THE RIGHT TO AN INTERPRETER UNDER CUSTOMARY INTERNATIONAL LAW

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INTRODUCTION

Over the past two decades, customary international law has become a hotly debated subject in the United States, giving rise to new theories on the relationship between international norms and the common law. However, simply because the applicability of customary international norms in U.S. courts has become foggy does not mean that the evolution of customary international norms has slowed, nor that parties in U.S. courts should be hesitant to argue new norms in U.S. state and federal jurisdictions.

This Note argues that the right to an interpreter1 is a right recognized and protected by customary international law and, as such, can be claimed by individuals in U.S. courts who have suffered a prejudicial violation. The right to an interpreter is generally viewed as a subsidiary right of the right to a fair trial; however, even as a subsidiary right, it is an important and necessary right that is well established by state practice and opinio juris. Moreover, the right is a more specified and definite norm of customary international law than the right to a fair trial and is thus more easily applicable in domestic jurisdictions, opening up the possibility for new customary international law claims to be made in U.S. courts.

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1. For the purposes of this Note, “the right to an interpreter” is used as a general term for the right to language assistance in criminal proceedings, including both oral interpretation and translation of essential written documents, following the jurisprudence of international courts and tribunals which have generally considered the right to translation of essential written documents to be a subsidiary right of the broader right to an interpreter. The scope and content of the right to an interpreter is further explained in Part III.A and B of this Note.
The recognition of the right to an interpreter as a norm of customary international law is important both in theory for the elucidation of international law and also in practice for individuals who have suffered a violation but lack an international forum in which they could vindicate their rights. The United States offers some of the strongest fair trial guarantees in the world, and, as a result, parties in U.S. courts can often look to the U.S. Constitution for protection of their due process and fair trial rights. However, in some circumstances, and as will be demonstrated with interpretation rights, international law may offer greater protection of specific fair trial rights, leaving individuals who are unable to argue these rights in U.S. courts vulnerable to a violation without an appropriate domestic remedy. Identifying the right to an interpreter as a right protected under customary international law consequently helps to provide greater protection of such rights for claimants in American courts. Moreover, because the right to an interpreter meets the heightened requirements of general acceptance and specificity set out by the U.S. Supreme Court in \textit{Sosa v. Alvarez-Machain}, the application of the right may help to reignite the use of customary international norms in the United States.

This Note begins in Part II by arguing that the right to a fair trial is a general norm under customary international law established by state practice and \textit{opinio juris}. However, the right to a fair trial is too vague and indefinite to be invoked successfully in national courts, and especially not U.S. courts, which may apply a strict standard for customary international law norms after the Supreme Court’s decision in \textit{Sosa v. Alvarez-Machain}. Part III finds that the right to an interpreter has sufficient state practice and \textit{opinio juris} to be considered a right under customary international law independent of the general right to a fair trial, and is not as problematic as the right to a fair trial for application in U.S. courts. Finally, Part IV considers the potential of the customary international right to an interpreter for application in U.S. federal and state courts, arguing that the right to an interpreter likely provides an additional layer of protection for individuals who are insufficiently protected by interpretation standards in federal or state jurisdictions. Ultimately, this Note aims to cement the status of the right to an interpreter as a norm of customary international law, for potential application in both national and international tribunals by individuals who have suffered prejudicial violations of their rights.
I. RIGHT TO A FAIR TRIAL UNDER CUSTOMARY INTERNATIONAL LAW

The right to an interpreter is generally viewed as a subsidiary right of the right to a fair trial and is intimately related to some of the essential elements of fair trials, such as the right to prepare an adequate defense and be present in court. Consequently, it is arguable that customary international law provides for language assistance primarily as an implied right under an international customary right to a fair trial. However, individuals who are arguing a violation of the right to an interpreter solely as a subset of the umbrella right to a fair trial face an uphill battle. In order to be considered demonstrative of customary international law, a norm must be supported by state practice and opinio juris requirements that the right to a fair trial, in general terms, satisfies. Yet, the right to a fair trial is a right with uncertain scope and content under customary international law and thus is likely not readily applicable in national courts, unlike the customary right to an interpreter.

A. State Practice

In order to give rise to a new rule of customary international law, state practice should be "both extensive and virtually uniform" and should occur "in such a way as to show a general recognition that a rule of law was involved." A survey of the history of the right to a fair trial and its codification in national constitutions demonstrates that there exists among states exactly the kind of general recognition of legal obligation required under customary international law and provides evidence of its extensive and virtually uniform practice.

2. See, e.g., Kamasinski v. Austria, App. No. 9783/82, ¶ 62 (Eur. Ct. H.R. Dec. 19, 1989) (describing the right to a fair trial as a constituent element of the general right to a fair trial and related to the right to be present in court); Akbingol v. Germany, App. No. 74235/01, ¶ 1 (Eur. Ct. H.R. Nov. 18, 2004) (finding that the accused person was not entitled to the translation of particular documents because they were not necessary to the preparation of the defence case and thus not essential to the guarantee of a fair trial).
The modern conception of the right to a fair trial can be traced back to the Roman *Lex Duodecim Tabularum,* and through the Magna Carta, the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution, and to Articles 6 and 9 of the French Declaration of the Rights of Man. Prior to the modern era of human rights, the Charters of the Nuremberg and Tokyo War Crimes Tribunals also guaranteed the right to a fair trial. Launching the modern era of human rights codification, Article 18 of the American Declaration of the Rights and Duties of Man first protected twentieth-century fair trial rights some months before the Universal Declaration of Human Rights did the same.

Since the UDHR recognized the right to a fair trial, the right has been codified by human rights covenants and conventions around the world. Perhaps most importantly, Article 14 of the International Covenant on Civil and Political Rights protects the right to a fair trial. The right to fair trial is also protected by Article 6 of the European Convention on Human Rights, the 1951 NATO Status of Forces Agreement, Article 8 of the American Convention on Human Rights.


14. See Harris, supra note 9, at 352–53.
Rights.\textsuperscript{15} Article 7 of the African Charter on Human and Peoples' Rights,\textsuperscript{16} Article 21 of the statute of the International Criminal Tribunal for the former Yugoslavia,\textsuperscript{17} Article 20 of the statute of the International Criminal Tribunal for Rwanda,\textsuperscript{18} Article 17 of the statute for the Special Court for Sierra Leone,\textsuperscript{19} Article 67 of the Rome Statute of the International Criminal Court,\textsuperscript{20} Article 35 the Charter for the Extraordinary Chambers of the Courts of Cambodia,\textsuperscript{21} and Articles 15 and 16 of the statute for the Special Tribunal for Lebanon.\textsuperscript{22} The Human Rights Committee in General Comment No. 32 has also clarified the content of the right to a fair trial contained in the ICCPR.\textsuperscript{23}

Moreover, as identified by Professor Bassiouni, the right to a fair trial or hearing is enumerated in the national constitutions of

\begin{itemize}
\item \textsuperscript{15} American Convention on Human Rights, \textit{opened for signature} Nov. 22, 1969, art. 8, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force July 18, 1978) [hereinafter ACHR].
\item \textsuperscript{21} \textit{Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea}, art. 35, NS/RSM/1004/006 (2004) [hereinafter ECCC Statute].
\item \textsuperscript{22} \textit{Statute of the Special Tribunal for Lebanon}, arts. 15, 16, U.N. Doc. S/RES/1757 (2007) [hereinafter STL Statute].
\item \textsuperscript{23} Human Rights Comm., General Comment No. 32: Article 14, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter General Comment No. 32].
\end{itemize}
thirty-eight national constitutions: 24 Antigua and Barbuda, 25 Bahamas, 26 Barbados, 27 Belize, 28 Bolivia, 29 Botswana, 30 Cameroon, 31 Canada, 32 Dominica, 33 Dominican Republic, 34 Fiji, 35 Gambia, 36 Grenada, 37 Guyana, 38 Hungary, 39 Jamaica, 40 Kenya, 41 Kiribati, 42

24. M. Cherif Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, 3 Duke J. Comp. & Int’l L. 235, 267 (1993). Although Prof. Bassiouni’s survey of world constitutions did not clearly describe his methodology, it appears that he classified a constitution as explicitly guaranteeing the right to a fair trial if language protecting a “fair trial” or “independent and impartial” tribunal was used, or language with only a slight variance to that effect. Constitutions that do not guarantee fair trial rights in this precise language, but rather contain general due process provisions are noted separately. See, e.g., infra note 127 and accompanying text.


29. Constitution of 2009 of the Plurinational State of Bolivia Feb. 7, 2009, pt. 1, tit. IV, art. 120(1). Note that Prof. Bassiouni’s study incorporated an earlier version of Bolivia’s Constitution that also had a fair trial provision but was placed in a different title.


31. Constitution of Cameroon June 2, 1972, as amended by Law No. 96-06, Jan. 18, 1996, pmbl. Note that the Constitution of Cameroon includes the UDHR as an annex, which also guarantees the right to a fair trial in article 10.


34. Constitution of the Dominican Republic June 13, 2015, ch. II, art. 69(2). Note that Prof. Bassiouni’s study incorporated an earlier version of the Dominican Republic’s Constitution that also had a fair trial provision but was placed in a different section.

35. Constitution of the Republic of Fiji Sep. 6, 2013, § 15(l). Note that Prof. Bassiouni’s study incorporated an earlier version of Fiji’s Constitution that also had a fair trial provision but was placed in a different article.

36. Constitution of the Republic of the Gambia 1997, ch. IV § 24(1). Note that Prof. Bassiouni’s study incorporated an earlier version of Gambia’s Constitution that also had a fair trial provision but was placed in a different article.


Liberia, 43 Malta, 44 Mauritius, 45 Namibia, 46 Nauru, 47 Nigeria, 48 Papua New Guinea, 49 St. Kitts and Nevis, 50 Sierra Leone, 51 Solomon Islands, 52 Sri Lanka, 53 Sudan, 54 Swaziland, 55 Trinidad and Tobago, 56 Tuvalu, 57 Uganda, 58 United Arab Emirates, 59 Zambia, 60 and Zimbabwe. 61

Bassiouni’s study incorporated an earlier version of Hungary’s Constitution that also had a fair trial provision but was placed in a different section.

