The Right of Ethnic Minorities to Free Interpretation in Criminal Proceedings under International Law: With Special Reference to China

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The right to free interpretation in criminal proceedings is one of the important components of the right to fair trial in international law. It applies to everyone within the territory and jurisdiction of the State, including those ethnic minorities who speak and write different languages from the ethnic majority. The international human rights treaty bodies and regional human rights courts expanded the scope of this right and imposed more obligations upon the State parties through the general comments and jurisprudences. This right serves to the interest of the right to fair trial in criminal proceedings. Under Chinese law, there might be two or more languages used in judicial proceedings in ethnic autonomous areas. In the case that one specific language is designated as the language to prosecute and try a specific criminal case, the Chinese judicial organs must provide interpretation and translation to the participant who is not familiar with that specific language. Therefore the right to free interpretation is implied in Chinese law and preserves the constitutional principle of equality to all ethnicities and the right to fair trial. The problem, however, is that such a right is not well implemented in Chinese judicial practice. Several practices are inconsistent with the minimum standards developed by the jurisprudence of the international human rights treaty bodies. It is suggested that China establish the regulations and judicial interpretations that comply with international minimum standards, and provide a robust constitutional review

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mechanism or national human rights institution to remedy the victims for violations of this right.

Keywords
Ethnic Minorities, Right to Free Interpretation, Fair Trial, ICCPR, ECHR, Chinese Criminal Procedure

I. Introduction

The People's Republic of China (hereinafter, China) is a country with 56 ethnic groups. The largest ethnic group is the Han ethnicity, while the other 55 ethnic groups are customarily referred to as 'ethnic minorities.' According to national census conducted in 2000, the population of mainland China is 1,265,840,000 of which 1,159,400 are ethnic Han (approximately 92 percent) and 106,430,000 are ethnic minorities (approximately 8 percent).[1] The human rights of Chinese ethnic minorities have been a topic of vast discussion in the fields of international relations, international law and the Chinese studies. Indeed, this topic not only relates to the protection of human rights of ethnic minorities at the international and domestic level, but is also a complicated game of international politics. Nevertheless, this paper will be limited to the legal aspects of the human rights of Chinese ethnic minorities.

There are several reasons why, among all of the human rights issues under international law, the right of Chinese ethnic minorities to free interpretation in the criminal proceedings is an important issue. First, it is estimated that the 55 Chinese ethnic minorities use about 120 languages, while the Han ethnicity, as the ethnic majority in China, uses Chinese. Only the Hui and Manchu ethnic minorities use Chinese. All other 53 ethnic minorities have their own languages.[2] Furthermore, the statistics of the State Ethnic Affairs Commission shows that more than 60 millions of the

1 *Reports submitted by States Parties under Article 9 of the Convention*, presented by the People's Republic of China, para.3. *See* U.N. Doc. CERD/C/CHN/10-13 (Mar. 24, 2009).

2 Li Jinfang, *Zhongguo Shaoshu Minzu you Shiyong he Fazhan Ziji de Yuyan Wenzi de Quanli* (The Chinese Ethnic Minorities Have the Right to Use and Develop Their Languages and Characters), 5 RENQUAN (HUMAN RIGHTS) 30 (2005); *See* also Yang Jianwu, *Zhongguo Zhengfu de Yuyan Zhengce he Zhongguo Shaoshu Minzu Renquan Baohu* (Language Policy of the Chinese Government and Human Rights Protection of the Ethnic Minorities in China), 1 BIJIE XUEYUAN XUEBAO (JOURNAL OF BIJIE UNIVERSITY) 77 (2006) ("The Chinese academics have different views about the number of the languages which are being used by the Chinese ethnic minorities. Some say that the number is about 120, while others say it is about 100").

ethnic minorities are using their native languages.[3] Therefore, the language issue of the ethnic minorities is a sensitive, complex and practical one in China.

Second, the right of Chinese ethnic minorities to language has been an area of frequent concern by the international community. For example, in the first review of China under the Universal Periodic Review of the UN Human Rights Council on February 9, 2009, several States were concerned about the language-related rights of the Chinese ethnic minorities.[4] Additionally, in the concluding observations on China's tenth to thirteenth periodic reports on August 28, 2009, the Committee on the Elimination of Racial Discrimination also expressed its concern on the language rights of Chinese ethnic minorities.[5]

Third, the Chinese government has committed to the international community that it is making preparations for the eventual ratification of the International Covenant of Civil and Political Rights ("ICCPR").[6] It shall be noted that (as will be demonstrated below) the right to free interpretation in criminal proceedings is one important component of the right to fair trial guaranteed by the ICCPR. Therefore, the examination of whether Chinese law and practice relating to this right is consistent with the ICCPR shall not be ignored on way to its eventual ratification.

Last, it seems that the right to free interpretation in criminal proceedings in China has not been examined thoroughly enough from the perspective of international law. It is necessary to look at this right from the perspective of international law, in particular the regime of the ICCPR, because it has been claimed that the right to fair trial has been violated by the Chinese government in the criminal trials of the suspects charged with violent riots in Lhasa on March 14, 2008, and Urumqi on July 5, 2009.[7]

This paper will examine the minimum standards of international human rights law relating to the language issue of ethnic minorities in criminal proceedings. The analysis will mainly focus on the ICCPR, which is the human rights treaty that the Chinese government has promised to ratify. Additionally, the jurisprudence of the regional human rights mechanisms will be examined, in particular the European Court of

3 *The Statement of the Central People's Government of the People's Republic of China, available at* http://202.123.110.5/zxft/ft181/content_1374165.htm (last visited on July 31, 2010).

4 E.g., United Kingdom, Czech Republic and Japan. *See* U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review: China*, U.N. Doc. A/HRC/11/25* (Oct. 5, 2009).

5 U.N. CERD, *Concluding Observations of the Tenth to Thirteenth Periodic Reports of the People's Republic of China*, para. 22 (right to languages relating to bilingual education for ethnic minorites). *See* U.N. Doc. CERD, CERD/C/CHN/CO/10-13 (Aug. 28, 2009).

6 999 U.N.T.S. 171. The PRC signed the ICCPR on October 5, 1998, but has not ratified it yet.

7 Amnesty International, *China: Briefing for the UN Committee on the Elimination of Racial Discrimination*, 75th Sess., Aug. 2009, Index: ASA 17/024/2009, June 2009, at 8-9, *available at* http://www.amnestyusa.org/uploads/asa170242009zh.pdf (last visited on July 31, 2010).

Human Rights ("ECtHR"). This paper will then present the Chinese laws relating to the right of ethnic minorities to free interpretation in criminal proceedings, including the Chinese Constitution, relevant statutory laws, and judicial interpretations. Finally, this paper will analyze Chinese law *vis-à -vis* international law, but highlighting its positive and negative aspects, and will be followed by some concluding remarks.

II. International Minimum Standards on Right of Ethnic Minorities to Free Interpretation in Criminal Proceedings

A. Provisions in International and Regional Human Rights Conventions

There is no specific provision in any international or regional human rights conventions governing the rights of ethnic minorities to free interpretation in criminal proceedings. However, some laws are relevant to the discussion. In this regard, Article 14 (3), paragraph (f) of the ICCPR is particularly important, which provides that:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court[.]

This provision corresponds literally to Article 6 (3), paragraph (e) of the European Convention on Human Rights ("ECHR").[8] It also corresponds generally to Article 8 (2), paragraph (a) of the American Convention on Human Rights.[9] However, it seems that the provision of American Convention on Human Rights is more protective than that of the ICCPR and the ECHR because the American Convention on Human Rights specifically includes reference to 'translator' and "the language of the tribunal" in its provisions, and because of the expression "if he does not understand or does not speak" the American Convention on Human Rights is more selective. In contrast the wording found in the ICCPR and the ECHR, "if he cannot understand or speak," might be interpreted as cumulative. Furthermore, Article 14 (3), paragraph (f) of the ICCPR corresponds literally to Article 40 (2), paragraph (b) (vii) of the Convention on the Rights of the Child[10] and Article 18 (3), paragraph (f) of the Convention on the Protection of the

8 213 U.N.T.S. 222. (Sept. 3, 1953).

9 1144 U.N.T.S. 123 (July 18, 1978).

10 U.N. Doc. A/44/49 (1989). The PRC signed the CRC on August 29, 1990, and ratified it on March 2, 1992 with a reservation on Article 6.

