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Equal Accessibility for Sign Language under the Convention on the Rights of Persons with Disabilities

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EQUAL ACCESSIBILITY FOR SIGN LANGUAGE UNDER THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

*Andrea R. Ball**

Achieving recognition of sign language as a protected and full language is a plight of Deaf sign language users. National recognition provides rights to access, advancement, and protection of the dominant means of communication for most Deaf individuals. Despite the positive implications of official recognition, many countries either refuse to recognize sign language, attempt to unify regional sign languages into one common, socially-constructed language, or simply manually code the majority spoken language. Regional and minority sign language users have no recourse as they find themselves excluded from official recognition as a domestic linguistic minority. Appealing to international human rights law likewise proves futile due to the inherent difficulties in classifying the Deaf as a linguistic minority. Shedding the linguistic minority framework, this Note will argue that classifying Deaf sign language users as disabled offers greater linguistic rights and protections than under a linguistic minority classification. Through the Convention on the Rights of Persons with Disabilities, sign language users have greater rights and States have explicit obligations to recognize and protect minority sign languages.

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I. INTRODUCTION

In 2009, the World Federation of the Deaf and the Swedish National Association of the Deaf issued a report entitled "Deaf People and Human Rights."¹ Drawing data from surveys completed by ninety-three countries, the report outlined several areas of concern for the Deaf² community around the world.³ The findings concluded that in many countries, Deaf individuals are deprived access to "large sections" of society due to a lack of recognition of sign language, a lack of bilingual education, and a limited availability of sign language interpreting services.⁴

The common link among these barriers is sign language. Sign language, the "most appropriate" first language for the Deaf,⁵ is an obstacle to accessibility due to the failure of many countries to officially recognize it as a language or national language.⁶ Yet even after official recognition is obtained, there is still uncertainty those Deaf individuals who do not communicate through a recognized (such as a national sign language) or majority sign language lack accessibility⁷ to public services and facilities. One reason

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¹ See WORLD FEDERATION OF THE DEAF AND SWEDISH NATIONAL ASSOCIATION OF THE DEAF, DEAF PEOPLE AND HUMAN RIGHTS 8 (2009) (Hilde Haualand & Colin Allen eds., 2009) [hereinafter WFD REPORT].

² Throughout this Note, the term "Deaf" will be capitalized to convey the principle that deafness is not only a disability, but also its own cultural community. See Jodi A. McCreary Stebnicki & Harriet V. Coeling, *The Culture of the Deaf*, J. OF TRANSCULTURAL NURSING 350, 350 (1999).

³ See WFD REPORT, *supra* note 1, at 6. Specific findings include limited access to media and other information, high illiteracy rates, heavy social prejudices, limited access to education (often low in quality), no real access to government services (due to a lack of sign language interpreters), limited access to higher education, and low access to public services (notably, information about a country's HIV/AIDS situation). *Id.*

⁴ *Id.* at 7.

⁵ DAVID S. MARTIN, THE ENGLISH-ONLY MOVEMENT AND SIGN LANGUAGE FOR DEAF LEARNERS: AN INSTRUCTIVE PARALLEL, SIGN LANGUAGE STUDIES 115, 120 (2001).

⁶ There are three obstacles that may encourage a state's reluctance to officially recognize sign language: (1) government ignorance of the importance of sign language; (2) the view that a hearing aid is "the solution" to the Deaf community's "problem"; and (3) the financial cost of official recognition. NINA TIMMERMANS, REPORT: A COMPARATIVE ANALYSIS OF THE STATUS OF SIGN LANGUAGES IN EUROPE 15 (2003), available at <http://www.fevlado.be/themas/gebarentaal/documenten/Status%20van%20gebarentalen%20in%20Europa.pdf>.

⁷ Jennifer Rayman, *Why Doesn't Everyone Here Speak Sign Language? Questions of Language Policy, Ideology, and Economics*, 10 CURRENT ISSUES IN LANGUAGE PLANNING 338, 343 (2009) ("Even in societies that have policies recognizing Sign Language as the community language of Deaf citizens, the access is often still limited."). In this Note,

behind this deprivation of access is the Deaf community's unsettled status as a linguistic minority.⁸

This Note explores the negative implications of classifying the Deaf as a linguistic minority. Part Two presents a brief overview of official sign language recognition with a focus on national sign languages. This overview includes several case studies exemplifying the cultural implications of official recognition on sign language users. Part Three reviews the lack of protection and recourse in several human rights instruments for individuals who communicate through unrecognized or minority sign languages. This section includes a relevant discussion of why national sign languages, though beneficial, are theoretically detrimental to achieving accessibility for the Deaf under a linguistic minority approach.⁹

Part Four details the impact of the Convention on the Rights of Person's with Disabilities (CRPD)¹⁰ and explains how classification as "disabled" under the CRPD, though controversial, would be a positive step for the Deaf community. This Note proposes that shifting from a linguistic minority approach into the disability rights framework of the CRPD¹¹ may

"access" refers to linguistic access. Since the majority of Deaf individuals communicate through sign language, access to public services such as health care, employment help, and social welfare require sign language interpreters or documents written in sign language.

⁸ See *infra* Part II for a discussion on the potential negative effects on official recognition of sign language and the adoption of national sign languages. The intended usage of the phrase "Deaf community" in this Note is to encompass Deaf individuals who "use sign language and are excluded collectively on the basis of their status as a minority group." Csilla Bartha, *Language Ideologies, Discriminatory Practices and the Deaf Community in Hungary*, in ISB4: PROCEEDINGS OF THE 4TH INTERNATIONAL SYMPOSIUM ON BILINGUALISM 211 (J. Cohen, K. McAlister, K. Rolstad, & J. MacSwan eds., 2005) (citing Mairian Corker, *Deafness/Disability – Problematising Notions of Identity, Culture, and Structure*, in DISABILITY, CULTURE AND IDENTITY 143 (S. Ridell, & N. Watson eds., 2003)).

⁹ Accessibility to *all* sign languages within a state is crucial since without sign language, Deaf people "cannot access enough information to make informed choices, form independent opinions, and express themselves adequately." WFD REPORT, *supra* note 1, at 22.

¹⁰ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 6, 2006), available at <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> [hereinafter CRPD].

¹¹ A disability rights approach is somewhat controversial. The Deaf community shuns the "disabled" label and prefers to be considered an ethnic or linguistic minority. See, e.g., Gill Valentine & Tracey Skelton, *The Right to be Heard: Citizenship and Language*, 26 POLITICAL GEO. 121, 123 (2007) ("Deaf people . . . regard themselves as a linguistic and cultural minority."); Maya Sabatello, *Cultural Minorities and International Law: Reconsidering the Case of the Deaf Community*, 26 WHITTIER L. REV. 1025, 1025 (2004–2005) ("Contemporary trends within the human rights discourse tend to embrace the argument that the Deaf community . . . is an ethnic or linguistic minority group."); Rayman, *supra* note 7, at 344 ("Placing the debate within the frame of reference of disability already limits the scope of possibilities for protecting and promoting Sign Language in a wider transformation of society.").

provide greater opportunities for linguistic accessibility and protection for the Deaf—regardless of the form of sign language an individual uses to communicate. Specifically, this Note focuses on a state's obligations under the CRPD to recognize and adopt official or national sign languages while providing accessibility and preserving cultural identities—important values to the Deaf signing community.¹²

To ensure that states ratifying the CRPD fulfill these obligations,¹³ Part Five of this Note proposes guidelines for the CRPD tailored to the Deaf community. These guidelines include defining an explicit “undue burden” standard that obligates states to utilize all possible resources to accommodate Deaf individuals. The additional proposed guidelines are focused on strengthening the state's duty to furnish the most effective means of communication possible for a Deaf individual, thus opening up accessibility to public services and society.

II. OFFICIAL AND NATIONAL SIGN LANGUAGES

Despite the benefits, official state recognition of sign language as a language can act as both a condition and barrier to accessibility in the public realm. For spoken languages, recognition often entails designation as either an “official” or “national” language.¹⁴ In many cases, states formulate national languages as a means to stabilize the state. This encourages state parties to bypass offering protections to minority languages within the state's borders.¹⁵ Under the guise of a “national” language, states assimilate indi-

¹² See, e.g., HARLAN L. LANE, ROBERT HOFFMEISTER, BENJAMIN J. BAHAN, *A JOURNEY INTO THE DEAF-WORLD* 70 (1996) (Deaf identity itself is “highly valued”); see also Carol Padden, *The Deaf Community and the Culture of Deaf People*, in READINGS FOR DIVERSITY AND SOCIAL JUSTICE 346 (Maurianne Adams ed., 2000) (stating a primary goal of the American Deaf community is to achieve public acceptance of Deaf people as equals).

¹³ In addition to providing accessibility to all sign languages, states must protect and promote Deaf culture. There are varying definitions of what “Deaf culture” entails. See, e.g., PADDY LADD, *UNDERSTANDING DEAF CULTURE: IN SEARCH OF DEAFHOOD* xvii (2003) (“a term that gives utterance to the belief that Deaf communities contained their own ways of life mediated through their sign languages”); SHERMAN WILCOX & PHYLLIS PERRIN WILCOX, *LEARNING TO SEE: TEACHING AMERICAN SIGN LANGUAGE AS A SECOND LANGUAGE* 56 (1997) (arguing that Deaf culture is not meant to imply Deaf people all over the world share a similar culture); DAVID BRIEN, *CONSTRUCTING DEAFNESS* 46 (Susan Gregory & Gillian M. Hartley eds., 2002) (detailing that cultural definitions conceive of the deaf community as “a separate cultural group with its own values and languages.”).

¹⁴ Some states legally recognize all minority languages while other states designate one language as the sole “official” or “national” language. See generally JAVAID REHMAN, *THE WEAKNESSES IN THE INTERNATIONAL PROTECTION OF MINORITY RIGHTS* 189 (2000) (discussing specific examples of the impact of official languages).

¹⁵ See Lauri Malksoo, *Language Rights in International Law: Why the Phoenix is Still in the Ashes*, 12 FLA. J. INT'L L. 431, 449 (1998); see also Miklós Kontra, *Some Reflections on the Nature of Language and its Regulation*, 6 INT'L J. ON MINORITY AND GROUP RIGHTS 281,

genous linguistic groups, cultural groups, and immigrants into the majority factions.¹⁶

Though intended to unify and stabilize, national languages transform into a survival mechanism.¹⁷ Minority language users are compelled to learn the language in order to freely function within the domestic political and civil system.¹⁸ As a result of the state's freedom to choose which language(s) are deserving of this official status,¹⁹ speakers of minority languages, as well as individuals who are simply unable to learn and acquire the designated national language, experience linguistic persecution.²⁰

282 (1999) ("Language serves a basic function in the communication of ideas which is necessary for the ordering of society. Accordingly, in any single society, there is a common interest in the use of at least one language for functional reasons."); REHMAN, *supra* note 14, at 23 ("States have sometimes failed to recognize that a distinct language exists or that there are linguistic or ethnic minorities.").

¹⁶ Valentine & Skelton, *supra* note 11, at 125. *But see* Kontra, *supra* note 15, at 282 ("[I]t would seem in the public interest of plurilingual societies that the State would use more than one language. Indeed, in principle, the more languages the better.").

¹⁷ See Fernand de Varennes, *The Existing Rights of Minorities in International Law*, in LANGUAGE: A RIGHT AND RESOURCE, APPROACHING LINGUISTIC HUMAN RIGHTS 129 (1999) ("Individuals who are generally less fluent in the official state language than native users of the language favored by public authorities would experience disadvantages or would be denied benefits or privileges enjoyed by others simply on the basis of their language."). See also Marina A. Torres, *Inside Looking Out: An Application of International and Regional Linguistic Protections to the U.S. Spanish-Speaking Minority*, 87 NEB. L. REV. 599, 603 (2009) ("One's choice of language is arguably a choice freely made, since the survival and flourishing of a group's culture quite often depends on the vitality of its language—which, in turn, depends on the language being spoken. Language is a means . . . and a threat to the language is very much a threat to the existence of the culture itself."); Kontra, *supra* note 15, at 282.

¹⁸ See Kontra, *supra* note 15, at 282. Language discrimination is most prevalent within the public and administrative sector. For the purposes and scope of this Note, the definition of "administrative or public authorities" provided by de Varennes, *supra* note 17, at 127, will be utilized. Administrative or public authorities includes "all areas of state involvement including the judiciary, public education, [and] naturalization." *Id.* at 121.

¹⁹ See RICHARD L. CREECH, LAW AND LANGUAGE IN THE EUROPEAN UNION, THE PARADOX OF A BABEL "UNITED IN DIVERSITY" 147 (2005). In *Podkolzina v. Latvia*, the European Court of Human Rights determined that the choice of a "working language" for a national parliament is dictated by historical and political considerations and is "in principle . . . exclusively for the State concerned to determine." Press Release, From the Registrar of the European Court of Human Rights, Chamber Judgment in the Case of *Podkolzina v. Latvia*, (Sept. 4, 2002), available at <http://www.echr.coe.int/eng/Press/2002/apr/PR%20Podkolzina%2009042002E.htm>. Similarly, in *Ballantyne v. Canada*, the Human Rights Committee declared that a State is free to choose one or more official languages but may not, "outside the spheres of public life, the freedom to express oneself in a language of one's choice." *Ballantyne v. Canada*, U.N. GAOR, Hum. Rts. Comm., 47th Sess., U.N. Doc. CCPR/C/47/D359/D385/1989 [hereinafter *Ballantyne*].

