

**THE IMPACT OF LANGUAGE DIVERSITY ON THE RIGHT TO FAIR  
TRIAL IN INTERNATIONAL CRIMINAL PROCEEDINGS**

*With Reference to the International Crimes Division of the High Court of  
Uganda*

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*The Impact of Language Diversity on the Right to Fair Trial in International Criminal Proceedings* is a study that explores the influence of the dynamic factor of language on fair trial at the international level and during domestic prosecution of international crimes. Chapter 5 constitutes a case study of the International Crimes Division of the High Court of Uganda, a contemporary specialised ‘court’ emerging within the framework of the statute of the International Criminal Court, by virtue of the principle of complementarity.

By way of empirical research, interviewing and jurisprudential analysis, It is sought to assess the implications of conducting a trial in more than one language, on due process. This thesis reveals that the language debate is as old as international criminal justice, but due to misrepresentation of the status of language fair trial rights in international law, the debate has not yielded concrete reforms. Language is the core foundation for justice. It is the means through which the rights of the accused are realised. Linguistic complexities such as misunderstandings, failures in translation and cultural distance among participants in international criminal trials affect courtroom communication, the presentation and the perception of the evidence hence challenging the foundations of trial fairness.

In conclusion, language fair trial rights are priority rights situated in the minimum guarantees of fair criminal trial; the obligation of the court to ensure fair trial or accord the accused person a fair hearing comprises the duty to guarantee linguistic rights. This thesis also entails recommendations on how to address the phenomenon.

**To my Parents**

*For their invaluable commitment to holistic education*

## **DECLARATION**

I, **Catherine Stella Namakula**, declare that this thesis is my own unaided work. It is submitted in fulfillment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.



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## **TABLE OF CONTENTS**

**ACKNOWLEDGMENTS X**

**ACRONYMS/ABBREVIATIONS XI**

**STATUTES/LEGISLATION/INSTRUMENTS XIII**

**INTRODUCTION XXIV**

**METHODOLOGY XXIX**

**LITERATURE REVIEW XXXIII**

## **CHAPTER I: THE LANGUAGE DEBATE IN INTERNATIONAL CRIMINAL JUSTICE**

**(a) Introduction 1**

**(b) Language Diversity in International Criminal Trials 2**

*(i) International Military Tribunal (IMT) 3*

*(ii) International Military Tribunal for the Far East (IMTFE) 4*

*(iii) The Tribunals of the 20<sup>th</sup> Century onwards 11*

*(aa) International Criminal Tribunal for former Yugoslavia (ICTY) 8*

*(bb) International Criminal Tribunal for Rwanda (ICTR) 10*

*(cc) International Criminal Court (ICC) 13*

*(iv) Hybrid Tribunals 15*

**(c) Structural provisions for linguistic diversity in international criminal practice 18**

**(d) Problematic multilingual court communication patterns 22**

**(e) Selected themes of the language debate in international criminal justice 24**

*(i) Multilingualism vis-à-vis Multiculturalism 24*

• *Paralinguistics 30*

*(ii) Translation as an aid to the trial process 30*

*(aa) History of translation in international criminal proceedings 31*

*(bb) Significance of translation in the trial process 33*

*(cc) Disadvantages of translation in the trial process 33*

*(iii) The rights perspective of the language debate in international criminal justice 36*

*(aa) Language fair trial rights 37*

- (bb) Restricting linguistic fair trial rights as a fair trial consideration 39
- (f) The status of the language debate in international criminal law discourse 42**
- (g) Conclusion 42**

## **CHAPTER 2: RIGHTS OR PRIVILEGES: EVALUATING THE FRAMEWORK OF PROTECTION OF FAIR TRIAL RIGHTS IN INTERNATIONAL CRIMINAL PRACTICE**

- (a) Introduction 45**
- (b) Nature & scope of human rights obligations of international criminal courts 47**
  - (i) Duty to respect fair trial rights 49*
    - Standard of respect for fair trial rights 54
- (c) Judicial perspectives on fair trial rights 56**
  - (i) Significance of Rules of Procedure & Evidence 56*
  - (ii) Duty of accused persons to take reasonable steps to realise fair trial rights 57*
  - (iii) Procedural rights vis -à- vis substantive rights 58*
  - (iv) Overarching right to fair & expeditious trial 60*
- (d) Judicial remedy for infringement of fair trial rights 62**
  - (i) Nature of remedies 62*
    - (aa) Right of the accused to compensation under the ICC Statute 64
    - (bb) Relinquishing jurisdiction on the basis of human rights violations 66
- (e) Conclusion 69**

## **CHAPTER 3: LANGUAGE RIGHTS IN THE MINIMUM GUARANTEES OF FAIR CRIMINAL TRIAL**

- (a) Introduction 71**
- (b) Evolution of the fair trial provision 73**
- (c) Situating language rights in the minimum guarantees of fair criminal trial 77**
  - (i) Information on charges 77*
  - (ii) Adequate time & facilities to prepare a defence 84*
  - (iii) Right to be tried without undue delay 88*
  - (iv) Right to defence 90*

- (v) *Examination & cross-examination of witnesses* 92
- (vi) *Interpretative assistance* 94
- (vii) *Right against self-incrimination* 97
- (d) Language fair trial rights vis-à-vis the Right to be heard 98**
- (e) Conclusion 101**

## **CHAPTER 4: UNDERSTANDING THE ROLE OF TRANSLATION IN TRIAL FAIRNESS**

- (a) Introduction 103**
- (b) Meaning & ambiguity of translation & interpretation in legal proceedings 104**
- (c) Translation in international criminal proceedings 108**
  - (i) *Translation during investigation of international crimes* 108
  - (ii) *Translation in the trial-phase* 109
  - (iii) *Significance of translation to International Criminal Tribunals (ICTs)* 110
  - (iv) *Role of the translator* 112
  - (v) *Procedural technicalities of translation at ICTs* 113
  - (vi) *Substantive technicalities of translation at ICTs* 114
    - (aa) Interpretation phase 115
    - (bb) Production/Reproduction phase 116
  - (vii) *Peculiarities & challenges of translating legal text* 117
    - (aa) Vague scope of the role of a translator 118
      - Translator as editor 118
      - Translator as researcher 119
      - Translator in developing vocabulary 120
    - (bb) Highly specialised & complex subject matter 121
    - (cc) Merger of legal systems and legal cultures 122
    - (dd) Nexus between context & meaning of legal text 124
    - (ee) Significance of social culture to effective translation 125
    - (ff) Limited standardisation & limited legalisation of languages 127
      - Localised vocabulary 128
      - Contextual vocabulary 128

- Lack of equivalents 129
- (gg) Time limits & hurried translations 130
- (viii) *Shortfalls in translation/interpretation* 132
- (aa) Alterations 132
- (bb) Lack of precision 133
- (cc) Errors in translation & interpretation 134
- Correction of errors in translation 136
- (ix) *Legal status of a translation* 137
- (d) Process of interpreting (oral transmission) 138**
- Listening 139
- Effective Speech 139
- (i) *Role of a courtroom interpreter* 140
- (ii) *Challenges to courtroom interpreting* 141
- (aa) Highly pressurised working circumstances-‘the interpretation furnace’ 141
- (bb) Speed of speech 143
- (cc) Maintaining impartiality 145
- (e) Conclusion 146**

## **CHAPTER 5: THE LANGUAGE QUESTION IN INTERNATIONAL CRIMINAL TRIALS AT THE NATIONAL LEVEL: *The Case of the International Crimes Division of the High Court of Uganda***

- (a) Introduction 148**
- (b) The International Crimes Division of the High Court of Uganda (ICD) 174**
- (i) *Establishment* 150
- (ii) *Jurisdiction* 151
- (iii) *Law Applicable* 153
- (c) Language dynamics of trials of the International Crimes Division 154**
- (i) *Contextual analysis* 154
- Persons with disabilities 154
- (ii) *Language of trial* 159
- (d) Language fair trial rights in Uganda’s legal framework & practice 165**



<i>(i) Presumption of innocence</i>	166
<i>(aa) Accused as witness</i>	166
<i>(bb) Confession</i>	167
• Making of the court record	170
<i>(cc) Plea taking</i>	171
<i>(ii) Information on the nature of the offence</i>	175
<i>(iii) Adequate time &amp; facilities to prepare a defence</i>	176
<i>(iv) Presence &amp; legal representation of the accused at trial</i>	178
<i>(v) Legal aid</i>	182
<i>(vi) Interpretative assistance</i>	182
<i>(aa) Appointment of interpreters</i>	183
• Police Officers as interpreters	184
<i>(bb) Efficacy of interpretation</i>	188
• Assessors & monitoring interpretative performance	189
• Interpreter as witness	191
<i>(cc) Status of a translation</i>	193
<i>(vii) Examination &amp; cross-examination of witnesses</i>	194
<b>(e) Conclusion</b>	<b>196</b>
<b>CONCLUSION</b>	<b>199</b>
<b>BIBLIOGRAPHY</b>	<b>204</b>
<b>ANNEXURE</b>	<b>211</b>

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## **ACRONYMS/ABBREVIATIONS**

AC	Appeals Chamber.
AFRC	Armed Forces Revolutionary Council.
AG	Attorney General.
AG J	Acting Judge.
BCS	Bosnian, Croatian, Serbian.
BLR	Botswana Law Reports.
CAP	Chapter.
CAU	Court of Appeal of Uganda.
CJ	Chief Justice.
Cr App	Criminal Appeal.
CDF	Civil Defence Forces.
CLR	Commonwealth Law Reports.
EA	East Africa.
EACA	Court of Appeal for Eastern Africa.
EALR	East African Law Reports.
ECCC	Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.
EU	European Union.
FLR	Federal Law Reports.
HCB	High Court Bulletin.
HCU	High Court of Uganda.
HURIPAC	Human Rights and Peace Centre.
HRC	Human Rights Committee.
ICC	International Criminal Court.
ICD	International Crimes Division.
ICCPR	International Covenant on Civil and Political Rights.
ICT/ICTs	International Criminal Tribunal(s).
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in

the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States.

ICTY                    International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.

IMT                    International Military Tribunal.

IMTFE                International Military Tribunal for the Far East.

J                        Justice.

JA                     Justice of Appeal.

JJ                     Justices.

JLOS                 Justice, Law & Order Sector.

JSC                    Justice of the Supreme Court.

KALR                 Kampala Law Reports.

LRA/M                Lord's Resistance Army/Movement.

Ors                    Others.

RPE                    Rules of Procedure & Evidence.

RUF                    Revolutionary United Front.

SCSL                 Special Court for Sierra Leone.

SCU                    Supreme Court of Uganda.

S/o                    son of.

STL                    Special Tribunal for Lebanon.

TC                     Trial Chamber.

TIA                    Trial on Indictments Act.

UPDF                 Uganda Peoples' Defence Forces.

UPE                    Universal Primary Education.

VP                     Vice President.

WCD                    War Crimes Division.

## **STATUTES/ LEGISLATION/INSTRUMENTS**

- African [Banjul] Charter on Human & Peoples Rights adopted on 27 June 1981, entered into force on 21 October 1986 OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).
- American Convention on Human Rights ('Pact of San Jose, Costa Rica') OAS Treaty Series No 36 1144 UNTS 123.
- American Declaration (1948) reprinted in 'Human Rights in the American States' PAU preliminary edition (1960).
- Amnesty Act (2000) Cap 294 (Laws of Uganda).
- Civil Procedure Act (1929) Cap 71 (Laws of Uganda).
- Constitution of Uganda, 1962.
- Constitution of the Republic of Uganda, 1995 as amended by the Constitution (Amendment) Act No 11/2005 & Amendment Act No 21/2005.
- Criminal Procedure Code (Rev 2009) Cap 75 (Laws of Kenya).
- European Convention on Human Rights (1950) as amended Rome 4 XI 1950.
- Geneva Conventions Act (1964) Cap 363 (Laws of Uganda).
- High Court (International Crimes Division) Practice Directions, Legal Notice No 10/2011 gazetted on 31 May 2011.
- ICTR Directive on Assignment of Defence Counsel as amended prepared by the Registrar and approved by the Tribunal on 9 January 1996.
- Illiterates Protection Act (1918) Cap 78 Laws of Uganda.
- International Covenant on Civil & Political Rights (adopted by GA Res 2200A (XXI) 16 December 1966).
- Judicature Act (1996) Cap 13 (Laws of Uganda).
- Law on the Establishment of the Extra-Ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea (Law on ECCC) as amended NS/RKM/1004/006 (promulgated on 27 October 2004).
- Regulations of the International Criminal Court ICC-BD/01-01-04 (adopted on 26 May 2004).
- Local Council Courts Act No 13/2006.
- Oaths Act (1963) Cap 16 (Laws of Uganda).
- Penal Code Act (1950) Cap 120 (Laws of Uganda).

- Poor Persons Defence Act (1998) Cap 20 (Laws of Uganda).
- Recording of Extra-Judicial Statements (2 February 1973) Reference CJ c/b. Rules of Procedure & Evidence of the International Criminal Tribunal for former Yugoslavia IT/32 (adopted on 11 February 1994) as amended.
- Rules of Procedure & Evidence of the International Criminal Court adopted by the Assembly of States Parties first session (New York) 3-10 September 2002 Official Records ICC-ASP/1/3.
- Rules of Procedure & Evidence of the International Criminal Tribunal for Rwanda UN Doc ITR/3/REV 1 (29 June 1995) as amended.
- Rules of Procedure & Evidence of the Special Court for Sierra Leone (adopted on 16 January 2002) as amended.
- Rules of Procedure & Evidence of the Special Tribunal for Lebanon STL/BD/2009/01/Rev.1 adopted on 10 June 2009) as amended.
- Statute of the International Criminal Court UN Doc A/CONF.183/9 (adopted on 17 July 1998).
- Statute of the International Criminal Tribunal for the former Yugoslavia as amended (adopted 25 May 1993 by Security Council 827).
- Statute of the International Criminal Tribunal for Rwanda (adopted by Security Council Resolution 955(1994) 8 November 1994).
- Statute of the Special Court for Sierra Leone (Annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone of 16 January 2002).
- Statute of the Special Tribunal for Lebanon (annexed to Security Council Resolution 1757(2007) adopted on 30 May 2007).
- Trial on Indictments Act (1971) Cap 23 (Laws of Uganda).
- Uganda Police Standing Orders (1984) 7 ed.
- Universal Declaration of Human Rights (UDHR) adopted on 10 December (1948) 43 AJIL supp 127.

## CASES CITED

- *Adan v R* [1997] KALR 445.
- *Alwen Industries Ltd & Kar Wong v Collector of Customs* (1996)3 NZLR 226.
- *André Rwamakuba v The Prosecutor* ICTR-98-44C-T AC Decision (Appeal against Dismissal of Motion Concerning Illegal Arrest and Detention) 11 June 2001.
- *André Rwamakuba v The Prosecutor* ICTR -98-44C-A Decision on Appeal against Decision on Appropriate Remedy (13 September 2007).
- *Anthony Olotunde Olowe v Uganda* [1997] KALR 58.
- *Antoine Ernesta v R Criminal* (1962) EACA 505.
- *Augustin Ngirabatware v The Prosecutor* ICTR-99-54-A Decision on Augustin Ngirabatware's Appeal of Decisions on Denying Motions to Vary the Trial Date (12 May 2009).
- *Barayagwiza Jean-Bosco v The Prosecutor* ICTR-97-19-AR 72 Appeal Chamber Decision (3 November 1999).
- *Beronda v Uganda* [1974] EA 46.
- *Bogere Moses & anor v Uganda* [1998] KALR 1.
- *Chandia v Uganda* [2002]2 EA 360.
- *Cheung Shing v Reginam* (1956) EACA 459.
- *Desai v Republic* [1971] EA 416.
- *Evaristo Turyahabwe v Uganda* [2001] KALR 88.
- *Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze v The Prosecutor* (Media Case) ICTR-99-52-A, Judgement, 28 November 2007.
- *Festo Androa Asenua & anor v Uganda* [1999] KALR 102.
- *Gaio v R* (1960) 104 CLR 419.
- *Gamuga s/o Gidagurija, Waida s/o Gidaghama v Regina* [1952] EACA 253.
- *Gicholi Paul v Uganda* [2004] KALR 52.
- *Gopa s/o Gidamebanya & ors v Reginam* [1953] EACA 318.
- *Gradidge v Grace Brothers Pty Ltd* (1988) 93 FLR 414.
- *Habre International Co Ltd v Ebrahim Alarakia Kassam & ors* [1999] KALR 391.
- *Hamisi s/o Salum v Rex* (1951) EACA 217.

- *Hassan Ngeze v The Prosecutor* ICTR-1999-52-A Decision on Hassan Ngeze's Application for Review of the Registrar's Decision of 12 January 2005 (14 September 2005).
- *Harward v Norway*, CCPR Communication (451/1991), 15 July 1994.
- *Jean-Bosco Barayagwiza v The Prosecutor* ICTR-97-19-AR 72, Decision, 3 November 1999.
- *Juma & ors v Attorney-General* [2003] 2 EA 461.
- *Juvénal Kajelijeli v Prosecutor* ICTR-98-44A-A Judgement (23 May 2005).
- *Kamasinski v Austria* 19 December 1989, ECHR, No 9783/82, 13, EHRR 36.
- *Kato Sula v Uganda* [2001] KALR 46.
- *Kawooya Joseph v Uganda* [2001] KALR 68.
- *Kostovski v The Netherlands* Application No. 11454/85, Judgement, 20 November 1989.
- *Kunnath v The State* (1993) 1 WLR 1315.
- *Laurent Semanza v The Prosecutor* ICTR-97-20-A Decision 31 May 2000 (AC).
- *Lelawan Leseroi v R* [1964] EA 111.
- *Lutwama David v Uganda* [2004] KALR 1.
- *Mafujja Leus v Uganda* [1995] KALR 202.
- *Mangwera s/o Msakazi v Rex* [1951] EACA 150.
- *Mattaka & others v R* [1971] EA 495.
- *Meghji Naya v Regina* [1952] 19 EACA 247.
- *Mikaeli Muhimana & ors v The Prosecutor* ICTR -95-1B –A, Judgement, 21 May 2007.
- *Miranda v Arizona* 348 US 434 1966.
- *Mmesetse & Moloi v State* CA Cr App No 2/1998.
- *Mohammed Farah Musa alias Shaur v Reginam* (1956) 23 EACA 469.
- *Mohamed s/o Salim v R* [1958] EACA 202.
- *Mukasa Anthony Harris v Dr Bayiga Michael Philip Lulume* SCU Election Petition Appeal No 18/2007.
- *Mushao & ors v Republic* [1971] EA 201.
- *Naroththandas Parmanandas Vithlani v R* [1957] EA 343.
- *Ochau s/o Osigai v Reginam* [1956] EACA 586.
- *Oduol & anor v Republic* [1969] EA 369.



- *Omaria Chudia v Uganda* [2002] KALR 18.
- *Paquette v R* (1985) 6 WWR 594 (Court of Queen's Bench of Alberta).
- *Patrisi Ozia v R* [1957] EA 36.
- *Paulo Kawanga Ssemwogerere & 5 others v AG* [2003] KALR 133.
- *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu* SCSL-04-16-ES.
- *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (SCSL-04-16-T).
- *Prosecutor v Alfred Musema* ICTR-96-13 Judgment & Sentence 27 January 2000.
- *Prosecutor v André Ntagerura & ors* ICTR-99-46-T, Judgement, 25 February 2004.
- *Prosecutor v André Rwamakuba* ICTR-98-44C-T Decision on Appropriate Remedy 31 January 2007.
- *Prosecutor v André Rwamakuba* ICTR-98-44C-T Judgement (20 September 2006).
- *Prosecutor v Ante Gotovina* IT-01-45-PT Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68 (14 July 2006).
- *Prosecutor v Barayagwiza Jean-Bosco* ICTR-97-19-AR72 3 November 1999.
- *Prosecutor v Barayagwiza Jean-Bosco* ICTR-97-19-AR72 Decision (Prosecutor's Request for Review or Reconsideration) (31 March 2000).
- *Prosecutor v Blagoje Simić & ors* IT-95-9 Decision on Application for Leave to Appeal against Trial Chamber Decision of 7 March 2000 (3 May 2000) AC.
- *Prosecutor v Casimir Bizimungu* ICTR-99-50-I, Decision on Motion to Protect Applicant's Right to Full Answer and Defence, 15 November 2002.
- *Prosecutor v Dario Kordić & Mario Čerkez* Judgement (17 December 2004).
- *Prosecutor v Dragan Nikolić* Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal IT-94-2-PT (9 October 2002).
- *Prosecutor v Dragan Nikolić* IT-94-2-AR73 Decision on Interlocutory Appeal Concerning Legality of Arrest 5 June 2003.
- *Prosecutor v Duško Tadić* Decision on the Prosecutor's Motion Requesting Protective Measures for Victims & Witnesses (10 August 1995).

- *Prosecutor v Édouard Karemera* ICTR-98-44-I Decision on the Defence Motion for the Restitution of Documents and Other Personal or Family Belongings Seized (Rule 40(C) of the Rules of Procedure and Evidence), and the Exclusion of such Evidence which may be used by the Prosecutor in preparing an Indictment against the Applicant (10 December 1999).
- *Prosecutor v Emmanuel Rukundo* 2001-70-A Decision on Motions for Extension of Time (25 March 2009).
- *Prosecutor v Fatmir Limaj et al* IT-03-66-A, Decision on Extension of Time, 16 February 2006.
- *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* ICTR-99-52-A (The Media Trial).
- *Prosecutor v Ferdinand Nahimana & ors* ICTR-99-52-T Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana (5 June 2003).
- *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* ICC-01/04-01/07 Judgment on the Appeal of Mr. Germain Katanga against the Decision of Pre-Trial Chamber I entitled *Decision on the Defence Request Concerning Languages* 27 May 2008.
- *Prosecutor v Isak Musliu* IT-03-66-PT 21 Decision on Assignment of Defence Counsel *Isak Musliu* (October 2003).
- *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* SCSL-04-15-T (RUF Case).
- *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T Judgement 2 September 1998.
- *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08 Decision on the the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa (14 August 2009).
- *Prosecutor v Joseph Nzirorera* ICTR-98-44-T Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized (7 September 2000).
- *Prosecutor v Juvénal Kajelijeli* ICTR-98-44-I Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing (8 May 2000).

- *Prosecutor v Ljube Boškoski, Johan Tarčulovski* Decision on the Motions of Fair Trial and Extensions of Time 19 May 2006.
- *Prosecutor v Mathieu Ngirumpatse* ICTR-97-44-I Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items (10 December 1999).
- *Prosecutor v Milan Kovačević* IT-97-24-AR73, AC Decision, 2 July 1998.
- *Prosecutor v Mile Mrkšić et al* IT -95-13/1-PT.7 Decision on Appointment of Co-Counsel for Mile Mrkšić 7 October 2005.
- *Prosecutor v Milomir Stakić* IT-97-24-A, Decision on Motion for Extension of Time, 30 October 2003.
- *Prosecutor v Miroslav Kvočka & ors* IT-98-30/1-A, Decision on Žigić's Motion for Translation of Documents Pertaining to his Appeal, 3 October 2002.
- *Prosecutor v Miroslav Kvočka & ors* IT-98-30/1-A, Decision on Žigić's Request to Verify Accuracy of Translation, 15 October 2002.
- *Prosecutor v Moinina Fofana & Allieu Kondewa* SCSL-04-14-T (CDF case).
- *Prosecutor v Momčilo Krajišnik & Biljana Plavšić* IT-00-39 & 40-PT Decision on Defence Motion to Exclude Evidence and Limit Scope of Trial *Krajišnik and Plavšić* (18 June 2002).
- *Prosecutor v Momcilo Krajišnik* IT-00-39-AR73.1 Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment (25 April 2005).
- *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-73 Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (3 February 2010).
- *Prosecutor v Paul Bisengimana* ICTR-2002-60-I, Decision on Bisengimana's Motion for Complete and Accurate Translation into Working Languages of the Tribunal and Respect for the Rights of the Accused, 7 March 2003.
- *Prosecutor v Pavle Strugar* IT-01-42-T, Decision on Motion to Terminate Proceedings, 26 May 2004.
- *Prosecutor v Pauline Nyiramasuhuko* ICTR-97-21-T Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized (12 October 2000).

- *Prosecutor v Radoslav Brdanin & Momir Talić* Decision on Second Motion by Brdanin to Dismiss the Indictment IT-99-36-PT (16 May 2001).
- *Prosecutor v Ramush Haradinaj & ors* IT-04-84—A.
- *Prosecutor v Ratko Mladić* IT-09-92-I.
- *Prosecutor v Sam Hinga Norman & ors* SCSL-04-14-AR73 Decision on Amendment of the Consolidated Indictment (16 May 2005).
- *Prosecutor v Sam Hinga Norman & ors* SCSL-04-14-T Decision on Request by the First Accused for Leave to Appeal against the Trial Chamber’s Decision on First Accused’s Motion on Abuse of Process 24 May 2005.
- *Prosecutor v Stevan Todorović* IT-95-9/1 (‘*Bosanski Šamac*’).
- *Prosecutor v Théoneste Bagosora & ors* ICTR-98-41-T, Decision on Motion for Reconsideration of the Trial Chamber’s Decision and Scheduling Order of 5 December 2001, 18 July 2003.
- *Prosecutor v Théoneste Bagosora & ors*, ICTR-98-41-T, Judgement & Sentence, 18 December 2008.
- *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06, Decision on Confirmation of Charges, 29 January 2007.
- *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Decision on the release of Thomas Lubanga Dyilo 2 July 2008 ICC-01/04-01/06-1418 02-07-2008 1/17 VW T.
- *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Decision on the translation of the Article 74 Decision & related procedural issues 15 December 2011.
- *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Scheduling Order for a status conference on the translation of a judgment 08 November 2011.
- *Prosecutor v Tihomir Blaškić* IT-95-14-PT, Decision on Motion to Dismiss Indictment based upon Defects in the Form thereof (Vagueness/Lack of Adequate Notice of Charges), 4 April 1997.
- *Prosecutor v Vidoje Blagojević & Dragan Jokić* IT-02-60-T, Decision on Motion for Stay of Proceedings Pending Resolution of the Issue of *Blagojević*’s Representation, 18 June 2003.
- *Prosecutor v Vidoje Blagojević, Dragan Jokić* IT-02-60-T Decision on Request for Certification to Appeal the Trial Chamber’s Decision on Vidoje Blagojević’s Oral Request

and Request for the Appointment of an Independent Counsel for this Interlocutory Appeal should Certification be granted (2 September 2004).

- *Prosecutor v Vidoje BlagoveniĆ, Dragan JokiĆ* IT-02-60-T Decision on Vidoje BlagoveniĆ's oral request (30 July 2004).
- *Prosecutor v Vladimir LazareviĆ, Sreten LukiĆ* IT-03-70-PT Decision on Prosecution's Motion for Protective Measures and Request for Joint Decision on Protective Measures (19 May 2005).
- *Prosecutor v Vojislav Šešelj* IT-03-67-PT Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence 9 May 2003.
- *Prosecutor v Vojislav Šešelj* IT -03 -67-PT Order on Translation of Documents 6 March 2003.
- *Prosecutor v Vujadin Popović & ors* IT-05-88-PT, Decision on Motions Requesting Translation of Pre-Trial Brief and Specific Motions, IT-05-88-PT, 24 May 2006.
- *Prosecutor v Vujadin Popović & ors* IT-05-88-PT, Decision on Motion seeking the Trial Chamber to order the Registrar to provide the Defence with BCS Transcripts of Proceedings in two past cases, 06 March 2006.
- *Prosecutor v Zdravko Tolimir & ors* IT-04-80-AR73.1, Decision on Radivoje MiletiĆ's Interlocutory Appeal against the TC's Decision on Joinder of Accused, 27 January 2006.
- *R v Tran* [1994] 2 S.C.R 951.
- *Prosecutor v Zejnil Delalić & ors* IT-96-21-T (Čelebići Case) Decision on Zravko Mucić's Motion for the Exclusion of Evidence (2 September 1997).
- *Prosecutor v Zejnil Delalić et al Ex parte Zdravko Mucić* IT-96 -21-T Decision on the Motion *Ex parte* by the defence of Zdravko Mucić concerning the issue of a subpoena to an interpreter (8 July 1997).
- *Protais Zigiranyirazo v The Prosecutor* ICTR-01-73-A Decision on Protais Zigiranyirazo's Motion for an Extension of Time for the Filing of the Reply Brief (3 July 2009).
- *Raphael Kiiza & Anor v Uganda* [1995] KALR 101.
- *R v Tran* [1994] 2 S.C.R 951.
- *R v WY Wilken* [1965] EA 286.
- *R v Yonasani Egalu & 3 others* (1942)9 EACA 65.

- *Re Cheng Kai Nam Gary* (2002)1 HKC 41.
- *Rex v Gidaharp s/o Gidawaresek* [1937] 4 EACA 31.
- *Rex v Gusambizi Wesonga* [1948] EACA 65.
- *Rex v Gutosi s/o Wamagale* (1947)14 EACA 117.
- *Rex v Kifungu s/o Nukurupia, Shauritanga s/o Mbalu* [1941] EACA 89.
- *Rex v Mali Kiza s/o Lusota* [1941] EACA 25.
- *Rex v Sidiki Kyoyo, Wadebuka s/o Maliwa, Kayendeki w/o Muga, Yowana Katende* [1943] EACA 103.
- *Rex v Yowasi s/o Paulo* [1939] EACA 126.
- *Rubarema Godfrey v Uganda* [1999] KALR 141.
- *Salau Dean v Republic* [1966] EA 272.
- *S v Roy Morris* [1979-80] BLR 80.
- *Seif s/o Selemani v Reginam* [1953] EACA 235.
- *Sewankambo Francis & 2 ors v Uganda* [2003] KALR 167.
- *Siméon Nchamihigo v The Prosecutor* ICTR-2001-63-A Decision on Defence Motion for a French Translation of the Prosecutor's Respondent's brief and for extension of time for the filing of the Reply Brief *Siméon Nchamihigo* (8 July 2009).
- *Stanislav Galić v The Prosecutor* IT-98-29-A, Decision on Request for Extension of Time to File Notice of Appeal, 22 December 2003.
- *State v Roman Galeboe* [1968-70] BLR 364.
- *Thomas Kwoyelo alias Latoni v Uganda* Constitutional Petition No 036/11 (Reference) Judgment (22 September 2011).
- *Tifu Lukwago v Samwiri Mudde Kizza & anor* [1999] KALR 296.
- *Twagira v Uganda* [2003] 2 EA 689.
- *Uganda v Kwoyelo Thomas alias Latoni* HCT-00-ICD-CASE No 0002/2010.
- *Uganda v Londoma Feremino* [1995] KALR 215.
- *Uganda Co-operative Transport Union Ltd v Roko Construction Ltd* [1997] KALR 131.
- *US ex rel Negrón v New York* 434 F 2d 386(2<sup>nd</sup> Cir.1970).
- *Vincent Rwamwaro v Uganda* [1993] KALR 42.
- *Waithaka s/o Kabera v R* [1963] EA 38.

- *Yozefu Masabo s/o Sebukuraya v Regina* [1952] EACA 266.
- *Zachary Kataryeba & 3 ors v Uganda* [1997] KALR 31.

## INTRODUCTION

Modern day history has registered a steady increase in international criminal trials. Important to mention are the Nuremberg, Singapore and Tokyo trials of 1945 and 1946, which were to foster accountability for the gruesome violations of World War II. The 1990s beheld the establishment of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia (ICTY),<sup>1</sup> and the Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda between 1 January 1994 and 31 December 1994 (ICTR).<sup>2</sup> The formation of *ad hoc* tribunals continued into the subsequent decade with the establishment of the hybrid Special Court for Sierra Leone (SCSL),<sup>3</sup> the Extra-Ordinary Chambers in the Courts of Cambodia (ECCC),<sup>4</sup> and the Special Tribunal for Lebanon (STL).<sup>5</sup> The coming into force of the Statute of the International Criminal Court on 1 July 2002 established the first permanent international criminal justice institution - the International Criminal Court (ICC). The ICC Statute currently has 122 ratifications.<sup>6</sup>

The aforesaid events set momentum for what has been referred to as the global spread of international criminal justice. This development has extended to national jurisdictions by virtue of the Rome Statute doctrine of complementarity.<sup>7</sup> The Article 1 principle of complementarity presupposes that the jurisdiction of the ICC is merely complementary; competent state authorities have an obligation to address the crimes committed in their respective jurisdictions. The ICC is a court of last resort. In this regard, states parties are enacting ICC implementing legislation to enhance their capacity to address international crimes. This has also led to the

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<sup>1</sup> Updated ICTY Statute adopted by SC Res 827 (1993) 25 May 1993 as amended.

<sup>2</sup> See ICTR Statute adopted by SC Res 955 (1994) 8 November 1994 as amended.

<sup>3</sup> Established by Agreement between the UN and the Government of Sierra Leone SC Res 1315 (2000) 14 August 2000.

<sup>4</sup> See Law on the Establishment of Extra-Ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea promulgated on 6 June 2003.

<sup>5</sup> Established by Agreement between the UN and the Lebanese Republic SC Res 1757(2007) 30 May 2007.

<sup>6</sup> By May 2013.

<sup>7</sup> Article 1 ICC Statute DOC A/CONF 183/9 of 17 July 1998, adopted on 17 July 1998, came into force on 1 July 2002. Art 1 provides that the ICC is complementary to national criminal jurisdictions.



formation of special legal entities to adjudicate international crimes such as the International Crimes Division of the High Court of Uganda (ICD).

Further, the development of the doctrine of universal jurisdiction has bolstered the jurisdiction of national courts over international crimes. Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.<sup>8</sup> Thus, there is an escalating impetus of international trials at both the national and international levels.

The history of international criminal justice is characterised by multilingual courtroom proceedings stimulating debate on the impact of language diversity on fair trial rights. Language is broadly defined as any organised means of conveying or communicating ideas especially by human speech, written characters or sign language.<sup>9</sup> In a trial situation, aspects such as silence, the courtroom setting, the gender of participants, dress code, the jurisdiction in which the trial takes place, have communicative value. Language is a pervasive and dynamic element that has powerful influences on the legal process.<sup>10</sup> The focus of this study is on language as communication in the administration of justice. It is intended to establish whether and how the conduct of a trial in more than one language affects the proceedings especially the rights of the accused person. A multilingual trial raises multiple complexities relating to cross-lingual and cross-cultural communication. Complexities such as misunderstandings, failures in translation, cultural distance among trial participants affect courtroom communication, the presentation and perception of the evidence, hence challenging the credibility of a trial. The impact of interpretation on proceedings also makes language diversity in criminal trial a fair trial concern.

The language debate in international criminal justice dates from the first trials of international crimes at Nuremberg (1945). The Nuremberg trials constituted a relatively global contribution of participants. This phenomenon subsists among contemporary tribunals as (i) a way of expressing global solidarity against crimes that affect humankind as a whole; (ii) ensuring impartiality by

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<sup>8</sup> See Principle 1 Princeton Principles on Universal Jurisdiction 28 (2001).

<sup>9</sup> BA Garner (ed) *Black's Law Dictionary* 9 ed (2009) 958.

<sup>10</sup> JN Levi & AG Walker (eds) *Language in the Judicial Process* (1990) 2.

engaging international personnel who are considered distanced from the subject of adjudication; (iii) a means of spreading the effects of the accountability process; and (iv) merging a global pool of expertise to address the diverse issues raised by international conflicts. The global-pool strategy has propelled the complexities of multilingual proceedings in the administration of international criminal justice.

Chapter 5 is a case study of the International Crimes Division of the High Court of Uganda. The impetus for establishing the court was majorly to complement the jurisdiction of the ICC in adjudicating international crimes. The ICD was particularly meant to take over the hearing of cases arising from the situation in Uganda currently under the purview of the ICC. This background arguably makes the ICD a representative example of a national court of an international character. The court is equally facing practical difficulties in ensuring language fair trial rights. The diverse linguistic constitution of Uganda is compounded by a turbulent legal history, which is characterised by adaptation of a foreign legal order and a foreign language. Only a small percentage of the population can participate competently in proceedings conducted in English-the language of the court. Most of the local languages are neither standardised nor legalised. The majority of persons with speech or hearing disabilities speak ‘home-made’ sign language which is neither studied nor standardised. The judiciary is faced with severe capacity constraints in its effort to ensure interpretative assistance and the language fair trial rights of persons who cannot understand the language of court. Noteworthy, the ICD is a domestic court and hence studied in its context. It is encountering similar capacity and systemic constraints in adjudicating international crimes as the High Court of Uganda in the exercise of its criminal jurisdiction. The court is relatively new and has only heard one case (Thomas Kwoyelo *alias* Latoni) and arraigned 12 terror suspects in the case of Hussein Hassan Agad and 11 others. However, in view of the constitutional guarantee of trial fairness to every accused person, one trial suffices to initiate an analysis of the competency of the court to ensure fair hearing. Caution is taken not to directly compare the ICD with the ICC; the standard is one of complementarity as opposed to competition.

Scholars such as Combs challenge the fact-finding and evidentiary foundations of international criminal convictions on grounds of language obstacles in the trial process.<sup>11</sup> Karton explains the loss of evidence and distortion of witness testimonies in the process of translation leading to verdicts based on faulty findings of fact.<sup>12</sup> Kelsall explores the adverse effects of cultural distance on communication in an international trial.<sup>13</sup> Floyd (defence counsel) reveals how language barriers affect the right of the accused to effective legal representation.<sup>14</sup> This study seeks to affirm the aforementioned observations and challenge the assumption by scholars such as Arzoz that language fair trial rights are not established anywhere, and must be interpreted as ideals and aspirations, and not as enforceable entitlements already recognised by international binding rules.<sup>15</sup> Misrepresentation of the status of language fair trial rights has kept the profile of the subject low in the discourse of international criminal justice. The courts are cognisant of the significance of language to legal process, but the practical effects of the subject are avoided.

This thesis reveals that language fair trial rights are embedded in the minimum guarantees of fair criminal trial, contained in constitutive statutes of International Criminal Tribunals (ICTs), international instruments, and national constitutions. Thus, fulfilling language fair trial rights is integral to fair trial. This research is based on (i) records of international criminal proceedings; (ii) empirical study of proceedings of ICTs and the International War Crimes Division of the High Court of Uganda (ICD); and (iii) interviewing stakeholders including judges, professionals in the field of international criminal justice, translators and interpreters, defence counsel of persons prosecuted for international crimes (see annexure).

In a nutshell, international criminal trials are marred by misunderstandings as a result of linguistic and cultural distance among participants, which in turn affect the foundations of trial fairness. The language debate therefore extends beyond translation to include multiculturalism and human rights. While explaining the scope of the debate, Chapter 1 illustrates that the

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<sup>11</sup> NA Combs *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010).

<sup>12</sup> J Karton 'Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony' (2008) 41 *Vanderbilt J of Transnational L* 1.

<sup>13</sup> T Kelsall *Culture under Cross-Examination: International Justice & the Special Court for Sierra Leone* (2009).

<sup>14</sup> J Floyd *International Injustice Rwanda, Genocide and Cover-up: the United Nations Media Trial* (2005).

<sup>15</sup> X Arzoz 'The Nature of Language Rights' (2007) JEMIE paper (Issue No 2/2007) 1.

language debate in international criminal justice is characterised by the aforementioned subjects (translation, multiculturalism and human rights). Chapter 3 particularly proves that language fair trial rights are priority rights situated in the minimum guarantees of fair criminal trial hence clarifying the stance of language rights in international law. The court has an obligation to fully respect these rights in the process of ensuring justice. As elucidated in chapter 2, this duty is both negative, requiring the court to refrain from violation of fair trial rights, and positive, requiring the court to ensure the realisation of those rights. Chapter 2 examines the regime of human rights protection in international criminal justice. Language fair trial rights are human rights. This chapter highlights the opportunities and challenges of the court in ensuring fair trial rights that could influence the implementation of language rights. Chapter 4 demonstrates the complexity and shortfalls in translation, a key aid to multilingual proceedings. These inadequacies are confirmed by scholarly translators such as Eades,<sup>16</sup> Garre,<sup>17</sup> Gaiba.<sup>18</sup> The chapter reveals the limitations of translation in aiding communication in court proceedings that could affect trial fairness. Culture extensively influences translation in international criminal trials; thus, chapter 4 embodies an analysis of the multicultural dynamics of a multilingual trial and how they affect translation. Translation refers to both translation (written communication) and interpretation (oral transmission); each subject is only treated distinctively in relation to peculiarities.

The study of the International Crimes Division of the High Court of Uganda, a national court of an international character, established in the framework of complementarity to the jurisdiction of the International Criminal Court demonstrates the challenges facing domestic courts, in similar jurisdictions, in ensuring fair trial rights especially linguistic guarantees. Chapter 5 reveals the impact of resource constraints on the duty of the court. However, there are good practices in the criminal procedure of Uganda that could lend constructively to the practice of other jurisdictions and international criminal tribunals.

Language is therefore a pertinent subject for consideration in the reform discourse of international criminal justice. A commitment to guarantee trial fairness in international criminal law should entail commitment to address the language question.

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<sup>16</sup> D Eades (ed) *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (1995).

<sup>17</sup> M Garre *Human Rights in Translation: Legal Concepts in Different Languages* (1999).

<sup>18</sup> F Gaiba *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (1998).

## METHODOLOGY

This study involved a mixed method approach specifically the concurrent nested strategy.<sup>1</sup> The research strategy enabled a deeper understanding of the language phenomenon in the trial process and facilitated simultaneous collection of data (both qualitative and quantitative) hence maximising time. The substantiation of facts with statistics such as ascertaining the rate of translation, the duration of trials, and the percentage accuracy of translation, confirmed the leading hypotheses of the research and provided checks and balances to the philosophical assumptions that guided the collection and analysis of the data. Creswell observes that the concurrent nested strategy enables a researcher to gain broader perspectives as a result of using the different methods as opposed to using the predominant method alone.<sup>2</sup> This strategy also fostered research method prioritisation and effective complementarity in securing findings, to the greatest possible extent, to all the components of the study. Due to the sensitivity of matters concerning international crimes, it became apparent that interviewing would yield better results. Participants revealed more details upon assurance of the ethical commitment of confidentiality by the researcher.

Qualitative methods especially interviewing and observation guided the research, with a necessary blend of simple quantitative approaches. Appeals to participate in the research were made to justice professionals through the administrative authorities of the selected institutions, and I followed up on those responses that expressed interest of the respondents in the topic. I also sent e-mails to those professionals that are personally known to me through my work experience with the tribunals, and persons recommended by them, interesting them in the study. Key considerations included the positions occupied by such persons at the tribunals, their experience, their linguistic capabilities in relation to their roles and in a few cases, the cases they would have worked on. All the key professionals of the International Crimes Division of the High Court of Uganda (ICD) were contacted through e-mail, telephone and office visits. Based on the responses I received, I enlisted the participation of 25 people, 22 expressed further interest. I interviewed 17 participants face-to-face and conducted four telephone interviews. One

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<sup>1</sup> This method combines both qualitative and quantitative methods; one is embedded within the other (nested)-SR Terrell 'Mixed- Methods Research Methodologies: The Qualitative Report' (January 2012) 270 (<http://www.nova.edu/ssss/QR/QR17-1/terrell.pdf>).

<sup>2</sup> JW Creswell *Research Design, Qualitative, Quantitative & Mixed Method Approaches* 2 ed (2003).

participant sent a written response to the interview questions by e-mail.<sup>3</sup> The face to face interviews were done in The Netherlands – home of the majority of international criminal tribunals studied that also enhanced access to the resource persons, and Uganda, for purposes of the International Crimes Division. I attended selected public trial proceedings of the International Criminal Tribunal for former Yugoslavia (ICTY), The International Criminal Court (ICC), the Special Court for Sierra Leone (SCSL), in The Hague, and watched broadcasts of proceedings of the International Criminal Court that were on-going during the duration of data collection. I also attended and observed the proceedings of the International Crimes Division of the High Court of Uganda. The aforementioned courts had on-going trial proceedings, their trials were linguistically and culturally diverse, and the different courts could be compared and contrasted significantly. For example, whereas the SCSL was a hybrid court with one working language (English), the ICTY was an *ad hoc* international criminal tribunal, with an approximately 14 years trial history, had two working languages (English and French) and also provided language services in Bosnian, Serbian and Croatian (BCS). The ICC, on the other hand, is a contemporary permanent court with two working languages, an evolving victims' participation regime and a multilingual and multicultural pool of participants.

The data analysis stage constituted a substantiation of facts with figures and vice versa. As Johnson & Onwuegbuzie note, taking a non-purist or mixed position allows researchers to mix and match design components that offer the best chance of answering their specific research questions.<sup>4</sup> Figures address issues such as the rate of translation, and the standard of accuracy of translation.

Further, the case study research of the International Crimes Division of the High Court of Uganda constitutes an integral part of this study. The formation of the court is a result of both internal and external factors specifically the application of the doctrine of complementarity in the Rome statute regime, hence providing a representative example of a national court of an international character. Operating in the Ugandan context, the language dynamics of the trials of the court signify the complexities of the language phenomenon at the national level.

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<sup>3</sup> Transcribed content of the interviews with 16 participants is attached. Scripts of 6 participants are excluded.

<sup>4</sup> RB Johnson & AJ Onwuegbuzie 'Mixed Methods Research: A Research Paradigm Whose Time Has Come' (2004) 33(14) *Educational Researcher* 14.

## *Data Collection Methods & Instruments*

To every necessary and possible extent, both qualitative and quantitative research methods and instruments were used. However, qualitative methods dominated the task. This was to maximise the edge and direct experience with the phenomenon (of language diversity in international criminal trials) that qualitative methods especially in-depth interviews, offered the researcher, hence enhancing the understanding required to report authoritatively on the subject.<sup>5</sup>

I analysed the transcripts of proceedings, judgements, rulings, and decisions of the Tribunals for Rwanda and Yugoslavia, the special court for Sierra Leone, and the International Criminal Court that involved issues of language fair trial rights, most of which are readily available online. However, some court records are confidential or redacted. I had to seek clarification in order to fill in the gaps through interviews. With the aid of open-ended questions, I conducted semi-structured interviews with 22 informants. This is the total number of persons that expressed willingness to participate in the study. The informants are accorded identification codes such as Respondent 2001 for ease of reference only. They are anonymous mainly because of the ethical commitments of this research. International crimes are of high public importance and involve politically sensitive investigations. There was a limit to the depth of the information that participants were willing to give. In the circumstances, audio recording did not seem appropriate. I tried to capture as much as I could through my senses. Monolingual international personnel of international criminal tribunals expressed less enthusiasm in participating in a study that seemed to question their linguistic ability to work in international courts. I had limited cooperation from such persons but relied significantly on the expertise of those that are personally known to me through my previous work with the International Criminal Court and the International Criminal Tribunal for Rwanda. The study was conducted during the execution of the completion strategies of the Tribunals for Rwanda and Former Yugoslavia; many of the experienced persons had either left or were preparing to leave. However, many of those have joined the newer tribunals such as the Special Tribunal for Lebanon and the International Criminal Court, I was therefore able to talk to some of them and they probably shared more in retrospect than they would have if they were still with the tribunals.

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<sup>5</sup> See Qualitative Measures, *Research Methods Knowledge Base* (<http://www.socialresearchmethods.net/kb/qual.php>).

I observed the trials of Thomas Lubanga Dyilo (International Criminal Court), Charles Taylor (Special Court for Sierra Leone), Ratko Mladić (International Criminal Tribunal for the former Yugoslavia), Thomas Kwoyelo (International Crimes Division of the High Court of Uganda), and attended the hearing of Thomas Kwoyelo's constitutional petition in the Court of Appeal of Uganda sitting as the Constitutional Court. I studied the International Crimes Division right at the beginning of its first trial. I therefore had only one case to study. However, the proceedings in the case sufficed in demonstrating the language complexities of trials at the court. The language obstacles of the court are systemic and similar to those encountered by the judiciary generally; thus participants made direct reference to their experiences in other trials. In the language of one of the judges in response to a question directing the inquiry to the kwoyelo trial answered: 'why kwoyelo alone, there are language problems in all trials'. The International Crimes Division is also a domestic court hence bound by precedents of the Court of Appeal and Supreme Court; I therefore studied the court within its actual context. I am also optimistic that my findings and discussions with the officials of the court, at the time I did, would inform improvements in the system so as to enable better access to justice.

### *Data Analysis*

Qualitative analysis and interpretation led the task of analysing the data acquired. It entailed conversational analysis of courtroom discourse. I studied legislation, jurisprudence, policy documents, transcripts of proceedings, and other court records which address the question of language in the legal process. Thematic content analysis (including simple quantitative processing) was significant in categorising data. Themes included the rights perspective of the language debate in international criminal justice, translation, and multiculturalism in international criminal proceedings. Miles & Huberman's approach of combining the use of the investigating questions and the themes arising from the data acquired during analysis significantly informed this study.<sup>6</sup>

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<sup>6</sup> MB Miles & AM Huberman *Qualitative Data Analysis: An Expanded Sourcebook* 2 ed (1994) 58- 65.



## LITERATURE REVIEW

Negru rightly affirms that law is a profession of words; no other domain gives as much importance to its linguistic vehicle as does the law.<sup>1</sup> In the courtroom, the means through which legal power is realised, exercised, abused or challenged are primarily linguistic.<sup>2</sup> Scholars on the subject of language in legal process have restricted the scope of the language debate in international criminal trials to translation. Beyond translation, Chapter 1 extends the debate to include multilingualism *vis à vis* multiculturalism, and the rights perspective of the language question in criminal justice. The interconnectedness of culture and language is affirmed by Danet;<sup>3</sup> Jiang;<sup>4</sup> Kelsall.<sup>5</sup> Culture is also a significant factor of interpretative performance.<sup>6</sup>

The dynamic social factor of language has powerful influences in the legal process.<sup>7</sup> More importantly, it ensures the functional presence of the accused at his/her trial.<sup>8</sup> Noteworthy, as a social variable, language is a pervasive and dynamic element of the trial process.<sup>9</sup> This study illustrates that the language factor is multidimensional in international criminal trials at both the international and national levels. It is a fair trial consideration as demonstrated in Chapter 3. International criminal proceedings constitute a multinational and multilingual pool of participants. Language barriers cause considerable delays in operations.<sup>10</sup> Whenever people who are communicating do not share the same culture, knowledge, values and assumptions, mutual

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<sup>1</sup> ID Negru 'Acceptability versus Accuracy in Courtroom Interpreting' in DS Giannoni & C Frade (eds) *Researching Language & the Law: Textual Features & Translation Issues* (2010) 213.

<sup>2</sup> JM Conley & WM. O'Barr *Just Words: Law, Language & Power* (1998) 2.

<sup>3</sup> B Danet 'Language in the Legal Process' (1980) 14 *Law & Society Review* 445.

<sup>4</sup> W Jiang 'The Relationship Between Culture & Language' (October 2000) 54 *ELT J* 328 [<http://eltj.oxfordjournals.org/cgi/reprint/54/4/328>].

<sup>5</sup> T Kelsall *Culture under Cross-Examination: International Justice & the Special Court for Sierra Leone* (2009).

<sup>6</sup> K Alfisi 'Language barriers to justice' *Washington Lawyer* (April 2009) 20 (<http://www.legalaidc.org/pressroom/documents/WashingtonLawyer409LanguageBarriersToJustice.pdf>); V Benmaman 'Legal Interpreting: An Emerging Profession' *The Modern Language J* (1992) 76 445; NA Combs *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010).

<sup>7</sup> JN Levi & AG Walker (eds) *Language in the Judicial Process* (1990) 2.

<sup>8</sup> J Kartou 'Lost in translation: International Criminal Tribunals and the legal implications of interpreted testimony' (2008) 41 *Vanderbilt Journal of Transnational Law* 1, 13.

<sup>9</sup> Levi & Walker (note 7 above) 2.

<sup>10</sup> PM Wald 'The International Criminal Tribunal for the former Yugoslavia comes of age: Some Observations on day to day Dilemmas of an International Court' (2001) 5 *Journal of Law & Policy* 92; M Swart *Judges & Law Making at the International Tribunals for former Yugoslavia & Rwanda* (2006) 132.

understanding can be especially difficult.<sup>11</sup> Thus, Combs challenges the fact finding foundations of International Criminal Courts.<sup>12</sup>

Jiang notes that language and culture are intricately interwoven that one cannot separate them without losing the significance of either.<sup>13</sup> Communicative competence includes mastery not only of grammatical rules but also of a set of cultural rules that include specification of the appropriate ways to apply the grammatical rules in speech situations.<sup>14</sup> Cross-cultural communication difficulties arise even within the same language but the issues associated with multicultural participation in international criminal proceedings are broader.<sup>15</sup> The participants in the trial especially the accused, witnesses and victims as well as the entire affected populations come from different cultures than those that shape the international criminal institutions and have dominated international law.<sup>16</sup> This lack of ‘cultural proximity’ undermines the ability of the participants to present their claims, lines of argument, stories and concerns in a way that is readily understood by the court officials, which in turn diminishes the worth of the proceedings for participants.<sup>17</sup> Cultural distance also affects the efficacy of translation as discussed in Chapter 4.

Kelsall contends that the proper understanding of the evidence necessitates appreciation of the cultural context within which it is presented. Truth is not simply ‘out there’ waiting to be discovered. Each society has its regime of truth, its ‘general politics’ of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.<sup>18</sup> Kelsall takes note of the laboured, tortuous, and inconclusive nature of many of the encounters between counsel and witnesses at the Special

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<sup>11</sup> G Lakoff & M Johnson *Metaphors We Live By* (1980) 231.

<sup>12</sup> Note 6 above.

<sup>13</sup> Jiang (note 4 above) 127.

<sup>14</sup> Danet (note 3 above) 454.

<sup>15</sup> Karton (note 8 above) 27.

<sup>16</sup> Ibid 28.

<sup>17</sup> J Almqvist ‘The Impact of Cultural Diversity on International Criminal Proceedings’ (2006) 4 *J Int Crim Just* 745, 748.

<sup>18</sup> Kelsall (note 5 above) 35.

Court for Sierra Leone.<sup>19</sup> The ICTR found that certain *Kinyarwanda* terms were infused with special meaning that could only be understood within the context of the Rwandan culture.<sup>20</sup>

In view of the multilingual character of international criminal proceedings, translation is a key aspect of support to judicial proceedings. Translation is the leading theme of the language debate in international criminal justice. The system of simultaneous translation developed at Nuremberg set the standard for interpretation used today in International Criminal Tribunals (ICTs).<sup>21</sup> Simultaneous translation enables a trial to proceed at commendable speed in several languages. Gaiba observed that it was thought that the interpreting system and the recording system would cope with all the problems in providing language services at trial. And yet, there was an intrinsic aspect of interpretation that could not be solved by any practical means: its impact on the proceedings.<sup>22</sup> Chapter 4 highlights the shortfalls of translation.

ICTs are particularly overwhelmed by translation tasks. Translation does not eliminate all the linguistic hurdles inherent in a multilingual trial. Further, there is a tendency of reducing the question of translation to a few limited questions mainly linked with the perspective of the translator.<sup>23</sup> Chapter 4 illustrates how trial participants affect the efficacy of translation. Translation is a complex process that requires the cooperation of all stakeholders. Some errors and distortions in translated material are beyond the control of the translator. The importance of a precise translation or interpretation should never be underestimated, as a lack thereof is one of the primary reasons for a miscarriage of justice in an international context.<sup>24</sup>

Chapter 4 also elucidates the procedural steps in translating documents at ICTs, justifying the delays that the process bears upon the trial process. Wemmers argues that there is greater potential for misinterpretation in international criminal tribunals than in national courts or international civil tribunals.<sup>25</sup> This view is qualified by Chapter 5 which illustrates considerable

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<sup>19</sup> Ibid 22.

<sup>20</sup> *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T Judgement 2 September 1998.

<sup>21</sup> Karton (note 8 above) 30.

<sup>22</sup> F Gaiba *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (1998)100.

<sup>23</sup> J Lambert 'The Status and Position of Legal Translation: a Chapter in the Discursive Construction of Societies' in FE Olsen, A Lorz, D Stein (eds) *Translation Issues in Language & Law* (2009) 76.

<sup>24</sup> W Schomburg 'The Role of International Criminal Tribunals in Promoting respect for Fair Trial Right' (2009) 8 *North Western Uni J of Int Human Rights* (2009) 1, 12.

<sup>25</sup> JA Wemmers 'Reparation and the International Criminal Court: Meeting the needs of victims' (2006) Report cited by Karton (note 8 above) 6.

challenges to the International Crimes Division of the High Court of Uganda in ensuring accurate interpretative assistance.

The significance of the language question in criminal law is based on the centrality of language to the realisation of trial fairness. However, as Schomburg—former Judge of the ICTR/ICTY Appeals Chamber rightly notes, the issue of language and translation is often ignored by practitioners.<sup>26</sup> Although the former Judge notes that it is becoming more and more apparent that language and translation are important considerations in a trial, he limits the debate to the significance of language to computation of adequate time for the preparation of a defence.<sup>27</sup> This study affirms the view that the status of language fair trial rights in international criminal law is undervalued.

DeFrancia contends that the status of particular norms in international law determines their fate in an independent system of adjudication.<sup>28</sup> In that regard, Arzoz notes that linguistic human rights are less abundant and their scope of protection less extensive than what appears at its surface.<sup>29</sup> The major problem lies with the danger of misrepresenting the actual status and significance of language rights in the context of human rights law, international law, and constitutional law.<sup>30</sup> I however contest Arzoz's assertion that linguistic human rights must be interpreted as ideals and aspirations, and not as enforceable entitlements already recognised by international binding rules.<sup>31</sup> Chapter 3 situates language rights in the minimum guarantees of fair hearing— a category of priority trial rights. In essence, it substantiates language fair trial rights in international criminal law.

The standard of protection of minimum rights is discussed in Chapter 2. ICTs must fully respect the language fair trial rights of accused persons.

Following the orientation of the debate, recommendations equally focus on making translation and interpretation services better and more representative. This study entails suggestions by

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<sup>26</sup> Schomburg (note 24 above) 29.

<sup>27</sup> Ibid 12.

<sup>28</sup> C DeFrancia 'Due Process in International Criminal Courts: Why Procedure Matters' (2001) 87 *Virginia LR* 1381, 1384.

<sup>29</sup> X Arzoz 'The Nature of Language Rights' (2007) JEMIE paper (Issue No 2/2007)1, 2.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

participants including minimising languages applicable to a particular trial in composing case teams, recruitment of staff; developing local languages into scientific discourse and legal usage among others.

## CHAPTER I

### THE LANGUAGE DEBATE IN INTERNATIONAL CRIMINAL JUSTICE

#### (a) Introduction

The language debate is as old as international criminal justice. This debate explores the significance of language as an aid to the administration of justice. It is comprised of three principal themes: multilingualism vis-à-vis multilingualism; translation as an aid to the trial process and language fair trial rights. International criminal trials involve a multinational contributory effort, which reflects in the multilingual pool of participants. Thus, central to the administration of international criminal justice is harmonising divergent languages; from the Nuremberg trials (1945), to the manoeuvres of the former Yugoslav Tribunal (1991), the Tribunal for Rwanda (1994), The International Criminal Court (2002), and the Special Tribunal for Lebanon (2007), language is a significant factor.

Trial proceedings in more than one language have generated debate primarily on the impact of multilingualism on fair trial. The dynamic social factor of language that has powerful influences even upon a monolingual legal process<sup>1</sup> is multidimensional in a multilingual trial. Such a trial entails additional variables which have far reaching effects on the truth finding process. These variables include multicultural dynamics, translation and interpretation, high resource demands of time, human power, and money. These factors constitute the cutting edge issues of the language debate in international criminal justice.

The language question has two major perspectives: (i) language as communication; (ii) language as a subject of identity in the minority rights discourse. Language in international criminal justice mainly concerns communication in the administration of justice. Despite its significance to the ends of justice, the subject is not considered meaningfully. The adverse practices of 1945 subsist to-date. Noteworthy, law is a profession of words.<sup>2</sup> No other domain gives as much importance

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<sup>1</sup> JN Levi & AG Walker (eds) *Language in the Judicial Process* (1990) 2.

<sup>2</sup> ID Negru 'Acceptability versus Accuracy in Courtroom Interpreting' in DS Giannoni & C Frade (eds) *Researching Language & the Law: Textual Features & Translation Issues* (2010) 213, 214.

to its linguistic vehicle as does the law;<sup>3</sup> its users place such store on the nuances of meaning conveyed by language that unstated intentions are disregarded.<sup>4</sup> Language is a core foundation for justice. It is particularly a dominant element in almost every situation in which the power of the law manifests itself; in the courtroom, the means through which legal power is realised, exercised, abused or challenged are primarily linguistic.<sup>5</sup> International criminal trials particularly involve cases of high public importance; the language of the trial contributes to the society-wide reconciliation process by projecting the deliberations and outcomes of the proceedings. Thus, a credible legal process thrives on a reliable linguistic and communication base.

Chapter 1 traces the origins of the language debate in international criminal justice, and illustrates its scope by highlighting the primary thematic issues. This analysis comprises of three major parts: (i) an overview of linguistic complexities in the history of international criminal trial practice from Nuremberg to The Hague, while distinguishing the case of the hybrid tribunals. Matters of particular concern include (a) translation as a delaying factor and constraint to the right of appeal; (b) translation as a litigable question; (c) the reality of linguistic discordance in task teams and how it negates the efficiency of competent professionals; and (c) how linguistic dynamics affect the presentation, perception, and memorisation of evidence. (ii) A discussion of structural provisions and adjustments by International Criminal Tribunals (ICTs) to contain the aforementioned complexities, and a record of the problematic communication patterns in a multilingual courtroom. (iii) An introduction of the thematic components of the language debate in international criminal trials. The thematic analysis is a selective scrutiny of the principal bearings of the linguistic complexities of criminal justice; it is not intended as exhaustive but considered as a representative categorisation of the leading concerns of the debate.

## **(b) Language diversity in international criminal trials**

Linguistic diversity is a recurring characteristic of international criminal tribunals. Such diversity is either vertical: across different languages such as English and French, or horizontal: within the same language such as American English and British English. From Nuremberg (1945), through

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<sup>3</sup> Ibid.

<sup>4</sup> D Crystal *The Cambridge Encyclopedia of Language* (1987) 386.

<sup>5</sup> JM Conley & WM O'Barr *Just Words: Law, Language & Power* (1998) 2.

former Yugoslavia (1991), and Rwanda (1994), to The Hague (2002), and Lebanon (2007), international tribunals are faced with the task of harmonising divergent languages during trial proceedings. Thus, the language debate dates back to the first recorded international criminal trials.

*(i) International Military Tribunal (IMT)*

In establishing the International Military Tribunal, also known as the Nuremberg Tribunal, every allied nation supplied a judge and a prosecution team.<sup>6</sup> It was therefore decided that every nation involved would have the right to use its own language.<sup>7</sup> The defendants on the other hand were predominantly German. All the different groups of participants spoke different languages but had to work together on the same trials. Bowen notes that language barriers existed among the very members of the bench, and among the various teams of prosecutors, who needed to interact in order to carry out a consistent prosecution.<sup>8</sup> Noteworthy, the tribunal was obliged by its charter to conduct all court proceedings and produce all official documents in English, French, and Russian, and in the language(s) of the defendant(s).<sup>9</sup> So much of the record and of the proceedings had to be translated into the language of the country in which the tribunal was sitting (German) as the tribunal considered desirable in the interests of justice and public opinion.<sup>10</sup> The freedom of every representative to use their own language, and the need to keep the general public informed of the proceedings had to be addressed in the tribunal's linguistic capacity. It therefore adopted four working languages.<sup>11</sup> Four working languages in a single trial constituted a recipe for communication struggles.

Nuremberg can be reckoned as the first experiment of a multilingual international criminal trial. The experience was not without difficulty. At the 17<sup>th</sup> organisational meeting of the tribunal, the chief prosecutor, Justice Robert H Jackson lamented:

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<sup>6</sup> United States of America (US), United Kingdom of Great Britain & Northern Ireland (UK), The French Republic, Union of Soviet Socialist Republics (USSR).

<sup>7</sup> F Gaiba *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (1998) 33.

<sup>8</sup> Ibid.

<sup>9</sup> See Article 25 Charter of the International Military Tribunal – Annex to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (1945) 82 UNTS 279.

<sup>10</sup> Ibid.

<sup>11</sup> English, French, German and Russian. See Gaiba (note 7 above) 33.



‘I think that there is no problem that has given me as much trouble and as much discouragement as this problem of trying to conduct a trial in four languages. I think it has the greatest danger from the point of view of the impression this trial will make upon the public. Unless this problem is solved, the trial will be such a confusion of tongues that it will be ridiculous...’<sup>12</sup>

Despite the ‘Babylonian’ confusion, the charter of the tribunal demanded that the trial and punishment of perpetrators had to be prompt.<sup>13</sup> The trial had to proceed in record time. The then existing mode of translation (consecutive translation)<sup>14</sup> would not enable speedy conduct of the trial; twice as much time would be required. These circumstances instigated the evolution of improved modes of translation leading up to the invention of the simultaneous mode of translation.<sup>15</sup> Simultaneous translation enabled the Nuremberg trial to proceed at commendable speed but it did not eliminate the adverse effects of third party communication on fairness of trial.

(ii) *International Military Tribunal for the Far East (IMTFE)*

Members of the International Military Tribunal for the Far East, also known as the Tokyo Tribunal, were appointed from among the names designated by the participating nations.<sup>16</sup> Each of the nations that had joined in forming the Far Eastern Commission elected to appoint to the prosecution team, an associate counsel to assist the chief of counsel.<sup>17</sup> Defence counsel of the

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<sup>12</sup> J Karton ‘Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony’ (2008) 41 *VJTL* (2008)1, 20.

<sup>13</sup> See Article 1 IMT Charter (note 9 above).

<sup>14</sup> Consecutive interpretation is the transposition of a speech into another language right after it is finished - Karton (note 12 above) 19.

<sup>15</sup> Simultaneous translation is where the information is transferred into the second language as soon as interpreters understand a ‘unit’ of meaning; an interpreter translates the text while hearing it – Ibid.

<sup>16</sup> Australia, Canada, China, France, Great Britain, India, Netherlands, New Zealand, Philippines, Soviet Union, United States. See S Horwitz, ‘The Tokyo Trial’ (1950) 465 *International Conciliation* 473, 488-489.

<sup>17</sup> The Far Eastern Commission (FEC) was the top-level policy formulating body with regard to the occupation of Japan, which represented the Allied Powers led by the US, Great Britain, China, and the Soviet Union. See Far Eastern Commission Records (FEC-031: Japanese Constitution) (<http://www.ndl.go.jp/constitution/e/library/06/201bunshoko.html>).

Japanese defendants were mainly from the United States.<sup>18</sup> Wanhong writes that the same problems that afflicted the builders of the Tower of Babel caused huge difficulties for the Tokyo Trial.<sup>19</sup> The language problem at this trial was bigger than at Nuremberg.<sup>20</sup> For instance, the judge from the Soviet Union could understand neither English nor Japanese, which were the two official languages of the tribunal.<sup>21</sup> In an interview with Prof. Cassese, Judge Röling, the Dutch judge, continually complained about having been required to communicate in English during the trial.<sup>22</sup> The court is expected to be the first to follow the proceedings, which is not possible where judges do not fully understand the language of the trial. American defence counsel also confronted what Piccigallo describes as the most formidable ubiquitous barrier of language.<sup>23</sup> These linguistic obstacles were compounded by the distinctiveness of Japanese - the language of the accused.

Translation at the Tokyo tribunal proved even more prone to error in part because Japanese is one of the most difficult languages to translate to English.<sup>24</sup> ‘An entire testimony could be the interpretation of the interpreter’.<sup>25</sup> The chief translator at the Tsuchiya trial, Sho Onodera, admitted that his task was a difficult one, because much of what he described as ‘pedestrian Japanese and English’ used at the trial was ‘virtually impossible’ to translate directly.<sup>26</sup> For example, there was no adequate distinction in the Japanese language between a stick and a club, yet use of the latter was considered graver than using the former.<sup>27</sup> Chief defence counsel in the

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<sup>18</sup> At the start, each of the defendants was represented by one or more Japanese lawyers. However, the position of a lawyer in the Japanese society is distinctive; a lawyer plays a much smaller role. It was recognised that Japanese counsel might be handicapped in their efforts to provide adequate defense for the accused. Attorneys were furnished by the United States, at the request of the Japanese Government, see Horwitz (note 16 above) 492.

<sup>19</sup> Z Wanhong ‘From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial’ (on the sixtieth anniversary of the Nuremberg Trials) (2006) 27 *Cardozo LR* 1673, 1680.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> See PR Piccigallo *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (1979) 92.

<sup>24</sup> NA Combs *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010) 69. See also T Maga *Judgment at Tokyo: The Japanese War Crimes Trials* (2001) 57: Japanese language is less direct than English.

<sup>25</sup> Per T Maga *ibid* 57: analysis of defense counsel actions. See also Piccigallo (note 23 above) 57 - ‘loose interpretation of the evidence’ at the Yamashita trial.

<sup>26</sup> See Maga *ibid* 15.