Rights of All Migrant Workers and Members of Their Families.[11]

B. General Comments and Jurisprudence

1. Whether the Right to Free Interpretation in Court Hearing Applies to Linguistic Minorities?

Article 14 (3), paragraph (f) of the ICCPR grants the right to free interpretation to 'everyone.' This indicates that the right is not limited to nationality, and that it "applie[s] to aliens as well as nationals."[12] In other words, citizens and aliens within the territory and under the jurisdiction of a particular State party shall be entitled to this right. Therefore, this right is surely applicable to any person of linguistic minorities within a particular State party. This point is important because, as will be demonstrated below, the relevant jurisprudence on this right is mainly drawn from the individual complaints or cases in which the authors or plaintiffs are actually aliens, rather than linguistic minorities.

2. Whether Linguistic Minorities Have the Right to Use or Speak Their Native Languages in Court Hearing?

Article 14 (3), paragraph (f) of the ICCPR merely states that: "[I]f a person cannot understand or speak the language used in court, he or she shall have the right to free interpretation." In other words, this provision does not provide a right to express oneself in the language of one's choice. If members of a linguistic minority are sufficiently proficient in the court's official language, they have no such a right. This is because Article 14 of the ICCPR "guarantees procedural equality but cannot be interpreted as guaranteeing equality of results or absence of error on the part of the competent tribunal," and the right to free interpretation in criminal proceedings did not mainly establish the rights of ethnic minorities to use a particular language, but to guarantee equality between the prosecution and the accused in criminal proceeding.[13] The *travaux préparatoires* of the ICCPR also supports this reading of the provision. A proposal made by the Soviet delegate that the accused should be permitted to defend himself in court in his own language was lost.[14] The jurisprudence of the Human Rights Committee ("HRC") has been consistently upholding the above reading. In Guesdon v. France, the HRC held that:

[11] U.N. Doc. A/45/49 (1990). The PRC has not yet signed or acceded to the CMW.

[12] HRC, General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by Article14, paragraph13 of the ICCPR (Apr. 13, 1984).

[13] HRC, B. d. B. v. The Netherlands, Communication No. 273/1988, para. 6.4 (Mar. 30, 1989).

[14] David Harris, *The Right to a Fair Trial in Criminal Proceedings as a Human Right*, 16 INT'L & COMP. L. Q. 368 (1967).

> The provision for the use of one official court language by States parties to the Covenant does not, in the Committee's opinion, violate Article 14. Nor does the requirement of a fair hearing mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language. Only if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language, must the services of an interpreter be made available.[15]

In Z.P. v. Canada case, the HRC reaffirmed that the requirement of a fair hearing does not obligate State parties to make the services of an interpreter available *ex officio* or upon application to a person whose mother tongue differs from the official court language, if the person is capable of expressing himself adequately in the official language.[16]

Furthermore, the HRC also expressed this understanding in its general comment. In General Comment No. 23, the HRC clearly stated that: "Article 14.3 (f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings."[17]

3. Whether and to What Extent Must Written Documents be Translated in Court?

Article 14 (3), paragraph (f) of the ICCPR does not provide specific guidance as to the extent to which interpretation shall be provided to the accused. It simply states that the free assistance of an interpreter shall be provided. Literally speaking, 'interpreter' only refers to a person who interprets spoken words, whereas a translator translates written documents. Therefore, if a literal approach of treaty interpretation was adopted, then surely the right of the accused in Article 14 (3), paragraph (f) would be limited to oral statements made during a criminal trial, and the accused would have no right to free assistance of a translator for any written documents, such as written documentary evidence submitted to the court.

15 HRC, Guesdon v. France, Communication No.219/1986, para. 10.2 (July 25, 1990). *See also* Cadoret and Le Bihan v. France, Communication No.221/1987 and 323/1988, para. 5.6 (Apr. 11, 1991); Barzhig v. France, Communication No.327/1988, para. 5.5 (Apr. 11, 1991); C.L.D. v. France, Communication No. 439/1990, para. 4.2 (Nov. 8, 1991); Z.P. v. Canada, Communication No. 341/1988, para. 5.3 (Apr. 11, 1991); C.E.A. v. Finland, Communication No. 316/1988, para. 6 (July 10, 1991) 2; Domukovsky et al. v. Georgia, Communication No. 623/1995, 624/1995, 626/1995 and 627/1995, para. 18.7 (Apr. 6, 1998).

16 HRC, Z.P. v. Canada, Communication No. 341/1988, para. 5.3 (Apr. 11, 1991). *See also* Shukuru Juma v. Australia, Communication No. 984/2001, para. 7.3 (July 28, 2003).

17 HRC, *General Comment No. 23: The Rights of Minorities* (art. 27), para. 5.3 (Apr. 8, 1994).

Nevertheless, Article 14 (3), paragraph (b) of the ICCPR further protects the right of the accused to have adequate time and facilities to prepare his defence. The question whether the accused has the right to access all documents used in the preparation of the trial against him in a language he can understand was examined in the case of Harward v. Norway.[18] In this case, the HRC denied the existence of such a right of the accused under Article 14. The HRC held that, although it is important for the guarantee of fair trial that the defence has the opportunity to familiarize itself with the documentary evidence against an accused, "this does not entail that an accused who does not understand the language used in court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel."[19] On the basis of the particular circumstances of this case, in the eyes of the HRC, if the relevant documents in a criminal investigation have been available to the defence counsel of his own choice, who had access to the entire file, and the counsel has the assistance of an interpreter in his meetings with the accused, the State party does not assume the obligation to translate all relevant documents to the accused. Thus, according to the HRC, the failure of the State party to provide written translations of all the documents used in the preparation of the trial does not violate the right of the accused to a fair trial.

The ECtHR had previously clarified this point in its jurisprudence at least fifteen years prior to the HRC's decision in Harward v. Norway. In Luedicke, Belkacem and Koç v. Germany, the ECtHR introduced the contextual interpretation of Article 6 (3), paragraph (e) of the ECHR, instead of the literal approach, holding that "construed in the context of the right to a fair trial guaranteed by Article 6, paragraph 3 (e) (art. 6-3-e) signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial."[20]

In Kamasinski v. Austria, the ECtHR also held that "the right, stated in Article 6, paragraph 3 (e) (art. 6-3-e), to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material."[21] However, the ECtHR further held in this case that "paragraph 3 (e) (art. 6-3-e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure," and that "the interpretation assistance provided should be such as to enable

18 HRC, Harward v. Norway, Communication No. 451/1991 (July 15, 1994).

19 *Id.* para. 9.5.

20 ECtHR, Luedicke, Belkacem and Koç v. Germany, Application No. 6210/73; 6877/75; 7132/75, Judgment, para. 48 (Nov. 28, 1978); Hermi v. Italy, Application No. 18114/02, Judgment, para.70 (Oct. 18, 2006).

21 ECtHR, Kamasinski v. Austria, Application No. 9783/82, Judgment, para. 74 (Dec. 19, 1989).

the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events."[22]

In Hermi v. Italy, the ECtHR, in addition to reiterating the above point, further reaffirmed the elements which must be taken into consideration of the extent of the translation. The ECtHR held that "in the context of application of paragraph 3 (e), the issue of the defendant's linguistic knowledge is vital and that it must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court."[23]

4. Whether the Interpretation and Translation Shall be Extended beyond Hearings in Court?

It is evident in Article 14 (3), paragraph (f) of the ICCPR that the right of the accused to free assistance of an interpreter only applies to court hearings. Therefore, literally speaking, the accused would not claim such a right in the pre-trial stage. Nevertheless, the HRC confirmed that the accused does have the right to free assistance of an interpreter and a translator in the pre-trial under the ICCPR. This conclusion does not directly draw from Article 14 (3), paragraph (f) but from Article 14 (3), paragraph (a) as well as Article 14 (1).

Article 14 (3), paragraph (a) of the ICCPR provides that "in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him." Under this provision, the authority must translate the indictment, and perhaps the arrest warrant or corresponding oral declaration, into a language the accused understands.[24] In Rozik Ashurov v. Tajikistan case, the accused requested the Tajik judge presiding over the second trial to instruct the investigative bodies to translate the indictment into Russian, as neither the accused, nor one of the two counsels for Ashurov mastered Tajik. However, it was denied without reason. The HRC noted that the Tajik government did not contest this fact, and therefore concluded that, paragraph (a), Article 14 (3) of the ICCPR has been violated by the Tajik government.[25]

In addition, Article 14 (1) provides that: "[A]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public

22 *Id.*

23 ECtHR, Hermi v. Italy, Application No. 18114/02, para. 71 (Oct. 18, 2006).

24 MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY, 332 (2nd ed. 2005).

25 HRC, Rozik Ashurov v. Tajikistan, Communication No. 1348/2005, para. 6.6 (Mar. 20, 2007).

hearing by a competent, independent and impartial tribunal established by law." In Nallaratnam Singarasa v. Sri Lanka, the confession of the accused took place in the sole presence of the two investigating officers – the Assistant Superintendent of Police and the Police Constable: the latter typed the statement and provided interpretation between Tamil and Sinhalese. The accused then claimed that his right under Article 14 (3), paragraph (f) had been violated due to the absence of an external interpreter during his alleged confession. In such circumstances, the HRC found no violation of Article 14 (3), paragraph (f) because that paragraph grants the right to an interpreter to the author during the court hearing only. However, the HRC concluded that the author was denied a fair trial in accordance with Article 14 (1) of the ICCPR by solely relying on a confession obtained in such circumstances.[26]

The jurisprudence of the HRC in this individual complaint is important in that it clarifies that the right to free interpretation in Article 14 (3), paragraph (f) is only limited to court hearing, and does not extend to criminal investigation made by the police. Nevertheless, this jurisprudence indicates that the right to free interpretation must still be guaranteed by the investigating police, and that the interpreter must be a third part, even if the investigating police are competent to interpret for the suspect, because this is required by the more broad right to fair trial under Article 14 (1).

