MINORITY LANGUAGE RIGHTS IN INTERNATIONAL LAW

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The provision of legislative or other legal protection for linguistic minorities is widespread in domestic legal systems.¹ In international law, and in international human rights law in particular, the question of minority language rights has until recently received much less attention. The entry into force on 1 March 1998 of the Council of Europe’s European Charter for Regional or Minority Languages (the “Minority Languages Charter”), the first international instrument directed solely at the question of language, suggests that the situation may be changing.

The recent growth of interest in minority language rights is explained in part by the general re-emergence of minority rights as a pressing issue in the wake of the fall of Communism in the former Eastern Bloc and the ensuing outbreak of ethnic tensions in central and eastern Europe.² This is, however, only part of a wider phenomenon; as one author has noted, “[s]trong, assertive, renewed cultural minorities seem to be a fact of life as we move towards the end of the twentieth century”.³ The question of linguistic minorities has taken on a particular urgency, however, because of the increasing recognition—amongst both linguists and speakers of minority languages themselves—of the threat of extinction faced by many minority languages. Linguists estimate that up to 90 per cent of the between 4,000 and 6,000 languages currently spoken world-wide could disappear by the end of the 21st century,⁴ due to a range of overlapping factors:

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1. For example, at least 157 States make provision for language in their national constitutions: UNESCO Most Programme on Linguistic Rights: http://www.unesco.org/most/In2nat.htm.; see also, Fernand de Varennes, Language, Minorities and Human Rights (The Hague: Martinus Nijhoff, 1996). Most such provisions give some measure of protection to certain linguistic minorities. Many States have also enacted other forms of language legislation; see, for example, the Welsh Language Act 1993, c.38 in the British context.


4. See, for example, Steven Pinker, The Language Instinct (London: Penguin, 1994), at 232, and David Crystal, ed., The Cambridge Encyclopedia of Language (Cambridge: Cambridge University Press, 1994), at 284. Pinker notes that only about 600 languages are “reasonably safe by dint of the sheer number of their speakers, say, a minimum of 100,000”, but notes that even this number of speakers does not guarantee even short-term survival.
Languages disappear by the destruction of the habitats of their speakers, as well as by genocide, forced assimilation and assimilatory education, demographic submersion, and bombardment by electronic media, which [the linguist Michael] Krauss calls “cultural nerve gas”.

Concern about this loss of linguistic diversity extends beyond the linguistic communities affected. In addition to the obvious value of languages to researchers in social sciences such as anthropology and human evolutionary biology, the linguist Steven Pinker offers more fundamental reasons for why the precipitous loss of languages matters:

As [Michael] Krauss writes, “Any language is a supreme achievement of a uniquely human collective genius, as divine and endless a mystery as a living organism”. A language is a medium from which a culture’s verse, literature, and song can never be extricated. … As the linguist Ken Hale has put it, “The loss of a language is part of the more general loss being suffered by the world, the loss of diversity in all things”.

What follows is an assessment of the nature and extent of minority language rights which currently exist under selected international instruments. In the first section, the theoretical bases of such rights will be considered. In the second section, the parameters of such rights will be explored; in particular, the question of what forms of expression are protected and of the identity of the beneficiaries of minority language rights will be addressed. Then, the actual content of minority language rights will be examined: generally, such rights fall into two broad categories, each of which will be treated in separate sections.

The first broad category of rights could be described as encompassing a regime of linguistic tolerance, and includes measures which aim to protect speakers of minority languages from discrimination and procedural unfairness, among other things. These measures generally appear in the major instruments inspired by the Universal Declaration of Human Rights (the “Universal Declaration”) and developed after the Second World War: in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention on Human Rights”, or the “ECHR”), and the International Covenant on Civil and Political Rights (the “ICCPR”). Both the ICCPR, a global

8. The ECHR came into force on 3 Sept. 1953 and 41 European States are party to it.
9. The ICCPR was adopted by General Assembly resolution 2200 A(XXI) of 16 Dec. 1966, and entered into force on 23 March, 1976; 147 States are party to it.
instrument, and the ECHR, a regional one, create binding international obligations which are, in general, enforceable through a system of individual petition.

The second broad category of language rights could be described as encompassing a regime of linguistic promotion, and includes measures which create certain “positive” rights to key public services, such as education and public media, through the medium of minority languages. These measures have appeared primarily in a number of instruments concerning minorities which have generally been concluded within the last decade under the auspices of the Conference for Security and Co-operation in Europe (the “CSCE”, which became the Organisation for Security and Co-operation in Europe, or the “OSCE”, in 1994), the Council of Europe and within the United Nations: see, for example, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (the “Copenhagen Declaration”), the United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (the “UNGA Minorities Declaration”), the Council of Europe Framework Convention for the Protection of National Minorities (the “Framework Convention”) and the Minority Languages Charter. Although there are other instruments which have some limited relevance to the question of language, they will not be considered here. Only the Framework Convention and the Minority Languages Charter, both regional instruments, create binding international obligations; however, their provisions are not enforceable by way of individual petition, but are subject only to a system of State reporting and national enforcement. Both the UNGA Declaration on Minorities, a global instrument, and the Copenhagen

14. The Framework Convention was opened for signature on 1 Feb. 1995, came into force on 1 Feb. 1998 and has been signed by 40 European States and ratified or acceded to by 32.
15. The Minority Languages Charter was opened for signature on 5 Nov. 1992, came into force on 1 March 1998 and has been signed by 24 Council of Europe Member States and ratified by 11.
16. There are, for example, several bilateral agreements between European States which are in force, and a number of other international conventions containing general provisions on minority rights, including the 1960 UNESCO Convention Against Discrimination in Education, the 1958 International Labor Organization Convention No. 111 Concerning Discrimination in respect of Employment and Occupation, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, and the 1989 Convention on the Rights of the Child: see the OSCE Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area (The Hague: OSCE, 1999).
Declaration, essentially a regional one, do not create fully binding international obligations, though both are influential and significant documents.

1. The Theoretical Bases for Minority Language Rights

The growing interest in linguistic rights has been accompanied by a growing debate as to the nature and theoretical underpinnings of such rights as human rights. Indeed, the issue of language forms part of a broader debate on the rights of ethnic and cultural minorities. Two broad approaches have emerged.

One approach is based on the notion that language is a fundamental constitutive element of personal identity. If this is so, then the existence of a secure and supportive cultural and linguistic environment is an important factor in an individual’s personal development. Such an environment is, however, much more likely to exist for members of cultural and linguistic majorities than for members of minorities. In this context, the traditional “difference blind” model of equality, which attempts to ensure freedom from discrimination or unwarranted interference, is not sufficient to ensure that members of cultural and linguistic minorities have the same range of possibilities in life as those who are members of a majority; to this model should be added a “difference aware” equality which involves an equality of respect and recognition, under which “the public culture and institutions of a society also need to reflect and accommodate the languages, religions and cultural practices of minority groups”, implying, where necessary, positive measures of State support.

