Preserving and Promoting Linguistic Diversity: Perspectives from International and European Law

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La problématique juridique soulevée par la présence de minorités linguistiques s'imbrique dans un ensemble plus vaste qui est celui du droit général des minorités. Celui-ci repose sur des fondements tels que la paix et la sécurité, les droits de l'homme ou encore la diversité culturelle. L'auteur se demande comment les droits linguistiques d'aujourd'hui reflètent ces fondements et quelles en sont les limitations implicites.

In recent years, there has been a growing awareness of linguistic and cultural diversity and a growing concern about the perceived threat to that diversity. In 2000, two books by leading sociolinguists, David Crystal's *Language Death*,[1] and *Vanishing Voices: The Extinction of the World's Languages* by Daniel Nettle and Suzanne Romaine,[2] gained a wide readership. Since then, a number of books for a less specialist, more popular, audience have appeared and have received critical and popular acclaim. These include Helena Drysdale's 2001 book *Mother Tongues: Travels through Tribal Europe*[3] and Andrew Dalby's *Languages in Danger: How Language Loss Threatens Our Future*,[4] which appeared in 2002. In 2003, Canadian journalist Mark Abley had considerable success with his book *Spoken Here: Travels among Threatened Languages*.[5]

Like climate change and its effects on bio-diversity before it, the issue of language loss seems to be moving from the world of academia

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1 (Cambridge: Cambridge University Press, 2000).

2 (Oxford: Oxford University Press, 2000).

3 (Basingstoke: Picador, 2001).

4 (London: Allen Lane, The Penguin Press, 2002).

5 (Boston: Houghton Mifflin, 2003).

into the popular culture. There are other similarities between the two issues. Both have been driven by concerns about diversity of species, and both have been framed in part by concerns about the potentially catastrophic effects of the loss of diversity on the human species. Language loss has become an issue of concern not only for linguists and the members of minority language communities affected by language shift. In this paper, I shall consider the extent to which international law and European law have responded to such concern. The term "European law" is used here not in the narrow sense of the law of the European Union ("EU") but as shorthand for international legal developments within Europe. It therefore includes not only EU law but legal norms developed multilaterally within other international organizations such as the Council of Europe and bilaterally between European states.

Broadly speaking, and with one notable exception to which reference will be made later in this paper, the issue of linguistic diversity has not been directly addressed in international law. International law does, however, provide some measure of protection for minorities, including linguistic minorities. To the extent that international legal norms aim to preserve the existence of linguistic minorities, they can be said to indirectly address the question of linguistic diversity. The international law relating to minorities has been driven by a number of intellectual paradigms. Sia Spiliopoulou Åkermark identified the three most important of these as: (1) a peace and security paradigm; (2) a human dignity paradigm, which could also be called a *human rights* paradigm; and (3) a cultural diversity paradigm.[6] While all three paradigms have been present in every period in the development of the international law on minorities, not all have had equal salience. And, while the three paradigms are often complementary and mutually reinforcing, they are not necessarily so.

While the protection of minorities in international law can be traced back to at least the 17th century, most of the relevant standards dealt with religious rather than linguistic minorities.[7] The modern period in the international law of minority protection dates from the years imme-

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[6] Athanasia Spiliopoulou Åkermark, "Justifications of Minority Protection in International Law," in *International Studies in Human Rights*, Vol. 30 (London, The Hague: Kluwer Law International, 1997) c. 4, at 68-85.

[7] See, *e.g.*, Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1991), at 1-4, or Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991) c. 2, at 25-37.

diately following the First World War, in which the "minorities system" of the League of Nations was created. It is in this system that we see the first significant norms relating to linguistic minorities.

