

**Minority Languages and  
Public Administration**  
**A Comment on Issues Raised in  
*Diergaardt et al. v. Namibia***

Alexander H. E. MORAWA

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# **Minority Languages and Public Administration**

## **A Comment on Issues Raised in *Diergaardt et al. v. Namibia***

Alexander H. E. MORAWA\*

### **I. Introduction**

In its views in the *Diergaardt et al. v. Namibia*<sup>1</sup> case of 25 July 2000, the United Nations Human Rights Committee addressed a complex set of complaints relating to the rights of a small community of people residing in the Rehoboth *Gebiet* (area) in the vicinity of the Namibian capital Windhoek. The case as such concerns a situation, shaped by unique historic events, that is not necessarily comparable to minority issues in Europe, and which was decided at the universal, as opposed to the regional, level of human rights protection. Nevertheless, it raises a number of issues that are of relevance beyond the given context.

The present comment is not primarily one on *Diergaardt* itself, but addresses one of the *aspects* dealt with by the Committee – and indeed the only one where it found a breach of the human rights guaranteed by the UN Covenant on Civil and Political Rights:<sup>2</sup> The question of the use of (minority) languages in relations between the members of (minority) groups and the public administration. This paper will explore, analyze, and discuss the currently available international norms and standards governing the question of rights of members of (minority) groups and indigenous peoples to use their specific languages in their contacts with public administrative authorities at the state, regional or local levels or, more broadly, in the context of public administration.

Why is the term ‘minority’ in parentheses? Because the Committee managed to solve that issue on the basis of the general non-discrimination provision (Article 26 of the Covenant) while providing us with few, if any, guidelines for interpreting Article 27 – the very norm safeguarding the rights of ethnic, religious or linguistic minorities,

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<sup>1</sup> Communication No. 760/1997, *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, views of 25 July 2000, CCPR/C/69/D/760/1997 (hereinafter “*Diergaardt* views”).

<sup>2</sup> Adopted on 16 December 1966, entered into force on 23 March 1976, 993 U.N.T.S. 171.

including the right to use their own language. The views are thus a striking example of judicial self-restraint, or cautiousness, on the one hand, and of the possibilities ‘general’ human rights provisions might offer to litigants who wish to advance minority-related rights, on the other hand.

## II. The *Diergaardt et al.* Case<sup>3</sup>

### A. The Complaint

The members of the Rehoboth Baster Community are descendants of indigenous Khoi and Afrikaans settlers who originally lived in the Cape, but moved to their present territory around Rehoboth, south of Windhoek, between 1868 and 1872. After the “Great Trek” they “rapidly establish[ed] their own institutions”<sup>4</sup> and, in 1872, adopted their *Vaderlike Wette*, or ‘Paternal Laws’, which provided for the election of a Captain and other public representatives.<sup>5</sup> At present, the community numbers some 35,000 (according to other sources: 34,000<sup>6</sup>, 33,000<sup>7</sup>, or even 41,000<sup>8</sup>) people and the area they occupy has a surface of 14,216 square kilometers. In this area the Basters developed their own society, culture, language and economy, with which they largely sustained their own institutions, such as schools and community centres.

Their independence – formally enshrined in a Treaty of Friendship and Protection between the Basters and the German Empire in 1885<sup>9</sup> – survived the occupation of the territory by South Africa during and immediately after World War I and lasted until 1924, when the South African government (the mandatory for South West Africa)

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<sup>3</sup> The facts of the case are taken primarily from the Committee’s views, with additional information from other sources inserted where appropriate.

<sup>4</sup> Minority Rights Group (ed.), *World Directory of Minorities* (1997), 504.

<sup>5</sup> The Paternal Laws and other legislative acts are reprinted in Y. J. D. Peeters, “On the Discrimination of the Rehoboth Basters: An Indigenous People in the Republic of Namibia”, fact file prepared for the 11<sup>th</sup> Session of the Working Group on Indigenous Populations and the 45<sup>th</sup> Session of the Subcommission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights, July-August 1993, at <http://www.cwis.org/fwdp/Africa/rehoboth.txt>.

<sup>6</sup> Minority Rights Group, *World Directory* ..., 502.

<sup>7</sup> K. Kjæret and K. Stokke, “Rehoboth Baster, Namibian, or Namibian Baster? An Analysis of National Discourses in Rehoboth, Namibia”, undated paper, at <http://folk.uio.no/stokke/PUBLICATIONS/Nationalism/Namibia/Bastereng.html>.

<sup>8</sup> Anne Pitsch, “Basters of Namibia”, paper and chronology dated September 1999, at <http://www.bsos.umd.edu/cidcm/mar/nambast.htm>.

<sup>9</sup> Reprinted in Peeters, “On the Discrimination ...”, Document 3.



suspended the agreement on self-government. In 1933, a gradual process of restoring some form of local government was introduced. By Act No. 56 of 1976, passed by the South African parliament, the Rehoboth people were again “granted self-government in accordance with the Paternal Law of 1872”, as the views put it. Another take on the Act is that it “insert[ed the Paternal Laws] into the South African administrative structure for the territory”.<sup>10</sup> The law provided for the election of a Captain every five years, who appointed the Cabinet, and for a legislative process of the community. Irrespective of the varying degrees of formal autonomy, commentators agree that “in all this period” the Baster community safeguarded “its ancestral institutions and organization”.<sup>11</sup>

The petitioners argued before the Committee that in 1989 the Basters accepted – under extreme political pressure – the temporary transfer of their legislative and executive powers to the Administrator General of South West Africa (a South African official), so as to comply with UN Security Council Resolution No. 435 (1978).<sup>12</sup> At that time, the Administrator General was requested to administer the territory as an agent and on behalf of the Captain and with the community’s institutions’ consent; at the end of the mandate the government of the Rehoboth would resume authority. The subsequent proclamation by the Administrator General, dated 30 August 1989, suspends the powers of the government of Rehoboth “until the date immediately before the date upon which the territory becomes independent”.<sup>13</sup> The Basters argued that the effect of this transfer expired on the day before the independence of Namibia, and that thus on 20 March 1990 the traditional laws and Law 56 of 1976 were in force on the territory of Rehoboth. A resolution restoring the power of the Captain, his Council and the Legislative Council and entrusting them with elaborating a new constitution for the Rehoboth *Gebiet* on the basis of the Paternal Laws of 1872 was

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.; see also Minority Rights Group, *World Directory ...*, 504, which speaks of continuation of the institutions.

