

## Regional Minorities, Immigrants, and Migrants: The Reframing of Minority Language Rights in Europe

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**ABSTRACT:** Scholarly debate about minority language rights in Europe is usually framed in terms of concern with either "regional" language minorities (such as Basque speakers in Spain) or concern with "immigrant" language minorities (such as Turkish speakers in Germany), with the interests of the two groups being seen as distinct, or even opposed. As a consequence, scholarship in this area has thus far focused upon the fact that a two-tier system of rights exists, with both nation state governments and trans-European institutions privileging "regional" groupings, rather than "immigrant" groups, with little exploration of the relationship between the rights of the two different groupings. This Essay argues, in contrast, that in recent years, national governments and pan-European organizations have fundamentally altered their approach to the language rights of both national minorities and immigrant minorities—in part due to the role played by transnational language communities and European migrants—so that the rights of regional and immigrant language minorities may actually be converging. The Essay proposes that a close analysis of the recent recommendations of the Advisory Committee to the Committee of Ministers on the Framework Convention on National Minorities and the Committee of Experts on the European Charter for Regional and Minority Languages, combined with the jurisprudence of the European Court of Justice, reveals an emerging trend toward this fundamental reframing of minority language rights. The treaty bodies and the ECJ appear to be departing from the traditionally held view of language rights as inherently preservationist and only applicable to members of certain indigenous, territorially anchored minority communities, and are instead adopting a broader, more expansive, human-rights based interpretation of language laws. Treaty bodies and transnational courts also appear to be moving away from treating language groups as collective holders of language rights, to treating individual language speakers as the primary rights-holders. In line with this reframing, this Essay argues that the very instruments originally constructed to protect the rights of the hitherto privileged "regional" minority groups may also ultimately be employed to promote the rights of individual speakers of the as-yet less favored "immigrant" languages.

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## INTRODUCTION

*"An ivory tower should be built to protect the Basque people and their language, to ensure that this jewel does not disappear."<sup>1</sup>*

*"The task (for Turks) is to be good citizens in Germany, to learn German, to speak German in their families."<sup>2</sup>*

The United Nations Year of Languages,<sup>3</sup> 2008, marked a significant milestone in the development of linguistic minorities<sup>4</sup> rights in Europe. 2008 was the tenth anniversary of the entry into force of two key Council of Europe<sup>5</sup> treaties—the Framework Convention for the Protection of National Minorities<sup>6</sup> and

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<sup>1</sup> Niko Marr, Georgian writer and philosopher, (1865-1934), Rector of the University of Tbilisi, Minister of Culture in the Czar's Government.

<sup>2</sup> Günther Beckstein, Governor of Bavaria, Interview with N24 Television, February 12, 2008.

<sup>3</sup> See G.A. Res. 10592 U.N. Doc. A/RES/10592 (16 May 2007); See also Press Release, *General Assembly Declares 2008 International Year of Languages, in Effort to Promote Unity in Diversity, Global Understanding*, available at <http://www.un.org/News/Press/docs/2007/ga10592.doc.htm>.

<sup>4</sup> In this Essay, the definition of "linguistic minority" will be that articulated by United Nations Special Rapporteur, Francesco Capotorti, in his 1991 Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, namely "a group that is numerically inferior to the rest of the population of a nation-state and whose members speak a language that is different from a language or languages spoken by the rest of the population." Francesco Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities at 16-26, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.91.XIV.2 (1991); see also Adeno Addis, *Cultural Integrity and Political Unity: The Politics of Language in Multilingual States*, 33 ARIZ. ST. L.J. 719 (2001) ("members of this linguistic group show a sense of solidarity and a desire to preserve the language that gives them that common identity,").

<sup>5</sup> The Council of Europe, which was founded in 1949, seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. The Council has 47 member states, one applicant state (Belarus) and five observers, the Holy See, Canada, the United States, Japan, and Mexico. The main component parts of the Council of Europe are: the Committee of Ministers, the Organisation's decision-making body, composed of the 47 Foreign Ministers of the member states or their Strasbourg-based deputies (ambassadors/permanent representatives); the Parliamentary Assembly, comprised of 636 members (318 representatives and 318 substitutes) from the 47 national parliaments: the Congress of Local and Regional Authorities composed of a Chamber of Local Authorities and a Chamber of Regions; and the Secretariat, headed by a Secretary General, elected by the Parliamentary Assembly. The Council of Europe should not be confused with the European Union (EU), although all of the member states of the EU are also members of the Council of Europe. See About the Council of Europe, at [http://www.coe.int/T/e/Com/about\\_coe/](http://www.coe.int/T/e/Com/about_coe/).

<sup>6</sup> European Framework Convention for the Protection of National Minorities ETS No. 157: 2 IHRR 217 (Feb. 1, 1995). The text of the Convention does not define "national minority." Several parties, including Austria, Denmark, Estonia, Germany, Poland, Slovenia, Sweden, Switzerland, and The Former Yugoslav Republic of Macedonia, set out their own definition of "national minority" when they ratified the Convention. Many of these declarations exclude non-citizens and migrants from protection under the Convention, and some identify the specific groups to whom the Convention will apply. Liechtenstein, Luxembourg, and Malta are parties to the Convention, but each declared that there are no national minorities within their respective territories. See generally, United Nations Guide for Minorities, Pamphlet No. 8, The Council of Europe's Framework Convention for the Protection of

the European Charter for Regional or Minority Languages<sup>7</sup>—as well as the tenth anniversary of the Organization for Security and Cooperation in Europe’s<sup>8</sup> Oslo Recommendations Regarding the Linguistic Rights of National Minorities.<sup>9</sup> For over a decade, the Framework Convention, the Charter, and the OSCE’s Oslo Recommendations have fostered the preservation and promotion of “regional” minority languages (RM<sup>10</sup> languages)—languages, like Basque, that are considered to be “autochthonous” or indigenous to Europe.<sup>11</sup> European countries and European institutions, including the Council of Europe, the OSCE, and the European Union,<sup>12</sup> have devoted considerable resources to fulfilling their treaty

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National Minorities, available at <http://www.ohchr.org/Documents/Publications/GuideMinorities8en.pdf>.

<sup>7</sup> European Charter for Regional and Minority Languages ETS No. 148 (Nov. 5, 1992). In the Charter, “regional or minority languages” are defined as languages that are: “(i) traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State’s population; and (ii) different from the official language(s) of that State; it does not include either dialects of the official language(s) of the State or the languages of migrants; “territory in which the regional or minority language is used” means the geographical area in which the said language is the mode of expression of a number of people justifying the adoption of the various protective and promotional measures provided for in this Charter; “non-territorial languages” means languages used by nationals of the 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.” *Id.* art. 1.

<sup>8</sup> The Organization for Security and Cooperation in Europe (OSCE) is the world’s largest regional security organization. It has 56 member states in Europe, Asia and North America, and its mission is to “work . . . for early warning, conflict prevention, crisis management and post-conflict rehabilitation.” Its Secretariat is based in Vienna and it currently has 19 missions and field offices throughout Europe and Central Asia. For a more detailed description of the mission and work of the OSCE, see Fact sheet, *What is the OSCE?* Available at [http://www.osce.org/publications/sg/2008/01/29209\\_1008\\_en.pdf](http://www.osce.org/publications/sg/2008/01/29209_1008_en.pdf).

<sup>9</sup> The Oslo Recommendations Regarding the Linguistic Rights of National Minorities. Available at [http://www.osce.org/documents/hcnm/1998/02/2699\\_en.pdf](http://www.osce.org/documents/hcnm/1998/02/2699_en.pdf).

<sup>10</sup> Throughout this Essay the shorthand “RM languages” is used to describe the languages spoken by regional minority groups, comprised of the national minorities discussed in Part I and transnational/cross-border minorities discussed in Part II. See Appendix for a map of Europe showing the location of the various RM language groups.

<sup>11</sup> UNESCO describes such languages as “the language of the people considered to be the original inhabitants of an area,” according to UNESCO official language designations. See UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL REPORT ON LANGUAGES, THE USE OF VERNACULAR LANGUAGES IN EDUCATION, 1953. There are thought to be at least eighty autochthonous languages in Europe, a figure that climbs to ninety-four when dialects are included. See official website of the EU Commissioner for Education, Culture and Multilingualism, <http://europa.eu/languages/en/document/90/22>. It is estimated that almost fifty million of Europe’s four hundred and fifty million citizens speak an autochthonous European language other than the major language of the state in which they live. See Francesco Palermo, *The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ*, 8 MAASTRICHT J. EURO. & COMP. L. 299 (2001). The majority of these indigenous language communities are concentrated in Central and Eastern Europe, where linguistic groups crisscross national borders. In Hungary, for example there are German, Armenian, Bulgarian, Croatian, Greek, Polish, Romanian, Ruthene, Serbian, Slovakian and Ukrainian minorities, each speaking a different language. Hungarians themselves represent a minority in Romania, Slovakia, Ukraine, Croatia, Slovenia and Austria. See Appendix for a map of Europe showing the location of the various RM language groups within Hungary.

<sup>12</sup> The European Union is an economic and political partnership between 27 European nations. The three major organs of the EU are: the European Parliament, composed of 785 elected MEPs (Members of the European Parliament) representing the citizens of Europe; the Council of the European Union (formerly the Council of Ministers of the European Union), composed of ministers of EU nation states whose principal responsibilities are foreign policy, security policy and justice and freedom issues; and the

obligations and promoting language diversity between linguistic majorities and RM language groups, and had a great deal of progress to celebrate during this anniversary year.<sup>13</sup>

2008 was, however, not only a language rights milestone for “regional” or linguistic minorities, but also a key year for the large communities of “immigrant” minority (hereinafter IM) language speakers—such as Turkish speakers living in Germany<sup>14</sup>—that reside in Europe. 2008 was the first officially-designated European Year of Intercultural Dialogue, intended to promote the histories, cultures, and languages of IM communities. As these communities grow and flourish, European nations and institutions are becoming increasingly concerned with IM languages, and have introduced a number of measures designed to promote the interests of IM language speakers—most often initiatives designed to facilitate the integration of IM language speakers into the linguistic mainstream.<sup>15</sup>

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European Commission, composed of 27 independent Commissioners (one from each member state) and approximately 24,000 civil servants charged with drafting proposals for new European laws, which it presents to the European Parliament and the Council, and managing the day-to-day business of implementing EU policies and spending EU funds. *See generally* Europa, *The EU at a Glance*, available at [http://europa.eu/abc/index\\_en.htm](http://europa.eu/abc/index_en.htm).

<sup>13</sup> Nation states’ legislatures have passed statutes and developed constitutional provisions guaranteeing a range of rights to their national minorities. *See* Nancy C. Dorian, *Western Language Ideologies and Small-Language Prospects*, in *ENDANGERED LANGUAGES: LANGUAGE LOSS AND COMMUNITY RESPONSE* 3, 5 (Lenore A. Grenoble & Lindsay J. Whaley eds., 1998). EU institutions now operate in twenty-three official languages, including languages spoken by linguistic minorities. Speakers of Catalan, Galician and Basque can communicate with EU institutions in their own languages. *See* European Commission, Booklet, *Many Tongues, One Family: Languages in the European Union*, 2004 available at <http://ec.europa.eu/publications/booklets/move/45/en.pdf> (last visited Jan. 19, 2009). The EU’s Charter of Fundamental Rights, refers expressly to the importance of linguistic diversity. Charter of Fundamental Rights of the European Union O.J. (C 364) 1 (Dec. 7, 2000) art. 22. (“The Union shall respect cultural, religious and linguistic diversity.”) Both the EU and the Council of Europe have invested heavily during the past two decades in the European Bureau for Lesser Used Languages, *see* <http://www.eblul.org/>, and the MERCATOR European Research Centre on Multilingualism and Language Learning, *see* <http://www.mercator-education.org/>, both of which promote RM languages. According to Jan Figel, the EU’s Commissioner for Education, Culture and Multilingualism, Europe’s “cultural and linguistic diversity is a tremendous asset” and RM languages “must be safeguarded and promoted.” *See* official website of EU Commissioner for Education Culture and Multilingualism, *supra*, note 11; *See also* European Commission, Press Release, *The Celebration of Linguistic Diversity* (Feb. 2001), available at <http://culture.coe.fr/AEL2001EYL/eng/diversity.htm>. Although many aspects of language policy are the preserve of nation state members, the EU has nonetheless continually emphasized the importance of policies that take into account the needs of national minorities. *See generally* NIC CRAITH MÁIRÉAD (Ed.), *EUROPE AND THE POLITICS OF LANGUAGE: CITIZENS, MIGRANTS AND OUTSIDERS* (2006).

<sup>14</sup> Immigrant minority languages are sometimes referred to as “community languages” by national governments and European institutions. The largest number of community languages in Europe can be found in the United Kingdom. Over 300 languages are currently spoken in London schools. Some of the most established of these are Bengali, Gujarati, Punjabi, Cantonese, Mandarin and Hokkien. C. BAKER & S. PRYS JONES (EDS.), *ENCYCLOPEDIA OF BILINGUALISM AND BILINGUAL EDUCATION* (1998)

<sup>15</sup> A number of European nations have recently introduced language tests as a prerequisite for long-term residency or citizenship acquisition. *See, e.g.* DILF (diplôme initial de langue française) website at <http://www.ciep.fr/dilf/>, outlining the proposed contents of the French language test; *See, also* *Turkey Slams German Immigration Law: Language Requirement “Against Human Rights,”* DER SPIEGEL (Apr. 5, 2007) available at <http://www.spiegel.de/international/germany/0,1518,475839,00.html>. Commentators in other nations have criticized “newcomers” inability to integrate rapidly, blaming language barriers between immigrants and native populations. *See, e.g.* Thomas Fuller, *Backlash in Europe: Foreign Workers Face Turning Tide*, INT’L HERALD TRIB., Oct. 25, 2002 (“integrating into

Legal scholars and advocates have long been engaged in a debate concerning the different forms of language “rights” available to RM and IM language groups in Europe. Scholars disagree vehemently about the appropriate definition of language “rights,” and the significance of the competing interests in the articulation of those rights.<sup>16</sup> However, despite their many disagreements, European language rights scholars concur on one point, namely that there is a fundamental inequality between the position of RM and IM language groups and speakers in Europe.<sup>17</sup> They draw this conclusion because, they argue, national and transnational legislation and case law have accorded members of RM groups a range of language rights that IM language speakers do not enjoy.<sup>18</sup> Scholars have

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Dutch society means “speaking Dutch . . . “sometimes when [Germans] hear [Ukrainian immigrants] speaking Russian together, they’ll say, ‘Do you speak German? You should learn German.’”

<sup>16</sup> Some scholars stress the importance of “language as resource” in determining access to, and distribution of, public resources, such as education, employment opportunities, healthcare, or transportation services. See Fernand de Varennes, *The Protection Of Linguistic Minorities In Europe And Human Rights: Possible Solutions To Ethnic Conflicts?* 2 COLUM. J. EUR. L. 107 (1996). Others discuss the impact that “language parity” or “linguistic inequality” has upon participation in civic life, and the influence that language policy choices have upon the rights of the governed to engage fully with government. See Alexander Caviedes, *The Role of Language in Nation-Building within the European Union*, 27 DIALECTICAL ANTHROPOLOGY 249 (2003) (“Language can become either an instrument of participation, access or deprivation, in that it can alter existing relationships of power between different groups within the polity.”); See also Fernand de Varennes, *Language and Freedom of Expression in International Law*, 16 HUM. R. QUART., 163, 179 (1994). Still others emphasize the importance of the right to language preservation, seeing language as “the quintessential cultural tool,” the “glue” cementing the individual’s interaction with family and society, and an integral part of communities’ shared histories and ongoing societal relationships. See J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 24 (1998). According to Will Kymlicka “language and history . . . constitute [the] vocabulary” of societal culture, which is that which “provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.” WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989). See also BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983). This ongoing language rights discussion is also shaped by a debate among legal scholars regarding the balance struck by nation states and European institutions between “tolerance-oriented” and “promotion-oriented” language rights, see HEINZ KLOSS, *THE AMERICAN BILINGUAL TRADITION* (1977), between individual and communal linguistic freedoms, see Tove Skutnabb-Kangas, *The Politics of Language Standards*, working paper presented at TESOL meeting, Baltimore, (1994), between the freedom to use one’s language and the freedom from being discriminated against for doing so, see Reynaldo Macías, *Language choice and human rights in the United States*, in GEORGETOWN UNIVERSITY ROUND TABLE ON LANGUAGES AND LINGUISTICS, 86–101 (James Alatis Ed., 1979), between minority language groups’ and individuals’ “claims to something” and “claims against someone else.” See Richard Ruiz, *Orientations in Language Planning*, 8 NABE J. 15–34 (1984).

<sup>17</sup> See generally STEPHEN MAY, *LANGUAGE AND MINORITY RIGHTS: ETHNICITY, NATIONALISM AND THE POLITICS OF LANGUAGE* (2003).

<sup>18</sup> This two-tier system is usually characterized as follows: RM language speakers are able to use their language as a resource—they are legally entitled to access education, employment opportunities, government services, and media in their own languages. See also OSCE, *Hague Recommendations Regarding the Education Rights of National Minorities* (1996), available at [http://www.osce.org/documents/hcnm/1996/10/2700\\_en.pdf](http://www.osce.org/documents/hcnm/1996/10/2700_en.pdf); Foundation on Inter-Ethnic Relations, *Lund Recommendations on the Effective Participation of National Minorities in Public Life* (Sep. 1999), available at [http://www.osce.org/documents/hcnm/1999/09/2698\\_en.pdf](http://www.osce.org/documents/hcnm/1999/09/2698_en.pdf). No such entitlement exists for IM language speakers. RM language speakers have been granted constitutional and treaty rights to political representation by speakers of their languages, and are encouraged to communicate with governments in their own languages. Speakers of Catalan, Galician and Basque can also communicate with EU institutions in their own languages. See European Commission, *Booklet, Many Tongues, One Family: Languages in the European Union*, 2004 available at <http://ec.europa.eu/publications/booklets/move>

debated whether this two-tier system of language rights is desirable, drawing differing conclusions,<sup>19</sup> but have not yet considered the possibility that RM and IM language rights may actually be converging.

This Essay argues that, contrary to scholars' standard interpretation of the distinct spheres occupied by RM and IM language groups, recent developments in ECJ jurisprudence and treaty bodies' interpretation of RM-oriented language laws are fundamentally redefining the rights of all linguistic minorities in Europe, including immigrant groups. The ECJ and treaty bodies have expanded rights originally conferred solely on RM groups to other minority language communities. As a consequence, this Essay argues, speakers of IM languages may, in the future, be able to vindicate rights comparable—but not identical—to those enjoyed by RM language speakers, by using the same legal instruments that were originally designed to protect RM language speakers' rights. This Essay proposes that this reframing has occurred in four key stages, transforming a right to language preservation originally accorded RM language groups in the early 1990s into a right to linguistic diversity available to both RM and IM language speakers in 2009. This Essay explores each of the four stages to demonstrate how and why this reframing in minority language rights in Europe is now taking place.

The Essay begins, in Part I, with the original formulation of minority language rights in Europe: the *right to preservation* accorded national minority language groups—a subset of RM language speakers—in nation state constitutions and statutes and in Council of Europe treaties. This right to language preservation, as originally defined, was only available to these territorially-anchored groups—such as Basque speakers in Spain or Frisian speakers in the Netherlands<sup>20</sup>—whose linguistic survival was dependent upon the linguistic majority of the nation state in which their territory was located.<sup>21</sup>

Part II explores how these rights were subsequently expanded to another subset of RM language speakers—Yiddish speakers—a transnational linguistic minority whose language was equally in need of antiquarian safeguards, but who

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*/45/en.pdf* (last visited Jan. 19, 2009). IM language speakers have been granted no equivalent constitutional rights. RM language speakers have been assured in national and international proclamations that the preservation of their languages, and thus their societies, cultures and histories, is of vital importance to the linguistic mainstream. No such assurances have been made to members of IM groups.

<sup>19</sup> Some scholars argue that this two-tier approach is inevitable and not necessarily prejudicial to IM language speakers and groups. Will Kymlicka, for example, argues that a state of affairs in which newcomers/immigrants cannot demand the same linguistic rights as the members of old and established minority linguistic groups is generally perceived to be just. See WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 34 (1995). However, other scholars, such as Cristina Rodríguez, disagree with Kymlicka's sharp differentiation between the claims of "national" minorities and "migrant" minorities, arguing that there is no bright line between the claims of certain RM groups for recognition of their linguistic identity and the language rights claims of IM language speakers. Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006).

