Afterword: On Harold Berman, law, language, the Tower of Babel, and Pentecost

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At the opening of Chapter 3 of this volume, Harold Berman writes: “The language of the law, as we have seen, is forged in the fire of legal procedures: of law-making, judging, regulating, negotiation, and other processes of creating, changing or terminating rights and duties.”¹ This language relies on words derived from non-legal speech; but what is “forged in the fire of legal procedures” becomes a distinct domain, and it becomes “strange and unacceptable to the non-lawyer.”² A rift has been created between the legal language and the layman’s language. (More or less the same applies to the juxtaposition of any professional language and layman’s language.) This creates a need for translation. Translators can only be those who speak both languages. This limits the circle of potential translators from legal language to lawyers. As Berman points out:

The lawyer generally likes to translate, if he can get the layman’s ear; and much of his professional work itself requires such translation – to clients, to juries, to legislative committees, and even to judges in oral argument … But the translation of professional legal language back into the popular speech from which it ultimately derives is not a substitute for the professional language itself. We can unfreeze the legal terms, but we cannot replace them.³

Thus, there is both a need and a possibility to build bridges between legal language and layman’s language. Yet these bridges yield no merger; they merely allow communication between distinct domains.

¹ See above, Chapter 3, p. 87. ² Ibid., 87. ³ Ibid., p. 104.
The problem also has a further dimension, which creates an even more pressing need for bridges (that is, for translation). Let me quote Berman again:

When we look more closely, we see that mankind speaks many different languages and uses many different kinds of law, each language bearing the stamp of a particular community and each kind of law, each legal system, bearing the stamp of a particular social order and a particular kind of justice. It is important that we recognize that as all language is one, so all law is one; but it is equally important that we recognize the unique qualities of different languages and different kinds of law – for it is characteristic for our common humanity that it not only permits but also requires a wide range of diversity among the different communities which comprise it. 4

Legal language relies on terms and notions that are not only profession specific, but also culture specific – and which find different expressions in different languages. Within the process of international dispute resolution (which has a constantly and rapidly growing share within dispute resolution in general) translation is a multidimensional problem – and also an everyday problem.

Berman captures both the problem and the solution in terms of a biblical metaphor. The problem is encapsulated in the story of the Tower of Babel, in which God prevented men from erecting a city and a tower that would reach the sky. A handicap was imposed on men to make them unable to accomplish their God-defying project. This handicap was a newly born multitude of languages and inability to understand each other. In the words of Berman: “That story tells us that at one time all men spoke the same language, but because of their pride God ‘confused the language of all the earth’ so that men could not understand one another’s speech.” 5

While the metaphor for the problem is the Tower of Babel, the metaphor for the solution is Pentecost, “[w]hich tells us that at a place where people of different languages had gathered to worship, certain of them were given the power to speak ‘in other languages’, so that all the peoples of the earth could hear ‘the mighty works of God’, ‘each in his own native tongue’. Thus the story of Pentecost gives hope that the pride of man can be overcome, and that by translation from one language to another we may share each other’s experience vicariously and become once again united.” 6

4 See above, Chapter 4, p. 113.
5 See above, Chapter 1, p. 54, with reference to Genesis, 11:2–9.
It is interesting that – according to the Bible – when Parthians and Medes, residents of Mesopotamia, Judea and Cappadocia, Pontus and Asia, Phrygia and Pamphylia, Egypt, Jews and Proselytes, Cretans and Arabians, visitors from Rome, and others, asked themselves, “How is it that we hear, each of us in his native language?” one emerging explanation was: “They are filled with new wine.” But Peter lifted his voice and explained that “these people are not drunk, as you suppose,” and offered a more dignified explanation of the miracle of translation, hinting at illumination by the Holy Spirit.

One may add here that the need to reach people in a variety of languages – and an awareness of the importance of translation – has also received recognition in other holy books that have established religions. For example, it is stated in the Qur’an that:

And among His Signs
Is the creation of the heavens
And the Earth, and the variations
In your languages
And colors;

To take another example, the origin of the Book of Mormon is tied to a tale of translation. As stated in the introduction of the Book, when Joseph Smith was 21 years old, an angel named Moroni gave him the gold plates on which Mormon wrote/engraved his book by his own hands. Joseph had little formal education and was unfamiliar with the ancient language used by Mormon, but he was able to translate it because God gave him the power to do so. The translation took less than three months, and in 1830 the book – and a new religion – appeared.

Translation may be a blessing, but it is also a momentous task. How can you, for example, translate “certiorari” into various languages, when other legal cultures do not have an identical institution? This also applies to legal cultures based on the English language, which have not adopted a writ of certiorari as a possible remedy. At such a juncture, translation by way of finding a matching word in another language is

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7 Acts 2:8–13 (English Standard Version)
8 Acts 2:14–21 (English Standard Version)
simply not a solution. In these situations, the substitute for translation is explanation.

Or let us take an example mentioned by Berman. Speaking of the development of legal concepts based on the substitution of meanings of words, he takes the example of “eavesdropping” (referring to Paul Freund).\(^\text{10}\) Originally, the ancient wrong of “eavesdropping” depended on trespass beneath the eaves of a house with the aim of listening to what people were saying inside. Later, “eavesdropping” gained a much broader meaning, but retained a distinct touch of history. Can one translate history-transmuted-to-flavor? Unfortunately not. But one can find in most languages a more or less matching term that will translate the present notion and connotations of “eavesdropping.”

