Name: Mohamed Paleker

Student Number: PLKMOH 001

Degree: Master of Laws (LLM)

Supervisor: Dr E Fagan

Date: 15 September 1996

Title: **The International Protection of Language Rights.**

Research dissertation presented for the approval of the Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

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Language is a perpetual Orphic
song,
Which rules with Daedal
harmony a throng
Of thoughts and forms, which
else senseless and shapeless
were.
PB SHELLEY: *Prometheus*
Unbound IV (1820)

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CHAPTER I

INTRODUCTION

We infer the spirit of the nation in great measure from the language, which is a sort of monument to which each forcible individual in the course of many a hundred years has contributed a stone.
RW EMERSON: *Nominalist and Realist* (1841).

Speakers of more than six thousand languages are not entitled to education, nor to the administration of justice or public services through the medium of their mother tongue(s)[1]. This statement is true of most indigenous *language minorities* and universally of *migrant, immigrant or refugee minorities*[2]. Many minority language groups are punished for speaking their mother tongue, both physically[3] as well as psychologically[4] and economically[5].

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* I am unable to find the full reference for the following article: "Claims for Freedom from Discrimination in the Choice of Language". The Article appears as a Chapter in a general text on human rights.

[1] It is possible to have at least two mother tongues. Hence any reference to mother tongue, in this essay, should be read both in the singular and plural: see Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 107. See also discussion at page 25 *post.*

[2] In this essay I shall argue that the term "minorities" for the purposes of language rights does not necessarily mean "cultural minorities". Often persons of a *language minority group*, subjected to language discrimination, do not share the same cultural back ground. For further discussion on this point see page 24 *post.*

[3] Communal conflicts are generated or exacerbated by language conflicts. People become the targets of mob violence. The intensity of linguistic antagonism was demonstrated in India during the `[c]onvulsive agitation' for the formation of linguistic states during 1952-1956. During the conflicts hundreds of people lost their lives in fierce rioting between different language communities: see D Bayley (1964) *Public Liberties in the New States* 96.

[4] According to Patanayak English is seen in India as one of the major symbols of "Indian intellectual slavery": see Patanayak "Language, Politics, Region, Formation, and Regional Planning" as cited in Tove Skutnabb, Kangas, Robert Phillipson "Linguicism: A Tool for Analysing Linguistic Inequality and Promoting Linguistic Human Rights" (1990) 2 (2) *International Journal for Group Tensions* 109 at 112.

[5] Tove Skutnabb, Kangas "Violence and Minority Education" (1984) *Bilingualism or Not: The Education of Minorities* as cited in Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 72.

While the overwhelming majority of *minority language groups* remain at the cutting edge of linguistic discrimination, some *national and regional minorities* (e.g. in Belgium, Canada, Finland, India, and Switzerland) by contrast, are empowered to exercise at least some of their basic linguistic rights[6].

One of the most common human experiences has been living in diverse societies. For most of history, multilingual societies have been the rule rather than the exception[7]. In the modern World the same picture presents itself. Nations like China, India, the Soviet Union, Nigeria and Indonesia but to mention a few, are examples of diverse multilingual societies that include speakers of not five or ten different languages, but in some cases fifty or a hundred languages, and not small numbers of speakers, but rather millions. Boldly stated: Linguistic diversity seems to be `[t]he normal human experience'[8].

The rise of international human rights with its focus on both individual and collective rights has highlighted the reality of and problems facing multilingual societies. This realisation has *politicised* linguistic diversity. Where language is used to obstruct access to jobs, education, progress, and power, it becomes *politicised* and a sure source of conflict. The struggle of the French-speaking Canadians is a glaring reminder of a politicised language struggle, marked by two

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[6] Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71.

[7] All major historic states and empires were multilingual. Egypt, Persia, China, Babylon were all multilingual societies. Even the Roman Empire was a multilingual society with subjects speaking Italian, Greek, Basque, Semitic, Slavic, and German. Major medieval and early modern states were also multilingual. The Ottoman Empire, Russian, Austrian Empires are all examples of states where the minority of their subjects could actually speak the official language of the respective empires. The same could be said of the Napoleonic, Abysinnian, Beninian and Mogul Empires not to mention the Aztec and Inca Empires: see GR Guy "International Perspectives on Linguistic Diversity and Language Rights" (1989) 13(1) *Language Problems and Language Planning* 44.

[8] GR Guy "International Perspectives on Linguistic Diversity and Language Rights" (1989) 13(1) *Language Problems and Language Planning* 44.

hundred years of discrimination, which resulted in social conflict that to this day remains unresolved[9]. The continuing politicisation of language in Bulgaria, Hungary, Nigeria, and Singapore is justification enough why the study and protection of linguistic rights is of such importance.

One cannot ignore the parallel between language and other social differences, such as race and religion, that have traditionally divided people. Human rights law has sought to eradicate racial and religious differences by entrenching basic individual human rights and, on a more cosmopolitan level, by protecting minority rights[10]. Bearing this in mind, should the logical conclusion not be the protection of linguistic rights, which, though rooted in these (racial and religious) social differences I would argue, have a substantive content, justifying their protection under international human rights law as substantive human rights. In fact Tove *et al* go so far as to claim that depriving individuals or groups of linguistic human rights reflects `[a] sophisticated contemporary form of racism, namely linguicism[11].

The fact that provisions which protect citizens against linguistic discrimination appear in approximately one third of the world's constitutions[12] and the fact that language policy legislation in many states provides protection to both *positive* and *negative* linguistic rights, although suggesting the growing international recognition of language rights, are in my opinion not enough. National language policies seek to protect local languages by declaring some languages official languages. Speakers of non-official languages are often the

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[9] GR Guy "International Perspectives on Linguistic Diversity and Language Rights" (1989) 13(1) *Language Problems and Language Planning* 44 at 52.

[10] GR Guy "International Perspectives on Linguistic Diversity and Language Rights" (1989) 13(1) *Language Problems and Language Planning* 44 at 52.

[11] Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71.

[12] Albert P Blaustein, Dana Blaustein Epstein (1986) *Resolving Language Conflicts: A Study of the World's Constitutions* 6 *et seq.*

targets of *language wrongs*[13]. More often than not, they are confronted with the following language option: either "to adapt or die".

At the international level, language rights should seek principally to guarantee a *secure linguistic environment*[14]. Such an *environment* must be achieved by firstly, *positively* guaranteeing the protection of the "status" of languages, so that all languages (and hence their speakers) are essentially equal. Secondly, "rights relating to language" must be protected and guaranteed. In achieving this aim language rights may be perceived by making use of two different approaches[15]. The first approach, which perceives language rights as being *positive* in nature, seek to define language rights to include the *right* to use one's own language in the course of one's personal human experience[16]. Provisions for positive equality require states to grant nationals, using a language other than the official language, the right to State sponsored mother tongue education for children; the right `[t]o hold meetings and to enjoy cultural activities in a language easily understood'[17]. It also includes the right `[t]o use one's own language to put out all forms of publications, including newspapers, journals and books and to broadcast radio and television programmes. Within the judicial system, language rights involve informing a person of the charges that has been brought against him in a language which he understands, and

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[13] "Linguistic wrongs" `[o]ccur when languages are marginalised and deprived of resources or recognition, when language shift is imposed on individuals and groups'. Language shift occurs when linguistic minority groups are assimilated into the dominant language and culture: see Robert Phillipson, Tove Skutnabb, Kangas "Linguistic Rights And Wrongs" (1995) 16(4) *Applied Linguistics* 483 at 484.

[14] for a discussion of what this term means see pages 20, 94 *post*.

[15] *Minority Schools in Albania Case* (1935) P.C.I.J., (Ser A/B) No. 64 at 17.

[16] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 516.

[17] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 516.

making adequate provisions for a defendant to follow all aspects of his trial, including the evidence of witnesses and the verdict'[18]. Finally, in administrative procedures with the government, linguistic groups must be accommodated to facilitate, easier correspondence with government institutions, to file forms and to be informed of the official regulations and activities in their own language. As an absolute or fundamental human right, the right to language may exist either as an individual human right, independent of any external or group context, or as a collective right[19]. It is common that the protection of language rights in this form can impose great administrative demands and financial burdens upon a state. Hence, `[t]his has traditionally been the disfavoured definition of language rights'[20]. Proponents for the enforcement of "positive" language rights argue that linguistic rights becomes highly significant depending on the context in which it is invoked. For example `[t]he *privilege* of utilising one's own language in the courts becomes a *fundamental human right* in the context where a substantial minority group wish to speak their own language' [My emphasis][21].

The second approach, `[c]ontemplates the protection of linguistic rights not only where language forms the basis of a distinct cultural group, but also in instances of individual assertion of linguistic rights'[22].

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[18] M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167.

[19] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 516.

[20] While most national and regional instruments have incorporated non-discrimination clauses, very few have actually sought to protect positive language rights: see JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 516.

[21] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 516.

[22] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 516.

This form of linguistic protection, classified as being "negative" in nature, secures freedom from both individual and group discrimination, but provides no "positive" grantees like the *right to use ones own language*. This negative protection operates under the umbrella guarantee of non-discrimination[23]. This form of protection seeks to ensure that minorities do not receive worse treatment than that of the other nationals of a state. It aims to eliminate all deprivations imposed upon the individual solely because she is a member of a group identified by a particular language[24].

The ambition of this essay is to argue for the recognition of language rights in international law as substantive, fundamental and inalienable human rights.

One of the major problems with language rights, and which has caused language rights to be viewed with great suspicion, turns around the question of *conceptualising* language rights. Here the common adage comes to mind: *We are often scared to venture into the unknown.* In consideration of these uncertainties, in Chapter II of this essay, I shall, as far as language rights are concerned, discuss some of the conceptual problems confronting the human rights lawyer. More specifically, I will define "language" for the purposes of language rights.

Chapter III of this essay, is dedicated to the survey of current international law. Here I shall show why language rights cannot be accommodated under the existing scheme of international law.

A common misconception in human rights law is that, those rights which are not adequately protected under international law do receive adequate protection when considered in conjunction with other entrenched fundamental rights. In Chapter IV of this essay, I shall

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[23] on the basis of language.

[24] M S McDougal et al (1980) *Human Rights and World Public Order: The Basic Policies of an International Law of Dignity* 713.

take a single right, the right to freedom of expression, and on a case study basis, I shall discuss how this right has been interpreted by international and national courts in so far as the right to freedom of expression impacts upon language rights. I shall indicate how restrictive interpretations placed upon fundamental rights often make it difficult to extend the content of such rights into the realm of the unprotected rights.

Lastly, in Chapter V of this essay, I will canvass the idea of an international declaration dedicated to the protection of language rights. Here I will look at some of the essential provisions that such an instrument should entrench.

CHAPTER II

SOME IMPORTANT PROBLEMS AND DISTINCTIONS IN ANALYSING, FORMULATING AND IMPLEMENTING LINGUISTIC HUMAN RIGHTS

> Language is no artificial product, contained in books and dictionaries and governed by the strict rules of impersonal grammarians. It is the living expression of the mind and spirit of a people, ever changing and shifting, whose sole standard of correctness is custom and the common usage of the community.
> A.H SAYCE: *Introduction to the Science of Language II* (1879).

A positive claim to language rights raises, a range of conceptual questions:

a) Do language rights exist?

b) How should language rights be classified, i.e. are language rights collective rights or individual rights?

c) What position do language rights occupy in the hierarchy of rights, assuming that hierarchies of rights exist?

d) What is the relationship between language rights and minority rights?

e) What constitutes "language" for the purposes of language rights?

f) Do dialects and variations of language count as "language" worthy of protection under a regime of linguistic rights?

It is imperative that these questions be addressed, as many of the misconceptions and suspicions concerning linguistic rights owe their existence to these questions, which represent, as it were, the grey areas in the linguistic rights debate.

Although each of the aforesaid questions will be dealt with in turn, I would like to note, that due to the complex nature of these questions it is difficult to discuss the issues raised in the order and in the categories cited, for in many respects these issues are tied to each other.

Do language rights exist?

It is common knowledge that under the international human rights regime a substantive right to language does not exist[25]. Consequently, no international instrument refers to the "right to language" or "linguistic rights". Neither is there an international instrument dedicated solely to the protection and promotion of language rights. However, these circumstances should not be interpreted to mean that linguistic rights are foreign to the human rights regime. The majority of the post-World War II human rights instruments mention language as a possible ground of discrimination[26]. However, the so-called *non-discrimination clauses*, which aim to eliminate all deprivations imposed upon individuals solely because such individuals are members of a group identified by a particular language, are couched in negative terms . One would be hard-pressed to interpret these provisions as entrenching some sort of direct promotion of and protection for language rights.

International tribunals too have identified language as a basis of discrimination. The Permanent Court of International Justice in the often quoted *Belgian Linguistics Case*[27] concluded that Section 7(3) of the Belgian Act of 2 August 1963 violated Article 14 of the **European Convention of Human Rights and Fundamental Freedoms (1950) (ECHR)** in that it was discriminatory. In casu, the Belgian Act prevented French children, solely on the basis of the residence of their parents, from

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[25] M Tabory "Language Rights as Human Rights (1980) 10 *Israel Yearbook on Human Rights* 167 at 173.

[26] United Nations Charter per Articles: 1(3), 13(1)(b), 55(c), 76(c); Universal Declaration of Human Rights per *inter alia* Articles: 2, 7; International Covenant of Civil and Political Rights per Article: 2(1); International Covenant of Economic, Social and Cultural Rights per Article: 2(2); The European Convention on Human Rights per Article: 14; American Convention on Human Rights per Article: 1; African Charter of Human and Peoples Rights per Article: 2.
The provisions of these instruments will be discussed in greater detail later, in Chapter III of this essay.

[27] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 1 Eur.Ct.H.R. 1967 (ser.B) 305.

having access to French language schools existing in six communes on the periphery of Brussels. However, Dutch-language schools in the six communes could accept all children, regardless of their language or parents' place of residence. The court concluded that the residence condition affecting only one of the two linguistic groups `[i]s not justified in the light of certain requirements of the Convention in that it involves elements of discriminatory treatment of certain individuals, *founded even more on language than on residence*'[28]. The court stated further that the rights and freedoms enumerated in the Convention `[s]hall be secured without discrimination on the ground inter alia of *language*'. The court took a cautious approach[29] towards the recognition of language rights and chose to interpret the existence of language rights within the interstices of the provisions of the Convention.

In more recent times, however, there has been a clear movement within the United Nations and the major regional human rights organisations towards the recognition of language rights. The United Nations-commissioned **Capotori Report** of 1979[30] spearheaded this movement by identifying the fundamental nature of language rights, especially in so far as language impacts upon "minority rights". The Report defined language rights to include the positive `[r]ight

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[28] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 1 Eur.Ct.H.R. 1967 (ser.B) 305.

[29] The `[r]estrictive interpretation of Article 14 adopted by the court suggests its reluctance to enforce positive linguistic rights through adjudication': see JP Gromacki: "The Protection Of Language Rights In International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 471 at 567. Although many scholars have expressed disagreement with the court's restrictive approach, the decision of the court has been consistently applied by the court in subsequent judgements.

[30] This Report was commissioned by the United Nations in 1971 and published in 1979.

granted to persons belonging to linguistic minorities to use their own language'[31].

In 1982 the European Parliament initiated the **European Bureau for Lesser Used Languages**, with the purpose of:

> `[p]romoting the languages and cultures of autochthonous minority groups of the member countries of the European Community'[32].

The European Parliament also passed two important resolutions on language rights, **Arfe** (1981) and **Kuijpers** (1987). The Arfe resolution[33] urged national and regional authorities to promote the use of minority languages in three main areas, education, mass communications, and public life and social affairs[34]. Specifically in the domain of education, States are urged:

> `-[t]o promote and take steps to ensure that the teaching of regional languages and cultures is included in official curricula right through from nursery school to university;
> - to provide, in response to needs expressed by the population, for teaching in schools at all levels and grades to be carried out in regional languages, with particular emphasis being placed on nursery school teaching so as to ensure that the child is able to speak its mother tongue;
> -to allow teaching of the literature and history of the communities concerned to be included in all curricula'[35].

These two resolutions were directly responsible for the adoption of the **European Charter for Regional and Minority Languages (1992)**[36].

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[31] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 At 542.

[32] Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 90.

[33] of 16 October 1981.

[34] Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 90.

[35] excerpted from the resolution, reproduced in the bulletin of the European Bureau for Lesser Used Languages: *Contact* 1 November 1983

[36]which was approved by the Committee of Ministers on 22 June 1922.

The preamble of the 1992 Charter provides that the `[r]ight to use a regional language in private and public life is an inalienable right'.

The **Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (1990)**[37] recognises a role for language rights and unequivocally states that:

> `[n]ational minorities should have the right to maintain their ethnic, cultural, *linguistic* or religious identity, the right to seek voluntary and public assistance to do so in educational institutions, *and should not be subjected to assimilation against their will*'[38].

The Preamble of the **United Nations Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**[39] provides:

> `[t]hat the promotion and protection of the rights of persons belonging to national or ethnic, religious and *linguistic* minorities contribute to the political and social stability of States in which they live.'

Article 4(1) prompts states actively to promote enjoyment of the rights entrenched:

> `[P]ersons belonging to ethnic, religious and *linguistic* minorities *have the right* to enjoy their own culture, to profess and practice their own religion, *and to use their own language,* in private and in public freely and without interference or any form of discrimination'.

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[37] The Conference on Security and Co-operation in Europe became from the late 1980's a major forum for East-West European links. The 35 participating states at the first Helsinki meeting in 1975 were: Albania, Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, USSR, United Kingdom, USA and Yugoslavia.

[38] Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 95

[39] adopted by the United Nations General Assembly on 18 December 1992.

The recent **United Nations Draft Universal Declaration on Indigenous Rights**[40] establishes as fundamental human rights that indigenous people have:

> `[9].The right to develop and promote their own languages, including an own literary language, and to learn them for administrative, juridical, cultural and other purposes.
>
> 10. The right to all forms of education, including in particular the right of children to have access to education in their own languages, and to establish, structure, conduct and control their own educational systems and institutions.
>
> 23. The (collective) right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous function'.

The fact that it has been Western governments that have been setting the human rights and in this case the language rights agenda, does not mean that language rights is a purely Western phenomenon. After independence, many former colonial states adopted vague human rights principles[41]. Initially language rights did not feature high on their human rights agendas with the result that the colonially imposed languages continued to flourish and indigenous languages remained unprotected against language assimilation. Recent political stabilisation prompted mainly by the move towards democracy has motivated many African states to consider protection for languages. However, developments have been slow[42].

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[40] E/CN.4/Sub.2/1988/25.

[41] The adoption of human rights norms was in most cases a pre-condition to aid from the West.

[42] The Cultural Charter for Africa, adopted in 1976 by many African States under the auspices of the OAU has not been implemented as yet. Similarly the OAU Language Plan for Africa, adopted in 1986, has not led to any wider use of indigenous languages.

All the same, this indicates a rapid global trend towards a substantive recognition of language rights.

Where do language rights fall in the hierarchy of human rights?

Despite the current trend towards an appreciation of human rights where human rights are regarded as `[i]ndivisible and presupposing each other, so that in principle there can be no hierarchy of human rights: they are implicitly equal'[43], in practice it seems that there are hierarchies of rights.

The most common distinction, to which this essay will limit itself, is that made between derogable and non-derogable rights[44]. Article 4 of the **International Covenant on Civil and Political Rights**, Article 15 of the **European Convention for the Protection of Human Rights and Fundamental Freedoms** , Art 30 of the 1961 **European Social Charter**, and Article 27 of the 1969 **American Convention on Human Rights** to mention a few, each in its own way provides that in "emergency" situations a State may take measures derogating from its obligations under these instruments[45]. Dinstein points out that there are generally two categories of non-derogable human rights not affected by war or

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[43] Tove Skutnabb, Kangas, Robert Phillipson "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 8.

[44] Derogations are permitted in times of extreme crisis, for example war or civil unrest.

[45] (to the extent that, as long as, the exigencies of the situation so demand), subject to the following conditions:

1. The measures are not inconsistent with the other obligations of the State under international law (this condition appears in all four instruments);
2. The measures do not involve discrimination on the grounds of race, colour, sex, language, religion or social origin (this condition is missing from the European Convention and Charter, and anyhow the implication is that discrimination is permitted on other grounds, like national origin or political opinion);
3. The existence of an emergency situation has been officially proclaimed (this condition is included only in the Covenant);
4. The state informs other Contracting Parties of the measures which it has taken and the reasons giving rise to them and further informs them when the measures are terminated, so that it once more fulfils the treaty provisions in their entirety (this condition is inserted in all four instruments): see Y Dinstein "The International Law of Civil Wars and Human Rights (1976) *6 Israel Yearbook on Human Rights* 62 at 70.

emergencies: (a) those human rights which persist despite crisis owing to their cardinal importance,[46] and (b) other human rights- due which to their marginal significance, are irrelevant to the crisis, and consequently their suspension is not justifiable[47]. Three of the four instruments (the one left out is the European Charter) enumerate human rights which are not to be suspended under any circumstances, even in time of war or emergency. All three list the following rights:

1. The right to life, except as pointed out by the European Convention in respect of deaths resulting from lawful acts of war.
2. Freedom from torture and degrading treatment.
3. Freedom from slavery.
4. Freedom from ex post facto criminal laws.

