

European Commission  
against Racism and Intolerance

**ECRI**  
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contre le racisme et l'intolérance

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# COMPILATION OF ECRI'S GENERAL POLICY RECOMMENDATIONS

Strasbourg, March 2018

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# Introduction

The European Commission against Racism and Intolerance (ECRI) was established by the Council of Europe in 1993. It is an independent human rights monitoring body specialised in questions relating to combating racism and intolerance. It is composed of independent and impartial members, who are appointed on the basis of their moral authority and recognised expertise in dealing with racism, xenophobia, antisemitism and intolerance.

One of the pillars of ECRI's statutory activities is the preparation of General Policy Recommendations, which are addressed to all member States and provide guidelines which policy makers are invited to use when drawing up national strategies and policies in various areas.

ECRI has so far adopted the following sixteen General Policy Recommendations, which are presented in this publication.

General Policy Recommendation No.1 contains a number of guidelines for national measures concerned with legal and policy aspects of the fight against racism and intolerance.

General Policy Recommendation No.2 concerns equality bodies to combat racism and intolerance at national level. The new edition dates from 2017. ECRI recommends that member States establish strong equality bodies that are independent and effective. Equality bodies should have two key functions: (i) to promote equality and prevent discrimination and (ii) to support people exposed to discrimination and intolerance and to pursue litigation on their behalf. In addition, they can be given the third function to take decisions on discrimination complaints. Equality bodies should have the necessary competences, powers and resources to perform their tasks effectively, and be accessible to all.

General Policy Recommendation No.3 on combating racism and intolerance against Roma/Gypsies takes as its starting point the fact that Roma/Gypsies suffer throughout Europe from persisting prejudices, are victims of a racism which is deep-rooted in society, are the target of sometimes violent demonstrations of racism and intolerance and that their fundamental rights are regularly violated or threatened. This text aims to encourage the adoption of a series of measures to combat manifestations of racism and intolerance and discriminatory practices against Roma/Gypsies.

ECRI's General Policy Recommendation No.4 on national surveys on the experience and perception of discrimination and racism from the point of view of potential victims notes that the results of such surveys may be used in a variety of ways to highlight problems and improve the situation. The Recommendation provides guidelines for carrying out such surveys, particularly their practical organisation, design and follow-up.

General Policy Recommendation No.5 deals with combating intolerance and discrimination against Muslims. This Recommendation advocates the adoption of a number of specific measures for combating intolerance and discrimination directed against Muslims. In this Recommendation ECRI also expresses regret that Islam is sometimes portrayed inaccurately on the basis of hostile stereotyping, the effect of which is to make this religion seem a threat.

ECRI's General Policy Recommendation No.6 concerns the dissemination of racist material via the Internet. The Recommendation requests governments to take the necessary measures, at national and international levels, to act effectively against the use of Internet for racist, xenophobic and antisemitic aims.

ECRI's General Policy Recommendation No.7 sets out the key elements which should feature in a comprehensive national legislation to effectively combat racism and racial discrimination. The scope of the Recommendation is very wide and covers all branches of the law: constitutional, criminal, civil and administrative. It addresses not only direct and indirect discrimination, but also other legal aspects of the fight against racism, including racist expressions, racists organisations and racially-motivated offences.

ECRI's General Policy Recommendation No.8 focuses on how to ensure that the fight against terrorism does not infringe upon the rights of persons to be free from racism and racial discrimination. This General Policy Recommendation is part of the more general efforts underway in the Council of Europe to ensure respect for human rights while fighting against terrorism.

ECRI's General Policy Recommendation No.9 is devoted to the fight against antisemitism. It sets out a comprehensive set of legal and policy measures to help Council of Europe member States fight against antisemitism, which should be systematically included in a broader policy against all forms of racism. Such measures include, inter alia, strengthening criminal law provisions, stepping up awareness-raising efforts in schools and the systematic collection of information about antisemitic offences.

ECRI's General Policy Recommendation No.10 on combating racism and racial discrimination in and through school education proposes specific measures to member States for ensuring compulsory, free and quality education for all; for combating racism and racial discrimination at school; and for training members of the teaching profession to work in a multicultural environment. For this purpose ECRI recommends the setting-up of a racist incidents monitoring system as well as awareness-raising and disciplinary measures for combating racism and racial discrimination at school.

ECRI's General Policy Recommendation No.11 on combating racism and racial discrimination in policing aims to help the police to promote security and human rights for all through adequate policing and covers racism and racial discrimination in the context of combating all crime, including terrorism. It focuses particularly on racial profiling; racial discrimination and racially motivated misconduct by the police; the role of the police in combating racist offences and monitoring racist incidents; and relations between the police and members of minority groups.

ECRI's General Policy Recommendation No.12 on combating racism and racial discrimination in the field of sport, sets out a wide range of measures that the governments of member States are advised to adopt in order to successfully combat racism and racial discrimination in the field of sport. ECRI's suggestions as to how this can be achieved cover, among other things, ensuring that adequate legal provisions are in place to combat racial discrimination and to penalise racist acts and providing training to the police to enable them to identify, deal with and prevent racist behaviour at sporting events.

ECRI's General Policy Recommendation No.13 on combating anti-Gypsyism and discrimination against Roma reinforces its General Policy Recommendation No.3, in response to a worsening of the situation of Europe's Roma population. In this recommendation, ECRI calls on member States to adopt no less than 90 measures: on the one hand, to ensure the access of Roma to education, employment and other goods and services; and, on the other hand, to combat hate speech, racist crimes and violence against Roma, through both the application of criminal law provisions and preventive and awareness-raising measures. Finally, it emphasises that only a comprehensive and multidisciplinary approach to Roma issues, involving Roma representatives at all levels of policy-making (conception, development, implementation and evaluation) can enhance mutual trust and contribute to the fight against anti-Gypsyism.

ECRI's General Policy Recommendation No.14 on combating racism and racial discrimination in employment urges member States to strengthen legislation and to develop employment best practices to ensure protection against racism and discrimination in employment. It recommends that governments actively promote equality, particularly in recruitment and promotion, and proposes various incentives that they can adopt to encourage employers to eliminate discrimination and promote diversity in the workplace.

According to ECRI's General Policy Recommendation No. 15, hate speech is based on the unjustified assumption that a person or a group of persons are superior to others; it incites acts of violence or discrimination, thus undermining respect for minority groups and damaging social cohesion. In this recommendation, ECRI calls for speedy reactions by public figures to hate speech; promotion of self-regulation of media; raising awareness of the dangerous consequences of hate speech; withdrawing financial and other support from political parties that actively use hate speech; and criminalising its most extreme manifestations, while respecting freedom of expression. Anti-hate speech measures must be well-founded, proportionate, non-discriminatory, and not be misused to curb freedom of expression or assembly nor to suppress criticism of official policies, political opposition and religious beliefs.

General Policy Recommendation No. 16 on safeguarding irregularly present migrants from discrimination seeks to ensure access by all persons in this particularly vulnerable group - women, men and children - to those human rights which are guaranteed to them in international human rights law, in particular as concerns education, health care, housing, social security and assistance, labour protection and justice, while they are within the jurisdiction of a member state. It calls for the creation of effective measures ("firewalls") to prohibit social services providers from sharing the personal data of suspected irregular migrants with immigration authorities.

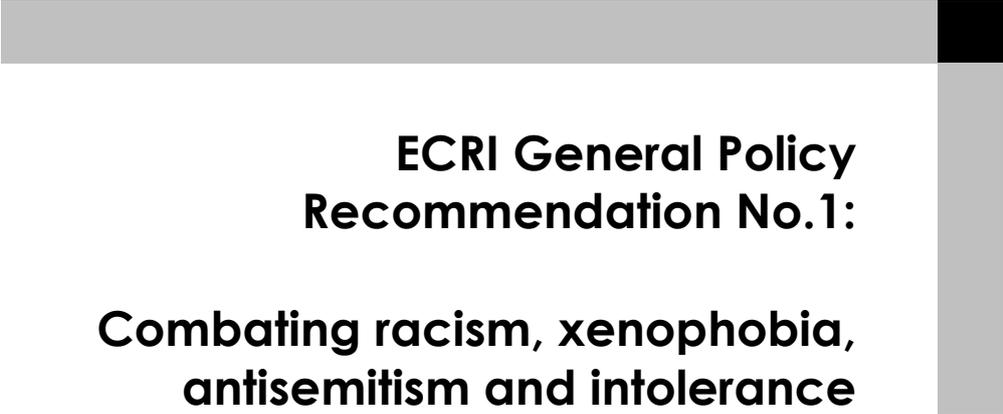


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**ECRI General Policy  
Recommendation No.1:  
Combating racism, xenophobia,  
antisemitism and intolerance**

Adopted on 4 October 1996



The European Commission against Racism and Intolerance:

Recalling the Declaration adopted by the Heads of State and Government of the member States of the Council of Europe at their Summit held in Vienna on 8-9 October 1993;

Recalling that the Plan of Action on combating racism, xenophobia, antisemitism and intolerance set out as part of this Declaration invited the Committee of Ministers to establish the European Commission against Racism and Intolerance with a mandate, *inter alia*, to formulate General Policy Recommendations to member States;

Bearing in mind the proposals contained in the Recommendation No.1275 on the fight against racism, xenophobia, antisemitism and intolerance adopted by the Parliamentary Assembly of the Council of Europe on 28 June 1995;

Convinced that effectively countering racism, xenophobia, antisemitism and intolerance requires a sustained and comprehensive approach reflected in a broad range of measures which complement and reinforce one another, covering all aspects of life;

Recognising the social, economic and legal diversity of member States and the need for specific measures in this field to reflect this diversity;

Aware that racism, xenophobia, antisemitism and intolerance cannot be countered by legal measures alone, but emphasising that legal measures are nevertheless of paramount importance and that non-enforcement of relevant existing legislation discredits action against racism and intolerance in general;

Recalling that medium and long-term preventive strategies based on educational and other measures are crucial for curbing the various manifestations of racism, xenophobia, antisemitism and intolerance and expressing in this respect its support for the initiatives taken within the Council of Europe, in particular in the field of history teaching, as well as for Recommendation (84)18 on the training of teachers in education for intercultural understanding, notably in a context of migration and Recommendation R (85)7 on the teaching and learning of human rights in schools;

Acknowledging the active role the media can play in favour of a culture of tolerance and mutual understanding;

Seeking in this first General Policy Recommendation, complementary to other efforts at the international level, to assist member States in combating racism, xenophobia, antisemitism and intolerance effectively, by proposing concrete and specific measures in a limited number of areas which are particularly pertinent;

recommends the following to the Governments of the member States:

**A. CONCERNING LAW, LAW ENFORCEMENT AND JUDICIAL REMEDIES**

- Ensure that the national legal order at a high level, for example in the Constitution or Basic Law, enshrines the commitment of the State to the equal treatment of all persons and to the fight against racism, xenophobia, antisemitism and intolerance;
- Sign and ratify the relevant international legal instruments listed in the Appendix;
- Ensure that national criminal, civil and administrative law expressly and specifically counter racism, xenophobia, anti-semitism and intolerance, inter alia by providing:
  - that discrimination in employment and in the supply of goods and services to the public is unlawful;
  - that racist and xenophobic acts are stringently punished through methods such as:
    - defining common offences but with a racist or xenophobic nature as specific offences;
    - enabling the racist or xenophobic motives of the offender to be specifically taken into account;
  - that criminal offences of a racist or xenophobic nature can be prosecuted ex officio;
  - that, in conformity with the obligations assumed by States under relevant international instruments and in particular with Articles 10 and 11 of the European Convention on Human Rights, oral, written, audio-visual expressions and other forms of expression, including the electronic media, inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group are legally categorised as a criminal offence, which should also cover the production, the distribution and the storage for distribution of the material in question;
- In conformity with the aforementioned international obligations, take measures, including where necessary legal measures, to combat racist organisations - bearing in mind the fact that they can pose a threat to the human rights of minority groups - including banning such organisations where it is considered that this would contribute to the struggle against racism;

- Ensure that the general public is made aware of the legislation combating racism, xenophobia, antisemitism and intolerance;
- Ensure that criminal prosecution of offences of a racist or xenophobic nature is given a high priority and is actively and consistently undertaken;
- Ensure that accurate data and statistics are collected and published on the number of racist and xenophobic offences that are reported to the police, on the number of cases that are prosecuted, on the reasons for not prosecuting and on the outcome of cases prosecuted;
- Ensure that adequate legal remedies are available to victims of discrimination, either in criminal law or in administrative and civil law where pecuniary or other compensation may be secured;
- Ensure that adequate legal assistance is available to victims of discrimination when seeking a legal remedy;
- Ensure awareness of the availability of legal remedies and the possibilities of access to them;

#### **B. CONCERNING POLICIES IN A NUMBER OF AREAS**

- Take measures in the fields of education and information in order to strengthen the fight against racism, xenophobia, anti-semitism and intolerance;
- Adopt policies that enhance the awareness of the richness that cultural diversity brings to society;
- Undertake research into the nature, causes and manifestations of racism, xenophobia, anti-semitism and intolerance at local, regional and national level;
- Ensure that school-curricula, for example in the field of history teaching, are set up in such a way to enhance the appreciation of cultural diversity;
- Set up and support training courses promoting cultural sensitivity, awareness of prejudice and knowledge of legal aspects of discrimination for those responsible for recruitment and promotion procedures, for those who have direct contact with the public and for those responsible for ensuring that persons in the organisation comply with standards and policies of non-discrimination and equal opportunity;
- Ensure, in particular, that such training is introduced and maintained for the police, personnel in criminal justice agencies, prison staff and personnel dealing with non-citizens, in particular refugees and asylum seekers;

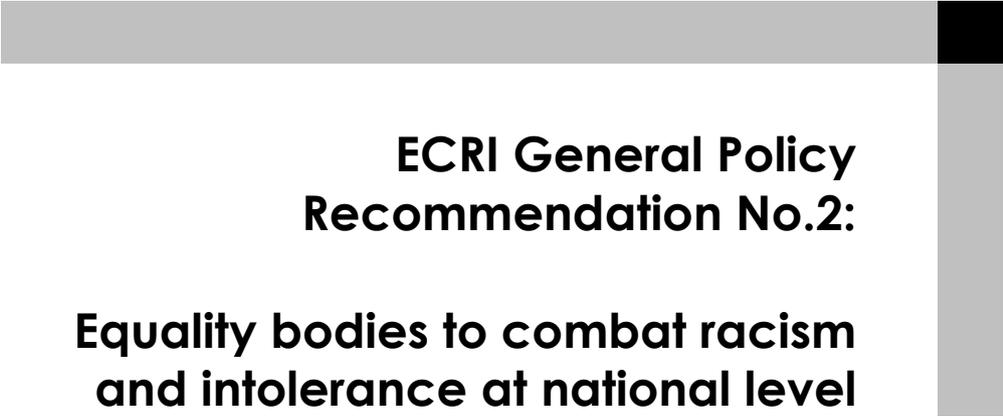
- Encourage public officials to bear in mind the desirability of promoting tolerance in their public comments;
- Ensure that the police provide equal treatment to all members of the public and avoid any act of racism, xenophobia, antisemitism and intolerance;
- Develop formal and informal structures for dialogue between the police and minority communities and ensure the existence of a mechanism for independent enquiry into incidents and areas of conflicts between the police and minority groups;
- Encourage the recruitment of members of public services at all levels, and in particular police and support staff, from minority groups;
- Ensure that all public services and services of a public nature such as healthcare, social services and education provide non-discriminatory access to all members of the public;
- Take specific measures, such as providing targeted information, to ensure that all eligible groups de facto have equal access to these services;
- Promote and increase genuine equality of opportunity by ensuring the existence of special training measures to help people from minority groups to enter the labour market;
- Initiate research into discriminatory practices and barriers or exclusionary mechanisms in public and private sector housing;
- Ensure that public sector housing is allocated on the basis of published criteria which are justifiable, i.e. which ensure equal access to all those eligible, irrespective of ethnic origin;
- Since it is difficult to develop and effectively implement policies in the areas in question without good data, to collect, in accordance with European laws, regulations and recommendations on data-protection and protection of privacy, where and when appropriate, data which will assist in assessing and evaluating the situation and experiences of groups which are particularly vulnerable to racism, xenophobia, antisemitism and intolerance.

## **APPENDIX**

### **List of relevant international legal instruments**

- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (1950) and its additional protocols
- United Nations Convention relating to the Status of Refugees (1951)
- Convention of the International Labour Organisation concerning Discrimination in Respect of Employment and Occupation (1958)
- European Social Charter (1961) and its additional protocols
- UNESCO Convention against Discrimination in Education (1960)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Covenant on Economic, Social and Cultural Rights (1966)
- International Covenant on Civil and Political Rights (1966) and its first additional protocol
- European Charter for Regional or Minority Languages (1992)
- Framework Convention for the Protection of National Minorities (1995)





**ECRI General Policy  
Recommendation No.2:**

**Equality bodies to combat racism  
and intolerance at national level**

Adopted on 7 December 2017



The European Commission against Racism and Intolerance (ECRI):

Recalling the prominence given to the right to equality and to the fight against racism and intolerance in many international instruments of the United Nations, the Council of Europe, the European Union, the Organization for Security and Co-operation in Europe, and other international bodies as well as in the constitutions and legislation of the member States;

Convinced that the achievement of equality and the fight against racism and intolerance are indispensable for the sustained development of democratic societies and that the resulting social cohesion is an important safeguard for peace and security in and among the Council of Europe member States;

Emphasising, based on the findings of its country monitoring, that equality bodies to combat racism and intolerance play an essential role in achieving equality and in combating discrimination and intolerance;

Welcoming the fact that equality bodies have been set up and are functioning in most Council of Europe member States and acknowledging the valuable pioneering work carried out throughout Europe that has made this possible;

Recognising that the institutional form and activities of such bodies vary, and continue to change, adapt, and evolve across the member States;

Aware of the difficulties and pressures that have been experienced by such bodies in seeking to fulfil their mandate and emphasising therefore the need for equality bodies to be independent and effective;

Convinced that the extent of inequality, racism and intolerance in Europe and the member States necessitates further investment in and strengthening of equality bodies to combat racism and intolerance;

Aware of the need to review the initial version of this General Policy Recommendation adopted on 13 June 1997 to include the experience acquired and the good practices developed in the member States during the last 20 years;

Building on other standards developed in this field, such as the Paris Principles on National Institutions for the Promotion and Protection of Human Rights and the European Union's equal treatment directives;

Wishing to assist member States to further strengthen equality bodies and the work of both member States and equality bodies to achieve equality and social cohesion;

Recommends the following to the governments of member States:

#### **I. Establishment of equality bodies**

1. Member States should establish by constitutional provision or legislation passed by parliament one or more independent equality bodies to combat racism and intolerance (equality body).
2. This text should clearly set out that equality bodies are independent and should establish the conditions to ensure this independence. Equality bodies should have both *de jure* and *de facto* independence, be separate legal entities placed outside the executive and legislature, and have the necessary competences, powers and resources to make a real impact. The different elements which are necessary to guarantee actual independence and effectiveness are set out in §§ 22 to 39 of this General Policy Recommendation (GPR).

3. The mandate, institutional architecture, functions, competences and powers, appointment and dismissal procedures, safeguards and terms of office for the leadership positions and the arrangements for the funding and accountability of equality bodies should be set out in the law in a manner that ensures both their independence and effectiveness.
4. The mandates of these bodies should individually or collectively cover:
  - a. The promotion and achievement of equality, prevention and elimination of discrimination and intolerance, including structural discrimination and hate speech, and promotion of diversity and of good relations between persons belonging to all the different groups in society (equality mandate).
  - b. The discrimination grounds covered by ECRI's mandate, which are "race",<sup>1</sup> colour, language, religion, citizenship, national or ethnic origin, sexual orientation and gender identity, as well as multiple and intersectional discrimination on these grounds and any other grounds such as those covered by Article 14 of the European Convention on Human Rights, while also integrating a gender perspective. Equality bodies may also cover additional grounds such as sex, gender, age and disability.
  - c. All areas in both the public and private sectors, in particular: employment, membership of professional organisations, education, training, housing, health, social protection and social advantages, social and cultural activities, goods and services intended for the public, whether commercially or freely available, public places, exercise of economic activity and public services and functions, including law enforcement.
  - d. The whole territory of the member State.

## II. Institutional Architecture

5. Depending on the legal and administrative traditions of the member States, equality bodies may take different forms.
6. Equality bodies can cover a single ground or multiple grounds. In the case of a multi-ground equality body, it is necessary to ensure a clear and appropriate focus on each of the grounds covered and on the intersections between them.
7. Equality bodies can be stand-alone or form an equal part of multi-mandate institutions that include a human rights or Ombudsperson mandate. In this latter case, the following provisions should apply:
  - a. Legislation should explicitly set out the equality mandate of the institution.
  - b. Appropriate human and financial resources should be allocated to each mandate to ensure an appropriate focus on the equality mandate.
  - c. Governing, advisory, and management structures should be organised in a manner that provides for clear leadership, promotion and visibility of the equality mandate.
  - d. Reporting arrangements should give adequate prominence to the concerns arising and work carried out under the equality mandate.

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<sup>1</sup> Since all human beings belong to the same species, ECRI rejects theories based on the existence of different "races". However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to "another race" are not excluded from the protection provided for by the Recommendation.

8. Where equality bodies form part of multi-mandate institutions, this General Policy Recommendation shall apply to these institutions and their activities in the field of equality. The competences and powers attached to all mandates in such institutions should be harmonised and levelled up so that each mandate should, as far as possible, enjoy the broadest competences and powers available to any of the other mandates.
9. Where different equality bodies exist, their competences and powers should be levelled up and co-ordination should be ensured to address overlaps, enable joint action and optimise the use of resources. The equality bodies should develop a common interpretation of the anti-discrimination legislation and make co-ordinated use of their competences and powers.

### III. Functions

10. Equality bodies should be assigned:

- a. The function to promote equality and prevent discrimination (promotion and prevention function) as set out in detail in § 13;
- b. The function to support people exposed to discrimination and intolerance and to pursue litigation on their behalf (support and litigation function) as set out in detail in § 14;

and may also be assigned:

- c. The function to take decisions on complaints (decision-making function) as set out in detail in § 17.

The decision-making function can be shared between equality bodies and the judiciary or be assigned entirely to the judiciary.

11. If the support and litigation and the decision-making functions are combined in one body, it is necessary to ensure that each function is provided by a different unit or by different staff. Appropriate human and financial resources should be allocated to all functions and the equality body should ensure that comprehensive legal and personal support is provided to people exposed to discrimination or intolerance.
12. Equality bodies should have the right to decide which competences, objectives and actions they will focus upon at any given time, and what combination of these they will use.

### IV. Promotion and prevention competences

13. The promotion and prevention function of equality bodies should include the competences to:

- a. Promote and achieve equality, prevent and eliminate discrimination and intolerance, and promote diversity and good relations between the different groups in society.
- b. Build a continuous dialogue with groups experiencing discrimination and intolerance and their representative organisations, and with organisations working more generally on human rights and equality issues.
- c. Conduct inquiries on their own initiative into all matters falling under their mandate, addressing both individual and structural discrimination, and make and publish recommendations.
- d. Conduct and commission research on any issue falling under their mandate.

- e. Build across society awareness, knowledge, valuing of and respect for equality, diversity, equal treatment legislation, non-discrimination and mutual understanding.
- f. Build, among groups experiencing discrimination and intolerance, knowledge about the rights and remedies established under the equal treatment legislation, capacity to exercise these rights, and trust in the equality bodies.
- g. Develop standards and provide information, advice, guidance and support to individuals and institutions in the public and private sectors on good practice for promoting and achieving equality and preventing discrimination and intolerance.
- h. Promote and support the use of positive action to remedy inequality in the public and private sectors.
- i. Support the implementation of the general duty on all authorities to promote equality and prevent discrimination in carrying out their functions as recommended in ECRI's General Policy Recommendation No. 7, establish standards for its implementation and, where appropriate, enforce them.
- j. Take part in the consultation procedures for new policy, legislation and executive acts, monitor existing policy, legislation and executive acts and make recommendations for the modification or introduction of policy, legislation or executive acts.
- k. Promote and contribute to the training of key groups in relation to equality and non-discrimination.
- l. Monitor the implementation of their recommendations.
- m. Track decisions made by courts and other decision-making bodies.
- n. Promote and support the ratification of relevant international treaties and the implementation and dissemination of such treaties and of the relevant standards, case law and reports emanating from intergovernmental organisations; take part in the proceedings of and with relevant intergovernmental organisations, take their recommendations into account and monitor their implementation.
- o. Cooperate with and support organisations with similar objectives to those of the equality body. Develop shared understanding on key issues in relation to equality and conclude cooperation agreements with such organisations.

## **V. Support and litigation competences**

14. The support and litigation function of equality bodies should include the competences to:
- a. Receive complaints and provide personal support and legal advice and assistance to people exposed to discrimination or intolerance, in order to secure their rights before institutions, adjudicatory bodies and the courts.
  - b. Have recourse to conciliation procedures when appropriate.
  - c. Represent, with their consent, people exposed to discrimination or intolerance before institutions, adjudicatory bodies, and the courts.
  - d. Bring cases of individual and structural discrimination or intolerance in the equality body's own name before institutions, adjudicatory bodies and the courts.
  - e. Intervene as *amicus curiae*, third party or expert before institutions, adjudicatory bodies, and the courts.

- f. Monitor the execution of decisions of institutions, adjudicatory bodies, and the courts dealing with equality, discrimination and intolerance.
15. Equality bodies should have the right to choose, based on published criteria established by them, the cases they take up for representation and strategic litigation and the venues in which they seek to secure the rights of people exposed to individual and structural discrimination.
  16. Member States should ensure that there is a system by which people exposed to discrimination or intolerance do not have to bear court and administrative fees or representation fees, in particular in cases of structural discrimination and where their cases are taken up for strategic litigation.

## **VI. Decision-making competences**

17. The decision-making function, where assigned to equality bodies, should include the competences to:
  - a. Receive, examine, hear and conciliate individual and collective complaints of discrimination and make decisions on these complaints based on the relevant legislation including the provisions on the shared burden of proof.
  - b. Decide whether there has been a breach of civil or administrative anti-discrimination legislation.
  - c. Issue legally binding decisions that require action to put an end to discrimination, achieve full equality, and avert future discrimination and impose effective, proportionate and dissuasive sanctions including payment of compensation for both pecuniary and non-pecuniary damage, fines and the publication of the decision and the name of the perpetrator.
  - d. Ensure the execution and implementation of their decisions and publish their decisions and recommendations.
18. If equality bodies that take decisions on complaints are not provided with the competence to issue legally binding decisions and impose sanctions as set out in paragraph 17 c) and d), the equality body should be provided with the competence to:
  - a. Issue non-binding recommendations requiring action to put an end to discrimination, achieve full equality, and avert future discrimination.
  - b. Ensure the implementation of its recommendations and, as appropriate, publish its decisions and recommendations.
19. The law should provide for a right to appeal before the courts against legally binding final decisions of the equality body.
20. The law should provide that complainants have the right to choose whether they first initiate proceedings before the equality body or whether they proceed directly to the courts. Proceedings before equality bodies should suspend the time limits for the initiation of subsequent court proceedings.

## **VII. Powers to obtain evidence and information**

21. Equality bodies should, in particular when conducting inquiries and deciding on complaints, have powers to obtain evidence and information. They should include powers to:
  - a. require the production of files, documents and other material for inspection, examination and making copies thereof;
  - b. conduct on-site inspections;
  - c. question persons;
  - d. apply for an enforceable court order or impose administrative fines if an individual or institution does not comply with the above.

## **VIII. Independence and effectiveness**

22. Equality bodies should function without any interference from the State, political parties or other actors and should not be given any instructions by them; they should be fully independent at institutional and operational level.
23. The persons holding leadership positions in equality bodies should be selected and appointed by transparent, competency-based and participatory procedures. The executive should not have a decisive influence in any stage of the selection process.
24. The persons holding leadership positions should benefit from functional immunity, be protected against threats and coercion and have appropriate safeguards against arbitrary dismissal or the arbitrary non-renewal of an appointment where renewal would be the norm.
25. The law should set out any activities and affiliations which are incompatible with holding leadership positions.
26. The persons holding leadership positions should have clearly defined responsibilities, be remunerated at a suitable level, and be appointed for an appropriate time period.
27. Equality bodies should decide independently on their internal structure and how to manage their resources, have the powers to recruit and appoint their own staff and have their own premises, which should be adequate for their needs.
28. Equality bodies should be provided with sufficient staff and funds to implement all their functions and competences with a real impact. They should have a separate budget or budget line and their funding should be subject annually to the approval of parliament. There should be no arbitrary or disproportionate reduction in the budget of the equality body. Where the mandate, functions or competences of the equality body are expanded, this should be consistent with its equality mandate and be accompanied by appropriate additional funding.
29. Equality bodies should have the right to raise additional funds for the carrying out of their functions in an open and transparent manner from sources other than the State in and outside the country while ensuring that this does not compromise their independence.
30. Equality bodies should have the right to make public statements and produce and publish research and reports without prior permission from, approval by or notification to government or any other institution or external party.

31. Equality body operations should be based on the relevant international and national legal framework, standards, and case law. Their reports and recommendations should be expert and evidence based through the use of research, investigation, documentation, and impartial and independent information.
32. Equality bodies should be subject to public service law and to the financial accountability and expenditure rules that apply to public authorities.
33. Equality bodies should engage in strategic planning on a regular basis, develop and track output and impact indicators to assess their progress, and conduct evaluations at appropriate moments.
34. Equality bodies should develop a communications strategy to shape and guide their awareness raising.
35. Equality bodies should publish annual reports, which should be discussed by parliament or its relevant committees and by government, but which should not be subject to their approval.
36. Authorities and equality bodies should build a sustained dialogue on progress in the field of equality and non-discrimination. Government and other authorities should consult and co-operate with equality bodies and take their recommendations on legislation, policy, procedure, programmes, and practice into account. The law should provide that government and other authorities must reply to or take action to implement the equality body's recommendations within a certain timescale.
37. Equality bodies should establish structures for sustained involvement and contribution of stakeholders, and in particular civil society organisations, to the planning and work of the equality body.
38. The leadership, advisory bodies, senior management, and staff of equality bodies should, as far as possible, reflect the diversity of society at large and be gender balanced.
39. The staff complement of equality bodies should have the multiple skills required for fulfilling all functions and competences assigned to the equality body.

#### **IX. Accessibility**

40. Equality bodies should be accessible to those whose rights they are established to protect. Accessibility requires:
  - a. Easily accessible premises, online, email and telephone services, and flexibility in meeting the time constraints of those seeking access to the services of the body.
  - b. Local outreach initiatives and local and regional offices for conducting the work of the body.
  - c. Being present with groups experiencing discrimination and intolerance at key moments and building sustained links with them as set out in § 12b.
  - d. The possibility for people exposed to discrimination or intolerance to contact and engage with the equality body in a confidential way and in a language in which they are proficient, to have face-to-face contact, and to submit complaints orally, online or in written form, with a minimum of admissibility conditions.
  - e. Adjustments in their premises, services, procedures and practices to take account of all forms of disability.

- f. The use of easy-to-read language in publications, in particular those providing information on rights and remedies, and translation of selected publications into all languages commonly used in the country.
- g. The functions and services of the equality body to be free of charge to complainants and respondents.
- h. Taking steps to publicise these provisions for accessibility and to make them available.

**X. Monitoring**

- 41. Monitoring of the implementation of this General Policy Recommendation will form part of the country monitoring and constructive dialogue between ECRI and the Council of Europe member States.

## Explanatory memorandum

### Introduction

1. This General Policy Recommendation (GPR) focuses on the key elements for the establishment and operation of equality bodies having the capacity to make a real impact. Such bodies are vital for advancing equality and for eliminating racism and intolerance in a sustained manner. Equality bodies play a pivotal role in making people and institutions aware of the importance of equality and in assisting them to take steps towards making equality a reality.
2. Twenty years after the adoption of the original version of GPR No. 2 in 1997, ECRI decided to revise its text in order to include the experience and the many good practices that have developed during this time. The term ‘national specialised bodies’, which was used in the original text, is updated to the term which is now commonly used for such bodies: ‘equality bodies’.
3. Together with the original version of GPR No. 2 from 1997, the EU’s equal treatment Directives (Article 13 of Directive 2000/43/EC dealing with discrimination on the ground of racial or ethnic origin and Article 12 of Directive 2004/113/EC, Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU dealing with the ground of gender) have been a driving force for the development of equality bodies. With the adoption of these directives, the EU member States accepted the obligation to set up equality bodies.
4. Almost all Council of Europe member States have also ratified the UN Convention on the Rights of Persons with Disabilities (CRPD), Article 33.2 of which provides for a similar obligation.
5. The 2001 Durban Declaration and Programme of Action of the UN world conference against racism and the Council of Europe’s Commissioner for Human Rights (Opinion CommDH (2011)2) have also called for the establishment and reinforcement of such institutions. The Paris Principles on National Institutions for the Promotion and Protection of Human Rights, adopted on 20 December 1993 by the General Assembly of the UN, and the General Observations for their interpretation and implementation have served as an important guideline for the establishment of equality bodies. The UN Committee on the Elimination of Racial Discrimination has done additional substantial work in this field.
6. The recommendations in this GPR build on these texts and are intended to further strengthen the efforts of both member States and equality bodies to achieve equality and social cohesion. They should not be used in any way to limit or weaken existing equality bodies or existing guarantees for their independence and effectiveness.

### I. Establishment of equality bodies

#### *Paragraph 1 of the recommendation*

7. Member States should establish a strong equality body. Some member States have set up more than one equality body to cover the different discrimination grounds (§ 4b of the GPR), all areas of the public and private sectors (§ 4c of the GPR), the whole territory of the member State (§ 4d of the GPR) and the different functions set out in this GPR (§ 10 of the GPR).
8. However, setting up too complex a system composed of too many bodies involves several risks: limited human and financial resources could be scattered, the visibility of the bodies could suffer, people might not know to which body to turn, and valuable resources could be bound up in ensuring co-ordination between these bodies instead of

being available for work on the substance of their mandate. Where more than one equality body has been established and where this has proven to be effective, the authorities should ensure coherence and close cooperation between these bodies.

9. Establishing equality bodies by constitutional provision offers strong and additional guarantees, as the abolition or substantial weakening of the equality body would be made more difficult. ECRI therefore considers it preferable to use constitutional provision. Details about the organisational structure of the body could be laid down in a separate law. If equality bodies are not established by constitutional provision, member States should proceed by organic or ordinary law passed by parliament.
10. The existence of comprehensive and clear anti-discrimination legislation constitutes another indispensable foundation for the functioning and impact of equality bodies. Guidelines for such legislation are set out in ECRI's General Policy Recommendation No. 7 on National legislation to combat racism and racial discrimination.

*Paragraph 2 of the recommendation*

11. Equality bodies need to be independent, in particular of government, to be able to address issues of equality, discrimination and intolerance as they see fit and without interference from any quarter. This also provides them with the necessary freedom to find and pursue new ways of promoting and achieving equality. Accordingly, independence is a precondition for the effectiveness and impact of equality bodies. Independence is particularly important where equality bodies address (structural) discrimination emanating from authorities and where they are assigned the function of taking decisions on complaints (§ 10c of the GPR).
12. Equality bodies should have both *de jure* and *de facto* independence. The necessary safeguards for *de jure* independence should be contained in the constitutional and legal provisions establishing the equality body (see § 3 of the GPR). The manner, in which these elements should be dealt with, is set out in particular in §§ 22 to 39 of the GPR.
13. Equality bodies should be separate legal entities and, subject to the legal order of the member State, separate legal persons. The recommendation to place them outside the executive and legislature does not exclude all interactions with these bodies. The executive and the legislature should, on the contrary, consult and exchange views with the equality body on all matters falling under the latter's mandate. At the same time, the executive or the legislature should not have power to instruct the equality body with regard to its strategic planning, operations, and activities.
14. *De facto* independence means that the executive and the legislature should not try directly or indirectly to instruct or inappropriately influence the equality body. Ways of exercising such influence include cutting the budget disproportionately or removing competences and powers, threatening the equality body, its leaders or staff, and using the media or other public or private institutions to put pressure on the equality body. To protect the independence and effectiveness of the equality body from such inappropriate influence, the law should also contain safeguards with regard to the equality body's competences, powers and resources (see §§ 3 and 28 of the GPR).
15. The persons holding leadership positions in the equality body should emphasise and assert their independence when acting for the equality body. An additional safeguard is to make the exchanges between the executive, the legislature and equality bodies open and transparent to the greatest possible extent.
16. Independence needs to be paired with effectiveness to ensure that the equality body can make an impact. Effectiveness means that the equality body implements its functions and competences in a way and to a scale and standard that make a significant impact on the achievement of equality and the elimination of discrimination and

intolerance. To be able to work effectively, equality bodies need, in particular, appropriate competences, powers and resources, as set out in §§ 13 and seq. of the GPR.

*Paragraph 3 of the recommendation*

17. Details regarding the core elements, which should be regulated by the text establishing the equality body or, where the body is established through constitutional provision, in an additional more detailed law on the equality body, are described in the following paragraphs of the GPR.

*Paragraph 4 of the recommendation*

18. The mandate of the equality body should be broad and comprehensive in scope and encompass all activities aimed at promoting and achieving equality. Achieving equality encompasses both: equal access to and exercise of rights by people experiencing discrimination and intolerance, and improvement of their individual and collective situation in various fields. These fields include, inter alia, education, employment, housing and health; political representation, power and influence on decisions; recognition, status and standing; and relationships of care, respect and solidarity with other groups and institutions.
19. The prevention and elimination of discrimination and intolerance is a foundation stone for achieving equality and includes combating all forms of racism (including xenophobia, Islamophobia, antisemitism and anti-gypsyism), homophobia and transphobia and their expression, such as hate speech and cyber hatred. The text establishing the equality body or the anti-discrimination legislation should explicitly set out that hate speech constitutes a form of discrimination and that equality bodies are mandated to counter hate speech at least through the means of civil and administrative law in accordance with § 8 of ECRI's GPR No. 15 on Combating hate speech. Whereas the police and prosecution services are the authorities primarily competent for dealing with hate crime, equality bodies should be competent to provide personal support and legal advice to people exposed to hate crime and refer them to the competent authorities (see §§ 72 and 81 of the Explanatory Memorandum).
20. Structural discrimination refers to rules, norms, routines, patterns of attitudes and behaviour in institutions and other societal structures that, consciously or unconsciously, present obstacles to groups or individuals in accessing the same rights and opportunities as others and that contribute to less favourable outcomes for them than for the majority of the population. Equality bodies should have a particular focus on addressing structural discrimination, as (i) persons involved in structural discrimination are often not aware of the discriminatory effect of their actions, (ii) structural discrimination regularly affects large numbers of persons and (iii) isolated persons are often not able to challenge structural discrimination within powerful institutions.
21. Promoting diversity means supporting a valuing of diversity and its added value in society and organisations. It includes making reasonable adjustments to take account of the practical implications of diversity. Promoting good relations between different groups in society entails fostering mutual respect, understanding and integration while continuing to combat discrimination and intolerance.
22. ECRI's mandate is limited to the discrimination grounds explicitly listed in § 4b of the GPR and to multiple and intersectional discrimination on these and other grounds falling under Article 14 of the European Convention on Human Rights and Article 1 of Protocol No. 12 to the Convention. The mandates of many equality bodies also cover other grounds mentioned in these provisions but not covered by ECRI. The recommendations of this GPR can be applied, *mutatis mutandi*, to equality bodies

responsible for grounds not falling under ECRI's mandate.

23. A gender perspective should be an integral part of the work of equality bodies. This involves analysing whether the needs, situation and experiences of both women and men have been equally taken into account and addressed in the equality body's plans and activities.
24. At the same time, the situation of transgender and intersex persons should be taken into account alongside analyses that reject binary gender categorisation (Council of Europe Commissioner for Human Rights (2015), Human Rights and Intersex people, p. 37 et seq.).
25. Multiple discrimination refers to discrimination experienced on two or more grounds of discrimination. Intersectional discrimination refers to a situation where several grounds of discrimination interact with each other at the same time in such a way that they become inseparable and their combination creates a new ground (§ 1c and the Explanatory Memorandum of ECRI's GPR No. 14 on Combating racism and racial discrimination in employment). As multiple and intersectional discrimination often affect victims in a particularly severe way, and as people at these intersections present a particular diversity of identity and experience, equality bodies should have a specific focus on these issues. Equality bodies should, in a similar way, take into account the needs of children exposed to discrimination and intolerance.
26. Definitions of different discrimination grounds can be found in § 7 of the Explanatory Memorandum to ECRI's GPR No. 15 on Combating hate speech.
27. Equality bodies should cover the whole of the private and public sectors, including law enforcement (see § 7 of ECRI's GPR No. 7). However, many equality bodies, in particular equality bodies established under the EU's equality directives, do not cover the full public sector and they are not competent for functions such as policing (see ECRI's GPR No. 11 on Combating racism and racial discrimination in policing), prisons and the military. Their mandate should be extended or another independent body such as a National Human Rights Institution or an Ombudsperson Institution should be tasked with the equality mandate in these areas.
28. There should be a consistent and coherent coverage of all regions of the member State, in particular in those with a federal structure, and there should be no territory without coverage by an equality body. The mandate should, as appropriate, also cover certain persons outside the country, such as citizens living abroad or people seeking asylum from outside the country.

## **II. Institutional Architecture**

### *Paragraphs 5 to 9 of the recommendation*

29. Over recent decades, a rich and diverse system of equality bodies has developed in the 47 member States. Details are documented in ECRI's country monitoring reports.
30. In some member States one equality body has been set up to cover multiple grounds, in others several equality bodies have been set up to cover single or multiple grounds. In all cases it is important to avoid any hierarchy emerging between the grounds and to ensure that an appropriate focus is given and appropriate resources are allocated to each ground and to the intersections between them.
31. Stand-alone equality bodies have an advantage in being able to concentrate on their equality mandate, have a dedicated budget for equality issues and develop specific expertise and visibility in the field of equality.

32. In some member States, the equality mandate has been attributed to a multi-mandate institution that also encompasses a human rights mandate and/or an Ombudsperson mandate. In other member States, single and multi-ground equality bodies have been merged with National Human Rights Institutions and Ombudsperson Institutions.
33. Locating the equality mandate in a multi-mandate institution can have a positive potential to address issues of equality, discrimination and intolerance more comprehensively and effectively by using all of its mandates. However, the realisation of this potential requires strong and innovative leadership in achieving efficient co-ordination and integration between the different mandates.
34. Within such multi-mandate institutions there can be tensions, particularly in the aftermath of a merger. Each mandate comes with its own tradition, approach and objectives. It is important to simultaneously respect and sustain this diversity and to progress integration of the merged mandates, in order to improve the impact of the body.
35. § 7 of the GPR contains recommendations to ensure an appropriate focus on the equality mandate in such institutions. A clear leadership structure for the equality mandate helps to ensure “ownership” for this mandate. In addition, there should be a strategic plan for the equality mandate (see § 33 of the GPR) and the implementation of activities in relation to equality issues should be organised in such a way as to ensure visibility for this mandate. An advisory committee (see § 114 of the Explanatory Memorandum) can help to improve the impact under the equality mandate. The term “equality” could also be included in the name of the institution.
36. The approach of merging or locating equality bodies in multi-mandate institutions should be pursued only where it does not weaken the equality mandate and where an appropriate focus on and appropriate resources for this mandate are ensured. Otherwise, it is preferable to establish or retain a stand-alone body.
37. Where the mandate of a multi-mandate institution is confined to the public sector, its equality mandate should be expanded to the private sector (and vice versa where the existing mandate covers only the private sector). This is preferable to tasking another equality body with the additional mandate.
38. Where equality bodies form part of a multi-mandate institution, the recommendations of this GPR should apply to the whole institution as far as possible. Whereas some of the GPR’s recommendations will apply only to the institution’s activities in the field of equality, others, such as the recommendations about the equality body’s independence, need to be applied to the whole institution.
39. In multi-mandate institutions, member States should harmonise, as far as possible, the competences and powers with regard to each of these mandates. In some cases, such multi-mandate institutions have been granted certain competences and powers only with regard to one mandate rather than to all mandates. In other cases, the criteria for the exercise of such competences and powers are different from one mandate to another. In order to achieve effective protection and impact over all mandates, these differences should be eliminated and this harmonisation should, where possible, be made to the highest standard available among the different mandates (“levelling-up”).
40. Equality bodies should co-ordinate and co-operate with each other, where there is more than one such body, and with other human rights institutions, including National Human Rights Institutions and Ombudsperson Institutions. This co-ordination and co-operation should aim to maximise their overall impact in relation to the equality mandate. They should also ensure that as broad a coverage of equality issues as possible

is achieved, issues of intersectionality are duly addressed, cases are cross referred, and there is no duplication of effort. This co-ordination and co-operation involves dialogue in their planning processes, joint initiatives in their work, and sustained ongoing communication.

### III. Functions

#### *Paragraphs 10 to 12 of the recommendation*

41. Equality bodies fulfil different functions. Three main functions can be identified, for which this GPR uses the terms: (i) promotion of equality and prevention of discrimination (promotion and prevention function), (ii) support to people exposed to discrimination and intolerance and litigation on their behalf (support and litigation function) and (iii) taking decisions on complaints (decision-making function).
42. As documented in ECRI's country monitoring reports, the situation in the member States is diverse also with regard to these functions: in some member States, all three functions have been assigned to equality bodies, in others only one or two. Whereas some member States have assigned all functions to the same equality body, others have distributed them among different equality bodies. In several member States, the decision-making function is assigned entirely to the judiciary; in others, the support and litigation function and the promotion and prevention function have been partly or fully delegated to civil society or other institutions. Government and the authorities also generally make a significant contribution to the promotion and prevention function.
43. ECRI considers, as it had also recommended in § 24 of its GPR No. 7, that all member States should assign to equality bodies the two functions of (i) promotion and prevention and (ii) support and litigation. Civil society organisations can and should play a role and make a valuable contribution in relation to these two functions alongside the equality body. People exposed to discrimination and intolerance often initially turn to civil society organisations, which subsequently encourage and help them to contact the equality body. Equality bodies and civil society organisations need to co-operate in these areas with a view to finding the best solution to enforce the rights of people exposed to discrimination and intolerance and co-ordinating their efforts.
44. In addition, member States can entrust a separate equality body with a decision-making function or assign this function fully to the judiciary. Equality bodies with a decision-making function can offer a more accessible, less adversarial, and more specialised venue for discrimination cases than the judiciary. Through the concentration of discrimination cases before one body, they allow for the development of expertise and consistent case law and thereby contribute to the implementation of and respect for the anti-discrimination legislation. Within the judiciary, a similar specialisation could be achieved by the concentration of discrimination cases in a small number of courts or court chambers or divisions specialising in this subject.
45. The support and litigation function and the decision-making function should preferably be assigned to different bodies. Equality bodies need to be impartial when exercising the decision-making function, whereas they are on the side of and act as advocates for the complainant when they implement the support and litigation function. Assigning both functions to the same body may affect stakeholders' trust in its impartiality, which is indispensable for exercising the decision-making function in a credible way.
46. Where both functions are nevertheless located in the same body, each function should be implemented by a different unit or by different staff and this should be clearly visible to the public.

47. Bodies which are responsible for both the decision-making function and the promotion and prevention and/or the support and litigation functions, are often obliged to use most of their resources on the decision-making function to ensure timely and high quality decisions in large numbers of cases. As there is a danger that such bodies may not be able to implement both the support and litigation and the promotion and prevention functions adequately, it is important to ensure that they have appropriate resources for these two functions.
48. Equality bodies should be free to choose, including in the context of their strategic planning (see § 33 of the GPR), which parts of their mandate, functions and competences they will focus upon at different times. This enables them to tailor their strategy and activities to the specific needs of the situation and gives them the flexibility to adapt to the ever-changing environment. Such flexibility is also needed to make the best use of limited resources.

#### **IV. Promotion and prevention competences**

##### *Paragraph 13 of the recommendation*

49. Equality bodies need a series of competences for the implementation of the promotion and prevention function. The first competence described in § 13a of the GPR is to undertake a complete range of promotion and prevention activities to fulfil their broad mandate as defined in § 4 of the GPR. The following parts of § 13 of the GPR describe the most important elements in a more detailed manner.
50. The dialogue between equality bodies and the persons and groups experiencing discrimination and intolerance lays the basis for planning and successfully implementing the promotion and prevention function. Having a regular in-depth dialogue with groups exposed to discrimination and intolerance and their representative organisations ensures knowledge of the full range of discrimination and intolerance they experience and of the priority issues that need to be tackled in order to improve their situation. It also enables identification of successful ways for resolving patterns of individual and structural discrimination.
51. This dialogue should seek to develop an understanding of the situation and the concerns of groups exposed to discrimination and intolerance; to involve these groups and their representative organisations in the activities and structures of the equality body (see § 37 of the GPR); to initiate processes of mutual education through the sharing of expertise and knowledge; and to ensure a regular presence of the equality body within these communities to support trust building and the reporting of instances of discrimination and intolerance.
52. The dialogue should encompass a wide range of societal groups and involve a broad variety of organisations, including, for example, grass roots organisations within these communities, minority consultative bodies, religious communities, civil society organisations and other stakeholders working with groups exposed to discrimination and intolerance such as trade unions and professional organisations.
53. Equality bodies should have the right to take up, on their own initiative, all matters falling under their mandate. As people exposed to discrimination and intolerance are often in a vulnerable situation and are not able to address structural discrimination on their own, it is important that equality bodies can conduct inquiries (in some member States the term investigation is used) and collect evidence on their own initiative in order to establish, expose, and address the, sometimes invisible, norms and processes within institutions that end up disadvantaging particular groups. These inquiry activities are important in uncovering and establishing the evidence of discrimination or intolerance that ultimately enables these experiences to be redressed. In cases and inquiries involving specific individuals, the equality body should act only with their

consent.

54. Research is an important means of developing the knowledge and understanding needed to identify, analyse and tackle the problems that groups exposed to discrimination and intolerance face. Sound quantitative and qualitative data on equality, discrimination and intolerance are fundamental to inform the general public, policy-makers and practitioners about the nature and extent of discrimination and intolerance. They also help in identifying the means for achieving equality and motivating decision-makers to take remedial action. Research and data further serve the equality body in the planning, implementation, monitoring and evaluation of its activities.
55. Research comprises wide-ranging activities and includes surveys, studies and data collection conducted by the body itself and analysis of equality surveys, studies and data from various sources. Collecting and systematising case law on equality, discrimination and intolerance also provides added value.
56. Through their awareness-raising activities, equality bodies should promote understanding of how open and hidden discrimination operates and spread knowledge about what is required for greater equality. Equality bodies should provide information about rights, remedies, and responsibilities under equal treatment legislation and support a valuing of equality and diversity in society and within institutions.
57. These activities should target a range of audiences including the general public, politicians, senior officials and other decision-makers, employers, trade unions, human resource professionals, service providers, employees in the public and private sectors, educationalists, religious communities, civil society organisations, the judiciary, and other legal professionals, the police and media personnel.
58. Equality bodies should develop specific awareness activities for people and groups exposed to discrimination or intolerance. Empowering and helping these people and groups to take the necessary steps to tackle discrimination and intolerance is an important contribution to improving their situation. A first step is to spread knowledge about equal treatment and hate speech and hate crime legislation and to dispel any perception that the experience of discrimination and intolerance is normal and that nothing can be done to change it. Equality bodies should furthermore strengthen the individual and collective capacities of members of groups exposed to discrimination and intolerance by training them about their rights, available legal remedies and how to exercise them. In addition, they should facilitate their access to other bodies mandated with protecting them, such as the police, the prosecution services, regulatory bodies in the field of media, and educational and labour inspectors. Together with these institutions, equality bodies should analyse the root causes of under-reporting of discrimination and intolerance and take the necessary steps to ensure that cases of discrimination and intolerance are systematically reported to the competent bodies.
59. Equality bodies should promote the development, exchange and implementation of good practice in the field of equality, discrimination and intolerance. A particular focus should be placed on politicians, senior officials, other decision-makers and institutions in the public and private sectors. Equality bodies should provide guidance and support to bring an equality perspective into policy-making and the legislative process and to implement internal equality and diversity systems and safeguards. Good practice in the field of equality includes the development and implementation of equality policies in one's organisation and area of responsibility, establishing a post with responsibility for equality, training staff, consultation with those experiencing inequality, gathering equality data, and assessing the impact of key decisions on advancing equality and preventing discrimination and intolerance. Such good practice could also include the use of anonymised job application procedures, or facilitating access to identity documents

or school enrolment for members of groups exposed to discrimination and intolerance.

60. Positive action, as provided for under § 5 of ECRI's GPR No. 7, involves measures to prevent or compensate for disadvantage suffered by groups exposed to discrimination and intolerance and to facilitate their full participation in all fields of life. Equality bodies should promote the use of positive action in particular in areas where deep-rooted, long-lasting structural discrimination needs to be addressed. Examples include special support in pre-schooling and schooling for groups exposed to discrimination and intolerance, and the targeted recruitment of members of such groups into employment in the public and private sectors.
61. In accordance with §§ 2 and 8 of ECRI's GPR No. 7, national anti-discrimination legislation should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions. In member States where such a statutory duty does not yet exist, equality bodies should promote the implementation of this recommendation.
62. Where such a statutory duty has been introduced, equality bodies should raise awareness about this general duty of mainstreaming equality in all activities of public authorities and support and monitor its implementation. To this end, equality bodies should develop standards that could for example include the development and implementation of guidelines for equality impact assessments and equality programmes (see in this respect § 27 of the Explanatory Memorandum to ECRI's GPR No. 7 and the Explanatory Memorandum to § 1 of its GPR No. 14, and for the sectors of policing and education the recommendations in its GPR No. 11 and section II.1 of its GPR No. 10). Equality bodies should furthermore assist authorities during the implementation of such standards through training and guidance material, and be involved in their regular assessment through monitoring and reviews of their impact. Where appropriate, equality bodies should enforce such standards or seek to have them enforced through bringing proceedings before the competent authority or by means of judicial review.
63. The competence to monitor legislative and executive acts at federal, regional and local level should be complemented by the competence to challenge them by litigation as set out in § 14 of the GPR.
64. Equality bodies should motivate and assist organisations responsible for providing training to develop and carry out initial and ongoing training on equality and non-discrimination. Key target groups should include politicians, senior officials and other decision-makers, employers, human resources professionals, trade unions, the judiciary, other legal professionals, the police, media personnel, educationalists, companies and service providers. Equality bodies could themselves provide such training, in particular where no other provider does so.
65. In order to make a real impact, equality bodies should not end their work with the issuing of recommendations, but also need to monitor their implementation. In many cases, it will be helpful to open a dialogue with those to whom the recommendations are addressed. Through this dialogue, equality bodies could explain their recommendations, show how they could be implemented and motivate the persons responsible to take the necessary steps. Equality bodies should track the progress in implementation of their recommendations and regularly publish an overview of their implementation status.
66. Equality bodies should also contribute to tracking and monitoring the implementation of relevant recommendations made by other similar bodies (see § 13n and o of the GPR).

67. A number of intergovernmental organisations, such as the United Nations, the Council of Europe and the Organization for Security and Co-operation in Europe and their associated courts, commissions and committees, have a mandate that includes promoting equality and preventing and combating discrimination and intolerance. There are considerable advantages for equality bodies in co-operating closely with such intergovernmental organisations. Equality bodies should promote ratification and implementation of relevant international treaties and disseminate knowledge about the standards, case law, reports and recommendations emanating from intergovernmental organisations. Connecting their work with the international framework increases the legitimacy and impact of the equality body's actions. Where necessary, equality bodies should promote the translation of such texts into the languages commonly used in their country.
68. Equality bodies should take part in the monitoring, advisory and co-operation activities of intergovernmental organisations. Within this framework, they should provide information and suggestions for recommendations. This enables intergovernmental organisations to take up the concerns and use the expert knowledge of equality bodies, base their own recommendations on these concerns and expert knowledge, give additional legitimacy to the positions of equality bodies and contribute to upholding and fostering their independence and effectiveness. Equality bodies should, in turn, promote and monitor the implementation of the recommendations of intergovernmental organisations at national level.
69. Equality bodies work within a broader framework of organisations and institutions concerned with equality, discrimination and intolerance. Building networks between these organisations, exploring their concerns and helping to co-ordinate their activities within these networks will increase their impact on the common goal. Equality bodies can in this way serve as a hub around which these organisations connect and exchange. Such networks should be used to develop shared understanding and objectives in the field of equality and to implement joint activities. In addition, co-operation with lawyers willing to work on a pro bono basis can be particularly important for both the promotion and prevention and the support and litigation functions.
70. Co-operation with equality bodies in other member States is an important source of peer learning, continuous improvement and strengthening of equality bodies. Equinet, the European network of equality bodies, for example, has a valuable role in this regard.

## **V. Support and litigation competences**

### *Paragraph 14 of the recommendation*

71. People exposed to discrimination and intolerance face multiple problems and obstacles in addressing inequality. Many of them have neither the capacities nor the resources to enforce their rights. Equality bodies, therefore, have an important role in helping them to do so.
72. Equality bodies should have the right to receive and take action on complaints of discrimination and intolerance, including hate speech. To facilitate the submission of such complaints, they should ensure that they are easily accessible to people exposed to discrimination and intolerance (see § 40 of the GPR). These persons often need, as a first step, personal and emotional support in order to deal with the discrimination or intolerance they experience. At the next level, they need legal advice to clarify their rights and possible ways of securing these rights. They then need legal assistance in approaching public and private institutions, decision-making bodies and the courts with a view to realising their rights.

73. The term “institution” in this context encompasses all private and public sector institutions that have a role in addressing or resolving complaints about discrimination or intolerance. “Adjudicatory bodies” include any bodies that have adjudicatory competences placed outside the court system, such as equality bodies with a decision-making function.
74. Conciliation can be a quick and consensual process to put an end to discrimination or intolerance. The use of conciliation can be particularly advantageous where discrimination or intolerance has occurred in an ongoing relationship, such as an employment or leasing relationship. Conciliation should be entrusted to an impartial person or unit in or outside the equality body.
75. Equality bodies should have the right to represent people exposed to discrimination and intolerance through their own staff or to engage and pay for a lawyer to represent the person concerned before institutions, adjudicatory bodies and the courts.
76. In cases of discrimination, there are numerous avenues of redress from which equality bodies should choose the most effective to secure the complainant’s rights. In the fields of school enrolment problems or forced evictions of Roma settlements, for example, the equality body could initiate administrative proceedings before the competent authority or initiate proceedings before an equality tribunal or a regular court. In other cases, it may choose proceedings before a private sector institution such as a press council. It is also important to give equality bodies access to the constitutional courts in cases addressing the compatibility of legislative or administrative acts with the fundamental right to equal treatment. At international level, equality bodies should have the right to bring cases before international or regional courts, and the committees dealing with individual or collective complaints such as the Council of Europe’s Committee of Social Rights or the United Nation’s Committee on the Elimination of Racial Discrimination.
77. Equality bodies need the competence to bring cases in their own name where a whole category of persons is discriminated against and hence there is no named complainant. An example would be incitement to hatred by a politician against all LGBT persons. The same competence is needed where the person exposed to discrimination and intolerance feels unable to bring forward a case in his/her own name, for example in areas where people are fearful of victimisation. Member States should explore all possible approaches in order to confer this competence upon equality bodies.
78. Institutions, adjudicatory bodies and courts should use the expertise of equality bodies in their proceedings. Equality bodies should, for their part, have the right to intervene in such proceedings if they are of the opinion that their expertise could assist in dealing with the case.
79. There are legally defined procedures for the execution of the decisions of courts, adjudicatory bodies and institutions. At the same time, there is room for additional activities by equality bodies to facilitate the implementation of such decisions. These can include correspondence with the individuals, bodies or institutions to whom decisions have been directed, advice to these persons, bodies and institutions, site visits, and joint action with other relevant entities, such as inspectorates, to ensure that the decisions are implemented. Follow-up activities should be implemented in a timely and systematic manner.

*Paragraph 15 of the recommendation*

80. While helping individual complainants, equality bodies should also develop and implement a policy of strategic litigation. Strategic litigation consists of identifying and carefully selecting cases for litigation in order to clarify, promote and protect the rights

of a whole group of people who are in a similar situation, and ensuring widespread publicity for such cases and dissemination of their results including through the media. In the field of equality, the aim of strategic litigation is to (i) generate case law that clarifies the interpretation of the equal treatment legislation, (ii) ensure a critical mass of casework on the different grounds covered, (iii) develop case law on issues of structural discrimination, (iv) generate publicity and use this publicity to sensitise individuals and institutions about their obligations under the equal rights legislation and (v) motivate individuals and institutions to respect these obligations and to bring about societal change. Through such strategic litigation and its media coverage, equality bodies can substantially improve the situation of groups exposed to discrimination and intolerance and increase the impact of their support activities.

81. As equality bodies attract increasingly high numbers of complaints, it is impossible for them to provide representation to all persons approaching them. While they should provide initial support to all complainants and, where appropriate, referral to other competent institutions, they should have the possibility to prioritise certain cases and provide representation in those cases. This would enable them to make the most effective use of their resources and to pursue strategic litigation. To ensure transparency and consistency, equality bodies should publicise the criteria on which they base these choices.

*Paragraph 16 of the recommendation*

82. People exposed to discrimination and intolerance are often unable to bear the cost and financial risk of proceedings initiated to secure their rights. Cases often need to be fought through several instances, in particular cases about structural discrimination and cases selected for strategic litigation. Costs and financial risks include (i) court and administrative fees; (ii) the cost of the complainant's own legal representation and (iii) exposure to the risk of having to pay the other party's legal fees in the event that the complainant loses the case.
83. In particular, in cases of structural discrimination and cases taken up for strategic litigation there should be a system to ensure that people exposed to discrimination and intolerance do not have to pay any such fees or costs. Member States could draw from existing good practice examples and address this situation in a range of different ways, for example by: (i) exempting people exposed to discrimination from court fees; (ii) providing legal aid in cases of discrimination that covers 100% of fees and costs; (iii) empowering equality bodies to recommend cases to courts "free of charge" so that people exposed to discrimination and intolerance do not have to pay court fees and get their legal representation for free through the state; (iv) ensuring that the complainant would not be liable for the costs of the other side in the proceedings where a case is unsuccessful but has raised important issues needing to be clarified or is in the public interest; (v) providing for class actions where a substantial number of complainants can combine together to take cases thereby reducing their exposure to costs or (vi) providing sufficient resources to enable equality bodies to represent people exposed to discrimination and intolerance through their own staff or paying for a lawyer to represent the person concerned, as already outlined in § 75 of the Explanatory Memorandum.

**VI. Decision-making competences**

*Paragraphs 17 and 18 of the recommendation*

84. Many member States have given equality bodies the competence to take decisions on complaints about discrimination and intolerance. Among these equality bodies, two models can be distinguished: the first group of equality bodies can issue binding decisions and some of them can also impose sanctions (§ 17 of the GPR). The second group of equality bodies issues recommendations, which in practice can have a

considerable impact, even if they are not binding and do not impose sanctions (§ 18 of the GPR). Institutions that combine an Ombudsperson mandate with an equality mandate often belong to this second group.

85. Equality bodies taking decisions on complaints can be similar to courts and deliver judgments or decisions, or be similar to independent administrative authorities and issue administrative acts or decisions.
86. Such bodies should be competent to receive complaints about discrimination including hate speech. It should be explicitly set out in the law that the rules on the shared burden of proof in discrimination cases (§ 11 of ECRI's GPR No. 7) apply to the proceedings before them. Additional provisions on the procedure before such bodies are needed, which should enshrine basic procedural guarantees and could be drawn from the codes of civil and administrative procedure. It is beyond the scope of this GPR to set out the details of such provisions.
87. If member States set up an equality body with a decision-making function, they should provide it with appropriate decision-making and follow-up competences. The equality body should preferably have the competence to take legally binding decisions (first model § 17) rather than being limited to non-binding recommendations (second model § 18). Under both models, equality bodies that take decisions on complaints should provide reasoning for and publish their decisions, and have the competence to issue decisions aimed at putting an end to discrimination (for example a requirement to allocate Roma children evenly among all classes of a school), to achieve full equality (for example to require payment of an equal salary to the complainant) and to avert future discrimination (for example to put in place a regulation for the allocation of pupils among the different classes). Furthermore, they should preferably have the additional competence to impose effective, proportionate and dissuasive sanctions in discrimination cases including the payment of compensation for both pecuniary and non-pecuniary damage (§ 12 of ECRI's GPR No. 7), fines and the publication of the decision with the name of the perpetrator (first model § 17). The complainant's name should be published only with his/her consent.
88. Under the first model, member States should establish a system for the execution of the equality body's decisions. This could draw on the legislation on the execution of court or administrative decisions.