Let me add that documents that are the focus of a lawsuit will typically offer cause for dispute because they are ambiguous and are thus understood differently by different parties. Can translation mirror the same ambiguity, and will it offer the same chances as the original? In other words, will the likelihood of an interpretation in favor of the seller (or of the buyer) be the same as it would be on the basis of the original?

To continue the list of limitations to the blessing of translation, let me mention that translation of advocacy, of pleadings, may amount to a daunting (and not always possible) task. The advocate will try to make an impression with logic, and this is usually translatable. But persuasion has other elements, too, which may not be reproduced in an adequate translation. There are words that are very well suited for emphasis in one language, but not in another. A play on connotations may or may not be reproduced effectively in translation.\(^\text{11}\)

The point is not that we should abandon or disparage translation. Translation is, indeed, a blessing, but it will produce better results if one is aware of its limitations. As a matter of fact, we have witnessed a dramatic increase in the importance of translation during the past several decades. This increase is due to a most consequent upsurge in dispute settlement without an anchor in one specific language. During the past decade, the International Court of Justice (ICJ) and the Permanent Court of Arbitration (PCA) have been joined by international criminal courts, like the International Criminal Court (ICC), and specialized international

\(^{10}\) See above, Chapter 3, pp. 99–100.

criminal courts, like the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR). None of these tribunals has one official language only; and practically all cases before the ICTY and ICTR involve the translation of documents and witness statements from the languages spoken in the area of the conflict. Let me add that during the past decades international commercial arbitration has become mainstream; it is no longer just an alternative but has become the dominant method of settling international commercial disputes. This dominant option does not have an official language (as courts do); it has instead various rules on determining the language of arbitration – and translation has become an element of the environment of international commercial arbitration.

In order to bring closer the present-day mission of bridging language differences, I would like to offer in this essay some illustrations indicating the complexity of the problem in real legal life.

First, can there be full equality in a multilingual setting? Building bridges and crossing bridges between languages takes time. The time factor leaves an imprint on cases in which translation is needed and used. It is commonly accepted that one of the key purposes (and results) of translation is equality. Someone who does not speak the language of the proceedings, or the language of a witness, will nevertheless become an equal participant by way of translation. But the time factor also emerges, and the question arises whether it might taint equality – and if it does, whether remedy is justified.

Let me bring this problem closer through an illustration from the practice of the ICJ. Oral pleadings before the ICJ sometimes have quite a tight schedule. This is particularly true for shorter hearings devoted to one specific issue – like pleadings on jurisdiction. Let me mention a possible schedule with which I have had personal experience: one party presents its pleadings between 10 a.m. and 1 p.m.; the other party will have to respond the next day starting at 10 a.m. (and will have to submit to the Secretariat the written text of its response an hour earlier). Between 10 a.m. and 1 p.m. the Pentecost miracle is in full operation. One advocate speaks in French, and others hear him/her in English (via earphones, thanks to the translating service); then, another advocate speaks in English, while others hear him/her in French. But the response has to be formulated between 1 p.m. and 9 a.m. on the next day, and, at this point, some limitations of the

m miracle come to the fore. Often, as a gesture of mutual courtesy, the parties will present to each other copies of the text of their oral presentation after the pleadings are completed at 1 p.m. In most cases, presentations are in two languages: French and English. At 1 p.m. the party rushing to prepare its rebuttal will have the originals (in English or French). Around 6 p.m. the Secretariat of the ICJ will deliver translations as well. This means that a counsel or advocate who speaks (or at least reads) both English and French can start working on the basis of the full text already at 1 p.m. (or, say, half an hour later, because he or she has to get from the Peace Palace to a working room in a hotel or in an embassy). Those who do not speak both languages will be in the same position five hours later – and these daytime five hours are significant, considering that one has less than twenty hours altogether (including the night) to prepare a rebuttal. Thus, translation does not yield equal arms in every respect. The counsel who speaks both languages will have a certain tactical advantage against the counsel who is relying only on translation. And there is no remedy here, just as there is no remedy if one of the opposing counsels needs less time because he or she thinks more quickly.

A similar problem arises in international litigation and arbitration cases in which one of the advocates is relying on translation. Suppose that one of the parties is Polish and the other party is German. The language of arbitration is Polish. The arbitrators invite (or allow) an exchange of arguments. The Polish attorney speaks both Polish and German, the German attorney does not speak Polish. The solution is in translation. During the oral hearing, the German attorney will rely on the services of an interpreter for his pleadings, rebuttals, or surrebuttals. If there is simultaneous translation, it will bring about a balance regarding time as well. If there is consecutive translation (which is also fairly common), the Polish attorney will hear (and understand) the arguments of the German opponent twice. Hence, he or she will have more time to prepare responses. The German attorney will first hear each argument in Polish, but he or she will only become alerted to some arguments after hearing the German translation. Again, we have a certain imbalance in favor of the attorney who does not need translation – and again, it would be difficult to find (and to justify) some remedy.

