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Draft recommendations on minorities in the criminal justice system

Note by the Secretariat

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I. Introduction

1. In accordance with Human Rights Council resolutions 6/15 and 19/23, the present document contains the draft recommendations that will form the basis for discussions at the eighth session of the Forum on Minority Issues (24 – 25 November 2015). At the eighth session, participants in the Forum will consider the theme of “Minorities in the criminal justice system”, and will be provided with substantive and tangible outcomes of the session in the form of thematic recommendations. The draft recommendations contained in the present document are intended to guide the Forum discussions with the objective of further strengthening and developing their content. The recommendations will be presented by the Special Rapporteur on minority issues to the Council at its thirty-second session.

2. The draft recommendations, which are primarily based on the provisions contained in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, recognize that comprehensive implementation of minority rights and the existence of adequate institutional and policy frameworks can effectively contribute to the elimination of all forms of discrimination against members of minority communities, as well as promote their full equality before the law without any discrimination.

3. The draft recommendations are also based on existing human rights standards, including international and regional instruments, and principles and guidelines concerning the fairness and effective safeguarding of minority rights at all stages of the criminal justice process. Specific reference is made to the jurisprudence and general comments of United Nations treaty bodies and relevant reports and recommendations of different special procedures mandate holders, including the work of the Special Rapporteur on minority issues. In this context, the draft recommendations also take into account general recommendation No. 31 of the Committee on the Elimination of Racial Discrimination on the prevention of racial discrimination in the administration and functioning of the criminal justice system, and extend the scope of the recommendations thereof to discrimination against all national or ethnic, religious and linguistic minorities.

4. The draft recommendations take into account the great variety of legal systems and minority situations around the world, and acknowledge that patterns of violation of the rights of minorities may vary between systems and that, consequently, different measures may be required to protect minority rights throughout the criminal justice process within a given State. The present document makes no claim to study the diversity of national criminal justice systems nor does it explore how specific systems may generate or accentuate particular forms of discrimination against minorities.

5. As recalled at previous sessions of the Forum on Minority Issues, it is important to recall that the range of issues covered by the draft recommendations is not exhaustive, but rather addresses a wide range of situations in which the rights of minorities are violated in the administration of justice. The draft recommendations are intended to be implemented in countries with diverse political, religious, historical and cultural backgrounds, in full respect of universal human rights standards and regardless of any specific State ideology, religion or value system. The secretariat sincerely hopes that the draft recommendations will be improved by participants in a constructive manner, in a spirit of cooperation and open dialogue.

6. The eighth session of the Forum on Minority Issues offers an opportunity to all stakeholders to discuss and explore manifestations of, and possible reasons leading to, discriminatory mechanisms and patterns in all stages of the criminal justice process that undermine the enjoyment of fundamental rights by individuals or groups belonging to a minority. The Forum also provides participants with an opportunity to share views on

existing positive practices, approaches and mechanisms that effectively address these challenges and could be replicated in other countries.

7. In this regard, the present draft recommendations provide State authorities, decision makers, public officials, minority groups, non-governmental organizations, academics and other stakeholders, including the media, with an overview of concrete solutions to address the specific challenges and needs of minorities in relation to various stages of the criminal justice process, and possible responses thereto.

II. General considerations

8. The draft recommendations proposed in the present document should be read in conjunction with the substantive and action-oriented recommendations formulated at the seven previous sessions of the Forum on Minority Issues, given that they also apply to situations where discrimination in the criminal justice system is to be prevented and/or addressed.

9. In particular, at previous sessions of the Forum, participants addressed some of the most fundamental, long-standing concerns and entrenched challenges that minorities face in their access to fundamental economic, social, civil and political rights, depriving them of the opportunity to contribute fully and on an equal footing to the socioeconomic and political life of the State. The present recommendations acknowledge the importance of addressing the systemic nature of social, economic exclusion and political marginalization, including institutionalized discrimination against minorities, as an essential element in the complex matrix between exclusion and criminal behaviour. The draft recommendations therefore recognize that an effective and responsive criminal justice system must, at the front end, involve investment, such as early intervention to combat social, economic and political disadvantage of minorities. In this regard, States should also consider taking special measures for minority groups.

