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Language rights and linguistic justice in international law: Lost in translation?

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Abstract

A range of international legal provisions guarantee rights to translation for linguistic minorities in certain circumstances, but these do not always lead to linguistic justice. This article explores why this may be the case, focusing on how assumptions embedded in international law as to the role of translation and interpretation limit the extent to which international language rights can deliver linguistic justice. Drawing on insights from other disciplines, particularly sociolinguistics and translation and interpreting studies, I identify four flawed assumptions about translation embedded in international legal discourse: that translation is straightforward or easy; that translation is expensive and impractical; that translation is just about words; and that translation is neutral or apolitical. Each of these flawed assumptions limit the ability of international law to achieve justice for minority language speakers.

Keywords: international law, human rights, language rights, linguistic justice, translation

1. Introduction

While there is no single *right* to language in international law, a range of international legal provisions protect languages and their speakers. These include minority rights, which protect the rights of minorities to use their own

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language; non-discrimination rights; rights to freedom of expression; rights to culture; and other rights, such as the right to a fair trial, which can be used incidentally to protect language interests in certain situations. Yet there is a significant body of literature demonstrating that these language rights do not necessarily deliver *linguistic justice*, understood loosely as justice between speakers of different languages, and may even exacerbate some of the difficulties faced by those who speak minority languages (Mowbray 2012).

This article explores why this may be the case, focusing on how assumptions embedded in international law as to the role of translation and interpreting limit the extent to which international language rights can deliver linguistic justice. Translation and interpreting are key mechanisms through which international law seeks to deliver linguistic justice. However, insights from other disciplines, particularly sociolinguistics and translation and interpreting studies, reveal that the conceptualisation of translation within international law is deficient in certain key respects. In particular, I identify four flawed assumptions about translation embedded in international legal discourse: that translation is straightforward or easy; that translation is expensive and impractical; that translation is just about words; and that translation is neutral or apolitical. In identifying these problematic assumptions, I build on work which has reached similar conclusions with regard to the operation of translation within domestic legal orders. The pervasiveness of these assumptions at the level of international law, however, raises its own particular issues which are worth considering separately. International law in general, and international human rights law in particular, should function as a check on the power of nation-states and a mechanism for protecting the rights of individuals and minorities when domestic legal systems do not. International law should therefore be a forum for addressing the defects in domestic legal orders identified in the existing scholarship. If international law itself is based on flawed assumptions about translation, however, its ability to achieve justice for minority language speakers is limited. As a result, the promise of international language rights fails to translate into linguistic justice.

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2. A note on terminology

Before going further, I should say something about the terminology I will be using in this article, including my use of the word *translation*. For the purposes of this article, I use the word translation in a general sense, to cover the provision of both translation and interpreting services. And I will generally describe those to whom these services are provided as *minority language speakers or linguistic minorities*, to reflect the fact that they do not speak the dominant or official language of the state. I acknowledge that those who do not speak the official language are not always in the minority, and do not always form an identifiable group. However, I will use the terminology of *minority* for ease of reference. I further acknowledge that not all states have a designated official language, and accordingly will also use the term *dominant language* to capture both official and quasi-official state languages.

I should also note that I adopt a broad approach to what constitutes *international law*. In what follows, I therefore consider not only binding legal rules, but also the broader discourse of international law, including a range of non-binding international legal instruments, jurisprudence, norm-setting and legal commentary. I will also consider the law developed under regional systems, such as the human rights and other instruments developed under the auspices of the Council of Europe. While there are differences between these systems, there are also common themes and practices of cross-reference which justify treating them together, in order to present a comprehensive overview of international legal discourse on language rights and translation.

3. Translation in international law

Translation is one of the key mechanisms through which international law seeks to address injustice faced by linguistic minorities. A number of legal provisions explicitly mandate translation as a means of ensuring language rights. The most significant of these are those which require translation in order to ensure that linguistic minorities receive a fair trial. So, for example, the International Covenant on Civil and Political Rights (ICCPR) provides in Article 14(3) that:

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> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> (a) to be informed … in a language which he understands of the nature and cause of the charge against him;
> …
> (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Similar rights are contained in a large number of international legal instruments.[1] Although these instruments all have a slightly different scope of application, certain legal principles are common to all of them. The first is that individuals are entitled to be informed of criminal charges and reasons for arrest in a language which they understand (ICCPR, Article 14(3)(a)). Secondly, individuals charged with criminal offences have the right to the free assistance of an interpreter to assist with court proceedings if they cannot understand the language used by the court (ICCPR, Article 14(3)(f)).

Other areas of international law explicitly require communication with individuals to take place in their minority language, or in a language which they understand, effectively mandating the use of translation to accommodate linguistic minorities. Thus Article 10(2) of the European Framework Convention for the Protection of National Minorities requires states, in certain circumstances, to establish "conditions which would make it possible to use the minority language in relations between those persons [national minorities] and the administrative authorities." The Advisory Committee, the body responsible for monitoring state compliance with the Convention, has confirmed that the "conditions which

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[1] See, for example: Convention on the Rights of the Child, Article 40(2)(b)(vi); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Articles 16(5), 16(8), 18(3)(a) and (f); ILO Convention No 169, Article 12; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Articles 5(2), 6(3)(a); EU Directive on the Right to Interpretation and Translation in Criminal Proceedings; EU Directive on the Right to Information in Criminal Proceedings; American Convention on Human Rights, Article 8(2)(a)).

