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The (In-)Visibility of Interpreters in Legal Wiretapping

— A Case Study: How the Swiss Federal Court Clears or Thickens the Fog

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Abstract
Interpreters in lawful interception of communications are an almost invisible group of language professionals. They participate in secret surveillance measures and enable law enforcement authorities to intercept conversations held in a foreign language. This group of translational agents who perform a hybrid activity between interpreting and translation within an institutional legal context has received scant attention from either translation and interpreting or legal studies. If the topic is addressed at all, it is most often examined within the context of police interpreting, even though intercept interpreters do not participate in the kind of triadic communication situation typical of face-to-face interpreting. Moreover, the sensitive context makes it difficult to collect data on the topic. In this article, we analyse nine judgments rendered by the Swiss Federal Supreme Court (FSC) from 2002 to 2019 concerning lawful interception with interpreters. Higher courts not only dispense justice but also contribute to the continued development of the law. Their judgments are also a rich source of knowledge, providing rare information about an understudied research area. These judgments are crucial because, as we will argue, it is the legal order and its implementation through jurisprudence that shape the degree of (in-)visibility of intercept interpreters. In addition, these judgments provide valuable information about the working processes and professional context of intercept interpreters. Our qualitative content analysis reveals that the FSC explicitly demands the visibility of intercept interpreters and their activity in some cases while implicitly accepting or deliberately generating their invisibility in others.

Keywords
intercept interpreting, wiretapping, communication interception, invisibility, legal translation studies, police interpreting, skopos theory, functional theory

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1. Introduction

Interpreters in lawful interception are an almost invisible group of language professionals. Intercept interpreters are translational agents mandated within the framework of secret surveillance measures in criminal proceedings. We understand interception as both wiretapping of landline or mobile telephone communications and bugging of cars, apartments, or any other location. In Switzerland, it is mainly used in organised crime (Art. 260ter CrimC[1]), such as drug trafficking (Art. 19 Narcotics Act[2]) or human trafficking (Art. 182 CrimC), and to fight terrorism (Art. 260^{quinquies}, 260^{sexies} CrimC). Within Swiss criminal proceedings, communications surveillance is part of the investigation conducted by the police under the lead of the prosecutor during the preliminary proceeding phase (Art. 308 ff. CrimPC[3], Art. 269 ff. CrimPC). As in many other countries, intercepted communications are allowed as evidence under certain legal conditions (e.g., Bucholtz, 2009; Fishman, 2006; González et al., 2012; Salaets et al., 2015; Sausdal, 2019; Stanek, 2012; Taibi & Martín, 2012).

In principle, prosecutors and judges – and, upon request, defence lawyers – should have access to the recorded audio file with the original communication (Art. 9 f. SPTA[4] and Art. 101 and 108 CrimPC). However, they generally use a translated written record of selected conversations or sequences of conversations, which is generated by the intercept interpreter and the police. This document becomes part of the case file and is used as evidence in the proceedings. Because of time pressure and the vast number of intercepted conversations, the audio recordings are generally not transcribed in the source language before being translated. This means that intercept interpreting involves immediately translating what is heard by producing different written records as well as oral information transfer in the target language. It is thus a hybrid translational activity that involves not only elements of interpreting and translation but also decryption of codes used by criminals, transfer of knowledge about cultural realities that serve legal and factual understanding, investigative competences, and voice recognition (Capus & Havelka, in preparation).

Despite the importance of this hybrid translational activity, research on intercept interpreting is lacking. In fact, a literature review conducted by Capus and Havelka (in preparation) shows that most of the research on this topic, in both translation and interpreting studies (TIS) and legal translation studies, focuses on court and police interpreting. Studies that do address intercept interpreting tend to do so in the context of

[1] Swiss Criminal Code, fedlex.admin.ch/eli/cc/54/757_781_799/en (accessed 27 July 2021).

[2] Federal Act on Narcotics and Psychotropic Substances, fedlex.admin.ch/eli/cc/1952/241_241_245/en (accessed 3 Aug 2021).

[3] Swiss Criminal Procedure Code, fedlex.admin.ch/eli/cc/2010/267/en (accessed 21 April 2021).

[4] Swiss Federal Act on the Surveillance of Postal and Telecommunications, fedlex.admin.ch/eli/cc/2018/31/en (accessed 3 Aug 2021).

police interpreting (Berk-Seligson, 2000; Drugan, 2020; Gradinčević-Savić, 2020; Perez, 2015; Salaets & Balogh, 2018; Stanek, 2011). Although it is not uncommon for police interpreters to be involved in both interrogations and wiretapping, the role of interpreters in police interrogations is considerably different from that of intercept interpreters. The former entails triadic communication (Pöchhacker, 2004: 90), which is typical of face-to-face interpreting. Situated between the defendant and the police, interpreters in police interrogations serve not only the interrogator but also the defendant, enabling the latter to understand and communicate with the law enforcement authorities. In contrast, the intercept interpreter exclusively serves the police, facilitating investigations of suspects.

International legal sources transmit the same blindness towards the hybrid translational activity of intercept interpreting: according to Art. 6 para. 1 of the European Convention of Human Rights (ECHR), suspects and defendants in criminal proceedings have the right to a fair trial and to be heard. Furthermore, Art. 2(8) and Art. 5(1) of the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings oblige EU member states to include measures in their respective legal systems that ensure the level of protection never falls below the minimal standard guaranteed by the ECHR. To that end, the directive lays down common minimum rules to be applied in the fields of interpretation and translation in criminal proceedings. However, the focus lies exclusively on interpreters in triadic communication situations.

Moreover, an inconsistent use of designations can be observed when reading the related Swiss legislation in the three official languages (German, French, and Italian). The German version of Art. 68, para. 1 CrimPC, regarding interpreting and translation in criminal procedures, refers to translators only, whereas the French and Italian versions, as well as the non-official English translation, mention both *interpreters* and *translators*.[5] A first step towards unambiguous designations in German has been taken in the Language Services Ordinance of the Canton of Zurich, which came into force on 1.7.2019. According to this ordinance, interpreting is to be defined as oral translation ("mündliches Übersetzen"), translating as written translation ("schriftliches Übersetzen") and *linguistic mediation* ("Sprachmittlung") in the field of communication interception.[6]

However, an inconsistent use of designations can also be observed in the research literature. Various terms are used to designate these translational agents and their activities (Capus & Havelka, in preparation). The most common terms are *interpreting*, *interpreters*, and *intercept interpreters* (Drugan, 2020; Gradinčević-Savić, 2020; Ortega Harráez & Foulquié Rubio, 2008; Salaets et al., 2015). However, other terms, such as

[5] No Rhaeto-Romanic version of the CrimPC is currently available. Cf. fedlex.admin.ch/eli/cc/2010/267/rm (accessed 3 Aug 2021).

[6] zh.ch/de/politik-staat/gesetze-beschluesse/gesetzessammlung/zhlex-ls/erlass-211_17-2018_12_19-2019_07_01-105.html (accessed 3 Aug 2021).

translator, *forensic linguistic expert* (Salaets et al., 2015), *linguist* (Drugan, 2020), and *monitor-translator* (Nunn, 2010), are also employed. The latter term, however, referred to policemen who perform a quasi-intralingual translation rather than to experts in interlingual translation.

> These individuals had to understand drug market language used by the Martindale targets. In the U.S., persons serving as monitors in wire rooms are sworn police officers who have been fully minimized and trained under the guidance of the judicial wiretap order and federal wiretap law, and thus either worked in the wire room as monitors or were allowed to listen to wiretap recordings later. (Nunn, 2010: 40)

In our view, a heterogeneous terminology creates invisibility – in research and in the professional (legal) practice: what is not clearly named cannot be clearly recognised and defined. Starting from this hypothesis of invisibility of interpreters in legal wiretapping, we want to study how the Swiss Federal Court clears or thickens the fog with regard to the legal practice.

Higher courts not only dispense justice but also contribute to the continued development of the law. Our case study shows how the interpretation and further development of the law can affect an entire group of professionals – in this case, intercept interpreters. The Swiss Federal Supreme Court (FSC) is the court of last resort within the Swiss legal system (Art. 1 Swiss Federal Supreme Court Act). It adjudicates appeals of rulings by the high cantonal courts of appeal and consists of seven divisions: two civil law divisions, two public law divisions, one criminal law division, and two social law divisions. The FSC's jurisprudence ensures the uniform application of federal law throughout the country. It also serves as a guide for the lower courts and the law enforcement authorities that apply the law, as they have to comply with the FSC's case law and adopt its principles.

