



## **INTEGRATION THROUGH PARTICIPATION FACING CHALLENGES TO MINORITY CONSULTATION**

***Roundtable Discussion – 17-18 March 2022***

***University of Glasgow & Liverpool John Moores University***

The event examined factors conducive to effective minority participation in decision- and policy-making at different levels of governance and in transborder cooperation. It considered the role of the OSCE High Commissioner on National Minorities (HCNM) in these processes, and on how OSCE participating states may facilitate inclusiveness of consultative mechanisms as part of their due diligence responsibilities. The event was part of a project entitled 'Integration through Minority Participation: Addressing Challenges to Social Cohesion in Post-Covid Europe', implemented by Central and East European Studies, University of Glasgow, and the Centre for the Study of Law in Theory and Practice, Liverpool John Moores University.

The event examined 'effective participation' in its multiple variants and with reference to HCNM standards, most notably:

- Lund Recommendations on the Effective Participation of National Minorities in Public Life
- Ljubljana Guidelines on Integration of Diverse Societies
- The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations

Additional principles on minority participation were also taken into account, particularly the Council of Europe's *Thematic Commentary No. 2: The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, under the Framework Convention for the Protection of National Minorities.

As the war in Ukraine started shortly before the event, it was decided to also incorporate a session on the conflict and the repercussions on national minorities in Ukraine and the region more broadly.

The event will be followed by a second (hybrid) workshop, to be held in Liverpool on **22 June 2022**.

This report summarises the main themes discussed during the event. It is divided into two parts:

- 1) effective participation and consultation;
- 2) national minorities in interstate and international relations;

## EFFECTIVE PARTICIPATION AND CONSULTATION

The first day of the workshop involved discussions on three aspects of participation (with a focus on consultation): existing challenges; internal pluralism of consultative bodies; and external pluralism. Below are the main themes that emerged from the discussion.

### Interconnectedness of minority standards and mainstreaming of minority rights

The starting point of the discussion was the interconnectedness of the three sets of HCNM recommendations/guidelines and, consequently, the balance of participation, integration and external kin-state engagement. A kin-state may promote minority protection but also, in some cases, inhibit societal integration in the state of residence. Thus, the three sets of standards have to be treated as complementary and mutually reinforcing.

It was noted that the Lund Recommendations are particularly challenging and complex, for a number of reasons:

- from the core principle of minority participation, they radiate to encompass all areas of policy;
- they relate to participation in all state bodies (not just participation in parliament and consultative bodies);
- they relate to the *process* of participation, while ‘objectives’ remain somehow undefined (see also below, ‘Translating ‘process’ into ‘objectives’ and ‘outcomes’”).

Moreover, minority participation does not only involve participation in matters that directly affect minorities.<sup>1</sup> Minority communities are a constituent part of society, and should be in a position to participate in cultural, social and economic life and in public affairs within a state. Additionally, matters that ‘affect’ minorities relate to a broad range of issues; for example, territorial administrative reform substantially affects minorities, even if not directly related to education, culture, language (given administrative reform’s ramifications into these policy areas). Then, the participants noted the importance of **mainstreaming** minority rights, transcending what are normally perceived as ‘minority issues’ in a narrow sense. There was a warning against compartmentalising issues and policy areas, to instead highlight their connections with, and impact on, minority communities.

Similarly, it was noted that, while ‘minorities’ are normally defined in relation to their language, culture and religion, a minority community is in fact ‘more than’ that. For example, individual members of a minority community position themselves differently in relation to political parties, which results in high levels of internal diversity. The objective existence of minority languages and cultures shared by members of a community should not cause one to overlook a group’s internal diversity, and the need for a nuanced, pluralistic representation of views. The participants referred to examples of measures that facilitate the representation of different political views within a minority advisory body (e.g. the Swedish-speakers Assembly in Finland) and through mainstream political parties, financial bodies and participation in the economic life of the country.

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<sup>1</sup> Article 15 of the Framework Convention for the Protection of National Minorities (FCNM) states:

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. [italics added].

## A balance of regulation and self-regulation in minority affairs

In principle international standards (regulation) and *self*-regulation are not incompatible; international law recognises the internal diversity of groups (e.g. jurisprudence of the European Court of Human Rights) and international legal standards can provide a sufficiently flexible framework to allow for internal self-organisation. In this sense, forms of regulation and *self*-regulation are complementary and can be mutually reinforcing.

The participants noted that the state has a duty to intervene when mechanisms for the accommodation of minority interests, such as consultative bodies, are hijacked by ethnic entrepreneurs. In all other cases, persons belonging to minorities should be free to self-organise on the basis of the right to freedom of association. At the same time, there are a number of complications, as it may be unclear whether a system has indeed been hijacked by a narrow elite. It might also be difficult to determine: if the interests of the group as a whole are indeed represented (because of the complexity of the group itself and in the presence of a descriptive form of representation); whether the due diligence responsibility of a state has been exhausted (when the state has done 'enough' to facilitate the representation of a group's internal diversity and varied concerns).

