Assessing the Existence of the Right to Translation under the International Covenant on Civil and Political Rights

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Abstract

The right to an interpreter for criminal defendants who do not speak the language of the court is guaranteed in article 14 (3)(f) International Covenant on Civil and Political Rights (ICCPR). However, the right to an interpreter is normally understood to only cover oral communications in the courtroom; it generally does not guarantee the translation of written documents or evidence. There is a growing awareness, though, that the translation of such documents may be required for a defendant to receive a truly fair trial. This paper seeks to determine whether a right to translation exists for criminal defendants within the framework of the ICCPR. In addition to examining the ICCPR treaty regime itself, the article also analyzes the jurisprudence surrounding identical treaty language arising from the European Court of Human Rights and both *ad hoc* international criminal Tribunals. Finally, the article reviews the explicit grant of a right to translation given in the Rome Statute for the ICC and discusses whether this specific language can be taken as both a codification of the international jurisprudence in this area, as well as a clarification of the evolving international legal standard on the right to translation.

Keywords

Translation; Interpretation; International Law; Customary Law; International Criminal Law; Criminal Procedure

I. Introduction

The right to a fair trial is a basic norm of international law.[1] However, the "right to a fair trial" is more than simply a singular right, rather it describes a collection of other individual rights and principles meant to ensure the eventual fulfillment of a "fair trial" for criminal defendants. Many of these individual rights that make up the overall right to a fair trial, such as the right to prepare and present a defense and the right to be presumed innocent, have become so familiar and accepted throughout the world that they are as familiar to non-lawyers as they are to lawyers. Indeed, the pervasiveness of these rights throughout national jurisdictions has led many scholars to conclude that the right to a fair trial, and specifically its codification in article 14 ICCPR,[2] represents customary international law.[3] Some scholars have even gone so far as to argue that the right to a fair trial, and presumably the individual rights contained therein, qualify as a peremptory norm.[4]

As is often said, the devil is in the details. It is easy enough to say that, for instance, the presumption of innocence is a norm of customary international law, but it is less easy to actually determine the detailed content of that particular norm. Within the folds of each of these article 14 rights exist manifest complexities and nuances. This paper will concern itself with one of these complexities, specifically with regard to one of article 14's lesser-known fair trial rights. The paper's purpose will be to discern whether the right to a fair trial, as embodied in article 14 ICCPR, entitles a criminal defendant to have access to translated documents during his criminal proceedings: a so-called "right to translation".

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1 See D. Weissbrodt/ R. Wolfrum, "Preface", in: D. Weissbrodt/ R. Wolfrum (eds), *The Right to a Fair Trial*, 1997.

2 UNTS Vol. 999 No. 14668.

3 See P. Robinson, "The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY", *Berkeley Journal of International Law Publicist* 3 (2009), 1 et seq. (6-7, 11); according to Doswald-Beck, the fair trial standard has materialized to such a degree that it can be claimed to have acquired the status of "one of the fundamental pillars of international law to protect individuals against arbitrary treatment", see L. Doswald-Beck, "Fair Trial, Right to, International Protection", in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2012, Vol. IV, 1104 et seq., para. 1.

4 Robinson, see note 3, 6-7, 11; G. Boas/ J.L. Bischoff/ N.L. Reid/ B.D. Taylor III, *International Criminal Procedure*, 2011, 12.

In this context it is necessary to distinguish between the concepts of "interpretation" and "translation". "Interpretation", from a linguistic standpoint, involves the transfer of *oral* content from one language to another, whereas "translation" concerns the same process in relation to *written* documents.[5] Article 14 (3)(f) ICCPR specifically guarantees a criminal defendant the right to "have the free assistance of an interpreter if he cannot understand or speak the language used in court." In other words, the right to an oral interpretation is explicitly enumerated. The right to the "translation" of written documents, however, is not expressly granted in the ICCPR.

Nowak has argued that it is doubtful that the ICCPR contains such a right, given that several proposals for its specific inclusion were rejected during the drafting of the Covenant.[6] However, Nowak also questions the logic of this omission, asserting that it is "highly doubtful" whether a criminal defendant can receive a fair trial absent the ability to read and understand the documentary evidence presented against him at trial.[7] This would appear to be even more troublesome in civil law jurisdictions where the case file and written evidence play such an obvious and substantial role in the process.[8] Thus, there is a legitimate question as to whether criminal defendants maintain a right to the translation of documentary evidence under the ICCPR.

II. The International Covenant on Civil and Political Rights

Given the acceptance of the ICCPR by an unheralded number of states,[9] as well as its generally-agreed-upon status as customary interna-

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5 See V. Benmaman, "Legal Interpreting: An Emerging Profession", *Modern Language Journal* 76 (1992), 445 et seq.

6 See M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2005, 343.

7 Ibid.

8 See S. Trechsel, *Human Rights in Criminal Proceedings*, 2005, 338.

9 As of April 2012, there were 167 State Parties to the ICCPR. Ratifying nations represent approximately 78 per cent of the world population (cf. CIA Factbook). It should also be noted that the vast majority of the uncovered population might arise from China, which as a non-ratifying signatory state, still has the obligation not to actively defeat the purpose of the treaty,

tional law, it represents the logical starting point for the discussion. As mentioned, the ICCPR does not explicitly mention a right to translation. Thus, if the right is to exist, it must be seen as part of one of the expressly enumerated rights. In this instance, the jurisprudence of the Human Rights Committee (HRC), as the main interpretive body with respect to the ICCPR, is of some use. The leading case in this respect is *Harward* v. *Norway*.[10]

In *Harward* v. *Norway*, the applicant asserted that he was not provided with adequate translations of four documents used against him at his criminal trial, and that he was therefore denied the right to have adequate time and facilities to prepare his defense.[11] The HRC held that the right to a fair trial required that the defense be given the "opportunity to familiarize itself with the documentary evidence against an accused", but that this did not necessarily require the translation of relevant documents specifically for the accused, so long as they were furnished to the accused's counsel, who presumably would be linguistically capable of reading and understanding their contents.[12] Although this case would seem to preclude the necessity to translate any relevant documents for the defendant as a fair trial requirement, the decision must be read with some element of caution.