In contrast with the jurisprudence of the HRC, the ECtHR seems to take a more active and free attitude to this issue. In Kamasinski v. Austria, the ECtHR held that "the right, stated in Article 6, paragraph 3 (e) (art. 6-3-e), to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings."[27] In Cuscani v. The United Kingdom, the ECtHR further held that the obligation to provide free interpretation to the accused extends to the sentencing stage of criminal proceedings.[28]

5. To What Extent Does the State Party Assume the Obligation to Provide a Free Interpreter to the Accused?

The HRC has not elaborated the extent to which a state Party must provide a free interpreter. Nevertheless, the ECtHR has addressed this issue in some cases. In Kamasinski v. Austria, the ECtHR held that:

> in view of the need for the right guaranteed by paragraph 3 (e) (art. 6-3-e) to be practical and effective, the obligation of the competent authorities is not limited to the

[26] HRC, Nallaratnam Singarasa v. Sri Lanka, Communication No. 1033/2001, para. 7.2. (July 21 2004).

[27] ECtHR, Kamasinski v. Austria, Application No. 9783/82, Judgment, para. 74 (Dec. 19, 1989).

[28] ECtHR, Cuscani v. U.K., No. 32771/96, para. 38 (Sept. 24, 2002).

> appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided.[29]

Furthermore, the burden of proof as to whether the accused understands the language used in judicial proceedings rests with the State party. In Brozicek v. Italy, the applicant complained that he had difficulty in understanding the contents of the communication for linguistic reasons, and requested the tribunal to use his native language or one of the official languages of the United Nations. The ECtHR held that "the Italian judicial authorities should have taken steps to comply with it so as to ensure observance of the requirements of Article 6, paragraph 3 (a) (art. 6-3-a), unless they were in a position to establish that the applicant in fact had sufficient knowledge of Italian to understand from the notification the purport of the letter notifying him of the charges brought against him."[30]

In Cuscani v. The United Kingdom, the ECtHR held that the verification of the applicant's need for interpretation facilities was a matter for the judge to determine in consultation with the applicant, especially since he had been alerted to counsel's own difficulties in communicating with the applicant, and that the onus was on the judge to reassure himself that the absence of an interpreter at the hearing on January 26, 1996 would not prejudice the applicant's full involvement in a matter of crucial importance for him.[31] The ECtHR further held that the ultimate guardian of the fairness of the proceedings was the trial judge who had been clearly apprised of the real difficulties which the absence of interpretation might create for the applicant.[32]

6. What are the Required Qualifications of an Interpreter and a Translator?

Neither Article 14 (3), paragraph (f) of the ICCPR, nor Article 6 (e), paragraph (e) of the ECHR explicitly provides what the qualifications of an interpreter shall be, since both paragraphs simply refer to 'an interpreter.' Nevertheless, both the HRC and the ECtHR have developed the relevant jurisprudence in case law.

In Griffin v. Spain, the accused claimed that he did not receive fair trial because of the incompetence of the court interpreter and the judge's failure to intervene in this respect. He argued that he was convicted due to a poor translation of a question, which led to a difference between his statement made during trial and his original statement to the magistrate. The HRC noted, however, that the accused "did not complain about the

29 *Supra* note 27.

30 ECtHR, Brozicek v. Italy, Application No. 10964/84, para. 41 (Dec. 19, 1989).

31 *Supra* note 28, para. 38.

32 *Id.* para. 39.

competence of the court interpreter to the judge, although he could have done so."[33] In the circumstances, the HRC found no violation of Article 14 (3), paragraph (f) of the ICCPR. The jurisprudence of the HRC in this individual complaint indicates that, in order to find the violation in terms of the competence of the court interpreter, the accused must lodge the complaint about the competence to the judge. Otherwise, even if the court interpreter is incompetent, there would be no violation. Therefore, the jurisprudence implicitly imposes an affirmative obligation on the accused to raise the issue of the interpreter's competence.

In Kamasinski v. Austria, interpretation was provided by another prisoner to the accused during interrogation by police officers, even though the prisoner had only a limited knowledge of English. During another interrogation, the interpreter was not a registered interpreter, but someone who regularly assisted police during interviews when no registered interpreter was available. The accused contended that the Austrian law providing for court-certification of interpreters was excessively vague and did not prescribe a reasonable standard of proficiency ensuring effective assistance of an interpreter. The ECtHR held that it was not called on to adjudicate the Austrian system of registered interpreters as such, but solely on the issue whether the interpretation in fact received by the accused satisfied the requirements of Article 6.[34] More specifically, the ECtHR found no indication in the evidence before it that the requirements of Article 6 (3), paragraph (e) of the ECHR were not met during the pre-trial questioning of the accused by the police and the investigating judges, since "an interpreter was present on each occasion,"[35] and since "it does not appear that [the accused] was unable to comprehend the questions put to him or to make himself understood in his replies."[36] The ECtHR held that, despite the lack of written translations into English, it was not satisfied that "the interpretation as provided led to results compromising his entitlement to a fair trial or his ability to defend himself."[37] This indicates that the ECtHR concerns the quality of the translation itself, rather than the qualification of an interpreter. In other words, so long as the interpretation does not affect the right to a fair trial or the ability to defend himself, the interpretation is acceptable under paragraph (e), Article 6 (3) of the ECHR.

The accused further alleged inadequate interpretation of oral statements and complained of the lack of written translation of oral statements at the different stages of the procedure. The ECtHR noted that the interpretation at the trial was not

33 HRC, Griffin v. Spain, Communication No. 493/1992, para. 9.5 (Apr. 4, 1995).

34 *Supra* note 27, para. 73.

35 *Id.* para. 77.

36 *Id.*

37 *Id.*

simultaneous but consecutive and in summary; in particular, questions put to the witnesses were not interpreted. Nevertheless, the ECtHR held that "this in itself does not suffice to establish a violation of sub-paragraphs (d) or (e) of Article 6, paragraph 3 (art. 6-3-d, art. 6-3-e), but is one factor along with others to be considered."[38] The ECtHR also noted that the trial record showed the attendance of a registered interpreter (without, however, specifying the extent of the interpretation provided) and that the interpretations summarized in some detail the substance of the evidence provided during trial. Additionally, the interpretations included declarations made by the accused, which did not include any objections by the accused or his lawyer regarding the quality or scope of the interpretations. Therefore, the ECtHR did not "find it substantiated on the evidence taken as a whole that [the accused] was unable because of deficient interpretation either to understand the evidence being given against him or to have witnesses examined or cross-examined on his behalf."[39] This implies that if the accused lodges objection regarding the quality or scope of the interpretation on time, it is possible for the ECtHR to find the breach of Article 6 (3), paragraph (e) of the ECHR.

In Sahin Ucak v. The United Kingdom, the ECtHR considers that it is not appropriate under Article 6 (3), paragraph (e) to lay down any detailed conditions concerning the method by which interpreters may be provided to assist accused persons. An interpreter is not part of the court or tribunal within the meaning of Article 6 (1), and there is no formal requirement of independence or impartiality as such. The services of the interpreter must provide the accused with effective assistance in conducting his defence and the interpreter's conduct must not be of such a nature as to impinge on the fairness of the proceedings.[40]

C. Concluding Remarks

The above survey of the general comments and jurisprudence of the HRC as well as the jurisprudence of the ECtHR in relation to the right to free interpretation in criminal proceedings reveals that, this right applies to everyone, including linguistic minorities, aliens and stateless persons, and that there is no separate right to use or speak the language of their own choice during criminal proceedings. In other words, the State party does not assume the obligation to use the language spoken or understood by the accused during criminal proceedings. The State party's obligation is only to provide free interpretation to the accused, provided that the accused cannot understand the language used during the proceedings. Under the regimes of the ICCPR and the ECHR,

38 *Id.* para. 83.

