

The Graz Recommendations on Access to Justice and National Minorities & Explanatory Note

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Introduction

In its Helsinki Decision of July 1992, the Organization for Security and Co-operation in Europe (OSCE) established the position of High Commissioner on National Minorities (HCNM) to be an instrument of conflict prevention at the earliest possible stage in regard to tensions involving national minority issues.¹ For almost 25 years, the institution has accumulated significant experience with regard to identifying and tackling potential causes of conflict related to national minorities. In their work, the successive High Commissioners have encountered a number of recurring issues and have published seven thematic Recommendations and Guidelines providing insight and advice for States facing these issues. These documents aim to make recommendations to States that can serve as a basis for developing policies which respect internationally agreed standards, and reduce tensions that could lead to inter-ethnic conflicts.

The first three sets of Recommendations – *The Hague Recommendations Regarding the Education Rights of National Minorities*, *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities* and *The Lund Recommendations on the Effective Participation of National Minorities in Public Life* – focus primarily on elaborating minority rights standards in the areas of education, language and participation in public life. The subsequent two publications – *Guidelines on the use of Minority Languages in the Broadcast Media* and *Recommendations on Policing in Multi-Ethnic Societies* – address specific challenges that many States face in guaranteeing minorities' access to broadcast media in their language and in providing effective policing in ethnically diverse societies. *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations* offer advice on how States may support minorities residing in other countries while maintaining peaceful and good-neighbourly relations. Most recently, *The Ljubljana Guidelines on Integration of Diverse Societies* are concerned with enhancing the integration and cohesion of diverse, multi-ethnic societies. The Recommendations and Guidelines of the HCNM have become increasingly relevant considering raised

¹ The term "national minority", as used in this document, refers to a wide range of minority groups, including ethnic, religious, linguistic and cultural communities, regardless of whether these groups are recognized as such by the States where they reside and irrespective of the designation applied to or claimed by them. Also see Note on Terminology, p.41.

political tensions in the OSCE area, particularly following the refugee and migrant crisis of recent years, and the resulting pressure on integration policies.

All the issues included in these publications relate directly to the High Commissioner's mandate to prevent conflict and to reduce tensions affecting minority communities. The publications are grounded in the recognition that the numerous conflicts involving national minorities that have erupted since the HCNM was established could have been avoided. More often than not, such conflicts are rooted in the denial of basic minority rights (including through violence) and the marginalization of minority communities in ways that amount to systemic discrimination.

As the Copenhagen Document stresses, "participating States recognize that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary."² This is why the protection and indivisibility of human rights and minority rights, including through access to justice, should be central to conflict prevention within and between States, and why it is a specific area of HCNM focus. National minorities might lose confidence in the justice system and in State authorities in general if they are unfairly targeted by law-enforcement and judicial bodies or if their access to justice is denied or even restricted, not least because of corruption.

The Ljubljana Guidelines go further, stating that lack of trust in the justice system, or a perception that the system favours members of the majority, undermines social cohesion, fosters alienation and can increase the risk of conflict, including of an inter-ethnic nature.³ In the most extreme cases, systemic discrimination and alienation, as well as inter-ethnic tensions and violence, can also contribute to a climate where violent extremism and radicalization may take root. It is also possible that persons belonging to minority communities may use violence or implement discriminatory measures against members of the majority in areas over which they exert control. Lastly, lack of access to justice and disillusionment with the State may encourage minority communities to look for support from neighbouring States or States from the region with which they share ethnic or cultural characteristics. This can further increase domestic and inter-State tensions. Inter-ethnic tensions, discrimination, hate crimes and lack of access to justice can lead to a cycle of inter-ethnic conflict. Access to justice, therefore, is not just about the rights of

2 OSCE (1990) Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, paragraph 30.

3 HCNM (2012) *Ljubljana Guidelines on Integration of Diverse Societies*, explanatory note to Guideline 47.

members of national minorities (and of the majority) but is intimately connected to conflict prevention within and between States, which is central to the HCNM's mandate.

Where the justice system fails to adequately address crimes committed against members of national minorities, particularly when committed by members of the majority, this can lower the psychological threshold to breaking the law. Some national minority groups remain particularly vulnerable in conflict prevention settings, including the Roma and Sinti. OSCE participating States have recognized that lack of respect for the rights of national minorities, including Roma and Sinti people, is an area that the HCNM should continue to address.

Although several international organizations have offered advice on improving access to justice for individuals and vulnerable groups, little work has been done on access to justice for persons belonging to national minorities from a conflict prevention perspective. This is an area of special expertise and experience for the HCNM. The basic premise of this document is that access to justice for national minorities is grounded in the idea that justice is not only about the enjoyment of rights by persons belonging to national minorities but is also relevant to conflict prevention.

The advice provided by the HCNM is underpinned by its work on national minority issues primarily in the context of State-building and consolidation. Based on this experience, these Recommendations recognize that in order to foster peaceful, stable and inclusive societies, States have a responsibility to guarantee to everyone, including persons belonging to national minorities, the effective enjoyment of all their rights through access to justice. Because equal access to effective and impartial justice is essential for the integration of society, the Ljubljana Guidelines advise that States should assess the situation with regard to access to justice and develop a comprehensive strategy and policies aiming to guarantee effective access to justice for all. This point is elaborated in these Recommendations.

This obligation on the part of the State to guarantee access to justice for all is inextricably linked to the principle of non-discrimination: all members of society are entitled to have access to justice without distinction of any kind. Closely related to non-discrimination in accessing justice is the principle of equality in law and equal protection of the law. According to the former principle, the law should not treat a person belonging to a minority community, or an entire minority community, less favourably than another person, or group, not belonging to a minority in the same situation or in comparable situations.

The concept of equality before the law entails a responsibility on the part of the State to not only refrain from violating the rights of citizens based on, *inter alia*, gender, ethnic identity, religion (or belief), language, disability, age or sexual orientation, or national and social origin (embodied primarily in the principle of non-discrimination), but also to take positive measures to ensure that persons belonging to minorities can effectively obtain a remedy if their rights have been violated or need enforcing. Indeed, one cannot speak of equal access to justice if, for instance, persons belonging to national minorities do not understand the judicial system, do not know their rights or cannot get suitable legal advice or afford legal representation, or even fear the judiciary and avoid it. These Recommendations are therefore informed by the State's dual obligation to not discriminate against persons belonging to national minorities seeking access to justice and to prevent indirect discrimination by taking positive measures to facilitate such access.

Because the HCNM approaches access to justice for national minorities from a conflict prevention perspective, it is important to underline that access to justice should include access to a remedy if it is found that an individual's rights, including the right to equal treatment, have been violated or need to be enforced. These Recommendations therefore not only address issues related to access to courts, but also to other mechanisms, such as national human rights institutions, that can secure an effective remedy for complainants – including persons belonging to national minorities – whose individual rights have been violated. The Ljubljana Guidelines suggest that ensuring effective access to remedies could include establishing and supporting effective independent bodies, such as ombudspersons or national human rights institutions.⁴ In addition, the Oslo Recommendations point out that independent and effective national human rights institutions can often provide quicker and less expensive recourse than the courts.⁵

It should also be emphasized that persons belonging to minority communities may face what is sometimes referred to as compound discrimination; for example, both on a linguistic and gender basis. States should factor this into the policies that the State adopts to ensure access to justice for persons belonging to national minorities. Moreover, to achieve equal protection and prevent discrimination, certain categories of persons within minority groups may require special and positive measures to ensure that they can effectively access justice on an equal footing with other members of society. In line with the OSCE's Action Plan for the

⁴ HCNM (2012) Ljubljana Guidelines, explanatory note to Guideline 21.

⁵ HCNM (1998) *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities*, explanatory note to Recommendation 16.

Promotion of Gender Equality, particular attention will be given throughout these Recommendations to measures that States should implement to ensure that women belonging to national minorities also have effective access to justice.

These Recommendations are based on the accumulated experience of the Institution of the HCNM and combine a normative and practical approach. Many HCNM staff actively participated in the development of the Recommendations, in particular Henrik Villadsen, Laurentiu Hadirca, Tihana Leko and William Romans. The Recommendations also benefitted from the engagement and insights of external experts, especially Dominique Orsini. Other experts who have been consulted and who have contributed valuable comments and criticisms include Ilze Brands Kehris, Amarsanaa Darisuren, Vincent de Graaf, Jürgen Heissel, Jennifer Jackson-Preece, Emma Lantschner, Tove Malloy, Roberta Medda-Windischer, Kerem Öktem, Declan O'Mahony, Alexander Osipov, Francesco Palermo, Petra Roter, and Richard Winkelhofer. The HCNM is also grateful for the input received from the OSCE Office for Democratic Institutions and Human Rights. The HCNM has been assisted greatly by the extensive research in this field conducted by Joseph Marko and his team at the University of Graz. These Recommendations are, however, based on specific HCNM experience and do not reflect the views of any single expert.

