



# Language proficiency and the right to an interpreter when accessing a fair trial

*Gearóidín McEvoy*

*University of Birmingham, United Kingdom*  
[g.mcevoy@bham.ac.uk](mailto:g.mcevoy@bham.ac.uk)

DOI: 10.12807/ti.115202.2023.a09

**Abstract:** This paper explores the right to an interpreter as part of the right to a fair trial under the United Nations and Council of Europe systems of human rights. The right to an interpreter is guaranteed as part of both Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights. Under both instruments, accused persons are entitled to a number of minimum rights to ensure a fair trial. Both instruments hold that an accused person has the right to “have the free assistance of an interpreter if he cannot understand or speak the language used in court”. This paper explores what this right means in reality for accused persons who seek to avail themselves of an interpreter. Only those who cannot understand or speak the language of the court are entitled to an interpreter. However, it is not always clear what is meant when we say a person ‘speaks’ or ‘understands’ a language. One may well understand day-to-day interactions in a second language but be completely out of their depth in a formal courtroom setting. Through comparison with the same right under the Statute of Rome, as well analysis of jurisprudence from the Human Rights Committee and the European Court of Human Rights this paper explores the scope of language rights under the right to a fair trial and the implications for access to justice.

**Keywords:** Court interpreting; international law; access to justice

## 1. Introduction

The right to an interpreter is a fundamental aspect of the right to a fair trial. Criminal trials are a major event, where the accused can face fines, a damaged reputation, criminal record, and even deprivation of liberty. When an accused does not share a language with the court, there is an added layer of stress and concern. As a means of alleviating that stress, the right to an interpreter has been provided for in the multitude of international human rights treaties and documents. In this paper, I will explore the meaning and scope of that right under the European Convention on Human Rights (ECHR) of the Council of Europe and the International Covenant on Civil and Political Rights (ICCPR) of the United Nations. These documents came into force in 1953 and 1966 respectively and mandate certain human rights which states must ensure, including the right to a fair trial. Under both of these instruments, an accused is entitled to the free assistance of an interpreter when they do not understand or speak the language of the court. Both encode the right to a fair trial in almost identical wording and so are relatively easy to compare. Additionally, both documents are overseen by court mechanisms which have longstanding jurisprudences. I will also discuss the Statute of Rome, the foundational statute of the International Criminal Court (ICC), and the right to an interpreter therein

as a comparison. This paper will have three distinct parts, to provide context for the scope of these rights. I will address them as follows:

Firstly, if the right to an interpreter is granted to any person who does not understand the language of the court, it is necessary to ask what it means to understand a language. I will discuss the literature on language acquisition and language domains, as it relates to the entitlement to an interpreter. Secondly, by way of comparison, I will examine the right to an interpreter under the Statute of Rome. The Statute of Rome has been chosen as it represents an international organisation where criminal law and the right to a fair trial are central. Additionally, the ICC has a dedicated history of multilingualism and overcomes linguistic challenges daily (Registry of the International Criminal Court, 2010). In analysing the scope of the right under the ECHR and the ICCPR, it is helpful to consider that which is *not* said in the texts. The Statute of Rome serves as this point of comparison. I will explore the jurisprudence of the ICC and how the entitlement to an interpreter has been understood therein. The jurisprudence from the ICC will be used to contrast the corresponding jurisprudence in the Human Rights Committee HRC<sup>1</sup> and the ECtHR.<sup>2</sup> Thirdly, I will explore the scope of the right to an interpreter, first under the HRC and then under the ECtHR. In understanding the right to an interpreter, we must explore who is, and who is not, entitled to an interpreter. The HRC and the ECtHR have been vague in the standards they have set for accused persons to be granted an interpreter. I will explore these standards, keeping the fairness of procedure and access to justice as central points of comparison.

Access to justice is an overarching principle of the right to a fair trial (Human Rights Committee, 2007). Therefore, if an accused is denied access to justice, then it stands to reason that their right to a fair trial in itself has not been guaranteed. The accused's individual reality and circumstances must always be considered. In denying an interpreter we must ask whether access to justice is being ensured.

## 2. Understanding 'understanding'

The right to interpretation is mandated under Article 14.3(f) of the ICCPR and Article 6.3(e) of the ECHR. Both instruments provide for this right, with identical wording and the entitlement to have "the free assistance of an interpreter if he cannot understand or speak the language used in court". But what does it mean to understand a language? If the right to an interpreter is afforded to a person who does not understand the language of court, then we need to explore this question. Not understanding is the threshold for having an interpreter provided, under the wording of both the ECHR and the ICCPR. We need to understand who fails to meet this threshold, and what it means to be left without an interpreter.