We analyse the reasoning of the FSC in the nine pertinent decisions issued between 2002 and 2019 concerning lawful interception with interpreters. These judgments are particularly interesting because they demonstrate that it is the legal order and its implementation through jurisprudence that shape the degree of the intercept interpreter's (in-)visibility. Furthermore, the judgments provide valuable information about the under-explored working processes and professional context of intercept interpreters.

In our analysis, we start from a translational perspective and situate intercept interpreting within the framework of translation and interpreting studies in general as well as, given the legal context of intercept interpreting, within the framework of legal translation and interpreting studies.

The topic of the (in-)visibility of translators and interpreters as such is not foreign to TIS. To set the theoretical framework for our analysis, in section 2, we introduce three *dimensions of (in-)visibility*: that of the translational agent (section 2.1.), their activity and products (section 2.2.), and the visibility of the translational activity in the product (section 2.3.). We propose approaching intercept interpreting from a functionalist perspective, that is, from the skopos theoretical framework developed by Katharina Reiss and Hans Vermeer in 1984 (1984/1991) (sections 2.2. and 2.3.). The functionalist approach (Reiss & Vermeer, 1984; Nord, 1993) allows us to clearly define and designate the different

translational processes and products of intercept interpreting within their institutional context. Building on this theoretical framework, in section 3 we analyse the FSC rulings from a translational perspective with respect to the three dimensions discussed in section 2. Finally, we present our conclusions and research desiderata in section 4.

2. Defining the (In-)Visibility of the Agent, the Activity, and the Product

The discussion of translator invisibility was initiated by Lawrence Venuti in his book *The Translator's Invisibility* (1995). In this seminal work on the status and hidden activity of the translator in literature, especially in the Anglo-American literary culture and market, Venuti discusses the role of the translator as an invisible co-producer of a text and calls for a stronger commitment of translators in favour of greater visibility of translators.

Since the publication of Venuti's book, (in-)visibility has continued to be discussed in literary translation (Emmerich, 2013) as well as in interpreting studies (e.g., Angelelli, 2004a; Ozolins, 2016). In the field of police and court interpreting, research on invisibility focuses on the fact that laypersons and lawyers often reduce interpreters to a *conduit* without autonomous status or an autonomous communication task (Angelelli, 2004b; Colin & Morris, 1996; Kranjčić, 2010; Leung & Gibbons, 2008; Nakane, 2009; Wadensjö, 1998).

Unlike interpreters in police interrogations and trials, the intercept interpreter works in an environment determined by its invisibility to the individuals under investigation – at least for as long as the secret surveillance lasts. Given this context, which distinguishes intercept interpreters from their more visible colleagues, we categorise (in-)visibility into three dimensions: the (in-)visibility of the agent (section 2.1.), the (in-)visibility of the activity and the product (section 2.2.), and the (in-)visibility of the translational activity in the product (section 2.3.).

2.1. (In-)Visibility of the Agent

Angelelli (2004b) examined the (in-)visibility of the interpreter in different settings, including medical, conference, police, courtroom, and community interpreting settings, and observed that the interpreter is often seen as a *language modem*, a *conduit* who accurately conveys meaning in another language. Likewise, Berk-Seligson (2017: 53) noted that court interpreters are meant to be "physically invisible and vocally silent, if that were at all possible".

Translational activity in criminal justice proceedings involves four translational agents who participate in different stages of the proceedings: the intercept interpreter, the interpreter in police interrogations, the interpreter in trials, and the judicial translator. Although the same person can perform all these functions, the different translational agents[7] are situated at different points on the visible–invisible spectrum.

The intercept interpreter intervenes in the first phase of criminal proceedings, the investigative stage. Interception, as a secret investigative measure, is by nature invisible to parties other than the police, the prosecutor involved, and the judge who approves the measures. Therefore, the invisibility of intercept interpreters is both the result and a prerequisite of the surveillance process. Furthermore, unlike in triadic interpreting settings, invisibility only exists vis-à-vis one of the parties (Pöchhacker, 2004: 90) of police interrogation and court hearings, where the interpreter is an independent communication partner, visible to everyone, who provides the defendant with the right to be heard in line with the international norms mentioned above. The intercept interpreter exclusively serves the police in facilitating investigations against individuals, particularly for drug trafficking, organised burglary, and organised crime in general.

In some situations, the invisibility of intercept interpreters may also be necessary, because the wiretapped suspects and people in their culture of origin may consider intercept interpreters to be traitors who support police "spying activities" (Härdi, 2015: 26). As a result, in the case of a serious threat to life and limb, the intercept interpreter can be assured of anonymity – provided that the right of the parties to be heard and the right of the accused to a fair trial and proper defence are respected (Art. 149 para. 5 CrimPC).

2.2. (In-)Visibility of the Activity and Product

Regarding the designation of the agent, we start from the hypothesis that unclear terminology contributes to the invisibility of the activity. This gives rise to two questions: First, we must clarify what intercept interpreters actually do: do they *interpret* or *translate*? Second, we need to define what they produce: do they produce *translata* or *transcriptions*?

In relation to the first question, Capus and Havelka (in preparation) identify intercept interpreting as a hybrid activity that produces a variety of *translata*. Different interpreting and translation techniques are required for wiretapping because in most cases, the source text is an oral conversation. Less frequently, written chats via messenger services or SMS are translated. From the intercepted conversation to the evidence presented in court, the *translatum* goes through several stages: from (informal) oral transmission of important or preliminary information to the investigator, to brief written *notes* in the computer system documenting the relevance or non-relevance of the conversation, to

[7] Holz-Mänttäri (1984) used the term *actants*, while Kadrić (2019), following Holz-Mänttäri, uses the term *translational agents*. Like Capus & Havelka (in preparation), we also adopt this designation of translators and interpreters acting in a communicative event.

the investigations, to *summaries* of conversations, and, finally, to the final product that is used as evidence in criminal proceedings. Evidence in court is always a written *translatum* in the form of a translated wiretap record (TWR)[8] of an entire conversation or relevant parts of a conversation.

The answer to the second question again highlights that translation studies literature lacks a clear-cut terminology. From a forensic linguistics perspective, Fishman (2006) describes the two different procedures and their respective work steps and problems. The term *transcription* refers to the written reproduction of the conversation in the source language, including prosody and meta-linguistic elements such as pauses, hesitations, sighs, and signs of nervousness or tension. By contrast, interlingual translation goes through a further step of processing – that is, the step of interlinguistic and intercultural transfer intrinsic to the translational activity – and often lacks meta-linguistic elements.

In the field of TIS, González et al. (2012: 967), in their comprehensive work on court interpretation, also distinguish between *forensic transcription* and *forensic translation*. According to their definition, forensic translation requires the prior intralingual transcription not only of the wiretapped conversation but also of recordings "of interrogations or of any form of interaction involving more than one language" (ibid.).

Nevertheless, in some works that describe the production of written documents from wiretapped conversations in TIS, *transcription* is used according to Fishman (2006) and González et al. (2012) to refer to the intralingual transfer of conversation into written language (González Rodríguez, 2015) whereas in others, the term *transcription* refers to the translation of the oral conversation directly from the audio recording into the target language (e.g., Berk-Seligson, 2000; Drugan, 2020). This lack of distinction is even more problematic because it obscures two important facts. First, from a legal perspective, most cases do not involve the production of intralingual wiretap transcripts. Consequently, the TWR alone forms the basis for investigative evaluation by law enforcement agencies and serves as evidence in criminal proceedings without any written source text for comparison. Second, from a translational perspective, intercept interpreters may have to deal with two layers of decoding because the sociolects used by groups of criminals are highly dependent on culture. Thus, interpreting a sociolect in a foreign language forms an additional layer of encoding.