These Recommendations offer a practical, policy-oriented approach to the issue of access to justice for national minorities. They are grounded in the HCNM's extensive experience dealing with minority issues and conflict prevention, including access to justice for persons belonging to national minorities. This document does not purport to be exhaustive or to offer ready-made policy options. Rather, it recognizes that while general human rights standards apply to all, not all good practices, standards, minority rights and policy options presented in these Recommendations apply to every situation in the same way. These Recommendations aim to encourage States to implement policies on access to justice that will alleviate tensions involving national minorities, thereby serving the HCNM's main objective of conflict prevention.

Lamberto Zannier
OSCE High Commissioner on National Minorities
The Hague, 14 November 2017

The Graz Recommendations on Access to Justice and National Minorities

1. Access to justice for persons belonging to national minorities should be underpinned by the principles of the rule of law, non-discrimination and equality, including gender equality, the right to a fair hearing within a reasonable time by an independent and impartial body established by law, the right to legal assistance and the right to an effective remedy.
2. Measures to guarantee access to justice for national minorities should be broader than providing access to courts. States should establish, strengthen and fund independent human rights institutions that can secure effective remedies for all complainants, including persons belonging to national minorities.
3. States should ensure that when persons belonging to national minorities engage with judicial and national human rights institutions and take part in proceedings, they are able to do so in a language they understand, and preferably in their language, as well as in an environment that is respectful of their identity.
4. States should make legal assistance available to national minorities in a way that addresses the obstacles they face in accessing justice.
5. The composition of courts, tribunals, prosecution offices, law-enforcement agencies, correctional services, enforcement agencies (or bailiffs) and human rights institutions, should aim to reflect the diversity of the population at all levels.

6. To facilitate access to justice for national minorities, States should ensure that law-enforcement agencies work to build trust with minority communities and enforce the law in an impartial and non-discriminatory manner, free of prejudice and gender bias.
7. Victim support services and witness protection measures should be sensitive to the needs of persons belonging to national minorities, and of minority women in particular.
8. States should ensure that court orders and judgments affecting persons belonging to national minorities are executed effectively, impartially and within a reasonable time.
9. States should ensure that persons belonging to national minorities held in detention or imprisoned are treated with humanity and respect for their identity.
10. States should, as a matter of urgency, provide effective redress to persons belonging to national minorities who have suffered serious human rights violations as a result of inter-ethnic conflict.

The Graz Recommendations on Access to Justice and National Minorities & Explanatory Note

1. Access to justice for persons belonging to national minorities should be underpinned by the principles of the rule of law, non-discrimination and equality, including gender equality, the right to a fair hearing within a reasonable time by an independent and impartial body established by law, the right to legal assistance and the right to an effective remedy.

Access to justice for national minorities is grounded in the idea that justice is not only about the enjoyment of rights by persons belonging to national minorities but is also intimately connected to conflict prevention. Access to justice should be underpinned by the principles of the rule of law, non-discrimination, equality, the right to a fair hearing within a reasonable time by an independent and impartial body established by law, the right to legal assistance and the right to an effective remedy.⁶

⁶ International Covenant on Civil Political Rights (1976) article 14; European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) articles 6 and 13; OSCE (1990) Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, paragraph 5. It should be noted that while some of the legal instruments referenced in this document (such as the European Convention for the Protection of Human Rights and Fundamental Freedoms or the Framework Convention for the Protection of National Minorities) are not legally binding on all OSCE participating States, they nonetheless give valuable reference points as to the interpretation of other, binding, international instruments.

i. *Rule of law*

Access to justice for national minorities is embedded in the concept of the rule of law.⁷ It means that States should ensure that public officials and private entities are subject to and accountable under the law. The process by which laws are enacted and enforced should be democratic, fair, transparent, predictable and inclusive of minority communities. Laws should be grounded in and protect human rights, including the rights of persons belonging to minority communities, and should be drafted in consultation with them.⁸ Importantly, laws should be enforced through independent and impartial courts, which should also be empowered to review administrative acts. Laws should be applied without any discrimination against persons belonging to national minorities, and judicial decisions affecting national minorities should be executed impartially, diligently and without undue delay (see Recommendation 8).

ii. *Non-discrimination and equality*

States should ensure that discrimination is clearly defined and prohibited by the Constitution and the law. The principle of non-discrimination prohibits any unjustified unequal treatment under the law or by law (also called direct discrimination) on the basis of membership of a national minority but also on the basis of ethnic identity, gender, sexual orientation, age, disability, language, religion (or belief), national or social origin.⁹ There is direct discrimination when the law treats a person belonging to a minority community, or an entire minority community, less favourably than another person, or group, in the same situation or in a comparable situation.

7 UN Security Council (2004) Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, paragraphs 5 and 6; OSCE (1990) Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, paragraph 2; Council of Europe (1994) Framework Convention for the Protection of National Minorities, preamble; Venice Commission of the Council of Europe (2011) Report on the Rule of Law; Venice Commission of the Council of Europe (2016) Rule of Law Checklist.

8 Lack of confidence in the judicial system can lead national minorities to resort to customary law and traditional forms of justice, particularly in the case of family-related issues and minor offences. States should implement policies that build the trust of national minorities in the judicial system. Such policies can include the creation of functional linkages and collaboration between informal justice mechanisms and the judicial system in the form of appeal procedures, case referrals and advice. In such cases, States should give precedence to informal justice mechanisms that are gender-sensitive and compatible with international human rights standards. See UN Committee on the Elimination of Discrimination against Women (2015) General recommendation on women's access to justice, paragraph 64(a) and (b).

9 See UN Human Rights Committee (1989) CCPR General Comment No. 18: Non-Discrimination; UN Committee on Economic, Social and Cultural Rights (2009) General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights; Council of Europe (1994) Framework Convention for the Protection of National Minorities, article 4; European Union (2000) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; European Union (2000) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

In addition, if a policy or a rule is formally neutral but has a disproportionate impact on a minority community, or on persons belonging to national minorities, it is regarded as indirect discrimination unless the policy or rule is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

States should adopt legislation and other measures not only to prevent direct and indirect discrimination but also adopt legislation and other measures to promote full and effective equality between persons belonging to national minorities and those belonging to the majority in all areas of economic, social, political and cultural life. Such legislation and other measures should also result in full and effective equality in access to justice for minorities and the majority alike. Differential treatment may be required to achieve equality. This is justified by the aims of preventing or compensating for disadvantages suffered by persons belonging to national minorities, tackling systemic discrimination against persons belonging to national minorities or facilitating the integration of society. As long as such positive measures conform to the principle of proportionality which requires, among others, that they do not extend, in time and scope, beyond what is necessary to achieve the aim of full and effective equality, they are not to be considered acts of discrimination.¹⁰

In this context, positive measures (such as the adoption of secondary legislation or the allocation of sufficient resources) to ensure full and effective equality in access to justice for persons belonging to national minorities may not only be acceptable but may even be required, depending on the specific conditions of the minorities concerned. States should, for instance, remove any procedural obstacles (including in civil and administrative law) that disproportionately prevent access to justice for national minorities, such as excessive formal requirements or unnecessarily complex procedures that can lead to serious and well-grounded court cases being declared inadmissible. Short statutes of limitations or high court fees should also be reviewed if they prevent persons from minority communities who are suffering from socio-economic disadvantage from pursuing cases. Legal standing — meaning who is entitled to initiate legal proceedings — should be defined in a way that guarantees the effective protection of rights for persons belonging to national minorities.¹¹

10 Council of Europe (1994) Framework Convention for the Protection of National Minorities, articles 4, 6 and 15; Council of Europe (1994) Explanatory Report of the Framework Convention on National Minorities, paragraph 39; European Union (2000) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, article 5. A good illustration of such measures can be found in OSCE (2003) Decision No. 566 Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, section III.

11 Legal standing — meaning who is entitled to initiate legal proceedings — should be defined in a way which does not exclude persons, often members of national minorities, who may have trouble proving their identity due to a lack of official documentation.

Ease of access for persons belonging to national minorities to courts and tribunals should also be factored into their geographic distribution around the country, or measures to facilitate access to more distant courts and tribunals should be put in place (see Recommendation 4). Persons belonging to national minorities should be able to communicate in a language they understand, and preferably in their language, during proceedings and in their communication with judicial and national human rights institutions (see Recommendation 3). The burden of proof should shift to the defendant or the Government once a *prima facie* case of discrimination has been established.¹²

iii. *The right to a fair hearing within a reasonable time by an independent and impartial body established by law*¹³

Like everyone, persons belonging to national minorities should be afforded an effective opportunity to challenge any private or public act that interferes with their rights.¹⁴ As bias and systemic discrimination often affect members of national minorities (as well as other marginalized groups), it is important to underline that national minorities should have their cases heard by courts, tribunals and national human rights institutions that are grounded in the principles of impartiality and independence, and that are free of bias against minorities and against women belonging to national minorities in particular, on an equal footing with anyone else in their society.¹⁵ Moreover, heightened judicial scrutiny should be applied to cases where persons belonging to national minorities are victims, defendants or plaintiffs in order to establish whether hate or discrimination may have played a role in the case in question, and should therefore constitute an aggravating circumstance.