The minorities system of the League of Nations was embodied in a series of international instruments, including (1) minorities-specific treaties with newly created states such as Czechoslovakia and Poland or states which obtained new territories under the peace treaties, such as Serbia, Romania and Greece; (2) chapters on minorities in the peace treaties imposed on four of the defeated states, Austria, Hungary, Bulgaria and Turkey; (3) further treaties with respect to particular minority territories, such as Danzig, the Åland Islands, Upper Silesia, and the Territory of Memel; and (4) unilateral declarations in respect of minority populations made by Albania, Lithuania, Latvia, Estonia and Iraq on their entry into the League of Nations.[8]

The dominant paradigm underlying the minorities system of the League of Nations was undoubtedly a peace and security paradigm. The territorial settlement resulting from the post-First World War peace treaties threw up a number of internal minorities — groups which differed ethnically, linguistically or in terms of religion from the majority. The minorities system was created to deal with the fear that such minorities would threaten the stability of the newly constituted or reshaped states of which they formed a part. Concern for international peace and security was particularly intense where such minorities were the dominant population in a neighbouring state. A system of minority protection which aimed at ensuring that members of minorities were placed on the same legal footing as the rest of the population and that such minorities were able to maintain their identities was considered to be the best way of addressing the threat that the existence of minority populations posed to peace and security.

However, the minorities system of the League of Nations also embodied a human rights paradigm. Indeed, this system was an important precursor to and in some ways an inspiration for aspects of the broader human rights instruments of the post-Second World War period. The human rights paradigm is clearest in one of the key features of the various instruments which formed part of this minorities system: norms relating to equality of treatment between members of minorities and

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[8] See *e.g.*, Capotorti, *id.*, c. 1, at 16-26, and Thornberry, *id.*, c. 3 and 4, at 38-54.

members of the majority. For example, the five minorities' treaties generally required that all nationals would be equal before the law and would enjoy equality of civil and political rights. They also provided that differences of race, language or religion should not prejudice any national with regard to entry into public employment or the exercise of professions and industries. The human rights paradigm is also apparent in norms which guaranteed freedom to exercise any creed or religion, and to establish, manage and control their own charitable, religious, social and educational establishments, with the right to use their own language and to exercise their religion freely within such institutions.

While the minorities system was not explicitly guided by the goal of promoting cultural and linguistic diversity, it did have elements which tended to facilitate such diversity. Once again, aspects of the League of Nations minorities system are important precursors to and are echoed in the contemporary system of minorities protection which has developed since about 1990 in international and European law — a system which does expressly recognize the value of cultural diversity. For example, in addition to protecting members of minorities from acts of discrimination, the minorities treaties of the League of Nations system included a number of special measures described by the Permanent Court of International Justice in its advisory opinion of 6 April 1935 on *Minority Schools in Albania*[9] as being aimed at ensuring for the minority element in a state suitable means for the preservation of its racial peculiarities, its traditions and its national characteristics, which include its language. The minorities treaties included provisions which enabled nationals whose mother tongue was not the official language of the state to use their own language, either orally or in writing, in the courts. They also required states to make provision for children of nationals whose mother tongue was not the official language to receive primary school education in that language, at least in those towns and districts in which there resided a considerable proportion of nationals whose mother tongue was not the official language. In such towns and districts, the minorities were also entitled to an equitable share of resources provided by the state or by local governments for educational, religious or charitable purposes. In many respects, the judgment of the Permanent Court in the *Minority Schools in Albania* advisory opinion has a very contemporary

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9 (1935), Advisory Opinion, P.C.I.J. (Ser. A/B) No. 64.

feel, particularly in its understanding that real equality of treatment sometimes requires special treatment of a particular group; the court observed that there could be no true equality between members of a majority and of a minority if the minority were deprived of its own institutions and compelled to renounce that which is the very essence of its being as a minority.

Yet, while the minorities system of the League of Nations reflected elements of a human rights paradigm and, arguably, even the hint of a cultural diversity paradigm, such paradigms had only an instrumental role. The core value of the system was the promotion of peace and security. Human rights and the preservation of diversity were valuable to the extent that they were conducive to social harmony within diverse states, thereby promoting peace and security. The instrumental nature of these other paradigms was reflected in the fact that the minorities system was limited in scope. It was only imposed on states in which the threat of violence based on ethnic, linguistic or religious grounds was considered to be particularly acute. Proposals to include at least some of the principles of the minorities system in the Covenant of the League of Nations, thereby making them generally applicable to all League members, were rejected. The minority system was not extended to Germany, one of the defeated powers, or to other powers such as France, Italy, Belgium and Denmark which also had acquired territories under the peace. Their minorities were not considered to constitute a threat to the stability of the state or to be a cause of potential international friction. And, despite the existence of minorities, including linguistic minorities, in many other European states, no attempt was made to extend minority protection to such groups. The selective nature of the minorities system of the League of Nations ultimately compromised its legitimacy.

