his right later on appeal. And even if the accused does complain and preserve his ability to appeal the issue, he has no way to prove that inadequacy after the fact, or that the interpreter’s mistakes led to his conviction (as he must), because he will not be given a bilingual record with which to prove it.

Taken together, the right to an interpreter, as developed by the ECtHR and the HRC, is itself a portrait of inadequacy. A fundamental misunderstanding of not only what

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<sup>146</sup> *Peter Lumley v Jamaica*, Comm No 662/1995 (31 March 1999) UN Doc CCPR/C/65/D/662/1995 (1999) §7.5.

<sup>147</sup> Trechsel (n 58) 328.



interpreters do, but also of their importance to the administration of justice, has led courts to undervalue the right and its protections. Courts ‘focus...on accommodating the immediate pragmatic needs’ of the normal courtroom participants as opposed to protecting the rights of those lacking linguistic competence.<sup>148</sup> Time and again, the interests of cost reduction and judicial efficiency have been prioritized ahead of guaranteeing an effective right to an interpreter. These various trade offs have left a weakened and inadequate right that is incapable of fulfilling the dual purposes for which it was instituted; reinforcing the right to a defence, and eliminating any disadvantages that a language-incompetent accused would suffer vis-à-vis a similarly situated native accused.

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<sup>148</sup> Moria Paz, ‘The Failed Promise of Language Rights: A Critique of the International Language Rights Regime’ (2013) 54 Harv Int'l L J 157, 204.