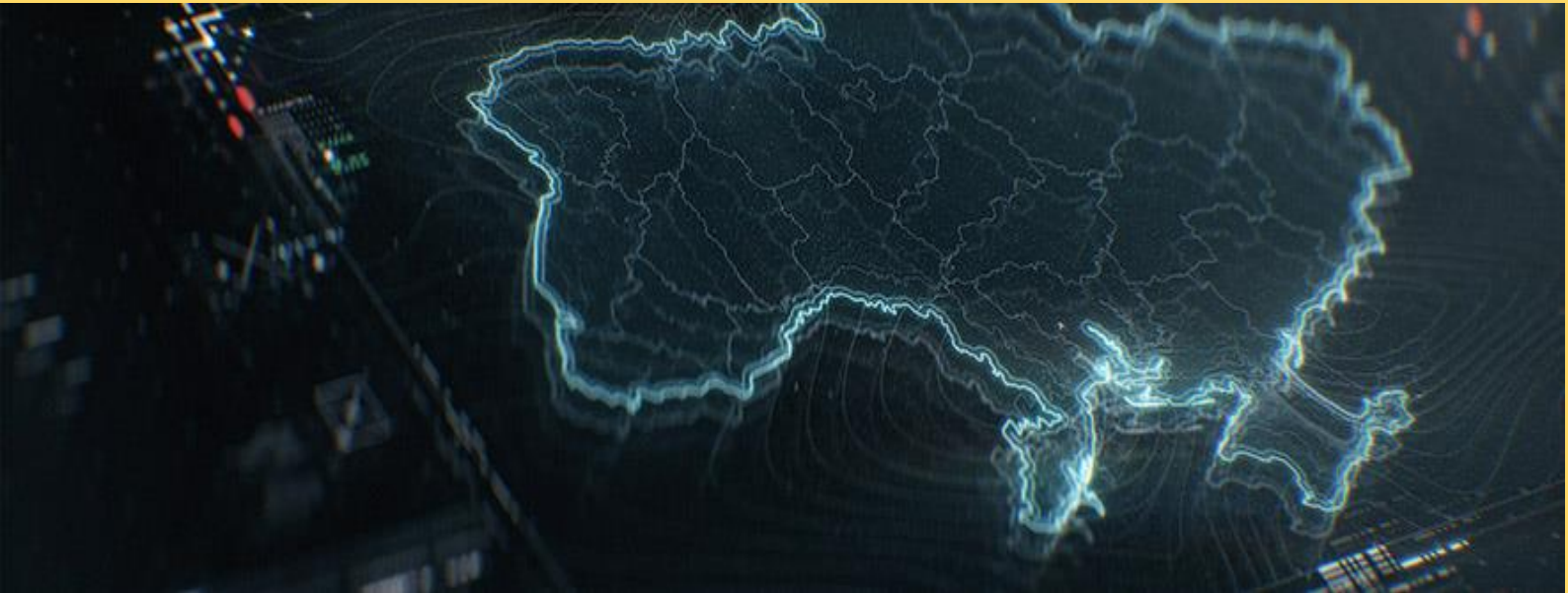




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# UKRAINE SETTLEMENT PROJECT



## **UKRAINE SETTLEMENT OPTIONS:** **Minority and Language Rights** By Kristin Henrard

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# UKRAINE SETTLEMENT OPTIONS PAPER:

## MINORITY AND LANGUAGE RIGHTS

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### A. INTRODUCTION

When identifying minority issues of most relevance to the war and peace negotiations between Russia and the Ukraine, a first step is the identification of the minorities concerned. As it stands there is no generally accepted legal definition of 'minority'. Nevertheless, a certain understanding has crystallized about core characteristics, namely having a distinct ethnic, religious and/or linguistic identity, being in a numerical minority position, having the wish to maintain a distinct identity and being in a non-dominant position. The requirement of 'nationality' (inter alia included in Special Rapporteur's [Francesco Capotorti's report](#) to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities) is no longer considered appropriate, particularly in case of state dissolution (see [Berkes](#)).

Looking at demographics, the latest official census (2001) (relied on in the 2022 [Council of Europe Project "Strengthening the protection of national minorities, in Ukraine"](#)) identifies Russians as the main minority group, with more than 15%. Other minority groups stay below 1% of the total population, some around 0.5% (Belarussians, Moldovans, Crimean Tatars and Bulgarians), several even smaller (Poles, Romanians, Armenians, Hungarians, and also Roma and Jews).

In relation to peace negotiations between Ukraine and Russia, the position and rights of the Russian minority are key. The Russian community in Ukraine is the largest outside Russia, and thus particularly important for kin-state Russia. At the same time, the history of Russian domination, also in terms of official language, makes Ukraine keen to promote its own identity and language, while not giving too strong a protection to the Russian ethnic and linguistic group. There is a particularly strong sensitivity about the position of the Ukrainian language in relation to the Russian language.

Having regard to the sensitivities of both Ukraine and Russia, it is important to 'fit' minority (language) rights that benefit Russians, into an overall frame of minority (language) rights. Minority rights are framed with many qualifiers that call for a *proportionate* adaptation to circumstances, particularly relative numerical strength and territorial concentrations of the groups concerned. The suitable (proportionate) protection of other minorities with neighboring kin-states (Romania, Moldavia, Bulgaria, Hungary), also having areas of relative territorial concentration, could thus facilitate negotiations for both sides, while contributing to regional security. In particular, [ongoing tensions with Hungary](#) related to the Hungarian minority have been noted, while [Romanians](#) and Moldovians have been asking for cultural concessions from Ukraine. Similarly, the protection of the [Crimean Tatars](#) as indigenous people, could also be

relevant from this ‘proportionality perspective’, especially given their concentration in Crimea, an area contested and occupied by Russia.

