

European Master's Degree in Human Rights and Democratisation

2002/2003

**MINORITY LANGUAGE RIGHTS IN EDUCATION:
THE KURDISH LANGUAGE ISSUE IN TURKEY'S
EDUCATIONAL SYSTEM IN THE LIGHT OF EU-
ACCESSION PERSPECTIVES**

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September 2003, Venice, Italy**

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TURKEY



ACKNOWLEDGEMENTS

This thesis would not have been realised without the support of the *Raoul Wallenberg Institute for Human Rights and Humanitarian Law* in Lund, Sweden.

I am very grateful to my thesis supervisor, Professor Katarina Tomaševski, for her kind support, assistance and information.

Special thanks to Lena Olsson for her warm welcome and for her help in the library of the institute.

Special thanks also to the *Kurdish Human Rights Project* (London) for its translations and information.

Thanks to my family and my friends for their support.

SUMMARY

In 2002, Turkish students organised a significant campaign claiming for both Kurdish mother tongue education in primary and secondary schools and for the introduction of Kurdish courses, as an optional subject, in Turkey's university curricula. In light of its EU-accession perspectives, Turkey enacted significant constitutional reforms in 2001 *inter alia* in the field of minority language education. Kurdish language education remains, however, a highly sensitive national political concern in Turkey and the controversies are still virulent on the question whether this so-called 'mini democracy package' brought the changes needed to conform to international standards. Turkey seems to fear that the extension of minority rights to Kurds will undermine the national territorial integrity and political unity. Moreover Turkey supports the idea that the extension of such rights will undermine the principle of equality and equal rights of all Turkish citizens.

With this background, the first part of the study aims at recalling the broadlines of the international and regional legal framework on minorities' language rights in education. A broad set of issues is at stake when one is tackling such a topic. The second part is devoted to a case study aimed at assessing the implication of Turkish legal changes for Kurds' language rights in education. The idea underlying our analysis is the need to ensure to all citizens of a given country, access on general terms of equality and non-discrimination, to public services in their country, in particular education. At the end of this study, conclusions are drawn as to find the right balance between the need to maintain the identity of the group and the need to integrate its members in the society at large.

ABBREVIATIONS

Copenhagen Document:	Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference for Security and Co-operation in Europe
CRC:	UN Convention on the Rights of the Child
ECHR:	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR:	European Court of Human Rights
European Charter:	Council of Europe's European Charter for Regional or Minority Languages
Framework Convention:	Council of Europe's Framework Convention for the Protection of National Minorities
Hague Recommendations:	Hague Recommendations regarding the Education Rights of National Minorities
ICCPR:	UN International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	UN International Covenant on Economic, Social and Cultural Rights
OSCE:	Organisation for Security and Co-operation in Europe
Oslo Recommendations:	Oslo Recommendations regarding the Linguistic Rights of National Minorities
UDHR:	Universal Declaration of Human Rights
UNESCO Convention:	UNESCO Convention against Discrimination in Education
UNGA Declaration:	UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
UN Sub-Commission:	UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities

“Only when minorities are able to use their own languages, benefit from services they have themselves organised, as well as take part in the political and economic life of States, can they begin to achieve the status which majorities take for granted”¹

“One of the greatest challenges in the coming decades will be to provide education to both majority and minority segments of a democratic, plural State, in an attempt to accommodate the various population groups in the educational system of a State”²

INTRODUCTION.

Mother tongue education is on the international agenda since the middle of the 20th century and the question whether minority language rights merit protection in international human rights law is a matter of many debates. There is a common recognition that minorities should be able to maintain and develop activities peculiar to their culture. The question arises whether minorities’ right to education, as protected by current international and regional standards, entails the right to education in one’s own language. Issues related to the rights of persons belonging to minorities are often contextual, politic and highly sensitive. The subject of minority education is a controversial issue in a number of States but language issues, although crucial, are rarely a priority in public policies. Just as ‘minority’ defies definition, so too is ‘education’ an interactive process. On the one side, a high number of children tend to dropout of school earlier, amongst other reasons, because of burdensome and inappropriate educational language policies. Many minority children are still physically, economically and psychologically punished for speaking their mother tongue at school. On the other side, human rights law provides that everyone should have access, on general terms of equality, to public services in his or her country. Indeed, an individual should not be disadvantaged in public matters because of some of his or her fundamental personal characteristics, including language. As a public service, education should thus be made available on equal bases, without discrimination. But to what extent do language rights intervene in public educational policies?

Education is a prerequisite for the exercise –and for the strengthening- of other human rights both civil and political rights and economic, social and cultural rights. Unequal access to education has further repercussions on access to public services, culture, jobs and political power. Education is also decisive for deciding in practice, which languages are learned and maintained in a given country. Deprivation of education in one’s mother tongue has been convincingly linked with poor educational results, education exclusion, poor employment opportunities, the creation of psychological inferiority and even, sometimes,

¹ UN Fact Sheet n.18 (Rev.1) on Minority Rights.

² SIEMIENSKI, G., *Vienna Seminar on Minority Education Issues – 22/23 November 1996*, “International Journal on Minority and Group Rights”, vol. 4, 1997, p.176.

as source of potential ethnic conflict. Human rights are indivisible and presupposing each other. Promoting one right put forward another one.

The government should search, in each case, an appropriate and fair balance in order to safeguard the rights of persons speaking minority languages as well as the interests of the nation as a whole. Education *in* and *of* the minority language should be made accessible when persons belonging to national minorities have expressed a desire for it, when they have demonstrated the need for it and when their numerical strength justifies it. It is always difficult for persons belonging to minorities to make a decision regarding the means of empowerment that are not destructive of their specific individual and collective identity. In any case, the educational system should seek to find the right balance between, on the one hand, the rights of persons belonging to minorities to maintain and develop their proper identity, culture and language and on the other hand, the necessity of ensuring that they are able to integrate into the wider society as full and equal members. Failing in achieving this balance may be source of inter-ethnic tensions. While the ‘right to existence’ of minorities is underwritten by international law, the concept of ‘existence’ is restricted to ‘physical existence’ and does not encompass the notion of ‘cultural genocide’ which happens with the destruction of minorities’ culture and identity. The right to identity should remain the key element of any proper system of minority protection. If a language is jeopardised, especially in education, it is the whole survival of the related specific identity that is at stake. But due both to the ambiguity surrounding language rights and to the high implementation and enforcement costs, minorities’ language rights are still highly controversial. This is not merely an academic question.

The purpose of this study is to analyse minorities’ language rights in education in light both of the existing international legal framework and of the concrete situation of a specific minority group, namely Kurds in Turkey. The event that inspired this study is the Turkish 2002 students campaign for Kurdish education. The purpose of this research is to compare the status of the Kurdish language in Turkey’s educational system with the relevant international and regional standards. We will then assess the changes in this field -if any- in the light of EU accession perspectives. Indeed, one of the reasons why the European Parliament questioned Turkey’s candidacy was *inter alia* its treatment of the Kurdish minority. The starting point of our case study is the ‘2002 students campaign’. This movement claimed for both Kurdish mother tongue education in primary and secondary schools and for the introduction of Kurdish courses, as an optional subject, in the university curriculum. In light of the available information, a modest attempt will be made to propose some recommendations as to what would be needed for Turkey to meet its international commitments in the sphere of minorities’ right to education, in order to give Kurds in Turkey the protection and the rights they are entitled to.

Minorities' language claims are often trapped in particular political agendas, which instrumentalise these legitimate demands. Minority language education is linked with political considerations, which must be taken into account in analysing these questions. The basic idea underlying this study is that the ultimate aim of all human rights is the full and free development of the individual human personality in conditions of equality, without jeopardising the community as a whole. We will adopt a legal approach. It is however important to recall the additional and complementary sociological, educational and psychological existing studies concerning the importance of his or her language for a person and for its community. It is also essential to recall the importance of the participation of the child, the parents and the minority group at large in the educational system. Effective participation of the group since the beginning of the decision-making process should underlie any adequate and democratic minority policy. Eventually, it should be reminded that minority protection always implies respect for the sovereignty and the territorial integrity of the State in question. It must also be kept in mind that the registration of all children, teachers' rights, respect for such rights and the creation of rights-based statistics are fundamental and necessary prerequisites for implementing the right to education in a country. A basic prerequisite is also, obviously, that beyond the acknowledgement and the authorisation of any public educational policy in minority languages, the State should ultimately officially recognise the value of the diplomas delivered by such educational institutions.

This study is divided in two parts, *i.e.* a theoretical part and a case study on the status of the Kurdish language in Turkey's educational system.

An attempt will be made in the first part of this paper to provide an overview of the international and regional standards relevant for the protection of minorities' language rights in education, especially for Kurds. There is nothing intrinsically wrong if a State is seeking to unite its citizens and encourage communication through a common language, but a common language should not require an exclusive language, especially in private matters. What is more controversial is whether -and under what conditions- the State has also an obligation to provide public services, such as education, in non-official languages. A substantial number of legal standards have emerged in recent years and they need to be clarified. Minorities' language rights in education are guaranteed both directly and indirectly. The explicit protection of such rights is however quite limited though the situation is changing slowly. The current individual right to education partially contributes to the realisation of multiculturalism in education and minority rights related instruments provide a complementary basis. Usually, the individual right to education does not deal explicitly with the language of instruction but literature on educational policy strongly emphasises the importance of mother tongue education for the child. A brief analysis of the European and the international case law in these fields will help to clarify some of the issues at stake. Provisions related to language rights also provide the different criteria of restriction that a State could use to limit its language policies. Indeed, the choice to use a particular language in certain public

matters is a political decision based on several factors namely, the numerical importance of the respective linguistic groups, their political and economic position within the country, the preservation of national unity, the need of conflict prevention, the availability of financial and professional resources, the level of development of the language as a mean of communication, not to mention also historical backgrounds. These various criteria could enable the legitimacy of State's restrictions in language-related policies. They constitute the first limit to language rights in education. Beyond this limit, the weakness of the protection of minorities' language rights in education flows from the wording used in the various instruments, which is often weak and vague. Legal bases in this field often have to be found in general 'umbrella' concepts, which more or less implicitly underwrite the rights in question. Moreover, instruments protecting such concepts are sometimes not ratified enough.

The principles of non-discrimination based on language and equality constitute two other complementary -or alternative- legal bases for the protection of language rights in education. Language rights are raised both as an autonomous category of rights and as a subset of non-discrimination. Equality in the enjoyment of human rights requires abstention from and prevention of discrimination in that enjoyment. These two general principles coupled with special measures could be used, in certain circumstances and under certain conditions, to support the international and regional provisions in the field of minority education. The proportionality principle is always crucial in such discussions.

Both 'cultural rights' and the 'right to identity' tackle mother tongue education and could also be used as additional legal bases.

In any case, beyond this theoretical body of laws and practices, the key issue always remains whether educational policies are actually properly implemented in practice. Any abstract declaration of rights without a commitment to their implementation is obviously meaningless.

The question whether education *in* and *of* minority language should be ensured at all levels of education will be then briefly studied.

As education is related to the development of both the identity of the child and his or her capacities to live in the wider society, any educational policy should ensure that the official language -or languages- of the country at stake is also properly taught. The need to establish a balanced educational system is fundamental and bilingualism or multilingualism should be the goal of any multicultural educational policies.

Most of the discussions, in the first part of the study, tackle public language policies in educational matters. The questions whether minorities have –or should have- the right to establish private educational institutions and whether States have –or should have- a corollary obligation to finance such institutions will be eventually analysed.

The second part of the study aims at applying to a concrete situation the body of laws, principles and policies established in the first part. The first part of the study shows the increasing recognition of basic principles in the field of minority protection, which have to be applied whatever the specific aspects of the problem in the different States. There are some major issues, which underpin minority policies at large. The case study analyses the Kurdish language issue in Turkey's educational system in the light of EU-accession perspectives. Given Turkey's desire to enter the EU, it is interesting to assess, in light of the standards set out in regional and international instruments, the changes instituted by Turkey with regard both to the Kurdish language and to minorities' education rights. Since the establishment of the Turkish republic at the beginning of the 20th century, Kurdish has almost always been banned in some way or another. The official recognition of the Kurdish language has been one of the main demands formulated by the leaders of that community. In 2001, Turkey enacted constitutional reforms aiming *inter alia* at lifting the language ban on various language and dialects, including Kurdish.

We will first briefly present Turkey's demography, Turkey's ethnic diversity and the historical background of Kurds in Turkey. The scope of this paper does not allow us to discuss in depth here the question whether Kurds constitute a minority in human rights law. However, according to a large number of studies and opinions, it seems clear that Kurds constitute a national minority in Turkey even though they are not recognised as such by the government.

The next chapter aims at assessing Turkey's international and regional obligations, which constitute the prerequisite for the application of the theoretical frame to any specific practical issues. The work both of the *Council of Europe* and the *Organisation for Security and Co-operation in Europe* (OSCE) are particularly relevant since Turkey is member of both organisations. Turkey is bound by a certain number of human rights instruments but some major documents -both at the international and at the European levels- remain unsigned. The claim for mother tongue education in Turkey is seen as jeopardising the territorial integrity of the country. This unfortunately removes the subject matter from the realm of education to that of national security.

An attempt will be made, in the next chapter, to present EU views about Turkey's minorities' language rights in education. The five EU-regular reports on Turkey (1998-2002) will be analysed in light of the so-called 'Copenhagen political criteria'. We will also briefly show that EU emphasis on minority protection in the EU accession process reveal once again EU double standards policies in these fields.

The domestic provisions regarding minorities' language rights in education will be then assessed in light both of the constitutional changes of the 2002 August reform and of the international and regional human rights provisions presented in the first part of the study.

Before a final assessment, we will carry out a comparison of Kurds' situation with that of Turkey's non-Muslim minorities in light of the Treaty of Lausanne.

The last chapter and the conclusion aim at applying the theory to the practical case study and propose perspectives and recommendations. As Turkey is pursuing a democratisation process, we will not stick on those international and regional obligations ratified by the country at stake. We will suggest the standards that Turkey might urgently ratify in order to provide an adequate system of minority protection for its Kurdish community. In any case, much of the effects of minority policies depend upon their proper implementation and monitoring system.

3. MINORITY LANGUAGE RIGHTS IN EDUCATION.

3.1. LEGAL BASIS FOR LANGUAGE RIGHTS IN EDUCATION.

3.1.1. Rationale of Language Protection.

Although the significance of language has long been recognised, the definition of language rights has generated much controversy. Are language rights autonomous claims or are they flowing from other human rights? Language rights are defined as “rights to use and perpetuate a language”³ or as “the legal regulation of the use of languages in public life as part of the arrangements dealing with interethnic regulations in a country with a mixed ethnic structure”⁴. One objective of language rights for a non-dominant group is the recognition of its existence. Language rights imply obligations on the part of the State to offer protection. This protection may include both negative obligations for the State (to abstain from discrimination) and positive duties (to promote linguistic rights)⁵. Approaching the issue of ‘mother tongue education’ imposes beforehand to define the concept of ‘mother tongue’⁶. Mother tongue could be defined in many different ways but usually it is the language one has learned first and identifies with. The UNESCO definition of mother tongue defines it as “the language which a person acquires in early years and which becomes his natural instrument of thought and communication”⁷. A child’s first language is normally the best medium for learning especially in the early stages of education. A UNESCO study on education deems that “it is axiomatic that the best medium for teaching a child is his mother tongue”⁸. It is now quite unanimously acknowledged that mother tongue education is the form of education that is most likely to result in the fullest development of a child. Forced assimilation into a second language through the medium of non-mother tongue education can be harmful for the development of the personality and of a positive self-image⁹.

Minorities’ language rights are part of minority’s protection policies. They contribute to the preservation and the development of the identity both of persons belonging to minorities and of the group itself. Human dignity and respect for human differences can and should be accommodated whenever possible as a part of human rights within a

³ WENNER, *The Politics of Equality Among European Linguistic Minorities*, “Comparative Human Rights”, 1976, pp.184-213 quoted by TABORY, M., *Language Rights as Human Rights*, “Israel Y.B.H.R.”, vol.10, 1980, p.184.

⁴ VILFAN, S., *Introduction* in VILFAN, S. (Ed.), *Ethnic Groups and Language Rights*, New York University Press, vol. 3, 1993, p.1.

⁵ VAN DER STOEL, M., quoted by SKUTNABB-KANGAS, T., *Linguistic Human Rights in Education and Turkey – Some International Comparisons*, Denmark, “Invited Plenary Paper at the International Conference on Kurds”, October 2002, p.1.

⁶ The most comprehensive definition provides that mother tongue is the language(s) one learned first (criteria of *origin*), the language(s) one knows best (criteria of *competence*), the language(s) one uses most (criteria of *function*) or the language(s) one identifies with (criteria of *internal identification*) or is identified as a native speaker by others (criteria of *external identification*) (SKUTNABB-KANGAS, T., *Language, Literacy and Minorities*, “Minority Rights Group Report”, Nov. 1990, pp. 9-11 and SKUTNABB-KANGAS, T. and PHILLIPSON, R., *Wanted! Linguistic Human Rights*, Roskilde Universitets Center – Linguistgruppen, Jan. 1989, p.42).

⁷ UNESCO, *The use of Vernacular Languages in Education, Monographs of Fundamental Education – VIII*, Paris, UNESCO, 1953, p. 46

⁸ *ibidem*, p.11.

democratic framework¹⁰. Minorities' issues should be assessed globally, taking into account the specific needs of the group (and its members) and the need to balance its claims with the rest of the national society as a whole.

From a linguistic point of view, all languages have equal worth: they are all logical, cognitively complex and capable of expressing any thoughts, provided enough resources are devoted to their cultivation¹¹. But in practice, languages have different worth depending on the power relationship between speakers of these languages¹². This relationship is manifested in public policies regarding States' language choices. Less than 5% of the world 4000 to 5000 linguistic groups live in a country where their mother tongue are official languages. This does not mean that 95% of the world's population experience violation of their linguistic rights as many of those 4000-5000 languages have very few speakers¹³. Although there are more than 40 officially bi- or multilingual States, a majority of the nearly 200 States of the world are, despite their *de facto* multilingualism, officially monolingual¹⁴. The protection of language rights in education seeks to find a balance between the interest of the State, usually representing those of the majority, and the rights of persons belonging to minorities within the State. Even though the *significance* of language has long been recognised, its *definition* has generated much controversy. Language is obviously an instrument of communication but it is also an intimate element of culture.¹⁵ It is a vehicle of expression, cultural identification and mutual understanding. It is commonly taken as a prime indicator of individual identity and cultural or group identity. It is a highly developed tool "*refined by generations of users, which enables a people to express their most intimate thoughts and finest ideas, to record their experience, lament their losses, celebrate their triumphs, and above all record these in their literature for coming generations*"¹⁶. The OSCE High Commissioner on National Minorities emphasised that "*for most minorities, language, as much as if not more than any other attribute of identity (such as common religion or history), serves as a means of unity of the group and source of self-identification of the individual*"¹⁷. The protection of language rights is thus directly linked with individual rights: on the one hand it ensures the individual to view the world through his or her language or culture and on the other hand, it fully ensures his or her enjoyment and exercise of other fundamental human rights. Indeed, language is the substructure of many other rights¹⁸. The promotion and protection of language are linked to the realisation of

⁹ DUNBAR, R. and McKAY, F., *Denial of a Language: Kurdish Language Rights in Turkey*, "KHRP Fact-Finding Mission Report", June 2002, p.37.

¹⁰ DE VARENNES, F., *The Linguistic Rights of Minorities in Europe* in TRIFUNOVSKA, S., *Minority Rights in Europe – European Minorities and Languages*, The Hague, T.M.C. Asser Press, 2001, p.30.

¹¹ SKUTNABB-KANGAS, T. and PHILLIPSON, R., *Wanted! Linguistic Human Rights*, op. cit., p.3.

¹² *ibidem.*, p.3.

¹³ SKUTNABB-KANGAS, T., *Language, Literacy and Minorities*, op. cit., p.6.

¹⁴ *ibidem.*, p.6.

¹⁵ Ó RIAGÁIN, D., *The importance of Linguistic Rights for Speakers of Lesser Used Languages*, "International Journal on Minority and Group Rights", vol.6, 1999, p.289.

¹⁶ *ibidem.*, p.290.

Article 1 of the European Charter establishes that "*regional or minority languages*" means 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".

¹⁷ Quoted in HRW, *Ensuring Language Rights*, 2000, www.hrw.org.

¹⁸ GREEN, L., *Are Language Rights Fundamental?*, "Osgoode Hall Law Journal", 1987, vol.25, p.651.

socio-economic equality and to greater political influence for the groups concerned¹⁹. Restricting deliberately the use of a language is an attack to the dignity of its speakers. Therefore language repression has often played a key role in policies of group domination and forced assimilation.

At the individual level, minorities' language rights in education may be defined as the right for any individual to receive education in his or her mother tongue. At the collective level, they may imply the right for minorities to establish and maintain educational institutions²⁰. Significantly the *UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (UN-Sub Commission)* specifies that the protection or enforcement of language rights also depends upon the desire of the minority group to exercise those rights.

Is there an ideal policy for minorities' language rights in education? If the case arises, how should it be define and understood? There is a continuing process going on to define more clearly how various international and regional human rights standards may affect the private and the public use of minority languages as well as State language policies. The debate on linguistic rights is highly controversial and the issues at stake are well summarised by M. TABORY:

“It is difficult to formulate specific recommendations for the provision of linguistic rights, for the considerations involved are dichotomous. On the one hand, the guarantee of language rights is a token of tolerance on the part of the State toward its citizens belonging to a linguistic minority, allowing them to express themselves and develop their cultural ethos in the manner most natural to them. On the other hand, mutual co-operation between citizens depends on open communication channels based on knowledge of a common language, and the fragmentation of languages used by monolingual citizens in a domestic setting may give rise to a variety of legal, cultural, politic and economic implications. The balanced solution probably rests in dual provisions for citizens to have basic command of the State language for official purposes (such as voting and court appearances), while guaranteeing their right to foster their vernacular heritage”²¹.

3.1.2. Limitation of the Existing Legal Basis for Language Rights in Education.

3.1.2.1. International Human Rights Law.

A. Presentation.

¹⁹ HENRARD, K., *Devising an Adequate System of Minority Protection - Individual Human Rights, Minority Rights and the Right to Self-determination*, The Hague, Martinus Nijhoff Publishers, 2000, p.244.