10. It is important to recall that, in any measures aimed at implementing the recommendations, a gender-sensitive approach is required, given that, in the various stages of the criminal process and in the prison administration of virtually all countries, minority women may be exposed to multiple and intersecting forms of discrimination, irrespective of their status as victims or perpetrators of offences or as witnesses.

11. All measures taken with a view to implementing the recommendations should be, to the fullest extent possible, developed, designed, implemented, monitored and evaluated in consultation with, and with the effective participation of, minorities, including women.

12. Recognition of minority status should not be left solely to the State to decide. As stated in the authoritative interpretation by the Human Rights Committee in its general comment No. 23 (para. 5.2), the existence of minorities should be established by objective criteria. Every effort should be made to ensure that the principle of self-identification is respected.

III. General recommendations for States

13. Regardless of the set of laws of a particular State is applicable for the criminal justice system or the procedure followed (adversarial, inquisitorial or combined), international law requires States to ensure that all individuals within their jurisdiction benefit from a fundamental basis of rights throughout the process: the right to a fair trial by a competent, independent and impartial court established by law, and the right to legal aid; the presumption of innocence; the principle of legality and non-retroactivity of more

stringent criminal laws; the principle of double jeopardy; the prohibition of torture and cruel, inhuman or degrading treatment, and the inadmissibility of confessions obtained by torture or the use of cruel, inhuman or degrading treatment; and the right to liberty and security of person, the prohibition of imprisonment for civil debt, and the due process required to protect these rights.

14. States should take measures that specifically promote equal treatment of minorities within the criminal justice system. For the criminal justice system to remain viable, society must be confident that, at every stage of the process – from the initial investigation by the police of a crime to prosecution and punishment – individuals in like circumstances are treated alike, in compliance with the fundamental guarantees of equal treatment under the law.

15. States, in collaboration with representatives of minorities, should aim at dismantling discriminatory mechanisms in the criminal justice system, including by detecting and addressing *de jure* discrimination in legislation relating to matters of substance and/or procedure, and indirect discrimination that may arise from laws, policies or practices that are apparently neutral but have a discriminatory outcome emerging in practice. Further studies to determine the nature and scope of the problem and the implementation of national strategies or plans of action aimed at the elimination of discrimination, including institutional discrimination against minorities, should be encouraged.

16. Comprehensive implementation of international standards of minority rights protection, equality and non-discrimination is the foundation for any action or initiative aimed at preventing and addressing discrimination against minority groups at all stages of the administration of justice. Although most States have general legislation of this kind, minorities are often caught between formal equality before the law and the courts and structural distinctions, differences in treatment and inequalities. States should equally apply non-discrimination legislation fully and without exemptions in respect of all law enforcement and judicial officials, and such legislation should expressly cover national, ethnic, religious and linguistic minorities.

IV. Thematic recommendations for States

A. Data collection and studies

17. The draft recommendations acknowledge that a fundamental barrier to progress in the area of combating discrimination in the criminal justice system is the failure of many States to collect and analyse disaggregated data in order to assess the scale and character of violations, and to measure progress in addressing them, including through accountability measures. States should collect comprehensive and disaggregated data on the involvement of persons belonging to minority groups in all aspects of the administration of justice.

18. States should encourage and require open and transparent data collection and sharing at all stage of the criminal justice process. They should make such data publicly available in a way that data sets can be easily interpreted and used by all potential users, including minority individuals and groups.

19. Data should be collected on the basis of self-identification and consent of individuals, and be used with due consideration for data protection and privacy guarantees at all stages of the criminal justice system. This is particularly important in law enforcement operations, where the risk that ethnic data are misused to facilitate racial and ethnic profiling - rather than to reduce it - is greater. Civil society and minority groups should be trained in data collection methodologies and be involved throughout the process, from

design to collection and analysis, in order to improve the accuracy and consistency of data collection and evaluation processes.

