

January 1981

Restrictions on Access to English Language Schools in Quebec: An International Human Rights Analysis

David E. Short

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>



Part of the [Transnational Law Commons](#)

Recommended Citation

David E. Short, *Restrictions on Access to English Language Schools in Quebec: An International Human Rights Analysis*, 4 Can.-U.S. L.J. 1 (1981)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol4/iss/3>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Restrictions on Access to English Language Schools in Quebec: An International Human Rights Analysis

by David E. Short*

I. INTRODUCTION

In May 1980, the voters of the Province of Quebec, Canada, rejected a referendum proposal to give their provincial government a mandate to negotiate "sovereignty - association" status for their province.¹ Under that proposal, Quebec would have been given exclusive authority to enact its own laws, levy taxes, and conduct foreign relations, but an economic association would have been established with the rest of Canada to provide for a common currency and customs union, among other things.² The referendum outcome reflected a rejection of the fundamental policy of the Parti Quebecois provincial government; that is, to work toward secession of Quebec from the rest of Canada.³

Since its November 1976 election victory, the Parti Quebecois has implemented a number of significant reforms addressed to the concern of French-speaking Quebecers for the preservation and enhancement of their language and culture.⁴ The attainment of meaningful reform in this area over the past several years may well have contributed to the defeat of the referendum, inasmuch as there is now a greater recognition among French-speaking Quebecers of the capacity of the provincial government, functioning within the context of the Canadian confederation, to protect the French language.

* A.B. (1976), Cornell, University; J.D. & M.P.A. (1979), University of Southern California. The author is an associate with the law firm of Galland, Kharasch, Calkins & Short, Washington, D.C. He is a member of the District of Columbia Bar. The author wishes to thank Professor Ami Barav, Visiting Professor of International Law at the University of Southern California Law Center, and Professor Nathan A. Pelcovits, of the Johns Hopkins University School of Advanced International Studies, for their helpful comments. The assistance of the Canadian Embassy in Washington and the Délégation Générale de Québec in New York City, in supplying background source materials, is also acknowledged with thanks.

¹ The Gazette (Montreal), May 21, 1981, at 1, col.

² *Referendum in Quebec, May 20, 1980 — Oui — Non*, 11 CANADA TODAY/D'AUJOURD'HUI 1, 3-4 (Canadian Embassy, Washington 1980) [hereinafter cited as *Referendum in Quebec*].

³ *Id.* at 2.

⁴ See generally CHARTER of the FRENCH LANGUAGE [Bill 101], Que. Stat. c.5 (1977) [hereinafter cited as LANGUAGE CHARTER], which includes provisions making French the principal or only language of the legislature, courts, civil administration, semi-public agencies, labor relations, commerce and business, and education.

Undoubtedly, the most far-reaching and the most controversial law enacted by the Parti Quebecois government in the linguistic-cultural sphere has been the Charter of the French Language, sometimes referred to as Bill 101.⁵ That law, adopted by the Quebec National Assembly in August 1977, is a comprehensive plan for the improvement of the status of the French language in Quebec. It declares French to be the only official language of the province⁶ and goes on to enumerate a number of specific provisions designed to increase the use of French in Quebec.⁷ The Charter supersedes the Official Language Act⁸ which had been in effect from 1974 to 1977.⁹

This paper will evaluate the language of education provisions of the Charter in the context of international law. The language of education provisions permit English public schools to continue to exist; however, access to such schools is denied to most children whose parents were not educated in English in Quebec. Thus, the principal issue presented is whether access restrictions of this nature can be implemented consistently with the obligations which are imposed by international law. Opponents of Quebec language policy have asserted that limitations on access to English schools violate fundamental human rights.¹⁰ Before any meaningful conclusion can be reached as to the validity of those claims, it is necessary to ascertain the extent to which linguistic and educational rights are protected under international law. Once that has been done, it will be possible to assess the probability of success for a legal challenge to the educational provisions of the Charter of the French Language, grounded in the international protection of human rights.

It is quite possible that provisions of the Charter other than those dealing with education, such as the requirements that French be the sole working language of most private businesses¹¹ and that only French appear on most signs and commercial advertising,¹² might also be inconsistent with international human rights protections. The scope of this paper, however, will be limited to an examination of the Charter's educational provisions.

⁵ *Id.*

⁶ *Id.* §1. Actually, French had been the only official language of Quebec since the enactment of the Official Language Act [Bill 22], Que. Stat. c.6 (1974) [hereinafter cited as Bill 22], (Repealed by Language Charter, Que. Stat. c.5 (1977)).

⁷ For discussion of the Language Charter and the public reaction which it provoked, see generally Note, *Language Rights and Quebec Bill 101*, 10 CASE W. RES. J. INT'L L. 543 (1978).

⁸ Bill 22, Que. Stat. c.6 (1974).

⁹ Language Charter, Que. Stat. c.5, §224 (1977).

¹⁰ See, e.g., Brierley, Cayne, Cotler, Humphrey, Scott, Slayton & Vlasic, *Undermines two-culture concept: Seven McGill Law Professors Raise Objections to Bill 22*, THE MONTREAL STAR, July 19, 1974, §D, at 2, Col. 3; see also QUEBEC ASSOCIATION OF SCHOOL ADMINISTRATORS, BRIEF ON BILL 1, at 4-5 (1977).

¹¹ Language Charter, Que. Stat. c.5, §§135-156 (1977).

¹² *Id.* §58.

The first part of the paper will present an overview of the educational provisions of the Charter in order to develop a frame of reference for the application of the principles of international law. The pertinent sources of international law, and in particular the international human rights covenants which are binding on Canada, will then be surveyed to determine the specific linguistic and educational protections which international law recognizes. Finally, there will be a discussion of the enforcement procedures pursuant to which a formal determination of the Charter's consistency (or inconsistency) with international human rights standards can be sought.

Considerable skepticism exists in some quarters as to the applicative value of international law—the question has been raised as to whether international law is really law at all.¹³ Traditionally, only states have had standing to bring actions before international tribunals.¹⁴ An action could only be brought against a state which had given its consent to being sued.¹⁵ Once a decision had been rendered by an international tribunal, problems in the implementation of the judgment sometimes arose.¹⁶

With regard to human rights, however, international law provides substantially more effective mechanisms for enforcement. One such procedure is set forth in U.N. Economic and Social Council Resolution 1503,¹⁷ which provides that the Subcommission on Prevention of Discrimination and Protection of Minorities may receive and investigate petitions from individuals alleging a consistent pattern of gross violations of human rights.¹⁸ Another fairly novel human rights protection mechanism is contained in the Optional Protocol to the International Covenant on Civil and Political Rights, which permits individuals to petition the Human Rights Committee established in Part IV of the Covenant regarding alleged violations of rights guaranteed to them under the Covenant.¹⁹ A similar measure is contained in the European Convention on Human Rights, pursuant to which individuals may seek redress of violations of rights protected in that Convention. This may be done by petitioning the European Commission of Human Rights, provided the state against which the petition is directed has recognized the jurisdiction of the Commission to receive such petitions.²⁰ In fact, almost all parties to the Con-

¹³ See M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 9-18 (3d ed. 1977).

¹⁴ See, e.g., Statute of the International Court of Justice, *opened for signature* June 26, 1945, art. 34, 59 Stat. 1055, T.S. No. 993.

¹⁵ *Id.* art. 36.

¹⁶ M. AKEHURST, *supra* note 13, at 13-15.

¹⁷ E.S.C. Res. 1503, 48 U.N. ESCOR Supp. (No. 1A) 8, U.N. Doc. E/4832/Add. 1 (1970).

¹⁸ See text accompanying notes 136-143, *infra*.

¹⁹ For a more complete discussion of this Protocol, see notes 129-136 and accompanying text, *infra*.

²⁰ EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, COLLECTED TEXTS, §1, Doc. 1, Art. 3 (1966).

vention have recognized the jurisdiction of the Commission, and a considerable body of case law interpreting the Convention has evolved since the Commission's inception in 1953.²¹ One decision in particular, the Belgian Linguistic Case,²² is especially relevant to the human rights analysis of the issues presented by the educational provisions of the Quebec Charter of the French Language. That case will be discussed at length at a later point.²³ The important lesson taught by the experience of the European Commission is that international law has the potential for becoming a meaningful instrument for assuring the protection of human rights, provided effective mechanisms are made available for its enforcement.

II. EDUCATIONAL PROVISIONS OF THE CHARTER OF THE FRENCH LANGUAGE

Until 1974, there were generally no restrictions on access to the English and French language educational systems in Quebec. There was recognition of an absolute right of all parents—whether they spoke English, French, or some other language—to determine in which of Canada's two official languages their children were to be instructed. This long standing principle was challenged in the late 1960's by a suburban Montreal school commission which did not want to provide English language instruction for Italian immigrant children.²⁴ In response to the action of that school board, legislation was enacted by the National Assembly confirming that all parents had the right to decide whether their children were to be educated in English or in French.²⁵

The first statutory restrictions on access to English language education came into force in 1974, when the Official Language Act²⁶ was adopted. Access to English language schools, under that law, was afforded only to children whose mother tongue was English, and to children who could pass an English language proficiency test establishing that they were capable of receiving instruction in English.²⁷ All other children were required to attend French schools.²⁸

²¹ The Decisions of the European Court of Human Rights and the European Commission of Human Rights are both reported in Y. B. EUR. CONV. ON HUMAN RIGHTS.

²² The case relates to certain aspects of the laws on the use of languages in Education in Belgium, [1968] Y.B. EUR. CONV. ON HUMAN RIGHTS 832 (Eur. Ct. of Human Rights) [hereinafter cited as Belgian Linguistic Case].

²³ See Notes 68-79 and accompanying text, *infra*.

²⁴ See "Il faut créer dix, vingt, cinquante St. Léonard": Jean—Marc Léger, [1968] CANADIAN ANN. REV., 86-89 (J. Saywell ed. 1969).

²⁵ Bill 63, Que. Stat. c.9 (1969). Bill 63 provides that instruction was generally to be given in French, but that by simply submitting a request to the local school board, any parent had the right to have his children educated in English. It effectively conferred on parents an unrestricted right to choose between the two linguistic educational systems.

²⁶ Bill 22, Que. Stat. c.6 (1974).

²⁷ *Id.* §§41,43.

²⁸ *Id.* §41.