In its opinion, the HRC placed some emphasis on the "particular circumstances of the case", one of which was the fact that the defendant in *Harward* v. *Norway* had been assigned a competent court interpreter who was capable of translating any necessary documents for the defendant at the request of his defense counsel.[13] Thus, while the decision may seem to categorically deny any right to the translation of relevant documents, this denial rests substantially upon the fact that the accused, in fact, was given the opportunity to have the documents translated by his interpreter, and chose not to avail himself of that opportunity. Furthermore, the HRC was careful to stress in its opinion that the defendant's right to have adequate facilities to prepare his defense, specifically, was not violated.[14] The possibility that a right to the translation of

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see article 18 Vienna Convention on the Law of Treaties, UNTS Vol. 1155 No. 18232.

10 *Harward* v. *Norway,* Communication No. 451/1991, Doc. CCPR/C/51/D/451/1991 of 16 August 1994.

11 See *Harward* v. *Norway*, see note 10, paras 3.3, 3.4.

12 Ibid., para. 9.5.

13 Ibid.

14 Ibid.

necessary documents might arise from some other provisions of the ICCPR, or from customary international law itself, is therefore not foreclosed by the decision.

In this respect, the right to an interpreter as enshrined in article 14 (3)(f) ICCPR is of some relevance, since it is meant, at its core, to guarantee that the defendant can both understand and participate in the court proceedings against him.[15] It is perhaps true, as the HRC determined in *Harward* v. *Norway*, that translations may not be necessary in order to adequately prepare a defense, especially where the defendant has access to a court interpreter and is represented by counsel who can read the original documents. However, this does not necessarily mean that the same defendant will be able to understand and participate in the proceedings absent these translations,[16] especially where the oral witness testimony that is being interpreted for the defendant continuously refers to non-translated written documents. In this manner, the lack of translated materials, where those materials are necessary to the oral proceeding, can not only render that proceeding incomprehensible to a linguistically incompetent defendant, but also impair that defendant's ability to participate effectively in his own defense.

As such, it is entirely logical to say that, even though the right to have adequate time and facilities to prepare a defense does not entitle a defendant to the translation of necessary documents, the right to a court interpreter does. Indeed, several other international actors, specifically the European Court of Human Rights (ECtHR) and the International Criminal Tribunal for Rwanda (ICTR), have reached this very conclusion: finding a right to the translation of written documents within the defendant's right to the interpretation of oral evidence.[17] Given that this is an area neither considered in, nor foreclosed by the HRC's *Harward* v. *Norway* decision, it is instructive to examine these other precedents, among others, in order to assess to what extent they may contribute to the determination of an ICCPR right in this context.

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15 See *Guesdon* v. *France*, Communication No. 219/1986, Doc. CCPR/C/39/D/219/1986 of 25 July 1990, para. 10.2.

16 See Nowak, see note 6, 343.

17 See Trechsel, see note 8, 338.

III. European Court of Human Rights

The right to an interpreter is guaranteed in article 6 (3)(e) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[18] It uses identical language to article 14 (3)(f) ICCPR.[19] As such, although certainly not conclusive, interpretations by the ECtHR of the article 6 ECHR right are at worst persuasive authority as to the meaning of the ICCPR right to an interpreter.[20] The ECtHR has dealt with the right to translation most directly in *Kamasinski* v. *Austria*.[21] In *Kamasinski* v. *Austria*, the applicant alleged several violations of article 6 ECHR arising from his criminal proceedings, among which was the allegation that he had suffered from a "lack of written translation of official documents at the different stages of the procedure."[22] Upon considering the applicant's appeal, the ECtHR elaborated that the right to an interpreter applied "not only to oral statements made at trial hearings but also to documentary material."[23] The court further asserted that the right entitled the applicant to the "translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand … in order to have the benefit of a fair trial."[24] The ECtHR noted, however, that the article 6 right did not extend so far as to entitle the defendant to translations of each and every written piece of evi-

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18 UNTS Vol. 213 No. 2889.

19 Cf. article 6 (3)(e) ECHR ("to have the free assistance of an interpreter if he cannot understand or speak the language used in court") with article 14 (3)(f) ICCPR ("[t]o have the free assistance of an interpreter if he cannot understand or speak the language used in court"); see also Nowak, see note 6, 343.

20 Both Nowak and Van Dijk support the proposition that ECtHR's interpretation of the right to a fair trial may be useful in interpreting the similar ICCPR provisions; Nowak, see note 6, 307.

21 *Kamasinski* v. *Austria,* Series A, No. 168, Application No. 9783/82 of 19 December 1989.

22 Ibid., para. 72.

23 Ibid., para. 74; see also in accord *Luedicke, Belkacem and Koç* v. *Germany*, Series A, No. 29, Application Nos 6210/73; 6877/75; 7132/75 of 28 November 1978, para. 48; *Hermi* v. *Italy*, Application No. 18114/02 of 18 October 2006, para. 69.

