

The Failed Promise of Language Rights: A Critique of the International Language Rights Regime

Moria Paz*

Major international legal instruments commit international law to protect language rights absolutely, irrespective of counter-pressures toward linguistic uniformity. This unconditional commitment to language rights is echoed in the writings of prominent human rights scholars, who argue that language is a constitutive element of cultural identity. This article contrasts the ideals of language rights with the actual record of their enforcement. It presents a detailed analysis of the 133 cases that have come before the European Court of Human Rights, the U.N. Human Rights Committee, and the Inter-American Court of Human Rights dealing with language issues as they arise in (i) education, (ii) court proceedings, and (iii) communications with the government. The analysis demonstrates that the decisions of international judicial or quasi-judicial bodies in language protection cases have consistently favored linguistic assimilation, rather than the robust protection of linguistic diversity that is formally espoused. Instead of strong language guarantees, only transitional accommodations are offered in the public realm for those as yet unable to speak the majority language. This jurisprudence treats minority language not as a valuable cultural asset worthy of perpetual legal protection, but as a temporary obstacle that individuals must overcome in order to participate in society. The legal decisions take a narrowly utilitarian approach to language, forcing the state to accept the use of minority languages only insofar as they facilitate communication with the majority and with the official bodies of the state. The paper concludes with a commentary suggesting that treating language interests under the rubric of human rights, however valid and worthy they may be, cannot be normatively defended.

INTRODUCTION

Language conflicts are pervasive in the world today. The imprisoned Kurdish rebel leader of the Kurdistan Worker's Party ("PKK"), Abdullah

* Fellow in International Law, Stanford Law School. I am grateful for the wisdom and kindness of Gabriella Blum, Barbara Fried, Tom Ginsburg, Mark Kelman, David Kennedy, Amalia Kessler, Martti Koskeniemi, and Peter Kozodoy, who graciously commented on the research as it developed. I am thankful to Laura Van den Eynde for invaluable research assistance. Finally, I would also like to thank the library staff at Stanford Law School, and in particular Sonia Moss, Rich Porter, and Sergio Stone, who kindly assisted me in gathering all the materials needed for this research. Any mistakes are mine alone.

Ocalan, noted in reference to Turkish outlawing of the Kurdish language that “the language ban . . . provokes this revolt.”¹ In recent years, the prohibition on the Kurdish language was eased. However, in 2009, after a prominent Kurdish lawmaker gave a speech in his native Kurdish in Turkey’s Parliament, the State-run television immediately silenced the legislator’s broadcast,² suggesting that this bitter conflict between Kurdish speakers and the Turkish government is far from nearing its end. The winds of an impending language war are also blowing over Ukraine. After the Parliament approved a bill in July 2012 reaffirming Ukrainian as the country’s sole national language, but allowing local and regional governments to grant official status to Russian and other languages spoken by at least ten percent of their residents, a donnybrook ensued in parliament. Lawmakers attacked one another physically, while outside furious demonstrators prepared to camp out. Platoons of riot police were summoned.³ Language conflicts, however, need not turn violent to be serious. “This is not a conflict where people will get killed. But it has the same structure as most big international conflicts,” said the former deputy prime minister of Belgium, after the third prime ministerial resignation in three years, of increased linguistic tension between Dutch- and French-speakers in the country.⁴ It took a modern-day world record of almost 600 days before Belgium ultimately succeeded in surmounting the linguistic standoff that threatened to wipe it from the map.

Leading scholarship on human rights and major international treaties and conventions makes particular promises as to how such conflicts bearing on language ought to be negotiated. The existing legal orthodoxy is based upon three principles. First, there is growing consensus that a human rights vocabulary is the best approach to deal with language rights claims. Academics vary on the degree to which this rights approach should be privileged: some advocate an absolute *right* protection to linguistic claims as a matter of law (“[l]inguistic rights should be considered basic human rights”),⁵ while

1. Stephen Kizner, *Kurdish Rebel Links Revolt to Repression by Turkey*, N.Y. TIMES, June 24, 1999, <http://www.nytimes.com/1999/06/24/world/kurdish-rebel-links-revolt-to-repression-by-turkey.html?src=pm>. For other instances in which language conflict played an important role in the prelude to an extremely violent drama, see, for example, Albanians in Serbia, Sri Lankan Tamils in Sri Lanka, Abkhazians and Ossetians in Georgia, Slavs in Moldova, Tibetans in China, Mons in Burma, or the Tuareg in Mali and Niger.

2. The Associated Press, *Kurdish Spoken in Challenge to Turkey*, NBC NEWS, Feb. 24, 2009, http://www.msnbc.msn.com/id/29371366/ns/world_news-europe/t/kurdish-spoken-challenge-turkey.

3. David M. Herszenhorn, *Lawmakers in Ukraine Approve Bill on Language*, N.Y. TIMES, July 3, 2012, <http://www.nytimes.com/2012/07/04/world/europe/ukraine-parliament-adopts-russian-language-bill.html>.

4. Ian Traynor, *The Language Divide at the Heart of a Split that is Tearing Belgium Apart*, THE GUARDIAN, May 8, 2010, <http://www.guardian.co.uk/world/2010/may/09/belgium-flanders-wallonia-french-dutch>.

5. Robert Phillipson, Mart Rannut & Tove Skutnabb-Kangus, *Introduction*, in LINGUISTIC HUMAN RIGHTS: OVERCOMING LINGUISTIC DISCRIMINATION 1, 1 (Skutnabb-Kangus & Robert Phillipson eds., 1994). On the same point, see generally Hans-Joachim Heintze, *Article 1*, in THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTEC-

others promote a human rights approach only as a normative *aspiration*, albeit carrying real practical challenges (“[i]f a particular regime of language rights could be shown . . . [to] be in some way ‘integral’ . . . to human rights, then this would offer an impressive normative and political foundation for that regime”).⁶ Similarly, while some scholars call for the adoption of a human rights vocabulary in all linguistic clashes between minorities and majorities, others support a qualified or pragmatic application of the approach that is applicable only to certain types of minorities (for example, the guarantee of substantive language rights to only indigenous people or national minorities, but not to other groups),⁷ or to particular social functions

TION OF NATIONAL MINORITIES 86, 86 (Marc Weller ed., 2005) (“The rights of persons belonging to minorities are an aspect of human rights”); NIAMH NIC SHUIBHNE, LANGUAGE RIGHTS AS HUMAN RIGHTS? LECTURE TO BORD NA GAELGE, DUBLIN (1998) (“language rights are legitimate human right”); Tove Skutnabb-Kangus, *Language Policy and Linguistic Human Rights*, in AN INTRODUCTION TO LANGUAGE POLICY: THEORY AND METHOD 273 (Thomas Ricento ed., 2006); Rainer Enrique Hamel, *Introduction: Linguistic Human Rights in a Sociological Perspective*, 127 INT’L J. OF THE SOC. OF LANGUAGES 1 (1997); LANGUAGES: A RIGHT AND A RESOURCE, APPROACHING LINGUISTIC HUMAN RIGHTS (Miklos Kontra, Robert Phillipson, Tove Skutnabb-Kangus, & Tobor Varady eds., 1999).

For a more descriptive approach, see, for example, Fernand de Varennes, *Language Rights Standards in Europe: The Impact of the Council of Europe’s Human Rights and Treaty Obligations*, in RIGHTS, PROMOTION AND INTEGRATION ISSUES FOR MINORITY LANGUAGES IN EUROPE 23, 25 (Susanna Pertot, Tom M.S. Priestly & Colin H. Williams eds., 2009) (“To put it simply, most—if not all—of what are called today language rights derive from general human rights standards”); STEPHAN MAY, LANGUAGE AND MINORITY RIGHTS 185–86 (2001) (“[T]here is a nascent consensus on the validity of minority language . . . rights. This is predicated on the basis that the protection of minority languages falls within generalist principles of human rights.”); Stephan May, *Language Rights: Moving the Debate Forward*, 9 J. OF SOCIOLINGUISTICS 319 (2005); FERNAND DE VARENNES, LANGUAGE, MINORITIES AND HUMAN RIGHTS 217–18 (1996).

For a more critical take on the human rights approach to language, see, for example, Will Kymlicka & Alan Patten, *Introduction: Language Rights and Political Theory*, in LANGUAGE RIGHTS AND POLITICAL THEORY 1, 33–37 (Will Kymlicka & Alan Patten eds., 2003) (especially when dealing with non-national minorities); Leslie Green, *Are Language Rights Fundamental?*, 25 OSGOOD HALL L. J. 639 (1987); Denise G. Réaume, *Official-Language Rights: Intrinsic Value and the Protection of Difference*, in CITIZENSHIP IN DIVERSE SOCIETIES 245 (Will Kymlicka & Wayne Norman eds., 2000); Eerik Lagerpetz, *On Language Rights*, 1 ETHICAL THEORY & MORAL PRACTICE 181 (1998); Xabier Arzoz, *Language Rights as Legal Norms*, 15 EURO. PUB. L. 541 (2009).

6. Kymlicka & Patten, *Introduction: Language Rights and Political Theory*, in LANGUAGE RIGHTS AND POLITICAL THEORY, *supra* note 5, at 33.

7. “In the case of indigenous peoples [and national minorities more generally], the state may have greater duty to respect their wishes in view of the nature of the relationship between the two, and that of the duties and obligations involved.” DE VARENNES, LANGUAGE, MINORITIES AND HUMAN RIGHTS, *supra* note 5, at 97–98. On the same point, see, for example, Council of Europe, European Charter for Regional or Minority Languages art. 1, para. a, *opened for signature* Nov. 5, 1992, C.E.T.S. 148 [hereinafter European Charter for Regional or Minority Languages] (protecting languages “traditionally used within a given territory of a state by the nationals of that State” and “not . . . the languages of migrants”); Joseph Heath, *Immigration, Multiculturalism, and the Social Contract*, 10 CAN. J. L. & JURIS. 343, 355 (1997) (immigrants are cultural minorities as a result of choices they have made, and they therefore have “no right-based claim to . . . [the] protect[ion] of their heritage culture”); WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP 156 (2001) (“National minorities have resisted integration and fought to maintain or rebuild their own societal culture, while immigrants have accepted the expectation they will integrate into the dominant societal culture”); CHARLES TAYLOR, RECONCILING THE SOLITUDES: ESSAYS ON CANADIAN FEDERALISM AND NATIONALISM (Guy Laforest ed., 1993); Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994).

(for example, schooling),⁸ or determined by the ad hoc circumstances of the minority (such as their numerical importance, locations and geographical concentration).⁹ Notwithstanding these disagreements about the degree rather than the essence of the approach, the privileged status of a human rights vocabulary to deal with linguistic claims is the norm among scholars.

The growing commitment to a human rights vocabulary to deal with linguistic claims is also reflected in major international and regional treaties and conventions. The prime example is Article 27 of the International Covenant on Civil and Political Rights (“ICCPR”), which explicitly recognizes the right of minorities “to enjoy culture and to use language.”¹⁰

Second, it is generally accepted that the protection of minorities’ languages is closely associated with culture. Fernand de Varennes, a leading legal expert on language rights, explains that the “importance of language for many minorities” derives from the centrality of language “to their social and cultural identity.”¹¹ Similarly, Susanna Mancini and Bruno de Witte

8. In the domain of education, for example, Stephan May quotes de Varennes: “[T]here is an increasing recognition within international and national law that significant minorities within the nation-state have a *reasonable* expectation to some form of state support” MAY, LANGUAGE AND MINORITY RIGHTS, *supra* note 5, at 128–65. May continues, “[i]t is increasingly accepted that where a language is spoken by a significant number within the nation-state, it would also be unreasonable not to provide some level of state services and activity in that language.” *Id.* at 192–93.

9. This is generally referred to as the “sliding scale approach,” which was developed by Fernand de Varennes. See, e.g., DE VARENNES, LANGUAGE, MINORITIES AND HUMAN RIGHTS, *supra* note 5, at 160 (“[T]o arrive at a reasonable equilibrium . . . in matters related to language use by public authorities, a sliding scale approach would be appropriate”); see also Fernand de Varennes, *The Existing Rights of Minorities in International Law*, in LANGUAGES: A RIGHT AND A RESOURCE, APPROACHING LINGUISTIC HUMAN RIGHTS 117, 117–46 (Susanna Pertor, Tom M.S. Priestly & Colin H. Williams eds., 2009).

10. International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 172 [hereinafter ICCPR], and other instruments are discussed in detail *infra* Part I.

11. DE VARENNES, LANGUAGE, MINORITIES AND HUMAN RIGHTS, *supra* note 5, at 129. For the tie between language and culture as advocated in scholarship, see also, for example, Alpha Connelly, *The European Convention on Human Rights and the Protection of Minorities*, 2 IRISH J. EURO. L. 277, 279 (1993) (“[L]anguage is often intimately linked to culture. Indeed it is an element of culture.”); Denise Gilman, *A “Bilingual” Approach to Language Rights: How Dialogue Between U.S. and International Human Rights Law May Improve the Language Rights Framework*, 24 HARV. HUM. RTS. J. 1, 6 (2011) (calling for the “respect for language as an essential element of culture”); MAY, LANGUAGE AND MINORITY RIGHTS, *supra* note 5, at 129 (“[O]ne might be able to assume that language has little actual significance to, or bearing on, questions of ethnic and national identity. However, this would be to make a grave mistake . . . there is considerable evidence that while language may not be a *determining* feature if ethnic and national identity, it remains nonetheless a *significant* one”); CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE, PHILOSOPHICAL PAPERS 1, 234 (1985) (“language . . . [is] central to our understanding of man”); KRISTIN HENRARD, DEVISING AN ADEQUATE SYSTEM OF MINORITY PROTECTION, INDIVIDUAL HUMAN RIGHTS, MINORITY RIGHTS AND THE RIGHT TO SELF-DETERMINATION 245 (2000) (the protection of languages derives from language’s role as “an important identity feature, which is intrinsic to or at least closely related to culture”); Joshua A. Fishman, *On the Limits of Ethnolinguistic Democracy*, in LINGUISTIC HUMAN RIGHTS: OVERCOMING LINGUISTIC DISCRIMINATION 49, 60 (Tove Skutnabb-Kangas & T. Cummis eds., 1995); VERNON VAN DYKE, HUMAN RIGHTS, ETHNICITY AND DISCRIMINATION 32 (1985); Denise G. Réaume, *The Group Right to Linguistic Security: Whose Right, What Duties*, in GROUP RIGHTS 118 (Judith Baker ed., 1994); Mala Tabory, *Language Rights as Human Rights*, 10 ISRAEL Y.B. ON HUM. RTS. 167, 173 (1980); Fernand de Varennes, *Ethnic Conflicts and Language in Eastern Europe and Central Asian States: Can Human Rights Help Prevent Them?*, 5 INT’L J. ON MINORITY & GROUP RTS. 135, 140–41 (1997).

note that “the use of a particular language not only serves as a means of functional communication, but also expresses that person’s cultural identity as well as the cultural heritage developed by all previous speakers of the language.”¹² Important legal instruments echo the notion that language is constitutive to culture: “Language is one of the most fundamental components of human identity. Hence, respect for a person’s dignity is intimately connected with respect for the person’s identity and consequently for the person’s language.”¹³

Third, the motivation for protection of the linguistic interests of minorities is to support what is widely accepted as “the preeminent human rights norm”¹⁴—the ideal of nurturing cultural diversity at large.¹⁵ Henry Steiner, a leading human rights scholar, explains:

By valuing diverse cultural traditions . . . human rights law evidences what must be a basic assumption—namely that differences enrich . . . the world. They contribute to a fund of human experience on which all individuals and groups can draw in the ongoing processes of change and growth. Ethnic groups nourish that fund.¹⁶

Bruno de Witte reiterates the importance of linguistic rights to foster cultural diversity in the European Union context. For de Witte, “the protection of linguistic *rights* is naturally related to the protection of linguistic *diversity*,” and this relationship is “so close” that the protection of linguistic diversity became an integral “part of the agenda of fundamental rights protection in the European Union.”¹⁷ And, again, international and regional legal instruments reflect the tie between the protection of minorities’ languages and the nourishment of cultural diversity: “[a]ll languages are the

12. Susanna Mancini & Bruno de Witte, *Language Rights as Cultural Rights: A European Perspective*, in *CULTURAL HUMAN RIGHTS* 247, 247 (Francesco Francioni & Martin Scheinin eds., 2008).

13. Organization for Security and Co-operation in Europe High Commissioner on National Minorities, *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities* 11 (Feb. 1, 1998) [hereinafter *Oslo Recommendations*]. Other examples are provided *infra* in Part I.

14. Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 *NOTRE DAME L. REV.* 1548, 1550 (1991).

15. This norm is legalized in the principle of equal protection. *See, e.g.*, ICCPR, *supra* note 10, art. 27 (see discussion of the Article *infra*, at Part I), U.N. Charter art. 55(c); Universal Declaration on Human Rights, *supra* note 18, art. 2; Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 222; American Convention of Human Rights art. 1, July 18, 1978, 1144 U.N.T.S. 123. In addition, entire conventions such as those on gender and racial discrimination are built upon it. Other rights declared in human rights treaties complement the idea of equal respect to difference and the value placed on diversity. *See, e.g.*, ICCPR, *supra* note 10, art. 18, 21 (“freedom to . . . manifest . . . religion or belief . . . in . . . practice or in teaching” and “peaceful assembly”).

16. Steiner, *supra* note 14.

17. Bruno de Witte, *Common Market Freedoms Versus Linguistic Requirements in the EU States*, in *MUNDIALITZACIÓ, LLIURE CIRCULACIÓ I IMMIGRACIÓ, I L'EXIGÈNCIA D'UNA LLENGUA COM A REQUISITE [GLOBALIZATION, FREE MOVEMENT, IMMIGRATION AND LANGUAGE REQUIREMENTS]* 109, 114 (Antoni Milian i Massana et al. eds., 2008). In the discussion de Witte refers to Article 22 of the EU Charter of Fundamental Rights and Freedoms (“[t]he Union shall respect cultural, religious and linguistic diversity”).

expression of a collective identity and . . . must therefore be able to enjoy the conditions required for their development.”¹⁸

This choice of a human rights vocabulary to regulate matters bearing on languages serves a fairly specific function: it endows a language claim with unconditional normative value and immediate applicability irrespective of local distributional consequences. Louis Henkin, widely considered one of the most influential human rights scholars of the twentieth century, writes that “human rights enjoy a *prima facie*, presumptive inviolability, and will often ‘trump’ other public goods.”¹⁹ The “*trumping*” power²⁰ of language rights lies in their “universal” and “factoid” (i.e. fact-like) properties.²¹ According to Henkin, human rights are “universal,”²² in the dual sense that they are (i) widely recognized and “the only political-moral idea that has received universal acceptance”²³ and (ii) that they impose external standards on states that “apply to all to whom they are relevant”²⁴ across “geography or history, culture or ideology, political or economic system, or stages of societal development.”²⁵

Human rights are, moreover, also fact-like in the sense that both their application and its consequences are self-evidently good. This means that “once you acknowledge the existence of the right, then you have to agree that its observance requires x, y and z.”²⁶ Judge Rosalyn Higgins, the former President of the International Court of Justice, describes this property of human rights:

[I]t is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world . . . [but] I

18. United Nations Educ., Sci. and Cultural Org. [UNESCO], Universal Declaration on Linguistic Rights, art. 7(1) (June 9, 1996) (declaration has not gained formal approval from UNESCO and has not been ratified by the U.N. General Assembly).

19. LOUIS HENKIN, *THE AGE OF RIGHTS* 4 (1970).

20. For rights as trumping policy, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1978) (“[i]ndividual rights are political thrums held by individuals. Individuals have rights when, for some reason, a collective goal is not sufficient justification for denying them what they wish”). Philip Alston adds a further qualification: “human rights can provide a meaningful basis for social order without being rigid, absolute or forever enduring.” Philip Alston, *Introduction*, in *HUMAN RIGHTS LAW* xi, xvi (Philip Alston ed., 1996).

21. I am building here on Duncan Kennedy’s definition of rights. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* 305 (1997). For a shorter version of this argument, see Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* 178, 185 (Wendy Brown & Janet Halley eds., 2002).

22. HENKIN, *supra* note 19, at ix (“Human rights is the idea of our time, the only political-moral idea that has received universal acceptance.”).

23. *Id.* For a critique of Henkin’s universalism, see Makau W. Mutua, *The Ideology of Human Rights*, 36 *VA. J. INT’L L.* 589, 628–31 (1996).

24. HENKIN, *supra* note 19, at 32.

25. *Id.* at 2.

26. Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 21, at 178, 185 (emphasis omitted).

believe, profoundly, in the universality of the human spirit. Individuals everywhere want the same essential things²⁷

Philip Alston, another leading human rights scholar, writes: “the characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and universal validity.”²⁸

Our existing international rhetoric makes sense of language claims by analogizing linguistic identity to cultural identity and speaks about a legalistic structure of language rights. But this is just talk. And talk, we know, is cheap.

This paper is a critique of the rights approach to linguistic claims. Descriptively, it reviews key international and regional human rights instruments and uncovers the gap between the promise of language rights protection and the judicial meanings of these rights as developed in practice. Normatively, it suggests that treating language interests, however valid and worthy they may be, under the rubric of human rights cannot be defended in practice. The paper advances three specific claims.

First, I survey the record of judicial implementation of language accommodations by the United Nations Human Rights Committee (“UNHRC”) and the European Court of Human Rights (“ECtHR”), and demonstrate the triumph of a limited pragmatic model of language protection. This model of accommodation does not base international legal protection on any moral or political investment in languages as an authentic expression of culture and does not live up to its billing of protecting language rights as human rights. In the few cases in which the UNHRC or the ECtHR accommodates the right of non-majority language speakers in the public domain, the protection offered is thin.

Such cases fall into two categories. The first includes situations in which a non-dominant language becomes a barrier to realizing certain *other* universally accepted human rights that are not specific to culture. In this case, the UNHRC and the ECtHR interpretation of language rights claims tends to emphasize procedural issues, not substantive redistribution of resources.

The second category includes cases where some minimal protection is needed in order to prevent irreparable harm to the individual from discrimination based on linguistic status. Here, minority language is accommodated in the public domain only until successful assimilation eliminates the need for protection. Legal accommodation thus lasts only until the minority-language speakers complete their transition into the linguistic mainstream of

27. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 96–97 (1994).

28. Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 3 (1988).

society and its dominant cultural practice. After assimilation, a minority can still maintain its language and culture, but on its own time and with its own funds.

The slippage between the lofty ideals of language rights and the concrete, judicially developed meanings of these rights confuses the real impact of our international language protection regime. In practice, case law has consistently favored linguistic assimilation rather than the robust protection of linguistic diversity that is espoused. Instead of strong language guarantees, only transitional accommodations are offered in the public realm for those individuals or groups as yet unable to speak the majority language. This jurisprudence treats minority language not as a valuable cultural asset worthy of perpetual legal protection, but as a temporary obstacle or disadvantage that individuals must overcome in order to participate in society. The legal decisions take a narrowly utilitarian approach to language, forcing the state to accept the use of minority languages only insofar as they facilitate communication with the majority and with the official bodies of the state. In the end, our international linguistic rights regime leans in the direction of assimilation on fair terms, not accommodation, and minority languages are structured as a disability, not an asset for cultural diversity.