The Charter of the French Language, which came into force in 1977 and supersedes the Official Language Act, imposes even greater restrictions on access to English language schools.²⁹ The Charter provides that in order for a child to enroll in an English school, at least one of his parents must have been educated in English in Quebec.³⁰ As a transitional measure, however, parents educated in English outside Quebec may also send their children to English schools, provided that the parents were domiciled in Quebec on the date the Charter came into effect.³¹ In addition, children legally enrolled in English schools prior to the effective date of the Charter may continue to attend such schools, and their younger brothers and sisters may also enroll in English schools.³² The final exception to the general rule of mandatory French language education for all pertains to persons living in Quebec for only a temporary period of time; such persons may send their children to English schools in accordance with regulations promulgated by the French Language Bureau (Office de La Langue Francaise).³³

The Charter essentially confirms that a tax-supported public school system offering instruction in the English language will continue to exist. It imposes significant restrictions, however, on access to that system. The Charter accords different treatment to individuals based on such factors as place and language of one's education, place and language of one's parents' education, and date of establishment of domicile in Quebec. For instance, a person born in Quebec, who received his elementary education in English in Quebec, may send his children to either English or French schools. His neighbor, also born in Quebec, but who was educated in the French language sector, may send his children only to French schools. Another neighbor, educated in English outside Quebec (in Ontario for example), and who moved to Quebec after August 1977, is also denied the right to send his children to English schools. Still another person who was educated in English in Ontario, but who moved to Quebec before August 1977, may send his children to either English or French schools. One of

²⁹ Language Charter, Que. Stat. c.5, §§72-88 (1977).

³⁰ *Id.* §72 states:

Instruction in the kindergarten classes and in the elementary and secondary schools shall be in French, except where this chapter allows otherwise. This rule obtains in school bodies within the meaning of the Schedule and also applies to subsidized instruction provided by institutions declared to be of public interest or recognized for purposes of grants in virtue of the Private Education Act (1968, chapter 67). *Id.* §73 provides:

In derogation of section 72, the following children, at the request of their father and mother, may receive their instruction in English:

(a) a child whose father or mother received his or her elementary instruction in English, in Quebec;

.....
³¹ *Id.* §72(b).

³² *Id.* §72(c),(d).

³³ *Id.* §85.

the most significant issues presented by the Charter, then, is whether such distinctions are permissible under international law. It is also noteworthy that the Charter of the French Language does not attempt to abolish the minority educational system; it actually sanctions the continued operation of that system, within prescribed limits. Resolving the question of whether the Quebec Government might be entitled to abolish the tax supported English language public school system would therefore contribute nothing toward determining the validity of the current language of education law.³⁴

Keeping in mind the analytical framework developed thus far, an examination of the language of education rights protected by international law will now be undertaken. The purpose of the following section is to determine what limitations, if any, international law places on governmental regulations regarding who may or may not have access to certain public schools, with particular reference to the types of classifications arising from the educational provisions of Quebec's Charter of the French Language.

III. SOURCE AND EXTENT OF INTERNATIONAL LAW PROTECTION OF LANGUAGE RIGHTS IN EDUCATION

A. *Sources of Protection*

International law is recognized as being derived from several different sources.³⁵ Among the more significant sources of international law are international conventions, international custom, and general principles of law in force in civilized nations.³⁶ Of these various sources of international law, treaties are generally regarded as being the most important.³⁷ A number of modern treaties serve as codifications of customary international law.³⁸ In other instances, treaties reflect the resolution of controversies between nations as to what rights and obligations arise under international custom.³⁹ In ratifying a treaty or voting in favor of adoption of an international convention, a state may signify that it recognizes the validity of the principles expressed in the document and is willing to be bound by those principles.⁴⁰

If an international convention is not ratified by a particular state but is ratified by a substantial number of other states, the convention nonetheless serves as evidence of the prevailing view within the community of

³⁴ See Notes 159-168 and accompanying text, *infra*.

³⁵ M. AKEHURST, *supra* note 13, at 30-47.

³⁶ *Id.* see also Statute of the International Court of Justice, *opened for signature* June 26, 1945, art. 38(1), 59 Stat. 1055, T.S. No. 993.

³⁷ M. AKEHURST, *supra* note 13, at 30-31.

³⁸ *Id.* at 32.

³⁹ *Id.* at 32-33.

⁴⁰ *Id.* at 122-26.

nations as to the status of the subject matter of the convention in international law.⁴¹ Such a treaty is not binding on the non-ratifying state in the same way that it is with respect to ratifying states. But to the extent that it sets forth widely accepted principles of international custom, the treaty is persuasive as to the rights and obligations of non-ratifying states under international law.⁴²

The first international legal source that will be considered is the United Nations Universal Declaration of Human Rights. Although the Declaration is less specific than the two Human Rights covenants in setting forth standards to which states must adhere, it is widely recognized as the preeminent restatement of international human rights protections, and is now legally binding on all states, including Canada, which are parties to the Helsinki Accords.⁴³ Against the background established by the Declaration, consideration will be given to the two human rights covenants,⁴⁴ which refine and render more precise the principles contained in the Declaration. The covenants are of particular significance because they expressly deal with educational rights and the rights of members of minority groups,⁴⁵ and because they create treaty obligations which are binding on Canada in international law.

The last two documents that will be analyzed are not binding on Canada, but are still helpful in determining the scope of international protection of educational language choice rights. The Convention Against Discrimination in Education, a UNESCO document, has now been ratified by at least 53 states.⁴⁶ Although the Convention is perhaps the most comprehensive codification of international law's educational antidiscrimination protections, its applicability to the analysis of Quebec's Charter of the French Language is limited by the fact that Canada has not ratified the Convention. Apparently, the Federal Government has elected not to ratify the Convention because under Canada's constitution, the British North America Act of 1867,⁴⁷ education is a matter within the

⁴¹ *Id.* at 33.

⁴² *Id.*

⁴³ Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, at 81, reprinted in 14 INT'L LEGAL MATERIALS 1293 (1975) [hereinafter cited as Helsinki Accords]. See also Fisher, *The Human Rights Covenants and Canadian Law*, 15 CAN. Y. B. INT'L. L. 42, 45-46 (1977).

⁴⁴ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6319 (1966) [hereinafter cited as Economic Covenant]. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) [hereinafter cited as Political Covenant].

⁴⁵ See Economic Covenant, *supra* note 44, art. 13; Political Covenant, *supra* note 44, art. 27.

⁴⁶ See Convention Against Discrimination in Education, opened for signature Dec. 14, 1960, 429 U.N.T.S. 93, reprinted in I. BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS 329 (I. Brownlie ed. 1971).

⁴⁷ British North America Act of 1867, 30 & 31 vict., c.3 (can.) [hereinafter cited as

exclusive jurisdiction of the provinces.⁴⁸ Neither the Federal Government nor the provincial governments, however, have expressed any opposition to or disapproval of the principles set forth in the UNESCO Convention. Accordingly, the Convention serves as persuasive authority as to the standards that Canada and other civilized nations are expected to live up to in the administration of their educational systems. The United Nations Declaration of the Rights of the Child also recognizes rights which are closely related to the issue of choice of language of education. This Declaration is not binding on any state,⁴⁹ but inasmuch as it was adopted unanimously by the U.N. General Assembly,⁵⁰ a body in which Canada is a voting member, it serves as a highly persuasive restatement of the protection afforded children under international law.

B. *The United Nations Universal Declaration of Human Rights*

The Universal Declaration of Human Rights is a statement of fundamental principles that was unanimously adopted by the U.N. General Assembly on December 10, 1948.⁵¹ The Declaration was not intended to give rise to any binding obligations, and it does not contain any specific enforcement provisions.⁵² Nevertheless, all states which are parties to the Helsinki Accords, including Canada, are bound to adhere to the Universal Declaration.⁵³

The Declaration contains an equal protection provision, Article 2, which requires that all the rights recognized in the Declaration be secured "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 26 of the Declaration establishes the right of every human being to receive an education. Section 1 of Article 26 obliges states to provide free and compulsory elementary education. Higher education must also be provided, and it must be made available to all on the basis of merit. Section 3 of the Article states: "Parents have a prior right to choose the kind of education that shall be given to their children."

At the very least, the Charter of the French Language cannot be said to promote the educational policies set forth in the Declaration. Until a few years ago, all Quebec parents had been afforded the right to deter-

B.N.A. Act].

⁴⁸ *Id.* §93. See generally Lebel, *Le choix de la Langue d'Enseignement et Le Droit International*, 9 REVUE JURIDIQUE THEMIS 221 (1974). "Le Canada n'a pas ratifié la convention et s'est abstenu de voter lors de son adoption, parce que l'éducation relève constitutionnellement de la compétence des provinces." *Id.* at 234.

⁴⁹ Declaration of the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR, Supp. (No. 2) 592, U.N. Doc. A/4249 (1959) [hereinafter cited as Rights of the Child].

⁵⁰ *Id.*

⁵¹ Universal Declaration of Human Rights, G.A. Res. 217, 3 U.N. GAOR, Supp. (No. 2) 71, U.N. Doc. A/1810 (1948) [hereinafter cited as Universal Declaration].

⁵² *Id.*

⁵³ Helsinki Accords, *supra* note 43.

mine, without governmental interference, whether their children would be educated in English or in French.⁵⁴ Since the enactment of the Charter in 1977, parents who were themselves educated in English in Quebec have been permitted to continue to exercise the right to choose whether their children will be instructed in French or in English, but all other parents have been denied that right of choice.⁵⁵

The phrase “[p]arents have a prior right to choose the kind of education that shall be given to their children” probably should not be interpreted as recognizing an *unqualified* right of parents to determine the language in which their children are to be educated. As will be discussed in the section of this article which considers the International Covenant on Economic, Social and Cultural Rights,⁵⁶ recognition of any such right could impose an undue administrative burden on the various states, which almost certainly was not intended by those who drafted the Declaration. If Article 26, section 3, is not to be rendered meaningless, however, it is essential that state educational systems provide some mechanism for parental input into the determination of the kind of education their children shall be given. The Article may not confer any absolute linguistic choice rights on parents, but neither does it sanction the implementation of educational policies which totally fail to reflect parental wishes.

The proper interpretation of Article 26 may depend on the circumstances existing in particular states. In a state where education has always been offered in only one language, and where no significant linguistic minority exists, the Article probably does not oblige the state to begin offering instruction in additional languages. But in a state where publicly-financed education in two languages has always been made generally available, and where parents have always enjoyed an unrestricted right to choose in which of the two languages their children are to be educated, legislation which takes away that parental right of choice surely is not in furtherance of the principles set forth in the Declaration.

It must not be forgotten, however, that whatever meaning may be ascribed to Article 26, that provision is subject to the qualification of the Declaration’s equal protection clause, Article 2. In other words, however limited the Article 26, section 1 right to education and Article 26, section 3 parental choice rights may be, those rights must be made available to all “without distinction of any kind, such as . . . language, . . . national or social origin, . . . birth or other status.”⁵⁷

In Quebec, parents who were themselves educated in the province’s English language school system enjoy a “prior right to choose” whether their children will be educated in English or in French. Denial of that right to parents who were educated in French in Quebec constitutes a dis-

⁵⁴ See notes 24-25 and accompanying text, *supra*.

⁵⁵ Language Charter, Que. Stat. c.5, §73 (1977).

⁵⁶ See notes 64-67 and accompanying text, *infra*.