<sup>20</sup> See Appendix for a map showing the territories inhabited by Basque and Frisian language communities.

<sup>21</sup> Reliance upon this original iteration of European language rights led commentators to conclude that language rights in Europe are only available to territorially anchored RM groups, but such a view does not take into account the subsequent re-interpretation of these rights by European treaty bodies and the European Court of Justice (ECJ).

were located throughout Europe, rather than anchored to one specific territory.<sup>22</sup> Part II then shows how the same rights were also extended to speakers of another RM language, Romani. Like Yiddish speakers, Romani speakers are a dispersed linguistic community, unlike Yiddish speakers, Romani speakers do not face language death.<sup>23</sup> In interpreting the Council of Europe's treaties in favor of the rights of Roma communities, this Essay argues, treaty bodies redefined language rights as not merely preservationist, but also oriented towards the protection of the intrinsic identity of members of a given language group.<sup>24</sup> This *right to protection* was then extended by the OSCE, and by the Council of Europe treaty bodies, to another type of transnational language community: RM groups with cross-border "kin states," such as Swedish speakers in Finland or Danish speakers in Germany.<sup>25</sup> As with Romani, neither the Swedish nor the Danish language is likely to die out, but the cultures and the linguistic identities of these language communities were nonetheless deemed worthy of protection under law.<sup>26</sup>

Part III of this Essay explores the next step in this evolutionary process: the Council of Europe treaty bodies' and the ECJ's extension of the rights previously available to cross-border language groups with kin-states to European migrants. For example, laws previously applied to protect German speaking minority groups in Italy's South Tyrol were interpreted by the ECJ as conferring similar language rights on Austrian and German nationals traveling through Italy.<sup>27</sup> This Essay argues that a *right to recognition* of the languages of all European migrants throughout the European Union has thus emerged through the intersection of the Council of Europe treaty bodies' expansion of their remit with the ECJ's interpretation of individuals' rights under EU law.

This Essay proposes that these three steps constitute a fundamental reorientation of language rights in Europe—from group-inhering, territorially-

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<sup>22</sup> Yiddish is described in the "definitions" section of the Charter for Regional and Minority Languages as a "non-territorial language," meaning a "language used by nationals of the 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." European Charter for Regional and Minority Languages ETS No. 148 (Nov. 5, 1992).

<sup>23</sup> Romani is also defined as a "non-territorial language" in the Charter for Regional and Minority Languages. European Charter for Regional and Minority Languages ETS No. 148 (Nov. 5, 1992).

<sup>24</sup> See, e.g. Advisory Committee on the Framework Convention for National Minorities, Report ACFC/INF/OP/I(2002)007 (Italy) (July 3, 2002) ("the existing statutory provisions on the Roma, Sinti and Travellers adopted by several regions are clearly inadequate in that they are disparate, lack coherence and focus too much on social questions and immigration issues at the detriment of the promotion of their identity, including their language and culture")

<sup>25</sup> There are about 300,000 Swedish-speaking Finns, or 5.6% of the population of Finland. Most Swedish speakers live in the coastal areas of Uusimaa, Turunmaa and Ostrobothnia. About 12,000 Swedish speakers (4%) live in entirely Finnish-language municipalities elsewhere in Finland. Åland is an entirely Swedish-speaking autonomous province with 26,000 inhabitants. See, Virtual Finland, Swedish in Finland, at <http://virtual.finland.fi/netcomm/news/showarticle.asp?intNWSAID=26218>. The Danish language ("Dansk") is spoken in Germany by a Danish minority estimated to number between 15 and 40,000 people in South Schleswig. See, Euromosaic Danish in Germany, at <http://www.uoc.es/euromosaic/web/document/danes/an/i1/i1.html#2>. The map in the Appendix attached to this Essay plots the location of each of these minority language communities.

<sup>26</sup> See The Oslo Recommendations Regarding the Linguistic Rights of National Minorities. Available at [http://www.osce.org/documents/hcnm/1998/02/2699\\_en.pdf](http://www.osce.org/documents/hcnm/1998/02/2699_en.pdf).

<sup>27</sup> See, e.g. Case C-274/96, Criminal Proceedings Against Bickel and Franz, 1998 E.C.R. I-7637 [ECJ].



defined, preservationist, and RM-focused, to individual rights that are potentially available to all Europeans. This reorientation has laid the foundation for the fourth and final stage in the evolution of language rights: *the right to diversity* that is now beginning to be claimed by individual members of immigrant minority language groups. Part VI of this Essay argues that it is possible to discern in the Council of Europe Treaty bodies' decisions and ECJ jurisprudence the beginning of a trend according immigrant minority language speakers linguistic recognition similar to that accorded European migrants, and extending to IM speakers language protections similar to those granted to transnational language minorities.<sup>28</sup> Consistent with this trend, the Essay concludes that the treaty rights originally designed to ensure the preservation of national minority groups are now being reframed and may eventually have the potential to guarantee the linguistic diversity of all Europeans, immigrants included.

### I. NATIONAL MINORITIES AND THE RIGHT TO PRESERVATION

Linguistic identity has played a decisive role in the development of European nation states, and in the foundation and expansion of modern European institutions.<sup>29</sup> From the revolutions of the mid-nineteenth century<sup>30</sup> to the Treaty of Versailles<sup>31</sup> to the post-World War II establishment of pan-European organizations,<sup>32</sup> concerns with language have been of paramount importance.<sup>33</sup> This is still the case today—among the twenty-seven member states of the

<sup>28</sup> See discussion *infra* pp 139-47.

<sup>29</sup> See generally ALEXANDER OSTROWER, LANGUAGE, LAW AND DIPLOMACY (1965).

<sup>30</sup> The so-called *Nationalprinzip* (literally "nationality principle"), developed in nineteenth century Germany and based upon language and ethnicity as co-determinants of national identity, became the formative principle for the creation of new states throughout Central, Eastern, and Southeast Europe in the nineteenth and twentieth centuries. German Philosophers such as Herder and Fichte, postulated the very existence of a German nation based on an idea that all persons who spoke the German language formed a German "*Volk*." See generally JOHANN GOTTLIEB FICHTE, REDEN AN DIE DEUTSCHE NATION (1878) [ADDRESSES TO THE GERMAN NATION]; JOHANN GOTTFRIED HERDER, IDEEN ZUR PHILOSOPHIE DER GESCHICHTE DER MENSCHHEIT (1790) [OUTLINES OF A PHILOSOPHY OF THE HISTORY OF MAN]. Until the mid-nineteenth century modern-day Germany was fractured into a range of political entities, including small city-states such as Cologne and large kingdoms like Prussia. R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD (6th ed. 1984). The common language was one of the catalysts for unification in 1871, and so Germany unified and solidified its territorial holdings by drawing together existing speakers of the same language. New states, such as Montenegro, Serbia, Romania, and Bulgaria emerged during the late nineteenth century, based on criteria of collective identity, foremost among which was language. See e.g. JOHN MERRIMAN, 2 A HISTORY OF MODERN EUROPE: FROM THE RENAISSANCE TO THE PRESENT (2d ed. 1996).

<sup>31</sup> The *Nationalprinzip* heavily influenced the victors of World War I when they redrew the map of Europe at the Treaty of Versailles. The new states which were formed, Czechoslovakia, Poland, Hungary, Estonia, Latvia, Lithuania, and the Kingdom of Serbs, Croats, and Slovenes (renamed Yugoslavia – literally "The Kingdom of Southern Slavs" in 1929) expressed their right to self-determination in terms of ethnic and linguistic solidarity.

<sup>32</sup> For example, the drafters of the Treaty of Rome, which established the European Economic Community, were acutely aware of the need to preserve some semblance of linguistic parity and therefore political parity when they conferred equal status on all national languages of the EU member states (with the exception of Irish and Luxembourgian) as working languages. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. I (Cmd. 5179-II)

<sup>33</sup> See generally OSTROWER, *supra*, note 29.

European Union, one of the most consistently contentious issues is whether or not nations' official languages receive equal treatment from central European institutions.<sup>34</sup> However, despite European nations' longstanding preoccupation with linguistic identity, a unified European approach to minority language rights has only emerged recently, during the last twenty years.<sup>35</sup>

This unified approach has frequently been characterized by commentators as: (i) preservationist;<sup>36</sup> (ii) group-oriented, rather than individual-oriented,<sup>37</sup> and (iii) limited to territorially-defined language communities.<sup>38</sup> Such a characterization relies upon a narrow reading of European nations' constitutional and statutory provisions, and of the texts of Council of Europe and European Union treaties. This Essay argues that this characterization accurately represents the original scope of minority language rights in Europe, but not their subsequent interpretation and expansion by courts and treaty bodies. Nonetheless, in order to fully understand how European language rights have evolved and changed in recent years, it is first essential to understand from whence they came: the right to preservation accorded national minority languages in nation states' constitutions and statutes and in pan-European treaties.

#### *A. The Right to Language Preservation in Nation State Constitutions and Statutes*

According to both the European Union and the Council of Europe, language rights issues are first and foremost the concern of individual nation

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<sup>34</sup> Settling on an agreed policy to adequately address the perceived hierarchy within official and unofficial European languages has been fraught with problems. *See generally* Rhona K. M. Smith, *Moving Towards Articulating Linguistic Rights-New Developments In Europe*, 8 MSU-DCL J. INT'L L. 437 (1999); European Ombudsman Press Release No. 6/2008, Ombudsman criticises Commission for language discrimination in EU project, May 27, 2008, available at <http://ombudsman.europa.eu/release/en/2008-05-27.htm>.

<sup>35</sup> *See* Frank R. Scott, *The Constitutional Protection of Linguistic Rights in Bilingual and Multilingual States*, 4 MAN. L. J. 243, 247 (1971) ("[E]very country that has a language problem attempts to solve it in its own way.") European lawmakers appear to have been reluctant, for a considerable period of time, to address concerns about language and language rights. For example, the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950 made no direct mention of a right to freely use any language of one's choosing. European Convention on Human Rights, EUR. T.S. 5 (Nov. 4, 1950)

<sup>36</sup> *See, e.g.* STEPHEN MAY, *LANGUAGE AND MINORITY RIGHTS: ETHNICITY, NATIONALISM AND THE POLITICS OF LANGUAGE* (2003); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 34 (1995).

<sup>37</sup> Alexander Ostrower argues that European language rights discourse uses groups or "peoples" as the primary unit of analysis because of "circumstances peculiar to Europe," first and foremost of which is "its turbulent history." OSTROWER, *supra*, note 29 at 667. *See also* Joseph Marko, "United In Diversity?" *Problems Of State- And Nation-Building In Post-Conflict Situations: The Case Of Bosnia-Herzegovina in Symposium, Accommodating Differences: The Present and Future of the Law of Diversity* 30 VT. L. REV. 431-937 (2006)

<sup>38</sup> *See, e.g.* Robert F. Weber, *Individual Rights and Group Rights in the European Community's Approach to Minority Languages* 17 DUKE J. COMP. & INT'L L. 361, 371 2007. ("For example, a French-speaking inhabitant of the Val d'Aosta can only make use of her language rights within the Val d'Aosta, and may not rely on those protections outside the region.")

states.<sup>39</sup> The following brief survey of national minorities' rights to language preservation therefore begins with examples of different iterations of that right found in nation states' constitutions and statutory provisions. These examples demonstrate the extent to which the right to minority language preservation was originally perceived of as applying only to territorially-defined linguistic groups. Excerpts from the Austrian, Hungarian, and Italian constitutions underscore the group inhering nature of the original grants of the right to language preservation, and excerpts from Italian, Spanish, Dutch and Portuguese laws illustrate the extent to which this right to language preservation was originally granted solely to groups with historical ties to a particular geographical region.<sup>40</sup>

The language of the Austrian Constitution underscores the importance accorded by the state to the preservation of the languages of RM groups. Article 8, Paragraph 2 of the Austrian Constitution refers explicitly to the rights of language groups, rather than individual speakers:

The Republic (the Federation, Länder and municipalities) is committed to its linguistic and cultural diversity which has evolved in the course of time and finds its expression in the autochthonous ethnic groups. The language and culture, continued existence and protection of these ethnic groups shall be respected, safeguarded and promoted.<sup>41</sup>

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<sup>39</sup> For an analysis of the EU's attitude towards the rights of language minorities, see Francesco Palermo, *The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ*, 8 MAASTRICHT J. EURO. & COMP. L. 299 (2001). For an analysis of the Council of Europe's attitude towards minority rights, see Geoff Gilbert, *The Council of Europe and Minority Rights*, 18 HUMAN RIGHTS QUARTERLY 160 (1996).

<sup>40</sup> These countries' approaches to minority language rights are representative of almost all other European nations, with one exception: France. See Nancy C. Dorian, *Western Language Ideologies and Small-Language Prospects*, in ENDANGERED LANGUAGES: LANGUAGE LOSS AND COMMUNITY RESPONSE 3, 5 (Lenore A. Grenoble & Lindsay J. Whaley eds., 1998). France banned all regional languages during the revolutionary period, and since then, France has promoted one national language, French, as *the* instrument to define unified national identity. See CARLTON J. H. HAYES, NATIONALISM: A RELIGION 52-53 (1960); see also EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870-1914, AT 114 (1976) Only standard French could be used in the public sphere, including the legislature, the administrative authorities, and the judiciary. See Jörg Polakiewicz, *Die Rechtliche Stellung der Minderheiten in Frankreich* [The Legal Status of Minorities in France], in 1 DAS MINDERHEITENRECHT EUROPÄISCHER STAATEN [The Rights of Minorities in European Nations] 126, 155 (Jochen A. Frowein et al. eds., 1993). See also JOSEPH MARKO, AUTONOMIE UND INTEGRATION: RECHTSINSTITUTE DES NATIONALITÄTENRECHTS IM FUNKTIONALEN VERGLEICH [Autonomy and Integration: A Functional Comparison of the Legal Institution of Nationality Laws] 248 (1995). When France became a signatory to the European Charter of Regional and Minority Languages<sup>40</sup> it declared that it had no linguistic minorities within its borders. This is, of course, untrue; Breton, Basque, German and Italian are spoken by sizeable "national" minorities, and France has a substantial immigrant population, drawn predominantly from its former colonies. The European Union (through the Charters and Framework Convention) and other member states (through their constitutional jurisprudence) have striven to recognize national minorities—reportedly in the name of both unity and diversity, and France has done the opposite—once again in the name of integration. France amended Article 2 of its Constitution in 1992 to declare that "[t]he language of Republic is French." Fr. Const. art. 2 (as amended by Constitutional Law No. 92-554 of June 25, 1992).

<sup>41</sup> BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] BGBl No. 1/1930, as amended by Bundesgesetz [BG] BGBl I No. 68/2000, art. 8, para. 2. (author's own translation)

The Austrian Constitution thus safeguards “indigenous” languages like Allemanisch, which is spoken in the Alpine district of Vorarlberg.<sup>42</sup> The choice of words used in Article 8, paragraph 2 is revealing: the Republic is only committed to languages that have “evolved in the course of time,” and that are “autochthonous,” i.e. “native” to the territory of Austria. The use of the word “safeguarded” is also telling—it implies that these languages are somehow endangered and need to be preserved. The minority language rights provisions in the Austrian Constitution may thus accurately be described as national minority-focused, group-oriented, and above all preservationist.

The Hungarian Constitution similarly grants language rights to specific national minority groups, recognizing “certain minorities as constituent nationalities and giv[ing] them certain self-government rights.”<sup>43</sup> Those “constituent nationalities”—German, Armenian, Bulgarian, Croatian, Greek, Polish, Romanian, Ruthene, Serbian, Slovakian and Ukrainian—have, according to the Constitution and subsequent legislation, a sufficiently long-standing connection to Hungary to warrant the preservation of their language and culture.<sup>44</sup> In addition to constitutional protections for these national minority groups, the Hungarian Parliament also passed legislation authorizing the creation of a Parliamentary Commissioner for the Rights of National and Ethnic Minorities.<sup>45</sup> The Commissioner’s portfolio includes enforcing the constitutionally established rights of national minorities to preserve their language and culture.<sup>46</sup> Conversely, the Hungarian Constitution confers no explicit language rights on minority groups left off the list of “constituent minorities,” or on individual members of any minority group.<sup>47</sup> Minority language provisions in Hungary, like those in Austria, can thus be described as preservationist and the exclusive preserve of historically rooted national minority communities.<sup>48</sup>

The same description could equally be applied to the language rights regime in Italy, the nation with the greatest number of national minority language speakers in Europe.<sup>49</sup> Article 6 of the Italian Constitution of 1948 emphasizes the importance of “protecting linguistic minorities with appropriate norms.”<sup>50</sup> However, despite this longstanding constitutional commitment, the first legislation designed to protect and preserve national minority groups was passed in 1999—over 50 years after the Constitution entered into force.<sup>51</sup> That legislation

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<sup>42</sup> For a detailed description of the origins, history and current reach of the Allemanisch language, see Allemanische Sprache at <http://www.badische-seiten.de/alemannisch/> (in German).

<sup>43</sup> Elena A. Baylis, *Minority Rights, Minority Wrongs*, 10 UCLA J. INT’L L. & FOREIGN AFF. 66 (2005)

<sup>44</sup> *Id.*

<sup>45</sup> See, EDWARD H. LAWSON, MARY LOU BERTUCCI, LAURIE S. WISEBERG, *ENCYCLOPEDIA OF HUMAN RIGHTS* 737 (1996)

<sup>46</sup> *Id.*

<sup>47</sup> A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution of the Republic of Hungary]; unofficial English translation available at <http://www.lectlaw.com/files/int05.htm>

<sup>48</sup> Michael Walzer, *Notes on the New Tribalism*, in *POLITICAL RESTRUCTURING IN EUROPE: ETHICAL PERSPECTIVES* 187 (Chris Brown ed., 1994); See also Adeno Addis, *Cultural Integrity And Political Unity: The Politics of Language in Multilingual States*, 33 ARIZ. ST. L.J. 719 (2001)

<sup>49</sup> An estimated 2.5 million people belong to at least 12 minority groups within Italy. Francesco Palermo, *The Italian Draft Bill on Linguistic Minorities*, in *MINORITY RIGHTS IN EUROPE* 55 (Snezana Trifunovska, ed. 2001).

<sup>50</sup> COSTITUZIONE [COST.], art. 6 (author’s own translation).

<sup>51</sup> Francesco Palermo, *The Italian Draft Bill on Linguistic Minorities*, in *MINORITY RIGHTS IN*

emphasizes the need to preserve the languages of specific groups—Albanian, Catalán, German, Greek, Slovene, Croat, French Provençal, Friulan, Ladin, Occitan, and Sardinian speakers—underscoring, once again, the fact that language rights in Europe traditionally inhered in specified groups, rather than in minority groups generally or in individual language speakers.<sup>52</sup> The Italian language rights regime also provides a clear example of the territorially-defined nature of early guarantees of RM language preservation.<sup>53</sup> The Italian Constitution grants limited autonomous status to five regions of the country where linguistic minorities are found: Friuli-Venezia Giulia, Val d’Aosta, Trentino-Alto Adige, Sardinia, and Sicily.<sup>54</sup> The grant of rights that attach to minority speakers originates in legislation passed by the governments of each of these regions, and such rights are connected to the territory, not the residents, of the regions.<sup>55</sup>

Article 2 of the Spanish Constitution of 1978 similarly confers a “right to autonomy” upon the “nationalities and regions of which [Spain] is composed,”<sup>56</sup> and Article 3.2 grants the public authorities of those autonomous regions the right to use their own regional languages when communicating with their citizens.<sup>57</sup>

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EUROPE 55 (Snezana Trifunovska, ed. 2001).

<sup>52</sup> See ANTONI MILLAN I MASSANA, *DERECHOS LINGÜÍSTICOS Y DERECHO FUNDAMENTAL A LA EDUCACIÓN. UN ESTUDIO COMPARADO: ITALIA, BELGICA, SUIZA, CANADA, Y ESPAÑA* [Linguistic Rights and the Fundamental Right to Education: A Comparative Study: Italy, Belgium, Switzerland, Canada and Spain] 134-37 (1994) (“to protect linguistic and cultural minorities means to protect designated groups of citizens.”) See Appendix for a map showing the location of the minority languages in Italy.

