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THE INTERLINGUAL INTERPRETER — CYPHER OR INTELLIGENT PARTICIPANT?

by

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Introduction: *The Interpreter's Turn*[*]

In this paper, the interpreter in question is the individual who has the delicate task of turning oral utterances made in one (source) language (L1/SL) in a legal context into versions in a second (target) language (L2/TL) with the goal of satisfying the system's prescriptive requirements on verbatim standards, legal equivalence, unobtrusiveness and objectivity. In most readings of the interlingual (or "foreign-language") interpreter's role, and above all in legal works, a mechanical nature is ascribed to these language-switching[1] (LS) activities. However, the author — for ten years a full-time interpreter at an international organization — rejects such a mechanistic view of the interlingual interpreter's role, arguing instead that it is precisely in intercultural settings such as those confronting a language-handicapped participant in legal proceedings that the interpreter should be considered an intelligent participant, not a cypher.

Paradoxically, in the European Communities context, where conference interpreting is taken for granted — where in some meetings the number of interpreters exceeds those of delegates, where headphones are automatically donned and a vast range of matters can be discussed in nine languages — it is precisely in this setting that the

[*] With apologies and thanks to Douglas Robinson (*infra*, n.16).

[1] This term is used to designate the activity performed by professional interpreters, i.e. interpretation. It is not to be confused with code-switching, the term normally used to designate the inclusion of terms in one language in the middle of a text primarily in another language. Nor is it a synonym for the legal interpretation of texts. The alternative term, interpretation, is used in the language-switching sense to designate the *oral* transfer of one language to another; translation designates the *written* activity.

interpreter has been reduced to a cypher-like state. Just as the tap is turned on for water, so the knob is turned for language. The interpreter's personal contribution is felt not at all. Even the interpreter, on the whole used to the subject matter, senses that a machine might be able to cope with the material, on condition that it was primed with the relevant Eurospeak vocabulary[2] and that delegates did not lapse into dialect or tell jokes. Of course, a certain degree of intelligence is still required in order to distinguish between homonyms, turn mispronounced foreign (particularly English) words into recognisable expressions and concepts, straighten out missing logical connections and complete dangling phrases. But generally, the EC interpreter tends to survive the daily grind by functioning to some extent on "automatic pilot". Indeed, had he been commenting on EC interpreting instead of police interviews, Christmas Humphreys might arguably not have been quite so outrageous as he was in *Attard* in maintaining that "interpreters are in a different position from that of police officers; they are impartial, mere cyphers, and are not expected to take an intelligent interest in the proceedings."[3]

Is the interlingual interpreter therefore simply a human — and consequently an all-too-fallible — machine, as is so often claimed? In the legal setting, the court interpreter has variously been compared to a phonograph,[4] a transmission belt, transmission wire or telephone,[5] a court reporter,[6] a bilingual transmitter,[7] a translating machine,[8] a (mere) conduit or channel,[9] a mere cypher,[10] an organ conveying

2 That "interlanguage" that has evolved over the last 35 years.

3 *R.* v. *Attard* (1958) 43 Cr.App.R. 90.

4 *Gregory* v. *Chicago R. I. & P. R. Co.* 124 N.W. 797 (1910).

5 *United States* v. *Anguloa* 598 F.2d 1182 (1979), [1186] Note 5.

6 *People* v. *Johnson* 46 Cal.App.3d 753, App., 120 Cal.Rptr.372 (1975). *People* v. *Resendes* 210 Cal.Rptr. 609 (Cal.App.5 Dist. 1985) at 612-613.

7 *Per* Kitto J., in *Gaio* v. *R.* (1960) 104 C.L.R. 419 at 430.

8 *Per* Kitto J., in *Gaio* at 431.

9 *State* v. *Chyo Chiagk* 92 Mo. 395, 4 SW 704 (June 20 1887); *per* Badham for the respondent at 421 in *Gaio*; *State in Interest of R.R.* (NJ) 398 A2d 76, 6 ALR 4th 140 (1979) at 142; *State* v. *Randolph* 698 S.W.2d 535 (Mo. App. 1985) at 538-539; *U.S.* v. *Koskerides* 877 F.2d 1129 (2nd Cir. 1989) at 1135; *United States* v. *Da Silva* 725 F.2d 838 (1983); *United States* v. *Dunham* 1991 U.S. App. LEXIS 10945; *United States* v. *Ushakow* 474 F.2d 1244 (1973).

(presumably reliably) sentiments or information,[11] and a mouthpiece.[12] Such images equate the interpreter with a unobtrusive device, depersonalising the individual performing LS activities, denying him or her any personal input or interactive role, and deflecting attention away from him or her as an individual participant in his or her own right.[13]

It is assumed by the legal system that by laying down rules, by codifying behaviour, by instructing interpreters to translate literally, the interpreter can be factored out, turned into a mechanical, transparent non-presence. It is further assumed that his or her words can be equated with those of the foreigner, so that L1 = L2. The assumption that rules (where they exist or are laid down on an *ad hoc* basis) will automatically engender the requisite (as perceived by the legal system) behaviour leads to the further assumption that by following the rules, (almost) any "bilingual"[14] (for which in certain cultures, particularly American and English, read: other, outsider, foreigner) can act as an adequate language-switching device. It should be noted

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10 See note 3 above.

11 *Du Barré* v. *Livette* 170 ER 96 (Peake 108) (27.7.1791): "No confidence was reposed in Rimond: he was merely the organ which conveyed the sentiments of the defendant to this attorney, and those of the attorney to the defendant."