The Covenant and the American Convention add:

5. Freedom of Conscience.
6. Freedom of religion.
7. Right to recognition as a person before the law.

The Covenant alone adds:

8. Freedom of thought.
9. Right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation.

The American convention, for its part, adds other rights (in lieu of the last ones):

10. Right to marry and to found a family.
11. Right to a name.
12. Right of children to special protection.
13. Right to nationality.
14. Right to participate in government.

All fourteen of the aforementioned human rights provisions are considered to be individual human rights[48].

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[46] These rights are also sometimes referred to in the literature as "hard-core rights".

[47] Y Dinstein "The International Law of Civil Wars and Human Rights (1976) 6 *Israel Yearbook on Human Rights* 62 at 70.

[48] I emphasise this because, as will be indicated later in this Chapter, language rights has both an individual and collective dimension.

The question as to where language rights fall in the derogable versus non-derogable rights dichotomy is at best a moot point. The difficulty that I have with the derogable versus non derogable rights distinction is that, it fails to explain why some fundamental and inalienable rights, recognised as such, are capable of being derogated from even in times of "emergency". One would think that rights which, by their very nature are inalienable should be incapable of being derogated from even in exceptional circumstances. It is submitted that it would be better to distinguish between the "essential" and the "non-essential" content of a right. Whereas a state, in appropriate circumstances, would be allowed to derogate from the non-essential content of a right, derogating from the essential content of a right would not be allowed under any circumstances. It is within this framework that language rights, and its hierarchisation, should be understood. The essential content of language rights, it is submitted, is closely allied to the function of language rights, namely to provide *linguistic security*. Language rights seek to give speakers a secure environment within which to make choices

about language use[49]. To this extent language rights principally seek to protect the "status" of languages, so that all languages are implicitly equal. This, to me, is the essential content of language rights. In order to achieve the position where speakers of a language may freely *use their language of choice*, language rights entrench enforceable legal measures, "rights relating to language". An example of such a "right" is, the *right to be educated in one's mother tongue*. Such "rights", it is submitted, can be derogated from in "appropriate[50]" circumstances[51].

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[49] Denise Réaume, Leslie Green "Education and Linguistic Security in the Charter" (1989) 34 *McGill Law Journal* 777 at 780.

[50] See page 101 *post* for further discussion on what is considered "appropriate".

[51] For further discussion on this point see Chapter V *post*.

Are language rights collective or individual rights?

The nature of rights under international law is complex and frequently undergoes change, `[r]eflecting developments in the philosophical and political underpinnings of efforts to clarify universal standards, and the practical constraints on their implementation'[52].

Previously, the primary goal of all declarations of human rights was held to be: the protection of the individual against, arbitrary, unjust or degrading treatment. However, within the modern human rights context there is an increasing awareness that a purely individualistic perception of human rights is not enough to alleviate the violation of rights suffered by groups. The continued discrimination against minority groups has prompted the conclusion that collective and individual rights are in fact two sides of the same coin.

Most international lawyers agree that because groups and individuals are the targets of language wrongs[53], language rights must be perceived as having two dimensions, `[o]ne primarily individual, another primarily collective'[54]. The two dimensions complement each other:

> `[T]he first [individual dimension] involves *continuity* from one generation to the next over time. It is therefore a linguistic human right to acquire the cultural heritage of preceding

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[52] F de Varennes "The Protection of Linguistic Minorities in Europe and International Human Rights Standards and Possible Solutions to Ethnic Tensions and Conflicts"- Paper presented at the Conference "Russia and East Central Europe in the New Geopolitical Realities," Institute of International Economic and Political Studies, Russian Academy of Sciences, Moscow, Russia, 27-30 January 1995 as cited in Robert Philipson, Tove Skutnabb, Kangas "Linguistic Rights and Wrongs" (1995) 16(4) Applied Linguistics 484.

[53] "Linguistic wrongs" `[o]ccur when languages are marginalised and deprived of resources or recognition, when language shift is imposed on individuals and groups.' Language shift occurs when linguistic minority groups are assimilated into the dominant language and culture: see Robert Phillipson, Tove Skutnabb, Kangas "Linguistic Rights and Wrongs" (1995) 16(4) *Applied Linguistics* 483 at 484.

[54] Robert Phillipson, Mart Rannut, Tove Skutnabb, Kangas "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 11.

> generations, initially in primary socialisation in the family and close community. The second [collective dimension] involves co-*operation* between individuals, binding together a group, a people, a population of a country, through sharing of languages and cultures of all'[55].

The *individual* right to language involves not only the right to speak a language (or languages as there may be more than one) but also the right to learn it, the right to be educated through the medium of it, and the right to use it[56]. This right is personal and individual. Although the educational aspect of this right refers mainly to children, one must not lose sight of the fact that language rights refer to everybody irrespective of age.

The collective nature of language rights is `[c]ontemporary, synchronic, and focuses more on humans as social beings'[57]. The collective dimension of language rights is able to grant everyone the right to:

> `[p]articipate in the riches provided by the social environment, thorough the learning of ... languages...'[58].

The collective nature of language further involves the right to be taught and to learn the official language(s) of the country. It may also imply[59] the right `[t]o learn those varieties of language(s) of the

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[55] Robert Phillipson, Mart Rannut, Tove Skutnabb, Kangas "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 11-12.

[56] Tove Skutnabb, Kangas "Mother Tongue Maintenance: The Debate: Linguistic Human Rights and Minority Education" 1994 (28)(3) *TESOL Quarterly* 625.

[57] Robert Phillipson, Mart Rannut, Tove Skutnabb, Kangas "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 12.

[58] Robert Phillipson, Mart Rannut, Tove Skutnabb, Kangas "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 12.

[59] I use the word "may" because I will argue later in this Chapter that one should define "language" for the purposes of language rights restrictively.

environment that enable everyone to participate fully in the cultural, economic and political processes of the country'[60].

The significance of language rights as *both individual and collective rights*[61] is well set out by Wenner:

1. `[i]ndividual use:
   a) the right to use the language at home;
   b) the right to use the language in the street;
   c) the right to use the language for personal names (both first and family names);

2. individual and collective uses:
   a) the right to use the language in personal communications (letters, telephone, conversations, communication).
   b) the right to use the language in activities designed to perpetuate its use in:
      1. schools;
      2. newspapers, journals, magazines, books, etc.;
      3. radio, television broadcasting;
      4. movies;
   c) the right to use the language in private economic activities in:
      1. business and manufacturing enterprise between workers;
      2. advertising (storefront, media, etc.);
      3. record-keeping (order, invoices, inventories, and the like);
      4. other communications (letterheads, etc.).
   d) the right to use the language in private associations in:
      1. clubs and all types (social, sport, cultural);
      2. churches and religious organisations.
   e) the right to use the language in public meetings.

3. Individual and collective uses vis-à-vis the government:
   a) in courts of law (with or without an interpreter supplied at government expense);

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[60] Robert Phillipson, Mart Rannut, Tove Skutnabb, Kangas "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 12.

[61] The Declaration of Recife 1987 reaffirms that language rights are both individual and collective rights.

b) in communications with the government, such as licence forms, filing required affidavits; tax forms; and applications for governmental services;
c) in public notices (street signs, public information signs, and the like;
d) in campaigning and running for office;
e) in government reports, documents, hearings, transcripts, and other official publications for public distribution;
f) in the national legislature (in debates), the national judiciary, and the national administrative agencies, buries, and departments'[62].

Language rights as minority rights

Many writers[63] equate language rights with cultural rights in order to draw a link between the collective nature of language rights and *minority rights*. Although such a linkage is not incorrect, it nevertheless warrants some caution. There is no authoritative definition of what constitutes a "minority" for human rights purposes. Unlike minority cultural groups, in order for a minority language group to assert their linguistic rights, it may not be necessary to prove that all the members of a linguistic group share the same cultural identity. As will be explained with greater in clarity later on in this section, in the case of mother tongue minority language groups, although the existence of a common culture is a determinant in identifying such groups, it is not an authoritative determinant, because one's home language[64] may be far removed from one's culture. The reference to "minorities" in the language rights setting seems to obscure the reality that majorities too

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[62] M W Wenner "The Politics of Equality Among European Linguistic Minorities" (1976) *Comparative Human Rights* 183 at 193.

[63] Stavenhagen for example constantly equates the collective nature of language rights with minority rights. I don't think that the writer is necessarily wrong, but I do think that caution is needed in drawing out such a relationship: see R Stavenhagen "Old and New Racism in Europe" (1988) *7 New Expressions of Racism: Growing Areas of Conflict in Europe;* see also Lachman M Khubchandani "Minority Cultures and Their Communication Rights" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 305 at 315.

[64] The wide definition of "mother tongue", which I support, takes into account that one's "home language" (a determinant of what constitutes a mother tongue) may be removed from one's native tongue.

are often the targets of language wrongs. The African people in South Africa constitute the majority population group. Yet, as a majority group, they suffered extensive linguistic wrongs[65]. Emphasis on "minorities" obscures the goal of human rights namely, to protect and maintain right to identity, which in the case of the linguistic identity must include both minorities and majorities[66].

What constitutes "language" for the purpose of the positive entrenchment of linguistic human rights?

Defining what constitutes "language" for the purpose of language rights is a highly complex issue. The emotive nature of language and the desire to reach practical solutions add to this complexity. The spectre of hierarchizing languages and language types in order to reach practical solutions stands at the helm of the debate concerning the way in which language is defined.

Language is broadly defined to include all signs[67] and symbols, both phonetic and phonemic, that are utilised for the purposes of expression and communication[68].

The origins of language may be perceived in terms of three core values: *the primordial, the anthropomorphic* and *the instrumental* values of language. The value one subscribes to may shape the way in which one appreciates language. Primordialists focus on the mother tongue and argue that language is something that one inherits, it cannot be chosen, it is ascribed and not acquired, almost in the same

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[65] African languages were, prior to 1994, `[u]nder valued and neglected': see I Currie "Official Languages" in Chaskalson, Kentridge, Klaaren, Maarcus, Spitz, Woolman (eds.) (1996) *Constitutional Law In South Africa* 37-1 at 37-7.

[66] In this essay, for the sake of convenience, reference will be made to "linguistic minority (ies) ". However, this should not be seen to exclude "linguistic majorities".

[67] *See* discussion at page 32 *ante*.

[68] JP Gromacki "The Protection of Language Rights In International Human Rights Law A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515.

sense as skin colour[69]. The primordialists perceive all languages as implicitly equal, such that there can be no hierarchies of language.[70]

Anthropomorphicists perceive language as having a life of its own, independent of its speakers. According to the anthropomorphic view, the value and function attached to a language is determined not by those who speak a language but if a language can be labelled as `[m]ore logical, rich, beautiful and developed than others, and then hierarchized on the basis of their presumed characteristics'[71]. It is submitted that language rights should not be concretised in terms of this value. Experience has shown that the creation of hierarchies of languages this can be used to `[s]upport hierarchizations of people.....ethnoses (ethnic groups) and cultures, which can lead to genocide'[72]. Historically, language has served as a powerful factor in social stratification. Societies highly concerned with perceived aesthetic values attached to a language, may go to the point where `[w]hat matters is not only the kind of language a person employs, but even the very accent that a person uses'[73].

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[69] Tove Skutnabb, Kangas, Robert Phillipson "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 9.

[70] Tove Skutnabb, Kangas, Robert Phillipson claim that they regard the sources of linguistic identification as primordial. As such they opine that `[l]anguages cannot be hierarchized for purposes of assessing their speakers need of language human rights' : see Tove Skutnabb, Kangas, Robert Phillipson "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 9.

[71] Tove Skutnabb, Kangas, Robert Phillipson "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 9.

[72] Tove Skutnabb, Kangas, Robert Phillipson "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 9.

[73] For example, "Brooklynese and Cockney" English in New York and London, `[r]espectively, do not connote foreignness or even a particular section of the city so much as the lower-class status in terms of income, education, or ethnicity'. This is a clear example of hierarchisation of language leading to hierarchisation of people and communities :see J Fishman (1970) *Sociolinguistics: A Brief Introduction* 2; : see "Claims for Freedom from Discrimination in the Choice of Language" 713 at 719; 720(fn 30).

Instrumentalists contribute to the hierarchization of language indirectly in that they define language as something that can be acquired and manipulated, `[s]omething that an individual can take on or off at will'[74]. To the instrumentalist language is a mobilisation device for the purposes of economic and political benefits. Instrumentalism does not `[r]ecognise the genuine feelings of deep attachment to mother tongues [and presumably, language in general] but sees the expression of these feelings as proof of successful manipulation by elites'[75]. The danger with instrumentalism is that its indifference to language where `[l]anguage in itself is of no special importance'[76] other than that it has an instrumental value, ignores that language is intrinsically linked to the fulfilment of the individual. Such a perception of language is a sure recipe for saying that since language has no real value it does not matter whether or not language is hierarchized or for that matter, the degree to which it is hierarchized. I submit that such a position should not be accepted.

Most human rights scholars seem to accept the source of language to be *primordial* and accordingly they hold the view that all language(s) and language types should be protected. Whereas linguistics seeks to evaluate language using **external identification criteria**, such as the existence of standardised spelling rules, [p]rescriptive devices of correction in grammatical and lexical usage'[77] and the existence of a literature etc., one cannot use the

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[74] Tove Skutnabb, Kangas, Robert Phillipson "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 9.

[75] Tove Skutnabb, Kangas, Robert Phillipson "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 9.

[76] Tove Skutnabb, Kangas, Robert Phillipson "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 9.

[77] Lachman M Khubchandani "Minority Cultures and their Communication Rights" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 305 at 308.

same standards if one wants to entrench language rights. For language rights one should take a "fluid" definition of language where "language" is defined using **internal identification criteria**. To determine the existence of language using the "internal identification criterion" one would resort to the following enquiries: Is there a group of people (which can be both minorities and majorities) speaking a language? What is the history and culture of these people? Is the language part of the history of the people? What is the history of the language[78]? These questions are important for the identification of a language because, as it so often happens, geographical dispersion of people, oppression of a language itself, denial of education in a language, may make the existence of written literature, and other external identification criteria, inaccessible[79].

While most scholars except that all languages should be capable of protection under a regime of language rights, they also take the position that the language "categorisation" (based on the utility of a language and which I hold to be distinct from "hierarchization") is an inescapable reality especially if one wants to entrench positive language rights. Inequalities in wealth and resources in the world community combined with the fact that language rights may impose severe financial burdens make language categorisation necessary.

The categorisation of language is not based upon the aesthetic or the perceived intellectual value of a language. "Categorisation"

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[78] These questions are essential because although language is not the sole determinant, it often is a *central cultural core value* in cultural identification: see Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove, Skutnabb, Kangas, Robert Phillipson (eds.) 1994 *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 109 (fn.12).

[79] This is the position with the Kashmiri language. Years of political subjugation and language suppression have resulted that the Kashmiri language has no identifiable literature or script: see Makhan L Tickoo "Kashmiri, A Majority Language: An Exploratory Essay" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 317 at 320.

seeks to identify which language types are necessary to the empowerment[80] of the individual/ group and then to grant these languages the necessary protection under international language rights. To this extent a distinction should be drawn between languages of *enlightenment*[81] or *necessary*[82] languages on the one hand and *acquisitive*[83] or *enrichment orientated* languages[84] on the other hand. As far as this distinction is concerned three language types have been identified by human rights scholars in determining what *ought* to count as "language" worthy of promotion and protection for the purposes of language rights: (a) mother tongue languages; (b) languages of national integration and ; (c) languages of wider communication.

In a human beings life, it frequently occurs that the language of the `[c]*lose community and primary, ethnolinguistic identity,* the mother tongue'[85], is learnt first. Next comes the language of *national integration*[86], also referred to in the literature as the *language of the national elite* or *the national language* or *the official language*. This is a second language for national linguistic minorities. And lastly

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[80] "Empowerment" refers to the social, economic and political empowerment of the individual and group.

[81] This phrase is coined by "Claims for Freedom from Discrimination in the Choice of Language" 713 at 717.

[82] This phrase is coined by Tove et al: see Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 103.

[83] This phrase is coined by "Claims for Freedom from Discrimination in the Choice of Language" 713 at 717.

[84] This phrase is coined by Tove et al: see Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 103.

[85] Tove Skutnabb, Kangas, Robert Phillipson "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 9.

[86] Tove Skutnabb, Kangas, Robert Phillipson "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 9.

languages of *wider communication beyond the confines of a state*, i.e. foreign languages[87].

Safeguarding mother tongue languages has not been unproblematic. One of the main problems has been trying to define what mother tongues are. Previously the term "mother tongue" was defined narrowly and held to be synonymous with *"native language"*. Following from this, a language was considered a mother tongue if there was an identifiable group with common characteristics (culture being the most important of these characteristics), who spoke a language. In this context, mother tongue language was seen to exist within the context of a minority group. However, recent studies have shown that different minority cultural groups have different attitudes towards their native language. Some groups have strong attachments to their native languages, while others view them as `[s]ymbols of minimum utility'[88]. The picture becomes even more complex when vast numbers of individuals within a cultural group, as it so often happens, consider another language quite remote from their identified cultural language, as their mother tongue. In diverse multilingual societies like Papua New Guinea for example, where 750 languages are spoken by a population of just 3 million people, it may even be difficult to determine with accuracy the native language of an individual.

In consideration of the above, a wider definition of "mother tongue" is advocated where "mother tongue" is defined in the following manner:

1. The language(s) that one has learnt first;
2. The language(s) that one identifies with;
3. The language(s) one is identified as a native speaker of by others (even if such an identification is made incorrectly);

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[87] To national minorities a foreign language will constitute a third language but to a national majority a foreign language will constitute a second language.

[88] Kamal K Sridhar "Mother Tongue Maintenance and Multiculturalism" (1994) 28(3) *TESOL Quarterly* 628 at 629.

4. The language(s) one knows best;
5. The language(s) one uses most.[89]

A definition of mother tongue in the manner prescribed is able to take into account the following circumstances:

`a) The same person can have different mother tongues;
b) A person can have two or more mother tongues according to all the criteria used;
c) The mother tongue can change during the course of one's life, even several times according to all the criteria except for criterion 1[90].

The wide definition of "mother tongue" easily accommodates the scenario the speaker's mother tongue language is remotely associated with his cultural roots. Furthermore, and this seems to me to be a essential aspect of the wide definition is that, it protects, as mother tongues, those kinds of languages which linguistics would not ordinarily consider to be "languages" in the proper sense[91]. Here I am referring to sign language. For a deaf person the use of a sign language is essential. It is the language that she knows best, the language that she probably uses the most, even though it might not be the language that she learned first, or the language she is identified as a native speaker of by others. Due to the paramount importance of such forms of communication, I firmly believe they should be regarded as language worthy of protection under a regime of language rights. It

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[89] Tove Skutnabb, Kangas, Sertaç Bucak "Killing a Mother Tongue: How the Kurds are Deprived of Linguistic Human Rights" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 347 at 360.
[90] Tove Skutnabb, Kangas, Sertaç Bucak "Killing a Mother Tongue: How the Kurds are Deprived of Linguistic Human Rights" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 347 at 361.
[91] *The Attorney General v Nancy Forget* [1988] 2 S.C.R 90 the Canadian Supreme Court declared that: `[T]he Concept of language is not limited to the mother tongue but also includes the language of use or habitual communication...there is no reason to adopt a narrow interpretation which does not take into account the possibility that the mother tongue and the language of use may differ' (at 100).

is significant that the **Constitution of the Republic of South Africa, 1996**[92] provides:

> (5) `[T]he Pan South African Language Board must -
> (a) promote and create conditions for the development and use of.....
> (iii) sign language.'[93]

Most scholars agree[94], and quite correctly so, that mother tongue language is a *necessary* language, and should therefore be regarded as worthy of protection under a language rights regime. Deprivation of the mother tongue has profound consequences at both the individual and group level. Several studies conducted by the United Nations and other organisations have shown the importance of the mother tongue in the development of the individual. The 1953 study conducted by UNESCO, **The Use of Vernacular Languages in Education** concluded:

> `[I]it is axiomatic that the best medium for teaching a child is his mother tongue. Psychologically, it is the system of meaningful signs that his mind works automatically for expression and understanding. Sociologically, it is a means of identification among the members of the community to which he belongs. Educationally he learns more quickly through it than through an unfamiliar linguistic medium."

This view was affirmed in 1957 in the UNESCO declaration where it was explicitly stated that every child had the right to be educated in the mother tongue. West in a detailed study concludes that the `[m]other tongue is a good way to lay the foundations of literacy and literacy-

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[92] The Constitution of the Republic of South Africa Bill as adopted by the Constitutional Assembly on 8 May 1996. The Constitution has not yet been promulgated into law and awaits certification from the Constitutional Court.

[93] Clause 6(5).

[94] Makhan L Tickoo "Kashmiri, A Majority Language: An Exploratory Essay" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 317 at 327.

related socio-cognitive skills[95] and dispositions'[96]. On the group level deprivation of the mother tongue can amount to linguicide[97].