The problem of blurred terminology in research becomes even more apparent if we consider Nunn's (2010) definition of translation. Nunn refers to "translation" or "police translation" as the interpretation of statements, not as interlingual translation (pp. 33–39). According to his definition, "monitor-translators" are experts who translate from slang or a sociolect into standard language and interpret potential codes. Although such

[8] In this paper, we use the term translated wiretap records (TWR) to distinguish full (literal) translations used as evidence from other *translata* produced on a regular basis, including *notes* and *summaries*.

decoding is also part of the translational activity of intercept interpreters (Härdi, 2015), Nunn does not refer to the same – interlingual – activity and expertise.

To clarify the terminology and situate intercept interpreting within the TIS framework, we propose approaching intercept interpreting from a functionalist perspective. From this perspective, the type of *translatum* is determined by the *skopos* (Reiss & Vermeer, 1984/1991): "A translational action is governed by its purpose" (2014: 85). The translational action is thus successful if it fulfils the purpose intended by the initiator of the translation (Nord, 1991: 94). A *translatum* can be any type of rendition of the source text as long as it fulfils its agreed purpose. The *adequacy* of the *translatum* takes priority over linguistic or textual equivalence.[9]

> [T]ranslating as 'information about an offer of information' often aims at providing only partial information about an information offer produced in a source language. It may even be impossible to provide full information about the information offer of the source text […]. (Reiss & Vermeer, 2014: 123).

Within this finalist approach, the authors define different strategies or types of translation. They distinguish between *word-for-word* and *interlinear translation*. The latter not only seeks equivalence on a word-for-word basis but also reproduces the syntactic structure of the source text (2014: 124). By contrast, a *literal translation* complies with the rules of the target language system. Unlike in *communicative translations*, "where the target text does not feel like a translation" (2014: 125), in literal translation, equivalence is established on the linguistic level. Another type of information offer is an *adaption* (2014: 126–127)[10]. In this type of translation, the text is not translated as a whole; rather, the *translatum* is edited with respect to the source text. The purpose determines the form of editing, and the "actants" involved in the translation process (Holz-Mänttäri, 1984) decide on the adequacy of the *translatum*. Adaptions include *translata* produced as aids for comprehension or source text summaries, and they all involve an additional intralingual translation process (Reiss & Vermeer, 2014: 126).

The products arising from intercept interpreting correspond to Reiss' and Vermeer's translation types, as the primacy of the skopos determines the adequacy of the type of information transfer, and as different purposes are "justifiable" (2014: 90) depending on the needs of the prosecution authorities.[11] Intercept interpreters perform different types of linguistic transfer on a daily basis and sometimes almost simultaneously. On the one hand, they produce various types of *adaptions* by orally informing the investigator about the content of conversations, making written notes about the criminal relevance of conversations, and summarising the content of conversations in written form. On the other

[9] For the reference frames of *translation equivalence*, see Koller (2004: 216).

[10] For a detailed description of all translation types, see Reiss & Vermeer (2014: 123–126).

[11] Interestingly, a study of interpreting in criminal justice from a skopos-theory perspective has emerged from the scholarship on jurisprudence. Kranjčić (2010) argues that lawyers should abandon the traditional view that interpreters should translate texts word for word and instead redefine the role of the interpreters according to the skopos of their activity. However, Kranjčić refers generally only to the (visible) interpreter in the preliminary proceedings and court trial, and does not mention the specific case of the intercept interpreter.

hand, they produce complete – that is, literal (section 3.3.) – *translata* of wiretapped conversations or parts of conversations (TWR). In conclusion, the skopos approach leads to a theoretically sound understanding of intercept interpreting within the TIS framework.

2.3. (In-)Visibility of Translational Activity in the Product

(In-)visibility can also refer to whether translational activity is visible in the *translatum*. With regard to interpreting, Angelelli (2004a) sets the criteria for visibility according to the interpreter's own interventions in the communication. These interpreter interventions can constitute *minor visibility*, such as a greeting or farewell, or *major visibility*, such as an explanation by the interpreter of the utterances of one party to the other. In the case of minor visibility, the interpreter is a co-owner of the text and is occasionally involving himself, whereas major visibility occurs when the interpreter is the owner of the text.

In our view, minor and major visibility are also present in legal and judicial translation and can, therefore, be applied to the written *translata* produced through the hybrid activity of intercept interpreting. In fact, Nord's (1991, 1993, 2011) functional theory, which is a further development of skopos theory, introduces the strategies of *documentary* and *instrumental translation* (Nord, 2011: 21). These two concepts are also widely applied in legal translation (Engberg, 2021; Prieto Ramos, 2015; Simonnaes, 2013; Svoboda et al., 2017)[12].

The first type is characterised by the documentation in the *translatum* of a communicative act in the source text for the purpose of enhancing comprehension in the target text situation. In legal translation studies, documentary translations may include calques, the use or addition of the source-language term, or an explanation of a term, which are elements of *major visibility*. Translators' notes that provide additional knowledge about legal concepts used in the source text and that support legal and factual understanding (Engberg, 2021) usually appear within brackets.

Instrumental translation, by contrast, is translation as an "instrument" for achieving a communicative goal in a new communication situation in the target culture (Nord, 2011: 22–23). In the field of legal translation, instrumental translations mainly contain elements of *minor visibility*, namely the translator's use of a partially equivalent legal term in the target language or his or her adaptation of legal linguistic or textual conventions to conventions in the target language.

For our context, it is important to underline that Nord links these two types of translation closely to the *translating instructions*, that is, the translation brief provided by the *translation initiator* (1991: 93). According to Nord, the translation brief specifies the pur-

[12] With regard to court interpretation, Kadrić (2019: 91–94) uses the terms *abbildende* and *anpassende Dolmetschung* (replicating and adapting interpretation). Whereas the first type of interpretation should be as close as possible to the original utterance, the latter refers to a communicative rendering of the content.

pose of the translation and, thus, also sets the framework for a documentary or an instrumental translation. However, the translation brief also confers responsibility and decision-making power on the translator by setting the framework within which translational experts can operate autonomously.

In sum, Nord's documentary and instrumental translation strategies reflect Angelelli's concept of text ownership. Both approaches show that visibility is closely connected to the question of the autonomy of the interpreter or translator. Nord (1991) refers to this responsibility as "loyalty" that commits the translator to both the source text and the target text situation:

> Whatever the translating instructions, the translator has to consider the conventional concepts of translation, since they determine the expectations of his partners from the translated text. However, "to consider the conventional concept" does not automatically mean "to do what everybody expects you to do". Loyalty may require precisely non-observance of certain conventions. But in any case, the translator should at least inform the other participants of what has been done, and why. (p. 95)

In our case, if Nord's translation strategies were to be adopted by intercept interpreters, this would lead to translational agents pulling up their visors and assuming responsibility for the texts they produce. Intercept interpreters, however, are required to keep their visors down, as our analysis of the FSC judgments will show (section 3.3.). In particular, the responsibility for evaluating the pertinence of the monitored conversations for the purposes of the investigation lies – at least officially – exclusively with police officers and prosecutors (Bucholtz, 2009; Sausdal, 2019).

3. Analysis: Dimensions of (In-)Visibility in FSC Rulings

The FSC is the highest judicial authority in Switzerland. It rules in final appeals brought against criminal judgments of the high cantonal courts of appeal and against decisions of the Federal Criminal Court (Art. 1 para. 1, Art. 80 f. Swiss Federal Supreme Court Act).

The competence to revise in criminal law cases is limited insofar as the facts of the case, which the lower court has found to be proven, can be reviewed only to a very limited extent: the facts can be contested only if they are established in a manifestly incorrect manner or in violation of federal law and if the rectification of the defect may be decisive for the outcome of the proceedings (Art. 97 Swiss Federal Supreme Court Act).

It is the court's responsibility to ensure that Swiss federal law is correctly applied in individual cases and that the rights of citizens enshrined in the Swiss Constitution[13] are protected. In our field of interest, this guarantee concerns, in particular, the right to a fair trial (Art. 29 para. 1 Swiss Constitution; Art. 6 para. 1 ECHR and Art. 3 II CrimPC) and the right to be heard (Art. 29 para. 2 Swiss Constitution; Art. 3 para 2 lit. c and Art.

[13] fedlex.admin.ch/eli/cc/1999/404/en (accessed 27 July 2021).