#### *Paragraphs 19 and 20 of the recommendation*

89. It should be possible to appeal to the courts in the case of legally binding decisions, but this should apply only to final decisions on the merits of the case in question. Non-binding recommendations should not be subject to appeal.
90. If a complainant has chosen to initiate proceedings first before the courts, he/she should not be allowed to initiate subsequent proceedings before a decision-making equality body on the same matter.

### **VII. Powers to obtain evidence and information**

#### *Paragraph 21 of the recommendation*

91. Equality bodies need appropriate powers to obtain evidence and information with respect to all three functions outlined in this GPR. The powers of decision-making bodies could be more far-reaching than those of equality bodies mandated only with the promotion and prevention and the support and litigation functions.

## VIII. Independence and effectiveness

### *Paragraph 22 of the recommendation*

92. For the best possible impact on and outcomes in the field of equality, member States should make a number of arrangements to ensure the equality body's independence and effectiveness (see also §§ 2 and 3 of the GPR).

### *Paragraphs 23 to 26 of the recommendation*

93. Leadership of high quality and integrity is essential for the independence and effectiveness of equality bodies. This GPR therefore contains several recommendations concerning the leadership of equality bodies.
94. As documented in ECRI's country monitoring reports, the leadership models for equality bodies in the member States vary considerably. Equality bodies can be led by a full-time or part-time executive chairperson or president of the board of the body, a single appointee (for example an Ombudsperson), with deputies responsible for different subject matters (for example deputy Ombudspersons), or a senior manager (for example a person recruited to head the equality body, often accountable to a board).
95. The primary safeguard for securing independent leadership of equality bodies is to select the people for leadership positions in a transparent and competency-based process with safeguards against any decisive influence by the executive in any stage of the selection process, in particular during the phase of nomination or (pre-) selection of candidates and during the decision-making phase. This process should be participatory, meaning that organisations representing or working with groups exposed to discrimination and intolerance should be involved in it. Being elected by the parliament in an open and transparent process is one way to satisfy these conditions.
96. The persons holding leadership positions should benefit from the same level of protection against threats and coercion as comparable representatives of the state. The law should contain provisions about the conditions under which persons holding leadership positions can in exceptional circumstances be dismissed or excluded from the selection process that could lead to a renewal of the mandate. Changes in the mandate or restructuring of the institution should not lead to the dismissal of persons holding leadership positions. Providing these persons with an appropriate level of immunity in relation to the carrying out of their functions is an additional safeguard for independence. Details and standards can be found in the Council of Europe's Venice Commission's report on the Scope and Lifting of Parliamentary Immunities, CDL-AD(2014)011.
97. The persons holding leadership positions should not carry out activities or be members of bodies or institutions that might undermine the independence of the equality body, or otherwise compromise their roles. They should not, for example, be government ministers, senior officials, or heads of professional organisations.
98. Strong and stable leadership is crucial for the impact of equality bodies. Those responsible for leading equality bodies must achieve progress and impact in the different fields of their mandate while negotiating an ever-changing political context and upholding the mandate and independence of the body. They also need to build professional and committed staff, focused on the strategic priorities of the organisation, and to manage an array of different relationships with various stakeholders.

99. To ensure efficient leadership, the responsibilities of the persons holding leadership positions should be clearly defined. There should be at least one full-time or part-time paid leader concentrating on managing and directing the equality body, who is paid a competitive salary. The length of their mandate should allow time for them to make an impact and secure their independence. It could, for example, vary between four and five years with the possibility of renewal or cover a longer period without renewal.

*Paragraph 27 to 29 of the recommendation*

100. Another important safeguard for the independence of equality bodies is the right to decide independently on their internal structure, the management of their budget and financial and human resources, and the hiring of their staff, and to identify and occupy their own, separate premises. These premises should, in size and purpose, correspond to the needs of the equality body. Secondment of staff from public sector institutions should be limited as this could impair the independence of the equality body and affect perceptions of its independence.
101. The adequacy of funding and staffing of equality bodies is a key factor for their effectiveness and should be calculated on the basis of objective indicators. These could include (i) the size of the member State and of its population, (ii) the level and nature of reported and unreported incidents of discrimination and intolerance including hate speech, (iii) the range, capacity and contribution of other bodies working on equality, discrimination and intolerance, (iv) the costs involved for the equality body in implementing its functions and competences to a scale and quality necessary to make an impact and (v) the scale of the national budget of the member State. Peer-to-peer reviews with other member States could assist in determining the appropriate level of resources for the equality body.
102. Transparency about the use of funds should be achieved, either through the annual report of the equality body or in another appropriate manner.
103. Entitlement to raise additional funds from sources other than the state, for example the EU, the Council of Europe or private philanthropic organisations, can contribute to increasing the impact of equality bodies so long as it does not compromise their independence.

*Paragraph 30 of the recommendation*

104. The right to make public statements and to produce and publish documents, including annual reports, thematic reports, special reports and investigation reports, without prior approval or notification is an important element of independence. Reports should not require approval by parliament or government.

*Paragraph 31 of the recommendation*

105. To underpin their independence and credibility, equality bodies should root their work in the relevant international and national legal framework, standards, recommendations and case law. Their work should be evidence-based and take into account and examine the views of relevant institutions and people.

*Paragraph 32 of the recommendation*

106. It is compatible with the independence of equality bodies that they are subject to public service law and financial accountability rules. These should not be misused to hinder the activities of the equality body. Where appropriate, the rules applying to the judiciary in this regard could also be applied to equality bodies.

*Paragraphs 33 to 34 of the recommendation*

107. Strategic planning and working in regular planning and management cycles are important for prioritising core issues, maximising impact, improving quality of work, using resources efficiently, and ensuring ongoing learning and continuous improvement within the equality body. These planning and management cycles typically involve analysing the outstanding challenges, defining goals and objectives, planning and developing activities, implementing activities, evaluating their impact and reflecting on work completed and progress made. They should be used to ensure that equality bodies pursue a strategic mix of activities across all their functions that will advance their objectives and maximise their impact (see § 12 of the GPR).
108. Equality bodies should establish indicators, baselines and targets for core objectives and activities enabling them to measure the input of resources into activities, the outputs from these activities and the impact of individual activities and the overall impact of the equality body. They should regularly assess their work by self-assessment and, from time to time, external evaluation and establish internal processes and information flows that involve all members of the staff in collective learning and continuous improvement. These planning and management processes should be simple but effective and not put too much of a strain on resources.
109. Given the complexity of the communication challenge faced by equality bodies, they should develop a separate communications strategy. This strategy should identify the communication objectives, the priority audiences targeted, core messages to be communicated, the various means of communication to use and the efficient use of available resources.
110. The core audiences and messages will usually include (i) the general public so as to support a societal valuing of and positive attitudes towards equality, diversity and non-discrimination, improve understanding of these issues and increase motivation to contribute to equality; (ii) the full range of institutions in the public and private sectors so as to provide knowledge and understanding of their obligations under equal treatment legislation and to foster and expand their motivation and capacity to fulfil and go beyond these obligations by implementing effective equality and diversity systems; (iii) groups exposed to discrimination and intolerance to inform them of their rights and to build the necessary trust, confidence and capacity that enables them to exercise their rights.

*Paragraphs 35 to 36 of the recommendation*

111. The legislature, the executive and equality bodies all have important roles in promoting and achieving equality and in preventing and combating discrimination and intolerance. To maximise progress towards these shared goals, equality bodies should regularly discuss key issues and the implementation of recommendations with highest level decision-makers in the legislature and the executive. Annual, thematic and other reports and the recommendations made therein serve as an excellent basis for such regular exchanges. Enshrining in the law at least one dialogue per year with the legislature and executive on the annual report sets out the necessary institutional framework for this co-operation.
112. Annual reports should identify the core issues arising with respect to equality, discrimination and intolerance and the recommendations of the equality body. They should also give an account of the activities of the equality body and the outcomes of these, including disaggregated data on discrimination complaints and their outcomes.
113. Authorities in general, and not only the highest level decision-makers mentioned in § 111 of the Explanatory Memorandum, should engage in regular dialogue with equality bodies. To this end, they should proactively refer draft legislation, policy and executive

acts to equality bodies for consideration of their impact on equality and non-discrimination. Equality bodies should for their part approach authorities with comments and recommendations. Authorities should be open to such dialogue.

*Paragraph 37 of the recommendation*

114. Equality bodies should not only establish external networks and co-operation with stakeholders (see § 12b of the GPR), but also involve stakeholders, in particular groups exposed to discrimination and intolerance and their representative organisations, in their own structures and work. A valuable tool for this involvement is the establishment of an advisory committee with a membership drawn from these groups and organisations. This committee would be involved in the strategic planning and monitoring of current and future work and plans of the equality body. A wider range of stakeholders including civil society, academia, employer and employee associations and the media could similarly be included in this committee or a separate committee. Equality bodies could furthermore set up temporary work and project groups with stakeholders to advance particular pieces of work and to set up and run joint activities and projects.

*Paragraph 38 to 39 of the recommendation*

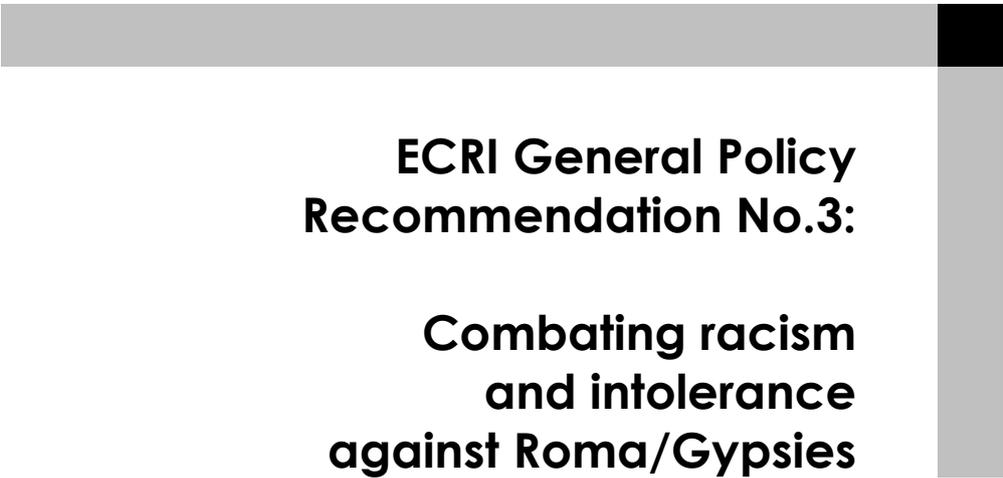
115. Equality bodies should serve as a model with regard to diversity and gender balance in all areas of their operations. Recruiting leaders and staff with various backgrounds and personal experiences will increase the equality body's capacity to understand, interact with and improve the situation of groups exposed to discrimination and intolerance. Diversity among the leadership of the equality body could be achieved by setting up a governing body and advisory committee with a membership drawn from the groups and organisations referred to in § 114 of the Explanatory Memorandum. Diversity among management and staff members could be achieved through a recruitment process based on equality and diversity systems, including positive action measures to recruit staff from underrepresented groups exposed to discrimination and intolerance.
116. Equality bodies should work towards achieving gender balance in their structures and staff and use positive action to achieve this goal, where appropriate.
117. Equality bodies have a broad range of competences (see §§ 13 to 18 of the GPR) and deal with issues of equality, discrimination and intolerance in a variety of fields. To carry out all necessary activities, their staff members need to be from different professions (for example educationalists, social scientists, lawyers) and have diverse competences (for example communication, counselling, research, data collection, drafting, legal and management skills).
118. Staff training within equality bodies is important to ensure that staff build up and maintain the full range of up-to-date knowledge, skills and awareness required to fulfil their roles to best effect.

**IX. Accessibility**

*Paragraph 40 of the recommendation*

119. As members of groups exposed to discrimination and intolerance often face multiple problems and obstacles (see § 71 of the Explanatory Memorandum), equality bodies should pay particular attention to ensuring that they are easily accessible for them.
120. To facilitate the initial contact, equality bodies should offer members of groups exposed to discrimination and intolerance different and easy ways for accessing information and for making contact. Accessible premises, online, email and telephone services are essential resources in this context.

121. It is equally important to set up, as appropriate, local and/or regional offices for a permanent presence and/or to develop local and/or regional outreach initiatives for a regular temporary presence with groups exposed to discrimination and intolerance throughout the country. This is particularly important where such groups live in remote areas and in member States with a large territory. Such activities could put a special focus on regions and municipalities with a strong presence of groups exposed to discrimination and intolerance or high levels of discrimination and intolerance. For members of such groups who do not live close to the central, regional or local offices of the equality body, it is also important to be able to contact the equality body online and to use technologies such as video conversations.
122. People who experience (multiple) discrimination and intolerance come from diverse groups with their own specific needs and characteristics. Some may not be proficient in the official language(s) of the country, they may be illiterate, may be fearful of contacting authorities or may not be able to contact the equality body during normal office hours. A key element for accommodating this diversity of needs is flexibility in the procedures and practices of the equality body. Equality bodies should therefore regularly analyse the varying needs of different groups exposed to discrimination and intolerance and develop a procedure for reasonably adjusting to these needs as from the initial contact. Examples of such adjustments would be providing for the possibility to interact with the equality body in different languages, to have face-to-face contact and oral communication, to meet the equality body in a confidence-inspiring environment, to be available to a certain extent outside normal office hours and to provide care for children during discussions with parents. Staff should be aware of such obstacles and characteristics, be prepared to explore the specific needs of each person exposed to discrimination and intolerance and be ready to implement the necessary adjustments as from the first contact.
123. Another key element for ensuring low-threshold access is to place minimal requirements on people when they make their first contact with the equality body. It should be possible to submit complaints orally and with a minimum of admissibility conditions.
124. The term 'disability' should be understood as in Article 1.2 of the UN Convention on the Rights of Persons with Disabilities.
125. Members of groups exposed to discrimination and intolerance often fear they may suffer additional harm when seeking the assistance of an equality body. Therefore it should be possible to contact equality bodies in a confidential way to minimise this risk. Equality bodies should strive to prevent and take action against any such victimisation of people exposed to discrimination and intolerance in the course of the procedure by making use of the legal provisions that prohibit any such retaliatory measure (see § 27 of ECRI's GPR No. 7).



**ECRI General Policy  
Recommendation No.3:**

**Combating racism  
and intolerance  
against Roma/Gypsies**

Adopted on 6 March 1998



The European Commission against Racism and Intolerance:

Recalling the decision adopted by the Heads of State and Government of the member States of the Council of Europe at their first Summit held in Vienna on 8-9 October 1993;

Recalling that the Plan of Action on combating racism, xenophobia, antisemitism and intolerance set out as part of this Declaration invited the Committee of Ministers to establish the European Commission against Racism and Intolerance with a mandate, *inter alia*, to formulate General Policy Recommendations to member States;

Recalling also the Final Declaration and Action Plan adopted by the Heads of State and Government of the member States of the Council of Europe at their second Summit held in Strasbourg on 10-11 October 1997;

Stressing that this Final Declaration confirms that the goal of the member States of the Council of Europe is to build a freer, more tolerant and just European society and that it calls for the intensification of the fight against racism, xenophobia, antisemitism and intolerance;

Noting the proposal concerning the nomination of a European mediator for Roma/Gypsies contained in Recommendation N° 1203 (1993) of the Parliamentary Assembly of the Council of Europe;

Bearing in mind the conclusions of the human dimension seminar on Roma in the CSCE (OSCE) region organised on 20-23 September 1994 by the Organisation for Security and Co-operation in Europe (OSCE), in

close consultation with the Council of Europe and the continuing co-operation between the two Organisations in this field;

Welcoming the nomination by the Secretary General in 1994 of a Co-ordinator of Council of Europe Activities on Roma/Gypsies;

Bearing in mind the work of the Specialist Group on Roma/Gypsies (MG-S-ROM);

Recalling Recommendation N° R (97) 21 of the Committee of Ministers to member States on the media and the promotion of a climate of tolerance;

Recalling the provisions contained in ECRI's general policy recommendation No.1, which sought to assist member States in combating racism, xenophobia, antisemitism and intolerance effectively, by proposing concrete and specific measures in a limited number of particularly pertinent areas;

Profoundly convinced that Europe is a community of shared values, including that of the equal dignity of all human beings, and that respect for this equal dignity is the cornerstone of all democratic societies;

Recalling that the legacy of Europe's history is a duty to remember the past by remaining vigilant and actively opposing any manifestations of racism, xenophobia, antisemitism and intolerance;

Paying homage to the memory of all the victims of policies of racist persecution and extermination during the Second World War and remembering that a considerable number of Roma/Gypsies perished as a result of such policies;

Stressing in this respect that the Council of Europe is the embodiment and guardian of the founding values - in particular the protection and promotion of human rights - around which Europe was rebuilt after the horrors of the Second World War;

Recalling that combating racism, xenophobia, antisemitism and intolerance forms an integral part of the protection and promotion of human rights, that these rights are universal and indivisible, and that all human beings, without any distinction whatsoever, are entitled to these rights;

Stressing that combating racism, xenophobia, antisemitism and intolerance is above all a matter of protecting the rights of vulnerable members of society;

Convinced that in any action to combat racism and discrimination, emphasis should be placed on the victim and the improvement of his or her situation;

Noting that Roma/Gypsies suffer throughout Europe from persisting prejudices, are victims of a racism which is deeply-rooted in society, are the target of sometimes violent demonstrations of racism and intolerance and that their fundamental rights are regularly violated or threatened;

Noting also that the persisting prejudices against Roma/Gypsies lead to discrimination against them in many fields of social and economic life, and that such discrimination is a major factor in the process of social exclusion affecting many Roma/Gypsies;

Convinced that the promotion of the principle of tolerance is a guarantee of the preservation of open and pluralistic societies allowing for a peaceful co-existence;

recommends the following to Governments of member States:

- to sign and ratify the relevant international legal instruments in the field of combating racism, xenophobia, antisemitism and intolerance, particularly the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages;
- to ensure that the name used officially for the various Roma/Gypsy communities should be the name by which the community in question wishes to be known;
- bearing in mind the manifestations of racism and intolerance of which Roma/Gypsies are victims, to give a high priority to the effective implementation of the provisions contained in ECRI's General Policy Recommendation N° 1, which requests that the necessary measures should be taken to ensure that national criminal, civil and administrative law expressly and specifically counter racism, xenophobia, anti-semitism and intolerance;

- to ensure that discrimination as such, as well as discriminatory practices, are combated through adequate legislation and to introduce into civil law specific provisions to this end, particularly in the fields of employment, housing and education;
- to render illegal any discrimination on the part of public authorities in the exercise of their duties;
- to ensure that suitable legal aid be provided for Roma/Gypsies who have been victims of discrimination and who wish to take legal action;
- to take the appropriate measures to ensure that justice is fully and promptly done in cases concerning violations of the fundamental rights of Roma/Gypsies;
- to ensure in particular that no degree of impunity is tolerated as regards crimes committed against Roma/Gypsies and to let this be clearly known among the general public;
- to set up and support specific training schemes for persons involved at all levels in the various components of the administration of justice, with a view to promoting cultural understanding and an awareness of prejudice;
- to encourage the development of appropriate arrangements for dialogue between the police, local authorities and Roma/Gypsy communities;
- to encourage awareness-raising among media professionals, both in the audiovisual field and in the written press, of the particular responsibility they bear in not transmitting prejudices when practising their profession, and in particular in avoiding reporting incidents involving individuals who happen to be members of the Roma/Gypsy community in a way which blames the Roma/Gypsy community as a whole;
- to take the necessary steps to ensure that rules concerning the issue of *de jure* and *de facto* access to citizenship and the right to asylum are drawn up and applied so as not to lead to particular discrimination against Roma/Gypsies;
- to ensure that the questions relating to "travelling" within a country, in particular regulations concerning residence and town planning, are solved in a way which does not hinder the way of life of the persons concerned;
- to develop institutional arrangements to promote an active role and participation of Roma/Gypsy communities in the decision-making process, through national, regional and local consultative mechanisms, with priority placed on the idea of partnership on an equal footing;
- to take specific measures to encourage the training of Roma/Gypsies, to ensure full knowledge and implementation of their rights and of the functioning of the legal system;

- to pay particular attention to the situation of Roma/Gypsy women, who are often the subject of double discrimination, as women and as Roma/Gypsies;
- to vigorously combat all forms of school segregation towards Roma/Gypsy children and to ensure the effective enjoyment of equal access to education;
- to introduce into the curricula of all schools information on the history and culture of Roma/Gypsies and to provide training programmes in this subject for teachers;
- to support the activities of non-governmental organisations, which play an important role in combating racism and intolerance against Roma/Gypsies and which provide them in particular with appropriate legal assistance;
- to encourage Roma/Gypsy organisations to play an active role, with a view to strengthening civil society;
- to develop confidence-building measures to preserve and strengthen an open and pluralistic society with a view to a peaceful co-existence.



**ECRI General Policy  
Recommendation No.4:**

**National surveys  
on the experience and perception  
of discrimination and racism  
from the point of view  
of potential victims**



Adopted on 6 March 1998



The European Commission against Racism and Intolerance:

Recalling the Declaration adopted by the Heads of State and Government of the member States of the Council of Europe at their Summit held in Vienna on 8-9 October 1993;

Recalling that the Plan of Action on combating racism, xenophobia, antisemitism and intolerance set out as part of this Declaration invited the Committee of Ministers to establish the European Commission against Racism and Intolerance with a mandate, *inter alia*, to formulate General Policy Recommendations to member States;

Recalling also the Final Declaration and Action Plan adopted by the Heads of State and Government of the member States of the Council of Europe at their second Summit held in Strasbourg on 10-11 October 1997;

Stressing that this Final Declaration confirms that the goal of the member States of the Council of Europe is to build a freer, more tolerant and just European society and that it calls for the intensification of the fight against racism, xenophobia, antisemitism and intolerance;

Recalling that in its General Policy Recommendation No.1, ECRI called on States to collect, in accordance with European laws, regulations and recommendation on data-protection and protection of privacy, where and when appropriate, data which will assist in assessing and evaluating the situation and experiences of groups which are particularly vulnerable to

racism, xenophobia, antisemitism and intolerance;

Stressing that statistical data on racist and discriminatory acts and on the situation of minority groups in all fields of life are vital for the identification of problems and the formulation of policies;

Convinced that such statistical data should be supplemented by data on attitudes, opinions and perceptions;

Considering in this respect that, in addition to surveys among the general population, targeted surveys which ascertain the experiences and perceptions of potential victims as regards the racism and discrimination they face represent an innovative and valuable source of information;

Considering that the results of such surveys may be used in a variety of ways to highlight problems and improve the situation;

Considering moreover that the acknowledgement of the validity of the experiences and perceptions of potential victims conveys an important message both to the population as a whole and to the vulnerable groups themselves;

Welcoming the fact that such surveys have already been organised in a number of member States;

Noting that the organisation of such surveys throughout Europe would provide a more detailed picture of the situation as regards racism and discrimination both on a national level and on a European level:

recommends to the governments of member States to take steps to ensure that national surveys on the experience and perception of racism and discrimination from the point of view of potential victims are organised, drawing inspiration from the guidelines set out in the Appendix to this recommendation.

## **Appendix to ECRI's General Policy Recommendation No.4**

### **Guidelines for the organisation of surveys on the experience and perception of racism and discrimination from the point of view of potential victims**

#### **I. General aims of such surveys**

1. The aim of the type of survey outlined in this recommendation is to gain a picture of the problems of racism and intolerance from the point of view of actual and potential victims. This innovative approach involves conducting a survey among members of various groups vulnerable to acts of racism, xenophobia, antisemitism, and intolerance, with questions aiming to elicit information about their experiences of racism and discrimination and how they perceive various aspects of the society in which they live in this respect. The data collected thus concerns the perceptions and experiences of members of vulnerable groups. Such data can supplement and enrich more quantitative data concerning racist incidents and levels of discrimination in various fields and data concerning opinions and attitudes of the majority population towards minority groups and issues of racism and intolerance.

#### **II. Practical organisation of surveys**

2. The design and implementation of such surveys might be entrusted to researchers or institutes with experience in the field of racism and intolerance, with the field work being carried out by survey research bodies.
3. The minority groups chosen as "categories" in the survey will depend according to national circumstances, and may include for example immigrant groups, national minorities and/or other vulnerable groups.
4. When choosing which groups to include as "categories", factors to be taken into consideration may include the size of the target population and information already available as to the degrees of discrimination faced by each group (for example, employment statistics, information about complaints of discrimination filed).
5. The inclusion of "control" or "contrast" groups may be appropriate to provide a base-line comparison: for example, a minority group which does not generally seem to face great problems of discrimination and racism might be included in the survey.
6. Good population statistics including information about variables such as place of birth, ethnic origin, religious confession, mother tongue, citizenship etc facilitate the organisation of such surveys. If this sort of census data is not available, alternative means of identifying and reaching the pertinent respondents will have to be found.

7. It should be borne in mind that some groups which might be particularly at risk as regards racism and discrimination - for example, illegal immigrants - may be very hard to reach with such surveys.

### III. Survey design

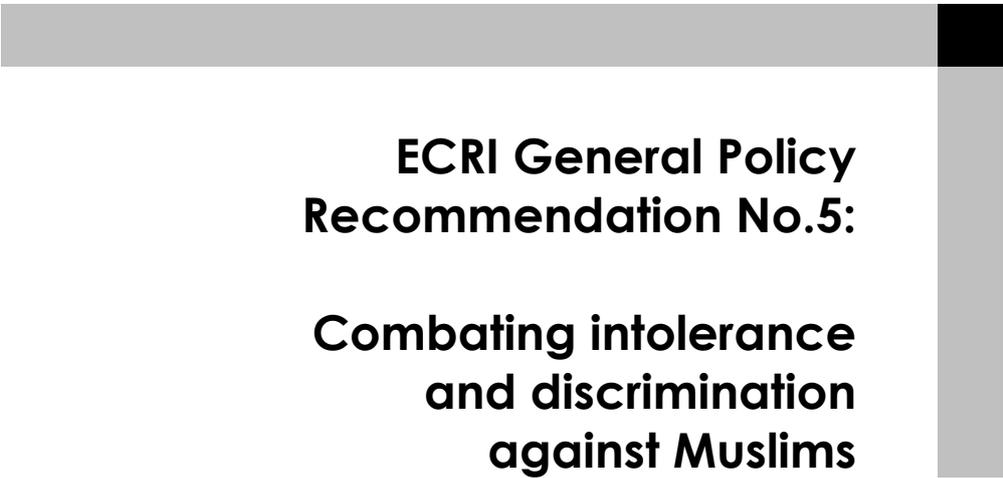
8. In addition to questions concerning the socio-economic background and other factual details, questions in the survey may fall into the following broad categories:

- questions pertaining to concrete situations, such as contacts with various authorities (eg police, health care, social welfare, educational institutions) as well as with other institutions (eg banks, housing agencies) and establishments (eg employers, restaurants, places of entertainment, shops): questions may ask how many times over a specific period of time (eg last year or last five years) respondents have been victims of unfair treatment due to their membership of a minority group and what sort of unfair treatment they have experienced.
- questions pertaining to perceived opportunities to participate on an equal basis in society, awareness of specific measures put in place to improve the situation of minority groups, and extent to which such opportunities have been realised (areas covered to include for example possibilities for success in education and vocational training, employment opportunities)
- questions pertaining to perceptions and attitudes: themes covered may include, as appropriate: amount of trust in institutions, attitudes towards immigration or minority policies, assessments of the country as a racist or xenophobic country, problems connected with religion, attitudes towards other groups, difficulties making contacts with the majority population, identification with the host country and country of origin, plans to stay or to return, where one feels most "at home", etc. The inclusion of such themes makes it possible to unveil interesting relationships between the degree of experienced discrimination and various attitudes and perceptions.

9. It should be noted that such questions mainly generate data on *subjective experiences* of discrimination. However, it is in any case extremely difficult to study acts of discrimination objectively and "in vivo" as they take place in the various walks of life. Reports on subjectively experienced discrimination are valuable as an indicator, particularly when they are assessed against the background of other kinds of information, such as unemployment statistics, police records, complaints filed etc.

#### **IV. Follow-up to surveys**

10. Over a period of time, follow-up surveys may be conducted, to explore changing patterns of discrimination and racism over time or to include different groups.
11. The results of the survey may be used in a variety of ways, for example: to highlight areas where action is especially necessary; for the evaluation and elaboration of policies which take into account the experiences and concerns of the groups concerned; to increase public awareness and understanding of the problems of discrimination as seen from the viewpoint of victims; to increase awareness among those working in particular areas of how their institutions and practices are perceived by minority groups (eg police, employers, service providers etc).



**ECRI General Policy  
Recommendation No.5:**

**Combating intolerance  
and discrimination  
against Muslims**

Adopted on 16 March 2000



The European Commission against Racism and Intolerance:

Recalling the Declaration adopted by the Heads of State and Government of the member States of the Council of Europe at their first Summit held in Vienna on 8-9 October 1993;

Recalling that the Plan of Action on combating racism, xenophobia, antisemitism and intolerance set out as part of this Declaration invited the Committee of Ministers to establish the European Commission against Racism and Intolerance with a mandate, *inter alia*, to formulate General Policy Recommendations to member States;

Recalling also the Final Declaration and Action Plan adopted by the Heads of State and Government of the member States of the Council of Europe at their second Summit held in Strasbourg on 10-11 October 1997;

Stressing that this Final Declaration confirms that the goal of the member States of the Council of Europe is to build a freer, more tolerant and just European society and that it calls for the intensification of the fight against racism, xenophobia, antisemitism and intolerance;

Recalling that Article 9 of the European Convention on Human Rights protects the right to freedom of thought, conscience and religion;

Recalling also the principle of non-discrimination embodied in Article 14 of the European Convention on Human Rights;

Bearing in mind the proposals contained in Recommendation No.1162 on the contribution of the Islamic civilisation to European culture adopted by the Parliamentary Assembly on 19 September 1991;

Taking note of the conclusions of the Seminar on religion and the integration of immigrants organised by the European Committee on Migration in Strasbourg on 24-26 November 1998;

Stressing that institutional arrangements governing relations between the State and religion vary greatly between member States of the Council of Europe;

Convinced that the peaceful co-existence of religions in a pluralistic society is founded upon respect for equality and for non-discrimination between religions in a democratic state with a clear separation between the laws of the State and religious precepts;

Recalling that Judaism, Christianity and Islam have mutually influenced each other and influenced European civilisation for centuries and recalling in this context Islam's positive contribution to the continuing development of European societies of which it is an integral part;

Concerned at signs that religious intolerance towards Islam and Muslim communities is increasing in countries where this religion is not observed by the majority of the population;

Strongly regretting that Islam is sometimes portrayed inaccurately on the basis of hostile stereotyping the effect of which is to make this religion seem a threat;

Rejecting all deterministic views of Islam and recognising the great diversity intrinsic in the practice of this religion;

Firmly convinced of the need to combat the prejudice suffered by Muslim communities and stressing that this prejudice may manifest itself in different guises, in particular through negative general attitudes but also, to varying degrees, through discriminatory acts and through violence and harassment;

Recalling that, notwithstanding the signs of religious intolerance referred to above, one of the characteristics of present-day Europe is a trend towards a diversity of beliefs within pluralistic societies;

Rejecting all manifestations of religious extremism;

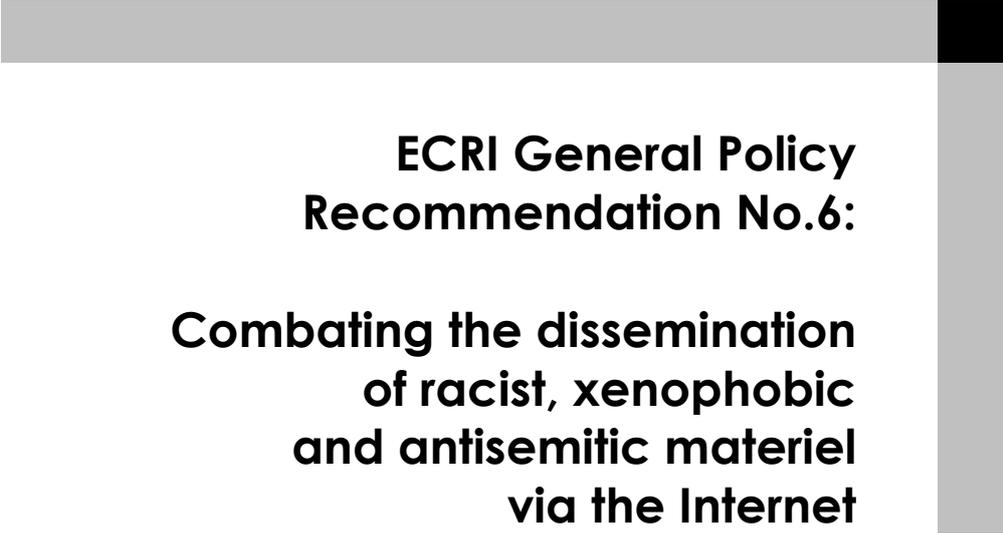
Emphasising that the principle of a multi-faith and multicultural society goes hand in hand with the willingness of religions to co-exist within the context of the society of which they form part;

recommends that the governments of member States, where Muslim communities are settled and live in a minority situation in their countries:

- ensure that Muslim communities are not discriminated against as to the circumstances in which they organise and practice their religion;
- impose, in accordance with the national context, appropriate sanctions in cases of discrimination on grounds of religion;
- take the necessary measures to ensure that the freedom of religious practice is fully guaranteed; in this context particular attention should be directed towards removing unnecessary legal or administrative obstacles to both the construction of sufficient numbers of appropriate places of worship for the practice of Islam and to its funeral rites;
- ensure that public institutions are made aware of the need to make provision in their everyday practice for legitimate cultural and other requirements arising from the multi-faith nature of society;
- ascertain whether discrimination on religious grounds is practised in connection with access to citizenship and, if so, take the necessary measures to put an end to it;
- take the necessary measures to eliminate any manifestation of discrimination on grounds of religious belief in access to education;
- take measures, including legislation if necessary, to combat religious discrimination in access to employment and at the workplace;

- encourage employers to devise and implement “codes of conduct” in order to combat religious discrimination in access to employment and at the workplace and, where appropriate, to work towards the goal of workplaces representative of the diversity of the society in question;
- assess whether members of Muslim communities suffer from discrimination connected with social exclusion and, if so, take all necessary steps to combat these phenomena;
- pay particular attention to the situation of Muslim women, who may suffer both from discrimination against women in general and from discrimination against Muslims;
- ensure that curricula in schools and higher education - especially in the field of history teaching - do not present distorted interpretations of religious and cultural history and do not base their portrayal of Islam on perceptions of hostility and menace;
- ensure that religious instruction in schools respects cultural pluralism and make provision for teacher training to this effect;
- exchange views with local Muslim communities about ways to facilitate their selection and training of Imams with knowledge of, and if possible experience in, the society in which they will work;
- support voluntary dialogue at the local and national level which will raise awareness among the population of those areas where particular care is needed to avoid social and cultural conflict;
- encourage debate within the media and advertising professions on the image which they convey of Islam and Muslim communities and on their responsibility in this respect to avoid perpetuating prejudice and biased information;
- provide for the monitoring and evaluation of the effectiveness of all measures taken for the purpose of combating intolerance and discrimination against Muslims.





**ECRI General Policy  
Recommendation No.6:**

**Combating the dissemination  
of racist, xenophobic  
and antisemitic material  
via the Internet**

Adopted on 15 December 2000



The European Commission against Racism and Intolerance:

Recalling the Declaration adopted by the Heads of State and Government of the member States of the Council of Europe at their first Summit held in Vienna on 8-9 October 1993;

Recalling that the Plan of Action on combating racism, xenophobia, antisemitism and intolerance set out as part of this Declaration invited the Committee of Ministers to establish the European Commission against Racism and Intolerance with a mandate, *inter alia*, to formulate General Policy Recommendations to member States;

Recalling also the Final Declaration and Action Plan adopted by the Heads of State and Government of the member States of the Council of Europe at their second Summit held in Strasbourg on 10-11 October 1997;

Recalling Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination;

Recalling Recommendation No R(92)19 of the Committee of Ministers to member States on video games with a racist content and Recommendation No R(97)20 of the Committee of Ministers to member States on "Hate Speech";

Recalling that, in its General Policy Recommendation No.1, ECRI called on the governments of Council of Europe member States to ensure that national criminal, civil and administrative law expressly and specifically counters racism, xenophobia, antisemitism and intolerance;

Stressing that, in the same recommendation, ECRI asked for the aforementioned law to provide in particular that oral, written, audio-visual expressions and other forms of expression, including the electronic media, inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group are legally categorised as a criminal offence, which should also cover the production, the distribution and the storage for distribution of the material in question;

Taking full account of the General Conclusions of the European Conference against racism held in Strasbourg on 11-13 October 2000 as the European regional contribution to the World Conference against racism, racial discrimination, xenophobia and related intolerance, which will be held on 31 August - 7 September 2001 in Durban, South Africa;

Noting that the European Conference against racism urged participating States to make every effort to prosecute those responsible for incitement to racial hatred on the internet and their accomplices;

Welcoming the fact that, in the Political Declaration adopted on 13 October 2000 at the closing session of the European Conference, the member States of the Council of Europe committed themselves to combating all forms of expression which incite racial hatred as well as to take action against the dissemination of such material in the media in general and on the Internet in particular;

Aware of actions and initiatives taken in this field by the United Nations, the OECD, the Council of Europe and the European Union;

Welcoming the progress made by the Council of Europe in suppressing cyber-crime, notably the work on the draft Convention on cyber-crime, and hoping for a prompt finalisation of this first international instrument for suppressing cyber-crime;

Regretting nevertheless that, for the time being, the draft Convention does not include provisions on racist, xenophobic and antisemitic crimes committed via the Internet;

Aware of the positive contribution that the Internet can make to combating racism and intolerance on a world scale;

Recognising that the Internet offers unprecedented means of facilitating the cross-border communication of information on human rights issues related to anti-discrimination;

Stressing that the use of the Internet to set up educational and awareness-raising networks in the field of combating racism and intolerance is a good practice which should be supported and further developed;

Deeply concerned by the fact that the Internet is also used for disseminating racist, xenophobic and antisemitic material, by individuals and groups aiming to incite to intolerance or racial and ethnic hatred;

Convinced of the determination of the member States of the Council of Europe to combat the phenomena of racism, xenophobia, antisemitism and intolerance which destroy democracy, and thus to act efficiently against the use of the Internet for racist, xenophobic and antisemitic aims;

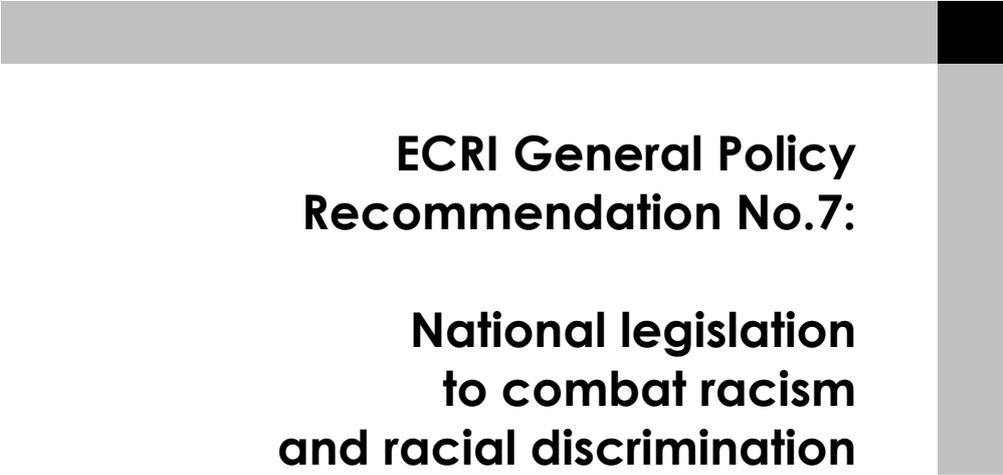
Aware that the very nature of the Internet calls for solutions at international level, and thus a willingness on the part of all States to combat incitement to racial hatred, enabling the fundamental principle of respect for human dignity to prevail;

Recommends that the Governments of the member States:

- include the issue of combating racism, xenophobia and antisemitism in all current and future work at international level aimed at the suppression of illegal content on the Internet;
- reflect in this context on the preparation of a specific protocol to the future Convention on cyber-crime to combat racist, xenophobic and antisemitic offences committed via the Internet;
- take the necessary measures for strengthening international co-operation and mutual assistance between law enforcement authorities across the world, so as to take more efficient action against the dissemination of racist, xenophobic and antisemitic material via the Internet;
- ensure that relevant national legislation applies also to racist, xenophobic and antisemitic offences committed via the Internet and prosecute those responsible for this kind of offences;

- undertake sustained efforts for the training of law enforcement authorities in relation to the problem of dissemination of racist, xenophobic and antisemitic material via the Internet;
- reflect, in this context, on the setting up of a national consultation body which might act as a permanent monitoring centre, mediating body and partner in the preparation of codes of conduct;
- support existing anti-racist initiatives on the Internet as well as the development of new sites devoted to the fight against racism, xenophobia, antisemitism and intolerance;
- clarify, on the basis of their respective technical functions, the responsibility of content host and content provider and site publishers as a result of the dissemination of racist, xenophobic and antisemitic messages;
- support the self-regulatory measures taken by the Internet industry to combat racism, xenophobia and antisemitism on the net, such as anti-racist hotlines, codes of conduct and filtering software, and encourage further research in this area;
- increase public awareness of the problem of the dissemination of racist, xenophobic and antisemitic material via the Internet while paying special attention to awareness-raising among young Internet-users - particularly children - as to the possibility of coming upon racist, xenophobic and antisemitic sites and the potential risk of such sites.





**ECRI General Policy  
Recommendation No.7:**

**National legislation  
to combat racism  
and racial discrimination**

Adopted on 13 December 2002  
and amended on 7 December 2017



The European Commission against Racism and Intolerance (ECRI):

Recalling the Declaration adopted by the Heads of State and Government of the member States of the Council of Europe at their first Summit held in Vienna on 8-9 October 1993;

Recalling that the Plan of Action on combating racism, xenophobia, antisemitism and intolerance set out as part of this Declaration invited the Committee of Ministers to establish the European Commission against Racism and Intolerance with a mandate, inter alia, to formulate general policy recommendations to member States;

Recalling also the Final Declaration and Action Plan adopted by the Heads of State and Government of the member States of the Council of Europe at their second Summit held in Strasbourg on 10-11 October 1997;

Recalling that Article 1 of the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights;

Having regard to the International Convention on the Elimination of All Forms of Racial Discrimination;

Having regard to Convention No 111 of the International Labour Organisation concerning Discrimination (Employment and Occupation);

Having regard to Article 14 of the European Convention on Human Rights;

Having regard to Protocol No 12 to the European Convention on Human Rights which contains a general clause prohibiting discrimination;

Having regard to the case-law of the European Court of Human Rights;

Taking into account the Charter of Fundamental Rights of the European Union;

Taking into account Directive 2000/43/EC of the Council of the European Union implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Directive 2000/78/EC of the Council of the European Union establishing a general framework for equal treatment in employment and occupation;

Having regard to the Convention on the Prevention and Punishment of the Crime of Genocide;

Recalling ECRI's general policy recommendation No 1 on combating racism, xenophobia, antisemitism and intolerance and ECRI's general policy recommendation No 2 on Equality bodies to combat racism and intolerance at national level;

Stressing that, in its country-by-country reports, ECRI regularly recommends to member States the adoption of effective legal measures aimed at combating racism and racial discrimination;

Recalling that, in the Political Declaration adopted on 13 October 2000 at the concluding session of the European Conference against racism, the governments of member States of the Council of Europe committed themselves to adopting and implementing, wherever necessary, national legislation and administrative measures that expressly and specifically counter racism and prohibit racial discrimination in all spheres of public life;

Recalling also the Declaration and the Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa, from 31 August to 8 September 2001;

Aware that laws alone are not sufficient to eradicate racism and racial discrimination, but convinced that laws are essential in combating racism and racial discrimination;

Stressing the vital importance of appropriate legal measures in combating racism and racial discrimination effectively and in a way which both acts as a deterrent and, as far as possible, is perceived by the victim as satisfactory;

Convinced that the action of the State legislator against racism and racial discrimination also plays an educative function within society, transmitting the powerful message that no attempts to legitimise racism and racial discrimination will be tolerated in a society ruled by law;

Seeking, alongside the other efforts underway at international and European level, to assist member States in their fight against racism and racial discrimination, by setting out in a succinct and precise manner the key elements to be included in appropriate national legislation;

Recommends to the governments of member States:

- a. to enact legislation against racism and racial discrimination, if such legislation does not already exist or is incomplete ;
- b. to ensure that the key components set out below are provided in such legislation.

## Key elements of national legislation against racism and racial discrimination

### I. Definitions

1. For the purposes of this Recommendation, the following definitions shall apply :
  - a) “racism” shall mean the belief that a ground such as race<sup>1</sup>, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.
  - b) “direct racial discrimination” shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
  - c) “indirect racial discrimination” shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

### II. Constitutional law

2. The constitution should enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality or national or ethnic origin. The constitution may provide that exceptions to the principle of equal treatment may be established by law, provided that they do not constitute discrimination.
3. The constitution should provide that the exercise of freedom of expression, assembly and association may be restricted with a view to

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<sup>1</sup> Since all human beings belong to the same species, ECRI rejects theories based on the existence of different “races”. However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to “another race” are not excluded from the protection provided for by the legislation.

combating racism. Any such restrictions should be in conformity with the European Convention on Human Rights.

### III. Civil and administrative law

4. The law should clearly define and prohibit direct and indirect racial discrimination.
5. The law should provide that the prohibition of racial discrimination does not prevent the maintenance or adoption of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons designated by the grounds enumerated in paragraph 1 b) (henceforth: enumerated grounds), or to facilitate their full participation in all fields of life. These measures should not be continued once the intended objectives have been achieved.
6. The law should provide that the following acts, *inter alia*, are considered as forms of discrimination: segregation; discrimination by association; announced intention to discriminate; instructing another to discriminate; inciting another to discriminate; aiding another to discriminate.
7. The law should provide that the prohibition of discrimination applies to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors, in all areas, notably: employment; membership of professional organisations; education; training; housing; health; social protection; goods and services intended for the public and public places; exercise of economic activity; public services.
8. The law should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions.
9. The law should place public authorities under a duty to ensure that those parties to whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination. In particular, the law should provide that public authorities should subject the awarding of contracts, loans, grants or other benefits to the condition that a policy of non-discrimination be respected and promoted by the other party. The law should provide that the violation of such condition may result in the termination of the contract, grant or other benefits.
10. The law should ensure that easily accessible judicial and/or administrative proceedings, including conciliation procedures, are available to all victims of discrimination. In urgent cases, fast-track procedures, leading to interim decisions, should be available to victims of discrimination.
11. The law should provide that, if persons who consider themselves wronged because of a discriminatory act establish before a court or any other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination.

12. The law should provide for effective, proportionate and dissuasive sanctions for discrimination cases. Such sanctions should include the payment of compensation for both material and moral damages to the victims.
13. The law should provide the necessary legal tools to review, on an ongoing basis, the conformity with the prohibition of discrimination of all laws, regulations and administrative provisions at the national and local levels. Laws, regulations and administrative provisions found not to be in conformity with the prohibition of discrimination should be amended or abrogated.
14. The law should provide that discriminatory provisions which are included in individual or collective contracts or agreements, internal regulations of enterprises, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations should be amended or declared null and void.
15. The law should provide that harassment related to one of the enumerated grounds is prohibited.
16. The law should provide for an obligation to suppress public financing of organisations which promote racism. Where a system of public financing of political parties is in place, such an obligation should include the suppression of public financing of political parties which promote racism.
17. The law should provide for the possibility of dissolution of organisations which promote racism.

#### IV. Criminal law

18. The law should penalise the following acts when committed intentionally:
  - a) public incitement to violence, hatred or discrimination,
  - b) public insults and defamation or
  - c) threatsagainst a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
  - d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
  - e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;

- f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d) and e);
  - g) the creation or the leadership of a group which promotes racism ; support for such a group ; and participation in its activities with the intention of contributing to the offences covered by paragraph 18 a), b), c), d), e) and f);
  - h) racial discrimination in the exercise of one's public office or occupation.
19. The law should penalise genocide.
20. The law should provide that intentionally instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraphs 18 and 19 is punishable.
21. The law should provide that, for all criminal offences not specified in paragraphs 18 and 19, racist motivation constitutes an aggravating circumstance.
22. The law should provide that legal persons are held responsible under criminal law for the offences set out in paragraphs 18, 19, 20 and 21.
23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraphs 18, 19, 20 and 21. The law should also provide for ancillary or alternative sanctions.

#### **V. Common provisions**

24. The law should provide for the establishment of of one or more equality bodies to combat racism and intolerance as set out in ECRI's General Policy Recommendation No. 2. The law should include within the competence of such a body: assistance to victims; investigation powers; the right to initiate, and participate in, court proceedings; monitoring legislation and advice to legislative and executive authorities; awareness-raising of issues of racism and racial discrimination among society and promotion of policies and practices to ensure equal treatment.
25. The law should provide that organisations such as associations, trade unions and other legal entities which have, according to the criteria laid down by the national law, a legitimate interest in combating racism and racial discrimination, are entitled to bring civil cases, intervene in administrative cases or make criminal complaints, even if a specific victim is not referred to. If a specific victim is referred to, it should be necessary for that victim's consent to be obtained.

26. The law should guarantee free legal aid and, where necessary, a court-appointed lawyer, for victims who wish to go before the courts as applicants or plaintiffs and who do not have the necessary means to do so. If necessary, an interpreter should be provided free of charge.
27. The law should provide protection against any retaliatory measures for persons claiming to be victims of racial offences or racial discrimination, persons reporting such acts or persons providing evidence.
28. The law should provide for one or more independent bodies entrusted with the investigation of alleged acts of discrimination committed by members of the police, border control officials, members of the army and prison personnel.



## **Explanatory Memorandum to ECRI general policy recommendation N° 7 on national legislation to combat racism and racial discrimination**

### **Introduction**

1. This general policy recommendation (hereafter: the Recommendation) focuses on the key elements of national legislation to combat racism and racial discrimination. Although ECRI is aware that legal means alone are not sufficient to this end, it believes that national legislation against racism and racial discrimination is necessary to combat these phenomena effectively.
2. In the framework of its country-by-country approach, ECRI regularly recommends to member States of the Council of Europe the adoption of effective legal measures aimed at combating racism and racial discrimination. The Recommendation aims to provide an overview of these measures and to clarify and complement the recommendations formulated in this respect in ECRI's country-by-country reports. The Recommendation also aims to reflect the general principles contained in the international instruments mentioned in the Preamble.
3. ECRI believes that appropriate legislation to combat racism and racial discrimination should include provisions in all branches of the law, i.e. constitutional, civil, administrative and criminal law. Only such an integrated approach will enable member States to address these problems in a manner which is as exhaustive, effective and satisfactory from the point of view of the victim as possible. In the field of combating racism and racial discrimination, civil and administrative law often provides for flexible legal means, which may facilitate the victims' recourse to legal action. Criminal law has a symbolic effect which raises the awareness of society of the seriousness of racism and racial discrimination and has a strong dissuasive effect, provided it is implemented effectively. ECRI has taken into account the fact that the possibilities offered by the different branches of the law are complementary. As regards in particular the fight against racial discrimination, ECRI recommends that the member States of the Council of Europe adopt constitutional, civil and administrative law provisions, and that, in certain cases, they additionally adopt criminal law provisions.
4. The legal measures necessary to combat racism and racial discrimination at national level are presented in the form of key components which should be contained in the national legislation of member States. ECRI stresses that the measures it recommends are compatible with different legal systems, be they common law or civil law or mixed. Furthermore, those components that ECRI considers to be key to an effective legal framework against racism and racial discrimination may be adapted to the specific conditions of each country. They could thus be set out in a single special act or laid out in

the different areas of national legislation (civil law, administrative law and penal law). These key components might also be included in broader legislation encompassing the fight against racism and racial discrimination. For example, when adopting legal measures against discrimination, member States might prohibit, alongside racial discrimination, other forms of discrimination such as those based on gender, sexual orientation, disability, political or other opinion, social origin, property, birth or other status. Finally, in a number of fields, member States might simply apply general rules, which it is therefore not necessary to set out in this Recommendation. This is the position, for example, in civil law, for multiple liability, vicarious liability, and for the establishment of levels of damages; in criminal law, for the conditions of liability, and the sentencing structure; and in procedural matters, for the organisation and jurisdiction of the courts.

5. In any event, these key components represent only a minimum standard; this means that they are compatible with legal provisions offering a greater level of protection adopted or to be adopted by a member State and that under no circumstances should they constitute grounds for a reduction in the level of protection against racism and racial discrimination already afforded by a member State.

## I. Definitions

### *Paragraph 1 of the Recommendation*

6. In the Recommendation, the term “racism” should be understood in a broad sense, including phenomena such as xenophobia, antisemitism and intolerance. As regards the grounds set out in the definitions of racism and direct and indirect racial discrimination (paragraph 1 of the Recommendation), in addition to those grounds generally covered by the relevant legal instruments in the field of combating racism and racial discrimination, such as race, colour and national or ethnic origin, the Recommendation covers language, religion and nationality<sup>3</sup>. The inclusion of these grounds in the definitions of racism and racial discrimination is based on ECRI's mandate, which is to combat racism, antisemitism, xenophobia and intolerance. ECRI considers that these concepts, which vary over time, nowadays cover manifestations targeting persons or groups of persons, on grounds such as race, colour, religion, language, nationality and national and ethnic origin. As a result, the expressions “racism” and “racial discrimination” used in the Recommendation encompass all the phenomena covered by ECRI's mandate. National origin is sometimes interpreted as including the concept of nationality. However, in order to ensure that this concept is indeed covered, it is expressly included in the list of grounds, in addition to national origin. The use of the expression “grounds such as” in the definitions of racism and direct and indirect racial discrimination aims at establishing an open-ended list of grounds, thereby allowing it to evolve with society. However, in

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<sup>3</sup> ECRI understands the term “nationality” as defined in Article 2 a). of the European Convention on Nationality: “ ‘nationality’ means the legal bond between a person and a State and does not indicate the person's ethnic origin”.

criminal law, an exhaustive list of grounds could be established in order to respect the principle of foreseeability which governs this branch of the law.

7. Unlike the definition of racial discrimination (paragraphs 1 b) and c) of the Recommendation), which should be included in the law, the definition of racism is provided for the purposes of the Recommendation, and member States may or may not decide to define racism within the law. If they decide to do so, they may, as regards criminal law, adopt a more precise definition than that set out in paragraph 1 a), in order to respect the fundamental principles of this branch of the law. For racism to have taken place, it is not necessary that one or more of the grounds listed should constitute the only factor or the determining factor leading to contempt or the notion of superiority; it suffices that these grounds are among the factors leading to contempt or the notion of superiority.
8. The definitions of direct and indirect racial discrimination contained in paragraph 1 b) and c) of the Recommendation draw inspiration from those contained in the Directive 2000/43/CE of the Council of the European Union implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and in the Directive 2000/78/CE of the Council of the European Union establishing a general framework for equal treatment in employment and occupation as well as on the case-law of the European Court of Human Rights. In accordance with this case-law, differential treatment constitutes discrimination if it has no objective and reasonable justification. This principle applies to differential treatment based on any of the grounds enumerated in the definition of racial discrimination. However, differential treatment based on race, colour and ethnic origin may have an objective and reasonable justification only in an extremely limited number of cases. For instance, in employment, where colour constitutes a genuine and determining occupational requirement by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, differential treatment based on this ground may have an objective and reasonable justification. More generally, the notion of objective and reasonable justification should be interpreted as restrictively as possible with respect to differential treatment based on any of the enumerated grounds.

## **II. Constitutional law**

9. In the Recommendation, the term “constitution” should be understood in a broad sense, including basic laws and written and unwritten basic rules. In paragraphs 2 and 3, the Recommendation provides for certain principles that should be contained in the constitution; such principles are to be implemented by statutory and regulatory provisions.

*Paragraph 2 of the Recommendation*

10. In paragraph 2, the Recommendation allows for the possibility of providing in the law for exceptions to the principle of equal treatment, provided that they do not constitute discrimination. For this condition to be met, in accordance with the definitions of discrimination proposed in paragraph 1 b) and c) of the Recommendation, the exceptions must have an objective and reasonable justification. This principle applies to all exceptions, including those establishing differential treatment on the basis of nationality.

*Paragraph 3 of the Recommendation*

11. According to paragraph 3 of the Recommendation, the constitution should provide that the exercise of freedom of expression, assembly and association may be restricted with a view to combating racism. In articles 10 (2) and 11 (2), the European Convention on Human Rights enumerates the aims which may justify restrictions to these freedoms. Although the fight against racism is not mentioned as one of these aims, in its case-law the European Court of Human Rights has considered that it is included. In accordance with the articles of the Convention mentioned above, these restrictions should be prescribed by law and necessary in a democratic society.

**III. Civil and administrative law**

*Paragraph 4 of the Recommendation*

12. The Recommendation provides in paragraph 4 that the law should clearly define and prohibit direct and indirect racial discrimination. It offers a definition of direct and indirect racial discrimination in paragraph 1 b) and c). The meaning of the expression “differential treatment” is wide and includes any distinction, exclusion, restriction, preference or omission, be it past, present or potential. The term “ground” must include grounds which are actual or presumed. For instance, if a person experiences adverse treatment due to the presumption that he or she is a Muslim, when in reality this is not the case, this treatment would still constitute discrimination on the basis of religion.
13. Discriminatory actions are rarely based solely on one or more of the enumerated grounds, but are rather based on a combination of these grounds with other factors. For discrimination to occur, it is therefore sufficient that one of the enumerated grounds constitutes one of the factors leading to the differential treatment. The use of restrictive expressions such as “difference of treatment *solely* or *exclusively* based on grounds such as ...” should therefore be avoided.

#### *Paragraph 5 of the Recommendation*

14. In its paragraph 5, the Recommendation provides for the possibility of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons designated by the enumerated grounds, or to facilitate their full participation in all fields of life. An example of temporary special measures designed to prevent or compensate for disadvantages linked to the enumerated grounds: a factory owner who has no black employees among his managerial staff but many black employees on the assembly line might organise a training course for black workers seeking promotion. An example of temporary special measures designed to facilitate the full participation, in all fields of life, of persons designated by the enumerated grounds: the police could organise a recruitment campaign designed so as to encourage applications particularly from members of certain ethnic groups who are under-represented within the police.

#### *Paragraph 6 of the Recommendation*

15. The Recommendation specifically mentions in paragraph 6 certain acts which should be considered by law as forms of discrimination. In theory, the application of the general legal principles and the definition of discrimination should enable these acts to be covered. However, practice demonstrates that these acts often tend to be overlooked or excluded from the scope of application of the legislation. For reasons of effectiveness, it may therefore be useful for the law to provide expressly that these acts are considered as forms of discrimination.
16. Among the acts which the Recommendation mentions specifically as forms of discrimination, the following warrant a brief explanation:
  - Segregation is the act by which a (natural or legal) person separates other persons on the basis of one of the enumerated grounds without an objective and reasonable justification, in conformity with the proposed definition of discrimination. As a result, the voluntary act of separating oneself from other persons on the basis of one of the enumerated grounds does not constitute segregation.
  - Discrimination by association occurs when a person is discriminated against on the basis of his or her association or contacts with one or more persons designated by one of the enumerated grounds. This would be the case, for example, of the refusal to employ a person because s/he is married to a person belonging to a certain ethnic group.
  - The announced intention to discriminate should be considered as discrimination, even in the absence of a specific victim. For instance, an employment advertisement indicating that Roma/Gypsies need not apply should fall within the scope of the legislation, even if no Roma/Gypsy has actually applied.

*Paragraph 7 of the Recommendation*

17. According to paragraph 7 of the Recommendation, the prohibition of discrimination should apply in all areas. Concerning employment, the prohibition of discrimination should cover access to employment, occupation and self-employment as well as work conditions, remunerations, promotions and dismissals.
18. As concerns membership of professional organisations, the prohibition of discrimination should cover: membership of an organisation of workers or employers, or any organisation whose members carry on a particular profession ; involvement in such organisations ; and the benefits provided for by such organisations.
19. Concerning education, the prohibition of discrimination should cover pre-school, primary, secondary and higher education, both public and private. Furthermore, access to education should not depend on the immigration status of the children or their parents.
20. As concerns training, the prohibition of discrimination should cover initial and on-going vocational training, all types and all levels of vocational guidance, advanced vocational training and retraining, including the acquisition of practical work experience.
21. As concerns housing, discrimination should be prohibited in particular in access to housing, in housing conditions and in the termination of rental contracts.
22. As concerns health, discrimination should be prohibited in particular in access to care and treatment, and in the way in which care is dispensed and patients are treated.
23. Concerning social protection, the prohibition of discrimination should cover social security, social benefits, social aid (housing benefits, youth benefits, etc.) and the way in which the beneficiaries of social protection are treated.
24. As concerns goods and services intended for the public and public places, discrimination should be prohibited, for instance, when buying goods in a shop, when applying for a loan from a bank and in access to discotheques, cafés or restaurants. The prohibition of discrimination should not only target those who make goods and services available to others, but also those who receive goods and services from others, as would be the case of a company which selects the providers of a given good or service on the basis of one of the enumerated grounds.
25. Concerning the exercise of economic activity, this field covers competition law, relations between enterprises and relations between enterprises and the State.
26. The field of public services includes the activities of the police and other law enforcement officials, border control officials, the army and prison personnel.

*Paragraph 8 of the Recommendation*

27. According to paragraph 8 of the Recommendation, the law should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions. The obligations incumbent on such authorities should be spelled out as clearly as possible in the law. To this end, public authorities could be placed under the obligation to create and implement “equality programmes” drawn up with the assistance of the equality body referred to in paragraph 24 of the Recommendation. The law should provide for the regular assessment of the equality programmes, the monitoring of their effects, as well as for effective implementation mechanisms and the possibility for legal enforcement of these programmes, notably through the national specialised body. An equality programme could, for example, include the nomination of a contact person for dealing with issues of racial discrimination and harassment or the organisation of staff training courses on discrimination. As regards the obligation to promote equality and prevent discrimination, the Recommendation covers only public authorities; however, it would be desirable were the private sector also placed under a similar obligation.

*Paragraph 10 of the Recommendation*

28. According to paragraph 10 of the Recommendation, in urgent cases, fast-track procedures, leading to interim decisions, should be available to victims of discrimination. These procedures are important in those situations where the immediate consequences of the alleged discriminatory act are particularly serious or even irreparable. Thus, for example, the victims of a discriminatory eviction from a flat should be able to suspend this measure through an interim judicial decision, pending the final judgement of the case.

*Paragraph 11 of the Recommendation*

29. Given the difficulties complainants face in collecting the necessary evidence in discrimination cases, the law should facilitate proof of discrimination. For this reason, according to paragraph 11 of the Recommendation, the law should provide for a shared burden of proof in such cases. A shared burden of proof means that the complainant should establish facts allowing for the presumption of discrimination, whereupon the onus shifts to the respondent to prove that discrimination did not take place. Thus, in case of alleged direct racial discrimination, the respondent must prove that the differential treatment has an objective and reasonable justification. For example, if access to a swimming pool is denied to Roma/Gypsy children, it would be sufficient for the complainant to prove that access was denied to these children and granted to non-Roma/Gypsy children. It should then be for the respondent to prove that this denial to grant access was based on an objective and reasonable justification, such as the fact that the children in question did not have bathing hats, as required to access the swimming pool. The same principle should apply to alleged cases of indirect racial discrimination.

30. As concerns the power to obtain the necessary evidence and information, courts should enjoy all adequate powers in this respect. Such powers should be also given to any equality body competent to adjudicate on an individual complaint of discrimination (see see paragraph 21 of General Policy Recommendation No. 2).