⁵⁷ Universal Declaration, *supra* note 51, art. 2.

inction based on language which is in contravention of Article 2 and section 3 of Article 26 of the Declaration. Denial of the right of English-speaking parents educated somewhere other than Quebec to choose the language of instruction for their children constitutes a distinction based on national origin, which is similarly proscribed by Article 2. Article 26, section 1 is violated in that one segment of the school population, delineated according to language, national origin, and birth, enjoys the right to education in either French or English while the remainder of the school population is given access only to French language schools. To restate the essence of this argument, when a state chooses to offer publicly-financed education in more than one language, the state cannot restrict access to one linguistic system according to impermissible criteria, while affording unlimited access to the other system.⁵⁸

Thus, any challenge to the Charter of the French Language based on the Universal Declaration of Human Rights will rely on both the equal protection provision, Article 2, and the provision conferring the right to education, Article 26. There is certainly an argument to be made that Article 26, section 3, standing alone, requires Quebec to permit all parents to decide whether their children are to attend the French or English public schools. But when Article 26 is read in conjunction with Article 2, an even more convincing case can be made that Quebec's language of education policies are inconsistent with the Universal Declaration.

C. *The International Covenant on Economic, Social, and Cultural Rights*

This covenant was adopted by the U.N. General Assembly on December 16, 1966, and entered into force on January 3, 1976, three months after the deposit with the Secretary General of the United Nations of the thirty-fifth instrument of ratification.⁵⁹ Canada ratified the Covenant on May 18, 1976,⁶⁰ and has been bound by the Covenant since August 19, 1976.⁶¹ The three articles of the Covenant which are particularly relevant to analysis of the educational provisions of the Charter of the French Language are set forth below. Article 2, section 2, of the Covenant reads:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or

⁵⁸ See notes 68-79 and accompanying text, *infra*.

⁵⁹ Economic Covenant, *supra* note 44. The covenants did not enter into force until January 3, 1976. See 32 U.N. GAOR, (Agenda item 76), U.N. Doc. A/32/150 (1977). See also Comment, *Entry into Force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights*, 70 AM. J. INT'L L. 511, 512 (1976).

⁶⁰ Order in Council P.C. 1976-1156 (May 18, 1976).

⁶¹ Economic Covenant, *supra* note 44, art. 2, para., 2.

other status.

Article 13 of the Covenant deals with education. Specifically, that article provides:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education 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, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article 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 principles set forth in paragraph 1 of this Article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 28 states that: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." Thus, with respect to Canada, the standards set forth in the Covenant

apply to laws enacted by both the Federal and Provincial Governments.

Article 13 establishes that everyone has the right to education. The Charter of the French Language does not purport to deny anyone their right to education. In fact, it expressly states that everyone does have the right to an education in the French language.⁶² Before concluding, however, that the Charter is not violative of Article 13 of the Covenant, it is necessary to take the analysis one step further—to determine the content of the term “right to education” as it is used in Article 13. Moreover, that Article cannot be read in isolation; it must be interpreted in conjunction with the other provisions of the Covenant, such as Article 2, section 2, the equal protection provision.

Article 13 states that everyone has a right to education, but it does not specify the language in which that education must be given. It could, for instance, have required that education be provided in the official language of the state. The Charter of the French Language would probably be in conformity with such a provision: section 1 of the Charter establishes French as Quebec’s only official language, and section 6 confirms the right of every Quebecer to be educated in French.⁶³ But the Covenant does not make any reference to a state’s official language as the appropriate language of instruction.

It seems unlikely that the Covenant’s silence on the point was intended to give rise to any inference that provision for education in a state’s official language is impermissible; on the other hand, that silence does serve to undermine any assertion that provision of education in the official language is all that the Covenant requires of a state. If that were so, the drafters of the Covenant could very easily have included an express statement to that effect. Suppose a state adopted an obscure local dialect as its official language. If Article 13 does not require anything more than the provision of education in a state’s official language, that state could conceivably offer education to everyone in the obscure local dialect. The state would thereby fully satisfy its obligations under the Covenant, while simultaneously operating a separate educational system which offered instruction in a major world language, but open only to members of a privileged elite. The right of everyone to an education in the state’s official language would be respected. But the intent of the Covenant surely was not to sanction such a discriminatory and inequitable

⁶² Language Charter, Que. Stat. c.5, §6 (1977).

⁶³ The conclusion that Quebec’s Charter affords everyone the right to education in the state’s official language is valid only if the “state” is defined as the Province of Quebec rather than the Dominion of Canada. See Official Languages Act, Can. Stat. c.54 (1969), establishing that both English and French are official languages of Canada. Although Quebec may be a nation it is clearly not a state. See *Nations Are Not States*, 9 CANADA TODAY/D’AUJOURD’HUI 1,2 (Canadian Embassy, Washington 1978). However, in this particular context the relevant official language may be that of the province of Quebec because under Canadian Law, education is a matter within exclusive jurisdiction of the provinces. See B.N.A. Act, 30 & 31 vict., c.3, §93 (can.).

educational system. Accordingly, the interpretation that Article 13 requires nothing more than the provision of education in a state's official language seems rather inconsistent with the purposes which underlie the International Covenant.

Another interpretation might be that the Covenant's silence regarding the appropriate language of education is indicative of a recognition that the prerogative of the state to determine the language of instruction in the schools which it operates is not something with which international law desires to interfere. This interpretation, however, must also be rejected because it would operate to effectively nullify the guarantee contained in Article 13 of the Covenant. Under this "absolute prerogative of the state" interpretation, no limitations at all would be placed on a state's language of education policies. The scenario suggested above, of the provision of education in an obscure local dialect for the masses and in a major world language for the elite, could be duplicated under the "absolute prerogative" interpretation, except that it would not even be necessary for the state to go through the formality of adopting the local dialect as its official language. This interpretation might be acceptable if states could be trusted to always act in fairness and good faith; but if states always did act in fairness and good faith there would be no need to have an International Covenant.

At the other extreme, it might be advanced that the Covenant obliges states to provide education in whatever language a child's parents request, or in the child's mother tongue. Some support for such an interpretation was expressed in the parliamentary debate on the Canadian Human Rights Act.⁶⁴ That Act contains an equal protection provision which is very similar to the one contained in the International Covenant, except that it does not enumerate language as one of the impermissible grounds for discrimination. As a justification for the omission of language from the list of prohibited criteria, the Minister of Justice explained that the inclusion of language in the list would have given rise to a requirement that services, employment and accommodations be provided in *all* the languages which are spoken in Canada, not merely in English and French.⁶⁵ Pursuant to that line of reasoning, the inclusion of language in the International Covenant's equal protection provision signifies that the various substantive rights recognized in the Covenant, including the Article 13 right to education, must be provided in all the languages spoken within the state, not just in the official language or languages. That interpretation may also be justifiable on psychological, sociological, and pedagogical grounds, inasmuch as provision of education in a child's native language has been shown to have a positive impact on the child's mental development.⁶⁶

⁶⁴ Can. Stat. c.33 (1976-1977).

⁶⁵ 136 H.C. 6199 (June 2, 1977) (remarks of Hon. Ron Basford).

⁶⁶ McDougal, Lasswell & Chen, *Freedom from Discrimination in Choice of Language*

This interpretation is not by any means universally accepted.⁶⁷ One problem is that it does contain the potential for absurd and unintended consequences. In a society composed of numerous linguistic groups, it is conceivable that requests might be submitted for instruction in a hundred or more different languages. Complying with all the requests would raise considerable administrative and financial problems for the state concerned. It seems doubtful that the true intent of the International Covenant was to impose such an enormous obligation on the ratifying states.

The decision of the European Court of Human Rights in the Belgian Linguistic Case⁶⁸ provides some guidance in determining whether any linguistic constraints are implicit in the Article 13 right to education. In the Belgian case, the Court was called upon to interpret Article 14 of the European Convention on Human Rights⁶⁹ and Article 2 of the First Protocol to that Convention.⁷⁰ Those provisions are very similar in substance to Articles 2 and 13 of the International Covenant on Economic, Social, and Cultural Rights: one article confirmed that everyone has the right to an education, while the other article required the signatory-states to protect the various rights recognized in the Convention without discrimination based on various criteria, including language. Essentially, one article dealt with the substantive right to education, and another article guaranteed the right to equal protection. The European Court of Human Rights rejected the idea that the Convention required states to provide instruction in the language of the parents' choice, but went on to hold:

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 discrimina-

and International Human Rights, [1976] S. ILL. U. L. J. 151; UNESCO, *THE USE OF VERNACULAR LANGUAGE IN EDUCATION* 11 (1953):

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

⁶⁷ See, e.g., Lebel, *supra* note 48.

⁶⁸ Belgian Linguistic Case, [1968] Y. B. EUR. CONV. ON HUMAN RIGHTS 832.

⁶⁹ Article 14 of the Convention states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁷⁰ Article 2 of the First Protocol states:

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.

tion on the ground, for instance, of language. This is the natural and ordinary meaning of Article 14 read in conjunction with Article 2.⁷¹

The Court determined that a number of the allegations of the petitioners did not amount to a violation of the Convention, when interpreted in that manner. In one instance, however, the Court found that the right to education of certain children had not been secured without discrimination on the basis of language.⁷² The provision of Belgian law that gave rise to that finding was accordingly held to be inconsistent with the European Convention on Human Rights.⁷³

The particular Belgian law established Dutch as the general language of instruction in six suburbs of Brussels. The law also permitted French language primary schools to be established in the communities, if requested by sixteen French-speaking resident families.⁷⁴ The Dutch language school system was open to everyone—all residents of the particular community, and all other Belgian residents, regardless of whether their mother tongue was Dutch or French. The French language schools, in contrast, were open only to French-speaking residents of the community where the schools were located.⁷⁵ Access to those schools was denied to French-speaking persons residing anywhere other than in the community where the school was located, and to all Dutch-speaking persons, regardless of residence.

In essence, the Court held that once the Government of Belgium had undertaken to operate both French and Dutch language schools in these particular towns, it could not limit access to one system while permitting unlimited access to the other system, for the purpose of favoring one language group over the other. Quebec's Charter of the French Language creates a closely analogous situation. Public schools offer instruction in two languages, French and English. Instruction in one of the languages, French, is made available to everyone; instruction in the other language, English, is made available to only a limited group of students.

In the Belgian Case, the Court noted that administrative and financial considerations may justify restrictions on access to particular schools, but stated that restrictions arising from a policy of favoring one language over another were impermissible in view of the Convention's equal protection provision. The Court found that with respect to the French schools in the six Brussels suburbs, the access restrictions were imposed "solely . . . from considerations relating to language,"⁷⁶ and that the restrictions were therefore inconsistent with Belgium's obligations under the European Convention.

⁷¹ Belgian Linguistic Case, [1968] Y. B. EUR. CONV. ON HUMAN RIGHTS, at 866.