²⁰ REHMAN, *supra* note 14, at 188 (quoting M.S. McDougal, H.S. Lasswell, Lung-Chu Chen, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN

Similar to the treatment of spoken languages discussed above, states that recognize sign language as an official language may then attempt to standardize and unify the various forms of sign languages for political stability.²¹ Although they lack a written component, sign languages are considered a full and genuine language.²² Over time, Deaf individuals came together from around the world to form communities that developed natural sign languages with distinct signs and cultural practices.²³ These distinct sign languages, also known as “shared sign languages,” now act as a source of political and social identity for Deaf communities dispersed throughout the world.²⁴

Since these distinct communities and sign languages developed around the world without regard for geographic neatness or boundaries,²⁵ it is challenging to identify a specific region solely by the content of a single sign language.²⁶ With such variation among sign languages, official recognition of sign language is a priority for Deaf communities because of the benefits and protections afforded to individuals who communicate in state-recognized languages.²⁷ This suggests that assimilation into a single, “offi-

INTERNATIONAL LAW OF HUMAN DIGNITY 174 (New Haven and London, Yale University Press, 1980) (orchestrated examples of linguistic persecution include the “denial of opportunity to acquire and employ the mother tongue, the language of the elite or world languages [and] . . . coerced learning of specified languages other than the home language.”)).

²¹ See Jan Branson & Don Miller, *National Sign Language and Language Policies*, in 1 ENCYCLOPEDIA OF LANGUAGE AND EDUCATION: LANGUAGE POLICY AND POLITICAL ISSUES IN EDUCATION 151, 153 (S. May & N.H. Hornberger eds., 2nd. Ed. 2008); see Richard J. Senghas and Leila Monaghan, *Signs of Their Times: Deaf Communities and the Culture of Language*, 31 ANNU. REV. ANTHROPOL. 69, 69–70 (2002).

²² See Branson & Miller, *supra* note 21, at 153 (stating reasons why sign languages are accepted as genuine languages); see also Senghas & Monaghan, *supra* note 21, at 69–70 (2002).

²³ See Senghas & Monaghan, *supra* note 21, at 74 (stating for example, in South Africa, how several “historically distinct” Deaf communities have developed); see also Debra Aarons & Louise Reynolds, *South African Sign Language*, in MANY WAYS TO BE DEAF: INTERNATIONAL VARIATION IN DEAF COMMUNITIES 202 (Leila Moaghan, Constanze Schmaing, Karen Nakamura, and Graham H. Turner eds., 2003).

²⁴ See Valentine & Skelton, *supra* note 11, at 131; see also Snezana Trifunovska, *Factors Affecting the Applicability and Efficiency of International Norms Protecting Linguistic Rights of Minorities*, 9 INT'L J. ON MINORITY AND GROUP RIGHTS 235, 235 (2002) (“[T]he speaking of language presents a means of communication between humans, and . . . for each linguistic group it has an additional dimension of providing for the maintenance of the group’s identity.”).

²⁵ Valentine & Skelton, *supra* note 11, at 131.

²⁶ *Id.* One single “internationally understood” sign language simply does not exist. Bencie Woll, Rachel Sutton-Spence, & Frances Elton, *Multilingualism: The Global Approach to Sign Languages*, in THE SOCIOLINGUISTICS OF SIGN LANGUAGES 9 (Ceil Lucas ed., 2001).

²⁷ See de Varennes, *supra* note 17, at 129.

cial” linguistic minority is therefore in the best interest of the Deaf sign language community.²⁸

Official state recognition of sign language, however, can undergo various formulations that effectively downgrade the status of certain sign languages within a state. Foremost, implementing a national sign language involves language planning.²⁹ Language planning may consist of deliberately changing or altering existing languages.³⁰ Alteration is notably prominent in the development of some national sign languages. For example, instead of officially recognizing *all* sign languages, many states artificially create a national sign language by manually-coding the state’s dominant oral or written languages.³¹ Although manually-coded languages are not considered a natural sign language,³² their intent is to encourage the acquisition of reading and writing skills.³³ Another type of artificial sign language involves finding commonalities among regional sign languages³⁴ and formulating a single sign language by unifying the numerous distinct minority sign languages.³⁵

²⁸ See *supra* notes 1–3 and accompanying text; see also Jan Branson & Don Miller, *Nationalism and the Linguistic Rights of Deaf Communities: Linguistic Imperialism and the Recognition and Development of Sign Languages*, 2 J. OF SOCIOLINGUISTICS 3, 7 (1998) [hereinafter *Nationalism*].

²⁹ See Timothy Reagan, *Language Planning and Policy*, in THE SOCIOLINGUISTICS OF SIGN LANGUAGES 145–48 (Ceil Lucas ed., 2001).

³⁰ *Id.* at 146.

³¹ Manually-coded sign languages are used primarily to teach spoken language to the Deaf. See Senghas & Monaghan, *supra* note 21, at 74; Branson & Miller, *supra* note 21, at 152–54. Manual sign codes are considered an “international phenomenon.” Reagan, *supra* note 29, at 153. The British Sign Language (BSL) is one example of a manual alphabet. It corresponds to the English alphabet. Rachel Sutton-Spence, *British Manual Alphabets in the Education of Deaf People Since the 17th Century*, in MANY WAYS TO BE DEAF: INTERNATIONAL VARIATION IN DEAF COMMUNITIES 26 (Leila Moaghan, Constanze Schmaing, Karen Nakamura, and Graham H. Turner eds., 2003).

³² Anna-Miria Muhlke, *The Right to Language and Linguistic Development: Deafness from a Human Rights Perspective*, 40 VA. J. INT’L. 705, 714 (1999–2000).

³³ Reagan, *supra* note 29, at 158. One concern with manually-coded sign languages is that they may delegitimize the status and language of the Deaf cultural community by imposing a brand new language on the linguistic minority. *Id.*

³⁴ See *infra* pp. 8–10 for examples of this method; see, e.g., Trude Schermer, *From Variant to Standard: An Overview of the Standardization Process of the Lexicon of Sign Language of the Netherlands over Two Decades*, 3 SIGN LANGUAGE STUDIES 469 (2003) (discussing the methods used to achieve a standard for creating the Sign Language of the Netherlands (SLN)); M.A. Abdel-Fattah, *Arabic Sign Language: A Perspective*, 10 J. OF DEAF STUDIES AND DEAF EDUCATION 212, 212 (2005) (providing an overview of the process to unify sign languages of Arab communities).

³⁵ For an example of this practice, see Press Release, World Federation of the Deaf, Open Letter with Regard the Unification Project of Sign Languages in the Arab Region (Oct. 7, 2009) [hereinafter Unification Press Release].

Under these methods, it appears insensible for some countries to even attempt and define a national sign language without ignoring the cultural value and importance of different natural sign languages.³⁶ While standardized languages are beneficial because they provide access and educational value to Deaf students, it is imperative to incidentally promote and protect Deaf culture—a protection that cannot be achieved through recognition of one sign language. Many different forces³⁷ affect language choices, such as political borders historical, events, and social reasons.³⁸ These forces vary among Deaf communities and render it difficult to find cohesion in one single, national sign language.³⁹

Several case studies exemplify the potential negative implications inherent in official recognition of sign language. First, linguists in both the Netherlands and South Africa witnessed firsthand the intricacies of adopting a common sign language. In the Netherlands, researchers developing the Sign Language of the Netherlands (SLN) in the early 1980s observed regional variations in the sign language utilized in the five Deaf schools around the country.⁴⁰ The researchers decided to take these regional variations into consideration when formulating SLN because of the risk that Deaf communities would not accept the national sign language if their regional signs were not included.⁴¹

Analyzing the variations, the researchers concluded that while some regions shared common signs, other distinct sign languages were influenced according to geographical location.⁴² In one particular region, French Sign Language heavily influenced the local sign language.⁴³ Although within the Netherlands itself the regional Deaf communities could understand and communicate with each other using the different variations, the ultimate need to include the variations in SLN derived from the demand of parents and teachers of Deaf students.⁴⁴ Despite these demands, the Deaf community did not favor standardizing sign language at the detrimental cost of excluding the diverse regional sign languages and variations.⁴⁵

³⁶ Woll, Sutton-Spence, & Elton, *supra* note 26, at 14; *see also supra* notes 23 and 24.

³⁷ Woll, Sutton-Spence, & Elton, *supra* note 26, at 14.

³⁸ *Id.* at 14–16.

³⁹ *See* Unification Press Release, *supra* note 35.

⁴⁰ Schermer, *supra* note 34, at 470.

⁴¹ *Id.* at 471. (“Spoken language planning studies . . . reveal that it is controversial to select a single dialect to be the standard or official language. . . . There are several examples of deaf communities that have never accepted national sign language dictionaries because their own regional signs had not been included.”).

⁴² *Id.* at 471–73.

⁴³ *Id.* at 473.

⁴⁴ *Id.* at 473–74.

⁴⁵ *Id.* at 474.

Like the situation in the Netherlands, researchers observing Deaf students in South Africa discovered a correlation between the particular sign language used and what school a student attended.⁴⁶ Various languages were used in different schools due to apartheid policies, spoken language apartheid, and/or geographical difference.⁴⁷ When linguists began standardizing the languages into an official South African Sign Language (SASL), they compiled signs (consisting of variations) from eleven distinct South African racial and geographical communities.⁴⁸ Due to the cultural variations associated with official SASL signs, sign language interpreters in South Africa must be trained in each natural sign language present within its borders to provide full access to South African society to Deaf individuals.⁴⁹

One notable example of the inherent diversity of a national sign language is the Australian national sign language, Auslan.⁵⁰ Auslan was created by gathering signing traditions from across Australia, influenced heavily by English, Scottish, and Irish culture,⁵¹ and declaring a national sign language.⁵² In Deaf classrooms, Auslan is taught in conjunction with English, the spoken language.⁵³ While the extent of Auslan usage and recognition is viewed as a progressive achievement for Deaf students in Australia, Auslan neglects to recognize Australia's multicultural, multilingual, and immigrant society.⁵⁴

A study concluded that from the twenty-five percent of all Deaf students in Australia raised in non-English speaking households, two-thirds of parents claimed their children did not receive instruction in school of the sign language used in the home.⁵⁵ Drawing from this statistic, the researchers questioned whether Auslan should be used as the primary sign language for instruction in all individual cases.⁵⁶ This uncertainty raises the greater

⁴⁶ Aarons & Reynolds, *supra* note 23, at 202.

⁴⁷ *Id.* The apartheid policies in South Africa that led to the division of schools involved a regime that created different departments of education for each racial group. Each department implemented its own curriculum and standards, thus explaining the linguistic disparity. *Id.* at 194.

⁴⁸ *Id.* at 204.

⁴⁹ *Id.* at 206.

⁵⁰ Branson & Miller, *Nationalism*, *supra* note 28, at 17–18.

⁵¹ *Id.* at 14.

⁵² *Id.* See also Valentine & Skelton, *supra* note 11, at 132, for an account of how British Sign Language, similar to Auslan, has diversified into a regionally distinct language itself.

⁵³ Branson & Miller, *Nationalism*, *supra* note 28, at 14.

⁵⁴ Jan Branson & Don Miller, *Achieving Human Rights: Educating Deaf Immigrant Students from Non-English-Speaking Families in Australia*, in *ISSUES UNRESOLVED: NEW PERSPECTIVES ON LANGUAGE AND DEAF EDUCATION* 88, 93 & 96 (Amatzia Weisel ed., 1998) [hereinafter *Achieving Human Rights*].

⁵⁵ *Id.* at 93.

⁵⁶ *Id.* at 96.

question of whether Auslan can in fact be classified as an accurate source of linguistic identification for the Deaf.

In recent years, Arab nations undertook the task of creating an Arabic Sign Language.⁵⁷ Linguists are burdened with standardizing sign languages from several different Middle Eastern countries dominated by local forms of sign language.⁵⁸ These local forms developed naturally throughout the years and include both European and American influences and regional signs inherited over hundreds of years.⁵⁹ It is precisely because of these regional sign languages that the WFD opposes the unification of Arabic sign languages.⁶⁰ The WFD proclaims that unifying Arab sign languages “endanger[s] local/national Sign Languages,” denying Deaf Arabs “the opportunity to learn, communicate in, and access [to] languages they already know.”⁶¹

Finally, composing sign language dictionaries presents a challenging task to linguists in both Sub-Sahara Africa and China. Deaf children in Sub-Sahara Africa are educated in the national spoken language since there is no national or official sign language.⁶² Linguists find it implausible to accurately measure the numerous sign languages present in the region.⁶³ Consequently, a sign language dictionary with the purpose of standardizing signs appears to be an insurmountable task considering it requires encompassing “no less than seven completely different languages.”⁶⁴ China likewise faces an immense challenge in constructing a national sign language. The existence of a multitude of sign languages, including cities, urban and rural, with their own distinct signs, presents a tremendous challenge to Chinese authorities attempting to standardize the languages.⁶⁵

⁵⁷ Abdel-Fattah, *supra* note 34, at 212. Jordan, Egypt, Libya, and the Gulf States are included. *Id.*

⁵⁸ *Id.* (“[C]ommunication with a deaf person is polarized within such circles. This situation has led to the emergence of many local means of sign communication.”).

⁵⁹ *Id.* at 213.

⁶⁰ Unification Press Release, *supra* note 35.

⁶¹ *Id.*

⁶² Nassozi B. Kiyaga and Donald F. Moores, *Deafness in Sub-Saharan Africa*, 148 AMERICAN ANNALS OF THE DEAF 18, 20 (2003).

