



## Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony

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### ABSTRACT

*When courtroom interpreters translate a witness's testimony, errors are not just possible, they are inherent to the process. Moreover, the occurrence of such errors is not merely a technical problem; errors can infringe on the rights of defendants or even lead to verdicts based on faulty findings of fact. International criminal proceedings, which are necessarily multilinguistic, are both particularly susceptible to interpretation errors and sensitive to questions of procedural fairness.*

*This Article surveys the history and mechanics of courtroom interpretation, explains the inherent indeterminacy of translated language, and describes the other sources of inaccuracy in interpreted testimony. It then assesses the impact that errors in interpretation may have on fact finding by*

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*international criminal tribunals and on the rights of international criminal defendants. The Article concludes by suggesting some low-cost and easy-to-institute measures that will reduce the likelihood that a judgment will turn on an inaccurate interpretation. Improving the quality of translation will buttress the rightness of the international criminal tribunals' judgments and the fairness of their procedures.*

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“Of course I want counsel. But it is even more important to have a good interpreter.”

—Hermann Göring, Oct. 29, 1945<sup>1</sup>

## I. INTRODUCTION

Peter Uiberall, the chief interpreter for most of the first Nuremberg trial, found when he became chief that the interpreters had consistently been translating the German “*ja*” as “yes.”<sup>2</sup> While “*ja*” can mean “yes,” it is most often used as a place-filler by German speakers in the way that English speakers might begin with “um” or “well” when responding to a question.<sup>3</sup> Thus, when a German witness or defendant was asked a question about some possibly incriminating activity, association, or knowledge, his hesitation was interpreted as an unconditional admission. Then, “once that ‘Yes’ is in the transcript, the man is stuck.”<sup>4</sup>

Although interpreters describe themselves as “neutral mouthpieces,”<sup>5</sup> “invisible,”<sup>6</sup> or mere “bridge[s] of communication,”<sup>7</sup> they are actually none of these; the act of interpretation invariably alters the meaning of a speaker’s utterances.<sup>8</sup> As the prosecutor at

1. FRANCESCA GAIBA, THE ORIGINS OF SIMULTANEOUS INTERPRETATION: THE NUREMBERG TRIAL 110 (1998).

2. *Id.* at 105–06.

3. *Id.*; see also OXFORD-DUDEN GERMAN/ENGLISH DICTIONARY (Warner Scholze-Stubenrecht et al. eds., 3d ed. 2005) (discussing the definition and translation of “*ja*”); Steven Kaufmann, A Modal Analysis of Expressive Meaning: German “*Ja*” under Quantifiers, Talk at the Workshop on Implicature and Conversational Meaning (Aug. 20, 2004) (discussing the use of “*ja*”).

4. HILARY GASKIN, EYEWITNESSES AT NUREMBERG 47 (1990). This Article is supported in large part by examples from the Nuremberg trials. This is primarily because the trials have been so well documented; dozens of people involved with them wrote memoirs or contributed to collections of reminiscences. In addition, because the Nuremberg trials represented the first use of true simultaneous translation (see *infra* Part III.B) and involved four working languages, they were fertile ground for interpretation problems and ingenious solutions to them. In order to widen the range of examples and because interpretation techniques have evolved since Nuremberg, I will also draw from the experiences of the modern tribunals.

5. Telephone Interview with Fernando Smith, Court Interpreter Coordinator for N.Y.C. (Dec. 1, 2004) [hereinafter Smith Interview].

6. Interview with Ricardo Barriga, former Fed. Court Interpreter, current Owner/Manager of a private New York interpretation services company, in New York, N.Y. (Dec. 2, 2004) [hereinafter Barriga Interview].

7. Letter from Richard Alderman, Assoc. Translator/Interpreter, Int’l Criminal Tribunal for Rwanda (ICTR) to author (Feb. 23, 2005) (on file with author) [hereinafter Alderman Letter].

8. This assertion—that translation by even the most skilled practitioner necessarily distorts the meaning of the translated utterances—is universally accepted by linguists. The only disagreements have to do with how much and in what ways

the United Nations (U.N.) International Criminal Tribunal for the Former Yugoslavia (ICTY) acknowledged in that tribunal's first trial (of Dusko Tadic), "[a] great deal of accuracy is bound to be lost in the translation process. There is no statement taken during the course of the investigation that will be a verbatim report of what the witnesses say."<sup>9</sup>

Despite the high stakes involved, legal scholars and practitioners remain largely unaware of the way interpretation works and of the effect of interpretation on testimony.<sup>10</sup> Instead, they view interpretation merely as a technical issue.<sup>11</sup> For example, a lengthy article written in 2006 about physician testimony in international criminal trials never mentions the issue of translation.<sup>12</sup> The legal treatments of courtroom interpretation that do exist largely focus on the rights of minority or deaf defendants to have access to the services of an interpreter in criminal trials.<sup>13</sup>

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meaning is changed. See, e.g., THOMAS NASH, DISCOVERING LANGUAGE: A CONCISE INTRODUCTION TO LINGUISTICS FOR CHINESE STUDENTS (1986). "Utterance" is a linguistic term describing the most basic unit of communication. *Id.* An utterance is a communicative event, comprising words spoken, intonation, stress patterns, facial expressions, and gestures, locatable at a particular time, date, and place. *Id.* at 100. An utterance is tangible and could be an entire sentence, a part of a sentence, or a single word or sound. *Id.*

9. Prosecutor v. Tadic, Case No. IT-94-1-T, Transcript, at 47 (May 7, 1996), available at <http://www.un.org/icty/transe1/960507IT.htm> [hereinafter Tadic Transcript].

10. See, e.g., David Weissbrodt et al., *Piercing the Confidentiality Veil: Physician Testimony in International Criminal Trials Against Perpetrators of Torture*, 15 MINN. J. INT'L L. 43 (2006) (failing to discuss interpretation).

11. See, e.g., Jennifer Schense, *Necessary Steps for the Creation of the International Court*, 25 FORDHAM INT'L L.J. 717, 728-29 (2002) (providing a purely technical analysis of interpretation services).

12. See Weissbrodt et al., *supra* note 10 (discussing physician testimony in international criminal trials, but failing to address the issue of translation). "Translation" and "interpretation" are distinct concepts, although translation is the more general term and includes interpretation. See discussion *infra* Part III.A.

13. A fairly comprehensive bibliography of the last ten years' worth of literature in American legal journals touching on this topic includes the following: Alice J. Baker, *A Model Statute to Provide Foreign-Language Interpreters in the Ohio Courts*, 30 U. TOL. L. REV. 593 (1999); Roxana Cardenas, *"You Don't Have to Hear, Just Interpret!": How Ethnocentrism in the California Courts Impedes Equal Access to the Courts for Spanish Speakers*, 38 CT. REV. 24 (2001); Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193, 195 (1997); Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 HARV. LATINO L. REV. 1 (2004); Eric Eckes, *The Incompetency of Courts and Legislatures: Addressing Linguistically Deprived Deaf Defendants*, 75 U. CIN. L. REV. 1649 (2007); Llewellyn Joseph Gibbons & Charles M. Grabau, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227 (1996); Patricia Walther Griffin, *Beyond State v. Diaz: How to Interpret "Access to Justice" for Non-English Speaking Defendants?*, 5 DEL. L. REV. 131 (2002); Virginia E. Hench, *What Kind of Hearing? Some Thoughts on Due Process for the Non-English-Speaking Criminal Defendant*, 24 T. MARSHALL L.

Much has also been written about various aspects of international criminal procedure. However, while such writings may mention the importance of interpretation to the functioning of the court and point to some of the difficulties that interpretation creates, they do not address the act of interpretation itself.<sup>14</sup> For example, Nice and Vallières-Roland, two trial attorneys in the ICTY Office of the Prosecutor, have described a variety of procedural innovations that have been introduced at the ICTY with the goal of expediting the proceedings.<sup>15</sup> In a discussion of such an innovation first used in the Milosevic trial, namely “proofing summaries,”<sup>16</sup> the only reference to translation is a note acknowledging that one of the reasons that proof of evidence-in-chief by writings is quicker than proof by oral testimony is that documents may be translated in advance.<sup>17</sup>

In other words, while some attention has been paid to the availability of interpretation services, almost none has been given to the character of these services or to their effects.<sup>18</sup> This Article discusses the effects of inaccuracies in testimony that are introduced by the interpretation process on the ability of international tribunals to find the “truth” in the cases before them and on the right of defendants to a fair trial before those tribunals. It has two primary goals: first, the Article seeks to raise awareness in the legal scholarly community with respect to the workings of courtroom interpretation and the potentially distortive effects of interpretation on testimony.

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REV. 251 (1999); Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work With Language Interpreters*, 6 CLINICAL L. REV. 347 (2000); Heather Pantoga, *Injustice in any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 MARQ. L. REV. 601 (1999); Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133 (2001); Franklyn P. Salimbene, *Court Interpreters: Standards of Practice and Standards for Training*, 6 CORNELL J.L. & PUB. POL'Y 645 (1997); David S. Udell & Rebecca Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO L.J. 1127, 1141–42 (2007); Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899 (2000).

14. See, e.g., Schense, *supra* note 11 (providing a purely technical analysis of interpretation services).

15. Geoffrey Nice & Philippe Vallières-Roland, *Procedural Innovations in War Crimes Trials*, 3 J. INT'L CRIM. JUST. 354 (2005). Of note is the fact that the authors both served on the Milosevic Prosecution Team, of which Mr. Nice was the leader. *Id.*

16. The proofing summaries represented an attempt to “warm-up” the tribunal to the idea of the prosecution presenting a greater portion of its evidence-in-chief in writing. These summaries were prepared as précis of witnesses’ oral testimony and presented to the judges and defense counsel with the hope that, “over time, rather than having the witness more or less repeating orally what was contained in the ‘proofing summary,’ the ‘proofing summary’ would be signed by the witness and that this would constitute his evidence.” *Id.* at 369.

17. *Id.*

18. Some judges have even actively discounted the issue of interpretation accuracy. See, e.g., Cardenas, *supra* note 13.

Second, it seeks to convince scholars and practitioners dealing with the international criminal tribunals that interpretation of testimony is not merely a technical or practical issue, but one with which they ought to concern themselves personally.

This Article focuses on interpretation in international criminal tribunals because the stakes are higher and there is greater potential for misinterpretation than in national courts or international “civil” tribunals.<sup>19</sup> The international criminal tribunals derive their legitimacy not from the coercive power of a controlling legal authority—as with national courts—but from the consent and approval of the international community, as expressed in the resolutions of the U.N. bodies and in states’ willingness to accept the tribunals’ decisions.<sup>20</sup>

Support from the international community for international criminal tribunals is in turn dependent upon the prevailing sense that the anational status of the international tribunals makes them better for prosecuting war crimes than the national courts in countries where atrocities have been perpetrated:

Even in cases where the Government has both the will and the capacity to bring to trial individuals for crimes under international law in conformity with international fair trial standards[,] . . . an international criminal tribunal may bring an added sense of objectivity and fairness to the criminal proceedings as well as raise their symbolic profile.<sup>21</sup>

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19. JO-ANNE WEMMERS, REPARATION AND THE INTERNATIONAL CRIMINAL COURT: MEETING THE NEEDS OF VICTIMS 15 (2006).

20. Although supported in general by the international community, the International Military Tribunals in Nuremberg and Tokyo, convened after World War II, were not truly international ventures; rather, they were multinational military tribunals established in the tradition of victors in war prosecuting the losers. The approbation of the then-nascent United Nations does not change this fact. CHRISTOPH J. M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 34 (2001). Consequently, international criminal tribunals truly came into being with the decision by the U.N. Security Council to establish the ICTY; the ICTY has been followed by the ICTR and the International Criminal Court (ICC). These bodies were joined in 2001 by a third ad hoc tribunal with distinct characteristics. The Special Court for Sierra Leone (SCSL), a “hybrid” or “mixed” tribunal with both domestic and international processes, was created by agreement of the U.N. Security Council and the government of Sierra Leone to prosecute those responsible for war crimes committed during that country’s recent civil war. S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 4, 2000). The hybrid tribunal model proved influential, and more recent tribunals established in East Timor and Cambodia have been organized in a similar way. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 343 (2003). The distinctive processes of hybrid tribunals are outside the scope of this article. See Laura R. Hall & Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT’L L.J. 287 (2003) (providing a good primer, looking specifically at the case of the Special Court for Sierra Leone). I will refer collectively to these bodies—the ICC, the ICTR and ICTY, and the hybrid tribunals—as the “international criminal tribunals.”

21. LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 278 (1997).

This is, furthermore, a critical time in the development of international criminal tribunals. While some have described a recent trend in international criminal law toward a reaffirmation of the role of national law and courts,<sup>22</sup> the international tribunals will retain a vital role in “robbing powerful criminals of the impunity that their power provides and beginning a new era of accountability.”<sup>23</sup> Unlike the Nuremberg trials, the first of which is the most famous primarily because it featured the most notorious surviving Nazi leaders, the international criminal tribunals had to reach first for the low-hanging fruit.<sup>24</sup> Now that the ICC has officially charged its first defendant,<sup>25</sup> international criminal law is poised to take a step towards regularization. If international criminal trials become more frequent and more accepted, the likelihood of marginal cases being prosecuted will increase, and so will the likelihood of a wrongful conviction.

As mentioned previously, the problems stemming from alteration of testimony by interpretation are more acute in international than national proceedings.<sup>26</sup> Witnesses to episodes of inter-ethnic fighting

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22. See Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1 (2006) (discussing the role of national governments with respect to the enforcement of decisions by international institutions). An often-cited example of this purported nationalization of international criminal law is the Pinochet case. See Frank Sullivan, Jr., *A Separation of Powers Perspective on Pinochet*, 14 IND. INT'L & COMP. L. REV. 409, 415–37 (2004) (including a detailed description of the legal proceedings in the United Kingdom). An important factor to which this trend may be traced is concern about the assertion of universal jurisdiction by some national courts over crimes against humanity. See, e.g., K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT'L L.J. 1, 1–2 (2004) (arguing that traditional judicial constraints should alleviate concerns); Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 340, 352–59 (2001).

23. Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court*, 4 J. INT'L CRIM. JUST. 765, 768 (2006).

24. Dusan Tadic, the defendant at the first ICTY trial, is acknowledged to have been a relatively minor perpetrator of atrocities in Yugoslavia. See Michael P. Scharf, *Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 875 (1996). The decision was made to prosecute him first largely because his was an easy conviction to secure. SAFFERLING, *supra* note 20, at 316–17; Scharf, *supra*. For a concise profile of the types of defendants prosecuted, see Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 561–64 (2006).

25. According to an ICC press release, a pre-trial chamber of the ICC confirmed the three charges brought by the ICC prosecutor against Thomas Lubanga Dyilo and referred those charges for trial before an ICC trial chamber. Press Release, Int'l Criminal Court, Pre-Trial Chamber I Commits Thomas Lubanga Dyilo for Trial (Jan. 29, 2007), available at <http://www.icc-cpi.int/press/pressreleases/220.html>. Dyilo's trial is the ICC's first. *Id.*

26. Throughout this Article, I will use “altered” or “alteration” to describe testimony that has had its meaning changed in some way because it has been interpreted into another language. The use of “alteration” to describe the effect of interpretation on testimony is intended to be free of any value judgment. As will be discussed further below, my emphasis on the negative consequences of testimony altered by interpretation is not intended to imply that the practice of interpretation is

predictably speak a variety of languages, and the judges and counsel rarely speak the same languages as the witnesses and defendants.<sup>27</sup> The multinational (and therefore multilingual) nature of international criminal tribunals, which gives the tribunals international support and should make it possible for them to act impartially, also hinders them from determining the true facts and doing justice.<sup>28</sup>

It must be emphasized that this Article deals only with the possible consequences of inaccurately interpreted testimony, and not with such issues as legal tactics involving interpretation. The risk that a party's complaint regarding an interpretation could be merely a litigation tactic is not addressed (for example, when a defendant claims that a suspect code phrase like "special handling" is not a euphemism for a culpable act). However, inaccurate interpretation does encompass instances such as those in which a word is improperly rendered into its grammatical equivalent, or a concept that is clear in one language and culture has no equivalent in another.

It is not known how many errors in translation make their way into the record. Of course, the examples of inaccurate interpretations given here have been discovered and corrected—otherwise, we would have no record of them. However, some were not discovered until the daily court transcript was checked over, at which time procedure allows a correction to be read into the record. Despite the availability of this remedy, harm may have already been done if the presiding judges have already formed opinions about a given witness's testimony. In any event, the errors identified in this Article are representative of the types of errors that go uncorrected.<sup>29</sup> The inherent indeterminacy of interpreted language cannot be "cured,"

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in any inherent way illegitimate. Indeed, international criminal trials would be impossible without it. See Gaiba, *supra* note 1, at 11 (noting that the Nuremberg trials "would have taken four times as long" without simultaneous interpretation).