⁷² *Id.* at 942.

⁷³ *Id.*

⁷⁴ Act of 2d Aug. 1963, art. 7, para. 3(b) (Belgium).

⁷⁵ See McDougal *et al.*, *supra* note 66, at 169-70.

⁷⁶ Belgian Linguistic Case, [1968] Y. B. EUR. CONV. ON HUMAN RIGHTS at 942.

Similarly, restrictions on access to English language schools in Quebec are motivated exclusively by the Government's language policies. The whole purpose of the Charter is to enhance the status of the French language.⁷⁷ The Quebec Government's own explanation for the access restriction concedes an underlying linguistic purpose: "the English school, which forms a special system granted to the present minority in Quebec, must cease being an assimilating force and must then be reserved to those for whom it was created."⁷⁸ There is no mention of financial or administrative considerations at all—the purpose of the access restriction is to assist in the assimilation of immigrants into the French-speaking community, and to prevent their assimilation into the English-speaking community.⁷⁹ In fact, significant financial and administrative problems might be expected to arise for those local school boards which had never before been called upon to offer anything but English language education due to the requirement that the school boards provide education in French to all students not qualifying for English language instruction under the Charter's criteria.

Based upon the interpretation by the European Court of the educational and equal protection provisions of the European Convention, it can be analogized that the corresponding articles in the International Covenant dictate that the public schools provided by a state must be made accessible to all without regard to such criteria as language or national origin. It should be re-emphasized that the Belgian Linguistic Case is not by any means a controlling precedent with respect to any international legal challenge to the Quebec Charter. The Belgian Case involved the interpretation of the European Convention on Human Rights by the European Court of Human Rights. With regard to Quebec, the European Convention is inapplicable and the European Court lacks jurisdiction. With this caveat in mind, the Belgian Linguistic Case serves as an illustration of the approach followed by a major international tribunal in applying a human rights convention that is very similar in content to the International Covenant on Economic, Social, and Cultural Rights, in order to resolve a choice of language of education controversy. The Belgian Case clearly suggests that in the event an international tribunal is called upon to resolve a challenge to Quebec's Charter of the French Language based upon Articles 2 and 13 of the International Covenant, the prospects are good for a finding that the language of education section of Quebec's Charter is inconsistent with the interpretation which the tribunal gives to those Articles of the Covenant.

⁷⁷ This is rather apparent from the title of the law, The Charter of the French Language. See also *MINISTÈRE DES COMMUNICATIONS, QUEBEC'S POLICY ON THE FRENCH LANGUAGE* (English version) (l'Éditeur officiel du Québec 1977) [hereinafter cited as *WHITE PAPER*].

⁷⁸ *Id.* at 71.

⁷⁹ *Id.*

D. *The International Covenant on Civil and Political Rights*

The procedural history of this Covenant closely parallels that of the International Covenant on Economic, Social, and Cultural Rights, discussed previously.⁶⁰ Both Covenants were adopted at the same time by the United National General Assembly,⁶¹ and both were ratified by Canada on the same date.⁶² The International Covenant on Civil and Political Rights has been binding on Canada since August 19, 1976.⁶³

The first provision of this Covenant that is of particular relevance to an analysis of Quebec's Charter of the French Language is Article 2, the equal protection provision. Article 2, section 1, requires that all rights recognized in the Covenant be secured "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 50 of the Covenant is identical to Article 28 of the Economic, Social, and Cultural Rights Covenant, in establishing the applicability of the document to "all parts of federal states without any limitations or exceptions." The right to education is not specifically mentioned in this Covenant, having been dealt with at length in the Covenant on Economic, Social, and Cultural Rights. But Article 27 of the Covenant on Civil and Political Rights provides that members of linguistic minorities are guaranteed "the right, in community with the other members of their group, to enjoy their own culture, . . . [and] to use their own language."

Article 27 is rather vague as to the specific obligations it imposes on states in order to protect the rights of members of linguistic minorities. It does not, for instance, state that linguistic minorities have the right to tax-supported public schools offering instruction in their own language. Rather, it establishes the principle that linguistic minorities are entitled to protection from assimilation into the majority group.⁶⁴ The particular means for assuring that protection are not specified; it is left up to the individual states to fashion such protective measures as are appropriate to the circumstances of their minority groups.

Article 27 cannot be read in isolation. It must be read in conjunction with Article 2, the equal protection provision, which relates to all the substantive rights guaranteed in the other articles of the Covenant, including the cultural and linguistic protections contained in Article 27. Article 2

⁶⁰ See notes 59-61, *supra*.

⁶¹ See note 44, *supra*.

⁶² See note 60, *supra*.

⁶³ *Id.* As provided in Article 49, the Covenant entered into force with respect to Canada three months after the date of ratification.

⁶⁴ Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 118 (1976); "Article 27 of the 1966 International Covenant on Civil and Political Rights . . . is declaratory in nature and reflects a minimum of rights recognized by customary international law. The fundamental concept, once more, is that of prevention of forced assimilation (a "melting pot") and preservation of the separate identity of the minority."

requires that the substantive rights conferred by the other articles of the Covenant be secured without discrimination on such grounds as language, national origin, and birth. Thus, whatever may be the specific mechanisms which a state adopts in order to assure recognition of the rights conferred under Article 27, those mechanisms must be made available to all who qualify for the protection of the article, *i.e.*, all members of the minority group without distinction based on the various criteria enumerated in Article 2.⁸⁵

In Quebec, the English public school system is one of the means by which the Article 27 rights of the English minority are protected. Under the Charter of the French Language this protection is not made available to all members of the minority group without distinction based upon an impermissible criterion. Access to the minority school system is limited to persons whose parents were educated in English in Quebec. Members of the Quebec English-speaking minority who do not qualify under this requirement because their parents were educated in English outside Quebec are denied their Article 27 rights. They are discriminated against because of national origin⁸⁶ and/or birth,⁸⁷ two criteria which are prohibited by Article 2.

The Government of Quebec has endorsed the policy of permitting the

⁸⁵ Political Covenant, *supra* note 44, art. 2, actually requires states to secure the substantive rights protected by the Covenant without *any* distinctions—the list of impermissible criteria set forth in Article 2 is not exclusive: “Each State Party . . . undertakes to respect and ensure . . . the rights recognized in the present Covenant, *without distinction of any kind, such as . . . language, . . . national or social origin, . . . birth or other status.*” (Emphasis added.) The types of distinctions utilized in the educational provisions of the Charter are relatively novel: place and language of education, and date of establishment of domicile within the Province of Quebec. In reality, these criteria seem to be variants of three of the distinctions specifically prohibited by Article 2: language, national origin, and birth. See notes 86-87, *infra*. But even if the Charter’s criteria were found not to give rise to distinctions based on language, national origin, and birth, they would not be permissible under Article 2 because that Article forbids *all* distinctions—not only those contained in the list of examples.

⁸⁶ English-speaking persons whose “nation of origin” is other than Quebec are denied the right to enroll their children in the English school system. From this perspective, the ultimate factor which is determinative of whether access will be afforded to the English school system is national origin. See PROVINCIAL ASSOCIATION OF PROTESTANT TEACHERS, No. 1, at 8 (1977): “This organization is opposed to any discrimination against people on grounds of their national origin, which is why we support total freedom of choice [as to language of education].”

⁸⁷ Under the Language Charter, access to English schools depends essentially on whether a child’s parents were educated in English in Quebec. Two children who are similarly situated in all respects (age, aptitude, mother tongue, place of residence, etc.) except that one child’s parents were educated in English in Quebec and the other child’s parents were educated in English outside Quebec are treated differently under the Charter’s school access regulations. The first child would be permitted to attend English school, while the second child would not. Birth to parents of a particular educational background thus determines whether or not a child will have access to English language schools. Language Charter, Que. Stat. c.5, §73 (1977).

English minority to have public schools offering instruction in the minority language.⁸⁸ There is no need to determine, at least for the time being, whether Quebec is bound to do so under the International Covenant.⁸⁹ The fact is that at the present time, Quebec purports to "guarantee the English minority in Quebec access to English school,"⁹⁰ a policy that is undoubtedly consistent with Article 27 of the Covenant. Having embarked on that course of action, the International Covenant on Civil and Political Rights requires that that protection be made available to all members of the linguistic minority without regard to national origin or birth. The provisions of the Charter of the French Language regulating access to English language public schools based upon place of education of a child's parents⁹¹ violate this command.

The stated purpose of the access restriction, according to the Quebec Government, is:

to open the English schools to all those who now live in Quebec and whose parents, because of their education, form part of the English-speaking community, as well as to their descendants; and to direct all other children to the French school, whether they already form part of the French-speaking community or whether they settle here in the future

.....

As for those who come to settle in Quebec after the adoption of the Charter, wherever they come from and whatever their native tongue they will have to send their children to French schools.⁹²

In essence, the intention is to classify residents of Quebec whose mother tongue is English into two groups based on parentage: one group consisting of English-speaking persons whose ancestors were Quebecers, which is afforded access to English schools, and another group consisting of English-speaking persons of non-Quebec ancestry, which is denied access to the English schools. Clearly, this distinction is impermissible under Article 2 of the Covenant.

Article 27 does not recognize the right of everyone within a state to have access to a minority language educational system; it protects the rights of members of minority groups only. Accordingly, Article 27 does not prevent the Quebec Government from implementing procedures designed to deny access to English language schools to persons who are not members of the English minority. Hence, the Covenant cannot be invoked on behalf of French-speaking persons, or in fact anyone who is not a member of the English-speaking minority, in support of any claim that such persons may wish to make regarding their right to attend English

⁸⁸ WHITE PAPER, *supra* note 77, at 71.

⁸⁹ See notes 159-168 and accompanying text, *infra*.

⁹⁰ WHITE PAPER, *supra* note 77, at 71.

⁹¹ Language Charter, Que. Stat. c.5, §73 (1977).

⁹² WHITE PAPER, *supra* note 77, at 71-75.

language schools.⁹³

The Quebec Government has expressed the view that the criteria contained in the Charter are the most workable administrative procedures for differentiating between members of the English-speaking minority (who are entitled to Article 27 protection), and persons who are not members of the English minority group (and who have no right to attend English schools under Article 27).⁹⁴ The Government has noted that language tests, such as those used between 1974 and 1977 pursuant to the Official Language Act,⁹⁵ are a less than ideal classification method.⁹⁶ The Government acknowledges that the optimal way of determining a child's native language is through a sworn statement of the parents.⁹⁷ That classification method was rejected, however, because the Government believes it might be subject to deceit and abuse.⁹⁸ Implicit in the Government's rejection of the sworn statement method is the notion that fundamental human rights may be compromised whenever permitting their full exercise would result in administrative complexity.

