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Is There a Right to Untranslatability? Asylum, Evidence and the Listening State*

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Abstract

This article focuses on Refugee Status Determination (RSD) procedures, in order to understand the relationships among language, translation / interpreting, evidentiary assessment, and what we call the 'listening state'. Legal systems have only recently begun to consider whether adjudicative processes ought to take place in multiple languages concurrently, or whether the ideal procedure is to monolingualize evidence first, and then assess it accordingly. Because of this ambivalence, asylum applicants are often left in the 'zone of uncertainty' between monolingualism and multilingualism. Their experiences and testimonies become subject to an 'epistemic anxiety' only infrequently seen in other areas of adjudication. We therefore ask whether asylum applicants ought to enjoy a 'right to untranslatability', taking account of the State's responsibility to cooperate actively with them or whether the burden ought to remain with the applicant to achieve credibility in the language of the respective jurisdiction, through interpretation and translation.

Keywords

translation – interpreting – asylum law – listening – refugees – international law – Refugee Status Determination

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All our work, our whole life is a matter of semantics.

—ASSOCIATE US SUPREME COURT JUSTICE

FELIX FRANKFURTER (1882–1965)¹

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1 Introduction

Is law understood to be monolingual or multilingual in 2017?² If law is multilingual, is it passively or actively so? That is, does law speak in multiple languages, comprehend multiple languages, or both? Is evidence that has been gathered to substantiate a given legal claim only admissible and valid when it is expressed in the language of the jurisdiction? Upon whom or what institution is the burden incumbent to translate or otherwise render a claim recognizable to an adjudicating body? May there be claims that are for one reason or another untranslatable, but nonetheless valid and substantive? Given the potentially broad impact of these questions on the lives of refugees, citizens, and claimants of various kinds, it is tempting to try to answer them with recourse to procedural norms and institutional strategies alone, without reflecting on more fundamental dilemmas regarding whether and how the state is responsible to listen multilingually, and how such a commitment will shape due process.³ If former US Associate Supreme Court Justice Felix Frankfurter's passionate

¹ Garson Kanin, 'Trips to Felix' (March 1964) *the Atlantic Monthly* 55.

² For five divergent answers to this question from multiple disciplines, see Karen McAuliffe, 'Language And Law In The European Union: The Multilingual Jurisprudence Of The ECJ' in Lawrence M Solan and Peter M Tiersma (eds), *The Oxford Handbook of Language and Law* (OUP 2012); Emily Apter, 'Translation after 9/11' (2005) 2 *TRANSIT*; Katrin Becker, 'Von der Mehrsprachigkeit der Einsprachigkeit: Ein Dogmatisch-Anthropologischer Blick auf die Relation Mensch-Recht-Sprache' (2015) 3 *Critical Multilingualism Studies* 90; Robert Moore, 'From revolutionary monolingualism to reactionary multilingualism: Top-down discourses of linguistic diversity, 1794-present' (2015) 44 *Language and Communication* 19; Steven Kellman, 'Omnilingual Aspirations: The Case of the Universal Declaration of Human Rights,' (2016) 4 *Critical Multilingualism Studies* 5.

³ From the (inter)disciplinary point of view of interpreting studies, Franz Pöchhacker has noted that 'the issue of untranslatability has received little attention in interpreting studies and has essentially been left to the philosophers of translation' Franz Pöchhacker, *Introducing Interpreting Studies* (Routledge 2004) 52.

(20th century) words above offer a baseline of awareness, the complex and increasingly multilingual polities of the 21st century may indeed require jurists to decide whether ‘semantics’ implicitly means ‘monolingual semantics’, ‘multilingual semantics’, and/or ‘semantics through translation / interpretation’. We believe these dilemmas can be countenanced both holistically and practically at once—by looking simultaneously at the persons, functions, languages, and principles participating in the asylum determination process.⁴

Bearing in mind these broad philosophical dilemmas and their moment-to-moment implications for actual claimants, the objective of this article is to consider how legal systems might successfully ensure that asylum applicants are able to present their claims to decision makers and judges. This means without asylum seekers being coerced to produce facts, meanings, or narrative forms which simply never existed in the language(s) of their experience, and without them risking penalty if they are struggling to express concepts from their native language, with no equivalent in the language of judgment. Languages often being radically or subtly different in their classificatory logics—as regards family roles, experiences of violence, domiciles and residential status, or ethnic terminology, to name a few classic spheres—how can claimants be afforded a space within the judicial process that does not compel them to debase themselves or to falsify aspects of their accounts in the course of proceedings, when even the best approximation might endanger them?⁵

So as to pursue this line of thought in as practical a context as possible, we will theorize moments of untranslatability among actors and communicators in the Refugee Status Determination (RSD) process—including the asylum seeker, the state’s decision maker, the interpreter, and the legal representative. Often, we note, there are multiples in each category of actor involved with any given asylum claim, simultaneously and/or consecutively, who often bring vastly inconsistent linguistic repertoires to the case.⁶ In conclusion, we will

4 For poignant examples of the crosscurrents among holistic and practical approaches to these questions, see for instance Erik Carmayd Freixas, ‘Interpreting after the Largest ICE Raid in US History: A Personal Account’ (2009) 7 *Journal of Latino Studies* 123; David A B Murray, ‘Queer Forms: Producing Documentation in Sexual Orientation Refugee Cases’ (2016) 89 *Anthropological Quarterly* 465.

5 As concerns the classificatory and socio-pragmatic divergences between languages, we are not presuming here a ‘strong’ linguistic relativity (often mislabeled the ‘Sapir-Whorf Hypothesis’). Rather we adopt an interactional perspective on linguistic difference and its effects in actual speech situations, akin to that at work in Dan Slobin, ‘From ‘Thought and Language’ to ‘Thinking for Speaking’” in John J Gumperz and Stephen C Levinson (eds), *Rethinking Linguistic Relativity* (CUP 1996).