The system of minority protection which has been developing since about 1990 under the auspices of the Organisation for Security and Co-operation in Europe ("OSCE") and the Council of Europe has been inspired in considerable measure by a peace and security paradigm. This is clear both from the circumstances which re-ignited standard setting in this area — in particular, the ethnic and religious tensions unleashed by the fall of communism — and from the drafting history and preambular recitals of the standards themselves. For example, at the Vienna summit of the Council of Europe's member states in October 1993, it was

agreed that the national minorities which the upheavals of history have established in Europe had to be protected and respected *as a contribution to peace and stability*.[10] Out of this summit grew perhaps the most important of the recent minorities instruments, the Council of Europe's *Framework Convention for the Protection of National Minorities* ("Framework Convention").[11] Its preamble reiterates the importance of minority protection for the maintenance of stability, democratic security and peace in Europe. As with the League system, the contemporary system is predicated on the idea that the only viable solution to minority issues is the accommodation of difference within the confines of existing state boundaries. However, the OSCE and the Council of Europe have learned an important lesson from the League of Nations system, and have ensured that the contemporary standards are of potentially universal application.

Nevertheless, an excessive emphasis on a peace and security paradigm can still be problematic, from the point of view of linguistic diversity at least. Many of the minorities situations which pose real threats to international peace and security involve minority populations which speak a language that is a minority language in the particular state, but which is not necessarily a threatened language. One obvious example of this is the Russian minorities in many of the states that emerged from the former Soviet Union. Another is the Albanian minority in Kosovo and Macedonia. By contrast, many of the world's most threatened minority languages are spoken by minorities which pose no real threat to the internal stability of the states in which they live or to international peace and security more generally. Indeed, many such linguistic minorities have no kin-state, and most have little or no aspiration to secede. An excessive emphasis on the peace and stability paradigm, however understandable, can lead to the neglect of some of the most marginalized and vulnerable linguistic minorities, and the loss of some of the most threatened languages.

The second paradigm is the human rights paradigm. As already demonstrated from the brief consideration of the minorities system of

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[10] See the Explanatory Report to the Framework Convention for the Protection of National Minorities, para. 5, in Council of Europe, *Framework Convention for the Protection of National Minorities, Collected Texts*, 2d ed. (Strasbourg: Council of Europe Publishing, 2001), at 19.

[11] Eur. T.S. 157; it was opened for signature on 1 February 1995, and entered into force on 1 February 1998.

the League of Nations, a human rights paradigm has been relevant to the question of linguistic minorities since the beginning of the modern period of minority protection. However, the major international human rights instruments of the post-Second World War period, such as the United Nations *International Covenant on Civil and Political Rights* ("ICCPR")[12] and the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms* ("the *European Convention on Human Rights*" or "ECHR")[13] have had a somewhat limited impact on linguistic minorities.

Without question, certain of the core civil and political rights have been of great importance to linguistic minorities, particularly those which have been subject to repressive state policies which aim to forcibly assimilate them. In cases such as *Ballantyne v. Canada*,[14] a communication made under the ICCPR to the Human Rights Committee, the right to freedom of expression has been interpreted to cover not only the content but also the form of speech, and protects speakers of minority languages from significant interferences by the state with their ability to express themselves through their language.[15] The right to freedom of association and of assembly and the right to the protection of family and private life also limit the ability of the state to impose restrictions on the use of minority languages in many aspects of daily life. And the principle of non-discrimination, as set out in provisions such as Article 2, paragraph 1 of the ICCPR and Article 14 of the ECHR, ensure the en-

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[12] Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200(A) (XXI) of 16 December 1966, and entered into force on 23 March 1976.

[13] Eur. T.S. 5, adopted and opened for signature on 1 November 1950, and entered into force on 3 September 1953.

[14] Communication No. 359/1989, CCPR/C/47/D/359/1989, 5 May 1993.