<sup>27</sup> *Ibid* 16.

Tsuchiya trial rightly argued that flaws in translation compromised his client's basic right to be heard and judged accurately; the court considered that claim semantic and not legal.<sup>28</sup> No further action was taken apart from applauding counsel for identifying difficult translation issues which were anticipated.<sup>29</sup> This revealed the underestimation, by the court, of the significance of language and communication to the ends of justice. The tribunal dedicated a volume of its records to 'the consolidated list of language and other corrections to the transcripts of the proceedings in open session'.<sup>30</sup> That volume is confirmation of the tribunal's linguistic struggles. Different 'states' of the transcripts were produced and a number of pages issued to replace others found to be in error.<sup>31</sup> Notably, a correction of the record may not necessary amount to a correction of memory. A corrigendum correcting a court record usually follows later in time that it may not even be considered by key participants in a trial. An erroneous interpretation as understood and memorised by a judge may still influence the verdict.

*(iii) The Tribunals of the 20<sup>th</sup> century onwards*

In modern history, globalisation of international criminal justice has perpetrated the linguistic obstacles of the Nuremberg and Tokyo Trials. Gotti observes that the process of globalisation offers a topical illustration of the interaction between linguistic and cultural factors in the construction of discourse both within specialised domains and in wider contexts.<sup>32</sup> International criminal trial practice is not an exception. Global solidarity in establishing international criminal tribunals attracts a multilingual and multicultural pool of participants. As a contributory effort of

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Consolidated List of Language and Other Corrections to the Transcripts of the Proceedings in Open Session Volume 120 Part A. See RJ Pritchard (ed) *The Tokyo Major War Crimes Trial: A comprehensive Reference Guide to the Proceedings to the Tokyo Major War Crimes Trial* (1998-2005) vol. 120 Part A-database incorporating (a) various other lists of corrections to the transcripts that were circulated to Members and Counsel representing the contending sides in the Trial; (b) printed references to passages that were otherwise found to have changed in versions of some pages of the several sets of the Transcripts of the Proceedings in Open Court that he consulted; (c) various handwritten corrections that were made directly onto the pages of those individual sets of the Transcripts of the Proceedings; (d) corrections that bear upon the reliability of a number of passages or names that have been translated inappropriately or transliterated in a manner that might prove confusing or misleading.

<sup>31</sup> See Pritchard *ibid.*

<sup>32</sup> M Gotti 'Globalizing Trends in Legal Discourse' in F Olsen, A Lorz & D Stein (eds) *Translation issues in Language & Law* (2009) 55,55.

the international community, the representation of participating states in the personnel composition of courts is central to legitimacy. Recruiting from a broad-spectrum of countries is also a way of ensuring that the impact and deterrent effects of the accountability process are felt globally. International conflicts involve divergent issues that a global pool of expertise is essential. From a tactical viewpoint, international personnel are distanced from the conflicts that are the subject of international criminal proceedings and therefore better placed to impartially propel the trial of crimes arising from such conflicts.

Contemporary ICTs have either English or both English and French as their working language(s). The two languages are used because, out of common usage, they have attained a rich legal vocabulary and a high level of scientific advancement. Further, most of the law applicable is written in the two languages making them the most appropriate in which to apply it. However, the common law foundations of the constitutive statutes of ICTs established under the auspices of the UN have raised the leverage of the English language. In practice, English is more predominantly used for court business. Accordingly, professionals exhibit an inclination to operate in English including those that have limited knowledge of the language. Such practices further complicate translation and intensify the obstacles to competent communication of the level required in a truth finding process.

Competency in a language, for purposes of participation in a criminal trial, is ability to speak and understand it.<sup>33</sup> The International Criminal Court (ICC) has further raised the standard of linguistic proficiency required of the accused person to one of ‘full understanding’. The accused person is said to fully understand and speak a language when they are completely fluent in the language in ordinary, non-technical conversation; it is not however required that such a person has an understanding as if they were trained as a lawyer or judicial officer.<sup>34</sup> The appeals chamber maintains that should there be any doubt as to whether the accused person fully understands and speaks the language of the court, the language requested by him/her is to be

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<sup>33</sup> See Article 18(3) Statute of the International Criminal Tribunal for the former Yugoslavia as amended (adopted by SC Res 827 25 May 1993).

<sup>34</sup> *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* ICC-01/04-01/07 Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled *Decision on the Defence Request Concerning Languages* (27 May 2008) 3-4.

accommodated.<sup>35</sup> Thus, the linguistic competency of the accused person should be established beyond reasonable doubt. This position is a fundamental departure from the standard required by the International Criminal Tribunal for the former Yugoslavia (ICTY), which tilts to a balance of probabilities. The trial chamber held in *Vojislav Šešelj*,<sup>36</sup> that it had reason to believe that the accused understood English by relying on a report of a United Nations Commission of Experts and a BBC News report that the accused spent one year teaching at the University of Michigan in the United States after receiving his Ph D.<sup>37</sup> Šešelj's competency was determined on the basis of historical facts. The court did not seek to establish the actual linguistic competency of the accused. As the ICC judges confirm, there is a practice of granting to the accused before the ICC, rights of a higher degree than in other courts.<sup>38</sup> This position arises from the spirit of the Rome Statute which represents a step further in the protection of the rights of criminal defendants.

(aa) International Criminal Tribunal for former Yugoslavia (ICTY)

The establishment of the ICTY was steered by international contribution of human resources; the United States sent twenty-two lawyers and investigators to work in the office of the prosecutor.<sup>39</sup> These persons joined the prosecutorial team led by Justice Richard Goldstone (South Africa), and Graham Blewitt (Australia). The team included five people from Australia, one American, and others from an assortment of other countries.<sup>40</sup> The judges equally originated from various jurisdictions.<sup>41</sup> Patricia Wald, a former judge of the tribunal revealed that ICTY judges spoke a dozen native languages more fluently than the official French and English of the tribunal.<sup>42</sup> By February 2011 (the date of this research), only one judge could conduct a trial in both languages

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<sup>35</sup> Ibid 4.

<sup>36</sup> *Prosecutor v Vojislav Šešelj* IT-03-67-PT Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence (9 May 2003).

<sup>37</sup> Ibid para 25.

<sup>38</sup> See *Katanga* Decision on the Defence Request Concerning Languages (note 34 above) para 49.

<sup>39</sup> J Hagan *Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal* (2003) 64.

<sup>40</sup> Ibid citing R Goldstone *For Humanity: Reflections of a War Crimes Investigator* (2000) 80.

<sup>41</sup> Italy, Canada, Pakistan, US, Costa Rica, China, Malaysia, Egypt, Australia, Nigeria, and France.

<sup>42</sup> PM Wald 'The International Criminal Tribunal for the former Yugoslavia comes of Age: Some observations on day to day dilemmas of an International Court' (2001) 5 *J of Law & Policy* 87, 89. Judge Patricia M Wald was formerly a Judge of the ICTY (November 1999–November 2001).

of the court.<sup>43</sup> On the other hand, the persons being tried are native Bosnian, Croatian, Serbian (BCS), Albanian and Macedonian speakers. So diverse are the ICTY trials that an accused person from Croatia has previously been represented by counsel from America and heard by a bench of judges from Congo, France, Switzerland and Hungary.<sup>44</sup> Unfortunately, the linguistic proficiency of the professionals, in many cases, does not match with the language competency of the accused persons, and in some cases, with the official standards of the tribunal. Judge Wald laments:-

‘The lack of fluency in the two working languages of the tribunal, and to an extent in the native languages of the defendants and witnesses, turned out to be a greater obstacle than I would have anticipated. There is no question that the lack of a common language makes out-of-court communication less spontaneous and memorising the proceedings more difficult.’<sup>45</sup>

The judge describes the two years of hearing cases at the tribunal as arduous work and a gruelling process for all involved, partly because of the obstacle of language.<sup>46</sup> The participants in this study confirmed that this is the case for all multilingual international trials.<sup>47</sup>

The language barrier also causes substantial delays of the tribunal’s operations with trials lasting fifteen months much longer.<sup>48</sup> Translation is particularly a time-consuming undertaking. A document sent to the official translation unit in the registry may take weeks to get back.<sup>49</sup> Such delays impede the speedy issuance of judgments because the judges must wait for drafts of the tribunals’ lengthy judgments to be translated before they can be discussed.<sup>50</sup> In some cases, judgments are not rendered in the second working language of the court for months after issuance of the first thereby causing delays in the time for filing appeals; a lawyer who speaks

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<sup>43</sup> Respondent 1001 interviewed on 22 February 2011 Annexure 211 (identity of participants is concealed and codes used on ethical grounds. All subsequent references to the interview transcripts appear in this order: participant code – interview date – page number on transcript annexed to this report).

<sup>44</sup> See *Prosecutor v Prlić & anor* IT-04-74-T Trial Chamber I.

<sup>45</sup> Wald (note 42 above) 92.

<sup>46</sup> Biography of The Honorable Patricia M. Wald (<http://www.innsofcourt.org/Content/Default.aspx?Id=321>).

<sup>47</sup> Transcripts annexed 211--252.

<sup>48</sup> Wald (note 42 above) 92.

<sup>49</sup> Ibid.

<sup>50</sup> M Swart *Judges & Lawmaking at the International Tribunals for former Yugoslavia & Rwanda* (2006) 132 citing NA Combs ‘Copping a plea to Genocide: the Plea Bargaining of International Crimes’ (2002) 151 *Univ of Pennsylvania LR* 1, 101-102.

English cannot be expected to appeal a judgment available only in French.<sup>51</sup> Translation also requires enormous resources that add to the cost of justice.<sup>52</sup>

(bb) International Criminal Tribunal for Rwanda (ICTR)

The state of affairs at the ICTR can be likened to the situation at the ICTY. The first elected judges of the tribunal originated from Senegal, Russia, Sweden, Pakistan, South Africa, and Tanzania.<sup>53</sup> Although English and French are the official languages of the ICTR, *Kinyarwanda*—the native language of defendants, witnesses and victims, is frequently used in proceedings. The tribunal has had its toll of linguistic hurdles. The chief prosecutor admitted that ICTR activities were significantly handicapped by the language and cultural barrier since all investigators were foreign and had to operate through interpreters.<sup>54</sup> Translation of *Kinyarwanda* testimony to the working language(s) of the court is a challenge. The tribunal acknowledged that the syntax and everyday modes of expression in the *Kinyarwanda* language are complex and difficult to translate into French or English.<sup>55</sup> However, difficult translation is distinguishable from bad translation.<sup>56</sup> The former may not necessarily affect the integrity of the process unless it can be proved that it went bad and occasioned miscarriage of justice. The issue is whether such an analysis was made at all.

The ICTR has also used chain translations because it could not obtain the services of a sufficient number of *Kinyarwanda*-English interpreters; *Kinyarwanda* testimony was typically translated first to French and then from French to English.<sup>57</sup> Notably, the result of each stage of interpretation is usually of an inferior quality; the degree of representation by the translation of

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<sup>51</sup> Wald (note 42 above) 92-93.

<sup>52</sup> Ibid 93.

<sup>53</sup> E Møse 'Main Achievements of the ICTR' (2005) 3 *J Int'l Crim Just* 920, 920.

<sup>54</sup> See JM Kamatali 'From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans (2005) *New Eng J.Int'l & Comp. L* 89, 94.

<sup>55</sup> *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T Judgement 2 September 1998 para 145. See also *Prosecutor v Alfred Musema* ICTR-96-13 Judgment & Sentence 27 January 2000 para 102: the chamber noted the difficulties presented by the consecutive translation of three languages (*Kinyarwanda*, French and English) in assessing evidence. In particular, it acknowledged the significant syntactical and grammatical differences among the three languages and took them into consideration in assessing the evidence.

<sup>56</sup> Distinguished in *Meghji Naya v Regina* [1952] 19 EACA 247.

<sup>57</sup> NA Combs (note 24 above) 72.

the original depreciates at each additional stage of translation. Thus, chain translation affected the quality of the facts as presented to the court.<sup>58</sup>

The aforementioned difficulties have caused the ICTR to restrict translation. The tribunal has rejected pleas for translation in situations that its provision is considered essential. In the *Media Case*,<sup>59</sup> counsel for Hassan Ngeze requested that the 73 issues of *Kangura*-the defendant's news journal should be translated into French and English so that he could read them. The indictment alleged that *Kangura* (written in *Kinyarwanda*) was principally responsible for the rampage that left 800,000 people dead in 1994. The registrar refused the translation on grounds that the tribunal lacked the resources, but the trial chamber allowed certain passages and a few articles translated for the office of the prosecutor to be used in trial.<sup>60</sup> Counsel filed a motion to dismiss the indictment on grounds that his client could not get a fair trial since *Kangura*-the documents incriminating him, could not be translated and could therefore not be read by his lawyer and the judges themselves. The chamber denied the motion reasoning that 'to translate *Kangura* would overburden the resources of the tribunal.'<sup>61</sup> Subsequently, all the 73 issues of the journal were admitted into evidence in the Media trial. Hassan Ngeze was arrested, indicted, tried and convicted because of the articles and cartoons that appeared in the journal.<sup>62</sup> Floyd asserts that the lack of translation of the *Kinyarwanda* journal hampered the defence of Ngeze during the totality of the trial.<sup>63</sup> The way translation was handled in the Media Case is highly regretted by stakeholders.<sup>64</sup> The case also illustrates the difficulty and harsh realities of the exercise of court's discretion in determining the scope of translation; practical considerations such as cost are essential but not easily reconcilable with the benchmarks of justice.

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<sup>58</sup> See Kamatali (note 54 above) citing the chief prosecutor of the ICTR: '...often nuances were lost in the interpretation and translation process thus potentially distorting what a witness may have said or meant'.

<sup>59</sup> *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* ICTR-99-52-A (Media case).

<sup>60</sup> JC Floyd *International Injustice: Rwanda, Genocide and Cover-up: The United Nations Media Trial* (2005) 142. Floyd was counsel for Hassan Ngeze.

<sup>61</sup> *Ibid* 47- 48.

<sup>62</sup> *Ibid* 142.

<sup>63</sup> *Ibid* 143.

<sup>64</sup> Anonymous source for security reasons.



Accordingly, the jurisprudence of ICTs exhibits attempts at determining the category of documents which must be provided to the accused in the language they understand. Translation of these documents must be done, if required. They include (i) a copy of the indictment; (ii) a copy of the supporting material which accompanied the indictment against the accused and all prior statements obtained by the prosecutor from the accused; (iii) statements of all witnesses; (iv) discovery material which appeared in a language understood by the accused at the time it came under the prosecution's custody or control; (v) written decisions and orders rendered by the chamber.<sup>65</sup> The Extraordinary Chambers in the Courts of Cambodia pronounced principles governing translation rights and obligations, and filled the gap in legislation by affirming the aforementioned translation priorities.<sup>66</sup>

In cases where translation is permitted, the delays can be frustrating. Judge Møse tried to assist the Media Case defence team prior to the beginning of the defence case by arranging for ten editions of *Kangura* to be translated.<sup>67</sup> This was to take three months. After seven months, only five of the ten were completed. According to Floyd (counsel), the translations were not enough for the proposed experts to work with.<sup>68</sup> Translation of documents caused sufficient delays in ICTR trials that the tribunal adopted a policy directive enabling the possibility of contracting outside translators.<sup>69</sup> Outsourcing translation was however not necessarily helpful. The outcomes were sometimes unusable due to the external translators' limited knowledge of the unique terminology of the Rwanda genocide, and the lack of proofing procedures such as those established at the tribunal. Most of the outsourced translations were redone by the tribunal's

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<sup>65</sup> *Prosecutor v Vojislav Šešelj* IT -03 -67-PT Order on Translation of Documents 6 March 2003. See also *Order on Translation Rights and Obligations of the Parties*, Extraordinary Chambers in the Courts of Cambodia (ECCC) 20 June 2008: an accused is entitled to translation into Khmer (the native language of accused persons) of (i) the indictment since it constitutes the final characterisation and founding of the charges on which a charged person is sent forward for trial; (ii) the elements of proof on which any such indictment would rely; (iii) the submissions of the prosecution and all footnotes and indexes of the factual elements on which those submissions rely.

<sup>66</sup> See *Order on Translation Rights and Obligations of the Parties* *ibid*.

<sup>67</sup> Floyd (note 60 above) 143.

<sup>68</sup> *Ibid*.

<sup>69</sup> See Adama Dieng 'The International Criminal Court: Lessons from the International Criminal Tribunal for Rwanda-Potential Problems for the Registrar' Conference – 'Towards Global Justice: Accountability and the International Criminal Court' (February 2008) (<http://www.ictt.org/ENGLISH/speeches/adwiltonpark020202.htm>).

language section, which intensified delays. A similar occurrence accounted for the delay in translating a few versions of *Kangura* in the Media Case.<sup>70</sup>

Similarly, shortfalls in translation have led to unfavourable contradictions. In assessing the evidence in *Akayesu*, the court found inconsistencies between the testimony of several witnesses on the stand and earlier statements by the same witnesses given to the tribunal investigators. The trial chamber attributed the contradictions to the complexity of translating the oral testimony of witnesses from *Kinyarwanda* into French and English.<sup>71</sup> Exact conveyance of the content of the original was not achievable. A translator aims at a version that is fundamentally equivalent, but not formally identical to the original.<sup>72</sup> This reality challenges the efficacy of translation as an aid to a fact finding process.

(cc) International Criminal Court (ICC)

The first judges elected to the International Criminal Court originated from Bolivia, Ireland, Mali, United Kingdom, Trinidad and Tobago, France, Germany, Finland, Ghana, Costa Rica, Cyprus, South Africa, Italy, Somoa, Republic of Korea, Brazil, and Latvia.<sup>73</sup> This diversity subsists to date as a justifiable indicator of the international character of the court. Currently, the first permanent criminal court is seized of only situations from Africa but recruits worldwide. By May 2010, trial had begun in two cases from the Democratic Republic of Congo (DRC) and The Central African Republic (CAR), which are both francophone African countries.<sup>74</sup> Lubanga Dyilo (DRC) was heard by a Spanish and English speaking trial chamber I.<sup>75</sup> Other languages of significance to accused, victims and witnesses in ICC trials were *Kiswahili*, *Lingala*, and *Kingwana*. Thus, translation was essential.

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<sup>70</sup> See Respondent 2005 interviewed on 25 February 2011 Annexure 229.

<sup>71</sup> *Akayesu Case* Judgment 2 September 1998 (note 55 above) para 145.

<sup>72</sup> Per senior translator at an ICT and trainer of ICT translators. Respondent 2001 interviewed on 19 March 2011, Annexure 217.

<sup>73</sup> See 'Election of ICC Judges: First Election-2003' Coalition for the International Criminal Court (<http://www.iccnw.org/?mod=electionjudges2003>).

<sup>74</sup> *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06, *Prosecutor v Germain Katanga & Matthew Ngudjolo Chui* (ICC-01/04-01/07).

<sup>75</sup> Judge Adrian Fulford, Presiding Judge (United Kingdom), Judge Elizabeth Odio Benito (Costa Rica), Judge René Blattmann (Bolivia).

There are generally serious delays at the ICC. The appeals chamber was particularly criticised for the prolonged period it took to issue an interlocutory decision in the appeal against the pre-trial chamber decision on the arrest warrant application in the case of President Al-Bashir.<sup>76</sup> William Schabas notes that it took the chamber more than seven months to rule on a simple issue; the ruling is only eighteen pages long, with only five pages of substance; the question is: why does it take so long?<sup>77</sup> Among other contributory factors to operational delays such as the complexity of the cases, the court operates in several languages. Translation of a single ICC judgment can take four months.<sup>78</sup> The court has resorted to proceeding on partially translated documents. In the Lubanga Case, the chamber ruled that the appeal process would proceed on the basis of the French translation of a few sections of the final judgment as identified by the defence.<sup>79</sup> In response to the question as to whether it was permissible and fair to move to the sentencing and reparations phase (in the event of a conviction) or the release of an accused (in the event of an acquittal) without a complete French translation, the court held that this course is permissible within the framework of the Rome statute.<sup>80</sup> The chamber had to move to the next phase, avoiding the delay that would be caused by waiting for the complete French translation.<sup>81</sup> The support of the approach, by the parties, ruled out all concerns for fairness but the compromise demonstrates the challenges faced by the ICC in operating in many languages.

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<sup>76</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-73 Judgment on the Appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’ (3 February 2010).

<sup>77</sup> William Schabas, ‘Nice work, if you can get it’ 3 Feb. 2010 (<http://humanrightsdoctorate.blogspot.com/2010/02/nice-work-if-you-can-get-it.html>). See also, D Akande ‘Should the ICC Appeals Chamber have made a decision on Bashir’s Immunity?’ (13 February 2010) (<http://www.ejiltalk.org/should-the-icc-appeals-chamber-have-a-made-a-decision-on-bashirs-immunity/>).

<sup>78</sup> See *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Scheduling Order for a status conference on the translation of a judgment 08 November 2011 para 2: the issue to be dealt with at the status conference is the timing of the delivery of the judgment, and, in particular, whether the judgment is to be delivered simultaneously in French and English or whether (in order to avoid a possible delay of approximately four months for translation) the English version is to be issued first.

<sup>79</sup> *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Decision on the translation of the Article 74 Decision and related Procedural issues 15 December 2011 para 26 (a).

<sup>80</sup> *Ibid* para 20.

<sup>81</sup> *Ibid*.

#### *(iv) Hybrid Tribunals*

In structuring ICTs emerging from direct cooperation between situation states and the international community,<sup>82</sup> there is inclination to substantial representation of partnering states.<sup>83</sup> Having nationals of contributory states as personnel of an international tribunal is part of ensuring local ownership and contribution to the accountability process, an integral factor to the success of international interventions. Staff from the situation countries also lend their local knowledge of the dynamics of the conflicts under investigation to the courts. National staff also serve the language and cultural demands of defendants, victims and witnesses. For instance, the Special Tribunal for Lebanon (STL) has four Lebanese judges alongside seven international ones.<sup>84</sup> The deputy prosecutor of the tribunal is also Lebanese. Similarly, the Extra-Ordinary Chambers in the Courts of Cambodia (ECCC) has 12 national judges among the chamber's 23 enlisted judges.<sup>85</sup> Typically, international courts such as the ICC also engage the language services of nationals of situation countries such as Uganda and the Democratic Republic of Congo as interpreters and translators.

Noteworthy is the distinct character of the Special Court for Sierra Leone (SCSL). The working language of the court is English (only).<sup>86</sup> The appeals chamber has advised that for the English language to work, it must be 'comprehensible and considered'.<sup>87</sup> The court therefore recalled the significance of clarity and precision to due process. The trial chamber has previously declared an application for leave to appeal as an abuse of process, denied it and ordered that all costs and

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<sup>82</sup> Referred to as 'Hybrid Tribunals' including the Special Tribunal for Lebanon (STL), the Extra Ordinary Chamber in the Courts of Cambodia (ECCC), and the Special Court for Sierra Leone (SCSL).

<sup>83</sup> Partnering states would include: the situation state (country affected by the conflict), the host state (the country in which the tribunal is based) and the contributing states (the international community).

<sup>84</sup> With one international Pre-Trial Judge, Trial Chamber (three judges: one Lebanese, and one international), and an Appeals Chamber (five judges: two Lebanese and three international). See 'The judges of the Special Court for Lebanon' (<http://www.stl-tsl.org/sid/26>).

<sup>85</sup> ECC judges include three international judges and four national judges for its Pre-Trial Chamber, three international judges and four national judges for its Trial Chamber, four national judges and five international judges for the Supreme Court Chamber. See 'Judicial Officers: Extraordinary Chambers in the Courts of Cambodia' ([http://www.eccc.gov.kh/english/judicial\\_officers.aspx](http://www.eccc.gov.kh/english/judicial_officers.aspx)).

<sup>86</sup> See Article 24 Statute of SCSL (Annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone of 16 January 2002), Rule 3 (A) Rules of Procedure & Evidence of SCSL (adopted on 16 January 2002) as amended.

<sup>87</sup> *Prosecutor v Sam Hinga Norman, Moinina Fofana & Allieu Kondewa (CDF Case)* SCSL-04-14-AR73 Decision on Amendment of the Consolidated Indictment (16 May 2005) para 48.

fees associated with the motion are withheld from counsel considering that the language used in his motion, in many instances, was neither ‘comprehensible and considered’, nor mindful of the admonishment not to use ‘exaggerated language’.<sup>88</sup> Participants are therefore obliged to use simple and clear English. Thus, the global movement to simplify legal language is also influencing ICTs.<sup>89</sup>

The Special Court has predominantly English speaking staff. This was a result of prior policy determination; in seeking qualified personnel for the SCSL, the UN Secretary General expressed the importance of obtaining such personnel from members of the Commonwealth sharing the same language and common law legal system.<sup>90</sup> It should be remembered that the special court was designed to improve on the international criminal tribunals for Yugoslavia and Rwanda that were perceived to be marred by a number of essential flaws such as their costly nature and excessive length of proceedings.<sup>91</sup> It was therefore decided to establish a court that would be lean and agile as well as inexpensive.<sup>92</sup> It is reported that upon the establishment of the SCSL, investigations were carried out quickly and in a targeted manner. In a matter of few months, the prosecutor issued indictments, trial chamber I and the appeals chamber became operative fairly rapidly and pronounced on many preliminary motions.<sup>93</sup> The fact that the court works in one language was a contributory factor to the record. Due to limited involvement of victims and witnesses in the initial operations of the tribunal, it sufficed to operate solely in English-the only working language of the court, which gave the court an advantage over other tribunals that had more than one working language.

However, the trial proceedings of the SCSL were equally marred by linguistic obstacles. The increasing role of accused persons, witnesses and victims, mainly from Sierra Leone, fuelled

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<sup>88</sup> See *CDF Case SCSL-04-14-T* ibid Decision on Request by the First Accused for Leave to Appeal against the Trial Chamber’s Decision on First Accused’s Motion on Abuse of Process (24 May 2005).

<sup>89</sup> See C Staughton & M Kirby ‘A Movement to Simplify Legal Language’ May 2002 <http://www.clarity-international.net/journals/47.pdf> .

<sup>90</sup> See Report of the UN Secretary-General on the Establishment of a Special Court for Sierra Leone Doc S/2000/915 (4 October 2000) para 59.

<sup>91</sup> See Report on the Special Court for Sierra Leone submitted by independent expert Antonio Cassese (12 December 2006) para 31 (<http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&>).

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

linguistic diversity and complexities at the court. Sierra Leone has 17 ethnic groups that are classified into two language families – the *Mande* and West Atlantic.<sup>94</sup> In the first group are the *Mende, Vai, Kono, Loko, Koranko, Soso, Yalunka* and *Mandingo*.<sup>95</sup> The West Atlantic group comprises the *Temne, Limba Bullom, Sherbro, Kissi, Gola, Krim, Fula* and *Creole (Krio)*.<sup>96</sup> Accused persons, witnesses and victims of crimes under the purview of the court originate from different groups. The special court provides translation and interpretation between six main Sierra Leonean languages and English.<sup>97</sup> The court has used chain translations; *Mende* testimony is sometimes translated first to *Krio* and then English.<sup>98</sup> In the *CDF Case*,<sup>99</sup> every word said in the courtroom had to be interpreted into the languages of the accused including *Mende*.<sup>100</sup> In the words of Prof. Cassese - the independent expert in a report on the court, the situation is even more complex.<sup>101</sup>

Other key participants in proceedings such as defence counsel further broaden the language varieties of ICTs. Defence counsel constitute a multinational pool of legal expertise building upon individual counsel's experience in their originating jurisdictions. In international criminal trials, linguistic barriers may exist amongst counsel on the same defence teams. The failure of communication in a defence camp leads to inadequate representation of the accused and negates the purpose of engaging more than one lawyer. For instance, when John Floyd (US) was appointed counsel to the defence team of Hassan Ngeze,<sup>102</sup> the lead counsel-Patricia Mongo (DRC) claimed not to speak any English but French only. Since Floyd spoke English only, the assistant counsel, who was also from the DRC, provided interpretation.<sup>103</sup> Floyd gives an account of how Mongo evaded all his questions through the language barrier.<sup>104</sup> Thus, language is significant in facilitating legal expertise to the defence of the accused; counsel need to discuss

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<sup>94</sup> See JAD Alie *A New History of Sierra Leone* (1985) 1.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> Report on SCSL (12 December 2006) (note 91 above) para 74. Languages include *Kono, Krio, Limba, Mandingo, Mende, & Temne*.

<sup>98</sup> Combs (note 24 above) 72.

<sup>99</sup> Civil Defence Forces (CDF) case (note 87 above).

<sup>100</sup> Report on SCSL (12 December 2006) (note 91 above) para 74.

<sup>101</sup> *Ibid.*

<sup>102</sup> In the *Media Case* (note 59 above).

<sup>103</sup> Floyd (note 60 above) 21.

<sup>104</sup> *Ibid.*

the case with a view to adopting a defence strategy. This is not possible in situations where they cannot communicate.

It is noteworthy that the law applicable to the ICTs entails provisions that further entrench linguistic diversity. For example, the ICTY has held that it is open to the registrar under Rule 44(B) of the tribunal's Rules of Procedure and Evidence,<sup>105</sup> to admit counsel who does not speak either of the two working languages of the tribunal but who speaks the native language of the accused, so long as this is done at the request of the accused, and where the interests of justice so demand.<sup>106</sup> This provision is justifiable in advancing the language fair trial rights of an accused person, in view of the mandatory right of the accused to use their language.<sup>107</sup> However, such provisions broaden the 'relevant languages bracket' and pose practical difficulties. The linguistic abilities of counsel who does not speak any of the working languages of the court are not likely to tally with those of the court's personnel. Such counsel would require translation for each intervention at whatever level, hence increasing operational delays.

In conclusion, language diversity and accompanying obstacles are prevalent in international criminal practice. However, ICTs have devised measures to control the impact of linguistic impediments on fairness of trial.

### **(c) Structural provisions for linguistic diversity in international criminal practice**

The diversity of linguistic competency at the ICTs, as illustrated above, has necessitated the formulation of working strategies that accommodate multilingualism. These strategies relate to both oral and written communication. The first measure is normative provision for official and working languages which represent the language proficiency of participants.<sup>108</sup> Noteworthy, the

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<sup>105</sup> ICTY Rules of Procedure & Evidence (RPE) IT/32 (adopted on 11 February 1994) as amended.

<sup>106</sup> *Prosecutor v Mile Mrkšić & ors* IT -95-13/1-PT 7 Decision on Appointment of Co-Counsel for Mile Mrkšić 7 October 2005 para 4.

<sup>107</sup> Under Rule 3B ICTY RPE (note 105 above).

<sup>108</sup> Official languages of the ICC include Arabic, Chinese, English, French, Russian, and Spanish (See Art 50 (1) & (2) ICC Statute UN Doc A/CONF 183/9 (adopted on 17 July 1998); the Statute and RPE of the ICTY and ICTR do not provide for official languages. The working languages of the sister tribunals are English and French. (see Article 33 ICTY Statute (note 33 above), Rule 3(A) ICTY RPE (note 105 above), Article 31 ICTR Statute (adopted by SC Res 955(1994) 8 November 1994), Rule 3(A) ICTR RPE

statute of the tribunal for Lebanon restricts the number of working languages applicable to any given trial to two of the three official languages.<sup>109</sup> This implies that a trial may not be conducted in more than two languages of the court hence limiting the complexities that arise from an additional language. However, the amendment to Rule 10 of the rules of procedure and evidence of the tribunal permits any participant in oral proceedings to use any one of the official languages.<sup>110</sup> Trial proceedings at the STL are yet to begin.

In practice, the courts have stretched their working language(s) capacities beyond the aforementioned legislative limits especially with regard to defendants, victims and witnesses. Witnesses have testified in *Lingala*, *Swahili*, and *Kingwana* before the ICC,<sup>111</sup> in *Kinyarwanda* before the ICTR, and in Bosnian, Croatian, Serbian, Albanian and Macedonian at the ICTY.<sup>112</sup> This flexibility is anticipated and enabled by the constitutive instruments. The statute of the ICC leaves room for any other official language of the court to be used as a working language,<sup>113</sup> and for the court to authorise a language other than English and French to be used by any party to the proceedings.<sup>114</sup> Whereas the regulations of the court require all documents and materials filed with the registry to be in English or French,<sup>115</sup> an exception is made in Regulation 39 (2) for unrepresented victims who do not have sufficient knowledge of the working language of the court or any other language authorised by the chamber or the presidency.<sup>116</sup> Most importantly, if a participant is authorised by the chamber to use another language apart from English and

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UN Doc ITR/3/REV 1 (29 June 1995) as amended; the official languages of the Special Tribunal for Lebanon are Arabic, English and French and the pre-trial judge or chamber may decide that one or two of the languages may be used as working languages (Art 14 STL Statute (annexed to Security Council Resolution 1757(2007) adopted on 30 May 2007), Rule 10 (A) STL RPE STL/BD/2009/01/Rev 1 adopted on 10 June 2009, as amended.

<sup>109</sup> See Article 14 STL Statute *ibid*.

<sup>110</sup> See Rule 10 (A) STL RPE *ibid*.

<sup>111</sup> See NS Nicholson 'Interpreting for the International Criminal Court: Linguistic Issues and Challenges' EULITA Conference (November 2009) (<http://eulita.eu/sites/default/files/Interpreting%20at%20the%20ICC.pdf>).

<sup>112</sup> 'ICTY Translation and Interpretation' (<http://www.icty.org/sid/165> ).

<sup>113</sup> See Art 50 (2) ICC Statute (note 108 above).

<sup>114</sup> Article 50 (3) ICC Statute *ibid*.

<sup>115</sup> Regulation 39 (1) Regulations of the International Criminal Court ICC-BD/01-01-04 (adopted on 26 May 2004).

<sup>116</sup> Regulation 39 (2) Regulations of the ICC *ibid*.



French, the ICC has to bear the expenses for interpretation and translation.<sup>117</sup> Thus, the official and working language provision is justifiably a functional standard for the personnel of the court.

At the ICTY, an accused person has a mandatory right to use their language.<sup>118</sup> Other persons appearing before the tribunal may also be permitted to use their language(s).<sup>119</sup> This privilege extends to counsel for the accused who may apply to use a language other than the two working languages of the court or the language of the accused.<sup>120</sup> However, there is no legislative requirement that the accused should understand the language used by such counsel. Likewise, an accused person at the STL has the right to use their language, and this right may also be exercised by other persons appearing before the tribunal in the exception of counsel.<sup>121</sup> The exemption of counsel is justifiable because they participate in the proceedings not in their own right but as representative(s) of the accused and officer(s) of court. Thus, they should be able to use the language of court or of the accused person. It is noteworthy that it is only the accused, as a subject of trial, who is guaranteed the right to use their language.

With regard to court documents and outcomes of proceedings, decisions on any written or oral submissions at the STL must be made in English or French; it is only judgments, sentences, decisions on jurisdiction and other decisions which the pre-trial judge or chamber decides address fundamental issues that must be translated into Arabic.<sup>122</sup> Translation, as opposed to interpretation, is a proven time-consuming and costly undertaking that legislative restrictions are highly desirable. At the ICC, it is judgments of the court as well as other decisions resolving fundamental issues as may be determined by the presidency for purposes of publication that are published in the official languages of the court.<sup>123</sup> The ICTY translates indictments and judgments into English, French, Bosnian, Croatian, Serbian, and where appropriate, Albanian

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<sup>117</sup> Regulation 39(3) Regulations of the ICC *ibid*.

<sup>118</sup> Rule 3(B) ICTY RPE (note 105 above).

<sup>119</sup> Rule 3(C) ICTY RPE *ibid*

<sup>120</sup> Rule 3(D) ICTY RPE *ibid*.

<sup>121</sup> See Rule 10 (D) STL RPE (note 108 above): Persons who do not have knowledge of the official languages may be authorised to use their own language; Article 50 (3) ICC Statute (note 108 above): Upon request, the court may authorise a language other than English or French to be used by a party or state; Rule 3(C) ICTY RPE (note 105 above): Persons who do not have sufficient knowledge of English or French may use their own language; Rule 3(C) ICTR RPE (note 108 above).

<sup>122</sup> Rule 10(E) STL RPE (note 108 above).

<sup>123</sup> Article 50 ICC Statute (note 108 above).

and Macedonian; documents tendered as evidence at trial, as well as motions to the court, are translated into one of the official languages.<sup>124</sup> The practice of translating court process and evidentiary documents lends constructively to criminal procedure in national jurisdictions where official languages are predominantly used irrespective of whether they are understood by targeted persons.

The operative linguistic space is further broadened by open provisions that permit participants to use their language(s).<sup>125</sup> In addition to the two working languages of the court (English and French), the accused may use their language, and the witnesses speak a different language from that in which documents are tendered in evidence. Consequently, international courtrooms are densely multilingual. For instance, ICTY trials are conducted in at least three to four languages,<sup>126</sup> with ICC proceedings running in up to five different languages.<sup>127</sup> However, English is more commonly used. Native English speakers particularly have a distinct advantage; they communicate more easily and can react on their feet.<sup>128</sup> The position of English as the language for international communication is a very strong one and is expected to become stronger, due to the need for a common global language or *lingua franca*.<sup>129</sup> Almost 80 percent of the documents and official correspondences of ICTs are originally drafted in English.

ICTs have also integrated in-house translation services. Language divisions have become an indispensable constituent of the courts.<sup>130</sup> The introduction of interlocutory means of

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<sup>124</sup> See 'ICTY Translation and Interpretation' (note 112 above).

<sup>125</sup> See Rule 10 (D) STL RPE (note 108 above): Other persons appearing before the court, who do not have sufficient knowledge of the official languages may use their own language.

<sup>126</sup> For example *Prosecutor v Ratko Mladić* IT-09-92 (English, French, Serbo-Croatian); *Prosecutor v Vujadin Popović* IT-02-57 (English, French, Bosnia/Croatian/Serbian, Serb-Croat). See also 'ICTY Translation and Interpretation' (note 112 above).

<sup>127</sup> *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 (note 74 above) (English, French, Swahili, Lingala, Kigwana).

<sup>128</sup> V Tochilovsky 'Globalizing Criminal Justice: Challenges for the International Criminal Court' (2003) 9 *Global Governance* 291, 295.

<sup>129</sup> See Gotti (note 32 above) 59.

<sup>130</sup> ICTY: Conference and Language Service Section (CLSS); ICTR: Language Services Section; ICC: Court Interpretation and Translation Section, and the Language Services Unit of the Office of the Prosecutor. See M Keating 'The International Criminal Court: An Introduction' (January–February 2005) (<http://www.aiic.net/ViewPage.cfm/page1660.htm>).

communication by way of translation and interpretation raises issues affecting due process. These concerns are subsequently highlighted in the thematic overview.

#### **(d) Problematic multilingual court communication patterns**

Interactions that reveal language difficulties in a multilingual courtroom include (i) communication amongst judges: deliberations amongst judges with divergent linguistic abilities are limited and even slower.<sup>131</sup> Discussions of such judges would have to be systematically convened sometimes necessitating translation. A situation of disproportionate distribution of linguistic proficiency among the members of the bench presents a likelihood of comparative advantage for the majority of the judges that share a particular language; naturally, they dominate the deliberations because of their ability to participate spontaneously hence undermining the role of the others that may require communicative assistance through translation.

(ii) Communication amongst counsel; and (iii) communication between counsel and the defendant(s). Vladimir Tochilovsky - lead prosecution counsel at the ICTY, rightly notes that linguistic proficiency, both oral and written, is one of the most crucial requirements in legal practice.<sup>132</sup> John Floyd's experience in the Media trial at the ICTR illustrates the extent of linguistic obstacles amongst counsel and between counsel and their clients. In that case, communication between the French-speaking lead counsel and the English-speaking co-counsel (Floyd) failed.<sup>133</sup> Floyd's interview with his client (Hassan Ngeze) was equally difficult and took approximately thirty hours partly because they did not speak the same language; Ngeze could only speak French and *Kinyarwanda* fluently.<sup>134</sup> Floyd was later to take on the case as lead counsel. He bought his client a DVD player and supplied him with American movies to help him learn English.<sup>135</sup> Such desperate measures illustrate the essence of language and communication between counsel and the client.

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<sup>131</sup> Wald (note 42 above) 92.

<sup>132</sup> See Tochilovsky (note 128 above) 295.

<sup>133</sup> Floyd (note 60 above) 21.

<sup>134</sup> Ibid 19, 23.

<sup>135</sup> Ibid 29.

Similarly, the defence in the case of *Momcilo Krajišnik* (ICTY) requested an immediate six months suspension of the proceedings on grounds of language difficulties, that is, the lack of Bosnian, Croatian, and Serbian (BCS) speakers on the team.<sup>136</sup> Noteworthy, the trial chamber refused the adjournment upon the observation that the defence team's language difficulties were about staffing issues which could not be solved by adjournment of the trial.<sup>137</sup> The defence appealed the decision arguing that the trial chamber's failure to give sufficient weight to the practical effects of the language difficulties in the case was an error on its part.<sup>138</sup> Such effects are impediments to the minimum guarantees of the accused to fair trial, which further challenge the integrity of the process. Krajišnik's defence further contended that whatever the composition and balance of the overall defence team the language issue was and would remain a major consideration in the handling of the case. Particularly, the more active the accused was in his defence, the more resources would be needed to facilitate communication. In other words, costs of communication with the defendant in that case were inevitable. These costs add up to the total cost of international criminal justice.

*Krajišnik* also appealed the trial chamber's decision to reject the application for trial transcripts to be made available in his language arguing that it increased the burden on him as he had to work from tapes.<sup>139</sup> The appeal chamber's decision disregarding *Krajišnik*'s argument illustrates that linguistic obstacles are sometimes ignored by the courts because the probable remedies may be burdensome to the court such as translating volumes of transcripts. The burden is therefore left to lie where it falls, usually on the accused, who is already encumbered by criminal allegations of an international magnitude.

Further problematic interactions as subsequently illustrated in this report include (iv) communication between counsel and the bench; (v) communication between prosecution and the bench; (vi) communication between witnesses and the prosecution; (vii) communication between

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<sup>136</sup> *Prosecutor v Momcilo Krajišnik* IT-00-39-AR73.1 Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment (25 April 2005) para 60.

<sup>137</sup> *Ibid* para 23.

<sup>138</sup> *Ibid* para 60.

<sup>139</sup> *Ibid*.

counsel and witnesses; (viii) communication between counsel and the prosecution; (ix) communication between the bench and defendants; (x) communication between the bench and witnesses; (xi) transmission of information from participants to language service provider(s): transcriber(s), interpreter(s), translator(s). Linguistic obstacles therefore affect all categories of participants at all levels of communication in the trial process.

### **(e) Selected themes of the language debate in international criminal justice**

#### *(i) Multilingualism vis-à-vis Multiculturalism*

*‘...culture and cultural differences have been and will continue to be an undeniable fact of life for all parties involved with international tribunals’.*<sup>140</sup>

Cultural diversity manifests in various components of international criminal practice ranging from the operative legal systems to the conduct of participants. The interface between multilingualism and multiculturalism results from the indivisibility of language and culture. Jiang affirms that a language is a part of a culture and a culture is a part of a language; the two are intricately interwoven that one cannot separate them without losing the significance of either.<sup>141</sup> The language of a people comprises their historical and cultural backgrounds, as well as their approach to life and their ways of living and thinking.<sup>142</sup> Thus, a multilingual trial is multicultural; the evidence adduced in a trial is derived from the events of people’s lives and their perception of such experiences. Culture constitutes the evidence and informs the verdict. A crime in any given society is what is thought as transgression. Cultural aspects therefore represent an important conditioning factor in the construction and interpretation of legal discourse.<sup>143</sup>

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<sup>140</sup> IL Bostian ‘Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda’ (2005) 12 *ILSA J of Int & Comp L* 1, 12.

<sup>141</sup> See W Jiang ‘The Relationship between Culture and Language’ (October 2000) 54 *ELT J* 328-334 (<http://eltj.oxfordjournals.org/cgi/reprint/54/4/328>).

<sup>142</sup> Ibid.

<sup>143</sup> Gotti (note 32 above) 55.

Communicating across languages in a trial involves communicating across cultures.<sup>144</sup> Communicative competency includes mastery not only of grammatical rules but also of a set of cultural rules that include specification of the appropriate ways to apply the grammatical rules in speech situations.<sup>145</sup> A story is told of an Indian official who, on finding his British superior laboriously correcting a letter he had drafted to a brother Indian official, remarked, ‘Your honour puts yourself to much trouble correcting my English and doubtless the final letter will be much better literature; but it will go from me Mukherji to him Bannerji, and he Bannerji will understand it a great deal better as I Mukherji write it than as your honour corrects it.’<sup>146</sup>

The appeals chamber of the Special Court for Sierra Leone specified the way English would be used as the language of court; it had to be ‘comprehensible and considered’.<sup>147</sup> This specification involves cultural connotations. Notably, cross-cultural communication difficulties arise even within the same language but the issues associated with multicultural participation in international criminal proceedings are broader.<sup>148</sup> The participants in the trial especially the accused, witnesses and victims as well as the entire affected populations come from different cultures than those that shape the international criminal institutions and have dominated international law.<sup>149</sup> Arguably, this lack of ‘cultural proximity’ undermines the ability of the participants to present their claims, lines of argument, stories and concerns in a way that is readily understood by the court officials, which in turn diminishes the worth of the proceedings for participants.<sup>150</sup> More importantly, it may undermine the objective of trial fairness.

Further, the proper understanding of the evidence necessitates cognisance of the cultural context within which it is presented. In *Akayesu*, the ICTR observed that certain *Kinyarwanda* terms were infused with special meaning that could only be understood within the context of the Rwandan culture: (i) the basic meaning of the term ‘*inyenzi*’ is ‘cockroach’ but the term had also

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<sup>144</sup> Karton (note 12 above) 27.

<sup>145</sup> B Danet ‘Language in the Legal Process’ (1980) 14 *Law & Society R* 445,454.

<sup>146</sup> See Ernest Gowers *The Complete Plain Words* (1962)13.

<sup>147</sup> See *CDF Case* (note 87 above) Decision on Amendment of the Consolidated Indictment 16 May 2005 para 48.

<sup>148</sup> Karton (note 12 above) 27-28.

<sup>149</sup> Ibid 28.

<sup>150</sup> Ibid citing J Almqvist ‘The Impact of Cultural Diversity on International Criminal Proceedings’ (2006) 4 *J Int’l Crim Just* 748-749.

been used to refer to the incursions of Tutsi refugees since the 1960s, and it was later used by anti-Tutsi extremist media to refer to all Tutsi.<sup>151</sup> (ii) The term ‘*ibytso*’, which literally means ‘accomplice’, evolved in the early 1990s to refer to all Tutsi.<sup>152</sup> The international tribunal had to conduct an independent inquiry into the correct usage of the aforementioned terms. In the Lubanga case (on conscription of child soldiers), intense controversy surrounded the use of the term ‘*kadogo*’ a *Swahili* word meaning ‘small one’ as referring to small children recruited into the rebel forces; this term is commonly used in the Swahili speaking African countries to refer to ‘little persons’ in the military. As the chamber heard, these persons could be below or above the age of 18 years.<sup>153</sup>

The ICTR also found broader cultural factors that were affecting witness testimony. Expert evidence was adduced that: (i) most Rwandese live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else.<sup>154</sup> Thus, during the examination of certain witnesses, it was at times clarified that evidence which had been reported as eyewitness account was in fact a second-hand account of what was witnessed.<sup>155</sup> The court made a consistent effort throughout the trial proceedings to ensure that a distinction was articulated by the witnesses between what they had heard and what they had seen.<sup>156</sup> (ii) It is a particular feature of the Rwandan culture that people are not always direct in answering questions especially if the question is delicate.<sup>157</sup> Several witnesses were reluctant or unwilling to state that the ordinary meaning of the term ‘*inyenzi*’ was cockroach although any Rwandan would know the ordinary meaning of the word.<sup>158</sup> In such cases, the answers given will very often have to be ‘decoded’ in order to be understood correctly. The interpretation would depend on the context, the particular

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<sup>151</sup> *Prosecutor v Jean-Paul Akayesu* (note 55 above) para 148. See also Bostian (note 140 above) 24- Throughout the 1960s incursions on Rwandan soil were carried out by some of these refugees, who would enter and leave the country under the cover of the night, only rarely to be seen in the morning. This activity was likened to that of cockroaches, which are rarely seen during the day but often discovered at night, and accordingly these attackers were called *Inyenzi*.

<sup>152</sup> *Akayesu* *ibid* para 150.

<sup>153</sup> See *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04/01/06 Judgment pursuant to Article 74 of the statute 14 March 2012 paras 636, 637, 640, 689.

<sup>154</sup> *Akayesu* Judgment 2 September 1998 (note 55 above) para 155.

<sup>155</sup> *Ibid*.

<sup>156</sup> *Ibid*.

<sup>157</sup> *Ibid* para 156.

<sup>158</sup> *Ibid*.

speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question.<sup>159</sup> The chamber was tasked with evaluating the responses of witnesses in light of the aforementioned cultural specific factors but it decided not to draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions.<sup>160</sup> The benchmarks of witness credibility were overshadowed by cultural dynamics. The standards upon which the tribunal determined reliable witness evidence are not clear.

Kelsall takes note of the laboured, tortuous, and inconclusive nature of many of the encounters between counsel and witnesses at the Special Court for Sierra Leone; the witnesses and many of the lawyers were evasive.<sup>161</sup>

‘Witnesses fell back on a repertoire of culturally prized linguistic strategies designed to protect them from the possibly malefic intentions of potential adversaries. They hedged, they qualified, they equivocated, they evaded, and in many cases they ran rings around the lawyers, problems compounded by a slipshod investigation and a witness protection regime that provided witnesses incentives to lie.’<sup>162</sup>

From Kelsall’s knowledge of anthropological literature, he knew that this was not necessarily because witnesses were telling lies; much would hinge on how the judges would interpret evasive speech genres, an exercise that is guided by cultural perspective(s).<sup>163</sup> The judges’ awareness of the cultural view point was crucial. Kelsall rightly concludes that-

‘Truth is not simply ‘out there’ waiting to be discovered. Each society has its regime of truth, its ‘general politics’ of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is

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<sup>159</sup> Bostian (note 140 above) 25.

<sup>160</sup> *Prosecutor v Jean- Paul Akayesu* (note 55 above) para 156.

<sup>161</sup> See T Kelsall *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (2009) 22.

<sup>162</sup> Ibid 35.

<sup>163</sup> Ibid.



sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true...'<sup>164</sup>

Thus, the effectiveness of ICTs in discovering the truth is dependent on their appreciation of the local cultural dynamics of the truth. International tribunals learn these cultural peculiarities through experience and this process is not devoid of misunderstandings.

Multiculturalism is further entrenched in criminal proceedings by translation and interpretation. Interpretation is so much more than just word substitution because the interpreter does not translate words but translates meaning. In many instances, the interpreter is interpreting cultural import and has got to have some cultural understanding.<sup>165</sup> Noteworthy, interpreting the full contextual meaning of an utterance accurately requires the interpreter to possess a high level of cross-cultural awareness.<sup>166</sup> At Nuremberg, the chief interpreter for most of the trial-Peter Uiberall found when he became chief that the interpreters had consistently been translating the German 'ja' as 'yes'.<sup>167</sup> While 'ja' can mean 'yes', it is most often used as a space-filler by German speakers in the way that English speakers might begin with 'um' or 'well' when responding to a question.<sup>168</sup> Interpreted literally, the utterance could amount to an admission of guilt hence compromising the right of the accused person against self-incrimination.<sup>169</sup> This right is fundamental to fair trial.

At the Tokyo tribunal, most of the interpretation inaccuracies stemmed from the different styles of Japanese and English speech because 'the Japanese language is less direct than English'; Japanese defendants appeared to be circumventing questions when their speech merely conformed to the norms of Japanese indirectness.<sup>170</sup> Combs reveals that the interpreters at times sought to remedy this problem by interpreting Japanese answers in the direct way that the English speaking lawyers expected, but they distorted the testimony they were conveying in the

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<sup>164</sup> Ibid.

<sup>165</sup> See K Alfisi 'Language Barriers to Justice' Washington Lawyer (April 2009) 20 (<http://www.legalaidddc.org/pressroom/documents/WashingtonLawyer409LanguageBarriersToJustice.pdf>)

<sup>166</sup> See V Benmaman 'Legal Interpreting: An Emerging Profession' *The Modern Language J* (1992)76 445, 446.

<sup>167</sup> Gaiba (note 7 above) 105-106.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> Combs (note 24 above) 69.

process.<sup>171</sup> Such effects of attempts to evade the language and cultural barrier damage the foundations of justice. Mistakes in interpretation as a result of cultural misunderstanding have also been registered at the Special Court for Sierra Leone. CDF witness TF2-021 was asked if the murder he had committed was reported to his commander.<sup>172</sup> Although the transcript reports that the witness said ‘no’, and counsel thought that the witness had actually said ‘no’,<sup>173</sup> the Sierra Leonean judge was convinced otherwise.<sup>174</sup> When asked a second time, the witness’s ostensible answer, in *Krio*, again was ‘no’,<sup>175</sup> but the Sierra Leonean judge-Justice Rosolu John Bankole Thompson persisted, convinced that the witness had in fact said ‘yes’. After the question was asked the third time, it became clear that the witness had indeed reported the killing to his commander.<sup>176</sup> The interpretation and understanding of the response of the witness was integral to the case in as far as it substantiated command responsibility. In the same case, witness Albert Nallo (CDF witness TF2-014) was interpreted as saying that ‘we beat him’ when he had actually said ‘we tabbied him’ which meant that they had tied him neatly.<sup>177</sup> The only reason that these and other mistakes came to light was that SCSL trials included a Sierra Leonean judge and Sierra Leonean defence counsel who were knowledgeable in the cultural communicative dynamics.<sup>178</sup> It is symbolic to note that ‘interpretation’ is a cross cutting component of judicial proceedings. It transcends the confines of the professional service of transmitting communication in a different language from the one in which it is conveyed. In the fact finding process, judges, counsel, and other participants seek to give meaning to all forms of communication in the courtroom hence interpreting it; the process engages cultural underpinnings. Multiculturalism particularly influences translation and interpretation in the trial process.

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<sup>171</sup> Combs *ibid* citing Maga (note 24 above) 15-16.

<sup>172</sup> See CDF Transcript (note 87 above) 3 November 2004 paras 27, 28.

<sup>173</sup> *Ibid* paras 11, 12, 19, 20.

<sup>174</sup> *Ibid*.

<sup>175</sup> *Ibid* para 15.

<sup>176</sup> *Ibid* para 4.

<sup>177</sup> See CDF Transcript (*ibid*) 10 March 2005) 48-49.

<sup>178</sup> See Charles Margai’s (Counsel from Sierra Leone) explanation of the term ‘tabbied’ to court: ‘Yes, my Lords, the witness did not say anything about beating. He said: ‘we ‘tabbied’ – We tabbay him very very well.’ That means tie him neat or he can explain it, but it’s not beating’- CDF Transcript *ibid* 10 March 2005, 49 paras 5-7.

- Paralinguistics

The accuracy of interpretation in a multicultural working environment is further complicated by paralinguistic forms of communication. Paralinguistic aspects of a speaker's communication include the speaker's body language, linguistic style and nuance, pauses, hedges, self-corrections, hesitations and displays of emotion.<sup>179</sup> Linguists have long recognised that humans communicate not just in words but also in facial expressions, posture, tone of voice, and other manifestations.<sup>180</sup> These forms of communication are central to the assessment of the demeanour of witnesses. Gaining a clear understanding of paralinguistic forms of communication is made difficult by cultural differences and the interposition of an interpreter.<sup>181</sup>

Contemporary modes of testifying at ICTs such as the use of video links, and distortion of voices and faces in protecting witness identities further minimise the opportunity of deciphering paralinguistics accurately. Some scholars have taken the argument further by contending that for nearly all the participants in an international criminal proceeding, the law, process, and physical context of the trial are alien; even if all the words spoken in a trial are correctly translated, the cultural gap between court officials and counsel on one side, and participants on the other, makes it impossible for the participants to participate fully in the trial.<sup>182</sup> This assertion is true to the extent that international trials are a learning process for all participants; as international personnel seek to understand the cultural context of their operations, the victims and witnesses are often overwhelmed by the clout of the proceedings that some are intimidated and others excited into exaggerating for effect, hence misleading the court.

*(ii) Translation as an aid to the trial process*

Translation is a key aspect of support to judicial proceedings. The term 'translation' refers to the transfer of thoughts and ideas from one language (source language) into another (target

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<sup>179</sup> Karton (note 12 above) 24.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid 25.

<sup>182</sup> See Almqvist (note 150 above) 748-749.

language) in either written or oral form.<sup>183</sup> It broadly includes interpretation although interpreting strictly relates to oral communication.<sup>184</sup> The latter is the contemporaneous rendering of utterances into their equivalents in another language.<sup>185</sup>

#### (aa) History of translation in international criminal proceedings

Interpreting complex multilingual proceedings did not exist in any recognisable form until around 1920.<sup>186</sup> Prior to World War I, diplomats of every country spoke French.<sup>187</sup> At the League of Nations and inter-war conferences, the desire to accommodate as many countries as possible led to the first use of consecutive interpretation.<sup>188</sup> The early consecutive interpreters would take notes as a participant was making their speech, and then deliver the entire speech in the target language.<sup>189</sup> This was followed by the adoption of the Filene-Findlay translation system.<sup>190</sup> Pre-translated speeches were broadcast simultaneously in different languages, and a selector switch at each seat enabled a participant to choose a language in which to listen to the speech.<sup>191</sup> This system was not really simultaneous interpretation.

Simultaneous interpretation into multiple languages was developed for the first Nuremberg trial.<sup>192</sup> At the planning stage of the trials, the need for spontaneous, immediate, multilingual interpretation became obvious.<sup>193</sup> US Colonel Leon Emile Dostert, who had been General Eisenhower's personal interpreter during the World War II was the first to realise that the Filene-Findlay equipment, with some modifications, could be used for the spontaneous and immediate interpretation needed at Nuremberg.<sup>194</sup> Under Dostert's direction, the technical problems were

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<sup>183</sup> Karton (note 12 above) 17.

<sup>184</sup> Ibid 4.

<sup>185</sup> Ibid 17.

<sup>186</sup> Gaiba (note 7 above) 27.

<sup>187</sup> Karton (note 12 above) 19.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Gaiba (note 7 above) 34-35.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

largely solved, and he became the first chief interpreter at the Nuremberg trials.<sup>195</sup> This mode of interpretation is usually done with the aid of electronic equipment: communication occurs through a wired system of microphones and headphones.<sup>196</sup> Interpreters hear the original speech through headphones and translate it into the language to which they are assigned.<sup>197</sup> By means of a selector switch, listeners can choose one of the various language channels in order to hear either the original speech or the interpreted version of their preference.<sup>198</sup> With this system, there is no need to pause after every sentence and wait for the translation as happens with consecutive interpretation.<sup>199</sup> The Nuremberg system set the standard for interpretation used today in ICTs.<sup>200</sup> The system is still a celebrated development in as far as it conveys translated messages almost immediately. Its efficacy is however overshadowed by the concerns raised by the broader subject of translation in a trial.

It is important to note that simultaneous interpretation can occur without equipment, also known as whispered interpreting or *chuchotage*; there is no use of microphones and head phones.<sup>201</sup> Whispered interpreting is commonly used in national courts where there is no electronic equipment in courtrooms. Interpreters sit next to the people who do not understand the working language and whisper the translation in their ears. In this context, the word ‘simultaneous’ is misleading because the interpreters have to understand a minimum of information before they can translate it into the target language.<sup>202</sup> There is a time lag between the original and the interpreted version and its length varies according to the interpreters.<sup>203</sup> The whispering method raises questions relating to monitoring and evaluating interpretative performance considering that it is only the recipient, who does not usually understand the source language, who hears what the interpreter says; the court does not have the benefit of hearing the interpretation and assessing its accuracy.

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<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid 30.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

<sup>203</sup> The time lag is referred to as *décalage* *ibid*.

#### (bb) Significance of translation in the trial process

Interpretative assistance is not only an aid to proceedings but also a fundamental right of a criminal defendant. Among the minimum guarantees of the accused is the entitlement to free assistance of an interpreter if they cannot understand or speak the language used in the proceedings.<sup>204</sup> It is symbolic to note that the statute of the International Criminal Court further develops the right to interpretation by: (i) emphasising exoneration of the defendant from any cost, whatsoever, for the interpretation; (ii) providing expressly for translation of documents; and (iii) specifying the quality of service.<sup>205</sup> Article 67(1) (f) of the ICC Statute also advances the criterion of qualifying for translation as where the proceedings or documents are not in a language which the accused ‘fully’ understands and speaks. Thus, it elevates the standard of linguistic competency to one of ‘full understanding’ and ‘full ability to speak’ from one of ‘ability to understand or speak the language used in court’ as provided for by similar provisions of the ICTR and ICTY Statutes. Complete fluency was emphasised by the appeals chamber in the *Germain Katanga case*.<sup>206</sup> This is a progressive development of language fair trial rights; unless the accused is fully competent in the language of the court, interpretation must be provided.

#### (cc) Disadvantages of translation in the trial process

Translation of judicial proceedings is facilitated by human and financial resources. It introduces resource demands of both time and cost on the process of procuring justice. These resources are at times not available or inadequate.<sup>207</sup>

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<sup>204</sup> See Article 21(4) (f) ICTY Statute (note 33 above); Art 20(4) (f) ICTR Statute (note 108 above); Art 16(4) (g) STL Statute (note 108 above); Art 17(4) (f) SCSL Statute (note 86 above); Art 35(f) Law on the Establishment of the Extra-Ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea (Law on ECCC) as amended NS/RKM/1004/006 (promulgated on 27 October 2004).

<sup>205</sup> Article 67(1) (f) ICC Statute (note 108 above) stipulates that the accused is entitled to have, free of any cost, the assistance of a competent interpreter, and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the court are not in a language which the accused fully understands and speaks.

<sup>206</sup> Note 34 above.

<sup>207</sup> Wald (note 42 above) 92.

Similarly, translation is a characteristic of ICTs that extends proceedings.<sup>208</sup> The delays it causes sometimes result in exclusion of evidence as illustrated by the *Krajišnik* and *Plavšić* decision on defence motion to exclude evidence and limit the scope of trial.<sup>209</sup> Pursuant to the decision, the prosecution was precluded from introducing into evidence any document not translated into one of the working languages of the ICTY and disclosed to the defence in that language by 1 July 2002.<sup>210</sup> A trial is based on the evidence adduced, when translation forms a basis upon which evidence is excluded, it is counterproductive.

Disputes relating to accuracy of interpretation or discussion about the accuracy of translations contribute to slowing down proceedings.<sup>211</sup> Combs rightly notes that there is every reason to believe that many of the most frustrating and incoherent exchanges appearing in international tribunal transcripts result at least in part from misinterpretations.<sup>212</sup> A case in point is the *AFRC* Case (SCSL),<sup>213</sup> there were recurring issues of inaccurate translation illustrated in cross-examination of a witness who, when confronted with transcripts of his evidence in chief consistently denied that the information was correct, and attributed the incorrectness to interpretation.<sup>214</sup> Such controversies cannot be disregarded and they are time consuming.

The highly technical process of translation entails a high probability of error. Karton notes that when courtroom interpreters translate a witness' testimony, errors are not just possible; they are inherent to the process.<sup>215</sup> Forms of inaccurate interpretation include (i) improper rendering of words or concepts into their equivalents,<sup>216</sup> (ii) omissions, (iii) additions, and (iv) distortions. Transmission of inaccurate communication in a judicial process potentially jeopardises the position of participants, and the credibility of the trial.

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<sup>208</sup> See Report on SCSL (note 91 above) para 74.

<sup>209</sup> *Prosecutor v Momčilo Krajišnik & Biljana Plavšić* IT-00-39 & 40-PT Decision on Defence Motion to Exclude Evidence and Limit Scope of Trial *Krajišnik & Plavšić* (18 June 2002).

<sup>210</sup> Tochilovsky (note 128 above) 296.

<sup>211</sup> See Report on the Special Court for Sierra Leone (note 91 above) para 74.

<sup>212</sup> Combs (note 24 above) 78.

<sup>213</sup> *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu* (SCSL-04-16-T) (AFRC case).

<sup>214</sup> AFRC *ibid* Transcript (2 October 2006) 81, Transcript (5 October 2006) 54; See also Special Court Monitoring Program Update #89 Week ending 6 October 2006 (<http://socrates.berkeley.edu/~warcrime/documents/Report89.pdf>.)

<sup>215</sup> Karton (note 12 above) 1.

<sup>216</sup> *Ibid* 8.

Further, translation introduces a ‘third party’ to the proceedings - the interpreter, whose role is not practically definite. In the case of *Zejnir Delalić*,<sup>217</sup> the court held that the interpreter is not one of the parties to the proceedings. S/he is an officer of the international tribunal, and for the purposes of providing interpretation before a chamber, an officer of the chamber in question.<sup>218</sup> As such, the interpreter has the status of an impartial third party in furtherance of the administration of justice. The aforementioned position expresses the prevalent judicial assumption that the presence of a court interpreter at a proceeding has no impact of its own on the progression of a judicial event.<sup>219</sup> Berk-Seligson is of the view that the judicial assumption is fallacious and that the presence of a foreign language court interpreter does indeed alter the normal flow of events in the courtroom.<sup>220</sup> In particular, the interpreter is an intrusive element in the courtroom setting, whose intrusiveness has serious implications for those who wish to control the testimony of witnesses and defendants.<sup>221</sup> Interpretation affects the forcefulness of questions posed to a witness during cross-examination. The time lag between the moment the question is posed and when the response is given, to allow interpretation to occur, offers opportunity for premeditated responses in the supposedly probing exercise. This is particularly detrimental where the witness understands the source language. Further, Judge Wald reveals that judges do not always repeat the witness’ testimony precisely when they ask a follow up question for it may be garbled in translation.<sup>222</sup> Thus, by intervening in the communicative process of participants, the interpreter inevitably influences the proceedings.

Interpreters also raise the likelihood of bias. In the case of *Isak Musliu*,<sup>223</sup> the appellant sought to challenge the use by the chamber of the services of an interpreter who was a member of the Association of Rwandan Media Women (ARFM), well known for their political activities, and

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<sup>217</sup> *Prosecutor v Zejnir Delalić & ors* IT-96 -21-T Decision on the Motion Ex parte by the Defence of Zdravko Mucic Concerning the Issue of a Subpoena to an Interpreter Ex parte Zdravko Mucic (8 July 1997).

<sup>218</sup> Ibid para 10.

<sup>219</sup> S Berk-Seligson *Bilingual Court Proceedings: The Role of the Court Interpreter* (2002) 156.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

<sup>222</sup> Wald (note 42 above) 90.

<sup>223</sup> *Prosecutor v Isak Musliu* IT-03-66-PT 21 Decision on Assignment of Defence Counsel (21 October 2003) ground (b).



backed by the Tutsi regime in Kigali, to interpret the testimony of women who had come to testify on rape. The said interpreter had just organised demonstrations in Kigali against sexual assault. The reliance of ICTs on the language services of persons originating from areas under the jurisdiction of the courts challenge the prime objective of hiring international personnel, which is to propel impartiality. Through translation, internationals depend heavily on the information transmitted by persons affected by the conflicts, as interpreters, to form the verdicts. The use of police officers as interpreters in national courts of developing countries such as Uganda is a salient issue of the language debate in criminal justice. Allegations of bias in interpreting are common but the mental element is difficult to prove, making it impracticable to litigate accountability of interpreters.

Existing scholarly attention on translation in international criminal practice focuses on how to make translation more efficient and representative. In view of the listed demerits, it may be pertinent to explore strategies of minimising reliance on translation.

*(iii) The rights perspective of the language debate in international criminal justice*

The development of a holistic approach to international criminal justice is characterised by integration of international human rights standards in international criminal law and practice. The constructive engagement of the two bodies of law has bolstered the significance of the right of the accused person to fair trial. Approximately 90 percent of decisions, judgments and pronouncements of ICTs reiterate the entitlement of the accused to minimum guarantees of fair criminal trial. The minimum guarantees constitute the contextual framework of language fair trial rights.

It is important to note that the main pre-occupation of language rights in international human rights law is in relation to the minority rights discourse; it concerns the legal situation of speakers of non-dominant languages or where there is no single dominant language.<sup>224</sup> On the other hand, the significance of the language question in criminal law is based on the centrality of language to the realisation of trial fairness. Language is the means of participating in the trial process and an

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<sup>224</sup> See X Arzoz 'Language Rights as Legal Norms' (2009) 15 *European Public L* 541, 544.

essential tool for pursuing justice; it enables parties to seek the protection and enforcement of their rights. The Supreme Court of Canada in *Reference re Manitoba Language Rights*<sup>225</sup> stated that -

the importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another and thus to live in society.<sup>226</sup>

(aa) Language fair trial rights

Chapter 3 of this report elaborates the position of language rights in the minimum guarantees of fair trial, as stated in Article 14(3) International Covenant on Civil and Political Rights (ICCPR).<sup>227</sup> The fair trial guarantees are reiterated in the constitutive documents of ICTs.<sup>228</sup> They include the right of the accused: (a) to be informed promptly and in detail, in a language that they understand, of the nature and cause of the charge(s) against them; (b) to have adequate time and facilities for the preparation of their defence, and to communicate with counsel of their own choosing; (c) to be tried without undue delay; (d) to be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; (e) to be informed of the right to legal assistance and legal aid; (f) to examine, or have examined, the witnesses against them; (g) to have free interpretative assistance if they cannot understand or speak the language used in court; and (h) not to be compelled to testify against her-or himself or to confess guilt.<sup>229</sup> As language fair trial rights: (a) the prompt and detailed information of the nature and cause of the charges against a person should be in the language which that person understands. (b) The accordance of adequate time and facilities to a person for the preparation of their defence

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<sup>225</sup> Supreme Court of Canada (1985) 1 SCR 721.