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- 12 See for instance, European Court of Human Rights (ECtHR), *Nachova v Bulgaria*, Application No. 43577/98 and 43579/98, 6 July 2005; Court of Justice of the European Union (CJEU), *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, Case C-54/07, 10 July 2008; CJEU, *Patrick Kelly v National University of Ireland (University College, Dublin)*, Case C-104/10, 21 July 2011; CJEU, *Galina Meister v Speech Design Carrier Systems GmbH*, Case C-415/10, 19 April 2012 and CJEU, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, Case C-81/12, 25 April 2013. See also UN Committee on the Elimination of Discrimination against Women (2015) General recommendation on women's access to justice, paragraph 15(g).
- 13 International Covenant on Civil Political Rights (1976) article 14; and European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) article 6.
- 14 In this context, States should consider introducing systems of e-justice to enhance the expediency and efficiency of justice. Close attention needs to be paid to ensuring that e-justice does not further complicate access to justice for persons belonging to national minorities who may have limited access to information technology or may lack the necessary training to make use of e-justice systems.
- 15 UN Committee on the Elimination of Discrimination against Women (2015) General Recommendation on women's access to justice, paragraph 28.

Heightened judicial scrutiny should also be applied to cases where hate or discrimination prevented the protection of a person or persons belonging to national minorities under the law and to ensure that their rights are upheld.¹⁶

The presumption of innocence should also apply equally to persons belonging to national minorities. Guarantees against excessive pre-trial detention for national minorities (for instance in cases where such persons have no permanent residence or domicile) should be put in place. Petitions for release should be judged by a competent, independent and impartial court and persons belonging to national minorities should not be held arbitrarily. The onus to request (continued) pre-trial detention of persons belonging to national minorities should be on the prosecution, and courts should provide specific reasoning to uphold decisions to continue detention. Equality of arms between defence and prosecution in criminal cases should also be upheld for defendants from minority backgrounds. This means that the same procedural rights should be afforded to persons belonging to national minorities. Equality of arms requires that minorities be also given the opportunity to contest all the arguments and evidence presented, in their language if warranted. Proceedings involving persons belonging to minority communities should not be delayed unduly and national minorities should not be prevented, in law or in practice, from appealing a judicial decision. No lesser credibility should be assigned to testimonies from persons belonging to minority communities owing to their gender, appearance, dress, demeanour, language or cultural conventions.

iv. The right to legal assistance

The right to bring an action and to a fair hearing is underpinned by the notion that persons involved in criminal, civil or administrative proceedings are entitled to legal assistance to present and defend their case. Enabling national minorities to defend their rights in legal proceedings by making legal services available to them will address many of the concerns they may have in relation to the administration of justice. Legal services, which should be provided in a language they understand and preferably in their language, include free legal aid but also other forms of assistance, such as access to court liaison offices to support isolated minority communities, mobile courts, on-line court services, legal education, access to legal information and other services that national human rights institutions may provide. In addition, persons belonging to minority communities should not be unfairly excluded from legal assistance

¹⁶ See for example, ECtHR, *Paraskeva Todorova v Bulgaria*, Application No. 37193/07, 25 March 2009; ECtHR, *Nachova v Bulgaria*, Application Nos. 43577/98 and 43579/98, 6 July 2005.

by the means test used to determine eligibility for financial assistance (see Recommendation 4). Lawyers and other staff involved in the provision of legal aid should also receive training to sensitize them to the needs of persons belonging to national minorities, including women.

v. *The right to an effective remedy*¹⁷

The right to an effective remedy includes holding perpetrators accountable and providing appropriate reparations to victims, including victims belonging to minority communities. Remedies come at the conclusion of proceedings and are intended to give victims a sense that they have been heard, that justice has been done and that it is seen to have been done, thereby fulfilling a vital conflict prevention function. Granting appropriate remedies to persons belonging to minority communities, including in collective redress that can tackle the causes of systemic discrimination, can also serve to signal the State's intent to treat them equally.

Reparations might involve measures such as compensation, restitution, rehabilitation and guarantees of non-repetition. States should ensure that decisions to award reparations to minorities are effectively carried out (see Recommendation 8). Lastly, disaggregated data (including gender-disaggregated data) regarding the identities of plaintiffs/respondents or victims/defendants, and the outcomes and remedies, should be collected by States to understand how the judicial system and national human rights institutions respond to cases involving national minorities.

2. Measures to guarantee access to justice for national minorities should be broader than providing access to courts. States should establish, strengthen and fund independent human rights institutions that can secure effective remedies for all complainants, including persons belonging to national minorities.

In the 1990 Copenhagen Document, the OSCE participating States committed to facilitate the establishment and strengthening of independent national human

¹⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) article 13

rights institutions.¹⁸ *The Lund Recommendations on the Effective Participation of National Minorities* underscore that “[n]on-judicial mechanisms and institutions, such as national commissions, ombudspersons, inter-ethnic or ‘race’ relations boards, etc., may also play critical roles.”¹⁹ With a mandate focused on promoting and protecting human rights, they are well suited to deal with violations affecting persons belonging to minority communities, especially if these involve public bodies (see below). In cases where judicial intervention is not legally possible, is unrealistic or unavailable to persons belonging to national minorities (for instance when litigation is too expensive), national human rights institutions can also provide an alternative recourse. Lastly, human rights institutions can offer a simpler and faster alternative to courts, making them more accessible to the public, and to minority communities in particular.²⁰

The form that participating States may adopt for their national human rights institutions depends on the context in which they are established. A State may decide to establish several human rights institutions, each with a specialized geographic or thematic focus, or to create one body with a broad mandate. Generally, ombudspersons deal with complaints of maladministration against public bodies while human rights commissions tend to have broader mandates that encompass the protection of human and minority rights guaranteed by the State’s constitution and, in many instances, international human rights standards as well. Bodies with a more specialized focus (for the protection of the rights of children or minorities for example) can co-exist and co-operate with generalist institutions.

From a conflict prevention perspective, it is important that minority communities be consulted prior to the establishment of these institutions and be represented in them (see Recommendation 5). They should also be fully independent and perceived as impartial by national minorities. They should have as broad a mandate as possible, and that should include, at least, the power to tackle administrative disputes involving organizations representing minority communities as well as cases of discrimination and human rights breaches committed by public entities, especially those that come in regular contact with persons belonging to minority communities. These include, *inter alia*, education bodies, social services and local authorities, as well as police and other security forces, detention centres and correctional services. By doing so, national human rights institutions can also build

18 OSCE (1990) Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, paragraph 27.

19 HCNM (1999) *The Lund Recommendations on the Effective Participation of National Minorities in Public Life*, explanatory note to Recommendation 24.

20 HCNM (1998) *The Oslo Recommendations*, explanatory note to Recommendation 16.

bridges between the State and national minorities. National human rights institutions should establish regional offices, and conduct outreach activities, including visiting areas with large concentrations of minority communities and organizing open days aimed at persons belonging to national minorities.

In addition to the advisory and promotion functions they fulfil, national human rights institutions should be empowered to exercise quasi-judicial powers to protect individual rights, including the rights of national minorities, such as:²¹

i. *The ability to receive and investigate individual complaints*

Human rights institutions should be able to receive complaints from individuals, but also from organizations representing minority communities, alleging breaches against public and private entities. These complaints can also be filed by third parties on behalf of the alleged victim(s), if consent has been given, and could lead to collective redress. Additionally, human rights institutions should be in a position to offer legal advice to complainants, assist them and represent them in other proceedings. The authority to investigate should include the power to compel the production of evidence and witnesses, including from public bodies, and to visit facilities normally not freely accessible to the public (such as detention centres). This power to investigate should also include the ability to protect witnesses and complainants from retaliation for being involved in a complaint.

ii. *The authority to initiate investigations*

Human rights bodies should be able to initiate cases on their own initiative (*suo motu*) in instances involving national minorities. This may allow them to tackle instances of systemic discrimination against national minorities and violations of minority rights in public interest litigation including by, for example, challenging decisions by public authorities that may be in formal compliance with the law but are disproportionately disadvantageous to persons belonging to national minorities.

iii. *The authority to issue decisions that can secure a remedy for the victim*

This authority should include the ability to settle cases through a decision (including recommendations regarding compensation) that can be enforced through the courts or specialized tribunals in case of non-compliance, the power to refer findings to the courts or specialized tribunals for adjudication or

21 See also Principles relating to the Status of National Institutions (The Paris Principles), adopted by UN General Assembly resolution 48/134 of 20 December 1993; and UN Committee on the Elimination of Discrimination against Women (2015) General recommendation on women's access to justice, paragraph 60.

to refer complaints falling outside their jurisdiction to the appropriate decision-making authority for adjudication.

iv. *The ability to seek a settlement through an alternative dispute resolution process*

Human rights institutions should be able to secure a remedy for minority complainants through alternative dispute resolution techniques, such as negotiation, mediation or conciliation, as long as they are compatible with international human rights standards. For instance, a national human rights entity may direct parties to an appropriate resolution once a determination has been made that a violation has occurred. A human rights body could also be involved in negotiations on behalf of a complainant belonging to a national minority with a public institution accused of having breached his or her rights. Alternative dispute resolution mechanisms under the auspices of national human rights institutions can secure a remedy for minority complainants, but they should not preclude litigation in case of non-compliance.

