Language and International Courts

Like any area of human knowledge, law is necessarily communicated through language. Yet language is more than the simple mediator of law – the two are connected and act upon one another in complex ways. Many view law itself as a sophisticated linguistic exercise, one that can be manipulated and misinterpreted, intentionally or not. Legal language is also subject to law, which requires the drafting of rules that are reasonably clear in order to protect individuals from the arbitrary exercise of power. Rules of interpretation may also help decipher the legal meaning of particular words. Finally, law also protects language in its own right. International human rights law, for instance, protects the linguistic rights of persons who are considered to be vulnerable, such as accused persons in criminal proceedings and minority groups.

How do these complicated relationships between law and language play out in the diverse context of international courts and tribunals? The staffs of these institutions are made up of individuals who hail from numerous countries, represent a variety of professional backgrounds, and have training in different legal traditions. Judges and other court personnel add to this diversity by bringing to their work environment the different languages they speak. This simple fact differentiates the international justice system from most of its domestic counterparts and has significant implications for the ways in which international courts carry out their work.

In this session, it was noted that the languages used by international courts and tribunals have an impact at three distinct levels of interaction:

1) At the internal level, where communication, both oral and written, has to take place regularly and efficiently among judges and those they work with on a daily basis.

2) At the level of interactions that the court has with the parties that come before it, also through both oral and written channels.

3) At the level of communication with the larger public, who need to be informed about significant aspects of their work, including the issuing of arrest warrants and indictments, and the rendering of judgments.

BIIJ participants discussed a number of issues related to multilingualism in international courts and tribunals. Some of these were practical issues: How do courts carry out their work given the ever-present linguistic diversity of those participating in international justice procedures? What are the problems associated with translation and interpretation? How can courts best communicate their accomplishments to a multilingual public? Other issues were more speculative: Should the linguistic knowledge of candidates for the international bench be taken into account in the selection process? What is the international justice system losing, if anything, by being dominated by a few languages? Do the gains outweigh the losses?
Participants began by examining the sections of the statutes or constitutive instruments of international courts and tribunals that address the multilingual challenges that they routinely face. These documents vary greatly both in detail and in flexibility regarding language use (see sidebars). Some courts explicitly designate both “official” and “working” languages, such as the ICC, IACHR, and the ACHPR. Other courts designate one or the other; for example the ICTY, ICTR, and SCSL have working languages, while ITLOS, the ICJ, and the WTO Appellate Body have official languages. Some courts provide details in their statutes about what is to be done if a party before the court is not knowledgeable in a working or official language. Others even specify how costs of interpretation are to be covered and how interpreters and translators are to be approved. Participants described to their fellow judges how language policies were interpreted and applied in their respective courts.

There is generally a logic attached to the selection of languages that have working or official status in a court. Sometimes they are widely spoken within a court’s geographic jurisdiction and are thus a natural choice. In other cases, languages are chosen because they have a worldwide reach and are commonly spoken by persons working in international organizations. Official languages may also occupy a special status in a court’s “parent institution.” For example, French and English are the working languages of the ICTY, just as they are at the United Nations. Yet the languages spoken most frequently by those testifying before the court, as well as by many defense lawyers – Bosnian, Croatian, and Serbian – are not official. This means, among other things, that authorized versions of ICTY judgments cannot necessarily be read by the tribunal’s primary “audience,” those living in the Balkan region.

In a multinational and multilingual legal system, translation and interpretation are always going to be needed. They thus play an essential role in the work of international courts, despite the fact that these tools create their own sets of problems. Several judges noted the difficulty of translating various legal terms from English to French, and contributed examples of situations where “semantic shift” from one to the other had been particularly problematic.

“Translation is not an art mineur,” claimed one participant; it takes enormous skill, and translators may play a more important role in the creation of legal knowledge than is generally acknowledged. Several participants even agreed that the translation process may enhance the quality of judgments and other court documents in their original language.
Further, two participants urged their colleagues to adopt and circulate official documents only after they have been scrutinized by the watchful eyes of translators and after the translation has been verified by judges and legal staff. One judge recounted that her court had “gotten burned” once in this regard. Judges had spent days debating key paragraphs only to find out that the English did not translate comprehensibly into the other official languages of that court. That institution has since started the practice of simultaneously drafting and translating the most important paragraphs of judgments.