²⁰ PHILLIPSON, R., RANNUT, M., SKUTNABB-KANGAS, T., *Introduction*, op. cit., p.2.

²¹ TABORY, M., op. cit., p.223.

Do minority children, have the right in international human rights law, to be educated through the medium of their mother tongue? Do they have the right to learn the mother tongue fully, to use it in official contexts and to identify with it?

Minority rights overlap substantially with linguistic rights. While religious and ethnic minorities benefit from a wide range of international protection, there is no instrument exclusively devoted to the protection of language rights in current international human rights law. It is not even clear if 'language' itself is officially recognised as a separate right by the various organs of the United Nations²². As we will see *infra*, language rights are sometimes implicitly encompassed in rights related to 'culture', 'minorities', 'education' and 'identity'. In many instruments, 'language' is mentioned in the preambles and in the general clauses as one of the basic characteristics (like 'religion', 'race' or 'gender') on the basis of which individuals should not to be discriminated against. But when we move to binding clauses in the field of education, language protection often disappear. The Hague Recommendations (1996) and the Oslo Recommendations (1998) have attempted to clarify educational linguistic right by establishing a frame for the development of State's policies and laws. Both recommendations constitute interesting guidelines on such issues but they do not interpret governments' obligations nor are they based on State practice. They were developed with a view to facilitating a clearer understanding of the international and regional legal provisions in place and of their implications for language policies. The Hague Recommendations aimed specifically at clarifying the content of minority education rights applicable in situations where the *OSCE High Commissioner on National Minorities* (HCNM) is involved. The main focus of the recommendations concerns the language of instruction for members of minorities and the principle of mother tongue education.

The time of the *League of Nations* brought the issue of minorities to the forefront. The regulations adopted during that period were based on the model of the Polish Minority Treaty²³. These regulations did not attempt to formulate generally binding standards on minority protection but rather dealt with specific situations. The aim of the League was double, namely prohibiting discrimination against minorities and establishing special measures to protect their separate identity²⁴. These two elements still constitute the two essential components of any adequate system of minority protection today. The treaty already viewed language both as an integral part of minority's identity and as a key-actor of the educational system. The Treaty of Lausanne between Greece and Turkey *inter alia* aimed at

²² GROMACKI, J.P., *The Protection of Language Rights In International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights*, "Virginia Journal of International Law", vol. 32, no. 2, 1992, p.520.

²³ HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.4.

²⁴ *ibidem.*, p.5.

Article 9 of the Polish Minorities Treaty acknowledges that, when a considerable proportion of the inhabitants of certain area is speaking a language different than the one spoken by the rest of the population, they should at least have access to State services, such as primary public education, in their own language.

guaranteeing minority rights in education (see the second part of this study). But the treaties ratified during the time of the *League of Nations* were overly formalistic and lacked sufficient capacity for enforcement²⁵.

Compared to the *League of Nations*, the *United Nations* (UN) adopted a different approach to the issue of minority protection. The starting point of the UN was that “*the universal respect for fundamental rights and freedoms, in combination with the prohibition of discrimination, would at the same time be the solution for the minorities issues*”²⁶. But it soon became clear that minority protection constitutes a special matter that deserves special attention. This was underscored by the establishment in 1946 of the *UN-Sub-Commission*, which enhanced the need for the protection of minorities beyond pure non-discrimination provisions. The *UN-Sub-Commission*, identified quite early, in accordance with the *Advisory Opinion on Minority Schools in Albania (infra)*, that minority’s protection requires a double approach namely, the prohibition of discrimination and special measures to enable the members of minorities to develop and preserve their identity²⁷. The Charter of the United Nations (1945) contains the first significant international protection against discrimination on the basis of language. It promotes “*universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion*” (emphasis added).

The Universal Declaration of Human Rights (1948) was the first –non binding- instrument declaring education to be a human right. Its article 26, providing that everybody has the right to education and that elementary education should be free and compulsory, does not refer to the language of instruction. Its only vague and indirect reference to language is “*education shall be directed to the full development of the human personality and to the strengthening of respect for human rights*” and “*parents have a prior right to choose the kind of education that shall be given to their children*”. Article 2 of the UDHR contains a non-discrimination provision stipulating that all individuals are entitled to the rights and freedoms set forth in the declaration without discrimination, including linguistic discrimination²⁸. The right to education protected by article 26 should thus be ensured without discrimination based on language. But what does this mean? Article 2 of the UDHR does not recognise language rights in education and should not be interpreted in that way. It just sets up that no one should be denied certain basic rights on the ground of language. It also reflects an intercultural approach to education. In the *General Assembly Resolution 181 on the Partition of the British-ruled Palestine* (1947), the UN adopted the principle of separate but equal treatment in education so far as language is concerned²⁹.

The Genocide Convention (1948), unlike its earlier drafts, does not refer to the destruction of linguistic groups (the so-called ‘cultural genocide’). Linguistic groups *per se* do not receive any specific protection under that Convention.

²⁵ GROMACKI, J.P., op. cit., p.525.

²⁶ HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.7.

²⁷ *ibidem.*, p.8.

²⁸ “*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language (...)*” (Emphasis added).

²⁹ “*The State shall ensure adequate primary and secondary education for the Arab and Jewish minority, respectively, in its own language and its cultural traditions. The right of each community to maintain its own schools for the education of its own members in its own language, while conforming to such educational requirements of a general nature as the State may impose, shall not be denied or impaired*” (United Nations General Assembly Resolution 181, 1947, Chapter 2, Paragraph 6).

DE VARENNES, F., *Language, Minorities and Human Rights*, Martinus Nijhoff Publishers, 1996, p. 71.

However, the convention includes six definition of genocide and some of these definitions could apply in situations of language assimilation through education³⁰.

The UNESCO Convention against Discrimination in Education (1960) forbids discrimination on various criteria, including language. It finally establishes explicitly the right to education in one's own language in certain circumstances. Article 5, paragraph 1(c) of the UNESCO Convention prescribes "*it is essential to recognise the right of members of national minorities to carry on their own educational activities (...) and, depending on the educational policy of each State, the use or the teaching of their own language, provided however (...) [1] that this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its - activities, or which prejudices national sovereignty (...) [2] that the standard of education is not lower than the general standard laid down or approved by the competent authorities; and (...) [3] that attendance at such schools is optional*". The greatest limitation to the right to mother tongue education seems not to lie in the three above explicit restrictions but in the fact that members of national minorities may use or teach their own language "*depending on the educational policy of each State*"³¹. This latter limitation seems to be stripped of any objective criteria³². Article 5 also specifies that "*education shall be directed to the full development of the human personality*" and that "*it shall promote understanding, tolerance and friendship among all nations, racial or religious groups*"³³.

The Convention on the Rights of the Child (1989), ratified by a high number of States, does not mention language in its general article 28 on education. However, it refers to language when it states, in article 29, that the education of the child shall be directed to "*the development of the child's personality, (...) the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own*" (emphasis added). Moreover, article 30 of the CRC, which is essentially identical to article 27 of the ICCPR, prescribes that "*in those States in which ethnic, religious or linguistic minorities (...) exist, a child belonging to such a minority (...) shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language*"(emphasis added). As the General Comment on article 27 of the ICCPR recognises that article 27 creates an obligation for States to take positive measures in support of linguistic minorities, it could be supposed that article 30 of the CRC imposes similar positive obligations on States. K. TOMAŠEVSKI, *UN-Special Rapporteur on the Right to Education* underlines the wisdom of the CRC, "*which has posited mother-tongue education as the best entry for any child into the system of education, whatever the language of instruction may be*"³⁴. She further recommends that the principle of 'the best interest of the child' be applied.

³⁰ Article II (e) defines genocide as "*forcibly transferring children of the group to another group*" and article II(b) defines it as "*causing serious bodily or mental harm to members of the group*"(emphasis added).

³¹ TABORY, M., op. cit., p.184.

³² *ibidem.*, p.184.

³³ Article 5, paragraph 1(a) of the UNESCO Convention.

³⁴ TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, 3-10 February 2002 (E/CN.4/2002/60/Add.2 27 March 2002), paragraph 62 (www.right-to-education.org/search/index.html).

Article 13 of the ICESCR (1966) recognises the right of everyone to education but omits any explicit reference to language rights in education. It just affirms that "*education shall be directed to the full development of the human personality and the sense of its dignity*" and that it "*shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups*". It permits parents to choose schools "*other than those established by the public authorities (...) to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.*" But again, no explicit reference to educational language rights is made.

Minority rights instruments provide some further help with regard to minorities' language rights in education. Article 27 of the ICCPR is the key-reference to minority rights in contemporary human rights instruments. It guarantees that "*in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*" (emphasis added). In addition, article 25 of the ICCPR prescribes that every citizen "*shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions (...) to have access, on general terms of equality, to public services in his country*". Article 27 is the first legally binding provision referring to the existence of linguistic groups *per se*³⁵. Although it refers to the rights of minorities '*in those States in which they exist*', its applicability is not subject to the official recognition of the minority by the State. Article 27 is expressed in negative terms but it does recognise the existence of a 'right' and requires that it shall not be denied. Positive measures of protection by the State are therefore required. It represents a hybrid of collective and individual rights. The rights are conferred to the "*persons belonging to minorities*" (and not to the group itself) but it seems they must be exercised in a group context. Moreover, the fulfilment of the right protected by article 27 of the ICCPR, to "*use their language*" naturally depends upon their ability to know their language. General Comment on article 27 provides that the right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the ICCPR. In the context of this paper, it is moreover important to underline that minorities' rights under article 27 are distinct from peoples' right to self-determination guaranteed in the first article of the same covenant. The answer to what, in practice, constitutes the communal use of language, its extent and its limits, must be sought in domestic legislation and jurisprudence³⁶. The interpretation of article 27 of the ICCPR is highly controversial. With regard to mother tongue education, some authors have adhered to a rather careful and restrictive interpretation of article 27 whereas some others are more 'generous'. T. MODEEN refuses to acknowledge that article 27 provides any right for a national minority to establish

³⁵ TABORY, M., op. cit., p.181.

³⁶ *ibidem.*, p.214.

its own schools³⁷. M. NOWAK, albeit quite careful in his analysis, seems to accept that article 27 encompasses minorities' right to establish their own schools³⁸. F. CAPOTORTI believes that article 27 explicitly recognises the need for special minority rights going beyond the prohibition of discrimination and the protection of individual rights³⁹. It is also unclear whether the right "to use their language in community with other members of the group" actually refers to the use of language in private or public education. This latter discussion will be tackled *infra* in this study.

With regard to States obligations to implement the covenants, the ICESCR imposes on States parties the obligation "to take steps, (...) to the maximum of [their] available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant"⁴⁰. The ICCPR has a more straightforward approach because it implies less expensive obligations for States. It imposes the obligation to ensure the rights recognised in it immediately and not progressively⁴¹. In terms of redress, the ICCPR guarantees for both individuals complain mechanisms (under its Optional Protocol) and State reporting systems. But none of these mechanisms actually provide very effective protection and redress.

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) is not legally binding but it provides global minimum standards for the protection and promotion of minority rights. Article 1 of the Declaration guarantees that "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity". It goes somewhat further than article 27 of the ICCPR. Article 4 paragraph 2, prescribes that "States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion (...)" (emphasis added). Further, paragraphs 3-5 provide, regarding minority language education, that "States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue (...)" (emphasis added). Unfortunately, this article seems to propose education *in* and *of* minority language as alternatives. The UNGA Declaration keeps a quite vague vocabulary when it tackles education whereas in other fields the declaration is much more straightforward and clear⁴². Moreover it insists on States obligations rather than on minority rights.

³⁷ See for instance, MODEEN, T., *The International Protection of National Minorities in Europe*, Åbo, Åbo Akademi, 1969, pp.108-109 quoted by SPILIOPOULOU ÅKERMARK, A., *Justification of Minority Protection in International Law*, Iustus Förlag, 1997, p.128.

³⁸ NOWAK, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl am Rhein, 1993 quoted by SPILIOPOULOU ÅKERMARK, A., op. cit., p.128.

³⁹ Article 27 acknowledges "the need to make, for the benefit of minorities, special provisions which is capable of ensuring that they receive genuinely equal treatment compared with the other inhabitants of the State, (and this) call for a number of protective measures over and above the treatment guaranteed, without distinction, to all. If the intention had been to restrict the protection of minorities to the enjoyment of certain freedoms, this would not have required a special clause" (CAPOTORTI, F., *The Protection of Minorities Under Multinational Agreements on Human Rights*, "Italian Yearbook of International Law", 1976 (3), p.22 quoted by HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.160); THORNBERRY, P., *International Law and the Rights of Minorities*, Oxford, Clarendon Press, 1991.

⁴⁰ Article 2, paragraph 1 of the ICESCR.

⁴¹ Article 2, paragraph 1 of the ICCPR.

⁴² THORNBERRY, P., *International Standards in Education Rights and Minorities*, "Minority Rights Group Report", 1994, p. 12.

The importance of language rights is also reflected in the work of the *UN-Human Rights Committee* where questions on linguistic rights are some of the most frequently asked questions. Indeed, States are regularly asked to answer questions related to minority language rights in education whether private or public⁴³. These country reports provide valuable guidelines regarding the way article 27 of the ICCPR is implemented. For the purposes of this paper, as Turkey did not ratify the ICCPR, we will not analyse these States reports here.

B. Conclusion.

The lack of explicit reference to the language of instruction in most of the instruments here presented contrasts with the numerous non-discrimination clauses included in the same documents. Mother tongue education is still inadequately protected. Most of the instruments do not specify the language of instruction but only declare that the right to education should be ensured without discrimination based on language. However, some instruments adopt a more explicit discourse. Language rights are sometimes more specifically elaborated in instruments restricted to certain issues, such as instruments related to education (*i.e.* the UNESCO Convention) or to minority protection (*i.e.* the UNGA Declaration). But generally, international human rights instruments that make reference to minority language rights in education remain quite vague and general with regard to the language of instruction. They often include wide ‘escape clauses’ for States parties to the instruments. They primarily create obligations to fulfil the right to education by means of ‘progressive’ positive action. They are not ratified enough and do not proposed clear roadmaps, deadlines and accountability systems. The general provisions on the individual right to education often make no specific reference to degrees of access nor do they stipulate which levels of mother tongue education should be made available to minorities and by what means. Their weakness is that the nature of the duties presupposed by the rights is left unclear⁴⁴. It is clear that initially the individual right to education was not intended to include the right to education in one’s language. Moreover, in so far as they exist, relevant provisions on education tend to be interpreted restrictively by the monitoring bodies. This narrow interpretation is often due to the high implementation costs of the rights and to the lack of feasible enforcement mechanisms⁴⁵. A crucial point constantly omitted by the instruments, including the UNESCO Convention, relates indeed to the allocation of economic means for supporting mother tongue education.

⁴³ For a detailed analysis of those questions see SPILIOPOULOU ÅKERMARK, A., *op. cit.*, p.142.

⁴⁴ PHILLIPSON, R., RANNUT, M., SKUTNABB-KANGAS, T., *Introduction* in SKUTNABB-KANGAS, T. and PHILLIPSON, R. (Eds.), *Linguistic Human Rights – Overcoming Linguistic Discrimination*, Berlin – New York, Mouton de Gruyter, 1994, p.14.

3.1.2.2. European Human Rights Law.

A. Presentation.

There is a growing trend in Europe for protecting and promoting linguistic diversity and minorities' language rights in education are protected at three different levels.

Firstly, there is a growing movement within the *Council of Europe* to clarify the extent and content of minority rights. On the one side, the *European Court of Human Rights* and its related convention tackle the issue with an original approach mainly based on the non-discrimination principle. On the other side, the Council of Europe drafted some recommendations and treaties on these questions, which will be analysed later. The OSCE, in particular the *Copenhagen Document*, provide a second European basis for minority protection. Finally, the *European Union* decided to insert respect for minority rights, amongst other, in the so-called 'Copenhagen political criteria' for EU accession.

At the level of the Council of Europe, the most important European document for the protection of human rights, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not contain any specific provision for the protection of minorities. The only article referring indirectly to national minorities is article 14, which is a non-discrimination provision. But article 2 of the First Protocol to the ECHR prescribes “no person shall be denied the right to education (...) in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”. Article 2 does not specify the language in which education must be conducted. This provision does not recognise the right to education in one's own language. It has been interpreted by the European Court as only meaning that subjects have the right to avail themselves of the means of instruction available at a given time, and not to have any particular type of education established⁴⁶ (this case law will be analysed

⁴⁵ GROMACKI, J.P., op. cit., p.535.

⁴⁶ NOWAK, M., *The Right to Education* in EIDE, A., KRAUSE, C. and ROSAS, A. (Eds.), *Economic, Social and Cultural Rights*, The Hague, Martinus Nijhoff Publishers, 2001, p.254 and SKUTNABB-KANGAS, T. and PHILLIPSON, R., *Wanted! Linguistic Human Rights*, op. cit., p.15.

later in this study). The Parliamentary Assembly of the Council of Europe published its Recommendation 1353 (1998) in which it recommends that States take account of the principle that all citizens should have the possibility to study their own language and culture in general, at all levels, including the university level. The Council of Europe's Framework Convention for the Protection of National Minorities (1995) is the first international treaty with a multilateral and comprehensive protection regime for minorities. Article 14 of the Framework Convention recognises explicitly the right of every person belonging to a national minority to learn his or her minority language⁴⁷. It prescribes "*if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language (...) without prejudice to the learning of the official language or the teaching in this language*" (emphasis added). The question remains whether this last sentence means that the State must ensure both education *in* minority language and teaching *of* the language or just one of them. Article 5 paragraph 2 recalls the prohibition of assimilation policies in human rights law. Article 12 of the Framework Convention guarantees that States parties shall, where appropriate, take measures in the fields of education to foster knowledge of the culture, history, language and religion of their national minorities and of the majority. In this context they shall *inter alia* provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities. Article 13 provides that, within the framework of their educational systems, the parties shall recognise that persons belonging to national minorities have the right to set up and to manage their own private educational system. The exercise of this latter right shall however not entail any financial obligation for the State. Even though framed in very weak terms, the Framework Convention could provide an interesting mechanism for responding to the needs of minorities by agreeing legally binding minimum standards that must be met by States. The need to ratify this convention is often emphasised by the EU Commission regular reports on Turkey (*infra*). The Framework Convention has been praised for the effectiveness of its monitoring mechanisms, which involve country visits and constructive dialogue between the Council of Europe, governments and minorities⁴⁸. Unfortunately, the treaty leaves to the States the definition of what constitutes a minority and places thus this crucial question in the realm of political discourse. The Council of Europe's European Charter for Regional or Minority Languages (1992) is probably unique in that it is the only international legal instrument solely and specially dedicated to the protection and promotion of minority and regional languages. Unfortunately only 17 States have ratified it at the time of writing. The European Charter protects and promotes regional or minority *languages*, not linguistic *minorities*. It is unfortunately designed in a 'pick and choose' format, which could render States obligations ineffective in practice⁴⁹. It

⁴⁷ See also article 7 of the *Council of Europe Parliamentary Assembly Recommendation 1201*, which states that "*every person belonging to a national minority shall have the right freely to use his/her mother tongue in private and in public, both orally and in writing. This right shall also apply to the use of his/her language in publications and in the audio-visual sector*". This recommendation serves as basis for examining the laws of States applying for membership of the Council of Europe (THORNBERRY, P., *International Standards*, op. cit., footnote 13).

⁴⁸ <http://www.minorityrights.org/>

⁴⁹ NIC SHUIBHNE, N., *EC Law and Minority Language Policy – Culture, Citizenship and Fundamental Rights*, Kluwer, 2002, p.229.

presents a 'sliding scale approach' to languages. The bottom end of the scale provides the minimum rights whereas the higher end of the scale suggests much broader rights when a larger number of minority members is involved⁵⁰. Article 8 of the European Charter applies this sliding scale approach to mother tongue education. Depending on the number of beneficiaries such education should be provided at the pre-school-, at the primary- and at the secondary-level of education. The European Charter is unfortunately framed in terms of State obligations rather than legally enforceable individual rights for the speakers of the languages protected. Moreover, unfortunately, article 2 provides that States may choose which languages to apply the European Charter to. The charter is thus quite useless, especially for the purposes of this study.

The OSCE's Copenhagen Document (1990) is much more explicit in this regard. Paragraph 34 of the document laid down both the rights to be trained in minority languages and to be taught the minority language "*notwithstanding the need to learn the official language or languages of the State concerned*"⁵¹. Moreover, according to the document, minorities should have the right to maintain their identity, the right to seek voluntary and public assistance to do so in educational institutions and should not be subjected to assimilation against their will⁵². The document goes quite far in defining minority protection and language rights but it is unfortunately not legally binding.

The European Union protection of minorities' language rights will be tackled in the second part of this study, in light of the 'Copenhagen political criteria' for EU accession. Minorities' language rights are part of EU's endeavour for the development of an adequate system of minority protection. The European parliament is maybe the organ that has revealed the most intensive interest in minority issues. It passed two significant non-binding resolutions on language rights⁵³: the *Arfe Resolution* (1981) urged national and regional authorities to promote the use of minority language in three main areas, including education. The *Kuijpers Resolution* (1987) recommends that member States actively promote minority languages *inter alia* in education. It also established in 1982 the *European Bureau for Lesser-Used Languages* which task is to promote the language and culture of autochthonous minority groups in Europe⁵⁴.

B. Conclusion

Article 2, Paragraph 2 of the European Charter states that "*In respect of each language specified at the time of ratification, acceptance or approval, in accordance with Article 3, each Party undertakes to apply a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 (Education) and 12 and one from each of the Articles 9, 10, 11 and 13*".

⁵⁰ DE VARENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 100.

⁵¹ "*The participating States will endeavour to ensure that persons belonging to national minorities, notwithstanding the need to learn the official language or languages of the State concerned, have adequate opportunities for instruction of their mother tongue or in their mother tongue, as well as, wherever possible and necessary, for its use before public authorities, in conformity with applicable national legislation.*" (Paragraph 34 of the Copenhagen Document).