<sup>53</sup> This territorially-dependent interpretation of linguistic rights is not unique to minority language provisions, but also applied with regard to official languages. The Constitution of Belgium, for example, also anchors language rights to geographically defined linguistic groups. Belgium has three official languages: French, Flemish and German, and each of Belgium’s autonomous regions is governed in whichever language is the majority language in that particular region. According to the Constitution, language rights attach to a culturally and geographically determined community, not to individual members of those communities. This is illustrated clearly by the fact that individuals do not take their rights with them when crossing regional boundaries—French speakers have the right to receive all government services in French in the French-speaking regions, but not in the Flemish-speaking territories. The Belgian Constitution establishes that Belgium’s internal boundaries, and hence Belgium’s territorially defined linguistic territories, cannot be altered except through an elaborate series of procedures under which the three national language groups hold specific voting and representation rights. The relevant Belgian constitutional provision reads: “The boundaries of the four regions may only be altered or amended by an act of Parliament passed on a majority vote in each linguistic group of each of the Houses, on condition that the majority of the members of each group are present and that the total votes in favor within the two linguistic groups attain two-thirds of the votes cast.” THE COORDINATED CONSTITUTION OF THE KINGDOM OF BELGIUM art. 4 (quoted in Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, in *THE RIGHTS OF MINORITY CULTURES* 31, 40 (Will Kymlicka ed., 1995)).

<sup>54</sup> See Francesco Palermo, *The Italian Draft Bill on Linguistic Minorities*, in *MINORITY RIGHTS IN EUROPE* 55 (Snezana Trifunovska, ed. 2001).

<sup>55</sup> Robert F. Weber, *Individual Rights and Group Rights in the European Community’s Approach to Minority Languages* 17 *DUKE J. COMP. & INT’L L.* 361, 371 (2007). (“For example, a French-speaking inhabitant of the Val d’Aosta can only make use of her language rights within the Val d’Aosta, and may not rely on those protection outside the region.”) See also Francesco Palermo, *The Italian Draft Bill on Linguistic Minorities*, in *MINORITY RIGHTS IN EUROPE* 55 (Snezana Trifunovska, ed. 2001).

<sup>56</sup> CONSTITUCIÓN [C.E.], art. 2 (author’s own translation)

<sup>57</sup> Article 3.1 of the Spanish Constitution recognizes that the state may legitimately impose a duty upon all of its nationals to learn the official language of the national government, Castilian, as a means of avoiding separatism or ghettoization and creating a common national unifying bond. But, Article 3.2 indicates that this does not exclude the possibility that other languages, such as Catalan, may be used by public authorities where it is reasonable to do so, especially where a large number of people are

Several of Spain's autonomous regions have followed the example set forth in the Constitution and promulgated their own normalization laws, to promote the use of their region's minority language in all spheres of life, including education, public administration, and communication.<sup>58</sup> These laws make clear that, in accordance with the provisions of the Constitution, they are designed to preserve the linguistic heritage of the national minority groups traditionally resident in a particular geographical area.<sup>59</sup>

Longstanding territorial links also define the right to language preservation enjoyed by national minority language groups in a number of other European nations, ranging from the Netherlands to Portugal to the United Kingdom. Although there are no constitutional provisions that directly address the needs of different language groups in the Netherlands, the Dutch Parliament has promulgated a number of statutory provisions providing for the preservation of the Frisian language in Friesland.<sup>60</sup> The Portuguese government has enacted similar statutory measures for the Mirandés community, found in northern Portugal.<sup>61</sup> In the United Kingdom, the provisions of the Welsh Act of 1993<sup>62</sup> specifically limit the remit of the *Bwrdd yr Iaith Gymraeg*<sup>63</sup> to the territory of Wales.<sup>64</sup> In short,

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concentrated in the same region and share the same language.3.1 El castellano es la lengua española oficial del Estado. Todos los Españoles tienen el deber de conocerla y el derecho a usarla.

3.2. Las demás lenguas españolas serán también oficiales en las respectivas Comunidades Autónomas de acuerdo con sus Estatutos

<sup>58</sup> See, e.g., Llei 1 de 7 de Gener, de Política Lingüística [Act No. 1, of 7th January 1988, on Linguistic Policy] (Generalitat of Catalonia), available at <http://www6.gencat.net/lengcat/legis/en/lpl.htm>

<sup>59</sup> *Id.* Article 3 of the Spanish Constitution sets out the framework through which Spanish institutions manage multilingualism and provides that "[t]he wealth of Spain's different linguistic modalities is a cultural patrimony that will be the object of special respect and protection." Constitución [C.E.] art. 3, § 3 (Spain) (author's own translation). Scholars have offered a number of theories to explain why the preservation of these territorially-defined language groups is such a priority for the Spanish government. One persuasive argument is that the emphasis on preserving the languages of these groups is an attempt to address the grievances of historically marginalized linguistic groups and relocate their histories and cultures firmly within the shared national imagination.<sup>59</sup> This reading of the Spanish Constitution regards the special status accorded Spanish minority languages as "national heritage languages" as an acknowledgment of their place within the national canon, and as emblematic of the Spain's commitment to remedy historical marginalization of RM groups dating back to the nineteenth century and to Francisco Franco's repression of minority languages during his decades of rule in the twentieth century. See Charlotte Hoffmann, *Balancing Language Planning and Language Rights: Catalonia's Uneasy Juggling Act*, 21 J. OF MULTILINGUAL & MULTICULTURAL DEVELOPMENT 425, 439 (2000).

<sup>60</sup> Including, *inter alia* detailed rules on the use of Frisian in an administrative or judicial capacity; rules establishing the legal basis for changing toponymical names from Dutch into Frisian; provisions to encourage the use of Frisian in schools. Floris Van Laanen, *The Frisian Language in the Netherlands*, in MINORITY RIGHTS IN EUROPE 72 (ed. Snezana Trifunovska 2001)

<sup>61</sup> See Lei n.7/99, Reconhecimento oficial de direitos linguísticos da comunidade mirandesa, (29 Jan 1999); see also Despacho Normativo n. 35/99 (5 Jul 1999) (implementing regulations to provide Mirandés education, including a limited grant of power to local institutions ("entidades da comunidade") to participate in the coordination of cultural and educational projects).

<sup>62</sup> The Welsh Language Act, 1993 c.38. (Gr. Brit.).

<sup>63</sup> Literally "The Welsh Language Board."

<sup>64</sup> See, e.g. §3.2(b) (provisions for "the conduct of public business and the administration of justice in Wales"); §3.2(c) (provisions for "the use of the Welsh language in . . . dealings with the public in Wales.") (emphasis added)

territoriality is a widespread marker of the boundaries of national minority language rights throughout Europe.<sup>65</sup>

This brief survey of the language rights laws of Austria, Hungary, Italy, Spain, the Netherlands, Portugal and the UK demonstrates that the traditional characterization of language rights in Europe as preservationist, group-inhering and territorially anchored accurately reflects the letter of the relevant national laws. A brief examination of the texts of the principal European treaties and initiatives that deal with national minority language rights reveals a very similar picture.

### *B. The Right to Language Preservation in European Treaties and Initiatives*

Two Council of Europe treaties, the Charter for Regional and Minority Languages<sup>66</sup> and Framework Convention for National Minorities,<sup>67</sup> and one European Union agreement, the Charter of Fundamental Rights of the European Union,<sup>68</sup> provide the transnational framework for minority language rights in Europe.<sup>69</sup> A close examination of the textual commitments of these treaties reinforces the argument that the original vision of minority language rights in Europe was preservationist, group-oriented, and only applicable to national minorities—i.e. territorially-defined RM communities.

In the late 1980s and early 1990s, complaints about threats to the continued existence of autochthonous languages in Europe were deemed to be a matter of “grave concern” by the Council of Europe.<sup>70</sup> The Council referred the

<sup>65</sup> A map showing the traditional territories of the European linguistic minority groups is attached as an Appendix to this Essay.

<sup>66</sup> European Charter for Regional and Minority Languages ETS No. 148 (Nov. 5, 1992)

<sup>67</sup> European Framework Convention for the Protection of National Minorities ETS No. 157: 2 IHRR 217 (Feb. 1, 1995).

<sup>68</sup> Charter of Fundamental Rights of the European Union O.J. (C 364) 1 (Dec. 7, 2000).

<sup>69</sup> The European Union had, traditionally, taken a less activist stance towards language rights than the Council of Europe, leaving the monitoring of treatment of linguistic minorities to the individual member states. See Francesco Palermo, *The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ*, 8 MAASTRICHT J. EURO. & COMP. L. 299 (2001)

<sup>70</sup> Scholars have advanced a number of different theories to explain why exactly the dwindling of RM populations in the early 1990s prompted the Council of Europe (and subsequently the EU) to promulgate treaties designed to preserve RM languages. One theory is that the specter of “language death” lead to a resurgence of interest in and commitment to language rights by nation state governments and European institutions. See, e.g. MARK JANSE, *Introduction: Language Death and Language Maintenance: Problems and Prospects*, in LANGUAGE DEATH AND LANGUAGE MAINTENANCE (Mark Janse & Sijmen Tol eds., 2003) (“As much as linguistic discrimination may add to language death, they are at the same time powerful forces in the reawakening of ethnic identity feelings among speakers of endangered minority languages. . . . Ethnic identity is often accompanied by an increased interest in language maintenance.”) Language death is, of course, not a uniquely European concern. The Declaration on the Responsibilities of the Present Generations Towards Future Generations, a legally non-binding instrument, adopted on 12 November 1997 by the General Conference of UNESCO, states in Article 7: “With due respect for human rights and fundamental freedoms, the present generations should take care to preserve the cultural diversity of humankind. The present generations have the responsibility to identify, protect and safeguard the tangible and intangible cultural heritage and to transmit this common heritage to future generations.” Records of the UNESCO General Conference, Paris, Fr., Oct. 21-Nov. 7, 1997, Declaration on the Responsibilities of the Present Generations Towards Future Generations, Vol. 1, Resolutions, 69-71. An alternative theory is that the fall of the Berlin wall prompted linguistic majorities to revisit the collective guilt that they bore for their role in “their” RM groups’ near extinction. See, e.g. M.-J. Azurmendi, E. Bacho & F. Zabaleta, *Reversing Language Shift:*

matter to the Standing Conference of Local and Regional Authorities of Europe,<sup>71</sup> which recommended the promulgation of a pan-European agreement to safeguard Europe's linguistic heritage.<sup>72</sup> The resultant treaty, the Charter for Regional or Minority Languages, was adopted under the auspices of the Council of Europe in 1992.<sup>73</sup> The language of the Charter, from the beginning of its Preamble:

Considering that the aim of the Council of Europe is to achieve a greater unity between its members, particularly for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Considering that the protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe's cultural wealth and traditions;<sup>74</sup>

makes clear that the Charter was originally conceived to be preservationist, group oriented, and designed to safeguard the languages of national minorities—territorially-bounded RM communities.<sup>75</sup>

The Preamble to the Charter emphasizes that it is being promulgated to ensure the preservation of RM languages at risk of extinction.<sup>76</sup> Each of the articles of the Charter focuses exclusively on group, rather than individual rights, referring repeatedly to the need to preserve languages, rather than the need to assist language speakers, and conferring no explicit individual rights upon speakers of minority

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*The Case of Basque*, in CAN THREATENED LANGUAGES BE SAVED? 234 (Joshua A. Fishman ed., 2001); M. Strubell, *Catalan a Decade Later*, in CAN THREATENED LANGUAGES BE SAVED? 260 (Joshua A. Fishman ed., 2001), to changing notions of the boundaries of nation states and nation states' responsibilities following greater European integration. For a discussion of shifting European conceptions of national and "European" identities and responsibilities see JOHN RAWLS, *THE LAW OF PEOPLES*, 1999, 38-39; for a historical perspective, see Ernest Renan, *Qu'est-ce qu'une nation?*, [What is a nation?] Lecture at the Sorbonne (March 11, 1882), available at <http://digbig.com/4rdfj> (follow "chapitre 3" hyperlink for the quote).

<sup>71</sup> The Standing Conference of Local and Regional Authorities of Europe is the branch of the Council of Europe composed of representatives of local and regional government. See About the Council of Europe, at [http://www.coe.int/T/e/Com/about\\_coe/](http://www.coe.int/T/e/Com/about_coe/).

<sup>72</sup> See, Explanatory Report on the European Charter for Regional or Minority Languages, ETS 148, ¶5. ("Acting on these recommendations and resolutions, the Standing Conference of Local and Regional Authorities of Europe (CLRAE) decided to undertake the preparation of a European charter for regional or minority languages, by reason of the part which local and regional authorities must be expected to play in relation to languages and cultures at local and regional level.")

<sup>73</sup> European Charter for Regional or Minority Languages, ETS 148.

<sup>74</sup> *Id.*

<sup>75</sup> For example, in Part I, art. 2 entitled "Undertakings," the text states "Each Party undertakes to apply the provisions of Part II to all the regional or minority languages spoken within its territory" and refers repeatedly to "each language specified at the time of ratification." *Id.*

<sup>76</sup> "[T]he protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe's cultural wealth and traditions." *Id.* at Preamble. Article 1 of the Charter also explicitly limits its protections to RM communities, ruling out the broader application of the Charter's provisions to immigrant groups, by stating that the term regional or minority languages "does not include the languages of migrants." European Charter for Regional or Minority Languages, ETS 148, Pt I, art. 1 (a).



languages.<sup>77</sup> The Charter has a two-tier structure: there are a set of compulsory core principles applicable to any and all qualifying languages used in a state,<sup>78</sup> and

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<sup>77</sup> Language rights scholars have debated why exactly the Charter was drafted with such a clear emphasis upon group rights, given other European institutions' consistent emphasis on individual rights. One credible explanation is that the timing of the Charter determined its content and its group-rights orientation. The presentation of the final draft of the Charter occurred at the same time as the formation of new, post-Communist regimes in the Warsaw Pact nations of Eastern Europe. The Explanatory Memorandum to the Charter suggests that its drafters were particularly concerned by the challenges posed by national minorities to the fledgling governments of the new democracies. The Explanatory Memorandum states that the drafters hoped that the Charter might:

[B]e expected to help, in a measured and realistic fashion, to assuage the problem of minorities whose language is their distinguishing feature, by enabling them to feel at ease in the state in which history has placed them. Far from reinforcing disintegrating tendencies, the enhancement of the possibility of use of regional or minority languages in the various spheres of life can only encourage the groups who speak them to put behind them the resentments of the past which prevented them from accepting their place in the country in which they live and in Europe as a whole.

This language strongly suggests that the drafters of the Charter were motivated to protect linguistic diversity primarily in order to prevent language-oriented secession. Perhaps this concern with maintaining the status quo is responsible for the drafters' consistent deference to nation states' own determinations about how far they should go to vindicate minority groups' language rights—leaving any radical policy decisions, and their consequences, firmly in the hands of the individual signatories. The Charter acknowledges nation states' discretion to formulate their own language policies, and establish their own linguistic hierarchies. The Charter suggests that the official majority language(s) and the regional or minority language(s) of a state should coexist in harmony, with each language having its "proper place." The place suggested in art. 1 of the charter is based upon the size of the numerical groups of speakers, and whether or not the language is afforded "official" status, thus, regional or minority languages are "(i) traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and (ii) different from the official language(s) of that State." The Charter, in tacit recognition of linguistic hierarchy, leaves it to the government of an individual member state to determine what those places may be. Art. 3 (1) states "Each Contracting State shall specify in its instrument of ratification, acceptance or approval, each regional or minority language, or official language which is less widely used on the whole or part of its territory, to which the paragraphs chosen in accordance with Article 2, paragraph 2, shall apply." A Government may choose to acknowledge or not acknowledge any relevant languages within its jurisdiction. The U.K. for example, has not recognized Scots Gaelic as an official language, although there are regular BBC broadcasts and other state-sponsored activities to promote use of the language, and there is no provision within the Charter for judicial review of a Government's decision to include or exclude a language.

<sup>78</sup> *Id.* at art. 7. ("1. In respect of regional or minority languages, within the territories in which such languages are used and according to the situation of each language, the Parties shall base their policies, legislation and practice on the following objectives and principles: (a) the recognition of the regional or minority languages as an expression of cultural wealth; (b) the respect of the geographical area of each regional or minority language in order to ensure that existing or new administrative divisions do not constitute an obstacle to the promotion of the regional or minority language in question; (c) the need for resolute action to promote regional or minority languages in order to safeguard them; (d) the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in public and private life; (e) the maintenance and development of links, in the fields covered by this Charter, between groups using a regional or minority language and other groups in the State employing a language used in identical or similar form, as well as the establishment of cultural relations with other groups in the State using different languages; (f) the provision of appropriate forms and means for the teaching and study of regional or minority languages at all appropriate stages; (g) the provision of facilities enabling non-speakers of a regional or minority language living in the area where it is used to learn it if they so desire; (h) the promotion of study and research on regional or minority languages at universities or equivalent institutions; (i) the promotion of appropriate types of transnational exchanges, in the fields covered by this Charter, for regional or minority languages used in identical or similar form in two or more States. 2. The Parties undertake to eliminate, if they have not yet done so, any unjustified distinction, exclusion,

a selection of more specific provisions—for education,<sup>79</sup> judicial authorities,<sup>80</sup> administrative authorities and public services,<sup>81</sup> media,<sup>82</sup> cultural activities and facilities,<sup>83</sup> and economic and social life<sup>84</sup>—all intended to safeguard the regional or minority languages nominated by the state.<sup>85</sup> State signatories to the Charter are required to undertake to fulfill at least thirty-five of the specific provisions. The majority of the specific provisions comprise options of various degrees of stringency that allow states parties to comply with the level of protection and promotion deemed desirable or most convenient at the time of ratification.<sup>86</sup> Each of these specific provisions is described in the text as an appropriate means of preserving the languages of RM groups.<sup>87</sup>

Three years after the Charter for Regional or Minority Languages was drafted, the Council of Europe promulgated the Framework Convention for the Protection of National Minorities (hereinafter FCNM).<sup>88</sup> The FCNM contains six articles that promote the rights of members of national minority groups to the preservation of their languages: articles 5, 9, 10, 11, 12 and 14. Although each of

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restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger the maintenance or development of it. The adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population or which take due account of their specific conditions is not considered to be an act of discrimination against the users of more widely-used languages. 3. The Parties undertake to promote, by appropriate measures, mutual understanding between all the linguistic groups of the country and in particular the inclusion of respect, understanding and tolerance in relation to regional or minority languages among the objectives of education and training provided within their countries and encouragement of the mass media to pursue the same objective. 4. In determining their policy with regard to regional or minority languages, the Parties shall take into consideration the needs and wishes expressed by the groups which use such languages. They are encouraged to establish bodies, if necessary, for the purpose of advising the authorities on all matters pertaining to regional or minority languages. 5. The Parties undertake to apply, *mutatis mutandis*, the principles listed in paragraphs 1 to 4 above to non-territorial languages. However, as far as these languages are concerned, the nature and scope of the measures to be taken to give effect to this Charter shall be determined in a flexible manner, bearing in mind the needs and wishes, and respecting the traditions and characteristics, of the groups which use the languages concerned.”)

<sup>79</sup> *Id.* at art. 8.

<sup>80</sup> *Id.* at art. 9.

<sup>81</sup> *Id.* at art. 10.

<sup>82</sup> European Charter for Regional or Minority Languages, ETS 148, art. 11.

<sup>83</sup> Article 12.

<sup>84</sup> Article 13.

<sup>85</sup> *Id.* at pt. III.

<sup>86</sup> For example, Article 8 outlines a state's obligations with respect to education, on a sliding scale, ranging from making education (at any or all levels, from pre-school to higher) available in the language concerned to those students who so request, to making the education available in the language concerned for all. *Id.* at art. 8 However, a state's obligation to satisfy this Article is made contingent upon there being sufficient numbers of minority language speakers living within a certain geographic area to warrant the provision of linguistic education. *Id.* The onus is on the state to decide what numbers justify the provision of additional teaching facilities. Other options in the section include teaching the history and culture of the language and training teachers to implement the options agreed upon.