<sup>12</sup> This Resolution *inter alia* establishes a United Nations Transition Assistance Group (UNTAG) to support the activities of the Special Representative of the UN Secretary General to ensure “early independence of Namibia through free elections”. Resolution No. 435 (1978), Operative Provision 3, with reference to Resolution No. 431 (1978). As a consequence of the Resolution, South Africa would, through the Administrator General, administer elections, but under the supervision of the Special Representative and UNTAG, see [http://www.un.org/Depts/dpko/dpko/co\\_mission/untagFT.htm](http://www.un.org/Depts/dpko/dpko/co_mission/untagFT.htm).

<sup>13</sup> *Diergaardt* views, para. 2.4.

adopted by the Rehoboth People's Assembly on 20 March 1990.<sup>14</sup> On 21 March 1990, Namibia became independent, and the Constitution came into force.

Before the Committee, the Basters brought several related claims, centring around the alleged expropriation of communal lands and buildings and the seizure of assets – a policy that they alleged endangered the traditional existence of the community as a collective of mainly cattle-raising farmers –, but also the re-zoning of administrative districts interfering with their ability to exercise their rights as a minority, including the right to participate in public affairs and to have access to public services (Articles 25 and 27 of the Covenant).<sup>15</sup>

Finally, the Basters pointed out that Article 3 of the Constitution declares English to be the only official language in Namibia, but allows for the use of other languages on the basis of legislation by Parliament. Article 3 reads as follows:

Article 3 [Language]

- (1) The official language of Namibia shall be English.
- (2) Nothing contained in this Constitution shall prohibit the use of any other language as a medium of instruction in private schools or in schools financed or subsidised by the State, subject to compliance with such requirements as may be imposed by law, to ensure proficiency in the official language, or for pedagogic reasons.
- (3) Nothing contained in Paragraph (1) shall preclude legislation by Parliament which permits the use of a language other than English for legislative, administrative and judicial purposes in regions or areas where such other language or languages are spoken by a substantial component of the population.<sup>16</sup>

The petitioners complained that the fact that seven years after independence such a law had still not been passed in Namibia discriminated against non-English speakers. As a consequence, they submitted, they have been denied the use of their mother

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<sup>14</sup> A summary and translation from Afrikaans is reprinted in Peeters, "On the Discrimination ...", Document 4.

<sup>15</sup> These provisions are reprinted in the appendix.

<sup>16</sup> Source: [http://www.uni-wuerzburg.de/law/wa00000\\_.html](http://www.uni-wuerzburg.de/law/wa00000_.html).

tongue in administration, justice, education and public life contrary to Articles 26 and 27 of the Covenant. The Basters also forwarded a circular issued by a regional administrator to all public servants to the Committee, which states the following:

1. It has come to the attention of the office of the Regional Commissioner that some Government officials handle (answer) official phone calls and correspondence in Afrikaans contrary to the Constitutional provision that Afrikaans ceased to be the official language in this country after 21 March 1990.
2. While it is understood that Afrikaans was for a very long time the official language, it now officially enjoys the same status as other tribal languages.
3. All employees of the Government are thus advised to, in future, refrain from using Afrikaans when responding to phone calls and their correspondence.
4. All phone calls and correspondence should be treated in English, which is the official language of the Republic of Namibia.

#### **B. The Committee's Views**

In its views the Committee, which could only take into account alleged violations that occurred or had immediate effects after the entry into force of the Covenant and Optional Protocol for Namibia (28 February 1995), firstly ruled against the Basters in so far as they alleged interferences with their rights as a minority:

10.6 As to the related issue of the use of land, the authors have claimed a violation of Article 27 in that a part of the lands traditionally used by members of the Rehoboth community for the grazing of cattle no longer is in the *de facto* exclusive use of the members of the community. Cattle raising is said to be an essential element in the culture of the community. As the earlier case law by the Committee illustrates, the right of members of a minority to enjoy their culture under Article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples.<sup>[17]</sup>

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<sup>17</sup> Reference is made to Communications Nos. 197/1985, *Kitok v. Sweden*, views of 27 July 1988, [1988] Annual Report 221; 167/1984, *Ominayak and the Lubicon Lake Band v. Canada*, views of 26 March 1990, [1990] Annual Report 1; 511/1992, *I. Länsman et al. v. Finland*, views of 26 October 1994, CCPR/C/52/D/511/1992; and 671/1995, *J. Länsman et al. v. Finland*, views of 30 October 1996, CCPR/C/65/D/671/1995, as well as General Comment No. 23, The Rights of Minorities (Art. 27), dated 8 April 1994, para. 7.

However, in the present case the Committee is unable to find that the authors can rely on Article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of self-government, the authors have failed to demonstrate how these factors would be based on their way of raising cattle. The Committee therefore finds that there has been no violation of Article 27 of the Covenant in the present case.

That part of the Committee's views is not easy to understand and seems to reflect the lowest common denominator the members could arrive at. Members Elizabeth Evatt and Cecilia Medina Quiroga in their concurring opinion seek to make the reasoning of the Committee a bit more transparent:

[T]he significant aspect of the authors' claim under Article 27 is that they have ... been deprived of the use of lands and certain offices and halls that had previously been held by their government for the exclusive use and benefit of members of the community. Privatization of the land and overuse by other people has, they submit, deprived them of the opportunity to pursue their traditional pastoral activities. The loss of this economic base to their activities has, they claim, denied them the right to enjoy their own culture in community with others. This claim raises some difficult issues as to how the culture of a minority which is protected by the Covenant is to be defined, and what role economic activities have in that culture. These issues are more readily resolved in regard to indigenous communities which can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects. In the present case, the authors have defined their culture almost solely in terms of the economic activity of grazing cattle. They cannot show that they enjoy a distinct culture which is intimately bound up with or dependent on the use of

these particular lands, to which they moved a little over a century ago, or that the diminution of their access to the lands has undermined any such culture. Their claim is, essentially, an economic rather than a cultural claim and does not draw the protection of Article 27.

The Committee then, with respect to Article 25 of the Covenant, acknowledged that while “the influence of the Baster community, as a community, on public life has been affected by the merger of their region with other regions when Namibia became sovereign, the claim that this has had an adverse effect on the enjoyment by individual members of the community of the right to take part in the conduct of public affairs or to have access, in general terms of equality with other citizens of their country, to public service has not been substantiated”.<sup>18</sup> Committee member Martin Scheinin in his concurring opinion rightly criticizes that the views “in [his] opinion unnecessarily, emphasize ... the individual nature of rights of participation under Article 25. ... [T]here are situations where Article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under Article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation.”