My second claim is that the ECtHR and the UNHRC have effectively converged on a *de facto* common standard for the protection of minority language speakers. The resulting international status quo is a limited due process accommodation of minority language in the public sphere. This alignment is surprising. The UNHRC and the ECtHR represent two separate legal regimes that include different entitlements in relation to linguistic minorities²⁹: The UNHRC is charged, *inter alia*, with making authoritative comments on individual communications (complaints) on the application of the ICCPR,³⁰ while the ECtHR is responsible for monitoring compliance of member states of the Council of Europe with their obligations under the

29. In general, the ICCPR is a text that largely corresponds to provisions found in the regional human rights conventions, including the ECHR. However, a very important exception to this general rule is Article 27 of the ICCPR, which is a provision missing from the ECHR. On the similarities between the ICCPR and the ECHR, see YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 60–61 (2003).

On the differences between the ICCPR and the ECHR, see, for example, *Report of the Committee of Experts to the Committee of Ministers of the Council of Europe on the Problems Arising from the Coexistence of the U.N. Covenants on Human Rights and the European Convention on Human Rights: Differences as Regards the Rights Guaranteed*, Sept. 1, 1970, H (70) 7 [hereinafter *Report of the Committee of Experts*]; Parliamentary Assembly of the Council of Europe, *Information Report on the Protection of Human Rights in the U.N. Covenant on Civil and Political Rights and Its Optional Protocol and in the ECHR*, April 27, 1976, Doc. No. 3773, at 4; Tabory, *supra* note 11, at 208–11.

30. Under the first Optional Protocol, the UNHRC is charged with examining “communications” (i.e. complaints) from individuals claiming to be victims of violations by state parties to the Covenant. The UNHRC “admits evidence, receives submissions, and makes its views available to the parties. The views are not binding upon the state parties.” RUTH MACKENZIE, CESARE ROMANO, YUVAL SHANY & PHILIPPE SANDS, *THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* 416 (2d ed. 2009).

European Convention on Human Rights (“ECHR”).³¹ The ICCPR provides applicants before the UNHRC with access to Article 27, a direct right to the use of minorities’ languages,³² whereas the ECHR contains no corresponding entitlement. Applicants before the ECtHR cannot raise direct language rights claims, but can only bring claims of violations of Article 14 of the ECHR, which prohibits discrimination in the enjoyment of other rights in the ECHR, with language as one of a number of suspected grounds.³³

Article 27 of the ICCPR is championed by legal scholars as a crown jewel in the protection of linguistic minorities and as “the most widely accepted legally binding provision on minorities.”³⁴ Moreover, it explicitly recognizes the need for “special” minority rights that go beyond the procedural prohibition of discrimination.³⁵ Yet the outcome for complainant proceedings under Article 27 of the ICCPR has not differed appreciably from similar cases that have come before the ECtHR, under which no direct language right exists, and there is only the more limited scope of Article 14 prohibition of discrimination in the enjoyment of another right enshrined in the Convention.

Indeed, during all its years of operation, the UNHRC has never once found an Article 27 breach in relation to language violations in the functions surveyed.³⁶ Applicants armed with a direct language entitlement—Article 27—did not enjoy more protection of their language than they would have enjoyed through equality and due process rights, which are not

31. European Convention on Human Rights art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

32. ICCPR, *supra* note 10, art. 27 (persons belonging to “ethnic, religious or linguistic minorities . . . shall not be denied . . . the right . . . to enjoy their own culture . . . [and] to use their own language.”).

33. ECHR, *supra* note 31 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

34. United Nations Office of the High Commissioner for Human Rights, *International Standards*, available at <http://www.ohchr.org/EN/Issues/Minorities/IEExpert/Pages/standards.aspx> (last visited Sept. 30, 2012). See, e.g., PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 141–42 (2001) (“Granting minorities a right to defend their special identity, their unique characteristics that distinguish them from other members of the human family is an important task for human rights. Article 27 of the United Nations Covenant on Civil and Political Rights is an inevitable focus for this aspect of minority rights. It is the only expression of the right to an identity in modern human rights conventions intended for universal application. It is, in fact, the first real attempt in the history of international law to provide such a universal right. . . .”); Kristin Henrard, *The Interrelationship Between Individual Human Rights, Minority Rights and the Right to Self-Determination and Its Importance for the Adequate Protection of Linguistic Minorities*, 1 *GLOB. REV. ETHNOPOLITICS* 41, 53 (2001) (“[Article 27 is] [t]he most basic international law provision on minority rights.”); Robert McCorquodale, *Rights of Peoples and Minorities*, in *INTERNATIONAL HUMAN RIGHTS LAW* 365, 383 (Daniel Moeckli, Sangeeta Shai, Sandesh Sivakumara & David Harris eds., 2010) (the adoption of Article 27 signals “significant development of minority rights”); Anne-Christine Bloch, *Cultural Rights as Individual Human Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS—A TEXTBOOK* 313 (Asbjorn Eide, Catarina Krause & Allan Rosas eds., 1995) (“Article 27 of the CCPR is the most well-known provision on special rights for minorities”).

35. HENRARD, *supra* note 11, at 159.

36. See *infra* Part II.

linguistically or culturally specific. By contrast, even without an express language entitlement, applicants before the ECtHR still enjoyed a measure of accommodation to their language claims through equality and due process provisions.

These two bodies do not take language rights as absolute human rights seriously; they interpret language claims pragmatically and make rulings based on ad hoc calculations of the specific economic and political circumstances, factual assumptions, and normative stakes in the case at hand. In doing so, they might in fact also facilitate local experimentation that could indeed provide politically feasible results and economically sustainable solutions to language strife.

But the broad ideals of language rights as human rights are not only a misapprehension of the actual practice of the members of the UNHRC and the judges of the ECtHR. My third and final claim is that a universal human rights approach to linguistic claims is, in fact, ill-suited as a mechanism to reach stable resolutions for language conflicts. Language rights claims are essentially a demand for a new distribution of power against a reality of scarce resources—or, a call for a new political settlement in society that allocates scarce resources within a single economy.³⁷ But this distributional aspect of language conflicts is under-acknowledged or even elided in the human rights literature.

Emphasizing the tie between language and culture puts the focus on the bearer of the rights, the minority language speakers, and the domain of culture, where minorities debate their collective self-understanding. But the accent on culture obscures the question of the costs of vindicating these rights and the correlation between privilege and its actual price. It also confuses the relational, redistributive element of linguistic conflict with concrete losers and winners across different constituencies within a society.

Similarly, employing the universalizing vocabulary of rights conceals the counter-pressure toward linguistic uniformity and the essentially political nature of the conflict. This structures the debate on language protection around labels: whether what we are doing now is or ought to be described as protection of a right, and what is or ought to be the precise scope of that right. These queries avoid an open politicization of the language strife. Yet at the core of the clash stand political, not legal, questions: What compromises can we live with? Which modes of engagement ought to be permitted and which should be excluded?

37. In developing this argument, I benefited from an article by Susan Marks suggesting the general blind spot of human rights to questions dealing with distribution. See Susan Marks, *Exploitation as an International Legal Concept*, in *INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES* 302 (Susan Marks ed., 2008).

Methodologically, I investigate applications before three bodies. The first is the UNHRC, an expert body with quasi-judicial powers³⁸ that functions under United Nations auspices and is charged with making authoritative comments on individual communications on the application of the ICCPR.³⁹ The second is the ECtHR, the regional body responsible for monitoring compliance of member states of the Council of Europe with their obligations under the ECHR.⁴⁰ The third is the Inter-American Court of Human Rights (“IACtHR”), the regional body entrusted with jurisdiction over certain members of the Organization of American States that have joined the 1969 American Convention on Human Rights (“IAHR Convention”) and accepted the power of the IACtHR to monitor their compliance with the IAHR Convention.

The UNHRC was selected for analysis because it is the only active human rights complaints body with a “potentially universal reach.”⁴¹ Its members over the years have included “some of the world’s most prominent international jurists and human rights experts,”⁴² and its broad jurisdiction “is a key component in the human rights movement.”⁴³ The ECtHR is of interest because this regional court is considered “a success story”⁴⁴ and “has become a source of authoritative pronouncements on human rights law for national courts that are not directly subject to its authority.”⁴⁵ Lastly, the IACtHR

38. For scholars who argue that the Committee is a “quasi-judicial body,” see, for example, MANFRED NOWAK, *UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 668–69 (2d ed. 2005). For authors who argue that the Committee’s views are in fact binding, see, for example, Martin Scheinin, *The Work of the Human Rights Committee Under the International Covenant on Civil and Political Rights and Its Optional Protocol*, in *LEADING CASES OF THE HUMAN RIGHTS COMMITTEE* 1, 22 (Rajia Hanski & Martin Scheinin eds., 2003). For a general discussion of the role and workings of the UNHRC, see HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 844–918 (3d ed. 2007) (in particular, for discussion of the legal status of the ICCPR Committee’s views, see 915–16).

39. See United Nations Office of the High Commissioner for Human Rights, *supra* note 34.

40. On the ECtHR and its role in enforcing the ECHR, see generally MARK W. JANIS, RICHARD S. KAY & ANTHONY W. BRADLEY, *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* (3d ed. 2008).

41. As of 2010, 113 states are parties to the First Protocol and have accepted the jurisdiction of the UNHRC to receive individual communications, more than double the number subject to the jurisdiction of any regional court. See MACKENZIE ET AL., *supra* note 30, at 426–27.

42. Yet note

“the Committee has not, until now, been able to establish itself as a focal point for human rights adjudications on a par with the European Court of Human Rights. The relative failure is no doubt attributed in part to the non-binding nature of the Committee’s Views, which rendered the Committee a merely quasi-judicial body (as opposed to a ‘real court’). It may also relate to the optional nature of the jurisdiction of the Committee under the Optional Protocol, which limits the reach of the Committee in relations to many human rights violations More serious constraints to the effectiveness of the Committee . . . can arguably be found . . . in the procedures it has actually embraced: the transparency deficit in the complaint process” MACKENZIE ET AL., *supra* note 30, at 426–27.

43. *Id.* at 427.

44. *Id.* at 356.

45. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 80 (2004). In particular, Slaughter explains, the ECtHR is responsible for groundbreaking developments relating to the status of individual applicants. *Id.* at 357. For a discussion of the differences between the UNHRC and the ECtHR see STEINER ET AL., *supra* note 37, at 844–918. For the similarities between the UNHRC and ECtHR see Steven

was chosen for analysis because this court has grown increasingly effective in consolidating its “authority and credibility across large-section[s] of the region’s states and inhabitants,” and has made “important normative contribution[s]” to the development of human rights law “on both the regional and global level.”⁴⁶

This paper examines cases relating to minority language use in three specific areas: (i) education—whether the state should subsidize parents’ choices as to the main language of public education; (ii) court proceedings—whether the state should permit freedom to use particular languages in these judicial spaces; and (iii) communication with public authorities—whether the state has a duty to accommodate non-majority language speakers in their dealings with the government (for methodology, see Appendix A). The study encompasses all of the communications that came before the UNHRC between 1976, when the First Optional Protocol began allowing individuals to submit “communications” or complaints before the UNHRC entered into force, and January 2012. It also evaluates the cases that came before the ECtHR, including the Commission,⁴⁷ between 1959, the start of the Court’s operation, and January 2012. Finally, it considers the communications that came before the IACtHR, including the Commission,⁴⁸ from 1979, when the Court was officially inaugurated, through 2012. In total, twenty-one communications before the UNHRC were analyzed (see Appendix B for the complete list of communications), ninety-eight decisions and judgments under the ECtHR (see Appendix C for the complete list of cases), and eleven decisions and judgments under the IACtHR (see Appendix D for the complete list of cases). The most important of these applications will be discussed at length in the following sections of this paper. My conclusions are drawn primarily from cases that came before the UNHRC and the ECtHR. The IACtHR appears to be pursuing a somewhat divergent approach in its legal decisions, but at this stage there are not enough data points to make a generalizable claim.⁴⁹

Greer, *Europe*, in INTERNATIONAL HUMAN RIGHTS LAW 454, 461 (Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran & David Harris eds., 2010).

46. The IACtHR has made an exceptional contribution to the human rights movement, in particular, in the field of indigenous peoples in time of conflict. MACKENZIE ET AL., *supra* note 30, at 384.

47. The original text of the ECHR introduced a two-tiered enforcement mechanism that consisted of the European Commission of Human Rights and the Court. Petitions were first brought before the Commission, which examined the admissibility of the petition and attempted to find a friendly resolution. Under certain conditions, the case could be referred to the Court. With the entry into force of the Eleventh Protocol to the Convention in 1998, the Commission was abolished and most of its functions transferred to the Court. See STEINER ET AL., *supra* note 38, at 939–40. For more on the system of the ECtHR, see *id.* at 943–46.

48. For information on the two-tiered system of the IACtHR, see MACKENZIE ET AL., *supra* note 30, at 364–87.

49. In total, there are only eleven cases that include a language component and came before either the Inter-American Commission on Human Rights or the IACtHR. None of these cases dealt directly and primarily with the issue of language.

In this article, “language rights” are understood to be specific entitlements that protect language-related acts and values. Language here is the primary good, and the aim of the legal protection is to ensure both that *individuals* enjoy a safe linguistic environment in which to speak their mother tongues and that vulnerable linguistic *groups* qua groups retain a fair chance to flourish.⁵⁰ This definition of language rights does not include protection against irrational barriers based on language status, which can hinder the attainment of *other* goods that are not themselves language-specific. In those cases, language is not a substantive right per se but a solution to protecting other rights that may have expression in language. An example of such a solution is mandating a public school to give speakers of minority languages special help due to their inability to speak the majority language.⁵¹ The underlying assumption in this case is that the non-majority language of the students is not a good on its own merits, but rather that it is a barrier they must overcome in order to enjoy equal opportunities in education.⁵² The legal accommodation is transitory and lasts only until the speakers of non-majority languages complete their transitions into the linguistic mainstream.

The paper unfolds in five parts. Part I provides a brief overview of some of the major international human rights treaties and conventions that connect

50. An example of this is Article 23 of the Canadian Charter, which authorizes French- and English-speaking minority communities to be educated in their own languages. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.). The aim of this provision is to protect language for its own sake. In the words of the Canadian Supreme Court: “The general purpose of s. 23 of the *Charter* is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.” *Mahe v. Alberta*, [1990] 1 S.C.R. 342 (Can.).

For a discussion of Section 23, see, for example, Denise Réaume & Leslie Green, *Education and Linguistic Security in the Charter*, 34 McGill L. J. 777 (1988–1989); Denise Réaume, *Official Language Rights*, in CONSTITUTIONAL LAW CASES, COMMENTARY AND PRINCIPLES 1300–11 (Leonard I. Rotman, Bruce P. Elman & Gerald L. Gall eds., 2008).

51. See, e.g., *Lau v. Nichols*, 414 U.S. 563, 566–68 (1974) (in which the U.S. Supreme Court held that a school district’s failure to provide programs for non-English-speaking Chinese students to assist the student in overcoming language barriers constituted a violation of Title VI of the Civil Rights Act of 1964). Though the continuing validity of *Lau* is in doubt for reasons unrelated to the specific rights of linguistic minorities, the case’s commitment to protecting non-English speakers through antidiscrimination law remains valid. In support of its holding in *Lau*, the Court quoted regulatory guidelines issued by the Department of Health, Education and Welfare: “Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.” *Id.* at 568 (citing Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11595 (July 18, 1970)).

52. Ruth Rubio-Marín proposes the term “instrumental language right” to describe this category, as opposed to non-instrumental language rights, which protect the use of language for its own sake. Ruth Rubio-Marín, *Language Rights: Exploring the Competing Rationales*, in LANGUAGE RIGHTS AND POLITICAL THEORY, *supra* note 5, at 52, 62–67. She explains that instrumental language rights are based on the idea that “language should not be a liability in the enjoyment of one’s general status of civil, social, and political rights and opportunities in society.” *Id.* at 63.

linguistic protection to cultural preservation and adopt a human rights approach to conflicts bearing upon language issues. Part II focuses on three functions in day-to-day life that generate language conflicts: (i) education, (ii) court proceedings, and (iii) communication with public authorities. It begins with a description of the rules and practices that regulate language use in these three areas in both the ICCPR and the ECHR. Next, it examines relevant case law that has come before the UNHRC and the ECtHR. The analysis demonstrates that there is a striking discrepancy between the announced justifications of the regime and the actual decisions of these two transnational bodies. Part III seeks to analyze and explain this discordance. Finally, Part IV concludes with a commentary suggesting that treating language interests under the rubric of human rights cannot truly be normatively defended.

I. LANGUAGE RIGHTS IN THEORY

While there is no international treaty dedicated to language rights,⁵³ major international and regional legal instruments deal with the language-related interests of minorities. These treaties and conventions follow the same principles outlined above—that the best approach to regulate minorities' language claims is through a human rights vocabulary and that the legal protection of minority languages and their speakers should be based on the cultural importance of language. They further assume that the protection of language is part of a larger policy of nurturing cultural diversity.

53. By contrast, the European Charter for Regional or Minority Languages, which came into force in 1998, directly protects the languages of national minorities. The Charter accommodates minority languages through an "à la carte" system, under which state parties undertake to implement a minimum number of measures to promote minority or regional languages in different fields. Lauri Mälksoo, *Language Rights in International Law: Why the Phoenix is Still in the Ashes*, 12 FLA. J. INT'L L. 431, 456 (1998–2000) (citing the European Charter for Regional or Minority Languages, *supra* note 7, at part II).

For an assessment of the nature and extent of minority language rights that currently exist under selected national and international instruments, see, for example, Robert Dunbar, *Minority Language Rights in International Law*, 50 INT'L & COMP. L.Q. 90 (2001); Tabor, *supra* note 11, at 167; Douglas A. Kibbee, *Minority Language Rights: Historical and Comparative Perspective*, 3 INTERCULTURAL HUM. RTS. L. REV. 79 (2008); Hamel, *supra* note 5; Jacques Maurais, *Regional Majority Languages, Language Planning and Linguistic Rights*, 127 INT'L J. SOC. LANG. 135 (1997); Miroslav Kusý, *Innate Dignity, Cultural Identity and Minority Language Rights*, 6 INT'L J. ON MINORITY & GROUP RTS. 299 (1998–1999); Green, *supra* note 5; Jacqueline Mowbray, *Ethnic Minorities and Language Rights: The State, Identity and Culture in International Legal Discourse*, 6 STUD. IN ETHNICITY AND NATIONALISM 2 (2006); Nathaniel Berman, *Nationalism Legal and Linguistic: The Teachings of European Jurisprudence*, 24 N.Y.U. J. INT'L L. & POL. 1515 (1991–1992).

The increased interest in linguistic rights has been accompanied by a growing debate as to the nature and theoretical underpinnings of such rights as human rights. See, e.g., Green, *supra* note 5; Denise G. Réaume, *The Constitutional Protection of Language: Survival or Security?*, in LANGUAGE AND THE STATE: THE LAW AND POLITICS OF IDENTITY 37 (David Schneiderman ed., 1989); C. Michael MacMillan, *Linking Theory To Practice: Comments on "The Constitutional Protection of Language"*, in LANGUAGE AND THE STATE: THE LAW AND POLITICS OF IDENTITY, *supra*, at 59; Réaume, *supra* note 11.

A prime example of this is Article 27 of the ICCPR,⁵⁴ a covenant commonly regarded as an instrument that forms a part of the “International Bill of Rights.”⁵⁵ Article 27 provides that “persons belonging to [ethnic, religious or linguistic minorities] shall not be denied the right . . . to enjoy their own culture . . . or to use their own language.”⁵⁶

To understand the importance of Article 27 of the ICCPR, we must briefly review its historical context. As Marks and Clapham write, “[t]he idea that members of minority communities should be protected from assimilationist pressures has a long history, and underpins the many ‘minority treaties’ that formed part of the post-World War I peace settlement.”⁵⁷ After World War II, minorities treaties fell out of favor and “most observers assumed that something like the Czech experience would be the inevitable result” of a legal regime that resembled the old one.⁵⁸ In place of support for minorities treaties, a new idea gained acceptance: that minorities could best be protected through universal, minority-specific human rights, combined with the prohibition of discrimination.⁵⁹ This new orientation was reflected in the passing of the Universal Declaration of Human Rights in 1948. Almost immediately thereafter, however, the pendulum swung back and “the notion that membership of a minority community entails distinct human rights took roots.”⁶⁰ The codification of Article 27 of the ICCPR in 1966 also exhibited this shift: the Article is the first and perhaps most notable

54. ICCPR, *supra* note 10, art. 27. Prior to the ICCPR, Article 2 of the Universal Declaration of Human Rights ensured, *inter alia*, the nondiscrimination of the individual based on her linguistic status. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 2 (Dec. 10, 1948) (stating, “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”). See also Henry Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77 (1988).

55. See, e.g., LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER & DAVID W. LEEBRON, *HUMAN RIGHTS* 73 (1999).

56. ICCPR, *supra* note 10, art. 27.

57. SUSAN MARKS & ANDREW CLAPHAM, *INTERNATIONAL HUMAN RIGHTS LEXICON* 45 (2005).

58. Quote, attributed to William E. Rappard in 1947, is taken from Nathaniel Berman, *International Law of Nationalism: Group Identity and Legal History*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 25, 53 (David Wippman ed., 1998).

59. On the shift from the Minorities Treaties era to individual human rights, see, for example, Nathaniel Berman, *International Law of Nationalism: Group Identity and Legal History*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 25, 53 (David Wippman ed., 1998); Hurst Hannum, *Minorities, Indigenous Peoples, and Self-Determination*, in *HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY* 5, 5–11 (Louis Henkin & John Lawrence Hargrove eds., 1994); HENRARD, *supra* note 11, at 159; MARKS & CLAPHAM, *supra* note 57; Louis B. Sohn, *The Rights of Minorities*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT OF CIVIL AND POLITICAL RIGHTS 270–74* (Louis Henkin ed., 1981); PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 116–17 (1991).