24 Ibid.

dence in the procedure, since not every prosecutorial document would be essential to the applicant's understanding of the proceedings.[25]

Thus, from *Kamasinski* v. *Austria*, one can see that the ECtHR, interpreting language that is identical to that contained in the ICCPR, moved in an entirely different direction than the HRC, by explicitly recognizing a right to the translation of "necessary" documents. This can be explained primarily by the context in which the applicant's claim was brought. While the HRC focused on the ability to prepare a defense, and thus placed emphasis on the capacity of the defendant's counsel to understand the evidence, the ECtHR stressed the defendant's ability himself to understand the evidence as a means to understanding the proceedings. Aside from the express recognition of a right to translated documents, the necessary result of the ECtHR's emphasis on the defendant's comprehension of the proceedings is that the right to translation is logically limited to only those documents that will alleviate any inability of the defendant to do so. In addition, it has been subsequently held that the oral interpretation of written documents in court by a courtroom interpreter (known as a "sight translation")[26] is sufficient to satisfy the defendant's right to understand the proceedings.[27]

Thus, in the estimation of the ECtHR, the right to translation is not an absolute right, but rather a limited entitlement meant only to fulfill the underlying purposes behind the explicit right to an interpreter. Whether this service is performed by a translator beforehand or an interpreter at the time is not relevant. As mentioned, this is not an issue or argument that was expressly considered by the HRC in *Harward* v. *Norway*, though it should be noted that the applicant in *Harward* v. *Norway* was afforded a court interpreter capable of fulfilling this purpose.[28]

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25 See *Kamasinski* v. *Austria*, see note 21, para. 74.

26 See E.M. de Jongh, "Foreign Language Interpreters in the Courtroom: The Case for Linguistic and Cultural Proficiency", *Modern Language Journal* 75 (1991), 285 et seq. (288).

27 See *Hermi* v. *Italy*, see note 23, para. 70.

28 See *Harward* v. *Norway*, see note 10, para. 9.5

IV. The *Ad Hoc* Tribunals

1. The Legal Framework

The most extensive jurisprudence on the right to translation arises in the context of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR. Each Tribunal was established by a resolution of the United Nations Security Council adopted under Chapter VII of the United Nations Charter.[29] Since the power of the Security Council to create the Tribunals through binding resolutions arises from a treaty (the United Nations Charter), it has been argued that the Statutes themselves should be treated as analogous to treaties.[30] Irrespective of whether or not the Statutes may be considered analogous to treaties, they were clearly meant to represent and stay within the norms of customary international law.[31] This was specifically emphasized by the UN Secretary-General with regard to the defendant's fair trial rights.[32] Thus, their content can be perceived as representing customary international law norms, and the jurisprudence of the two Tribunals in this area can therefore be considered interpretations of the contemporary status of customary international law.[33] While this viewpoint concerning the impact of judicial decisions on the content of customary international law is not without its critics,[34] it is enough to note here that the relevant language pertaining to the right to a fair trial in both the ICTY and ICTR Statutes is virtually identical to that contained in article 14 ICCPR on the same subject.[35] Therefore, even if the ICTY and ICTR

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29 For the ICTY, see S/RES/827 (1993) of 25 May 1993; for the ICTR, see S/RES/955 (1994) of 8 November 1994. ICTY Statute – reprinted at *ILM* 32 (1993), 1192 et seq. ICTR Statute – reprinted at *ILM* 33 (1994), 1598 et seq.

30 See R. Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", *Journal of Conflict & Security Law* 11 (2006), 239 et seq. (242).

31 See G. Werle, *Principles of International Criminal Law*, 2005, 50.

32 See Report of the Secretary-General pursuant to para. 2 of S/RES/808 (1993) of 22 February 1993, para. 106.

33 See Cryer, see note 30, 6.

34 Ibid.

35 Cf. article 14 (1) ICCPR "All persons shall be equal before the courts and tribunals" with article 20 (1) ICTR Statute "All persons shall be equal before the International Tribunal for Rwanda" and article 21 (1) ICTY Statute "All persons shall be equal before the International Tribunal"; cf. article 14

are incapable of affirmatively determining the content of customary international law in the area of the right to a fair trial, their interpretation of language that is identical to that found in the ICCPR is relevant in attempting to determine the content of the ICCPR rights.

The working languages of each Tribunal are English and French.[36] However, they each regularly accommodate both witnesses and defendants who neither understand nor speak these working languages. As such, the standard working practice is to automatically provide interpretation at each oral proceeding, in order to fulfill the defendant's right to an interpreter.[37] Such interpretation practices, however, do not solve the linguistic issues concerning documents and evidence, all of which must be presented to the court in one of the working languages.[38] Considering that the Prosecutor's evidence alone in a case can easily exceed 10,000 pages of documents,[39] a sight translation for the defendant of each document (as allowed under ECtHR jurisprudence) is impractical given the amount of delay in the proceedings this would cause. As such, the Tribunals have been forced to deal with the issue straight on, and the result has been a very rich and detailed view of the right to translation in the context of an international criminal trial.

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(3)(f) ICCPR's language "have the free assistance of an interpreter if he cannot understand or speak the language used in court" with the language of article 21 (4)(f) ICTY Statute "have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal" and article 20 (4)(f) ICTR Statute "have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda"; and finally note the identical nature of article 14 (3)(a) ICCPR, article 20 (4)(a) ICTR Statute and article 21 (4)(a) ICTY Statute.