<sup>226</sup> Ibid 744.

<sup>227</sup> Adopted by GA Res 2200A (XXI) (16 December 1966).

<sup>228</sup> See Article 67(1) ICC Statute (note 108 above); Art 21(4) ICTY Statute (note 33 above); Art 20 (4) ICTR Statute (note 108 above); Art 16 (4) STL Statute (note 108 above); Art 17(4) SCSL Statute (note 86 above).

<sup>229</sup> Article 14(3) (a), (b), (c), (d), (e), (f), and (g) ICCPR respectively (note 227 above).

necessitates their comprehension of the proceedings, and provision of documents to the defendant in the language they understand. (c) Trial facilitation such as translation should not prolong the proceedings as to affect the timely conduct of the procedure. (d) The presence of the accused at trial and (e) the right to defence only have meaning if the accused person understands the proceedings, and can communicate competently to their defence, and so is the ability to avoid self-incrimination(h).<sup>230</sup> Further, examination of witnesses requires harmonious means of communication. More expressly, paragraph (f) provides for the right to free assistance of an interpreter if a person cannot understand or speak the language used in the court. The position of language rights in the minimum standards of fair criminal trial brings them to the core of the integrity of legal process.

The literal interpretation of Article 14 ICCPR leads to the conclusion that language rights are not standalone rights; they are constituents of the right to fair trial. This perspective situates language rights in the ambits of a fundamental right. The Commission on Human Rights emphasised the significance of the right to fair trial by expressing the view that the implementation of all the rights in the ICCPR depends upon the proper administration of justice that is addressed by Article 14.<sup>231</sup> On the other hand, language guarantees as components of the fair trial provision are obscured by the abstract understanding of the right; thus, they are often understood severally as privileges other than entitlements. Practice shows that ICTs tactfully counterbalance language fair trial rights with the overriding goal of a speedy hearing.

The enforcement of language fair trial rights by ICTs is particularly contentious. Although there is an unequivocal recognition of linguistic trial rights, the components of practice which propel the fulfilment of these rights have been selectively implemented. In *Radoslav Brdanin & anor*,<sup>232</sup> the accused complained that the tribunal did not provide him with sufficient resources properly and legally to prepare his defence, and that it had caused unnecessary delay by failing to provide sufficient translation services to the office of the prosecutor. He argued that the delays caused by

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<sup>230</sup> See discussion on 'Language Rights in the Minimum Guarantees of Fair Criminal Trial' in chapter 3.

<sup>231</sup> See *Travaux Préparatoires* of the ICCPR 5<sup>th</sup> Session (1949) 6<sup>th</sup> Session (1950) A/2929 Commission on Human Rights Chap VI 673 cited by MJ Bossuyt *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (1987) 279, 280.

<sup>232</sup> In *Prosecutor v Radoslav Brdanin & Momir Talić* Decision on Second Motion by Brdanin to Dismiss the Indictment IT-99-36-PT (16 May 2001).

these failures were in violation of his right to be tried without undue delay. Trial chamber II avoided the human rights wording advanced by the accused, and agreed to the contention of the prosecution that it was a resource issue which could be addressed by the registry under the directives. Realistically, finding the required balance warranties compromise among the various rights of the accused, and language fair trial rights have been undermined.

However, the plight of linguistic fair trial rights partly arises from their apparent vagueness. Arzoz argues that the practical meaning of language rights has not yet been established anywhere.<sup>233</sup> Language rights are generally concerned with the rules that public institutions adopt with respect to language use in a variety of different domains.<sup>234</sup> It is left to the discretion of the various institutions to determine the significance of those rights in their sphere of operation. Language rights therefore derive significance within a particular context. A linguistic human rights approach has only been successfully advanced for language rights in education.<sup>235</sup> Only the rights to learn and to use one's mother tongue, and to learn at least one of the official languages in one's country of residence can qualify as 'inalienable, fundamental linguistic human rights'.<sup>236</sup> The notion of linguistic human rights is less certain when taken outside the context of educational rights.<sup>237</sup> This study is intended to challenge this assumption by establishing the primacy of language fair trial rights in criminal justice.

#### (bb) Restricting linguistic rights as a fair trial consideration

Language fair trial rights are not absolute; their exercise is subject to conditions and limitations. Firstly, all trial rights can only be exercised within the ambits of the rules of procedure and evidence.<sup>238</sup> The right to translation is the most restricted linguistic guarantee in criminal practice. This right is seldom provided for by statute. With the exception of Article 55(1) (c) of the ICC Statute, which makes express reference to translation as an entitlement, the fair trial

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<sup>233</sup> See Arzoz (note 224 above) 544.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> *Prosecutor v Vidoje Blagojević, Dragan Jokić* IT-02-60-T Decision on Vidoje Blagojević's Oral Request (30 July 2004): the court held that the right to be heard can only be exercised within the ambits of the rules of procedure and evidence of the court.

provisions of other tribunals only address the right to an interpreter. Thus, the scope of the right to translation is a subject of judicial discretion and determination.

Judicial attempts at drawing the boundaries of the right to translation are characterised by determining materials which in any event must be submitted to the accused in the language that they understand. The rule is that the defendant's right to translation of documents into a language they understand extends neither to all documents in the case-file nor to all filings submitted.<sup>239</sup> ICTs have accordingly denied requests for translation of all documents, arguing that translation of every document may seriously jeopardise the defendant's right to be tried without undue delay because of the substantial time and resources required to translate so many documents.<sup>240</sup>

The guiding principle for determining documents for translation is laid down in Article 55 of the ICC Statute: it is those documents which are necessary to meet the requirements of fairness. Specifying the materials which must be translated in each particular case is left to the chamber. The issue is the extent to which the fairness test can be stretched in determining the scope of translation. The fairness principle does not grant the right to have all procedural documents and evidence translated.<sup>241</sup> The fact that not all documents on a defendant's file are in a language they understand is not a violation of their fair trial rights.<sup>242</sup> Providing a defendant with an interpreter may be an adequate substitute for provision of certain documents in a language the defendant understands.<sup>243</sup>

However, in any event, the following materials must be translated into the language of the accused (a) a copy of the indictment; (b) a copy of the supporting material which accompanied the indictment against the accused and all prior statements obtained by the prosecutor from the accused, irrespective of whether these items will be offered at trial; (c) statements of all

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<sup>239</sup> See S Blanchard 'An Assessment of the ECCC Order on Translation Rights and Obligations' ([http://www.cambodiatribunal.org/CTM/Ieng%20Sary,%20OCIJ,%20Order%20Concerning%20Translation%20Rights%20and%20Obligations%20of%20the%20Parties%20\(20%20June%202008\).pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avP1XmRZP6FzDQzg3&phpMyAdmin=KZTGHmT45FRCAiEg7OLizXFdNJ4](http://www.cambodiatribunal.org/CTM/Ieng%20Sary,%20OCIJ,%20Order%20Concerning%20Translation%20Rights%20and%20Obligations%20of%20the%20Parties%20(20%20June%202008).pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avP1XmRZP6FzDQzg3&phpMyAdmin=KZTGHmT45FRCAiEg7OLizXFdNJ4))).

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

witnesses (either in hard copy or in audio format) that the prosecutor intends to call to testify at the trial along with all written statements taken as admission of written statements and transcripts in *lieu* of oral testimony, and statements of additional prosecution witnesses when a decision is made to call those witnesses; (d) discovery material which came under the prosecution's custody or control; (e) written decisions and orders rendered by the chambers.<sup>244</sup>

The right to translation is also constrained by the overarching goal of expediting trial. In *Siméon Nchamihigo*, the Appeals Chamber denied a request for a further extension of time for the appellant to be provided with a translation of the prosecution's brief. The appellant's request was advanced on the rights premise that the appellant had a right to understand the prosecution's arguments in a language with which he was familiar. The chamber held that -

the tribunal's deadlines for the filing of briefs pursuant to the rules are essential to ensure the expeditious preparation of the case. Extensions of time for the purpose of translation are generally accorded only where an appellant's counsel works in a language other than the one in which the prosecution filed its submissions. In limited cases, the court may stretch its power to grant extension of time for the translation of the prosecution's submissions. Normally, this occurs where the extension will not impact on the overall time dedicated to considering the appeal.<sup>245</sup>

Notably, the chamber accorded prominence to the need to expedite the trial. However, the decision was made in view of the fact that counsel would understand the brief and represent the accused accordingly. Thus, the accused's lack of understanding of the brief was not fatal to his defence. It should be remembered that the process of balancing fair trial rights should be guided by the requirement of according the accused the minimum guarantees in 'full equality'. The criterion does not permit prioritisation and creating a hierarchy among the minimum rights.

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<sup>244</sup> See *Vojislav Šešelj* Order on Translation of Documents 6 March 2003 (note 65 above).

<sup>245</sup> *Siméon Nchamihigo v The Prosecutor* ICTR-2001-63-A Decision on Defence Motion for a French Translation of the Prosecutor's Respondent's brief and for extension of time for the filing of the Reply Brief Siméon Nchamihigo 8 July 2009 para 5 citing with approval *Protais Zigiranyirazo v The Prosecutor* ICTR-01-73-A Decision on Protais Zigiranyirazo's Motion for an Extension of Time for the Filing of the Reply Brief 3 July 2009 ('Zigiranyirazo Decision') para. 6; *Prosecutor v Emmanuel Rukundo* 2001-70-A Decision on Motions for Extension of Time (25 March 2009) 3.

## **(f) The status of the language debate in international criminal law discourse**

The significance of language to fair criminal trial is rarely considered. Wolfgang Schomburg-former judge of the appeals chamber of the ICTY/ICTR notes that: ‘...despite the fact that language and translation are important considerations when assessing the amount of time adequate for the preparation of a defence, this issue is often ignored by practitioners. However, it is becoming more and more apparent.’<sup>246</sup> It is equally surprising that language is not part of the Rule 11 *bis* discourse at the tribunals for Rwanda and former Yugoslavia.<sup>247</sup> The transfer of cases by international tribunals to national jurisdictions should involve linguistic perspectives; before an accused person is sent to another country for trial, it should be established that they can be heard and understood in the intended circumstances. The unpopularity of the language debate can be attributed to the vague stance of linguistic fair trial rights; they are not clearly defined.

The global spread of international criminal justice extends linguistic diversity to trials of international crimes at the national level. A case in point is the International Crimes Division of the High Court of Uganda (ICD) that is facing significant linguistic obstacles.<sup>248</sup> Language complexities at the national level, especially in jurisdictions with similar circumstances, are even more detrimental due to capacity constraints.

## **(g) Conclusion**

International criminal trials are densely multilingual and multicultural; this feature arises from the ‘global’ character of international criminal justice mechanisms. In the wording of the preamble to the ICC Statute, international crimes shock the conscience of humankind; they therefore sanction universal responsibility towards the accountability process. The formation of ICTs constitutes contribution and recruitment of human resources from a broad spectrum of legal

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<sup>246</sup> See W Schomburg ‘The Role of International Criminal Tribunals in Promoting respect for Fair Trial Right’ (2009) 8 *North Western Uni J of Int’l Human Rights* (2009) 1, 29 para 35.

<sup>247</sup> Rule 11 *bis* of the ICTR and ICTY RPE (note 108 and 105 above respectively) establish a procedure for the transfer of cases, to willing and competent national jurisdictions, in preparation for the completion of the tribunals’ mandates.

<sup>248</sup> See detailed discussion of Language dynamics of the International Crimes Division of the High Court of Uganda in chapter 5.

and social cultures. International representation of participants is central to legitimacy. International personnel are viewed as distanced from the conflicts that constitute the subject of international crimes and therefore better placed to advance the essential goal of impartiality. International participation also spreads the impact and deterrent effects of the accountability process.

However, language diversity is a problematic characteristic of international criminal proceedings. Linguistic barriers comprise a serious impediment to fair hearing and full participation; they affect all phases of procedure including (a) investigation; (b) presentation of the evidence; (c) interpretation of the evidence; (d) defence of charges; (e) chamber deliberations; and (d) outreach. Language obstacles constrain examination and cross-examination of witnesses; prolong trials; limit counsel-client interviews; lead to exclusion of evidence (see for example, *Krajišnik* and *Plavšić* Decision on Motion to Exclude Evidence and Limit Scope of Trial); constrict chamber deliberations and make them less spontaneous, among other obstacles. The language complexities at ICTs confirm Levi and Walker's observation that language is a pervasive and dynamic element of the legal process.<sup>249</sup>

ICTs are cognisant of the significance of language fair trial rights to the integrity of legal process. Linguistic warranties are embedded in the minimum guarantees of fair trial, which are contained in Article 14 ICCPR and reiterated in the constitutive instruments of the tribunals. The courts have therefore undertaken normative and structural mechanisms in order to duly conduct multilingual trials; they include (i) adopting official and working languages which represent the language abilities of participants; (ii) providing in-house language services including translation and interpretation. However, these measures have not alleviated linguistic hurdles; conversely, they have introduced new challenges to the system. Translation - a key aspect of support to judicial proceedings, enables a trial to proceed in several different languages. An accused that does not understand the language used in the proceedings has a right to interpretative assistance. Courtroom interpretation has undergone significant improvements since Nuremberg to become a more efficient tool of international criminal procedure. Nonetheless, (i) it is costly; (ii) it causes extensive delays; (iii) it is not accurate; (iv) it invokes reliance on the language services of

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<sup>249</sup> Levi & Walker (note 1 above) 2.



persons originating from the areas under the jurisdiction of ICTs hence compromising the appearance of impartiality.

Further, it is demonstrably difficult to neutralise the multicultural effects of multilingualism. The different legal and social cultures of participants influence their perception of nearly all aspects of the proceedings; from the courtroom set up, the dress code, the trial procedure, the evidence and how it is presented. The silent but effective dynamics of culture tilt the evidence to unintended directions, hence risking the truthfulness of courts' findings. The oral tradition of indirectness among witnesses from Rwanda left the ICTR with no standards upon which to distinguish credible witness testimony.<sup>250</sup> The Special Court for Sierra Leone was also later to battle with the evasive speech genres of witnesses and victims.<sup>251</sup>

The language debate is as old as international criminal justice. It has been part of the discourse of international criminal law since Nuremberg (1945). However, the debate has not attracted the required attention to foster policy reforms. ICTs have dismissed claims of language fair trial rights as administrative. The global spread of international criminal justice replicates similar concerns in national jurisdictions, making the impact of language diversity on fair criminal trial a crucial subject.

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<sup>250</sup> *Prosecutor v Jean-Paul Akayesu* (note 55 above) para 148.

<sup>251</sup> See CDF Transcript (note 87 above) 3 November 2004 paras 27, 28 – Evidence of CDF witness TF2-014.

## CHAPTER 2

### **‘RIGHTS’ OR ‘PRIVILEGES’: EVALUATING THE FRAMEWORK OF PROTECTION OF FAIR TRIAL RIGHTS IN INTERNATIONAL CRIMINAL PRACTICE**

#### **(a) Introduction**

Chapter 1 of this thesis introduces linguistic rights as components of the right to fair trial.<sup>1</sup> To seek to promote language guarantees as fair trial rights is to rely on the efficacy of the framework of protection of human rights in international criminal practice. The duty of International Criminal Tribunals (ICTs) and courts<sup>2</sup> to safeguard human rights is inherent in their objective to put an end to serious human rights violations and bring perpetrators to justice.<sup>3</sup> The core objective of criminal justice is to defend human rights. Indeed, trial fairness is arguably the foremost criterion for measuring the success of international criminal justice.<sup>4</sup> Although ICTs are mandated to apply humanitarian law, they are instructed by human rights as well.<sup>5</sup> Human rights law entails a normative framework for the protection of the rights of individuals and groups in the process of administering justice. A Nuremberg tribunal suggested that prosecutors and judges involved in a trial lacking the fundamental guarantees of fairness could be held

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<sup>1</sup> See Chapter 1 (e) iii (aa): Language Fair Trial Rights 37.

<sup>2</sup> The distinction between international criminal courts and international criminal tribunals is superfluous. The two terms are used interchangeably to refer to international criminal adjudicating mechanisms. They include: (i) Extra-Ordinary Chambers in the Courts of Cambodia (ECCC); (ii) International Criminal Court (ICC); (iii) International Criminal Tribunal for Rwanda (ICTR); (iv) International Criminal Tribunal for the former Yugoslavia (ICTY); (v) Special Panel for Serious Crimes in East Timor (‘SPSCET’); (vi) Special Tribunal for Lebanon (STL); (vii) Special Court for Sierra Leone (SCSL).

<sup>3</sup> See Preamble to the resolution establishing the ICTY-SC Res 827(1993)25 May 1993; Preamble to the resolution establishing the ICTR-SC Res 955 (1994) 8 Nov 1994. See also UN Secretary General’s statement on Article 21 ICTY statute adopted by SC Res 827 (1993) (Rights of the accused): ‘It is axiomatic that the international tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of the proceedings in particular those contained in Article 14 of the ICCPR’- Report of the Secretary-General pursuant to paragraph 2 of SC Res 808(1993), UN Doc S/25704(1993) para106.

<sup>4</sup> T Meron *The Making of International Criminal Justice: A view from the Bench* (2011)184. JA Andrews (ed) *Human Rights in Criminal Procedure A Comparative Study* (1982) 8: the extent to which human rights are respected and protected within the context of a society’s criminal proceedings is an important measure of its civilisation.

<sup>5</sup> See Meron *ibid* 183.

responsible for crimes against humanity.<sup>6</sup> There is no precise definition of what amounts to a crime against humanity but Article 7(1) k of the Statute of the International Criminal Court qualifies any inhumane act knowingly committed as part of a widespread or systematic attack directed against any civilian population, hence intentionally causing great suffering, or serious injury to body or to mental or physical health, as a crime against humanity. Thus, a trial that is intentionally conducted without regard to due process rights, as part of a systemic and targeted attack against an identifiable group of persons may amount to a crime against humanity. International criminal justice is therefore irreconcilable with trials in violation of due process rights.

International criminal courts have expressed their intention to produce a reliable historical record of propagating human rights values.<sup>7</sup> These principles include fair trial rights that are embedded in Article 14 International Covenant on Civil and Political Rights (ICCPR).<sup>8</sup> An accused person is entitled to: (a) information on the nature and cause of the charge against her/him; (b) adequate time and facilities for the preparation of their defence; (c) trial without undue delay; (d) a competent defence; (e) examination and cross-examination of witnesses; and (f) not to incriminate her-or himself.<sup>9</sup> Of note, linguistic fair trial rights have only been narrowly litigated but the perspectives of the courts on human rights in the trial process offer valid lessons. Linguistic human rights are human rights. Thus, the discussion of human rights in this chapter encompasses all categories of rights.

This chapter evaluates the system of human rights protection in international criminal justice, highlights the opportunities, shortcomings, and the responsibilities of each participant in fulfilling human rights in the trial process. It explores advances in contemporary international criminal law which foster the obligation of ICTs to ensure human rights, and it discusses the principles and peculiarities of the human rights protection regime of international criminal tribunals. The principal objective is to test the viability of the framework in which linguistic fair

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<sup>6</sup> WA Schabas 'General Remarks on Article 67 ICC Statute' in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* 2 ed (2008) 1248.

<sup>7</sup> M Damaška 'What is the Point of International Criminal Justice?' (2009) 83 *Chicago-Kent LR* 330.

<sup>8</sup> Adopted by GA Res 2200A (XXI) 16 December 1966.

<sup>9</sup> Article 14 (1) a-f ICCPR *ibid*.

trial rights are construed in chapter 3. It is also intended to establish whether the ICTs' approach to fair trial rights is consideration of rules of justice (rights) or aspects of practical advantage (privileges). The chapter consists of three principal parts: (i) the nature and scope of human rights obligations of international criminal courts; (ii) judicial perspectives on fair trial rights; (iii) judicial remedy of infringement of fair trial rights.

### **(b) Nature & scope of human rights obligations of international criminal courts**

As a general rule, the court has an obligation to uphold the inalienable rights of persons under its purview. The rights of the accused that are set out in Article 14 ICCPR<sup>10</sup> are replicated with modifications in the constitutive statutes of ICTs.<sup>11</sup> Bitti notes that the development of these rights under international law is one of the most important aspects of the Statute of the International Criminal Court, which could have an important impact on national legislation.<sup>12</sup> Noteworthy, the majority of national constitutions entail a bill of rights that embodies fair trial rights. In a trial situation, the accused stands in a position of vulnerability facing allegations of crimes of an international magnitude. The provision obliging courts to respect the rights of that person constrains possible excesses of judicial power that could affect the dignity of the subjugated person.

The theory of fundamental rights distinguishes three basic functions: to respect, to promote and to protect human rights. These roles correspond to three basic normative structures in the relationship between the individual and the state: *status negativus*, *status positivus* and *status activus* respectively.<sup>13</sup> *Status negativus* relates to freedom from interference from the state; *status positivus* refers to circumstances in which the individual cannot enjoy freedom without the active intervention of the state (including judicial protection); *status activus* is the exercise of the individual's freedom within and for the state.<sup>14</sup>

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<sup>10</sup> Ibid.

<sup>11</sup> See for example Art 20 ICTR Statute adopted by SC Res 955(1994) 8 November 1994, Art 21 ICTY Statute (note 3 above), Article 67 ICC Statute UN Doc A/CONF 183/9 adopted on 17 July 1998.

<sup>12</sup> G Bitti 'Analysis and Interpretation of Article 64 ICC statute' in O Triffterer (note 6 above) 1203-1204.

<sup>13</sup> X Arzoz 'Language Rights as Legal Norms' (2009)15:4 *European Public Law* 541, 547.

<sup>14</sup> Ibid.

Language rights belong to two different categories: tolerance-oriented rights and promotion-oriented rights. On the one hand, language rights include the freedom to freely choose and to use one's language, and to be free of interference in one's linguistic affairs and identity (tolerance-oriented rights).<sup>15</sup> This freedom of language does not require state intervention to be effectively enjoyed since it is immediately applicable.<sup>16</sup> Statutes of ICTs accord the accused person the right to use their language;<sup>17</sup> what is required of the court is to respect the choice of the accused. On the other hand, language rights include the right to receive basic public services in a given language (promotion-oriented rights).<sup>18</sup> For instance, the right of an accused person to defend her-or himself, using their language, requires the court to provide interpretative assistance of the language of the accused to the working language(s) of the court.

However, categorising language rights is not definite in all cases. The right of an accused person lacking proficiency in the working language of the court to a court-appointed interpreter does not aim to afford tolerance, protection or promotion for any language or any linguistic identity.<sup>19</sup> Its rationale lies in securing trial fairness by enabling the accused to communicate effectively. The right to interpretative assistance is a right that facilitates the realisation of a broader right, that is, the right to fair trial. It does not distinctively belong to either the category of tolerance-oriented rights or promotion-oriented rights.<sup>20</sup>

In conclusion, a language guarantee may inherently belong to different categories of fair trial rights, by so doing influencing the nature of the obligation of the court. In addition, the decision of the court to ensure a particular right may derive from extraneous factors such as practical convenience as opposed to what is considered to be the requirements of justice.

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> See for example Rule 3(B) ICTY Rules of Procedure & Evidence (RPE) IT/32 adopted on 11 February 1994, as amended, Rule 10 (D) STL RPE STL/BD/2009/01/Rev 1 10 June 2009.

<sup>18</sup> Arzoz (note 13 above) 547.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid 545 citing A Patten & W Kymlicka 'Language Rights and Political Theory: Context, Issues, and Approaches' in W Kymlicka & A Patten (eds) *Language Rights and Political Theory* (2003) 27-28.

(i) *Duty to respect fair trial rights*

The credibility and legitimacy of international criminal justice depends on rigorous respect for the right of the accused to a fair trial.<sup>21</sup> A trial chamber is obliged to ensure that each trial is conducted with full respect for the rights of the accused.<sup>22</sup> At the commencement of proceedings, the chamber must satisfy itself that the rights of the accused were respected even in the pre-trial phase.<sup>23</sup> In the case of *Nikolić*, the court upheld the view that respect for due process of law encompasses more than the duty to ensure a fair trial for the accused to include questions such as how the parties have been conducting themselves in the context of a particular case and how an accused has been brought into the jurisdiction of the tribunal.<sup>24</sup>

In elucidating the nature of the duty to respect human rights,<sup>25</sup> the Human Rights Committee (HRC) notes that-

the legal obligation to respect human rights is both negative and positive in nature. States parties must refrain from violation of the rights recognised by the covenant. The positive obligation on states parties to ensure covenant rights will only be fully discharged if individuals are protected by the state, not just against violations of covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of covenant rights in so far as they are amenable to application between private persons or entities.<sup>26</sup>

Thus, the duty of ICTs to respect the rights of the accused entails refraining from violating those rights,<sup>27</sup> and protecting accused persons from possible violations by all stakeholders in the

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<sup>21</sup> See Schabas (note 6 above) 1248.

<sup>22</sup> Article 19 (1) ICTR Statute (note 11 above); Art 20 (1) ICTY Statute (note 3 above); Art 64 (2) ICC Statute (note 11 above).

<sup>23</sup> Article 20(1) STL Statute annexed to SC Res 1757 (2007) 30 May 2007; Art 20 (3) ICTY Statute *ibid*; Art 19(3) ICTR Statute *ibid*; Article 60 ICC Statute *ibid*. See *Prosecutor v Barayagwiza Jean – Bosco* ICTR-97-19-AR72 (3 November 1999).

<sup>24</sup> *Prosecutor v Dragan Nikolić* Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal IT-94-2-PT (9 October 2002) para 111. See Meron (note 4 above) 185-186.

<sup>25</sup> In Article 2(1) ICCPR (note 8 above): Each state party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognised in the covenant.

<sup>26</sup> General Comment No 31 [80] ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ CCPR/C/21/Rev1/Add 13 (26 May 2004) paras 6-8. HRC is a body of independent experts established under Art 28 ICCPR *ibid*, to monitor implementation of the covenant.

<sup>27</sup> The rights of the accused are stated in the fair trial provision embedded in the Statutes of ICTs.

process of procuring justice. By inquiring into the pre-trial conduct of proceedings, a trial chamber performs part of the duty to respect fair trial rights.

The prosecutor is the ‘watchdog’ of human rights in the pre-trial phase. In the wording of the ICTR Appeals Chamber -

‘...because the prosecutor has the authority to commence the entire legal process through investigation and submission of an indictment for confirmation, s/he has been likened to the ‘engine’ driving the work of the tribunal, or, as one court has stated-the ultimate responsibility for bringing a defendant to trial rests on the government... Consequently, once the prosecutor has set this process in motion, s/he is under a duty to ensure that, within the scope of his/her authority, the case proceeds to trial in a way that respects the rights of the accused.’<sup>28</sup>

The duty of the court to ensure that the rights of the accused are not abused by other entities is significant to ICTs because international criminal procedure is often fragmented over several jurisdictions. In a single case, the evidence may be collected from several states, the accused arrested in another state, and sentence executed in a different state from the one where the accused is detained for the duration of the trial. The language fair trial rights of a person apprehended in a foreign state may be at risk where the suspect does not speak the language of the arresting state. The dispersal of the criminal procedure over various jurisdictions raises pertinent questions regarding the scope of application of human rights law which binds the tribunals in their activities.<sup>29</sup> The controversy is the extent of the responsibility of the tribunal (prosecution) for the conduct of other participants in the process. The prosecution has argued that violations that occur outside the trial forum’s jurisdiction are of no concern to the tribunal, or have no consequences for the trial because the trial forum lacks the competency to supervise acts of criminal procedure taking place in another sovereign state.<sup>30</sup> Accordingly, the ICTR has previously refused to review the legality of a number of searches, seizures and arrests by national

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<sup>28</sup> *Barayagwiza* Appeals Chamber (AC) Decision 3 November 1999 (note 23 above) para 92.

<sup>29</sup> G Sluiter ‘International Criminal Proceedings & the Protection of Human Rights’ (2002/2003) 37 *New England LR* 935, 941.

<sup>30</sup> *Barayagwiza* (note 23 above).

authorities reaffirming that since it is a sovereign state that carries out arrests, searches and seizures, the tribunal is not competent to supervise the legality of these actions.<sup>31</sup>

Supervising actions of states would involve issuing directives. An international tribunal does not possess any power to take enforcement measures against states.<sup>32</sup> Under customary international law, states, as a matter of principle, cannot be ‘ordered’ either by other states or by international bodies; a chamber can request or order but cannot enforce its order.<sup>33</sup> The court cannot make an order which is unenforceable; equity does not act in vain. The *Todovorić* case illustrates how a request by an ICT may be vehemently disregarded by a state.<sup>34</sup> Stevan Todorović claimed that he had been kidnapped from his home in Serbia by bounty hunters hired by the multinational ‘stabilisation force’ in Bosnia (SFOR), perhaps even in accord with the ICTY’s office of the prosecutor,<sup>35</sup> and then taken across the border into Bosnia where the SFOR arrested him. He challenged this mode of apprehension as illegal under international law by filing a ‘motion for an order directing the prosecutor to return him to the country of refuge.’ He subsequently filed a ‘notice of motion for judicial assistance’ which sought information, including documents and testimony from SFOR and other military forces operating in Bosnia, which he hoped to use as evidence in support of his earlier motion. Also for the same purpose, Todovorić submitted a motion to compel the prosecutor to produce certain relevant documents. The trial chamber, hoping to avoid ruling on the applicant’s politically delicate request for assistance from SFOR,

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<sup>31</sup> *Prosecutor v Pauline Nyiramasuhuko* ICTR-97-21-T Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized (12 October 2000) para 26. See also *Prosecutor v Mathieu Ngirumpatse* ICTR-97-44-I Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items (10 December 1999) para 56; *Prosecutor v Juvénal Kajelijeli* ICTR-98-44-I Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing (8 May 2000) para 34; *Prosecutor v Édouard Karemera* ICTR-98-44-I Decision on the Defence Motion for the Restitution of Documents and Other Personal or Family Belongings Seized (Rule 40(C) of the Rules of Procedure and Evidence), and the Exclusion of such Evidence which may be used by the Prosecutor in preparing an Indictment against the Applicant (10 December 1999) para 4.2; *Prosecutor v Joseph Nzirorera* ICTR-98-44-T Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized (7 September 2000) para 27.

<sup>32</sup> *Prosecutor v Ferdinand Nahimana et al* ICTR-99-52-T Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana (5 June 2003) para 9.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Prosecutor v Stevan Todorović* IT-95-9/1 (‘*Bosanski Šamac*’).

<sup>35</sup> See J Katz ‘International Criminal Courts & Fair Trials: Difficulties & Prospects’ (2002) 27 *Yale J of Int Law* 124 - A Serbian court convicted nine Serbs of abducting Todovorić in exchange for \$22,700.



granted the much less controversial motion against the prosecutor, and the appeals chamber affirmed this ruling.<sup>36</sup> The office of the prosecutor however lacked nearly all the documents requested. SFOR refused to hand over any information voluntarily. The trial chamber subsequently granted Todovorić's motion for judicial assistance<sup>37</sup> and ordered SFOR, the North Atlantic Council, and the states participating in the SFOR to provide documents related to Todovorić's apprehension. The trial chamber also issued a *subpoena* to US General Eric Shinseki who was the commanding general of the base where Todovorić was apprehended, requiring him to testify about Todovorić's arrest. In his separate opinion, Judge Patrick Robinson spelled out the importance of the trial chamber's decision for its ability to conduct fair trials -

No legal system, whether international or domestic, that is based on the rule of law can countenance the prospect of a person being deprived of his liberty, while tribunals or courts remain powerless to require the detaining or arresting authority to produce, in proceedings challenging the legality of the arrest, material relevant to the detention or arrest; in such a situation, legitimate questions may be raised about the independence of those judicial bodies.<sup>38</sup>

In response, Canada, Denmark, Germany, Italy, The Netherlands, NATO, Norway, the United Kingdom, the United States and later France filed requests for review of the trial chamber's decision. The appeals chamber stayed the trial chamber's orders and scheduled dates for written submissions and oral arguments. The United States in its legal brief maintained that the tribunal did not have the ability to summon the US General. It further contended that the decision of the judges 'would be of utmost significance to the future of the tribunal, and its relationship with those engaged in the apprehension of persons indicted for war crimes.'<sup>39</sup> Although a plea bargain

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<sup>36</sup> Katz ibid citing Order on Defence Request for Judicial Assistance for the Production of Information in the case of *Todorović* 07 March 2000, *Prosecutor v Blagoje Simić & ors* IT-95-9 Decision on Application for Leave to Appeal against Trial Chamber Decision of 7 March 2000 (3 May 2000) AC.

<sup>37</sup> Katz ibid citing *Prosecutor v Simić* ibid Decision on Motion for Judicial Assistance to be provided by SFOR and Others Trial Chamber Decision 18 October 2000.

<sup>38</sup> *Prosecutor v Stevan Todorović* (note 34 above) Decision on Motion for Judicial Assistance to be provided by SFOR and Others Separate Opinion of Judge Robinson, *Prosecutor v Simić* ibid Trial Chamber, Decision 18 October 2000.

<sup>39</sup> See *Prosecutor v Blagoje Simić & ors* IT-95-9-AR108bis Brief of the United States of America on Review of Decision on Motion for Judicial Assistance to be provided by SFOR & others 15 November 2000.

was entered before the matter could be concluded, in Katz's words, the lesson is valid.<sup>40</sup> There are subtle boundaries to what the tribunal can do in ensuring human rights, especially in situations where state cooperation is required.

However, in cases where the alleged infringement of fair trial rights is not in dispute and investigation is not required, the court would be obliged to take a standpoint. Infringement of language rights of accused persons by arresting states would fall under this category. Under the abuse of power doctrine, it is irrelevant which entity is responsible for the violation; even if the fault is the result of the actions of a third party, it would undermine the integrity of the judicial process.<sup>41</sup> The involvement of the court or any of its organs in the violation is only relevant in determining remedies. In the *Čelebići* case, the ICTY trial chamber was faced with the question as to whether a statement obtained from the accused in the absence of his counsel could be admitted into evidence.<sup>42</sup> The accused- Zdravko Mucić, was prior to his transfer to the tribunal interrogated by Austrian police, not at the request of the ICTY, but with a view to his transfer to the ICTY or even his extradition to a state. Under Austrian law, there is no right for counsel to be present at these types of interrogations. The prosecutor argued that the tribunal itself, including its organs, had not violated the right to counsel, and as such, there was no reason to exclude the evidence.<sup>43</sup> The trial chamber reaffirmed the view that the exclusion of evidence obtained in violation of internationally protected human rights is mandatory under Rule 95.<sup>44</sup> In this respect, it is irrelevant whether the tribunal in any way requested or was involved in the collection of the evidence, although involvement of the prosecutor in obtaining evidence in violation of human rights could result in remedies addition to the exclusion of evidence.<sup>45</sup> Notably, the facts of *Čelebići* are distinguishable from those of *Nyiramasuhuko*.<sup>46</sup> In *Čelebići*, it was not in dispute that the questioning of Mucić was done without a lawyer-an infringement under the rules of

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<sup>40</sup> Note 35 above.

<sup>41</sup> *Barayagwiza* AC Decision 3 November 1999 (note 23 above) para 73.

<sup>42</sup> *Prosecutor v Delalić & ors* IT-96-21-T (*Čelebići* case) Decision on Zdravko Mucić's Motion for the Exclusion of Evidence (2 September 1997).

<sup>43</sup> *Ibid* para 30.

<sup>44</sup> *Ibid* para 43, Rule 95 ICTY RPE (note 17 above) provides for exclusion of evidence obtained by methods which (i) cast doubt on its reliability, (ii) if its admission is antithetical to and would seriously damage the integrity of proceedings.

<sup>45</sup> Sluiter (note 29 above) 943.

<sup>46</sup> In which court declines to exercise jurisdiction over state actions.

procedure of the tribunal. All that was required of the tribunal was to make a declaration without assuming an inquisitorial role into actions of the arresting state. The remedy, that is, to exclude the evidence, was also within the power of the tribunal to effect. A similar approach would be anticipated for violations of language fair trial rights.

- Standard of respect for fair trial rights

The statutory provisions obliging ICTs to respect human rights emphasise that the rights of the accused are ‘fully respected.’<sup>47</sup> The standard of ‘full respect’ expresses the primacy of the rights of the accused amidst competing demands from the rights of other participants in the trial process especially victims and witnesses.<sup>48</sup> The court’s regard for the protection of victims and witnesses must not be at the expense of the rights of the accused.<sup>49</sup> The balance between the rights of the accused and protection of victims and witnesses poses considerable practical difficulties especially in cases where disclosure to the accused of the names and addresses of the witnesses is required to allow for preparation of the defence.<sup>50</sup> The ICTY trial chamber expressed the view that the aforementioned equilibrium dictates clearly in favour of an accused’s right to the identity of witnesses upon whom the prosecution intends to rely, particularly in light of the right of the accused to prepare their defence, subject to any protective measures granted.<sup>51</sup> Bitti suggests that one solution could be to disclose the names of the witnesses just before the trial, as adopted by the ICTR which ordered the protection of the identity of victims and prosecution witnesses only until they are brought under the protection of the tribunal, but conditioned this order to disclosure by the prosecutor.<sup>52</sup> The identity of such victims and

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<sup>47</sup> See Art 20 ICTR Statute (note 11 above), Art 21 ICTY Statute (note 3 above), Art 67 ICC Statute (note 11 above).

<sup>48</sup> See for example chapter 4 ICC Statute *ibid*: provisions relating to various stages of the proceedings, chapter 3 Regulations of the ICC ICC-BD/01-01-04 26 May 2004 (Provisions relating to all stages of the proceedings), Regulation 41: Role of the Victims and Witnesses Unit, Regulation 42: application and variation of protective measures). *Prosecutor v Ante Gotovina* IT-01-45-PT Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68 (14 July 2006): the rights of the Accused are given primary consideration, and then witness protection is secondary.

<sup>49</sup> See Bitti ‘Analysis & Interpretation of Article 67 ICC Statute’ in O Triffterer (note 6 above) 1203.

<sup>50</sup> *Ibid* 1204.

<sup>51</sup> See *Prosecutor v Vladimir Lazarević, Sreten Lukić* IT-03-70-PT Decision on Prosecution’s Motion for Protective Measures and Request for Joint Decision on Protective Measures 19 May 2005.

<sup>52</sup> See Bitti (note 12 above) 1204 citing ICTR Press Release ‘Measures Granted to the Prosecutor for the Protection of Witnesses against Elie Ndayambaje’ UN Doc ICTR Info 9-2-039 (11 Mar 1997) Arusha.

witnesses would only be disclosed when they are already under tribunal protection and the accused would have the necessary information to prepare their defence. Noteworthy, witness protection measures such as voice distortion and testifying behind curtains limit the transmission of body language and other forms of paralinguistic communication that are integral to the determination of the demeanour of witnesses.<sup>53</sup> Thus, the exercise of balancing the rights of the accused and the rights of victims and witnesses should be left for the court to determine in light of the circumstances of each particular case.

Similarly, the court has to maintain the correct balance between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with international crimes.<sup>54</sup> This requirement is significant where a decision to relinquish court's jurisdiction has to be made. In *Kajelijeli*, the duty of the court to safeguard the interest of the international community in prosecuting international crimes was a crucial factor in determining the requisite level of egregious breaches of human rights that could override the personal jurisdiction of the tribunal.<sup>55</sup> The delayed release of Thomas Kwoyelo is constrained by similar reasons following an order by the Constitutional Court, halting his trial in the International Crimes Division of the High Court of Uganda (ICD).<sup>56</sup> As the first case of the ICD, the state desires to continue with the trial so as to demonstrate its ability to adjudicate international crimes, and its commitment to seek accountability from perpetrators of the crimes committed in Northern Uganda. Thus, ICTs seek to respect the rights of the accused in the broader framework of international criminal justice; 'full respect' is subject to several limitations such as public policy considerations.

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<sup>53</sup> Paralinguistic aspects of a speaker's communication include the speaker's body language, linguistic style and nuance, pauses, hedges, self-corrections, hesitations and displays of emotion - J Karton 'Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony' (2008) 41 *VJTL* (2008)1, 24.

<sup>54</sup> *Juvénal Kajelijeli v Prosecutor* ICTR-98-44A-A Judgement (23 May 2005) para 206.

<sup>55</sup> *Ibid* para 206.

<sup>56</sup> *Thomas Kwoyelo alias Latoni v Uganda* Constitutional Petition No 36/2011(reference) Judgement of 22 September 2011. The court ordered that the trial of Kwoyelo, a former commander of the Lord's Resistance Army, for crimes committed in the conflict in Northern Uganda is halted. According to the court, to try him would be to violate his right to equality before the law.

### **(c) Judicial perspectives on fair trial rights**

In principle, ICTs have taken cognisance of the binding nature of human rights law upon international criminal adjudication. Meron notes that this jurisprudential move was motivated in part in order to apply due process norms;<sup>57</sup> ensuring fair trial rights is an important aspect of due process of law.<sup>58</sup> Of note, international criminal justice manifests its own perspective to human rights that constitutes (i) the significance of rules of procedure and evidence to the realisation of fair trial rights; (ii) the duty of the accused to take reasonable steps to realise fair trial rights; (iii) dominance of the minimum guarantees of fair trial; and (iv) the overriding right to fair and expeditious trial.

#### *(i) Significance of Rules of Procedure & Evidence*

It is a statutory requirement that the guarantee and exercise of trial rights is in accordance with the rules of procedure and evidence.<sup>59</sup> Thus, all forms of language fair trial guarantees such as translation and examination of witnesses are rule-based. In the case of *Blagojević*,<sup>60</sup> the court was seized of an oral request by the accused to waive his right to remain silent and be heard. In arriving at the decision to deny his request, the chamber considered the view that the accused, who had consistently stated that he does not seek to represent himself had refused to communicate with his assigned defence throughout his trial, and rejected the option to appoint a legal representative to assist in the preparation of his defence. Upon the request to testify, the trial chamber asked the direct question of whether he would follow the procedure for examination-in-chief as set out in Rule 85(B),<sup>61</sup> namely that the party calling the witness examines the witness, in which case, his counsel would examine him. The accused intimated that he would not answer any questions put to him on direct examination by counsel. Consequently, the chamber concluded that the accused's refusal to follow the procedure established in the rules

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<sup>57</sup> Meron (note 4 above) 183.

<sup>58</sup> *Prosecutor v Dragan Nikolić* Decision on Motion Challenging Jurisdiction (9 October 2002) (note 24 above) para 111.

<sup>59</sup> See for example Art 20(1) ICTY Statute (note 3 above), Art 19(1) ICTR Statute (note 11 above).

<sup>60</sup> *Prosecutor v Vidoje Blagojević, Dragan Jokić* IT-02-60-T Decision on Vidoje Blagojević's Oral Request (30 July 2004) 8,9,10.

<sup>61</sup> ICTY RPE (note 17 above).

for the presentation of testimonial evidence, as endorsed by the trial chamber, constituted an effective waiver to appear as a witness in his case. In essence, the right of the accused to defend himself had to be exercised according to the established procedure. It should be remembered that rules of procedure also ensure fair trial rights. They serve as a checklist of actions of due process. A rule-based and ordered system also promotes efficiency and propels the trial. Thus, mainstreaming fair trial rights in trial procedure is significant to their implementation.

*(ii) Duty of accused persons to take reasonable steps to realise fair trial rights*

The duty of the accused to take reasonable steps to seek and exercise fair trial rights corresponds with the obligation of the court to fully respect those rights. The accused approaches trial in an inherent state of dignity; the responsibility of the court is not to commence the exercise of their rights but to ensure the continuance of the process and restrain from halting it. The most that a chamber does is inform the accused of their entitlement to a particular right and inquire from them whether they wish to exercise that right. The court is considered to have discharged its obligation even when the accused chooses not to exercise their right after every opportunity to do so is offered to them, irrespective of whether the actual exercise of such a right would be the best way to guarantee fairness. For example, if an accused chooses to use a language in which they are not proficient, the tribunal cannot insist that such an accused uses their language; the court can only inform her/him of the availability of interpretative assistance should they choose to use their language.

Further, it is the duty of the accused to advise the court on violation of their fair trial rights. In the case of *Nahimana*, the ICTR held that the responsibility for drawing the chamber's attention to what the accused considers a breach of the tribunal's statute and rules lies in the first place with the aggrieved.<sup>62</sup> The courts are also hesitant to volunteer remedies in cases of infringement of fair trial rights. An accused seeking relief on the basis of allegations of violation of fair trial rights is obliged to (a) prove the occurrence of the violation; and (b) specifically plead for a remedy (if required). In the case of *Rwamakuba*, the trial chamber upon acquitting the accused

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<sup>62</sup> *Ferdinand Nahimana & ors v The Prosecutor* ICTR-99-52-A Judgement (28 November 2007) para 131.

found that his right to legal assistance was violated during the first months of his detention.<sup>63</sup> The chamber however only advised that the accused was at liberty to file an application seeking an appropriate remedy after the time limit to file an appeal to its judgment had elapsed.<sup>64</sup> The trial chamber's position followed an earlier observation by the appeals chamber that it was open to Rwamakuba to invoke the issue of the alleged violation of his fundamental human rights by the tribunal in order to seek reparation at the appropriate time.<sup>65</sup> The requirements above are justified by the procedural technicality that any allegations must be specifically pleaded. They also invoke the applicability of the old maxim that equity aids the vigilant, to the subject of fair trial rights.

*(iii) Procedural rights vis -à- vis substantive rights*

International criminal tribunals exhibit a practice of distinguishing the implementation of procedural rights, particularly the minimum guarantees of fair criminal trial, from substantive rights. This categorisation bears significantly upon the status of linguistic fair trial rights, which chapter 1 presents as components of the minimum guarantees of fair trial.

The minimum guarantees or minimum rights (in the language of Article 6 (3) of the European Convention on Human Rights) are engulfed in Article 14 (3) a-g of the ICCPR, and expounded by the constitutive statutes of ICTs.<sup>66</sup> They include the entitlement of the accused person to (a) prompt and detailed information on the charges; (b) adequate time and facilities for the preparation of the defence; (c) trial without undue delay; (d) presence at trial and defence in person or through legal assistance of the accused's own choosing; (e) examination and cross-examination of witnesses; (f) free interpretative assistance; and (g) the right against self-incrimination. These guarantees embody procedural protections that guide due process hence their primacy in criminal procedure. The position of language fair trial rights in the minimum guarantees is substantiated in chapter 3. Linguistic guarantees are therefore situated in the

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<sup>63</sup> *Prosecutor v André Rwamakuba* ICTR-98-44C-T Judgement (20 September 2006) para 220.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid* para 219.

<sup>66</sup> See Article 67(1) ICC Statute (note 11 above); Art 21(4) ICTY Statute (note 3 above); Art 20 (4) ICTR Statute (note 11 above); Art 16 (4) STL Statute (note 23 above); Art 17(4) SCSL Statute ((Annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone of 16 January 2002); Art 35 Law on the Establishment of the ECCC as amended NS/RKM/1004/006 (6 June 2003).

framework of priority rights in international criminal practice. ICTs have demonstrated commitment to fulfilling the rights envisaged in the minimum guarantees; this would include language fair trial rights.

Beyond procedural rights, the tribunals have taken a restrained approach to other human rights that are crucial to the integrity of international criminal justice such as the right to compensation for those acquitted. International trials take a considerable length of time during which the accused are kept under detention. The clout of allegations involved also has the effect of tainting the image of the accused hence making resettlement into community life difficult. An acquitted person is victimised by the inevitable effects of the process. While compensation would accrue in those cases, ICTs have declined making such awards. In the case of *Rwamakuba*, the ICTR in response to a plea for compensation upon acquittal held that the statute and the rules of the tribunal did not provide a basis for compensation in the circumstances, nor is any found in the jurisprudence of the ICTR or ICTY.<sup>67</sup> In my view, awarding compensation to persons acquitted of international crimes is a distinctive subject for judicial activism. Compensation to those unjustifiably subjected to the life changing process of international criminal prosecution is significant in contributing to restoring their dignity. International justice is for the accused as well. If compensation is mainstreamed, it would also remedy human rights violations and substitute the controversial reliefs such as relinquishing jurisdiction in appropriate situations. This may include the infringement of language fair trial rights.

It is trite that the fulfilment of the minimum guarantees does not suffice to foster a fair trial; those norms only provide for the absolute minimum standards applicable.<sup>68</sup> The narrow scope of human rights protected by the ICTs raises questions relating to the courts' commitment to the broader subject of the dignity of the accused. The duty of the court to respect human rights goes beyond the guarantee of procedural rights to include all other entitlements of a human being. The lengthy nature of international trials translates into long periods of detention for accused persons.

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<sup>67</sup> *André Rwamakuba v The Prosecutor* Case No. ICTR -98-44C-A Decision on Appeal against Decision on Appropriate Remedy 13 September 2007 para 10.

<sup>68</sup> Sluiter (note 29 above) 941 citing *Nikolić* Decision on Motion Challenging Jurisdiction (9 October 2002) (note 24 above) para 110.



The courts should be mindful of the significance of human freedom especially to suspects. Thus, there is need to broaden the human rights protection regime of ICTs to include substantive rights.

*(iv) Overarching right to fair and expeditious trial*

International tribunals have recognised an overarching right of the accused to fair and expeditious trial, and affirmed a corresponding obligation upon the court to ensure that right.<sup>69</sup> The jurisprudence suggests that the exercise, by the accused, of their rights must be in furtherance of a prompt, speedy, and fair trial. Even the discretion of the court in conducting proceedings is subject to its duty to ensure that the trial is fair and expeditious.<sup>70</sup>

Expedited proceeding is emerging as an independent criterion for granting fair trial rights to accused persons. The courts have assumed the role of supervising the exercise of trial rights to ensure that it does not affect the speed of the trial.<sup>71</sup> For instance, the right to translation is limited to only those documents which substantiate the nature of the charge in order to avoid inordinate delays.<sup>72</sup> The umpiring role of the court is essential because trial rights are mutually reinforcing in fostering the ultimate objective of fairness.

However, there is no systemic priority accorded to actions against infringement of human rights. Human rights claims - usually brought in form of interlocutory applications and appeals, are entangled in lengthy and technical procedures that negate the promptness of judicial intervention. In the report on the Special Court for Sierra Leone, Prof. Cassese noted that - the appeals chamber took months to issue interlocutory appeals decisions yet some of those decisions of the

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<sup>69</sup> *Prosecutor v Vidoje Blagojević, Dragan Jokić* IT-02-60-T Decision on Request for Certification to Appeal the Trial Chamber's Decision on Vidoje Blagojevic's Oral Request and Request for the Appointment of an Independent Counsel for this Interlocutory Appeal should Certification be granted (2 September 2004) 5.

<sup>70</sup> See *Augustin Ngirabatware v Prosecutor* ICTR-99-54-A Decision on Augustin Ngirabatware's Appeal of Decisions on Denying Motions to Vary the Trial Date (12 May 2009) para 22.

<sup>71</sup> See *Ngirabatware* Decision on Motions to Vary the Trial Date 12 May 2009 *ibid* para 23: The accused has a right to a fair trial within a reasonable time, and the court has an obligation to balance the need for the accused to have adequate time for the preparation of one's case and the need for an expeditious trial.

<sup>72</sup> See 'An assessment of the ECCC Order on Translation Rights and Obligation' *Khmer Rouge Trial web portal* ([http://www.krtrial.info/showarticle.php?language=english&action=showarticle&art\\_id=3413&needback=1](http://www.krtrial.info/showarticle.php?language=english&action=showarticle&art_id=3413&needback=1)).

appeals chamber involved human rights issues that warranted a quicker procedure.<sup>73</sup> During the period covered by the report (2006), all four decisions issued by the appeals chamber took more than one month to be delivered; two decisions had taken over four months from the final filing of the parties, with the longest taking almost a year after the trial chamber's decision and more than five and a half months from the last filing of the parties.<sup>74</sup> An exception is only made of human rights issues that affect the jurisdictional competence of the court; these are addressed at the beginning of the trial.<sup>75</sup> Thus, human rights interventions need to be accorded the necessary urgency in the prolonged course of judicial proceedings.

Further to that is the controversy surrounding the forum for requests relating to the rights of the accused. Floyd and Jolles - formerly defence counsel at the ICTR, critique the practice of having requests relating to the fair trial rights of the accused handled by the registrar (administratively) other than the judges (judicially).<sup>76</sup> They rightly contend that decisions such as (i) whether certain documents could be translated, (ii) which counsel should be removed, and (iii) the resources to be expended on the defence of the accused should be made by judges in order to allow for judicial review or appeal.<sup>77</sup>

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<sup>73</sup> See Report on the Special Court for Sierra Leone Submitted by the Independent Expert Antonio Cassese (12 December 2006) (<http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&>).

<sup>74</sup> Ibid 12 para 45. AFRC (Armed Forces Revolutionary Council) - *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, SCSL-04-16-ES: Decision on Prosecution Appeal against Decision on Oral Application for Witness TFI-150 to Testify without being compelled to Answer Questions on Grounds of Confidentiality (26 May 2006) (Appeals decision issued 4 months and 10 days after filings completed); CDF (Civil Defence Forces) - *Prosecutor v Moinina Fofana & Allieu Kondewa* SCSL-04-14-T: Decision on Prosecution Appeal Against Confidential Decision on Defence Application Concerning Witness TF2-218 (26 May 2006): Appeals Decision issued almost one year after the trial chamber decision of 8 June 2005, and some 5 months and 19 days after the completion of the appeals filings.

<sup>75</sup> See *Barayagwiza* AC Decision 3 November 1999 (note 23 above) para 72. In response to the appellant plea challenging the jurisdiction of the tribunal due to persistent violations of his rights, the chamber held that '...Given that the appeals chamber is of the opinion that to proceed with the trial of the appellant would amount to an act of injustice, we see no purpose in denying the appellant's appeal, forcing him to undergo a lengthy and costly trial, only to have him raise, once again the very issues currently pending before this chamber. Moreover, in the event the appellant was to be acquitted after trial we can foresee no effective remedy for the violation of his rights. Therefore, on the basis of these findings, the appeals chamber will decline to exercise jurisdiction over the appellant, on the basis of the abuse of process doctrine'.

<sup>76</sup> JC Floyd III & A Jolles 'International Criminal Tribunals: Dispensing Justice or Injustice?' *Revue québécoise de droit int (Hors-série)* (2010) 303.

<sup>77</sup> Ibid 311,312.

#### **(d) Judicial remedy for infringement of fair trial rights**

The positive duty of the court to respect and ensure fair trial rights involves providing remedies to aggrieved parties. The duty to ensure that any person whose rights are infringed has an effective remedy is stipulated under Article 2 (3) (a) of the ICCPR.<sup>78</sup> Any violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy.<sup>79</sup> Remedies to victims of human rights violations are significant in negating the injurious effects of the abuses and restoring the integrity of the legal process.

##### *(i) Nature of remedies*

There are three forms of remedies: (i) judicial, (ii) legislative, and/or (iii) administrative remedies.<sup>80</sup> The law-making role of judges at international criminal tribunals (also referred to as judicial legislation) is controversial,<sup>81</sup> hence challenging the authority of ICTs to grant legislative relief.

With the exception of the ICC Statute, statutes of other international criminal tribunals do not provide for remedies to accused persons for violation of their rights. In *Rwamakuba's* case, the ICTR Trial Chamber maintained that the Security Council would have to amend the statute of the tribunal, or take any other action for any claims for compensation in the context of acquittal to be admissible.<sup>82</sup> In the year 2000, the ICTY and ICTR made separate proposals, to the Secretary General of the United Nations, for inclusion in the statutes of the tribunals, a provision

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<sup>78</sup> Article 2(3) (a) ICCPR (note 8 above) provides that each state party undertakes to ensure that any person whose rights or freedoms recognised in the covenant are violated shall have an effective remedy.

<sup>79</sup> *Laurent Semanza v Prosecutor* ICTR-97-20-A Decision 31 May 2000 (AC) para 125. See also *Rwamakuba* Judgment 20 September 2006 (note 63 above) para 218: any violation of the rights of the accused entails the provision of an effective remedy pursuant to Article 2(3) (a) ICCPR *ibid*.

<sup>80</sup> FF Martin, SJ Schnably, RJ Wilson, JS Simon & MV Tusnet 'International Human Rights & Humanitarian Law: Treaties, Cases & Analysis' (2006) 302.

<sup>81</sup> See M Swart *Judges & Lawmaking at the International Criminal Tribunals for former Yugoslavia & Rwanda* (2006).

<sup>82</sup> Note 63 above para 31.

for compensation to persons who may have been wrongfully detained, prosecuted or convicted.<sup>83</sup> To-date, no such amendment has been made. The presidents of the sister tribunals, on that occasion, pleaded that ‘since the tribunals wish, by definition, to abide fully by internationally recognised norms relating to the rights of suspects and accused persons, the absence of any provision which could allow for awarding compensation in such situations was a cause for concern.’<sup>84</sup> This proclamation is an insider’s perspective on capacity constraints to the ability of ICTs to fully perform their positive duty to ensure human rights. This is one of the *lacunae* inhibiting the rights enforcement capacity of ICTs.

Due to lack of a legislative structure for remedies, aggrieved persons have pleaded for various forms of relief. In some cases, chambers advise parties on the appropriate remedies to seek.<sup>85</sup> Remedies previously considered include (i) relinquishing jurisdiction;<sup>86</sup> (ii) excluding evidence;<sup>87</sup> (iii) apology;<sup>88</sup> (iv) reparation, such as, financial compensation (if accused found not guilty);<sup>89</sup> and reducing sentences (if accused found guilty).<sup>90</sup>

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<sup>83</sup> Letter dated 26 September 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General annexed to Letter dated 28 September 2000 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2000/925, 3. See also Letter dated 19 September 2000 from the President of the International Criminal Tribunal for the Former Yugoslavia addressed to the Secretary-General annexed to Letter dated 26 September 2000 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2000/904, 3.

<sup>84</sup> Ibid 3.

<sup>85</sup> For example, in *André Rwamakuba v Prosecutor* (note 63 above) AC Decision (Appeal Against Dismissal of Motion Concerning Illegal Arrest and Detention) 11 June 2001, the Appeals Chamber advised the appellant to invoke the issue of the alleged violation of his fundamental human rights by the tribunal in order to seek reparation as the case may be at the appropriate time.

<sup>86</sup> See *Prosecutor v Nikolić* IT-94-2-AR73 Decision on Interlocutory Appeal Concerning Legality of Arrest (5 June 2003) paras 28-33: Gross violation of the rights of the accused in the process leading to acquisition of jurisdiction by an international tribunal may, according to the circumstances of a particular case, constitute a legal impediment to the exercise of jurisdiction over such an accused person.

<sup>87</sup> *Prosecutor v Delalić & ors* Decision on Mucic’s Motion for Exclusion of Evidence (2 September 1997) (note 44 above): the Trial Chamber excluded a statement made by the accused to Austrian authorities because the accused had not been informed of his right to counsel or permitted counsel.

<sup>88</sup> *Rwamakuba* ICTR-98-44C-T (note 63 above) Decision on Appropriate Remedy 31 January 2007 para 79 (II) & (III): the Trial Chamber found that there was a breach of André Rwamakuba’s right to legal assistance, as provided for in Article 20 (4) (d) of the statute, resulting from the registrar’s failure to appoint duty counsel for Rwamakuba during the initial months of his detention at the United Nations detention facilities, from 22 October 1998 until 10 March 1999; Accordingly, it ordered that the registrar provide André Rwamakuba with an apology for the violation of his right to legal assistance.

<sup>89</sup> *Laurent Semanza v Prosecutor* ICTR -97-20-A Decision (31 May 2000) Disposition sub para 6 (a) & (b): the appeals chamber decides that for the violation of the his rights, the appellant is entitled to a remedy, which shall be given when judgement is rendered by the Trial Chamber as follows: if found not

(aa) Right of the accused to compensation under the ICC Statute

The ICC Statute provides for an enforceable right to compensation, to persons in circumstances showing that there was a miscarriage of justice leading to their unlawful arrest or detention.<sup>91</sup>

Article 85(1) ICC Statute adopts verbatim the wording of Article 9 (5) ICCPR.<sup>92</sup> According to the Human Rights Committee, Article 9 (5) ICCPR is meant to address all deprivations of liberty; it goes beyond criminal cases to apply to other cases such as immigration control, mental illness, and educational purposes among other situations.<sup>93</sup> In principle, Article 85 (1) ICC Statute confers wide discretion upon the court to determine cases for which to award compensation. Staker highlights two situations in which the provision would apply (i) cases where a person is arrested or detained in violation of specific provisions of the statute (in particular Article 55 (1) d (arbitrary arrest and detention)) or the rules, and presumably where the arrest or detention was unlawful under other applicable rules of international law.<sup>94</sup> There is no doubt that human rights norms constitute part of the other applicable rules of international law referred to above. The draft version of paragraph 1, at the preparatory committee level, read as follows: ‘...in violation of the statute, the rules or internationally recognised human rights law’.<sup>95</sup>

(ii) Arrests or detentions by state authorities in connection with proceedings before the court, which are unlawful under the national law of that state.<sup>96</sup> Further, the specifications of paragraphs (2) and (3) would guide the court’s discretion in determining deserving cases.

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guilty, the appellant shall be entitled to financial compensation; if found guilty, the appellant’s sentence shall be reduced to take into account the violation of his rights.

<sup>90</sup> *Kajelijeli* AC Judgement (23 May 2005) (note 54 above) para 255: the Appeals Chamber considers that under the jurisprudence of this tribunal, where the Appeals Chamber has found on interlocutory appeal that an accused’s rights have been violated, but not egregiously so, it would order the Trial Chamber to reduce the accused’s sentence, if the accused is found guilty at trial..

<sup>91</sup> Article 85(1), (2), (3) ICC Statute (note 11 above).

<sup>92</sup> Article 9(5) ICCPR (note 8 above): anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. See Christopher Staker ‘Commentary on Article 85 of the Rome Statute’ in O Triffterer (note 6 above) 1500.

<sup>93</sup> See CCPR General Comment No 8 ‘Right to Liberty and Security of Persons’ (30 June 1982) para 1 ([http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument) ).

<sup>94</sup> See Staker (note 92 above) 1501.

<sup>95</sup> See Article 84 Report of the Preparatory Committee on the Establishment of the International Criminal Court A/CONF 183/2/Add 1 (14 April 1998) 130.

<sup>96</sup> Staker (note 92 above) 1501.

Article 85 (2) ICC Statute provides for mandatory award of compensation in cases where a conviction is reversed as a result of a revision of the final judgment revealing the occurrence of a miscarriage of justice in the process. This provision would enable the ICC to provide compensation to acquitted persons. However, paragraph 2 is unlikely to apply to cases where a conviction by a trial chamber is overturned on appeal on the basis of new evidence presented in the appeal proceedings, since the conviction in such a case would not have been ‘by a final decision’ as required by the wording of the provision.<sup>97</sup> Paragraph 2 therefore addresses a special category of acquitted persons: those that exhaust all appellate stages. It is only at this stage that an acquittal is confirmed as final and the court is *functus officio*. Revision of a final judgment of conviction or sentence can only be done by the appeals chamber under Article 84 of the statute.<sup>98</sup>

Article 85 (2)<sup>99</sup> does not entail a definition of what amounts to ‘miscarriage of justice’; it is also not clear whether the expression would encompass every case in which a final judgment of conviction is reversed.<sup>100</sup> However, the lack of a definition gives the court more flexibility in determining just cases for reparation.

Paragraph (3) confers no right to compensation but allows for compensation to be awarded in the court’s discretion.<sup>101</sup> The court would proceed on its own motion where it finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, to award compensation to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.<sup>102</sup> For want of definition, the notions ‘exceptional circumstances’ and ‘grave and manifest miscarriage of justice’ are potentially litigable, and could constrain the discretion conferred upon the court to grant the remedy in question. It is a claw-back clause.

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<sup>97</sup> Ibid.

<sup>98</sup> ICC Statute (note 11 above).

<sup>99</sup> Ibid.

<sup>100</sup> Staker (note 92 above).

<sup>101</sup> Article 85(3) ICC Statute (note 11 above). See Staker *ibid*.

<sup>102</sup> Article 85(3) ICC Statute *ibid*.

In my view, there is a low probability for success of claims for compensation under provisions of Article 85 of the ICC Statute. The existence of a concrete right of the accused to compensation can only be established by jurisprudence.

(bb) Relinquishing jurisdiction on the basis of human rights violations

The tribunal, an institution whose primary purpose is to ensure that justice is done, must not place its imprimatur on such violations. To allow the appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the tribunal is at stake in this case. Loss of public confidence in the tribunal, as a court valuing human rights of all individuals including those charged with unthinkable crimes would be among the most serious consequences of allowing the appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results’– ICTR appeals chamber.<sup>103</sup>

The challenge posed by the rights perspective to the jurisdiction of the court, in cases of profound violations of human rights in international criminal proceedings is the most contentious subject of the discourse of remedies in international criminal justice. In principle, gross violation of the rights of a suspect in the process of bringing them under the purview of the court constitutes a legal impediment to the court’s jurisdiction. In the case of *Barayagwiza*, the ICTR found unjustified persistent delays in bringing the accused for trial. The delays in question included the lapse of 96 days between the date the accused was transferred to the tribunal and the date of his initial appearance.<sup>104</sup> The chamber evoked the abuse of process doctrine, declined jurisdiction, and exercised its discretion to direct the immediate release of the accused.<sup>105</sup> The chamber reconsidered its position upon a subsequent application by the prosecution adducing

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<sup>103</sup> *Barayagwiza* AC Decision 3 November 1999 (note 23 above) para 112.

<sup>104</sup> Ibid para 68: the accused was transferred to the tribunal on 19 November 1997 and his initial appearance was not held until 23 February 1998.

<sup>105</sup> Ibid paras 74, 75, 106.

new facts which were not known at the time of the first decision.<sup>106</sup> Those facts purportedly diminished the role played by the failings of the prosecutor as well as the intensity of the violation of the rights of the appellant.<sup>107</sup> Similarly, the ICC trial chamber in the case of *Lubanga* ordered the unconditional release of the accused person. The court decided to secure Lubanga's right to liberty in the absence of the prospect of a trial.<sup>108</sup> As a result of an unconditional stay of the proceedings, there was uncertainty of the trial resuming at a future date, leading to prolonged detention of the accused.<sup>109</sup> The appeals chamber reversed the decision to stay proceedings hence enabling proceedings to resume before reversing the decision of release.<sup>110</sup>

The determination of whether or not there are violations in the pre-trial phase brings into question the extent of the supervisory powers of the court. The appeals chamber in *Barayagwiza* held that it is generally recognised that the courts have supervisory powers that may be utilised in the interests of justice regardless of a specific violation. The use of such supervisory powers serves three functions: (i) to provide remedy for the violation of the accused's rights; (ii) to deter future misconduct; and (iii) to enhance the integrity of the judicial process.<sup>111</sup> In that case, the chamber justified its jurisdiction over Barayagwiza's detention in the arresting state on grounds that even for the period the accused was held in Cameroon, he was in constructive custody of the tribunal because he was held at the behest of the tribunal. This brought that phase directly under the purview of the ICTR.<sup>112</sup> Hence, the chamber decision in Barayagwiza's case does not contravene the view that acts of sovereign states may not be within the competence of the court to supervise.

The remedy of setting aside the jurisdiction of the court accrues only in circumstances of gross violations of the rights of the accused. This relief may offset the interest of the international

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<sup>106</sup> See *Prosecutor v Barayagwiza* ICTR-97-19-AR72 Decision (Prosecutor's Request for Review or Reconsideration) 31 March 2000.

<sup>107</sup> Ibid para 71.

<sup>108</sup> *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Decision on the release of Thomas Lubanga Dyilo 2 July 2008 ICC-01/04-01/06-1418 02-07-2008 1/17 VW T para 30.

<sup>109</sup> *Prosecutor v Thomas Lubanga Dyilo* ibid Judgment on the Appeal of Prosecutor against the Oral Decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo 8 October 2010 ICC-01/04-01/06-2583 08-10-2010 1/11 T OA17 para 22.

<sup>110</sup> Ibid para 1.

<sup>111</sup> *Barayagwiza* AC Decision 3 November 1999 (note 23 above) para 76.

