Filling the Frame
5th anniversary of the entry into force of the
Framework Convention for the Protection of National Minorities
Strasbourg, 30-31 October 2003

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Opening plenary

The Framework Convention within the context of the Council of Europe – Comments with reference to the European Charter for Regional or Minority Languages

Presentation by Rob Dunbar, Senior Lecturer in Law, The School of Law, he University of Glasgow

Ladies and Gentlemen, let me begin by thanking the organising committee for the kind invitation to give a response today to Mr. Cilevics' stimulating and thoughtful paper. It is a pleasure for me to address such a distinguished gathering on this important occasion.

As Mr. Cilevics correctly noted, the Framework Convention for the Protection of National Minorities (the "Framework Convention") is one of two instruments adopted in the first half of the 1990s under the auspices of the Council of Europe which broadly deal with minority issues. The other is, as he noted, the European Charter for Regional or Minority Languages (the "Languages Charter"). One of the main problems or tasks identified by Mr. Cilevics with respect to the future development of minority protection within the Council of Europe is to achieve better co-operation and synergy between different Council of Europe monitoring bodies. Indeed, he made particular reference to the urgent need to develop complementarity between the Advisory Committee, the body charged with monitoring State compliance under the Framework Convention and the Committee of Experts, the body charged with this task under the Languages Charter.

This is an objective with which no one would argue, and there are several reasons for this. First, there is the obvious point that the Languages Charter and the Framework Convention will have relevance for members of many of the same groups in States which are party to the two instruments, and there is obviously some overlap in the subject matter of the two treaties. Second, a significant number of States--sixteen at present--are parties to both treaties. Of those, twelve have submitted initial State reports under both treaties, and the process of scrutiny of those reports is complete or is soon to be complete for nine. Third, as just suggested, the two treaties have very similar compliance mechanisms: both employ a system of State reporting under which State reports are scrutinised by independent experts, the Advisory Committee under the Framework Convention and the Committee of Experts under the Languages Charter.

While the selection and composition of the two committees is somewhat different, each has developed similar and, in my view, innovative and effective working methods. Particularly notable here are the broad powers that both Committees have to receive and solicit information from non-official sources, particularly NGOs active in the field of minority and human rights issues. Also notable are the "on-the-spot" visits, under which members of the Committees actually visit the State being monitored to meet with both government officials and representatives of civil society. Without question, the ability to receive information from a wide range of sources and the possibility of visiting the State to get a first-hand picture of what is really happening and to open up a dynamic dialogue with both officials and representatives of community organisations has significantly increased the amount of information available to the two committees, and has allowed both to broaden and deepen their understanding of State legislation, policy and practice, and this is reflected in the generally very high quality of the reports of the two Committees.

Finally, it should be noted that the objective of closer co-operation between the Advisory Committee and the Committee of Experts is facilitated by the rules of procedure of both committees, which provide that each committee may, where

appropriate, co-operate and exchange information with each other, as well as with other bodies of the Council of Europe with relevant expertise.

However, in the short time that I have available, I would like to explore some of the theoretical and practical barriers that limit the ways in which the laudable objective of better co-operation and synergy between the two Committees can be achieved, but also to offer some suggestions as to where such co-operation may be most fruitful and effective.

The major obstacle to closer co-operation is the ways in which the Languages Charter and the Framework Convention differ in important respects. These differences are of three types: overall objectives and core principles, structure, and detailed legal norms.

Overall Objectives

With regard to overall objectives and core principles, there is a difference in emphasis under the two instruments. The overarching aim of the Framework Convention, as expressed in its preamble, is simply "the effective protection of national minorities and of the rights and freedoms belonging to those minorities". However, the protection of national minorities is firmly situated within the sphere of the maintenance and further realisation of human rights and fundamental freedoms. The protection of national minorities is also highlighted as an important peace and stability issue. Pluralism and cultural diversity are certainly also recognised as important values, but they are two of a range of such values, and are not, perhaps, the primary bases for minority protection.

In the Languages Charter, by contrast, the emphasis is placed very strongly on cultural diversity and the maintenance and development of cultural wealth and traditions as being the core objectives. The overriding concern is not the protection of collectivities such as national minorities *per se*, nor of members of such minorities *per se*, but with the historical regional or minority languages of Europe, which may be spoken by at least some of those national minorities and their members. This point is made even clearer in the Explanatory Report, which provides that the Charter's overriding purpose is cultural, and that it is designed to protect and promote regional or minority languages as a threatened aspect of Europe's cultural heritage. The preamble to the Languages Charter recognises that the other central principles and objectives of the Framework Convention—the promotion of human rights, minority rights and peace and stability—are laudable *by-products* of the maintenance of cultural diversity, but they are not the overriding purposes in themselves—the maintenance of cultural diversity is.