There are various layers to language acquisition, and these vary from person to person (Ellis, 1985). One person's cognitive ability to acquire a language may be greatly different from another's (Piller, 2016). A number of other factors can also affect a person's competency in a language, such as language deprivation (Glickman et al, 2018), educational background, age (Piller, 2016), and disability (Schneider et al, 2004). Not everyone learns language in a formal educational setting (Piller, 2016). While two people may

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<sup>1</sup> The HRC is the body which, *inter alia* hears individual complaints alleging violations of rights under the ICCPR.

<sup>2</sup> The ECtHR is the adjudicating court over individual and state allegations of violations of rights under the ECHR.

have a similar grasp of a language or be enrolled in the same language class, they cannot be said to have had the same experience and command of a language (Piller, 2016).

In the context of criminal court cases, Piatt references the high linguistic capacity needed when undergoing a trial when he states that, “because of the sophisticated language level used in [c]ourts, it is necessary to have a minimum of fourteen years of education to understand what goes on in a criminal trial...” (Piatt, 1990 p. 84). The language used at trial can be complex and difficult for lay persons to engage with, even when an individual’s first language is the same as the court’s language (O’Barr and Black, 1995, p. 25; Hartley, 2000; Suri 2019). This is not to mention the impact that the stress of trial and the legal system can have on an individual. (Ramirez et al, 1994). It must also be noted that fluency is not a static state of being (Piller, 2016). One is not simply ‘fluent’ and therefore competent to perform in any arena in that language (Piller, 2016). A person might be well versed in speaking about videogames in English, but struggle when encountering complex legal terminology. Fishman has discussed this phenomenon with reference to ‘domains’ of language (Fishman, 1971). A domain of language refers to the context in which it is used, such as home domains, workplace domains, religious domains or medical domains. Competency in one domain does not imply competency in another. Berk-Seligson (1988) provides a helpful explanation of different registers or ‘domains’ of language as defined by Fishman. She states that a linguistic context can include “location, topic or participants. Typical domains are ‘family’, ‘school’ ‘place of recreation’ and ‘church’” (Berk-Seligson, 1988, p. 17). She goes on to note that multilingual people will have a better command of their second language in the domain in which they learned that language:

...if you learned to play marbles in Spanish, but learned the rules of soccer in English, you probably will have difficulty describing marble game rules in English and similarly, you will have difficulty in describing the soccer game rules in Spanish (1988, p. 17)

Language learning and language competency are situational. Just because a person can order coffee in Swedish, or chat about the weather in French does not mean that they can defend themselves in Swedish or French courts. Language learning is a process, and it is highly unlikely for a person to conquer fluency in every domain of a language. This is particularly true in the legal context, as McCaffrey states:

The problem of vocabulary becomes even more complex in legal interpreting if highly technical language is involved, such as medical, scientific or other specialized language. (2000, p. 354)

Legal settings can include an overlap of complexities, where one could conceivably require a familiarity with a legal domain and another specialised domain. For example a case relating to robbery through removing ATMs from walls would likely include reference to specialist machinery or welding terminology, as well as the anticipated legal lexicon of a court case.

To bring this back to the right to an interpreter, if an accused has a conversational command of a language, capable of chatting about the weather, ordering a coffee or greeting people, then they might be said to ‘understand’ a language. Language acquisition and ability vary from person to person and constitute a continuous and situational process (Piller, 2016). When an individual ‘understands’ the language of the court, within the scope of the wording of Article 6.3(e) and 14.3(f) of the ECHR and the ICCPR respectively, they are not entitled to a free interpreter. If ‘understanding’ is understood on

such a superficial level without considering domain-specific or individual experience, there is a risk that the accused will be denied an interpreter when they need one. If the right to an interpreter is to be effective, then it needs to take into account the linguistic competency of the accused and the domain in which they find themselves.