Finally, the Committee turned to the language issue and held as follows:

10.10 The authors have also claimed that the lack of language legislation in Namibia has had as a consequence that they have been denied the use of their mother tongue in administration, justice, education and public life. The Committee notes that the authors have shown that the State party has instructed civil servants not to reply to the authors’ written or oral communications with the authorities in the Afrikaans language, even when they are perfectly capable of doing so. These instructions barring the use of Afrikaans do not relate merely to the issuing of public documents but even to telephone conversations. In the absence of any response from the State party the Committee must give due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use

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<sup>18</sup> *Diergaardt* views, para. 10.8.

Afrikaans when dealing with public authorities. Consequently, the Committee finds that the authors, as Afrikaans speakers, are victims of a violation of Article 26 of the Covenant.

The dissents of numerous Committee members make clear how controversial that decision was: Abdalfattah Amor, for instance, accepted Namibia's choice to make English the official language "out of a legitimate concern to improve the chances of integration. It was thought that granting any privilege or particular status to one of the many other minority or tribal languages in the country would be likely to encourage discrimination and be an obstacle to the building of the nation. Since then, all languages other than English have been on an equal footing under the Constitution: no privileges, and no discrimination."<sup>19</sup> He adds:

Whatever legislative weaknesses there may have been so far, the right to use one's mother tongue cannot take precedence, in relations with official institutions, over the official language of the country, which is, or which is intended to be, the language of all and the common denominator for all citizens. The State may impose the use of the common language on everyone; it is entitled to refuse to allow a few people to lay down the law.<sup>20</sup>

The dissent of P.N. Bhagwati, Lord Colville, and Maxwell Yalden emphasizes that

...[t]he circular refers specifically only to Afrikaans and seeks to prohibit its use by Government officials in official phone calls and correspondence, because the problem was only in regard to Afrikaans which was at one time, until replaced by English, the official language and which continued to be used by Government officials in official phone calls and correspondence ... It is therefore not correct to say that the circular singled out Afrikaans for unfavorable treatment as against other languages ... .

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<sup>19</sup> *Diergaardt* views, dissenting opinion of Abdalfattah Amor, para. 1.

<sup>20</sup> *Ibid.*, para 4.

### III. Assessment

#### A. The Non-Discrimination Aspect

The Committee's conclusion that the circular was deliberately targeting the Baster Community and their desire to use Afrikaans in their dealings with the public authorities may in part be seen as a reaction to the respondent state's stubborn silence when asked to explain the measure, but cannot be sustained as such in light of the facts. It appears that the circular was indeed aimed at ending a longstanding practice of treating Afrikaans-speakers favourably by letting them use their language while those speaking other regional and tribal languages were not permitted to do so. That, in itself, is not discriminatory, but a remedy against unjustified favourable treatment. In this respect, the *reasoning* of the views is flawed.<sup>21</sup> Was the *outcome* nevertheless correct? An answer to that question can only be given after a more thorough review and analysis of a complex set of treaty provisions, non- or semi-binding rules, emerging principles, and scholarly opinions relating to specific positive, or affirmative, rights of members of minority groups. That cannot be done in the present paper: It will merely raise some *issues* for a future discussion.

#### B. Minority Languages and Public Administration: The Question of 'Administrative Language Rights'

Explaining principles 13 to 15 of the 1998 Oslo Recommendations<sup>22</sup>, the OSCE High Commissioner on National Minorities has underscored that "[i]n line with the principles of equality and non-discrimination, these provisions also imply a dynamic participatory relationship wherein the language of the minority may be a full-fledged vehicle of communication in local political life and in the interface between citizens and public authorities including in the provision of public services".<sup>23</sup> Principle 14, for instance, provides:

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<sup>21</sup> For an overview of recent non-discrimination practice under international human rights law, see Alexander H.E. Morawa, "The Evolving Right to Equality", 1 *European Yearbook of Minority Issues* (2001/02), forthcoming.

<sup>22</sup> OSCE High Commissioner on National Minorities (hereinafter "HCNM"), The Oslo Recommendations Regarding the Linguistic Rights of National Minorities (hereinafter "Oslo Recommendations"), February 1998.

<sup>23</sup> HCNM, Oslo Recommendations, Explanatory Report, Principles 13-15.

Persons belonging to national minorities shall have adequate possibilities to use their language in communications with administrative authorities especially in regions and localities where they have expressed a desire for it and where they are present in significant numbers. Similarly, administrative authorities shall, wherever possible, ensure that public services are provided also in the language of the national minority.

As the Proposed American Declaration on the Rights of Indigenous Peoples<sup>24</sup> puts it, linguistic minorities should be enabled “to understand administrative, legal and political rules and procedures, and to be understood in relation to these matters”.<sup>25</sup> Other international legal texts go beyond that and establish the use of minority languages in contacts with administrative authorities as an essential element of “deal[ing] with persons belonging to national minorities in an inclusive and equitable manner”<sup>26</sup> and, ultimately, their effective political participation.<sup>27</sup> That is also reflected in Article 7 of the European Charter for Regional or Minority Languages<sup>28</sup> which speaks of “an expression of cultural wealth” (para. (1) (a)) and seeks to safeguard and encourage the use of such languages and the preservation of geographical areas where they can exist (para. (1) (b) and (d)). In the words of the Charter’s drafters:

[I]f a language were to be completely barred from relations with the authorities, it would in fact be negated as such, for language is a means of public communication and cannot be reduced to the sphere of private relations

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<sup>24</sup> Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on 26 February 1997, at its 1333<sup>rd</sup> Session, 95<sup>th</sup> Regular Session, Article VIII (3).

<sup>25</sup> A similar approach is taken, for instance, by the drafters of the Draft UN Declaration on the Rights of Indigenous Peoples, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth session, E/CN.4/Sub.2/1993/29/Annex I, dated 23 August 1993, Article 14, and by the ILO in Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989, entered into force on 5 September 1991, Article 12.

<sup>26</sup> HCNM, Oslo Recommendations, Explanatory Report, Principles 13-15.

<sup>27</sup> See also the Proposals of the ECMI Seminar “Towards Effective Participation of Minorities”, Flensburg, 30 April - 2 May 1999, at: [http://www.ecmi.de/doc/projects\\_recomm\\_05.html](http://www.ecmi.de/doc/projects_recomm_05.html): “States should further the visibility and use of the minority language in all domains as an effective way of providing minorities with favourable conditions for developing a sense of safe identity and to assert their social position as open communities.”