60. This shift “is reflected in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948, under which certain acts committed with intent to destroy a ‘national, ethnical, racial or religious group’ were defined as a genocide and made international crimes.” MARKS & CLAPHAM, *supra* note 57. It is also reflected in the establishment of the U.N. Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (“Sub-Commission”) in 1947, with a double function of preventing discrimination and protecting minorities. On the establishment of the Sub-Commission and its role in the protection of minorities, see THORNBERRY, *supra* note 59, at 124–132.

expression in a binding universal instrument of minorities' direct right to their culture and language that goes beyond a guarantee of non-discrimination and the protection of individual rights.⁶¹

Notwithstanding the significance of Article 27, the drafting of the provision was fraught with difficulties. On the one hand, there was agreement among both statesmen and legal scholars on the need to recognize the legal status of a collectivity that is different from the individuals that compose it, and that is endowed with at least some rights that are more than the sum of the rights of equality and nondiscrimination of its individual members.⁶² On the other hand, most states refused "to accept proposals which would have obliged them to concede to every minority on its territory, regardless of its numbers, the right to obtain public financial assistance to establish institutions, amongst other things."⁶³ Ultimately, while Article 27 explicitly recognizes the right of minorities "to enjoy their own culture . . . and [to] use their own language,"⁶⁴ the final formulation of the provision (minorities "shall not be denied" the listed rights) is "grudging, or at any rate negative."⁶⁵

The qualified wording of Article 27 led to important disagreement in the international legal and human rights literature about the beneficiaries of Article 27 and the precise nature of the legal obligations that follow from this provision.⁶⁶ Article 27 may attach rights to the group itself or merely to the individual members therein, or to both.⁶⁷ It may be understood to pro-

Hurst Hannum explains that the resurgence of the notion of minorities' rights was in part due to "violent conflicts based at least in part on ethnicity and struggles to assert indigenous, minority, and/or 'national' identity that mushroomed across the world." HANNUM, *supra* note 59, at 6.

61. ICCPR, *supra* note 10, art. 27.

62. On the drafting history of Article 27, see Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* 31–34, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1979); Sohn, *supra* note 59, at 273–74.

63. DE VARENNES, LANGUAGE, MINORITIES AND HUMAN RIGHTS, *supra* note 5, at 135.

64. ICCPR, *supra* note 10, art. 27.

65. MARKS & CLAPHAM, *supra* note 57.

66. This is reflected in the Human Rights Committee, which has been divided over numerous issues concerning the application of Article 27. See U.N. Doc. CCPR/C/SR. 625 AND S.R. 633 (1985).

67. For a general discussion of the individual or group nature of Article 27, see HENKIN ET AL., *supra* note 55, at 428–38.

For an individualistic reading of Article 27, see, for example, *Report of the Committee of Experts*, *supra* note 29, at 57 ("These rights are to be guaranteed to 'persons belonging to such minorities In other words, the rights are accorded to individual persons, and not to the group as such."); Hurst Hannum, *Minorities, Indigenous Peoples, and Self-Determination*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY, *supra* note 59, at 5 (Hannum refers to Article 27 as an "individually oriented text").

For a view of Article 27 as an individual right that is generally reliant on group rights, see, for example, U.N. Office of the High Commissioner for Human Rights, General Comment No. 23 on The Rights of Minorities (Art. 27), ¶ 6.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (April 8, 1994) [hereinafter General Comment No. 23] ("Although the rights protected under [A]rticle 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion."); Robert Dunbar, *Minority Language Rights in International Law*, 50 INT'L. & COMP. L.Q. 90, 99 (2001) ("While the Article 27 right is enjoyed by individuals, in order to claim the protection of Article 27, both a 'minority' must exist and the individual must be a member of that minority."); HENKIN ET AL.,

protect only national minorities or also immigrants, migrants, workers, refugees, and noncitizens.⁶⁸ Finally, and most contentious, the Article may be interpreted as guaranteeing a broad right that places positive obligations on the state to assume an active role in accommodating minority language rights, or as a “narrow”⁶⁹ right that imposes on states only a negative duty to refrain from regulating language use in certain domains.⁷⁰

supra note 55, at 428–29 (Article 27 right refers to rights that are framed in terms of individuals who “belong to” certain groups; thus in the “terminology of international law, it would be more accurate to say that Article 27 recognizes ‘minority rights’ than ‘group rights’”); Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1543, 1547 (1991) (“Rights of members of minorities to use their own language, to practice their religion, or to associate, are necessarily exercised jointly by individuals. In this respect, such individual rights have an inherently collective character”; “[A]rticle 27 blends the individual and collective aspects of a minority culture”); see also STEINER ET AL., *supra* note 38, at 153.

For a group rights interpretation of Article 27, see, for example, Tabory, *supra* note 11, at 209 (“[Article 27 actually] enunciates in positive terms the rights of minorities as a group to use their own language.”).

For a discussion of the group nature of language rights in general, see, for example, Réaume, *supra* note 53, at 118; WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 4 (1995); Hamel, *supra* note 5.

Finally, in *Ominayak v. Canada*, the UNHRC held that the right of members of a group to enjoy their culture under Article 27 extends to the maintenance of the group’s cohesiveness. *Ominayak v. Canada*, U.N. Human Rights Committee, Final Views, U.N. Doc. No. CCPR/C/38/D/167/1984 (1990). For a discussion of the case in light of Article 27, see Benedict Kingsbury, *Claims by Non-States Groups in International Law*, 25 CORNELL INT’L L. J. 481, 490–91 (1992).

68. Francesco Capotorti in his famous review, for example, argued that Article 27 applies solely to national minorities but that immigrants may during the course of time become historical entities contemplated by Article 27. Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *supra* note 62, at 16. For a similar position, see, for example, DE VARENNES, *LANGUAGE, MINORITIES AND HUMAN RIGHTS*, *supra* note 5, at 172 (“Attempts to restrict the category of [Article 27] beneficiaries to citizens, well-established minority groups (or national minorities), non-dominant minorities, or even non-indigenous groups have all been proven to be wrong”); Tabory, *supra* note 11, at 188–90.

In addition, according to the Office of the High Commissioner for Human Rights, the individual designated to be protected need not be a citizen of the state, and thus permanent citizens are also protected. See General Comment No. 23, *supra* note 67, ¶ 5.1; cf. Heinz Kloss, *The Language Rights of Immigrant Groups*, 5 INT’L MIGRATION REV. 5, 250, 260–62 (advocating for “tolerance-oriented” linguistic rights for any minority, but “promotion-oriented” rights for established minority language speakers”).

69. Kingsbury, *supra* note 67, at 489.

70. For a narrow interpretation of Article 27, see, for example, DE VARENNES, *LANGUAGE, MINORITIES AND HUMAN RIGHTS*, *supra* note 5, at 217–18 (“[I]t should be remembered that it was never the intent of the drafters of article 27 to provide too many concessions to linguistic minorities. For better or for worse, Article 27 only affords a minimal guarantee of non-interference in certain areas”). For more on a narrow-negative interpretation of ICCPR Article 27, see U.N. Doc E/NC.4/Sub.2/286: §§ 155–57; Antony Anghie, *Human Rights and Cultural Identity: New Hope for Ethnic Peace?*, 33 HARV. INT’L L. J. 341, 344 (1992) (“Article 27 only requires the state to desist from interfering with minorities wishing to practice their own culture. The state is not legally obliged to actively support minority cultures.”); Marc Weller, *The Contribution of the European Framework Convention for the Protection of National Minorities to the Development of Minority Rights*, in *THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES*, *supra* note 5, at 620 (Article 27 is a “negative right”); Manfred Nowak, *The Evolution of Minority Rights in International Law*, in *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 103, 109 (Catherine Brölmann, Rene Lefeber & Marjoleine Zieck eds., 2003) (“since Article 27 . . . is phrased with the typically negative formulation that members of minorities “shall not be denied” certain rights, positive state obligations to affirmative action . . . cannot be inferred from this provision”); Hannum, *supra* note 59, at 5 (Article 27

More recently, however, the U.N. Human Rights Committee, the body charged with the official interpretation of the ICCPR,⁷¹ has made clear its view that Article 27 recognizes a right which calls for positive protection, not only against acts of the state itself, but against acts by others within the states as well.⁷² Further, in an important communication that dealt, among other things, with the meaning of Article 27, the UNHRC replaced the grudging wording of the provision with a strong obligation: “[A]rticle 27 of the Covenant requires States parties to accord protection to ethnic and linguistic minorities.”⁷³

as “minimalist . . . oriented text”); *Report of the Committee of Experts*, *supra* note 29, at 57 (“this article is of a rather limited character”); Yoram Dinstein, *The Degree of Self-Rule of Minorities and Federal States*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 221, *infra*, at 229–30; Mala Tabory, *Language Rights as Human Rights*, in 10 ISRAEL YEARBOOK ON HUMAN RIGHTS 167, 182; TORE MODEEN, THE INTERNATIONAL PROTECTION OF NATIONAL MINORITIES IN EUROPE 108–09 (1969). Finally, Fernand de Vareennes argues that three UNHRC decisions dealing with Article 27 in relations to indigenous peoples—*Kitok v. Sweden*, *Lovelace v. Canada* and *Ominayak v. Canada*—seem to confirm indirectly the non-interference nature of Article 27 as a minimal measure of protection of minorities. *See de Vareennes*, *supra* note 5, at 154–57.

On Article 27 as a provision that entails positive obligations, see Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *supra* note 62, ¶ 213 (“Nevertheless, there is the reason to question whether the implementation of Article 27 of the Covenant does not, in fact, call for active intervention by the state. At the cultural level in particular, it is generally agreed that, because of the enormous human and financial resources which would be needed to for a full cultural development, the right granted to members of minority groups to enjoy their culture would lose much of its meaning if no assistance from the government concerned was forthcoming.”).

Indeed some authors even refer to Article 27 as a “hard” law. *See, e.g.*, Weller, *The Contribution of the European Framework Convention for the Protection of National Minorities to the Development of Minority Rights*, in THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, *supra* note 5, at 634; *see also* W.K. HASTINGS, THE RIGHT TO AN EDUCATION IN MAORI: THE CASE FOR INTERNATIONAL LAW 19 (1988) (“to recognize a right to use a minority language implies an obligation that the right might be made effective”); Tabory, *supra* note 11, at 209 (“[Article 27 actually] enunciat[es] in positive terms the rights of minorities as a group to use their own language”); MAY, *supra* note 5, at 186; THORNBERRY, *supra* note 34, at 180; JAMES W. TOLLEFSON, PLANNING LANGUAGE, PLANNING INEQUALITY: LANGUAGE POLICY IN THE COMMUNITY (1991); Tove Skutnabb-Kangas, *Human Rights and Language Wrongs—A Future for Diversity?*, 20 LANGUAGE SCIENCES 5 (1998); UNIVERSAL MINORITY RIGHTS (Alan Phillips & Allan Rosas eds., 1995).

71. The UNHRC is charged with offering “‘authentic’ interoperations” of the ICCPR. Weller, *The Contribution of the European Framework Convention for the Protection of National Minorities to the Development of Minority Rights*, in THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, *supra* note 5, at 621.

72. General Comment No. 23, *supra* note 67, ¶¶ 6.1 & 6.2, which read as follows:

“6.1. Although [A]rticle 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a ‘right’ and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.”

“6.2 . . . positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.”

73. *Lovelace v. Canada*, U.N. Human Rights Committee, Final Views, ¶ 7.2, Comm. No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) (1981). *But see de Vareennes*, *supra* note 5.

The implications of Article 27's right of minorities to "enjoy their culture and to use their language" were further elaborated in "the influential, if not formally binding"⁷⁴ 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic or Religious Minorities ("U.N. Declaration").⁷⁵ This document, which is considered to be an interpretative declaration of Article 27,⁷⁶ transcends the tentative approach of Article 27 of the ICCPR. Article 2 of the U.N. Declaration uses an affirmative tone and insists that: "[p]ersons belonging to . . . linguistic minorities . . . have the right to enjoy their own culture . . . and to use their own language."⁷⁷

Around the same time that the United Nations passed the U.N. Declaration, regional bodies also adopted a human rights vocabulary for the protection of language rights of minorities, particularly national minorities.⁷⁸ Like

74. MARKS & CLAPHAM, *supra* note 57, at 46.

75. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities pmb., G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992) [hereinafter U.N. Declaration].

76. U.N. Declaration, *supra* note 75 ("Inspired by the provisions of [A]rticle 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious and linguistic minorities"). See also R.L. Barsh, *Minorities: The Struggle for a Universal Approach*, in *THE LIVING LAW OF NATIONS: ESSAYS ON REFUGEES, MINORITIES, INDIGENOUS PEOPLES AND THE HUMAN RIGHTS OF OTHER VULNERABLE GROUPS* 143, 150 (Gudmundur Alferdsson & Peter Macalister-Smith eds., 1996).

77. U.N. Declaration, *supra* note 75, art. 2.1. For a discussion of this point, see Heintze, *Article 1, in THE RIGHTS OF MINORITIES IN EUROPE, A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES*, *supra* note 5, at 93.

78. "National minority" is undefined in every international instrument dealing with minority rights. On the lack of a definition, see generally *The Council of Europe and Minority Rights*, 18 HUM. RTS. Q. 160, 161–70 (1996). In *Gorzelik v. Poland*, the ECtHR noted that "the formulation of . . . a definition [of a national minority] would have presented a most difficult task, given that no international treaty—not even the Council of Europe's Framework Convention for the Protection of National Minorities—defines the notion of 'national minority.'" *Gorzelik v. Poland*, 44158/98, Eur. Ct. H. R. (Fourth Section) (admissibility) (May 17, 2001).

For criticism of the "national minority paradigm" that distinguishes between historically present minorities and new arrivals, see Cristina M. Rodríguez, *Language and Participation*, 94 CALIF. L. REV. 687, 709–18 (2006).

While I focus here on national minorities, important instruments extend the use of a human rights approach also to the protection of the linguistic interests of non-national minorities. These include, *inter alia*, World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 19, U.N. Doc. A/CONF.157/23 (July 12, 1993) (addressing minorities in general and noting that "considering the importance of the promotion and protection of the rights of persons belonging to minorities," these entities "have the right to enjoy their own culture . . . and to use their own language in private and in public, freely . . ."); International Labor Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* pmb. (ILO No. 169), Jun. 27, 1989, 72 ILO Official Bull. 59, 28 I.L.M. 1382 (protecting the aspirations of indigenous people "to maintain and develop their identities, languages and religions . . ."). See also Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, arts. 13–14, U.N. Doc. A/61/L.67 (Add.1), (13 Sept., 2007); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, art. 31, U.N. Doc. A/RES/45/158, (18 Dec., 1990) ("ensure respect for the cultural identity of migrant workers and members of their families"); Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which they Live, G.A. Res. 40/144, art. 5(1)(f), U.N. Doc. A/RES/40/144, (13 Dec., 1985) ("Aliens shall enjoy . . . [t]he right to retain their own language, culture and tradition"); Convention on the Rights of the Child, G.A. Res. 44/25, arts. 29–30, U.N. Doc. A/RES/44/25, (20 Nov., 1989) (arguing that a child's education should develop "respect for . . . his or her own cultural identity, language and values . . ." and "[i]n those States in which ethnic, religious or linguistic minori-

the U.N. Declaration, these documents were also at least partially influenced by Article 27.

In 1998, “for example,” the Organization for Security and Co-operation in Europe (“OSCE”) published its standards for the treatment of the linguistic rights of national minorities.⁷⁹ The Oslo Recommendations Regarding the Linguistic Rights of National Minorities (“Oslo Recommendations”), a document that begins by acknowledging the “considerable importance” of the ICCPR in the context of language rights,⁸⁰ rests upon the presumption that “existing standards of minority rights are part of human rights.”⁸¹ It then sets out to provide “reference for the development . . . [and effective implementation of] language rights of persons belonging to national minorities, especially in the public sphere.”⁸² Although the Oslo Recommendations are not legally binding upon states, they are nonetheless highly influential, “politically binding”⁸³ documents and represent the position of the OSCE High Commissioner on National Minorities (“HCNM”).⁸⁴

Following the ethnic-nationalist violence in Europe during the early 1990s, the Council of Europe similarly adopted two crucial instruments that privilege human rights vocabulary in dealing with issues that bear on languages and national minorities in Europe.⁸⁵ As with the Oslo Recommendations, we meet the spirit of Article 27 of the ICCPR here too. Opened for signature in 1992, the European Charter for Regional or Minorities Languages focuses exclusively on the regulation of the use of languages.⁸⁶ It begins by declaring that “the right to use a regional or minority language in private and public life is an inalienable right conforming to the principles embodied in the ICCPR, and according to the spirit of the Council of Europe Convention for the Protection of Human Rights and Fundamental

ties or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right . . . to enjoy his or her own culture . . . or to use his or her own language . . .”).

79. Oslo Recommendations, *supra* note 13.

80. *Id.*

81. *See id.*, at 3.

82. *Id.* at 4.

83. Geoff Gilbert, *Article 5*, in *THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES* 153, *supra* note 5, at 164.

84. *See* Rainer Hofmann, *Introduction*, in *THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES*, *supra* note 5, at 1–2 (outlining HCNM’s role in creating the *Oslo Recommendations*).

85. Though to date, neither of the two instruments is universally accepted. Council Resolution 1713, *Minority Protection in Europe: Best Practices and Deficiencies in Implementation of Common Standards*, ¶ 3, Mar. 12, 2010, available at <http://assembly.coe.int/Main.asp?link=/documents/AdoptedText/ta10/ERES1713.htm>.

86. The Charter applies directly and exclusively to the regulation of the use of territorially-anchored “regional or minority languages” that are “different from the official language(s) of [a] State” and are “traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State’s population.” European Charter for Regional or Minority Languages, *supra* note 7, art. 1.

Freedoms.”⁸⁷ Opened for signature in 1994, the Framework Convention for the Protection of National Minorities in turn extends language privileges indirectly as a consequence of minority protection and the importance of language to minorities.⁸⁸ Article 10 touches upon the use of national minority languages and gives a “clearer legal form”⁸⁹ for the use of national minority languages and signifies the “growing legal appreciation of the human rights dimension of language rights.”⁹⁰

In addition to adopting a human rights approach to minorities’ language claims, Article 27 of the ICCPR calls for the protection of the minority’s language because of its importance to the minority, and advances a reading of language as a central component of culture.⁹¹ The UNHRC notes that Article 27 establishes rights for minority groups, including language rights, which are “directed towards ensuring the survival and continued development of the cultural . . . identity of the minorities concerned, thus enriching the fabric of society as a whole.”⁹² Like Article 27, other international and regional charters and conventions also connect the identity constitutive function of language with culture and diversity. There are numerous examples, including “[l]anguage is one of the most fundamental components of human identity,”⁹³ “regional or minority languages” are “an expression of cultural wealth,”⁹⁴ “[a]ll languages are the expression of a collective identity,”⁹⁵ and many others.⁹⁶

87. European Charter for Regional or Minority Languages, *supra* note 7, pmbl.

88. Council of Europe, Framework Convention for the Protection of National Minorities pmbl., Feb. 1, 1995, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm> [hereinafter Framework Convention for the Protection of National Minorities].

89. Fernand de Varennes, *Article 10*, in *THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES*, *supra* note 5, at 301, 302.

90. *Id.* at 302–03.

91. ICCPR, *supra* note 10, art. 27.

92. Human Rights Comm., *General Comment 23, Article 27 (50th Sess., 1994)*, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, art. 9, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

93. Oslo Recommendations, *supra* note 13, at 11.

94. European Charter for Regional or Minority Languages, *supra* note 7, art. 7(1)(a).

95. Universal Declaration on Linguistic Rights, *supra* note 18, art. 7(1).

96. *See, e.g.*, U.N. Educ., Scientific and Cultural Org., Convention for the Safeguarding of the Intangible Cultural Heritage art. (2)(a), Oct. 17 2003, *available at* <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf> (protecting language as a “vehicle of the intangible cultural heritage”); U.N. Educ., Scientific and Cultural Org., Universal Declaration on Cultural Diversity art. 5, Annex II.5–6, Nov. 2, 2001, *available at* http://portal.unesco.org/en/ev.php-URL_ID-13179&URL_DO-DO_TOPIC&URL_SECTION-201.html (noting that “[c]ultural rights are an integral part of human rights, which are universal, indivisible and interdependent,” as well as committing the signing states to “[s]afeguarding the linguistic heritage of humanity and giving support to expression, creation and dissemination in the greatest possible number of languages” and “encouraging linguistic diversity”); Council of Europe, Framework Convention for the Protection of National Minorities pmbl., Feb. 1, 1995, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm> (noting that “the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity”).

II. LANGUAGE RIGHTS IN PRACTICE

This section contrasts the ideal of a human rights approach to minorities' language claims as expressed in major international and regional treaties and conventions with the actual judicial interpretations given to linguistic demands by the UNHRC and the ECtHR.⁹⁷ As mentioned above, Article 27 of the ICCPR secures persons belonging to linguistic minorities an express right to enjoy their own culture and to use their own language.⁹⁸ This provision "clearly involve[s] obligations which are additional to those set out in the European Convention."⁹⁹ The ECHR contains no specific minority rights provision analogous to Article 27 and offers no autonomous rights for a linguistic minority as such. Such minorities, therefore, have no direct way to claim language rights before the ECtHR.¹⁰⁰

Article 14 of the Convention, however, prohibits discrimination on the grounds of language in the exercise of the substantive rights of the Convention.¹⁰¹ But even the nondiscrimination protection offered under the ECHR is narrower than the one provided by the ICCPR: Article 14 of the ECHR only has an accessory character in that the prohibition of discrimination must be invoked in combination with other rights enshrined in the Convention.¹⁰² The ICCPR, in turn, includes two separate anti-discrimination provisions: Article 2(1) (a general, autonomous prohibition of discrimination based, inter alia, on language) and Article 26 (prohibition against discrimination regarding all activities which the state regulates by law), which together provide a greater protection against the discrimination of minorities than the one offered under Article 14 of the ECHR.¹⁰³

Notwithstanding the narrower scope of Article 14 of the ECHR, the ECtHR held that minority groups can use this provision to bring forth vio-

97. The methodology which was deployed to find and analyze the specific decisions that are analyzed in this section can be found in the Appendices, as well as a complete list of the cases.

98. ICCPR, *supra* note 10, art. 27.

99. *Report of the Committee of Experts*, *supra* note 29, at 4–5.

100. However, the Court has held that Member States are under an obligation to uphold "international standards in the field of the protection of human and *minority rights*." *Denizci v. Cyprus*, App. No. 25316-25321/94 and 27207/95, 2001-V Eur. Ct. H.R. 225, ¶ 410 (emphasis added). See also RICHARD L. CREECH, LAW AND LANGUAGE IN THE EUROPEAN UNION: THE PARADOX OF A BABEL "UNITED IN DIVERSITY" 132–38 (2005) (summarizing European Union language law); Niamh Nic Shuibhne, *EC Law and Minority Language Policy: Some Recent Developments*, in RESPECTING LINGUISTIC DIVERSITY IN THE EUROPEAN UNION 123, 124–26 (Xabier Arzoz ed., 2008) (same); Francesco Palermo, *The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ*, 8 MAASTRICHT J. EUR. & COMP. L. 299, 300–03 (2001) (same).

101. ECHR, *supra* note 31, art. 14. Article 14 of the ECHR was later also set out in Council of Europe, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 2000, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/177.htm> ("The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.").

102. ECHR, *supra* note 31, art. 14.

103. Henrard, *supra* note 11, at 71 n.75.

lations of European Convention obligations and submit applications to the Court *qua* group.¹⁰⁴ Furthermore, the Court and the Commission have interpreted the accessory character of the provision “with increasing flexibility, which could have rather positive repercussions for members of minorities.”¹⁰⁵ Thus, while the primary document of the ECHR is more ambivalent in its protection of language rights than the ICCPR, it still leaves a potential avenue for language right claims.¹⁰⁶ It remains unclear, however, whether the Article 14 antidiscrimination clause covers linguistic and cultural preservation of the collective, or only protects against animus or irrational treatment of the group and its individual members due to their linguistic status.