<sup>87</sup> *Id.*

<sup>88</sup> Framework Convention for the Protection of National Minorities, opened for signature Feb. 1, 1995, C.E.T.S. No. 157 (entered into force Feb. 1, 1998), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm> [hereinafter FCNM]. The Framework Convention is so designated because it is primarily a statement of principles rather than a detailed set of obligations. Supervision of compliance is done through a system of state reporting to the Committee of Ministers, assisted by an expert advisory committee.

these provisions refers to the rights of “persons,” the text makes clear that any rights those persons may have derive from their membership of specific national minority groups.<sup>89</sup>

The language rights articulated in the FCNM may therefore, like those contained in the Charter for Regional and Minority Languages, be characterized as (i) preservationist, (ii) group oriented and (iii) the preserve of territorially-rooted national minority communities. Individual textual commitments demonstrate each of these characteristics. For example, Article 5 of the FCNM promotes preservation of essential elements of group identity, “namely religion, *language*, traditions and cultural heritage.”<sup>90</sup> Article 9 is concerned with freedom of expression and group access to minority language media.<sup>91</sup> Article 10 underscores the importance of territoriality to national minority groups by stipulating that in areas traditionally belonging to, or inhabited by, substantial numbers of persons belonging to national minorities, administrative authorities shall endeavor to use the minority language in dealings with members of the national minorities, including, if necessary, occasions when members of national minorities are arrested.<sup>92</sup> Article 11 guarantees members of minority families the right to use national minority names.<sup>93</sup> Article 12 states that in territories inhabited by national minority groups, signatories shall, “take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority,”<sup>94</sup> and Article 14 states that every person belonging to a national minority group has the right to learn his or her minority language, suggesting that, where possible, the state should ensure that persons belonging to minorities have adequate opportunities to do so.<sup>95</sup>

The Charter of Fundamental Rights of the European Union<sup>96</sup> also adopts a group-based approach to language rights—an approach that is particularly noteworthy in a treaty that is overwhelmingly concerned with individual human rights. The Charter, proclaimed by the European Commission in December 2000, contains fifty-four separate articles, grouped into chapters entitled “Dignity,” “Freedoms,” “Equality,” “Solidarity,” “Citizens’ Rights,” and “Justice.” Fifty-

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<sup>89</sup> The emphasis on group identity in both the FCNM and the Charter for Minority and Regional Languages has been interpreted by some scholars as an innovative departure from established European individual rights norms. See Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the new Equality Directives*, 44 HARV. INT’L L.J. 331, (2003). Others see this emphasis as a consequence of the invariably collective nature of language. See Denise G. Réaume, *The Group Right to Linguistic Security: Whose Right, What Duties?*, in GROUP RIGHTS 118 (Judith Baker ed., 1994); Eibe Riedel, *Gruppenrechte und Kollektive Aspekte Individueller Menschenrechte*, in AKTUELLE PROBLEME DES MENSCHENRECHTSSCHUTZES. BERICHTE DER DEUTSCHEN GESELLSCHAFT FUER VOLKERRECHT [Current Problems in Minority Rights Protection. Report of the Germany Society for Human Rights] 33, 49, 59 (1994).

<sup>90</sup> *Id.* at art. 5 (emphasis added)

<sup>91</sup> *Id.* at art. 9. (“The Parties undertake to recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties shall ensure, within the framework of their legal systems, that persons belonging to a national minority are not discriminated against in their access to the media.”)

<sup>92</sup> *Id.* at art. 10.

<sup>93</sup> *Id.* at art 11.

<sup>94</sup> *Id.* at art 12.

<sup>95</sup> *Id.* at art 14.

<sup>96</sup> Charter of Fundamental Rights of the European Union O.J. (C 364) 1 (Dec. 7, 2000).

three of the fifty-four articles in the Charter address individual rights, and just one, Article 22 in the chapter entitled “Equality,” addresses collective rights, including language rights: “The Union shall respect cultural, religious and *linguistic* diversity.”<sup>97</sup> Unlike the two Council of Europe treaties, the Charter of Fundamental Rights does not specify what kind of linguistic diversity should be respected—the text of Article 22 is not explicitly limited to indigenous “European” languages, and there is no suggestion that preservation of linguistic heritage is the most important motivation for promoting linguistic diversity. Yet, even though the text of Article 22 is not expressly preservation-oriented, national minority language group advocates have seized upon the text of the Charter as inferring a grant of the right to linguistic preservation for territorially anchored national minority communities.<sup>98</sup>

As this brief review of their key provisions has shown, the language rights granted in the Charter for Regional and Minority Languages, the FCNM, and the Charter of Fundamental Rights, were originally understood to be preservationist, group-oriented, and available to territorially-defined national minority communities. This echoes the approach used in individual nation states’ constitutional and statutory language rights provisions. However, while this characterization adequately describes the original, narrowly-focused grant of minority language rights embodied in the texts of constitutions, statutes and treaties, it does not describe fully or adequately describe their subsequent interpretation and reorientation by European courts and treaty bodies. This Essay attempts to do just that, and continues in Part II by illustrating the ways in which the grants of language rights originally intended to preserve the languages of territorially-anchored national minority groups were subsequently reinterpreted to confer linguistic protections on members of transnational minorities.

## II. TRANSNATIONAL MINORITIES AND THE RIGHT TO PROTECTION

Although the texts of nation state constitutions and European treaties such as the Charter for Regional and Minority Languages and the Framework Convention for National Minorities emphasize the rights national minority groups enjoy to the preservation of their linguistic heritage, these documents also refer—albeit less frequently—to the rights enjoyed by other RM language groups; linguistic minorities that are not anchored to a particular nation state’s territory. These “transnational minorities” fall into two broad categories: (i) groups that are geographically dispersed throughout Europe, such as Yiddish or Romani speakers (ii) “cross-border” minority language communities who share a language with the

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<sup>97</sup> Charter of Fundamental Rights of the European Union, O.J. (C 364) 1 (Dec. 7, 2000).

<sup>98</sup> National groups founded to protect RM language “heritage,” such as the French Association International Pour la Défence des Langues et Cultures Menacées and the Italian Associazione per i Popoli Minacciati, as well as pan-European organizations such as the European Bureau for Lesser Used Languages, *see* <http://www.eblul.org>, and the MERCATOR European Research Centre on Multilingualism and Language Learning, all emphasize that RM language groups were granted rights under Article 22 of the EU’s Charter of Fundamental Rights, as well as the Council of Europe’s Charter for Regional and Minority Languages and FCNM.

majority of the inhabitants of an adjoining nation, such as Hungarian speakers in Romania, or Swedish speakers in Finland.<sup>99</sup>

In the case of Yiddish, the Council of Europe treaty bodies' decisions underscore the importance of not merely language *preservation*, but also language protection. In the case of Romani and "cross border" minority languages—languages that are not endangered<sup>100</sup>—the treaty bodies' concern is entirely with the protection of the languages and language speakers from the hegemony of the linguistic majority. As the discussion below demonstrates, the rights granted to transnational minority language speakers play a crucial role in the reorientation of minority language rights in Europe away from a right to language survival, available only to territorially-anchored RM groups, and toward the right to protection of language speakers' continued connection with their pan-European language community (in the case of Yiddish and Romani speakers) or with the linguistic majority in their kin state (in the case of language communities with kin states).<sup>101</sup>

#### *A. The Right to Preservation and Protection of Yiddish*

Yiddish enjoys a special status under the Charter for Regional and Minority Languages and the Framework Convention for National Minorities.<sup>102</sup> Although Yiddish speaking communities are not anchored to a particular territorial location, the Yiddish language has been spoken throughout Europe for centuries, and is considered to be "indigenously" European.<sup>103</sup> Despite its longevity, the threat to the survival of the Yiddish language is acute. The near-annihilation of European Jewish communities during the holocaust, their persecution by Communist regimes, and the mass emigration of Yiddish speakers who survived

<sup>99</sup> "Cross-border" regional minority communities also arguably include territorially anchored linguistic groups, such as the Basque in France and Spain, the Frisians in Germany and Denmark, and the Saami in northern Scandinavia whose "right to preservation" was discussed in section I, *supra* pp 109-20.

<sup>100</sup> The Romani language is not in danger of extinction—the Roma constitute Europe's largest minority group. See Romani Rose, *Europe's Largest Minority—Roma and Sinti—Demand Equal Rights*, UN Chronicle, Vol. XLIII, No. 3 (2006), available at <http://www.un.org/Pubs/chronicle/2006/issue3/0306cont.htm>. The languages spoken by "cross border" minority groups are also not endangered—Swedish is spoken by Swedes in Sweden, Danish is spoken by Danes in Denmark, and Polish is spoken by Poles in German.

<sup>101</sup> See discussion *infra* pp.126-31.

<sup>102</sup> Yiddish and Romani are described in the "definitions" section of the Charter for Regional and Minority languages as "non-territorial languages," meaning they are "languages used by nationals of the 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."

<sup>103</sup> The earliest documents in pre-Yiddish going back to the 12th century were glosses of Hebrew religious works. The language began to develop amid Gallo-Romanic High German dialects and took its Old Yiddish shape in the 14th century when the *Dukus Horant*, the Yiddish version of the German *Kudrunlied*, appears. The first printed book was the *Bovebukh* of 1507. The period of New Yiddish begins in the 18th century. Yiddish was the primary vernacular of European (Ashkenazi) Jewry for more than 600 years. Itsself a remarkable fusion of Jewish culture with European forms of expression, it became the *lingua franca* and one of the principal vehicles of Ashkenazi civilisation. Until the 19th century it was used in speech, literature and traditional Jewish education throughout Central and Eastern Europe. See Council of Europe Doc. 7489, "Yiddish Culture" Feb. 12, 1996, Explanatory Memorandum at 5, available at <http://assembly.coe.int/Documents/WorkingDocs/doc96/edoc7489.htm>.

World War II to Israel and the United States, almost led to the disappearance of the Yiddish language in Europe.<sup>104</sup> In 1939 there were over 8 million speakers of Yiddish in Central and Eastern Europe; today there are approximately 2 million Yiddish speakers worldwide, most of whom live in the United States or Israel and many of whom are elderly.<sup>105</sup>

It is therefore perhaps unsurprising that a number of states parties to European treaties have made firm textual commitments to the preservation of the Yiddish language. Despite their numerically small Yiddish-speaking communities, Finland, the Netherlands, Romania, Sweden, Switzerland, and Ukraine all made declarations when they signed the Charter for Regional and Minority Languages proclaiming that Yiddish was a protected national minority language in their countries under the terms of the Charter.<sup>106</sup> However, what is surprising is the extent to which textual commitments in these treaties to the preservation of the Yiddish language have been expansively interpreted by the treaty bodies, moving beyond the survival of the language to encompass the *protection* of the language speakers and promotion of the language itself.

The Committee of Experts on the Charter for Regional and Minority Languages, tasked with overseeing signatories' compliance with their obligations under the Charter, has issued a number of advisory opinions regarding states parties' promotion of Yiddish.<sup>107</sup> Other European institutions have followed the treaty bodies' lead, seeking not just to preserve Yiddish but also to protect the rights to community of Yiddish speakers. For example, in 1995, three years after the draft of the Charter for Regional and Minority Languages was finalized (and two years before the Charter entered into force) the Council of Europe's Parliamentary Assembly convened a colloquy in Vilnius<sup>108</sup> to consider how best to protect the Yiddish language and culture from vanishing.<sup>109</sup> The colloquy considered Council of Europe Members' obligations under the Charter for Regional and Minority Languages, the Council's Parliamentary Assembly's

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<sup>104</sup> See Council of Europe Doc. 7489, "Yiddish Culture" Feb. 12, 1996, available at <http://assembly.coe.int/Documents/WorkingDocs/doc96/edoc7489.htm>

<sup>105</sup> It is estimated that in the late 1930s the numbers of native Yiddish speakers were well in excess of 11 million worldwide. Some 8 million were in Europe (3.3 million in Poland, 3 million in the Soviet Union, 800 000 in Romania, 250 000 in Hungary, 180 000 in Lithuania and others in England, France, Germany, Latvia, Belgium, Switzerland) and the rest in North and South America, South Africa and Australia. *Id.*

<sup>106</sup> See Council of Europe, List of Declarations Made with Respect to Treaty No. 148, Charter for Regional or Minority Languages (status as of Oct. 27, 2008) at <http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=148&CM=1&DF=&CL=ENG&VL=1>

<sup>107</sup> The Committee of Experts on the Charter has issued 35 evaluation reports, resulting in 30 Council of Europe Committee of Ministers recommendations. For all of the states that declare Yiddish to be an Charter-eligible language, the Committee of Experts issues regular updates on the progress made to preserve and protect the language. For example, in its first report on the Netherlands, the Committee undertook research into the prevalence of Yiddish in public life and noted that Yiddish was spoken in the home as a private language, and could be studied at the university of Amsterdam and similar institutions, but there was little wider public interest in the language, as yet.

<sup>108</sup> Vilnius was selected for the colloquy because of its central role in Yiddish culture and history. Known as the "Lithuanian Jerusalem" in the nineteenth century, the book *Teuda Beisrael* ("A testimony in Israel") by Isaak Baer Levinsohn, the unofficial "manifesto" of the Jewish Enlightenment in Eastern Europe was published in Yiddish in Vilnius in 1828. See Council of Europe Doc. 7489, Yiddish Culture, (Feb. 12, 1996).

<sup>109</sup> The full minutes of the colloquy are available online at <http://assembly.coe.int/Documents/WorkingDocs/doc96/EDOC7489AD.htm>

Recommendation 928 (1981) on the educational and cultural problems of minority languages and dialects in Europe,<sup>110</sup> Recommendation 1275 (1995) on the fight against racism, xenophobia, anti-Semitism and intolerance, and Resolution 885 (1987) on the Jewish contribution to European culture, and concluded that European nations had an affirmative responsibility to both safeguard and promote Yiddish by: (i) establishing university chairs in Yiddish, (ii) establishing scholarships for Yiddish-speaking writers and artists to encourage them to produce more works, (iii) funding Yiddish theatre groups and printing presses, and (iv) providing financial assistance to Jewish cultural centers to produce materials in Yiddish.<sup>111</sup> The Parliamentary Assembly of the Council of Europe also recommended establishing a "laboratory for dispersed ethnic minorities" such as Yiddish specifically designed to protect the interests of transnational language groups without a kin-state.<sup>112</sup> These measures taken to protect Yiddish demonstrate how European nation states and institutions were beginning to take steps to protect minority language that went beyond language preservation to encompass a broader protection of minority language speakers and promotion of minority languages.

### *B. The Right to Protection of Romani*

European treaty bodies' decisions and European courts' jurisprudence relating to the Romani language provide further clear examples of the reorientation of language rights in Europe beyond mere language preservation toward language protection and promotion. The situation of the Romani language is similar in many ways to that of Yiddish: the Roma, like European Jews, have been described as a "dispersed ethnic minority;" Romani, like Yiddish, is an "indigenous" European language with a long and rich history;<sup>113</sup> Roma and Sinti<sup>114</sup> communities were

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<sup>110</sup> *Id.*

<sup>111</sup> Parliamentary Assembly of the Council of Europe, Recommendation 1291 (1996).

<sup>112</sup> The proposed mandate for the laboratory was (a) to promote the survival of minority cultures or their memory; (b) to carry out surveys of persons still speaking minority languages; (c) to record, collect and preserve their monuments and evidence of their language and folklore; (d) to publish basic documents (for example the unfinished lexicon of the Yiddish language); (e) to promote legislation to protect minority cultures against discrimination or annihilation. *Id.*

<sup>113</sup> The Proto-Romani language is believed to have originated in Central India in approximately 500 BCE, the Early Romani language was spoken by minorities in the Byzantine Empire and was heavily influenced by Greek. In the late fourteenth century, Romani-speaking populations began to emigrate from the Balkans, settling in central and in western Europe during the fifteenth and early sixteenth centuries. Differences among the speech varieties of the various Romani populations emerged during this period, resulting in a split into dialect branches. The different internal developments in morphology, phonology, and lexicon were accompanied by the influences of various contact languages on the individual dialects, the most significant of those being Turkish, Romanian, Hungarian, German, and various Slavonic languages. The earliest attestations of Romani are usually in the form of groups of short sentences and wordlists, dating from between the mid-sixteenth and mid-seventeenth centuries. These sources represent dialects from western Europe, southern Europe, and the Balkans. See YARON MATRAS, ROMANI: A LINGUISTIC INTRODUCTION (2002);, PETER BAKKER AND HRISTO KYUCHUKOV, WHAT IS THE ROMANI LANGUAGE? (2000).

<sup>114</sup> The difference between Roma and Sinti is often described as a difference of self-identification. Since the twelfth century C.E., the Sinti have differentiated themselves from other Roma, through cultural traditions and dialect. The term "Sinti" is used most frequently in Germany, the term "Manush" is often used in France, the term "Polske Roma" in Poland and the term "Kale" in Spain. See E Romani Historija, 1.1 Roma and Sinti at <http://www.romahistory.com/ro/1.htm>.

decimated by the holocaust<sup>115</sup> and persecuted by the former Communist governments of Central and Eastern Europe.<sup>116</sup> However, there is one key difference between the situation of the Romani language and the Yiddish language: unlike Yiddish, the Romani language is not in danger of extinction.<sup>117</sup> There are an estimated 10 million Roma and Sinti in Europe today, making them the largest single indigenous minority language group in Europe.<sup>118</sup> Thus, the rights regime that has developed with regard to the Romani language is not preservationist—survival of the language is not at issue—rather it is protectionist, designed to protect and promote the interest of language speakers that have suffered discrimination and marginalization by the ethnic and linguistic majorities in the countries in which they live.<sup>119</sup>

The Czech Republic, Finland, Germany, Hungary, Montenegro, the Netherlands, Norway, Romania, Serbia, Slovakia, Slovenia, Sweden all identify Romani as a minority language under the Charter for Regional and Minority Languages.<sup>120</sup> Each of these nations has made a commitment to protect the Romani language and groups of Romani speakers who are found within their territory. Similarly, Germany, Slovenia, Sweden, and the Former Yugoslav Republic of Macedonia declared that the Roma (and in Germany's case, also the Sinti) were protected minorities under the FCNM.<sup>121</sup> The Committee of Experts on the Charter for Regional and Minority Languages has taken a particular interest in the protection of the Romani language. For those states parties that recognize Romani as a minority language under the Charter,<sup>122</sup> the Committee of Experts has undertaken a searching review of the provisions in place to provide educational,

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<sup>115</sup> At least 250,000 Roma were exterminated during the Holocaust, but exact figures are unavailable. See Roma Mark Holocaust at Auschwitz, BBC News, Aug. 2, 2004 at <http://news.bbc.co.uk/2/hi/europe/3527024.stm>.

<sup>116</sup> For an overview of the history of the Roma and Sinti and the challenges facing European Roma and Sinti communities, see OSCE Office for Democratic Institutions and Human Rights, Roma and Sinti, at <http://www.osce.org/odihr/18148.html>.

<sup>117</sup> Although some commentators believe that the Roma's abandonment of their peripatetic lifestyles and settlement in one location has fractured the Roma's own sense of collective identity See István Pogány, *Minority Rights And The Roma Of Central And Eastern Europe*, 6 HUMAN RIGHTS L. REV. 1, (2006)

<sup>118</sup> See European Commission Publication, The Situation of Roma in an Enlarged European Union (2004), available at <http://ec.europa.eu/social/main.jsp?catId=518&langId=en> (last visited August 26, 2008); Romani Rose, *Europe's Largest Minority—Roma and Sinti—Demand Equal Rights*, UN Chronicle, Vol. XLIII, No. 3 (2006), available at <http://www.un.org/Pubs/chronicle/2006/issue3/0306cont.htm>.

<sup>119</sup> *Id.* See also Marnie Lloyd & Alexander H.E. Morawa, European Ctr. for Minority Issues, Ombudspersons and Minority Rights: A Sketch 2-3, <http://www.ecmi.de/doc/ombudsman/download/Background%20Paper.pdf> (last visited Feb. 26, 2006); Linda C. Reif, *The Promotion of International Human Rights Law by the Office of the Ombudsman*, in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE 272, 273-74, 288-91 (Linda C. Reif ed., 1999).