<sup>28</sup> Adopted on 5 November 1995, entered into force on 1 March 1998, E.T.S. No. 158 (hereinafter “Language Charter”).



alone. Furthermore, if a language is not given access to the political, legal or administrative sphere, it will gradually lose all its terminological potential in that field and become a ‘handicapped’ language, incapable of expressing every aspect of community life.<sup>29</sup>

The 2000 Flensburg Recommendations thus emphasize that “governments should recognise the selection, design, implementation and evaluation of policies in favour of regional or minority languages as necessary tasks making a crucially important contribution to the good governance of modern societies”.<sup>30</sup> Such good governance extends to more than the traditional elements of a (central) administration. The Language Charter consequently provides for language-related rights in the context of state authorities (Article 10 para. (1)), local or regional authorities (para. 2), as well as “public services provided by the administrative authorities or other persons acting on their behalf” (para. 3).

For the purpose of the present paper, the author chooses the (somewhat artificial) term ‘administrative language rights’ to encompass all these elements of the “general”<sup>31</sup> use of minority languages by public authorities. The term is also chosen to emphasize that rights pertaining to the use of such languages in the course of judicial proceedings are not addressed.<sup>32</sup>

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<sup>29</sup> Explanatory Report to the Language Charter, para. 101.

<sup>30</sup> ECMI, Flensburg Recommendations on the Implementation of Policy Measures for Regional or Minority Languages (hereinafter “Flensburg Recommendations”), I. (2), Importance of Minority Language Policy, at: [http://www.ecmi.de/doc/projects\\_recomm\\_01.html](http://www.ecmi.de/doc/projects_recomm_01.html).

<sup>31</sup> Fernand de Varennes, “Language Rights as an Integral Part of Human Rights”, 3 *MOST Journal on Multicultural Societies* (No. 1, 2001), at <http://www.unesco.org/most/v13n1var.htm>, para. 2.4

<sup>32</sup> It should be noted that due process rights in judicial (in particular criminal) proceedings are not discussed in the present paper. These include the right to be informed of a criminal charge in a language the person concerned understands and to have an interpreter present during a trial; that is also applicable to members of minority groups if and in so far as they do not understand the official language in which proceedings are conducted. See, amongst many others, Sally Holt and John Packer, “OSCE Developments and Linguistic Minorities”, 3 *MOST Journal on Multicultural Societies* (No. 2, 2001), at <http://www.unesco.org/most/v13n2packer.htm>, para. 2.13.

For the scope of Article 10 (2) of the CoE’s Framework Convention for the Protection of National Minorities, adopted on 1 February 1995, entered into force on 1 February 1998, E.T.S. No. 157 (hereinafter “Framework Convention”), see Explanatory Report, para. 64, and the similar text introduced by CAHMIN (94) 32, 7<sup>th</sup> Meeting, 10 - 14 October 1994, Meeting Report, dated 14 October 1994, para. 64: “This provision does not cover all relations between individuals belonging to national minorities and public authorities. It only extends to administrative authorities. Nevertheless, the latter must be broadly interpreted to include, for example, ombudsmen.”

The following observations will outline issues related to the scope of these rights and their legal qualification, the preconditions for exercising them, and what standards one has to bear in mind when assessing what measures states take are ‘adequate’ to effectively realize them.

## 1. The Legal Quality of the Right

Apart from the contents – and, thus, reach – of a fundamental right or freedom, its legal quality is of the essence when it comes to assessing its effectiveness. International law knows many levels of legal force, or validity, below and beyond binding norms, as we know them from domestic law. Non- or semi-binding provisions may also serve as valuable sources and can inform the process of the creation and/or interpretation of the right at issue. Thus, it is necessary to first consider the legal quality of ‘administrative language rights’ in light of all the existing international provisions.<sup>33</sup>

The 1995 Council of Europe (CoE) Framework Convention provides in Article 10 (2):

In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.

The drafting history reveals that proposals were made to include a much ‘stronger’ right in a CoE minority treaty. Austria proposed to the Steering Committee for Human Rights (CDDH) in 1991 the following Article 7 (3) of an Additional Protocol to the European Convention on Human Rights (ECHR):

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<sup>33</sup> For an earlier assessment, see Karin Oellers-Frahm, “Der Status der Minderheitensprachen vor Behörden und Gerichten”, in: Jochen Abr. Frowein, Rainer Hofmann and Stefan Oeter (eds.), *Das Minderheitenrecht europäischer Sprachen* (Berlin *et al.*, 1994), Part 2, 383—409, 399 *et seq.*

In ethnic group regions members of the ethnic group have the right to use their mother tongue in contact with all administrative authorities and in legal proceedings before courts and legal authorities.<sup>34</sup>

The Parliamentary Assembly's famous Recommendation 1201 (1993) contained a by and large similar provision, while replacing "ethnic group regions" with "regions in which substantial numbers of a national minority are settled".<sup>35</sup> The 1991 Venice Commission Proposal<sup>36</sup> also speaks of a "right ... to speak and write in their own language to political, administrative and judicial authorities ..." of the region or state, but introduces (apart from the earlier substantial numbers criterion) the "as far as possible" qualification, which also permits states to advance the lack of financial resources to limit the scope of 'administrative language rights'.<sup>37</sup> The 1994 FUEN Draft also speaks of a right to communicate with all the administrative authorities in a "settlement area" in an "ethnic group language".<sup>38</sup>

The subsequent discussions in the Ad Hoc Committee for the Protection of National Minorities (CAHMIN) make it clear that the 'rights' approach to 'administrative language rights' was not going to be followed. During the April 1994 meeting,

[b]earing in mind financial, administrative and technical considerations, some experts expressed a certain lack of enthusiasm for incorporating the right to use the minority language before public institutions into a convention, while making clear that they could go along with it if provision would be made for restrictions leaving a wide margin of appreciation to the Parties. ... It was agreed that this provision would indeed have to be very

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<sup>34</sup> CDDH, Draft Protocol to the European Convention on Human Rights Guaranteeing the Protection of Ethnic Groups, prepared by the Austrian Delegation, CDDH (91) 46, dated 20 December 1991.

<sup>35</sup> Parliamentary Assembly of the Council of Europe, Recommendation 1201 (1993) on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights, dated 1 February 1993, Article 7 (3) (hereinafter "Recommendation 1201").

<sup>36</sup> European Commission for Democracy Through Law (Venice Commission), Proposal for a European Convention for the Protection of National Minorities, reprinted in: CDL-MIN (93) 6, dated 22 February 1993, Article 8 (hereinafter "Venice Commission Proposal").

<sup>37</sup> Explanatory Report to the Venice Commission Proposal, para. 34.