[15] The communication involved a challenge to certain sections of Quebec's Bill 178, enacted on 22 December 1988, with the purpose of modifying certain provisions of Quebec's Bill 101, the *Charter of the French Language*, R.S.Q., c. C-11. Although Bill 178 modified those provisions of Bill 101 relating to signage, s. 58 of the Charter, as modified by s. 1 of Bill 178, still required that public signs and posters and commercial advertising outside or intended for the public outside must be solely in French. The Human Rights Committee found that these restrictions constituted a violation of the complainants' right to freedom of expression (para. 11.3) and that such restrictions, while provided for by law, were not necessary for the protection of the rights of others (namely, the rights of the francophone minority in Canada under Article 27 of the ICCPR, which is discussed in this paper, below) and were not, in any case, necessary in order to protect the vulnerable position in Canada of the francophone minority (para. 11.4).

joyment of treaty-protected rights without distinction of any kind, and make specific reference to language.

Important as these rights are to speakers of minority languages, they do not ensure that such languages can be used in all aspects of daily life. When we speak of linguistic human rights, we are usually referring to rights to obtain various public services through the medium of the minority language. The human rights paradigm, at least as reflected in the major international and regional human rights instruments, generally does not confer "linguistic human rights" in this sense of the term. Even Article 27 of the ICCPR, the well-known "minorities provision," contains a very limited and vague formulation,[16] and while the Human Rights Committee has, in its general comment on Article 27, made clear that the article does require states to take positive measures to support minority identity, it has not clarified what is the precise nature of this obligation.[17] An even sharper example of this can be seen in the manner in which the right to education, created under Article 2 of the First Optional Protocol to the ECHR, has been interpreted. This right provides that no person shall be denied the right to education, and that the state must respect to right of parents to ensure that such education is in conformity with their own religious and philosophical principles. In the famous *Belgian Linguistics* case of 1968,[18] the European Court of Human Rights ruled that this right to education did not include a right to be taught in the language of parents' choice. However, the *Cyprus v. Turkey* case of 2001[19] must also now be considered. One of the complaints brought against Turkey involved the closure of the only secondary school in Turkish-controlled Cyprus which offered education through the medium of Greek. Greek-medium education continued to be available at primary level. The Court found that the discontinuance of Greek-medium education at secondary level in these circumstances amounted

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[16] Article 27 provides as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[17] General Comment No. 23: The Rights of Minorities (Art. 27), 8 April 1994, CCPR/C/21/Rev.1/Add5; see especially paras. 6.1 and 6.2.

[18] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Application No. 1474/62, (1968) Eur. Ct. H. R. (Ser. A) No. 6.

[19] Application No. 25781/94, (2001) Eur. Ct. H.R. 327.

to a denial of the substance of the right to education.[20] Clearly, the decision does not imply anything like a generalizable right to minority-language education. However, the principle of this decision could potentially be applied to cases in which children from a linguistic minority who do not speak the language of the school are forced into majority-language education; given increasing amounts of evidence from the work of specialists in early childhood education and development concerning the adverse cognitive, psychological and developmental effects of forced majority-language education for children from such backgrounds,[21] the denial of minority-language education could arguably constitute a violation of Article 2 of Protocol One, at least in those circumstances. Indeed, given increasing evidence suggesting that students undergoing such forced immersion education also suffer from inferior educational outcomes, resulting in many cases in more limited economic opportunities, there is an argument, based on Article 2 of Protocol 1, in conjunction with Article 14, that such forms of education are inconsistent with the enjoyment of the right to education without discrimination based on language. However, such a development in the law would still be of limited value in the context of many of the most severely threatened minority languages, as children from communities which speak such languages will often come to school knowing both the minority and majority language; indeed, in many cases, they may be more proficient in the dominant language than in the threatened minority language. In such circumstances, minority-language education is often essential to ensure the regeneration of such languages.[22]

The important but limited protection offered by the principle of non-discrimination to linguistic minorities has also been held up as an exam-

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[20] *Id.*, at para. 278.