<sup>112</sup> Ibid paras 43, 100.



community in prosecuting international crimes. A court should only decline to exercise jurisdiction where to do so would prove detrimental to the court's integrity. For instance, violation of human rights which have the character of customary international law such as the prohibition against torture constitutes a legal impediment to the jurisdiction of the court.<sup>113</sup> However, determining human rights falling under customary international norms is a complex exercise. A considerable number of human rights may be derogated from under certain conditions, for example, when this is necessary in a democratic society, or time of public emergency which threatens the life of a nation. These conditions concern the application of human rights within national jurisdictions and may not fit easily in the application of human rights by international criminal tribunals.<sup>114</sup> Thus, although there is no precedent where the jurisdiction of the court is completely ousted on the basis of findings of human rights violations, the remedy is legitimate.

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<sup>113</sup> See *Kajelijeli* AC Judgement 23 May 2005 (note 54 above) AC para 206: where an accused is very seriously mistreated, may be even subject to inhuman, cruel or degrading treatment, or torture before being handed over to the tribunal, this may constitute a legal impediment.

<sup>114</sup> Sluiter (note 29 above) 938.

## **(e) Conclusion**

The framework of protection of fair trial rights in international criminal practice is a promising structure for fulfilling language rights in legal proceedings. The jurisprudence of ICTs demonstrates their commitment to fulfil the duty of ensuring the minimum guarantees of fair trial. The courts are mindful of the entitlement of the accused person to (a) prompt and detailed information on the charges; (b) adequate time and facilities for the preparation of their defence; (c) trial without undue delay; (d) presence at trial and defence in person or through legal assistance of the accused's own choosing; (e) examination and cross-examination of witnesses; (f) free interpretative assistance; and (g) the right against self-incrimination. Linguistic fair trial rights are particularly introduced in the framework of the aforementioned priority rights. The standard of full respect for human rights set in the statutes of ICTs further enhances the significance of ensuring human rights to the integrity of the trial process.

International criminal justice constitutes a distinct approach to fair trial rights. This approach is characterised by (i) adherence to the rules of procedure and evidence. The exercise of fair trial rights must be in accordance with procedural rules. (ii) The duty of the accused to take reasonable steps to realise fair trial rights. It is also the primary responsibility of the accused to draw the court's attention to what they consider violation of their rights. (iii) Priority of procedural norms embodied in the minimum guarantees of fair criminal trial. Notably, the position of language fair trial rights in the minimum guarantees situates them in a framework of priority rights. (iv) An overarching obligation to ensure that the trial is fair, prompt and speedy, which corresponds with the overriding right of the accused person to a fair and expeditious trial. Further, ICTs have also expressed willingness to grant remedies including relinquishing jurisdiction in cases where the rights of the accused are so seriously violated that to exercise jurisdiction would prove detrimental to the court's integrity. A case in point is the decision of the ICTR in *Barayagwiza Jean-Bosco v Prosecutor*,<sup>115</sup> ordering the immediate release of the suspect before the trial; on grounds that due process could not be founded on the egregious breaches of the suspect's rights in the period preceding the trial. Thus, it is strategically viable to promote language fair trial rights in the rights framework of international criminal justice.

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<sup>115</sup> Note 23 above.

However, there are notable constraints to the human rights mandate of ICTs such as (i) the inability of the courts to enforce orders and requests against states. It has been particularly difficult for ICTs to detach from the political realities of the context in which they were established and still operate. The judicial character and independence of ICTs needs to be established to enable them to abide fully by internationally recognised norms relating to the rights of suspects and accused persons. (ii) Lack of a legislative framework for remedies to accused persons in statutes of ICTs. It is only the ICC Statute which provides for the right to compensation to persons in circumstances showing that there was a miscarriage of justice leading to their unlawful arrest or detention. (iii) The courts also need to structure a specialised procedure to address human rights petitions with the urgency that they usually require preferably judicially as opposed to administratively.

## CHAPTER 3

### LANGUAGE RIGHTS IN THE MINIMUM GUARANTEES OF FAIR CRIMINAL TRIAL

#### (a) Introduction

The concept of fair trial is fundamental to the integrity of legal proceedings. A fair trial is a duly conducted process with regard to the rights of the parties. The right to trial fairness figures prominently in efforts to guarantee human rights at the international level.<sup>1</sup> In criminal proceedings, it assures the accused of an effective position from which to face charges competently. Thus, provision is made for essential due process rights in international instruments, criminal legislation, and national constitutions. These entitlements are the minimum guarantees of fair criminal trial enumerated in Article 14 (3) International Covenant on Civil and Political Rights (ICCPR) (1966).<sup>2</sup> Notably, linguistic competency forms each of the minimum rights. An accused person is entitled to (a) information on the nature of the charge(s), (b) adequate time and facilities for the preparation of a defence, (c) trial without undue delay, (d) defence, (e) examination and cross-examination of witnesses, (f) interpretative assistance and (g) non-self-incrimination. However, the rightful position of language fair trial rights in international criminal justice is yet to be realised.

The status of particular norms in international law determines their fate in any independent system of adjudication.<sup>3</sup> Hence, the position of language rights in international law and the priority they are accorded in criminal proceedings are key to their fulfilment in criminal practice. Linguistic human rights are less abundant and their scope of protection less extensive than what appears in the international legal framework.<sup>4</sup> I agree with Arzoz that the major problem lies with the danger of misrepresenting the actual status and significance of language rights in the

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<sup>1</sup> D Harris 'The Right to a Fair Trial in Criminal Proceedings as a Human Right' (1967) 16 *Int & Comp LQ* 352, 352.

<sup>2</sup> Adopted by GA Res 2200A (XXI) 16 December 1966.

<sup>3</sup> C DeFrancia 'Due Process in International Criminal Courts: Why Procedure Matters' (2001) 87 *Virginia LR* 1381, 1384.

<sup>4</sup> X Arzoz 'The Nature of Language Rights' (2007) JEMIE paper (Issue No 2/2007)1, 2.

context of human rights law, international law, and constitutional law.<sup>5</sup> However, I depart from his assertion that linguistic human rights must be interpreted as ideals and aspirations, and not as enforceable entitlements already recognised by international binding rules. Arzoz's aforementioned position applies satisfactorily to language rights as minority rights, that is, the right to use one's language as an affirmation of identity.

This chapter distinguishes the status of linguistic rights of participants in an international criminal trial, as actionable rights, by demonstrating the significance of language to the fulfilment of the minimum guarantees of fair hearing. The objective is to situate language rights in a category of priority rights. These rights are rooted and can be effectively enforced within the human rights framework. In principle, human rights law enjoys primacy over other bodies of norms in international law.<sup>6</sup> Demonstrably, the basis of language arrangements in the European Union (EU) has more to do with the determination to protect human rights than with either linguistic diversity or language equality.<sup>7</sup> The EU has the leading regime of linguistic rights protection in criminal trials.

There are varying approaches to human rights. The manner in which human rights are understood bears significantly upon their enforcement. There are two problems with the traditional understanding of rights. Firstly, in traditional legal discourse, rights are too narrowly perceived as conclusions drawn within a system of rules.<sup>8</sup> We view rights as entitlements of individuals rather than as means of conducting human relations. Hence, they are continually pursued by aggrieved persons because they are seldom integrated in human interactions. Secondly, we understand rights within an inherited framework established by our political, social and cultural as well as our legal background. This framework and hence our understanding of particular rights is influenced by our economic and other interests.<sup>9</sup> In international criminal practice, the rights of participants are subjected to the rules of procedure and evidence, in view of

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<sup>5</sup> Ibid 3.

<sup>6</sup> X Arzoz 'Language Rights as Legal Norms' (2009) 15 *European Public Law* 554,554.

<sup>7</sup> A De Elera 'What Place for Linguistic Diversity, Language, Equality, and Rights in the Language Arrangements of the European Union?' (2005) 12 *Maastricht J of Euro & Comp L* 271, 271.

<sup>8</sup> SJM Donnelly *The Language and Uses of Rights: A Biopsy of American Jurisprudence in the Twentieth Century* (1994) 7.

<sup>9</sup> Ibid 8.

the broader objective of expediting trial and the interest of the international community to bring suspects to justice.

Donnelly advances a reference point for understanding rights that is not behaviour but obligation grounded in human commitments. From the view of recognising commitments such as advancing the cause of humanity, affording all persons respect and concern, an additional use of the rights discourse is perceived, that is, as a means of conducting human relations.<sup>10</sup> Rights and the language of rights are used by claimants to appeal to obligations which persons in authority recognise or which they should recognise.<sup>11</sup> The obligation may arise from commitment to a legal system, a moral system, a fundamental moral principle, an ideological cause, or to respect for humanity or the fundamental humanity of each person.<sup>12</sup> This interpretation underpins the understanding of human rights in this chapter.

This chapter contains two sections (i) the evolution of the fair trial provision, and (ii) situating language fair trial rights in the minimum guarantees.

### **(b) Evolution of the fair trial provision**

The 20<sup>th</sup> Century paradigm shift to an individual as an autonomous subject of international law, in international criminal law, elevated the significance of due process rights. The term ‘due process’ is broadly construed to include all those aspects that relate to the integrity of legal proceedings such as (i) notice; (ii) opportunity to be heard; (iii) orderliness of proceedings and (iv) the competence of the adjudicating mechanism. These components take another form and more compelling structure in criminal law discourse: the rights construction as expressed in the popular subject of the right to fair trial. A criminal trial presents a peculiar situation of power imbalance between disputing parties. At the national level, it is the state against an individual and, in the case of international criminal trials, solidarity of states seeking accountability from individuals. Naturally, the accused stand in a vulnerable position that there is need for systemic protections of human dignity from probable excesses of state power. This assertion supports the proposition that the guarantees of fairness are primarily for the defendant, although a fair trial is

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<sup>10</sup> Ibid 82.

<sup>11</sup> Ibid 9.

<sup>12</sup> Ibid.

for all parties to the proceedings. Ensuring the rights of the accused comprises proper administration of justice, with due respect to the principles of fairness.<sup>13</sup>

In 1948, the right to fair trial was affirmed as a basic human right by the Universal Declaration of Human Rights (UDHR)<sup>14</sup> and by the American Declaration of the Rights and Duties of Man.<sup>15</sup> Subsequently, it was included as a key undertaking in the ICCPR<sup>16</sup> and, at the regional level, in the European Convention on Human Rights (ECHR),<sup>17</sup> and the American Convention on Human Rights ('Pact of San Jose, Costa Rica').<sup>18</sup> There is also notable widespread representation of the right in the bill of rights of national constitutions worldwide.

The fair trial provision underpins the human rights discourse in international criminal law. It is also the foundational basis of language fair trial rights. Today, the question of fair conduct of proceedings has a bearing on the legitimacy of courts themselves. The fair trial provision is included in the constitutive documents of International Criminal Tribunals (ICTs). Notably, the wording of the fair trial provisions of ICTs is modelled on Article 14 ICCPR.<sup>19</sup> The Law on the establishment of the Extra Ordinary Chambers in the Courts of Cambodia (ECCC)<sup>20</sup> distinctively states that the minimum guarantees in its Article 35 are in accordance with the ICCPR provision.

However, the notion of fair trial is not capable of precise definition. Existing attempts are more descriptive than definite. Its meaning has also changed over time. According to Langford, the word 'fair' first collocated with 'trial' in the 17<sup>th</sup> century, and since then the meaning of 'fair trial' has varied with changes in the meaning of the word 'fair' itself.<sup>21</sup> Prior to the 20<sup>th</sup> Century, fair trial was used to refer to a trial that was roughly 'free from blemish' reflecting a meaning of 'fair' that was in use until the 19<sup>th</sup> century; a duly conducted procedure in accordance with the

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<sup>13</sup> General Comment 32 (90) 'Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court established by Law' 27 July 2007 UN Doc CCPR/C/GC/32 para 2.

<sup>14</sup> Article 10 UDHR (1948) 43 AJIL supp 127.

<sup>15</sup> Article XVIII American Declaration (1948) reprinted in 'Human Rights in the American States' PAU preliminary edition (1960)155.

<sup>16</sup> Note 2 above.

<sup>17</sup> Article 6 ECHR (1950) as amended Rome 4.XI.1950.

<sup>18</sup> Article 8 American Convention OAS Treaty Series No 36 1144 UNTS 123.

<sup>19</sup> Note 2 above.

<sup>20</sup> As amended promulgated on 6 June 2003 (NS/RKM/1004/006).

<sup>21</sup> I Langford 'Fair Trial: The History of an Idea' (2009)8 *Journal of Human Rights* 38, 38.

procedural rules and technicalities.<sup>22</sup> This ‘free from blemish’ meaning of fair trial became obsolete in the 19<sup>th</sup> and 20<sup>th</sup> centuries, and was replaced by a new meaning implying ‘procedural fairness.’<sup>23</sup> A fair trial became one that observed certain rights that had become possessions of the party being put on trial.<sup>24</sup>

Arguably, today’s perception of fair trial is a duly conducted process with regard to the rights of the parties, hence comprising a blend of both meanings as advanced by Langford. It comprises both procedural regularity and procedural fairness. The 20<sup>th</sup> Century rights protection perspective of fair trial expounded the ancient procedural regularity meaning of fair trial. The result has been a more fluid notion of fair trial since the categories of procedural regularities and procedural rights are continually expanding. The 20th century rights perspective of fair trial has been of intense significance to criminal proceedings, nurturing the notion of fair criminal trial.

Amidst the ambiguity, the essential elements of a fair criminal trial are captured in the minimum guarantees. In the wording of Article 14 ICCPR, an accused person is entitled to (a) information on the nature of the charge(s), (b) adequate time and facilities for the preparation of a defence, (c) trial without undue delay, (d) defence, (e) examination and cross-examination of witnesses, (f) interpretative assistance and (g) non-self-incrimination. Article 8 American Convention deploys the phrase ‘due guarantees’; a fair trial is a hearing with due guarantees. The guarantees embody the core objective and purpose of the fair trial provision. In the negotiating history of Article 6 ECHR (on the right to fair trial), M. Teitgen (France) stated that ‘we simply desire to secure for Europeans, freedom of defence, and procedural safeguards, because those safeguards are the very expression of individual liberty and individual rights.’<sup>25</sup> In those words, Teitgen expressed the intention of the delegates in formulating the fair trial provision, which was to secure all other rights by enabling competent action for their enforcement.

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid. See *Raney v Commonwealth* 153 SW 2d 935, 937-38(1941) (Ky): a fair trial is one where the accused person’s legal rights are safeguarded and respected.

<sup>25</sup> See Preparatory Work on Article 6 of the European Convention on Human Rights, Information Document Prepared by the Secretariat of the European Commission of Human Rights DH(56)11 Strasbourg (8 October 1956) 8 para 5 ([http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART6-DH\(56\)11-EN1338886.PDF](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART6-DH(56)11-EN1338886.PDF)).



The primary question is whether the minimum guarantees constitute the yardstick for fair trial; is their fulfilment sufficient to guarantee a fair criminal trial? The Human Rights Committee (HRC) treats the requirements of paragraph 3 as the bare minimum; their observance is not always sufficient to ensure the fairness of a hearing as required by Article 14 (1) ICCPR.<sup>26</sup> The drafters of the ICCPR only intended to state the most important guarantees to the individual in the sphere of penal and civil procedure.<sup>27</sup> Hence, a fair trial is determined on a subjective standard, which is dependent upon the satisfaction of stakeholders. It is also significant to note that paragraph 3 enumerates only procedural guarantees for persons charged with criminal offences; guarantees for civil litigants are not addressed.<sup>28</sup> Established by virtue of Article 28 ICCPR,<sup>29</sup> the HRC is a body of independent experts that monitors the implementation of the covenant by states parties.

Noteworthy is the distinctive reference to the ‘guarantees’ as ‘minimum rights’ in Article 6 (3) ECHR.<sup>30</sup> This was one of the five corrections of form, made on Article 6, by the Committee of Legal Experts, on 3 November 1950, the eve of the signing of the convention.<sup>31</sup> The two terms ‘minimum guarantees’ and ‘minimum rights’ have a similar legal effect and are commonly used interchangeably.<sup>32</sup> A guarantee is assurance that a legal act will be duly carried out;<sup>33</sup> a right is a legally enforceable claim that another will do or will not do a given act.<sup>34</sup> As minimum guarantees, the constituents of Article 14 (3) ICCPR express obligations of justice professionals to ensure the standards listed, and as minimum rights, Article 6 (3) ECHR entails prerogatives of criminal defendants. Legal realists argue that a legal right is only meaningful when a person can

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<sup>26</sup> General Comment 13 ‘Equality before the Courts and the Right to a Fair and Public Hearing by the Independent Court established by Law’ (13 April 1984) para 5.

<sup>27</sup> MJ Bossuyt *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (1987) 280. See also NS Nicholson ‘The Law on Language in the European Union: Policy Development for Interpreting/Translation Services in Criminal Proceedings (2009) 16 (1) *Int’l J of Speech, Language & the Law* 59, 70: there is no ‘upper limit’ of rights, only minimum standards are established - Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union.

<sup>28</sup> General Comment 32(90) (note 13 above) para 3.

<sup>29</sup> Note 2 above.

<sup>30</sup> Note 17 above.

<sup>31</sup> Preparatory Work on Article 6 ECHR (note 25 above) para 20.

<sup>32</sup> See General Comment 32(90) (note 13 above) para 31—40, See also Harris (note 1 above) 352, 361.

<sup>33</sup> BA Garner (ed) *Black’s Law Dictionary* 7ed (1999)711.

<sup>34</sup> *Ibid* 1322.

make a prediction that courts will recognize that right and afford a remedy.<sup>35</sup> Thus, the minimum rights as stated in the ECHR are actionable; they confer upon the accused person the power to sue for breach of duty and to seek remedies for violation. Similarly, the ICTs are seized of actions by accused persons for violation of the minimum guarantees. Barayagwiza challenged the jurisdiction of the ICTR on grounds of gross violation of his rights by the arresting state (Cameroon). The rights in question included the right to be promptly informed of the charges against him.<sup>36</sup> In *Nikolić*, the court held that gross violation of the rights of the accused in the process leading to acquisition of jurisdiction by an international tribunal may constitute a legal impediment to the exercise of jurisdiction over such an accused person.<sup>37</sup>

Another concern is the sequence of the minimum guarantees. The order in which the rights appear in Article 14 (3) ICCPR is not intended to create an order of priority. The minimum guarantees are to be accorded in ‘full equality’ to the accused; they are interlinked and mutually reinforcing.

### **(c) Situating language rights in the minimum guarantees of fair criminal trial**

#### *(i) Information on charges*

In determining any criminal charge, the defendant is entitled to prompt and detailed information on the nature and cause of the charge against them, in a language that they understand (Article 14 (3) (a) ICCPR).<sup>38</sup> This is the most explicit expression of a language requirement amongst the paragraph 3 guarantees. The nature of the charge refers to the precise legal qualification of the offence, and the cause of the charge relates to the facts underlying it.<sup>39</sup> The right to information of charges is a fundamental guarantee of the fairness of proceedings.<sup>40</sup>

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<sup>35</sup> Donnelly (note 8 above) 2.

<sup>36</sup> *Jean-Bosco Barayagwiza v Prosecutor* ICTR-97-19 AC Decision 3 November 1999.

<sup>37</sup> *Prosecutor v Dragan Nikolić* IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003 paras 28—33.

<sup>38</sup> Note 2 above.

<sup>39</sup> *Prosecutor v André Ntagerura & ors* ICTR-99-46-T Judgement 25 February 2004 para. 29.

<sup>40</sup> *Mikaeli Muhimana v Prosecutor* ICTR -95-1B –A Judgement (21 May 2007) 86 See Partly Dissenting Opinion of Judge Schomburg on the Interpretation of the Right to be Informed para 2.

This guarantee originates from the right to liberty and security of the person: the affirmation that no one shall be deprived of their liberty except on grounds and in accordance with such procedure as established by law.<sup>41</sup> Article 9 (1) ICCPR provides an elementary safeguard that any person arrested should know why they are deprived of their liberty.<sup>42</sup> Notably, the guarantee recognises that information can only be imparted and facilitated by a language that is understood by the person receiving the information. There are two distinct periods when the right to information of charges is applicable: (i) when the suspect is initially arrested and detained under Article 9 (2) ICCPR,<sup>43</sup> and (ii) at the initial appearance of the accused before the court after the confirmation of the indictment under Article 14 (3) (a) ICCPR,<sup>44</sup> or as soon as the person concerned is formally charged with a criminal offence.<sup>45</sup> Following the decision in *Miranda v Arizona*,<sup>46</sup> a person under arrest must be informed of the following rights (also known as Miranda Rights): (i) the right to remain silent; (ii) that anything they say can and would be used against them in a court of law; (iii) the right to talk to a lawyer and have one present during questioning; (iv) that if they cannot afford to hire a lawyer, one would be appointed to represent them before any questioning, if desired. Such information is to ensure that investigations do not jeopardise the rights of a prospective accused, and affect the integrity of the process. It is important for international criminal procedure to provide for the right to information on charges subsequent to arrest, because any state can apprehend a suspect of an international crime; the language of the suspect may not be the most convenient mode of communication in the arresting state. The rights framework obliges such a state to take extra measures, to ensure that the language understood by the suspect is used. The provision of information on charges further illustrates that language facilitates the enterprise of protecting all other rights by empowering the accused person.

*Blaškić* distinguishes between the minimum right guaranteed to an accused through a presentation of the facts and charges (at arrest), and the right to receive more detailed information for purposes of preparing one's defence (upon charge or at the commencement of

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<sup>41</sup> Article 9 (1) ICCPR (note 2 above).

<sup>42</sup> *Barayagwiza* AC Decision 3 November 1999 (note 36 above) para 81.

<sup>43</sup> Note 2 above, See *Barayagwiza* *ibid*.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Barayagwiza* AC Decision 3 November 1999 (note 42 above) para 81.

<sup>46</sup> 384 U.S. 436 (1966) 13 June 1966.

proceedings).<sup>47</sup> The degree of specificity required on either occasion is distinctive: at arrest, under Article 9 (2),<sup>48</sup> it is enough that the substance of the charge is conveyed in general terms and without regard to any particular form, being all that is needed to enable the person arrested to challenge the curtailment of their liberty.<sup>49</sup> The suspect is afforded the opportunity to obtain their release prior to the initiation of trial proceedings.<sup>50</sup> Oral communication suffices, although written communication acts as proof of fulfilment of this requirement.<sup>51</sup>

On the other hand, the requirement of Article 14 (3) (a) ICCPR (in (ii) above) is to inform the accused in detail of the nature and cause of the charge(s). It gives the suspect the information they require to prepare their defence.<sup>52</sup> This involves service of court process including documents verifying the charge(s), especially the indictment, the only statutory accusatory instrument.<sup>53</sup> These documents should be furnished to the defendant in a language that they understand. All documents substantiating the nature of the charge must be translated into the language that the accused understands.<sup>54</sup>

The issue is when an accused is considered to understand a language within the meaning of paragraph 3. The task of gauging linguistic and comprehension level in both cross-lingual and monolingual situations is problematic in many respects.<sup>55</sup> There are various degrees of proficiency in a language. It might be difficult to judge where on the scale of understanding a person should be situated.<sup>56</sup> Article 14 (3) (a) ICCPR<sup>57</sup> requires that what is conveyed should rightly occur effortlessly to a person in the ordinary sense. In the language of the ICC appeals

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<sup>47</sup> *Prosecutor v Tihomir Blaškić* IT-95-14-PT Decision on the Defence Motion to Dismiss the Indictment based upon Defects in the Form thereof (Vagueness/Lack of Adequate Notice of the Charges) (4 April 1997)13.

<sup>48</sup> ICCPR (note 2 above).

<sup>49</sup> *Prosecutor v Milan Kovačević* IT-97-24-AR73 AC Decision 2 July 1998 Judge Shahabuddeen.

<sup>50</sup> *Prosecutor v Vojislav Šešelj* IT-03-67-PT Order on Translation of Documents 6 March 2003.

<sup>51</sup> General Comment 32(90) (note 13 above) para 31.

<sup>52</sup> *Prosecutor v Vojislav Šešelj* IT-03-67-PT Order on Translation of Documents (note 50 above).

<sup>53</sup> *Ntagerura* Judgement 25 February 2004 (note 39 above) para 29.

<sup>54</sup> *Prosecutor v Vojislav Šešelj* IT-03-67-PT Order on Translation of Documents (note 50 above).

<sup>55</sup> J Cotterill 'Reading the Rights: A Cautionary Tale of Comprehension and Comprehensibility' (2000) 7 (1) *Forensic Linguistics* 4, 10.

<sup>56</sup> K Henrard 'Language & the Administration of Justice: The International Framework' (2000)7 *Int J on Minority & Group Rights* 75, 88.

<sup>57</sup> Note 2 above.

chamber, ‘an accused fully understands and speaks a language when he is completely fluent in the language in ordinary, non-technical conversation; it is not required that he has an understanding as if he were trained as a lawyer or judicial officer’.<sup>58</sup> This decision describes what is meant by understanding a language, so as to be fairly subject to legal process in it.

International criminal law entrenches the requirement of information on charges in court practice by the Rules of Procedure and Evidence (RPE). For example, Rule 121 (3) ICC RPE<sup>59</sup> obliges the prosecutor to provide to the pre-trial chamber and the accused a detailed description of the charges together with a list of the evidence to be presented, no later than 30 days before the date of the confirmation hearing. At the first appearance of Lubanga, the pre-trial chamber noted that it had satisfied itself that the accused had been informed of his rights and of the crimes which he was alleged to have committed prior to announcing a date for the confirmation hearing.<sup>60</sup> Confirmation hearing is the hearing by a pre-trial chamber within a reasonable time after the person’s surrender or voluntary appearance before the court, to confirm the charges on which the prosecutor intends to seek trial.<sup>61</sup> The prosecutor supports each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.<sup>62</sup> The person charged may (a) object to the charges; (b) challenge the evidence presented by the prosecutor; and (c) present evidence.<sup>63</sup> The pre-trial chamber, on the basis of the hearing, determines whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.<sup>64</sup> It is therefore important that the accused understands the description of the charges prior to their confirmation so as to participate ably in this crucial stage of their trial. However, Rule 121<sup>65</sup> does not require a specific description of the charges in a language that an accused understands, and neither did the chamber, in Lubanga

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<sup>58</sup> *Prosecutor v Germain Katanga* Judgement on the Appeal of Mr. Germain Katanga against the Decision of Pre-Trial Chamber I entitled ‘*Decision on the Defence Request Concerning Languages No. 01/04-01/07(OA 3)*’ (27 May 2008) para 3.

<sup>59</sup> Adopted by the Assembly of States Parties first session (New York) 3-10 September 2002 Official Records ICC-ASP/1/3.

<sup>60</sup> *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Decision on Confirmation of Charges 29 January 2007 para 17.

<sup>61</sup> Article 61 Statute of the International Criminal Court 17 July 1998, DOC A/CONF 183/9.

<sup>62</sup> Article 61(5) *ibid.*

<sup>63</sup> Article 61(6) a, b & c *ibid.*

<sup>64</sup> Article 61(7) *ibid.*

<sup>65</sup> ICC RPE (note 59 above).

indicate that it was mindful of the language in which the charges were communicated. This rule can, however, be read in conjunction with Article 55 ICC Statute,<sup>66</sup> which provides for translation of all documents necessary to meet the requirements of fairness, especially those substantiating the charge. Arguably, the obligation ‘to inform’ in criminal practice is customarily accompanied by the requirement ‘to make understand’, which can be met by using a language that is recognisable to the person being informed.

The process of informing someone of their rights or the charges against them involves a series of complex and challenging linguistic tasks, tackling a range of issues which have preoccupied academics for years: (i) the person relaying the information addresses the thorny problem of testing comprehension.<sup>67</sup> Judge Fulford affirms the statutory duty of a judge, at the commencement of trial, to ensure that the accused has heard the charges explained and understands them.<sup>68</sup> In international criminal trials, reading the charges to the accused and ascertaining whether they understand them is a technicality because counsel is expected to have explained the charges to the accused in considerable time before the commencement of trial. The judge is, however, obliged to confirm whether that was done. Explicit proof of understanding is also essential to due process in criminal trials at the national level.<sup>69</sup>

Proof of comprehension is commonly obtained by asking the person a single, global yes-no question: Do you understand the charges against you? The communicator then must rely on the recipient’s self-evaluation; this clearly requires the accused to have an awareness of precisely what constitutes an appropriate baseline level of comprehension.<sup>70</sup> I agree with Shuy that one does not know what it is that they do not know; many accused are therefore unlikely to make a well-informed assessment of their level of understanding.<sup>71</sup>

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<sup>66</sup> Note 61 above.

<sup>67</sup> Cotterill (note 55 above) 20.

<sup>68</sup> *Lubanga* (note 60 above) Transcript (26 January 2009) 2.

<sup>69</sup> RW Shuy & JJ Staton Review of Instruments for Assessing Understanding and Appreciation of Miranda Rights (2000) *Forensic Linguistics* 131,131.

<sup>70</sup> Cotterill (note 55 above) 20-21.

<sup>71</sup> *Ibid* 21.

(ii) Similar to measuring comprehension of cautions, if the communicator does ascertain that an accused is experiencing difficulties in comprehension (from ‘tone of voice’, ‘lack of eye contact’, or ‘by instinct’), the official must quickly estimate the comprehension capacity of the accused and grade the language of their explanations accordingly.<sup>72</sup> Thomas Grisso developed instruments for assessing understanding Miranda rights.<sup>73</sup> Grisso views comprehension from its different components: (a) self-generated paraphrases, (b) semantic recognition, (c) vocabulary recognition, and (d) language function recognition. Grisso’s tests are confidential, but Shuy and Stanton highlight four different measures that are built in the instruments including (i) asking the examinee to paraphrase each warning (a language production measure); (ii) asking the examinee to identify various interpretations provided by the examiner as being the same or different from the specific Miranda warning (a language reception measure); (iii) asking the examinee to define certain key words used in the Miranda warnings (a vocabulary recognition measure); (iv) asking the examinee to recognise, from picture/vignette scenario stimuli, the significance of Miranda rights (a language function measure). Shuy and Stanton suggest asking for a paraphrase of what was heard as the most obvious way to determine comprehension.<sup>74</sup>

It is noteworthy that international criminal practice does not illustrate any comprehension assessment procedure especially in situations where the accused does not plead guilty. In the case of *Lubanga*, it sufficed for counsel to inform the judge that she had explained the charges to the accused.<sup>75</sup> Notably, it was counsel who indicated to court that her client would like to plead not guilty. The judge did not engage Lubanga directly on the matter. The propriety of this course of action could constitute a subject of independent analysis.

The opening session of Mladić illustrates divergent approaches to assessment of understanding of trial rights on one hand and assessment of understanding of charges on the other.<sup>76</sup> After reading the rights to the accused, Judge Orić asked Mladić: ‘Do you understand these rights which were just read out to you?’ Mladić responded:

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<sup>72</sup> Ibid.

<sup>73</sup> Shuy & Stanton (note 69 above) 131.

<sup>74</sup> Ibid 132-133.

<sup>75</sup> *Lubanga* (note 60 above) Transcript (26 January 2009) 2.

<sup>76</sup> *Prosecutor v Ratko Mladić* IT-09-92-I Transcript (3 June 2011) 6-9.

‘I am a gravely ill man. I have heard what the young lady said. I need a bit more time to think about all the things she read out, so please bear with me, be patient. I was taken to the prison infirmary and three binders of documents were brought to me. I haven’t read any of that...I have this stress and now I did understand what the girl read out’.

Judge Orie intercepted the accused:

‘I do understand that you want to further think about these rights, and if I understand you well, not having read everything yet, the materials you have received until now, that you want to consider your position, if there is any need to be further informed about what these rights exactly mean, I take it that counsel will assist you.’

Upon obtaining a positive response from counsel that he would answer any questions that Mladić would have in relation to the rights, the judge proceeded to the next subject. It is not clear whether the situation would have been different if Mladić was self-represented.

Pertaining to the charges against Mladić, Judge Orie sought confirmation of the following (i) whether the accused had received a copy of the indictment in his language; (ii) whether counsel had explained the indictment to the accused; (iii) whether the accused had understood the indictment; (iv) whether counsel was convinced that the accused had understood the indictment. In ascertaining confirmation of these facts, the judge sought to establish the presence of conditions necessary for understanding. However, the form that the explanation to be accorded to an accused is to take is not prescribed. This matter is left to the discretion of counsel. The concern of an international adjudicator about an accused’s level of understanding extends to the entire proceedings.<sup>77</sup> The judge ignored an express waiver by the accused of his right to have the indictment read to him, and proceeded to read its summary including the charges for the benefit of both the accused and the public.<sup>78</sup> Thus, counterbalances may be necessary for the trial to proceed fairly and expeditiously. Mladić indicated that he needed at least two months to read the documents provided so as to understand his rights and the charges against him. If such a request was granted, it would delay his trial. It is court’s obligation to ensure expeditiousness.

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<sup>77</sup> See Judge Orie, *ibid* 1.

<sup>78</sup> *Ibid* 11--19.



(ii) *Adequate time & facilities to prepare a defence*

A fair trial must accord the accused adequate time and facilities to prepare their defence including communicating with counsel of their own choosing.<sup>79</sup> The sub-paragraph (b) guarantee has two requirements: (i) ‘adequate time’ and (ii) ‘adequate facilities’. It is agreed that what counts as ‘adequate time’ depends on the circumstances of each case.<sup>80</sup> The language question is significant to the amount of adequate time. The delays caused by translation stretch the time required for the defence to prepare its case. For example, Stakić sought and obtained extension of time to file his appellant brief on the ground that his counsel was unable to consult with him regarding the details of the appeal because he had not yet received a BCS translation of the judgment appealed from.<sup>81</sup> Limaj sought and obtained an extension of time in which to file his appellant’s brief because the trial chamber’s judgment had not yet been translated into Albanian, and the accused, who spoke only Albanian, was thus unable to read and review the judgement with his counsel. The deadline for filing the appellant’s brief was fixed at 40 days after the filing of the Albanian translation of the judgement.<sup>82</sup>

‘Adequate facilities’ is broadly construed to encompass all aspects that facilitate effective participation such as interpretation, legal assistance and legal aid, among others. In every case, however, ‘adequate facilities’ must include access to documents and other evidence.<sup>83</sup> This access consists of all materials that the prosecution plans to offer in court against the accused or that are exculpatory.<sup>84</sup> Notably, these documents should be tendered in a condition advancing their object and purpose. As the defence rightly pleaded in *Popović*, the right to adequate

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<sup>79</sup> Article 14(3)(b) ICCPR (note 2 above), *Prosecutor v Ferdinand Nahimana, Hassan Ngeze, Jean-Bosco Barayagwiza* ICTR-99-52-T (Media Case) Decision on the Motion to Stay the Proceedings in the Trial of *Ferdinand Nahimana* 5 June 2003 para 5.

<sup>80</sup> General Comment 32(90) (note 13 above) para 32, *Prosecutor v Théoneste Bagosora & ors* ICTR-98-41-T Decision on Defence Motion for Reconsideration of the Trial Chamber’s Decision and Scheduling Order of 5 December 2001 (18 July 2003) para 15.

<sup>81</sup> *Prosecutor v Milomir Stakić* IT-97-24-A Decision on Motion for Extension of Time 30 October 2003.

<sup>82</sup> *Prosecutor v Fatmir Limaj & ors* IT-03-66-A Decision on Extension of Time 16 February 2006 paras 2, 14.

<sup>83</sup> *Prosecutor v Vujadin Popović & ors* IT-05-88-PT Decision on Joint Defence Motion seeking the Trial Chamber to order the Registrar to provide the Defence with BCS Transcripts of Proceedings in two past cases before the International Tribunal 06 March 2006.

<sup>84</sup> General Comment 32 (90) (note 13 above) para 33.

facilities entails receiving documents ‘in a practical and effective manner’. This includes a language that the accused understands.<sup>85</sup>

The Human Rights Committee notes that the provision for adequate time and adequate facilities to prepare one’s defence is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.<sup>86</sup> This principle obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.<sup>87</sup> Notably, the linguistic needs of the prosecution are predictable through the working languages provision of the courts, and hence catered for in recruitment of staff. On the other hand, the defence is usually linguistically diverse. It is common for accused persons to choose counsel that do not speak their language. The compound and political nature of international crimes creates mistrust and suspicion among persons of a similar background, contributing to the accuseds’ preference of alien counsel. In the *Media Case*, court held that -

the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. It means that the prosecution and the defence must be equal before the court. It follows that the chamber shall provide every practicable facility it is capable of granting under the rules and statute when faced with a request by a party for assistance in presenting its case.<sup>88</sup>

International criminal tribunals are faced with recurring requests for translation of documents from the defence partly symbolising their linguistic struggles. In determining the extent of translation that meets both the requirements of justice and fair trial, the judges are faced with conflicting priorities. The balance between the required level of translation to meet the ends of justice and the guarantee of a speedy trial is a challenge.

Attempts by courts at balancing the right to ‘adequately tendered materials’ with the practicalities of justice have been eventful. In *Bisengimana*, the defence discovered discrepancies

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<sup>85</sup> *Prosecutor v Vujadin Popović & ors* IT-05-88-PT Decision on Joint Defence Motions Requesting the Translation of the Pre-Trial Brief and Specific Motions, IT-05-88-PT 24 May 2006 para 8.

<sup>86</sup> General Comment 32(90) (note 13 above) para 32.

<sup>87</sup> *Media Case* Decision on the Motion to Stay the Proceedings in the Trial of *Ferdinand Nahimana* (5 June 2003) (note 79 above) para 5.

<sup>88</sup> *Media Case* (ibid) Appeals Chamber Judgement 28 November 2007 para 220.

between the original prosecutor's motion and its translation, which were a result of errors in translation. It filed a motion for a complete and accurate translation to enable it to respond appropriately. Although the chamber granted the defence request, it alluded to two interesting notions: 'judicial economy' and 'authoritative version'.<sup>89</sup> Judicial economy relates to the cost of justice. The chamber demonstrated its awareness of the cost of translation in deciding a translation request. 'Authoritative version' refers to the edition of a court document that takes precedence in case of discrepancies. In anticipation of translation, it is the practice of international criminal tribunals to indicate at the bottom of an original document that it is the authoritative version. This demonstrates the courts' awareness of the likelihood of errors in translation.

Further, the court has distinguished situations in which an accused is self-represented. The tendency is to expand the scope of translation in such cases. In *Kvočka*, the chamber considered it essential for an appellant who is not represented to receive all the documents directly relating to their appeal in a language which they understand. It ordered that several documents be translated into Bosnian/Croatian/Serbian (BCS) including decisions, motions, responses, and statements that were relevant to the lodging of the appeal.<sup>90</sup> BCS with Albanian or Macedonian are the languages spoken in the former Socialist Federal Republic of Yugoslavia, hence the native languages of most accused at the ICTY.

On the other hand, if the accused does not speak the language in which the proceedings are held, but is represented by counsel who is familiar with that language, it is sufficient that the relevant documents in the case file are made available to counsel.<sup>91</sup> Article 14 does not contain an explicit right of an accused to have direct access to all documents used in the preparation of the trial in a language they understand; neither does it entail the right of an accused who does not understand the language of court to be furnished with translations of all relevant documents in a criminal

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<sup>89</sup> *Prosecutor v Paul Bisengimana* ICTR-2002-60-I Decision on Bisengimana's Motion for Complete and Accurate Translation into Working Languages of the Tribunal and Respect for the Rights of the Accused, 7 March 2003 paras 6, 9.

<sup>90</sup> *Prosecutor v Miroslav Kvočka & ors* IT-98-30/1-A Decision on Zoran Žigić's Motion for Translation of Documents Pertaining to his Appeal 3 October 2002.

<sup>91</sup> *Kvočka* *ibid* para 33.

investigation.<sup>92</sup> The defence is considered as a team; adequacy of facilities is judged on the basis of the team's capacity. In a decision laying down the principles governing translation rights and obligations, the ECCC held that the parties (including the charged persons) must contribute to the resolution of their own language needs, by using the linguistic capacity within their teams.<sup>93</sup> The judges of the ECCC affirmed this view by reminding a French defence counsel, who argued that he could not participate in the proceedings because every evidentiary document on his client's file had not been translated into French, that he had a Cambodian co-counsel who could understand the documents at issue.<sup>94</sup> In such cases, it is not clear whether co-counsel is expected to translate the documents for the linguistically deficient counsel or have one lawyer proceed with the case. The first possibility would transfer the tribunal's obligation to the defence team and impose a corresponding burden on their 'adequate time'. The latter would constrain the potential contribution of co-counsel to the detriment of the defence.

Fair trial queries arise in cases where evidentiary documents in the language of the accused are not comprehensible to counsel and the bench. In the *Media Trial, Kangura*, a *Kinyarwanda* journal, was admitted in evidence and translation refused. Ngeze was arrested, indicted, tried and convicted because of the articles and cartoons that appeared in *Kangura*.<sup>95</sup> Floyd, counsel of the defendant, argues that the lack of translation of the journal hampered the defence of Ngeze during the whole trial.<sup>96</sup>

Article 14 (3) (b) ICCPR<sup>97</sup> also demands that the accused be able to communicate with their counsel. This guarantee presupposes that counsel and the accused speak the same language. If otherwise, an interpreter should be provided.<sup>98</sup> In *Strugar*, the court rightly held that the use of

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<sup>92</sup> *Harward v Norway* CCPR Communication (451/1991) 15 July 1994 paras 9.4 & 9.5.

<sup>93</sup> See Order on Translation Rights and Obligations 23 June 2008 ECCC para 4 (<http://www.eccc.gov.kh/en/documents/court/order-concerning-translation-rights-and-obligations-parties>).

<sup>94</sup> S Blanchard 'An Assessment of the ECCC Order on Translation Rights and Obligations' (2008) *Documentation Centre of Cambodia* (DC-CAM).

<sup>95</sup> J Floyd *International Injustice Rwanda, Genocide and Cover-up: the United Nations Media Trial* (2005) 142.

<sup>96</sup> *Ibid* 143.

<sup>97</sup> Note 2 above.

<sup>98</sup> *Harward v Norway* (1994) (note 92 above) para 1.

counsel requires that the accused has the capacity to be able to instruct counsel sufficiently for the purpose of effective exercise of their rights and to enable them to adequately compensate for any deficiency of capacity to defend in person.<sup>99</sup>

Counsel-client communication should be in conditions that fully ensure confidentiality. The right of an accused to free and confident communication with counsel is a fundamental right with respect to the preparation of an accused's defence.<sup>100</sup> The Human Rights Committee has observed that lawyers should be able to advise and represent persons charged with criminal offences in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.<sup>101</sup> The presence of an interpreter could compromise full and confident disclosure especially in investigations involving crimes of a high magnitude. Such occurrences illustrate the bearing of the language question on the right to adequate time and facilities.

*(iii) Right to be tried without undue delay*

A suspect is entitled to trial without undue delay.<sup>102</sup> This guarantee relates to both the time by which trial should commence and the time by which it should end as well as judgment rendered.<sup>103</sup> The provision is designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case.<sup>104</sup>

The courts are faced with the challenge of balancing pleas for fair trial with demands for expeditiousness. The chamber in *Blagojević* considered that while the right to be tried without

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<sup>99</sup> *Prosecutor v Pavle Strugar* IT-01-42-T ('*Strugar* Decision') Decision on the Defence Motion to Terminate Proceedings 26 May 2004 para 22.

<sup>100</sup> *Prosecutor v Casimir Bizimungu* ICTR-99-50-I Decision on the Defence Motion to Protect the Applicant's Right to Full answer and Defence 15 November 2002 para 24.

<sup>101</sup> *Harward v Norway* (1994) (note 92 above) para 34.

<sup>102</sup> Article 14 (3) (C) ICCPR (note 2 above).

<sup>103</sup> *Prosecutor v Zdravko Tolimir & ors* IT-04-80-AR73.1 Decision on Radivoje Miletić's Interlocutory Appeal against the Trial Chamber's Decision on Joinder of Accused (27 January 2006) para 25.

<sup>104</sup> General Comment 32 (90) (note 13 above) para 35.

undue delay is one factor which the chamber must consider, a balance must be struck to ensure the right to fair trial.<sup>105</sup> Thus, the two themes have been correlated, hence the phrase ‘the right to a ‘fair and expeditious trial’’. To make the right effective, a procedure must be available in order to ensure that the trial proceeds ‘without undue delay’.<sup>106</sup> The rules of procedure and evidence regulate and facilitate the linguistic adaptations of a trial so as to minimise delays. It is the responsibility of the court to arrange for translation and interpretation services necessary to ensure the implementation of its obligations under the statute and the rules, but the scope of such translation and interpretation is not specified.<sup>107</sup> The judges have embraced the balancing task of limiting translation to only what is necessary to meet the ends of justice.

Specifically, translation is a significant trial-time determinant. For instance, where a party is required to take action within a specified time after the filing or service of a document by another party; and that document is filed in a language other than a working language of a tribunal, time does not run until the party required to take action has received a translation of the document.<sup>108</sup>

Similarly, litigation on translation sometimes manifests as a delaying tactic. In *Nahimana*, the appellant pleaded that neither he nor his lead counsel was proficient in English. He queried the trial chamber’s decision to dismiss his request that the period for filing his response to the prosecutor’s final trial brief should run from the date on which the defence received those arguments in both working languages of the tribunal. He added that failure to disclose to the defence a French version of the prosecutor’s closing brief and rebuttal arguments deprived him of ‘adequate facilities for the preparation of his defence’. The appeals chamber recalled that Nahimana’s co-counsel was English-speaking and several parts of his closing brief were written in English; his defence was capable of working in both English and French.<sup>109</sup> Another scenario

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<sup>105</sup> *Prosecutor v Vidoje Blagojević & Dragan Jokić* IT-02-60-T Decision on Prosecution’s Motion for a Stay of Proceedings Pending Resolution of the Issue of Vidoje Blagojević’s Representation, 18 June 2003.

<sup>106</sup> General Comment 13 (note 26 above) para 10.

<sup>107</sup> Common Rule (3) E ICTY RPE as amended IT/32/Rev 44; ICTR RPE UN Doc ITR/3/REV 1 (29 June 1995) as amended; Rule (3) D SCSL RPE (adopted on 16 January 2002) as amended; Rule 42 ICC RPE (note 59 above).

<sup>108</sup> Rule 3 (f) (i) & (ii) ICTY RPE *ibid*. See also *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Decision on the translation of the Article 74 Decision and related Procedural issues 15 December 2011.

<sup>109</sup> *Media Case* Judgement 28 November 2007 (note 79 above) paras 220, 236, 237.

arose in *Žigić*, where a self-represented accused, on grounds of not being able to read or understand English, requested the court to have translations to BCS of all the documents relevant to his defence.<sup>110</sup> This request was granted by the pre-appeal judge. Subsequently, *Žigić* applied to verify the accuracy of the English translation. The chamber found that *Žigić* was able to understand English so far as he was capable of checking the accuracy of a translation. Although the chamber subsequently revoked his right to BCS translations, valuable trial time was wasted in conducting translation that was not necessary because the defendant understood English. The linguistic requirements of a trial contribute to how long it takes. The language abilities of the defence team impact on adequate time. Arguably, an expeditious international trial is a compromise of linguistic obstacles.

*(iv) Right to defence*

Ignorance of the language of court or difficulty in understanding may constitute a major obstacle to the right to defence.<sup>111</sup> Every person facing criminal trial has a right to defend her-or himself, which constitutes the following entitlements: (i) presence at their trial, (ii) defence in person or through legal assistance of their own choosing, (iii) information on the right to legal assistance, and (iv) legal aid where the interests of justice so require.<sup>112</sup>

The requirement of presence of accused persons during trial is reiterated by Article 63 (1) of the ICC Statute.<sup>113</sup> While ‘presence’ in this provision literally means the accused’s physical presence in the courtroom,<sup>114</sup> the accused should have the linguistic ability to participate in the process. The attendance of the accused is meant to advance the objective of according them an opportunity to participate in the trial. Successful participation in the legal process greatly depends on the manipulation of language.<sup>115</sup> In *Kunnath*, the court expressed the view that

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<sup>110</sup> *Prosecutor v Miroslav Kvočka & ors* IT-98-30/1-A Decision on Zoran *Žigić*’s Request to Verify Accuracy of Translation 15 October 2002.

<sup>111</sup> General Comment 13 (note 26 above) para 13.

<sup>112</sup> Article 14 (3) (d) ICCPR (note 2 above).

<sup>113</sup> Note 61 above.

<sup>114</sup> *Prosecutor v Théoneste Bagosora & ors* ICTR-98-41-T Judgement and Sentence 18 December 2008 para 129.

<sup>115</sup> D Eades (ed) *Language in Evidence: Issues Confronting Aboriginal & Multicultural Australia* (1995) VII.

presence must not just be corporeal presence but necessarily includes the defendant's understanding of the proceedings, which would permit informed decisions regarding the case. Where the defendant has little or no understanding of the proceedings against them, the trial is for all practical purposes conducted without their presence. Such absence denies the accused the opportunity of a fair trial in breach of natural justice principles.<sup>116</sup> The fair trial requirement of presence at trial is knowledge of the evidence as given at the actual trial.<sup>117</sup> It underpins the significance of language competency in ensuring the presence of the accused at trial.

The second guarantee of paragraph (d) is the right of an accused to defend her-himself in person or through legal counsel.<sup>118</sup> Whether it is defence by self or through legal assistance, fulfilment of this right requires ability to present arguments in the language of court.<sup>119</sup> In *Nahimana*, the court held that a combined reading of Articles 20 (Rights of the accused) and 31 (Working languages of the court) of the ICTR Statute shows that the accused's right to defend her-or himself against charges implies the accused being able, in full equality with the prosecutor, to put forward the arguments in one of the working languages of the tribunal and to be understood by the judges.<sup>120</sup> Language ability is therefore a prerequisite to the realisation of the right to self-defence.

Language proficiency is also an essential characteristic of good counsel. All accused have a right to be represented by competent counsel. Counsel for the defence must have excellent knowledge of and be fluent in at least one of the working languages of the court.<sup>121</sup> In the wording of the SCSL rule, the abilities of counsel including language proficiency facilitate an effective defence. Defence lawyers at the SCSL must speak fluent English.<sup>122</sup> The ICTR registrar keeps a list of counsel for purposes of legal aid who should speak at least one of the working languages of the

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<sup>116</sup> *Kunnath v The State* (1993) 1 WLR 1315, 1320.

<sup>117</sup> C Brown-Blake 'Fair Trial, Language and the Right to Interpretation' (2006)13 *International Journal on Minority & Group Rights* 406,406.

<sup>118</sup> General Comment 32 (90) (note 13 above) para 37.

<sup>119</sup> *Genocide, War Crimes & Crimes against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda* Human Rights Watch (2004) 355.

<sup>120</sup> *Media Case* AC Judgement 28 November 2007 (note 79 above) para 246.

<sup>121</sup> Rule 22(1) ICC RPE (note 59 above).

<sup>122</sup> Rule 45 (C) (i) SCSL RPE (note 107 above).



tribunal.<sup>123</sup> Counsel at the Special Tribunal for Lebanon (STL) must prove written and oral proficiency in English or French.<sup>124</sup> Although most listed counsel speak the language(s) of court, there is no requirement that (i) the language of counsel should match the language of the accused, or that (ii) counsel working on the same team should speak the same language(s). In the *Media Case*, the first lead counsel spoke French only and the co-counsel spoke only English; they could hardly communicate.<sup>125</sup> Similarly, co-counsel, who was later to become lead counsel, experienced difficulties in communicating with his client - Ngeze, who spoke little English.<sup>126</sup> Such instances illustrate how language obstacles undermine legal representation.

(v) *Examination & cross-examination of witnesses*

An accused is entitled to examine defence witnesses and cross-examine prosecution witnesses. By definition, a witness is a person who, by means of communication, imparts knowledge of a fact or facts acquired at some time through the ordinary senses of seeing, feeling, hearing, tasting, and smelling.<sup>127</sup> Examination is therefore a communicative process requiring the examiner and the person examined to understand each other.

The guarantee to examine and cross-examine witnesses is significant in ensuring effective defence. Cross-examination is to try, challenge, test, and determine the credibility of a witness' testimony. It is not compatible with the right of defence for a conviction to be based solely or to a decisive extent on a statement unless there is an opportunity to challenge it.<sup>128</sup>

Courtroom questioning is the most crucial way in which counsel and judges hold linguistic control over witnesses and defendants.<sup>129</sup> In a cross-examination, a question becomes an order that the respondent's knowledge be displayed in a certain way.<sup>130</sup> The way in which the witness'

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<sup>123</sup> Rule 45(A) ICTR RPE (note 107 above), Article 13 (ii) ICTR Directive on Assignment of Defence Counsel as amended, prepared by the Registrar and approved by the Tribunal on 9 January 1996.

<sup>124</sup> Rule 58 (A) (ii) STL RPE (10 June 2009) STL/BD/2009/01/Rev 1.

<sup>125</sup> Floyd (note 95 above) 21.

<sup>126</sup> Ibid 29.

<sup>127</sup> JS Moss 'Examination and Cross Examination of Witnesses' (1959-1960) 5 *South Texas LJ* 83, 83.

<sup>128</sup> *Kostovski v The Netherlands* Judgement of 20 November 1989 Series A no 166 para 44.

<sup>129</sup> S Berk-Seligson *The Bilingual Courtroom: Court Interpreters in the Judicial Process* (1990) 23.

<sup>130</sup> Ibid 23.

knowledge is conveyed is of evidential value. Thus, linguistic aptitude is an essential constituent of the witness' and examiner's ability to impart and extract evidence.

Linguistic dynamics have several influences on the process of examining and cross-examining witnesses. Berk-Seligson highlights three types of interpreter-induced intrusions (i) interrupting the attorney; (ii) interrupting the witness; (iii) prodding or prompting the witness to answer questions when for a variety of reasons they are hesitant about doing so.<sup>131</sup> Gaiba reveals that because of translation at Nuremberg, lawyers had to speak slowly to allow time for proper interpretation.<sup>132</sup> Most lawyers complained that cross-examination was ineffective when performed slowly.<sup>133</sup> Ideally, the lawyer in a cross-exam should drive it through at the speed they dictate, not allowing breathing space or a chance to draw red herrings across the line of questioning.<sup>134</sup> Questioning through interpretation gives witnesses time to think through their responses. An interpreter may also clear communication traps laid by counsel in what is put to a witness in cross-examination, to get the witness to tell counsel's story. The presence of an interpreter transforms the course of cross-examination by counterbalancing the immense advantage that counsel could otherwise use over a witness through their mastery of the language as the primary manipulative tool in the courtroom.<sup>135</sup>

Further, the effectiveness of cross-examination is directly dependent upon the level of coerciveness of the questions asked. One important element that enters into the perception of a question as being coercive is the status of the person who has asked it.<sup>136</sup> Questions coming from judges are coercive in and of themselves because of the status of the judge in the courtroom. The intervention of the courtroom interpreter in relaying the questions to the witness disrupts power dynamics.

In addition, linguistic and cultural limits (such as improper pronunciation of names) have a dramatic impact on the process of examination. At Nuremberg, British and American prosecution teams were scandalised because of their unfamiliarity with the German language,

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<sup>131</sup> Ibid 186—189.

<sup>132</sup> F Gaiba *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (1998) 101,102.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Eades (note 115 above) 59.

<sup>136</sup> Berk-Seligson (note 129 above) 23.

history and institutions.<sup>137</sup> This could affect the quality of representation by damaging the confidence of average counsel.

(vi) *Interpretative assistance*

‘Next day allied officers handed copies of the indictment to each of the defendants in the lightless cells of Nürnberg prison. Informed that they could choose their attorneys from prepared lists, the indicted reacted variously... Hermann Göring: ‘Of course I want counsel. But it is even more important to have a good interpreter’.<sup>138</sup>

Every accused person is entitled to free assistance of an interpreter if they cannot understand or speak the language used in court.<sup>139</sup> This right arises at all stages of the proceedings, whenever an accused or the defence witnesses have difficulties in understanding or in expressing themselves in the language of court.<sup>140</sup> Unlike the broader guarantee of translation (which has generated debate as to the scope of implementation), the right to interpretation in a criminal trial is expansive. It is triggered by one condition: the inability of a person to understand or speak the language used in court. Once that criterion is met, as Robertson J. notes, that right should attach generally, not in a restricted capacity.<sup>141</sup>

Interpretative assistance is another aspect of fairness and equality of arms in criminal proceedings.<sup>142</sup> The right aids the realisation of other critical due process rights, especially the right to adequate facilities, examination and cross-examination of witnesses, the right against self-incrimination, and the right to defence. The case of *Kunnath* (1993)<sup>143</sup> illustrates that interpretative assistance ensures the actual presence of the accused at trial by ensuring informed participation. The ability of interpretation to functionally enable the accused to attend the trial makes it critical to the administration of justice. The multilingual character of international trials makes interpreting an indispensable component of proceedings. Not even the fact of legal

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<sup>137</sup> Gaiba (note 132 above) 103.

<sup>138</sup> Ibid 38.

<sup>139</sup> Article 14(3) (f) ICCPR (note 2 above).

<sup>140</sup> Henrard (note 56 above) 86.

<sup>141</sup> *Alwen Industries Ltd & Anor v. Collector of Customs* (1996).

<sup>142</sup> General Comment 32(90) (note 13 above) para 40.

<sup>143</sup> Note 116 above. See also *US ex rel. Negrón v New York* (1970) 434 F 2d 386(2<sup>nd</sup> Cir 1970).

representation can cure or waive lack of interpretation or bad interpretation.<sup>144</sup> Brown-Blake notes that, since the right of the accused to be present at trial arguably justifies and conceptually underscores the right to interpretation, it is not generally dispensable except by a voluntary act by the accused such as contemptuous conduct or where the accused absconds.<sup>145</sup> However, in the interest of justice, court may insist on interpretation even when an accused person waives their right to it.

Although the statutory phrase ‘assistance of an interpreter’ is broad and inclusive, the ICTs have restricted the applicability of the interpretation provision to oral proceedings, and maximised subparagraph 9 (a) (on the right to information of charges) and sub-paragraph (b) (on adequate facilities) to enforce the right of the accused to translation of documents. The rationale is to effectively control the scope of obligatory translation of documents in an effort to safeguard expeditiousness of trial. The application of subparagraph (f) to documentary material would make the right to translation more ‘fluid’ and impracticable. These are all linguistic underpinnings of a fair trial.

Interpreting should not attract any cost to the accused. A corresponding provision of the ICC Statute entails the phrase ‘free of any cost,’ extending the applicability of the provision to non-financial obligations.<sup>146</sup> Contemporary courts have stretched their language service provisions in order to cater for the interpretation demands of accused persons. In *Katanga*, it was held that an accused’s request for interpretation must be granted as long as the accused is not abusing their fair trial rights.<sup>147</sup> Abuse of fair trial rights in this case refers to a situation where interpretative assistance is sought while not required. This provision does not require a court to yield to the linguistic preferences of an accused if sufficiently competent in the language used by the court.<sup>148</sup>

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<sup>144</sup> Brown-Blake (note 117 above) 404.

<sup>145</sup> Ibid 402.

<sup>146</sup> Article 67(1) (f) ICC Statute (note 61 above).

<sup>147</sup> *Germain Katanga* Judgement on Appeal against ‘Decision on the Defence Request Concerning Languages (27 May 2008) (note 58 above) 3.

<sup>148</sup> Brown-Blake (note 117 above) 409.

Interpretation should be adequate. Adequacy relates to the scope of interpretation and efficacy of service, which may derive from the skill of the interpreter. The adequacy of interpretation must be assessed against the measure of enabling the accused to understand the case against them and to mount a defence by being able to put before the court their version of the events.<sup>149</sup> Unprofessional and erroneous interpretation could jeopardise the position of the accused in a trial. The ICC Statute stipulates that the accused is entitled to have the assistance of a ‘competent interpreter’.<sup>150</sup> It is the responsibility of the court to ensure that the interpretation meets the standards of fairness. In *Kamasinski*,<sup>151</sup> the European Court of Human Rights held that the obligation of the authorities is not limited to the appointment of an interpreter but extends to judgment over the competence of a specific interpreter. Bad interpretation is good reason for adjournment. In *Meghji Naya* [1952],<sup>152</sup> a magistrate noted, on the record, that during the course of the accused’s evidence, the interpretation was ‘bad.’ Consequently, he could not put any weight on that particular aspect of the accused’s evidence. The East African Court of Appeal (EACA) advised that the magistrate should have stopped the case as soon as he realised that the interpretation was deficient. This position presupposes that the judge is proficient in all the languages being used in court so as to be able to detect inferior interpretation. This might not be the case for a typical international bench. It may also not be practical for the judge to attend to more than one language transmission. Further, the court distinguished proceedings in which interpretation is ‘difficult’ without being ‘bad’, in which case it does not necessarily mean that a trial cannot be properly conducted.<sup>153</sup> The right to interpretation is therefore another linguistic bearing that is a crucial fair trial determinant.

The right to interpretation is linked to other fair trial guarantees such that denial of an interpreter or poor interpretation does not, by itself, amount to a miscarriage of justice. A court must further ascertain whether the denial violated the right to a fair trial; that inevitably calls for an analysis of its impact on other rights.<sup>154</sup> The court would seek to determine the importance of the information that was distorted or lost to the accused person’s case. The Canadian case of *Tran*

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<sup>149</sup> *Kamasinski v Austria* 19 December 1989 ECHR no 9783/82, 13, EHRR 36 para 74.

<sup>150</sup> Article 67(1) (f) ICC Statute (note 61 above).

<sup>151</sup> Note 149 above.

<sup>152</sup> *Meghji Naya v R* (1952) 19 EACA 247.

<sup>153</sup> *Mohamed Farah Musa v R* [1956] 23 EACA 472.

<sup>154</sup> *Brown-Blake* (note 117 above) 395--397.

[1994]<sup>155</sup> expresses the view that it is those lapses in interpretation which affect the vital interests of the accused, and not merely collateral or extrinsic matters that constitute violation of the right to language interpretation. The ‘vital interests’ relate to the other rights of the accused or matters relating to the exercise of those rights.

The right to interpretation has dominated the language debate; the issue of language fair trial rights arises in situations where there is a language barrier in the criminal process involving the accused, and where, inevitably, the right to interpretation comes into play.<sup>156</sup> In practice, interpretation is the scapegoat of the majority of cross-lingual courtroom communication failures.

*(vii) Right against self-incrimination*

An accused must not be compelled to testify against her-or himself or to confess guilt.<sup>157</sup> This right currently extends to witnesses.<sup>158</sup> This safeguard was intended to address and outlaw any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused with a view to obtaining a confession of guilt.<sup>159</sup> Torture was the major concern.

The relevance of language to the subject of self-incrimination arises in instances where an accused, owing to lack or limited understanding of what is put to them, responds in an incriminating manner. It also relates to how words said by the accused person are perceived, memorised or recorded by key persons such as judges, counsel, interpreters, and transcribers. An erroneous interpretation could mislead a person to self-incrimination. The Nuremberg situation where the German ‘ja’, as a hesitation, was consistently translated as ‘yes’ is one such example.<sup>160</sup>

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<sup>155</sup> R v Tran [1994] 2 SCR 951.

<sup>156</sup> Brown-Blake (note 117 above) 398.

<sup>157</sup> Article 14(3) (g) ICCPR (note 2 above).

<sup>158</sup> Rule 28 ECCC Internal Rules (Rev 8) 03 August 2011.

<sup>159</sup> General Comment 32 (90) (note 13 above) para 41.

<sup>160</sup> J Karton ‘Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony’ (2008)1 *Vanderbilt J of Transnational L* 1, 3.

#### **(d) Language fair trial rights vis-à-vis the Right to be heard**

Linguistic fair trial rights are also fundamental to fulfilment of the right to be heard; language difficulties impede fair hearing. The right for one's cause to be heard, in the wording of Article 7 of the African Charter,<sup>161</sup> is arguably another form of expressing the right to fair trial or the right to fair hearing. This right is grounded in the principles of natural justice specifically, the rule to hear both sides, also expressed in the latin maxim: *audi alteram partem*. This rule is also expressed in African proverbs on the administration of justice. *Audi alteram partem* embodies the concept in criminal law that no person shall be condemned unheard; it is akin to due process.<sup>162</sup>

The African Charter expounds the right to be heard with additional guarantees of appeal, non-retrospective criminality, individual responsibility for punishment, and non-retrospective punishment.<sup>163</sup> The American Convention utilises both phrases (fair trial and hearing) in its Article 8(1) fair trial provision.<sup>164</sup> The rights discourse is one of the fastest evolving areas of the law; plausible contributions to what constitutes a fair hearing are continually emerging from jurisprudence, policy, and legislation around the world. For instance, the ICTY trial chamber in *Tadić* stated that inherent in the notion of fair trial is the need to balance the interest in the ability of the defendant to establish facts, and the interest in the anonymity of a witness.<sup>165</sup> Witness protection is prominent in trials of international crimes due to the nature of the charges in question and the profile of the persons at trial, which place the personal security of witnesses at risk.

The right to be heard encompasses more explicit connotations for linguistic rights in criminal trials. Hearing suggests a communicative situation where the words transmitted are understood

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<sup>161</sup> African [Banjul] Charter on Human & Peoples Rights adopted on 27 June 1981, entered into force on 21 October 1986.

<sup>162</sup> J Lehman West's Encyclopedia of American Law (2005).

<sup>163</sup> See Article 7 African Charter (note 161 above).

<sup>164</sup> It stipulates that everyone has the right to a hearing, with due guarantees and within a reasonable time, by a competent independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him.

<sup>165</sup> *Prosecutor v Duško Tadić* Decision on the Prosecutor's Motion Requesting Protective Measures for Victims & Witnesses (10 August 1995) para 55.

by the recipient. Thus, the accused is not only entitled to relay their case to court, but court should also understand it as they intend. This position supports an argument for a guarantee for one to be understood, and it justifies the affirmation of effective interpretative assistance for an accused person. This perspective is relevant in light of the position in *Boškoski & Tarčulovski* where court dismissed the view that the inability of a defendant to speak any of the working languages of the court raises a fair trial issue.<sup>166</sup> The chamber held that so long as the defendant is availed with translations of the documents necessary to enable them to fully understand and participate in the proceedings and prepare their defence, it suffices.<sup>167</sup> The court in this case restricted the defence of the criminal defendant to the time of making submissions before the court, which is a well-ordered procedure. Noteworthy, defence in a criminal trial proceeds throughout the trial, constituting interventions from the accused. Linguistic proficiency to the level that enables the accused to confidently command and maximise the audience of court is crucial. It is a facet of full participation. A similar view is expressed by Justice Hartmann in the Chinese case of *Re Cheng Kai Nam Gary*.<sup>168</sup> The judge held that -

the constitutional right of a person to use the Chinese language in a court of law in Hong Kong means no more than the right of that person to employ that language, that is, to utilise it, for the purpose of forwarding or protecting his interests. That right to employ or utilise the language does not imply a reciprocal obligation on the part of the court to speak and read that language. It is sufficient if processes, such as the employment of interpreters or translators, exist to facilitate the court's comprehension of what is said or written.

My view is that the communicative process should be complete. The facilitation mechanism should be of such quality as to convey precisely what the accused person presents to the court.

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<sup>166</sup> *Prosecutor v Ljube Boškoski, Johan Tarčulovski* Decision on the Motions of Fair Trial and Extensions of Time 19 May 2006 para 13.

<sup>167</sup> *Ibid.*

<sup>168</sup> Hong Kong Court of First Instance (2002)1 HKC 41 cited PCW Chan 'Important Decisions of Hong Kong Courts in 2002 (Part I): Language Rights, Foreign Offenders: Sentencing, and Immigration and Refugee Laws' (2005) 4 *Chinese J of Int L* 219, 222.



The efficacy of communication with the aid of translation was rightly questioned by the observation of Justice Sinclair in *Paquette v R*<sup>169</sup> that if one person speaks a language to another who is unable to directly understand what is being said, the language is not being used for its fundamental purpose of effective communication. This assertion is supported by the high probability of error in translation and the opinion of linguists that communication goes beyond what is said. Communication includes paralinguistic forms that may not be precisely conveyed in translation.

Paralinguistic communication is the component of communication that is conveyed by (i) the pitch and loudness of the speaker's voice; (ii) its rhythm; (iii) emphasis; (iv) frequency; and (v) the frequency and length of hesitations.<sup>170</sup> It is not what is said but how it is said.<sup>171</sup> People often reveal their true feelings and emotions by paralinguistic slips.<sup>172</sup> Emotions tend to 'leak out' even if a person tries to conceal them-'non-verbal leakage'.<sup>173</sup> Similarly, people who are lying often betray themselves through paralinguistic expressions of anxiety, tension and nervousness. Research has shown that when a person is lying, the pitch of their voice is higher than when the same person is telling the truth.<sup>174</sup> These perspectives are significant to the fact-finding process of a criminal trial. In the language of Article 21(3) ICC Statute,<sup>175</sup> the application and interpretation of the law applicable to the ICC must be consistent with internationally recognised human rights, and must be without adverse distinction founded on grounds such as language, among others. The statute of the international criminal court therefore prohibits discrimination on the basis of language, but encourages affirmative action to ensure communicative efficacy, towards an inclusive and human rights based approach to justice.

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<sup>169</sup> (Right of Canada) Court of Queen's Bench of Alberta (1985) 6 WWR 594 cited with approval by Chan *ibid* 224.