### 3. The Rome Statute of the International Criminal Court

The right to an interpreter recognises that language may present an obstacle to the provision of justice. It offers a solution to this problem in the form of interpretation. In providing for an interpreter, judicial institutions lift the barrier that language poses for the accused. An interpreter allows the accused who does not speak the language of court, the language of the police, or the language of their counsel, to access language in these contexts. The text of the right in both the ICCPR and the ECHR is scant in detail – which is not in itself unusual. The right is no more or less detailed than the right to life<sup>3</sup> or the right to private and family life<sup>4</sup> for example. The jurisprudence of both the HRC and the ECtHR will be discussed below in order to trace the scope of this right. It is helpful at this juncture to compare the text of Articles 6.3(e) and 14.3(f) of the ECHR and ICCPR respectively to a similarly worded international instrument in order to garner meaning from that which is *not* said. Under both the ICCPR and the ECHR the right entitles an accused to “the free assistance of an interpreter if he cannot understand or speak the language used in court”. The Rome Statute of the ICC offers an interesting comparison. Article 67.1(f) reads that an accused shall

have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused *fully understands and speaks*. (Emphasis added)

Two main aspects feature in the Statute of Rome which are not present in the wording of the text of either the ICCPR and the ECHR: the requirement that an interpreter be competent and that the accused must fully understand and speak the language of the court in order to be denied an interpreter. It is the interpreter’s role, in effect, access to justice, so that the accused can actually access the content of trial and participate in proceedings (Flynn, 2016, p. 16). In respect then of what is meant by an accused “fully” understanding and speaking, the ICC itself has then elaborated that:

[a]n accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non-technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer. If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated. (*Prosecutor v. Katanga*, 2008, para 3)

While legal education or familiarity is not required, ‘complete fluency’ in ‘ordinary’ language is. Most importantly, where there is a doubt about the accused’s proficiency, the ICC should err on the side of providing an interpreter. This necessity of complete comprehension that is featured in the (1998) Rome

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<sup>3</sup> Article 2.1 of the ECHR and Article 6.1 of the ICCPR

<sup>4</sup> Article 8.1 of the ECHR and Article 17.1 of the ICCPR

Statute is of notable absence in the ICCPR and the ECHR. It demonstrates a better understanding of domain and what it means to understand a language than what is included in the ICCPR and ECHR.

While the ICC thus errs on the side of interpreter provision, this is not a feature of the jurisprudence of either the ECHR or the HRC as will be shown below. Neither the HRC nor the ECtHR have provided any guidance on how language proficiency should be assessed in order to grant an interpreter to an accused in their jurisprudence. There is no indication from either institution as to whether it should be the job of a judge, arresting police officers, independent observer or other to decide whether there is a need for an interpreter. As such, it would seem that states are free to assess this on an ad hoc basis, free from any specific mandate from the HRC or the ECtHR.

The ICC goes on to distinguish the wording of the Rome Statute from various other international instruments, including Article 14.3(f) and Article 6.3(e):

There seems to have been an intention to grant to the accused before the [ICC], rights of a higher degree than in other courts referred to. There must be a difference between an entitlement to a language one understands or speaks (or simply understands) and a language one fully understands and speaks. (*Prosecutor v. Katanga*, 2008, para 49)

The ICC here states that the term ‘fully’ means that the accused must completely understand language of the court. Again, it demonstrates an accused-centric understanding of the right to interpretation, with the accused’s abilities and domain at the core. The ICC must grant the accused language services,

unless it is absolutely clear on the record that the person fully understands and speaks one of the working languages of the Court and is abusing his or her right under article 67 of the Statute. (*Prosecutor v. Katanga*, 2008 para 61)

Only when it is ‘absolutely clear’ that no interpreter is needed, may the right be waived. The wording in the Rome Statute therefore grants express language rights (Namakula, 2012) to an accused which are based on the accused’s understanding of and competency in a language, rather than on whether they have some of the language or the perception from the court of what their competency ought to be.

It should be noted that even in a recent case where a defendant, Alfred Yekatom was determined not to need an interpreter, the right was not removed absolutely. Yekatom clearly had proficient French and evident fluency, and therefore not in need to a French-Sango interpreter to assist his defence. Nevertheless, it was held that he still had the right to the assistance of such an interpreter, on an *ad hoc* basis to help with witness statements if he so wished. (*The Prosecutor v Alfred Yekatom*, 2019).

When compared to the wording of both Articles 14.3(f) and 6.3(e) of the ICCPR and ECHR respectively, a disparity is evident. The qualifier of ‘fully’ in Article 67.1(f) – absent from the ECHR and the ICCPR – suggests that anything below full comprehension of the language without an interpreter would interfere with the minimum standards of the right to a fair trial. Undoubtedly the jurisdiction and purpose of the International Criminal Court (ICC)<sup>5</sup> are different from that of the HRC and the ECtHR. The ICC has

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<sup>5</sup> Which is established by the Rome Statute

jurisdiction over genocide,<sup>6</sup> crimes against humanity,<sup>7</sup> war crimes<sup>8</sup> and crimes of aggression.<sup>9</sup> The gravity of these crimes, coupled with the repeated questioning of its legitimacy (Murphy, 2010, de Hoon, 2017) may encourage the court to reach for the highest possible standards in granting the accused rights. However, on this point, I argue that the same standard ought to be required under the ECtHR and the HRC. The standards of justice afforded to those accused of genocide and war crimes ought not be of a higher standard than those accused of petty theft in domestic courts. If we are to maintain access to justice then we must interpret the right to an interpreter with the accused's individual circumstances and capabilities in mind.