41. Constitution art. 25(c), art. 50(1)-(2) (2010) (Kenya). Note that Prof. Bassiouni’s study incorporated an earlier version of Kenya’s Constitution that also had a fair trial provision but was placed in a different article. Also note that art. 25(c) states that the right to a fair trial is a non-derogable right.
42. Constitution of Kiribati 1980, § 10(1).
44. Constitution of Malta Sep. 21, 1964, art. 39(1).
48. Constitution of Nigeria (1999) § 36(1), (4). Note that Prof. Bassiouni’s study incorporated an earlier version of Nigeria’s Constitution that also had a fair trial provision but was placed in a different article.
54. Interim National Constitution of the Sudan July 6, 2005, pt. II § 34(3). Note that Prof. Bassiouni’s study incorporated an earlier version of Sudan’s Constitution that also had a fair trial provision but was placed in a different article.
55. The Constitution of the Kingdom of Swaziland Act July 26, 2005, ch. III § 21(1). Note that Prof. Bassiouni’s study incorporated an earlier version of Swaziland’s Constitution that also had a fair trial provision but was placed in a different chapter.
58. Constitution of the Republic of Uganda Oct. 8, 1995, ch. IV § 28(1). Note that Prof. Bassiouni’s study incorporated an earlier version of Uganda’s Constitution that also had a fair trial provision but was placed in a different chapter.
Other constitutions that explicitly guarantee the right to a fair trial that were not included in Professor Bassiouni's survey are: Albania, Andorra, Angola, Armenia, Bangladesh, Belarus, Bosnia and Herzegovina (hereinafter BiH), Bulgaria, Burkina Faso, Burundi, Congo, Cote d'Ivoire, Croatia, Cyprus, Czech

60. CONSTITUTION OF ZAMBIA (1996) § 18(1). Note that Prof. Bassiouni's study incorporated an earlier version of Zambia's Constitution that also had a fair trial provision but was placed in a different article. Also note that Zambia's Constitution was amended on Jan. 5, 2016; however, the amendments do not appear to have altered Part III on fundamental rights and freedoms of the individual.
61. CONSTITUTION OF ZIMBABWE § 69(1). Note that Prof. Bassiouni's study incorporated an earlier version of Zimbabwe's Constitution that also had a fair trial provision but was placed in a different chapter.
62. For the purposes of this Note, a constitution was considered to explicitly enumerate the right to a fair trial if language guaranteeing a "fair trial" or "independent and impartial" tribunal was used, or language varying only slightly to that effect, in order to replicate as closely as possible Prof. Bassiouni's methods. Constitutions that did not have an exact guarantee of a "fair trial" or trial by an "independent and impartial" tribunal, but contained several provisions that together guaranteed such rights have been noted in the relevant note. See supra note 24; infra note 127 and accompanying text.
67. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH Nov. 4, 1972, pt. III, art. 35(3).
70. CONSTITUTION OF THE REPUBLIC OF BULGARIA July 13, 1991, ch. II, art. 31(4) ("The rights of a defendant shall not be restricted beyond what is necessary for the purposes of a fair trial.").
73. CONSTITUTION DE LA REPUBLIQUE DU CONGO Oct. 25, 2015, art. 9.
74. CONSTITUTION DE LA REPUBLIQUE DE COTE D'IVOIRE Oct. 30, 2016, art. 7.
76. CONSTITUTION OF CYPRUS Aug. 16, 1960, pt. II, art. 30(2).
Republic, 77 Ecuador, 78 Egypt, 79 Equatorial Guinea, 80 Eritrea, 81 Finland, 82 Germany, 83 Ghana, 84 Guinea, 85 Iceland, 86 Iraq, 87 Japan, 88 Kosovo, 89 Latvia, 90 Lesotho, 91 Libya, 92 Lithuania, 93 Malawi, 94 Maldives, 95 Marshall Islands, 96 Mongolia, 97 Montenegro, 98 Nepal, 99 New Zealand, 100 Norway, 101 Pakistan, 102 Palau, 103 Paraguay, 104

77. Usneseni č. 2/1993 Sb. ch. V, art. 36 (Czech.).
78. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR tit. I, ch. VIII, art. 7(k).
79. DUSTUR JUMHURIAT MISR AL-ARABIAT [CONSTITUTION] ch. IV, art. 96 (Egypt).
81. QWAM ERITREA [CONSTITUTION] ch. III, art. 17.
82. SUOMEN PERUSTUSLAKI [CONSTITUTION] ch. II, sec. 21 (Fin.). Note that section 21 states that guarantees of a fair trial will be laid out by an Act.
83. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, § IX, art. 103 (Ger.). Note that article 103 does not guarantee a fair trial in its content, but is entitled “fair trial”.
84. THE CONSTITUTION OF THE REPUBLIC OF GHANA ch. V, art. 19(1).
85. LA CONSTITUTION DE LA REPÚBLIQUE DE LA GUINÉE ch. II, art. 9 (Guinea).
86. STJÓRNASKRÁ LYDVELDISINS ÍSLANDS [CONSTITUTION] § VII, art. 70 (Iec.).
88. NIHONKOKU KENPO [KENPO] [CONSTITUTION], ch. III, art. 37 (Japan).
89. CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, ch. II., art. 31.
90. LATVIJAS REPUBLIKAS SATVERSME [LV] [CONSTITUTION], ch. VIII, art. 92 (Latvia).
91. CONSTITUTION OF LESOTHO, ch. II, arts. 4(1)(h), 12.
92. CONSTITUTIONAL DECLARATION, ch. IV, art. 31 (Libya). Note that Prof. Bassiouni’s study incorporated an earlier version of the Libyan Constitution that only provided for procedural safeguards for the defense and was classified in such study.
94. REPUBLIC OF MALAWI (CONSTITUTION) ACT May 18, 1994, ch. IV, art. 42/2(f0).
95. CONSTITUTION OF THE REPUBLIC OF MALDIVES, ch. II, art. 42(a).
99. CONSTITUTION OF NEPAL Sept. 20, 1015, pt. III, art. 209). Note that the Constitution cited here was adopted in September 2015 and the author is relying on an unofficial translation by International IDEA.
Poland, Romania, Rwanda, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Serbia, Seychelles, Slovenia, Somalia, South Africa, South Sudan, Switzerland, Syria, Tanzania, Togo, Tonga, Tunisia, Turkey, and Vanuatu.

102. Pakistan Const. pt. II, ch. I, art. 10A.
113. The Constitution of the Republic of Slovenia Dec. 23, 1991, ch. II, art. 23. Note that Article 23 guarantees the right to "have any decision regarding his rights, duties, and any charges brought against him made without undue delay by an independent, impartial court constituted by law" and that Articles 24 through 31 guarantee subsidiary fair trial rights.
117. Bundesverfassung [BV] [Constitution] Apr. 18, 1999, SR 101, arts. 29, 30 (Switz.).
121. The Constitution of Tonga Nov. 4, 1875, pt. I, art. 14. Note that Article 14 does not guarantee a fair trial in its content, but is entitled "trial to be fair".
122. The Constitution of Tunisia Jan. 26, 2014. Note that Prof. Bassiouni's study incorporated an earlier version of the Tunisian Constitution
The right to a fair trial was also enumerated in the 2003 Draft Constitution of the State of Palestine. In addition to protections through the common law, the right to a fair trial is explicitly protected in the United Kingdom through the Human Rights Act of 1998, which incorporated the ECHR into British law.

In addition to the almost a hundred countries explicitly protecting the right to a fair trial, other national constitutions contain general due process language that has been interpreted to guarantee fair trial rights, most notably the U.S. Constitution, which guarantees fair trial rights in the Fifth, Sixth, and Fourteenth Amendments. The constitutions of Afghanistan, Algeria, Bhutan, Cape Verde, Colombia, Mexico, the Federated States of Micronesia, the Philippines, Uruguay, and Venezuela that only provided for procedural safeguards for the defense and was classified in his study as such.

126. Human Rights Act, 1998, c. 42, § 1(3), sch. 1, pt. 1, art. 6 (Eng.).
127. U.S. CONST. amends. V, VI, XIV; see also Bassioni, supra note 24, at 267 (noting the fair trial protections of the Fifth, Sixth, and Fourteenth amendments); MASON, supra note 7, at 1 (describing fair trial rights as guaranteed by the U.S. Constitution).
129. CONSTITUTION OF THE PEOPLE’S DEMOCRATIC REPUBLIC OF ALGERIA 1989, as amended, 1996, pt. I, ch. IV, art. 45 (requiring that an accused has “all the guarantees required by the law”).
130. CONSTITUTION OF THE KINGDOM OF BHUTAN 2008, art. 7(1) (guaranteeing due process rights).
131. CONSTITUTION OF THE REPUBLIC OF CAPE VERDE 1992, as amended, 1999, ch. II, pt. II, tit. I art. 20 (stating that everyone should be “guaranteed by law the right to defense, to be represented, to have access to information, and to consultation.”).
133. CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [CP], tit. I, ch. I, art. 14, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.).
135. CONST. (1987), art. III § 1 (Phil.).
similarly contain general due process language.\textsuperscript{138} The Australian constitution does not have an enumerated right to a fair trial, but courts are able to protect fair trial rights through the common law.\textsuperscript{139} The constitutions of the Democratic Republic of the Congo (hereinafter D.R.C.), Estonia, Ethiopia, Nicaragua, and Oman do not enumerate the right to a fair trial, but rather explicitly guarantee several subsidiary fair trial rights, such as the right to a speedy and public trial.\textsuperscript{140} The Constitution of the Slovak Republic does not guarantee the right to a fair trial, but instead states that “[e]veryone may claim by the established legal procedure his right to an independent and impartial court hearing.”\textsuperscript{141} Several more constitutions guarantee simply the right to all the procedural safeguards necessary for the defense:\textsuperscript{142} Benin,\textsuperscript{143} Brazil,\textsuperscript{144} Central African Republic,\textsuperscript{145} Chad,\textsuperscript{146} El Salvador,\textsuperscript{147} Gabon,\textsuperscript{148} Kuwait,\textsuperscript{149} Madagascar,\textsuperscript{150} Moldova,\textsuperscript{151} Niger,\textsuperscript{152} Portugal,\textsuperscript{153} and Qatar.\textsuperscript{154}