<sup>38</sup> FUEN, Fundamental Rights of Persons Belonging to Ethnic Groups in Europe, Draft for an Additional Protocol to the ECHR (Revised FUEN Draft), 1994, Article 6 (hereinafter "1994 FUEN Draft").

flexible (using words such as “States shall endeavour, as far as possible”) and contain a number of conditions.<sup>39</sup>

The May 1994 CAHMIN draft of the Framework Convention thus contained the following proposed Article 8 (2) [the restriction clauses are highlighted]:

In regions *traditionally inhabited* by national minorities or by *substantial numbers* of a national minority, if those minorities so *request* and where this request *corresponds to a real need*, the Parties *shall endeavour* to ensure, *as far as possible*, the conditions necessary for persons belonging to these national minorities to use their minority language with the administrative authorities and to receive answers and communications from the same authorities in that language. The Parties shall in particular endeavour to ensure those conditions at the local and regional level.<sup>40</sup>

The discussions within CAHMIN of the draft relate mostly to the restriction clauses and will be discussed *infra*. Some delegations, however, voiced their opinion that the issue of language use in judicial proceedings should somehow be incorporated into the draft convention (albeit with numerical and regional restriction clauses);<sup>41</sup> these proposals were, in the end, defeated.

In the context of the legal validity and reach of the rules governing the exercise of ‘administrative language rights’, the question arises whether the exercise of such rights implies that a minority language should be declared an official language of a state or region. The treaties currently in force provide no guidance in this respect, and the other documents reflect no uniform attitude: While the Proposed American Declaration on the Rights of Indigenous Peoples demands in Article VIII (3) that “[i]n areas where indigenous languages are predominant, states shall endeavor to establish the pertinent languages as official languages and to give them the same status that is

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<sup>39</sup> CAHMIN (94) 13, 3<sup>rd</sup> Meeting, 11 - 15 April 1994, Meeting Report, dated 15 April 1994, paras. 17 and 18.

<sup>40</sup> CAHMIN (94) 12, Preliminary Draft Framework Convention for the Protection of National Minorities, dated 10 May 1994 (hereinafter “CAHMIN May 1994 Draft”)

<sup>41</sup> Proposals by the Austrian and Portuguese Delegations, CAHMIN (94) 14 *rev.*, Proposals Concerning the Preliminary Draft Framework Convention for the Protection of National Minorities (CAHMIN (94) 12), dated 10 June 1994, pp. 3 and 13.

given to non-indigenous official languages”, and the 1994 FUEN Draft speaks of the right of ethnic groups to “the use and equal status of their language”,<sup>42</sup> the Explanatory Report to the Venice Commission Proposal states that “[i]t was considered preferable not to state a principle whereby, where the minority accounted for a certain percentage of the total population, the State would be obliged to declare the minority's language an official language throughout its territory or even in a part thereof”.<sup>43</sup> In its deliberations, CAHMIN also addressed the issue and emphasized that the ‘administrative language rights’ enshrined in Article 10 of the Framework Convention should not be understood as “in any way affect[ing] the formal status of the official language of the State”.<sup>44</sup>

The drafters of the Language Charter recognized that “[i]n some cases the characteristics of the regional or minority language allow it to be recognised as a ‘quasi-official’ language, thus making it, on its territory, a working language, or the normal means of communication, of the public authorities”.<sup>45</sup> That, however, represents merely the ‘maximum’ option a state may chose to fulfill its treaty obligations, but not a required undertaking. Thus it appears doubtful that a far-reaching obligation such as accepting a minority language as an official language can be imposed on states *de lege lata*.

All this only allows the conclusion that while there may be a degree of (particularly European) consensus that members of minority groups should enjoy certain ‘administrative language rights’, these rights suffer from the ambiguity and ‘flexibility’<sup>46</sup> of the legal texts and, at least as of yet, the lack of (a) a precise definition and scope, and (b) the required ‘strength’ in light of the various

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<sup>42</sup> Article 6 (5).

<sup>43</sup> Para. 33.

<sup>44</sup> CAHMIN (94) 19, 5<sup>th</sup> Meeting, 27 June - 1 July 1994, Meeting Report, dated 7 July 1994, para. 11. See also CAHMIN (94) 32, 7<sup>th</sup> Meeting, 10 – 14 October 1994, Meeting Report, dated 14 October 1994, para. 66.

<sup>45</sup> Language Charter, Explanatory Report, para. 103.

<sup>46</sup> States parties to the Framework Convention appear ready to utilize the drafting history to limit the scope of their obligations in light of the ‘flexible’ provisions giving them a wide margin of appreciation, as the reaction of Estonia to the Advisory Committee’s suggestion that making the right to receive responses from administrative authorities in minority languages dependent on whether at least 50 % of the permanent residents of the region in question belonged to that minority group was problematic from the perspective of the Convention, demonstrates; see Comments of the Government of Estonia on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in Estonia, Comments on Article 10.

qualification-, limitation-, and restriction-clauses contained in all international treaties and documents. These clauses will be addressed in the following section.

## **2. The Preconditions and the Limitation Clauses**

As we have seen above, the ‘administrative language rights’ provisions in the various international documents dealing with minority rights have in common clauses that make their exercise dependent upon preconditions and/or impose certain limitations on them. These encompass, in particular, numerical minima and the ‘possibility’ and ‘necessity’ (comprising both ‘desire’ and ‘real need’) criteria.

### **a. Significant Numbers**

While the 1990 Copenhagen Document<sup>47</sup> does not speak of the requirement of “significant numbers” of members of minorities present in regions or localities in order to trigger the application of ‘administrative language rights’, the 1998 Oslo Recommendations do, much in line with the CoE’s pertinent instruments. The Venice Commission in 1991 still spoke of a ‘right’ – a term that disappeared early in the deliberations of CAHMIN –, making it quite clear, though, that it was not absolute, but would “not exist” under certain circumstances and, in particular, “when the number of persons belonging to the minority concerned is too small”.<sup>48</sup> CAHMIN’s experts inserted “significant number/proportion”<sup>49</sup> as the first of three restriction criteria into the draft Framework Convention in April/May 1994.

Other, even more restrictive clauses proposed by delegations to CAHMIN were rejected: Turkey, for instance, desired in June 1994 to limit (then draft) Article 8 (2)

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<sup>47</sup> Second Conference on the Human Dimension of the CSCE, 5 June - 29 July, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990 (hereinafter “1990 Copenhagen Document”), para. 34.

<sup>48</sup> Explanatory Report to the Venice Commission Proposal, para. 32. See, for a critical view of the existing norms and proposals at that time, Oellers-Frahm, “Der Status der Minderheitensprachen ...”, 400-1.