B. Minorities and policing/police operations

20. States should enact specific legislation that explicitly prohibits and punishes questioning, arrests and searches that are based solely or primarily on the physical appearance of a person or the belonging of a person to a minority group, including the use of racial and ethnic profiling by law enforcement agencies.

21. States should provide detailed and practical guidance, including through operational protocols, codes of conduct, regulations and training, for all law enforcement officers on how to ensure impartial and non-discriminatory application of the law and to avoid singling out any particular minority group in police and security operations.

22. Minority groups, particularly disadvantaged and stigmatized minorities, may be disproportionately subjected to human rights violations at the hands of law enforcement officers, ranging from pervasive verbal abuse and harassment to excessive force, torture and inhuman or degrading treatment during arrest and interrogation, extrajudicial killings and death in custody. States should ensure that rules on the use of force by the police respect the general principles of proportionality and strict necessity in accordance with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and that intentional use of lethal force is restricted to situations where it is unavoidable to save life.

23. States should allocate sufficient resources to document, investigate and prosecute independently, promptly and thoroughly all allegations of discriminatory patterns of use of excessive or otherwise unlawful force by law enforcement officers.

24. States should ensure that the composition of law enforcement bodies at the local, regional and national levels reflect the diversity of the population. Initiatives to increase recruitment of underrepresented minorities from junior to senior ranks should be introduced, as well as any direct or indirect discriminatory barriers to the recruitment, retention and vertical mobility of minorities in the police forces removed.

25. Where appropriate, States should ensure that law enforcement patrols include the deployment of female officers and other personnel who, where possible, are trained in dealing with women who may be victims of rape or other forms of gender-based violence. It is important that minority women be able to be actively involved in police-community partnerships. Mixed patrol teams that include women from the minority community concerned and who speak the minority language are crucial.

26. Police should take steps to encourage the reporting of crimes against minorities, including racial or ethnic motivated violence by non-State actors, and ensure that they are recorded fully and investigated. Particularly where ethnic tensions and/or violence against minorities have previously occurred, States must ensure that authorities investigate effectively and promptly any crimes against minority individuals and communities, including by investigating any alleged discriminatory motive behind the attacks.

C. Access to justice for minority victims

27. The criminal justice system must be sensitive to the ways in which persons are deliberately targeted on the basis of their nationality, ethnic, religious or linguistic identity. Targeting, which may include violence, can cause long-lasting harm; criminal processes should therefore be aimed at empowering minority victims and at providing justice and reparations, as well as at restoring their dignity and life chances.

28. The police, prosecutors and judicial authorities must ensure that criminal complaints by members of minorities are pursued with the same rigour and diligence applied to other complainants. States should guarantee that the criminal justice system promotes a climate of trust between minorities and State authorities and not tolerate the promotion of a culture of impunity, which may encourage further crimes, including violence, against minorities.

29. States should ensure that members of minorities are informed proactively, in a language and through a means appropriate to their situation, of their rights as victims of a crime, and how to secure access to support, including legal assistance and interpretation services. To that end, States should consider establishing liaison offices from or with connections to relevant minority communities.

30. States should ensure equal and effective access to justice and accountability measures, and remove all obstacles preventing minority victims, including those from most vulnerable groups within the community, such as children, persons with disabilities, older persons, minorities living in extreme poverty and minorities affected by conflict or displacement, from reporting a crime. To that end, States should ensure that minorities have an enabling environment in their access to formal justice, including by guaranteeing their personal safety and security, and identifying and overcoming legislative, administrative, social or cultural barriers that minorities, especially women, may face in exercising their right to have access to justice. Such barriers may include onerous and discriminatory rules of evidence and procedural requirements, fear of reprisal by perpetrators of the crime owing to a lack of confidence that authorities will protect minority victims, and fear of being stigmatized by their own and/or other communities.

31. States should investigate and punish officials who neglect their duty to protect the rights of minorities, including the underlying causes that may lead to unnecessary delays experienced by minority victims at any stage of the justice system. States should ensure specifically the availability of remedies for minority women victims of gender-based violence, who may face multiple stigma and intersecting forms of discrimination with regard to their minority origin, cast or their sex, and the nature of the crime suffered.