⁶³ *Id.*

⁶⁴ *Id.* (quoting Alan Jones, *Deaf awareness programs in South Africa*, in THE DEAF WAY: PERSPECTIVES FROM THE INTERNATIONAL CONFERENCE ON DEAF CULTURE 698, 699 (C. Ertling, R. Johnson, D. Smith & B. Snider eds., 1994); see also Timothy Reagan, Claire Penn, & Dale Ogilvy, *From Policy to Practice: Sign Language Developments in Post-Apartheid South Africa*, 5 LANGUAGE POLICY 187, 192 (discussing the difficulties posed to researchers in studying signing in South Africa).

⁶⁵ Richard R. Lytle, Kathryn E. Johnson, & Yang Jun Hui, *Deaf Education in China: History, Current Issues, and Emerging Deaf Voices*, 150 AMERICAN ANNALS OF THE DEAF 457, 466 (2005-2006). See generally Christina Mien-Chun Lin, Barbara Gener de Garcia &

The case studies described above each illustrate the challenges involved in officially recognizing sign language, notably when states undergo the adoption of a national sign language.⁶⁶ While national sign languages serve the valuable purpose of promoting accessibility and recognition of the Deaf community as a linguistic minority,⁶⁷ the impact is individually discriminating. Deaf communities using natural sign languages must struggle to gain accessibility (including education) in their own distinct sign language.⁶⁸ What becomes a struggle for official recognition of the Deaf as a culture with its own language seemingly shifts into a battle for safeguarding individual linguistic rights.⁶⁹

These studies also demonstrate that Deaf individuals who do not communicate in or lack access to education in the national sign language face prejudice in terms of public accessibility and cultural expression.⁷⁰ External sources of protection, such as international law, thus become vital for enforcing minority sign language rights that may not otherwise be protected at the domestic level. Yet, as discussed below, appeals to several human rights instruments may prove futile due to a lack of protection for lin-

Deborah Chen-Pichler, *Standardizing Chinese Sign Language for Use in Post-Secondary Education*, 10 CURRENT ISSUES IN LANGUAGE PLANNING 327 (2009) (discussing the need for a standardization of Chinese sign languages due to its detrimental effect on the educational system). For insight on a similar situation in Thailand and Vietnam, see James Woodward, *Sign Languages and Deaf Identities in Thailand and Viet Nam*, in MANY WAYS TO BE DEAF: INTERNATIONAL VARIATION IN DEAF COMMUNITIES 283–301 (Leila Moaghan, Constanze Schmaing, Karen Nakamura & Graham H. Turner eds., 2003). The existence of seven distinct and separate sign languages in Thailand creates conflict in regards to Modern Thai Sign Language, which was constructed from influences from American Sign Language. *Id.* at 283, 290. No attempts have been made to establish formal deaf communities in distinct regions that utilize distinct sign languages. *Id.* at 296.

⁶⁶ Branson & Miller, *supra* note 21, at 153.

⁶⁷ See *supra* notes 17–18.

⁶⁸ See Branson & Miller, *Nationalism*, *supra* note 28, at 6–7 (“The dominance of the national language within the borders of the state as well as beyond, throughout its spheres of influence, creates minority states of other languages within the nation-state. These minority languages are . . . culturally devalued and operate frequently as community languages.”). Minority sign languages are used in communal settings and involve deep cultural traditions, especially in Sub-Saharan Africa. Reagan, Penn, & Ogilvy, *supra* note 64, at 190 (“[C]ommunity membership involves the use of a natural sign language as one’s vernacular language, culturally appropriate behaviors, endogamous marital patterns, an acceptance of the historical understanding of the cultural community, and participation in the various voluntary organizations of the community.”).

⁶⁹ Linguistic human rights implies that “all people can identify positively with their mother tongue and have that identification accepted and respected by others whether their mother tongue is a minority language or a majority language.” Tove Skutnabb-Kangas, *Mother Tongue Maintenance: The Debate, Linguistic Human Rights and Minority Education*, 28 TESOL QUARTERLY 625 (1994). Also, for a general discussion on research into the field of the deaf and linguistic communities, see Senghas & Monaghan, *supra* note 21, at 81.

⁷⁰ Branson & Miller, *supra* note 21, at 153.

guistic minorities. Moreover, the inherent problems in obtaining classification of the Deaf as a linguistic minority and including all forms of sign language within that classification proves particularly challenging.

III. MINIMAL PROTECTION UNDER INTERNATIONAL LAW

Defending the Deaf community's linguistic rights commands a sound legal framework and a viable enforcement mechanism, whether at the domestic or international level.⁷¹ When domestic laws are to the contrary, international obligations may be effective. For the Deaf, seeking recourse in the international arena from discriminating language laws presents a complex challenge under a linguistic minority approach.⁷² Close analysis of several human rights instruments demonstrates that Deaf individuals who live in a state without official recognition of sign language or who communicate in a non-recognized sign language may be shunned from classification as a linguistic minority.

In international human rights instruments, protections for minority languages appear as either "negative" obligations on the state to prohibit discrimination against minorities or "positive" obligations requiring affirmative action to encourage the use of minority languages in the public sector.⁷³ One main provision specifically directed towards protecting linguistic minorities is Article 27 of the International Covenant on Civil and Political Rights (ICCPR).⁷⁴ Under Article 27, a person belonging to a linguistic mi-

⁷¹ Trifunovska, *supra* note 24, at 236.

⁷² *Id.* ("[T]he majority of the linguistic communities in the world are weak vulnerable groups without possibility of creating themselves as the conditions necessary for preservation and protection of their characteristics. For these groups national protection of human rights is vital.")

⁷³ Three different legal theories exist as to the extent of the positive obligation of States to provide "public services, benefits, and privilege" in minority languages. de Varennes, *supra* note 17, at 127. One theory asserts that it is "well-established" in international law that public authorities are to use minority languages. This is because States are under an obligation to not discriminate against language. *Id.* A second theory finds the right to the use of minority language in the public sector is an emerging right that is "just beginning" to be included in legal instruments. *Id.* Finally, a third theory finds that only members of national minorities are entitled to such a right. *Id.* The third theory poses the biggest challenge to sign language users in states that have a national sign language. If State parties are not required to provide minority language access to non-national minorities, then sign language users who do not use the national sign language may not be regarded as a national minority. Language access in the context of public benefits and services would therefore be denied. *See* text accompanying notes 18–20.

⁷⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (1967) [hereinafter ICCPR]. *See* REHMAN, *supra* note 14, at 170; *See* Abdulrahim P. Vijapur, *International Protection of Minority Rights*, 43 INT'L STUDIES 367, 374 (2006), available at <http://isq.sagepub.com/cgi/content/abstract/43/4/367>. ("Thus, it must be stated that the ICCPR is the only international instrument legally binding on the ratifying states which

nority “shall not be denied the right, in community, with the other members of the group . . . to use their own language.”⁷⁵ Though the text grants individuals the right to use their own language, the right must be exercised in community with others.⁷⁶

For an individual to realize Article 27’s benefits, the individual must be a member of an existing “minority,” such as a linguistic minority.⁷⁷ A valid claim by a Deaf individual under Article 27 that a state is inaccessible or is violating the ICCPR’s linguistic protections is therefore contingent on the state recognizing the Deaf individual as part of a linguistic minority.⁷⁸ Left unclear is what exactly constitutes a minority—absent from Article 27 is an explicit definition.⁷⁹ Adding to the uncertainty is a General Comment to the ICCPR issued by the Human Rights Committee (HRC) defining a minority as an individual who “belongs to a group and . . . share[s] in common a culture, a religion, and/or a language.”⁸⁰ Applying the HRC’s criteria, it cannot acutely be ascertained if all sign languages within a state will be protected if a state recognizes the Deaf as a linguistic minority. An argument can certainly be made that the various language communities formed by the Deaf⁸¹ would benefit more from specific state recognition as a linguistic minority, especially in states with a national sign language.

Since the ICCPR leaves the debate open as to what criteria defines a minority,⁸² a state’s own definition should control.⁸³ A troubling aspect to

contains an Article on minority rights.”). For states that have adopted the Optional Protocol to the ICCPR, individuals are able to assert claims of violations of rights specified in the Covenant to the Human Rights Committee (HRC). Theresia Degener, *Disability and Freedom: The International Covenant on Civil and Political Rights (ICCPR)*, reprinted in HUMAN RIGHTS AND DISABILITY: THE CURRENT USE AND FUTURE POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENTS IN THE CONTEXT OF DISABILITY 48 (Theresia Degener & Yolán Koster-Dreese eds., 1995).

⁷⁵ ICCPR, *supra* note 74, art. 27.

⁷⁶ CREECH, *supra* note 19, at 138.

⁷⁷ Robert Dunbar, *Minority Language Rights in International Law*, 50 INT’L & COMP. L. Q. 90, 99 (2001). *But see* Sabatello, *supra* note 11, at 1036 (asserting that the Deaf fall under the category of a “cultural” minority under the ICCPR).

⁷⁸ *See* Dunbar, *supra* note 77.

⁷⁹ THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, CASES MATERIALS AND COMMENTARY 754 (Sarah Joseph, Jenny Schultz, & Melissa Castan eds. 2nd ed., 2004) [hereinafter ICCPR CASE MATERIALS AND COMMENTARY].

⁸⁰ *Id.* (citing Human Right’s Committee, General Comment No. 23 on Art. 27 (50th Sess. 1994) CCPR/C/21/Rev.1/Add.5, para 5.1 (Aug. 4, 1994)).

⁸¹ *See* Senghas & Monaghan, *supra* note 23.

⁸² *See* Dunbar, *supra* note 77, at 99. One theory behind the reason for why there is no accepted definition of what constitutes a “minority” is because governments are “reluctant to tie their hands through the acceptance of a binding international definition of minorities which may reduce their freedom in pursuing their own priorities in the field of . . . domestic policy.” Rainer Grote, *The Struggle for Minority Rights and Human Rights: Current Trends*

this somewhat simple theory is what criteria each state will use when considering what groups deserve minority status based on language. In a General Comment, the HRC disregarded the use of subjective criteria by the state when classifying an “official” minority⁸⁴ and asserted that the state must use objective criteria.⁸⁵ However, when read in context, this requirement only means that if a group constitutes the majority in a certain area or province in the state, the state must still classify them as a minority when they are not considered a part of the state’s majority group.⁸⁶

Despite hope this particular Comment would broaden linguistic minority rights under Article 27, there is no assurance a state will classify the Deaf as a linguistic minority. One list of the possible objective factors which work best to define a minority group include shared communal traits, such as skin color or area of residence.⁸⁷ Whereas the only common trait

and Challenges, in 193 INTERNATIONAL LAW TODAY: NEW CHALLENGES AND THE NEED FOR REFORM? 227–28 (2008); *see generally* Vijapur, *supra* note 75, at 370–72 (discussing the problems inherent in defining what constitutes a “minority”).

⁸³ *But see* Tove Skutnabb-Kangas, *Linguistic Diversity, Human Rights and the “Free” Market*, in LANGUAGE RIGHTS AND RESOURCES, APPROACHING LINGUISTIC HUMAN RIGHTS 212 (Miklos Kontra, Robert Phillipson, Tove Skutnabb-Kangas & Tibor Varady eds., 1999). Skutnabb-Kangas sees hope for some minority groups in regards to Article 27 due to a broader General Comment adopted by the UN Human Rights Committee. The Comment states that Article 27 protects “all individuals on the State’s territory or under its jurisdiction . . . irrespective of whether they belong to the minorities specified in the Article or not.” Important to the question of whether minority sign language users are protected under Article 27 is the comment stating that the existence of a minority requires establishment “by objective criteria” and not on a decision by the State. Office of the High Commissioner of Human Rights, General Comment No. 23, CCPR/C/21/Rev.1/Add.5, para 5.2 (Aug. 4, 1994) [hereinafter ICCPR Gen. Cmt. 23]. In relation to sign language users, this objective criteria may prove harmful because of the additional shared characteristics required to constitute an “official” minority. *See infra* note 88.

⁸⁴ ICCPR Gen. Cmt. 23, *supra* note 83, para 5.2.

⁸⁵ *Id.* *See also* ICCPR CASES MATERIALS AND COMMENTARY, *supra* note 79, at 759, stating that the objectivity standard “probably also precludes a minority group from conclusively defining its own membership, especially in circumstances that undermine a putative member’s personal minority rights.”

⁸⁶ Vijapur, *supra* note 74, at 377. Vijapur relates the suggestions of Fausto Pocar, a member of the HRC, in regards to what the objective criteria should be. Pocar suggests that states must indicate if any “ethnic, religious or linguistic minorities live in the country, whether permanently or otherwise.” Additionally, states must include such information as the respective number of minorities in the state as compared to the majority population of the country; measures taken by the state to provide minorities with equal political and economic opportunities; amount of minority representation in central and local government; and information on how an individual member of a minority can effectively exercise his or her rights.

⁸⁷ *See* Sabatello, *supra* note 11, at 1038 (“Although recognition as a linguistic minority . . . does not require that the language is used exclusively by the community, it does require additional communal characteristics, such as skin color, origin, name, area of residence, familial relationship, or culture, which are missing from the bulk of the case involving deaf children.”).

shared by every single Deaf person is deafness,⁸⁸ this trait may place the group outside the classification as a linguistic minority⁸⁹—unless a shared disability is at some point considered an objective criterion.