A. Education

In a recent decision not directly related to schools, the UNHRC stated that “in the context of article 27 [of the ICCPR], education in a minority language is a fundamental part of minority culture.”¹⁰⁷ Yet the ICCPR is silent on the topic of the language of instruction in schools.¹⁰⁸ The ECHR,

104. See Geoff Gilbert, *The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights*, 24 HUM. RTS. Q. 736, 738–39 (2002) (noting the ECtHR has held “it is contrary to the European Convention to treat ‘any person, nongovernmental organization or group of individuals’ in a discriminatory fashion . . . without reasonable and objective justification . . .”). Indeed, the Parliamentary Assembly of the Council of Europe also more recently “reiterate[d] its position that the protection of persons belonging to national minorities is essential to . . . the promotion of the diversity of cultures and languages in Europe.” Council Resolution 1713, *supra* note 85, ¶ 8.

105. Henrard, *supra* note 11, at 72.

106. Mancini and de Witte, *supra* note 12, at 271. Mancini and de Witte refer to Geoff Gilbert, who argues “there is a burgeoning minority rights jurisprudence of the Court based on interpretation and application of the European Convention.” Gilbert, *supra* note 104, at 738.

107. Mavlonov v. Uzbekistan, Communication No. 1334/2004, U.N. Doc. CCPR/C/95/D/1334/2004, ¶ 8.7 (Apr. 29, 2009).

108. See ICCPR, *supra* note 10, art. 27 (discussing minority language use generally, but not specifically discussing education in a minority language). Note, however, that more recent international instruments deal with the language of education more directly. See OSCE High Comm’r on Nat’l Minorities, The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note 5, Oct. 1996, available at <http://www.osce.org/hcnm/32180?download=true> (noting that “[t]he right of persons belonging to national minorities to maintain their identity can only be fully realized if they acquire a proper knowledge of their mother tongue during the educational process”); Oslo Recommendations, *supra* note 13, at 1–2 (stating that the fulfillment of the basic human “right of persons belonging to national minorities to use their language” naturally depends upon their ability to know the language, focusing on the need to protect the language of “persons belonging to national/ethnic groups who constitute the numerical majority in one State but the numerical minority in another (usually neighboring) State”).

More recent international instruments recognize specific “positive” minority language and education rights. See, e.g., Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 14 (Sept. 13, 2007) (stating that the indigenous people have a right to an appropriate depiction in education of their cultural backgrounds and upbringings); Universal Declaration on Linguistic Rights, *supra* note 18, art. 24 (arguing that “[a]ll language communities” should have resources to enable their language to have presence “at all levels of education within their territory”); U.N. Declaration, *supra* note 75, art. 4(4) (committing states to take “where appropriate . . . measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities

like the ICCPR, does not mention education.¹⁰⁹ But Article 2 of Protocol 1 (“Enforcement of Certain Rights and Freedoms Not Included in Section I of the European Convention on Human Rights”) adds a universal right to education.¹¹⁰ Significantly, the right is a general right to education, not education in a particular language.¹¹¹

to gain knowledge of the society as a whole”); Conference on Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE art. 34, June 29, 1990, available at <http://www.osce.org/odihr/19394> (stating that the participating States would ensure that national minorities “have adequate opportunities for instruction of their mother tongue” and “in educational establishments, they will also take account of the history and culture of national minorities”); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49, art. 29(1)(c)-(d) (Nov. 20, 1989) (stating that there should be respect for and development of a child’s cultural identity); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, art. 13 (Dec. 16, 1966) [hereinafter ICESCR] (providing that the participating States recognize the right of everyone to have an education).

109. For historical contrast, during the League of Nations era, the Minorities Treaties signed during the Paris Peace Conference at the conclusion of WWI contained provisions specifically involving the use of a minority language as a medium of instruction in the state school system. These provisions made it obligatory for a state to provide primary public instruction in minority language under certain conditions. See the Polish Minorities Treaty art. 9, June 28, 1919, available at <http://www.ucis.pitt.edu/ehistory/H200Readings/Topic5-R1.html>, which provided the basis for all other Minorities Treaties. However, this system was limited and applied only to minorities living in countries defeated in WWI. Further, even for the Minorities Treaties, the purpose was not the protection of minorities’ languages qua languages, but ensuring international stability. Tennent Harrington Baglay, *The International Protection of Minorities*, in *MINORITIES IN NATIONAL AND INTERNATIONAL LAW* 172, 196 (Satish Chandra ed., 1985) (quoting President Wilson’s draft article for the League Covenant). On the same point, see C. A. MACARTNEY, *NATIONAL STATES AND NATIONAL MINORITIES* 297 (Russell & Russell 1968) (quoting President Wilson’s speech at the 1919 Peace Conference of May 31, 1919).

110. “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” Council of Europe, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11 art. 2, Mar. 20, 1952, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm> [hereinafter First Protocol].

111. See in contrast the EU treatment of immigrants where the EU did refer to the language of instruction. The EEC Directive of 1977 on the education of children of migrant workers, for instance, imposes a positive duty on the host state to teach such children the official language (or one of them) of the host state, and calls on the host state to take “appropriate measures” to promote the “teaching of the mother language and culture of the country of origin,” with an eye “principally to facilitating their possible reintegration into the Member State of origin.” Council Directive 77/486, pmbL., art. 3, 1977 O.J. (L199) 32 (EC). For more on linguistic rights for community migrants, see Bruno de Witte, *Surviving in Babel? Language Rights and European Integration*, in *THE PROTECTION OF MINORITIES AND HUMAN RIGHTS*, 277, 289–92 (Yoram Dinstejn & Mala Tabory eds., 1992).

Note that Article 8(1) of the Draft Protocol to the ECHR on national minorities, included in the Parliamentary Assembly’s Recommendation 1201, contains a much less ambiguous statement of the right to minority language education. Council of Europe, Recommendation 1201 on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights art. 8(1), Feb. 1, 1993, available at <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta93/erec1201.htm#1>. However, the Minority Protocol was not adopted by the Committee of Ministers of the Council of Europe, and therefore creates no binding international legal obligation. *But see* Dunbar, *supra* note 53, at 101 n.43 (stating that while the proposal was never adopted by the Committee of Ministers and “does not create any binding international obligations, the Parliamentary Assembly of the Council of Europe considers itself bound by it”).

Other international instruments outside the ICCPR and/or the ECHR use a general prohibition of discrimination to create a right for public schooling in a minority language when a substantial number of students of a minority are concentrated territorially (or the “sliding-scale” approach). But “[s]uch a right

Four cases will exemplify the contrast between the ideals of the language rights approach and the actual record of their enforcement by the UNHRC and the ECtHR in dealing with the language of instruction in public schools.¹¹²

In the *Belgian Linguistic Case*,¹¹³ possibly the most famous international case involving schooling, the ECtHR adjudicated the claim of Francophone parents who argued that Belgium implicitly violated the rights of French-speaking minority parents living in Flanders by offering education in state-financed schools in Dutch only, while also withdrawing subsidies from private schools operating in French in that region.¹¹⁴

In their argument, the Francophone parents asserted that a mother tongue is as constitutive of the self as religious belief.¹¹⁵ Thus, for the parents, the obligation in Article 2 of the First Protocol to ensure that education is provided in conformity with parents' "religious and philosophical convictions"¹¹⁶ should also cover their "cultural and linguistic preferences."¹¹⁷ The lack of education in French, they explained, created "instruments of forced depersonalisation"¹¹⁸ for the children and violated the "personal, absolute and inalienable right"¹¹⁹ of the head of the family that "his children should resemble him . . . culturally."¹²⁰

The ECtHR held that, although the ECHR is silent on the language of instruction in school, in fact the right to education contained in Article 2 of the First Protocol includes an implicit language component. The right, the judges explained, "would be meaningless if it did not imply . . . the right to be educated in the national language."¹²¹ Outside the national language—

is not, however, necessarily limited to minorities, since it can be linked to the general prohibition of discrimination." Fernand de Varennes, *The Linguistic Rights of Minorities in Europe*, in *MINORITY RIGHTS IN EUROPE: EUROPEAN MINORITIES AND LANGUAGES* 3, 21 (Snezana Trifunovska & Fernand de Varennes eds., 2001). Examples of such instruments on both the international and regional European level are: The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note, *supra* note 108; U.N. Declaration, *supra* note 75, art. 4; Central European Initiative, CEI Instrument for the Protection of Minority Rights art. 18, Nov. 19, 1994, available at http://www.mzv.cz/file/18350/CEI_Instrument_for_the_Protection_of_Minority_Rights.pdf; Framework Convention for the Protection of National Minorities, *supra* note 88, art. 14, and European Charter for Regional or Minority Languages, *supra* note 7, art. 8. However, members of a minority are expected also to learn the official language to a reasonable degree of fluency.

112. Only some selected cases are presented here. For a complete list of cases, see the appendices.

113. Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium", 1968 Y.B. Eur. Conv. on H.R. 832 (Eur. Ct. H.R.) [hereinafter *The Belgian Linguistic Case*]. For an analysis of the *Belgian Linguistic Case* decision, see Tabory, *supra* note 11, at 196–203; Berman, *supra* note 53, at 1526–37.

114. See *The Belgian Linguistic Case*, *supra* note 113, at 890 (describing the Francophone parents' claims and legal issues).

115. *Id.* at 840.

116. First Protocol, *supra* note 110, art. 2.

117. *The Belgian Linguistic Case*, *supra* note 113, at 840.

118. *Id.* at 870.

119. *Id.* at 844.

120. *Id.*

121. *Id.* at 858. On this point, see de Witte, *supra* note 111, at 284.

Dutch, in this region—there are no language rights in the public school system. The judges explained that “conferring on everyone . . . a right to obtain education in the language of his own choice would lead to absurd results.”¹²²

The Strasbourg Court declared that “to interpret the terms ‘religious’ and ‘philosophical’ as covering linguistic preferences would amount . . . to read[ing] into the Convention something which is not there.”¹²³ For the judges, the aim of the language of instruction in school is to promote “among pupils a knowledge in depth of the usual language of the region”¹²⁴ and “to achieve linguistic unity within the two large regions of Belgium in which a large majority of the populations speaks only one of the two national languages.”¹²⁵ The Court sacrifices here the broad ideology of language preservation for the more pressing pragmatic need to secure political and social peace in a country that has a history of tension between two linguistic communities. Precisely because language is, for the judges, merely a means of communication distinct from identity (as opposed to religion or philosophical beliefs), requiring children to assimilate “against their wish[es], into the sphere of the regional language”¹²⁶ cannot be “characterized as an act of ‘depersonalisation.’”¹²⁷

The *Belgian Linguistic* Court allowed French-speaking parents two possible exits from this regime of “linguistic uniformity”: they could bus their children to attend schools in the French-speaking regions, or they could open unsubsidized private schools that better reflect their linguistic and cultural preferences. As the court noted, the territorial measure does “not prevent French-speaking parents who wish to provide a French education for their children from doing so, either in non-subsidized private schools, or in

122. The Belgian Linguistic Case, *supra* note 113, at 866.

123. *Id.* at 860. In a more recent decision, the Court noted that:

“[A] right to education in a particular language or a right to obtain from the State the creation of a particular kind of educational establishment cannot be derived from Article 2 of Protocol No. 1. This provision does not require of States that they should, in the sphere of education or teaching, respect parents’ linguistic preferences, but only their religious and philosophical convictions. To interpret the terms “religious” and “philosophical” as covering linguistic preferences would amount to a distortion of their ordinary and usual meaning and to read into the Convention something which is not there.”

Moreover, the Court recalls that the “drafting history of that Article” confirms that the object of the second sentence of Article 2 was in no way to secure respect by the State of a right for parents to have education conducted in a language other than that of the country in question. *Skender v. Former Yugoslav Republic of Macedonia*, App. No. 62059/00, Eur. Ct. H.R. 1, 6 (2001) (citation omitted).

The term “philosophical convictions” was explained by the ECtHR in *Campbell v. United Kingdom* as relating “to such convocations as are worthy of respect in a ‘democratic society’ and are not incompatible with human dignity” (citation omitted). *Campbell v. United Kingdom*, 48 Eur. Ct. H.R. (ser. A) at 16 (1982).

124. The Belgian Linguistic Case, *supra* note 113, at 974.

125. *Id.* at 884.

126. The Belgian Linguistic Case, *supra* note 113, at 908.

127. *Id.* at 910.

schools in the French unilingual region or in the Greater Brussels District.”¹²⁸

The entitlement that the Court is applying here is the individual right of parents to direct the education of their children and not a positive right for the possession and use of the language itself. The French language in private schools has no intrinsic value in and of itself, but is only one manifestation of the larger privilege of the parents to opt out.¹²⁹

Two recent cases—*Waldman v. Canada*¹³⁰ from the UNHRC and *Cyprus v. Turkey*¹³¹ from the ECtHR—provide precedents regarding when the state does in fact have financial obligations toward schools that use minority language as the medium of instruction. In *Waldman v. Canada*, an applicant who wished to provide his children with a Jewish education challenged Ontario’s practice under its Education Act of funding Roman Catholic schools, but not schools of other religious persuasions.¹³² *Waldman* raised, inter alia, a violation of Article 26 of the ICCPR (non-discrimination)¹³³ in connection with Article 27 of the ICCPR (right to “enjoy culture and use language”).¹³⁴ He submitted that “the conferral of a benefit on a single religious group cannot be sustained . . . [w]hen a right to publicly financed religious education is recognized by a State party, no differentiation should be made among individuals on the basis of the nature of their particular beliefs.”¹³⁵ In addition, he argued, “Article 27 recognizes that separate school systems . . . form an essential link in preserving community identity and the survival of minority religious groups and that positive action may be required to ensure that the rights of religious minorities are protected.”¹³⁶ *Waldman* brought the two violations together precisely because his demand could not be reduced to only a procedural claim about fairness. He was making *both* a due process demand regarding fairness in distribution (under Article 26, discrimination is the substantive right per se, with separate religious education a possible solution to protecting this other right) *and* a

128. *Id.* at 898.

129. For historical contrast, the Permanent Court of International Justice operating during the League of Nations era held that “provision will be made in the public educational system in towns and districts in which are resident a considerable proportion of Albanian nationals whose mother-tongue is not the official language, for adequate facilities for ensuring that in the primary schools instruction shall be given to the children of such nationals, through the medium of their own language.” *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64, at 14 (Apr. 6). Another PCIJ decision stated that Article 9 of the Polish Minorities treaties (which called for public facilities for ensuring primary education in minority language) represented the right of “minorities . . . [to] enjoy . . . amongst other rights, equality of rights . . . in matters relating to primary instruction.” *Treatment of Polish Nationals in Danzig*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, at 21 (Feb. 4).

130. *Waldman v. Canada*, Views of the Human Rights Comm., U.N. Doc. CCPR/C67/D/694/1996 (Nov. 5, 1999).

131. *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R. (2001).

132. *Waldman v. Canada*, ¶ 3.1.

133. ICCPR, *supra* note 10, art. 26.

134. *Id.* art. 27.

135. *Waldman v. Canada*, ¶ 3.1.

136. *Id.* ¶ 3.5.

substantive claim for the preservation of his culture (under Article 27, the right of the minority to maintain its culture is the primary good).

But the UNHRC *only* focused on the discriminatory component of Waldman's demand and found a violation of Article 26 of the ICCPR.¹³⁷ The decision read in part: "the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination."¹³⁸ According to this anti-discrimination rationale, "funding for the schools of one religious group and not for another must be based on reasonable and objective criteria."¹³⁹ After the UNHRC found that there was an Article 26 violation, it declared that it was "of the opinion that in view of its conclusions in regard to [A]rticle 26, no additional issue arises for its consideration."¹⁴⁰

The communication did not raise a language issue, but in a concurring opinion, Professor Martin Scheinin connected it directly to linguistic protection. Article 26 of the ICCPR, he explained, did not permit states that opt to fund minority language education to make unjustified distinctions among different minority languages.¹⁴¹ Consequently, while a state is not obligated to subsidize private education in a minority language, if it chooses to fund education in one language or religion, it should also financially support all other minority languages or religions, unless there are "reasonable and objective criteria" not to do so.¹⁴²

Significantly, the right that the UNHRC applied in *Waldman v. Canada* was a nondiscrimination entitlement that called only for a technical remedy for the state policy of financing religious schools. The UNHRC never went beyond procedural justice to bring about a systematic change in the relationship between Roman Catholic and other religious collectivities in Canada.

In *Cyprus v. Turkey*, the ECtHR followed the same principle of reasonable application of nondiscrimination.¹⁴³ This case concerned Turkey's occupation of Northern Cyprus in 1974 and the establishment of the Turkish Republic of Northern Cyprus ("TRNC"). The TRNC permitted Greek-speaking elementary schools to operate but abolished Greek-speaking secondary schools, in effect requiring Greek children beyond elementary school to

137. *Waldman v. Canada*, Views of the Human Rights Comm., U.N. Doc. CCPR/C67/D/694/1996, ¶ 3.5 (Nov. 5, 1999).

138. *Waldman v. Canada*.

139. *Id.*

140. *Id.* ¶ 10.7.

141. *Waldman v. Canada*, Views of the Human Rights Comm., U.N. Doc. CCPR/C67/D/694/1996, ¶ 5 (Nov. 5, 1999) (Scheinin, J., concurring) ("Providing for publicly funded education in minority languages for those who wish to receive such education is not as such discriminatory, although care must of course be taken that possible distinctions between different minority languages are based on objective and reasonable grounds.")

142. *Waldman v. Canada*, ¶ 10.6.

143. See *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R. (2001).

attend either Turkish- or English-language secondary schools.¹⁴⁴ The applicants alleged that this violated the educational rights guaranteed under the First Protocol to the ECHR in conjunction with Articles 8 and 14 of the ECHR.¹⁴⁵

In its judgment, the Grand Chamber explained that because students could receive continuing secondary education in one or more languages, “[i]n the strict sense, accordingly, there is no denial of the right to education.”¹⁴⁶ Citing its *Belgian Linguistic* judgment, the Court remarked that the right to education under Article 2 of the First Protocol “does not specify the language in which education must be conducted in order that the right to education be respected.”¹⁴⁷ Nevertheless, the Court emphasized the particular circumstances of this case: the Turkish-Cypriot authorities had continued to provide primary education in Greek but eliminated “the secondary educational facilities which were formerly available to children of Greek Cypriots” and that used Greek as the medium of instruction.¹⁴⁸ In addition, while the TRNC allowed students to continue their secondary education in the Greek language in the South, they undermined this formal possibility by denying the right of students who completed their education to return to the North.¹⁴⁹ In the Court’s view, this left the Greek Cypriot pupils in an “unrealistic”¹⁵⁰ situation: they could neither meaningfully exercise the right to travel South, nor could they benefit from secondary education in either Turkish or English because they began their education in Greek-speaking schools and had no sufficient knowledge of either of these tongues.¹⁵¹ The majority of the Court held that “[h]aving assumed responsibility for the provision of Greek-language primary schooling, the failure of the ‘TRNC’ authorities to make continuing provision for it at the secondary-school level must be considered in effect to be a denial of the substance of the right at issue.”¹⁵² It follows that, if the TRNC opted to subsidize primary schools using Greek as the language of instruction, it had to “make continuing provision” for secondary schools. Again, the right that the ECtHR applies here is a due process entitlement in education, not a language privilege, with language as only a subset of the nondiscrimination right. The TRNC has no obligation to provide education in Greek at all, but since it offered primary education in the language, it would be a breach of the procedural right not to also provide secondary education in that language.¹⁵³

144. *Cyprus v. Turkey*, ¶ 275.

145. *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R., ¶ 195 (2001).

146. *Cyprus v. Turkey*, ¶ 277.

147. *Id.*

148. *Id.* ¶ 275–76.

149. *Id.* ¶ 275.

150. *Id.* ¶ 278.

151. *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R., ¶ 278 (2001).

152. *Cyprus v. Turkey*, ¶ 278.

153. Significantly, Geoff Gilbert notes that the result of the case was heavily conditioned by the particular situation in Northern Cyprus, especially the existence of Greek language schools, their aboli-

Finally, in *Oršuš v. Croatia*, “the ECtHR examines” a case that involves the education of Roma pupils in Europe.¹⁵⁴ The case stems from an unusual posture: the applicants sought to integrate into mixed classes in the dominant language after having been barred from those classes for failing to pass entry exams conducted in the majority tongue.¹⁵⁵ The claimants alleged, among other things, discrimination and violation of the right to education on the ground of ethnic origin.¹⁵⁶

In deciding the case, the *Oršuš* Court treated the Roma pupils as a “specific type of disadvantaged and vulnerable minority”¹⁵⁷ (in fact, the judgment includes 10 separate references to the Romani people as a “disadvantaged” group) that requires “special consideration”¹⁵⁸ and found a violation of the antidiscrimination provision on the ground of ethnic origin in breach of Article 14 of the ECHR.¹⁵⁹

For the Grand Chamber, “the decisive factor” of the case was the Roma students’ “lack of knowledge or inadequate knowledge of Croatian, the language used to teach in schools.”¹⁶⁰ As such, “the central question to be addressed” was “whether adequate steps were taken by the school authorities to ensure the applicants’ speedy progress in acquiring an adequate command of Croatian and, once this was achieved, their immediate integration in mixed classes.”¹⁶¹ In answering this inquiry, the Court held that, while Roma pupils could be placed in special classes,¹⁶² with only “supplementary tuition in the Croatian language,”¹⁶³ Croatia was under an “obligation to take appropriate positive measures to assist the applicants in acquiring the necessary language skills [in the majority language] in the shortest time possible, notably by means of special language lessons, so that they could be

tion by the TNRC, and the denial of the rights of Greek Cypriot children to return to the Northern Cyprus if they went to the Southern part for their education. Gilbert, *supra* note 104, at 762. See also Manuel Lezertua Rodriguez, *The European Convention of Human Rights and Minority Language*, in MINORITY LANGUAGE PROTECTION IN EUROPE: INTO A NEW DECADE 13, 23 (Council of Europe Publishing, 2010). See generally Geoff Gilbert, *The Council of Europe and Minority Rights*, 18 HUM. RTS. Q. 160, 161–70 (1996).

154. *Oršuš v. Croatia*, App. No. 15766/03 Eur. Ct. H.R. (2010).

155. The Roma applicants were placed into special Roma classes, composed only of Roma students, within the general school system. See *Oršuš v. Croatia*, App. No. 15766/03 Eur. Ct. H.R., ¶ 10 (2010). See also *D.H. v. Czech Republic*, App. No. 57325/00 Eur. Ct. H.R. (2007) (discussing Roma in special schools in the Czech Republic); *Sampanis v. Greece*, App. No. 32526/05, Eur. Ct. H.R. (2008).