#### **4. The right to an interpreter under the ICCPR and the ECHR**

In combining the above discussions on understanding and proficiency in the legal domain, and the Rome Statute, I now explore the right to an interpreter itself under the ICCPR and the ECHR. Both bodies have addressed the levels of language proficiency and understanding necessary to warrant an interpreter (or rather when an interpreter is not mandated) in their jurisprudence. For the most part, rather than adding to a better understanding of the scope of the right to an interpreter, both institutions have actually added to uncertainty around interpreter access. However, as will be shown, in more recent jurisprudence, there is potentially a shift in perspective visible in both the HRC and the ECtHR. I will begin with an assessment of the jurisprudence under the HRC before moving on to a discussion of the ECtHR.

##### **4.1 HRC**

The HRC has discussed on the scope of the right to an interpreter in its General Commentary. The Committee has stated that the right to interpretation

is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence. (Human Rights Committee, 1994, para 13)

Under this standard, an accused is 'ignorant' of the language of the court, or when they have "major" trouble understanding it. This standard is vague, however, since it is not clear what is meant by 'ignorant'. It could be that ignorance is assessed as having no command whatsoever of the language. Or it could mean that accused has acquired some of the language and is competent in some domains, but not in the domain of the court. Similarly, what constitutes a 'major obstacle' is unclear.

In its individual complaints capacity, the HRC has also addressed the scope of Article 14.3(f). The case of *Guesdon v France* related to a Breton speaker who was refused a Breton interpreter in court because he also spoke French. The HRC held in its decision:

that the notion of a "fair trial", within the meaning of article 14 of the Covenant, implies that the accused be allowed, in criminal proceedings, to express himself in the language in which he normally expresses himself, and that the denial of an interpreter for himself and his witnesses constitutes a violation of article 14,

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<sup>6</sup> Article 6 of the Statute of Rome

<sup>7</sup> Article 7 of the Statute of Rome

<sup>8</sup> Article 8 of the Statute of Rome

<sup>9</sup> Article 8 *bis* of the Statute of Rome

paragraphs 3(e) and (f)...[T]he requirement of a fair hearing [does not] 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. (*Guesdon v France*, 1990, para 10.2)

Here the HRC is taking two different stances on the right to an interpreter. Firstly, that there is a right to use at trial, the language in which one normally expresses themselves. In this case, for Mr. Guesdon, that language was Breton. However, the Committee goes on to state that there is no right for the accused to have an interpreter when their mother tongue differs from that of the court's language. Where the accused does not speak the language of the court 'adequately' and where they have difficulty in understanding, then an interpreter must be provided. However, what is meant by having difficulty in understanding is unclear, particularly given that the Committee went on to say that in not providing an interpreter to Mr. Guesdon,

the French courts complied with their obligations under article 14, paragraph 1, in conjunction with paragraphs 3(e) and (f). 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 Committee notes that the notion of a fair...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. (*Guesdon v France*, 1990, para 10.3)

The Committee's logic here seems to be conflicting. Mr Guesdon's 'simple but adequate' command of French was deemed a sufficient standard to stand trial in the absence of an interpreter. In spite of the Committee's acknowledgement that there is a right to use the language one normally uses before the court, it has also accepted a 'simple' command of French as enough to forego an interpreter. Article 14.3 denotes the minimum guarantees that must be afforded. But it must be asked why expressing oneself in the language which is the least difficult for an individual might not form part of this minimum guarantee. As Del Valle (2003) says, surely when an accused faces criminal charges, one would want to give testimony with the most clarity and accuracy of intent, rather than relying on the "simple but adequate" speech that satisfied the Committee in *Guesdon*.