Less clear, however, is whether such measures should be extended equally to members of all minorities within a society. Perry Keller, for example, argues that the right to maintain and develop a cultural identity


20. Ibid, at 40–41, and Green and Reaume, supra, n.17.
is “in principle a universal right”, and that there is therefore no reasonable basis in principle to make formal distinctions between types of ethnic minorities—particularly between the rights of long-established “traditional” minorities and more recently arrived immigrant groups.21 Yet he and others who support this approach accept that, at least as regards the obligation to provide positive support for the subsidisation of education or media programming in a minority language, for instance, some distinctions between minorities may be necessary. In rationing such measures of support, factors such as the size and physical concentration of minority group members, the degree to which the minority differs from the majority, the prevalence of discrimination, the particular vulnerabilities of a minority language or cultural tradition, and the commitment of the group itself to the maintenance of its own distinctive identity are all considered to be relevant. The application of such factors to specific linguistic situations is, however, fraught with difficulties. For example, some have argued that the more concentrated and more assertive the minority, the greater the entitlement to positive measures of support should be.22 Yet if the provision of minority language rights is based on ensuring that all individuals enjoy a secure and supportive linguistic environment, one would have thought that the relative weakness and marginalisation of a minority linguistic group would justify more, not less extensive measures of positive support.

The second basic approach to the theoretical basis for minority language rights could be described as an “ecological” one, under which linguistic diversity, like bio-diversity, is valued in and of itself.23 While this approach is in some respects laudable, it does not offer a very sound basis for establishing linguistic rights as human rights, because it grounds such rights not in the person, but in abstraction, namely language itself.24 It therefore contemplates an interest to be protected which is separate to

21. Keller, supra, n.18, at 43; in a British context, “traditional” minorities would include Welsh- or Gaelic-speakers, whereas Urdu- or Cantonese-speakers would fall into the second category.
24. See, for example, Reaume (1989), supra, n.17, at 39–45, and Nick Shuibhne, supra, n.17, at 10.
and possibly in some circumstances at odds with even the interests of speakers of minority languages themselves.

Both of the foregoing theoretical approaches to minority language rights are, however, reflected in some of the recent international instruments. The first approach can, for example, be seen in the preamble to the Framework Convention, which provides that “a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity” (emphasis added). An expert group convened by the Foundation for Inter-Ethnic Relations has interpreted Article 1 of the Universal Declaration of Human Rights, which states that “All human beings are born free and equal in dignity and rights . . .”, as follows:

[equality in dignity and rights presupposes respect for the individual’s identity as a human being. Hence, respect for a person’s dignity is intimately connected with respect for the person’s identity and consequently for the person’s language.25

A recent OSCE report notes that

[b]oth the rights of non-discrimination and of the maintenance and development of identity serve to advance the primary function of human rights law, respect for human dignity . . . Linguistic rights, and minority rights in general, help ensure that minorities are able to realize and enjoy rights that the majority might be able to enjoy on its own . . .26

On the other hand, the Minority Languages Charter sets the importance of language rights firmly in the context of the positive value attached to cultural diversity for its own sake. The preamble to the Minority Languages Charter provides, for example, that “the protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe’s cultural wealth and traditions”. As paragraphs 2 and 11 of the explanatory report to the charter make clear, its overriding purpose is to preserve and promote the autochthonous27 languages of Europe, all of which are characterised by “a greater or lesser degree of precariousness”.

27. The term used in the charter to describe “traditional” or “indigenous” minorities.
2. The Parameters of Minority Language Rights

Before considering the content of minority language rights in international law, it is useful to consider what forms of expression are protected—the question of what constitutes “language”—and the identity of the beneficiaries of such rights—in particular, the question of who is entitled to claim such rights.

The Meaning of “Language”: What is Protected?

While language is referred to in many international instruments, none address the fundamental question of what constitutes a language, of what forms of expression are entitled to protection. Do, for example, language rights extend to speakers of particular dialects? Article 1, paragraph a of the Minority Languages Charter makes clear that the “regional or minority languages” protected thereunder do not include dialects of the official language of the State; it does not, however, provide any guidance as to how to determine whether a form of speech is a dialect of an official language or a distinct language.

In the absence of a legal definition of what constitutes “language”, reference could be made to criteria which linguists use to distinguish a language from a dialect. Unfortunately, this distinction is “one of the most difficult theoretical issues in linguistics”. 28 A test which is often used is that of “mutual intelligibility”; that is, if two forms of language are mutually intelligible, they are considered to be dialects of the same language. A common problem, however, is that two forms of speech which are recognised as regional dialects of a single language may not always be mutually intelligible in their spoken form; at the same time, each may be intelligible to speakers of a neighbouring dialect of another language. 29 A second problem is that forms of language which are easily mutually intelligible in their spoken form may be written in different scripts; it is not clear whether language should be determined by reference to speech, script or both. 30 Ultimately, the distinction between a language and a dialect is often based on political and historical rather than linguistic reasons. 31

28. Crystal, supra, n.4, at 25.
29. “This is the problem of a geographical dialect continuum”: Crystal, ibid.
30. Philip Vuciri Ramaga, “The Bases of Minority Identity”, (1992) 14 Human Rights Quarterly 409 at 426. Ramaga notes, for example, that Serbian and Croatian are mutually intelligible and therefore could be considered to be dialects of a common language, but that written Serbian uses the Cyrillic script while written Croatian uses Latin script.
31. Crystal, supra, n.4, at 25, and Mala Tabory, “Language Rights as Human Rights”, (1980) 40 Israel Yearbook on Human Rights 167 at 189. The explanatory report to the Minority Languages Charter recognises at para.32 that the question of what constitutes a dialect “depends not only on strictly linguistic considerations, but also on psycho-sociological and political phenomena which may produce a different answer in each case”, and leaves it to the States themselves to resolve the matter.
Tabory has argued that a legal distinction between language and dialect is legitimate, “for otherwise the fragmentation of dialects, and even accents, claiming linguistic rights would be endless”.32 While this concern with an “endless” expansion of claims for minority language protection is reasonable, it is not clear that a distinction based on dialect is always appropriate, particularly given the principles which may underlie the protection of minority languages in the first place. Ramaga offers useful guidance:

Because minority protection concerns actual or perceived risks to a distinct group, the precondition to protecting linguistic minorities must be distinguished from general recognition of languages, which may belong to minorities or majorities. The need for protection necessarily implies that “language” must refer not to any distinct form of speech, but to those forms whose distinctness arouses, or is likely to arouse, group conflict or domination . . . “Language” cannot, therefore, be interpreted in a solely linguistic sense to exclude such aspects as script, which may serve as symbols of group identity and form a heritage rooted in culture or religion.33

The same could presumably be said of dialect. If language rights are founded on the concept of linguistic security, it is difficult to see why speakers of particularly marginalised or disadvantaged dialects should necessarily be excluded from legal protection. If language rights are founded on the concept of the positive value of linguistic diversity, it is difficult to see why particularly threatened dialects should necessarily be excluded.