6 The complexity, variety, and mutability of these multilingual, interpreted communication settings indeed outstrip many of the heuristic models predominant in interpreting studies

consider the relationship between the semantic and pragmatic phenomenon of ‘the (un)translatable’ and the premise that the state has a responsibility to listen adequately, prior to adjudicating an asylum claim.⁷ While also recognizing the potentially utopian gesture implicit in aspiring to characterize the state as ‘listening’ to the asylum seeker, when evidence shows the refugee experience is increasingly one of being ignored or systematically misheard, we ground the idea of the ‘listening state’ in the responsibility of states signatory to the 1951 Refugee Convention to cooperate with the asylum seeker in the evaluation and also—crucially—in ascertaining relevant elements of their claim.⁸ By grounding the idea in refugee law and adjudicative protocol,⁹ we claim that listening is tantamount to a choice signaling the state’s intention to uphold refugee law.

In part, we derive this sense of the listening state from the hypothesis that, under law, reason and listening are and must be intimately related. Writing in the immediate aftermath of the Third Reich, the jurist, psychologist, and philosopher Karl Jaspers held that:

Grundhaltung der Vernunft ist universelles Mitleben: Vernunft als das ständige Vordringen zum Anderen ist die Möglichkeit des universellen Mitlebens, Dabeiseins, des allgegenwärtigen Hörens dessen, was spricht,

at large, i.e. beyond the legal context. See for instance the ‘type-case’ model of three-party interaction. R Bruce W Anderson, ‘Perspectives on the Role of the Interpreter’ in Richard W Brislin (ed), *Translation: Applications and Research* (Gardner 1976) 211. See also the model of community interpreting in Adolfo Gentile, Uldis Ozolins and Mary Vasilakakos, *Liaison Interpreting: A Handbook* (Melbourne University Press 1996).

7 For recent theoretical work on the untranslatable, see Michael Syrotinski (ed) ‘Translation and the Untranslatable’ (2015) 38(2) *Paragraph Special Issue* (Edinburgh University Press 2015).

8 See Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9 (Qualification Directive (Recast)) art 4 (1). The UK and Ireland opted out of the second phase Qualification Directive (Recast) but they remain bound by Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 (Qualification Directive) art 4(1). Article 4(1) is in the same terms in each instrument; Case C-277/11 *M. M. v Ireland* [2013] 1 WLR 1259.

9 See discussion in Section 2 below.

und dessen was sie selbst sprechen macht. Vernunft ist Vernehmen: *Vernunft ist daher der totale Kommunikationswille*.¹⁰

Proceeding in the hermeneutic tradition, and indeed doing so in the immediate context of the Nürnberg trials, Jaspers insisted that there can be no reasonable procedure without the ‘total will to communicate’, to ‘hear witness’ (*vernehmen*).

On the other end of the conceptual spectrum, ‘untranslatability’ is a concept in recent circulation in European philosophy and comparative literature.¹¹ The French philologist Barbara Cassin considers the untranslatable to be any substance or meaning that prompts constant translation, reformulation, retranslation, and revision. Counter-intuitively, then, untranslatable experiences, phenomena and ideas are for Cassin continuously translated anew, precisely because there always seems to be a recalcitrant remainder of meaning within them which cannot be or has not been translated. Cassin puts it this way: the untranslatable is ‘not what one doesn’t translate, but what one doesn’t stop (not) translating’.¹² Of course, literary and philosophical translation—the home territory for this line of thinking—takes place under very different circumstances than does interpreting in RSD. While Cassin and other philosophers view the untranslatable as a methodologically and aesthetically rich concept for humanities researchers, allowing for the unfolding and fecundity

10 The basic stance of reason is universal living-with: Reason as a continuous advancement toward the other, which itself is the possibility of a universal living-with, a being-alongside, of an omnipresent hearing of that which is speaking and of that which makes it speak. Reason is hearing witness; *reason is thus the total will to communicate*. Karl Jaspers, *Von der Wahrheit* (Piper 1947) [emphasis and translation added].

11 The primary architect of this concept in the French context has been Barbara Cassin. See Barbara Cassin (ed), *Vocabulaire européen des philosophies: Dictionnaire des intraduisibles* (Le Seuil/Le Robert 2004); Barbara Cassin, ‘The Energy of the Untranslatables: Translation as a Paradigm for the Human Sciences’ 38 Paragraph 145. In the United States of America, the concept of untranslatables has been amplified primarily by Emily Apter. See Barbara Cassin, *Dictionary of Untranslatables* (Emily Apter, Jacques Lezra and Michael Wood trans Princeton University Press 2014); see also Bethany Wiggin and Catriona MacLeod (eds), *Un/Translatables: New Maps for German Literatures* (Northwestern University Press 2016). For a thoroughgoing rebuttal of the very idea of the untranslatable, see Lawrence Venuti, ‘Hijacking Translation: How Comp Lit Continues to Suppress Translated Texts’ 43 boundary 2 179.

12 Barbara Cassin, ‘Untranslatables and their Translations: A Logbook’ (Andrew Goffey (tr)2009) *Transeuropeennes* <http://www.transeuropeennes.eu/en/articles/83/Untranslatables_and_their_Translations> accessed 26 June 2017.

of sequential attempts at translation; the untranslatable is (in the experience of asylum claimants) rather an experience of precariousness, privation, and 'not being listened to'. The profound difference in the practical implications of the untranslatable in these two settings may be expressed as follows: in contemplative humanities, where the concept was first formulated, untranslatability facilitates a multilingualism of plentitude. In refugee law, however, it epitomizes a multilingualism of adversity.¹³

Though this concept of the untranslatable has not been discussed in legal studies to the extent that it has in other humanistic disciplines, we are nonetheless concerned that legal claims from asylum seekers tend to follow a parallel sequence to that which Cassin describes. They are an arduous endeavor of constant, compulsory translation and repetition in front of, or across from, ever new interlocutors in languages foreign to the claimant. Asylum claimants are routinely required to produce, over and over, the most minute and ancillary aspects of their story, and to demonstrate the accuracy of this story in the most unpredictable formats and settings. This ritualized process presumes such an ordeal of repetition, and the consistent accumulation of such ordeals not only galvanizes but constitutes the evidentiary rigor of a personal claim before the state: each meticulously consistent repetition of the same story tends to augment the reliability of the asylum seeker's narrative, while even slight differences between repetitions tend to quickly scuttle their prospects. In contrast with Cassin's philological view of the fecundity and potential associated with repeated and differing multilingual iterations across language barriers, such differences in the RSD context often make the asylum seeker appear inconsistent and lacking credibility. We are thus interested in the ritual excess of 'telling' and 'hearing' in asylum procedures, and how it rehearses the dynamics of the untranslatable, while not necessarily assuring a claimant has access to a 'listening state.'¹⁴