<sup>120</sup> See Council of Europe, List of Declarations Made with Respect to treaty No. 148, Charter for Regional or Minority Languages (status as of Oct. 27, 2008) at <http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=148&CM=1&DF=&CL=ENG&VL=1>

<sup>121</sup> *Id.*

<sup>122</sup> Namely, the Czech Republic, Finland, Germany, Hungary, Montenegro, the Netherlands, Norway, Romania, Serbia, Slovakia, Slovenia, Sweden.



judicial, administrative, and social services in Romani for Roma communities.<sup>123</sup> For example, in the Committee's first monitoring cycle report on Germany, issued in 2002, the Committee identified an urgent need to train and employ a cadre of Romani speaking teachers and social service providers.<sup>124</sup> In its next monitoring cycle report, issued in 2006, the Committee criticized the lack of progress towards this goal, and set clear objectives for the German authorities to meet before the next monitoring cycle.<sup>125</sup> Furthermore, in each of its advisory opinions on provisions for speakers of Romani, the Committee simultaneously acknowledges that the text of the Charter limits states' obligations to Romani, because it is a "non-territorial" language in most states,<sup>126</sup> but nonetheless make suggestions for the provision of services to Romani-speaking communities in line with those mandated for "territorial" languages. The Committee of Experts has even taken the unprecedented step of expanding its remit with regard to Romani beyond the states that recognize Romani as a minority language under the Charter to states that *do not* list Romani as a minority language and has *sua sponte* issued recommendations for its inclusion as a "non-territorial language by certain states."<sup>127</sup>

The Advisory Committee for the FCNM has taken a similarly active stance in its monitoring of state parties' obligations towards Romani speakers and urging the protection and promotion (rather than mere preservation) of the Romani language. In its 2002 opinion on Germany, the Advisory Committee "urged the German authorities to ensure that all requests for financial support from the different organisations representing persons belonging to Roma/Sinti groups," including Romani language organizations, were "carefully considered."<sup>128</sup> In its opinion on Italy of the same year, the Advisory Committee went further and declared that the existing national laws and local ordinances afforded the Roma and Sinti language communities inadequate protections, declaring that:

the existing statutory provisions on the Roma, Sinti and Travellers adopted by several regions are clearly inadequate in that they are disparate, lack coherence and focus too much on social questions and immigration issues

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<sup>123</sup> See, e.g., Council of Europe, Charter for Regional or Minority Languages, Reports or Recommendations, Committee of Experts' Evaluation Report, Germany (Dec. 4, 2002) at [http://www.coe.int/t/dg4/education/minlang/Report/default\\_en.asp](http://www.coe.int/t/dg4/education/minlang/Report/default_en.asp)

<sup>124</sup> *Id.*

<sup>125</sup> Council of Europe, Charter for Regional or Minority Languages, Reports or Recommendations, Committee of Experts' Evaluation Report, Germany (Mar. 1, 2006) at [http://www.coe.int/t/dg4/education/minlang/Report/default\\_en.asp](http://www.coe.int/t/dg4/education/minlang/Report/default_en.asp). The Committee also noted the need for Sinti speaking teachers and social workers in Hamburg.

<sup>126</sup> The exception is Hesse in Germany where Romani is granted full protections under Parts II and III of the Charter for Regional and Minority Languages.

<sup>127</sup> For example, the Committee's 2003 report on the United Kingdom noted that: In the initial periodical report, there is no mention of non-territorial languages. The Committee of Experts has been informed, during the "on-the-spot" visit, of users of Roma languages residing within the UK. The Committee of Experts has not been in a position at this stage to investigate this further. It encourages the UK authorities to deal with this issue in the next report Council of Europe, Charter for Regional or Minority Languages, Reports or Recommendations, Committee of Experts' Evaluation Report, United Kingdom (Aug. 29, 2003) at [http://www.coe.int/t/dg4/education/minlang/Report/default\\_en.asp](http://www.coe.int/t/dg4/education/minlang/Report/default_en.asp)

<sup>128</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/I(2002)008, (Germany) (Sep. 12, 2002).

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at the detriment of the promotion of their identity, including their language and culture.<sup>129</sup>

Romani language rights and the protection of Roma and Sinti linguistic identity were also at the forefront of the Advisory Committee's opinion on Spain, in which it stated that it welcomed "the debate that is taking place in Spain regarding the role that language could play in the cultural identity and self-confidence of Roma."<sup>130</sup>

The increased emphasis by both treaty bodies on nation states' treatment of the Roma, and on the protection of the languages of Roma and Sinti communities, has influenced the incorporation of clauses protecting the Romani language into national statutes<sup>131</sup> and international agreements concerning the human rights of the Roma.<sup>132</sup> The European Union now considers the protection of the Romani language to be an integral part of the protection of the Roma and Sinti peoples from persecution and discrimination.<sup>133</sup>

### *C. The Right to Protection of Language Groups with "Kin-States"*

The trend towards minority language protection (rather than preservation) is also evident in European treaty bodies' and courts' findings with regard to a further type of linguistic minority: minority language groups with "kin states." Many European language communities straddle national borders, including Swedish speakers in Finland,<sup>134</sup> Finnish speakers in Sweden,<sup>135</sup> German speakers in Belgium,<sup>136</sup> Danish speakers in Germany,<sup>137</sup> German speakers in Denmark,<sup>138</sup>

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<sup>129</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/I(2002)007, (Italy) (July 3, 2002).

<sup>130</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/OP/II(2007)001, (Spain) (Apr. 2, 2008) ("According to the information received by the Advisory Committee, there is a growing interest among some Roma in the preservation of *caló*. *Caló*, which is reportedly spoken less and less by new generations of Roma, has been described as a hybrid language composed of isolated Romani words using the grammar of local Spanish languages (Castilian, Catalan, Basque, etc.) Certain Roma are also interested in the introduction of a novel, standardised form of Romani. The Advisory Committee welcomes the fact that research on this issue is envisaged as one of the competences of the new Institute of Roma Culture to be established in Spain.")

<sup>131</sup> See, e.g. Race Relations Act 2000 (UK).

<sup>132</sup> See, e.g. OSCE Permanent Council Decision No. 566 ACTION PLAN ON IMPROVING THE SITUATION OF ROMA AND SINTI WITHIN THE OSCE AREA 27 November 2003 at 18, ("Facilitate access to justice for Roma and Sinti people through measures such as legal aid and the provision of information in the Romani language.")

<sup>133</sup> See European Commission Publication, The Situation of Roma in an Enlarged European Union (2004), available at <http://ec.europa.eu/social/main.jsp?catId=518&langId=en> at 21 (highlighting the importance of "Providing adequately for cultural education about Roma – including Romani language, history and culture – for both Romani and non-Romani.") (last visited August 26, 2008).

<sup>134</sup> See Kristian Myntti, *National Minorities and Minority Legislation in Finland*, in THE PROTECTION OF ETHNIC AND LINGUISTIC MINORITIES IN EUROPE 79 (John Packer & Kristian Mynntti eds. 1997).

<sup>135</sup> See, Euromosaic, Finnish in Sweden (Tornedalen) at <http://www.uoc.es/euromosaic/web/document/fines/an/i2/i2.html>.

<sup>136</sup> See, Bruce Donaldson, *The German-Speaking Minority of Belgium*, in GERMAN MINORITIES IN EUROPE: ETHNIC IDENTITY AND CULTURAL BELONGING 33 (Stefan Wolff ed., 2000).

<sup>137</sup> See, Euromosaic, Danish in Germany, at <http://www.uoc.es/euromosaic/web/document/danes/an/i1/i1.html#2>.

Slovene Speakers in Austria,<sup>139</sup> and Serbian speakers in Romania,<sup>140</sup> amongst many others.<sup>141</sup> The languages spoken by these linguistic minority communities are not endangered—Swedish is spoken by Swedes in Sweden, Danish is spoken by Danes in Denmark, and Polish is spoken by Poles in Poland—and so the language rights accorded cross-border linguistic communities should properly be understood as a right to language community protection, rather than a right to linguistic preservation.

The protection of the languages of cross-border linguistic groups is not a recent phenomenon. In the aftermath of World War II, many European nations entered into bilateral language rights agreements with one another, to protect groups of “their” people who were stranded in another nation’s sovereign territory once national borders had been redrawn.<sup>142</sup> However, in the 1990s, the entry into force of the Charter for Regional and Minority Languages and the Framework Convention for National Minorities, as well as the promulgation of the Charter of Fundamental Rights of the European Union lead to renewed emphasis on the protection of these cross-border peoples’ rights to use their languages.<sup>143</sup> In the late 1990s, in the wake of the passage of the Council of Europe’s treaties designed to preserve the threatened languages of national minority communities, such as the Basque, Frisians, or Saami,<sup>144</sup> advocates for cross-border language communities with kin states began to argue that the provisions of the Charter for Regional and Minority Languages and the FCNM should also be applied to protect their language groups.<sup>145</sup>

This activism had two distinct consequences. The first consequence was the ratification in 1998 by the OSCE of the Oslo Recommendations Regarding the Linguistic Rights of National Minorities. These Recommendations were

<sup>138</sup> See, Karen Margrethe Pedersen, *A National Minority with a Transethnic Identity—the German Minority in Denmark*, in GERMAN MINORITIES IN EUROPE: ETHNIC IDENTITY AND CULTURAL BELONGING 15 (Stefan Wolff ed., 2000).

<sup>139</sup> See Tom Priestly, *Maintenance of Slovene in Carinthia (Austria): Grounds for guarded optimism?*, 45 CANADIAN SLAVONIC PAPERS 95 (2003).

<sup>140</sup> See Peter Jordan, *Romania*, in LINGUISTIC MINORITIES IN CENTRAL AND EASTERN EUROPE 189, 202 (Christina Bratt Paulston & Donald Peckham eds., 1998)

<sup>141</sup> The map attached as an Appendix to this essay shows the location of many cross-border minorities. See also Press Release, Support from the European Commission for measures to promote and safeguard regional or minority languages and cultures: The Euromosaic Study, at [http://ec.europa.eu/education/policies/lang/languages/langmin/euromosaic/index\\_en.html](http://ec.europa.eu/education/policies/lang/languages/langmin/euromosaic/index_en.html) (last visited Oct. 27, 2008)

<sup>142</sup> For example, an Austrian-Italian annex to the Peace Treaty with Italy required Italy to protect the linguistic rights of a German minority population in the South Tyrol; a 1977 treaty between Italy and Yugoslavia concerned with the language rights of ethnic troops in Trieste. See generally, John Quigley, *Towards International Norms on Linguistic Rights: The Russian-Romanian Controversy in Moldova*, 10 CONN. J. INT’L L. 69, 86 (1994).

<sup>143</sup> See generally Francois Grin & Tom Moring, Report of European Bureau for Lesser Used Languages & European Center for Minority Issues, Support For Minority Languages in Europe, European Commission Contract No 2000-1288/001-001 EDU-MLCEV (May 15, 2002) available at <http://ec.europa.eu/education/policies/lang/languages/langmin/files/support.pdf>

<sup>144</sup> The Basque, who are found in France and Spain, and the Frisians who are found in Germany and Denmark and the Saami who are found in Finland and Sweden are also “cross-border” linguistic minorities—although they are of course linguistic minorities without a “kin-state.”

<sup>145</sup> The Charter for Regional and Minority Languages had, for example, recommended Transfrontier Exchanges under article 14, designed to promote exchanges between minority groups on either side of a border, e.g. Basques in France and Spain, but not to promote exchanges between a minority group in one state and the majority group in an adjacent kin state.

specifically focused on the need to protect the languages of “persons belonging to national/ethnic groups who constitute the numerical majority in one State but the numerical minority in another (usually neighbouring) State.”<sup>146</sup> The second consequence was a series of decisions by the treaty bodies established to monitor the implementation of the Charter for Regional and Minority Languages and the Framework Convention for National Minorities in favor of the protection of minority language communities with kin states.<sup>147</sup>

Opinions issued by the Advisory Committee established to monitor implementation of the FCNM provide examples of the shift away from mere *preservation* of national minority languages towards the *protection* of the rights to language usage by linguistic minorities with cross-border kin-states.<sup>148</sup> To date, the Advisory Committee has issued 61 opinions, in three cycles, leading to 54 resolutions by the Committee of Ministers.<sup>149</sup> The first reporting cycle ran from 2000 to 2006, and the second and third cycles (which are still ongoing) began in 2006.<sup>150</sup> In the first cycle of reporting, the Advisory Committee’s reports began to consider the degree to which the provisions of the Charter had been implemented with regard to minority groups with kin-states.

The Advisory Committee’s first report on Austria in 2002, for example, addressed the need to preserve “national” minority languages and dialects, such as Allemanisch, and then highlighted the challenges facing the national and *Länder* governments’ fulfillment of their obligations under the FCNM with to protect the linguistic autonomy of the Slovenian cross-border minority in Styria<sup>151</sup> and the

<sup>146</sup> *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities*, approved by the Organization for Security and Cooperation in Europe (OSCE) in Oslo, February 1998

<sup>147</sup> See discussion *infra* pp.126-131.

<sup>148</sup> The monitoring mechanism of the Framework Convention for National Minorities is based on Articles 24-26 of the FCNM, European Framework Convention for the Protection of National Minorities ETS No. 157: 2 IHRR 217 (Feb. 1, 1995), and on the Council of Europe’s Committee of Ministers’ Resolution (97) 10, RESCMN(1997) 10 of 17 Sep. 1997. The evaluation of the adequacy of the implementation of the Framework Convention by its 39 states parties, Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Georgia, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Ukraine and the United Kingdom. Belgium, Greece, Iceland and Luxembourg are signatories to the Framework Convention., is carried out by the Committee of Ministers, assisted by an Advisory Committee of 18 independent and impartial experts appointed by the Committee of Ministers. See Council of Europe Activities in the Field of Protection of National Minorities, Overview of Activities, updated August 24, 2006, available at [http://www.coe.int/t/e/human\\_rights/minorities/1\\_GENERAL\\_PRESENTATION/PDF\\_Overview\\_en.pdf](http://www.coe.int/t/e/human_rights/minorities/1_GENERAL_PRESENTATION/PDF_Overview_en.pdf) (last visited August 21, 2008).

<sup>149</sup> Available at [http://www.coe.int/t/e/human\\_rights/minorities/2\\_framework\\_convention%28monitoring%29/2\\_monitoring\\_mechanism/4\\_opinions\\_of\\_the\\_advisory\\_committee/1\\_country\\_specific\\_opinion\\_s/](http://www.coe.int/t/e/human_rights/minorities/2_framework_convention%28monitoring%29/2_monitoring_mechanism/4_opinions_of_the_advisory_committee/1_country_specific_opinion_s/) (last visited August 21, 2008)

<sup>150</sup> The most recent report was published on June 4, 2008.

<sup>151</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/I(2002)009 (Austria) (Nov. 7, 2002) at 3, available at [http://www.coe.int/t/e/human\\_rights/minorities/2\\_framework\\_convention%28monitoring%29/2\\_monitoring\\_mechanism/4\\_opinion\\_s\\_of\\_the\\_advisory\\_committee/1\\_country\\_specific\\_opinions/1\\_first\\_cycle/PDF\\_1st\\_OP\\_Austria\\_en.pdf](http://www.coe.int/t/e/human_rights/minorities/2_framework_convention%28monitoring%29/2_monitoring_mechanism/4_opinion_s_of_the_advisory_committee/1_country_specific_opinions/1_first_cycle/PDF_1st_OP_Austria_en.pdf) (noting that “there remains a need for considerably more determined measures from the authorities to help this community to preserve its identity, notably in the field of media and participation in public life.”)

Hungarian and Croat cross-border minorities in Burgenland.<sup>152</sup> Similarly, the Advisory Committee's first report on Germany first reviewed Germany's fulfillment of its Convention obligations to preserve the Sorbian and Frisian languages, and then declared that Germany had additional obligations to protect the rights of the Danish-speaking communities living along the border with Denmark.<sup>153</sup>

The ratification of the OSCE's Recommendations and the treaty-bodies' broad interpretation of the Charter for Regional and Minority Languages and FCNM to encompass protections for transnational language minorities, marked a significant departure from previous international law governing the protection and recognition of transnational language minorities with kin states.<sup>154</sup> No other international treaty bestows such far-reaching protections for cross-border communities with kin states.<sup>155</sup> The two UN treaties that address minority language rights—the International Covenant of Civil and Political Rights<sup>156</sup> (hereinafter ICCPR) and the Convention on the Rights of the Child<sup>157</sup>—do not reach concerns unique to transnational minorities, such as the provision of opportunities for cultural exchange with kin state communities.<sup>158</sup> Indeed, with regard to both transnational *and* territorially bounded minority language groups, the Charter for Regional and Minority Languages, the FCNM and the OSCE Recommendations mark a point of significant departure in terms of the treatment of

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<sup>152</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/I(2002)009, (Austria) (Nov. 7, 2002) at 15, *available at* [http://www.coe.int/t/e/human\\_rights/minorities/2\\_framework\\_convention\\_%28monitoring%29/2\\_monitoring\\_mechanism/4\\_opinions\\_of\\_the\\_advisory\\_committee/1\\_country\\_specific\\_opinions/1\\_first\\_cycle/PDF\\_1st\\_OP\\_Austria\\_en.pdf](http://www.coe.int/t/e/human_rights/minorities/2_framework_convention_%28monitoring%29/2_monitoring_mechanism/4_opinions_of_the_advisory_committee/1_country_specific_opinions/1_first_cycle/PDF_1st_OP_Austria_en.pdf) (observing that the “authorities of Burgenland . . . have stated that they would be willing to put up new signs in municipalities where national minorities represent more than 10% of the population, which should be the case of the Croats and Hungarians.”)

<sup>153</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/I(2002)008, (Germany) (Sep. 12, 2002) *available at* [http://www.coe.int/t/e/human\\_rights/minorities/2\\_framework\\_convention\\_%28monitoring%29/2\\_monitoring\\_mechanism/4\\_opinions\\_of\\_the\\_advisory\\_committee/1\\_country\\_specific\\_opinions/1\\_first\\_cycle/PDF\\_1st\\_OP\\_Germany\\_en.pdf](http://www.coe.int/t/e/human_rights/minorities/2_framework_convention_%28monitoring%29/2_monitoring_mechanism/4_opinions_of_the_advisory_committee/1_country_specific_opinions/1_first_cycle/PDF_1st_OP_Germany_en.pdf). The Advisory Committee also applied the same standards in its 2001 review of Denmark's treatment of the German speaking minority living on the other side of the border. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/I(2001)005, (Denmark) (Oct. 31, 2001), *available at* [http://www.coe.int/t/e/human\\_rights/minorities/2\\_framework\\_convention\\_%28monitoring%29/2\\_monitoring\\_mechanism/4\\_opinions\\_of\\_the\\_advisory\\_committee/1\\_country\\_specific\\_opinions/1\\_first\\_cycle/PDF\\_1st\\_OP\\_Denmark\\_en.pdf](http://www.coe.int/t/e/human_rights/minorities/2_framework_convention_%28monitoring%29/2_monitoring_mechanism/4_opinions_of_the_advisory_committee/1_country_specific_opinions/1_first_cycle/PDF_1st_OP_Denmark_en.pdf)

<sup>154</sup> See generally Kay Hailbronner, *The Legal Status of Population Groups in a Multinational State Under Public International Law*, 20 ISRAEL Y.B. ON HUM. RTS. 127 (1990).

<sup>155</sup> See Lauri Mälksoo, *Language Rights in International Law: Why The Phoenix is Still in the Ashes*, 12 FLA. J. INT'L L. 431 (2000).

<sup>156</sup> Covenant of Civil and Political Rights, 999 U.N.T.S. 171, art. 27 (Dec. 16, 1966).

<sup>157</sup> G.A. Res. 44/25 U.N. DOC. A/RES/44/25 (Dec. 12, 1989). On the drafting process of Article 27, see, e.g. MARC J. BOSSUT, GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 493 (1987).