The HRC again referred to the right to an interpreter in *Shukuru Juma v. Australia*. The applicant in this case was a Tanzanian man who spoke Swahili as his first language. English, the language used at trial, was his fourth language. He claimed that he was "unable to understand what was taking place during the court hearings and unable to understand the complexities of the legal process" and that in his lack of understanding, he merely agreed with the questions put to him (*Shukuru Juma v. Australia*, 2003 at para 3.1). Nevertheless, it was alleged that the applicant could express himself in 'reasonable' English. The HRC then found that there is no right to an interpreter under Article 14.3(f) where the accused is "capable of expressing himself adequately in the official language of the court" (*Shukuru Juma v. Australia*, 2003 para 7.3. Emphasis added) command of the language of the court. Again, these standards of language competency are vague and potentially allow for an accused to be deprived of an interpreter where they need one.

The HRC's failure to effectively engage with the scope of the rights related to language was acknowledged in *Hill and Hill v. Spain*, wherein brothers from the UK were tried in Spain with varying access to an English language interpreter. Committee Member Eckhart Klein criticised the Committee for

failing to elaborate on alleged violation of, *inter alia*, rights associated with language. He stated that just because

the Committee found a violation of the authors' right to a fair trial under article 14 regarding certain aspects...[it did] not release the Committee from its duty to examine whether other alleged violations of the rights enshrined in article 14. (*Hill and Hill v Spain*, 1997)

Unfortunately, the Committee failed to analyse in detail the scope of the right to an interpreter. In its more recent General Comment 32, the HRC updated its stance on the scope of the right to an interpreter where it is stated that under Article 14.3(f)

...accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively (Human Rights Committee, 2007)

Certainly, it followed *Guesdon* in determining that no immediate entitlement to an interpreter existed where the accused's mother tongue<sup>10</sup> differs from the court language. However the standard for being denied an interpreter is set at a command of the language, sufficient enough to allow the accused to form an effective defence. The HRC has since reiterated this stance in *Zeynalov v. Estonia*. This development is a more accused-centric approach. The standard is concerned with the accused's ability to form an effective defence, not merely a categorisation of whether language poses a 'major obstacle'. The approach aligns also with Flynn's understanding of access to justice, which requires, *inter alia*, the ability of the accused to participate "effectively in proceedings designed to administer justice" (Flynn, 2016, p. 15).

The rights under Article 14.3 constitute minimum guarantees. They are the baseline between human rights and no human rights – basic requirements to which State Parties must adhere. When the scope of these rights are elaborated in vague and conflicting terms, what must be done to ensure their satisfaction is likewise vague and conflicting. The use of undefined terms about the linguistic ability of an accused has unfortunately been common. The threshold for acquiring an interpreter under the jurisprudence of the HRC has been vague and certainly does not fall below the threshold seen at the ICC. However, there have been positive developments from the HRC's General Comment 32. The shift towards an accused-centric approach to granting an interpreter is visible. It is a move which has the capacity to take into account the specific needs of marginalised people, towards ensuring access to justice.

While the HRC has had a history of vagueness when considering the right to an interpreter, developments since General Comment 32 show that there is possibly a shift towards procedural access. The HRC may be said to be moving forwards from requiring that language pose a 'major obstacle' to considering whether the accused can use the language sufficiently to defend themselves. While this is positive, it also must be noted that the facts in *Zeynalov v Estonia* showed that the accused was highly proficient in the language of court. In fact the request for an interpreter largely related to a lawyer assisting Mr Zeynalov,

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<sup>10</sup> It should also be noted that there is no definition provided for what is understood by 'mother tongue'. One would assume it is used here to refer to the language an accused acquired first, or their home language, but this classification is not a hard and fast rule. For Deaf people, for example, their home language is unlikely to be an SL, given that approximately 90% of Deaf people are born into hearing families and therefore can often grow up without their SL used in the home (Feher-Prout, 1996).



who did not speak Estonian. There was no dispute about Mr Zeynalov's abilities in Estonian. In denying his request for an interpreter, no violation of the right was found by the HRC. However, it would be interesting to see how the HRC would rule in a case where the accused's capabilities in the language were not so obvious. If the HRC is to follow its own jurisprudence, then one would assume the accused's individual capabilities would be taken into account, and access to justice would prevail.