But what circumstances suggest that the state indeed intends to listen to asylum claimants? Entitlement to refugee or humanitarian (subsidiary) protection status can be articulated in broad legal terms for those who have a

13 On adverse multilingualism, see for instance Aline Gohard-Radenkovic, 'Le plurilinguisme, un nouveau champ, ou une nouvelle idéologie: Ou quand les discours politiquement corrects prônent la diversité' 2 *Alterstice Revue Internationale de la Recherche interculturelle* 89.

14 We have found no prior coinage of the notion of a listening state, though an editorial ran under that title in *The India Express*, which praised the Indian government's recent call for more opportunities for public pre-legislative scrutiny of ministerial policies. <<http://epaper.indianexpress.com/230549/Indian-Express/17-February-2014#page/1/1>> accessed 17 February 2014.

‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’,¹⁵ or who risk ‘serious harm’¹⁶ in their country of origin.¹⁷ The tension that exists between these obligations, on the one hand, and individual states’ desire to control borders, on the other, is obvious and plain. In Section 3 below, we explore how such tensions between refugee protection and border control play out in the context of individual states’ RSD procedures. However, first we look at how asylum seekers tend to encounter the processes themselves.

RSD procedures generally involve a preliminary and then a substantive interview between an asylum seeker, a state official and an interpreter (if required).¹⁸ The purpose of these interviews is to establish the applicant’s account. The account of an applicant from these interviews, as well as any other evidence from the applicant (such as medical, psychiatric evidence, travel documents, etc.) is then assessed alongside available corroborating information (which may include ‘expert evidence’ and other Country of Origin documentation), to test the internal and external consistency and plausibility of the account given by the applicant.¹⁹ Findings on consistency and plausibility thus inform the conclusions of the decision maker on the overall credibility of

15 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), art 1(a).

16 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 312 ETS 5 (European Convention on Human Rights), art 3; Qualification Directive, art 15; Qualification Directive(Recast), art 15.

17 The Refugee Convention obliges states (inter alia) not to *refoule* refugees to persecution (art 33) and to cooperate with the United Nations High Commissioner for Refugees (UNHCR) in the protection of refugees (art 35).

18 Home Office, ‘Immigration Rules part 11: asylum’ (HC395, 2 May 2017) <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>> accessed 25 June 2017 implementing Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13 (Asylum Procedures Directive). The UK and Ireland exercised their opt-out in relation to the ‘second phase’ Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection(recast) [2013]OJL170/60(Asylum Procedures Directive (Recast)),which is in similar terms to the Asylum Procedures Directive but imposes a number of additional obligations, including regarding interpreters. The UK and Ireland remain bound by the Asylum Procedures Directive, and the UK Immigration Rules reflect this.

19 John Barnes and Allan Mackey, ‘The Credo Document’ in Carolus Grütters, Elspeth Guild, Sebastian de Groot (eds), *Assessment of Credibility by Judges in Asylum Cases in the EU* (Wolf 2013) 120.

the account, and the decision to grant/refuse protection turns, in most cases, on the applicant's credibility. When negative decisions are appealed against, any discrepancies between accounts given during various interviews and those given at later appeal stages must be reconciled, as they are likely to impinge on credibility findings at the appeal stage as well. What is said at each asylum interview thus reverberates onwards in a compounding manner throughout the process.

Asylum interviews are notoriously grueling for applicants,²⁰ and the reiterative intensity and format of the interviews raise fundamental questions about the capacity of the process to reliably recognize valid claims. We wish to explore the general circumstances surrounding the rather obvious fact that, in order to reach a valid decision about a claim, the decision maker needs to be listening, not just hearing. We are particularly interested in being able to ascertain to whose repertoire of meanings the decision maker is actually listening, and which language may be said to count as the claimant's language of testimony.²¹ If we allow the obvious yet somewhat idealized conceit to suffice, namely, that the decision maker is listening to the applicant herself; we risk ignoring the fact that the applicant and decision maker will, in virtually every case, come from mutually incomprehensible cultural and linguistic repertoires of meanings. In breaking the barrier between languages, we render the interpreter in the room invisible, bypassing her sense-making function and stripping her of the coherence that she provides. This predominant 'conduit model' has long shaped the modern professionalization of interpreting in institutional settings.²² In ignoring these multilingually embodied features of

20 Christel Querton, 'I feel like as a woman I'm not welcome' (Asylum Aid 2012) <http://dzt68d2rgartlv.cloudfront.net/wp-content/uploads/2013/02/ifeelasawoman_report_web_.pdf> accessed 5 January 2017.

21 The work of Diana Eades in an Australian Aboriginal context shows how Australian court proceedings tend to monolingualize evidentiary testimony, by only permitting court transcripts to reproduce English utterances, and not bilingual or indigenous language contributions. Thus, while the court could indeed rely on collaboration between interpreters and witnesses to self-translate relevant aspects of multilingual testimony, the court preemptively reduces the admissibility criterion to English monolingualism alone. See Diana Eades, 'Participation of second language and second dialect speakers in the legal system' (2003) 23 *Annual Review of Applied Linguistics* 113.

22 On the 'conduit model', see Annelie Knapp-Potthoff and Alfried Knapp 'Interweaving Two Discourses: The Difficult Task of the Non-professional' in Juliane House and Shoshana Blum-Kulka (eds) *Interlingual and intercultural communication: discourse and cognition and translation and second language acquisition studies*. Laster and Taylor claim that the 'conduit model' has been necessitated by legal systems' endeavor to exclude hearsay

the interview, decision makers essentially presuppose that linguistic difference does not matter significantly under law.