The second type of language identified for the purposes of language rights is languages of *national integration* also referred to in the literature as the language of the *national elite, dominant languages* or *national/official* languages. In this case too, most scholars express the opinion that the dominant language is a necessary language for the purpose of language rights. It is submitted that they are correct. It is common cause that as far as language suppression is concerned, the language of national integration is least affected. In fact language suppression is often conducted in order to ensure that linguistic minorities assimilate with a national language. This argument is often used to support the view that national languages should receive minimal or no protection under a regime of language rights[98]. However by excluding national languages from the reach of language rights, linguistic minority groups, and especially those groups unfamiliar with a national language because of systematic exclusion from the process of learning the official language, may continue to suffer discrimination and disempowerment. Where judicial and administrative proceedings are held principally in an official language, language deprivations may continue to multiply. Modeen indicates that non-speakers of a dominant language who are handicapped by

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[95] West argues that cognitive abilities are required to meet the demands of true learning: see Makhan L Tickoo "Kashmiri, A Majority Language: An Exploratory Essay" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 317 at 331.

[96] Makhan L Tickoo "Kashmiri, A Majority Language: An Exploratory Essay" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 317 at 330.

[97] Tove Skutnabb, Kangas, Sertaç Bucak "Killing a Mother Tongue: How: the Kurds are Deprived of Linguistic Human Rights" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 347 at 361.

[98] The argument is also made that in those states where the dominant language is a former colonial language, the protection of such languages would only entrench the structural and ideological dominance of the colonial languages which will result in the further underdevelopment of indigenous languages.

language barriers `[o]ften experience psychological difficulties, and may be subjected to severe deprivations of well-being'[99]. It has also been stressed that

> `[a]ccess to the elite language is essential for exposure to the larger culture and for effective participation in the power and other value processes of the national community.' Denial of such access may generate a self-perpetuating cast-like society, which offers benefits to a chosen few and which is utterly repugnant to human dignity values'[100].

The "shrinking" world and the interdependence of world communities, it is argued, are a major reason why people should have knowledge of at least one foreign language. Knowledge of world languages is an important base for removing the `[a]rtificial boundaries erected by "national boundaries"[101]. Tove et al, quite correctly, are highly critical of international languages being included in the definition of "language" for the purpose of language rights. The writers label international languages as "enrichment-orientated languages". They argue that if foreign languages were to be protected under a regime of language rights there would be a conflict of interest. The "promotion"[102] of foreign languages, in their opinion, operates under the guise of achieving "internationalisation", whereas, the promotion and protection of *necessary languages*, arises within the context of the need for such languages to have support so as to ensure their survival and development[103]. Accordingly they submit that international

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[99] In extreme cases people who are unable to make themselves familiar with the prevailing language of the community may even be forced to endure physical harm: see T Modeen (1969) *The International Protection of National Minorities in Europe* 42.

[100] "Claims for Freedom from Discrimination in the Choice of Language" 713 at 721

[101] "Claims for Freedom from Discrimination in the Choice of Language" 713 at 721

[102] An international regime of language rights would only "promote" international languages. There would be no need to "protect" such languages.

[103] Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71.

languages should not be afforded protection under a language rights regime.

As far as this essay is concerned, it is submitted that "language" for the purposes of language rights should be limited to *necessary languages*, that is, mother tongue languages and national/official languages but not languages of wider communication, otherwise referred to as *enrichment languages*. It is imperative to note that even though I argue that all mother tongue languages and official languages should receive positive protection, this is merely a **normative** argument. It will be necessary to place limitations on this argument to facilitate the practical enforcement of positive language rights. To this end it may be necessary to take into account factors like: the number of speakers claiming a right to a language, the locality of the claimants and the impact of a positive claim to language upon other fundamental rights. Such limitations will be discussed in greater detail later in Chapter V of this essay.

Variations of language

During the Draft discussions of the **International Covenant of Civil and Political Rights 1966 (ICCPR)** the question of the protection of dialects was raised[104]. The representatives drafting the ICCPR expressed the opinion that the term "dialect" should not be equated with the term "language". It was maintained `[t]hat protecting the rights of such individuals was an extremely complex question, and that any study of the question would not only fail to eliminate, [but] might

[104] Member states requested clarification on the position of "dialects" as it was pointed that in `[a]lmost every country there was an element of the population that did not use the majority or official language, and in some countries there are elements using dialects which lack the characteristics of a true language' :see M Tabory "Language Rights As Human Rights (1980) 10 *Israel Yearbook on Human Rights* 167 at 188.

even stimulate, linguistic separatist movements'[105]. It is submitted that this rationale, excluding dialects from the scope of language rights, reflects a pure instrumental perception of language, and hence cannot be supported.

The argument for the positive entrenchment of language rights raises the cardinal question: Can one and should one distinguish between the pedigreed[106] form of a language and variations (dialects) thereof? In the English language for example, reference is frequently made to the Queen's English, the "badge of respectability,"[107] in contradistinction to other dialects of the English language which are considered inferior. If a Cockney person in England claims his language rights[108], which variation of the English language is the relevant mother tongue? Can he claim that the Cockney dialect is his mother tongue and hence claim that the positive right to language incorporates Cockney English, or would one consider the Queen's English, the objective standard to which the purity of the language is determined, to be the mother tongue? Similarly, where a person on the Cape Flats claims her language rights, would one consider the "Kombuis Afrikaans" dialect as her mother tongue or would one be inclined to measure mother tongue language in terms of "Suiwer Afrikaans?

According to the Shorter Oxford English Dictionary, `[a] dialect is a variety of a language arising from local peculiarities'[109]. Linguistics differentiate between languages and dialects by applying objective

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[105] M Tabory "Language Rights As Human Rights (1980) 10 *Israel Yearbook on Human Rights* 167 at 188.

[106] presuming of course that this can be identified.

[107] Makhan L Tickoo "Kashmiri, A Majority Language: An Exploratory Essay" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 317 at 325.

[108] which as I have clarified includes the rights relating to the mother tongue and the national language.

[109] as cited in M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 189.

criteria such as: the linguistic distance between characteristics and the existence of separate word roots[110]. The most objective criterion would seem to be that of *mutual intelligibility*. If two languages are one hundred percent mutually intelligible, they may be identified as dialects, while those which have no mutual intelligibility are regarded as separate languages.

As far as language rights is concerned, it is submitted, that the mutual intelligibility test is not a good indicator to demarcate the difference between a language and its dialect. The reason for this is that international law cannot simply accept that "a language" is in fact "a language". Considering our world history, marked by episodes of linguistic domination, discrimination and assimilation, any claim that a particular language constitutes "a language" must be looked upon with scepticism. South Africa is a case in point. How can we, having regard to South Africa's racial past, where a minority of the people determined what was socially and for that matter linguistically acceptable, say with certainty that "Kombuis Afrikaans" is not more than a dialect. How can we with absolute certainty say that "Kombuis Afrikaans" is not "the language" and "Suiwer Afrikaans" (which was forced on the majority of the people) is not "the dialect". This is a difficult problem that confronts the language rights lawyer, and which this essay will not even venture an answer.

The mutual intelligibility test fails on another level. In hard cases it may be difficult to discern between dialect boundaries[111] (presupposing

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[110] M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 188.

[111] An example of a hard case: There are two main dialects of Kurdish and several smaller dialects. There is the Kurmanci dialect spoken in Turkish and Syrian Kurdistan, in the northern parts of Iranian and Iraqi Kurdistan and in (former Soviet) Armenia. The second major dialect is Sorani spoken in the Southern parts of Iranian and Iraqi Kurdistan. Some linguists classify the southern dialects Sinei, Kirmansahi and Lekei as a distinct varieties. In addition, speakers of some central Iranian (grouped together as Zaza and Gurani) and Southwest Iranian (e.g. Luri) varieties, also claim Kurdish ethnic and linguistic identity. These varieties (Sinei, Kirmansahi, Lekei, Luti) are not mutually

that dialects are discernible). This is complicated further where a domestic constitution grants official language status to a dialect. The **Constitution of the Republic of South Africa, 1996**[112] has done exactly this. Clause 6 of the Constitution provides:

> **Languages**
> 6. (1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

If one conducted the mutual intelligibility test one would come to the following conclusion: that many of the "languages" given official status are "dialects" of each other.

At the same time it should be appreciated that if one allowed the willy-nilly positive entrenchment of every dialect (once again presupposing that dialects are discernible), this could lead to absurd results. The positive claims to dialects would be endless. One could even have the situation where people will start claiming a right to an accent. The administrative and financial burdens upon states will cause the entire language rights regime to collapse. Therefore, I propose that a dialect should only receive negative protection under a language rights regime. So, whereas the state would not be allowed to prevent somebody from speaking the dialect, the state would also not be under a positive duty to protect and promote the dialect in question. Under this scenario a person speaking a dialect cannot be prevented from speaking his dialect in court, for example, but at the same time the state would not be under a positive duty to ensure that such a person receives instruction or legal representation in his dialect.

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intelligible with Kurmanci and Sorani, but speakers of Zaza and Gurani learn Kurmanci very easily whereas Kurmanci speakers are unable to learn Zaza and Gurani easily: see Tove Skutnabb, Kangas, Sertaç Bucak "Killing a Mother Tongue: How the Kurds are Deprived of Linguistic Human Rights" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 347 at 351.

[112] The Constitution of the Republic of South Africa as adopted by the Constitutional Assembly on 8 May 1996.

CHAPTER III

SOURCES OF INTERNATIONAL LAW: ESTABLISHING A HUMAN RIGHTS NORM FOR THE PROTECTION OF LANGUAGE RIGHTS

> Language is the archives of history, and, if we must say it, a sort of tomb of the muses. For, though the origin of most our words is forgotten, each word was at first a stroke of genius.
> RW EMMERSON: *The Poet* (1844).

A. THE SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

International human rights law is derived from numerous sources. Treaties, a major source of international law, create legally binding obligations for states that are parties to such treaties. Of the twenty or more major human rights treaties, the **United Nations Charter of Human Rights (UNCHR)**[113] is considered to be the most important, and is also indicative of international customary law.

Besides the plethora of treaties, there are a number of international declarations, resolutions and recommendations which are relevant to the protection and promotion of human rights. While most of these are not binding, `[t]hey set standards and encourage the implementation of human rights protection on both regional and national levels'[114]. One of the most significant of these international human rights instruments is the **Universal Declaration of Human Rights (UDHR)**[115].

Another source of international law is the decisions and actions of the various organs of the United Nations, as well as other international and regional organisations involved in human rights. Notable among these standard setting instruments is the **International Covenant on Civil and Political Rights (ICCPR)**[116]; the **European**

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[113] Adopted in 1948.
[114] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 518.
[115] Adopted by the United Nations in 1948.
[116] Adopted in 1966.

Convention on Human Rights (ECHR)[117], the **American Convention on Human Rights (ACHR)**[118] and the **African Charter on Human and Peoples' Rights (ACHPR)**[119].

Customary international law, another important source of international human rights law, is binding on all nations by virtue of general usage[120]. The establishment of customary international law requires proof that states recognise some normative obligation to observe a rule. To this extent national laws, regulations, administrative decisions, and policy pronouncements of many countries that implement human rights are important for the development of international customary law.

B PROTECTION OF LANGUAGE RIGHTS UNDER INTERNATIONAL LAW

Prior to this century international law was restricted to the Law of Nations. It covered the relationship between states and excluded the possibility of states interfering in the internal affairs of another sovereign state. The Charters of human rights formulated after the American and the French Revolutions, today considered to be the forerunners of the modern human rights regime, made no claim to universal validity. They contained no provisions relating to the status of minorities and certainly did not guarantee minorities any linguistic rights. It was the later instruments entrenching minority rights that first canvassed the idea of linguistic rights.

The development of linguistic human rights in international law may be divided into roughly five periods:

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[117] Adopted in 1950 and came into force on 3 September 1953.
[118] Adopted in 1969.
[119] Adopted in 1981.
[120] Courts have identified two main requirements for the existence of a customary rule: a) settled practice (uses) and; (b) the acceptance of an obligation to be bound (opinio juries sieve necessitates): see John Dugard (1994) *International Law: A South African Perspective* 24-25.

(i) Pre-1815

Language rights concerning minorities were not covered in any international treaties except for the occasional bilateral agreement. Rights concerning minorities were primarily found in agreements relating to *religious* but not *linguistic minorities*[121]. During this time, the notion of imposing a single language within the borders of the state was proposed as an instrument of government policy. This policy, which coincided with colonial expansion, was seen as a means of securing linguistic uniformity within a state's borders.

(ii) 1815-1918

This period commenced with the **Final Act of the Congress of Vienna-1815**[122]. The Act was `[t]he first important international instrument to contain clauses safeguarding *national minorities*, and not only religious minorities'[123]. However, most multilateral treaties during this period accorded no rights to linguistic minorities. There is evidence to suggest that during this period there were a number of constitutions and some multilateral instruments which safeguarded national linguistic minorities. Constitutional protection for language rights arose within the context of Empires[124] which generally were more

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[121] Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 74.

[122] Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 74.

[123] Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 74.

[124] As early as 1867, the Austrian Constitution for example recognised the rights of linguistic minorities. Article 19 of the Constitution provided: "[A]ll the ethnic minorities of the States shall enjoy the same rights and, in particular, have an absolute right to maintain and develop their nationality and their language. All the languages used in the provinces are recognised by the State as having equal rights with regard to education, administration of public life. In provinces inhabited by several ethnic groups, the public educational institutions hall be organised in such a way as to

accommodating to multilingualism, contrasting to the strong monolingual influences of neighbouring single nation states.

(iii) 1918-1945

This period marked the interval between the two world wars, also known as the Pre-United Nations Period. This period saw the protection of minorities in the major multilateral treaties and international conventions. This period was also characterised by the signing of the so-called Minorities Treaties.

In the aftermath of the First World War the **Covenant of the League of Nations** sought to enshrine certain basic human rights. In particular, the Covenant sought to achieve substantive equality between individuals. No specific provisions for the protection of minorities were included in the Covenant. Language was identified as a manifestation of nationality[125]. As such, language was perceived as one of the primary elements for determining whether a group of individuals constituted a national minority and whether an individual belonged to that minority. The rise of nationalism in Europe was singled out as the cause of World War I and the founding fathers of the League were reluctant to further emphasise the existence of distinct groupings, fearing a resurgence of nationalism.

In implementing the principle of self-determination, at the 1919 Paris Peace Conference following World War I it was decided that the protection of minorities would be dealt with under separate

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enable all the ethnic groups to acquire the education they need in their own language, without being obliged to learn another language of the province": see Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 75.

[125] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 525.

enactments dedicated to the protection of minorities in Europe[126]. In the inter-war period, a system of Minorities Treaties developed which sought to provide international guarantees to ethnic minorities of all kinds. It was within the context of the Minorities Treaties, that sought to protect "national" minorities, that language as a distinctive factor was recognised. The Paris Conference required sixteen Central and Eastern European nations to guarantee minorities' rights[127]. The signatories to these Minority Treaties undertook to guarantee the free use by any national of the country of any language in private interaction, in commerce, in religion, in the press and in publications, and at public meetings[128]. They further agreed to grant adequate facilities for nationals, whose mother tongue was not the official language, to employ their own language, both in writing and orally, before the courts[129]. For towns and districts where a considerable number of nationals of foreign speech were resident, it was agreed to provide adequate facilities for primary school instruction for children of such nationalities in their own language, without preventing the obligatory teaching of the official language in the schools. Finally, the treaties stipulated that in towns or districts where a substantial proportion of nationals of the country belonged to racial, religious or linguistic minorities, these were to be assured an equitable share of the public

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[126] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 521.

[127] The following Minorities Treaties contained provisions which protected linguistic rights of minorities: The Treaty With Poland, June 28, 1919; The Peace Treaty With Austria, September 10, 1919-Treaty Of St German; The Treaty With Czechoslovakia, September 10, 1919; The Treaty With Serb-Croat-Slovene State, September 10, 1919; The Treaty With Bulgaria, November 27, 1919-Treaty of Neil; The Treaty With Rumania, December 9, 1919; The Peace Treaty With Hungary, June 4, 1920; The Treaty Concerning The Protection Of Minorities In Greece, August 10, 1920; The Declaration Concerning The Protection Of Minorities In Albania, October 2, 1921; The Declaration Concerning The Protection Of Minorities In Lithuania, May 12, 1922; The Treaty Of Peace With Turkey, July 24, 1923-Treaty Of Lasagne.

[128] "Claims for Freedom from Discrimination in Choice of Language" 713 at 724.

[129] "Claims for Freedom from Discrimination in Choice of Language" 713 at 724.

funds under State, municipal or other budgets designated for educational, religious or charitable purposes[130]. Clearly, discrimination on the basis of language was not to be tolerated. Non-discriminatory linguistic provisions were formulated to ensure at least "negative protection" of language rights[131].

The Permanent court of International Justice, in the *Minority Schools in Albania Case*[132] described the dual nature of the Minorities Treaties. The court evinced that the Treaties sought on the one hand to ensure equality for all before the law, and on the other, to preserve the distinctive characteristics of minorities. The Court stated:

> `The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, *language* or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs'[133].

The Court went on to explain that the Minorities Treaties incorporated two elements in order to reach this goal:

> `The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with other nationals of the State[134].

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[130] "Claims for Freedom from Discrimination in Choice of Language" 713 at 724.

[131] `[F]ull and complete protection of life and liberty to all inhabitants....without distinction of birth, nationality, language, race or religion': see Treaty of St German, art 63; Treaty of Triton, art 55; Treaty of Neil, art 50; Treaty of peace with Poland, art 2. `[A]ll...nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language, or religion': see Treaty of St German, art 66; Treaty of Triton, art 58; Treaty of Neil, art 53; Treaty of Peace with Poland, art 7.

[132] *Advisory Opinion On Minority Schools in Albania* [1935] P.C.I.J., Ser.A/B, No 64.

[133] *Advisory Opinion On Minority Schools in Albania* [1935] P.C.I.J., Ser.A/B, No 64 at 17.

[134] The first category has been referred to as negative equality, i.e. merely that minorities do not receive worse treatment than that of the majority. In the context of the Minorities Treaties this included *inter alia* (a) those measures guaranteeing equality of all nationals of the country in matters relating to schools, with the right to use their own language therein, and (b) equality in the use of any language in private intercourse, in commerce, in religion, in the press or in publications of any kind,

> The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics'[135].

The impact of the Minorities Treaties on the protection of minorities and the furtherance of language rights was minimal. Robinson *et al* point out that the provisions in the respective Treaties and Declarations regarding linguistic rights were not, on the whole, incorporated into the constitutional or municipal law of the States involved[136]. The tendency, particularly in the Baltic States, where the problems of religion, language and nationality were closely intertwined, `[w]as to restrict rather than to expand the right to use languages'[137]. Although all the Signatory States adopted certain court rules for nationals who did not know the state language, such regulations did not implement the underlying principles of the Minorities Treaties, namely the right of minorities to use their mother tongue, regardless of the extent to which the members of a minority had command of the State language[138]. In

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or at public meetings: see M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 172

[135] The second category has been called "positive" equality, i.e. guaranteeing minorities the preservation and development of their national consciousness. Provisions to this effect `[s]tipulated that interested States accept the obligation (a) to grant nationals using a language other than the official one proper facilities for employing their own language before the courts, and (b) to ensure that in localities where a substantial portion of the citizens speak a language other than the State's official language, instruction should be given to the children of such nationals in their own language': see M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 172.

[136] J Robinson *et al* (1943) *Were the Minorities Treaties A Failure* 209.

[137] J Robinson *et al* (1943) *Were the Minorities Treaties A Failure* 209.

[138] Consider the words of the writers:

`[B]y prescribing that no laws be enacted restricting the free use by minorities of their own language in private relations, public gatherings, the press, and religious services, the treaties did not thereby demand of the Minorities States that they take positive action, but only that they refrain from discriminatory measures. The states, thereby complied with the letter of their international obligations if they did not interfere with the use by minorities of their own language. Nevertheless, provisions (to some extent progressive) were often enacted which regulated the matter either by the constitutional embodiment of the language right or by the enactment of specific laws. In many cases, however, the free use of minority languages was restricted by legislation or by special decree': see J Robinson *et al* (1943) *Were the Minorities Treaties a Failure* 215.

my opinion, the problem with the Minorities Treaties lay in the nature of the instruments themselves. Both at the international and regional levels, these instruments lacked the necessary binding effect. These instruments were at best bilateral agreements safe-guarding the interests of signatory nationalities. Furthermore, their failure to amount to much may be ascribed to the fact that they slavishly implemented the doctrine of "state sovereignty".

Although these treaties were never abolished, they had lost all significance by the time that World War II ended.

(iv) 1945-1979

This period saw a major effort within the framework of the United Nations to legislate internationally for the protection of minorities[139]. Considering the notion of "language", one would have expected that the question of language rights would have been raised within the framework of minority rights. However, and this makes the disregard for language rights very clear[140], for over thirty years since its inception the question of minority rights was neglected by the United Nations. The UN Charter for example makes no mention of minorities at all. For a long time, it was incorrectly assumed that the cultural characteristics of minorities, including language, were adequately covered by the general non-discrimination clauses[141], prohibiting discrimination *on inter* alia race, sex, *language*, or religion. Immigrant minorities were excluded from consideration in the Captori Report, and hence from the main thrust of the United Nation's efforts to end discrimination

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[139] Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 77.

[140] considering that language rights are closely related to minority and cultural rights.

[141] Articles 1(3); 13(1)(b); 55(c).

against minorities. Even today, migrant workers, refugees, stateless persons and other non-nationals are still `[n]ot true minorities'[142].

Regrettably, broad and cautious formulations in various instruments outlawing discrimination provided only relative protection for minorities. Even within the ambit of individual human rights, language rights never reached full flower. It was thought that human rights instruments in general provided enough protection for everybody and that specific human rights were therefore unnecessary.