A system that is overly flexible can result in a lack of institutionalisation. This can lead to ineffectiveness, an inability to pin down the body's competencies and obligations, lack of accountability mechanisms and lack of trust in the institution. Excessive flexibility can also result in the failure to establish targets and clear objectives: in this case, a body may look like it provides consultation (a *process* of consultation), but there are no means to evaluate whether it is effective (see also 'Translating 'process' into 'objectives' and 'outcomes'').

On the other hand, it was noted, a system that has is rigidly regulated can create stultified systems of consultation, and limit the freedoms of the group members (particularly in authoritarian countries, where there can be issues of co-optation of minority representatives, and control of appointments or elections). Overly formal mechanisms can lead to a tendency to simply 'tick boxes' (focusing on process in itself rather than the achievement of particular objectives).

Models of good practice through bottom-up activism, led by minority groups with the capacity and willingness to engage in consultation, can be useful to identify forms of self-regulation that is conducive to effective consultation. At the same time, three relevant points were made during the workshop:

- both the state and minority communities are not neutral; they are affected by political considerations and, in some cases, personal interests (which requires at least some regulation); moreover, a minority community has its own 'majority', in the sense of persons espousing prevailing attitudes, and this is inevitably reflected in the group's internal workings; as we expect states to respect the rights of minorities (while still responding to majority concerns), so too minority groups should be respectful of their internal dissent or diversity;
- in some states there is only a limited tradition of democratic dialogue: thus, participatory mechanisms may not work in practice even if they are sophisticated and well thought-out; clearly political culture affects consultation and its outcomes; it also affects the type of balance that should be struck between regulation and self-regulation;
- in some states (the case of Serbia was mentioned), there are high levels of political clientelism and a centralisation of power, which has a considerable impact on political participation.

## Need to bridge societal divisions

There are many types of societal divisions. Tensions can exist between the identity of the state and identity/ies of minorities. There can also be tensions between **integration and self-governance**: between, on the one hand, minority participation in the political and socio-economic life of a state *and*, on the other, minorities' independent management of some matters directly linked to group identity (e.g. minority-language schools).

The participants referred to particular scenarios in the post-Soviet region, where many newly-independent states became 'nationalising states'. These states adopted the model of 'one state-one language', in an effort to correct an imbalance created by the Soviet regime, which marginalised local languages and privileged Russian as a *lingua franca*. Russians/Russian-speakers became linguistic minorities in post-Soviet states: their responses varied, from making a sustained effort to learn the state language, to resenting (what they perceived as) the erosion of their rights.

In addition, in most states of Central and Eastern Europe (CEE), mechanisms for minority accommodation and the application of international standards in this area are relatively recent. At the same time, the more recent accession to the Council of Europe and, in some cases, the EU, means that there is a greater scrutiny on developments in CEE compared to 'Western' Europe, which can lead to accusations of double standards.

The participants also noted instances of deep societal divisions along ethnic lines in CEE, focusing on the example of the Western Balkans, where there have been attempts to promote concepts such as 'society for all' and multi-ethnic parties. In line with international standards (e.g. Lund Recommendations and of the Framework Convention for the Protection of National Minorities - FCNM), minority parties provide an important avenue to political participation of minorities. At the same time, an overreliance on mono-ethnic parties and structures can be problematic. Participants noted the importance of, as far as possible, transcending mono-ethnic institutions and creating bridges across communities. These efforts should be supported by the international community, yet there is still no clear guidance on the embedding of minority positions into mainstream structures.

It was noted that the application of measures for minority protection can itself be divisive, for various reasons. Power-sharing mechanisms or consultative bodies can heighten the sense of 'boundaries' between groups. They can also create suspicions between different groups that are 'in competition', fuelling distrust and antagonisms.

Finally, as noted, there can be divisions within a minority community itself, as different members may position themselves differently in relation to state institutions or political actors, or have different visions of how the community ought to be represented. This raises issues of accountability (see below, 'Internal diversity and consultative bodies').

## Consultative bodies as multi-dimensional and multi-level

Consultation mechanisms are influenced by historical legacies, political context and levels of ethnic diversity present in a country. They are multi-dimensional and multi-level. During the discussion it became clear that different participants were talking about different types of consultation mechanisms, depending on the region(s) they focused on in their work. Future research into empirical cases should carefully define the type of consultative mechanisms that are being analysed, and set out the criteria employed for different types of bodies.