<sup>170</sup> See ML Andersen & HF Taylor *Sociology: Understanding a Diverse Society* 4 ed (2008) 122. See also F Poyatos *Non-verbal Communication and Translation* (1996) 111.

<sup>171</sup> Andersen & Taylor *ibid* 123.

<sup>172</sup> *Ibid*.

<sup>173</sup> *Ibid*.

<sup>174</sup> *Ibid*.

<sup>175</sup> Note 61 above.

## **(e) Conclusion**

The right to fair trial is central to the protection of all other rights. It has attained great importance in international criminal justice as a measure for legitimacy of adjudicating processes. A person against whom the international community brings a criminal action is placed in a situation of power imbalance such that there is need for systemic protection of their rights from possible excesses of power. Fair hearing is underpinned by procedural propriety and fairness, with due guarantees to the accused. These guarantees include the right of the accused (i) to prompt and detailed information of the nature and cause of the charges in a language that they understand; (ii) to adequate time and facilities for the preparation of their defence and communication with counsel; (iii) to trial without undue delay; (iv) to presence at trial, and defence in person or through legal assistance, to information of the right to legal assistance and legal aid; (v) to examination and cross-examination of witnesses; (vi) to free interpretative assistance; (vii) not to be compelled to testify against her-or himself or confess guilt. The aforementioned guarantees in Article 14 (3) ICCPR constitute the minimum standards of fair criminal trial.

The fair trial guarantees contain an unsung but crucial component to the truth-finding process: language rights. Contributors to a trial should understand what is said during the course of the proceedings in order to (i) present the evidence, (ii) test the evidence, (iii) defend, (iv) adjudicate or (v) intervene. The right to defence particularly implies being able to put forward arguments in one of the working languages of the court. Language is also the means of realising all the rights of the accused. Language requirements characterise the abovementioned guarantees as either explicit or implied terms. Explicit expressions of language guarantees include (i) the right of the accused person to be informed of the charges against them in the language that they understand, and (ii) the right to the assistance of an interpreter. Language competency is also implicit in all the other guarantees. (i) Language is a significant determinant of adequate time and facilities for the preparation of a defence. (ii) Language perspectives affect expeditiousness of trial. (iii) Actual presence at trial implies ability to understand and participate in the proceedings. An accused or their counsel should be able to mount a defence in one of the working languages of the court. (v) Examination and cross-examination of witnesses are communicative processes. (vi)

Lack or limited understanding of the language used in court proceedings might lead to self-incrimination.

International criminal tribunals have accordingly conferred upon accused persons the right to use their own language(s) in the proceedings. The courts are, however, faced with competing priorities in balancing the procedural rights of the accused with the overarching right to an expeditious trial, and the interests of the international community in ensuring the prompt administration of justice. Further, assessing linguistic comprehensibility is problematic. The courts have not standardised the mode of explanation to be accorded to accused persons, and neither have they developed the criteria of ascertaining whether such explanations are understood. The task of evaluating understanding is left to the accused, who must assess their own comprehension, and to the discretion of counsel to maximise their communication skills in the service of their clients. Linguists such as Grisso have developed instruments of assessing understanding of Miranda rights that lend constructively to the subject of evaluating understanding of rights and charges in the legal process.

The rules of procedure and evidence of international criminal tribunals entail procedural requirements which fulfil linguistic guarantees. They streamline good practices such as enlisting competent counsel for purposes of legal aid, providing the accused with documents in the language that they understand, translation/interpretation, which ensure the protection of language rights. Thus, language rights of an accused person should be a priority consideration of international criminal justice within the framework of the increasing influence of human rights on criminal law.

## CHAPTER 4

### UNDERSTANDING THE ROLE OF TRANSLATION IN TRIAL FAIRNESS

#### (a) Introduction

‘It was thought that the interpreting system and the recording system would cope with all the problems in providing language services at trial. And yet, there was an intrinsic aspect of interpretation that could not be solved by any practical means: its impact on the proceedings.’<sup>1</sup>

The issue is whether translation can effectively facilitate communication among multilingual participants, and a trial proceeds fairly. Translation is the transfer of thoughts and ideas from one language (source language) into another (target language) in either written or oral form.<sup>2</sup> Thus, the term ‘translation’, in this chapter, refers to either written communication or both written and oral transmission. Interpretation is only discussed distinctly in relation to peculiarities.

The efficacy of translators and interpreters in bridging linguistic gaps in international criminal trials is a core subject of the language debate in international criminal justice. This discourse is however restricted to how translation aids legal process. Lambert rightly notes that there is a tendency among scholars, of reducing the question of translation to a few limited questions, mainly linked with the perspective of the translator.<sup>3</sup> The court language service is often a scapegoat of failures in courtroom communication. Thus, there is little regard to how trial participants affect translation by for example the quality of their speech and manner of writing. The views of translators and interpreters constitute an integral part of this chapter.

It is noteworthy that translation does not eliminate all the linguistic hurdles inherent in a multilingual trial. In international criminal trials: (i) communicating across different legal cultures and legal systems is problematic; there is a high probability of misunderstanding. (ii) Translation consumes a lot of time hence impeding expeditiousness of trial. International Criminal Tribunals (ICTs) are overburdened by translation tasks.<sup>4</sup> (iii) An interpreter interferes

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<sup>1</sup> F Gaiba *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (1998)100.

<sup>2</sup> J Karton ‘Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony’ (2008) 41(1) *Vanderbilt J of Transnational L* 1, 17.

<sup>3</sup> J Lambert ‘The Status and Position of Legal Translation: A Chapter in the Discursive Construction of Societies’ in FE Olsen, A Lorz, D Stein (eds) *Translation Issues in Language and Law* (2009) 76,77.

<sup>4</sup> Respondent 1002 interviewed on 22 February 2011, Annexure 213.

with the communication dynamics among trial participants hence impacting on the perception of the original message. (iv) Evidence is lost in translation. (v) Reliance on interpretative assistance of persons originating from areas under the jurisdiction of the courts defeats the purpose of engaging international personnel, which is to advance impartiality. The question is whether a multilingual trial can actually be fair.

This chapter seeks to explore the role of translation in ensuring fair criminal trial. Part (b) is a discussion of the meaning and ambiguity of translation and interpretation in legal proceedings. Part (c) is an expose of the practice of translation in international criminal tribunals. Under this subject, the following aspects are discussed: (i) translation during investigation of international crimes; (ii) translation in the trial-phase; (iii) the significance of translation to ICTs; (iv) the role of the translator; (v) procedural technicalities of translation at ICTs; (vi) substantive technicalities of translation; (vii) peculiarities and challenges of translating legal text; (viii) shortfalls in translation; and (ix) the legal status of a translation.

Part (d) comprises: (i) a discussion of the process of interpreting; (ii) the role of the interpreter; and (iii) challenges to courtroom interpreting.

### **(b) Meaning & ambiguity of translation & interpretation in legal proceedings**

The strict meaning of translation relates to written texts and interpretation to oral transmission of messages. However, this distinction is blurred by a number of factors: (i) there is general lack of consistency within the profession in the use of the two terms: sometimes the distinction between written and oral text is respected; sometimes the terms ‘translation’ and ‘translator’ incorporate the notion of ‘interpreting’ and ‘interpreter’.<sup>5</sup> (ii) The interpreter is often asked to perform ‘sight translation’ whereby a written document relevant to a situation is passed to the interpreter for immediate oral translation.<sup>6</sup> This activity combines the two professional roles.<sup>7</sup> Common usage has therefore negated the distinction between the two terms. The context in which either word is used is significant in ascertaining the actual activity intended. Thus, with the exception of the specific sections of this chapter where interpretation is distinctly discussed, that is, part (d) - the

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<sup>5</sup> A Gentile, U Ozolins & M Vasilakakos with L Ko & T Quynh- Du *Liaison Interpreting: A Hand Book* (1996) 39.

<sup>6</sup> Ibid 39--40.

<sup>7</sup> Ibid.

process of interpreting, and part (viii) (cc) - errors in interpreting, the word-translation includes 'interpretation', and likewise 'translator' refers to an interpreter as well.

Practice also reveals fluidity of the meaning of 'translation'. The term 'translate' emerges from the Latin words *trans* (across) and *latus* (carry).<sup>8</sup> It comes from the same Latin verb as 'transfer' and has much the same meaning suggesting that one might carry something over from one language to another.<sup>9</sup> This idea of translation as transportation commits us implicitly to the view that the meaning of a sentence can be separated from its words, language, and cultural context, and reproduced in another.<sup>10</sup> However, Boyd White persuasively argues that-

it is impossible to completely translate a text, from one language to another; one cannot get the 'ideas' or 'concepts' or 'information' contained in one text, composed in another language, 'over' into another text, composed in another language, nor can one in other respects create the 'equivalent' in one's own language of a text composed in another. Rather what one can do is to create a text in response to an earlier text...Translation is therefore the composition of one text in response to another as a way of establishing relations by reciprocal gesture, to be judged by criteria of appropriateness.<sup>11</sup>

In this regard, a translator of international legal material seeks to tailor the original document to the legal language and legal culture of the target document. For instance, translating a legal document from German - a language of a civil law jurisdiction, into English - a common law language would require modification of terminology and concepts. The outcome may not convey precisely the content of the original. This view, if substantiated as this chapter attempts to, would highlight the challenge of obtaining a fair criminal trial in proceedings propelled by translation.

It is agreed that the common mistaken expectation about translation that 'what is said' in one language can be 'said' in another is found to be the result of the defective view of language.<sup>12</sup>

'Language is conceived as transparent; the speaker is assumed to engage, before speaking, in intellectual processes that in some way yield the content that will ultimately be expressed in the utterance but have as yet no linguistic form...In its strongest version, it

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<sup>8</sup> J Boyd White *Justice as Translation: An essay on Cultural and Legal Criticism* (1990) 234.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid 255--256.

<sup>12</sup> Ibid 244.

assumes that we all live in a common non-linguistic world of ideas, concepts...and so forth, which different languages happen to label differently, with different sounds...But in fact our experience is linguistic at every stage: our languages shape what we say and what we mean, what we see and what we experience; we are always talking in inner or outer speech; there can be no 'content' without language.'

Language is therefore a vibrant force in human thinking as much as expression. Accordingly, the different language(s) of trial participants affect the mode of perceiving the evidence and conveying it in the course of proceedings. In the words of an international judge at a high level court, 'I process everything in my own language. The French legal mind is expressed in the French language, and the thinking about the evidence is different in the different languages, be it English or French. Thinking about the same thing in different languages brings about distinct issues.' This perspective raises concern about the efficacy of translation in transmitting courtroom communication and its capability to advance fairness in a multilingual trial. By introducing a third party to the communicative process, the message transmitted through translation may reach the targeted person in a different form from the original.

Further, literal interpretation is not appropriate in certain situations (i) where a phrase is established by tradition. For example, the correct English rendition of the Spanish version of a writing by Lenin entitled *Qué Hacer?* is 'What is to be done?' because this is how the essay was translated into English, not the literal 'What to do.'<sup>13</sup> (ii) Idiomatic expressions where certain structures of language while not equivalent as to construction are known to mean certain things.<sup>14</sup> To say 'it was cold' in Spanish is *hacía frío*, (literally: it made cold). When a witness says *hacía frío*, in answer to a question about the weather, it would be incorrect for the interpreter to say 'it made cold'.<sup>15</sup> (iii) False friends: some words in two different languages have a strong similarity in appearance but the meaning is different or the usage reversed.<sup>16</sup> *Contrepartie* - a French word that translates into 'compensation' in English is often mistaken for

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<sup>13</sup> AB Edwards *The Practice of Court Interpreting* (1995) 95.

<sup>14</sup> Ibid

<sup>15</sup> Ibid.

<sup>16</sup> GC Moss 'Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?' in C Binder, U Kriebaum, A Reinisch & S Wittich *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer* (2009) 782.

counterpart (English). The two words – *contrepartie* (French) and counterpart (English) are similar but they have divergent meanings.

It is noteworthy that the content of a translation is often less representative of the original.<sup>17</sup> In the opinion of a senior interpreter, what is reproduced is of an inferior quality.<sup>18</sup> Thus, evidence is lost in the process.<sup>19</sup> Boyd White observes that if the proper measure of a ‘translation’ is the degree to which it succeeds in ‘setting over’ the meaning of an original, then translation would be impossible.<sup>20</sup> This position raises questions as to the degree of accuracy of communication in international criminal proceedings. In cases where chain translations are done, the court record is based on translation of translations. There are two stages of possible loss of evidence. At the International Criminal Tribunal for Rwanda (ICTR), *Kinyarwanda* testimony is translated first to French and then from French to English.<sup>21</sup> The Special Court for Sierra Leone (SCSL) translates *Mende* testimony first to *Krio* and then English.<sup>22</sup> Loss of evidence taints the evidentiary foundations of trial fairness.

Scholars have expressed views about the criteria for representation of the original in a translation. The success of a translation is measured by how closely it measures up to three ideals: (i) accuracy: reproducing as exactly as possible the meaning of the source text; (ii) naturality: using natural forms of the target language in a way that is appropriate to the kind of text being translated; (iii) communicative: expressing all aspects of the meaning in a way that is readily understandable to the intended audience.<sup>23</sup> The issues arising include (a) what standard of accuracy is required of translation to guarantee the credibility of the court record. (b) Is the level of precision realised in translation sufficient to found the facts of a criminal case? (c) Is it probable that distortions in communication could go to the root of the fundamental guarantees of fair criminal trial? The minimum rights of an accused person include: (i) the right to be informed of the charges; (ii) to provision of adequate time and facilities for preparation of a defence; (iii)

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<sup>17</sup> Boyd White (note 8 above) 255.

<sup>18</sup> Respondent 2001 interviewed on 19 March 2011, Annexure 217.

<sup>19</sup> See Karton (note 2 above).

<sup>20</sup> Boyd White (note 8 above) 255, 256.

<sup>21</sup> NA Combs *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010) 72.

<sup>22</sup> Ibid.

<sup>23</sup> See ‘Translation Theory and Practice’ Summer Institute of Linguistics (<http://www.sil.org/translation/TrTheory.htm>.)



to trial without undue delay; (iv) the right to defence; (v) the right to examine and cross-examine witnesses; (vi) the right to adequate interpretative assistance; and (vii) the right against self-incrimination.

Translation is therefore a complex process with far reaching effects on legal proceedings.

### **(c) Translation in international criminal proceedings**

In view of the multilingual pool of participants in international criminal trials, translation is fundamental to the process. It is particularly integral to: (i) investigation of international crimes (the pre-trial phase), and (ii) trial proceedings (the trial phase).

#### *(i) Translation during investigation of international crimes*

Investigation of atrocities that form the subject matter of international criminal trials largely involves collection of witness testimonies. With the exception of the Nuremberg trials, in which documentary evidence was readily available to the prosecution,<sup>24</sup> witness testimonies are the leading source of evidence in cases of mass atrocities. In the process of interviewing informants, international investigators are assisted by local persons.<sup>25</sup> Translation is particularly important since the crimes investigated occur in local settings where specialised languages are used.

In a structured investigation, the investigator asks a question to the informant in an official language of the court. The interpreter relays the question in the native language to the informant, who usually responds in the same language. Then the interpreter interprets the response to the investigator in an official language. This mode of interpreting is known as liaison interpreting. The interpreting is performed in two language directions by the same person.<sup>26</sup> In most cases, the interpreter comes from the same background as the source language native speakers.<sup>27</sup> Ethnicity or speech community membership of the interpreter is a significant factor to how the interpreter

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<sup>24</sup> See Combs (note 22 above) 11.

<sup>25</sup> See J Hagan *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (2003) 79. Also see Accounts of Respondents 5001 (15 February 2011) Annexure 238; 6001 (16 February 2011), Annexure 241; 6003 (21 February 2011) Annexure 243.

<sup>26</sup> A Gentile, U Ozolins & M Vasilakakos (note 5 above) 17.

<sup>27</sup> Source language is the language from which one takes speech or a translation, as opposed to target language, into which one interprets or translates. See Edwards (note 14 above) 13.

is accepted by the person whose testimony is being interpreted especially in conflict and post-conflict situations.<sup>28</sup> This matter is further discussed below.

A recording of the dialogue between the investigator and informant is made, leaving out the words of the interpreter. The recording is assigned to a transcriber, who makes a written copy of the testimony in the original language of the informant. The transcription is then sent to the language section of the court for translation into the working language(s) of the court.<sup>29</sup> The resultant document is what is tendered into evidence as the witness' testimony. It is significant to note that the field interpreter does not take oath; such a person is not an official of the court. There is no basis for accountability for translation at this level since no record of the interpreter's speech is kept. ICTs have however integrated proofing strategies in their investigative procedures. The testimony is read back to the witness through two more independent interpreters to test the authenticity of the initial interpretation.<sup>30</sup> This is an essential undertaking but it is facilitated by resources of both time and money.

*(ii) Translation in the trial-phase*

During trial, translation enables the active participation of the parties, and it aids the work of professionals including judges. Patricia Wald - former judge of the International Criminal Tribunal for former Yugoslavia (ICTY) laments: 'I know of no judge in an international tribunal who does not acknowledge that s/he is totally at the mercy of the translator in the courtroom.'<sup>31</sup> It is significant to note that since participants at every stage of an international criminal trial rely on translators to overcome the language barriers, the quality of decisions, advice, strategy and judgment must depend in part on the quality of the interpreted information.<sup>32</sup> Clearly, there is a link between the outcome of a case and the work of interpreters involved, though interpretation is only one of the many complex factors in any case.<sup>33</sup> A court record may comprise translated material only.

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<sup>28</sup> See A Gentile, U Ozolins & M Vasilakakos (note 5 above) 14.

<sup>29</sup> Per Investigator – Respondent 5001 (15 February 2011) Annexure 238.

<sup>30</sup> Per Former Investigator at an ICT - Respondent 6001 (16 February 2011) Annexure 241—242).

<sup>31</sup> PM Wald 'Running the Trial of the Century: The Nuremberg Legacy' (2006) 7 Cardozo LR 1559, 1570-1571.

<sup>32</sup> A Gentile, U Ozolins & M Vasilakakos (note 5 above) 111.

<sup>33</sup> Ibid.

Translation in a trial is done in two language directions: to and from the working language(s) of the court (mainly English and French). For example, if a witness testifies in *Swahili*, the testimony is simultaneously translated from *Swahili* to French, and at the same time from *Swahili* to English. Interventions directed at the witness are translated from the working language(s) of court to that witness in *Swahili*. Notably, some situations necessitate chain translations; the ICTR has had to translate *Kiriyarwanda* testimony first to French and then from French to English due to lack of a sufficient number of *Kiriyarwanda* to English translators.<sup>34</sup> In such cases, the court record is based on the translation of a translation.

*(iii) Significance of translation to International Criminal Tribunals (ICTs)*

Translation serves four principal functions: (i) as illustrated above, it facilitates investigation of international crimes; (ii) it ensures the actual presence of the accused person at trial by eliminating linguistic barriers to understanding the proceedings; (iii) it aids the contribution of international experts and other participants in a trial. An international judge stated that - ‘we are totally dependent on translation.’<sup>35</sup> International constitution of personnel at all levels of the process is preferred majorly because persons that are detached from the atrocities in question are better placed to be independent and impartial, among other factors. (iv) Translation enables the international community to follow the proceedings hence contributing to the prospect of reconciliation in society.

The significance of translation to the fair conduct of an international criminal trial is further illustrated by the void of excluding it. For instance, it is preferred that chamber deliberations are conducted secretly especially during the time of debating sentences. The judges choose to work without any third parties, even interpreters. They therefore resort to interpreting for one another. There are several shortcomings in such a situation: (i) there are practical problems in understanding one another due to lack of independent professional language services; (ii) groupings may emerge among the adjudicators along linguistic lines; (iii) a certain group or individual, solely by virtue of linguistic advantage may dominate the discussion. Naturally, the dominating judge(s) would write the decision. The language in which the decision is written may not be comprehensible to other judges. (iv) The other judges are therefore not able to form or

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<sup>34</sup> Combs (note 22 above) 72.

<sup>35</sup> Respondent 1002 (22 February 2011) Annexure 213.

express their opinions without influence.<sup>36</sup> Such circumstances present an opportunity for manipulation, and they undermine the very reason of having a reasonable number of adjudicators. In the pursuit of a fair trial, it is anticipated that each member of the bench is independent and capable of forming and expressing well-considered professional judgment. The language barriers to chamber deliberations among international judges with divergent linguistic abilities undermine such independent judgment, hence challenging the guarantees of fairness.

Notably, the justification of engaging foreign nationals to adjudicate international crimes, as more probably impartial, is qualified by the observation that these experts rely totally on the language services of local people, who are hired as interpreters to propel the process. In the likelihood of biased interpretation, the entire process would be flawed. There are several allegations of bias in interpretation but the *mens rea* is difficult to prove. Claims of accountability of interpreters are not driven to any meaningful or definitive end.

Although bias in interpretive assistance at ICTs has not been proved, there are cases of appearance of bias. Richard Sonnenfeldt - a German born Jew was lead interpreter of the US interrogations team during the three months of interrogating the imprisoned Nazis, including all 22 who became Nuremberg defendants.<sup>37</sup> It should be remembered that Sonnenfeldt fled Nazi Germany as a teenager.<sup>38</sup> He was one of the US soldiers that liberated Dachau Concentration Camp in 1945.<sup>39</sup> He was later to become a *de facto* senior interrogator, and one of the two men that served the October 1945 indictment on each Nuremberg defendant. Sonnenfeldt worked on the US prosecution team throughout the trial.<sup>40</sup> It is reported that less officially, but with permission, his job was to startle, harry and trick the accused into admitting what they had done.<sup>41</sup> With due respect to the level of professionalism that he exhibited at Nuremberg, the neutrality of Sonnenfeldt's position as an interpreter of the suspects' accounts appears dented by his undertakings as interrogator and aide of the prosecution team, his background notwithstanding.

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<sup>36</sup> Account of a judge- Respondent 1001 (22 February 2011) Annexure 211.

<sup>37</sup> See John Q Barrett Richard Sonnenfeldt's Memoir 'Witness to Nuremberg' (<http://www.stjohns.edu/media/3/cf01f851490643c6b0e6e331a781462e.pdf>).

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Richard Sonnenfeldt *The Economist* (29 October 2009) (<http://www.economist.com/node/14743425>).

Former ICTR investigators recall experiences of withdrawal of co-operation by witnesses protesting the ethnicity of local interpreter(s).<sup>42</sup> A Hutu witness would object to being interpreted by a Tutsi interpreter. With most conflicts as ethnic-based, the ethnicity of interpreters is a wide spread concern despite affirmations of professionalism. The engagement of local persons as intermediaries, by the International Criminal Court, to assist prosecution or defence investigators in identifying sources of evidence and helping to contact potential witnesses and victims has instigated similar concerns.<sup>43</sup>

However, court translators are bound by professional ethical standards and take oath to perform faithfully, independently, impartially and with full respect for the duty of confidentiality, their functions as interpreters or translators.<sup>44</sup> Thus, a translator is personally accountable for any deliberate distortions. Advanced means of technology such as video recordings, audio recordings, and automated transcriptions are used in the process of recording evidence; these would incriminate an interpreter that distorts the evidence. As one translator confirms, ‘it is difficult to conceal manipulation of translation, everything is in black and white, it is written down and any errors are on the record’.<sup>45</sup> Recordings form a basis upon which translation, in the trial phase, is monitored, evaluated and challenged (if necessary); this possibility advances the goals of trial fairness.

#### *(iv) Role of the translator*

The success of a translation depends in part on the conditions under which the task is executed. Translators and interpreters are concerned about how their clients underestimate the complexity of their role. Underrating translation undermines cooperation between clients and translators leading to unfavourable working conditions and corresponding results. McAuliffe rightly observes that many people think of translation merely as part of the administrative process.<sup>46</sup> It is

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<sup>42</sup> Respondent 6001 (16 February 2011) Annexure 241.

<sup>43</sup> See ‘Intermediaries and the International Criminal Court: A Role for the Assembly of State Parties’ ([http://www.soros.org/initiatives/justice/articles\\_publications/publications/intermediaries-20111212/intermediaries-20111212.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/intermediaries-20111212/intermediaries-20111212.pdf)).

<sup>44</sup> Excerpts from Translator’s/Interpreter’s Oath of an ICT (name withheld on ethical grounds).

<sup>45</sup> Respondent 2002 (18 February 2011) Annexure 221.

<sup>46</sup> K McAuliffe ‘Translation at the Court of Justice of the European Communities’ in FE Olsen, A Lorz, D Stein (eds) *Translation Issues in Language and Law* (2009) 104.

often considered to be ‘nothing more than typing with dictionaries.’<sup>47</sup> A judge of the European Court of Justice is quoted as stating that: ‘I can’t understand why a translator translates only seven pages a day when I can read more than one hundred pages a day’.<sup>48</sup> As illustrated below, translation is a far more complex and demanding task.

Generally, interpreters are better regarded than translators because of their physical presence in courtrooms and their prompt intervention in proceedings, but their role is also seen as (only) a fragment in the entire legal process.<sup>49</sup> The situation is not different at international criminal tribunals. Minimising the work of translators and interpreters at ICTs adversely affects translation – a strong undercurrent of a fair multilingual trial.

The complexity of the role of a translator is better understood from the perceptive of the procedural and substantive technicalities of translation at ICTs.

*(v) Procedural technicalities of translation at ICTs*

Translation in an international criminal tribunal is a highly structured process. It involves (i) the actual translation; (ii) revision; and (iii) proof reading. The document for which translation is required is filed with the court registry, for transmission to the Court Management Section with a formal request for translation. The Court Management Section refers the document to the Language Services Section specifically the Documents Control Unit. A date upon which the translation is expected to be ready is negotiated and agreed upon. It is then assigned to a translator for action.

After translation, the resultant document is sent for revision. A reviser verifies the accuracy of the translation, and checks for inaccuracies of format and content. The product should conform to the formal nature of judicial documents. The reviser is usually more experienced and should have a proven good work record as a translator. Revisers are often trained lawyers.<sup>50</sup>

After revision, the translation is sent to the Documents Control Unit to be processed for proof reading. The proof reader’s work is editorial; they do the final editing. The proof reader’s focus

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid 105.

<sup>49</sup> Lambert (note 3 above) 77.

<sup>50</sup> Respondent 2002 (18 February 2011) Annexure 222.

is on the form of all significant features such as the date, the format, font, content, and language. They have less to do with the substance.

After proof reading, the document is sent to the typing pool for typing. Any queries are addressed in direct consultation with the proof readers. The final result is then sent to the Documents Control Unit where it is officially attested or confirmed as a completed document. This confirmation is known as certification. It is then forwarded to the court registry for transmission to the party that requested it.<sup>51</sup>

A translation is believed to become more accurate as it progresses through each of the aforementioned stages. Once it is certified, it is presented as 'accurate'. In very limited situations of urgency, a translation may be released uncertified. Such a document would however be restricted to a few in-house purposes; it can only be used by officials of the tribunal. The translators that participated in this study rated the degree of accuracy of a certified translation at 90 percent.<sup>52</sup> It is difficult to commit to a complete standard of accuracy because of the intricacies inherent in the process of legal translation. In this regard, the experts confirm the view that a translation cannot be as good as the original. Whether a translation is not good enough to found fairness is a subjective test that is dependent upon the degree of inaccuracy of the document in question.

*(vi) Substantive technicalities of translation*

In summary, translation consists of (a) studying the lexicon (vocabulary), grammatical structure, communication situation, and cultural context of the source language text; (b) analysing it in order to determine its meaning; and then (c) reconstructing that same meaning using the vocabulary and grammatical structure which are appropriate in the receptor language and its cultural context.<sup>53</sup> Thus, a translator serves two masters; they are forced to continually ask: what is the text about? What do I have to communicate to the readers of the translation?<sup>54</sup> Stolze classifies the process of translation into two main phases: (aa) the interpretation phase

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<sup>51</sup> As enumerated by Respondent 2002 (18 February) Annexure 220.

<sup>52</sup> Respondent 2005 (25 February 2011) Annexure 228.

<sup>53</sup> ML Larson *Meaning-Based Translation: A Guide to Cross-Language Equivalence* (1998) 586.

<sup>54</sup> M Garre *Human Rights in Translation: Legal Concepts in Different Languages* (1999) 78.

(understanding the text); (bb) the production or reproduction phase (reproducing the text in another language).<sup>55</sup>

(aa) Interpretation phase

Before beginning the translation, the translator seeks to study the document; they would therefore read the entire text through, perhaps more than once.<sup>56</sup> A full reading helps (a) see where a document is going; (b) identify its purpose; (c) reveal words or terms that will need to be researched.<sup>57</sup> This process is intended to obtain a full understanding of the wording, grammar, and context of the text to be translated. The translator understands small elements by seeing them as part of the whole text; they have to understand ‘the whole in the part and the part in the whole’.<sup>58</sup> This process constitutes the basis of translation.<sup>59</sup> It is therefore essential that it is conducted diligently.

In the understanding process, the translator must draw on all their general and specific knowledge.<sup>60</sup> A legal translator has to study the background documents of the case they are working on. Language sections of ICTs have referencing units that peruse the documents to be translated and establish all the documents relevant to the translation of a particular text. All the documents cited in the source text have to be read and understood. For example, if a decision is to be translated, the following documents have to be read and understood: (i) the motion; (ii) the reply to the motion (if any); (iii) all documents referenced in the decision; (iv) all documents referenced in the motions.<sup>61</sup> This process is particularly difficult for the majority of the translators at ICTs because they do not have a legal background.

Further, the translator may have to work backwards to the transcript in order to verify the accuracy of what appears in a particular court document. It may be established that what appears in the original court document is different from what appears in the transcript. In that case, the translator would have no authority to correct the record; they would have to wait for the error in

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<sup>55</sup> Ibid 79.

<sup>56</sup> Edwards (note 14 above) 109.

<sup>57</sup> Ibid.

<sup>58</sup> Garre (note 55 above) 80.

<sup>59</sup> Ibid 1.

<sup>60</sup> Ibid 79.

<sup>61</sup> Respondent 2005 (25 February 2011) Annexure 228.



transcription to be corrected. The process of correcting such a mistake would involve making reference to the video/audio recordings of the proceedings. The biggest resource in the process is time; time to go through the database and find those decisions, and time to read the documents.<sup>62</sup> This huge investment of time in translation reflects in the total period of completing the trial hence impacting on the right of the accused to an expeditious trial.

In addition, it is not sufficient for the translator to understand the linguistic meaning of a text; they also have to understand any underlying meanings.<sup>63</sup> The translator would therefore have to analyse the document in order to understand fully the social, cultural and linguistic aspects of the source text.<sup>64</sup> Source text analysis comprises of (a) analysis of extra-textual factors; and (b) analysis of intra-textual factors.<sup>65</sup>

Extra-textual factors are those factors which are more or less related to the translation situation: the sender, sender's intention, recipient and text function, including medium, space and time.<sup>66</sup> Analysis of extra-textual factors gives the translator a better basis for engaging in the translation task itself.<sup>67</sup> It is a basis for the analysis of the intra-textual factors and a crucial part of the translation process.

Analysis of intra-textual factors concerns the actual content of the text that is to be translated.<sup>68</sup> The translator focuses on features such as style, subject matter, content, internal situation, text structure, sentence structure, and terminology, among others.<sup>69</sup> Source text analysis takes its toll of trial time.

#### (bb) Production/Reproduction phase

Production is when the translator actually formulates their translation and it becomes obvious to everyone how they have understood the text they are translating.<sup>70</sup> In this phase, the translator

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<sup>62</sup> Ibid.

<sup>63</sup> See Garre (note 55 above) 79.

<sup>64</sup> Ibid 78.

<sup>65</sup> Ibid 72.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid 73.

<sup>68</sup> Ibid 95.

<sup>69</sup> Ibid 73.

<sup>70</sup> Ibid 80.

must use the results gathered from their analyses in the initial stages, to formulate a translation which takes into account the coherence and content of the target text as well as the correspondence between the original text and the translation.<sup>71</sup> In essence, the translator deconstructs the text and formulates a similar text in the required language.<sup>72</sup>

The translation result is evaluated on the basis of the concept of equivalence.<sup>73</sup> The notion of equivalence relates to the objective of a translator as finding something that is fundamentally equivalent, but not formally identical to the original text. This is the standard of translation at ICTs.<sup>74</sup> The substance and the merits have to be the same, but not the form.<sup>75</sup> This goal has also been criticised as unachievable but has not been successfully challenged.<sup>76</sup> The standard of equivalence is a useful reminder of the core concern as to whether the level of accuracy realised in translation is sufficient to sustain a fact finding process of a judicial nature. If a meaningful representation of the substance and the merits can be achieved, then a fair trial is possible. It is a question of the degree to which the original message is portrayed in the resulting translation. The aggrieved party has to prove that there was an actual miscarriage of justice.

*(vii) Peculiarities & challenges of translating legal text*

‘The legal translator’s skills and tasks are very different from the lawyer’s. The legal translator does not read and interpret the way a lawyer does. The legal translator does not write the law either. However, the legal translator needs to know how lawyers including judges and law makers think, and write the way they do, and at the same time be sensitive to the intricacy, diversity, and creativity of language as well as its limits and power’.<sup>77</sup>

Cao’s observation sums up the challenges of a translator in the legal process.

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<sup>71</sup> Ibid 81.

<sup>72</sup> Ibid

<sup>73</sup> Ibid.

<sup>74</sup> Per Senior translator at an ICT and trainer of ICT translators Respondent 2001 (19 March 2011) Annexure 217.

<sup>75</sup> Ibid.

<sup>76</sup> Garre (note 55 above) 81 on Stolze’s theory that the overall goal is to achieve symmetry between the meanings of the two texts. Symmetry has also been criticised as having the same meaning as equivalence.

<sup>77</sup> D Cao *Translating Law* (2007) 5.

There are several challenges to judicial interpreting and translation of legal text. (i) The scope of the role of a translator is vague; (ii) the subject matter is highly specialised and complex; (iii) there is merger of legal systems and legal cultures in international criminal justice; (iv) the context of a legal text is integral to the meaning; (v) cross-cultural understanding is essential to effective translation; (vi) there is limited standardisation and legalisation of languages; (vii) legal procedure has stringent time limits that lead to hurried translations.

(aa) Vague scope of the role of a translator

Legal professionals rely on translators for information and communication but the issue is whether this fact is sufficiently taken into account in legal translation.<sup>78</sup> Translators consulted in this study were aware of the significant bearing of their work on the judicial process by virtue of their training and experience of litigation dynamics. Translation has particularly been identified as the cause of many shortcomings in international criminal trials such as late submissions by parties, errors on the court record, misguided responses, among others.

An ICT translator attests to the peculiarity of judicial translation as highly demanding because every word is significant and must be portrayed precisely as it may be crucial to the trial.<sup>79</sup> Thus, reasonable care is taken to ensure that the conversion is done correctly. It is against this background that a legal translator is presented with a task of presenting a flawless product, a goal that stretches the traditional boundaries of the role of a translator. Translators undertake editing and research tasks as well as developing new vocabulary for less scientifically developed languages.

*Translator as editor*

Whereas a translator would want to stick as close as possible to original grammar, style and register of a document, editorial improvements may be necessary so as to avoid further

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<sup>78</sup> Garre (note 55 above) 4.

<sup>79</sup> Respondent 2005 (25 February 2011) Annexure 228.

confusion.<sup>80</sup> If the original text is strewn with spelling and punctuation errors, the translator may punctuate the document correctly to help make it more understandable.<sup>81</sup> Any changes to the document are made in consultation with the author. This may end up as another time consuming process. It is noteworthy that this editorial function is not intended to change or correct the content of a document especially if it constitutes the court record.

Formatting is also a demanding task; style usually concerns editorial conventions such as the placement of commas, preferences for the use of ‘which’ or ‘that’, capitalisation, use of numbers, placement of titles and page numbers.<sup>82</sup> ICTs require that documents adhere to an established institutional style. The writing style is also a result of, as well as a reason for a certain legal culture.<sup>83</sup> Different languages have different styles; the translation should look and read as if it was originally written in that language.

Further editorial tasks in translation arise from discrepancies in referencing. There are cases where the wrong references are cited in the original documents. The translator may have to correct such mistakes.

#### *Translator as researcher*

Translation has the potential of highlighting defects in a document that may not be obvious on the face of the original. It can be an eye opener and new point of reference by suddenly making one see the ambiguity of concepts which seemed so normal in the original.<sup>84</sup> In such situations, the translator would have to conduct research. The research could involve consulting several dictionaries and comparing meanings; reading the literature on the subject in question; consulting with the author of the document for clarification of the expression intended; consulting with transcribers among others.<sup>85</sup> The extent of the research to be done in translating a particular text cannot be precisely determined at the commencement of the task.

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<sup>80</sup> Edwards (note 14 above) 111.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid 112.

<sup>83</sup> U Kischel ‘Legal Cultures - Legal Languages’ in FE Olsen, A Lorz, D Stein (eds) *Translation Issues in Language and Law* (2009)13.

<sup>84</sup> Ibid 9.

<sup>85</sup> Account of an ICT translator - Respondent 2005 (25 February 2011) Annexure 229.

It is important to note that a translator is not authorised to make any changes to the substance of a document. ICT translators contend that the debate on accuracy of translation should extend to accuracy of originals; a good translation is dependent upon a good original. Accurate translation of documents exhibiting poor writing skills and limited working knowledge of the language in which they are written is not possible.<sup>86</sup> In some cases, the language section has to send the document back to the transcriber to have it corrected with reference to the audio and video recordings, or the party that submitted it. Such interventions are time consuming. Notably, poor originals at ICTs are often documents prepared by unrepresented accused persons and legal professionals who choose to work in languages in which they are not adequately proficient.<sup>87</sup> Thus, there is shared responsibility for the efficacy of translation in the trial process.

#### *Translator in developing vocabulary*

In their efforts to bring certain fundamental texts from one culture to another, translators have had an impact on the evolution of languages themselves.<sup>88</sup> The language section of the Special Court for Sierra Leone has developed native vocabulary for legal concepts.<sup>89</sup> The team has compiled the most commonly used legal terminology in trials of the Special Court and translated them into four major local languages of Sierra Leone: *Krio*, *Limba*, *Mende* and *Themne*.<sup>90</sup> This functional role of a translator is beyond conventional limits.

Thus, the role of an ICT translator goes beyond transmitting information to filling gaps in communicating in a highly interactive international trial context. What a translator produces depends largely on the state of the material provided. There is collective responsibility for the impact of translation on a trial.

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<sup>86</sup> Ibid, Annexure 229.

<sup>87</sup> Ibid.

<sup>88</sup> See J Delisle & J Woodsworth (eds) *Translators through History* (1995) 25.

<sup>89</sup> Respondent 2006 (26 February 2011) Annexure 234.

<sup>90</sup> See 'Special Court Launches Glossary of Legal Terms in Local Languages' - the 'Integrated Glossary of Legal Terminology: Krio, Limba, Mende, Themne' Press Release Free Town, Sierra Leone, 6 November 2008. (<http://www.sc-sl.org/LinkClick.aspx?fileticket=Dw8KzK0LV3k%3D&tabid=73>).

(bb) Highly specialised & complex subject matter

‘Legal translation is the most intense and most arduous of dialogues...’<sup>91</sup> It is a cross-cultural event involving not only translation from one language into another, but also from one legal language to another legal language and from one legal system into another legal system.<sup>92</sup> This view was affirmed by ICT translators that participated in this study.<sup>93</sup>

Stolze identifies three problem areas in understanding and translating legal texts. (i) How to interpret each text is always an issue; (ii) how to deal with formulaic expressions such as ‘have agreed as follows’, very commonly found in texts of ICTs; and (iii) how to translate legal concepts.<sup>94</sup>

Legal interpretation is a tradition rooted in an institutionalised professional culture.<sup>95</sup> When translators translate legal texts, in many ways they will move into the sphere of legal professionals in that they are working with legal texts, in legal systems and are trying to establish the meaning of legal texts in order to be able to translate them.<sup>96</sup> A legal translator must not only have the factual knowledge of the legal system, but first and foremost understand the system and its traditions, both in terms of the law itself and in terms of text reading and interpretation.<sup>97</sup> Legal discourse is also invaded by loan words, loan structures, and interferences. An Indian lawyer, for example, would have problems not just with English words, but also with Latin, Roman and French idiomatic trends.<sup>98</sup> Translators without a legal background encounter practical difficulties. It may be justifiable to hire lawyers as translators or provide legal training to translators.

However, the *ad hoc* ICTs for Rwanda and former Yugoslavia were established as response mechanisms to crises; their work had to commence in record time for their impact to be felt

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<sup>91</sup> L Beaudoin ‘Legal Translation in Canada: the Genius of Legal Language(s)’ in FE Olsen, A Lorz, D Stein (eds) *Translation Issues in Language and Law* (2009)144.

<sup>92</sup> A Doczekalska ‘Drafting or Translation – Production of Multilingual Legal Texts’ in FE Olsen, A Lorz, D Stein (eds) *ibid* 120.

<sup>93</sup> Respondents 2001 (19 March 2011) Annexure 217; 2002 (18 February 2011) Annexure 220; 2005 (25 February 2011) Annexure 228; & 2006 (26 February 2011) Annexure 232.

<sup>94</sup> Garre (note 55 above) 83 citing R Stolze *Hermeneutisches Übersetzen* (1992) 177 (English translation).

<sup>95</sup> Garre *ibid* 101.

<sup>96</sup> *Ibid* 3.

<sup>97</sup> *Ibid* 99.

<sup>98</sup> Lambert (note 3 above) 78.

promptly. There was very little time to train staff. At the inception of the first ICTs, there were just a few experienced legal translators, and fewer in the field of international criminal justice, which was a relatively new subject of international law. Translators were hired on the basis of their linguistic expertise and for the most part, it was on the job training. It is generally acceptable that much of the translator's learning would be on the job because so many local variations of practice affect their work. The laws differ in each situation; each court has its own rules and procedures, and no case is the same.<sup>99</sup>

The result of the tribunals' inevitable approach of hiring non-lawyers as translators was a chaotic beginning. The translation fiasco in the Media trial is one such example; it tainted the fairness of the trial of Hassan Ngeze. The tribunals devised a system of procedural checks and balances so as to minimise errors. The translators also became familiar with the subject matter over time and lent their expertise to subsequent international criminal courts. However, the completion strategies of the international criminal tribunals for Rwanda and former Yugoslavia is characterised by instability of staff tenures, a factor that has led to continued movement of experienced translators to other establishments. These tribunals are, once again, faced with resource gaps at the time when they require utmost efficiency.

#### (cc) Merger of legal systems & legal cultures

The most challenging feature of international criminal law texts, for purposes of translation, is that they are a product of a merger of legal systems. International criminal tribunals constitute a merger of both civil and common law legal systems. Legal translation in circumstances where more than one legal system is applied presents additional difficulties because of co-existence of systems and languages, which could have undergone parallel development, hence the necessity for beginning translators to acquire a firm grasp of the formal, conceptual, stylistic and organisational differences between the languages and between the legal systems involved.<sup>100</sup>

Firstly, each language favours certain construction or stylistic processes and terms.<sup>101</sup> As legal translators who work from English to French go from one language to the other, not only do the

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<sup>99</sup> Edwards (note 14 above) 4.

<sup>100</sup> Beaudoin (note 92 above) 136.

<sup>101</sup> Ibid 140.

concepts and words change, but the relationships between them change as well.<sup>102</sup> Particularly, modes of expression peculiar to legal French and legal English attest to the ability of each language. As a rule, French legal reasoning employs deduction, beginning with principles and then applying them to concrete cases. ‘English’, on the other hand, prefers induction, inferring principles from particular cases.<sup>103</sup>

Secondly, different legal systems have different legal concepts, some of which are contested.<sup>104</sup> For example, the equivalent of *estoppel*- a common law term in legal French is a subject of controversy. There are uncertainties about the legal scope of contested concepts and translations of contested concepts.<sup>105</sup> The only way to establish boundaries in the law for such concepts is through case law and interpretation by the courts.<sup>106</sup> Authoritative pronouncements on many of these concepts may not yet exist.

Thirdly, there are abstract legal concepts such as ‘rule of law’ that have a wide margin of interpretation and exist in both legal language and in everyday speech but with different meanings.<sup>107</sup> In translating such concepts, the translator’s focus is divided between the aspects of contention, and on how to translate the legal concepts into another language.<sup>108</sup> The resultant compromise may not represent the original.

Further, some concepts are new to other legal systems that their equivalents are not established.<sup>109</sup> They may also express unique legal notions. Sir Basil Markesinis - a British comparatist, notes that the word ‘common law’ cannot be translated into German or French.<sup>110</sup> It is unique to the legal system it represents. As a newly evolving field of law, international criminal law entails peculiar phrases that present a huge challenge to translators. Notions such as ‘positive complementarity’ are unique to the Rome Statute regime. Sometimes the target language not only does not contain terms of art used in a particular legal system but also does not

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<sup>102</sup> Ibid.

<sup>103</sup> Ibid 141.

<sup>104</sup> Garre (note 55 above) 83.

<sup>105</sup> Ibid 169.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid 83.

<sup>108</sup> Ibid.

<sup>109</sup> O Brand ‘Language as a Barrier to Comparative Law’ in FE Olsen, A Lorz, D Stein (eds) *Translation Issues in Language and Law* (2009) 23.

<sup>110</sup> Ibid 23, 24.



contain simple words used in everyday conversation.<sup>111</sup> At the SCSL, pages of deliberation centred on what the witness meant by the word ‘usually’ as it was used in her statement until an interpreter advised that there is no word for ‘usually’ in the *Mende* language - the language of the witness.<sup>112</sup>

Furthermore, the concepts from different legal systems are used jointly in some situations. Over time, common law jurists have developed parallel concepts by combining French terms and English terms, giving rise to several doublets in legal English such as ‘last will and testament’, ‘breaking and entering’, ‘fit and proper’.<sup>113</sup> In some cases, two different terms were employed (one French and one English) for the same concept; examples include ‘buy/purchase’, ‘have/possess’, ‘child/infant’. This parallelism makes the modes of expression in common law heavier and more complex.<sup>114</sup> However, internationalisation nowadays generates a campaign in favour of plain language.<sup>115</sup> The author of a document has to state the intended communication clearly in simple terms. The appeals chamber of the Special Court for Sierra Leone in the *CDF* case upheld the view of the trial chamber that English as the working language of the court must be comprehensible and considered, and must not contain exaggerated language.<sup>116</sup> This position discourages unnecessary parallelism and repetitions which complicate legal language. Legal professionals in the service of international criminal justice are encouraged to draft documents in simple and clear language.

#### (dd) Nexus between context & meaning of legal text

Legal terms often have meaning only in the context of a legal system.<sup>117</sup> All legal systems contain system-bound terms with no counterparts in other legal systems.<sup>118</sup> These terms designate concepts and institutions peculiar to the legal reality of a specific system and very

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<sup>111</sup> Garre (note 55 above) 169.

<sup>112</sup> Combs (note 22 above) 77. See also AFRC Transcript - *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, SCSL-04-16-ES (18 July 2005) 106-111.

<sup>113</sup> Combs *ibid* 140.

<sup>114</sup> *Ibid*.

<sup>115</sup> Lambert (note 3 above) 78.

<sup>116</sup> *Prosecutor v Sam Hinga Norman, Moinina Fofana & Allieu Kondewa* (CDF Case) SCSL-04-14-AR73 Decision on Amendment of the Consolidated Indictment (16 May 2005) para 48.

<sup>117</sup> Beaudoin (note 92 above) 136. See also M Gotti ‘Globalizing Trends in Legal Discourse’ in FE Olsen, A Lorz, D Stein (eds) *Translation Issues in Language and Law* (2009) 56, 57.

<sup>118</sup> *Ibid*.

often are considered as untranslatable.<sup>119</sup> For instance, it is not possible to translate common law concepts such as ‘equity’ that have evolved over centuries in English into French.<sup>120</sup>

Further, translation turns into a legal problem once there are authoritative versions of a norm in several languages. Multilingual norms pose problems in interpretation when they are applied, and translation when they are drafted.<sup>121</sup> The centrality of legal context to content of a legal document bolsters the research role of a translator.

#### (ee) Significance of social culture to effective translation

The influence of culture on communication intensifies the complexity of translation in a multilingual trial. Kelsall rightly notes that an international criminal trial is a social encounter where different modes of being and different world views conceivably collide.<sup>122</sup> Whenever people who are communicating do not share the same culture, knowledge, values and assumptions, mutual understanding can be especially difficult.<sup>123</sup> Understanding among such persons is only possible through the negotiation of meaning, flexibility and imagination.<sup>124</sup> Thus, the translator as an involved party in the act of communication has to be flexible and demonstrate their insight into different cultures and backgrounds and then at the same time try to envisage how differences between the writer and the reader of the translation might create problems of understanding.<sup>125</sup> As international criminal trials have shown, an international translator may not be knowledgeable in the cultural dynamics of all participants in a trial; their position may not always be right hence tilting courtroom communication to an unintended direction.

In addition, the translator contributes their own cultural perspectives to the communication process. Garre argues that it is not possible for a professional translator to work with texts in a vacuum; whether consciously or unconsciously, translators work as individuals with their own

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<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Kischel (note 84 above) 10.

<sup>122</sup> T Kelsall *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (2009)18.

<sup>123</sup> Garre (note 55 above) 132 citing G Lakoff & M Johnson *Metaphors We Live By* (1980) 231.

<sup>124</sup> Ibid 133.

<sup>125</sup> Ibid.

background, perspective and culture.<sup>126</sup> Cultural taboos may inhibit an interpreter from conveying a clear testimony of a witness.<sup>127</sup> At Nuremberg, some of the interpreters were reluctant to accurately translate vulgar language; one female interpreter particularly refused to interpret ‘brothel’, while another female interpreter rendered the sentence ‘you just had to piss on the Jews’ as ‘you just had to ignore the Jews.’<sup>128</sup> This rendition was a distortion of the evidence that affected the liability of the accused.

Of note, culture is a controversial concept. According to Kelsall, it has generally been understood by anthropologists to refer to one of the following four things (i) the ontology (existence), cosmology (origins), or world view of a people, community or society; (ii) their systems of signification, encompassing language (verbal or non-verbal), art, monuments, music and dance; (iii) their traditions: patterns of valued behaviour carried out into the present, and their total way of material and symbolic life.<sup>129</sup> In courtroom interpreting, inter-cultural understanding of demeanour, conduct and character can be difficult.<sup>130</sup> Problems are created by cultures that encourage evasiveness, exaggeration, euphemism or understatement, and by the wide variations that govern norms of eye contact, and facial expression.<sup>131</sup> These factors are essential in determining the credibility of a witness. The body language of a witness also guides the courtroom interpreter in forming the message to be conveyed. There is a high possibility of inter-cultural misunderstanding, which may have adverse effects on fair trial.

Kelsall makes an important observation that evasiveness, exaggeration and euphemism may arise from extraneous but compelling cultural considerations.<sup>132</sup> In ‘highly structured’ societies such as Sierra Leone, everyday culture is said to be characterised by theories of ambiguity and valorisation of secrecy, founded in the region’s long standing tradition of ‘secret societies’.<sup>133</sup> Most of the international trials are of former bearers of power positions in communities or sects. Some of these positions are associated with superstitions that influence the manner in which

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<sup>126</sup> Ibid 99.

<sup>127</sup> Ibid 74.

<sup>128</sup> Gaiba (note 1 above) 107--108.

<sup>129</sup> Kelsall (note 123 above) 19--20.

<sup>130</sup> Ibid 16 citing R Cryer ‘A Long Way from Home: Witnesses before International Criminal Tribunals’ (2007) 4 (1) *Int Commentary on Evidence* 1-4.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid

<sup>133</sup> Ibid 17.

witnesses testify. For example, Kondewa, alleged ‘High Priest’ of the Kamajor militia and formerly a defendant at the Special Court, was widely thought to have been able to turn himself into a snake, and to make himself invisible.<sup>134</sup> Charles Taylor was formerly head of the poro secret society. Evasiveness and euphemism was exhibited by members of these cults who were called as prosecution witnesses. Witnesses expressed fear for their lives after giving implicating evidence against their leaders. As one witness at the Special Court for Sierra Leone exclaimed ‘After here, I am dead’.<sup>135</sup> They return to their communities where they may face punitive measures. Witness evidence against former high profile leaders or former perpetrators of terror is tainted by similar perspectives. There is no guarantee that the person testified against would be convicted and kept in custody; even convicts are held for a definite period of time. The grant of conditional release to Jean-Pierre Bemba in 2009 instigated deep concern for the safety of victims and witnesses.<sup>136</sup> The consequences of perceptions and superstitions on the security of witnesses are beyond the coverage of even the most sophisticated witness programs, devised by international mechanisms to reinforce the confidence of witnesses. The fears of witnesses manifest in modes of speech that could mislead the process of interpretation, hence affecting trial fairness.

(ff) Limited standardisation & limited legalisation of languages

The majority of languages are not studied or standardised; the same word in the same language may have different meanings. A word with the same meaning may have different spellings in the same language. In this regard, African villages, locations and features have been a subject of controversy in international trials.

Similarly, the majority of languages are not legalised. Thus, a large number of legal concepts have no known expressions in local languages. These deficiencies present considerable translation and transcription difficulties in trials involving specialised local languages. There are three major complexities associated with this gap in international trials (i) highly specialised

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<sup>134</sup> Ibid.

<sup>135</sup> Respondent 6003 (21 February 2011) Annexure 243.

<sup>136</sup> See *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08 Decision on the the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa (14 August 2009) 37.

local vocabulary; (ii) contextual vocabulary; and (iii) lack of equivalents in international working languages.

- Localised vocabulary

Certain phrases derive from local custom or events that their meaning requires a greater understanding of the broader context in which they arose, and they are used.<sup>137</sup> A concept may even be controversial in its natural context that the native users themselves do not know its precise meaning. The translator would have to conduct intensive research on the subject in question. The ICTR has a terminology unit, within the language services division, which researches and consolidates the meaning of controversial terminology.

Further, regional speech can vary; the same word could have different meanings in different regions of the same jurisdiction.<sup>138</sup> Differences in pronunciation may also lead to misunderstandings. At the Special Court for Sierra Leone, there have been situations of judges failing to understand the English spoken by Sierra Leonean interpreters, and repeatedly asked them to speak English!<sup>139</sup> A language may also have several dialects. Even native translators may not understand perfectly the dialects of regions where they do not originate. Thus, not even the translators originating from situation countries can solve the complexities of a multilingual trial.

- Contextual vocabulary

The emergence of special contextual terms is one of the key characteristics of a conflict. Unique expressions are used to propel commissions and enable omissions in conflicts that later constitute the subject matter of adjudication in international criminal trials. Examples include ‘cockroaches’- used in the 1994 Rwanda genocide to refer to Tutsis. Ordinary phrases may also acquire special meaning in the context of a conflict that care must be taken in interpreting them. The term ‘cleansing operation’ emerged as controversial at the tribunal for former Yugoslavia. The appeals chamber found that in some contexts it was ambiguous since it could be understood as synonymous with ‘mopping up operation’ in the military sense or with unlawful ethnic

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<sup>137</sup> Edwards (note 14 above) 101.

<sup>138</sup> Ibid 100.

<sup>139</sup> Respondent 6003 (21 February 2011) Annexure 245.

cleansing; caution had to be taken when interpreting answers given by witnesses.<sup>140</sup> Similarly, the use of the word '*Impuzamugambi*', which means 'working together' in *Kinyarwanda*, acquired new meaning in the context of the *interahamwe* militia. The new meaning expressed criminal intent. Defence counsel for one of the accused persons laments the erroneous and incriminating use of '*Impuzamugambi*' by interpreters, within the meaning acquired during the conflict instead of the ordinary sense.<sup>141</sup> It is his view that the interpreters had no power to confer a particular meaning to the controversial term without further verification.<sup>142</sup> The trial of facts inevitably involves the discovery and discussion of the controversial terms. Thus, the translator or interpreter in the trial has to be well informed of the history and hidden meanings of special terminology so as to convey the meaning intended by the user. Misconceptions have implications on trial fairness.

In case of existing judicial pronouncements on these contextual terms, the translator should be fully knowledgeable of them, constituting an additional research topic for a translator. This task may not have been foreseen at the establishment of the language divisions.

- Lack of equivalents

Gotti correctly notes that the increasing need at the international level for accurate and authoritative translation of legal texts and documents across languages depends on the need for them to convey appropriately, in both languages, the practical intentions and implications of the original text.<sup>143</sup> One of the barriers to accurate translation emerges from the fact that some of the languages in need of translation at ICTs simply do not have the vocabulary to convey the concepts in question.<sup>144</sup> Even the most developed languages may not be up to speed of evolution of concepts in international criminal law. In such instances, the interpreter would have to explain the words other than substitute them. This however causes difficulty in simultaneous interpretation because time is needed for such explanations. The court proceedings would have to progress at a slower pace so as to allow time for explanations, hence the delays.

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<sup>140</sup> See *Prosecutor v Dario Kordić & Mario Čerkez* Judgement (17 December 2004) para 403, p106.

<sup>141</sup> Name of accused person withheld on ethical grounds. Account by Respondent 6006 (18 March 2011) Annexure 246.

<sup>142</sup> Account by Respondent 6006 *ibid*.

<sup>143</sup> See Gotti (note 118 above) 56.

<sup>144</sup> Combs (note 22 above) 76.

#### (gg) Time limits & hurried translations

In furtherance of expeditiousness of trial, the rules of procedure and evidence stipulate time frames for essential actions in criminal proceedings. Justifiably, translation is not allotted a definite period in the rules and regulations. The time for which a particular translation can be done is negotiated with the language services section at the time of submission, and determined according to the circumstances of each particular case. Determinant factors include (i) the workload at the language section at the time of submission; (ii) the volume of the work to be done; (iii) the urgency of the document submitted for translation; and (iv) how easily the document can be translated. The UN standard rate for translation is 5 pages a day for each translator but technical fields such as law can range from 3 pages a day.

It is a wide spread concern among translators that documents are often submitted shortly before the translations are needed; almost every document is urgent at ICTs. A defence counsel reveals that he would be hesitant to submit a document in good time for fear of possible leakages of evidence, which would compromise his client's position.<sup>145</sup> It is believed that submitting documents on short notice minimises the extent of the possible damage that a leakage in the evidence can cause. Language divisions are viewed as part of the court and as belonging together with the prosecution. The defence is suspicious of the confidentiality of the information entrusted with the language services section. The mistrust and suspicion undermines cooperation among stake holders, a prerequisite to effective translation and a hand maid to fair trial.

Similarly, chambers submit decisions and judgments for translation only after delivering them in court. The time for filing an appeal from a decision or judgement starts running from the date the decision or judgment is delivered.<sup>146</sup> Where the accused person does not understand the language of the document, this mode of time computation contravenes the fair trial guarantee of the accused to adequate facilities to prepare their case. They may have to appeal a judgment or

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<sup>145</sup> Respondent 6006 (18 March 2011) Annexure 247--248.

<sup>146</sup> See *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Decision on the translation of the Article 74 Decision & related procedural issues 15 December 2011. This decision is distinguishable. The chamber held that the obligation of the accused to file a notice of appeal would only commence once the French-Language version of the judgment that was issued in English was made available. French (the language that the defence team understood) is also an official and working language of the ICC. In the words of the chamber, the two languages (English and French) rank equally. The chamber considered this fact alongside the argument for fairness in coming up with the aforementioned favourable position to the accused - See paras 4, 18.

decision delivered in a language they do not understand. All rights are enjoyed within the ambits of the rules of procedure and evidence. The appellant would be required to file an appellate brief in the specified time, based on the document available, with liberty to make any necessary amendments when the translation is made available, usually ‘as soon as possible’.<sup>147</sup> In such situations, the language section is pressurised to deliver in no time. In view of the degree of care required to translate accurately, hurried translations are a risk to trial fairness.

There are also compelling situations of urgency in which translations have to be delivered as soon as possible. Some chambers have made misguided orders directing translators to speed up their work. It should be remembered that factors such as time and resources play an important role in translation. A translator needs time to interpret a document, analyse its contents, research on unclear aspects of it, and form a good representation of the original. If the process is rushed, a translator is forced to complete their work against a narrow background.<sup>148</sup> The results are usually regrettable. Measures such as splitting documents among several translators in order to have the work done quickly have previously been adopted at ICTs. Translation of a legal document into one language by different translators is often very different.<sup>149</sup> The internal consistency of such a document is usually lost and it may have to be assigned to one particular translator for harmonisation.<sup>150</sup> Thus, splitting documents among several translators does not necessarily save time.

Due to intense pressure, tribunals have also tried to outsource translation tasks. Outsourcing often produces more problems than it solves. Independent translators have limited knowledge of the specific terminology used in the documents and limited familiarity with the house style of tribunal documents. Some outsourced documents have emerged as unusable. In such cases, an official of the tribunal has to revise the translation, and reconcile it with tribunal standards.<sup>151</sup> In

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<sup>147</sup> See the language in Rule 144 (2) ICC Rules of Procedure & Evidence (RPE), Rule 98 *ter* (D) ICTY RPE IT/32/Rev 46.

<sup>148</sup> Garre (note 55 above) 97, 98.

<sup>149</sup> Edwards (note 14 above) 95.

<sup>150</sup> Harmonisation is the combination or adaptation of parts, elements or related things, so as to form a consonant and orderly whole. See M Boodman ‘The Myth of Harmonisation of Laws’ (1991) 39 *American J of Comp L* 699,724.

<sup>151</sup> Account by Respondent 2005 (25 February 2011) Annexure 229.



conclusion, translation has to take as much time as it often does and the huge task rests solely upon the tribunals.

*(viii) Shortfalls in translation*

Shortfalls in translation include (aa) alterations; (bb) lack of precision; (cc) errors.

*(aa) Alterations*

The Italian proverb '*traduttori, traditori*' – 'translators are traitors' expresses the view that language as the medium for translators considerably conditions the message it carries.<sup>152</sup> In the words of an ICT defence counsel 'to translate a document is to betray its content'.<sup>153</sup>

Words resist a meaningful translation for various reasons (i) some words are 'moving targets'; their meaning constantly changes depending upon the context.<sup>154</sup> Pierre Pescatore, formerly a judge at the European Court of Justice has assembled a whole list of terms which are frequently used by the court but can acquire different meanings in different contexts that they are a notable threat to meaningful translation.<sup>155</sup> Examples include '*Il y a lieu de*', '*ayant*'. The potential for altering the intended meaning is high in the process of translating such words. Misrepresentations of meaning may affect the proceedings and the integrity of the process.

(ii) Some words are simply non translatable - the 'non-translation' dilemma. Brand laments that 'legal transplants - the borrowing of legal institutions from other legal systems, have brought this phenomenon upon us'.<sup>156</sup> International criminal practice is prone to this phenomenon because it is a hybrid of legal systems. In such cases, the words are left in the state of the original while being used in the hybrid system. Such words might acquire a different meaning as a result of separation from their original cultural context.<sup>157</sup> The degree of change a transplant is likely to suffer depends on the extent of the difference between the donating and the receiving system. A certain gap will always yawn as the dynamics of the two systems differ.<sup>158</sup> Words that resist

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<sup>152</sup> See Brand (note 110 above) 23.

<sup>153</sup> Respondent 6006 (18 March 2011) Annexure 246.

<sup>154</sup> Brand (note 110 above).

<sup>155</sup> Ibid.

<sup>156</sup> Ibid 24.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid 25.

translation further challenge the capacity of translation to propel a fair multilingual trial; distortions are more probable than not.

(bb) Lack of precision

In legal interpreting, the importance of accuracy cannot be overemphasised as any inconsistency in a witness' account can damage the credibility of that witness.<sup>159</sup> Lack of precision covers gross violations of meaning such as substituting 'three feet' for 'three meters' or details such as switching 'this' for 'that'.<sup>160</sup> It is generally accepted that translation of any kind involves some measure of approximation; it's not easy to find an exact translation that conveys the context.<sup>161</sup>

These approximations may arise where words or concepts exist in a number of different languages but do not necessarily have the same meaning in each language because of differences between legal systems.<sup>162</sup> An example is the rendering of the concept of reasonableness, basic in common law systems, where expressions such as 'reasonable steps', 'reasonable measures', 'reasonable person' and 'proof beyond a reasonable doubt' frequently occur.<sup>163</sup> When this concept is translated into languages spoken in countries adopting a civil law system, it is considered too vague and it's rendering as *ragionevole*, *raisonnable* or *vernünftig* often gives rise to criticism and dissatisfaction.<sup>164</sup>

The question in legal translation is not which translation is right, but much more modestly, which one is less wrong.<sup>165</sup> The existence or lack of a legal and terminological equivalent is not a question of 'yes' or 'no' but rather one of degree.<sup>166</sup> Thus, Edwards suggests that requirements for accuracy should be flexible in that there are redundant elements that can and may be, intentionally or not, left out of the rendition, without affecting the message in the target text.<sup>167</sup> The unreliability of language as the vehicle of conducting proceedings shakes the credibility of

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<sup>159</sup> A Gentile, U Ozolins & M Vasilakakos (note 5 above) 102.

<sup>160</sup> Edwards (note 14 above) 92.

<sup>161</sup> See McAuliffe (note 47 above) 105.

<sup>162</sup> Ibid 106.

<sup>163</sup> Gotti (note 118 above) 57.

<sup>164</sup> Ibid.

<sup>165</sup> Kischel (note 84 above) 7.

<sup>166</sup> Ibid 8.

<sup>167</sup> See Edwards (note 14 above) 84.

the foundations of trial fairness. This situation is compounded in a trial involving confusion of many tongues.

(cc) Errors in translation & interpretation

In the process of understanding the source text (the first step in the process of translation), a translator can error in two ways: (i) they might not understand the text at all (lack factual knowledge about the subject matter of the text or is not linguistically competent to understand the text); (ii) they may not understand the text (they think they understand the text but they do not actually grasp the intended meaning of the text).<sup>168</sup>

There may also be hidden implications in the legal text.<sup>169</sup> Such implications cause ‘losses in translation’ because they can be more readily discovered by certain users and not others.<sup>170</sup> It is for this reason that native speakers interpret a text more deeply while foreign interpreters struggle to understand even the main theme.<sup>171</sup> The greater the ethnic and cultural distance between the document user and the author’s legal culture, and the fewer historical contacts and common models that exist, the more readily hidden implications will be missed.<sup>172</sup> This is one way in which evidence is lost in translation.

Further, the document may contain new words that cannot be found in dictionaries or any source documents available.<sup>173</sup> In that case, a translator may find words close to the meaning. Where a translator cannot provide the right answer, they provide the best guess as to the possibilities.<sup>174</sup> A wrong guess might have implications on the fairness of the trial depending on the significance of the material misrepresented.

There are also cases where the original is not well written raising the possibility of error in translation. This can mean a number of things, but lack of clarity creates the most trouble.<sup>175</sup> Notably, it is not the responsibility of an interpreter to make meaning clear when the source

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<sup>168</sup> Ibid.

<sup>169</sup> Brand (note 110 above) 25.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Edwards (note 14 above) 110.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

language is unclear.<sup>176</sup> For textual ambiguities, when the person or office requesting translation cannot clear up the confusion, a translator does what is done in interpretation: where the original is ambiguous, the rendition into the target language should be equally ambiguous.<sup>177</sup> Such are some of the evidentiary foundations of multilingual international proceedings and verdicts.

In interpretation (the oral transmission of communication), errors arise from (a) misunderstanding the context; if one misunderstands what is being said in the source language, they may interpret it incorrectly in the target language.<sup>178</sup> A word may have opposite meanings depending on the context. If a word comes out of context and the interpreter guesses at its meaning, the interpreter may guess wrong.<sup>179</sup> For example, when an English lawyer talks about costs, lawyer's fees are included, this is not so for an American. When an American lawyer talks about an opinion, an English lawyer would talk about a judgment.<sup>180</sup>

(b) Misunderstanding the speech. It is so easy to be wrong.<sup>181</sup> The interpreter may give an incomplete rendition of the message or fail to transmit some words without realising that they have dropped those words.<sup>182</sup> For example, the interpreter can possibly omit a phrase as apparently casual as 'I think' which would be a linguistic premise to inadmissible evidence in that it is the expression of opinion and not fact.<sup>183</sup> This would influence the trial.

(c) There may also be errors in the register at the reproduction phase. Register refers to the level of language usage, its degree of formality, elegance, or lack thereof.<sup>184</sup> Types of registers include legal; deliberately obscure; academic; scientific; elegant; cultured; polite; vulgar; and deliberately offensive.<sup>185</sup> The interpreter needs to be able to identify the position of a given word in the register or spectrum of language.<sup>186</sup> When the speaker uses a certain register, the

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<sup>176</sup> Ibid 87.

<sup>177</sup> Ibid 110.

<sup>178</sup> Ibid 91.

<sup>179</sup> Ibid 91.

<sup>180</sup> Kischel (note 84 above) 16.

<sup>181</sup> Ibid 91.

<sup>182</sup> Ibid 92.

<sup>183</sup> See ID Negru 'Acceptability versus Accuracy in Courtroom Interpreting' in DS Giannoni & C Frade (eds) *Researching Language & the Law: Textual Features & Translation Issues* (2010) 216.

