intense focus on the Alien Tort Statute. He sees the possibility of regulatory enforcement of the FCPA to address the same kinds of abuses that have been the subject of ATS litigation.

These four papers, which can only be summarized in the *Proceedings*, deserve publication in full. They raise important issues and broad questions about the development of human rights law and the role of international and domestic tribunals in that development.

The Tower of Babel: Human Rights and the Paradox of Language

By Moria Paz[*]

Underlying human rights advocacy and litigation on the right of minorities to maintain their language is a serious conflict that, remarkably, has gone undiagnosed.

Major human rights instruments and leading scholars suggest two key functions of language: first, at an individual level, language is constitutive of a person's cultural identity (we are what we speak). Second, at a collective level, linguistic pluralism increases diversity. Here heterogeneity in languages has a positive value. It enhances cultural diversity, which, in turn, ''enriches the world.''[1] Given the relative weakness of minorities, if their language remains unprotected they are at a greater risk of losing their distinct identity. In this approach, the injury is born by both the minority and the entire society. Because diversity is good, treaties and scholars argue that the international human rights regime ought to enforce the right of minorities to maintain a fairly high level of linguistic separatism.[2]

There is, however, another way of viewing the function of language. This function could be called communicative as opposed to identity-constitutive. Seen from this perspective, language is above all a social tool that facilitates market operations and supports political unification. Here, value is assigned to the smooth operation of the state and civil society. Linguistic diversity is now presumed to be a cost rather than a benefit to society. The preferred solution to linguistic multiplicity is the speedy assimilation of minority speakers into the majority language of the public sphere on fair terms.

In contrast to the treaty regime and the writing of scholars, this second approach is the one that is actually advanced in practice by major human rights courts and quasi-judicial institutions. In practice, they are not prepared to force states to swallow the dramatic costs entailed by a true diversity-protecting regime.

To demonstrate my claim, I systematically examine the way in which the United Nations Human Rights Committee (UNHRC), and the European Court of Human Rights (ECtHR) dispose of cases bearing on language. I selected these two institutions because they both create *rights* that are judicially enforceable by individual submission and that lead to generally applicable decisions. The rights approach provides the linguistic interests of minorities with a prima facie presumptive inviolability.[3]

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[1] Henry Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 Notre Dame L. Rev. 1539, 1550 (1990–1991). The value placed on diversity and the idea of equal respect for differences in human rights law is also legalized in the principle of equal protection. *See, e.g.*, International Covenant on Civil and Political Rights (ICCPR) arts. 21, 22; UN Charter art. 55(c); Universal Declaration of Human Rights (UDHR) art. 2; European Convention on Human Rights (ECHR) art. 14; American Convention on Human Rights (ACHR) art. 1.

[2] *E.g.*, ICCPR art. 27; UN Declaration on the Rights of Persons Belonging to National or Ethnic or Religious Minorities art. 2; European Charter for Regional or Minorities Languages, preamble; Framework Convention for the Protection of National Minorities art. 10; Universal Declaration on Linguistic Rights art. 7(1).

[3] Louis Henkin, The Age of Rights 4 (1970); Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 Harv. Hum. Rts. Y.B. 3, 3 (1988).

The UNHRC and the ECtHR apply different substantive law on languages. Article 27 of the ICCPR guarantees a seemingly absolute right to the use of a minority language. The directive is framed in the negative—people shall not be denied the right to the use of their language. However, the UNHRC has made clear that Article 27 calls for a positive ''legislative, judicial or administrative'' commitment on the part of the state ''to protect the identity of a minority.''[4] Prominent scholars, moreover, have further pushed the article in the direction of a strong affirmative right that contains, in the words of one scholar, ''no limitations.''[5]

The ECHR, in turn, does not include any general standards for the use of language or any specific minority right. Article 14 of the Covenant simply makes discrimination on the basis of language a suspect classification. But in the past decade, the ECtHR has greatly expanded the scope of the provision to justify the adoption of positive action to redress situations of systemic disadvantage that are brought about by a history of discrimination.[6] Moreover, leading EU scholars highlight the language potential of the ECHR.[7]

Notably, despite these doctrinal differences, both the ICCPR and the ECtHR explicitly ground minorities' rights to use and preserve their own languages in the identity-constitutive and diversity-providing functions of language. Accordingly, given the existing legal framework, we would expect that when members of minorities submit language claims before the UNHRC and ECtHR, the protection that is afforded them will be robust, and linguistic diversity will be the motivation for protection.

But it appears that this is not at all what is happening. I examined all the cases and communications that reached these enforcement bodies up to January 2012 in two main areas of conflict: (1) whether the state must facilitate the use of minority language in court proceedings by providing free translators; and (2) whether the state must subsidize parents' choices concerning the main language in which their children are educated in public schools. In total, I surveyed 150 cases.