Multiple models of consultative bodies exist, which present both advantages and disadvantages, different *modi operandi* in different countries and political contexts. Consultative bodies may gather all minorities recognised in a country, or only represent one minority community; they can deal with several or one specific theme. The functioning of these bodies is variously affected by a range of

factors, including their legal entrenchment (or lack of it), procedures for elections or appointment, levels of transparency in election/appointment and in devising agendas and activities.

The discussion also centred around measures that can mitigate the possible capture of systems of consultation by ethnic entrepreneurs and/or the state itself (particularly with reference to bodies that represent a range of minorities). The participants referred to as possible solutions:

- a hybrid system by which half the members are selected by minority communities themselves and the other half by a 'neutral' body (such as an ombudsperson), if it exists;
- a mixed body with minority representatives working alongside persons in public office (e.g. mayors for the localities in question participating *ex officio* – the case of Montenegro was mentioned);
- 'one person-one vote' system rather than proportional representation (in bodies gathering all national minorities recognised in a state there is a risk of the most influential minority monopolising the body).

All models have both benefits and potential pitfalls that need to be considered and periodically reviewed.

Besides different types of consultative bodies, the forms of consultation will differ for different policy areas (e.g. education, language). Research into consultation processes should take these differences into account.

## Internal diversity and consultative bodies

The participants agreed that levels of internal diversity are often low in consultative bodies. Particular individuals may control the points of entry to these bodies (and possibly manipulate the system). Additional issues mentioned include: limited human resources (particularly in the case of numerically small minorities); and difficulties in 'admitting' new individuals into the pool of representatives (when they are unknown and not yet trusted). In some cases, there may be forms of 'socialisation' of new members and representatives, for example by involving youth in activities (such as summer camps) that can ultimately shape their views and behaviour. This form of socialisation can effectively dilute internal diversity by homogenising the group (socialising new members so as to resemble old members).

In all cases, restricting the scope of representation can affect the agency of the community as a whole. The participants referred to cases in which organisations claim to represent an entire minority, yet a subgroup (or fringe organisation(s)) will argue that they do not consider themselves to be represented by them. In these cases, 'traditional' minority organisations have lost the confidence of some subgroups, fragmenting the community.

A highly complex issue relates to identifying not only who the *representatives* are, but also who the *represented* are – that is, who can be included or excluded from the community, particularly in terms of voting rights to elect representatives. In the discussion on the Sámi in Finland, a participant mentioned that some Sámi argue for stringent criteria of inclusiveness (to keep the group 'pure'). At the same time, more flexibility would make the group more numerous thereby increasing its 'people power' and influence. Crucially, however, the wider the range of voters, the more tenuous the connections with the group, and the weaker the justification for a special voting regime.

It was noted that a common assumption in many states is that descriptive representation is sufficient for effective consultation. When this happens, there can also be a presumption of **accountability**: the activities implemented by ethnic minority leaders will be assumed to be what the minority community wishes for, without an effort to consider the broader range of views, or the concerns of individual members.

It was suggested that participation at the **local level** can be important in addressing specific concerns through institutions that are ‘closer’ to minority communities and their day-to-day concerns. At the same time, the proliferation of institutions (and of responsibilities/competencies at different levels and in different areas of policy) can be burdensome for minorities, particularly numerically small ones.

Larger consultative bodies, encompassing all minorities present in a state, can pose several problems. While these bodies are diverse given their multi-ethnic character, they will often not reflect the internal diversity of each community. Moreover, in countries/regions that have a large number of minorities, there will be a dispersal of potential for influence. A large number of minorities will mean a large number of issues to be discussed, which in turn will reduce the level of depth with which each issue is approached.

A participant noted that future discussions should take into account the use of **technology** to enhance participation, particularly among certain categories that are at times marginalised in consultative bodies, such as youth and women. ‘Digital participation’ will likely bring a number of benefits, but also potential risks, possibly in the form of a ‘digital divide’. It is expected that, in the next few years, increasing emphasis will be placed on the interplay of minority issues and technology, following on from the HCNM’s 2019 *Tallinn Guidelines on National Minorities and the Media in the Digital Age*.

### ‘Effective’ participation

During this session of the workshop, the participants considered the meaning of ‘effective’ participation. The starting point, it was noted, is the vision of a shared future encompassing the majority and minority/ies. Interaction should be based on respectful dialogue, with minorities feeling that they are being listened to and taken seriously (Article 15, taken in conjunction with Article 6<sup>2</sup> FCNM).

‘Effectiveness’ is referred to in *Thematic Commentary No. 2*, which states that it is not sufficient for state parties to formally provide for the participation of persons belonging to national minorities. They should also ensure that their participation has a *substantial* influence on decisions, and that there is shared ownership of decisions taken (para 71).