Let me add at this point that arbitrators – who are typically free to set time limits – will often set adjusted (longer) time limits for submissions when translation of documents is implied. But what about time limits that are judicially created or set by statutes? In a 1989 decision, the United States Court of Appeals for the First Circuit considered a request to set aside an arbitral award. The US District Court for the District of Puerto Rico had dismissed the action as time barred. One of the principal issues
brought before the First Circuit was whether the Puerto Rico 30-day judicially created time bar also applied when translation was implied (the original documents were in Spanish). The First Circuit held: “We are unpersuaded by appellant’s plea that the necessity of translating Spanish documents into English warrants a more protracted interval within which to sue in Puerto Rico’s federal courts.” One of the arguments explaining this position was that “[t]ranslations can be made after the fact; verbatim transcripts and elaborate documentation are unnecessary for filing of a complaint, which under the Civil Rules ought only to contain a ‘short and plain statement’ of the claim.” It remains an open issue whether a more consequential and persuasive burden of translation would have prompted a different position. It is not easy to modify deadlines while maintaining principles and predictability. (With statutory time limits this is probably even more difficult than with judicially created time limits.) The question also arises whether time limits adjusted to the needs of translation would impair equality from another angle. Translation should – and normally does – establish a basic balance of fairness. It cannot completely eradicate a certain competitive advantage on the part of those who do not need translation.

Second, who is (and what causes are) entitled to translation? In *Dominique Guesdon v. France*, the Human Rights Committee had to face some specific language issues that were not mainstream, but not insignificant either. Guesdon was accused of painting over some road signs (which were in French only) in order to manifest his desire that road signs on the territory of Bretagne be henceforth bilingual (French and Breton). Guesdon denied personal involvement, but expressed sympathy and understanding for those who painted over the road signs. The procedural problem arose when Guesdon indicated to the French court that he and his twelve witnesses wished to give their testimonies in Breton (with translation into French). Guesdon stated that he and the witnesses did speak French, but that they were more at ease with Breton. This request was denied by the French courts, including the *Cour de Cassation*. The question arose whether this amounted to a violation of the right to fair trial. According to the view expressed by the Human Rights Committee,

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15 The conclusions of the Human Rights Committee are stated in the form of a “view.”
the requirement of a fair hearing does not mandate state 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.

Two interesting issues are highlighted in the Guesdon case. First, the question arises of how one should come to a conclusion whether translation is really needed for the purpose of understanding. The second question is how to deal with situations in which the main purpose of translation is not understanding but recognition of contested identities. In the Guesdon case, the French courts did not really consider whether translation was needed for the purpose of understanding, assuming (probably rightly) that Guesdon had other reasons for requesting translation. This approach was essentially approved by the Human Rights Committee. In a number of interesting (and somewhat similar) cases, different positions were taken.

In a high profile case before the ICTY, the issue arose whether Slobodan Milošević should be entitled to translation. Submitting that Milošević had a good command of English, the prosecution wanted to present to him witness statements in English. This position of the prosecution was challenged by three *amicus curiae*. It was not contested that Milošević spoke English (he actually spent some years of his career as a banker in London). The objection against the position of the prosecution may have been inspired by defiance, but it is also a fact that Milošević was certainly more at ease in his native Serbian. The court did not try to weigh linguistic skills, and – probably in order to avoid potential problems – Judges May, Robinson, and Fihri rejected the prosecutor’s motion, stating that the “demands of justice outweigh the prosecution pleas for judicial economy.”

Let me also mention a case in which the Supreme Court of Bronx County, New York, undertook some linguistic analysis. The issue was whether Krio, a language spoken in Sierra Leone, is or is not a separate language – and, hence, whether translation to and from Krio was needed. In *The People of the State of New York v. G. Smith*, the services of an interpreter were used, but the defendant moved for a mistrial on the grounds that Krio did not require the services of an interpreter, and that the interpreter relayed the testimony inaccurately. The defense counsel submitted that Krio is not a separate language, that it is “nothing more than

a Patois [and] ... English with a bad accent.” The court first stated that, as a matter of principle: “In dealing with the question of whether Krio is in fact a language separate and distinct from English, the court is compelled to examine the nature of Krio and how it evolved into a language in the context of the history of Sierra Leone.” Having opted for this point of departure, the court undertook an investigation, and established, among other things, that “In sociolinguistic terms, Krio is a derivative of Creole English and had its source in native contact with speakers in English. Historically, it became a makeshift form of speech called Pidgin. Eventually it evolved into a distinct language of its own.” After the analysis, the New York court came to the following conclusion: “The court finds that Krio, although related to English, is a separate and distinct language that cannot be readily understood without an interpreter.”

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The dissolution of the Soviet Union had linguistic consequences as well. Newly created states wanted to reinforce new – and somewhat still frail – identities, and this resulted in the establishment of new official languages as well. In a number of cases, Russian ceased to be an official language. In the beginning of the 1990s, the question arose as to what the impact of these changes would be on communication with authorities of the newly emerging states. It is known, for example, that Article IV of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards requires the submission of the original award, and – if the language of the award is not the same as the official language of the recognizing court – an authenticated translation into the official language of the recognizing court. Does this mean that English or French awards will have to be translated to Tadjik, or Uzbek, or Kirgiz – or will translation into Russian suffice? It is safe to assume that judges who spoke Russian and performed their official duties in Russian a year or two ago would understand perfectly a Russian document. But the point I am making is that there are various reasons for seeking translation – and confirmation of identities is one of them.