This options paper will outline the importance of minority rights and especially language rights for any peace negotiations between Ukraine and Russia, in light of international legal and soft law standards.

## **B. ROLE OF MINORITY AND LANGUAGE ISSUES IN NEGOTIATIONS**

The question of minority and language rights is bound to play an important role in peace negotiations between Russia and Ukraine. In relation to Crimea, the first region of Ukraine that Russia occupied, [Zalimas](#) analyses how Russia invoked ethnic reunification, under the guise of self-determination of the people of Crimea. In addition, [Ball](#) and [Arel](#) both underscore how Russia launched its more recent incursion into eastern Ukraine ‘on the pretext of protecting ethnic Russians and Russian speakers in the region’. Clearly, Russia’s kin-state connection will require due consideration.

During a considerable part of the Soviet era, both Russian and Ukrainian were considered ‘generally used languages’ in Ukraine. Since the 1920-1930s an increasing Russification took place and in 1990 Russian became the official ‘all Union language’. Since Ukraine’s independence in 1991, the country’s [Constitution \(Article 10\)](#) proclaims Ukrainian as the only state language, which is to be developed for use in all spheres of social life and throughout the entire territory. The article also guarantees ‘free development, use and protection of Russian and other languages of national minorities’. While this provision seems to offer a balanced position, everything depends on the respective regulation of the use of the ‘state language’ and the language rights of national minorities.

Ever since independence, a [hot debate has raged](#) in Ukraine about the status of the Russian language: accepting Russian as the second state/official language or countering the ongoing dominance of Russian in many (urban) areas. The 2012 Language law favored languages spoken by 10% or more of the population of a region or city, by granting such languages the status of ‘regional language’, while such languages could be used in courts, schools and government institutions. In the many regions/cities where Russian became ‘regional language’ it was not really necessary to learn Ukrainian. [It has been claimed](#) that the intended abolition of this law in 2014 was seen by Russia ‘as an aggressive gesture against the “Russian-speaking population” of Ukraine and later used as a pretext to justify the annexation of Crimea and military aggression in the Donbas’.

While abolition of the 2012 Language Law never eventuated, the [2014 Maidan revolution](#), mainly concerned with forging a new Ukrainian nation, triggered a shift in nationalism with undeniably negative effects on the Russian speaking population, particularly in Eastern Ukraine. Subsequently, several laws were adopted to strengthen Ukrainization in relation to: toponomy (2015); the media (2016), imposing 60% language quota; education (2017), imposing Ukrainian as the medium of instruction in state schools from the 5<sup>th</sup> grade onwards; and public institutions more generally (2017), by imposing ‘Ukrainian only’. Relatedly, Russian lost its status as ‘regional language’ in several regions and cities.

When the Constitutional Court declared on 28 February 2018, the 2012 Language Law unconstitutional ([1-1/2018](#)), this opened the way for a new Language Law. The [2019 Language Law](#) aims to ensure the functioning of Ukrainian as state language. The first step concerned language use by public authorities, and the medium of instruction in public schools. Subsequently, it has been extended to a range of spheres of public life, from health and science, to advertising, and to media and culture. Gradually, Ukrainian has been made compulsory in ever more spheres of life, each time with minor exemptions. Strikingly, these exemptions benefit the indigenous language Crimean Tatar and EU languages, but not other national minority languages, including Russian. Put differently, the 2019 Language Law clearly fulfills the constitutional obligation to ensure the comprehensive development and functioning of the Ukrainian language in all spheres of social life throughout the entire territory. However, it is questionable ([CDL-AD\(2019\)032](#)) whether the ensuing restrictions on the use and protection of non-EU minority languages are in line with the Constitution's guarantees of the 'free development, use and protection of Russian and other languages of national minorities'.

Both Russians and Ukrainians focus on protecting their respective languages as representative of their distinct identity. Russian rhetoric and Russian controlled media further converted the promotion of the Ukrainian language into a physical threat to ethnic Russians, requiring Russian intervention. When identifying key points for peace negotiations, the bulk of the issues will concern language rights, against the background of overarching principles concerning minority protection and minority rights. For both sides, and particularly for Ukraine, it is useful to put this discussion on Russian language rights within the broader picture of the treatment and rights of minorities in Ukraine, particularly minorities with neighboring kin-states.

## **C. LEGAL FRAMEWORK FOR MINORITY RIGHTS PROTECTION: OVERARCHING PRINCIPLES AND RELEVANT INSTRUMENTS**

This section addresses the legal framework for minority rights protection and highlights the centrality of proportionality considerations, which can be particularly useful during peace negotiations.

### **C.1 Overarching Principles of Minority Rights and Legal Standards**

Already in a [1935 Advisory Opinion of the PCIJ regarding \*Minority Schools in Albania\*](#) (par 48-52), the three overarching concerns of minorities, and the way these three concerns are interrelated, are identified, namely: **(real, substantive) equality, identity and participation (and integration) in the broader society**. The PCIJ's analysis concerned the Minorities Treaties set up in the League of Nations, but the reasoning is still relied upon when discussing the core concerns of minority protection measures today. The goal of the Minorities Treaties, to enable minorities 'living peaceably alongside that [majority] population and co-operating amicably with it', safeguards the minorities' *participation (and integration)* in the broader society. This participation goes hand in hand with 'preserving the characteristics which distinguish them from the majority', and thus the right to respect for minority *identity*. The Advisory Opinion ties these two concerns to the *equality* principle, and nicely shows their close interrelation. Furthermore, the PCIJ's understanding of the equality principle goes beyond mere formal equality, to encompass substantive equality. This understanding captures the wish of minorities to be treated identically to the majority (formal equality) in some respects, as well

as their desire to be treated differently in other respects, in order to take into account their specific characteristics and to protect and promote their separate identity. Indeed, real or substantive equality can require formal unequal treatment (see [Fredman 2001](#), 104-111).