Uniquely amongst the various instruments, the Minority Languages Charter effectively creates different classes of linguistic communities, some of which are entitled to considerable support and some of which are entitled to no support whatsoever. The charter provides for measures of support to two types of languages: the “regional or minority languages” of its title, and certain “non-territorial languages”. Article 1, paragraph a defines “regional or minority languages” as those which are traditionally used within a given territory of a State by nationals of the State who form a group numerically smaller than the rest of the State’s population, and which are different from the official language(s) of the State. Both this paragraph and paragraph 31 of the explanatory report make clear that the languages of recent immigrant populations are excluded. As noted, the definition also specifically excludes dialects of the official language(s) of the State. The other category of language to which the Minority Languages Charter applies, the “non-territorial languages”, is defined in Article 1, paragraph c to include languages used by nationals of the State which differ from the language or languages used by the rest of the State’s

32. Tabory, ibid.
33. Ramaga, supra, n.30.
population, but which, although traditionally used within the State, are not associated with any particular geographical area within the State. In the explanatory report, Yiddish and Romany are given as examples. Both the “regional or minority languages” and the “non-territorial languages” of a State are entitled to the benefit of Part II of the Minority Languages Charter, which contains some general objectives and principles to which the State is required to adhere, but only the “regional or minority languages” are entitled to the benefit of Part III of the charter, which contains the more detailed and specific positive measures of support which the State is required to take in various areas, such as education, the media, and so forth. Since it is up to a State which of its “regional or minority languages” it will specify for the purposes of the Part III, and since a State is given a wide discretion as to which Part III measures it will apply to any language so specified, there is not even a guarantee that each regional or minority language will be treated in the same way.

The hierarchy of forms of language that is created under the Minority Languages Charter and the complete exclusion of certain linguistic minorities from its protection is in part explained by its overriding preoccupation with the more threatened autochthonous language communities of Europe, but is at odds with the notion that minority language rights are founded on the dignity of the person and are therefore in principle universal, fundamental rights to which all individuals are entitled. Even when viewed as a measure to promote linguistic diversity for its own sake, the charter is flawed. It contemplates that certain threatened languages, the “non-territorial languages” and those “regional or minority languages” not designated under Part III, will have less protection than the “regional or minority languages” which are ultimately designated under Part III. Such differential treatment will not, however, necessarily be based on any objective assessment of the linguistic needs of the threatened languages themselves. Romany or Yiddish may, objectively speaking, be more seriously threatened than many of the regional or minority languages which will be designated by

34. Article 3(1).
35. Article 2(2).
States for Part III protection, and yet will receive less significant support under the charter.36

The Beneficiaries of Minority Language Rights: Who is Protected?

Generally, individuals are the beneficiaries of minority language rights in international law; none of the instruments confers rights on groups without reference to persons who are members such groups. Some rights, however, are contingent on the individual beneficiary being a member of a group, such as a linguistic “minority” or a “national minority”: this is particularly true of many of the rights which could be considered as measures of linguistic promotion.37 Take, for example, Article 27 of the ICCPR, which provides that “[I]n those States in which ethnic, religious or linguistic minority exists, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language” (emphasis added). 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. The identification of the existence of a minority is complicated by the fact that the concept is not defined in Article 27, and has never been adequately defined in international law.38

It was in part to avoid the intractable difficulties in defining “minorities” and “national minorities” and in determining membership in such groups that the authors of the Minority Languages Charter linked State obligations to languages themselves.39 The charter makes clear that it


37. As we shall see, many of the provisions of the Framework Convention, for example, only apply in respect of persons who belong to a “national minority”.


39. Obligations on States are in respect of the “regional or minority languages” or “non-territorial languages” themselves, not in respect of speakers thereof.
does not create any legally enforceable rights for the minority language communities or for individual speakers of the protected languages. By avoiding an approach based on individual or group rights, however, the authors of the Minority Languages Charter, the first international instrument directed solely at minority language communities, have missed an opportunity to advance the notion that minority language rights are fundamental human rights under international law. Indeed, the charter does not go as far in this regard as the Framework Convention, the other recent minority instrument which imposes legally binding international obligations on States, because many of the provisions of the Framework Convention are framed in terms of individual rights enjoyed by members of national minorities.

3. The Content of Minority Language Rights I: Language Rights as Measures of Linguistic Tolerance

The Principle of Non-discrimination

Language rights as expressions of a regime of linguistic tolerance are most closely associated with instruments such as the ICCPR and the ECHR. The most basic means of protection for speakers of minority languages is the principle of non-discrimination. This principle is expressed in Article 2 of the Universal Declaration, which provides that “[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” (emphasis added). Essentially the same guarantee is provided in Article 14 of the ECHR and in Article 2(1) of the ICCPR. Article 26 of the ICCPR contains a wider guarantee of non-discrimination; unlike Article 14 of the ECHR, it applies not only in respect of the rights set out in the instrument itself but for all purposes, and has therefore been described as a “stand-alone” guarantee of non-discrimination.

The principle of non-discrimination has been reiterated and reinforced in the various instruments relating to minorities which have been developed in the 1990s. In this, Article 4(1) of the Framework Convention is typical; it provides that

40. See paragraph 11 of the explanatory report. Thus, neither the general objectives of Part II nor the specific measures of support in Part III are justiciable or enforceable through a system of individual or group communication or petition; instead, the Minority Languages Charter provides in Part IV for a system of State reporting.

41. Article 26 provides: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as… language…”
[t]he Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.

While the term “national minority” is not defined in the Framework Convention, it should certainly include linguistic minorities. Similar provisions are contained in Articles 31 and 32 (especially 32.6) of the Copenhagen Declaration, Articles 3(1) and 4(1) of the UNGA Minorities Declaration, and in Article 2(1) and 2(2) of an Additional Protocol to the ECHR on the Rights of Minorities (the “Minorities Protocol”).

While the principle of non-discrimination seeks to ensure that speakers of minority languages are not subject to discrimination at the hands of the State, it does not ensure that such persons obtain governmental services through the medium of their language—measures which provide “difference aware” equality. Furthermore, the principle of non-discrimination may give rise to difficult questions where such measures of “difference aware” equality are offered to one group only. The recent decision of the United Nations Human Rights Committee in Waldman v. Canada provides an illustration. The Human Rights Committee found that a law which provided public funding to Roman Catholic schools but not other religious schools violated Article 26 of the ICCPR. The Committee stated that

… the [ICCPR] 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. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria.

The Committee found that the provision of public funding to Roman Catholic schools and not to Jewish schools was not based on such “reasonable and objective” criteria. Significantly, the Committee noted that the fact that the funding of Roman Catholic schools is enshrined in the Canadian constitution of 1867 does not render the provision of support only to such schools “reasonable and objective”.

42. With respect to the meaning of the word “minority”, see the discussion of Article 27 of the ICCPR, above.
43. Proposed by the Parliamentary Assembly of the Council of Europe in Recommendation 1201 (1993); it was never adopted by the Committee of Ministers. While it does not create any binding international obligations, the Parliamentary Assembly of the Council of Europe considers itself bound by it: Benoit-Rohmer, supra, n.2, at 37.
44. Belgian Linguistic Case (No. 2), (1968) 1 EHRR 252; for an analysis of this decision, see Tabory, supra, n.31, at 196–203, and Berman, supra, n.17, at 1526–1537.
46. Ibid, at para.10.6.
In his individual opinion, in which he concurred with the Committee’s conclusion, Martin Scheinin speculated on the implications that this decision may have for minority language education:

[Providing for education in minority languages for those who wish to receive such education is not, as such, discrimination, although care must of course be taken that possible distinctions between different minority languages are based on objective and reasonable grounds.]