During the ensuing decades (1950's-1979)[143], however, three types of groups came to be protected under international law on a collective basis, namely ethnic, religious and linguistic minorities.

Since the period 1945-1979 stands out as a particularly progressive period in the development of international human rights law in general, I shall consider the products of this period in more detail.

The United Nations Instruments

A. The United Nations Charter

One of the purposes of the United Nations is to achieve international co-operation `[i]n promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, *language*, or religion'[144]. The United Nations General Assembly is charged with initiating studies and making recommendations for the purpose of `[a]ssisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, *language* or religion'[145]. Among the principles enunciated in the Charter in connection with the Economic and Social Council

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[142] *United Nations Fact Sheet No 18 (March 1992)* at 9.
[143] See page 50 *et seq.*
[144] Article 1(3).
[145] Article 13(1)(b).

(ECOSOC), the United Nations `[s]hall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, *language*, or religion'[146].

Despite the recognition of language as one of the four impermissible grounds of discrimination, the provisions of the Charter reflect a hesitance on the part of the drafters to impose positive language rights. Accordingly, the Charter articles only impose negative duties upon States to respect language rights. In deference to the doctrine of "state sovereignty", the Charter guarantees impose no obligations upon States to recognise or protect positive linguistic rights on the national level.

B. *Declaration on the Granting of Independence to Colonial Countries and Peoples (1960)*

This Declaration, like the Charter, reiterates, in negative terms, the importance of the observance of `[h]uman rights and fundamental freedoms for all without distinction as to race, sex, *language* or religion'.

C. *The Universal Declaration of Human Rights (UDHR)*[147]

The principle of non-discrimination based on language is set forth in Article 2 of the UDHR[148]. No explicit reference is made in this general provision to linguistic or other minorities as a group being entitled to collective rights. The UDHR protects language implicitly in several other

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[146] Article 55(c).

[147] Adopted in 1948.

[148] Article 2 provides:

> "[E]veryone is entitled to all the rights and freedoms set forth in this Declaration, without any distinction of any kind, such as race, colour, sex, *language*, religion, political or other opinion, national or social origin, property, birth or other status."

articles, *inter alia* article 10 (right to a fair hearing)[149]; articles 18 and 19 (rights to freedom of thought, belief and expression)[150] and article 26 (right to education)[151]. Early on during the discussions on the First Draft of the International Covenant on Human Rights, various Communist States urged the adoption of more positive linguistic rights[152]. However, this position was subsequently rejected[153].

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[149] Article 10 provides:

> `[E]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

[150] Article 18 provides:

> `[E]veryone has the right to freedom of thought, conscience and religion, this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship or observance'.

Article 19 provides:

> `[E]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.

[151] Article 26 provides:

> `[1]. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
>
> 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
>
> 3. Parents have the prior right to choose the kind of education that shall be given to their children'.

[152] For example, at the Third Committee of the General Assembly, the representative of the USSR advocated that `[S]tates should guarantee to their national minorities the right to use their own language'. The same view was echoed by the representative for Poland who felt that the deficiency in the draft was `[t]he absence of an article....on the right of national minorities to use their own native language'. And to the representative from Yugoslavia, it was regrettable that the draft did not mention some widely recognised political rights, including the "right of national minorities to use their own language': see M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 175.
It is interesting that an earlier draft of the UDHR contained the following provision in respect of racial, religious and *linguistic* minorities:
`...[s]hall have the right as far as compatible with public order to establish and maintain their schools and cultural or religious institution, and to use their language in the Press, in public assembly and before the courts and other applications....': see "Suggestions of the Drafting Committee for Articles of an International Declaration on

D. *The Work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.*

Many writers ascribe the neglect of the earlier instruments to recognise positive language rights to the fact that in the early years minorities' rights did not feature high on the human rights agenda. In February 1947 the United Nations Economic and Social Council (ECOSOC) defined the task of the Sub-Commission on Prevention of Discrimination as :

> `(a) In the first instance, to examine what provisions should be adopted in the definition of the principles which are to be applied in the field of the prevention of discrimination on the grounds of race, sex, *language*, or religion, and in the field of the protection of minorities, and to make recommendations to the Commission on urgent problems in these fields'[154].

On 10 December 1948, the day that the Universal Declaration was adopted, the General Assembly, as if to compensate for the fact that it omitted the protection of minorities from the Declaration itself, asked the Subcommission to undertake a `[t]horough study of the problem of minorities, in order to assist the United Nations to take effective measures for the protection of racial, national, religious or linguistic minorities'[155]. One of the first problems that confronted the Subcommisssion was defining what constituted "minorities":

The Sub-Commission at its third session in 1950 recognised

Human Rights to the President of the Economic and Social Council" (1947) *United Nations Yearbook on Human Rights* 499 at 503; U.N. Document. E/CN.4/ AC.1/W.2/Rev.2; also reprinted in M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 175; JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 533.

[153] Verdoodt as cited in M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 176.

[154] M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 176.

[155] Res. 217(III), pt. C (1948) as cited in JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 539.

> `[t]hat there are among nationals of many States distinctive population groups, usually known as minorities, possessing ethnic, religious, or *linguistic* traditions or characteristics different from those of the rest of the population, and that among these are groups that need to be protected by special measures, national or international, so that they can preserve and develop the traditions or characteristics in question'[156].

Conceding that there were exceptions and complexities, the Commission defined "minorities" in the following manner:

> `[T]he term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or *linguistic* traditions or characteristics markedly different from those of the rest of the population'[157].

Until the adoption of the draft covenants on human rights, the Sub-Commission suggested that Member States:

> `[i]n the interest of enabling recognised minority groups to maintain their cultural heritage when they desire to do so... should provide as a minimum, adequate facilities, in districts, regions and territories where they represent a considerable proportion of the population, for:
> 1. The use in judicial procedure of *languages* of such groups, in those cases where the member of the minority group does not speak or understand the language ordinarily used in the courts;
> 2. The teaching in State-supported schools of *languages* of such groups, with due regard of the requirements of education efficiency, provided that such groups request it and that the request in reality expresses the spontaneous desire of such groups;
> ...so long as these rights are not used for the purpose of threatening or undermining the unity or security of States'[158].

The relationship between minority rights and language rights was barely beginning to take shape when at the tenth session of the Commission on Human Rights these principles were abandoned [159].

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[156] M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 177.

[157] H A Strydom "Views on International Measures for the Protection of Minorities (1992) 18 *South African Yearbook of International Law* 134.

[158] Document E/CN.4/Sub.2/L.4, 8 October 1951, Res. III at 4 as cited in M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 178 (fn.30).

specifies language as one of the impermissible grounds of discrimination. Szabo criticises the formulation of the Article in that once again it is a provision that entrenches in negative terms the equality of persons in the enjoyment of various rights rather than to make a "positive assertion" of the minorities' right to use their own language or foster their culture[164]. The provisions in the ICESCR must be considered in conjunction with the provisions of the **International Covenant Of Civil And Political Rights**[165] **(ICCPR)**, which also protects language by projecting a negative prohibition of discrimination[166]. Even in times of public emergency, when the Parties may derogate from their obligations under the ICCPR to the extent strictly required by the situation, such measures must not be incompatible with their other obligations under international law and must `[n]ot involve discrimination solely on the ground of race, colour, sex, *language*, religion or social origin'[167]. In addition to the aforementioned provisions the ICCPR has several other articles to ensure equality, namely Articles 14(3)[168]; 24(1)[169]; 26[170]; and 27[171]. In contrast to Article 26, the wording of

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[163] The International Covenant on Economic, Social and Cultural Rights was adopted on 16 December 1966. It came into force on 3 January 1976.

[164] Szabo (1974) *Cultural Rights* 111.

[165] The International Covenant of Civil and Political Rights was adopted on 16 December 1966 and came into force on the 23 March 1976 with the exception of Article 41, which in accordance with Article 41(2), entered into force on 28 March 1979.

[166] Article 2(1) of the ICCPR provides in slightly different language that Parties will ensure the rights set forth in the Convention `[w]ithout distinction of any kind, such as race colour, sex, *language* or other traits.'

[167] Article 4(1).

[168] Article 14(3), which deal with the right to a fair trial, provides in Article 13, paragraphs 3(a) and (f), that in connection with `[a]ny criminal charge' an accused is to be `[i]nformed promptly and in detail in a language which he understands of the nature and the cause of the charge against him' and is to `[h]ave free assistance of an interpreter if he cannot understand or speak the language used in court'.

[169] Regarding the rights of the child, the ICCPR lays down in Article 24(1) that:

> `[E]very child shall have, without discrimination as to race, colour, sex, *language*, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State'.

[170] Article 26 contains an extremely wide non-discrimination clause:

Article 24(1) suggests the existence of special positive language rights for children. Most of the provisions dealing with language guarantee that language will not form the basis of discrimination with regard to any of the positive rights secured in the Covenant. During the preparatory discussions it was agreed that while Articles 2(2) and 2(1) of the ICESCR and ICCPR respectively contained a general prohibition on discrimination on the grounds of race, *language* and religion, this was only so with regard to the rights enunciated in the Covenants, and these did not include the right of minorities *inter alia* to use their own language[172].

Article 27 of the ICCPR provides explicit treatment with regard to the rights of minorities. This is the first provision in a universal instrument which refers to the existence of linguistic groups *per se*. However, some scholars have observed that the rights themselves "[a]re conferred on the *persons* belonging to such minorities and <u>not</u> on the minority group as such"[173]. If this view is correct, and it is submitted it is[174], then Article

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'[A]ll 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 race, colour, sex, *language*, religion, political or other opinion, national or social origin, property, birth or other status'.

[171] Article 27 provides:'[I]n those states in which ethnic, religious, or *linguistic minorities* exist, 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 their own religion, *to use their own language*'.

[172] M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 181.

[173] Robertson *(1972) Human Rights in the World* 96. However, Gromacki agues otherwise. He argues, relying on the wording of the Article, "in community with other members of their group", that the Article is specific enough in its wording to indicate that the right may only be exercised in the group context. In any event, no matter which way the argument goes, even Gromacki concedes that the rather '[v]ague language of Article 27 has posed interpretative problems regarding the precise status of linguistic rights as either group or individual rights': see JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 538.

[174] Schwelb expresses the opinion that Article 27 is intended to have universal application, and is therefore more cautious and less far-reaching and elaborate than the provisions of the Peace and Minorities Treaties and Declarations following World War I and various bilateral agreements. If the Minorities Treaties and post-World War I

27 entrenches a form, albeit a weak form, of individual protection from linguistic discrimination. The difficulty in interpreting Article 27 can be reduced to the lack of a clear definition for the term "minorities"[175]. What is certain however is that Article 27 applies to States in which minorities exist. At the preparatory discussions a distinction was drawn between (a) national minorities on the one hand; (b) groups of immigrants on the other hand. It appears that Article 27 applies to the former category of individuals, which are established `[m]inorities with historical and cultural traditions which ought to be preserved[176]', as opposed to "accidental" groups `[c]omposed of immigrants who should, wherever possible, be integrated into the life of the country of immigration'[177]. A further question relates to whether the rights of minorities to use their languages set forth in Article 27 refers `[t]o the use of language in private intercourse, in commerce, in the press and publications and at public meetings, or whether it also includes the use of minority languages before the courts and authorities'[178]. Tabory

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declarations were cautious about protecting group rights, then surely the drafters of ICCPR must have been hesitant to protect such rights: see Schwelb "Some Aspects of the International Covenants on Human Rights of December 1966" in Eide and Schou (1968) *International Protection of Human Rights* 103 at 121-122. Dinstein emphasises that Article 27 is of a declaratory nature, and in his view it reflects collective rights at a minimal level in that it is `[e]xercised by members of minorities as a group': see Y Dinstein "Collective Human Rights of Peoples and Minorities" (1976) 25 *International and Comparative Law Quarterly* 102 at 118.

Tabory understands the words "in community with the other members of their group" differently. To the learned writer these words reflect a relational aspect in that they prevent members of a linguistic group from insisting on using their own language for individual purposes, such as in court or in Parliament: see M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 183.

[175] According to Robertson, for purposes of interpreting Article 27, the definition in the commentary on the draft Covenant will probably be used, which defines *minorities* as `[s]eparate or distinct groups, well defined and long established on the territory of a State, excluding groups which would seek to form separate entities in a State': see Robertson *(1972) Human Rights in the World* 96 at 97.

[176] M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 182.

[177] M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 182.

[178] Schwelb "Some Aspects of the International Covenants on Human Rights of December 1966" in Eide and Schou (1968) *International Protection of Human Rights* 103 at 122.

argues that the words "in community with the other members of their group" are significant in this regard. These words would seem to prevent members of a linguistic group from insisting on using their own language *for individual purposes*, such as in court or in parliament. The qualifying phrase in Article 27 would seem to `[l]imit the use of the minority's language to communal purposes, such as in schools, religious worship and cultural activities'[179]. Although I agree with the interpretation given to this Article, one cannot ignore the glaring inconsistency in this article. While this provision is placed within the system of individual rights, it at the same time `[r]ecognises indirectly as a matter of course, the existence of national and linguistic minorities as *social groups* and projects individual rights to the existence of such groups'[180]. In summary then, while Article 27 of the ICCPR contains the most positive provision on the subject of language rights of minorities, it does not deal with the issue of the use of languages in schools and for that matter education which, as indicated earlier on in this essay, plays a fundamental role in the whole scheme of achieving protection in the context of linguistic rights.

F. The Convention against Discrimination in Education[181]

The Convention forbids discrimination based on a variety of criteria, including language[182]. As far as education is concerned the convention unequivocally lays down that the:

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[179] M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167

[180] Schwelb "Some Aspects of the International Covenants on Human Rights of December 1966" in Eide and Schou (1968) *International Protection of Human Rights* 103 at 111.

[181] Adopted by UNESCO's General Conference on 14 December 1960, and in force since 22 May 1962.

[182] Article 1(1).

`[e]stablishment or maintenance, for linguistic reasons, of separate (but equal) educational systems or institutions shall not be deemed to constitute discrimination within the meaning of the Convention, provided that `[s]uch education is in keeping with the wishes of the pupil's parents or legal guardians, that participation is optional, and that the educational or other standards conform to those laid down by the competent authorities'[183].

In this regard Article 5(1)(c) provides that:

> `[I]t is essential to recognise the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the *teaching of their own language*, provided however: [*inter alia*]
>
> (i) That this is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices the national sovereignty'.

This Article, while guaranteeing the minority's communal right to an education , stipulates `[t]hat (a) the culture and language of the larger community should not be cut off, nor may the practical education through its teachings prejudice national sovereignty; (b) the standards of this special education must not be lower that those set by the competent authorities for the population as a whole; and (c) attendance at such special schools is to be optional and not mandatory'[184].

From the perspective of protecting language rights, there are a number of shortcomings with Article 5(1)(c). The Article limits language rights indirectly by limiting the right to education, which seems to lie not

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[183] Article 2(b).

[184] M Tabory "Language Rights as Human Rights" 1980) 10 *Israel Yearbook on Human Rights* 167 at 184.

in the three above restrictions, but in the proviso that members of national minorities may use or teach their own language *depending on the language policy of each State*. The Article gives no indication what conditions should exist that would warrant a State's educational policy to taking into account national groups and *a fortiori* their right to use their own language in education. Tabory opines that `[o]nce the entire right to "use or [teach their] own language" is made contingent upon a state's educational policy, it seems to be stripped of any objective criteria or content'[185]. Another shortcoming of Article 5(1)(c) is that it refers to the use or the teaching of minority languages, but only in the context of the rights of national (i.e. ethnic) minorities. Dinstein explains, tongue in cheek, that the article refrains from addressing itself to the rights of a non-ethnic, purely linguistic minority, that is, a group differing from the majority in its language preference, but not ethnically, as for instance the Yiddish speaking Jews of Israel. However, Dinstein is not very critical of this shortcoming, for he holds the view that the article should only apply to national minorities in any event[186]. I beg to differ with Dinstein. Earlier on in this essay, I stated the that although there may be a nexus between language and culture, such a nexus should not be over-emphasised. A wide definition of "mother tongue" which, as I have established earlier on in this essay, is essential for determining what constitutes language for the purposes of language rights, holds that even those languages not related to the group and the individual's ethnicity and culture should be protected. Furthermore, Dinstein's emphasis on national linguistic minorities obscures the reality that majorities too may suffer linguistic wrongs.

Given the restrictive approach towards the protection of linguistic rights both in the collective and the individual rights

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[185] M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 184.

[186] Dinstein "Cultural Rights" (1979) 9 *Israel Yearbook of International Law* 58 at 71.

`(a) provide effective safeguards for free access to national and world cultures by all members of society without distinction or discrimination based on *[inter alia] language*....

(b) protect, safeguard and enhance all forms of cultural expression such as *national or regional languages, dialects*....'[188]

However, like so many other human rights provisions the uncertainty in Article 9(3) comes in the qualification "*appropriate measures*" which weakens the presumptive protection of linguistic rights.

Nevertheless, the various UNESCO instruments must be appreciated in terms of Article 1(1) of the 1945 UNESCO constitution, which states:

> `[t]he purpose of the Organisation is to contribute to peace and security by promoting collaboration among nations through education, science and culture ... without distinction of race, sex, *language*, or religion by the Charter of the United Nations'[189].

G *The International Convention on the Elimination of All Forms of Racial Discrimination*[190]

The preamble of this Convention makes reference to the purpose of the United Nations, namely to promote and encourage the `[u]niversal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, *language* or religion'. The Convention defines racial discrimination but omits to mention language as a basis of discrimination[191]. The effect of this omission is two fold. Language as a basis of discrimination is

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[188] as cited in M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 186.

[189] 4 *U.N.T.S* 275 as cited in M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 186.

[190] This Convention was adopted on 7 March 1966 and entered into force on 4 January 1969.

[191] Article 1(1) defines discrimination as: `[a]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose of nullifying or impairing the recognition, enjoyment or exercise ... of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.

justiciable under the non-discrimination clauses of this Convention and other human rights instruments only when race features as an element of such discrimination. In other words, the notion of linguicism or linguistic discrimination pure is not recognised. Secondly, it is clear that if minority groups seek to protect and encourage their language, this would only be possible thorough a separate human rights instrument `[w]hich specifically identifies linguistic rights as the object of promotion'[192]. As already noted, at present no such instrument exists.

The Regional Arrangements

A. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The ECHR contains several provisions[193] dealing explicitly with the protection of language rights. The ECHR by virtue of these provisions guarantee at least two positive linguistic protections: the right to be informed of the charge in the language that one understands, and the use if an interpreter. However, as noted by Gromacki, these seemingly positive guarantee do not fit exactly into the conventional definition of

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[192] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 563.

[193] Article 5(2) stipulates that:

> `[E]veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and any charge against him.'

This right runs parallel to the right of anyone against whom criminal charges are brought, enunciated in Article 6(3):

> `[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;
> b) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

positive linguistic rights. The provisions are limited in scope and `[p]rotect linguistic rights only as far as due process would require'[194].

It is trite law[195] that Article 14, the ECHR non-discrimination clause[196], which is based on Article 2[197] of the UDHR, does not extend positive rights to linguistic groups. Recently it has been suggested that the ECHR be supplemented with an additional protocol, consisting of language similar to that of Article 27 of the ICCPR, that would seek to offer more explicit protection for linguistic minorities and minority rights in general. This suggestion has been rejected.

B. *The American Convention on Human Rights (ACHR)*[198]

As expected the ACHR too contains a number of provisions in which language is mentioned[199]. The provisions enunciated in this

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[194] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 564.

[195] *Case of Luedicke, Belkacem and Koç v The Federal Republic of Germany*, 29 Eur. Ct H.R. (Ser.A) 21 at 51-53 as cited in JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 566 fn 274; *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (1968) 6 Eur. Ct. H.R. (Ser.A) at 87 (this case is commonly referred to in the literature as the *Belgian Linguistics case*).

[196] Article 14, the non-discrimination clause of the ECHR reads:

> `[T]he 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.'

[197] see page 48 *ante*.

[198] Article 1, the non-discrimination clause provides:

> `[T]he State Parties to this Convention undertake to respect the rights and freedoms recognised thereon and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, *language*, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'. The American Convention on Human Rights, also known as the Pact of San Jose of Costa Rica, was adopted on 22 November 1969 and came into force on 18 July 1978.

[199] The wording of this clause was influenced by Article II of the American Declaration of the Rights and Duties of Man which stated that:`[A]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, *language*, creed or any other factor'; and Article 15 of the Declaration of Santiago which read: `[A]ll persons are equal before the law. The law

instrument are not in any way different to or more noteworthy than the provisions of the other international instruments surveyed above. Like its predecessors, the American Convention on Human Rights too makes no attempt to entrench any clear-cut *positive* mention of the right to language.

C. *The African Charter on Human and Peoples' Rights (ACHPR)*[200]

Article 2 contains a general clause which adopts the principle of non-discrimination[201]. Article 25 imposes upon states a duty to ensure that the rights and freedoms of the Charter are understood. This article caters indirectly for the protection and promotion of linguistic rights[202].

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shall prohibit discrimination and guarantee all persons equal and effective protection against any discrimination for reasons of race, colour, sex, *language*, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'.

In the Chapter on the "Civil and Political Rights", the right to a fair trial appears in the following manner:

> `[E]very person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
> the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the *language of the tribunal or court.* (Article 8(2); 8(2)(a))'

Like the provisions of the ECHR, this provision too protects linguistic rights to the extent required by the considerations of due process.