32. States should ensure that mechanisms to provide advice, support and rehabilitation for victims of crime are equally accessible to and effective for persons belonging to minorities.

33. States should recognize that minority victims of a criminal act may be exposed to secondary victimization when the responses of justice institutions fail to recognize their experience as victims. The overall process of criminal investigation and trial may cause secondary victimization, from investigation, decisions on whether or not to prosecute, the trial itself and the sentencing of the offender, to the person's eventual release. States actors responsible for ordering criminal justice processes and procedures should always take into account the perspective of the victim and the context in which the crime against a minority individual or community has been committed.

D. Minorities in detention facilities

34. Systematic and/or institutionalized discrimination in society may contribute to legitimizing and replicating violence and discrimination against minorities, including women and minors, in the context of detention and other forms of deprivation of liberty. States should prevent and punish acts of violence against minority detainees and ensure that their physical and mental integrity and dignity are respected at all times, from the time of arrest until eventual release.

35. Conditions of detention or imprisonment and the relevant staff should reasonably accommodate the cultural, dietary, religious and linguistic characteristics of minority prisoners. Places of detention should be subject to unannounced visits by independent bodies that include adequate representation of minorities.

36. States should encourage measures to increase the recruitment of minority officers and administrators with the aim of building a diverse workforce in detention facilities, in particular in contexts where minorities are overrepresented in prison populations and detention personnel are culturally, linguistically or ethnically homogenous.

E. Judicial proceedings and sentencing

37. States should ensure that accused minority persons receive legal assistance, including free-of-charge assistance, without discrimination, particularly where imprisonment or the death penalty is a possible sentence.

38. States should incorporate, when possible and in consultation with minority communities, aspects of the cultural, religious, linguistic or other characteristics of the minority communities in culturally suited courts and proceedings. In the absence of such courts, States should ensure that the cultural background of the accused, victims and witnesses is appropriately recognized, respected and accommodated by the authorities throughout the conduct of criminal proceedings. Whatever the character or customs of a court, States must ensure full compliance with international human rights standards, including guarantees for a fair and public hearing by a competent, independent and impartial tribunal under the rule of law.

39. States should ensure free translation for accused minority persons not fluent in the language used in court, and allow such persons to use their minority language. States should also consider recognizing the right of members of minorities that have a significant population or historical ties, whether nationally or locally, to have proceedings conducted in their language.

40. States should ascertain whether minorities are subjected to harsher penalties or undue delays in sentencing or the execution of sentences, and identify any role that direct or indirect discrimination plays in this regard, and where discovered, take measures aimed at providing full remedies and redress.

41. States that make use of death penalty should take all measures necessary to ensure that the death penalty is not applied as a result of racial or ethnic bias of prosecutors, judges, juries or lawyers. If necessary, States should undertake further studies to identify the underlying factors of the substantial racial and ethnic disparities in the application of the death penalty with a view to developing effective strategies aimed at rooting out discriminatory practices.

42. Where applicable, States should discontinue the application of the life sentence without parole to persons belonging to minority groups under the age of 18 years at the time the offence was committed, and review the situation of those already serving such sentences. States should ascertain whether juveniles from religious, ethnic, national or linguistic minority communities are incarcerated at a disproportionately high rate than their representation in the overall population; if this is found to be the case, they should create and implement more robust programmes providing alternative measures to incarceration, focus on rehabilitation and emphasize terms of imprisonment as a last resort only.

V. Essential measures to prevent discrimination against minorities in the administration of justice

A. Training

43. Compulsory training and education of law enforcement and judicial officials, including of prison personnel, in human rights and minority rights, including in the principle of non-discrimination and in cultural competency, is an essential element of a functioning judicial system, which should be designed to foster greater tolerance and respect for diversity and include the integration of a gender perspective in all its aspects.