The question must therefore arise whether listening to the interpreter is tantamount to accurate and appropriate access to the meanings and experiences of the claimant. Compromising predicaments may come in various forms:

- CLASSIFICATORY: The claimant cannot, based on the categories available in her language, provide the specificity or generality of information solicited by an interview question. For instance: a claimant refers with the word 'uncle' to a non-familial relation who does not count as an 'uncle' in English or French.
- PRAGMATIC: The claimant cannot, given the codes of civility and appropriateness salient in her language, tell a story of sexual assault in the presence of a male interpreter, or in the presence of her children. Of course, internal norms of politeness in language span a wide spectrum of potential forms, but languages also compel and maintain certain affordances for euphemization, indirection, and indeed credibility/witnessing. Turkish, for instance, compels a speaker to denote through verb conjugation, rather than through explicit statement, whether or not she was present and able to view a certain fact, or merely heard it second-hand.
- IDEOLOGICAL: A Coptic Christian Arabic speaker's claim is (unintentionally or even intentionally) misinterpreted by a Muslim Arabic Speaker, or vice-versa.²³

Of course, it need not necessarily be the case that any of these elements are, in themselves, untranslatable in some essential or even procedural sense. Under ideal Habermasian communicative circumstances, even the most harrowing or complicated stories can indeed be translated and translated well, given proper time and context; but they will tend not to be in typical situations where refugee status is determined. Commenting on these situations, a Credibility Assessment Training Manual which is widely used in RSD processes in the EU describes the 'interferences' that can arise in the interpretation process, and suggests that the risk of 'interference' is 'even higher in the asylum context than in most other translation situations.'²⁴

evidence. Kathy Laster and Veronica L Taylor, *Interpreters and the legal system* (Federation Press 1994).

23 *MM (Sudan) v Secretary of State for the Home Department* [2014] INLR 576.

24 There are various ways to classify interferences in translation. For professional legal advice on how to recognize and deal with the situations where such interferences can arise,

The Classificatory, Pragmatic and Ideological binds described above tend, over the course of a protracted asylum procedure, to generate the phenomenon of compulsory and compulsive retranslation, verification, and incomplete translation that Cassin refers to under the term ‘untranslatable,’ where the claimant (as voiced through the interpreter) cannot but become the one ‘who doesn’t stop (not) translating.’²⁵ The ritual of repetitive self-translation (with or without an interpreter) interweave into other eligibility practices in asylum procedures, which according to ethnographer Heath Cabot ‘are persistently haunted by epistemic anxiety: pervasive uncertainties that manifest in an endemic climate of mistrust and which, for workers, reflect the epistemological problem of how to know, really, about those whom they must judge.’²⁶ Often, the more and more a particular detail is translated or interpreted by various persons, the less likely the composite story is to be considered credible, which is a key criterion in RSD.

2 Listening, Evidentiary Burden and the Multiingual Hearing

Although we have said that decision makers obviously listen, the experience of interviews and decision-making by asylum seekers is a far cry from the ideal of a listening state,²⁷ and so we need to further explore where this idea comes from conceptually and procedurally. In the legal context, the notion of listening draws on the emphasis which Zahle, as well as Hathaway and Foster, place on communication in RSD. What Hathaway and Foster describe as the most fundamental principle governing the fact-finding process in RSD is the recognition that, while the burden of proving their case lies on the asylum seeker, the circumstances of flight dictate that corroborating documentary evidence to support a refugee’s narrative is often lacking.²⁸ The state therefore has a responsibility to co-operate with the applicant, and this cooperation can extend

see Gabor Gyulai and others, ‘Credibility Assessment in Asylum Procedures: A Multi-Disciplinary Training Manual’ Vol 2(2015) Hungarian Helsinki Committee.

25 Cassin (n 11).

26 Heath Cabot, ‘The Social Aesthetics of Eligibility: NGO Aid and Indeterminacy in the Greek Asylum Process’ (2013) 40 *American Ethnologist* 452.

27 Debora Singer ‘Falling at Each Hurdle: Assessing the Credibility of Women’s Asylum Claims in Europe’ in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds) *Gender in Refugee Law* (Routledge 2014).

28 James Hathaway and Michelle Foster, *The Law of Refugee Status* (2 edn CUP 2014) 118–121.

to producing evidence to support the application in certain cases.²⁹ This is the 'shared burden' principle, and it derives from the heavy reliance placed on the oral evidence from applicants in RSD, as well as from state obligations under international refugee law.³⁰ The *UNHCR Handbook on Procedures and Criteria for Refugee Status*, which is the authoritative source for the interpretation of a state obligation to provide a process which will prevent *refoulement* of refugees to persecution, puts it like this:

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary proof. [...] Thus, while the burden of proof in principle rests on the applicant, *the duty to ascertain and evaluate all relevant facts is shared between the applicant and examiner.* (our emphasis)³¹

The state therefore has a shared responsibility, once the applicant has submitted their case, to 'ascertain' as well as 'evaluate' all relevant facts. When interpreting Article 4(1) of the EU Qualification Directive,³² which brings this cooperative duty into EU Law, the Court of Justice of the European Union (CJEU) has said that it can mean, in practical terms, that if the elements provided by the applicant are not complete, then it is necessary for the state to cooperate actively with the applicant, so that all elements needed may be assembled.³³ The co-operative duty can therefore involve finding evidence to fill gaps. We think cooperation certainly involves making the effort to communicate actively with the applicant, including where certain parts of the account may be difficult to understand or even 'untranslatable'. Zahle has argued that the principle of cooperation supports his general description of asylum as a *communicative* process, as opposed to a strictly forensic or receptive event. He further argues that the widespread focus on credibility in asylum decision-making, the inherent recognition of the asylum applicant, and the difficulty of establishing levels of risk on return, combine to favor a rigorously

29 UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', (December 2011) UN Doc. HCR/IP/4/Eng/REV.3 (UNHCR Handbook on Procedures) at para 196.