27. In increasingly multicultural Western societies, this problem of the necessity for interpretation is also growing in domestic proceedings. In Britain, for example, the court system's translation budget tripled in the first half of this decade. *Tongue-Tied Newcomers*, *ECONOMIST*, Feb. 17, 2007, at 37.

28. See Christin B. Coan, Comment, *Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia*, 26 N.C. J. INT'L L. & COM. REG. 183 (2000). Coan addresses the impact of interpretation on the forcefulness of rape victims' testimony. She concludes that,

[I]nterruptions and errors focus attention on the linguistic mode of production rather than on the testimony itself. Undoubtedly, interpretation and translation problems have at times interfered with the overall impact of rape victim testimony and the presentation of evidence of rape. However, no feasible alternatives exist.

*Id.* at 233.

29. Alderman Letter, *supra* note 7.

but it can be accounted for; extrinsic factors that affect the accuracy of interpretation may also be minimized.

This Article proceeds first, in Part II, by briefly setting out the existence and scope of the due process rights of the accused in international criminal law and identifying which rights may be affected by interpretation of testimony. Subsequently, it surveys the history and mechanics of courtroom interpretation (Part III), discusses the inherent indeterminacy of translated language (Part IV), and describes the extrinsic sources of inaccuracy in interpreted testimony (Part V). It then assesses the impact of the alteration of testimony interpretation on the correctness of judicial fact finding and the right of the accused to a fair trial (Part VI). Finally, in Part VII, it conveys suggestions for minimizing and mitigating the impact of the alteration of testimony through interpretation.

## II. THE RIGHTS OF THE ACCUSED IN INTERNATIONAL CRIMINAL LAW

To achieve their purpose of reinforcing international peace and security as well as upholding human rights, international criminal tribunals must not only determine who is responsible for international crimes, but also must protect the rights and dignity of the persons involved. Without trials that are both fair and perceived as fair, “pacification of the conflict between victim and offender, which can be so severe in international crimes, is an unachievable goal.”<sup>30</sup> Thus, success in the international criminal arena “should be measured not by the number of convictions achieved by each institution, but rather by whether ‘justice’ was served in the trials before these international bodies.”<sup>31</sup> Indeed, it is “undoubted”<sup>32</sup> and “axiomatic”<sup>33</sup> that the international criminal tribunals must arrange their affairs so as to produce just results that respect the human rights of all involved.

Safferling distinguishes three elements comprising a fair trial:

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30. SAFFERLING, *supra* note 20, at 48.

31. Luka Misetic, *Sacrificing the Rights of the Accused for the “Success” of International Criminal Justice*, in THE POSITION OF THE DEFENCE AT THE INTERNATIONAL CRIMINAL COURT AND THE ROLE OF THE NETHERLANDS AS HOST STATE 49 (Martine Hallerset al. eds., 2000).

32. Christine Chinkin, Comment, *Due Process and Witness Anonymity*, 91 AM. J. INT’L L. 75, 75 (1997).

33. The Secretary-General, *Report of the UN Secretary-General Pursuant to Para. 2 of Security Council Resolution 808*, ¶¶ 101, 106, delivered to the Security Council, UN Doc. S/25704 (May 3, 1993); see also Stuart Beresford, *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals*, 96 AM. J. INT’L L. 628, 629–32 (2002) (discussing the rights of the accused).

institutional guarantees, such as the independence and impartiality of the tribunal or court, . . . moral principles like the presumption of innocence or the principle of equality of arms . . . [and] rights, conceived of in a classically narrow manner, like the right not to be arbitrarily detained or the right to counsel.<sup>34</sup>

Because testimony altered by interpretation can have important consequences for the third of these elements—procedural rights—this Article focuses on those rights, which are collectively referred to as “due process” in the United States and elsewhere. The alteration of testimony by interpretation may affect whether international criminal tribunals fully respect the procedural rights of defendants and whether the tribunals actually discern the truth of the matters before them.

The concept of the fair trial runs through all of the 20th-century human rights conventions and treaties, starting with one of the U.N.’s foundational documents, The Universal Declaration of Human Rights (UDHR).<sup>35</sup> More specifically, the International Covenant on Civil and Political Rights (ICCPR) guarantees in Article 14 the right to a “fair and public hearing.”<sup>36</sup> Other human rights conventions that have affirmed the right to a fair trial include the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment<sup>37</sup> and the Convention on the Rights of the Child.<sup>38</sup>

These documents may not embody unanimously-accepted legal norms,<sup>39</sup> but they do represent the international community’s moral and political commitment to the principle of a fair trial. Indeed, the issue of the legal status of the human rights treaties is moot for present purposes because the statutes of all of the international criminal tribunals guarantee the right of the accused to a fair trial.<sup>40</sup>

34. SAFFERLING, *supra* note 20, at 31.

35. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), *available at* <https://www1.umn.edu/humanrts/instree/b1udhr.htm>. In particular, art. 11(1) of the UDHR provides that “[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.” *Id.* art. 11, ¶ 1.

36. International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* <http://www1.umn.edu/humanrts/instree/b3ccpr.htm> [hereinafter ICCPR].

37. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 7, ¶ 3, Dec. 10, 1984, 1465 U.N.T.S. 85, *available at* <http://www1.umn.edu/humanrts/instree/h2catoc.htm>.

38. Convention on the Rights of the Child art. 40(b), Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* <http://www1.umn.edu/humanrts/instree/k2crc.htm>.

39. Even Cassese, one of the UDHR’s most avid proponents, admits that it does not necessarily constitute universal, binding legal norms. ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 48 (1990).

40. Rome Statute of the International Criminal Court art. 67, ¶ 1, U.N. Doc A/CONF. 183/9 (July 17, 1998), *available at* <http://untreaty.un.org/cod/icc/statute/rome.htm> [hereinafter ICC Statute]; Statute of the International Criminal Tribunal for Rwanda, art. 20, ¶ 4, U.N. Doc. S/RES/995 (Nov. 8, 1994), *available at*

Despite the guarantee of a fair trial, the specific procedural guarantees that must be in place for a trial to be considered fair remain undefined and subject to substantial disagreement.<sup>41</sup> For example, there is no dispute that the right to counsel exists for defendants in international criminal trials, but the exact contours of such a right remain unsettled.<sup>42</sup> Nevertheless, we must know something of what these rights are before we can discuss how interpreted testimony affects them.

To the extent that due process rights have been codified in international law, their seminal expression is Article 14 of the ICCPR.<sup>43</sup> The statutes of the international criminal tribunals borrow

<http://www.ictt.org/ENGLISH/basicdocs/statute.html> [hereinafter ICTR Statute]; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, art. 2(f), U.N. Doc. S/RES/827 (May 25, 1993), *available at* <http://www.un.org/icty/legaldoc/statuteindex.htm> [hereinafter ICTY Statute].

The Nuremberg and Tokyo International Military Tribunals (IMTs), as noted above, were not truly international and did not respect all of the rights guaranteed by the later tribunals. For example, Article 12 of the London Charter, which empowered the Nuremberg IMT, permitted trials *in absentia*, a practice more recently condemned as negating the right of the accused to prepare a defense and to be heard completely. SUNGA, *supra* note 21, at 312. Nevertheless, Article 16 of the London Charter guaranteed to the defendants various procedural rights, *see* SAFFERLING, *supra* note 20, at 22, and criticisms like the above notwithstanding, the trials (at least those held at Nuremberg) were, and still are, generally regarded as having been procedurally fair. *See, e.g.*, BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS (1980); Max Radin, *International Crimes*, 32 IOWA L. REV. 33, 44 (1946) (“The Court at Nuremberg established a procedure which . . . closely follows what in the United States is regarded as the basic pattern of a just procedure.”).

41. While this Article focuses on interpretation during trials, it should be noted that many of the rights associated with due process come into play before the trial begins, and therefore, translation may affect those rights other than just during the trial. On the pre-trial rights of international criminal defendants generally, *see* Sherrie L. Russell-Brown, *Poisoned Chalice?: The Rights of Criminal Defendants Under International Law, During the Pre-Trial Phase*, 8 UCLA J. INT’L L. & FOREIGN AFF. 127 (2003). Russell-Brown identifies four key due process rights that are of issue during the pre-trial phase of a prosecution:

- 1) the right to be free from arbitrary arrest and detention, including the right to be informed of the reasons for arrest at the time of arrest and the right to be “promptly” charged; 2) the right to a fair trial, including the right to be informed of the charges; 3) the right to a speedy trial, including the right to be brought promptly before a judge; and lastly 4) the right to assistance of counsel.

*Id.* at 127. All of these may be affected to some degree by the lack of an interpreter or by inaccurate interpretation.

42. The various ad hoc tribunals have addressed the parameters of the right to counsel on several occasions; their holdings are largely congruent (to the point that it can be said that a body of case law has been developed). Nevertheless, there are inconsistencies. *See* Kate Kerr, Note, *Fair Trials at International Criminal Tribunals: Examining the Parameters of the Right to Counsel*, 36 GEO. J. INT’L L. 1227 (2005).

43. Some commentators argue that the due process rights contained in Article 14 have attained binding authority as international customary law due to their

language from ICCPR Article 14 and guarantee to provide at a minimum what Article 14 provides.<sup>44</sup> Consequently, this Article considers its provisions to be authoritative.<sup>45</sup> Article 14 sets out the institutional guarantees, moral principles, and procedural rights that make up the elements of fairness and that have been adopted by the international criminal tribunals.<sup>46</sup> Paragraph 3 of ICCPR Article 14 sets out the procedural rights that are considered to be the necessary components of a fair trial.<sup>47</sup> It guarantees to all those accused of a crime, in full equality, the following rights:

1. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
2. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
3. To be tried without undue delay;
4. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
5. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
6. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
7. Not to be compelled to testify against himself or to confess guilt.<sup>48</sup>

The express recognition of an autonomous right to interpretation services that Article 14 provides is of particular interest. To the Author's knowledge, no constitutional or other due process scheme of any state directly guarantees this right. In the United States, the

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influence on subsequent documents and near-universal acceptance. See, e.g., SAFFERLING, *supra* note 20, at 25 (citing HUMAN RIGHTS IN INTERNATIONAL LAW, LEGAL AND POLICY ISSUES 96–97 (Theodor Meron ed., 1984)). Another example is the report of the 1994 UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, which cited Article 14 as the basis for a well-established rubric of fair trial rights. U.N. Econ. & Soc. Council, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening*, UN Doc. E/CN.4/Sub.2/1994/24 (June 3, 1994).

44. See, e.g., ICC Statute, *supra* note 40, arts. 55, 66–67.

45. Using what he described as an “inductive” approach, Bassiouni enumerated a very similar list of basic procedural rights that he suggests are indisputably afforded under international criminal process because they are common to all legal systems. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 295, Appendix II (1993).

46. ICCPR, *supra* note 36, art. 14.

47. *Id.* art. 14, ¶ 3.

48. *Id.*

right to interpretation services is regarded not as an autonomous right, but as a derivative one.<sup>49</sup> The rationale is that interpretation services in and of themselves are not morally or constitutionally required, but their provision is necessary to vindicate other, more fundamental rights.<sup>50</sup> U.S. judicial decisions that address the provision of interpretation services have focused on the rights of criminal defendants to be present for all critical stages of the trial,<sup>51</sup> to benefit from the effective assistance of counsel,<sup>52</sup> and to confront adverse witnesses,<sup>53</sup> as well as the due process rights of defendants to know and defend against the charges against them, assist in their own defense, and testify on their own behalf.<sup>54</sup> For its part, the U.S. Supreme Court has never recognized an autonomous right of criminal defendants to interpretation services. It has addressed the issue only once, in its 1907 judgment in *Perovich v. United States*.<sup>55</sup> The Court in *Perovich* held that the decision of whether to appoint an interpreter for a non-English speaking defendant is within the trial court's discretion; however, the Court considered no constitutional

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49. See, e.g., T. Caroline Briggs-Sykes, *Lost in Translation: The Need for a Formal Court Interpreter Program in Alaska*, 22 ALASKA L. REV. 113 (2005) ("In Alaska, neither the legislature nor the court system has identified a right to an interpreter during a criminal trial.")

50. See ICCPR, *supra* note 36, art. 14, ¶ 3(f).

51. For example, various state and federal courts in the United States have held that an inability to understand the proceedings makes the defendant functionally absent from the trial, including preliminary hearings, pleadings, the full trial, and sentencing. See, e.g., *State v. Natividad*, 526 P.2d 730 (Ariz. 1974); *People v. Luu*, 813 P.2d 826 (Colo. Ct. App. 1991), *aff'd*, 841 P.2d 271 (Colo. 1992).

52. U.S. courts have held that to provide effective assistance, an attorney must be able to communicate with her client before and during the trial. For the constitutional underpinnings of the right to effective counsel, see *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Gideon v. Wainwright*, 372 U.S. 335 (1963). For judgments holding that the right to effective counsel requires access to an interpreter, see, e.g., *United States v. Quesada Mosquera*, 816 F. Supp. 168, 174–75 (E.D.N.Y. 1993); *Giraldo-Rincon v. Dugger*, 707 F. Supp. 504, 508 (M.D. Fla. 1989); *Peeler v. State*, 750 S.W.2d 687, 691 (Mo. Ct. App. 1988); *State v. Kounelis*, 609 A.2d 1310, 1313 (N.J. Super. Ct. App. Div. 1992).

53. The Sixth Amendment to the Constitution guarantees the right to confront accusers, a right that binds states as well. *Pointer v. Texas*, 380 U.S. 400, 400–01 (1965). Although the Supreme Court has not addressed this issue, various courts have held that the right to confrontation is meaningless if the defendant cannot understand the witnesses' testimony. See, e.g., *United States v. Mayans*, 17 F.3d 1174 (9th Cir. 1994); *Giraldo-Rincon v. Dugger*, 707 F. Supp. 504 (M.D. Fla. 1989); *United States ex rel. Negron v. New York*, 310 F. Supp. 1304 (E.D.N.Y.), *aff'd*, 434 F.2d 386 (2d Cir. 1970); *Terry v. State*, 105 So. 2d 386, 387 (Ala. Crim. App. 1925).

54. See *United States v. Carrion*, 488 F.2d 12, 13 (1st Cir. 1973); *United States v. Desist*, 384 F.2d 889, 902 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1968); *People v. Mata Aguilar*, 677 P.2d 1198, 1199 (Cal. 1998); *Mariscal v. State*, 687 N.E.2d 378, 382 (Ind. Ct. App. 1997); *People v. Rodriguez*, 546 N.Y.S.2d 769, 771 (N.Y. Sup. Ct. 1989).

55. 205 U.S. 86 (1907).

arguments and rooted its holding in the jurisprudence of the Federal Rules of Civil Procedure.<sup>56</sup>

In contrast, the ICCPR and the statutes of the various international criminal tribunals all explicitly guarantee the right of the defendant to interpretation services.<sup>57</sup> This guarantee traces back to the post-war military tribunals; in Nuremberg<sup>58</sup> and Tokyo,<sup>59</sup> defendants were explicitly granted the right to interpretation services. International criminal judges are given no discretion in this regard, which is proper considering the fact that, for every international criminal tribunal, all trials are multilingual and multicultural.<sup>60</sup>

Although the ICCPR and the statutes of the international criminal tribunals have identified the rights to be protected, it remains necessary to determine what actual practices and procedural rules will be necessary to “safeguard the individual rights in each stage of the procedure.”<sup>61</sup> As the Human Rights Committee of the U.N. acknowledged in its General Comment on ICCPR Article 14, “The requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure a fairness of a hearing.”<sup>62</sup>

Thus, the Rules of Procedure and Evidence of the various tribunals include a variety of specific provisions meant to ensure that the more general rights promised in the tribunals’ statutes are protected.<sup>63</sup> This Article focuses on the procedural and evidentiary rules pertaining to language.

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56. Cole & Maslow-Armand, *supra* note 13, at 196–97; Pantoga, *supra* note 13, at 612.

57. ICCPR, *supra* note 36, art. 14, ¶ 3(f).

58. Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 16(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

59. Charter of the International Military Tribunal for the Far East, art. 9(b), Jan. 19, 1946, T.I.A.S. No. 1989, 4 Bevens 20.

60. For nearly all of the participants in an international criminal proceeding, the law, process, and physical context of the trial are alien. Consequently, some have argued that, even if all the words spoken in a trial are correctly translated, the cultural gap between the trial chamber officials and the counsel on one side, and the participants on the other, makes it impossible for the participants to participate fully in the trial. See, e.g., Jessica Almqvist, *The Impact of Cultural Diversity on International Criminal Proceedings*, 4 J. INT’L CRIM. JUST. 745, 748–49 (2006).