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would make it possible to use the minority language in relations between those persons and the administrative authorities" include the availability of translation and interpreting services (Advisory Committee Opinion on Denmark 2011, pars. 95 and 96).[2]

International labour law similarly contains provisions designed to ensure that workers receive safety and other information in a language which they understand.[3] International law on the rights of prisoners, including prisoners of war, also requires that individuals be given information in a language which they understand (Mowbray 2017, 34), noting that "the services of an interpreter" shall be used "whenever necessary" to achieve this (Organization for Security and Co-operation in Europe (OSCE), Oslo Recommendations 1998, Article 20).

In a different context, the European Charter for Regional or Minority Languages ("European Charter") lists a variety of measures which states can take to promote minority or regional languages, a number of which refer to translation. Article 9(1) lists measures that states can take to allow the use of regional or minority languages in criminal, civil, and administrative proceedings "if necessary by the use of interpreters and translations." Article 9(3) refers to states making "available in the regional or minority languages the most important national statutory texts and those relating particularly to users of these languages." Article 10 sets out steps which states can take to encourage the use of regional or minority languages in dealings with administrative authorities and public services, and Article 10(4) specifically provides that one way of doing this is through "translation or interpretation as may be required." Article 12, dealing with cultural activities and facilities, indicates that states can promote access in other languages to cultural works produced in regional or minority languages (and vice versa) "by aiding and developing translation, dubbing, post-synchronisation and subtitling activities" (Article 12(1)(b) and (c)). Although states are not required to adopt

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[2] Interestingly, however, the Advisory Committee has also expressed a preference for functional bilingualism over translation in some circumstances: see, for example, the Advisory Committee's Opinions on Sweden (2012), pars. 87 and 182, and Georgia (2015), par. 78.

[3] See, for example, International Labour Organization (ILO) Convention No 180, Article 5(8); ILO Recommendation No 151, Articles 7(1)(a), 21-2; and ILO Recommendation No 86, Article 5(2).

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these particular provisions, as the scheme of the Charter gives states a choice as to which obligations they will accept, states are required (by Article 2(2)) to take at least one measure under each of Articles 9 and 10, and at least three measures under Article 12. In this way, the Charter encourages states to embrace translation as a way of protecting regional or minority languages.

In addition to these provisions of international law, which more or less explicitly require the use of translation, other language rights in international law implicitly require translation. International law prohibits discrimination on certain bases, including on the basis of language (ICCPR, Articles 2 and 26; International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2).[4] This means that, in appropriate circumstances, states should provide translation in order to protect individuals from discriminatory treatment, or in order to ensure equal access to other rights. So, for example, Article 25 of the ICCPR guarantees the right to vote and stand for election. This has been interpreted to require that "positive measures should be taken to overcome specific difficulties, such as … language barriers" and that "information and materials about voting should be available in minority languages" (UN Human Rights Committee 1996, par. 12). Similarly, Article 12 of the ICESCR, which guarantees the right to health, has been interpreted as requiring states to provide translation in order to ensure that minorities who do not speak the language used by doctors and in hospitals are nonetheless able to access medical services, and to ensure that public health information is available in minority languages (UN Special Rapporteur on Minority Issues 2017, 25–26; Report of the UN Independent Expert on Minority Issues 2012, par. 68). And the right to education under Article 13 of the ICESCR may require translation programmes for students who do not speak the classroom language (UN Special Rapporteur on Minority Issues 2017, 19, 21).

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[4] See also Universal Declaration of Human Rights, Articles 2 and 7; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Article 14 and Protocol 12; American Convention on Human Rights, Articles 1 and 24; African Charter on Human and Peoples' Rights, Articles 2 and 3.

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Overall, then, it is clear that international law both explicitly and implicitly mandates the use of translation to protect the rights of linguistic minorities. More fundamentally, the possibility of translation underwrites international law's guarantee of equal treatment for linguistic minorities: in states where a particular language dominates, it is through translation from and into this language that minorities can participate in public life and enjoy rights on a basis of equality. International law therefore positions translation as an important *solution* to the problem of linguistic diversity and linguistic inequality. In doing so, international legal discourse makes a number of assumptions about translation and its effectiveness in enabling justice as between speakers of different languages. In what follows, I identify four key assumptions about translation embedded in international legal discourse and argue that these are, in various ways, flawed. As a result, the ability of language rights under international law to contribute to linguistic justice is constrained.