<sup>184</sup> Ibid 92--93.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

interpreter must also use that register in the target language.<sup>187</sup> Misrepresentation of the register in the final rendition is distortion of communication, which may affect the trial.

(d) Condescension: failure to take witness speech patterns seriously. For example, if a speaker says ‘yes sir’ and the interpreter says ‘yes’, the interpreter has been inaccurate as well as condescending.<sup>188</sup>

(e) Natural errors. For interpreters, it might mean inadequate concentration, inability to catch the flow and direction of the case, or forgetting some words.<sup>189</sup> However, there are errors that participants help create. This may be due to lack of clarity in speech and needless complication of questions. Negative constructions particularly cause special problems.<sup>190</sup> For example, the question ‘Is it not true that...’ When the response is ‘yes’, is the person saying ‘yes’ to the fact that something is true or it is not true? Ultimately, the responsibility of dealing with such traps of communication falls with the interpreter who may solve the dilemmas in the way they consider fit. By being acceptable but not accurate, the interpreter may make mistakes such as (a) use more (or less) polite language than the original; (b) inject or omit hesitation; (c) use more formal or less formal language; (d) eliminate or introduce ambiguities.<sup>191</sup> This may distort the communication in the trial proceedings.

#### *Correction of errors in translation*

When an error in interpretation is discovered in an international criminal trial, the interpreter is obliged to correct it, on the record, as soon as possible.<sup>192</sup> The mistake should be corrected in such way as to make it clear that it is the interpreter who is changing their version and not the witness (phrases such as ‘interpreter correction’ are used).<sup>193</sup> If the error is identified by a party to the proceedings, they can apply to court for action to be taken. In this case, the transcripts and audios are checked and the court record reconciled accordingly. A senior interpreting official checks and makes corrections, in an erratum, which is signed and filed as part of the court

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<sup>187</sup> Ibid 93.

<sup>188</sup> Edwards (note 14 above) 93.

<sup>189</sup> Ibid 66.

<sup>190</sup> Ibid.

<sup>191</sup> Negru (note 184 above) 225.

<sup>192</sup> Respondent 2006 (26 February 2011) Annexure 234.

<sup>193</sup> Edwards (note 14 above) 69.

record.<sup>194</sup> A similar procedure applies to mistakes in written documents (translation) but a corrigendum is issued containing the corrections and filed as part of the court record.<sup>195</sup>

However, there is no systematic way of monitoring errors in interpretation. Judges cannot ensure accurate transmission of communication in more than one language of a trial. Apart from the common lack of linguistic capabilities required for the task, each person can only listen to a single language transmission at a time since the interpreting is simultaneous. Mistakes are ordinarily pointed out by aggrieved vigilant persons. If it is a favourable mistake, one might choose to ignore it even if it impacts on the evidence. This is another effect of translation on trial fairness; translation mainly aids the vigilant.

The shortfalls of translation raise the question of the status of translations in the judicial process.

*(ix) Legal status of a translation*

Doczekalska contends that legal multilingualism is based on the principle of equal authenticity of all language versions of a legal act.<sup>196</sup> Equal authenticity means that all language versions have equal power and authority.<sup>197</sup> The principle implies that each of the authenticated language versions has the force of law and must be considered by a court during the interpretation process when the meaning of a legal act is sought.<sup>198</sup> In order to guarantee that all language versions are treated as equally authentic and none of them prevails for interpretation purposes, the aforementioned principle presumes that all language versions have the same meaning and consequently the same legal effect.<sup>199</sup> Notably, a translated text is considered inferior to the original; thus, one language version of a legal act cannot be regarded as a translation of the other one.<sup>200</sup> This means that once a document is deemed a translation of the other, it cannot have the same legal effect as the original.

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<sup>194</sup> Respondent 2006 (26 February 2011) Annexure 234.

<sup>195</sup> See for example *Prosecutor v Ramush Haradinaj & ors* IT-04-84--A Corrigendum to Judgment of 19 July 2010, 23 July 2010.

<sup>196</sup> See Doczekalska (note 93 above) 116, 117.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

It is symbolic to note that a translation at an ICT has a status of a copy of the original. Court endorses the term ‘authoritative version’ on an original court document. A completed translation is certified as a ‘true copy of the original’ or ‘official copy of the original’.

Arguably, the words ‘true copy of the original’ or ‘official copy of the original’ equate to ‘authenticity’. The word ‘authentic’ conveys the meaning of ‘legally valid’ rather than ‘original’.<sup>201</sup> Language versions are usually authenticated when they are enacted or adopted by a proper body.<sup>202</sup> At ICTs, translations are done and certified by the registry. As an organ of court, certification of a translation by the registry is an act of court. In that regard, a translation certified as an official or true copy of the original is authentic.

#### **(d) Process of interpreting (oral transmission)**

One of the most significant legacies of Nuremberg is the use of the simultaneous mode of interpreting in international criminal trials. The listener hears the interpretation at the same time as the speech is made.<sup>203</sup> The interpreter sits in a booth wearing headphones with a microphone. The interpreter hears the speech through the headphones and simultaneously interprets.<sup>204</sup> There is a booth for each language and two or sometimes three interpreters in each booth. It is generally understood that there must be at least two interpreters who would interchange every half hour. The interpreters also work as a team and may consult each other in the process. The half-hour rule is a safeguard for accuracy and helps check interpreter mistakes.<sup>205</sup>

The goal of a courtroom interpreter is to make a full and faithful interpretation of courtroom speech.<sup>206</sup> The understanding of the original meaning and the communicative intention must be grasped from the combination of words of the original utterance and such utterance should then be placed in context before conveying the final meaning into the target text.<sup>207</sup>

The interpreter should listen effectively and speak effectively.

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<sup>201</sup> Ibid.

<sup>202</sup> Ibid 117.

<sup>203</sup> M Phelan *The Interpreter’s Resource* (2001) 6.

<sup>204</sup> Ibid.

<sup>205</sup> Edwards (note 14 above) 74.

<sup>206</sup> Ibid 63.

<sup>207</sup> Negru (note 184 above) 225.

### *Listening*

The process of interpreting involves a very concentrated sort of listening.<sup>208</sup> A distinction must be made between hearing and listening. Hearing is the automatic ability to receive sound; it is a sensory aspect which alone is not enough to enable an interpreter to ‘get the message’ or understand the meaning of an utterance.<sup>209</sup> Listening, on the other hand, is a totally conscious process demanding attention and concentration.<sup>210</sup> Listening for meaning consists of locating the logical connections or relationships in an utterance, beyond simply understanding the meanings of words.<sup>211</sup> Understanding the speaker is the most crucial part in the process of interpreting.<sup>212</sup>

An interpreter may request an explanation from the speaker in case they have not understood the meaning of what is said. This is permitted in court proceedings. However, persistent requests are tactfully avoided lest they give an impression of incompetence on the part of the interpreter.

### *Effective speech*

Effective speaking skills are necessary for the interpreter to be able to transmit the message.<sup>213</sup> Such skills range from quality of voice, to choice of idiom, vocabulary, and phrasing.<sup>214</sup> Both what comes out of the mouth of the interpreter and the way it comes out are important in the overall effectiveness of the interpretation.<sup>215</sup> The interpreter aims at fluency. Fluency consists of the correct pace, intonation, stress, tone, and an absence of false starts, repetitions, pauses and hesitation.<sup>216</sup> There have been instances when the interpreters cannot be understood even when speaking the working language of the court.<sup>217</sup> Strong accents particularly make communication ineffective and the interpretation difficult to understand.<sup>218</sup>

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<sup>208</sup> See Edwards (note 14 above) 83, See also A Gentile, U Ozolins & M Vasilakakos (note 5 above) 100,110.

<sup>209</sup> A Gentile, U Ozolins & M Vasilakakos ibid 44.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid 45.

<sup>213</sup> Ibid 47.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

<sup>217</sup> Respondent 6003 (21 February 2011) Annexure 244.

<sup>218</sup> Ibid.



*(i) Role of a courtroom interpreter*

In summary, the interpreter is supposed to (a) concentrate; (b) listen; (c) understand; (d) process the message; and (e) speak.<sup>219</sup> Edwards notes that an interpreter has to work out or recognise and interpret a spoken message transmitted in a particular context, and then convert it and deliver it in another language so that it has the same meaning and impact upon the listener as it would for a listener of the same language.<sup>220</sup> To achieve this goal, the interpreter must enter the courtroom already prepared, with the correct information and terminology.<sup>221</sup> Obtaining some data about what the participant would say in court, beforehand, if possible, allows the interpreter to follow the person's flow of ideas.<sup>222</sup> Like the translator, the interpreter should read and understand the background information and if available, the speech itself. Pre-prepared documents are not often available in trial situations partly because of mistrust and suspicion among participants and the language services sections.

The role of the interpreter has been defined as an instrument of the legal process and as having particular responsibilities such as ensuring that a party is linguistically present.<sup>223</sup> In the case of *Gradidge*,<sup>224</sup> it was held that any party who is unable to understand what is happening (for lack of knowledge of the language of the court) must, by the use of an interpreter, be placed in the position in which they should be in, if those defects did not exist. 'Any party' in this case refers to any participant in the trial besides the accused person who has the right to assistance of an interpreter. The extended application of the rule in *Gradidge* is more relevant to an international criminal trial situation where more participants such as victims are entitled to participate in proceedings.

Further, there is conflict between the role of an interpreter as a facilitator of communication and the role assigned to an interpreter by the legal system.<sup>225</sup> The aim of legal interpreting is to

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<sup>219</sup> Respondent 2002 (18 February 2011) Annexure 220.

<sup>220</sup> Edwards (note 14 above) 101.

<sup>221</sup> Ibid 63.

<sup>222</sup> Ibid 67.

<sup>223</sup> A Gentile, U Ozolins & M Vasilakakos (note 5 above) 114. See also *Gradidge v Grace Brothers Pty Ltd* (1998) 93 FLR 414 [Australia]: Interpretation enables the accused person to be 'linguistically present in the proceedings.

<sup>224</sup> *Gradidge v Grace Brothers Pty Ltd* (1998) 93 FLR 414 *ibid*.

<sup>225</sup> A Gentile, U Ozolins & M Vasilakakos (note 5 above) 101.

facilitate meaningful participation of those that would otherwise not understand what is being said. It is contended that the task of the interpreter is to remove any barriers which prevent understanding or communication. It is not restricted merely to passing on the questions when the party is giving evidence; it must be extended also to appraising a party of what is happening in the court and of what procedures are being conducted at a particular time.<sup>226</sup> In practical terms, an interpreter may encourage a sobbing witness to speak.<sup>227</sup> In so doing, the interpreter may interfere with the communicative dynamics of a trial as discussed below.

Existing jurisprudence illustrates a narrow description of the role of an interpreter. In *Gaio*,<sup>228</sup> the judges observed that the interpreter is essentially a ‘translating machine’ - a bilingual transmitter ‘not different in principle from that which in another case an electrical instrument might fulfil in overcoming the barrier of distance’. The guiding principle at ICTs is that the interpreter interprets the person that has the floor; the subject matter of the task is what is verbalised by such a person. It is not common for an interpreter to explain procedures and report what is happening in court unless it is verbalised by court or a participant with the audience of court.

#### *(ii) Challenges to courtroom interpreting*

Challenges to courtroom interpreting include (i) the highly pressurised working conditions; (ii) speed of speech; (iii) maintaining impartiality.

##### *(aa) Highly pressurised working circumstances – ‘the interpretation furnace’<sup>229</sup>*

‘I went into it with the innocent enthusiasm of my 21 years..., four months later, the trial was over, I left ten years older...’ - Patricia Vander Elst (Interpreter at Nuremberg).<sup>230</sup>

Court interpreting ranks as the most demanding aspect of interpreting work. Courtroom proceedings could even be more complicated than even the highly formulaic written mode

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<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> *Gaio v R* (1960) 104 CLR 419 [Australia], See Kitto J 430.

<sup>229</sup> ‘Interpretation furnace’ was a term used by Nuremberg translators to portray the gruesome experience in an interpreting booth.

<sup>230</sup> See ‘The Nuremberg Trial’, Patricia Vander Elst ([http://aiic.net/page/983#authors\\_bio](http://aiic.net/page/983#authors_bio)).

because of so many language varieties at work simultaneously in the same professional context.<sup>231</sup> Legal language is made up of several genres, each with its own specific often related characteristics.<sup>232</sup> It includes (a) spoken exchanges in a court between, say lawyers and witnesses in a cross-examination; (b) jargon employed by members of the legal profession in interpersonal communication; (c) written language in case law, law reports and prescriptive legal texts.<sup>233</sup> An interpreter may be well prepared for the subject matter, but cannot predict the way that subject matter would be presented in the court.<sup>234</sup> The language used is legalistic and the concepts and principles underlying legal reasoning are strongly culturally bound and the rules governing the conduct of participants are largely procedural.<sup>235</sup> The special circumstances and conditions that apply to the court setting make the context in which ordinary events and answers to ordinary questions given highly stressful and important, where every word can make the difference between prison and freedom.<sup>236</sup> Even when events narrated could well be part of a normal day to day conversation; they are transferred into a broad setting of legal language.<sup>237</sup> A courtroom interpreter therefore approaches duty in a highly apprehensive state.

In a spoken context, other numerous factors come into play as the translator is no longer alone with the text, but facing a communicative situation which is embedded with face-saving situations, and questions of footing.<sup>238</sup> The interpreter is viewed as an equaliser, someone who will put litigants who do not speak the language of the proceedings on an equal footing with those who do.<sup>239</sup> In that regard, the interpreter has to study the cases of both sides - the prosecution and the defence. Research is equally integral to interpretation.

The courtroom interpreter is particularly faced with the challenge of balancing the obligation to convey communication in the manner proportionate to the level of the civility of the court, with portraying the message faithfully. This may arise in situations where abusive or vulgar language is used by a participant. In the SCSL's *RUF* trial, the interpreter translated a witness as stating

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<sup>231</sup> Negru (note 184 above) 215.

<sup>232</sup> Ibid 214.

<sup>233</sup> Ibid.

<sup>234</sup> Respondent 2001 (19 March 2001) Annexure 218.

<sup>235</sup> A Gentile, U Ozolins & M Vasilakakos (note 5 above) 95.

<sup>236</sup> Negru (note 184 above) 219.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid 215.

<sup>239</sup> Ibid.

that a rebel had said to a girl, ‘Let me have sex with you’. Hearing this, a linguist in the translation booth shouted ‘no’ and insisted that the interpreter corrects the translation of the rebel’s statement to ‘I want to fuck you’. The interpreter was too embarrassed to use the obscenity.<sup>240</sup> It should be noted that the two accounts have divergent impacts on the evidence. The interpreter’s account (‘let me have sex with you’) could be considered a request, and the linguist’s account (‘I want to fuck you’) could equate to an order, and evidence of sexual assault.

(bb) Speed of speech

Firstly, simultaneous interpretation is so speedy that a high level of concentration is required to capture each word spoken and render it into the target language.<sup>241</sup> However, the speed of the speaker should be conducive for effective listening. Fast speech arises in (a) circumstances of charged exchanges; (b) where the speaker is reading a text; (c) where the speaker is naturally very fast.

A highly charged courtroom environment raises tension, nervousness, and fear in a witness, all of which cause them to speak quickly.<sup>242</sup> The pressure on the witnesses during examination and the resultant stress on the interpreters as a result of shaky argumentation affect the completeness of the communication facilitated by them.<sup>243</sup> Evidence may be lost in such circumstances.

The speed of speech particularly affects the interpreters’ comprehension of what is being said.<sup>244</sup> The interpreter would neither understand nor interpret fast speech fully or accurately. Edwards notes that the real danger of excess speed is that it is possible to interpret half an hour of speech and still miss the real meaning and not transmit it to the end users.<sup>245</sup>

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<sup>240</sup> See Combs (note 22 above) 74—75 - analysis of *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* SCSL-04-15-T (RUF Case) Transcript 14 July 2004, 26—27.

<sup>241</sup> Combs *ibid* 14.

<sup>242</sup> Edwards (note 14 above) 67.

<sup>243</sup> Negru (note 184 above) 226.

<sup>244</sup> Edwards (note 14 above) 89.

<sup>245</sup> *Ibid* 89.

Fast testimony also affects the ability of an interpreter to speak effectively. The interpreter may speed up and stumble over words, sometimes repeating words in the source language instead of transmitting them in the target language.<sup>246</sup>

Speed might also negate the significance of tone of voice in interpreting. The tone of voice is a significant form of paralinguistic communication. Anger, for example, is often expressed by a raised voice or a disagreeable variation.<sup>247</sup> An interpreter should try to reproduce the tone in the target language, but it is an extra, and if the speaker is going very fast, an interpreter may ignore voice variation in favour of accuracy of meaning and speed.<sup>248</sup> Of course full accuracy ought to properly include transmission of voice tone.<sup>249</sup> Thus, participants that speak too fast in interpreted cases invite and indeed compel less than total interpreter accuracy.<sup>250</sup>

In an international criminal trial, the interpreter has the prerogative to ask court to impose reasonable speed on the proceedings. It is common court practice to ask the witnesses and other participants to speak reasonably slowly so as to allow interpretation to flow. These requests may be ignored or ultimately rejected. For example, the SCSL found itself so unable to deal with an interpretation challenge that it abandoned verbatim interpretation.<sup>251</sup> Witness TF2-162 was repeatedly asked to speak more slowly so that the interpreters could translate his testimony. He refused, saying ‘that is the only way I can speak’. The trial chamber succumbed and ordered the interpreter to summarise his testimony rather than translate it verbatim, saying: ‘It is not at his age that you can change him, if he speaks in a particular fashion. Let’s just go ahead and bear with him, please. Let the interpreters do everything to summarise him very faithfully, not necessarily getting into what they consider a verbatim report. Please understand the way he speaks and adapt yourself to him.’<sup>252</sup>

There are also occurrences of speedy speech by the judges themselves. Although interpreters are permitted to interject, they may be threatened by such authoritative persons especially if the need

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<sup>246</sup> Transcriber’s account – Respondent 2003 (02 March 2011) Annexure 225.

<sup>247</sup> Edwards (note 14 above) 81.

<sup>248</sup> Ibid 81.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid 90.

<sup>251</sup> Combs (note 22 above) 73.

<sup>252</sup> *Prosecutor v Moinina Fofana & Allieu Kondewa* SCSL-04-14-T (CDF Case) Transcript (8 September 2004) 17--18. Also see Combs *ibid*.

for interruption arises repeatedly. In such cases, the interpreters adopt a summary approach. The summary approach may also be the only remedy to scenarios where texts are read in court without being provided to the interpreters beforehand. In such cases, full and accurate interpretation is not possible.

#### (cc) Maintaining impartiality

An interpreter has the status of an impartial third party in furtherance of the administration of justice.<sup>253</sup> Ideally, they should neither hold nor express any opinion or added emotion to what is conveyed. The interpreter as an advocate has no place in the judicial setting.<sup>254</sup>

Beyond impartiality, the interpreter should keep out of the case; this means not helping, and not fixing things.<sup>255</sup> The ICTY has ruled that the interpreter is not responsible for authentication of the court record.<sup>256</sup>

In order to achieve the required standard of neutrality, it is advisable that the interpreter has no prior personal connection to the case, and no interest in the outcome.<sup>257</sup> It should be remembered that ICTs justifiably engage persons originating from the situation countries as translators. Such persons are more competent and knowledgeable in the local languages and cultural dynamics of participants originating from the areas under the jurisdiction of ICTs. However, some of these interpreters could have experienced the traumatic events narrated in the courtrooms. Sometimes the testimony given by a witness may not be true according to the experience of the interpreter. An interpreter in that situation expends a good deal of emotional energy to remain impartial because they would not want to hold an opinion on the case lest that opinion subconsciously colours their interpretation.<sup>258</sup> In cases where the account is narrated correctly, the interpreter could be re-traumatised. There are incidents of interpreters breaking down in the course of

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<sup>253</sup> See *Prosecutor v Zejnil Delalic & Others Ex parte Zdravko Mucic* IT-96-21-T, 08 July 1997 Decision on the Motion Ex parte by the Defence of Zdravko Concerning the Issue of a Subpoena to an Interpreter para 10.

<sup>254</sup> See Edwards (note 14 above) 66.

<sup>255</sup> Ibid.

<sup>256</sup> See *Prosecutor v Zejnil Delalic & Others* (note 254 above) Decision on subpoena to an interpreter para 11.

<sup>257</sup> Edwards (note 14 above) 66.

<sup>258</sup> Ibid 64, See also Respondent 2006 (26 February 2011) Annexure 234.

interpreting, or vacating the booth as unable to deal with the strains. A few have given up their work at ICTs or been advised to resign.

#### **(e) Conclusion**

The multilingual character of international criminal trials raises the significance of translation to the legal process. Firstly, translation is an instrument of investigation of conflicts that constitute the subject matter of international crimes. Secondly, it is an aid to participation of a multilingual and multinational pool of participants in an international criminal trial. Thirdly, interpretation forms the court record where courtroom deliberations are interpreted into the official language(s) of the court. Similarly, translated documents, though regarded as copies of original court documents are authentic documents of court, and constitute the court record. Further, translation is a tool of broadcasting international criminal proceedings to the international community. It is a handmaid of justice.

The efficacy of translation in eliminating linguistic barriers to the fair conduct of an international trial is questionable. It is trite that a translation is not often as good as the original. Translation is also a lengthy and highly technical procedure that requires a lot of time to implement. The role of a translator is more extensive than converting words. Translation involves studying the vocabulary, grammatical structure, communication situation and cultural context of the document to be translated; analysing it in order to ascertain its meaning and then reconstructing that same meaning using the vocabulary and grammatical structure which are appropriate in the receptor language and its cultural context.<sup>259</sup> In a trial situation, a translator has to be mindful of the formality of courtroom communication. Thus, conditioning the original message is inevitable. To the extent that the process might distort the evidence, trial fairness is compromised. Translators also expend a lot of time researching about materials for translation, editing documents and inventing legal words for specialised languages. Thus, the process cannot be conducted hastily; it bears upon trial time and contributes to delays.

ICT translators endure highly pressurising working conditions, and operate hurriedly in an intensely charged environment. They deal with a broad-spectrum of languages, most of which are neither studied nor standardised. Documents are submitted soon before translations are

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<sup>259</sup> Delisle & Woodsmorth (note 89 above).

expected partly because of mistrust and suspicion among participants. Initiatives to outsource translation tasks have not been very productive. Originals are often marred by mistakes, and many are so poorly written that the translations cannot be any better. These circumstances affect the quality of communication at international criminal tribunals, hence challenging the credibility of the proceedings.

Further, shortfalls in translation such as alterations, imprecision, and errors may distort the foundations of facts of a case. Misunderstandings also arise from the cultural complexities of a multilingual communicative process. Whenever people who are communicating do not share the same culture, knowledge, values and assumptions, there is a high probability of misunderstanding. Translation cannot eliminate this unfortunate possibility; it replicates and often aggravates it. The cultures of the communicator, the interpreter and the receiver such as the transcriber influence what finally appears on the court record. Extraneous cultural factors such as superstitions have also manipulated the way evidence is presented and perceived. Some witnesses at ICTs have exhibited evasiveness, exaggeration and euphemism as a result of subtle but compelling cultural considerations.

The criteria for determining the impact of translation on trial fairness should constitute an assessment of whether it ensures or inhibits the minimum guarantees of fair trial. Efficacy of translation should be evaluated upon the degree to which translation affects: (i) the information of charges to the accused; (ii) the accused's adequate time and facilitates for preparation of the defence; (iii) trial without undue delay; (iv) the right to defence in person or by counsel; (v) examination and cross-examination of witnesses; (vi) adequate interpretative assistance to an accused who does not understand the language of court; (vii) the accused's right against self-incrimination. It is a subjective test.



## CHAPTER 5

### THE LANGUAGE QUESTION IN INTERNATIONAL CRIMINAL TRIALS AT THE NATIONAL LEVEL

#### *THE CASE OF THE INTERNATIONAL CRIMES DIVISION OF THE HIGH COURT OF UGANDA (ICD)*

##### (a) Introduction

The establishment of a special division of the High Court of Uganda to adjudicate international crimes is a remarkable development following the deliberations of the Juba peace process. The court is to try any offence relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime under the International Criminal Court Act of Uganda, 2010, the Geneva Conventions Act, 1964, the Penal Code Act of Uganda, and any other criminal law.<sup>1</sup> The International Crimes Division (ICD) has commenced proceedings in two cases including the trial of a former commander of the Lord's Resistance Army (LRA) - Thomas Kwoyelo, and of 12 Al-Shabaab terror suspects.<sup>2</sup> The first trials of the court illustrate the significance of the language debate to fair conduct of international trials at the national level.

The International Crimes Division is a classic illustration because it emerges within the framework of the first test to the complementarity principle of the statute of the International Criminal Court.<sup>3</sup> Complementarity is a crucial underlying jurisdictional principle of the International Criminal Court affirming that the jurisdiction of the ICC is only complementary to

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<sup>1</sup> The High Court (International Crimes Division) Practice Directions, Legal Notice No 10/2011, Legal Notices Supplement, Uganda Gazette, No 38 Vol CIV, 31 May 2011.

<sup>2</sup> *Uganda v Kwoyelo Thomas alias Latoni* HCT-00-ICD-CASE No 0002/ 2010, *Uganda v Hussein Hassan Agad & 11 ors* (unreported) See 'Terror suspects' trial starts' New Vision 15 November 2011 ([http://www.newvision.co.ug/article/fullstory.aspx?story\\_id=30007&catid=1&mid=53](http://www.newvision.co.ug/article/fullstory.aspx?story_id=30007&catid=1&mid=53)).

<sup>3</sup> See MM El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC' (2005) 5 *Int Cr LR* 83—119. In December 2003, Uganda referred the conflict in Northern Uganda to the prosecutor of the International Criminal Court. However, during the negotiations in the Juba peace process between the government of Uganda and the Lord's Resistance Army (LRA), the rebel faction influenced the government to seek the withdrawal of ICC arrest warrants by, among others, bolstering the capacity of domestic courts to handle international crimes, hence the establishment of the ICD.

national criminal jurisdictions.<sup>4</sup> State parties have the primary obligation to adjudicate crimes in the ICC statute. Thus, the government of Uganda established the ICD to fulfil that obligation. The ICD is also meant to demonstrate Uganda's willingness and ability to address crimes charged against the Lord's Resistance Army, and possibly reclaim jurisdiction over the situation from the ICC and seek accountability from other perpetrators who have not been indicted by the International Criminal Court. This factor, in addition to the international character of the jurisdiction of the ICD, imposes an international standard of operation on the court. The ICD is subtly compared with the International Criminal Tribunals (ICTs). This chapter seeks to analyse the language dynamics of proceedings of the court and how they affect trial fairness.

Laws of Uganda envisage language fair trial rights and the practice is to ensure the right of the accused person to use the language in which they are best knowledgeable.<sup>5</sup> From the colonial era, English is the language of the law and legal action in Uganda. Legislation is enacted in English, and the language of formal courts is English: evidence must be recorded in English, and written communication to and from court is made in English. However, English, also the official language of Uganda, is mainly learnt in school and mostly used only in formal settings; it is therefore not widely known among Ugandans. Thus, translation is a fundamental tool of court proceedings. Translation refers to either written or oral transfer of thoughts and ideas from one language into another.<sup>6</sup>

This chapter examines the challenges of the ICD in adhering to the linguistic requirements of a fair trial. Important to note are resource constraints and the *ad hoc* structure of judicial translation and courtroom interpreting in Uganda. Reference is made to rule-based procedures such as recording confessions, and plea taking, which emphasise language guarantees. Language is broadly defined as any organised means of conveying or communicating ideas especially by

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<sup>4</sup> Article 1 ICC Statute (last amended January 2002) UN Doc A/CONF 183/9, entered into force on 1 July 2002.

<sup>5</sup> Sources of law include common law and doctrines of equity. Thus, this chapter entails case law from other common law jurisdictions especially within the East African sub-region: Kenya and Tanzania. The jurisprudence of the defunct Court of Appeal for Eastern Africa (EACA) is authoritative because it was the highest appellate court for Uganda, among other countries. The Supreme Court of Uganda is currently the highest appellate court.

<sup>6</sup> See J Karton 'Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony' (2008) 41(1) *Vanderbilt J of Transnational L* 1, 17.

human speech, written characters or sign language.<sup>7</sup> Thus, speech and hearing disability are addressed as language obstacles. It is noteworthy that the ICD is a division of the High Court falling within the hierarchy of courts of judicature of Uganda; the language complexities in the system affect the court, hence the scope of this chapter.

This chapter consists of the following subsequent parts (b) an introduction of the International Crimes Division: establishment, jurisdiction, and law applicable; (c) a contextual analysis of the language dynamics of the work of the ICD including the historical foundations of the language of trial in Uganda. (d) Language fair trial guarantees in Uganda's legal framework and practice. The interpretation of language fair trial rights in part (d) is based on the position of language rights in the minimum guarantees of fair trial as established in chapter 3.<sup>8</sup> The minimum rights are enumerated in Article 28 (3) Constitution of Uganda, 1995 to include the following (a) the presumption of innocence; (b) information on the nature of the offence; (c) adequate time and facilities for the preparation of the defence; (d) presence and legal representation of the accused at trial; (e) legal aid; (f) assistance of an interpreter; and (g) facilitation to examine and cross-examine witnesses. The discussion of these rights in part d follows this sequence.

## **(b) The International Crimes Division of the High Court of Uganda (ICD)**

### *(i) Establishment*

The International Crimes Division (ICD) is part of the strategy to resolve the protracted conflict in Northern Uganda. The division was established in July 2008 by the Justice, Law and Order Sector (JLOS) as a mechanism of transitional justice.<sup>9</sup> Its creation was in fulfilment of the commitment by the government of Uganda in the Juba peace process, to consolidate the

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<sup>7</sup> BA Garner (ed) *Black's Law Dictionary* 9 ed (2009) 958.

<sup>8</sup> Entitled 'Language Rights in the Minimum Guarantees of Fair Criminal Trial'. Chapter 3 establishes language rights as priority minimum rights by situating them in the core guarantees of fair trial.

<sup>9</sup> JLOS is a sector wide approach adopted by the government of Uganda, to bring together institutions with closely linked mandates of administering justice and maintaining law and order and human rights, into developing a common vision and policy framework (<http://www.jlos.go.ug/page.php?p=about>). It was formed in 2001 and assigned the responsibility of spearheading the implementation of commitments agreed upon in the 'Juba Peace Agreements'. See E Nahamya 'Combating Gender-Based Crimes: Uganda's Efforts to Strengthen its Legal Status' (6-7 March 2009) (Conference Presentation) Gender Justice Forum, Dakar, Senegal.

framework for addressing the agenda of accountability and reconciliation.<sup>10</sup> Although the Agreement on Accountability and Reconciliation is not a legal instrument because it has not been signed by the Lord's Resistance Army/Movement (LRA/M), it has inspired significant developments in Uganda's criminal justice system. Among others, the 'agreement' affirmed domestic jurisdiction over international crimes by providing that formal courts provided for under the Constitution of Uganda should exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes, during the course of the conflict.<sup>11</sup> This assertion set into motion a series of developments leading up to the formation of the International Crimes Division.

In May 2011, the Chief Justice issued a legal notice formally establishing the ICD and defining its operations.<sup>12</sup>

*(ii) Jurisdiction*

The subject matter jurisdiction of the ICD is any offence relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime defined in the International Criminal Court Act, 2010, the Geneva Conventions Act, 1964, the Penal Code Act, 1950, or any other criminal law.<sup>13</sup> The Penal Code<sup>14</sup> is the Act establishing a code of criminal law in Uganda, and the Geneva Conventions Act is the law that gives effect to four Geneva Conventions of 1949 in Uganda.<sup>15</sup> These Conventions include (i) the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field; (ii) the Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; (iii) the Geneva Convention relative to the

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<sup>10</sup> See Agenda Item No 3 paragraph 5.6 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement. Juba Sudan (29 June 2007).

<sup>11</sup> See Clause 6.1 Agreement on Accountability and Reconciliation, *ibid*.

<sup>12</sup> High Court (International Crimes Division) Practice Directions (note 1 above). See 'Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division' (2012) Human Rights Watch.

<sup>13</sup> See High Court (International Crimes Division) Practice Directions *ibid*.

<sup>14</sup> Cited as Penal Code Act (1950) Cap 120 (Laws of Uganda).

<sup>15</sup> Cited as Geneva Conventions Act (1964) Cap 363 (Laws of Uganda).

treatment of prisoners of war; and (iv) the Geneva Convention relative to the protection of civilian persons in time of war.<sup>16</sup>

The criminal jurisdiction of the ICD is derived from the unlimited original jurisdiction of the High Court in all matters, conferred by Article 139 (1) of the Constitution.<sup>17</sup> The Supreme Court affirmed the jurisdiction of the High Court in *Habre International Co Ltd v Ebrahim Alarakia Kassam & ors*<sup>18</sup> as only subject to the constitution and cannot be fettered by any other law without first amending the Constitution. It was particularly recognised in the ‘Juba agreement’ that Uganda has institutions and mechanisms, as provided for and recognised under national laws, which, with necessary modifications, are capable of addressing the crimes and human rights violations committed in the conflict.<sup>19</sup> It is against this background that the ICD emerges as a division of the High Court. The specialised court therefore falls within the hierarchy of courts of judicature of the Republic of Uganda.<sup>20</sup>

Appeals from the court lie to the Court of Appeal and then the Supreme Court. The Court of Appeal may also sit as the Constitutional Court to determine matters and issues arising in the proceedings before the ICD, which relate to the interpretation of the constitution.<sup>21</sup> Both trials of the ICD have been referred to the Constitutional Court.<sup>22</sup> In *Uganda v Kwoyelo Thomas alias Latoni*,<sup>23</sup> the first trial of the court, the ICD made a reference to the Constitutional Court to determine the propriety of trying the accused in view of existing law guaranteeing amnesty to

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<sup>16</sup> First Schedule, Second Schedule, Third Schedule and Fourth Schedule of the Geneva Conventions Act *ibid*.

<sup>17</sup> Cited as Constitution of the Republic of Uganda, 1995 as amended by the Constitution (Amendment) Act No 11/2005 & Amendment Act No 21/2005. This provision is reiterated in Section 14(1) Judicature Act (1996) Cap 13 (Laws of Uganda).

<sup>18</sup> [1999] KALR 391, 393.

<sup>19</sup> See paragraph 5.1 Agreement on Accountability and Reconciliation (note 10 above).

<sup>20</sup> See Article 129 (1) Constitution (note 17 above): The courts of judicature consist of (a) the Supreme Court of Uganda (SCU); (b) the Court of Appeal of Uganda (CAU); (c) the High Court of Uganda (HCU); (d) such subordinate courts as Parliament may by law establish.

<sup>21</sup> See Article 137(1) Constitution *ibid*. It provides that any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.

<sup>22</sup> *Thomas Kwoyelo alias Latoni v Uganda* Constitutional Petition No 036/11 (Reference) Judgment (22 September 2011), *Uganda v Hussein Hassan Agad & 11 ors* Constitutional Petition No 55/2011.

<sup>23</sup> Note 2 above.

persons that denounce rebellion as the accused claimed to have done.<sup>24</sup> The Constitutional Court declared the indictment of the accused unconstitutional and ordered the discontinuation of the trial.<sup>25</sup> Thus, operations of the ICD are subject to the conditions and systemic challenges to the Uganda judicial system. Accordingly, this chapter refers to experiences of other courts of the language phenomenon, and their pronouncements on several aspects of the matter. Like all other courts in the common law jurisdiction, the ICD is bound by the doctrine of precedent; perspectives of superior courts and the High Court on the language factors of criminal trial are authoritative.

*(iii) Law applicable*

At the commencement of the Kwoyelo trial, the judges of the International Crimes Division reaffirmed the applicability of domestic law to the work of the court. The bench made a commitment to advise the parties of any possible relevance and applicability of international law. Notably, the accused was indicted solely under the Laws of Uganda. All the 12 counts of the indictment were brought under the provisions of the Fourth Geneva Convention of 12 August 1949, which is domesticated by the Geneva Conventions Act.<sup>26</sup> The 53 alternative charges preferred against Kwoyelo were brought under the provisions of the Penal Code Act.<sup>27</sup>

The law applicable to Uganda includes (i) written law; (ii) common law and doctrines of equity; (iii) any established and current custom or usage; (iv) principles of justice, equity and good conscience.<sup>28</sup> Uganda has also ratified several international and regional instruments. In *Paulo Kawanga Ssemwogerere & 5 others v AG*,<sup>29</sup> Twinomujuni JA held that International conventions to which Uganda is a signatory or a party were saved by Article 287 of the Constitution, and are part of the Laws of Uganda.<sup>30</sup>

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<sup>24</sup> See Amnesty Act (2000) Cap 294 (Laws of Uganda): An Act to provide for an amnesty for Ugandans involved in acts of a warlike nature in various parts of the country and for other connected purposes.

<sup>25</sup> See *Thomas Kwoyelo alias Latoni v Uganda* Constitutional Petition No 036/11 (Reference) Judgment (note 22 above).

<sup>26</sup> Note 15 above.

<sup>27</sup> Note 14 above. See Amended Indictment: *Uganda v Kwoyelo Thomas alias Latoni* 0002/2010.

<sup>28</sup> See Section 14(2) Judicature Act (note 17 above).

<sup>29</sup> [2003] KALR 133,159--160.

<sup>30</sup> Article 287 of the Constitution of Uganda (note 17 above) preserves the applicability of international treaties, agreements and conventions to which Uganda ascended after independence and before the coming into force of the Constitution.

### **(c) Language dynamics of trials of the International Crimes Division**

#### *(i) Contextual analysis*

Uganda is a multi-ethnic and multilingual nation. As of 1<sup>st</sup> February 1926, the country had 65 constitutionally recognised indigenous communities, most of which have distinct languages, dialects and cultures.<sup>31</sup> The chronic conflict in East and Central Africa has led to massive forced migration in the region. There has been an influx of several language groups into Uganda from Burundi, Democratic Republic of Congo (DRC), Kenya, Rwanda, South Sudan and Somalia, among other jurisdictions. Further, Uganda is also experiencing voluntary settlements from a broader spectrum of countries such as India and Pakistan. There are 45 recorded languages;<sup>32</sup> cultures are equally diverse. Uganda does not have a national language. The state is however obliged to encourage the development of a national language or language(s).<sup>33</sup> This is yet to materialise.

#### **- Persons with disabilities**

Naturally, Uganda has persons with speech or hearing impairment: deaf, dumb or deaf-mute. A few of these have acquired formal education and are able to use standardised sign language. In trials involving such persons, the judiciary seeks specialised interpretation from an existing institution in the country. Interpretation in proceedings involving a person with communication impairment is a typical case of double interpretation which is comparable to chain translation at

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<sup>31</sup> Acholi, Aliba, Alur, Aringa, Baamba, Babukusu, Babwisi, Bafumbira, Baganda, Bagisu, Bagungu, Bagwe, Bagwere, Bahehe, Bahororo, Bakenyi, Bakiga, Bakonzo, Banyabindi, Banyabutumbi, Banyankore, Banyara, Banyaruguru, Banyarwanda, Banyole, Banyoro, Baruli, Barundi, Basamia, Basoga, Basongola, Batagwenda, Batoro, Batuku, Batwa, Chope, Dodoth, Ethur, Gimara, Ik(Teuso), Iteso, Jie, Jonam, Jopadhola, Kakwa, Karimojong, Kebu (Okebo), Kuku, Kumam, Langi, Lendu, Lugbara, Madi, Mening, Mvuba, Napore, Ngikutio, Nubi, Nyangia, Pokot, Reli, Sabiny, Shana, So (Tepeth), Vonoma. See Third Schedule to the Constitution of Uganda *supra* note 8.

<sup>32</sup> See Ethnologue Report for Uganda ([http://www.ethnologue.com/show\\_country.asp?name=UG](http://www.ethnologue.com/show_country.asp?name=UG)). They include Acholi, Adhola, Alur, Amba, Aringa, Bari, Chiga, English, Ganda, Gujarati, Gungu, Gwere, Hindi, Ik, Kakwa, Karamojong, Kenyi, Konzo, Kumam, Kupsabiny, Lango, Lendu, Lugbara, Ma'di, Ma'di Southern, Masaaba, Ndo, Nubi, Nyang'i, Nyankore, Nyole, Nyoro, Pökoot, Rundi, Ruuli, Rwanda, Saamia, Singa, Soga, Soo, Swahili, Talinga-Bwisi, Teso, Tooro, and Ugandan Sign Language.

<sup>33</sup> See paragraph XXIV (d) National Objectives and Directive Principles of State Policy embedded in the Constitution of Uganda (note 17 above).

the international criminal tribunals.<sup>34</sup> Double interpretation involves two interpreters with one exclusively serving the person with special needs by interpreting their sign language to court, and also interpreting to them, what is conveyed by court or other participants in the trial. The second interpreter would attend to the communication needs of court and other participants, by interpreting to them what is conveyed by the interpreter of the person with special needs and also conveying their communication to the interpreter assisting the person with communication difficulties, for transmission to the client. There are two phases of possible loss or distortion of evidence in translation. In *Mohammed Farah Musa alias Shaur v Reginam*,<sup>35</sup> Briggs JA observed that double interpretation is a situation which nearly always causes difficulty, but does not necessarily, or even probably, mean that a trial cannot be properly conducted.<sup>36</sup> Thus, whether double interpretation affects trial fairness is a subjective finding.

Notably, many deaf, dumb or deaf-mute persons are not capable of using standardised sign language; they use special signs to communicate, for which no formal interpreter can be found. The courts encounter difficulties in ensuring the language requirements of fair trial in such cases. In *Cheung Shing v Reginam*,<sup>37</sup> the Court of Appeal for Eastern Africa (EACA) acknowledged this phenomenon. However, it reaffirmed that an accused who is unable to understand the proceedings, either because they are deaf and dumb and have not learnt to communicate by sign language, or because they speak only some language for which no interpreter can be found, cannot be allowed wholly to escape criminal responsibility, but special measures have to be taken for their protection.<sup>38</sup> The measures to be taken depend on the circumstances of each particular case. For instance, the courts permit sworn interpretation of the special sign language

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<sup>34</sup> Chain translation is where the translation of the original testimony is also translated. See NA Combs Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions (2010) 72. *Kiryarwanda* testimony at the International Criminal Tribunal for Rwanda is translated first into French and then English. *Mende* testimony at the Special Court for Sierra Leone is sometimes translated first to *Krio* and then English.

<sup>35</sup> (1956) EACA 469.

<sup>36</sup> *Ibid* 472.

<sup>37</sup> (1956) EACA 459.

<sup>38</sup> *Emp v Husen* (1881) 5 Bom 262, *Emp v Somir Bowra* (1899) 27 Cal 368 cited with approval in *Cheung Shing v Reginam* *ibid* 463. The EACA was a joint appeal court for Kenya, Tanzania & Uganda. It heard appeals from decisions of the High Courts of the three East African countries. The decisions of the EACA are binding over High Courts and subordinate courts - See D Brown *Criminal Procedure in Uganda & Kenya* 2 ed (1970) 9.



by persons close to the user, such as relatives and spouses. The accuracy of such interpretation is difficult to evaluate and there is a likelihood of bias.

The aforementioned position that trial should proceed even when the person at trial cannot be made to understand the proceedings by any available means originates from the jurisprudence based on the Criminal Procedure Code of Kenya. Section 167 (describing the procedure when an accused does not understand proceedings) provides that if an accused, though not insane, cannot be made to understand the proceedings, the court shall proceed to hear the evidence, on the basis of which it can either acquit and discharge the accused, or order the accused to be detained.<sup>39</sup> It is a fundamental guarantee of fairness that the accused is present at their trial.<sup>40</sup> Presence is not just corporeal presence but necessarily includes the defendant's understanding of the proceedings, which would permit informed decisions regarding the case.<sup>41</sup> It is no justice to conduct a trial when the subject of those proceedings cannot understand what is being done, but, if the alternative is impunity, then a fair balance ought to be ascertained. The hearing of Kwoyelo's constitutional petition was conducted without interpretation.<sup>42</sup> Kwoyelo was present, and stood in the dock throughout the hearing, but it was clear that he did not understand what transpired in the courtroom. During the hearing, the accused averred by affidavit, facts leading to his abduction, conscription into the rebel group, and his capture by the Uganda Peoples Defence Forces (UPDF). The affidavit contained facts within his personal knowledge. It was filed in English, without translation and was presented to court, in English, without interpretation.

It was ascertained that interpretation of proceedings in the Constitutional Court is generally not considered except upon express application by a party, and in matters of great public importance. Since all petitioners to the court are represented, it is presumed that counsel would advise their clients about the conduct of the case. Explanations for lack of translation in the Kwoyelo case included (i) constitutional cases raise purely matters of law, which the accused would not have understood, even if interpretation was provided. (ii) The Commissioner of Oaths, at the time of

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<sup>39</sup> See Section 167(1) a & b Criminal Procedure Code (Rev 2009) Cap 75 (Laws of Kenya) (<http://www.kenyalaw.org/Downloads/Acts/Criminal%20Procedure%20Code.pdf> ).

<sup>40</sup> Article 28 (3) d, Constitution of Uganda, 1995: An accused person must be permitted to appear before the court in person.

<sup>41</sup> *Kunnath v The State* (1993) 1 WLR 1315, 1320.

<sup>42</sup> *Thomas Kwoyelo alias Latoni v Uganda* Constitutional Petition No 036/11 (note 22 above), Researcher's observation 19 September 2011. See also 'Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division' Human Rights Watch (note 12 above) 22.

administering the swearing of the affidavit would have ascertained that Kwoyelo understood the contents of the document. If an interpreter is involved in the process of drafting the affidavit, they have to take oath and declare that they understand the English language and the language of the accused well, and that they have truly, distinctly, and audibly interpreted the contents of the affidavit to the deponent.<sup>43</sup>

Notably, the constitutional hearing was a procedure for determining the civil rights of Kwoyelo, within the wording of Article 28 (1) of the Constitution. Thus, he was entitled to the same guarantees as he had in the criminal proceedings of the International Crimes Division. Whereas the Commissioner of Oaths is an officer of court, their fiduciary duty to the court does not discharge the obligation that the court owes the accused to ensure a fair trial. The Constitutional Court should have inquired into the representative nature of the interpretation of the ‘Acholi’ communication of the accused to the person that drafted the affidavit in English. The fact that the affidavit was a translation was not noted on the affidavit, neither was the identity of the interpreter revealed. However, controversy over translation did not arise because the facts as set out in the affidavit and presented by defence counsel were not disputed.

Speech impairment, hearing disability and inability to understand proceedings have been used as tactics to evade trial. The court should therefore conduct independent inquiry into the plausibility of such allegations. This entails the daunting task of measuring comprehension, referred to in chapter 3. In *Lelawan Leseroi v R*,<sup>44</sup> the appellant was arraigned with another person for stealing cattle. The magistrate recorded before any witnesses were heard that the appellant was unable to hear or speak though he was said to be quiet fluent when questioned at a police post. Thereafter prosecution witnesses were called and the appellant though given the opportunity did not cross-examine them and the magistrate recorded that the appellant ‘still adopted the attitude that he is an idiot and unable to speak’. Three prosecution witnesses testified to the appellant’s ability to speak. The police officer in charge of the police post where the appellant was detained gave evidence that the appellant could hear and speak reasonably well, but the chief of the appellant’s manyatta (‘village’) testified that the appellant was unable to speak and said ‘we speak to him by hand signs and he replies the same way’. In his judgement, the magistrate made no precise finding whether the

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<sup>43</sup> Form E First Schedule, Oaths Act (1963) Cap 16 (Laws of Uganda).

<sup>44</sup> [1964] EA 111.

appellant was pretending throughout the trial but he found that though the appellant was apparently dumb (lacked speaking ability) he was well aware of what went on around him and was able to understand what was required of him. On appeal, Sir John Ainley CJ held that -

‘If an accused stands before the court dumb (unable to speak), and apparently without comprehension, as it would seem the appellant did... the procedure is as follows: (a)...first consider the question of sanity; (b) if the accused is considered sane the question whether he is in fact deaf or dumb or both, must be considered; (c) If the accused is deaf, or dumb, or both, the question whether he can by sign or otherwise be made adequately to understand the proceedings must next be considered, and provision for a suitable ‘interpreter’ must be made. The question in each case may be stated this way - taking into account the nature of the charge and the evidence likely to be adduced, are the means of communication available adequate to ensure that the accused will have a full and proper understanding of the allegations made against him, and of what the prosecution witnesses are saying about him? Further, can the rights of the accused be adequately explained to him and can he avail himself of those rights? If in these respects the means of communication with the accused are adequate, the trial may proceed in the normal way, the person chosen to communicate by signs with the accused being sworn in much the same way as an interpreter is sworn.(d) If the accused is insane, the procedure for trial of persons of unsound mind must be followed; (e) if the person though not insane cannot be made to understand the proceedings, section 167 must be followed;<sup>45</sup> (f) if the person can in one way or another be made to understand the proceedings, the trial, with the aid of a ‘sign interpreter’ if necessary, will proceed in the normal way.’<sup>46</sup>

The case of *Leseroi*<sup>47</sup> introduces the possibility of insanity to a courtroom communication situation where ordinary language forms are ineffective. Medical proof is recommended to establish the status of the speaking, hearing, or comprehension ability of the accused. However,

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<sup>45</sup> Section 167 Criminal Procedure Code Cap 75 (note 39 above) describes the procedure when an accused does not understand proceedings) the court shall proceed to hear the evidence, on the basis of which it can either acquit and discharge the accused, or order the accused to be detained

<sup>46</sup> *Lelawan Leseroi v R* [1964] (note 44 above) 111--114.

<sup>47</sup> *Ibid.*

this case does not provide the needed criteria for ascertaining comprehension. The measures built in Thomas Grisso's instruments for assessing understanding of Miranda rights explained in chapter 3 are relevant in that respect.<sup>48</sup>

In general, persons with disabilities are not a threat to Ugandan society. They are rarely a subject of criminal proceedings. However, all persons have a constitutional right to participate in judicial processes in any other capacity such as witness, assessor, or judicial officer. Article 21 (2) of the Constitution prohibits any kind of discrimination on the ground of disability. The judiciary is obliged to enhance its capacity to ensure the meaningful participation of persons with disabilities in judicial proceedings. The National Objectives and Directive Principles of State Policy require the state to promote the development of a sign language for the deaf.<sup>49</sup> This is yet to be realised.

#### *(ii) Language of trial*

By virtue of Article 6 of the Constitution,<sup>50</sup> the official language of Uganda is English. Swahili was introduced as the second official language in a constitutional amendment of 2005, but it is only to be used in circumstances prescribed by statute.<sup>51</sup> Parliament may also provide, by law, for any other language, except English and Swahili, to be used for judicial purposes.<sup>52</sup> However, it is expressly provided that the language of all courts shall be English.<sup>53</sup> Evidence in all courts is to be recorded in English, and written applications to the courts shall be made in English.<sup>54</sup> It is trite that the use of the word 'shall' in legislation is directory: expressing what ought to be

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<sup>48</sup> (a) asking the examinee to paraphrase each warning (a language production measure); (b) asking the examinee to identify various interpretations provided by the examiner as being the same or different from the specific Miranda warning (a language reception measure); (c) asking the examinee to define certain key words used in the Miranda warnings (a vocabulary recognition measure); (d) asking the examinee to recognize, from picture/vignette scenario stimuli, the significance of Miranda rights (a language function measure) - RW Shuy & JJ Staton Review of Instruments for Assessing Understanding and Appreciation of Miranda Rights (2000) *Forensic Linguistics* 131,131.

<sup>49</sup> Paragraph XXIV(C) National Objectives & Directive Principles of State Policy - Constitution of Uganda (note 17 above).

<sup>50</sup> Ibid.

<sup>51</sup> Article 6(2) Constitution of Uganda *ibid*.

<sup>52</sup> Article 6 (3) Constitution of Uganda *ibid*.

<sup>53</sup> Section 88 Civil Procedure Act (1929) Cap 71 (Laws of Uganda).

<sup>54</sup> Section 88(3) & (4) Civil Procedure Act *ibid*.

done.<sup>55</sup> The Act therefore directs that English is the working language of courts of record in Uganda.<sup>56</sup> Kibuuka J defined a court of record in *Rubarema Godfrey v Uganda*<sup>57</sup> as one whose proceedings are recorded. Thus, courts of record include the Supreme Court, Court of Appeal, High Court (as superior courts of record);<sup>58</sup> and Magistrates Courts (Chief Magistrate, Magistrate Grade I, Magistrate Grade II).<sup>59</sup>

Although the Civil Procedure Act (CPA) is to make provision for the procedure in civil courts, the English language requirement has extended to criminal courts. In formal judicial proceedings, local languages are referred to as ‘vernacular’ connoting ‘colloquial speech’.<sup>60</sup> Ironically, a situation may arise where all parties and officials to a case are proficient in a particular local language, but the proper course of action is to proceed in English, even when it is not common to all involved. Thus, judicial officers have to be fluent in English. The 5 judges of the ICD, the Registrar, legal assistants and support staff are fluent in English. However, the actual level of English language proficiency of Uganda’s judicial officers is a possible subject of independent investigation.

Of note, the Civil Procedure Act, which prescribes the language of court, was enacted in 1929 when Uganda was a British Protectorate. English was the language of the colonial authority and all laws were written from that perspective.<sup>61</sup> This is the foundation of English as the language of laws of Uganda.

Further, the protectorate experienced a wholesale reception of English law under the 1902 Order-in-Council.<sup>62</sup> To date, English common law influences the law applicable to Uganda. Certain

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<sup>55</sup> See *Uganda v Kwoyelo Thomas alias Latoni* HCT-00-ICD-CASE No 0002/2010 Ruling (02 August 2011), *Mukasa Anthony Harris v Dr Bayiga Michael Philip Lulume* SCU Election Petition Appeal No 18/2007.

<sup>56</sup> A court of record is a court which has power to fine and imprison. It is required to keep a record of its proceedings. See Garner (note 7 above) 407.

<sup>57</sup> [1999] KALR 141,142.

<sup>58</sup> Article 129 (1) a, b and c Constitution (note 17 above).

<sup>59</sup> Section 4 (2) Magistrates Courts Act (MCA) (1971) Cap 16 stipulates the grades of Magistrates in Uganda.

<sup>60</sup> See for example *Chandia v Uganda* [2002] 2 EA 360(SCU).

<sup>61</sup> Laws adopted in the period of 1920-1958 were made by the Legislative Council, which was chaired by a British native -the Governor and head of the protectorate. The Legislative Council was established by virtue of the Uganda Order-in-Council of 1920.

<sup>62</sup> See HF Morris & JS Read *Uganda: The Development of its Laws and Constitution* (1966) 240.

Acts of the Parliament of the United Kingdom continue to apply and have effect in Uganda (with necessary modifications).<sup>63</sup> English is still the language of the law in Uganda and so is implementation. There is no known initiative to translate legislation into local languages. This includes principal legislation such as the Constitution; criminal legislation; specialised laws that are integral to criminal justice among ordinary Ugandans such as the Illiterates Protection Act,<sup>64</sup> the Poor Persons Defence Act;<sup>65</sup> and bye-laws (local legislation).

On the other hand, English is a secondary language to most Ugandans. There are many factors which affect the level of English proficiency among the people of Uganda: (i) the level of formal education. As the medium of instruction in educational institutions, most Ugandans learn English in school. Enrolment in school has increased considerably with the introduction of free primary and secondary school education in 1997 and 2007 respectively. Prior to that, it is estimated that only a fifth of school age children were attending school in the country. It is noteworthy that education is still not accessible to all Ugandans for various reasons. (a) In deeply rooted cultures such as Karimojong, formal education was rejected as irrelevant to the survival needs of the semi-nomads. A ritual was conducted in Karamoja to unearth the pen that had been cursed and buried because it was associated with oppression.<sup>66</sup> A special curriculum was designed and is being implemented in the region, starting 1998, under the Alternative Basic Education Program in Karamoja (ABEK). The focus of ABEK is to improve access to basic education in the region, which does not necessarily impart English language skills upon those that do not later enrol into formal education. (b) Instability: Some parts of Uganda have been marred by unrest characterised by abduction of children. Abducted children experience educational interruptions. They are held in isolated places where crude dialects are used. The children do not even have an opportunity to master their mother tongues. Kwoyelo, the first accused person before the ICD, was abducted at the age of 13 on his way to school.<sup>67</sup> He cannot speak nor understand English.

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<sup>63</sup> See Section 47 Judicature Act Cap 13 (note 17 above).

<sup>64</sup> (1918) Cap 78 (Laws of Uganda). The Illiterates Protection Act is an Act for the protection of illiterate persons. It provided for verification of documents written by illiterates and verification of signatures of illiterates.

<sup>65</sup> (1998) Cap 20 (Laws of Uganda). The Poor Persons Defence Act makes provision for the defence of poor persons committed for trial before the High Court including legal aid.

<sup>66</sup> See 'Alternative Basic Education for Karamoja: A Review Report' (August 2006) Submitted to Save the Children in Uganda by Development Education Consultancy 9.

<sup>67</sup> See Affidavit by Thomas Kwoyelo alias Latoni in support of Constitutional Petition No 036/11 (Reference) (Arising out of HCT-00-ICD-Case No 02/10).

This also applies to children born in rebel camps and to internally displaced persons (IDPs). The support systems, on which education thrives such as the family, are destroyed by armed conflict. Linguistic under-development among former combatants affects the ability of witnesses to testify in international criminal trials.<sup>68</sup> This phenomenon is illustrated by trials of the Special Court for Sierra Leone and the International Criminal Court.<sup>69</sup> (c) Poverty: Many Ugandan families cannot afford to meet the cost of education. Despite the existence of free education government programmes, many parents cannot afford the cost of meals and clothing required for the purpose. Child labour is diverted to subsistence endeavours such as farming, paid labour, and marriage. (d) Resource gaps: the developing country is still building its human and financial resources in order to meet the education needs of the nation. There are limited scholastic materials, and limited skilled instructors.<sup>70</sup> This has adversely affected the quality of learning in schools. Thus, the English proficiency level of most purportedly educated Ugandans is not sufficient to enable them to participate competently in judicial processes conducted in English. (ii) Culture: Traditional Ugandan communities educate generations through oral tradition in native languages (verbal storytelling, poetry, proverbs, and traditional music). The propensity of the majority of Ugandans to master a foreign language is restricted by the limited reading culture. Thus, using English in courts of law in a country where the majority of its people have limited knowledge of the language instigates debate on the efficacy of courtroom communication and the guarantee of language fair trial rights.

The courts are cognisant of the limited level of English knowledge and usage among Ugandans but the possibility of using local languages in formal courts is restricted by the requirement of English as the language of the court record. Noteworthy, Parliament has made flexible provision for the language of local council courts. Local Council Courts are grass-root courts established at the village, parish, town, division and sub-county levels.<sup>71</sup> Section 21(1) Local Council Courts Act, 2006 provides that proceedings of local council courts and the records of those proceedings

<sup>68</sup> See K Sanin & A Stirnemann 'Child Witnesses at the Special Court for Sierra Leone' (March 2006) ([http://socrates.berkeley.edu/~warcrime/documents/ChildWitnessReport\\_000.pdf](http://socrates.berkeley.edu/~warcrime/documents/ChildWitnessReport_000.pdf)).

<sup>69</sup> See for example *Prosecutor v Charles Ghankay Taylor* SCSL-2003-01-T Trial Chamber II 12 May 2008 (transcript) testimony of Witness TF1-571 (Karmoh Kanneh) 9539 - '...they used to teach me how to speak English and Arabic...but I did not speak it...'

<sup>70</sup> See FW Juuko & C Kabonesa 'Universal Primary Education (UPE) in Contemporary Uganda: Right or Privilege?' (2007) HURIPEC Working Paper No 8 (May 2007) ([http://huripec.mak.ac.ug/working\\_paper\\_8.pdf](http://huripec.mak.ac.ug/working_paper_8.pdf).)

<sup>71</sup> See Section 3 Local Council Courts Act No 13/2006.

shall be in the language widely spoken in the area of jurisdiction. The possibility of using native languages in these courts contributes to access to justice. Judicial power is derived from the people and is supposed to be exercised in the name of the people and in conformity with values, norms and aspirations of the people of Uganda.<sup>72</sup> ‘The language(s) of the people’ can be read into the ambits of this provision in as far as it advances the cause of justice and fairness.

Further, the conduct of judicial proceedings of courts of record in native languages, at present, may be inhibited by practical aspects. (i) Structural factors: judicial officers constitute a multilingual pool of Ugandan nationals working in various areas of the country that are often not their home regions. The rotation system in the Uganda Public Service also applies to the judiciary. Proficiency in local languages is not a determining factor in allocating duty stations. A judicial officer may not understand the local language(s) of the area of operation. In addition, the geographical jurisdiction of higher courts may encompass several language groups. For example, the ICD is to adjudicate international crimes from the whole of Uganda. The local language regime of a court with nationwide jurisdiction may be difficult to determine.

(ii) Limited standardisation and knowledge of local languages. Firstly, the majority of native languages of Uganda are not scientifically studied except *Swahili, Luganda, Luo, Runyakitara (Runyoro-Rutooro and Runyankore-Rukiga)*.<sup>73</sup> Consequently, lots of local idioms do not have English equivalents. Secondly, there are horizontal differences among the same local language(s); the same word of the same language can have different meanings depending on the region where it is used. For instance, the Acholi spoken in Gulu is different, in many respects, from the Acholi spoken in Kitgum. Thirdly, many Ugandans, especially those that use English, are not fluent in their mother tongues. The dilemma is that they are neither fluent in English nor their mother tongue(s). Among other factors, this is caused by conflict and destruction of communities through which local knowledge is orally transmitted. Thomas Kwoyelo speaks a hybrid dialect of Acholi and other languages. He left Acholi land as a child and spent the most part of his life as a guerrilla amongst several countries in the Great Lakes Region. The accused expressed difficulties in understanding even the Acholi interpretation. This raises the question as to whether the ICD could actually guarantee the language rights of the accused.

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<sup>72</sup> See Article 126 (1) Constitution (note 17 above).

<sup>73</sup> See web site of the Institute of Languages - Makerere University (<http://arts.mak.ac.ug/lang.html>).



(iii) Limited legalisation of local languages. Since the colonisation of Uganda in 1894, the use of local languages in judicial proceedings was not legally authorised until the introduction of the local council court system in 2006. Local languages have also not been utilised in enacting legislation. Thus, there is limited opportunity for development of expressions of legal concepts in native languages. The statute books are particularly not comprehensible to many Ugandans; as in all other jurisdictions, ignorance of the law is no defence to a criminal charge. Comprehensibility of laws to the target population serves two principal purposes that are relevant to this discussion: it warns the public of potential crime; if the public is aware of what action(s) or omission(s) constitutes crime, it is only then that they can seek justice. It is also a presupposition of justice that a person should be aware or have good reason to be aware of the criminal nature of their action(s) or omission(s) at the time of committing the purported offence. It is because of this, among other reasons, that the constitution prohibits charging or convicting a person of a criminal offence on the basis of an act or omission that did not constitute a criminal offence at the time it took place.<sup>74</sup> Secondly, it sensitises people of their fair trial rights and empowers them to seek protection. Chapter 2 illustrates that the aggrieved person has the primary obligation to move court for the protection of their rights. Language is a means of legal action and inability to speak the language of court, as most Ugandans, is a serious constraint.

It is symbolic to note that the local languages of Uganda have the potential to develop into the languages of trial in the courts of record. Direct evidence of this prospect is their current ability to propel local council court proceedings. Noteworthy, these languages have previously supported traditional legal systems in the pre-colonial era. Before Uganda was made a British protectorate, there existed a system of customary law courts administered by chiefs and others in the different tribes.<sup>75</sup> At a notable level, the Kingdom of Buganda had a sophisticated court system with an organised hierarchy of appellate stages. Ancient Buganda had a great variety of judicial tribunals connected in a pyramidal structure so that appeal lay from the minor chiefs through the great chiefs to the Katikkiro (Prime Minister) and thereafter the Kabaka (King of Buganda) and rarely on final appeal from the Kabaka to ordeal by intoxication (*amaduudu*).<sup>76</sup> The Luganda language has adapted contemporary legal notions, illustrated by an existing

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<sup>74</sup> See Article 28 (7) Constitution (note 17 above): The rule against retrospective criminality.

<sup>75</sup> D Brown & Peter APJ Allen *An Introduction to the Law of Uganda* (1968) 42.

<sup>76</sup> ES Haydon *Law & Justice in Buganda* (1960) 12.

Luganda law dictionary.<sup>77</sup> This development illustrates the potential of local languages to scientifically progress into legal usage. A contrary argument would challenge the authenticity of the on-going interpretation of court proceedings into local languages: if a language cannot be used in a legal context, then interpretation of proceedings into that language should equally not be possible. Court proceedings in Uganda are mainly dependant on translation of proceedings into local languages especially for the benefit of the accused, witnesses and the general public. Amendment of the provision on the language of court would be a significant step towards legalising local languages of Uganda and advancing the cause of justice and fairness.

#### **(d) Language fair trial rights in Uganda's legal framework & practice**

The Constitution of Uganda provides for the right to fair hearing.<sup>78</sup> Article 28 (3) entails the minimum guarantees of fair trial; these guarantees embody language fair trial rights as discussed in chapter 3.<sup>79</sup> Uganda is also a state party to the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR) expressing commitment to guarantee fair trial and protect the right to be heard respectively.<sup>80</sup> The Supreme Court in *Twagira v Uganda*<sup>81</sup> held that the term 'fair trial' in Article 28 means that an accused must be afforded opportunity to hear the witnesses of the other side testify openly; if he chooses, challenge those witnesses by way of cross-examination; give his own evidence in his defence; and call witnesses to support his case. This description of the right to fair hearing is expounded in the Kenyan case of *Juma & ors v AG*,<sup>82</sup> where fair hearing was held as ordinarily a judicial investigation and listening to evidence and arguments, conducted impartially in accordance with the fundamental principles of justice and due process of law of which a party has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford, and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be apprised of the evidence against him in the matter so that he will be fully aware of the basis of the adverse

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<sup>77</sup> See Ntanda Nsereko *English - Luganda Law Dictionary* (1993).

<sup>78</sup> See Article 28 Constitution (note 17 above).

<sup>79</sup> See Article 28 (3) a, b, c, d, e, f & g Constitution *ibid*.

<sup>80</sup> Article 14 ICCPR, 1966, entered into force on 23 March 1976. Uganda ratified the covenant on 21 June 1995, Article 7 ACHPR, 1981, entered into force on 21 October 1986. Uganda ratified the charter on 10 May 1986.

<sup>81</sup> [2003]2 EA 689, 690 Tsekooko JSC.

<sup>82</sup> [2003] 2 EA 461 Mbogholi & Kuloba JJ.

view of him for the judgment, a right to argue that a decision be made in accordance with the law and evidence. The court further notes that the adjective ‘fair’ describing the requisite hearing requires the court to ensure that every hearing or trial is reasonable, free from suspicion of bias, free from clouds of prejudice, every step is not obscure, and in whatever is done, it is imperative to weigh the interest of both parties alike for both, and make an estimate of what is reciprocally just.<sup>83</sup> The traits of fair trial enumerated in Article 28 of the Constitution and expounded by the relevant jurisprudence entail language warranties.

*(i) Presumption of innocence*

Every person who is charged with a criminal offence is presumed innocent until proved guilty or until that person pleads guilty.<sup>84</sup> There are three situations with a probability of affecting the presumption of innocence, or where an accused may taint their innocence. (a) Where an accused person testifies as a witness; (b) where an accused makes a confession; (c) where an accused pleads guilty. These circumstances further highlight the impact of language complexities on the guarantee of fair criminal trial in Uganda.

*(aa) Accused as witness*

An accused person is a competent witness for the defence. Upon their own application, a person charged with an offence may be called as a witness.<sup>85</sup> The defence testimony of an accused in criminal proceedings is one of the ways through which the cause of the person at trial can be heard.<sup>86</sup>

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<sup>83</sup> Ibid 464.

<sup>84</sup> Article 28(3) (a) Constitution (note 17 above).

<sup>85</sup> Section 43 Trial on Indictments Act (TIA) (1971) Cap 23 (Laws of Uganda). The TIA is an Act to consolidate the law relating to the trial of criminal cases on indictment before the High Court and for matters connected therewith and incidental therewith.

<sup>86</sup> See *Prosecutor v Vidoje Blagojević, Dragan Jokić* Case No IT-02-60-T Decision on Request for Certification to Appeal the Trial Chamber’s Decision on Vidoje Blagojević’s Oral Request & Request for the Appointment of an Independent Counsel for this Interlocutory Appeal should Certification be granted (2 September 2004) 5. The Trial Chamber held that an accused can be heard by the chamber in two ways: by making a sworn or unsworn statement or by testifying as a witness.