61. SAFFERLING, *supra* note 20, at 2.

62. U.N. Human Rights Comm., *General Comment 13, Article 14 (Twenty-first Session, 1984), Compilation of General Comments and General Recommendations*, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

63. Int’l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugo. since 1991 [ICTY], *Rules of Procedure and Evidence*, U.N. Doc. IT/32/Rev. 39 (Feb. 11, 1994) (as amended, Sept. 22, 2006), available at <http://www.un.org/icty/legal/doc/basic/rpe/IT032Rev39e.pdf> [hereinafter ICTY Rules]; Int’l Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Int’l

The ICTY and the ICTR Rules of Procedure and Evidence contain mirror-image rules that explicitly recognize the right of the accused to use his or her language.<sup>64</sup> Witnesses and any persons appearing before the tribunals other than as counsel who do not speak French or English to their own level of comfort may similarly use their own native languages.<sup>65</sup> Counsel for an accused may also apply for leave to use the native language of the accused or a language other than English or French.<sup>66</sup> Finally, the rules make explicit that the Registrars of the respective Tribunals are responsible for arranging for interpretation of testimony and translation of documents into and out of the two working languages.<sup>67</sup> To this end, the Registrars of both tribunals have established special language sections.<sup>68</sup> Drawing on the experience of the ad hoc

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Humanitarian Law Committed in the Territory of Rwanda [ICTR], *Rules of Procedure and Evidence*, U.N. Doc. ITR/3/Rev.1 (June 29, 1995) (as amended, Nov. 10, 2006) available at <http://69.94.11.53/ENGLISH/rules/101106/rop101106.pdf> [hereinafter ICTR Rules].

64. See ICTY Rules, *supra* note 63, R. 3(B) (“An accused shall have the right to use his or her own language.”); ICTR Rules, *supra* note 63, R. 3(B) (“An accused shall have the right to use his own language.”).

65. ICTY Rules, *supra* note 63, R. 3(C); ICTR Rules, *supra* note 63, R. 3(C).

66. ICTY Rules, *supra* note 63, R. 3(D); ICTR Rules, *supra* note 63, R. 3(D).

67. Although the extent of the translation work that would have to be done was not fully appreciated until after the ICTY began work, the need for an extensive interpretation and translation system was acknowledged by the time of the first annual report of the ICTY. ICTY, *First Annual Report to the General Assembly and the Security Council*, ¶ 30, U.N. Doc. A/49/342, S/1994/1007 (Aug. 39, 1994). The ICTY’s Conferences and Language Services Section also sends interpreters into the field to work with investigators, and oversees the French- and English-language court reporters who prepare the court transcripts. Almquist, *supra* note 60, at 755 n.34.

“Until 1996, the language services provided by the ICTR had consisted mainly of support to the Office of the Prosecutor.” *Id.* at 753 n.29. When the ICTR began holding trials, however, a Language and Conference Services Section was established along the lines of the ICTY’s (I cannot account for the slight difference in the names of the two language sections). *Id.* at 752–53 & n.29; ICTR, *Second Annual Report to the General Assembly and the Security Council*, ¶ 73, U.N. Doc. A/52/582, S/1997/868 (Nov. 13, 1997). In addition, “as part of the inter-Tribunal cooperation project, the ICTR receives terminology support from the ICTY in the form of databases and glossaries.” *Id.* at 753 n.27; ICTR, *Tenth Annual Report to the General Assembly and the Security Council*, ¶ 338, U.N. Doc. A/58/297, S/2003/829 (Aug. 20, 2003).

68. All documentation produced to or by the Office of the Prosecutor at each of the two Tribunals, regardless of its relevance, must be translated so as to make evidence available in languages that the accused, the prosecutors, and defense counsel understand. ICTY Rules, *supra* note 63, R. 3(E); ICTR Rules, *supra* note 63, R. 3(E). The volumes involved are substantial. For example, in 2003, the ICTY Office of the Prosecutor printed an average of 50,000 pages per week for disclosure. See Almquist, *supra* note 60, at 753 n.27. Since then, a General Service Unit of the office roughly translates prosecution materials at a preliminary stage in order to determine whether they are likely to be produced. *Id.* If so, the documents are re-translated for use in the proceedings. *Id.* “The second translation is provided by certified translators of the Conference and Language Services Section (*ICTY Report of the Board of Auditors to the General Assembly of the United Nations*, UN doc. A/59/5/Add.12, 10 August 2004, §§ 49–51).” *Id.*

tribunals, the ICC has put into place a similar regime, although it has not yet been battle-tested.<sup>69</sup> It remains to be seen how well the ICC's regime will cope with the greater linguistic challenges that the ICC will face.

History has demonstrated that protections of the due process rights of the accused have improved as each of the international criminal tribunals did their work.<sup>70</sup> As Meron notes, "One of the principal criticisms of the Nuremberg and Tokyo Tribunals was, and is, that they were victors' courts trying the vanquished."<sup>71</sup> This criticism "resonates most strongly in the context of due process protections."<sup>72</sup> However, despite the vagueness of the London Charter that created the Nuremberg trials, when it came to due process, the procedural rights granted to the defendants at the trials in many ways exceeded those that persisted in any of the allies' domestic systems.<sup>73</sup> More importantly, however, the general perception that the Nuremberg trials were fair made it possible for a later generation to assemble the political will necessary to create the modern ad hoc tribunals.<sup>74</sup> In turn, as Cassese notes, the perceived success of the ICTY and ICTR in

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69. See Almquist, *supra* note 60, at 755 (noting that, while the collected experience of the ICTY and ICTR will be useful for the ICC's development of its own language services, the ICC still faces huge translation obstacles).

70. See *id.* at 764 ("The Tribunals themselves have sought to redress some of the most urgent culture-specific concerns stemming from a lack of common language and are engaged in extensive translations and interpretations.").

71. Meron, *supra* note 24, at 569. "Victors' justice" was not just leveled as a criticism of the tribunals; indeed, the Soviet authorities who participated in the Nuremberg trials were particularly enthusiastic proponents of it. Telford Taylor, who was the chief American prosecutor at Nuremberg after the first trial, described one occasion in which court officials were socializing together and the Soviet prosecutor offered a toast to the defendants: "May their paths lead straight from the courthouse to the grave!" Some of the judges had already downed their Cointreau by the time they heard the translation. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 211 (1992).

72. Meron, *supra* note 24, at 569. Meron recounts, in particular, that the Nuremberg and Tokyo tribunals permitted trials to be conducted *in absentia* and contained no protection against double jeopardy. However, as Meron concedes, the military tribunals' record on due process was, on the whole, quite good: "[F]airness norms inevitably crept into the proceedings, in spite of the conciseness of the Tribunal's charter." *Id.* at 570.

73. Jonathan A. Bush, *Lex Americana: Constitutional Due Process and the Nuremberg Defendants*, 45 ST. LOUIS U. L.J. 515 (2001). Bush cites, for example, the rights of the Nuremberg defendants to have counsel present at interrogations of prospective prosecution witnesses who were being detained by the Allies (as possible defendants in later trials or as protected informants); to address the court at the close of proceedings, freely, not under oath, and not subject to cross-examination; to have counsel of their choice paid for by the tribunal; and to examine documentary evidence held by the prosecution to an extent that would not be permitted in the United States for decades afterward (this was permitted starting only midway through the trial program). *Id.* at 525–27.

74. See *id.* at 536 (noting that proponents of ad hoc international criminal tribunals have argued that Nuremberg proved "that international trials are effective and can be conducted with basic fairness").

effectively respecting the rights of the accused while bringing the guilty to justice revitalized longstanding plans to establish a permanent international criminal court.<sup>75</sup>

Procedural fairness is an intractable concept and difficult to put into practice, especially considering the different—and in places incompatible—procedural systems that are amalgamated in international criminal procedure. It is indisputable, however, that international criminal tribunals must ensure that their procedures do more than the bare minimum to provide for the participants' rights. Ineffective protections are barely better than no protection at all. Part VII, *infra*, will explore what practices and procedural rules will help minimize the impact that alteration of testimony by interpretation has on the procedural rights set out above.<sup>76</sup>

### III. THE HISTORY AND MECHANICS OF COURTROOM INTERPRETATION

Most linguistic texts on interpretation begin by distinguishing interpretation from translation.<sup>77</sup> The word “translation” refers to “the transfer of thoughts and ideas from one language (the source language) into another (the target language),” in either written or oral form.<sup>78</sup> Interpretation, on the other hand, encompasses only oral communication and is defined as “situations in which one person speaks in the source language, an interpreter processes this input and produces output in the target language, and another person listens to the interpreted target language version of the original speaker’s message.”<sup>79</sup> For present purposes, interpretation may be considered the more or less contemporaneous rendering of utterances into their equivalents in another language.<sup>80</sup> Part III describes the different types of interpretation, the origins and mechanics of modern courtroom interpretation, and the interpretation of paralinguistic (non-verbal) communication.<sup>81</sup>

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75. CASSESE, *supra* note 20, at 341. Cassese writes that the political will necessary to establish the ICC would never have come about without the prior example of two functioning ad hoc tribunals. *Id.* Indeed, although the nature of the ICC’s jurisdiction is fundamentally and necessarily different from that of the ad hoc tribunals, it was clearly modeled upon them. Donoho, *supra* note 22, at 42.

76. *See infra* Part VII.

77. *See, e.g.*, TRANSLATION: APPLICATIONS AND RESEARCH 1 (R.W. Brislin ed., 1976).

78. *Id.*

79. ELENA M. DEJONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY AND PRACTICE 35 (1992); *see also* GAIBA, *supra* note 1, at 16.

80. Pantoga, *supra* note 13, at 633.

81. *See discussion infra* Part III.A-D.

### A. Types of Interpretation

The two types of interpretation commonly used in courtrooms are consecutive and simultaneous.<sup>82</sup> In consecutive interpretation, the interpreter talks during pauses between the speaker's utterances.<sup>83</sup> In simultaneous interpretation, the speaker's utterances are interpreted continuously, but inevitably with a slight lag.<sup>84</sup> Consecutive interpretation is often preferred for opening and closing statements and when a judge questions the witness because it gives the interpreter more time to consider nuances and therefore is more accurate.<sup>85</sup> Conversely, interpretation for the defendant's benefit is always performed simultaneously, and examination of witnesses often involves a rapid back-and-forth and conversational flow that requires simultaneous interpretation.<sup>86</sup> Simultaneous interpretation can be performed with or without the aid of electronic equipment; the latter method is called *chucotage* and involves the interpreter standing next to the witness and whispering into his or her ear.<sup>87</sup>

In practice, nearly all interpretation in international criminal trials is simultaneous. Interpreters tend to prefer to work simultaneously, so as to preserve the flow of the translated speech.<sup>88</sup> More importantly, consecutive interpretation can be slow. At the 1945 San Francisco Conference at which the U.N. Charter was drafted, consecutive interpretation was used exclusively and “[s]essions were delayed interminably while translators slogged along well in the wake of the proceedings.”<sup>89</sup> International criminal trials often last years—in any event, much longer than the San Francisco Conference—and the utterances of the parties must be rendered at the same time into multiple languages.<sup>90</sup> Consequently, as a practical

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82. Two other types of interpretation exist but are rarely seen in the courtroom. Sight interpretation involves the spontaneous oral rendering into the target language of written materials in the source language. It seldom has a place in the courtroom; for accuracy, documents are translated in advance and introduced into evidence in translated form. Summary interpretation occurs when an interpreter condenses and summarizes the speaker's utterances. It is not, and generally should not be, used in legal settings, where it is vital that the fact finder knows as precisely as possible what a witness said. See DEJONGH, *supra* note 79, at 49.

83. Pantoga, *supra* note 13, at 643.

84. *Id.* at 646.

85. *See id.* at 643–45.

86. *Id.* at 649.

87. GAIBA, *supra* note 1, at 16.

88. Alderman Letter, *supra* note 7.

89. Dana Schmidt, *Pick Your Language*, N.Y. TIMES MAG., Aug. 25, 1946, at 24, quoted in GAIBA, *supra* note 1, at 29.

90. Although the general perception of international criminal trials is that they are unusually long and slow, they do not necessarily last longer than complex or politically sensitive domestic trials, particularly those domestic trials that are subject to similar media scrutiny. As ICTY Prosecutor Carla Del Ponte notes, the 1992 federal trial of the Los Angeles police officers accused of beating Rodney King took two and a

matter, international criminal courts must rely on simultaneous interpretation.<sup>91</sup>

### B. *Origins of Courtroom Interpretation*

Interpretation today is taken for granted at multinational events, and there are permanent booth installations for interpreters at most major conference halls.<sup>92</sup> However, interpretation of complex, multilingual proceedings did not exist in any recognizable form until around 1920.<sup>93</sup> Prior to World War I, diplomats of every country spoke French.<sup>94</sup> At the League of Nations and inter-war conferences, the desire to accommodate as many countries as possible led first to the use of consecutive interpretation<sup>95</sup> and then to the adoption of the Filene-Findlay translation system, which IBM developed and manufactured.<sup>96</sup> However, this system was not really simultaneous interpretation; pre-translated speeches were broadcast simultaneously in different languages, and a selector switch at each seat enabled participants to choose a language in which to listen to the speech.<sup>97</sup>

True simultaneous interpretation into multiple languages was developed for the first Nuremberg trial.<sup>98</sup> While the trials were still in their planning stages, the need for spontaneous, immediate, multilingual interpretation became obvious,<sup>99</sup> as did the difficulty of

half months for conduct that lasted less than two minutes and was captured on videotape. The Milosevic prosecution, on the other hand, “involved years of conduct over extensive territory, involving a number of organs, including a multitude of military and quasi-military organizations and the alleged commission of hundreds of incidents of serious crimes.” Carla Del Ponte, *Investigation and Prosecution of Large-Scale Crimes at the International Level*, 4 J. INT’L CRIM. JUST. 539, 542 n.6 (2006).

91. For practical reasons and in order to safeguard the right of defendants to a speedy trial, reducing delays in trials remains a preoccupation of the international criminal tribunals. See, e.g., Marlise Simons, *Court Looks for Ways to Speed Milosevic Trial*, N.Y. TIMES, July 28, 2004, at A1.

92. GAIBA, *supra* note 1, at 27.

93. *Id.*

94. *Id.*

95. The early consecutive interpreters would take notes as a participant was making his speech, then deliver the entire speech in the target language. They were a highly-educated, elite group, and often had egos to match. An often-repeated story about one of the consecutive interpreters at the League of Nations, George Kaminker, illustrates how this first generation of interpreters saw themselves: When a delegate whispered to him after an especially inspired interpretation of the delegate’s speech, “That is not what I said,” Kaminker retorted, “I know, but that is what you meant to say, isn’t it?” Hannah Schiller Wartenberg, *Simultaneous Interpreters: A Good Profession for Women?*, in UNUSUAL OCCUPATIONS AND UNUSUALLY ORGANIZED OCCUPATIONS 151, n.7 (Helena Z. Lopata & Kevin D. Henson eds., 2000).

96. GAIBA, *supra* note 1, at 30.

97. GASKIN, *supra* note 4, at 43.

98. GAIBA, *supra* note 1, at 34–35.

99. GASKIN, *supra* note 4, at 44; see GAIBA, *supra* note 1, at 35.

putting it into practice.<sup>100</sup> At one of the organizational meetings for the Nuremberg tribunal, the chief U.S. prosecutor, Supreme Court Justice Robert H. Jackson, stated:

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, and I fear ridicule much more than hate.<sup>101</sup>

U.S. Colonel Léon Emile Dostert, who had been General Eisenhower's personal interpreter during World War II, was the first to realize that the Filene-Findlay equipment, with some modifications, could be used for the spontaneous and immediate interpretation needed at Nuremberg.<sup>102</sup> Under Dostert's direction, the technical problems were largely solved, and he became the first chief interpreter at the Nuremberg trials.<sup>103</sup> The interpretation that occurs today in domestic courts, international business conferences, U.N. committees, and international criminal tribunals is a direct descendant of the Nuremberg system.<sup>104</sup>

### *C. Mechanics of Modern Courtroom Interpretation*

Language interpreting is difficult.<sup>105</sup> It is a popular misconception that any bilingual person would make an adequate interpreter, but bilingualism is "only the starting point."<sup>106</sup> Alfred Steer, who directed the language interpretation office at Nuremberg, found that only about five percent of the experienced translators whom he interviewed would be able to perform the simultaneous interpretation needed at the Nuremberg trials.<sup>107</sup> Today, the overall pass rate for

100. The Tokyo military tribunal did not even try to employ simultaneous translation, citing the difficulty of translating into and out of Japanese. See Allison Marston Danner, *Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism*, 46 VA. J. INT'L L. 83, 90–91 (2005).

101. GAIBA, *supra* note 1, at 34 (quoting the Seventeenth Organization Meeting of the International Military Tribunal, Oct. 29, 1945, convened for the purpose of developing criminal procedures).

102. GASKIN, *supra* note 4, at 35.

103. Wartenberg, *supra* note 95, at 155.

104. In fact, the Nuremberg trials are credited with first awakening the American legal community to the need for defendants to have legal proceedings interpreted into their native languages. DEJONGH, *supra* note 79, at 2.