#### **4.2 The ECtHR**

The ECtHR has also discussed the scope of the right to an interpreter. In the case of *Hermi v. Italy*, the applicant stated he had a passing or scant grasp of Italian and therefore needed an interpreter when tried in Italian. This provision of an interpreter for Mr Hermi was addressed, *inter alia*. The Court held that:

interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events. (*Hermi v Italy*, 2006, para 70)

The standard here is to have knowledge of the case, and to be able to put forward one's version of events. This view followed the jurisprudence seen in *Kamasinski v. Austria* and *Lagerblom v. Sweden* and was indeed followed again in *Baytar v. Turkey*. In connecting the right to an interpreter with having knowledge of the case against oneself, the Court has set the standard on the basis of the accused's needs. An interpreter's role is to allow an accused have access to the case against them. Nevertheless in *Hermi v Italy*, the Court went on to qualify this by saying:

The Court has held that, in the context of the application of paragraph 3 (e), the issue of the defendant's linguistic knowledge is vital and that it must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court (*Hermi v Italy*, 2006, para 71)

Based on this jurisprudence, access to an interpreter is only mandated where the case is 'sufficiently complex' to warrant that access. This view places the burden of interpretation access on the specifics of the case, rather than on the individual needs of the accused. This sets an uncertain and somewhat dangerous precedent. The Court effectively mandated that in certain 'non-complex' cases, it is justifiable to operate in the absence of an interpreter. As has already been alluded to, court cases are largely complicated affairs, making us of specific language and conducted in a more formal domain. It could easily be argued that all case are complex for an accused, particularly if that accused has not experienced trial before and if they have a limited command of the language used in court. In *Sqman v Turkey*, where a Kurdish woman was arrested and tried in Turkey for membership of the Kurdish Workers Party, the applicant attested to having only limited Turkish. The ECtHR followed the jurisprudence set in *Hermi v Italy* and held that it must

examine the nature of the accusations against the applicant and to assess whether they are sufficiently complex to require a detailed knowledge of the language in which [an accused] was questioned. (*Sqman v Turkey*, 2011, para 31)

In essence, the ECtHR found that the complexity of the case is directly related to the necessity of an interpreter. It gives no context for what might be

considered a ‘complex’ domain, so it is possible to construe that all cases require the use of complex legal terminology that the everyday user of a language is not usually privy to. Nevertheless if it were the case that all trials were ‘complex’, then the Court would not have admitted the caveat of a case being “sufficiently complex”. It can therefore be concluded that the ECtHR means to exclude some cases from the ambit of Article 6.3(e) for being ‘insufficiently complex’ in terms of the legal domain so as to require an interpreter. Piatt’s research points to the necessity of having a minimum of 14 years of education in order to comprehend criminal trials (Piatt, 1990). Furthermore, a penalty of deprivation of liberty is a risk at many criminal trials, regardless of complexity. Therefore, even when an accused’s liberty is at stake, they may be denied access to the details of what goes on at a trial because the domain does not represent ‘sufficient complexities’ to warrant an interpreter. Again, to bring this back to access to justice, the qualifier of ‘sufficiently complex’ places the burden for granting an interpreter on the content of the case, rather than on the accused’s individual needs or capabilities. It goes against the understanding of access to justice provided – the accused is denied the opportunity to effectively participate in proceedings, and as such, access to justice is not guaranteed (Flynn, 2016).

It must be noted that in recent times, the ECtHR has updated its jurisprudence on the right to an interpreter. In 2018, the ECtHR held that having a basic understanding of the language of court is not sufficient to forego the use of an interpreter. The case, *Vizgirda v. Slovenia* revolved around a Lithuanian man, residing in Slovenia, convicted of bank robbery.

The applicant, Mr. Vizgirda, was provided with an interpreter who spoke Russian, however Mr. Vizgirda attested to having a weak command of Russian. Translations of documents were also provided to him in Russian but he could not read Russian. Mr. Vizgirda’s native language was Lithuanian and he complained that the State had made an assumption that he spoke Russian. It is interesting to note that the State alleged that as the applicant had been born in Lithuania in 1980, then part of the Soviet Union where Russian was the official language until Lithuanian independence in 1990, he must have learned Russian at school, thereby insinuating that the applicant ought to have knowledge of Russian. Additionally the State noted that because of the widely spoken status of Russian in Slovenia, the applicant ought to have a command of Russian. Effectively the state argued that they had satisfied the right to an interpreter by providing interpretation into a language which the applicant *should* have understood, rather than into the language which he *actually* understood.

In coming to its conclusion, the Court held that

[the duty to provide an interpreter] is not confined to situations where the foreign defendant makes an explicit request for interpreting. In view of the prominent place held in a democratic society by the right to a fair trial...it arises whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings, for example if he or she is neither a national nor a resident of the country in which the proceedings are being conducted. (*Vizgirda v. Slovenia*, 2018, para 81)

The Court concluded here that it was not the duty of the accused to explicitly request an interpreter. The burden is placed on the State itself to ensure that fairness will still be protected in the absence of an interpreter. This development of jurisprudence puts the accused’s proficiency in a given language at the heart of the right to an interpreter. Additionally, it has access to justice at its core – the right to an interpreter is guided by whether fairness will be protected. The standard set here is a marked departure from the earlier

jurisprudence in *Kamasinski*, *Lagerblom*, *Hermi*, *Baytar* and *Sqman* where the right to interpretation had been connected to the complexities of the case.