107 CrimPC). Moreover, the decisions of the FSC, particularly landmark decisions, contribute to the continued development of the law and its adaptation to changing circumstances. The other courts and the administrative authorities comply with the FSC's case law and adopt its principles.

In 2002, the very first landmark decision on procedural shortcomings with respect to a lack of information about the identity, activity, tasks, and products of the interpreter in the context of police interception was rendered (BGE[14] 129 I 85, judgment of 13 November 2002).

3.1. Materials and Methods

Our analysis is based on nine judgments of the FSC between 2002 and 2019, five of which were in French and four in German. These judgments resulted from a search in the FSC's database[15] for rulings based on the first landmark decision BGE 129 I 85, judgment of 13 November 2002, as subsequent decisions will inevitably refer to it.[16]

In our query, no other landmark decision resulted. The judgments other than landmark decisions are not published in the official collection of landmark decisions and are indexed differently. We considered all decisions without regard to the language. In fact, decisions of this Court are issued in either French, German, or Italian. The search resulted in 36 hits. We sorted out the decisions (n=13) that concerned proceedings from before 2011 because these decisions are based on cantonal Codes of Criminal Procedure, as the actual Federal Criminal Procedure Code has been in force since 1.1.2011. In a third step, we eliminated all decisions that cite the 2002 landmark decision in relation only to the general requirement to document procedural acts, without reference to the translation of intercepted communications (n=14).
The resulting corpus comprises the following:

BGE, 129 I 85 Judgment of November 13, 2002
6B_80/2012 Judgment of August 14, 2012
6B_125/2013, 6B_140/2013 Judgment of September 23, 2013
6B_1021/2013 Judgment of September 29, 2014
6B_946/2015 Judgment of September 13, 2016
6B_71/2016 Judgment of April 5, 2017
6B_376/2018, 6B_380/2018 Judgment of September 25, 2018
6B_1368/2017 Judgment of June 14, 2018
6B_403/2018 Judgment of January 14, 2019

In all cases, the complainants attacked the activities of the intercept interpreters and claimed a violation of their right to a fair trial and to be heard. The landmark decision

[14] Landmark decisions are cited as BGE, the abbreviation of *Bundesgerichtsentscheid*.
[15] bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht.htm (accessed 21 April 2021).
[16] An analysis of legislation, doctrine, and case law from a legal perspective has been conducted by Capus & Bally (2020).

and the judgments are structured in considerations. Therefore, we refer to these (abbreviated as cons.) when citing the rulings.

We conducted a qualitative content analysis based on Mayring (2015) and Kuckartz (2016). We used the Atlas.ti software package to perform an initial inductive coding of the material based on the ways in which the FSC requires disclosure or limits or generates the invisibility of the intercept interpreter. Examples of labels applied during the first round of coding are *formal issues; formal issues – effects; dependency investigator; required visibility; terminology transcript/translation*. We then categorised the results of the first round of coding according to the *dimensions of (in-)visibility* described in section 2, namely the *agent*, the *activity*, and the *product*, as well as the (in-)visibility of the activity in the product.

In this second round of coding, it turned out that the FSC not only intentionally produces invisibility, but also accepts factual invisibility or unintentionally creates it. This observation led to a finer subdivision of the three dimensions, as reflected in the following sections.

3.2. The Agent's (In-)Visibility

In our view, the (in-)visibility of the agent refers to two dimensions of (in-)visibility: the explicit demand by the FSC that the identity of intercept interpreters be disclosed to the defendant, and the formal visibility of intercept interpreters as experts while implicitly obscuring their specific translational expertise. Requiring disclosure of the identity of the intercept interpreter is based on the 2002 landmark decision BGE 129 I 85.

On the TWR, intercept interpreters are generally identified by a combination of letters and numbers. According to the FSC, however, the identity of the acting intercept interpreters must be disclosed upon the request of the defendant. Therefore, the investigating authorities must provide a list with the names of all interpreters deployed in the case, and if names are missing, the identity must be disclosed separately (6B_403/2018, cons. 3.4.).

There are two legal reasons for requiring the disclosure of the intercept interpreter's identity. First, the defendant must be able to check whether there might be any bias or conflict of interest related to the interpreter. Second, both the authorities and the defendant must be able to check whether intercept interpreters have been informed of the criminal penalties for false testimony and false translation in accordance with Art. 307 CrimC[17] (BGE 129 I 85, judgments 6B_80/2012, 6B_125/2013, 6B_1021/2013, 6B_946/2015, 6B_71/2016, 6B_1368/2017, 6B_403/2018). If the interpreter is not identified and, thus,

[17] "Any person who appears in judicial proceedings as a witness, expert witness, translator or interpreter and gives false evidence or provides a false report, a false expert opinion or a false translation in relation to the case is liable to a custodial sentence not exceeding five years or to a monetary penalty."

the above-mentioned verification is not possible, the relevant TWR may not be used as evidence.

> The complainant is therefore correct in arguing that it is unacceptable to use the aforementioned translated wiretap records to his detriment, since it is not possible to determine from the case files who produced them and how. (BGE 129 I 85, cons. 4.2)[18]

However, under some circumstances, the invisibility of intercept interpreters may be necessary. In one such circumstance, wiretapped suspects and people related to them may consider the intercept interpreters to be traitors who support police "spying activities" (Härdi, 2015: 26). As mentioned in section 2.1., in the event of a justified assumption that the life or physical integrity of the intercept interpreter is seriously at risk, anonymity can be granted in accordance with Art. 149 CrimPC. This was the case in the judgment 6B_71/2016, cons. 2.3:

> The complainant did not have the opportunity to determine the person of the translator, since no information about him or her was given in the decree approving the guarantee of anonymity of 13 March 2014.

Nonetheless, in order to respect the fundamental rights of the defendant in such cases, it is also common practice for the audio recordings to be heard again during the police interrogation or oral hearing and translated directly by the attending – visible – interpreter (judgment 6B_71/2016, cons. 2.3; 6B_946/2015, cons. 1.4; 6B_1368/2017).

A second dimension of invisibility of the agent is the mere formal visibility of intercept interpreters as experts on the one hand and the implicit negation of their specific translational expertise on the other. Art. 68 CrimPC, already mentioned in the introduction and entitled "Translation and interpretation", provides the basis for the activities of court and police interpreters and translators in general and, because of the lack of specific regulations, also applies to the intercept interpreter's activities.

> [1] Where a party to the proceedings does not understand the language of the proceedings or is unable to express him- or herself adequately, the director of proceedings shall appoint an interpreter. In minor or urgent cases, the director of proceedings may, if the person concerned consents, dispense with appointing an interpreter provided the director of proceedings and the clerk of court have an adequate command of the foreign language concerned. […]
>
> [5] The provisions on expert witnesses (Art. 73, 105, 182–191) apply mutatis mutandis to translators and interpreters.[19]

In line with para. 1 above, members of the authorities may assume the role of an interpreter in minor or urgent cases, although in the context under discussion here, this can take place without the consent of the suspect. Furthermore, Art. 68, para. 5 CrimPC[20]

[18] This quotation and all subsequent quotations from judgments in German or French are our own translations.

[19] fedlex.admin.ch/eli/cc/2010/267/en#art_68 (accessed 20 March 2021).

[20] fedlex.admin.ch/eli/cc/2010/267/en#art_182 (accessed 21 April 2021).

refers, *inter alia*, to Art. 182 CrimPC, entitled "Requirements for requesting the services of an expert witness":

> The public prosecutor and courts shall request the services of one or more expert witnesses if they do not have the specialist knowledge and skills required to determine or assess the facts of the case.

Consequently, while most other experts are assumed to have a genuine specialised competence (such as members of the medical, scientific, or technical professions) and cannot be replaced by a police or judicial representative, the jurisprudence considers bilingual competence a sufficient requirement to assume the expert task of an interpreter or translator.

In ruling 6B_125_2013, the court is critical of the fact that the police carried out the translation of recordings, but only with regard to their failure to disclose the division of tasks and the legal instruction of the agents involved in the translation:

> The role of the police in this exercise is also unclear, since the federal police seems to have indicated that investigators also carried out the transcriptions and/or translations […] and had regular discussions with the translators/transcribers 'in order to ensure that the level of knowledge of the case file was the same for all, for the purposes of efficiency' […]. These different aspects are not compatible with the guarantees deduced from the right to be heard. (6B_125/2013; cons. 2.3)

Hence, the FSC does not, in principle, object to the deployment of police officers as intercept interpreters as long as the identities of the interpreters, the instructions, and the work process are sufficiently documented and disclosed to the defendant (cons. 2.6).