39 *Id.*

40 ECtHR, Sahin Ucak v. U.K., No. 44234/98, Final Decision (Jan. 24, 2002).

the right to free interpretation serves the interest of fair criminal trials, rather than the interest of non-discrimination against accused who speaks the minority language. The relevant jurisprudence of the HRC and the ECtHR further reveals that the right to free interpretation does not only extend to the written documents of the court hearing but also to the proceedings prior to and post the trial. This does not mean that all the written documents or communications in every stage of criminal proceeding must be translated or interpreted. The fundamental concern is whether the interpretation is sufficient for the accused to be aware in sufficient detail of the nature and cause of accusations leveled against him, thus not preventing the accused from defending himself or receiving a fair trial. In proving the capacity of the accused to speak or understand the court language, the State party assumes the burden of proof, and it is for the trial judge of the domestic court to determine whether free interpretation shall be provided. Finally, the jurisprudence of the HRC and the ECtHR demonstrates that it is not appropriate to provide detailed qualification or methods for the interpreter or translator. The HRC and the ECtHR do not stress the qualifications and methods of the interpreter or translator, but emphasize the quality of the interpretation or translation provided to the accused. Indeed, "in order that the right may be of real value, the interpreter must, of course, be a genuinely qualified linguist."[41] In any case, the provision of an interpreter or translator shall not affect the right to a fair trial or the ability of an accused to defend himself in the ICCPR or the ECHR.

III. Examination of Chinese Law under the International Minimum Standard

A. The Language or Languages Used in the Chinese Judicial Organs

Unlike the laws of many countries, Chinese law does not provide any specific language used in the Chinese judicial organs,[42] though this is one of the fundamental considerations in the Chinese Constitution. Article 134 of the Constitution provides that "the people's courts and people's procuratorates should provide translation for any participant to the proceedings who is not familiar with the spoken or written languages

41 *Supra* note 14, at 369.

42 In the PRC, the 'judicial organs' often refer to the state organs which participate in the criminal proceeding, including the public security organs, the people's procuratorates, and the people's courts in the ordinary crimes. In the proceedings on crimes against state security, the state security organs are in charge of the investigation and enforcement of arrest, rather than the public security organs.

commonly used in the locality."[43] It further provides that:

> In an area where people of an ethnic minority live in a concentrated community or where a number of ethnicities live together, court hearings should be conducted in the language or languages commonly used in the locality; indictments, judgments, notices and other documents should be written, according to actual needs, in the language or languages commonly used in the locality.[44]

In order to implement the Constitution, many statutes adopted by the National People's Congress ("NPC") or its Standing Committee ("NPCSC") follow the provision of Article 134 of the Constitution. These include the Act on the Organization of the People's Courts, the Act on Ethnic Regional Autonomy ("AERA"), and the Criminal Proceedings Code ("CPC").

Article 6 of the Act on the Organization of the People's Court provides that:

> Citizens of all ethnicities shall have the right to use their native spoken and written languages in proceedings. The people's courts shall provide translation for any party to the proceedings who is not familiar with the spoken or written languages commonly used in the locality.
>
> In an area where people of an ethnic minority live in concentrated communities or where a number of ethnic minorities live together, the people's courts shall conduct hearings in the languages commonly used in the locality and issue judgments, notices and other documents in the languages commonly used in the locality.[45]

Similarly, Article 47 of the AERA provides that:

> In the prosecution and trial of cases, the people's courts and people's procuratorates in ethnic autonomous areas shall use the language commonly used in the locality, and they shall rationally be manned with persons who are familiar with the spoken

43 The Constitution was adopted at the 5th Session of the 5th NPC on Dec. 4, 1982, and subsequently amended on Apr. 12, 1988, Mar. 29, 1993, Mar. 15, 1999 and Mar. 14, 2004, respectively, *available at* http://www.npc.gov.cn/englishnpc/Law/2008-01/24/content 1381976.htm (Eng. trans.) (last visited on July 31, 2010).

44 *Id.*

45 The Act on the Organization of the People's Courts was adopted at the 2nd Session of the 5th NPC on July 1, 1979, and subsequently amended at the 2nd Session of the Standing Committee of the 6th NPC on Sept. 2, 1983 and at the 24th Session of the Standing Committee of the 10th NPC on Oct. 31, 2006, respectively. Please note that there is no corresponding article in the Act on the Organization of the People's Procuratorates (adopted at the 2nd Session of the 5th NPC on July 1, 1979, and amended at the 2nd Session of the Standing Committee of the 6th NPC on Sept. 2, 1983). The author believes this was an oversight and does not indicate that the right is not guaranteed by the people's procuratorates.

> and written languages of ethnic minorities commonly used in the locality.
>
> The people's courts and people's procuratorates shall provide translation and interpretation for any participant to the proceedings who is not familiar with the spoken or written languages commonly used in the locality. Legal documents shall be prepared, in the light of actual needs, in the language or languages commonly used in the locality. The right of citizens of the various nationalities to use the spoken and written languages of their own nationalities in court proceedings shall be safeguarded.[46]

More importantly, Article 9 of the CPC provides that:

> Citizens of all ethnicities shall have the right to use their native spoken and written languages in proceedings. The people's courts, the people's procuratorates and the public security organs shall provide translations for any participant to the proceedings who is not familiar with the spoken or written language commonly used in the locality.
>
> Where people of an ethnic minority live in a concentrated community or where a number of ethnicities live together in one area, court hearings shall be conducted in the spoken language commonly used in the locality, and judgments, notices and other documents shall be issued in the written language commonly used in the locality.[47]

Furthermore, in order to implement Article 9 of the CPC, the Ministry of Public Security promulgated Order No. 35 titled the Provisions on the Procedures of Dealing with Criminal Cases by the Organs of Public Security on May 14, 1998. Article 11 of the Order No. 35 provides that:

> The public security organs shall provide translations for any participant to the proceedings who is not familiar with the spoken or written language commonly used in the locality when they are dealing with criminal cases.
>
> Where people of an ethnic minority live in a concentrated community or where a number of ethnicities live together in one area, court hearings shall be conducted in the spoken language commonly used in the locality, and the publicized proceeding

[46] The Act on Regional National Autonomy was adopted at the 2nd Session of the 6th NPC on May 31, 1984, and amended at the 20th Session of the Standing Committee of the 9th NPC on Feb. 28, 2001, *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1383908.htm (Eng. trans.) (last visited on July 31, 2010).

[47] The Criminal Proceedings Code was adopted at the 2nd Session of the 5th NPC on July 1, 1979, and modified at the 4th Session of the 8th NPC on Mar. 17, 1996, *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384067.htm (Eng. trans.) (last visited on July 31, 2010).

documents shall be issued in the written language commonly used in the locality.[48]

It is thus evident from the above almost similar provisions that the "language commonly used in the locality" is the language used in the Chinese judicial organs, including the people's courts, the people's procuratorates, and the public security organs. It does not only refer to the spoken language, but also to the written language.

The problem is how to define the "language commonly used in the locality." It shall be noted that no Chinese statute provides a definition of the "language commonly used in the locality." The Act on Language Commonly Used in the Country ("ALCUC")[49] only provides the definition of the "language commonly used in the country." It is silent on the definition of the "language commonly used in the locality." In accordance with Article 2 of the ALCUC, *putonghua* and standardized Chinese characters are the "language commonly used in the country." Article 8 of the ALCUC stipulates that the spoken and written languages of ethnic minorities shall be used in accordance with the relevant provisions of the Constitution, the AERA and other laws. This indicates that the ALCUC does not provide assistance to the interpretation of "language commonly used in the locality."

Thus, the meaning of the "language commonly used in the locality" shall be found in the local regulations adopted by the people's congresses of the localities, including the provinces, municipalities directly under the central government, and the autonomous regions, etc. In other words, Chinese judicial organs use the local languages at various local levels. This point is unique to Chinese law and differs from the laws of many other States previously examined by the HRC and ECtHR, where there is usually one official language of the judicial system.

If one carefully reads Article 9 of the CPC, one will find that it consists of two paragraphs. The first paragraph stipulates that the judicial organs shall provide translation to the participant in the proceedings who is not familiar with the language commonly used in the locality. It is commonly understood that this paragraph applies to the whole territory and citizens.[50] The second paragraph stipulates that where people of an ethnic minority live in a concentrated community or where a number of ethnicities live together in one area, the language used in the judicial organs of such an area shall

48 Translated by the author. The Chinese version is *available at* http://www.mps.gov.cn/n16/n1282/n3493/n3823/n443822/457091.html (last visited on July 31, 2010).