3.1 Assumption 1: Translation is straightforward/easy

In the provisions of international law set out above, there is an assumption that translation is possible: that evidence in criminal trials, workplace safety requirements, health information, education resources and so on *can* effectively be translated into minority languages in order to protect rights. The view embodied by such provisions is that "languages are always in principle translatable" (Haviland 2003, 769). From this perspective, translation is a straightforward, technical task of taking words in one language and *converting* them into another.

This assumption as to the nature of translation is particularly evident in those provisions of international law mandating translation in order to ensure that an individual receives a fair trial. Since these provisions are also the most detailed and specific in terms of when translation is required, and have been subject to some judicial and other consideration, they make a good case study. The relevant international legal provisions essentially provide that where individuals "cannot understand or speak the language used in court,"

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their right to a fair trial will be protected by giving them "the free assistance of an interpreter" (ICCPR, Article 14(3)(f)). In other words, translation — and translation alone — will be sufficient to prevent injustices arising from the fact that individuals do not understand the language in which court proceedings are taking place. As Haviland has put it in the context of similar provisions under US law, "[u]nder the law, at least, a linguistic handicap can be adequately addressed simply by supplying the requisite officially approved translations" (Haviland 2003, 769).

This assumes that translation is straightforward and effective: translation is the solution, which ensures a fair trial for minority language speakers. Indeed, the way in which the relevant legal provisions have been interpreted by judicial and other authorities assumes that translation is not only possible, but that it is *so* effective that the scope of what requires translation, under international law, can be narrowed in very significant ways. So, for example, it has been held that the law does not require that all relevant documents and proceedings be translated into the accused's language (*Husain v Italy; Hermi v. Italy*; most recently affirmed in *Bokhonko v Georgia*). This is particularly the case if the accused is represented by counsel competent in the language of the court (*Harward v Norway*), or if "as a result of … [an] oral explanation given to him, [the accused] sufficiently understood" the nature of a document (*Kamasinski v Austria*, par. 85). Similarly, it has been held that individuals are not entitled to the assistance of an interpreter merely because they cannot understand legal technical terminology in the language of the court (*Isop v Austria*). As long as the accused understands the "gist" of proceedings, there is no violation of the right to a fair trial (Brannan 2010, 11).

In limiting an accused's rights to translation in these ways, these decisions assume that minimal translation is effective to convey meaning and to allow an accused to present their legal case. In doing so, they not only assume that translation is straightforward and effective, but also assume that conveying the essential meaning of proceedings or texts is relatively easy: an oral explanation of a document, sufficient for the accused to understand the "gist," will be enough; the fact that the accused's counsel understand a document and can ask their client about it will suffice.

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We do not have to be experts in translation studies to realise that this vision of translation as straightforward, even easy, is problematic. The BBC's fascinating list of "the greatest mistranslations ever" (Macdonald 2015) demonstrates that even at the highest levels of international diplomacy, translation difficulties arise. The very existence of the phrase "lost in translation" reflects the common and intuitive sense that translation is not always (or perhaps ever) capable of conveying the full meaning of the original expression in another language.

This common-sense understanding is confirmed by scholarship in fields including translation studies, sociolinguistics, and linguistic anthropology. This scholarship demonstrates that the conduit model (see Reddy 1979) or verbatim theory of translation — that expressions in one language "can be rendered for legal purposes, without loss and exactly" (Haviland 2003, 768) into equivalent expressions in another language — is based on a fundamental misunderstanding of language and how it operates. In particular, it fails to take account of the phenomenon of indexicality, that is, the fact that the same linguistic expression may have different meanings in different contexts (Braun 2015). It similarly fails to account for the fact that "meaning is a social phenomenon" (Muñoz Martín & Rojo López 2021, 62) not merely a linguistic one, with cultural and social frameworks playing an important role in the creation of meaning (see Lambertini Andreotti 2016 for an interesting analysis of how this influences the way in which the target-language receiver comprehends interpreted text). Empirical analyses have thus demonstrated that "the common assumption that competent interpreting can put a person in the same position as a speaker of the official language would be" is problematic on both linguistic and pragmatic grounds (Angermeyer 2013, 105; see also Berk-Seligson 1987; Mason 2015).

The idea that translation is a straightforward and technical activity is similarly refuted by scholars in translation studies, for whom the concept of "translation problems" is axiomatic (Nord 2006, 263). Within this field, it is accepted that the idea of "equivalence" between expressions in different languages is "imaginary" (Leung 2014, 57). Problems with translation in the legal sphere specifically have been documented from diverse perspectives by writers including Leung (2014),

Monzó-Nebot (2018), and Cao (2019). Particular issues arising in the context of courtroom translation have been identified by scholars including Hale (2004), Stern (2018), and Moore (2021).