36 Arts 33 ICTY Statute; 31 ICTR Statute.

37 For the ICTY, see *Prosecutor* v. *Delalić* (Case No. IT-96-21-T), Trial Chamber, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996, para. 12; for the ICTR, see *Prosecutor* v. *Muhimana,* Case No. ICTR-95-1B, Trial Chamber, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of His Counsel, 6 November 2001, para. 34.

38 See *Delalić*, see note 37, paras 6, 10.

39 See ICTY, *Prosecutor* v. *Šešelj,* Case No. IT-03-67-T, Trial Chamber, Second Order concerning the Translation of Documents the Accused Intends to Tender as Defence Evidence, 19 February 2008.

2. Evaluation of the Case Law from the *Ad Hoc* Tribunals

The first major case arising concerning document translation was *Prosecutor* v. *Delalić* of the ICTY, in which the Defense requested that "all 'transcripts and other documents'" be provided to the accused in his native language of Bosnian during the pre-trial phase of the case.[40] The Tribunal held that the Defense was not entitled to the translation of every transcript or document, but rather was entitled only to translated versions of any and all evidence that would be submitted by the Prosecution at trial, any materials submitted in support of the indictment against the accused, and any orders or decisions issued by the Tribunal.[41] For all other evidence (such as prosecutorial discovery, correspondence, or transcripts), the working languages of the Tribunal were sufficient and no pre-trial translation for the accused into Bosnian was necessary.[42] In so holding, the ICTY based its decision *not* upon the accused's right to an interpreter (as the ECtHR had done), but rather upon the concepts of equality before the Tribunal and the accused's right to be informed of the charges against him in a language that he understood.[43] Thus, pre-trial translations of relevant documents were required to ensure that the Defense (including the accused) and the Prosecutor were able to interact on an equal footing before the Tribunal, and also to allow the accused to understand the evidence that would be presented at trial to prove his guilt. Although the ICTY buttressed its holding using the article 21 (4)(a) language of understanding "the nature and cause of the charge against" the accused, its reasoning is somewhat similar to that of the ECtHR in *Kamasinski* v. *Austria*, in that it is primarily concerned with the accused's ability to understand the evidence presented at trial.

In the 2001 case of *Prosecutor* v. *Muhimana*, the ICTR was faced with a similar request from an accused to have "all" documents translated into his native language of Kinyarwanda.[44] Following *Prosecutor* v. *Delalić*, the ICTR likewise ruled that the accused was not entitled to the translation of every document in the case, but instead was limited to those documents allowed under *Prosecutor* v. *Delalić*, as well as any and all prior statements from witnesses that the Prosecution anticipated

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40 See *Delalić*, see note 37, para. 1.

41 Ibid., Disposition.

42 Ibid.

43 Ibid., para. 6, citing specifically article 21 (1) and (4)(a) ICTY Statute.

44 See *Prosecutor* v. *Muhimana*, see note 37, para. 3.

calling at trial.[45] The ICTR, however, while placing great emphasis on *Prosecutor* v. *Delalić*, distanced itself from the ICTY's decision and reasoning in one important respect: it explicitly based its ruling in part upon the accused's right to an interpreter.[46] The Tribunal stated that, in its opinion, "the right of an accused to have the free assistance of an interpreter … covers, not only oral proceedings, but also … some documents relating to this case."[47] In doing so, the ICTR both cited with approval and discussed at length the jurisprudence of the ECtHR, specifically *Kamasinski* v. *Austria*.[48] In every other respect, the rules laid down in *Prosecutor* v. *Delalić* were followed.

For its part, the ICTY has continued to both follow and refine the rules that originated in the *Prosecutor* v. *Delalić* opinion. Concerning the pre-trial stage, the ICTY now requires the translation not only of the documents listed in *Prosecutor* v. *Delalić*, but also any prior "statements obtained by the Prosecutor from the Accused", any statements by witnesses that the Prosecution will likely call to testify, any statements by witnesses that will be entered into evidence in lieu of oral testimony (Rule 92*bis* statements), as well as any "[e]xculpatory material disclosed by the Prosecutor according to Article 68 of the [ICTY] Rules."[49] In addition, where the accused has chosen to represent himself, the Tribunal has extended the right to translation to include any motions filed by the Prosecutor and any Defense briefs filed by counsel for co-accused (if there are co-accused in the case).[50] During the trial phase of the case, the right to translation also has been held to require the possible translation of any exhibits tendered by the Prosecutor.[51] In addition, the ICTY has clarified extra classes of documents of which the accused is not entitled to a translation, including any pre-trial briefs

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45 Ibid., paras 22-26.

46 Ibid., para. 16.

47 Ibid.

48 Ibid., paras 16-21.

49 ICTY, *Prosecutor* v. *Ljubičić,* Case No. IT-00-41-PT, Trial Chamber, Decision on the Defence Counsel's Request for Translation of All Documents, 20 November 2002.

50 See ICTY, *Prosecutor* v. *Prlić,* Case No. IT-04-74-PT, Pre-Trial Judge, Order for the Translation of Documents, 17 January 2006, see also ICTY, *Prosecutor* v. *Šešelj,* Case No. IT-03-67-T, Trial Chamber, Order on the Translation of Documents, 6 March 2003.