18 759 N.Y.S.2d 315, at 316.
19 759 N.Y.S. 2d at 316. One may note that the Supreme Court of Bronx County did not devote separate attention to the allegation that “the interpreter relayed the testimony inaccurately.”
20 759 N.Y.S.2d 315, at 316.
22 Or, at least, this was the case in the beginning of the 1990s.
In *Finamar Investors Inc. v. The Republic of Tadjikistan*,\(^{23}\) Finamar sought an order to compel the foreign government to submit to arbitration. One of the key issues before the New York District Court was whether the petitioner had effected proper service under the Foreign Sovereign Immunity Act (FSIA). Subsections 1608(a)(3) and (4) of the FSIA clearly require the petitioner to translate summons, complaint, and notice of suit into the official language of the foreign state. Documents were first served in English – which was evidently inadequate. Later, however, the petitioner obtained translations and served the process in Russian. Tadjikistan objected, stressing that Tadjik, not Russian, was the only official language of Tadjikistan. The District Court held that the requirements of the FSIA were not met. It pointed out: “Petitioner details the difficulty in ascertaining the official language of a nation recently separated from the former Soviet Union. Such difficulty, however, does not absolve petitioner of its responsibility to follow the requirements of §1608(a)(3) and (4) which specify that the summons and complaint must be translated into the official language of the foreign state.”\(^{24}\) Let me add that the District Court did not dismiss the complaint, but allowed rectification of service “within reasonable time.”

In another case, the Commercial Court of Tashkent City (Uzbekistan) refused to enforce a GAFTA award\(^{25}\) in favor of Romak S.A. from Geneva because the award presented to the Uzbek court was not translated into Uzbek, the official language of Uzbekistan – as required by Article IV of the New York Convention. Again, translation into Russian was held not to be adequate.

One may characterize the position taken in these two post-Soviet cases as inflexible – but it would be difficult to justify an opposite holding. Language is a tool of understanding – and it is also an important symbol. It may be true that in both Soviet cases the main motive behind the request for translation was pride rather than the need for understanding. Nevertheless, it would be difficult to depart from the (rather unequivocal) provisions of the FSIA, or of the New York Convention, on the ground of an analysis of the motives behind the assertion of an unconditional statutory right. Moreover, it may indeed be difficult to provide translation into Tadjik or Uzbek, but the problem is clearly not

\(^{23}\) 889 F. Supp. 114 (SDNY, June 20, 1995).

\(^{24}\) 889 F.Supp. 114, at 117.

What we have had to face in the post-Soviet cases is the growing relevance of a number of clearly distinct languages. Within the setting of the dissolution of the former Yugoslavia we have experienced a phenomenon much more reminiscent of Babel, namely the dispersion of one language into several.

Let me try to explain this. The official languages of the former Yugoslavia were Serbo-Croatian, Slovenian, and Macedonian. The languages of the two most sizable minorities (Albanian and Hungarian) also had a semi-official status at the federal level, and the Official Gazette of the SFRY was published in these languages, too. There was a lingering debate whether there was indeed a Serbo-Croatian language, or whether instead there existed a Serbian, a Croatian, and a Bosnian language. The additional claim emerged that Montenegrin, too, was a separate language. It is common ground that Serbs, Croats, Bosnians, and Montenegrins do not really have difficulty understanding each other (at least, not language-wise). It is also clear that one can tell whether a person is speaking Serbian, Croatian, Bosnian, or Montenegrin. The dividing line between the very similar and the identical is subtle. One might add that the differences between dialects within Serbia (or Croatia) may be greater than the differences between literary Serbian and literary Croatian. When new states emerged from the dissolution of the former Yugoslavia, we witnessed a drive to identify and acknowledge symbols of distinct identities. Language has always represented a strong symbol of identity. In this context it is understandable that with the emergence of new states the concept of a Serbo-Croatian (or Croato-Serbian) language was abandoned, and the new constitutions of the new sovereign states established Serbian, Croatian, and Bosnian as distinct official languages. Soon after Montenegro separated from Serbia in 2006, the Babel syndrome continued, and Montenegrin became the official language of Montenegro.

The question has arisen how this reality (or quasi-reality) should be heeded in the process of international decision-making. I would first like to mention an arbitration case from my own experience. One of the parties was from Croatia, the other was from Serbia. Earlier, there would have been no problem in agreeing on the language of arbitration – the obvious choice would have been Serbo-Croatian. This was, however, no
longer a possible choice. Choosing Serbian (or Croatian) would not have jeopardized understanding, but it would have offended sensitivities by granting recognition to one identity over the other. Thus, a more balanced and circumspect solution was needed – and actually this was not difficult to find. Both parties and all three arbitrators easily agreed to identify both Serbian and Croatian as the languages of the arbitral proceedings, allowing all participants to use one or the other, without requiring translation. In this way, in addition to choosing language(s) which allowed the participants to understand each other, a balance of symbols and identities was also respected.

The arbitration case mentioned above shows that common sense may transcend Babel-type problems. But what if common sense is lacking? In some cases before the ICTY – and in the Šešelj case in particular – the problem appeared in a rather odd setting. Let me first mention that the ICTY has accepted the fact that Serbo-Croatian is no longer an official language, and therefore it has been using separate names (Serbian, Croatian, Bosnian), but it also accepted as a fact that these languages can be used interchangeably. This is how the S/C/B (or C/S/B, or B/C/S) language was established. The crux of the solution is that a Croat, a Serb, or a Bosniac is entitled to translation, and will receive a B or C or S translation depending on the availability of the translator.

