

In the matter of proposed international legal action against

THE GERMAN STATE

EXECUTIVE SUMMARY OF LEGAL OPINION

A: Introduction

1. An international team of legal experts from Doughty Street Chambers [Professor Marc Weller, Steven Powles KC and Margherita Cornaglia] have been asked to provide a legal opinion to the 'Serbski Sejm' (Sorbian Parliament) on potential causes of action / complaints against the German state arising out of the alleged failure to guarantee the minority and indigenous rights of the Sorbs.
2. The Serbski Sejm have four primary concerns: (i) the passing of a status law, (ii) recognition of the Serbski Sejm's representative rights, (iii) funding for cultural and educational rights and (iv) recognition of indigeneity.

B: Sources of Applicable International Law

3. International law governs the relations between states and other international subjects. International legal obligations do not flow from a central, international law-giver, but obtain their character as 'law' through the consent of states.
4. Under the Basic Law, or Constitution, of the Federal Republic of Germany, customary international law standards can be applied directly as part of German law, including before German courts. The same holds true for treaties, provided that their provisions are sufficiently specific to allow for direct application without further transformation into German legislation.
5. International law can be based in treaties and conventions, in customary international law, or in general principles of law. Treaties and conventions can be fully universal, in that they attract the consent of all or nearly all states in the world. There is no single treaty addressing minority rights specifically that is fully universal. With respect to

indigenous rights, ILO Convention 169 on Indigenous and Tribal Peoples of 1989 is potentially of universal application. 24 states have ratified the Convention thus far, Germany being one of them.

6. The ILO Convention contains a legal definition of its scope of application, addressing:

... peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

7. Moreover, the Convention adds that 'self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.'

8. There are a number of other international instruments of universal aspiration that apply to the present context. These are either general or specialized international human rights conventions.

9. The International Covenant on Civil and Political Rights has achieved wide-spread international acceptance. The Covenant confirms the obligation of non-discrimination, and includes Article 27, expressly addressing minorities:

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.

10. Among the other, quasi universal international conventions that address more specific issues that may also be of particular relevance to minorities are, for instance, international conventions addressing the rights of the child, discrimination, or UNESCO agreements addressing aspects of education.

11. In addition to treaties, international law can be developed through 'soft law' provisions. The two soft law instruments are of particular relevance. These are the United Nations Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities of 1992 (UN General Assembly Resolution 47/135), and the United Nations Declaration on the Rights of Indigenous Peoples of 2007 (UN General Assembly Resolution 61/295).

12. Beyond the universal level, human rights tend to be developed through regional instruments. The European Convention on Human Rights and its Protocols provide a

very strong grounding for 'hard' human rights in their area of application. These can be enforced through the European Court of Human Rights. Moreover, a number of important specialized conventions have been adopted in that context.

13. Within the Council of Europe area, there is also one of the very few regional conventions addressing minority rights, the European Framework Convention for the Protection of National Minorities.

C: Political Participation and Self-Organization

14. The International Covenant on Civil and Political Rights guarantees the freedom of association of all, as provided in Article 22:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

15. Moreover, Article 25 provides, every citizen shall have the right and opportunity: 'To take part in the conduct of public affairs, directly or through freely chosen representatives.' The emphasis lies on 'freely chosen,' which emphasizes the entitlement to self-determination where the choice of mechanisms or associations for representation is concerned, and of course also the choice of representatives.

16. The General Comment of the Human Rights Committee, the authoritative body for interpreting the Covenant, has confirmed the link between Article 25 and freedom of association, in the sense that 'the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the right protected by Article 25.' (General Comment, Article 25). Again, political participation therefore includes a right to self-association.

17. The UN Declaration on the Rights of Minorities expands on this principle. It confirms that minorities have the right: 'to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.' Moreover, 'persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.' Specifically:

Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

18. Most importantly, persons belonging to 'minorities have the right to establish and maintain their own associations,' towards these ends. Again, this is directly opposed to any suggestion that the government should form or control such associations.
19. This is also reflected and expanded upon in Article 7 of the Framework Convention. Members of minorities 'may form political parties and/or organizations.' This would quite clearly include the Serbski Sejm which is political organization.
20. According to Article 15 of the Framework Convention:

The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.
21. The Advisory Committee on the Framework Convention for the Protection of National Minorities has previously addressed the issue of representation when considering the state reports of the Federation Republic of Germany. In response to the most recent, the 5th State Report, the Committee reiterated that 'when specific consultative mechanisms in respect of an individual national minority are set up, due regard should be paid to the diversity within this group. State parties are encouraged to periodically review the appointment procedures to make sure that the bodies concerned are as inclusive as possible ... and genuinely represent a wide range of views amongst persons belonging to national minorities.' (Quoted in AC 5th Report, para 244.)
22. The singular representative structure adopted by the Federal Republic of Germany appears inconsistent with the demands for transparency, diversity and regular review of the representative nature of its members. The present structure seems designed to reflect anything but 'a wide range of views' among members of the national minority.
23. In view of the fact that the Government of the Federal Republic of Germany claims to have established a fully adequate mechanism for political participation of minorities and for their participation in political life, the following concluding comment by the Advisory Committee, made specifically with reference to the Serbski Sejm, is noteworthy:

246. The Advisory Committee strongly encourage the authorities to create inclusive consultation processes which are facilitative and take into account different perspectives within national minorities.
24. There is plainly an expectation that the Government of the Federal Republic of Germany should moderate its position on this issue, particularly in relation to its recognition of the Serbski Sejm.

D: Overview of Procedural Avenues

25. In pursuing concerns at the international level, a plethora of mechanisms are available to the Sorbs within the United Nations ('UN') system, at European Union ('EU') level, before the International Labour Organisation ('ILO') and for breaches of rights protected under the European Convention on Human Rights ('ECHR').
26. The former, UN mechanisms, fall into two broad categories: treaty-based bodies and charter-based bodies. Treaty-based bodies monitor the implementation of the ten UN human rights treaties; access to complaints mechanism under the treaties is contingent upon state signatories accepting the competence of the treaty-based complaints mechanism, usually via ratification of an additional protocol.
27. Charter-based bodies include the Human Rights Council ('HRC'), Special Procedures, the Universal Periodic Review and Independent Investigations. The Special Procedures of the Human Rights Council are independent human rights experts who report and advise on country situations or thematic issues in all parts of the world. The Special Procedure relevant to the Sorbs' case is the Special Rapporteur on Minority Rights ('the Special Rapporteur'). The HRC and Special Rapporteur respectively operate a complaints mechanism and mechanisms to communicate grievances falling within the Special Rapporteur's mandate. There is also a complaints mechanism before the United Nations Educational, Scientific and Cultural Organization ('UNESCO'), which provides avenues open to the Sorbs.
28. Outside the UN system, mechanisms exist before the EU, before the Organization for Security and Co-operation in Europe ('OSCE') and before the ILO.
29. Our opinion sets out in detail the primary legal avenues available to national minorities seeking to enforce their rights at international level:
 - (i) Engagement with the Special Rapporteur on Minority Issues;
 - (ii) Complaints to the International Labour Organisation;
 - (iii) Mechanisms available under the European Union framework;
 - (iv) Mechanisms available under the Office for Democratic Institutions and Human Rights;
 - (v) Complaints to the United Nations Educational, Scientific and Cultural Organization ('UNESCO');

- (vi) Individual communications to one or more of the following treaty bodies:¹
- The Committee on Economic, Social and Cultural Rights, which oversees the implementation of the International Covenant on Economic, Social and Cultural Rights;²
 - The Committee on the Elimination of Racial Discrimination, which oversees the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination;
 - The Committee on the Rights of the Child, which oversees the implementation of the Convention on the Rights of the Child;
 - The Committee on the Elimination of Discrimination against Women, which oversees the implementation of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW').
- (vii) Complaints to the Human Rights Committee, which oversees the implementation of the International Covenant on Civil and Political Rights.³
- (viii) Complaints for violations of the European Convention on Human Rights to the European Court of Human Rights.

E: Conclusion

30. It is clear that a range of international procedural avenues are already available to the Sorbs in pursuing their aims. Others are contingent upon the exhaustion of domestic remedies. At this stage, it is very much hoped that the the German state will re-open discussions with the Serbski Sejm, and thereby obviate the need for any such steps.

Steven Powles KC

9 July 2023

Professor Marc Weller

Margherita Cornaglia

DOUGHTY STREET CHAMBERS

¹ These complaints require the exhaustion of domestic remedies.

² For the Committee on Economic, Social and Cultural Rights to have the competence to receive individual complaints, the State party concerned must have recognized the Committee's competence by ratifying the Optional Protocol.

Germany has not recognised the Committee's competence.

³ This complaints procedure requires the exhaustion of domestic remedies.