He did not provide guidance as to what those grounds should be, although he suggested that “constant demand” for minority language education and the question of “whether there is a sufficient number of children to attend [the minority school] so that it could operate as a viable part in the overall system of education” were relevant considerations.

The use of demand as a basis for determining which minority groups should benefit from positive measures of support is problematic—a point which will be addressed further, below—but reference to other possible criteria may be just as problematic. In practice, States do make provision for publicly-funded minority language education which is restricted to only certain linguistic groups. In Scotland, for example, there is a significant Urdu-speaking population. Does the provision of Gaelic-medium education to Gaelic speakers without similar provision of Urdu-medium education to the Urdu-speaking community constitute a violation of Article 26? If not, what “objective and reasonable grounds” distinguish the two communities?

On the one hand, it could be argued that Scotland’s Gaelic-speaking minority is entitled to special treatment. It is a “traditional” minority which, given its small numbers, is in a precarious state. Given that Gaelic is not spoken as a community language anywhere else, it could be argued that the UK has a special duty to its Gaelic-speaking population. Furthermore, on 2 March 2000, the UK signed the Minority Languages Charter which, as already noted, provides for special measures of support to such “traditional” or “autochthonous” linguistic communities but excludes so-called “immigrant” languages. Finally, it could be argued that the UK facilitated the decline of this linguistic group through its State policies, and therefore owes this community a special duty.
If, on the other hand, language rights are based on a universal right to maintain and develop a cultural identity, there is no intrinsic reason for favouring “traditional” minorities over more recently arrived immigrant groups.\textsuperscript{52} Significantly, the Human Rights Committee did not make reference to the relative length of historical linkage that the two religious minority communities had with Canada as a relevant basis for distinguishing between groups. And if considerations such as numbers and concentrations of speakers and vitality of the linguistic community are relevant criteria for making distinctions between minorities, Urdu-speakers, who tend to be concentrated in closely-knit urban communities, may have a stronger claim for certain positive measures of support than Gaels, a significant number of whom live in scattered and isolated rural and island communities.

The Principle of Protection and Non-Assimilation

The recent minorities instruments go beyond the ICCPR and ECHR, however, by imposing obligations on States with respect to the protection of minorities, including linguistic minorities. These obligations could themselves be said to have a “negative” and “positive” aspect. The negative aspect is a guarantee of freedom from assimilation. Article 32 of the Copenhagen Declaration, for example, provides that “[p]ersons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will” (emphasis added).\textsuperscript{53} This language is echoed in Article 3(1) of the Minorities Protocol, as well as in Article 5(2) of the Framework Convention. Such provisions could be seen as a limited attempt to redress a gap in the UN Convention on the Prevention and Punishment of the Crime of Genocide of 1948, where it was decided not to include any provision which specifically addressed cultural genocide.\textsuperscript{54} Once again, though, of the foregoing provisions, only the Framework Convention contains binding legal obligations, and its guarantee of freedom from assimilation is somewhat clouded by the proviso that this

\textsuperscript{52} See Keller, supra, n.18, at 43.

\textsuperscript{53} In a sense, Article 27 of the ICCPR is a measure of this sort, as it provides that persons belonging to, \textit{inter alia}, linguistic minorities shall not be denied the right, in community with other members of their group, to use their language.

\textsuperscript{54} See, for example, Tabory, supra, n.31, at 174–5, Johannes Morsink, “Cultural Genocide, the Universal Declaration, and Minority Rights”, (1999) 21 Human Rights Quarterly 1009, Yoram Dinstein, “Collective Human Rights of Peoples and Minorities”, (1976) I.C.L.Q. 102, at 118, and Braen, supra, n.38, at 6. Dinstein notes that linguistic groups are not mentioned in the Genocide Convention, “probably due to the fact that such minorities do not usually face a danger to their physical survival”. Many linguistic minorities would likely be protected under the Genocide Convention as “national” or “ethnical” groups.
guarantee is “without prejudice to measures taken [by States] in pursuance of their general integration policy.” The explanatory report to the Framework Convention suggests that this is an “acknowledgement of the importance of social cohesion.” Strictly speaking, an integrationist policy towards minorities is not necessarily inconsistent with cultural and linguistic plurality. However, the borderline between integrationist and assimilationist policies is a murky one, at best.

The positive aspect is the obligation, which many of the recent minorities instruments impose on States, to protect minorities from violence and other forms of aggressive behaviour based on hatred. Thus, Article 6 of the Framework Convention, in addition to imposing the obligation on Parties to encourage a spirit of tolerance and intercultural dialogue, provides at paragraph 2 that “[t]he Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity” (emphasis added). Similar principles are set out more expansively in Article 40 of the Copenhagen Declaration.

Language and Basic Civil and Political Rights: The Right to a Fair Trial, Freedom of Expression, Freedom of Assembly and Association

A small number of the provisions of the ICCPR and the ECHR dealing with fundamental civil and political rights make reference to language. Article 5 of the ECHR, which guarantees, inter alia, freedom from arbitrary arrest and detention, provides in paragraph 2 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” (emphasis added). Article 6 of the ECHR, which generally guarantees the right to a fair trial, provides at subparagraph (3) that “[e]veryone...
charged with a criminal offence has the following minimum rights: (a) to be informed promptly, \textit{in a language which he understands} and in detail, of the nature and cause of the accusation against him; \ldots (e) to have the free assistance of an interpreter if he \textit{cannot understand or speak the language} used in court” (emphasis added).\footnote{60} There are essentially the same requirements in the parallel provisions of the ICCPR, set out in Article 14(3). Both the Article 5(2) and 6(3) provisions of the ECHR are reiterated in Article 10(3) of the Framework Convention. A major limitation with all of these provisions, however, is that the protection afforded only applies where the individual does not understand the language being employed and does not require the use of the victim’s language unless he understands no other; the bodies which oversee the ECHR and ICCPR have confirmed that these provisions do not permit a member of a linguistic minority to choose the language to be used.\footnote{61} Given that many speakers of minority languages are also able to speak the official language of their State, these provisions offer little practical support to speakers of such languages. This is, of course, not surprising, as these provisions are aimed at the right to procedural fairness rather than the protection of language. Still, it could be argued that the forced use of a second language, even in cases in which the speaker has reached a level of fluency, may, in the tension-filled atmosphere of the courtroom, have an adverse effect on the speaker, resulting in unfairness.