105. See Griffin, *supra* note 13, at 135.

106. Grabau & Gibbons, *supra* note 13, at 258.

107. GASKIN, *supra* note 4, at 39. Hannah Schiller Wartenberg, who worked as an interpreter at Nuremberg from 1946 to 1947, recalls that no particular qualification other than bilingual fluency was required. Translators who wanted to work as interpreters were given an oral examination and, if it seemed that they could handle the task of simultaneous interpretation, they were hired. Wartenberg, *supra* note 95, at 153.

the U.S. Federal Court Interpreter Certification Examinations is just four percent.<sup>108</sup> Similarly, to work as international conference interpreters for bodies such as the U.N. and the international criminal tribunals, candidates must demonstrate proficiency through a series of oral tests and recorded interpretation performances that are judged by a panel of experts.<sup>109</sup> The vast majority of candidates fail, including most graduates of the few interpretation schools that have been established.<sup>110</sup>

Interpreters must engage in “attending,” as distinguished from hearing. Attending is the most deliberate form of listening; it requires a concerted effort to process the incoming message.<sup>111</sup> Only after the interpreter has fully heard and understood a source utterance can he or she reformulate it in the target language.<sup>112</sup> Ideally, that reformulation should be accomplished “without editing, summarizing, deleting, or adding while conserving the language level, style, tone, and intent of the speaker.”<sup>113</sup>

In addition, in either the consecutive or simultaneous mode, interpreters must be able to work speedily. The flow and cadence of speech is an important aspect of meaning, and the proceedings should not be allowed to drag on too slowly. Accordingly, there is a strong perception in the interpretation community that academic linguists tend to make poor courtroom interpreters because they are too concerned with achieving perfect equivalence in their interpretations.<sup>114</sup> Simultaneous interpretation is too fast for fastidiousness. Highly-educated linguists often “can’t reconcile all that they know and have learned about language work with the business of giving an instant solution, as you have to.”<sup>115</sup>

Finally, interpreters must be careful not to editorialize, bowdlerize, or otherwise distort the meaning of a party’s utterances. The interpreter is an officer of the court, akin to a second court

108. ROSEANNE DUENAS GONZALEZ ET AL., FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY, AND PRACTICE 350 (1991). Certification at the federal court level is available only for Spanish, Haitian Creole, and Navajo. U.S. Courts, Three Categories of Interpreters, <http://www.uscourts.gov/interpretprog/categories.html> (last visited Nov. 26, 2007). The requirements for serving as an interpreter in other languages vary by court.

109. See, e.g., U.S. Dept. of State, Employment Opportunities with the United Nations and Other International Organizations, <http://www.state.gov/p/io/empl/11076.htm> (last visited Nov. 30, 2007) (“The UN agencies recruit for [translator and interpreter] positions by competitive examination.”).

110. Wartenberg, *supra* note 95, at 161. There are currently only two such schools in the United States, one at Georgetown University in Washington, D.C. and the other at the Monterey Institute for International Studies in Monterey, California.

111. Pantoga, *supra* note 13, at 644.

112. *Id.*

113. GONZALEZ, *supra* note 108, at 19.

114. GASKIN, *supra* note 4, at 48.

115. *Id.*

reporter. Just as the reporter's transcript is the official record of the words spoken in court, not the actual words themselves, the court interpreter's version of the testimony is the basis for the reporter's transcript, not the original testimony itself.<sup>116</sup> Thus, for example, if an interpreter is faced with a witness giving rambling or non-responsive answers, "the interpreter should interpret the answer of the witness, neither editing nor adding to the witness's words."<sup>117</sup> It is up to the court to determine whether an answer is responsive.

At Nuremberg, interpreters worked from their native languages, interpreting into their second languages.<sup>118</sup> That is, a native German speaker would translate a German witness's testimony into English.<sup>119</sup> Today, interpreters work in the reverse; they are thought to be more accurate when translating into, rather than out of, their native languages.<sup>120</sup>

Interpreting into one's native language also has the benefit of eliminating difficulties arising from interpreters' accents. The U.S. and British judges at Nuremberg found that it was tiring to listen to heavily-accented English for hours on end.<sup>121</sup> Indeed, Alfred Steer arranged for the interpreters whose native language was not English to undergo accent-elimination training to help mitigate the problem.<sup>122</sup> The modern practice of translating into one's native language nearly eliminates the need for such training.

In multilingual international criminal courtrooms, a bank of interpreters sits either in the courtroom or in separate soundproof booths (to reduce the effects of ambient noise—this is the preferred arrangement) where they can see the lawyers and witnesses.<sup>123</sup> A team or shift of interpreters includes at least one interpreter for each source and each target language spoken or understood in the trial.<sup>124</sup> A backup interpreter is present for each one currently interpreting, to step in if the interpreter falters and to alternate at regular intervals.<sup>125</sup> In addition, to help manage interruptions, check for errors, and direct the switching-off of interpreters, a supervisor, called the "monitor," is always present and listening in on the various interpretation feeds.<sup>126</sup> If the monitor disagrees with an interpretation, he or she can cut in to

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116. Marina Hsieh, "Language-Qualifying" Juries to Exclude Bilingual Speakers, 66 BROOK. L. REV. 1181, 1185 (2001).

117. Gibbons & Grabau, *supra* note 13, at 293.

118. GASKIN, *supra* note 4, at 44.

119. *Id.*

120. Alderman Letter, *supra* note 7.

121. Gibbons & Grabau, *supra* note 13, at 40.

122. *Id.*

123. Barriga Interview, *supra* note 6.

124. *Id.*

125. *Id.*

126. *Id.*

notify the judges.<sup>127</sup> In addition to the obvious benefit of correcting the record, such instances of interruption help the judges by showing them the different colors of meaning that could attach to a witness's or advocate's statements. If nothing else, the fact that a difference of opinion exists as to the proper translation signals to the judges that close attention should be paid to the testimony in question.

Sometimes an interpreter will not clearly hear or understand some utterance, whether because of low speech volume, a lawyer and witness talking over one another, or an unfamiliar colloquialism.<sup>128</sup> In such instances, the interpreter must interrupt to clarify. At times this can be difficult, such as when a cross-examination becomes heated, a lawyer raises an objection, a witness breaks down on the stand, or arguments over motions occur.<sup>129</sup>

The Nuremberg interpreters realized before the beginning of the trial that some interpretation errors would be unavoidable.<sup>130</sup> Consequently, a written transcript (separate from the court reporter's transcript) was typed each day from recordings of what the interpreters heard and spoke so that court officials could resort to it when there were disagreements over the translation.<sup>131</sup> Each day, the interpreters who were not on duty would review the record and edit it to correct mistakes.<sup>132</sup> These transcripts were relied upon heavily: "the difficulties in translation among the various witnesses often made it necessary for Tribunal members to review translated transcripts after the fact along with volumes of other documentary evidence."<sup>133</sup>

Today, a simultaneous transcript of the interpreted testimony appears on monitors placed on each desk in the courtroom, so that

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127. *Id.*

128. In general, the success of the interpretation depends greatly on sound quality. Bad acoustics in the room, ambient noise and conversation, technical glitches, and static can contribute to inaccuracies in interpretation. DEJONGH, *supra* note 79, at 29. One might think that such technical problems have been largely resolved, but at the ICTY, problems still regularly arise with the headphones. For many participants, high-pitched feedback and the need to surf back and forth over the different audio channels has "proved a distraction and an irritant." Edwin Villmoare, *Ethnic Crimes and UN Justice in Kosovo: The Trial of Igor Simic*, 37 TEX. INT'L L.J. 373, 378 (2002).

129. Alderman Letter, *supra* note 7.

130. See GAIBA, *supra* note 1, at 95 ("[A] system of recording was developed to which courtroom people could resort in cases of misunderstanding or disagreement about the translations.").

131. *Id.*

132. *Id.*

133. Jeffrey L. Spears, *Sitting in the Dock of the Day: Applying Lessons Learned from the Prosecution of War Criminals and Other Bad Actors in Post-Conflict Iraq and Beyond*, 176 MIL. L. REV. 96, 126 (2003). This review of the transcript may, however, have little influence on the judges. They may have already made up their minds regarding the credibility of a witness during the giving of testimony, and reading a corrected transcript may do little to change this. GAIBA, *supra* note 1, at 95.

parties, counsel, and judges can read it and watch for inaccuracies.<sup>134</sup> When an interpreter realizes that he or she has made an error, the correct procedure is to wait for a pause in the proceedings to make a clarification.<sup>135</sup> The errors that are corrected are read into the official record, so that when judges review the record they can see that a clarification was made.<sup>136</sup> Parties bear the responsibility to check the transcripts for errors and to object to any errors they discover.<sup>137</sup>

#### D. A Note on Paralinguistic Interpretation

An important aspect of interpretation generally, but particularly in the courtroom, is conveyance of the “paralinguistic” aspects of a speaker’s communication, i.e., the emotional content and background of utterances, as expressed through the speaker’s body language, linguistic style and nuance, pauses, hedges, self-corrections, hesitations, and displays of emotion.<sup>138</sup> Interpreters “must find ways to modify their voice, in tone and in volume, to convey these types of messages.”<sup>139</sup>

Linguists have long recognized that humans communicate not just in words, but also in “facial expressions, posture, tone of voice, and other manifestations.”<sup>140</sup> According to one study, the denotative meanings of the actual words spoken account for only about 7% of communication, while 38% is tonal, and the remaining 55% is body language.<sup>141</sup> The legal consequences of mistranslation of paralinguistic communication will be discussed further below, but it should be noted here that at least some U.S. courts, if not yet international ones, have

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134. Coan, *supra* note 28, at 230; Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT’L L. 725, 734 (1999).

135. Alderman Letter, *supra* note 7.

136. *Id.*

137. Coan, *supra* note 28, at 232.

138. GONZALEZ, *supra* note 108, at 16–17; Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 14 (1997). For this reason, interpreters generally insist on sitting where they can clearly see the witnesses. Alderman Letter, *supra* note 7.

139. Alderman Letter, *supra* note 7.

140. Salimbene, *supra* note 13, at 652. The importance of tone of voice indicates that the interpreter’s voice and accent can significantly affect the impact of testimony. For example, one observer at the first Nuremberg trial complained that “[y]oung women with chirpy little voices” interpreting the rough declamations of generals diminished the power of their words. JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 263 (1994).

141. ALBERT MEHRABIAN, SILENT MESSAGES 43 (1971). Linguists dispute the precision of Mehrabian’s numbers, but do agree that tone and body language constitute a significant part of oral communication—often more significant than the actual words spoken. “In a conversation between two people more than half of the message is communicated by gestures.” Nash, *supra* note 8, at 6.

recognized the “centrality of language to individual personality and the interpretation of meaning.”<sup>142</sup>

Accurately interpreting the full contextual meaning of an utterance requires the interpreter to possess a “high level of cross-cultural awareness and sophisticated skills, including the ability to manipulate dialect and geographic variation, different educational levels and registers, specialized vocabulary, and a wide range of untranslatable words and expressions.”<sup>143</sup> Conveying emotional content can be particularly difficult when the interpreter is faced with a witness speaking in an unfamiliar slang or dialect. For example, Spanish has at least nineteen identifiable dialects<sup>144</sup> and Chinese has ten major sub-groups divisible into nearly one thousand dialects.<sup>145</sup> The interpreter’s failure to recognize regional or class differences in accent and vocabulary can lead to serious miscommunications.<sup>146</sup> It can also give rise to linguistic disputes that cannot be resolved. During the Tokyo trials, one witness rebutted a defense challenge of his testimony by “explaining that the objector understood only colloquial Outer Mongolian, whereas he was speaking classical Outer Mongolian.”<sup>147</sup> As there was no translator available who was sensitive to the differences between colloquial and classical Outer Mongolian, the court had no choice but to rule on the objection from a position of ignorance.<sup>148</sup>

What makes paralinguistic communication so important in the courtroom is that judges assess the witnesses’ credibility based not only the witnesses’ words, but also on their tone and demeanor. Triers of fact “need to have a clear understanding of the emotions such as anger, fear, shame, or excitement that are expressed by witnesses.”<sup>149</sup> However, gaining such a clear understanding is made exponentially more difficult by cultural differences and the interposition of an interpreter.

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142. Rodriguez, *supra* note 13, at 133 (citing *Hernandez v. New York*, 500 U.S. 352, 370–71 (1991)).

143. Virginia Benneman, *Legal Interpreting: An Emerging Profession*, 76 MOD. LANG. J. 445, 446 (1992).

144. Alexandre Rainof, *How Best to Use an Interpreter in Court*, 55 CAL. ST. B.J. 196 (1980).

145. Glossika, Chinese Languages and Dialects, <http://www.glossika.com/en/dict/> (last visited Nov. 26, 2007).

146. Dominguez-Urban, *supra* note 138, at 30.

147. A. S. Comyns-Carr, *The Tokyo War Crimes Trial*, 18 FAR E. SURV. 109, 114 (1949).

148. Danner, *supra* note 100, at 91.

149. Benneman, *supra* note 143, at 259.

## IV. THE INHERENT INDETERMINACY OF TRANSLATED LANGUAGE

Several of the Nuremberg defendants, by way of reinforcing their defense of superior orders, complained that English translations of the German concept of *Führerprinzip*—the “principle of total obedience to the leader”—could not convey the seriousness and depth of the duty or its central place in German culture.<sup>150</sup> Such disputes arise frequently in international criminal proceedings, but are not unique to them. It is obvious to anyone who has studied a foreign language that words in one language cannot perfectly capture the meaning of an utterance in another language. In this way, interpretation is at least as much an art as it is a science.<sup>151</sup>

What makes interpretation so difficult is that it is useless to translate words into their literal equivalents because people do not communicate only by the strict denotative meanings of words. Ideally, all interpretation aims to achieve an “integral communication of meaning” that centers on ideas expressed rather than individual words uttered.<sup>152</sup> Specifically, an interpreter must reformulate source utterances into their experiential, contextual, and phenomenological equivalents in the target language,<sup>153</sup> doing his or her best to preserve the import of the speaker’s words, phrases, colloquial expressions, gestures, and the like.

The two main factors that contribute to the inherent indeterminacy of translated language are diversity in syntax and vocabulary between languages, and the problem of cross-cultural communication.

A. *Diversity in Syntax and Vocabulary*

The vocabularies of different languages do not overlap exactly. Many expressions and basic ways of speaking are not literally translatable because they have no equivalents in other languages. In such cases, the best an interpreter can do is to find an expression in the target language that is the rough equivalent of the one in the source language, or briefly to explain the general import of the source language expression.

The different sentence structures (syntax) of different languages also mean that sentences cannot be perfectly interpreted. The

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150. GASKIN, *supra* note 4, at 48.

151. *Id.* at 44. The characterization of interpretation as an art is supported by the reputed powers of a small number of “star” interpreters. At Nuremberg, Wolfe Frank, a German-English interpreter, was one such star: “Frank’s translations were delicious—he had a great command of the English language. I used to go to the courtroom sometimes in the afternoon just to listen to him.” Henry T. King, Jr., *The Nuremberg Context from the Eyes of the Participant*, 149 MIL. L. REV. 37, 43 (1995).

152. DEJONGH, *supra* note 79, at 49.

153. *Id.* at 30.

intensity of this phenomenon varies depending upon how closely related the source and target languages are. When interpreting between languages that employ similar syntaxes, such as French into English, the interpreter must translate the words but generally need not restructure the sentence because the languages use similar syntax.<sup>154</sup> However, translating between German and English (for example) is more difficult because in German sentences, the main verb comes at the end of a sentence.<sup>155</sup> Peter Uiberall cited what he called a “classic example” from the first Nuremberg Trials of the interpretation difficulties such structural differences can cause:

[A] former Nazi official on the witness-stand is asked, ‘Did you know Mr. Schmidt?’ [The name is made up.] And let us say Mr. Schmidt was a concentration camp Commandant, and having known him would be incriminating. The witness starts ‘*Ja, den Schmidt, den habe ich im Jahre Fünfunddreissig oder nein im Jahre Sechsunnddreissig, da habe ich den Schmidt. . .*’ You still don’t know. Has he seen him, has he known him, has he spoken to him, has he heard of him? All this can follow the verb at the end. So the poor interpreter cannot start, unless he [says something like] ‘Yes, er, no, er, Schmidt, well, with regard to Schmidt, was it in thirty-five or thirty-six, was it in Leipzig or was it in Dresden, I’m not quite sure, it was then that. . .’ You have to turn the sentence around completely, in order to be free to speak when he speaks, or else you lose him and you cannot catch up.<sup>156</sup>

Such convoluted sentences involving structural complications—which are pervasive in natural, colloquial speech—can also put the interpreter into a bind as to whether to interpret a statement like the one quoted above simultaneously or consecutively. If the interpreter chooses simultaneous interpretation (the more likely choice, because changing modes would interrupt the flow of the examination), the problem described by Uiberall will arise. Compounding matters, when an interpreter does turn the sentence around to make it structurally coherent, the interpreted testimony, full of “ums” and pauses, will sound like prevarication to a judge. If the interpreter chooses to wait until the end of the witness’s statement and then to interpret consecutively, the gap in the translation will confuse those listening to the interpreter.