⁵² Paragraph 32 of the Copenhagen Document.

⁵³ HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.9.

⁵⁴ For more information, see their web site: <http://www.eblul.org/>.

Compared to the UN system, the Council of Europe, the OSCE and –we will see later- the European Union are more explicitly protective of minorities’ language rights in education. These organisations are searching for a kind of equilibrium between States’ interests and minority claims. The Framework Convention, the European Charter or the Copenhagen Document, make interesting steps towards the protection of minorities’ mother tongue education. But the protection by those instruments remains unfortunately almost useless either because of the small number of States parties to the texts, either because of the non-binding or weak character of the document. The ECHR also remains quite weak in this regard. The case law of the European Court, which will be analysed later, provides some help in clarifying the content of minorities’ language rights in education in Europe.

International and European instruments provide thus little *explicit* support for minorities language rights in education. States obligations concerning minority education are merely forbearing and negative in nature even though more recent European instruments are searching for a kind of equilibrium between States interests and minority claims⁵⁵. Language is accorded in them much poorer treatment than other fundamental human characteristics such as ‘religion’, ‘gender’ or ‘race’. When they exist, provisions dealing with mother tongue education are either vague and/or contain many ‘escape clauses’. Indeed, who is to decide what constitute ‘appropriate measures’, ‘if there is sufficient demand’, ‘substantial number’ or ‘adequate opportunities’? And what is ‘possible’? The further development of a legal binding framework for the protection of minorities’ language rights in education (and its proper implementation) together with accreditation systems, roadmaps and deadlines are thus crucial first steps to promote and protect minority rights and full implementation of international standards. An attempt will be made in the next chapter to find alternative or complementary legal basis for minorities’ language rights in education.

3.1.3. Other Existing Instruments to complement the Above Explicit Legal Basis.

3.1.3.1. Preliminary Remarks.

‘Non-discrimination’, ‘equality before the law’ and ‘equal protection by the law’ constitute basic and general human rights principles, which have by now acquired the status of customary international law⁵⁶. An adequate system of minority protection is based on two pillars namely the prohibition of discrimination and ‘special measures’ designed to protect and promote minority separate identity. The two pillars are interrelated and both, in a way, implement the

⁵⁵ HENRARD, K., *Education and Multiculturalism: the Contribution of Minority Rights?*, “International Journal on Minority and Group Rights”, vol. 7, 2000, p.394.

principle of equality. Non-discrimination is sometimes referred to as ‘negative protection’ and special measures are referred to as ‘positive protection’. Both pillars will be analysed successively in the next chapters. Both constitute potential complementary legal basis for minorities’ mother tongue education. K. TOMAŠEVSKI, *UN-Special Rapporteur on the Right to Education*, deems that the principle of non-discrimination should constitute the pillar of education, human rights and development⁵⁷. While ‘negative protection’ or ‘negative equality’ seems to be firmly entrenched in various multilateral instruments considered and generally adhered to in State practice, ‘positive linguistic rights’ are still lacking. Contrary to certain provisions in international instruments, non-discrimination in education is not subject to progressive realisation but has to be secured immediately and fully⁵⁸. Non-discrimination is a necessary prerequisite for further ‘special measures’. Despite different interpretations of the content and the effect of special measures, we’ll point out the existence of a sufficient common understanding of these rights at the international and regional level and show their impact on language rights in educational matters. International and regional actors like the United Nations or the European Court of Human Rights contributed to a large extent to this understanding. The real difficulty is to understand what the principles involve in a general sense and how they should be translated into practice when they tackle language matters⁵⁹. Indeed, the role played by the principle of equality in language matters is ambiguous. In certain circumstances, linguistic differences between persons may not be taken into account while sometimes the adoption of special measures in this field is required⁶⁰. On the one hand, the prohibition of discrimination on the ground of language is not absolute. On the other hand, States can not choose freely and in a discretionary way the language used in public matters. The principle of non-discrimination and the criterion of reasonability and proportionality limit their conduct in public affairs.

3.1.3.2. Equality and Non-Discrimination Based on Language.

C. The Principle of Equality and Non-Discrimination in Education.

Non-discrimination and equality are fundamental human rights principles. They could be used as alternative or complementary legal basis for language rights in education. The principle of non-discrimination and equality in education leads to the application of the Aristotelian formula to treat equally what is equal and treat differently what is different. In principle, with regard to the choice of a language by the State for public affairs, individuals whom

⁵⁶ HANNUM, H., *Contemporary Developments in International Protection of the Rights of Minorities*, "Notre Dame Law Review", vol. 66, n. 5, 1991, p. 1444.

⁵⁷ TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, op. cit., paragraph 39.

⁵⁸ TOMAŠEVSKI, K., *Preliminary Report of the Special Rapporteur on the Right to Education*, January 1999, (E/CN.4/1999/49) paragraph 57.

⁵⁹ DE VARENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 126.

language differs from that of the majority should be treated differently in order to be treated equally⁶¹. However, the principle of non-discrimination in public education does not guarantee an individual unrestricted freedom of choice as to the language of instruction. The prevention of discrimination is defined as “*the suppression or prevention of any conduct, which denies or restricts a person’s right to equality*”⁶². Equality and the right to non-discrimination require that individuals be protected against unreasonable differential treatment. Most of the major international and regional instruments include a non-discrimination provision⁶³. Article 1 of the ICERD does not include language as a ground for possible discrimination⁶⁴. The official interpretation of this text prescribes however that “*the term "discrimination" as used in the [ICERD] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as (...) language (...) and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*”⁶⁵ (emphasis added). Substantive equality and equality of opportunities cannot be reached if not every person receive the same quality of education⁶⁶.

Even though international law, regional law and State practice show quite consistently that the exclusive use of a language constitutes a differential treatment which may under certain circumstances be discriminatory⁶⁷, there is unfortunately no unanimity on the substance of linguistic discrimination in educational matters. Assuming the existence of a legitimate public interest on the basis of which the State may interfere at all, equality and non-discrimination imply that “*the State should not consider individual attributes (such as (...) religion or language) when it allocates its resources, provides services or excludes or burdens individuals, unless it is necessary and reasonable to take into account these factors*”⁶⁸. In other words, the individual should not be disadvantaged in public matters because of some of his or her fundamental personal characteristics, including language.

All governments must use at least one language for the conduct of their affairs. “*One can have a separation of church and State, but in advanced societies separation of language and State is simply not possible*”⁶⁹. By choosing a language, the State automatically establishes a differential treatment: an advantage for those who speak the language chosen and a

⁶⁰ DE WITTE, B., *Linguistic Equality: a Study in Comparative Constitutional Law*, “*Revista de Llengua I Dret*”, vol.3, 1985, 43-126 quoted by DE VARENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 55.

⁶¹ DE VARENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 57.

⁶² THORNBERRY, P., *International Law and the Rights of Minorities*, op. cit., p.125.

⁶³ See: Article 1, Paragraph 3 of the UN Charter, Articles 2 and 7 of the UDHR, Article 2 of the ICESCR, Articles 2, Paragraph 1 of the ICCPR, Article 24, Paragraph 1 of the ICCPR extends the non-discrimination clause to children and could be interpreted as suggesting the existence of positive language rights for children, the ICERD, Article 2 and 3 of the UNGA Declaration, Paragraph 2 of the Hague Recommendations, Article 14 of the ECHR, Paragraph 31 of the Copenhagen Document, Article 4 of the Framework Convention.

In addition to the non-discrimination provision of article 2, the ICCPR contains a “free standing” non-discrimination provision in article 26. Protocol no.12 of ECHR, once entered into force, will have the comparable effect.

⁶⁴ It defines discrimination as follows: “*Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*”.

⁶⁵ UNHCR General Comment 18 on non-discrimination, Paragraph 7.

⁶⁶ HENRARD, K., *Education and Multiculturalism*, op. cit., p.395.

⁶⁷ DE VARENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 78.

⁶⁸ *ibidem.*, p. 79.

⁶⁹ quoted by DE VARENNES, F., *Ethnic Conflicts and Language in Eastern European and Central Asian States: Can Human Rights Help Prevent Them?*, “*International Journal on Minority and Group Rights*”, vol. 5, 1997, p.140.

disadvantage for those for whom this language (or languages) is not the primary one. The degree of enjoyment of services or jobs offered by the State will depend on the ability of the individual to speak and understand the language chosen by the authorities⁷⁰. The official language becomes a condition for the full access to a number of services such as education. This occurs despite the fact that all citizens have contributed by their taxes to the functioning of the public service at stake. In certain situations, in order not to discriminate some of its citizens, the State should choose more than one language for the conduct of public affairs. In certain circumstances and under certain conditions (see *infra*), it would appear unreasonable and discriminatory not to provide also public services, *inter alia* education, in minority languages. Obviously the principle of non-discrimination does not mean that a State can not have an official or preferred language, neither does it mean that the State should accept all linguistics claims. It implies that, in some circumstances and under certain conditions, it would be unreasonable not to use additionally the other languages spoken in the country. “Equality is therefore an ambiguous concept; it can be invoked for claiming a treatment which is at the same time identical in substance but differentiated in (linguistic) form⁷¹”. Treating people equally with regard to their language of instruction does not imply a ‘one language for all policy’. Such an understanding of the principle of non-discrimination albeit adopted sometimes by States⁷², does not reach in practice, the aim of the rule. With unequal power relationships, ‘equal treatment’ reproduces unequal conditions⁷³. On the contrary, a sound equal treatment would consist in a public educational system, which provides to each student instruction through his or her primary language. Such equal treatment should be reflected in the access to jobs or other public services. In other words, “the public authorities, by using a single language in a plurilingual situation do not provide an equal treatment to all but operate what could be called a ‘cultural redistribution’ in favour of those persons who speak the official language”⁷⁴.

Equality and non-discrimination require that individuals be protected against unreasonable differential treatment. Distinctions are forbidden unless they are reasonable and necessary. But what are those criteria of reasonability? We will show later in this study the circumstances (or ‘State objectives’) that could permit a reasonable differential treatment in language matters. Assessing precisely how the principle of language discrimination must be understood and applied is a highly sensitive issue. “To prohibit someone from having access to State-funded education because his primary language is not the country’s official language clearly ‘nullifies’ that individual right to education, as does a practice where education in only one language acts as an absolute barrier to a child who has no understanding of the language used”⁷⁵. It is eventually up to the courts to assess the balance made by the State between its general interests (or priorities) and the protection and respect of rights of individuals who may be disadvantaged by the political choices. But, as we will see in the next section, this case law is quite weak.

⁷⁰ DE VARNENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 55.

⁷¹ DE WITTE, B., *Conclusion: A Legal Perspective* in VILFAN, S. (Ed.), op. cit., p.304.

⁷² See France’s policies for instance.

⁷³ SKUTNABB-KANGAS, T. and PHILLIPSON, R., *Wanted! Linguistic Human Rights*, op. cit., p.40.

⁷⁴ DE WITTE, B., *Conclusion: A Legal Perspective* in VILFAN, S. (Ed.), op. cit., p.304.

⁷⁵ DE VARNENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 85.

To sum up, equality and non-discrimination in public education may require the use of a minority language as a medium of instruction because of the disadvantage suffered by the member of the minority who are less fluent in the official language of the State. The obligation to provide public schooling in minority language is thus supported by more or less explicit international and regional provisions (see *supra*) and by the principles of non-discrimination and equality in public services *inter alia* education.

1. United Nations System - Case Law.

In the pre-United Nations period, the most relevant decision regarding non-discrimination in the choice of language for educational matters is certainly the *1935 Advisory Opinion on Minority Schools in Albania* in which the *Permanent Court of International Justice* examined the validity of an Albanian law abolishing all private schools of the country⁷⁶. The Greek minority of Albania considered that this law violated the principle of equality: all Greek schools were private and the public schools only used the Albanian language.⁷⁷ In this opinion the Court has formulated the two basic pillars of any adequate system of minority protection that we mentioned before⁷⁸. Firstly, persons belonging to racial, religious or linguistic minorities should be placed in every respect on a footing of *perfect equality* with the other nationals of the State. Then, these persons should be ensured *suitable means* for the preservation of their separate identity⁷⁹. The two pillars are closely interrelated and intertwined. P. THORNBERRY deems that “*there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being a minority*”⁸⁰.

The UN’ case law concerning minority language rights is essentially based on article 27 of the ICCPR. The *UN-Human Rights Committee* has dealt with many aspects of the provision but has never focussed specifically on minority language rights in educational policies. However, the Committee asks questions to reporting governments on minority education since many years. “*In view of the commitment to minority survival expressed in the article and the intrinsic relationship between cultural development and education*”, it seems that the general wording of article 27 covers educational matters too⁸¹. In *Ballantyne, Davidson and McIntyre v. Canada*, the *UN-Human Rights Committee* unfortunately seems to agree upon a purely formal interpretation of the principle of non-discrimination, *i.e.* equality is reached when everyone is

⁷⁶ *Advisory Opinion on Minority Schools in Albania (1935)*, Permanent Court of International Justice, Series A/B, n.64, quoted by DE VARENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 201.

⁷⁷ DE WITTE, B., *Conclusion: A Legal Perspective* in VILFAN, S. (Ed.), op. cit., p.304.

⁷⁸ HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.7.

⁷⁹ *ibidem.*, p.9.

⁸⁰ *Advisory Opinion on Minority Schools in Albania (1935)* quoted by TABORY, M., op. cit., p.221.

⁸¹ THORNBERRY, P., *International Standards*, op. cit., p. 11.

submitted to the same general legal requirements⁸². To sum up, in this case, the committee decided that, as the prohibition to use the English language applies to French speakers as well as English speakers, there has been no discrimination on the ground of language thus no violation of article 26 of the ICCPR. Such an interpretation of equality is very formal and it is believed that the committee would not adopt the same attitude if it had to decide upon a similar case today. Since the mid-1980s, French citizens of Breton origin have also submitted numerous cases under article 27 in combination with other provision of the ICCPR. These so-called 'Breton cases' concern the use of the Breton language in various fields including education. In analysing them, the *UN-Human Rights Committee*, unfortunately again, seems to support the French position that a general law, applicable to everyone, requiring the exclusive use of French within the activities of public authorities meant that everyone was treated equally. But none of the 'Breton cases' have been examined on the merits because of the French 'declaration-reservation' regarding article 27 of the ICCPR.

These two decisions contradict the committee's own definition of non-discrimination established in its *General Comment 18* (see before). As some persons are permitted to use their mother tongue and other not, a distinction and an additional burden for the latter is created.

2. European System- Case Law.

The *European Court of Human Rights (ECtHR)* does not give any specific opinion on minorities right to mother tongue education. It does not go beyond a commitment to the principle of non-discrimination reflected in the *Belgian Linguistic Case* and to pluralism in the educational process reflected in *Kjeldsen, Busk Madsen and Pedersen v. Denmark*⁸³. The well-known *Belgian Linguistic Case* clarifies the possible linguistic aspects of the right to education. It should be noted that the issue of the *Belgian Linguistic Case* was not analysed in light of minority protection, as the ECHR does not indeed encompass any specific provision related to minority protection. In this case, the Court has examined the application of French-speaking persons living in the Dutch (*i.e.* Flemish) unilingual territory, who complain that the Belgian State violates both their right to family life and the principle of non-discrimination by obliging all children to be educated exclusively in Dutch at local public schools. The central issue was the extent to which article 14 of the ECHR (*i.e.* non discrimination) could be applied in an effort to protect the positive linguistic rights of the applicants. The Court, in examining whether the Belgian legal provisions that were attacked satisfy these criteria, concluded that their purpose was to achieve linguistic unity within the two large regions of Belgium in which a large majority of the population speaks only one of the official languages. It concluded that the policies were justified and reasonable, thus not discriminatory. "*Article 14, even when read in conjunction with Article 2 of the [First] Protocol, does not have the effect of*

⁸² Ballantyne, Davidson and McIntyre v. Canada (CCPR/C/47/D/359/1989 and 385/1989/Rev.1), Paragraph 11(5).

⁸³ THORNBERRY, P., *International Standards*, op. cit., p. 10.

guaranteeing to a child or to his parent the right to obtain instruction in a language of his choice. The object of these two articles, read in conjunction, is more limited: it is to ensure that the right to education shall be secured by each contracting party to everyone within its jurisdiction without discrimination on the ground, for instance, of language⁸⁴". With regard especially to the language of instruction, the Court interpreted article 2 of the First Protocol in a quite narrow way deciding that it does not give any indication about the language in which education should be conducted. It does not recognise the right to education in one's own language. It has been interpreted by the ECtHR as only meaning that subjects have the right to avail themselves of the means of instruction available at a given time, and not to have any particular type of education established⁸⁵. The right to education does not in itself imply the right to establish or receive subsidisation for schools offering education in the language of choice⁸⁶ (*infra*). It does not imply any obligation for States to create a particular type of educational system. But the Court added "*the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be*". Moreover, it added that "*for the 'right to education' to be effective, it is further necessary that, inter alia, the individual who is the beneficiary should have the possibility of drawing profit from the education received*". Does this mean that the child has the right to *understand* the education received? The Court seems to accept that, in some cases and under certain circumstances, limiting State education to one language could be discriminatory⁸⁷. Article 2 does not require States to respect parents' linguistic preferences in matters of education, as it has to respect their religious and philosophical convictions⁸⁸. Broadly interpreted, these 'philosophical convictions' could include linguistic preferences⁸⁹ but generally it is decided that they do not encompass language. In the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark* concerning mandatory sexual instruction in public schools, the ECtHR emphasised the important role played by education in a democratic society. The ECHR's First Protocol "*aims (...) at safeguarding the possibility of pluralism in education*" and the Court declared that "*it is above all through State teaching that this aim must be realised*". This could be a first step towards the acknowledgement of the importance of multiculturalism and multilingualism in education. Another interesting regional decision in this field is the *Lau v. Nichols*' case of the American Supreme Court but, as the aim of this paper is to focus on instruments to which Turkey is –or should become– party, we will not analyse this latter decision here⁹⁰.

D. Criteria of State Language Choices.

⁸⁴ ECtHR *Belgian Linguistic Case*, Judgement of 23 July 1968, Series A, n. 6, paragraph 11.

⁸⁵ NOWAK, M., *The Right to Education*, op. cit., p.254 and SKUTNABB-KANGAS, T. and PHILLIPSON, R., *Wanted! Linguistic Human Rights*, op. cit., p.15; PHILLIPSON, R. and SKUTNABB-KANGAS, T., *Linguistic Rights, Past and Present* in SKUTNABB-KANGAS, T. and PHILLIPSON, R. (Eds.), *Linguistic Human Rights – Overcoming Linguistic Discrimination*, op. cit., p.86.

⁸⁶ HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.119.

⁸⁷ The Court specifies that "*Article 14 [of the ECHR] does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention*".

⁸⁸ TABORY, M., op. cit., p.203.

⁸⁹ HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.120.

Even if it acknowledged that language rights require protection, pragmatic choices have to be made. States can not - and must not- accept all claims. State language policy may not be discriminatory if it relies on certain justified and reasonable criteria. These criteria vary from State to State and depend on the social and historical background of the country at stake. There must be a relationship of proportionality between the so-called 'benefits and costs' and our purpose is to see what kind of legitimisation is accepted in current human rights law. In any case, it is to be recalled that 'equality of treatment' should not be confused with 'identical treatment'. The objective is to find the right balance⁹¹. Number of factors can be taken into account when evaluating the reasonability and the legitimacy of a minority claim. As we will see, demographic concentration, national unity, financial and professional resources or the desire to correct oppressing State practices of the past should be taken into account when drawing the balance. However, other factors are sometimes mentioned too but they are less relevant for the present study⁹². In other words, there is no automatic 'right to language' for minorities but there is only a right 'when appropriate'⁹³. In this regard, a 'sliding scale approach' offers a compromise between the claim for mother tongue education and its practical restrictions⁹⁴.

4. Demographic Concentration

One of the major factors that must be taken into consideration when assessing the reasonability of State's language policies, is the territorial concentration and the number of people whom are denied a benefit or an advantage enjoyed by others. The need to implement language policies is directly proportional to the number of speakers of any particular language. If a relatively large number of individuals use a particular language in a given State and if they have expressed a particular need, their voice should be heard by public authorities⁹⁵. Failure to do so may be a violation of the right to equality and non-discrimination based upon language. It will moreover reveal democratic shortcomings. If there is a sufficiently large and concentrated number of individuals speaking a non-official language, it is more likely

⁹⁰ For a commentary of this decision, see GREEN, L., op. cit., p.661.

⁹¹ SIEMIENSKI, G. and PACKER, J., *Integration Through Education: the Origin and Development of the Hague Recommendations*, "International Journal on Minority and Group Rights", vol. 4, 1997, p.193.

⁹² The UNESCO study on the use of vernacular language in education mentions other elements that could enter into account when assessing a State policy in language matters: the potential inadequacy of vocabulary, the shortage of educational materials, the multiplicity of languages in a locality, the multiplicity of languages in a country, the shortage of suitable trained teachers, the popular opposition to use of mother tongue,... (UNESCO, *The use of Vernacular Languages in Education*", op. cit., p. 50-57).

⁹³ DE VARNES, F., *The Linguistic Rights of Minorities in Europe*, op. cit., p.19.

⁹⁴ HENRARD, K., *Education and Multiculturalism*, op. cit., p.398.

⁹⁵ SIEMIENSKI, G., op .cit., p.178.

Article 10 of the Framework Convention goes in that sense when it states that "*In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those*

that many of these persons are not fluent in the official language because they have few opportunities to communicate with members of the ‘majority’. The geographical concentration of ethnic groups is a factor that usually reinforces the sense of identity of the groups⁹⁶. If the financial means are sufficient, it appears unreasonable not to provide some level of State services, such as public schools, in their language⁹⁷. It is eventually always a question of finding a fair balance given the fact that no clear ‘numerical’ criterion is established on this point.