12 *Per* Fullagar J. in *Gaio* at 429: "What is in truth and in substance taking place is a single conversation between A and B — and none the less because a means of communication has to be used which would be unnecessary if they had a common language ... C is not in any real sense a party to the conversation. He contributes nothing of his own that is material. He is merely the mouthpiece alternately of A and B." However, this "mouthpiece" role may be exceeded, as Roxburgh J. points out in *Re Trepca Mines Ltd*. See below at note 36.

13 The absence from this list of metaphors of any comparison with a tape recorder may indicate this device's ambiguous status given the perceived possibilities of faking and editing material. Early discussions in the English legal system about the admissibility of tape recordings seem to reflect an essential ambiguity towards the reliability or trustworthiness of tape recorders and the medium of magnetic tape which echoes attitudes towards interlingual interpreters.

14 On the negative implications of "bilingual" in American society (among others), see J. Fishman, "Bilingualism and Separatism", *Annals of the American Academy of Political and Social Science* (AAPSS) (1986), 487:170.

that the precise degree of LS adequacy is extremely important, since — for the purpose of evidence — the person of the testifying witness is subsumed in that of the interpreter, and the interpreter's words entirely replace those of the witness. Unfortunately, the system often assumes that the apparent production of words in a foreign tongue by the interpreter and the subsequent turning of the foreign words into something recognisable as the language of the court is sufficient indication of language-switching adequacy.

Mistaken Expectations about Translation

Writing of the common mistaken expectation about translation — that "what is said" in one language can be "said" in another — J.B. White argues that this is the result of a defective view of language generally, i.e. that language is a "code", into which "messages" are encoded.[15] In this view, language is conceived of as transparent. If language is transparent, then the interlingual interpreter can similarly act as a transparent conduit or decoder through which "messages" can flow from one code into another. Some commentators who have worked with both better and less adequate interpreters consider that the professional interlingual interpreter is able to provide such transparency, whereas the amateur is not. Thus Tung notes how most "improvised" interpreters are unable to achieve what he calls the "transparency"[16] of a professional interpreter, "with adverse effects for the resultant dialogue".[17] Is this a tenable attitude? Does it simply mean that the amateur is inevitably biased and will produce a

15 J.B. White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago and London: University of Chicago Press, 1990), 253.

16 D. Robinson, *The Translator's Turn* (Baltimore & London: John Hopkins University Press, 1991), 54.

17 In discussing psychiatric care in the United States for Southeast Asians, Minh Tung Tran, "Psychiatric Care for Southeast Asians; How Different is Different?", in T.C. Owan, ed., *Southeast Asian Mental Health: Treatment, Prevention, Services, Training and Research* (Rockville, Md.: National Institute of Mental Health, 1985), 5-40, describes the complex and unsatisfactory dynamics that can result from using "auxiliaries", native speakers of the patient's language who are neither professional interpreters nor professional therapists but may be called upon to perform something of both roles for LS purposes in a therapeutic situation.

subjective rendering, while the professional will exclude all bias and allow "the message" to shine through the language-switching process undistorted and unbesmirched by personal input? Or does it indicate a genuine belief in the professional's ability to convey the original message fully and accurately in the target language, without his or her persona becoming involved in the situation?[18]

The Court Interpreter: Cultural Intermediary, Expert, Advocate?

Under existing codes of practice, court interpreters are strictly forbidden to assume any judicial functions. They are to render the original source material "without editing, summarizing, deleting, or adding while conserving the language level, style, tone, and intent of the speaker".[19] In addition they must not be required to identify or edit out inadmissible material such as hearsay[20] --in other words, they should not assume or be given the role of gatekeeper, or any other essentially judicial duty.

This list of negative and positive requirements may be considered to represent a non-exhaustive enumeration of the legal system's conditions for accurate language-switching (or re-presentation of L1 material in L2), in order to achieve accurate representation of testimony given in a language other than that of the court. Considering representation of testimony in Haldar's terms — "To know the truth of an event is to represent accurately what is outside the court, inside the court"[21] --the significant difference is that here the events (the speech acts that take place during legal proceedings) are actually occurring inside the court, but are nevertheless normally inaccessible to

18 G.M. Mirdal, "The interpreter in cross-cultural therapy", paper presented at the International Workshop on Strategies for Solving Health Problems of Turkish Ethnic Minorities in Europe (University of Antwerp, 29-31 October 1987) considers such a situation impossible: "The interpreter does not convey words, she conveys meanings and must be extremely sensitive and thus 'subjective' to a certain extent."

19 R.D. Gonzales, V.F. Vasquez, H. Mikkelson, *Fundamentals of Court Interpretation* (Durham, N.C.: Carolina Academic Press, 1991), 16.

20 *People* v. *Wong Ah Bank (Bang)*, 65 Cal.305, 4 P.19 (1884).

21 P. Haldar, '"The Evidencer's Eye: Representations of Truth in the Laws of Evidence", *Law and Critique* II/2 (1991), 171-189, at 172.

participants. Legal participants in proceedings involving a language with which they are unfamiliar are forced to rely on the verbal re-presentation, accurate or otherwise, of the court interpreter, of what is said by the speaker of that additional language.