The HRC does appear to understand the hesitation in allowing states to craft their own minority definition. In one document, the HRC expresses concern for state legislation that limits the definition of a “minority” and acknowledges only “some” minority groups within a state.⁹⁰ Furthermore, the HRC concludes that laws limiting the definition of minorities effectually restricts or excludes specific residents from full recognition as minority groups with minority rights.⁹¹

To summarize, Article 27 can be an empty tool for protecting the rights of minority sign language users. Article 27’s emphasis on classification as a minority group manifests doubt and lingering questions. For instance, are individuals who communicate in the official or adopted national sign language automatically considered part of a recognized linguistic minority?⁹² Additionally, the uncertainty of what objective criteria a state should use when defining a linguistic minority generates an unsettling proposition: what happens if Deaf language communities⁹³ do not fall under any criteria or the state refuses to recognize sign language and classify the Deaf as a linguistic minority? The ultimate answer may be that Article 27’s terms are inapplicable and non-binding, a proposition that may seemingly

⁸⁸ *But see infra* note 87 and accompanying text. The common trait shared by all Deaf individuals is hearing loss. Adapting to this trait led to the development of communities using varied sign languages that are now minority languages. Since an objective trait caused different minority languages to develop, the Deaf should be classified a linguistic minority under the ICCPR because this shared characteristic.

⁸⁹ Sabatello, *supra* note 11, at 1038.

⁹⁰ *See* ICCPR CASE MATERIALS AND COMMENTARY, *supra* note 79, at 756 (citing Human Rights Committee, Concluding Observations of the Human Rights Committee: Austria, U.N. Doc. CCPR/C/79/Add. 103) (Nov. 11, 1998) (“Thus the Committee has noted its concern at State legislation that limits the definition of minorities, and/or laws which acknowledge only some minority groups within the relevant state.”).

⁹¹ *Id.* One current example of this type of law is the Act on the State Language of the Slovak Republic, Act 270/1995 (Nov. 15, 1995) (amended June 30, 2009), available at <http://www.culture.gov.sk/en/legislation/jazykov-zkon---anglick-verzia>. The law is criticized for criminalizing the use of minority languages in certain areas, and mandating that the Slovak language be used first in many situations, including at cultural events. Press Release, European People’s Party, New Slovak Language Law Does Not Comply With European Standards (July 9, 2009), <http://www.eppgroup.eu/press/en/Allzcom.asp?ArchiveMonth=07&ArchiveYear=2009> (follow “09/07/2009: New Slovak language law does not comply with European standards. Michael Gahler MEP” hyperlink).

⁹² *See* Dunbar, *supra* note 77, at 99.

⁹³ This is because Deaf language communities identify by what sign language they use. If this sign language is not considered part of the official or national sign language, members of these communities may not be considered “linguistic minorities.” *See* Skutnabb-Kangas, *supra* note 69 and accompanying text.

give incentive for states to completely bypass offering full accessibility to Deaf sign language users.

The Deaf also have insignificant protection in the International Covenant of Economic, Social, and Cultural Rights (ICESCR).⁹⁴ Article 2 of the ICESCR only requires states to “undertake to take steps” in implementing non-discriminatory policies towards language.⁹⁵ Any positive obligations within this phrase are more or less diluted by the lack of mandatory language.⁹⁶ Moreover, the vagueness of the phrase incites debate as to whether the measures are to be “universally valid or relevant, or quite specific” to particular cultures or legal systems.⁹⁷ Any obligations towards eradicating language discrimination under Article 2 are further constrained by limiting the obligation to the availability of resources in the state.⁹⁸ One assumption that may be derived from this limitation is that it provides an automatic defense—perhaps without an explanation of what steps were exactly taken or what resources are available—to states that fail to protect or recognize minority languages.

Still, even if the ICESCR adopted an individual complaints mechanism,⁹⁹ it is unclear how sign language users would utilize the ICESCR to enforce linguistic rights and protections. For instance, Article 13(1) requires state education to promote understanding, tolerance, and friendship among nations and all racial, ethnic, or religious groups.¹⁰⁰ “Language” groups are notably excluded.¹⁰¹ This exclusion renders the significance of “language” in Article 2 weak and “virtually meaningless.”¹⁰²

In addition to the international instruments discussed above, two specific regional European human rights instruments endeavor to protect

⁹⁴ International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (1976) [hereinafter ICESCR].

⁹⁵ Paul Conor Hale, Note, *Official, National, Common or Unifying: Do Words giving Legal Status to Language Diminish Linguistic Human Rights?*, 36 GA. J. INT'L & COMP. L. 221, 227 (2007–2008); ICESCR, *supra* note 94, art. 2, para 1.

⁹⁶ See Trifunovska, *supra* note 24, at 237, for a discussion on why the words of provisions in human rights instruments must be “clear and determined” in creating obligations for states. Trifunovska argues that phrases such as “states will endeavor” and “will encourage the creation of conditions” are examples of “weak formulations which can be an obstacle to a genuine protection.” *Id.* The language of Article 2 of the ICESCR is analogous to these types of weak phrases.

⁹⁷ HENRY J. STEINER, PHILIP ALSTON, & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS, MORALS 277 (3rd ed. 2008).

⁹⁸ *Id.* at 275 (citing ICESCR, *supra* note 94, art. 2(1)).

⁹⁹ Such a mechanism is lacking but a draft protocol exists. *Id.* at 277.

¹⁰⁰ ICESCR, *supra* note 94, art. 13(1).

¹⁰¹ Skutnabb-Kangas, *supra* note 83, at 205. This proposition is assuming that states will not consider the Deaf as an ethnic group.

¹⁰² *Id.*

linguistic minorities yet fail to provide an effective solution for the Deaf community. First, the European Convention on Human Rights (ECHR)¹⁰³ is binding on every Member State of the European Union.¹⁰⁴ The Court of Human Rights (CHR) adjudicates individual claims brought under the ECHR.¹⁰⁵ Article 14 of the ECHR prohibits discrimination on the basis of language to secure “enjoyment of the rights and freedoms” of the ECHR.¹⁰⁶ Explicit language rights in Articles 5 and 6 only pertain to procedural and police-related matters.¹⁰⁷ Despite the inclusion of these language-specific articles, decisions by the CHR concerning language rights provide “very minimal” protections for linguistic minorities.¹⁰⁸

In the *Belgian Linguistics Case*,¹⁰⁹ the CHR denounced the express guarantee of linguistic freedom in the ECHR and its First Protocol. The CHR rejected a claim that the use of Dutch as the sole national language in the public administration in Flanders violated the freedom of expression protected by Article 10 of the ECHR.¹¹⁰ Instead, the CHR found the only explicit language rights in the ECHR were guaranteed under Articles 5(2) and 6(2)(a) and (e), rights irrelevant to the plaintiff’s dispute.¹¹¹ Key to the

¹⁰³ European Convention of Human Rights, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR].

¹⁰⁴ CREECH, *supra* note 19, at 134.

¹⁰⁵ *Id.*

¹⁰⁶ ECHR, *supra* note 103, art. 14. The prohibition of discrimination under Article 14 pertains only to the rights listed in the Convention and its Protocols. It has no independent existence. Marek Antoni Nowicki, *The European Convention of Human Rights: Prohibition of Discrimination*, 1999 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 17, 19 (1999).

¹⁰⁷ KRISTIN HENRARD, DEVISING AN ADEQUATE SYSTEM OF MINORITY PROTECTION: INDIVIDUAL HUMAN RIGHTS, MINORITY RIGHTS AND THE RIGHT TO SELF-DETERMINATION 125 (2000).

¹⁰⁸ *Id.* at 127.

¹⁰⁹ Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, 6 Eur. Ct. H.R. (ser. A) (1968) [hereinafter *Belgian Linguistics Case*]. The plaintiffs in this case were French-speaking persons living in Flanders where Dutch was the sole national language used in the public administration and school system. Bruno de Witte, *Surviving in Babel? Language Rights and European Integration*, in YORAM DINSTEN & MALA TABORY, *THE PROTECTION OF MINORITIES AND HUMAN RIGHTS* 279–80 (1992). Their claim asserted that the sole use of Dutch constituted a “linguistic regime” that violated several articles of the ECHR. *Id.* at 280.

¹¹⁰ ECHR, *supra* note 103, art. 10. The language of Article 10 relevant to this discussion is in Article 10(1): “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” *Id.*

¹¹¹ de Witte, *supra* note 109, at 281 (1992). Article 5(2) requires the State to inform an arrested individual of the reasons for their arrest in a language which he or she understands. ECHR, *supra* note 104, art. 5(2). Article 6.3(a) obligates the State to inform a defendant in a language they understand of the nature and cause of the allegations against him, while

CHR's decision was the denial of Article 14 as containing any express or implied linguistic rights.¹¹² By limiting Article 14's scope to the "nature of the rights and freedoms" included in a discrimination question posed to the CHR,¹¹³ the CHR articulated the requirement that Article 14 is only activated when a complaint includes a violation of a right or freedom listed in the article.¹¹⁴

The reasoning in *Belgian Linguistics* suggests that if a minority sign language user who does not utilize the official or national sign language brings a complaint under the ECHR alleging language discrimination by public authorities, the claim would be rejected on the grounds that it does not allege a violation of another article of the ECHR.¹¹⁵ Given the decision in *Belgian Linguistics*, an Article 14 claim in conjunction with Article 10 will be rejected because it does not constitute a violation of the individual's freedom of expression.¹¹⁶

Second, the Council of Europe implemented the European Charter for Regional or Minority Languages (ECRML) to mitigate the lack of positive protections for minority language users in the ECHR.¹¹⁷ European state governments are obligated to apply Part II of the ECRML, which defines the objectives and principles of the document, to all regional or minority languages.¹¹⁸ The obligations included in Part II include taking action to

6(3)(e) requires the assistance of an interpreter if the defendant cannot understand or speak the language in court. *Id.* art. 6(3)(a),(e).

¹¹² See CREECH, *supra* note 19, at 134 (discussing the implications of the *Belgian Linguistics Case* on Article 14 as a source of language rights in Europe).

¹¹³ Nowicki, *supra* note 106, at 20 (quoting *Belgian Linguistics Case*, *supra* note 111, at 9).

¹¹⁴ *Id.* These rights and freedoms include sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. ECHR, *supra* note 104, art. 14.

¹¹⁵ See also *Fryske Nasjonale Partij and Others v. the Netherlands*, App. No. 11100/84, Eur. Ct. H.R. (1985). In this case, the CHR reiterated that Article 9 and Article 10 of the ECHR do not guarantee linguistic freedom, particularly the right to use the individual's choice of language in administrative matters. ATHANASIA SPILIOPOULOU AKERMARK, *JUSTIFICATIONS OF MINORITY PROTECTION IN INTERNATIONAL LAW* 212 (1997).

¹¹⁶ *But see* *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R. (2001) [hereinafter *Cyprus v. Turkey*], where the Court of Human Rights indicates it may be leaning towards a broader application of Article 14. CREECH, *supra* note 19, at 134. In this case, the Court stated the right to education is "no longer confined to the right to an education in a state's choice of its official language." *Id.* at 142 (citing *Cyprus v. Turkey*, *supra* note 118).

¹¹⁷ European Charter for Regional or Minority Languages, CETS 148 (Nov. 5, 1992) [hereinafter ECRML]. The ECRML applies to "regional or minority" languages, defined as "[l]anguages that are different from the official language or language of the state and are traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population." CREECH, *supra* note 19, at 135 (citing ECRML, *supra* note 117, art. I(a)). Dialects of the official language are excluded. *Id.*

¹¹⁸ CREECH, *supra* note 19, at 135.

safeguard regional or minority languages¹¹⁹ and facilitating and encouraging the use of regional or minority languages in speech and writing, both in public and private life.¹²⁰

In conjunction with Part II's obligations, states must adopt at least thirty-five of the measures listed in Part III; these measures are intended to "promote the use of regional or minority languages in public life."¹²¹ Part III's option clause raises numerous challenges for minority language users. Notably, permitting states to "pick and choose" which measures to implement to promote minority language rights essentially depends on which languages a state considers important.¹²² Furthermore, the ECRML's explanatory report allows the state to base decisions on which measures to impose according to the situation of each language.¹²³ The factors suggested for state consideration when determining which minority languages "deserve" protection include the number of speakers of a language¹²⁴ and degree of fragmentation.¹²⁵ Additional considerations include the costs involved in implementing the measures and the state's administrative and financial capacity.¹²⁶

¹¹⁹ ECRML, *supra* note 117, art. 7(1)(c).

¹²⁰ *Id.* art. 7(1)(d).

¹²¹ *See id.*; Part III.

¹²² *See* CREECH, *supra* note 19, at 136.

¹²³ Council of Europe's Explanatory Report on the European Charter for Regional or Minority Languages, ETS 148 para. 22 [hereinafter COE Report].

On the one hand, the charter establishes a common core of principles, set out in Part II, which apply to all regional or minority languages. On the other hand, Part III of the charter contains a series of specific provisions concerning the place of regional or minority languages in the various sectors of the life of the community: the individual states are free, within certain limits, to determine which of these provisions will apply to each of the languages spoken within their frontiers. In addition, a considerable number of provisions comprise several options of varying degrees of stringency, one of which must be applied "according to the situation of each language."

Id.

¹²⁴ The Explanatory Report to Article 9, regarding judicial authorities, states that "language services should only be provided when the number of residents who are users of the regional or minority languages justifies the measure." *Id.* para. 90. Accordingly, measures should only be taken "as far as this is reasonably possible." *Id.* para. 104.