Importantly, the right to equal treatment does not imply an absolute prohibition of differential treatment, nor an absolute duty to differential treatment. Instead, the ‘reasonable and objective justification’ formula implies substantial room for **proportionality** considerations, which also play a crucial role in relation to minorities’ fundamental rights enshrined in the Council of Europe’s instruments ratified by Ukraine: the European Convention on Human Rights (ECHR) and the Framework Convention for the Protection of National Minorities (FCNM). Furthermore, the ‘menu’ approach of the European Charter for Regional or Minority Languages similarly caters for proportionality considerations.

In addition to general human rights set out in, for example, the ECHR, several category specific minority rights have been developed for persons belonging to minorities, such as those in the FCNM. Undoubtedly, several general human rights are particularly important for persons belonging to minorities, including the right to equal treatment, freedom of religion, and fundamental rights geared towards the collective expression of a distinct identity such as freedom of expression, freedom of assembly and association. At the same time, the right to equal treatment in these general human rights is not clearly geared towards substantive equality, and the right to respect for a distinct identity is not really catered for either, particularly in relation to language. The added value of minority specific rights, and their relevance for Ukraine-Russian relations and peace negotiations is thus obvious.

The [FCNM](#) is the Council of Europe’s instrument that is geared most explicitly to the protection of minorities fundamental rights. Its core is captured in Articles 4, 5, 6 and 15, enshrining respectively the right to equal treatment, the right to identity, state duties to promote dialogue and tolerance, and the right to **participation** for persons belonging to national minorities. The remaining articles specify what this core implies in terms of rights that allow expression and/or promotion of the separate **identity**, including through access to the media (Article 9), and to education (Article 12). **Equality**, and more specifically substantive equality, is an overarching principle. Article 4 FCNM captures both dimensions of the right to equal treatment identified above, with special attention to the need to take into account the specific conditions of the persons belonging to national minorities, and the related state duty to adopt formal differential treatment (special measures) ([Henrard 2011](#)). While Article 5 FCNM acknowledges the legitimacy of a state’s quest for an integrated society, it emphasizes the prohibition of forced assimilation of minorities, which may imply a duty to adopt special measures to respect their right to a distinct identity. Article 5 thus points again to the importance of a balancing act between the respective interests of the state of residence and minorities (see [FCNM Explanatory Report](#)).

Proportionality considerations ‘work’ differently for minority rights in comparison to general human rights. General human rights, such as those in the ECHR, for the most part allow for limitations to their enjoyment. These limitations must be proportionate to the legitimate aim pursued by the state (‘necessary in a democratic society in the interests of ...’ (ECHR, [Articles 8-11](#)). In contrast, the minority specific rights, found in the FCNM, do not have limitation clauses. Instead, the rights formulations are replete with qualifiers, such as ‘as far as possible’, ‘where appropriate’, ‘if those persons so request and where such a request corresponds to a real

need’, and ‘in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers’. These qualifiers can be understood as referring to proportionality considerations, and thus balancing of respective interests.

Applying this to potential Ukraine-Russian peace negotiations, if the sides were to focus on questions of degree (proportionality) rather than outright yes/no, there would be considerable room for manoeuvre. Admittedly, opinions can still differ about what would be proportionate/reasonable in a given situation, but negotiations could work, as a first step, towards identifying parameters both substantive and procedural.

## **C.2 Relevant Soft Law Instruments**

This section zooms in on a range of soft law instruments that could constitute useful reference points in negotiations, as they flesh out the overarching principles and legal standards, and provide guidance on how to apply the equality, identity, and participation principles as modulated by proportionality considerations.

Prior to the FCNM’s adoption, the UNGA adopted in 1992 the first relevant international document with rights for persons belonging to minorities, namely the [UN Minorities Declaration](#). While not a legally binding instrument, the UN Minorities Declaration can be considered an interpretative guide to Article 27 of the International Covenant on Civil and Political Rights, which has been ratified by many states, including Ukraine and Russia. The provisions of the UN Minorities Declaration could thus be referred to as authoritative in negotiations.

Importantly, the overarching principles of equality, identity and participation are visible in the UN Minorities Declaration, as well as the guiding principle of proportionality (as to the exact protection levels), while these are further developed in the already mentioned FCNM. Article 1 of the UN Minorities Declaration enshrines the state duty to protect the minority existence and distinct **identity** (and the obligation to take the necessary measures), which is complemented by the duty in Article 4(2) to create favorable conditions for the expression and development of the distinct minority identity. Both dimensions of the **equality principle** (the right to equal treatment) are visible in Article 4(1), namely duties to counter invidious discrimination and where necessary special measures/duties of differential treatment aimed at ensuring substantively equal treatment with the rest of the state’s population. The focus of Article 6 of the FCNM on the promotion of tolerance and mutual understanding, as relevant towards effective equality, identity and participation, is to some extent present in the UN Minorities Declaration, where it addresses the promotion of knowledge about the history, traditions, language and culture of minorities in the sphere of education (Article 4(4)). The **participation principle** is also generously developed in the UN Minorities Declaration. Article 2(2) enshrines the right to **participate** effectively in cultural, religious, social, economic and public life, thus going beyond a simple reference to ‘public life’; while Article 4(5) dictates that full participation in economic life should be ensured. In addition, there is ample regard for the need for minorities to have a voice in decisions affecting them (Article 2(3)) and for their interests to be taken on board when national policies and programs are planned and implemented (Article 5). The latter is again a crucial reminder of the need to balance promotion of national identity and interests with sufficient protection of minority rights.