In another ruling, the court rejects the complaint of the defendants regarding the deployment of police officers as intercept interpreters in more explicit terms:

> The deployment of police officers as translators cannot be objected to, especially since the provisions referred to in Art. 68 para. 5 CrimPC apply mutatis mutandis (ruling 6B_376/2018 of 25 September 2018, cons. 5.5). The complainant's objections, by which he sweepingly questions the competence of the translating police officers, are not capable of substantiating a violation of these provisions. He does not argue that the protocols translated by them were qualitatively inadequate. Moreover, with regard to the police officers acting as translators, it can be assumed that they are aware of the penal consequences under Article 307 CrimC due to their training and activities, in particular their cooperation with the court interpreters (ruling 6B_376/2018 of 25 September 2018, cons. 5.5). (6B_403/2018, cons. 3.6)

According to the federal judges, *expert competence* seems to comprise only limited translational competence, referring more to bilingual competence and other competences that make the translator a kind of "deputy police officer", namely a "feel" for between-the-lines meanings, codes, and crime-related situations (Härdi, 2015).

In summary, while on the one hand, the FSC requires that the identity of intercept interpreters must be visible like that of all other expert witnesses, on the other hand, the judges – *de facto* – fail to recognise the status of the intercept interpreter as an independent expert with genuine expertise. Intercept interpreters have to act exclusively on the basis of documented instructions and can be replaced by any "putative interpreter" (González et al., 2012: 967), including a police officer with language skills.

Finally, this ambiguity is exacerbated by the fact that the FSC rulings lack a clear designation for these translational experts in the same way that the legal basis does (section 1). In German, the terms *Dolmetscher* (interpreter), *Übersetzer* (translator), and *übersetzende Person* (translating person) are used interchangeably. Likewise, in the rulings in French, *interprète* and *traducteur* are both used, even in the same paragraph (6B_376/2018, cons. 5.7). In ruling 6B_125/2013 cons. 2.3, the agents involved in the production of the translations are referred to as *traducteurs/transcripteurs*.

3.3. (In-)Visibility of the Activity and the Product

As a defendant may request that all translational processes undertaken to produce the evidence be traced, the federal judges, in their landmark decision of 2002 (BGE 129 I 85), required that such traceability be ensured by the authorities. If this is not achieved, the TWR may not be used as evidence against the defendant:

> The files are also incomplete with regard to the translated interception records. In general, it is to be noted that, according to the statements of the lower court, the division of work between the investigator and the translating person is not evident from the interception records. (6B_1368/2017, cons. 2.5.3)

> The complainant also argues on the grounds of violation of the right to be heard and the right to a fair trial that it is not known how the interception records were produced. It was not evident by whom the interception records had been produced and according to which instructions. (6B_403/2018, cons. 3.1)

Thus, the files must clearly indicate the working instructions given to the intercept interpreters. An analysis of what judges expect interpreter instructions to include reveals that these instructions largely contradict Nord's (2011) "translating brief". According to the latter, instructions should provide information about the skopos and the situational contexts of the source text and the target text but should otherwise empower the translator to make *autonomous* translational decisions. By contrast, as the following sections will show, the police's instructions must clearly indicate that the activity of the intercept interpreter is strictly bound to the orders of the investigator.

More concretely, the FSC requires visibility regarding the following questions: What serves as the source text, and who decides on the translation type? Who selects the criminally relevant information? What instructions are given regarding the translation strategies visible in the TWR?

The first question pertains to the requirement that transparency must be guaranteed with regard to the source text and to the decision about the translation type. As mentioned above, the landmark ruling of 2002 requires disclosure of the identity of the individual who gives the instruction regarding the translation type and, thus, decides the process stages that the audio transcript goes through. The defendant must, therefore, be able to access information on whether, as a first step, an intralingual transcript was created or whether the intercept interpreter performed the translation directly from the audio recording:

> […] Nor is it known how they were produced, i.e., whether the audio cassettes were translated directly or whether transcripts were first made in Albanian and then translated. Thus, the collection of this evidence is comprehensible neither to the court nor to the complainant, which is why, according to what has been said, it should not have been used to his detriment; the complaint is well founded. (BGE 129 I 85, cons. 4.2)

Apparently, it is common practice for the intercept interpreter to listen to the audio and directly produce different *translata* in the target language. In such a case, no source-language transcript exists, and verification of accuracy is possible only by re-listening to the audio files. However, the rulings are not always unequivocal, as the following quotations from our FSC rulings illustrate:

> The note from the police investigator submitted by the public prosecutor to the lower court in a letter dated September 4, 2017, suggests that the interpreters listened to the conversations via headphones in the original language and wrote them down directly in the target language, in this case German. (6B_1386/2017, cons. 2.5.3)

> It emerges from the files that the police instructed the appointed translator to listen to the conversations, which were primarily conducted in Calabrian, and to summarise what he heard in written form. (6B_403/2018, cons. 3.7)

As mentioned above, the translation can be typed or even written by hand:

> - the interpreter listens to the conversation in Albanian,
> - the interpreter transcribes the conversation in French, in handwritten form,
> - the translated form is filed and kept for the duration of the investigation,
> - the important translated conversations are introduced, by a secretary or an investigator, in the federal data base (JANUS),
> - these conversations entered into JANUS are forwarded to the public prosecutor. (6B_376/2018, cons. 5.3)

In the first quotation, the process description is clear (apart from the fact that the interpreter did not *translate* but "wrote it down"). However, in the second quotation, the judges accept an explanation that does not clearly state in which language the conversation was summarised. In our corpus, no judgment explicitly mentions a first transcription of the audio recording in the source language and a subsequent translation in a second working step.

Furthermore, the instructions must provide information about which translation types were chosen, by whom, and what justified the choice:

> The letter from the Federal Judicial Police does not specify what method was employed to obtain the records used, i.e., whether the telephone conversations were first transcribed into the foreign language and then translated, whether they were transcribed by the same person or by two different persons, what instructions were given to the persons involved, or whether the transcripts were re-transcribed word for word or only summarised. (6B_125_2013, cons. 2.3)

It follows that TWRs are produced only on instruction, which places the responsibility for choosing the type of *translatum* on the investigators. Thereby, the investigators' effective dependence on the work of the intercept interpreters to be able to decide on the

translatum and, consequently, the responsibility of the intercept interpreter are pushed into invisibility.

Furthermore, the above quotations again reveal the problem of a blurred terminology, as already observed in section 2.2. for the translational agent. With regard to TWRs, the terms *transcription* and *transcription mot à mot* are predominant in the rulings in French. However, the judges also use *retranscription* or *retranscription mot à mot*. This designation is particularly misleading, since it suggests a new transcription in another language when, in fact, no transcript in the source language exists.

In the German-language judgments, TWRs are also referred to only as *Übersetzungen* (translations). Instead, the term *Transkription* (transcription) is used in the rulings 6B_1021/2013, 6B_1368/2017 and 6B_403/2018 in reference to the landmark ruling of 2002. The most common designation for TWR in German is *Protokoll* (record) or composites such as *Wort-*, *Telefon-*, *Audio-* or *Abhörprotokoll* (word, telephone, audio, intercept record), all of which hide the translational activity. In addition, as in the ruling 6B_1368/2017, cons. 2.5.3, the translational activity can also be obscured by verbal phrases such as "wrote them down directly in the target language" ("direkt in der Zielsprache, vorliegend Deutsch, niedergeschrieben").

Hence, although all professionals involved in the criminal procedure are familiar with the fact that evidence is produced by a TWR, the FSC turns a blind eye to the unclear terminology, which fails to reflect the translational activity.