The following principles of effective participation were discussed:

- effective participation requires effective organisations representing persons belonging to national minorities<sup>3</sup> (**capacity**);
- effective participation requires that persons belonging to national minorities feel that they and their issues are represented by members of Parliament, consultative bodies and organisations claiming to represent them,<sup>4</sup> to reflect a variety of views within the national minority (**representation of interests** – internal pluralism);
- effective participation means real and substantial influence on decisions taken with a view to a shared ownership of the decisions taken<sup>5</sup> (**substantive influence**).

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<sup>2</sup> Article 6 states: ‘states shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and cooperation among all persons living on their territory.’

<sup>3</sup> ACFC, *Thematic Commentary No. 2: The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, adopted on 27 February 2008 [hereinafter ‘ACFC, *Thematic Commentary No. 2*’], para. 21.

<sup>4</sup> See ACFC 4th opinion on Serbia (2019), 5th Opinion on Croatia (2021) and *Thematic Commentary No. 2*, para. 21.

<sup>5</sup> *Thematic Commentary No. 2*, paras 19 and 71.

These principles are discussed in more detail below.

### *a) Capacity*

Participation of minorities is affected by their capacity to engage with state actors (as well as their willingness to do so). *Thematic Commentary No. 2* states that:

It may be a challenge for representatives of national minorities to participate effectively in decision-making. It implies the allocation of time and resources, not only to participate, but also to try to reflect accurately the variety of views among persons belonging to their national minority. Consequently, national minorities require both *capacity building and resources* to ensure that their representatives can contribute effectively. (para 21) [italics added]

It was noted that only if minorities receive financial support and can build their knowledge and expertise, can they interact with the state authorities at an even level. Capacity also involves distilling clear messages to be conveyed to the state. When minority organisations have the capacity to engage effectively, they can become good partners for the authorities in building inclusive and diverse societies. The case of Pavee Point, an umbrella organisation for Travellers and Roma in Ireland, was mentioned as a case in point. They have received financial support from the Irish state and contributed to capacity building of a number of smaller organizations of Roma and travellers.

Building capacity also includes increasing knowledge of minority rights themselves, and awareness of the legitimacy of minority claims. This can require challenging views interpret minority claims as signs of disloyalty and a source of instability, thereby securitising minorities.

In some cases, there is also a need to build the capacity of state actors. It was noted that some state officials have limited knowledge of minority rights and concepts such as substantive equality or effective participation. Follow-up meetings after the issuing of Opinions of the Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC) can be important in consolidating the understanding of these concepts, and to reflect on how to translate ACFC recommendations into practice. Some state officials might require more specific knowledge on issues affecting particular minorities (e.g. reindeer herding in the case of the Sámi in Sweden).

### *b) Representation of interests*

Effective participation requires that persons belonging to national minorities feel that their interests are represented in different bodies (such as the parliament) and also in consultative bodies themselves.

A participant referred to research carried out in Serbia and showing that minority respondents do not feel represented by national councils. This can affect trust in institutions and their capacity to operate effectively: without trust, and without an expectation that consultative bodies will help them, minorities tend to disengage.<sup>6</sup>

Some consultative bodies might not include all organisations representing particular minorities or (sub-)groups. In some cases, more than one organisation can (claim to) represent the same minority. A focus on *descriptive* representation would imply involving in consultation only one of the organisations representing a minority; *substantive* representation would require inviting all minority organisations to participate in consultation. Clearly, states should aim at substantive representation as they have a responsibility of inclusivity in managing consultative processes; yet there is often no recognition of substantive representation as a desirable goal.

Minority issues are inherently political: the question was raised as to whether they can (or should) be treated as apolitical and fully depoliticised. At times, however, there may be an excessive

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<sup>6</sup> This sort of confidence deficit often underlies people's disengagement from institutions more generally, and is not unique to minority regimes.

politicisation of minority issues. In some instances, organisations can be excluded from consultation unless they become involved in party politics and engage the power structures. This can be seen as becoming overly obsequious to people in power, compromising integrity.

The scope of action of some minorities is affected by state-civil society dynamics present in a state. In (semi-)authoritarian states, cooperation with the authorities can only occur by adjusting to political imperatives, which can lead to some forms of submissiveness to the authorities, diluting minority claims. This can fragment a minority community, dividing it between those 'loyal' to the authorities and those that are not, fuelling internal divisions and hostilities. Thus, in some cases consultative mechanisms can in fact complicate consultation, by creating or consolidating cleavages.

In some instances, minorities might prefer to exclude political parties from systems for minority participation (e.g. there was a reference to arrangements in Armenia, where voting systems for minorities are linked to parties, yet they are often not trusted by persons belonging to minorities). Alternatively, mainstream parties could intensify their efforts to accommodate minorities and gain their trust. In other cases (e.g. in Russia) minorities are required to remain outside politics and only work on uncontroversial subjects (e.g. promotion of cultural activities).