The case of Prosecutor v. Vojislav Šešelj trial has put on record a long list of endeavors by Šešelj to defy, disparage, or obstruct the ICTY. In 2003, some of the translations that reached Šešelj were in Croatian, and this provided a new opportunity. He claimed that he could not understand a “C” translator, and thus his due process rights were violated. Šešelj pointed out several (rather unconvincing) examples, stating, for instance, that he did not understand what “Zapadni Srijem” might mean. (This is a geographical region with which some of Šešelj’s activities were linked, called “Zapadni Srijem” in Croatian, and “Zapadni Srem” in Serbian.) The problem had to be addressed, because Serbian, Bosnian, and Croatian have indeed become separate official languages. In Prosecutor v. Vojislav Šešelj, Trial Chamber II rendered a specific Order on Translation of Documents. In reaching its decision, the Trial Chamber relied on Article 21 of the Statute of the ICTY, which guarantees to the accused information “in a language which he understands” … In the concluding sentence of the Order of March 6, 2003, it is stated that the Trial Chamber

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“FURTHER ORDERS the Registry to provide the Accused with translations of any future motions filed by the Prosecution (without attachments) in B/C/S … thereby guaranteeing the right of the Accused to be heard in a language he understands.” Later during the trial, on March 25, 2003, Judge Schomburg responded to Mr. Šešelj endeavoring to return to common sense:

Dr. Šešelj, we are here in a tribunal where we use the – all three variants of the same common Serbo-Croatian language, and everybody is treated equally … So you have to accept and you have to show some tolerance. Language is a tool bringing persons, bringing people together, and to make us understand each other, but we can't expect that everybody speaks the same variant or, even worse, the same dialect. In this Tribunal, for example, we have English as one of the official languages. Sometimes also for us it is difficult to understand a person speaking Irish English, French English, German English [meaning English spoken by a Frenchman or by a German person], American English, but we have to live with this in the spirit of tolerance and trying to understand each other … And to be honest, we don't care about this from where a person comes, be it Zagreb, Novi Sad, Belgrade, or wherever. The main point is that it’s translated into a language you understand, and there should be not the slightest problem with this. 27

As this case nicely illustrates, it is not always easy to decide upon entitlement to translation. There is, of course, an obvious and straightforward justification: the need to understand. Yet claims for translation are sometimes based on different concerns, such as the assertion of sovereignty or of a distinct identity. Translation may very well be perceived as a tribute to sovereignty or distinct identity. Such claims might be asserted directly (like in the post-Soviet cases), or under the guise of the mainstream justification (the need to understand a different language). In my opinion, as a rule of thumb, one should recognize entitlement to translation if the target language is the official language of a sovereign country. Even if one assumes that Uzbek or Tadjik officials and judges speak Russian as well, this does not supersede the entitlement to receive submissions in their official language. Flexibility is possible – particularly if such flexibility is exercised by those courts whose official language is at issue 28 – but the entitlement remains.

28 Such flexibility was exercised in a few cases by Norwegian and Dutch courts, which recognized arbitral awards written in English, without requesting translation into Norwegian or Dutch. See e.g., Pulsarr Industrial Research B.V. (Netherlands) v. Nils H. Nilsen A.S.
Minority rights could also conceivably justify an entitlement to translation – but a scrutiny of this issue would take us beyond the boundaries of this chapter. The situation is particularly sensitive when the asserted justification is the need to understand, but the circumstances indicate other concerns. Faced with this quandary, the solution might be to stay on the track of understanding, and to establish whether translation is really needed for the purpose of understanding. (One has to mention, though, that this might sometimes take us to the uncertain ground of linguistic controversies with regard to closely related languages.) Faced with a real dilemma as to whether the request for translation is prompted by an actual need for understanding or by other concerns, one should keep in mind that it is a lesser error to allow unnecessary translation than to disallow translation when it might really be needed. Unfortunately, the blessing of the obvious does not always provide a solution regarding the issue of entitlement to translation.

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Staying with the example of the ICTY, I would like to draw attention to some further risks built into the process of multilingual proceedings. The ICTY has two working languages: English and French (as provided by Article 33 of the Statute). In practice, the dominant language is English. However, most of the accused, most victims, and most witnesses do not speak either French or English. This poses a host of logistical problems, and it has an impact on the quality of the proceedings as well. The prosecution is shaping a picture relying at least in part on witnesses. These witnesses speak another language. Doubts or confidence are first of all triggered by the allegations themselves – and these can be mirrored in an accurate translation. But can translation fully substitute for direct communication? Speaking a language is not only important in order to understand what the witness is saying. Being at home with a language also offers an added opportunity to be able to make an educated guess whether the witness is telling the truth. Prosecutors, advocates, and judges who are themselves part of a given language culture are in better position to fully


29 See on this problem Várady, Language and Translation, 140–56, dealing with closely related languages in the context of international commercial arbitration.
understand and also to screen what the witness is saying. They can recognize and discern familiar patterns of exaggeration, and patterns of telling the truth, patterns which are different in different cultures. Newly formed international criminal tribunals have offered an opportunity to gain more insight into both the capacities and the limitations of translation.

Focusing on accuracy, it deserves to be pointed out that the ICTY adopted rules that are clearly mindful of priorities (as well as nuances) with regard to accuracy. In Article 10(1) of the “Code of Ethics for Interpreters and Translators Employed by the ICTY” it is stated:

Interpreters and translators shall convey with the greatest fidelity and accuracy, and with complete neutrality, the wording used by the persons they interpret or translate.