A further limitation is that the right to the use of a particular language in the courts is limited to the criminal courts. The various minorities instruments generally do not expand this right to cover the use of language in the civil courts, although Article 7(3) of the Minorities Protocol proposed a general right for national minorities “to use their mother tongue \ldots in proceedings before the courts and legal authorities”.\footnote{62} It has been suggested that the provision of a choice of language in legal proceedings of all kinds is in keeping with the fundamental guarantee of equality before courts and tribunals, set out in the first sentence of Article 14(1) of the ICCPR.\footnote{62}

There are other basic civil and political rights which have relevance to language, in that they protect freedom of expression\footnote{63} and freedom of peaceful assembly and association.\footnote{64} The Framework Convention also

\footnote{60} See Tabory, \textit{supra}, n.31, at 191–194.
\footnote{62} See the Oslo Recommendations, \textit{supra}, n.25, at para.18 of the explanatory report.
\footnote{63} Article 19, ICCPR, Article 10, ECHR.
\footnote{64} Articles 21 and 22, ICCPR, and Article 11, ECHR.
makes reference to these basic civil and political rights. The UN Human Rights Committee has indicated in its decision in *Ballantyne, Davidson and McIntyre v. Canada* that the guarantee of freedom of expression in Article 19 of the ICCPR protects not only the content of the communication, but also the linguistic form which it takes, with the result that prohibition on the use of a particular language in advertisements aimed at the general public offends the ICCPR. However, this very decision shows how the Article 19 guarantee can be a double-edged sword. The communication involved a successful challenge to provisions in Quebec’s *Charter of the French Language* which required that commercial signage appear only in French. Ironically, the impugned legislation was itself designed to protect and promote a minority language, in this case French; although it is spoken by a majority in Quebec, it is spoken by a minority in Canada as a whole.

The issue of the extent to which measures taken to protect or promote a linguistic minority should be permitted to encroach on the right to freedom of expression (or other freedoms) of speakers of majority languages is a challenging one. In *Ballantyne*, the Human Rights Committee used the concept of proportionality to resolve this issue; it considered whether the sign provisions in dispute were necessary to achieve a legitimate purpose. While, for example, the protection of the vulnerable position of the francophone minority in Canada was a legitimate purpose, the Committee found that it was not necessary to prohibit commercial advertising in English in order to accomplish this objective. Protection of French could be achieved in other ways that did not limit freedom of expression in fields such as trade; the law could, for example, have required the advertising to be in both French and English.

The recent minorities instruments contain provisions which generally guarantee to persons belonging to linguistic minorities the right to enjoy their own culture and to use their own language in private and public life, freely and without interference or any form of discrimination. Paragraph 63 of the explanatory report to the Framework Convention makes

65. Article 7 provides that “[t]he Parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion.” Article 9(1) expands on the freedom of expression by including a right of non-discriminatory access to the media, and Article 9(3) provides that “[t]he Parties shall not hinder the creation and the use of printed media by persons belonging to national minorities.” Article 11(2) reiterates the right to display in the minority language signs, inscriptions and other information of a private nature visible to the public.


68. See Article 2(1) of the UNGA Minorities Declaration, Article 3(2) of the Minorities Protocol to the ECHR, and Article 10(1) of the Framework Convention.
clear that the reference to the use of the minority language in “public life” is restricted to its use in public places or in the presence of others, and is not concerned with communications with public authorities or, presumably, the use of the minority language in official contexts. The obligation imposed on States under Article 17(2) of the Framework Convention “not to interfere with the right of persons belonging to national minorities to participate in the activities of non-governmental organisations, both at the national and international levels” is probably implicit in the rights to peaceful assembly and freedom of association. Paragraph 32(2) of the Copenhagen Declaration adds that persons belonging to national minorities have the right “to establish and maintain their own educational, cultural and religious institutions, organisations and associations, which can seek voluntary financial and other contributions as well as public assistance . . .”. While this would not guarantee funding, it would likely ensure, when combined with the principle of non-discrimination, that where the State does provide financial assistance to similar activities, linguistic minorities get an appropriate proportion thereof. These provisions are also likely to ensure the right of linguistic minorities to use their language in economic and commercial life in the private sector.

4. The Content of Minority Language Rights II: Regimes of Linguistic Promotion, or Language Rights as “Positive” Rights

As noted above, the recent minorities instruments have gone beyond a regime of linguistic tolerance and have recognised the importance of “positive” linguistic rights—rights which impose obligations on States to provide positive measures of support to speakers of minority languages. Indeed, the UN Human Rights Committee has indicated that even under Article 27 of the ICCPR, which merely provides that States shall not deny members of linguistic minorities the right to use their own language, “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 . . . in community with other members of the group”. There is growing recognition that the threat posed to such languages is due “at least as much to the inevitably standardising influence of modern civilisation and especially of the mass media as to an
unfriendly environment or a government policy of assimilation”.71 In this social context, the Minority Languages Charter recognises that a regime of linguistic tolerance is not, by itself, sufficient to meet the needs of minority linguistic communities, a point which is recognised explicitly in the explanatory report:

Having regard to the present weakness of some of the historical regional or minority languages of Europe, . . . the mere prohibition of discrimination against their users is not a sufficient safeguard. Special support which reflects the interests and wishes of the users of these languages is essential to their preservation and development.72

Thus, in Article 7(1), the Minority Languages Charter requires States to, among other things, take positive steps to meet “the need for resolute action to promote regional or minority languages in order to safeguard them”.

All of the recent minorities instruments support in principle this approach. For example, Article 1, para.1 of the UNGA Minorities Declaration provides in that “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity” (emphasis added). Furthermore, Article 1, para.2 provides that “States shall adopt appropriate legislative and other measures to achieve those ends.” The obligation to take measures to create favourable conditions for linguistic minorities to express their characteristics and develop their language is reiterated in Article 4(2). Article 33 of the Copenhagen Declaration contains a similar statement of obligation, as does Article 5(1) of the Framework Convention. Indeed, Article 4(2) of the Framework Convention explicitly recognises that effective equality requires more than simply non-discrimination, and that positive measures are also required. The recognition of the need for positive measures of State support is an important development; it seems to give legal expression to the concept of “difference aware” equality. Once again, though, only the Framework Convention, a regional instrument, creates binding obligations, and even these obligations are only subject to verification through a system of State reporting.

Educational Rights

Both minority language activists and linguists have placed considerable importance on the role of minority language education in language

71. The Minority Languages Charter, explanatory report, para.2.
72. Explanatory report, para.27.
minority language rights in international law.

While the recent minority instruments contain certain “positive” linguistic rights in this area, the guarantees are, at best, equivocal. They also illustrate an important limitation in a rights-based approach to language maintenance, even one which accepts the crucial importance of “positive” rights.

With regard to the provisions themselves, in addition to encouraging States to take measures to promote knowledge of the history, traditions, language and culture of minorities among the general population, these instruments impose an obligation on States to ensure that, “wherever possible”, members of linguistic minorities may have “adequate opportunities” to learn or have instruction in their mother tongue. The parallel provision in the Framework Convention contains a less conditional and less ambiguous statement of the same principle. Less clear, however, is how this right is to be delivered and the practical extent of the State obligation.

Article 32.2 of the Copenhagen Declaration provides that persons belonging to a national minority have the right to establish and maintain maintenance and revitalisation efforts. A recent OSCE report noted that

The fulfilment of the basic human right of persons belonging to national minorities to “use their language” (ICCPR, art. 27) naturally depends upon their ability to know the language. As stated in The Hague Recommendations, the right of persons belonging to national minorities to maintain their identity can only be fully realised if they acquire a proper knowledge of their mother tongue during the educational process. Although the oral aspect of the language may be passed on within a family, the written and literary aspects require the active commitment of educational institutions.