Quebec's interest in preventing persons who are not members of the English-speaking minority from having access to English language schools is not inconsistent with the obligations which are imposed on it pursuant to the Covenant. The Government of Quebec also has an interest in the implementation of the simplest administrative procedures for determining who is and who is not a member of the eligible minority group. Quebec cannot, however, under the guise of this latter interest, deny rights protected under Article 27 to persons who are bona fide members of the English minority.

The classification procedures set forth in the Charter of the French Language may indeed offer the advantage of administrative simplicity. But they are defective inasmuch as they do not serve the permissible purpose of accurately distinguishing between members of the English minority and other persons.⁹⁹ Consider, for instance, a family that has moved from Ontario to Quebec after the enactment of the Charter. The parents were educated in English in Ontario, and the children have always at-

⁹³ Of course, sources of international law other than the Covenant on Civil and Political Rights—such as the Covenant on Economic, Social, and Cultural Rights, and the U.N. Universal Declaration of Human Rights may protect the right of non-English-speaking persons to attend English schools.

⁹⁴ See WHITE PAPER, *supra* note 77, at 73.

⁹⁵ See notes 4-6 and accompanying text, *supra*.

⁹⁶ WHITE PAPER, *supra* note 77, at 73.

⁹⁷ *Id.* at 73-74.

⁹⁸ *Id.*

⁹⁹ *Id.* at 73. "The problem is to find a criterion that is valid and quite easily applied to designate those who, if they expressly wish it, may enroll their children in the English schools." *Id.* The WHITE PAPER then goes on to justify the Language Charter's access criteria almost exclusively in terms of being "easily applied"; there is no attempt made to establish that the Language Charter's criteria are the most "valid" of those that might have been adopted.

tended English schools in that province. English is the only language spoken by members of this family. Under Quebec's Charter, the family would not be classified as part of Quebec's English-speaking minority and would not be afforded the Article 27 rights which the Province is obliged to recognize with respect to all members of that minority.¹⁰⁰ Since the parents were not educated in English in Quebec, their children would not be permitted to enroll in English schools. Clearly, upon moving to Quebec, that family became a part of the Province's English-speaking minority. The failure of the minority school access regulations to classify this family as part of the minority group illustrates the ineffectiveness of those procedures at accomplishing the permissible purpose of differentiating between members of the English minority and other persons.

It should be noted that the classification accorded this particular family is not by any means an anomaly arising from some legislative oversight: the Government's White Paper states that the intention of the law is to prevent all newcomers to Quebec, even though their language may be English, from having access to the English school system.¹⁰¹ Thus, it is clear that the Government never intended to fulfill its obligation to respect the Article 27 rights of all members of the English minority without distinction on account of national origin and birth. The English school access regulations contained in the Charter attempt to differentiate according to ancestry, not according to membership in the English linguistic minority. A differentiation based on ancestry may be easier for the Government to administer, but such a differentiation fails to comport with the requirements of the International Covenant.

In sum, the International Covenant on Civil and Political Rights, a document that is binding on Canada in international law, requires that states permit members of linguistic minorities to enjoy their own culture and use their own language in community with other members of their linguistic minority group. This protection must be secured to all members of the linguistic minority, without distinction of any kind such as that based on national origin or birth. Quebec law divides the English minority into two groups, according to ancestry, *i.e.*, national origin and birth. Quebec has partially fulfilled its obligations under the Covenant inasmuch as it permits one of the two groups—those English-speaking per-

¹⁰⁰ "English-speaking Quebecers must preserve their language, their culture and their way of life. The government not only does not object to this but acknowledges the fact as part of our common history." WHITE PAPER, *supra* note 77, at 39. See generally METROPOLITAN QUEBEC LANGUAGE RIGHTS COMMITTEE, A BRIEF ON BILL 1 (prepared on behalf of the Quebec city English-speaking community, May 25, 1977):

The White Paper—Quebec's Policy on the French Language—announced happy days for the English-speaking community. . . . Then, Bill 1 [The Charter of the French language] was tabled. And we learned that we were no longer part of the Quebec people, and indeed, we were considered public enemy number one. *Id.* at 1.

¹⁰¹ WHITE PAPER, *supra* note 77, at 75.

sons of Quebec ancestry—to enjoy their own culture and use their own language in the English public schools. Quebec law denies those rights to the remainder of the English minority who are not of Quebec ancestry. The Charter of the French Language thus does not respect the Article 27 rights of all members of the English minority without distinction based upon criteria classified as impermissible under Article 2. Accordingly, the prospects are highly encouraging for a successful challenge to the Charter under the International Covenant on Civil and Political Rights by members of the English-speaking minority who are currently denied access to English language schools.

E. The Convention Against Discrimination in Education

Another international document which is helpful in assessing the validity of the Charter's educational provisions is the 1960 UNESCO Convention Against Discrimination in Education. This document is persuasive authority as to the current status of educational anti-discrimination protections contained in international law, inasmuch as it has been ratified by at least 53 states.¹⁰² The Canadian Government has chosen not to ratify this Convention because under Canadian law, education is a matter within the exclusive jurisdiction of the provincial governments.¹⁰³ Canada's failure to ratify the Convention has not, however, been accompanied by any statement of disapproval of the principles which it expresses.

Article 1, section 1, of the Convention sets forth the definition of discrimination as:

any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education. . . .

The definition goes on to list several specific situations which constitute discrimination, including:

- (a) Of depriving any person or group of persons of access to education of any type or at any level;
- (b) Of limiting any person or group of persons to education of an inferior standard;
- (c) Subject to the provisions of [A]rticle 2 of this convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
- (d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

Finally, Article 1 clarifies that:

For the purpose of this convention, the term "education" refers to all

¹⁰² See Convention Against Discrimination in Education, *supra* note 46.

¹⁰³ See Lebel, *supra* note 48, at 234.

types and levels of education *and includes access to education*, the standard and quality of education, and the conditions under which it is given. [Emphasis added.]

Article 2 provides that separate educational systems may be established for linguistic reasons, provided such education is "in keeping with the wishes of the pupil's parents, [and] . . . participation in such systems or attendance at such institutions is optional . . ." As might be inferred from its title, this Convention is concerned with *eliminating discrimination* in education. The focus is upon protecting certain groups and individuals from being treated in an inferior manner. The Convention does not attempt to impose affirmative obligations on states, other than the obligation to provide equal treatment. As long as certain conditions are fulfilled,¹⁰⁴ the Convention permits but does not require the operation of separate linguistic educational systems. Article 2 thus does not require that an English language school system be maintained in Quebec; it simply affirms that establishment of a separate linguistic educational system does not necessarily constitute a violation of the Convention. The English school system that is permitted to exist under the Charter of the French Language is probably in conformity with most of the conditions enumerated in Article 2, subparagraph (b) insofar as attendance at such schools is optional, and pedagogical standards for the minority sector are at least as high as those applicable to majority language schools.

One question of interpretation arises in connection with the Article 2 requirement that when separate linguistic educational systems exist, attendance must be optional, and the education offered must be consistent with the wishes of the pupil's parents. Enrollment in the separate English educational system is "optional" with respect to children whose parents were educated in English in Quebec, but not with respect to other children. Perhaps the term "optional" should be interpreted narrowly, so as to merely require that those children who are determined by the state to be eligible for enrollment in the minority system may not be required to attend minority schools but must also be afforded the option of enrolling in the majority system. Under this interpretation, the state remains free to determine the class of children who may, if they or their parents wish, attend the minority schools.

Alternatively, the term "optional" might be construed as requiring that all members of the linguistic minority be afforded the option of sending their children to either the minority or the majority schools. In other words, a minority school system might not be deemed to be in compliance with the Convention's "optional" requirement unless the option to enroll in the system was extended to all members of the linguistic

¹⁰⁴ The conditions specified in the Convention—optional attendance, and pedagogical standards equivalent to those applicable to majority language schools—serve to assure that the separate educational systems function in a manner consistent with the Convention's ultimate purpose, the elimination of discrimination in education.

group.

A "plain meaning" analysis suggests that the first interpretation is probably correct; the Convention does not attempt to define who must be afforded access to minority schools, but merely seeks to guarantee that those who do have access to the minority system also have access to the majority system. The second interpretation, however, seems more consistent with Article 2 read as a whole. Of particular significance in this regard is the phrase: "The establishment or maintenance, for . . . *linguistic reasons*, of separate educational systems . . . [shall not be deemed to constitute discrimination]." If a minority school system is really operated for linguistic reasons, as it must be in order to come within the terms of Article 2, it seems strange that only those members of the minority linguistic group whose parents were educated in a particular locale are permitted to have access to it. Such a restriction on access might be appropriate if the real reason for maintaining the separate school system was, for instance, to confer a special privilege on children of a certain ancestry.¹⁰⁵ Basing access to the separate school system on descent rather than on language casts serious doubt on whether linguistic reasons are the real justification for the existence of the minority "linguistic" educational system. If the real reason for the system's existence is not linguistic, the establishment and operation of the system is impermissible under Article 2.

Article 3 of the Convention lists certain specific measures that the states which have ratified the Convention are obliged to undertake in order to eliminate discrimination in education. The educational provisions of the Charter of the French Language are inconsistent with at least two of the measures set forth in Article 3. Subparagraph (d) of that Article prohibits "restrictions or preferences based solely on the ground that pupils belong to a particular group." The Quebec Charter divides the school population into two groups, essentially according to parentage. It permits one group to have access to English *and* French language schools, and restricts the other group to the French system only. In so doing, it grants a preference to the former group and imposes a restriction on the latter group, in clear contravention of this provision of the Convention.

Article 3, subparagraph (e) requires states "to give foreign nationals resident within their territory the same access to education as that given to their own nationals." It might be contended that the Charter provisions restricting access to English language schools are not violative of this section inasmuch as they do not make any express differentiation between Quebec (or Canadian) citizens and foreign nationals.¹⁰⁶ Most Quebecers are denied the right to English education; therefore, it cannot be said that the Charter provisions discriminate against foreign nationals

¹⁰⁵ See text following note 63, *supra*.

¹⁰⁶ That is, the access restrictions are expressed in terms of the parents' place of education rather than their nation of origin.

by subjecting them to the same denial. But a closer examination of the practical operation of the Charter raises serious questions as to the validity of that argument. Under the law, no foreign nationals who come to Quebec after the enactment of the Charter may have access to the English educational system.¹⁰⁷

According to the Quebec Government, the English school system is the inheritance of the Province's English-speaking community.¹⁰⁸ The Charter, however, restricts the benefits of that system not to all members of the English-speaking community, but to English speaking people living in Quebec on the date of the Charter's enactment, and their descendants. By extinguishing any possibility that newcomers to Quebec may ever be permitted to qualify for education in English, the Charter is inconsistent with Article 3, subparagraph (e) of the Convention.

Not all restrictions on access to the English language educational system are by any means inconsistent with subparagraph (e) of the Article. An access restriction which actually serves to distinguish between members of the English-speaking minority and others might be permissible under subparagraph (e).¹⁰⁹ The problem with the access restrictions contained in Quebec's Charter is that they result in different rights being extended to persons who are similarly situated in all respects except nationality. It is that distinction, based on nationality, which subparagraph (e) prohibits.