156. *Oršuš v. Croatia*, ¶139 (Third intervening claimed that the Roma students were denied “[A]ccess to education without discrimination.”).

157. *Id.* ¶ 147.

158. *Id.* ¶ 148.

159. *Id.* ¶ 185.

160. *Id.* ¶ 60.

161. *Id.* ¶ 67 (citing *The third report on Croatia, published on 17 December 2004*, ¶ 145).

162. *Oršuš v. Croatia*, App. No. 15766/03 Eur. Ct. H.R., ¶ 157 (2010). The judges added “temporary placement of children in a separate class on the grounds that they lack an adequate command of the language is not, as such, automatically contrary to Article 14 of the Convention.” Indeed, “in certain circumstances such placement would pursue the legitimate aim of adapting the education system to the specific needs of the children. However . . . appropriate safeguards have to be put in place.” *Id.*

163. *Oršuš v. Croatia*, ¶ 60 (quoting almost entirely the Croatian Constitutional court).

quickly integrated into mixed classes,” where education “was in Croatian only.”¹⁶⁴

The Court here took a narrowly utilitarian approach to the Romani language, forcing Croatia to accept the use of the minority language only in the process of its elimination. Romani is treated as an obstacle that Roma pupils must overcome in order to participate in the school environment, rather than as a valuable cultural possession worthy of legal protection. The decision calls on Croatia to accommodate the language as a liability to a “specific type of disadvantaged and vulnerable minority,”¹⁶⁵ such that accommodation should last only until the students surmount this disability and assimilate “in the shortest time possible”¹⁶⁶ into the linguistic mainstream. In contrast, if the Romani language were protected as a good on its own merits, the Court would at least have had to consider offering the Roma children the possibility of meaningful bilingual education that could assist them in both learning the majority language and developing their own mother tongue.¹⁶⁷ The only language that the ECtHR protects in the long term is the majority language. In the end, the regime is about speedy assimilation on fair terms.

We began with two doctrinal regimes—the ICCPR, which grants a right to “enjoy culture and use of language” under Article 27, and the ECHR, which only offers a nondiscrimination-based language entitlement under Article 14 in conjunction with Article 2 of the First Protocol. Yet the decisions of the UNHRC and the ECtHR converge. The two transnational bodies protected non-majority language in the public school system in only one of two forms: either as a subset of another right such as nondiscrimination or the freedom of parents to direct the education of their children, or as an impediment to successful assimilation into the linguistic mainstream. For

164. *Id.* ¶ 165.

165. *Id.* ¶ 147.

166. *Id.* ¶ 165.

167. For contrast, see generally *D.H. v. Czech Republic*, where the ECtHR referred to various Council of Europe sources, U.N. material and submissions of third-party interveners that raised the importance of the Romani language to the Roma culture and to the larger cultural diversity of Europe and called attention to the potential benefits of bilingual education. *D.H. v. Czech Republic*, App. No. 57325/00 Eur. Ct. H.R. (2007). For example, the *D.H.* Court referred in the decision, inter alia, to Eur. Parl. Ass., *Recommendation 1203 (1993) on Gypsies in Europe*, art. 3, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta93/EREC1203.htm> (stating that Gypsies “greatly contribute to the cultural diversity of Europe” through their “language and music or by their trades and crafts,” *D.H. v. Czech Republic*, ¶ 56) and Eur. Parl. Ass., *Recommendation 1557: The Legal Situation of Roma in Europe, on Gypsies in Europe*, art. 15(e) (2002), available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc03/EDOC9828.htm> (asking Member States “to take specific measures and create special institutions for the protection of the Romani language, culture, traditions and identity,” *D.H. v. Czech Republic*, ¶ 58). The Court also referred to the *General Recommendation XXVII on Discrimination Against Roma* of the Committee on the Elimination of Racial Discrimination, Comm. on the Elimination of Racial Discrimination, *General Recommendation XXVII on Discrimination Against Roma*, U.N. Doc. A/55/18, Annex V, art. 18 (Aug. 16, 2000) (stating that the object of education is “[t]o prevent the segregation of Roma students, while keeping open the possibility for bilingual or mother-tongue tuition; to “this end, . . . recruit[ing] school personnel from among members of Roma communities and . . . promot[ing] intercultural education,” citing *D.H. v. Czech Republic*, ¶ 98).

the former, the language of instruction is not a good on its own merits, but is treated as merely a subcategory of other general rights that are not themselves culturally or linguistically specific. For the latter, accommodation is transitory and offered only to those as yet unable to speak the majority language.¹⁶⁸

B. Court Proceedings

While both the ICCPR and the ECHR were silent on language of education in public schools, these two instruments include an explicit language component in dealing with an accused in criminal proceedings. Articles 14(3)(a) and (f) of the ICCPR grant positive protection to the language of an accused in criminal procedures and guarantee that, first, a defendant must be informed of the nature of the charges in a language that she understands, and, second, that she should have the right to the assistance of an interpreter when facing trial in a language which she does not understand.¹⁶⁹ At the same time that Article 14 of the ICCPR explicitly mentions the language of an accused, it links—and thus also limits—the language component of the right to a procedural guarantee of a fair trial: the focus of the provision is on a language that an accused “understands,” not on the language that she chooses or desires.¹⁷⁰

The ECHR echoes the ICCPR when addressing court proceedings. Article 5(2) of the ECHR provides that “[e]veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”¹⁷¹ Article 6(3) of the ECHR specifies that “[e]veryone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; . . . [and] (e) to have the free assistance of an interpreter if he cannot under-

168. The discussion does not include *Catan v. Moldova and Russia*, App. nos. 43370/04, 8252/05 and 18454/06, Eur. Ct. H.R. (2010), as we are still waiting for a judgment on the merits. However, this decision may ultimately prove very important for our discussion. The applicants in the case, 600 children studying at Evrica High School in Rîbnița, their parents, and one of the teachers complained about the closure of their schools and their harassment by the “Moldavian Republic of Transnistria” (“MRT”) authorities under Article 2 of Protocol No. 1 to the Convention and Articles 3 and 8 of the Convention, taken alone and in conjunction with Article 14. In a decision on the admissibility of the application, the Court decided that the case “raise[s] serious questions of fact and law which are of such complexity that their determination should depend on an examination on the merits. These complaints cannot, therefore, be considered manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and no other ground for declaring them inadmissible has been established.” *Id.* ¶ 112. A further judgment on the merits is now pending.

169. ICCPR, *supra* note 10, art. 14(3)(a), (f). See also U.N. Human Rights Comm., Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, General Comment No. 13, ¶¶ 8, 13 (April 13, 1984).

170. On this argument, see Kristin Henrard, *Language and the Administration of Justice: The International Framework*, 7 INT’L J. ON MINORITY & GROUP RTS. 75, 87 (2000).

171. ECHR, *supra* note 31, art. 5(2).

stand or speak the language used in court.”¹⁷² Again, neither provision guarantees a full-blown language entitlement, but instead offers only a limit on the due process right—the Articles require language protection only insofar as it is strictly needed for an accused to “understand” the charges against him and to defend himself in court.¹⁷³ The threshold of “understanding” is, however, left undefined.¹⁷⁴ By way of illustrating how these provisions were applied in practice, I will briefly review several cases from both the UNHRC and the ECtHR.¹⁷⁵

172. *Id.* art. 6(3).

173. More recently, the Minorities Protocol adds a much clearer expression of the right of the minority language community to the use of its mother tongue in contacts with judicial authorities. It provides: “[i]n the regions in which substantial numbers of a national minority are settled, the persons belonging to a national minority shall have the right to use their mother tongue in their contacts with the administrative authorities and in proceedings before the courts and legal authorities.” *Id.* art. 7(3). However, the protocol was never ratified. For a good summary of the E.U. directives on language assistance in criminal proceedings, see James Brannan, ECHR Case-law on the right to Language Assistance in Criminal Proceedings and the EU response, available at http://www.eulita.eu/sites/default/files/Brannan%20ECHR%20case%20law%20_2_.pdf.

174. This vague standard is the subject of criticism. For example, Wiersinga argues: “Everything must be seen against the background of adequacy. Generally speaking, the rights guaranteed by Art. 6 . . . have to be ‘practical and effective’. This means that a lot of ‘casuistics’ can be modelled on this pretty vague, European standard.” WIERSINGA in *Aequalitas*, Lessius Hogeschool 2003, at <http://www.agisproject.com/> (Publications). Trechsel, President of the former European Commission on Human Rights until 1999, makes a similar point: “[The Court] prefers a vague reference to the proceedings as a whole and to fairness in general to the meticulous analysis of each guarantee” STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 207 (2006).

The right to interpretation in court proceedings is now enshrined and developed in a EU Directive. The Explanatory Memorandum (15/12/2009) stated: “This initiative for a Directive sets out the basic obligations and builds on the ECHR and the case-law of the ECtHR.” Its Preamble specifically mentions the ECHR several times, declaring the need to implement the Article 6 rights and guarantees consistently and to develop, within the EU, the minimum protection already guaranteed under the Convention (see Recital 7). See 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, published in the Official Journal of the European Union on 26/10/2010. Similarly, other international and European instruments do provide provisions for the use of minority languages in court proceedings when the numbers of minorities are present in significant numbers. See, e.g., Recommendations 18 and 19 of the Oslo Recommendation Regarding the Linguistic Rights of National Minorities, or Article 9 of the European Charter, Article 10(2) of the Framework Convention.

Importantly, in both the ICCPR and the ECHR, the right to the use of a particular language in the courts applies to criminal proceedings and does not generally extend to civil courts. Article 7(3) of the Draft Protocol on Minorities, however, proposed a general right for national minorities “to use their mother tongue . . . in proceedings before the courts and legal authorities,” but, as noted earlier, the Protocol was never adopted by the Committee of Ministers of the Council of Europe (Minorities Protocol, art. 7(3)). While, the terms of Article 6 of the ECHR are not specifically enumerated to civil cases, “if a party to a civil proceedings is denied the rights mentioned in paragraph 3 [of Article 6 ECHR], under certain circumstances this may entail that there is no ‘fair hearing’ in the sense of the first paragraph.” Kristin Hennard, *Language and the Administration of Justice: The International Framework*, 7 INT’L J. ON MINORITY & GROUP RTS. 75, 83 (2000). See also YUTAKA ARAI ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 579 (Pieter van Dijk et al. eds., 4th ed. 2006) (discussing the term “fair hearing” in Article 6 of the ECHR).

175. In this section, I only look at selected jurisprudence that dealt with the issue of language in court proceedings. A complete list of the cases analyzed in the paper can be found in the appendices.

In *Guesdon v. France*,¹⁷⁶ the UNHRC examined a communication from a Breton-speaking person who was convicted in criminal proceedings after he and his witnesses demanded to give testimony in Breton with the assistance of an interpreter paid by the state, which the French Court would not allow.¹⁷⁷ Guesdon raised a violation of Article 14 (fair trial)¹⁷⁸ in connection with Article 27 (right to “enjoy culture and use language”).¹⁷⁹ He submitted that he and his witnesses had a right to use in court the “language [of their] ancestors”¹⁸⁰ and “to express themselves with ease . . . and in the language which they normally speak.”¹⁸¹ The author mobilized both Articles 14 and 27 precisely because his claim sought not only to address individual fairness but also to accommodate a collective linguistic identity, a request that falls outside of what an accused can ask for under the due process provision.

While *Guesdon* brought forth violations of both Article 14 and Article 27, the Committee separated the two provisions: the members of the UNHRC focused on due process and structured the language component as a subset of the procedural guarantee. The decision reads in part:

[A]rticle 14 is concerned with procedural equality; it enshrines, inter alia, the principle of equality of arms in criminal proceedings. . . . [T]he requirement of a fair hearing [does not] mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language.¹⁸²

After the UNHRC overruled a due process violation, it “did not find it necessary to address . . . [A]rticle 27 of the Covenant in this case, as the facts of the communications did not raise issues under this provision.”¹⁸³ This is particularly interesting because at the time of ratifying the ICCPR, France had entered a reservation to Article 27, effectively excluding the minority rights contained therein; thus, the Committee could have refused to examine the application of the provision to the case in light of the reservation.¹⁸⁴ For

176. *Guesdon v. France*, Human Rights Comm., Communication No. 219/1986, U.N. Doc. CCPR/C/39/D/219/1986 (Aug. 23, 1990).

177. *Guesdon v. France*, ¶¶ 2.1–2.2.

178. *Id.* ¶ 6.2.

179. *Id.* ¶ 6.5. See also *id.* art. 27.

180. *Id.* ¶ 6.4.

181. *Id.* ¶ 6.2.

182. *Guesdon v. France*, Human Rights Comm., Communication No. 219/1986, U.N. Doc. CCPR/C/39/D/219/1986, ¶ 10.2 (Aug. 23, 1990).

183. *Guesdon v. France*, ¶ 7.3.

184. Indeed, in other “Breton cases,” the UNHRC explicitly stated that France inserted a “reservation” regarding Article 27 of the ICCPR. See, e.g., Human Rights Comm., *Communication No. 347/1988*, ¶ 5.3, *S.G. v. France*, U.N. Doc. CCPR/C/43/D/347/1988 (Nov. 15, 1991) (holding that “France’s ‘declaration’ made in respect of [Article 27] is tantamount to a reservation and therefore precludes the Committee from considering complaints against France alleging violations of [A]rticle 27 of the Cove-

the UNHRC, the application was about a due process right, not a language privilege. Therefore, the solution (if found appropriate) should be tailored to meet only the *individual's* fair trial circumstances, not the group's contention for shared life and the redistribution of collective goods. The Committee stopped after determining that no due process guarantees were violated.¹⁸⁵

In focusing only on an individual due process entitlement—the most minimal interpretation of the complainant's claims—the UNHRC picked up on a distinction that was embedded in the ICCPR itself, between Article 27's broad commitment to cultural/linguistic preservation (the right to enjoy one's own culture and to use one's own language) and Article 14's functional guarantees (only the right to understand the proceedings in court).¹⁸⁶ Article 14, which protects language as part of a due process guarantee, calls for much less accommodation than does a full-fledged language right.¹⁸⁷ Due process is satisfied with only adequate mutual comprehension between an accused and the court; the national court alone determines what constitutes an acceptable level of linguistic proficiency. The test is pragmatic: fairness dictates *only* that a litigant must understand the charges against him so that he can participate in the proceedings against him. In contrast, if the minority language right of a defendant were protected under the more robust language right envisioned in Article 27, the Court would at least have had to consider that the accused be allowed to speak in his language of choice and not forced against his will to conform to the language of the majority.¹⁸⁸

nant"). See also Human Rights Comm., *Communication No. 363/1989*, ¶ 5.3, R.L.M. v. France, U.N. Doc. CCPR/C/44/D/363/1989 (Apr. 7, 1992) (applying the same holding in the context of public schools).

185. Guesdon v. France, Human Rights Comm., *Communication No. 219/1986*, U.N. Doc. CCPR/C/39/D/219/1986, ¶¶ 10.3–11 (Aug. 23, 1990).

186. ICCPR, *supra* note 10, art. 14.

187. *Id.*

188. Subsequent communications show variations of the same preference of Article 14 over Article 27. See, e.g., Human Rights Comm., *Communication No. 323/1988*, Cadoret v. France, U.N. Doc. CCPR/C/41/D/323/1988 (Apr. 11, 1991) (authors claiming a violation, inter alia, of Articles 14 together with Article 27 of the ICCPR, arguing that Article 14 gave them a right to defend themselves in a criminal trial in their Breton mother tongue. Again, the UNHRC focused only on Article 14 and not Article 27. The Committee held that the "fair trial" guarantee merely demands that the accused is "sufficiently proficient in the court's language" and "need not take into account whether it would be preferable for [the accused and/or his witnesses] to express themselves in a language other than the court language." *Id.* ¶ 5.7. After the Committee found that there was no Article 14 violation, it announced "In respect of the authors' claim of a violation of Article 27 of the Covenant . . . the facts of the communications did not raise issues under this provision." *Id.* ¶ 5.3.); see also Human Rights Comm., *Communication No. 220/1987*, ¶ 8.4, T.K. v. France, U.N. Doc. CCPR/C/37/D/220/1987 (Dec. 8, 1989) (regarding the Court's refusal to entertain a complaint submitted in Breton and holding that, if an author demonstrated "proficiency in French," the dominant language of the Court, there would be no "irreparable harm" to his substantive right if he was forced to use "the French language to pursue his remedy."). Compare with Denise Réaume, *The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?*, 47 MCGILL L.J. 593, 599 (2002) (discussing the Canadian approach protecting the rights of both French and English speakers, construing section 133 of the Constitution Act of 1867 and Section 19 of the Charter of Rights and Freedoms as imposing a positive obligation to enact legislation in both languages); Denise Réaume, *Official-Language Rights: Intrinsic Value and the Protection of Difference in Citizenship in Diverse Societies*, in CITIZENSHIP IN DIVERSE SOCIETIES 245, 252 (Will Kymlicka & Wayne

Like the UNHRC, the ECtHR also focuses on individual-based procedural fairness. For the ECtHR, the language used in the trial is a form of state-endorsed “disadvantage” that can negatively impact accused persons who do not understand the language of the proceedings.¹⁸⁹ The Court will protect claimants who are completely ignorant of the Court’s language and thus cannot respond to the charges against them.¹⁹⁰ It will not, however, accommodate the language demands of a bilingual defendant who can speak the language of the proceedings but chooses not to do so.¹⁹¹

Similar to the UNHRC, the ECtHR has developed a utilitarian test for what constitutes a sufficient level of linguistic proficiency: the accused should be able “to have knowledge of the case against him and to defend himself.”¹⁹² The determination of adequate linguistic skills requires reference to a threshold of individual fairness and equality, not collective linguistic/cultural preservation.¹⁹³ Further, the judge must actively make this determination, rather than relying on the defendant’s subjective feeling of being linguistically at home in the court environment.¹⁹⁴ Legal accommodation ends as soon as an accused overcomes the language hindrance and completes his assimilation to the mainstream.¹⁹⁵

Norman eds., 2000) (citing the statutorily-protected right to use either English or French in the Canadian courts as a “characteristic feature of the Canadian language rights regime”).

189. See Fernand de Varenes, *The Linguistic Rights of Minorities in Europe*, in MINORITY RIGHTS IN EUROPE 3, 22 (Snezana Trifunovaska and Fernand de Varenes eds., 2001), for the “state-endorsed ‘disadvantage’” argument.

190. See *Brozicek v. Italy*, 167 Eur. Ct. H.R. (ser. A) (1989) (in which the ECtHR held a violation of paragraphs 3 (a) and 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms when a German national was prosecuted in Italy without an interpreter, stating that the burden of proof is on the judicial authorities to show that the defendant sufficiently understands the language of the court, not for the defendant to show he did not).

191. *Kozlovs v. Latvia*, App. No. 50835/99, Eur. Ct. H.R. (2002), under point “B” (“it is established case-law that the Court does not guarantee linguistic freedom as such and the right to use the language of its choice in relation with public institutions”). This phrasing was also used in the case *Pabor v. Italy*, European Comm’n of Human Rights, Application N° 19927/92, Partial decision on admissibility of 29 June 1994 and in *Fryske Nasionale Partij v. Netherlands*, European Comm’n of Human Rights, App. No. 11100/84.

See also *Bideault v. France*, App. No. 11261/84 (1983) at 236 (concerning statements by French witnesses whose mother tongue was Breton and who claimed the right to use that language despite the fact that they also spoke French. The Commission held that Article 6(3) did not recognize witnesses’ right to choose the language they wished to use in court) (“Article 6 para. 3 (d) of the Convention does not guarantee the right of witnesses to speak in a language of their choice”); *Clerfayt v. Belgium*, European Comm’n of Human Rights App. No. 10650/83, decision on admissibility of 17 May 1985.

192. *Lagerblom v. Sweden*, Eur. Ct. H.R. App. No. 26891/95, 14 January 2003, ¶ 61.

193. See, e.g., *Luedicke v. Germany*, 29 Eur. Ct. H.R. (ser. A) (1978), ¶ 53 (noting that the purpose of Article 6, paragraph 3(e) is “to prevent any inequality between an accused person who is not conversant with the language used in court and an accused person who does speak and understand that language.”).

194. See *Isop v. Austria*, App. No. 808/60, 1962 Y.B. Eur. Conv. on H.R. 108 (showing the ECtHR actively determining linguistic skill rather than relying on claimant’s stated discomfort with the language of the court, resulting in dismissal of the application to use his home language).

195. See, e.g., *K. v. France*, App. No. 10210/82, 35 Eur. Comm’n H.R. Dec. & Rep. 203, 207 (1983) (declaring inadmissible an Article 6 claim for deprivation of interpreter to facilitate the claimant’s defending himself in Breton because claimant was born and educated in France and could adequately express himself in French, showing that protection is procedural (individual fair trial), not substantive

Since the objective of the procedural guarantee is a fair trial for the accused, the ECtHR views use of an accused's preferred language as only one possible answer to the larger problem of due process. Indeed, *Isop v. Austria*¹⁹⁶ suggests other possible solutions. In this case, the European Commission of Human Rights examined an application from an Austrian citizen of Slovene origin who insisted on presenting his civil complaint in his Slovene mother tongue.¹⁹⁷ While he spoke some German, Isop argued that "his knowledge of the . . . [German language] . . . was [not] sufficient for a successful pursuit of his claim."¹⁹⁸ He added that denial of his request represented denial of a fair hearing and discrimination against him on the grounds of language and of association with a national minority.¹⁹⁹ The European Commission of Human Rights dismissed the case, holding that the language requirement for a fair trial could also be satisfied through a lawyer proficient in the court language and whose language skills *together* with those of the accused amount to "sufficient linguistic knowledge" within the meaning of Article 6.²⁰⁰

The decisions of the UNHRC and the ECtHR support the same approach of treating language as part of a due process guarantee, even though the ICCPR includes Article 27, which provides an express right for a minority to enjoy its culture and to use its language *in addition to* a due process provision that is missing from the ECHR. After the moment of language choice, the defendant is owed no more favorable legal treatment.

C. *Communication with the Authorities*

In addition to the Article 27 right to enjoy culture and use language, the ICCPR also indirectly touches on the linguistic aspects of communication with the government. Article 25 calls on states to ensure equal access to public services in the country.²⁰¹ Article 26, in turn, prohibits discrimination regarding all activities which the state had regulated by law and is based on grounds "such as . . . language."²⁰² Neither provision bars all

(collective cultural), and that legal accommodation ends as soon as the accused can exercise a language choice).

196. *Isop v. Austria*, App. No. 808/60, 1962 Y.B. Eur. Conv. on H.R. 108.

197. *Isop v. Austria*, ¶ 8.

198. *Id.*

199. *Id.* ¶ 7.

200. *Isop v. Austria*, App. No. 808/60, 1962 Y.B. Eur. Conv. on H.R. 108, 124. *See also* Kamasinski v. Austria, 168 Eur. Ct. H.R. at 33 (ser. A) (1989) (holding that right to a fair trial is not violated if a state assigns a defendant an advocate who is proficient in the language used in court and the language of the accused, and also noting that Article 6 applies to oral statements made at the trial hearing, as well as documentary material and the pre-trial proceedings).