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75. OSCE Report, supra, n.26, at I (C) 1.
76. See, for example, Article 4(4) of the UNGA Minorities Declaration, Article 34 of the Copenhagen Declaration, and Article 12(1) of the Framework Convention. This is in keeping with Article 26(2) of the Universal Declaration of Human Rights, which provides that education shall “promote understanding, tolerance and friendship among all nations, racial or religious groups”. See also Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”), adopted by General Assembly resolution 2200 A (XXI) of 16 Dec. 1966, and which entered into force on 3 Jan. 1976, and Article 29(1)(c) and (d) of the 1989 UN Convention on the Rights of the Child.
77. See Article 4(3) of the UNGA Declaration on Minorities and Article 34 of the Copenhagen Declaration. See also Article 29(1)(c) of the UN Convention on the Rights of the Child, which provides that the education of the child shall be directed to “the development of respect for the child’s parents, his or her own cultural identity, language and values . . .”.

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their own educational institutions, for which they can seek private as well as public assistance, although the Article imposes no requirement on States to actually provide such assistance. Article 13(1) of the Framework Convention expresses essentially the same right, although Article 13(2) makes clear that this right does not imply any financial obligation on the State. At the end of the twentieth century, where universal public education is the norm, at least in developed States, the right to set up schools without any guarantee of State support is a hollow right at best, particularly in the context of minority language communities, which are often economically as well as linguistically weak and vulnerable.

Article 14 of the Framework Convention is even more troubling. Paragraph 1 thereof asserts the right of every person belonging to a national minority to learn his or her minority language. Paragraph 74 of the explanatory report amplifies this, stating that this right “concerns one of the principal means by which [members of a linguistic minority] can assert and preserve their identity.” The paragraph adds that “[t]here can be no exceptions to this.” Yet, it is again unclear how this right is to be realised, as the same note goes on to add that paragraph 1 of Article 14 “does not imply positive action, notably of a financial nature, on the part of the State.” Paragraph 2 of the Article seems to impose a special obligation to provide “adequate opportunities” to members of national minorities to be taught the minority language or to receive instruction in this language. The former seems to imply language classes in the minority language in the broader context of majority language education, while the latter seems to suggest full minority language-medium education. Paragraph 77 of the explanatory report acknowledges that the Article does not impose any obligation on the State to do both, with the result that the State may satisfy its obligations by providing less than full minority language-medium education.

However, the right set out in Article 14(2) is subject to other important qualifications. First, it applies only in areas inhabited by persons belonging to the national minority “traditionally” or “in substantial numbers”. Significantly though, Article 16 of the Framework Convention attempts to prevent States from avoiding their obligations under this and other similar provisions by providing that States are prohibited from making deliberate changes to the demographic composition of a region in which a minority is settled (by gerrymandering or otherwise).

78. See also Article 13(3) of the ICESCR. This provision requires States Parties to have respect for the liberty of parents to choose for their children schools other than those established by the public authorities in order to ensure the religious and moral education of their children in conformity with their own convictions. As no reference is made to linguistic or cultural education, this provision seems to be considerably narrower than those in the recent minorities instruments.

79. See, also, Article 5 of the Minorities Protocol.
which is to the detriment of the minority or its rights. Second, even in the areas where the language is spoken “traditionally” or “in significant numbers”, the right applies only where there is “sufficient demand”. There is no indication of how sufficiency of demand is to be determined; presumably it is up to the State itself, because paragraph 75 in the explanatory report makes the point that the Article was drafted to give States “a wide measure of discretion”, and paragraph 76 implies that the determination is to be made by the State alone. Third, even where there is sufficient demand, States are only required to “endeavour to ensure, as far as possible and within the framework of their education systems” that the right is provided (emphasis added). Again, paragraph 75 in the explanatory report expresses sympathy with States for the “possible financial, administrative and technical difficulties associated with instruction of or in minority languages”, and that such provision can only be “dependent on the available resources” of the State concerned.

In short, the conditions which have been attached to this positive obligation fundamentally compromise its effectiveness. By contrast, Article 8(1) of the Minorities Protocol to the ECHR contained a much less ambiguous statement of the right to minority language education. This article provided that “[e]very person belonging to a national minority shall have the right to learn his/her mother tongue and to receive an education in his/her mother tongue at an appropriate number of schools and of State educational and training establishments, located in accordance with the geographical distribution of the minority.” As noted, however, the Minority Protocol was never adopted by the Committee of Ministers of the Council of Europe, and therefore creates no binding international legal obligation.80

Even a clearer State obligation with respect to minority language education would not, however, address one of the most fundamental problems, namely, the role of the minority language community in the design and control of such education.81 This, indeed, is a major problem with many of the “positive” rights relating to essential services of a broadly cultural nature, such as education and broadcasting. The assumption behind these “positive” obligations is that if the State is simply required to provide these services through the minority language, all problems will be resolved. However, linguists recognise that the content of curriculum or of broadcast programming, the incentive structures in the delivery of such services, including promotion and other rewards, and other similar design and implementation issues can have a profound effect on the success of such measures in protecting the

80. See supra, n.43.
81. This is discussed further below: “The Right of Linguistic Minorities to Participate in Decisions which Affect Them”.
language community.82 Even if State obligations with respect to the provision of these minority language services were not so hedged with conditions and exceptions, the unilateral control by the State, and by implication the majority language community, of the power to make fundamental decisions about the structure of the service would still pose fundamental problems.

In this and other areas, the Minority Languages Charter has significantly broadened and deepened our understanding of the sorts of measures of positive support which States may employ. In particular, Part III of the Charter sets out detailed measures of linguistic support in 65 different paragraphs and subparagraphs in seven separate Articles, each devoted to a major policy area: Education (Article 8), Judicial authorities (Article 9), Administrative authorities and public services (Article 10), Media (Article 11), Cultural activities and facilities (Article 12), Economic and social life (Article 13), and Transfrontier exchanges (Article 14). With respect to education, for example, the charter contains a wide range of provisions with respect to both the teaching of and the teaching through the medium of the regional or minority language at the pre-school, primary, secondary and tertiary levels, as well as the training of teachers and the monitoring of performance. All of the Part III obligations are, however, subject to many of the same qualifications as the provisions in the various recent minorities instruments, in particular, the test of demand sufficiency as a precondition to the creation of any State obligation. For example, the obligation to provide services under the various articles in Part III of the Minority Languages Charter is generally limited to those geographic areas within the State “in which the number of residents using the regional or minority language justifies the measures”,83 or to “within the territories [within the State] in which [regional or minority] languages are used”.84 Article 1, paragraph b defines the phrase “territory in which the regional or minority language is used” as “the geographical area in which the said language is the mode of expression of a number of people justifying the adoption of the various protective and promotional measures provided for in the Charter”. Thus, both of these formulae essentially link any State obligation to numerical criteria. Even in such areas, the provision of specific minority language services is further limited to cases where there is sufficient demand for that particular service. As is the case in the various recent minorities instruments, these restrictions are essentially a reflection of State concerns about both potentially open-ended spending commitments and

82. See, for example, Fishman, supra, n.58, at 98–114.
83. See, for example, Art.9, para.1, and Art.10, paras.1 and 2.
84. See, for example, Art.8, para.1, Art.10, para.3, Art.11, para.1, Art.12, para.1, and Art.13, para.2.
potential shortages of minority language speakers to provide such services if the obligation to provide such services was absolute. However, as was already noted, they are inconsistent with the notion that minority language rights are fundamental rights.85

A second major qualification with respect to the Minority Languages Charter is that it gives States a wide discretion in the choice of positive measures of support which they are obliged to implement under Part III. States need only specify measures in 35 of the 65 paragraphs and subparagraphs in Part III, and since the detailed measures range from the relatively weak to the quite strong, there is no guarantee that States will assume those obligations which are necessary and appropriate for the regional or minority language in question.86 If the intended progressive ratchet effect works, it may first extend protection after the demise of some minority languages.