3. States should ensure that when persons belonging to national minorities engage with judicial and national human rights institutions and take part in proceedings, they are able to do so in a language they understand, and preferably in their language, as well as in an environment that is respectful of their identity.

In order to build trust with minority communities and provide them with more direct and easier access to justice, States should ensure that they create an environment in judicial and national human rights institutions that is respectful of the identity of national minorities, operates in accordance with existing international standards and is conducive to the effective administration of justice.

Central to this is the guarantee that a language that national minorities understand will be used during proceedings. This is a basic standard of due process that is universally applicable in judicial proceedings, and should also be applicable to proceedings conducted by national human rights institutions.²² Indeed, *The Oslo*

²² International Covenant on Civil and Political Rights (1976) article 14; OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991), article 23.1(ii); and European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) article 6.

Recommendations Regarding the Linguistic Rights of National Minorities advise that “[i]nternational law requires public authorities to ensure that all persons who are arrested, accused and tried be informed of the charges against them and of all other proceedings in a language they understand.”²³ Moreover, the Oslo Recommendations add that “it is reasonable to expect that States should, so far as possible, ensure the right of persons belonging to national minorities to express themselves in their language [including through an interpreter] in all stages of judicial proceedings (whether criminal, civil or administrative) while respecting the rights of others and maintaining the integrity of the processes, including through instances of appeal.”²⁴ It should be emphasized that when persons belonging to national minorities are able to use their language in proceedings, their perception that the process is fair increases, which in turn fosters confidence in the justice system and contributes to conflict prevention.

The use of minority languages entails providing, free of charge, interpretation during proceedings and timely translation of relevant documents, including evidence used at trial. Particular attention should be paid to making laws available in minority languages and to developing legal terminology in minority languages consistent with relevant national laws to facilitate the use of these languages in proceedings. Moreover, in areas where national minorities are settled in substantial numbers, consideration should be given to conducting all proceedings in their language, as suggested in The Oslo Recommendations.²⁵ In addition to ensuring that persons belonging to minority communities can use their language in proceedings, from a practical point of view, minorities should also be able to speak their language in administrative procedures and in communications with courts and national human rights bodies.²⁶ Their language should be spoken by staff and displayed on signage in buildings alongside majority languages. Forms, information about the institution, legal aid services and other practicalities (such as opening hours) should be made available in minority languages on-site and, where relevant, online.

23 HCNM (1998) The Oslo Recommendations, explanatory note to Recommendation 17. See also European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) article 5(2); Council of Europe (1994) Framework Convention for the Protection of National Minorities, article 10(3); and Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities (2012) Thematic Commentary No. 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention, paragraph 59.

24 HCNM (1998) The Oslo Recommendations, explanatory note to Recommendation 18. The same standard should apply to national human rights institutions.

25 HCNM (1998) The Oslo Recommendations, Recommendation 19.

26 Council of Europe (1994) Framework Convention for the Protection of National Minorities, article 10(2).

Language is a critical factor to enhance the legitimacy of courts and national human rights institutions in the eyes of national minorities. Other concerns, however, should be addressed too. The Ljubljana Guidelines note that “[s]ymbols, such as flags, signs, statues, monuments, place and street names, commemorative occasions or holidays, historical sites and burial sites, can have profound meanings related to identity. Symbols can have a powerful impact on social relations, and can be used to promote inclusion and cohesion as well as separation and division.”²⁷ Care should be taken to ensure that the facilities used and the symbols displayed in courts, tribunals, prosecution offices and national human rights bodies are appropriate for the administration of justice and do not unnecessarily foster a feeling of exclusion on the part of national minorities or cause offence and provoke tensions with them. Lastly, persons belonging to minority communities who testify in court should be allowed to choose a form of oath that they consider appropriate for their religious and cultural identity.

4. States should make legal assistance available to national minorities in a way that addresses the obstacles they face in accessing justice.

Persons belonging to national minorities, who may be socio-economically marginalized or have a limited knowledge of official languages, require assistance because they may not know or understand their rights, the law, legal procedure or the language of the court. Persons belonging to national minorities, and minority women in particular, may not have sufficient financial means to afford court fees or legal representation. They may live far from judicial institutions, making it more difficult for them to pursue cases. Without assistance, minority communities may perceive the judiciary as out of reach, alien or even biased against them. Such a perception can make them feel at a disadvantage as a community, contributing to negative views of the State and its institutions and potentially increasing tensions with the majority.

²⁷ HCNM (2012) Ljubljana Guidelines, explanatory note to Recommendation 50.

Legal assistance needs to be strategically organized to address the obstacles faced by national minorities in accessing justice, especially in cases of conflict-related displacement.²⁸ States should develop such strategies, in co-operation with key stakeholders, including the judiciary, prosecutors, law-enforcement agencies, national human rights institutions, bar associations, legal aid providers (including paralegals), other civil society organizations and representatives of national minorities. An important first step consists of putting in place, in consultation with persons belonging to national minorities, a regulatory and legislative framework for legal aid that is sensitive to the needs of minorities, and of minority women in particular. Several considerations should be taken into account when preparing such a framework. It should ensure that persons belonging to minority communities are able to access legal services in a language they understand, and preferably in their language (including through an interpreter), for criminal, civil and administrative cases at any stage of legal proceedings and also after, in case they serve a prison sentence.²⁹

It is also important that national minorities are not unfairly excluded from legal assistance by the means test used to determine eligibility for financial assistance. In this context, consideration should also be given to making primary legal aid (consisting of legal advice only) free. A means test can then be applied before providing legal assistance to vulnerable individuals to prepare their case and to be represented in court (sometimes referred to as secondary legal aid). Legal assistance should also be offered, regardless of an individual's means, if the interests of justice so require. It may be important to apply this principle in cases of hate crimes committed against persons belonging to national minorities because doing so will underline the importance that the State attaches to ensuring that these crimes are tackled vigorously.³⁰ Deciding which particular areas of law to include in the provision of assistance should therefore be assessed against the needs of

28 See United Nations (1990) Basic Principles on the Role of Lawyers (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders); UN General Assembly (2012) Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly resolution 67/187, annex); Council of Europe (1978) Resolution (78) 8 On Legal Aid and Advice (adopted by the Committee of Ministers at the 284th meeting of the Ministers' Deputies); Council of Europe (1976) Resolution (76) 5 On Legal Aid in Civil, Commercial and Administrative Matters (adopted by the Committee of Ministers at the 254th meeting of the Ministers' Deputies); and Council of Europe (1993) Recommendation No. R (93) 1 of the Committee of Ministers on Effective Access to the Law and to Justice for the Very Poor (adopted by the Committee of Ministers at the 484th meeting of the Ministers' Deputies).

29 See OSCE (2003) Decision No. 566 Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, paragraph 18.

30 See United Nations (2013) Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, paragraph 21; and United Nations (1990) Basic Principles on the Role of Lawyers (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders).

persons belonging to minority communities, and minority women in particular. Lastly, gender-sensitive legal aid policies should be designed and implemented for persons belonging to minorities who have been victims or witnesses of serious crimes, including sexual crimes, to minimize the risks of repeat victimization and secondary victimization (see Recommendation 7).³¹

The supply side of legal services also needs to be carefully organized. While sufficient resources need to be allocated to legal aid providers, a data-driven system for quality control is also very important. A code of conduct for legal aid providers also needs to be developed, which should contain provisions that protect the interests of clients irrespective of their background, and include a responsibility to act impartially, independently and with integrity.³² Training on minority issues and inter-ethnic relations should be given to providers of legal services. Depending on the context, the provision of independent legal aid can be under the direct responsibility of a ministry or another State agency, or be outsourced by the State to private law firms, individual lawyers or civil society organizations.

Geography does not only matter to the distribution of courts and tribunals around the country, but also to the supply of legal assistance, especially in States where national minorities tend to live in significant numbers in remote areas. Initiatives to address the geographic isolation of national minorities can include the establishment of court liaison offices in their communities to facilitate access to judicial institutions. Where relevant, such court liaison offices should communicate in a language that national minorities understand and preferably in their language. Their services can include: offering legal aid for criminal, civil and administrative cases; transporting parties to attend court; providing legal information on issues affecting minority communities; facilitating document certification; and liaising with civil society organizations that can support minority communities in their interaction with the judiciary. Mobile courts that visit minority communities in remote locations for short periods of time to hear cases are another way of facilitating access to justice for persons belonging to minority communities. Online court services offered in a language persons belonging to national minorities understand, and preferably in their language, provide another option to facilitate access to justice for minority communities that have sufficient access to information technology.