5. National Unity or Conflict Prevention?

Do many languages divide a nation whereas a ‘one language policy’ unites it? The relationship between language and nationalism has long been a matter of studies and controversies since the tower of Babel⁹⁸. The number of minority’s stipulations in peace treaties since the beginning of the 20th century made the link between minority protection and ‘peace and security’ quite obvious. According to the traditional nation-State ideology (or ‘nation-building ideology’), the ideal State is homogeneous, consists of one ethnic/nation group and has one language⁹⁹. Such ‘one language for all’ policy (including in educational matters) is often perceived, even symbolically, as promoting State’s political and social unity¹⁰⁰. The dominant group seeks to deprive the non-dominant group of its own identity, culture, language or religion¹⁰¹. The process is thus highly assimilationist: unity means uniformity. As language is a significant component of culture and of group identity, fostering language rights is seen as a threat to political and territorial unity and stability. It is believed that granting linguistic rights will lead to quests for autonomy and independence. This threat is not evident. Indeed, the *UN-Sub-Commission* stipulated that language rights could and should be exercised “*so long as these rights are not used for the purpose of threatening or undermining the unity or security of States*”¹⁰². A ‘one language for all’ policy could be extremely risky if it’s adopted in a context where a large number of persons speaking a minority language are concentrated in the same region. Language exclusion is then a divisive rather than a unifying factor.

persons and the administrative authorities" but this is "to be implemented without prejudice to the learning of the official language or the teaching in this language".

⁹⁶ CAPOTORTI, F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, New York, United Nations Study Series, 1991, p.45.

⁹⁷ DE VARENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 93.

⁹⁸ On this question, see SAFRAN, W. *Nationalism* in FISHMAN, J.A. (Ed.), *Handbook of Language and Ethnic Identity*, Oxford University Press, 1999, p.77; BARBOUR, S. *Nationalism, Language, Europe* in BARBOUR, S. and CARMICHAEL, C., *Language and Nationalism in Europe*, Oxford University Press, 2000.

⁹⁹ PHILLIPSON, R., RANNUT, M., SKUTNABB-KANGAS, T., *Introduction*, op. cit., p.4.

¹⁰⁰ "In many countries [like France or Turkey, for instance] the view is widely held that the consolidation of the unity of the people, the spiritual integrity of the nation and the need to create a sense of national identity would require that only one language be declared the official language" (CAPOTORTI, F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, op. cit., p.39).

¹⁰¹ EIDE, A., *Minority Situations: In Search of Peaceful and Constructive Solutions*, "Notre Dame Law Review", vol.66, no.5, 1991, p.1323.

¹⁰² quoted by GROMACKI, J.P., op. cit., p.540.

International minority instruments often insist on the fact that the legal recognition of minorities and the extension to such minorities of certain rights do not permit any activity which is contrary to the principles of sovereignty and territorial integrity of States (see, per instance, article 21 of the Framework Convention and article 5 of the European Charter). Moreover the Preamble of the UNGA Declaration establishes that “*the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live*” (emphasis added). Paragraph 30 of the Copenhagen Document states that

Moreover, assimilationist policies aiming at a homogeneous State have rather sinister and violent antecedents. According to J. PACKER, if assimilation is forced, then any apparent ‘stability’ will be “*hollow, unreliable and ultimately temporary*”¹⁰³.

On the contrary, the principle of non-discrimination and minorities’ language rights may be a way of *preventing* conflicts. Language rights may be potential causes of conflict in situations where groups *lack* linguistic, economic or political rights¹⁰⁴. National experiences in multilingual States -like the Belgian or the Canadian ones- teach us that the recognition of minority rights are viable alternatives to conflicts and instability. Respect for human rights and minority rights are fundamental methods of conflict prevention. A strong argument supporting this opinion is that the *OSCE-High Commissioner on National Minorities*, a major instrument of conflict prevention at the earliest possible stage, has recently published a report on minorities’ linguistic rights and related issues¹⁰⁵. The High Commissioner sees the protection of linguistic rights as a means to ensure “*domestic tranquillity and human rights*” and puts special attention both on the language of instruction and on the school’s curriculum¹⁰⁶. The *Council of Europe’s Vienna Summit* (1993) also pointed out that “*the protection of national minorities is an essential element of stability and democratic security in our continent*”¹⁰⁷. R. STAVERNHAGEN pointed out that “*in most cases of open conflict in the world today, the State is not an impartial onlooker or arbiter, but rather a party to the conflict itself*”¹⁰⁸.

It is therefore desirable for the government to search, in each case, an appropriate and fair balance in order to safeguard the fundamental rights of persons speaking minority languages as well as the interests of the nation as a whole. In any case, it seems clear that the national interests are best served by optimum advancement of education, even if this may imply mother tongue education¹⁰⁹.

6. *Financial Resources.*

Minorities are entitled to access to education on the same basis as the rest of the population. However, we saw that their specific identity requires differential treatment thus specific and additional resources. The additional cost to

“*respect for the rights of persons belonging to national minorities as part of universally recognised human rights is an essential factor for peace, justice, stability and democracy in the participating States*”.

¹⁰³ PACKER, J., *The Content and Aim of Minority Education from the Perspective of International Instruments*, “International Journal on Minority and Group Rights”, vol. 4, 1996, p.173.

¹⁰⁴ PHILLIPSON, R., RANNUT, M., SKUTNABB-KANGAS, T., *Introduction*, op. cit., p.7.

¹⁰⁵ see VAN DER STOEL, M., *Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area*, March 1999, (<http://www.osce.org/>).

¹⁰⁶ *ibidem* (see especially questions 4 – 6 on the language in education).

¹⁰⁷ quoted by STOBART, M., *The importance of Minority Education Rights in the New Europe*, “International Journal on Minority and Group Rights”, vol.4, 1996, p. 156.

¹⁰⁸ STAVERNHAGEN, R., *Ethnic Conflict and Human Rights – their Inter-relationship* in RUPESINGHE, K. (Ed), *Ethnic Conflict and Human Rights*, Tokyo, United Nations University, 1988, p.19 quoted by DE VARENNES, F., *Equality and Non-discrimination: Fundamental Principles of Minority Language Rights*, “International Journal on Minority and Group Rights”, vol. 6, 1999, p.309.

¹⁰⁹ UNESCO, *The use of Vernacular Languages in Education*, op. cit., p.50.

governments of the special arrangements necessary for providing instruction in minority languages is another factor that may impede mother tongue education¹¹⁰. The existence of financial, human or material resources is an important criterion to assess if a State's policy is discriminatory or not. There is a need to balance the limited financial means of a State and the aim to realise an educational policy respectful of minority linguistic rights (*i.e.* an 'additive bilingualism policy'¹¹¹). The existing funds must be used in a non-discriminatory and equitable manner, as it is an issue of equal access and opportunity¹¹². This is an issue at all levels of education but institutions of tertiary education are obviously relatively more costly to establish and maintain¹¹³. Education should be a long-term priority investment because of its impact and contribution to the development of a democratic society. In any case, the mere lack of funds can not lead to the conclusions that the basic principles are no longer relevant for future educational policies¹¹⁴. K. TOMAŠEVSKI deems that "a comprehensive right-based strategy for education would elevate the priority for education in budgetary allocation and enhance regulatory and institutional coherence as human rights obligations pertain to all parts of the government"¹¹⁵. She also recommends that budgetary allocation for education be increased to 6% of the GNP, as recommended by UNESCO. She adds "education can not be isolated from macro-economic and fiscal policies, nor can funding for education remain unaffected by other claims upon limited public funds or immune to corruption"¹¹⁶.

3.1.3.3. Special Measures

Minorities' language rights in education could also be supported by the developing idea of 'special measures'. Minority protection calls for more than mere tolerance of the different cultures within a State. 'Special measures' are the so-called 'second pillar' of an adequate system of minority protection. The nature of those measures depends on the special needs of the minority concerned. They aim at achieving *de facto* equality (or 'substantive equality') between members of minorities and the rest of the population. They are granted to make it possible for minorities to preserve their identity and are just as important in achieving equality of treatment as non-discrimination¹¹⁷. The first pillar namely the prohibition of discrimination remains however fundamental and constitutes a necessary prerequisite for any further special measure. The second pillar builds thus on the 'acquis' of the first one and goes beyond this latter¹¹⁸.

¹¹⁰ CAPOTORTI, F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, op. cit., p.84.

¹¹¹"Additive bilingualism" is defined as: "a situation where a second language is learnt by an individual or a group without detracting from the maintenance and development of the first language. A situation where a second language adds to, rather than replaces the first language" quoted by KONTRA, M., *Some Reflections on the Nature of Language and its Regulation*, "International Journal on Minority and Group Rights", vol.6, 1999, p.283.

¹¹² SIEMIENSKI, G. and PACKER, J., op. cit., p.193.

¹¹³ SIEMIENSKI, G., op. cit., 1997, p.180.

¹¹⁴ VAN DER STOEL, M., *Vienna Seminar on Minority Education Issues – 22/23 November 1996*, "International Journal of Minority and Group Rights", vol. 4, 1997, p. 154.

¹¹⁵ TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, op. cit., Executive Summary.

¹¹⁶ *ibidem*, Paragraph 31.

¹¹⁷ UN Fact Sheet n. 18 (Rev.1) on Minority Rights.

¹¹⁸ HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.9.

The increasing attention for special measures of minority protection is reflected once again in article 27 of the ICCPR¹¹⁹ and in other international and European instruments¹²⁰. It is however still a highly contested issue whether or not article 27 of the ICCPR imposes positive obligations on States to actively support minorities on their territory. The General Comment on article 27 recognises that it creates an obligation for States to take positive measures in support of linguistic minorities. In this regard, F. CAPOTORTI, in his well-known study on minorities argues:

“To enable the objectives of [article 27] to be achieved, it is essential that States should adopt legislative and administrative measures. It is hard to imagine how the culture and the language of a group can be conserved without, for example, a special adaptation of the education system of a country (...) A passive attitude on the part of [the States] would render such rights inoperative”¹²¹.

But what is the exact content of ‘special measures’? G. ALFREDSSON, referring to the definition established by the *Permanent Court of Justice*¹²², defines ‘special rights’ as:

“The requirement to ensure suitable means, including differential treatment, for the preservation of minority characteristics and traditions, which distinguish them from the majority of the population. Among these means are the implementation of special measures or positive action involving the rendering of concrete services, such as schools providing education in the majority language”¹²³.

The *UN-Human Rights Committee* refers to special measures as to a “*certain preferential treatment in specific matters as compared with the rest of the population*”¹²⁴. Special rights should not be seen as privileges since they are “*rooted in the principle of equality just as non-discrimination*.”¹²⁵ In principle, ‘special rights’ are allowed on a temporary basis and must be discontinued when equality is attained¹²⁶. But in practice, long-term protection of minorities and substantive

¹¹⁹ *“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”*(article 27 of the ICCPR).

¹²⁰ See, for instance, Article 1, paragraph 4, Article 2, paragraph 2 and article 4 of the ICERD, Article 27 of the ICCPR, Article 13 of the ICESCR, Article 5, paragraph 2 of the UNESCO Convention, Article 4, paragraph 2 of the UNGA Declaration.

Article 30 of the CRC is essentially identical to article 27 of the ICCPR. It could therefore be submitted that article 30 of the CRC also imposes positive obligations on the States parties to this convention in order to ensure the protection and the respect of the minority identity, culture and language. Paragraph 4 of the Hague Recommendations indicates that “*States should approach minority Education rights in a proactive manner. Where required, special measures should be adopted by States to actively implement minority language education rights to the maximum of their available resources, individually and through international assistance and co-operation, especially economic and technical.*” Paragraph 31 of the Copenhagen Document and Article 12 and Article 4, paragraph 2 of the Framework Convention also encourage States to act in a proactive manner.

¹²¹ CAPOTORTI, F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, op. cit., p.37.

¹²² See its *Advisory Opinion on Minority Schools in Albania (1935)*.

¹²³ ALFREDSSON, G., *Minority Rights: Protection by the United Nations*, “*Human Rights Law Journal*”, vol.14, No. 1-2, 1993, p.2.

¹²⁴ See Paragraph 10 of the UNHCR General Comment 18 on non-discrimination.

¹²⁵ *ibidem.*, p.2.

¹²⁶ BEYANI, C., *The Prerequisites of Education in Education Rights and Minorities*, “*Minority Rights Group Report*”, 1994, p. 16.

equality will require quite permanent and durable measures (such as the maintenance of educational institutions), as the group will often remain in a weaker position.

Several controversies underlie the concept of 'special rights'. Unfortunately, the scope of this paper does not allow us to discuss them in depth here. The first discussion relates to the collective dimension of the measures which itself relates to 'group rights' and to the debate surrounding them¹²⁷. 'Special measures' for minorities tend to have a certain group dimension and group rights are necessary to guarantee a number of rights, including the right to education¹²⁸.

There is another controversy among scholars. It is agreed that 'special measures' are measures that put members of minorities in a substantively equal position as the rest of the population. K. HENRARD¹²⁹ argues that special rights "aim at granting to minorities analogous rights as those granted to the rest of the population" and that "these rights put members of minorities in a substantively equal position as the rest of the population". On the contrary, A. EIDE and F. DE VARENNES argue that special measures are "measures for the protection of minorities, which don't have any corresponding measures for majorities" and which aimed at restoring equality "where, in the past, there had been inequality or where structural factors make equality difficult to preserve"¹³⁰. In this latter view, State-funded education in any other language than that of the majority should not be seen as a 'special measure' unless the corresponding right for the majority does not exist (which is unlikely).¹³¹ According to F. DE VARENNES, State-funded minority education would flow 'just' from the principle of non-discrimination. However, neither State practice neither international binding instrument do provide such funding obligation by now. The opinions of these latter scholars is supported by the *UN-Human Rights Committee*, which points out that "where the general conditions of some groups prevent or impair their enjoyment of human rights (...) specific action should be taken even if it might amount to preferential treatment"¹³².

The respect for the language of individuals in public services can not thus be considered as a 'special measure' or privilege; where appropriate and reasonable, respect for language flows from the principle of non-discrimination. The principle of non-discrimination should not be understood as implying only negative measures or prohibitions. It should also be seen as driving to positive and affirmative action by the State. The problem remains whether this principle can be invoked in order to favour differences of treatment as between majorities and minorities or if the principle is concerned just with individual rights and not with majority/minority type of relationships¹³³. Differences in the treatment of minorities -and of persons belonging to them- are justified if they aim at promoting effective

¹²⁷ "Group rights" are defined as rights which are granted to groups as such, and of which the group as group is the legal subject. "Collective rights" are defined as rights given to individuals but in their capacity of member of a certain group (HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.153).

¹²⁸ ALFREDSSON, G., *Minority Rights Handbook*, op. cit., p.27.

¹²⁹ HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.224.

¹³⁰ EIDE, A., *Minority Situations*, op. cit., p.1334 and DE VARENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 120.

¹³¹ "If the State provides to some of its inhabitants a service (...), such as education in their primary language, then it must do so in a non-discriminatory way. It is not strictly speaking a "special right": the State (...) has no obligation to do anything, but if it chooses to provide any (...) service, it must do so without discrimination" (DE VARENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 119).

¹³² The *UN-Human Rights Committee* is quoted by: EIDE, A., *Minority Situations*, op. cit., p.1342.

¹³³ DE VARENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 118.

equality and the welfare of the community as a whole¹³⁴. This form of special measures may have to be sustained over a prolonged period in order achieve sound substantive equality.

3.1.3.4. Cultural Rights and the Right to Identity.

In this section we will search for other additional legal basis to support the idea of mother tongue education for persons belonging to minorities. Does the developing 'cultural rights' provide a complementary legal basis for mother tongue education or is the growing recognition of the 'right to identity' of better help in this regard?

Contemporary legal instruments do not define 'culture' (though they point out the importance of education as a prerequisite to culture) and seem to prefer to regulate 'cultural rights'¹³⁵. Cultural rights constitute a specific category of rights contained *inter alia* in article 27 of the UDHR¹³⁶ and article 15 of the ICESCR¹³⁷. The UNESCO has elaborated a definition of 'cultural rights' as the rights of people to assert themselves against all forms of domination, including cultural domination (i.e., all individuals or collectivities have the right to self-affirmation through their cultural identity)¹³⁸. Cultural rights include the right of members of minorities to preserve and develop their culture. Cultural rights are, by their nature, collective rights and "*depend upon a context of other individuals asserting similar rights to merit protection*"¹³⁹.

Education is obviously fundamental for the preservation of any culture, minority or majority. Schools are the primary vehicle through which majorities have attempted to assimilate minorities. Therefore minorities view the right to maintain their own educational institutions as essential for their self-preservation¹⁴⁰. T. SKUTNABB-KANGAS analyses in depth the risk of 'linguicism' (or what she calls 'linguistic genocide') through education¹⁴¹. She makes constantly the point that while education could be a crucial instrument for the preservation of identities it is, on the

¹³⁴ UN Fact Sheet n.18 (Rev.1) on Minority Rights.

¹³⁵ THORNBERRY, P., *International Law and the Rights of Minorities*, op. cit., p.187.

¹³⁶ Article 27 of the UDHR: "(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

¹³⁷ Article 15 of the ICESCR: "1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

¹³⁸ UNESCO, *Cultural Rights as Human Rights*, no.3, 1970 quoted by TABORY, M, op. cit., p.185.

¹³⁹ GROMACKI, J.P., op. cit., p.548.

¹⁴⁰ HANNUM, H., op. cit., p. 1441.

¹⁴¹ Ethnicism and linguicism are defined as "Ideologies, structures and practices which are used to legitimate, effectuate and reproduce an unequal division of power and resources (both material and non material) between groups which are defined on the basis of 'race' ethnicity/culture or language" (SKUTNABB-KANGAS, T., *Language, Literacy and Minorities*, op. cit., p.11).

contrary often used, by the dominant group, as an ideological vehicle of assimilation into the dominant culture¹⁴². Linguistic and cultural human rights are, according to her, prerequisite to prevent ethnic and linguistic genocide¹⁴³. The European Commission recognised the link between language and culture when, in the context of mother tongue education for children of migrant workers, it provided that “*the Commission justifies the teaching of mother tongues to migrants as part of the TEU’s guarantees of protection of national identities, by extending the concept of national identity to include the cultural identities of all citizens of a member State*”¹⁴⁴.

Do language rights constitute a part of the broader category of cultural rights? If so, what is the relation between them? Culture is often interpreted as including language among a large variety of other elements. But while language is undoubtedly a part -and an important vehicle and basis- of culture, it is unclear whether certain aspects of the use of minority language (including its use in education) fall into this category¹⁴⁵. According to M. NOWAK, the term ‘cultural life’ should be understood in a broad sense. This term covers –as a sort of precondition- the right to pass on the culture by way of educating following generations, whether by setting up separate schools or by the corresponding respect for the cultures of minorities in public schools¹⁴⁶. The right at stake is not the use of language *per se* but it is the ability of the group to preserve its specific culture¹⁴⁷. But cultural rights do not seem to constitute a sufficiently strong legal basis for mother tongue education. Their exact content is still highly discussed and unclear. However they definitely constitute an additional and complementary legal basis for our study.

The ‘right to identity’ is another –if not the major- concept of an adequate system of minority protection. “*Mother tongue education is relevant in two different but related ways: the right to identity of minorities and the principle of substantive equality*”¹⁴⁸. Education has an essential role in the transmission, maintenance and development of identities. The right to identity is not explicitly named in article 27 of the ICCPR but it is generally acknowledged that article 27 enshrines an absolute prohibition of forced assimilation and a right to identity for minorities¹⁴⁹. This point is also made by the UNGA Declaration, parts of which are considered to be an interpretation of article 27¹⁵⁰. Many recent international instruments refer to the importance of the right to identity. They express a clear trend towards the protection and

¹⁴² See especially SKUTNABB-KANGAS, T., *Linguistic Genocide in Education or World Wide Diversity and Human Rights?*, London, Lawrence Erlbaum Associates, 2000.

¹⁴³ SKUTNABB-KANGAS, T. *Education of Minorities* in FISHMAN, J.A. (Ed.), *Handbook of Language and Ethnic Identity*, Oxford University Press, 1999, p.57.

¹⁴⁴ NIC SHUIBHNE, N., op. cit., p.111-112.

¹⁴⁵ see SOHN who argues that the right to enjoys one’s culture includes the right to have schools and cultural institutions (mentioned in HANNUM, H., op. cit., p. 1444).

¹⁴⁶ NOWAK, M., *U.N. Covenant on Civil and Political Rights CCPR: Commentary*, op. cit., p.501.

¹⁴⁷ HANNUM, H., op. cit., p. 1442.

¹⁴⁸ HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.257.

¹⁴⁹ *ibidem.*, p.165.

¹⁵⁰ Article 1 of the UNGA Declaration provides that “*States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity (...)* States shall adopt appropriate legislative and other measures to achieve those ends”.

promotion of cultural diversity both internationally and internally within States¹⁵¹. As language is one of the most fundamental components of human identity, respect for a person's dignity is intimately connected with respect for the person's identity and language¹⁵². Language and culture are thus intimately connected to individual and collective identities and the right to maintain these identities is exercised, above all, through education¹⁵³. In this regard, the first paragraph of the Hague Recommendations acknowledges that "*the right of persons belonging to national minorities to maintain their identity can only be fully realised if they acquire a proper knowledge of their mother tongue during the educational process*". Education is crucially important for the preservation and promotion of particular identities. K. TOMAŠEVSKI has consistently held that the right to education "*entails adaptation to each child rather than forcing children to adapt themselves to whatever education may be provided (...) Adaptation necessitates translating into reality the principle of non-discrimination*"¹⁵⁴.

Thus both cultural rights and the right to identity broadly encompass mother tongue education and constitute additional and complementary legal basis for minorities' language rights. But again, although language is undoubtedly an essential component of identity and culture, it remains still controversial if both cultural rights and the right to identity constitute sufficiently independent legal basis for language rights in education. The issue of an 'adapted' public education system remains an important topic of discussion. Given the state of current international instruments and case law, we do believe that choosing cultural rights and the right to identity as the only legal basis for mother tongue education is still too weak.

3.2. BENEFITS OF MOTHER TONGUE EDUCATION...

3.2.1. Education of and in Minority Language - At all Levels of Education?

It is essential to provide minority children full access to majority or official languages for purposes of democracy and equal participation. The principle of substantive equality requires that "*the conditions of merit as a basis for access to higher education be diminished and put into perspective*"¹⁵⁵. Access to university education is especially aimed here as such access

¹⁵¹ EIDE, A., *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (E/CN.4/Sub.2/AC.5/2001/2), paragraph 27. Other instrument promote the right to identity, see paragraph 32 and 33 of the Copenhagen Document, Article 5, paragraph 1 of the Framework Convention.