44. In order to foster or increase effective participation and inclusion of minorities in all aspects of the administration of justice, States should ensure that all established personnel in each agency, including high-ranking officials, are given training on significant cultural, social and political issues that might obstruct minority recruitment and on the kind of conduct or behaviour that is to be avoided. This is likely to involve the production of manuals and codes of conduct on policing and the administration of justice in a multicultural environment, and the introduction of appropriate structures to enforce compliance. Such training and education material should be designed and delivered with the meaningful participation of minorities.

B. Community engagement

45. States should establish mechanisms and mandate policies and practices to ensure dialogue and consultation with and participation of minorities to assist States in understanding the situation of minorities, their issues and concerns when confronted with the criminal justice system, and to promote their full and equal access to the criminal justice system. States should consider undertaking community-oriented initiatives to bring State officials and minorities together to work for the safety of minority communities and non-discrimination in the administration of justice, fostering trust, dialogue and partnership and advancing the engagement of State officials with minority communities. Police forces should also collaborate with minorities at the local level to establish permanent liaison mechanisms with minority communities to develop jointly local strategies, to review and revise relevant policies and practices, to keep channels of communication open and to build mutual trust. Complaint mechanisms could also be set up for minorities.

C. Improving diversity throughout the system

46. Overrepresentation of minorities as victims and defendants in the criminal justice system can also be overcome by removing obstacles to the participation of minorities in the administration of justice. Strategies that are inclusive of minorities should be part of an overall governmental policy for the promotion and protection of minority rights. An isolated approach towards the inclusion of minorities in the criminal justice system is likely to be ineffective if it operates in conflicting minority-related policies in other areas. Coherent and comprehensive minority policies therefore require meaningful consultation that is designed to address the particular needs and circumstances of minorities in a given society, and their full and equal participation in all aspects of life of the State.

47. Experience in many countries has shown that legislation to outlaw discrimination and to foster equality of opportunity in itself has little impact on patterns of recruitment and the promotion of minorities in established State agencies. States should assess the current

composition of each relevant State agency, including by collecting and analysing figures disaggregated by gender, position type (junior/senior) and geographical location.

48. States should consider adopting a wide range of measures, including positive actions, to overcome potential or actual barriers of all kinds to the recruitment, promotion and retention of members of underrepresented minorities in the police, the judiciary, prosecution services, the legal profession, and prison personnel, including measures specifically targeted to this end and developed in consultation with minority groups and existing minority staff members. Such measures could include a pro-active recruitment strategy in minority areas; the removal of formal barriers to recruitment, such as specific physical or educational requirements that are difficult for minorities to meet; the elimination of practices and emblems that are culturally exclusive and contribute to a feeling of exclusion; or actions to reduce or eliminate derogatory and discriminatory remarks or jokes in the work place. Practical and realistic targets within determined timelines for achieving appropriate levels of participation in security, policing and justice agencies should be set.

D. Independent oversight and accountability mechanisms

49. States should guarantee independent oversight and accountability mechanisms, including by ensuring independent examination of policies, programmes, recruitment practices and other policing and security activities as a crucial element to upholding integrity, deterring misconduct and restoring or increasing public confidence in the justice system and as an indispensable element of the rule of law. In this respect, States should establish – depending on the structure and traditions of each jurisdiction – independent supervisory or investigatory bodies to oversee the work of the police, prosecutors and courts and to deal with complaints of discriminatory or otherwise unacceptable practices. Such bodies should ensure that professional codes of conduct prohibit discrimination against minorities, and that complaints of discrimination are investigated promptly and impartially, and are followed by fair disciplinary proceedings where complaints are found to be well-founded. 50. Oversight and accountability bodies should include members of minorities and have the mandate and technical capacity to address complaints of unfair treatment and abuse against minorities, including through the collection of data, for use in monitoring direct and indirect discrimination and in conducting self-initiated investigations.

VI. Recommendations for non-State actors

51. Combating bias and discrimination in the criminal justice system requires a multi-stakeholder approach. In this regard, the role of non-State actors, including civil society, minority communities and religious leaders, national human rights institutions and political leaders, is fundamental.

52. National human rights institutions should themselves be representative of the diversity in their respective community, and consider putting in place dedicated oversight mechanisms and allocating appropriate resources and expertise to assess systematically and report on the situation of minorities within the criminal justice process, including on the behaviour of the police, the judiciary, prosecutors and the legal profession, and take action when they observe cases of discrimination.