30 James Hathaway and Michelle Foster, *The Law of Refugee Status* (n 28) 118–121.

31 UNHCR Handbook on Procedures (n 29) para 196.

32 Qualification Directive and Qualification Directive (Recast).

33 Case 277–11 *M.M. v Ireland* (n 8).

communicative and dialogical view of RSD.³⁴ Describing an adjudicative process as communicative may seem obvious, since communication takes place in civil and criminal processes too, and we discuss the similarities between asylum and other adjudicative processes in Section 3 below. We however do think that the asylum process has uniquely communicative parameters, which we see reflected in Hathaway and Foster's and in Zahle's interpretations of refugee law, and which set it apart from other adjudicative processes in important ways. The communicative aspects of RSD therefore need to be emphasized as a first step towards identifying the conditions under which (a) untranslatables can be understood as a legal problem, (b) a potential 'right to untranslatability' may be reasonably envisioned, and (c) a state might be understood as obliged (by existing international law) to listen multilingually.

The communicative nature of RSD also makes a difference, because it means recognizing the *effort* which the asylum process demands of all actors. These circumstances include finding facts in situations where corroboration is usually impossible, and where documentary proof of a claim has often been destroyed or lost. Zahle considers the implications of this and, for him, communication means that it is not enough for the state decision maker to sit back and wait to be persuaded. The decision maker needs to listen affirmatively, reflecting the fact that the state has a duty, in cooperation with the applicant, in assessing the relevant elements of the application.³⁵ While a state, and indeed a modern state, can choose to abdicate such a communicative duty toward claimants, cultivating for itself what Carl Schmitt called a 'catechontic' sovereignty based on withholding communication;³⁶ it cannot do these things while also meaningfully upholding its obligations under international human rights law. The 1951 Refugee Convention requires states to listen, in the form of a genuine and indeed often (multilingually) inconvenient intent to communicate, even when they may ultimately reject a given claim to protection.³⁷

34 'Because the communicative approach is the best description, an accurate and free statement as early as possible is required', Henrik Zahle, 'Competing Patterns for Evidentiary Assessments' in Gregor Noll (ed) *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Brill 2005) 25.

35 Qualification Directive and Qualification Directive (Recast), art 4(1).

36 Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. Translated by G L Ulmen. (Telos Press Publishing 2006).

37 The European Court of Justice has held that the Member State's 'duty to cooperate' in Qualification Directive article 4(1) involves recognizing that the fundamental rights of the applicant must be recognized, particularly the right to be heard. C-277/11 *M.M. v Ireland* (n 8).

2.1 *Credibility and Trust*

The decision maker's purpose is, of course, to adjudicate, and their conclusions about an applicant's credibility usually determine whether refugee status is granted or refused. Credibility is not mentioned in the Refugee Convention itself, but there is authoritative guidance on how decision makers should approach credibility in the *UNHCR Handbook on Procedures*, and this guidance instructs decision makers to give the 'generally credible' applicant the "benefit of the doubt".³⁸ The "benefit of the doubt" principle is intended to compensate for the circumstance of the asylum process: the absence of documentary evidence, and the reliance on oral testimony, which in turn create its reliance on the applicant's credibility (because there is no other first-hand account). According to Zahle, an applicant's credible statement shifts an evidential burden to the adjudicator, who communicates dialogically with the applicant, giving meaning to the shared investigation of the case.³⁹ In sharp contrast with asylum seekers' general experience, which tells us that credibility is routinely used as a peremptory reason to refuse an otherwise strong claim,⁴⁰ Zahle saw the 'benefit of the doubt' in asylum cases as meaning a benefit in the communicative dimension of a case, with the adjudicator being required to display greater preparedness to trust what he terms 'surprising statements'.⁴¹ Zahle's approach considers the implications of the communicative nature of asylum, resulting in 'the benefit of the doubt' being given to 'generally credible' applicants. It is an approach which entails that the decision maker, if not entirely trusting, is at some fundamental level nonetheless prepared to accommodate statements that might, in the context of the host state, seem 'surprising'.

2.2 *RSD as a 'Special Case'*

The axiom of a 'listening state', when combined with a preparedness to accept or at least to take seriously 'surprising' statements, posits an adjudicative process which, as we have mentioned, is a far cry from the state processes which asylum seekers meet: these are more often described as harsh. Dauvergne (among others) has discussed the tension that exists between states' obligations to

38 UNHCR Handbook on Procedures (n29), paras 203–204.

39 Zahle (n 34), 19, 22–24.

40 Helen Muggeridge, 'Unsustainable: The Quality of Initial Decision-making in Women's Asylum Claims' (Asylumaid.org.uk, 1 February 2013) <<http://www.asylumaid.org.uk/wp-content/uploads/2013/02/unsustainableweb.pdf>> accessed 25 June 2017.

41 Gregor Noll, 'Introduction: Re-mapping Evidentiary Assessment in Asylum Procedures' in Noll (ed) (n 34) 7.

refugees under international law on the one hand and their desire to control borders on the other.⁴² These tensions arise because of the competing aims which states pursue at their borders. One set of tensions arises where a state's aim of resisting 'irregular migration'—which drives it to close its borders—competes with its aim of participating in global markets—which drives it to open them. Keeping in mind that participating in global markets involves also participating in international relations, involvement in the Refugee Convention is, at least, an expected consequence of participation in international relations. Even as nationalistic and xenophobic populist agendas challenge human rights movements,⁴³ we nonetheless also presume firstly that, at some level, states are aware that migrants contribute to host communities, and secondly that the threat of sanctions, which could follow if an individual state were to explicitly withdraw from the Refugee Convention, would prevent them from taking this step.⁴⁴ We therefore start from the position that states do not intend to withdraw from the Refugee Convention, even as another tension, created by austerity economics, influences the capacity of cash-strapped state institutions to maintain adequate standards of decision-making.⁴⁵ While we acknowledge those tensions, we also think that it makes sense for RSD processes to approach the task of identifying who qualifies for refugee status and who does not, as competently and holistically as possible. For that reason, we think it is important to recognize firstly that, amongst adjudicative processes, RSD is a 'special case' and secondly that, if we are to understand what kind of communication with the state is taking place in RSD, we first need to explore its nature. Exploring the nature of RSD also helps us to understand the kind of 'due process' protections that are appropriate for it, and where 'untranslatable' might belong in it.