<sup>158</sup> Article 27 of the ICCPR does not offer any definition of the different kinds of language minorities that might be subject to the Covenant, it merely provides that individuals belonging to a minority "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Covenant of Civil and Political Rights, 999 U.N.T.S. 171, art. 27 (Dec. 16, 1966).

minority language groups.<sup>159</sup> In contrast with the ICCPR and the Convention on the Rights of the Child—which appear to be oriented towards “negative” rights, prohibiting interference with members of linguistic minorities’ use of their native language, rather than placing an affirmative obligation on governments to provide services<sup>160</sup>—the Charter, the FCNM and the OSCE Recommendations all

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<sup>159</sup> Giorgio Malinverni, *Le projet de Convention pour la protection des minorités élaboré par la Commission européenne pour la démocratie par le droit*, [The Project of the Convention for the Protection of Minorities Developed by the European Commission for Democracy through Law] 3 REVUE UNIVERSELLE DES DROITS DE L’HOMME [Universal Review of Human Rights] 157, 161 (1991). (Il s’agit là d’un droit particulièrement important pour les minorités, si elles veulent promouvoir et renforcer leurs caractéristiques communes. Le droit consacré par cet écrit concerne tout d’abord les minorités dispersées sur le territoire d’un ou de plusieurs États. Il est en outre destiné à s’appliquer aux nombreuses minorités établies près des frontières et qui présentent les mêmes caractéristiques ethniques, religieuses ou linguistiques que la population des États voisins. Pour elles, le droit d’entretenir des contacts avec les populations limitrophes, y compris en se déplaçant dans ces États, revêt une importance particulière.)

<sup>160</sup> Scholars and practitioners are divided in their interpretation of the guarantees of Article 27. See generally RENATE OXENKNECHT, DER SCHUTZ ETHNISCHER, RELIGIÖSER UND SPRACHLICHER MINDERHEITEN IN ART. 27 DES INTERNATIONALEN PAKTES ÜBER BÜRGERLICHE UND POLITISCHE RECHTE VOM 16. DEZEMBER 1966 [The Protection of Ethnic, Religious and Linguistic Minorities in Art. 27 of the International Covenant on Civil and Political Rights of December 16, 1966] 136-87 (1988); Kay Hailbronner, *The Legal Status of Population Groups in a Multinational State Under Public International Law*, 20 ISRAEL Y.B. ON HUM. RTS. 127, 143-46 (1990); SYMEON KARAGIANNIS, LA PROTECTION DES LANGUES MINORITAIRES AU TITRE DE L’ARTICLE 27 DU PACTE INTERNATIONAL RELATIF AUX DROITS CIVILS ET POLITIQUES, REVUE TRIMESTRIELLE DES DROITS DE L’HOMME [The Protection of Minority Languages under Article 27 of the ICCPR, Quarterly Review of Human Rights] 195 (1994). A minority of commentators conclude that the provision obligates states to provide “positive” rights for linguistic and other protected minorities. MANFRED NOWAK, U.N. CONVENTION ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 495 (1993). In other words, states must provide the means to ensure the survival and maintenance of their characteristics through appropriate financial assistance and a legal framework for institutions and activities vital to the minorities’ interests. See Karl Joseph Partsch, *Discrimination Against Individuals and Groups*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, VOL. I, at 1079, 1082 (Rudolph Bernhardt ed., 1992). However, the majority of commentators reject this “positive” interpretation, and conceive of Article 27 firmly within the framing of “negative” rights – i.e. non-interference of the state in private community activities tied in with language, religious or cultural usage. See De Varennes *supra*, note 16. This majority viewpoint appears to have prevailed within the United Nations. Although the United Nations Human Rights Committee has never had to explicitly address the extent of the rights guaranteed by Article 27, its decisions indirectly confirm the non-interference nature of the provision as a minimal measure of protection of minorities. For a review of the committee’s views on Article 27, see GAETANO PENTASSUGIJA, MINORITIES IN INTERNATIONAL LAW 97-111 (Council of Europe 2002). In the three decisions where the Committee agreed to consider Article 27 submissions, *Kitok v. Sweden*, Communication No. 197/1985, Hum. Rts. Comm., U.N. GAOR, 43rd Sess., Supp. No. 40, at 221, U.N. DOC. A/43 (1988). *Lovelace v. Canada* Hum. Rts. Comm., Selected Decisions Under the Optional Protocol, 2nd-16th Sess. at 83, U.N. DOC. NO. CCPR/C/OP/1 (1985), and *Ominayak v. Canada*, Hum. Rts. Comm., 45th Sess., Supp. No. 40, Vol. II, Annex IX(A), U.N. DOC. A/45/40 (1990), it concluded that government actions had been wrong because they *interfered* in the cultural life or language use of indigenous peoples constituting linguistic or ethnic minorities. “In *Kitok v. Sweden*, reindeer herding and a decision regarding the right of residence within a minority community both came within the purview of Article 27, not as rights granted by the Swedish state but as examples of state intervention in a minority member’s cultural life. In *Lovelace v. Canada*, the Canadian government was similarly involved in restricting a person from contacts and ties with her community. And in *Ominayak v. Canada*, government legislation and policies interfered with traditional economic and social activities so intimately tied to culture that they amounted to a denial of the right to enjoy that culture.” De Varennes, *supra* note 16. Similar “negative rights” obligations to those articulated in Article 27 have also been confirmed in the UN Convention on the Rights of the Child. G.A. Res. 44/25 U.N. DOC. A/RES/44/25 (Dec. 12, 1989). The Convention requires

underscore that speakers of minority languages have “positive” rights to the provision of services by national governments and European institutions. This shift from “negative” to “positive” rights is also indicative of the shift away from a right to language preservation—in accordance with which minority language speakers should be left alone by the linguistic majority and allowed to survive—toward language protection and active promotion. The right to protection accorded transnational linguistic minorities—Yiddish and Romani speakers, as well as groups with cross-border kin-states—thus clearly demonstrates movement away from the traditional view of the European language rights regime discussed in Part I of this Essay—i.e. as (i) antiquarian and preservationist, and (ii) only available to members of territorially bounded linguistic groups. The only element of the traditional characterization of European language rights that still appears entirely valid in light of the European treaty bodies’ approach to transnational linguistic minorities is that the vision of language rights as group-inhering. However, as the discussion in Part III below shows, recent developments in ECJ jurisprudence and treaty bodies’ findings with regard to European migrants have also rendered that characterization increasingly outdated.

### III. EUROPEAN MIGRANTS AND THE RIGHT TO RECOGNITION

This Essay has, thus far, charted the evolution of language rights jurisprudence in Europe over the past twenty years, from the original right to preservation of RM language groups articulated in the Council of Europe’s Charter for Regional and Minority Languages and in the Framework Convention for National Minorities,<sup>161</sup> through the right to protection of transnational minority languages that was delineated in the OSCE’s Oslo Recommendations and in the Council of Europe treaty bodies’ first monitoring cycle reports.<sup>162</sup> The third Part of this Essay considers the third stage in the evolution of language rights—the recognition of the language needs and language competencies of European migrants. This Part, argues that European migrant workers and students have played a unique role in the reorientation of minority language rights in Europe, away from the concept of rights that was prevalent in the early 1990s— i.e. of language rights as rights that were only available to territorially-anchored RM communities, that were preservationist in nature, and that were applicable to groups rather than individual language speakers—toward a notion of language rights as human rights, available to all individual Europeans. This part of the Essay will explore how, in recent years, treaty bodies, national courts, and the European Court of Justice have expanded the grant of language rights to migrants. First, the Essay will discuss the Committee of Experts on the Charter for Regional and Minority Languages and Advisory Committee on the Framework Convention on National Minorities, and their recent inclusion of migrants’ rights in their reports. Second,

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that the education of a child be directed towards the "development of respect for ... his or her own cultural identity, language and values."<sup>160</sup> According to the Convention, a child who is a member of a minority group "shall not be denied the right, in community with other members of his or her group ... to use his or her own language." Id. at art. 30.

<sup>161</sup> See discussion, Section I *supra* pp.109-20.

<sup>162</sup> See discussion, Section II *supra* pp.120-31.

the Essay will discuss the jurisprudence of the European Court of Justice, which has begun to respond to complaints from European migrants who constitute, essentially, a linguistic minority of one—such as a German-speaking truck driver in Italy<sup>163</sup> or a Dutch-speaking teacher in Ireland<sup>164</sup>—by drawing upon the precedent established with regard to transnational minority groups and minority groups with kin states.<sup>165</sup>

The treaty bodies and the Court both appear to be developing a remarkably expansive reading of the Council of Europe's Charters and other pan-European grants of human rights.<sup>166</sup> This fundamental shift and expansion of linguistic rights has thus far been under-explored by scholars, who have not yet considered the treaty bodies' decisions and have only discussed the ECJ case law with reference to the treatment of RM language groups, thereby failing to consider the transformative potential with respect to migrants', and ultimately immigrants' language rights.<sup>167</sup> In contrast, this Essay argues, the case law and treaty body decisions relating to European migrants are the key to understanding how language rights in Europe are being transformed, and why that transformation may ultimately benefit members of immigrant minority language groups.

#### *A. The Right to Recognition of Migrants' Languages in Treaty Bodies' Decisions*

The right of every European citizen to move and reside freely within the territory of the Member States is enshrined in the Charter of Fundamental Rights of the European Union,<sup>168</sup> and in the European Parliament and Council Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the member states.<sup>169</sup> According to the European Commission's Directorate of Justice and Home Affairs: "The right to free movement means that every EU citizen is entitled to travel freely around the Member States of the European Union, and settle anywhere within its territory."<sup>170</sup> Originally envisaged as a means to ensure that a mobile workforce would be available to power the single market, the right to free movement extends not merely to workers but to all categories of citizens and their dependents, including students and those who are no longer economically active.<sup>171</sup> Today a significant number of Europeans live and work in another member state and the number of citizens from new member states living and working abroad looks set to increase further during the next ten years.<sup>172</sup> The European populace's increased mobility has led the

<sup>163</sup> See Case C-274/96, *Criminal Proceedings Against Bickel and Franz*, 1998 E.C.R. I-7637.

<sup>164</sup> See Case 378/87, *Groener*, 1989 ECR I-3967.

<sup>165</sup> Discussed in Section II A, *supra*.

<sup>166</sup> See discussion *infra* pp. 132-135.

<sup>167</sup> See, e.g., Francesco Palermo, *The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ*, 8 MAASTRICHT J. EURO. & COMP. L. 299 (2001).

<sup>168</sup> O.J. 2000 c 364/01.

<sup>169</sup> Amending Regulation No 1612/68 on freedom of movement for workers within the Community.

<sup>170</sup> See "Free Movement within the EU, a fundamental right" at [http://ec.europa.eu/justicehome/fsj/freetravel/fsj\\_freetravel\\_intro\\_en.htm](http://ec.europa.eu/justicehome/fsj/freetravel/fsj_freetravel_intro_en.htm).

<sup>171</sup> *Id.*

<sup>172</sup> Of the original fifteen EU countries, only the UK, Ireland and Sweden did not impose a "transitional" ban on nationals of the 10 members states that acceded to the Union in 2004 seeking employment in



European Parliament to pass new laws granting nationals of EU member states Union-wide recognition of educational and professional qualifications,<sup>173</sup> as well as the right to join trade unions,<sup>174</sup> and to draw equivalent social security and other benefits for which they are ordinarily eligible in their own nation in any other EU country;<sup>175</sup> however, neither the text of the Charter for Regional and Minority Languages nor the text of the Framework Convention for National Minorities contains provisions for the language rights of migrants.

Indeed, the text of the Charter for Regional and Minority Languages, as mentioned *supra*, emphatically excludes migrants' languages from its protections, explaining in Article I, "Definitions," that the term regional or minority languages "does not include the languages of migrants,"<sup>176</sup> and the Committee of Experts is further bound by state parties' own definitions of which language groups should be defined as "regional" or "minority" languages.<sup>177</sup> Nonetheless, in their second monitoring cycle opinions the Committee of Experts began to make recommendations on behalf of migrants.<sup>178</sup>

In common with the Committee of Experts on the Charter, the Advisory Committee on the FCNM has also taken a number of steps to recognize the language rights of European migrants in its second monitoring cycle opinions. For example, in its second opinion on Austria, the Committee highlighted the need to fund and develop schooling in Czech, Slovak and Hungarian for migrant

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their countries, and only Sweden held its labor market open for Bulgarian and Romanian nationals when their countries joined the EU in 2007. Nevertheless, despite these restrictions, a significant number of European Nationals currently live, study, and/or work in other member states, and that number appears set to increase sharply once the "transitional" prohibition on the employment of migrant workers from the new member states is lifted in 2011. Eurobarometer survey data show that at present 4% of the population of the EU live in another member state and approximately 22% of the EU population has ever lived in another European region or country. See European Foundation for the Improvement of Living and Working Conditions, *Mobility in Europe: Analysis of the 2005 Eurobarometer survey on geographical and labour market mobility* (2006), PDF available at <http://www.eurofound.europa.eu/pubdocs/2006/59/en/1/ef0659en.pdf>. According to Eurobarometer, 7% of Poland's population expects to move to another EU country in the next five years. Poland has a population of circa 40 million people, so such an exodus would be both statistically and numerically significant

<sup>173</sup> See Directive 89/48/EEC and supplemented by Directive 92/51/EEC, as amended by Directive 2001/19/EC governing recognition of professional qualifications; see also [http://ec.europa.eu/education/index\\_en.htm](http://ec.europa.eu/education/index_en.htm) for information on recognition of educational qualifications in other member states.

<sup>174</sup> See Article 25 of the Constitution of the European Trade Union Confederation, available at <http://www.etuc.org/>.

<sup>175</sup> See, e.g. Directgov, Factsheet, Benefits for Britons Living Abroad in the EEA, at [http://www.direct.gov.uk/en/BritonsLivingAbroad/Moneyabroad/DG\\_4000102](http://www.direct.gov.uk/en/BritonsLivingAbroad/Moneyabroad/DG_4000102) (detailing the eligibility of UK citizens living in other European countries for disability benefits, Jobseekers Allowance, Statutory Maternity Pay and Statutory Sick Pay.)

<sup>176</sup> European Charter for Regional or Minority Languages, ETS 148, Pt I, art. 1 (a).

<sup>177</sup> In their first monitoring cycle reports, the Committee of Experts ignored this prohibition as discussed *supra*, the Committee of Experts began to suggest the inclusion of transnational minority groups such as the Roma and Sinti as linguistic minorities worthy of protection under the Charter. See, e.g. Council of Europe, Charter for Regional or Minority Languages, Reports or Recommendations, Committee of Experts' Evaluation Report, United Kingdom (Aug. 29, 2003) available at [http://www.coe.int/t/dg4/education/minlang/Report/default\\_en.asp](http://www.coe.int/t/dg4/education/minlang/Report/default_en.asp)

<sup>178</sup> For example, the Committee has begun to advocate on behalf of Roma migrants to Denmark of Yugoslav origin, who fled the Balkan wars of the 1990s, see Council of Europe, Charter for Regional or Minority Languages, Reports or Recommendations, Committee of Experts' Evaluation Report, Denmark (Sep. 26, 2007) at 7, available at [http://www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/Denmark/ECRML2\\_en.pdf](http://www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/Denmark/ECRML2_en.pdf).

communities living in Vienna.<sup>179</sup> In the same opinion the Committee also highlighted the need for the provision of government services in Polish, for the increasingly large group of Polish migrants who had settled in Vienna after Poland's accession to the EU.<sup>180</sup> The Committee's opinion reflected Poland's official declaration upon signing the FCNM that it was doing so because it envisaged the FCNM would be enforced "to protect national minorities in Poland and minorities or groups of Poles in other States."<sup>181</sup> In so stating, the Polish government offered no distinction between groups cross-border communities—such as Polish speakers in Lithuania—and the Polish diaspora living and working in the United Kingdom, Ireland, Germany and Austria. This blurring of the identities and hence treatment of transnational linguistic minorities and migrants in the eyes of individual nation states and the Advisory Committee is crucially important. It suggests decisive movement away from consideration of language rights as preservationist, territorially-anchored, and group inhering, toward language rights as human rights that are available to all—even individual migrants—regardless of the specific category of linguistic minority with which a person is affiliated.

The Advisory Committee's most thorough treatment of the language rights of European migrants is found in its second monitoring cycle report on the United Kingdom.<sup>182</sup> In this report, the Committee expressed its concern "that the proposed categories for the 2011 census would not capture the numbers of persons belonging to certain minority ethnic communities, including the increasing number of new migrants." The committee noted that European migrant communities were frequently "nonvisible," because they were Caucasian, but that they nonetheless needed government services and educational and employment opportunities that were accessible in their native languages. The Committee feared that the "failure of the census to capture these communities" would "contribute to the reported tendency of certain public authorities to view "race relations" as referring to established and "visible" minorities only, and not to new and often "white" migrants." In its recommendations to the Committee of Ministers, the Advisory Committee urged the Council of Europe to press the UK government to raise "awareness among public authorities on the relevance" of the new migrant communities' linguistic and cultural needs.<sup>183</sup>

The decision by both the Committee of Experts on the Charter and the Advisory Committee on the FCNM to consider the language rights of European

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<sup>179</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/SR/II(2006)008, (Austria) (Dec. 1, 2006) *available at* [http://www.coe.int/t/dghl/monitorings/minorities/3\\_FCNMdocs/PDF\\_2nd\\_SR\\_Austria\\_en.pdf](http://www.coe.int/t/dghl/monitorings/minorities/3_FCNMdocs/PDF_2nd_SR_Austria_en.pdf).

<sup>180</sup> *Id.*

<sup>181</sup> *See* List of Declarations with Respect to Treaty No. 157, Poland, Declaration contained in a Note Verbale, handed at the time of deposit of the instrument of ratification on 20 décembre 2000, *available at* <http://assembly.coe.int/Documents/WorkingDocs/doc01/EDOC8939.htm>. ("The Republic of Poland shall also implement the Framework Convention under Article 18 of the Convention by conclusion of international agreements mentioned in this Article, the aim of which is to protect national minorities in Poland and minorities or groups of Poles in other States.")

<sup>182</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/OP/II(2007)003, (UK) (Oct. 26, 2007). The UK is the European country that has experienced the greatest influx of migrants from other parts of the Continent in the wake of EU accession, due to the UK's liberal work authorization policies.

<sup>183</sup> *Id.* at 46.

migrants during their second monitoring cycles is highly significant. This recognition of European migrants' language rights could be seen as a radical departure from both treaty bodies' previous practices. However, a more persuasive argument can be made that this move by both bodies in their second monitoring cycle is in fact a *continuation* of the trend that began in their first cycle when they expanded their opinions to protect the language rights of transnational European minorities such as the Roma and Sinti—a trend to view language rights not merely in narrow, preservationist, territorially defined terms, but rather as human rights applicable to all Europeans.<sup>184</sup> Indeed, theories advanced by scholars in the context of other individual human rights suggest that this trend is inevitable, because predicating rights vindication on prior group membership would undermine the very liberal democratic commitments underpinning greater European integration.<sup>185</sup> This evolution is not confined to the Council of Europe treaty bodies, a brief survey of the European Court of Justice's language rights jurisprudence suggests that very similar developments are also taking place in European case law.

### *B. The Right to Recognition of Migrants' Languages in ECJ Case Law*

The European Court of Justice has been engaged for many years with issues of language rights and linguistic minorities. The Court has played such a prominent role in addressing the concerns of minority linguistic groups that some European scholars regard the ECJ's case law as the most significant source of minority language rights law within Europe.<sup>186</sup> The Court's jurisprudence over the past twenty-five years has fostered two fundamental shifts in language rights discourse in Europe. First, the Court has shifted from advancing what Heinz Kloss described as *duldende Sprachenrechte* (toleration-oriented language rights) to *fördernde Sprachenrechte* (promotion-oriented language rights).<sup>187</sup> Second, the Court has shifted from treating language rights as rights predicated upon membership of specified groups, to rights available to all individuals, irrespective

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<sup>184</sup> See discussion *supra* pp.123-36.

<sup>185</sup> Sujit Choudhry writes, in "liberal democracies, differentiating among citizens simply on the basis of prior membership, without additional justification... appears to contradict the basic liberal commitment of giving equal importance to the interests of every citizen." Sujit Choudhry, *National Minorities and Ethnic Immigrants: Liberalism's Political Sociology*, 10 J. POL. PHIL. 54, 56 (2002). David Gauthier, also argues that a territorially fixed notion of which language groups are worthy of protection and status and which are not fosters essentialist and nationalistic viewpoints. Gauthier suggests that limiting the EU legislative instruments for protecting language minorities to autochthonous language groups perpetuates the very problems these instruments were supposed to solve - discrimination, inequality, concerns about identity and suspicion about otherness. DAVID GAUTHIER, *MORALS BY AGREEMENT* 201-05 (1986). Some commentators argue that perpetuating such problems also has linguistic ramifications; sociolinguistic research has demonstrated that "inter-group grievances" can foster ethnic identity and language use while simultaneously eroding alternative linguistic development. See JOSHUA A. FISHMAN, *Sociolinguistics*, in *HANDBOOK OF LANGUAGE AND ETHNIC IDENTITY* 152, 154, 161 (Joshua A. Fishman ed., 1999).