With regard to the right of freedom of thought and expression the Convention Article 13(5) provides:

> `...[a]ny advocacy of national, racial, or religious hatred that constitutes incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, colour, religion, *language*, or national origin shall be considered as offences punishable by law.'

[200] The African Charter on Human and Peoples' Rights was adopted on 27 June 1981 and came into force on the 21 October 1981.

[201] Article 2 provides:

> `[E]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, *language*, religion, political or any other opinion, national or social origin, fortune, birth or other status.'

[202] Article 25 provides:

Language rights are also arguably[203] protected through the guarantee of the right to cultural development contained in Article 22(1)[204]. In relation to Article 22(1) Gromacki reasons:

> `[T]he active duty of the state to ensure the exercise of this right to development suggests that the state must protect at least the collective right of an indigenous population to use its own language'[205].

While Article 2 cannot be said to protect positive linguistic rights, the learned writer submits that Articles 25 and 22(1) may be indicative of entrenching positive linguistic rights[206].

(v) <u>1979 to the present day</u>

In 1971 the Subcommission on Prevention of Discrimination and Protection of Minorities requested M Captori to conduct a study on the status of minorities under international human rights law. In 1979 the **Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities** was published[207]. As far as language rights were concerned, the study constituted the `[m]ost comprehensive and significant analysis *at that time* of the international, regional and

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> `[S]tate parties to the present Charter shall have a duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.'

[203] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 570.

[204] Article 22(1) provides: `[A]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind'.

[205] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 570.

[206] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 570.

[207] Francesco Captori "Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities" U.N. Document E/CN.4/Sub.2/384/Rev.1 (1979).

national implementation of language rights'[208][my italics]. The Captori Report (hereinafter referred to as the Report) defined language rights to include the positive `[r]ight granted to persons belonging to linguistic minorities to use their own language'[209]. The Report considered language policies of states in detail and came to the following conclusions. Firstly, the Report identified that there were four possible options open to states to protect linguistic rights: (a) to declare as national or official all languages spoken by the main linguistic group; (b) to designate some minority languages, but not all, as official languages; (c) to stipulate that languages of some minorities be granted official status either at the national or regional level; and (d) where some languages have not been granted official status at the regional or national level, to stipulate that their use is guaranteed by the constitution, by law or treaties[210]. Although one cannot ignore the important role played by the Report in efforts currently underway to codify language rights, *especially for minorities*, within the UN and UNESCO, the Council of Europe and the European Parliament, the Report remains difficult to reconcile in many respects[211].

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[208] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 542.

[209] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 542.

[210] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 542.

[211] If one interprets the Report as a whole it seems, that it affirms the protection and enforcement of minimal positive language rights. This conclusion may be inferred from a closing remark of the Report to the effect that due to the enormous implementation costs, no enforceable obligation existed to declare minority languages as official national languages of the state. However, in ambiguous language the Report was prepared to concede that in the administration of justice, and in those cases where a minority language does not enjoy official status, `[a]dequate facilities should be made available to the members of the minority linguistic group to ensure that they are not at a disadvantage merely because they speak a different language from the majority': see Francesco Captori "Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities" U.N. Document. E/CN.4/Sub.2/384/Rev.1 (1979) at 77.

A. *The European Parliament*

Since 1982 the European Parliament, with the establishment of the "*European Bureau for Lesser Used Languages,*" has taken positive steps towards not only the recognition of language rights but also the entrenchment thereof. The **European Charter for Regional and Minority Languages (1992)**[212], which stresses in its preamble `[t]he value of interculturalism and multilingualism', is indicative of the positive steps initiated by the European Parliament. The Charter seeks to dispel the traditional view `[t]hat the protection and encouragement of regional or minority languages [is not detrimental to] official languages [but rather] [a]n important contribution to the building of Europe based on principles of democracy and cultural diversity...'[213]

The European Parliament has also adopted a **Resolution on the Use of Languages in the Community**[214]. The Resolution reaffirms the principle that all languages and cultures (which languages express) have an intrinsic value; that each individual has the right to express herself freely in her own language or in the language of her choice. The resolution encourages measures at community and state level in order to promote the use of community languages. As far as the Resolution is concerned two points should be made. Firstly, it is formulated in general terms. Secondly, considering the nature of the body responsible for passing the Resolution, it comes as no surprise that at the preparatory stage it was the European Community languages which were of main concern[215].

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[212]which was approved by the Committee of Ministers on 22 June 1922

[213] Tove, Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present in Tove, Skutnabb-Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 91.

[214] Official Journal of the European Communities, 13 April 1984 no.C127/1239.

[215] These are not the only problems with the Resolution. The Resolution incorporates by reference Directives and other enactments of the EEC, which are themselves difficult to interpret: see Tosi (1984) *Immigration and Bilingual Immigration* 17.

B Council of Europe

The European Commission has drafted a **Proposal for a European Convention for the Protection of Minorities.** The Proposal seeks on a collective level to respect, safeguard and develop minorities' ethnic, religious and linguistic identity[216]; to `[f]reely preserve, express and develop their cultural identity in all its aspects, free of any attempts at assimilation against their will'[217]. On the singular level the Proposal affirms that the individual has the right to `[u]se his language freely, in public as well as in private'[218]. One would be foolish to interpret the Proposal as an authoritative document for the promotion of linguistic rights, because it contains a plethora of escape clauses. Consider, for example, Article 8:

> `[W]henever a minority reaches a *substantial percentage* of the population of a region or of the total population, its members shall have the right, *as far as possible*, to speak and write in their own language to the political, administrative and judicial authorities of this region or, *where appropriate*, of the State. These authorities shall have a corresponding obligation' [My italics].

The difficulties with this paragraph are not difficult to see. Article 9 elucidates even further:

> `[W]henever the conditions of Article 8 are fulfilled, in State Schools, obligatory schooling shall include, for pupils belonging to the minority, study of their mother tongue. *As far as possible, all or part* of the schooling shall be given in the mother tongue of pupils belonging to the minority. However, *should the State not be in a position to provide such schooling*, it must permit children to attend private schools. In such a case, the State shall have the right to prescribe that the official language or languages also be taught in such schools' [My italics].

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[216] Article 3(2).'
[217] Article 6(1).
[218] Article 7.

The "guarantees" in Article 9 are patently weak in that compliance with its provisions is made contingent upon the fulfilment of the requirements set out in Article 8. The guarantees in Article 8 are in themselves weak on account of the fact that the article gives states wide room, by stipulating levels of compliance, to manoeuvre away from their obligations. Evidently, when the requirements of Article 8 have been fulfilled the state has a wide discretion to decide, whether it has the resources entitling minority children to mother tongue education. And even if it is *possible* to provide such education, the State is further allowed to decide whether *all or part* of the education should be given in the mother tongue language. In my opinion these provisions are so weak in their enforcement ability that even a state with adequate resources would be able to escape its obligations under these articles. The provisions as they now stand allow an "ideal"[219] state convincingly to shut the door on full mother tongue education. The alternative of private education can at best be described as a "cop-out" provision. The minimum that the provision could have entrenched was an obligation on states to at least provide some financial assistance to private schools teaching a minority language. Despite the criticisms that may be directed against these far from ideal provisions, it should be noted that they do reflect a more progressive international attitude towards linguistic rights[220].

The **Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation**

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[219] I venture to use the word "ideal" in its most extreme meaning i.e. utopian.

[220] On an earlier occasion for example, when the Universal Declaration of Human Rights was drafted, a draft article, prepared by the Drafting Committee of the Human Rights Commission, recognised that racial, linguistic, and religious minorities: `[s]hall have the right *as far as compatible with public order* to establish and maintain their schools and cultural or religious institutions and to use their language in the Press, in public assembly and before the Courts and other applications' [My emphasis].
This draft article was subsequently rejected, as it was said to place heavy burdens upon States.

in Europe (1990)[221] goes further than any of the international covenants mentioned earlier in stating how minorities should be protected.[222] However with regard to migrant workers the Document reaffirms earlier international agreements but expresses a

> `[r]eadiness to examine, at future CSCE meetings, the relevant aspects of the further promotion of the rights of migrant workers and their families.'

The Preamble[223] of the **United Nations Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities** compared to Article 27 of the ICCPR replaces the words "shall not be denied" by "have the right" and by adding that these rights apply "in private and in public, freely and without any form of discrimination." Articles 4(1)[224] and 4(2) prompt states actively to promote enjoyment of the rights entrenched.

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[221] The Conference on Security and Co-operation in Europe became from the late 1980's a major forum for East-West (European) links. The 35 participating states at the first Helsinki meeting in 1975 were: Albania, Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, USSR, United Kingdom, USA and Yugoslavia.

[222] Tove *et al* argue that the Document represents a major step forward. This is especially so if "minority" is defined as it is in the Council of Europe draft, if it becomes legally binding, if there is a procedure for monitoring progress (which the European Charter for Minority or Regional Languages contains), if the individuals or communities concerned have effective legal recourse in the event of their rights not being represented and is the funds necessary for implementation are made available: see Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 95.

[223] The Preamble affirms `[t]hat the promotion and protection of the rights of persons belonging to national or ethnic, religious and *linguistic* minorities contribute to the political and social stability of States in which they live'.

[224] Article 4(1) provides:

> `[P]ersons belonging to ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public freely and without interference or any form of discrimination.

A notable feature of the Declaration is that most of the articles are mandatory, as indicated by the word "shall", and have few escape modifications and alternatives. However, in the case of education it is regrettable that, as with the European Charter and the other instruments, there are alternatives entrenched which permit reluctant States to provide minimalist protection[225].

The recent **United Nations Draft Universal Declaration on Indigenous Rights**[226] entrenches a number of provisions relating to the language rights that linguistic minorities have[227]. This is the only (draft) Declaration that clearly promotes *minority indigenous mother tongues.* It stands in striking contrast to the **United Nations Convention on Migrant Workers and their Families**, which accords only minimal rights to mother tongue language[228]. It has to be noted that the current draft of the Declaration is a compromise, for at the earlier drafting stages there were representatives who favoured a stronger approach towards the protection of language rights. In addition they also felt that individual

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[225] Consider Article 4(3):

> '[S]tates *should take appropriate measures* so that, *wherever possible*, persons belonging to minorities have *adequate* opportunities to learn their mother tongue or to have instruction in their mother tongue' [emphasis added].

Once again the question has to be posed? What constitutes "appropriate measures" or "adequate opportunities"? A lacuna in the Article is that it does not say who is to decide what is "possible." The words "instruction in their mother tongue" are open to interpretation. The phrase could mean "through the medium of their mother tongue" or "instruction in the mother tongue as a subject", the second interpretation clearly having a more limited meaning: see also page 67 *et seq. ante* for further discussion.

[226] E/CN.4/Sub.2/1988/25.

[227] The right to develop and promote their own languages, including an own literary language, and to learn them for administrative, juridical, cultural and other purposes.
The right to all forms of education, including in particular the right of children to have access to education in their own languages, and to establish, structure, conduct and control their own educational systems and institutions.
The (collective) right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous function.

[228] M Hasenau "Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and Their Families in Relation to the ILO in Standards on Migrant Workers" (1990) 2 *International Migration* XXVIII 133.

protection was needed. The wording of Article 9, for example, has been toned down by inserting the words "develop and promote", whereas an earlier draft contained the words "to maintain and use one's own language". As far as the binding effect of the Declaration is concerned, the fact that this Declaration applies only to indigenous peoples[229] means that the instrument has an extremely limited scope. One must also not lose sight of the fact that unlike a convention, `[w]hich must be legally precise, a declaration is usually drafted in broad terms leaving room for interpreting according to national conditions'[230].

Conclusion

As far as the international[231] protection of language rights is concerned it is axiomatic that the regional multilateral instruments provide limited protection. Even less protection is discernible in the universal instruments. The more general human rights instruments mention language only in passing, and in those instruments where language rights are mentioned, such instruments apply to numerically small groups only or to specific themes, such as instruments relating to genocide or education or to minorities or indigenous people[232]. Over the years three categories of minorities came to be protected on a

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[229] The `[i]ndigenous category does not include all linguistic minorities, as indigenous languages include only those languages that are native to a specific region or state': see JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 555. Hannum too argues that indigenous peoples include only those populations who are native to a specific region or state :see H Hannum "New Developments in Indigenous Rights" (1988) 28 *Virginia Journal of International Law* 677-78.

[230] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 554.

[231] The importance and the impact of national protection of language rights through constitutional developments will be dealt with later on in this essay. See Chapter V.

[232] Tove Skutnabb, Kangas, Robert Phillipson "Linguistic Human Rights, Past and Present" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71 at 78.

collective basis, namely ethnic, religious and *linguistic* minorities[233]. While ethnic and religious minorities receive protection through a number of international instruments, there is no international instrument exclusively devoted to the protection of language or linguistic rights[234]. Initially it was not even clear whether language was officially recognised as a separate right by the various organs of the United Nations[235]. Today language is well recognised as an important vehicle of expression and cultural identification[236]. Moreover, language is recognised as one of the four fundamental bases upon which individuals and groups may not be discriminated against[237]. From the above survey it is clear that the positive entrenchment of language rights cannot be accommodated in the existing universal and regional human rights instruments. What is needed is a separate Declaration dedicated not only to the positive protection and promotion of the language rights of minorities, but to *language in general.*

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[233] Y Dinstein "Collective Human Rights of Peoples and Minorities" (1976) 25 *International & Comparative Law Quarterly* 102 at 111-112.

[234] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 520.

[235] M Tabory "Language Rights as Human Rights" (1980) 10 *Israel Yearbook on Human Rights* 167 at 167.

[236] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 520.

[237] Y Dinstein "Collective Human Rights of Peoples and Minorities" (1976) 25 *International & Comparative Law Quarterly* 102 at 113.

CHAPTER IV

THE RELATIONSHIP BETWEEN "LANGUAGE" AND "FREEDOM OF EXPRESSION"

> Language! the blood of the soul, sir, into which our thoughts run, and out of which they grow.
> OW HOLMES: *The Professor at the Breakfast Table II* (1859).

"Language" is inextricably linked to the human condition[238]. The fulfilment of the essential content of many fundamental rights cannot be attained if the individual is deprived of communicating in his language. This assertion is sometimes used to support the view that there is no need to protect language as language rights are protected when giving content to other fundamental rights.

The relationship between language and other fundamental rights, such as, for example, rights pertaining to judicial due process, rights to equality and freedom from discrimination, rights of access to information, rights to education etc., has long been recognised and supported both in international and national law. Within the context of constitutional interpretation, national courts by way of the "purposive approach" have favoured a *wide and generous approach* to delineate the relationship between language and other rights[239].

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[238] In *R v Mecure* 48 [1988] D.L.R. (4th) 1, La Forest J in his majority judgment held:

> `[I]t can hardly be gainsaid that language is profoundly anchored to the human condition.'

[239] *See R v Big M Drug Mart* [1985] 18 D.L.R. (4th) 321 at 359; *R v Therens* [1985] 18 D.L.R. (4th) 655; *Reference Re Minority Language Educational Rights* [1988] 49 D.L.R. (4th) 499 at 509 *et seq.; Reference Re Public Schools Act* [1990] 67 D.L.R. (4th) 510 *et seq;* Julius H Grey "Language in Canadian Public Law in Prinsloo, Peeters, Turi, Van Rensburg (eds.) (1992) *Language, Law and Equality* 57 at 65 *et seq.*
The "purposive approach" of constitutional interpretation has been cited with approval by the South African Constitutional Court in *inter alia S v Zuma* 1995 (2) SA 642 (CC); *S v Mkwanyane* 1995 (3) SA 391 (CC); *S v Mhlungu* 1995 (3) SA 867 (CC). In *Nortje and Another v Attorney-General, Cape and Another* 1995 (2) SA 460 (C), Marais J held that the purposive approach should not be construed as being synonymous with the "wide and generous approach" of interpretation. The court expressed doubt whether the two approaches yielded the same results. At 471-I the judge held:

> `[S]ome contend for a consistently "liberal", "broad", and "generous" approach to the rights conferred by this kind of legislation. Some say "and

International courts and tribunals, which have sometimes taken a more restrictive approach to the interpretation of international instruments, have been more sluggish in recognising the existence of the nexus between language and other rights. Considering that rights pertaining to judicial due process[240], education[241], freedom of movement[242], access to information[243], equality[244] etc., have received much attention in international and national law, I propose to canvass the relationship between a relatively new association, namely that between language and the right to freedom of expression. I will discuss the manner in which this relationship has been received in international law and foreign jurisdictions. The purpose of this exercise is simply to illustrate, taking a single right, that it is incorrect to assume that within the realm of the protection offered to the so-called fundamental rights that language rights will receive adequate protection. Often the courts place internal conceptual restrictions on rights which makes it

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purposive" in the same breath, as if those approaches are calculated to produce the same result. As Hogg *Constitutional Law of Canada* 3rd ed. at 814 has pointed out, they do not always yield the same result. A generous or liberal interpretation of a conferred right may so "overshoot" the purpose of the right (as ascertained from a "purposive" interpretation of the right) that that purposive interpretation as preferred to, and used to pare down, the generous or liberal interpretation'.

[240] See *Isop v Austria:* Application No. 808/60. Decision of 8 March 1962 in (1962) 5 *Yearbook of the European Convention on Human Rights* 108-25 as cited in M Tabory "Language Rights as Human Rights (1980) 10 *Israel Yearbook on Human Rights* 167 at 193 (fn 73), *X v The Federal Republic of Germany:* Application No. 1794/63. Decision of 23 May 1963 in (1966) 9 *Yearbook of the European Convention on Human Rights* as cited in M Tabory "Language Rights as Human Rights (1980) 10 *Israel Yearbook on Human Rights* 167 at 193 (fn 74); *Luedicke, Belkacem and Koç v The Federal Republic of Germany* as cited in M Tabory "Language Rights as Human Rights (1980) 10 *Israel Yearbook on Human Rights* 167 at 196; *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (Merits), Judgment of 23 July 1968, at 87 as cited in M Tabory "Language Rights as Human Rights (1980) 10 *Israel Yearbook on Human Rights* 167 at 198 (fn 90).

[241] *Alsemburg and Beersel v Belgium* (1963) 6 Yearbook of the European Convention On Human Rights 332.

[242] *Groener v Minister of Education* [1990] C.M.L.R 401.

[243] Ford v Quebec (A.G.) [1988] 2 S.C.R. 712.

[244] Ford v Quebec (A.G.) [1988] 2 S.C.R. 712.

extremely difficult for such rights[245] to glove other rights[246], especially those not explicitly recognised in international law.

While freedom of expression is upheld as a basic human right[247], "language" as the medium and constituent component of expression[248] has for a long time been overlooked not only in national jurisdictions but also on the international human rights scene. It seems strange to assert that an individual `[f]orbidden by the state to use his own language, is not a victim of an infringement upon his freedom of expression'[249]. It is more consistent with the definition of the right to freedom of expression[250] as espoused by the national and international courts to include language as an integral and necessary component of this freedom. One of the consequences of maintaining that a language is not an integral part of freedom of expression is that a state could, for example, ban the publication of newspapers printed in a particular language or make it a criminal offence to address a conference in a particular language, as is the case in Algeria[251]. While

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[245] in this case the *right to freedom of expression.*

[246] in this case *language rights.*

[247] In the *Handyside case,* the European court of Human Rights stated:

> `[F]reedom of Expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... Such are the demands of pluralism, tolerance and broadmindedness without which there can be no "democratic society': see Handyside Case (1976) 24 European Court Of Human Rights (Ser.A) at 23.

[248] In *Ford v Quebec (A.G.)* [1988] 2 S.C.R. 712 the Canadian Supreme Court held:

> `[L]anguage is not merely a means or a medium of expression, it colours the content and meaning of expression. It is the means by which a people may express its cultural identity. It is also the means by which one expresses one's personal identity and sense of individuality' (at 716).

[249] Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163 at 181.

[250] The right to freedom of expression has been defined as the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences. The purpose of the right to expression is `[t]o preserve an uninhibited market place of ideas in which truth will ultimately prevail...' : see *Red Lion Broadcasting* Co. *v F.C.C.* 23 L Ed 2d 371 at 389; *Associated Press v United States* 89 L Ed 2013 at 2030; *New York Times Co. v Sullivan* 11 L Ed 2d 686 at 700.

[251] A few years ago a Kurdish person was arrested for addressing a human rights conference in Kurd: see Tove Skutnabb, Kangas, Sertaç Bucak "Killing a Mother Tongue: How the Kurds are Deprived of Linguistic Human Rights" in Tove, Skutnabb-

the existence of a relationship between language and the right to freedom of expression may appear to be self-evident, until recently, international courts and other human rights bodies paid very little attention to such a relationship. One of the reasons for this is that, traditionally, the right to freedom of expression was thought solely to ensure political and social debate for the proper operation of the democratic system of government[252]. However, an increasingly individualistic appreciation of the right to expression has caused the right to transcend the political threshold into matters such as science, literature, theatre, the arts, and commercial activities[253].

Constitutional commentators point out that despite the seemingly inseparable nexus between the right to freedom of expression and the right to expression in one's language of choice, national constitutional provisions do not directly recognise the existence of such a nexus. Indirect recognition is more discernible as most constitutions contain a bill of rights entrenching freedom of expression and language provisions[254].

Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 347.