<sup>49</sup> CAHMIN (94) 13, 3<sup>rd</sup> Meeting, 11 - 15 April 1994, Meeting Report, dated 15 April 1994, para. 18.

to “regions inhabited mainly by persons belonging to a national minority” and added another number-clause: “if the overwhelming majority of these persons so request.”<sup>50</sup>

In its opinion on Estonia the Framework Convention’s Advisory Committee considered “that the numerical threshold for the right to receive replies from a state or local government agency in a minority language, i.e. the requirement that at least half of the permanent residents of the locality at issue belong to a national minority – is high from the point of view of Article 10 of the Framework Convention”.<sup>51</sup> In the cases of Romania and Slovakia, on the other hand, the Committee found a 20 per cent threshold contained in a draft law to be “an important step in the implementation of the Framework Convention”.<sup>52</sup>

Article 10 of the Language Charter also requires states to take the measures enumerated therein only if and when “the number of residents who are users of regional or minority languages justifies” them.

Numbers also play a role when additional, more far-reaching linguistic rights are at issue. The recognition of the language of an indigenous people as an official language envisaged in the Proposed American Declaration on the Rights of Indigenous Peoples, for instance, requires a showing that indigenous languages are “predominant”<sup>53</sup> in the area.

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<sup>50</sup> Proposals by the Turkish Delegation, CAHMIN (94) 14 *rev.*, Proposals Concerning the Preliminary Draft Framework Convention for the Protection of National Minorities (CAHMIN (94) 12), dated 10 June 1994, p. 24.

<sup>51</sup> Opinion on Estonia, adopted on 14 September 2001, para. 40. A similar conclusion was reached with respect to Croatia’s law containing an apparently unclear provision that may mean ‘absolute’ or ‘relative’ majority at the local or municipal level (ACFC/SR (99) 5, received on 16 March 1999, and Opinion on Croatia, adopted on 6 April 2001, para. 44). The Ukraine also reported that it had a ‘more than 50 %’ threshold (ACFC/SR (99) 14, received on 2 November 1999); the opinion of the Advisory Committee is not yet public.

<sup>52</sup> Opinion on Romania, adopted on 6 April 2001, para. 49. See also Opinion on the Slovak Republic, adopted on 22 September 2000, para. 36. Cf. Rainer Hofmann, “Protecting the Rights of National Minorities in Europe. First Experiences with the Council of Europe Framework Convention for the Protection of National Minorities”, 44 *German Yearbook of International Law* (2001) 237-269, 261-262.

<sup>53</sup> Article VIII (3).

De Varennes suggests a “sliding-scale-model”<sup>54</sup> in the context of ‘administrative language rights’: Depending on the number of speakers of a particular language in a region, local authorities should be required to provide for an “increasing level of services”<sup>55</sup> in that language, starting with bilingual or minority language forms and documents, then the duty to accept petitions and respond to them in a minority language, and ultimately a “bilingual administration”<sup>56</sup> extending into areas such as education, health services and public broadcasting.

### **b. Possibility**

“Wherever possible”<sup>57</sup> (the phrase used by the OSCE) and “as far as possible”<sup>58</sup> or “reasonably possible”<sup>59</sup> (CoE) are probably the most far-reaching limitation clauses. They enable states to advance a range of arguments preventing them from giving full effect to ‘administrative language rights’ and thus underscore the fact that the provisions concerned are worded “very flexibly, leaving Parties a wide measure of discretion”.<sup>60</sup> Prominent among them features the unavailability of financial resources.<sup>61</sup> However, despite the states’ discretion, they must not differentiate between minority groups except on the basis of objective grounds.<sup>62</sup>

As far as financial resources are concerned, the Venice Commission has apparently looked at those as closely related to the number-question when it suggested a flexible wording of the pertinent provision of its convention so as to (a) not specify the percentage of minority residents and (b) to “take account of the individual circumstances of the State concerned, including its financial resources”.<sup>63</sup>

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<sup>54</sup> Fernand de Varennes, *Language, Minorities and Human Rights* (The Hague/Boston/London, 1996) 177 *et seq.* and *id.*, “Language Rights as an Integral Part of Human Rights”, para. 2.12.

<sup>55</sup> De Varennes, *Language, Minorities and Human Rights*, at 177 and *id.*, “Language Rights as an Integral Part of Human Rights”, para. 2.12.

<sup>56</sup> De Varennes, “Language Rights as an Integral Part of Human Rights”, para. 2.13.

<sup>57</sup> 1990 Copenhagen Document, para. 34, 1998 Oslo Recommendations, Principle 14.

<sup>58</sup> Introduced by the Venice Commission in Article 8 of its Proposal and incorporated into Article 10 (2) of the Framework Convention.

<sup>59</sup> Language Charter, Article 10 (1).

<sup>60</sup> CAHMIN (94) 32, 7<sup>th</sup> Meeting, 10 - 14 October 1994, Meeting Report, dated 14 October 1994, para. 64.

<sup>61</sup> See the Explanatory Report to the *Venice Commission Proposal*, para. 32.

<sup>62</sup> See CAHMIN (94) 13, 3<sup>rd</sup> Meeting, 11 - 15 April 1994, Meeting Report, dated 15 April 1994, para. 18.

<sup>63</sup> Explanatory Report to the Venice Commission Proposal, para. 34.



### c. Necessity

The necessity requirement, which was already included in the 1990 Copenhagen Document, can be subdivided in the quasi-subjective ‘desire’ voiced by (members of) minority groups to use their languages in their dealings with the public authorities, on the one hand, and the quasi-objective ‘real need’, on the other hand. The ‘desire’ must “correspond”<sup>64</sup> to the ‘need’.

#### i. *Desire*

The HCNM’s 1998 Oslo Recommendations make the rights enshrined therein dependent upon the expression of a “desire” by persons belonging to a national minority.<sup>65</sup> In the CoE area, the ‘desire’ element was missing in the 1991 Austrian proposal, Recommendation 1201, the Venice Commission Proposal and the 1994 FUEN Draft. It was CAHMIN which insisted in its 3<sup>rd</sup> meeting on what it called either a “demand” or a “desire”<sup>66</sup> and, in the May 1994 draft, a “request”.<sup>67</sup>

While the term “desire” sounds as if it meant (a) an expression of a wish made by the relevant minority without state interference and (b) an essentially subjective decision, the drafting history suggests that that is not necessarily so. The Portuguese delegation to CAHMIN, for instance, emphasized that states “shall in particular endeavour to ensure that such requests are *assessed* on the basis of objective and non-discriminatory criteria ... .”<sup>68</sup> Thus, states seem to retain the competence to ‘assess’ desires but, in doing so, must not act arbitrarily. As a consequence, the ‘desire’ and ‘real need’ elements are not as different as the terms would suggest.

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<sup>64</sup> Article 10 (2) of the Framework Convention.

<sup>65</sup> Principles 13 and 14.