¹⁵² *Explanatory Note to the Oslo Recommendations regarding the Linguistic Rights of National Minorities*, Foundation on Inter-Ethnic Relations, February 1998.

¹⁵³ *Explanatory Note to the Hague Recommendations Regarding the Education Rights of National Minorities*, Foundation on Inter-Ethnic Relations, October 1996.

¹⁵⁴ TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, op. cit., paragraph 44.

¹⁵⁵ HENRARD, K. *Education and Multiculturalism*, op. cit., p.403.

is based on merit¹⁵⁶. Literacy is a necessary basis for the economic, social and cultural development both on the national and the individual level¹⁵⁷. The right to be trained in minority language and to be taught minority language appears thus to be of central importance for minority education. A. EIDE, commenting the UNGA Declaration, argues that "*States shall encourage the promotion of the linguistic identity of the minority concerned, measures are required for persons belonging to minorities to learn their mother tongue (which is a minimum) or to have instruction in their mother tongue (which goes some steps further)*"¹⁵⁸. Should mother tongue instruction be implemented at all levels of education?

The discussion on mother tongue education was initially focussed on the first years of education (implying a shift after a few years, to the official language as a medium of instruction). There is now an increasing insistence on the importance of mother tongue education at all levels of education (including tertiary education) because of its enduring impact on the cognitive and socio-cultural development of students¹⁵⁹. There is at least a need to give preponderance to the minority language in primary schools. Later, some compromise may be found although, at the same time, "*there too minority language has to play a key role*"¹⁶⁰. According to the Hague Recommendations, as the first years of education are of such pivotal importance in a child's development, the medium of teaching at pre- school, kindergarten and primary levels should ideally be the child's language¹⁶¹. The minority language should be taught as a subject on a regular basis. But the official State language should also be taught as a subject on a regular basis "*preferably by bilingual teachers who have a good understanding of the children's cultural and linguistic background*"¹⁶². Towards the end of the primary period, "*a few practical or non-theoretical subjects should be taught through the medium of the State language*"¹⁶³. With regard to secondary schools, paragraph 13 of the Hague Recommendations sets out that "*a substantial part of the curriculum*" should be taught through the medium of the minority language. And as far as vocational schools are concerned, "*vocational training in the minority language should be made accessible in specific subjects when persons belonging to the national minority in question have expressed a desire for it, when they have demonstrated the need for it and when their numerical strength justifies it*"¹⁶⁴. Finally, even if it is highly controversial, the recommendations provide that "*persons belonging to national minorities should have access to tertiary education in their own language when they have demonstrated the need for it and when their numerical strength justifies it*"¹⁶⁵. In the case of tertiary education, the principles of equal access and non-discrimination must be taken into consideration as well as the other criteria analysed above. However, the

¹⁵⁶ "Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit" (article 26 of the UDHR) and "Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means" (article 13, paragraph 2 (c) of the ICESCR).

¹⁵⁷ PHILLIPS, A., *Language, Literacy and Minorities*, "Minority Rights Group Report", Nov. 1990, p.5.

¹⁵⁸ EIDE, A., *Commentary to the Declaration*, op. cit., paragraph 59.

¹⁵⁹ HENRARD, K., *Education and Multiculturalism*, op. cit., p.395.

¹⁶⁰ VAN DER STOEL, M., *Vienna Seminar on Minority Education Issues*, op. cit., p. 154.

¹⁶¹ Paragraph 11 and 12 of the Hague Recommendations.

¹⁶² Paragraph 12 of the Hague Recommendations.

¹⁶³ Paragraph 12 of the Hague Recommendations.

¹⁶⁴ Paragraph 15 of the Hague Recommendations.

¹⁶⁵ Paragraph 17 of the Hague Recommendations.

provision of tertiary education in the minority language is not synonymous with the establishment of parallel infrastructures; creative solutions could be found¹⁶⁶. In any case, it seems that States are not specifically required to provide both education *in* and *of* minority language¹⁶⁷. The limits reviewed, in particular those related to sufficient financial, professional and material resources must always be taken into account in the assessment of mother tongue education up to the university level.

3.2.2. Need to Learn Also the Official Language: A Balanced Education System.

Almost all international instruments, while providing for instruction *in* or *of* minority language, refer expressly to the need both to learn the official language of the State and “*to gain knowledge of the society as a whole*” (article 4 of the UNGA Declaration). Their approach is thus highly integrative and finding the right balance requires co-operation on all sides. As we mentioned before, there is nothing intrinsically wrong if a State chooses to require everyone to learn the official language. The error would be to make it the exclusive language for public education. A balance must be maintained between the exigencies of developing and preserving the child’s identity and the necessity to ensure that he or she will be able to integrate into the national society as full and equal citizen¹⁶⁸. Such integration requires the acquisition of a sound knowledge of both the wider national society and the official language thus, the attainment of the highest possible level of bilingualism¹⁶⁹.

Paragraphs 12 and 13 of the Hague Recommendations set out that the official language should be taught at the primary and secondary level¹⁷⁰. With regard to the secondary level, it is specified that “*throughout this period, the number of subjects taught in the State language, should gradually be increased*”. Many scholars now recognise that bilingualism or multilingualism is a necessary educational goal for all linguistic minority children and a desirable goal for all children¹⁷¹. ‘Additive bilingualism’ should now become the societal norm, keeping in mind that the mother tongue should be the so-called ‘first language’¹⁷². Additive bilingualism also results in an empowerment of students belonging to minorities¹⁷³.

¹⁶⁶ *Explanatory Note to the Hague Recommendations*, op. cit.; “*The right of persons belonging to national minorities to maintain their identity can only be fully realised if they acquire a proper knowledge of their mother tongue during the educational process. At the same time, persons belonging to national minorities have a responsibility to integrate into the wider national society through the acquisition of a proper knowledge of the State language*” (Paragraph 1 of the Hague Recommendations).

¹⁶⁷ VAN DER STOEL, M., *Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area*, op. cit.

¹⁶⁸ SIEMIENSKI, G., op. cit., p.183.

¹⁶⁹ *Explanatory Note to the Hague Recommendations*, op. cit.

¹⁷⁰ “*The Official State language should also be taught as a subject on a regular basis preferably by bilingual teachers who have a good understanding of the children’s cultural and linguistic background*”.

¹⁷¹ SKUTNABB-KANGAS, T., *Language, Literacy and Minorities*, op. cit., p.8.

¹⁷² See definition at footnote 50.

¹⁷³ HENRARD, K. *Education and Multiculturalism*, op. cit., p.397.

Other crucial elements for minority education relate to both the content of the curriculum and the training of teachers. Although both topics are relevant for the present study, the purpose of this paper does not allow us to discuss them in depth here.

3.3.... BUT IN WHICH EDUCATION SYSTEM? PRIVATE or PUBLIC?

3.3.1. Minority Right to Establish Private Educational Institutions?

Until now, most of the discussion related to public educational policies. But the right to establish private educational institutions is also crucial for the protection and the promotion of minorities' language rights. It constitutes the minimum measure that States should allow regarding minority education. It now appears to be a generally accepted international standard to allow members of a linguistic minority to establish private educational institutions, free from State restrictions, save general national educational standards¹⁷⁴. International instruments and case law underwrite parental freedom of choice in educational matters and the right to establish private educational institutions¹⁷⁵. Today, States that do not guarantee this right are quite rare. With regard to private institutions, article 29, paragraph 2 of the CRC states that "*no part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State*". The UNESCO Convention recognises that "*the establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents (...), if participation in such systems (...) is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities (...)*" (emphasis added) should not be considered as discriminatory¹⁷⁶.

The right to establish private educational institutions is explicitly acknowledged in article 5, paragraph 1 of the UNESCO Convention although that provision contains several conditions to its implementation (*supra*). The restrictions of article 5 provide that the right should not be exercised "*in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its - activities, or which prejudices national sovereignty (...)*". The standards of education should neither be lower than the general standards laid down by the competent authorities. The attendance at such schools should also remain optional. The greatest

¹⁷⁴ SIEMIENSKI, G., op. cit., p.182; TABORY, M., op. cit., p.200.

The right to set up and manage their private educational training is also recognised in article 13, paragraph 3 of the ICESCR, article 13 of the Framework Convention, paragraph 32 (2) of the Copenhagen Document and by article 2 of the First Protocol of the ECHR protecting the liberty of parents. See also Paragraph 8 of the Hague Recommendations: "*In accordance with international law, persons belonging to national minorities, like others, have the right to establish and manage their own private educational institutions in conformity with domestic law. These institutions may include schools teaching in the minority language*".

¹⁷⁵ See for instance, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, HUDOC REF00000094, (1976) 1 EHRR 711.

¹⁷⁶ Article 2 (b) of the UNESCO Convention.

limitation in article 5 lies in the fact that members of national minorities may use or teach their own language “depending on the educational policy of each State”. This restriction is somehow stripped of any objective criteria and weakens the protection of the right¹⁷⁷. The right to set up and manage their private educational institutions is in harmony with the principle of subsidiarity. But the potential danger, which is recognised in paragraph 9 of the Hague Recommendations, is that the imposition of severe educational standards by the State might lead to a *de facto* public monopoly of education¹⁷⁸. As K. HENRARD underlines, “*State interference in private educational matters should thus not go as far as eroding the right to establish and administer private educational institutions by making it impossible due to over-demanding official standards in this regard*”¹⁷⁹. Another potential danger is that “*permitting the establishment of separate schools rather than increasing bilingual, multicultural education, may actually contribute to the entrenchment of separation of communities as each group (than can afford it) establishes its own schools, teaching its own curriculum in its own language*”¹⁸⁰.

3.3.2. State Obligation to Finance Private Educational Institutions?

An ongoing controversial issue is whether or not -and if so to what extent- current international instruments impose positive financial obligations on States to finance private schools. In other words, while States should authorise the establishment of private educational institutions by minorities, do they also have an obligation to financially support them? Even if the claim exists¹⁸¹, currently such funding obligation does not exist in international law¹⁸². The *Human Rights Committee* held that the State does not discriminate when subsidies for private schools are lower than those granted to public schools.

Some believe that the right to establish private schools is illusory if the minority itself has to pay all costs¹⁸³. According to G. SIEMIENSKI, given the fact that everyone pays taxes, “*by channelling all its educational funding to official State language public schools, governments can force members of national minorities into a situation whereby they will have essentially no choice but to rely exclusively on a network of private minority language schools*”¹⁸⁴. This situation could, in practice, lead to a kind of forced assimilation of persons belonging to national minorities, which would be contrary to international human rights law.

¹⁷⁷ TABORY, M., op. cit., p.184.

¹⁷⁸ HENRARD, K., *Education and Multiculturalism*, op. cit., p.403.

¹⁷⁹ *ibidem*, p.404.

¹⁸⁰ WILSON, D., *Minority Rights in Education – Lessons for the European Union from Estonia, Latvia, Romania and the Former Yugoslav Republic of Macedonia*, www.right-to-education.org, p.11-12.

¹⁸¹ See, e.g., the written statement of the Organisation Internationale pour le Développement de la Liberté d’Enseignement (OIDE) to the UN Commission on Human Rights, UN doc. E/CN.4/1993/NGO/25 mentioned by NOWAK, M., *The Right to Education*, op. cit., p.264

¹⁸² Strictly interpreted, article 2 of the ECHR’s First Protocol does not oblige States to finance private schools. All the applications submitted by private schools against countries such as Sweden, France or the UK have been rejected in the European human rights system. (NOWAK, M., *The Right to Education*, op. cit., p.265).

¹⁸³ SKUTNABB-KANGAS, T. and PHILLIPSON, R., *Wanted! Linguistic Human Rights*, op. cit., p. 41.

¹⁸⁴ SIEMIENSKI, G., op. cit., p.182.

Whilst article 27 of the ICCPR does not mandate State financial support for private schools, the principle of prohibition of discrimination would imply that if a State provides financial assistance to such institutions, it does so in a reasonable and balanced way¹⁸⁵. An equivalent funding should be granted to other private institutions as well, unless the differential treatment is reasonable and objectively justifiable¹⁸⁶. The principle of substantive equality and the need to make educational rights effective could thus impose higher financial obligations on States¹⁸⁷. K. HENRARD proposes an interesting balanced interpretation of State obligations in this field¹⁸⁸. The idea is that the State would have the obligation to finance private educational institutions only in certain circumstances namely when the financial means of the minority in question are not sufficient to administer these schools or/and when public schools are not pluralistic enough. This latter condition flows from the State obligation, under international law, to respect the ideological and philosophical convictions of the parents in educational matters.

¹⁸⁵ DE VARENNES, F., *The Linguistic Rights of Minorities in Europe*, op. cit., p.14.

¹⁸⁶ HENRARD, K., *Education and Multiculturalism*, op. cit., p.404.

¹⁸⁷ HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.267.

¹⁸⁸ See: HENRARD, K., *Devising an Adequate System of Minority Protection*, op. cit., p.267.

4. CASE STUDY ON THE RIGHT TO EDUCATION IN TURKEY: THE KURDISH LANGUAGE ISSUE IN TURKEY'S EDUCATIONAL SYSTEM IN THE LIGHT OF EU-ACCESSION PERSPECTIVES.

4.1. INTRODUCTION.

“With reference to Turkey, the available information indicates that the government is making a continuous effort to achieve cultural homogeneity, as evidenced by the education system, which is designed to channel the minorities into a uniform stream of Turkish culture. This obviously tends to reduce the prospects of preserving the cultural identity of minority groups. The Turkish government has stressed that the rights granted to national minorities by the Treaty of Lausanne are fully respected and that the Treaty has the force of law in Turkey”¹⁸⁹.

This assessment of F. CAPOTORTI is now more than ten years old. An attempt will be made in this case study to see if Turkey's educational system has changed with regard to its official and unofficial minorities. Minorities' language rights in education have been analysed from a rather theoretical perspective in the first part of this study. Our purpose now is to see their application and implication in practice with regard to the status of the Kurdish language in Turkey's educational system and policies. This case study aims at being an 'individual' example of the relevance of the international and regional standards and practices referring directly or indirectly to language rights in education. These standards are not exclusively relevant for Turkey and they could obviously be applied in other contexts too. Equally, this case study should not be understood as constituting the only human rights issue in the country at stake. For practical reasons, we will not develop the issue whether Kurds in Turkey constitute or not a minority. All the more so we will not develop the definition of a 'minority' in itself. International lawyers and numerous studies on the issue clearly show that Kurds are a national minority in international human rights law even though they are not recognised as such by the Turkish government.

Although oppression of the Kurdish language has been Turkish policy since the time of Atatürk and was enshrined in the Constitution of 1923, this oppression has been intensified in recent years in a number of new laws. Yet it was in the early 1990s that the Kurdish question became Turkey's prime domestic concern. Mother tongue education continues to be part of the agenda as one of the most essential problem in Turkey's educational system. Even though Turkey signed a number of international and regional instruments and even though Turkey passed the so-called '2002 mini-reform package', there are still some crucial steps to go through. Illiteracy rate for the Kurdish region is 35%

whereas it reaches 19,3% at the national level. Moreover, 60% of the Kurdish population lives below the poverty level¹⁹⁰. Gender discrimination takes place within the already discriminated Kurdish minority. Kurdish girls suffer from greater illiteracy than boys. This latter issue will not be analysed in this study.

The restrictions existing on Kurdish education are primarily matters of domestic law and, to a very great degree, domestic practice. One of the most striking aspects of Turkish Law in this regard is the link that is consistently made between, on the one hand, Kurdish language and culture and on the other hand, separatism and terrorism¹⁹¹. Minority rights instruments challenge what scholars define as the ‘two ideological preoccupations’ that seem to guide Turkey on the issue of granting Kurds with minority rights¹⁹². These preoccupations relate on the one hand, to the fear that the extension of minority rights to Kurds will necessarily undermine the political unity and territorial integrity of Turkey. On the other hand, it is the idea that the extension of such rights will somehow undermine the principle of equality and equal rights of all Turkish citizens. The conception of the Turkish language as a basic element of national unity and integrity is particularly problematic. So long as Kurdish mother tongue education conformed to the broader requirements of the Turkish education system, it is difficult to see why its refusal by Turkish authorities is justified.

Given Turkey’s desire to enter the EU, our purpose is to assess any legal and political changes instituted by Turkey with regard both to the Kurdish language and to minority education in light of the standards set out in regional and international instruments. The work of the Council of Europe and the OSCE are particularly relevant since Turkey is member of both organisations. The process of accession to the EU has forced Turkish authorities to reconsider these issues and the discourse among Kurds has also changed from one emphasising national struggle and separatism to one that emphasised pluralist democracy and cultural rights.

In light of the available information, a modest attempt will be made to propose some recommendations as to what would be needed for Turkey to meet its international commitments in the sphere of minorities’ right to education. K. TOMAŠEVSKI, *UN-Special Rapporteur on the Right to Education*, underlines in this regard:

*“Mother-tongue education is in the best interest of non-Turkish-speaking children so as to enable them to exercise their right to education in the education system, whose language of instruction is Turkish. Decision-making on the teaching and learning of foreign languages, has been, in the case of Kurdish, dwarfed by national-security concerns. Introducing the human rights approach would, in the UN-Special Rapporteur’s view, facilitate solving underlying problems”*¹⁹³.

¹⁸⁹ CAPOTORTI, F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, op. cit., p.52.

¹⁹⁰ These rates have been found in ARAYICI, A., *Les Disparités d’alphabétisation et de Scolarisation en Turquie*, “International Review of Education”, 2000, p.134.

¹⁹¹ DUNBAR, R. and McKAY, F., op. cit., p.33.

¹⁹² *ibidem*, pp. 28.

¹⁹³ TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, op. cit.

The fear that extending minority rights to Kurds will undermine the equal rights of all Turkish citizens is the result of a formalistic understanding of the concept of equality. The narrow focus on formal equality in a multicultural society like the Turkish one (where only one ethnicity and only one language are recognised) drives necessarily to exclusion and real inequality for many members of ethnic or linguistic minorities.

A *Minority Rights Group International Report* of 1996 provides that only 70% of Kurdish children enrolled at primary school, that 18% went on to secondary school and that of these only 9% completed the cycle¹⁹⁴. Deprivation of the mother tongue has profound consequences both at the individual level and at the group level. At the group level, deprivation of the mother tongue amounts to linguicide, which is what Turkey seems to attempt to do. It tries to make Turkish the mother tongue of all Kurds. It tries to do it openly, in its constitution. The teaching and learning of foreign languages has thus become a praiseworthy symbol of change¹⁹⁵.

4.2. DEMOGRAPHY AND HISTORICAL BACKGROUND OF KURDS IN TURKEY.

4.2.1. Turkey's Ethnic Diversity.

Turkey's population is over 67 million. Its Kurdish population is estimated between 8 and 15 million (thus approximately 20%), depending on the source of information. In Turkey, only those Kurds who do not speak Turkish are officially counted for census purposes as Kurds, yielding a very low figure¹⁹⁶. Turkey does not recognise its Kurdish population as a 'minority'. Some even went so far as to simply deny the existence of a separate Kurdish identity. Despite the absence of exact data, it is clear that Kurds are the second largest ethnic group in Turkey, after Turks. *Human Rights Watch* notes that "the Turkish government uses an idiosyncratic definition of the term "minority," which causes mutual frustration whenever the question of rights concerning language and culture arises in international fora"¹⁹⁷. According to the Treaty of Lausanne (1923), three minorities are officially recognised by the Turkish State: Armenians (app. 50.000), Jews (app. 25.000) and Greeks (app. 5.000). They are known as 'religious minorities' and benefit from a special protection under articles 37-45 of the treaty¹⁹⁸.

¹⁹⁴ McDOWALL, D., *The Land of The Kurds in The Kurds*, "Minority Rights Group International (Report)", MRG, 1996, p.18.

¹⁹⁵ TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, op. cit., paragraph 65.

¹⁹⁶ McDOWALL, D., *The Land of The Kurds in The Kurds*, op. cit., p.7.

¹⁹⁷ HRW, *Ensuring Language Rights*, op. cit.

¹⁹⁸ 1998 Regular Report From The European Commission On Turkey's Progress Towards Accession, p. 19.

The Jewish community is fairly well integrated into the social and economic life of Turkey. The authorities have been much less tolerant towards the presence of the Armenian community. They often complicated -if not hindered- the Armenian's ability to maintain its identity, for instance, by hampering education. The Greek community has fared the worst. It became hostage to the Greek Government's treatment of the Turkish minority in the Western Thrace region of Greece. (KIRIŞCI, K., *Evaluating the Question of Minorities in Turkey in the Light of Turkish-EU Relations* in DUNER, B. (Ed.), *Turkey: the Road Ahead?*, Stockholm, Swedish Institute of International Affairs, 2002, p.105).

Turkey does not recognise minorities other than those defined by the Treaty of Lausanne¹⁹⁹. The Constitution thus does not recognise Kurds as a national, racial, or ethnic minority. However, many other different minorities make Turkey's cultural diversity including the Kurds, Roma, Laz and Assyrians. Kurds are considered to be simply Turks of Kurdish origin. Kurds live all over Turkey but are mainly concentrated in the south-east part of the country. They embraced Islam. They are economically and socially disadvantaged²⁰⁰ and this impoverishment is reinforced by low-quality Turkish medium education. The State's refusal to use Kurdish in primary schools "*directly contributed to the economic misery that fuelled political and guerrilla opposition to the State*"²⁰¹. In the south-east, the average per-capita is less than half the national average²⁰² and unemployment at the end of the 1990s was estimated to be twice as high as the national average of 25%²⁰³. A report by a Council of Europe's Committee notes²⁰⁴:

"Compared to Western Turkey, [South-eastern Turkey] is less developed and much poorer. Here the population is mainly of Kurdish origin, they speak Kurdish (a language of Indo-European origin), have kept their Kurdish traditions and want to live their Kurdish cultural identity. It is here that in 1984 the PKK has started to provoke the people of Kurdish origin and to commit acts of terrorism, resulting in the armed conflict, which so far has cost about 30.000 human lives".