[21] There is a very sizeable literature on minority language education and the effects of dominant language-medium education on children who come from minority language homes; for a useful introduction, see Colin Baker & Sylvia Prys Jones, *Encyclopedia of Bilingualism and Bilingual Education* (Clevedon: Multilingual Matters, 1998), Part III, especially c. 12 and 13.

[22] The broader and potentially more supportive way in which the right to education has been formulated in more recent international instruments should, however, be borne in mind. Note, *e.g.*, the 1989 United Nations *Convention on the Rights of the Child* (1989), 28 I.L.M. 1448. Article 28 of the Convention sets out the right to education, and Article 29 then provides that the education of the child shall be directed towards a number of goals, including "the development of respect for the child's parents, his or her own cultural identity, *language* and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own" (emphasis added): Art. 29, para. 1(c).

ple of the limitations of the human rights paradigm for such minorities. In this context, however, the 2001 decision of the European Court of Human Rights in *Thlimmenos v. Greece*[23] may be significant; although this was not, strictly speaking, a minorities case, it did advance the principle of substantive equality in making clear that discrimination can result if members of a group of persons who are in less favourable circumstances are treated in the same way as others; differing circumstances may require appropriately different treatment.

The principle of equal protection of the law also has potential. This principle is embodied in Article 26 of the ICCPR; no similar principle yet exists in the ECHR, although it is enshrined, together with a general principle of non-discrimination, in the Twelfth Optional Protocol to the ECHR, which is not yet in force. The potential of this principle for linguistic minorities is illustrated by the views of the Human Rights Committee in *Diergaardt v. Namibia*, decided in late 2000.[24] Under the constitution of Namibia, English was the only official language of the state. The communication involved a community whose language was a form of Afrikaans. Staff in local public offices were instructed by the government not to communicate with the public in any language other than English, notwithstanding that public servants could speak the minority language and that at least some members of the community allegedly could not speak English. The Human Rights Committee found this to be a violation of Article 26 of the ICCPR.[25] As the grounds for this conclusion were not spelled out, the basis for the conclusion is not clear. A strong reading of the case would be that the denial of minority language public services to members of a linguistic minority who cannot speak the language of the state constitutes a violation of the right to the equal protection of the law. Yet, even such a robust interpretation of the decision may be of limited value to some of the most vulnerable of minority languages, whose speakers often speak the language of the state.[26] So, once again, a human rights paradigm, while of considerable

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[23] [2000] Eur. Ct. H.R. 161.

[24] Communication No. 760/1997, 6 September 2000, CCPR/C/69/D/760/1997.

[25] *Id.*, at paras. 10.10 and 11; note, however, that there were a number of forceful dissents from some members of the Human Rights Committee.

[26] For further discussion of this decision, see Alexander H. E. Morawa, "Minority Languages and Public Administration: A Comment on the Issues Raised in *Diergaardt et al. v. Namibia*", European Centre for Minority Issues Working Paper No. 16, October 2002, available at the ECMI website: <http://www.ecmi.de/>.

value to linguistic minorities in many circumstances, particularly those which are subject to vigorously pursued assimilationist policies, does not represent a completely adequate solution to the needs and aspirations of many linguistic minorities.

In this context, the development since 1990 of minorities specific instruments marks a new departure, for these instruments are in part inspired by the human rights paradigm. Indeed, these instruments are generally considered to be human rights instruments in which the protection of minorities is conceived of as, in part, a matter of rights. This is particularly clear in the Council of Europe's Framework Convention,[27] which in addition to embodying some of the classic civil and political rights discussed earlier, also creates a number of rights which require states to take positive measures of support, including limited rights to minority-language education[28] and administrative services.[29] These rights are not dependent upon the inability of members of the minority to speak the language of the state, and can therefore be particularly important to linguistic minorities in which diglossia is widely prevalent, as is usually the case for the more threatened minority languages. However, the enjoyment of such rights is subject to a number of conditions. In particular, such rights tend to be limited to those areas of the state inhabited by persons belonging to national minorities traditionally or in "substantial" numbers. Their enjoyment is usually made contingent upon "sufficient" demand — and in the case of services from administrative authorities, where such demand corresponds to "a real need."[30] Furthermore, they tend to oblige the state to "endeavour" to ensure the provision of the service "as far as possible," creating further potential roadblocks to full implementation. Finally, the Framework Convention creates no judicial or quasi-judicial remedy; its implementation is monitored through a state reporting mechanism.[31] Thus, while the