<sup>186</sup> "The fact that we can observe some language-based delimitation of Community freedoms (circulation, establishment, etc.) is due to the jurisprudence of the Court of Justice rather than to any effort to identify a legal basis for EU intervention." Iñigo Urrutia & Iñaki Lasagabaster, *Language Rights as a General Principle of Community Law*, 8 GERMAN LAW JOURNAL 5, 1 (2007)

<sup>187</sup> See KLOSS, *supra* note 16.

of their language group membership. Four key cases—*Mutsch*,<sup>188</sup> *Groener*,<sup>189</sup> *Bickel and Franz*,<sup>190</sup> and *Angonese*,<sup>191</sup>—illustrate when and how this evolution took place, and how, by the year 2000, the recognition of European migrants’ language needs and language competencies by host nations had become an accepted principle of ECJ jurisprudence.

*Mutsch*,<sup>192</sup> decided in 1985, was the first ECJ ruling on official recognition of European migrants’ languages before host nations’ courts. The Court held that *Mutsch*, a national of Luxemburg who lived in a German-speaking municipality in Belgium, was entitled to use his own language in proceedings in front of the Belgian courts, because that same privilege was available to Belgian nationals who spoke French, Flemish or German. Belgian legislation stipulates that nationals residing in a certain region of the country may ask to have proceedings before a court in that region conducted in a specific language (French or Flemish), and the Court held that this right had to be extended, without discrimination based on nationality, to EU nationals of other member states. In its opinion the Court did not address the issue of minority protection but focused instead on the importance of official recognition of other European nations’ languages in the context of the free movement of workers.<sup>193</sup> For the Court, the right of a worker to use a language of her choice in proceedings before the courts of the ‘host’ member state played an important role in the integration of the worker in the host nation and the recognition of that worker’s individual rights.<sup>194</sup> The Court saw the language right as conferring a “social advantage” and concluded that national provisions adopted to confer that advantage upon a minority group (in this case the German-speaking population of Belgium) do not only concern persons who are members of that specific minority, but rather all similarly-situated Europeans. The Court’s argument in *Mutsch* suggests a conceptualization of language rights as rights that are not territorially or historically bounded, but inhere in the individual, in whatever situation the individual finds himself.

A similar acknowledgment of the importance of recognizing migrants’ language needs and competences is found in *Groener*,<sup>195</sup> a 1987 case involving a Dutch teacher living and working in the Republic of Ireland. In *Groener*, the Court approved the use of an Irish language test for full-time instructors in vocational education, signaling its recognition of the importance of fostering the Irish language among young people in the Ireland,<sup>196</sup> but said that an individual Dutch national, *Groener*, should not be denied employment if she was able to fulfill

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<sup>188</sup> Case C-137/84, *Mutsch*, 1985, E.C.R. I-2681, paras. 11–17.

<sup>189</sup> Case 378/87, *Groener*, 1989 ECR I-3967, 3967.

<sup>190</sup> Case C-274/96, *Criminal Proceedings Against Bickel and Franz*, 1998 E.C.R. I-7637

<sup>191</sup> Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, 2000 E.C.R. I-4139.

<sup>192</sup> Case C-137/84, *Mutsch*, 1985, E.C.R. I-2681, paras. 11–17.

<sup>193</sup> *Id.*

<sup>194</sup> For a broader discussion of the importance of workers’ language rights in ECJ jurisprudence, see also Gabriel von Toggenburg, *The EU’s ‘Linguistic Diversity’: Fuel of Brake to the Mobility of Workers*, in CROSS-BORDER HUMAN RESOURCES, LABOR AND EMPLOYMENT ISSUES: PROCEEDINGS OF THE NEW YORK UNIVERSITY 54TH ANNUAL CONFERENCE ON LABOR (Andrew P. Morris and Samuel Estreicher eds., 2004), 677–723.

<sup>195</sup> Case C-378/87, *Groener*, 1989 E.C.R. I-3967.

<sup>196</sup> *Id.*

certain reformulated language criteria.<sup>197</sup> The opinion emphasizes that the linguistic competencies and qualifications of Groener—a non-native Irish speaker, a non-native English speaker and a native Dutch speaker—should be recognized in Ireland.<sup>198</sup> In its decision the Court stressed that the Irish language is recognized in the Irish Constitution as the national language, thereby framing the case as one concerned with linguistic requirements designed to protect and promote a language that is both the national language and the first official language.<sup>199</sup> Nonetheless, within this context, the Court also emphasized that enforcement of linguistic requirements should not impinge upon individual fundamental freedoms—suggesting that any group-oriented language requirements must be applied in a proportionate and non-discriminatory manner that takes individual migrants’ linguistic competencies and personal circumstances into account.<sup>200</sup>

In *Bickel and Franz*,<sup>201</sup> a case that was, like *Mutsch*,<sup>202</sup> concerned with the use of languages in national courts, the ECJ held that German-speaking non-residents (in this case two truck drivers) who were traveling through a German-speaking region of Italy were entitled to use German in court proceedings on the same terms as the residents of the region. In its 1998 ruling—issued six years after the entry into force of the Charter for Regional or Minority Languages, and three years after the entry into force of the FCNM—the Court emphasized the importance of recognizing and respecting the linguistic needs of migrants, even when doing so exceeded the previously established language policies and practices of nation states. In its holding, the Court stressed that it was deferring to Italy’s long-established practice of granting bilingual service in all administrative and judicial proceedings to its German-speaking minority living in the northern region of South Tyrol, acknowledging that “the protection of such a [ethno-cultural] minority may constitute a legitimate aim.”<sup>203</sup> However, when the Italian Government argued (without success) that its rules were meant to “recognize the ethnic and cultural identity” of a given regional minority group, and should not be applied to “outsiders,”<sup>204</sup> the Court demurred, insisting that Austrian and German visitors—individuals who shared a language characteristic of the RM group, but who were themselves members of a majority language group in their own nation—should enjoy the same linguistic privileges as long-term residents of the region.<sup>205</sup>

In *Angonese*,<sup>206</sup> a case decided in 2000, the ECJ built upon the legacy of both *Groener* and *Bickel and Franz*. As in *Groener*, the *Angonese* case involved an individual’s right to non-discriminatory access to employment against the legitimacy of procedures for gauging linguistic competence, and as in *Bickel and Franz* the case concerns the German-speaking minority in the South Tyrol. Roman Angonese applied for an advertised position at a bank in South Tyrol. The

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<sup>197</sup> See Nathaniel Bermann, *Nationalism Legal and Linguistic: The Teachings of European Jurisprudence*, 24 N.Y.U. J. INT’L L. & POL. 1515, 1567-68 (1992).

<sup>198</sup> *Groener*, 1989 E.C.R. at 3967

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Case C-274/96, *Criminal Proceedings Against Bickel and Franz*, 1998 E.C.R. I-7637.

<sup>202</sup> Case C-137/84, *Mutsch*, 1985, E.C.R. I-2681, paras. 11–17.

<sup>203</sup> Case C-274/96, *Criminal Proceedings Against Bickel and Franz*, 1998 E.C.R. I-7637.

<sup>204</sup> CORTE COST., 19 GIU. 1998, N.213 (ITALY).

<sup>205</sup> Case C-274/96, *Criminal Proceedings Against Bickel and Franz*, 1998 E.C.R. I-7637.

<sup>206</sup> Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, 2000 E.C.R. I-4139.

advertisement stipulated that candidates needed to possess a certificate (called a “patentino”) as proof of their linguistic competence in both German and Italian.<sup>207</sup> The bank would not accept any other form of certification and the province of Bolzano, capital of the Alto Adige, was the only authority that administered the patentino examination.<sup>208</sup> Angonese presented his application complete with documentation from his university training in Vienna that testified to his competence in both Italian and German, but the bank rejected his application because he did not produce the patentino.” In *Angonese* the Court held that on non-discrimination grounds, institutions in one member state must recognize language qualifications issued by competent authorities in other European countries, arguing that “the principle of non-discrimination precludes any requirement that the linguistic knowledge in question must have been acquired within the national territory.”<sup>209</sup> The ECJ’s holding that the bank’s actions were discriminatory and therefore illegal firmly suggests a movement towards conceiving of minority language rights as individual human rights, rather than preservationist, territorially anchored and group-inhering privileges.

Some commentators have criticized the *Angonese* holding, seeing it as “evidence of the dangers of extending the *Bickel and Franz* interpretation of the non-discrimination principle to an increasing array of bona fide group rights aimed at contributing to the cultural life of minority language groups.”<sup>210</sup> However, the *Angonese* holding can also be seen as a positive consequence of the expansion of language rights from national minority groups, to transnational minority groups with kin states, to transnational minority groups without kin states, and ultimately to all linguistically isolated or disadvantaged Europeans. Whichever interpretation is applied—positive or negative—the chain of cases leading up to, and including, *Angonese* support the argument that minority language rights in Europe are being reframed as individual human rights. In each of the decisions discussed *supra*, the justifications given for promoting the language rights of European migrants are not preservationist and territorially bounded, but instead focused upon the consequences of social movement across European borders, and the engagement of other nationals in a host state’s labor market.<sup>211</sup>

Furthermore, although the Court’s jurisprudence has thus far, with one exception,<sup>212</sup> referred solely to either RM groups or European migrants—i.e. nationals of other European nations, rather than immigrants<sup>213</sup>—the four opinions

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Groener*, 1989 E.C.R. at 3968

<sup>210</sup> Robert F. Weber, *Individual Rights and Group Rights in the European Community's Approach to Minority Languages* 17 DUKE J. COMP. & INT’L L. 361, 406 2007 Robert Weber describes the Court’s approach to the patentino requirement as though its sole aim was to ascertain individual applicants’ knowledge of German and Italian as “institutional blindness” – ignoring the needs of the Bolzano community and focusing “on the Community rights of individuals that speak the minority language, and not the flourishing of the minority language group itself.” Weber at 405-06

<sup>211</sup> Contrast to the European Charter for Regional or Minority Languages, ETS 148, at Preamble and Article 12 of the FCNM which are explicitly oriented towards territorially bounded national or regional minority groups.

<sup>212</sup> The *Haim* case, discussed *infra* pp.146-47. Case C-424/97, *Haim*, 2000 E.C.R. I-5123.

<sup>213</sup> Some immigration rights scholars and advocates have criticized this trend in the Court’s jurisprudence, arguing that the promotion and protection of European migrants’ rights does nothing to help—and may even *harm*—the IM communities living alongside them in their host country. A two-

discussed *supra* do not specify that the grant of language rights to these individual litigants are, or should be, exclusively available to non-immigrant European nationals. Whether the Court's silence on this topic was deliberate or accidental, the ECJ has nonetheless left open the opportunity for the fourth and final stage in the development of language rights in Europe, the extension of language rights to immigrant minority language speakers.

#### IV. IMMIGRANT MINORITIES AND THE RIGHT TO DIVERSITY

The fourth and final part of this Essay will explore the next stage in the evolution of minority language rights as human rights in Europe—the granting of language rights to immigrant minority language speakers. As this Essay has shown, European language rights laws and jurisprudence have changed greatly over the past twenty years. An original right to preservation of RM language groups articulated in the Council of Europe's Charter for Regional and Minority Languages and in the Framework Convention for National Minorities<sup>214</sup> was expanded to encompass the right to protection of transnational minority languages that was delineated in the OSCE's Oslo Recommendations and in the Council of Europe treaty bodies' first monitoring cycle reports,<sup>215</sup> and further broadened to incorporate the right to recognition of European migrants' languages that has just emerged in the same treaty bodies' second monitoring cycle reports and in the recent jurisprudence of the ECJ.<sup>216</sup> This Essay has argued that in the course of this evolution the very notion of what a language "right" is has shifted; what began, in the early 1990s, as a preservationist, group-inhering good has been transformed over the past twenty years into an aspirational, promotion-oriented, individual human right. In this light, the reframing of European language rights to extend similar guarantees and protections to Immigrant Minority (IM) language speakers seems like the logical, and perhaps inexorable, next step.

Extending language rights to IM language speakers is a small step from the precedent of *Bickel and Franz*<sup>217</sup> and *Angonese*,<sup>218</sup> or from the the Advisory

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tiered status of foreignness has evolved: on the one hand there are third-country national foreign residents of European countries, some of whom have been born and raised in these countries and who know of no other homeland; on the other hand are those who may be near-total strangers to the language, customs, and history of their host country but who enjoy special status and privilege by virtue of being a national of an EU member state. See SEYLA BENHABIB, *THE RIGHTS OF OTHERS* 154 (2004); See also [europa.eu.int/scadplus/citizens/fr/d7.htm](http://europa.eu.int/scadplus/citizens/fr/d7.htm). Such criticism may be valid on many grounds. Indeed, several commentators argue that the Court has simply redefined the meaning of linguistic "insider" to include the speakers of languages dominant in other member states, thereby redefining the meaning of "outsider" to apply to non-territorial languages when spoken by naturalized citizens of the Union. See Bruno De Witte, *Politics Versus Law in the EU's Approach to Ethnic Minorities*, 3 *EUI Working Paper RSC 2000/4*, 2000; Francesco Palermo, *The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ*, 8 *MAASTRICHT J. EUR. & COMP. L.*, 299, 301 (2001).

<sup>214</sup> See discussion, Section I *supra* pp.109-20.

<sup>215</sup> See discussion, Section II *supra* pp.120-31.

<sup>216</sup> See discussion, Section III *supra* pp. 131-39.

<sup>217</sup> Case C-274/96, *Criminal Proceedings Against Bickel and Franz*, 1998 E.C.R. I-7637.

Committee on the FCNM's instructions to Austria to consider the needs of migrant communities.<sup>219</sup> It is, however, a long way from the original grant of rights to national minority language groups in nation state constitutions and statutes, and a long way from the express intent of the drafters of the Charter for Regional and Minority Languages that the term minority languages should "not include the languages of migrants."<sup>220</sup> This next step is also a long way from what was, for decades, the only language "right" available to speakers of immigrant minority languages: the right to access and acquire the receiving country's language and thereby integrate into the linguistic mainstream.<sup>221</sup> Yet, in line with the transformation of other linguistic minorities' rights, this right to integration is already being transformed into a right to language diversity. As the discussion in this Part will demonstrate, the language rights of individual members of immigrant minorities are beginning to be advanced by the Advisory Committee on the FCNM, and may soon be addressed by the ECJ. In other words, the very same instruments that were once used solely to vindicate RM groups' language rights are now also being used to vindicate the rights of speakers of IM languages. This suggests that, in future, the rights of RM and IM language groups should no longer be considered as wholly distinct and separate, but rather interrelated and possibly even converging.<sup>222</sup>

#### *A. Immigrants' Languages and the Right to Integration in European Treaties*

Since the 1980s the "foreign born" population living in the European Economic Area (EEA) has increased considerably. According to the OECD, first generation immigrants accounted for 4.8% of the total population of the EEA in 1991, a percentage that rose to 5.7% in 2001.<sup>223</sup> Yet despite the significant number of immigrants in Europe, immigrant minorities' languages have not, as yet, been granted any formal status or recognition by the European Union or by individual nation states.<sup>224</sup> Almost all references to the languages of immigrants in nation states' legislation and European treaties or declarations refer to the need to encourage the integration and assimilation of immigrants, without any attendant recognition of the worth of immigrant minorities' own languages, or the role that

<sup>218</sup> Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, 2000 E.C.R. I-4139.

<sup>219</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/SR/II(2006)008, (Austria), (Dec. 1, 2006) available at [http://www.coe.int/t/dghl/monitorings/minorities/3\\_FCNMdocs/PDF\\_2nd\\_SR\\_Austria\\_en.pdf](http://www.coe.int/t/dghl/monitorings/minorities/3_FCNMdocs/PDF_2nd_SR_Austria_en.pdf).

<sup>220</sup> European Charter for Regional or Minority Languages, ETS 148, Pt I, art. 1 (a).

<sup>221</sup> See discussion *infra* pp. 140-42.

<sup>222</sup> This suggestion undoubtedly raises normative concerns about whether such convergence is desirable. Scholars and advocates disagree vehemently about whether or not immigrants should be granted the same language rights as regional or national minority groups. Compare WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 34 (1995) (arguing that a two-tier system privileging RM groups is both inevitable and desirable) and Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006) (arguing that there is no bright line between the claims of certain RM groups for recognition of their linguistic identity and the language rights claims of IM language speakers). This Essay does not advance a normative argument about the desirability of convergence, but rather argues positively that convergence may be the ultimate outcome of the trend that is visible in the treaty body decisions and ECJ jurisprudence.

<sup>223</sup> (OECD, 2004).

<sup>224</sup> The one exception to this is the EU's "lifelong learning" initiative, due to run from 2007-2013.



native languages might play in the integration of immigrants into receiving countries and communities.<sup>225</sup> Some nations have even erected language barriers for new immigrants or would-be immigrants, insisting that in order to qualify for long-term residence or citizenship, immigrants must pass tests demonstrating their competence in the majority language.<sup>226</sup>

On a Europe-wide level, the rights of IM language speakers have traditionally been defined in similarly narrow terms, focused exclusively on the right to linguistic integration and assimilation. There are just two noteworthy Europe-wide pronouncements concerned with the use of IM languages, both of which address the teaching of IM languages to (non-European) “migrant” or “immigrant” schoolchildren, and both of which explicitly subordinate the goals of teaching IM languages to the goal of integrating the children into the linguistic mainstream of the receiving state. The first pronouncement is the Directive of the Council of the European Communities (now the EU) on the Schooling of Children of Migrant Workers, issued in July 1977.<sup>227</sup> This Directive promotes the legitimization of IM language instruction and occasionally also its legislation in some countries, but the scope and ambitions of the Directive are limited to the terms of Article 3, namely that “Member States shall, in accordance with their national circumstances and legal systems, and in cooperation with States of origin, take appropriate measures to promote, in coordination with normal education, teaching of the mother tongue and culture of the country of origin.”<sup>228</sup>

The second pronouncement on IM language rights is the European Parliament Resolution on Integrating Immigrants in Europe through Schools and Multilingual Education, passed in 2003.<sup>229</sup> This Resolution goes further than the Directive of 1977, most notably in its recognition “that the school-age children of immigrants have a right to State education, irrespective of the legal status of their families, and that this right extends to learning the language of their host country, without prejudice to their right to learn their mother tongue.”<sup>230</sup> However, the goal of the Resolution is the effective integration of immigrant children. “[P]rimary and secondary schools must provide educational support for immigrant children, especially when they are not proficient in the language of their host country, so as to enable them to adapt more easily and prevent them from finding themselves at a disadvantage compared with other children.”<sup>231</sup> The Resolution also makes it clear that permitting assistance and instruction to IM language speakers in their own

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<sup>225</sup> See BENHABIB, *supra* note 213 at 141.

<sup>226</sup> Germany, France, and the Netherlands have all introduced language tests as a prerequisite for the issuance of indefinite leave to remain or citizenship. See *id.* at 141 (“Some polities may require a written language exam to prove competence, others may be satisfied with oral demonstration alone.”) See also DILF (diplôme initial de langue française) website at <http://www.ciep.fr/dilf>, outlining the proposed contents of the French language test; See, also *Turkey Slams German Immigration Law: Language Requirement “Against Human Rights,”* DER SPIEGEL (Apr. 5, 2007) available at <http://www.spiegel.de/international/germany/0,1518,475839,00.html>.

<sup>227</sup> EC Directive 77/486 of July 1977, OJ L 199 6.8.1977 p. 32.

<sup>228</sup> See generally E. REID & H. REICH, BREAKING THE BOUNDARIES, MIGRANT WORKERS’ CHILDREN IN THE EC (1992); W. FASE, ETHNIC DIVISIONS IN WESTERN EUROPEAN EDUCATION (1994).