One final but significant point of difference between the Languages Charter and the Framework Convention relates to the historical context in which they were prepared. The Framework Convention was a product of the early 1990s, and was certainly inspired and influenced by events in the former eastern bloc and activities of other international organisations, particularly the OSCE—or the CSCE as it then was. The origins of the Languages Charter were very different, and go back to efforts within the Council of Europe in the 1980s. These initiatives were inspired largely by a concern about the precariousness of many of the historical regional or minority languages of

Europe, particularly of the western European States which made up a much larger share of the Council of Europe's membership at that time. Generally, the language communities affected were not afflicted so much by oppressive State policies giving rise to massive human rights violations, nor by serious ethnic conflict. Much of the work on the Languages Charter was done by the Standing Conference of Local and Regional Authorities of Europe ("CLRAE") in the 1980s, and, indeed, the CLRAE conceived and presented its draft charter before the dramatic changes in central and eastern Europe.

Structure

With respect to the overall structure of the Languages Charter and Framework Convention, there are certain similarities. There are, however, also important differences, not only in the content of the substantive provisions, which I shall touch on at the end of this comment, but in their structure, and this is most obvious in the part or section of the Languages Charter and the Framework Convention which contains the more detailed legal norms—Part III of the Languages Charter and Section II of the Framework Convention.

First, the Framework Convention contains mostly programme-type provisions that set out objectives which States undertake to pursue, and which leave States with a considerable measure of discretion as to implementation. Part III of the Charter, by contrast, goes into considerably more detail, and although the provisions of Part III also leave some room to States with respect to implementation, they generally provide more detailed guidance and may, because of this detail, lend themselves more easily to a closer scrutiny of State practice. This is an important difference. Second, it is also important to note that, in spite of the greater level of detail, the Charter does not create any rights, individual or collective; the provisions of Part III are generally simply phrased in terms of State obligations. The provisions of Section II of the Framework Convention are generally phrased in the language of individual rights, and this may be of significance when interpreting the provisions themselves and when monitoring State compliance. To the extent that minority rights are, as Mr. Cilevics suggests, understood as individual *rights*, it is not clear, then, that the Charter fits fully or easily into a minority rights framework. It is also important not to overstate this, though, as the work of the Committee of Experts has shown that the implementation of the Charter may require domestic legislation and this may create rights in domestic law.

A further significant structural distinction between the two instruments is with respect to their scope of application, and this has two aspects. First, the Framework Convention provisions generally apply in respect of persons belonging to a national minority. The Framework Convention does not define this term but the potential application is wide, and would certainly include both "historical" minorities of long standing on a State's territory and so-called "new" minorities, groups which have come to be on the State's territory as a result of more recent immigration. The Languages Charter, by contrast, does not make reference to concepts such as "minorities" or "national minorities", and, indeed, does not define its obligations by reference to people--either individuals or groups--but by reference to languages themselves. As already noted, though, the obligations imposed under the Languages Charter will have an indirect effect on the situation of the communities which speak

such languages and their individual members. And it is clear that, unlike under the Framework Convention, the individuals and groups which will benefit in this indirect way from the Languages Charter's protection are "traditional" or "historical" minorities, and *not* "new" minorities. This is because the "regional or minority languages" to which protection is primarily given under the Languages Charter specifically excludes the languages of migrants.

Again, Mr. Cilevics argued for a broad approach to minority rights which, based on the principle of non-discrimination, should include both "historical" minorities and "new" minorities. I would certainly strongly support this suggestion. Is the Languages Charter at odds with this laudable approach? In my view, not necessarily. It does not *preclude* States from applying similar policies to languages spoken to new minorities; it merely requires that certain basic measures should be taken in respect of particularly vulnerable historical minority language communities. It also serves to remind us that, while the distinction between "new" and "historical" minorities can be problemmatic, different minority communities can face different challenges and may have different needs and aspirations. The particular needs of the most vulnerable historical linguistic minorities may be inadequately protected by existing provisions in instruments such as the Framework Convention, and the more detailed and comprehensive coverage which may exist under the Languages Charter may be more appropriate to their specific circumstances.

This has certainly been my experience in working with such groups in Britain. You will, for example, be aware that the British government has taken a very broad approach to what constitutes a "national minority" under the Framework Convention, and this has been welcomed by both the Advisory Committee and by British minorities themselves. As "national minority" is not a concept which exists in UK domestic law, the government decided to apply the definition of "racial group" under the UK' main non-discrimination legislation, the *Race Relations Act 1976*, which is defined by reference to colour, race, nationality or ethnic or national origins. It clearly includes new minorities and even migrants and guest workers. As a result, however, of a 1986 case, *Gwynedd County Council v. Jones*, it is not clear that historical linguistic minorities such as Welsh-speakers, Scottish Gaels and so forth—the groups that have benefited greatly from the Languages Charter—are a "racial group" and therefore a "national minority" for the purposes of the Framework Convention. (The case held that while Welsh people as a whole were a racial group, Welsh-speaking Welsh people were not. The British State report under the Framework Convention did make reference to initiatives with respect to the Welsh, Gaelic, Irish and Scots languages, but it is not clear that the government had any basis for doing so under domestic law. And while Britain's indigenous linguistic minorities did take advantage of the monitoring process under the Framework Convention, it seems that they generally looked to the Languages Charter, and not the Framework Convention, as the instrument best suited to advancing their claims and meeting their aspirations.