On the other hand, an accused person has a right against being compelled to give evidence against her-or himself.<sup>87</sup> The constitutional provision on non-compulsion of accused witnesses does not however render self-incriminating evidence inadmissible, if it is given voluntarily. Due to linguistic deficiency, an accused person may incriminate her-or himself, or be understood as testifying against her-or himself. Misunderstanding may also arise from errors in interpretation. Also read into the presumption of innocence is the right of the accused to remain silent; inferences may however be drawn from the refusal by the accused to answer to criminal accusations.<sup>88</sup>

#### (bb) Confession

The general rule is that statements procured lawfully during interrogation such as confessions, are admissible in court during trial.<sup>89</sup> A confession connotes an unequivocal admission of having committed an act which in law amounts to a crime;<sup>90</sup> it either admits the offence or at least substantially all the facts, which constituted the offence.<sup>91</sup> The Supreme Court has distinguished a conviction based on a confession, from self-incrimination; reliance on a confession for a conviction is not tantamount to asking an accused person to incriminate her- or himself contrary to Article 28 (11) of the Constitution.<sup>92</sup> One significant distinction relates to timing: whereas confessions are made in the pre-trial phase, self-incriminating evidence emerges in the trial process. In both phases: criminal investigation (the pre-trial phase), and during trial proceedings, linguistic obstacles are rife.

Confessions are a notorious subject in Uganda's criminal jurisprudence. The procedure of recording a statement of admission of guilt raises notable language fair trial issues. The Court of

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<sup>87</sup> See Article 28 (11) Constitution (note 17 above). See also *Mattaka & others v R* [1971] EA 495: At no stage of a trial is an accused a compellable witness even for co-accused.

<sup>88</sup> I Nakane *Silence in Intercultural Communication: Perceptions and Performance* (2007) 5. See also F Poyatos *Non-Verbal Communication across Disciplines: Paralanguage, Kinesics, Silence, Personal and Environmental Interaction* (2002) - silence is not simply an absence of sound but constitutes a part of communication as important as speech.

<sup>89</sup> See *Festo Androa Asenua & anor v Uganda* [1999] KALR 102, 105 para 9.

<sup>90</sup> *Rex v Kifungu s/o Nusurupia, Shauritanga s/o Mbalu* [1941] EACA 89, See also *Festo Androa* ibid 115.

<sup>91</sup> *Festo Androa Asenua & anor v Uganda* [1999] ibid 105 para 5, See also *Rex v Mali Kiza s/o Lusota* [1941] EACA 25.

<sup>92</sup> *Festo Androa Asenua & anor v Uganda* ibid para 5.

Appeal in *Beronda v Uganda*<sup>93</sup> took note of the frequent submissions, some not without justification, that confessions were being obtained by police officers by intimidation and even by the use of force. It is against this background that the presumption of innocence emerges as the first minimum guarantee of fair trial in the Constitution of Uganda. Noteworthy, language is a universal tool of manipulating or misleading suspects into making unintended confessions. Thus, linguistic bearings are central to the procedural safeguards introduced to the process of taking confessions. In a practice direction entitled 'Recording of Extra-Judicial Statements', the Chief Justice laid out the procedure to be adopted in recording confessions.<sup>94</sup> This procedure was approved by the Supreme Court in *Festo Androa & anor v Uganda*.<sup>95</sup>

Selected directives include (i) the magistrate taking the confession should inquire of the prisoner the language which they understand. If it is one which the magistrate does not know, they should send for an interpreter.<sup>96</sup> (ii) The statement should be recorded in the language which the prisoner chooses to speak. This may be done through an interpreter or the magistrate may herself, if s/he is fully conversant with the vernacular being used, record it in the same language. Any question put to the prisoner must be designed to keep the narrative clear, and the question so asked must be reflected in the statement.<sup>97</sup> (iii) The vernacular statement should be read back to the prisoner incorporating any corrections they may wish to make.<sup>98</sup> (iv) The prisoner should certify the correctness of the statement by signing or thumb-printing it. The magistrate and the interpreter, if any, should counter sign it.<sup>99</sup> (v) An English translation of the vernacular statement should then be made by the magistrate or the interpreter, as the case may be.<sup>100</sup> (vi) The originals of the statement: vernacular and its English translation should be handed over to the police.<sup>101</sup> The abovementioned procedure and the status of 'original' that is accorded to the vernacular version of the confession ensure that the accused expresses the admission of guilt in their

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<sup>93</sup> [1974] EA 46, 47 paragraph E,

<sup>94</sup> Recording of Extra-Judicial Statements (2 February 1973) Reference CJ c/b. The power of the Chief Justice to issue orders and directions to the courts necessary for the proper administration of justice is provided for under Article 133(1) b Constitution (note 87 above).

<sup>95</sup> Note 89 above 120.

<sup>96</sup> See Recording of Extra-Judicial Statements Reference CJ c/b (note 94 above) para 3.

<sup>97</sup> Ibid para 9.

<sup>98</sup> Ibid para 10.

<sup>99</sup> Ibid para 11.

<sup>100</sup> Ibid para 12.

<sup>101</sup> Ibid para 14.

language. In *Chandia v Uganda*,<sup>102</sup> the appellant was charged and convicted for murdering his wife. The appellant made a confession in *Lugbara* but only the English translation was produced in court and admitted in evidence without objection from his counsel. The Appellant admitted on oath that he made a statement although without knowing its contents and signed it in several places. The trial court relied on the appellant's confession to convict the appellant. This conviction was approved by the Court of Appeal. On his further appeal to the Supreme Court, the appellant argued that failure by the trial court to record the confession statement in *Lugbara* contravened the Chief Justice's administrative instructions, and the reliance on the English translation occasioned injustice. Counsel revealed that the police officer who recorded the statement did not know *Lugbara*, but recorded the English version through an interpreter. It was contended for the appellant that since he denied the contents of the confession statement, reliance by the two courts on the English version confession statement caused miscarriage of justice. The Supreme Court agreed in principle with the arguments of the appellant but dismissed his appeal because there was further incriminating evidence including the appellant's admission on oath, in court, of some important facts contained in the controversial statement. The Supreme Court still considered the statement in question even when it was clear that it was made in contravention of the language rights of the accused person. This illustrates the profile of language fair trial rights in criminal procedure in Uganda.

Notably, it is not a legal requirement that the accused should use their mother tongue in the process of recording a confession. An accused person has the right to use any of the language(s) known to them. The Supreme Court affirmed this position and further noted that if an accused person chooses to speak in a language not their own, the danger that they may speak it badly is met, so far as possible, by the provision that their actual words must be recorded.<sup>103</sup>

It is however not clear whether a person can use more than one language in a statement or use different languages in the same trial. Language users consciously or unconsciously take advantage of their mother tongue in communicative processes.<sup>104</sup> The mother tongue strongly

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<sup>102</sup> Note 60 above.

<sup>103</sup> *Patrisi Ozia v R* [1957] EA 36, 37.

<sup>104</sup> M Azuma 'Positive and Negative Effects of Mother-tongue Knowledge on the Interpretation of Figurative Expressions' (2009) Papers in Linguistic Science No 15, 165 ([http://repository.kulib.kyoto-u.ac.jp/dspace/bitstream/2433/141347/1/pls15\\_7Azuma.pdf](http://repository.kulib.kyoto-u.ac.jp/dspace/bitstream/2433/141347/1/pls15_7Azuma.pdf)).

affects expressions of anger and excitement. Thus, multilingual trial participants may switch into other languages in the same speech. At the Special Court for Sierra Leone, interpreters have spoken Krio - an English-based dialect, during the course of interpreting proceedings into English, especially when the original speech is fast. A court should be alert to such occurrences so as not to miss crucial communication that would jeopardise the integrity of the trial.

### *Making of the court record*

The court in *Patrisi Ozia v R*<sup>105</sup> alludes to the significance of recording the actual words of trial participants, as a means of preserving the truth for future verification. For the same reason, proceedings of courts of record are recorded. In the language of the Supreme Court in *Ozia*, the written proceedings are the official and authentic history of the case and the judgment intended to remain a perpetual and unimpeachable memorial of the proceedings and judgment.<sup>106</sup> The High Court of Uganda is a court of record; proceedings of the International Crimes Division are therefore recorded. The proceedings are transcribed by court clerks using old-fashioned transcription machines. The official transcript can take several days to get ready. There are no digital recording systems as in international criminal tribunals; transcriptions are the only court record and whatever is missed by the transcriber cannot be traced. It should be remembered that audio and video recordings of trials at ICTs are crucial backups; they are reference points in settling mishearings, omissions, ambiguities, or discrepancies relating to the record. In Uganda, judges endeavour to make hand written notes of what is important to the determination of the case during the course of proceedings. A hearing session can take several hours; they cannot record all the deliberations. The record is therefore inevitably incomplete. Thus, there is no reliable memory of proceedings in Uganda.

For courts which are not courts of record such as Magistrates' Courts, the case file itself is part of the record.<sup>107</sup> In many cases, the case file is actually the only available record of the case. The handwritten notes of the presiding officer constitute the official transcript of the trial. Distortion, mutilation, or destruction of the case file adversely affects the continuation of the case. Disappearance of case files is a common and absurd cause of continued detention of Ugandans

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<sup>105</sup> *Patrisi Ozia v R* [1957] EA 36, 37.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

charged in subordinate courts. Such victims would have no basis upon which to enter appearance in court and seek their right to liberty or justice. Hearings are scheduled on the basis of the records and prisoners are only brought to court for hearings. By facilitating the appearance of the accused before the court, the court record is the foundation of the right to be heard.

Of note, the Commercial Division of the High Court of Uganda has digital recording systems. The proceedings are automated and a transcript can be obtained immediately after the trial. Unlike the International Crimes Division, the Commercial Court is specially funded to expedite settlement of investment disputes. The constitution provides that the distribution of powers and functions as well as checks and balances provided for in the constitution among various organs and institutions of government shall be supported through provision of adequate resources for their effective functioning at all levels.<sup>108</sup> The various courts of Uganda are equally assigned the same role-administering justice; thus, the funding of operations should reflect the proportionality of the task. The International Crimes Division can be better facilitated to ensure its obligation to guarantee fair trial.

#### (cc) Plea taking

At the commencement of a criminal trial, the indictment is read over to the accused person by an officer of court, explained if need be by that officer or interpreted by the interpreter of the court, and the accused is required to plead.<sup>109</sup> In practice, the accused is asked three key questions: (i) Have you heard the charges read to you? (ii) Do you understand the charges against you? (iii) Do you plead guilty or not guilty? The significance of the first two questions is to ascertain whether the accused understands the nature of the charges against them pursuant to Article 28 (3) b of the Constitution.<sup>110</sup> Noteworthy, Thomas Kwoyelo's response to both questions was 'awiinyo', literally translated as 'I heard'. The interpreter however interpreted the same response to the second question as 'I understood' in so doing conveying a wrong rendition of a response that is so significant to fair trial. The accused did not confirm that he understood the charges against him. The incident stimulated debate among civil society, but the defect was cured by the fact that the accused pleaded not guilty and the case proceeded to trial.

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<sup>108</sup> See National Objectives and Directive Principles of State Policy paragraph viii, Constitution of Uganda, 1995 (note 17 above).

<sup>109</sup> Section 60 Trial on Indictments Act (note 85 above).

<sup>110</sup> Note 17 above - the right of the accused person to information of charges.



The procedure for recording a plea of guilt was laid down in the land mark case of *Adan v R*.<sup>111</sup> Noteworthy are the linguistic guarantees integrated in the procedural safeguards hence affirming the centrality of language to plea taking as a component of trial. (i) The significance of the language used and the record of the identity of the interpreter. The charge and the particulars should be read out to the accused, so far as is possible in their own language, or the language which they can understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged.<sup>112</sup> If an interpreter is involved, it is good practice for a magistrate to record conspicuously, the name of the interpreter who assists in the plea taking process.<sup>113</sup> The identity of the interpreter is fundamental to accountability.

(ii) The record of a guilty plea should constitute the accused's own words and the language used by the accused. If the accused admits all the essential elements of the offence, the magistrate should record what the accused says, as nearly as possible in their own words, and then formally enter a plea of guilty. Recording the accused's own words prevents guilty pleas from arising out of misunderstandings, and acts as a reference point for disputed pleas. In *Waithaka s/o Kabera v R*,<sup>114</sup> the plea recorded by the trial magistrate was 'I plead guilty'. The appellant-an African, was convicted. Taking note of his race, the Supreme Court of Kenya held that the word 'guilty' should not be used in recording a plea unless it is actually used by the accused in which case the record should show that the accused spoke in English.<sup>115</sup> The requirement that the exact words of the accused should be recorded was endorsed as an absolute rule in cases where the plea is one of guilty.<sup>116</sup> The appellant argued that his plea was equivocal as he spoke little English and the words recorded were not likely to have been used by a person of limited education. The language used in plea taking at the ICD is therefore significant in view of the limited education and limited knowledge of English of the majority of the court's prospective accused persons.

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<sup>111</sup> [1997] KALR 445 (EACA).

<sup>112</sup> See also *Anthony Olotunde Olowe v Uganda* [1997] KALR 58 Bossa J: when an accused pleads guilty, court is enjoined to explain to such accused every ingredient of the offence with which s/he is charged, and the accused should be required to admit or deny the same and their answer must be recorded in their own words, in a form to prove to the appellate court that the accused fully understood the charge and pleaded guilty to every element of the same unequivocally.

<sup>113</sup> See *Evaristo Turyahabwe v Uganda* [2001] KALR 88, 91.

<sup>114</sup> [1963] EA 38.

<sup>115</sup> *R v Yonasani Egalu & 3 ors* (1942) 9 EACA 65.

<sup>116</sup> *Desai v Republic* [1971] EA 416, 418 Spry VP.

(iii) The accused should have an opportunity to verify the accuracy of the facts stated. The magistrate should ask the prosecutor to state the facts of the alleged offence, and when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused agrees in principle with the statement of facts, the magistrate should record a conviction and proceed to hear any further facts relevant to sentencing.<sup>117</sup> The statement of facts and the accused person's reply must be recorded. The language used should be clearly understood by the accused.

The inevitable function of English as a language of court in plea taking and recording has rendered pleas of guilty to capital offences by non-English speaking accused ineffectual. In other words, a case against a person who does not speak English for an offence which is punishable by death must proceed to trial. In *Mangwera s/o Msakazi v Rex*,<sup>118</sup> court emphasised that '...in the region, it is generally inadvisable for a trial judge, particularly in the case of a person who does not speak or understand English, to accept what he says when arraigned on a capital charge as a plea of guilty. It is far better, even though the words of the plea may clearly indicate that the person accused has no defence, that the court should hear the evidence before convicting.'<sup>119</sup>

It is symbolic to note that persons convicted on their own plea of guilty have no right of appeal against conviction, except against the legality of the plea or the extent or legality of sentence.<sup>120</sup> It is therefore imperative that plea taking is conducted with utmost fairness.

Courts are mindful of the high probability of misunderstandings in the process of translating pleas from the language(s) of accused person(s) to English. Appellate courts have discouraged

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<sup>117</sup> *Uganda v Londoma Feremino* [1995] KALR 215, 216 Okello J: It is good practice to record facts constituting the offence, put them to the accused and only after s/he has admitted the correctness of those facts, and the facts constitute the commission of the offence charged that a conviction can properly be entered.

<sup>118</sup> [1951] EACA 150.

<sup>119</sup> Ibid 151.

<sup>120</sup> See Section 132 (3) TIA (note 85 above): No appeal shall be allowed in the case of any person who has pleaded guilty in his or her trial by the Chief Magistrate or Magistrate Grade I or on appeal to the High Court and has been convicted on the plea, except as to the legality of the plea or to the extent or legality of the sentence; Section 132 (1) (a) Trial on Indictments Act *ibid* (Appeals to the Court of Appeal from High Court): an accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than a sentence fixed by law. See also section 204 (3) Magistrates Court Act (note 59 above): No appeal shall be allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a magistrate's court except as to the legality of the plea or to the extent or legality of the sentence.

the undertaking by judicial officers to do the translation. The involvement of a sworn interpreter is emphasised. The High Court quashed a conviction in *Evaristo Turyahabwe v Uganda*,<sup>121</sup> which was based on a plea of guilt made by an accused who did not understand English, in the absence of an interpreter. The appellant was an employee of the complainant in his saloon. The complainant alleged that the appellant had stolen his shaving machines. The appellant was charged with theft and in his plea he said 'I stole the machines'. The trial magistrate thereby entered the plea of guilty. The prosecutor then read the facts stating that the complainant had left 2 shaving machines in his saloon under the management of the appellant. The complainant was later told that the machines had been stolen. The complainant suspected that it is the appellant that had stolen the machines. To this statement of facts from the prosecution, the appellant stated 'the facts are true as stated'. Notably, the appellant was not conversant with the English language and there was no interpreter in court. The appellant was convicted and sentenced. In his appeal, the appellant sought to challenge the recording of the plea of guilty. The High Court held that -

where an accused person is unrepresented, is of limited education and does not speak the language of court, the danger of convicting an accused on an equivocal plea is greatest.<sup>122</sup> In the present case the appellant did not understand the language of court. The absence of the interpreter in court meant that the appellant did not have an opportunity to understand the facts put to him and it cannot be therefore said that his plea of guilty was unequivocal. The absence of an interpreter rendered the taking of the plea and the conviction that followed irregular and might have led to a miscarriage of justice.<sup>123</sup>

There are cases where an accused person confesses to a crime during interrogation, but pleads not guilty at trial. The doctrine of presumption of innocence requires court to inquire from the

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<sup>121</sup> Note 113 above 89. See also *Gicholi Paul v Uganda* [2004] KALR 52, 54. The High Court found that the appellant was not versed in English and yet there was no translation of the charge into the language he understood. It was held that the reading of the charge to the accused necessitates translating the charge to the accused in the language he is best knowledgeable about if he is not versed with English, the language of court.

<sup>122</sup> See also Spry VP in *Adan v R* [1997] (note 111 above).

<sup>123</sup> *Evaristo Turyahabwe v Uganda* [2001] (note 121 above) 91.

accused whether or not they object to the admission of the confession statement in evidence, unless that accused on their own object or admit the confession expressly.<sup>124</sup>

*(ii) Information on the nature of the offence*

Every person who is charged with a criminal offence has to be informed immediately of the nature of the offence in a language that they understand.<sup>125</sup> Article 28 (3) (b)<sup>126</sup> applies to two occasions: (i) the time of arrest of an accused person; this provision is distinguishable from Article 23 (3) of the Constitution, which provides for information of reasons of arrest to suspects.<sup>127</sup> Article 28 (3) applies to a situation of arrest subsequent to the laying of charges. (ii) At the commencement of every trial, the court is enjoined to read out the charge to the accused in a language they best understand or through an interpreter who is versed with the language the accused is best knowledgeable in.<sup>128</sup> The practice is to read both the charge<sup>129</sup> and the particulars of the offence.<sup>130</sup> The ‘particulars of the offence’ is a section of the indictment containing the essential elements of the offence such as the place, date, time and circumstances in which the alleged offence was committed.<sup>131</sup> It is a rule of drafting indictments that the statement of the offence and particulars are set out in ordinary language, avoiding as far as possible the use of technical terms.<sup>132</sup> This requirement is intended to ensure comprehensibility of the charges by the accused person. The accused must understand the charges and the judicial officer must satisfy her-or himself that the accused does understand.<sup>133</sup>

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<sup>124</sup> *Sewankambo Francis & 2 ors v Uganda* [2003] KALR 167. See also *Omaria Chudia v Uganda* [2002] KALR 18.

<sup>125</sup> Article 28(3) b Constitution (note 17 above).

<sup>126</sup> *Ibid*

<sup>127</sup> *Ibid*. A person arrested, restricted or detained shall be informed immediately, in a language that the person understands, of the reasons for the arrest, restriction or detention, and of their right to a lawyer of their choice.

<sup>128</sup> *Zachary Kataryeba & 3 ors v Uganda* [1997] KALR 31, 34 Kagaba AG J.

<sup>129</sup> A charge is a written statement containing the accusation against a person alleged to have committed an offence. When a charge is filed for trial before the High Court, it is called an indictment. See BJ Odoki *A Guide to Criminal Procedure in Uganda* (1983) 55.

<sup>130</sup> See *Adan v R* [1973] (note 111 above) : When a person is charged, the charge and the particulars should be read out to them, so far as is possible in their own language, but if that is not possible, then in a language which they can understand.

<sup>131</sup> See Brown (note 38 above) 38, See also Odoki (note 129 above) 59.

<sup>132</sup> See Section 23 (a) ii & Section 23(f) TIA respectively (note 85 above).

<sup>133</sup> See Brown (note 38 above) 60.

It is regrettable that a number of law enforcement agents at the grass root level are illiterate or semi-literate, making the framing of charges a daunting task. Defective charges are common resulting in failure of criminal cases in lower courts. This problem exists in the police force and local council authorities. Officials are often not able to explain to arrested persons, the charges against them because either they do not understand them or cannot verbalise them in recognisable terms, or both. Suspects arrested by such officials have to wait until their appearance in court in order to know the charges against them. It should be remembered that the purpose of information on charges is to counterbalance the interest of the prosecuting authority in seeking continued detention of a suspect by affording the suspect the opportunity to deny the offence and obtain their release prior to the initiation of trial proceedings. It also gives the suspect the information they require to prepare their defence.<sup>134</sup> This is a fundamental guarantee of fair trial.

*(iii) Adequate time & facilities to prepare a defence*

A person who is charged with a criminal offence must be given adequate time and facilities for the preparation of their defence.<sup>135</sup> The High Court of Kenya observed that:

‘The framers of the Constitution intended the expression ‘facilities’ in this provision to be understood in its ordinary everyday meaning, free from any technicality and artificial bending of that word. In its ordinary connotation that word means the resources, conveniences, or means which make it easier to achieve a purpose; an unimpeded opportunity of doing something; favourable conditions for the easier performance of something; means or opportunities that render anything readily possible. Its verb is to ‘facilitate’ and means to render easy or easier the performance or doing of something to attain a result; to promote, help forward, assist, aid or lessen the labour of one; to make less difficult; or to free from difficulty or impediment.’<sup>136</sup>

Mbogholi and Kuloba JJ further held that in practical terms the constitutional right of an accused person to adequate time and facilities is satisfied only if an accused person is given and allowed or afforded everything which promotes the ease of preparing their defence, examination of any

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<sup>134</sup> *Prosecutor v Vojislav Šešelj* Order on Translation of Documents 6 March 2003.

<sup>135</sup> Article 28(3) (c) Constitution (note 17 above).

<sup>136</sup> *Juma & ors v AG* [2003] (note 82 above) 465 paras h, i & j.

witnesses called by the prosecution and securing witnesses to testify on their behalf. In general terms, it means that an accused shall be free from difficulty or impediment and free more or less completely from obstruction or hindrance in fighting a criminal charge made against them. They should not be denied something the result of which denial will hamper or stall their case and defence or lessen their fair attack on the prosecution case.<sup>137</sup>

Noteworthy is the phrase ‘must be given adequate time and facilities’ in Article 28 (3) (c) of the Constitution of Uganda, 1995.<sup>138</sup> The right of the accused to adequate time and facilities is fulfilled by the actual giving of the facilities to the accused person. The wording of the provision transcends entitlement; it contains a clear statement of obligation. Among others, the accused person has to be provided with copies of statements made to the police by persons who would or might be called to testify as witnesses for the prosecution as well as the copies of exhibits which are to be offered in evidence for the prosecution.<sup>139</sup> It should be remembered that these documents should be received by the accused in a practical and effective manner especially in a language that the accused understands.<sup>140</sup> Translation is therefore inevitable.

However, the Uganda Judicial Service does not generally conduct translation of written documents for the benefit of parties. Documents are only translated for the court record. The Trial on Indictments Act (TIA) provides for interpretation of documents tendered into evidence.<sup>141</sup> In *Tifu Lukwago v Samwiri Mudde Kizza & anor*,<sup>142</sup> court affirmed that the official language of courts of judicature is English and all documentary exhibits that are to be used in court if not originally in English must be translated into English before being filed with pleadings or before being introduced in evidence. The party tendering the exhibit is responsible for the translation.

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<sup>137</sup> Ibid 465 paras d & e.

<sup>138</sup> Note 17 above.

<sup>139</sup> *Juma & ors v AG* (note 82 above) 466.

<sup>140</sup> See *Prosecutor v Vujadin Popović & ors* Decision on Joint Defence Motions Requesting the Translation of the Pre-Trial Brief and Specific Motions (24 May 2006) para 8. The defence argued that the right to adequate facilities entails receiving documents, especially those containing charges, against the accused ‘in a practical and effective manner’. This includes being provided in a language that the accused understands.

<sup>141</sup> Section 57 TIA (note 85 above). TIA is an Act to consolidate the law relating to the trial of criminal cases before the High Court and for matters connected therewith and incidental thereto.

<sup>142</sup> [1999] KALR 296.

The scope and purpose of translation in Uganda's criminal justice system contrasts sharply with that of International Criminal Tribunals. ICTs translate all documents substantiating the nature of the charge, especially the indictment - the statutory accusatory instrument, into the language that the accused person understands.<sup>143</sup> Whereas translation at ICTs is done to facilitate the preparation of the defence, the only available translation in Uganda is for the direct benefit of the court. The judiciary needs to incorporate translation services in its structure so as to be able to provide court process to accused persons in the language(s) they understand. This would enhance its capacity to guarantee a crucial component of trial fairness.

*(iv) Presence & legal representation of the accused at trial*

An accused person must be permitted to appear before the court in person or by a lawyer of their choice.<sup>144</sup> With the exception of cases where the accused waives their right to be present at trial, the trial cannot take place in their absence unless the accused so conducts her-or himself as to render the continuance of the proceedings in their presence impracticable and the court makes an order for them to be removed and the trial to proceed in their absence.<sup>145</sup> The right of the accused to attend their trial is to enable the accused to hear the evidence brought against them, test that evidence through cross-examination, and adequately present their defence.<sup>146</sup> Thus, the language of the trial is essential to ensuring the functional presence of the accused person.

Further, the presence of the accused enables them to test the accuracy of interpretation. In *Salau Dean v Republic*,<sup>147</sup> the appellant was convicted of corruption and giving false information to a public servant. The appellant informed the police that an immigration officer had asked him for 50 pounds to refrain from prosecuting his friend under the Immigration Act, and a police trap was laid. The appellant met the immigration officer and had a conversation which was recorded. At the end of the conversation, the immigration officer was in possession of the money given to the appellant by the police. Their conversation was recorded in Punjabi on two spools of tape which were not played over except for identification purposes at the hearing. A complete

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<sup>143</sup> *Prosecutor v Vojislav Šešelj* Order on Translation of Documents (note 134 above).

<sup>144</sup> Article 28(3) (d) Constitution (note 17 above). See also Section 55 TIA (note 85 above). In *Bogere Moses & anor v Uganda* [1998] KALR 1, 3: The law does not permit criminal trial of any person in his or her absence.

<sup>145</sup> Article 28 (5) Constitution *ibid*. See also Section 54 (1) TIA *ibid*.

<sup>146</sup> Odoki (note 129 above) 97.

<sup>147</sup> [1966] EA 272.

English transcript was put in evidence with the agreement of both sides. The immigration officer asserted that the money had been thrust into his pocket by the appellant after unsuccessful efforts to persuade him to accept it as a bribe. After the hearing but before judgment, the magistrate had the tapes played over in the privacy of his chambers in the presence of two police officers and a court interpreter but in the absence of the appellant or his counsel. The magistrate's intention was to satisfy himself, with the aid of the interpreter, beyond all doubt that the English transcript was correct. The magistrate was interested in two Punjabi words which were translated into English as 'keep it' and the interpreter assured the magistrate that though a correct and literal translation of the Punjabi words was 'keep it', these words could be used appropriately when offering another person something, and could therefore bear the meaning 'take it'. The magistrate held that the expression 'keep it' must be construed as 'take it'. On appeal, Sir John Ainley CJ observed that the learned magistrate, although in good faith, took the opinion of someone whom he regarded as an expert upon a matter which had some bearing on the case. That opinion was adverse to the case of the appellant and was given to the magistrate in the absence of the appellant and the appellant's advocate. The appellant had no opportunity to challenge it. He was unaware that such an opinion had been given. In accepting it, the magistrate made a fundamental error, and deprived the appellant not only of the semblance, but of the substance of a fair trial.<sup>148</sup> Thus, it is a fundamental aspect of the right to fair hearing that the accused is present during interpretation of evidence and is offered an opportunity to test the authenticity of such translation.

Whereas proceedings conducted in the absence of the accused outside the abovementioned exceptions are a nullity,<sup>149</sup> a fair and impartial trial can be held, and the ends of justice served, without legal representation.<sup>150</sup> The right to representation is therefore not absolute.<sup>151</sup> However, crimes falling within the jurisdiction of the International Crimes Division are majorly capital

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<sup>148</sup> Ibid 276.

<sup>149</sup> *Naroththandas Parmanandas Vithlani v R* [1957] EA 343 Bennett J.

<sup>150</sup> *Mushao & ors v Republic* [1971] EA 201, 202 Mosdell J.

<sup>151</sup> Section 53 TIA (note 85 above) provides that the accused person may of right be defended by an advocate; 'may' implies discretionary. See also Odoki (note 129 above) 96: the right to legal representation is not absolute.



offences, which qualify accused persons for mandatory legal representation, at the expense of the state, under Article 28 (3) e of the Constitution.<sup>152</sup>

Similarly, it is trite that every accused person has a constitutional right to be defended by counsel of their choice, and if they are deprived of that right through no fault of their own or that of their counsel and a conviction follows, the conviction cannot stand.<sup>153</sup> The expectation is that counsel's conduct of the accused's legal representation helps the accused to have a full and fair examination of all the facts in issue.<sup>154</sup> The proficiency of counsel in the language of court often covers the lack or limited English language proficiency among accused persons. However, counsel's proficiency in the English language should not be seen as depriving the accused, who is the subject of proceedings, of the right to be functionally present at their trial; this was the case in Kwoyelo's hearing at the Constitutional Court. The accused person should still be able to understand the proceedings and contribute to the deliberations.

The constitutional right to representation by a lawyer of one's choice is only meaningful if it means informed representation.<sup>155</sup> An accused is legally represented only if they can instruct counsel. The word 'instruct' should be given its natural meaning. In *Cheung Shing v Reginam*,<sup>156</sup> the accused - a Chinese national, was convicted of murder on board a ship within the territorial waters of Aden. At the preliminary inquiry the accused was suffering from a fractured skull and was unable to understand the proceedings. He was represented by an advocate - Mr. Nunn, who had been assigned for this purpose by the Acting Attorney-General. The Acting Attorney General took this measure because of the anxiety of the Captain of the ship that the ship should not be delayed. The Advocate informed court that he had been unable to obtain instructions from the accused. The preliminary inquiry was continued and Crown Counsel asked that seven of the witnesses who were members of the ship's crew be not bound over. The seven witnesses were then examined by Crown Counsel and Mr. Nunn, appointed by the Acting Attorney - General to represent the appellant, put some questions to them. The depositions of the witnesses were read

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<sup>152</sup> Note 17 above.

<sup>153</sup> *Vincent Rwamwaro v Uganda* [1993] KALR 42, See also Zachary Kataryeba (note 128 above) Kagaba AG. J: It is a fundamental law that an accused has an inherent right to be represented by an advocate of his choice in the criminal trials.

<sup>154</sup> See *Kawooya Joseph v Uganda* [2001] KALR 68, 69 (SCU).

<sup>155</sup> *Juma & others v AG* [2003] (note 82 above) paras a,b.

<sup>156</sup> [1956] EACA 459 (note 37 above).

out in English but were not interpreted to the accused. The seven statements were later admitted in evidence. The appellant sought to challenge the propriety of that course of action since he had no advocate at the time these seven depositions were taken. It was obviously impossible for him to cross-examine personally. Further, the magistrate had found by implication that he was ‘unable to understand the proceedings’. Through a sworn Chinese interpreter, the tentative charge was explained to him, and he said: ‘I do not know’. The learned magistrate then recorded: ‘I cannot be fully satisfied that the accused understands the proceedings. I am satisfied he is conscious and not insane. He is undoubtedly sick and it may be that he does not fully understand what is happening. I shall however proceed with the inquiry acting under Section 241 of the Criminal Procedure Ordinance. It does not appear that the accused will be in a better position to understand the evidence for at least two weeks.’<sup>157</sup> On appeal, the EACA affirmed that the accused did not have legal representation in the circumstances. In the words of Briggs JA:-

‘The position of the advocate assigned to defend the accused was at the commencement of the preliminary inquiry no more than that of *amicus curiae*. He was not at any time in law the advocate of the appellant. The appellant himself had not instructed him to appear. The Acting Attorney-General was not the authorised agent of the appellant for the purpose of instructing counsel for him nor had the Acting Attorney-General the status of a committee, guardian *ad litem* or next friend.’<sup>158</sup>

The significance of the right of the accused to choose and instruct counsel is that an accused person would have their communication needs among the criteria for determining counsel. Accused persons in Uganda often choose counsel with whom they share a common language. The linguistic competency of counsel as compared to that of accused persons plays an important role in legal representation because of the limited availability of translation;<sup>159</sup> the accused is entitled, as of right, to make their own choice.

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<sup>157</sup> Section 241 Criminal Procedure Ordinance provided that if the accused, though not insane, cannot be made to understand the proceedings, the court may proceed with the inquiry or trial; and in the case of a court other than the Supreme Court, if such inquiry results in a commitment, or if such trial results in a conviction the proceedings shall be forwarded to the Supreme Court with a report of the circumstances of the case, and the Supreme Court shall pass thereon such order as it thinks fit.

<sup>158</sup> *Cheung Shing v Reginam* (note 37 above) 461-462.

<sup>159</sup> In Kwoyelo’s case, not all legal discussions were translated - See ‘Justice for Serious Crimes Before National Courts: Uganda’s International Crimes Division’ Human Rights Watch (note 12 above) 22.

(v) *Legal aid*

Any person who is charged with a criminal offence which carries a death sentence or imprisonment for life is entitled to legal representation at the expense of the state.<sup>160</sup> Legal aid through the state brief system for capital cases is funded by the government of Uganda and administered by the judiciary. Assistance is available for every accused person charged with a capital offence irrespective of their financial ability. Thus, all prospective accused of the ICD would be entitled to mandatory legal representation.

Improper consideration of the question of providing legal aid is a ground for a re-trial.<sup>161</sup> In my view, language competency of counsel should form part of the criteria for proper consideration of legal aid. Accused persons should be allocated counsel who can communicate with them in the language(s) they understand best. Kwoyelo's defence counsel both originate from Acholiland - the accused's home region; spontaneous communication was seen to transpire between the accused and his counsel during the course of the trial.<sup>162</sup>

(vi) *Interpretative assistance*

Every accused person has to be afforded free assistance of an interpreter if they cannot understand the language used at the trial.<sup>163</sup> As a multilingual jurisdiction, much of the criminal proceedings in Uganda are dependent on interpretation.<sup>164</sup> The law provides expressly for the interpretation of the evidence to the accused or their advocate;<sup>165</sup> and documents tendered for the purpose of formal proof. The extent of interpretation of documents of evidential value is left to the discretion of court.<sup>166</sup> Noteworthy, interpretation of documents (oral transmission of written

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<sup>160</sup> Article 28 (3) (e) Constitution (note 17 above).

<sup>161</sup> See *Mohamed s/o Salim v R* [1958] EACA 202.

<sup>162</sup> Researcher observation, 19 September 2011.

<sup>163</sup> Article 28(3) (f) Constitution (note 17 above).

<sup>164</sup> See also *S v Roy Morris* [1979-80] BLR 80 Hayfron - Benjamin CJ [Botswana] in D Ntanda Nsereko *Criminal Procedure in Botswana: Cases & Materials* 3 ed (2002) 382.

<sup>165</sup> Section 56 (1) TIA (note 85 above): whenever any evidence is given in a language not understood by the accused person, it shall be interpreted to them in open court in a language understood by them. Section 56 (2) TIA *ibid*: If the accused appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the Advocate in English.

<sup>166</sup> See Section 57 TIA *ibid*: When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much of them as appears necessary.

text) is distinguishable from translation (written rendition). There is no requirement to have the interpretation in writing; a verbal explanation suffices.

Interpretation in Uganda raises fair trial questions such as (aa) appointment of interpreters; (bb) efficacy of interpretation; (cc) status of a translation.

(aa) Appointment of interpreters

Interpreting is not trained or practised as a profession in Uganda. There is no school for interpreting; neither is there a body regulating the conduct of interpreters. Need-based *ad hoc* training is provided in isolated situations. For instance, the Justice, Law and Order Sector initiated a nine-day training of 30 court clerks as interpreters, weeks before Kwoyelo's trial, for the benefit of the ICD.<sup>167</sup> The judiciary often engages the services of court clerks as interpreters. Court clerks are paralegal personnel who assist court in executing its functions. They are provided with basic training in interpreting skills. In view of the significant role of court clerks as interpreters, it is a practice of the judiciary to recruit court clerks locally. They are often fluent in the native language(s) of the people within a particular magisterial area. As native speakers with legal knowledge, they assist court understand idioms and explain legal concepts in ways recognisable to participants.

However, it is noticeable that the legal knowledge of court clerks is not adequate for them to decipher and interpret complex legal notions. It is desirable to have lawyers in the profession;<sup>168</sup> but as Negru rightly affirms: we cannot talk of a serious professional situation without good pay.<sup>169</sup> The judiciary only pays allowances for interpreting tasks. Allowances are by nature discretionary and subject to availability of funds. There are no budgetary commitments to this integral component of administering justice. Better terms are required in order to attract more qualified persons to the occupation. Translation as a handmaid of justice and trial fairness needs to be acknowledged and facilitated in Uganda.

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<sup>167</sup> See 'Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division' Human Rights Watch (note 12 above) 21—22.

<sup>168</sup> Per Judge of the ICD (10 October 2011) name withheld on ethical grounds.

<sup>169</sup> See ID Negru 'Acceptability versus Accuracy in Courtroom Interpreting' in DS Giannoni & C Frade (eds) *Researching Language & the Law: Textual Features & Translation Issues* (2010) 227.

It is noteworthy that there are situations where even court clerks are not available for interpretation. The courts often find anybody who can transmit the proceedings to the desired target language.<sup>170</sup> The practical considerations are seen to override fair trial concerns. The people engaged to interpret such as security guards, police constables, are not always skilled, experienced or fully competent. There is little chance of them being aware of the rules and ethics of interpreting.<sup>171</sup> The use of the services of persons, who may have an interest in the prosecution, such as police officers has raised the question of bias. Similarly, bias in interpreting is difficult to prove; the mental element of deliberate misinterpretation is nearly beyond formal proof. It is a rule of evidence that whoever alleges a fact must prove it.<sup>172</sup>

### *Police officers as interpreters*

The human resource constraints faced by courts especially in the rural areas have led courts to engage the services of police officers as interpreters. This practice is undesirable as it raises the appearance of bias especially in cases where the police officer in question has been involved in the investigation of the case or in arresting the accused.<sup>173</sup> Of note, detachment from the case is as crucial to effective interpretation as the linguistic abilities of the interpreter.<sup>174</sup> It has also been held that the interpreter should be a civilian interpreter,<sup>175</sup> but there may be cases where no alternative is available.<sup>176</sup> The courts in Uganda face the same challenges as those that led Dendy Young CJ of Botswana to admit in *State v Roman Galeboe*<sup>177</sup> that the court is permanently embarrassed by total lack of staff and adequate accommodation and materials at every centre at which it sits and is obliged to make use of policemen from time to time on the understanding that the interpreter, who is sworn, has not taken part in the investigations. Thus, the emphasis is the

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<sup>170</sup> See Needs Assessment Mission (NAM) Report, March 2011, conducted at the request of the Justice, Law and Order Sector, to assess the readiness of justice-sector institutions for international crimes proceedings paras 76—79.

<sup>171</sup> Negru (note 169 above) 227.

<sup>172</sup> See Section 102 Evidence Act (1909) Cap 6 (Laws of Uganda): The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any particular person.

<sup>173</sup> See *Rex v Sidiki Kyoyo & ors* [1943] EACA 103. See also *State v Roman Galeboe* [1968-70] BLR 364 cited in Ntanda Nsereko (note 164 above) 273: the use of an interpreter who had taken part in the investigations would amount to an irregularity.

<sup>174</sup> See Negru (note 169 above) 227.

<sup>175</sup> *Festo Androa Asenua & anor v Uganda* [1999] (note 89 above) para 16.

<sup>176</sup> *Rex v Sidiki Kyoyo & ors* [1943] (note 173 above).

<sup>177</sup> [1968-70] BLR 364 (note 173 above), cited in Ntanda Nsereko (note 164 above) 273.

objectivity other than the status of the person engaged as an interpreter; as long as the accused is not prejudiced by the interpretation, and accuracy of the communication transmitted is ensured, the demands of justice are met.<sup>178</sup>

The status of someone as a police officer does not necessarily make her or him an interested party. In *Gamuga s/o Gidagurija & anor v Regina*,<sup>179</sup> the appellants were charged with murder and convicted before the High Court of Tanganyika. The admissibility of extra-judicial statements made by the appellants to a magistrate was attacked on the ground that the interpreter was a headman with the powers of a police officer and was thus an interested party. The court found that the interpreter had joined in the search for the murderers, as indeed had the whole countryside, but that he had no part in the arrest of the appellants, nor was he in anyway responsible for their custody. It further found that:-

The magistrate, no doubt realising these facts and the further fact that it would have been almost impossible to obtain anyone not employed by government or the native authority or not otherwise associated in some way with the investigation of this offence who could speak the appellant's language, he appeared to take exceptional care in taking the statements. The magistrate went out of his way to check the correctness of the interpretation, in so far as he personally could, and to ensure that the appellant fully understood exactly what was happening. The statement was therefore not rendered inadmissible by reason of the fact that the headman was the interpreter in the taking of the statement. It is possible to differentiate the capacity in which a person is acting when that person holds more than one office and the interpreter did not act in any police capacity in his association with the appellants. The statements were voluntary and admissible.

A similar view is held about the use of the same interpreters during investigation and trial. In principle, it is objectionable for the same interpreter who has interpreted a statement at the police

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<sup>178</sup> *State v Roman Galeboe* ibid court held: in respect to a situation where the magistrate used, in the absence of any other interpreter, a policeman as an interpreter, that the appellant was not prejudiced considering that both defence counsel and the prosecutor were conversant in Setswana and would have intervened in case of misinterpretation.

<sup>179</sup> [1952] EACA 253, 254.

charge office (during investigation) to act as interpreter for the magistrate (during trial).<sup>180</sup> However, due to shortage of interpreters, if no injustice is caused to the accused, the trial can proceed. In *Gopa s/o Gidamebanya & ors v Reginam*,<sup>181</sup> a messenger of a native authority had interpreted statements made by the appellants at the police charge office prior to his acting as interpreter for the magistrate. The EACA upheld the view of the trial judge that the practice, though undesirable did not adversely affect the correctness of interpretation in that case. The court distinguished *Gamuga*<sup>182</sup> because a headman is a person in authority and is an agent of the police.

Further distinction can be made of cases where the investigating officer or the judicial officer undertakes the role of the interpreter during the course of investigation or trial respectively. This is also undesirable,<sup>183</sup> but can only warrant action if it occasions a proven miscarriage of justice. In *Seif s/o Selemeni v Reginam*,<sup>184</sup> the appellant made a statement to a police officer in Swahili. The police officer to whom the statement was made understood both Swahili (the language of the appellant) and English (the official language); he recorded the statement in English without engaging an interpreter. The statement was not read back, nor signed, nor acknowledged by the appellant. At the trial, evidence was given by a police officer of the statement made by the appellant in answer to the charge. Counsel objected to the admission of the statement on the ground that it should have been taken down in Swahili and thereafter translated into English. This objection which the prosecuting counsel opposed as ‘almost frivolous’ was overruled by the judge. On further appeal, the EACA upheld the mode in which the statement was taken. The Justices of Appeal noted that the official language of the court is English and if the police officer who is an African knew himself to be proficient enough to turn what the appellant said into English then and there, he was entitled to do this. The proper course for the defence, if doubtful of his proficiency, was to test it in cross-examination.

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<sup>180</sup> *Gopa s/o Gidamebanya & ors v Reginam* [1953] EACA 318, 319.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Gamuga s/o Gidagurija & anor v Regina* (note 179 above).

<sup>183</sup> *Antoine Ernesta v R* (1962) EACA 505.

<sup>184</sup> [1953] EACA 235.

The abovementioned position illustrates that the courts are hesitant to outlaw the practice of direct interpretation<sup>185</sup> despite express rules requiring that a statement is recorded first in the language of the deponent, and then translated to the required language. The Supreme Court of Uganda has accepted direct interpretation in *Lutwama David v Uganda* (2004).<sup>186</sup> In the absence of other forms of recording the deliberations, this practice is disadvantageous in as far as it does not involve taking an original record. The resultant statement is not the record of what is said by the deponent. In *Lutwama*,<sup>187</sup> the appellant was charged with the murder of an infant. He made a charge and caution statement which was recorded in English, the language the appellant never spoke.<sup>188</sup> The appellant at the trial repudiated the statement and claimed that he did not know of its contents since it was recorded in English. The trial court convicted and sentenced the appellant to death on the basis of the charge and caution statement. It was argued for the appellant that the statement should not have been found admissible because it was recorded without following the rule which requires that a charge and caution statement should be recorded in the language of the accused and then translated. The Supreme Court found that indeed the law required that a charge and caution statement should be recorded in the language the accused understands. That in that case, the statement was recorded in English which was not the language of the accused. The learned trial judge remarked that:-

‘... although there is nothing wrong with the method used by the police officer in recording the accused’s charge and caution statement, a better method should have been recording the statement in the language used to communicate with the accused. Later the statement so recorded would be translated into official language - English. The method that the police officer used is short-cut probably designed to save time that is necessary for a busy schedule. It carries with it risks of the statement being declared inadmissible. The longer and rather cumbersome method is safer.’<sup>189</sup>

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<sup>185</sup> Author uses the word ‘direct interpretation’ to refer to a situation where a person undertakes, without the involvement of an interpreter, to interpret what is said in another language, and record it at the same time in the target language.

<sup>186</sup> [2004] KALR 1.

<sup>187</sup> Ibid.

<sup>188</sup> A charge and caution statement is a statement made by a suspect usually with the help of a police officer. Uganda Police Standing Orders (1984) 7 ed Rules 20, 21 and 26 (2), (3) require that the recording officer shall record the statement of a suspect in the language spoken by the suspect.

<sup>189</sup> See *Lutwama David v Uganda* (note 186 above) 4.



Noteworthy, the judge did not declare the statement inadmissible because it was found that what was relevant for the admissibility of a charge and caution statement is that it is made voluntarily. In the instant case the evidence on the record showed that the statement was made voluntarily, though it was recorded in another language, the appellant made it in his own language. The courts preceding the Supreme Court were therefore entitled to find that the statement was admissible. In my view, the language question was avoided, illustrating the low level of regard for language fair trial rights. The appellant was challenging ownership of the statement because it was written in a language he did not understand; he did not allege coercion, a question that seemed to derail court's attention.

Of note, direct interpretation results from resource constraints; enduring it is a practical consideration especially in rural settings and a contrary approach might lead to impunity. If in special circumstances a judicial officer undertakes the duties of an interpreter, s/he should administer the interpreter's oath to her- or himself.<sup>190</sup> That would act as a basis for future cross-examination of the judicial officer on the interpretation done.

The aforementioned positions are compromises for the lack of a system of judicial interpreting in Uganda and the East Africa sub-region. They demonstrate the capacity constraints of the judiciary in assuring the language fair trial rights of accused persons.

#### (bb) Efficacy of interpretation

Resource restraints and lack of professional regulation of translation in Uganda raise concerns about the efficacy of interpretation. An interpreter undertakes to faithfully interpret and make true explanation of deliberations of the court, the assessors, the witnesses and the accused, according to the best of their skills and understanding.<sup>191</sup> Hence, the liability of an interpreter for the accuracy of interpretation is subject to their skills and expertise. The court retains the primary responsibility of ensuring that the interpretation is adequate. In *Meghji Naya v Regina*,<sup>192</sup> the magistrate noted on the record that at a certain point, the interpretation was bad. The trial continued. On appeal, the EACA held that having realised the interpretation was bad, the magistrate should have stopped the case and obtained the services of another interpreter; because

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<sup>190</sup> *Antoine Ernesta v R* (1962) (note 183 above) Newbold JA.

<sup>191</sup> See Interpreter's Oath Form D First Schedule, Oaths Act (note 43 above) (Laws of Uganda).

<sup>192</sup> [1952] EACA 24 cited with approval in *Cheung Shing v Reginam* (note 37 above).

no objection to interpretation was made on the accused's behalf, the magistrate was not relieved of the responsibility of ensuring that the interpretation of the accused's evidence was at least adequate. The obligation of the accused to seek the protection of their rights does not discharge the overarching duty of the court to ensure a fair trial.

Firstly, the court has to satisfy itself that the interpreter provided for the accused's assistance is sufficiently competent.<sup>193</sup> Secondly, the presiding officer should monitor and evaluate the quality of interpretation. Sound equipment is integral to the exercise of monitoring interpretative performance at ICTs. It amplifies and transmits the voice of the interpreter to the bench and the parties. The International Crimes Division, as many courts in Uganda, does not have sound equipment.<sup>194</sup> The mode of interpretation used is whisper simultaneous interpretation; the interpreter sits or stands next to the targeted recipient of the message such as the accused, and whispers throughout the entire trial.<sup>195</sup> The judges would not hear directly what would be said to the accused person. Since counsel are able to follow the proceedings in the language of the court, the content of interpretation would not be a concern to them. Thus, what the accused is informed of is left to the discretion and competency of the interpreter.

However, criminal proceedings in Uganda entail systemic mechanisms of monitoring interpretative performance such as the involvement of assessors and calling interpreters as witnesses.

#### *Assessors & monitoring interpretative performance*

It is a legal requirement that all trials before the High Court are held with the aid of two or more assessors.<sup>196</sup> A trial with less than two assessors is a nullity.<sup>197</sup> Assessors are lay persons selected

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<sup>193</sup> See *Mmesetse & Moloi v State* CA Cr App No 2/1998 Friedman JA in Ntanda Nsereko (note 164 above) 268.

<sup>194</sup> A senior administrative officer of the ICD revealed that the equipment had been procured but not yet installed.

<sup>195</sup> See A Edwards *The Practice of Court Interpreting* (1995) 77.

<sup>196</sup> Section 3(1) TIA (note 85 above).

<sup>197</sup> *Rex v Yowasi s/o Paulo* [1939] EACA 126.

in a locality to advise judges on the trial.<sup>198</sup> The eligibility criteria of assessors include ability to understand the language of the court (English) with a degree of proficiency sufficient to follow the proceedings.<sup>199</sup> At the commencement of the trial, each assessor takes an oath to impartially advise the court to the best of their knowledge, skill and ability, on the issues pending before the court.<sup>200</sup> With regard to the scope of the issues in the aforementioned provision, the EACA noted that –

the legislatures of all the East African territories have been vague, perhaps intentionally so, in defining or setting out the functions of assessors, and until they are so defined it would be unsafe and impossible for the court to set them out in comprehensive certainty. All that can be said is that in the examination of the actual exercise by assessors of any function, the court will always apply the test of what is fair to an accused person and will keep in mind the principles of natural justice.<sup>201</sup>

Language as a subject of fair trial is one of the matters upon which the local knowledge of assessors is of aid to criminal proceedings in the High Court. Judges rely on the linguistic advantage of assessors to identify errors in interpretation.<sup>202</sup> This expectation has led to subtle biases in the selection of assessors such as the inclination to choose assessors of the same race, or tribe as the accused, or witnesses. These biases are means to the end of achieving a linguistically competent team. In *R v WY Wilken*,<sup>203</sup> Sir John Ainley of the Supreme Court of Kenya held that -

‘...whether an assessor has a full and comprehensive command of the language of court, namely, English, is very important and the judge’s selection of assessors should be governed by the help which he anticipates he will gain from the individuals upon his list, and an attempt should be made to select from those summoned three assessors who will give the maximum assistance in the particular cases to be tried. In some cases, perhaps in very many cases, it may be desirable that the judge should be

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<sup>198</sup> See Odoki (note 129 above) 150. See also Brown (note 38 above) 170.

<sup>199</sup> Rule 2 (1) Assessors Rules. Schedule to the TIA (note 85 above).

<sup>200</sup> Section 67 TIA *ibid*.

<sup>201</sup> *Rex v Gusambizi Wesonga* [1948] EACA 65, 68.

<sup>202</sup> Per ICD Judge, name withheld on ethical grounds (10 October 2011).

<sup>203</sup> [1965] EA 286.

assisted by assessors conversant with the ways, customs, beliefs and language of a particular community... Language may often be very important.’<sup>204</sup>

In a nutshell, the significance of the language abilities of an assessor to a criminal trial is an important consideration in the appointment of assessors. International criminal tribunals engage linguistic experts to adduce evidence of idioms. Assessors would readily advise the High Court (International Crimes Division) on such aspects, in furtherance of a fair trial.

#### *Interpreter as witness*

‘It has been held many times in the courts of this country that where a statement has been made through an interpreter, in the absence of the interpreter’s evidence the statement is hearsay’ – Farell J.<sup>205</sup>

The courts are cognisant of the shortfalls of translation hence adapting a conscious approach to documentary evidence made through translation such as charge and caution statements, confessions, and witness statements. One of the measures taken is obliging interpreters to testify on oath, about what was said and what is contained in the document. As sworn witnesses, interpreters would be subject to cross-examination. The mechanism has materialised as a means of identifying errors in interpretation. In fact, it is recommended that a statement made through interpretation is not read out in open court until it is proved by the evidence of the interpreter as well as the person who recorded it. In *Yozefu Masabo s/o Sebukuraya v Regina*,<sup>206</sup> the statement made by the appellant when he was charged at the police station was produced in English by a police inspector who, after it had been marked for identification, read it out to the court. When the interpreter was called, it transpired that he had not properly interpreted to the appellant the usual caution. The learned trial judge refused to admit the statement. The court highlighted the danger of allowing a statement to be admitted as soon as it is produced and warns that a trial judge should be careful never to admit a statement, or even have it read out in open court, until it is properly proved by the evidence of the interpreter as well as by the magistrate or the police officer who recorded it. It further observed that the appellant was by no means prejudiced by the fact that what was said to the police officer had been read in court before it was properly proved.

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<sup>204</sup> Ibid.

<sup>205</sup> *Oduol & anor v Republic* [1969] EA 369.

<sup>206</sup> [1952] EACA 266, 267.

According to the EACA, the danger of reading it out in open court is that it may have been understood by the assessors who would, no doubt, find difficulty in excluding it from their consideration of the case.

It is against that background that statements submitted without the evidence of the interpreter are dismissed as hearsay.<sup>207</sup> It is required that (i) the fact that the document was recorded through interpretation, the identity of the interpreter and the languages used are revealed;<sup>208</sup> (ii) the interpreter and the person recording the statement sign the statement. Thus, the aforementioned facts constitute part of the court record for future reference; (iii) the interpreter is called to give evidence of what was recorded as what was said by the person making the statement.<sup>209</sup> The requirement of the evidence of the interpreter to prove the contents of a document is an exception to the general rule of evidence.

It is a salient principle of evidence that a document speaks for itself; its contents must be proved by primary evidence, that is, the document itself produced for the inspection of court.<sup>210</sup> Proof of contents of a document by secondary evidence such as an oral account of a person who has her- or himself seen the document<sup>211</sup> is only permitted in restricted circumstances specified under section 64 (1) of the Evidence Act.<sup>212</sup> The testimony of an interpreter is an exception considering that the document itself is adduced in evidence and oral evidence is also required to prove its

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<sup>207</sup> See also *Rex v Gidaharp s/o Gidawaresek* [1937] 4 EACA 31. Held: a confession made to a magistrate through an interpreter and recorded by the magistrate must be proved by calling both the magistrate and the interpreter, both of whom should sign the record of the confession. In the absence of any evidence by the interpreter of what the magistrate recorded as having been said by the person making the extra judicial statement, the statement is merely hearsay and should not be admitted.

<sup>208</sup> *Desai v Republic* [1971] (note 116 above) Held: Wherever interpretation is required the fact should be recorded together with the name of the interpreter and the languages used.

<sup>209</sup> See *Rex v Gutosi s/o Wamagale* (1947) 14 EACA 117: by reason of the failure to call the interpreters as witnesses, the statement of the appellant to a superintendent of police was inadmissible as evidence. This was a case of double interpretation and the court found that the superintendent could only speak to the second interpreter. What was taken down was the interpretation of the second interpreter. The two interpreters had to be called as witnesses. See also *Antoine Ernesta v R* (1962) (note 183 above) Newbold JA: to accept as a safe foundation for a conviction of perjury a record in English of what a witness said in another language without either the record disclosing that English was the result of the sworn interpretation or the interpreter being called would be contrary to the basic principles on which criminal justice is administered.

<sup>210</sup> See Section 63 Evidence Act (note 172 above).

<sup>211</sup> Section 62 Evidence Act *ibid*.

<sup>212</sup> Only in circumstances under Section 64 (1) a, c, & d Evidence Act *ibid* which include (a) where the original cannot be obtained, (c) where the original has been destroyed or lost; (d) where the original is not easily movable.

contents. Arguably, the exercise is to verify the accuracy of the contents of a document, as opposed to proof of its contents, but in as far as the interpreter is called to testify to what was recorded in the document, then the exercise should be accorded its natural meaning. Noteworthy, this good practice could lend constructively to the criminal procedure of international criminal tribunals. As a mechanism of monitoring accuracy of translation, it advances the cause of trial fairness.

#### (cc) Status of a translation

The principle is that documentary evidence against the person who executed the document must be proved by primary evidence –the document itself.<sup>213</sup> A translation is a counterpart of the original and only qualifies as evidence of a secondary nature if brought against a party who did not execute it.<sup>214</sup> Further, a translation does not suffice as evidence of a statement; the original has to be adduced in evidence in the language used by the declarant. This view is illustrated by the case of *Ochau s/o Osigai v Reginam*.<sup>215</sup> The appellant was taken to Kumi Police Station (a predominantly *Acholi* - speaking upcountry location in Uganda). A sub-inspector of police charged him with murder and cautioned him. On that occasion, the appellant made a statement orally in *Ateso*, his mother tongue, in the presence of the sub-inspector. There was no police officer at Kumi Police Station of the rank of corporal or of a higher rank (authorised by law to record statements), who was literate in *Ateso*. Accordingly, a police constable (Okoropot) acted as *Ateso*-Swahili interpreter. When the appellant made his statement, it was recorded by Okoropot in *Ateso*. The police constable (Okoropot) then orally translated the statement into Swahili and the sub-inspector recorded it in that language and subsequently made a written translation of it in English. The interpreter read back the statement to the appellant who, according to the sub-inspector and the constable, agreed that it was correct and thumb-marked both the original *Ateso* version and the Swahili version. The interpreter testified that he had read the statement back to the appellant in *Ateso*. Although the original recording in *Ateso* was described by the interpreter in his evidence, it was not in fact put into the court as an exhibit. What were tendered were the Swahili and English translations. An appeal against the conviction for murder lay to the EACA from the High Court of Uganda. Counsel for the defence objected to

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<sup>213</sup> Sections 63 & 61 Evidence Act *ibid* respectively.

<sup>214</sup> See Section 62 (d) Evidence Act *ibid*.

<sup>215</sup> [1956] EACA 586.

the admission of the Swahili translation (by inference to the English translation made from it). Counsel however did not call the appellant as a witness or elicit an unsworn statement from him on the trial of the issue. When eventually the appellant spoke on the merits he said ‘Okoropot did not translate my statement properly to the sub-inspector. He asked me to thumb-mark the statement and then read it back to me in Swahili: I don’t understand Swahili. When the statement was read back I denied that it was correct. At the preliminary inquiry, the interpreter asked me if I had made a statement to the police and I said ‘No’. When the magistrate closed the case he said ‘You can say your words before the High Court.’ Bacon JA reaffirmed that a translation is a counterpart of the original by holding that -

the appellant was in effect contending that the Swahili and English translations did not in fact represent a confession which could properly be attributed to him at all, but only alleged translations of a recording of something which he was supposed to have said but which, being ignorant of Swahili, he had no means of checking...the true construction of the rule pertaining to statements to police officers is that, where a police officer literate in the language of the person whose statement is to be taken is available, as was Okoropot in the instant case, the statement recorded by him in that language is the statement which should be produced at the trial as the utterance of the person concerned. There must, of course, also be an English translation, duly proved by the translator; but neither that nor any other translation should be treated as a substitute for the original version. We think that that is the safe and sound rule of practice which should prevail.<sup>216</sup>

*(vii) Examination & cross-examination of witnesses*

Every accused person must be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.<sup>217</sup> The mandatory provision of the opportunity to a party to adduce evidence through witnesses and challenge evidence adversely given by the other party at the trial is reiterated in Section 136 (1) of the Evidence Act.<sup>218</sup> The exercise of the

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<sup>216</sup> Ibid.

<sup>217</sup> Article 28 (3) (g) Constitution (note 17 above). This requirement is further reinforced by Section 72 & 75 TIA (note 85 above). See also *Kato Sula v Uganda* [2001] KALR 46.

<sup>218</sup> See *Uganda Co-operative Transport Union Ltd v Roko Construction Ltd* [1997] KALR 131, 132 Tsekooko JSC, See also *Raphael Kiiza & Anor v Uganda* [1995] KALR 101, 106 Ouma J: the failure by

guarantee to examine and cross-examine witnesses requires vigilance on the part of the accused person. It has been affirmed that where a person declines to avail her-or himself the opportunity to put their essential and material case by cross-examination, it must follow that that person against whom testimony has been given believes that it could not be disputed at all.<sup>219</sup>

The ability to examine a person is a subject of communicative capacity; language is a significant determinant. Language factors which affect examination of witnesses at the international criminal tribunals, as discussed in chapter 4, also affect courts of Uganda. Interpretation as an aid to cross-examination of witnesses has particularly proven inhibitive; the pace of questioning is slowed down and witnesses have an opportunity to think through their responses hence jeopardising the truth finding process. Cross-examination is only effective when counsel leads the witness through a communicative process free of premeditation and bias.

There are rare situations where the language barrier cannot be circumvented and the evidence of witnesses cannot be taken. Examples include where the witness speaks an exceptional language for which no interpreter can be obtained locally. Considerable challenges to the courts also arise from persons with speech disabilities. As a general rule, a witness who is unable to speak may give their evidence in any other manner in which they can make it intelligible, as by writing or by signs; evidence so given is deemed to be oral evidence.<sup>220</sup> However, the sign language used by the majority of dumb persons is 'home-made' and only intelligible to persons close to them. 'Home-made' sign language cannot be relied on as a mode of adducing information of evidential value because such evidence cannot be tested fully through cross-examination. The court would also not have the capacity and opportunity to monitor interpretative performance in such cases.

A similar but bigger challenge is presented by deaf-dumb illiterate witnesses; these are competent witnesses<sup>221</sup> but it may be practically impossible to examine them. In *Hamisi s/o*

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the trial magistrate to hear the evidence of two defence witnesses as, to the extent it denied the appellants a fair trial, occasioned a failure of justice. It was an irregularity that vitiated the proceedings.

<sup>219</sup> *Mafujja Leus v Uganda* [1995] KALR 202, 206.

<sup>220</sup> Section 118 Evidence Act (note 172 above): Dumb witnesses.

<sup>221</sup> Section 118 Evidence Act *ibid* also applies to deaf-dumb witnesses. The EACA in *Hamisi s/o Salum v Rex* (1951) EACA 217 held that although there is no provision in the Evidence Act precisely covering the case of dumb-deaf witnesses, there is no reason why the provision relating to the dumb cannot be applied. A deaf-mute is not incompetent as a witness if he can be made to understand the nature of an oath, and if intelligence can be conveyed to and received from him/her by means of signs.



*Salum v Rex*,<sup>222</sup> the appellant was convicted of murder. Evidence was given for the prosecution by a deaf-mute as an eye witness of the alleged murder. The magistrate having noted that the witness was dumb, her evidence was given through the medium of a sworn interpreter, who was in fact her sister, and who claimed to be able to interpret the signs and noises made by the witness. The EACA agreed that a deaf-dumb witness may be examined through the medium of a sworn interpreter who understands the signs. However, in that case, the learned trial judge, having tested the proposed method of interpretation, and found it of a very crude type, should have made an order, as it was entirely within his discretion to do, that the evidence of the witness should be excluded.<sup>223</sup> The underlying consideration is that court should be able to understand and follow the testimony of the witness, which was not possible in the circumstances. Such linguistic barriers deprive the courts of substantial evidence, hence presenting obstacles to fair trial.

#### **(e) Conclusion**

The International Crimes Division (ICD), a domestic court of ‘international character’ is facing language difficulties, which hinder its ability to ensure fair trial. Despite the uniqueness of the court, it has not been detached from the realities of its context. The court adjudicates cases in a diversely multilingual jurisdiction with approximately 45 languages and several dialects. Uganda has no national language; cultures are also diverse. The country has a turbulent legal history characterised by adapting a foreign language and legal order. The language of trial, which is English by law, is not well-known to a greater proportion of the population. The constitution emphasises that judicial power is derived from the people of Uganda and is to be exercised by the courts in the name of the people and in conformity with law, and with the values, norms and aspirations of the people (Article 126). With the ability of native languages to propel legal discourse being demonstrably clear, the language of court needs to be harmonised with the foundations and aspirations of judicial power.

The constitution of Uganda also guarantees language fair trial rights within the framework of minimum rights of the accused person provided for in Article 28 and expounded in chapter 3. Uganda’s obligation to ensure language guarantees is reinforced by its commitment to the

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<sup>222</sup> (1951) *ibid.*

<sup>223</sup> *Ibid.*

International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights. Every person who is charged with a criminal offence is entitled to (a) the presumption of innocence until proven guilty or until that person has pleaded guilty. If a person confesses to an offence or pleads guilty, this should be done in accordance with the prescribed procedure which emphasises the use of the language that the accused person is best knowledgeable in, as the medium of communication. (b) Information on the nature of the offence in the language that the person understands; (c) adequate time and facilities for the preparation of their defence; (d) appearance before the court in person or by a lawyer of their own choice; (e) legal aid, in case of a capital offence; (f) free assistance of an interpreter if that person cannot understand the language used at the trial; and (g) facilities to examine and cross-examine witnesses.

The first trial of the ICD (of Thomas Kwoyelo) illustrates the struggles of the High Court and the judiciary as a whole in ensuring language fair trial rights. There is lack of structural, financial, and human resources to foster a professional standard of judicial interpreting and the making of the court record of the level exhibited by international criminal tribunals. The evidence of persons with speech disabilities has presented considerable challenges in this regard (*Hamisi s/o Salum v Rex*). Consequently, courts have improvised ways of ensuring that trials proceed within the available means. These strategies raise questions which impact on trial fairness. (i) Interpretation is only done in situations where it is strictly required; trials on technical questions of law are left to the professionals sometimes to the exclusion of the parties for want of interpretative assistance. (ii) The courts have ignored appearances of bias and permitted the services of police officers as interpreters so long as impartiality can be guaranteed in reality. Whoever alleges a contrary view must prove it. (iii) Direct interpretation: judicial officers undertake interpreting tasks. The practice has been held undesirable but it is accepted (*Lutwama David v Uganda*). (iv) Trial can proceed even when the accused person cannot be made to understand the proceedings. The physical presence of the accused, if represented suffices (*Thomas Kwoyelo alias Latoni v Uganda Constitutional Petition (Reference)*). However, such compromises of fair trial standards are meant to maximise the available means to ensure that at the bare minimum, there are trials (*Cheung Shing v Reginam*).

Noteworthy are some good practices in Uganda's criminal procedure that advance language fair trial rights. Examples include (i) statements recorded through interpretation are subjected to independent judicial verification before they can be read in open court. In the absence of the interpreter's evidence, a statement made through an interpreter is hearsay (*Oduol & anor v Republic*). (ii) The involvement of local persons as advisors to the court (assessors) on the accuracy of interpretation minimises cost and time which would be needed to involve expert linguists. (iii) A translation is of secondary evidential value. Documentary evidence is proved by the original. These practices could inform criminal procedure in other countries and among international criminal courts.

In conclusion, the challenges of the International Crimes Division in assuring the language fair trial rights of trial participants represent systemic problems in the judiciary and the nation, requiring a holistic approach. Among others, there is need to foster a professional standard of judicial interpreting, allocate adequate resources to all courts of law, and to tackle national language reform.

## CONCLUSION

The study of the impact of language diversity on the right to fair trial in international criminal proceedings explores a long-standing question since the Nuremberg trials. The implications of the ‘Babylonian’ situation at the Nuremberg and Tokyo tribunals<sup>1</sup> on due process were underestimated and are continually replicated in contemporary international criminal proceedings at all levels. International criminal trials are densely multilingual, thus constituting linguistic barriers that raise the question of trial fairness. The language debate in international criminal proceedings is characterised by three principal discourses: (i) culture; (ii) fair trial rights; and (iii) translation.