In light of this popular and scholarly evidence, the "legal fiction" (Leung 2014, 57) that translation is straightforward and easy is problematic in two ways. First, and most obviously, it limits the ability of linguistic minorities to communicate effectively in situations where their human rights are at stake, thus limiting their ability to enjoy those rights. So, for example, in the context of the right to a fair trial, as outlined above, the assumption that expressions in one language can be unproblematically translated into another has repeatedly been shown to have negative effects on parties who do not speak the language of the courtroom (Berk-Seligson 1989; Angermeyer 2013; Mason 2015). The translation process itself creates a barrier to their ability to present their case; yet the existence of this barrier is actively denied through court processes which instruct judges and juries to attach legal consequences to the translated words as if they were identical to the original (Haviland 2003, 768). This is problematic given that law is an inherently linguistic activity and it is through the language of the trial — the presentation of evidence and argument, the assessment (through linguistic exchanges, such as cross-examination) of the credibility of witnesses and evidence — that the judge or jury reach their conclusion. Perceived inconsistencies in the accused's account, which may result from the complex process of translation, can lead to them being found not to be a credible witness. Mistranslations can have even more profound consequences. This is of huge significance in the context of a criminal trial, where what is at stake is a criminal conviction, with the possibility of imprisonment or other sanctions attached.[5]

While the discussion above has focused particularly on the right to a fair trial, the operation of the "legal fiction" that translation is straightforward limits linguistic justice in all areas where translation is the means through which

[5] For further discussion of this issue in another context, namely applications for asylum, see Smith-Khan 2022.

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international law seeks to protect the rights of linguistic minorities. In the healthcare context, for example, a significant literature has demonstrated that language barriers to effective healthcare result from the "centrality of language to health beliefs, attitudes, practices, cultural scripts, and conceptual frameworks" (Peled 2018, 1), such that assuming healthcare barriers faced by linguistic minorities can be unproblematically overcome through translation is fundamentally flawed. Similarly, the assumption that meaning, including the meaning of complex written documents, can effectively be conveyed through informal, oral interpretation affects the rights of linguistic minorities in the context of dealings with administrative authorities. So, for example, in its 2018 report in respect of Germany, the Committee of Experts of the European Charter for Regional or Minority Languages noted that regional and minority languages are used "mainly in oral exchanges" (17) with local administrative authorities, without more fulsome translation services being provided.

The second problem with the assumption that translation is straightforward is that it positions problems with translation, and injustices which result, beyond the scope of international law. In focusing on translation as a primary means of protecting language rights and addressing injustices associated with language use, international law therefore conceals injustices which can result from the process of translation itself. Translation is the *solution* to problems of linguistic injustice; once translation is provided, international law tends not to look beyond to consider injustices arising from the process of translation itself. Thus, the jurisprudence demonstrates that, in the fair trial context, for example, there is no requirement for translators to be registered (Brannan 2010, 8), and very little legal redress in cases of poor-quality translation (Brannan 2010, 10–11). The European Court of Human Rights has found that as long as the accused understands the "gist" of proceedings, it does not matter if the translation provided is "somewhat inaccurate" (Brannan 2010, 11, discussing *Khatchadourian v Belgium*). While the question of inaccurate translation is frequently raised before international bodies — and some commentators have optimistically suggested that "this is an area in which we might see further developments" (Vogiatzis 2022, 21) — as of July 2022, there were no cases in which this concern had been upheld. Rather,

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complaints about the quality of translation are generally held to be "improper" or "belated" (in the sense that they should be raised before the domestic courts in the original proceedings, not at the international level) and therefore not capable of consideration under international law (Brannan 2010, 10).

To claim that international law assumes that translation is straightforward or easy is, of course, something of an oversimplification. As the very cases identified in the previous paragraph indicate, international courts have to grapple with evidence of the imperfections of translation on a regular basis. I am not suggesting that international lawyers and judges are blind to the problems of translation. Perhaps it would be more accurate to characterise the relevant assumption as being that, despite all the difficulties associated with translation, it is a sufficient means of protecting rights such as the right to a fair trial. However, even this assumption is, as the theoretical and empirical work discussed above shows, flawed. In relation to the right to a fair trial, for example, miscarriages of justice can and do occur as a result of translation issues. Further, while individual lawyers and judges may be aware of the limits of translation, there is still a bias within the discourse of international law as a whole towards essentialising translation, viewing it in simplistic terms as the straightforward and obvious *solution* to the problem of linguistic diversity. As the scholarship discussed above shows, this is not necessarily the case.

3.2 Assumption 2: Translation is expensive/impractical

The second assumption which can be seen to inform international law in this area is that translation is expensive and widespread use of translation impractical. The relevant legal provisions, and the cases which have interpreted them, contain significant limitations and caveats on the translation rights which they confer on minorities. As noted above in the context of translation to guarantee the right to a fair trial, the extent of translation provided is strictly circumscribed: translation of documents and legal terminology is heavily limited and there is preference for brief, oral explanations over full translation. The implicit assumption here is that providing translation is administratively difficult or impractical, and that

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the extent of translation provided should be limited to the bare minimum necessary to enable an accused to participate in criminal proceedings. This perception is reinforced by the fact that (except perhaps in relation to indigenous peoples) there is no international legal obligation on states to provide translation in civil, as opposed to criminal, proceedings at all (Mowbray 2017, 38–39).