¹²⁵ *Id.* para. 23. "This flexibility takes account of the major differences in the de facto situations of regional or minority languages (number of speakers, degree of fragmentation, etc). It also has regard to the costs entailed by many of the provisions and the varying administrative and financial capacity of the European states. In this respect it is important that the parties are allowed to add to their commitments at a later stage, as their legal situation develops or their financial circumstances allow." *Id.*

¹²⁶ *Id.*

Considering the potential costs of providing full accessibility to Deaf individuals who may not communicate in a recognized or national sign language, states have no incentive to provide accessibility under the ECRML. With the available defenses, it is more conducive for a state to claim that the number of minority sign language users in proportion to the number of other minority languages (such as spoken languages) does not justify providing language services in the public realm.¹²⁷ The ECRML's "pick and choose" approach does not translate into a reliable source of recourse for the Deaf in situations where a Deaf individual may require access to health care or public services.¹²⁸

Approaching sign language protection and accessibility under a linguistic minority framework proves virtually fruitless under the instruments discussed above. Rooted in the instrument's terms are uncertainties as to where exactly the Deaf community stands in terms of classification as a linguistic minority. With no express guarantee a state will even classify the Deaf as a linguistic minority and whether such a classification would encompass all sign languages is too much of a risk to take when accessibility to crucial services is at stake. Instead, a new avenue for sign language accessibility must be taken.

IV. SIGN LANGUAGE ACCESSIBILITY UNDER THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

It is important to note that when a state recognizes sign language, it is also recognizing the cultural and linguistic identity of Deaf communi-

¹²⁷ See Skutnabb-Kangas, *supra* note 83, at 206 (stating that the Charter "permit[s] a reluctant state to meet the requirements in a minimalist way, which it can legitimate by claiming that a provision was not 'possible' or 'appropriate', or that numbers were not 'sufficient' or did not 'justify' a provision").

¹²⁸ The content of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities accords a similar opinion. G.A. Res. 47/135, U.N. Doc. A/RES/47/135, 92nd plenary mtg. (Dec. 18, 1992) [hereinafter UNDRM]. Though not binding, the Declaration offers a relevant opinion on minority protection under international law. See CREECH, *supra* note 19, at 139. Under the Declaration, states have no obligation to provide "adequate opportunities" for minorities to be educated in their mother tongue. UNDRM, *supra* note 128, art.4(3). To the contrary, the Declaration insists that States simply "should" take appropriate measures to provide such opportunities. *Id.* When viewed as an opinion on the extent of minority rights under international law, the Declaration approaches the subject in the context of what the "right" thing to do is to protect minorities while implicitly suggesting that it may be too difficult and burdensome on the State. *But see* REHMAN, *supra* note 14, at 175 (2000) (discussing specific examples of the impact of official languages) (explaining how the Declaration may be taken as "a concerted effort on the part of the international community to overcome some of the limitations surrounding international law relating to minorities") (citing B. Dickson, *The United Nations and the Freedom of Religion*, 44 ICLQ 327, 354 (1995)).

ties.¹²⁹ With numerous Deaf language communities throughout the world, many with distinct sign languages,¹³⁰ obtaining recognition for each community is challenging. Although official recognition or the adoption of a national sign language provides accessibility to public services for many Deaf individuals, the disparate impact is inaccessibility to Deaf individuals who communicate in minority sign languages. This disparity also leads to a lack of recognition for their cultural and linguistic identities.¹³¹

By shifting the analysis from a linguistic minority approach into a disability rights approach, the recently adopted Convention on the Rights of Persons with Disabilities (CRPD)¹³² offers great potential for procuring full accessibility to all Deaf sign language users. The CRPD is the first legally binding instrument protecting the human rights of persons with disabilities.¹³³ In states that ratify the CRPD and its Optional Protocol, disabled individuals have an individual-complaints mechanism available when discriminated against on the basis of disability.¹³⁴ A critical component of the CRPD is its rights-based approach,¹³⁵ focusing on the specific prohibition of

¹²⁹ WFD REPORT, *supra* note 1, at 22.

¹³⁰ See *supra* note 21 and accompanying text.

¹³¹ See Rayman, *supra* note 7, at 344–45 (“While recognition may legally increase the status of Sign Language, in and of itself, recognition is not enough to raise the chances of Deaf people to full participatory citizenship in the larger society.”).

¹³² CRPD, *supra* note 10. The CRPD and its Optional Protocol (if separately adopted) are binding on ratifying states. Article 33 imposes obligations for national implementation and monitoring. Specifically, Article 33(2) mandates states to “maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the [CRPD].” *Id.* art. 33(2).

¹³³ CRPD, *supra* note 10. As of January 1, 2011, there are 147 signatories and 97 ratifications of the CRPD. United Nations Enable, Rights and Dignity of Persons with Disabilities, <http://www.un.org/disabilities/> (last visited Apr. 2, 2011); Yanghee Lee, *Expanding Human Rights to Persons with Disabilities: Laying the Groundwork for a Twenty-First Century Movement*, 18 PACIFIC RIM L. & POL’Y J. 283, 283 (2009). See also Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUMAN RIGHTS L. REVIEW 1, 12 (2008). Disabled individuals have seen their rights explicitly recognized until the CRPD came into effect. None of the binding instruments of international human rights law (the UDHR, ICCPR, ICESCR) include the disabled as a protected category. *Id.*

¹³⁴ See Kayess & French, *supra* note 133, at 22–32. Under the Optional Protocol, when a State breaches its obligations under the CRPD, individuals are able to file a complaint (a “communication”) to the Committee on the Rights of Persons with Disabilities. Lending to the purpose of the CRPD, a written submission is the only requirement to file a complaint; personal appearance before the Committee is not required. United Nations Enable, The Optional Protocol to the Convention: Chapter Three; Monitoring the Convention and the Optional Protocol, <http://www.un.org/disabilities/default.asp?id=229> (last visited Apr. 2, 2011). State parties are encouraged to establish mechanisms to “promote, protect and monitor” implementation of the CRPD. CRPD, *supra* note 10, art. 33(2).

¹³⁵ Kayess & French, *supra* note 133, at 3.

discrimination against the disabled in all facets of life such as equality of opportunity and accessibility.¹³⁶ The instrument intertwines linguistic rights with accessibility by emphasizing cultural preservation and protecting the individual identity of each disabled individual.

The downside to achieving greater linguistic accessibility under the CRPD is the negative connotation associated with labeling the Deaf as “disabled.”¹³⁷ The Deaf community does not view deafness as a disability.¹³⁸ An encouraged and more accepted definition views Deaf individuals as members of a linguistic and cultural minority with “distinctive mores, attitudes, and values and a distinctive physical constitution.”¹³⁹ Under a disability label, concerns exist that “correctional” methods will be imposed on the group.¹⁴⁰ The nexus between correctional methods and classifying the Deaf as disabled is formulated on the theory that society seeks to reduce the number of disabled individuals by eliminating or curing the disability.¹⁴¹ Thus, a main reason to reject a disability classification is the fear that cor-

¹³⁶ CRPD, *supra* note 10, art. 3; Lee, *supra* note 133, at 285.

¹³⁷ Martin, *supra* note 5, at 122. A disability is defined as a “classification of a physical, behavioral, or mental difference from the norm that is attributed to biological causes in a particular culture in a given era, as a result of the interventions of interested parties.” Harlan Lane, *Do Deaf People Have a Disability?*, 2 SIGN LANGUAGE STUDIES 356, 363 (2002) [hereinafter *Disability*]; see also *Elridge v. British Columbia, (Attorney General)* [1997] 3 S.C.R. 624, available at <http://csc.lexum.umontreal.ca/en/1997/1997scr3-624/1997scr3-624.pdf> [hereinafter *Elridge*]. In *Elridge*, the Canadian Supreme Court acknowledged that excluding the Deaf from opportunities and services designed for the hearing population is not justified by the Deaf community’s resistance to the “disability” label.” *Id.* at 47–48.

¹³⁸ See Lane, *Disability*, *supra* note 137, at 369 (“[D]eaf people generally do not see themselves as disabled nor do they seek what people who say they are disabled seek.”).

¹³⁹ Lane, *Disability*, *supra* note 137, at 368; see LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY 100 (1995) (discussing a community of deaf people who share “language, cultural values, history, and social life”); see also Bonnie Poitras Tucker, *The ADA and Deaf Culture: Contrasting Precepts, Conflicting Results*, 549 THE ANNALS OF THE AMERICAN ACADEMY 24, 24 (1997) (discussing the opinions of deaf culturists who consider deaf people to be a cultural minority).

¹⁴⁰ See Sabatello, *supra* note 11, at 1025 (discussing the rights of recognition and preservation to which the deaf community is entitled); see also Harlan Lane, *Ethnicity, Ethics, and the Deaf-World*, 10 THE J. OF DEAF STUDIES AND DEAF EDUCATION 291, 297–302 (2005) [hereinafter *Ethnicity*] (listing several reasons supporting the statement that the disability label should be rejected); Lane, *Disability*, *supra* note 137, at 370.

¹⁴¹ See Amy Elizabeth Brusky, *Making Decisions for Deaf Children Regarding Cochlear Implants: The Legal Ramifications of Recognizing Deafness as a Culture Rather than a Disability*, 1995 WIS. L. REV. 235, 236 (1995) (citing HARLAN LANE, THE MASK OF BENEVOLENCE: DISABLING THE DEAF COMMUNITY 21 (1992) (“[P]arents who seek implants for their deaf child are robbing the child of his or her “birthright” of silence by steering the child into the hearing culture instead of accepting the child’s deafness and the culture and lifestyle that accompany it.”)).

rectional methods, such as cochlear implant surgery,¹⁴² may accelerate in popularity.¹⁴³ One major concern about possible techniques to correct deafness is the possibility that the Deaf as a linguistic and cultural minority will diminish.¹⁴⁴

The implications of a disability label indeed raise critical issues requiring deeper analysis.¹⁴⁵ Yet, as this Note demonstrates below, the CRPD approaches disability rights with an emphasis on preserving individual culture and identity. As applied to the Deaf population, this explicitly includes promoting sign language¹⁴⁶ and recognizing the Deaf community's linguistic identity.¹⁴⁷ These specific rights, in conjunction with the CRPD's goal to recognize the importance of acknowledging and respecting a disabled individual's autonomy,¹⁴⁸ should act as a shield to the threat of corrective techniques, if adhered to.

The CRPD is a gateway for linguistic accessibility primarily because of the specific rights applicable to the Deaf.¹⁴⁹ Throughout the CRPD drafting conferences, disability rights groups advocated the need for the CRPD to recognize sign language so the Deaf could gain greater human

¹⁴² Cochlear implants electrically stimulate the auditory nerve to produce hearing precepts. An external component receives incoming sound. The sound is then processed according to a predefined strategy and transferred by signals across the skin. An implanted electronic device receives the signal, decodes it, and proceeds to stimulate electrodes in the cochlea. The auditory nerve is then stimulated directly by the electrodes. Mario A. Svirsky, Amy M. Robbins, Karen Iler Kirk, David B. Pisoni, and Rochard T. Miyamoto, *Language Development in Profoundly Deaf Children with Cochlear Implants*, 11 *PSYCHOLOGICAL SCIENCE* 153, 153 (2000).

¹⁴³ See Lane, *Disability*, *supra* note 137, at 370 (discussing how the "disability label encourages the technologies of normalization").

¹⁴⁴ *Id.* at 374 ("[I]f there were highly effective implants – and one day there may well be – the ranks of the Deaf-World would presumably diminish. It is unethical to take steps that tend to reduce the ranks of a minority culture.").

¹⁴⁵ See Bonnie P. Tucker, *Deafness – Disability or Subculture: The Emerging Conflict*, 3 *CORNELL J. L. AND PUB. POL'Y* 265 (1993–1994) (providing further analysis on the tension between labeling deafness as a disability or as a culture).

¹⁴⁶ CRPD, *supra* note 10, art. 21(e).

¹⁴⁷ *Id.* art. 24(2)(b).

¹⁴⁸ *Id.* Preamble (n). The text states that one goal of the CRPD is "Recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices."

¹⁴⁹ A person with disabilities under the CRPD is defined as individuals who have "long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." CRPD, *supra* note 10, art. 1. Although the CRPD's definition of a disabled individual does list specific disabilities such as deafness, the Deaf are considered covered under the CRPD. See WFD REPORT, *supra* note 1, at 8.

rights and equal treatment under the law.¹⁵⁰ In response, the drafters explicitly included sign language in five separate articles.¹⁵¹

Article 3 contains guiding principles to be read in conjunction with the specific sign language protections in the CRPD.¹⁵² Distinctly, Article 3 describes the CRPD's goals as promoting respect for "the right of children with disabilities to preserve their identities,"¹⁵³ and for "difference and acceptance of persons with disabilities as part of human diversity and humanity."¹⁵⁴ Under this framework, labeling the Deaf as disabled can no longer be viewed as diminishing the linguistic identities attached to deafness.¹⁵⁵ Rather, a "disability" label under the CRPD must be regarded as securing not only greater social protections, but linguistic and cultural as well.