Interpreters shall convey the whole message, including vulgar or derogatory remarks, insults and any non-verbal clue, such as the tone of voice and emotions of the speaker, which might facilitate the understanding of their listeners.

Interpreters and translators shall not embellish, omit or edit anything from their assigned work.

If patent mistakes or untruths are spoken or written, interpreters and translators shall convey these accurately as presented.

Article 10 offers a thoughtful and well-balanced definition of the goal. Attention has been devoted to the issue, and results have been achieved. However, there have been failures as well. I would like to highlight the problem through a rather bizarre episode, in which the source of the problem was a translation crafted by secret services outside the ICTY. The process of clarification was burdened by the classified character of the information – and the admissibility of the information was also an open issue.

In order to make the plot understandable, let me make some preliminary remarks on the expression (ribanje) which became a challenge. In all post-Serbo/Croatian languages (Serbian, Croatian, Bosnian) riba means “fish.” From fish (riba), however, you do not get to “fishing” the same simple way as in English. It may be enticing to add just the –nje ending (which does mean “–ing”) and to come up with ribanje. But there also exists a verb ribati, which means “to scrub,” and “ribanje” actually means scrubbing. What is even more important, in a figurative sense, ribanje means scolding or slating or dressing-down. In other words, translating ribanje as “fishing” is about as adequate as if one were to translate “giving

30 See www.un.org/icty/basic/codeinter/IT144.htm.
someone a good dressing-down” as “assisting someone in strip-tease.” In B/C/S languages “fishing” is actually *ribolov* (literally “fish hunt”) or *ribarenje* (built on the word *ribar*, i.e., “fisherman”).

And this is where the problem started in the ICTY case against Radoslav Brđanin. The prosecution presented as evidence an intercepted 1992 phone conversation between Radovan Karadžić and Nenad Stevandić. The interceptors had to translate. They did. The transcript mentions Mr. Brđanin “being taken fishing up to Jovica’s” (“Jovica” was Mr. Jovica Stanišić, then head of the Serbian secret service). In the original Serbian text it was stated that Mr. Brđanin was summoned to Jovica (Stanišić) for *ribanje* (scolding, dressing-down). Western intelligence forces came up with a translation stating that Mr. Brđanin went fishing with Jovica (Stanišić). The context raised doubts, and prompted a discussion which takes thirteen pages(!) of the transcript of the hearing on July 3, 2003.31 The dialogue is at some points reminiscent of Ionesco or Beckett – and, in line with patterns of absurd drama, there is no clear unbinding; the knot remains.

The main focus is on the following part of the intercepted and translated conversation:

STEVANDIĆ: But, I wanted, no, as concerns Brđjo [nickname for Brđanin], there are no problems there. Miroslav and I have hold of Brđanin. Last time we took him fishing up to Jovica’s.

KARADŽIĆ: Yes.

STEVANDIĆ: And he scared him a little so that stupid things shouldn’t be done and so on and we have hold on Brdjo now … 32

Had *ribanje* been translated by the CIA as “scolding, dressing-down,” the picture would have been quite clear. Brđanin was sent to the head of the secret police, where he was subject to scolding or dressing-down, and after that it could have been expected that he would no longer dare to oppose Karadžić and Stevandić. In other words, after Brđanin had been subjected to some harsh words by the head of the secret police, Karadžić and Stevandić had a hold on him. The situation is different, however, if one were to assume that Brđanin was not scolded by the head of the secret police, but went fishing with him (which might indicate a friendly relationship with the strongman). Judge Agius sensed the inconsistency, and a probing dialogue developed. Here are some typical fragments:


32 Ibid., p. 18767.
The rumination continued, and on the thirteenth page a solution was suggested. The emerging proposition was, however, still somewhat foggy, and eventually Judge Agius proposed to move on towards other matters:

MR. ACKERMAN: Your Honour, I’m told that there is another interpretation of the word *ribanje* [...] which is brainwashing, which may be what was meant here. I don’t know.

JUDGE AGIUS: Let’s – if you were following what the interpreter, one of the interpreters said at one moment, she said that the word “fishing” could actually mean something else, and that’s sort of convincing or I forgot exactly.

JUDGE JANU: Task.

JUDGE AGIUS: I understand your point here. Let’s go ahead because we have – I anticipate – a lot of problems in the course of today’s sitting so let’s proceed. 34

At the end, the meaning set by the mistranslation got loosened up, became volatile, but was not really replaced. (Fortunately, this did not really have an impact on the conviction.) One is prompted by such episodes to wonder what happens to mistranslations in the files of various secret services that never see the daylight of court proceedings.

6

It is a fact that nowadays we have a dominant language at the global level. This language is English. It follows that in a considerable number of cases the use of English may represent at least a partial substitute for translation. If a party from Hungary and a party from Belgium conduct their correspondence in English, if they execute their contract in English, and if they agree on an arbitration clause which sets English as the language of arbitration, translation is avoided (except maybe for witnesses who might testify before the arbitral tribunal if a dispute arises – or except for purposes of contact with Hungarian and Belgian authorities if the contract were to need government approval or registration). To a lesser extent, some other “world languages” (like French or German), or languages

33 Ibid., p. 18772.  34 Ibid., p. 18773.
widely spoken in a region (like Russian) may also serve as a bridge between parties from different countries with different languages. As English has been gaining more and more ground on territories where it is not the first language, we have witnessed an interesting turnaround. Normally, translation follows the original. An interesting trait of our time is an increased frequency of the reversed sequence, in that translation precedes the original. In the domain of international transactions, for example, contracts are often drafted in a language that is not the native language of any of the parties to the contract (typically in English). In such situations, the original signed by the parties is actually a translation, and the language from which this translation was made remains hidden. This raises some quite fascinating questions.