Where testimony is mediated through an interpreter, participants who have no proficiency in the language in which the witness testifies cannot judge directly for themselves even what is taking place before their eyes inside the court. Even where the interpreter "accurately" (i.e. with care) renders the substance of an utterance — the words[22] — into L2, participants may lack a considerable number of the clues needed to evaluate properly what they hear as well as what they see.[23] The most reliable court interpreter cannot be a completely adequate substitute for the original speaker, even when

[22] White, *supra* n.15, at 298 (Note 13) refers to the observation by Ortega y Gasset that what one finds in a dictionary is not words — for words exist only in actual utterances — but abstracted "possibilities of meaning." J. Ortega y Gasset, *Man and People* (W. Trask trans. 1957), 235.

[23] H.A. Powell, K.C. "Annotation Evidence VIII—Admissibility of Confessions in Criminal Cases", D.L.R. 2 (1924), 374-387, refers to *Taylor on Evidence* (11th ed., vol.1, p.582, n.(c)) as quoting a passage from Lord Macaulay's *History of England*, which is very apropos in this connection: "Words," says he, "may easily be misunderstood by an honest man. They may easily be misconstrued by a knave. What was spoken metaphorically may be apprehended literally. What was spoken ludicrously may be apprehended seriously. A particle, a tense, a mood, an emphasis, may make the whole difference between guilt and innocence." In *The State* v. *Fields* (1823), Peck (Tenn.) 140, the Court observed (at 142): "How easy it is for the hearer to take one word for another, or to take a word in a sense not affixed to it by the speaker! And for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner and action of the one who made the confession, how almost impossible is it to make third persons understand the exact state of the mind and meaning of the one who made the confession."'

In order to try to and narrow the communications gap, H.A. Ishisaka, Q.T. Nguyen, J.T. Okimoto, "The Role of Culture in the Mental Health Treatment of Indochinese Refugees", in T.C. Owan, ed., *Southeast Asian Mental Health: Treatment, Prevention, Services, Training and Research* (Rockville, Md.: National Institute of Mental Health, 1985), 41-64, at 45, urge that the interpreter be encouraged to provide far greater input into a clinical situation than is usually the case: "The interpreter must assume the hugely important role of translating meanings across what is often a vast cultural and personal distance."

the L1 speaker is present before the court's eyes.[24] Nor can a "faithful" LS rendering ensure that exactly the same impact will be made on the listener to the L2 version as on the listener to the L1 version. Different cultural backgrounds and worlds of knowledge inevitably colour the impact of any communicative event. To some extent, in the Bakhtinian view, all acts of understanding another involve a process of translation.[25] Or, in Steiner's terms, "all human communication equals translation".[26] In this "translation" process, how far can an interpreter go in making explicit clues which might otherwise be missed by the listener?

Attali notes that a reliable machine-translation program is being worked on in order to replace the unreliable "re-presentative" human translator.[27] The courts would doubtless place a massive order for any machine that could cut out the intrusive, unreliable human element in the oral language-switching process (rescinding Babel?).[28]

24 In the case of *Gordon (formerly Szerdahelyi)* v. *Gonda*, heard in the High Court of Justice (Chancery Division (1954) 71 RPC 121), Mr. Justice Danckwerts noted, "...when the answers come through an interpreter and the witness is speaking ... in a foreign language, it is always rather difficult to appreciate the demeanour of the witness and to evaluate it in the same way as with a witness who is being examined in his own language, in English, so that you can see the effect which any question has upon him."

25 Robinson, *supra* n.16, at 279, quotes Emerson on Bakhtin's implicit attitudes towards translation: "To understand another person at any given moment ... is to come to terms with meaning on the boundary between one's own and another's language: to translate." See C. Emerson, Editor's preface to her translation of Bakhtin's *Problems of Dostoevsky's Poetics* in *The Dialogic Imagination: Four Essays*, ed. M. Holquist (Austin: University of Texas Press, 1981), 259-422.

26 G. Steiner, *After Babel* (London: Oxford University Press, 1975), 47: "Inside or between languages, human communication equals translation."

27 J. Attali, *Bruits: Essai sur l'économie politique de la musique* (Paris: Presses Universitaires de France, 1977). Translated by Brian Massumi, *Noise: A Political Economy of Music* (Minneapolis: University of Minnesota Press, 1985), quoted in Robinson, *supra* n.16, at 251.

28 Robinson, *supra* n.16, at 252 and 296 n.27, refers to "The Voice", a "one-way translating machine that will translate two thousand spoken phrases in English, German, French, or Spanish into their spoken equivalents in one of the other languages. "One-way" translating means that it will not translate the local's reply to your question — it cannot process natural language, which makes it next to useless." See also at note 47 below.

The nature of Attali's re-presentation is artisanal, the craftman's individual production; the nature of repetition is machine-like, industrial. In the former is room for individual features, idiosyncrasies, peculiarities, fine shading, customizing — explaining; in the latter all must be standardised, cut-and-dried, mechanistic, "machine-readable", able to fit into a reliably repeatable pattern — *this* L1 word *always* means *this* L2 word. When the lawyer tells the court interpreter, "translate, don't interpret", he means: "repeat, don't represent". The lawyer is pursuing the old Augustinian view of translation, with its belief of ultimate perfection just around the corner. For him, repetition of the foreign language material replaces it, excises it, exorcises the foreign element. Like the effect of Luther's German translation of the Bible,[29] foreign-language originals uttered in the English-language court are wiped off the face of the earth. The foreign-language speaker's voice is a prime example of the missing voices in the law.[30] The lawyer will "quote" the witness using the interpreter's words, supremely confident that these are indeed a perfect substitute for the original.[31] However, when the boot is on the other foot, when the interpreter must relay the lawyer's question to the witness, the examiner immediately becomes mistrustful. The form of the question will be changed, legal rules will be broken, and the process of law will be circumvented. In the lawyer's imagination, the interpreter grows horns. In the law's view of the language-switching process, utter perfection alternates with utter disaster.[32]

To sum up: The interlingual interpreter re-presents the L1 message, in L2; but the system deludes itself that he is ("literally") repeating it — seeking again and therefore, presumably, finding the mes-

[29] Robinson, *supra* n.16, at 73: "They will also forget, of course, that the words were ever written in another language ... "

[30] J.M. Conley and W.M. O'Barr, *Rules versus Relationships: The Ethnography of Legal Discourse* (Chicago: University of Chicago Press, 1990).