In Algeria under Articles 18 and 31 of the *Loidu 16 janvier portant généralisation de l'utilisation de lange arabe,* a person can be prosecuted for speaking a prohibited language.

[252] see *Ford v Quebec (supra)* at 712.

[253] In *Valentine v Chrestensen* 316 U.S 52 (1978), the Supreme Court of the United States declined to afford First Amendment protection to speech which did no more than propose a commercial transaction. This view was repudiated in a line of cases: *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc.* 425 U.S 748 (1976); *Hudson Gas & Electric Corp. v Public Service Commission of New York* 447 U.S 557 (1980). Within the context of the Canadian Charter in *Irwin Toy Ltd. v Procereur Général du Québec* [1986] R.J.Q. 2441 the court unequivocally stated that there was no basis on the face of s.2(b) of the Canadian Charter for distinguishing, in respect of the guarantee of freedom of expression, between different kinds of expression, whether they be of a political, artistic, cultural or other nature.

[254] Consider for example the Constitution of the Republic of South Africa, 1996. Section 16, the **Freedom of expression** clause, provides:

`16. (1) Everyone has the right to freedom of expression, which includes -

(a) freedom of the press and other media;

(b) freedom to receive and impart information and ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

National courts, through liberal interpretation of constitutional provisions[255], recognise that language is an integral part of the freedom of expression, but many countries have shied away from dealing the issue directly[256]. In Switzerland the *Tribunal Federal* indicated that language `[i]s a necessary condition for the recognition of all the fundamental rights connected with freedom of expression in written or verbal form'[257]. The Canadian Supreme Court has dealt extensively with the relationship between the right to freedom of expression and language rights. The Canadian Supreme Court in the seminal case of *Ford v Quebec (A.G.)* held that:

> `[L]anguage is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression, it colours the content and meaning of expression'[258].

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(2) The right in subsection (1) does not extend to -
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.

Section 30, the **Language and culture** provision, provides:

`30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights'.

It is evident that there is no direct relationship between the right to freedom of expression and the language provision. And yet no one would deny that in order to exercise the liberties entrenched in section 16 language, as a medium of expression, is essential.

[255] *A.G. Quebec v Quebec Association Of Protestant School Boards* [1984] 10 D.L.R (4th) 321 at 331-332; *R v Mecure* [1988] 48 D.L.R (4th) 1 at 57-58; *Ref. Re Public Schools Act* [1990] 67 D.L.R (4th) 488 at 510 *et seq.*

[256] Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163 at 167.

[257] Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163 at 167 (fn17).

[258] Ford v Quebec (A.G.) [1988] 2 S.C.R. 712. In casu the Supreme Court was called upon to pronounce on the constitutionality of Article 58 of the Quebec *Charte de la langue française*, which made in most cases French the exclusive language of outdoor commercial signs.

In *Devine v Quebec (A.G.)*[259] the Canadian Supreme Court came to a similar conclusion, but the court added that the right to freedom of expression does not include the right to use exclusively one's language of choice. Recently, the Supreme Court has reiterated its earlier view of the interrelationship between language and the right to freedom of expression[260].

The precise relationship between language and the right to freedom of expression within the context of the American First Amendment[261] has not really received much attention, but there is authority to suggest that the United States Supreme Court is beginning to grapple with the question. In *Red Lion Broadcasting Co. v FCC*[262], the US Supreme Court concluded *obiter* that the right to free speech included the right to broadcast in a foreign language[263]. Within the context of expressing concern for people who could not speak English the court opined:

> `[O]bviously, when broadcasting is only in English, the exclusive foreign-speaking listener has no suitable access to the *ideas, experiences, views and voices which the Court finds to be his or her right...*'[My italics].

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[259] [1988] S.C.R 790 (Can.).

[260] In *Reference Re Criminal Code (Manitoba)* [1990] S.C.R. 1123 at 1181 the court stated:

> `[T]he choice of the language through which one communicates is central to one's freedom of expression. The choice of language is more than a utilitarian decision, language is, indeed, an expression of one's culture and often one's sense of dignity and self-worth. Language is, shortly put, both content and form.'

[261] The First Amendment to the US Constitution states that `[C]ongress shall make no law ... abridging the freedom of speech, or the press....'

[262] 395 U.S. 367 (1969).

[263] The court expressed the view that:

> `[P]eople who do understand English and therefore have access to English language broadcasting may still have a First Amendment right to a diversified programming schedule that would include the right to foreign broadcasting'.

The above statement clearly affirms the uneasiness with which the courts view the impact of monolingualism on the right to freedom of expression.

On the international level, although the right to freedom of expression has long been emphasised, there remains ambiguity on the position language occupies in giving content to opinions expressed. Article 19 of the **International Covenant on Civil and Political Rights** - which provides that freedom of expression `[s]hall include the freedom to receive and impart information and ideas of all kinds, ... either orally or in writing'[264], seems to support the idea that language may be a constituent part of the right to expression `[i]nsofar as it is a necessary component of freedom of expression'[265].

The United Nations Human Rights Committee (UNHRC) in a number of cases[266] considered complaints by applicants alleging that the refusal of their national courts to hear their complaints in their mother tongue language violated their right to freedom of expression. Regrettably, in the majority of the cases the UNHRC failed to even

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[264] Article 19 provides:

1. [E]veryone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include the right 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.
3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and necessary:
    a) For respect of the rights and reputation of others;
    b) For the protection of national security or for public order, or for public health or morals.

[265] Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163 at 170.

[266] *Dominique Guesdon v France* U.N. GAOR, Hum.Rts. Comm., vol II, 45th sess., Appendix X at 61, U.N. Document. A/45/40 (1990); *T.K v France* U.N. GAOR, Hum. Rts. Comm., vol.II, 45th sess., Appendix X, at 118, U.N. Document. A/45/40 (1990); *M.K v France* U.N. GAOR, Hum. Rts. Comm., vol II, 45th Sess., Appendix X at 127, U.N. Document. A/45/40 (1990); *Yves Cadoret and Herve Le Bihan v France* Communications No. 221/1987 and 333/1988, April 11, 1991.

address the validity of the claim. In cases where applicants admitted that they were proficient in the language of the court (even though the language of the court might have differed from their mother tongue language) the UNHRC simply dispensed with the complaint on this account, without further clarification[267].

Recently, in *Yves Cadoret and Herve Le Bihan v France*[268], the Committee had the yet another opportunity to deal with the relationship between language and freedom of expression[269]. Although the eventual conclusion reached by the UNHRC was not in any way different to its previous decisions, the case is of interest in that France's position seemed to be that, had the applicants been

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[267] In *Dominique Guesdon v France (supra)* the applicant submitted that Breton was his mother tongue and first language and that the French courts violated *inter alia* his freedom of expression, when it rejected both his requests that he and his witness testify in Breton and his demand that they be heard through the assistance of an interpreter. The Committee, taking into account the admission by the applicant that he was conversant in French and that he was bilingual, considered the freedom of expression argument inadmissible. The Committee summated:

> '[A]s to the applicant's claim that he had been denied his freedom of expression, the Committee observed that the fact of not having been able to speak the language of his choice before the French courts raised no issue under Article 19(2). The Committee therefore found that this aspect of the communication was inadmissible' see: *Dominique Guesdon v France* U.N. GAOR, Hum.Rts. Comm., vol II, 45th sess.,Appendix X at 61, U.N. Document. A/45/40 (1990) at ¶ 7.2.

In *T.K v France (supra)*, the applicant stated the Tribunal Administratif of Rennes had refused to consider a case that he submitted in the Breton language. The applicant contended *inter alia* that his right to freedom of expression was restricted in that he was not allowed to express himself in his mother tongue Breton language. The Committee was not persuaded by the argument in that the accused acknowledged that he was conversant in the French language.

In *M.K v France (supra)* the Committee took a similar approach. In casu, the Tribunal Administratif of Rennes refused to consider a complaint directed against the refusal of French tax applications to accept the applicant's address in Breton. The Committee refused to entertain the applicant's complaint until all domestic remedies had been exhausted.

[268] Communications No. 221/1987 and 333/1988, April 11, 1991.

[269] In casu, the applicants appeared before the Tribunal Correctionel of Rennes on charges of having vandalised three road signs. Although Breton was their first language, they were refused leave to present their cases or the testimony of their witnesses in Breton. They were consequently found guilty and sentenced. In their communications the applicants alleged that the refusal of the courts to let them present their defence in Breton was a clear and serious restriction of their freedom of expression contrary to Article 19(2). On this point the state party indicated that the applicants were bilingual, an allegation duly admitted by the applicants.

unilingual in Breton, or had they not had sufficient mastery of the French language, then the *Tribunal Correctionel* might have infringed upon their freedom of expression. It is regrettable that the UNHRC did not canvass what the outcome would have been had this in fact been the position.

The UNHRC has missed a number of opportunities authoritatively to state the relationship between language and freedom of expression. It is hoped that in the future when the occasion arises again the opportunity will be seized.

The situation in the European context also remains rather hazy. Article 10[270] of the **European Convention for the Protection of Human Rights and Fundamental Freedoms** (ECHR) entrenches the right to freedom of expression. In *Inhabitants of Leeuw-St. Pierre v Belgium*[271], the European Commission of Human Rights was asked to examine the request of a group of Belgian citizens living in a Flemish municipality attempting to receive administrative documents in French[272]. They

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[270] Article 10 states:

1. [E]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise to these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorders or crime, for the protection of health or morals, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.'

[271] *Inhabitants of Leeuw-St. Pierre v Belgium* 8 (1965) *Year Book of the European Convention on Human Rights 338.*

[272] Section 3(1) of the Act of 28 June 1932 provided that a language census be held every 10 years in order to record trends in Belgian municipalities with regard to the languages spoken. In this way necessary administrative, educational and judicial changes could be made in accordance with the results of the census. The Act of 24 July 1961 ordered that a census be taken in accordance with the 1932 Act. However on 3 November 1961 a Royal Decree was issued which not only abolished the linguistic part of the census to be held on 31 December 1961 but also prohibited the distribution of bilingual census forms, fearing that these would facilitate an indirect

claimed that the municipality's refusal to provide these documents in French violated their freedom of expression under Article 10 of the ECHR. The Commission declared simply that the application was inadmissible *ratione materiae* because the Convention does not expressly guarantee linguistic freedom when attempting to obtain a right to use the language of one's choice in relations with municipal authorities[273]. The Commission conceded that the applicants' argument would have been valid if it was brought under the purview of texts similar to Articles 5(2)[274] and 6(3)[275] of the Convention. However, the Commission was loathe to admit that it might have some foundation in Articles 9(1)[276] and 10(1) for such interpretation would cause the specific guarantees given Articles 5 and 6 to be superfluous[277]. The Commission seemed to have drawn a distinction between freedom of expression outside governmental authority on the one hand, and a claim to have administrative formalities completed in a particular language. In the case of the former the Commission, it seems, would have been willing to concede a possible (if there were no grounds for inadmissibility) relationship between language and

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linguistic census. In issue in this case was the unavailability of the French census forms, tax certificates and other administrative documents.

[273] The court held that there was no article in the Convention or the protocol to the Convention that expressly guaranteed "linguistic freedom." The only provisions that deal with the use of languages are to be found in Articles 5(2) and 6(3)(a) & (e) and even then, held the Commission, these provisions are limited in scope and irrelevant to the case in point. Furthermore Article 14 is clear when it prohibits discrimination solely in "the enjoyment of the rights and freedoms set forth " in the Convention. Accordingly held the court that the Application was inadmissible.

[274] Article 5(2) deal with the right to information in a language that one understands especially in circumstances where one is arrested.

[275] Article 6(3) provides for the right to the free assistance of an interpreter when one does not understand the language used in court.

[276] Article 9(1) provides that `[e]veryone has the right to freedom of thought, conscience and religion' which `[i]ncludes freedom to change his religion or belief and freedom wither alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.'
Article 10(1) provides that `[e]veryone has the right to freedom of expression,' including `[f]reedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'

freedom of expression, whereas in the case of "administrative" governmental action the Commission would have been less inclined to draw such a nexus[278].

The Commission rejected another application involving language and freedom of expression in *X v Ireland*[279]. The Applicant was a civil servant. He claimed a taxed allowance for each of his four children. However, his claim was rejected by the taxing authorities on account of the fact that he had not filled out a prescribed form. The form was entirely in Irish, which he could neither read nor write. He refused to comply, despite a warning that he would loose the allowance if he did not comply. When he insisted in obtaining a form printed in English, he lost his allowance. The Applicant maintained that the requirement of Irish exclusively in these forms constituted a violation of his freedom of expression under Article 10. The Commission's response was that the requirement to complete the form in the Irish language did not in any way interfere with the Applicant's freedom of expression, and that the application was inadmissible[280].

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[277] *Inhabitants of Leeuw-St. Pierre v Belgium* 8 (1965) *Year Book of the European Convention on Human Rights 338.*

[278] The Commission held: `[W]hereas in the last analysis the Applicants are claiming the right to be able to use the language of their choice, or of their mother tongue or usual language, in relations with the authorities;
Whereas, however, it appears that the guarantee of this right lies outside the scope of the Convention, in particular of Articles 9 and 10...': see *Inhabitants of Leeuw-St. Pierre v Belgium* 8 (1965) *Year Book of the European Convention on Human Rights* 338 at 360.

[279] 13 (1970) *Year Book of the European Convention on Human Rights* at 792.

[280] Morris has criticised this decision. In the opinion of the writer in *X v Ireland* there was interference with the Applicant's freedom of expression. However the same writer justifies the Commission's refusal to consider the question seriously and indicates that the Applicant could have had the form translated. de Verrenes is not convinced that the Applicant invoked the correct right. According to de Verrenes the Applicant should have argued that his right to equality was infringed instead of his right to freedom of expression. The writer goes on to explain that to only provide governmental services or funds to those who use a language understood by a tiny percentage of the state's population seems to be unfair and difficult to justify. The writer explains further: `[B]y limiting the language of government services, a state imposes a condition of access to those services. By so doing, a state is creating an inequality between those for whom the language of service is their primary language, and for those whom it is not. The former have no difficulties in complying

In *Charlent v Belgium*[281], the European Commission indirectly acknowledged that in private affairs, freedom of expression included the freedom to use one's language of choice[282].

In *Fryke Nasjonale Partij v Netherlands*[283] the applicants were prevented from standing as candidates in elections of the *Eerste Kamers der Staten-Generaal* because they submitted their registration for election in Frisian and not in Dutch. They asserted, *inter alia,* that this action infringed upon their freedom of expression under Article 10 of the Convention[284]. The European Commission once again indicated that freedom of expression does not guarantee the right to use the language of one's choice in administrative affairs.

In 1993, the UNHRC handed down an important decision.. In *Ballantne and Macintyre v Canada*[285], the applicants were English speaking residents of the province of Quebec who claimed that the prohibition against using any language other than French on outdoor commercial signs or in a firm's name infringed upon their freedom of expression. To this assertion the government of Quebec responded

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with this condition for access to the services, whereas the latter will, either because they do not understand the language, because they have difficulty in responding properly in the language, or even because it imposes on them an additional burden in exercising their right to these services. In other words, there is a distinction based on language that creates an inequality between two groups of individuals. This distinction may in addition constitute discrimination if it is not reasonable or justifiable the particular circumstances of the case' : see Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163 at 175 (Fn 41).

[281] 6 (1963) *Year Book of the European Convention on Human Rights 454.*

[282] The Commission held:

> `[W]hereas freedom of religion is not in question; whereas this is also true of freedom of thought, conscience and expression of the Applicants themselves, since nothing prevents them from expressing their thought freely in the language of their choice' see: *Charlent v Belgium* 6 (1963) *Year Book of the European Convention on Human Rights* 454.

[283] 45 (1986) *Decisions And Reports* 240 as cited in Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163 at 176 fn46.

[284] facts of the case cited in Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163 at 177.

[285] Communications Nos. 359/1989 and 385/1989, March 31, 1993.

that the right to freedom of expression as entrenched in Article 19 of the Covenant did not include commercial activity, but was limited to matters involving political, cultural, and artistic expression. It was further argued that even if commercial activity was contemplated by the article, this freedom did not include the individual's absolute right to choose the language of commercial signs. Finally, the government contended that even if freedom of expression included freedom of choice of language of commercial activities, the prohibitions contained in the *Charte de la française* was reasonable and that the limitation sought to protect the French language and culture in Quebec. The Commission rejected the government's argument. The Committee stated that Article 19(2) of the Covenant applies not only to ideas and subjective opinions, but also to any news and information, to any expression, to any commercial publicity or signs, and to any work of art[286]. The Committee rejected the sentiment that commercial activity constituted a lesser form of expression. In response to the State party's contention that the measures that it adopted were reasonable and necessary, the Committee answered that Article 19 only permits restrictions that are "provided by law" and necessary either to respect the reputations of others or to protect national security, public order, health or morals. The Committee admitted that the restrictions placed by the State party were "provided by law" but held that, the language restrictions relating to outdoor commercial signs in Quebec were unnecessary, because they protected neither the rights of other individuals, nor the public order, health or morals. Furthermore, even if the restrictions were based on Article 19(2)(a) or (b), the government would nevertheless have to show that such restrictions were justified. In

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[286] Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163 at 177.

casu, the government had failed to show that the restrictions were justifiable beyond claiming that they were reasonable.

In essence, the Committee endorsed the view that in an entirely non-governmental realm, any attempt at restricting an individual's language choice clearly violates the individuals freedom of expression. This case is may also be regarded as supportive of the view that the argument that one does not really affect the substantive right to freedom of expression, if one has an accessible language in which to express one's opinion, is fallacious[287]. Although the Human Rights Committee did not elaborate on this point the case does indicate however, that the right to expression extends to any possible medium of expression.

Comment on the cases

In canvassing the relationship between the right to freedom of expression and the right to language, the case law makes it quite clear, especially in national jurisdictions, that a distinction is drawn between the public use of language and the private use of language. This distinction is an important one, for it seems that in the case of private discourse the courts are more willing to acknowledge the nexus between language and the right to expression than in the case of public discourse. Put differently, it seems that an individual has the freedom to transmit information or address his government in any language, but the state does not have a analogous obligation to receive this information or respond to the individual's exercise of his freedom. When one examines both the UNHRC's and the European Commission's decisions, it is axiomatic that most of the cases concerning freedom of expression and language arose within the

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[287] Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163 at 177.

context of the public or state activities. All the cases involved individuals claiming that the state was positively obliged to accede to their linguistic preference in state activities[288].Clearly the cases `[d]o not involve an individual seeking to express his opinion or point of view in the private dormain'[289].

Although one gets the impression from the European commission as well as the UNHRC that language is implicitly linked to the right to freedom of expression it is common that both bodies failed to elucidate clearly why they regarded the right to freedom of expression inadmissible in almost every case. One can only speculate that the inadmissibility arose `[b]ecause the complainants attempted to impose a positive linguistic obligation on states, rather than to protect a right of non-interference in private matters relating to the freedom of expression'[290].

The *Ballantyre case* failed to canvass the situation where an individual is completely unable to use or comprehend the state sanctioned official language of expression. And yet, in many of the cases discussed this was an important factor in declaring the complainant's claim inadmissible. It is submitted that such an approach is seriously flawed. It seeks to create a restriction neither recognised or implicit in the rights provided for in Article of the ECHR and Article 19 if the ICCPR. As de Varrennes points out:

`[I]t represents *de facto* state interference in private activity[291].'

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[288] In *Inhabitants Of Leeuw-St. Pierre* and *X v Ireland,* the applicants claimed the right to receive administrative documents in a particular language. In *Dominique Guesdon v France, T.K v France,* and *Yves Cadoret and Herve Le Bihan v France,* concerned the right to use Breton in judicial or administrative proceedings.

[289] Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163 at 179.

[290] Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163 at 179.

[291] Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163 at 180.

The textual approach taken to the interpretation of the European Convention in the *Inhabitants of Leeuw-St. Pierre case (supra)* is a clear repudiation of any attempt to create a new limitation on the freedom of expression by governments not provided for in these instruments. By declaring a complainant's claim inadmissible simply because she is able to comprehend and speak a state's official language is a *de facto* limitation not contemplated by the European Convention and totally inconsistent with the textual approach of interpretation.

The argument is sometimes made that Article 27 of the **ICCPR** already contains a provision that protect minority language between persons so that there is no need to include language as an element of freedom of expression. This argument contains a number of weaknesses. Article 27 contains a number of restrictions. It pertains only to linguistic minorities existing in a given state. The reference to "linguistic minorities" becomes even less clear when read in conjunction with the rest of Article 27. A global reading of the Article seems to indicate that the reference to linguistic minorities is closely allied to "cultural minorities". This shadows the fact that often language minority groups may not have the same cultural ties. Furthermore, it may be difficult to invoke the protection offered by this Article because some states contend that "minorities", least of all, "language minorities", exist. And even if accepted that Article 27 applies to "linguistic minorities" the Article would offer very little or even no protection for the individual or a group of individuals who are not members of a linguistic group. Furthermore the emphasis on linguistic minorities seem to obscure the fact that linguistic majorities too suffer language discrimination.

In summary then, while instinct would lead one to conclude that language and freedom of expression are two sides of the same coin, conflicting approaches in the interpretation of human rights make the

realisation of language rights difficult. While the relationship between language and freedom of expression is more discernible within the context of private discourse, this is not so where the state, the duty holder, is placed under a positive obligation to protect language rights. The conclusion that can be reached is that, while there is a relationship between language and freedom of expression, it is not a relationship that should be over-emphasised. The independent *positive* protection of language rights is still therefore necessary.