Translation rights are strictly circumscribed by international law in other contexts as well. For example, Article 10(2) of the Framework Convention for the Protection of National Minorities, which seeks to give national minorities rights to use their own language in dealings with administrative authorities, provides that:

> In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.

It is immediately evident that the *rights* to translation (and, more generally, to use minority languages in communications with administrative authorities)[6] contained in this provision are heavily qualified: they arise only in "areas inhabited by persons belonging to national minorities traditionally or in substantial numbers," "if those persons so request," and "where such a request corresponds to a real need." Even if those conditions are met, the obligation imposed on states is simply "to endeavour to ensure," "as far as possible" that it is possible to use the minority language in communications with administrative authorities. As Thornberry and Martín Estébanez have concluded, this right is so heavily qualified that it "struggles to escape its chains" (2004, 105).

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[6] As noted in footnote 2 above, the Advisory Committee interprets Article 10(2) as requiring direct communication in the minority language, through functional bilingualism, wherever possible.

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Similar limitations are inherent in other international legal provisions in this area. States are generally given a wide discretion in determining when to provide translation, through formulations such as "wherever possible" (OSCE, Oslo Recommendations 1998, Article 14), "as far as this is reasonably possible" (European Charter, Article 10(1)), and "where practicable" (UN Special Rapporteur on Minority Issues 2017, 13, 18, 19, 23, 27, 35, 36). Often provisions only apply where there are a sufficient number of minority language speakers (European Charter, Article 1(b)).

Rights to translation are therefore exceptional and limited. The implicit assumption is that translation is impractical, and in particular that widespread use of translation is an unreasonable cost for the state. This is explicitly confirmed in the Explanatory Report to the Framework Convention, which notes, in relation to Article 10(2), that: "in recognition of the possible financial, administrative … and technical difficulties associated with the use of minority languages," and therefore translation, Article 10(2) "has been worded very flexibly, leaving Parties a wide measure of discretion" (Council of Europe 1995, par. 64). Emphasising concerns about the expense involved in translation, the Explanatory Report goes on to provide that "[a]lthough contracting States should make every effort to apply this principle, the wording 'as far as possible' indicates that various factors, in particular the financial resources of the Party concerned, may be taken into consideration" (par. 65).

From one perspective, of course, it is true that translation is expensive and widespread translation impractical. States must pay for translation services, and it would be difficult for states to offer free translation services in every language for all dealings with public bodies. For this reason, states develop policies and guidelines as to when translation will be available (see, for example, re courtroom interpreting in the US, Killman 2020). At the same time, however, this idea of *practicality* requires some closer consideration. From the perspective of the state, it may well be most practical, or efficient, to limit the scope of translation. However, if we shift perspective and consider the issue from the point of view of minority groups, the costs of such arrangements outweigh the benefits. These groups are precluded from

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accessing state services, or are required to bear the costs of translation in order to do so. In this sense, limiting translation by state authorities simply passes on the costs, such that they are borne by minority language speakers rather than the state.

Furthermore, as Ingrid Piller has beautifully demonstrated in her analysis of the translation policy of the EU, the *overall* costs of not providing translation are far greater than the costs of providing it.[7] Writing in 2016, Piller notes that maintaining 24 official languages costs the EU about 1.1 billion euros a year in translating and interpreting. On a per capita basis, this is 2.2 euros per person per year, "about the price of a cup of coffee" (Piller 2016, 190). However, if the EU introduced an English-only policy:

> Most Europeans would be paying much, much more than the equivalent of a cup of coffee for linguistic provision. To begin with, the British and the Irish would not be paying anything at all. Those 7% of continental Europeans who already speak 'very good' English would not be paying, either. That would leave everyone else—around 80% of Europeans—out of pocket for English language learning if they wanted to exercise their democratic right to understand what is going on in the European parliament and to participate in the European project in any other way. … [F]or all these individuals language costs would be much, much higher than is currently the case. Furthermore, it would no longer be a public expense shared by all, but their own private expense. (Piller 2016, 190)

As Piller's extract suggests, this assumption that translation is expensive and impractical, and should therefore be strictly limited, has significant implications for linguistic justice. In particular, it shifts the costs of accommodating linguistic diversity from the state to minority language speakers, who must bear a cost which those who speak the dominant language do not. In reflecting and reinforcing this assumption, international law not only fails to address such linguistic injustice, but implicitly authorises it. It goes without saying that this limits the ability of

[7] Killman (2020) also discusses the issue of the value added by interpreters relative to expense, in the US context.

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international law to contribute to linguistic justice. Ultimately international law reinforces a model of translation policy that is, as Piller has demonstrated, both unjust and more costly overall.