Article 5 is the foundation for enforcing equality and non-discrimination in ratifying states.¹⁵⁶ States must prohibit discrimination on the basis of disability while guaranteeing equal and effective legal protection to the disabled.¹⁵⁷ One cornerstone of Article 5 is the requirement that state parties take "all appropriate steps" to reasonably accommodate the

¹⁵⁰ See, e.g., Contribution by International Disability Alliance Towards a U.N. Disability Convention, Statement for 2nd Ad Hoc Committee Session (June 2003), <http://www.un.org/esa/socdev/enable/rights/contrib-ida.htm> (In asserting the protections the CRPD must recognize in regards to freedom of expression, IDA specifically noted this right is pertinent to the Deaf community, whose "human rights are violated by denial or prohibition of sign language."); Ad Hoc Committee on an International Convention, DPI Japanese Assembly Position Paper Regarding the Convention, <http://www.un.org/esa/socdev/enable/rights/wgcontrib-dpi.htm> (The DPI Japanese Assembly proposed a subsection stating that "Persons with hearing-impairment have the right to make use of sign language whenever they feel it necessary.").

¹⁵¹ See *infra* pp. 25–27. Since "signed language" is included within the definition of "Language," every article that mentions "communication" or "language" includes sign languages. Article 2 of the CRPD defines "Language" as including "spoken and signed languages and other forms of non spoken languages." CRPD, *supra* note 10, art. 2; WFD REPORT, *supra* note 1, at 8.

¹⁵² WFD REPORT, *supra* note 1, at 8.

¹⁵³ CRPD, *supra* note 10, art. 3(h). *But see* Lane, *Ethnicity*, *supra* note 140, at 305 ("[W]hen culturally Deaf people allow their ethnic identity to be subsumed under the construct of disability, they set themselves up for wrong solutions and bitter disappointments. After all, members of the Deaf-World differ from disabled people in their language and cultural experiences, in their body of knowledge, in their system of rules and values, and in their models for selfhood.").

¹⁵⁴ CRPD, *supra* note 10, art. 3(d).

¹⁵⁵ See *supra* notes 141–48.

¹⁵⁶ CRPD, *supra* note 10, art. 5. Article 5(1) obligates state parties to "recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

¹⁵⁷ *Id.* art. 5(2).

disabled.¹⁵⁸ Article 5's mandate of prohibiting discrimination and reasonably accommodating the disabled must be read together with the "specific non-discrimination and equality measures" of the other Articles.¹⁵⁹

Reading the following Articles in conjunction with Article 5 advances an opportunity for obtaining official recognition and access to sign language. First, Article 9 is an essential tool in the fight to acquire greater accessibility to public services.¹⁶⁰ States are obligated to take appropriate measures to ensure disabled persons have equal access to "information and communication."¹⁶¹ Such measures include providing "professional sign language interpreters" to facilitate accessibility to "buildings and other facilities open to the public, both in urban and rural areas."¹⁶² More generally, Article 9 imposes a somewhat challenging burden on the State to assure the overall "environment" is accessible to disabled persons.¹⁶³

Second, Article 21 requires states to not only recognize and promote sign languages,¹⁶⁴ but to take appropriate measures to accept and faci-

¹⁵⁸ *Id.* art. 5(3); *see also* Kayess & French, *supra* note 133, at 27 ("The incorporation of a State obligation to ensure that reasonable accommodations are made to facilitate the exercise by persons with disability of CRPD rights is perhaps the most fundamental instrumental element of the convention.").

¹⁵⁹ Human Rights Council [HRC], *Thematic Study by the Office of the United Nations High Commission for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities*, ¶ 38, U.N. Doc. A/HRC/10/48 (Jan. 26, 2009) [hereinafter HRC Study].

¹⁶⁰ *See* WFD REPORT, *supra* note 1, at 2 ("Access to a language is a prerequisite for enjoyment of many human rights."). Kuwait, during the third session of the CRPD Ad Hoc Committee, suggested that Article 19 (now Article 9) contain language obligating states to "provide sign language interpreters as intermediaries to interpret information from spoken language into sign language and from sign language into spoken language for access to public services, education and to facilitate participation." U.N. Convention on the Human Rights of People with Disabilities, Ad Hoc Committee Daily Summaries, Third Session, Vol. 4, # 6 (June 1, 2004), <http://www.un.org/esa/socdev/enable/rights/ahc3sum19.htm>.

¹⁶¹ CRPD, *supra* note 10, art. 9. The Human Rights Council views Article 9 as recognizing an accessible environment as "instrumental to the realization of the rights of persons with disabilities to independent living and full participation in all areas of life." HRC Study, *supra* note 159, ¶ 41. This requires States to ensure access to the "physical environment, to transportation, to information and communication, including information and communication technologies and systems, and to other facilities open to the public." *Id.*

¹⁶² CRPD, *supra* note 10, art. 9.2(e).

¹⁶³ Kayess & French, *supra* note 133, at 28. Kayees & French contend that Article 9 demands geographic equity, entailing that "equivalent levels" of environmental accessibility is required in both urban and rural areas. *Id.* This principle may pose a financial challenge to states in which there are a multitude of regional sign languages that have developed. Professional sign language interpreters would have to be trained in these sign languages when the pertinent Deaf individuals need access to public buildings. Nevertheless, this is an important step in recognizing the linguistic human rights of sign language users while undermining the value of a national sign language.

¹⁶⁴ CRPD, *supra* note 10, art. 21(e).

litate the use of sign language in official interactions.¹⁶⁵ The text is particularly valuable due to its “official” context.¹⁶⁶ If implemented as intended, Deaf individuals will have the right to submit a document in sign language and receive a response in that language, receive information in court, transact in [public] offices and departments, and receive consumer information in sign language.¹⁶⁷ The third specific mention of sign language is in Article 24(4), requiring states to undergo appropriate measures to employ (or train) teachers qualified in sign languages.¹⁶⁸ Finally, Article 30 obligates the state to recognize and support the specific cultural and linguistic identity of disabled individuals, which includes sign language and Deaf culture.¹⁶⁹

If executed, the obligations discussed above have the potential to greatly expand the accessibility (and acceptance) of sign language. Due to the CRPD’s individual rights approach,¹⁷⁰ state considerations on how to implement these obligations must focus on the specific circumstances of each individual disabled person.¹⁷¹ In the realm of sign languages, tailoring solutions to each specific Deaf person warrants accessibility to his or her specific sign language, whether nationally recognized or not. To accomplish this accessibility (and in turn linguistic rights) for the Deaf, guidelines for implementation are needed to help facilitate states in determining what rea-

¹⁶⁵ *Id.* art. 21.

¹⁶⁶ Markku Jokinen, *Legal Measures Required by the Convention on the Rights of Persons with Disabilities*, WORLD FEDERATION OF THE DEAF, http://www.wfdeaf.org/reports/Legal_Measures.pdf (last visited Apr. 2, 2011).

¹⁶⁷ *Id.*

¹⁶⁸ CRPD, *supra* note 10, art. 24(4).

¹⁶⁹ *Id.* art. 30(4). In the discussions leading up to the final draft of the CRPD, the World Federation of the Deaf explained that there are five elements to deaf culture: language, values, traditions, norms and identity. Deaf individuals experience culture through “their own experience and communications. The WFD also noted that art is important to Deaf culture, including sign language art, sign language literature, sign language singing, and sign language poetry. U.N. Convention on the Human Rights of People with Disabilities, Ad Hoc Committee Daily Summaries, Seventh Session, Vol. 8, #10 (Jan. 27, 2006), <http://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

¹⁷⁰ See Anna Lawson, *People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities*, 26 LAW IN CONTEXT 62, 67 (2008) (“[T]he concepts of ‘reasonableness’ and ‘undue burden’ will themselves inject some degree of progressive realisation into the implementation of reasonable accommodation duties. These concepts are inherently sensitive to the particular circumstances not only of the disabled individual in need of accommodation, but also to the circumstances on whom the duties fall.”).

¹⁷¹ *Id.* at 64. The Human Rights Council supports the individual-right approach, explicating (word choice) that the accessibility of “physical and communication access” (including sign language) in education requires “individualized student support” where necessary. Interpreting the reasonable accommodations mandate under Article 5 thus requires individual considerations in the areas of “education, transport, employment or access of justice. HRC Study, *supra* note 159, ¶ 39.

sonable accommodations will best fulfill the CRPD's objectives of individual autonomy, preservation of cultural and linguistic identity, and equal accessibility.

V. RECOMMENDATIONS FOR ACHIEVING SIGN LANGUAGE ACCESSIBILITY UNDER THE CRPD

The CRPD's disability rights model should be the foundation for implementing a framework that opens the door for full linguistic accessibility for the Deaf. Other instruments, like the ICCPR, instill linguistic protection to sign language users only if the state considers them part of a linguistic minority.¹⁷² The linguistic minority approach has two obstacles blocking full accessibility for Deaf sign language users. First, it is difficult to force states to officially recognize the Deaf as a linguistic minority, let alone encourage the state to officially recognize sign language. Second, once a national sign language is recognized or adopted, how does a Deaf individual achieve accessibility to public services if they do not have access to education in an official or national sign language?

An essential feature of the CRPD's model is the emphasis on balancing the preservation of the Deaf individual's linguistic identity¹⁷³ while achieving accessibility to public services for sign language. The CRPD's drafters were cognizant of this intent and underwent great lengths to protect the value of sign language in the most beneficial way possible.¹⁷⁴ For the CRPD framework to have an influential impact, state governments should be prudent to understand these values when implementing the CRPD's objectives.

Despite the CRPD's clear mandate on individual cultural value and accessibility for those with a disability, states may use the defense that an accommodation imposes a "disproportionate or undue burden" on the state.

¹⁷² See *supra* notes 77–83 and accompanying text.

¹⁷³ The CRPD asserts that state parties "shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including: Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community." CRPD, *supra* note 10, art. 24(3).

¹⁷⁴ See, e.g., Sixth Session of the Ad Hoc Comm. on a Comprehensive and Integral Int'l Convention on the Prot. and Promotion of the Rights and Dignity of Pers. with Disabilities, NGO Comments on the Draft Text, World Federation of the Deaf, *Policy Paper on Education and Deaf People*, (Aug. 12, 2005), <http://www.un.org/esa/socdev/enable/rights/ahc6contngos.htm> (located in document at end of page); U.N. Convention on the Rights of Persons with Disabilities, Ad Hoc Comm. Daily Summaries, Definitions, Fourth Session, Vol. 5, # 1 (Aug. 23, 2004), <http://www.un.org/esa/socdev/enable/rights/ahc4sumart03.htm>; see also *supra* note 218.

This undue burden standard¹⁷⁵ protects states from having to reasonably accommodate a disabled individual when the accommodation may be too costly or impose a strain on resources.¹⁷⁶ The potential for manipulation in claiming this defense is great, considering the CRPD currently lacks an explicit definition of what an undue burden exactly is or what factors a state should consider when assessing the reasonableness of an accommodation.

First, to ensure the CRPD objectives are fulfilled for both the Deaf community and the disabled community as a whole, the CRPD should include a standard for the undue burden defense that is flexible for the state, in line with the CRPD's objectives, and guarantees the disabled will be guaranteed some rights no matter what their situation entails. The goal is not to allow the state to deny full access or accommodations because it is too burdensome, but to ensure alternative solutions are available to craft a reasonable accommodation.

Second, in terms of the Deaf community, the key component to accessibility for public services is the availability of a sign language interpreter. Considering the multitude of sign languages utilized within a state, the CRPD should adopt a guideline narrowly defining the terms "professional sign language interpreter" used in Article 9¹⁷⁷ and "qualified sign language interpreter" used in Article 24.¹⁷⁸ Adopting a narrower definition would impose a stronger obligation on the state to provide accessibility to public services for Deaf individuals regardless of the sign language they choose to communicate in.¹⁷⁹

A. *Defining an "Undue Burden"*

As noted, the CRPD obligates states to reasonably accommodate the disabled in all facets of life unless the accommodation imposes an undue burden. Although the CRPD lacks an explicit definition or guidance on assessing an accommodation, it appears that states are responsible for molding their own standard in interpreting the undue burden defense.¹⁸⁰ States that

¹⁷⁵ Domestic legislation reflecting the CRPD's mandate must also identify "duty-bearers, including different levels of government and non-State actors" so it is clear who holds the duty to reasonably accommodate the disabled. *National Legislation and the Convention*, U.N. ENABLE, <http://www.un.org/disabilities/default.asp?id=236> (last visited Apr. 2, 2011).

¹⁷⁶ Lawson, *supra* note 170, at 64.

¹⁷⁷ CRPD, *supra* note 10, art. 9(2)(e).

¹⁷⁸ *Id.* art. 24(4).

¹⁷⁹ To facilitate the obligations under Article 9, the United Nations Human Rights Council recommends the adoption of "minimum standards and guidelines" for the accessibility of public services and facilities. HRC Study, *supra* note 159, ¶ 42.

¹⁸⁰ See U.N. Secretary-General, Note by the Secretary-General, Committee on the Rights of Persons with Disabilities, *Guidelines on Treaty-Specific Document to be Submitted by State*

adopt the CRPD are obligated under Article 35 to submit a “comprehensive report on measures taken to give effect” to the CRPD’s obligations within two years of ratification.¹⁸¹ In a guideline issued by the Committee on the Rights of Persons with Disabilities (Committee), the report is to include the “ways and means” by which a state understands the concepts of “reasonable accommodation” and “disproportionate and undue burden.”¹⁸² In essence, this guideline suggests that states will be held accountable for defining their own factors to consider when analyzing an accommodation.

Giving states the power to mold the undue burden standard leaves open a strong potential for manipulation, especially since states only have to submit reports every four years after the first initial report.¹⁸³ Without some sort of guidance, states can claim the defense without ever trying to accommodate the individual, or claim confusion and uncertainty in what exactly an undue burden is under the CRPD. This threatens to deny full and equal access to the disabled community in general.