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  \item \textsuperscript{137} CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA 1999, \textit{as amended} 2009, tit. III, ch. II, art. 49.
  \item \textsuperscript{138} The 2008 Constitution of Myanmar also contains due process language in Article 381; however, due process guarantees are explicitly allowed to be derogated in times of foreign invasion, insurrection, and emergency in the same article. \textit{See} CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR May 29, 2008, ch. VIII, art. 381.
  \item \textsuperscript{139} Simon Bronitt & Bernadette McSherry, \textit{The Use and Abuse of Counseling Records in Sexual Assault Trials: Reconstructing the “Rape Shield”?}, 8 CRIM. L.F. 259, 272–273 (1997).
  \item \textsuperscript{141} CONSTITUTION OF THE SLOVAK REPUBLIC Sept. 1, 1992, ch. II, pt. VII, art. 46/1).
  \item \textsuperscript{142} Bassioumi, supra note 24, at 267–68.
  \item \textsuperscript{143} CONSTITUTION DE LA REPUBLIQUE DU BENIN Dec. 2, 1990, art. 17. Note that Prof. Bassioumi’s study did not classify Benin’s Constitution as such.
  \item \textsuperscript{144} CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.). Note that Prof. Bassioumi’s study incorporated an earlier version of Brazil’s Constitution that also had a fair trial provision but was placed in a different section.
  \item \textsuperscript{145} CONSTITUTION DE LA REPUBLIQUE CENTRAFRIQUE Mar. 27, 2016, art. 3 (Cent. Afr. Rep.). Note that the document cited here is the Constitution adopted after constitutional referendum in December 2015.
  \item \textsuperscript{146} CONSTITUTION DE LA REPUBLIQUE DU TCHAD Mar. 31, 1996, art. 24 (Chad).
\end{itemize}
1. *Opinio Juris*

As evidenced by national constitutions, international treaties and U.N. statutes, fair trial rights have nearly universal protection, satisfying the state practice requirements set out by the I.C.J. Nonetheless, in order to be considered customary international law, a norm must be evidenced not only by state practice, but also *opinio juris*; that is, a state’s subjective belief that it is bound by the obligation.\(^ {155} \) However, it is less obvious whether states believe fair trial rights to be a norm under international law, as opposed to a protected right under their own national constitutions.

*Opinio juris* is what distinguishes customary international law from “mere habit or usage,”\(^ {156} \) and thus cannot be neglected or assumed. Yet, it is difficult to ascertain when a norm has reached

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147. **CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR [CONSTITUTION]** Dec. 15, 1983, arts. 11–12. Note that Article 11 guarantees the right not to be deprived of liberty without previously being heard and defeated in a trial, while Article 12 protects the accused’s right to “all the guarantees necessary for his defense.”

148. **CONSTITUTION OF THE GABONÉSE REPUBLIC** Mar. 26, 1991, prelim. tit., art. 1(4). Note that Prof. Bassiouni’s study incorporated an earlier version of Gabon’s Constitution that had a provision guaranteeing all the procedures necessary to safeguard the right to defense, but was placed in a different title.

149. **CONSTITUTION OF KUWAIT** Nov. 11, 1962, pt. III, art. 34.


151. **CONSTITUTION OF THE REPUBLIC OF MOLDOVA** Jul. 24, 1994, tit. II, ch. I, art. 21. Note that Article 21 guarantees the right to be presumed innocent, the right to a public trial, and the right to “all guarantees necessary for . . . defense”.

152. **CONSTITUTION OF 8 NOVEMBER 1960** tit. II, art. 20 (Niger). Note that Prof. Bassiouni’s study did not classify Niger’s Constitution as such; however, it was considering an earlier version of the Constitution.


154. **PERMANENT CONSTITUTION OF THE STATE OF QATAR** 2003, pt. III, art. 39. Note that Prof. Bassiouni’s study had classified the Constitution of Qatar as explicitly guaranteeing the right to a fair trial, as an earlier version of the Constitution had included such as provision in Article 11. However, the 2004 Constitution no longer explicitly guarantees the right to a fair trial and only guarantees that the necessary safeguards for self-defense will be secured.


156. *Id.*
customary status through opinio juris,\textsuperscript{157} and particularly difficult to ascertain the subjective views of a state with regard to a norm like the right to a fair trial, as it is explicitly and extensively guaranteed by numerous treaties and declarations. For instance, China is particularly notorious for failing to comply with fair trial rights.\textsuperscript{158} Nevertheless, changes were made to the Chinese Criminal Procedure Law and Criminal Law in the 1990s to enhance fair trial protections (at least on paper).\textsuperscript{159} Consequently, even from a Chinese perspective, it appears that the right to a fair trial entails some sense of legal


obligation under international law and before the international community.\textsuperscript{160}

The overwhelming prevalence of fair trial rights in national constitutions and treaties and the frequency of international condemnations of fair trial violations suggests that the right to a fair trial is subjectively valued by states.\textsuperscript{161} Indeed, the fact that the United States in particular internationally condemns other states for fair trial violations is a good indicator that it views the right as a customary international norm, as the two primary sources of international fair trial obligations upon the United States, aside from customary international law, are the UDHR and the ICCPR.

However, the debate over the customary status of these documents is likely more disputed than that of fair trial rights.\textsuperscript{162} While some commentators argue that the norms contained in the UDHR and ICCPR have "risen to the level of customary international law"\textsuperscript{163} and lower courts in the United States have cited the UDHR as

\textsuperscript{160} See \textit{id.} at 173. But see Ping Yu, \textit{Glittery Promise vs. Dismal Reality: The Role of a Criminal Lawyer in the People’s Republic of China after the 1996 Revision of the Criminal Procedure Law}, 35 VAND. J. TRANSNAT'l. L. 827, 862 (2002) (arguing that China is obligated to uphold the right to a fair trial, citing the UDHR as binding authority for customary international law); Marsha Wellknown Yee, Note, \textit{Hong Kong’s Legal Obligation to Require Fair Trial for Rendition}, 102 COLUM. L. REV. 1373, 1390 (2002) (arguing that Hong Kong has an obligation to provide fair trials for rendition and extradition based on the ICCPR, customary international law, and other international instruments).

\textsuperscript{161} See also \textsc{Antonio Cassese et al., Cassese’s International Criminal Law} 357 (3rd ed., rev. 2013) (stating that the “principle of fairness” is likely \textit{jus cogens} due to “the insistence of all states on the importance of fair but expeditious trials”).

\textsuperscript{162} See, e.g., Tai-Heng Cheng, \textit{The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?}, 41 CORNELL INT'L. L.J. 251, 278–80 (2008) (noting that since \textit{Sosa} eighteen lower courts have interpreted \textit{Sosa} to hold that the UDHR has no authoritative value, forty courts have avoided deciding the status of the UDHR, and twelve have relied on the UDHR as authoritative international law).

a source of customary international law binding upon the United States, the present status of these documents is unclear.

In *Sosa v. Alvarez-Machain*, the U.S. Supreme Court considered whether the UDHR and ICCPR could form the basis for customary international law causes of action for the case arising under the Alien Tort Statute (ATS). The Court ultimately concluded that the UDHR “does not of its own force impose obligations as a matter of international law.” In contrast, the Court concluded that the “[ICCPR] does bind the United States as a matter of international law” but that the non-self-executing treaty does not “itself create obligations enforceable in the federal courts.” Consequently, the Court argued that the ICCPR as a source of customary international law, potentially giving rise to fair trial obligations under international norms, while dismissing the UDHR as a source of such obligations.

*Sosa*, however, is also important for its discussion of the conditions needed for a norm of customary international law to be recognized by U.S. courts. In declining to recognize a norm against the kind of arbitrary detention suffered by Alvarez, the Court introduced two requirements: general acceptance and specificity. The Court stated that any claim based on a norm of customary

requirement”); Mark S. Ellis, *A Global Legal Odyssey: A Training Manual for the Legal Profession*, 43 S. TEX. L. REV. 355, 356 (2002) (arguing that the UDHR sets out principles recognized as part of customary international law by the I.C.J. in the Tehran Hostages Case); Ioannis Kallouzos & Itamar Mann, *Banal Crimes against Humanity: The Case of Asylum Seekers in Greece*, 16 MELBOURNE J. INT’L L. 1, 16 n.83 (2015) (citing the WGAD decision in *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment* for the statement that the UDHR established international norms relating to the right to a fair trial); *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 cmt. d (1987)* (stating that “it is increasingly recognized that states parties to the [U.N.] Charter are legally obligated to respect some of the rights recognized in the [UDHR]”).

164. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 882–83 (2d Cir. 1980).


166. *Sosa*, 542 U.S. at 734; see also Bradley et al., *supra* note 165, at 899 (describing the holding of *Sosa* with regard to the UDHR and ICCPR).

167. *Sosa*, 542 U.S. at 735 (emphasis added); see also Bradley et al., *supra* note 165, at 899 (describing the holding of *Sosa* with regard to the UDHR and ICCPR).

international law must be “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” The Court gave the example of piracy as a sufficiently specific norm, and further clarified that “the determination whether a norm is sufficiently definite to support a cause of action should . . . involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.” While the decision still leaves a number of ambiguities as to the exact levels of general acceptance and specificity that will be sufficient for norm recognition, it indicates that, in the future, customary international norms must meet a substantially heightened standard to be recognized in U.S. courts.