The political sensitivity of some minority issues may cause minority representatives to feel uncomfortable articulating some of their claims. In these cases, it was noted, a neutral party – such as an international body such as the Council of Europe or OSCE – could assist in facilitating dialogue between the state and its minorities. At the same time, IGOs can, in some cases, be criticised for being too remote from the situation on the ground and therefore unable to 'understand' its complexity. The view of international minority standards as 'Western', and as such alien to regions with a different history and traditions, is sometimes articulated by certain governments and can complicate their application.

### *c) Substantive influence*

*Substantive* influence relates to shared ownership of decisions, by moving from 'process' to 'objectives' and then to specific outcomes/outputs (see next section). It involves transcending the assumption that descriptive representation is enough, and the *process* of consultation (discussing issues) is sufficient, regardless of outcomes.

Measures towards substantive influence can include formalising consultation – for example, through *ad hoc* legislation on consultation. A factor inhibiting these processes, which was mentioned at the workshop, is the concern of some minority representatives to be seen as disloyal, advancing claims perceived as illegitimate and causing instability.

### Translating 'process' into 'objectives' and 'outcomes'

There are different views on what consultation implies, and different expectations. One narrow meaning of consultation is that of a process by which the 'outcome' of consultation is simply the process itself (the fact that issues are discussed). Consultation, in this instance, may be only symbolic. A different approach to consultation is that of a process that produces tangible outcomes in terms of policy, reflecting the wishes and needs of minorities.

It was noted that the Lund Recommendations are more about 'process' than about 'objectives'. It was also suggested that objectives are implicit in the Recommendations, and that the aim of the process is to produce specific outcomes by empowering minorities through participation. Future research and activities should strive to restore this vision of minority empowerment.

While *Thematic Commentary No. 2* goes into much detail on consultative mechanisms, for the FCNM and Thematic Commentary No. 2 alike, the priority has been encouraging states to establish advisory bodies to stimulate dialogue, rather than creating powers of (co-)decision per se. In its early opinions, the ACFC stressed the *procedural* aspect of consultation rather than the substantive



aspect. However, more recently, the importance of outcomes – understood in terms of influence or co-decision – has increasingly come to the fore. *Thematic Commentary No. 2*, while focusing on process, also speaks about results and the outcome linked to procedures:

Whatever the mechanisms chosen, persons belonging to national minorities should be given real opportunities to *influence* decision-making, the outcome of which should adequately reflect their needs. According to the Advisory Committee, mere consultation is, as such, not a sufficient means to be considered effective participation. (para 71)

This approach is consistent with the general understanding of ‘*effective* participation of minorities’ as involving an ‘obligation of result’ upon states parties (para 10). Some ACFC Opinions of the past few years reflect Paragraph 71 and Paragraph 19 (shared ownership of decisions)<sup>7</sup> of *Thematic Commentary No. 2*. Thus, there is a clear sense that consultation must be effective and designed to yield results.

This was also recognised in the biannual report submitted to the Committee of Ministers for the years 2018-2020.<sup>8</sup> The report makes it clear that the adoption of laws and the establishment of consultative bodies is no longer sufficient, while one ought to focus on practical *outcomes* of relevant processes:

In the last biennium, the Advisory Committee observed that the formal structures for participation in public affairs are generally in place: in many states, national minorities are afforded institutionalised participation in decision-making [...]. This is an important step forward compared to the earlier days of the Framework Convention, where the Advisory Committee frequently found that the lack of dedicated legislation was a major obstacle to the enjoyment of minority rights.

Having said this, it is also clear that the *legislation in place does not in all cases enable all persons belonging to national minorities to effectively participate* in decision-making. [...] *Only rarely is legislation on effective participation evaluated as to whether it has the desired effect.*<sup>9</sup> [italics added]

A number of ACFC Opinions from past few years reflect Paragraph 19 (shared ownership of decisions), and Paragraph 71 (decisions adequately reflecting the needs of national minorities). Thus, there is a sense that consultation must be effective and yield results. At the same time, there is no definition of ‘effectiveness’, and circumstances vary from country to country. It was suggested that, when there is no definition, scholars and practitioners turn to *procedures*, as at least one can say that the process is fair and transparent, and allows for participation for all. In this case, procedure can be seen as a ‘last resort’ when it comes to providing an answer as to what ‘effectiveness’ exactly entails.