51 See *Prosecutor* v. *Ljubičić*, see note 49.

filed by the Prosecutor[52] and any unrelated materials such as "case-law of other jurisdictions, books, and other literature."[53]

As an enforcement mechanism for its translation rulings, the Tribunal has further held that any untranslated document may not be submitted as evidence.[54] Needless to say, given that the documents in each case can easily number in the thousands of pages,[55] the work required to sort through, organize, classify and then submit the required documents to the Registry for translation in any given case is substantial (as are the financial costs involved). This has, on occasions, led to significant delays by parties, which might, in theory, jeopardize that party's ability to enter evidence into the record.[56] In practice, however, the ICTY has been highly accommodating of time delays caused by individual parties, thus alleviating any concern in this respect.[57] However, delays are not solely the provenance of the parties; the translation workload placed upon the Registry has also played its part.[58] These delays have caused unease at both Tribunals, raising the specter of possible violations of the accused's right to an expeditious trial.[59] In the end, however, the accused's ability to understand the evidence (through translation) has been placed ahead of any concerns regarding expediency, judicial efficiency and costs.[60]

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52 See ICTY, *Prosecutor* v. *Popović*, Case No. IT-05-88-PT, Trial Chamber, Decision on Joint Defence Motions Requesting the Translation of the Pre-trial Brief and Specific Motions, 24 May 2006.

53 ICTY *Prosecutor* v. *Šešelj*, Case No. IT-03-67-T, Trial Chamber, Decision on Request for Material Cited in Prosecution Pre-trial Brief, 12 July 2006.

54 See ICTY *Prosecutor* v. *Naletilić,* Case No. IT-98-34-T, Trial Chamber, Decision on Defence's Motion concerning Translation of All Documents, 18 October 2001.

55 See *Prosecutor* v. *Šešelj*, see note 39.

56 See ICTY, *Prosecutor* v. *Milutinović,* Case No. IT-05-87-T, Trial Chamber, Decision on *Lukić* Defence Motion for Reconsideration of Denial of Extension of Time and Leave to File Replies, 10 June 2008.

57 Ibid.

58 See C.P.R. Romano/ A. Nollkaemper/ J.K. Kleffner (eds), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*, 2004, 342.

59 See ICTY, *Prosecutor* v. *Milošević,* Case No. IT-02-54-T, Trial Chamber, Decision on Prosecution Motion for Permission to Disclose Witness Statements in English, 19 September 2001; see also *Prosecutor* v. *Ljubičić*, see note 49; *Prosecutor* v. *Naletilić*, see note 54.

60 Ibid.

3. Assessment

The considerable jurisprudence of the *ad hoc* Tribunals concerning the right to translation can be seen as both a clarification and an expansion of the ECtHR's doctrine in this area. While the ECtHR has focused mainly on the concept of "necessity", entitling the accused only to the translation of those documents that are "necessary" in order to ensure the comprehensibility of the oral proceedings, the *ad hoc* Tribunals have addressed different concerns. They have mainly set out to alleviate any inequalities before the Tribunals effecting either party, while simultaneously seeking to ensure that the accused will be able to understand the evidence that will be used against him at trial. It is logical to assume that the ECtHR doctrine would guarantee, in practical effect, the translation of many of the same documents covered by the *ad hoc* Tribunals' jurisprudence, especially the evidence presented at trial. Yet, it is also likely that the *ad hoc* Tribunals' rules in this area go some way past what the ECtHR jurisprudence would require in criminal proceedings.

This divergence in coverage between the ECtHR and *ad hoc* Tribunals can be largely attributed to the different levels of importance that each jurisdiction places on the reasons why translations are necessary. The ECtHR is focused on the right of the accused to understand the oral proceedings (and thus invoke the right to an interpreter as the justifying provision), while the *ad hoc* Tribunals are focused on the concept of equality before the Tribunals and the necessity of the accused to understand the evidence supporting the charges against him. Since each is focused on alleviating a different problem, they logically arrive at different solutions. The result is that the *ad hoc* Tribunals have set out a more expansive, and significantly more detailed, entitlement than the ECtHR has.

That the right to translation has been more fleshed out by the *ad hoc* Tribunals is both a positive and a negative development in regard to the interpretation of the identical ICCPR provisions. On the one hand, the extra attention lavished upon the question has necessarily resulted in increased analysis by well-respected and well-qualified independent judges.[61] That their opinions may be of some persuasive influence on the eventual interpretation of the analogous ICCPR provisions can only be seen as a positive development. On the other hand, it is worth asking whether the decisions and practices of the Tribunals can really be

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61 See Cryer, see note 30, 245-246 (regarding the general influence of judicial decisions, and their specific use as a source of international law).

that helpful. While it is true that the language difference between the ICCPR and the relevant Tribunal Statutes is minimal, the circumstances in which each provision must be applied could not be more distinct.

The ICCPR is meant to set the minimum guarantees pertaining to the right to a fair trial in domestic jurisdictions, as is the nearly identical provision of the ECHR. The Tribunal provisions, however, are meant to cover the necessities of a fair trial in specific international criminal Tribunals. These dissimilar contexts make a great deal of difference,[62] since few domestic jurisdictions have the necessary experience of dealing with a multiple language trial or the built-in translation and court interpretation services that the *ad hoc* Tribunals possess. The different realities in each jurisdiction call into question the relevance of the Tribunals' jurisprudence for national courts, since the Tribunal rulings can be seen as developing international criminal procedural thresholds for a fair trial, and not necessarily domestic thresholds.

In other words, when the ICTY rules that all exculpatory evidence must be translated for the accused, this may very well be seen as a necessity given the specific rules applied in the context of a multilingual international Tribunal with a well-functioning translation department where the disclosure of such evidence is required by that Tribunal's internal rules.[63] Whether the pre-trial translation of such evidence would be necessary in a domestic proceeding operating under different rules and with different budgetary realities is highly questionable. There is, in essence, a difference between national criminal procedures required by international law and those criminal procedures required at international criminal Tribunals (so-called international criminal procedure). As such, the expansive entitlement to translated documents as practiced by the *ad hoc* Tribunals, while certainly laudable, may not be the best guide as to the possible content of a right to translation under the ICCPR, regardless of the similarity in language between the *ad hoc* Tribunal Statutes and the Covenant.