There are no legal barriers to Kurds' participation in political and economic affairs. Many members of Parliament are Kurds. But Kurds who publicly or politically assert their Kurdish identity or publicly espouse the use of Kurdish in the public domain risk public censure, harassment, or prosecution²⁰⁵. State-dictated rigidity concerning language and identity is the result of an attempt to build a modern nation-State based on a secular Turkish national identity and the Turkish language. That process began in 1923, when Mustafa Kemal (Atatürk), proclaimed the Republic of Turkey from what remained of the former Ottoman Empire. Education was highly centralised and assimilation policies were the order of the day. Turkey contends that Kurdish education could divide the country along ethnic lines. Despite all these efforts, by the 1960s, more than ¾ of Kurds in Turkey did not speak Turkish²⁰⁶. The government perceives ethnic diversity as a danger to the integrity of the Turkish State and, as Kurds constitute the largest non-Turkish ethnic group with the strongest identity, obviously they constitute the most serious threat. The presence of many other ethnic minorities leads the government to see the Kurdish quest for recognition as the first step of a 'domino theory'.

¹⁹⁹ see the Turkish Foreign Ministry website: www.mfa.gov.tr/grupa/ac/acl/faq.htm#bm1.

²⁰⁰ For a more detailed presentation of the Kurds in Turkey, see: McDOWALL, D., *The Land of The Kurds* in *The Kurds*, op. cit.; McDOWALL, D., *The Kurds – A Nation denied*, "Minority Rights Publications", 1992, pp.51-57.

²⁰¹ McDOWALL, D., *The Land of The Kurds* in *The Kurds*, op. cit., p.7.

²⁰² *The Kurds in Turkey – the 1990s and Beyond* in McDOWALL, D., *The Kurds – A Nation Denied*, op. cit., p.53.

²⁰³ *ibidem.*, p.53.

²⁰⁴ *Honouring of obligations and commitments by Turkey* (report by a Council of Europe Committee), Doc.9120, 13 June 2001.

²⁰⁵ 1998 Regular Report From The European Commission On Turkey's Progress Towards Accession, p.19.

²⁰⁶ GRAHAM-BROWN, S., *The role of the Curriculum in Education Rights and Minorities*, "Minority Rights Group Report", 1994, p. 31.

Therefore Kurds were decreed to be Turks, and their language and culture were to be Turkish²⁰⁷. As a direct consequence of the armed conflict engaged since 1984 in the south-east of Turkey, opposing Turkish authorities and the PKK (*Kurdistan Workers Party*), large-scale forced evacuation, destruction of villages and human rights abuses were perpetrated by Turkish security forces²⁰⁸. The security situation now has largely improved and Turkey is embarking on a socio-economic development programme in this region.

In any case, a first prerequisite to ensure the right to education, as emphasised by K. TOMAŠEVSKI, *UN-Special Rapporteur on the Right to Education*, is to have reliable statistics²⁰⁹ and, with regard even just to the exact number of Kurds in Turkey, this is far from being the case.

4.2.2. The Kurdish Language Amongst Turkey's Language Diversity.

According to the Constitution, Turkish is the only official language but there are in reality about 30 different languages spoken across Turkey (*e.g.* Kurdish, Arabic, Caucasian, Greek, Hebrew)²¹⁰. As Kurds constitute the biggest minority in Turkey, Kurdish is the second most widely spoken language after Turkish. Taking the definition of 'mother tongue' (see chapter 1.1.1.), there is about 8-15 millions of people in Turkey whose mother tongue is Kurdish. A little more than a decade ago, speaking Kurdish was a crime in Turkey.

Kurdish is an Indo-European language from the north-western Iranian family. It is closely related to (Iranian) Farsi/Persian²¹¹. It is not related to Turkish, which is a not an Indo-European language. Kurdish has two dialects namely 'Kurmanji' and 'Sorani'. 'Kurmanji' is spoken in Turkey, Syria, the area along the northern boundary of Iraq and north-west Iran and Armenia. 'Sorani' is used in Iraq and can also be easily understood in Iranian Kurdistan²¹². It is estimated that 90% of Turkish Kurds use the same dialect namely Kurmanji. The almost complete exclusion of Kurdish from the educational system means that Kurds are deprived of the opportunity to develop and understand their own language, together with its literature, songs, traditions in any formal setting. Efforts to teach Turkish in rural areas where ethnic Kurds predominate have had mixed results. In a recent interview, *the State minister responsible for south-eastern Turkey, stated that 1/3 of those living in the region did not speak Turkish, a figure that rose to 50 % among women*²¹³. It is often when dealing with State authorities, especially in attempts to access public services that the inability to communicate causes problems. The inability to speak Turkish among rural Kurds is a legacy of

²⁰⁷ http://www.hrw.org/reports/1999/turkey/turkey993-08.htm#P975_221981

²⁰⁸ 1998 Regular Report From The European Commission On Turkey's Progress Towards Accession, p.19.

²⁰⁹ TOMAŠEVSKI, K., *Preliminary Report of the Special Rapporteur on the Right to Education*, op. cit., paragraph 25-31.

²¹⁰ TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, op. cit., paragraph 60.

²¹¹ HASSANPOUR, A., SKUTNABB-KANGAS, T. and CHYET, M., *The Non-Education of Kurds: a Kurdish Perspective*, "International Review of Education" (special issue: "Education of Minorities"), vol.42, no.4, p.368.

²¹² MEYER-INGWERSEN, J., *The Kurdish Language and the Formation of Identity in Kurdish Children and Youths in Human Rights in Kurdistan – Documentation of the International Conference on Human Rights in Kurdistan*, Bremen, "Initiative for Human Rights in Kurdistan", 1989, p.39.

²¹³ http://www.hrw.org/reports/1999/turkey/turkey993-08.htm#P941_209664

underdevelopment and poverty, traditional family structure, and, more recently, the conflict in the region²¹⁴. A more open attitude towards cultural and linguistic plurality within Turkey might contribute to resolving some of the problems faced by the country today.

4.3. TURKEY'S INTERNATIONAL AND REGIONAL OBLIGATIONS REGARDING MINORITIES' LANGUAGE RIGHTS IN EDUCATION.

4.3.1. Turkey's International and Regional Commitments.

Historically, one of Turkey's first major instruments dealing with minority education is the Treaty of Lausanne of 1923. The third section of the treaty aims at protecting minorities in general but most of these provisions are directed at the protection of Turkey's non-Muslim minorities, namely Turkey's ethnic Greek, Armenian and Jewish populations. As Kurds are largely Muslim, they would generally not benefit from such protection²¹⁵.

However, some articles of the Treaty of Lausanne are relevant for the protection of minorities in general, including Kurds. Article 38, paragraph 1 prescribes that "*the Turkish Government undertakes to assure full and complete protection of life and liberty to all inhabitants of Turkey without distinction of birth, nationality, language, race or religion*"(emphasis added). Article 39, paragraphs 4-5 provide that "*all the inhabitants of Turkey, without distinction of religion, shall be equal before the law*" and that "*no restrictions shall be imposed on the free use by any Turkish national of any language in private intercourse, in commerce, religion, in the press, or in publications of any kind or at public meetings*". In article 37, Turkey undertakes "*that the stipulations contained in Articles 38 to 44 shall be recognised as fundamental laws, and that no law, no regulation, nor official action shall conflict or interfere with these stipulations, nor shall any law, regulation, nor official action prevail over them*". An attempt will be made later in this study to compare the status of non-Muslim minorities with that of Kurds in Turkey in the light of the treaty of Lausanne.

Turkey has been quite selective in signing international and regional instruments dealing with education. One major instrument signed by Turkey, although not binding, is the UDHR. In August 2000, Turkey signed two other essential international instruments in the field of human rights, namely the ICCPR (and its Optional Protocol) and the ICESCR. Turkey did not ratify the ICCPR nor the ICESCR and the process of ratification will show whether any reservations are made to any of their provisions. While signing treaties does not in any way commit the country to proceed to ratification, it does create an obligation to refrain from acts that would defeat the objectives of the Convention, or to take measures to undermine it. As the ratification of the ICCPR and of the ICESCR is listed among Turkey's priorities in Turkey's 2000- and 2003-Accession Partnerships with the EU, it is expected to ratify both

²¹⁴ http://www.hrw.org/reports/1999/turkey/turkey993-08.htm#P941_209664

instruments in the near future. But as Turkey does not recognise Kurds as a ‘minority’, it is sometimes anticipated that Turkey will make a reservation on article 27 of the ICCPR similar to the French one²¹⁶. Turkey is party to the Convention on the Rights of the Child (albeit with a number of reservations) and to the Convention on the Elimination of All Forms of Discrimination against Women²¹⁷. It recently ratified the UN Convention on the Elimination of All Forms of Racial Discrimination. When ratifying the CRC in 1990, Turkey made a reservation to the effect that it reserves the right to interpret and apply the provisions of articles 29 and 30 “*according to the letter and the spirit of the Constitution of the Republic of Turkey and those of the Treaty of Lausanne of 24 July 1923*”. In its concluding observations of June 2001, the *Committee on the Rights of the Child* expressed its concern that “*the reservations made by the State party under articles 17, 29 and 30 of the Convention in some cases, in particular in the fields of education, freedom of expression and the right to enjoy one’s own culture and use one’s own language, may have a negative impact on children belonging to ethnic groups which are not recognised as minorities under the Treaty of Lausanne, in particular children of Kurdish origin*”²¹⁸. The UNGA Declaration was adopted in 1992 without a vote by the General Assembly, of which Turkey is party. With regard to regional instruments, Turkey has ratified the ECHR and its First Protocol in 1954. When ratifying the Protocol, Turkey made a reservation namely that article 2 of the Protocol shall not affect the provisions of Law No. 430 of 1924 relating to the unification of education. In 2001 Turkey also signed -but not ratified- Protocol 12 to the ECHR, which is a free-standing non-discrimination provision²¹⁹. Turkey took part in the *Second Conference on the Human Dimension of the CSCE*, which proclaimed the so-called ‘Copenhagen Document’. The advantage of the ICCPR and the ECHR is that their provisions have an established praxis and leave the possibility for persons directly to claim their rights stated therein.

There are however still other major human rights instruments to which Turkey has not yet acceded. EU’s regular reports on Turkey’s accession constantly underline the fact that Turkey has still not signed Framework Convention. Neither did it sign the European Charter. One of the shortcomings of the European Charter however is that article 2 authorises States to choose which languages to apply the charter to. In the Turkish context, this could have important consequences for the Kurdish language. Article 22 of the European Union Charter of Fundamental Rights confirms that “*the Union shall respect cultural, religious and linguistic diversity*”. Cultural and linguistic diversity is thus definitely a European characteristic.

4.3.2. The Place of International Law in the Turkish Legislative System.

²¹⁵ DUNBAR, R. and McKAY, F., op. cit., pp. 12-13.

²¹⁶ ODER, B.E., *Enhancing the Human Face of Constitutional Reality in Turkey Through Accession Partnership with the EU* in DUNER, B. (Ed.), op. cit., p.73.

²¹⁷ In August 2002 it ratified its Optional Protocol.

²¹⁸ Quoted by TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, op. cit., paragraph 63.

²¹⁹ Protocol 12 strengthens the ECHR by protecting individuals from discrimination with regards to all of their legal rights, not just rights protected by the Convention.

In Turkey's domestic law, the status of international treaties is regulated by the Constitution. Article 90 of the Constitution provides that ratified international instruments should take precedence over domestic legislation. Nevertheless, human rights safeguards are defined through authoritative interpretation of the Constitution, which prevails over international treaties²²⁰. The constitutional preamble underlines that “no protection should be accorded to an activity contrary to Turkish national interests”. It is argued that a direct application of international human rights treaties “would dispense with the time-consuming process of amending a variety of laws, as well as ensuring the conformity of domestic and international jurisprudence”²²¹. Such direct application would help when assessing the exact effect and value of international law in Turkey.

4.4. EU-VIEWS ABOUT TURKEY'S MINORITIES' LANGUAGE RIGHTS IN EDUCATION.

4.4.1. EU-Accession's Criteria.

Turkey is member of several European organisations since a long time. The *Helsinki European Council* of 1999 formally recognised Turkey as a candidate for accession to the EU. This was a crucial step for developing the collaboration between EU and Turkey with regard to human rights protection. Turkey is candidate to the EU on the basis of the same criteria as applied to other candidate countries. Accession negotiations will thus start when Turkey fulfils the so-called ‘Copenhagen criteria’. The *Copenhagen European Council* of 1993 decided on a number of political criteria for accession, namely that “the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”. It is clear however that the application of Copenhagen criteria related to minority protection is not depending upon the official recognition of the minority by the State. Turkey benefits from a ‘pre-accession strategy’ to stimulate and support its reforms in particular with regard to human rights²²². The main elements of the pre-accession strategy include the approximation of legislation and the adoption of the *acquis*. But the incorporation of the *acquis* into legislation is not in itself sufficient. It is necessary to ensure that this *acquis* is applied to the same standards as those applied within the EU. The Copenhagen criteria are not legally binding, hence the questions whether respect for and protection of minorities are part of the ‘*acquis*’ or not²²³.

²²⁰ TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, op. cit., paragraphs 23-24.

²²¹ *ibidem*, paragraphs 23-24.

²²² *TURKEY: 2000 Accession Partnership*, paragraph 3 (Principles).

²²³ VON TOGGENBURG, G., *The European Union – A Rough Orientation Through a Delicate Relationship: the European Union's Endeavours for its Minorities* in TRIFUNOVSKA, S., *Minority Rights in Europe – European Minorities and Languages*, The Hague, T.M.C. Asser Press, 2001, p.226-227.

The Accession Partnership (AP) is the centrepiece of the pre-accession strategy. Turkey's AP was formally adopted in March 2001 and was revised in May 2003²²⁴. The purpose of the AP is "to set out in a single framework the priority areas for further work (...), the financial means available to help Turkey implement these priorities and the conditions which will apply to that assistance"²²⁵. It thus defines the objectives and priorities for the fulfilment of the accession criteria, which Turkey must implement in the short and medium term²²⁶. Appropriate monitoring mechanisms are established. The priorities and intermediate objectives in the AP are divided into two groups of short and medium term objectives²²⁷.

Short-term priorities of the 2001'AP are quite weak with regard to language rights in education. They provide that legal provisions forbidding the use by Turkish citizens of their mother tongue in TV/radio broadcasting should be removed. They add that a comprehensive approach to reduce regional disparities should be adopted and that the situation in the south-east should be improved "with a view to enhancing economic, social and cultural opportunities for all citizens". The medium term objectives of the 2001'AP provide better protection. They impose to "ensure cultural diversity and guarantee cultural rights for all citizens irrespective of their origin". They add that "Any legal provisions preventing the enjoyment of these rights should be abolished, including in the field of education" (emphasis added). The medium term political priorities aim at guaranteeing full enjoyment of human rights and freedoms without discrimination, including discrimination based on language. They also aim at reviewing the Constitution and the roles of the *National Security Council*²²⁸ with a view to accord them with the practice of EU-States.

The wording chosen by the AP seems to manifest a conscious effort to avoid using the term 'minority' and to emphasise 'cultural rights'. The AP seems to treat 'cultural rights' as a special category of rights but does not make explicit what sort of steps Turkey should make to ensure those rights²²⁹. As explained in the first part of this paper, the question remains about the exact content and definition of 'cultural rights' and 'cultural diversity'. Turkey refuses to use the word 'education' within the framework of cultural rights²³⁰. According to R. DUNBAR and F. MCKAY, the 'cultural rights' mentioned in the AP are a category of rights which differ from and go beyond both basic civil and political rights and economic, social and cultural rights²³¹. These authors base their opinion on EU's regular reports which, according to their opinion, "make very clear that the Commission views the Kurdish population as a minority which is to be a beneficiary – perhaps, given the emphasis placed in the regular reports on the Kurds, the beneficiary with the most pressing need – of minority rights, cultural rights and State protection (...). They also "make clear that rights to things like Kurdish language

²²⁴ TURKEY: 2000 Accession Partnership, "Official Journal of the European Union", (2001/235/EC) and TURKEY: 2003 Accession Partnership, "Official Journal of the European Union", (2003/398/EC).

²²⁵ TURKEY: 2000 Accession Partnership, paragraph 2 (Objectives).

²²⁶ Explanatory memorandum to the "Turkish Accession Partnership".

²²⁷ The short term priorities have to be fulfilled in 2003/2004. The medium term priorities are expected to take more than one year to complete.

²²⁸ Established by the 1961 Constitution, the *National Security Council* (NSC) plays a key role in the formulation and implementation of national security policy and also covers a wide range of political matters. NSC's mandate reaches deeply into education, i.e. it decides which foreign languages may be taught in Turkey. The existence of this body shows that, despite a basic democratic structure, the Turkish constitution allows the army to play a civil role and to intervene in every area of political life.

²²⁹ DUNBAR, R. and MCKAY, F., op. cit., p.21.

²³⁰ Yasar Kaya Views EU Accession, *Cultural Rights*, The Kurdistan Observer, October 24, 2000.

²³¹ DUNBAR, R. and MCKAY, F., op. cit., p.21.

broadcasting and education are clearly cultural rights and minority rights within the meaning of the Copenhagen criteria, and therefore issues which must be addressed by Turkey” (emphasis added)²³². Moreover, EU’s reports often emphasised the need to ratify the Framework Convention, which is one of the only instruments that explicitly recognises the right to mother tongue education.

The revised AP of May 2003 is much more explicit with regard to mother tongue education; it provides that Turkey should “ensure cultural diversity and guarantee cultural rights for all citizens irrespective of their origin” and that it should “ensure effective access to (...) education in languages other than Turkish through implementation of existing measures and the removal of remaining restrictions” (Emphasis added).

In March 2001, Turkey announces its own *National Programme for the Adoption of the Acquis*. In this programme, Turkey expresses the will to complete the accession process “on the basis of the fundamental principles of the Republic as articulated in the Turkish Constitution”²³³. Those principles are the irrevocable principles contained in article 1-3 of the Constitution (*infra*) and sets out the limits to the changes that EU accession will imply²³⁴. According to Human Rights Watch, the National Programme “exploited all the gaps in the EU documents and attempted to bargain down the EU’s human rights demands”²³⁵. The sensitive issue of minorities’ mother tongue education has no place in the national programme. In reality, the national programme watered down the objectives of the AP²³⁶.

Even though doubts remain about the real political will of the newly elected Turkish government, led by the Justice and Development Party (AKP), it has committed to proceeding with human rights reform, regardless of the EU process. “The government’s prompt action to enact further reform in January 2003 suggests that it intends to avoid repeating the mistake of previous governments by waiting until the eve of the 2004 EU summit to rush reforms through”²³⁷.

4.4.2. EU-Reports on Turkey’s Progress Towards Accession (1998 – 2002).

As in the case of other candidate countries, Turkey’s progress in creating the conditions for accession is reviewed and assessed in annual reports prepared by the European Commission. The Commission’s regular reports highlight the extent of the efforts that still have to be made in certain areas by candidate States²³⁸. The AP indicates the priorities for EU accession but the country will nevertheless have to address *all* issues identified in the various reports. As mentioned before, the Commission views Kurds as a ‘minority’ and frequently insists on their protection through minority rights, cultural rights and active State protection. The references in the reports to minority rights and to the

²³² *ibidem*, p.22.

²³³ Turkish National Programme for the Adoption of the Acquis (unofficial translation), *Introduction*, paragraph 10, see www.abgs.gov.tr mentioned by ODER, B.E., op. cit., p.73.

²³⁴ ODER, B.E., op. cit., p.73.

²³⁵ *Human Rights Watch Analysis of the 2001 Regular Report on Turkey*, December 2001, www.hrw.org

²³⁶ *Hits and Misses on turkey’s EU Accession Targets*, HRW Documents on Turkey, October 7, 2002.

²³⁷ *A Human Rights Agenda for the Next Phase of Turkey’s E.U. Accession Process*, Jan. 2003, www.hrw.org

²³⁸ *TURKEY: 2000 Accession Partnership*, paragraph 4 (Priorities and Intermediate Objectives).

need for a political solution for the Kurdish issue provoked criticism and even accusations that the EU was aspiring to undermine Turkey's territorial integrity²³⁹.

The 1998 Regular Report underlines that “Kurdish is no longer banned in the context of cultural activities but cannot be used in ‘political communication’ or education”²⁴⁰. The same report argues that “a civil solution could include recognition of certain forms of Kurdish cultural identity and greater tolerance of the ways of expressing that identity, provided it does not advocate separatism or terrorism”. In its 1999 Regular Report, the Commission notes that “contrary to certain hopes expressed notably by some Member States in the context of the Öcalan trial, progress on the Kurdish question has not been made”²⁴¹. The report recalls the proposition of the previous report: “a civil solution could include recognition of certain forms of Kurdish cultural identity and greater tolerance of the ways of expressing that identity, provided it does not advocate separatism or terrorism”²⁴². The report mentions a Council of Europe's report²⁴³ affirming that “the essential point is that any such group should have the opportunities and material resources to use and sustain its natural languages and cultural traditions in circumstances and under conditions now clearly and reasonably defined by [the Framework Convention, the European Charter and the Council of Europe's Recommendation 1201]”. The report further deems that “the argument that this would threaten the unity of the Turkish State is unconvincing. The effect is more likely to be the contrary”²⁴⁴. The 2000 Regular Report is more explicit²⁴⁵:

“As far as the use of languages other than Turkish is concerned, no particular problems have been reported for citizens belonging to minorities covered by the 1923 Lausanne Treaty (Jews, Armenians, Greeks). However for those belonging to groups that are outside the scope of the Lausanne Treaty the situation has not improved, notably concerning (...) education (...). In the field of education (basic and extended education), no language other than Turkish is allowed for teaching purposes, except where explicitly authorised by the Ministry of National Education. Neither legislation nor practice should prevent the enjoyment of cultural rights for all Turks irrespective of their ethnic origin. This is of particular importance for the improvement of the situation in the Southeast, where the population is predominantly of Kurdish origin. As regards equal opportunities, gender disparity is still high. The illiteracy rate is roughly 25 % for women and 6 % for men, due to low school enrolment rates for girls, particularly in eastern Turkey. There is still a need for further action to improve the educational position of women. In terms of equality of treatment, conformity with the EC acquis is not yet ensured.”
(Emphasis added)

²³⁹ KIRIŞCI, K., *Evaluating the Question of Minorities in Turkey in the Light of Turkish-EU Relations*, op. cit., p.110.