201. ICCPR, *supra* note 10, art. 25 ("Every citizen shall have the right and the opportunity, without any of the distinctions . . . (a) To take part in the conduct of public affairs, directly or through freely chosen representatives . . . [and] (c) To have access, on general terms of equality, to public service in his country."). For a discussion of Article 25 and political participation, see Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 64–65, 77, 81 (1992) and Steiner, *supra* note 54.

202. ICCPR, *supra* note 10, art. 26.

differential treatment based on language in the exchange between individuals and the state machinery, even if such differential treatment is disadvantageous to minority language speakers. However, both Articles 25 and 26 guarantee at least qualified procedural rights that prohibit a state from discriminating between different language groups, unless there is an objective justification to do so.²⁰³

Article 14 of the ECHR, in turn, offers no rights to the use of minority languages when interacting with the state. The provision bans discrimination only within the ambit of one of the substantive rights of the Convention.²⁰⁴ Since the right to use one's language in dealing with public authorities is not protected by one of the provisions of the Convention,²⁰⁵ Article 14 cannot be used to challenge the unequal application of state regulations of public language use. To illuminate how these provisions were interpreted in practice, the paper now turns to case law.²⁰⁶

In *Diergaardt v. Namibia*,²⁰⁷ the UNHRC dealt with an application by the Basters, a small Afrikaans-speaking, cattle-raising community that lives mainly in and around the Rehoboth region in central Namibia. The newly independent state of Namibia brought a radical change to the Basters' traditional way of life. The authors claimed, *inter alia*, that Namibia denied them "the use of their mother tongue in administration, justice, education and public life"²⁰⁸ and instead forced them to use English, "a language they do not normally use and in which they are not fluent,"²⁰⁹ in breach of their rights under Articles 26 and 27 of the ICCPR. They emphasized, moreover, that the state "instructed [its] civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language, even when they were perfectly capable of doing so."²¹⁰

203. For example, Fernand de Varennes suggests that when dealing with a minority that is numerically important (twenty-five percent or more of the population) or territorially concentrated *and* state resources make it viable, local authorities should provide for increasing services in the minority language. FERNAND DE VARENNES, LANGUAGE, MINORITIES AND HUMAN RIGHTS 56–105 (1996). For more on the "sliding scale" approach, see DE VARENNES, *Language Rights Standards in Europe: The Impact of the Council of Europe's Human Rights and Treaty Obligations*, in RIGHTS, PROMOTION AND INTEGRATION ISSUES FOR MINORITY LANGUAGES IN EUROPE, *supra* note 5, at 27.

204. ECHR, *supra* note 31, art. 14.

205. *See id.* art. 2–12.

206. Only some selected cases are presented here. For a complete list of cases, see the appendices.

207. *Diergaardt v. Namibia*, Communication No. CCPR/C/69/D/760/1997, Views, (U.N. Human Rights Comm. Sept. 6, 2000).

208. *Diergaardt v. Namibia*, Communication No. CCPR/C/69/D/760/1997, Views, ¶ 3.5 (U.N. Human Rights Comm. Sept. 6, 2000).

209. *Diergaardt v. Namibia*, ¶ 3.3.

210. *Id.* ¶ 10.10. Although "article 3 of the [Namibian] Constitution declare[d] English to be the only official language in Namibia" it also "allow[ed] for the use of other languages on the basis of legislation by Parliament." *Id.* ¶ 3.4. In spite of Article 3, civil servants were told not to reply to the authors' communications in Afrikaans. *Id.* ¶ 10.10. A circular issued by a regional administrator to all public servants read in part:

"1. It has come to the attention of the office of the Regional Commissioner that some Government officials handle (answer) official phone calls and correspondence in Afrikaans contrary, to

In its decision, the UNHRC found a violation of the Article 26 nondiscrimination provision because the Namibian policy “intentionally targeted against the possibility to use Afrikaans when dealing with public authorities.”²¹¹ The UNHRC focused on procedural equality, and the decision emphasized that the Afrikaans language was singled out for *distinct* treatment among the many minority languages spoken in Namibia and that the state had specifically *only* prohibited civil servants from communicating in the Afrikaans language.²¹² Indeed, the Committee ordered Namibia to “[allow] its officials to respond in other languages than the official one in a *nondiscriminatory manner*” (emphasis added).²¹³ Notably, the norms the UNHRC upheld here are procedural fairness and state neutrality, not the importance of cultural diversity or the protection and promotion of the Basters’ minority language.²¹⁴

While the UNHRC gave the Basters’ language a very thin accommodation based on individual due process in the public sphere of the state, the decision emphasized that Namibia can only regulate the official use of language in public administration and “when dealing with *public authorities*” (emphasis added).²¹⁵ In adopting this public-private divide, the Committee followed its earlier precedent in *Ballantyne v. Canada*.²¹⁶ In that decision, the

the Constitutional provision that Afrikaans ceased to be the official language in this country after 21 March 1990.

2. While it is understood that Afrikaans was for a very long time the official language, it now officially enjoys the same status as other tribal languages.

3. All employees of the Government are thus advised to, in future, refrain from using Afrikaans when responding to phone calls and their correspondence.

4. All phone calls and correspondence should be treated in English, which is the official language of the Republic of Namibia.”

Diergaardt v. Namibia, individual opinion of Rajsoomer Lallah (dissenting), ¶ 3.

211. *Id.* ¶ 10.10.

212. *Id.* ¶ 10.10. n.202, 204. The state intentionally targeted against this one language.

213. Diergaardt v. Namibia, Communication No. CCPR/C/69/D/760/1997, Views, ¶ 12 (U.N. Human Rights Comm. Sept. 6, 2000).

214. Even this relatively modest protection of the minority language as a corollary of the right to nondiscrimination gave rise to strong conflicting opinions among the members of the Human Rights Committee. One dissenting member of the Committee explained that “the right to use one’s mother tongue cannot take precedence, in relations with official institutions, over the official language of the country, which is, or which is intended to be, the language of all and the common denominator for all citizens” (Diergaardt v. Namibia, individual opinion of Abdalfattah Amor (dissenting) ¶ 4). Another dissenting member held that “each sovereign State may choose its own official language and that the official language may be treated differently from non-official languages” (*Id.* individual opinion of Nisuke Ando (dissenting)). Finally, three more dissenting voices declared: “Once a State party has adopted any particular language or languages as its official language or languages, it would be legitimate for the State party to prohibit the use of any other language for official purposes” (*Id.* individual opinion of P.N. Bhagwati, Lord Colville, and Maxwell Yalden (dissenting) ¶ 6).

215. Diergaardt v. Namibia, Communication No. CCPR/C/69/D/760/1997, Views, ¶ 10.10 (U.N. Human Rights Comm. Sept. 6, 2000).

216. *Ballantyne v. Canada*, Communications Nos. CCPR/C/47/D359/1989 and 385/1989, Views, ¶ 11.2 (U.N. Human Rights Comm., May 5, 1993) (denying an Article 27 claim on the grounds that English speakers are not “a linguistic minority” in Canada and establishing that minority status is determined in reference to numbers throughout the country). Anglophone claimants challenged Quebec’s Bill 178, which required the exclusive use of French for outdoor commercial signs and the names of

Committee stated explicitly that “[a] state may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one’s choice.”²¹⁷ And so we have the terms of the status quo: no freedom of language choice in the public domain and cultural/linguistic autonomy in the unsubsidized private sphere.

The ECHR provides no substantive entitlement to language choice in relation with the authorities. Thus, the ECtHR quickly dismisses applications that raise this violation. The lineup of relevant cases starts with *Inhabitants of Leeuw-St. Pierre v. Belgium*.²¹⁸ In this case, the European Commission of Human Rights reviewed an application from Francophone complainants who asked to receive administrative documents from their government in French.²¹⁹ The French-speaking applicants raised arguments that revolved around the primacy of language to cultural identity. They submitted that “freedom of thought . . . also covers cultural or linguistic freedom”²²⁰ and that they thus “have the right to expect full development of their personality through their own form of culture.”²²¹

The European Commission of Human Rights declared the application inadmissible, and dismissed the applicants’ claim of a right “to use the language of their choice, or of their mother tongue . . . in relations with the authorities.”²²² For the European Commission of Human Rights, language in the context of dealing with the official bodies of the state was not a “form of culture,” as the applicants contended,²²³ but instead merely a mode of communication that facilitates “the completion of all administrative formalities.”²²⁴ The function of language is thus pragmatic—to facilitate communication with the official bodies of the state. While there may be no freedom of chosen language in communication with the state, the European Commission of Human Rights allowed the flourishing of non-dominant languages in the private sphere. Indeed, the Commission noted, even the Belgian Government had agreed that “these considerations” apply only to “the use of *languages of administration*.”²²⁵

commercial forms, arguing that the Bill violated their rights under various provisions of the ICCPR. *Ballantyne v. Canada*, ¶ 3.1. The UNHRC rejected the claim that the Bill violated Article 26’s equal treatment provision and Article 27. *Id.* ¶¶ 11.4, 11.5.

217. *Ballantyne v. Canada*, Communications Nos. C/47/D/359/1989 and 385/1989, Views, ¶ 11.4 (U.N. Human Rights Comm., May 5, 1993).

218. *Inhabitants of Leeuw-St.Pierre v. Belgium*, App. No. 2333/64, 1965 Y.B. Eur. Conv. on H.R. 338 (Eur. Comm’n on H.R.).

219. *Inhabitants of Leeuw-St.Pierre v. Belgium*, at 338.

220. *Id.* at 352.

221. *Id.*

222. *Id.* at 360.

223. *Inhabitants of Leeuw-St.Pierre v. Belgium*, App. No. 2333/64, 1965 Y.B. Eur. Conv. on H.R. 338, 352 (Eur. Comm’n on H.R.).

224. *Inhabitants of Leeuw-St.Pierre v. Belgium*, at 348.

225. *Id.* at 348 (emphasis added). The Belgian Government’s reply read:

“These considerations are obviously applicable without restriction to the applicants’ grievances regarding the use of *languages of administration*. It is clear that one has to distort the usual

Subsequent case law confirmed the reasoning in *Inhabitants of Leeuw-St. Pierre*.²²⁶ It is now beyond doubt that the Strasbourg Court does not recognize a right to language choice in communication with the state. Recently, in *Mentzen v. Latvia*, the judges stated “at the outset” that:

[L]inguistic freedom as such is one of the rights and freedoms governed by the Convention . . . the fact remains that with the exception of the specific rights stated in Articles 5 § 2 and 6 § 3 (a) and (e), the Convention *per se* does not guarantee the right to use a particular language in communications with public authorities or the right to receive information in a language of one’s choice.²²⁷

The ICCPR implicitly accommodates the non-majority language in dealings with the state and ensures the provision of government services in some minority languages when appropriate and practical in the circumstances. It also provides an express right for minorities “to the use their own language” under Article 27.²²⁸ In contrast, the ECtHR lacks a direct language privilege and furthermore includes no substantive right for communication with the government²²⁹ that would enable a claim of nondiscrimination under Article 14.²³⁰ Yet, in practice, the jurisprudence of both bodies holds that a state can regulate the public space so that it is monolingual.²³¹ In the rare instance where the UNHRC has found a violation in relation to communica-

meaning of the passages [Articles 9 and 10 of the Convention] if one is to transform the right to express one’s thought freely in the language of one’s choice into a right to complete, and insist on the completion of, *all administrative formalities in that language* (emphasis added).”

See similarities to *X v. Ireland* where the applicant argued that a demand by the Irish government that forms for children’s allowance be filed in the Irish language amounted to “an imposition,” *X v. Ireland*, App. No. 4137/69, 1970 Y.B. Eur. Conv. on H.R. (Eur. Comm’n on H.R.) 792, of the decision, indeed a “language dictatorship,” *id.* at 794. In response, the European Commission of Human Rights found that the state’s request to “complete in the Irish language the form for claiming child allowances . . . could not in any way be considered as an interference with the applicant’s freedom of expression.” *Id.* at 796.

In contrast, the Committee has noted that, in private affairs, there is nothing that prevents minority speakers “from expressing their thoughts freely in the language of their choice.” *X v. Belgium*, App. No. 1769/62, 1963 Y.B. Eur. Conv. on H.R. (Eur. Comm’n on H.R.) 444, 456.

226. See, e.g., *X v. Ireland*, App. No. 4137/69, 1970 Y.B. Eur. Conv. on H.R. (Eur. Comm’n on H.R.) 792; *Podkolzina v. Latvia*, 2002-II Eur. Ct. H.R. 13–15; *Pahor v. Italy*, Eur. Comm’n H.R. X (1994); *Kozlovs v. Latvia*, App. No. 50835/99, Eur. Ct. H.R. 1–25 (2002).

227. *Mentzen v. Latvia*, 2004-XII Eur. Ct. H.R. 25–26. See also *Bulgakov v. Ukraine*, App. No. 59894/00, X Eur. Ct. H.R. X, ¶ 43 (2007).

228. ICCPR, *supra* note 10, art. 27.

229. *Bulgakov*, App. No. 59894/0010.

230. ECHR, *supra* note 31, art. 14.

231. For the UNHRC, see *Ballantyne v. Canada*, Communications Nos. CCPR/C/47/D359/1989 and 385/1989, Views, ¶ 11.4 (U.N. Human Rights Comm., May 5, 1993) (A state “may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one’s choice.”). For the ECtHR, see *Inhabitants of Leeuw-St. Pierre v. Belgium*, App. No. 2333/64, 1965 Y.B. Eur. Conv. on H.R. 338, 360–62 (Eur. Comm’n on H.R.) (finding that no article of the Convention assures freedom of language and that the claims of discrimination in this case did not violate any articles of the Convention).

tion with the public state,²³² the Committee bypassed the question of robust language protection by focusing on nondiscrimination.

III. DISCUSSION: A LANGUAGE RIGHT TURNED INTO A RIGHT TO BE ASSIMILATED ON FAIR TERMS INTO ONE'S STATE

The decisions of the UNHRC and the ECtHR are very closely aligned regarding minority language use. Both bodies provide non-majority language speakers accommodation grounded in the *material needs of the individual* but stop short of accommodating the individual's demand for a shared life and the linguistic collectivity's need for social power and confidence. The legal treatment of the language in the court proceedings of the UNHRC and the ECtHR is a good example. Neither court is willing to accommodate demands for linguistic freedom in a court setting by a bilingual defendant.²³³ At the same time, both the UNHRC and the ECtHR will likely protect the language rights of a defendant who cannot comprehend the court procedures and ties his application to fairness and individual due process as opposed to a demand for cultural preservation.²³⁴

This linguistic accommodation has a *strong antidiscrimination component*. Non-majority languages have no substantive status themselves under antidiscrimination protection—the procedural element merely mandates a rational treatment of minority-language speakers so that they are not affected by false stereotypes or animus based on their language class. This is a narrow remedy that focuses on form and participation (not reallocation of resources) and does not prohibit every distinction involving a language, but only those that are 'unreasonable' in the light of the relevant factors.²³⁵ The view provided by the UNHRC in *Diergaardt v. Namibia* and *Waldman v. Canada*

232. See *Diergaardt v. Namibia*. U.N. Human Rights Comm., Communication No. 760/1997, U.N. Doc. CCPR/C/63/D/760/1997, ¶ 10 (July 7, 1998).

233. See, e.g., *Guesdon v. France*, Human Rights Comm., Communication No. 219/1986, U.N. Doc. CCPR/C/39/D/219/1986 ¶ 10 (Aug. 23, 1990); *Cadoret v. France*, U.N. Doc. CCPR/C/41/D/323/1988, ¶ 5.6 (Apr. 11, 1991); *Kozlovs v. Latvia*, App. No. 50835/99, X. Eur. Ct. H.R. X (2002); *Bideault v. France*, App. No. 11261/84, 1983 Y.B. Eur. Conv. on H.R. 234, 235–36 (Eur. Comm'n on H.R.); *Isop v. Austria*, App. No. 808/60, 1962 Y.B. Eur. Conv. on H.R. X, X (Eur. Comm'n on H.R.); *T.K. v. France*, U.N. Doc. CCPR/C/37/D/220/1987 (Dec. 8, 1989); *K. v. France*, App. No. 10210/82, 35 Eur. Comm'n H.R. Dec. & Rep. 203, ¶ 8–9 (1983); *Luedicke v. Germany*, App. No. 6210/73, X Eur. Ct. H.R., X, ¶ 48 (1978).

234. While the ECtHR dealt with this factual reality, see *Brozicek v. Italy*, App. No. 10964/84, X Eur. Ct. H.R. X (1989), such a case has not yet presented itself before the UNHRC. However, under the terms of Article 14 of the ICCPR, it is reasonable to predict that the Committee will accommodate such an applicant.

235. See DE VARENNES, *supra* note 5, at 117–21. More specifically for the ECtHR, the substantive test applied by the judges in situations where they consider an Article 14 violation is that:

"[T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference in treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: article 14 (art. 14) is

illustrates the difference between robust linguistic/cultural protection of minorities and much more limited antidiscrimination accommodation. Namibia could not discriminate *only* against the Basters' language in dealing with the state, and Canada could not grant preferential treatment in funding only Roman Catholic schools. But while the UNHRC demanded procedural justice in state policy, it did not ask either state to afford any structural protection that would be more favorable for the minority's long-term cultural or linguistic survival and growth.

In addition, the two enforcement bodies offer *transitory accommodation* to non-dominant language speakers that lasts only until their assimilation into the linguistic mainstream. The UNHRC and the ECtHR accommodate minority language speakers so long as their linguistic status seems immutable and creates an impediment for participation in larger social processes of society. Both bodies consider language immutable only until the ability to speak in the majority language, or the fact of bilingualism, has been acquired. Favorable legal treatment ends when the speaker is able to choose between languages. Legal protection thus stops short of providing resources toward cultural/linguistic retention. We see this clearly with cases dealing with court proceedings; neither body allows bilingual accused to choose a language that is not that of the majority.²³⁶

Finally, both the UNHRC and the ECtHR consistently avoid a head-on discussion of the merits of a maximalist interpretation of language rights. They sidestep this topic by deferring at each turn to a *pragmatic management of the immediate need of the two parties to the conflict*. This point is demonstrated by briefly revisiting the three cases that came before the European Human Rights Court and that involve the language of education in public schools. In *Oršuš v. Croatia*, the accommodation of the Romani language was not based on a determination that it was a treasured cultural resource worthy of continual legal protection, but rather based on the judges' detailed analysis of the Roma students' difficulty in assimilating due to their specific turbulent history.²³⁷ Similarly, in *Cyprus v. Turkey*, the judges accommodated Greek instruction in public schools not out of an authentic respect for the Greek language, but rather because of their evaluation of the larger circum-

likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."

The Belgian Linguistic Case, 1968 Y.B. Eur. Conv. on H.R. 832, 864–66 (Eur. Comm'n on H.R.).
236. See *supra* Part II.

237. Thus, the *Oršuš* Court opinion reads:

"While the case at issue concerns the individual situation of the fourteen applicants, the Court nevertheless cannot ignore that the applicants are members of the Roma minority. Therefore, in its further analysis the Court shall take into account the specific position of the Roma population . . . the Roma have become a specific type of disadvantaged and vulnerable minority . . . They therefore require special protection . . ."

Oršuš v. Croatia, App. No. 15766/03, Eur. Ct. H.R. 51, ¶ 147-148 (2010).

stances of the case, particularly the fact of occupation.²³⁸ Lastly, in the *Belgian Linguistic Case*, in withholding protection, the Court bypassed the identity-constitutive value of the French language by focusing instead on the immediate need to secure “linguistic unity”²³⁹ in a state that has witnessed years of linguistic tension.²⁴⁰ In each of these cases, the decision to extend or deny protection to minority languages was made with significant contextual considerations, and is not derived from a moral or political investment in languages.²⁴¹

A surprising finding of this study is the convergence between the UNHRC and the ECtHR regimes in handling claims bearing on language use in the public sphere. As we saw already, the UNHRC and the ECtHR represent two separate legal regimes that include different entitlements in relation to linguistic minorities: Article 27 of the ICCPR offers minorities a right “to enjoy their own culture . . . [and] to use their own language.” In contrast, the ECHR does not provide applicants with a similar direct right, and “[l]inguistic freedom as such is not one of the rights and freedoms governed by the Convention.”²⁴² Instead, the ECHR merely prohibits discrimination on the grounds of language—as one of a number of suspected grounds—in the exercise of the substantive rights of the Convention.²⁴³

The fact that the decisions of the UNHRC and the ECtHR nevertheless align with each other suggests that the members of the UNHRC and the judges of the ECtHR are relatively insensitive to the precise formulation of the treaty regimes pertaining to language rights. In all the years of its operation, the UNHRC never once used the wording of Article 27 to justify an actual protection in relation to a language claim dealing with any of the three functions examined in the paper: education, court proceedings, and

238. The decision noted “the fact that the complaints alleged by the applicant Government are shaped in a vulnerable political context.” *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R. 84, ¶ 346 (2001).

239. *The Belgian Linguistic Case*, 1968 Y.B. Eur. Conv. on H.R. 832, 882–86 (Eur. Ct. H.R.).

240. The decision noted that, in Belgium, the “factual features which characterise the life of the society” is of “a plurilingual State comprising several linguistic areas.” *The Belgian Linguistic Case*, at 31–32, 86.

241. This is a restatement of Martti Koskenneimi’s argument in a number of his articles on assessing human rights law in terms of ad hoc management or balancing rather than the application of rights with universal normative validity. See generally Martti Koskenneimi, *The Limits of International Law: Are There Such?*, in *MIGHT AND RIGHT IN INTERNATIONAL RELATIONS* 27 (Kalliopi Koufa, ed. 1999); Martti Koskenneimi, *Human Rights, Politics and Love*, in 19 *MENNESKER & RETTIGHETER* 33 (2001); Martti Koskenneimi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 *HUMANITY. AN INTERNATIONAL JOURNAL OF HUMAN RIGHTS, HUMANITARIANISM AND DEVELOPMENT* 47 (2010); Martti Koskenneimi, *The Effect of Rights on Political Culture*, in *THE EU AND HUMAN RIGHTS* 99 (Philip Alston ed., 1999); Martti Koskenneimi, *The Preamble to the Universal Declaration on Human Rights*, in *THE UNIVERSAL DECLARATION ON HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 27 (Alfredsson-Eide, eds., 1999).

242. *Bulgakov v. Ukraine*, App. No. 59894/00, Eur. Ct. H.R. 10, ¶ 43(a) (2007). See also *Podkolzina v. Latvia*, App. No. 46726/99, Eur. Ct. H.R., ¶ 34 (2002); *Pahor v. Italy*, App. No. 19927/92, Eur. Ct. H.R. (1994); *Kozlovs v. Latvia*, App. No. 50835/99, Eur. Ct. H.R. (2002); *Inhabitants of Leeuw-St-Pierre v. Belgium*, App. No. 2333/64, 1965 Y.B. Eur. Conv. on H.R. (Eur. Comm’n on H.R.) 338.