The right of national minorities to operate their own schools is recognized in Article 5, paragraph 1 (c) of the Convention. Consistent with this provision, the Quebec Government permits the operation of English language schools within its jurisdiction. These schools are probably in conformity with the specific criteria prescribed by Article 5, such as affording students the opportunity to gain an understanding of the language and culture of the majority,¹¹⁰ adhering to the same pedagogical standards as schools in the majority system, and optional attendance.¹¹¹

The minority educational system established in accordance with Ar-

¹⁰⁷ It should be noted that foreign nationals who intend to reside in Quebec for only a limited period of time may under some circumstances be afforded access to the English school system. See Language Charter, Que. Stat. c.5, §85 (1977). See also text accompanying note 33, *supra*. Those coming to Quebec to reside permanently, however, are denied access to that system.

¹⁰⁸ WHITE PAPER, *supra* note 77, at 71.

¹⁰⁹ Of course, alternative access restriction criteria might be vulnerable to a challenge under other provisions of the Convention, or other sources of international human rights protections.

¹¹⁰ Language Charter, Que. Stat. c.5, §84 (1977), provides:

No secondary school leaving certificate may be issued to a student who does not have the speaking and writing knowledge of French required by the curricula of the Department of Education.

¹¹¹ Whether the English schools are in conformity with the Article 5 "optional" requirement, like the one contained in Article 2(b), depends upon the interpretation accorded to that term. See text accompanying notes 104-105, *supra*.

article 5, paragraph 1 (c) is not, however, in conformity with the Convention's requirement that such education be made available in a non-discriminatory manner. Article 1, paragraph 1 (a) prohibits a state from "depriving any person or group of persons of access to education of any type or at any level." When a state's educational policy provides for the public funding and operation of minority language schools, it is inconsistent with this section of the Convention to deny *anyone* access to that educational system. In light of Article 5, paragraph 1 (c), the denial to certain members of the minority group of access to that educational system is even more inconsistent with the principles expressed in the Convention. Quebec may be commended for adhering to Article 5, paragraph 1 (c) to the extent that it permits many of its approximately one million English-speaking citizens to operate an educational system offering instruction in the minority language.¹¹² Quebec is subject to criticism, however, for failing to respect the Article 5 rights of many other members of its English-speaking community, and for imposing access restrictions on the minority school system which are clearly in contravention of Article 1, paragraph 1 (a).

Since Quebec's Charter of the French Language creates a number of distinctions regarding educational rights based on language, national origin, and birth, it violates several provisions of the Convention Against Discrimination in Education. Although the Convention is not binding on Canada, the inconsistencies which can be demonstrated between Quebec's educational policies and the international standards set forth in the Convention would certainly lend support for any claims asserted under those Covenants which are binding on Canada in international law.¹¹³

F. *The Declaration of the Rights of the Child*

Another international document which bears on the validity of the educational provisions of the Charter of the French Language is the United Nations Declaration of the Rights of the Child. This Declaration was unanimously adopted by the United National General Assembly on November 20, 1959.¹¹⁴ Three sections of the Declaration seem especially pertinent to the analysis of Quebec's Charter: Principles 1, 2, and 7. Principle 1, the equal protection provision, states:

The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin,

¹¹² If, indeed, it is necessary or appropriate to commend a government for complying with international law.

¹¹³ See notes 44, 51, *supra*, for the two human rights covenants and the Universal Declaration.

¹¹⁴ Rights of the Child, *supra* note 49.

property, birth or other status, whether of himself or of his family.

Principle 2 provides:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy dignity. In the enactment of laws for this purpose, *the best interests of the child shall be the paramount considerations.* [Emphasis added.]

The impact of the language of education on a child's development has been considered extensively elsewhere.¹¹⁵ To summarize the conclusions reached in these studies, education should generally be made available in the child's mother tongue, unless that would be impossible due to the limited financial resources of the state.¹¹⁶ In light of this conclusion, one cannot help but question the extent to which the educational provisions of Quebec's Charter have adopted "the best interests of the child [as] the paramount considerations." The White Paper makes clear that the primary motivating force behind the Charter is the Government's desire to enhance the status of the French language.¹¹⁷ To the extent that the educational provisions of the law allow that interest to predominate over the best interests of the child, the provisions are inconsistent with Principle 2 of the Declaration.

Principle 7 of the Declaration confirms the right of children to receive education. In particular, it requires that the education provided to the child "promote his general culture, and enable him, on a basis of equal opportunity . . . to become a useful member of society." The Declaration requires that education promote *the child's* general culture, not the culture of the majority group within the society. Perhaps the cultural opportunities made available in the Quebec French language educational system would be deemed adequate to conform to the "general culture" requirement of Principle 7, even with respect to non-French-speaking children. But when a state undertakes to provide public instruction in a child's native language as well as in a non-native language, a strong argument can be made that the child's general culture would be promoted to a greater degree by his attendance at one of the schools offering instruction in his own language.¹¹⁸

Also significant is Principle 7's requirement that education enable the child, on a basis of equal opportunity, to become a useful member of

¹¹⁵ See sources cited in notes 24-25, *supra*. See also C. AMMOUN, *STUDY OF DISCRIMINATION IN EDUCATION* 143-77, U.N. Doc. E/Cn.4/Sub.2/181 (1957).

¹¹⁶ "The only rational limits which a community should be able to place upon its deference to a minority language is the community's ability to finance a multi-lingual system within available resources." McDougal *et al.*, *supra* note 66, at 160.

¹¹⁷ "The first of [the general principles which inspired the government] is a vigorous assertion of the primacy of the French Language in Quebec." WHITE PAPER, *supra* note 77, at 50.

¹¹⁸ See sources cited in note 66, *supra*.

society. Undoubtedly, the education offered in the Quebec French language sector is intended to help children become useful members of society. The real question is whether the education made available in the English language sector accomplishes that objective to an even greater degree, inasmuch as its graduates must be proficient in both of Canada's two official languages, whereas graduates of the French system need be proficient in only one official language.¹¹⁹ However marginal the value of bilingualism may be in Quebec society, permitting members of one group to receive an education which results in their becoming bilingual while confining members of another group to a unilingual education contravenes the Declaration's command that education enable the child "on a basis of equal opportunity . . . to become a useful member of society."¹²⁰ This conclusion is further reinforced by the fact that the distinction between the two groups is made on the basis of language, national origin, and birth, criteria which are prohibited under Principle 1.

Principle 7 goes on to state that: "The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents." Under the Charter of the French Language, some parents are permitted to decide whether a French or English language education would better advance the interests of their child.¹²¹ Other parents are denied the right to make that choice.¹²² The distinction between the two groups is based essentially on language, national origin, and parentage (birth)¹²³—grounds that are impermissible under Principle 1. Principle 7, like Article 26 of the U.N. Universal Declaration of Human Rights, suggests that Quebec should afford parents substantial latitude in determining the kind of education their children will receive. Whether this encompasses an obligation to permit parents to choose between the two languages in which public instruction is offered remains to be resolved,¹²⁴ but once Quebec has undertaken to permit some parents to exercise that right of choice, it cannot prohibit other parents from doing so on grounds of language, national origin, or ancestry. Again, international law may not require Quebec to operate any minority educational system, but once the province has chosen to permit English public schools to exist, it cannot restrict access to them in a discriminatory manner.

¹¹⁹ Language Charter, Que. Stat. c.5, §84 (1977), requires that students enrolled in English schools become proficient in French prior to their graduation from high school. Although the WHITE PAPER, *supra* note 77, at 42, states that "it is important to learn languages other than French," there is no requirement that graduates of French schools become proficient in English.

¹²⁰ Rights of the Child, *supra* note 49, Principle 7.

¹²¹ *I.e.*, parents educated in English in Quebec.

¹²² *I.e.*, all parents educated outside of Quebec, and parents educated in French in Quebec.

¹²³ See notes 86 & 87, *supra*.

¹²⁴ See notes 151 & 171 and accompanying text, *infra*.

The Declaration of the Rights of the Child is a statement of principle that does not contain specific enforcement procedures.¹²⁶ The Declaration, however, was adopted by the U.N. General Assembly,¹²⁶ an international body of which Canada is a member; therefore, the Declaration could be cited as a highly persuasive source of international law in any challenge to the validity of Quebec's Charter of the French Language brought before an international tribunal. The unanimity with which the General Assembly adopted the Declaration serves as further evidence of the validity and broad acceptance of the standards set forth in the document on the part of members of the international community.

IV. PROCEDURES FOR ENFORCING HUMAN RIGHTS RECOGNIZED UNDER INTERNATIONAL LAW

As Mr. Justice Holmes stated in a United States Supreme Court opinion, "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp."¹²⁷ The protections contained in the various sources of international law discussed in the preceding section of this paper will be no more valuable to the victims of human rights violations than the ghosts to which Justice Holmes alluded, unless meaningful procedures exist for their enforcement.

One of the most novel human rights enforcement mechanisms is contained in the Optional Protocol to the International Covenant on Civil and Political Rights, a protocol that has been ratified by Canada.¹²⁸ Pursuant to that document, an *individual* may petition the Human Rights Committee, established under Part IV of the Covenant, to consider allegations of violations of the Covenant by a state that is a party to the Protocol.¹²⁹ The individual must be a victim of the human rights violation¹³⁰ and he must have exhausted all available domestic remedies.¹³¹ The Committee gives notice of the complaint to the state which is alleged to have violated the Covenant, and the state is required to submit a response to the Committee within six months explaining its conduct and describing any remedial action that it intends to pursue.¹³² Thereupon, the Committee meets in closed session to consider the matter, and upon reaching a decision, forwards its views to the petitioner and to the state concerned.¹³³ The Committee also reports annually to the General Assem-

¹²⁶ Rights of the Child, *supra* note 49.

¹²⁶ *Id.*

¹²⁷ *The Western Maid*, 257 U.S. 419, 433 (1922).

¹²⁸ See note 60, *supra*.

¹²⁹ Of course, the Protocol is only open to ratification by states which have ratified the Covenant. See Art. 8 of the Protocol.

¹³⁰ Political Covenant, *supra* note 44, Optional Protocol, Art. 1.

¹³¹ *Id.* Art. 2.

¹³² *Id.* Art. 4.

¹³³ *Id.* Art. 5.

bly on its activities under the Protocol.¹³⁴ Thus, a member of the Quebec English-speaking minority who is currently denied access to English language schools, and therefore claims a violation of his rights under Articles 2 and 27 of the Covenant,¹³⁵ may petition the Human Rights Committee to consider his grievance once his domestic remedies have been exhausted.