It was noted that, in many countries, minorities have become disillusioned with consultation processes that do not yield results. The example of Sámi in Sweden was discussed: the Sámi denounced a lack of influence in decision-making when traditional Sámi land is exploited for mining or forestry. This is contrary to Article 5 of the Swedish Minority Law, which states that the authorities, in their decision-making, are obliged to take into account the views and needs of national minorities. In practice, when relevant decisions are taken, the provision is seldom observed. In order to comply with its international obligations, the Swedish government prompted the process

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<sup>7</sup> It states:

[I]t is not sufficient for State Parties to formally provide for the participation of persons belonging to national minorities. They should also ensure that their participation has a *substantial* influence on decisions which are taken, and that there is, as far as possible, a *shared ownership* of the decisions taken. [italics added]

<sup>8</sup> ACFC, *Twelfth Activity Report Covering the Period from 1 June 2018 to 31 May 2020*, September 2020, <https://rm.coe.int/12th-acfc-biennial-activity-report-en-final/1680a07db8>

<sup>9</sup> *Ibid*, p. 15.

towards the adoption of a new law on Sámi consultation that came into effect in March 2022. However, the new law does not include an obligation for the state to strive towards shared ownership of decisions. The political sensitivity of the issue meant that drafts of the law were contested, and, over time, weakened. This ultimately resulted in the adoption of a law that is unclear on the right of Sámi to influence decisions the use of traditional lands. Another example that was discussed is that of the Finnish Mining Act, which goes further than the Swedish law, by stating that failure to take into account the views of Sámi can result in the matter being taken to court. Another example noted is decision-making affecting indigenous land in British Columbia (Canada).

Research needs to be carried out focusing on the tangible outcomes of consultations with persons belonging to national minorities. It would involve studies using qualitative methods, analysing the way minorities perceive participation and outcomes, and identifying procedures that translate legislation and consultative bodies into specific outcomes (see '**Error! Reference source not found.**').

A factor that is likely to increase effectiveness is building capacity of minority and of state actors (see above on this). This can be complemented by discussions on expectations and opportunities surrounding ACFC Opinions and Committee of Ministers resolutions. These processes can highlight the importance of international recommendations and strengthen commitment. Another crucial factor is, clearly, the availability of resources.

## International standards and international engagement

International standards, and the minority rights regime as a whole, were unable to prevent the conflict in Ukraine. This raises the question as to whether the standards should be modified.

The participants referred to the possibility of updating *Thematic Commentary No. 2*, to include the recommendation that facilitators/mediators take part in consultation through follow-up meetings. These are meetings that follow the Committee of Ministers' resolutions, held by the ACFC with representatives of local, regional and state authorities *and* representatives and national minorities. An update of *Thematic Commentary No. 2* could also make more explicit the link between consultation and particular effects on decision-making.

Other ACFC thematic commentaries may also be updated in light of recent ACFC Opinions. It was noted that new opportunities might be becoming available for upgrading the practice around the FCNM, on which researchers and policy-makers need to reflect.

Another suggestion related to the consideration of cases from the Inter-American system on consultation, as part of the process of updating standards. The relevant jurisprudence involves cases of violations of indigenous land rights due to a failure to undertake an appropriate process of consultation with indigenous peoples.

## Evaluation

The participants referred to a need to evaluate the effectiveness of participation, and to devise a mechanism of assessment. The HCNM provides guidance to governments and to national minorities with a view to facilitating dialogue and effective participation. At the same time, there is a paucity of evidence-based research as to whether internationally standards-based recommendations have any relevance or impact on levels of participation of national minorities in public life.

Different countries have different political contexts, which means that recommendations may not always be universally applicable. Evidence-based research could shed light on these dynamics and the effects of IGOs' recommendations and engagement. Most of the IGOs' work has been based on models rather than evidence of impact. These activities could bridge efforts of the Council of Europe, the HCNM and academia.

In terms of effectiveness of consultative bodies themselves, the question is how to measure, for example, the impact of minority councils on decision making. It is unclear how to assess an 'output' in terms of minority participation. Possible ways include the use of indicators, or assessing the levels of satisfaction of minorities (with government policies or structures like consultative councils). A complication is that there are different interpretations of consultation, and levels of satisfactions can be affected by different expectations as to what consultation should entail. There are also different interpretations of concepts such as discrimination and equality: it can be difficult to discuss these issues in the presence of different understandings; this can also affect the evaluation of mechanisms that are intended to address these issues.

Another complication is that decision-making processes are influenced by multiple interests, and the interests of minority representatives may well be in conflict with the interests of other actors. It is difficult, then, to unravel the processes that have led to particular decisions, and the driving forces behind particular outcomes.

In some cases, the lack of monitoring and evaluation of the effectiveness of consultation can lead to the perception that participation has taken place when this might not be the case in practice. Platforms are created for public discussions, to which minority organisations are invited, yet the fact that 'outputs' do not follow the 'process' might go unnoticed. The absence of evidence on levels of impact of minority engagement may tend to feed the 'illusion' of participation.