*Paragraph 12 of the Recommendation*

31. Paragraph 12 of the Recommendation states that the law should provide for effective, proportionate and dissuasive sanctions for discrimination cases. Apart from the payment of compensation for material and moral damages, sanctions should include measures such as the restitution of rights which have been lost. For instance, the law should enable the court to order re-admittance into a firm or flat, provided that the rights of third parties are respected. In the case of discriminatory refusal to recruit a person, the law should provide that, according to the circumstances, the court could order the employer to offer employment to the discriminated person.
32. In the case of discrimination by a private school, the law should provide for the possibility of withdrawing the accreditation awarded to the school or the non-recognition of the diplomas issued. In the case of discrimination by an establishment open to the public, the law should provide for the possibility of withdrawing a licence and of closing the establishment. For example, in the case of discrimination by a discotheque, it should be possible to withdraw the licence to sell alcohol.
33. Non-monetary forms of reparation, such as the publication of all or part of a court decision, may be important in rendering justice in cases of discrimination.
34. The law should provide for the possibility of imposing a programme of positive measures on the discriminator. This is an important type of remedy in promoting long-term change in an organisation. For instance, the discriminator could be obliged to organise for its staff specific training programmes aimed at countering racism and racial discrimination. The national equality body should participate in the development and supervision of such programmes.

*Paragraph 15 of the Recommendation*

35. According to paragraph 15 of the Recommendation the law should provide that harassment related to one of the enumerated grounds is prohibited. Harassment consists in conduct related to one of the enumerated grounds which has the purpose or the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. As far as possible, protection against harassment related to one of the enumerated grounds should not only target the conduct of the author of the harassment but also that of other persons. For instance, it should be possible for the employer to be held responsible, where applicable, for

harassment by colleagues, other employees or third parties (such as clients and suppliers).

*Paragraph 16 of the Recommendation*

36. Paragraph 16 of the Recommendation states that the law should provide for the obligation to suppress public financing of political parties which promote racism. For example, public financing for electoral campaigns should be refused to such political parties.

*Paragraph 17 of the Recommendation*

37. Paragraph 17 of the Recommendation states that the law should provide for the possibility of the dissolution of organisations which promote racism. In all cases, the dissolution of such organisations may result only from a Court decision. The issue of the dissolution of these organisations is also dealt with under Section IV - Criminal law (see paragraphs 43 and 49 of the present Explanatory Memorandum).

#### **IV. Criminal law**

*Paragraph 18 of the Recommendation*

38. The Recommendation limits the scope of certain criminal offences set out in paragraph 18 to the condition that they are committed in “public”. Current practice shows that, in certain cases, racist conduct escapes prosecution because it is not considered as being of a public nature. Consequently, member States should ensure that it should not be too difficult to meet the condition of being committed in “public”. Thus, for instance, this condition should be met in cases of words pronounced during meetings of neo-Nazi organisations or words exchanged in a discussion forum on the Internet.
39. Some of the offences set out in paragraph 18 of the Recommendation concern conduct aimed at a “grouping of persons”. Current practice shows that legal provisions aimed at sanctioning racist conduct frequently do not cover such conduct unless it is directed against a specific person or group of persons. As a result, expressions aimed at larger groupings of persons, as in the case of references to asylum seekers or foreigners in general, are often not covered by these provisions. For this reason, paragraph 18 a), b), c), and d) of the Recommendation does not speak of “group” but of “grouping” of persons.
40. The term “defamation” contained in paragraph 18 b) should be understood in a broad sense, notably including slander and libel.
41. Paragraph 18 e) of the Recommendation refers to the crimes of genocide, crimes against humanity and war crimes. The crime of genocide should be understood as defined in Article II of the Convention for the Prevention and Punishment of the Crime of Genocide and Article 6 of the Statute of the International Criminal Court (see paragraph 45 of the present Explanatory Memorandum).

Crimes against humanity and war crimes should be understood as defined in Articles 7 and 8 of the Statute of the International Criminal Court.

42. Paragraph 18 f) of the Recommendation refers to the dissemination, distribution, production or storage of written, pictorial or other material containing racist manifestations. These notions include the dissemination of this material through the Internet. Such material includes musical supports such as records, tapes and compact discs, computer accessories (e.g. floppy discs, software), video tapes, DVDs and games.
43. Paragraph 18 g) of the Recommendation provides for the criminalisation of certain acts related to groups which promote racism. The concept of group includes in particular *de facto* groups, organisations, associations and political parties. The Recommendation provides that the creation of a group which promotes racism should be prohibited. This prohibition also includes maintaining or reconstituting a group which has been prohibited. The issue of the dissolution of a group which promotes racism is also dealt with under Section III - Civil and administrative law (see paragraph 37 of the present Explanatory Memorandum) and below (see paragraph 49 of the present Explanatory Memorandum). Moreover, the notion of "support" includes acts such as providing financing to the group, providing for other material needs, producing or obtaining documents.
44. In its paragraph 18 h) the Recommendation states that the law should penalise racial discrimination in the exercise of one's public office or occupation. On this point, the definitions contained in paragraphs 1 b) and c) and 5 of the Recommendation apply *mutatis mutandis*. Racial discrimination in the exercise of one's public office or occupation includes notably the discriminatory refusal of a service intended for the public, such as discriminatory refusal by a hospital to care for a person and the discriminatory refusal to sell a product, to grant a bank loan or to allow access to a discotheque, café or restaurant.

#### *Paragraph 19 of the Recommendation*

45. Paragraph 19 of the Recommendation provides that the law should penalise genocide. To this end, the crime of genocide should be understood as defined in Article II of Convention on the Prevention and Punishment of the Crime of Genocide and Article 6 of the Statute of the International Criminal Court, i.e. as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group". The Recommendation refers only to penalisation of genocide and not of war crimes and crimes against humanity since these are not necessarily of a racist nature. However, if they do present such a nature, the

aggravating circumstance provided for in paragraph 21 of the Recommendation should apply.

*Paragraph 20 of the Recommendation*

46. Paragraph 20 of the Recommendation provides that instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraphs 18 and 19 should be punishable. This recommendation applies only to those offences for which instigating, aiding, abetting or attempting are possible.

*Paragraph 21 of the Recommendation*

47. According to paragraph 21 of the Recommendation, the racist motivation of the perpetrator of an offence other than those covered by paragraphs 18 and 19 should constitute an aggravating circumstance. Furthermore, the law may penalise common offences but with a racist motivation as specific offences.

*Paragraph 22 of the Recommendation*

48. According to paragraph 22 of the Recommendation, the law should provide for the criminal liability of legal persons. This liability should come into play when the offence has been committed on behalf of the legal person by any persons, particularly acting as the organ of the legal person (for example, President or Director) or as its representative. Criminal liability of a legal person does not exclude the criminal liability of natural persons. Public authorities may be excluded from criminal liability as legal persons.

*Paragraph 23 of the Recommendation*

49. According to paragraph 23 of the Recommendation, the law should provide for ancillary or alternative sanctions. Examples of these could include community work, participation in training courses, deprivation of certain civil or political rights (e.g. the right to exercise certain occupations or functions; voting or eligibility rights) or publication of all or part of a sentence. As regards legal persons, the list of possible sanctions could include, besides fines: refusal or cessation of public benefit or aid, disqualification from the practice of commercial activities, placing under judicial supervision, closure of the establishment used for committing the offence, seizure of the material used for committing the offence and the dissolution of the legal person (see on this last point paragraphs 37 and 43 of the present Explanatory Memorandum).

## V. Common provisions

### *Paragraph 24 of the Recommendation*

50. The details of the establishment of equality bodies are laid down in ECRI's General Policy Recommendation No. 2.

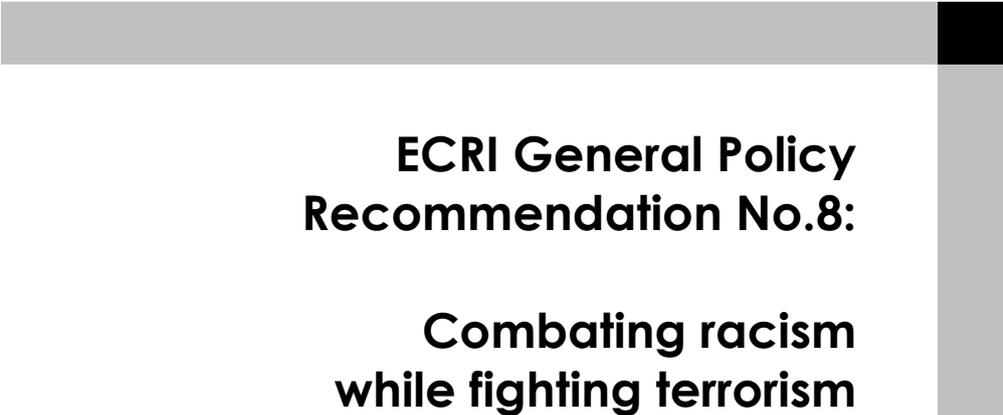
Paragraphs 51 to 55 deleted by GPR No. 2 adopted on 7 December 2017.

### *Paragraph 25 of the Recommendation*

56. The Recommendation provides in its paragraph 25 that organisations such as associations, trade unions and other legal entities with a legitimate interest should be entitled to bring complaints. Such a provision is important, for instance, in cases where a victim is afraid of retaliation. Furthermore, the possibility for such organisations to bring a case of racial discrimination without reference to a specific victim is essential for addressing those cases of discrimination where it is difficult to identify such a victim or cases which affect an indeterminate number of victims.

### *Paragraph 27 of the Recommendation*

57. According to paragraph 27 of the Recommendation, the law should provide protection against retaliation. Such protection should not only be afforded to the person who initiates proceedings or brings the complaint, but should also be extended to those who provide evidence, information or other assistance in connection with the court proceedings or the complaint. Such protection is vital to encourage the victims of racist offences and discrimination to put forward their complaints to the authorities and to encourage witnesses to give evidence. In order to be effective, the legal provisions protecting against retaliation should provide for an appropriate and clear sanction. This might include the possibility of an injunction order to stop the retaliatory acts and/or to compensate victims of such acts.



**ECRI General Policy  
Recommendation No.8:**

**Combating racism  
while fighting terrorism**

Adopted on 17 March 2004



The European Commission against Racism and Intolerance:

Having regard to the European Convention on Human Rights, and in particular to its Article 14;

Having regard to Protocol No.12 to the European Convention on Human Rights;

Having regard to the International Covenant on Civil and Political Rights, and in particular to its Articles 2, 4 (1), 20 (2) and 26;

Having regard to the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees;

Having regard to the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism;

Recalling the Declaration adopted by ECRI at its 26<sup>th</sup> plenary meeting (Strasbourg 11-14 December 2001);

Recalling ECRI General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination and ECRI General Policy Recommendation No.5 on combating intolerance and discrimination against Muslims;

Recalling the Convention on cybercrime and its additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems as well as ECRI General Policy Recommendation No.6 on combating the dissemination of racist, xenophobic and antisemitic material via the Internet;

Recalling the European Convention on the Suppression of Terrorism, the Protocol amending the European Convention on the Suppression of Terrorism and other international instruments against terrorism, notably those adopted in the framework of the United Nations;

Firmly condemning terrorism, which is an extreme form of intolerance;

Stressing that terrorism is incompatible with and threatens the values of freedom, democracy, justice, the rule of law and human rights, particularly the right to life;

Considering that it is therefore the duty of the State to fight against terrorism;

Stressing that the response to the threat of terrorism should not itself encroach upon the very values of freedom, democracy, justice, the rule of law, human rights and humanitarian law that it aims to safeguard, nor should it in any way weaken the protection and promotion of these values;

Stressing in particular that the fight against terrorism should not become a pretext under which racism, racial discrimination and intolerance are allowed to flourish;

Stressing in this respect the responsibility of the State not only to abstain from actions directly or indirectly conducive to racism, racial discrimination and intolerance, but also to ensure a firm reaction of public institutions, including both preventive and repressive measures, to cases where racism, racial discrimination and intolerance result from the actions of individuals and organisations;

Noting that the fight against terrorism engaged by the member States of the Council of Europe since the events of 11 September 2001 has in some cases resulted in the adoption of directly or indirectly discriminatory legislation or regulations, notably on grounds of nationality, national or ethnic origin and religion and, more often, in discriminatory practices by public authorities;

Noting that terrorist acts, and, in some cases, the fight against terrorism have also resulted in increased levels of racist prejudice and racial discrimination by individuals and organisations;

Stressing in this context the particular responsibility of political parties, opinion leaders and the media not to resort to racist or racially discriminatory activities or expressions;

Noting that, as a result of the fight against terrorism engaged since the events of 11 September 2001, certain groups of persons, notably Arabs, Jews, Muslims, certain asylum seekers, refugees and immigrants, certain visible minorities and persons perceived as belonging to such groups, have become particularly vulnerable to racism and/or to racial discrimination across many fields of public life including education, employment, housing, access to goods and services, access to public places and freedom of movement;

Noting the increasing difficulties experienced by asylum seekers in accessing the asylum procedures of the member States of the Council of Europe and the progressive erosion of refugee protection as a result of restrictive legal measures and practices connected with the fight against terrorism;

Stressing the responsibility of the member States of the Council of Europe to ensure that the fight against terrorism does not have a negative impact on any minority group;

Recalling the pressing need for States to favour integration of their diverse populations as a mutual process that can help to prevent the racist or racially discriminatory response of society to the climate generated by the fight against terrorism;

Convinced that dialogue, including on culture and religion, between the different segments of society, as well as education in diversity contribute to combating racism while fighting terrorism;

Convinced that thorough respect of human rights, including the right to be free from racism and racial discrimination, can prevent situations in which terrorism may gain ground;

Recommends to the governments of member States:

- to take all adequate measures, especially through international co-operation, to fight against terrorism as an extreme form of intolerance in full conformity with international human rights law, and to support the victims of terrorism and to show solidarity towards the States that are targets of terrorism;
- to review legislation and regulations adopted in connection with the fight against terrorism to ensure that these do not discriminate directly or indirectly against persons or groups of persons, notably on grounds of “race”, colour, language, religion, nationality or national or ethnic origin, and to abrogate any such discriminatory legislation;
- to refrain from adopting new legislation and regulations in connection with the fight against terrorism that discriminate directly or indirectly against persons or groups of persons, notably on grounds of “race”, colour, language, religion, nationality or national or ethnic origin;
- to ensure that legislation and regulations, including legislation and regulations adopted in connection with the fight against terrorism, are implemented at national and local levels in a manner that does not discriminate against persons or groups of persons, notably on grounds of actual or supposed “race”, colour, language, religion, nationality, national or ethnic origin;
- to pay particular attention to guaranteeing in a non discriminatory way the freedoms of association, expression, religion and movement and to ensuring that no discrimination ensues from legislation and regulations - or their implementation - notably governing the following areas:
  - checks carried out by law enforcement officials within the countries and by border control personnel
  - administrative and pre-trial detention
  - conditions of detention
  - fair trial, criminal procedure
  - protection of personal data
  - protection of private and family life
  - expulsion, extradition, deportation and the principle of *non-refoulement*
  - issuing of visas
  - residence and work permits and family reunification
  - acquisition and revocation of citizenship;
- to ensure that their national legislation expressly includes the right not to be subject to racial discrimination among the rights from which no derogation may be made even in time of emergency;
- to ensure that the right to seek asylum and the principle of *non-refoulement* are thoroughly respected in all cases and without discrimination, notably on grounds of country of origin;
- to pay particular attention in this respect to the need to ensure access to the asylum procedure and a fair mechanism for the examination of the claims that safeguards basic procedural rights;

- to ensure that adequate national legislation is in force to combat racism and racial discrimination and that it is effectively implemented, especially in the fields of education, employment, housing, access to goods and services, access to public places and freedom of movement;
- to ensure that adequate national legislation is in force to combat racially motivated crimes, racist expression and racist organisations and that it is effectively implemented;
- to draw inspiration, in the context of ensuring that legislation in the areas mentioned above is adequate, from ECRI General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination;
- to ensure that relevant national legislation applies also to racist offences committed via the Internet and to prosecute those responsible for these kinds of offences;
- to ensure the existence and functioning of an independent specialised body to combat racism and racial discrimination competent, *inter alia*, in assisting victims in bringing complaints of racism and racial discrimination that may arise as a result of the fight against terrorism;
- to encourage debate within the media profession on the image that they convey of minority groups in connection with the fight against terrorism and on the particular responsibility of the media professions, in this connection, to avoid perpetuating prejudices and spreading biased information;
- to support the positive role the media can play in promoting mutual respect and countering racist stereotypes and prejudices;
- to encourage integration of their diverse populations as a mutual process and ensure equal rights and opportunities for all individuals;
- to introduce into the school curricula, at all levels, education in diversity and on the need to combat intolerance, racist stereotypes and prejudices, and raise the awareness of public officials and the general public on these subjects;
- to support dialogue and promote joint activities, including on culture and religion, among the different segments of society on the local and national levels in order to counter racist stereotypes and prejudices.



**ECRI General Policy  
Recommendation No.9:  
The fight against antisemitism**

Adopted on 25 June 2004



The European Commission against Racism and Intolerance:

Having regard to Article 14 of the European Convention on Human Rights;

Having regard to Protocol No.12 to the European Convention on Human Rights which contains a general clause prohibiting discrimination;

Having regard to the case-law of the European Court of Human Rights and recalling that the Court held that disputing the existence of crimes against humanity committed under the National-Socialist regime was one of the most severe forms of racial defamation and of incitement to hatred of Jews and that the denial of such crimes against humanity and the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10 of the European Convention on Human Rights;

Having regard to the Additional Protocol to the Convention on Cybercrime concerning criminalisation of acts of a racist or xenophobic nature committed through computer systems;

Recalling ECRI's General Policy Recommendation No.1 on combating racism, xenophobia, antisemitism and intolerance and ECRI's General Policy Recommendation No.2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level;

Recalling also ECRI's General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination, which contains the key elements of appropriate legal measures in combating racism and racial discrimination effectively;

Bearing in mind the Declaration of Concern and Intent on "Antisemitism in Europe today" adopted on 27 March 2000 by the participants in the Strasbourg "Consultation on Antisemitism in Europe today", convened by the Secretary General of the Council of Europe;

Having regard to Recommendation (2001) 15 of the Committee of Ministers to member States on history teaching in twenty-first century Europe, which was confirmed by Ministers of Education at the ministerial seminar held in Strasbourg in October 2002;

Recalling the principles contained in the Charter of European political parties for a non-racist society;

Taking note of the conclusions of the OSCE Conferences on Antisemitism held in Vienna on 19-20 June 2003 and in Berlin on 28-29 April 2004;

Recalling the work of the European Union in combating racism and discrimination and taking note of the conclusions of the seminar on "Europe against antisemitism, for a Union of Diversity" organised in Brussels on 19 February 2004;

Recalling that the legacy of Europe's history is a duty to remember the past by remaining vigilant and actively opposing any manifestations of racism, xenophobia, antisemitism and intolerance;

Paying homage to the memory of the victims of the systematic persecution and extermination of Jews in the Shoah, as well as of the other victims of policies of racist persecution and extermination during the Second World War;

Paying homage to the Jewish victims of killings and systematic persecution under totalitarian regimes following the Second World War, as well as other victims of these policies;

Stressing in this respect that the Council of Europe was precisely founded in order to defend and promote common and just values - in particular the protection and promotion of human rights - around which Europe was rebuilt after the horrors of the Second World War;

Recalling that combating racism, xenophobia, antisemitism and intolerance is rooted in and forms part of the protection and promotion of human rights;

Profoundly convinced that combating antisemitism, while requiring actions taking into account its specificities, is an integral and intrinsic component of the fight against racism;

Stressing that antisemitism has persisted for centuries across Europe;

Observing the current increase of antisemitism in many European countries, and stressing that this increase is also characterised by new manifestations of antisemitism;

Noting that these manifestations have often closely followed contemporary world developments such as the situation in the Middle East;

Underlining that these manifestations are not exclusively the actions of marginal or radical groups, but are often mainstream phenomena, including in schools, that are becoming increasingly perceived as commonplace occurrences;

Observing the frequent use of symbols from the Nazi era and references to the Shoah in current manifestations of antisemitism;

Stressing that these manifestations originate in different social groups and different sectors of society;

Observing that the victims of racism and exclusion in some European societies, themselves sometimes become perpetrators of antisemitism;

Noting that in a number of countries, antisemitism, including in its new forms, continues to be promoted, openly or in a coded manner, by some political parties and leaders, including not only extremist parties, but also certain mainstream parties;

Believing that an adequate response to these phenomena can only be developed through the concerted efforts of all relevant actors in European societies, including representatives of different communities, religious leaders, civil society organisations and other key institutions;

Stressing that efforts to counter antisemitism should include the thorough implementation of legal provisions against racism and racial discrimination in respect of all perpetrators and for the benefit of all victims, with special emphasis on the provisions against incitement to racial violence, hatred and discrimination;

Convinced furthermore that these efforts should also include the promotion of dialogue and cooperation between the different segments of society on the local and national levels, including dialogue and cooperation between different cultural, ethnic and religious communities;

Emphasising strongly the role of education in the promotion of tolerance and respect for human rights, thereby against antisemitism;

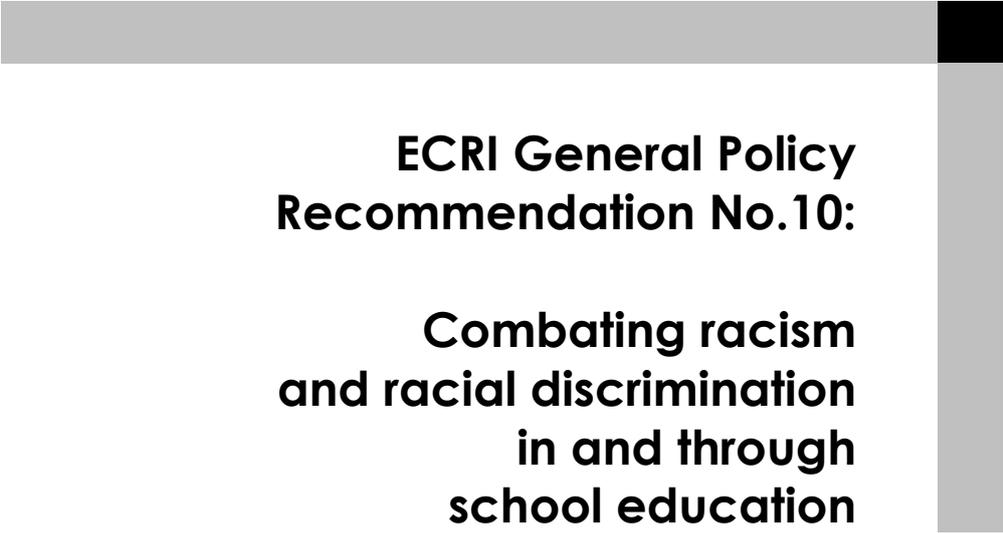
Recommends that the governments of the member States:

- give a high priority to the fight against antisemitism, taking all necessary measures to combat all of its manifestations, regardless of their origin;
- ensure that actions aimed at countering antisemitism are consistently given their due place amongst actions aimed at countering racism;
- ensure that the fight against antisemitism is carried out at all administrative levels (national, regional, local) and facilitate the involvement of a wide range of actors from different sectors of society (political, legal, economic, social, religious, educational) in these efforts;
- enact legislation aimed at combating antisemitism taking into account ECRI's suggestions in its General Policy Recommendation No 7 on national legislation to combat racism and racial discrimination;
- ensure that the law provides that, for all criminal offences, racist motivation constitutes an aggravating circumstance, and that such motivation covers antisemitic motivation;
- ensure that criminal law in the field of combating racism covers antisemitism and penalises the following antisemitic acts when committed intentionally:
  - a. public incitement to violence, hatred or discrimination against a person or a grouping of persons on the grounds of their Jewish identity or origin;
  - b. public insults and defamation of a person or a grouping of persons on the grounds of their actual or presumed Jewish identity or origin;
  - c. threats against a person or a grouping of persons on the grounds of their actual or presumed Jewish identity or origin;
  - d. the public expression, with an antisemitic aim, of an ideology which depreciates or denigrates a grouping of persons on the grounds of their Jewish identity or origin;
  - e. the public denial, trivialisation, justification or condoning of the Shoah;
  - f. the public denial, trivialisation, justification or condoning, with an antisemitic aim, of crimes of genocide, crimes against humanity or war crimes committed against persons on the grounds of their Jewish identity or origin;
  - g. the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with an antisemitic aim, of written, pictorial or other material containing manifestations covered by points a), b), c), d), e), f) above;
  - h. desecration and profanation, with an antisemitic aim, of Jewish property and monuments;

- i. the creation or the leadership of a group which promotes antisemitism; support for such a group (such as providing financing to the group, providing for other material needs, producing or obtaining documents); participation in its activities with the intention of contributing to the offences covered by points a), b), c), d), e), f), g), h) above;
- ensure that criminal legislation covers antisemitic crimes committed via the internet, satellite television and other modern means of information and communication;
- ensure that the law provides for an obligation to suppress public financing of organisations which promote antisemitism, including political parties;
- ensure that the law provides for the possibility of disbanding organisations that promote antisemitism;
- take the appropriate measures to ensure that legislation aimed at preventing and sanctioning antisemitism is effectively implemented;
- offer targeted training to persons involved at all levels of the criminal justice system - police, prosecutors, judges - with a view to increasing knowledge about antisemitic crimes and how such acts can be effectively prosecuted;
- take steps to encourage victims of antisemitic acts to come forward with complaints of antisemitic acts, and put in place an effective system of data collection to thoroughly monitor the follow-up given to such complaints;
- establish and support the functioning of an independent specialised body along the lines set out in ECRI's General Policy Recommendation No 2 on Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level, and ensure that the actions carried out by this organ cover all forms of antisemitism;
- introduce anti-racist education into the school curriculum at all levels and in an integrated manner, including content that builds awareness about antisemitism, its occurrences through centuries and the importance of combating its various manifestations, ensuring that teachers are provided with the necessary training;
- promote learning about Jewish history as well as about the positive contribution of Jewish persons, communities and culture to European societies;
- promote learning about the Shoah, and the developments leading up to it, within schools and ensure that teachers are adequately trained in order to address this issue in a manner whereby children also reflect upon current dangers and how the recurrence of such an event can be prevented;
- promote learning and research into the killings and systematic persecution of Jewish and other persons under totalitarian regimes following the Second World War;

- where antisemitic acts take place in a school context, ensure that, through targeted training and materials, school directors, teachers and other personnel are adequately prepared to effectively address this problem;
- encourage debate within the media professions on their role in fighting antisemitism, and on the particular responsibility of media professionals to seek to, in this connection, report on all world events in a manner that avoids perpetuating prejudices;
- support the positive role the media can play in promoting mutual respect and countering antisemitic stereotypes and prejudices;
- support and encourage research projects and independent monitoring of manifestations of antisemitism;
- support the activities of non-governmental organisations, which play an important role in fighting antisemitism, promoting appreciation of diversity, and developing dialogue and common anti-racist actions between different cultural, ethnic and religious communities;
- take the necessary measures to ensure that the freedom of religion is fully guaranteed, and that public institutions make provision in their everyday practice for the reasonable accommodation of cultural and other requirements;
- support dialogue between different religious communities at local and national levels in order to counter racist stereotypes and prejudices, including through providing financing and establishing institutional fora for multifaith dialogue;
- ensure that religious leaders at all levels avoid fueling antisemitism, and encourage religious leaders to take responsibility for the teachings spread at the grassroots level;
- encourage political actors and opinion leaders to take a firm public stand against antisemitism, regularly speaking out against its various manifestations, including all its contemporary forms, and making clear that antisemitism will not be tolerated.





**ECRI General Policy  
Recommendation No.10:**

**Combating racism  
and racial discrimination  
in and through  
school education**

Adopted on 15 December 2006



The European Commission against Racism and Intolerance (ECRI):

Having regard to Article 26 of the Universal Declaration of Human Rights;

Having regard to the international Convention on the Elimination of All Forms of Racial Discrimination;

Having regard to the United Nations Convention on the Rights of the Child;

Having regard to the UNESCO Convention against Discrimination in Education;

Having regard to the European Convention on Human Rights, in particular its Article 14 and Article 2 of its Protocol No.1;

Having regard to Protocol No.12 to the European Convention on Human Rights, which contains a general clause prohibiting discrimination;

Having regard to the European Social Charter (Revised) and in particular Article 17 thereof;

Having regard to the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems;

Having regard to Committee of Ministers Recommendation (2000)<sup>4</sup> to member States on the education of Roma/Gypsy children in Europe;

Having regard to Committee of Ministers Recommendation (2001)<sup>15</sup> to member States on history teaching in twenty-first century Europe;

Having regard to Committee of Ministers Recommendation (2002)<sup>12</sup> to member States on education for democratic citizenship;

Having regard to Parliamentary Assembly Recommendation 1093(1989) on the education of migrants' children;

Having regard to Parliamentary Assembly Recommendation 1346(1997) on human rights education;

Having regard to Parliamentary Assembly Recommendation 1720(2005) on education and religion;

Taking into account the general conclusions adopted by the European Conference against Racism on 13 October 2000, in particular those concerning education and awareness-raising to combat racism, related discrimination and extremism at sub-national, national, regional and international levels;

Taking into account the Commentary on Education under the Framework Convention for the Protection of National Minorities adopted by the Advisory Committee of the Framework Convention;

Recalling ECRI General Policy Recommendation No.3 on combating racism and intolerance against Roma/Gypsies; ECRI General Policy Recommendation No.5 on combating intolerance and discrimination against Muslims; ECRI General Policy Recommendation No.9 on the fight against antisemitism;

Recalling ECRI General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination;

Recalling that ECRI's mandate is to combat racism and racial discrimination, that is to combat violence, discrimination and prejudice faced by persons or groups of persons on grounds such as race, colour, language, religion, nationality or national or ethnic origin;

Stressing that the scope of this Recommendation is limited to pre-

primary, primary and secondary education;

Aware however that in higher education combating racism and racial discrimination is equally important;

Aware also that informal and non formal education can play a significant role in this field;

Aware that civil society organisations are implementing effective anti-discrimination education and diversity training programmes for youth within the school environment;

Recalling that education is an important tool for combating racism and intolerance, and yet aware that it is also an area in which racism and racial discrimination can exist, with harmful consequences for children and society as a whole;

Rejecting all forms of direct and indirect discrimination in access to schooling;

Recalling that national legislation to combat racism and racial discrimination should cover, among others, the field of education and that the prohibition of discrimination should apply to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors;

Recalling that school education is a right and that access to it should be granted to all children present on the territory of member States, regardless of their legal status or that of their parents, and independently of the laws on asylum, immigration and acquisition of citizenship;

Convinced that quality education includes also diversity;

Convinced that schools must recognise and respect diversity;

Deploring the existence, sometimes, of de facto segregation in school education which is due to historical

factors or to external factors such as the housing problem;

Stressing that measures to ensure the integration of children from minority groups in the school system must not in fact lead to forcible assimilation;

Emphasising that special measures can improve the access of children from minority groups to school education and to good teaching;

Recalling that human rights education based on the principles of equality, non-discrimination, tolerance and respect for diversity can play a key role in combating racism and intolerance in general;

Convinced of the need to ensure that all schools conform to satisfactory standards in respect of teaching in these areas;

Recalling the importance of ensuring that school textbooks and other teaching aids not spread prejudice and stereotypes;

Aware of the growing importance of modern technology, including the Internet, in school education and the need for this to be taken into account for questions relating to the fight against racism and racial discrimination;

Convinced of the need for mandatory training on teaching in a multicultural context to be given to all educational staff;

Convinced of the importance of initial and on-going training for educational staff in matters pertaining to human rights and combating racial discrimination;

Urging that all school authorities be placed under an obligation to promote equality and that progress on compliance with this obligation be properly monitored;

Recommends that the governments of member States:

**I. Ensure compulsory, free and quality education for all, and to this end:**

1. undertake, in conjunction with civil society organisations, studies on the situation of children from minority groups in the school system, by compiling statistics on their: attendance and completion rates; drop-out rates; results achieved and progress made;
2. gather the information required to identify problems facing pupils from minority groups in the school environment in order to introduce policies to solve these problems;
3. conceive, at national and regional level, in co-operation with the minority groups concerned, policies to further attendance and full participation of pupils from minority groups, on an equal footing, in the school system:
  - a) by ensuring that schools have an obligation to promote equality in education;
  - b) by devising, in consultation with all the parties concerned and taking into account the socio-economic dimension (employment and housing) policies to avoid, in the best interests of the child, pupils from minority groups being over-represented in certain schools;
  - c) by making provision, in particular cases and for a limited period of time, for preparatory classes for pupils from minority groups to, amongst others, learn the language of instruction, if this is justified by objective and reasonable criteria and is in the best interests of the child;
  - d) by introducing policies to avoid placing children from minority groups in separate classes;
  - e) by ensuring that policies promoting more diversity at school are supported by awareness-raising measures targeting pupils, the pupils' parents and educational staff;
  - f) by ensuring that teaching staff from minority groups are recruited at all levels and that they are not subjected to racial discrimination in the school system;
  - g) by ensuring that parents of pupils from minority groups are sufficiently informed of the consequences of any special measures envisaged for their children to allow for an informed consent;
  - h) by providing parents of pupils from minority groups who do not speak the majority language the necessary resources, such as the services of an interpreter and/or language courses, to enable them to communicate with the educational staff;
  - i) by ensuring that parents of pupils from minority groups can fully participate in the school's decisions and activities;

- j) by having recourse, where necessary, to school mediators or any regional, national or NGO mediation service, to facilitate the integration in school of children from minority groups and to ensure good communication between parents and the school authorities;

## **II. Combat racism and racial discrimination at school, and to this end:**

1. ensure that schools are obliged to incorporate the fight against racism and racial discrimination as well as respect for diversity into the way that they are run:
  - a) by ensuring that the fight against such phenomena in schools, whether they emanate from pupils or educational staff, is part of a permanent policy;
  - b) by setting up a system to monitor racist incidents at school and compile data on these phenomena in order to devise long-term policies to counter them;
  - c) by adopting, in order to combat incidents of racism or discrimination which do not cause physical harm, educational measures such as, for example, non formal education activities in organisations dealing with victims of racism and racial discrimination;
  - d) by treating incitement to racial hatred in schools and any other serious racist act, including the use of violence, threats or damage to property, as acts punishable by suspension or expulsion or any other appropriate measure;
  - e) by encouraging within schools the adoption of a code of conduct against racism and racial discrimination for all staff;
  - f) by favouring measures (such as special anti-racism days or weeks, campaigns or competitions) to foster awareness among both pupils and parents of racism and racial discrimination issues and the relevant school policies;
2. ensure that school education plays a key-role in the fight against racism and racial discrimination in society:
  - a) by ensuring that human rights education is an integral part of the school curriculum at all levels and across all disciplines, from nursery school onwards;
  - b) by ensuring that pupils are given an instruction on religion which complies with the scientific neutrality essential in any educational approach;
  - c) by ensuring that, where public schools provide denominational religious education, easy procedures of discharge are in place for children for whom an exemption is requested;
  - d) by removing from textbooks any racist material or material that encourages stereotypes, intolerance or prejudice against any minority group;
  - e) by promoting critical thinking among pupils and equipping them with the necessary skills to become aware of and react to stereotypes or intolerant elements contained in material they use;

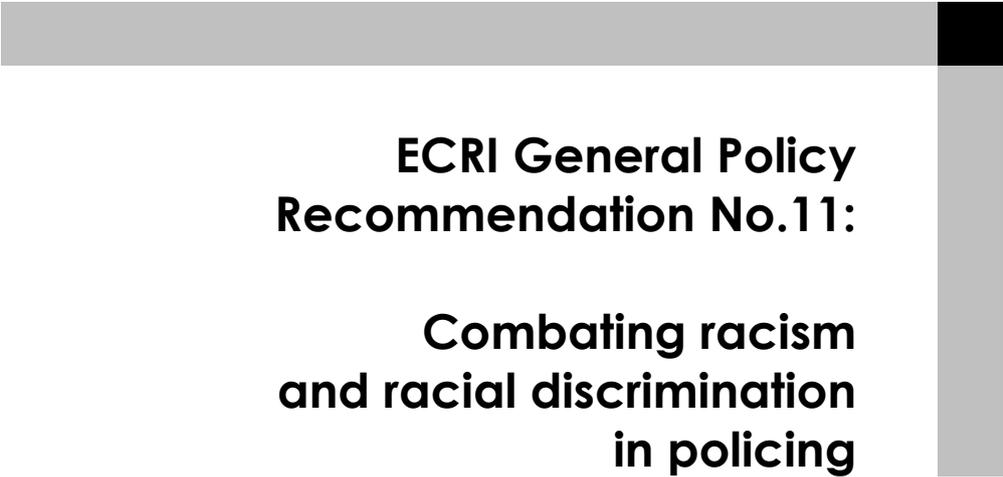
- f) by revising school textbooks to ensure that they reflect more adequately the diversity and plurality of the society, and include, to this end, minority groups' contribution to society;
- g) by ensuring that the quality of school textbooks is regularly monitored in co-operation with all concerned so as to remove any racist or discriminatory elements;
- h) by teaching pupils to use the Internet as a means of learning how to combat racism and racial discrimination, while providing for the necessary resources, such as filtering software, to protect them against any racist messages;
- i) by ensuring that bodies involved in monitoring the quality of education, such as Ministries of Education and/or School Inspectorates regularly include monitoring of racism and racial discrimination in their work;

**III. Train the entire teaching staff to work in a multicultural environment, and to this end:**

1. provide them, at all levels, with initial and on-going training to prepare them to educate and respond to the needs of pupils from different backgrounds;
2. provide them with initial and on-going training designed to foster awareness of issues pertaining to racism and racial discrimination and of the harmful consequences these have on the ability of children who are victims of these phenomena to succeed at school;
3. ensure that they receive training on anti-discrimination legislation at national level;
4. ensure that they are trained to prevent at school any manifestations of racism and racial discrimination, including indirect and structural discrimination, and to react promptly and effectively when faced with such problems;
5. provide them with initial and on-going training in issues relating to human rights and racial discrimination, which covers, inter alia, the following:
  - a) international and European standards;
  - b) the use of teaching material specifically intended for teaching human rights, including the right to equality; and
  - c) the use of interactive and participatory teaching methods;
6. provide a framework in which the members of the teaching profession can regularly share experiences and update methods used for teaching human rights, including the right to equality;

**IV. Ensure that all the policies advocated above receive the necessary financial resources and that they are regularly monitored to assess their impact and adjust them when necessary.**





**ECRI General Policy  
Recommendation No.11:**

**Combating racism  
and racial discrimination  
in policing**

Adopted on 29 June 2007



The European Commission against Racism and Intolerance (ECRI):

Having regard to Article 14 of the European Convention on Human Rights, Protocol No12 to this convention and the case-law of the European Court of Human Rights;

Having regard to the International Convention on the Elimination of All Forms of Racial Discrimination;

Recalling ECRI's General Policy Recommendation No 7 on national legislation to combat racism and racial discrimination;

Recalling ECRI's General Policy Recommendation No 8 on combating racism while fighting terrorism;

Recalling Recommendation Rec (2001) 10 of the Committee of Ministers to member States on the European Code of Police Ethics, adopted by the Committee of Ministers of the Council of Europe on 19 September 2001;

Recalling the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism;

Recalling the standards adopted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

Recalling General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, adopted by the Committee on the Elimination of Racial Discrimination on 17 August 2005;

Recalling the OSCE High Commissioner on National Minorities' Recommendations on Policing in Multi-Ethnic Societies, of February 2006;

Stressing that, in its country reports, ECRI regularly recommends to member States the adoption of effective measures aimed at combating racism and racial discrimination in policing;

Stressing the positive role the police must play in combating racism and racial discrimination and promoting human rights, democracy and the rule of law;

Stressing the need to provide the police with all the necessary human, financial and other means to fully play this role;

Aware that combating crime, including terrorism, constitutes a challenging task for the police to accomplish;

Stressing that in order to fully accomplish their tasks, the police must ensure that the rights and security of all persons are protected and guaranteed;

Recommends to the governments of member States:

**I. As concerns racial profiling**

1. To clearly define and prohibit racial profiling by law;

For the purposes of this Recommendation, racial profiling shall mean:

“The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities”;

2. To carry out research on racial profiling and monitor police activities in order to identify racial profiling practices, including by collecting data broken down by grounds such as national or ethnic origin, language, religion and nationality in respect of relevant police activities;
3. To introduce a reasonable suspicion standard, whereby powers relating to control, surveillance or investigation activities can only be exercised on the basis of a suspicion that is founded on objective criteria ;
4. To train the police on the issue of racial profiling and on the use of the reasonable suspicion standard;

**II. As concerns all forms of racial discrimination and racially-motivated misconduct by the police**

5. To ensure that legislation prohibiting direct and indirect racial discrimination cover the activities of the police;
6. To train the police in human rights, including the right to be free of racism and racial discrimination, and in the legal provisions in force against racism and racial discrimination;
7. To take measures to make the police aware of the fact that acts of racial discrimination and racially-motivated misconduct by the police will not be tolerated;
8. To provide for support and advice mechanisms for victims of racial discrimination or racially-motivated misconduct by the police;
9. To ensure effective investigations into alleged cases of racial discrimination or racially-motivated misconduct by the police and ensure as necessary that the perpetrators of these acts are adequately punished;
10. To provide for a body, independent of the police and prosecution authorities, entrusted with the investigation of alleged cases of racial discrimination and racially-motivated misconduct by the police;

**III. As concerns the role of the police in combating racist offences and monitoring racist incidents**

11. To ensure that the police thoroughly investigate racist offences, including by fully taking the racist motivation of ordinary offences into account;
12. To establish and operate a system for recording and monitoring racist incidents, and the extent to which these incidents are brought before the prosecutors and are eventually qualified as racist offences;
13. To encourage victims and witnesses of racist incidents to report such incidents;
14. To these ends, to adopt a broad definition of racist incident;

For the purposes of this Recommendation, a racist incident shall be:

“any incident which is perceived to be racist by the victim or any other person” ;

**IV. As concerns relations between the police and members of minority groups**

15. To place the police under a statutory obligation to promote equality and prevent racial discrimination in carrying out their functions;
16. To train the police in policing a diverse society;
17. To recruit members of under-represented minority groups in the police and ensure that they have equal opportunities for progression in their careers;
18. To establish frameworks for dialogue and co-operation between the police and members of minority groups;
19. To provide to the extent possible those who are in contact with the police and do not understand the official language, with access to professional interpretation services;
20. To ensure that the police communicate with the media and the public at large in a manner that does not perpetuate hostility or prejudice towards members of minority groups.



## EXPLANATORY MEMORANDUM

### Introduction

21. This General Policy Recommendation (hereafter: the Recommendation) focuses on combating racism and racial discrimination in policing. The Recommendation does not, however, aim to cover all aspects relevant to combating racism and racial discrimination in policing with the same level of detail. Combating racism and racial discrimination in policing has been the subject of extensive national and international attention from different angles, and recommendations have been issued accordingly by other international organisations. Therefore, while trying to be as comprehensive as possible, ECRI has decided to make a special focus on those aspects of combating racism and racial discrimination in policing in respect of which it can bring specific added value as an independent human rights monitoring body of the Council of Europe specialised in combating racism and racial discrimination.
22. For the purposes of this Recommendation, the term “police” refers to those exercising (or having by law) the power to use force in order to maintain law and order in society, normally including prevention and detection of crime. This Recommendation applies regardless of how such police are organised; whether centralised or locally oriented, whether structured in a civilian or military manner, whether labelled as services or forces, or whether they are accountable to the state, to international, regional or local authorities or to a wider public. This includes secret security and intelligence services and border control officials. It also includes private companies exercising police powers as defined above.
23. By avoiding racism and racial discrimination, the police responds to two important aspects of its mission. Firstly, it can meet the challenges posed by the need to counter crime, including terrorism, in a way that both enhances human security and respects the rights of all. Secondly, it promotes democracy and the rule of law. The aim of this Recommendation is therefore by no means to highlight bad policing and stigmatise the police, but to help them to promote security and human rights for all through adequate policing.
24. The Recommendation covers racism and racial discrimination in the context of combating all crime, including terrorism. In its country-by-country monitoring reports, ECRI regularly deals with problems linked to racism and racial discrimination in policing in the context of fighting crime and makes recommendations to member States as how to combat such phenomena. Recently, ECRI has expressed concern in its monitoring reports at information according to which cases of racism and racial discrimination in policing, including racial profiling, have intensified and taken on a new dimension, particularly as a result of the fight against terrorist crime.

25. ECRI is aware that the police often works in a difficult context and that the everyday reality of combating crime, including terrorism, pose real challenges that need to be met. However, ECRI is convinced that racism and racial discrimination, including racial profiling, cannot constitute a possible response to these challenges. Firstly, because they violate human rights. Secondly, because they reinforce prejudice and stereotypes about certain minority groups and legitimise racism and racial discrimination against them among the general population. Thirdly, because racial profiling is not effective and is conducive to less, not more human security. ECRI believes that it is trust in the police by all segments of society that enhances overall security. It is not possible for the police to work effectively, including against specific security challenges, without the co-operation of all components of society, majority and minority.
26. It is paramount that effective safeguards against racist acts committed by the police are provided for. There can be no confidence in the police, if its members are allowed to abuse with impunity the powers that this institution needs to fulfil its mission.

#### **I. As concerns racial profiling**

##### *Paragraph 1 of the Recommendation:*

*“To clearly define and prohibit racial profiling by law;*

*For the purposes of this Recommendation, racial profiling shall mean:*

*‘The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities’”*

27. The Recommendation provides a definition of racial profiling. Since racial profiling constitutes a specific form of racial discrimination, the definition of racial profiling adopted by ECRI draws inspiration from the definition of racial discrimination contained in its General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination (hereafter: GPR 7) and on the definition of discrimination used by the European Court of Human Rights in its case-law.
28. Racial profiling is the use by the police of certain grounds in control, surveillance or investigation activities, without objective and reasonable justification. The use of these grounds has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
29. ECRI stresses that even when, in abstract terms, a legitimate aim exists (for instance the prevention of disorder or crime), the use of these grounds in control, surveillance or investigation activities can hardly be justified outside the case where the police act on the basis of a specific suspect description within the relevant time-limits, i.e. when it pursues a specific lead concerning the identifying characteristics of a person involved in a specific criminal activity. In order for the police to avoid racial profiling, control, surveillance or

investigation activities should be strictly based on individual behaviour and/or accumulated intelligence.

30. With respect to differential treatment on the ground of ethnic origin, the European Court of Human Rights indicates that “[i]n any event, [it] considers that no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures” (ECHR, 13 December 2005, *Timishev v. Russia*, § 58). As concerns differential treatment on the ground of nationality, the European Court of Human Rights includes this ground among those for which “very weighty reasons” are required in order for differential treatment to be justified (ECHR, 16 September 1996, *Gaygusuz v. Austria*, § 42). More generally, as it has already highlighted in GPR 7, ECRI stresses that the notion of objective and reasonable justification should be interpreted as restrictively as possible with respect to differential treatment based on any of the enumerated grounds.
31. Bearing these principles in mind, different considerations should be taken into account in order to assess whether the proportionality test between the means employed and the aims sought to be realised is satisfied in the context of racial profiling. These considerations are:
32. i) effectiveness criterion: the ability of the concrete measure to achieve the ends for which it was conceived. The effectiveness criterion includes considering: the extent to which the measure in question has led to identification of criminals; the extent to which the measure in question affects the ability of the police to work with minority groups to identify criminals; the extent to which the measure in question may divert the police away from identifying real criminal activities.
33. ii) necessity criterion: the existence or otherwise of other, less invasive, measures in order to achieve the same aim.
34. iii) harm criterion: the extent to which the concrete measure affects the rights of the individual (right to respect for private and family life, right to liberty and security, right to be free from discrimination, etc.). Beyond considerations relating to the individual rights affected, the harm criterion should be understood in more general terms, as including considerations on the extent to which the measure in question institutionalises prejudice and legitimises discriminatory behaviour among the general public towards members of certain groups. Research has shown that racial profiling has considerably negative effects. Racial profiling generates a feeling of humiliation and injustice among certain groups of persons and results in their stigmatisation and alienation as well as in the deterioration of relations between these groups and the police, due to loss of trust in the latter. In this context, it is important to examine, as part of the assessment of the harm criterion, the behaviour of the police when conducting the relevant control, surveillance or investigation activity. For instance, in the case of stops, courtesy and explanations provided on the grounds for the stop have a central role in the individual’s

experience of the stop. It is also important to assess the extent to which certain groups are stigmatised as a result of decisions to concentrate police efforts on specific crimes or in certain geographical areas.

35. The definition of racial profiling used by ECRI contains a list of grounds, which is a non-exhaustive list. In addition to the grounds explicitly mentioned, other grounds on which racial profiling can intervene include, for instance, a person's country of origin. An illustration of this are certain checks carried out on passengers on board flights originating from specific countries. As concerns the ground of "race", ECRI stresses that although it rejects theories based on the existence of different "races", it has nevertheless decided to use this term in the Recommendation to ensure that those persons who are generally and erroneously perceived as belonging to "another race" are not excluded from the scope of the protection that this Recommendation intends to provide. The term "grounds" used in the definition of racial profiling must include grounds which are actual or presumed. For instance, if a person is questioned on the presumption that he or she is a Muslim, when in reality this is not the case, this would still constitute racial profiling on grounds of religion.
36. The definition of racial profiling refers to control, surveillance or investigation activities. Acts that fall in this definition include: stops and searches; identity checks; vehicle inspections; personal searches; searches of homes and other premises; mass identity checks and searches; raids; surveillance (including wire-tapping); data mining/data trawling. While this list is non-exhaustive, police activities that are carried out for purposes other than control, surveillance and investigation (such as the treatment of persons held in custody) do not fall in ECRI's definition of racial profiling. However, these activities may well be in breach of the prohibition of racial discrimination (on this point, see Section II).
37. Racial profiling is mainly the result of stereotypes existing among the police, whereby certain groups of persons designated by grounds such as race, colour, language, religion, nationality or national or ethnic origin are presumed to be more prone than others to commit offences or certain kinds of offences. However, the prohibition of racial profiling must also cover those situations where the link between stereotypes and racial profiling is more difficult to establish.
38. In the same way as racial discrimination, racial profiling can take the form of indirect racial discrimination (see the definition of indirect racial discrimination below in paragraph 49-b). In other words, the police may use (without objective and reasonable justification) criteria which are apparently neutral, but impact disproportionately on a group of persons designated by grounds such as race, colour, language, religion, nationality or national or ethnic origin. For instance, a profile that tells the police to stop all women who wear a headscarf could constitute racial profiling inasmuch as it would impact disproportionately on Muslim women and would not have an objective and reasonable justification. The prohibition of racial profiling also covers these indirect forms of racial profiling. Furthermore, in the

same way as racial discrimination, racial profiling can take the form of discrimination by association. This occurs when a person is discriminated against on the basis of his or her association or contacts with persons designated by one of the grounds mentioned above.

39. The Recommendation refers to the need to “prohibit racial profiling by law”. As concerns sanctions for violations of this prohibition, since racial profiling constitutes a form of racial discrimination, the sanctions provided for in GPR 7 for racial discrimination should apply. In addition to legal sanctions and remedies designed essentially for individual officer behaviour, more flexible remedial mechanisms should be available to address the type of racial profiling that results from institutional policies and practices. For instance, upon receipt of credible reports of racial profiling by a police service, appropriate authorities could be entitled to conduct a policy audit to examine this question by means of a review of established policy, training, operational protocols or other factors existing within that service. Especially where existing administrative mechanisms do not provide a vehicle for such policy audits, the latter could be carried out by an independent authority. This might be the independent body entrusted with the investigation of alleged acts of racial discrimination and racially-motivated misconduct by the police (the establishment of which is recommended in paragraph 10) or the specialised body which ECRI recommends be established in its General Policy Recommendation No.2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level.

*Paragraph 2 of the Recommendation:*

*“To carry out research on racial profiling and monitor police activities in order to identify racial profiling practices, including by collecting data broken down by grounds such as national or ethnic origin, language, religion and nationality in respect of relevant police activities”*

40. Very little research and monitoring are carried out within the member States of the Council of Europe concerning racial profiling. There are serious gaps in knowledge both as concerns research on methods aimed at identifying and measuring racial profiling and as regards studies that would cover the different aspects mentioned above with respect to the definition of racial profiling, namely the effectiveness, necessity of and harm caused by racial profiling. ECRI considers that these gaps in knowledge effectively allow racial profiling practices to continue unhindered and to intensify in specific security contexts.
41. As concerns monitoring of police activities in order to identify racial profiling practices, one of the main reasons for the gap in knowledge about racial profiling is the lack, in the vast majority of the member States of the Council of Europe, of data broken down by grounds such as national or ethnic origin, language, religion and nationality. In its country monitoring reports, ECRI consistently recommends that member States collect such data, in order to monitor the situation of minority groups and identify possible patterns of direct or indirect discrimination they may face in different areas of life. Policing and, more generally, the criminal justice system are crucial areas in respect of which ECRI has called for this type of data to be collected in order

to foster accountability and provide a common foundation of knowledge for policy-making. ECRI also consistently stresses that such data should be collected with due respect to the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group and in close co-operation with all the relevant actors, including civil society organisations.

42. For data broken down by grounds such as national or ethnic origin, language, religion and nationality to be used to identify and measure racial profiling, such data should be collected in respect of relevant police activities, including identity checks, vehicle inspections, personal searches, home/premises searches and raids. Data should also be collected on the final results of these activities (in terms of prosecutions and convictions) so as to be able to assess whether the ratio between checks carried out and actual convictions is any different for members of minority groups compared to the rest of the population. In order to be useful, research and monitoring of racial profiling must also respond to high standards of scientific research, which are to be reflected in the methodology used. Good practices have already been developed in this respect to document and measure racial profiling in Europe and abroad. For instance, when monitoring possible racial profiling in stops and searches carried out in a particular area at a particular time, care should be taken to measure the composition of the population in that area and at that time in order to determine whether the police are disproportionately stopping members of minority groups in that particular context.
43. ECRI stresses that by collecting this type of data, the police demonstrate good will and a readiness to listen to the complaints of minority groups. If no racial profiling is established, this can help to re-establish or consolidate confidence and decrease the risk that police may be subject to aggressive behaviour. ECRI also stresses that the perception that the police may be resorting to racial profiling can be just as harmful as racial profiling itself.

*Paragraph 3 of the Recommendation:*

*“To introduce a reasonable suspicion standard, whereby powers relating to control, surveillance or investigation activities can only be exercised on the basis of a suspicion that is founded on objective criteria”*

44. The European Code of Police Ethics provides in its paragraph 47 that “[p]olice investigations shall, as a minimum, be based upon reasonable suspicion of an actual or possible offence or crime”. As explained in its Explanatory Memorandum to the Code, this means that there needs to be a suspicion of an offence or crime that is justified by some objective criteria before the police can initiate an investigation. ECRI believes that the introduction of a reasonable suspicion standard in the exercise of police investigation powers and in the exercise of police powers relating to control and surveillance activities is a particularly important tool in combating racial profiling. It therefore recommends that such a standard be introduced in the legal or regulatory frameworks which, in the different member States, govern the exercise of these police powers.

*Paragraph 4 of the Recommendation:*

*“To train the police on the issue of racial profiling and on the use of the reasonable suspicion standard”*

45. This training must cover the unlawfulness of racial profiling as well as its ineffectiveness and harmful nature as described above.
46. Training on the use of the reasonable suspicion standard should include practical examples of operational situations indicating the behaviour expected of police officers in the exercise of their powers. It should also include practical principles to be used by police officers in concrete situations in order to assess whether they are acting in compliance with the reasonable suspicion standard. One such principle could be, for instance, that the concrete grounds on which the officer builds his or her suspicion should be enough to give rise to that suspicion in a reasonable third person. Another principle could be that there can be no reasonable suspicion when the officer knows in advance that the exercise of his or her power has little or no likelihood of resulting in an offence being detected. At the same time, when the officer has a reasonable suspicion that an offence has been or may be committed in a clearly identified geographical area, the officer may exercise his or her powers with respect to all persons within that area, provided that this is done without discrimination.
47. In order to be effective, such specific training must be accompanied by more general training to raise the awareness among the police of human rights issues and of the need to combat racism and racial discrimination (on this point, see the other parts of the Recommendation covering training and awareness raising).

**II. As concerns all forms of racial discrimination and racially-motivated misconduct by the police**

48. The recommendations made under this section apply to all forms of racial discrimination (including racial profiling) and racially-motivated police misconduct.

*Paragraph 5 of the Recommendation:*

*“To ensure that legislation prohibiting direct and indirect racial discrimination cover the activities of the police”*

49. With this recommendation ECRI reiterates its call on member States, already made in its GPR 7, to bring the activities of the police under the scope of antidiscrimination legislation. In GPR 7, ECRI defines direct and indirect racial discrimination as follows:
  - a) “racial discrimination” shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

- b) “indirect racial discrimination” shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
50. In addition to providing these definitions, in its GPR 7 ECRI enumerates the key elements that effective antidiscrimination legislation should contain, including as concerns the burden of proof in discrimination cases, the sanctions that should be available for such cases and the specific acts to be explicitly considered as acts of discrimination. All these key elements should therefore also apply to the activities of the police. ECRI reiterates here that these key components might also be included in broader legislation encompassing the fight against racism and racial discrimination in policing. For example, when adopting legal measures against discrimination in policing, member States might prohibit, alongside racial discrimination, other forms of discrimination such as those based on gender, sexual orientation, disability, political or other opinions, social origin, property, birth or other status.

*Paragraph 8 of the Recommendation:*

*“To provide for support and advice mechanisms for victims of racial discrimination or racially-motivated misconduct by the police”*

51. Victims of racial discrimination and racially-motivated misconduct by the police are in a particularly vulnerable situation, since the police are in principle the natural interlocutors for victims of these acts when they are committed by others. It is therefore necessary to ensure that legal advice and adequate psychological support are available, be it within the police or outside of it, so as to encourage victims to come forward to have their rights protected. Their access to legal aid and medical assistance should also be guaranteed. Furthermore, victims should be protected against retaliation by police officers, including abusive counter-charges.
52. Support mechanisms for victims of racial discrimination and racist acts should also be available when such acts are committed by persons other than police officers. In these cases, the police have an even more active role to play in encouraging and advising victims by referring them to the structure that is best suited to their specific situation.
53. An example of support mechanism is the establishment of a free telephone helpline, which can provide victims with legal advice and/or psychological support in different languages 24 hours a day. Persons who complain of racial discrimination or racially-motivated misconduct by the police should be informed about social services and civil society organisations that provide support and advice to victims. For instance, information leaflets concerning support for victims of racial

discrimination or racially-motivated misconduct by the police could be made available.

*Paragraph 9 of the Recommendation:*

*“To ensure effective investigations into alleged cases of racial discrimination or racially-motivated misconduct by the police and ensure as necessary that the perpetrators of these acts are adequately punished”*

54. By “effective investigation” ECRI means an investigation that meets the criteria established by both the European Court of Human Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). To be effective, an investigation must in particular be adequate, comprehensive, thorough, prompt, expedient and independent. See the case-law of the European Court of Human Rights (for instance, ECHR, 26 January 2006, *Mikheyev v. Russia*) and the CPT standards (*The CPT Standards*, October 2006, from p. 81 onwards, Extract from the 14th General Report [CPT/Inf (2004) 28]). Measures must be taken to ensure that victims are kept informed about the investigations and their results.
55. As concerns investigations into racially-motivated police misconduct, in the case of *Nachova v. Bulgaria* of 6 July 2005 and other subsequent cases, the European Court of Human Rights has underlined the obligation for the national authorities to carry out an investigation on the possible racist motives behind the conduct of law enforcement officials when there are indications of the existence of such motives. Failing a satisfactory investigation on this point, the State is responsible for violating article 14 of the Convention (prohibition of discrimination) in combination with another article (for instance article 2- right to life, or article 3 - prohibition of torture or inhuman or degrading treatment or punishment) from the point of view of procedure.
56. As concerns the need to ensure that police officers who are responsible for racial discrimination and racially-motivated misconduct are adequately punished, ECRI recalls the key elements of effective criminal legislation against racism and racial discrimination it identified in its GPR 7. In particular, it recalls that the racist motivation of an offence should be provided by law as a specific aggravating circumstance in sentencing. Victims of racial discrimination and racially-motivated misconduct by the police should also benefit from adequate compensation for any material and moral damages they have suffered.
57. The police must provide for an internal quality-check mechanism of police work, covering questions related to cases of racial discrimination and racially-motivated misconduct. Police leaders must give a high priority to these questions and communicate such priority to their subordinates.

*Paragraph 10 of the Recommendation:*

*“To provide for a body, independent of the police and prosecution authorities, entrusted with the investigation of alleged cases of racial discrimination and racially-motivated misconduct by the police”*

58. The body entrusted with the investigation of alleged cases of racial discrimination and racially-motivated misconduct by the police should exist alongside other structures competent for receiving complaints against police misconduct, such as the internal disciplinary mechanisms (police inspectorate, Department of the Ministry of Interior, etc.) and the prosecutor. Experience shows that victims of police abuses do not generally have confidence in the complaints mechanisms internal to the police. They are often also reluctant to bring cases before institutions which cooperate closely and on a daily basis with the police, such as the prosecution authorities. It is therefore necessary to create a system whereby a victim can bring a complaint in full confidence to an independent body whose main task is to control the activities of the police. See also on this point the Section on Police Accountability and Transparency of the *Guidebook on Democratic Policing*, by the Senior Police Adviser to the OSCE Secretary General, December 2006, from p. 33 onwards.
59. This body entrusted with the investigation of alleged cases of racial discrimination and racially-motivated misconduct by the police should be given all the necessary powers to exercise its task effectively. Therefore, it should have powers such as requesting the production of documents and other elements for inspection and examination; seizure of documents and other elements for the purpose of making copies or extracts; and questioning persons. When the facts brought to its knowledge are of a criminal nature, this body must be required to bring the case before the prosecuting authorities.
60. The body entrusted with the investigation of alleged cases of racial discrimination and racially-motivated misconduct by the police may take different forms. It might be a national institution for the protection and promotion of human rights, a specialised police Ombudsman, a civilian oversight commission on police activities, or the specialised body which ECRI recommends be established in its General Policy Recommendation No.2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level.
61. In addition to investigation powers, this body could be given the following powers for cases which do not entail criminal responsibility: friendly settlement of disputes; monitoring the activities of the police and making recommendations for improving legislation, regulations and practices in order to combat racism and racial discrimination in policing; and the establishment of codes of conduct. The body in question should be required to actively co-operate with the organisations working in the field of combating racism and racial discrimination. It is essential that such a body be easily accessible to those whose rights it is intended to protect. Where appropriate, local offices should be set up in order to increase this body's accessibility.

**III. As concerns the role of the police in combating racist offences and monitoring racist incidents**

62. The Recommendation makes a distinction between racist offences and racist incidents. Unlike racist offences (which are criminal law concepts), racist incidents consist of any incident which is perceived to be racist by the victim or any other person. Therefore, all racist offences can first be qualified as racist incidents. However, not all racist incidents will eventually constitute racist offences. It is for the investigation, and ultimately the court, to determine whether a criminal offence has been committed and whether, for instance, the motivation of the offence was racist.
63. By racist offences, ECRI means ordinary offences (such as murder, assault and battery, arson or insult) committed with a racist motivation (racially-motivated offences), and other offences in which the racist element is inherent to the offence (such as incitement to racial hatred or participation in a racist organisation).
64. As concerns the grounds covered by the notions of *racist* incident and *racist* offence, in its GPR 7 ECRI has already clarified that racism covers conduct based on grounds such as race, colour, language, religion, nationality or national or ethnic origin.