[31] White, *supra* n.15, at 236, comparing translation and interpretation (of a legal or other text) argues that the original must continue to be present, "if only as a ghost behind the form ... The heart of both is the same: the presence of two texts, two voices, and the making of a relation between them."

[32] Robinson, *supra* n.16, at 68: "Translation soon becomes an all-or-nothing affair, either total meaning, total understanding, total liberation from oppression, or total failure, total untranslatability."

sage.[33] The original L1 material is effectively re-placed by the interpreter's L2 rendering in the sense of "superseded by"; yet should it not be re-placed in terms of "restored to its rightful place"? The law's view is that the original material, L1, is replaced, is substituted by L2, once L1 has ceased to fulfil its function. L1 testimony is inaccessible to the court. It must therefore be re-placed by L2.

Views of Interpreters as Non-mechanical Devices (Non-verbatim Renderings)

The mechanical view of the interpreter is not the only one reflected in case reports. As indicated above, interpreters are also perceived as being prone to surrender to their "natural" impulses[34] and utter, not the words of the witness, but their own; acting as advocate, not mouthpiece; providing, in their own words, their own *interpretation* of what the witness meant to say.

Occasionally, legal commentators evince a sympathetic attitude towards the interpersonal aspects of the interpreter's role, particularly when commenting on the unsuitability of an individual, such as a police officer, to act as interpreter.[35] More frequently, however, such behaviour is referred to as exceeding the interpreter's set role. In an echo of the advocacy vs. interpreting debate in the British public service sphere, the role of the interpreter has been firmly defined by judicial comment as "a go-between, and nothing more, bridging over the difficulty of language ... theoretically merely a mouthpiece and not an advocate at all ...".[36] However, this theoretical definition is succeeded by a comment that, as indicated

33 Re-peat: from re-petere, to seek.

Re-place — 1. take the place of, supersede, 2. substitute a person or thing for (another which has ceased to fulfil its function); 3 — put back or return; restore to its rightful place.

34 Robinson, *supra* n.16, at 33.

35 In *State* v. *Mitjans* (394 N.W.2d 221 (Minn.App. 1986) at 225), a police officer investigating the case had acted as (unsworn) interpreter in interviewing the defendant. The appeal court made comments that reflect awareness of the possible occurrence of interpersonal aspects in the interpreter/client relationship.

36 *Per* Roxburgh J., *In re Trepca Mines Ltd*. [1960] 1 W.L.R. 24.

above, reflects a judicial kneejerk reaction to interpreters:

> but, in fact, when an interpreter translates counsel's questions into the language of the witness, what happens is that rules of evidence are broken and, unless counsel or the judge knows the language, they are powerless to prevent it ...[37]

Not only are the witness's words subsumed into those of the interpreter: the excluded legal participant perceives the interpreter as somehow being in cahoots with the foreign-speaking other, the two engaging in a private colloquy — "in their own language".[38]

The upshot is that the legal participant feels stripped of control over the proceedings. Power is felt to have been ceded to the interpreter. The result is that lawyers feel they must attempt to wrest control of the proceedings back from these LS individuals. Yet since they do not (normally) understand the foreign language, they are powerless to intervene. Hence comments about "voluble" foreign witnesses — i.e. individuals speaking a language that they do not understand and whom they cannot control.[39]

Once they refrain from viewing interpreters as mechanical devices, in their alternative reading of the interpreter's role lawyers appear to be ideologically[40] conditioned to view interpreters as individ-

[37] An example of what Roxburgh J. was referring to is the following:
Counsel: "And what condition did you find your wife in when you came back from England?"
Interpreter: "Was your wife pregnant when you came home?"
Witness: "Yes, she was pregnant."
Interpreter: "She was pregnant."

[38] *Grinskis and Another* v. *Lahood and Another* [1971] NZLR 502 *per* Haslam J. at 504.

[39] For example, the comment of Popplewell J in *Kourtis* v *Bloomsbury District Health Authority*, Queens Bench Division, 4 April 1990 (unreported): "Mrs Kourtis was not a witness who was readily willing to answer yes or no, but I have to be very careful not to treat her evidence with less care simply because she was dealing with a foreign language and because she was somewhat voluble in the answers that she gave." See also note 46 below.

[40] Lawyers would argue that the conditioning is the result of their experiences with interpreters (see Roxburgh J. in *re Trepca Mines*, as quoted above at note 36). The present author would argue that those individuals who have acted in this fashion have not been professional interpreters and that, moreover, lawyers almost always fail to grasp the complex mental and linguistic aspects of the LS process.

uals who, unless held in check, will surrender to their "natural" impulses[41] and utter, not the words of the witness, but their own; who will act as advocate, not mouthpiece; who will provide, in their own words, their own interpretation of what the witness *meant* to say, not a (literal) translation of the witness' actual words.