31 See UN Committee on the Elimination of Discrimination against Women (2015) General recommendation on women's access to justice, paragraph 37(a).

32 Some of the principles for the provision of legal aid are included in UN Committee on the Elimination of Discrimination against Women (2015) General recommendation on women's access to justice, paragraph 37(b).

The demand for legal assistance from national minorities will be driven in great part by their knowledge of their rights, the law and the judiciary. Persons belonging to national minorities should be offered opportunities to increase their awareness of the law and skills to deal with their legal problems through education, information and community-based organizing. Details about such services can be disseminated (in minority languages) through targeted information campaigns, media outlets used by national minorities and social media (where relevant). It can also be done through community-based paralegals trained specifically to work with minority communities and who can provide basic legal information to persons belonging to national minorities in their own language. Lastly, national human rights institutions can also assist minorities by offering legal aid and alternative dispute resolution mechanisms (in a language they understand and preferably in their own language) that can empower them to tackle their legal problems.

5. The composition of courts, tribunals, prosecution offices, law-enforcement agencies, correctional services, enforcement agencies (or bailiffs) and human rights institutions, should aim to reflect the diversity of the population at all levels.

Ensuring that the population's diversity is reflected in the judicial system and national human rights institutions³³ is a critical factor in building trust and relationships between minority communities and these institutions, thereby contributing to conflict prevention. The judicial system and, to a large extent, national human rights institutions can be one of the most visible and positive manifestations of State power if members of society feel confident enough to engage with these bodies. In areas where tensions involving national minorities persist, persons belonging to minority communities often do not take their complaints to law-enforcement agencies, the judiciary or national human rights entities because they do not trust them. They may even fear them, or see them as biased against their community or lacking independence.

Increasing diversity in the judicial system and national human rights institutions at all levels can help to address this lack of confidence on the part of minorities, make justice more accessible to them, promote the integration of society through participation in State institutions and build trust in the State. Diversity in the judiciary

33 See Note on Terminology, p.41.

increases public confidence in the fairness of the courts, which in turn can act as a bulwark against conflict and radicalization. For these reasons, increasing the representativeness of the judicial system and national human rights institutions should be regarded as a priority.³⁴

Achieving diversity in the judicial system and national human rights bodies requires a sustained effort on the part of the State to put in place and implement policies that will make these bodies a desirable place of employment for minorities, including minority women, and to remove discriminatory hurdles during the recruitment process. Measures should aim to enhance not only the hiring, but also the promotion and retention of minorities, in the judicial system and national human rights institutions. It should be emphasized, however, that in the case of the judiciary, such policies will need to be tailored to respect the principle of judicial independence. This is in line with the 1990 Copenhagen commitments, which state that “the independence of legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice.”³⁵

National minorities can be underrepresented in the judicial system and national human rights institutions for a variety of reasons. These include negative previous experience with these institutions, discrimination in recruitment and promotion, lack of relevant qualifications, inadequate knowledge of State and/or official languages and lack of information about professional opportunities in these bodies. The reasons for this lack of diversity vary in each situation, and States should devote time and resources to understand the precise causes of underrepresentation of minorities and of minority women in particular in the judicial system and national human rights institutions. Disaggregated data collection according to relevant criteria, such as ethnicity, language and gender, should be a regular and integral part of this effort, with due consideration given to data protection issues.³⁶ Special measures can then be designed and implemented to tackle systemic obstacles to diversity and achieve targets for recruitment and promotion. It is important to underline that such measures should not lower standards for minorities at the

34 OSCE Office for Democratic Institutions and Human Rights (ODIHR) (2010) *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, paragraph 24.

35 OSCE (1990) Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, paragraph 5.13.

36 See United Nations Economic Commission for Europe (2006) Conference of European Statisticians Recommendations for the 2010 Censuses of Population and Housing; Council of Europe (1981) Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108); Council of Europe (1997) Recommendation No. R 97 (18) of the Committee of Ministers to Member States Concerning the Protection of Personal Data Collected and Processed for Statistical Purposes (Adopted by the Committee of Ministers on 30 September 1997 at the 602nd Meeting of the Ministers' Deputies); and HCNM (2012) Ljubljana Guidelines, explanatory note to Guideline 15.

point of entry into the judicial system and the legal profession, or national human rights institutions. These measures should not constitute reverse discrimination against the majority or weaken the overall level of competence in the organization. Measures to promote effective representation could include:

i. Addressing the lack of qualifications

Access to the legal and law-enforcement professions can be facilitated by offering, where relevant, legal or other relevant curricula in minority languages. Mutual recognition of academic and legal qualifications between States can also ease access to these professions for persons belonging to national minorities that may have studied abroad. Providing other courses and training, including language training, to help persons belonging to national minorities to achieve the required level to pursue legal studies and complete police academy programmes can ensure greater access to these professions. Other measures include providing law students from minority communities with opportunities to gain experience through pro-bono work and placements in legal institutions, and for students from the majority to work with minority communities. Particular attention needs to be paid to institutions providing legal training and accredited to deliver licences to practise law, such as bar associations, to ensure that students, and female students in particular, from minority backgrounds are not discriminated against. Training to that effect should be provided to these institutions.

ii. Disseminating information to minority communities about employment opportunities in the judicial system (and the legal profession more generally) and national human rights institutions

Such initiatives can include outreach to schools with professionals working in the judicial system and national human rights institutions to encourage pupils from minority communities to pursue such careers, promoting such initiatives together with community leaders, using relevant media to encourage applications from national minorities, and facilitating visits by young people belonging to minority communities to law-enforcement bodies, judicial and national human rights institutions.

iii. Develop policies to increase diversity in the recruitment and promotion of personnel in the judicial system and national human rights institutions

Such policies must abide by the principle of judicial independence and ensure that recruitment and promotion in law-enforcement, correctional, judicial

and national human rights institutions are based on merit and capability.³⁷ Recruitment and promotion criteria must also be fully justifiable for the function or judicial office in question and not create unnecessary obstacles for minorities and minority women by, for instance, recruiting judges from a limited group of experienced advocates or lawyers, which generally tends to favour men from the majority. This requires defining a set of competencies expected from successful candidates, accessible to the public, against which applicants and staff applying for promotion can be evaluated.³⁸ Reviewing selection and interview procedures for possible bias against minorities (and female minorities in particular) is another useful measure.³⁹ For instance, some countries have noted that the use of competitive examinations to select judges is fairer to women than basing recruitment on experience in the legal profession.

Quotas – the practice of allocating places for members of particular groups to be filled during a selection or promotion process – represents another policy option to increase minority participation in judicial and national human rights institutions. However, the use of quotas can give rise to complaints of unfairness and lowering standards.⁴⁰ Quotas are, nonetheless, appropriate for transitional periods and in the context of comprehensive reforms (for example, in post-conflict settings) of the judicial system and national human rights institutions. In such instances, quotas help to achieve the aim of representativeness at the outset, thereby enhancing the legitimacy of new institutions.

In addition to the points made above, recruitment for judicial office, as well as promotion within the judiciary, should be done by open competition under the auspices of an independent selection board or a standing judicial oversight body independent from the government. Relevant legal practitioners and experts should be included in the selection and promotion processes, as well as persons holding judicial office.⁴¹ Policies to increase the recruitment and promotion of minorities and minority women should fully respect judicial

37 Council of Europe (1994) Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (Adopted by the Committee of Ministers at the 518th meeting of the Ministers' Deputies), Principle I, paragraph 2.c.

38 OSCE ODIHR (2010) *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, paragraphs 21 to 23.

39 UN Human Rights Council (2013) Resolution 23/6 on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, paragraph 2.

40 Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities (2008) Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, paragraphs 122 and 123.

41 Venice Commission of the Council of Europe (2007) Judicial Appointments (Report adopted by the Venice Commission at its 70th Plenary Session), paragraphs 27–31.

independence and not be made at the expense of the basic criterion of merit.⁴² Positive action, consisting of giving preference to candidates from minority communities, is appropriate in cases of candidates of equal merit.

iv. Introduce policies to retain personnel from minority communities in the judicial system and national human rights institutions

Over time, recruitment and promotion policies underpinned by independence, fairness and transparency should increase diversity in the judicial system and national human rights institutions. Nonetheless, attention should also be paid to fostering a working environment that accepts diversity and welcomes persons belonging to minority communities, including minority women. Unless this is achieved, there is a significant risk that national minorities will not remain in their employment in these institutions. For instance, action should be taken to stop and sanction discriminatory practices in the workplace, while respect should be shown for minority identities in matters of dress, language, diet and religion when they comply with human rights standards. As discussed in Recommendation 4, facilities, as well as the images, emblems, flags and other symbols displayed on uniforms and in police stations, prisons, courts, tribunals, prosecutions offices, enforcement agencies and national human rights bodies, should be appropriate for the administration of justice and should not unnecessarily cause offence to and provoke tensions with national minorities employed in these organizations. Equal treatment in the workplace, mentoring initiatives, opportunities for professional development and effective internal complaints mechanisms, supported by the organization's leadership, will go a long way towards ensuring that national minorities feel respected and accepted.