Another procedure by which individuals may seek to have human rights violations redressed is by petitioning the United Nations Subcommittee on Prevention of Discrimination and Protection of Minorities. Since its inception, the United Nations has been receiving thousands of petitions each year from individuals alleging that their human rights are being violated. Initially, the United Nations took the position that it was without jurisdiction to act on such petitions, and an official policy was adopted of discouraging the submission of petitions from individuals.¹³⁶ In 1970, the U.N. Economic and Social Council reversed that position by authorizing the Subcommittee on Prevention of Discrimination and Protection of Minorities, which is responsible to the Human Rights Commission, to study complaints received from individuals that "appear to reveal a consistent pattern of gross and reliably attested-to violations of human rights and fundamental freedoms."¹³⁷ With the consent of the state involved, the Commission on Human Rights may establish an *ad hoc* committee to investigate the allegations.¹³⁸ This procedure has the disadvantage that without the consent of the state alleged to be committing the human rights violations, the Commission may only study and may not investigate complaints. It has the advantage, however, of subjecting governmental practices to review in light of the full range of international human rights protections, not just those set forth in one particular document.

As an alternative to the establishment of an *ad hoc* committee, the Commission may recommend to the Economic and Social Council that some other type of action be taken. Thus, the resolution suggests that the *ad hoc* committee will be the usual procedure for dealing with individual complaints, but affords the Council flexibility to fashion whatever investigatory measures it deems appropriate.

Thus far, no government has consented to the establishment of an *ad hoc* committee to investigate allegations that it has violated human rights.¹³⁹ Only the Government of Canada can enlighten us as to whether or not it would consent to the establishment of such a committee, in the

¹³⁴ *Id.* Art. 6.

¹³⁵ See notes 80-101 and accompanying text, *supra*.

¹³⁶ E.S.C. Res. 75, 5 U.N. ESCOR 20, U.N. Doc. E/505 (1947).

¹³⁷ E.S.C. Res. 1503, 48 U.N. ESCOR Supp. (No. 1A) 8, U.N. Doc. E/4832/Add.1 (1970).

¹³⁸ *Id.*

¹³⁹ Saario & Cass, *The United Nations and the International Protection of Human Rights: A Legal Analysis and Interpretation*, 7 CAL. W. INT'L L. J. 591, 604 (1977).

event a petition is submitted to the Subcommittee alleging that Quebec's Charter of the French Language violates fundamental human rights. The Federal Government's stated policy regarding the Quebec language law suggests, however, that consent to the creation of such a committee is very possible. At the time the Charter of the French Language was enacted by the Quebec National Assembly, the Federal Government chose not to exercise any of the powers available to it in order to summarily invalidate the law.¹⁴⁰ It did make a commitment, however, to intervene on behalf of any private parties bringing suits in the lower courts to challenge the validity of the language law.¹⁴¹ Thus, while the Federal Government respects the autonomy of the Provincial Government to legislate as it sees fit in regard to education and other matters, it does not by any means endorse the specific policies and procedures contained in the Charter. Canada might, therefore, welcome the opportunity to have the validity of the language law tested in an international investigation.

Canada presumably does not want to contravene the standards set forth in international law, and the decision of an international organization as to the validity of the language charter in light of those standards would greatly assist it in that regard. Moreover, one of the reasons for the Federal Government's failure to exercise its power to disallow the Charter¹⁴² was that it wanted to avoid giving the impression that Quebec could become free to implement whatever language policies it desired by simply opting out of confederation.¹⁴³ Invalidation of the Charter on the ground

¹⁴⁰ See note 7, *supra*, at 560.

¹⁴¹ *Will back challenges to Quebec bill: La londe*, *Globe & Mail* (Toronto), Oct. 10, 1977, at 10.

¹⁴² B.N.A. Act, 30 & 31 vict., c.3, §90, authorizes the Governor-General of Canada (who acts upon advice of the Prime Minister) to disallow any provincial law, for any reason or for no reason at all. It has been advanced that three types of provincial legislation in particular justify the exercise by the Federal Government of its power of disallowance—specifically, laws that (1) interfere with national legislation or policy, (2) infringe the rights of Canadian citizens living in other provinces, and (3) impair fundamental rights of Canadian citizens other than those protected in the B.N.A. Act. See R. DAWSON, *THE GOVERNMENT OF CANADA* 213-17 (5th ed. 1970). A cogent argument can be made that the Charter of the French Language comes within not only one, but all three, of Dawson's criteria. Exercise of the power of disallowance "interferes with the democratic process" inasmuch as it results in the invalidation of a law enacted by a duly elected provincial legislature. But the power of disallowance would never have been conferred on the Federal Government in the B.N.A. Act if there had been a desire to foreclose such "interference." The constitutional plan is thus defeated not by the exercise of the power of disallowance, but by the *failure* of the Federal Government to exercise it, under appropriate circumstances.

¹⁴³ If the Federal Government's policy is to abandon minority language rights in Quebec and thereby allow the province for all intents and purposes to function as an independent state—a part of Canada in name only—members of the minority might well question whether it is to their advantage to continue to support federalism. They might be better off if Quebec separated from the rest of Canada, and if the English-speaking community, concentrated in the West End of Montreal, in turn sought independence from the rest of Quebec.

of incompatibility with human rights protections contained in *international* law, as opposed to invalidation by governmental fiat, would be an ideal way of accommodating the somewhat conflicting concerns of the Canadian Government. It could not be said, by those Quebecers who support the Province's restrictive language policies, that invalidation of the Charter is attributable to Quebec's membership in the Canadian confederation; it would be attributable, rather, to Quebec's membership in the world community, and the attainment of independence from the rest of Canada would not in any way serve to change that.

During the 1980 Quebec referendum campaign on sovereignty-association, those advocating a "No" vote pledged to work toward reform of the Canadian federal system in various respects.¹⁴⁴ The Quebec Liberal Party's blueprint for constitutional reform¹⁴⁵ proposes that a "Charter of Rights and Liberties" be included in the new constitution to guarantee basic human rights, including language rights. With respect to education, this proposal would confer on all English- and French-speaking persons, as well as native peoples, the right to primary and secondary education in their own language. Implementation of this proposal would apparently override, at least to some extent, the restrictive language of education policies contained in Quebec's Charter of the French Language. It is not by any means certain, however, whether constitutional reforms will in fact be adopted, and whether any such reforms will incorporate the Quebec Liberal Party's proposal with respect to language of education rights.¹⁴⁶ The Charter of Rights and Liberties proposal serves to indicate, however, that even among Quebecers who favor a dramatic restructuring of the Canadian constitution to confer substantial additional responsibilities on the provincial governments, there is a recognition that the Parti Quebecois' Charter of the French Language has gone too far in infringing basic human rights.

Another means whereby human rights may be enforced in international law is through diplomatic protection.¹⁴⁷ Under this doctrine, a state may bring a cause of action before an international tribunal alleging that another state has failed to treat nationals of the plaintiff-state in accordance with "minimum international standards." The various sources of international law discussed previously serve as evidence of the appropriate minimum international standard. Once all domestic remedies have been exhausted, the first step undertaken by a state which chooses to exercise its right of diplomatic protection is to assert a claim against the other state through diplomatic channels.¹⁴⁸ If the matter cannot thereby

¹⁴⁴ *Referendum in Quebec*, *supra* note 2, at 8-10.

¹⁴⁵ QUEBEC LIBERAL PARTY, *A NEW CANADIAN FEDERATION* (1980) (Popularly referred to as THE BEIGE PAPER).

¹⁴⁶ *See Referendum in Quebec*, *supra* note 2, at 9-10.

¹⁴⁷ *See M. AKEHURST*, *supra* note 13, at 88-102.

¹⁴⁸ *Id.* at 88.

be resolved to the satisfaction of the plaintiff-state, the claim may be submitted to an international tribunal for further action, depending on the policies of the states concerned regarding the jurisdiction of such tribunals.¹⁴⁹

There are two significant limitations on diplomatic protection as a means for redressing human rights violations. One is that diplomatic protection pertains only to violations of the rights of aliens within a state. It would permit, for instance, the United States to assert a claim against Canada based on the denial of access to English language schools to U.S. citizens currently living in Quebec. But it would be unavailing, at least in a direct sense, to Canadian citizens who believe that their human rights have been violated by Quebec's language policies. The second limitation is that no state is obliged to exercise its right of diplomatic protection. Thus, the United States *could* assert a claim against Canada on behalf of its nationals living in Quebec, if it chooses to do so; but nothing in the doctrine of diplomatic protection would *require* the United States to exercise its right to protect its nationals by asserting such a claim.

In practice, these limitations may not be as critical as might appear on first examination. Technically, a diplomatic protection claim can only be asserted on behalf of an alien. But many "test cases," particularly within the field of constitutional law, are brought by individual plaintiffs and not as class actions. Once a decision is rendered in such a case, it is no less pervasive *vis-a-vis* the rights of similarly situated individuals who were not parties to the particular litigation. For example, assume that France brings a successful diplomatic protection claim against Canada establishing the right of French nationals living in Quebec to decide whether their children will attend French or English schools.¹⁵⁰ How tenable would it be for Quebec to recognize that right of French nationals permanently living within its jurisdiction, while denying that right to its own French-speaking citizens? Once it has been established that minimum international standards require that parents be afforded the right to choose between the English and French educational systems, pressure might be exerted on Quebec through the vehicle of world public opinion to totally abrogate those practices that had been determined to constitute human rights violations under international law.¹⁵¹ As a practical matter, therefore, a successful diplomatic protection challenge to Quebec's Charter of the French Language might very well precipitate a complete revision of the language policies so as to comport with the "minimum inter-

¹⁴⁹ *Id.* at 227-31.

¹⁵⁰ This might be premised, for instance, on the argument that the Language Charter's access regulations violate the Economic Covenant and the Universal Declaration. See notes 51-79 and accompanying text, *supra*.

¹⁵¹ Consider, for instance, the role of world public opinion in securing more humane treatment for some dissidents in the Soviet Union, and in improving conditions for blacks in Southern Africa.

national standard" established by the resolution of the diplomatic protection claim.

The second limitation on the diplomatic protection doctrine, the absence of any obligation upon states to assert claims on behalf of their nationals, is also somewhat illusory. Whether any state would in fact choose to assert a claim against Canada pursuant to its right of diplomatic protection is difficult to ascertain at this point in time.¹⁵² Perhaps the determinative factors would be the state's evaluation of the gravity of the alleged human rights violations on the part of the Quebec Government, and the state's general policies regarding the appropriateness of invocation of diplomatic protection. Also important would be the amenability of the Canadian Federal Government to having such a claim asserted against it. The earlier discussion of the possible attitude of the Canadian Government toward an investigation by the U.N. Human Rights Committee¹⁵³ might extend to a diplomatic protection challenge to the language law brought by another state. The Government might welcome the opportunity to have questions concerning the Charter's validity resolved by an international tribunal, regardless of whether the tribunal's jurisdiction is premised upon U.N. rules for the investigation of petitions from individuals, or international law procedures for the resolution of diplomatic protection claims.