The Right to Use a Minority Language in Official Contexts

There are a number of provisions in the recent minorities instruments which deal with the right to use a minority language in official contexts. Such a right ensures that linguistic minorities may be able to understand governmental policies which affect them, express their views on such policies, and generally to become more active in the civic life of the State.87 Article 10(2) of the Framework Convention provides that

[I]n areas inhabited by persons belonging to national minorities tradition-ally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrat-ive authorities.

This echoes and to some extent expands upon the principle set out in Article 34 of the Copenhagen Declaration. Article 10(2) suffers from many of the same fundamental weaknesses as the provisions in the Framework Convention on education: the right is territorially limited, and in any case only requires of the State to “endeavour” to fulfill the demand “as far as possible”. Paragraph 64 of the explanatory report justifies this “wide measure of discretion” given to States “in recognition of possible financial, administrative, in particular in the military field, and technical difficulties” associated with minority language use in official contexts such as these. The note specifically provides that the financial resources of the State may be taken into consideration here. States are

85. See also The European Social Charter (revised) ETS No. 163.
86. See Dunbar (2000) and Dunbar (1999), supra, n.35.
87. OSCE Report, supra, n.26, at para. IV (B) 1.
apparently concerned that it may be difficult to recruit civil servants who speak the minority language. Yet, strangely, the discretion itself allows States to avoid taking the very measures necessary to redress such shortages. Finally, Article 10(2) makes the provision of the right contingent on need, rather than demand: it provides that speakers of minority languages must themselves request the minority language service, and this request must “correspond to real need”. Paragraph 65 of the explanatory report makes clear that the State alone will assess this need, but that it is to apply unspecified “objective criteria”. This condition is potentially more limiting than demand contingency; if, for example, there is considerable demand, but those requesting the services are fully bilingual, is there any “real need”? A more effective provision from the point of view of language maintenance and revitalisation would require the need to be assessed primarily on the requirements of the minority language community in its efforts at language maintenance and revitalisation, as determined by it or with its significant input.

Article 7(3) of the Minorities Protocol to the ECHR provided a much clearer expression of the right of the minority language community to the use of its mother tongue in contacts with the authorities. Significantly, it is the only provision which extended this right to proceedings before the courts and legal authorities, thereby addressing the shortcomings of the ICCPR and ECHR provisions described in section 3 of this paper.

In this area as well, the Minority Languages Charter significantly deepens our understanding of the sorts of positive measures of support which States may undertake. In Article 9, “Judicial Authorities”, the charter contains detailed provisions with respect to the use of regional or minority languages in the civil and criminal courts and before administrative tribunals, with regard to the legal effectiveness of a range of documents in the regional or minority language, and in relation to the dissemination of important legal texts through the medium of such a language. In Article 10, “Administrative authorities and public services”, the charter contains a wide range of provisions with respect to the use of the regional or minority language by the public in dealing with public bodies, and with respect to the use of the language in the internal operation of such bodies. These obligations are, however, subject to the same limitations described above.

The Right to Use the Minority Language in Personal and Place Names

Article 11(1) of the Framework Convention provides that members of national minorities have the right to use their surnames and first names in the minority language, and that they have the right to official recognition
of these forms of their names. Article 11(2) provides that members of national minorities also have the right to display in their minority language signs, inscriptions and other information of a private nature visible to the public. Para. 69 of the explanatory note makes clear, however, that the State may be entitled to require that such signage also appear in the official language and/or other minority languages. It should be noted that freedom of expression is itself limited where restrictions are provided by law and are necessary for the protection of national security or of public order, or of public health or morals. Thus, the State could require the use of the official or other language, in addition to the minority language, in the furtherance of workplace health and safety, consumer protection, and product labelling requirements. Article 11(3) of the Framework Convention also requires States to display traditional local names, street names and topographical indications intended for the public in both the minority language and the majority or official language. However, this obligation is limited geographically to those areas “traditionally inhabited by substantial numbers” of minority language speakers, is conditional on there being “sufficient demand”, and is aspirational, as it requires only that States “endeavour” to meet the obligation.

Access to Media

The pervasive presence of modern communications media and their profound impact on both patterns of language use and language maintenance efforts cannot be overstated. Yet the importance of media is by and large not reflected in most of the recent minorities instruments. As noted above, Article 19(2) of the ICCPR provides that the right to freedom of expression includes the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”. Article 9(1) of the Framework Convention ensures that this freedom shall be enjoyed by members of a national minority through the medium of the minority language.

88. Article 7(2) of the Minorities Protocol to the ECHR contained similar guarantees. It is likely that this right is implicit in one’s right to privacy. In Coeriel and Aurik v. The Netherlands, the Human Rights Committee found that a person’s surname constitutes an important component of one’s identity and that the protection against arbitrary or unlawful interference with one’s privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one’s own name: para. 10.2, Communication No. 453/1991, CCPR/C/SZ/D/453/1991.
89. See, for example, Article 19(3) of the ICCPR, Article 10(2) of the ECHR.
90. See Oslo Recommendations, supra, n.25, at para.12, explanatory note.
91. Article 7(4) of the Minorities Protocol to the ECHR contained a similar obligation, though it was not limited by the existence of sufficient demand.
92. See, also, Article 10(1), ECHR.
Article 9(3) of the Framework Convention requires States to ensure, as far as possible, that members of national minorities have the possibility of creating and using their own radio and television broadcasting media. No obligation is imposed on States actually to fund such efforts, although Article 9(1) provides that members of national minorities shall not be discriminated against in their access to the media and Article 9(4) does provide that States “shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities”. Given the cost of television broadcasting, in particular, the absence of a clear State obligation to provide funding is a fundamental shortcoming. It has been argued that Article 9(4) of the Framework Convention does imply that a national minority consisting of “a substantial number of members” should be given access to its “fair share” of public radio and/or television broadcasting time, at “reasonable times of the day”.

While this is an enlightened interpretation of the Article 9(4) requirement, it may overstate the extent of State obligation. In particular, the phrase “adequate measures” in Article 9(4) may be intended to limit the extent of the State obligation, as paras. 62 and 39 of the explanatory report indicate that such measures need to be “adequate” “in order to avoid violation of the rights of others as well as discrimination against others”, and that they “do not extend . . . beyond what is necessary in order to achieve the aim of full and effective equality”. And while the explanatory note to The Oslo Recommendations Regarding the Linguistic Rights of National Minorities (the “Oslo Recommendations”), prepared under the auspices of the Foundation on Inter-Ethnic Relations for the OSCE High Commissioner on National Minorities, suggests that “[m]echanisms should be put in place to ensure that the public media programming developed by or on behalf of national minorities reflects the interests and desires of the community’s members and is seen by them as independent”, there is no legal obligation in any of the minorities instruments to this effect.