Yet, though the more detailed regime expounded by the *ad hoc* Tribunals may not be completely applicable to national jurisdictions, the jurisprudence of the Tribunals is still rather instructive on certain issues. First, the unmistakable thrust of the Tribunals' opinions is in favor of a right to translation. As for the content of this right, leaving argument

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62 See Robinson, see note 3, 9 (arguing that "there is no gainsaying that context is significant in construing provisions of the ICTY's Statute and Rules").

63 See Rule 68 ICTY Rules of Procedure and Evidence, Doc. IT/32/Rev. 46.

over the details aside, it would appear to set the minimum bar at least at the same level as the ECtHR in *Kamasinski* v. *Austria*. Second, the *ad hoc* Tribunals supported their "right to translation" using different provisions of the right to a fair trial than the ECtHR did (though the ICTR also acknowledged the importance of the right to an interpreter as a source provision). This is important for the simple reason that the HRC denied the existence of a right to translation without considering the specific fair trial provisions relied upon in the *ad hoc* jurisprudence. Thus, it cannot be discounted that the concept of equality (or the right to understand the charges, or both) might also eventually be seen as a source provision for a right to translation under the ICCPR. At the end of the day, the endorsement of the right to translation by the *ad hoc* Tribunals, and their implicit or explicit approval of the ECtHR case law on the issue, is significant as to the eventual outcome of the debate over whether or not such a right exists under the ICCPR. To what extent the detailed expansion of the right contributes to the overall debate, or eventually helps define or clarify the boundaries of an ICCPR right, is yet to be determined. One place where the *ad hoc* Tribunals' decisions have already had an impact, however, is with the founding of the ICC.

V. The Rome Statute of the International Criminal Court

1. The Legal Framework

The relative success of the *ad hoc* Tribunals at the international level helped lead to the founding of the ICC through the successful negotiation and entry into force of the Rome Statute of the ICC (Rome Statute).[64] Supplementing the Rome Statute are the ICC Rules of Procedure and Evidence,[65] which are "based in part on the experience and practice of the ICTY and ICTR."[66] As such, the entire development and structure of the ICC can be seen as heavily influenced by both the success of the *ad hoc* Tribunals, as well as their actual jurisprudence.

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64 UNTS Vol. 2187 No. 38544; see also W.A. Schabas, *An Introduction to the International Criminal Court*, 2001, 12.

65 See ICC Rules of Procedure and Evidence, Official Records ICC-ASP/1/3.

66 M.C. Bassiouni, "The Sources and Content of International Criminal Law: A Theoretical Framework", in: K. Koufa (ed.), *The New International Criminal Law: 2001 International Law Session*, 2003, 19 et seq. (184-185).

Unlike the *ad hoc* Tribunal Statutes, the Rome Statute specifically addresses the necessity of translations to the guarantee of a fair trial. Article 55 (1)(c) Rome Statute guarantees an individual under investigation the right to have a competent interpreter while being questioned, as well as "such translations as are necessary to meet the requirements of fairness." In addition, and more importantly in this context, article 67 (1)(f) Rome Statute states that the accused is entitled to "have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the court are not in a language which the accused fully understands and speaks." From these provisions, several things are immediately clear.

First, the right to translation is specifically guaranteed, which is a clear break from the previous treaties and Statutes that have been discussed. Second, the right to translation is located alongside the right to an interpreter in both provisions, thus adding credence to the ECtHR's interpretation that these two entitlements are necessarily connected when seeking to ensure that the accused is able to understand any oral proceedings (or interrogations, as the case may be). Third, the right, as formulated, substantially mirrors the ECtHR's language of "necessity". The Rome Statute speaks of those documents that are "necessary to meet the requirements of fairness" while the ECtHR protects those documents that are "necessary for [the accused] to understand … in order to have the benefit of a fair trial."[67] In each instance, the fairness of the proceedings, and what is necessary to achieve that fairness, is of paramount concern.

Given the similarities between the Rome Statute and the ECtHR jurisprudence on this issue, the argument can be made that the Rome Statute effectively codified the ECtHR standards as to the right to translation. The fact that the drafters of the Statute specifically altered the "normal" fair trial provisions (as can be seen in the identical wording of the ECHR, ICCPR, and Statutes of the ICTY and ICTR) to include language expressly granting a right that was, to that point at least, a court-created entitlement, lends credence to the idea that the Rome Statute meant to codify and clarify that right. In effect, the drafters meant to explicitly acknowledge a right to translation that other jurisdictions had implicitly found necessary to the fairness of a trial. That the language used, and its placement within the right to interpreter pro-

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67 Cf. article 67 (1)(f) Rome Statute with *Kamasinski* v. *Austria*, see note 21, para. 74.

vision, reflect the jurisprudence of the ECtHR is likely no accident, but rather more probably a conscious choice meant to reflect what the drafters perceived as the majority rule in this area. If the idea was to make explicit what had previously only been implicit, then recognizing a baseline standard that had already found backing in the ECtHR and *ad hoc* Tribunals would seem a logical adoption.