<sup>66</sup> CAHMIN (94) 13, 3<sup>rd</sup> Meeting, 11 - 15 April 1994, Meeting Report, dated 15 April 1994, para. 18.

<sup>67</sup> CAHMIN May 1994 Draft, Article 8 (2).

<sup>68</sup> Proposals by the Portuguese Delegation, CAHMIN (94) 14 *rev.*, Proposals Concerning the Preliminary Draft Framework Convention for the Protection of National Minorities (CAHMIN (94) 12), dated 10 June 1994, pp. 12-13 (emphasis added).

## **ii. Real Need**

The Framework Convention, in particular, uses the quasi-objective term “real need”. The CoE’s Directorate of Legal Affairs suggested in August 1994 that “at least the Explanatory Report should specify by whom and according to what criteria the ‘real need’ will be established”.<sup>69</sup> There seems to be agreement amongst at least the drafters of the binding treaties that that ‘need’ is to be assessed by the states parties, albeit on the basis of “objective criteria”.<sup>70</sup> Dunbar rightly criticizes the approach and concludes that “a more effective provision ... would require the need to be assessed primarily on the requirements of the minority language community in its efforts at language maintenance and revitalisation, as determined by it or with its significant input”.<sup>71</sup> The same concern is reflected in the Flensburg Recommendations which speak of a “*proper identification* of the needs and demands of the regional or minority languages”<sup>72</sup> in the context of policy-making in relation to the use of regional and minority languages. The Language Charter’s “according to the situation of each language”-qualification in Article 10 may in fact serve as a purposeful guiding light for states if and as far as it is understood as requiring an objective assessment of the “situation” and as demanding that states pay due attention to the (objective and – thereby having regard to the minority group’s point of view – subjective) vulnerability of the language in question and the corresponding need for protection.

### **d. The National Legislation Clause**

The 1990 Copenhagen Document in para. 34 contains the clause that ‘administrative language rights’ shall be granted “in conformity with applicable national legislation”. A similar clause has fortunately not made it into the Framework Convention, although

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<sup>69</sup> CAHMIN (94) 25, Summary of the Main Points Raised by the Opinion of the Directorate of Legal Affairs on the Draft Framework Convention, dated 18 August 1994, 2.

<sup>70</sup> CAHMIN (94) 28, 6<sup>th</sup> Meeting, 12 - 16 September 1994, Meeting Report, dated 19 September 1994, para. 37, affirmed by CAHMIN (94) 32, 7<sup>th</sup> Meeting, 10 – 14 October 1994, Meeting Report, dated 14 October 1994, para. 65.

<sup>71</sup> Robert Dunbar, “Minority Language Rights in International Law”, 50 *International and Comparative Law Quarterly* (2001), 90-120, 114.

<sup>72</sup> Flensburg Recommendations, III. (7) (emphasis added).

delegations suggested exactly that during the drafting process “in ... light of the great financial, logistic, and other difficulties ...”.<sup>73</sup>

#### **IV. Concluding Observations**

As we have seen at the outset, the Human Rights Committee’s views in the *Diergaardt et al.* case do *not* answer any questions pertaining to the minority-rights based claim to ‘administrative language rights’. They are solely based on the general non-discrimination clause of Article 26 of the Covenant. The Committee found Article 27 – the very norm that deals with the rights of minorities, including language rights – inapplicable to the Namibian Basters. This is not the place to discuss whether that assessment, which is not sufficiently explained in the views, anyway, is sound. Nor would it be appropriate to criticize the Committee for creating a situation where the Basters are the only ethnically distinguishable group in Namibia that can claim that an international body has ‘given’ it the right to enjoy ‘administrative language rights’, since the Committee can only rule on the case before it, and the rights of other ethnic groups were not at issue before it, plain and simple. However, the wealth of international provisions of varying legal validity allow us to draw a few tentative conclusions as to what ‘best practices’ might emerge and, ultimately, develop into a binding legal rule, with respect to the granting of ‘administrative language rights’ and what measures taken by a state to give effect to them will then be deemed adequate:

According to the Explanatory Report, the Language Charter “provides for measures offering active support for [regional and minority languages]: the aim is to ensure, as far as reasonably possible, the use of regional or minority languages in education and the media and to permit their use in judicial and administrative settings, economic and social life and cultural activities. Only in this way can such languages be compensated, where necessary, for unfavourable conditions in the past and preserved and developed as a living facet of Europe’s cultural identity”.<sup>74</sup> The HCNM’s 1998

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<sup>73</sup> Proposals by the Romanian Delegation, CAHMIN (94) 14 *rev.*, Proposals Concerning the Preliminary Draft Framework Convention for the Protection of National Minorities (CAHMIN (94) 12), dated 10 June 1994, p. 17. See also the Proposals by the Slovak Delegation, *ibid.*, at. 20, suggesting to insert the phrase “within the frame of their legal system” into Article 10 (2).

<sup>74</sup> Explanatory Report to the Language Charter, para. 10.

Oslo Recommendations spell out what is obviously necessary to give effect to ‘administrative language rights’: that states “shall adopt appropriate recruitment and/or training policies and programmes”<sup>75</sup> to ensure that qualified civil servants are available to receive and handle petitions and to interact with persons speaking such languages in daily business.

An adequate policy on ‘administrative language rights’ may well take de Varennes’ “sliding-scale model” as a starting point. Such a policy should indeed pay attention to numerical differences among the various minority groups speaking distinct languages, while at the same time taking the numerous other factors into account that should guide the policies governing ‘administrative language rights.’ Among them are an equitable distribution of available resources, seen here as an ‘entitlement’ for minority groups on a non-discriminatory basis, rather than a ‘defence’ for a state against such a group’s demands. The Flensburg Recommendations give the following guidelines in this respect:

The principle of cost-effectiveness, which is only a means to an end, is entirely compatible with adequate provisions for regional or minority languages, and requires a well-managed use of resources towards achieving desirable results. Cost-effectiveness favours the transparent use of resources allocated to minority language policy and demonstrates the authorities’ commitment to good policies; it is therefore a key factor for the acceptability, among majority opinion, of minority language policies. Demonstrated cost-effectiveness should be seen as an opportunity for increasing the aggregate volume of resources made available to minority language promotion.<sup>76</sup>

Another relevant factor may be the strength of a ‘request’ or ‘demand’ in light of the overall situation and, in particular, the vulnerability of the minority group concerned. That aspect clearly demands to part with purely numerical considerations and to pay primary attention to the requirements of the minority group, as emphasized by Dunbar. In that respect, numerical inferiority will even lead to an entitlement to *more*

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<sup>75</sup> Principle 14, last sentence.