Irrespective of the domestic status of ICCPR- or UDHR-based fair trial rights, the United States regularly accuses other states of violating fair trial norms. Consequently, U.S. actions in this regard

169. Id.
170. Id. at 731–32 (2004).
172. See, e.g., People v. Ramirez, 139 P.3d 64, 118–19 (Cal. 2006) (plaintiff citing the UDHR and ICCPR as evidencing a customary international law right to a fair trial but court finding that the defendant was not denied a fair trial even by international standards).
indicate that it likely views the right as a norm of customary international law, and thus has sufficient opinio juris. Additionally, states that are accused of fair trial violations generally respond by arguing that no such violation occurred or that other states similarly have violated fair trial rights, rather than by contesting the value or

protection of fair trial rights.\textsuperscript{174} This practice suggests that even violators do not wish to be perceived by the international community as such and that they feel compelled to protect the right as an international norm. In that sense, the right to a fair trial is treated by states similarly to well-established norms, such as the prohibition against torture, where states engage in linguistic and legal gymnastics in order to avoid being chastised by the international community for violations.\textsuperscript{175}

Moreover, over time the right to a fair trial has become a more common protected right in national constitutions. While older constitutions, particular the U.S. Constitution, often offer general due process protections, many of the constitutions drafted after colonial occupation or the end of the Cold War explicitly enumerate the right to a fair trial as a fundamental right protected under the constitution, along with rights such as those to life and liberty.\textsuperscript{176} Consequently, states, and especially new states, appear to place increasing importance upon the right to a fair trial over the last few decades, suggesting that while the right may not have been a customary international law norm prior to the Second World War, it is today.

2. The Right to a Fair Trial as \textit{Jus Cogens}

Some commentators have gone even further and have concluded that the right to a fair trial it not merely a right under customary international law, but has achieved the status of \textit{jus...}


\textsuperscript{175} However, although the international community in this sense treats the right to a fair trial similarly to the prohibition of torture, the right to a fair trial is likely not a peremptory norm of customary international law, or \textit{jus cogens}, and thus is quite distinguishable from the prohibition of torture. \textit{See infra} Part I.C.

\textsuperscript{176} For instance, the more recently adopted constitutions of Albania, BiH, Croatia, Czech Republic, Eritrea, Latvia, Lithuania, Montenegro, Serbia, South Africa, and South Sudan enumerated the right to a fair trial as a fundamental right with subsidiary rights, similarly to the structure of fair trial rights in the ICCPR and ECHR. \textit{See supra} Part I.A.
cogens, a peremptory norm of international law. Fair trial rights would thus join the rank of norms such as the prohibition against genocide and torture as norms from which no derogation is ever permitted. However, while the right to a fair trial is certainly an important right in international law, the right faces an internal limitation that may prevent it from achieving the status of jus cogens. The right to a fair trial is generally considered to be a derogable right in cases of emergency, for instance codified in Article 4 § 2 of the ICCPR. As a consequence, some commentators argue that the right to a fair trial cannot achieve the status of jus cogens, as it is not absolute. Nevertheless, while it is contestable whether the right to

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177. See Robinson, Right to a Fair Trial, supra note 5, at 7 (arguing that the right to a fair trial is a peremptory norm of general international law); Patrick L. Robinson, Fair but Expeditious Trials, in The Dynamics of International Criminal Justice 169, 171 (Hirad Abtahi & Gideon Boas eds., 2006) (arguing that the fair trial standards enshrined in Article 14 of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171, are of a jus cogens nature); Gideon Boas, The Milosevic Trial: Lessons for the Conduct of Complex International Criminal Proceedings 16-17 (2007) [hereinafter Boas, Milosevic]; Michail Wladimiroff, Rights of Suspects and Accused, in Substantive and Procedural Aspects of International Criminal Law 419, 430 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000); Alexander Orakhelashvili, Peremptory Norms in International Law 60 (2005); John H. Dingfelder Stone, Assessing the Existence of the Right to Translation under the International Covenant on Civil and Political Rights, 16 Max Planck Y.B. U.N. L. 159, 161 (2012); see also Geert-Jan Alexander Knoops, Theory and Practice of Internationalized Criminal Proceedings 24-25 (2005) (describing procedural due process norms as jus cogens); Cassese et al., supra note 161, at 357 (stating that the "principle of fairness" is an undoubted norm of customary international law and is likely jus cogens due to "the insistence of all states on the importance of fair but expeditious trials"); Sarah H. Cleveland, Norm Internationalization and U.S. Economic Sanctions, 26 Yale J. Int’l L. 1, 29 (2001) (noting that the right to a fair trial may be approaching the status of a customary obligation erga omnes); Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, 34 Yale J. Int’l L. 331, 371 (2000) (noting that a few scholars have argued that due process should be recognized as a peremptory norm).


179. See Michael Byers, Book Review, 101 A.J.I.L. 913, 916 (2007) (reviewing Orakhelashvili, supra note 177) (rejecting the notion that derogable rights such as due process and the right to a fair trial can be peremptory norms).
a fair trial has or even can become *jus cogens*, as evidenced by state practice and *opinio juris*, the right to a fair trial, as a general right, is a protected right under customary international law.

3. Scope and Content of the Right to a Fair Trial

The right to a fair trial can thus be considered a norm of customary international law. Yet, that conclusion may have little practical meaning for defendants in national courts who have suffered a particular violation of their fair trial rights. While the right is protected almost universally outside of customary international law, the actual scope and content of the right is difficult to ascertain. 180 Indeed, in considering a Vienna Convention on Consular Relations (hereinafter VCCR) claim in the 2006 *Vienna Convention Decision*, the German Federal Constitutional Court noted that the right to a fair trial “does not contain explicit rules and prohibitions in detail” and consequently these rules are to be clarified by the national courts. 181

National constitutions that explicitly guarantee the right to a fair trial vary significantly in terms of the content of the right. Moreover, even amongst the international human rights treaties, there are discrepancies in the criteria required for a fair trial. 182 As just one example, considerable debate has emerged after international courts such as the ICTY have identified certain rights

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*see also* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1965–66 (2002) (distinguishing the right to a fair trial from the non-derogable *jus cogens* prohibiting torture and genocide); Mike Madden, *Comparative Cherry-Picking in a Military Justice Context: The Misplaced Quest to Give Universally Expansive Meaning to International Human Rights*, 46 GEO. WASH. INT’L L. REV. 713, 739 (2014) (describing the disagreement between commentators about the status of fair trial rights in customary international law). *But see* ORAKHELASHIVLI, *supra* note 177, at 60 (stating that certain derogable rights, such as the right to a fair trial, can be peremptory).

180. *See* Madden, *supra* note 179, at 731 (noting the difficulty in determining the substance of a customary international right to a fair trial).


as existing within fair trial rights, due to discrepancies between civil and common law jurisdictions on the particular content of the right to a fair trial. Therefore, even if there is a general right to a fair trial guaranteed under customary international law, it would be difficult to implement such a right in national courts without a guiding treaty such as the ICCPR. More importantly for potential claimants in American courts, the right to a fair trial seemingly lacks the required specificity for an international norm set out in Sosa, which may be fatal if courts interpret the requirements of Sosa to apply beyond ATS cases.

As a result, individuals who have suffered violations of the right to a fair trial likely would not be able to rely on that norm alone in national courts due to its lack of clear scope or content. Consequently, there is a need to elucidate the customary international law norms within the right to a fair trial that may independently be considered rights under customary international law, in order to identify those subsidiary rights that may have a greater chance of vindication in national courts than a general customary fair trial norm.

II. RIGHT TO AN INTERPRETER UNDER CUSTOMARY INTERNATIONAL LAW

A. State Practice and Opinio Juris

The right to an interpreter is one such right within the broader right to a fair trial that is independently protected as a right under customary international law due to near universal state practice and opinio juris. Similarly to the right to a fair trial, the

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183. In 2001 the ICTY Trial Chamber in Milošević found that an accused has a customary right to self-representation, which has been rejected by several commentators. See Prosecutor v. Milošević, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, ¶ 11 (Int’l Crim. Trib. for the former Yugoslavia July 3, 2001); Gideon Boas, Self-Representation before the ICTY, 9 J. INT’L CRIM. JUS. 53, 56 (2011) [hereinafter Boas, Self-Representation]; Michael P. Scharf & Christopher M. Rassi, Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials?, 20 OHIO ST. J. DIS. RES. 3, 37-38 (2005).


185. See BOAS, MILOŠEVIĆ, supra note 177, at 17 (stating that the overarching right to a fair trial is a jus cogens norm and that the “provisions
right to an interpreter has been enumerated as a right under numerous international human rights conventions and treaties. The right to an interpreter is guaranteed by Article 14 § 3(f) of the ICCPR,186 Article 6 § 3(e) of the ECHR,187 Article 8 § 2(a) of the ACHR,188 Article 21 § 4(f) of the ICTY Statute,189 Article 20 § 4(f) of the ICTR Statute,190 Article 17 § 4(f) of the SCSL Statute,191 Articles 55 and 67 of the Rome Statute,192 Article 35(f) of the ECCC Charter,193 and Articles 15 and 16 of the SCL Statute.194 The right to an interpreter has also been clarified by the European Commission in Directive 2010/64/EU195 and by the Human Rights Committee in General Comment No. 32.196 Migrants may also have a protected right to an interpreter under international human rights norms for migrants.197

The exception to the universal codification of the right to an interpreter is the African Court on Human and Peoples’ Rights, which does not have an enumerated guarantee of the right to an interpreter under the African Charter on Human and Peoples’ Rights.198 Nevertheless, in 1992 the African Commission on Human and Peoples’ Rights adopted a resolution stating that accused persons shall have “the free assistance of an interpreter if they cannot speak the language used in court” due to the relationship of the right to the overarching right to a fair trial.199 Furthermore, the African Commission on Human and People’s Rights found in *Malawi African
Association and Others v. Mauritania that the right to an interpreter was included within an accused person's right to a defense under the African Charter.\(^{200}\)

In addition to international instruments, Professor Bassiouni has identified the right to an interpreter as guaranteed by thirty-two national constitutions: Antigua and Barbuda,\(^{201}\) Bahamas,\(^{202}\) Barbados,\(^{203}\) Belize,\(^{204}\) Botswana,\(^{205}\) Canada,\(^{206}\) Dominica,\(^{207}\) Estonia,\(^{208}\) Ethiopia,\(^{209}\) Fiji,\(^{210}\) Gambia,\(^{211}\) Grenada,\(^{212}\) Guyana,\(^{213}\) Jamaica,\(^{214}\) Kenya,\(^{215}\) Kiribati,\(^{216}\) Malta,\(^{217}\) Mauritius,\(^{218}\) Nauru,\(^{219}\) Nicaragua,\(^{220}\) others.