In reality, the UNHRC and the ECtHR do not insist on a minority group's right to linguistic preservation. Courts in these jurisdictions converge, in practice, on a common standard for the protection of minority language speakers. They do *not* protect minority languages as constitutive of identity and culture. They *do*, however, protect minority languages as a means of communication. The former conception demands strong rights of protection; the latter inclines toward fair terms of assimilation. This circle is hard to square.

In case law, the UNHRC and the ECtHR accommodate three narrow interests that are not themselves language-specific.[8] First, they enforce minority language accommodation as a *subsidiary mechanism to realize another universally recognized right*. An example is the right to fair trial. Both the UNHRC and the ECtHR require language protection of defendants who do not speak the majority language in court proceedings, insofar as it is strictly needed to ''understand'' the charges against them. But accommodation ends when an accused overcomes the language barrier and assimilation into the majority language has begun. The

[4] UNHRC, General Comment 23, 1994.

[5] Louis B. Sohn, *The Rights of Minorities*, *in* The International Bill of Rights—The Covenant of Civil and Political Rights 285 (Louis Henkin ed., 1981); Patrick Thornberry, International Law and the Rights of Minorities 197 (1991); Louis Henkin, *Introduction*, *in* The International Bill of Rights—The Covenant of Civil and Political Rights 21 (Louis Henkin ed., 1981).

[6] *E.g.*, Thlimmenos v. Greece (2000); Stec v. UK (2006); D.H. v. Czech Republic (2007).

[7] *E.g.*, Bruno de Witte, *Language Rights: The Interaction Between Domestic and European Developments*, *in* Linguistic Diversity and European Democracy 172 (Anne Lise Kjaer & Silvia Adamo eds., 2011).

[8] For examples of how these narrow categories of protection emerge in case law, see Moria Paz, *The Failed Promise of Language Rights: A Critique of the International Language Rights Regime*, 54 Harv. Int'l L.J. (2013); Moria Paz, The Tower of Babel: Human Rights and the Paradox of Language (forthcoming).

protected good is thus procedural justice, not diversity, and this standard ties language to the value of instrumental communication alone.

Second, the two adjudicatory bodies enforce minority language protection as a *transitory right for linguistic assimilation*. In this case, the minority language is protected, but only as a way station to its elimination. For example, the state is required to take positive measures to accommodate the language of minority students in public schools, but only until they are able to integrate into mixed classes where education is in the dominant language. Here, the concern is to promote assimilation on fair terms into the state and the market, and not the continuation of the minority language.

A third and final circumstance in which courts accommodate minority language rights is when doing so is necessary to achieve a political compromise between the majority and one or more minority groups (for example, the protection of French language in Canada). This third kind of protection is perpetual and very strong. But, importantly, it is a response to the political power of *selective* minority-language communities to win concessions and is a far cry from a universal human right. It is afforded only after a path-dependent compromise has been achieved on the local level that defines for the international court the state's accommodation of multiple languages (that is, after the majority has already accepted the normative foundations of the language settlement).

From the collective perspective of linguistic minorities seeking to make their community viable over the long term, and for the human rights scholars who support them, the actual protection granted by the UNHRC and the ECtHR may be a great disappointment. The law is simply not delivering what it promises. While its words honor the normative value of diversity, human rights enforcement bodies actually privilege the commitment to assimilation. And thus, although assimilation is not the formal rule, it still determines the scope of the actual language rights regime.

But from the perspective of society as a whole, and also of the *individual* members of that linguistic minority, the scaled-back approach actually followed may carry important political benefits. The regime provides positive assistance for those who seek to assimilate. At the same time, in the private sphere the international enforcement bodies also preserve a minimum area of personal linguistic freedom. But the minority has to internalize the costs of maintaining its separate language and culture. This regime sets a floor on the protection afforded linguistic minorities; it does not set a ceiling. Individual nation-states are free to give greater rights to some linguistic minorities, if the majority deems it appropriate in light of the state's particular constraints. Doing so likely has the best chance of producing politically feasible and economically practical solutions to language strife. At the end of the day, it is not the number of laws making language protection a human right, but the terms of particular national compromises—who benefits, who pays the costs, and who is left out—that will determine the degree to which any particular language regime can be said to be fundamentally just.

Africa as a Generator of Human Rights Law

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The African region has long been perceived as a reluctant latecomer to the global human rights regime. But Africa should now be recognized as a generator of innovative human

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https://doi.org/10.5305/procannmeetasil.107.0478 Published online by Cambridge University Press