3.3 Assumption 3: Translation is just about words

A third assumption which seems to underpin international legal discourse on translation is that the purpose of translation is simply to ensure effective communication; in other words, translation is just about the words. The broader significance of translation as a nuanced exercise in intercultural communication is obscured by provisions of international human rights law, for example, which focus on the instrumental significance of language as a tool for communication and tend to ignore the intrinsic significance and meaning that language may have to members of linguistic minorities. So, for example, the relevant provisions do not give individuals the right to use their own language, but only to use a language which they "understand" (ICCPR, Article 14(3)(a), (f)), or are presumed to understand (ILO Convention No 180, Article 5(8)). And where members of minorities are "able to understand" the official language, even if imperfectly, there is no obligation on the state to provide translation at all. In the case of *Guesdon v France*, for example, the applicant, whose mother tongue was Breton, complained that a French court had refused to allow him to present his defence to criminal charges in Breton rather than French. The UN Human Rights Committee found:

> The provision for the use of one official court language by States parties to the Covenant does not, in the Committee's opinion, violate article 14 [of the International Covenant on Civil and Political Rights]. Nor does the requirement of a fair hearing mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language. Only if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language, must the services of an interpreter be made available.
>
> The author has not shown that he, or the witnesses called on his behalf, were unable to address the tribunal in simple but adequate French. In this context, the

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> committee notes that the notion of a fair trial … does not imply that the accused be afforded the possibility to express himself in the language which he normally speaks or speaks with a maximum of ease. If the court is certain … that the accused is sufficiently proficient in the court's language, it is not required to ascertain whether it would be preferable for the accused to express himself in a language other than the court language. (*Guesdon v France*, pars. 10.2–10.3)

The finding in this case has been repeatedly confirmed in other fair trial cases before international tribunals (*Cadoret and Le Bihan v France*; *SG v France*; *Isop v Austria*; *Bideault v France*). A similar approach, of requiring translation only where there is an instrumental purpose for it, is evident throughout international human rights law (Mowbray 2017, 36–37). There is no right to translation unless it is necessary to overcome communication barriers affecting the achievement of *other* human rights: rights to a fair trial, rights to fair treatment in prison, rights to safety at work, rights to health and education, and so on. Translation is provided to the minimum extent necessary to ensure those other rights are adequately protected: so as long as an individual is "sufficiently proficient" (*Guesdon v France*, par. 10.3) in the dominant language to prevent "difficulties in understanding," there is no need for translation. Language is significant, in this context, solely for its ability to enable or hamper effective communication.

In reality, of course, language has not only instrumental significance but also intrinsic significance, as a marker of identity and an aspect of culture. From this perspective, requiring translation only where there is an instrumental purpose for it is problematic because it fails to recognise minority identity and the significance of language to that identity. Particularly in the "high stakes" context of a criminal trial, an accused may prefer to use their own language as a matter of cultural safety (see Ramsden 1992). They may also attach a particular symbolic significance to being able to use their own language to defend themselves in criminal proceedings brought against them by the State. More generally, failure to allow an individual to use their own language before public authorities functions as an important form of symbolic exclusion, a failure to recognise and accommodate minority identity, which constitutes a

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particular form of linguistic injustice. Take, for example, the Breton speakers in cases like *Guesdon*. They did not want to use Breton because they did not speak French; rather, they felt that as the traditional inhabitants of Brittany, they should be able to use their own language before the courts. Their claims to use Breton were about expressing and protecting Breton identity — a claim that the French state should recognise and accommodate the Breton community within it (Mowbray 2012, 143). However, international human rights law does not respond to these claims. By allowing translation only for instrumental purposes, it reinforces the status quo, under which courts reflect only dominant identity and culture, together with the injustices inherent in that arrangement. And it fails to address cultural and symbolic barriers to justice faced by minority groups.

Not all provisions of international law focus solely on the instrumental significance of language. Bodies of international law dealing with the protection of cultural diversity and the rights of minority groups both acknowledge the significance of language to culture and minority identity. Thus, the European Charter for Regional or Minority Languages encourages states to take steps to protect regional or minority languages, including through translation, because they are "an expression of cultural wealth" (Article 7(a)) and "a living facet of Europe's cultural identity" (Council of Europe 1992, par. 10). Similarly, the European Framework Convention for the Protection of National Minorities acknowledges the intrinsic significance of language for minority groups, as an "essential element" (Article 5) of minority identity and culture. The 1998 OSCE Oslo Recommendations Regarding the Linguistic Rights of National Minorities go further and suggest that minorities should have the right to defend themselves in their own language during judicial proceedings "with the free assistance of an interpreter and/or translator" even where they speak the language of the court (Article 18), thus acknowledging that minorities have interests in using their own language which extend beyond effective communication.

Even in these instruments, however, the significance of translation is understood narrowly, with a focus on the translation of words rather than the broader process of intercultural communication. Thus, the fora in which

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the law requires translation to be available are generally those in which effective communication is legally significant, that is, in dealings with public authorities and before the courts (Framework Convention, Article 10; European Charter, Articles 9(1) and 10(4)). And the focus is on translation in individual cases: the legal provisions speak, for example, about the right of "every person" to "the free assistance of an interpreter" (Framework Convention, Article 10(3))[8]. The need for translation outside these instrumental contexts, to facilitate intercultural communication among different groups in society more generally, largely falls outside the scope of the relevant international instruments.