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27 There is now a considerable literature on the Framework Convention. For a very useful recent account, see Patrick Thornberry & Maria Martin Amor Estebanez, *Minority Rights in Europe* (Strasbourg: Council of Europe Publishing, 2004) c. 2, "The Framework Convention for the Protection of National Minorities", at 89-135. See also Council of Europe, *Filling the Frame: 5 Years of Monitoring the Framework Convention for the Protection of National Minorities* (Strasbourg: Council of Europe Publishing, 2004).

28 *Supra*, note 11; see, *e.g.*, art. 14, para. 2.

29 *Id.*, art. 10, para. 2.

30 *Id.*

31 *Id.*, s. IV, arts. 24-26.

human rights paradigm is of some use in the preservation of minority languages — this is particularly true of the contemporary minorities instruments such as the Framework Convention — this paradigm suffers also suffers from some limitations.

Even where rights to minority language services are created and are supported by judicial remedies, there are other limitations to the effectiveness of the human rights paradigm for members of many linguistic minorities and for the preservation of linguistic diversity more generally. First, as human rights are traditionally conceived of as being held against the state, they generally do not guarantee linguistic choice in the receipt of non-state services. Second, rights tend to be process-oriented rather than outcome-oriented. They may be able to guarantee members of a linguistic minority the option of using their language in the receipt of certain services. However, they generally do not seek to, nor can they, ensure that members of linguistic minorities will, in fact, take advantage of the opportunity to use their language in such circumstances. Speakers of many of the more threatened minority languages often do not utilize their rights, for a number of understandable reasons. Given long histories of marginalization and prejudice, they may not feel comfortable in using their language outside of the private sphere. Not having been educated in their own language, some feel they lack the requisite language skills in more formal domains. They may feel that their languages are a burden and a barrier to success in the wider society. They might simply feel that the quality of the minority language service is inferior to that of the same service offered through the majority language, a perception which is often true, due to inadequate resource allocation and other problems. Third, implementation of a right often requires litigation, which can be expensive and risky. Minority language communities are also often economically disadvantaged ones. Even if litigation by a particular community is successful, the decision may not be fully or generally implemented. All of this is not to say that the rights paradigm is unimportant, or that minority language rights, robustly conceived, cannot be of significant value to a minority language community. It is merely to suggest that a rights paradigm may not be able to address all of the issues involved in the maintenance of minority languages.

This brings us to the final paradigm, the cultural diversity paradigm. The question of the concept of cultural diversity in international law in general is a large one, and space does not permit a proper discussion of it. It is, however, a value that is gaining increasing prominence. For

example, it can be seen in the recently concluded UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*,[32] as well as in ongoing efforts, in which Canada is playing a key role, on the drafting of an International Convention on Cultural Diversity.[33] The protection of cultural diversity is also an emerging value in the law of the European Union. For example, paragraph 3 of Article I-3 of the Draft Constitution of the EU,[34] which sets out the EU's objectives, provides that the EU shall respect Europe's "rich cultural and linguistic diversity" and shall ensure that Europe's cultural heritage is "safeguarded and enhanced." The first of these obligations is repeated in Article II-82, in the Draft Constitution's Charter of Fundamental Rights. The preservation and promotion of cultural diversity is also a value that is explicitly recognised in contemporary minorities instruments. While, as noted, the Framework Convention firmly situates minorities protection within the sphere of the maintenance and further realization of human rights and fundamental freedoms and the promotion of peace and stability, its preamble also recognizes pluralism and cultural diversity as important values. And cultural diversity is the core paradigm underlying the only international instrument which specifically addresses minority language issues, the Council of Europe's *European Charter for Regional or Minority Languages* ("Languages Charter").[35]

Indeed, the overriding concern of the Languages Charter is not the protection of collectivities such as national minorities *per se*, nor of members of such minorities *per se*. Rather, the purpose of the Languages Charter is cultural, and its Explanatory Report makes clear that it is designed to protect and promote regional or minority languages as a

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[32] 17 October 2003, MISC/2003/CLT/CH/14, available online on the UNESCO Website at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>.