\(^{200}\) Malawi African Association and Others v. Mauritania, Case No. 54/91, ¶ 97 (African Comm'n H.P.R. May 11, 2000).

\(^{201}\) Bassiouni, supra note 24, at 284.


\(^{206}\) Constitution of Botswana, 1966 (as amended up to 2006), ch. II § 10(2)(f).


\(^{210}\) Constitution of the Federal Democratic Republic of Ethiopia Dec. 8, 1994, art. 20(7). Note that Prof. Bassiouni's study incorporated an earlier version of Ethiopia's Constitution that also had a provision protecting the right to an interpreter but was placed in a different chapter.

\(^{211}\) Constitution of the Republic of Fiji Sep. 6, 2013, § 14(2)(f). Note that Prof. Bassiouni's study incorporated an earlier version of Fiji's Constitution that also had a provision protecting the right to an interpreter but was placed in a different article.

\(^{212}\) Constitution of the Republic of the Gambia 1997, § 24(2)(f). Note that Prof. Bassiouni's study incorporated an earlier version of Gambia's Constitution that also had a provision protecting the right to an interpreter but was placed in a different article.


\(^{216}\) The Constitution of Kenya Dec. 27, 2010, ch. IV, art. 50(2)(m). Note that Prof. Bassiouni's study incorporated an earlier version of Kenya's Constitution that also had a provision protecting the right to an interpreter but was placed in a different article.

\(^{217}\) The Kiribati independence Order [Constitution] June 26, 1979, ch. II § 10(2)(f).
Nigeria, Papua New Guinea, Peru, Romania, St. Kitts and Nevis, Sierra Leone, Solomon Islands, Swaziland.
Trinidad and Tobago, Tuvalu, Uganda, Zambia and Zimbabwe.

Other national constitutions not identified by Professor Bassiouni that explicitly protect the right to an interpreter are: Afghanistan, Albania, Angola, Armenia, Azerbaijan, Bolivia, China, Croatia, Cyprus, Czech Republic, Ecuador, Finland, Georgia, Ghana, Italy, Kosovo, and Zimbabwe.


232. Constitution of the Republic of Uganda, 1995 Oct. 8, 1995, as amended Sept. 30, 2005, ch. IV § 28(3)(f). Note that Prof. Bassiouni's study incorporated an earlier version of Uganda's Constitution that also had a provision protecting the right to an interpreter but was placed in a different chapter.

233. Const. of Zambia (1996), as amended Jan. 5, 2016, pt. III, art. 18(2)(f). Note that Prof. Bassiouni's study incorporated an earlier version of Zambia’s Constitution that also had a provision protecting the right to an interpreter but was placed in a different article. Also note that Zambia's constitution was amended on Jan. 5, 2016; however the amendments do not appear to have altered Part III on fundamental rights and freedoms of the individual.

234. Constitution of Zimbabwe Dec. 21, 1979, as amended Mar. 16, 2013, ch. IV, pt. II § 79(1)(j). Note that Prof. Bassiouni's study incorporated an earlier version of Zimbabwe's Constitution that also had a provision protecting the right to an interpreter but was placed in a different chapter.


239. Constitution of the Azerbaijan Republic Nov. 12, 1995 ch. VII, art. 127, sec. 10. Note that Azerbaijan does not have an enumerated right to a fair trial but does protect the right to an interpreter.

240. Constitucion Política del Estado [Constitution] Jan. 25, 2009, art. 120(I) (Bol.). Note that Prof. Bassiouni's study incorporated an earlier version of Bolivia's Constitution that did not have an provision guaranteeing the right to an interpreter.

241. Xianfa [Constitution], art. 134 (1982) (China). Note that China does not have an enumerated right to a fair trial but does protect the right to an interpreter.


246. CONSTITUTION OF FINLAND June 11, 1999, § 17. Note that section 17 states that the rights of persons in need of an interpreter or translator will be set down by an Act.


249. ART. 111 COSTITUZIONE [CONSTITUTION] (It.).


251. CONSTITUTION OF LESOTHO 1993, art. 12(2)(f).


255. CONSTITUTION OF MONGOLIA Jan. 13, 1992, art. 53.

256. CONSTITUTION OF MONTENEGRO 2007, arts. 29, 37.


258. CONSTITUTION OF PARAGUAY June 20, 1992, art. 12(4).

259. CONSTITUTION OF THE REPUBLIC OF SERBIA 2006, art. 32.


264. ÚSTAVA SLOVENSKÉ REPUBLIKY [CONSTITUTION] Sept. 3, 1992, art. 47(4) (Slovak.).


266. S. APR. CONST., 1996, art. 35(3)(k).

267. THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA Sept. 19, 1978, art. 24(3). Note that Prof. Bassiouni’s study did not list the Sri Lankan Constitution as guaranteeing the right to an interpreter, despite the 1978 Constitution containing an article on language rights in the country generally and language rights in courts specifically.


269. CONSTITUTION OF TURKMENISTAN 2008, sec. VI, art. 106.


Additionally, the right to an interpreter is explicitly protected in the United Kingdom through the Human Rights Act.\(^{272}\)

In addition to these constitutions that have explicit guarantees to interpretation rights in criminal proceedings, some national constitutions have provisions that would in practice guarantee language assistance for individuals who do not speak the language used in court. Neither the right to an interpreter nor the right to be informed of the charges against oneself in a language one understands are explicitly guaranteed in the Constitution of Bosnia and Herzegovina; however, Art. II para. 2 states that the rights and freedoms enumerated in the ECHR, which includes the right to an interpreter, are directly applicable in BiH and have priority over all other law.\(^{273}\) The right to an interpreter is not enumerated in the 2003 Draft Constitution of the State of Palestine or the constitutions of the D.R.C., Eritrea, Namibia, or Switzerland, but in all an accused has a right to be informed of the charges against him in a language he understands.\(^{274}\)

In the United States, due process rights under the Fifth, Sixth and Fourteenth Amendments provide protection for the right to an interpreter.\(^{275}\) Additionally, the right to a court interpreter in federal court is protected by the Court Interpreters Act of 1978 and cases pre-dating the Act, such as United States ex rel. Negron v. New York.\(^{276}\) In California and New Mexico, the right to an interpreter is protected by the state constitution.\(^{277}\) The right to an interpreter is also protected in other states by state statutes\(^{278}\) or common law.\(^{279}\)

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272. Human Rights Act, 1998, c. 42, § 1(3), sch. 1, pt. 1, art. 6(3)(a), (e) (Eng.).
273. CONSTITUTION OF BOSNIA AND HERZEGOVINA art. II, para. 2.
274. CONSTITUTION OF THE STATE OF PALESTINE Mar. 25, 2003, ch. II., art. 29; THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO 2005, tit. II, ch. I, art. 18 (note that Professor Bassouni's study originally included the Constitution of Zaire, which did not provide for fair trial or interpretation rights); QWAM ERITREA [CONSTITUTION] ch. III, art. 17(3); THE CONSTITUTION OF THE REPUBLIC OF NAMIBIA 2010, ch. 3, art. 11(2); BUNDEVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 31, para. 2 (Switz.).
275. U.S. CONST. amends. V, VI, XIV; see also MASON, supra note 7, at 1.
Finally, Title VI of the Civil Rights Act of 1964 has been interpreted to require state courts receiving federal funds to provide interpreters, which was enforced in 2000 by Executive Order 13166.

279. See Tsen v. State, 176 P.3d 1, 8 (Alaska Ct. App. 2008) (noting that the state law on the right to an interpreter was undefined by case law or statute and thus required the court to look to federal law); State v. Natividad, 526 P.2d 730, 733 (Ariz. 1974); State v. Munoz, 659 A.2d 683, 696 (Conn. 1995); Garcia v. State, 511 A.2d 1, 4 (Del. 1986); State v. Inich, 173 P. 230, 234 (Mont. 1918) (holding that the trial court has the discretion to appoint an interpreter); People v. Ramos, 258 N.E.2d 197, 198 (N.Y. 1970) (holding that N.Y. Crim. Proc. Law § 260.20 requires that a defendant who cannot understand English to have testimony translated to him in a language that he understands); Wise v. Short, 107 S.E. 134, 136 (N.C. 1921) (holding that the court has the inherent power to appoint an interpreter); Parra v. Page, 430 P.2d 834, 837 (Okla. Crim. App. 1967) (holding that the defendant’s fundamental rights were violated when he was denied an interpreter); State v. Masato Karumai, 126 P.2d 1047, 1050 (Utah 1942) (holding that the court may, at the State’s expense, appoint an interpreter where necessary to prevent injustice).

Additionally, language assistance is protected in American Article 5 military tribunals and Combatant Status Review Tribunals for unlawful combatants, as well as in Canadian military tribunals for unlawful combatant status reviews. The protection of the right to an interpreter in such tribunals is interesting, as it suggests that interpretation rights extend to international humanitarian law and may not be derogable in situations where other fair trial rights are.

Finally, international courts have demonstrated the existence of international norms regarding language assistance by referencing fundamental judgments from different courts and tribunals. This practice indicates that while interpretation rights may be explicitly guaranteed by the ICCPR or a regional human rights convention, the right is sufficiently similar across jurisdictions to be considered not just a statutory right but also an international norm. Furthermore, some commentators have indicated that the right to translation of documents, itself a subset of the right to an interpreter, has reached the status of customary international norm, suggesting that the broader right to an interpreter must have as well.