I remember an arbitration case in which the bone of contention was an exchange of letters in connection with a contract. The contract was executed in English; the letters were also written in English. The first letter was written by a party from Bosnia, who proposed “to put the contract to peace.” The other party (from a different country, whose native language was not English either), agreed “to put the contract to peace.” The problem was that while the party from Bosnia thought that they had agreed to suspend the contract, the other party took a position that they had agreed to terminate the contract. The Bosnian party was in all likelihood shaping his thoughts in Bosnian, and tried to find an adequate English expression of the Bosnian words. In Bosnian (just as in Croatian or Serbian) mir means “peace.” Staviti [putting] u mirovanje (derived from mir) is being used as a legal term, meaning suspension. This is what the Bosnian party must have meant, when he translated staviti u mirovanje as “putting to peace.” The other party, on the other hand, may have understood the expression as indicating termination. It is also conceivable that there was no real misunderstanding, but the other party wanted to get out of the contract anyway (rather than just to postpone contractual obligations), and used the imprecision molded by the literal translation as an opportunity to turn things in this direction. What makes this problem-pattern specific is that mistranslation (or ambiguous translation) is part of the original. It is true that there is a deeper layer below the text which is formally the original, but this deeper layer (which I call “anchor language”35) is not on record, it is invisible. The question is whether one could and should reach

towards the anchor language (in this case, the language of the Bosnian party who coined the contested phrase) in deciding whether the contract was suspended or terminated.

Staying with the issue of the hidden anchor language, the original may also remain hidden when the language of the contract is not a third language but is the language of one of the parties, and the draft is prepared by the other party. For example, the contract is concluded between a US and a Finnish party, and the Finnish party is the one that submits the draft. (In such situations, it also matters how much negotiation will actually take place and how much effort will be invested by the native-speaker party in scrutinizing the language of the contract.) Again, the question arises whether the anchor version of a contract (or of a phrase in a contract) may gain relevance before the arbitrators (or before a court).

This was the issue in a case between a Hungarian and a UK party who agreed on an arbitration clause which read: “In case of controversial matters the parties determine the selected court, which operates next to the Chamber of Commerce in Budapest.” What became a bone of contention here was a literal translation of the Hungarian term for arbitration. In Hungarian, arbitration is called választottbíróság, which means literally “selected court” or “chosen court.” The case reached the Budapest Court of Arbitration. An oral hearing was held, but the UK respondent failed to appear (although duly notified). The absence of the UK party made it more difficult to clarify the intentions of the parties. As stated in the English language award, the claimant offered the following explanation: “[t]he designation ‘selected court which operates next to the Chamber of Commerce in Budapest’ is a literal translation. The Hungarian term ‘választottbíróság’ means arbitration, but its literal translation is ‘selected court.”

The arbitrators raised the question whether a valid arbitration agreement existed, and stated: “Scrutinizing the wording of the ‘Mutual Agreement’ the arbitrators were faced with another example of clauses falling into the category labeled ‘clauses pathologiques’ by Eisemann. This leads to the difficult question of the limits of the power of the arbitrators in seeking the ‘true intent’ of the parties beyond (or even in spite of) what the parties actually wrote. It is the opinion of the arbitrators, that

36 Some other languages follow the same logic. In Croatian and Serbian, for example, the term for “arbitration” is izbrani sud or izabrani sud – which also means “chosen court” or “selected court.”
37 Award of May 21, 2002 in Case No. Vb/01181 (unpublished).
the arbitration agreement must possess in itself a minimum level of co-
herence in order to serve as a foothold for a search after the true inten-
tions of the parties.” 38 Referring specifically to the phrase “selected court,”
the arbitrators stated further on: “The wording of the arbitration clause
does not make much sense otherwise but on the assumption that this is
a translation of a Hungarian draft – which translation actually conveyed
the words, more so than the meaning.” Eventually, the arbitrators found
that they had no jurisdiction, but for reasons other than the imperfect
reference to the arbitral institution. 39 It appears from the wording of the
award that the phrase “selected court” may not in itself have justified re-
fusal of jurisdiction.

The intriguing question (which remained unanswered) was what the
intentions and the perception of the UK party were. It is quite obvious
that the English native-speaker party did not devote much attention
to the language of the contract. It happens – unfortunately with some
frequency – that contracts are concluded without sufficient scrutiny.
Normally, the party that failed to devote attention to the wording but
signed the contract will be bound. Will the party also be bound by an
arbitration agreement which refers to a “selected court”? Let us repeat
that a party is normally bound by what is written in a clause, even if he
or she failed to scrutinize it (though having had the opportunity to do
so). The situation is somewhat different when one has to reach towards an
anchor language in order to establish the proper meaning of a contractual
provision. If the literal translation offers a plausible option as it stands, the
party that has no command of the anchor language may possibly insist
on this option, arguing that he or she was misled (led to trust the mean-
ing flowing from the literal translation). Bona fide reliance on the literal
meaning may block an examination of the anchor language. In the case
referred to above, however, it would have been difficult for the UK party to
argue that it did not know that “selected court” meant arbitration. In the
given context, this argument would not have been persuasive. It would
also be quite difficult for the English-speaking party to explain what it
did have in mind. In the case, which ended with the May 2002 award,
the English party did not show up at the oral hearing, and thus could not