### B. Cross-Cultural Communication

Communicating across languages necessarily involves communicating across cultures,<sup>157</sup> and the problems involved in cross-

154. GAIBA, *supra* note 1, at 104. Sentences in English and the Romance languages follow the order subject–verb–object.

155. See GASKIN, *supra* note 4, at 44.

156. *Id.*

157. Indeed, cross-cultural communication difficulties often arise even within the same language; witness the old adage about America and Britain being “two nations divided by a common language.”

cultural communication have received more attention from scholars than any other aspect of interpretation. This Subpart focuses on the linguistic complications that arise due to the multicultural nature of international criminal proceedings. However, the issues associated with multicultural participation in those proceedings are broader. Most significantly, the participants in the trial—the accused, witnesses, and victims—as well as the entire affected populations come from different cultures than those that shaped the international criminal institutions and have dominated international law for centuries. This lack of “cultural proximity” may undermine 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 international criminal proceedings for the participants.<sup>158</sup>

In linguistics, the cultural contingency of language is universally accepted.<sup>159</sup> The U.S. Supreme Court has given legal force to this notion: “Language permits an individual both to express a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond.”<sup>160</sup> It is thus not surprising that the legal literature is rife with examples, explanations, and denunciations of the phenomenon of witnesses and defendants being misunderstood because of cultural differences.<sup>161</sup> For example, “[p]rejudicial misimpressions may result because a defendant fails to make eye contact with the jury . . . [.] speaks in a voice unnaturally loud or soft, or appears without emotion. These and other forms of non-verbal communication may be misinterpreted because of cultural differences.”<sup>162</sup> While such problems cannot be eliminated, they can be minimized by educating interpreters about the culture of the participants.<sup>163</sup>

Of course, some of this misunderstanding is due to bias and ethnic, religious, or racial prejudice of trial participants. Bias on the part of translators may also contribute, although this effect appears

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158. Almqvist, *supra* note 60, at 748–49. In particular, participants in the trial and officials of the tribunals may hold “opposing views on acceptable rules of conduct [and] disagree[] over the meaning and requirement of justice in the context of grave crimes.” *Id.* at 747.

159. DEJONGH, *supra* note 79, at 49.

160. *Hernandez v. New York*, 500 U.S. 352, 370 (1991); *see also* Rodriguez, *supra* note 13, at 140–41.

161. Cole & Maslow-Armand, *supra* note 13, at 195; Michael J. Maloney & Allison Taylor Blizzard, *Ethical Issues in the Context of International Litigation: “Where Angels Fear to Tread,”* 36 S. TEX. L. REV. 934, 957–60 (1995).

162. Cole & Maslow-Armand, *supra* note 13, at 196.

163. Alderman Letter, *supra* note 7. Interpreters at the ICTR are educated in Rwandan history, politics, language, and culture, even if they do not interpret into or from Kinyarwanda, the primary language spoken in Rwanda.

to be less frequent than in the past.<sup>164</sup> Various techniques have been proposed for accounting for bias and reducing its impact, but these techniques are beyond the scope of this Article, except to emphasize that interpreters and judges must be aware of and sensitive to the issue.

In a trial, cross-cultural communication difficulties impact most significantly on the ability of triers of fact to assess the weight that should be given to different witnesses' testimony. People tend to believe themselves to be good judges of others' character, but the evidence contradicts such widespread self-satisfaction.<sup>165</sup> In assessing another's trustworthiness, observers usually focus on the most obvious mannerisms: whether a speaker looks his or her interlocutor in the eye, fidgets, stammers, and the like.<sup>166</sup> However, the cues and mannerisms that people take for granted as indicating honesty or deception—and body language in general—vary from one culture to another and are more difficult to control than the words used.<sup>167</sup> In addition, the “they all look the same” phenomenon comes into play; even people without any racist animus tend to have difficulty telling apart the faces and deciphering the facial expressions of members of other ethnic groups.<sup>168</sup> In a different context, that of interviewing applicants for asylum, an Australian court took notice of these difficulties:

Reliance upon demeanour as a determinant of credibility requires the exercise of great care, even by the most experienced arbiters of fact, and it may be unsafe to do so where the witness provides evidence in a foreign language and the tribunal receives only the interpreter's understanding of the witness's account.<sup>169</sup>

A final complication is that the strained, impersonal, and adversarial atmosphere of the courtroom makes the problems associated with cross-cultural communication particularly difficult to overcome. Members of different cultures have the best chance of overcoming their prejudices and working together when “their contact is intimate, on equal terms, and perceived as rewarding rather than

164. A low point of the Tokyo trials occurred when the head of the language section, with overall responsibility for the translation of documents and testimony, declared to the court in session that “it is an established fact that an Oriental, when pressed, will dodge the issue.” ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* 161–62 (1987).

165. Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 *CONN. L. REV.* 1, 14 (2000).

166. *Id.* at 16.

167. See, e.g., WILLIAM E. HEWITT, *COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS* 158 (1995) (discussing cultural differences between the deaf community and the general public vis-à-vis body language).

168. Rand, *supra* note 165, at 35.

169. Steve Norman, *Assessing the Credibility of Refugee Applicants: A Judicial Perspective*, 19 *INT'L J. REFUGEE L.* 273 (2007) (citing *WAEJ v. MIMIA* (2003) FCAFC 188, 17 (Austl.)).

antagonistic,”<sup>170</sup> all of which is unlikely in the case of a genocidal perpetrator and a witness to genocide.

## V. EXTRINSIC SOURCES OF ALTERATION OF MEANING IN TRANSLATED TESTIMONY

In addition to the fact that interpretation by its nature changes the meaning of utterances, a variety of other factors contribute to the alteration of testimony, the most important of which are interpreter fatigue, an interpreter’s lack of relevant extralinguistic knowledge, and difficulties associated with the cross-examination of witnesses through interpreters.<sup>171</sup> Part V discusses each of these factors, then proceeds to analyze the special challenges presented by the international criminal context.

### A. Interpreter Fatigue

Interpretation is an intense, exhausting activity. Alfred Steer wrote, “You need a certain amount of absolutely iron nervous control, so that you can absolutely rely on the fact that you’re never going to stutter or stop, ever.”<sup>172</sup> As the speed and duration of interpretation increase, the possibility for error increases,<sup>173</sup> so time limits must be established, with a second interpreter standing by for each interpreter currently working. Accordingly, U.N. interpreters (including those at the international criminal tribunals) are not permitted to interpret simultaneously for more than thirty consecutive minutes.<sup>174</sup> However, to cut down on mistakes due to fatigue, interpreters try to switch off every twenty minutes or so, if possible, either during natural breaks in the testimony or between witnesses.<sup>175</sup>

Another method employed to mitigate the effects of mental exhaustion and help maintain consistency is to have interpreters interpret in only one direction.<sup>176</sup> If, for example, an interpreter

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170. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 59 (1995).

171. See discussion *infra* Part V.A–C.

172. GASKIN, *supra* note 4, at 38.

173. Coan, *supra* note 28, at 231.

174. GONZALEZ, *supra* note 108, at 18; Gibbons & Grabau, *supra* note 13, at 296.

175. ALICIA B. EDWARDS, *THE PRACTICE OF COURT INTERPRETING* 14 (1995).

176. See GASKIN, *supra* note 4, at 38 (“If [an interpreter] interpreted from German into English, he did *not* do English into German, so he was spared from going back and forth in two languages, but even so we found that he could not do it day after day.”).

interprets from Serbo-Croatian to French, she will never interpret from French to Serbo-Croatian.<sup>177</sup>

Beyond the inevitable fatigue, even highly-trained interpreters sometimes falter because of sudden fatigue, sickness, or strong emotion. At Nuremberg, there were “repeated instances where an interpreter would simply fail, break down, be unable to continue, and we would have to put in a substitute at as short notice as possible, so that the court wouldn’t be delayed any more than need be.”<sup>178</sup> Sometimes, the backup interpreter or the monitor is able to tell that an interpreter is about to break down and can get ready to step in.<sup>179</sup> In addition, simultaneous interpretation is not exactly simultaneous; there is a six to eight second lag called the *décalage* between the interpreter hearing a word in the source language and speaking it in the target language.<sup>180</sup> As Steer discovered, “If the lag got longer [than eight seconds], the interpreter would soon get into trouble, because you can only hold a very limited number of words in your memory under [courtroom] conditions.”<sup>181</sup>

Different tribunals have devised different systems to deal with flagging interpreters.<sup>182</sup> At Nuremberg, the interpreters used a lights system to signal the judges.<sup>183</sup> Steer, who often acted as monitor, devised “a system of two lights: a yellow one meaning ‘Please slow down,’ and a red one meaning ‘Please stop the proceedings momentarily.’ I’d press the red one, which was in front of Lord Justice Lawrence [the presiding judge], he would stop everything, and I’d make the shift.”<sup>184</sup> In addition, a complete separate team of interpreters was kept on hand at all times in the courtroom to avoid having to stop the proceedings because of a missing interpreter or one who broke down under the strain.<sup>185</sup>

### B. *Extralinguistic Knowledge*

To be effective, interpreters must possess extralinguistic knowledge relevant to the proceedings, which means they must have good command of relevant specialized vocabulary beyond ordinary

177. *Id.*

178. *Id.*

179. *Id.*

180. GAIBA, *supra* note 1, at 16.

181. GASKIN, *supra* note 4, at 39.

182. For example, compare the Nuremberg strategy with the concept of team interpreting, which is gaining support amongst translators. See Giovanna L. Carnet, *Team Interpreting: Does it Really Work?*, ATA CHRONICLE, Nov.–Dec. 2006, available at [http://www.atanet.org/chronicle/feature\\_article\\_nov\\_dec2006.php](http://www.atanet.org/chronicle/feature_article_nov_dec2006.php).

183. GASKIN, *supra* note 4, at 39.

184. *Id.* at 38. For an interpreter’s perspective on the two-light system, see *id.* at 43.

185. GAIBA, *supra* note 1, at 72.

fluency in the source and target languages. Most obviously, this implies knowledge of legal proceedings and jargon. DeJongh cites the following example, which occurred in a state court in California:

Judge: "Do you waive further notice of this date?"

Spanish Interpreter: "*¿Ud despide que se le deje saber de otras informaciones en este caso?*" ("Do you wave [good-bye] to receiving other information about this case?").<sup>186</sup>

To avoid such misunderstandings, interpreters at the international criminal tribunals, as part of their training, are expected to "familiarize themselves with . . . the Tribunal's Rules of Procedure and Evidence . . . includ[ing] reading Tribunal judgments, Decisions, Prosecution and Defense Motions, [and] expert reports submitted by expert witnesses at the Tribunal."<sup>187</sup>

Extralinguistic knowledge goes beyond legal jargon. Peter Uiberall recalls an urbane and well-educated German-English interpreter at Nuremberg who had particular difficulty interpreting a certain witness's testimony regarding forced labor in the potato fields: "He could have handled Nietzsche or Schopenhauer very well, but . . . couldn't figure out for the life of him what 'eyes' had to do on potatoes."<sup>188</sup> Even without issues of vocabulary, extralinguistic knowledge of the context of testimony can be all-important in selecting a proper interpretation. Richard Alderman, the ICTR interpreter, cites the following example:

In [Rwanda] . . . much is made about the plane of President Habyarimana crashing. It occurred on 6 April 1994, a date you will hear at ICTR at least ten times daily. The genocide began that day. Much debate surrounds the circumstances of that crash. The plane was shot down, but there is debate as to who did it. The RPF [Rwandan Patriotic Front]? The Hutu extremists? One expert witness was testifying and the interpretation of the "plane crash" came out as "*l'accident*" in French. Now of course implying that it was an "accident" prompted the French-speaking defence lawyer to question the witness as to why such a theory could be developed. Did the witness have information suggesting that it was an accident and not an attack? The debate took this unexpected turn and went on for a while, all the result of a slight modification of the original meaning.<sup>189</sup>

In general, interpreters must have a background broad enough to include "a wide range of vocabulary and an ability to assimilate a

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186. DEJONGH, *supra* note 79, at 29; *see also* Mollie E. Pawlosky, *When Justice is Lost in the "Translation": Gonzalez v. United States, an "Interpretation" of the Court Interpreters Act of 1978*, 45 DEPAUL L. REV. 435, 467 (1996) (noting that an interpreter should be not only bilingual, but also "bicultural" in order to ensure the accuracy of interpretations).

187. Alderman Letter, *supra* note 7.

188. GASKIN, *supra* note 4, at 46.

189. Alderman Letter, *supra* note 7.

variety of subjects.”<sup>190</sup> The best interpreters are ones who have spent several years living and working in places where the source and target languages are spoken<sup>191</sup> and have specialized training or experience in areas relevant to the trial.<sup>192</sup>

### C. Cross-Examining Witnesses through Interpreters

Lawyers often find it difficult to examine witnesses through an interpreter. In particular, a lawyer will aim to take control of a cross-examination by “driv[ing] it through at the speed he dictates, not allowing the witness breathing space or a chance to draw red herrings across the line of questioning.”<sup>193</sup> Attorneys thus have particular difficulty adjusting to the pace of cross-examination through interpreters; they resent having to speak slowly and complain that cross-examination is rendered ineffective when interpretation breaks the flow of the examination.<sup>194</sup> For this reason, defendants usually demand simultaneous interpretation when they testify, even if they speak the language of the examining attorney.<sup>195</sup> Simultaneous interpretation also gives defendants extra time to think of their answer to each question, an advantage some are able to exploit to reduce the impact of the cross examination.<sup>196</sup>

The most well-known example from the Nuremberg trials of interpretation gone awry is also a lesson in how a savvy defendant can manipulate interpretation to his advantage. At a climactic

190. Siegfried Ramler, *Origins and Challenges of Simultaneous Interpretation: The Nuremberg Trial Experience*, in LANGUAGES AT CROSSROADS 438 (Deanna Lindberg Hammond ed., 1988).

191. *Id.*

192. A good example is Jean Meyer, who worked as a French-German interpreter at the first Nuremberg trial. Meyer was particularly prized because he had studied medicine before World War II and was therefore familiar with relevant technical terminology. Meyer parlayed his renown within the profession into steady work at international medical conferences and later became Charles de Gaulle’s personal interpreter. Wartenberg, *supra* note 95, at n.19.

193. ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 266 (1983).

194. GAIBA, *supra* note 1, at 101.

195. *Id.* at 102. For example, at the first Nuremberg trial, at least five of the defendants (Schacht, Fritzsche, Speer, Göring, and Hess) spoke excellent English, but all insisted on having their examiners’ questions translated into German. *Id.*

196. Witnesses demanding interpretation, although they speak the language of the examiner, can make the act of interpreting more difficult.

[S]uch situations often become problematic because a witness will tend to start answering some questions before receiving the interpretation. In that case, it becomes very difficult since the witness will be speaking while the interpreter is still trying to give a rendition. . . . In such cases I have actually seen the judges ask the witness if s/he understands the language and ask if the witness would kindly use the language in question. Often this just saves judicial time, and that is what the judges are looking for.

Alderman Letter, *supra* note 7.

moment of his examination of Hermann Göring, Justice Jackson<sup>197</sup> was forced to withdraw an important piece of documentary evidence that he believed conclusively demonstrated Germany's intention to take control of the Rhineland as early as the spring of 1935.<sup>198</sup> The document was a list of orders signed by Göring that included one order for the "*Freimachung des Rheins*" (literally, "free-making of the Rhine").<sup>199</sup> While this phrase could mean "clearing of the Rhine," it had been translated as "liberation of the Rhineland."<sup>200</sup> When Jackson brandished the document as proof of the German intention to retake control of the Rhineland, Göring successfully argued that the document was merely a routine administrative order referring to the dredging of the Rhine River in order to open the river to larger ships.<sup>201</sup>

In general, the insertion of any buffer between lawyer and witness shields the witness, making it easier to get away with prevarication and stalling.<sup>202</sup> When a lawyer does manage to conclude a quick and skillful cross-examination (with the interpreters struggling to keep up) the effect may be lost on the judges, who, relying on the interpretation, miss the dramatic power of the questioning.<sup>203</sup> When the examining lawyer and the witness speak the same language, the problems of interpreting the exchange into the court's working languages can actually be exacerbated because lawyers and witnesses who speak the same language tend to speak faster and more colloquially.<sup>204</sup>

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197. Robert H. Jackson, an Associate Justice of the United States Supreme Court from 1941–1954, took a leave of absence from the court to help establish the legal framework for Nuremberg Trials and to serve as the Chief U.S. Prosecutor during the first trial. See Whitney R. Harris, *Justice Jackson at Nuremberg*, 20 INT'L L. 867 (1986).

198. GAIBA, *supra* note 1, at 109.

199. *Id.*

200. *Id.*

201. *Id.* It should be noted that despite Göring's ability to discredit the document in the eyes of the court, this episode may not actually have been an innocent (if heated) disagreement as to the proper translation. The document in question contained an otherwise innocent list of directions, but only "*Freimachung des Rheins*" was written in quotation marks. *Id.* at 117 n.50.