The measures suggested above often require a shift in the organizational culture of the judicial system and perhaps even national human rights institutions, and call for the development of multicultural and service-oriented institutions. Leadership, sustained effort, skilled management and appropriate diversity training are key ingredients to ensure that such a change is positive, sustainable and contributes to building trust with all communities. Lastly, disaggregated data should be collected, with due consideration given to data protection and the right to self-identification, to measure progress in achieving diversity targets in the judicial system and national human rights institutions.

⁴² Venice Commission of the Council of Europe (2007) Judicial Appointments (Report adopted by the Venice Commission at its 70th Plenary Session), paragraph 37.

6. To facilitate access to justice for national minorities, States should ensure that law-enforcement agencies work to build trust with minority communities and enforce the law in an impartial and non-discriminatory manner, free of prejudice and gender bias.

The police are usually the first point of contact for persons who wish to report an incident or a crime. As such, they provide an entry point into the criminal justice system and police officers are key actors in facilitating access to justice for persons belonging to minority communities. But if persons belonging to a national minority are disproportionately victims of ill-treatment during arrest, questioning and detention, then minority communities will fear, distrust and shun law-enforcement bodies. In such circumstances, access to justice is denied because crimes committed against minorities either go unreported or are not investigated fairly and rigorously, and therefore do not lead to successful prosecutions. They can significantly increase tensions between law-enforcement agencies and minority communities.

The *Recommendations on Policing in Multi-Ethnic Societies* point out that “good policing in multi-ethnic societies is dependent on the establishment of a relationship of trust and confidence, built on regular communication and practical co-operation, between the police and the minorities. [...] Effective policing in a democratic society must be based not on fear, but on consent.”⁴³ Ensuring that law-enforcement agencies reflect the diversity of society, communicate and co-operate with minority communities in their daily work and apply the law in an impartial and non-discriminatory manner is critical for the development of a relationship of trust with minorities. Such a relationship is beneficial for several reasons. Minority communities benefit from law-enforcement agencies that are responsive to their complaints, concerned about their safety and facilitate their access to justice. Policing, in turn, is more effective because law-enforcement agencies can rely upon the co-operation of national minorities in their daily work. Such co-operation also enhances the ability of law-enforcement agencies to prevent crime. States also benefit when societies are better integrated, policing is more effective and communities can co-exist peacefully with each other.

Establishing a relationship of trust with national minorities – a core tenet of community policing – rests on the ability and willingness of law-enforcement bodies to

⁴³ HCNM (2006) *Recommendations on Policing in Multi-Ethnic Societies*, introduction and explanatory note to Recommendation 12.

communicate and co-operate with them. Courses offered at police academies and subsequent in-service training courses should include themes such as community policing, human rights (including non-discrimination legislation) and inter-cultural communication. Where relevant, effective communication with minorities requires the recruitment of persons belonging to minority communities or of interpreters who speak a language they understand, and preferably their language. Protocols and methods to engage with minority communities need to be established as well, such as the use of leaflets, broadcasts in the media and posts on social media to communicate information in a language they understand and preferably in minority languages. Other forms of engagement with minority communities involve personal contact and dialogue, such as: *ad hoc* public meetings with law-enforcement officials, regular community forums to discuss policing in the community, workshops on specific topics related to community safety and the appointment of liaison officers to national minorities.

Law-enforcement agencies can derive an important benefit from developing a relationship of trust with minority communities in the form of information and evidence obtained from individuals in these communities. Encouraging minorities to report crimes motivated by ethnic hatred, and following up on these complaints, signals to minority communities that justice is accessible. Persons belonging to national minorities are more likely to come forward and report crimes, with information and evidence for law-enforcement bodies a by-product, if they know that their complaints will be handled professionally, vigorously and with due diligence.⁴⁴ Crime prevention strategies (such as community safety programmes), where law-enforcement bodies and communities work together to make their neighbourhoods safer and free of crime, is another way to encourage minority communities to co-operate with law-enforcement agencies. Such strategies should be underpinned by an understanding of the underlying causes for the commission of crimes, and hate crimes in particular, against persons belonging to national minorities.

How police and other security services conduct their operations and investigations has a very significant impact on the way in which they are perceived by national minorities. In addition to prioritizing the investigation of hate crimes and pursuing all cases involving minority victims diligently and impartially, law-enforcement agencies should factor a number of considerations into their operational planning, such as deploying a number of officers appropriate for the task at hand (including officers from minority backgrounds in mixed teams that include women) and taking care

⁴⁴ See for instance OSCE (2003) Decision No. 566 Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, paragraphs 26 to 31.

not to use weapons and tactics that unnecessarily provoke, frighten or harm national minorities. Arbitrary arrests, illegal detentions, stop and search schemes, abusive sweep operations in minority community areas, checkpoints and vehicle inspections that target persons belonging to minorities because of their appearance or stereotypes about them (i.e. racial profiling) instead of their individual behaviour are all extremely damaging to relations between minorities and law-enforcement agencies and should be discontinued. Professional standards and operational policies grounded in the principle of equal treatment and integrating international policing standards should be developed as a matter of priority, while a rigorous complaints process should be put in place to encourage members of the public, including persons belonging to national minorities, to report violations by law-enforcement agencies.

7. Victim support services and witness protection measures should be sensitive to the needs of persons belonging to national minorities, and of minority women in particular.

States need to take into account the needs of persons belonging to national minorities when providing assistance to minority victims of crime.⁴⁵ The Recommendations on Policing note that “States need to establish national structures that are capable of delivering victim support services locally and services that are accessible to and appropriate for the needs of all ethnic groups.”⁴⁶ This is particularly important as minority victims, and victims of hate crime in particular, may be reluctant to report crimes owing to a history of negative experience with law-enforcement agencies, a lack of trust in the judicial system or a lack of knowledge about their rights and criminal justice in general. Minority victims may also be concerned that the crimes (in particular sexual crimes) perpetrated will not be investigated and prosecuted diligently on account of their ethnic identity and gender, fear of reprisals

⁴⁵ See UN General Assembly (1985) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (A/RES/40/34, 96th plenary meeting); Council of Europe (1985) Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure (adopted by the Committee of Ministers at the 387th Meeting of the Ministers' Deputies); Council of Europe (2006) Recommendation Rec (2006) 8 on Assistance to Crime Victims (Adopted by the Committee of Ministers on 14 June 2006 at the 967th Meeting of the Ministers' Deputies); Council of Europe (2011) Convention on Preventing and Combating Violence against Women and National Violence (CETS No.210); and European Union (2012) Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime.

⁴⁶ HCNM (2006) Recommendations on Policing, explanatory note to Recommendation 20.

from the perpetrators or unease with the attention that investigation may bring on themselves, their families and their community. Lastly, national minorities' lack of representation in law-enforcement agencies and the judiciary can be a strong disincentive against approaching the judicial system (see Recommendation 5), not least because of the language barriers it can create and the lack of sensitivity to cultural diversity it fosters.

The judicial system should treat minority victims in a way that empowers them and facilitates their access to justice. By doing so, the State demonstrates its commitment to the rule of law and to individual rights without discrimination. This, in turn, will contribute to the integration of society and to conflict prevention. The police service is often the first State institution that victims of crime visit (although some victims may choose to contact the police through a State-sponsored free help line, where available). At the moment they report a crime, victims may be emotionally distressed, physically unwell, unsure about what course to follow and in need of immediate assistance. In addition to initiating a criminal investigation, law-enforcement agencies should assess the needs of the victim and identify the protection measures required.⁴⁷ They should also provide immediate support and direct minority victims to other relevant institutions, including civil society organizations, particularly those specialized in assisting persons belonging to national minorities. Services should be provided indiscriminately to minority victims in the immediate aftermath of a crime and for the duration of proceedings (and perhaps beyond, if warranted), and could include medical care, psychological counselling, material support, social care and legal assistance.

The Recommendations on Policing point out that "it is essential that police perform these immediate victim support tasks effectively, both for the safety of the victim and to maintain the victim's confidence in the police. Police need to maintain this confidence so that victims will be willing to provide information for the investigation of their case, and also be willing to testify in court."⁴⁸ As they may be providing testimony, law-enforcement agencies may also need to offer protection to minority victims. Protection is also required when there is a threat to their safety due to them coming forward to report a crime. In this context, States should adopt clear standards regulating the disclosure to a third party of information received from or relating to a victim.

⁴⁷ See EU (2012) Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

⁴⁸ HCNM (2006) Recommendations on Policing, explanatory note to Recommendation 20.

States should also set up specialized centres for victims of crimes, such as sexual and domestic violence, and to facilitate access to these centres.