In the eyes of the law, as reflected in case reports, interlingual interpreters have a dualistic image: the traitor, and the instrument.[42] Ideally, the law would exclude the traitor, and ignore the instrument. Case reports frequently show courts agreeing — reluctantly, fearfully and suspiciously — to use an interpreter only when considered absolutely necessary, and lawyers viewing the interpreter's role in purely technical and mechanical terms, or alternatively as a device that handicaps their own performance.[43] In this view the interpreter is seen as not only impeding the process of cross-examination,[44] but also disempowering the lawyer by mediating, interceding and intervening between the examiner and the examinee, providing protection for the foreigner — the other — who purports not to be able to understand and communicate in the questioner's language in order to gain extra time for thinking out his or her answers.[45] Worse still, in place of a metaphrase, a literal translation, the lawyer believes that the interpreter uses a paraphrase, conveying the substance as identified by him,[46] not the essence, clarifying the message in his terms and putting his own interpretation on it. Like translators, "deep in their hearts" — to quote Robinson — lawyers too "long for a time when translation will either succeed perfectly or be unnecessary (rescission of the curse of Babel)."[47]

In the resultant dialectic, Robinson argues that the translator is

41 Robinson, *supra* n.16, at 33.

42 Can this dualism be compared with Davidson's "dualism of conceptual scheme and empirical content"? See D. Davidson, *Inquiries into Truth and Interpretation* (Oxford: Oxford University Press, 1984).

43 *Rajnowski* v. *Detroit, B. C. & A. R. Co.* 41 N.W. 849 (1889) at 850.

44 J.E. Macy, "Annotation: Use of interpreter in court proceedings", ALR 172 (1947), 923, at 930.

45 Macy, *supra* n.44, at 930. See also *R.* v. *Burke* (1858) 8 Cox, C.C. 44.

46 Macy, *supra* n.44, at 930.

47 Robinson, *supra* n.16, at 53.

both nothing — a tool, a mere instrument of world redemption, and everything, the redeemer, "a re-creative artist whose dialectical ability to bring SL and TL, East and West, day and night, into juxtaposition and then once and for all join them will save us all from death".[48] Does the same nothing/everything, instrument/redeemer dialectic apply to the court interpreter? Paradoxically, even experienced court interpreters are considered with suspicion; while at the same time inexperienced individuals with suspect language and LS skills are assumed to be capable of providing utterly faithful L2 renderings.[49] In its unwillingness to rely on the go-between, the system frequently uses such unreliable intermediaries that it condemns itself to the treacherous behaviour it most fears. It rejects the use of monitoring because it believes in a singular approach to LS — a single, univocal meaning — and cannot cope with the idea of a message having multiple meanings.[50] The result is that the interlingual interpreter must "lay down the law", linguistically speaking, in terms of determining *the* (single) meaning of an utterance, often without being given the opportunity to even query the precise meaning with the speaker or without the benefit of all-important context.[51]

The sociological and psychological reality that lies behind suspicion of the interpreter as an advocate frequently centres round migrants' alienation in a strange culture whose language they do not speak and whose social, legal and economic system they do not understand fully. In her detailed study of immigrants in the early

48 Robinson, *supra* n.16, at 91.

49 In a rare critique of the latter approach, in *Matter of Tomas* (Board of Immigration Appeals, Department of Justice, 19 I. & N. Dec. 464 (1987)), the Board of Immigration Appeals commented unfavourably on the state of affairs at the original hearing, in which the applicant's daughter had been compelled to act as LS provider.

50 *State* v. *Van Pham* 675 P.2d 848 (Kan. 1984) at 826: "To have the jury hear various interpretations involving fine shadings of meanings of the same word or phrase and then have the court, as it did here, accept the official interpretation would certainly confuse the jury."

51 White, *supra* n.15, at xi-xii: "... our words get much of their meaning from the gesture of which they are a part, which in turn gets its meaning largely from the context against which it is a performance ..."

United States, Claghorn[52] paints a picture of exploitation of non-English-speaking immigrants by unscrupulous and often professionally unqualified lawyers and interpreters alike. Cases such as *Gregory*[53] and *Rajnowski*[54] reflect the often concerned views of members of the judiciary at the poor level of interpretation services available in courts, and the resultant problems for the administration of justice.

One vital question is the ability of the courts, historically and contemporaneously, to draw a distinction between the overall impact of LS on legal proceedings, on the one hand, and the specific effect of incompetent or inadequate interpretation services or instances of inadequate renderings on the other. A second question is whether courts choose to do anything about improving the quality of those involved in language-switching activities before them. The court's comments in *Rajnowski* indicate that while being able to identify incompetent interpreters as the source of inaccurate testimony (what it robustly calls "the evil"), it nevertheless considered its remit not to go further than calling attention to that state of affairs:

> We have seen so many instances in the records before us of testimony which appeared of questionable accuracy that, while it is beyond our power to correct the evil, we deem it proper to advert to the occasion for having it corrected, if possible. It is not for us to do more than call attention to it.[55]

Work in Australia has shown that frequently lawyers do not realise that their non-English-speaking-background (NESB) clients often have a communication problem.[56] This issue, manifestly not exclu-

52 K.H. Claghorn, *The Immigrant's Day in Court* (New York and London: Harper & Brothers Publishers reprinted Arno Press & The New York Times, 1923 reprinted 1969).