Whichever procedures may be selected to pursue an international legal challenge to the Quebec language charter, they must be directed against the Government of Canada and not against the Government of the Province of Quebec. Although major progress has been made in recent years to enable individuals to petition international tribunals regarding human rights violations, it continues to be well settled that the only subjects of international law are states themselves.¹⁵⁴ Despite the fact that the statute which constitutes the subject of the legal challenge was enacted by a provincial legislature, it is the Canadian Federal Government—the government of the state—which is held accountable for the statute in international law.

As discussed above, the principal grounds for challenging the Quebec language charter are derived from treaties, *i.e.*, the Universal Declaration of Human Rights, and specific provisions of the two covenants which interpret it. Conflicts between treaty obligations and municipal law—whether national or provincial—are bound to occur from time to time; but it is incumbent upon states which have entered into treaties with other states to conform their municipal legal systems to the require-

¹⁵² The question will not actually arise until all available domestic remedies have been exhausted, *i.e.*, until a determination has been made by the Canadian court of last resort that Quebec's language charter is in fact valid under Canadian law.

¹⁵³ See notes 140-144 and accompanying text, *supra*.

¹⁵⁴ R. SWIFT, INTERNATIONAL LAW: CURRENT AND CLASSIC 58 (1969).

ments of the treaties.¹⁵⁵ A state cannot respond to charges of having violated a treaty by saying that its municipal legal system does not permit the treaty's execution. In situations such as this, the state is required to reform its municipal legal system; if that is not possible, it should not have entered into the treaty in the first place. There can be no doubt that the international human rights covenants were intended to constrain provincial as well as national governments; both covenants contain articles expressly confirming that the covenants apply "to all parts of Federal states, without exception."¹⁵⁶

There is no question that the nature of a federal system results in problems that would not arise in a state where there is but one legislative body. But these problems do not excuse or in any way alter Canada's responsibility to fulfill its obligations under international agreements. Just as a state cannot plead, in international law, deficiencies in its municipal legal system as a defense to allegations of treaty violations, neither can it claim that the nature of its constitutional framework excuses adherence to its obligations under international law. Assuring compliance by all provincial legislatures with international agreements may not be an easy task; the reluctance of the Canadian government to enter into international agreements that focus on fields of exclusive provincial jurisdiction evidences this.¹⁵⁷ Once it ratified the two international covenants, however, the Canadian federal government imposed upon itself the obligation of preventing provincial legislatures from adopting statutes that contravene the provisions of the covenants.

International law inherently lacks the sanctions that exist in most municipal legal systems. International law has survived for as many centuries as it has because states recognize its long-term value in maintaining peace and world order; states are generally willing to comply with principles established in international law even though the threat of sanctions may not exist.¹⁵⁸ Accordingly, what is most important is the substantive content of international law—in this case, the extent of the human rights protections that international law recognizes. Some procedures for determination of that content must, and do, exist. The procedures available for "enforcement" of international law's substantive content may appear to be inadequate; but ultimately, enforcement is dependent upon the will of the state. Pressure from other members of the community of nations and recognition by the offending state that world peace is dependent upon its continued respect for international law serve as substitutes for the more

¹⁵⁵ LORD McNAIR, *LAW OF TREATIES* 78 (Oxford 1961): "[F]or no State can plead a deficiency in its municipal law or organization against a complaint of a breach of a treaty obligation or of a rule of customary international law. [Footnote omitted.]"

¹⁵⁶ See Economic Covenant, *supra* note 44, art. 28; Political Covenant, *supra* note 44, art. 50.

¹⁵⁷ See note 103 and accompanying text, *supra*.

¹⁵⁸ See M. AKERHURST, *supra* note 13, at 13-18.

visible enforcement procedures that those accustomed to dealing with municipal legal systems may believe to be essential.

V. CONCLUSION

Ideally, opponents of Quebec's Charter of the French Language might like to see recognition accorded to an unqualified right of all parents to determine the language in which their children are to be educated. Several of the documents which have been considered in this paper may lend some measure of support to that claim. But the most promising grounds for invalidation of Quebec's Charter concentrate their attack on the discriminatory aspects of the language law.¹⁵⁹ In order to prevail on this "discrimination theory," it is unnecessary to resolve whether Quebec is under any obligation to provide tax-supported English language education in the first place. The theory maintains that if the Province elects to provide for such an educational system, it is prevented, under international law, from restricting access to that system in a discriminatory manner. Whether international law requires Quebec to operate an English language school system at all is completely outside the scope of the requisite analysis.

In response to a challenge under international law premised upon this "discrimination theory," Quebec might simply claim that it is not required to permit English language schools to exist in the first place. If the English language school system were totally abolished, and if *all* children were required to attend French schools, the discrimination problem would be eliminated. The argument admits that present regulations may not comport with international anti-discrimination standards, but points out that if those measures are invalidated, an alternative course of action will be pursued that is even more detrimental to the interests of those who oppose the existing law. Why should the generosity which Quebec has seen fit to extend to some of its English-speaking citizens compel the abrogation of one of the Government's highest priorities,¹⁶⁰ the enhancement of the status of the French language? Thus, this response is not really a defense to the discrimination allegation at all.

In the Belgian Linguistic Case, the Government of Belgium included a similar argument in its presentation to the European Commission of Human Rights. The petitioners in the Belgian Case contended that the

¹⁵⁹ In the Belgian Linguistic Case, the petitioners were unsuccessful in their attempt to establish that all parents had the right to choose the official language in which their children were to be educated. The petitioners prevailed, however, on the theory that by affording linguistic choice rights to some parents while denying such rights to others, the Belgian educational language law discriminated against the latter group, giving rise to an inconsistency between the law and Belgium's obligations under the European Convention on Human Rights. See *Belgian Linguistic Case*, [1968] Y.B. EUR. CONV. ON HUMAN RIGHTS, at 42.

¹⁶⁰ WHITE PAPER, *supra* note 77, at 1.4.

educational system existing in six suburbs of Brussels was violative of the educational and anti-discrimination provisions of the European Convention on Human Rights because it permitted unrestricted access to instruction in the Dutch language, while severely limiting access to French language instruction.¹⁶¹ Belgium claimed that it was under no obligation to provide any French language instruction in the six suburbs and that accordingly it should be free to impose whatever access restrictions it deemed appropriate with respect to those French language schools that it voluntarily chose to operate. The Commission responded to that line of reasoning in the following manner:

Would the simple abolition of French language classes at Drogenbos, Kraainem, Linkebeek, Rhode-St. Genese, Wemmel and Wezembeek-Oppem remove the discrimination in question? The Commission does not think it need consider this possibility, one of the effects of which would be to deprive the locality of Kraainem of a French school, a locality "which has a French-speaking majority": "what may happen as the result of a change in legislation in the near or distant future" does not concern the Commission. In any case it seems to the Commission "rather unlikely that the Belgian Government would consider adopting such a radical solution," which would probably be "difficult" to adopt in practice.¹⁶²

The decision of the European Court on Human Rights, holding the provision of Belgian law restricting access to French language schools in the six towns to be inconsistent with the European Convention on Human Rights, did not discuss the possibility that the discrimination problem might be "solved" by complete abolition of the French schools.¹⁶³ History has confirmed the wisdom of the manner in which the Commission and the Court dealt with the Belgian Government's "threat": the Court's decision in the case did not bring about any action whatsoever on the part of the Government of Belgium to abolish the French language schools.¹⁶⁴

Whether Quebec would actually respond to a finding by an international tribunal that its French Language Charter is inconsistent with international law by abolishing the English language educational system is a highly speculative question. The proposed charter of language rights, which will be considered in the forthcoming constitutional reform process,¹⁶⁵ would create an impediment in Canadian municipal law to the pursuit by the Quebec Government of such a policy. Moreover, the Quebec Government's current policy regarding the continued operation of English language schools, as expressed in the White Paper, is as follows: "English schools have a large staff and considerable resources. *There can be no question of abolishing English education nor of rejecting the cul-*

¹⁶¹ See notes 68-76 and accompanying text, *supra*.

¹⁶² Belgian Linguistic Case, [1968] Y.B. EUR. CONV. ON HUMAN RIGHTS, at 936-38.

¹⁶³ *Id.* at 938-42.

¹⁶⁴ Lebel, *supra* note 48, at 240 n.5.

¹⁶⁵ See THE BEIGE PAPER, *supra* note 145.

tural tradition which has inspired it until this day."¹⁶⁶ [Emphasis added.] Perhaps the Quebec Government would not enthusiastically reiterate that statement if the day ever comes that its Language Charter is found to be inconsistent with international law; but at least the statement suggests that legislation designed to abolish the English school system will not by any means be the inevitable response of the Government to such a decision by an international tribunal. Analysis of the validity of legislation to abolish the English school system can be undertaken in a more satisfactory manner if and when such a bill is introduced in the National Assembly, *i.e.*, at the time the specific provision of the legislation are made known.¹⁶⁷

The objective of this paper has been to develop a framework for the evaluation of the educational provisions of Quebec's Charter of the French Language in light of the protection accorded human rights under international law. Analysis of the language law with respect to several of the international human rights documents which are binding on Canada indicates that the Language Charter may very well give rise to a number of colorable claims of human rights violations.

A decade ago, a group of Belgian citizens were successful in their challenge to comparable provisions of their nation's educational language law based upon the contravention of international human rights protections.¹⁶⁸ Those who oppose the educational provisions of Quebec's Charter of the French Language are now afforded a similar opportunity. In view of the sparse protections of individual and minority rights recognized in Canadian municipal law,¹⁶⁹ and the reticence of the Canadian Federal Government in dealing with violations of individual rights by Quebec's Provincial Government,¹⁷⁰ international law may be the greatest source of encouragement for those whose fundamental human rights have been infringed by Quebec's Charter of the French Language. The potential for vindication of those rights is already in existence. It is now up to the aggrieved individuals to set in motion the procedures which international law has made available for the purpose of redressing precisely such violations of human rights.

¹⁶⁶ WHITE PAPER, *supra* note 77, at 71.

¹⁶⁷ Depending on the content and the political factors existing at the time, it is possible that such legislation might be disallowed by the Federal Government. See notes 143-144 and accompanying text, *supra*.

¹⁶⁸ Belgian Linguistic Case, [1968] Y.B. EUR. CONV. ON HUMAN RIGHTS, at 938.

¹⁶⁹ "[A] study of the texts reveals that there is no constitutional guarantee for the English language in Quebec." WHITE PAPER, *supra* note 77, at 37-38. See also Bureau Métropolitain des Ecoles Protestantes de Montréal c. Ministre de L'Education du Québec, [1976] C.S. 430, wherein the Quebec Superior Court rejected a constitutional challenge to the validity of the English school access restrictions contained in the Official Language Act.

¹⁷⁰ See note 141 and accompanying text, *supra*.