If minority victims feel that law-enforcement agencies are unwilling to take their perspective into account or to protect them from repeat victimization, including retaliation for having reported a crime, then their confidence in the police and the wider judicial system will decline, leaving them feeling that justice is beyond their reach. It is important to point out that crimes motivated by ethnic hatred may be committed against entire minority communities and not just persons belonging to these communities. In this case, law-enforcement agencies should adapt their support and protection measures to ensure that they can encompass whole communities. In addition to the risk of repeat victimization, law-enforcement officials should be sensitive to the fact that minority victims, and female victims in particular, may be subject to secondary victimization through the response of the judicial system and individuals to the crimes perpetrated against them. Police officers, lawyers, judges and prosecutors should always take into account the victim's perspective as well as the context in which the crime against individual minorities or their community was committed.

In the course of criminal proceedings, persons belonging to minority communities may be called to provide testimony. By doing so, they can put themselves and their families at risk of retaliation and may be in need of protection before, during and after trial. Witnesses and their families may require police protection or even to enter witness protection programmes, which can include relocation. Achieving a satisfactory level of protection for witnesses from minority communities may be particularly difficult given their specific socio-economic, cultural and linguistic circumstances. For instance, a balance needs to be found between respect for outward cultural and religious symbols associated with minority communities and the need for protecting the identity of witnesses originally from that community. States should make sure that every possible effort is made to address the challenges related to the protection of witnesses belonging to minority communities to avoid hindering the pursuit of justice.

8. States should ensure that court orders and judgments affecting persons belonging to national minorities are executed effectively, impartially and within a reasonable time.

The effective execution of judicial decisions is an integral component of access to justice for all members of society, including national minorities.⁴⁹ Executing judicial decisions is particularly important in cases involving individuals who are at greater risk of being victims of crime or affected by discrimination because of their gender, status as a minority or both. Moreover, executing judicial decisions effectively is important to protect the rights of persons belonging to minority communities, including to property, and to ensure their safety. Lack of execution can lead to situations where property is not restored to its rightful owner, convicted persons are not imprisoned and remain a threat to their victims, or plaintiffs continue to suffer from discrimination.

If the execution of judicial decisions affecting national minorities is selective, delayed or completely lacking, members of minority communities are likely to reach the conclusion that access to justice is elusive for them. Their trust in the judiciary and the State will be damaged as a consequence. On the other hand, effective execution of judgments and court orders signals that the State is committed to uphold the rule of law and individual rights without discrimination. This implies that all orders and judgments by courts and tribunals affecting persons belonging to national minorities, be they criminal, civil or administrative, are issued in a language they understand and preferably in their language, and are also respected and executed without discrimination and within a reasonable time.

Law-enforcement agencies and correctional services are key actors in executing judicial decisions in criminal matters (such as search warrants or detention on remand). They should execute judgments and court orders professionally, within a reasonable time and without discrimination. In addition, enforcement agencies (or bailiffs) are also needed to ensure the execution of judicial decisions regarding civil and administrative matters, such as private claims and the collection of public receivables.

⁴⁹ See Council of Europe (2003) Recommendation Rec(2003)17 on Enforcement (adopted by the Committee of Ministers at the 851st Meeting of the Ministers' Deputies); Council of Europe (2009) Guidelines for a Better Implementation of the Existing Council of Europe's Recommendation on Enforcement (adopted by the CEPEJ at its 14th Plenary Meeting); and Council of Europe, Consultative Council of European Judges (2010) Opinion No. 13 on the role of judges in the enforcement of judicial decisions.

Like law-enforcement agencies, the judiciary and correctional services, enforcement agencies should reflect the diversity of the population, not least to lend additional legitimacy to the execution of decisions by courts or tribunals (see Recommendation 5).

9. States should ensure that persons belonging to national minorities held in detention or imprisoned are treated with humanity and respect for their identity.

In common with all members of society, the way minorities are treated during their time in detention or in prison may have a significant impact on whether they are able to defend their rights, access justice and, where relevant, rehabilitate after they are released from prison.⁵⁰ States should ensure that persons belonging to minority communities are not singled out for harsher treatment when they are detained or imprisoned. They should not be held unnecessarily in police custody or pre-trial detention for long periods of time. They should not be subjected to arbitrary or collective arrests, or torture and other inhumane treatment, including to extract confessions. States should ensure that their families are not blackmailed to secure their release, a more lenient sentence or better detention conditions, and their lawyers should not be physically assaulted, intimidated or arrested. Discriminatory and abusive behaviour shown by prison staff or other inmates towards prisoners belonging to minority communities constitutes a denial of justice too. It can also feed a deep sense of injustice among minority communities. Ill-treatment can increase alienation on the part of individuals who suffer abuse and their communities. In particular, it adds to the risk of conflict if minority communities come to believe that the State turns a blind eye to or even sanctions their mistreatment by law-enforcement agencies and correctional services.

The closed environment of prisons and (to a lesser extent) police detention can amplify the discrimination and stigmatization that national minorities may already face in society at large. Minority women may be particularly at risk on account of their membership of a minority community and their gender. Generally, persons belonging to national minorities risk being subjected to one or a combination of the following while in prison or detention: worse treatment or conditions than those for other groups; an unwillingness to communicate with them in a language they

⁵⁰ International Covenant on Civil and Political Rights (1976), article 10.1.

understand and preferably in their language; a failure to respect religious and cultural habits, even when these comply with international human rights standards; physical and psychological abuse; enhanced searching and interview protocols; systematic classification into higher security arrangements (such as solitary confinement); and unwarranted disciplinary punishments in prison. States should put measures in place to ensure that detainees and inmates from minority communities are granted access to justice and that the reasons for their detention and imprisonment, as well as their treatment while in custody, can be challenged effectively before a court or with a national human rights institution. States should also collect disaggregated data on their prison population and, if warranted, devote resources to understand the causes of minority overrepresentation in prisons.⁵¹

States should ensure that the conditions of detention and imprisonment for persons belonging to national minorities meet the following standards:

i. Detention by law-enforcement agencies

States should ensure that basic standards are not lowered when persons belonging to minority communities are detained by law-enforcement agencies. Monitoring of detention facilities by independent bodies, such as national human rights institutions, civil society organizations, national preventative mechanisms and the International Committee of the Red Cross (ICRC), should be encouraged. Persons belonging to minority communities who have been arrested should be promptly informed of their rights, the reason for their arrest and the charges against them in a language they understand, and preferably in their language. They should have access to a lawyer and a doctor, and they should be allowed to notify a third party of their choice that they are being detained. A record should be kept for each person detained that includes all aspects of their detention and actions taken during custody.

Questioning during detention should be conducted in accordance with the law and existing regulations, and it should be respectful of the cultural and religious habits of persons belonging to minority communities. Minority detainees should be questioned in the presence of officers from minority backgrounds where possible, and female officers should be present when minority women are questioned. When questioning persons belonging to national minorities, officers should use a language they understand or an interpreter. Standards regarding the permissible length of interrogations, rests between and breaks during interrogations, and places where are interrogations may be conducted

⁵¹ See footnote 29.

should not be lowered for national minorities, and the obligation on the part of the interrogating officers to identify themselves should remain in place. The electronic recording of interrogations, an additional safeguard against ill-treatment, should be encouraged. The standards of detention facilities provided for minority detainees should not be inferior to those provided to persons from other communities.

ii. *Imprisonment*

Rehabilitation and reintegration (as called for by the International Covenant on Civil and Political Rights) may be particularly difficult to achieve for persons belonging to national minorities because they run the risk of being further discriminated against and stigmatized on account of their prison sentence.⁵² While prisoners from minority communities should always be treated with dignity and with respect for their identity, States should also put in place policies on prison management that facilitate their rehabilitation as a means to buttress social cohesion.

Non-discriminatory prison rules grounded in international standards for the treatment of prisoners should be designed and communicated by prison administrators to staff and to all prisoners.⁵³ This can be done by handing out copies of such rules and regulations to all prisoners and by making sure that they are provided to minority prisoners in a language they understand, and preferably in their language. Correctional staff should also receive training to make them more sensitive to the needs of male and female prisoners from minority backgrounds. They should also be able to communicate with minority prisoners in a language they understand and preferably in their language. In addition, correctional staff should also include minority employees to reflect society's diversity (see Recommendation 5).

Independent bodies (such as national human rights institutions, civil society organizations, national preventative mechanisms and the ICRC) should provide ongoing monitoring of possible discrimination in the prison environment, and a complaints mechanism should be available to minority prisoners.

⁵² International Covenant on Civil and Political Rights (1976), article 10.3.