53 See *Gregory* v. *Chicago, R. I. & P. R. Co.* at 800.

54 In the early (1889) Michigan case of *Rajnowski*, the court made extremely perceptive comments, reflecting the abysmal quality prevailing at the time in respect of intralingual interpreters.

55 *Rajnowski* at 850.

56 G. Bird, "Current Research Projects of NCCSL", *Legal Service Bulletin* 16:1 (1991), 35. See also M. D'Argaville, "Serving a Multicultural Clientele: Communication Between Lawyers and Non-English-speaking Background

sive to Australia, can obviously be taken in a wider context, involving *inter alia* not only the complexity of the language used by lawyers, but also the way in which language and culture shape outlooks and perceptions. It is in this spirit that White argues that "our community is defined by our language — our language *is* the set of shared expectations and common terms that enable us to think of ourselves as a 'we'".[57]

Belonging, to some extent, to both communities, the interpreter may identify mismatches between speakers' styles of communicating — including outlooks, language-anchored habits and discourse patterns, all produced by enculturation — which distort the communication process.[58] The interpreter's dilemma concerns the degree to which he or she is or is not entitled to draw attention to such factors, or even to use his or her discretion to independently provide, explicitly or covertly, information or material which can smooth out potential or actual distortions and misunderstandings.[59] To some extent, the degree of such latitude will vary with the degree of formality of the situation in which LS is being provided, as well as the attitude of

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Clients", in *Law in Multicultural Australia*, ed. G. Bird (Melbourne: National Centre for Crosscultural Studies in Law, 1991).

57 White, *supra* n.15, at 23.

58 These factors can also distort communication even when both participants are nominally using the same language, particularly when they are from different ethnic backgrounds. See C. Roberts, E. Davies and T. Jupp, *Language and Discrimination: A Study of Communication in Multi-ethnic Workplaces* (London and New York: Longman, 1992) and R.P. Roberts, "Interlingual Communication in Legal Settings", in A.M. Aguirre, ed., *Northeast Conference on Legal Interpretation and Translation*, The Consortium of Educators in Legal Interpretation and Translation at Jersey City State College (1989), 5-16.

59 In her discussion of different connotations and figurative meanings in source and target languages, R.P. Roberts, *supra* n.58, at 12) notes that when faced by such difficulties, the legal interpreter must either find another equivalent with the same connotation or figurative meaning, or translate literally, "explicating where necessary the connotation or figurative meaning", or if no concept or term exists in the target language and it is not grasped by the listener, the interpreter may bring this fact to the attention of the legal parties concerned (by addressing the judge in formal legal situations).

the non-language professionals.[60]

Examples

I shall now examine a few examples of the kind of behaviour on the part of interpreters that might attract lawyers' opprobrium. They are all taken from the 1987-88 trial of Ivan John Demjanjuk, held in Jerusalem and involving the use of Hebrew, English, Ukrainian, Yiddish and German. Like most of the evidence, my examples involve the World War Two period, and more particularly events in Eastern Europe. A large number of the witnesses were elderly Jews, speaking from personal knowledge of the period in question; the prosecution lawyers were younger Israelis, well acquainted with the history and background of the case, and with excellent command of Hebrew, English and German; while the defence team, variously constituted at different stages of the trial, always included one if not two American non-Jews who seemed singularly lacking in familiarity with both Jewish culture and the history of the Second World War. There was also an Israeli defence lawyer.

The first example of the kind of problem facing the English interpreters at the Demjanjuk trial is the Hebrew word "parochet". This is the curtain in front of the Ark of the Law in a synagogue, and originally designated the curtain in front of the Holy of Holies. It is often richly embroidered, and traditionally is decorated with a Star of David.[61] At the Treblinka concentration camp, one of the gas chambers similarly bore a Star of David — a device intended to help dissimulate the building's true purpose. The inmates who worked in the camp referred ironically to this symbol as the "parochet". When a witness used the term to designate a particular location in the camp, the English-language interpreter was confronted by the problem of how to deal with the reference.

[60] It is unlikely that the legal profession would accept the conclusions drawn by Rack as to the interpreter's suggested behaviour. Starting from a linguistic and psychiatric context, P. Rack, *Race, Culture, and Mental Disorder* (London and New York: Tavistock, 1982), 200-201, describes the interpreter as a cultural informant as well as a linguistic professional.

[61] Interestingly, this accepted conventional rendering of the Hebrew — *Magen David* — is itself a non-literal translation, "magen" being a shield. (Shield of David is also an accepted term.)

Options available to the interpreter included: a) a literal rendering — "where the curtain before the Ark was"; b) an explanatory rendering — "the gas chamber with the Star of David symbol on it." The literal rendering was considered unacceptable, on the grounds that in the death camp context any *explicit* reference to an Ark, synagogue or other place of Jewish worship would have struck a discordant note. The Hebrew term's religious connotations are more muted, and not exclusive — in Modern Hebrew the term can be used also for "cover". On the other hand, the explanatory rendering would have accurately conveyed the referent, but would have failed to convey the ironic usage. The interpreter's solution — not a wise one — was to resolve her dilemma by omitting the reference altogether, but thereby making the testimony sound less precise than it had been.[62]

To illustrate the point that "translation is ... not simply code switching, where one code is unambiguously retrievable if the other is given. The world of different speakers is not just the same world with different labels attached",[63] I shall now discuss several examples involving the designation of times of the year.