[33] *Draft International Convention on Cultural Diversity*, 29 July 2003, by the Working Group on Cultural Diversity and Globalization, chaired by Canada, of the International Network on Cultural Policy, available at <http://206.191.7.19/iicd/draft_e.pdf>.

[34] *Treaty Establishing a Constitution for Europe*, 16 December 2004, the Official Journal of the European Union, 2004/C 310/01. The constitution is expected to enter into force on 1 November 2006, upon its ratification by all 25 existing members of the EU.

[35] Eur. T.S. 148, opened for signature on 5 November 1992, and entered into force on 1 March 1998. There is also a growing literature on the Languages Charter, and for a very useful recent account, see Patrick Thornberry & Maria Martin Amor Estebanez, *Minority Rights in Europe*, *supra*, note 27, c. 3, "The European Charter for Regional or Minority Languages", at 137-68.

threatened aspect of Europe's cultural heritage.[36] The goal is the maintenance and development of cultural wealth and traditions. The other paradigms — human rights and peace and security — are recognized in the preamble to the treaty and are considered to be laudable by-products of the maintenance of cultural diversity, but they are subsidiary.

Since the Languages Charter sets out to protect and promote regional or minority languages, *not* linguistic minorities, it creates obligations for states in respect of languages, rather than their speakers. And, significantly, the Languages Charter does not create any individual or group rights.[37] Obviously, languages are spoken by people, and therefore individual speakers of regional or minority languages do benefit from the obligations imposed; but they do so indirectly, as speakers of the protected languages. State obligations are set out in two parts. Part II contains the general principles which should guide the policies, legislation and practices of states in respect of all of their "regional or minority languages."[38] Part III contains a number of more detailed articles that apply only in respect of those regional or minority languages that the states themselves identify; these articles deal with the use of the specified minority languages in education, in the legal system, by administrative authorities and public services, in the media, in cultural activities, in economic and social life, and so forth. Not only do states have the power to choose which of their regional or minority languages obtain the benefits of Part III,[39] they also have a considerable degree of choice as to the exact obligations undertaken.[40]

The Languages Charter suffers from some obvious limitations, and lawyers will rightly identify the absence of rights and the lack of a judi-

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[36] Council of Europe, *European Charter for Regional or Minority Languages, and Explanatory Report* (Strasbourg: Council of Europe Publishing, 1998), Explanatory Report, para. 10, at 5.

[37] *Id.* Para. 11 of the Explanatory Report is unequivocal on this issue: "The charter does not establish any individual or collective rights for the speakers of regional or minority languages."

[38] *Supra*, note 35, art. 7, at para. 5 makes clear that the provisions of Part II also apply in respect of "non-territorial languages," defined in art. 1, para. c as languages used by nationals of a state which differ from the language or languages used by the rest of the state's population but which, although traditionally used within the territory of the state, cannot be identified with a particular area thereof. The explanatory report gives Yiddish and Romany as examples of two such languages: at para. 36.

[39] *Id.*, art. 2, at para. 2.

[40] *Id.*, art. 2, at para. 2: States must apply a minimum of 35 paragraphs and subparagraphs from the various articles in Part III, out of a possible 65 paragraphs or subparagraphs available for selection. There is, in practice, considerable scope for selection within each of the articles, as well.

cial mechanism — like the Framework Convention, implementation of state obligations under the Languages Charter is monitored through a state reporting system[41] — as well as the fairly wide latitude that states enjoy with respect to the choice of the detailed Part III obligations. Nonetheless, the cultural diversity paradigm which is at the core of the Languages Charter helps in addressing some of the shortcomings of the other two paradigms.

First, unlike contemporary minorities instruments such as the Framework Convention, which were inspired by the ethnic tensions unleashed at the end of the 1980s, work on the Languages Charter started in the early 1980s, and was inspired by the precariousness of many of the lesser-used languages of Europe, particularly those of Central and Western Europe. As the Explanatory Report makes clear, such languages are threatened more by "the inevitably standardising influence of modern civilisation and especially of the mass media" than by an unfriendly environment or a government policy of assimilation[42] — precisely the sorts of forces that have typically inspired minorities instruments and with which the peace and security paradigm tends to be preoccupied.