*Paragraph 11 of the Recommendation:*

*“To ensure that the police thoroughly investigate racist offences, including by fully taking the racist motivation of ordinary offences into account”*

65. In the case of *Šečić v. Croatia* of 31 May 2007, concerning police investigations into a racist attack against a person of Roma origin by individuals suspected to belong to a skinhead group, the European Court of Human Rights has underlined that “[t]reating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights”. The Court therefore considered it unacceptable that a violent act which was most probably racially-motivated had not been investigated seriously and expeditiously with a view to identifying and prosecuting the perpetrators (See *Šečić v. Croatia*, § 67-69).
66. One practical measure that can be taken to ensure that the police investigate all racist offences thoroughly, and in particular that they do not overlook the racist motivation of ordinary offences in their investigations, is the adoption of the broad definition of racist incident provided in this Recommendation (paragraph 14). As soon as a racist incident is reported in accordance with this definition, the police must be required to pursue that line of investigation thoroughly. To this end, specific guidelines should be provided to police officers on the steps to be taken when a racist incident is reported, including as concerns the following areas: sensitivity towards the victim; action to be taken at the scene to secure evidence; location and questioning of witnesses; seeking the suspect; exploring possible links with organised racist, including neo-Nazi and skinhead, groups; proceeding with a detailed victim statement.

67. Other measures that can be taken in order to ensure that the police thoroughly investigate racist (including racially-motivated) offences comprise the establishment of units within each police division which specialise in dealing with such offences and the issuing of ministerial circular letters and other documents to raise the awareness among the police of the need to vigorously counter racist (including racially-motivated) offences.

*Paragraph 12 of the Recommendation:*

*“To establish and operate a system for recording and monitoring racist incidents, and the extent to which these incidents are brought before the prosecutors and are eventually qualified as racist offences”*

68. In order to gain an overview of the situation as concerns the occurrence of manifestations of racism in society that is as accurate as possible and monitor the response of the criminal justice authorities to such manifestations, it is necessary to develop a reliable system for the recording and monitoring of racist incidents. The adoption of the broad definition of racist incident provided in this Recommendation (paragraph 14) is a key element of such a system. The definition aims to enable uniform monitoring of these incidents by ensuring that all police units and all agencies with a role in receiving reports of such incidents use the same concepts.
69. Furthermore, the police (and all those receiving reports of racist incidents) should gather detailed information on each report. This could be done for instance by filling a racist incident report form, which should contain information on different elements, including as concerns the victim, the suspect or offender, the type of incident, its location and the grounds involved. An example of an incident report, relating to hate crimes generally, is contained in *Combating Hate Crimes in the OSCE Region*, OSCE/ODIHR, 2005, Annex D. See also on this question *Policing Racist Crime and Violence, A Comparative Analysis*, EUMC, September 2005.
70. The collection by the police of detailed and accurate information on racist incidents at this stage is a precondition to effectively monitoring how the criminal justice system as a whole deals with racist incidents and racist offences. However, in order to be able to gain such an overall picture, it is also necessary for the prosecuting authorities and the courts to establish or refine their monitoring systems. These systems should include readily available information on investigations carried out, charges brought and sentences handed down in these cases.
71. The recording of racist incidents also helps the police to improve their investigations of racist offences (as recommended in paragraph 11), in that it provides them with useful background information that can clarify the context within which subsequent offences take place.

*Paragraph 13 of the Recommendation:*

*“To encourage victims and witnesses of racist incidents to report such incidents”*

72. There are different ways in which victims and witnesses of racist incidents may be encouraged to report such incidents. In a general manner, all measures aimed at improving the confidence of minority groups in the police, such as those enumerated in Part II and Part IV of this Recommendation have a strong potential for encouraging reporting of racist incidents. From a more specific perspective, examples of measures that would encourage reporting of racist incidents include the establishment of systems whereby victims and witnesses can report racist incidents to different local agencies (apart from the police, these agencies could include local authorities and civil society organisations) acting in a co-ordinated way. All agencies could for instance be trained on the use of the same definition of racist incident and on what to do when victims or witnesses approach them. Non-police agencies that receive complaints therefore act as intermediaries and may feed, as necessary, the information to the police. This role of intermediary may be especially relevant for persons in particularly vulnerable positions, such as persons without legal status, who may be reluctant to report racist incidents to the police. Another specific measure is specialised training of police in receiving complaints of racism and racial discrimination.
73. Victims and witnesses of racist incidents should be protected against victimisation, i.e. any adverse treatment or consequences as a reaction to reporting an incident or filing a complaint.

*Paragraph 14 of the Recommendation:*

*“To these ends, to adopt a broad definition of racist incident;*

*For the purposes of this Recommendation, a racist incident shall be:*

*‘any incident which is perceived to be racist by the victim or any other person’”*

74. The Recommendation provides that a racist incident be defined as an incident which is perceived to be racist by the victim or any other person. The adoption of such a broad definition of a racist incident has the advantage of sending the message to the victims that their voice will be heard. This definition is drawn from the 1999 Stephen Lawrence Inquiry Report by Sir William Macpherson of Cluny (Cm 4262, Chapter 47, paragraph 12).
75. As mentioned above, the purpose of adopting a definition of a racist incident is two-fold: firstly, to improve the recording and monitoring of racist incidents and, secondly, to ensure that the police investigate all racist offences thoroughly and do not overlook the racist motivation of ordinary offences.

#### IV. As concerns relations between the police and members of minority groups

76. In Parts I, II and III of this Recommendation, ECRI has essentially addressed circumstances in which members of minority groups - i.e. for the purposes of this Recommendation, groups designated by characteristics such as race, colour, language, religion, nationality or national or ethnic origin - are victims of racial discrimination, including racial profiling, and racially-motivated conduct, be it at the hands of the police or by private individuals. However, it is also necessary to ensure that the police behave in a professional and impartial manner when dealing with offences that are not racially-motivated and still involve members of minority groups as victims, perpetrators, witnesses, etc. ECRI's country monitoring reports indicate that prejudice on the basis of race, colour, language, religion, nationality or national or ethnic origin also affects the way in which the police deal with members of minority groups in the context of these offences. For instance, members of minority groups are more easily believed to be the perpetrators of specific offences. Conversely, the police may be less likely to trust members of minority groups who are witnesses or victims of ordinary crime. Difficulties in this area also result from lack of competence among police officers to work in a diverse society. Although of a more general scope, the recommendations made by ECRI in Part IV aim to address these issues.

##### *Paragraph 15 of the Recommendation:*

*“To place the police under a statutory obligation to promote equality and prevent racial discrimination in carrying out their functions”*

77. In its GPR 7, ECRI had already recommended that public authorities be placed under a statutory obligation to promote equality and prevent racial discrimination in carrying out their functions. With this recommendation, ECRI stresses the importance for the police in particular to be placed under such an obligation. In order to comply with this obligation, the police could be required to draw-up and implement specific programmes aimed at promoting equality and preventing discrimination. These programmes could include a wide range of activities, from training and awareness raising to monitoring and setting equality targets. An example of initiatives that could be included in these programmes is the drawing up of internal codes of conduct against racism and racial discrimination. More generally, police programmes aimed at promoting equality and preventing discrimination should include initiatives and commitments in all areas addressed in this Section (diversity, representation of minority groups in the police, and relations with minority groups and the media). As recommended by ECRI in its GPR 7, police compliance with the statutory obligation to promote equality and prevent racial discrimination could be monitored and enforced through an independent specialised body to combat racism and racial discrimination at national level.

*Paragraph 16 of the Recommendation:*

*“To train the police in policing a diverse society”*

78. Training in policing a diverse society includes specific training for police officers who are in contact with members of minority groups, both citizens and non-citizens. It may also include training aimed at teaching majority police officers a language spoken by a minority group. It may include as well training on cultural and religious pluralism and activities aimed at promoting interaction and respect among colleagues of different backgrounds. The training mentioned above should be as practical as possible, for instance through enacting situations and interaction with members of minority groups.

*Paragraph 17 of the Recommendation:*

*“To recruit members of under-represented minority groups in the police and ensure that they have equal opportunities for progression in their careers”*

79. Ensuring that the composition of the police reflects the diversity of the population is important for promoting a society whose members feel that they enjoy equal opportunities irrespective of their ethnic, national, religious, linguistic or other background. It is also important in order to equip the police with new competences and skills, including language skills, and to increase police effectiveness by enhancing communication with and trust by minority groups.
80. Different types of measures can be taken in order to recruit members of minority groups in the police. These include positive measures such as: (i) to advertise and carry out other promotion work aimed at encouraging applications for jobs within the police from members of minority groups; (ii) to provide members of minority groups who do not possess the necessary skills to pass police exams with such skills, through preparatory courses; (iii) to identify and remove practices that directly or indirectly discriminate against members of minority groups (e.g. non-discrimination training of those responsible for recruitment, review of selection criteria, etc.); (iv) to set targets for recruitment of members of minority groups and monitor attainment of these targets. Measures that facilitate the recruitment of members of minority groups into the police should not consist of lowering professional standards.
81. Different types of measures can be taken in order to ensure that members of minority groups have equal opportunities for progression in their careers within the police. These include: (i) to prohibit racial harassment among the police (ii) to adopt and implement no-racism internal policies; (iii) to establish and implement effective internal complaints mechanisms; (iv) to take legal measures against officers who racially offend, insult or harass colleagues; (v) to monitor promotions of members of minority groups; (vi) to provide mentoring schemes for members of minority groups with willingness and potential to advance.

*Paragraph 18 of the Recommendation:*

*“To establish frameworks for dialogue and co-operation between the police and members of minority groups”*

82. The establishment of frameworks for dialogue and co-operation between the police and members of minority groups is a crucial element to successfully combating racism and racial discrimination in policing. It is also a way to ensure the effectiveness of police work. It is not possible for the police to carry out their tasks effectively without the co-operation of the members of society, including minority groups. This requires the establishment of trust. The establishment of a dialogue benefits the police and the members of the public, and this is bound to impact favourably on society as a whole. To be effective, the establishment of frameworks for dialogue and co-operation should go along with measures to ensure monitoring and enforcement of the duty of dialogue and co-operation.
83. Dialogue between the police and members of minority groups is a means to avoid racial profiling, but also to avoid that members of minority groups feel that they are victims of racial profiling when this is not the case. On this point, see the considerations above concerning racial profiling.
84. The police should not only co-operate with minority groups and civil society in general, but also with public authorities. It should also closely co-operate with the specialised body which ECRI recommends be established in its General Policy Recommendation No.2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level. This body can play the role of an intermediary or mediator, but also co-operate in the establishment of the programmes mentioned above as part of the obligation for the police to promote equality and prevent discrimination.
85. Means to establish a dialogue and co-operation between the police and members of minority groups include the holding of regular consultation meetings with representatives of minority groups and the creation of advisory committees composed of representatives of minority groups. It is also possible to provide for neighbourhood policing and contact points or contact persons (liaison officers) at police stations, specifically responsible for liaising with minority groups. The Explanatory Note to the recommendations of the OSCE High Commissioner on National Minorities on Policing in Multi-Ethnic Societies provides many detailed examples of mechanisms which can foster communication and co-operation between the police and the members of a multi-ethnic society.
86. A way of fostering dialogue and co-operation is the appointment of mediators. Provided that they possess the necessary competencies, including language skills, and that they enjoy trust from both the minority groups concerned and the police, mediators can play an important role as intermediaries, thereby avoiding conflict between the police and the minority group concerned.

*Paragraph 19 of the Recommendation:*

*“To provide to the extent possible those who are in contact with the police and do not understand the official language with access to professional interpretation services”*

87. According to the European Convention on Human Rights, everyone who is arrested and/or charged with a criminal offence has the right to be informed in a language which he/she understands of the reasons for his/her arrest and/or of the nature and cause of the accusation against him/her. As concerns persons who are in contact with the police but are not suspects or charged with a criminal offence, such as victims and witnesses, efforts should be made to ensure that interpretation services are available to them, for instance by telephone in cases where it is impossible to find an interpreter on the spot. As a complementary measure, the police could provide for the presence of officers with command of one or more languages in addition to the official language, so as to facilitate communication among persons who do not speak the official language. In those countries which have ratified the Framework Convention for the Protection of National Minorities, the requirements posed by this convention as concerns the language of communication between the public authorities and the minority groups concerned must also be taken into account.

*Paragraph 20 of the Recommendation:*

*“To ensure that the police communicate with the media and the public at large in a manner that does not perpetuate hostility or prejudice towards members of minority groups”*

88. The police should not reveal to the media or to the public information on the race, colour, language, religion, nationality or national or ethnic origin of the alleged perpetrator of an offence. The police should only be allowed to disclose this type of information when such disclosure is strictly necessary and serves a legitimate purpose, such as in case of a wanted notice.
89. Especially when making public statistical information, the police should be careful not to contribute to spreading and perpetuating myths linking crime and ethnic origin or linking the increase in immigration with an increase in crime. The police should ensure that they release objective information, in a way that is respectful of a diverse society and conducive to promoting equality.



## GLOSSARY

*Police:*

Those exercising (or having by law) the power to use force in order to maintain law and order in society, normally including prevention and detection of crime. This includes secret security and intelligence services and border control officials. It also includes private companies exercising police powers as defined above.

*Racial profiling:*

The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities.

*Reasonable suspicion:*

A suspicion of an offence that is justified by some objective criteria before the police can initiate an investigation or carry out control, surveillance or investigation activities.

*Racist incident:*

Any incident which is perceived to be racist by the victim or any other person.

*Racist offence:*

An ordinary offence (such as murder, assault and battery, arson or insult) committed with a racist motivation (racially-motivated offence), and other offences in which the racist element is inherent to the offence (such as incitement to racial hatred or participation in a racist organisation).

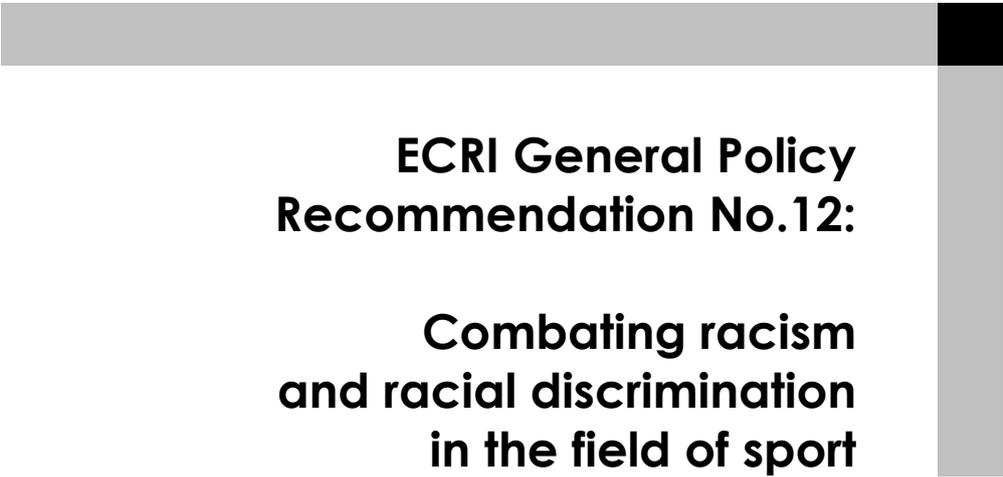
*Direct racial discrimination:*

Any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

*Indirect racial discrimination:*

Cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.





**ECRI General Policy  
Recommendation No.12:**

**Combating racism  
and racial discrimination  
in the field of sport**

Adopted on 19 December 2008



The European Commission against Racism and Intolerance (ECRI):

Having regard to Article 14 of the European Convention on Human Rights, Protocol No.12 to this Convention and the case-law of the European Court of Human Rights;

Having regard to the Additional Protocol to the Convention on cybercrime concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems;

Having regard to the revised European Sports Charter;

Having regard to Recommendation (2001)6 of the Committee of Ministers to member States on the prevention of racism, xenophobia and racial intolerance in sport;

Recalling ECRI's General Policy Recommendation No.2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level;

Recalling ECRI's General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination;

Recalling ECRI's General Policy Recommendation No.11 on combating racism and racial discrimination in policing;

Bearing in mind ECRI's Declaration on the occasion of EURO 2008 "Unite against racism";

Underlining that the fundamental values of sport which include fair play, friendly rivalry, mutual respect and tolerance should be at the heart of any sporting activity;

Emphasising that the protection against racism and racial discrimination is a human right, which must be secured also in the field of sport;

Convinced that the general public should be involved in the fight against racism and intolerance in sport, in a spirit of international solidarity and friendship;

Aware that sport not only has a role in education and socialisation, but that it can also help to explore and celebrate diversity;

Deeply regretting the existence of racism and of racial discrimination in sport and noting that these phenomena concern many sports and can manifest themselves at all levels;

Strongly condemning the manifestations of racism, xenophobia, antisemitism and intolerance which occur during and in relation to sports events and recalling that these phenomena constitute a serious threat to sport and its ethics;

Rejecting any attempt to trivialise racist acts committed during sports events;

Seeking to strengthen the implementation in the field of sport of international and European human rights protection standards;

Recommends that the governments of member States:

**I. Ensure equal opportunities in access to sport for all, and to this end:**

1. gather information on the situation and representation of minority groups in sports, including the collection of good practices in this field;
2. conceive appropriate and effective legal and policy measures, including:
  - a) the adoption of adequate anti-discrimination legislation to prevent discrimination in access to sport;
  - b) the promotion of equal opportunities policies in order to achieve a more balanced representation of minority groups in sports at all levels;
  - c) the removal of legal and administrative barriers for non-citizens to participate in local and national sports competitions, where appropriate;
  - d) the promotion of physical education for all at school;
  - e) the adoption of integration programmes with a special emphasis on promoting access to sport of children from minority backgrounds;
3. invite local authorities:
  - a) to support and facilitate the participation of minority groups in sports, including in the working of local sport structures;
  - b) to advise and support local sports clubs and partners regarding equal opportunity programmes;
  - c) to organise sport-related outreach activities bringing together people from different backgrounds;
4. invite sports federations and sports clubs:
  - a) to adopt diversity and equal opportunity policies in order to ensure balanced representation of minority groups in sports at all levels;
  - b) to take measures to attract supporters of different minority backgrounds to sports events;

**II. Combat racism and racial discrimination in sport, and to this end:**

5. ensure that general and, as necessary, specific legislation against racism and racial discrimination in sport is in place. In particular, the legislator should provide:
  - a) a clear definition of racism and racial discrimination;
  - b) that specific forms of racism and racial discrimination, as necessary, are defined and prohibited;
  - c) adequate and comprehensive anti-discrimination legislation;
  - d) legal provisions penalising racist acts;
  - e) that dissemination of racist material via the internet is prohibited;

- f) that remedies are available for victims of racism and racial discrimination in sport;
  - g) that security regulations allow the police and security personnel to stop, report and document racist behaviour;
  - h) that sports clubs and federations are held responsible for racist acts committed during sports events;
6. ensure that legislation aimed at preventing and sanctioning racist offences in the field of sport is effectively implemented, and to this end:
    - a) provide clear elements and guidelines for the identification of racist acts;
    - b) have clear mechanisms in place for reporting and dealing with racist behaviour;
    - c) establish monitoring and data collection systems;
    - d) offer targeted training to persons involved at all levels of the justice system;
    - e) take steps to encourage victims of racist acts to come forward with complaints and to monitor the follow-up given to such complaints;
    - f) ensure the existence and effective functioning of an independent anti-discrimination body competent, inter alia, in assisting victims in bringing complaints of racism and racial discrimination;
  7. organise and finance large scale anti-racism awareness raising campaigns in sport at all levels, involving all relevant actors;
  8. request that local authorities:
    - a) mainstream the fight against racism and racial discrimination in their regular activities, in particular in their work with bodies dealing with sport;
    - b) support movements and initiatives to promote sportsmanship and tolerance, as well as educational and social projects in this field;
    - c) provide the local police force with adequate training for dealing with racist incidents in and outside sports grounds;
  9. request that the police:
    - a) undergo training on how to deal with racist incidents which occur during sporting events and on how to identify the perpetrators;
    - b) adopt joint strategies with the security personnel of the organisers of sporting events for dealing with racist incidents;
    - c) identify and remove racist, antisemitic or discriminatory leaflets, symbols and banners;
    - d) intervene quickly to stop racist behaviour;
  10. invite sports federations and sports clubs:
    - a) to recognise that racism is an important problem in sport at all levels and to demonstrate publicly their commitment to combating it;

- b) to establish internal mechanisms for dealing with cases of racism and racial discrimination;
  - c) to adopt and implement self-regulatory, disciplinary and awareness raising measures;
  - d) to train their security personnel on how to prevent and adequately deal with racist incidents on the sport ground;
  - e) to refuse access to sport grounds to persons who distribute or carry with them racist, antisemitic or discriminatory leaflets, symbols or banners;
  - f) to support movements and initiatives to promote sportsmanship and tolerance, as well as educational and social projects in this field;
11. remind athletes and coaches:
- a) to abstain from racist behaviour in all circumstances;
  - b) to report racist behaviour when it occurs;
12. remind referees:
- a) to react appropriately where athletes, technical staff and/or supporters engage in racist gestures or expressions by imposing adequate measures and sanctions;
  - b) to mention in the referee report the occurrence of racist incidents during a sporting event;
13. encourage supporters' organisations:
- a) to adopt supporters' charters, containing anti-racism clauses;
  - b) to organise activities to attract members from minority backgrounds;
  - c) to be vigilant about possible racist content on their websites and fanzines;
14. encourage political actors and opinion leaders to take a firm public stance against racism in sport;
15. encourage the media:
- a) to abstain from reproducing racist stereotypes in their reporting;
  - b) to pay the necessary attention to the image that they convey of minority groups in sports;
  - c) to report on racist incidents taking place during sport events and to give publicity to sanctions incurred by racist offenders;
16. encourage sponsors and the advertising industry:
- a) to avoid giving a stereotyped picture of athletes from minority backgrounds;
  - b) to avoid discriminating against athletes from minority backgrounds;

### **III. Build a coalition against racism in sport, and to this end:**

17. promote cooperation between all relevant actors through:
  - a) the establishment and promotion of consultation mechanisms;
  - b) the adoption of a national framework agreement, outlining the tasks and responsibilities of each actor;
18. promote exchanges of good practices, through:
  - a) the creation of a good practice award for combating racism and racial discrimination in sport;
  - b) the mandating of the national anti-discrimination body with the creation of a database of good practices on combating racism and racial discrimination in the field of sport;
19. provide funding for social, educational and information activities for non-governmental organisations active in the field of combating racism and racial discrimination in sport.



## EXPLANATORY MEMORANDUM TO ECRI GENERAL POLICY RECOMMENDATION No. 12 ON COMBATING RACISM AND RACIAL DISCRIMINATION IN THE FIELD OF SPORT

### Introduction

1. This General Policy Recommendation (hereafter: the Recommendation) focuses on combating racism and racial discrimination in the field of sport. It is intended to cover all types of sport, including professional and amateur sports, individual and team sports, as well as all activities related to sport in and outside sports grounds.

2. For the purpose of this Recommendation, ECRI uses the definition of sport as contained in the revised European Sports Charter<sup>1</sup>, according to which:

*"Sport" means all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.*

3. Sport can be a powerful tool for promoting social cohesion and for transmitting important values, such as fair play, mutual respect and tolerance, but sometimes it is also an area in which racism and racial discrimination can thrive, thereby perverting these very values.

4. In its General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination, ECRI defines racism as follows:

*"Racism" shall mean the belief that a ground such as race<sup>2</sup>, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons".*

5. In line with its mandate, ECRI concentrates in this Recommendation on instances of intolerance and discrimination on the grounds of race, colour, language, religion, nationality or national or ethnic origin. However, ECRI is aware that intolerance and discrimination in the field of sport also occurs on other grounds or a combination of different grounds, including gender or sexual orientation. Attention should be drawn to the fact that many of the recommendations contained in this text could be applied *mutatis mutandis* to these other grounds.

6. In the framework of its country monitoring work, ECRI has observed that racism and racial discrimination in sports manifest themselves in many different forms, and that usually only the crudest forms of racial abuse in the most popular sport

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<sup>1</sup> Recommendation No.R(92)13 REV on the Revised European Sport Charter, adopted by the Committee of Ministers of the Council of Europe on 24 September 1992 and revised on 16 May 2001.

<sup>2</sup> "Since all human beings belong to the same species, ECRI rejects theories based on the existence of different "races". However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to "another race" are not excluded from the protection provided for by the legislation".

disciplines come to the attention of the general public. Besides, there is also a tendency to trivialise racist acts taking place during sporting events. Therefore, this Recommendation draws also attention to more hidden forms of racism and racial discrimination in sports and provides concrete examples of unacceptable practices and behaviour<sup>3</sup>. There is also persuasive evidence that racism and racial discrimination in sport goes beyond the individual or collective behaviour of fans or isolated cases of racist gestures and remarks made, for example, by athletes, coaches or club managers. In fact, institutional racism<sup>4</sup> is also at work in the field of sport. Therefore, this Recommendation also emphasises the question of how to ensure equal opportunities in access to sports for all persons, irrespective of their race, colour, language, religion, nationality or national or ethnic origin.

7. In accordance with ECRI's mandate, this Recommendation is addressed to the governments of all Council of Europe member States, who are responsible for establishing an effective legal and political framework for combating racism and racial discrimination in society in general and in the field of sport in particular. It is their duty to ensure that all the relevant actors in this field, including public authorities and bodies (among others, the legislator, the judiciary, human rights institutions, including national anti-discrimination bodies, the police, governmental bodies responsible for sport, educational institutions and local authorities) and non-governmental organisations (among others, professional and amateur sports federations, sports clubs, local sports associations, athletes' unions, coaching associations, referee unions, supporters' organisations, sponsors and the media) take effective action against racism and racial discrimination in the field of sport.

#### **I. Ensure equal opportunities in access to sport for all, and to this end:**

*Paragraph 1 of the Recommendation:*

*"To gather information on the situation and representation of minority groups in sports, including the collection of good practices in this field."*

8. It is important to note that minority groups are well or even over-represented as athletes in certain sport disciplines, while they are usually under-represented among management, administrative and coaching staff. This seems to be partly due to racist stereotypes concerning the sporting capacity and professional competence of athletes of minority background. Furthermore, athletes of minority background sometimes have problems to advance in their careers, because it is difficult for them to gain access to informal networks essentially composed of members of the majority population.
9. In its country monitoring work ECRI is, however, confronted with the fact that in most countries and for most sport disciplines reliable information on the situation and representation of minority groups in sports is not available. This makes it very difficult for governments to devise adequate legal and policy responses for

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<sup>3</sup> See paragraphs 12, 27 and 40 of the Explanatory memorandum.

<sup>4</sup> According to the Stephen Lawrence Inquiry Report by Sir William Macpherson of Cluny 'institutional racism' is "the collective failure of a [public] organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.

ensuring equal opportunities in access to sport for all members of society. Therefore, ECRI encourages the commissioning of research in the following areas:

- Research on the conditions of entry/access to the organised practice of sport and physical activity and on the representation of minority groups in different sport disciplines;
  - Research on the career development of athletes from minority backgrounds;
  - Qualitative and quantitative surveys on the situation of sport managers from minority backgrounds;
  - Socio-demographic analyses of the general public following sporting events.
10. The necessary quantitative data for this kind of research is often, however, not easily obtained. This is due to the fact that a vast majority of the member States of the Council of Europe do not collect data broken down by grounds such as national or ethnic origin, language, religion and nationality. This is why ECRI consistently recommends in its country monitoring reports that member States collect such data, in order to monitor the situation of minority groups and identify possible patterns of direct or indirect discrimination they may face in different areas of life. ECRI stresses that these areas should include sport.
11. In addition, special efforts should be made to identify existing good practices for promoting equal opportunities in access to sport, with a view to implementing them on a large scale.

*Paragraph 2 of the Recommendation:*

*“To conceive adequate legal and policy measures”*

12. On the basis of the collected information, ECRI calls on governments to develop and adopt adequate legal and policy measures to ensure equal opportunities in access to sport, among which the adoption of a comprehensive body of anti-discrimination legislation should have a prominent place. ECRI’s General Policy Recommendation No.7 provides valuable guidance in this respect and gives a definition of direct and indirect racial discrimination. In addition to providing these definitions, it enumerates the key elements that effective anti-discrimination legislation should contain, including a prohibition of discrimination in all areas of life in both the public and the private sector and the possibility of adopting temporary special measures for members of disadvantaged groups.
13. The prohibition of racial discrimination should cover the conditions of admission to a sports club; the scouting and recruitment of athletes; the recruitment of management, administrative and coaching staff; and the career development of athletes and management, administrative and coaching staff. The prohibition of racial discrimination should apply to both amateur and professional sports. It is also important to be vigilant against trafficking and exploitation, in particular of young athletes.
14. In order to actively counter any racist and discriminatory practices in access to sport, ECRI recommends that member States promote the adoption of equal opportunity policies among sport governing bodies and sport organisations. Public authorities with responsibilities in the field of sport (e.g. sport ministries, educational institutions, local authorities) should be placed under a public duty to promote equality, including in access to sport. Private sporting organisations

should be assisted in the development of equal opportunity policies by providing them with guidelines and information on best practices in this field, which could be, for example, developed and collected by national anti-discrimination bodies<sup>5</sup>.

15. Physical education at school should be used both to raise children's interest in sport and to enhance their awareness of racism and racial discrimination in all its manifestations. This can be achieved, for example, by emphasising the importance of promoting tolerance and non-discrimination in physical education curricula or by encouraging sport teachers and coaches to promote the inclusion of children of minority background.
16. In some countries there exist a certain number of legal and administrative barriers to the participation of non-citizens in local and national sports competitions. As a result, both professional and amateur sports clubs are sometimes reluctant to admit persons who do not possess the citizenship of the country concerned. ECRI is concerned that this can cause problems for young immigrants, whose feelings of rejection might seriously hamper their integration into the host society.
17. Sport can be a powerful tool for promoting integration, ECRI therefore encourages governments to adopt integration programmes with a sport dimension. Special emphasis should be placed on involving children from minority backgrounds in sport activities, both at school and at professional and amateur sports clubs. As regards in particular team sports, ECRI favours mixed teams rather than teams that are composed of only one particular group in order to prevent exclusion and segregation.

*Paragraph 3 of the Recommendation:*

*The role of local authorities in ensuring equal opportunities in access to sport*

18. The closeness of local authorities to their community gives them a key role to play in ensuring equal opportunities in access to sport. Promoting equality in sport can naturally complement their efforts to promote social and cultural integration in their community.
19. Local authorities are best placed to identify the problems and needs of minority groups and to encourage and support them in participating in sport. For this they have to establish close links with minority groups by consulting them on a regular basis and inviting them to take part in the work of local sport councils. Existing barriers to the participation of minority groups in sport should be addressed in this framework.
20. In addition to ensuring the participation of minority groups in formal consultation mechanisms, local authorities should seek dialogue and partnership with a wider range of actors, including sports clubs, migrant associations, minority organisations and minority media. Ideally, this involvement should lead to concrete grass-root level projects promoting the participation of minority groups in sport.
21. More specifically, local authorities should promote and develop the practice of sport in areas where there exist tensions within the community. This can be achieved, for example, by improving the availability and attractiveness of sport

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<sup>5</sup> The tasks and responsibilities of national anti-discrimination bodies are described in more detail in paragraph 47 of the Explanatory Memorandum.

facilities in the concerned neighbourhood and promoting the mixing of people from different backgrounds at sporting events.

22. Local authorities also have an important role to play in advising and supporting local sports partners and clubs on how to devise and implement equal opportunity programmes, including by offering equality training for their staff and providing them with information on recruitment programmes inclusive of minority groups.
23. Local authorities should also organise sportive and cultural events, which should bring together people of different ethnic backgrounds, as well as raise their interest in practising sports.

*Paragraph 4 of the Recommendation:*

*The role of sports federations and sports clubs in ensuring equal opportunities in access to sport*

24. Sports federations and clubs can have an important role-model function, if they show a real commitment to combating racism and ensuring equal opportunities in access within their own ranks. In practice, they shape to a great extent the conditions under which sport is practiced. They recruit athletes and other sport staff and closely accompany them during their whole professional or amateur career. It is therefore of utmost importance that sports federations and clubs adopt diversity and equal opportunity policies in their statutes and rules, which should not only stay at the level of intent, but also translate into concrete action.
25. Measures to be adopted in this respect should include to inform sport scouts and recruitment agencies of the organisation's diversity and equal opportunity policy; to ensure that recruitment panels maintain - as far as possible - an ethnic balance; to provide regular equality training to their staff; to give their diversity and equal opportunity policy a prominent place in their staff hand books; to provide special training for sport staff from minority backgrounds under-represented in their sport discipline; to provide mentoring support for individuals from minority backgrounds; and to allocate and/or apply for grants to develop and organise activities with minority groups.
26. At the same time sports federations and clubs should also encourage more diversity among spectators and supporters. In certain sport disciplines the discrepancy between the high number of athletes from minority background and the lack of minorities among the audience is striking and ECRI therefore encourages the adoption of measures to attract supporters from different minority backgrounds to sports events.

## **II. Combat racism and racial discrimination in sport, and to this end:**

*Paragraph 5 of the Recommendation:*

*“Ensure that general and specific legislation against racism and racial discrimination in sport is in place”*

27. Most Council of Europe member States possess legal provisions against racism and racial discrimination. These legal provisions usually take the form of general anti-discrimination clauses in constitutional texts or are part of a body of anti-discrimination law or another legal text covering many fields of life. However, these provisions are not always enough for successfully combating racism and

racial discrimination in sport, because the relevant actors are often not aware of their existence and do not know how they are relevant for their daily work. Therefore, it is important to have, as necessary, special provisions against racism and racial discrimination in all the relevant sport regulations and laws.

28. Most importantly, the law must provide a clear definition of racism and racial discrimination that should apply in the field of sport. Specific forms of racism and racial discrimination in sport should also, as necessary, be prohibited by the relevant sport regulations and laws. The definitions contained in ECRI's General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination should apply in this respect. These definitions are in line with the case law of the European Court of Human Rights, according to which discrimination is differential treatment which has no objective and reasonable justification. Applied to the field of sport, behaviour to be prohibited should therefore include unjustified differential treatment in remuneration, employment conditions and career development, "stacking" (discriminatory practice in team sports, having the practical effect that athletes from minority background are rarely found in outcome or control positions of the game) and discrimination in the selection and nomination for sports competitions<sup>6</sup>
29. These kinds of cases of racial discrimination in sport usually receive limited attention by national legal and policy makers and ECRI therefore wants to draw their attention to these phenomena. This lack of attention is to some extent due to the fact that comprehensive research on racial discrimination in sport is lacking in most Council of Europe member States.
30. The situation is slightly different as regards incidents of racist violence and racist expression at sporting events, which in more recent times have received more attention, in particular in football. In this context, ECRI wants to draw attention to the fact that racism is also present in other sport disciplines, but that awareness of these issues is still under-developed among many of them. This is especially true for amateur sports, but also for professional sports in the lower leagues.
31. Where these problems have been addressed, initiatives for combating racism in sport have often mainly concentrated on fan behaviour and more in particular on hooliganism, even if not all hooligans or members of radical fan groups are necessarily racist. It is important to acknowledge that racist acts are also perpetrated by athletes, coaches and other sport staff, as well as ordinary fans. However, special attention must be given to the activities of extremist Neo-Nazi and right-wing groups, which sometimes use sporting events for recruiting new members.
32. As regards racist behaviour on the part of fans that are not part of organised groups ECRI has observed a certain reluctance to intervene on the part of the police and other security personnel, including stewards. In fact, a certain impunity seems to reign as regards racist expression on many sports grounds. ECRI is deeply worried about this, as it sends a negative message to society as a whole and risks rendering racism in sport and therefore also racism in general, banal and normal. ECRI, therefore, categorically rejects any attempt to justify or trivialise such acts on the pretext that the events at which they occur are highly

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<sup>6</sup> Discrimination in access to sport is dealt with in paragraph 2 of this Recommendation.

emotional. It must be clear that “What is illegal outside the stadium is also illegal inside the stadium”.

33. Therefore, ECRI would like to draw the attention of governments to the guidelines contained in its General Policy Recommendation No.7. In this document ECRI recommends to governments that the law should penalise the following acts when committed intentionally:

- a) public incitement to violence, hatred or discrimination,
- b) public insults and defamation or
- c) threats  
against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
- d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
- e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;
- f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 33 a), b), c), d) and e);
- g) the creation or the leadership of a group which promotes racism; support for such a group; and participation in its activities with the intention of contributing to the offences covered by paragraph 33 a), b), c), d), e) and f);
- h) racial discrimination in the exercise of one’s public office or occupation.

34. ECRI is aware that the law might not prevent the dissemination of racist ideas in more hidden, insidious ways in and around sports grounds. However, ECRI is of the opinion that special training for the police and other security personnel, including stewards, will help them to identify and to combat more encoded forms of racism as well.

35. In some popular sport disciplines, spectator violence poses a serious problem. ECRI strongly supports instruments and cooperation mechanisms that have been developed to counter violence at sports events, such as the European Convention on Spectator Violence and Misbehaviour at Sports Events<sup>7</sup> and its Standing Committee, since these valuable instruments can also be used to counter racially

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<sup>7</sup> European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches - European Treaties Series No.120, adopted by the Committee of Ministers of the Council of Europe on 19 August 1985.

motivated violence on the sports ground. However, a clear distinction should always be drawn between violent behaviour which is motivated by racism and that which is not. This distinction is important, because ECRI considers that for all criminal offences committed in the field of sport the racist motivation should constitute an aggravating circumstance in legal proceedings.

36. Apart from the sports ground, there is another forum in which sport-related racism can thrive, namely the internet. ECRI therefore recommends that legislation should also cover racist crimes committed via the internet. ECRI's General Policy Recommendation No.6<sup>8</sup> and the Additional Protocol to the Convention on cybercrime<sup>9</sup> provide very valuable guidance in this respect.
37. ECRI considers that the existence of effective remedies for victims of racism and racial discrimination in sport is of central significance. These should include civil and penal remedies before the courts, but also the possibility of lodging complaints with disciplinary boards or commissions of sport governing bodies or with national anti-discrimination bodies. Sanctions and penalties imposed as a result of such proceedings should have a sufficiently deterrent effect, as well as have an educational dimension.
38. In this context, ECRI would also like to stress that sports organisations and clubs, as well as sports ground owners and public authorities have a special responsibility in keeping the sport environment free from racism and racial discrimination. The legislator should therefore foresee sanctions and/or other appropriate means, if they do not take the necessary measures for preventing and controlling racist violence or misbehaviour during and in relation to sporting events.
39. An effective means for preventing and controlling such behaviour is the installation of audio-visual video cameras and CCTV systems (Closed Circuit Television) on the sports ground. Security regulations should therefore foresee their possible use for documenting racist abuse.

*Paragraph 6 of the Recommendation:*

*"To ensure that legislation aimed at preventing and sanctioning racist offences in the field of sport is effectively implemented."*

40. Comprehensive legislation against racism and racial discrimination is important, but remains a dead letter, if not effectively implemented.
41. Laws and regulations in the field of sport should therefore contain clear and comprehensive guidelines on how to recognise racist acts. According to ECRI, racist behaviour to be prohibited includes racist insults and chanting, the flaunting of racist banners and symbols and the wearing, distribution and selling of racist, antisemitic and discriminatory banners, symbols, flags, leaflets or images.

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<sup>8</sup> ECRI General Policy Recommendation No.6 on combating the dissemination of racist, xenophobic and antisemitic material via the Internet.

<sup>9</sup> Additional Protocol to the Convention on cybercrime concerning criminalisation of acts of a racist or xenophobic nature committed through computer systems, European Treaties Series No.189, adopted by the Committee of Ministers of the Council of Europe on 28 January 2003.

42. At the same time, rules and regulations in the field of sport should foresee the establishment of mechanisms for reporting and dealing with racist incidents during and in relation to sporting events. For example, special protocols could be adopted, laying down the exact responsibilities of referees, security officers, stewards and the police when racist incidents occur.
43. As already mentioned in other parts of this Recommendation, there is no comprehensive information on the number of racist incidents in the field of sport. This lack of information concerns all sport disciplines in almost all Council of Europe member States. This makes it very difficult to get a real picture of the situation. Racism monitoring systems in line with national legal requirements have therefore to be put into place, which should be operated by the law enforcement authorities, for example, in cooperation with sport organisations, clubs and specialised NGOs.
44. In order to ensure an effective recording and monitoring of racist incidents and that police investigations are carried out in a thorough and satisfactory manner and law enforcement officers do not overlook the racist motivation of ordinary offences, ECRI advocates a broad definition of “racist incident”, as contained in its General Policy Recommendation No.11, that is “*any incident which is perceived to be racist by the victim or any other person*”<sup>10</sup>.
45. A racist incident must be strictly distinguished from a racist offence and may only serve as a starting point for further investigations by the concerned law enforcement authorities.
46. The follow-up given to acts of racism and racial discrimination in the field of sport can further be improved by offering targeted training to all persons involved in the justice system, including the police, prosecutors and judges with a view to increasing their knowledge about racism in sport and how such acts can be effectively prosecuted. This training should also include measures to encourage victims of racist acts to come forward with complaints.
47. National anti-discrimination bodies, as described by ECRI in its General Policy Recommendation No.2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level can also play a very important role. Depending on their mandate, they may provide victims with information about their rights, give them legal advice, carry out investigations, negotiate settlements and conduct mediation, take formal decisions or assist them in ordinary court proceedings.

*Paragraph 7 of the Recommendation:*

*“To organise and finance anti-racism awareness raising campaigns”*

48. One of the major problems for combating racism and racial discrimination in sport is the lack of awareness of the existence of these phenomena and of their seriousness. In fact, there are only a few countries and a few sport disciplines, where this problem is acknowledged and addressed and even where it is done, awareness-raising measures mainly address racist fan behaviour. ECRI is, in contrast, convinced that anti-racism campaigns should be devised to address all

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<sup>10</sup> This definition contained in General Policy Recommendation No.11 is drawn from the 1999 Stephen Lawrence Inquiry Report by Sir William Macpherson of Cluny (Cm 4262, Chapter 47, paragraph 12).

the different forms of racism and racial discrimination in sport, as described in previous parts of this Recommendation.

49. Governments should either organise or coordinate such awareness-raising campaigns themselves or provide sufficient funding for them to be carried out by other relevant actors in this field, including by international sports federations, European organisations, national sports federations and clubs, educational institutions, national anti-discrimination bodies, minority organisations and anti-racism NGOs.

*Paragraph 8 of the Recommendation:*

*Local authorities*

50. Local authorities should adopt equality or anti-racism action plans, setting out a strategy and concrete measures for integrating the fight against racism and racial discrimination in all their activities.
51. As regards the field of sport, concrete measures should be first discussed within the local bodies dealing with sport, bringing together the relevant politicians, civil servants, sports organisations, sports clubs, sporting ground owners, as well as civil society representatives, including minority groups.
52. Special emphasis should be placed on encouraging and supporting movements and initiatives to promote tolerance and sportsmanship, as well as educational and social projects.
53. Local authorities have also the responsibility to ensure that the local police force receives adequate training in dealing with racist incidents in and around sporting grounds.

*Paragraph 9 of the Recommendation:*

*Police*

54. The police play a vital role in preventing and responding to racist incidents both in and outside sporting grounds. Police officers therefore have to receive regular training on how best to deal with racist incidents and how to identify their perpetrators.
55. In order to successfully prevent and respond to racist incidents related to sporting events, the police have to work in close cooperation with the security personnel of the organisers of such events. The practical terms of this cooperation could be laid down in special agreements between the police and the organisers.
56. In addition, the police should assist the organisers of sporting events in the fight against racism and racial discrimination by providing them in advance with any relevant security related information, collecting the necessary evidence and identifying the perpetrators of racist acts and putting racist incidents on the police record.

*Paragraph 10 of the Recommendation:*

*Sports federations and sports clubs*

57. In the framework of its country monitoring, ECRI has observed a certain attitude of denial on the part of certain sports federations and clubs as regards the existence of racism and racial discrimination in their particular sport discipline.

There are of course notable exceptions, but the average level of public commitment to combating these phenomena is rather low among these key actors in the field of sport. This has a variety of reasons, among which fears to destroy the positive image of sport play a considerable role. ECRI can understand these fears, but would like to point out that - if unaddressed - racism is able to fully develop its corrupting power, thereby tainting sport's image and undermining its very values.

58. Sports federations and clubs should therefore take a preventive approach to countering this dangerous phenomenon, including by establishing internal mechanisms for dealing with cases of racism and racial discrimination and by adopting and implementing self-regulatory, disciplinary and awareness raising measures.
59. As regards internal mechanisms for dealing with cases of racism and racial discrimination, sports federations and clubs should nominate a person responsible for combating racism and racial discrimination within their own internal structures. Furthermore, they should develop procedures and enter into agreements to foster the exchange of information concerning racist incidents.
60. As regards self-regulatory measures, sports clubs and federations should include anti-racism and equality clauses in their statutory regulations. They should produce codes of conduct clearly stating their commitment to promoting equality and tackling discrimination and distribute it to all their staff, volunteers, coaches and sport officials. They should organise regular trainings and awareness-raising sessions for their key staff, volunteers, coaches and sport officials. In addition, they should provide coaches and referees with clear guidelines as to how to deal with racist and discriminatory behaviour.
61. As regards disciplinary measures, they should expel racist offenders from stadiums, cancel their season ticket, pronounce stadium bans on persistent offenders and inform the police. In serious cases of racism committed by athletes, coaches or fans, referees should be able to discontinue sporting events and sports federations should be able to impose fines or withdraw points from the concerned athlete or sport club and/or to decide that future sports competitions are held behind closed doors.
62. As regards awareness raising measures, sports clubs and federations should publish announcements in sports competition programmes that they do not tolerate racism, condemn racist chanting and the displaying of extreme right symbols and salutes, and will take appropriate action. Furthermore, they should make regular stadium announcements against racism and xenophobia on the scoreboard and by the stadium speaker, display anti-racism banners during sport events and, if possible, organise special anti-racism days. Finally, they should integrate the anti-racist message in their communication strategy (e.g. websites, game programmes, fan magazines, billboards).
63. In addition to these self-regulatory, disciplinary and awareness raising measures, they should train their security personnel, including stewards how to prevent and adequately deal with racist incidents on the sporting ground. Part of this training should also be how to recognise racist behaviour, including more coded forms of racism (e.g. Neo-Nazi symbols).

64. The security personnel should be instructed to refuse access to the sporting ground to persons, who display or carry with them racist, antisemitic or discriminatory leaflets, symbols or banners. They also have to prevent the distribution and sale of racist material on or near the sporting ground.
65. Finally, information on racist incidents during sport events should be brought to the attention of the head of security and/or the police, which should give these incidents an appropriate follow-up and draw up an inventory of racist incidents for each sporting event.

*Paragraph 11 of the Recommendation:*

*Athletes and coaches*

66. Athletes and coaches often stand in the limelight of public attention. They are role models for young and old and they should therefore abstain from racist behaviour in all circumstances. At the same time, they should also report such behaviour when it occurs and bring it to the attention of sport governing bodies so that proper action can be taken.
67. In this context ECRI would like to acknowledge and welcome the personal commitment of certain athletes to combating racism and racial discrimination in the field of sport.

*Paragraph 12 of the Recommendation:*

*Referees*

68. Referees have special responsibilities, when racist incidents occur on the sporting ground. It is their duty to protect athletes from racist abuse on the sporting ground during competitions. In order to be able to react appropriately when athletes and/or supporters engage in racist gestures or expressions, they have to be able to identify racist behaviour as described in paragraph 40 of this Explanatory Memorandum. For this they should follow a special training course to improve their knowledge of the problem of racism and racial discrimination. Furthermore, they should be familiar with the anti-racism and equal opportunity policies of the relevant sports governing bodies and clubs involved in a particular competition.
69. In the event of a racist or discriminatory incident, the referee has to react promptly and take all the necessary steps to put an end to these occurrences. As regards more particularly racist shouting or chanting by spectators during a sporting event, a circular of the Belgian Directorate General for Security and Prevention Policy<sup>11</sup> provides very valuable guidance and requests referees to respond in the following manner to such incidents:
- a. they should summon the two captains of the team;
  - b. they should inform them of their intention to make an appeal via the stadium speaker;
  - c. they should ask the captains for their help to calm down the spectators;

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<sup>11</sup> Circulaire OOP 40 du 14 décembre 2006 portant des directives à l'encontre des propos et slogans blessants, racistes et discriminatoires scandés en chœur à l'occasion des matches de football.

- d. they should summon the persons responsible for the sporting ground and ask them to appeal to the spectators via the stadium speaker;
- e. they should take the decision to resume the game.

If despite these measures the behaviour is repeated, the Circular foresees that referees should proceed in the following manner:

- a. they should take the decision to momentarily interrupt the game;
- b. they should ask the teams to go to their dressing rooms;
- c. they should ask the persons responsible for the sporting ground to make a last appeal via the stadium speaker;
- d. they should resume the game after ten minutes;
- e. they should definitely stop the match if the behaviour is repeated, despite a first momentary interruption and after consultation with the security personnel and the police.

70. The referee has also to impose adequate sanctions for racist incidents taking place between athletes. For example, in football by showing the offending player the yellow or red card.

71. All racist incidents and referees' responses to them should be mentioned in the referee reports. These reports, which are usually centralised at the corresponding referee unions, should be also used to monitor racist incidents on the sporting ground.

*Paragraph 13 of the Recommendation:*

*Supporters' organisations*

72. Sport organisations and clubs should highly value contacts with their fans. Their love and enthusiasm for sport makes many sporting events a unique experience, but it must not be forgotten that some fans also show racist behaviour at such occasions. An effective means for countering such behaviour is to include anti-racism clauses in supporters' charters, which set out the club's obligations to its supporters and the supporters' obligations towards the club and clearly define each party's rights and duties.

73. In this context, supporters' organisations should be encouraged to take measures to also attract members from minority backgrounds and to be vigilant about possible racist content on their websites and fanzines.

74. Finally, their internal rules should also foresee procedures for excluding members from their organisation, who have engaged in racist or discriminatory acts.

*Paragraph 14 of the Recommendation:*

*Political actors and opinion leaders*

75. ECRI also considers it very important that political actors and opinion leaders take a firm public stance against racism in sports. In particular, ECRI would like to remind politicians that they should not try to trivialise the problem or even try to make electoral gains by making racist remarks about minority groups.

*Paragraph 15 of the Recommendation:*

*The media*

76. The media have a unique position in society and have an important influence on people's attitudes. Media representations of the different groups in society, the way journalists portray relationships between these groups and the way in which they report on events, may, in some cases, fuel stereotypes and prejudices. This is particularly true for the field of sport.
77. National authorities should therefore encourage the media, without encroaching on their editorial independence, to pay attention to the image that they convey of minority groups in the field of sport.
78. In particular, the media should avoid reporting on athlete or crowd behaviour in a manner which could foster confrontation. At the same time, sport journalists should pay special attention to avoid stirring up xenophobic or racist sentiments in their on-the-spot commentaries.
79. ECRI is aware that the media can play a very positive role in combating racism in sport, for example, when they draw attention to the occurrence of racist incidents on sports grounds, put them into the right context and later on also give publicity to the sanctions incurred by racist offenders. ECRI acknowledges and welcomes the positive role that certain media and journalists play in the fight against racism and racial discrimination in the field of sport.

*Paragraph 16 of the Recommendation:*

*Sponsors and advertising industry*

80. ECRI is concerned about the sometimes very stereotyped picture that is given of athletes from minority backgrounds in the advertising industry. There is also some evidence that athletes from minority backgrounds sometimes attract less interest from sponsors and/ or close sponsorship deals which are less advantageous than that of their counterparts from the majority population.

**III. Build a coalition against racism in sport, and to this end:**

*Paragraph 17 of the Recommendation*

*"To promote cooperation between all relevant actors"*

81. Governments should promote the cooperation between all relevant actors in this field, including ministries of education and sport, national and international sports federations, sports clubs, athletes, sports coaching and referees' unions, supporters' organisations, local authorities, educational institutions, national anti-discrimination bodies, minority organisations, sports and anti-racism NGOs, sponsors and the media.
82. In fact, in some Council of Europe member States national action plans to promote tolerance and fair play and to eliminate discrimination have been already adopted for this purpose. ECRI welcomes such efforts and appeals to other member States to follow their example.

83. These action plans should be accompanied by national framework agreements, outlining the responsibilities and tasks of each cooperation partner. Such agreements give their commitment to combating racism and racial discrimination a more binding character and also secure funding for anti-racism projects in the longer-term.

*Paragraph 18 of the Recommendation*

*“To promote the exchange of good practices”*

84. Special emphasis should be placed on the promotion of the exchange of good practices in the field of sport. Measures to be adopted in this context include the creation of a good practice award for combating racism and racial discrimination in sports, which could be organised, for example, by international or national sports federations with the financial support of governments and/or private sponsors.

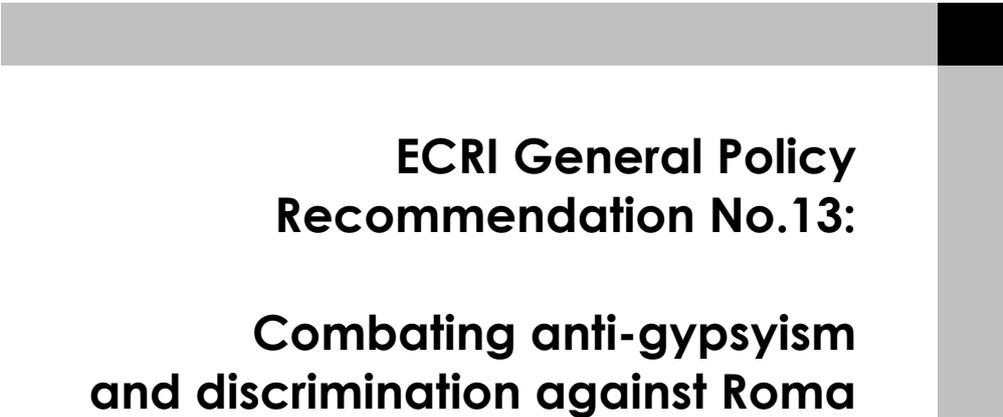
85. ECRI would also like to draw the attention of governments to the fact that national anti-discrimination bodies are often best placed to creating and maintaining a database of good practices on combating racism and racial discrimination in the field of sport.

*Paragraph 19 of the Recommendation*

*“To provide funding for social, educational and information activities”*

86. ECRI has also observed that there is a great problem of under-funding for initiatives aimed at combating racism and racial discrimination in the field of sport. As outlined in other parts of this Recommendation, there is a wide range of measures to be taken in this field and all of them need a sustained financial commitment on the part of governments.





**ECRI General Policy  
Recommendation No.13:  
Combating anti-gypsyism  
and discrimination against Roma**

Adopted on 24 June 2011



The European Commission against Racism and Intolerance (ECRI):

Having regard to the European Convention on Human Rights;

Having regard to Recommendation CM/Rec(2009)4 of the Committee of Ministers to member states on the education of Roma and Travellers in Europe (adopted on 17 June 2009);

Having regard to Recommendation CM/Rec(2008)5 of the Committee of Ministers to member states on policies for Roma and/or Travellers in Europe (adopted on 20 February 2008);

Having regard to Recommendation Rec(2006)10 of the Committee of Ministers to member states on better access to health care for Roma and Travellers in Europe (adopted on 12 July 2006);

Having regard to Recommendation Rec(2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe (adopted on 23 February 2005);

Having regard to Recommendation Rec(2004)14 of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe (adopted on 1 December 2004);

Having regard to Recommendation Rec(2001)17 of the Committee of Ministers to member states on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe (adopted on 27 November 2001);

Bearing in mind the work of the Committee of Experts on Roma and Travellers (MG-S-ROM);

Taking the work of the European Committee of Social Rights into consideration;

Bearing in mind the work of the Advisory Committee on the Framework Convention for the Protection of National Minorities;

Recalling ECRI's General Policy Recommendation No.3 on combating racism and intolerance against Roma/Gypsies, aimed at helping member states to take effective action against the discrimination which they experience;

Recalling ECRI's General Policy Recommendation No.10 on combating racism and racial discrimination in and through school education and its General Policy Recommendation No.11 on combating racism and racial discrimination in policing;

Stressing that in its country-by-country reports, ECRI has regularly recommended for very many years that member states take measures to combat the prejudice, discrimination, violence and social exclusion experienced by Roma and give the Roma identity a real chance of continued existence;

Stressing that over several years, the European Court of Human Rights has developed case-law concerning the discrimination Roma experience in various areas and has regarded them as a particularly disadvantaged and vulnerable minority thus requiring special attention;

Recalling that anti-Gypsyism is a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination;

Stressing that anti-Gypsyism is an especially persistent, violent, recurrent and commonplace form of

racism, and convinced of the need to combat this phenomenon at every level and by every means;

Recalling that discrimination against Roma is chiefly founded on their ethnic origin and lifestyle;

Deeply concerned by the increasing acts of violence inflicted on a large number of Roma, and by the too-frequent impunity that the culprits enjoy;

Recalling that the preservation of the distinctive identity of some Roma communities, to which their members remain attached, is challenged both by economic development and by failed attempts at integration;

Noting that for many Roma citizens of the European Union, the exercise of their right to move freely is hindered by administrative obstacles, and that they are the victims of intolerance and abusive practices;

Acknowledging, however, that many member states have adopted policies aimed on the one hand at improving the situation of Roma in areas such as education, employment, housing, health and culture, and on the other hand at combating the discrimination which they experience, and thus acknowledging the existence of a political will to solve the problems which Roma face;

Considering that local and regional authorities have a particularly important role to play in combating anti-Gypsyism;

Aware moreover of the numerous initiatives taken by the Council of Europe- including those by the Commissioner for Human Rights- the United Nations, the OSCE and the European Union to improve the lot of Roma, and taking note of the outcomes measured by such initiatives;

Observing that in spite of everything, the situation of Roma in most member states remains alarming and that the signs of anti-Gypsyism are continually increasing and worsening;

Noting with concern that the political discourse in many member states tends to stigmatise Roma and to incite hatred towards them;

Anxiously realising that public opinion in many member states remains openly hostile to Roma;

Noting with concern that some media convey a negative image of Roma;

Stressing that to be effective, action to combat anti-Gypsyism requires sufficient human and financial resources;

Considering that measures to aid preservation of the Roma identity constitute one of the instruments for fighting anti-Gypsyism;

Aware that any policy intended to improve the situation of Roma requires not only a long-term investment, but also clear political will, and the involvement of the Roma themselves as well as civil society in general;

Stressing that it is indispensable for the Roma community to realise the role which it must itself perform in combating anti-Gypsyism;

Recalling that Europe derives from its history a duty of remembrance, vigilance and resistance to the rise of racist, xenophobic, antisemitic and intolerant phenomena;

Recalling that the fight against racism, xenophobia, antisemitism and intolerance is an integral part of the protection and promotion of universal and indivisible human rights, standing for the rights of every human being with no distinction whatsoever;

Also observing that the persistent prejudice against Roma leads to discrimination against them in many areas of social and economic life, and that these provide considerable fuel for the process of social exclusion affecting Roma;

And,  
stating that, in the present recommendation, the term “Roma” includes not only Roma but also Sinti, Kali, Ashkali, “Egyptians”, Manouche and kindred population groups in Europe, together with Travellers, so as to embrace the great diversity of the groups concerned;

Recommends that the governments of member states:

1. if they have not yet done so, ratify Protocol No.12 to the European Convention on Human Rights, as well as the Framework Convention for the Protection of National Minorities;
2. employ, under a national plan, a comprehensive multidisciplinary approach to issues concerning Roma, involving their representatives in the conception, framing, implementation and evaluation of the policies that concern them;
3. enhance mutual trust between Roma and public authorities, in particular by training mediators from, among others, the Roma community;
4. combat anti-Gypsyism in the field of education, and accordingly:
  - a. give the implementation of ECRI’s General Policy Recommendation No.10 on combating racism and racial discrimination in and through school education high priority;
  - b. take measures for preventing and combating stereotypes, prejudice and discrimination experienced by Roma children in schools, by making parents of non-Roma children aware of it and by training teaching staff in particular for intercultural education;
  - c. include teaching on the Roma genocide (“Parrajimos”) in school curricula;
  - d. take urgent measures, including legal and political ones, to put an end to the segregation at school which Roma children are subjected to, and integrate them into schools attended by pupils from the majority population;
  - e. abolish the too-frequent placement of Roma children in special schools, making sure that Roma pupils not afflicted with mental disorders are spared such placement and that those already placed are speedily enrolled in ordinary schools;
  - f. combat, through sanctions, the harassment inflicted on Roma pupils at school;
  - g. take all appropriate measures to combat absenteeism and dropping-out among Roma children;

- h. carry out actions aimed at increasing Roma parents' awareness of the importance of nursery school, of preventing dropping-out, and of giving priority to their children's education;
- i. eliminate every financial and administrative obstacle to the access of Roma children to education;
- j. ensure that each Roma child has genuine access to nursery school;
- k. recruit school mediators, including among Roma to ensure a liaison between the school and Roma parents;
- l. ensure that a large number of Roma join the teaching profession to aid the school integration of Roma children;
- m. provide Roma pupils in need of it with preparatory and additional instruction in the official language(s);
- n. offer Roma pupils instruction in their mother tongue, upon the parents' request;
- o. take measures to ensure continuous schooling for children from travelling communities;
- p. facilitate access to life-long education for adult Roma desiring it;
- q. ensure that school textbooks do not convey stereotypes on Roma and do contain information on Roma language, culture and history and present the benefits brought by Roma to society;
- r. ensure that cases of discrimination against Roma in the sphere of education are prosecuted and punished;

**5. combat anti-Gypsyism in employment, and accordingly:**

- a. ensure that national legislation affords genuine protection against discrimination in employment and that it is indeed implemented;
- b. for that purpose, provide adequate training to civil servants;
- c. take positive measures for Roma in respect of employment, as concerns particularly recruitment and vocational training;
- d. promote Roma employment at all levels of the public sector;
- e. take measures to stamp out discrimination against Roma as regards recruitment and career development;
- f. help Roma suffering from discrimination in employment to assert their rights before appropriate civil or administrative bodies;
- g. conduct information and awareness campaigns in the private and public sectors in order to make the relevant legislation known and to improve its implementation as concerns Roma;
- h. remove any obstacles, including bureaucratic, to the exercise of traditional trades;
- i. in consultation with Roma, find alternatives to the vanished trades in which they have traditionally engaged, for instance by offering them

advantageous loans to set up their own businesses and/or propose tax benefits;

- j. ensure that cases of discrimination against Roma in employment are prosecuted and punished;

**6. combat anti-Gypsyism as regards housing and the right to respect for the home, and accordingly:**

- a. afford Roma access to decent housing;
- b. combat de facto or forced segregation in respect of housing;
- c. ensure that the provision of new social housing for Roma aids their integration and does not keep them segregated;
- d. ensure that Roma are not evicted without notice and without opportunity for rehousing in decent accommodation;
- e. take steps to legalise the occupation of Roma sites or dwellings built in breach of town planning regulations once the situation has been tolerated for a long period of time by the public authorities;
- f. promote coexistence and mutual understanding between persons from different cultures in neighbourhoods in which Roma and non-Roma live;
- g. combat prejudice and stereotypes concerning Roma and Travellers in respect of access to housing;
- h. combat any act of discrimination against Roma in respect of housing, particularly by ensuring that the legislation, including anti-discrimination legislation, is duly applied;
- i. take effective measures against refusal to enter Roma in the register of inhabitants when they wish to settle permanently or temporarily;
- j. ensure that spatial planning regulations do not systematically impede the traditional life of Travellers;
- k. ensure that appropriate encampment areas, whether for permanent occupation or transit, are available to Travellers in sufficient numbers on suitable and duly serviced sites;
- l. encourage consultation between all local players and Travellers about the positioning of encampment areas destined for them;
- m. ensure that acts of discrimination against Roma in respect of housing are prosecuted and punished;

**7. combat anti-Gypsyism in health care, and accordingly:**

- a. take measures to secure equal access to all quality health care to Roma;
- b. recruit health mediators, in particular from the Roma community to provide liaison between health personnel and managers and Roma;

- c. take positive measures to ensure that no financial or administrative hindrance impedes the access of Roma to health care and medical treatment;
- d. provide training to health workers aimed at combating stereotypes, prejudice and discrimination against Roma;
- e. ensure that acts of discrimination against Roma in the health sector are prosecuted and punished;
- f. expressly prohibit any practice of forced sterilisation of Roma women;
- g. prevent and combat any segregation in hospitals and in particular in maternity wards;

**8. combat racist violence and crimes against Roma, and accordingly:**

- a. pay particular attention to the implementation of ECRI's General Policy Recommendation No.11 on combating racism and racial discrimination in policing, especially Chapter III thereof on the role of the police in combating racist offences and following up racist incidents;
- b. set up a comprehensive system for recording acts of violence against Roma;
- c. take steps to encourage Roma victims of racist violence and crimes to lodge complaints, in particular by making them aware of the adequate bodies and by ensuring that if need be they receive the necessary assistance;
- d. give the police, prosecuting authorities and judges special training concerning the legislation punishing racist crimes and its implementation as concerns Roma victims;
- e. ensure that the police and the prosecuting authorities conduct the requisite investigations of racist crimes and acts of violence against Roma so that the culprits do not go unpunished;

**9. combat manifestations of anti-Gypsyism likely to come from the police, and accordingly:**

- a. pay particular attention to the implementation of ECRI's Recommendation No.11 on combating racism and racial discrimination in policing;
- b. encourage Roma who are victims of misconduct by the police to lodge complaints, offering them the necessary support;
- c. ensure that investigations are conducted where there are allegations of police misconduct towards Roma, and that the perpetrators are prosecuted and punished;
- d. train the police in human rights and relevant legislation, particularly in order to improve their relations with Roma communities;
- e. raise police awareness of the problems Roma face and give them training about the problems that affect Roma, particularly violence

and racist crimes, in order to better prevent and combat these phenomena;

- f. take measures to promote Roma recruitment to the police force by conducting, to that end, information campaigns in Roma communities;
- g. ensure that Roma enjoy equal opportunities for career development within the police;
- h. recruit and train adequate numbers of mediators, in particular from the Roma population in order to ensure a liaison between Roma and the police;
- i. ensure, in accordance with paragraph 10 of ECRI's General Policy Recommendation No.11, the creation of an independent body for investigating complaints made against the police, particularly by Roma;

**10. combat anti-Gypsyism expressed in the media while acknowledging the principle of their editorial independence, and accordingly:**

- a. ensure that the legislation is indeed applied to those media that incite discrimination, hatred or violence against Roma;
- b. encourage the media not to mention the ethnic origin of a person named in articles or reports when it is not essential for a good understanding of events;
- c. encourage the media to adopt a code of conduct for preventing, inter alia, any presentation of information that conveys prejudice or might incite discrimination, hatred or violence against Roma;
- d. encourage the media to refrain from broadcasting any information likely to fuel discrimination and intolerance towards Roma;
- e. support all initiatives taken to impress the dangers of anti-Gypsyism upon media professionals and their organisations;
- f. encourage the professional bodies of the media to offer journalists specific training on questions relating to Roma and anti-Gypsyism;
- g. promote the participation of Roma in the media sector in general by taking steps for journalists and presenters from among Roma communities to be recruited and trained;

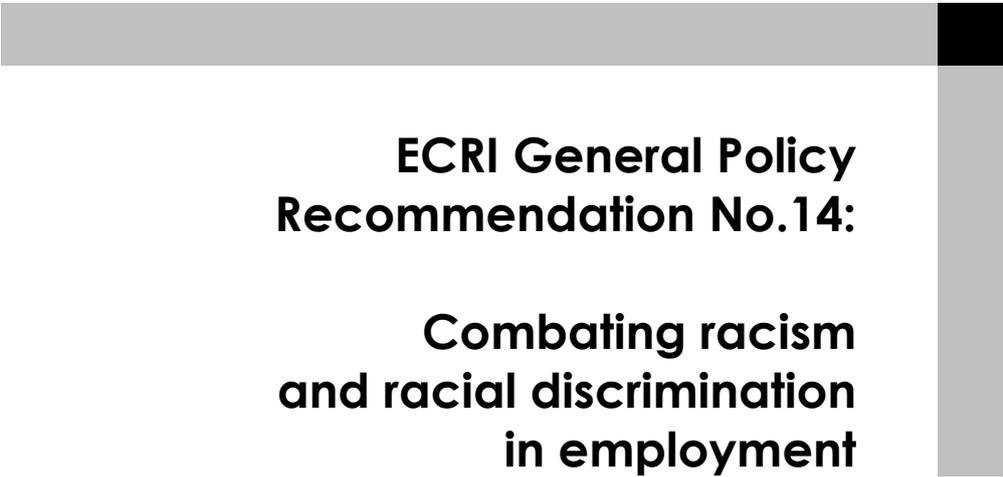
**11. combat anti-Gypsyism as regards access to places open to the public, and accordingly:**

- a. ensure that the anti-discrimination legislation is applied to the owners or persons in charge of a place open to the public who deny entry to Roma;
- b. take measures to encourage private security firms to raise their personnel's awareness and to train them in order to avoid any discriminatory attitude and behaviour towards Roma;

- 12. combat anti-Gypsyism as regards access to public services, and accordingly:**
  - a. ensure that Roma have access to social welfare allowances on the same terms as the rest of the population, and that the legislation against discrimination is applied if necessary;
  - b. ensure that Roma communities concentrated in certain neighbourhoods or villages are not disadvantaged in respect of public services such as water supply, sanitation, electricity, refuse removal, transport, access to the road system and road maintenance;
  - c. offer civil servants training in the prevention of racism and discrimination against Roma and in the relevant legislation;
  - d. encourage Roma to lodge complaints where they consider themselves victims of discrimination on the part of civil servants;
  - e. prosecute and punish civil servants committing discrimination against Roma;
  - f. ensure that Roma enjoy the same type and quality of services as the rest of the population;
- 13. combat anti-Gypsyism in access to goods and services, in particular in the banking and insurance sectors;**
- 14. in order to better measure the problems with the aim of combating them more effectively and to adapt policies to be undertaken, collect statistical data on Roma, in particular in the fields of education, employment, housing and health, by ensuring respect for the principles of confidentiality, voluntary self-identification and informed consent;**
- 15. to condemn all public discourse which publicly incites direct or indirect discrimination, hatred or violence against Roma;**
- 16. to encourage a monitoring system of expressions of anti-Gypsyism on the Internet and ensure effective prosecution, by following the principles set out by the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, and their implementation;**
- 17. in general, in order to combat anti-Gypsyism and discrimination against Roma, ensure:**
  - a. that the name used officially for the various Roma communities is the name by which the community in question wishes to be known;
  - b. the promotion and protection of Roma culture, fostering the rest of the population's better knowledge of Roma communities as well as the advancement of intercultural dialogue;
  - c. the advancement of Roma women and of their rights, and combat the multiple discrimination which they may face ;
  - d. that all Roma children are registered at birth;
  - e. that all Roma are issued identity documents;

- f. that legislation concerning citizenship is not discriminatory towards Roma;
- g. citizenship for Roma to obviate all cases of statelessness;
- h. that the legislation, and its implementation, on the freedom of movement of persons are not discriminatory towards Roma;
- i. adequate political representation enabling Roma to have their voices heard;
- j. access for Roma to legal aid so that they may assert their rights in all eventualities;
- k. the promotion of sport in so far as it promotes respect for diversity and facilitates the integration of Roma.