42 Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 MLR 588.

43 Philip Alston, 'The Populist Challenge to Human Rights' (Lseacuk/humanRights, 1 December 2016) <http://www.lse.ac.uk/humanRights/events/2016/The-Populist-Challenge-to-Human-Rights.aspx#DynamicJumpMenuManager_1_Anchor_1> accessed 25 June 2017.

44 UN General Assembly New York Declaration for Refugees and Migrants UNGA Res 71/1 (19 September 2016) UN Doc A/RES/71/1.

45 The work of the European Asylum Support Office (EASO) gives an indication of the controversies surrounding asylum decisions.

3 What Kind of Process is RSD?

In the absence of secure routes to protection, asylum seekers generally arrive at state borders as ‘irregular migrants’,⁴⁶ and just as a growing literature documents the criminalization of that group,⁴⁷ we might presume that asylum procedures could be compared to criminal procedures. At the same time, the ‘due process’ procedural protections which are associated with criminal processes—Article 6 ECHR, the ‘right to silence’ and so on—do not apply in the same way to RSD. The institutional location of RSD within the administrative rather than the judicial area,⁴⁸ partly explains this. However, it does not fully account for it, since the reach of Article 6 ECHR extends to some parts of the administrative domain.⁴⁹ Also, asylum seekers benefit from certain procedural standards, which emphasize its adjudicative nature: these include the ECHR right to an effective remedy,⁵⁰ and, in the context of the EU’s Common European Asylum System (CEAS), they enjoy rights of an equivalent standard to Article 6 ECHR, including Article 47 Charter of Fundamental Rights, as well as more specific rights to information, to interpretation and to translation.⁵¹ Together, these standards capture something of the special nature of RSD.

Therefore, there are specifics about asylum that set it apart as a process or, as Noll would argue, as a ‘basket of procedures’. According to Noll, RSD is from the state’s perspective not only about protection but it must simultaneously also be about border control and domestic state protection. Accordingly, we should think of RSD not as one single procedure about refugee status, but

46 Margerite Zoetewij-Turhan and Sarah Progin-Theuerkauf, ‘CJEU Case C-368/16 PPU, X and X- Dashed hopes for a legal pathway to Europe’ <<http://europeanlawblog.eu/2017/03/10/cjeu-case-c-63816-ppu-x-and-x-dashed-hopes-for-a-legal-pathway-to-europe/>> accessed 25 March 2017.

47 Mary Bosworth and Sarah Turnbull, ‘Immigration Detention and the Expansion of Penal Power in the UK’ in Keramet Reiter and Alexa Koenig (eds), *Extreme Punishment* (Palgrave 2015).

48 *Maaouia v France* (2001) 33 EHRR 42.

49 *Feldbrugge v Netherlands* (1986) Series A no 99; *Salesi v Italy* (1993) Series A no 257.

50 European Convention on Human Rights, art 13.

51 Asylum Procedures Directive (Recast) Article 12(1)(a)12(1)(b), 12(1)(f), Article 15. The UK and Ireland opted out of the Asylum Procedures Directive (Recast) and are bound by the Asylum Procedures Directive, Article 13. As discussed in more detail below, the responsibility of the ‘competent’ interpreter to ensure ‘appropriate communication’ of an asylum claim can also be an aspect of ‘due process’.

rather as a 'basket' of procedures containing criminal (identity), administrative (border control) as well as civil (family) aspects.⁵² Noll's approach means that communication of the asylum narrative takes place in a process which requires the applicant to be credible not just about her protection needs, but also about immigration control (e.g. by claiming in the first safe country she arrives in, or having a credible reason for not doing so) and identity (by satisfying the decision maker regarding criminality and security). According to Noll's analysis, the credibility of an asylum seeker's flight narrative therefore goes to all of these elements, and not just refugee 'protection'. From this perspective, the asylum process—like confession—requires a general and exhaustive 'full disclosure' from the asylum seeker.⁵³ The interviewer makes wide-ranging and often topically inscrutable requests for information, in the course of determining what the claimant ultimately needs to be credible about.

Asylum seekers are already entitled to be informed, with information in their own language,⁵⁴ that they are entering a process. Noll's notion of the 'basket of procedures', and his discussion of the need to be credible about so many things at once, reveal why asylum seekers also need to know what *kind* of process they are entering. For instance, unlike in a criminal trial, where the burden of proof is on the state to establish guilt, in the communicative circumstances of asylum, the 'right to silence' would not help an asylum seeker whose task is to give 'holistic disclosure' to the state.

3.1 *Exclusion over Protection*

Noll's notion of a 'basket of procedures' also reminds us that identity (crime and security) and border control considerations feed continually into decisions on refugee status—often at the expense of refugee protection. National institutional settings—identifying asylum seekers as security risks, criminalizing those who travel on false documents and so on—build considerations of identity, crime and security into the framework within which individual decision makers work.⁵⁵ Scarcity of resources means that, just as the competing pressures on decision makers build, their status declines, making it more

52 Gregor Noll, 'Salvation by the Grace of State? Explaining Credibility Assessment in the Asylum Procedures' in Noll (ed) (n 34) 199.

53 Ibid.

54 Asylum Procedures Directive art 10 and Asylum Procedures Directive (Recast) art 12.

55 Ana Aliverti, *Crimes of Mobility: Criminal Law and the Regulation of Immigration* (Routledge 2013).

difficult for decisions to receive the ‘anxious scrutiny’ they require.⁵⁶ In this institutional context, reports of poor quality decision-making in asylum cases persist,⁵⁷ and the outcome of an asylum decision is put down to a lottery, a matter of chance.⁵⁸ Asylum has a legal, as well as an institutional context, of course, and so, just as criminal law has developed due process standards aiming to protect accused persons’ rights, we look to the refugee law context to explain what due process standards could be drawn down. As already noted, asylum seekers are called on to give an account of themselves to state officials in order to prevent removal/secure entry, and this means that the procedural protections they need are those associated with language, with communication and also, we would argue, with ‘untranslatable’ elements of testimony.