Other soft law standards developed by experts have also obtained a certain authority and could thus constitute useful reference points in negotiations. The [OSCE's High Commissioner on National Minorities](#) (HCNM) noticed early on in his work that he was often confronted with recurring issues, causing tensions between minorities and other groups in states, while the existing legal standards did not provide enough guidance. The Office of the HCNM began to develop thematic recommendations by independent experts, later to be endorsed and used in its work. These thematic recommendations or guidelines provide more detailed and refined guidance about the topics concerned, while confirming **equality, identity, participation and proportionality** as central reference points. Strikingly, all these recommendations, to different degrees, confirm the importance of communication in minority languages for the effective enjoyment of minorities' fundamental rights, and their optimal inclusion in the national society. Attention will be given to three sets of recommendations of relevance to the minority rights framework.

The [2008 Bolzano Recommendations](#) are of overarching relevance in the context of the Ukraine-Russia conflict, including its possible ripple effects, as this plays out in the post-Soviet setting with substantial Russian minorities in states emerging from the USSR's dissolution. Indeed, the Bolzano Recommendations were developed because of concerns for these kinds of tensions. They confirm the obligations of the state of residence towards minorities, such as the right to preserve and develop their linguistic identity, which may require special (substantive equality) measures (Recommendations 5 and 6) tailored by proportionality considerations. The Bolzano Recommendations also remind states of the importance of societal integration, which would imply that minorities have an effective voice at all levels of governance (Recommendation 7). Additionally, these recommendations signal that the kin-state needs to respect the principle of territorial integrity and should not undermine good inter-state relations (Recommendations 10, 11 and 13). This in itself points to the importance of proportionality considerations in shaping the respective expectations of kin-states and kin-minorities.

Relatively early on, the HCNM Office also confirmed the crucial importance of minority participation in 'public life' ([1999 Lund Recommendations](#)) for their integration in society, without forced assimilation (with respect for their distinct identity). These recommendations consist of two strands, one focusing on 'participation in decision-making' and the other on 'self-government'. The 'participation in decision-making' strand identifies state obligations to ensure 'that opportunities exist for minorities to have an effective voice at the level of the central government'. In this respect, Recommendation 6 flags the relevance of 'special (substantive equality) measures for ... the provision of public services in the language of the national minority'. In addition, states should establish advisory or consultative bodies, addressing inter alia language issues (Recommendation 12). The self-governance strand identifies, both for territorial and non-territorial self-governance arrangements, 'the use of minority languages' as a matter susceptible of regulation that is either shared with central authorities or with primary or significant authorities for minority self-governance (Recommendation 18 and Recommendation 20).

Central to the 2012 [Ljubljana Guidelines](#) is the understanding that integration (and the inherently related 'participation') should not involve forced assimilation, but requires respect for distinct minorities (Guideline 10). Guideline 3 confirms that effective protection against invidious discrimination and substantive equality are essential for effective integration. Regarding minority linguistic identity, the Guidelines confirm the Oslo Recommendations on

the legitimacy to promote the state language, while discouraging a system of sanctions. The state duty to respect the linguistic rights of minorities translates (Guideline 42) into a preference for positive incentives and the promotion of cross-community dialogue (Guideline 45). The Integration guidelines also confirm the preceding recommendations concerning minority languages in education and in media (Guideline 45 and Guideline 49).

### **C.3 A Framework for Minority Rights Protection in Ukraine**

Discussion on minority language rights needs to be set against the background of the overall minority rights framework. In its [latest review](#) of Ukraine's performance in 2017, the Advisory Committee on the FCNM highlights the lack of a proper overall legislative framework, while for the right to equal treatment, an institutional structure and proper enforcement of the norms are lacking (para 49, 56). State support for minority cultures is criticized for being insufficient and not responsive to real needs ([para 72](#)). Minority communities justify their reliance on kin-states because of the weak protection by the state of residence. The Advisory Committee also flags the need to invest in promoting mutual understanding and tolerance, with specific attention for an inclusive curriculum (education) (para 141). Regarding the crucial participation theme, the Advisory Committee notes in 2017 that the 'system of national minority protection in Ukraine lacks any guaranteed and effective participation of minorities in elected bodies' (para 169), while specialized bodies to promote minority participation in public affairs do not have the necessary resources or competences ([paras 176-177](#)).

Put differently, peace negotiations in regard to minority language rights should acknowledge the preliminary importance of developing a legislative and enforcement framework regarding minority rights more generally, with due participation of the minorities concerned.

## **D. LANGUAGE RIGHTS: PROTECTING RUSSIAN AS MINORITY LANGUAGE VS PROMOTING UKRAINIAN AS STATE LANGUAGE**

### **D.1 International Legal 'Frame'**

The centrality of language rights in tensions between Ukraine and Russia is mirrored by a strong focus on language rights in minority rights provisions and soft law standards alike.

Turning first to state negotiated standards, three paragraphs of the UN Minorities Declaration concern language rights. Article 2(1) enshrines the freedom to use one's minority language in public and private, while Article 4(2) identifies a state obligation to support the development of minority languages, and Article 4(3) addresses the teaching of/in the minority languages. The FCNM includes several linguistic rights, several of which take up and confirm language rights enshrined in the UN Minorities Declaration. Thus, the FCNM protects the expression of ideas in the minority language (Article 9) and its use in public and private (Article 10). The FCNM goes beyond a provision on language in education (Article 14), and also regulates language use in communication with public authorities (Article 10) and language use for names and topographical indications (Article 11). The latter provisions are always 'qualified', and thus support proportionality considerations (and the related room for negotiations).