CHAPTER V

AN INTERNATIONAL DECLARATION FOR THE PROTECTION OF LANGUAGE AND LANGUAGE RIGHTS

> A man who does not make himself proficient in at least two languages other than his own is a fool. Such men have the quaint habit of discovering things fifty years after all the world knows about them-because they read only their own languages.
> MARTIN H FISCHER (1879).

The extension of international human rights norms and their impact on constitutionalism have in modern times done much to alleviate the plight of individuals and groups affected by language wrongs. However, while progress is conspicuous, it is nevertheless apparent that there lies a long road towards a dispensation where the right to use one's language will be a fundamental and universal right. Considering that language discrimination and multilingualism are universal phenomena, *international* human rights law is the appropriate vehicle for bringing about global change. It is submitted, taking into account the aforementioned analysis of the present status of language rights in international law, that a **Universal Declaration For Language Rights**[292] would provide an appropriate and useful model to facilitate the explicit international recognition, promotion and protection of linguistic rights as fundamental human rights. In this section I will canvass some of the pertinent issues that would have to be taken into account when drafting such an instrument.

In October 1987 at the XXII Seminar of the International Association for the Development of Cross Cultural Communications on "Human Rights and Cultural Rights" at the School of Law at the *Universidad Federal de Pernambuco* in Recife, Brazil, the **Declaration of Recife** was produced. The Declaration prompted that `[l]inguistic rights

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[292] Hereinafter also referred to as the "Instrument".

should be acknowledged, promoted and observed, *nationally, regionally,* and *internationally,* so as to embrace and ensure the dignity and equity of all languages'[293]. Furthermore `[t]he need for legislation to eliminate linguistic prejudice and discrimination, and all forms of linguistic domination, injustice and oppression, in such contexts as services to the public, the place of work, the educational system, the courtroom, and the mass media'[294], was emphasised. The Preamble of the Recife Declaration concludes as follows:

> *Hence, conscious* of the need to provide explicit legal guarantees for linguistic rights to individuals and groups by the appropriate bodies and member states of the United Nations,
> RECOMMENDS that steps be taken by the United Nations to adopt and implement a **UNIVERSAL DECLARATION OF LINGUISTIC RIGHTS** which would require a *reformulation of national, regional, and international language policies* [my Italics].

There was a follow-up gathering at UNESCO in Paris in April 1989, Frankfurt 1990 and Pécs, Hungary in 1991 organised by FIPLV, the *Federation Internationale des Professeurs de Langues Vivantes,* as a result of which a revised, expanded document is being circulated to a substantial number of professional associations and researchers, and the elaborate machinery for processing such a declaration has been set in motion[295]. The exercise will involve a major task for the international legal community in clarifying concepts, drawing international comparisons, and elaborating a declaration of universal relevance and applicability. Already many thorny issues have developed from the conferences. Questions relating to the interpretation of terms and placing limitations on rights have been to

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[293] Declaration of Recife (1988) 10 *Human Rights Quarterly* 306-307.
[294] Declaration of Recife (1988) 10 *Human Rights Quarterly* 306-307.
[295] Tove Skutnabb, Kangas, Robert Phillipson "Linguicism: A Tool for Analysing Linguistic Inequality and Promoting Linguistic Human Rights" (1990) 2(2) *International Journal for Group Tensions* 109 at 119.

the fore. Another issue that has still to be clarified is whether the right to learn a foreign language will be included[296].

The **Organisation for African Unity (OAU) Inter African Bureau of Languages** in 1985 proposed a Linguistic Charter for Africa which includes the following proposals:

- That the equal linguistic rights of every individual be recognised, together with the need to provide access to literacy in every living African language.
- That as many languages as possible in each African state, depending on the number of speakers, be given the status of *national languages,* with an established place in the national education system and in the media.
- That at least one African language in each state be given the status of *official language,* to replace or be used alongside any existing "foreign" official language[297].

The challenges presented by the Recife Declaration, in particular, are immense. The Declaration contemplates international language rights regulation on three levels: the *international* level, the *regional* level and the *national* level.

A common assumption associated with the international regulation of human rights, and which has been the source of major disappointment, is that when human rights provisions are adopted by states, such states are expected immediately to comply with such provisions on an equal basis with other states. However, inequalities in wealth, resources and differences in geopolitics very often make the implementation of human rights provisions difficult. In drafting an

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[296] Earlier on in this essay I gave reasons why foreign languages should not be regarded when defining "language" for the purposes of language rights: see page 29 *ante*.

[297] Robert Phillipson, Tove Skutnabb, Kangas "Language Rights in Post Colonial Africa" in Tove, Skutnabb, Kangas, Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 336 at 344.

instrument dedicated to the protection of language rights a number of influences would have to be borne in mind:

(a) Language discrimination may vary from one region to another:

Intolerance towards multilingualism varies from one country to another and from one region to another. This is due to a number of factors, principally the socio-economic and political dynamics operating within a particular state and region. Sadly, and this is the challenge which presents itself to international human rights law, in those states where language discrimination is rife, one also finds political instability, intolerance between different social groups and a frail economic structure. An international regime for the protection of language rights would have to be mindful of these influences, so as not to overwhelm states with unrealistic demands.

In some countries and regions, significant language rights reforms are discernible, while in other states and regions, draconian monolingual policies still exist. In the latter states the immediate plan of action should be for such language laws to be repealed and the recognition by such states of the fundamental nature of language rights. A single universal instrument for the protection of language rights would have the effect of placing incredible burdens upon some states while taking a relaxed attitude towards states where there is some recognition of language rights. It is submitted that a system of international regulation should be created, whereby states with limited or no language rights adherence should be persuaded, as the short-term plan of action, to recognise and become aware of language rights while states with ostensible language rights, awareness should be forced into the implementation stage. To this extent, it is proposed that the universal language rights instrument should be drafted in `[b]road

and general terms'[298]. Such flexibility, it is said, `[i]s essential since the protection of linguistic rights will necessarily vary depending upon the context of each state's linguistic and cultural diversity'[299].

(b) Language rights will impose financial burdens upon states

Traditionally states have shied away from language claims mainly because of the financial burdens that states would have to endure in granting language rights. The reality of the situation is that while some countries have the resources and wealth to provide administrative documents for their citizens in all official languages, other states are barely able to provide basic education for their citizenry. Earlier on in this essay, I indicated that while language for the purposes of language rights should include all mother tongue languages and official languages, I also pointed out that this was a normative argument and that limitations would be necessary in protecting and promoting language rights. Ideally one would like the *right of the individual to use her own language* to be defined widely, but we all know that in reality the right would have to be qualified by reasonable limitations. Such limitations would have to be drafted so as not to diminish the essential content of language rights. The essential content of language rights is closely allied to the function of language rights, namely to provide *linguistic security*. Language rights seek to give speakers a secure environment in which to make choices about language use[300]. Limitations entrenched in the Instrument should not

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[298] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 575.

[299] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 575.

[300] Linguistic security is a universal good. According to Denise Réaume and Leslie Green, to have linguistic security is to have the opportunity, `[w]ithout serious impediments, to live a full life in a community of people who share one's language'. This opportunity is taken for granted by people who have full language rights and do

jeopardise the existence of a secure environment within which linguistic freedom may be exercised.

c) National constitutional provisions and domestic legislative provisions would have to be taken into account:

The constitutions of most states contain provisions relating to language, and in most cases constitutional provisions are supplemented with domestic language legislation[301]. An international regime for the regulation of language rights would have to be sensitive to national constitutional and legislative enactments.

The easiest and most effective way of implementing human rights is through actions within a state's own legal system. Most human rights treaties require that states incorporate relevant obligations into their domestic law and that they provide appropriate local remedies. There are two techniques for incorporating international treaties into domestic law. One is the method of "general transformation" whereby a constitutional provision automatically incorporates ratified treaties

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not suffer language discrimination. They are able to enjoy all aspects of human fulfilment. In the language context, such groups have linguistic carte blanche, they are freely able to abandon their mother tongue language and opt for new languages. Opting for a new language is not due to any social or other pressures, and hence their decision to express and communicate in a language is based on free choice made within an environment where there is linguistic security. But it is different for individuals who suffer language discrimination. Without special protection they are placed under strong pressures to abandon their mother tongue and to assimilate with the dominant language. A secure linguistic environment is established by, firstly, those general rights which establish a regime of linguistic tolerance: freedom of expression, and association, judicial due process, non-discrimination, etc. And, secondly, through a system of language rights which facilitates participation in services under government regulation and control, for example, participation in the political life of a country, education, and administrative and judicial bodies: see Denise Réaume and Leslie Green "Education and Linguistic Security in the Charter" (1989) 34 *McGill Law Journal* 777 at 780.

[301] The Constitutions of *inter alia* Canada, India, Australia, Germany and South Africa have provisions relating to language rights. In all these countries there are specific legislative enactments dealing with language.

into domestic law[302]. This method, which presupposes ratification by a legislative body, is used in the United States, Netherlands and the Federal Republic of Germany. The other method is the one used in Canada and the United Kingdom and is known as the technique of "special transformation". It consists in the domestic implementation of treaties by appropriate and separate legislation. In the absence of such domestic legislation, a treaty will be powerless to affect domestic rights unless it can be shown to have become part of international customary law. Section 231 of the **Constitution of the Republic of South Africa, 1996** generally provides for "special transformation" but it also provides for "general transformation" in exceptional cases[303].

Most constitutions contain a supremacy clause[304], elevating the national constitution above international law, and national courts interpret the supremacy clauses strictly to give them unfettered jurisdiction when applying international human rights norms within the state's borders. This in turn provides the rationale for the common

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[302] A Brudner "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 *University Of Toronto Law Journal* 219 at 221.

[303] **International agreements**

231. (1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

[304] Section 2 of the New Constitution provides:

2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed.

requirement that domestic remedies be exhausted before an international body will investigate a complaint of human rights violations. To this extent Gromacki advocates that an international instrument dedicated to language should be one which is "principle-orientated" as opposed to "rule-orientated"[305]. The Instrument should lay down principles for the protection of language rights which would be easier for states to incorporate into their domestic legal regimes. What is certain however is that the rights entrenched have to be legally binding. They should not merely be recommendations: they have to be incorporated into national law[306].

While there would have to be respect for national laws, most writers agree that the instrument would have to provide for both individuals and groups (as well as states) to have access to a complaints procedure[307]. The *state reporting* and the *individual complaints procedure system* are well established under international law. State parties are usually required to `[s]ubmit reports detailing the measures that they have adopted to give effect to the provisions of an [international instrument] and on the progress made in the

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[305] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 575.

[306] Robert Phillipson, Mart Rannut, Tove Skutnabb, Kangas "Introduction" in Tove Skutnabb, Kangas, Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 17.

[307] Gromacki opines, however, that it is not necessary to mark out in any great detail the mechanisms by which such rights will or must be implemented by states. He reasons that:

> `[T]o do so would only lessen the likelihood of international recognition and protection. Drafting a declaration of universal linguistic rights in broad and general terms will leave room for flexibility on regional and national implementation and enforcement programs. Such flexibility is essential since the protection of linguistic rights will necessarily vary depending upon the context of each state's linguistic and cultural diversity. This flexibility will also enable the local, national and regional de facto implementation of international de jure standards' : see JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 575.

enforcement of rights entrenched'[308]. The objective of state reporting is to force state parties to review their laws and policies. This obligation to report is important because it allows the Human Rights Committees to request reports whenever they suspect a state party of violating rights[309]. State reporting provides no solution to specific instances of human rights abuse. The objective is long-term.

A complaints system is essential to provide relief for victims and to allow for detailed and specific implementation of language rights. There are two forms of complaints procedures, namely interstate and individual complaints. Of the many international human rights instruments, only the **ICCPR**, **The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)** and **The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)** make provision for these optional procedures[310]. This is so because States fear extra-territorial quasi-judicial implementation of treaty provisions. In 1993 at the World Conference on Human Rights, an optional protocol to the ICESCR was called for which would allow for individual and collective complaints. The rationale was that:

> `....[a]s long as the majority of the provisions of the Covenant...are not the subject of any detailed jurisprudential scrutiny at the international level, *it is most unlikely that they will*

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[308] Article 18(1) of the Convention on the Elimination of All Forms of Discrimination Against Women. Corresponding clauses may be found in the following instruments: Article 40 of the ICCPR; Article 16 of the ICESCR; Article 9 of The International Convention on the Elimination of All Forms of Racial Discrimination; Article 19 of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 44 of The Convention on the Rights of the Child.

[309] For more information on the State reporting procedures: see P Alston and B Simma "The First Session of the United Nations Committee on Economic, Social and Cultural Rights (1987) 81 *American Journal of International Law* 610; M Nowak "The Activities of the United Nations Human Rights Committee: Developments from 1 August 1989 through 31 July 1992" (1993) 14(9) *Human Rights Law Journal* 11; DD Fisher "Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee" (1982) 76 *American Journal of International Law* 142 at 146.

[310] Under CERD the inter-states complaints procedure is not optional.

be subject to such examination at the national level either'[311] [Italics added for emphasis].

The inter-state complaints procedure is established by Article 11 of **CERD,** Article 41 of the **ICCPR** and Article 21 of **CAT.** It gives State parties *locus standi* to notify the Committee of treaty violations by another state[312]. The individual's complaints procedure is established by the **Optional Protocol of the ICCPR**[313], Article 14 of **CERD,** and Article 22 of **CAT.** All the treaties require, however, that domestic remedies be exhausted before the Committee will act. Besides being in accordance with the principles of international law, this jurisdictional requirement is strictly applied as it protects state sovereignty and prevents damage to state structures through circumvention[314].

An innovative complaints procedure is unique to **CAT,** and it is submitted that it is a procedure which could possibly be entrenched in a language rights instrument. Article 20 of **CAT** provides that if the Committee receives *reliable* information which indicates that torture is being practised systematically in the territory of a State party the Committee "shall" invite the State party to co-operate in the examination of the information and to submit observations. The only

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311 M Schienin "Economic and Social Rights as Legal Rights" in Eide et al (eds.) (1995) *Economic, Social and Cultural Rights* 59.

312 However, with the exception of CERD, the requirement has been added that both parties should have acceded to this procedure.

313 Article 1 of the Optional Protocol makes the Human Rights Committee competent to receive and consider "communications" from individuals claiming a violation of a Covenant right by a State which is party to both the Covenant and the Protocol. For more information on the procedures involved in bringing complaints to the HRC: see MG Schmidt "Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform (1992) 15 *International and Comparative Law Quarterly* 645 *et seq.*; M Nowak "The Activities of the United Nations Human Rights Committee: Developments from 1 August 1989 through 31 July 1992" (1993) 14(9) *Human Rights Law Journal* 11 at 13.

314 In *Ohc v Columbia* the HRC held that the rule that domestic remedies must be exhausted will not apply where the domestic remedies are unreasonably prolonged. This rule was upheld in *Weinberger Weisz v Uruquay.* In *Baboeram et al v Suriname* it was held that the failure to exhaust procedures which would provide no effective remedy did not render a communication inadmissible: see PR Ghandhi "The Human Rights Committee and the Right of Individual Communication" (1986) *British Yearbook of International Law* 249.

qualification on the source and nature of the information is that it be *reliable*[315]. Any individual, organisation or state could be the source of the information. The Committee also has the power to proceed *mero motu* - neither a report nor a complaint is necessary. After considering the State's observations, as well as other relevant information, the Committee may designate one or more of its members to make a confidential enquiry and to report his/her findings to the Committee. This may include an investigation *in situ*[316]. If sufficiently serious the Committee will include a summary of its findings in its annual report to the General Assembly of the United Nations. Regrettably, this is the only sanction available to the Committee.

While the Committee's reporting mechanism may serve a vital function in the protection, promotion and implementation of the rights entrenched in a language rights instrument, it should however be noted that the power to coerce states to reform remains with the political bodies of the United Nations and similar bodies. The central political body, the United Nations Security Council for example, is well-known for its ability to coerce states with poor human rights records into enforcing international law. It is difficult to measure the coercive power that such bodies have or, are willing to exercise. Much turns on the politics of the day and the political and economic status that a State party enjoys at the international level.

Limitations on Language Rights

For reasons discussed earlier, all the leading proponents of language rights agree that limitations must be placed on language rights entrenched in an international instrument. It seems that the

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[315] Rodley (1994) *International Remedies for Torture and Other Ill Treatment* 110.
[316] see article 20(2) & (3) of CAT.

limitations must be "reasonable[317]," "necessary," "Appropriate" "effective" and "practical"[318].

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[317] Gromacki in his "Proposed Draft Declaration on Linguistic Rights" proposes in draft Article 4 thereof:

> `[A]ll states shall take reasonable legislative and other appropriate and effective measures to promote and protect the linguistic rights of all persons.

In Draft Article 5 the writer provides:

> `[A]ll states shall takes reasonable measures to create favourable conditions for the full exercise of linguistic rights, including measures to enable persons to express freely their language, and to develop their language, and to participate fully on an equitable basis in the cultural, religious, social, economic, and political life of the state in which they reside': see JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 576 et seq.

[318] Gromacki in his "Proposed Draft Declaration on Linguistic Rights" proposes in draft Article 7 thereof:

> `[A]ll persons have the right, either individually or collectively, to use their own language for the purpose of education, to establish their own schools and, whenever possible, to receive teaching in their own language': see JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 576 et seq.

The Constitution of the Republic Of South Africa Act 200 of 1993 provides in section 3 (3) and (6):

> `[W]herever practicable, a person shall have the right to use and to be addressed in his/her dealings with and public administration ...'.

Section 32, the "Education" clause of Chapter 3, provides:

> `[E]very person shall have the right -
>
> .....
>
> (b) to instruction in the language of his or her choice where this is reasonably practicable ...'.

The New Constitution of South Africa, 1996 provides in more or less the same terms:

> `[L]anguages
>
> 6. (1) .....
>
> (2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
>
> (3) National and provincial governments may use particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances, and the balance of the needs and preferences of the population as a whole or in respective provinces; provided that no national or provincial government may use only one official language. Municipalities must take into consideration the language usage and preferences of their residents.
>
> (4).....
>
> Education
>
> 29.
>
> (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where

The courts and international law, it seems, have considered two kinds of limitations "reasonable," "necessary," "appropriate" "effective" and "practical": (a) geographical limitations and (b) numerical limitations. For example, the recent **European Charter for Regional or Minority Languages** require states to implement measures protecting and encouraging the use of regional and minority languages in `[t]he 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] Convention'[319].

In the oft-quoted *Belgian Linguistics case*[320] the European Court of Human Rights in a split decision held that, *in casu*, the residence restrictions imposed upon the French-speaking Applicants by section 7(3) of the Belgian Act of 2 August 1963 did not comply with Article 14 of the Convention read in conjunction with Article 2 of the Protocol, `[i]n so far as it prevents certain children, solely on the basis of the residence of their parents, from having access to French-language schools'. However, in a collective dissenting opinion five judges explained that the difference in treatment between the Dutch-speaking Flemings and the French-speaking Walloons was not arbitrary, but was justified on objective grounds[321].

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that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account -

(a) equity;
(b) practicability; and
(c) the need to redress the results of past racially discriminatory law and practice.'

[319] European Charter for Regional or Minority Languages adopted by the Committee of Ministers of the Council of Europe (opened for signature 2 October 1992).

[320] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* European Court of Human Rights, Ser. A, vol 6 Judgment of 23 July 1968 at 87.

[321] The Court held that it does not mean that the numerous legal and administrative provisions which do not secure to everybody complete equality of treatment in

The majority decision has been criticised by most writers,[322] who argue that limitations on language rights based on residence is justifiable. Both the **Interim Constitution**[323] and the **Constitution of the Republic of South Africa Bill, 1996**[324] make provision for regional differentiation in relation to language policy.

Admittedly limitations on the basis of numbers is a strange phenomenon in the human rights arena, because none of the fundamental human rights is subject to a numbers constraint. But language has an inextricably collective dimension. The justification for the protection of language rights does not rest solely on the interests of the individual, but on his interest as a member of a linguistic community. The benefits of language rights can only be appreciated in a linguistic group. When one talks of the collective dimension of language, there is a background notion of a minimally viable language group. It is within the framework of this notion that numerical limitations to language rights must be perceived. Some language rights, for example those dealing with education, can only be granted where the language group consists of a sufficient number of speakers.

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enjoying the rights and freedoms recognised in the Convention would be considered as contrary to it. The court further intimated that:

> '[t]o interpret the two provisions [Article 14 in conjunction with Article 2 of the Protocol] as conferring on everyone within the jurisdiction of a State a right to obtain education in the language of his own choice would lead to absurd results, for it would be open to anyone to claim any language of instruction in any of the territories of the contracting States': see *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* European Court Of Human Rights, Ser. A, vol 6 Judgement of 23 July 1968 at 87.

[322] Castberg argues that:

> '[D]utch is the usual language of Flanders. In order to acquire the privilege of being allowed to attend schools in which teaching was in French, the legal requirements had to be met, *inter alia*, in respect of residence. It does not constitute discrimination that those who did not meet these special conditions had to attend schools in which teaching was given in the ordinary language of the region': see Castberg (1974) *The European Convention on Human Rights* 128.

[323] Section 3(4).

[324] Section 6(4).