53. National human rights institutions should monitor the number of complaints received from persons belonging to minorities, in particular in the context of criminal justice processes, assess whether complainants are adequately aware of their rights and

enjoy unlimited access to available formal justice mechanisms, without fear of reprisals, and design their work plans and outreach and information strategies accordingly.

54. Independent professional associations for judges, prosecutors and lawyers should provide guidance and training on minority rights, including on implicit bias and indirect discrimination. Disciplinary consequences and remedial measures should follow when discrimination against minorities is practiced in these contexts.

55. Political leaders should speak out publicly against discrimination and refrain from making statements indiscriminately linking a religion, nationality, language, race or ethnicity to criminal behaviour, irregular migration or terrorism. Political parties should refrain from spreading inflammatory and racist rhetoric and ensure that public discourse does not perpetrate stereotypical, racist, hateful or discriminatory views about specific minority groups. They should take effective action against such discourse.

56. Civil society organizations should systematically engage with relevant stakeholders in order to contribute to the eradication of unlawful discriminatory practices and attitudes by law enforcement agencies and/or the judiciary, including by addressing accountability and access to justice for minorities more effectively. Civil society organizations should cooperate closely with minority groups and consider developing dedicated initiatives focusing on the identified problem areas identified.

57. Civil society organizations, including minority organizations, should be a valued partner in guaranteeing the promotion and protection of minority rights within law enforcement and the judiciary, including by strengthening their efforts in data-collection initiatives. Civil society organizations should support, including through litigation, minority individuals who have been victims of discriminatory practices by law enforcement agencies and/or the judiciary.

58. Civil society organizations should identify and disseminate good practices already adopted at the international, regional and/or national levels with a view to reducing inequalities and eliminating discrimination against minorities in the criminal justice system.

59. The mass media, including social media, play an important role in the construction of public knowledge about crime and justice. The public's perception of victims, criminals, witnesses and law enforcement officials is largely determined by their portrayal in the mass media. Public and private media bodies and sources should not contribute to broad negative stereotypes of minority groups as criminals, violent, untrustworthy, disloyal, alien or dirty, and should not nurture inaccurate or false assumptions, opinions or generalizations on the supposed criminal tendency of a specific minority group that may develop into entrenched discriminatory attitudes and prejudices.

60. Media outlets should adopt codes of ethics and conduct for the exercise and promotion of ethical standards and be accessible in different minority languages. The participation of minority professionals in media outlets in all roles and at all levels, as well as of independent media monitoring bodies, is essential to ensure the objective and non-stereotypical portrayal of minorities. Media outlets should implement programmes to train, recruit and support media workers belonging to minority groups.

VII. Recommendations for international and regional organizations

61. Relevant field-based United Nations bodies, mechanisms and specialized agencies should support national Governments in the task of identifying manifestations of implicit or explicit bias and discrimination in police operations and the administration of justice, and submit concrete recommendations and proposals for improvement.

62. United Nations country teams working in administration of justice reform processes should establish country-specific consultative structures for minorities.

63. International and regional organizations should make consolidated and integrated efforts to review and support the activities of national institutions that play a key role in combating institutional racism and discrimination and reforming the criminal justice system, for example by providing States with legal assistance in reviewing criminal legislation, including to make racial and other forms of discrimination an aggravating factor in criminal cases, to support, through mentoring and capacity-building, the investigation, prosecution and sentencing of persons who have committed racist or other discriminatory acts, and to support research and data gathering to inform policymaking processes.

64. International and regional organizations should assist States in designing and implementing independent oversight and accountability mechanisms for the police and the judiciary in accordance with United Nations standards and norms and other relevant international and regional instruments with a view to advancing full equality before the law without any discrimination.

65. International and regional organizations should support national justice and/or security sector reform plans that encourage the recruitment of male and female law-enforcement officers, prosecutors, judges, lawyers and other personnel from minority groups, and provide the said personnel with training on minority rights when necessary.