Even where these instruments raise the possibility of translation in the context of culture, the focus remains on translation as a means of ensuring access to cultural *works*, rather than as a medium for mediating between cultures themselves. Thus, the provisions of the European Charter for Regional or Minority Languages provide for the translation of cultural works from and into regional and minority languages (Article 12(1)(b) and (c)). The Explanatory Report explains the rationale behind these provisions as follows:

> By reason of their limited number of speakers among the population, regional and minority languages do not have the same cultural productivity as the more widely-spoken languages. In order to promote their use and also allow their speakers access to a vast cultural heritage, it is therefore necessary to have recourse to the techniques of translation, dubbing, post-synchronisation and subtitling (paragraph 1.c). The avoidance of cultural barriers implies, however, a two-way process. It is therefore essential to the viability and status of regional or minority languages that important works produced in them should become known to a wider public. That is the purpose of paragraph 1.b. (Council of Europe 1992, par. 116).

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[8] Of course, it is logical for these provisions to be cast in these terms, given the focus of the relevant instruments on individual rights. Nonetheless, it is both striking and significant how such formulations structure the international legal discourse on translation. For related observations about the way in which international law limits the availability of translation to formal contexts and participation in government, see Mowbray (2017, 48–49).

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Although such commentary implicitly acknowledges the connection between language and culture, it nonetheless seems to overlook the intrinsic significance of language as an aspect of cultural identity in favour of an emphasis on the instrumental significance of language as a barrier to accessing cultural works. *Culture* and *cultural heritage* are here understood in narrow terms as cultural productions or commodities (films, novels, and so on), to which translation enables access by overcoming communication problems. The broader concept of culture as a way of life, and the intrinsic significance of language to culture in that sense, seems to be obscured. So, for example, the European Charter encourages translation of minority language works into dominant languages, including through practices such as dubbing (Art 12(1) (b) and (c)). Yet this could function as a form of erasure: dubbing effectively involves removing the minority language from a cultural work altogether and replacing it with the dominant form of expression. However, concerns such as these find no expression in the scheme of the Charter. Even in these provisions, which concern the use of minority languages in the cultural sphere, the intrinsic significance of the minority language, as an important element of minority culture, is poorly accounted for.

In failing to recognise fully the intrinsic significance of language, international legal discourse limits the role of translation to enabling communication (translation is just about words), without considering the important cultural and symbolic work which translation can do to address injustice. This limits the ability of international law to address the range of injustices faced by linguistic minorities and thus the extent to which language rights under international law translate into linguistic justice.

3.4 Assumption 4: Translation is neutral/apolitical

Scholars in translation studies have comprehensively demonstrated that the act of translation is never neutral, but invariably reinforces the relations of power between dominant and minority languages: "translators, either willingly or inadvertently, contribute to distributing the symbolic power of languages by implementing certain translation policies that impact those hierarchies" (Monzó-

Nebot 2020, 14). The politics of translation is much-discussed in the literature (Evans & Fernández 2018) and the way in which translation relates to power is a subject of active study across a range of fields, including international relations (Capan, dos Reis & Grasten 2021). Substantial theoretical and empirical work has demonstrated how practices of translation, and the linguistic and pragmatic choices involved, disadvantage minority language speakers in a variety of ways (Berk-Seligson 1988; Angermeyer 2013; 2015; Mason 2015; Mellinger 2017). This is equally true across different contexts, ranging from translation of public signage (Angermeyer 2017) to translation of court forms (Mellinger 2017) to interpreting in legal proceedings (Angermeyer 2015).

Awareness of the politics of translation is, however, almost completely absent from international legal discourse. This discourse, as noted above, constructs language as a barrier to the enjoyment of rights and justice, and positions translation as the solution to this problem. Building on the assumptions that translation is straightforward and *just about words*, this discourse assumes that this solution is a neutral, technical one. The idea that translation itself might involve the exercise of power relations, and contribute to injustice, finds no reflection in the international legal provisions. Thus, injustices associated with the translation process itself are not recognised by international law, with questions of quality of translation generally considered beyond the scope of international legal consideration. But more significantly, the way in which international law deploys translation to address linguistic injustice is blind to the power dynamics at work in that process. This is exemplified by the way in which international law prefers, or at least allows the preference of, informal oral interpretation over formal translation of documents. We do not have to be sociolinguists or translation scholars to appreciate that providing only informal, oral interpretation of formal, written documents reinforces the marginalisation of minority languages and their speakers in a range of practical and symbolic ways. Yet in many cases international law specifically limits rights to translation in this way.