3.2 *The Interpreter’s Role and the ‘Zone of Uncertainty’*

The UNHCR *Handbook on Procedures* describes the services of a ‘competent interpreter’ as an ‘essential guarantee’ for applicants submitting their case to the authorities.⁵⁹ The interpreter—rather than the asylum seeker—is often, therefore, the principal person the decision maker listens to during an asylum interview, and the emphasis placed on credibility gives their role greater prominence: credibility relies on their words, and they can make things better or worse. They actively participate. Hearing a disjointed account, the interpreter can decide to depart from the applicant’s words, in order to optimize communication.⁶⁰ Empathetic approaches, including prompts, which put her at ease, can also benefit the applicant.⁶¹ Interpreters can also make things worse. There is some evidence that, even where ‘language rights’ (to interpretation

56 Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart Publishing 2011).

57 David Bolt, ‘An Inspection of Asylum Casework March–July 2015’ (Independent Chief Inspector of Borders, 1 February 2016) <<http://icinspector.independent.gov.uk/wp-content/uploads/2016/02/ICIBI-Asylum-Report-Feb-2016.pdf>> accessed 25 June 2017.

58 Jaya Ramji-Nogales, Andrew Schoenholtz and Philip Schrag, *Refugee Roulette* (New York University Press 2011).

59 UNHCR *Handbook on Procedures* (n 29) para 192.

60 Sanne Van der Kleij, ‘Interaction in Dutch asylum interviews: A corpus study of interpreter-mediated institutional discourse’ (Www.lotpublications.nl, 1 January 2015) <<http://www.lotpublications.nl/interaction-in-dutch-asylum-interviews-a-corpus-study-of-interpreter-mediated-institutional-discourse>> accessed 25 June 2017.

61 Moira Inghilleri, ‘Macro Social Theory, Linguistic Ethnography and Interpreting Research’ (2006) 0 *Linguistica Antverpiensia*, New Series—Themes in Translation Studies <<https://lans-tts.uantwerpen.be/index.php/LANS-TTS/article/view/152>> accessed 20 April 2017.

and translation) are acknowledged, those who do not speak the language of the decision maker/court are still disadvantaged.⁶² As a member of the same linguistic community as the asylum seeker, an interpreter might pass on details inappropriately.⁶³ An interpreter who makes only 'veiled' references to rape,⁶⁴ or whose disapproval of a young woman's sexual activity is tangible,⁶⁵ can effectively silence or incriminate the applicant. Interpreters are not neutral. As Inghilleri puts it:

Interpreters, as well as the norms generating their communicative practices, do not come from nowhere. They too are socially and politically situated, actively participating in the production and reproduction of macro-discursive practices.⁶⁶

The 'basket' of procedures which comprise RSD and which—as Noll says—require full disclosure or 'confession' of an asylum seeker is a feature of RSD in every case, regardless of whether multilingual communication is involved or not. But the 'basket of procedures' makes the role of the interpreter particularly difficult to negotiate. Additionally, in cases involving rape, interviewers may avoid asking 'awkward questions',⁶⁷ and claims risk becoming untranslatable. Interpreters may be aware of this. These factors make up what Inghilleri has described as the interpreting *habitus* in asylum; interpreters work within a 'zone of uncertainty', which has the potential to put the interpreter in almost as powerful a position as the lawyer and adjudicator, albeit that position is contingent on more powerful players—such as the decision maker/judge—who can interrupt or terminate the interpreted event.⁶⁸ 'Untranslatables' in the legal scene then must include accounts of rape, torture, and trauma which for

62 US research on asylum determination in Dallas, Texas indicated that, when other factors were accounted for, speaking English increased the cumulative odds of a grant of asylum by 267 per cent. See: Linda Camp Keith and Jennifer S Holmes, 'A Rare Examination of Typically Unobservable Factors in US Asylum Decisions' (2009) 22 *Journal of Refugee Studies* 224.

63 Helen Baillot, Sharon Cowan, and Vanessa Munro, 'Seen but not heard' (2009) 36 *Journal of Law and Society* 195.

64 *Ibid.*

65 UNHCR, 'Improving Asylum Procedures—Comparative Analysis and Recommendations for Law and Practice: Key Gender-Related Findings and Recommendations' (March 2010), available at <<http://www.refworld.org/docid/4be01ed82.html>> accessed 25 June 2017.

66 Inghilleri (n 61) 58.

67 Baillot et al (n 63).

68 Inghilleri (n 61) 67.

reasons of morality and propriety, often become euphemized or obscured in the course of their multilingual conveyance.

Adjudicative processes do not respond well to ‘zones of uncertainty’, preferring accuracy and transparency instead. One response to the power of the interpreter would be for the decision maker to ignore it—literally treating the interpreter as a ‘conduit’. A common institutional response to the power of the interpreter is for the decision-making body to attempt to control the ‘zone of uncertainty’ by issuing strict codes of conduct for interpreters, demanding accuracy, precision, neutrality and impartiality.⁶⁹ Several studies have criticized this approach. Rycroft describes the dilemmas facing an interpreter who, because of their experience, is aware of gaps in an applicant’s information, but risks being ‘told off’ if they are seen to assist the applicant by prompting.⁷⁰ Good and Gibb criticize the expectation on interpreters to provide ‘verbatim’ or ‘exact’ translation as ‘naïve’ and, like Inghilleri, they question the notion that interpretation can be neutral.⁷¹

The ‘zone of uncertainty’ which the multilingual context creates is clearly troublesome for RSD. Structurally exclusionary decision-making processes—i.e. those implicitly designed to quantitatively limit the number of successful petitions—are increasingly prevalent. Therefore, while Zahle’s ideas of an affirmative role for credibility and of trust emerging between asylum-seeker and decision maker might seem far-fetched in the context of the ‘culture of disbelief’ we are familiar with, for us, this is the point. A more expansive approach to the idea of ‘general credibility’ and ‘the benefit of the doubt’ would highlight the extent to which RSD currently focuses on exclusion rather than protection and therefore provide an important counterpoint to it, in the spirit of the Refugee Convention. Zahle’s approach gives communication a central place in the asylum process, rooted in the Refugee Convention and its associated instruments, but for us it does not engage sufficiently with the multilingual context in which the asylum interview takes place, and therefore it does not explore the links between translation, interpretation, (un)translatability and communication that we think the asylum process could benefit from. From UNHCR

69 Central Interpreters Unit UK visas and immigration, ‘Code of Conduct for the Home Office Registered Interpreters’ (www.gov.uk, 17 August 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454473/Code_of_conduct_17_08_15.pdf> accessed 25 June 2017.