**ECRI General Policy  
Recommendation No.14:**

**Combating racism  
and racial discrimination  
in employment**

Adopted on 22 June 2012



The European Commission against Racism and Intolerance (ECRI):

Recalling that Article 1 of the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights;

Having regard to the European Convention on Human Rights, in particular its Article 14 which contains a non-discrimination clause concerning the enjoyment of the rights set forth in the Convention and its Protocol No.12 which contains a general clause prohibiting discrimination;

Having regard to the case-law of the European Court of Human Rights;

Having regard to the European Social Charter (revised), in particular its Articles 1, 19 and E;

Having regard to the case law of the European Committee of Social Rights;

Having regard to the Framework Convention for the Protection of National Minorities, in particular its Articles 4 and 15;

Having regard to the work of the Advisory Committee on the Framework Convention for the Protection of National Minorities;

Having regard to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and its related instruments;

Having regard to the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;

Having regard to the International Convention on the Elimination of all Forms of Racial Discrimination, in particular its Articles 1 and 5;

Having regard to the International Covenant on Economic, Social and Cultural Rights, in particular its Articles 6, 7 and 8;

Having regard to the International Labour Organisation Discrimination Convention (n. 111) and Domestic Workers Convention (n. 189);

Taking into account the Charter of Fundamental Rights of the European Union;

Taking into account Directive 2000/43/EC of the Council of the European Union implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC of the Council of the European Union establishing a general framework for equal treatment in employment and occupation;

Recalling that ECRI is entrusted with the task of combating racism, racial discrimination, xenophobia, antisemitism and intolerance in greater Europe from the perspective of the protection of human rights;

Recalling ECRI's General Policy Recommendation No.1 on combating racism, xenophobia, antisemitism and intolerance, ECRI's General Policy Recommendation No.2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level, ECRI's General Policy recommendation No.7 on national legislation to combat racism and racial discrimination as well as ECRI's General Policy Recommendation No.13 on combating anti-Gypsyism and discrimination against Roma;

Stressing that, in its country-by-country reports, ECRI regularly recommends to member States the adoption of effective legal measures aimed at combating racism and racial discrimination in employment;

Recalling the Committee of Ministers Recommendations Rec(89) 2 on the protection of personal data used for employment purposes, Rec(2001)17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe, Rec(2004) 2 on the access of non-nationals to employment in the public sector and CM/Rec(2008)10 on improving access of migrants and persons of immigrant background to employment;

Having regard to the so called Paris Principles on minimum standards concerning national human rights institutions adopted unanimously by the UN General Assembly in 1993;

Having regard to the UN Refugee Convention Relating to the Status of Refugees of 1951, in particular its Article 3;

Having regard to the rights of minorities to effectively participate in economic life as protected by the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, in particular its Article 2(2), and to the UN Human Rights Council recommendations in particular A/HRC/16/46 *“Recommendations of the Forum on Minority Issues at its third session, on minorities and effective participation in economic life”* 14 and 15 December 2010;

Recalling that the fight against racism, racial discrimination, xenophobia, antisemitism and intolerance is an integral part of the protection and promotion of universal and indivisible human rights of every human being with no distinction whatsoever;

Aware of the multiple forms of discrimination against groups of concern to ECRI including on the basis of age, disability, gender, gender identity or sexual orientation, and that ethnic minority, migrant, asylum-seeking and refugee women face

additional barriers in relation to access to, participation and advancement in employment;

Aware that laws alone are not sufficient to eradicate racism and racial discrimination, but convinced that laws are essential in combating racism and racial discrimination in employment;

Stressing that to be effective, action to combat racism and racial discrimination in employment requires sufficient human and financial resources;

Stressing the importance of the role of local and regional authorities in employing and providing services to members of groups of concern to ECRI;

Aware that eliminating racial discrimination, achieving equality in the field of employment and creating an integrated workforce requires member States to collaborate with the social partners, particularly with employers, trade unions and civil society organisations;

Stressing the importance to successful businesses of creating workplace environments where workers are respected and their contributions valued, regardless of their “race”<sup>1</sup>, colour, language, religion, nationality or national or ethnic origin;

Emphasising that eliminating racial discrimination and providing equality of access to employment and to promotion can result in the creation of a diverse workforce which offers an unlimited pool of talent to employers and stressing that an inclusive working

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<sup>1</sup> Since all human beings belong to the same species, ECRI rejects theories based on the existence of different races. However, in this Recommendation ECRI uses this term “race” in order to ensure that those persons who are generally and erroneously perceived as belonging to another race are not excluded from the protection provided for by the Recommendation.

environment which promotes and respects diversity is of benefit to employers, employees and the whole of society;

Emphasising that the promotion of non-discrimination is a corporate social responsibility and a good marketing tool for employers and that a reputation for discrimination could have a negative impact on a company's profitability;

Emphasising that employing people with the knowledge of the culture, language and networking in the countries of foreign trading partners is of benefit to employers;

Aware that knowledge of the right to equality and to be protected from unlawful discrimination as well as knowledge of the existence of specialised bodies or of complaint mechanisms are low across the Council of Europe member States and that this lack of awareness is more acute among particularly disadvantaged groups;

Stressing the importance of ensuring that individuals who complain of discrimination, or people who provide them with support to complain or who act as witnesses in discrimination cases must be protected from reprisals and are entitled to legal protection against any adverse treatment which may result from their actions;

Recommends that the governments of member States:

1. Take all necessary action to eliminate de jure and de facto racism, racial discrimination and racial harassment on grounds such as "race", colour, language, religion, nationality, or national or ethnic origin (hereafter: racism, racial discrimination and racial harassment) in employment in both the public and private sectors and adopt national law and enforcement mechanisms which ensure the active enforcement of rights and full equality in practice.
2. Adopt, under a national plan, a comprehensive multidisciplinary strategy to promote equality and eliminate and prevent racism, racial discrimination and racial harassment in employment, including strategies for improving the integration of groups of concern to ECRI and their equal participation in employment and economic activity.
3. Take into account the provisions of the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive 2000/78/EC in particular:
  - a. the requirements to disseminate information on discrimination law and
  - b. promote dialogue with the social partners with a view to fostering equal treatment.
4. Adopt a national plan for all national government departments, regional and local authorities, and state agencies to enable the social partners and civil society organisations articulating the interests of groups experiencing inequality and disadvantage to be consulted and provide expertise on the most effective methods to promote equality and eliminate racial discrimination and racial harassment in employment.

5. With a view to ensuring full equality in practice, adopt legislation permitting positive action and promote and provide clear guidance on positive action measures in employment which prevent or compensate for disadvantages linked to the enumerated grounds.
6. Ratify Protocol No.12 to the European Convention on Human Rights, the Framework Convention for the Protection of National Minorities, the European Social Charter (Revised) (accepting the system of collective complaints), the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, as well as the International Labour Organisation Convention Concerning Decent Work for Domestic Workers.

## 1) LEGAL REVIEW

Ensure that national legislation affords genuine protection against direct and indirect discrimination in employment and that it is implemented in practice, *inter alia* through encouragement of self-regulation of the private sector, and, accordingly:

- a) Ensure that national anti-discrimination employment law applies to all employers, including public authorities, natural and legal persons, and guarantees equality in all spheres of public and private employment and occupation.
- b) Ensure that the scope of national anti-discrimination employment law includes membership of and involvement in professional organisations and trade unions and the enjoyment of the benefits provided by such organisations, collective bargaining, remuneration, vocational training and guidance, social protection and the exercise of economic activity.
- c) Enact legislation against discrimination on more than one ground to provide protection from multiple forms of discrimination.
- d) Ensure that discriminatory provisions which are included in individual or collective contracts or agreements, internal regulations of enterprises, and rules governing the independent professions, access to credit and loans, and workers' and employers' organisations are amended or abrogated.
- e) Drawing upon regular monitoring of equality data relating to employment, provide the necessary legal tools to review the compliance of all laws, regulations and administrative provisions at the national and local level with the prohibition of racial discrimination in employment. Laws, regulations and administrative provisions, including obstacles to the hiring of workers from the groups of concern to ECRI, found not to be in conformity with the prohibition of discrimination, should be amended or abrogated.

### Public procurement

- f) Enact legislation permitting contracting authorities additional possibilities of imposing sanctions in the public procurement process on economic operators who have violated international obligations regarding non-discrimination, including EU standards in the field of social and labour law or international social law.

### **Legal duties on public authorities**

- g) Enact legislation requiring public authorities when carrying out their functions, including their employment functions, to promote equality and prevent and eliminate racism, racial discrimination and harassment on the enumerated grounds.

### **Legal duties on employers**

- h) Enact legislation requiring all employers to promote equality, prevent and eliminate racism, racial discrimination and racial harassment in employment.
- i) Enact legislation ensuring that harassment is prohibited in employment and all employers are required to ensure that the work place is free from racial harassment or intolerance.
- j) Enact legislation making the employer liable for acts of unlawful racial discrimination or racial harassment committed in the course of employment. The employer will be liable unless he or she can prove that he or she took such steps as were reasonably practicable to prevent the unlawful acts.
- k) Reinforce the work of existing labour inspection services and provide them with sufficient resources to deal effectively with the elimination and prevention of racism, racial discrimination and racial harassment in employment.

### **Reprisals**

- l) Enact legislation providing protection against dismissal or other retaliatory action for workers who complain of racial discrimination or racial harassment and ensure that those who act as witnesses or provide support to them including employees or others who report such acts or provide evidence are protected from any adverse treatment as a result.

## **2) KNOWLEDGE OF LEGISLATION**

Take steps to improve knowledge of equality rights and of the existence of specialised bodies and complaint mechanisms, including provisions for mediation, reconciliation and arbitration, among groups of concern to ECRI and to improve knowledge of anti-discrimination law and practice among judges and lawyers and, accordingly:

- a) Promote the engagement of civil society groups representing the interests of those who experience racial inequality in the national strategy to eliminate racial discrimination.
- b) Develop a national education and capacity building strategy to enhance the capacity of members of groups of concern to ECRI to challenge racism, racial discrimination and racial harassment in employment.
- c) Protect and support the advocacy work of civil society organisations working to eliminate racial discrimination and advance equality.

- d) Provide training for judges, prosecutors, lawyers as well as all relevant government officials in anti-discrimination law and practice.
- e) Provide training for employers in their duties and responsibilities under national anti-discrimination law including in the rights of workers to be treated with respect and to be free from racial discrimination or racial harassment in employment.

### 3) ACCESS TO JUSTICE

Improve the access of victims of discrimination to justice and ensure that accessible legal or administrative processes providing prompt and effective remedies are available to them and, to that end:

- a) Review access to judicial and/or administrative proceedings dealing with complaints of employment discrimination to ensure that these are easily accessible to groups of concern to ECRI, including reviewing time limits.
- b) Enact legislation to require a sharing of the burden of proof between complainants and respondent employers, and provide practical guidance and training for judges and lawyers in its application.
- c) Establish procedures which require the employer to provide the complainant with an explanation of the facts in dispute in a prospective or actual discrimination complaint.
- d) Provide that the law should guarantee free legal aid<sup>1</sup> for racial discrimination and racial harassment cases in the field of employment before the competent tribunal and, where necessary, a court-appointed lawyer, for victims who wish to go before the courts as applicants or plaintiffs and who do not have the necessary means to do so. If necessary, an interpreter should be provided free of charge.
- e) Ensure that the national anti-discrimination legislation enables specialised bodies or other similar institutions, trade unions, associations and non-governmental bodies, which have, according to the criteria laid down by the national law, a legitimate interest in combating racism and racial discrimination, to bring employment discrimination cases to the relevant tribunal. The law should permit such bodies to bring cases either on behalf of or in support of the victim, provided the victim gives his or her consent in writing.
- f) Establish accessible procedures for resolving employment discrimination complaints through alternative dispute resolution processes such as mediation, conciliation and arbitration.
- g) Enable the competent tribunals to consider evidence obtained as a result of situation testing in accordance with the national legal system.

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<sup>1</sup> In line with General Policy Recommendation No.7 and in accordance with the national eligibility criteria.

#### 4) RECRUITMENT

Take action to eliminate racial discrimination from all recruitment and selection procedures and ensure that such procedures guarantee equal opportunities for all applicants and, accordingly:

- a) Ensure that employers test and review their recruitment and selection procedures to eliminate racism and direct and indirect racial discrimination, including reviewing their conditions for access to employment, selection criteria, recruitment processes, as well as selection for promotion and access to training opportunities and practical work experience.
- b) Encourage employers to ensure that their recruitment and selection criteria focus on the experience, qualifications and competencies required for each post.
- c) Enact legislation making it unlawful to publish or to cause to be published an advertisement which has a discriminatory purpose or effect.
- d) Empower the specialised body to monitor and take action to prevent discriminatory advertisements.

#### 5) EQUALITY OF OPPORTUNITY

Take action to eliminate barriers to employment for members of groups of concern to ECRI which result from racism and racial discrimination and work to create an integrated workforce and, accordingly:

- a) Ensure that individuals of working age who are legally permitted to reside in the member State are entitled to a work permit, within a reasonable time period.
- b) Promote the development of mentoring and shadowing programmes to facilitate engagement between employers and members of groups of concern to ECRI.
- c) Enact legislation to establish national transparent mechanisms for the assessment, certification and recognition of qualifications including prior learning and previous experience, irrespective of the countries in which they were acquired and whether they were acquired formally or informally, without prohibitive translation or notary costs.
- d) Promote through campaigns and other means, the adoption and implementation of good anti-discrimination practice and equality and diversity standards across all areas of employment, including promoting the benefits to employers of a diverse and multicultural workforce.
- e) Establish language courses for members of groups of concern to ECRI free of charge whenever possible and encourage campaigns to enable their integration in the workplace.
- f) Ensure equal access to self-employment opportunities, such as access to finance and credit, for groups of concern to ECRI.

- g) Ensure that all employers provide equal opportunities for the progression of all members of groups of concern to ECRI in their careers and to that end provide them with the necessary in-service and other training.
- h) Ensure that management and human resources personnel receive the necessary initial training and professional support to be able to interact with ethnically, religiously and linguistically diverse employees and to eliminate and prevent racial discrimination and racial harassment.

## **6) RACIAL DISCRIMINATION**

Take steps to eliminate racial discrimination in the work place. In particular, take specific steps to eliminate racial harassment in employment and, to that end, conduct campaigns against racial harassment in employment and encourage employers to establish mechanisms to prevent such harassment, racism and intolerance in the workplace, including the adoption and implementation of anti-harassment policies and the appointment of appropriate staff and establishment of procedures, including mediation, to deal sensitively and quickly with harassment complaints.

## **7) POSITIVE ACTION**

Make full use of the provision for positive action measures in international and European anti-discrimination law and, to that end:

- a) Promote a labour market which adequately reflects the diversity of the population and take all necessary steps to overcome barriers to access to employment experienced by groups of concern to ECRI by, among others, investing in programmes that build employability skills for such groups.
- b) Enact legislation permitting employers to adopt temporary special measures designed either to mitigate or compensate for disadvantages suffered by persons designated by the enumerated grounds or to facilitate their full participation in employment. These measures should not be continued once the intended objectives have been achieved.
- c) Provide clear guidance, including practical examples, on the scope for employers to take specific positive action measures in employment.

## **8) SANCTIONS**

Ensure that the law provides victims of discrimination with effective remedies and that sanctions for unlawful racial discrimination and racial harassment in employment and recruitment are effective, proportionate and dissuasive and, accordingly:

- a) Review sanctions available to the relevant courts and tribunals to ensure they include powers, among others, to:
  - i. make a declaration on the rights of the complainant and the employer;
  - ii. order the employer to pay compensation for material and moral damages to the complainant;

- iii. punish persistently offending employers through imposing additional fines;
  - iv. where appropriate, order the reinstatement of the unlawfully dismissed complainant into the employer's work place;
  - v. make recommendations to employers and/or order change, within a specified period, in the employer's future practice and impose sanctions on employers who fail to comply.
- b) Empower relevant state bodies to suspend licences and permits, make declarations of non-compliance with anti-discrimination law and disqualify employers from tendering for public contracts.

## **9) STRENGTHEN POWERS AND ROLE OF SPECIALISED BODIES**

Ensure that the specialised bodies and other national institutions that combat racism and racial discrimination have the appropriate organisational structures, accountability mechanisms, leadership and adequate resources to be independent and effectively deploy their functions and use their resources strategically in accordance with the standards set by ECRI's General Policy Recommendations No.2 and No.7; to that end: review the powers of these institutions to enable them to work more effectively in the field of employment towards combating racial discrimination and racial harassment and to promote equality of opportunity including by empowering the bodies to bring cases before the courts and to intervene in legal proceedings as an expert.

## **10) GENERAL PROVISIONS**

Ensure that the national strategy to promote equality and eliminate and prevent racism, racial discrimination and racial harassment in employment is implemented at all government levels and supported with equality data and sufficient allocation of resources, and, accordingly:

### **Data collection**

- a) Implement effective monitoring and accountability of the national anti-discrimination strategy by developing indicators and setting benchmarks, gathering and monitoring equality data, establishing criteria for measuring and evaluating the impact of actions undertaken and, accordingly:
  - i. invest in, and create initiatives for, gathering and analysing employment equality data with compliance of data protection rules and consistent with the principles of confidentiality, informed consent and individuals' voluntary self-identification as members of a particular group, and in consultation with the groups concerned;
  - ii. require public authorities to monitor their workforce composition and make reports available on request to the specialised body;
  - iii. enable the specialised body to publish disaggregated data regularly on employment which is benchmarked and disaggregated by, among others, "race", colour, language, religion, nationality or national or ethnic origin.

### **National employment contract**

- b) Develop and promote the adoption by all employers of a national model employment contract which requires employers to meet minimum legal labour law and anti-discrimination standards and promote equality and diversity in employment.

### **Codes of conduct and equality plans**

- c) Develop and promote codes of conduct for good practice in employment and equality plans in order to create a diverse working environment which encourages respect for all. These will support employers to promote equality and eliminate and prevent racial discrimination and racial harassment in the workplace, including, among others, in recruitment and selection, in access to opportunities for training and promotion, and in termination of employment.
- d) Enable the specialised bodies to monitor the implementation of such codes and plans, and provide practical support to employers through the provision of training and materials, practical guidance on equality matters such as procurement, positive action and recruitment, and by encouraging employers to adopt equal opportunities and anti-harassment policies.

### **Incentives**

- e) Develop incentives to encourage employers to embrace good practice in employment, for example official recognition awards, tax reductions for employers with a multicultural workforce or for those undertaking agreed positive measures such as employing members of groups of concern to ECRI.

## EXPLANATORY MEMORANDUM

### Introduction

This General Policy Recommendation (hereafter: the Recommendation) focuses on combating racism, racial discrimination and racial harassment in the field of employment. It aims to develop and strengthen ECRI's General Policy Recommendation No.7 which sets out the elements that need to be included to ensure that national legislation to combat racism and racial discrimination is as comprehensive as possible. In particular, this Recommendation aims to ensure that adequate legislation is in place for combating racial discrimination and promoting equality in the field of employment. ECRI believes that both adequate legislation and the active promotion of equality are essential to enable groups of concern to ECRI to overcome barriers to employment and achieve full participation in the labour market. It recognises the important role public authorities, employers and the social partners play, in partnership with the national authorities, in achieving this goal through, among others, programmes for integration, good practice and positive action.

While positive outcomes from legislation outlawing discrimination in the field of employment are noted, ECRI's country monitoring work observes barriers to its implementation and effectiveness in most Council of Europe member States. Recalling that non-enforcement of relevant existing legislation discredits action against racism and intolerance in general, this Recommendation also provides guidelines to ensure that legal remedies are made accessible and are used in practice.

ECRI has also observed that racism and racial discrimination in employment manifest themselves in many different forms, including harassment, victimisation, discrimination by association, perceived discrimination, multiple discrimination, instructions to discriminate, aiding and abetting discrimination, and segregation. Therefore, this Recommendation emphasises the importance of ensuring equal opportunities in employment for all persons in practice, irrespective of the specific form in which racism and racial discrimination takes place.

The Recommendation covers the following phases of employment: conditions for access to employment, to self-employment and to occupation, including selection criteria as well as recruitment and promotion conditions, whatever the branch of activity and at all levels of the professional hierarchy; vocational guidance and training; conditions of employment, including remuneration; membership of trade unions and enjoyment of benefits of collective bargaining; working conditions; career development and advancement; and termination of employment.

The Recommendation is addressed to the governments of all Council of Europe member States, which are responsible for establishing an effective legal and political framework for combating racism, racial discrimination and racial harassment in society in general and in the field of employment in particular. It is their duty to ensure that all the relevant actors in this field, including public authorities and bodies (among others specialised bodies mandated to combat racism, xenophobia, antisemitism and intolerance at national level), social partners (among others, trade unions and employers' associations), NGOs and public and private employers take effective action against racism, racial discrimination and racial harassment in the field of employment.

In line with ECRI's mandate, the Recommendation concentrates on instances of racism and racial discrimination on the grounds of "race", colour, language, religion, nationality or national or ethnic origin (the enumerated grounds). However, ECRI is aware that discrimination, as well as harassment, in the field of employment also occurs on other grounds, such as age, disability, gender, gender identity or sexual orientation. Attention should be drawn to the fact that many of the recommendations contained in this text could be applied *mutatis mutandis* to these other grounds.

## Definitions

### ***"Racism and racial discrimination"***

In its General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination, ECRI defines racism and racial discrimination as follows:

a) *"racism" shall mean the belief that a ground such as "race", colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.*

b) *"direct racial discrimination" shall mean any differential treatment based on a ground such as "race", colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*

c) *"indirect racial discrimination" shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as "race", colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*

### ***"Groups of concern to ECRI"***

In its country-by-country monitoring work, as well as in its work on general themes, ECRI has dealt with the situation of numerous groups which are particularly vulnerable to acts of racism, xenophobia, antisemitism and intolerance. In ECRI's General Policy Recommendation No.4 on national surveys on the experience and perception of discrimination and racism from the point of view of potential victims, it is suggested that identification of such categories *"will depend according to national circumstances, and may include for example immigrant groups, national minorities and/or other vulnerable groups"*. ECRI's annual reports have listed under the category of "vulnerable groups" Roma<sup>1</sup>, migrants, Muslims, refugees and asylum seekers, members of Black and Jewish communities, as well as other religious minorities.

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<sup>1</sup> In its General Policy Recommendation No.13 on combating anti-Gypsyism and discrimination against Roma, ECRI states that the term "Roma" includes not only Roma but also Sinti, Kali, Ashkali, "Egyptians", Manouche and kindred population groups in Europe, together with Travellers, so as to embrace the great diversity of the groups concerned. The term of "Roma" used in this Recommendation refers to the same definition.

### **Paragraph 1 of the Recommendation (Legal Review)**

The Recommendation emphasises at paragraph 1(a) that the prohibition of racial discrimination in employment applies to all employers regardless of size, whether in the public or private sector. In its country-by-country monitoring ECRI notes that some national anti-discrimination law does not make it clear that employers who are natural or legal persons are liable for acts of unlawful discrimination. The Recommendation stresses that the prohibition on discrimination applies to employers that are either natural or legal persons.

The guarantee of equality and protection from racism, racial discrimination and racial harassment at paragraph 1(a) is intended to apply to all workers, however defined by national law. From its country-by-country monitoring ECRI is aware that national anti-discrimination law in some member States does not provide adequate protection against discrimination or harassment for workers such as contract workers, seasonal workers, agency workers, agricultural labourers, seafarers, military personnel and statutory officeholders. In addition, workers in certain sectors do not enjoy the protection of the law, for example, domestic workers undertaking work in private households. In many countries, domestic workers do not have the protection of national employment law and, as a result, they are particularly vulnerable to racial discrimination and racial harassment in respect of conditions of employment and work.

Paragraph 1(b) recommends member States to ensure that the scope of national anti-discrimination employment law has a broad application. The exercise of economic activity includes, among others, the issuing of permits to carry on a trade, for example street vending.

#### ***Multiple discrimination***

Paragraph 1(c) sets out a recommendation for member States to provide legal protection from multiple forms of discrimination. Some people experience disadvantage because of discrimination on several enumerated grounds. For instance, ethnic minority people may find themselves discriminated against not only because of their racial or ethnic origin but also because they are women, or disabled, or LGBT or old or any combination of these factors. “Multiple discrimination” refers to discrimination suffered on two or more enumerated grounds, for example, on the grounds of religion and gender as experienced by a Muslim woman.

“Intersectional discrimination”, which is a different concept and has only recently been recognised, at least in international fora, refers to a situation where several grounds interact with each other at the same time in such a way that they become inseparable and their combination creates a new ground. For instance an employer promotes both Black men and White women in his employment but never promotes Black women. The employer is not discriminating on grounds of “race” or gender, but may be doing so on grounds of a combination of “race” and gender. The concepts of multiple or intersectional discrimination are rarely covered by national discrimination law which tends to focus on one ground of discrimination at a time.

#### ***Equality data***

Paragraph 1(e) sets out a recommendation for member States, drawing on equality data, to provide the necessary legal tools to review the compliance of all laws, regulations and administrative provisions, as well as policies, with the prohibition on discrimination. ECRI has noted that relevant data broken down by different

categories such as “race”, colour, language, religion, nationality or national or ethnic origin can provide important baseline information on the situation of vulnerable groups to inform social policies targeted at equality in employment and also to evaluate the impact of such policies so that any necessary changes and adjustments may be made.

The collection of such data should be systematically carried out in accordance with the principles of confidentiality, informed consent and individuals’ voluntary self-identification as members of a particular group and with full respect of data protection principles established in the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has set out the principles governing the processing of personal data and taking account of recommendations adopted by the Committee of Ministers developing guidelines for the implementation of the Convention in specific sectors or circumstances.

### ***Public procurement***

The Recommendation in paragraphs 1(f) aims to ensure that public procurement is in conformity with the relevant commitments within WTO or EU standards, which require that all considerations in public procurement, including social considerations be linked with the subject matter of the contract. In addition to sanctioning, public authorities may be required to monitor and promote implementation of these contract clauses. Contractors may be further required to provide the contracting authority with an equality plan which should identify how the contractor promotes equality and non-discrimination in employment and in the provision of their services. The competition authorities or national specialised bodies may be involved in the process of evaluating and assessing these equality plans. Public authorities may also set exclusion criteria allowing them to take into account the previous record of the contractor in the field of non-discrimination, for instance a final judgment for offences relating to discrimination or the equal treatment of workers.

### ***Legal duty on public authorities***

In paragraph 1(g) it is recommended that the law should require public authorities when carrying out their functions, including their employment functions, to promote equality and prevent and eliminate racism, racial discrimination and racial harassment. This Recommendation aims to impose an obligation on public authorities actively to promote equality in employment and not merely to avoid discrimination.

ECRI recognises that public authorities, including local and regional authorities, act as major employers in many member States and as such should eliminate discrimination and promote equality in their employment practice. They also have an important role to play in providing a model of good employment practice to the public and private sectors.

The duty on public authorities to promote equality requires them to create and implement “equality programmes” drawn up with the assistance of the specialised body. Such equality programmes should include the public authorities’ employment function and require an assessment of the impact of all the authorities’ employment policies and decisions on the promotion of equality and the elimination of racism, racial discrimination and racial harassment. Understanding the potential impact of employment policy and decision-making on different groups in society will assist public authorities to make informed decisions and to eliminate any discrimination on the enumerated grounds.

Assessing the impact of employment policy or decision-making on equality may require an assessment or analysis of good equality data, gathered by a variety of means including consultation with the affected groups. The results of the assessment should inform and improve the authorities' decision-making processes.

For instance, where a public authority suspects that the proportion of ethnic, religious or linguistic minorities in its employment is low in comparison to the ethnic, religious or cultural profile of the society in which it operates, it should undertake an assessment of its staff by collecting equality data on the "race", colour, language, religion, nationality, and national and ethnic origin of its existing workforce. On the basis of this information, the authority could identify a number of gaps, such as an under-representation of vulnerable groups in its overall employment, or an under-representation at particular grades or levels of seniority within the authority. It should then undertake an analysis of its employment policies and practices and set objectives, within a specified timeframe, to meet the gaps identified, putting in place systems to monitor and evaluate equality data in targeted areas such as the success rates of job applicants, take-up of training opportunities, applications for promotion and success rates, grievances and complaints, dismissal, redundancy, retirement, and the length of service or time spent on different pay grades. Finally, it should monitor and evaluate over time its progress in achieving its equality objectives.

### ***Legal duty on employers***

In paragraph 1(h) it is recommended that the law should require employers to promote equality, prevent and eliminate racism, racial discrimination and racial harassment in employment. The employer could fulfil this duty by implementing an equality action plan which sets a timetable within which, among others, to develop or review equality and anti-harassment policies and procedures, review recruitment, selection and redundancy procedures, develop appropriate positive action measures, and develop and implement a programme of equal opportunities and harassment training for all staff. The equality action plan should set targets for achieving the actions and for monitoring and evaluating progress.

Promoting equality and preventing and eliminating racial discrimination in employment could include action to remove or minimise disadvantages experienced by groups of concern to ECRI. This could include identifying and removing barriers that prevent individuals from groups experiencing inequality from accessing employment, for example, because the job selection criteria include mother tongue language skills which are not necessary to do that particular job effectively and which act as a barrier to migrant workers or religious or ethnic minorities. Other examples include taking steps, within reasonable time limits, to meet the particular needs of religious minorities such as making a room available to staff for prayer, or, if the employer provides refreshments or meals for staff, meeting dietary requirements. Taking steps to meet the particular needs of linguistic minorities might include providing or translating essential employment documents into relevant minority languages. Other steps might include ensuring that workplace dress codes do not indirectly discriminate against vulnerable groups and that any restrictions on dress, including hairstyles, are justifiable.

### ***Harassment***

The Recommendation at paragraph 1(i) makes employers responsible for ensuring that the workplace is free from racial harassment. Harassment is one of the major forms of discrimination and it is difficult to prove. Racial harassment occurs when unwanted conduct related to the enumerated grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. For instance, if an employer mocks his/her employee's religious practice and beliefs and makes derogatory statements to him/her about his/her faith, these statements may amount to harassment on the grounds of religion.

Harassment can occur at the hands of the employer, his or her employees, agents, customers, service users or clients. Harassment by customers, service users or clients is a frequent occurrence in many workplaces which provide services to the public; for instance medical staff are particularly vulnerable to harassment when providing emergency or other health care services. The law should ensure that all workers are protected from unlawful harassment, whether at the hands of the employer, his or her employees, agents or the public who are customers, service users or clients.

### ***Vicarious liability***

The Recommendation provides in paragraph 1(j) that law be enacted which makes employers liable for acts of unlawful racial discrimination or racial harassment which are done in the course of employment. The employer will be liable unless he or she can prove that he or she took such steps as were reasonably practicable to prevent the unlawful acts.

The aim of vicarious liability is to make employers, not taking the necessary measures, legally responsible for acts of unlawful racial discrimination or racial harassment which are carried out by employees, agents, customers, service users or clients.

For instance, if a shopkeeper goes on holiday and an employee, who is left in charge of the shop, unlawfully harasses a colleague by making him the butt of racial jokes and insults, the shopkeeper could be held legally responsible for the actions of the employee.

Employers who use recruitment agencies or similar services are responsible for others' actions, so they must be sure that these services act appropriately and in accordance with the relevant equality and diversity policies. Therefore, the vicarious liability of employers should apply also on behalf of agents for their unlawful acts of racial discrimination or racial harassment against agency workers working for the employers.

However, the employer will not be legally responsible if he or she can show that they took all reasonable steps to prevent the unlawful acts of racial discrimination or racial harassment. Reasonable steps require the employer to be aware of what employees, agents, customers, service users or clients are doing and to take active measures to implement the employer's equality duty, such as having and putting into action an equality policy or providing equality training for workers.

### ***Labour inspection services***

The Recommendation provides in paragraph 1(k) that the work of existing labour inspection services should be reinforced and sufficiently resourced to effectively deal with the elimination and prevention of racism, racial discrimination and racial harassment in employment. By regularly visiting workplaces, labour inspectors can monitor and promote legal compliance with employment rights legislation. They can provide impartial information on a wide variety of employment rights legislation to employees, employers and the public through awareness raising programmes. They can monitor employment rights for all workers and seek redress. The Recommendation also provides that member States, if necessary, ought to review and increase existing labour inspection services assigning greater importance to their enforcement and advisory services. These powers are essential if employees keep quiet about discriminatory practices because they fear losing their jobs. Effective labour inspection services can reduce the need for victims to take legal action through the courts or even to give evidence.

### ***Reprisals***

In paragraph 1(l) it is recommended that the law should provide protection against dismissal or other retaliatory action for workers who complain of racial discrimination or racial harassment. Protection against victimisation, as a consequence of making a complaint or acting as a witness or otherwise in support of a person who has experienced discrimination, is essential if discrimination is to be eliminated from the workplace.

### **Paragraph 2 of the Recommendation (Knowledge of Legislation)**

Paragraph 2 sets out a recommendation for member States to take steps to improve knowledge of equality rights and of the existence of specialised bodies and complaint mechanisms among groups of concern to ECRI. ECRI's country's monitoring has often reported the lack of awareness among vulnerable groups of how to bring discrimination complaints and of sources of help in obtaining redress and this lack of awareness inhibits the reporting of discrimination complaints and the effectiveness of legal protection. This view is supported by research from other international organisations indicating that persons with an ethnic minority or immigrant background are often either unaware or unsure about the existence of anti-discrimination legislation, including in the field of employment, and about organisations that could offer support to victims of discrimination - be this a government-based or an independent institution such as specialised body or NGO.

To overcome these barriers to accessing justice, ECRI has often recommended that national authorities conduct appropriately targeted information and awareness-raising campaigns in the private and public sectors in order to make the relevant anti-discrimination legislation and existing remedies known, especially among the most vulnerable, and to improve its implementation. This could include initiating national and local information campaigns and other awareness activities on the relevant provisions of national anti-discrimination legislation among workers, especially among groups of concern to ECRI, as well as employers, employment agencies, national and decentralised public authorities. To overcome lack of knowledge of their right to protection, training should also target vulnerable groups, including migrant and other workers, in partnership with specialised bodies and trade unions. Information on relevant legislation should be made available in multiple

languages to reach a wider audience and to ensure that ethnic minority groups and migrants are also aware of their rights.

Training should also be offered to judges, prosecutors and lawyers to enhance understanding of European anti-discrimination standards and support the development of professional, impartial and independent adjudication of complaints in accordance with a fair procedure by properly qualified personnel.

Specialised bodies and others should provide support for employers on statutory duties, legal responsibilities, positive action and procurement. Action should be taken to encourage employers to disseminate information about workers' rights to equality and protection from discrimination and the available remedies in cases of discrimination.

Training for national, regional and local government officials, and civil servants on equality and non-discrimination linked to their specific job functions should also be provided. Recognising the powerful role of the media in influencing public opinion, ECRI recommends that journalists should also be trained in order, among others, to counter negative and stereotypical views of Roma and other vulnerable groups appearing in the media.

### **Paragraph 3 of the Recommendation (Access to Justice)**

The Recommendation provides in paragraph 3(a) that member States should review access to judicial and/or administrative proceedings dealing with complaints of employment discrimination to ensure that these are accessible to groups of concern to ECRI, including reviewing time limits, with a view to ensuring that complainants have access to justice.

ECRI considers that member States should ensure that, in practice, members of such groups should be able to make complaints, and that the judicial or administrative mechanisms are free, accessible and rapid. A low cost public advice service staffed by specialist advisors as well as, in urgent cases, fast-track procedures leading to interim decisions should be available to victims of discrimination. ECRI considers that, bearing in mind the complexity of anti-discrimination law, the lack of adequate representation and financial resources available to complainants and the unavailability of state funded legal aid, time limits for lodging complaints should permit complainants to obtain adequate specialist advice, prior to submitting complaints to the relevant tribunal.

### ***Burden of proof***

The Recommendation provides in paragraph 3(b) that law be enacted to require a sharing of the burden of proof between complainants and respondent employers.

A shared burden of proof means that the complainant should establish facts from which it may be presumed that there has been direct or indirect discrimination, whereupon the onus shifts to the respondent to prove that there was no discrimination. The employer must prove that he or she has not acted unlawfully and that any differential treatment was objectively and reasonably justified by reasons unrelated to the enumerated grounds.

For instance, in a situation where the owner of a small manufacturing company only allows staff to take annual leave during designated shutdown periods in August and December, a Muslim worker who is refused holiday time to undertake the Hajj

considers that he has been subjected to unlawful indirect discrimination on the grounds of religion. The worker must establish facts that demonstrate that the employer's annual leave policy adversely affects Muslim workers. The onus is then on the employer to prove that the annual leave policy has an objective and reasonable justification, such as the legitimate operational needs of his business. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's case that he or she has not breached the principle of non-discrimination.

Member States should provide practical guidance and offer training in the application of the shared burden of proof for judges and lawyers.

### ***Procedures regarding explanation of facts***

The Recommendation provides in paragraph 3(c) that member States should establish procedures which require the employer to provide the complainant with an explanation of the facts in dispute in a prospective or actual discrimination complaint. From its country-by-country monitoring ECRI is aware that complainants face difficulties in collecting the necessary evidence to prove discrimination complaints. Requiring the respondent in a discrimination complaint to provide, prior to the submission of the complaint, an explanation for the treatment complained of would reduce these difficulties and improve access to justice. The procedure could include powers to require the respondent employer to answer questions about the treatment complained of and power for the relevant tribunal to decide that, if the respondent deliberately, and without reasonable excuse, omitted to reply within a reasonable period or that his/her reply is evasive or equivocal, the tribunal could draw any inference from that fact that it considers it just and equitable to draw, including an inference that the employer committed an unlawful act.

For example, the legislation of a certain member State allows job applicants, who have a plausible claim that they have been discriminated in a recruitment process, to request that the employers provide information in writing concerning the education, working experience and other clearly ascertainable qualifications of the appointee for the post in question. However, the Court of Justice of the European Union concluded in a case referred by the German Federal Labour Court<sup>2</sup>, that EU non-discrimination legislation does not entitle a worker, who has a plausible claim that he/she meets the requirements listed in a job advertisement and whose application was rejected, to have access to information indicating whether the employer engaged another applicant. The Court concluded, however, that a refusal by the employer to disclose any such information may be one of the elements to take into consideration when establishing the presumption overturning the burden of proof (on the burden of proof see above).

### ***NGOs***

The Recommendation provides in paragraph 3(e) that national legislation should enable trade unions, associations and NGOs to bring employment discrimination cases where there has been a breach of discrimination law. It can be in the public interest to challenge such violations even in cases when the unlawful conduct has no specific victim; for instance, the publication by an employer of a job advertisement discouraging "immigrants" from applying.

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<sup>2</sup> Galina Meister case (C-415-10)

In employment cases victims of discrimination are in a vulnerable situation as the employment relationship is one of unequal power. Research shows that victims are also concerned about the negative consequences of bringing complaints, they do not know how to go about reporting complaints, are sometimes unaware of their rights, or they are discouraged by the complaints procedure. Free legal aid and the support of civil society groups may be critical in ensuring “equality of arms” between victims and employers. In certain member States both trade unions and public interest NGOs have standing to bring “actio popularis” discrimination cases which enables them to focus on institutional and structural discrimination where the rights of many are affected.

### ***Mediation and conciliation***

In paragraph 3(f) it is recommended to establish accessible procedures for resolving employment discrimination complaints through alternative dispute resolution processes such as mediation, conciliation or arbitration. The aim is to resolve disputes without recourse to legal procedures, thus avoiding costs, delay and a breakdown in employment relationships. The process of mediation uses a neutral mediator to assist the parties involved in a workplace dispute to reach a satisfactory solution which both sides are able to agree to. Mediation can involve face-to-face meetings between the parties with the assistance of the mediator. The process of conciliation involves an independent conciliator who works with the parties in dispute to find a solution that both sides find acceptable. Arbitration involves the appointment of an independent arbitrator who decides how the dispute is to be settled.

### ***Situation testing***

Paragraph 3(g) sets out a recommendation for member States to enable the competent tribunals to consider evidence obtained as a result of situation testing in accordance with the national legal system. Situation testing is an experimental method which aims to establish evidence of discrimination in practice. It consists in the process of creating artificially similar fact evidence that are based on circumstances similar to those which the actual victim experienced. The process tests the actions of the alleged discriminator analysing the employer’s response to the employee’s personal characteristics.

For instance, in one member State where a pharmacy was suspected of discrimination against Roma, a Roma woman applied for a job advertised by the pharmacy. She was told that it had already been filled. A non-Roma woman of the same age, acting as a tester and carrying a hidden cassette recorder, was offered an interview only minutes later and, even though she said that she had neither training nor experience, the employer indicated that she might be accepted. The Roma woman brought a claim before a court with the support of a NGO. The evidence from the test was declared admissible and she won her case. The respondent was ordered to apologise and pay damages to the claimant.

Situation testing can be a useful tool to overcome denials of the existence of discrimination. The evidence from the test can be admissible in court to support a claim that the employer behaved in a discriminatory manner. It can also be a useful tool for specialised bodies, NGOs, or researchers to raise awareness or as a quality control with regard to existing anti-discrimination practices.

#### **Paragraph 4 of the Recommendation (Recruitment)**

The Recommendation in paragraph 4 addresses recruitment and selection procedures to ensure that they guarantee equal opportunities for all applicants and that employers use a fair and objective procedure to recruit and select employees. In particular, paragraph 4(b) encourages employers to ensure that their recruitment and selection criteria focus on the experience, qualifications and competencies required for each post. A competency is an ability, skill, knowledge or attribute that is needed for successful performance in a job and is often defined in terms of behaviours, e.g. communication skills. The aim is to ensure that the employer uses justified criteria objectively to select employees which are based on the applicant's ability to effectively perform the tasks required.

Paragraph 4(c) sets out a recommendation for member States to enact legislation making it unlawful to publish or cause to be published an advertisement which has a discriminatory purpose or effect. It is good practice for employers to advertise widely for jobs so that they can attract and select staff from a wide and diverse pool of talent. The practice of recruitment from within the existing work force or on the basis of recommendations made by existing staff, rather than through advertising, can lead to discrimination. For example, where the workforce is drawn largely from one ethnic group, this practice can lead to continued exclusion of other ethnic groups. An advertisement can include a notice or circular, whether to the public or not, in any publication, on radio, television or in cinemas, via the internet or at an exhibition. Advertisements should not include any wording that suggests the employer might directly or indirectly discriminate by, for example, including words which suggest criteria that would disadvantage members of groups of concern to ECRI, unless the criteria can be objectively justified.

#### **Paragraph 5 of the Recommendation (Equality of Opportunity)**

Paragraph 5 sets out a recommendation for member States to take action to eliminate barriers to employment and paragraph 5(b) encourages them in particular to promote the development of mentoring and shadowing programmes.

Workplace mentoring is a learning partnership between employees for the purposes of sharing technical information, institutional knowledge and insight with respect to a particular profession. Formal mentoring programs allow organisations to create and nurture those relationships by matching more experienced employees (mentors) with less experienced employees to meet specific occupational objectives while helping those individuals in the mentoring relationship to identify and develop their own talents. Mentoring can be adapted to create an integrated workforce.

For instance, to address the under-representation of Black and other minority ethnic groups at senior levels in the broadcast media industry, a senior mentoring scheme was established with the aim to provide members of these groups with the support, encouragement and guidance necessary to reach the most senior roles in the industry. Participants were teamed up with a mentor for 12 months during which period they met with their mentor on a number of occasions to discuss where they were, where they would like to be in their career and how to get there. Targeted at talented staff, the scheme focused on overcoming barriers to progress, developing confidence, enhancing skills and finding ways to forward the participant's career, and educational and professional development.

Work shadowing is the process of accompanying and observing someone in work in order to train or gain an insight into a particular area of employment. Offering work shadowing or mentoring opportunities to people from a particular vulnerable group aims to raise aspirations and build knowledge and confidence among members of the group about applying for work or promotion opportunities, because they will know more about what is involved.

For instance, a judicial shadowing scheme could provide junior lawyers with an opportunity to gain insight into the reality of holding judicial office by allowing them to work shadow a serving judge. The experience could provide them with the opportunity to gain a better understanding of the role and responsibilities of judges and would open up the potential of applying for judicial office to individuals who might otherwise not consider this as a career path.

### ***Mechanism for recognition of qualifications***

In paragraph 5(c) it is recommended that member States enact legislation to establish a national transparent mechanism for the assessment, certification and recognition of qualifications. In the field of employment, groups of concern to ECRI experience additional discrimination in relation to the recognition of qualifications obtained abroad. Members of these groups tend to be employed in jobs that do not reflect their qualifications and they face barriers to progression within the job. Although employment in low paid sectors can be regarded as an entry point to higher wage levels, in practice this rarely happens. Employers justify this underemployment by pointing out that immigrants do not have sufficient national language skills despite the fact that many of the job opportunities denied to immigrants do not require higher level language requirements. Because of difficulties they experience in finding a job, members of groups of concern to ECRI may be forced to accept lower wages. ECRI considers that the underutilisation of the skills, qualifications and experience of such workers is a waste of talent and expertise. In certain countries, projects have been put in place to assist migrants by assessing their skills and giving them expert advice and guidance on recognition of their qualifications. At the same time specialised government agencies may exchange information internationally and assist in the establishment of appropriate and relevant standards for equivalent qualifications and skills in different national contexts. For instance, the remit of the National Academic Recognition Information Centres<sup>3</sup> could be extended to cover not only academic qualifications but also non-academic qualifications, including those obtained outside the European Union. These centres should be staffed and financed appropriately

### ***Good anti-discrimination practices and equality and diversity standards***

Paragraph 5(d) recommends the promotion of the adoption and implementation of good anti-discrimination practice and equality and diversity standards across all areas of employment.

Implementing good equality practices in the workplace greatly reduces the likelihood that employers will unlawfully discriminate and thereby face legal claims against them. Good practice can also help the employer conduct his/her core business

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<sup>3</sup> National Academic Recognition Information Centres and National Information Centres on academic recognition and mobility were established by the European Commission, the Council of Europe and UNESCO/CEPES to facilitate recognition of foreign diplomas, degrees and other qualifications.

better. Organisations have found that taking positive steps to promote equality and diversity has benefits which include;

- greater worker satisfaction, which helps attract new staff and retain those already there, reduced recruitment costs and increased productivity;
- improved understanding of the experience of their existing or potential customers, clients or service users;
- filling skills gaps.

Member States can assist employers to implement equality in the workforce, in the workplace and in customer and supplier activities by providing funding for the implementation of diversity taskforces in the workplace, including training and awareness raising activities on non-discrimination, equality and diversity management and by promoting the benefits to employers of a diverse and multicultural workforce.

#### **Paragraph 6 of the Recommendation (Discrimination in Employment)**

Paragraph 6 sets out a recommendation for member States to take steps to eliminate discrimination in employment. Racism and racial discrimination are not limited to the fringes of society and have many faces: in particular racial harassment in the workplace. Members of groups of concern to ECRI may be scapegoated for economic difficulties. If racism is to be rooted out completely, its manifestations such as ethnic slurs or verbal abuse in the workplace must be challenged.

Harassment adversely affects not only the victim, who may be unable to develop or function properly at work, but can also have a negative effect on the work environment. Employers should clearly communicate to all employees - through a written policy or other appropriate mechanisms - that harassment such as ethnic slurs or other verbal or physical abuse related to the enumerated grounds is prohibited. An employer also should have effective and clearly communicated policies and procedures for addressing complaints of harassment and should train managers on how to identify and respond effectively to harassment.

#### **Paragraph 7 of the Recommendation (Positive Action)**

Paragraph 7 sets out a recommendation for member States to make full use of the provision for positive action measures in international and European anti-discrimination law. Positive action includes temporary and proportionate measures or strategies to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity. Paragraph 7(a) sets out a recommendation for member States to enact legislation permitting employers to adopt special temporary positive action measures. Positive action can be critical in encouraging members of groups of concern to ECRI to participate in employment or economic life, particularly in areas where their participation is disproportionately low. Examples of positive action by member States include the development of programmes that build employability skills, such as apprenticeships and traineeships for vulnerable groups; the provision of adult education in areas where such groups live including vocational training and qualifications for higher-skilled sectors; targeted scholarships and research fellowships for higher education; free access to language and literacy training; ensuring equal access to new technologies, or training programmes (with provision for child care) targeted at women from vulnerable groups. Positive action aimed at improving Roma's participation in employment includes developing employment projects which are highly practical and offer

flexible training adjusted to their lifestyle and specific needs. The existing skills of Roma, which may have been acquired informally through experience and family transition, should be taken into account and accredited,

Positive action by employers includes, for instance, advertisements or other promotional work aimed at encouraging applications for jobs from members of groups of concern to ECRI as well as setting targets for recruitment and monitoring attainment of these targets.

#### **Paragraph 8 of the Recommendation (Sanctions)**

Paragraph 8 sets out a recommendation for member States to ensure that the law provides victims of discrimination with effective, proportionate and dissuasive remedies. At the same time it is important to convey a message to all employers and employees that discrimination will not be tolerated. These remedies include powers to the competent tribunal to make recommendations to employers and/or order change, within a specified period, in the employer's future practice. Such recommendations could include recommending or ordering the employer to adopt equality policies, end discriminatory practices, or train staff on anti-discrimination law and on good practice in employment.

#### **Paragraph 9 of the Recommendation (Specialised Bodies)**

The Recommendation in paragraph 9 focuses on strengthening the powers and the role of specialised bodies as envisaged by ECRI's General Policy Recommendations No.2 and No.7. Specialised bodies in different member States engage a wide range of powers in the fight against discrimination. These include the power to investigate complaints of discrimination and enforce compliance with the results of their investigations. Some specialised bodies have powers to take legal action in the public interest or to initiate an "actio popularis" to protect the rights of groups or individuals whose rights have been, or could be, violated by a particular course of action. Other examples include the legal standing to bring complaints to the relevant tribunal or court for discriminatory advertisements, discriminatory collective agreements, patterns of discrimination, persistent breaches of discrimination law, or a failure to implement an agreed equality programme or comply with a relevant statutory equality duty.

In its General Policy Recommendation No.2 ECRI has acknowledged that "*according to the legal and administrative traditions of the countries in which they are set up, specialised bodies may take different forms. The role and functions of such institutions should be fulfilled by bodies which may take the form of, for example, national commissions for racial equality, ombudsmen against ethnic discrimination, Centres/Offices for combating racism and promoting equal opportunities, or other forms, including bodies with wider objectives in the field of human rights generally*". However, recently ECRI has nevertheless been concerned about disproportionate reductions in the budgets of national specialised bodies. In ECRI's view, when assessing such bodies' need for funding, one must bear in mind the crucial role they are called upon to play, in particular in times of economic difficulty. Particular care should, therefore, be taken not to hamstring their efforts and undermine their credibility by scaling down their staff costs and general level of financing. Preserving their effectiveness should, on the contrary, be the overriding objective.

In relation to the equality duty on public authorities, ECRI has recommended that the law should provide effective implementation mechanisms, including the option of legal enforcement of equality programmes notably through the national specialised body.

Concerning discrimination in employment, specialised bodies or other similar institutions should have the legal means to be able to conduct independent surveys including opinion polls on the perception by the general population of racial discrimination in employment; these institutions should ensure adequate monitoring of the situation of all groups of concern to ECRI in the field of employment. In addition such Institutions should be able to conduct *ex officio* investigations, or investigations at request to establish whether the obligations of equal treatment in employment have been violated on grounds such as “race”, colour, language, religion, nationality or national or ethnic origin and be able to make decisions on the basis of the investigations.

An equality ombudsman should be identified within the organisation to whom people can turn for advice and support in discriminatory cases. This person should be well-rehearsed and knowledgeable of the individual’s rights and options for attaining protection.

The role of specialised bodies should be known to workers, victims of racial discrimination and other interested parties through relevant awareness raising activities. Specialised bodies should be able to undertake outreach work and provide independent assistance to victims of racial discrimination or racial harassment to enable them to pursue their complaints including legal advice, support to take legal action and legal representation.

Specialised bodies should have the power to make recommendations to national, regional and local government bodies, public authorities and employers. They should monitor media practice, undertake advocacy work with national associations, trade unions, civil society actors working on anti-discrimination in employment and with the media, professional and regulatory bodies for journalists, and promote best practice in the training of journalists, including on the reporting of “race” issues.

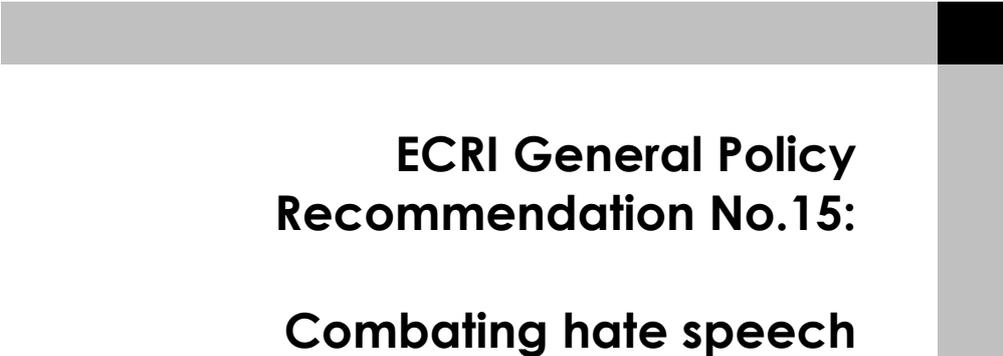
Specialised bodies should have sufficient resources in order to be able to advise and guide public authorities and employers on their legal equality duties and take legal action to enforce those duties. These institutions should establish dialogue with groups of concern to ECRI to learn from their experience in order to build mutual trust and develop effective methods of working.

#### **Paragraph 10 of the Recommendation (General Provisions)**

The Recommendation in paragraph 10 covers miscellaneous measures promoting non-discrimination in employment. A national employment contract can be a model employment contract which requires employers to meet minimum legal labour and anti-discrimination standards and promote equality and diversity in employment. It can be developed in consultation with business and trade unions. Codes of conducts provide practical guidance on how to implement anti-discrimination standards and to promote equality and diversity in employment. Once adopted by employers, they signal commitment on the part of employers to the principle of non-discrimination. They facilitate self-regulation and may attract a diverse workforce.

Besides systems of quota or fines, governments may develop positive incentives to encourage employers to embrace non-discrimination in employment. The incentives can be of financial nature, for instance tax or insurance reductions for employers with a multicultural workforce or funding for training programs. They can also be of non-financial nature, such as recognition awards or certificates.

Governments can also publish research on concrete examples of employees with a foreign background being of value to a company trading with the country in question. This will help highlight the benefit of employing people with the knowledge of the culture, language of and networking in the countries of foreign trading partners.