[The European Charter on Regional or Minority Languages](#) may not enshrine rights for speakers of languages, it does provide a menu of obligations concerning language use in a broad range of spheres, including education and public authorities (Article 8 and Article 10), judicial



authorities (Article 9), media (Article 11), cultural activities (Article 12), and economic and social life (Article 13). Importantly, states have considerable discretion in the determination of what languages are covered and what level of obligation they accept in this regard (Article 2). The supervisory practice by the [Committee of Experts](#) has confirmed the [Explanatory Report](#)'s point that the level chosen should be 'according to the situation of each language' (para 22). The Explanatory Report also highlights that the Charter applies predominantly to territorial languages, in the sense of languages with a certain concentration in a particular geographical area (para 33), as certainly applies to the Russian language in Ukraine.

Strikingly, the [first two thematic recommendations](#) endorsed and published by the OSCE's HCNM confirm the central importance of language rights. The centrality of language issues is confirmed in the 2003 Guidelines for minority languages in media, while the 2013 Guidelines have several guidelines focusing on the use of minority languages in digital media. Furthermore, all the other thematic recommendations confirm the importance of communication in the minority languages for the effective enjoyment of minorities' fundamental rights, and their optimal inclusion in the national society. The Guidelines concerning Policing in Multi-Ethnic Societies emphasize the importance of communication in the minority languages by the police, flagging implications for recruitment policies and training. Similarly, the Graz Recommendations on Access to Justice for persons belonging to national minorities, invite states to facilitate proceedings and court documents in the minority languages. While the Lund Recommendations concerning participation of national minorities in public life invite 'special measures for ... the provision of public services in the language of the national minority'; language issues are also considered to be areas about which minorities can have (a measure of) self-governance. The Ljubljana Guidelines affirm the core idea of integration as one that goes hand in hand with respect for the maintenance of separate minority identities. This leads to the confirmation of several of the linguistic components of the preceding recommendations and guidelines.

In the following sections, several 'language' themes will be discussed in turn, each providing further insights into the relevant standards and legal developments in Ukraine, and their assessment by international supervisory mechanisms. Regarding the latter, it is important to realize that the latest Opinions of the supervisory committees on Ukraine took place before the adoption of the 2019 Language Law. The Council of Europe's Venice Commission's findings on that law will be discussed at more length.

## **D.2 State Language and Minority Languages: Overarching Principles and their Assessment in Ukraine**

[The 1998 Oslo Recommendations](#) provide useful pointers for peace negotiations concerning language rights, as they take up several of the linguistic themes, also visible in legal standards, in relation to questions of names/topographical indications, media, economic life, administrative and judicial authorities. To some extent these Recommendations also make explicit the standards in relation to NGO's and independent national institutions. Throughout the Oslo Recommendations, it is obvious that international fundamental rights, as interpreted dynamically, leave room for proportionality considerations, which allow the interests of both sides to be balanced.

It should be noted that some linguistic rights are stronger, in the sense that there is less room for 'balancing'. This is the case for the official recognition of names in the minority language,

and the right to operate NGOs and private enterprises in a minority language (Principle 1, Principle 6, and Principle 12). Other rights, requiring more active state support, as they imply the provision of documents and services in the minority language, are strikingly more qualified by proportionality considerations.

The following sections discuss the extent to which the overarching principles of equality, participation and proportionality are reflected in Ukrainian laws and practice, having regard to international supervisory practice.

### ***1. Balance - Proportionality***

A particularly important point in the HCNM Recommendations concerns the required balance between a state's desire to promote its state language and 'reasonable and fair accommodation of the needs and interests of the different linguistic groups in society' (Tallinn Guideline 13). The need to strive for balance between these two concerns, and the underlying *proportionality* consideration, is a steady component in the international supervisory practice (see [2017 FCNM Advisory Committee Opinion](#), para 118, and the [Venice Commission Report on the 2019 Ukrainian State Language Law](#), paras 31-32).

In this respect, Ukraine's ratification of the European Language Charter reveals a rather positive baseline towards linguistic minorities in that it recognizes 13 languages under [Part III of the Charter](#). Furthermore, in relation to the Russian language, the [2017 Committee of Experts Report](#) concluded that the overwhelming majority of the commitments on ensuring the use of the Russian language in Ukraine are satisfied (para 87). Admittedly, at that time, the 2012 Language Law was still in effect, allowing minority languages to be recognized as 'regional languages' when spoken by at least 10% of the population of a territorial administrative unit.

The perceived preponderance of Russian in the public space inspired the 2019 Language Law, with its stronger focus on promoting Ukrainian as state language to strengthen Ukrainian identity. This law makes the use of Ukrainian obligatory in most aspects of public life (and is being gradually rolled out). The timing of the law further confirms the close interrelation with the tensions between Ukraine and Russia and the important place of language themes. The 2019 Language Law [was passed](#) the day after Russia enabled applications for Russian passports by residents of separatist territories in east Ukraine, and thus constituted a clear countermove which triggered severe criticism from the Kremlin.

While there is room for exemptions and deviations (using a different language) by mutual agreement, the [Venice Commission](#) report does conclude that in several respects the 2019 Language Law [does not strike a fair balance](#) between protecting the national identity and Ukrainian language, and safeguarding the rights of linguistic minorities. The Commission also problematizes the use of administrative fines for using minority languages and calls on Ukraine to promote the new state language through positive incentives instead of punitive measures (paras 127-129). This position is also [confirmed](#) by the FCNM Advisory Committee (para 118). Particularly relevant for peace negotiations, the Venice Commission highlights that this positive approach would be beneficial for Ukraine and the Ukrainian wish to promote its national language and identity, as it would be more effective (para 129). Underscoring the extreme complexity and sensitivity surrounding language issues in Ukraine (para 132), the Commission confirms the central role of the proportionality principle and the need to balance respective interests (para 136).