202. Howard S. Levie, *Prosecuting War Crimes Before an International Tribunal*, 28 AKRON L. REV. 429, 432 (1995). A famous example of this phenomenon occurred not at a war crimes trial, but in the U.N. Security Council chamber during the Cuban Missile Crisis. During a speech to the Council, U.S. Permanent Representative Adlai Stevenson dared the Soviet representative, Ambassador Zorin, to deny that the U.S.S.R. had placed missiles in Cuba. As Zorin sat silently, waiting for the interpreters' feed to play in his headphones, Stevenson abruptly demanded, "Yes or no—don't wait for the translation—yes or no?" Adlai Stevenson, U.S. Ambassador to the United Nations, Cuban Missile Crisis Speech to the U.N. Security Council (Oct. 25, 1962), available at [http://en.wikisource.org/wiki/Adlai\\_Stevenson's\\_Cuban\\_Missile\\_Crisis\\_speech\\_to\\_the\\_United\\_Nations\\_Security\\_Council](http://en.wikisource.org/wiki/Adlai_Stevenson's_Cuban_Missile_Crisis_speech_to_the_United_Nations_Security_Council).

203. GAIBA, *supra* note 1, at 103.

204. Coan, *supra* note 28, at 232.

D. *The Special Challenges Presented by International  
Criminal Tribunals*

In international criminal trials, all of the problems associated with interpretation discussed above are amplified. Indeed, interpreters working for the international criminal tribunals report that the work is unlike—and more difficult than—simultaneous interpretation in any other context.<sup>205</sup> Simply put, interpretation at an international criminal proceeding is a much more complex undertaking than in national courts.<sup>206</sup> Of immediate interest is that every proceeding involves at least three languages: French, English (the working languages of the tribunals), and the native language of the defendant.

Because the international criminal tribunals have multiple working languages, everything must be translated into and from each of the working languages.<sup>207</sup> This has the effect of doubling both the workload of the translators and the opportunities for testimony to be altered.<sup>208</sup> As discussed below, the fact that the judges may listen to either the French or the English audio means that they may hear testimony that differs substantially.<sup>209</sup>

In addition, the fact of multiple working languages can create unexpected complications outside the courtroom. Judge Patricia M. Wald, formerly of the ICTY, describes herself as having been able

205. Alderman Letter, *supra* note 7 (“The work [at the ICTR] is so unlike any other type of interpretation work I’ve been involved in that I believe the only way to effectively learn what [the ICTR] does is to be there in person and acquire a feel for what is being done.”). Because the work is so unusual, ICTR interpreters, who must be highly skilled and experienced in order to obtain the job in the first place, train in the courtroom in a dead booth, in which an interpreter can practice during a live session, i.e., an actual court hearing or conference, without broadcasting his or her interpretation. The interpreter’s dead booth session is usually recorded for review. *Id.*

206. See Del Ponte, *supra* note 90 (providing an overview of the practical difficulties inherent in prosecuting international crimes). Del Ponte was Chief Prosecutor of the ICTY and also previously served as Chief Prosecutor for the ICTR. Wikipedia, Carla Del Ponte, [http://en.wikipedia.org/wiki/Carla\\_Del\\_Ponte](http://en.wikipedia.org/wiki/Carla_Del_Ponte) (last visited Nov. 26, 2007). For a brief overview of the logistical challenges the ICTR faces, see Erik Møse, *The ICTR: Experiences and Challenges*, 12 NEW ENG. J. INT’L & COMP. L. 1 (2005). Judge Møse is President of the ICTR and Presiding Judge of its first trial chamber. *Id.*

207. See Møse, *supra* note 206, at 8 (noting that “translation of thousands of pages of documents into the official languages of the Tribunal is often required.”).

208. See generally Møse, *supra* note 206, at 8, 11. This leaves aside the hybrid tribunals, which generally face less daunting linguistic challenges than do the ICTR, ICTY, and ICC. Take, for example, the situation at the SCSL: although some defendants and witnesses may speak different tribal languages or Krio, an English-based creole, the SCSL has only one working language, English, which is also the only official language of Sierra Leone. See Statute of the Special Court for Sierra Leone, art. 24, Aug. 14, 2000, available at <http://www.sc-sl.org/Documents/scsl-statute.html>.

209. See Part VI *infra*.

speak only “a high school smattering of French” when she arrived in The Hague.<sup>210</sup> She relates,

[O]utside the courtroom we were on our own as far as communication with colleagues was concerned. That made for some difficulties in deliberations among the judges, and since most of the legal assistants assigned to the French Chamber also spoke primarily French, it meant much juggling for an English-speaking judge like me to figure out what they were saying in their memoranda and research.<sup>211</sup>

Beyond the matter of multiple working languages, there are many more witnesses than in a typical national trial, and the witnesses tend to come from different cultures and speak different languages than the prosecutors and judges (and often the defense counsel as well).<sup>212</sup> At the same time, international criminal proceedings are often more dependent than are national courts upon witness testimony, particularly that of eyewitnesses.<sup>213</sup> At Nuremberg, this reliance on witness testimony was not as much of a problem; as Justice Jackson explained in his opening statement, “The Germans were always meticulous record keepers, and the[] defendants had their share of the Teutonic passion for thoroughness in putting things on paper.”<sup>214</sup> Thus, “rather than basing its case primarily on witness testimony, the prosecution was able to rely heavily on the defendants’ own words and records to prove its accusations.”<sup>215</sup> Modern war criminals have proved less fastidious at maintaining their records than were the Nazis, so modern prosecutors have not been able to make their cases primarily on documentary evidence.<sup>216</sup>

Moreover, the post-war International Military Tribunals benefited from “the extensive police powers that the Allies exercised in occupied Germany,” which gave them “an evidence-gathering apparatus that any prosecutor would envy.”<sup>217</sup> By contrast, the ad hoc tribunals and the ICC do not enjoy a general police power that would enable them to search for documentary or circumstantial

210. Patricia M. Wald, *International Criminal Courts—A Stormy Adolescence*, 46 VA. J. INT’L L. 319, 321 (2006).

211. *Id.* at 322.

212. *Id.*

213. Tadic Transcript, *supra* note 9, at T. 65 (noting that “[this Tribunal] is to a considerable degree . . . dependent on eyewitness testimony.”); *see also* Patricia M. Wald, *Dealing With Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 220 (2002) (discussing the ICTY’s reliance on eyewitness testimony).

214. Justice Robert H. Jackson, Chief of Counsel for the United States, Opening Statement (Nov. 21, 1945), in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 102 (1947).

215. Meron, *supra* note 24, at 560.

216. Wald, *supra* note 213, at 217–19.

217. *Id.*

evidence.<sup>218</sup> This lack of an autonomous evidence-gathering capacity further contributes to the dependence of the international criminal tribunals upon witness testimony.

International criminal tribunals are dependant upon witness testimony not only to establish the involvement of the individual defendant in the acts identified in the indictment, but also to prove the defendant's knowledge of the acts and the intent with which he or she committed them.<sup>219</sup> Aside from the standard problems associated with proving intent, understanding such concepts as honor, duty, and obedience is fundamental to determining why a particular defendant acted the way he or she did.<sup>220</sup> The meaning of testimony on these topics may be only subtly altered, but those subtleties go to the heart of mens rea.

Furthermore, each of the crimes that international criminal tribunals are convened to prosecute emphasize intent: genocide, crimes against humanity, and war crimes.<sup>221</sup> According to the ICC Statute's definition, genocide is merely murder unless "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group";<sup>222</sup> crimes against humanity are identifiable when they are "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the

218. The modern tribunals' lack of independent evidence-gathering capabilities forces them to rely on supportive governments and individuals. In theory, Security Council resolutions require all member states to cooperate fully with the ad hoc tribunals' requests and orders, including those for the production of evidence. However, as Meron notes, there is a "disconnection" between theory and practice:

[G]overnments do not always cooperate, and when they do are often willing to share information only if its sources are kept confidential. . . . The ICTY has devised a system . . . permitting confidential information sharing at the investigative and pretrial stages but requiring disclosure if information is actually used in evidence at trial. However, in recognition of the Tribunal's utter dependence on the assistance of states, states supplying confidential information are permitted to block its use at trial. The ICTR has enjoyed the solid support of the government of Rwanda, except when the ICTR prosecutor has tried to investigate crimes allegedly committed by the Tutsi.

*Id.* at 561.

219. See *Ghosts of Rwanda, Rwanda Today: The International Criminal Tribunal and the Prospects for Peace and Reconciliation—An Interview with Helena Cobban*, FRONTLINE, Apr. 1, 2004, available at <http://www.pbs.org/wgbh/pages/frontline/shows/ghosts/today/> ("The ICTR prosecutors have been trying to establish the historical record, but they have had to rely overwhelmingly on witness testimony.").

220. See Andrew J. Cappel, *Bringing Cultural Practice into Law: Ritual and Social Norms Jurisprudence*, 43 SANTA CLARA L. REV. 389 (2003) (discussing the role of social norms on jurisprudence).

221. ICTY Statute, *supra* note 40, arts. 2–5; ICTR Statute, *supra* note 40, arts. 2–4; ICC Statute, *supra* note 40, arts. 5–8. I have left aside for the purposes of this note the controversial and as-yet-undefined crime of aggression mentioned in article 5(1)(d) of the ICC Statute.

222. ICC Statute, *supra* note 40, art. 6.

attack”;<sup>223</sup> and war crimes are distinct from other violent crimes in that they are “committed as part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>224</sup>

An added layer of difficulty is that evidence of *mens rea* is likely to be given in colloquial and culturally-specific terms, and thus is particularly open to challenges over the proper translations of expressions and euphemisms.<sup>225</sup> The ability of judges at international criminal tribunals to assess the credibility of witness testimony is thus both unusually important and unusually difficult. As Judge Wald writes,

My distinct impression is that most witnesses before the ICTY tell the truth as to the core of their experience . . . [B]ut war crime witness testimony may be compromised by the speaker’s desire for the trial to have concrete results . . . at the same time, judges’ ability to assess witnesses’ credibility is diminished . . . because the counsel and witnesses are speaking in several languages simultaneously and the trials can go on for months or years.<sup>226</sup>

One example of specialized vocabulary that commonly arises in international criminal proceedings is that of ethnic slurs and related epithets.<sup>227</sup> Such terms are fraught with historical and current social significance, so a proper understanding of their meanings is critical to interpretation, especially to shed light on the perspectives of witnesses and intent of the accused. Thus, in international criminal trials, ethnic slurs in particular “must be understood both in their historical context and in the context in which they were used during the conflict.”<sup>228</sup>

In addition, the heinous nature of the crimes prosecuted by international criminal tribunals means that the testimony presented is often grisly and disturbing.<sup>229</sup> Many of the witnesses are themselves victims of atrocities, which affects both witnesses and interpreters. First, the delay caused by interpretation can rattle witnesses and exacerbate the stress and fear that they are already

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223. *Id.* art. 7(1).

224. *Id.* art. 8(1). On the *mens rea* issues involved in the prosecution of rape as a war crime, see Susana Sà Couto, *Advances and Missed Opportunities in the International Prosecution of Gender-Based Crimes*, 10 GONZ. J. INT’L L. 49 (2006).

225. See Møse, *supra* note 206, at 11 (observing that the mixture of cultures present at hearings makes the legal system “*sui generis*”).

226. Wald, *supra* note 213, at 235–36.

227. See, e.g., Del Ponte, *supra* note 90, at 553 (noting that at the ICTY, the trial chamber was confronted with the use of a variety of ethnic epithets, such as “chetniks,” “ustashds,” “Turks,” or “balijas.” Each has a distinct etymology, denotative meaning, and cultural significance.).

228. *Id.*

229. See, e.g., Coan, *supra* note 28, at 183 (discussing witnesses testifying in front of the ICTY after being raped during the conflict in Yugoslavia).

experiencing.<sup>230</sup> Second, the disturbing nature of the testimony tests the nerves of even the most well-trained interpreters. At Nuremberg, many of the German-English interpreters were U.S. Jews who had grown up in Germany and emigrated to the United States either before or during the Nazi regime.<sup>231</sup> They sometimes broke down in the interpreters' booths, unable to continue knowing that they sat so close to those responsible for the murder of their relatives.<sup>232</sup> Even the highly-trained and professional corps of interpreters working at today's international criminal tribunals sometimes experiences this type of problem.<sup>233</sup>

The nature of the crimes concerned also makes interpreters more likely—whether consciously or unconsciously—to editorialize.<sup>234</sup> Alfred Steer cites the example of Virginia Grey, a German-American interpreter at Nuremberg who found herself unable to say some of the words that needed translating.<sup>235</sup> Steer noticed the problem when a particular concentration camp guard was on the witness stand and used especially derogatory language.<sup>236</sup> At one point he said, “You just had to piss on the Jews” [*auf die Juden pissen*].<sup>237</sup> Grey translated this as, “You just had to ignore the Jews.”<sup>238</sup> While such problems do not arise as often today, they do still occur.<sup>239</sup>

International tribunals are also more likely than national ones to require double-interpretation, which occurs when speakers of less

230. *Id.* at 231. For a discussion of the effect of trial delays on rape victim witnesses, see *id.* at 223–24.

231. GASKIN, *supra* note 4.

232. *Id.* at 41.

233. Richard Alderman, the ICTR interpreter, writes:

The biggest challenge for me personally can be the subject matter. Some of the testimony that has to be interpreted can be difficult to hear. One is interpreting real people, real tragedy. Here I am referring to some of the more gruesome details of the genocide. Dealing with subjects such as killing, rape, extermination and the like on a daily basis can tend to wear down anyone. I am not saying that it turns one into a basket case, but there are days where it can be difficult to stomach. . . . There were a few occasions where I had such difficulty with witness testimony I actually had to ask my colleague to take over. Sometimes you go home saddened and drained. But these are simply human reactions to human situations.

Alderman Letter, *supra* note 7.

234. See Gibbons & Grabau, *supra* note 13, at 281.

235. GASKIN, *supra* note 4, at 40–41.

236. *Id.*

237. *Id.*

238. *Id.* This particular error was caught in the daily review of the interpretation transcript and was corrected in the official record. However, as noted above, there is good reason to doubt that the judges regularly checked the corrected interpreters' transcript and no evidence that the judges ever changed their minds on any particular point due to a correction in the transcript. See *supra* notes 130–33 and accompanying text.

239. See *supra* note 90 and accompanying text.

commonly spoken languages are called upon to testify.<sup>240</sup> The tribunal may not have staff interpreters qualified to interpret between a witness's language, the official languages of the court, and the language of the defendant, so a two-stage interpretation is performed.<sup>241</sup> For example, double interpretation occurred in Nuremberg when a Belgian who spoke only Flemish testified regarding the destruction of the library of the University of Louvain in Flanders.<sup>242</sup> A Flemish-English interpreter would stand next to the witness and interpret via *chucotage*, then the interpreters in the booths would continue the interpretation from there.<sup>243</sup> In the early stages of the proceedings under the ICTR, Kinyarwanda-speaking interpreters were in short supply, so double interpretation was commonplace.<sup>244</sup> Two-stage interpretation exacerbates both the inherent alteration of testimony caused by interpretation and the likelihood of errors.

Although this Article does not deal directly with the translation of witness statements and other written documents, it should be noted that such translation presents its own problems. Most notably, the sheer volume of documents that must be translated into several official or working languages of a tribunal creates unacceptable delays.<sup>245</sup> Judge Erik Møse of the ICTR describes the situation:

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240. Wartenberg, *supra* note 95, at 156.

241. Sometimes, double interpretation is deliberately used to save resources—fewer language experts are needed overall—especially when the intermediate language is from the same linguistic family as either the source or target language. *Id.*

242. GASKIN, *supra* note 4, at 45.

243. *Id.*

244. Alderman Letter, *supra* note 7. At first, due to a lack of qualified interpreters, consecutive interpretation into and out of Kinyarwanda was used. The ICTR did not introduce simultaneous interpretation of Kinyarwanda into both English and French into one of its trial chambers until 2001, more than four years after it began conducting trials. ICTR, *Eighth Annual Report to the General Assembly and the Security Council*, § 4, U.N. Doc. S/2003/707, A/58/140 (July 11, 2003). The switch to simultaneous interpretation made proceedings about 25% faster than they were when only consecutive interpretation was used. *Id.* The ICTR now runs its own in-house simultaneous interpretation training courses in Kinyarwanda. ICTR, *Ninth Annual Report to the General Assembly and the Security Council*, § 74, U.N. Doc. S/2004/601, A/59/183 (July 17, 2004).