49 Adopted at the 18th Session of the Standing Committee of the 9th NPC on Oct. 31, 2000, *available at* http://www.moe.edu.cn/edoas/en/level2.jsp?tablename=1242700726117393 (Eng. trans.) (last visited on July 31, 2010).

50 Wu Shimin, *Zunzhong Shaoshu Minzu you Shiyong ben Minzu Yuyan Wenzi de Quanli* (The Right of Ethnic Minorities to Use Their Native Languages Shall be Respected), 5 FAXUE (LEGAL SCIENCE MONTHLY) 20 (1985). Due to the constitutional arrangement of "One Country, Two Systems," the CPC does not apply to Hong Kong Special Administrative Region, Macau Special Administrative Region, and Taiwan region.

be the language commonly used in the locality. In other words, this paragraph only applies to the areas where people of an ethnic minority live in a concentrated community or where a number of ethnicities live together in one area. Before delving into the first paragraph, the second paragraph should be analyzed because it is lex specialis to the first paragraph.

1. Language or Languages Used in the Judicial Organs of Ethnic Regional Autonomy

In accordance with Article 4 of the Constitution, ethnic regional autonomy shall be established in areas where people of an ethnic minority live in a concentrated community, and in these areas ethnic autonomous areas are established to exercise the power of autonomy. Article 2 of the AERA defines "ethnic autonomous areas" as "the autonomous regions, autonomous prefectures and autonomous counties." By the end of 2003, China had established five autonomous regions (provincial level), 30 autonomous prefectures (municipal level), and 120 autonomous counties/banners (county level).[51] Furthermore, in accordance with Article 116 of the Constitution and Article 19 of the AERA, the people's congresses of ethnic autonomous areas have the power to enact autonomous regulations on the exercise of autonomy and other separate regulations in light of the political, economic and cultural characteristics of the ethnicity or ethnicities in the areas concerned. Accordingly, many ethnic autonomous areas adopted autonomous or separate regulations to define the "language commonly used in the locality."

For example, Article 2 of the Regulation on the Work of the Spoken and Written Mongolian Language of Inner Mongolia Autonomous Region ("IMAR") provides that "the spoken and written Mongolian language is the language commonly used in the IMAR."[52] This may lead to the conclusion, in connection with Article 9, paragraph 2 of the CPC, that the Mongolian language shall be the language used by judicial organs in the IMAR. Meanwhile, the IMAR also adopted a Measure on the Implementation of the ALCUC in 2007 (hereinafter, Measure).[53] Although the Measure does not explicitly state that Chinese is a language commonly used in the IMAR, such a point is implied

[51] Information Office of the State Council, White Paper, *Zhongguo de Minzu Quyu Zizhi* (Regional Autonomy for Ethnic Minorities in China), Feb. 28, 2005, *available at* http://www.china.org.cn/e-white/20050301/II.htm (last visited on July 31, 2010).

[52] Adopted at the 12th Session of the Standing Committee of the 10th People's Congress of the IMAR on Nov. 26, 2004, *available at* http://www.nmg.gov.cn/nmdt/ArticleContent.asp x?id=26506&ClassId=182&ChannelId=147 (last visited on July 31, 2010).

[53] Adopted at the 28th Session of the Standing Committee of the 10th People's Congress of the IMAR on May 31, 2007, *available at* http://www.nmg.gov.cn/nmdt/ArticleContent.aspx?id= 26437&ClassId= 182&ChannelId=147 (last visited on July 31, 2010).

because, in accordance with Article 4 of the Measure, Mongolian is also a language commonly used in the IMAR. This implies that both Chinese and Mongolian are languages commonly used in the IMAR, and that they shall be the languages used in the judicial organs of the IMAR.[54] In practice, some judicial organs in the IMAR have used bilingual proceedings to try cases involving Mongolian participants. For example, it was reported that the People's Procuratorate of Damaoqi Banner in Baotou, IMAR adopted a Measure on the Implementation of Proceedings in Spoken and Written Mongolian Language (Tentative Provisions), according to which all cases relating to the participants of the Mongolian ethnicity shall be tried in bilingual mode.[55] In Dongwu Banner, Xilingol League, the procuratorate uses both Chinese and Mongolian for proceedings where one party is of Mongolian ethnicity, including for legal documents such as the notification on the rights of proceedings and the indictment.[56] Thus, it appears that in practice the judicial organs of the IMAR use both Chinese and Mongolian if the party or participants in the criminal case are of Mongolian ethnicity.

In Tibet Autonomous Region ("TAR"), in accordance with Article 1 of the Regulation on the Study, Use and Development of the Tibetan Language of the TAR, Tibetan is the language commonly used. Article 3 further stipulates that Tibetan and the language commonly used in the country, *i.e.* Chinese, have the equal validity when the state organs at various levels of the TAR enforce their functions. Article 5 specifically stipulates that the judicial organs at various levels of the TAR use one or several languages commonly used based on the actual needs of a particular locality.[57] This implies that in addition to Tibetan and Chinese, other languages might also be used in the judicial organs of the TAR. In practice, both Chinese and Tibetan are used in the TAR. For example, in a series of criminal trials related to the Tibetan unrest of March 14, 2008, all of the defendants were illiterate, and could only speak Tibetan. In the 14 trials conducted by the Lhasa Intermediate People's Court, nine of them were conducted in Tibetan, and in the remaining five trials the defendants were provided with translations

[54] Liu Guiqin & Liu Rongjun, *Lun Menghan Shuangyu Susong de Chengxuxing Baozhang* (On the Procedural Safeguard of Mongol-Chinese Bilingual Litigation), J. INNER MONGOLIA UNIV. (PHILOSOPHY AND SOCIAL SCIENCE) 97 (May 2008).

[55] According to the report, that procuratorate has seven staff members who understand both Mongolian and Chinese, *available at* http://www.nmrb.cn/Item/207367.aspx (last visited on July 31, 2010).

[56] *See Xilinguolemeng Dongwuqi Jianchayuan Tuchu Minzutese, Jinyibu Jiaqiang Mengwenmengyu Susonggongzuo* (Procuratorate of Dongwu Banner, Xilin Gol League Highlight Ethnic Characteristics to Strengthen Proceeding Work in Mongolian Characters and Spoken Mongolian), *available at* http://www.surag.net/viewArticle.do?method=viewArticle&id=4a4f 878f22f99 28d0123089c6db2000c (last visited on July 31, 2010).

[57] Adopted at the 5th Session of the 4th People's Congress of the TAR on July 9, 1987, and amended at the 5th Session of the 7th People's Congress of the TAR on May 22, 2002, *available at* http://www.china-lang uage.gov.cn/97/2008_3_18/1_97_3423_0_1205808038145.html (last visited on July 31, 2010)

and interpretations.[58] In an arson case in April 2009, the Lhasa Intermediate People's Court used Chinese and provided interpretations and translations to the defendants.[59]

In Xinjiang Uygur Autonomous Region ("XUAR"), Article 12 of the Regulation on the Work of the Spoken and Written Languages of the XUAR provides that:

> [...] In the prosecution and trial of cases, the people's courts and people's procuratorates in the areas where people of an ethnic minority live in a concentrated community or where a number of ethnicities live together in one area, shall use the language commonly used in the locality, and shall provide translation and interpretation for any party to the court proceedings who is not familiar with the spoken or written languages commonly used in the locality. Legal documents shall be prepared, in the light of actual needs, in the language or languages commonly used in the locality.[60]

Thus it seems as thought the XUAR Regulation does not define the language or languages to be used in its judicial organs. However, Article 7 of the Regulation provides that:

> The autonomous organs of XUAR simultaneously use Uygur and Chinese in enforcement of their functions; the autonomous organs of the autonomous prefectures and autonomous counties, while using Uygur and Chinese commonly used in XUAR, use the language of the ethnicity of which the ethnic regional autonomy is practiced in enforcement of their functions, and they may use the languages of other ethnicities commonly used in the locality in the light of actual needs; if they simultaneously use several languages to enforce the functions, the language of the ethnicity of which ethnic regional autonomy is practices shall be the main language.

Although this article does not explicitly state that Uygur and Chinese are the languages commonly used in XUAR, it can be implied from the article and in practice. For example, in a criminal trial of seven Uygur defendants involved in the July 5, 2009 violence, all of the prosecutors and judges were Uygurs. The Urumqi Intermediate People's Court used Uygur as the court language, and provided the simultaneous

58 *See Lasa "3·14" Shijian Fanzui Anjian Shenpan: Beigao Dedao Chongfen Bianhu* (Trials of Criminal Cases in Lhasa Incident on March 14: The Accused Fully Defended), XINHUA NEWS, *available at* http://news.xinhua net.com/newscenter/2008-05/01/content_8087976.htm (last visited on July 31, 2010).