## 2. *Equality*

The 2019 Language Law also received considerable criticism in terms of equal treatment. The Venice Commission reiterates in its [2019 report](#) the criticism voiced in relation to the 2017 Ukrainian Education law about differential treatment between categories of minority languages. While the Commission acknowledges that differentiation is possible, this requires a reasonable and objective justification for it to respect the prohibition of discrimination ([para 41](#)). The Commission identifies three levels of protection in the state language law and accepts that the highest level of protection goes to indigenous minorities without kin-states ([para 43](#)). However, it does not accept the justification of differential protection for minority languages that are EU official languages and others, including Russian and Yiddish ([paras 42, 44](#)). While the past oppression of Ukrainian justifies positive measures to promote the national language, this should not go hand in hand with the disregard of rights of linguistic minorities ([para 44](#)). Concretely, the Commission suggests that the level of protection for minority languages that are EU official languages should be extended to other minority languages.

## 3. *Participation of Minorities*

A third important and recurring criticism regarding Ukraine's state language law concerns the lack of proper minority participation in the drafting process. The Venice Commission does not accept that this participation can be realized in the future law on the rights of minorities: these two laws should have been developed in tandem. The [1999 Lund Recommendations](#) highlights that language issues are a topic requiring minority involvement in relevant decision-making, as it is a crucial dimension of their distinct identity ([Recommendation 12](#)).

### **D.3 Language Rights in Spheres of public Life**

#### **1. *Education***

The teaching of or in the minority language has been a crucial element of minority protection, because of its important role in passing the language from one generation to the next. This is reflected in the UN Minorities Declaration (Article 4(3)) and the FCNM (Article 14). In addition to the identity element, there is also a crucial equality argument made by [social linguists](#): to ensure the equal psycho-social development of children, they need education in their mother tongue, particularly throughout the first phase. At the same time, the provisions acknowledge the resource intensiveness of providing education in minority languages in the multiple qualifiers, opening the door to proportionality considerations. These identity, equality and proportionality considerations concerning minority language education are reflected in the [1996 Hague Recommendations](#). The first paragraph also emphasizes the importance of acquiring a proper knowledge of the state language for minorities' integration.

[The 2017 FCNM Advisory Committee Opinion](#), released prior to the 2017 Law on Education, paints a positive baseline for teaching in and of minority languages ([para 152](#)), remarking that several schools teach in minority languages and there is sufficient attention to quality control of this teaching. In relation to the tensions with Russia, the Committee notes that the Russian language is actually strongly represented. The Committee of Experts under the Language Charter, in its [2017 opinion](#), confirms the high level of protection for Russian (and some other languages with neighboring kin-states), but notes a stark difference for other minority languages ([para 17](#)). The Committee invites Ukraine to develop a more structured and pro-active approach ([paras 18-20](#)).

The [Venice Commission](#) was critical about the 2017 Law on Education because of the three differential levels of protection it provided for minority language education, where the lowest level includes Russian and other non-EU minority languages. The low level of protection for education in these languages [would fall below](#) the required standard, and the differentiation would not be justifiable (and thus discriminatory). This division into three categories of languages is repeated in the 2019 Language Law and is similarly criticized by the Venice Commission as discriminatory. The Commission opines that there is insufficient attention for secondary education and beyond, while it notes a lack of legal certainty for parents (leaving too much power to education authorities concerning the amount of time and subjects taught in the minority language).

Considering the important identity and equality considerations inherent in education in the minority language, as well as its crucial socialization function (for integration and participation), finding a balanced and structured approach enabling sufficient education through the minority language medium (at least basic school level of education), while ensuring optimal knowledge and proficiency in the state language, seems key.

## **2. Public Authorities**

The [1998 Oslo Recommendations](#) confirm what is visible in Article 10(2) of the FCNM, that communications by public authorities in the minority languages are strongly qualified by proportionality considerations, requiring sufficient numerical presence (territorial concentration) and/or traditional presence. The latter requirements are arguably satisfied for the Russian speaking minority in several regions of Ukraine.

The particular importance of language issues for minorities is confirmed in the [1999 Lund Recommendations](#). In regard to ‘participation in decision-making’, states should establish advisory or consultative bodies, addressing inter alia language issues (Recommendation 12). Relatedly, the self-governance strand identifies, both for territorial and non-territorial self-governance arrangements, ‘the use of minority languages’ as a matter susceptible of regulation that is either shared with central authorities or with primary or significant authority for minority self-governance (Recommendation 18 and Recommendation 20). In addition, Recommendation 6 flags the relevance of ‘special measures for ... the provision of public services in the language of the national minority’. Provision of services in the minority languages is thus considered to improve the equal and effective enjoyment of these services.

Similar ideas concerning the use of minority languages by public officials and about representativeness of public officials can be found in the [2006 Recommendations on Policing in Multi-Ethnic Societies](#) and the [2017 Graz Recommendations on Access to Justice](#). The former may not have a strong focus on linguistic issues, it does highlight the importance of suitably training police staff and developing communication with minorities. In this respect the ‘capability to communicate with minorities in minority languages, wherever possible by recruitment and training of multilingual staff’ is put forward (Policing Recommendation 13). The capacity to communicate in minority languages is also promoted by ensuring the composition of the police includes minorities (Recommendation 4), thus ‘reflecting the diversity of the population’. The importance of a representative judiciary, in that it reflects the diversity of the population, is similarly underscored in the 2017 Graz Recommendations (Recommendation 5). Recommendation 3 confirms the minimum ‘due process’ standard of national minorities taking part in proceedings in a language they understand. At the same time,

the recommendation clarifies that states should ‘preferably’ strive for the participation of minorities in judicial proceedings in their own language.