The similarities between the ICESCR’s text and the CRPD are a guiding tool for constructing a standard for the CRPD’s undue burden defense. The defense should be crafted to ensure that states are mandated to at least attempt to accommodate a disabled individual. Under the ICESCR, state parties are legally obligated to “[T]ake steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant . . . by all appropriate means.”¹⁸⁴ In situations where a lack of resources prohibits the state from meeting its minimum obligations under the ICESCR, the burden is on the state to demonstrate that “every effort has been made to use all resources” at its disposal to satisfy the obligations.¹⁸⁵ To summarize, all appropriate

Parties Under Article 35, Paragraph 1 of the Convention on the Rights of Persons with Disabilities, ¶ B(3), U.N. Doc. CRPD/C/2/3 (Nov. 18, 2009), available at http://www.bayefsky.com/general/crpd_c_2_3_2009.pdf [hereinafter CRPD Report Guidelines]. While this obligation is listed as pertaining to Articles 1 and 4, Article 4 lists the states “General Obligations” under the CRPD, applicable to the entire CRPD. CRPD, *supra* note 10, art. 4.

¹⁸¹ CRPD, *supra* note 10, art. 35(1).

¹⁸² CRPD Report Guidelines, *supra* note 180, ¶ B(3).

¹⁸³ CRPD, *supra* note 10, art. 35(2). Even if the state has adopted the Optional Protocol, it may take months for the Committee to investigate a report of a CRPD violation. See Optional Protocol to the Convention on the Rights of Persons with Disabilities, art. 6, U.N. Doc. Doc.A/61/611 (Dec. 6, 2006), <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocol.aspx>.

¹⁸⁴ ICESCR, *supra* note 94, art. 2, para 1 (“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”).

¹⁸⁵ Anna Bruce, Gerard Quinn & Padraic Kenna, *Disability and Social Justice: The International Covenant on Economic, Social and Cultural Rights*, in HUMAN RIGHTS AND

measures must be taken to ensure realization of a right before a state may claim it cannot fulfill its obligations.¹⁸⁶

Two sections within Article 4 of the CRPD, listing the General Obligations of state parties, are comparable to the above text of the ICESCR.¹⁸⁷ First, Article 4(f) obligates the state to “undertake or promote” research and development of universally designed goods, services and equipment facilities.”¹⁸⁸ In doing so, the state “*should* require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities.”¹⁸⁹ Second, and most similar to the ICESCR, is Article 4(2) stating “With regard to economic, social, and cultural rights, each State Party undertakes to take measures *to the maximum of its available resources*.”¹⁹⁰

Both instruments also contain similar definitions of disability discrimination. Disability discrimination under the ICESCR entails the “denial of reasonable accommodation . . . which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social, or cultural rights.”¹⁹¹ Likewise, the CRPD mandates states to take “all appropriate steps to ensure that reasonable accommodation is provided” to promote equality and eliminate discrimination.¹⁹²

By combining the two approaches, a standard can be formulated that emphasizes placing the burden on the state to make (and try) all possible accommodations before ‘giving up.’ In order to benefit the disabled, the state’s burden to provide reasonable accommodations should be strict. Disabled individuals should not worry that a state will automatically claim an accommodation poses an undue burden, either financially or logistically, before the state attempts implement or analyze the request. To be effective, this Note proposes that before claiming an accommodation constitutes an undue burden, the state should be required to take all efforts to reasonably accommodate disabled individuals to the maximum extent possible subject to the availability of resources.

This formula achieves a more objective definition of what exactly constitutes an “undue burden” under the CRPD. For instance, when applying this approach to requests by the Deaf community for linguistic accessi-

DISABILITY: THE CURRENT USE AND FUTURE POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENTS IN THE CONTEXT OF DISABILITY 83 (Gerard Quinn & Theresia Degener eds., 2002).

¹⁸⁶ *Id.*

¹⁸⁷ CRPD, *supra* note 10, art. 4.

¹⁸⁸ *Id.* art. 4(f).

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ *Id.* art. 4(2) (emphasis added).

¹⁹¹ U.N. Committee on Economic, Social, and Cultural Rights, General Comment 5, 11th sess., para. 11 U.N. Doc. E/1995/22 (Sept. 12, 1994).

¹⁹² CRPD, *supra* note 10, art. 5(3).

bility, a state should be unable to automatically claim that training sign language interpreters in several forms of sign language is an undue burden. The focus should be on *how* the state can utilize its available resources to provide accessibility for a particular individual.

While this approach imposes a heavy burden on the state to prove every single available resource has been used and/or exhausted, states should not view this negatively. The rigidity of the proposed standard emphasizes the flexibility of the CRPD's reasonable accommodation approach. It invites and encourages the state to become creative with accessibility solutions to fight off accusations that not every mode of accessibility has been attempted, while ensuring the disabled have some form of reasonable accommodation always available.

B. Applying the Undue Burden Standard to Sign Language Accessibility in Public Services

In practice, the proposed undue burden standard can be specifically adapted to the needs of each particular disability. In regards to the Deaf community, the standard's effectiveness is evident when applied to finding a solution for full accessibility to sign language in the public realm. For Deaf sign language users, the key component of access is the availability of sign language interpreters.¹⁹³ The CRPD drafters recognized this need and expressly included an obligation for the state to provide sign language interpreters in both Article 9, which applies to several other articles, and Article 24.

Under Article 9, states are required to take appropriate measures to provide guides, readers, and professional sign language interpreters in public buildings and facilities.¹⁹⁴ This encompasses public buildings, roads, transportation, and other indoor and outdoor facilities including schools,

¹⁹³ *Id.*; see, e.g., JEMINA NAPIER, RACHEL LOCKER MCKEE, DELLA GOSWELL, SIGN LANGUAGE INTERPRETING: THEORY AND PRACTICE IN AUSTRALIA AND NEW ZEALAND 9 (2006) (describing the value of sign language interpreters to the Deaf and how they rely on each other for certain benefits); EDDA OSTARHILD, CAREERS USING LANGUAGES 34 (2002) (stating that sign language interpretation is a growing profession due to their need in a wide range of settings).

¹⁹⁴ CRPD, *supra* note 10, art. 9. When the Ad Hoc Committee assembled to discuss the CRPD's proposed text, one of the debates centered around the inclusion of "professional" before the phrase "sign language interpreters." The International Disability Caucus (IDC) proposed including "professional" in Article 9(2) because sign language interpretation is an "important job [requiring] significant training . . . in signing . . . and also [must] provide interpretation service without infringing upon the autonomy of the person with a disability." UN Convention on the Human Rights of People with Disabilities, Ad Hoc Committee Daily Summaries, Vol. 8, # 2 (Jan. 17, 2006), <http://www.un.org/esa/socdev/enable/rights/ahc7sum17jan.htm>.

housing, medical facilities, and workplaces, as well as information, communications, and other services.¹⁹⁵

What defines a “professional sign language interpreter?” Like an “undue burden,” the CRPD is lacking in an explicit definition.¹⁹⁶ The danger of leaving this term undefined is that states may deny access to a Deaf individual in an Article 9 facility on the grounds that it is an undue burden to supply a “professional” sign language interpreter or train an interpreter to reach a “professional” level. Defining “professional” under the CRPD is presumably left to the state’s discretion. The Deaf community would therefore benefit from a narrow definition of “professional” sign language interpreter. In particular, the Americans with Disability Act (ADA)¹⁹⁷ includes a definition that not only assures some form of accessibility for the Deaf, but also understands the sensitivity and importance of providing accessibility to all forms of sign language.

Under the ADA, public accommodations¹⁹⁸ are mandated to provide “auxiliary aids and services” for Deaf individuals.¹⁹⁹ “Auxiliary aids and services” include “qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments.”²⁰⁰ A qualified interpreter is considered necessary under the ADA for achieving effective communication for the Deaf individual, and is defined as one who is able to “interpret effectively, accurately and impartially, both receptively and expressively, using any necessary specialized vocabulary.”²⁰¹

¹⁹⁵ CRPD, *supra* note 10, art. 9(1)(b).

¹⁹⁶ The WFD declares that the term imposes responsibility on the state to “promote and develop sign language interpreter training, degree, registration and also to facilitate interpreter services and to promote access to interpreters.” Jokinen, *supra* note 166, at 11.

¹⁹⁷ Americans with Disabilities Act, 42 U.S.C. § 12101 (2008).

¹⁹⁸ See 42 U.S.C. § 12181(7) (providing an extensive definition of what is considered a “public accommodation” under the ADA).

¹⁹⁹ “Specific discrimination” includes a “failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.” *Id.* § 12182(b)(2)(A)(iii).

²⁰⁰ *Id.* § 12102(1)(A). Some examples of auxiliary aids include qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD’s), videotext displays, and exchange of written notes. U.S. DEP’T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL, COVERING PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES, III-4.3300, <http://www.ada.gov/taman3.htm> [hereinafter ADA Assistance Manual].

²⁰¹ ADA Assistance Manual, *supra* note 200, III-4.3200.

Recognizing the reality that Deaf individuals covered under the ADA in the United States communicate in different forms of sign language, the ADA Technical Manual further defines a “qualified interpreter”:

There are a number of sign language systems in use by persons who use sign languages (the most common systems of sign language [in America] are American Sign Language and signed English). Individuals who use a particular system may not communicate effectively through an interpreter who uses another system. When an interpreter is required, the public accommodation should provide a qualified interpreter, that is, an *interpreter who is able to sign to the individual who is deaf what is being said by the hearing person and who can voice to the hearing person what is being signed by the individual who is deaf*. This communication must be conveyed effectively, accurately, and impartially, through the use of any necessary specialized vocabulary.²⁰²

By adopting this narrow definition, a “professional sign language interpreter” under the CRPD would not only reflect the WFD’s understanding of the term,²⁰³ but would also recognize that the interpreter must be able to sign in a form of sign language the Deaf individual is able to communicate in. This requirement reflects the principle that without the ability to communicate in a sign language they understand and can use, a Deaf individual cannot have equal access (or access at all) to public services and facilities.

To understand how this narrower definition would play out, consider its impact on several rights within the CRPD. First, the CRPD requires states to take appropriate measures to ensure equal access to health services for the disabled, including providing health care “as close as possible to people’s own communities, including rural areas.”²⁰⁴ Through Article 9, this includes an obligation for public medical facilities to provide access to professional sign language interpreters.²⁰⁵ Without professional interpreters familiar in a region’s sign language, especially in a rural community where Deaf individuals may not have access to education in the national or majority sign language, communication between a doctor and a Deaf patient would be hindered if no assistance or accommodations at all were available. Such a communication barrier would not only violate the CRPD’s objectives,²⁰⁶ but may also greatly affect the level of medical care or treatment a Deaf patient receives.

²⁰² *Id.* (emphasis added).

²⁰³ See Jokinen, *supra* note 166.

²⁰⁴ CRPD, *supra* note 10, art. 25(c).

²⁰⁵ See *supra* note 199 and accompanying text.

²⁰⁶ See also EUROPEAN DISABILITY FORUM, THE EUROPEAN DISABILITY FORUM CONTRIBUTION TO THE SECOND AD HOC COMMITTEE TO CONSIDER PROPOSALS FOR A UNITED

Second, in addition to providing the right for disabled individuals to work on an equal basis with others,²⁰⁷ appropriate measures must be undertaken to include professional sign language interpreters in public workplaces.²⁰⁸ The disabled must have “effective access” to technical and vocational guidance programs and training,²⁰⁹ and reasonable accommodations in the workplace.²¹⁰ If a state is free to deny the availability of a sign language interpreter, Deaf individuals may not be able to have an equal opportunity to secure gainful employment, complete current jobs to the best of their ability, or receive promotions in current jobs or effective vocational training. Third, Article 28(2)(c)²¹¹ mandates states to provide access to state assistance for poverty-stricken disabled individuals. This includes access to “adequate training . . . and counseling.”²¹² If the state denied interpreter services for a Deaf individual who requests this public training and counseling, the impact may be to deny the individual the opportunity to find employment, gain valuable skills, and ultimately overcome poverty.

Finally, and arguably most importantly, all educational providers, public and private, have a duty under Article 24 to provide reasonable accommodations tailored to each disabled individual’s requirements.²¹³ The focus here is on public education. Thus, the state must provide accommodations that are “available, accessible, and [provide an] adaptable education on an equal basis with others.”²¹⁴ Instead of requiring “professional sign language interpreters” as included in Article 9, the state must take appropriate measures to employ teachers “qualified” in sign language.²¹⁵

NATIONS CONVENTION TO PROTECT AND PROMOTE THE RIGHTS OF PERSONS WITH DISABILITIES, AD HOC COMMITTEE ON AN INTERNATIONAL CONVENTION (May 2003), <http://www.un.org/esa/socdev/enable/rights/contrib-edfvision.htm> (proposing that in the ‘right to health’ article of the CRPD, the right to be free from disability discrimination in access to health care should include “being able to communicate in sign language.”).

²⁰⁷ CRPD, *supra* note 10, art. 27.

²⁰⁸ See *supra* note 200 and accompanying text.

²⁰⁹ CRPD, *supra* note 10, art. 27(1)(d).

²¹⁰ *Id.* art. 27(1)(i).

²¹¹ *Id.* art. 28 (“Adequate Standard of Living and Social Protection”).

²¹² *Id.* art. 28(2)(c).

²¹³ HRC Study, *supra* note 159, ¶ 52. The Committee suggests these accommodations be “clearly established” in national legislation.