There is a final structural difference between the two instruments which I want to briefly consider and which can result in differences in their application in respect of the same States and, indeed, can make a comparison of their implementation more complex. This difference is that, under the Framework Convention, both the general principles in Section I and the more specific legal norms in Section II should apply to

all members of all national minorities in a particular State, whereas under the Languages Charter, only the general principles in Part II apply to all regional or minority languages. States themselves determine which of the regional or minority languages will benefit from the more detailed provisions of Part III, and States have a fairly wide discretion as to which of the numerous Part III obligations they will undertake for each language. Thus, speakers of certain regional or minority languages may benefit, by virtue of being members of a national minority, from the full protection of the Framework Convention, but may be entitled to no protection or only limited protection of Part III of the Languages Charter, despite the fact that these Part III provisions tend to be more detailed and, indeed, comprehensive in scope that those of the Framework Convention. As noted, speakers of the languages of "new" minorities will only benefit from the Framework Convention. And finally, to complicate the matter even further, it may be possible that speakers of a regional or minority language may not be considered by a State to be members of a national minority at all--perhaps because under the criteria chosen by the State for the determination of national minorities, language, by itself, may not be a decisive marker of the existence of a national minority, a point which was just explored with respect to Britain.

Detailed Legal Norms

Finally, with respect to the legal norms contained in the Charter and the FCNM, there is certainly some overlap in terms of the subject matter, but considerable variation exists in terms of the actual content. Time does not permit a detailed analysis of this, but a brief look at minority language education, which is given fairly significant coverage under both instruments, will give a good taste of this problem. It should be noted, though, that there are many sectors, such as the legal system, cultural activities and facilities, and economic and social life, in which the Languages Charter potentially imposes quite detailed and extensive obligations, and where there the standards under the Framework Convention are either weak or non-existent.

Education is the subject of three articles in the Framework Convention, and is dealt with in both the general objectives and principles in Part II of the Languages Charter and in a very detailed article in Part III. With regard to the teaching of or through the medium of minority languages to members of the linguistic minorities in question, the Framework Convention provisions are more detailed and precise than the general obligations and principles set out in Part II of the Languages Charter, but less so than the detailed rules contained in the relevant article in Part III of the charter; again, however, States party to the charter are only required to provide protection under Part III to those regional or minority languages they themselves choose, and must only apply three of the eleven paragraphs or subparagraphs contained in the article on education in Part III, with the result that the substantive rules in respect of the same State under the two treaties may differ considerably. In analysing the output of the two committees in respect of common States, somewhat different conclusions can be reached. In my opinion, though, this is not primarily the result of a lack of co-operation between the two committees or of differing procedures or even of significantly different inputs—although some differences in sources of information do occur—but in considerable measure to differing norms. Such differences in output are therefore not, in my view, necessarily a problem

Conclusions

To conclude, the suggestion that the Advisory Committee under the Framework Convention and the Committee of Experts under the Language Charter should co-operate with each other is, in principle, unobjectionable, and both committees, and the secretariats which serve them, already do so. There are, however, very important limitations to the extent and nature of that co-operation. The main limitation is that the two instruments, though broadly similar, are very different in many significant respects. Though they are clearly complementary, they serve somewhat different purposes, both of which, I suggest, are important with respect to the broad question of minorities.

Given this reality, further co-operation between the two committees should, in my view, be narrowly focussed on certain important areas. First, the secretariats which serve the two committees—and the committees themselves—operate on a very limited and, in my view, inadequate budget, given both the scope and importance of their work. Their budgets should be increased. But there may be opportunities for synergies in the area of information-gathering, commissioned research and information storage and retrieval. The preparation of a common database of NGOs, as well as of public sector bodies, local, regional and national governmental departments and contact persons within such departments could be extremely useful. Such a database could include submissions by NGOs, commissioned research, and other information. Consideration of the committee reports under the other instrument may not always have been possible, because of differences between dates of ratification under both instruments of due to timing of submissions of State reports, but as subsequent rounds of monitoring take place—the Committee of Experts is now onto its second round and the Advisory Committee is almost there—such consideration may become possible. Finally, although there are significant differences between norms, certain concepts, in particular the territorial definition of the space of a particular community and the concept of sufficiency of demand, are important under both instruments, and the two committees may usefully enter into a dialogue as to how such similar concepts may be interpreted and applied.

Thank you for your attention.