The ICC's foremost decision in this area adds support to this theory. In *Prosecutor* v. *Lubanga*, the accused sought the translation of certain procedural and evidentiary documents into a language which he was capable of understanding (French, in this instance).[68] The ICC ruled that the Rome Statute did not entitle the accused to the translation of "all procedural documents and all evidentiary materials", but rather only a smaller subset of these documents.[69] In so holding, the ICC relied extensively on *Kamasinski* v. *Austria* and the ECtHR's jurisprudence as to the implicit right to translation under the ECHR.[70] The Court even went so far as to affirm that its interpretation of the explicit right to translation found in the Rome Statute was "fully consistent with the case law of the [ECtHR] on this matter."[71] That the ICC would seek to align the Rome Statute's right to translation provision with the ECtHR's jurisprudence in this area can be taken as evidence that the court acknowledged the ECtHR standard as the authoritative rule, even with regard to the interpretation of an independent treaty provision. Whether the drafters of the Rome Statute intended to codify this standard or not is less important than the outcome of their efforts: the ECtHR standard was explicitly recognized as determinative as to the right to translation embodied in article 67 (1)(f) Rome Statute.

2. The Impact of the Rome Statute on the Interpretation of the International Covenant on Civil and Political Rights

The question is whether this specific endorsement of the right has any effect on the interpretation of the ICCPR. As mentioned, the language of the Rome Statute is substantially different from the ICCPR. Thus, unlike the *ad hoc* Tribunals' analysis of identical language, any jurispru-

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68 See ICC *Prosecutor* v. *Lubanga Dyilo,* Case No. ICC-01/04-01/06-268, 4 August 2006, 2.

69 Ibid., 6.

70 Ibid., 5.

71 Ibid., 6.

dence emanating from the ICC on this issue is likely unhelpful as to the content of the ICCPR's language. Rather, it is the Rome Statute itself that provides the most potential impact on the interpretation of the ICCPR. If one accepts that the ICCPR embodies the contemporary customary international law standards pertaining to the right to a fair trial (even to the point of being *jus cogens*), while simultaneously accepting that the Rome Statute is meant to confirm and clarify those very same standards,[72] then it becomes clear that the text of the Rome Statute itself can play a significant role in the interpretation of the ICCPR's provisions in that area. In other words, the very fact that the Rome Statute is more precise as to fair trial standards (and purports that these are a reflection of customary international law) than the ICCPR (which also represents the same standards) can be taken to mean that the language in the Rome Statute is a clarification of what the ICCPR is meant to embody. In this interpretation, the provisions of the Rome Statute in this area are nothing more than a more detailed explanation of the more general ICCPR provisions, or, at a minimum, the customary international law standards which the ICCPR's provisions are meant to represent.

Utilizing the Rome Statute as a source for the interpretation of the ICCPR is not without legal precedent. Article 31 (3)(c) Vienna Convention on the Law of Treaties, when addressing the general rules of treaty interpretation, dictates that "(3) [t]here shall be taken into account, together with the context: … (c) any relevant rules of international law applicable in the relations between the parties."[73] Among the "relevant rules" that must be taken into consideration are customary international law norms.[74] Although in the past many courts have shown reluctance to overtly refer to customary norms when interpreting treaty provisions,[75] in recent times the practice has grown in both importance and acceptance.[76] Now, informing the interpretation of a treaty provi-

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72 See Cryer, see note 30, 10; Werle, see note 31, 49.

73 Article 31 (3)(c) Vienna Convention on the Law of Treaties, see note 9.

74 See C. McLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention", *ICLQ* 54 (2005), 279 et seq. (290-291). Other treaties are also generally considered "relevant rules" that must be taken into consideration as interpretive help, but their actual usage is still relatively controversial and as such, less helpful.

75 See P. Sands, "Treaty, Custom and the Cross-fertilization of International Law", *Yale Human Rights & Development Law Journal* 1 (1998), 85 et seq. (95).

76 See McLachlan, see note 74, 280.

sion using the relevant customary international law norms in that area is seen simply as fitting the provision into its "proper place within the larger normative order."[77] Given that the ICCPR provision is less specific than the Rome Statute provision, and the latter can be interpreted as a clarification of the former, it is not only entirely appropriate to look to the Rome Statute as evidence of customary international law in this instance, but exceedingly useful as well.

There is, however, a minor logical flaw in this argument. If the Rome Statute was intended to codify a more detailed and precise version of an already existing general customary law norm (the ICCPR standard), then it is not altogether clear why this would be necessary. If it is taken for granted that the right to translation already exists as a necessary part of the right to a fair trial under customary law, then there would appear no need to explicitly sanction this right. This is especially true given the unproblematic recognition of the right by both the ECtHR and the *ad hoc* Tribunals. It can just as easily be argued that the codification of the right to translation was made explicit specifically because the right was up to that point not an accepted part of the right to a fair trial under international law. In other words, the States Parties made the right explicit because they feared that the right would not necessarily exist as part of the ICC's procedures if they had not. Seen in this light, the Rome Statute, rather than advancing the development of the right to translation, can be taken as evidence that the right did not exist absent specific expression.

Furthermore, there is some doubt as to whether the Rome Statute itself actually embodies customary international law in this area. Werle, while acknowledging that the Rome Statute is meant to conform to and clarify existing customary international law standards in criminal law, draws a distinction between substantive and procedural criminal law standards.[78] He argues that although the substantive criminal law provisions reflect customary law, the procedural standards enshrined in the Rome Statute likely do not.[79] Likewise, just as with the *ad hoc* Tribunals, it can be argued that the provisions of the Rome Statute, even if accepted as customary international law standards in this area, actually reflect norms of international criminal procedure, and not national procedural requirements that would be relevant to the interpretation of the ICCPR.