²¹⁴ *Id.*

²¹⁵ CRPD, *supra* note 10, art. 24(4). Japan, in discussions prior to adoption of the CRPD, suggested adding the phrase “through such measures as employment of teachers who are fluent in sign language” in this article. Japan felt there should be “more appropriate measures consistent” with the child’s condition. U.N. Convention on the Human Rights of People with Disabilities, Ad Hoc Committee Daily Summaries, Seventh Session, Vol. 8, # 7 (Jan. 24, 2006), <http://www.un.org/esa/socdev/enable/rights/ahc7sum24jan.htm>.

Similar to the discussion surrounding the term “professional” above, it is unclear what the term “qualified” encompasses. The meaning can range from mandating the state to train teachers of Deaf students in a state’s national or majority sign language to training in the distinct sign language utilized by each individual Deaf student. While instruction in the majority or national sign language benefits Deaf students by encouraging assimilation into society, denying any instruction in the student’s particular sign language threatens to undermine the student’s cultural identity, values, and background. Like the definition of a “professional” discussed above, accessible education under the CRPD for the Deaf should narrowly construe the phrase “qualified” sign language interpreter.²¹⁶

In accordance with the ADA standard discussed above,²¹⁷ public teachers who have Deaf students in the classroom should be trained in both the majority or national sign language (if one is recognized) and any distinct sign language a certain student may use as their only means of communication. At a minimum, Deaf students should have the choice whether or not they want to be educated in their own sign language. Regardless of what choice is made, the student should be concurrently educated in the majority or national sign language to ease the state’s burden in other areas, such as the dissemination of mass media and public information.²¹⁸

While this proposed guideline appears to impose a heavy undue burden on the state, Article 24’s text supports this requirement. First, in terms of education, states must ensure that persons with disabilities can access education on an equal basis with others *in the communities in which they live*.²¹⁹ Considering the communal nature of deafness involves various sign languages distinct to an individual’s language community,²²⁰ equal education should require instruction in that distinct language.

²¹⁶ This argument is premised on Article 30, which states that “Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.” CRPD, *supra* note 10, art. 30(4). Denying a Deaf individual use of their own distinct language goes against this principle. During drafting of the CRPD, the World Federation of the Deaf noted the importance of Article 30 in protecting development of one’s full potential and personality. The WFD noted that this value is important for Deaf people because language is a basic identity to development. The organization further noted that “the right of language, identity, and culture does not mean segregation from society because sign language spans other cultures. If these cultural and linguistic rights of the Deaf community are not recognized, it will be unable to develop to its full creative, artistic, and intellectual potential.” U.N. Convention on the Human Rights of People with Disabilities, Ad Hoc Committee Daily Summaries, Third Session, Vol. 4, # 7 (June 2, 2004), <http://www.un.org/esa/socdev/enable/rights/ahc3sum24.htm>.

²¹⁷ *See supra* pp. 35–36.

²¹⁸ *See infra* the discussion on pp. 43–44.

²¹⁹ CRPD, *supra* note 10, art. 24(2)(b) (emphasis added).

²²⁰ *See supra* note 21 and accompanying text.

Second, state parties must provide “reasonable accommodations of the *individual’s requirements*.”²²¹ Comparable to the previous subsection, this text should be read as requiring instruction in the sign language the Deaf individual is most comfortable communicating (and learning) in. Again, the emphasis is on the “individual’s” language, not the state’s chosen language.

Third, the state must “facilitate the learning of sign language and the promotion of the *linguistic identity* of the deaf community.”²²² As previously stated, the linguistic identity of the Deaf community is intertwined with cultural values and identity.²²³ This reinforces the importance of instruction in the language the student most culturally identifies with.

Finally, Article 24(4) offers the strongest support for this Note’s proposed definition of “qualified.” This text requires states to ensure the education of persons, particularly Deaf children, is delivered in “the most appropriate languages and modes and means of communication *for the individual*.”²²⁴ The state’s decision to instruct solely in the national or majority sign language should not be considered a “reasonable accommodation” under this subsection. The focus is on the individual and what is the most accessible means of communication for them. This argument is further supported by Article 9’s mandate for the State to take “appropriate steps” to provide professional sign language interpreters in public schools—presumably this means that if no teachers qualified in sign language are available, the state has a duty to try to provide a professionally trained interpreter to supplement the student’s education.

C. Resolving the Burdens of Full Accessibility for All Sign Languages

The proposed narrow definition of “professional” and “qualified” sign language interpreters in the CRPD carries an obvious burden on the state. Providing interpreters on request that are trained in numerous distinct sign languages poses a tremendous financial, logistical, and administrative burden to the state. In countries with hundreds of sign languages, can the state really accommodate every single form sign language if needed? The ADA is once again instructive in addressing and resolving this concern.

The ADA declares that even if providing a particular auxiliary aid or service would impose an undue burden, the public accommodation (for purposes of this Note, the state) is not relieved from its responsibility to

²²¹ CRPD, *supra* note 10, art. 24(2)(c) (emphasis added).

²²² *Id.* art. 24(3)(b) (emphasis added).

²²³ See *supra* notes 21–24 and accompanying text.

²²⁴ CRPD, *supra* note 10, art. 24(3)(c) (emphasis added).

ensure “effective communication.”²²⁵ For example, if an interpreter cannot be provided because of hardship, an alternative aid such as a written script or a document (presumably in the majority sign language or written language) can be an effective accommodation.²²⁶ Most importantly, the ADA directs public accommodations to consult with disabled individuals “wherever possible” to determine what type of aid is necessary for communication. The ultimate decision of what measures to use must be made by the public accommodation, so long as the measure provides effective communication.²²⁷

The CRPD should integrate this approach within the narrow definitions of “professional” and “qualified” sign language interpreters. As the undue burden standard proposed above dictates, states should utilize every resource or means possible to accommodate a disabled individual. By including the additional requirement that a Deaf individual should be able to consult with the state regarding an alternative accommodation if an interpreter cannot be provided, the individual is in this sense guaranteed to have some access to public services. Moreover, the state is deterred from instantly claiming an undue burden defense because (1) the state has to represent that it has utilized all of its resources or attempted to accommodate the individual, including consulting with the individual as to what accommodations would work best, and (2) the state holds the ultimate decision as to what is reasonable for ensuring effective communication and access.

The focus of this standard is to provide equal access even if it requires an alternative solution. While it is vital that a Deaf individual have access in the sign language of his or her choice, it may not be realistic for the state to provide an interpreter or subsidize the individual’s own interpreter in every single situation. The solution for this problem should be for the state to consult with the individual, whether in written communication or through the individual’s own interpreter, and decide on the best course of action. This allows the individual to understand that the state does recognize the need to preserve the individual’s identity and culture, and is attempting to best accommodate that individual’s language. If the state cannot provide

²²⁵ ADA Assistance Manual, *supra* note 200, III-4.3600 (“[T]he fact that providing a particular auxiliary aid or service would result in a[n] . . . undue burden does not necessarily relieve a public accommodation from its obligation to ensure effective communication. The public accommodation must still provide an alternative auxiliary aid or service that would not result in an undue burden . . . but that would ensure effective communication to the maximum extent possible, if one is available.”).

²²⁶ For example, the ADA Assistance Manual states that it may be an undue burden for a “small private historic house museum on a shoestring budget to provide a sign language interpreter for a deaf individual wishing to participate in a tour. Providing a written script of the tour, however, would be an alternative that would be unlikely to result in an undue burden.” *Id.* III-4.3600.

²²⁷ *Id.* III-4.3200.

an interpreter trained in that individual's sign language and the individual cannot afford to bring his or her own interpreter, only then should an interpreter in the majority or national sign language be considered a viable option, unless the individual is completely uneducated in that sign language.

Applying this standard in a practical situation should at least encourage the state to allocate funding to hire and/or train enough interpreters in the national, majority, and/or largest minority sign languages so they are readily available when needed.²²⁸ Then, when an individual who does not communicate in these sign languages requires a specialized interpreter, the state can proceed with the process described above. If the state absolutely refuses to train or hire any sign language interpreters, consult with the Deaf individual on a solution, or offer any type of reasonable accommodation to a public service, recourse should then be available through a domestic administrative remedy or the individual complaints mechanism of the CRPD's Optional Protocol.²²⁹

Still, there is one particular public service where it may be impractical for the state to provide access in every single form of sign language: public information. Many Deaf individuals rely on documents translated in sign language, as well as closed captioning or sign language interpreters on television.²³⁰ Under close scrutiny, the logistical difficulties and financial costs associated with completely rendering mass media accessible to all sign languages is problematic. Thus, a variation from the proposed guidelines above may be needed for this area.

As it pertains to the CRPD, information and communication involves ensuring accessibility to voting procedures, facilities and materials,²³¹ cultural materials such as television,²³² film theaters, places for cul-

²²⁸ See CRPD, *supra* note 10, art. 5(4), which clarifies that specific measures taken to accelerate the recognition of equality for the disabled are not to be considered discriminatory.

²²⁹ See *supra* note 136.

²³⁰ See, e.g., GARY D. ROBSON, THE CLOSED CAPTIONING HANDBOOK 3 (2004) (explaining how closed captioning is a "tremendous help" in helping deaf and hard-of-hearing people learn).

²³¹ CRPD, *supra* note 10, art. 29(a)(i). One of the debates involving the text of Article 29(a)(i) was whether "electoral campaigns, in particular the mass media" should also require accessibility. Several countries, including Brazil, proposed the amendment. See Ad Hoc Committee, Seventh Session, Contributions by Governments – Brazil, <http://www.un.org/esa/socdev/enable/rights/ahc7brazil.htm> (last visited Apr. 2, 2011). The Chair of the Ad Hoc Committee responded that such language could be interpreted as requiring a sign language interpreter "whenever a candidate appears on a street corner." Instead, the Chair stated that it is up to the political party to make campaign materials accessible to the disabled. UN Convention on the Human Rights of People with Disabilities, Ad Hoc Committee, Daily Summaries, Seventh Session, Vol. 8, #9 (Jan. 26, 2006), <http://www.un.org/esa/socdev/enable/rights/ahc7sum26jan.htm> (last visited Apr. 2, 2011).

²³² CRPD, *supra* note 10, art. 30(1)(b).

tural performance,²³³ and recreational events such as sporting arenas.²³⁴ Written mass media requires documents, pamphlets, and brochures written in sign language while visual media demands closed captioning or on-air sign language interpreters. The challenge is how to provide accessible reasonable accommodations to every Deaf individual on an equal basis with others without imposing an undue burden on the state. The state, in this situation, cannot consult with every individual at a sporting event on what type of interpreter or accommodation works best, or what type of accommodation is needed for Deaf individuals receiving a brochure.

Yet accessibility through mass media is crucial because it involves all facets of life, including public health information, emergency information, and current news. For instance, access to healthcare services for the Deaf should encompass health-oriented brochures printed in sign language.²³⁵ The focus in this area, therefore, should shift from individual accessibility into a format that is accessible to the majority of Deaf individuals. This likely pertains to Deaf individuals familiar with the majority or national sign language of the state. But this guideline may not deny access to all Deaf individuals, however. By providing concurrent education in both the majority or national sign language and a Deaf individuals unique sign language (if requested), the state has an opportunity to fulfill its obligation under the CRPD to take appropriate measures to ensure full and equal accessibility for the Deaf. Thus, more Deaf individuals will have at least enough familiarity with the majority or national sign language so as to understand interpreters or captioning on the television, public brochures, or other types of information disseminated by the mass media.

VI. CONCLUSION

Language discrimination affects all facets of society, including the disabled community. States fearful of the challenges, burdens, and potential instability associated with protecting every language within its borders cannot be ignorant of certain language groups, such as the Deaf. Denying language rights to the Deaf denies their accessibility to public services and society. It affects their right to be treated equally, and in some cases, precludes them from gaining an equal and effective education, proper health

²³³ *Id.* art. 30(1)(c)

²³⁴ *Id.*

²³⁵ In a report detailing the United Nation's development goals for disabled persons, the Secretary-General noted that "People who are . . . deaf . . . find that information on sexual and reproductive health is often inaccessible to them." The Secretary-General, *Report of the Secretary-General on Realizing the Millennium Development Goals for Persons with Disabilities through the Implementation of the World Programme of Action Concerning Disabled Persons and the Convention on the Rights of Persons with Disabilities*, ¶ 23, delivered to the General Assembly, U.N. Doc. A/54/180 (July 27, 2009).

care and health care information, and the benefits of social services and mass media.

Deafness should only be viewed as a disability under the law within the confines of the CRPD. The CRPD recognizes that deafness is a distinct culture and identity, expressed throughout the world in numerous sign languages. Protecting and providing access to Deaf individuals who use sign language necessitates the CRPD's framework because it understands the value of Deaf culture while granting explicit rights to sign language. Any stigma associated with a disability label should be eradicated by the CRPD's framework because it is premised on individual autonomy, linguistic identity, and cultural preservation. These are all important values to the Deaf.

Integrating the standards and guidelines suggested by this Note into domestic policies or law should be viewed as a progressive step towards the advancement and recognition of sign language.²³⁶ Obtaining language accessibility rights through the CRPD should not be viewed as an attempt to cure the effects of a disability, but as a firm resolution that the Deaf community is a valued linguistic and cultural minority in need of equal treatment and recognition under the law. Such treatment cannot be obtained under a linguistic minority approach.

²³⁶ Domestic legislative policies must be modeled in accordance with the protections under the CRPD. HRC Study, *supra* note 159, ¶ 39. Even in states who do not ratify the CRPD or its Optional Protocol, domestic legislation should obligate the State to provide reasonable accommodations to the disabled, which includes the Deaf. *Id.*