**ECRI General Policy  
Recommendation No.15:  
Combating hate speech**

Adopted on 8 December 2015



The European Commission against Racism and Intolerance (ECRI):

Reaffirming the fundamental importance of freedom of expression and opinion, tolerance and respect for the equal dignity of all human beings for a democratic and pluralistic society;

Recalling, however, that freedom of expression and opinion is not an unqualified right and that it must not be exercised in a manner inconsistent with the rights of others;

Recalling moreover that Europe derives from its history a duty of remembrance, vigilance and combat against the rise of racism, racial discrimination, gender-based discrimination, sexism, homophobia, transphobia, xenophobia, antisemitism, islamophobia, anti-Gypsyism and intolerance, as well as of crimes of genocide, crimes against humanity or war crimes and the public denial, trivialisation, justification or condonation of such crimes;

Recalling that this duty of remembrance, vigilance and combat is an integral part of the protection and promotion of universal and indivisible human rights, standing for the rights of every human being;

Taking note of the differing ways in which hate speech has been defined and is understood at the national and international level as well as of the different forms that it can take;

Considering that hate speech is to be understood for the purpose of the present General Policy Recommendation as the advocacy, promotion or incitement, in any form, of the denigration, hatred or

vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race",<sup>1</sup> colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status;

Recognising that hate speech may take the form of the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes;

Recognising also that forms of expression that offend, shock or disturb will not on that account alone amount to hate speech and that action against the use of hate speech should serve to protect individuals and groups of persons rather than particular beliefs, ideologies or religions;

Recognising that the use of hate speech can reflect or promote the unjustified assumption that the user is in some way superior to a person or a group of persons that is or are targeted by it;

Recognising that the use of hate speech may be intended to incite, or

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<sup>1</sup> Since all human beings belong to the same species, ECRI rejects theories based on the existence of different races. However, in this Recommendation ECRI uses this term "race" in order to ensure that those persons who are generally and erroneously perceived as belonging to another race are not excluded from the protection provided for by the Recommendation.

reasonably expected to have the effect of inciting others to commit, acts of violence, intimidation, hostility or discrimination against those who are targeted by it and that this is an especially serious form of such speech;

Aware of the grave dangers posed by hate speech for the cohesion of a democratic society, the protection of human rights and the rule of law but conscious of the need to ensure that restrictions on hate speech are not misused to silence minorities and to suppress criticism of official policies, political opposition or religious beliefs;

Conscious of the particular problem and gravity of hate speech targeting women both on account of their sex, gender and/or gender identity and when this is coupled with one or more of their other characteristics ;

Recognising that the use of hate speech appears to be increasing, especially through electronic forms of communication which magnify its impact, but that its exact extent remains unclear because of the lack of systematic reporting and collection of data on its occurrence and that this needs to be remedied, particularly through the provision of appropriate support for those targeted or affected by it;

Aware that ignorance and insufficient media literacy, as well as alienation, discrimination, indoctrination and marginalisation, can be exploited to encourage the use of hate speech without the real character and consequences of such speech being fully appreciated;

Stressing the importance of education in undermining the misconceptions and misinformation that form the basis of

hate speech and of the need for such education to be directed in particular to the young;

Recognising that an important means of tackling hate speech is through confronting and condemning it directly by counter-speech that clearly shows its destructive and unacceptable character;

Recognising that politicians, religious and community leaders and others in public life have a particularly important responsibility in this regard because of their capacity to exercise influence over a wide audience ;

Conscious of the particular contribution that all forms of media, whether online or offline, can play both in disseminating and combating hate speech;

Conscious of the harmful effects suffered by those targeted by hate speech, the risk of alienation and radicalisation ensuing from its use and the damage to the cohesion of society from failing to tackle it;

Recognising that self-regulation and voluntary codes of conduct can be an effective means of preventing and condemning the use of hate speech and that their use needs to be encouraged;

Stressing the importance of those targeted by hate speech being themselves able to respond to it through counter-speech and condemnation as well as through bringing proceedings in the competent courts and authorities;

Recognising that criminal prohibitions are not in themselves sufficient to eradicate the use of hate speech and are not always appropriate, but

nevertheless convinced that such use should be in certain circumstances criminalised;

Bearing in mind the six-point threshold test in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and being convinced that criminal prohibitions are necessary in circumstances where hate speech is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it;

Stressing the importance of not supporting organisations that facilitate the use of hate speech and the need to prohibit ones that do so when this is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it;

Stressing the need for a prompt and effective investigation into complaints about hate speech and avoiding undue

restrictive interpretations of provisions concerning its use;

Recalling that the duty under international law to criminalise certain forms of hate speech, although applicable to everyone, was established to protect members of vulnerable groups and noting with concern that they may have been disproportionately the subject of prosecutions or that the offences created have been used against them for the wrong reasons;

Recalling that the work of ECRI focuses on hate speech on the grounds of “race”, colour, language, religion, nationality, national or ethnic origin, gender identity or sexual orientation but recognising that hate speech can also be based on all the other considerations already noted, and that the recommendations contained in this text should be applied *mutatis mutandis* to them;

Recommends that the governments of member States:

1. ratify the Additional Protocol to the Convention on Cybercrime, concerning criminalisation of acts of a racist and xenophobic nature committed through computer systems, the Framework Convention for the Protection of National Minorities and Protocol No. 12 to the European Convention on Human Rights, if they have not yet done so;
2. withdraw any reservations to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and to Article 20 of the International Covenant on Civil and Political Rights and recognise the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals under Article 14;

3. **seek to identify the conditions conducive to the use of hate speech as a phenomenon and the different forms it takes, as well as to measure its extent and the harm that it causes, with a view to discouraging and preventing its use and to reducing and remedying the harm caused, and accordingly:**
  - a. develop reliable tools for this purpose;
  - b. ensure that there are public authorities designated for the purpose of using these tools and that this is done properly;
  - c. ensure that the gathering of data on hate speech is not limited to the criminal justice sector;
  - d. ensure that the data gathered is appropriately disaggregated;
  - e. support the monitoring of hate speech by civil society, equality bodies and national human rights institutions and promote cooperation in undertaking this task between them and public authorities;
  - f. support research that seeks to analyse the conditions conducive to the use of hate speech and its forms ;
  - g. disseminate, on a regular basis, data about the incidence of hate speech, as well as its forms and the conditions conducive to its use, both to the relevant public authorities and to the public; and
  - h. draw on the results of the monitoring and the research to develop strategies to tackle the use of hate speech;
4. **undertake a vigorous approach not only to raising public awareness of the importance of respecting pluralism and of the dangers posed by hate speech but also to demonstrating both the falsity of the foundations on which it is based and its unacceptability, so as to discourage and prevent the use of such speech, and accordingly:**
  - a. promote a better understanding of the need for diversity and dialogue within a framework of democracy, human rights and the rule of law;
  - b. promote and exemplify mutual respect and understanding within society;
  - c. facilitate and exemplify intercultural dialogue; and
  - d. combat misinformation, negative stereotyping and stigmatisation;

- e. develop specific educational programmes for children, young persons, public officials and the general public and strengthen the competence of teachers and educators to deliver them;
  - f. support non-governmental organisations, equality bodies and national human rights institutions working to combat hate speech; and
  - g. encourage speedy reactions by public figures, and in particular politicians, religious and community leaders, to hate speech that not only condemn it but which also seek to reinforce the values that it threatens;
  - h. encourage perpetrators to renounce and repudiate the use of hate speech and help them to leave groups that use it;
  - i. coordinate all such efforts, where appropriate, with those undertaken by other States and international organisations;
- 5. provide support for those targeted by hate speech both individually and collectively, and accordingly:**
- a. endeavour to help them, through counselling and guidance, to cope with any trauma and feeling of shame suffered;
  - b. ensure that they are aware of their rights to redress through administrative, civil and criminal proceedings and are not prevented from exercising them through fear, ignorance, physical or emotional obstacles or lack of means;
  - c. encourage and facilitate their reporting of the use of hate speech, as well as the reporting of it by others who witness such use;
  - d. sanction detrimental treatment or harassment of any person complaining about or reporting on the use of hate speech; and
  - e. show solidarity with and provide long-term support for persons targeted by hate speech;
- 6. provide support for self-regulation by public and private institutions (including elected bodies, political parties, educational institutions and cultural and sports organisations) as a means of combating the use of hate speech, and accordingly:**
- a. encourage the adoption of appropriate codes of conduct which provide for suspension and other sanctions for breach of their provisions, as well as of effective reporting channels;

- b. encourage political parties to sign the Charter of European Political Parties for a non-racist society;
  - c. promote the monitoring of misinformation, negative stereotyping and stigmatisation;
  - d. encourage the unambiguous condemnation of breaches of these codes;
  - e. support appropriate training as to the meaning and negative effects of hate speech, as well as about the ways in which its use can be challenged; and
  - f. promote and assist the establishment of complaints mechanisms;
- 7. use regulatory powers with respect to the media (including internet providers, online intermediaries and social media), to promote action to combat the use of hate speech and to challenge its acceptability, while ensuring that such action does not violate the right to freedom of expression and opinion, and accordingly:**
- a. ensure effective use is made of any existing powers suitable for this purpose, while not disregarding self-regulatory mechanisms;
  - b. encourage the adoption and use of appropriate codes of conduct and/or conditions of use with respect to hate speech, as well as of effective reporting channels;
  - c. encourage the monitoring and condemnation of the use and dissemination of hate speech;
  - d. encourage the use, if necessary, of content restrictions, word filtering bots and other such techniques;
  - e. encourage appropriate training for editors, journalists and others working in media organisations as to the nature of hate speech, the ways in which its use can be challenged;
  - f. promote and assist the establishment of complaints mechanisms; and
  - g. encourage media professionals to foster ethical journalism;

8. **clarify the scope and applicability of responsibility under civil and administrative law for the use of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those who are targeted by it while respecting the right to freedom of expression and opinion, and accordingly:**
  - a. determine the particular responsibilities of authors of hate speech, internet service providers, web fora and hosts, online intermediaries, social media platforms, online intermediaries, moderators of blogs and others performing similar roles;
  - b. ensure the availability of a power, subject to judicial authorisation or approval, to require the deletion of hate speech from web-accessible material and to block sites using hate speech;
  - c. ensure the availability of a power, subject to judicial authorisation or approval, to require media publishers (including internet providers, online intermediaries and social media platforms) to publish an acknowledgement that something they published constituted hate speech;
  - d. ensure the availability of a power, subject to judicial authorisation or approval, to enjoin the dissemination of hate speech and to compel the disclosure of the identity of those using it;
  - e. provide standing for those targeted by hate speech, equality bodies, national human rights institutions and interested non-governmental organisations to bring proceedings that seek to delete hate speech, to require an acknowledgement that it was published or to enjoin its dissemination and to compel the disclosure of the identity of those using it; and
  - f. provide appropriate training for and facilitate exchange of good practices between judges lawyers and officials who deal with cases involving hate speech;
9. **withdraw all financial and other forms of support by public bodies from political parties and other organisations that use hate speech or fail to sanction its use by their members and provide, while respecting the right to freedom of association, for the possibility of prohibiting or dissolving such organisations regardless of whether they receive any form of support from public bodies where their use of hate speech is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it;**

10. **take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected, and accordingly:**
  - a. ensure that the offences are clearly defined and take due account of the need for a criminal sanction to be applied;
  - b. ensure that the scope of these offences is defined in a manner that permits their application to keep pace with technological developments;
  - c. ensure that prosecutions for these offences are brought on a non-discriminatory basis and are not used in order to suppress criticism of official policies, political opposition or religious beliefs;
  - d. ensure the effective participation of those targeted by hate speech in the relevant proceedings;
  - e. provide penalties for these offences that take account both of the serious consequences of hate speech and the need for a proportionate response;
  - f. monitor the effectiveness of the investigation of complaints and the prosecution of offenders with a view to enhancing both of these;
  - g. ensure effective co-operation/co-ordination between police and prosecution authorities;
  - h. provide appropriate training for and facilitate exchange of good practices by law enforcement officers, prosecutors and judges who deal with cases involving hate speech; and
  - i. cooperate with other States in tackling the transfrontier dissemination of hate speech, whether in a physical or electronic format.

# Explanatory Memorandum

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## A. Introduction

1. This general policy recommendation (hereafter: the Recommendation) focuses on the phenomenon of hate speech and the damaging consequences of its use for individuals, certain groups of persons and society as a whole. These consequences have been noted particularly in the course of ECRI's country monitoring but are more generally appreciated. The Recommendation thus sets out ECRI's understanding of what constitutes hate speech and identifies the measures that can and need to be taken to combat its use. In so doing, it builds upon and strengthens certain aspects of General Policy Recommendations (GPR) Nos. 5, 6, 9 10 and 13, but especially GPR No. 7.
2. The starting point for the Recommendation is the recognition of the fundamental importance of freedom of expression, tolerance and respect for equal dignity, all of which are guaranteed under numerous international instruments accepted by member States of the Council of Europe. ECRI is aware, in particular, that any efforts to tackle hate speech should never exceed the limitations to which freedom of expression, as a qualified right, can legitimately be subjected. It is also aware that in some cases hate speech can be effectively responded to without restricting freedom of expression. For this reason, the Recommendation has a graduated approach to the measures that need to be undertaken. In particular, the view that the use of criminal sanctions should not be the primary focus of action against the use of hate speech reflects not only the importance of respecting the rights to freedom of expression and association but also an appreciation that addressing the conditions conducive to the use of hate speech and vigorously countering such use are much more likely to prove effective in ultimately eradicating it.
3. A definition of hate speech for the purpose of the Recommendation is set out in the recitals. In the operative part, the Recommendation first addresses the need, where this has not already occurred, for certain treaties to be ratified, as well as for a number of reservations to two other treaties to be withdrawn. In both cases, this is to reinforce the commitment to take appropriate measures against the use of hate speech and to ensure that there are no legal inhibitions on them being taken. It then underlines the need for various steps to be taken to increase understanding of the conditions conducive to the use of hate speech and the different forms it can take as this is recognised to be a prerequisite for any measures against such use to be effective.
4. The specific measures against the use of hate speech that ECRI considers to be necessary comprise efforts that involve: raising public awareness; countering any use of hate speech; providing support to those targeted by such use; promoting self-regulation; taking regulatory action; imposing

administrative and civil liability; withdrawing support from particular organisations and prohibiting others; and imposing criminal sanctions in some very specific and limited circumstances.

5. The Recommendation is addressed to the governments of Council of Europe member States. However, its effective implementation will clearly require the involvement and commitment of a wide range of private and non-governmental actors, in addition to the public ones. It will, therefore, be essential to ensure that appropriate steps are taken to secure their active participation in the process of implementation.
6. Although the Recommendation is particularly concerned with the use of hate speech falling within ECRI's work, its provisions are envisaged as being applicable to all forms of such speech, i.e., on grounds additional to "race", colour, language, religion, nationality, national or ethnic origin, gender identity or sexual orientation.

## **B. Definition(s)**

### *Terminology*

7. For the purposes of this Recommendation, the following definitions shall apply:
  - a. "advocacy" in connection with denigration, hatred or vilification shall mean the explicit, intentional and active support for such conduct and attitudes with respect to a particular group of persons;
  - b. "alienation" shall mean the withdrawal of a person from the society in which he or she lives and of his or her commitment to its values;
  - c. "anti-Gypsyism"<sup>1</sup> shall mean racism which is directed against Roma/Gypsies;
  - d. "antisemitism" shall mean prejudice against, hatred of, or discrimination against Jews as an ethnic or religious group;
  - e. "condonation" shall mean the excusing, forgiving or overlooking of particular conduct;
  - f. "crimes against humanity" shall mean any of the acts listed in Article 7 of the Rome Statute of the International Criminal Court when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack;
  - g. "denigration" shall mean the attack on the capacity, character or reputation of one or more persons in connection with their membership of a particular group of persons;
  - h. "discrimination" shall mean any differential treatment based on a ground such as "race", colour, language, religion, nationality or national or ethnic origin, as well as descent, belief, sex, gender, gender identity, sexual

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<sup>1</sup> ECRI's GPR No. 13 defines anti-Gypsyism as a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination.

- orientation or other personal characteristics or status, which has no objective and reasonable justification<sup>2</sup>;
- i. **“gender”** shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men<sup>3</sup>;
  - j. **“gender identity”** shall mean each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modifications of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism<sup>4</sup>;
  - k. **“genocide”** shall mean any of the acts listed in Article 6 of the Rome Statute of the International Criminal Court committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group;
  - l. **“glorification”** shall mean the celebrating or praising of someone for having done something;
  - m. **“hatred”** shall mean a state of mind characterised as intense and irrational emotions of opprobrium, enmity and detestation towards the target group<sup>5</sup>;
  - n. **“Holocaust denial”** shall mean the act of denying, questioning or admitting doubts, in whole or in part, with the respect to the historical fact of the genocide of Jews during the Second World War;
  - o. **“homophobia”** shall mean prejudice against, hatred towards, or fear of homosexuality or of people who are identified or perceived as being bisexual, gay, lesbian or transgender;
  - p. **“hostility”** shall mean a manifestation of hatred beyond a mere state of mind<sup>6</sup>;
  - q. **“incitement”** shall mean statements about groups of persons that create an imminent risk of discrimination, hostility or violence against persons belonging to them;
  - r. **“Islamophobia”** shall mean prejudice against, hatred towards, or fear of the religion of Islam or Muslims;
  - s. **“marginalisation”** shall mean the making of a group of persons feel or be isolated or unimportant and thereby limiting their participation in society;
  - t. **“media literacy”** shall mean the knowledge, skills and attitude required to engage with all forms of media, including, in particular, an understanding of its role and functions in democratic societies and the ability both to

<sup>2</sup> GPR No. 7. This does not explicitly cover discrimination on grounds of descent, belief, sex, gender, gender identity and sexual orientation but the grounds listed are not exhaustive and the GPR’s provisions can be applied mutatis mutandis to discrimination based on other personal characteristics or status.

<sup>3</sup> Article 3 of the **Council of Europe Convention on preventing and combating violence against women and domestic violence**.

<sup>4</sup> Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

<sup>5</sup> Principle 12.1 of the Camden Principles on Freedom of Expression and Equality.

<sup>6</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357, 7 September 2012, para. 44.

- critically evaluate media content and to engage with media for the purpose of self-expression and democratic participation;
- u. “**negative stereotyping**” shall mean the application to a member or members of a group of persons of an generalised belief about the characteristics of those belonging to that group that involves viewing all of them in a poor light regardless of the particular characteristics of the member or members specifically concerned;
  - v. “**radicalisation**” shall mean the process whereby someone adopts extreme political, religious or social values which are inconsistent with those of a democratic society;
  - w. “**racism**” shall mean the belief that a ground such as “race”, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons<sup>7</sup>;
  - x. “**Roma**” shall mean not only Roma but also Sinti, Kali, Ashkali, “Egyptians”, Manouche and kindred population groups in Europe, together with Travellers<sup>8</sup>;
  - y. “**sex**” shall mean a person’s biological status;
  - z. “**sexual orientation**” shall mean each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender<sup>9</sup>;
  - aa. “**status**” shall mean a person’s legal or factual situation, covering not only having a particular marital, migrant or professional status but also factors such as birth outside marriage, disability, financial position, health, imprisonment, membership of a trade union or other body and place of residence;
  - bb. “**stigmatisation**” shall mean the labelling of a group of persons in a negative way;
  - cc. “**transphobia**” shall mean prejudice against, hatred towards, or fear of transsexuality and transsexual or transgender people, based on the expression of their internal gender identity;
  - dd. “**trivialisation**” shall mean the making of something seem unimportant or insignificant;
  - ee. “**vilification**” shall mean the abusive criticism of one or more persons in connection with their membership of a particular group of persons;
  - ff. “**violence**” shall mean the use of physical force or power against another person, or against a group or community, which either results in, or has a

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<sup>7</sup> GPR No. 7. Although religion is not included in the definition of racial discrimination in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination recognises, in the light of the principle of intersectionality, that racist hate speech extends to speech “targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism”. General Recommendation No. 35 on Combating racist hate speech, CERD/C/GC/35, 26 September 2013, para. 6.

<sup>8</sup> GPR No. 13.

<sup>9</sup> Yogyakarta Principles.

- high likelihood of resulting in, injury, death, psychological harm, maldevelopment or deprivation<sup>10</sup>;
- gg. “**vulnerable groups**” shall mean those groups who are particularly the object of hate speech, which will vary according to national circumstances but are likely to include asylum seekers and refugees, other immigrants and migrants, Black and Jewish communities, Muslims, Roma/Gypsies, as well as other religious, historical, ethnic and linguistic minorities and LGBT persons; in particular it shall include children and young persons belonging to such groups;
- hh. “**war crimes**” shall mean any of the acts listed in Article 8 of the Rome Statute of the International Criminal Court; and
- ii. “**xenophobia**” shall mean prejudice against, hatred towards, or fear of people from other countries or cultures.

#### ***Definition of hate speech***

8. As already indicated, the understanding of hate speech for the purpose of the Recommendation is set out in its recitals. It reflects the different contexts, aims and effects of the use of hate speech and is matched by the **varying responses** appropriate to it. This reflects an appreciation that **member States may give effect to it through a combination of existing and new measures.**
9. Hate speech for the purpose of the Recommendation entails the use of one or more particular forms of expression - namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression - that is based on a non-exhaustive list of personal characteristics or status that includes “race”, colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation.
10. The significant elements in the Recommendation’s understanding as to what constitutes hate speech that differ from those found in many other documents are its application to:
- advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification as well as; harassment, insult, negative stereotyping stigmatisation or threat;
  - use that is not just intended to incite the commission of acts of violence, intimidation, hostility or discrimination but also such use that can reasonably be expected to have that effect; and
  - grounds that go beyond “race”, colour, language, religion or belief, nationality national or ethnic origin and descent.

<sup>10</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357, 7 September 2012, para. 44.

11. “**Expression**” is understood in the Recommendation to cover speech and publications in any form, including through the use of electronic media, as well as their dissemination and storage. Hate speech can take the form of written or spoken words, or other forms such as pictures, signs, symbols, paintings, music, plays or videos. It also embraces the use of particular conduct, such as gestures, to communicate an idea, message or opinion.
12. In addition, the forms of expression coming within the scope of the Recommendation can also include the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred and the glorification of persons for having committed such crimes. The condition that the crimes involved must actually have been found by courts to have occurred is intended to ensure that loose accusations about particular conduct do not then form the basis for claims that certain statements amount to hate speech. Moreover, the glorification of persons who have committed such crimes only amounts to hate speech where this is specifically concerned with them having done this and does not extend to positive assessments of any other, unrelated activity by the persons concerned.
13. At the same time, the Recommendation specifically excludes from the definition of hate speech any form of expression - such as **satire or objectively based news reporting and analysis** - that merely offends, hurts or distresses. In doing so, the Recommendation reflects the protection for such expression which the European Court of Human Rights has found is required under Article 10 of the European Convention on Human Rights<sup>11</sup>. Nonetheless, it is recalled that the European Court has also recognised that incitement to hatred can result from insulting, holding up to ridicule or slandering specific groups of the population where such forms of expression are exercised in an irresponsible manner - which might entail being unnecessarily offensive, advocating discrimination or using of vexatious or humiliating language or might involve an unavoidable imposition on the audience<sup>12</sup> - and these forms would also come within the scope of the Recommendation’s definition.
14. The Recommendation further recognises that, in some instances, a particular feature of the use of hate speech is that it may be intended to incite, or can reasonably be expected to have the effect of inciting, others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it. As the definition above makes clear, **the element of incitement** entails there being either a clear intention to bring about the

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<sup>11</sup> See, e.g., *Jersild v. Denmark* [GC], no. 15890/89, 23 September 1994, *Sürek and Özdemir v. Turkey* [GC], no. 23927/94, 8 July 1999, *Giniewski v. France*, no. 64016/00, 31 January 2006, *Alves da Silva v. Portugal*, no.41665/07, 20 October 2009 and *Fáber v. Hungary*, no. 40721/06, 24 July 2012.

<sup>12</sup> See, e.g., *Féret v. Belgium*, no. 15615/07, 16 July 2007 and *Vejdeland and Others v. Sweden*, no. 1813/07, 9 February 2012.

commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular hate speech used.

15. Intent to incite might be established where there is an unambiguous call by the person using hate speech for others to commit the relevant acts or it might be inferred from the strength of the language used and other relevant circumstances, such as the previous conduct of the speaker. However, the existence of intent may not always be easy to demonstrate, particularly where remarks are ostensibly concerned with supposed facts or coded language is being used.
16. On the other hand, the assessment as to whether or not there is a risk of the relevant acts occurring requires account to be taken of the specific circumstances in which the hate speech is used. In particular, there will be a need to consider (a) the context in which the hate speech concerned is being used (notably whether or not there are already serious tensions within society to which this hate speech is linked); (b) the capacity of the person using the hate speech to exercise influence over others (such as by virtue of being a political, religious or community leaders); (c) the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination); (d) the context of the specific remarks (whether or not they are an isolated occurrence or are reaffirmed several times and whether or not they can be regarded as being counter-balanced either through others made by the same speaker or by someone else, especially in the course of a debate); (e) the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a “live” event); and (f) the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination).
17. The different circumstances relevant for this risk assessment reflect many aspects of the text in the Rabat Plan of Action for expressions to be considered as criminal offences<sup>13</sup>. However, they go beyond them - and also the scope of the Recommendation in paragraph 18 of GPR No. 7 with respect to the criminal law<sup>14</sup> - in one respect, namely, in recognising that intent to incite the commission of acts of violence, intimidation, hostility or discrimination is not essential for this especially serious form of hate speech. Rather, it is considered also to be capable of being used where the commission of those acts can reasonably be expected to be the effect of

<sup>13</sup> For the content of the Rabat Plan of Action, see para. 59 below.

<sup>14</sup> “The law should penalise the following acts when committed intentionally: a) public incitement to violence, hatred or discrimination, b) public insults and defamation or c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin”.

using the hate speech concerned. Where this effect can reasonably be expected from a particular use of hate speech, it would thus be reckless for it to be used.

18. This approach is consistent with rulings of the European Court of Human Rights that have upheld the compatibility with Article 10 of the European Convention on Human Rights of the imposition of criminal sanctions for remarks made where it should have been appreciated that these were likely to exacerbate an already explosive situation<sup>15</sup>.
19. Nonetheless, the imposition of restrictions other than criminal sanctions where there is a reasonable expectation of a particular use of hate speech having the effect of inciting others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it could, in the specific circumstances, be a more proportionate response to the pressing social need which this use creates.
20. The definition of hate speech is not restricted to expressions **used in public**. However, the use of hate speech in this context is a consideration that is especially relevant for certain of its forms, such as the denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes. Moreover, it may also be a significant factor in determining whether or not a particular use of hate speech can reasonably be expected to have the effect of inciting others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it. Furthermore, the existence of a public context is an essential requirement when it is recommended that criminal sanctions be imposed on certain uses of hate speech as this limits the extent of interference with the right to freedom of expression. An expression should be considered to have been used in public where this occurred in any physical place or through any electronic form of communication to which the general public have access.
21. Hate speech is, as has been seen, concerned with various forms of expression directed against a person or group of persons on the ground of the personal characteristics or status of the person or group of persons and action against it does not necessarily entail the imposition of criminal sanctions. However, when hate speech takes the form of conduct that is in itself a criminal offence - such as conduct that is abusive, harassing or insulting - it may also be referred to as hate crime<sup>16</sup>.

### **C. Context**

22. The Recommendation has been adopted at a time when there is increasing concern within member States, the Council of Europe and other

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<sup>15</sup> See, e.g., *Zana v. Turkey* [GC], no. 18954/91, 25 November 1997 and *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, 8 July 1999.

<sup>16</sup> Hate crime is a criminal act motivated by bias or prejudice towards a particular group of people; <http://hatecrime.osce.org/what-hate-crime>.

organisations about the use of hate speech in Europe's diverse society, as well as about its role in undermining self-respect of the members of vulnerable groups, damaging cohesion and inciting others to commit acts of violence, intimidation, hostility or discrimination. This concern has been exacerbated by many incidents in which individuals, institutions, memorials and property have been subjected to actual violent attacks on account of a hostility to them founded on one or more of the grounds enumerated above. Therefore there should be a prompt response to hate speech - making use of the large spectrum of measures suggested by the Recommendation - in order to avoid the development of negative attitudes towards, in particular, minority groups, leading to their loss of self-respect and endangering their integration into mainstream society.

### *Data*

23. The actual extent to which hate speech is being used remains uncertain, even though the impression is that, as the Recommendation notes, this is becoming more commonplace. This uncertainty is attributable to the **absence of comprehensive and comparable data** regarding complaints about the use of hate speech, resulting from complaints either not being recorded or the varying criteria by which member States regard such use as having occurred. Moreover, it is evident that those targeted by hate speech do not always report it, often for lack of confidence in the justice system or for fear of action being taken against them. Furthermore, it does not seem that all complaints made about its use are investigated. In addition, there is no systematic monitoring of all fora in which such speech might be used. Nonetheless, there is no doubt that the use of hate speech is both more visible and more readily spread as a result of the widespread availability of electronic forms of communication. Furthermore, the use of hate speech has been a notable feature of the situation that has been found to exist in many member States in the course of ECRI's 4<sup>th</sup> and 5<sup>th</sup> monitoring cycles.

### *ECRI's country monitoring findings*

24. Thus, amongst the findings of ECRI's country monitoring in these two cycles have been the explicit publication in certain media of clearly racist content, the praise of Nazism and the denial of the Holocaust, the use of offensive language and stereotypes in connection with particular minorities and the making of derogatory comments about persons belonging to them on the streets, in schools and in shops, as well as actual calls for the use of violence against them and certain campaigns against the use of minority languages. Although there have certainly been instances noted of political parties and other groups and organisations cultivating and disseminating racist, xenophobic and neo-Nazi ideas, the use of hate speech has not been limited to ones that are extremist and outside the mainstream. Thus, **the employment of a rude tone in many parliaments and by state officials** has been found to contribute to a public discourse that is increasingly offensive and intolerant. Such discourse has been exacerbated by some high-level politicians not being inhibited from using hate speech in their

pronouncements. Furthermore, attempts by public figures to justify the existence of prejudice and intolerance regarding particular groups, which only tends to perpetuate and increase hostility towards them, have also been noted.

25. Not all the hate speech in use is so explicit, with some publications relying on **“coded” language** to disseminate prejudice and hatred. For example, reference is made to people who don't work and survive on state benefits when a particular minority is intended and protests against such a minority are reported as being by the **“good people”** of the country when this is by a neo-Nazi group. In addition, it has been observed that the sensational or partial coverage of particular events can spread misinformation and give rise to fear, creating prejudice for those belonging to the minority that might be involved in them.
26. The use of hate speech has been noted to be a particular feature of some electronic forms of communication, with web pages, forums and social networks forums having that as a primary purpose and some using such speech even when they are hosted by local government bodies<sup>17</sup>.
27. There have been many instances noted where no action had been taken against the use of hate speech, sometimes because of the restricted reach of national legislation but also because of its narrow interpretation, a reluctance to act in the absence of a specific complaint, the lack of a thorough investigation and the ruling out too readily of bringing proceedings against alleged perpetrators. Where such proceedings have been brought, the sanctions imposed have tended not to be a significant deterrent to repetition or emulation. Self-regulatory mechanisms have also not always proved to be effective.
28. Furthermore, the use of hate speech and the failure to tackle such use has **adverse consequences** both for those to whom it is specifically addressed and for society as a whole.
29. The former, as has been seen in ECRI's country monitoring, do not just suffer distress, hurt feelings and an assault upon their dignity and sense of identity. In addition, the use of hate speech also contributes to those targeted by it being subjected to discrimination, harassment, threats and violence as a result of the antipathy, hostility and resentment towards them that this use can engender or strengthen. Such attitudes and conduct can then lead to them feeling afraid, insecure and intimidated. Ultimately, the use of hate speech can lead to those targeted by it withdrawing from the society in which they live and even ceasing to be attached to its values. There has been concern, in particular, about the use of hate speech leading to the early dropping out of school of pupils, who then face problems in accessing

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<sup>17</sup> See, e.g., C. Bakalis, *Cyberhate: An issue of continued concern for the Council of Europe's Anti-Racism Commission* (Council of Europe, 2015).

the labour market and this in turn reinforces the separation of those concerned from society.

30. The use of hate speech is also damaging for society as a whole. It is not just that it has a negative impact on the character of public discourse. Of greater significance is the resulting climate of hostility and intolerance, together with a readiness to accept or excuse discrimination and violence, which is divisive, undermines mutual respect and threatens peaceful co-existence. The pluralism that is an essential requirement for a democratic society is thus being put at risk.
31. Those found in the ECRI country monitoring to be particularly affected by the use of hate speech have been immigrants, Jews, Muslims and Roma but it has not been restricted to them. Moreover, ECRI has also seen hate speech directed against persons on account of their sex, gender identity or sexual orientation. Furthermore, women can be subject to an aggravated form of hate speech in that this can be directed at them on account not just of their “race”, religion or some other personal characteristic or status but also of their sex and/or gender identity.

#### *Lessons from the past*

32. The use of hate speech is by no means just a current problem. It has been a significant element in the commission of crimes of genocide, crimes against humanity and war crimes. Such crimes have been a particular feature of recent European history. What happened in the past remains a stark warning of the dangers posed by allowing bigotry, hatred and prejudice to flourish unchallenged. Moreover, it has prompted the establishment of various commemorations, such as **International Holocaust Remembrance Day** proclaimed by the United Nations General Assembly in resolution 60/7 of 1 November 2005. Such commemorations are, however, intended to go beyond remembrance and to ensure that the lessons of the past are applied to the present. Furthermore, like resolution 60/7, the Recommendation recognises that the danger lies not in one particular form of intolerance but in any form that questions the enjoyment of human rights and fundamental freedoms by everyone without distinction.

#### *United Nations treaties*

33. While this duty of remembrance is a prompt for taking action against the use of hate speech, more specific requirements to do so are found in Article 20(2) of the **International Covenant on Civil and Political Rights** (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”) and Article 4 of the **International Convention on the Elimination of All Forms of Racial Discrimination** (“States Parties ...(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance

- to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination”).
34. The failure to give effect to these requirements or to do so in an effective manner has been the subject of adverse comment by the United Nations Human Rights Committee and the Committee on the Elimination of Racial Discrimination respectively in their concluding observations on the periodic reports submitted by certain States Parties pursuant to the treaties concerned.
35. However, although legal prohibitions are required for the specific forms of expression addressed in Article 20 of the International Covenant on Civil and Political Rights, the Human Rights Committee has underlined that these must still be compatible with the restrictions on freedom of expression that are authorised by Article 19(3) (*General comment No. 34 Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, 12 September 2011, paras. 50-52).
36. At the same time the Committee on the Elimination of Racial Discrimination, while considering that “as a minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law, is indispensable to combating racist hate speech effectively”, has emphasised that the “relationship between proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other. The rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights” (*General Recommendation No. 35 Combating racist hate speech*, CERD/C/GC/35, 26 September 2013, paras. 9 and 45). This echoes the Committee’s earlier statement that “the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression” and that the latter right “carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance” (*General Recommendation XV on article 4 of the Convention*, para. 4).
37. In its case law the United Nations Human Rights Committee has upheld as consistent with freedom of expression a conviction for challenging the conclusions and the verdict of the International Military Tribunal at Nuremberg in circumstances where the statements concerned were, read in their full context, of a nature to raise or strengthen antisemitic

feelings<sup>18</sup>. It has similarly considered that the dismissal of a schoolteacher for statements denigrating the faith and belief of Jews and calling upon Christians to hold those of the Jewish faith and ancestry in contempt as an admissible restriction on freedom of expression for the purpose, amongst others, of protecting the right to have an education in the public school system free from bias, prejudice and intolerance<sup>19</sup>. However, a complaint about the alleged failure to take effective action against a reported incident of hate speech against Muslims was considered inadmissible as the author had not established that the statements had specific consequences for him or that such consequences were imminent and so he could not be regarded as a victim of a violation of Article 20(2) of the International Covenant on Civil and Political Rights<sup>20</sup>.

38. The Committee on the Elimination of Racial Discrimination has found violations of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination where there was a failure to ensure that statements in a public speech that contained ideas based on racial superiority or hatred and which incited, at least, to racial discrimination were not protected by the right to freedom of expression<sup>21</sup>. It has also found a violation of this provision where there was a failure to carry out an investigation into whether certain statements made in a radio broadcast - which generalised negatively about an entire group of people based solely on their ethnic or national origin and without regard to their particular views, opinions or actions regarding the subject of female genital mutilation - amounted to racial discrimination<sup>22</sup>. In addition, the Committee has found a violation of Article 4 arising from a failure to carry out such an effective investigation in respect of statements depicting generalised negative characteristics of the Turkish population in Germany and calling for their denial of access to social welfare and for a general prohibition of immigration influx since it considered that the former contained ideas of

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<sup>18</sup> *Faurisson v. France*, Communication No. 550/1993, Views of 8 November 1996. Referring to this case, the Human Rights Committee has, however, stated that “Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20”; with the restrictions on freedom of expression that are authorised by Article 19(3) (General comment No. 34 Article 19: Freedoms of opinion and expression, para. 49).

<sup>19</sup> *Ross v. Canada*, Communication No. 736/1997, Views of 18 October 2000.

<sup>20</sup> *A W P v. Denmark*, Communication No. 1879/2009, Decision of 1 November 2013. There was also considered to be a failure to substantiate the facts in respect of an alleged violation of Article 20(2) in *Vassilari v. Greece*, Communication No. 1570/2007, Views of 19 March 2009 but there were dissenting opinions on this issue by Abdelfattah Amor, Ahmad Amin Fathalla and Bouzid Lazhari.

<sup>21</sup> *The Jewish Community of Oslo et al. v. Norway*, Communication No. 30/2003, Opinion of 15 August 2005.

<sup>22</sup> *Adan v. Denmark*, Communication No. 43/2008, Opinion of 13 August 2010. A failure to carry out an investigation was similarly considered in *Gelle v. Denmark*, Communication No. 34/2004, Opinion of 6 March 2006 to entail a violation of Article 4

racial superiority and the latter involved incitement to racial discrimination<sup>23</sup>.

### ***The European Convention on Human Rights***

39. **The European Convention on Human Rights** guarantees freedom of expression under Article 10 and prohibits discrimination - in relation to other rights and freedoms under Article 14 and more generally pursuant to Article 1 of Protocol No. 12 - but it does not contain any provision directed specifically to the use of hate speech. Nonetheless, the European Court of Human Rights (and the former European Commission of Human Rights) has had to address such use when considering complaints about the imposition of criminal sanctions and other restrictions on certain statements. In doing so, it has either regarded the remarks in question as entirely outwith the protection afforded by the right to freedom of expression under Article 10 - relying on the prohibition in Article 17 on acts and activity aimed at the destruction of any of the rights and freedoms in the European Convention - or it has sought to judge whether the measures concerned were a restriction on the exercise of that freedom that could be regarded as serving a legitimate aim - such as for the protection of the rights of others - and as being necessary in a democratic society..
40. The former approach can be seen with regard to vehement attacks on a particular ethnic or religious group<sup>24</sup>, antisemitic statements<sup>25</sup>, the spreading of racially discriminatory statements<sup>26</sup> and Holocaust denial<sup>27</sup>. The latter approach has been followed in cases involving statements alleged to stir up or justify violence, hatred or intolerance. In respect of such cases, particular account has been taken of factors such as a tense political or social background, a direct or indirect call for violence or as a justification of violence, hatred or intolerance (particularly where there are sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups), the manner in which the statements were made and their capacity - direct or indirect - to lead to harmful consequences. In all of them, the European Court has always been concerned about the interplay between the various factors rather than any

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<sup>23</sup> TBB-Turkish Union in Berlin/Brandenburg v. Germany, Communication No. 48/2010, Opinion of 26 February 2013.

<sup>24</sup> See, e.g., Pavel Ivanov v. Russia (dec.), no. 35222/04, 20 February 2007 and Norwood v. United Kingdom (dec.), no. 23131/03, 16 November 2004.

<sup>25</sup> See, e.g., W P v. Poland (dec.), no. 42264/98, 2 September 2004 and M'Bala M'Bala v. France (dec.), no. 25239/13, 20 October 2015

<sup>26</sup> See, e.g., Glimmerveen and Hagenbeek v Netherlands (dec.), no 8438/78, 11 October 1979. See also Jersild v. Denmark [GC], no. 15890/89, 23 September 1994, at para. 35.

one of them taken in isolation. Also material considerations for the Court in determining such cases will be whether or not the measures taken in respect of the statements concerned were disproportionate and whether or not civil or other remedies might have been used to deal with them<sup>28</sup>.

41. In addition, the European Court has recognised that there is a positive obligation for member States to protect those targeted by the use of hate speech from any violence or other interferences with their rights which such use may actually incite others to attempt<sup>29</sup>. Furthermore, discriminatory conduct is capable of amounting to a violation of the prohibition on inhuman and degrading treatment under Article 3 and such conduct could be regarded as ensuing from passivity - including the failure to enforce criminal provisions effectively - in the face of interferences with rights and freedoms under the European Convention<sup>30</sup>. Moreover, the European Court has also accepted that a failure to provide redress for insulting expression, notably in the form of negative stereotyping, that is directed to a particular group of persons could entail a violation of the positive obligation under Article 8 to secure effective respect for the right

<sup>27</sup> See, e.g., *Honsik v. Austria* (dec.), no. 25062/94, 18 October 1995, *Marais v. France* (dec.), no. 31159/96, 24 June 1996, *Lehideux and Isorni v. France* [GC], no. 24662/94, 23 September 1998, at para. 47, *Garaudy v. France* (dec.), no. 65831/01, 24 June 2003, *Witzsch v. Germany* (dec.), no. 7485/03, 13 December 2005 and *M'Bala M'Bala v. France* (dec.), no. 25239/13, 20 October 2015. Cf. *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015, in which the European Court of Human Rights found there was no international obligation to prohibit genocide denial as such and that a criminal conviction for such denial was not justified in the absence of a call for hatred or intolerance, a context of heightened tensions or special historical overtones or a significant impact on the dignity of the community concerned (para. 280).

<sup>28</sup> See, the cases cited at footnotes. 11-13 as well as *Hennicke v. Germany* (dec.), no. 34889/97, 21 May 1997, *Incal v. Turkey* [GC], no. 22678/93, 9 June 1998, *Lehideux and Isorni v. France* [GC], no. 24662/94, 23 September 1998, *Witzsch v. Germany* (dec.), no. 41448/98, 20 April 1999, *Karataş v. Turkey* [GC], no. 23168/94, 8 July 1999, *Erdoğan and İnce v. Turkey* [GC], no. 25067/94, 8 July 1999, *Özgür Gündem v. Turkey*, no. 23144/93, 16 March 2000, *Şener v. Turkey*, no. 26680/95, 18 July 2000, *Le Pen v. France* (dec.), no. 55173/00, 10 May 2001, *Osmani v. "the former Yugoslav Republic of Macedonia"*, no. 50841/99, 11 October 2001, *Gunduz v. Turkey* (dec.), no. 59745/97, 13 November 2003, *Gunduz v. Turkey*, no. 35071/97, 4 December 2003, *Seurot v. France* (dec.), no. 57383/00, 18 May 2004, *Maraşlı v. Turkey*, no. 40077/98, 9 November 2004, *Dicle v. Turkey*, no. 34685/97, 10 November 2004, *Gumus and Others v. Turkey*, no. 40303/98, 15 March 2005, *Alinak v. Turkey*, no. 40287/98, 29 March 2005, *İ A v. Turkey*, no. 42571/98, 13 September 2005, *Han v. Turkey*, no. 50997/99, 13 September 2005, *Koç and Tambaş v. Turkey*, no. 50934/99, 21 March 2006, *Aydın Tatlav v. Turkey*, no. 50692/99, 2 May 2006, *Erbakan v. Turkey*, no. 59405/00, 6 July 2006, *Güzel v. Turkey* (No. 2), no. 65849/01, 27 July 2006, *Düzgören v. Turkey*, no. 56827/00, 9 November 2006, *Yarar v. Turkey*, no. 57258/00, 19 December 2006, *Üstün v. Turkey*, no. 37685/02, 10 May 2007, *Birdal v. Turkey*, no. 53047/99, 2 October 2007, *Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey* (dec.), no. 6587/03, 27 November 2007, *Demirel and Ateş v. Turkey*, no. 10037/03, 29 November 2007, *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey*, no. 11369/03, 14 December 2007, *Soulas, and Others v. France*, no. 15958/03, 10 July 2008, *Balsytė-Lideikienė v. Lithuania*, no. 72596/01, 4 November 2008, *Leroy v. France*, no. 36109/03, 2 October 2008, *Özer v. Turkey*, no. 871/08, 26 January 2010, *Willem v. France*, no. 10883/05, 16 July 2009, *Dink v. Turkey*, no. 2668/07, 14 September 2010 and *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015.

<sup>29</sup> See, e.g., *Ouranio Toxo and Others v. Greece*, no. 74989/01, 20 October 2005, *Begheluri and Others v. Georgia*, no. 28490/02, 7 October 2014, *Karahmed v. Bulgaria*, no. 30587/13, 24 February 2015 and *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015.

<sup>30</sup> See, e.g., *Opuz v. Turkey*, no. 33401/02, 9 June 2009.

to private life of a member of that group on account of this expression amounting to an attack on his or her identity<sup>31</sup>.

***Other Europeans treaties***

42. Three other **Council of Europe treaties** deal specifically with the use of hate speech.
43. Thus, the **Additional Protocol to the Convention on Cybercrime**, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems requires member States to adopt legislative and other measures as may be necessary to establish as criminal offences the dissemination of racist and xenophobic material through computer systems and the use of computer systems to make racist and xenophobic motivated threats and insults and to deny, grossly minimise, approve or justify genocide or crimes against humanity.
44. Furthermore, the **European Convention on Transfrontier Television** requires that programme services shall not in be likely to incite to racial hatred. In addition, the **Council of Europe Convention on preventing and combating violence against women and domestic violence** refers to forms of violence against women that can also be manifestations of online/offline sexist hate speech: sexual harassment (Article 40) and stalking (Article 34) and requires that Parties take the necessary legislative or other measures.

***Other European and international standards***

45. In addition to these particular treaty obligations requiring or authorising action to be taken against the use of hate speech of a particular character or in certain contexts, there are various other **European and international standards** relevant to the taking of such action. They are comprised of Recommendations of the Committee of Ministers of the Council of Europe, Recommendations and Resolutions of the Parliamentary Assembly of the Council of Europe, a report of the European Commission for Democracy through Law (Venice Commission), two European Union measures, the *Durban Declaration and Programme of Action of September 2001* and the *outcome document of the Durban Review Conference of April 2009* and the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 5 October 2012, as well as reports to the United Nations General Assembly and the Human Rights Council of the United Nations Special Rapporteurs on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, on minority issues and on the promotion and protection of the right to freedom of opinion and expression, as well as of the United Nations High Commissioner for Human Rights.

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<sup>31</sup> Aksu v. Turkey [GC], no. 4149/04, 15 March 2012. See also Church of Scientology v. Sweden (dec.), no. 8282/78, 14 July 1980.

46. Many of the **Recommendations of the Committee of Ministers of the Council of Europe** and the **Recommendations and Resolutions of the Parliamentary Assembly of the Council of Europe** have been concerned with particular forms of hate speech, such as aggressive nationalism, extremism, neo-Nazism, ethnocentrism and racial hatred. Others have focused on those targeted against specific groups of persons, such as those concerned with anti-Gypsyism, antisemitism, xenophobia, Islamophobia, homo/transphobia, migrant status and religious affiliation. Some others have addressed its use in particular contexts, notably, in cyberspace, online media, political discourse and video games.
47. Recommendation No. R (97) 20 of the Committee of Ministers to member states on "Hate Speech" defines this term as covering "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin". It recommends that member states' legislation and practice be guided by a number of principles in combatting hate speech. Similarly other Recommendations and Resolutions have called for various administrative, civil and criminal measures to be adopted to tackle the use of such speech, while respecting the right to freedom of expression. In addition, they have sought to promote a culture of tolerance, emphasising the role of various forms of media in this regard<sup>32</sup>.
48. The **Venice Commission Report** was particularly concerned with incitement to religious hatred<sup>33</sup>. Having examined European legislation on blasphemy, religious insult and incitement to religious hatred, the report concluded that incitement to hatred, including religious hatred, should be the object of criminal sanctions and that it would be appropriate to have an explicit requirement of intention or recklessness. It also concluded that it was neither necessary nor desirable to create an offence of religious insult, i.e., just insult to religious feelings without the element of incitement to hatred as an essential component. Moreover, the report concluded that the offence of blasphemy should be abolished and not reintroduced.
49. The two **European Union measures** with respect to hate speech are the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (Framework Decision) and Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or

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<sup>32</sup> See the Annex for a list of the various recommendations and resolutions.

<sup>33</sup> Report on the Relationship between Freedom of Expression and Freedom of Religion: the Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, CDL-AD(2008)026, 23 October 2008.

administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

50. The **Framework Decision** provides that “racism and xenophobia are direct violations of the principle of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States”. Although acknowledging that combating racism and xenophobia requires various kinds of measures in a comprehensive framework and may not be limited to criminal matters, the measures that the Framework Decision requires Member States to take are limited to combating particularly serious forms of racism and xenophobia by means of criminal law. Thus, it requires that public incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin be punishable where such conduct is intentional. In the same way the law should punish any intentional public condonation, denial or gross trivialisation of crimes of genocide, crimes against humanity and war crimes directed against such a group of persons or member of such a group when the conduct is carried out in a manner likely to incite to violence or hatred against it or them. At the same time, the Framework Decision makes it clear that it does not require the taking of measures in contradiction to fundamental principles relating to freedom of association and freedom of expression.
51. The **Audiovisual Media Services Directive** requires Member States to ensure that such services provided by media services providers do not contain any incitement to hatred based on race, sex, religion or nationality. In addition, Member States should ensure that media service providers comply with the requirement that audiovisual commercial communications shall not prejudice respect for human dignity or include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.
52. The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which had been convened by the United Nations General Assembly<sup>34</sup>, adopted the ***Durban Declaration and Programme of Action*** in 2001. This affirmed that racism, racial discrimination, xenophobia and related intolerance constituted a negation of the purposes and principles of the Charter of the United Nations and recognised that failure to combat and denounce all these forms of intolerance by all, especially by public authorities and politicians at all levels, was a factor encouraging their perpetuation. It urged the adoption of a wide range measures, legislative, judicial, regulatory and administrative but also self-regulatory, to prevent and protect against racism, racial discrimination, xenophobia and related intolerance and to promote respect and tolerance. In particular, it urged States “to implement legal sanctions, in accordance

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<sup>34</sup> Pursuant to resolution 52/111, 18 February 1998.

with relevant international human rights law, in respect of incitement to racial hatred through new information and communications technologies, including the Internet”<sup>35</sup> and it encouraged the denunciation and active discouragement of the transmission of racist and xenophobic messages through all communications media<sup>36</sup>.

53. The **Durban Review Conference** was convened by the United Nations General Assembly<sup>37</sup> to review progress towards the goals set by the World Conference. Its **outcome document** expressed concern over the rise of acts of incitement to hatred, which have targeted and severely affected racial and religious communities and persons belonging to racial and religious minorities, whether involving the use of print, audio-visual or electronic media or any other means, and emanating from a variety of sources. It resolved, “as stipulated in Article 20 of the International Covenant on Civil and Political Rights, to fully and effectively prohibit any advocacy of national, racial, or religious hatred that constituted incitement to discrimination, hostility or violence and to implement it through all necessary legislative, policy and judicial measures”<sup>38</sup>. In addition, it urged States to take measures to combat the persistence of xenophobic attitudes towards and negative stereotyping of non-citizens, including by politicians, law enforcement and immigration officials and in the media<sup>39</sup>. Furthermore, it urged States to punish violent, racist and xenophobic activities by groups that are based on neo-Nazi, neo-Fascist and other violent national ideologies and called upon them to declare illegal and to prohibit all organizations based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote national, racial and religious hatred and discrimination in any form, and to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination<sup>40</sup>.
54. The **Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance** has emphasised the centrality of legislative measures in any strategy to combat and prevent racism, ethnic and xenophobic hatred on the Internet and social media and has thus encouraged States that have not enacted legislation to consider doing so. At the same time the Special Rapporteur has also emphasised the important role of the private sector and of education in addressing the challenges of racism and incitement to racial hatred. In addition the Special Rapporteur has underlined the need to counter extremist political

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<sup>35</sup> Paragraph 145.

<sup>36</sup> Paragraph 147(d).

<sup>37</sup> Pursuant to resolution 61/149, 19 December 2006.

<sup>38</sup> 24 April 2009, para. 69.

<sup>39</sup> *Ibid*, para. 75.

<sup>40</sup> *Ibid*, paras. 60 and 99

parties, movements and groups and to strengthen measures to prevent racist and xenophobic incidents at sporting events<sup>41</sup>.

55. Furthermore, the **Special Rapporteur on minority issues** has issued a report focused on hate speech and incitement to hatred against minorities in the media. This report acknowledges that the root causes of hatred need to be better understood but underlined the importance of engaging majority communities to join marginalised and disadvantaged minorities in demanding human rights, equality and human dignity for all. The Special Rapporteur called for legislation that prohibited advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, while fully respecting the right to freedom of expression. In addition, the Special Rapporteur called for the adoption of the Rabat Plan of Action<sup>42</sup> when implementing or revising their domestic legal framework on hate speech. The report emphasised the need for democratic political parties to find effective tools and outreach strategies to counterbalance hate messages spread by extremist forces and parties.
56. The Special Rapporteur underlined the importance of media outlets maintaining the highest standards of ethical journalism, avoiding stereotyping of individuals and groups and reporting in a factual and impartial manner. The report encouraged the establishment of national, independent regulatory bodies, including representatives of minorities, with powers to monitor hate speech in the media, receive reports from the public in relation to hate speech, receive and support complaints, and make recommendations. It also stated that internet service providers should establish detailed terms of service, guidelines and notice-and-takedown procedures regarding hate speech and incitement, in line with national legislation and international standards, and ensure transparent implementation of those policies. Furthermore, the report emphasised the need for education and training with, in particular, the key functions of media literacy being included in school curricula at all stages with a special focus on the online environment. This was seen as essential for providing youth and adults with adequate tools and resources to develop critical thinking in order to question the accuracy, bias and impact of the information provided by the media<sup>43</sup>.
57. Concern about hate speech has also been the focus of a specific report by the **Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression**<sup>44</sup>. This report recognised that the right to freedom of expression can and should be restricted in extreme cases, such as incitement to genocide and incitement to hatred in accordance

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<sup>41</sup> See, e.g., the following reports: A/HRC/26/50, 10 April 2014, A/HRC/26/49, 6 May 2014 and A/HRC/29/47, 13 April 2015.

<sup>42</sup> See para. 59 below.

<sup>43</sup> See A/HRC/28/64, 5 January 2015.

<sup>44</sup> A/67/357, 7 September 2012.

with international norms and principles but it also emphasised that this right contributed to exposing harms caused by prejudice, combating negative stereotypes, offering alternative views and counterpoints and creating an atmosphere of respect and understanding between peoples and communities around the world. The Special Rapporteur thus emphasised that laws to combat hate speech must be carefully construed and applied by the judiciary not to excessively curtail freedom of expression<sup>45</sup>. In addition, the Special Rapporteur underlined the need for such laws to be complemented by a broad set of policy measures to bring about genuine changes in mind-sets, perception and discourse. In order to prevent any abusive use of hate speech laws, the Special Rapporteur recommended that only serious and extreme instances of incitement to hatred - involving severity, intent, content, extent, likelihood or probability of harm occurring, imminence and context - be prohibited as criminal offences<sup>46</sup>.

58. In a report on discrimination and violence against individuals based on their sexual orientation and gender identity, the **Office of the United Nations High Commissioner for Human Rights** has set out various measures that it recommended States take to address such violence. One of the recommendations was the prohibition of incitement to hatred and violence on grounds of sexual orientation and gender identity and the holding to account of those responsible for related hate speech<sup>47</sup>.
59. The adoption of the **Rabat Plan of Action** was the culmination of an exercise initiated by the Office of the United Nations High Commissioner for Human Rights “to conduct a comprehensive assessment of the implementation of legislation, jurisprudence and policies regarding advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence at the national and regional levels, while encouraging full respect for freedom of expression, as protected by international human rights law”<sup>48</sup>. It recommends that a clear distinction be made between (a) expression that constitutes a criminal offence, (b) expression that is not criminally punishable, but may justify a civil suit or administrative sanctions and (c) expression that does not give rise to any of these sanctions but still raises concern in terms of tolerance, civility and respect for the rights of others<sup>49</sup>. In this connection it drew attention to a six-part threshold test for expressions to be considered as criminal offences, namely, one concerned with the particular context, speaker, intent, content and form, extent of the speech act and likelihood

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<sup>45</sup> Ibid., para. 76.

<sup>46</sup> Ibid.

<sup>47</sup> A/HRC/29/23, 4 May 2015, para. 78.

<sup>48</sup> Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, A/HRC/22/17/Add.4, 11 January 2013, para. 6.

<sup>49</sup> Ibid., para. 12.

(including imminence)<sup>50</sup>. In addition, its other recommendations include efforts to combat negative stereo-typing and discrimination, to promote intercultural understanding, to handle complaints about incitement to hatred and to guarantee systematic collection of data<sup>51</sup>.

***ECRI standards***

60. **ECRI's previous GPRs** relating to hate speech concern:
- the encouragement of debate within the media and advertising professions on the image which they convey of Islam and Muslim communities and on their responsibility in this respect to avoid perpetuating prejudice and biased information<sup>52</sup>;
  - the taking of measures to act against the use of the Internet for racist, xenophobic and antisemitic aims<sup>53</sup>;
  - the taking of all necessary measures to combat antisemitism in all of its manifestations, including ensuring that criminal law in the field of combating racism covers antisemitism<sup>54</sup>;
  - the taking of measures to combat racism and racial discrimination at school<sup>55</sup>;
  - the taking of measures to combat anti-Gypsyism and discrimination against Roma<sup>56</sup>; and
  - the criminalisation of certain forms of hate speech<sup>57</sup>.
61. GPR No. 7 recommends that the following conduct should be criminal offences:
- intentional public incitement to violence, hatred or discrimination against a person or a grouping of persons on the ground of their "race", colour, national/ethnic origin, citizenship, religion or language;
  - intentional public insults and defamation against such a person or grouping; intentional threats against the same target; the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the ground, inter alia, of their "race", colour, national/ethnic origin, citizenship, religion or language; and
  - the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes<sup>58</sup>.

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<sup>50</sup> Ibid., Appendix, para. 29.

<sup>51</sup> Ibid., Appendix, paras. 42-47.

<sup>52</sup> GPR No. 5, Combating intolerance and discrimination against Muslims.

<sup>53</sup> GPR No. 6, Combating the dissemination of racist, xenophobic and antisemitic material via the internet.

<sup>54</sup> GPR No. 9, The fight against antisemitism.

<sup>55</sup> GPR No. 10, Combating racism and racial discrimination in and through school education.

<sup>56</sup> GPR No. 13, Combating anti-Gypsyism and discrimination against Roma.

<sup>57</sup> GPR No. 7, National legislation to combat racism and racial discrimination.

### *Concerns about application*

62. There is thus a clearly well-founded basis under international and regional human rights law for imposing restrictions on the use of hate speech. Nevertheless, there is also concern on the part of bodies responsible for supervising the implementation of States' obligations in this regard that such restrictions can be unjustifiably to **silence minorities** and to **suppress criticism, political opposition and religious beliefs**.
63. Thus, for example, the Committee on the Elimination of Racial Discrimination, when reviewing reports of States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination, has recommended that the definitions in legislation directed against 'extremism' be amended so as to ensure that they are clearly and precisely worded, covering only acts of violence, incitement to such acts, and participation in organizations that promote and incite racial discrimination, in accordance with Article 4 of that Convention. Similarly, the United Nations Human Rights Committee has expressed concern that such legislation could be interpreted and enforced in an excessively broad manner, thereby targeting or disadvantaging human rights defenders promoting the elimination of racial discrimination or not protecting protect individuals and associations against arbitrariness in its application. In addition, concerns about the use of hate speech restrictions to silence criticism and legitimate political criticism have also been voiced by ECRI and others such as the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Advisory Committee on the Framework Convention on National Minorities.
64. Linked to these concerns is another one, namely, that **hate speech prohibitions** may have been **disproportionately or unjustifiably used** against those whom they are intended to protect and the importance of avoiding any possible misuse of them. The basis for this concern may be no more than impressionistic - resulting from the prominent reporting given only to certain proceedings and the lack of comprehensive data - rather than one that can be substantiated. Nonetheless, while it is important to ensure that all action against the use of hate speech be well-founded and that such action never be undertaken on a selective or arbitrary basis, the Recommendation is clear that any criminal prohibition of hate speech must be of general application and not be directed just to certain types of perpetrators.

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<sup>58</sup> This formulation was essentially followed in GPR No. 9 except that it refers to "Jewish identity or origin" rather than "race", "colour", etc. and also includes the public denial, trivialisation, justification or condoning of the Shoah and the desecration and profanation, with an antisemitic aim, of Jewish property and monuments. In addition both GPRs recommend that there be offences with respect to the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, of written, pictorial or other material containing manifestations covered by the offences noted in the text above and also with respect to the creation or the leadership of a group which promotes racism or antisemitism, support for such a group and participation in its activities with the intention of contributing to the offences noted in the text above.

### **Conclusion**

65. The different measures envisaged in the Recommendation are all ones that are either required under international law or ones which it permits to be taken in order to secure the universality of human rights.

### **D. Ratifications, reservations and recourse**

#### **Recommendation 1**

##### **Ratifying treaties**

66. The three treaties which recommendation 1 proposes should be ratified if member States have not already done this, as GPR Nos 13 and 14 have also previously recommended, entail the making of commitments to adopt various measures that are crucial to fulfilling the goals of the Recommendation.
67. The measures required by the **Additional Protocol to the Convention on Cybercrime** are concerned with the criminalisation of acts of a racist and xenophobic nature committed through computer systems. They have already been noted above<sup>59</sup> and are important because of their specific focus on hate speech. Those required by the other two treaties - the **Framework Convention for the Protection of National Minorities** (the Framework Convention) and **Protocol No. 12 to the European Convention on Human Rights** (Protocol No. 12) - are, however, equally important.
68. Thus, the Framework Convention not only requires a guarantee of the right of equality before the law and of equal protection of the law to persons belonging to national minorities but it also requires (a) the encouragement of tolerance and intercultural dialogue, (b) the promotion of mutual respect, understanding and co-operation and (c) the protection of persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity. Furthermore, Protocol No. 12 strengthens the prohibition on discrimination in the European Convention on Human Rights by requiring that the enjoyment of any right set forth by law - and not just the specific rights and freedoms already guaranteed by the latter instrument - be secured without discrimination.
69. Recommendation 1 has not, however, included the European Convention on Transfrontier Television in the list of treaties to be ratified as this one now requires an updating Protocol to take account of various media developments since its adoption. Ratification of the unamended treaty would thus be futile.

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<sup>59</sup> See para. 43 above.

## ***Recommendation 2***

### **Withdrawing reservations**

70. The first point in this recommendation, namely, that **reservations** in favour of the rights to freedom of assembly, association and expression to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and to Article 20 of the International Covenant on Civil and Political Rights be withdrawn, is made because of concern that their maintenance could impede effective action to prohibit organisations which promote or incite racism and racial discrimination, propaganda for war and the advocacy of national, racial or religious hatred.

### **Providing recourse**

71. The second point in the recommendation 2 - acceptance of the **competence of the Committee on the Elimination of Racial Discrimination** to receive and consider communications from individuals or groups of individuals claiming to be victims of violations of rights in the International Convention on the Elimination of All Forms of Racial Discrimination - has been made as a safeguard against failures to tackle hate speech at the national level since such acceptance will allow them then to be challenged at the international level.

## **E. Causes and extent**

### ***Recommendation 3***

72. The specific object of this recommendation is that appropriate steps should be taken to establish the range of circumstances that can give rise to the use of hate speech and to this taking particular forms, as well as to measure both the extent of such use and the impact which it has. The need to address the present limited understanding of this phenomenon and the lack of certainty as to its extent and effects is considered to be essential. Without such an understanding, effective action cannot be taken both to discourage and prevent the use of hate speech and to reduce and remedy the harm which such use causes. Improving the level of understanding and dispelling the uncertainty will, however, require various tools to be developed and used.
73. It may well be that certain conditions are likely to be especially conducive to the use of hate speech and to this taking particular forms. Such conditions are likely to embrace the existence of a range of economic, political and social factors, as well as the transmission without reflection of negative stereotypes and prejudice from one generation to the next. However, it does not seem that the fulfilment of these conditions - either alone or in certain combinations - will always lead to the use of hate speech.

### Undertaking research

74. In order to have a much better understanding both of the conditions that are relevant and the specific ways in which they operate, there is a need for **suitable research projects** to be directed particularly to current circumstances and the considerations that lead to differing levels of response to individual conditions. Such research should take the form of surveys and field studies and, where practicable, should also be comparative in nature.
75. Research on the conditions conducive to the use of hate speech and its different forms need not be carried out by public authorities themselves. Nonetheless, it is important that they not only provide the necessary support for this to occur but also ensure that such research is undertaken. Furthermore, comparative research is likely to be best pursued through research entities in different member States working together. Their collaboration in this regard should therefore be specifically encouraged and facilitated.

### Shortcomings in data gathering

76. Although specific instances of the use of hate speech have been noted in the course of ECRI's monitoring and in other studies, sometimes with the impressionistic inference or conclusion that this is increasing, the actual picture regarding the extent of such use still remains unclear. This is a consequence of various considerations noted in the monitoring, most notably: the differing ways in which hate speech is defined (with only certain of the personal characteristics and status on which it can be grounded being covered); the adoption of different approaches to classification by the various authorities concerned; the limitation of data collection to only those instances in which the use of hate speech potentially constitutes a criminal offence; the failure of particular instances in which hate speech has been used to be either noted by or reported to relevant public authorities; and, occasionally, there being either a complete absence of any data collection regarding such use or a failure to publish all or any of the data that has been collected.
77. In some instances, the failure to gather data is a reflection of concerns about the possibility of this being inconsistent with obligations relating to data protection. Furthermore, not all data that has been gathered is appropriately taken into account. This is especially so as regards the outcome of monitoring by civil society. In addition, such data as is gathered is not always analysed with a view to then allowing conclusions to be drawn as to the response which the use of hate speech thereby revealed requires. Finally, there is a need to ensure that the data gathered goes beyond examining the extent to which hate speech is used and establishes its impact on those targeted by it.