Thus, the right to an interpreter is widely protected by international instruments and national constitutions. Although the right faces the same difficulties for establishing opinio juris as the right to a fair trial, in the case of interpretation rights, where there is little indication that any state could be seen as a persistent objector

283. Id. at 65.
284. See infra notes 302–04 and accompanying text.
286. See generally Dingfelder Stone, supra note 177, at 159 (describing arguments that the right to translation is a customary norm of customary international law as embodied in the ICCR and Rome Statute); see also infra Part II.B.
287. See supra Part I.B.
in this case, state practice and protection by international instruments may provide sufficient evidence of *opinio juris*.²⁸⁸ For instance, it is interesting to note that states which are regularly accused of general fair trial violations such as Azerbaijan and China actually explicitly protect the right to an interpreter in their national constitutions,²⁸⁹ suggesting that interpretation rights are subjectively valued by states even when the broader fair trial norm is not necessarily. Some commentators have also argued that where there is a great deal of sufficient state practice, there may be less need for evidence of *opinio juris*,²⁹⁰ although this view has recently been rejected by the International Law Commission.²⁹¹ Therefore, together, the widespread protection of the right to an interpreter in international instruments and national constitutions and statutes gives substantial evidence of state practice and *opinio juris* that the right to an interpreter is a norm under customary international law.

**B. Scope and Content of the Right to an Interpreter**

In addition to satisfying the requirements for customary international norm status of state practice and *opinio juris*, the right to an interpreter additionally satisfies the heightened requirements

²⁸⁸. *See* Michael B. Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 12 (1974) (arguing that a small amount of practice is sufficient to prove a rule of customary international law where there is no evidence presented against it); Scharf, *supra* note 157, at 312, 314, 316 (noting that international legal custom can be evidenced by silence, inaction, spontaneous compliance, and sufficient representation); *see also* International Law Commission, *supra* note 155, ¶ 71 (stating that the evidence needed to determine *opinio juris* may “depend upon the nature of the rule and the circumstances in which the rule falls to be applied.”).

²⁸⁹. *See supra* notes 239 and 241.

²⁹⁰. *See* Kirgis, *supra* note 157, at 149; *see also* John Tasioulas, *In Defense of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. LEG. STUD. 85, 109 (1996) (supporting Professor’s Kirgis’s “sliding scale” view of *opinio juris*); Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 165, 384–86 (1998) (also supporting Professor’s Kirgis’s “sliding scale” view of *opinio juris*). Some commentators have even argued that *opinio juris* is not necessary for the formation of a norm of customary international law. *See* Hersch Lauterpacht, *The Development of International Law by the International Court* 380 (1958); Akehurst, *supra* note 288, at 32; Mendelson, *supra* at 289; *see also* Guzman, *supra* note 157, at 145 (noting that some prominent commentators view *opinio juris* as unnecessary for the formation of customary international norms).

²⁹¹. *See* International Law Commission, *supra* note 155, ¶ 21–32 (reaffirming that the formation of customary international law requires the two elements of a general practice accepted as law).
set out in *Sosa* for customary international laws to be applied in U.S. federal courts. Although *Sosa* concerned claims brought under the ATS, and thus its holding may be limited to customary international law claims under the ATS, it is nonetheless important that the right to an interpreter satisfies even the *Sosa* standards, as it opens the possibilities for claims of interpretation violations to be brought in the United States.

Unlike the right to a fair trial, the right to an interpreter is a more specified right, with more or less consistent definitions between international instruments such as the ICCPR and ECHR and interpretations between international bodies such as the Human Rights Council and ECtHR. As an international customary law norm, the right to an interpreter protects the right to language assistance both pre-trial and during trial, and during any interviews or interrogations with authorities. The customary right to an interpreter also imposes a positive obligation upon the competent authorities to independently ensure that the accused is able to understand the proceedings, and thus a violation can occur even when the accused has not notified the court of his difficulties or

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292. *See supra* note 171 and accompanying text.
294. One area of potential variance between the Human Rights Committee and ECtHR concerns whether the right to an interpreter is an individual right belonging to the accused alone, or a right belonging to the “defense.” For instance, in *Harward v. Norway*, the Human Rights Committee did not find a violation where the accused did not have separate language assistance but the accused's defense counsel could speak the language used in court and could interpret and translate for the accused. *See Harward v. Norway*, Comm'n No. 451/1991, ¶ 9.5 (Hum. Rts. Comm. July 15, 1994). In contrast, the ECtHR in *Cuscani v. the United Kingdom* found that the defense counsel's language skills were insufficient protection of the accused's fair trial rights and that the accused should have been provided with a formal interpreter. *See Cuscani v. the United Kingdom*, App. No. 32771/96, ¶ 38 (Eur. Ct. H.R. Sept. 24, 2002). However, this discrepancy may exist due to the particular facts of the cases, as in *Cuscani* the defense counsel appeared to have grossly exaggerated his language skills, whereas in *Harward* the defense counsel was competent in the accused's language.
296. However, where the accused makes no challenges to the quality of the interpretation, fails to request a replacement interpreter, and appears to understand the proceedings, the court may assume that interpretation is sufficient, so long as language assistance would have been available had it been requested. *Protopapa v. Turkey*, App. No. 16094/90, ¶ 86 (Eur. Ct. H.R. Sept. 22, 2009).
when the defense counsel has assured the court that accused does not need language assistance.\textsuperscript{297} Finally, the right to an interpreter under international law is an absolute right to free language assistance, regardless of the accused person's finances, and costs cannot be retrieved by the court after the proceedings, even if the accused is convicted.\textsuperscript{298}

The greatest variation between international instruments with regard to the right to an interpreter is whether an accused person is entitled to the free translation of documents, as some instruments have not explicitly enumerated this right, while others have.\textsuperscript{299} However, whether explicitly enumerated as a separate right or found to be an implied right within the right to an interpreter, international courts and tribunals have not substantially disagreed on the scope of translation rights, generally finding that translation is guaranteed as required to safeguard the principles of fairness.\textsuperscript{300} Additionally, the scope and content of the right to an interpreter does not vary between civil and common-law jurisdictions. Consequently, the right is more specified and consistent across legal systems than other subsidiary fair trial rights, such as the right to counsel.\textsuperscript{301}


\textsuperscript{299} Cf. ECHR, supra note 13, art. 6, para. 3(e); Rome Statute, supra note 20, art. 67, para. 1(f); see generally Dingfelder Stone, supra note 177, at 159 (describing the scope of the right to translation of documents under the ICCPR and customary international law).


\textsuperscript{301} While the right to counsel is itself uncontroversial, commentators and courts have disagreed as to whether the right to counsel entails also a right to
Moreover, the right to an interpreter also appears to be a non-derogable right in times of emergency. The right to an interpreter is not an absolute right in and of itself; rather it is guaranteed in order to safeguard the right to a fair trial. Consequently, certain limitations may be placed on the right where it causes no prejudice to the accused person or where a balance must be struck between the right to an interpreter and another fair trial right, most often the right to a speedy trial. However, even in situations of emergencies and under international humanitarian law, states have protected the right to an interpreter for accused persons. Consequently, the right has a clear scope and definition both in times of emergency and in normal application.

The right to an interpreter is also likely a right that would have been protected at the time of the founding of the United States, since, as a fair trial right, it can be traced to the Sixth Amendment. Indeed, court interpreters have been documented as being used in the United States since at least 1808. Thus, defendants claiming a violation of the right to an interpreter in ATS cases might face an easier battle than did the defendant in Sosa in proving a right against arbitrary detention. Moreover, according to Professors Bradley, Goldsmith, and Moore, the Court in Sosa implied that state practice, as evidence through national constitutions, “might be influential in establishing that nations had accepted the norm in question,” and

self-representation, as the ICTY Trial and Appeals Chambers concluded in Milosević. See Prosecutor v. Milosević, Case No. IT-92-54-A-R73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, ¶ 11 (Int’l Crim. Trib. for the Former Yugoslavia July 3, 2001); Boas, Self-Representation, supra note 183, at 56; Scharf & Rassi, supra note 183, at 15.


303. See generally Sandel v. the Former Yugoslav Republic of Macedonia, App. No. 21790/03, ¶ 44 (Eur. Ct. H.R. May 27, 2010) (detailing the efforts of Macedonian authorities to find a Hebrew-Macedonian interpreter for the proceedings which caused the proceedings to be unduly delayed under Article 6 of the ECHR).

304. See generally Bogar, supra note 282, at 65 (describing the right to an interpreter in U.S. and Canadian military tribunals).

305. In re Norberg, 4 Mass. (1 Tyr) 81 (Mass. 1808) (swearing in an interpreter for a Swedish witness for a grand jury who did not speak English); see also Gonzalez et al., supra note 280, at 4.


may be more valued than inclusion in international instruments such as the ICCPR and UDHR.\textsuperscript{308} Therefore, not only is the right to an interpreter a right protected under customary international law, but also a customary international law norm that may be invoked in U.S. courts even under the stricter requirements set out in \textit{Sosa}.

\section*{III. APPLYING THE RIGHT TO AN INTERPRETER IN U.S. COURTS}

The right to an interpreter is thus a norm under customary international law, and one that likely has the sufficient specificity, definition, and state practice to satisfy the requirements of even a \textit{Sosa} analysis of general acceptance and specificity.\textsuperscript{309} should that be necessary. Consequently, the right to an interpreter could be invoked as a right under customary international law in U.S. courts, and indeed \textit{should} be, as the customary international law right to an interpreter likely provides far greater guarantees of language assistance than currently exists in the United States.