Article 11 of the Minority Languages Charter, by contrast, offers a choice of measures with respect to both radio and television broadcasting, which range from the creation of a dedicated station or channel for a regional or minority language to the provision of air-time for broadcasting in such languages on majority language media outlets. Like the other Part III Charter provisions, however, these suffer from a number of the same limitations described above.

93. The Oslo Recommendations, supra, n.25, at para.9, explanatory report,
Cross-border Communication

A number of provisions in the various recent minority instruments provide for a limited right to cross-border communication, primarily to foster contacts with other minority groups or members of the same minority group in other States.95

The Right of Linguistic Minorities to Participate in Decisions which Affect Them

The importance of minority language community involvement in the design and implementation of policies affecting them was discussed above, in the context of minority language education. The recent minorities instruments do make some attempt to address this crucial issue. For example, both Article 2(3) of the UNGA Minorities Declaration and Articles 33 and 35 of the Copenhagen Declaration provide that persons belonging to linguistic minorities have the right to participate effectively, both nationally and regionally, in decisions which affect their language community. Article 5(1) of the UNGA Minorities Declaration also requires that national policies and programmes be planned and implemented with due regard for the legitimate interests of linguistic and other minorities. Article 35 of the Copenhagen Declaration “notes” efforts of certain States to protect and promote minority linguistic identity by establishing appropriate local or autonomous administrations for such minorities, but does not create any obligation for States to establish such autonomy; by contrast, Article 11 of the Minorities Protocol did establish a right to a measure of autonomy for minorities “in regions where they are in the majority”, and in Article 13 provided protection to members of the majority who thereby themselves become a minority. Of course, none of these provisions create binding obligations under international law.

The one binding obligation, in Article 15 of the Framework Convention, is by comparison very vague, requiring only that States “create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them”. The explanatory note suggests, for example, that States could meet this obligation by promoting “consultation” with persons belonging to national minorities when States “are contemplating legislation or administrative measures likely to affect them directly”, and “involving these persons in the preparation,

95. See, for example, Article 2(4) of the UNGA Minorities Declaration, Article 32.4 of the Copenhagen Declaration, Article 10 of the Minorities Protocol to the ECHR, several places in the Framework Convention, but in particular, Article 17(1), and Article 14 of the Minority Languages Charter.
implementation and assessment of national and regional development plans and programs likely to affect them directly." Presumably, this weak obligation is not engaged with respect to measures which affect the minorities only indirectly. And while the note suggests that persons belonging to national minorities should be entitled to “effective participation” in “the decision-making processes and elected bodies both at national and local levels,” this also does not guarantee their effective participation in, to say nothing of their control over, decisions on matters which directly or indirectly affect them.

Even the Minority Languages Charter imposes no significant requirement to involve the regional or minority language community in the decision-making and linguistic planning process. Article 7(4) only requires that in determining their policies, States take into consideration the needs and wishes expressed by such communities, and encourages States to set up bodies to advise authorities on all matters pertaining to regional or minority languages.

**Limits on the Rights of Linguistic Minorities**

Finally, it should be noted that all of the recent minorities instruments impose limits on the positive rights conferred on linguistic minorities. Essentially, some provide that the exercise of the positive rights shall not impinge on the basic civil and political rights of others. Also, they take pains to ensure that the provision of positive measures of support shall not in any way compromise the territorial integrity and political unity of the State. These latter provisions are, of course, motivated by the concern that minority issues should not be used to advance secessionist or irredentist causes.

Since these recent minorities instruments create positive rights for minorities, there is the possibility that majorities could argue that measures taken in support of these rights themselves violate the fundamental principle of non-discrimination, described above in part 3 of this paper. Given that these rights do not create special privileges for linguistic minorities, but only try to provide them with access to the same linguistic rights and privileges as the majority enjoy, such arguments are

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96. Para.80.
97. Ibid.
98. One of the optional Part III measures with respect to Media is that States undertake to ensure that the interests of users of regional or minority languages are represented or taken into account by bodies responsible for “guaranteeing the freedom and pluralism of the media”.
99. See Article 8(1) of the UNGA Declaration on Minorities, and Article 20 of the Framework Convention.
100. Article 8(4) of the UNGA Declaration on Minorities, Article 37 of the Copenhagen Declaration, Article 14 of the Minorities Protocol to the ECHR, and Article 21 of the Framework Convention.
not convincing. However, for greater certainty, Article 8(3) of the UNGA Declaration on Minorities\textsuperscript{101} makes clear that measures taken by States to ensure enjoyment of minority language rights shall not \textit{prima facie} be considered to be discriminatory.

5. Conclusions

While it is clear that international law, and in particular international human rights law, provides for a range of language rights, some of which may be of considerable importance to speakers of minority languages in certain, rather limited, circumstances, it is also clear that the present provision falls well short of a comprehensive and coherent package. The major human rights treaties such as the ICCPR and the ECHR, based as they are on the classic liberal civil and political rights, provide for certain "negative" language rights—most importantly, a right to non-discrimination based on language—which may be of some real use to those linguistic minorities faced with repressive, assimilationist State policies. However, as the explanatory report to the Minority Languages Charter acknowledges, the nature of the threat to many minority languages today is from more subtle pressures, some of which are the result of non-State actions and processes.

Thus, speakers of minority languages have had to look to the State for positive measures of support. Since 1990, there has developed a growing range of international instruments relative to minority rights which have sought to respond to this need. Yet, it cannot be said that, even under these various instruments, language rights have been given the status of fundamental rights under international law. First, there is the rather patchwork nature of the support provided. Many of the most useful measures of positive support have not attained the status of binding international legal principles. Second, there is the limited nature of the rights themselves. In many cases, particularly with respect to fundamental services such as education, the rights provided are subject to a range of conditions, such as sufficient levels of demand, demonstrated "real need", and the administrative and financial convenience of States themselves, all of which tend to significantly weaken these rights. Indeed, the Minority Languages Charter takes pains to insist that it confers no individual or collective rights at all. Not all languages are protected; generally, only those which are spoken by a "minority" or a "national minority" qualify. Third, almost all of the positive rights and State obligations are essentially unenforceable, either because, once again, the instrument is not legally binding under international law, or because the instrument creates no real means of enforcement such as a right of individual petition or complaint

\textsuperscript{101} See, also, Article 12(2) of the Minorities Protocol to the ECHR.
to an international body; indeed, only Article 27, together with the other rights in the ICCPR and ECHR, are capable of being litigated before such bodies.

Finally, and perhaps most fundamentally, even the positive rights are provided in such a way that a one-sided reliance on government is created, with limited community control and input into the process of language planning and policy design and implementation. The narrow focus on government obligations obscures extremely important questions about the manner in which minority language services are conceived and developed. There needs to be greater focus on process rather than outcome. Nonetheless, the Minorities Language Charter has placed the focus on language maintenance and revitalisation, and this is an important development, even though this charter perpetuates many of the existing problems and limitations.