59 *See Zhi 5 Ren Si Lasa Yichun Fuzhuangdian Beizonghuoan 3 Ming Yifan Huoxing* (Three suspects who led to five people death in Lhasa Yishion couture arson case were sentenced), *available at* http://news.jcrb.com/jxsw/200904/t20090422_210368.html (last visited on July 31, 2010).

60 Amended at the 30th Session of the 9th People's Congress of the XUAR on Sept. 20, 2002, *available at* http://www.china-language.gov.cn/97/2008_3_18/1_97_3420_0_1205807194832.html (last visited on July 31, 2010).

interpretation of Chinese and Uygur in the public trial.[61] In XUAR, there are autonomous prefectures or counties where the ethnic minorities are not Uygur, but the Mongolian, Hui, Kazakhstan or Kyrgyzstan ethnicities. In the Bayinguoleng Mongolian Autonomous Prefecture in XUAR, in accordance with Article 4 of the Administrative Regulation on the Spoken and Written Language of the Bayinguoleng Mongolian Autonomous Prefecture, the languages commonly used in the Autonomous Prefecture are Mongolian, Uygur and Chinese.[62] Therefore, the languages commonly used by the judicial organs of the provincial level in XUAR shall be both Chinese and Uygur, while the languages commonly used by judicial organs of the municipal level (for example, in the Bayinguoleng Mongolian Autonomous Prefecture) shall be Chinese, Uygur and Mongolian.

In the provinces where autonomous prefectures or counties are established, the local regulations of the autonomous prefectures or counties may designate the language or languages which must be used by local judicial organs. For example, Sichuan Province has established three autonomous prefectures and four autonomous counties. The Measure on the Implementation of the ALCUC of Sichuan Province does not define the language or languages, other than Chinese, as the language or languages commonly used in the Province. The Measure only provides in Article 3 that "the use of the languages of the ethnic minorities may be regulated by the relevant provisions of the Constitution, the AERA and other laws."[63] Nevertheless, for example, Aba Tibetan and Qiang Autonomous Prefecture in Sichuan Province adopted an autonomous regulation, which provides in Article 21 that "the language commonly used in the locality shall be used when the Intermediate People's Court of the Autonomous Prefecture tries the case and the People's Procuratorate conducts the criminal proceedings," and that "the legal documents shall be used by one or two of Tibetan and Chinese in the light of the actual needs."[64] This indicates that in Aba Tibetan and Qiang Autonomous Prefecture in Sichuan Province, the language used in its judicial organs is either Tibetan or Chinese. Similarly, in accordance with Article 4 of the Regulation on the Work of the

[61] *See Falvjie: "7·5" Shijian Beigaoren Hefaquanli Dedaole Baozhang* (Legal Circle: The Legal Right of the Defendants in 7·5 Incident Has Been Protected), XINHUA NEWS, *available at* http://bt.xinhuanet.com/2009-10/13/content_17929779.htm (last visited on July 31, 2010).

[62] Adopted at the 3rd Session of the 11th People's Congress of Bayinguoleng Mongolian Autonomous Prefecture on Jan. 29, 2005, and approved at the 15th Session of the Standing Committee of the 10th People's Congress of XUAR on Mar. 25, 2005, *available at* http://rd.xjbz.gov.cn/html/flfg/2009-11/2/13_10_43_986.html (last visited on July 31, 2010).

[63] The Sichuan Provincial People's Government, Order No. 177, *available at* http://www.china- language.gov.cn/97/2007_6_22/1_97_2680_0_1182478739203.html (last visited on July 31, 2010).

[64] Adopted at the 4th Session of the 5th People's Congress of the Aba Tibetan Autonomous Prefecture on May 21, 1986, and approved by the 20th Session of the 6th People's Congress of Sichuan Province on July 12, 1986, *available at* http://www.seac.gov.cn/gjmw/zcfg/2005-05-11/11 69530562680847.htm (last visited on July 31, 2010).

Standardized Spoken and Written Chinese Language of Jilin Province, the use of the languages of the ethnic minorities may be regulated by the relevant provisions of the Constitution, the AERA and other laws.[65] Yanbian Korean Autonomous Prefecture in Jilin Province adopted an autonomous regulation, which provides in Article 27 that:

> The Intermediate People's Court and Procuratorate of the Autonomous Prefecture shall use both Korean and Chinese to try and prosecute the cases, and guarantee the right of the citizens of all ethnicities to use their own languages to participate in the proceedings. Translation shall be provided to those participants in the proceedings who are not familiarized with Korean or Chinese. Legal documents shall be used in both Korean and Chinese or one of them in the light of the actual needs.[66]

In practice, if all the participants in the proceedings are of Korean ethnicity, the case will be tried in Korean, and no Chinese translation will be provided. If the participant in the proceeding is of Korean ethnicity while the witness is of Chinese ethnicity, or vice versa, the interpretation and translation will be provided.[67]

2. Language Used in the Judicial Organs in Area with No Ethnic Regional Autonomy

In the majority of Chinese territory where ethnic regional autonomy is not established, the language used by judicial organs is Chinese. This is provided by the ALCUC Article 9, which provides that *putonghua* and the standardized Chinese characters shall be used by State organs as the official language, except where otherwise provided for in laws.

This is specifically confirmed by the measures of implementation of Regulation on the Work of Ethnicities in Cities[68] in some Provinces or Municipalities, even if the Regulation in itself does not contain a provision to address the issue of the language used by the judicial organs in cities. For example, both Article 10 of the Regulation on

[65] Adopted at the 22nd Session of the Standing Committee of the 10th People's Congress of Jilin Province, available at http://www.china-language.gov.cn/97/2007622/197269801182478737078.html (last visited on July 31, 2010).

[66] Adopted at the 3rd Session of the 8th People's Congress of Yanbian Korean Autonomous Prefecture on Apr. 24, 1985, and approved by the 14th Session of the Standing Committee of the 6th People's Congress of Jilin Province on July 31, 1985, amended at the 1st Session of the 12th People's Congress of Yanbian Korean Autonomous Prefecture on Dec. 16, 2002, and approved at the 35th Session of the Standing Committee of the 9th People's Congress of Jilin Province on Jan. 6, 2003, *available at* http://www.yanbian.gov.cn/yanbian/board.php?board=difangfagui&act=view&no=39 (last visited on July 31, 2010).

[67] Liu Liqun, *Yao Qieshi Baozhang Chaoxianzu Qunzhong Shiyong Ben Minzu Yuyan Jinxing Susong de Quanli* (The Right of the Citizens of Korean Ethnicities to Use Their Own Language to Participate in the Proceedings Shall be Feasibly Guaranteed), 2 RENMIN SIFA (PEOPLE'S JUSTICE) 33 (1982).

[68] Adopted by the State Ethnic Affairs Commission on Sept. 15, 1993, *available at* http://www.seac.gov.cn/gjmw/zcfg/2004-07-23/1168742761849065.htm (last visited on July 31, 2010).

the Protection of the Rights of Ethnic Minorities in Shanghai[69] and Article 12 of Regulation on the Protection of the Rights of Ethnic Minorities in Wuhan, Capital of Hubei Province[70] provide that "the citizens of ethnic minorities have the right to use the spoken and written languages of their own to participate in the proceedings. The judicial organs shall provide interpretation and translation to the participants who are not familiarized with the spoken and written Chinese." This implies that Chinese is the language to be used by judicial organs in Shanghai and Wuhan.

3. Conclusion

The above examination of the Chinese relevant laws and practices on the language used by Chinese judicial organs can be summarized as follows: (1) in areas where ethnic regional autonomy (autonomous regions, autonomous prefectures, autonomous counties) is not established, Chinese is the language to be used by judicial organs; (2) in areas where ethnic regional autonomy is established, the language(s) used by judicial organs will be Chinese and the language(s) used by the ethnic minorities in the autonomous areas; (3) generally speaking, in determining which language shall be used an a judicial proceeding, the capacity of the accused to speak or understand one of the languages commonly used by the judicial organ of ethnic regional autonomy is a crucial element.[71] With more and more employees of the judiciary in the ethnically autonomous areas becoming familiar with two or more languages commonly used in the locality, bilingual or even trilingual criminal trials are becoming popular.