"Rosh Hashana" is a term rooted in Jewish culture. The expression literally means "head of the year" — New Year in the Jewish calendar. A literal rendering is precluded as unidiomatic; in context, the conventional English rendering would be New Year.[64] However, when the term is used to designate a historical date (in this case in September or October 1942,[65] when the Jews of a particular Polish town were deported to Treblinka), the rendering of "New Year" would be not only inadequate, but misleading, as an American listener (in this case, the cross-examining lawyer) would construe it as January 1. The interpreter therefore chose to add the word "Jewish". A further complication was that the term was used in conjunction

62 *State of Israel* v. *Demjanjuk*, 2.3.87, 17:37.

63 O. Werner and D.T. Campbell, "Translating, Working Through Interpreters, and the Problem of Decentering", in R. Naroll and R. Cohen, eds., *A Handbook of Method in Cultural Anthropology* (Garden City, N.Y.: Natural History Press, 1975), 398-420, at 403.

64 But in traditional English-speaking Jewish circles, the term remains in Hebrew.

65 Jewish festivals vary by approximately one month in the Gregorian calendar.

with the word "Erev", or "eve". Semantically, "Erev Rosh Hashana" could be rendered as "New Year's Eve", but the connotation would be utterly wrong (December 31). The interpreter therefore chose the expression "eve of Jewish New Year".[66]

A parallel issue arose when the Israeli defence lawyer needed to refer to the period between Christmas and New Year. In his Hebrew phrase, he added the term "Christian" (*notsri*) to the words "Rosh Hashana" in order to avoid ambiguity. When rendering the expression into English, the interpreter omitted the word "Christian" as it was felt that no possible ambiguity would exist without it, and to retain the term would unjustifiably stress the antithesis to "Jewish".

Unsuspected areas of confusion may arise. For someone from the American Midwest or Russia, winter, for example, begins around November of one calendar year and continues until March of the following year. It is conventionally referred to as the winter of the year in which it begins. Thus the winter of 1942 will be the period from, say, November 1942 to March 1943; and the winter of 1943 will encompass November 1943 to March 1944. In Israel, the winter — the main rainy period — often does not begin until January, so that January and February are more likely to be thought of as winter. Thus an Israeli might well think of as the winter of 1943 the months of January and February 1943. Therefore unless a term encompassing two calendar years is used (e.g. winter 1942/1943), terms such as "winter 1942" or "winter 1943" are eminently ambiguous. When a witness is being questioned about historical events that took place during the winter, confusion is highly likely to result. Such confusion certainly arose at the Demjanjuk trial, but although the interpreters were aware of this state of affairs, they could not draw counsel's attention to it. Several examinations were considerably lengthened as a result.[67]

Now for an example of the importance of context in correctly ren-

66 *State of Israel* v. *Demjanjuk*, 25.2.87, 16:53.

67 Further complications were added by the fact that the defendant was being questioned about his capture by the Germans during a battle in the Crimea. The particular location, Kerch Peninsula, was fought over twice, during two consecutive "winters". The precise timing was extremely important. In Crimea, the climate is reportedly particularly mild, so that winter is not normally markedly distinguished from the rest of the year. This further complicated counsel's efforts to get his client to date his capture accurately.

dering certain expressions into another language. A German expert witness submitted a photograph to illustrate wartime conditions in Warsaw. Copies of the photograph were provided to prosecution and defence counsel, as well as to the three-person bench. The Hebrew court interpreter and the German interpreter in the body of the court were able to see the photograph. The English interpreters, seated in a separate booth overlooking the court, were not given a copy. The witness referred to there being only one undestroyed "Strassenzug" in the scene. This unusual term, not known to either of the two English interpreters, is the equivalent of the American "block", or group of buildings bounded by intersecting streets. However, in the absence of a specific context other than a wartime street scene, from its etymology one of the interpreters guessed it to be a synonym of "Strassenbahn", or tram (streetcar).[68] The physical isolation of the English interpreters was compounded by the prevailing general attitude towards the interpreters that made it next to impossible for them to initiate clarification of expressions. Under these circumstances, the meaning of the word was guessed at, incorrectly. Had the interpreters seen the photograph, no such problems would have arisen. The problem existed here on two levels: the interpreters' unfamiliarity with the "sign", and the absence of other elements, i.e. context, which would have enabled the sign to be adequately dealt with in the target language.

On occasion, legal participants at the Demjanjuk trial demonstrated sensitivity to the fact that the words they were "quoting" were not actually those of the witness, but of the interpreter.[69] However,

[68] *Strassenbahn* is literally a "street way" (whereas a railway or railroad is "Eisenbahn", or "iron way"); in "Strassenzug" the "zug" element comes from the verb "ziehen", meaning to draw, so that the "zug" designates a continuous group of some elements: in the case of a railway, carriages, and in the case of a block, buildings along a street.

[69] In an Australian war crimes trial (*Polyukhovich*, March 1993, unreported), the defence confronted witnesses for the prosecution with video or audio recordings of all previous interviews so that their memory of the interview could be checked against their *own* words in the original language, rather than the interpreter's rendering. The defence lawyer explained the need for this approach to the judge before showing the video recording, on the grounds that transcripts are known to be a problem, as a result of inaccurate transcription and other factors. This approach is highly commendable, and it is to be hoped that it will be followed and extended elsewhere.

laudable attempts to obtain confirmation (or otherwise) of a particular expression from the interpreter were immediately stamped upon by the Presiding Judge, presumably for fear that a dialogue would spring up between lawyer and interpreter.[70] A further explanation that may be advanced for the Presiding Judge's comments in the sequence below is the kneejerk reaction that the interpreter is answering the question instead of the witness.[71]

Prosecutor:	You [m.] said that he was tall — that's how you [f.] translated it, right?
Interpreter:	Yes.
Presiding Judge:	Madam Translator, when the questions are addressed to the defendant, you must first listen to the reply as given by him and only then translate what he says.
Interpreter:	I apologize. I thought—
Presiding Judge:	Mr. Blattman — Kindly address the accused only. You have no contact whatsoever with the interpreters. That is for us.