### Requirements for data gathering

78. **Data collection and analysis** regarding the actual use of hate speech thus needs to be undertaken on a much more consistent, systematic and comprehensive basis.
79. This means, first, that data should be gathered in all instances by reference to the understanding as to what constitutes hate speech for the purpose of the Recommendation.
80. Secondly, data protection guarantees should not be invoked to limit or preclude the collection of data with respect to the use of hate speech. Certainly, these guarantees do not bar the gathering and processing of data on identifiable persons where: this is for a lawful purpose; that data is adequate, relevant and not excessive for that purpose; it is accurate and kept up to date; and is not retained for longer than necessary. Moreover, data protection guarantees have no application to any data which is rendered anonymous in such a way that it is not possible to identify any individuals concerned by the use of hate speech and that should be the case for all statistical analyses of the use of hate speech.
81. Thirdly, the data being collected should not be limited to those instances where the expression concerned is either alleged or has been found to constitute an offence as that necessarily excludes the majority of the situations in which hate speech is being used and needs to be tackled.
82. Fourthly, the relevant public authorities should have an explicit responsibility to report in a statistical format all complaints of instances in which the use of hate speech contrary to administrative, civil or criminal law is alleged to have occurred, as well as the outcome of any action taken with respect to such complaints.
83. Fifthly, data collection should not be limited to recording complaints about the use of hate speech but should also seek to capture the experience of those who are affected by such use and who may be reluctant to report the fact of its occurrence. Monitoring - whether conducted in real time or retrospectively through analysis of archived material or involving discourse and content analysis<sup>60</sup> - can most usefully be undertaken by civil society and equality bodies/national human rights institutions, with the latter being authorised to do this according to the focus of their specific activities and priorities where this has not already occurred.
84. There will, however, be a need to ensure that appropriate support is provided for such monitoring, which can require the financing for either the human analysts required or the hardware and software necessary to undertake automated techniques of analysis. Equality bodies/national

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<sup>60</sup> See B. Lucas, Methods for monitoring and mapping online hate speech, GSDRC Helpdesk Research Report 1121, 2014.

human rights institutions and other competent bodies should also be able to undertake or commission surveys of those who may be targeted by hate speech in order to establish its frequency especially in circumstances where such occurrence may not be readily monitored or reported. Good examples are the general European Survey on Crime and Safety<sup>61</sup> and also the survey undertaken by the European Union Agency for Fundamental Rights specifically with respect to lesbian, gay, bisexual and transgender persons<sup>62</sup>. Such surveys can also be used to establish the consequences of this use for persons in these groups, particularly as regards the possibility of them feeling fear, isolation and shame, withdrawing from society and being reluctant to complain or being deterred from doing so<sup>63</sup>.

85. Sixthly, it is important that the data being gathered through these different techniques is collated and appropriately analysed, using modern processing technology for this purpose, so that the overall scale of the phenomenon to be addressed can be discerned. In particular, whenever data has been gathered from two or more sources and put together or “aggregated” into an anonymised statistical format to illustrate the incidence of particular uses of hate speech - such as those contrary to administrative, civil or criminal law - it should still be capable of being broken down into small information units so that issues relating to particular groups (such, as disability, gender, religion or belief) and factors (such as the type of user or the location of the use) can be identified. This would ensure that the emergence of certain trends or the particular vulnerability of certain targets of hate speech becomes more evident. Such considerations could then be factored into the adoption of responses to tackle the use of hate speech.
86. Seventhly, the data that is being gathered and its analysis should be widely disseminated. It should thus be provided not only to all those bodies and individuals that have formal responsibilities for tackling the use of hate speech but also to politicians, religious and community leaders and others in public life who are in a position to make it clear that the use of hate speech is unacceptable in a democratic society. Furthermore, it is important that the data and its analysis should also be presented in a format that is accessible for further dissemination through media outlets. This will enable the public to appreciate what is occurring and the harm that the use of hate speech causes.
87. Finally, a specific public authority should be designated as having the responsibility for ensuring that these requirements for more consistent,

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<sup>61</sup> See J. van Dijk, J. van Kesteren and P. Smit, *Criminal Victimization in International Perspective: Key Findings from the 2004-2005 IcvS and EU ICS*, 2007.

<sup>62</sup> Such as the harassment revealed through the European Union Agency for Fundamental Rights' EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey - Main results, 2014.

<sup>63</sup> “Reports on subjectively experienced discrimination are valuable as an indicator, particularly when they are assessed against the background of other kinds of information, such as unemployment statistics, police records, complaints filed etc.”, GPR No. 4, para.9.

systematic and comprehensive data collection and analysis are actually being fulfilled by the various bodies and institutions concerned.

## F. Raising awareness and counter-speech

### *Recommendation 4*

88. This recommendation is directed to discouraging and preventing hate speech through demonstrating the danger that it poses and through counter-speech, i.e., the reaffirmation of the values that its use threatens and challenges to the assumptions on which this use relies. It recognises that this entails drawing upon a wide range of actors but especially public figures and officials, educators and teachers, non-governmental organisations, equality bodies and national human rights institutions. However, the emphasis on the need for the active engagement with the public in general on this matter reflects the fact that respecting and securing the inherent dignity and the equal and inalienable rights of all members of the human family is the responsibility of everyone in a democratic society.
89. At the same time, recommendation 4 requires certain persons to be the object of particular efforts in which both the unacceptability of the use of hate speech is asserted and the values threatened by this use are reinforced. Such efforts should be directed not only to those who may be particularly susceptible to the influence of misinformation, negative stereotyping and stigmatisation but also to those who have either already succumbed to that influence or are seeking to exercise it. Past experience has shown that democracy and pluralism can be undermined and swept aside where calls to deny some their right to equality and dignity are listened to and acted upon.
90. Thus, the maintenance of pluralism and democracy is understood to require concessions by individuals and groups of individuals, limiting some of their freedoms so as to ensure the greater stability of society as a whole.

### **Raising awareness**

91. However, these ideals will not be safeguarded and valued solely by the imposition of restrictions on what people can say and do. It is also essential that there be an appreciation of **the importance of respect for diversity** within society and a shared commitment to securing it. At the same time, there is a need for steps to be taken to remove those barriers between various groups in society that can impede the development of mutual respect and understanding and that can be exploited to promote disharmony and hostility. These goals can be achieved in various ways.
92. In the first place, it is important to keep alive knowledge about what happened in the past. This can be achieved through the commemoration of the Holocaust and other onslaughts against democracy, pluralism and human rights perpetrated in Europe and elsewhere in the course of our

common history. Such commemoration can be undertaken through marking these events on special days or anniversaries, as well as by the erection of monuments to mark their occurrence, and through ongoing programmes that raise awareness and understanding about what occurred and why reflecting on these events remains relevant today. In particular, it would be useful to draw attention to the similarities between the goals and activities of organisations that are currently promoting hatred and intolerance and ones that have previously done so with disastrous consequences.

93. Secondly, efforts should be made to ensure that there is a much wider appreciation of what human rights standards require and of why their observance is fundamental for a democratic society. In particular, these issues - with a particular focus on the nature and effect of discriminatory practices - should be included in the general education which everyone receives. Teachers and professors should thus receive appropriate training and the necessary teaching materials so that they can provide this. It is important within the school context that this education be applied in the way pupils treat each other<sup>64</sup>. In this context, ECRI has recommended in its country monitoring the adoption of measures to promote mutual tolerance and respect in schools regardless of sexual orientation and gender identity. However, it has been noted that the responsibility given to certain institutions for developing appropriate curricula in this regard has not always been discharged and, in some instances, courses have not been delivered because of a failure to adopt the necessary implementing arrangements for them. There is a need, therefore, to ensure that necessary support is given for the development and delivery of such courses and that action in respect of both of these is duly monitored. Moreover, information and awareness-raising about human rights should not just be a matter for formal education programmes. It should also be the focus of recurrent discussion in the media and information programmes for the public in general.
94. Thirdly, initiatives to engender respect for diversity through promoting greater awareness of the "other" or "others" in society should be undertaken or supported. These initiatives might take the form of art and film festivals, concerts, culinary events, drama and role plays, exhibitions, lectures and seminars and special projects involving schools as well as broadcasts and publications. At the same time, it could be useful for persons with a migration background - including but not limited to those who may be prominent in fields such as culture, the economy and sport - to take part in programmes demonstrating their successful integration while maintaining their identity. It is, however, unlikely that all these promotional activities will be successful unless mutual respect and understanding is also exemplified by all public authorities in the way they carry out their different functions.

### Removing barriers to understanding

95. Fourthly, intercultural dialogue - involving an open and respectful exchange of views between individuals and groups belonging to different cultures - should be facilitated so that a deeper understanding of each other's perspectives can be gained. Such dialogue should take account of the guidelines in the *Council of Europe White Paper on Intercultural Dialogue "Living Together as Equals in Dignity"*<sup>65</sup>. In particular, it could be effected through undertaking shared cultural events and research projects, the provision of language courses, the establishment of scholarship and student exchange programmes and the holding of workshops to explore particular issues of concern. In the case of communities whose relations have been marked by conflict in the past, the support for dialogue between them may need to be linked to measures to promote conflict prevention, mediation and reconciliation. It will again be important for all public authorities to play an active part in this dialogue so that their example can be an encouragement for others to follow.
96. Fifthly, the links between different communities could also be strengthened through support for the "creation of collaborative networks to build mutual understanding, promoting dialogue and inspiring constructive action towards shared policy goals and the pursuit of tangible outcomes, such as servicing projects in the fields of education, health, conflict prevention, employment, integration and media education"<sup>66</sup>. The establishment of **mechanisms to identify and address potential areas of tension between members of different communities, and the provision of assistance with conflict prevention and mediation** could also be helpful<sup>67</sup>.
97. Sixthly, there should be particular efforts to **combat misinformation, negative stereotyping and stigmatisation** as these can provide the foundation on which the use of hate speech is based. For example, the police and the judiciary should only disclose the ethnic origin of alleged perpetrators of an offence when this is strictly necessary and serves a legitimate purpose as such disclosure can unjustifiably reinforce prejudices, while their subsequent acquittal may be overlooked or not reported. However, it is not enough to correct "facts" and contradict supposed characteristics which have been wrongly ascribed to a specific person or group of persons since this may never get the same circulation or attention as the statements being corrected or contradicted. There is a need for efforts also to be made to disseminate as widely as possible

<sup>64</sup> See measures proposed in GPR No. 10, parts II and III.

<sup>65</sup> Launched by the Council of Europe Ministers of Foreign Affairs at their 118th Ministerial Session, 7 May 2008.

<sup>66</sup> As recommended in Human Rights Council Resolution 16/18 Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, violence against, persons based on religion or belief, (24 March 2011), para. 5(a).

<sup>67</sup> *Ibid.*, para. 5(b).

alternative, comprehensible narratives about those subject to misinformation, negative stereotyping and stigmatisation which portrays them in a positive light that is well-founded and provides a compelling challenge to the adverse portrayal of the person or group of persons concerned. This could include steps to promote the participation and acceptance of persons from minorities in mixed sporting teams. **In addition, there should be a clear prohibition on the use of profiling** - i.e., the use of stereotypical assumptions based on membership of a particular group<sup>68</sup> - as the basis for measures taken in respect of counter-terrorism, law enforcement and immigration, customs and border control<sup>69</sup>. Although all such efforts may not affect the outlook of all those who employ misinformation, negative stereotyping and stigmatisation, they can contribute to preventing others being influenced by it.

#### The importance of counter-speech

98. Finally, these efforts should be linked with specific, prompt and unqualified condemnations of the actual use of hate speech. The clear condemnation of the use of hate speech is necessary not simply because its use is entirely unacceptable in a democratic society but also because this serves to reinforce the values on which such a society is based. Such **counter-speech** should thus not just say that the use of hate speech is wrong but underline why it is anti-democratic. It is important that no one stands by and allows hate speech of any kind to be used without challenging it. Such challenges are especially practicable in online media which provide various means of reacting to what is disseminated. All users of the media in any form should thus be encouraged to draw attention to instances in which hate speech is being used and to make clear their objection to such instances. However, while challenging the use of hate speech is the responsibility of everyone, public figures can make an especially important contribution in this regard because the esteem in which they are held gives their voice a considerable influence over others. It is, therefore, crucial that all public figures, notably politicians and religious and community leaders but also personalities in the arts, business and sport speak out when they hear or see hate speech being used as otherwise their silence can contribute to legitimising its use. In the monitoring cycles it has been noted that equality bodies, ombudspersons and national human rights institutions have often been particularly vocal in condemning the use of hate speech. This is undoubtedly valuable but such condemnation needs to be mainstreamed so that it is a much more general response by public figures rather than just a few lone voices. Such counter-speech might also take the form of withdrawing from activities and organisations in which persons using hate speech are actively involved.

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<sup>68</sup> Racial profiling is, according to GPR No. 11 (para. 1), "The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities".

<sup>69</sup> On the need to preclude profiling see, e.g., Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/HRC/29/46, 20 April 2015.

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99. Although many of the steps suggested above are ones of general application, recommendation 4 underlines that there is a special need for them in relation to children, young persons and public officials. In the case of the first two this is because their age may not only make them especially susceptible to the influence of hate speech but also because this may allow education to more readily free them from the prejudices that sustain its use. In the case of public officials the proposed steps are needed both because of the scope for positive influence over others arising from their position and because that position will make any use of hate speech by them especially serious given its apparent endorsement of the State.
100. Recommendation 4 also envisages the taking of steps to encourage those who use hate speech both to repudiate this use and to help them to end their association with groups using it. It is appreciated that this is not an easy task, not least because of engrained prejudices that can make resort to the use of hate speech almost habitual. Nonetheless, changing behavioural patterns is not impossible and various projects directed to this goal have been noted in the monitoring cycles. It would be appropriate, therefore, for these to be more widely emulated and supported, drawing also upon the experience gained from the programmes which Article 16(1) of the Council of Europe Convention on preventing and combating violence against women and domestic violence requires to be adopted to teach perpetrators of domestic violence to adopt non-violent behaviour in interpersonal relationships.
101. The steps envisaged by recommendation 4 are ones to be taken not just by individuals but also by a wide range of specific actors. However, recommendation 4 recognises that a particular contribution in this regard can be, and is often being, made by non-governmental organisations, equality bodies and national human rights institutions, whether individually or in cooperation with one another. In some instances this may require the latter two entities to be given specific authorisation to work against hate speech but all three of them will also need to be given the resources required to undertake such work.
102. Furthermore, recommendation 4 places special emphasis on educational work in raising public awareness about the dangers posed by the use of hate speech and in reinforcing the commitment to pluralism and democracy. This will require the capacity of teachers and educators to be enhanced so that they can deliver the necessary educational programmes<sup>70</sup>. Appropriate support should thus be provided for the training that this will entail, as well as for the production of the materials to be used in these programmes.

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<sup>70</sup> See, in this connection, the detailed recommendations in part III of GPR No. 10.

103. Although all these different efforts can be undertaken in isolation, they are likely to have an even more significant impact where they are undertaken against a background of greater cooperation and coordination on the part of the different stakeholders involved. This can entail, as has been noted in the monitoring cycles, the adoption of national strategies and action plans to fight extremism, racism, xenophobia, antisemitism and related intolerance, homophobia and transphobia. Such strategies and plans should have concrete tasks for ministries, municipalities and police and be drawn up and evaluated annually. It would also be appropriate to adopt action plans to integrate minority communities, with those communities participating in all stages of their design, monitoring and evaluation. In any event, it is crucial that all these efforts involve a continuing and not an ad hoc process and that they address all forms of hate speech.

#### **G. Support for those targeted**

##### ***Recommendation 5***

104. This recommendation focuses on the need to provide various forms of support for those who are targeted by hate speech. This reflects a recognition not only that the use of such speech may have an adverse effect on them emotionally and psychologically but also that they may be either unaware of their rights to take action against it or deterred from doing so on account of these effects or of various forms of pressure not to exercise those rights.
105. The use of hate speech can lead to those targeted by it feeling not only afraid and insecure but also - without any justification - guilty or ashamed and humiliated, leading to a loss of self-confidence and self-esteem. Moreover, these feelings can also result in physical symptoms such as loss of sleep and headaches, as well as mental and physical health problems of a more serious nature. As a result, such feelings can have consequences for every aspect of the life of those concerned, whether at work, school, or home, but their impact on family relations and the willingness to participate in society is especially serious<sup>71</sup>.

##### **Provision of counselling and guidance**

106. There is a need, therefore, to ensure that **appropriate support** is made available for those who suffer any of these consequences of the use of hate speech or are at risk of doing so. In particular, there is a need for this support to be provided both as soon as possible after they have experienced the use of hate speech and thereafter throughout the various official responses to it, including any criminal proceedings. Appropriately trained counsellors are required for the provision of such support. In particular, they should be able to ask about the person's feelings and

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<sup>71</sup> See, e.g. the review of the literature in I. Dzelme, Psychological Effects of Hate Crime - Individual Experience and Impact on Community (Attacking Who I am) A qualitative study, Latvian Center for Human Rights, 2008. This is also recognised in the provisions of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

fears, as well as to establish whether there is a need for any medical attention. In addition these counsellors need to provide the reassurance that the person targeted by the use of hate speech is not at fault and to help him or her regain some sense of control and confidence. It also needs to be recognised that the process of recovery can take some time and the period can vary according to the particular experience and the character of the individual affected. The provision of this form of support for those targeted by hate speech needs to be organised on a systematic basis and to be available whatever form the use of hate speech may take.

#### **Exercising the right to redress**

107. At the same time, those targeted by the use of hate speech have the right both to respond to it through **counter-speech and condemnation** and through seeking recourse through proceedings brought before the competent courts and authorities. However, having such rights is not sufficient. It is also important that they be aware of such possibilities and that they are not deterred from exercising them.
108. There are various measures that can be adopted in order to ensure that those targeted by the use of hate speech are **aware of their rights**. These include publicity campaigns making it clear not only that the use of hate speech is unacceptable but also setting out the different ways in which those targeted by it can respond or seek redress. In addition, such campaigns should emphasise that, as well as dealing with the particular situation of the individual concerned, making complaints is a crucial part of the wider efforts to tackle the use of hate speech. Such campaigns might often be general in nature. However, in some instances it could be particularly useful to focus them on persons belonging to particular groups, such as visible minorities or LGBT persons through the NGOs or media outlets that they especially use.
109. In addition, information about the various possibilities of taking action against the use of hate speech might be disseminated through central and local government offices used by the public, advice centres, lawyers and non-governmental organisations.

#### **Removing obstacles to redress**

110. Furthermore, even when there is an awareness of the rights, there are various factors that may discourage those targeted by the use of hate speech from exercising them. These can include a sense that doing so is too complicated, too expensive or is not worth the trouble involved, particularly if it is believed that complaints will not be believed or taken seriously. In addition, persons may be deterred from taking action because of fear of repercussions from those using hate speech as well as actual threats issued by them. All of these factors seem to lead to the under-reporting of instances of the use of hate speech that has been noted in the monitoring cycles.

111. Concerns about the **complexity and expense of making complaints** - particularly those involving legal proceedings - in respect of the use of hate speech can best be addressed by making the requirements for them as straightforward and user-friendly as possible and ensuring that appropriate assistance is available for submitting and pursuing them. Such assistance can take the form of support for organisations - whether non-governmental ones or equality bodies and national human rights institutions - to provide advice and representation in relevant proceedings and/or the extension of legal aid schemes to the making of complaints, especially where legal proceedings are involved. It would not be appropriate for public authorities or private organisations to charge a fee for their handling of complaints made to them about the use of hate speech. Furthermore, any fee payable for legal proceedings brought in respect of such use should not be set at a level that makes bringing them impracticable. Moreover, all those tasked with receiving complaints, whether in public authorities or in private organisations, should have appropriate training to ensure that the manner in which those complaints are received is not in itself off-putting to those who are complaining.
112. Notwithstanding such support for making complaints, it is unlikely that they will be lodged where there is a strong feeling that these are not expected to make a difference, whether to the person concerned or the group of persons to which he or she belongs. It is vital, therefore, that the positive impact of a complaint - namely, a remedy for the individual instituting the process and/or action to prevent repetition - can be demonstrated. This requires not only that complaints be properly investigated and determined but also that their outcome is widely disseminated. The latter could usefully be an element in the steps taken to ensure that those targeted by the use of hate speech are aware of their rights.
113. Furthermore, those who are targeted by the use of hate speech should not be deterred by fears about the consequences that might follow from their having complained or provided evidence about such use. Thus, there should be a specific criminal prohibition on any **retaliatory action** - such as dismissal from a job or harassment - being taken against them. For example ECRI has recommended in its country monitoring that migrants in an irregular situation should be able to complain about hate crime without risking immediate expulsion.

## H. Self-regulation

### *Recommendation 6*

114. This recommendation is concerned with the ways in which the use of hate speech can be tackled through the efforts of some of the bodies, institutions and other organisations to which those using it either belong or are otherwise connected. Although the use of hate speech is a matter of general public concern and occurs in a wide variety of different fora, those

using it will in many instances have particular affiliations - including as employees and users of facilities - with one or more different bodies, institutions and organisations. These can be both public and private entities and will include parliaments and other elected bodies at the national, regional and local level, ministries and other public bodies, the civil or public service, political parties, professional associations, business organisations and schools, universities and other educational institutions, as well as a very wide range of cultural and sporting organisations.

#### A matter of responsibility

115. Notwithstanding that the problems posed by the use of hate speech may not be a particular focus of the activities pursued by every one of such bodies, institutions and organisations, they all have the common responsibility of everyone in a democratic society to respect and secure the inherent dignity and the equal and inalienable rights of all members of the human family. Thus, insofar as possible within their competence, these bodies, institutions and organisations should make it clear that the use of hate speech by persons affiliated with them is entirely unacceptable and they should take action to prevent or sanction such use. Furthermore, they should seek to ensure that any use of hate speech by persons affiliated with them is brought to their attention. In addition, they should provide training so that those persons appreciate why the use of hate speech is unacceptable and so that others can speak out against and condemn such use.

#### Essential features

116. The emphasis placed by this aspect of the Recommendation on **self-regulation** is a reflection of the need to ensure that any control exercised over freedom of expression is as limited as possible. In addition, it embodies a recognition that these bodies, institutions and organisations are often best-placed to identify certain uses of hate speech and to prevent their continuation, whether by the exercise of persuasion or the imposition of some form of sanction. In many instances, therefore, the use of self-regulation can be the most appropriate and most effective approach to tackling hate speech. However, it is also appreciated that **the nature of these bodies, institutions and organisations can vary significantly and that this will have a bearing on the exact way in which they can discharge their particular responsibility to tackle hate speech.** This should, therefore, be borne in mind in the provision of support by governments for the self-regulation undertaken by these bodies, institutions and organisations. In particular, any such support should not be conditional on a single model of self-regulation being adopted; **for this reason self-regulation involving the media is more specifically addressed in recommendation 7.**
117. Nonetheless, recommendation 6 identifies certain features that can be useful to include in all self-regulatory schemes, namely, the adoption of **codes of conduct** (or ethics) accompanied by certain sanctions for non-

compliance with their provisions, arrangements for the monitoring of statements and publications to preclude the use of negative stereotyping and misleading information, the provision of training and the establishment of complaints mechanisms.

#### **Codes of conduct**

118. The existence of such codes is all the more important where the position of the speaker may entail an immunity - such as in the case of judges and parliamentarians - since that may preclude any other forms of action being taken against the use of hate speech by the person concerned.
119. It is clear from the monitoring of ECRI that various bodies, institutions and organisations have already adopted codes of conduct (or ethics) and similar sets of standards - including rules of procedure - that can be used to tackle hate speech by those affiliated with them in some way. Those found in various member States include ones adopted for judges, ministers, members of legislatures, members of professional organisations, those involved in sporting organisations and staff and students in universities and colleges. In addition, there are a number of international or regional codes or charters that are applicable to bodies, institutions and organisations operating within member States such as the Disciplinary Code of the International Federation of Football Association (FIFA), the guidelines of the European Union Football Association (UEFA) and the Charter of European Political Parties for a non-racist Society. In some instances the reach of these codes can be quite wide, notably in the case of those connected with sporting activities. Thus, these can apply not only to those engaged in the sport itself or involved in its organisation and management but they also apply to those attending or supporting the activities both where it these take place and elsewhere (such as in the course of travelling to the venue concerned). Certain codes governing parliamentarians also apply wherever the impugned speech takes place and so are not limited to proceedings within the legislature.
120. However, the provisions found in these codes do not always address the use of hate speech in specific terms. Instead they can be concerned with various forms of conduct which may come within its scope, such as the use of insulting, offensive or threatening language, or they may refer only to the requirement to respect dignity and equality in very general terms. Unfortunately, not all forms of hate speech are treated in practice as being embraced by such formulations and, as a result, no action is taken against some users of hate speech, including those who use racist and homo- and transphobic speech. The use of codes to tackle hate speech is likely to be more effective if the conduct being proscribed is explicitly formulated by reference to the understanding of hate speech in this Recommendation. In particular, they should be concerned about all forms of hate speech and not just those which might attract criminal sanctions. Furthermore, the codes should make clear the commitment of those adopting them to equality and dignity and leave no doubt to their view that the use of hate

speech is unacceptable. In all cases the formulations used in codes should be clear and accessible so that there can be no uncertainty about the conduct considered unacceptable. This is important both for those who may be subject to sanctions and for those targeted by the use of hate speech. Moreover, the codes need not only to be disseminated to and drawn to the attention of those to whom they apply but should also be made publicly available so that anyone with an interest in ensuring the observance of their requirements is in a position to act accordingly.

121. Recommendation 6 specifically calls for political parties to be encouraged to sign the **Charter of European Political Parties for a non-racist society** as acceptance of it by such parties will not only entail an acknowledgement by them of their particular responsibilities of such parties as actors in a democratic political process but will also provide leadership for others in demonstrating the need to adopt codes to tackle the use of hate speech<sup>72</sup>.

#### Implementation

122. Although the adoption of codes in itself reflects a commitment to the values embodied in them, their effectiveness also requires some arrangement to ensure that their provisions are respected. This can best be achieved through a combination of **monitoring and complaints mechanisms**.
123. Monitoring techniques can vary. In some instances, they will involve no more than listening to speeches and reviewing publications of those affiliated with the body, institution or organisation concerned and then making an appropriate response to it. However, there ought still to be someone with the clear responsibility for such monitoring, even if others are also able to draw attention to particular uses of hate speech. Furthermore, as recommendation 6 indicates, it will be particularly important for those monitoring to watch out for the use of negative stereotyping and misleading information as the former can be a less obvious form of hate speech and the latter can reinforce the prejudices that sustain such use. In the context of sporting venues, particular attention needs to be paid to the scrutiny of those attending events so as to prevent them from distributing or selling in their proximity any material in which hate speech is used, as well as to prevent access to those who display or carry banners, leaflets and symbols on which hate speech is used and to suspend or stop an event when hate speech is used by those attending it<sup>73</sup>.

<sup>72</sup> See also ECRI Declaration on the use of racist, antisemitic and xenophobic elements in political discourse (adopted on 17 March 2005).

<sup>73</sup> See GPR No. 12 Combating racism and racial discrimination in the field of sport.

124. Complaints mechanisms can provide a means of determining whether the provisions of the codes have been breached even where internal monitoring or reports by others have not pointed to this having occurred. In addition, where such a breach is found, they can decide what sanctions should be imposed. Such mechanisms should be open not just to those who are affiliated with the relevant body, institution or organisation but also to those who have grounds for considering that they have been targeted by an affiliated person's use of hate speech. They should embody clear, fair and transparent procedures and should be readily accessible, such as by means of a telephone hot-line or some on-line arrangement. Bodies, institutions and organisations with complaints mechanisms should make particular efforts to encourage those targeted by the use of hate speech to come forward with complaints. They should also monitor how such complaints are dealt with so that they can provide a genuine remedy for those affected by such use.
125. Most of the existing codes also make provision for the imposition of sanctions in the event of breach of their provisions. These vary in character but they can include the imposition of fines, the removal of a minister from a government post and a judge from his or her appointment, the suspension of a member of parliament from the legislature's proceedings, the expulsion and barring of persons from sporting venues, the withdrawal of points in sporting competitions and the requirement to hold sporting events behind closed doors. It is important that any sanctions imposed genuinely reflect the gravity of the use of hate speech, otherwise this could give the impression of endorsing such use. Certainly, the imposition of appropriate and well-publicised sanctions for the use of hate speech can send a clear anti-hate speech message and demonstrate that unfettered freedom of expression is unacceptable. Thus, where a particular use of hate speech has been sanctioned, it will be important for the leadership of the body, institution or organisation concerned to draw this fact to the attention of both those affiliated with it and the wider public, together with an explicit reaffirmation that the use of hate speech as entirely unacceptable.
126. The effective implementation of codes is very much dependent upon the provision of **appropriate training** for those with responsibilities in this regard. In particular, there is a need for such persons to understand what constitutes hate speech, including its use in coded or less obvious formats, how to respond to its use and how to handle those using it, as well as how to undertake monitoring and operate complaints mechanisms appropriately. As this is not something that can be easily achieved by all the bodies, institutions and organisations for which the adoption of codes dealing with hate speech would be appropriate, the provision of support by governments is likely to be especially helpful. This might be done directly or through facilitating its provision by entities with particular skills in this field.

127. In addition, the implementation of codes will only be effective if **sufficient funding** is provided for the various monitoring and complaints mechanisms involved. This needs, therefore, to be a factor to be taken into account both at the time of their adoption and in subsequent reviews of their operation.
128. Furthermore, in order to facilitate the adoption and application of codes of conduct (or ethics) to tackle the use of hate speech, it would be helpful if governments also provided support for **exchanges of information** between all the bodies, institutions and organisations concerned as to the strengths and weaknesses of those codes that have been in operation for some time.

#### **Relationship to other forms of redress**

129. In many instances self-regulation in general and internal complaints mechanisms in particular can be expected to deal effectively with the use of hate speech, including the provision of appropriate satisfaction for those targeted by it. However, this will not always be the case, especially where a specific use of hate speech is such that the payment of compensation or the imposition of a criminal sanction might be the response required. Thus, although self-regulatory arrangements will often preclude the need to pursue other forms of redress under the law, they should never be or become a barrier to seeking such forms of redress.

#### **I. Media and the Internet**

##### ***Recommendation 7***

130. The use of hate speech in the vast majority of cases takes place through the media and the Internet, with the connected opportunities afforded by the latter often enhancing the reach and the immediacy of such use. At the same time, the media and the Internet are also amongst the primary means not just for communicating and reinforcing the values which the use of hate speech seeks to undermine but also for exercising the right to freedom of expression which is fundamental to a democratic society. Thus, the specific focus in this recommendation on both regulation of and self-regulation by the media and the Internet reflects the recognition of their particular significance for hate speech - as a vehicle both for using it and challenging this - and also of the need to ensure that any control exercised over freedom of expression is as limited as possible. While some regulation of the media and the Internet is not inconsistent with the right to freedom of expression, the placing of greater reliance on self-regulation to tackle the use of hate speech will in many instances be not only more effective but also more appropriate.

#### **Recognising diversity**

131. The term “**media and the Internet**” is one that embraces many forms of communication with vastly different characteristics and impact. Thus, it covers print media (such as newspapers, journals and books, as well as pamphlets, leaflets and posters) but also audiovisual and electronic media (such as radio, television, digital recordings of sound and image, web sites,

apps, emails and a vast array of social media and video games) and undoubtedly other forms of communication that may yet be developed. Moreover, some things spoken, published or otherwise communicated will be truly individual initiatives, while others will be the product of substantial business enterprises. Some such communications will be subject to varying forms of editorial control but others will appear without being reviewed by anyone other than their originator and indeed appear without the prior knowledge of the person providing the particular means of communication. In many instances the author of a communication will be identifiable but in others he or she can remain anonymous. Some communications will reach an audience almost instantaneously but others will depend on the willingness to listen, read or otherwise access what is being communicated. Some will be widely disseminated and/or enduring but others will be barely noticed and/or fleeting in their existence. All these differences need to be taken into account when determining the scope of regulatory action and self-regulation, as well as whether expectations as to what they can achieve are realistic.

132. Apart from the requirements applicable to statements and publications (including broadcasts) under the general law (discussed in the following section), the degree of specific regulation to which the media and the internet are subject varies from one member State to another. In some instances there is a requirement to obtain a licence or franchise to operate. There may also be a requirement to abide by certain standards, with the imposition of sanctions - including the permanent or temporary loss of the licence or franchise being possible - where these are breached. In other instances there may only be a requirement to observe certain standards and the existence of some power to enjoin the particular material from being put into circulation, as well as the possibility of exercising indirect influence through the grant of subsidies in cash or in kind that are subject to the fulfilment of certain conditions. Yet in others there are no particular requirements to be observed apart from those under the generally applicable law.

#### **Basic requirements**

133. All **regulatory action** with respect to the media and the Internet - including that directed to the use of hate speech - must be consistent with the right to freedom of expression and afford the safeguards against misuse of power applicable to all legal measures affecting the exercise of this right (considered in the following section). Recommendation 7 does not suggest that any new regulatory powers should be adopted but does indicate that effective use should be made of all existing ones - including the full range of available sanctions - that might be relevant to tackling the use of hate speech. For this purpose, however, it is important - as it has been already observed - that the understanding of hate speech relied upon should be as wide as the one found in the Recommendation. In addition, such powers as exist will only be useful if the relevant bodies both actively monitor the entities that they are meant to regulate - including taking the

initiative to look at the way certain groups of persons are being portrayed - and respond promptly to instances where the use of hate speech is drawn to their attention.

134. Moreover, the regulatory bodies should ensure that there is sufficient public awareness of their role so that such instances are actually drawn to their attention. Regrettably, it is recalled that in the monitoring cycles it has been noted that the relevant bodies sometimes only exist on paper as they have not actually been properly constituted and this clearly needs to be remedied for any regulatory action to occur. However, consistent with the need to respect the right to freedom of expression, those with regulatory roles should appreciate the desirability of giving preference to using such powers as they have to encourage effective self-regulation of the use of hate speech rather than seeking themselves to intervene directly with the operation of the media and the Internet.
135. The elaboration in recommendation 6 on **self-regulation** as regards the adoption of appropriately formulated codes of conduct (or ethics), monitoring, complaints mechanisms and training is generally applicable to the operation of self-regulation by the media and the Internet. It is not, therefore, repeated in this section but certain aspects of especial relevance to the media and the Internet are highlighted.

#### Codes of conduct

136. As has been noted in the monitoring cycles, various codes of conduct (or ethics) containing provisions on hate speech have already been adopted by many media professionals and organisations, including the Internet industry<sup>74</sup> Some have been adopted by professionals themselves and others are internal documents of particular organisations but many apply across specific sectors. In some instances they are entirely the initiative of those adopting them but often they have been prompted by regulatory pressures. However, although these codes often specifically provide that hatred should not be incited and that discrimination should not be propagated, they do not generally cover all the aspects of hate speech as this is understood in the Recommendation, including its more coded forms. Moreover, in some member States the only codes that do exist are limited - whether formally or in practice - to just print media and they may not even apply to companion websites on which hate speech may be posted.
137. There is a need, therefore, to encourage the adoption of codes that cover the widest possible range of media and internet use. Furthermore, such codes - or conditions of use - should govern everyone and not just media professionals and organisations, although it might not be possible for these to cover all individual initiatives (such as self-publishing). This does not mean that there should just be one code as that could make it difficult, if

<sup>74</sup> Such as The Best Practices for Responding to Cyberhate, of the Anti-defamation League (ADL), to which Facebook, Google, Microsoft, Soundcloud, Twitter, Yahoo, YouTube and other social networks have signed up.

not impossible, to take account of the different forms of communication being used. However, the conduct proscribed in these codes should explicitly use the understanding of hate speech found in the Recommendation.

138. Moreover, given the influence that can be exercised by or through the media and the Internet, it would be appropriate for these codes not only to proscribe the use of hate speech in all its forms but also to indicate ways of presenting information that does not unnecessarily strengthen the attitudes that sustain the use of hate speech, to require that proper account be given of the perspective of those targeted by the use of hate speech in reporting events and to encourage the coverage of events that challenge negative perceptions about particular groups of persons. Thus, the inclusion in news reports of the ethnic origin of the alleged perpetrator of an offence is not generally relevant but this fact can often be remembered despite the person concerned having been subsequently acquitted. There is also a need for care to be exercised in reporting some events, particularly those involving extremists or terrorists, since sensationalising them and focusing on drama can inadvertently strengthen prejudices and inflame passions.
139. In addition, consideration should be being given to whether or not certain events involving those frequently stigmatised are only being reported because those reporting them share the negative perceptions of them, as well as to whether persons hostile to such groups are effectively given privileged access to certain outlets. Similarly, the conditions of use for web fora and similar services might preclude the use of anonymous comments. In addition, they might also preclude access at night-time where this possibility is seen to facilitate the posting of offensive comments. Moreover, reports concerning events involving or of concern to persons who are frequently targeted by the use of hate speech - such as those reporting their involvement in some alleged disorder or dispute - often do not give their view on the circumstances concerned and thus allow the reinforcement of misinformation and negative stereotyping to go unchallenged. Furthermore, such stereotyping and stigmatisation could also be challenged by the publication of reports showing persons belonging to groups of persons targeted by hate speech in a positive light, such as ones dealing with their successful integration or explaining the values underpinning particular traditions. Reporting of this kind could be facilitated by encouragement for the development of tools such as the glossary for journalists on integration that explains certain key terms, which was noted in a monitoring cycle. In this way, the codes could encourage the media to develop counter narratives to the 'rationale' that underpins the use of hate speech<sup>75</sup>.

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<sup>75</sup> See further Council of Europe Commissioner for Human Rights, Ethical journalism and human rights, (CommDH (2011)40, 8 November 2011).

### **Monitoring**

140. A crucial aspect of self-regulation is the monitoring of what is being communicated by media and through the Internet. This is of general importance but it is especially necessary where this has not been subject to any form of editorial control. Even where there are codes of conduct (or ethics), monitoring is not always undertaken systematically. This is notably so in respect of the use of hate speech on the Internet. However, as some services on the Internet have shown, there are various automatic techniques available to search for hate speech and these can be complemented by specific facilities to report its use and the material in question can then be removed in accordance with the service's conditions of use. Such schemes should be emulated and, wherever possible, they should be encouraged by regulatory authorities. In addition, research into enhancing their effectiveness should be encouraged by regulatory bodies. Furthermore, individual users should be encouraged to report uses of hate speech and non-governmental organisations should be supported in the undertaking of monitoring or the operation of contact points or hot-lines so that such uses of hate speech can be identified. Monitoring will, however, only be worthwhile if this also leads to the timely deletion of uses of hate speech that are identified and the commitment to do so has already been made by some social platforms that have undertaken both these approaches. Consideration should also be given, in particular cases, to whether or not it would be appropriate for persistent uses of hate speech to entail the blocking of access to internet services where this occurs.

### **Complaints mechanisms**

141. The impact of the complaints mechanisms that exist seems to be variable. Although there are certainly instances in which complaints about the use of hate speech are considered and upheld, there are many others where this does not occur. In addition, as already noted, some are limited to print media and in particular newspapers and journals. Moreover, even these mechanisms are not applicable to all such publications because they are based on voluntary membership and some do not choose to join it. In addition, some of the mechanisms are entirely internal bodies of a given media or internet entity. Furthermore, some do not attract many complaints despite the extent of the use of hate speech occurring and this seems partly attributable to the fact that the mechanisms are not very well-known and, where this is not the case, lack of confidence that they will be effective. Certainly, any rulings that are adopted - which usually just entail the publication of the specific finding by the mechanism - are not generally binding and are not always acted upon.
142. There is a need, therefore, for either complaints mechanisms that apply to particular sectors of the media and the Internet - and are thus not merely internal bodies - to have a wider remit to embrace sectors that are not currently covered or for similar bodies to be established for those sectors. Moreover, confidence in such mechanisms could be enhanced by ensuring that they were better known, they enjoyed clear independence from the

influence of those whose conduct was being considered, and their role and rulings were more widely accepted, with the latter being given sufficient prominence so that any condemnation of the use of hate speech is obvious to all concerned. Steps in this direction should, therefore, be encouraged by regulatory bodies.

#### **Preserving freedom of expression**

143. At the same time, self-regulatory action should not lead to unjustified interferences with the right to freedom of expression. Thus, the barring and deletion of material from, for example, social platforms would only be justified where the actual use of hate speech is involved. However, it is certainly possible that the application of codes of conduct and conditions of use leading to the barring and deletion of material may in fact involve a mistaken or overbroad interpretation as to what can amount to hate speech, resulting in particular instances of the exercise of freedom of expression being unjustifiably stifled. There is a need, therefore, for decisions that have the effect of barring or deleting material to be subject to appeal and ultimately to challenge in the courts. Without such remedies, there will not be adequate protection for the right to freedom of expression.

#### **Provision of training**

144. As with other forms of self-regulation, there is also a need to ensure that **appropriate training** is provided for those involved in its operation. In particular, media professionals should not only have a deeper understanding of what constitutes hate speech but also appreciate how, in what they write and publish, they can both avoid facilitating its use and combat the conditions that give rise to such use through promoting tolerance and better understanding between cultures.

### **J. Administrative and civil liability**

#### ***Recommendation 8***

145. This recommendation is concerned with the imposition of administrative and civil liability for the use of hate speech. In particular, it deals with the clarification of the different responsibilities that may arise in respect of such use, taking into account the various ways in which such use may occur and the degree of involvement in this that particular actors may have. In addition to the need for redress for the particular harm which should be arranged in the light of the recommendations in paragraphs 10-13 and 15 of GPR No. 7, recommendation 8 identifies the need for specific powers to require the deletion of certain hate speech, the blocking of sites using hate speech, and the publication of an acknowledgement that hate speech had been published, as well as to enjoin the dissemination of hate speech and to compel the disclosure of the identities of those using it. These powers are proposed only for the more serious instances in which the use of hate speech occurs and requires their use to be subject to judicial authorisation or approval in order to ensure that the right to freedom of expression is respected.

146. In order to ensure that appropriate action is taken against these more serious instances of the use of hate speech, it is also recommended that the standing to bring the relevant proceedings be extended not only to those targeted by the use of the hate speech concerned but also to equality bodies, national human rights institutions and interested non-governmental organisations. In addition, the effective use of these powers is recognised to entail the training of the judges, lawyers and officials involved, as well as the exchange of good practices between those involved in the exercise of such powers.

#### Clarifying the basis for liability

147. The harm that results from the use of hate speech will in most instances be of a moral kind. However, there could well be instances in which those targeted by this use can also demonstrate that this has also caused them to suffer material loss, such as where it can be linked to the denial of an employment opportunity or the loss of the capacity to work through ill-health. There is a need, therefore, for the law to clarify the particular circumstances in which **compensation might be payable** and the basis under administrative or civil law on which this compensation can be sought, whether as in some member States pursuant to the protection of personality and reputation or by reference to some other administrative or civil wrong. Moreover, the use of hate speech can also be damaging to the reputation of a whole community or group of persons. However, while specific individual loss will not necessarily be significant in all such cases, the ability to seek a declaration that the reputation of persons belonging to that community or group of persons has been damaged and/or some token award could be appropriate and should be provided for in the law.
148. Furthermore, in order to ensure that there is no unjustified interference with the right to freedom of expression, any liability should be limited to the more serious uses of hate speech, namely, those which are intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it. Thus, it should not be enough to demonstrate damage or loss as a result of a particular use of hate speech for any liability to be imposed; the particular use must also be of such gravity - namely, where there is the intention to incite or an imminent risk of this occurring - that its imposition is warranted.

#### Recognising different responsibilities

149. At the same time, clarification will also be necessary in respect of those who might actually be found liable in this way on account of the use of hate speech. This is of crucial importance since, as recommendation 8 notes, many different kinds of entity and means of communication could become involved where hate speech is being used. An appropriate legal framework governing their **respective responsibilities**, if any, as a result of the use of hate speech messages should thus be established.

150. While the initial author of a particular use of hate speech might have some responsibility for this use, the determination of the degree to which this is shared - if at all - by others will need to take account of factors such as whether or not they took an active part in its dissemination, whether or not they were aware that their facilities were being used for this purpose, whether or not they had and used techniques to identify such use and those responsible for it and whether or not they acted promptly to stop this from continuing once they became aware that this was occurring. In this connection it should be noted that the European Court of Human Rights has considered the right to freedom of expression not to have been violated where a company was found liable to those targeted by hate speech posted on its internet news portal<sup>76</sup>. It did so, having regard to the extreme nature of the comments, the absence of means of identifying the person who had posted the comments so that he or she could be pursued, the company's failure to prevent or promptly remove the comments and the fact that the economic consequences of liability were not substantial for the company since the award was proportionate and had not affected its business operations<sup>77</sup>.
151. Furthermore, in some instances, the ability for certain facilities to be exploited for the use of hate speech may reflect a failure to comply with regulatory requirements. In such cases, when imposing any consequential **administrative sanctions**, such as a fine or loss of a licence or franchise, account would also need to be taken of the particular circumstances involved, including whether or not any previous warnings about the failures concerned have been given. A failure to take these circumstances into account could lead to a disproportionate response, which would be inconsistent with the right to freedom of expression

#### **Remedies other than compensation**

152. In addition to the payment of compensation and the imposition of administrative sanctions, recommendation 8 envisages the need for several **other remedies** to be available to deal with instances in which hate speech has been used. The remedies concerned - deletion, blocking of sites, publication of acknowledgements, enjoining dissemination and compelling disclosure - all entail significant interferences with the right to freedom of expression. Nonetheless, their use will not necessarily entail a violation of Article 10 of the European Convention on Human Rights as this has been considered appropriate in particular sets of circumstances by the European Court of Human Rights<sup>78</sup>. Thus, there is a need to ensure that they are only used where the use of hate speech involved is of the gravity required by

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<sup>76</sup> Delfi AS v. Estonia [GC], no. 64569/09, 16 June 2015.

<sup>77</sup> Cf. Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, no. 22947/13, 2 February 2016 in which the fact that no hate speech was used was a factor in finding that the imposition of liability on a company for a posting on its internet portal did amount to a violation of the right to freedom of expression.

recommendation 8 - namely, where it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it - and that this is not only actually required to remedy the situation in question but is also no wider in effect than that requires<sup>79</sup>. For example, there would be no need to require deletion or the publication of an acknowledgement where this had already occurred.

#### The importance of judicial control

153. Furthermore, the requirement that any exercise of such powers be subject to judicial authorisation or approval is a reflection of the fundamental importance of the courts being able to exercise a supervisory role and thereby provide a safeguard against the possibility of any unjustified interference with the right to freedom of expression. In most cases the exercise of such powers should require the prior approval of a court but it is also recognised that there can be urgent situations in which it is not appropriate to wait to seek such approval before acting and so judicial control can only occur after a particular power has been exercised.

#### Standing to sue

154. The ability to seek the use of these powers should certainly be vested in those who are targeted by the use of hate speech concerned. Indeed, there are already possibilities in some member States for someone whose personality has been violated by the use of hate speech to seek the discontinuation of this unlawful interference with it and/or the removal of its effects. Furthermore, given that judicial proceedings will be an intrinsic part of the process, it is essential that **legal aid** be made available to enable such persons to take part in them. However, recommendation 8 also envisages **a role for equality bodies, national human rights institutions and interested non-governmental organisations** in seeking the exercise of the powers to require deletion, blocking of sites and publication of acknowledgements, as well as those to enjoin dissemination and to compel disclosure. This reflects the recognition that these entities can all play a role in monitoring the use of hate speech. As a result, these entities may be especially well-placed to substantiate the need for the exercise of these powers and to initiate the process leading to this occurring. Making specific provision for them to act in this way is likely to ensure that these powers will not merely be theoretical remedies for the use of hate speech but will be ones that are practical and effective.

<sup>78</sup> See, e.g., *Andreas Wabl v. Austria*, no. 24773/94, 21 March 2000, *Nordisk Film & TV A/S v. Denmark*, no. 40485/02, 8 December 2005, *Keller v. Hungary (dec.)*, no. 33352/02, 4 April 2006 and *Peta Deutschland v. Germany*, no. 43481/09, 8 November 2012.

<sup>79</sup> Cf. the overbroad blocking measures found in *Yildirim v. Turkey*, no.3111/10, 18 December 2012 and *Cengiz and Others v. Turkey*, no. 48226/10, 1 December 2015 to violate Article 10.

### The need for training

155. Finally, as with other measures to be taken to tackle the use of hate speech, there will be a need to ensure that the judges, lawyers and officials involved in the provision of the various administrative and civil remedies for such use have **appropriate training**. This is important to enable them to appreciate whether or not a use of hate speech has occurred or is occurring is of sufficient gravity to warrant the use of these remedies, as well as whether or not a specific use of a particular remedy is consistent with the right to freedom of expression. In addition to this training, these goals could be facilitated by the exchange of good practices between those who have to deal with the sort of cases where administrative and civil remedies might be sought. Such exchanges should not be limited to ones between judges, lawyers and officials within their particular member State but should extend to those in other member States to ensure that the benefits of experience are more widely shared. All such exchanges should be facilitated by member States.

### K. Administrative and other sanctions against organisations

#### *Recommendation 9*

156. This recommendation is particularly concerned with the appropriate response to the use of hate speech by political parties and other organisations, as well as by those who belong to them. It envisages a two-fold response to their use of hate speech. Firstly, there should be a withdrawal of financial and other forms of support by public bodies where any form of hate speech is used by them or, in the case of their members, such use is not sanctioned. Secondly, there should be provision for prohibiting or dissolving political parties and other organisations - regardless of whether they are in receipt of such support - where the use of hate speech by them is of a more serious character, namely, it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination.
157. The two forms of response being recommended build on the similar ones found in paragraphs 16 and 17 of GPR No. 7. In particular, recommendation 9 is concerned with the use of hate speech in general and not just the promotion of racism dealt with in GPR No. 7. Moreover, the **requirement to withdraw support by public bodies** extends to all its forms. Thus it would cover not only grants, loans and other forms of financing for the activities of the political parties and other organisations concerned but also the making available to them of facilities or premises, the possibility to use staff and any other kind of practical assistance. Although directed to the withdrawal of all these forms of support, it is also implicit in recommendation 9 that no such support should be granted to political parties and other organisations where the specified conditions are seen to be met at the time this is requested. The measures envisaged in recommendation 9 are ones to be taken with respect both to political parties and organisations that have a formal legal status and those having a

more informal or *de facto* character. However, it is recognised in recommendation 9 that all such measures must always be applied in a manner consistent with the requirements of the right to freedom of association.

#### Rationale

158. The use of hate speech by various organisations, as well as the failure to sanction such use by their members, has been a concern noted in the monitoring cycles. In particular, this has involved the cultivation and dissemination by them of neo-Nazism, racism and xenophobia. In many instances, the entities concerned have been political parties - including those represented in the legislature - and other campaigning organisations. However, the use of hate speech by other organisations - including student fraternities within universities and football supporters' associations - has also been noted. In a number of instances, the organisations using hate speech have at the same time been receiving various forms of public support, usually financing in the case of political parties and the provision of facilities where other entities are involved.

#### Current practice

159. The monitoring cycles have noted that certain elements of the measures that are now being recommended already exist in some member States. Thus, there is the possibility of discontinuing public funding for political parties that are found to be hostile towards the rights and freedoms guaranteed under the European Convention on Human Rights. In addition, in many member States there are powers to prohibit or dissolve organisations, notably, ones that support racial or national hatred, incite violence and are a threat to democracy. However, it has also been noted that the arrangements to discontinue public funding for political parties have not always worked, particularly because of difficulties in fulfilling procedural requirements and the strict interpretation being given to the substantive ones. Moreover, where there are powers to prohibit or dissolve organisations that promote racism, it has noted that no action has in fact been taken. This can be because of the failure of the relevant authorities to be sufficiently active in gathering the evidence that would be required for the relevant proceedings or of a self-imposed requirement that such evidence should also be sufficient to substantiate the conviction of one or more of those belonging to them. Furthermore, in a number of member States there is still no power to prohibit or dissolve organisations which promote racism.

#### Justification for measures

160. The withdrawal of support from political parties and other organisations undoubtedly has the potential to infringe the right to freedom of association of those founding and belonging to them. This is even more so in the case of measures that result in their **prohibition and dissolution**. However, the right to freedom of association is guaranteed under Article 11 of the European Convention on Human Rights and Article 22 of the International Covenant on Civil and Political Rights. Both these guarantees

of the right provide that it can be subject to limitations where these are necessary in a democratic society for the protection of various objectives, most notably, the rights and freedoms of others. In addition, both treaties specifically provide that nothing in their provisions “may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised” in them or at their limitation to a greater extent than they provide<sup>80</sup>. Moreover, Article 20(2) of the Covenant additionally provides that “Any advocacy of national, racial or religious hatred that constitutes incitement to any discrimination, hostility or violence shall be prohibited by law”.

161. Furthermore, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that States Parties “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia: (a) Shall declare an offence punishable by law ... the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination”.
162. In several of its general recommendations, the Committee on the Elimination of Racial Discrimination has underlined the need for States Parties to fulfil their obligations under Article 4(b) of the International Convention on the Elimination of All forms of Racial Discrimination to declare illegal and prohibit organisations that promote or incite racial discrimination. It has done so most recently in *General Recommendation No. 35 Combating racist hate speech*), in which it also made it clear that it considered that “the reference in Article 4 to “organized...propaganda activities” implicates improvised forms of organization or networks, and that “all other propaganda activities” may be taken to refer to unorganised or spontaneous promotion and incitement of racial discrimination” (CERD/C/GC/35, 26 September 2013, para. 21). This approach is consistent with the view that the associations to which the

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<sup>80</sup> Article 17 and 5 respectively.

guarantee of the right to freedom of association applies covers both those with and without any discrete legal personality from their members<sup>81</sup>.

163. Furthermore, in its concluding observations on the periodic reports submitted pursuant to the International Convention on the Elimination of Racial Discrimination, the Committee has also expressed the need for certain States Parties - including member States - to adopt specific legislation criminalizing racist organisations and participation in such organisations, as well as to penalise organisations that propagate racist stereotypes and hatred towards persons belonging to minorities. In addition, it has commented on the need for existing prohibitions both to be strengthened and used. In particular, the Committee has expressed concern about certain cases of no action being taken to prohibit organisations involved the dissemination of ideas of ethnic superiority or hatred, or of the use of defamatory language or the advocacy of violence based on such ideas despite those cases having been widely reported in the country concerned.
164. Moreover, the need for bans to be imposed on racist associations has also been the subject of certain recommendations in the Universal Periodic Review.
165. In the context of the limitations on the right to freedom of association discussed above, it is thus not surprising that both the United Nations Human Rights Committee and the European Court of Human Rights have respectively concluded that such measures as those which recommendation 9 envisages being taken against political parties and other organisations - including those involving their prohibition or dissolution - are not necessarily inconsistent with the right to freedom of association. This has been particularly the case where the entity concerned was promoting fascism<sup>82</sup>, advocating racially motivated policies together with the use of large-scale coordinated intimidation<sup>83</sup>, inciting hatred and discrimination<sup>84</sup> or otherwise pursuing goals that were inconsistent with pluralism and thereby undermining democratic principles<sup>85</sup>.
166. In addition, in its concluding observations on periodic reports submitted by States Parties to the Covenant, the United Nations Human Rights Committee has also called for specific legislation criminalising racist organisations and expressed the need for effective steps to be taken to combat hatred, violence and discrimination and to impose on all actors and

<sup>81</sup> See European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Association* (2014), para. 48.

<sup>82</sup> E.g., *M. A. v. Italy*, Communication No. 117/1981, 10 April 1984.

<sup>83</sup> E.g., *Vona v. Hungary*, no. 35943/10, 9 July 2013.

<sup>84</sup> *Association nouvelle des Boulogne Boys v. France* (dec.), no. 6468/09, 22 February 2011.

<sup>85</sup> E.g., *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98, 13 February 2003 and *Kalifatstaat v. Germany* (dec.), no. 13828/04, 11 December 2006.

political forces rules of conduct and behaviour that are compatible with human rights, democracy and the rule of law. Similarly, in its concluding observations on periodic reports submitted pursuant to the International Convention on the Elimination of All forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination has recommended the adoption of legal and policy measures with the aim of preventing the registration and disbanding of the activities, as necessary, of organisations that have been involved in repeated attacks against foreigners and members of “visible minorities”.

#### Requirements to be observed

167. However, the European Court of Human Rights and the two Committees are also conscious of the potential for the measures envisaged in the recommendation 9 to entail violations of the right to freedom of association. Thus, both Committees have expressed concern in their concluding observations to periodic reports about the possibility of legislation directed against 'extremism' being interpreted and enforced in an excessively broad manner, thereby targeting or disadvantaging human rights defenders promoting the elimination of racial discrimination or not protecting individuals and associations against arbitrariness in its application. Moreover, there have been many instances where the prohibition on the formation of political parties and other organisations or their enforced dissolution has been found by the European Court of Human Rights to be unjustified<sup>86</sup>. Thus, all measures affecting both the existence of political parties and other organisations and their ability to operate must be supported by relevant and sufficient reasons and be proportionate in their scope.
168. The withdrawal by public bodies of various forms of support for political parties and organisations using hate speech or failing to sanction their members for having done so is, in principle a restriction compatible with the right to freedom of association. However, such a withdrawal is unlikely to be regarded as a proportionate measure unless there is a clear institutional commitment to the use of hate speech. This will undoubtedly exist where it figures in policy documents and pronouncements and by leading personalities in the political party or organisation concerned but also where it is used repeatedly by individual members without any objection being made to this. On the other hand, it will be less evident where such use entailed no more than an isolated incident of remarks by an individual member.

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<sup>86</sup> E.g., *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998, *The United Macedonian Organisation Ilinden and Others v. Bulgaria*, no. 59491/00, 19 January 2006, *Tourkiki Enosi Xanthis and Others v. Greece*, no. 26698/05, 27 March 2008 and *Association of Citizens Radko & Paunkovski v. the former Yugoslav Republic of Macedonia*, no. 74651/01, 15 January 2009.

169. The requirements for the prohibition or dissolution of a political party or other organisation are even more exacting given the gravity of such a measure<sup>87</sup>. This is reflected in the limitation by the recommendation 9 of the use of such measure to situations in which the hate speech concerned is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination. There will, therefore, be a need to establish that there is plausible evidence either that such an intention exists or that there was an imminent likelihood of the acts concerned occurring. Moreover, where the use of hate speech involved the speeches or other conduct of individuals as opposed to more formal policy documents or pronouncements, there will also be a need to establish that these were imputable to party or organisation concerned and that they gave a clear picture as to the approach which it supported and advocated<sup>88</sup>. This will most often be the case with the speeches and conduct of leading figures in a party or organisation. Thus, it may be appropriate to place less emphasis in this context on the activities of individual members, including former leaders, where these have not been endorsed in an explicit or tacit manner<sup>89</sup>.
170. The withdrawal of any form of support from a political party or other organisation should always be open to challenge in an independent and impartial court. Moreover, the prohibition or dissolution of a political party or other organisation should only be capable of being ordered by a court and such an order should be subject to prompt appeal, The observance of these requirements are essential safeguards for the right to freedom of association<sup>90</sup>.

## L. Criminal liability and sanctions

### *Recommendation 10*

171. This recommendation is concerned with the circumstances in which criminal sanctions ought to be imposed for the use of hate speech. Their imposition is only considered appropriate in limited circumstances because of the potential risk they pose for violating the right to freedom of expression. However, even then there should be no resort to criminal sanctions where a particular use of hate speech can be effectively dealt with through a measure of a less restrictive nature. Furthermore, it addresses the manner in which the relevant offences are defined since this

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<sup>87</sup> See European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights, Guidelines on Political Party Regulation (2011), paras.89-96 and European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights, Guidelines on Freedom of Association (2014), paras. 247-256.

<sup>88</sup> See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98, 13 February 2003, at paras. 101 and 111-115.

<sup>89</sup> See, e.g., the conclusion in *Socialist Party and Others v Turkey* [GC], no. 21237/93, 25 May 1998 that the speeches of a former chairman did not provide evidence of the party's inadmissible objectives and thus justify its dissolution.

<sup>90</sup> See, e.g., paragraphs 10 and 74 of Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe.

is important both to avoid the risk of a violation of freedom of expression and to ensure that their scope keeps pace with technological developments relating to the use of hate speech. Moreover, recommendation 10 highlights the danger of the offences being misused through prosecutions that target criticism of official policies, political opposition or religious beliefs rather than any actual use of hate speech. In addition, it recognises the importance of those targeted by a particular use of hate speech being able to participate in the relevant proceedings.

172. Recommendation 10 underlines the need for the sanctions made available for these offences to reflect the serious consequences that can result from the use of hate speech. At the same time, it emphasises the need for any specific penalty imposed in a particular case to reflect the principle of proportionality since a failure in this regard can itself be a basis for violating the right to freedom of expression. Although recommendation 10 envisages the imposition of criminal sanctions as exceptional, it also recognises that their imposition in appropriate circumstances should not be frustrated by failings in the handling of investigations or prosecutions. It thus underlines the need for the effectiveness of these to be monitored. As such effectiveness will often turn on good cooperation and coordination between the authorities involved (including those in other States) and on those working for them being appropriately trained, recommendation 10 highlights these matters requiring the particular attention of member States.

#### **Circumstances warranting criminal responsibility**

173. The relevant factors for a particular use of hate speech to reach **the threshold for criminal responsibility** are where such use both amounts to its more serious character - namely, it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination - and the use concerned occurs in a public context. As the paragraphs above dealing with the definition of hate speech make clear<sup>91</sup>, the former factor goes beyond the formulation used in paragraph 18 a-f of GPR No. 7 in that it envisages responsibility being imposed where there is an element of recklessness as to violence, intimidation, hostility or discrimination being a consequence of a particular use of hate speech and not just that this is intended. Moreover, although threats - as opposed to the other conduct covered by GPR No. 7 are not required to be made in public for the purpose of attracting criminal responsibility, recommendation 10 requires a public context for a use of hate speech to attract such responsibility.
174. It is a matter for the criminal law of each member State as to how such responsibility is to be imposed. In particular, it might sometimes be possible to rely on **provisions of more general character**, such as those dealing with insult, rather than ones specifically concerned with the use of

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<sup>91</sup> See paras. 14-18 above.

hate speech. However, it is crucial that, in addition to requiring compliance with the two factors just discussed, there actually be a provision or provisions enabling responsibility to be imposed for each of the different elements of what constitutes hate speech for the purpose of the Recommendation. In this connection, it is recalled that the monitoring cycles have shown that this has not always been the case with regard to criminal responsibility for the different acts with which paragraph 18 of GPR No. 7 is concerned. As a result of lacunae in the legislation, there have been instances in which it was not possible to prosecute persons who appeared to have committed some of those acts. Moreover, it is important that, if offences other than those specifically dealing with the use of hate speech are the basis for a prosecution in respect of such use, this does not lead to the significance of the conduct concerned being diminished either in terms of the seriousness with which it is viewed or the level of the sanction that can be imposed. Although sanctioning serious uses of hate speech is desirable in itself, such a measure also has the additional benefit of underlining its unacceptability in a democratic society. This benefit should not, therefore, be lost by an inappropriate qualification of the conduct concerned

#### Drafting the offences

175. The need to ensure that the relevant provisions are drafted in a clear and precise manner is of the utmost importance. Without such **clarity and precision**, there is likely an absence of legal certainty as to scope of the conduct that is prohibited. This would then sustain claims that there is an interference with freedom of expression that is not prescribed by law and so - notwithstanding that the imposition of a criminal sanction would otherwise be consistent with the right to freedom of expression - a violation of Article 10 of the European Convention on Human Rights (as well as potentially of the prohibition in Article 7 on punishment without law). Thus, when framing the relevant provisions, due account should be taken of the definitions given above for the various terms used in the understanding of what constitutes hate speech for the purpose of the Recommendation<sup>92</sup>.
176. Furthermore, particular attention should also be paid when drafting the relevant provisions to setting out clearly the **considerations appropriate for imposing a criminal sanction** on a given use of hate speech. These considerations are whether (a) there actually exists an intent to incite acts of violence, intimidation, hostility or discrimination or a likelihood of this being incited<sup>93</sup> and (b) whether there are other less restrictive but still

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<sup>92</sup> See paras. 8-21 above.

<sup>93</sup> See the finding of the European Court of Human Rights in *M'Bala M'Bala v. France* (dec.), no. 25239/13, 20 October 2015 that a blatant display of hatred and antisemitism disguised as an artistic production was as dangerous as a head-on and sudden attack and so did not deserve protection under Article 10 of the European Convention on Human Rights.

effective means of responding to the use of hate speech (such as through the imposition of civil and administrative liability<sup>94</sup>).