Sufficient time and resources need to be devoted to translation, participants agreed. It was noted in this regard that some courts were specifically requested by the parent body financing the court to reduce the volume of pages of their decisions in order to reduce translation costs. Several participants were concerned that such requests could affect the overall transparency of judicial processes.

A criminal judge in the group described one of the current linguistically complex cases at his court, characterizing it as a virtual “Tower of Babel.” The chamber is mostly English-speaking and the defense team is entirely French-speaking, while the witnesses and victims frequently testify in a language of their home country. Interpretation in the courtroom is thus constantly called for, and the translation of documents to be shared by the prosecution and defense furthermore slows down the flow of the trial. The cost in terms of both time and money, he said, is immense.

Several participants suggested that requiring judges and staff to speak more than one working language of their courts would solve many of the difficulties that occur at the level of internal communication. The need for translation of documents being used by a mixed-language chamber, and for interpretation during deliberations, would disappear. Mutual understanding of a wide array of legal terms and
notions, coming from both civil and common law, would also be enhanced through multilingualism on the bench, as well as through a comparative knowledge of legal systems. (In fact, these two forms of knowledge often go hand in hand.) As one judge observed of his own institution, “Speaking both languages [of the court] would allow judges to better reach compromises between concepts.” It was also pointed out that judges who speak only the less frequently used official language of their court are at a disadvantage since their ability to communicate with colleagues – on matters both great and small – is compromised.

Despite their multiple institutional languages and the recognized benefits of multilingualism, however, international courts seem more interested in having a staff that is balanced along lines of geographic representation, legal training, and in some cases, gender than one that speaks most if not all the relevant languages. Diversity along multiple lines is clearly critical if an international court is to be perceived as an institution capable of serving a broad constituency. Yet inattention to linguistic balance, in particular, means that certain courts are unable to compose chambers of judges who use a common language. According to one criminal judge, this imposes an undue burden on the entire criminal proceedings. Many believe, however, that there is already a limited pool of candidates who are qualified to serve on international benches. Requiring multilingualism on top of expertise in various fields of law would reduce the pool even further.

While the internal operation of courts might be facilitated through widespread staff multilingualism, linguistic diversity among the parties that come before a court will always be present. The ECJ and the ECHR experience this diversity to a heightened degree, as they accept “applications” in any of the languages spoken within their wide geographic jurisdictions (covering 27 and 47 states respectively). In oral proceedings, the “language of the case” at the ECJ remains the original language of the application. In contrast, once an application is deemed admissible at the ECHR, one of the working languages, either English or French, is normally used both for oral proceedings and for document submission by states. In the judgment phase, there are also differences between the two European courts. The ECJ is particularly concerned that its judgments be communicated effectively to member states so that they can be incorporated into domestic law. To that end, ECJ judgments are translated into 23 different languages, an exercise that accounts for 15% of its annual budget and 50% of its staff time. The ECHR, on the other hand, does not have a policy of translating its judgments into the languages relevant to a particular case. It is left up to the respondent state to bring its judgment from Strasbourg “back home.”

Paradoxically, the two courts with the widest geographic jurisdictions – the ICJ and ITLOS – demonstrate the least flexibility in terms of language. Submissions by the parties are accepted, proceedings are carried out, and judgments are rendered in only the official languages, French or English, unless special authorization is obtained to use another. The World Trade Organization Appellate Body is similarly stringent in its language policies, restricting the use of languages in all aspects of the institution’s work to English, French, and Spanish. These global institutions thus place the burden of linguistic accommodation on the state parties that come before them.

The opposite policy is found in criminal tribunals, where effective communication with parties is “a matter of human rights” and where tremendous efforts at linguistic accommodation are consequently made by the institutions. If the accused cannot understand the charges against him in either French or English, then they must be presented in a language he can understand. The fact that the indictment is very long and expensive to translate is not a consideration. The accused also has the “fair trial right” to understand all the proceedings.

The ICC will certainly feel the burden of respecting the linguistic rights of the accused in the years to come. The cases currently before the court involve
languages that do not necessarily have a preexisting cadre of professionals who can carry out the necessary translation and interpretation, which could cause long delays in the proceedings. Too long a delay could also, then, result in an infringement of the rights of the accused. The court also cannot anticipate the languages that will be involved in future cases and thus prepare for the work ahead. This contrasts with the work of the ECJ, for example, where translation is performed in a great number of languages but generally the same ones.