In the above quotation, the prosecutor follows the rule of addressing the witness directly, using the second person masculine pronoun. However, for the sake of effective cross-examination he also wishes to check directly with the interpreter that the Hebrew term she has used ("tamir" — tall, erect) is the correct Hebrew equivalent of the Ukrainian adjective used by the defendant. The interpreter, being directly addressed, as is clear from the marking of the feminine second person pronoun in Hebrew, as well as the reference "you translated" ("tirgamt"), begins to reply to the prosecutor. She is thus speaking in her own right, i.e. not as the witness's alter ego, but as the interpreter who is being asked about her rendering. However, the presiding judge instructs the prosecutor and the interpreter that there is to be no exchange between them. The upshot is that the interpreter is de-

70 This is similar to the rulings in various cases that preclude jurors from querying an interpreter's rendering or require the original-language version to be ignored in favour of the interpreted version: see *United States* v. *Perez* (658 F.2d 654 (1981)); *People* v. *Hernandez*, 528 N.Y.S.2d 625 (A.D. 2 Dept. 1988); *Hernandez* v. *New York*, 552 N.E.2d 612 (N.Y. 1990); *Hernandez* v. *New York*, (1991) 114 L.Ed. 2d 395.

71 *State of Israel* v. *Demjanjuk*, 29.7.87, 9:12. English version.[72] Particularly during the accused's vital examination in Ukrainian.

nied the opportunity to confirm or modify her choice of vocabulary, and the prosecutor cannot be sure what the witness actually said.

The above brief exchange between prosecutor, interpreter and presiding judge neatly illustrates a range of attitudinal and technical problems that arise in language-switching situations in a legal setting. The user of the interpreter's services (in this case the prosecutor) is aware of his reliance on the accuracy of her renderings. He therefore addresses her with a request for confirmation of her rendering, breaking off to do so in the middle of asking a question of the witness — in this case, the defendant. This action identifies the interpreter as a participant in her own right, as an actor with an identifiable persona who makes a specific — and vital — contribution to the proceedings. Thus addressed, the interpreter, not unnaturally, replies. The presiding judge sees the court's control over the proceedings slipping, and the nature of those proceedings being potentially undermined. He assumes automatically that the interpreter has answered in place of the witness, and proceeds to lecture her on appropriate behaviour. The interpreter's apology is followed by an attempt on her part to explain that she thought (rightly, it so happens) that she was being asked to confirm her previous choice of words. She is totally ignored by the presiding judge, who proceeds next to cut the prosecutor down to size, instructing him that he must address only the defendant: counsel can have no dealings with the interpreters. Only the court (the three-man bench) is entitled to such contacts. The court does not, however, interact with any of the interpreters, with the possible exception of the head of the team, the chief interpreter into Hebrew. The other interpreters are treated as more or less recalcitrant machine-like underlings. On occasion, however, major language-switching difficulties do, at times lead the court to an acceptance of certain interpreters' control over individual witnesses.[72] Thus on the whole, the court pursues a strict line of maintaining exclusive control over any contact with interpreters, and excluding any interaction between interpreters and legal participants. This approach complies with the protocol normally followed in formal legal settings. The interpreters' problem is that any assistance they may require to improve the quality (i.e. accuracy and reliability) of their performance (e.g. obtaining a repetition of unclear material or slowing down a speaker) must necessarily come from the presiding judge, whose level of sophistication in respect of LS issues is typical

of that normally found on the bench. Protocol may be satisfied, but large amounts of judicial time are on occasion wasted by the ensuing confusion. If any errors are present in the interpreted version, silencing the interpreter in this fashion increases confusion, thereby possibly lengthening the proceedings, as well as reducing the effectiveness and, concomitantly, even the quality of the justice of the judicial process. The advantage of the Demjanjuk court's approach is that it leaves its control of the proceedings untouched.[73] It is a moot point as to whether such an advantage is not outweighed by the drawbacks of its attitude.

Conclusion

The final question that arises here is whether interpreters' behaviour -—in adding a word here or deleting a word there, as in the examples given above — actually justifies the suspicion of legal participants that they are not being told "literally" what the witness is saying. Interpreters argue that a literal rendering may confuse or mislead. Legal figures accuse interpreters of using their own words.

Legal etiquette frequently precludes interpreters from identifying cultural or linguistic factors that are generating miscommunication, such as in the example given above of designating a particular winter. The mechanical, non-participatory role ascribed to interpreters in the legal setting further leads the legal "professionals" to denigrate the standing of the individuals performing language-switching. Failure to treat interpreters as participants, e.g. by supplying them with all documentation, including photographic material, leads to inaccuracies. The mechanical view of interpreters frequently precludes them from participating at their own initiative, either to request clarification of unclear material or to provide clarification where speakers' referents are based on different worlds of knowledge. I suggest that it is high time that the legal profession re-examined its attitudes towards foreign-language interpreters, and towards their product — interlingual interpretation.

73 This is one of the points discussed in the Australian case of *Gradidge* v. *Grace Bros. Pty. Ltd.* (1988) 93 FLR 414.