This is problematic, from the perspective of linguistic justice, because it means that international law uncritically reproduces the power dynamics between dominant and minority languages (and the corresponding injustices

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which these create for linguistic minorities). Taking this a step further, a close analysis reveals that international legal discourse in fact reinforces those power dynamics in important ways. First, by treating minority language use as a barrier to accessing rights and justice — a difficulty which is to be overcome through translation into the dominant language — the relevant legal provisions implicitly devalue minority languages. Knowledge of such languages is structured as a disability, not, for example, as "an asset for cultural diversity" (Paz 2013, 164). Thus, linguistic minorities are only to be accommodated through translation until they have learnt to communicate in the official language; once they can understand the official language, albeit imperfectly, there is no obligation to provide translation. The bias, then, is towards linguistic assimilation, rather than recognition of minority identity as an important and valuable part of the character of the state.

This suggests a second way in which international legal discourse on translation reinforces the power dynamics between dominant and minority languages, namely by reinforcing the privileged position of the dominant language. By providing for translation only where it is necessary for effective communication with authorities operating in the official language, the law implicitly suggests that only the official language (and the ability to understand it) has value. It also takes as given the status of the dominant or official language, obscuring broader questions about the appropriateness or otherwise of the state's language policy which confers this status (Mowbray 2017, 40). In this way, international law on translation precludes more radical challenge to the structures of linguistic injustice embedded in the choice of official language itself.

International law on translation precludes more radical challenge to linguistic injustice in other ways, too. Overwhelmingly, the vision of translation justice presented by international legal discourse focuses on isolated use of translation in individual cases, particularly where necessary to protect other human rights. Translation here is a short-term, ad hoc fix to practical problems created by linguistic diversity.[9] The possibility of more far-reaching, systemic change is

[9] A similar point is made in relation to sign language interpreting by De Meulder & Haualand (2021).

not contemplated by these provisions. This not only precludes the possibility of achieving such change through international law, but may actively undermine claims by linguistic minorities for more emancipatory change through, for example, policies encouraging multilingualism in public institutions. Ng, for example, has argued for a policy of "language matching" in US courtrooms, allowing for the creation of Spanish-language courtrooms with proceedings conducted entirely in Spanish (Ng 2009). But this vision of "linguistic justice" finds no reflection in international human rights law, which offers no language in which to articulate such a claim to institutional multilingualism. And while instruments such as the European Framework Convention for the Protection of National Minorities (in, for example, Article 10(2)) and the European Charter for Regional or Minority Languages (in, for example, Article 10(1)(a)(i)) do contain provisions encouraging multilingualism, these are both limited in scope (in terms of geography and languages covered) and, as noted above, heavily qualified through caveats such as "where possible." As a result, claims for far-reaching multilingualism are largely not reflected in the general discourse of international law.

More generally, international legal discourse obscures the politics of translation by characterising both the problems faced by linguistic minorities, and the solution to those problems, narrowly. In constructing language as a barrier to the enjoyment of rights and justice, and suggesting that this barrier can be overcome through translation, the law simplifies the nature of the disadvantage suffered by minority language speakers. It suggests, for example, that translation can ensure that linguistic minorities access the legal process on the basis of equality, that is, that "competent interpreting can put a person in the same position as a speaker of the official language would be" (Angermeyer 2013, 105). In reality, linguistic minorities often face multifaceted, systemic, and institutionalised forms of disadvantage. As a result of their limited knowledge of the dominant language, they are often socially and economically marginalised, with limited access to good jobs and education, and virtually no political power or representation in public institutions. Translation may provide these groups with the appearance of equality before the law, but in reality, their participation in the legal process may be hampered by a range of other factors. Focusing

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on language as a barrier to be overcome through translation tends to obscure broader questions of the structural disadvantage suffered by linguistic minorities across the board. It suggests that linguistic difference is just a technical problem to be overcome, thus masking the way in which such difference can provide the basis for entrenched, institutionalised inequality and injustice.

In all these ways, international law fails to attend to the political consequences of translation, as well as the political background against which translation policies take effect. Doing so not only limits the ability of international law to translate language rights into linguistic justice. It implicates international law in reinforcing the structures of power which disadvantage minority language speakers.

4. Conclusion

Translation is key to international law's promise of linguistic justice for minority language speakers. Across diverse fields of international law and throughout the accompanying legal discourse, translation is implicitly or explicitly mandated as the primary means of addressing injustices faced by linguistic minorities. Yet the way in which this discourse conceptualises the practice of translation is limited in a number of ways. In particular, it is possible to identify four flawed assumptions about translation embedded in international legal discourse: that translation is straightforward or easy; that translation is expensive and impractical; that translation is just about words; and that translation is neutral or apolitical.

Each of these assumptions undermines the ability of international law to respond to linguistic injustice, by obscuring the true extent of the injustices suffered by linguistic minorities and the real costs and consequences of offering translation to remedy them. As a result, international law not only fails to achieve its emancipatory potential, but in fact contributes to affirming the power relations between dominant and minority languages that disadvantage linguistic minorities.

Addressing this issue will require international lawyers to be much more attentive to insights from other disciplines, such as sociolinguistics and translation studies, regarding the practice and politics of translation. It will also

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require a willingness to embrace more "radical" solutions to the problems of linguistic diversity, including institutional change and policies of multilingualism. Without such a shift, the promise of linguistic justice inherent in international law will remain always lost in translation.

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