<sup>229</sup> 2004/2267 INI, OJ C 233E, 28.9.2006. The full text is easily accessible at <http://www.ciemen.org/mercator/bulletins/67-29.htm>

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

languages must not disrupt instruction in the “language of education,” particularly if that language is a RM language.<sup>232</sup>

In addition to these two pronouncements, there is also one initiative by the Council of Europe, entitled Recommendation 1383 on Linguistic Diversification, which advances recommendations for the integration of immigrant language speakers. The Recommendation was adopted by the Council’s Parliamentary Assembly in September 1998, the same year that the Charter for Regional and Minority Languages and the FCNM entered into force, and the same year that the OSCE issued the Oslo Recommendations. Article 8(i) of Recommendation 1383 states that

the Committee of Ministers invite member states to improve the creation of regional language plans, drawn up in collaboration with elected regional representatives and local authorities, with a view to identifying existing linguistic potential and developing the teaching of the languages concerned, *while taking account of the presence of non-native population groups*, twinning arrangements, exchanges and the proximity of foreign countries.<sup>233</sup>

Two declarations promoting the linguistic assimilation of schoolchildren and a recommendation that acknowledges that the “presence of non-native population groups” should be taken into account by governments drawing up language plans do not constitute an extensive body of laws on which to build a coherent legal regime safeguarding the rights of IM languages and IM speakers. Yet, despite the dearth of laws promoting the vindication of IM language speakers’ rights, the Committee of Experts on the Charter for Regional or Minority Languages and the Advisory Committee on the Framework Convention for National Minorities have begun to engage with immigrant minorities’ language rights in their most recent reporting cycles. Moreover, through this engagement the treaty bodies have, consistent with their recommendations relating to transnational minorities and European migrants, reinterpreted the preexisting right of IM language speakers to linguistic integration,<sup>234</sup> as a right to language diversity.

### *B. Immigrants’ Languages and the Right to Diversity in European Treaties*

This part of the Essay will discuss the ways in which the FCNM and the Charter for Regional and Minority Languages—instruments originally drafted to preserve the rights of RM language groups—are now beginning to be used to provide a framework for consideration of IM language speakers’ rights. Although, as discussed *supra*, immigrant groups were explicitly excluded from coverage by

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<sup>232</sup> *Id.* (“[T]he integration of immigrants at school must not adversely affect the development of the language of the education system, especially if that language is itself a minority language.”)

<sup>233</sup> *Emphasis added.* Council of Europe Recommendation 1383 (1998) Available at <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta98/erec1383.htm#1>; See also Parliamentary Assembly Document 8173 (1998) available at <http://assembly.coe.int/1>

<sup>234</sup> Embodied in the two Pronouncements and the Directive. See discussion *supra* pp.140-4.

both treaties at the time they were signed,<sup>235</sup> the treaty bodies have turned to the rights of immigrant language speakers in their second and third monitoring cycle reports. A close reading of the second and third monitoring cycle decisions of the Advisory Committee on the FCNM suggest that the treaty bodies are reframing the language rights enjoyed by individual IM language speakers as rights to linguistic diversity.

As discussed *supra*,<sup>236</sup> the Advisory Committee on the FCNM has no general remit to consider the rights of migrants or IM groups, groups that are typically not included in the states parties' declarations regarding the presence of "national minorities" in their countries.<sup>237</sup> Yet, in the wake of the Committee's inclusion of European migrants' rights in its first cycle of reporting, the Committee in its second and third monitoring cycles turned *sua sponte* to the rights of both European migrants *and* IM groups.<sup>238</sup>

The reports generated by the second and third monitoring cycles address IM groups in a variety of ways. Several of the Committee's second and third cycle advisory opinions—such as the reports on Austria and Spain—do not mention immigrants' language rights *per se*, but do stress state parties' obligations to respect immigrants' human rights.<sup>239</sup> The reports on these countries mention immigrants'

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<sup>236</sup> See discussion, Section I *supra* 109-120.

<sup>237</sup> With the exception of the UK's expansive definition of "ethnic minorities." See Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/I(2002)006 (UK) (May 22, 2002) "This was the result of the United Kingdom's decision to base its first State Report on the definition of "racial group"2 as set out in the Race Relations Act 1976, namely: "a group of persons defined by colour, race, nationality (including citizenship) or ethnic or national origin". The Advisory Committee also noted that the Courts have the possibility of defining which groups amount to a "racial group" under the Race Relations Act 1976." *Id.*

<sup>238</sup> In the United Kingdom's case, the Advisory Committee's first monitoring report also touched, very briefly, on IM issues. The Committee praised the United Kingdom's inclusion of "minority ethnic communities" such as "Sikhs" in the scope of its application of the FCNM. However, the Committee did not reach a detailed discussion of educational, employment or government service provisions in the languages of these "minority ethnic communities," beyond declaring that "noting the importance of giving adequate recognition and support to those wishing to learn their own minority language, the Advisory Committee called on the authorities to further assess the level and variety of language needs of the minority ethnic communities." *Id.* at 215.

<sup>239</sup> For example, the Committee's report on Austria criticized the "harassment of immigrants," particularly "'visible" minorities, and notably persons of African origin," as well as anti-immigrant reporting by the media, and anti-immigrant attitudes by politicians. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report 8 ACFC/OP/II(2007)005 (Austria) (June 11, 2008). The report concluded that "additional measures need to be taken to promote the integration of immigrants and to prevent the social exclusion of persons facing difficulties in accessing Austrian citizenship" without once mentioning language. *Id.* Similarly, in its most recent report on Spain, issued in April 2008, the Advisory Committee focused on the legal and institutional measures adopted by the Spanish government "to accommodate the rapid increase in immigration and diversity in Spanish society," Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/OP/II(2007)001 81 (Spain) (Apr. 2, 2008). The Advisory Committee is pleased to note that the authorities are developing a range of instruments, both legal and institutional, to accommodate the rapid increase in immigration and diversity in Spanish society.<sup>10</sup> The adoption, in December 2004, of Royal Decree 2393/2004 implementing the Aliens Law 14/2003, enabled 600,000 foreign workers living in Spain without legal status, who fulfilled certain conditions, to obtain work and residence permits through a special "normalisation" procedure, thereby facilitating their social inclusion, including channeling "large amounts of State funds into measures adopted by Autonomous Communities and Municipalities to facilitate access for immigrants to employment, education, social services, housing and health care."

need to access these government services and the importance of “intercultural perspectives on education,” but do not make any recommendations related to IM languages, instead encouraging “the authorities to pursue further their integration efforts, above all by continuing to adapt public services, including the education system, to the needs of immigrants.”<sup>240</sup> In other country reports, however, the Advisory Committee condemns the violation of IM groups’ rights and recommends language-based remedies designed to protect individual IM language speakers’ human rights and dignities, while also promoting the integration of IM speakers into civic society.<sup>241</sup>

The Advisory Committee’s most recent report on Germany begins with the observation that the German government has not informed the Committee of “specific demands from other groups, particularly those of immigrant origin, to benefit from the protection afforded by the Framework Convention,” but that nonetheless the committee believes that such groups should, in fact, be afforded the protections of the FCNM, even though the German government argued that they did “not meet the criteria of citizenship and traditional residence, in the scope of the Framework Convention.”<sup>242</sup> The Committee’s report specifically mentions Turkish *Gastarbeiter*—an immigrant minority—as the kind of group that should be afforded the protections, including cultural and linguistic protections, of the FCNM.<sup>243</sup>

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<sup>240</sup> *Id.* at 91.

<sup>241</sup> For example, the Committee’s report on Denmark harshly criticizes “the introduction of an anti-immigrant agenda in the political arena” and “the way in which certain media portray persons from different ethnic and religious groups, including members of the Muslim faith” and suggests that “[t]he Government’s policy towards integration, while following a laudable aim, has been criticised for not sufficiently taking into account the problems, including discrimination, faced by persons from different ethnic and religious groups.” Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/II(2004)005 (Denmark) (May 11, 2005). The Committee suggests that the best way to remedy this deficit would be to do more “to promote intercultural dialogue by the reflection of the culture, history, language and religion of persons belonging to different ethnic and religious groups in the curriculum and textbooks used in schools.”

<sup>242</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/OP/II(2006)001 (Germany) (Feb. 7, 2007)

<sup>243</sup> “The Advisory Committee adds that the Citizenship Act of 2000 and the Immigration Act of 2004 will, in all probability, speed up the integration into German society of many Turkish and other people with foreign background who, in the Advisory Committee’s view, could benefit from certain rights covered by the Framework Convention.” In its report on Germany, the Committee returns repeatedly to the question of citizenship and the impact of citizenship status on an individual’s entitlement to linguistic rights and other Convention guarantees. The Committee argues that Germany’s unwillingness to extend the protections of the Charter to non-citizen residents is neither appropriate nor fair, resulting in a two-tier approach, whereby some members of the same IM group have German citizenship and are therefore entitled to vindicate their language rights, and other members of the same group are permanent or temporary residents and therefore not entitled to the provision of government services in their languages. *Id.* at 71. The Advisory Committee finds that, in most cases, Roma residing in Germany without German citizenship do not qualify for the measures taken for Roma/Sinti holding German citizenship, even though some of these measures could prove relevant to their situation, for instance in the field of education. Their integration is, therefore, made more difficult and relations with the majority population can sometimes be tense. The Advisory committee argues that the German government’s failure to address problems in the implementation of the Immigration Act of 2000 and failure to treat members of the same IM language groups equally “may contribute to uncertainty and insecurity in which many immigrants live and limit their opportunities for integration.” *Id.*

The fullest articulation of IM language speakers' linguistic rights are found in the Committee's 2007 report on the United Kingdom.<sup>244</sup> In this report, the Committee moves away from stressing a purely integrationist agenda, towards recognition of the importance of multiculturalism and multilingualism in society.<sup>245</sup> The Committee stresses the UK's treaty obligations to provide services for members of IM communities in their own languages, underscoring, for example, "the crucial importance of interpretation and translation services in delivering health services to persons belonging to minorities."<sup>246</sup> The Committee identifies a need for the government to "ensure that there are adequate funding opportunities for the initiatives of minority ethnic organisations aimed at maintaining and developing minority languages and cultures,"<sup>247</sup> not in order to promote greater integration, but rather as an end in its own right:

The Advisory Committee understands that strengthening contacts between different groups is a valuable objective, but it considers that efforts to promote "community cohesion" should not be pursued at the expense of initiatives aimed at maintaining and developing the cultures and languages of persons belonging to minority ethnic communities.<sup>248</sup>

The Committee stresses in its recommendations that the government should provide adequate funding to achieve this goal, and should encourage the media to "pursue further its actions aimed at increasing knowledge of and interest in the United Kingdom's multi-cultural and multi-lingual society."<sup>249</sup>

The Advisory Committee specifically calls on the UK government to address the language needs of IM children and adults who were "African and African Caribbean, Pakistani and Bangladeshi, in the field of education."<sup>250</sup> The Committee suggests that truly addressing the language requirements of IM communities requires going beyond "boosting teaching of English as an additional language" to actually valuing and celebrating IM minorities' own languages.<sup>251</sup> The Committee recommends that the UK government implement "the findings of the final report of the Dearing Review on the Government's language policy, which recommends, among other things, that more attention be given to the teaching of languages of minority ethnic communities."<sup>252</sup> The Committee encourages the UK authorities to make concerted efforts to promote bi-lingual and multi-lingual education, including by stepping up funding for supplementary schools, and take a proactive approach in encouraging schools to expand the provision of minority

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<sup>244</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/OP/II(2007)003 (UK) (Oct. 26, 2007). The UK was the only state party to expressly extend the protections of the FCNM to IM groups at signing, and was thus the only state party whose approach to IM groups was reviewed by the Committee during their first reporting cycle in 2000

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Report at 93.

<sup>248</sup> Report at 92.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* (citing 'Languages Review', Report by Ron Dearing and Lid King for the Department for Education and Skills, 8 March 2007).

ethnic languages,” including “Mandarin, Urdu and other widely-spoken world languages depending on local needs and circumstances.”<sup>253</sup>

Thus, in the most recent and most throughgoing articulation of language rights available to members of immigrant minorities, the language right envisaged by the treaty body is not one of absorption into the linguistic mainstream, but rather one of membership of a diverse, multicultural, multilingual society. This right to language diversity is not preservationist and isolationist, but rather designed to promote dialogue and exchange with speakers of other languages. The right to language diversity is not group-inhering, but individual, being the preserve of “persons,” not linguistic communities. Above all, the right to language diversity available to IM language speakers is expansive, incorporating the rights of access to government services, to schooling, and to the funding for cultural and social activities—in other words, the same rights granted in the early 1990s to speakers of RM languages.

### *C. Immigrants’ Languages and the Right to Diversity in ECJ Case Law*

The ECJ has yet to consider a claim brought by an IM speaker seeking to vindicate her language rights, so there is no binding ECJ jurisprudence that explicitly supports the this Essay’s argument that immigrants’ language rights are converging with the rights of RM language speakers.<sup>254</sup> However, there is one recent case, *Haim*,<sup>255</sup> which includes noteworthy dicta that, consistent with the thesis of this Essay, suggests that the trend discernable in European treaty body decisions towards the acknowledgements of IM language rights may also soon appear in ECJ opinions.

In *Haim*, the ECJ found that the German government was allowed to implement its own rules regarding recognition or non-recognition of qualifications from outside the European Union, even if other EU member states adopted different standards.<sup>256</sup> Specifically, the Court ruled that the German healthcare and insurance system were not required to honor another European nation’s decision to recognize dentistry qualifications obtained at educational institutions in non-European countries.<sup>257</sup> *Haim*, a Turkish immigrant, had studied dentistry in Istanbul, and emigrated to Belgium, before finally settling in Germany. The Belgian government had recognized *Haim*’s dentistry qualifications, and *Haim* sought the same recognition from the German government so that he could practice

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<sup>253</sup> Several reports by the Committee of Experts on the Charter for Regional and Minority Languages also pick up on the same IM language issues addressed in the opinions of the Advisory Committee on the FCNM. For example, in their 2007 report on the United Kingdom, the Committee of Experts discusses the merits of the “language ladder” scheme to introduce languages spoken in the local community—described in the report as “Asian languages, Polish etc”—into schools’ curricula.

<sup>254</sup> In the light of the recent proclamation of the Charter of Fundamental Rights by the European Parliament on 12 December 2007 and the entry into force of the Treaty of Lisbon,<sup>254</sup> it seems likely that the ECJ’s language rights jurisprudence will develop rapidly, as individuals now have direct recourse to the ECJ in matters relating to language rights and linguistic diversity. See The Lisbon Treaty and Language Rights, available at [http://www.eblul.org/index.php?option=com\\_content&task=view&id=150&Itemid=1](http://www.eblul.org/index.php?option=com_content&task=view&id=150&Itemid=1)

<sup>255</sup> Case C-424/97, *Haim*, 2000 E.C.R. I-5123.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

in Germany.<sup>258</sup> This recognition was not forthcoming, and Haim was prohibited by the German courts from treating patients covered by the German healthcare and insurance scheme.

In upholding the German courts' decision,<sup>259</sup> the ECJ stated that while it respected a nation state's healthcare insurance system's right to establish its own standards, the same healthcare insurance system should also make provisions for individuals whose mother tongue is not the national language to speak in their own language with dental practitioners.<sup>260</sup> In this instance, the court suggested, Turkish-speaking dental patients in Germany should be granted an opportunity to consult with their dentist in Turkish.

This dicta in *Haim* is wholly inconsistent with the traditional characterization of language rights as inhering only in territorially-defined autochthonous European groups speaking at-risk languages in need of preservation.<sup>261</sup> The Turkish language is not at risk, is not indigenously European, and is spoken in Germany by *Gastarbeiter* who reside in territorially diffuse areas in Germany and other European countries.<sup>262</sup> Furthermore, the dicta in *Haim* suggests that the right to consult with one's dentist in one's native tongue is a right held by individuals—individual dental patients, “whose mother tongue is not the national language”<sup>263</sup> to be specific—rather than by any community or collective unit. *Haim* suggests—at least in dicta—that the logical next step in the evolution of European language rights, the extension of a right to language diversity to immigrant groups, may soon appear in ECJ caselaw, just as it has already done in European treaty bodies' reports and recommendations.

## CONCLUSION

This Essay has charted the evolution and transformation of the language rights of national minorities, transnational minorities, migrants, and immigrants in Europe. In doing so, this Essay has argued that the traditionally held view of language rights as inherently preservationist and only applicable to members of certain indigenous, territorially anchored minority communities is no longer current, as the ECJ and European treaty bodies have redefined language rights as fundamental human rights, inhering in individual Europeans rather than groups. As a consequence, the very instruments originally constructed to protect the rights of the “regional” minority groups may now—or may soon—be employed to promote the rights of individual speakers of “immigrant” languages.

In advancing this argument, this Essay is not seeking to contribute to the well-developed normative debate about whether there should be a two-tier system

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<sup>258</sup> *Id.*

<sup>259</sup> Which might perhaps be interpreted as hindering, rather than facilitating the integration of extra-European migrants into the European professions.

<sup>260</sup> Case C-424/97, *Haim*, 2000 E.C.R. I-5123. at ¶ 60.

<sup>261</sup> See discussion *supra* Part I, pp. 109-120.

<sup>262</sup> See Gabriel von Toggenburg, “The EU's ‘Linguistic Diversity’: Fuel of Brake to the Mobility of Workers”, in Andrew P. Morris and Samuel Estreicher (eds.), *Cross-Border Human Resources, Labor and Employment Issues: Proceedings of the New York University 54th Annual Conference on Labor* (Kluwer Law International, The Hague, 2004), 677, 712.

<sup>263</sup> Case C-424/97, *Haim*, 2000 E.C.R. I-5123. at ¶ 60.

of language rights that differentiates between the claims of RM groups and IM groups.<sup>264</sup> Scholars, advocates and the general public disagree vehemently as to whether RM language rights are more “valuable” or “important” (either in general or in Europe in particular) than IM language rights,<sup>265</sup> or whether groups or individuals are the more appropriate units of analysis for rights-based jurisprudence (either generally or for Europe),<sup>266</sup> or whether Europe’s attitude towards IM communities should be integrationist or pro-diversity.<sup>267</sup> These arguments are incredibly important and passionately contested, but they are not the preserve of this Essay.

Instead, this Essay seeks to present a detached analysis of the complicated, fascinating, evolving positive European law regarding language rights—a legal framework that started in one place, with treaties designed to preserve RM language groups, and is now on the cusp of going somewhere quite different, with treaty body decisions and case law beginning to protect individual IM language speakers. When Spain undertook to preserve its fragile Basque linguistic community by granting protections to national minorities in its 1978 Constitution,<sup>268</sup> it could not have known that it was taking the first step down a path that would lead to the vindication of the language rights of individual Turkish-speaking dental patients in Berlin,<sup>269</sup> or of Bangladeshi schoolchildren in London.<sup>270</sup> Nonetheless, as the evolution of European law concerning minority language rights makes clear, that is precisely where the path leads next.

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<sup>264</sup> See generally STEPHEN MAY, LANGUAGE AND MINORITY RIGHTS: ETHNICITY, NATIONALISM AND THE POLITICS OF LANGUAGE (2003).

<sup>265</sup> Some scholars argue that this two-tier approach is inevitable and not necessarily prejudicial to IM language speakers and groups. Will Kymlicka, for example, argues that a state of affairs in which newcomers/immigrants cannot demand the same linguistic rights as the members of old and established minority linguistic groups is generally perceived to be just. See WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 34 (1995). However, other scholars, such as Cristina Rodríguez, disagree with Kymlicka’s sharp differentiation between the claims of “national” minorities and “migrant” minorities, arguing that there is no bright line between the claims of certain RM groups for recognition of their linguistic identity and the language rights claims of IM language speakers. Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006).

<sup>266</sup> See, e.g. Robert F. Weber, *Individual Rights and Group Rights in the European Community’s Approach to Minority Languages* 17 DUKE J. COMP. & INT’L L. 361, 371 (2007).

<sup>267</sup> See SEYLA BENHABIB, THE RIGHTS OF OTHERS 154 (2004);

<sup>268</sup> See CONSTITUCIÓN [C.E.], art. 2

<sup>269</sup> Case C-424/97, *Haim*, 2000 E.C.R. I-5123.

<sup>270</sup> See Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/OP/II(2007)003 (UK) (Oct. 26, 2007).



APPENDIX: MAP OF EUROPE SHOWING THE LOCATION OF REGIONAL MINORITY LANGUAGE GROUPS<sup>271</sup>



<sup>271</sup> Available at <http://www.eurominority.org>