²⁴⁰ 1998 Regular Report From The European Commission On Turkey's Progress Towards Accession, p. 18.

²⁴¹ 1999 Regular Report From The European Commission On Turkey's Progress Towards Accession, p. 14.

²⁴² *ibidem*, p. 14.

²⁴³ *Honouring of obligations and commitments by Turkey*, report by a Council of Europe Committee, Doc.8300, 15 January 1999.

²⁴⁴ *ibidem*, paragraph 34.

²⁴⁵ 2000 Regular Report From The European Commission On Turkey's Progress Towards Accession, p. 18.

Further the 2000 Report deems²⁴⁶:

“Regardless of whether or not Turkey is willing to consider any ethnical groups with a cultural identity and common traditions as “national minorities”, members of such groups are clearly still largely denied certain basic rights. Cultural rights for all Turks, irrespective of their ethnic origin, such as the right (...) to learn their mother tongue or to receive instruction in their mother tongue, are not guaranteed. In addition, these citizens are not given opportunities to express their views on such issues. In the case of Turkish citizens of Kurdish origin, it should be mentioned that the expression of pro-Kurdish views is still vigorously fought by the Turkish State”.

However prime Minister B. ECEVIT declared that Kurds were not a minority and that “*if the Europeans don’t mix up in this, the Kurdish problem will be solved*”²⁴⁷. The 2001 Regular Report recognises the 2001 constitutional amendments as a significant step but it deems that, in practice, the reforms are superficial. The 2001 regular report has made it clear that Turkey was lagging behind in its efforts to meet the accession conditions of “*democracy, the rule of law, human rights and respect for and protection of minorities*”. However, the 2001 report engendered a surprisingly positive response from Turkey. In its most recent regular report of 2002, the Commission refers to the three sets of ‘reforms packages’ (*infra*). It deems that “*there has been limited improvement in practice in the ability of members of ethnic groups, with a cultural identity and common traditions, to express their linguistic and cultural identity*”²⁴⁸. The 2002 reports provides:

“Overall, Turkey has made noticeable progress towards meeting the Copenhagen political criteria (...). The reforms adopted in August 2002 are particularly far-reaching. Taken together, these reforms provide much of the groundwork for strengthening democracy and the protection of human rights in Turkey. (...) Nonetheless Turkey does not fully meet the political criteria. First, the reforms contain a number of significant limitations, which are set out in this report, on the full enjoyment of fundamental rights and freedoms (...) Secondly, many of the reforms require the adoption of regulations or other administrative measures, which should be in line with European standards. (...) To be effective, the reforms will need to be implemented in practice by executive and judicial bodies at different levels throughout the country”.

4.4.3. EU-Double Standards Policy.

²⁴⁶ *ibidem*, p. 19.

²⁴⁷ ECEVIT: *Kurds and Turks are equal*, 7 June 2001, www.kurdishobserver.com

The EU has been criticised for the emphasis given to minority issues in its external relations. They present a kind of ‘double standard’ as the EU often still ignores, at least formally, the issue of minority protection within its own borders²⁴⁹. Concern for minorities seems to be “*primarily an export article and not one for domestic consumption*”²⁵⁰. Indeed, the way candidate States implement the Framework Convention is an important factor in considering how the EU accession criteria on minority rights are met²⁵¹. Imposing duties on applicants States, which are not fulfilled by all members States, is a frequent practice. The ideology of the nation-State has to a large extent prevailed until now in western Europe. Both France and Turkey have tended to adopt policies aimed at creating a centralised State united through national symbols such as language. Since the French Constitution recognises that everyone is equal, there can be no minority. Turkey in many ways emulated the French experience. But the EU seems to insist more on the Turkish ratification of the Framework Convention than on the French ratification. It must be however specified that some minority language courses are already provided in France.

2.5. MINORITIES’ LANGUAGE RIGHTS IN EDUCATION IN LIGHT OF EU-ACCESSION DISCUSSIONS.

2.5.1. 2002 Students Campaign for Kurdish Language Education.

The constitutional amendments adopted in October 2001 removed mention of ‘language forbidden by law’ from legal provision concerning freedom expression. Thereafter a campaign for Kurdish-language education started in Istanbul’s universities in November 2001 and rapidly spread across the country²⁵². Students and parents demonstrated and submitted petitions supporting optional Kurdish language courses in schools and universities. In December 2001, students collect signatures with the slogan “*My Mother Tongue is the Condition of Existence and Limits of My Language are the Limits of My World*”²⁵³. The petitions had two objectives. Firstly, it was argued that children in primary and secondary education should be able to obtain Kurdish mother tongue education or at least classes in Kurdish. Secondly, it was

²⁴⁸ 2002 Regular Report From The European Commission On Turkey’s Progress Towards Accession, p. 42.

²⁴⁹ VON TOGGENBURG, G., op. cit., p.221.

²⁵⁰ DE WITTE, B., *Politics versus Law in the EU’s Approach to Ethnic Minorities*, EUI Working Paper, RSC No.2000/4 quoted by VON TOGGENBURG, G., op. cit., p.9.

²⁵¹ <http://www.minorityrights.org/>

²⁵² See *Questions and Answers: Freedom of Expression and Language Rights in Turkey*, op. cit.

²⁵³ *Campaign At Full Speed*, 7 December 2001, www.kurdishobserver.com

claimed that university students should be able to take courses in Kurdish as an optional subject (an ‘*optional foreign language*’) in their university curriculum²⁵⁴. One of these students argued “*unless we can not study it, Kurdish language and culture will disappear*”²⁵⁵. Despite the threat of expulsion, about 12000 students across Turkey have signed the petition. A few students subsequently withdrew their names under pressure from authorities²⁵⁶. While it was possible, for instance, to study Hungarian three hours per week, petitions to introduce Kurdish as a foreign language were rejected²⁵⁷. One reason that has been given for official rejection of Kurdish mother tongue education and courses in Kurdish is that such courses would violate Turkey’s Constitution. The constitutional provision on which Turkish authorities rely in rejecting any instruction through the medium of Kurdish is mainly article 42. In February 2002, a government-sponsored declaration (that the rectors of all 77 public and private universities were required to sign) claims the petitions represent a continuation of the PKK’s rebellion by non-military means²⁵⁸. The authorities see the movement as a sign of Kurdish separatism. About 2000 students and/or parents have been detained and hundreds of them have been arrested²⁵⁹. Turkey’s Higher Education Board called for disciplinary action against university students who have held demonstrations and filed those petitions²⁶⁰. “*No concessions are possible on education (...) we have made this clear at every opportunity*”, Prime Minister B. ECEVIT said in response to a question about demands for Kurdish classes²⁶¹. He said that Kurdish language education was “*unacceptable*” and that a campaign to bring Kurdish to Turkish classrooms aimed at eroding the country’s unity²⁶². Similarly, the *National Security Council* characterised the Kurdish language campaign as “*separatist activities (...) directed by a terrorist organisation*”²⁶³. The government believes that allowing Kurdish education would be giving into the demand of Kurdish rebels, whose 15-years fight for autonomy resulted in some 37.000 deaths²⁶⁴. Interior Minister said the movement was part of a recent PKK strategy of “*civil disobedience*” in a circular to governors across Turkey²⁶⁵. It has to be reminded however that the ban on Kurdish language existed already *before* 1984 when the PKK started its armed struggle. National Defence Minister S. CAKMAKOGLU declared, “*we need to defend our unity. We think that those who defend education in Kurdish language aren’t*

²⁵⁴ DUNBAR, R. and McKAY, F., op. cit., p.2-5.

²⁵⁵ BOLLAG, B., op. cit., p.1

²⁵⁶ *ibidem*, p.1

²⁵⁷ TOMAŠEVSKI, K., *Report submitted by the Special Rapporteur on the right to education – Mission to Turkey*, op. cit., paragraph 66

²⁵⁸ BOLLAG, B., op. cit., p.1

²⁵⁹ *Turkey cracks down on campaign for Kurdish-language education*, The Kurdistan Observer, January 17, 2002 (www.kurdistanobserver.com).

²⁶⁰ *Turkey Moves to Punish Students for Kurdish Education Demands*, The Kurdistan Observer, November 27, 2001 (www.kurdistanobserver.com).

The new government prepared two further legislative packages. They will guarantee for the revocation of disciplinary actions taken against university students since 2001, together with their records. The Parliament is expected to adopt these packages soon.

²⁶¹ *Turkey Rules Out Kurdish Education*, The Kurdistan Observer, January 30, 2002 (www.kurdistanobserver.com).

²⁶² *Questions and Answers: Freedom of Expression and Language Rights in Turkey*, New York, April 2002, www.hrw.org ; *Turkish PM calls Kurdish Education ‘unacceptable’*, The Kurdistan Observer, January 26, 2002 (www.kurdistanobserver.com).

²⁶³ *Turkey Rules Out Kurdish Education*, op. cit.

²⁶⁴ *ibidem*

²⁶⁵ *Turkey Cracks Down On Campaign For Kurdish-Language Education*, op. cit.

aware of Turkey's realities"²⁶⁶. But as mentioned in the first part of this study, international human rights instruments relating to minorities implicitly and explicitly reject the view that stability can be achieved through the suppression of linguistic and cultural differences.

Significantly, Deputy Prime Minister M. YILMAZ, who oversees relations with the EU, declared on the contrary that Turkey should allow some Kurdish-language education and that lifting the ban would not erode national unity: "People should be able to learn the language of their parents if they want to (...). If it's by private means outside of official [schools], the State shouldn't block this and shouldn't forbid it"²⁶⁷. He added however that Turkish should remain the official language in State schools. Asked whether separatist were using the Kurdish-language campaign to divide Turkey, he answered "I definitely don't believe this, I do not share these fears (...) I believe just the opposite. By blocking [the campaign] without good reason you serve the PKK's propaganda"²⁶⁸. Similarly, M. ALTAN, a Professor of economics at Istanbul University rejects the authorities' argument that repression is needed to keep Turkey from being divided. "It's just the opposite (...) Only democracy can maintain the integrity of the country", he said²⁶⁹. Moreover, the Human Rights Association's (IHD) General Secretary S. ESMER recalled that submitting a petition is a constitutional right in Turkey and that it should not be treated as a criminal act²⁷⁰.

K. TOMAŠEVSKI, UN-Special Rapporteur on the Right to Education deems that the "removal of the issue of teaching and learning foreign languages from academic decision-making to the jurisdiction of State Security Courts (...) highlights a much deeper problem. The boundaries between national security and education are apparently fluid and issues that pertain to education can be decided on national-security grounds rather than on their educational merits"²⁷¹. Mother tongue education in Turkey should thus be assessed in this highly controversial context. The problem is broad. Indeed, it seems that often, any democratic attempt to improve Kurds' legal status is interpreted by the Turkish authorities as flowing from PKK activities²⁷².

2.5.2. Domestic Provisions Regarding Minorities' Language Rights in Education.

2.5.2.1. Introduction.

The decision on its EU-candidate status encouraged Turkey to introduce a series of fundamental reforms in its domestic legal framework. On the 3rd October 2001, the Turkish Parliament passed a constitutional reform by adopting a law amending 34 articles of the Constitution (of which 24 relate explicitly to the protection of fundamental

²⁶⁶ CAKMAKOGLU: *Discussion About Education in Kurdish language are Pointless*, The Kurdistan Observer, January 20, 2002 (www.kurdistanobserver.com).

²⁶⁷ *Turkey should allow Kurdish education-deputy PM*, The Kurdistan Observer, February 20, 2002 (www.kurdistanobserver.com).

²⁶⁸ *ibidem*

²⁶⁹ BOLLAG. B., op. cit.

²⁷⁰ *Kurdish Education Problem May Delay Social Peace Process*, The Kurdistan Observer, January 22, 2002 (www.kurdistanobserver.com).

²⁷¹ TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, op. cit., paragraph 67.

rights) to move closer to compliance with the criteria set by the EU²⁷³. As mentioned above, these amendments were indispensable both to meet the Copenhagen criteria and to create an environment more conducive to cultural pluralism and minority rights. However, Kurdish-language education was left outside the scope of the package. In February, March and August 2002, further legislative harmonisation packages (nicknamed ‘the mini-democracy packages’) were enacted to align several laws with the constitutional amendments of October 2001²⁷⁴. On the 3rd August 2002, a few month after the ‘students campaign’, the Turkish parliament adopted the ‘August Reform package’ (Law N°. 4771, Harmonisation Law). This last reform will be analysed *infra*. Turkey’s domestic framework regarding minorities’ language rights in education is well summarised by Professor B. TANÖR, a constitutional scholar at Istanbul University:

“In Turkey it is okay to have Turkish as the official language. But what the mother tongue is, is a different matter. This raises two problems: Kurdish education in the State system and outside the State system. There are foundations outside the State system, like Kurt-Kav, but they face problems. These problems could be solved (...). [Law 2923] is very strange: ‘the mother tongue of the Turkish citizens cannot be taught in any language other than Turkish’. The element of strangeness is...[that] according to the meaning of the sentence, it is possible for a Turkish citizen to have a mother tongue other than Turkish, but that mother tongue can be taught only in Turkish (...) the last paragraph of Article 42 of the constitution which rejects a natural and social phenomenon as the ‘mother tongue’ and treats it as an official language is disturbing, even offensive. There is absolutely no need for this. The state, the constitution, and the laws have the right to decree that the official language be taught as the primary and mandatory language in all schools. But the expression of this should in no way be like the one in the stated provisions (...).”²⁷⁵.

2.5.2.2. Constitution.

Turkish Constitution has been written in 1982 when Turkey was under military rule and its structure tends to reflect its conception. The founders of the Turkish Republic choose a policy of making the Turkish society and identity homogenous²⁷⁶. Special emphasis was put on the use of the Turkish language in all public contexts, in particular in education. “*Nation-building was translated into unilingualism, patriotism and nationalism in education. Forging a new identity*

²⁷² INSEL, A., *Débat sur la langue Kurde: l’Etat Turc et le PKK se satisfont du blocage*, Radical (Istanbul), January 27, 2002 (www.medea.be).

²⁷³ ODER, B.E., op. cit., p.72.

²⁷⁴ Act N°. 4744 was adopted in February 2002 and act N°. 4748 was adopted in March 2002.

²⁷⁵ Interview, Istanbul, August 1997, http://www.hrw.org/reports/1999/turkey/turkey993-08.htm#P941_209664.

²⁷⁶ KIRIŞCI, K., *Evaluating the Question of Minorities in Turkey in the Light of Turkish-EU Relations*, op. cit., p.105.

was hastened by the 1927 language law, with a shift to Turkish as the language of instruction”²⁷⁷. A number of fundamental human rights are guaranteed by the Constitution but are subject to considerable restrictions often referring to the indivisible integrity of the State. Traditionally, Turkey remains particularly sensitive to any development that might be construed as a challenge to the notion of a unitary and indivisible nation-State²⁷⁸. According to the Constitution, Turkey is a republic and unconditional, unrestricted sovereignty belongs to the nation. The Republic of Turkey is a democratic, secular social legal State, respecting human rights and committed to the nationalism of Atatürk²⁷⁹. The nation is ‘single’, the country is ‘whole’, and the State is ‘one’²⁸⁰. The Constitutional Court itself affirms there is no “*intercultural constitution*” in Turkey²⁸¹.

The Constitution is supposed to be ‘neutral’ so that all citizens are treated equally. It means that, with the exception of non-Muslim minorities, no ethnic or religious minority could express its identity in any public form²⁸². According to the constitution, it is wrong to refer to Kurdish citizens as a ‘Kurdish minority’ and Turkey contends that Kurdish education could divide the country along ethnic lines.

The Constitution includes some ‘irrevocable provisions’, which cannot be amended and cannot even be proposed to be amended (article 4 of the Constitution). These irrevocable provisions refer to the form of the government as a republic and a unitary State, to Turkish as the official language, to the flag, the national anthem and the capital (see articles 1-3 of the Constitution). Article 3 of the Constitution provides that Turkey’s official language is Turkish²⁸³ but the legal effects of this article are still unclear. Does it necessarily preclude the use of other languages? Article 10 of Turkey’s Constitution guarantees equality before the law without any discrimination based on "*language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations*" (emphasis added). The next paragraph impeding the bestowal of privileges on the ground of sex or language "*is interpreted as if it constituted an obstacle to the elimination of discrimination*"²⁸⁴. Formal equality is thus coupled with the absence of recognition of ethnic or linguistic diversity²⁸⁵. Article 13 of the Constitution, which was a general clause stating the grounds for the restrictions of rights and freedoms, was modified by the 2001 amendments. It now prescribes that fundamental rights and freedoms shall be restricted only in accordance with the specific grounds contained in the specific provisions of fundamental rights and freedoms and that such restriction shall not impair the core of those rights²⁸⁶. Similarly, the amendment of article

²⁷⁷ TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, op. cit., paragraph 14.

²⁷⁸ KIRIŞCI, K., *Evaluating the Question of Minorities in Turkey in the Light of Turkish-EU Relations*, op. cit., p.105.

²⁷⁹ Constitution, article 2.

²⁸⁰ <http://www.mfa.gov.tr/grupc/ca/cag/default.htm>

²⁸¹ ODER, B.E., op. cit., p.80.

²⁸² KIRIŞCI, K., *Evaluating the Question of Minorities in Turkey in the Light of Turkish-EU Relations*, op. cit., p.105.

²⁸³ The Turkish State with its territory and people, is an indivisible whole. The language is Turkish, These facts may not be changed, nor may any changes be proposed” (article 3 of the Constitution).

²⁸⁴ TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, op. cit., paragraph 39.

²⁸⁵ *ibidem*, paragraph 40.

²⁸⁶ Before its change, article 13 provided that the grounds for restriction were "*the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health*" (ODER, B.E., op. cit., p.83).

14 has shorted the form of abuse of fundamental rights and freedoms. It prohibits ‘activities’ which aim at destroying the “*indivisible integrity of the State with its territory and nation, and the democratic and secular State based on human rights*”²⁸⁷. Article 42 of the Constitution is the most important provision with regard to minorities’ language rights in education. It was not amended by the October 2001 package of constitutional reforms neither by the August Reform Package. It prescribes that primary education is compulsory and free for all Turks and that Turkish must be the main (though not exclusive?) language of education: “*No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education (...). Foreign languages to be taught in institutions of training and education and the rules to be followed by schools conducting training and education in a foreign language shall be determined by law*” (emphasis added). According to some scholars, article 42 is the “*most fundamental barrier to even the most limited presence of Kurdish in the educational system*”²⁸⁸. The Constitutional Court does not accept that regional languages could be used as instruments of “*contemporary education*”²⁸⁹. The decision of the court to forbid mother tongue education is based on article 42 of the Constitution, article 14 on abuse of fundamental rights and article 4 protecting the official language. A minimum sign towards the protection of language rights in education would be the repeal of some parts of article 42.

The third section of the Treaty of Lausanne (article 38-45) is particularly important with regard to minority education and will be analysed in details *infra*.

2.5.2.3. Legislation.

Article 42 of the Turkish Constitution is supported by the legislation, in particular by article 2 of the *Law on Foreign Language Education and Training* (Law 2923). Article 2(a) of Law 2923 provides that Turkish citizens may not be taught their mother tongue in any language other than Turkish. Article 2(b) provides that lessons concerning Turkish republican reform history, Turkish language and literature, history, geography, social sciences, religious culture and morality and Turkish culture may not be taught in a foreign language. Finally, article 2(c) provides that foreign languages to be taught in Turkey shall be determined by a decision of the Council of Ministers obtaining the opinion of the *National Security Council*. What are the exact effects of article 42 of the Constitution and article 2 of Law 2923?

The precise effect of both provisions is unclear but they do not appear to go so far as to prohibit the teaching of Kurdish as a subject, although they may effectively prohibit any teaching through the medium of Kurdish²⁹⁰. Indeed, the fact that article 42 prescribes that “*no language other than Turkish shall be taught as a mother tongue*” does not clearly preclude that other languages (‘foreign languages’) could be taught within educational establishments, presumably as a

²⁸⁷ ODER, B.E., op. cit., p.86.

²⁸⁸ DUNBAR, R., *Turkey’s August 2002 Reform Package And The Kurdish Language: A Glimmer Of Light?*, “KHRP Legal Review”, 2002 (2), p.71.

²⁸⁹ (see ODER, B.E., op. cit., p.80).

subject. Article 42 does not seem to forbid private education in other languages or the teaching of other languages, as long as they are not ‘mother tongues’²⁹¹. In any case, the interpretation of article 42 in a manner that prohibits any teaching of Kurdish would be inconsistent with international and regional obligations.

On the 3rd August 2002, a few month after the students campaign, the Turkish parliament adopted the so-called ‘August Reform package’. It was the third package of reforms passed by the Turkish parliament in 2002. This package amended the *Law on Foreign Language Education and Teaching* (Law 2923). Article 11(a) of the Harmonisation Law (i.e. August Reform Package) changed the name of the *Law on Foreign Language Education and Teaching Law* (Law 2923) to the “*Law on Foreign Education and Training, and the Learning of Different Languages and Dialects by Turkish Citizens*”. The legislation scrupulously avoids mentioning the name of any particular language, including -and especially- Kurdish. Article 11 of the Harmonisation Law²⁹² did not ensure that the teaching of Kurdish as a subject will become part of the curriculum or even an available optional course at State’s educational institutions. The reform potentially provided for the teaching of Kurdish at private institutions. Following the adoption of this amendment, a number of court cases against students who had petitioned for optional Kurdish courses at university level, were dropped²⁹³. Public education in languages other than Turkish does not fall under the scope of the amended law, as article 42 of the Constitution remains unchanged²⁹⁴.