The second question pertains to the selection of the criminally relevant parts of the wiretapped conversation. The decision on the translation type is *de facto* also a decision about who screens and selects the information estimated to be relevant for the investigation. Again, it must be documented that the responsibility for information triage lies exclusively with the investigator:

> The person concerned [translator no. XXX] had also indicated that he would translate, in agreement with the inspectors, what was relevant to the investigation, i.e., translate word for word what was important and summarise the trivialities, while translating in full if instructed to do so. (6B_376/2018, cons. 5.3)

In addition, in a complaint concerning triage, the defendant can request that the entire course of surveillance measures be documented (6B_946/2015; 6B_1368/2017; 6B_403/2018). However, while the court grants the defendant the right to be informed about the information triage, it does not require the submission of a detailed "logbook" of all surveillance measures (6B_403/2018, cons. 2.4). The judges state that

> […] a triage of the documents produced in the investigation is unavoidable in more extensive cases, and the prosecutor does not have to include irrelevant material in the files. (6B_403/2018, cons. 2.2)

The triage is carried out upon a preliminary, summative translation type, which equates to an *adaption* in skopos theory:

> The translating person had been instructed to record the non-relevant conversations with short notes. On the basis of these documents, the leading investigator would have carried out the triage requested

> by the public prosecutor and commissioned the production of records of the relevant conversations […]. Contrary to the complainant's criticism, the instruction and the division of work can thus be understood. (6B_403/2018, cons. 3.7)

However, the above statement is contradictory because it is not clear what happens when triage takes place, or who conducts it, in case of *relevant* conversation content. Given that the intercept interpreter is the only and very first person who listens to the wiretapped conversations in a foreign language, it is quite clear that the decision about what is relevant or not lies *a priori* with her or him and takes place while listening to the audio recordings. In the case of non-relevant content, the investigator finds only a short note, but the basis on which is decided when a TWR must be produced is not explained. For the FSC, however, the requirement for disclosure of the instructions and division of work is satisfied, and the decisive contribution of the intercept interpreter to the screening and selection of information is obscured.

Triage by police and prosecutors may also be based on interpretations of statements that the intercept interpreter communicates informally, such as by decoding encrypted messages.[21]

> When speakers used 'hidden words', he [interpreter no. XXX] would write the actual word while mentioning in parentheses the term decoded according to his context-based interpretation. […]
>
> He [the interpreter] added that he transcribed by hand and translated directly into French what he heard and that, in the absence of relevance for the investigation, he simply gave an oral or written summary but would translate the entire conversation if the investigators requested it. He indicated that, while translating faithfully, he would also give the investigators an oral summary of the conversation and his view of the actual meaning of certain terms used. […]
>
> This translator [translator no. YYY] stated that he was instructed to translate what was essential or useful to the investigation, excluding small talk, and that he was to translate the precise meaning of what was said. (6B_376_2018, cons. 5.3)

Decoding generally takes place in an informal setting, because the authority to formally interpret coded language and implicatures, that is, utterances that say something else or have a hidden meaning, lies exclusively with the police and the public prosecutor. If interpretations are visible in the TWR, the defendant may appeal against its use as evidence. Thus, the invisibility of the intercept interpreter places the investigators in the foreground, while the decisive contribution of the intercept interpreter to successful investigations remains in the background.

Intercept interpreters, along with their translational activity, become completely invisible when they no longer produce the *translatum* by themselves:

> The translator further clarified that he was transcribing by hand what he was listening to and that this would be transferred into the computer system by the inspectors. (6B_276/2018, 6B_380/2018, cons. 5)

[21] The legal and ethical issues surrounding unilateral triage of information which exclusively incriminates the suspect, professional hearing, and entextualisation, to which intercept interpreters also contribute, cannot be addressed within the scope of this article. For more details, see Bucholtz (2009), Nunn (2010), Sausdal (2019), and Taibi & Martin (2012).

The informal information triage performed by the intercept interpreter takes place on two levels. First, while the intercept interpreter listens, triage takes place through the interpretation of explicit utterances, coded messages, or implicatures, which serves to distinguish between what is relevant and what is not and which only the intercept interpreter is able to do. At the next level, she or he decides between different *translata*, depending on whether the conversational content is relevant or non-relevant. After that, the investigator comes into play selecting relevant conversations on the basis only of these *translata*. When this finding is combined with the findings mentioned above regarding the choice of translation type, it becomes clear that, according to the FSC, only an explication of the instructions and procedures is required, while the actual responsibility of the intercept interpreter is not addressed. The intercept interpreter formally takes a back seat, and information triage is allegedly performed by the investigator.

The third question concerns the (in-)visibility of the translational activity in the TWR. According to the FSC, the instructions to be disclosed refer not only to the translational processes but also to what may appear in the TWR in terms of additional information necessary for comprehension. In these *translator's notes* (section 2.2.), the intercept interpreter can mention difficulties in the translation process, such as poor recording quality, and provide explanations and interpretations regarding the suspect's utterances. As indicated in section 2.3., these are cases of *major visibility* in which the intercept interpreter has ownership of the text.

As shown for the translation type and triage, the court gives absolute priority to the fact that the instructions the intercept interpreter received for marking incomprehensible conversation sequences must be evident from the files:

> Except for the fact that they are supposed to record incomprehensible text passages in the record as 'incomprehensible', neither the note in the file nor the other files reveal what instructions the interpreters followed in their work; this is of particular interest with regard to the comments in brackets or interpretations criticised by the complainant. It is not clear from the files or the records who made these remarks. (6B_1368/2017, cons. 2.5.3)

Nevertheless, as long as the instructions given are documented, the court accepts even a relatively informal marking of unintelligible passages by a simple question mark and does not require explanatory notes in brackets, such as *[unintelligible; translator's note]*:

> He placed a question mark on his transcript when he did not clearly hear a word. (6B_376/2018, cons. 5.3)

Translators' notes within brackets that add information about legal concepts that have no equivalent in the target legal language, or that provide comparative legal information for understanding, are a common practice in "intersystemic legal translation"[22] (cf. i.e.,

[22] This term refers to the German term "rechtssystemübergreifende Übersetzung", used by Wiesmann (2004).

Bestué, 2019). However, notes in brackets that contain the intercept interpreter's interpretations of statements may be the subject of complaints alleging a violation of the right to be heard due to formal deficiencies:

> Furthermore, some interview transcripts inadmissibly contained various bracket notes, interpretations and summaries. (6B_1368/2017, cons. 2.2)

From the perspective of (legal) translation studies, it would be adequate to proceed according to the general rules for court and official translations, that is, to add information or explanations necessary for understanding in a translator's note, according to a *documentary translation* (Nord, 2011: 21). This form of language and cultural transfer, that is, of *major visibility,* pertains to the concept of professional translation as an expert activity and would make the autonomous, self-responsible activity of the intercept interpreter visible.

Hence, the FSC is less concerned with the disclosure of the translation strategy chosen by the intercept interpreter, that is, a choice according to Nord's translating brief. The court does not question whether he or she decided, as a translational expert, on a literal or communicative translation, how interpretations and explanations are documented, or how the intercept interpreter makes dialectal or sociolectal expressions recognizable. Regarding the choice of translation type and the selection of information, what appears in the TWR is subject to the formal question of whether the intercept interpreter worked according to the instructions of the investigators and whether sovereignty over the translational processes and the interpretations of the utterances lies with the law enforcement authorities. The intercept interpreter's ownership of text is especially limited and restricted to the police instructions.

As the judgments discussed above show, the mission of the intercept interpreter is to produce a *literal translation* on the linguistic surface, without any manifest intervention. As Scott (2019: 247) states, in the context of legal translation, "for many legal professionals, translators can 'just translate'", and the addition of contextual knowledge contradicts the ideal that the translator's work must not "affect" the transfer from one language into another. This is all the more true for the intercept interpreter, whose translational activity remains invisible, and who remains a "language modem" (Angelelli 2004).

In addition to the three dimensions of (in-)visibility discussed above, quality issues can lead to a differentiation between the invisible and visible intercept interpreter. In our corpus, only a few complaints relate to the quality of translation. Here, we will examine quality issues only with respect to the visibility of the intercept interpreter, which becomes concrete when these substantive deficiencies are rectified during the court procedure.

According to the FSC, quality defects can be remedied in different ways, namely through re-translation by another intercept interpreter (judgment 6B_1368/2017) or re-interpretation during the police interrogation or court hearing (BGE 129 I 85 cons. 4.3; judgment 6B_125/2013).