This, despite the fact that the number of speakers in region Y is incredibly small when compared to the total regional population. It is inconsistencies such as these that have prompted the Canadian Supreme Court to endorse the "sliding scale approach" to fixing numbers when considering language rights. According to this approach:

> `[T]he numbers test should be applied on a local basis throughout the province [for], any arbitrary limitation applied across the province may be difficult to justify. The numbers fixed will not always be immutable. They may vary with geographic regions and the type of instruction to be provided'[329].

As far as limitations are concerned, it is submitted that a distinction should be made between those that seek to diminish the "rights relating to language" and those that seek to diminish the "status of languages". Whereas "rights" refers to enforceable legal measures relating to languages, "status" refers to the position occupied by a language[330]. In the case of limitations relating to "rights," such limitations should be permitted, provided of course that they are reasonable, rational and fall within one of the recognised and valid grounds for arguing their limitation. However, in the case of limitations affecting the "status" of language, such limitations should not be condoned. The purpose of language rights, as stated earlier, is to ensure *linguistic security*. Linguistic security can only exist if all people, as right holders, have at least the right to communicate in their mother tongue. This right is absolute and non-derogable even though there might not be any corresponding duty upon the duty holder, which in most cases is the state, to enforce rights relating to the enjoyment of the particular mother tongue. Consider the following example: A

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[329] *Reference Re Public Schools Act* (1990) 67 D.L.R (4th) 488 at 557.
[330] I Currie "Official Languages" in Chaskalson, Kentridge, Klaaren, Marcus, Spitz, Woolman (eds.) (1996) *Constitutional Law in South Africa* 37-1 at 37-5.

group of people claim the right to receive education in their mother tongue language, Xhosa. The state may limit their right to education in the Xhosa language (the right relating to the language), but the state would not be allowed in any circumstance irrespective of numbers or other qualifications involved from prohibiting the use of the Xhosa language by that community in private or public discourse[331].

Some Basic Objectives and Challenges Facing the Drafters of an International Declaration for the Protection of Language Rights.

1. The primary objective of the international instrument would be to proclaim language rights to be *inalienable fundamental linguistic human rights*[332].

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[331] As is the case in Algeria and Turkey for example.

[332] Before language can be appreciated as a fundamental human right a popular misconception has to be dispelled, namely that language rights are founded solely on political compromise for their existence. In *Sociétés des Acadiens de Nouveau Brunswick v Association of Pareants* [1986] 1 S.C.R. 549, the Canadian Supreme Court intimated that language rights were not fundamental because they are based on a political compromise: see Julius H Grey "Language in Canadian Public Law" in Prinsloo, Peeters, Turi, van Rensburg (eds.) 1992 *Language, Law and Equality* 57 at 66. The reason why this view has to be dispelled is because it may impact negatively on the manner in which limitations are interpreted. In *Sociétés des Acadiens de Nouveau Brunswick v Association of Pareants* [1986] 1 S.C.R. 549 Justice Beetz, after quoting *MacDonald v City of Montreal* [1986] 1 S.C.R. 460 to the effect that language rights are not fundamental but are based on political compromise, states the following:

> `[T]his essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights'.

Although this decision has been severely criticised and the courts have returned to the liberal interpretation of language provisions in the Charter, the mistake made by the court has not been effectively stamped out, and there is still a tendency to equate language rights with political compromise instead of legal rights that inhere in all individuals. In *Ford v A.G. Quebec* [1988] 2 S.C.R. 712 at 751, the Supreme Court reinterpreted *Sociétés des Acadiens* as holding that the distinctive basis of language rights is that they impose positive duties on government. It is unclear whether this is meant to supplant or supplement the distinction drawn in the earlier cases between rights based on "compromise" and rights based on "principle."

The declaration must promote *linguistic security*[333]. To this extent the declaration must ensure that everybody can:

- identify with their mother tongue and have this identification accepted and respected by others;
- learn their mother tongue fully, i.e. orally and in writing. This presupposes that there would have to be a right entitling linguistic groups[334] to receive education in their own mother tongue language[335], provided of course that this is "reasonable" and "practical";
- use their mother tongue in a court of law and when communicating with the government (like filling in forms, dealing with officials etc.);
- having access, where "reasonable" in their mother tongue to government reports, documents, official publications intended for public distribution; in legislation; and in proceedings and records of the legislature[336];

In respect of those whose mother tongue is not an official language, the Declaration should guarantee the right that such individuals:

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[333] *See* page 94*ante* for a discussion on what is meant by linguistic security.

[334] as opposed to individuals.

[335] It is interesting to note that the recent United Nations Draft Declaration on Indigenous Rights establishes as fundamental rights that indigenous people have inter alia:

> `10. The right to all forms of education, including in particular the right of children to have access to education in their own languages, and to establish, structure, conduct and control their own educational systems and institutions': see United Nations Draft Declaration on Indigenous Rights E/CN.4/Sub.2/1988/25

[336] The United Nations Draft Declaration on Indigenous Rights establishes as fundamental rights that indigenous people have inter alia:

> `5 The right to maintain and use their own languages, including for administrative, judicial and other relevant purposes': see United Nations Draft Declaration on Indigenous Rights E/CN.4/Sub.2/1988/25.

- can become bilingual in: the mother tongue and (one) of the official language(s) according to his/her own choice.

Fundamentally however the Declaration must guarantee that:

- any change from the mother tongue is voluntary, not imposed.

2. The interpretation of language rights in the instrument must transcend the distinction between individual and collective rights.
3. The special language rights of persons belonging to linguistic and indigenous "minorities"[337] and groups should not be given separate status or treatment in the Instrument[338]. The Instrument should be mindful of the fact that often linguistic majorities too suffer language wrongs.
4. A universal interpretation of language and linguistic rights must be adopted. According to Gromacki "language rights" or "linguistic rights" should be interpreted to mean simply the "right to use one's own language"[339]. A clear and concise definition of the terms "language" and "mother tongue" would have to be given. It is suggested that a wide definition of "mother tongue" (as discussed earlier on in this essay) should be opted for and accordingly, that the definition should include sign language used by the deaf community.
5. According to Tove *et al* the rights have to be formulated explicitly, `[i]n a sufficiently specific and detailed way, so that difficulties of

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[337] By "minorities", I mean *numerical minorities.*

[338] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 575.

[339] JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515 at 575.

interpretation are minimised'[340]. Gromacki proposes that the principle of non-discrimination should form the basis of the Instrument. It is submitted that while the principle of non-discrimination may philosophically underlie language rights, language rights must be protected as substantive rights, fundamental and inalienable in nature.

6. The convention must specify whose financial responsibility it is to ensure implementation of the rights[341]. At the national level especially, there should be shared responsibility between national (federal) governments and provincial (state) governments.
7. The convention must specify whose duty it is to guarantee observance of the rights[342]. It is vital that the duty should not only rest on individual State parties but on the global community as a whole. To this extent a Committee Reporting System should be entrenched to ensure the observance of the Instrument.

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[340] Robert Phillipson, Mart Rannut, Tove Skutnabb, Kangas "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 17.

[341] Robert Phillipson, Mart Rannut, Tove Skutnabb, Kangas "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 17.

[342] Robert Phillipson, Mart Rannut, Tove Skutnabb, Kangas "Introduction" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1 at 17.

CONCLUSION

> Every living language, like the perspiring body of living creatures, is in perpetual motion and lateration, some words go off, and become obsolete; others are taken in, and by degrees grow into common use; or the same word is inverted to a new sense and notion, which in tract of time makes as observable a change in the air and features of a language as age makes in the lines and mien of a face.
> RICHARD BENTLEY: *Dissertation Upon the Epistles of Phalaris* (1697).

On the international stage of human rights, language rights are not glamorous rights. They are shadowed from the spotlight mostly because they are misunderstood. The difficulties of conceptualising, implementing and protecting language rights have caused international lawyers simply to ignore the reality of the fundamental nature of language rights. However, in modern times, the global politicisation of language makes it clear that if the question of language rights is not addressed, the likelihood of language as vehicle of conflict will only escalate.

Tóku reo, tóku ohooho
Tóku reo, tóku mápihi maurea
Tóku reo, tóku whakakai marihi [343].

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[343] As part of its promotion and publicity campaign in 1988 Te Taura Whiri I Te Reo Máori, the Máori Language Commission, issued a poster which featured a photograph of an ancestor Púkakí and his twin sons with the above caption: see Tímoti S Káretu "Máori Language Rights in New Zealand" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 209. Translated the caption means:

My language, my valued possession
My language, my object of affection
My language, my precious adornment.

BIBLIOGRAPHY

ARTICLES AND BOOKS

1. P Alston and B Simma "The First Session of the United Nations Committee on Economic, Social and Cultural Rights (1987) 81 *American Journal of International Law* 610.

2. D Bailey (1964) *Public Liberties in the New States.*

3. Nathaniel Berman "Nationalism Legal and Linguistic: The Teachings of European Jurisprudence" (1992) 24 *International Law and Politics* 1515.

4. Albert P Blaustein, Dana Blaustein Epstein (1986) *Resolving Language Conflicts: A Study of the World's Constitutions.*

5. A Brudner "The Domestic Enforcement of International Covenants On Human Rights: A Theoretical Framework" (1985) 35 *University Of Toronto Law Journal* 219.

6. Francesco Capotori "Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities" UN Document. E/CN.4/Sub.2/ 384/ Rev.1 (1979).

7. Castberg (1974) *The European Convention on Human Rights.*

8. I Currie "Official Languages" in Chaskalson, Kentridge, Klaaren, Maarcus, Spitz, Woolman (eds.) (1996) *Constitutional Law in South Africa* 37-I.

9. Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163.

10. Y Dinstein "Collective Human Rights of Peoples and Minorities" (1976) 25 *International & Comparative Law Quarterly* 102.

11. Y Dinstein "The International Law of Civil Wars and Human Rights (1976) 6 *Israel Yearbook of International Law* 62.

12. Y Dinstein "Cultural Rights" (1979) 9 *Israel Yearbook of International Law* 58.

13. J Dugard (1994) *International Law: A South African Perspective.*

14. DD Fisher "Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee" (1982) 76 *American Journal of International Law* 142 at 146.

15. J Fishman (1970) *Sociolinguistics: A Brief Introduction.*

16. Julius H Grey " Language in Canadian Public Law" in Prinsloo, Peeters, Turi, van Rensburg (eds.) 1992 *Language, Law and Equality* 57.

17. JP Gromacki "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1992) 32 *Virginia Journal of International Law* 515.

18. GR Guy "International Perspectives on Linguistic Diversity and Language Rights" (1989) 13 (part 1) *Language Problems and Language Planning* 44.

19. Rainer Enrique Hamel "Indigenous Education in Latin America: Policies and Legal Frameworks" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) 1994 *Linguistic Human Rights: Overcoming Linguistic Discrimination* 271.

20. H Hannum "New Developments in Indigenous Rights" (1988) 28 *Virginia Journal of International Law* 677.

21. M Hasenau "Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of all Migrant Workers and their Families in Relation to the ILO Standards in Migrant Workers" (1990) 2 *International Migration* 133.

22. John P Humphrey "The International Law of Human Rights in the Middle Twentieth Century" in M Bros (ed.)(1973) *The Present State of International Law and Other Essays* 75.

23. Tímoti S Káretu "Máori Language Rights in New Zealand" in Tove Skutnabb, Kangas, Robert Phillipson (eds.) (1994) Linguistic Human Rights: Overcoming Linguistic Discrimination 209.

24. Lachman M Khubchandani "Minority Cultures and their Communication Rights" in Tove, Skutnabb, Kangas, Robert Phillipson (eds.) 1994 *Linguistic Human Rights: Overcoming Linguistic Discrimination* 305.

25. M S McDougal *et al* (1980) *Human Rights and World Public Order: The Basic Policies of an International Law of Dignity.*

26. T Modeen (1969) *The International Protection of National Minorities in Europe.*

27. M Nowak "The Activities of the United Nations Human Rights Committee: Developments from 1 August 1989 through 31 July 1992" (1993) 14(9) *Human Rights Law Journal* 11.

28. Jeffrey L Obler "Group Rights and the Linguistic Dispute in Brussels" (1981) 3 *Taal en Sosiale Intergrasie* 39.

29. Bokatola Isse Omanga "The Draft Declaration on the United Nations on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities" (1990) 6 *The Review: International Commission of Jurists.*

30. A Ostrower (1965) *Language, Law and Diplomacy: A Study of Linguistic Diversity in Official International Relations and International Law.*

31. Robert Phillipson, Mart Rannut, Tove Skutnabb, Kangas "Introduction" in Tove Skutnabb, Kangas, Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1.

32. Robert Phillipson, Tove Skutnabb, Kangas "Language Rights in Post Colonial Africa" in Tove, Skutnabb, Kangas, Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 336.

33. Robert Phillipson, Tove Skutnabb, Kangas "Linguistic Rights and Wrongs" (1995) 16(part 4) *Applied Linguistics* 483.

34. Denise Réaume and Leslie Green "Education and Linguistic Security in the Charter" (1989) 34 *McGill Law Journal* 777.

35. Robinson *et al* (1943) *Were the Minorities Treaties a Failure?*

36. Rodley (1994) *International Remedies for Torture and Other Ill Treatment.*

37. M Schienin "Economic and Social Rights as Legal Rights" in Eide et al (eds.) (1995) *Economic, Social and Cultural Rights* 59.

38. MG Schmidt "Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform (1992) 15 *International and Comparative Law Quarterly* 645

39. Schwelb "Some Aspects of the International Covenants on Human Rights of December 1966" in Eide & Schou (1968) *International Protection of Human Rights* 103.

40. Kamal K Sridhar "Mother Tongue Maintenance and Multi-culturalism" (1994) 28(part 3) *TESOL Quarterly* 628.

41. M Tabory "Language Rights as Human Rights" (1980) 10 *Israel yearbook on Human Rights* 167.

42. R Stavenhagen "Old and New Racism in Europe" (1988) 7 *New Expressions of Racism: Growing Areas of Conflict in Europe.*

43. H A Strydom "Views on International Measures for the Protection of Minorities (1992) 18 *South African Yearbook of International Law* 134.

44. Szabo (1974) *Cultural Rights.*

45. Makhan L Tickoo "Kashmiri, A Majority Language: An Exploratory Essay" in Tove, Skutnabb, Kangas, Phillipson (eds.) (1994) *Linguistic Human Rights: Overcoming Linguistic Discrimination* 317.

46. Tosi (1984) *Immigration and Bilingual Immigration.*

47. Tove Skutnabb, Kangas "Mother Tongue Maintenance: The Debate: Linguistic Human Rights and Minority Education" 1994 (28)(part 3) *TESOL Quarterly* 625.

48. Tove Skutnabb, Kangas, Phillipson "Linguistic Human Rights, Past And Present" in Tove, Skutnabb, Kangas, Phillipson (eds.) 1994 *Linguistic Human Rights: Overcoming Linguistic Discrimination* 71.

49. Tove Skutnabb, Kangas, Sertaç Bucak "Killing a Mother Tongue-How the Kurds are Deprived of Linguistic Human Rights" in Tove, Skutnabb-Kangas, Robert Phillipson (eds.) 1994 *Linguistic Human Rights: Overcoming Linguistic Discrimination* 347.

50. Tove Skutnabb, Kangas, Phillipson "Linguicism: A Tool For Analysing Linguistic Inequality and Promoting Linguistic Human Rights" (1990) 2 (part 2) *International Journal for Group Tensions* 109.

51. M W Wenner "The Politics of Equality Among Linguistic Minorities" (1976) *Comparative Human Rights* 183.

52. "Suggestions of the Drafting Committee for Articles of an International Declaration on Human Rights to the President of the Economic and Social Council" (1947) *United Nations Yearbook on Human Rights* 499.

53. Official Journal of the European Communities, 13 April 1984 no. C127/1239.

54. *United Nations Fact Sheet No 18 (March 1992).*

INTERNATIONAL INSTRUMENTS

1. Universal Declaration of Human Rights (1948).
2. United Nations Charter on Human Rights (1948).
3. American Declaration on the Rights and Duties of Man (1948).
4. European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).
5. European Social Charter (1961).
6. International Convention on the Elimination of All Forms of Racial Discrimination (1965).
7. International Covenant on Civil and Political Rights (1966).
8. Optional Protocol to the International Covenant on Civil and Political Rights (1966).
9. International Covenant on Economic, Social and Cultural Rights (1966).
10. American Convention on Human Rights (1969).
11. Convention on the Elimination of All forms of Discrimination against Women (1979).
12. African Charter on Human and Peoples' Rights (1981).
13. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
14. Declaration of Recife (1988)
15. Convention on the Rights of the Child (1989).
16. United Nations Draft Declaration on Indigenous Rights (1992).
17. European Charter for Regional or Minority Languages (1992).

NATIONAL LEGISLATION

1. Constitution of the Republic of South Africa Act 200 of 1993.
2. Constitution of the Republic of South Africa 1996.

INTERNATIONAL, DOMESTIC & FOREIGN CASE LAW

International case law

1. *Advisory Opinion on Minority Schools in Albania* [1935] P.C.I.J., Ser. A/B, No 64.

2. *Alsemburg and Beersel v Belgium* (1963) 6 *Yearbook of the European Convention on Human Rights* 332.

3. *Case relating to Certain Aspects of the Laws on the Use of Language in Education in Belgium* (1968) 6 Eur. Ct. Hr. (ser.A) 87.

4. *Case of Luedicke, Belkacem and Koç v The Federal Republic of Germany* 29.Eur. Ct Hr. (Ser.A) at 21.

5. *Charlent v Belgium* 6 (1963) *Year Book of the European Convention on Human Rights 454.*

6. *Dominique Guesdon v France* U.N. GAOR, Hum.Rts. Comm., vol II, 45th sess., Appendix X at 61, U.N. Document. A/45/40 (1990).

7. *Fryke Nasjionale Partij v Netherlands* (1986) *Decisions And Reports* 240 as cited in Fernand de Varennes "Language and Freedom of Expression in International Law" (1994) 16 *Human Rights Quarterly* 163.

8. *Handyside Case* (1976) 24 European Court of Human Rights (Ser.A) at 23.

9. *Inhabitants of Leeuw-St. Pierre v Belgium* 8 (1965) *Year Book of the European Convention on Human Rights 338.*

10. *Isop v Austria:* Application No. 808/60. Decision of 8 March 1962 in (1962) 5 *Yearbook of the European Convention on Human Rights* 108-25.

11. *M.K v France* U.N. GAOR, Hum. Rts. Comm., vol II, 45th Sess., Appendix X at 127, U.N. Document. A/45/40 (1990).

12. *T.K v France* U.N. GAOR, Hum. Rts. Comm., vol.II, 45th sess., Appendix X, at 118, U.N. Document. A/45/40 (1990).

13. *X v the Federal Republic of Germany:* Application No. 1794/63. Decision of 23 May 1963 in (1966) 9 *Yearbook of the European Convention on Human Rights.*

14. *Yves Cadoret and Herve Le Bihan v France* Communications No. 221/1987 and 333/1988, April 11, 1991.

15. *Ohc v Columbia ;Weinberger Weisz v Uruquay. Baboeram et al v Suriname*: see PR Ghandhi "The Human Rights Committee and the Right of Individual Communication" (1986) *British Yearbook of International Law* 249.

Domestic case law

16. *S v Mhlungu* 1995 (3) SA 867 (CC).

17. *S v Mkwanyane* 1995 (3) SA 391 (CC).

18. *Nortje and Another v Attorney-General, Cape and Another* 1995 (2) SA 460 (C).

19. *S v Zuma* 1995 (2) SA 642 (CC).

Foreign case law

20. *Quebec v Quebec Association Of Protestant School Boards* (1984) 10 D.L.R. (4th) 321.

21. *Associated Press v United States* 89 L Ed 2013.

22. *Devine v Quebec* [1988] S.C.R 790.

23. *Ford v Quebec (A.G.)* [1988] 2 S.C.R. 712.

24. *Groener v Minister of Education* [1990] C.M.L.R 401.

25. *Hudson Gas & Electric Corp. v Public Service Commission of New York* 447 U.S. 557 (1980).

26. *Irwin Toy Ltd. v Procereur Général du Québec* [1986] R.J.Q. 2441.

27. *MacDonald v City of Montreal* [1986] 1 S.C.R. 460.

28. *New York Times Co. v Sullivan* 11 L Ed 2d 686.

29. *Quebec v Quebec Association Of Protestant School Boards* [1984] 10 D.L.R. (4th) 321.

30. R v Big Drug Mart [1985] 18 D.L.R. (4th) 321.

31. *R v Mercure* 48 [1988] D.L.R. (4th) 1.

32. *R v Therens* [1985] 18 D.L.R. (4th) 655.

33. *Red Lion Broadcasting Co. v F.C.C* 23 L Ed 2d 371.

34. *Reference Re Criminal Code (Manitoba)* [1990] S.C.R. 1123.

35. *Reference Re Education Act of Ontario and Minority Language Education Rights* (1984) 10 D.L.R. (4th) 491

36. *Reference re Minority Language Educational Rights* [1988] 49 D.L.R. (4th) 499.

37. *Reference Re School Act* (1988) 49 D.L.R. (4th) 499

38. *Ref. Re Public Schools Act* [1990] 67 D.L.R. (4th) 488.

39. *Valentine v Chrestensen* 316 U.S. 52 (1978).

40. *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc.* 425 U.S. 748 (1976).

41. *Sociétés des Acadiens de Nouveau Brunswick v Association of Pareants* [1986] 1 S.C.R. 549.