To the extent that Kurdish is a ‘different language’ now covered by this law, the change arguably marks the recognition by the Turkish State that Kurdish is not a ‘foreign’ language²⁹⁵. Article 11 (b) amends article 1 of Law 2923 and specifies that “*the purpose of the law was also to regulate the procedures pertaining to the learning of different languages and dialects traditionally used by Turkish citizens in their daily lives*”. Significantly, paragraph (c) of article 11 added a following paragraph to article 2 of Law 2923 namely that “*private courses subject to the provisions of the Law on Private Educational Institutions N^o. 625 dated 8.6.1965 can be opened to enable the learning of the different languages and dialects used traditionally by Turkish citizens in their daily lives. (...) The procedures and principles related to the opening and regulation of these courses shall be undertaken through a regulation to be issued by the Ministry of National Education*”²⁹⁶. Such regulation was published on the 20th September 2002 and its translation in English has been kindly transmitted to us by the *Kurdish Human Rights Project* based in London²⁹⁷. The last paragraph of article 11 however imposes some important restrictions. Indeed, the fact that private courses “*cannot be against the fundamental principles of the Turkish Republic*

²⁹⁰ DUNBAR, R., op. cit., p.72.

²⁹¹ DUNBAR, R. and McKAY, F., op. cit., p.35.

²⁹² An unofficial translation of the *Harmonisation Law* has been found on the website: <http://www.byegm.gov.tr/on-sayfa/uyum/uyum-ing-3.htm>.

²⁹³ 2002 Regular Report From The European Commission On Turkey’s Progress Towards Accession, p. 41.

²⁹⁴ “No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education” (article 42 of the Constitution).

²⁹⁵ DUNBAR, R., op. cit., p.72.

²⁹⁶ This was published on the 20th September 2002.

²⁹⁷ “Regulation Regarding The Learning Of Different Languages And Dialects Traditionally Spoken In Their Daily Lives By Turkish Citizens”, *Official Gazette*, 20th September 2002.

enshrined in the Constitution and the indivisible integrity of the State with its territory and nation” is a potential basis for considerably limiting courses in Kurdish²⁹⁸.

The regulation of September 2002 was crucial in order to know the extent to which Kurdish would, in fact, come within the ambit of the new provision. It governs the procedures concerning private courses that may be opened in accordance with the *Law on Foreign Education and Training and the Learning of Different Languages and Dialects by Turkish Citizens*. According to the regulation “*courses may be opened in the event of conditions regarding permission given for the opening of institutions and commencing of teaching in the regulation governing Private Teaching Institutions affiliated to the Ministry of National Education being fulfilled*”. The regulation imposes many restrictions to the opening of such courses. The purpose of the courses is to teach/learn traditional languages and dialects, *i.e.* education of the minority language. The teaching of other subjects through the medium of these languages and dialects is not guaranteed. Education in minority languages is thus not permitted. Article 10 of the regulation provides that “*on the course only the teaching programme related to learning languages and dialects traditionally used by Turkish citizens in their daily lives shall be applied*”. Other restrictions relate to the age of pupils wishing to learn Kurdish. The conditions of enrolment (article 8 of the regulation) provide that only those “*who are at least primary school graduates and Turkish citizens*” are allowed to learn these languages and dialects, including Kurdish. Pupils under 18 must have parent’s consent. However “*6th, 7th and 8th year students in primary education may attend classes at weekends or in the summer holidays*”. In any case thus, students wishing to learn Kurdish on private course will have to have learned Turkish before. Given that many Kurdish speakers have an insufficient command of Turkish and have not completed a Turkish elementary education, they will be unable to benefit from these courses²⁹⁹. A major restriction relies in the fact that the teaching programme needs to be approved by the ministry and that the *Education Council of the Ministry of Education* will set the curriculum on all such languages courses. The *Kurdish Human Rights Project’s 2002 Newslines* explains the different steps that Kurdish language courses will now have to go through: “*the course must initially receive the approval of the National Security Council (a military body possessing ultimate political authority), after which it will be passed to the Ministers’ Committee and then finally to the Ministry of Education who, should the former two bodies agree, will allow for the opening of the course*”³⁰⁰. There are thus, in practice, still many –arbitrary- impediments to the establishment of such courses. Moreover, the list of the persons attending courses shall be given to the relevant directorate of national education (article 10 of the regulation). If some language courses are finally authorised, most Kurds will not have access to them, as such courses are restricted to expensive, private institutions. It has been reported that under the new regulation, teachers will also be required to go through a rigorous vetting process by the government before being permitted to teach in privately run institutions. According to the *Kurdish Human Rights Project*, the single greatest impediment to the package’s proper implementation is however

²⁹⁸ DUNBAR, R., op. cit., p.72.

²⁹⁹ *ibidem*, p.73.

³⁰⁰ Kurdish Human Rights Project, “Newslines”, Autumn 2002, Issue 19, p. 1.

the ‘Anti-Terror Legislation’, which “allows the government to ban any activity considered to be against the State” and which is frequently reiterated throughout the reform package³⁰¹.

2.5.3. Comparison of the Kurdish Situation With That of Turkey’s Non-Muslim Minorities in the Light of the Treaty of Lausanne.

As mentioned before, non-Muslim minorities are the only minorities officially recognised by the Turkish State. However, despite the protection of the treaty of Lausanne, non-Muslim minorities have also suffered from concerted effort of assimilation by the Turkish Government in the 20th century³⁰². With regard to education, article 40 of the Treaty of Lausanne provides that non-Muslim minorities are entitled “to establish, manage and control at their own expense, any charitable, religious and social institutions, any schools and other establishments for instruction and education, with the right to use their own language and to exercise their own religion freely therein”³⁰³. They thus benefit from rights and privileges with regard to minorities’ language rights in education. Turkey has even sometimes gone beyond these provisions by providing financial resources for the operation of private minority schools³⁰⁴. Armenian, Greek and Jewish minorities thus have their own private schools of pre-primary, primary and secondary level (in 1971 there were 50 such schools in Turkey)³⁰⁵. However Turkey has started to reduce the number of hours of instruction in the minority language³⁰⁶.

Article 39 of the Treaty of Lausanne prescribes that Turkish nationals belonging to non-Muslim minorities will enjoy the same civil and political rights as Muslims. It does not merely regulate the special rights of a particular religious minority, but rather deals with the validity of the general principle of equality under the law. The two last paragraph of article 39, which guarantee the uses of one’s mother tongue in all essential private and public aspects of daily life, must be understood in this context. It should be interpreted in favour of every Turkish citizen, including Kurds³⁰⁷. Interestingly, the Treaty of Lausanne, which is often used to rather artificially limit the interpretation of the term ‘minority’, actually makes generous provisions for the use of non-Turkish languages. Article 41 of the treaty further provides that “as regards public instruction, the Turkish Government will grant in those towns and districts, where a considerable proportion of non-Moslem nationals are resident, adequate facilities [including financial facilities] for ensuring that in the primary

³⁰¹ Kurdish Human Rights Project, “Newslines”, Autumn 2002, op. cit., p. 1.

³⁰² KIRIŞCI, K., *Evaluating the Question of Minorities in Turkey in the Light of Turkish-EU Relations*, op. cit., p.105.

³⁰³ The Treaty of Lausanne has a reflexive aspect in that it specifies that the rights conferred by its provisions on the non-Muslim minorities of Turkey will be similarly conferred, by Greece, on the Muslim minority in her territory.

³⁰⁴ DE VARENNES, F., *Language, Minorities and Human Rights*, op. cit., p. 222.

³⁰⁵ CAPOTORTI, F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, op. cit., p.84.

³⁰⁶ Indeed, properties obtained since 1936 by foundations belonging to non-Muslim communities have been confiscated. This practice of the government has caused alienation among members of the Armenian and Greek minorities and in particular has adversely affected their ability to develop, let alone maintain, their educational establishments. (KIRIŞCI, K., *Evaluating the Question of Minorities in Turkey in the Light of Turkish-EU Relations*, op. cit., p.106).

³⁰⁷ RUMPF, C., *The Turkish Law Prohibiting Languages other than Turkish in Human Rights in Kurdistan – Documentation of the International Conference on Human Rights in Kurdistan*, Bremen, “Initiative for Human Rights in Kurdistan”, 1989, p.75.

Article 39 provides that “No restriction shall be imposed on the free use by any Turkish national of any language in private intercourse, in commerce, religion, in the press or in publication of any kind or at public meetings”.

schools the instruction shall be given to the children of such Turkish nationals through the medium of their own language. This provision will not prevent the Turkish Government from making the teaching of the Turkish language obligatory in the said schools”. While article 10 of the Turkish Constitution affirms the equality of all individuals without discrimination, the formal equality of Turkish citizens seems to be already compromised in practice. There is a *de jure* and *de facto* difference in the treatment accorded to minorities officially recognised under the Lausanne Treaty and those outside its scope. The situation of the Kurds is much different from that of non-Muslim communities. Interestingly however, a Turkish official declared that, “*in the present setting this [suggestions that there are discriminations in the country] would be tantamount to prohibiting the shooting of kangaroos in Turkey*”³⁰⁸.

The issue of Kurdish education is highly sensitive compared to non-Muslim educational facilities. The government for years has claimed that expressions of Kurdish identity were veiled attempts to break up the State. Teachers could be arrested or dismissed for not conforming to the rules. Students were also punished for using their language at school³⁰⁹. Until 1991 it was illegal to speak Kurdish in Turkey even in private spheres. This was thus *prima facie* violating article 39, paragraph 4 of the Treaty of Lausanne, which guarantees that no restrictions shall be imposed on the free use by any Turkish national of any language in private intercourse. In 1991 the government annulled Law 2932³¹⁰ that prohibited the use of Kurdish and broke down the ‘taboo’ on debating the Kurdish issue in public. Under Law 2932 it was totally prohibited to play Kurdish music or even to speak Kurdish in the street³¹¹. This law provided that the mother tongue of all Turkish citizens was Turkish³¹².

Although the language ban has been lifted, various legal restrictions remain on the expression of the Kurdish minority identity. While Turkey’s policies were in theory, directed against all of the languages spoken by the different ethnic groups living in Turkey, the main target is Kurdish³¹³. Use of Kurdish is now allowed in informal settings, but it remains outlawed in public schools and cannot be used in political settings or in broadcasts other than music³¹⁴.

³⁰⁸ Quoted by *No Racism in Turkey, if You Say You’re a Turk*, The Kurdistan Observer, August 25, 2001(www.kurdistanobserver.com).

³⁰⁹ For a list of individual testimonies related to the use of Kurdish at school, see: SKUTNABB-KANGAS, T., *Linguistic Genocide in Education or World Wide Diversity and Human Rights?*, op. cit., pp.320-326; GRAHAM-BROWN, S., op. cit., p. 31.

³¹⁰ Law regarding publications in languages other than Turkish, N° 2932 of 19 October 1983.

³¹¹ DUNBAR, R. and McKAY, F., op. cit., p.31.

³¹² BUCAK, S. and SKUTNABB-KANGAS, T., *Killing A Mother Tongue – How Kurds Are Deprived Of Linguistic Human Rights in* SKUTNABB-KANGAS, T. and PHILLIPSON, R., *Linguistic Human Rights – Overcoming Linguistic Discrimination*, op. cit., p.357.

³¹³ http://www.hrw.org/reports/1999/turkey/turkey993-08.htm#P941_209664

³¹⁴ DUNBAR, R., op. cit., p.73.

CONCLUSION

ASSESSMENT OF THE IMPLEMENTATION OF KURDS' LANGUAGE RIGHTS IN TURKEY'S EDUCATIONAL SYSTEM IN THE LIGHT OF EXISTING HUMAN RIGHTS STANDARDS.

The purpose of this study, inspired by the 2002 Turkish students campaign, was to analyse minorities' language rights in education in light both of the theoretical international legal framework and of the concrete situation of a minority group, namely Kurds in Turkey. The purpose was to compare the status of the Kurdish language in Turkey's educational system with the relevant international and regional standards and to assess the changes in this field - if any - in the light of EU accession perspectives.

The Kurdish problem is the main source of political instability in Turkey today and has become a great national and international challenge for the future of the country. There is a *de jure* and *de facto* system in Turkey that denies Kurdish identity and that promotes and practises assimilation policies with regard to Kurds. Many Turks fear that any movement towards granting rights to Kurds will compromise the sacrosanct 'Turkish identity' and inevitably lead to Kurdish secession. Kurds are not officially recognised by Turkey as being a national minority but they do in practice constitute a minority before international human rights law. In theory, Kurds' language rights are –explicitly or implicitly- protected under international and European human rights law. But even though the awareness of the importance of language rights is rising, instruments and practice are rather poor as related to multiculturalism in education. The growing attention granted to the 'best interest of the child' in educational policies makes nevertheless believe that mother tongue education is implicitly recognised by the international community. The protection offered by both the ICCPR and the ICESCR is not explicit for minorities' language rights in education. According to some opinions, article 27 of the ICCPR, by protecting the right to identity, could constitute the basis for special measures, such as *inter alia* the establishment of minority's educational institutions. But both covenants still have to be ratified by Turkey. The advantage of the ICCPR is that it offers a monitoring mechanism based on individual complains, which could be used by Kurds for clarifying the extent of the content of article 27. However, if Turkey ratifies the ICCPR following the 'French example' (*i.e.* its reservation on article 27), the monitoring system will be quite useless. Interestingly, Turkey ratified the CRC in which article 29 prescribes that "*the education of the child shall be directed to (...) the development of respect for the child's parents, his or her cultural identity, language and values (...)*". Such ideas are to be found in many other instruments too. The right to

identity of the Kurdish community and of its members together with the increasing recognition of cultural rights, provide complementary and reinforcing legal basis for the use of Kurdish in education. The Council of Europe instruments like the Framework Convention or the European Charter, if ratified, provide a most explicit legal binding basis for mother tongue education. But the ECHR does not provide great support in this regard.

The instruments often do not specify the modalities of the positive measures that States should take in order to support and protect linguistic minorities. The opportunity to enjoy Kurdish mother tongue education and the opportunity to learn Kurdish as a subject in the curriculum of schools and universities would probably be consistent with international human rights law, if not required thereby. In any case, the total denial of such opportunities would clearly be inconsistent with Turkey's international obligations.

Turkey always claims and advocates the principle of equality of all Turkish citizens, which implies the absence of any differential treatment. But the Turkish 'formal equality theory' and the principle of non-discrimination have already been undermined by the special position conferred upon certain non-Muslim minorities under the Treaty of Lausanne (*i.e. inter alia* their right to establish, manage and control their own educational institutions). The fear that extending minority rights to Kurds will undermine the equal rights of all Turkish citizens is the result of a formalistic understanding of the concept of equality. Insisting on equality leads in fact to nothing more than inequality. Turkey's policies of assimilation and homogenisation for reasons of national security or territorial unity are illegal and unacceptable in human rights law. The manner in which Turkey deals with the identity formation of the new generation stands in crude contrast to everything we know today about identity and the formation of identity.

The basic idea underlying this study is that everyone should have access, on general terms of equality, to public services in his or her country. As a public service, education should be made available on equal bases, without discrimination. With regard to minority education, States' policies are limited by a number of criteria, which frame the legitimacy of their choices in public affairs. Equality and non-discrimination require the use of minorities' language within a State when a sufficiently large number of people speak a non-official language, which is clearly the case of the 8-15 millions of Turkish Kurds. For these reasons and for democratic reasons, Turkey's public education system in the south-east part of the country should be tailored for the Kurdish identity. Kurds should at least be able to establish, manage and control private educational institutions providing education *in* and *of* Kurdish. In principle, Turkey would not have any obligation to finance Kurdish private educational institutions but the principle of non-discrimination implies that if any funding is granted to private schools, this should be done in a non-discriminatory manner.

One other major criterion for choosing a public policy in educational matters, namely the availability of financial and professional resources remains problematic. Turkey is now undergoing a “*deep and multifaceted crisis*”³¹⁵ where financial means are not easily available. However, it is important to recall that the UNESCO and K. TOMAŠEVSKI, *UN-Special Rapporteur on the Right to Education* advocate the allocation of 6 % of the GNP as to make the many needed improvements possible³¹⁶. Turkey’s financial allocations to education are still very low compared to this ideal level.

Another criterion, namely the availability of professional and material resources directly depends upon the freedom of expression in Kurdish and the ability to print and broadcast in Kurdish. The use of Kurdish is effectively restricted in many other domains beyond education.

The process of accession to the EU represented the most important incentive for Turkey’s recent reforms. The process of enlargement has brought at stage the political dimension of minority protection. The revised Accession Partnership of 2003 and the various EU regular reports highlight the need to ensure minority rights in Turkey. The European Commission insists on the ratification of the Framework Convention, which is one of the few instruments that openly acknowledge minorities’ rights to mother tongue education. But many member States of the EU did not ratify the Framework Convention. EU-double standards policies are once again at stake. Even though Turkey claims to be “*in line with the expectation in the AP*” and that “*the legal restrictions are lifted and changes in line with the EU norms are achieved*”³¹⁷, some doubts remain.

At the domestic level, the 2002 August reform lifted restrictions on minority language courses, including Kurdish courses. It looks as if it guarantees a new respect for linguistic diversity but the reform is hedged with qualifications that could block its effective implementation. While some have hailed the August reform as a major breakthrough for Kurdish speakers, the immediate implications of the changes for the legal status of the Kurdish language in education and the rights of its speakers are quite short. The legal position in Turkey now, with regard to the status of the Kurdish language in a number of spheres, appears to be a matter open to interpretation³¹⁸. The reform has not ensured that the teaching of Kurdish as a subject will become part of the curriculum or even an available optional course at State’s educational institutions. Kurdish still cannot be taught at universities. The changes fall well short of what students protesting were seeking namely education in their language. Both article 42 of the constitution (providing that no language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education) and article 2 of Law 2923 (providing that Turkish citizens may not be taught their mother

³¹⁵ TOMAŠEVSKI, K., *Report Submitted By The Special Rapporteur On The Right To Education – Mission To Turkey*, op. cit., paragraph 8.

³¹⁶ *ibidem*, paragraph 25.

³¹⁷ SKUTNABB-KANGAS, T., *Linguistic Human Rights in Education and Turkey – Some International Comparisons*, op. cit.

³¹⁸ DUNBAR, R. and McKAY, F., op. cit., p.31.

tongue in any language other than Turkish), should still be amended in order to eliminate the remaining major restrictions on Kurds' language rights in education.

Although Kurds have expressed a desire for education *in* and *of* Kurdish, although they have demonstrated the need for it and although their numerical strength justifies it, public education in the south-east part of Turkey is still provided only through the medium of Turkish not Kurdish. Contrary to what both the principle of non-discrimination and the concept of special measures would require in such a context, the Turkish public education imposes a direct submersion -or assimilation- system that is not in line with international human rights standards.

With regard to private education, the new regulation provides some improvements in the teaching of Kurdish but these steps could be diluted by the different restrictions imposed in the document. The threat remains that the severe interference of the State in private educational matters nullifies, in practice, these improvements. The situation now is quite paradoxical. Kurdish publications are allowed but the language itself can hardly be learned or taught. Moreover, human rights groups claim that the change in law is likely to have little impact on Kurds' education as long as classes are restricted to expensive, private language institutes. At best the reform is a limited first step towards international standards on minority protection.

The August package potentially opened the door to the teaching of Kurdish at private institutions³¹⁹. But the relative lack of teachers trained to teach Kurdish -which is itself a product of the complete exclusion of Kurdish from the educational system- together with the restrictions set under the regulation suggest that the real impact of the reform is limited in practice. Implementation of the constitutional changes significantly depends upon administrative authorities and there are few reasons to believe that the attitudes of the authorities have changed very much. To sum up, the issue of mother tongue education, in particular of Kurdish education, still faces legal and political obstacles. We have to see, in practice, how Kurdish private courses will be organised and if such courses would suffer from the above mentioned restrictions. If properly implemented, the reform package may significantly liberalise certain provisions but Turkey has still a long way to go before Kurds are given the sort of respect and protection, which is required under the main international and regional instruments.

In any case, education *in* and *of* Kurdish thus does not mean the abandon of the Turkish language. The system shall remain balanced: almost all international and regional instruments ensure the additional teaching of Turkish as official language. A politic of additive bilingualism or multilingualism should become the goal of minority's educational systems. Bilingualism –at every level of education- should be the goal of Turkey's educational system in the south-east part of the country. Demands for Kurdish education are demands for democratisation. A right balance has to be found

³¹⁹ DUNBAR, R., op. cit., p.72.

between the financial means available and the need, for the State, to realise a policy of additive bilingualism as fully as possible. The educational system should seek to ensure both the development of the identity of the child and its knowledge of the society as a whole. According to *Human Rights Watch*, there can be however no meaningful progress on Turkey's EU candidacy until the Turkish military becomes unequivocally and transparently engaged in the process³²⁰. Educational matters should be shifted from a national security issue to a human rights discourse. Moreover, the participation of the Kurdish community should be ensured in matters concerning them.

Significant attitudinal changes thus need to occur in order for these limited changes to be effective. The first one would be Turkey's official recognition of Kurds as a 'national minority'. Constitutional and legal guarantees recognising and protecting the Kurdish cultural existence are also urgently needed. The EU should strengthen its requirements, its roadmaps and its monitoring system in the field of minority protection as to make the EU-accession a real evidence of the democratisation of a candidate country. Minorities' language rights themselves should receive stronger and unambiguous protection under international and European binding instruments. A clarification of the different concepts involved in this discussion is urgently required. The duty-holder should be specified as well as whose financial responsibility it is to ensure implementation of such rights. Eventually, a proper monitoring mechanism should be established.

Generally speaking, minority protection policies should always be tackle globally in light of the particularities of the country at stake. Other issues –like political and media participation, cultural events or certain forms of autonomy–deserve also special attention and appropriate State funding in order to achieve and preserve a proper and balanced system of minority protection. With regard to minorities' language rights in education, it is sometimes argued that a legally binding version of the Hague Recommendations would be welcomed, even though they do not deal with all relevant issues neither. Some scholars also see the *Declaration of Linguistic Rights* signed in June 1996 in Barcelona and co-chaired by the UNESCO as an important step towards language protection.

Minorities' language rights and language rights in general, will surely remain a topic of high national and European controversy in the coming decades. The EU-enlargement process contributes significantly to this discussion on the role, the place and the choice of languages for public services and public policies. Eventually, much could depend on the interpretation of the content of the European Convention, which still has to be adopted by the EU member States.

³²⁰ "Human Rights Watch Analysis of the 2001 Regular Report on Turkey", December 2001, www.hrw.org

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