245. Of course, this concern is not limited to international criminal tribunals. In the various tribunals of the European Union, most prominently the European Court of Justice, much ink has been spilled lamenting the delays caused by the necessity of translating documents into multiple languages. For example, Ian S. Forrester, a Brussels-based lawyer who practices regularly in front of the European tribunals, notes:

[F]or reasons of translation, our judgments cannot be delivered until several weeks after they have been finalised and where the judgment is especially long, the delay can be up to a few months. This problem recurs throughout the procedure as the pleadings lodged in each case have to be translated. The situation is such that it risks jeopardising one of the achievements in

The Tribunal also had problems with disclosure of witness statements and other documents to the defense, as well as with a need to translate thousands of pages into the two official languages of the Tribunal. A working group has found ways to speed up translation of documents, thereby reducing delays in judicial proceedings. Techniques have been developed to reduce the volume of documents that require translation. However, the Tribunal still has to prioritize. This is not an easy task because the translation services work for the Appeals Chamber, the three Trial Chambers, the Prosecution, the Defense, and the Registry.<sup>246</sup>

Despite these acknowledged difficulties, translation of written documents has become more commonplace in the international criminal tribunals because parties increasingly use written documents instead of oral witness testimony.<sup>247</sup> This change from oral to written testimony is primarily intended to save time at trial, since documents can be pre-translated and then simply introduced into evidence at trial.<sup>248</sup> Although oral witness testimony will likely remain the evidentiary mainstay of international criminal trials, greater use of written testimony deserves attention because it will affect the role of interpreters and the nature of interpreted testimony.

As the slow pace of international criminal trials can itself be seen as infringing the right of the accused to a speedy trial, on September 13, 2006, the ICTY amended Rule 92*bis* of its Rules of Procedure and Evidence and added Rules 92*ter* and 92*quater*.<sup>249</sup> The new rules permit the introduction of written evidence in broader circumstances than had previously been allowed.<sup>250</sup> Taken together, the amended rules provide a robust system for the admission of written evidence in lieu of oral testimony.<sup>251</sup> As is usual with the

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Community justice to which the Court attaches great importance, namely the availability of the judgments in all of the languages on the day of the judgment.

Ian S. Forrester, *The Judicial Function in European Law and Pleading in the European Courts*, 81 TUL. L. REV. 647, 696–97 (2007).

246. Møse, *supra* note 206, at 11.

247. See Nice & Vallières-Roland, *supra* note 15, at 365–72.

248. See, e.g., *id.* (discussing the procedural innovations geared toward speeding up trials).

249. ICTY Weekly Press Briefing, (Sept. 20, 2006), available at <http://www.un.org/icty/briefing/2006/PB060920.htm>.

250. *Id.*

251. I have chosen to focus on these aspects of the ICTY Rules because the ICTY was the first to address this issue explicitly and because the ICTY Rules' treatment of it is the most extensive. Later, in 2006, the ICTR adopted rules similar to those adopted by the ICTY. Rule 92*bis* of the ICTR Rules contains language identical to Rules 92*bis* and 92*quater* of the ICTY Rules, but the ICTR Rules do not include a rule equivalent to Rule 92*ter* of the ICTY Rules. Compare ICTY Rules, *supra* note 63, at R. 92*bis*, with ICTR Rules *supra* note 63, at R. 92*bis*. The Rules of Procedure and Evidence of the ICC contain no specific provision dealing with the admissibility of written evidence offered in lieu of oral testimony. Int'l Criminal Court, *Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1 (2000) available at <http://www.icc-cpi.int/vtf.html> (Click on "English" hyperlink under the "Rules of

introduction of written testimony, the rules' primary concerns are protecting the accused's right to confront adverse witnesses (especially with respect to cross-examining them) and ensuring that those writings introduced into evidence are true and an accurate reflection of the witness's authentic testimony.<sup>252</sup>

Rule 92*bis* establishes the parameters for the admission of written statements and transcripts.<sup>253</sup> It permits a trial chamber to "dispense with the attendance of a witness in person" by allowing the introduction of a written statement or transcript of evidence previously given.<sup>254</sup> The rule then provides a list of factors that the trial chamber should consider in making such a decision.<sup>255</sup>

Procedure and Evidence of ICC heading"). The ICC Rules do state, more generally, that a trial chamber of the ICC may admit previously recorded audio, video, or written testimony of a witness, so long as (1) both parties have had an opportunity to examine the witness, and (2) if the witness is present before the trial chamber, he or she does not object to the submission of the previously recorded testimony. *Id.* at R. 68.

252. Since it was enacted in 2004, Rule 92*bis* has been a frequent subject of scholarly discussion. Commentaries have focused primarily on these two concerns. See, e.g., Ari S. Bassin, *Dead Men Tell No Tales: Rule 92bis—How the Ad Hoc International Criminal Tribunals Unnecessarily Silence the Dead*, 81 N.Y.U. L. REV. 1766 (2006); Nice & Vallières-Roland, *supra* note 15; Patrick L. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, 3 J. INT'L CRIM. JUST. 1037 (2005). See generally the Journal of International Criminal Justice's symposium issue: *The ICTY 10 Years On: The View from Inside*, 2 J. INT'L CRIM. JUST. 353 (2004).

253. ICTY Rules, *supra* note 63, at R. 92*bis*.

254. *Id.* at R. 92*bis* (A).

255. *Id.* The Rule provides:

(i) Factors in favour of admitting written statements or transcripts include whether the evidence in question:

- (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
- (b) relates to relevant historical, political, or military background;
- (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
- (d) concerns the impact of crimes upon victims;
- (e) relates to issues of the character of the accused; or
- (f) relates to factors to be taken into account in determining sentence.

(ii) Factors weighing against admitting written statements or transcripts include whether:

- (a) there is an overriding public interest in the evidence in question being presented orally;
- (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
- (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

Generally speaking, the trial chamber must balance the efficiencies to be gained and the benefits to the witness from admitting written testimony against the risk that false evidence will be introduced and the right of the accused to confront adverse witnesses will be compromised.<sup>256</sup> If the trial chamber does admit a witness's evidence in the form of a written statement or transcript, a witnessed declaration of its truth to the best of the witness's knowledge must accompany that evidence,<sup>257</sup> and the trial chamber may still require the witness to appear for cross-examination.<sup>258</sup>

Under Rule 92*ter*, notwithstanding the provisions of Rule 92*bis*, written evidence may be admitted of witnesses who: (i) are present in court, (ii) are available for cross-examination and questioning by the judges, and (iii) can attest in court that the written statement that was introduced reflects both the witness's actual previous declaration and what the witness would say under direct examination.<sup>259</sup>

Finally, Rule 92*quater* permits the admission of written statements of unavailable witnesses, so long as the trial chamber finds that the statement is reliable and that either (1) the witness is unavailable due to death or sufficiently severe bodily or mental condition or (2) the witness can no longer be located with reasonable diligence.<sup>260</sup> As an additional protection, a factor weighing against the admission of written evidence of an unavailable witness is that the evidence pertains to the acts or conduct of the accused as charged in the indictment.<sup>261</sup> In other words, although Rule 92*quater* operates notwithstanding the requirements of Rule 92*bis*, it imports that rule's provision that written evidence going to peripheral matters is more likely to be admissible than evidence going directly to the guilt of the accused.<sup>262</sup>

It is too soon to assess definitively the impact of these new rules. However, as their supporters have predicted,<sup>263</sup> they are likely to

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*Id.* at R. 92*bis*(A)(i)–(ii).

256. *See id.* at R. 92*bis*(B).

257. *Id.*

258. *Id.* at R. 92*bis*(C).

259. *Id.* at R. 92*ter*(A). Rule 92*ter* is a codification of a ruling by the Appeals Chamber in the Milosevic case that, as a matter of law, Rule 89(F) of the ICTY Rules permits the introduction of written evidence, provided the three listed conditions are fulfilled. Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements (Sept. 30, 2003); *see also* Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-AR73.4, Interlocutory Appeal of the Prosecution Against the Decision on Prosecution Motion for the Admission of Evidence-in-Chief of its Witnesses in Writing (May 13, 2003). The Appeals Chamber's interpretation of Rule 89(F) in these rulings was controversial, and the addition of Rule 92*ter* makes reference to Rule 89(F) unnecessary.

260. ICTY Rules, *supra* note 63, at R. 92*quater* (A).

261. *Id.* at R. 92*quater* (B).

262. *Id.*

263. Nice & Vallières-Roland, *supra* note 15, at 365–72.

speed up proceedings to some extent. In addition, they may also improve the quality of translations because translators working from written texts will have more time to consider their words and to check for errors.

## VI. THE LEGAL CONSEQUENCES OF TESTIMONY ALTERED BY INTERPRETATION

Two important legal consequences stem from the alteration of testimony through interpretation. First, such alteration harms the procedural rights of defendants.<sup>264</sup> Second, it leads to skepticism as to the correctness of judicial findings of fact.<sup>265</sup>

Alteration of testimony by interpretation diminishes the defendant's guarantee of access to interpretation services contained in ICCPR Article 14(3)(f).<sup>266</sup> In addition, the alteration of testimony through interpretation can impair some of the other due process rights.<sup>267</sup> Specifically, if a defendant cannot fully and accurately understand the testimony of witnesses, the utterances of opposing lawyers, and the pronouncements of the judges, he may functionally have been tried without being present.<sup>268</sup> Furthermore, if a defendant cannot communicate with counsel or cannot with full confidence examine witnesses, raise objections, or petition the court for redress of grievances, his right to effective counsel is infringed.<sup>269</sup> Finally, interpretation harms the ability of defendants to confront their accusers because witnesses' credibility cannot be assessed as accurately as it could be if all parties spoke the same language.<sup>270</sup>

Harm to defendants arising from altered testimony may be mitigated by placing the obligation for guaranteeing the quality of interpretation on the court and by taking the various practical steps discussed below in Part VII.<sup>271</sup> A more intractable problem stems from the fact that international criminal tribunals are presided over

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264. See Hench, *supra* note 13, at 269–72 (discussing a case where the Ninth Circuit Court of Appeals criticized a district court ruling because a defendant was denied an interpreter).

265. *Id.*

266. ICCPR, *supra* note 36, art. 14(3)(f).

267. See, e.g., JOHN FALLAHAY, RIGHT TO A FULL HEARING 9 (2000); Hench, *supra* note 13, at 269; Stewart Kwoh, *Building Bridges to Justice*, 9 ASIAN L.J. 201 (2002); Pantoga, *supra* note 13, at 610–11.

268. ICCPR, *supra* note 36, art. 14(3).

269. *Id.*

270. *Id.*; see, e.g., Baker, *supra* note 13, at 596; Cole & Maslow-Armand, *supra* note 13, at 196; Sharon Meadows, *Implementing the Right to Counsel in Post-Apartheid South Africa*, 29 GEO. WASH. J. INT'L. L. & ECON. 453 (1995).

271. See *infra* Part VII.

by panels of judges drawn from different countries.<sup>272</sup> This diversity reflects the multinational nature of the enterprise, emphasizes that violations of human rights are a crime against all of humanity, and protects against bias.<sup>273</sup> However, it also has an important unintended consequence; because the judges may listen to testimony (and the submissions of counsel) in either of the working languages of the court, they may hear different interpretations of the same testimony.<sup>274</sup> In other words, the judges render their decisions based on testimony that may differ subtly or grossly in substance. In addition, judges frequently disagree as to how much weight to give a particular witness's testimony, and the different translations of that testimony may exacerbate this divergence.

This issue has been addressed in the United States, but only in connection with juries. In *Hernandez v. New York*, the U.S. Supreme Court upheld a trial court's ruling that prosecutors may strike potential jurors on the basis of their ability to speak a language (other than English) in which testimony is to be given (in that case, Spanish).<sup>275</sup> In reaching its decision, the court accepted the state's argument that ensuring that all jurors hear a single version of a witness's testimony is a legitimate objective.<sup>276</sup>

It should be noted that the reasoning in *Hernandez* is inapplicable to judges presiding over international criminal courts in two respects. First, the judges in international criminal trials deliberate together extensively before rendering a unified judgment. Any substantive differences in the judges' impressions of important testimony should become apparent during deliberations, which gives the judges an opportunity to consult the corrected interpretation transcript and resolve any discrepancies.<sup>277</sup> Of course, juries also deliberate as a group, but it is fair to assume that the deliberations of legal experts are more likely to involve rigorous exploration of the reasons underlying differences of opinion than the deliberations of lay jury members. In addition, modern trial chamber judges have access to the live computer feed of the translated testimony.<sup>278</sup>

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272. See Møse, *supra* note 206, at 13 ("The trial judges come from a wide variety of legal cultures; predominately African, European, and Asian.").

273. SUNGA, *supra* note 21, at 288–90.

274. See Møse, *supra* note 206, at 14.

275. *Hernandez v. New York*, 500 U.S. 352, 371 (1991).

276. *Id.* at 352–80. The Supreme Court's review dealt primarily with a claim that the prosecutor had actually dismissed jurors because of their Hispanic ethnicity, not because of what language they spoke. The Court found that the trial judge had not exceeded his discretion in determining that the prosecutor had no discriminatory intent. *Id.* However, it declined to hold that the practice of disqualifying bilingual jurors is always constitutional. For an in-depth assessment of *Hernandez*, see Hsieh, *supra* note 116.

277. See Møse, *supra* note 206, at 13 (discussing why dissents are rare in international tribunal decisions).

278. See Coan, *supra* note 28, at 230.

Second, the situation of judges hearing differently-interpreted testimony is unavoidable without remaking the structure of international courts. *Hernandez* focused on whether the ability to understand a second language that would be used in testimony was a legitimate basis for disqualifying a juror.<sup>279</sup> In international trials, at least for the foreseeable future, there is no choice; switching to a single working language for the court would undo a carefully negotiated compromise. Moreover, even if such a switch were possible, it would be a politically impossible choice between disqualifying the French-speaking or the English-speaking judges. While it may be feasible to change to a single working language in the future, for now it is not possible. The international nature of the enterprise confers significant symbolic and practical benefits. As long as interpretations into the two working languages of the international criminal courts are policed for accuracy and consistency, the international community may have to resign itself to the fact that instances of inconsistency will arise.

#### VII. SOME STEPS THAT CAN BE TAKEN

The capacity of interpretation to alter testimony is not a purely technical problem to be addressed by linguists and other experts in interpretation. Rather, the inherent ability of interpretation to alter the meaning of witness' utterances, combined with the multitude of factors that make errors in interpretation more likely, creates the potential for infringement of the procedural rights of defendants and verdicts based on faulty findings of fact.

Only in the rare, extreme case of a significant error relating to material testimony that remains uncorrected would inaccurate interpretation negate the due process rights retained by international criminal defendants. Indeed, there is no evidence that any conviction thus far handed down by international criminal tribunals has actually turned on corrupted testimony. Nevertheless, the danger is real. As the ICTY Tribunal noted in the *Mucic* case, "The attorneys who speak both English and Bosnian have noticed many errors in the translation which change the meaning. . . . The answer given on several occasions changed not only the names of people and places but also the very substance of what the witness was saying."<sup>280</sup>

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279. 500 U.S. at 357–63 (analyzing the prosecutor's peremptory challenges under the *Batson* test and finding, inter alia, that the fact that multilingual jurors might not defer to the court interpreter's official translation is a legitimate concern and that dismissal on the basis of linguistic ability is race-neutral despite the correlation between language and race).

280. Prosecutor v. *Mucic et al.*, Case No. IT-96-21, Transcript, at 6797–98 (Sept. 4, 1997).

As described in Parts III and IV, *supra*, there are two different ways in which interpretation can alter the meaning of testimony.<sup>281</sup> First, there are alterations that stem from the inherent indeterminacy of translated language; these cannot be cured but can be taken into account. Second, there are the inaccuracies that stem from interpreter error, environmental factors, and the like; these can be minimized and largely eliminated.

For both types of alterations, however, the impetus for improvement must come from the court. The interpreters who work at international criminal tribunals are, for the most part, the elite of their profession. They are trained in the art and science of simultaneous interpretation and also in relevant terminology and cultural issues. Lengthening their training or increasing the number of interpreters in the pool would reduce errors somewhat, but would bust the already-strained budgets of the international criminal tribunals.<sup>282</sup>

The onus for minimizing the impact of interpretation on testimony must fall on the judges rather than the parties. The judges at the international criminal tribunals are not just neutral umpires of the process, but also arbiters of the result. They are charged with establishing their own rules of procedure and ensuring that the proceedings are conducted fairly.<sup>283</sup>

Furthermore, judges in the international criminal tribunals take on the inquisitorial role of judges in the civil law system. They may question defendants directly, compel production of evidence, and summon additional witnesses (including experts) after the parties have concluded their cases.<sup>284</sup> The judges of the trial chambers have in fact exercised this power.<sup>285</sup> Thus, the judiciary has a significant

281. See discussion *supra* Parts III–IV.

282. See UN: Budget, staff cuts put strain on Int'l Court of Justice, Court President Tells General Assembly, M2 PRESSWIRE, Oct. 28, 1997, available at <http://www.globalpolicy.org/wldcourt/icjfinan.htm>.

283. SUNGA, *supra* note 21, at 313–14. The ICTY and ICTR Statutes both require the trial chambers to ensure that trials are “fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence.” ICTY Statute, *supra* note 40, art. 20; ICTR Statute, *supra* note 40, art. 19.