243. ECHR, *supra* note 31, art. 14.

communication with the government.²⁴⁴ Applicants before the UNHRC who used Article 27 to substantiate their complaints did not advance any further in realizing their interests than did those applying before the ECtHR, who had no access to a similar direct language right. At the same time, the ECtHR mobilizes other rights, especially nondiscrimination entitlements, to grant a measure of linguistic protection (similar to those filing before the UNHRC) through due process and equality.

Ultimately, the status quo that emerges from the case law flies in the face of the goals advanced by major international and regional treaties and conventions as well as those supported by human rights scholars. International judicial or quasi-judicial human rights bodies have recast the human rights approach to language protection as a limited due process accommodation. Further, the value of language as central to identity is reconfigured as an obstacle that individuals must overcome in order to participate in society. This slippage between the promise of the law and the actual holdings of the UNHRC and the ECtHR has serious costs. In particular, it leads us to misunderstand what, in fact, is going on with our international language rights regime. There are four separate issues at play.

First, and most obviously, the gap confuses the impact of our international language rights regime. Despite the seemingly broad commitment of our regime to a robust protection of language rights as human rights, human rights courts and other international decisionmaking institutions do not protect and nurture cultural diversity in practice. The UNHRC and the ECtHR implement the promise of language protection as a policy that allows the State to incentivize assimilation of fair terms, transforming a diversity-protecting impulse into an integrationist regime. The two supranational bodies accommodate non-majority language speakers in the public realm only insofar as needed to prevent irreparable harm from discrimination based on linguistic status, and merely until these speakers complete their transition into the linguistic mainstream of society and its dominant cultural practice. Minority language, therefore, is accommodated in the public domain only during the process of its elimination. The main language interest protected in the long term is the interest in learning the majority language; in the end, the commitment of the legal regime to the protection of minority languages is skin deep.²⁴⁵

Second, the chasm conceals the distributional aspect of our international language regime. In particular, it elides the reality whereby minority lan-

244. Out of the twenty-one cases I analyzed for this Article (see Appendix A for research methodology), only three of the the UNHRC cases found Article 27 violations: *Lovlace v. Canada*, Comm. No. R.6/24, U.N. Doc. Supp. No. 40 A/36/40 (Jul. 30, 1981); *Lubicon Lake Band v. Canada*, U.N. Doc. CCPR/C/38/D/167/1984 (May 10, 1990); and *Mavlonov v. Uzbekistan*, Comm. No. 1344/2004, U.N. Doc. CCPR/C/95/D/1334/2004 (Apr. 29, 2009). Only the third communication relates directly to language, but the contested issue was the banning of a newspaper, and not any of the three functions surveyed in this Article.

245. See *Oršuš v. Croatia*, App. No. 15766/03, Eur. Ct. H.R. 67 (2010).

guage speakers bear unevenly the distributional cost of linguistic protection. For the majority, the dominant language is their mother tongue, whereas linguistic minorities are expected to learn this tongue as a foreign language and to pay the transition cost involved in shifting between languages. This leads minorities to suffer from an inequality of opportunities that are derivative of unequal valuable native competences.²⁴⁶ Next, to the extent they wish to retain their mother tongue, minority-language speakers are also required to cover the expenses associated with the linguistic preservation of their language in the private realm: they can subsidize private schools (*Belgian Linguistic Case*);²⁴⁷ they can hire more expensive native lawyers in court cases (*Isop v. Austria*);²⁴⁸ and they can translate administrative forms at their own expense (*X v. Ireland*).²⁴⁹

Linguistic minorities also bear unevenly additional non-monetary costs. The linguistic accommodation of minorities, limited as it is, is channeled through constructing their language as a disability. But this disability may actually also be the *product* of this very same classification by either the UNHRC or the ECtHR. One can see this in the *Oršić* decision. In the case, the ECtHR guarantees the Roma pupils benefits in education only as members of a “special disadvantaged group.” Romani children—particularly the primary school age applicants in the case—may internalize the Court’s negative definitional terms of their language and culture and see those terms as fundamental to their identity.²⁵⁰ Moreover, to the extent that each individual Romani student understands herself as a member of a preexisting general group of victims, her space for experiencing her own uniqueness and accommodating her own particular needs or special qualities is erased. Indeed a regime that accommodates the cultural interests of the majority members of the minority may in fact end up causing serious harm to the individual needs of some members within the group.²⁵¹

246. Philippe Van Parijs, *Linguistic Justice and the Territorial Imperative*, 13 CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 181 (2010) (calling this “unfair” and “distributive justice”).

247. The Belgian Linguistic Case, 1968 Y.B. Eur. Conv. on H.R. 832, 904–08 (Eur. Ct. H.R.).

248. *Isop v. Austria*, App. No. 808/60, 1962 Y.B. Eur. Conv. on H.R. 108 (Eur. Comm’n on H.R.).

249. *X. v. Ireland*, App. No. 4137/69, 1970 Y.B. Eur. Conv. on H.R. 792, 796 (Eur. Comm’n on H.R.).

250. In making this argument, I am building on Taylor’s thesis on public recognition: “our identity,” Taylor explains, “is partly shaped by recognition or its absence.” Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 25 (Amy Gutmann ed., 1994). See generally Charles Taylor, *Why Do Nations Have to Become States?*, in RECONCILING THE SOLITUDES: ESSAYS ON CANADIAN FEDERALISM AND NATIONALISM (Guy Laforest ed., 1993); Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002); Alan Patten, 29 *Political Theory and Language Policy*, POLITICAL THEORY, 691, 608 (2001) (referring to Taylor and arguing that the respect of others of another’s linguistic identity “seems crucial to developing a full sense of one’s own worth and an undistorted sense of one’s agency and identity”).

251. The dissenting opinion in *Oršić* touched on this very point: “the interest of the applicants and other Roma children who did not speak the Croatian language” varied considerably from those of Roma students “who did speak Croatian” and “had an interest in not being held back too much in their

But minority-language speakers do not stand alone. While the dominant-language speakers remain largely invisible in all the cases surveyed in the paper, in practice they enjoy disproportionately the benefits of our international legal regime of language protection. They enjoy a regime of cultural preservation that is achieved on the cheap.

In the public sphere, the UNHRC and the ECtHR have defended the use of a single designated national language.²⁵² Outside the national language, the members of either the UNHRC or the ECtHR protect only a thin layer of non-majority languages that is focused on fairness and the needs of the individual, and that demands the most minimal redistribution of resources: transitory immersion programs in school (not bilingual schools), interpreters in criminal procedures only for those defendants who are completely ignorant of the court language (not every defendant's language of choice), and no linguistic freedom in dealing with the state. At the same time, in the private unsubsidized realm, the UNHRC and the ECtHR support a thick layer of cultural and linguistic preservation and guarantee linguistic minorities' complete freedom to defend and to develop their distinct linguistic identity and cultural practices.²⁵³ But this is only after they have shifted the costs of the maintenance of minority language and cultures to the private sector and onto concerned individuals themselves.

As a result, the majority populations free-ride on the benefits that come with both the dominant language-learning of the minority, therefore a convergence on a monolingual public space (thus benefits such as nation building, a common public language of citizenship, effective communication),²⁵⁴ *as well as* the preservation of minorities' mother tongue on their own resources, which confer the advantages of cultural diversity.²⁵⁵ The majority

education owing to the insufficient linguistic proficiency of a very large number of other pupils." Oršuš v. Croatia (Jungwiert, J. et. al, dissenting), App. No. 15766/03, Eur. Conv. on H.R., 67 ¶ 9 (Jungwiert, J. et al. dissenting).

252. See *The Belgian Linguistic Case*, 1968 Y.B. Eur. Conv. on H.R. 832, 832 (Eur. Ct. H.R.); *Inhabitants of Leeuw-St. Pierre v. Belgium*, App. No. 2333/64, 1965 Y.B. Eur. Conv. on H.R. 338 (Eur. Comm'n on H.R.) (endorsing the Belgian government's method of dividing the country into territorial, state-like, regions, each with a chosen official language).

253. See *Ballantyne v. Canada*, Case No. CCPR/C/47/D359/1989 and 385/1989, 28 (U.N. Human Rights Comm., May 5, 1993) ("A state may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice"); see also *Inhabitants of Leeuw-St. Pierre v. Belgium*, App. No. 2333/64, 1965 Y.B. Eur. Conv. on H.R. (Eur. Comm'n on H.R.) (noting that linguistic restrictions apply only to "the use of *languages of administration*").

254. See Alan Patten, *Liberal Neutrality and Language Policy*, 31 PHIL. PUB. AFF. 356, 362–63 (2003) (arguing that people can benefit from a "common public language of citizenship or international communication. Public institutions should not encourage people to remain isolated in linguistic ghettos."). See also *id.* at 379–381 (Patten's discussion of the advantages of the *common public language model* "as primarily a tool for nation building").

255. See *id.* at 363 (arguing that "people have a stake in the recognition and success of their *own* language. In part, this is for the straightforward reason that at any given moment in time some people will lack fluency in any language other than their own . . . [in addition, people] may still be deeply attached to their own language community. They may identify with their language community and believe that their culture is uniquely expressed through their own language."). See also *id.* at 365 (Pat-

reap these dual advantages without being asked to bear either the transaction costs associated with a language shift or providing the resources needed to protect and develop a robust bilingual society.

The dominant-language group also benefits in a second, non-material way. In putting the burden of language shift on the minority, the majority confirms not only its own linguistic identity, but also its superiority.²⁵⁶ If minority language is changeable, theirs is fixed; while a minority's tongue is unstable, theirs is immutable.²⁵⁷

The third cost of the disparity between the lofty ideals and the actual judicial interpretation of language rights' claims is that it masks the skewed incentive system inherent in our international regime of language rights. At each turn both the UNHRC and the ECtHR neglect the general ideology of linguistic preservation and focus instead on accommodating the immediate pragmatic needs of the two parties. In the long term this pragmatic bent means that our international legal regime protects to a greater degree those who completely opt out of the public realm of the state (either by choice, by necessity, or by accident) than it does those who partially collaborate with the state's larger political and economic project while also preserving a degree of their distinct language and culture. For example, an accused individual in a criminal trial who belongs to a non-dominant linguistic group but who has assimilated enough into the state to possess "sufficient knowledge" in the dominant language is forced to speak in the language of the court, even if he feels that his knowledge of that language is not "sufficient for a successful pursuit of his claim."²⁵⁸ However, if the same accused had never learned the state language (again either by choice, by necessity, or by accident), he would be allowed to use the language of his choice in court sessions, and would have the costs of an interpreter covered by the state.²⁵⁹ Procedurally, this means that those who do not participate in the state project end up with more accommodation by the international legal regime than those who do. But it also means that they would be protected by the law only so long as they are unable to speak the majority language, thus also to the extent that they remain politically marginal and either unwilling or unable to speak the majority tongue to make serious claims on the public state.

ten's discussion of the advantages of the *language maintenance model* that is "oriented . . . [around] the main priority . . . [of preserving] particular language communities that are vulnerable to decline or marginalization."); KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE, *supra* note 67, ch. 7-9, 5-6.

256. See Martha Minow, *The Supreme Court 1986 Term, Forward: Justice Endangered*, 101 HARV. L. REV. 10, 51 n.201 (1987) (suggesting that "[i]n assigning the label of difference, the group confirms not only its identity, but also its superiority, and displaces doubts and anxieties onto the person now called 'different.'").

257. See Philippe Van Parijs, *supra* note 246, at 182 (discussing the link between language and dignity and the implication of unequal dignity on linguistic minorities from a philosophical perspective).

258. See *Isop v. Austria*, App. No. 808/60, 1962 Y.B. Eur. Conv. on H.R. 112 (Eur. Comm'n on H.R.).

259. See *Brozicek v. Italy*, 167 Eur. Ct. H.R. (ser. A) (1989).

Fourth, and finally, the slippage between the broad theoretical framework of the regime and the actual case law confuses the role of human rights litigation. If we start by taking seriously the trumping power of a human rights approach to linguistic conflicts, the international judge is expected to operate as an instrument of law that objectively interprets the relevant legal doctrine existing outside the political society and implements it absolutely, irrespective of distributional consequences. But, in fact, the expectation that judges will function as neutral instruments of law is not a plausible description of judicial behavior in linguistic disputes.²⁶⁰

Objective implementation of the law in conflicts bearing on language is simply not possible. Rights are vague (see again the ambiguous minimum standard of language “adequacy” that can satisfy the requirement of a fair trial under Article 6 (3)(e) ECHR). Rights, moreover, contradict each other (recall the shift in the ICCPR between Article 27’s broad commitment to cultural/linguistic preservation—the right “to enjoy culture and to use language”—and Article 14’s functional and instrumental guarantee for a “fair trial”).²⁶¹ Further, they contain undefined potential in relation to language claims (for instance, Article 14, the antidiscrimination provision of the ECHR). Finally, both opposing sides can present their claims in terms of honoring valid rights, indeed at times even the same right—resulting in two norms of equal qualitative significance without an a priori way of prioritizing between them.²⁶²

Instead of an independent judiciary, a better frame to understand the role of the members of the UNHRC or the judges of the ECtHR is to view them as policy actors whose decisions are politically oriented or/and pragmatically driven. The decisions of the members of the UNHRC and the judges of the ECtHR are politically driven in the sense that they defer back to sovereign authority. Previous work done on the ECJ suggests that “legislators are

260. See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 116–17 (2002) (“In particular the human rights movement fetishizes the judge as someone who functions as an instrument of the law rather than a political actor, when this is simply not possible—not a plausible description of judicial behavior—given the porous legal vocabulary with which judges must work and the likely political context within which judges are asked to act.”).

261. ICCPR, *supra* note 10, arts. 14, 27; see *Guesdon v. France*, U.N. Human Rights Comm., Communication No. 219/1986, U.N. Doc. CCPR/C/39/D/219/1986, ¶¶ 10.3–11 (August 23, 1990).

262. See, e.g., *Diergaardt v. Namibia* U.N. Human Rights Comm., Communication No. 760/1997, U.N. Doc. CCPR/C/63/D/760/1997 (July 7, 1998) (suggesting that the overarching conflict was essentially between Namibia’s self-determination right under Article 1 of the ICCPR and the Diergaardt community’s Article 27 right to maintain “the basis of its cultural, social and ethnic identity” (Section 3.1). The resolution of the conflict required, paradoxically, the upholding of either Diergaardt’s or Namibia’s right at the cost of curtailing the other’s right, thus also introducing a hierarchy between two fundamental rights in the ICCPR. The choice between these two rights could not be resolved from any inherent meaning of the relevant right. Ultimately, the Committee overruled a violation under Article 27. In making its decision, the Human Rights Committee relied expressly on its complex and detailed “assessment of the relationship between the authors’ way of life and the lands covered by their claims . . . [and] the Rehoboth community . . . distinctive properties as to the historical forms of self-government” (Section 10.6). But this assessment of the Basters’ way of life and its relationship to their property is far from treating the provisions of the ICCPR as universal and overarching principles of validation.)

more likely to act against judicial activism when it creates significant financial and political consequences and less likely to act against judicial activism that does not upset current policy.”²⁶³ Building on this scholarship, this paper argues that the UNHRC and the ECtHR are likely to prioritize state interests and provide only nominal accommodation of language rights claims over the demands for maximal interpretation of the rights. Robust linguistic accommodation would place significant political and financial stress upon the state in the immediate term, especially when speakers of multiple languages populate the public sphere.²⁶⁴ Because of this dramatic material and political impact in the immediate time horizon, we can expect the UNHRC and the ECtHR to moderate their jurisprudence and competence in a way that would avoid the emergence of a consensus to attack their prerogatives.

This concern with political acceptability is likely to be particularly relevant to the UNHRC. The combined effect of the non-binding nature of the Committee’s “views” (which means that its decisions cannot be enforced without states’ consent) together with the optional nature of its jurisdiction under the Optional Protocol, which authorizes the Committee to address individual communications, suggests that the members of the Committee are likely to be more sensitive to the limits of their maneuverability in developing a legal doctrine that goes against state interests.²⁶⁵

At the same time, the decisions of the UNHRC and the ECtHR may also be pragmatically driven. In this view, the members of the Committee and the judges on the Strasbourg Court operate like technocrats—they make judgment calls and tradeoffs, or a sophisticated allocation of scarce resources that involves a complex and detailed account of the political and economic stakes involved in the case at hand. Their final decision is oriented to the case itself, and is a far cry from adopting a human rights approach to the conflict that suggests the absolute applicability of rights and is blind to counter-pressures toward linguistic and cultural uniformity.²⁶⁶ By adopting

263. Karen J. Alter, *Who Are the “Masters of the Treaty?” European Governments and the European Court of Justice*, 52 INTERNATIONAL ORGANIZATION 121, 143 (1998); see also Paul Pierson, *The Path to European Integration: A Historical Institutionalist Analysis*, 29 COMP. POL. STUD. 123, 135–136 (April 1996); Joseph Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2407 (June 1991).

264. See François Grin, *On the Costs of Cultural Diversity*, 4 CURRENT ISSUES IN LANGUAGE PLANNING 189, 192–97 (2003).

265. See Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 351 (1997) (discussing the shortcomings of the UNHRC in relation to the implementations of its decisions, the authors argue that “[t]he views” of the Committee are not binding under international law on the parties to the dispute before it. The Committee itself considers this fact “a major shortcoming in the implementation machinery established by the Covenant.”).

266. See, e.g., *Waldman v. Canada*, Human Rights Comm., Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 (Nov. 5, 1999) (While the author claimed, inter alia, that the state’s practice of educational funding that differentiated between Roman Catholics and other religions was discriminatory within the meaning of Article 26 of the ICCPR, Canada submitted, among other arguments, that the privileged treatment of Roman Catholic schools is enshrined in the Constitution Act 1867 and that its funding practices are thus within its Constitutional obligations. Each of these conflicting sides here presented the Committee with powerful substantive arguments that were backed by valid

a pragmatic interpretation of language rights talk the UNHRC and the ECtHR may in fact bring the international language rights regime to the ground level of economic, political, and electoral constraints in the national realms. In doing so, they might also facilitate local experimentation that can indeed provide politically feasible results and economically practical solutions to language strife.

IV. CONCLUSION

Thus far, the paper has argued that, both as prescriptive and descriptive matters, the UNHRC and the ECtHR are not doing what we think they are doing. In this conclusion, it is further argued that these two supranational human rights bodies *should not*, in fact, follow the lofty ideals expressed in major international legal instruments and echoed by leading human rights scholars on language protection.

Language right claims are demands for new distributions of power. But the accommodation of multiple languages in a single economy is enormously costly. The demand to vindicate the worthy language arguments of some requires balancing against other perfectly just concerns. Students, for example, have valid claims for education in their mother tongue, but they *also* have a legitimate interest in quality facilities and good health care.

rights. The question before the UNHRC, then, was *whose* rights to uphold. In arriving at a decision, the Committee balanced the material before it and concluded that there is no evidence to show “that members of the Roman Catholic community or any identifiable section of that community are *now* in a disadvantaged position.”) (emphasis added). Accordingly, it rejected the State party’s argument. But this particular way of slicing the decision—upholding the cultural preferences of the author over the state’s—was subject to the needs of the political compromise of the day. It is very plausible that in 1867 when “Catholics represented 17% of the population of Ontario, while Protestants represented 82% . . . [and all] other religions combined represented .2% of the population,” *Waldon v. Canada*, § 2.2, the Committee decision would have gone the other way. Again, instead of applying a rights analysis, in reaching their decision the members of the UNHRC exercised discretion and assessed all of the facts of the case); see, e.g., Martti Koskenniemi, *The Effects of Rights on Political Culture*, in *THE EU AND HUMAN RIGHTS* 99 (Philip Alston, Mara Bustelo & James Heenan eds.); Martti Koskenniemi, *The Limits of International Law: Are There Such?*, in *MIGHT AND RIGHT IN INTERNATIONAL RELATIONS* 27 (Kalliopi Koufa ed., 1999); Martti Koskenniemi, *Human Rights, Politics and Love*, in *MENNESKER & RETTIGHETER* 33 (April 2001); Martti Koskenniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, in 1 *HUMANITY: AN INTERNATIONAL JOURNAL OF HUMAN RIGHTS, HUMANITARIANISM AND DEVELOPMENT* 47 (2010); Martti Koskenniemi, *The Preamble to the Universal Declaration on Human Rights*, in *THE UNIVERSAL DECLARATION ON HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 27 (Alfredsson-Eide ed., 1999). In making this argument, I benefited from earlier work on the ECtHR and the ECJ. For example, in a series of articles, Martti Koskenniemi already suggested that both the judges on the ECtHR and the ECJ use terms such as, inter alia, “reasonable,” “proportionate,” “public order,” “morals,” to distance themselves from a rights approach and instead make their rulings by reference to ad hoc policy considerations); see Susan Marks, *The European Convention on Human Rights and Its ‘Democratic Society’* in *THE BRITISH YEARBOOK OF INTERNATIONAL LAW* 209 (1996) (discussing the role of the criterion of “necessary in a democratic society,” in inserting political discretion into the European system); Jason Coppel and Aidan O’Neill, *The European Court of Justice: Taking Rights Seriously?*, 29 *COMMON MARKET L. R.* 669 (1992); see also Francis G. Jacobs, *Human Rights in the European Union: The Role of the Court of Justice*, 26 *EUR. L. REV.* 331, 336 (2001) (describing the instrumental use of human rights vocabulary in the context of the ECJ).

When entering the world of political balancing between competing claims, “it is always tempting to ‘jump the queue,’” write Mark Kelman and Gillian Lester in a different context, “by claiming that one’s distributive interests take priority over the interests of another group.”²⁶⁷ Both the coupling of language/culture and the human rights approach to language conflict are helpful in this context precisely because they enable “jumping the queue.” They do that by providing a vocabulary that precludes seeing (thus also challenging) the concrete distributional consequences of linguistic accommodation. The tie between language and culture and rights vocabulary trumps the issue of costs and the inescapable link between privilege and deprivation in two different ways.

The emphasis on the bond between language and culture suggests that the problems with and solutions to language protection lie in the realm of culture, where communities generate their collective self-understandings. But it leaves the question of costs—with some that lose and others that win—largely unaddressed. Further, it also foregrounds the bearer of the right, the minorities (or the victim of violation), but backgrounds the beneficiaries of the regime that enjoy both the material and non-material benefits of the existing order. Human rights scholars and treaty language see culture, but they forget to consider who will bear the costs of vindicating language demands (and cultural preferences), and who benefits from the privilege and how.

Similarly, the mobilization of rights talk leaves very little room for the working of politics. If we take the rights approach seriously, even if the precise meaning of the right/duty remains unclear, it nonetheless suggests unconditional applicability. To maintain the compelling mode of universality and political neutrality, language rights talk must systematically ignore local economic and political variations. But there is no single, universal long-lasting legal or institutional arrangement that can resolve linguistic conflicts before the particularities of politics on the ground have begun. Linguistic struggles have multiple alternatives that require far-reaching, complex, and at times even contradictory homegrown responses. They all involve choices in specific situations with their own political and economic struggles. A universal solution to language disputes that transcends social and economic complexities is simply unattainable in light of the local nature of language strife. Human rights scholars and treaty language emphasize a language right, for example, Article 27 of the ICCPR,²⁶⁸ with absolute moral clarity; what they miss, however, is the political nature of reaching compromises in society.