The above laws and practices show the difference from those of the States examined in the jurisprudence of the HRC and the ECtHR, in which often only one specific language is designated as the official language used by its judicial organs. The reason for such a difference is that the interests the laws serve are different. As have been concluded, the right to free interpretation under the ICCPR and the ECHR serves the interest of providing fair trial, while the right to free interpretation under the Chinese

[69] Adopted at the 14th Session of the Standing Committee of the 10th People's Congress of Shanghai on Dec. 9, 1994, *available at* http://www.spcsc.sh.cn/ckzl/content/2005-05/08/content_34326.htm (last visited on July 31, 2010). Shanghai is one of the four municipalities directly under the central government, and it is an administrative region of the provincial level.

[70] Adopted at the 14th Session of the Standing Committee of the 10th People's Congress of Wuhan on Oct. 11, 1999, *available at* http://www.569.gov.cn/gb2312/zhengwugongkai/difangfaguiwenjian/2008 0611/88.html (last visited on July 31, 2010).

[71] "In the selection of the mode of bilingual criminal proceedings in criminal cases, minority regions consider three factors generally when determining the use of bilingual proceedings in a criminal case: (1) the seriousness of the case, (2)the linguistic abilities of the accused and (3) the level of involvement of the accused in the case." *See* Gulazat Tursan, *The Protection of Minorities in Court Proceedings: A Perspective on Bilingual Justice in China*, 9 CHINESE J. INT'L L. 559 (2010).

law serves interest of guaranteeing equality to all ethnicities in China.[72] Thus, under Chinese law, the right to fair trial is secondary to the principle of equality to all ethnicities. This can be further demonstrated by the fact that the right to free interpretation in the proceedings is provided in Article 134, Section VII (People's courts and procuratorates) of Chapter III (State judiciaries) of the Constitution, rather than Chapter II (Fundamental rights and obligations of citizens) of the Constitution.

B. The Right to Free Interpretation

Having established the language or languages used by the Chinese judiciary, it is now appropriate to introduce Chinese laws related to the right to free interpretation. Literally speaking, Chinese law is silent on this right. If one reads, for example, Article 9 of the CPC, one will find that there is no explicit expression that every Chinese citizen has such a right. However, such a right can be inferred from Article 9 of the CPC. The second sentence of paragraph 1 of that article reads as follows:

> The people's courts, people's procuratorates and the public security organs shall provide translations for any participant to the proceedings who is not familiar with the spoken or written language commonly used in the locality.

It is evident that this clause establishes on the judiciary an obligation to provide translations. Although this is only one sentence, its implications are much broader.

First of all, the term, 'translations' in the sentence shall be broadly understood to cover 'interpretation,' as well. The Chinese characters for 'translation' in this sentence is 'Fan Yi' (翻译), which does not only refer to translation, but also interpretation. In Chinese, interpretation (Kou Yi, 口译) are usually considered as one form of translation (翻译). Such an interpretation in itself is supported by Chinese scholars and practice.[73] To this point, Chinese law is consistent with the minimum standard in Article 14 (3), paragraph (f) of the ICCPR. The problem is, however, the qualifications of an interpreter or translator in the Chinese judicial system is not as clear as to guarantee effective interpretation and translation and thus the right to fair trial of the defendant. Chinese law is almost silent on this issue. The qualifications, rights and obligations of an interpreter or translator in the criminal proceedings, as well as the legal consequences and procedure or mechanism on the quality of interpretation and translation remain largely undeveloped. After researching the relevant laws, regulations and autonomous

[72] Constitution of the People's Republic of China, art. 4.

[73] Leng Chuanli, *Minzu Yuyan Susong Yuanze de Shiyong yu Wanshan* (Application and Perfection of Ethnic Language Lawsuit Principles), 1 GUIZHOU MINZU YANJIU (GUIZHOU ETHNIC STUDIES) 139 (2001).

regulations, only some autonomous regulations at the autonomous prefecture level have adopted regulations regarding standards for interpreters or translators to be used by judicial organs. For example, Article 21 of the Autonomous Regulation of Aba Tibetan and Qiang Autonomous Prefecture, Sichuan Province provides that "the staff in charge of investigation, prosecution and trial shall not simultaneously act as an interpreter or translator."[74] Similarly, Article 21 of the Autonomous Regulation of Huangnan Tibetan Autonomous Prefecture, Qinghai Province provides that "the staff in charge of prosecution and trial in the case shall not simultaneously act as an interpreter or translator in the same case."[75]

In practice, the sources of an interpreter or translator in the proceedings are varied. In some cases, the police, prosecutors or judges will act as the interpreter or translator, even if they are involved with the case.[76] This has given rise to much doubt as to whether the right to fair trial of the suspect can be guaranteed. Such practice may violate the right to fair trial of the suspect, as the jurisprudence of the HRC shows in Nallaratnam Singarasa v. Sri Lanka.[77] Furthermore, such practice may violate Chinese law in that it would be impossible for the suspect to request the interpreter to withdraw from the case since the police, prosecutor, and judge in the case also serve as the interpreter or translator.[78] As one Chinese judicial practitioner admitted, "in the long time, some judicial staffs do not emphasize the use of ethnic languages in the dealing with the cases, and has formed the evidence-taking practice of simultaneous interrogation, interpretation or translation, and record consciously or unconsciously, laying the risk for the subsequent prosecution and trial."[79] In some cases, the interpreter or translator comes from other governmental bodies. For example, in a criminal case involving a defendant with Mongolian ethnicity, the interpreter or translator was brought in from the office of translation in the local committee of the Communist Party.[80] In another criminal case involving three Uygur defendants in Gejiu People's

74 *Supra* note 64.

75 Adopted at the 2nd Session of the 9th People's Congress of Huangnan Tibetan Autonomous Prefecture on Oct. 12, 1987, and approved at the 30th Session of the Standing Committee of the People's Congress of Qinghai Province on Dec. 26, 1987, *available at* http://www.seac.gov.cn/gjmw/zcfg/2005-05-10/1169530562662634.htm (last visited on July 31, 2010)

76 Li Zheng, *Chuyi Jianli Woguo de Fawu Fanyi Zhidu* (An Argument for Establishment of the Judicial Interpretation System), 6 RENMIN JIANCHA (PEOPLE'S PROCURATORIAL MONTHLY) 30 (2002).

77 *Supra* note 26.

78 The Chinese law allows the accused to request the interpreter or translator to withdraw from the case. The following are such regulations: the CPC, art. 31; Order No. 35 of the Ministry of Public Security art. 32; the Rules on Criminal Proceedings of the People's Procuratorates, art. 31 (adopted by the SPP on Jan. 18 1999), etc.

79 Bao Lanying, *Hushi yong Minzu Yuyan Quzheng Biduan Duo* (Many Disadvantages Come from the Ignorance of Evidence-taking in Ethnic Languages), 12 RENMIN JIANCHA (PEOPLE'S PROCURATORIAL MONTHLY) 54 (2001).

80 *See Shi Jianchayuan Shouqi Mengyu Susong Anjian Shunli Kaiting* (The Case Prosecuted by the Municipal

Court, Yunnan Province in 2007, the defendants could not speak Chinese. Furthermore, the defendants spoke different dialects of Uygur. It was thus extremely difficult for the Court to find an interpreter or translator for the defendants. The trial judges eventually found an interpreter from the Department of Public Security of Yunnan Province after contacting many government agencies.[81] In other cases, the judiciary will try to find an interpreter or translator from the society through various channels, including personal relationships, *e.g.*, a professor, university student, or a member of a community of the same ethnicity as the defendant.[82] In such cases, the interpreters or translators are hired on an as-need-basis with the court.[83] In cases where it is very difficult to find a proper interpreter or translator, the right to fair trial of the accused may be affected. For example, in a 2005 case, the Hongshan District People's Court in Wuhan, Capital of Hubei Province experienced much difficulty in eventually finding an interpreter or translator for a Uygur criminal defendant who was not familiar with Chinese.[84]

Second, although the above-clause does not mention that the provision of translations shall be free, it is a consensus among the Chinese judiciary and scholars that the provision shall be interpreted as providing free translations, though there is no regulation as to how payment is made for these services.[85] This obligation implied in this sentence, which has been carried out in practice.[86] The problem is that, if there is no special financial guarantee to provide interpretation or translation from the judiciary, the quality of the interpretation or translation may be questionable.

Third, the obligation to provide translations provides more protection to the right to

Procuratorate in Mongolian for the First Time was Openly Tried), *available at* http://www.bynezfw.gov.cn/newsView.do?Id=260 (last visited on July 31, 2010).

81 *See Xingshi Susong Zhong Fanyi Chengxu de Baozhang* (Guarantee of Translation Procedure in Criminal Proceeding), *available at* http://www.gy.yn.gov.cn/Article/spsw/xssp/200707/8342.html (last visited on July 31, 2010).