In cases of quality issues, it is common practice in professional (legal) translation to apply the first solution, that is, for a translation that has been the target of objection to be checked and, if necessary, re-translated by another translator under equivalent conditions. The second solution raises certain problems concerning the situational context, although from a procedural perspective, it seems to be more economical in terms of both time and money.

> However, the lower court may listen to those conversations that it wishes to use and whose quality permits this at the new appeal hearing and have them translated directly by an – ideally new – interpreter (see judgment 6B_125/2013 of 23 September 2013 cons. 2.6). If this is not possible due to poorly understandable passages of the audio recording, the court is free to commission new written translations from a known interpreter who has received sufficient legal and working instructions and to grant the parties the right to be heard. (6B_1368/2017, cons. 2.5.3)

This solution means that the *visible* interpreter verifies the intercept interpreter's job directly during the interrogation or in court by re-interpreting the parts of the text in question. This should be done – where possible, but not on a mandatory basis – by an interpreter other than the first intercept interpreter. However, mandating a re-translation *live* on-site does not take into account the fact that the communication situation in the interrogation room or especially in the courtroom places a significantly higher cognitive and emotional burden on interpreters due to the time pressure involved and the presence of the public. Furthermore, the new interpreter may be missing contextual information that the intercept interpreter acquired in the course of the interrogation. In addition, the new interpreter will not be familiar with the voices of the conversation participants – whereas an intercept interpreter becomes accustomed to those voices over weeks and months – nor does the new interpreter have the opportunity to repeatedly listen to passages that are difficult to decipher due to background noise, unclear pronunciation, or conversation overlays. However, if the problem of audio quality is solved by having the same intercept interpreter – who is familiar with the interception in question – perform the interpreting during the interrogation, the interpreter will only conduct a self-monitoring of his or her own performance. In this case, the presence of a – visible – interpreter at the hearing to check the TWR on the spot serves to remedy formal deficiencies but not substantive shortcomings, such as poor translation quality due to an audio recording that is difficult to understand, as the FSC itself acknowledges in its ruling 6B_1368/2017, cons. 2.5.3.

Nevertheless, in principle, it is sufficient to have the contested TWR examined by a directly present, visible interpreter, even if it is the same person. According to the FSC, both formal (lack of disclosure of the identity of the intercept interpreter, lack of legal instruction, lack of disclosure of work processes and instructions) and substantive deficiencies (quality) can be remedied by a new interpretation and thus by direct collection of evidence during the interrogation and the court hearing. On the one hand, this procedure confirms the status of the visible interpreter as an expert witness, while on the other hand, it once again pushes the intercept interpreter into invisibility.

4. Conclusion

In this article, we first situate the (in-)visibility of the intercept interpreter within the field of TIS by categorising the topic by the agent, the activity and the product, and approaching the activity from the perspective of skopos theory. The three *dimensions of (in-)visibility* provided a framework for our qualitative content analysis of a corpus of nine FSC judgments. From the analysis, we can conclude that the FSC both clears and thickens the fog surrounding intercept interpreters.

In summary:

- The FSC *requires* visibility with respect to the agents involved, the instructions for the division of work, the translation processes, the translation types and strategies, as well as for the intercept interpreters' text ownership in the *translatum*.
- However, the court *allows* invisibility if it is necessary, that is, if a threat to life and limb requires anonymity, but the invisibility of the intercept interpreter in such cases is subject to strict legal limits and subordinated to the primacy of the right of the defendant to a fair trial and to be heard.
- Legislation and the FSC *accept* invisibility with regard to the expert status of intercept interpreters, as they are considered at any time replaceable by bilingual police officers and thus are not accredited with any specific translational expert competence.
- Finally, the FSC deliberately *generates invisibility*: The implicit mission and the responsibility of the intercept interpreter regarding the triage of relevant information and the dependence of the investigators on the interpreter's translational activity are obscured. The *ghost metaphor* used by Angelelli (2004b: 20) seems particularly appropriate because oral, informal information transfer and interpretation in the context of ongoing surveillance activities is accepted as an economical and legally unassailable solution.

It can be concluded that the FSC demands the visibility of intercept interpreters whenever it strives to limit their responsibility as translation experts in their own right, even to the point of demanding strictly literal translation strategies in the TWR of conversations. Thus, it requires translation on the linguistic surface, whereby the criteria of communicative translation do not apply. At the same time, it prohibits a *documentary translation* according to Nord (2011: 21), which would allow comments and interpretations within brackets, that is, elements of text ownership with *major visibility*.

However, if we take into account jurisprudential demands, it is appropriate to apply Nord's (1991) definition of instrumental translation: all translations that are produced in the context of intercepted communication, literal translations (TWR) and adaptations in the form of oral and written summaries, as well as notes on the criminal relevance of conversation contents, are subject to their own special skopos and fulfil their instrumental function in the target context, that is, police investigation and criminal prosecution.

We then examine the activity of intercept interpreting within the framework of skopos theory. According to Reiss and Vermeer, the skopos "must be justifiable" (2014: 90). Thus, if the skopos has the primacy, the competence to interpret the content of conversations lies exclusively with law enforcement authorities. Consequently, elements of *major visibility* are not permitted, and elements of *minor visibility* are contested. What at first appears to be a clash of translational and legal norms is justified by the purpose: Since the legal norms predominate, a translation of the source text that is *as literal as possible* seems justified, because any interference, interpretations, or decoding on the part of the intercept interpreter discernible in the *translatum* render the TWR useless as evidence. From the point of view of skopos theory, the required non-communicative translations are justifiable and fulfil the criteria of *adequacy* of the target text.

Moreover, the analysis confirms our assumption that the hybridity of the activity is the reason for the heterogeneous terminology used to refer to intercept interpreters as a professional group and the *translata* they produce, which, in turn, hinders the visibility of intercept interpreters as a group of experts *sui generis*. Furthermore, the professional competences of intercept interpreters are not clarified: intercept interpreters operate in an institutional and legal context and must know the relevant legal framework and their duties with respect to it. However, the content of the conversations they are required to translate does not require any knowledge of legal language, but rather knowledge of sociolects and a sense of criminology (Capus & Havelka, in preparation). This may also be a reason why, from the perspective of the FSC, bilingual police officers are also accepted as intercept interpreters, provided they fulfil the formal requirements. From a translational perspective, the intercept interpreter is thus deprived of the status of an independent expert, as translational competence does not seem to play a role.

Finally, although the corpus of judgments analysed in this paper has revealed some aspects of the multifunctional activities of intercept interpreters, it has become manifest that scientific knowledge about intercept interpreters' translational activities and related legal implications is fragmented and replete with lacunae. This article contributes to closing this research gap and paves the way for further interdisciplinary research on this underexplored topic.

References

Angelelli, C. (2004a). *Medical interpreting and cross-cultural communication* (digital printed version). Cambridge University Press. DOI: 10.1017/CBO9780511486616.

Angelelli, C. (2004b). *Revisiting the interpreter's role: A study of conference, court, and medical interpreters in Canada, Mexico, and the United States. Benjamins translation library: Vol. 55*. John Benjamins.

Berk-Seligson, S. (2000). Interpreting for the Police: Issues in the Pre-Trial Phases of the Judicial Process. *Forensic Linguistics*, *7*(2), 212–237.

Berk-Seligson, S. (2017). *The bilingual courtroom: Court interpreters in the judicial process* (Second edition). University of Chicago Press.

Bestué, C. (2019). A matter of justice: Integrating comparative law methods into the decision-making process in legal translation. In Ł. Biel, J. Engberg, R. Martín Ruano, & V. Sosoni (Eds.), Law, language and communication. *Research methods in legal translation and interpreting: Crossing methodological boundaries* (pp. 130–147). Abingdon Oxon UK, New York NY: Routledge.

Bucholtz, M. (2009). Captured on tape: Professional hearing and competing entextualizations in the criminal justice system. *Text & Talk: An Interdisciplinary Journal of Language*, *29*(5), 503–523. DOI: 10.1515/TEXT.2009.027.

Colin, J., & Morris, R. (1996). *Interpreters and the legal process*. Waterside Press.

Drugan, J. (2020). Complex collaborations. Interpreting and translating for the UK police. *Target*, *32*(2), 307–326. DOI: 10.1075/target.20086.dru.