Second, unlike the rights paradigm, which tends to focus on the individual rights holder and the discrete rights violation, the cultural diversity paradigm as reflected in the Languages Charter focuses attention on broad social patterns and on outcomes, namely, the survival of the minority language. A right to obtain a minority language service implies a choice, and the rights holder does not necessarily have to exercise that choice. The Languages Charter directs our attention to the broader social relationships underlying such choices, and aims at creating an environment in which choices are both available *and* exercised. In the context of minority languages, particularly the more seriously threatened minority languages, this paradigm brings valuable new insights, and while it should not replace a rights paradigm, it very usefully supplements it.

I shall conclude this paper by making two final observations. Under a cultural diversity paradigm, we must still confront the question of which cultures and how much diversity. Under the Languages Charter,

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41 *Id.*, Part IV, arts. 15-17.

42 *Supra*, note 36, at para. 2, the Explanatory Report.

the limits to both the numbers of cultures/languages and the extent of the diversity promoted are set by the definition of the "regional or minority languages" which enjoy its protection. They are defined in paragraph a of Article 1 as those languages that are traditionally used within a given territory of the State by nationals of that State who form a group numerically smaller than the rest of the State's population. They must be different from the official language of the State, and both dialects of the official language(s) of the State *and* the languages of migrants are specifically excluded from the definition. In the UK, for example, the Celtic languages and Scots, a close relation of English, are covered, but the large number of languages brought to the UK by successive waves of immigrants, such as Urdu, Panjabi, Hindi, Cantonese, Yoruba, and so forth, are not. In practice, determining the point at which a language becomes "traditionally used" in a particular state is not easy; officials of the Council of Europe have acknowledged that languages such as Urdu may become "regional or minority languages" in states such as the UK, but have not offered any specific yardsticks with which to resolve this issue.[43] Surely, though, the experience of an Urdu-speaker in, say, Edinburgh contributes to the UK's linguistic and cultural diversity. At the very cornerstone of the concept of the nation-state is the notion that the boundaries of the nation — often defined by reference to language and culture — are ideally contiguous with those of the political community, the state. The construction of the nation by means of the promotion of a unifying national language is part of the legacy of this concept. The recognition of linguistic and cultural diversity has always posed a challenge to the notion of the "nation-state" where the "nation" is defined by reference to language.[44] Recent developments in the protection of minorities show that the strangle-hold of the nation-state concept is loosening somewhat, but the fear of centrifugal forces that could be unleashed through the recognition of too much diversity still exists, and this, I suggest, is buried in the Languages Charter's definition of "regional or

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[43] See, *e.g.*, the comments of Philip Blair, Director of Cooperation for Local and Regional Democracy, the Council of Europe, "The European Charter for Regional or Minority Languages" in Dónall Ó Riagáin, ed., *Language and Law in Northern Ireland*, Belfast Studies in Language, Culture and Politics 9 (Belfast: Cló Ollscoil na Banríona, 2003) 39, at 41.

[44] The literature on these issues is voluminous and fairly well known; for a good treatment in the specific context of language, see Stephen May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* (Harlow: Pearson, 2001), especially c. 1, 2 and 9.

minority languages," a definition which certainly shows that states still have concerns about certain forms of linguistic and cultural heterogeneity.

The other observation is that, even under the Languages Charter, the norms are generally directed at the provision of services by the state and the ability to access services through the medium of the minority language. Almost nothing is said about control by linguistic groups of their own institutions, and little is done to address the fundamental power relationships within a society between linguistic minorities and the majority. Yet, as modern socio-linguistics tells us, the survival of minority languages is intimately linked to such issues.[45] Once again, it would appear that the very structure of instruments such as the Languages Charter is shaped by the concerns and interests of the nation-states. Given that instruments such as the Languages Charter, no matter how promising in certain respects, are the work of nation-states, this should not come as a surprise.

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[45] For the classic treatment of these issues, see Joshua A. Fishman, *Reversing Language Shift* (Clevedon: Multilingual Matters, 1991).