82 A'nisha, *Chengxu Gongzheng yu Tingshen zhong Minzu Yuyan de Pingdeng Shixian* (Procedural Justice and Equal Realization of National Languages in Court Trial), 3 ZHONGGUO ZHENGFA DAXUE XUEBAO (JOURNAL OF CUPL) 45 (2009); *See also supra* note 73.

83 Zhang Jie, *Fanyi Renyuan Canyu Xingshi Susong Huodong Jidai Guifan* (The Participation of Interpreters and Translators in Criminal Proceedings Is To Be Urgently Regulated), 8 RENMIN JIANCHA (PEOPLE'S PROCURATORIAL MONTHLY) 63 (2008).

84 Dou Mei, Lin Lei & Tian Yingbin, *Lun Shaoshu Minzu Dangshiren Shiyong Ben Minzu Yuyan Jinxing Susong zhi Quanli de Sifa Baozhang* (On Judicial Safeguard of the Minority Litigant's Rights in Taking Proceedings in His Native Language), 1 ZHONGNAN MINZU DAXUE XUEBAO (J. SOUTH-CENTRAL UNIVERSITY FOR NATIONALITIES; HUMANITIES AND SOCIAL SCIENCES) 89 (2006).

85 Lan Xiangdong, *Fanyi Renyuan Canyu Xingshi Susong Ruogan Wenti Tantao* (Discussions on Several Issues Relating to the Participation of Interpreters), 10 RENMIN JIANCHA (PEOPLE'S PROCURATORIAL MONTHLY) 23 (1998).

86 In criminal cases where the defendant is an alien, if he or she is familiar with Chinese but refuses to be interpreted by others, he or she shall make a written statement, or his or her oral statement shall be recorded. The proceeding documents are in Chinese, but shall be attached with the foreign translation with which he or she is familiar. The translation fee shall be borne by him or her. *See Interpretations on Several Issues in Implementation of the CPC*, Supreme People's Court (1998), art. 319.

free interpretation. Since it is an obligation in nature, the judicial organs must provide translations to any participant who is not familiar with the language used in court, even if the request to provide translations is not made by the participant. In other words, once the judicial organ finds that the participant is not familiar with the language of the court, the court shall provide translations. This shows that in this regard Chinese law goes beyond the minimum standard in Article 14 (3), paragraph (f) of the ICCPR because the latter allows the person to voluntarily waive the right to free assistance of an interpreter.[87]

Fourth, the obligation to provide translation extends to the judicial organs (people's courts, people's procuratorates, and public security organs). However, it is unclear whether such an obligation further extends to other state agencies, which are competent to investigate some special crimes and detain the suspect in the pre-trial stage.[88]

Last, the obligation to provide translations extends to any participant to the proceedings who is not familiar with the language commonly used in the locality.[89] The obligation is not limited to the accused. According to Article 82 (4) of the CPC, the "participants in the proceedings" means the parties, legal representatives, agents *ad litern*, defense counsel, witnesses, expert examiners and interpreters. Therefore, this encompasses a large number of participants under Chinese law. This also shows that in this regard Chinese law go farther than the minimum standard in Article 14 (3), paragraph (f) of the ICCPR. Furthermore, according to Article 9 of the CPC, the obligation to provide translation extends only to participants who are not familiar with the language commonly used in the locality.

A question may arises whether a member of an ethnic minority, who is familiar with Chinese, still has the right to free interpretation. One would argue that in such a case participant shall not have such a right because he or she is familiar with the language used in the judicial organ, thus rendering Article 9, paragraph 1 of the CPC inapplicable. Others would hold the opposite view, because in accordance with the first sentence of Article 9, paragraph 1 of the CPC, "citizens of all ethnicities shall have the right to use their native spoken and written languages in court proceedings," which is the most fundamental principle in the whole article, as well as other types of proceedings in

87 ECtHR, *inter alia*, Colozza v. Italy, Application No. 9024/80, para. 28 (Feb. 12, 1985).

88 Article 6 of the Act on State Security ("ASS") provides that: "[I]n the work of state security, the state security organs exercise the powers of investigation, detention, pre-trial and enforcement of arrest, and other powers stipulated by laws in accordance with law." The ASS in itself contains no provision on the issue of translation and interpretations, *available at* http://www.law-lib.com/law/law_ view.asp?id=9333 (last visited on July 31, 2010).

89 It shall be noted that in Article 6 of the Act on the Organization of the People's Court, the expression used is not the "participants in the court proceedings," but the "parties in the court proceedings." According to Article 82 (2) of the CPC, "parties in the court proceedings" are limited to "victims, private prosecutors, criminal suspects, defendants and the plaintiffs and defendants in incidental civil actions."

China, such as civil and administrative proceedings.[90] Therefore, even if a member of an ethnic minority is familiar with Chinese, he or she shall still be granted the right to free interpretation because it is a fundamental principle. For example, a Professor of Xinjiang University School of Law argued that:

> An accused person who speaks a designated language has a right not only to understand the court proceedings and the charges against him, but also has the right to file his case in his own language, hear the judge's instructions in his language and have court transcripts recorded in his language. Moreover, these rights are not conditional on the inability of the accused person to understand the language of the court.[91]

In addition, according to the provision, the obligation to provide translation extends only to any participant who is not familiar with the language commonly used in the locality. The problem with Chinese law in this regard is that, no procedure has been established in order to test whether the participant in the judicial proceedings is familiar with the language used in the proceeding. Thus, the following questions must be addressed:

(1) What should a court do when the participant is familiar with the daily communicative language but not with the legalistic language?
(2) Who has the final say as to the meaning of 'familiar' in making this determination?
(3) If the participant claims to be unfamiliar with the language, who has the burden of proof?

All of these questions need to be clarified in law. After all, many Chinese legal terms are not easily understood even by native Chinese speakers. This could lead to starkly different results with even minor changes in the characters used in the Chinese Criminal Code. There should be a very high threshold if the relevant judicial organ contends that the accused is familiar with its language.

90 This is one of the fundamental principles applicable to court proceedings in China in both civil and administrative cases. *See* The Civil Proceedings Code, art. 11 (adopted at the 4th Session of the 7th NPC on Apr. 9, 1991 and amended at the 30th Session of the Standing Committee of the 10th NPC on Oct. 28, 2007), and the Administrative Proceedings Code, art. 8 (adopted at the 2nd Session of the 7th NPC on Apr. 4, 1989).

91 *See* Tursan, *supra* note 71, at 555.

IV. Conclusion

For the average person, confrontation with the criminal justice system is a frightening experience, especially when the judicial actors are speaking in a language that the accused does not understand or understand well.[92] Therefore, the right to free interpretation in criminal proceeding plays a crucial role in ensuring the right to fair trial when the accused does not understand or understand well the language used in the judicial organs.

In comparison with the minimum international standards on the right of linguistic minorities to free interpretation, Chinese law is found to be generally consistent with the standards. They have some similarities. First, both Chinese law and international law recognize that linguistic minorities have the right to free interpretation in trial. Second, both demonstrate that the right to free interpretation extends to translation of written legal documents, though both are not clear-cut about the extent of such translations. Finally, both are clear that the right to free interpretation extends to the proceedings prior to and post the court trial.

However, there are some differences between them. First, international law does not recognize that linguist minorities have the right to use or speak the language of their own choice during criminal proceeding, while Chinese law explicitly provides every Chinese ethnicity with the right to use their native spoken and written languages in court proceeding. Secondly, international law has been clarified that the burden of proof as to whether the accused understands the language used in judicial proceeding rests with the State party, while the Chinese law is not clear about this point. Finally, although international and regional human rights bodies have not stress the qualifications and methods of the interpreter or translator, they attach much importance to the quality of interpretation or translation, while in Chinese law, there is no established procedure to control the quality, and some practices are even detrimental to the right to fair trial.

Nevertheless, in general there is no legislative obstacle for China to ratify the ICCPR with regard to this right. It can be said the problem lies in how to implement this right in practice in the Chinese judicial organs. It is very necessary to adopt and carry out the measures of implementation on the right to free interpretation for ethnic minorities in order to make the right to fair trial effective. More importantly, it is suggested China

92 David Cote, *The Right to Language Use in South African Criminal Courts*, a dissertation for Master of Laws (LL.M.) in Criminal Justice presented to the University of Cape Town 3 (Aug. 30 2005), *available at* http://lawspace2.lib.uct.ac.za/dspace/bitstream/2165/244/1/CoteD_2005.pdf (last visited on July 31, 2010).

timely establish a feasible mechanism of constitutional review or national human rights institution, through which the victims of violation of human rights, including the right to free interpretation, can be effectively remedied without delay.