39 The dispute was between two companies, while the “Mutual Agreement” containing the
arbitration clause was signed by two natural persons, without indicating the names of
the legal persons they represented; furthermore, the “Mutual Agreement” was an agency
agreement, while the subject matter of the dispute arose from a sales contract.
offer any explanation. Had the party appeared, it might have confirmed that both parties meant arbitration. Explaining any other meaning would have been quite difficult: it just would not sound plausible to argue that by saying that “[t]he parties determine the selected court, which operates next to the Chamber of Commerce in Budapest,” the parties actually meant to submit disputes to a court which is identified by being in the proximity of the Budapest Chamber of Commerce. Reaching after the hidden anchor language mandates caution, but it is a rational device of contract interpretation when contracts are being shaped in a multilingual environment.

In Chapter 1 of this book, Berman writes that “we are all creatures of the language in which we have been brought up.”\(^{40}\) This is a most apposite remark, which also explains the role of the anchor language. There are, however, some ramifications of this truth as stated by Harold Berman. There are people whose life is marked by transitions – including transitions between languages. There are persons whose identity is denoted by changeovers. Can such an identity be considered as the anchor, as the hidden layer behind the formal original? In most cases probably not – but there are exceptions.

I would like to refer here to an award of the Iran–United States Claims Tribunal, in which transition between identities served as (added) guidance in interpreting the text of a letter.\(^{41}\) Professor Dadras wrote his letter in Persian (Farsi), and dated it according to the Persian calendar. Persian was the native language of Professor Dadras, this was the language in which he had been brought up; but he left Iran, and he had been living in the USA for almost thirty years.\(^{42}\) The date of the letter was indicated according to the Persian calendar, and corresponded to September 11, 1978. Professor Dadras asserted, however, that he got confused, and actually wrote his letter on August 21, 1978. The date of the letter was important. Endeavoring to establish which date was accurate, the arbitrators relied on indications in the text of the letter, but they also relied on the circumstance that behind the original (which was Persian/Farsi) there was another layer. In this case, it appeared that this hidden original was actually not English as a newly acquired anchor, but rather the perplexity

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40 See above, Chapter 1, p. 50.
42 It is not clear from the award whether thirty years were counted up to the year of the award (1995), or up to the year of the contested letter (1978).
yielded by transition. The arbitrators captured this with the following words:

The third and particularly significant factor is that the letter was written in Persian, a language in which Prof. Dadras was no longer comfortable after having lived in the United States for almost thirty years during most of which time he was married to a non-Persian speaker. As discussed above, the letter contains dates written in three different calendars, namely the Gregorian, the Iranian Hejri-Shamsi and the Iranian Imperial calendars. The necessity of making date conversions in or between three different calendars therefore would have added to the stressful situation in which Prof. Dadras found himself, and would have significantly increased the likelihood of making faulty conversion.  

7

The idea of Pentecost may have been bestowed on us by God, but its implementation is left to humans. People who have the courage to sail between languages, however, have a patron saint in Saint Jerome. It is interesting to consider the character of the person who received the quite peculiar status of the patron saint of translators. Saint Jerome was born in 347, and lived until 419 (or 420). He was born in Stridon, lived in Rome, Trier (Germany), Constantinople, Bethlehem, Antioch, the Desert of Chalcis, and many other places. His most important achievement is the translation of the Holy Script from Hebrew and Greek to Latin and thus the creation of the Vulgate, the official version of the Holy Bible for more than a millennium. He was a brilliant intellectual. In a number of his writings he gave a subtle (and still relevant) analysis of many intricate problems of translation. Let me cite one of the many subtle elucidations one can find in the writings of Saint Jerome. In his letter to Pammachius he states:

It is difficult in following lines laid down by others not sometimes to diverge from them, and it is hard to preserve in a translation the charm of expressions which in another language are most felicitous. Each particular word conveys a meaning of its own, and possibly I have no equivalent by which to render it, and I make a circuit to reach my goal, I have to go many miles to cover a short distance. To these difficulties must be added the windings of hyperbata, differences in the use of cases, divergencies

44 It is not clear where Stridon was exactly. It is assumed that it was on the present-day territory of either Croatia or Slovenia.
of metaphor; and last of all the peculiar and if I may so call it, inbred char-
acter of the language. 45

In the same letter, Saint Jerome quotes Horace, who gave the following advice to the skilled translator:

> And care not thou with over anxious thought.  
> To render word for word. 46

Of course, Saint Jerome and Horace were focusing on literary translation, and one cannot equate literary translation with legal translation. But the basic problem-pattern is the same, and the guidance of Saint Jerome remains relevant. Saint Jerome’s main focus is not on strengthening faith in the miracle of translation. Unqualified faith is actually more often characteristic of people who do not really have experience with multilingualism, who have not seen things from inside, do not have a realistic picture of the task, and tend to believe that translation is bound to produce an identical twin of the original. Saint Jerome did not try to offer protection and encouragement by way of eliminating doubt. He tried instead to throw light upon various sources of doubt and difficulties in order to enable the translators to cope with them. The more we are aware of inside structure, layers, intricacies, limitations, traps, and jargon, the closer we can get to the spirit of Pentecost.


46 Ibid.