\subsection*{A. Federal Courts}

The Court Interpreters Act of 1978 goes a long way to guarantee the right to an interpreter in federal courts in comparison to the lack of protection prior to its enactment. However, the Act also leaves much to be desired.\textsuperscript{310} and provides far fewer guarantees than the customary international law right. Under the Act, an accused is only entitled to interpretation if the need is obvious to the judge or brought to the attention of the judge.\textsuperscript{311} Consequently, the Act does not impose a positive obligation upon the competent authorities to ensure that the accused is able to fully participate in the proceedings, as the customary norm does.\textsuperscript{312} In fact, the Court Interpreters Act

\begin{itemize}
  \item \textsuperscript{308} See id. at 898–99.
  \item \textsuperscript{309} See supra note 171 and accompanying text.
  \item \textsuperscript{311} JLM, supra note 310, at 496; see United States v. Fuentes, 553 F.2d 527, 536–37 (2d Cir. 1977); Gonzalez v. United States, 33 F.3d 1047, 1050 (9th Cir. 1994).
  \item \textsuperscript{312} See supra Part II.B.
\end{itemize}
leaves the decision to provide language assistance to the trial judge’s discretion, which is consistent with the Supreme Court’s reasoning in *Perovich v. United States*.313

Accordingly, most courts have found that the Constitution does not *per se* require that every accused person who has demonstrated a need for language assistance be provided with it, opening the possibility for a general fair trial violation in addition to failing to meet international standards for interpretation.314 Aliens are particularly left vulnerable by gaps in the Court Interpreters Act, with the Second Circuit concluding that the Immigration and Naturalization Service is not always required to provide interpreters for aliens, thus leaving aliens especially vulnerable to a violation of their customary international law right to an interpreter.315 The Court Interpreters Act also does not enumerate a right to translation of documents, and courts have disagreed on what documents an accused is entitled to have translated in order to ensure due process.316 Finally, despite the constitutional requirement for free interpretation services for criminal proceedings in the United States, federal and state courts have often failed to provide free interpretation services for criminal cases, and in particular courts have often tried to recover costs for language assistance from defendants who have not demonstrated their financial need.317 Therefore, there is both a gap in and a dearth of protection for language assistance in the United States that can be corrected by customary international law. The identification of the right to an interpreter as a norm of customary international law thus does not merely reinforce existing fair trial protections for individuals in the United States, but establishes new standards to which American

313. *Perovich v. United States*, 205 U.S. 86, 91 (1907) (noting that the decision to appoint an interpreter “is a matter largely at the discretion of the trial court”).

314. JLM, *supra* note 310, at 497; see *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980); *United States v. Edouard*, 485 F.3d 1324, 1337 (11th Cir. 2007); *Abdullah v. INS*, 184 F.3d 158, 166 (2d Cir. 1999).

315. *Abdullah*, 184 F.3d at 166.


courts should be held and from which new claims of violation could be brought.

This Note does not aim to weigh in on the considerable debate over the status of customary international law in federal courts. Since Sosa this issue has not become any less contested, as “everybody except [Alvarez-Machain] thinks that they won the case.” As a result, supporters of the “modern” position reason that Sosa vindicates their argument that customary international law is federal common law. On the other side, “revisionists” also claim a victory, interpreting Sosa as rejecting the “modern” position that customary international law is self-executing federal common law. A third approach argues that customary international law is neither state nor federal law, but “general common law.”

Thus, much controversy remains over the status of customary international law in U.S. federal courts after Sosa. However, Sosa did


322. See Young, supra note 318, at 370; see also Meltzer, supra note 318, at 515 (commenting on Professor Young’s general common law argument).
not shut the door to such international claims. Provided that the norm alleged meets the requirements set out in Sosa, as the right to an interpreter does, an individual could bring a customary international law claim under the ATS for violations of rights which occurred outside the United States.\(^323\) Commentators have also noted that other avenues to federal jurisdiction remain open, such as federal question jurisdiction under 28 U.S.C. § 1331,\(^324\) and that Sosa did not directly address the use of customary international law absent congressional authorization, leaving the door somewhat open for common-law type claims.\(^325\) Consequently, regardless of the relative success of the “modern,” “revisionist,” or general common law theories in the U.S. Supreme Court, post-Sosa claims of violations of customary international law could likely be brought in U.S. federal courts through one of several different avenues. Customary international law also has not lost its status as a helpful tool for statutory interpretation.\(^326\) Therefore, assuming that the Supreme Court has not completely foreclosed the use of customary international law by federal courts, a claim of a violation of the right to an interpreter may be brought in a U.S. federal court through one of several causes of action.

For instance, a customary international law right to an interpreter might be successfully relied upon in a habeas corpus petition. Prior to the Supreme Court’s confusing commentary in Sosa, the Kansas District Court in Fernandez v. Wilkinson relied entirely on customary international law in its holding on the prolonged detention of one of the Mariel Cubans.\(^327\) After surveying the major human rights treaties for evidence of state practice and opinio juris, the court found that the defendant’s arbitrary detention, while not

\(^{323}\) See also Bart M.J. Szewczyk, Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions, 82 GEO. WASH. L. REV. 1118, 1125 (2013) (finding that U.S. courts have generally used customary international law in the context of statutory interpretation and future litigants in ATS cases may be most successful with this approach).


prohibited by the Constitution or statute, was prohibited by customary international law.\textsuperscript{328} Moreover, in affirming the judgment on statutory grounds, the Tenth Circuit also noted that “[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment,”\textsuperscript{329} and cited the UDHR and ACHR.

Other Circuits have taken different approaches to customary international law in considering habeas petitions. After noting that international law was controlling only in the absence of a treaty or a controlling executive, legislative or judicial decision, the 11th Circuit in \textit{Garcia-Mir v. Meese} found that the “reach of international law [was] interdicted by a controlling judicial decision,”\textsuperscript{330} the Supreme Court’s earlier ruling in \textit{Jean v. Nelson}.\textsuperscript{331} In the case of a violation of the right to an interpreter, it is not clear whether a court would consider the Court Interpreters Act a controlling legislative decision, as the Act does not fully set out the scope and content of interpretation rights in the United States, and leaves that job to the courts. As a result, it may be possible to rely solely on a customary international law claim in federal courts for a violation of the right to an interpreter, particularly for the right to translation of documents, which is not covered by the Court Interpreters Act.\textsuperscript{332} Therefore, while the success of the claim may vary depending on the Circuit and many ambiguities remain post-Sosa, individuals who have suffered a violation of their interpretation rights may be successful in relying on customary international law in U.S. federal courts and should make such arguments, especially where U.S. statutory protections are insufficient in comparison to international norms.

B. State Courts

Although the right to an interpreter is guaranteed by state statutes and common law, the right to an interpreter is also inadequately protected in U.S. state courts, violating both U.S. due process guarantees and customary international law.\textsuperscript{333} In addition to

\begin{itemize}
\item \textsuperscript{328} \textit{Fernandez}, 505 F. Supp. at 795.
\item \textsuperscript{329} \textit{Rodriguez-Fernandez}, 654 F.2d at 1388.
\item \textsuperscript{330} \textit{Garcia-Mir v. Meese}, 788 F.2d 1446, 1455 (11th Cir. 1986).
\item \textsuperscript{331} \textit{Garcia-Mir}, 788 F.2d at 1455; see \textit{Jean v. Nelson}, 472 U.S. 846 (1985).
\item \textsuperscript{333} See \textit{Abel}, supra note 280, at 4.
\end{itemize}
suffering from the same deficiencies as federal courts, and especially
the failure to provide interpreters free of cost for all accused persons
and witnesses, state courts are particularly likely to insufficiently
protect interpretation rights due to the substantial variance in
standards for interpretation between courts, both interstate and
intrasate, despite statutory or common law protections existing in
every state. As a result, customary international law could play a
significant role in state courts as well as federal courts, by bringing
international standards for the right to an interpreter to individuals
engaged in proceedings in state courts.

U.S. federal courts have dominated the discussion of
customary international law since Professors Bradley and Goldsmith
ignited debate in the late 1990s; however, state courts should not be
forgotten in the discussion of customary international law. State
courts in practice do consider customary international law, and
defendants in state courts have a long history of raising customary
international law defenses. Since the ATS has been cut back in
scope, some commentators believe that there will be an increase in
cases brought in state courts for violations of customary
international law.

One subset of defendants who may wish to raise such
customary international law claims in state courts are defendants
who have been unsuccessful with VCCR claims. Despite the

334. See GONZÁLEZ ET AL., supra note 280, at 225; see also supra Part II.A.
335. See Jack L. Landau, Customary International Law in State Courts:
336. See, e.g., Cochran & Thompson v. Tucker, 43 Tenn. (3 Cold.) 186
(Tenn. 1866) (considering the laws of war); Hedges v. Price, 2 W.Va. 192 (W.Va.
1867) (considering the laws of war); Capterton v. Martin, 4 W.Va. 138 (W.Va.
1870) (considering the laws of war); Ferguson v. Loar, 68 Ky. 689 (Ky. 1869)
(considering the laws of war); Bryan v. Walker, 64 N.C. 141 (N.C. 1870)
(considering laws of war); Koonce v. Davis, 72 N.C. 218 (N.C. 1875) (considering
the laws of war); Namba v. McCourt, 204 P.2d 569 (Or. 1949); Peters v. McKay,
238 P.2d 225 (Or. 1951) (considering international law arguments for suspending
the statute of limitations); see also Gwynne L. Skinner, Beyond Kiobel: Providing
Access to Judicial Remedies for Violations of International Human Rights Norms
by Transnational Business in a New (post-Kiobel) World, 46 COLUM. HUM. RTS. L.
REV. 158, 201 n.100 (2014) (describing the treatment of customary international
law in state courts during the 1800s).
(considering an ATS claim for arbitrary detention); Kiobel v. Royal Dutch
Petroleum Co., 133 S. Ct. 1659 (2013) (finding that the presumption against
extraterritoriality applies to the ATS).
338. See Landau, supra note 335, at 56; Skinner, supra note 336, at 201.
safeguards provided by the U.S. Constitution, recent history has shown that foreign nationals are particularly susceptible to fair trial violations when facing criminal proceedings in the United States and particular violations of their right to consular notification. Accordingly, the I.C.J. has found that the United States has deprived foreign nationals of their rights under the VCCR in several cases. However, U.S. defendants alleging VCCR violations and attempting to have their I.C.J. judgments enforced in the United States have been largely unsuccessful in federal courts.