The Court in *Vizgirda v. Slovenia* even approached the standard seen in the ICC above. In acknowledging the importance of understanding the linguistic capabilities of the accused:

[The Court] would add in this connection that the fact that the defendant has a basic command of the language of the proceedings or, as may be the case, a third language into which interpretation is readily available, should not by itself bar that individual from benefiting from interpretation into a language he or she understands sufficiently well to fully exercise his or her right to defence. (*Vizgirda v. Slovenia*, 2018, para 83)

Here the Court established the standard as being able to ‘fully’ exercise the right to defence. It also acknowledged that domain and command of language are important factors in ascertaining whether an interpreter is needed. This line of reasoning is consistent with ensuring access to justice, putting the accused’s ability to effectively participate in the proceedings at the forefront. The Court elaborated on the command of language necessary to forego an interpreter in a way that has not been done before.

In addition to this development, the Court also went as far as to recognise the European Union’s Directive 2010/64 as an indication of significant development in law amongst a large portion of CoE Member States.

The Court further observes that the importance of verifying the defendant’s interpretation needs in order to ensure the right to a fair trial has been recognized also by the adoption of the European Union’s Directive 2010/64/EU. That directive requires member States to ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter (*Vizgirda v. Slovenia*, 2018, para 82)

The Court acknowledged the importance of the Directive’s accused-centric approach to providing an interpreter. It must be assessed on the basis of the ‘defendant’s interpretation needs’, which needs to take into account the particular language domain and their capabilities. While the Directive does not constitute law under the CoE, the Court has recognised a movement towards better rights for accused who do not speak the language of court. As it has done in the past (*Christine Goodwin v. The United Kingdom*, 2002 at para 84 and *Tyrer v. The United Kingdom*, 1978, para 183) the Court could be argued to have viewed the Directive as somewhat of a European consensus (Dzehtsiarou, 2011). Of the 47 Council of Europe Member States, 26 are members of the EU and all but Denmark are parties to the Directive. While previous readings of the ECHR may not have involved such a detailed understanding of the right to an interpreter, as part of EU law, the Directive may act as a persuasive authority for developing the meaning of Article 6.3(e) of the ECHR. This update in interpretation of the right would fall within the principle of both a European consensus and the idea of the ECHR as a living instrument (*Tyrer v. The United Kingdom*, 1978, para 183). While it is currently not possible to say whether the ECtHR will maintain or even broaden the scope of the right to an interpreter in a more detailed way, for now it is arguable that the Court has moved towards a more accused-centric reading of the right. The right, based on *Vizgirda v. Slovenia*, places the burden on the state to ensure fairness and that the accused has full access to the case against them in a move that is comparable more to the Statute of Rome than the ICCPR, and guarantees the express language rights found therein. This approach more closely ensures access to justice as discussed

– it asks for the accused’s specific needs, ensuring that their participation in the trial process is meaningful.

Table 1: Jurisprudence of the UNHRC and the ECtHR

Source	Year	Standard of competency for accessing interpretation
<b>UNHRC</b>		
General Comment 13	1984	Provided an interpreter if their lack of knowledge of the language of court poses a “a major obstacle”
<i>Guesdon v. France</i>	1990	If the accused has a “simple but adequate” command of the language, there is no entitlement to an interpreter
<i>Shukuru Juma v. Australia</i>	2003	No entitlement to an interpreter where the accused can “adequately” express himself in the language of the court
General Comment 32	2007	The accused is not entitled to an interpreter if they can speak the language “sufficiently to defend themselves”
<i>Zeynalov v Estonia</i>	2015	Followed General Comment 32. The accused is not entitled to an interpreter if they can speak the language “sufficiently to defend themselves”
<b>ECtHR</b>		
<i>Kamasinski v. Austria</i>	1989	An interpreter is so to allow the accused to have “knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events”
<i>Lagerblom v. Sweden</i>	2001	An interpreter is so to allow the accused to have “knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events”
<i>Hermi v. Italy</i>	2006	Entitled to an interpreter where the subject matter is “sufficiently complex to require a detailed knowledge of the language used in court”
<i>Saman v Turkey</i>	2011	Entitled to an interpreter where the subject matter is “sufficiently complex to require a detailed knowledge of the language”
<i>Baytar v Turkey</i>	2014	An interpreter is so to allow the accused to have “knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events”
<i>Vizgirda v. Slovenia</i>	2018	Just because the accused has a “basic command of the language of the proceedings or, as may be the case, a third language into which interpretation is readily available, should not by itself bar that individual from benefiting from interpretation into a language he or she understands sufficiently well to fully exercise his or her right to defence”