Some work has been done on developing indicators by a number of international actors, which is still work in progress. Research on minorities' levels of satisfaction should focus on perceptions of consultation and its effectiveness: this would likely not 'measure' (quantify) their levels of satisfaction but aim at analysing their perceptions and responses.

## NATIONAL MINORITIES IN INTERSTATE AND INTERNATIONAL AFFAIRS

Kin state engagement and cross-border cooperation can further the promotion of minority rights. However, there has also been a tendency towards the bilateralisation of minority protection in Europe on the one hand, and the instrumentalisation of kin-states' engagement on the other, for purposes other than minority protection, including the furthering of (geo)political objectives. With the Ukraine war, national minority protection was used as a justification for the use of force in violation of international law: it reflects an instrumentalization of kin minorities for political ends.

While the war in Ukraine was the focus of this session, the participants also considered wider issues on the role of kin states. The session examined:

- how some of the consequences of the war may be addressed; and
- how the instrumentalisation by kin-states of national minority protection may be pre-empted or at least contained in the future.

### The war in Ukraine and consequences for minorities

The consequences of the war were discussed in relation to Russia, and Ukraine and the region more generally.

#### *a) Russia*

The Russian government has advanced the view that Russian(-speaking) minorities have been discriminated against in the post-Soviet space. Since the beginning of the war various governments (also outside the former Soviet Union) have been accused of anti-Russia sentiments.

An issue discussed during the session was the fact that the Russian(-speaking) kin-minority was 'appropriated' by the Russian state. The Russian government has made assumptions as to who the

members of the kin minority are (rather than allowing them to self-identify as such). In addition, the Russian government has made assumptions as to what the kin minority wants, by claiming that it is acting in their interests, and has a right to intervene to address a (perceived) situation of oppression. As it was repeatedly pointed out during the workshop, the definition of 'Russians' or 'Russian-speakers' in Ukraine is contested, and many persons belonging to minorities (as well as many ethnic Ukrainians) have Russian as first language. The expression 'Russian-speakers' is used here in the sense of both ethnic Russians and all minorities who use Russian as their main language of communication.

As a result of the war, within Russia itself there are much fewer opportunities to cooperate with international organisations such as Council of Europe and OSCE. Moreover, in recent years, minorities in Russia have experienced an intensification of the promotion of the Russian language and culture (and dilution of minority identities). Minority NGOs have also been affected by restrictions on the work of civil society and cross-border cooperation (through the Law on Foreign Agents). They are now experiencing an increased isolation through the war (Russia no longer being a member of the Council of Europe). The process under the FCNM was truncated and the ACFC had to cancel its country visit, despite Russia having submitted a report. There might be some opportunities for Russia to continue some engagement under the FCNM but this is increasingly unlikely. Thus, several mechanisms that were previously available to minorities in Russia are now out of reach, including participation in international advocacy networks. The role of the HCNM/OSCE seems particularly important, as Russia remains a participating state of the OSCE; at the same time, there are signs that the Russian government might also be disengaging from the OSCE.

#### *b) Ukraine and the region*

There are clearly difficulties in monitoring human/minority rights in Ukraine and the region as a whole (e.g. Moldova). Even before the war, the monitoring of human rights in Crimea and Eastern Ukraine presented significant challenges.

Ukraine's national minorities (and indigenous peoples), like the Ukrainian majority, are victims of the conflict. They have become 'collateral damage', with kin-states generally unable to provide protection or assistance. At the same time, a positive development noted during the session has been cross-border cooperation in regions that are multi-ethnic. This type of cross-border cooperation already existed before the war and was consolidated through recent projects. Existing networks seem to have been utilised effectively to deal with the humanitarian crisis, apparently in a way that has been more effective than governmental interventions.

The participants noted the importance of analysing the period preceding the war, and also prior to 2014. The 2012 Law 'On the Principles of State Language Policy' was, according to Venice Commission's assessment of the draft law, unbalanced in favour of Russian. Ukraine's current restrictive regulations regarding minority languages were adopted in 2017 (Education Law) and 2019 (State Language Law) following Russia's illegal annexation of Crimea and its support for separatists in Donbas. The participants noted that, before and after 2014, Ukraine did not manage to strike a balance between strengthening the state language and protecting minority languages that could be acceptable to all. Language legislation that marginalises minority communities, neglecting their rights to participation in dialogue on the subject, creates fertile ground for the instrumentalisation of kin minorities, which has effectively resulted in their weaponization in the case of Russian(-speaking) communities in Ukraine. Similar processes could also be analysed in relation to the Baltic states, particularly the promotion of the state language in the education system.