The [2017 Opinion of the Committee of Experts on the European Language Charter](#), preceding the 2019 Language Law, was rather positive about the use of Russian by administrative authorities and judicial authorities (paras 22-24). Regarding other minority languages, the Committee called for a more structured and pro-active approach aimed at encouraging the use of minority languages in the administration (paras 25-28) and before judicial authorities (paras 21-22).

[The Venice Commission’s evaluation](#) of the 2019 Ukrainian Language Law is rather critical, both in relation to the working language of public authorities, and proficiency requirements for access to state positions. The Commission underscores that Ukraine now falls below its commitments under the Language Charter, as the numerical threshold they use is too high (para 58-60). Proficiency requirements for official positions may have a legitimate aim, but they do need to be proportionate, in being tailored to the requirements/specificities of different positions (para 52-54), and not be overly demanding. The latter would also be difficult to reconcile with the right of minorities to participate in public life (FCNM, Article 15).

Older supervisory practice clarified that the stronger presence of Russian speakers could justify a higher level of protection/promotion of the Russian language in comparison with other minority languages, as long as the latter also benefit from a reasonable level of protection.

During peace negotiations, reference to the comparative/proportionality scale could helpfully frame the formulation of better (reasonable) protections for the Russian minority, along with a proportionate protection of other minorities with a neighboring kin-state. The latter could have a beneficial impact on regional security more generally.

### **3. Media**

Visibility and representation in the media are important for minorities in at least two respects. First, it contributes to protecting and promoting the distinct minority identity. Second, it enhances public knowledge and understanding of minority identities and languages, and acknowledges their status as part of the national society, thus contributing to mutual understanding, inclusion and integration. It is thus not surprising, therefore, that minority specific international standards include access of minorities to their own media channels in their own languages, as well as the representation and presentation of minorities, and their cultures, religions and languages in public media channels.

Article 9 of the FCNM confirms that freedom of expression also encompasses the free choice of language to express one’s ideas. Furthermore, minorities are ensured non-discriminatory access to public and private media. Paragraph 4 even identifies a positive obligation to adopt ‘adequate measures in order to facilitate access to the media for persons belonging to national minorities’, confirming the overarching importance of the promotion of tolerance and cultural pluralism. In terms of equal (and proportionate) access to media and ensuing representation, the [1998 Oslo Recommendations](#) underscore that the ‘amount and quality of time allocated to broadcasting in the language of a given minority should be *commensurate* with the numerical size and concentration of the national minority, and appropriate to its situation and needs’ (Principle 9, emphasis added).

According to the [2003 Guidelines on the Use of Minority Languages in the Broadcast Media](#), freedom of expression, as a general human right, encompasses the right to express one's ideas 'in a language and media of their choice without interference' (Principle 1). The role of media in the minority language for protecting minorities' identity is confirmed throughout the guidelines (Principles 2-3 in particular). The prohibition of discrimination and state duties to adopt special measures towards effective equality are also confirmed in this respect (Principle 4). Identity and equality considerations in relation to media need to be balanced with a state's wish to promote a particular language, as national language. Principle 10 underscores that this should 'not impair the enjoyment of the rights of persons belonging to national minorities'. Hence, Principle 11 puts the proportionality principle center stage of any regulation of language use in the media, by pointing to the relevance of characteristics of the media concerned, but also the 'rights, needs, expressed desires and nature of the audiences affected, including their numerical size and geographical concentration'. It is important that these guidelines emphasize the positive state obligations aimed at the substantively equal support of broadcasting in minority languages, which can take several forms, namely access to broadcasting, subsidies and capacity building (Principle 14).

In 2013 an additional set of Guidelines was published on [National Minorities and the Media in the Digital Age](#). While the content is not focused on linguistic issues, these are present throughout. Guideline 1 confirms that freedom of expression encompasses the right to 'seek, receive and impart information, in the language of their choice'. Guideline 7 flags state obligations to 'support and facilitate the production of content by and for national minorities, including in their own languages', while [Guideline 9](#) adds state duties to 'promote media and information literacy, including in the languages of national minorities'.

Particularly relevant for tensions between Ukraine and Russia in relation to the Ukrainian regulation of languages, the 2013 Guidelines confirm the importance of balancing a state's desire to promote the state language with the adequate protection of the linguistic rights of national minorities, to protect and promote their linguistic identity. Securing the latter implies that language quotas should not unfairly restrict the use of national minority languages (Guideline 14). Relatedly, licensing schemes should include, as one of the relevant criteria, 'the service of national minority communities, including shared and dedicated channels and/or channels or programming in the languages of national minorities' (Guideline 25). In order to secure the equal and effective inclusion and participation of minorities, Guideline 16 requires states to translate public (service) announcements in the languages of the national minorities, and disseminate them 'in an equitable and non-discriminatory manner through a range of media, including minority media'.

Turning to developments in Ukraine, the [Venice Commission](#) in its 2019 Opinion is particularly critical about the disproportionately high language quota requirements, certainly for private broadcasters (para 97). It also flags the chilling effect on publishing in minority languages of the requirement to have Ukrainian translations for the print media (para 100). Similarly, in its latest opinion, the [FCNM's Advisory Committee](#) urges Ukrainian authorities to reconsider their rigid approach to quota requirements in broadcasting media (para 110). Importantly, this is not only considered important for linguistic minorities, but also for the broader society since minorities and majority can benefit from a diverse but shared media space (para 110). The Committee of Experts on the Language Charter (para 32) and the FCNM's Advisory Committee (para 114) both express concern about the lack of clear procedures and

rules for financial support of newspapers in minority languages, which leads to very few newspapers benefitting from public support.