⁵³ Also known as the Nelson Mandela Rules, international standards for the treatment of all prisoners are found in the United Nations Standard Minimum Rules for the Treatment of Prisoners (2015). See also Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

Legal assistance should be made available to prisoners in a language they understand, and preferably in their language. All prisoners, including minority prisoners, should be allowed to observe the tenets of their religion, including dietary requirements. Their culture and, where relevant, their language should not be belittled, and they should be allowed to communicate with their families in their language. Symbols that are offensive to minorities and can provoke tensions with other groups should be eliminated (see Recommendation 3). Special vocational programmes should be designed for minority prisoners, including minority women, to support their rehabilitation and enhance their self-sufficiency. Care should be taken to make sure that minority prisoners are incarcerated in facilities and prison areas where they will not be at risk because of their status as minorities, and close to their communities. Consideration should be given to allow minority prisoners to serve their sentence in areas where national minorities are concentrated geographically.

10. States should, as a matter of urgency, provide effective redress to persons belonging to national minorities who have suffered serious human rights violations as a result of inter-ethnic conflict.

Communal conflicts have a deep and long-lasting impact on how the State is perceived by minority communities, on relations between minority communities and the majority and on the individuals affected by the conflict. Separation between the majority and minority communities, often a by-product of inter-ethnic conflict, divides societies and creates an environment where negative stereotypes and competing narratives can develop. Claims and grievances left over from the conflict, including with regard to actions by State institutions, can leave minority communities feeling wronged, marginalized and systematically discriminated against. Human rights violations committed against individuals, including persons belonging to national minorities, often invite retaliation and further violence.

If these tensions and crimes are left unaddressed, they are likely to foster resentment on the part of victims, entrench divisions between communities and lead to another cycle of conflict, violence and possibly mass atrocities. Societies that have experienced conflict and serious human rights violations involving national minorities need to find ways to deal with the past so they can build a future in which all communities, including national minorities, can coexist peacefully. States should therefore and as a matter of urgency provide redress to victims and, where

appropriate, to communities (including national minorities) that have been affected by serious human rights violations in the context of communal conflict. This can be achieved through several means:

i. *Institutional reform/vetting of State employees*⁵⁴

To re-establish trust, prevent the repetition of human rights violations and ensure the protection of human rights (including minority rights) in post-conflict situations, State institutions (and, in particular, military, law-enforcement and judicial bodies) should be reformed to consolidate the rule of law and guarantee public accountability. An important part of this process consists of reforming the normative framework (laws, by-laws and professional standards) under which these institutions operate to ensure it is compatible with international human rights standards. Regarding the security sector (military and law-enforcement), reform should aim to increase civilian control, ensure democratic accountability, and improve governance and effectiveness. As for the judiciary, reform should seek to increase its independence, impartiality, accessibility (including for persons belonging to national minorities) and effectiveness. Minority communities should be involved in the reform process, not least to ensure that reforms tackle the causes of systemic discrimination in these institutions.

Another important reform can include vetting individuals working for State institutions to ensure that they meet basic standards of integrity and professionalism and have not been involved in serious human rights violations, including against persons belonging to national minorities. While vetting does not constitute a legal remedy as such, it is nonetheless a form of accountability and demonstrates the State's commitment to justice for victims, including victims from minority communities. Vetting schemes also make it possible to hold perpetrators accountable when the prosecution of all perpetrators is not possible. If done as follows, vetting is an important measure to rebuild national minorities' trust in the State and its institutions.

A vetting programme generally includes three main phases. The first phase consists of registering staff in the institution being vetted. Second, applicants are assessed against criteria set for State employees as well as on the basis of information they provide alongside other information obtained through independent sources (e.g. victims, civil society organizations, minority

⁵⁴ See UN Security Council (2004) Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, section XV.

communities, truth commissions and national human rights institutions). Lastly, those deemed ineligible to work in the State institution concerned are removed from public service. Vetting mechanisms must comply with the basic principles of procedural fairness, including the right to appeal a decision, and should not disproportionately target national minorities.

ii. *Truth commissions*⁵⁵

Truth commissions are independent commissions of inquiry established by the State with a mandate to investigate and report on current or past human rights abuses and to recommend reparations as well as other reforms to prevent the recurrence of conflict. Truth commissions can also be vested with quasi-judicial powers, such as being able to rule on reparation claims or to compel witnesses to testify. They are victim-centred in nature and work directly with them by taking statements, holding public hearings and investigating facts, causes and circumstances surrounding past abuses. They can help victims belonging to minority communities to achieve reparations and recognition from the State for abuses committed against them and can make the prosecution of perpetrators possible. Truth commissions can be an effective tool for tackling past atrocities in post-conflict situations when State institutions are not able to investigate all abuses vigorously and fairly. By gathering information and recommending prosecutions as well as other reforms (such as institutional reform and vetting), they can pave the way for addressing violations committed against national minorities, play a part in crafting a shared narrative about the conflict, act as a conflict-prevention tool and contribute to reconciliation.

iii. *Access to judicial remedies*⁵⁶

States should provide equal access to an effective judicial remedy to victims of serious human rights violations. Besides criminal prosecution, this should include the possibility of civil lawsuits, including by groups of victims as part of collective redress. Legal assistance should be made available to minority victims (see Recommendation 4). States should also investigate and prosecute individuals who committed serious human rights violations during the conflict in question. It is important that crimes committed against persons belonging to national minorities are tackled thoroughly and impartially. Within the investigation and prosecution, particular attention should be paid to instances of gender-based violence perpetrated against minority women and cases of missing

55 UN Security Council (2004) Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, section XIV.

56 UN Security Council (2004) Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, section XII.

persons. By addressing crimes committed against minority communities, States signal a break with the past, contribute to rebuilding confidence in public institutions and deter future violations.

Criminal prosecutions should be underpinned by a coherent and effective investigative and prosecutorial strategy. Prosecutions should be based on clear objectives and thorough investigations of all crimes on all sides of the conflict. Due to the scale of violations, it may not be realistic or possible, however, to try all perpetrators. Strategies for prosecution should therefore focus on the systemic aspects of serious human rights violations, and clear and transparent criteria should be used to select and prioritize cases for prosecution. Criminal justice efforts must also adhere to the principles of fair trial, due process and access to justice for victims, including minority victims. Prosecutions need to be supported by a robust communication and outreach strategy to minority communities in a language they understand, and preferably in their language, to explain and clarify judicial outcomes, as they may not always meet the expectations of minority victims. Attention should be paid not to expose victims and witnesses to repeat victimization or secondary victimization, including by protecting the identity of victims and witnesses. This is particularly important in cases of gender-based violence, which affects women disproportionately.

iv. Reparations⁵⁷

State-run reparations programmes should seek to redress damage suffered by minority victims or communities as a consequence of serious human rights violations committed against them. This can be achieved through restitution which, whenever possible, should restore victims to their original situation before serious violations of human rights law occurred. Reparations can also take the form of financial compensation to victims for their loss, while rehabilitation (for example through medical and psychological services or pension benefits) is another type of reparations. Sanctions against those liable for the violations also constitute reparations and so do efforts to locate those missing, abducted or killed. Reparation policies may be designed on the basis of recommendations made by truth commissions or national human rights institutions.

Access to reparations should be as inclusive as possible to avoid any further marginalization of minority victims or communities, and to demonstrate the State's commitment to address the past and to strengthen social cohesion.

⁵⁷ UN Security Council (2004) Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, section XVI.

Note on Terminology⁵⁸

Access to Justice

The concept of access to justice is understood as an obligation on the part of the State to guarantee indiscriminately each individual's right to effective redress if it is found that their rights have been violated or need to be enforced.

Compound Discrimination

The concept of compound discrimination means that individuals from national minorities often face discrimination on the grounds of their ethnic identity, gender, sexual orientation, age, disability, language, religion (or belief), national or social origin in addition to the discrimination they face as members of national minority groups.

Judicial System

The judicial system is understood in this document as courts, tribunals, prosecution offices, law-enforcement agencies, correctional services and enforcement agencies (or bailiffs).

National Human Rights Institutions

National human rights institutions are understood as independent State bodies established by law with a mandate to promote and protect human rights in a country, and include human rights institutions established at the sub-national level.

⁵⁸ This Note on Terminology is intended as a guide for the general reader on how the HCNM is applying these terms in this specific document. They are not legal definitions. These terms may be used by the HCNM differently in other documents, depending on the context.

National Minority

The term “national minority” refers to a wide range of minority groups, including ethnic, religious, linguistic and cultural communities, regardless of whether these groups are recognized as such by the States where they reside and irrespective of the designation applied to or claimed by them. The terms “national minorities”, “minorities”, and “minority communities” are used in this document as a convenient abbreviation of the phrase “persons belonging to national minorities”.

Secondary Victimization

The victim-blaming attitudes, behaviours and practices engaged in, which result in additional trauma for the victim of a crime.

Systemic Discrimination

The concept of systemic discrimination refers to rules, norms, attitudes and behaviour in State institutions and in society that prevent certain persons, in this case persons belonging to national minorities, from enjoying the same rights and opportunities that are available to the majority.

Victimization

The unwarranted singling out of persons belonging to national minorities and subjecting them to crime, exploitation, unfair treatment or another wrong.