A trial is a communicative process. Language informs its integrity and outcomes and is also the means of realising all the rights of the accused. In fact, language is a core foundation for justice. The competence of the court to ensure fair trial is dependent upon its ability to maximise communication. However, language is a pervasive and dynamic element of the legal process.<sup>2</sup> Records of international criminal trials reveal misunderstandings resulting from cultural distance;<sup>3</sup> misinterpretation;<sup>4</sup> inconsistencies and contradictions between pre-trial statements made by witnesses following interviews with investigators and their evidence at trial;<sup>5</sup> exclusion of evidence due to translation complexities;<sup>6</sup> and litigation on language matters.<sup>7</sup>

Multilingualism particularly instigates multicultural effects on the legal process. The different legal and social cultures of international criminal trial participants influence the way the evidence is perceived, communicated and applied. Social and cultural factors such as

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<sup>1</sup> International Military Tribunal (IMT) and the International Military Tribunal for the Far East (IMTFE) respectively.

<sup>2</sup> JN Levi & AG Walker (eds) *Language in the Judicial Process* (1990) 2.

<sup>3</sup> CDF Transcript - *Prosecutor v Moinina Fofana & Allieu Kondewa* SCSL-03-14-I (3 November 2004) paras 11, 12, 19, 20.

<sup>4</sup> AFRC Transcript - *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu* SCSL-2004-16-PT (2 October 2006) 81; AFRC Transcript (5 October 2006) 54, Consolidated List of Language & Other Corrections to the Transcripts of the Proceedings in Open Session Volume 120 Part A (IMTFE).

<sup>5</sup> *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T Judgment 2 September 1998 para 137.

<sup>6</sup> *Prosecutor v Momčilo Krajišnik & Biljana Plavšić* IT-00-39 & 40-PT Decision on Defence Motion to Exclude Evidence and Limit Scope of Trial Krajišnik and Plavšić (18 June 2002).

<sup>7</sup> *Prosecutor v Ferdinand Nahimana, Hassan Ngeze & Jean-Bosco Barayagwiza* ICTR-99-52-T (Media Case) Decision on the Prosecution’s Application to admit Translations of RTLM Broadcasts & Kangura Articles 3 June 2003.

superstitions and the oral tradition of indirectness among witnesses have affected the standards of distinguishing credible witness testimony.<sup>8</sup> Communication across legal cultures in international criminal proceedings also intensifies errors in translation.

Of note, linguistic fair trial guarantees are enforceable rights embedded in the minimum rights. The jurisprudence of ICTs demonstrates prioritisation of the minimum guarantees, making the framework of protection of fair trial rights in international criminal practice a viable structure for protecting linguistic rights in legal proceedings. Language requirements characterise the minimum rights as either explicit or implied terms. Explicit expressions of language guarantees include: (i) the right of the accused to information on the nature of the charges against them in a language that they understand and, (ii), the right to the assistance of an interpreter. Implicitly: (i) language is a significant determinant of adequate time and facilities for the preparation of a defence; (ii) language perspectives affect the expeditiousness of trial; (iii) actual presence at trial implies ability to understand and participate in the proceedings; (v) examination and cross-examination of witnesses are communicative processes; (vi) lack or limited understanding of the language of the court could lead to self-incrimination. The International Criminal Court has drawn significant lessons from the experiences of the tribunals for Rwanda and former Yugoslavia. It grants rights of a higher degree, hence raising the standards of compliance among the national jurisdictions that are State Parties to the Rome Statute.<sup>9</sup>

International criminal tribunals have conferred upon accused persons the right to use their own language(s) in the proceedings. The courts are, however, faced with competing priorities in balancing the procedural rights of the accused with the overarching right to an expeditious trial and the interests of the international community in ensuring the prompt administration of justice. Further, assessing the level of linguistic comprehension of a person is problematic. There is no standard criterion for determining that the communication needs of a person are adequately met. The mandate of international criminal tribunals to fulfil human rights is also constrained by their inability to enforce orders and requests against states and the lack of a legislative framework for

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<sup>8</sup> *Prosecutor v Jean-Paul Akayesu* (note 5 above) para 148 (ICTR), See also CDF Transcript (note 3 above) 3 November 2004 paras 27, 28 – Evidence of CDF witness TF2-014 (Special Court for Sierra Leone).

<sup>9</sup> See *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* ICC-01/04-01/07 Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled Decision on the Defence Request Concerning Languages (27 May 2008) para 49.

remedies to accused persons in the constitutive statutes. There is also need to accord human rights claims the urgency and significance that they require.

Translation is a crucial handmaid to fair trial in international criminal proceedings. It is an instrument of investigation of international crimes, it is an aid to participation in trial and in many cases, it forms the court record. However, the impact of interpretation on due process is an intrinsic aspect that cannot be solved by any practical means.<sup>10</sup> Translation is a complex process that consumes a lot of trial time, overburdens trial participants, invokes the issue of bias in communication - the fundamental means of trial, and increases the cost of justice. ICT translators endure highly pressurised working conditions and operate so hurriedly that accuracy is difficult to achieve. They deal with a broad spectrum of languages, most of which are neither studied nor standardised. Shortfalls in translation such as alterations, omissions, additions and errors distort the evidential foundations and facts of cases. Translation also interferes with the communicative process. The interpreter is an intrusive element in the courtroom setting, whose invasiveness inhibits control over testimonies.<sup>11</sup> It deprives the court of the opportunity to evaluate paralinguistic forms of communication, such as body language, tone of voice, hesitations and other manifestations that characterise the demeanour of witnesses. The criteria for evaluating the impact of translation on trial fairness are subjective, but in all cases they should constitute an assessment of whether it ensures or inhibits the minimum guarantees of fair trial.

National prosecution of international crimes at the International Crimes Division of the High Court of Uganda illustrates systemic constraints to the capacity of the judiciary in assuring language fair trial rights. Linguistic rights are entrenched in several facets of Uganda's legal framework, such as the fair trial provision in the Constitution,<sup>12</sup> the international legal instruments to which Uganda is a party,<sup>13</sup> rules of criminal procedure and evidence, practice directions and common law. However, there is a lack of structural, financial and human resources to foster a professional standard of judicial interpreting and the making of the court

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<sup>10</sup> F Gaiba *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (1998)100.

<sup>11</sup> S Berk-Seligson *Bilingual Court Proceedings: The Role of the Court Interpreter* (2002) 156.

<sup>12</sup> Article 28 Constitution of Uganda, 1995.

<sup>13</sup> International Covenant on Civil and Political Rights, 1966, entered into force on 23 March 1976. Uganda ratified the covenant on 21 June 1995, the African [Banjul] Charter on Human & Peoples Rights, 1981, entered into force on 21 October 1986. Uganda ratified the charter on 10 May 1986.

record. The language of the court (English) is irreconcilable with the linguistic abilities of the people, requiring language reform to consolidate the foundations of judicial power.<sup>14</sup> Linguistic underdevelopment affects the ability of persons to participate in court proceedings. The International Crimes Division emerges within the framework of the first test to the complementarity principle of the Statute of the International Criminal Court. It illustrates the synergies between international criminal practice and criminal procedure in national jurisdictions. Whereas the ICD could take significant lessons from the ICTs such as streamlining translation especially of court process and documents of evidential value; the ICTs may consider the practice in Uganda of engaging assessors and requiring the evidence of the interpreter before admitting a statement recorded through interpretation into evidence.

Language is a crucial determinant of due process in international criminal proceedings, requiring significant regard towards a standard of full realisation of fair trial. It is suggested that:-

- States should be mindful of the linguistic abilities of judges (whether they can speak the official languages of the court and conduct hearings in those languages) before electing them.
- The person adducing documentary and video evidence should have the primary responsibility of translating that evidence. It is only when the authenticity of the translation is disputed that the registry should intervene. This would save time committed to translation tasks in the course of the proceedings.
- The court should satisfy itself of the competence of interpreters.
- The court should show and maintain willingness to listen to litigants, even when unrepresented, at every stage of the proceedings. The judicial officer should consistently inquire from the accused as to whether they understand the proceedings.
- Indigenous languages should be developed into scientific discourse hence enhancing their potential for legal usage. The likelihood of conducting trials in indigenous languages would minimise the incidence of translation in criminal trials at the national level.
- Persons intending to have their documents translated should submit their documents in good time to allow for better translation.
- Professionals and participants need to be sensitised about translation and how best they can work within the system.

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<sup>14</sup> Foundations of judicial power include the values, norms, and aspirations of the people of Uganda, see Article 126 (2), Constitution of Uganda, 1995.

- Uganda should professionalise translation and improve courtroom communication and the system of recording proceedings. Digital recordings provide very high quality audios for future reference.
- Budgetary commitments should be made to translation at the national level so as to attract qualified persons to the profession.
- Editorial services should be provided to unrepresented accused persons.
- The linguistic composition of the staff of an international criminal tribunal should correspond with the capacity of the language services section.
- Legal language should be kept simple and comprehensible.
- Justice professionals should only work in those languages in which they are proficient.
- Justice professionals need to be sensitised about the modalities of translation in the legal process.
- Diversity in language(s) applicable to a particular trial should be minimised, to every possible extent, in constituting case teams and recruiting personnel.



## BIBLIOGRAPHY

### BOOKS

- AB Edwards *The Practice of Court Interpreting* (1995).
- A Gentile, U Ozolins & M Vasilakakos *Liaison Interpreting: A Hand Book* (1996).
- A Klip & G Sluiter (eds) *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia 1993-1998* (1999).
- BA Garner (ed) *Black's Law Dictionary* 7ed (1999).
- BA Garner (ed) *Black's Law Dictionary* 9 ed (2009).
- BJ Odoki *A Guide to Criminal Procedure in Uganda* (1983).
- D Brown *Criminal Procedure in Uganda & Kenya* 2 ed (1970).
- D Brown & Peter APJ Allen *An Introduction to the Law of Uganda* (1968).
- D Cao *Translating Law* (2007).
- D Ntanda Nsereko *Criminal Procedure in Botswana: Cases & Materials* 3 ed (2002).
- DS Giannoni & C Frade (eds) *Researching Language and the Law: Textual Features and Translation Issues* (2010).
- ES Haydon *Law & Justice in Buganda* (1960).
- FE Olsen, A Lorz, D Stein (eds) *Translation Issues in Language and Law* (2009).
- FF Martin, SJ Schnably, RJ Wilson, JS Simon & MV Tusnet *International Human Rights & Humanitarian Law: Treaties, Cases & Analysis* (2006).
- F Gaiba *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (1998).
- F Olsen, A Lorz & D Stein (eds) *Translation Issues in Language and Law* (2009).
- F Poyatos *Non-verbal Communication and Translation* (1996).
- F Poyatos *Non-Verbal Communication across Disciplines: Paralanguage, Kinesics, Silence, Personal and Environmental Interaction* (2002).
- GC Moss 'Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?' in C Binder, U Kriebaum, A Reinisch & S Wittich *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer* (2009).
- *Genocide, War Crimes, and Crimes against humanity: A digest of the case law of the International Criminal Tribunal for Rwanda* Human Rights Watch (2004).
- G Lakoff & M Johnson *Metaphors We Live By* (1980).

- HF Morris & JS Read Uganda: *The Development of its Laws and Constitution* (1966).
- ID Negru ‘Acceptability versus Accuracy in Courtroom Interpreting’ in DS Giannoni & C Frade (eds) *Researching Language & the Law: Textual Features and Translation Issues* (2010).
- I Nakane *Silence in Intercultural Communication: Perceptions & Performance* (2007).
- J Boyd White *Justice as Translation: An essay on Cultural and Legal Criticism* (1990).
- JC Floyd, *International injustice Rwanda, genocide and cover up: the United Nations Media Trial* (2005).
- J Delisle & J Woodsworth (eds) *Translators through History* (1995).
- J Hagan *Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal* (2003).
- J Lambert ‘The Status and Position of Legal Translation: a Chapter in the Discursive Construction of Societies’ in FE Olsen, A Lorz, D Stein (eds) *Translation Issues in Language and Law* (2009) 76.
- J Lehman West’s Encyclopedia of American Law (2005).
- JN Levi & AG Walker (eds) *Language in the Judicial Process* (1990).
- K McAuliffe ‘Translation at the Court of Justice of the European Communities’ in FE Olsen, A Lorz, D Stein (eds) *Translation Issues in Language and Law* (2009).
- MJ Bossuyt *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (1987).
- ML Andersen & HF Taylor *Sociology: Understanding a Diverse Society* 4 ed (2008).
- M Swart *Judges & Lawmaking at the International Tribunals for former Yugoslavia & Rwanda* (2006).
- NA Combs *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010).
- Ntanda Nsereko *English-Luganda Law Dictionary* (1993).
- O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2008).
- PR Piccigallo *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (1979).
- S Berk-Seligson *Bilingual Court Proceedings: The Role of the Court Interpreter* (2002).
- S Berk-Seligson *The Bilingual Courtroom: Court Interpreters in the Judicial Process* (1990).

- SJM Donnelly *The Language and Uses of Rights: A Biopsy of American Jurisprudence in the Twentieth Century* (1994).
- T Maga *Judgement at Tokyo: The Japanese War Crimes Trials* (2001).
- T Kelsall *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (2009).

## ARTICLES

- A De Elera 'What Place for Linguistic Diversity, Language, Equality, and Rights in the Language Arrangements of the European Union?' (2005) 12 *Maastricht Journal of European & Comparative Law* 271.
- B Danet 'Language in the Legal Process' (1980) 14 *Law & Society Review* 445.
- C Brown-Blake 'Fair Trial, Language and the Right to Interpretation' (2006) 13 *International Journal on Minority & Group Rights* 406.
- C DeFrancia 'Due Process in International Criminal Courts: Why Procedure Matters' (2001) 87 *Virginia LR* 1381.
- D Eades (ed) *Language in Evidence: Issues Confronting Aboriginal & Multicultural Australia* (1995).
- D Harris 'The Right to a Fair Trial in Criminal Proceedings as a Human Right' (1967) 16 *International & Comparative Law Quarterly* 352.
- G Sluiter 'International Criminal Proceedings and the Protection of Human Rights' (2003) 37 *New England LR* 935.
- HR Hone 'The Native of Uganda and the Criminal Law' (1938-39) *Uganda J* Vol VI 1.
- I Langford 'Fair Trial: The History of an Idea' (2009) 8 *Journal of Human Rights* 38.
- IL Bostian 'Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda' (2005) 12 *ILSA J of Int & Comp L* 1.
- J Almqvist 'The Impact of Cultural Diversity on International Criminal Proceedings' (2006) 4 *J Int'l Crim Just* 745.
- JC Floyd III & A Jolles 'International Criminal Tribunals: Dispensing Justice or Injustice?' *Revue québécoise de droit int'l (Hors-série)* (2010) 303.
- J Cotterill 'Reading the Rights: A Cautionary Tale of Comprehension and Comprehensibility' (2000) 7 (1) *Forensic Linguistics* 4.

- J Kamatali 'From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans (2005) *New Eng J.Int'l & Comp. L* 89.
- J Karton 'Lost in translation: International Criminal Tribunals and the legal implications of interpreted testimony' (2008) 41 *Vanderbilt Journal of Transnational Law* 1.
- J Katz 'International Criminal Courts and Fair Trials: Difficulties and Prospects' 27(2002) *Yale J of Int L* 111.
- JS Moss 'Examination and Cross Examination of Witnesses' (1959-1960) 5 *South Texas Law Journal* 83.
- K Henrard 'Language & the Administration of Justice: The International Framework' (2000) 7 *International Journal on Minority & Group Rights* 75.
- M Azuma 'Positive and Negative Effects of Mother-tongue Knowledge on the Interpretation of Figurative Expressions' (2009) 15 *Papers in Linguistic Science* 165.
- M Boodman 'The Myth of Harmonisation of Laws' (1991) 39 *American J of Comp L* 699.
- M Damaška 'What is the Point of International Criminal Justice?' 83(1) *Chicago-Kent Law Review* 329.
- M Garre *Human Rights in Translation: Legal Concepts in Different Languages* (1999).
- ML Larson *Meaning-Based Translation: A Guide to Cross-Language Equivalence* (1998).
- M Phelan *The Interpreter's Resource* (2001).
- NA Combs *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010).
- NS Nicholson 'The Law on Language in the European Union: Policy Development for Interpreting/Translation Services in Criminal Proceedings (2009) 16 (1) *International Journal of Speech, Language & the Law* 59.
- PCW Chan 'Important Decisions of Hong Kong Courts in 2002 (Part I): Language Rights, Foreign Offenders: Sentencing, and Immigration and Refugee Laws' (2005) 4 *Chinese Journal of International Law* 219.
- PM Wald 'Running the Trial of the Century: The Nuremberg Legacy' (2006) 7 *Cardozo LR* 1559.
- PM Wald 'The International Criminal Tribunal for the former Yugoslavia comes of age: Some Observations on day to day Dilemmas of an International Court' (2001) 5 *Journal of Law and Policy* 87.

- R Cryer ‘A Long Way from Home: Witnesses before International Criminal Tribunals’ (2007) 4(1) *Int Commentary on Evidence* 1.
- RW Shuy & JJ Staton ‘Review of Instruments for Assessing Understanding & Appreciation of Miranda Rights’ (2000) *Forensic Linguistics* 131.
- S Blanchard ‘An Assessment of the ECCC Order on Translation Rights & Obligations’ (2008) *Documentation Centre of Cambodia* (DC-CAM).
- W Schomburg ‘The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights’ (2009) 8 *North Western Uni. Journal of International Human Rights* 1.
- X Arzoz ‘Language Rights as Legal Norms’ (2009)15 *European Public Law* 554.
- X Arzoz ‘The Nature of Language Rights’ (2007) *JEMIE paper* (Issue No 2/2007) 1.

### **COMMENTARIES/REPORTS**

- Alternative Basic Education for Karamoja: A Review Report (August 2006) Submitted to Save the Children in Uganda by Development Education Consultancy.
- CCPR General Comment No 8 ‘Right to Liberty and Security of Persons’ (30 June 1982).
- E Nahamya ‘Combating Gender-Based Crimes: Uganda’s Efforts to Strengthen its Legal Status’ (6-7 March 2009) (Conference Presentation) Gender Justice Forum, Dakar, Senegal.
- General Comment 13 ‘Equality before the Courts and the Right to a Fair and Public Hearing by the Independent Court established by Law’ (13 April 1984).
- General Comment 32 ‘Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court established by Law’ 27 July 2007 UN Doc CCPR/C/GC/32.
- Preparatory Work on Article 6 of the European Convention on Human Rights, Information Document Prepared by the Secretariat of the European Commission of Human Rights DH(56)11 Strasbourg (8 October 1956)  
([http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART6-DH\(56\)11-EN1338886.PDF](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART6-DH(56)11-EN1338886.PDF)).
- General Comment No 31 [80] ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ CCPR/C/21/Rev1/Add 13 (26 May 2004).
- Report of the Preparatory Committee on the Establishment of the International Criminal Court A/CONF 183/2/Add 1 (14 April 1998).

- Report of the Secretary-General pursuant to paragraph 2 of SC Res 808(1993), UN Doc S/25704(1993).
- Report on the Special Court for Sierra Leone Submitted by the Independent Expert Antonio Cassese (12 December 2006) (<http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&>).

## WEB SOURCES

- FW Juuko & C Kabonesa ‘Universal Primary Education (UPE) in Contemporary Uganda: Right or Privilege?’ (2007) HURIPec Working Paper No 8 (May 2007) ([http://huripec.mak.ac.ug/working\\_paper\\_8.pdf](http://huripec.mak.ac.ug/working_paper_8.pdf)).
- K Alfisi ‘Language barriers to justice’ Washington Lawyer (April 2009) 20 (<http://www.legalaiddc.org/pressroom/documents/WashingtonLawyer409LanguageBarriersToJustice.pdf>).
- K Sanin & A Stirnemann ‘Child Witnesses at the Special Court for Sierra Leone’ (March 2006) ([http://socrates.berkeley.edu/~warcrime/documents/ChildWitnessReport\\_000.pdf](http://socrates.berkeley.edu/~warcrime/documents/ChildWitnessReport_000.pdf)).
- NS Nicholson ‘Interpreting for the International Criminal Court: Linguistic Issues and Challenges’ EULITA Conference (November 2009). (<http://eulita.eu/sites/default/files/Interpreting%20at%20the%20ICC.pdf>).
- S Blanchard ‘An Assessment of the ECCC Order on Translation Rights and Obligations’ (2009) Documentation Center of Cambodia’ ([http://www.cambodiatribunal.org/CTM/Ieng%20Sary,%20OCIJ,%20Order%20Concerning%20Translation%20Rights%20and%20Obligations%20of%20the%20Parties%20\(20%20June%202008\).pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avPIxmRZP6FzDQzg3&phpMyAdmin=KZTGHmT45FRCAiEg7OLlzXFdNJ4](http://www.cambodiatribunal.org/CTM/Ieng%20Sary,%20OCIJ,%20Order%20Concerning%20Translation%20Rights%20and%20Obligations%20of%20the%20Parties%20(20%20June%202008).pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avPIxmRZP6FzDQzg3&phpMyAdmin=KZTGHmT45FRCAiEg7OLlzXFdNJ4)).
- S Horwitz ‘The Tokyo Trial’ (November 1950) 465 *International Conciliation* 473.
- V Tochilovsky ‘Globalizing Criminal Justice: Challenges for the International Criminal Court’ (2003) 9 *Global Governance* 291.
- W Jiang ‘The Relationship between Culture and Language’ (October 2000) 54 *ELT Journal* 328 (<http://eltj.oxfordjournals.org/cgi/reprint/54/4/328>).
- X Arzoz ‘Language Rights as Legal Norms’ (2009) 15 *European Public Law* 541.

- Z Wanhong 'From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial (on the sixtieth anniversary of the Nuremberg Trials)' (February 2006) 27 *Cardozo LR* 1673.

## **ANNEXURE**

### **Respondent 1001**

**Interview date: 22 February 2011.**

#### **Qn 1: What are the challenges of conducting a trial in several languages?**

Under normal circumstances, the judges should be proficient in both languages of the court, but quite often, nominations are made by states without regard to such practical considerations. The judges speak different languages and may not be proficient in both working languages of the court. Even in cases where the judges are fluent in both languages, the level of knowledge of each language may vary. A particular judge may lack the level of command required to propel a real debate. Some judges may not even have sufficient linguistic ability to follow the case and conduct a trial in one of those languages. Problems of translation arise within the bench itself since the official languages are more than one. At the ICTY, there is only one judge who can conduct a trial in both languages.

Chamber deliberations: normally, chamber deliberations are secret and the judges prefer to be by themselves (without interpreters for fear of any possibility of manipulating proceedings or rule out any possibility of mistakes). At the stage of deciding the sentence, no interpreter, whatsoever, is allowed in; just to secure the confidentiality of the deliberations. The judges have to deal with the linguistic barriers. There is a problem in understanding one another, and in such cases, linguistically competent judges may have to explain to the other judges. What if the judge with the high command of the language manipulates the others? That same judge is usually asked to be the one to write down what has been agreed upon.

During proceedings, participants have to stay alert and do the corrections in the interpretation by following both what is said in the source language and the target language. However, they only raise queries if what is said jeopardises their case, otherwise, they remain silent.

The scope of certain expressions has been disputed. These are expressions developed and used in the specific context of the conflict such as military jargons. In the conflict in Yugoslavia, 'everyone go everywhere' was used to mean 'spread and kill all Muslims that are around the advance line'.



Bias of interpreters: there may be inaccurate interpretation, but there have been no proven cases of bias.

Errors in interpretation may arise from people speaking too fast and therefore the proceedings have to be summarised.

Witnesses manipulate the complex process of communication that involves sophisticated technology by asking for repetition, as they build up what they want to say.

Translation always delays the appeal process because every judgement is issued in one language with the others as translations.

Translation of expert reports consumes a considerable amount of time.

**Qn 2: What strategies has the court devised in dealing with linguistic hurdles?**

The court always decides that appeal on the final judgement is upon release of the translation, but the accused must meet the time limit of filing. In situations where the appellant does not understand the language of the original judgment, they would file a preliminary brief but hearing the appeal would not proceed until the translation is released and the defence is offered a reasonable opportunity to make the relevant adjustments.

In determining linguistic bearings, court is guided by the needs of the defence as a matter of priority. This is done considering the fact that the prosecution has a broad spectrum of lawyers, from the whole world, to choose from, which the defence does not have. The defendant, on the other hand, would often prefer to choose counsel that would speak their own language.

**Qn 3: What would you recommend?**

States parties should be alive to the linguistic abilities of judges (whether they can speak the official languages and conduct hearings in those languages) before electing them.

**Respondent 1002**

**Interview date: 22 February 2011.**

**Qn 1: What are the challenges of working in several languages in a single trial?**

The major challenges are of a technical nature. A lot of time is invested in mechanisms to enable the trial to proceed in many languages.

Words with no equivalents in interpretation. There are words that have no equivalents in *Kiswahili* or *lingala*, and each time they are used, a lengthy explanation of those words has to be given, which is time consuming.

Bilingual judges are extremely rare and knowledge of other languages among judges is low in many instances. There is need for interpreters even in exchanges among judges themselves. This leads to caucusing and side deliberations among judges that share a similar language.

The court is overburdened by translation tasks. We are totally dependent on interpretation. In the *Katanga* case, the chamber had to listen to videotaped evidence. The audio was in Swahili, and the prosecution, which tendered it, provided transcripts of the audio together with a translation. The defence objected to having the translation tendered in the evidence because the translation was done by the prosecution and therefore likely to be compromised. The quality of the videos was also not good and the translators could not interpret them. The court had to proceed by only listening to the audio without seeing what was happening.

**Important remarks on the significance of language to legal process**

The French legal mind is expressed in the French language. The thinking about the evidence is different in the different languages be it English or French. Thinking about the same thing in different languages brings about different issues. I process everything in my own language.

In case of mistakes in interpretation, the lawyers do the correction and if the error favours them, they remain silent.

The court relies totally on translation and on the pleas for correction raised by counsel, and the parties that understand the discrepancies and know when the translation is erroneous. It is the parties that seek the fulfilment of their rights.

Language may also be central to the charges in some cases. For example, in the *Media* case hate speech and propaganda provided the catch words to the conflict.

**Qn 2. What do you recommend?**

As is the policy at the ICTY, the person adducing documentary and video evidence should have the primary responsibility of translating their evidence. It is only when the authenticity of the translation is disputed that the registry should come in. At the ICC, translation is done by the registry hence intensifying delays.

**Respondent 1004**

**Interview date: 23 February 2011.**

**Qn1: From your experience, what are the challenges of linguistic diversity to the trial process?**

I would speak from my experience as a judge in two national jurisdictions.

The official languages of international criminal courts, usually English and French are determined by the international community. The two languages have already developed a rich legal vocabulary; they are also presumed to have a high level of scientific advancement and are therefore capable of advancing the goals of certainty and precision, which are central to legal practice.

The laws are also written in those languages so it is more convenient to proceed in those languages.

At the national level, the laws are written in foreign languages and official languages of national courts follow suit. Professionals are therefore obliged to function in those foreign languages. The language of the court is usually foreign. On the other hand, litigants speak local languages. Translation is therefore a matter of necessity. In jurisdictions where only a few magistrates understand the local language, much depends on the correctness of the interpretation. Ironically, all participants might share a common local language but the proceedings have to be conducted in the official language of the court.

In proceedings at the national level, the presiding judge could know the language of the parties and could therefore correct any mistakes. The situation at the international level is more complex. The process of dual interpretation (English to French, and French to local language) could cause misinterpretation. If a presiding officer is not vigilant in ensuring accuracy of interpretation, there could be miscarriage of justice.

At the national level, trained interpreters are not always available especially in remote areas; there is a temptation to use police officers as interpreters, some of whom might have been investigators in the cases being handled.

Due to lack of proper understanding of proceedings, the accused could incriminate themselves in unintended guilty pleas.

**Qn 2: What would you recommend?**

The court should satisfy itself of the competence of interpreters.

The court should show and maintain willingness to listen to litigants, even when unrepresented, at every stage of the proceedings. The judicial officer should keep inquiring from the accused as to whether they understand the proceedings.

Indigenous languages can also be developed into scientific discourse. If local languages are developed, they can be used legally. There would be no need for translation or interpretation. Developing local languages and using them in courts of law would also fulfil the right of all persons to their culture and language.

**Respondent 2001****Interview date: 19 March 2011.****Qn1: What are the challenges to interpretation and translation at International Criminal Tribunals?**

I have been an interpreter for several years (number withheld for purposes of anonymity).

Interpretation is a communication profession. The role of an interpreter is to convey the meaning of what is said, without imparting emotion or independent messages. If meaning is not conveyed, the message is not conveyed, there is no communication. The interpreter would not have done their work. Interpretation is of meanings, not merely words. Notably, the interpreters are only supposed to provide support work to the chamber and not to participate in the proceedings. One cannot interpret what they don't understand. If what is said does not make sense to the interpreter, then they should ask for an explanation. However, the interpreter should be alive to perceptions that may arise from requesting for clarification repeatedly such as boring the court, raising issues of competence, and delays. Alternatively, if it is not a perfectly comprehensible expression, they can repeat it as it is. For example, if a witness says 'hmmmm' the interpreter should repeat the same.

An interpreter is supposed to know both the source and target languages perfectly - perfectly bilingual or multilingual. The school of interpretation does not teach languages.

An interpreter is also an intensive researcher. They have to research the subject matter in the speech or text to be translated. By appreciating the general meaning of the document, they are able to interpret words that they do not understand by giving them their contextual meaning.

An interpreter should be able to see the person being interpreted (the one speaking). Their demeanour and lips portray what they are saying. This provides a way around strong accents and unclear speeches. In a modern day courtroom, the person with the floor appears on the monitor of the interpreters. This is not the case for video conferencing or telephone conferences. The quality of the images may be too bad and not portray a clear picture of the speaker.

## **Challenges**

There is always a serious element of stress. The subject matter may be known from the reading materials provided way ahead of time, but the way that subject matter would be presented cannot be predicted.

An international tribunal deals with horrendous crimes. It is an emotion provoking situation, with the accused on one side (who has rights too), and the victims on the other. Each side seeks to prove something. The interpreter is supposed to be a neutral person, just like a chair or table. In principle, the emotions and sentiments of an interpreter are not supposed to affect the message conveyed. Many times, the interpreters do not want to commit the traumatic courtroom tales to memory. Whatever is heard in court can impact on the social lives of interpreters. For example, they may lose appetite or have sleepless nights.

The subject matter (law) is very technical. Intensive research is needed. An interpreter prepares for both the prosecution and the defence.

The sophisticated protocol in the courtroom is intimidating. The level of seriousness, the robes worn, and the atmosphere are very peculiar. The interpreters are usually anxious about what standards of delivery are expected of them.

Secrecy: Documents are not provided by the parties beforehand to the interpreters. For example, judges are hesitant to provide judgements to the interpreters before they are delivered so as to avoid any possibilities of leakage. In addition, these judgments are read very quickly at the rate that interpreters cannot follow.

Technical linguistic complexities: Languages use different forms and different words to convey the same meaning. The target of an interpreter is to find something that is fundamentally equivalent, but not formally identical; the substance and the merits have to be the same but not the form. Literal interpretation is not functional because languages do not use the same alignment of words to convey a particular meaning. The stylistic and idiomatic forms of several

languages are different. This is what leads to one speaking a particular language in the words of another such as speaking French with English words.

### **Qn2: What is the rate of translation?**

The UN standard is 5 pages a day. But in technical fields such as law and science, this rate is varied. For an international criminal tribunal for example, technicalities slow down the work. A translator has got to research quotations, and references. There is a special reference unit that deals with research on references. The references elaborate whatever one is translating. The rate is therefore 3.5 pages per day for legal documents. Currently, there is software which produces every single reference that has already been translated so as to avoid duplication. It also contains those documents that are already in the database.

### **Constituents of the Language Services Section**

Terminology Unit. This unit compiles revision notes and sets standards of how particular words are to be translated. A case law database contains all decisions and judgments.

The Documents Control Unit provides document control assistance by monitoring issues such as who is doing what; follows up on outsourcing, when the document would be ready and also offers reference control assistance-reference numbers. It is also a contact section for outsourcing. Outsourcing is one way of filling human resource gaps. Not many experienced translators are interested in working in places where the tribunals are based. Priority goes to former employees of the tribunal, and those who have previously been engaged by the tribunal and passed the performance test. It is basically documents of a general nature that are outsourced. The technical work is restricted to tribunal staff—certain categories of documents are not outsourced.

Typing pool: This Unit enters all corrections. It also tailors documents according to the UN style, which is different for the different languages.

### **Qn3. What would you recommend?**

Clients should present the documents to the registry on time. There is a lot of time pressure from all parties. Everyone's document is a priority.



**Respondent 2002**

**Interview date: 18 February 2011.**

**Qn1: What is the role of an interpreter?****Tasks of an interpreter**

In summary, an interpreter is supposed to concentrate, listen, understand (process the message in the mind) and speak.

The interpreter has to understand the legal systems (civil or common law), and what is said before conveying the conversion. Normally, they are given documents of what is anticipated to be said prior to the session so that they can familiarise themselves with the context. Linguistic knowledge is applied to the subject of the message. One should be able to draw the sense out of the text, and this involves preparing and reading about the context.

There are usually three interpreters in the same booth who advise and reinforce one another where it is necessary.

**Qn2: What are the challenges of interpreting international criminal proceedings?**

Most interpreters are not legal translators. They are trained as interpreters generally. At first, judicial proceedings were new to the majority of interpreters. It was on the job training for most of them. Initially, the interpreters themselves did not understand what was being said. The terminology was new. Misinterpretation arose from the learning process. Subsequently, basic law courses were offered by the tribunals.

The speaker may, out of necessity, be too fast. For example, if one is reading a book, the rate of proceeding may be high and an interpreter would be compelled to give only a summary of what is being said. In some instances, the bench intervenes to control the speed at which the participants speak by asking the speaker to slow down.

Overlapping speeches: This may arise in cases of argument in the courtroom. The interpreter only interprets the communication of the person who has the floor. Other overlapping deliberations are not captured in interpretation.

Misunderstanding the task of translation: Many professionals are under the misapprehension that translation is just a conversion of words. They therefore present bulky documents to the section and expect quick results. Hurried documents may require that the work is subdivided and distributed to various translators and this may pose challenges of harmonising the various components.

As the tribunal closes, the work load is more. Several judgements are released at almost the same time. Work is being outsourced to outside companies but budgetary limitations of a closing tribunal are equally a problem.

Errors: There may be mistranslations, omissions at the typing pool, or other mistakes. If this be the case, a corrigendum is issued to make corrections. If a party notices a mistake in a document, they can send it back to language services for correction. In case of a transcript, when a court reporter produces the transcript, the team leader (head of interpretation) revises it for any possible errors.

## **Qn2: What does translation involve?**

This is the written exercise. Messages are translated from the source language to the target language (text). A translation is in black and white, one cannot get away with a mistake! Care should be taken to ensure that the conversion is exact.

### *Chain of translation*

First, the document is filed with the registry, with a request for translation.

Court management refers the document to the language section specifically the Documents Control Unit.

It is assigned to a particular translator for action. Translation involves checking references, and verifying details of references made such as page numbers because they may be different in the

various language versions of a particular text. References in decisions, judgements, appeal briefs, and motions must also be cross-checked.

After translation, the document is sent to a reviser. The reviser verifies the accuracy of the translation, checks for inaccuracies of format and content, and improves the language by making it more formal. Without changing the text of the source document, the reviser makes it conform to the formal nature of judicial documents. The reviser is usually more experienced and should have a proven good work record of translation. Most revisers are trained lawyers.

After revision, the document is sent back to the documents control section to be passed on to proof readers. The proof reader's job is editorial. The focus is on the form (the date, right format, font, presentation, omissions, and language).

After proof reading, the document is sent to the typing pool. The final document is typed; any queries are addressed with the proof readers.

The final document is sent to the documents control unit, and marked as a completed document, which is then forwarded to the registry and to the party that requested it.

### **Qn3: What is the rate of translation?**

The UN standard is five pages per day. This applies to an ordinary document such as a letter, but a judicial document entails additional requirements such as checking references, three and a half pages is a reasonable target. Technological advancements have also aided improvements in speed.

Persons requesting the translation usually state the date upon which they expect the translation. Language services would upon assessing the work to be done and the work load at hand, ascertain the possibility of delivering within the specified time. A date is negotiated and once it is agreed upon, language services would have to deliver by that deadline. There has to be proper co-ordination between language services and other organs of the court through the documents

unit. The Language services section has the final word on when the document would be ready. Any disputes are handled administratively by the registrar of the court.

**Qn 4. How does culture factor in translation?**

The writing style of each language is different. For all intents and purposes, the translation should sound like it is originally written in the target language.

**Qn5: What would you say about matching of voices and sex of interpreters with witnesses?**

The party is in court as a witness, what is important is what is said and not how it is portrayed.

**Qn6. What would you recommend?**

Professionals and participants need to be sensitised about translation and how best they can work within the system.

## **Respondent 2003**

**Response received by e-mail on 02 March 2011.**

### Overview

I have tried to split this up into distinct user friendly sections, beginning with my background and training and ending with my current position at\*\*\* [withheld on ethical grounds]. Obviously, this only encompasses my personal experience both in England and in Holland. My colleagues, who have worked in Canada, America and Australia, had very different training and I believe often encounter problems that I do not share, but which I will outline later. In addition, within each section relating to the three different methods of transcription, I have tried to summarise the benefits, pitfalls and remedies.

### 1) My experience of same language transcription

Most modern courtrooms have microphones and digital recording systems, but when I first started you had to rely on your hearing and sit as close to the witness as possible in order to hear their testimony. Originally there was no tape backup and so any words missed were gone forever, or any mishearings or ambiguities could not be checked against the audio and corrected if necessary. If a barrister or a judge queried what a witness said, very often the court reporter would be asked to read back from their shorthand that was printed on a ream of paper that spewed out of the back of the old-fashioned machines. We were, in those days, the only court record.

### Advantages:

There was only one set of ears and only one level of possible error, which as things evolved eventually could then be checked later against the audio in order to produce the final version of the transcript.

### Pitfalls:

There are many accents and local dialects in England and, on a much smaller scale than different languages, this can lead to errors, mishearing of words, interpretation/guesswork in your own head of what you personally believe the witness was trying to say.

### Remedies:

Being English and having worked in many parts of the UK, your ear becomes attuned to the nuances of local English dialects, as well as Scottish, Irish and Welsh accents and to those of

people speaking English when it is not their first language. Also, having the audio recording of the proceedings means that any queries you may have can be checked, or any testimony missing because somebody coughed, or the court reporter was distracted, or someone was speaking too quickly can be added later.

## 2) My experience of one single language interpreted into another

Working for SCSL was my first experience of interpreters and was a difficult learning experience. Some witnesses gave evidence in English, but the majority spoke in Krio and Liberian English and this was interpreted mainly by interpreters from Sierra Leone and Liberia into English which the English court reporters then received in their headsets and wrote down what they heard.

### Advantages:

Interpreters from the same country as the witnesses helped with a much more accurate translation of the testimony, than merely a literal translation that foreign interpreters would not necessarily achieve. The real-time transcript enables counsel in court to very quickly focus on and draw to the attention of the judges areas which may be ambiguous, or that possibly have been interpreted incorrectly.

### Pitfalls:

Fast testimony led to the interpreters speeding up and stumbling over words, sometimes under pressure saying Krio words instead of English, and also strong accents made the delivery of English to the stenographers initially quite poor, but this very quickly improved with training provided by SCSL for the relatively inexperienced interpreters. Testimony was also littered with Krio expressions and sayings, and in addition the ever increasing variations of spellings and pronunciation of African villages, towns, rivers etc, by all the different parties from whatever country led to some confusion on occasions and requests for errata to be issued.

### Remedies:

Digital recordings provided very high quality audio that could be listened to over and over again by the stenographers, but also queries could be referred to the interpreters who would listen in

both English and Krio or Liberian English and correct any mistakes. Any Krio words were spelt for us by the interpreters and any requests for errata were painstakingly checked by the stenographers and usually not agreed to as they were often the prosecution's mistaken recollection or spin on what they wanted the witness to have said.

### (3) My current experience of relay interpretation

At the ICC we now have interpretation from Sango into French and then into English. The stenographers again provide a real-time live transcript, which is later checked against the audio. A final edited transcript is produced approximately 30 minutes after the end of the hearing.

#### Advantages

Evidence is often very slow due to the relay system, which enables the interpreters not to rush their speech and stumble over words. The system also facilitates very accurate verbatim reporting by the stenographers. The real-time transcript again enables counsel in court to very quickly focus on and draw to the attention of the judges, areas which may be ambiguous, or that possibly have been interpreted incorrectly.

#### Pitfalls

This is a 'Chinese whispers' type of system creating the possibility of inaccuracies in the relaying of the initial sense and meaning of the words of the witness and compounding the error as each word is translated into the next language. This has often led to differences and completely opposite meanings of the testimony reflected in the French and English versions of the transcript. Some testimony is not translated and is given in Sango, or French, but this will have travelled through from the witness to the Sango-to-French interpreter and then to the French-to-English interpreter. Even though we usually receive witness statements in advance, place names in Africa and names of friends and family members are often pronounced in several different ways and are then recorded in the transcript as a phonetic spelling, or they may even be said in a way that is completely indiscernible.

**Remedies**

Digital recording again means the stenographers can listen over and over again in Sango, French and English. We also liaise with the French team of reporters if there are anomalies and refer phonetic spellings of place names and people's names to the interpreters. Phrases in Sango can also be checked by the interpreters. Also, if there are queries raised about parts of the testimony as translated in the French and English transcripts, the interpreters can be asked by the judges. However, any indiscernible testimony remains in the transcript.



**Respondent 2005**

**Interview date: 25 February 2011.**

**Qn1. What does translation involve?**

The process of translation involves the actual translation, revision, and proofreading. The document becomes more accurate as it goes through the process. And once it is certified, it is presented as accurate. In some circumstances of urgency, the document is released as a draft (uncertified). However, this is used for in-house purposes such as Associate Legal Officers in drafting documents. Noteworthy, translations of documents delivered by the chamber must be certified. I would rate the accuracy rate at 90 percent. The quality of translation is determined by the responses of the end users; whether there are any complaints.

**Qn 2: What is the role of a translator?**

A translator is an intensive researcher. Before translating a document, the translator has to appreciate the context by reading all the documents relating to the text. For example, if one has to translate a decision, they have to read and understand the motion. The translator needs to have all the references and jurisprudence at hand. All the documents cited have to be read and understood. These documents are determined by the Referencing Unit. The biggest resource in the process is time-time to go through the database and find those decisions, and time to read the documents.

Sometimes the translator may have to go back to the transcript especially in a case where what is written in a judgement is different from what appears in the transcript. A translator does not have power to make such corrections. If however it is suspected to be a mistake in transcription, the video recording is consulted and the mistake rectified.

Judicial translation is peculiar and demanding because every word is significant and must be portrayed precisely because it may be significant to the trial. In some instances, a translator has to read several dictionaries in order to establish the exact meaning of a word. This may involve inquiring from the person that submitted the document for connection to the author or draftsperson for clarification.

The experience of the tribunals is that with time, the translators get used to the terminology of the subject matter. Training was provided and a glossary of key words compiled. Members of the language section team also originate from various parts of the world with various cultural backgrounds and linguistic competencies; they reinforce one another.

**Qn3: What are the challenges to translation in an international tribunal?**

There is so much pressure on translators. Documents are brought in by parties on short notice. The clients do not appreciate what the exercise involves and quite often do not allow enough time for the exercise. It is always crisis management. There is also a tendency to write most documents in English, even among those that are not fluent in the English language, hence overloading the English language translators.

Harmonisation: In cases where the work is overly voluminous, it is subdivided amongst various translators. However, one person has to coordinate the products of all translators and harmonise the language and terminology. In cases where tasks are outsourced, there are often more problems in harmonising the work and reconciling it with tribunal standards. External companies often have no knowledge of the specific terminology used at the tribunal. They may also not have an established procedure of revising and proofreading, which is meant to promote accuracy. At times the outsourced documents are unusable. Examples include the media trial. In such cases, an official of the tribunal has to revise the translation and correct the bulk of mistakes. This is a duplication of resources and waste of time. Outsourcing of documents is at times a result of intense pressure from the chamber. A few orders have been issued by judges demanding quick translation of bulky documents.

Mistakes in originals or erroneous originals: Ideally, a good translation is dependent upon a good original. Some originals are so poorly written and marred by mistakes that good translations are not possible. In some instances, the translation section may send such originals back to the transcriber to have them corrected with reference to the recordings. The parties or authors may be asked to correct their own documents. Some documents exhibit poor writing skills making the translation exercise difficult. It takes more time to work on such documents.

The impending closure of the Tribunals for Rwanda and Former Yugoslavia has posed difficulties of retaining qualified and competent staff. The number of positions is being reduced due to the closing strategy and yet this is the time that many decisions and judgements are being issued. Recruiting new staff members is not a viable solution because they would need training and familiarisation with the system. The language section has resorted to prioritising urgent documents. Each chamber has a co-ordinator who assists in identifying the urgent documents such as appealed judgements, appeal briefs. Every month, a list of priority documents is released by the chamber co-ordinators.

Merger of systems of law: The merger of civil and common law systems at the international tribunals compounds the linguistic challenges. There are often words that cannot be translated because the notions are different in either system.

Ethnic differences and linkages to the conflict: The ethnic complexities of the conflicts addressed by the tribunals are reproduced in their work. There are mixed reactions to interpreters from particular ethnic groups.

**Qn4: What is the rate of translation?**

For translation, the target is five pages a day depending on the complexity of the document. For revision, the target is 3.5 pages a day. However, at times one may not be able to do even one page because of the mode of writing, complexity of the topic, and writing skills of the author. In a case where the document is poorly written, the translator also edits the document. The debate on accuracy of translation should extend to the quality of the original.

**Qn5: What would you recommend?**

Participants should draft documents in the language(s) they are most fluent.

Documents from the parties should be professionally edited.

The linguistic abilities of staff members should be balanced, with half writing in French and half writing in English so as not to overwhelm English translators.



**Respondent 2006**

**Interview date: 26 February 2011.**

**Qn1: What is the role of an interpreter in an international criminal trial?**

An interpreter is a channel of communication or an intermediary that conveys messages to the court, participants, and the public. This is an important function because most witnesses and some accused persons do not speak English.

An interpreter has to listen, understand, and convert the message to the target language in split seconds.

Without interpreters, there can be no proceedings. The credibility of the witness depends on the interpreter's message. The interpreter is to convey exactly what the witness says in the source language without adding, omitting or distorting the meaning in the target language. The core role of an interpreter is to maintain the original meaning of what is said. Exact interpretation is significant in examining witnesses since it might influence the response given. All this requires professionalism that comes through training. Judicial proceedings are particularly demanding.

Conveying emotion: The interpreter conveys the speaker's emotion by using words or the relevant voice tone (voice control). If a witness is crying while talking, the interpreter would tone down their voice to convey the pitiful nature of the message. The witness can also be seen since interpretation is simultaneous. Similarly, other emotions such as aggression are portrayed with an increase in volume. The interpreter is however obliged to convey the message of aggression in such a way as to reflect the civility of the court.

The interpreter is not supposed to impose their preconceptions on the message even when they were present at the scene of the event being talked about.

**Qn2: How are interpreters trained?**

Interpreters are often recruited on a crash program. I obtained only three weeks training. Most of the work is learnt on the job. The interpreter has to read a lot.

**Qn3: What are the challenges to courtroom interpreting and how do you overcome them?**

The languages of the witnesses are not standardised. The same words can have the same meaning in the different regions or areas of the country. Similarly, there are differences in the same language. One language could have several dialects. The interpreters, though originating from the same country, may not understand precisely the dialects of other regions. Accurate interpretation requires that the interpreter understands perfectly both the source and target language. Accordingly, the court has recruited from all the various regions of the country; the professionals work in teams of threes and fours so that they can consult one another. An interpreter is permitted to request court's permission to halt proceedings so as to consult and convey the right interpretation.

Words in the local languages may not have English language equivalents. In such instances, the interpreter would just explain their meanings. This however causes difficulty for purposes of simultaneous interpretation because time is needed for such explanations. The interpreter may have to request the court for the proceedings to proceed at a slower pace so as to allow time for explanations.

The interpreter may not understand a particular word used by a participant especially legal jargon. In such cases, through court, they would ask the speaker to explain the meaning. Pleas such as 'please repeat', 'rephrase' are professional in interpretation. Interpreters are at times tempted to say 'just like the speaker has said' leaving it to the speaker to explain the meaning.

Counsel and judges are sometimes not conscious to interpretation and do not appreciate being interrupted or asked to speak slowly.

Some words are ambiguous; they have several meanings. For example, the phrase 'where were you stabbed' could refer to the scene of crime or the body part; 'You' can mean the person or the rebel group that person belonged to. If a question such as 'were you there?' is asked, an interpreter would not know whether it is the singular or the plural that is being used. Counsel usually attack interpreters for divergent responses. Unlike translation, interpretation is spontaneous, the interpreter works without knowledge of the background story. In such cases, the

interpreter asks the speaker to explain. Many interpreter interventions could delay the proceedings so it is advisable that counsel remains alert and asks the relevant follow up questions.

Interpreters convey messages as understood from the original. The interpretation is as good as the original in the way that it cannot make it better.

Personal association of the interpreters with the conflicts addressed: It is possible that the interpreters could have witnessed some of the incidents testified about. When a witness tells a different account in the courtroom, interpreting the false version is difficult. Some interpreters are traumatised and others withdraw from the task to avoid imposing their personal knowledge or emotion on the message.

Mistakes: If an interpreter misinterprets something fundamental to the proceedings, it is the interpreter's responsibility to correct it on the record. The interpreter, through the bench, draws the court's attention to the mistake. If a correction is belatedly discovered, the interpretation section waits for the correct opportunity to make a correction on the record. On the other hand, if a party identifies a mistake in interpretation, they can apply to court seeking relief. In this case, the transcripts and audios are checked and reconciled. The supervisor corrects the mistake, signs the document and files it as part of the record.

The language section team has researched and compiled a glossary of the most commonly used legal words and translated them into local languages.

N.B: Unlike interpretation at the international level, there is no accountability, supervision and established order in interpretation at the national level.

#### **Qn 4: What would you recommend?**

Professionalising interpretation

Budgetary commitments should be made to the profession at the national level so that experienced persons can be kept in the profession.

Local languages should be developed and such work widely published and studied.



**Respondent 3002****Interview date: 22 February 2011.****Qn1. What are the challenges of working in several languages?**

Evidence gets lost in translation due to untranslatable terms or when what is said is unclear. Lawyers would have to ask follow up questions in order to fill gaps in the evidence, which result from omissions in interpretation.

The beginning was a struggle, expertise of interpreters came with time as key words, key phrases, and key concepts of the conflict were mapped. Initially, investigations were facilitated by interpreters who were not professional and had no legal training. Witnesses would disown their own testimonies. Deliberate or biased misinterpretation has been alleged but not proven.

Some witnesses refused to speak to interpreters of the conflicting ethnicity.

The mode of examining witnesses or leading evidence is also influenced by translation. Participants are urged to speak slowly and clearly, using simple and straight forward sentences so as to aid translation. Further, the party adducing recorded evidence is responsible for its translation. The tape would be played in open court and its translation tendered into evidence.

In cases where the cross-examination swerves to the normal trend (fast) and interpretation is not done correctly, the evidence is lost. In some cases, the witness is lost in the exchanges of counsel: one counsel may ask a question and the other counsel objects to it without waiting for interpretation of the witness account. Examination could descend into a lawyer's show.

**Qn2: What would you recommend?**

It is a learning process that people may have to endure.



**Respondent 5001**

**Interview date: 15 February 2011.**

**Qn1: What is your experience of working in several languages as an investigator?**

*Translation during investigation*

There are different investigators that conduct interviews in the field. International investigators are assisted by local interpreters. The investigator asks a question in an international language and the respondent gives a response in the native language, which is interpreted in the international language back to the investigator. A recording of this interview is done leaving out the words of the translator. The transcriber at this stage transcribes the testimony in the original language of the respondent or informant. The transcription is sent to the language section of the court for translation into the working languages.

The court [name withheld] engages local actors in gathering evidence and enlisting participation of victims. Translation is particularly important since the crimes investigated occur in local settings where specialised languages are spoken.

*Translation in the courtroom*

Translation in the courtroom is done in both working languages: English and French. There is translation from the local language(s) to French and from the local language to English and vice versa: from English and French into local languages.

**Qn2: What are the challenges of working in many languages?**

The names of individuals and locations are wrongly spelt by intermediaries that the persons cannot be later identified. The spellings of locations, towns and villages are mixed up especially where they are similar. In certain countries, the same place can be found in different provinces. These names are important in locating the data of participants. This particularly becomes a problem when the chamber asks for the correct identity of the person giving the evidence and at that point the person has to be found in order to obtain permission to reveal their identity.

When recordings are played back to witnesses during proofing, at times they deny having said the content of the recordings. Distortions of evidence often result from (i) erroneous

interpretation of the investigator's communication in the working language of the court to the language of the witness, (ii) erroneous transcription or erroneous translation of the informant's account to the language of court. These processes involve different persons who might not be familiar with the culture and context of the conflict. The evidence is sometimes sent back to the translation section for correction, with reference to the recordings.

For victims of sensitive crimes such as sexual violence, using translation means they would have to speak to more persons, which is undesirable.

Witnesses may also speak fast that interpreters cannot cope. This may lead to gaps in the record with the word 'inaudible' being frequently entered in transcripts. Witnesses are often reminded to slow down for interpretation to follow.

Language obstacles also exist among staff members for purposes of official correspondences. However, most of the work of the court is done in English. Translations follow much later and could take long to come through.



**Respondent 6001**

**Interview date: 16 February 2011.**

**Qn1: What is your experience of working in several languages?**

International criminal tribunals principally engage international personnel. These are persons that are not directly involved in the conflict and are more likely to be impartial.

Finding the truth requires engaging translators, but the translators are often local persons that may have been party to the conflict. Such persons use the language gap to manipulate the evidence so that justice can suit their goals. There are allegations of bias, deliberate misinterpretation, mistrust and suspicion among interpreters. International staff are aware of this possibility and monitor the work of translators and interpreters.

**Qn2: Are there any language barriers to investigations?**

In the initial stages, interpretation was a gamble. Enlisting trained interpreters was a challenge. Many persons hired as interpreters had not interpreted before. Consequently, they never interpreted precisely; they gave inferences of the testimonies. In some instances, the witnesses denied having said the contents of their purported testimonies. It should be remembered that witness testimonies are crucial in trials of mass crimes; forensic evidence is not practicable. The language of the conflict area is not internationally studied. There were no specialised interpreters in that language.

There was also general resistance of interpreters from opposing ethnicities. Many of the conflicts are ethnic-based; language is involved in the conflict itself. The politics of the conflict found its way into the collection of the evidence through the engagement of local persons as interpreters.

There is no accreditation of interpreters in the situation country, and no standard professional code of conduct and ethics. Accordingly, there is no body and no mode of enforcing accountability of interpreters. Deliberate misinterpretations were allegedly carried out by some interpreters. In such cases, the prosecution would end up with witnesses who did not understand their own testimonies. The investigation teams sought to verify the accuracy of testimonies by

engaging interpreters from other ethnic groups. Transcribed testimonies were read back to witnesses, at least three times, for purposes of verification.

The tribunal had to train its own interpreters from the local persons. These multilingual interpreters are now the resource for many tribunals.

**Qn3: Do the language hurdles extend to trial?**

During the first trials, there were so many requests by the language section to make corrections. So many adjustments had to be made because of errors in interpretation.

**Qn4: How did you deal with the problem?**

Each side, both prosecution and defence, would be better placed if it hired local persons in order to assist identify errors. Some court staff would have to learn the local language.

A glossary of common and non-translatable words was developed by the language section to aid all court functions.

Witnesses were asked to phonetically spell out names of locations and persons, the common ones were included in the glossary and ‘the live note’ for the guidance of staff.

Cross-examination was not common since most counsel were from a civil law background.

Witnesses are always urged to slow down to allow for interpretation to follow.

In case of certifications, the certifying officer should speak the language of the witness, no interpretation is needed.

**Respondent 6003**

**Interview date: 21 February 2011.**

**Qn1: How does working in several languages affect the work of the court?**

The conflict in Sierra Leone involved several countries. It is believed that the first recruits originated from the Gambia and Burkina Faso, they were trained in Libya under the leadership of a Liberian President, who accorded them diplomatic passports to overthrow the government of Sierra Leone. The conflict therefore involved the languages of over five different countries. Other forms of language such as colours of the gowns of judges, the sophisticated looking courtrooms with flashy cameras could intimidate, paralyse or excite witnesses.

**Qn2. Are there any cultural perspectives to the proceedings of the court?**

The witnesses explained sexual violence with a lot of difficulty and in very obscure terms. What exactly transpired could hardly be expressed in the local languages yet these accounts were significant in proving the elements of the offence charged or even disapproving the evidence adduced.

In Sierra Leone, sacred customary practices such as female genital mutilation are not spoken about in public. The interpreters who emerge from these regions find it difficult to convey information regarding such sacred practices. Rituals are also another category of matters that are difficult to convey. Charles Taylor for example was believed to be the Chief Priest of the Aporo Society; witnesses could hardly speak of him in direct language because it is believed that speaking about such persons would have spiritual implications.

**Qn3: How important was translation to your work?**

We (staff) would go to the remote areas of Sierra Leone to obtain witness statements. Most witnesses spoke local languages. Translation was a very important component. Some of the things that the witnesses said could not be translated without further explanation. For example, 'man and woman business' was used to mean sex.

Taking witness statements was a very lengthy process because of the difficulty in capturing the essence of what was being said. In these conflict areas, English (the working language of the



court) is learnt at school, considering that education in conflict areas is interrupted, finding interpreters is a very practical exercise; only language skills are considered without emphasis on qualifications. Enlisting translators is a challenge.

Video clips, which were to be adduced in evidence, had to be translated before the trial.

The interpreter may have to calm down a sobbing witness and encourage them to speak.

### **Language complexities in the courtroom**

Bilingual interpreters often divest to their other language especially when they are trying to give explanations. For example, a Portuguese speaking person may start speaking in French when trying to place something in context. Likewise, when trying to explain an event that took place in Angola, there is temptation to divest into Portuguese.

Non translatable words: ‘Ebbo’ as an exclamation for surprise is not translatable and so is ‘Koto’ a title for ‘important’.

Interpreting legalese and Latin terms to a witness may be very difficult. Some interpreters have been relieved of their duties for being unintelligible.

At times the lawyer is carried away and engages with the witness directly to the exclusion of all other participants including the interpreters and transcribers.

The transcribers are challenged by the speed of the speakers. At times they leave the booth and abandon their work.

Sometimes translation is not correct leading to witness protests such as ‘that’s not what I said’.

An interpreter may be attacked for using the language of the witness. In a sense, the words are attributed to them personally. For example, an interpreter once said: ‘he fucked me’ and the judge asked the interpreter to use proper language.

Ambiguities in interpretation surface quite often: one English word could have several meanings. For example, the question: Did you see the commander again? The answer: One day means never in the Sierra Leonean dialect, but the translation would be 'yes' one day. Currently, counsel are used to this possibility, a follow up question would be asked such as when? Then it would be ascertained whether it was intended to be a 'yes', or 'never'.

The hybrid nature of dialects: Creole has French and English words. It is written differently from the way it is spoken. It has symbols and a special alphabet. This complicates testifying. The translators have to transcribe for the judges.

Among dialects, complexities are equally common. For example Mandingo does not have a gender dimension (the 'he' or 'she' is non-existent). In cases of protected witnesses, this may cause some confusion. Follow up questions may have to be asked and codes such as 'X' & 'Y' used to distinguish the sexes.

The interpreters are at times taken up by the native pronunciations of English phrases-English spoken with Creole accents. This compounds the problem.

The interpreters might need to see the person speaking but at the Special Court for Sierra Leone, they do not.

At times interpretation is so obscure that the error in interpretation can only be detected from the direction of the answer.

On one hand, all the stenographers are native English speaking professionals, the witnesses on the other hand speak English with strong African accents; the stenographers have abandoned their work on several occasions.

**Respondent 6006**

**Interview date: 18 March 2011.**

**Qn 1: As defence counsel, what would you say about working in more than one language in a trial?**

As I have always said: ‘to translate is to betray the content of a document as originally intended’.

I was lead counsel of \*\*\* [name withheld] who was indicted for incitement of genocide. The use of the word ‘Impuzamugambi’ came into question. In Kinyarwanda, this word means working together. During the genocide, this word acquired a new meaning within the context of the interahamwe (the militia). The new meaning was incriminating. During trial, the interpreters often used this word within the meaning acquired during the conflict instead of the original meaning in Kinyarwanda. When this word was used in the new meaning, it meant something completely different. It is my view that the interpreters had no power of conferring a particular meaning.

The delays are serious. For a Kinyarwanda document to be translated into an English document, it takes several months. During such time, communication between counsel and the client is halted. This particularly relates to instances where documents are prepared by third parties, for example, where counsel is English speaking, co-counsel is French speaking, and the client a Kinyarwanda speaker, the Kinyarwanda version would be much needed to inform the client. Similarly, the accused person cannot be placed in a position of a professional translator in order to provide counsel with the right translation for them to defend effectively.

With the completion strategy, there is a lot of pressure on the language division and on all participants to have trials proceed on time. Counsel arrange for pre-translation by someone within the team and present it for court’s approval. In many instances, the nuances or connotations are lost because the translation is not professional.

Regarding courtroom interpretation, common law places emphasis on the demeanour of witnesses especially during cross-examination. It is easier to discern the authenticity of a response, if one is using the same language than through interpretation. Without interpretation,

there is no time to think over the response and tone down the atmosphere of pressure created by the questioning. For example, if counsel put it to the witness that: 'you are lying to me', by the time it goes through interpretation, the aggressive tone of questioning and the actual words are lost in the process.

Resources: The resources available to conduct a case determine the nature of the trial. More resources are available to the prosecution than the defence. This raises practical difficulties for the defence during interviewing witnesses in the pre-trial phase. More time for example, is required to interview witnesses through interpretation.

Interviewing witnesses through interpretation and the amount of time required for the process discourages witnesses because it is a laborious process. In cases where witnesses take time off to participate in court proceedings, time is of essence.

Cultural perspectives: It took experience for foreign judges to appreciate the African concept of time. A witness living in the rural setting in Rwanda, in the 1990s, would not be able to tell time with precision. Many of them did not even have watches, since reading time is taught in school, many of them would not be able to even read the time. Quite often, light is the determinant of time leading to only two precise distinctions: night and day. During the course of the day, it was immaterial as to what time exactly it was. This factor was used to discredit witnesses due to inconsistencies in the evidence. African counsel would however lead the witnesses to explain the inconsistencies with questions such as: did you have a watch?

## **Qn 2: Why does n't the defence submit documents for translation in good time?**

The defence can only start investigations when the trial is foreseeable. Investigations by the defence are authorised by the defence unit in the run up to the trial itself to avoid missing intervening incidents. It is only during such investigations that the documents are discovered and could be brought for translation.

The language section is also viewed with a lot of suspicion from the defence; it is seen as part and parcel of the Institution, belonging together with the prosecution. Defence counsel are

therefore conscious about entrusting their documents with the section for a time long enough to allow for leakages. They therefore hand the documents in for translation at the last minute, so as to leave no time or opportunity for manipulation, to their disadvantage.

**Qn3: What would you recommend?**

Bolster the efficacy of the language section. For example, the prosecution relies on documents discovered more than a decade before the trial, but the translation of these documents does not start until the proceedings commence, yet it could have been predicted that these documents would be required for the trial, and are actually used in determining the charges preferred.

I highly commend the continuance of an integrated personnel approach because the tribunal is nothing less than an international institution. It has to do with legitimacy. The legitimacy of the court is enhanced by the diverse staff constitution. The impact of the international criminal justice process should also be felt internationally. There are also foreign witnesses at the courts that can be better dealt with by foreign judges. External staff is also removed from any biases that would prevail in a team that is closer to the conflict. International conflicts involve diverse issues that the diverse composition of staff is an asset.

Challenges are inevitable to a human run system. That is why there is an opportunity for appeal.

**Respondent 8001****Interview date: 15 August 2011.****Qn1. How does language affect the work of the International Crimes Division?**

Fair trial is characterised by clarity. The essence of justice is for the offences to be clearly perceived by the prosecution and portrayed to the offender. The accused should also be able to present an adequate defence.

The language of the ICD is foreign. Kwoyelo's knowledge of Acholi is questionable having been abducted as a child. He speaks a hybrid dialect of Acholi. The male interpreter at the court is Langi but can speak Acholi. Kwoyelo was uneasy with the interpretation. He told the second interpreter that he did not understand the Acholi that the other interpreter was speaking. In plea taking, the accused responded 'Awinyo' –I heard, but the interpreter relayed the confirmation that the accused had understood the charges to the judges. Understood is 'inyang' in Acholi. The matter was discussed by civil society but it was agreed that since the accused did not plead guilty, then there was no need to pursue the matter further.

Counsel is Acholi but cannot speak Acholi fluently. Co-counsel speaks Acholi of a different region. The Acholi of Kitgum (spoken by co-counsel) is different from the Acholi of Gulu (where the accused originates). The same phrase can have different meanings in the two regions.

**Qn2: What would you recommend?**

It is important to test the linguistic ability of the accused and match it with that of the interpreter. Interpreter training does not include language training.

The performance of interpreters should be monitored. Assessors can assist with this task.

**Respondent 8002**

**Interview date: 18 August 2011.**

**Qn1: The Constitution provides for the right to interpretation, why was there no interpretation for Kwoyelo in the Constitutional Court?**

Nobody has complained. Unless a party requests interpretation, it is not provided during hearing of constitutional petitions. The majority of petitioners are represented, it is presumed that the lawyers interview their clients and would raise the need for interpretation in the pre-trial conference. Counsel is an officer of the court and has the duty to court to ensure the realisation of the rights of the accused. Further, the Constitutional Court does not take evidence.

**Qn2: What is the criterion for providing interpretative assistance?**

It depends on the circumstances of a particular case. Determining factors include the language proficiency of litigants, the public importance of the case; justice is for the people. The parties can object to interpretation.

The judiciary may not be able to provide interpretation into the language requested. Interpreters of languages such as Punjabi are difficult to find.

**Qn3: How is interpreting organised in the judiciary?**

Interpreting is done by court clerks. They are trained on the job. There are no interpreting schools in Uganda. A court clerk should have a diploma in law. Clerks are allocated duty with regard to their language proficiency and the languages spoken in the area of assignment. They take oath as civil servants. A biased interpretation would attract criminal charges.

Lay persons also provide interpretative assistance to the judiciary. Allowances are offered for interpreting work. Allowances are discretionary, since there is no specific budget for interpreting.

The biggest challenge is of persons with disabilities. There are no skills to handle the deaf and dumb in the judiciary. There are no court clerks with the ability to interpret sign language. There

are no facilities and no real initiatives to aid such persons. However, cases of disabled persons are rare. Such persons are generally not a danger to society.

**Qn4: What would you recommend?**

The judiciary should acquire special needs skills. A sign language tradition needs to be developed within the institution so as to enable fair trial for persons with disabilities.

Improve courtroom communication generally. Judges tend to speak softly; they are often not audible enough. Equipment has been procured for the International Crimes Division and is yet to be installed.

The budget of the judiciary should include communication equipment.

**Qn5: What about recording proceedings?**

Judges make their personal notes.

Court clerks are also transcribers. Processing of the court record needs to be updated to the level of the Commercial Court. Transcripts at the commercial court are automated and available immediately after the proceedings. The court is specially funded in a bid to create a conducive investment climate by expediting settlement of investment disputes. We need to replicate the services of the commercial court in other courts. Plans are underway to upgrade the transcription equipment.

Recording also depends on the nature of the case. For example, recording was done and screens provided for the public in the terrorism case. But this is controlled to avoid influencing the judges: having a court of public opinion facilitated by the media in addition to the real court.



**Respondent 8003****Interview date: 10 October 2011.****Qn1: What would you say about the impact of language on the Kwoyelo Trial?**

Why would you limit it to the Kwoyelo trial? In any trial, language is an issue. Uganda is a country without a local national language. Persons who know the official language so well do not understand local languages and vice versa. On the other hand, the court record must be made in English; communication and all documents of the court have to be done in English.

**Qn2: How do you organise interpretation honourable Judge?**

Persons recruited as clerks provide interpretative support on oath. Clerks have better knowledge of local idioms. They also have local cultural knowledge. Assessors assist me in monitoring accuracy of interpretation. They advise on any errors. Judges who are knowledgeable in local languages also take on translation tasks. The court should be the first to follow. In Kwoyelo's hearing, the clerk could not translate the word 'abduct' into Acholi. She used the word 'kippe' which literally means 'protecting' other than 'makko'. Protecting is not a crime. I would urge every participant to be vigilant in identifying such mistakes.

Interpreting for persons with disabilities is the most fascinating. There are often two interpreters with one interpreting for the person with special needs and the other interpreting for the court. The judiciary acquires sign language services from the Ntinda School of the deaf but police does not have that capacity. There are difficulties in communication during investigation.

**Qn3: What would you recommend?**

To professionalise interpretation: Clerks should have a higher level of education; if possible, lawyers should be engaged in the service.