<sup>76</sup> Flensburg Recommendations, III. (9).

affirmative action in favour of the group concerned. Policies in the area of ‘administrative language rights’ will furthermore be required to abide by certain basic principles such as, in the first place, that of the preservation of a minority’s *identity* which is stipulated in no uncertain terms in the preambles and introductory provisions of the treaties currently in force.<sup>77</sup>

“Considering that the protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe’s cultural wealth and traditions”,<sup>78</sup> the maintenance and revitalization – also through elevating minority languages to a status where they are more frequently deemed to be ‘practical’ and ‘useful’ in everyday life, such as in contact with administrative agencies – should be the prime goal. ‘Administrative language rights’, seen in that light, could be less of a burden and more of a *not* particularly burdensome opportunity, also for states with limited resources, to integrate minority languages and those who speak them into their administrative structure. In any event, speaking of positive – or affirmative – duties arising out of the general non-discrimination provisions and the more specific ones contained in minority-related treaties and documents, the preservation of the particularly vulnerable<sup>79</sup> languages and the linguistic rights of numerically inferior minority groups deserve even greater attention. That line of thought has most recently been affirmed by the Advisory Committee attached to the Framework Convention, which had noted when examining the German state report that “the use of minority languages in relations with administrative authorities is rather limited”.<sup>80</sup> To the German authorities’ explanation “that this state of affairs is often due, *inter alia*, to

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<sup>77</sup> See, e.g., the Preamble to the Framework Convention: “Considering that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity ...”.

<sup>78</sup> Language Charter, Preamble. See also III. (8) of the Flensburg Recommendations: “The issue of the effectiveness of policies must be given particularly sustained attention in the case of particularly threatened languages, with a view to restoring, wherever possible, the conditions for the natural maintenance and development of all regional or minority languages.”

<sup>79</sup> See the “Working Paper on Discrimination against Indigenous Peoples”, submitted by Mrs Erica-Irene Daes in accordance with Sub-Commission Resolution 1999/20, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2001/2, dated 18 August 2001, para. 8, emphasizing “the vulnerability of many indigenous languages”. See also generally, Alexander H.E. Morawa, “‘Vulnerability’ as a Concept of International Human Rights Law”, 10 *Journal of International Relations and Development* (No. 1, 2003) (forthcoming).

<sup>80</sup> Opinion on Germany, adopted on 1 March 2002 and made public on 12 September 2002, para. 48.

the relatively small percentage of persons belonging to national minorities in administrative districts where they reside traditionally”,<sup>81</sup> the Committee responded by saying:

However, the Advisory Committee observes that Article 10 paragraph 2 also applies to such situations provided persons belonging to national minorities traditionally inhabit the areas concerned, if there is a request by such persons and if such a request corresponds to a real need.<sup>82</sup>

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<sup>81</sup> Ibid. and the German state report, p. 73, Article 10 (2), para. 1: “Due to the mostly small number of members of minorities as a percentage of the given local population, in general it is not possible to use the minority language in relations with the administrative authorities; rather, such use is confined to special regulations.”

<sup>82</sup> Ibid. In its comments, the German government appears to have accepted that view when it states: “The use of the minority language in the traditional settlement areas represents an important aspect of the protection and promotion of the minority. The government agencies are trying to further enhance the effective use of the minority language. To the extent that the Sorbian language is rarely used in dealings with public authorities, the experience gained so far suggests that *this is due to the lack of demand among the population*. People are actually given the opportunity to use this language.” Comments of the Government of Germany on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in the Federal Republic of Germany, made public on 12 September 2002, re: Article 10, Number 85 (emphasis added).

## **V. Appendix: Relevant Provisions of International Treaties**

### **Covenant on Civil and Political Rights (CCPR)**

#### **Article 25**

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

#### **Article 26**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### **Article 27**

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

### **Framework Convention for the Protection of National Minorities**

#### **Article 10**

- 1 The Parties undertake to recognise that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing.
- 2 In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.

- 3 The Parties undertake to guarantee the right of every person belonging to a national minority to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language, if necessary with the free assistance of an interpreter.

## **European Charter for Regional or Minority Languages**

### **Article 10 – Administrative authorities and public services**

- 1 Within the administrative districts of the State in which the number of residents who are users of regional or minority languages justifies the measures specified below and according to the situation of each language, the Parties undertake, as far as this is reasonably possible:
  - a
    - i to ensure that the administrative authorities use the regional or minority languages; or
    - ii to ensure that such of their officers as are in contact with the public use the regional or minority languages in their relations with persons applying to them in these languages; or
    - iii to ensure that users of regional or minority languages may submit oral or written applications and receive a reply in these languages; or
    - iv to ensure that users of regional or minority languages may submit oral or written applications in these languages; or
    - v to ensure that users of regional or minority languages may validly submit a document in these languages;
  - b to make available widely used administrative texts and forms for the population in the regional or minority languages or in bilingual versions;
  - c to allow the administrative authorities to draft documents in a regional or minority language.
- 2 In respect of the local and regional authorities on whose territory the number of residents who are users of regional or minority languages is such as to justify the measures specified below, the Parties undertake to allow and/or encourage:
  - a the use of regional or minority languages within the framework of the regional or local authority;
  - b the possibility for users of regional or minority languages to submit oral or written applications in these languages;
  - c the publication by regional authorities of their official documents also in the relevant regional or minority languages;



- d the publication by local authorities of their official documents also in the relevant regional or minority languages;
  - e the use by regional authorities of regional or minority languages in debates in their assemblies, without excluding, however, the use of the official language(s) of the State;
  - f the use by local authorities of regional or minority languages in debates in their assemblies, without excluding, however, the use of the official language(s) of the State;
  - g the use or adoption, if necessary in conjunction with the name in the official language(s), of traditional and correct forms of place-names in regional or minority languages.
- 3 With regard to public services provided by the administrative authorities or other persons acting on their behalf, the Parties undertake, within the territory in which regional or minority languages are used, in accordance with the situation of each language and as far as this is reasonably possible:
- a to ensure that the regional or minority languages are used in the provision of the service; or
  - b to allow users of regional or minority languages to submit a request and receive a reply in these languages; or
  - c to allow users of regional or minority languages to submit a request in these languages.
- 4 With a view to putting into effect those provisions of paragraphs 1, 2 and 3 accepted by them, the Parties undertake to take one or more of the following measures:
- a translation or interpretation as may be required;
  - b recruitment and, where necessary, training of the officials and other public service employees required;
  - c compliance as far as possible with requests from public service employees having a knowledge of a regional or minority language to be appointed in the territory in which that language is used.
- 5 The Parties undertake to allow the use or adoption of family names in the regional or minority languages, at the request of those concerned.