#### ***4. Personal Names and Topographical Indications***

Finally, it is striking that the regulation of personal names and topographical indications in minority languages has been explicitly included in the minority specific standards in Europe (both the FCNM and the European Language Charter). For both minorities and states, these are important symbolic matters: for minorities, they concern their inclusion with recognition of their distinct identity; for states, they concern recognition of the national linguistic identity. At the same time, the relative ‘strength’ of these minority rights needs to be underscored. The right to official recognition of names in the minority language is formulated strongly, similar to general human rights; whereas, having topographical indications in the minority languages is strongly qualified by proportionality considerations, given it requires more active state support and resources.

The actual practice in Ukraine has been found wanting by the [FCNM’s Advisory Committee](#). This is particularly striking for the recognition of personal names in minority languages also because the national language law recognizes the strength of this right (paras 130-134). The Advisory Committee welcomes the positive approach in the legal framework, of providing for toponyms in minority languages alongside the Ukrainian language (bilingual signs), at least in those municipalities with at least 10% minority language speakers (paras 135-137). However, the Committee is critical of the de facto lack of state support, as the cost is borne by local government, which does not have a budget for this. The end result is that toponyms that are only in Ukrainian, a matter also criticized by the [Venice Commission](#) in its 2019 Opinion.

#### **E. CONCLUSION: IMPLICATIONS FOR PEACE NEGOTIATIONS**

As the historical background in Section B demonstrated, one of the main underlying tensions of the armed conflict is between, on the one hand, the wish and concern of the Ukrainian people to full self-determination as a people with a distinct state and official (state) language, and on the other, the Russian concern to counter that development, allegedly in order to protect the Russian minority living in Ukraine. The Ukrainian goal to forge a distinct Ukrainian nation has emphasized strengthening the Ukrainian language as state language. Legislative and policy changes to realize those aims triggered unrest amongst Russian communities. Russia’s reaction can be seen to reveal not only a concern to safeguard the de facto dominant position of the Russian language but also its desire to maintain overall Russian control in the territory concerned.

Put differently, while the core controversy is the respective place/position/power/rights of the Ukrainian and Russian ethnic group in relation to Ukrainian territory, the ‘issue’ around which most mobilization took place is the status of the respective languages and related language rights. Hence, language rights in the framework of fundamental rights of minorities will need to be addressed in the peace negotiations.

The preceding discussion of international legal standards points to several elements of relevance for peace negotiations. Ukraine could seek to demonstrate its willingness to commit to ‘its side of the bargain’ by offering appropriate protections for the Russian minority in its

territory. The overall size of that minority is much bigger than any other minority (18% versus less than 1% of the total population). Even when one emphasizes that protection of the Russian minority should not be disproportionately higher in comparison with other minorities, the relative numbers of the Russian minority would warrant a high level of protection. In this respect, Ukraine will need to acknowledge that the Russian minority, as one of the several minorities with kinstates in its territory, is still special because of that strong numerical size, and traditional presence.

Although proportionate protection of the Russian minority may be less than what is demanded by the Russian side, it would be in line with Ukraine's international obligations, and could form part of a more general framework concerning minority protection with appropriate standards and institutional backup. This approach not only ensures the longevity of the agreed standards, but also promotes overall regional security (as it also benefits minorities of other regional kinstates). Indeed, balancing the desire to protect the Ukrainian national identity with suitable protections for minorities in Ukraine is key, particularly to appease neighboring kinstates. The international supervisory practice has further clarified that minimum percentages of population requirements should not be set too high, while procedural hurdles should not be too demanding either ([Third Thematic Commentary FCNM \(Language rights\)](#), paras 55-58, 65-67 and 74).

Ensuring the equality, identity, and participation principles, while taking into account proportionality considerations, also enables Ukraine to tailor the norms/provisions to the specific circumstances of its regions. When the rights would be resource intensive, such as language rights, relative numbers and territorial concentrations determine what can reasonably be expected from a government. This confirms the possibility of differential levels of protection between regions, each time depending on relative territorial concentrations.

When peace negotiations invite Ukraine to develop its legislative framework regarding minorities, it can deal with the particular case of the Russian minority within that broader framework, putting proportionality principles center stage. Proportionality considerations create negotiation space for both sides, to work through concrete measures that may secure or enhance minority identity, substantive equality, and participation/inclusion in society, while protecting and promoting Ukraine's national identity.

The supervision of Ukrainian practice on minority rights protection, and particularly minority language rights, has revealed several critical assessments of the status quo, which can be taken on board for negotiations. For minority rights protection in general, the lack of a general regulatory framework has been highlighted, as well as a lack of institutions to ensure proper implementation of laws and policies. Regarding Ukrainian language laws, the supervisory bodies have been critical about the working language of public authorities, and the proficiency requirements for access to state positions, which are too restrictive for minority languages, and certainly the Russian language. In relation to education in minority languages, the current differentiation between categories of minority languages, to the detriment of Russian, is criticized and thus invites revision. Media laws and particularly the quota system, and requirements with potential chilling effects, also invite revision.

In all respects, peace negotiations could lead to commitments undertaken by both sides, which cater for the Ukrainian desire to promote its language and identity, as well as the Russian minority's wish for an appropriate level of protection. The latter could, in turn, be an important trigger towards the development of a more appropriate legal framework for minority and



language rights in Ukraine, with proper minority participation in line with the HCNM's Lund Recommendations. Regarding the respective responsibilities of the kin-state and the state of residence of the minorities, the HCNM's Bolzano Recommendations could provide useful pointers.

There will undoubtedly be differences of opinion about what qualifies as the appropriate level of protection. Nevertheless, the legal frame and related principles provide both sides with important negotiation space.