70 Roxana Rycroft, ‘Communicative Barriers in the Asylum Account’ in Prakash Shah (ed), *The Challenge of Asylum to Legal Systems*, (London: Cavendish 2005) 245.

71 Robert Gibb and Anthony Good, ‘Interpretation, Translation and Intercultural Communication in Refugee Status Determination Procedures in the UK and France’ (2014) 14 *Language and Intercultural Communication* 385.

sources, we can discern that communication is central in RSD,⁷² and we can identify communication standards that aim to assist the applicant, such as the requirement that the services of a competent interpreter be provided, and the interpreter's responsibility to ensure 'appropriate communication'.⁷³ Rights to interpretation and translation are important standards, but on their own they are not adequate. They are given substantive content by the requirement on the 'competent' interpreter to ensure 'appropriate communication', and this is where 'untranslatability' comes into play. The idea of a right to untranslatability relates to interpretation and translation precisely because of the 'distortions' that inevitably accompany interpretation from a multilingual setting to the monolingual adjudicative process of asylum: our examples of 'pragmatic' and 'ideological' untranslatability (above) are scenarios in which the interpreter distorts the asylum seeker's claim. Circumstances including cultural gaps; stress levels; (sensitivity of) the topic of discussion; (lack of) special preparedness of the interpreter, use of remote connections,⁷⁴ combine in RSD in a way that is highly relevant to the question whether 'appropriate communication' with the applicant is being provided by an interpreter. Untranslatability is a term that could embrace the uncertainties and distortions that arise in these circumstances. Untranslatability is therefore a profound moral, pragmatic, semantic, and social axis, located within the 'zone of uncertainty' of refugee status determination. From an analytical point of view, it is a concept that aims to categorize and organize the 'distortions' that interpreted events involve, and to improve communication in RSD.

Conclusions

The sort of institutional designs that would have to take hold in order for RSD to recognize that a right to untranslatability exists would first involve identifying asylum as a communicative process, and secondly it would involve recognizing the 'zone of uncertainty' that accompanies the interpreter's role in that process. Identifying asylum as a communicative process would make

72 UNHCR Handbook on Procedures (n 29) para 192.

73 Asylum Procedures Directive (Recast) art 12(1)(a)12(1)(b), 12(1)(f), Article 15; Asylum Procedures Directive art 13; Home Office, 'Immigration Rules part 11: asylum' (HC395, 2 May 2017) Rule 339ND <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>> accessed 25 June 2017.

74 For an account of the distortions, see Gyulai and others (n 24).

it easier to acknowledge the distortions in communication that the ‘zone of uncertainty’ brings, and to recognize when ‘untranslatables’ arise. Such institutional designs would recognize that distortions in communication can explain apparent inconsistencies in an applicant’s account, and that when they occur, ‘the benefit of the (multilingual) doubt’ can still be given. The designs would categorize the ‘untranslatables’ (e.g. classificatory, pragmatic, ideological) that can arise and exacerbate a ‘zone of uncertainty’. These designs would recognize the kinds of due process protections—including a place for ‘untranslatability’—that applicants should receive in a communicative asylum process, without detracting from the rigorous approach and ‘anxious scrutiny’ required of decision makers in RSD: ‘poor losers’, who criticize the interpreter to attack an outcome they do not like, would still lose. Such designs could diminish uncertainty and improve the chances of reaching appropriate decisions. Categorizing the types of untranslatability that can arise could enable the decision maker to identify untranslatability when it occurs, thereby gaining confidence in their ability to deal with the uncertainties that accompany linguistic differences. While it would require them to make an active effort to communicate with every asylum seeker, such an approach would, we would argue, be more reliable than the decision maker trusting solely in the ability of the interpreter to communicate. Such an approach would acknowledge the central role played by communication in the asylum process, as well as the various ways in which linguistic differences can introduce uncertainty.

In open court, Associate US Supreme Court Justice Felix Frankfurter once rebuked an attorney who had dismissively claimed that some matter of evidence was merely a ‘matter of semantics’. Flustered by what he saw as a common and dismissive disregard for language, Frankfurter insisted: ‘All our work, our whole life is a matter of semantics, because words are the tools with which we work, the material out of which laws are made, out of which the Constitution was written. Everything depends on our understanding of them.’⁷⁵

The Justice had no reason to anticipate in the 1960s the ‘postmonolingual condition’⁷⁶ of 21st-century legal deliberation, where it is not only ‘words’ that constitute all our work and our life under the law, but indeed words in multiple languages at once. What Frankfurter envisioned in that spontaneous moment of argumentation was a principle by which language(s) would be allowed to matter in all of their dimensions—in fact-finding, testimony, and deliberation.

75 Kanin (n 1).

76 Yasemin Yildiz, *Beyond the Mother Tongue: The Postmonolingual Condition* (Fordham University Press 2011).

Fifty years on, it is perhaps time for a similar vision that recognizes the true multilingual implications of Frankfurter's intervention. Interpreters, claimants, lawyers, and judges would be persons participating in a multi-nodal, intersubjective process of listening that seeks what Philippe van Parijs has called 'linguistic justice for Europe and for the world'.⁷⁷

77 Philippe van Parijs, *Linguistic Justice for Europe and for the World* (OUP 2011).