The above table shows the progress that the HRC and the ECtHR have made in defining the scope of the right to an interpreter, specifically as relates to who is entitled to an interpreter. As can be seen from Table 1, both the HRC and the ECtHR initially used vague qualifiers that the threshold for being entitled to an interpreter would be quite difficult to meet. However, both the HRC and the ECtHR have developed their jurisprudence somewhat towards a more accused-centric view. In both *Zeynalov v Estonia* and *Vizgirda v. Slovenia*, entitlement to an interpreter is more focused on the individual and

domain, with a precedent more akin to the Statute of Rome's express language rights and access to justice at the centre.

## 5. Conclusion

The right to an interpreter is an integral part of the right to a fair trial. When considering the use of a language different from that of the court, this right constitutes the most obviously relevant minimum standard under the right to a fair trial. However, the right to an interpreter is not straightforward and there are a number of issues to consider.

Firstly, as the right is qualified under the ICCPR and the ECHR by 'understanding' the language of court, we must be clear on what it means to understand a language in this context. As the literature on language and domains of usage shows, understanding a language is situational. Fluency is not a static state-of-being. A person can be fluent in one domain of language, but lack competence in another domain. Therefore, merely because a person can use a language in one domain or in a number of domains, does not mean that they will be capable of using that language in a court domain. Additionally, it was noted that the language used in courts can be particularly complex, even for those who share the language of the court (Piatt, 1999, Hartley, 2000). Therefore, when considering whether or not an accused 'understands or speaks' the language of court, we must take into consideration the language domain, as well as the accused's individual capabilities. Just because an accused can engage in informal domains of the language does not mean they will not need the aid of an interpreter. Denying an interpreter to an accused who cannot understand the language of court interferes with their access to justice and is contrary to the purpose of the right to an interpreter itself.

In analysing the wording of the right to an interpreter under the ICCPR and the ECHR, I have discussed that which is absent from the wording. In comparison to the Statute of Rome, we can see that if the accused is not 'fully' competent in the language of the court, then they will be provided with an interpreter. The ICC has held that where there is any doubt about whether or not an accused needs an interpreter, an interpreter will be provided. The ICC errs on the side of providing an interpreter, to mitigate the risk of denying access to justice. It places an emphasis on the accused and their needs, ensuring that they be provided with an interpreter when they do not fully understand the language of the court. Under the ICC, great steps are taken to ensure that accused persons have access to the court on a linguistic front. The standard for granting an interpreter is full understanding and the interpreters provided are trained and skilled, meeting the requirements of competency. Aware of constant global scrutiny, it is perhaps in the best interest of the ICC, in maintaining its legitimacy, to provide an accused with every right possible to ensure a fair trial. However there is no reason why an accused in a domestic CJS could not be entitled to the same safeguards afforded to those on trial at the ICC. If the right to an interpreter under the ECHR and the ICCPR represents a minimum standard to ensuring fairness, then this fairness must include access to justice. Therefore, where there is a doubt about the accused's ability to understand the language of the CJS, I would argue that the right should mandate erring on the side of caution and granting an interpreter.

Under much of the jurisprudence of both the HRC and the ECtHR, the right to an interpreter did not take into account the specific and individual needs of the accused. Rather than providing clarity on the scope of the right, both the HRC and ECtHR have actually added to the lack of clarity, for much of their

jurisprudence. An accused was held to be unentitled to an interpreter when they have an ‘adequate’ understanding of the language of the CJS, ‘simple but adequate’ command of the language of the CJS, or where the language of the CJS is not ‘sufficiently complex’ to warrant an interpreter. In terms of access to justice, access cannot be guaranteed when the accused is not provided with an opportunity to effectively participate in the proceedings against them. Where they are not provided with an interpreter based on an arbitrary understanding of ‘understanding’ but nevertheless need an interpreter, access to justice has not been guaranteed. This of course shows a shift in the scope of the right to an interpreter under the HRC and ECtHR. Both have shown a better focus on the specific needs of the accused. However, whether both institutions will develop or improve this jurisprudence remains to be seen. It is unclear whether they will develop the scope of the right to an interpreter to more closely match the specific needs of an accused, that is, veering more towards the entitlements found under the ICC.

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