#### *c) Scenarios: dealing with the conflict*

Some participants stressed the need to return to diplomacy and avoid isolating Russia attempting engagement as much as possible. Others argued that engaging Russia is hardly possible under the current circumstances. Some of the demands advanced by the Russian government could be seen as

a form of degradation of the international legal order (e.g. making the Crimean annexation permanent, international recognition of Eastern Ukraine and Crimea as Russian territory).

At the same time, a model of 'consensus minus one' in the case of the OSCE (previously used in the former Yugoslavia) would not work, as some countries (such as Belarus and Central Asian countries) are likely to side with Russia.

Minority issues might be overshadowed by more pressing priorities dealing with security and militarisation in Europe. Recent discussions on European security structures have tended to exclude minority-related concerns. Consequently, the participants noted that international actors such as the HCNM and Council of Europe should endeavour to:

- keep minority rights on the agenda (including language rights and education), through a strategy based on multi-ethnic cooperation, also involving governments with kin minorities in Ukraine; while acknowledging existing challenges, the importance of cooperation and societal cohesion should continue to be stressed;
- continue to look for 'creative' ways to monitor human/minority rights in occupied areas or regions that are not physically accessible;
- support grass-roots initiatives that involve cross-border cooperation, and have assisted in dealing with the humanitarian crisis;
- develop different strategies to prepare for what may happen in Ukraine (from the 'best case' to the 'worst case' scenario).

The question of Ukrainian refugees in Europe was also mentioned, including possible issues with their integration. There is an assumption that refugees will wish to return to Ukraine when it is safe to do so, but there are several deterrents, such as the fact that regions where they resided have been fully destroyed and also the trauma of fleeing a war zone. There are questions as to whether, if refugees remain in the host states, there could be impediments with integration, particularly in the case of ethnic Russians.

#### *d) Post-conflict situation*

The participants noted the importance of looking ahead at the reconciliation phase and reconstruction. What is yet unknown is the extent to which Ukraine itself will be prepared to make progress on minority rights (language and education) once peace has been achieved.

Following the start of the war, the Russian language has effectively become the 'language of the aggressor'. This might complicate the protection of Russian-speaking minorities in Ukraine following the war. It also complicates cross-border cooperation and relations between the kin-state and kin-minorities, as the Russians/Russian-speakers in Ukraine have for the most part strongly opposed the invasion.

It was suggested that it will be very important, during and after the conflict, not to overfocus on the Russian-Ukrainian divide. Rather, there should be an effort to look for solutions that accommodate all communities in a multi-ethnic region, taking into account the concerns of all minorities (including Hungarian and Romanian communities, and also involving kin states). Following the war, the Ukrainian government will need to return to discussions on language rights of minorities, which will be a very sensitive, highly emotional issue. There will also probably be shifts in the Ukrainian government's way of dealing with or thinking about minority rights, which is likely not to be in favour of minorities.

The HCNM's role will be highly significant in this context. It was suggested that the HCNM, Council of Europe and the European Union could try to present a common message to the Ukrainian government. There will probably be scope for redeveloping forms of bilateral cooperation, and collaboration across the region, with the support of international organisations. This may include the

former treaty between Russia and Ukraine – terminated following the annexation of Crimea – which encompassed standards on human and minority rights.

## Kin states

In line with the Bolzano/Bozen Recommendations (and international law more generally) the home state has the primary responsibility to address the rights of minorities. At the same time, in some cases more resources and benefits are provided to a minority community by the kin state than by the home state. There are cases of unilateral kin-state activism, which can be counterproductive: even without the extreme case of the war in Ukraine, it can have a negative impact on relations between states and on minorities themselves.

Possible future research could relate to:

### *a) Cross-border cooperation involving minorities*

There have been some attempts to articulate proposals in terms of cross-border cooperation but, from an international law perspective, they have remained mostly ideas and proposals. For example, there is an element of transborder cooperation under Serbian legislation for cultural autonomies. In addition, after the war in former Yugoslavia, the Badinter Commission's Opinion No. 2 referred to a form of transborder content as one of the implications of self-determination for the Bosnian Serbs (part of this was entrenched in the 1995 Dayton Agreement). Relevant references of this type can be found in various documents, which indicate at least the possibility of cross-border cooperation involving minorities. These phenomena can be studied both in terms of institutions and legal practice, but also in terms of political practice.

There are a number of transnational structures that could also be studied, to identify possible cases of good practice. One of them is the Sámi Council, which coordinates the Sámi parliaments across the Nordic countries. This type of research could analyse the processes and mechanisms that enable state parties to engage with each other with the involvement of minorities.

### *b) Joint commissions*

Research could be conducted into the work of joint commissions established on the basis of bilateral treaties, and the reasons why some of them do not tend to function effectively. It would be important to take into account the fact that minorities are not represented in multilateral commissions between states dealing with a range of issues (e.g. energy) that do not fall into the scope of narrowly-defined minority issues.