Emmerich, K. R. (2013). Visibility (and invisibility). In Y. Gambier & L. van Doorslaer (Eds.), *Handbook of translation studies* (Vol. 4, pp. 200–206). John Benjamins Publishing Company. DOI: 10.1075/hts.4.vis1.

Engberg, J. (2021). Legal translation as communication of knowledge: On the creation of bridges. In M. Schreiber & C. Griebel (Eds.), *Rechtssprache und Rechtsübersetzung in Geschichte und Gegenwart. Legal language and legal translation: Past and Present. Parallèles 33*(1), 6–17.

Fishman, C. S. (2006). Recordings, Transcripts, and Translations as Evidence. *Washington Law Review*, *81*, 473–524.

González, R. D., Vásquez, V. F., & Mikkelson, H. (2012). *Fundamentals of court interpretation: Theory, policy, and practice* (2. ed.). *University of Arizona Agnese Haury Institute for Interpretation series*. Carolina Academic Press.

González Rodríguez, M. J. (2015). Interpreting Wiretapped Conversations in the Judicial Setting: Descriptive Analysis and Operating Methodology. *TRANS-REVISTA DE TRADUCTOLOGIA*, *19*(1), 109–129.

Gradinčević-Savić, D. (2020). Anforderungsprofil für Polizei, Staatsanwaltschaft, Rechtspflege und Gericht zum Erkennen und Umsetzen des Dolmetsch- und Übersetzungsbedarfs. *Babel. Revue Internationale De La Traduction / International Journal of Translation*, *66*(2), 172–187. DOI: 10.1075/babel.00155.gra.

Härdi, R. (2015). Dolmetscherleistungen für geheime Überwachungsmassnahmen – eine Gratwanderung? In Fachgruppe/Zentralstelle Dolmetscherwesen (Chair), *Konferenz zur Harmonisierung des Justizdolmetscherwesens in der Schweiz*. Symposium conducted at the meeting of Obergericht des Kantons Zürich, Stadttheater Olten.

Holz-Mänttäri, J. (1984). *Translatorisches Handeln: Theorie und Methode*. *Suomalaisen Tiedeakatemian toimituksia Sarja B*. Suomalainen Tiedeakat.

Kadrić, M. (2019). *Gerichts- und Behördendolmetschen: Prozessrechtliche und translatorische Perspektiven*. Facultas Verlags- und Buchhandels AG.

Koller, W. (2004). *Einführung in die Übersetzungswissenschaft* (7., revised edition). Quelle & Meyer.

Kranjčić, C. (2010). *"…dass er treu und gewissenhaft übertragen werde."*. Mohr Siebeck.

Kuckartz, U. (2016). *Qualitative Inhaltsanalyse: Methoden, Praxis, Computerunterstützung* (3., revised edition). *Grundlagentexte Methoden*. Beltz Juventa.

Leung, E. S. M., & Gibbons, J. (2008). Who is responsible? Participant roles in legal interpreting cases. *Multilingua – Journal of Cross-Cultural and Interlanguage Communication*, *27*(3), 177–191. DOI: 10.1515/MULTI.2008.010.

Mayring, P. (2015). *Qualitative Inhaltsanalyse: Grundlagen und Techniken*. *Beltz Pädagogik*. Beltz.

Nakane, I. (2009). The Myth of an 'Invisible Mediator': An Australian Case Study of English-Japanese Police Interpreting. *PORTAL Journal of Multidisciplinary International Studies*, *6*(1). DOI: 10.5130/portal.v6i1.825.

Nord, C. (1991). Scopos, Loyalty, and Translational Conventions. *Target*, *3*(1), 91–109.DOI: 10.1075/target.3.1.06nor.

Nord, C. (1993). *Einführung in das funktionale Übersetzen: Am Beispiel von Titeln und Überschriften*. *Uni-Taschenbücher: Vol. 1734*. Francke.

Nord, C. (2011). *Funktionsgerechtigkeit und Loyalität: Theorie, Methode und Didaktik des funktionalen Übersetzens*. *TransÜD Arbeiten zur Theorie und Praxis des Übersetzens und Dolmetschens: Band 32*. Frank & Timme Verlag für wissenschaftlich Literatur.

Nunn, S. (2010). 'Wanna still nine hard?': Exploring Mechanisms of Police Bias in the Translation and Interpretation of Wiretap Conversations. *Surveillance & Society*, *8*(1), 28–42. DOI: 10.24908/ss.v8i1.3472.

Ortega Harráez, J. M., & Foulquié Rubio, A. I. (2008). Interpreting in police settings in Spain. C. Valero Garcés & A. Martin (Eds.), *Crossing borders in community interpreting* (pp. 123–146). Benjamins translation library.

Ozolins, U. (2016). The myth of the myth of invisibility? *Interpreting*, *18*(2), 273–284. DOI: 10.1075/intp.18.2.06ozo.

Perez, I. (2015). Police settings. In F. Pöchhacker, N. Grbić, P. Mead, & R. Setton (Eds.), *Routledge encyclopedia of interpreting studies* (pp. 210–212). Routledge Taylor & Francis Group.

Pöchhacker, F. (2004). *Introducing interpreting studies*. Routledge.

Prieto Ramos, F. (2015). Quality Assurance in Legal Translation: Evaluating Process, Competence and Product in the Pursuit of Adequacy. *International Journal for the Semiotics of Law - Revue Internationale De Sémiotique Juridique*, *28*, 11–30. DOI: 10.1007/s11196-014-9390-9.

Reiss, K., & Vermeer, H. J. (1984/1991). *Grundlegung einer allgemeinen Translationtheorie*. *Linguistische Arbeiten: Vol. 147*. Max Niemeyer Verlag.

Reiss, K., & Vermeer, H. J. (2014). *Towards a General Theory of Translational Action: Skopos Theory Explained*. Taylor and Francis.

Salaets, H., Alsulaiman, A., & Biesbrouck, S. (2015). Tap Interpreting: from practice to norm: A Belgian case study. *Turjuman*, *24*(2), Article 1, 11–49.

Salaets, H., & Balogh, K. (2018). Interdependence of investigating legal authorities and the FoLiTex (Forensic Linguistic Tap Expert): an unexplored area of expertise. Available at: lirias.kuleuven.be/2349981?limo=0.

Sausdal, D. (2019). Policing at a distance and that human thing. *Focaal – Journal of Global and Historical Anthropology*, *2019* (85), 51–64. DOI: 10.3167/fcl.2019.850105.

Simonnaes, I. (2013). Legal translation and "traditional" comparative law – Similarities and differences. *Linguistica Antverpiensia*,12 (2013), 147–160. Available at: lans-tts.uantwerpen.be/index.php/LANS-TTS/article/view/230/219.

Stanek, M. (2011). *Dolmetschen bei der Polizei: Zur Problematik des Einsatzes unqualifizierter Dolmetscher*. Frank & Timme.

Svoboda, T., Biel, Ł., & Łoboda, K. (Eds.). (2017). *Translation and multilingual natural language processing*. *Quality aspects in institutional translation*. Language Science Press.

Taibi, M., & Martin, A. (2012). Court translation and interpreting in times of the 'War on Terror': The case of Taysir Alony. *Translation & Interpreting*, *4*(1), 77–98.

Venuti, L. (1995). *The translator's invisibility: A history of translation*. *Translation studies*. Routledge.

Wadensjö, C. (1998). *Interpreting as interaction. Language in social life series.* Longman.

Wiesmann, E. (2004). *Rechtsübersetzung und Hilfsmittel zur Translation: Wissenschaftliche Grundlagen und computergestützte Umsetzung eines lexikographischen Konzepts.* Forum für Fachsprachen-Forschung: Vol. 65. Tübingen: Narr.

Text Corpus FSC Judgments

BGE, 129 I 85 Judgment of November 13, 2002

6B_80/2012 Judgment of August 14, 2012

6B_125/2013, 6B_140/2013 Judgment of September 23, 2013

6B_1021/2013 Judgment of September 29, 2014

6B_946/2015 Judgment of September 13, 2016

6B_71/2016 Judgment of April 5, 2017

6B_376/2018, 6B_380/2018 Judgment of September 25, 2018

6B_1368/2017 Judgment of June 14, 2018

6B_403/2018 Judgment of January 14, 2019