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77 Ibid., 312.

78 See Werle, see note 31, 50.

79 Ibid.

Cryer as well doubts whether the Rome Statute accurately reflects customary international law in every instance, asserting that in some instances it either falls short of contemporary standards or goes too far.[80] Even the minimum level assertion of the Rome Statute's embodiment of customary international law, that it at least reflects the *opinio juris* of a "great number of states",[81] does little to support the notion that the Rome Statute embodies customary international law standards, since several of the most powerful and populous nations have failed to ratify it.[82] While it is highly unlikely that these nations abstained from supporting the ICC due to the Rome Statute's provisions on the right to translation, their nonparticipation in this Treaty does nothing to support the assertion that the Rome Statute represents contemporary norms of customary international law in this area either.

And yet, despite the arguments given above, there is still a case to be made that the procedural rules of the Rome Statute do indeed reflect contemporary standards specifically as to the right to a fair trial. As Bassiouni has argued, the procedural rules of the ICC, as well as the *ad hoc* Tribunals are not only "based on general principles of procedural law which emerge from the laws and practices of the world's major criminal justice systems," they also mirror the rules and principles enshrined in numerous international and regional treaties.[83] As such, they represent a "convergence of international, regional, and national legal norms that represent contemporary standards of procedural due process."[84]

Moreover, even if the overall procedural standards reflected in the Rome Statute do not, as a whole, represent established norms of customary international law, it is still possible to argue that the treaty's specific right to translation standard itself does indeed merit such a distinction. One may reject the argument that the entirety of the procedural rules of the ICC represents customary international law norms, and yet still accept the assertion that specific provisions therein do reflect such standards, so long as they have sufficient international sup-

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80 See Cryer, see note 30, 10.

81 ICTY, *Prosecutor* v. *Furundžija,* Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 227.

82 For instance, China, India, the United States of America, and Russia (comprising nearly 43 per cent of the world's population, according to the CIA Factbook) have all failed to ratify the Rome Statute.

83 Bassiouni, see note 66, 185.

84 Ibid.

port. In this instance, it may plausibly be argued that the right to translation, given that it has been recognized by several different highly influential international jurisdictions with virtually no direct objections from the international community, has garnered such extensive support. That each of these courts (the ICTY, ICTR, and the ECtHR) have pointed to different parts of the right to a fair trial as the origin of the right to translation does little to undermine the existence of that right. Rather, it simply makes the determination of the eventual content of that right harder to assess. At an absolute minimum, the specific insertion of a right to translation into the Rome Statute serves as evidence of a larger movement towards acknowledgment of the right to translation at the international level.

VI. Conclusion

In the end, the question as to whether or not a right to translation exists under the ICCPR is far from settled. It would perhaps be easier to simply say that the right to translation exists as a norm of customary international law, and leave aside any enquiry into the ICCPR. However, it is not a foregone conclusion that a customary norm exists in this context either. As mentioned above, both the *ad hoc* Tribunal Statutes and the Rome Statute purport to represent customary international law, but the question must be asked whether they supposedly represent customary norms as to national or international criminal procedures. A fairly convincing argument can be made that the procedural fair trial guarantees embodied in the international Statutes represent customary international law applicable to any criminal proceedings before an international criminal Tribunal or court. Yet, it is less clear that these procedural guarantees would (or even could) apply equally to domestic criminal prosecutions in national courts; the contexts are different enough to make their applicability questionable. As such, while the international Statutes may represent customary international law standards on the right to a fair trial (and a right to translation), they probably only do so at the international level, which renders them largely unhelpful to the establishment of a truly universal standard. The practice of the ECtHR, on the other hand, does support the creation of such a standard, since it relates to domestic prosecutions. Standing alone, though, its jurisprudence would appear insufficient as evidence of such a universal norm.

Thus, considering the uncertainty surrounding the existence of a customary international law norm in this context, the ICCPR remains the best hope as to the universal existence of a right to translation. That the HRC expressly denied the existence of such a right in *Harward* v. *Norway* is problematic, but hardly conclusive to the issue. In its Decision, the HRC placed great emphasis on the particular circumstances of the case and limited its consideration to whether the right to have adequate time and facilities to prepare a defense required the translation of documents.[85] It implicitly left open the possibility that other facets of the right to a fair trial might entitle an accused to a right to translation. This is precisely what the ECtHR and *ad hoc* Tribunals have found. Within the context of the right to an interpreter, and thus the guarantee of understanding the oral proceedings, both the ECtHR and the ICTR have explicitly found that such a right to translation does exist.[86] The ICTY has implicitly endorsed this rationale as well, while simultaneously finding the right to translation in the notions of equality before the court and the right to understand the evidence supporting any determination of guilt.[87] For its part, the Rome Statute represents evidence that the development of the right has reached a point that it can be codified as an accepted part of the right to fair trial.[88]

Combined with the HRC's lack of an explicit statement on the issue, the practice of these other international actors leaves open the possibility that the right to translation does indeed exist within the framework of the ICCPR. Whether or not the HRC ultimately chooses to endorse this interpretation of the right to a fair trial is, of course, an open question. Yet the positive movement in this direction by several different international actors lends credence to the theory that, while not inevitable, this is more likely to occur than not.

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85 See *Harward* v. *Norway*, see note 10.

86 See *Prosecutor* v. *Muhimana*, see note 37; *Kamasinski* v. *Austria*, see note 21.

87 See *Prosecutor* v. *Delalić*, see note 37.

88 See Rome Statute, see note 64.