Another judge emphasized the critical role of good interpreters for the fact-finding aspect of criminal proceedings. He observed that in his own court, none of the judges speak the language most frequently used for testimony. He has the impression, however, that interpreters are sometimes influenced too strongly by the manner in which testimony is given, which may lead to inaccurate renderings of witness statements. At the same time, judges are wholly dependent on interpreters for their understanding of witness statements and are usually not in a position to evaluate their accuracy. One participant pointed out that when discrepancies between an original testimony and the translation can be identified, it is clear they have the potential to affect fact-finding. He related how in the early years of the ICTY, an interpreter mistakenly translated a witness' statement into English as “they were digging a furrow” rather than “they were digging a trench,” thereby suggesting that the activity observed was agricultural instead of potentially for the disposal of bodies.

Over the course of discussions, participants noted that, notwithstanding the adoption by their institutions of multiple official or working languages, in almost all cases one has become dominant – English. This trend parallels, of course, the increasing importance that English plays on the world stage, particularly in business, science and research, and the media.

This linguistic dominance has several important implications for the world of international justice. It has been noted, for example, that English speakers have become overrepresented in judicial institutions that are meant to reflect the world’s diversity. Judges and court staff who are native or near-native speakers of English are also at an advantage in relation to their colleagues from other language groups. They are already fluent in the language most commonly used in their courts and thus do not carry the additional professional burden of functioning professionally in a second (or third or fourth) language.

The importance of English is also expanding at the expense of one language in particular – French. Many francophone judges and personnel of international courts and tribunals feel that legal thinking in their language has been historically influential in the development of international law and that its declining importance impoverishes the field. From a pragmatic point of view, however, the official status of French in many courts may not be logical. One participant observed that few of the judges in his court, much less the parties before it, speak or understand French. “The French language has got a place in the system that it would not merit,” he declared, “if looked at from a fresh and purely practical perspective.” The ECJ is an exception among international courts in the status it accords to French – all if its judges deliberate on cases in French, without the use of interpreters.

Participants also discussed whether the dominance of English creates the “side effect” of privileging common law within international courts and tribunals. The greater the number of judges and staff (especially legal assistants) who function in English, the more likely they are to read and cite jurisprudence from the English-speaking world. The eventual effect of this trend, some fear, will be the decreased influence of civil law notions in international legal thinking. One participant agreed that language plays a role in the expansion of the common law in international courts and tribunals. He asked, “Was it not inevitable to have Statutes for the ICTY and ICTR so much influenced by common law? They were both drafted in English.” But another judge rejected this characterization for his own court. It is true that chambers with a majority of judges
from common law countries often privilege their own legal thinking, he conceded. But this is less a question of language than of the tendency to apply familiar domestic legal procedures at the international level.

The gist of the session’s discussions was twofold. First, multilingualism poses many challenges – practical, philosophical, and financial – for the international justice system. But, realistically, courts with large geographical jurisdictions have little choice but to embrace this diversity. As one European judge noted, “European law is multilingual law. For the legitimacy of the court, it is important to have many languages on board. The cost argument should not be taken into account – some costs are inherent to a democratic order.” If international courts are to serve their multilingual jurisdictions and publicize their work, accommodating the language needs of their constituents, to a greater or lesser degree, cannot be avoided.

The second conclusion drawn from the discussions was that lack of linguistic knowledge among some international judges places a burden on their institutions. Monolingual judges may be impaired in their capacity to interact with other members of their benches. They also lack the ability to review the validity of translated versions of judgments in other official languages. Furthermore, monolingualism limits access to legal knowledge and new perspectives that could be helpful in drafting a decision that is understandable and acceptable to parties who come from diverse cultural and legal settings.

BIIJ participants generally agreed, then, that it is strongly desirable for international judges to be multilingual, both for reasons of practicality and collegiality. International judges should strive to improve their language skills and, very importantly, international justice institutions should support them as much as possible in this endeavor.

Notes


3. These statutes or constitutive instruments do not specify, however, what exactly “official language” or “working language” means in the context of their institution.

4. These closely related languages are referred to at the ICTY as “BCS.”

5. This is because translators often ask for clarification when they have difficulty in rendering an unclear passage into a second language, which then leads to a revision of the original.

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