284. See ICTY Rules, *supra* note 63, at R. 98 (“A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance.”).

285. See, e.g., Prosecutor v. Kupreskic, Case No. IT-95-16, Decision on Defence Motion to Summon Witnesses, (Oct. 6, 1998). In that case, the court stated:

Rule 98 (“Power of Chambers to Order Production of Additional Evidence”), which provides that “a Trial Chamber may order either party to produce additional evidence. It may itself summon witnesses and order their attendance”, is inapplicable to the case at hand insofar as it concerns the production of *additional* evidence, whereas what is requested by defence counsel in this instance is an order of the Chamber summoning witnesses to testify as court witnesses . . . .

role in the production of evidence and the creation of the record that is separate and apart from the role of the parties. International criminal court judges are intended to intervene “in the presentation of evidence [in a manner] not governed by party interests but considered truly independent, aimed solely at seeking of the truth, ‘inquisitorial’ in this sense.”<sup>286</sup>

Currently, in the absence of any explicit rule to the contrary, it falls on the parties to object if they discover interpretation errors in the record.<sup>287</sup> This practice amounts to making the adversarial parties the guardians of due process. On the contrary, the Preparatory Committee on the Establishment of the ICC envisaged that the “President should play an active role in guiding the trial proceedings by conducting the debate and monitoring the manner in which evidence for or against the accused was reported.”<sup>288</sup>

For the judges to play the role that the Preparatory Committee intended for them will require a change in attitude. Currently, the perspective of most judges at the international criminal tribunals reflects the attitude of many legal scholars—that interpretation is a technical issue only.<sup>289</sup> Judge Møse of the ICTR is a typical example; he acknowledges the problems posed by translation but supposes them to be solvable with simple “vigilance”:

The testimony of Kinyarwanda-speaking witnesses presents particular problems. Vigilance is of the essence when the communication between the witness and those asking the questions takes place through translation into two languages—Kinyarwanda to French, and then French to English. Occasionally, there is a need for repetition of the evidence in order to avoid mistakes.<sup>290</sup>

With respect to the first, “incurable” type of alterations of testimony, the most important thing is for judges always to remain actively aware of the effects of interpretation. Understanding the ways in which interpretation can alter testimony will help to make judges more sensitive to inconsistent testimony and more likely to

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*Id.* See also Press Release, The Hague, Blaskic Case: The Chamber Orders the Appearance as Witnesses of General Philippe Morillon (Former UNPROFOR Commander), Colonel Robert Morillon (Former BRITBAT Commander), A Former Chief of Staff of the Croatian Defence Council (HVO), Muslim Commanders of the Army of Bosnia and Herzegovina, and of the Former Chief of the ECMM (Apr. 6, 1999).

286. SAFFERLING, *supra* note 20, at 219.

287. See Coan, *supra* note 28, at 232 (“Parties bear the responsibility to check the transcripts for accuracy and make objections as soon as errors are discovered.”).

288. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, ¶ 265, U.N. Doc. A/51/22/Add.1 (1996).

289. See, e.g., Møse, *supra* note 206, at 14 (representing an ICTR judge who views interpretation as a technical issue).

290. *Id.*

think twice in the face of vague or ambiguous statements, rather than making a snap judgment.

With respect to the other extrinsic factors that contribute to the alteration of testimony, judges, witnesses, and attorneys can do a variety of things to help the interpreters perform with a higher degree of accuracy. For example, at the beginning of the Tadic trial, the ICTY trial chamber warned the parties to “speak slowly, because sometimes the interpreter needs additional time.”<sup>291</sup> Trial participants must also be careful not to talk over each other. These are perhaps obvious points, but their importance is impossible to overstate.<sup>292</sup> Counsel and witnesses can help the court (and themselves) by speaking slowly, using simple sentences, and avoiding colloquialisms and expressions that are culture-specific.

In addition, it is human nature to revert to familiar patterns of speech as lengthy proceedings continue, and judges must remain vigilant throughout the trial, interrupting when necessary to ensure that witnesses and advocates continue to speak so as to make interpretation easier and more accurate. Sometimes, specific problems must be addressed; at the Tokyo trials, for example, the Japanese military defendants shouted their testimony, as they had been trained to shout when responding to superiors’ questions.<sup>293</sup>

Hans Fritzsche, one of the defendants at the first Nuremberg trial who spoke fluent English, wrote in his memoirs that the long, complex sentences some of his co-defendants used hurt their defenses because the interpreters could not properly communicate their sentiment to the judges.<sup>294</sup> Even pausing mid-sentence to assist the interpreter did not actually help because the interpreter could not communicate the sentence until he or she heard the verb at the end of it.<sup>295</sup> Fritzsche wrote, “Because of this weakness, essential parts of

291. Coan, *supra* note 28, at 231.

292. Alderman Letter, *supra* note 7.

The parties had to learn to pause before speaking. This has an impact when lawyers are examining witnesses (especially when they want to react quickly to impeach a witness during cross-examination.) You often find lawyers speaking while the interpreters are still interpreting. The consequences of this are obvious. Interpreters can only interpret one person speaking at a time.

*Id.*

293. See Danner, *supra* note 100, at 91.

294. HANS FRITZSCHE, *THE SWORD IN THE SCALES* 82 (D. Pyle & H. Fraenkel trans., 1953), *quoted in* GAIBA, *supra* note 1, at 104. Fritzsche was a senior Nazi official who held various posts, eventually rising to be Joseph Goebbels’ deputy in the German propaganda ministry. Wikipedia, Hans Fritzsche, [http://en.wikipedia.org/wiki/Hans\\_Fritzsche](http://en.wikipedia.org/wiki/Hans_Fritzsche) (last visited Oct. 24, 2007). He was tried in place of the deceased Goebbels but was one of only three major Nazi figures to be acquitted at Nuremberg. *Id.* However, Fritzsche was soon after charged with other crimes and eventually served time in prison. *Id.*

295. FRITZSCHE, *supra* note 294, at 82.

various German arguments were lost in translation and never came up for discussion at all.”<sup>296</sup> Fritzsche attempted to help out his fellow defendants by compiling a list of “Suggestions for Speakers,” but his list was largely ignored.<sup>297</sup> He was particularly frustrated by the garbled testimony of Fritz Sauckel: “more than half of what [Sauckel] had to say in his own defense remained untranslated.<sup>298</sup> It was, quite simply, untranslatable.”<sup>299</sup> Such problems will be reduced if the judges remain alert throughout the trial, to inform and remind trial participants of the need to speak and act in ways that benefit the interpreters, and to step in immediately when a witness, lawyer, or another judge speaks too quickly or too colloquially.

In addition, witnesses and counsel should speak directly to each other, ignoring the interpreter intermediary.<sup>300</sup> Judges should also be aware that it is more difficult to interpret when a bilingual party speaks alternately in different languages, as often occurs when a witness is testifying primarily in his or her native language but also speaks one of the court’s working languages. Such variation breaks the flow of the interpreter’s thought process and should be stopped immediately.

Judges should remember that interpreting is tiring, that interpreters must rest between half-hour shifts, and that interpreters should ideally work only one or two shifts in the courtroom per day.<sup>301</sup> The presiding judge must also be aware of the necessity of

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296. *Id.*

297. GAIBA, *supra* note 1, at 104

298. FRITZSCHE, *supra* note 294, at 83. Sauckel was Reich Defense Commissioner and Plenipotentiary for Manpower from 1942 to 1945, and as such was in charge of procuring and mobilizing slave labor. Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 199 (1997) (“Sauckel, the Plenipotentiary General for the Utilization of Labor, claimed that he was not responsible for the abuses associated with the detention and transportation of workers to Germany. The Tribunal, however, noted that ‘Sauckel had over-all responsibility for the slave labor program.’”). He held honorary senior rank in both the SA and SS. Avi Singh, *Criminal Responsibility for Non-State Civilian Superiors Lacking De Jure Authority: A Comparative Review of the Doctrine of Superior Responsibility and Parallel Doctrines in National Criminal Laws*, 28 HASTINGS INT’L. & COMP. L. REV. 267, 291 (2005) (“Sauckel, a Nazi official who was an Obergruppenfuehrer with both the SA and the SS, was not guilty of Count 1 and 2, though he was guilty of Counts 3 and 4.”). The International Military Tribunal eventually found Sauckel guilty, and he was hanged on October 16, 1946. See Ellis Washington, *The Nuremberg Trials: The Death of the Rule of Law (in International Law)*, 49 LOY. L. REV. 471, 489–90 (2003) (discussing the date that Sauckel was executed).

299. FRITZSCHE, *supra* note 294, at 83. The proposition that Sauckel’s testimony was largely untranslatable is, of course, only Fritzsche’s personal opinion; as far as the Author can determine, no interpreter singled out Sauckel as being particularly difficult to interpret. However, the larger point—that speaking style greatly affects the ability of interpreters to translate effectively—is not controversial.

300. Barriga Interview, *supra* note 6.

301. Alderman Letter, *supra* note 7.

swapping interpreters and orchestrate the proceedings so that these switches occur smoothly.

Better training—broadly defined—in the cultural and linguistic particularities that will become relevant at trial is necessary for all those involved in the trial, not just for the interpreters. ICTY Prosecutor Del Ponte writes:

Because Judges are not from the region and generally have no knowledge of relevant factors such as geography, locations where the crime took place, distances, language, cultural sensitivities and relevant political or historical background, evidence that sets the context within which the crimes were committed has to be collected and prepared for presentation in court. Though such challenges may occasionally arise when prosecuting at the national level, it is an everyday reality when constructing a case before the Tribunal, requiring extensive effort, resources and time.<sup>302</sup>

The burden of educating the judges in this manner should not fall entirely upon the prosecutors and defense counsel (although good advocacy entails a certain amount of instruction). Thus, at the outset of the *Akayesu* trial at the ICTR (that tribunal's first prosecution for genocide), the trial chamber called an expert witness on linguistics to testify regarding Kinyarwanda slang expressions for the word "rape."<sup>303</sup> That chamber correctly recognized the need not only to understand the denotative meanings of such Kinyarwanda slang terms for rape as "*inkotanyi*," but also their origins and history.<sup>304</sup> However, this excellent decision has not been made standard practice at the ICTR or at any of the international criminal tribunals. A related practice established at the ICTR that has not, but should be, made universal is English-language classes for the detainees; these classes have taken place at the ICTR since 1999.<sup>305</sup>

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302. Del Ponte, *supra* note 90, at 552.

303. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, (Sept. 2, 1998).

The words *Inkotanyi*, *Inyenzi*, *Icyitso/Ibyitso*, *Interahamwe* and the expressions used in Kinyarwanda for "rape," because of their significance to the findings of the Chamber, are considered particularly, as follows: The Chamber has relied substantially on the testimony of Dr. Mathias Ruzindana, an expert witness on linguistics, for its understanding of these terms. The Chamber notes that Dr. Ruzindana stated in his testimony that in ascertaining the specific meaning of certain words and expressions in Kinyarwanda, it is necessary to place them contextually, both in time and in space.

*Id.* ¶ 146.

304. *Id.*

305. See President of the Int'l Tribunal for Rwanda, *Report of the 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 Between 1 January and 31 December 1994*, ¶ 92, delivered to the Security Council and the General Assembly, U.N.

In addition, the international criminal tribunals should establish written procedures for dealing with disputes over interpretations. For example, when a party disagrees with the interpreter's chosen language, appeal could be made to the monitor. Also, the rules of procedure relating to judges and interpreters do not address interaction with the interpreters, and there are currently no standing international rules governing the conduct of defense counsel.<sup>306</sup> Detailed guidelines for working through interpreters should be drafted, codifying the steps that the trial participants should take to contribute to the accurate interpretation of testimony. Having written procedures will help the judges to enforce "interpretation discipline" throughout the trial. Otherwise, even those judges with the best of intentions will allow the trial participants to backslide as the trial inevitably protracts.

Finally, when assessing witnesses' testimony, judges must always remember to monitor the witness's voice, not just the interpreter's, and should observe the witness's tone and body language. If judges are unsure of the meaning of nonverbal signals they observe, they should not hesitate to interrupt and ask the interpreter to characterize the witness's testimony. Similarly, judges should be sensitive to the fact that some witnesses may be even more hesitant than they might otherwise be to speak of personal problems when an interpreter of the same ethnic group or cultural background is present, because such admissions would "shame" their families.<sup>307</sup> In such cases, judges should stop the proceedings to allow a different interpreter to step in.

## VIII. CONCLUSION

International criminal law is currently at a threshold. The ad hoc tribunals were established as executive organs, charged with prosecuting those responsible for perpetrating human rights violations in specific times and places.<sup>308</sup> Nevertheless, despite this relatively limited ambit, they have "served as a training ground for

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Doc. S/1999/943, A/54/315 (Sept. 7, 1999) ("Another positive development worth noting is the introduction of English language classes for the detainees in order to facilitate communications between them and the Tribunal in the two official languages. The classes take place in the UNDF and are paid for by the Tribunal.").

306. Jann Kleffner, *Some preliminary Thoughts on the Position of the Defence at the New International Criminal Court and the Role of the Netherlands as the Host State*, in *THE POSITION OF THE DEFENCE AT THE INTERNATIONAL CRIMINAL COURT AND THE ROLE OF THE NETHERLANDS AS HOST STATE* 5 (Martine Hallers et al. eds., 2000).

307. Smith Interview, *supra* note 5.

308. MISETIC, *supra* note 32, at 50.

the next generation of leaders in the field of international criminal law.”<sup>309</sup>

The establishment of the ICC takes international criminal law in a new direction, one of permanence, regularity, and systematization. One of the main difficulties facing the ICC is the procedural order that it should apply; the Rome Statute and the ICC Rules represent “many years of political and legal struggle and contain[] a certainly impressive compromise. However, the discussion about a correct procedural order for this court . . . is far from over.”<sup>310</sup> Following the example of the Nuremberg and Tokyo IMTs, the international criminal tribunals have continued to refine and improve their due process protections long after their charters and rules of procedure were first enacted.<sup>311</sup> As the ICC puts its rules of procedure into practice and begins to hold trials, it will be able to take advantage of experience gained and lessons learned at the ad hoc tribunals. However, in many ways—including linguistically—the ICC presents new and greater challenges. The ad hoc tribunals’ jurisdiction is constrained to specific conflicts, and therefore to specific language groups.<sup>312</sup> Serbian and Croatian, for example, are virtually the same language; they are only written using different alphabets. In addition, unlike the ICTY and ICTR, the ICC explicitly recognizes a right of victims to participate in its proceedings.<sup>313</sup> Consequently, the translation responsibilities of the ICC are greater and more complex than the tribunals that came before it.

Those charged by international tribunals, although not yet tried, are labeled war criminals.<sup>314</sup> If convicted, they will not only lose their liberty for the time of their sentence and possibly much of their property, but they will also in theory be stigmatized to an extent beyond all but the most shocking of domestic crimes.<sup>315</sup> Thus, “given the severity of these repercussions, the international criminal justice system requires the highest standard of proof before an accused can be convicted and imprisoned.”<sup>316</sup>

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309. Meron, *supra* note 24, at 578.

310. SAFFERLING, *supra* note 20, at 1.

311. Cristian Defrancia, *Due Process in International Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1438 (2001). For example, argues Defrancia, the increasing disfavor of anonymous witness testimony by the ad hoc tribunals “represents a move toward a stronger balance in favor of the rights of the accused.” *Id.*; see also *supra* notes 57–60 and accompanying text.

312. See ICC Statute, *supra* note 40, art. 5.

313. *Id.* art. 75.

314. Beresford, *supra* note 33, at 630.

315. Just “in theory” because convicted war criminals are often supported and acclaimed by the members of the ethnic, religious, or political groups in whose name they committed their criminal acts.

316. Beresford, *supra* note 33, at 630. Furthermore, the ICCPR, *supra* note 36, art. 14(6), guarantees defendants the right to a remedy for breach of the right to a fair trial. The nature of this potential remedy remains undefined in international criminal

Judge Wald of the ICTY, a forceful supporter of the international criminal tribunals,<sup>317</sup> admits that international criminal law has experienced a “stormy adolescence.”<sup>318</sup> However, if the tribunals fail, this “will seriously deflate any pretensions for the practical significance of international criminal and humanitarian law.”<sup>319</sup> The best hope for making war criminals accountable for the atrocities they perpetrate is the establishment of a respected system of prosecution that is free of procedural cavils. Alteration of testimony by interpretation is currently a neglected issue, and one with the potential to harm the legitimacy of the international criminal tribunals. However, the tribunals can take some low-cost and easy-to-institute measures to reduce the likelihood that a judgment will turn based on an inaccurate interpretation. Improving the quality of simultaneous interpretation of testimony will buttress the truth of the international criminal tribunals’ findings and the fairness of their procedures.

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law, but many, including the former Presiding Judges of the ICTY and ICTR (Claude Jorda and Navanethem Pillay, respectively (now both judges of the ICC)), have argued for the monetary compensation of those wrongly prosecuted or convicted. Beresford, *supra* note 33, at 633–40.

317. See Patricia M. Wald, *Why I Support the International Criminal Court*, 21 WIS. INT'L L.J. 513 (2003).

318. Wald, *supra* note 210, at 319.

319. *Id.* at 345–46.