There is more to the problem. Even if we ignore this external critique and take both the link between language and culture and rights vocabulary on

267. MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 226 (1997).

268. ICCPR *supra* note 10, art. 27.

their own terms, neither is a panacea to language protection. To begin, there is a variety of ways in which the emphasis on culture confuses the precise nature of the language claim involved. First, it underestimates the weakness of the connection between language and culture. The tie conflates the act of speaking a language with the status of belonging to a minority. This entails a conviction that cultural status is occupied exclusively by persons who speak the language. But possessing a language does not commit an individual to specific ways of thinking or behaving. One can be a member of the cultural group even if one does not speak the language, just as much as a native speaker can still opt out voluntarily or be expelled out of her linguistic group.²⁶⁹

Second, it is difficult to make sense of what culture means. Linguistic identity is not coherent; it is simply not stable prior to the discussion of it. There are no linguistic values or preferences that every person in any cultural group shares or ought to share. Just as individuals have multifaceted and shifting language needs and value preferences, unitary and uniform “linguistic minorities” that fall into rigid, ideal categories of cultural minorities are nonexistent. Because of the fluidity and the kaleidoscopic nature of linguistic identity, the investment in languages as an authentic expression of culture cannot provide a stable basis for legal protection. In reality, there is no single legal regime that is normatively preferable for all members of the group; a regime that protects the cultural interests of some members in the group may be catastrophic in its impact on other members of the very same language group.²⁷⁰ This is in no way to suggest that we should absolve ourselves of responsibility for remedying the suppression of linguistic minorities. On the contrary, it is precisely because we feel this responsibility that we must begin to distance ourselves from the language rights approach and focus instead on finding pragmatic and feasible ways to protect minorities’ language and culture.

Likewise, even if we take the rights approach to language on its own terms, this vocabulary is not a good fit for language demands.²⁷¹ For one,

269. See *Lovelace v. Canada*, Comm. No. R.6/24, U.N. Doc. Supp. No. 40 A/36/40 (Jul. 30, 1981) (Lovelace was born and registered as “Maliseet Indian” but has lost her rights and status as an Indian after having married a non-Indian. Her marriage has broken up, but the tribe denied her right to go back to the reservation. Although she was a native speaker of the language, she was denied by her tribe the cultural benefits of membership living in the Indian community); see also Janet Halley, *The Politics of the Closet: Legal Articulation of Sexual Orientation Identity*, in *AFTER IDENTITY* 7–24 (Dan Danielsen & Karen Engle, eds., 2007) (writing in the context of gay identity); RICHARD THOMPSON FORD, *RACIAL CULTURE, A CRITIQUE* (2005); RICHARD THOMPSON FORD, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM/LEFT CRITIQUE* 185 (Wendy Brown & Janet Halley, eds., 2002) (focusing on the African-American context); Henrard, *supra* note 11 (criticizing the conflation between language and culture).

270. See the discussion of the dissent opinion in *Oršuš v. Croatia*, App. No. 15766/03, Eur. Ct. H.R., ¶ 180 (2010), *supra* Part II.A.

271. In developing this critical perspective on rights, I built on a number of other writers, in particular: RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* (2011); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE}* (1997); RICH-

rights are configured in the correlative terms of a right/duty relationship: for every right, there is a duty, and for every duty there exists a right.²⁷² But many of the normative demands that come up in the context of language disputes—like a father’s wish that “his children should resemble him culturally”²⁷³—simply cannot be reduced into a right-duty relationship. Furthermore, rights are “inescapably individualistic.”²⁷⁴ Yet the individual focus of legal treatment fails to capture the distinctive relational nature of language whereby the single self is both a product of and is embedded in her linguistic context.²⁷⁵ The accent on the individual, moreover, cannot sufficiently address the feeling of communal injustice that arises from the sense of belonging to an oppressed minority that is prohibited from using its “mother tongue” (*Diergaardt v. Namibia*)²⁷⁶ or “language of ancestors” (*Guesdon v. France*)²⁷⁷ in the public domain of the state.²⁷⁸

Rights, moreover, usually privilege the state as both the source of the violation and the primary agent of change. This frame holds the state answerable for a concrete legal wrong and calls for a regulatory change as a remedy. But it discourages more creative political possibilities for action by ordinary citizens and impedes the undertaking of more structural changes to society.²⁷⁹ In the *Oršuš* decision, the ECtHR recognized that the policy of separate classes for Romani children and Croatian pupils was at least in part also due to “hostility”²⁸⁰ from the non-Romani parents who opposed mixed

ARD THOMPSON FORD, *UNIVERSAL RIGHTS DOWN TO EARTH* (2011); Makau W. Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589 (1996).

In the context of international law, I also built on the critical positions of other authors. See, e.g., Kennedy, *supra* note 260, at 116–17; Martti Koskenniemi, *Human Rights, Politics and Love*, in MENNESKER & RETTIGHETER 33 (2001); Martti Koskenniemi, *The Effect of Rights on Political Culture*, in THE EUROPEAN UNION AND HUMAN RIGHTS 99 (Philip Alston ed., 1999); Susan Marks, *Exploitation as an International Legal Concept*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES, *supra* note 37, at 281; Susan Marks, *Human Rights and Root Causes*, 740 MOD. L. REV. 57, 57–78 (2011).

272. See Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE L. J. 16, 41 (1913).

273. The Belgian Linguistic Case, 1968 Y.B. Eur. Conv. on H.R. 832, 870 (Eur. Ct. H.R.).

274. On human rights as “inescapably individualistic,” see Martti Koskenniemi, *The Effect of Rights on Political Culture*, in THE EUROPEAN UNION AND HUMAN RIGHTS 99, 114 (Philip Alston ed., 1999).

275. Human interactions must occur in language, and language shapes the very capacity to participate in social life. For a discussion of the various features that make language distinctive, and therefore in need of a special treatment, see Alan Patten, *Political Theory and Language Policy*, 29 POL. THEORY 691, 691–92 (2001).

276. *Diergaardt v. Namibia*, Communication No. CCPR/C/69/D/760/1997, Views, (U.N. Human Rights Comm. Sept. 6, 2000).

277. *Guesdon v. France*, Human Rights Comm., Communication No. 219/1986, U.N. Doc. CCPR/C/39/D/219/1986 (Aug. 23, 1990).

278. This is a restatement of Koskenniemi’s argument. See, e.g., Koskenniemi, *supra* note 274, at 104, 114.

279. For the development of this argument in the context of both human rights and humanitarian law, see DAVID KENNEDY, *THE DARK SIDE OF VIRTUE, REASSESSING INTERNATIONAL HUMANITARIANISM* 3–35 (2004) (arguing, inter alia, that conceptualization of political possibilities in a human rights vocabulary may distort or limit the field of political possibility.). See also Marks, *supra* note 271, at 57–78.

280. *Oršuš v. Croatia*, App. No. 15766/03, Eur. Ct. H.R., ¶ 180 (2010).

classes and “went so far as to stage a demonstration in front of a school . . . [to deny] . . . entry to the Roma children.”²⁸¹ Yet in the judgment, the *Oržuš* Court only held the state liable for the violation and ordered Croatia to reconsider the “schooling arrangements for Roma children.”²⁸² This focus on state policy left the private arrangements of Croatian citizens and the more systemic character of the Roma problems in Croatia largely unaddressed.²⁸³ Indeed, even if Croatia would remedy its official misconduct, it is still likely that parents would demonstrate outside school gates against the admission of Roma students.

Finally, placing the state and its policies at the center of linguistic remedy binds legal accommodation with citizenship status (under this paradigm, the members of the minority are cast as rights-bearing citizens who hold rights against their state). The state’s intervention now becomes the source—but also the limit—of the applicants’ linguistic and cultural liberation. Viewed in this way, the moment the members of a linguistic minority contest their state, they have also identified with it, thereby amplifying, rather than limiting, the state’s powers.²⁸⁴ This might be particularly disadvantageous for minority groups that span across multiple territories and face similar challenges in many states. Since their problems are comparable across boundaries, might there not be transnational solutions that could empower the community outside the confines of their home state?

Writing in 1950, Sir Hersch Lauterpacht, perhaps one of the most important international lawyers of the past generation, believed that human rights law formed the core of international law.²⁸⁵ Yet he probably would have objected to expanding an international human rights vocabulary to language protection.²⁸⁶ For him, except in the most extreme situations, such as if a state actively persecuted persons under its jurisdiction on account of their language, the human rights approach to language protection should be rejected “insofar as such protection signifies the safeguarding of human rights and fundamental freedoms through a legally authorized and effective machinery of compulsion.”²⁸⁷ Instead of “an absolute, literal and immediate legal duty,” he explains, language protection “must be interpreted in a reasonable way . . . having regards to the circumstances and conditions of each

281. *Id.* ¶ 154.

282. *Id.* ¶ 182.

283. See Marks, *supra* note 271, at 57–78.

284. See Ford, *supra* note 250, at 63 (“Legal rights are a *form* of state action, not a limit on state action.”)

285. See HERCSH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 153, 161 (1950) (“promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”). In my quotes, I am paraphrasing this view on the legal effect of Article 1(3) of the U.N. Charter. Lauterpacht died in 1960, six years before the codification of the ICCPR.

286. Lauterpacht died in 1960, six years before the codification of the ICCPR.

287. *Id.*

State.”²⁸⁸ The proliferation of international and regional instruments that call for a human rights approach to language conflicts—where we are today—bluntly contradicts Lauterpacht’s view.

It is useful to consider Lauterpacht’s comments on the limitations of a human rights approach to the resolution of language conflicts. Human rights are, of course, valuable and necessary in certain circumstances.²⁸⁹ However, at least when it comes to language protection and outside the most egregious violations, the repeated use of unobjectionable but intrinsically open-ended language rights vocabulary at the expense of situation-specific analysis may in the long run undermine the legitimacy of the international legal project and challenge the integrity and standing of the existing body of rights. Resorting to human rights talk in cases of linguistic disputes runs the risk of devaluing the larger human rights endeavor and does not advance reaching a compromise in concrete disputes. Language strife will likely be settled by ad hoc solutions with very different distributional consequences for different minority groups, not by the overriding power of absolute and universal rights.

When it comes to language, the accent on culture and the commitment to protect language claims as human rights is not an automatically progressive choice.²⁹⁰ The formal pronouncements in human rights law focus on culture; but a host of pragmatic considerations that are contextualized politically and economically, not reflections on the “nature” of language or an abstract bond between language and culture, determine the terms of linguistic protection in a given society. Leading scholars ask (for example, in the debate around Article 27 of the ICCPR),²⁹¹ “What is the precise scope and content of language rights?” But this is a legal question, while the essence of the conflict is a distributional demand. If we begin by assuming that linguistic minorities have a universal right to “enjoy culture and to use language,” whatever its precise limits, we will never be able to deduce what compromises minorities and majorities can live with. Instead, the questions human rights scholars ought to be asking are: “Who will gain most from this particular linguistic protection? How are scarce resources to be allo-

288. *Id.*

289. Multiple authors already discussed this point. See Philip Alston, *Introduction*, in HUMAN RIGHTS LAW xi, xvi–xvii (Philip Alston Ed., 1996) (suggesting that human rights can provide “a meaningful basis for social order”); Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992); Louis Henkin, *Introduction*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 1, 1–14 (Louis Henkin ed., 1981); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND IN PRACTICE (1991); Theodore Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 1–9, 21–23 (1986); Klaus Günther, *The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture*, in THE EU AND HUMAN RIGHTS 117 (Philip Alston ed., 1999).

290. In a different context, Martti Koskeniemi challenges the belief that “commitment to ‘law’ would be an automatically progressive choice,” suggesting instead that it is important to ask “what kind of (or whose) law, and what type of (and whose) preference?” Martti Koskeniemi, *The Politics of International Law 20 Years Later*, 20 EUR. J. INT’L L. 7, 17 (2009).

291. ICCPR *supra* note 10, art. 27.

cated? What outcome will the compromise produce? Who is included and who is left out?" It is the answers to these questions that will determine how progressive our language protection regime is, not the amount of regulations or laws making language claims a matter of human rights.

Ultimately, human rights advocates and policy makers may decide that a rights vocabulary is a useful frame in which to deal with some types of language claims, for example, protection against the most extreme situations, such as a state that actively persecutes people on account of their language. Certain more limited kinds of protection may also be worth guaranteeing, for example, a translator in court for an accused who does not understand the language of the proceeding. Identifying the full panoply of interests that ought to be deemed rights and thus permitted to, in Mark Kelman and Gillian Lester's words, "jump the queue," is a complex question lying outside the scope of this Article.²⁹² My point is simply that rather than adopting a human rights approach to language claims, it may be better to break down this broad, overarching category of language rights into a collection of narrower, more particular interests, only some of which (and likely not most) are entitled to absolute protection under the law. Those linguistic interests that we do not deem rights are not for this reason invalid or unworthy of protection; indeed an interest can be perfectly just, even if it is not framed in terms of human rights.²⁹³

It is an old and endlessly captivating dream: a universal solution to language disputes distinct from politics and transcending social and economic complexities. But this visionary program, ingenious enough to circumvent political convention and abolish choice and compromise on the ground and in culturally idiosyncratic enclaves, may be something like the unattainable Idea perceived by yearning mortals in Plato's cave. The emphasis on culture elides questions of distributional costs of protection. The use of language rights vocabulary, moreover, distances the project from the actual political stakes of the conflict and the real counter-pressures for linguistic homogeneity. By advocating a human rights approach to linguistic conflicts between minorities and majorities, human rights scholars transform political questions into legal questions, and then transform legal questions into questions of universal abstract language rights, or human rights more generally. With this movement, as we have seen, they promise a solution the law cannot really deliver.

APPENDIX A: METHODOLOGY

The purpose of the qualitative study was to produce a descriptive mapping of how the UNHRC, the ECtHR, and the IACtHR deal with language

292. See JUMPING THE QUEUE, *supra* note 267, at 226.

293. JUMPING THE QUEUE, *supra* note 267, at 226.

right claims in relationship to the three functions under examination—education, court proceedings, and communication with the government.

The study encompassed all the communications that came before the UNHRC between 1976 and 2012, the cases submitted to the ECtHR between 1959 and 2012, and applications that came before the IACtHR between 1979 and 2012. I began by identifying the total population of relevant applications that came before each body. To collect the communications concerned with linguistic issues dealt by the UNHRC, I used the Netherlands Institute of Human Rights database and relied on the thematic issue of “language.”²⁹⁴ The ECtHR database does not list the decisions or cases per thematic section. In order to identify the relevant population of cases, I searched the ECtHR’s online database, HUDOC,²⁹⁵ with the term “linguistic right” and double-checked the results with those provided by Westlaw under the European Human Rights Reports heading. As I was interested in the cases concerning language in education, in judicial proceedings, and in relationship with public services, I filtered out decisions concerned with the issue of language in electoral law and broadcasting as well as other irrelevant cases. Finally, since there is no systematic and comprehensive database of IACtHR case law, I used various sources to establish a list of cases to analyze. These included the “search by thematic” engine of the website of the Court²⁹⁶ and the repertory of the American University School of Law.²⁹⁷ To ensure that I was not missing any important cases, I also consulted other official documents issued by the IACtHR, such as the Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, January 19, 1984 and the Advisory Opinion of the Court and the Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, 1983, as well as multiple scholarly articles and information on relevant NGOs’ websites.

To supplement my list of applications, I used two additional methods to check the completion of my pool of cases. First, I made sure that previous cases/applications referred to in the judgments were part of the list. Second, I identified and included in the analysis relevant cases that were mentioned in other cases, doctrines, or secondary literature. In addition, together with analyzing “linguistic rights cases,” I surveyed some relevant communications before the UNHRC and cases before the ECtHR and the IACtHR that were not directly concerned with the issue of language but are nonetheless

294. See Netherlands Institute of Human Rights Database, [http://sim.law.uu.nl/SIM/CaseLaw/CCPRcase.nsf/\(Keyword\)?OpenView&Start-111&Count-30&Expand-112#112](http://sim.law.uu.nl/SIM/CaseLaw/CCPRcase.nsf/(Keyword)?OpenView&Start-111&Count-30&Expand-112#112)[http://sim.law.uu.nl/SIM/CaseLaw/CCPRcase.nsf/\(Keyword\)?OpenView&Start-111&Count-30&Expand-112#112](http://sim.law.uu.nl/SIM/CaseLaw/CCPRcase.nsf/(Keyword)?OpenView&Start-111&Count-30&Expand-112#112).

295. See HUDOC Database, <http://www.echr.coe.int/ECHR/EN/hudoc>.

296. See Corte Interamericana de Derechos Humanos [Inter-American Court of Human Rights] Database, http://www.corteidh.or.cr/bus_temas.cfm.

297. La Corte Interamericana de Derechos Humanos: 1980–1997, <http://www.wcl.american.edu/humright/repertorio/introduction.cfm>.

helpful to the discussion, such as those concerned with the place of religion in education, discrimination in public schools, or immigration issues.

In total, I analyzed twenty-one communications before the UNHRC (see Appendix B for the complete list), ninety-eight decisions and judgments under the former European Commission of Human Rights and the ECtHR (see Appendix C for the complete list), and eleven decisions and judgments under the IACtHR (see Appendix D for the complete list).

APPENDIX B: COMMUNICATIONS BEFORE THE UNHRC

Singer v. Canada (1994)
 Mahuika v. New Zealand (2000)
 Ballantyne v. Canada (1991)
 C.L.D. v. France (1988)
 Coeriel v. Netherlands (1994)
 Diergaard v. Namibia (2000)
 Guesdon v. France (1981)
 Barzhig v. France (1991)
 Ignatane v. Latvia (2001)
 Kitok v. Sweden (1988)
 Kleckovski v. Lithuania (2007)
 Raihman v. Latvia (2010)
 Lovelace v. Canada (1981)
 Lubicon Lake Band v. Canada (1990)
 M.K. v. France (1989)
 Mavlonov v. Uzbekistan (2009)
 R.L.M v. France (1992)
 S.G. v. France (1991)
 T.K. v. France (1989)
 Waldman v. Canada (1999).
 Cadoret v. France (1991)

APPENDIX C: DECISIONS AND JUDGMENTS UNDER THE FORMER EUROPEAN COMMISSION OF HUMAN RIGHTS AND THE ECtHR

Forty Mothers v. Sweden (1977)
 Abdulaziz v. United Kingdom (1985)
 Ciftci v. Turkey (2004)
 Akbingöl v. Germany (2004)
 Akdogan v. Germany (1986)
 Ahmad v. Romania (2007)
 Amer v. Turkey (2009)
 Association Ekin v. France (2001)

B.N. v. Sweden (1993)
Baka v. Romania (2009)
Bazjaks v. Latvia (2010)
Beard v. United Kingdom (2001)
Belgian Linguistic Case (1968)
Berisha v. Former Yugoslav Republic of Macedonia (2007)
Bideault v. France (1986)
Brozicek v. Italy (1989)
Buckley v. United Kingdom (1996)
Bulgakov v. Ukraine (2007)
C. v. France (1992)
Campbell v. United Kingdom (1982)
Catan v. Moldova (2010)
Chapman v. UK (2001)
Coban v. Spain (2003 and 2006)
Conka v. Belgium (2002)
Cuscani v. United Kingdom (2002)
Cyprus v. Turkey (2001)
D.H. v. Czech Republic (2007)
Delcourt v. Belgium (1967)
Dhoest v. Belgium (1987)
Diallo v. Sweden (2010)
Dogru v. France (2008)
Drozd v. France (1992)
Erdem v. Germany (1999)
Fedele v. Germany (1987)
Folgero v. Norway (2007)
Fryske Nasjonale Partij v. Netherlands (1985)
G. v. Norway (1983)
Galliani v. Romania (2008)
Güngör v. Germany (2001)
Hermi v. Italy (2006)
Husain v. Italy (2005)
Ireland v. United Kingdom (1978)
Isop v. Austria (1962)
Isyar v. Bulgaria (2008)
Johansson v. Finland (2007)
K. v. France (1983)
Kajolli v. Italy (2008)
Kamasinski v. Austria (1989)
Kearns v. France (2008)
Khatchadourian v. Belgium (2010)
Kjeldsen v. Denmark (1976)
Konrad v. Germany (2006)

Köse v. Turkey (2006)
Kozlovs v. Latvia (2002)
Ladent v. Poland (2008)
Lagerblom v. Sweden (2006)
Lautsi v. Italy (2011)
Inhabitants of Leeuw-St. Pierre v. Belgium (1965)
Sahin v. Turkey (2005)
Luedicke v. Germany (1983)
M.S. v. Finland (2001)
Mathieu-Mohin v. Belgium (1987)
Mentzen v. Lithuania (2004)
Noack v. Germany (1998)
Orsus v. Croatia (2010)
Özkan v. Turkey (2006)
Özturk v. Germany (1984)
Pahor v. Italy (1994)
Pakelli v. Germany (1983)
Pala v. France (2007)
Panasenko v. Portugal (2008)
Todorova v. Bulgaria (2010)
Podkolzina v. Latvia (2002)
Polacco v. Italy (1997)
Ponomaryov v. Bulgaria (2011)
Protopapa v. Turkey (2009)
Sandel v. Former Yugoslav Republic of Macedonia (2010)
Alba v. Italy (2004)
Sejdic v. Bosnia (2009)
Shannon v. Latvia (2009)
Skender v. Former Yugoslav Republic of Macedonia (2005)
Slivenko v. Latvia (2003)
Stec v. UK (2006)
Stjerna v. Finland (1994)
Strati v. Turkey (2009)
Tabai v. France (2004)
Tabesh v. Greece (2009)
Taskin v. Turkey (2004)
Tiemann v. France (2000)
Timishev v. Russia (2005)
Uçak v. United Kingdom (2002)
Rad v. France (1997)
Valsamis v. Greece (1998)
Welter v. Sweden (1985)
X. v. Austria (1989)
X. v. Germany (1967)

X. v. United Kingdom (1973)
Zengin v. Turkey (2007)

APPENDIX D: DECISIONS AND JUDGMENTS BEFORE THE IACtHR

Jehovah's Witnesses v. Argentina (1978) (Commission)
Yean v. Dominican Republic (2001) (Commission)
Galleguillos v. Chile (2002) (Commission)
Tingni v. Nicaragua (2001) (Court)
Yakye Axa Indigenous Community v. Paraguay (2005) (Court)
López-Álvarez v. Honduras (2006) (Court)
Sawhoyamaya Indigenous Community v. Paraguay (2006) (Court)
The Saramaka People v. Suriname (2007) (Court)
Cantú v. Mexico (2007) (Court)
Tojín v. Guatemala (2008) (Court)
Ortega v. Mexico (2011) (Court)