Some state courts, however, have been more favorable to hearing international law arguments, including allegations of VCCR violations. Looking to the I.C.J.'s Avena judgment, in 2005 the Oklahoma Court of Criminal Appeals subsequently remanded the case of Osbaldo Torres to trial court to consider whether Torres, a Mexican national, was prejudiced by Oklahoma's failure to inform him of his VCCR rights. On remand, the trial court found that Torres was prejudiced due to the VCCR violation, based on a three-prong test that the trial court, and subsequently the Oklahoma Court of Criminal Appeals, adopted. In considering the trial court's finding of a violation on appeal, the Oklahoma Court of Criminal Appeals noted that the test used by the trial court was consistent

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339. Under Article 36 of the VCCR, a foreign national arrested, committed to prison, put in custody pending trial, or detained in any manner, has a right to notify their consular post of their detention without delay, and the arresting authorities should inform the detained individual of this right. See Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Moreover, under the Optional Protocol Concerning the Compulsory Settlement of Disputes, disputes arising from interpretations of the VCCR are the compulsory jurisdiction of the I.C.J. See Optional Protocol to the Vienna Convention on Consular Relations Concerning Compulsory Settlement of Disputes, art. 1, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 (hereinafter Optional Protocol). Any party to the dispute who is a party to the Protocol may bring the dispute before the I.C.J. in an application. See Optional Protocol, art. 1.


343. Id. The test considers: (1) whether the defendant did not know he had a right to contact his consulate for assistance; (2) whether he would have availed himself of the right had he known of it; and (3) whether it was likely that the consulate would have assisted the defendant.
with the I.C.J.'s reasoning in \textit{Avena}.\textsuperscript{344} However, the Oklahoma Court of Criminal Appeals ultimately concluded that Torres was not prejudiced by his Vienna Convention violation, and denied his application for post-conviction relief.\textsuperscript{345} Nevertheless, the \textit{Torres} decision provided some hope to similarly situated foreign nationals, as it held that, as a matter of state law, the Vienna Convention confers individually enforceable rights.\textsuperscript{346}

Since \textit{Medellin v. Texas}, foreign nationals who have allegedly suffered a violation of their consular notification rights under the Vienna Convention have been largely without relief due to the procedural default rule.\textsuperscript{347} However, despite the Supreme Court's finding that the VCCR is a non-self-executing treaty, one state court has been willing to continue reviewing VCCR violations as directed by the I.C.J.\textsuperscript{348}

In 2012, the Nevada Supreme Court considered the denial of a post-conviction writ of habeas corpus from Carlos Gutierrez.\textsuperscript{349} In 1994, Gutierrez had pleaded no contest to the first-degree murder of his stepdaughter and was sentenced to death.\textsuperscript{350} Gutierrez was one of the named Mexican nationals in \textit{Avena}, and unlike the defendant in \textit{Medellin}, the facts of his case are, prima facie, indicative of prejudice due the lack of timely consular access.\textsuperscript{351} In his criminal proceedings in Nevada, Gutierrez had been denied adequate interpretation services, which may have been rectified had the Mexican consulate been notified of his detention.\textsuperscript{352} One of the interpreters used during his proceedings not only mistranslated key words, but also relied on the incorrect variant of Spanish, utilizing Cuban-Spanish rather than

\textsuperscript{344} Id. at 1187.
\textsuperscript{345} Id. at 1190.
\textsuperscript{347} See, e.g., Leal Garcia v. Quarterman, 573 F.3d 214, 218 (5th Cir. 2009) (finding that the basis for the petitioner's habeas claim had been foreclosed by \textit{Medellin} and state procedural default rules).
\textsuperscript{350} Id.
\textsuperscript{351} Id. at *2–4; Garcia v. Texas, 131 S. Ct. 2866, 2868 (2011) (per curiam); Medellin v. Texas, 554 U.S. 759, 760 (2008) (per curiam) (denying Medellin's stay of execution after the Court's decision in Medellin I); see Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 17 (March 31).
\textsuperscript{352} Gutierrez, 2012 WL 4355518, at *5–13.
The Right to an Interpreter

Mexican-Spanish. 353 Furthermore, the interpretation services provided to Gutierrez were inadequate as a matter of law. The interpreter who interpreted for the judges and three of the State’s witnesses was later convicted of perjury for falsifying his credentials at Gutierrez’s death penalty hearing.354 Demonstrating the degree of harm the interpreter may have inflicted on Gutierrez, the State described the interpreter as “a sociopath” who “does not know how to recognize or offer truthful assertions”355 but who, nonetheless, played an “integral”356 role in Gutierrez’s death penalty hearing.

The Nevada Supreme Court noted that while state procedural default rules do not need to yield to I.C.J. judgments such as Avena without Congressional legislation executing the VCCR, “they may yield, if actual prejudice can be shown.”357 Gutierrez, the court found, “needed help navigating the American criminal system”358 and while the U.S. Constitution does not require certified interpreters, “it does require reliable evidence,”359 which had likely been undermined by the misconduct of the interpreter. Consequently, the Nevada Supreme Court reversed and remanded the decision of the district court denying a writ of habeas corpus for an evidentiary hearing to determine whether Gutierrez suffered prejudice from his lack of consular access.360

Since the case was remanded for an evidentiary hearing in 2012, no movement has been made on the Gutierrez case. Therefore, it is possible that upon rehearing, the district court may find that Gutierrez was prejudiced by his lack of consular access, giving life back to Avena and individual enforcement of consular notification rights in U.S. courts. Yet the history of the VCCR in the United States demonstrates that foreign nationals relying solely on VCCR claims are unlikely to find any ultimate relief.

353. Id. at *11.
356. Id. at *11 (quoting the State’s arguments in State v. Gonzalez).
357. Id. at *4.
358. Id. at *6.
359. Id.
360. Id. at *12–13.
Nevertheless, when VCCR rights are violated, other rights are also often implicated and even infringed upon. In the case of Gutierrez, the facts are so peculiar that they likely give rise to not only a violation of the right to consular notification under the VCCR, but also a violation of the right to an interpreter under customary international law. Indeed, Gutierrez's arguments for a violation of the right to an interpreter may be stronger than under the VCCR claim. The facts available indicate that the interpretation provided to the court was insufficient to ensure procedural fairness. Even though the interpreter was interpreting for the judges rather than for Gutierrez, Gutierrez's fair trial rights were still likely infringed upon. The right to an interpreter is not merely a right essential to the accused's ability to participate in the proceedings, but also an essential element of the court and the trier of fact's ability to evaluate the credibility and reliability of witnesses and accused persons.

Moreover, international courts such as the ECHR have been sensitive to interpretation violations during particularly critical moments of criminal proceedings, and thus the lack of sufficient interpretation during Gutierrez' death penalty hearing may be considered an especially egregious violation under international law. Thus, the facts indicate that the interpretation services provided to Gutierrez would likely be considered a violation of the right to an interpreter in an international tribunal. However, it is unclear whether consular notification would have rectified this issue, as the


363. See Human Rights Council, Opinion of the Working Group on Arbitrary Detention, Opinion No. 34/2011, A/HRC/WGAD/2011/34, ¶ 5 (Feb. 28, 2011) (noting that the accused persons who were denied an interpreter were facing the possibility of execution); Saman v. Turkey, App. No. 35292/05, ¶ 31, 36 (Eur. Ct. H.R. Apr. 5, 2011) (noting that the accused was facing complex charge for grave criminal offenses and thus that the interpretation provided was insufficient).
problematic interpreter was a court interpreter and not an interpreter for Gutierrez.\textsuperscript{364}

Consequently, for a defendant like Gutierrez, where the facts indicate that the defendant suffered prejudice (thereby overcoming the procedural default rule\textsuperscript{365}) and the state court appears favorable to international law claims, a violation of the customary international law right to an interpreter may be easier to establish than a VCCR claim, particularly as the right is also protected, albeit less comprehensively, by the U.S. Constitution and Nevada state law.\textsuperscript{366} Alternatively, a defendant could claim a violation of the right to an interpreter under customary international law in addition to a violation of the VCCR, bolstering both international law claims.

CONCLUSION

The right to an interpreter, while not previously identified as such, is well established by both state practice and \textit{opinio juris}. As a right essential to the broader international law guarantees of a fair trial, the right to an interpreter is longstanding in international law and, particularly, international criminal law. However, unlike the right to a fair trial, the right to an interpreter is both more specified and more readily applicable, consequently giving it a better chance of recognition in U.S. courts. As a result, individuals who have faced substantial difficulties in claiming a treaty-based international law right in U.S. state or federal courts, may have a better chance of success with a customary international law claim. As a customary norm, the right to an interpreter is not limited by the requirements of dualist systems such as the United States for execution of treaties, and consequently, has potentially more value to U.S. claimants than treaty rights only protected under international instruments such as the ICCPR. Moreover, the customary international law right to an interpreter is more comprehensive and offers far stronger fair trial


\textsuperscript{365} According to the U.S. submissions in \textit{LaGrand}, the procedural default rule “is a federal rule that, before a state criminal defendant can obtain relief in federal court, the claim must be presented to a state court. If a defendant attempts to raise a new issue in a federal \textit{habeas corpus} proceeding, the defendant can only do so by showing cause and prejudice.” \textit{LaGrand} Case (Germ. v. U.S.), 2001 I.C.J 466, 477 (June 27).

\textsuperscript{366} See U.S. CONST. amends. V, VI, XIV; NEV. REV. STAT. § 50.0515 (LexisNexis 2012).
protections than U.S. statutory provisions. Therefore, the right to an interpreter is not only a right guaranteed by the intangible body of customary international law, but also a practical right that may be successfully exercised in the United States by individuals who have suffered a substantial violation of this right.