177. Moreover, in drafting the relevant provisions, it is also crucial to **avoid introducing further requirements** for the imposition of criminal responsibility to those which have already been outlined, such as the disruption of public order, the size of the audience for the hate speech used or the extent of its dissemination. These requirements may well be relevant to the assessment of the risk of whether any incitement can reasonably be anticipated but their separate specification as an element of criminal liability has been seen in the monitoring cycles as adding further obstacles to securing convictions.
178. Finally, although clarity and precision is essential, the particular language used to specify the different forms of expression through which hate speech is used should be sufficiently open to **accommodate technological developments**. This language should not, therefore, be anchored in the known forms of expression (such as the print or social media) but should focus more on the essential nature of expression and thus be capable of embracing other forms that might emerge.
179. In addition to imposing criminal responsibility on the basis set out above, it would also be appropriate to impose **certain additional bases for responsibility**. These are the ones set out in paragraph 18g and paragraph 20 of GPR No. 7, namely, the imposition of responsibility for creating or leading a group which promotes or supports the use of hate speech, participating in the activities of such a group with the intention of contributing to the use of hate speech for which criminal sanctions can be imposed and intentionally instigating, aiding or abetting the use of such hate speech or attempting to use it. The imposition of responsibility in such cases would reflect both the breadth of the understanding for the purpose of the Recommendation and the liability for inchoate acts that normally accompanies the creation of criminal offences. Also following, paragraph 22 of GPR No. 7, it should be made clear that the foregoing criminal responsibility can arise for both natural and legal persons. The potential responsibility of the latter is important since corporate organisations can be the vehicle through which hate speech is disseminated<sup>95</sup>.

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<sup>94</sup> See the finding of the European Court of Human Rights in *Lehideux and Isorni v. France* [GC], no. 24662/94, 23 September 1998 that, “having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies” (para. 57), a criminal conviction was disproportionate.

<sup>95</sup> Thus, e.g., in *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, 8 July 1999 the European Court of Human Rights did not accept the argument that the owner of a review should be exonerated from any criminal liability for the content of the letters it published on account of having only a commercial and not an editorial relationship with it. In its view, the owner had, as such, the power to shape the editorial direction of the review and so “was vicariously subject to the “duties and responsibilities” which the review’s editorial and journalistic staff undertake in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension” (para. 63).

### Measures to prevent abusive prosecutions

180. Recommendation 10 takes account of the concern already noted about the risk of criminal responsibility being unjustifiably used to suppress criticism of official policies, political opposition and religious beliefs<sup>96</sup>. The unacceptability of such use should be evident from the requirements set out above for the imposition of criminal responsibility. However, it would be appropriate to reinforce this point by including in the relevant laws an explicit stipulation that the offences are not applicable to such criticism, opposition or beliefs. Furthermore, given the concern about hate speech prohibitions possibly being disproportionately used against those whom they are intended to protect<sup>97</sup>, it would also be appropriate to develop guidelines for law enforcement officials and prosecutors that draw attention to this potential risk and require consideration on a periodic basis as to whether there is any difference in the approach to the institution of criminal proceedings according to the particular characteristics of those accused of using hate speech. The objective should be to ensure that these characteristics have no bearing on the institution of such proceedings

### Involving those targeted

181. Recommendation 10 also underlines the importance of the possibility of effective participation for those targeted by the use of hate speech in any criminal proceedings instituted with respect to such use. This participation should run from the investigation stage following a complaint through to the conclusion of proceedings in court. It is particularly important that such persons be kept informed of the progress of an investigation and of any difficulties encountered in the course of it. In addition, they should be able to comment before any decision is taken to end an investigation or to drop charges that have been made against someone for using hate speech. This is vital not only to ensure that the relevant authorities have all the information material to such a decision but also to give confidence to those targeted by the use of hate speech in the operation of the justice system. Furthermore, those targeted by the use of hate speech should be notified in good time of any relevant court hearing and their dignity should be assured when they give evidence as a witness. Insofar as there is any possibility for private prosecutions to be brought, such as for attacks upon honour of a person or for defamation, it is also important that there be clarity as to who has standing to institute such a prosecution. Furthermore, the rules on standing need to be applied in a consistent manner.

### The penalties

182. In both prescribing and imposing particular penalties following a conviction for the use of hate speech, recommendation 10 identifies two relevant considerations to be taken into account, namely, the serious consequences flowing from such use and the principle of proportionality.

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<sup>96</sup> See paras. 62-64 above.

<sup>97</sup> See para. 64 above.

183. The former comprise not only the ones suffered by those who are the particular targets of the use of hate speech concerned but also the impact that such use has on others in the group of persons to which they belong and the damaging effect that it can have on the cohesion of society generally. The specific penalties made available thus need to reflect the significance of these consequences. They should thus be - as paragraph 23 of GPR No. 7 specified - both **effective and dissuasive** so that they reflect the damage already done and discourage its recurrence. Such penalties might involve imprisonment or the imposition of fines, as well as the seizure and forfeiture of the publications involved. However, they could also be influenced more specifically by the conduct found objectionable. Thus, for example, they could involve a temporary loss of political rights, a requirement to visit one or more memorials to the Holocaust or a requirement to undertake some form of practical reparation for the group of persons targeted by the particular use of hate speech.
184. Nonetheless, the actual imposition of sanctions also needs to take account of the risk that a particular penalty - in the specific circumstances of the case - could entail an **undue interference with freedom of expression**. Although no objection in principle has been raised by the European Court of Human Rights to the imposition of fines, prison sentences, forfeiture and the loss of political rights<sup>98</sup>, the imposition of at least the first two has also been the basis for it concluding in some cases that there had been a disproportionate interference with freedom of expression<sup>99</sup>. Each case clearly has to be addressed on its merits but prison sentences and substantial fines are unlikely to be considered compatible with the right to freedom of expression under Article 10 of the European Convention on Human Rights except with respect to the most serious uses of hate speech. Conversely, relatively small but not inconsequential fines and other penalties that could prompt a change of attitude - such as a requirement to undertake some work for those who were targeted by the use of hate speech - are unlikely to be considered disproportionate and thus objectionable in the majority of cases.

#### Ensuring effective investigation and prosecution

185. The importance attached by recommendation 10 to the monitoring of the effectiveness of **the investigation of complaints and of the prosecution of offenders** reflects the shortcomings found in this regard in the course of the monitoring cycles. Although some instances of effective law

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<sup>98</sup> See, e.g., *Zana v. Turkey* [GC], no. 18954/91, 25 November 1997 (one year's imprisonment), *Hennicke v. Germany* (dec.), no. 34889/97, 21 May 1997, *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, 8 July 1999 ("a relatively modest fine"; para. 64), *Incal v. Turkey* [GC], no. 22678/93, 9 June 1998 (forfeiture, although this was not applied in this case) and *Féret v. Belgium*, no. 15615/07, 16 July 2007 (loss of the right to stand for election for ten years but the dissenting judges considered this to be disproportionate).

<sup>99</sup> See, e.g., *Karataş v. Turkey* [GC], no. 23168/94, 8 July 1999 (imprisonment for one year, one month and ten days, with a fine of TRL 111,111, 110), *Aydın Tatlav v. Turkey*, no. 50692/99, 2 May 2006 (a fine of TRL 2, 640, 000) and *Sürek and Özdemir v. Turkey* [GC], no. 23927/94, 8 July 1999 (the seizure of copies of the review in which the impugned publications appeared).

enforcement measures against those using hate speech, there have also been many in which criminal action has been ruled out too easily, with the result that very few of the cases initiated by a complaint to the authorities ever reaching the courts. In addition, where cases do actually get brought to court, the actual conviction rates often seem to be low and the specific penalties imposed are not always commensurate with the use of hate speech concerned. Various factors lie behind such apparently limited success in the use of the criminal law to tackle the use of hate speech where this would be an appropriate response. They include: (a) the failure of some police officers to take the offences seriously and to act expeditiously; (b) a lack of competence in gathering and assessing evidence; (c) an overly expansive view of the protection afforded by the right to freedom of expression (which is not consistent with the approach of the European Court of Human Rights and/or an overly strict interpretation of what constitutes elements of the offence (such as incitement to hatred); (d) unsuccessful attempts to establish requirements for a conviction that are no longer applicable; (e) the failure to undertake sufficient, systematic and effective investigation of the use of hate speech; (f) the devotion of resources to investigating religious fundamentalists rather than extremists motivated by racism and other aspects of hate speech; (g) territorial disputes as to which authority has authority over a particular case; (h) the reclassification of the offences as ordinary criminal offences so as not to prejudice targets for success rates for achieving convictions; (i) the immunity enjoyed by politicians; and (j) a possible lack of impartiality amongst members of juries determining the cases.

186. Certain of these shortcomings have also been the basis for the finding of violations by the Committee on the Elimination of Racial Discrimination of Article 4 and 6 of the International Convention on the Elimination of All forms of Racial Discrimination. In particular, they have included the failure to investigate complaints with due diligence and expedition<sup>100</sup> and the failure to take account of the limitations on the right to freedom of expression<sup>101</sup>.
187. All these shortcomings with respect to the handling of complaints about the use of hate speech that might constitute hate speech inevitably sends a strong message to the public that **hate speech is not being taken seriously** and can be engaged in with impunity. It is, therefore, not enough to establish offences with respect to the use of hate speech. There is also a need to monitor carefully and continually the manner in which complaints

<sup>100</sup> L K v. Netherlands, Communication No. 4/1991, Opinion of 16 March 1993, Gelle v. Denmark, Communication No. 34/2004, Opinion of 6 March 2006, Adan v. Denmark, Communication No. 43/2008, Opinion of 13 August 2010 and TBB-Turkish Union in Berlin/Brandenburg v. Germany, Communication No. 48/2010, Opinion of 26 February 2013.

<sup>101</sup> The Jewish Community of Oslo et al. v. Norway, Communication No. 30/2003, Opinion of 15 August 2005. And TBB-Turkish Union in Berlin/Brandenburg v. Germany, Communication No. 48/2010, Opinion of 26 February 2013.

about their alleged occurrence are investigated, prosecuted and adjudicated so that appropriate adjustments can be made to the approach being pursued, with a view to ensuring that prosecutions are brought and convictions secured in all appropriate cases.

188. The **essential purpose of any investigation** should be to secure the effective implementation of the relevant law and to ensure the accountability of those who may be responsible for committing an offence. Such an investigation should be undertaken once a matter has come to the attention of the authorities and thus should not necessarily be dependent upon a formal complaint. This is particularly important in cases involving the use of hate speech since those targeted by this may well be reluctant to complain. Any investigation should be adequate in that it must be capable of establishing whether or not an offence has been committed and of identifying those responsible. There is a need to take all reasonable steps to secure the evidence, including eyewitness testimony and relevant documents or electronic material. This should be undertaken promptly and conducted with reasonable expedition. Furthermore, there is a need to ensure that the investigation and its results are subject to public scrutiny so as to secure accountability and to maintain public confidence. This includes - as previously noted<sup>102</sup> - keeping that any complainant informed of the progress of the investigation and giving him or her the opportunity to comment before any decision is taken to end it or to drop charges. Finally, the investigation's conclusions and any prosecution decision should be based on a thorough, objective and impartial analysis of all the material available.
189. **Approaches to enhance effective investigation and prosecution** of the use of hate speech could include: (a) the introduction of a tool that allows the online reporting of the use of hate speech; (b) regular analysis of the follow-up to complaints about the use of hate speech from the time of their recording by the police to assess whether complainants received an adequate response; (c) the undertaking of systematic monitoring of the online use of hate speech so that investigations are no longer just based on complaints; (d) the creation of specialist units, having appropriate technical and human resources, with responsibility for the investigation and prosecution of cases involving the use of hate speech; (e) a firm response to instances in which politicians and other public figures use hate speech so that members of the general public do not feel encouraged to follow their example; (f) the lifting of any immunity for politicians in respect of the use of hate speech; and (g) the development of a dialogue, mutual trust and cooperation with groups of persons who are targeted by the use of hate speech so as to gain their confidence and to increase awareness of their rights.

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<sup>102</sup> See para. 179 above.

190. Recommendation 10 also recognises that the effectiveness of criminal proceedings instituted with respect to the use of hate speech is also dependent upon three other factors.
191. Firstly, the various actors - and in particular the police and prosecution authorities - having in place both suitable good arrangements for **cooperation and coordination** of their individual activities. There are various ways in which this can be achieved. However, such cooperation and coordination will be more readily achieved through the establishment of good communication channels between the authorities. Moreover, there ought to be a common indication from those in leadership positions that working together to tackle the use of hate speech through criminal proceedings - where this is appropriate - is a high priority for each of the authorities concerned.
192. Secondly, all those involved in the criminal justice system ought to be provided with **appropriate training** to enable them to determine whether particular remarks involve the use of hate speech and, if so, whether - having regard to the right to freedom of expression - imposing a criminal sanction would be the appropriate response. In addition, this training should provide those concerned with a more general appreciation of the impact of such use for those targeted by it and of the dangers which such use poses for society as a whole. In addition, depending upon their particular responsibilities, efforts should be made to enhance their capacity to gather and evaluate any evidence relevant to the institution and adjudication of criminal proceedings concerned with the use of hate speech. Furthermore, guidance should be provided for judges as to the approach required when determining which particular penalties to impose following a conviction. In all cases, such training and capacity development is likely to be enhanced by the exchange of good practices, particularly where certain actors in the criminal justice system have more experience than others in dealing with cases that involve the use of hate speech.
193. Thirdly, the dissemination of hate speech is not restricted to national borders. As a result, proceedings in respect of this can sometimes be frustrated because this originates outside the territory and jurisdiction of a particular member State. This is particularly so with respect to dissemination occurring online. It is recognised that there are no easy solutions in such cases, especially where internet servers may be based in countries that do not have similar requirements governing the use of hate speech to those in the Recommendation. Nonetheless, cooperation with the authorities in those States may prompt action to limit the capacity for such **transfrontier dissemination**. In addition, it may yield information which would enable any appropriate criminal proceedings to be brought against those persons in the member State concerned who have had some role to play in this dissemination. It is, therefore, crucial that all member States - following the lead of some of them - put in place appropriate arrangements to facilitate cooperation relating to the transfrontier use of

hate speech that involves not only each of them but also any non-member States of the Council of Europe who are prepared to join in efforts to tackle such dissemination.

## Annex

The following Recommendations of the Committee of Ministers of the Council of Europe and the Recommendations and Resolutions of the Parliamentary Assembly of the Council of Europe relating to the use of hate speech have been adopted:

### *Committee of Ministers*

Recommendation No. R (92) 19 of the Committee of Ministers to member states on video games with a racist content;

Recommendation No. R (97) 20 of the Committee of Ministers to member states on "Hate Speech";

Recommendation No. R (97) 21 of the Committee of Ministers to member states on the media and the promotion of a culture of tolerance;

Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

### *Parliamentary Assembly*

Recommendation 1277 (1995) Migrants, ethnic minorities and media;

Recommendation 1543 (2001) Racism and xenophobia in cyberspace;

Recommendation 1706 (2005) Media and terrorism;

Recommendation 1768 (2006) The image of asylum-seekers, migrants and refugees in the media;

Recommendation 1805 (2007) Blasphemy, religious insults and hate speech against persons on grounds of their religion;

Recommendation 2052 (2014) Counteraction to manifestations of neo-Nazism and right-wing extremism.

Resolution 1345 (2003) Racist, xenophobic and intolerant discourse in politics;

Resolution 1510 (2006) Freedom of expression and respect for religious beliefs;

Resolution 1563 (2007) Combating anti-Semitism in Europe;

Resolution 1577 (2007) Towards decriminalisation of defamation;

Resolution 1605 (2008) European Muslim communities confronted with extremism;

Resolution 1728 (2010) Discrimination on the basis of sexual orientation and gender identity;

Resolution 1743 (2010) Islam, Islamism and Islamophobia in Europe;

Resolution 1754 (2010) Fight against extremism: achievements, deficiencies and failures;

Resolution 1760 (2010) Recent rise in national security discourse in Europe: the case of Roma;

Resolution 1846 (2011) Combating all forms of discrimination based on religion;

Resolution 1877 (2012) The protection of freedom of expression and information on the internet and online media;

Resolution 1928 (2013) Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence;

Resolution 1948 (2013) Tackling discrimination on the grounds of sexual orientation and gender identity;

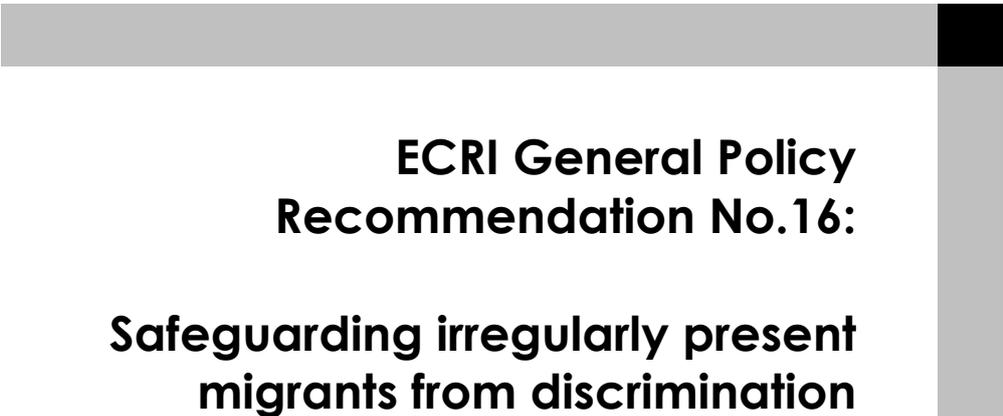
Resolution 1967 (2014) A strategy to prevent racism and intolerance in Europe;

Resolution 2011 (2014) Counteraction to manifestations of neo-Nazism and right-wing extremism;

Resolution 2069 (2015) Recognising and preventing neo-racism;

Resolution 2069 (2015) Recognising and preventing neo-racism.





**ECRI General Policy  
Recommendation No.16:  
Safeguarding irregularly present  
migrants from discrimination**

Adopted on 16 March 2016



**Abstract:**

*For the purposes of this General Policy Recommendation (GPR) “irregularly present migrants” should be understood as individuals - women, men and children - present in a member State that is not their country of origin, who do not, or no longer, fulfil the conditions under national law for entry or stay in that member State.*

*The purpose of the GPR is to address a pressing issue of discrimination which is causing grievous hardship to a substantial number of migrants who are irregularly present in member States. It deals exclusively with the question of ensuring access by all persons in this particularly vulnerable group to those human rights which are guaranteed to them in international human rights instruments, in particular as concerns education, health care, housing, social security and assistance, labour protection and justice, while they are within the jurisdiction of a member State.*

*To this end, this GPR calls for the creation of effective measures (hereafter “firewalls”) to prevent state and private sector actors from effectively denying human rights to irregularly present migrants by clearly prohibiting the sharing of the personal data of, or other information about, persons suspected of irregular presence or work, with the immigration authorities for purposes of immigration control and enforcement.*

*This GPR does not seek in any way to address member States’ laws and practices concerning the expulsion of irregularly present migrants. Nor does it deal with questions or issues of possible access to the labour market or regularisation of persons in such irregular situations.*



The European Commission against Racism and Intolerance (ECRI):

Recalling that Article 1 of the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights;

Recalling that human rights are the patrimony of all people expressed in the international instruments of the United Nations, the Council of Europe and other international bodies as well as in national legislation;

Having regard to a broad definition of “irregularly present migrants”, meaning individuals - women, men and children - present in a member State that is not their country of origin, who do not, or no longer, fulfil the conditions under law for entry or stay in that member State;

Stressing that all migrants, including irregularly present migrants, have human rights, including civil, political, economic, social and cultural rights; recalling that international law establishes minimum standards in this respect which must be guaranteed without discrimination on grounds prohibited under ECRI’s mandate;

Acknowledging the power of all states, as an expression of national sovereignty, to control the entry and stay of foreign nationals onto their territory subject to their human rights obligations, including both the duty of non-discrimination and the principle of equal treatment; also that national sovereignty entails responsibility for human rights protection of all persons within a state’s jurisdiction;

Recalling that those people whom states have categorised as irregularly present migrants, and in particular children, are among the most vulnerable of all persons subject to state action and therefore require special attention to protect their human rights;

Having regard to the European Convention on Human Rights and its Protocols and to the case law of the European Court of Human Rights;

Having regard to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the Council of Europe Convention on Action against Trafficking in Human Beings, the Convention against Discrimination in Education, the Labour Inspections Convention, the Migration for Employment Convention (Revised), the Migrant Workers (Supplementary Provisions) Convention and the Domestic Workers Convention;

Having regard to the specific obligation of member States according to the Convention on the Rights of the Child always to take into account the best interests of the child as a primary consideration when considering the position of children and their parents irrespective of their immigration or migratory status;

Having regard to the European Social Charter (revised) and to the case law of the European Committee of Social Rights;

Having regard to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and its related instruments;

Recalling Resolution 1509 (2006) of the Parliamentary Assembly of the Council of

Europe on the human rights of irregular migrants; Recommendation 1985 (2011) on undocumented migrant children in an irregular situation, a real cause for concern; Recommendation 1917 (2010) on migrants and refugees, a continuing challenge for the Council of Europe; Recommendation 1975 (2011) on living together in 21st-century Europe, a follow-up to the report of the Group of Eminent Persons of the Council of Europe; Recommendation CM/Rec(2011)13 of the Committee of Ministers on mobility, migration and access to health care; and Resolution 2059 (2015) of the Parliamentary Assembly of the Council of Europe on criminalisation of irregular migrants: a crime without a victim;

Recalling the reports of the UN Special Rapporteur on the Human Rights of Migrants, in particular the 2013 Regional Study: Management of the External Borders of the European Union and its Impact on the Human Rights of Migrants; the reports of the UN Special Rapporteurs on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and on the right to education;<sup>1</sup> and the 2014 Report of the Office of the High Commissioner for Human Rights on the economic, social and cultural rights of migrants in an irregular situation;

Recalling General Comment No. 2 of the Committee on Migrant Workers on the rights of migrant workers in an irregular situation and members of their families (2013) and the reports of the European Union Agency for Fundamental Rights, in particular its 2015 report on the Cost of exclusion from health care: the case of migrants in an irregular situation;

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<sup>1</sup> Such as the UN Special Rapporteur on the right to education's 2010 report on the right to education of migrants, refugees and asylum seekers (A/HRC/14/25), and the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health's 2013 report on the right to health of migrant workers (A/HRC/23/41).

Recalling the Positions on the rights of migrants in an irregular situation of the Commissioner for Human Rights of the Council of Europe, and in particular the 2007 Issue paper on the human rights of irregular migrants in Europe and 2010 Issue paper on the criminalisation of migration in Europe: human rights implications;

Recalling the Council of Europe's Strategy on Children's Rights and in particular its attention to the most vulnerable children, such as unaccompanied minors;

Recalling that ECRI is entrusted with the task of combating racism,<sup>2</sup> racial discrimination,<sup>3</sup> xenophobia, antisemitism and intolerance in greater Europe from the perspective of the protection of human rights and that it has always examined the situation of non-nationals, including irregularly present migrants, in its country monitoring work;

Recalling ECRI's General Policy Recommendations No. 1 on combating racism, xenophobia, antisemitism and intolerance; No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level; No. 7 on national legislation to combat racism and racial discrimination; No. 8 on combating racism while fighting terrorism; No. 10 on combating racism and racial discrimination in and through school education; No. 11 on combating racism and racial discrimination in

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<sup>2</sup>According to ECRI's General Policy Recommendation (GPR) No. 7 on national legislation to combat racism and racial discrimination, "racism" shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.

<sup>3</sup> According to ECRI's GPR No. 7, "racial discrimination" shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification.

policing; and No. 14 on combating racism and racial discrimination in employment;

Recalling that the fight against racism, racial discrimination, xenophobia, antisemitism and intolerance is an integral part of the protection and promotion of universal and indivisible human rights of every human being with no distinction whatsoever;

Recognising, further, that the inherent dignity and equality of irregularly present migrants as individual human beings requires state authorities to refrain from discourse that encourages or implicitly justifies discrimination on grounds prohibited under ECRI's mandate; similarly, it requires them to avoid locating migration as an exclusively economic or security issue, which abstracts its human dimension;

Having regard to the vulnerability of people - women, men and children - who, notwithstanding their entitlement to human rights, find that, on account of states' allocation of specific statuses relating to non-nationals, they are outside of specific national rules on rights and the object of coercive action to force them to leave the state;

Taking into account the increasing volume of case law of the European Court of Human Rights and the European Committee of Social Rights that

enunciates the obligation of states to protect the fundamental rights of all persons within their jurisdiction, including irregularly present migrants, specifically as regards education, health care, housing, social security and assistance, labour protection and justice;

Taking into account that the practical protection of the human rights of all persons, including those irregularly present within the jurisdiction of member States, requires the strict separation of immigration control and enforcement activities from other state and private services; taking into account that this also requires the creation of firewalls to prevent, both in law and practice, state and private sector actors from effectively denying human rights to irregularly present migrants by clearly prohibiting the sharing of the personal data of, or other information about, migrants suspected of irregular presence or work with the immigration authorities for purposes of immigration control and enforcement;

Stressing that these firewalls must be binding on state authorities and the private sector in order fully to protect the human rights of those migrants designated as irregularly present, in accordance with the objectives of relevant ECRI General Policy Recommendations;

Recommends that the governments of the member States:

1. Ensure that all irregularly present migrants - women, men and children - are fully protected against all forms of discrimination, including by enacting legislation to this effect in accordance with international norms and instruments, including relevant ECRI General Policy Recommendations;
2. Respect the fundamental human rights of irregularly present migrants, inter alia in the fields of education, health care, housing, social security and assistance, labour protection and justice;
3. Decouple immigration control and enforcement from the provision of services and assurance of rights of irregularly present migrants within their jurisdiction in order to ensure that those rights are guaranteed to such migrants and to relieve authorities

whose primary responsibilities lie elsewhere (such as in the fields of education, health care, housing, social security and assistance, labour protection and justice) from interference by immigration enforcement policies and institutions;

4. Protect the personal data of all persons, including irregularly present migrants, in accordance with international obligations and ensure that all state authorities are required to obtain individualised and specific authorisations based on grounds of reasonable suspicion of criminal activities by named individuals or grounds of national security before seeking personal data which is protected by the right to respect for privacy;
5. Recognise and affirm the obligations that exist in relation to irregularly present migrant children within their jurisdiction and ensure that all policies affecting irregularly present migrants are developed in light of the obligation to respect children's rights, in particular the principle that the best interests of the child shall be a primary consideration;
6. Recognise and ensure the right to respect for family life, bearing in mind the best interest of the child to reside with his or her parent(s), family member or guardian irrespective of their immigration or migratory status;
7. Ensure that irregularly present migrants have full, non-discriminatory access to appropriate administrative and judicial remedies including against private sector actors such as landlords or employers without risk of the sharing of their personal data or other information with immigration authorities for the purposes of immigration control and enforcement;
8. Comply with the spirit of UN General Assembly Resolution 3449 (2433<sup>rd</sup> Plenary Meeting 9 December 1975) on measures to ensure the human rights and dignity of all migrant workers, and with Resolution 2059 (2015) of the Parliamentary Assembly of the Council of Europe on criminalisation of irregular migrants: a crime without a victim, and refrain from designating as "illegal" those migrants who have entered or are present in a member State without immigration permission;

#### **I. INTERNATIONAL LEGAL INSTRUMENTS**

9. If not already parties, sign and ratify, and in all cases implement all instruments set out in the Appendix to this recommendation;

#### **II. DISCRIMINATION ON GROUNDS OF CITIZENSHIP**

10. In accordance with ECRI's GPR No. 7, prohibit all forms of discrimination within ECRI's mandate, including on the basis of citizenship; any differential treatment must be set out in law, justified on reasonable grounds and subject to a proportionality assessment;

### **III. PROTECTION OF IRREGULARLY PRESENT MIGRANTS IN KEY AREAS OF PUBLIC AND PRIVATE SERVICES**

#### **a) General provisions**

11. Ensure that no public or private bodies providing services in the fields of education, health care, housing, social security and assistance, labour protection and justice are under reporting duties for immigration control and enforcement purposes;
12. Develop legislation, policy guidelines and other measures to prohibit public and private bodies from reporting to and sharing with immigration authorities the personal data of, or information about, migrants suspected of irregular presence for any purposes, other than in exceptional circumstances which are set out in law and subject to judicial review and a substantive appeal right;
13. Prohibit the carrying out of immigration control and enforcement operations at, or in the immediate vicinity of, schools, health facilities, housing centres (including accommodation agencies, shelters and hostels), legal assistance centres, food banks and religious establishments;
14. Ensure that the provision of social and humanitarian assistance to irregularly present migrants in all areas of public and private services is not criminalised;
15. Encourage competent authorities, in cooperation with civil society, to raise awareness amongst irregularly present migrants, service providers and public authorities about entitlements and access to services (such as education, health care, housing, social security and assistance, labour protection and justice) for all persons, regardless of their immigration or migratory status;
16. Ensure that immigration control and enforcement measures do not result in the application of disproportionate restrictions on the right to marry and establish a family, such as blanket prohibitions on marrying or the imposition of restrictions which go beyond an assessment of the genuineness of the relationship or which discriminate against migrants or their spouses on grounds prohibited under ECRI's mandate;
17. Ensure both in law and practice that irregularly present migrants are able to register the birth and obtain a birth certificate for their children born within the jurisdiction of a member State without the risk of the sharing of their personal data or other information with immigration authorities for the purposes of immigration control and enforcement;

#### **b) Education**

18. Guarantee access to preschool, primary and secondary education for children of irregularly present migrants and irregularly present unaccompanied minors under the same conditions as nationals of the member State;
19. Ensure that school authorities do not require documentation relating to immigration or migratory status for school enrolment which irregularly present migrants cannot procure;

20. Ensure that children of irregularly present migrants or irregularly present unaccompanied minors are able to obtain certificates in member States indicating the level to which they have completed their education;

**c) Health care**

21. Ensure that the right to health care is formally guaranteed in national law for all persons, including irregularly present migrants and those among them who are destitute, and that it includes emergency medical treatment and other forms of necessary health care;
22. Ensure that health service providers do not require documentation relating to immigration or migratory status for registration which irregularly present migrants cannot procure;
23. Ensure that health care professionals provide adequate and appropriate care by following the same guidelines, protocols and codes of conduct that medical and academic professional organisations adhere to in care for any other patients;
24. Ensure that irregularly present migrant children have full access to national immunisation schemes and to paediatric care and that irregularly present migrant women have access to all medical services related to pregnancy;

**d) Housing**

25. In order to reduce the risk of exploitative or abusive situations, ensure that renting accommodation to irregularly present migrants is not criminalised by reason only of their immigration or migratory status;
26. Establish a framework that recognises and ensures the right to emergency accommodation, including in homeless shelters, for irregularly present migrants;
27. Recognise the specific obligation to ensure adequate shelter for all children, including those who, or whose parents, are irregularly present, regardless of whether or not they are unaccompanied;

**e) Labour protection**

28. Ensure that decent working conditions are guaranteed in legislation for all persons, irrespective of immigration or migratory status, on the basis of the principle of equal treatment and in accordance with international labour standards, including fair wages and compensation, working hours, leave, social security, access to training and rights at work, the right to organise and to bargain collectively, accident insurance, and access to courts of the member State;
29. Ensure an effective system of workplace monitoring and inspection by separating the powers and remit of labour inspectors from those of immigration authorities;
30. Establish effective mechanisms to allow irregularly present migrant workers to lodge complaints in respect of labour standards against employers and obtain effective remedies without the risk of the sharing of their personal data or other information with immigration authorities for the purposes of immigration control and enforcement;

31. Where irregularly present migrant workers have made contributions to the social security system through employment, ensure that they are entitled to receive the resultant benefits or reimbursement of these contributions if they are required to leave the country;

**f) Policing and criminal justice**

32. Prohibit the abuse of immigration control and enforcement activities to justify racial profiling in all circumstances, and ensure effective independent monitoring of all police, national security and immigration control and enforcement practices;
33. Establish safeguards ensuring that irregularly present migrants who are victims of crime are aware of their rights and are able to report to law enforcement authorities, testify in court and effectively access justice and remedies without the risk of the sharing of their personal data or other information with immigration authorities for the purposes of immigration control and enforcement;

**IV. ASSISTANCE TO IRREGULARLY PRESENT MIGRANTS: SPECIALISED BODIES AND CIVIL SOCIETY**

34. Establish effective independent specialised bodies to provide assistance to migrants, including those irregularly present, who claim to be victims of discrimination contrary to this GPR; where such bodies already exist, such as equality bodies, national human rights institutions or ombudspersons, ensure that they are also available to irregularly present migrants who should be able to access them without the risk of the sharing of their personal data or other information with immigration authorities for the purposes of immigration control and enforcement;
35. Encourage civil society bodies to ensure that their activities and services include all individuals within the jurisdiction in so far as those activities and services relate to the delivery of human rights.

## Appendix: Legal Instruments

### Council of Europe Instruments

- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (1950) and its additional protocols
- European Social Charter (1961) and its additional protocols
- European Social Charter (revised) (1996)
- European Convention on Establishment (1955)
- European Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) and its related instruments
- Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2011)
- Council of Europe Convention on Action against Trafficking in Human Beings (2005)

### United Nations Instruments

- Universal Declaration of Human Rights (1948)<sup>1</sup>
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention on the Rights of the Child (1989)
- Convention against Discrimination in Education (1960)
- ILO Labour Inspections Convention, 1947 (No. 81)
- ILO Migration for Employment Convention (Revised), 1949 (No. 97)
- ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)
- ILO Domestic Workers Convention, 2011 (No. 189)

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<sup>1</sup> As this is a Declaration neither signature nor ratification is required.

## Explanatory Memorandum

This General Policy Recommendation (GPR) addresses a pressing issue of discrimination that causes grievous hardship to the substantial number of migrants who are irregularly present in member States - namely their inability to enjoy certain rights they have under international law because of the vulnerability inherent in their immigration status.<sup>1</sup>

The GPR defines “irregularly present migrants” as individuals - women, men and children - present in a member State that is not their country of origin, who do not, or no longer, fulfil the conditions under national law for entry or stay in that member State. The GPR recognises that this is a diverse group, including persons who are in an irregular situation because of technical reasons but also those who might have intentionally tried to flout or circumvent national rules on legal entry and stay. Taking this into consideration, the GPR deals exclusively with the question of how to secure for these persons effective access to certain human rights for the time period - however long or limited this may be - that they are still within the jurisdiction of a member State.

The GPR’s approach is based on the incontrovertible fact that member States have assumed a number of obligations - in particular in the fields of education, health care, housing, social security and assistance, labour protection and justice - under the European Convention on Human Rights (ECHR) and its Protocols, the European Social Charter (revised) and the other instruments set out in the GPR’s Appendix. As a result, all migrants, including those irregularly present, have certain civil, political,<sup>2</sup> economic, social and cultural rights. While the underlying international-law obligations only set out minimum human-rights standards, these must be guaranteed without discrimination on a number of grounds, including immigration status.

The central pillar of this GPR is the creation of “firewalls” which prevent certain public authorities, but also some private-sector actors, from effectively denying some human rights to irregularly present migrants by means of a clear prohibition on the sharing of personal data of, and other information about, migrants suspected of irregular presence, with immigration authorities for purposes of immigration control and enforcement.<sup>3</sup> This sharing of personal data and information constitutes a barrier, often insurmountable, for irregularly present migrants to the enjoyment of human rights to which they are entitled, as any effort to access them results in immigration control and enforcement related activities rather than the delivery of those rights.

The GPR does not seek to address member States’ law and practices regarding the entry, expulsion or detention of irregularly present migrants. The European Court of Human Rights (ECtHR) has long recalled “that the [ECHR] does not guarantee the right of an alien to enter or to (continue to) reside in a particular country” (*Boultif v. Switzerland*<sup>4</sup>). The ECtHR has also recognised that irregular migrants may under certain circumstances be

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<sup>1</sup> Recognised by the European Court of Human Rights on numerous occasions (such as in *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011; *Jeunesse v. Netherlands*, Application no. 12738/10, 3 October 2014; *Nunez v. Norway*, Application no. 55597/09, 28 September 2011; and *Rodrigues da Silva and Hoogkamer v. Netherlands*, Application no. 50435/99, 3 July 2006).

<sup>2</sup> This GPR includes political rights only in so far as they have been recognised to everyone in the International Covenant on Civil and Political Rights and as interpreted by the UN Human Rights Committee established under it.

<sup>3</sup> See especially Recommendations 3, 4, 11 and 12 of this GPR.

<sup>4</sup> Application no. 54273/00, 2 August 2001.

subjected to detention. However, the sovereign right to control the entry and stay of migrants cannot relieve member States of their duty to secure human rights to all persons within their jurisdiction irrespective of immigration or migratory status.

The fields of law and policy covered by this GPR are: education, health care, housing, social security and assistance, labour protection and justice. As concerns labour, it should be noted that there is no specific right for irregularly present migrants to work without authorisation, and this GPR does not deal with the question of access to the labour market. Moreover, the GPR does not address the issue of the regularisation of persons in irregular situations.

However, it should be noted that ECRI, in its country monitoring reports, has frequently recommended the creation of comprehensive and long-term strategies on migration, addressing also the issue of irregular migration, with the necessary human and financial resources and training for personnel dealing with irregularly present migrants to ensure full respect for international and European human rights standards (see for example, its fourth report on Greece). As noted in ECRI's fifth report on Greece, where irregular migrants fall into situations of destitution, this leads the general public to associate them with the decay and impoverishment of certain areas and contributes to increased racism and intolerance.

The objective of this GPR is the protection of fundamental human rights irrespective of immigration or migratory status. It is essential that the inclusiveness of human rights designed to cover everyone within a jurisdiction is not undermined by rules based on citizenship and immigration status as prerequisites to the enjoyment of such rights. This GPR does not seek this result through placing constraints on member States' legislation in respect of migration. It is strictly limited to ensuring access to human rights for all persons within the jurisdiction by restricting the circumstances in which state authorities and private sector actors can be compelled or encouraged to share personal data or other information with immigration authorities for the purposes of immigration control and enforcement.

### ***Recommendation 1***

States are encouraged to enact legislation for the elimination of all forms of discrimination within ECRI's mandate, and ensure that these apply to all persons, including irregularly present migrants. A list of the key international instruments is contained in the Appendix to the GPR. The relevant ECRI General Policy Recommendations are No. 1 on combating racism, xenophobia, antisemitism and intolerance; No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level; No. 7 on national legislation to combat racism and racial discrimination; No. 8 on combating racism while fighting terrorism; No. 10 on combating racism and racial discrimination in and through school education; No. 11 on combating racism and racial discrimination in policing; and No.14 on combating racism and racial discrimination in employment.

### ***Recommendation 2***

The fundamental rights of all persons within the jurisdiction of member States must be respected.<sup>5</sup> Recommendation 2 addresses, among others, the right to education, health care, housing, social security and assistance, labour protection and justice. The importance of these fields and their inclusion in this GPR are the result of ECRI's findings

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<sup>5</sup> See Office of the High Commissioner for Human Rights, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, HR/PUB/14/1, 2014.

in its country reports regarding the situation of many irregularly present migrants. Specifically in these fields they are often subject to discrimination, both direct and indirect. National laws excluding irregularly present migrants from education, health care, housing, social security and assistance (direct discrimination) are common. Some national laws create indirect discrimination by making core labour rights inaccessible to irregular migrants as any effort to access such rights results in the transfer of personal data and information to the immigration authorities (indirect discrimination). ECRI has recommended, for example, in numerous reports of its fourth monitoring cycle, that states provide in law for access to medical care for everyone within their jurisdiction, irrespective of legal status (see the reports on Azerbaijan, Greece, Spain and Sweden). ECRI's fourth report on Cyprus expressed concern that the contact details of migrant children enrolling in school were regularly sent to the police. Exploitation and mistreatment of irregularly present migrant workers and abusive labour conditions are highlighted in many of ECRI's reports (see its fourth reports on Belgium, Cyprus, the Russian Federation and Spain). ECRI has also recommended the decriminalisation of renting accommodation to irregular migrants (see its fourth report on Italy and fifth report on Greece). In its fourth report on Spain, ECRI welcomed the provisions on registration in the population register of all persons, regardless of immigration status, in order to access basic health care, social services and assistance; however, it expressed concern that registration required the presentation of identity and residence documents. Exclusion from housing is also contrary to the case law of the European Committee of Social Rights, in particular in its decisions in *Defence for Children International (DCI) v. Netherlands*<sup>6</sup> and *Conference of European Churches v. Netherlands*<sup>7</sup> where the Committee held that access to emergency housing is a duty of all states on the basis of need, not immigration status. This case law may, by extension, also be applied to other core social rights.

### **Recommendation 3**

The application of immigration rules must not interfere with the correct application of the human rights obligations of states in respect of all persons within their jurisdiction. The legitimate objectives of justice and interior ministries regarding immigration control and enforcement should not compromise the fulfilment of the human rights obligations of other parts of government regarding people who may be irregularly present. Those who are homeless, in need of food and necessary medical treatment, or children who need schooling, are under the responsibility of ministries other than justice and interior and which are unrelated to immigration control. There must be clear firewalls which separate the activities of state authorities which provide social services and, where applicable, the private sector, from immigration control and enforcement obligations. These firewalls are the ineluctable consequence of states' duties to protect everyone within their jurisdiction from discrimination as set out in numerous human rights treaties and ECRI's General Policy Recommendations.<sup>8</sup>

All of the areas of state and private sector activity covered in this GPR are particularly important to the delivery of human rights to all persons in the jurisdiction. Some of ECRI's country reports indicate that these are often the fields where justice and interior ministries conduct the fight against irregular migration. In its fifth report on Greece, for example, ECRI recommended that, where medical services for irregular migrants are provided by NGOs, access to them should not be jeopardised by police checks. The human

<sup>6</sup> Complaint No. 47/2008, 20 October 2009.

<sup>7</sup> Complaint No. 90/2013, 1 July 2014.

<sup>8</sup> See also the European Committee of Social Rights Statement of interpretation on the rights of refugees under the European Social Charter, 15 October 2015.

cost of permitting immigration control considerations to compromise the delivery of human rights in these fields is considerable. First, it results in social exclusion and destitution, and forms a basis for racism and intolerance (see comments on Recommendation 10).<sup>9</sup> ECRI noted in its fifth report on Greece that irregular migrants left to fend for themselves, without any social protection, have resorted to squatting in abandoned houses and derelict apartment buildings, which has resulted in local residents associating them with the decay and impoverishment of these areas. Second, it stigmatises all migrants by creating suspicion and requiring continuous checks on the immigration status of all persons on the basis of the fight against irregular immigration. Third, it distracts state authorities responsible for the delivery of social and public services from their primary duties and requires them to use precious resources on justice and interior ministry priorities. Fourth, it creates suspicion and division among staff working with those in need, and fear among people who are unsure of their immigration status or are irregularly present but in desperate need of assistance.

It is necessary to decouple immigration-control activities from the assurance of human rights to irregularly present migrants. This can only be done by removing immigration-control related obligations from the delivery of human rights in the fields covered by this GPR.<sup>10</sup>

A number of good practices can be cited here. In Paris, Médecins du Monde operates 21 medical dispensaries for irregular migrants with the cooperation of local authorities.<sup>11</sup> Some states, such as Austria, operate on a “functional ignorance” basis, allowing irregular migrants to access emergency health care services without inquiry regarding legal status.<sup>12</sup> The Italian cities of Florence, Torino and Genoa have publicly extended access to education by granting all children the right to attend nursery school regardless of immigration status.<sup>13</sup> Similarly, the Hesse region in Germany has allowed children to enroll in school without proof of local residence since 2009, and several municipalities, including Frankfurt, Hamburg and Munich have lifted the obligation of staff working in the education sector to report irregularly present migrant children in schools.<sup>14</sup> Several municipalities in Europe have extended the provision of legal assistance and services to all individuals regardless of immigration status. For example, the city of Ghent in Belgium provides free legal advice to all migrants in cooperation with Information Point Migration, organised by the Integration Service of the city of Ghent and funded by the local government.<sup>15</sup>

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<sup>9</sup> See also Resolution 2059 (2015) of the Parliamentary Assembly of the Council of Europe on criminalisation of irregular migrants: a crime without a victim.

<sup>10</sup> European Union Fundamental Rights Agency, *Apprehension of Migrants in an Irregular Situation - Fundamental Rights Considerations*.

<sup>11</sup> François Crépeau, “Protecting Migrants’ Rights: Undocumented Migrants as Local Citizens” in François Crépeau and Colleen Sheppard, eds, *Human Rights and Diverse Societies: Challenges and Possibilities* (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2013) at 208.

<sup>12</sup> Ursula Karl-Trummer, Sonja Novak-Zezula and Birgit Metzler, “Access to health care for undocumented migrants in the EU: A first landscape of NowHereland” (2010) 16:1 *Eurohealth* at 13-15.

<sup>13</sup> Sergio Carrera and Joanna Parkin, *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union* (Centre for European Policy Studies, 2011) online: <<http://cor.europa.eu/>> at 19.

<sup>14</sup> Sergio Carrera and Joanna Parkin, *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union* (Centre for European Policy Studies, 2011) online: <<http://cor.europa.eu/>> at 19.

<sup>15</sup> Sergio Carrera and Joanna Parkin, *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union* (Centre for European Policy Studies, 2011) online: <<http://cor.europa.eu/>> at 22.

#### **Recommendation 4**

The right to respect for private life is guaranteed under Article 8 ECHR and applies to all persons irrespective of immigration status. The personal data of irregularly present migrants must be protected from automatic sharing by state authorities and private actors with immigration authorities of member States, as required also by the European Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) and its related instruments. Exceptions are possible but on specific grounds where immigration authorities have obtained individualised and specific authorisations based on grounds of reasonable suspicion of criminal activities by named individuals or grounds of national security. This principle that personal data protection duties can only be derogated from on specified grounds forms part of the EU Data Protection Regulation and Data Protection Directive on the protection of individuals with regard to the processing of personal data by both competent authorities and private sector actors for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data.<sup>16</sup> Matters of policing and criminal justice must remain the responsibility of the relevant specialised authorities.

#### **Recommendations 5 and 6**

The protection of children, both those who are irregularly present themselves and those whose parents are irregularly present migrants, is a matter of specific concern as regards human rights. The United Nations Convention on the Rights of the Child is expressed in terms of the rights of *all* children. Children are a particularly vulnerable group who not only need protection on account of their age but also, in some cases, on account of their irregular presence which renders them especially vulnerable.<sup>17</sup> All actions of member States must be consistent with the Convention on the Rights of the Child and the principle that the best interests of the child shall be a primary consideration.

Article 8 ECHR requires all member States to respect the right to private and family life. The ECtHR has consistently recognised and upheld the duty of states to protect children irrespective of their immigration status or that of their parents, including the right to education,<sup>18</sup> and the right to contact with their parents. While this does not necessarily require states to respect the choices of families and individuals as to the country where they wish to live, it does require member States to take into account the circumstances of each person and their families to determine whether they should be allowed to reside in that state. The best interests of the child as a primary consideration have been confirmed by the ECtHR as sufficiently important to require states, in some circumstances, to issue residence permits to irregularly present migrants in order to permit the full enjoyment of the rights of the children.<sup>19</sup> In any event, the irregularities of their parents' immigration status must not be a reason for states to refuse human rights, including social rights, to such children.

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<sup>16</sup> The status of the Directive and Regulation were confirmed as politically agreed by the Council of the European Union on 28 January 2016 and they should be formally adopted shortly.

<sup>17</sup> See the Council of Europe Strategy for the Rights of the Child (2012-2015).

<sup>18</sup> *Ponomyoyi v. Bulgaria*, Application no. 5335/05, 28 November 2011; *D.H. and Others v. the Czech Republic (GC)*, Application no. 57325/00, 13 November 2007.

<sup>19</sup> *Jeunesse v. Netherlands*, Application no. 12738/10, 3 October 2014; *Nunez v. Norway*, Application no. 55597/09, 28 September 2011; and *Rodrigues da Silva and Hoogkamer v. Netherlands*, Application no. 50435/99, 3 July 2006.

### **Recommendation 7**

Rights without remedies have little value for people who need to establish their entitlements. The right to an effective remedy is enshrined in Article 13 ECHR for breaches of rights guaranteed under that convention. In recognition of this, all member States have extensive systems of administrative and judicial oversight and adjudication to settle disputes between individuals and between individuals and the state. These administrative and judicial dispute resolution channels must be available to all persons, including irregularly present migrants, on the basis of non-discrimination with nationals of the state, in order to resolve claims to rights. The exercise of the right to access to justice must not be discouraged for irregularly present migrants, for instance because of automatic sharing of personal data and other information with immigration authorities for the purposes of immigration control and enforcement.

### **Recommendation 8**

Language matters both in law and practice. It is of utmost importance that governments and their officials avoid the prejudicial language of illegality when speaking about migrants. This language of illegality confuses the public, suggesting that criminal offences which constitute a danger to society are committed by those so categorised. The Council of Europe's Commissioner for Human Rights has strongly urged all states to cease the criminalisation of migration<sup>20</sup> as profoundly problematic for the respect of human rights and counterproductive in social policy terms. The public must not be influenced into confounding irregular immigration status with criminal activities which harm society. The Parliamentary Assembly of the Council of Europe, in its Resolution 2059 (2015) on criminalisation of irregular migrants: a crime without a victim, underlined that inappropriate use of the terminology relating to migration plays a part in reinforcing xenophobic and racist attitudes and heightens fear of migrants. It called on member States to promote the use of neutral terminology and replace the term "illegal migrants" with "irregular migrants" in speeches and official documents. Similarly, ECRI, in its fourth report on the United Kingdom, urged the authorities "not to assimilate as criminals persons who have breached immigration law." Furthermore, ECRI frequently calls upon member States to stress in public debate the positive aspects of immigration and the contribution of people with migrant backgrounds to society and to the economy (see its fifth report on Norway, for example).

## **I. INTERNATIONAL LEGAL INSTRUMENTS**

### **Recommendation 9**

States must take seriously their human rights obligation to prevent and combat discrimination. The starting place is the signature and ratification of all the core human rights treaties which provide a sound foundation for human rights protection, including for irregularly present migrants. The list of international and Council of Europe treaties contained in the Appendix includes all core treaties which states should ratify if they have not already done so. Particular attention is drawn to Protocol No. 12 to the ECHR, which provides for a general prohibition of discrimination; ECRI consistently calls upon those member States which have not yet ratified it to do so. However, ratification is insufficient in itself. It must be accompanied by full and comprehensive implementation particularly with regard to irregularly present migrants.

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<sup>20</sup> See the Council of Europe Commissioner for Human Rights, report *Criminalisation of Migrants in Europe: The Human Rights Implications*, 10 February 2010, <https://wcd.coe.int/ViewDoc.jsp?id=1579605>.

## II. DISCRIMINATION ON GROUNDS OF CITIZENSHIP

### **Recommendation 10**

ECRI calls for the prohibition of all forms of discrimination within its mandate, including on the basis of citizenship.<sup>21</sup> While discrimination on the basis of citizenship is prohibited in most human rights treaties, this is not the case for all. Differential treatment on the basis of citizenship may be permissible for purposes of border controls but must not result in indirect or disguised discrimination on another ground, such as “race” or ethnic origin. This must be avoided at all costs. As discussed above in respect of Recommendation 3, the legitimate activities of states’ justice and interior ministries in immigration control and enforcement must not be allowed to “function creep” into other state activities. They must be strictly limited to their specific domain as otherwise these activities risk providing a basis of racism and intolerance because they are always directed at persons who are classified by those immigration authorities as others (all too often confused in the public imagination with visible differences).

This position is based on the approach of the ECtHR in cases such as *Gaygusuz v. Austria*<sup>22</sup> and *Koua Poirrez v. France*<sup>23</sup> in which it has consistently held that citizenship is a suspect category which cannot necessarily justify differences of treatment which otherwise would be classified as prohibited discrimination. The ground of citizenship is suspect for discrimination although it can be justified in specific cases such as border controls. On the one hand, discrimination on the ground of citizenship may be elided with discrimination on the basis of ethnic origin and thus, while the citizenship discrimination is direct, it effectively constitutes indirect discrimination on a prohibited ground. On the other hand, discrimination on the basis of citizenship is suspect because it may encourage racist attitudes.

This position has been particularly important in the judgments concerning social rights which should be allocated on the basis of need and in a non-discriminatory manner, including with respect to citizenship.<sup>24</sup> Only exceptions which are set out in law, justified on reasonable grounds subject to a proportionality assessment should be contemplated.

## III. PROTECTION OF IRREGULARLY PRESENT MIGRANTS IN KEY AREAS OF PUBLIC AND PRIVATE SERVICES

### a) General Provisions

### **Recommendation 11**

As set out above regarding Recommendation 3, this GPR is founded on the firewalls approach between civil and administrative activities which form part of human rights entitlements and immigration control and enforcement activities of the state. For all the reasons set out in the GPR, the only way to protect the human rights of all persons within

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<sup>21</sup> According to ECRI’s GPR No. 7 on national legislation to combat racism and racial discrimination, “racism” is the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons. “Racial discrimination” is any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification.

<sup>22</sup> Application no. [17371/90](#), 16 September 1996.

<sup>23</sup> Application no. 40892/98, 30 September 2003.

<sup>24</sup> *Gaygusuz v. Austria*, Application no. [17371/90](#), 16 September 1996; *Koua Poirrez v. France*, Application no. 40892/98, 30 September 2003; *Luczak v. Poland*, Application no. 77782/01, 27 November 2007.

the jurisdiction and to ensure that everyone is able, in law and practice, to exercise their human rights is to establish firewalls between the activities of state and private sector authorities which provide social services and immigration control and enforcement authorities. This Recommendation gives voice to those firewalls by prohibiting reporting duties on all those providing services in the areas of education, health care, housing, social security and assistance, labour protection and policing and criminal justice regarding the immigration status of people who come before them.

### **Recommendation 12**

Immigration control and enforcement activities often commence with obligations by both public and private sector actors, in the context of other activities in the fields of education, health care, housing, social security and assistance, labour protection and justice, to report and share with immigration authorities the personal data of, or other information about, persons suspected of being irregularly present in the jurisdiction. This kind of personal information sharing sometimes takes place on a voluntary basis or it may be a legal requirement. In either case the result is highly problematic for the delivery of human rights to irregularly present migrants and, as seen in relation to Recommendation 4, creates an obstacle to the respect for private life. The personal data of irregularly present migrants must be protected from automatic sharing with immigration authorities. The principle that personal data protection duties can only be derogated from on specified grounds is also set out in the EU Data Protection Directive and Regulation 2016, as mentioned above. This objective can best be accomplished where legislation or policy instruments explicitly set out a prohibition on general information-sharing.

The division of responsibilities among state authorities and private actors should always operate in such a way that immigration control and enforcement authorities are primarily responsible for immigration control and enforcement activities. These duties should not be transferred to other state authorities or private sector bodies and actors unless truly exceptional circumstances arise which are set out in law, duly justified and subject to judicial challenge.

### **Recommendation 13**

Identification and immigration checks at a variety of public locations, including schools, health centres, and religious facilities have been reported.<sup>25</sup> ECRI, in its fifth report on Greece, for example, expressed concern about the frequent checking of migrants' documents by police outside NGO-operated health care centres in Athens, which had become a major disincentive for irregular migrants to access the centres, for fear of arrest and possible deportation. Such immigration control activities have the effect of creating fear for irregularly present migrants and constitute an obstacle to the delivery of human rights. The purpose of this recommendation is to ensure that irregularly present migrants are able to access services in the fields covered by this GPR without fear of encountering immigration control and enforcement authorities in the vicinity of those places where assistance is made available. For the purposes of this GPR, housing centres are places where those in urgent need of accommodation may go to receive assistance in finding shelter.

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<sup>25</sup> European Union Fundamental Rights Agency, *Fundamental Rights of Migrants in an Irregular Situation in the European Union*, November 2011.

### **Recommendation 14**

The criminalisation of social and humanitarian assistance to irregularly present migrants encourages intolerance and racism as it punishes people for helping others on the basis of their immigration status. By social and humanitarian assistance this GPR includes all aid and action designed to save lives, alleviate suffering and maintain and protect human dignity. The Parliamentary Assembly of the Council of Europe, in its Resolution 2059 (2015), noted that some member States sanction humanitarian assistance, thereby creating an “offence of solidarity”, and has called for an end to the threat of prosecution on charges of aiding and abetting irregular migration of people who rescue migrants.<sup>26</sup> Threatening citizens and regularly present migrants with criminal charges, trials and penalties if they assist irregularly present migrants is highly counterproductive to the delivery of human rights. As irregularly present migrants will inevitably be foreigners and may be in need, such measures encourage a false convergence in the public imagination of irregularly present migrants as dangerous. Criminalising those who provide assistance to irregular migrants can also result in exploitative circumstances where individuals engaged with irregular migrants, such as landlords or employers, shift the risk associated with their relationship by exacting abusive demands from the irregular migrants for continued employment, housing, etc. However, in no circumstances should a claim to be acting to provide social and humanitarian assistance be tolerated as an excuse to exploit irregularly present migrants. Finally, the criminalisation of assistance to irregularly present migrants also enhances their precariousness within society.<sup>27</sup> It will often result in heightened fear and hesitation on their part to seek out the services they may need, including, for example, urgent medical care.

### **Recommendation 15**

In order to ensure that all persons, including irregularly present migrants and those who provide social and public services, are aware about entitlements and access to the services which form the subject of this GPR, competent authorities in these different fields are encouraged to raise this general awareness. ECRI has made this point also in some of its country reports, such as its fourth report on Finland, in which it recommended that the authorities take measures to facilitate access to health care for irregularly present migrants, specifically ensuring that they have the necessary information to benefit from their rights. The assistance of NGOs in this respect is of great importance since they often have direct contact with irregularly present migrants.

### **Recommendation 16**

The right to marry is a human right contained in the ECHR (Article 12) and other international human rights treaties. It has the effect of permitting all persons to regulate their matrimonial status in accordance with national law. It does not necessarily confer a right to remain in the jurisdiction of the state where the marriage takes place. The right to marry may be made subject to legitimate restrictions, such as to prevent bigamy, but there must be no restrictions interfering with the right to marry applying exclusively to irregularly present migrants. Such restrictions might include, for instance, the production of specific identification documents which are never available to irregularly present migrants, such as valid residence permits, specific nationally-issued identity cards, passports, or nationally-issued authorisations for foreigners to marry within the jurisdiction

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<sup>26</sup> Resolution 2059 (2015) of the Parliamentary Assembly of the Council of Europe on criminalisation of irregular migrants: a crime without a victim.

<sup>27</sup> See the Council of Europe Human Rights Commissioner’s 2010 report on the criminalisation of migrants in Europe: human rights implications.

of the state. All other legitimate means to prove the identity of the person seeking to marry should be accepted by those authorities entitled to carry out such ceremonies.

### **Recommendation 17**

All children have the right to be registered immediately after birth (Article 7 of the Convention on the Rights of the Child). This right must be respected without the parents being discouraged from registering their children by reason of the irregularity of their presence in the jurisdiction because of automatic sharing of personal data and other information with immigration authorities for the purposes of immigration control and enforcement. Individuals must be able to register births without having to produce documents which they may not possess and are not able to obtain (such as valid residence permits, passports, nationally issued ID cards). While it is acknowledged that some documentation may be required to register births, flexibility should be exercised and requested documentation should not include documents exclusively related to immigration status.

## **b) Education**

### **Recommendation 18**

The right to education is enshrined in Article 2 of the Protocol to the ECHR. The ECtHR has held that the right to education is a fundamental democratic value of the Council of Europe and, as such, constitutes a right to which every person is entitled.<sup>28</sup> The right of all children to education must be assured irrespective of the immigration status of the parents or the children (see also comments on Recommendations 5 and 6). This has been affirmed by the ECtHR in the case of *Ponomaryovi v. Bulgaria*<sup>29</sup> and *D.H. and Others v. the Czech Republic*.<sup>30</sup> Access to education is central to the achievement of the human potential of all persons and an inseparable component of human dignity. The right to education does not stop at the end of primary school but continues to the end of all compulsory education. In its fourth report on Slovenia, ECRI recommended that all children should have equal access to upper secondary education, regardless of their citizenship, ethnic origin or immigration status or those of their parents. Preschool education can be critical to realising children's potential, closing any gaps resulting from disadvantage and preparing children for compulsory education. It should be provided to all children on the basis of equality, as should tertiary education. Many of ECRI's country reports echo this approach. Its fifth report on Norway calls on the authorities to guarantee a legal right to preschool education (for asylum seeking children). ECRI also strongly recommended, in its fifth report on the Czech Republic, that the authorities carry out their plans to introduce at least one year of compulsory and free of charge preschool for all children before entry to mainstream primary education. Finally, it is desirable that equal treatment also be granted regarding access to vocational training and apprenticeships.

### **Recommendation 19**

Children must be able to register for school at all levels without having to produce documents (such as valid residence permits, national ID documents, passports) which they and their families are unable to obtain. While there may be circumstances where educational authorities will need to know about the immigration status of a child, for

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<sup>28</sup> *Timishev v. Russia*, Application nos. 55762/00 and 55974/00, 13 December 2005, see § 64.

<sup>29</sup> Application no. 5335/05, 28 November 2011.

<sup>30</sup> Application no. 57325/00, 13 November 2007.

instance where the child clearly suffers from stress on account of the uncertainty of his or her family's situation, in order best to address the educational needs of that child, such information must remain confidential within the school.

### **Recommendation 20**

In the event that the family and the children leave a member State, children must be entitled to all documents confirming the level of education which they have completed in that state in order that their continued education elsewhere is not hindered. This is also reflected in the Committee on the Rights of the Child General Comment No. 6 on the Treatment of unaccompanied and separated children outside their country of origin.

### **c) Health care**

### **Recommendation 21**

The right to health is guaranteed under Article 12 of the International Covenant on Economic, Social and Cultural Rights, Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 24 of the Convention on the Rights of the Child and Article 11 of the European Social Charter (revised). The latter also guarantees the right to medical assistance in Article 13.

The European Committee of Social Rights, in *FIDH v. France*,<sup>31</sup> has confirmed that health care is a core social right. All persons must be entitled, at a minimum, to all emergency medical treatment and other forms of necessary health care. The ECtHR has interpreted this obligation of states as including a duty to make health care available to their whole population, the denial of access to health care possibly implying a violation of Article 2 of the ECHR.<sup>32</sup> ECRI has drawn attention to this obligation in many of its country monitoring reports. Its fourth report on Finland, for example, recommended that the authorities take measures to facilitate access to health care for irregular migrants, and in its fourth report on Greece, ECRI recommended that the authorities provide, in law, for access to public medical care for everyone living on Greek territory, irrespective of their immigration or migratory status. The determination of the necessity of health care is a medical assessment which must be taken with full regard to the case law of the ECtHR.<sup>33</sup> The right to health care is also of central importance for the host community which may suffer substantial health consequences if persons in need of health care do not receive it (for instance in the case of persons suffering from communicable diseases). In its fifth report on Greece, ECRI recommended that the authorities provide adequate medical treatment to migrants irrespective of their residence status in cases of serious infectious diseases or other public health risks.

One of the greatest barriers to accessing health care is the inability to pay for it. In many member States, all residents, including those who are irregularly present, are obliged to take out health insurance. But in practice, many cannot afford such costs. This recommendation ensures that even destitute migrants' right to health care should be guaranteed. People in a situation of destitution are those whose material conditions fall

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<sup>31</sup> Complaint No. 14/2003, 3 November 2004.

<sup>32</sup> *Cyprus v. Turkey* (GC), Application no. 25781/94, 10 May 2001; *Powell v. the United Kingdom*, Application no. 45305/99, 4 May 2000; *Nitecki v. Poland*, Application no. 65653/01, 21 March 2002.

<sup>33</sup> *Mehmet Emin Yüksel v. Turkey*, Application no. 40154/98, 20 October 2004; *Serifis v. Greece*, Application no. [27695/03](#), 2 November 2006; *Tarariyeva v. Russia*, Application no. [4353/03](#), 14 December 2006; Committee on Economic, Social and Cultural Rights General Comment No. 20, paragraph 33; World Health Organization Fact Sheet No 323, December 2015.

below the threshold of inhuman and degrading treatment as prohibited by Article 3 ECHR and such as to be also a violation of the right to dignity as determined by the ECtHR in *M.S.S. v. Belgium and Greece*.<sup>34</sup>

### **Recommendation 22**

Individuals must be able to access health services without having to produce documents which they may not possess and are not able to obtain (such as valid residence permits, passports, nationally issued ID cards). While it is acknowledged that health care providers may require some documentation to register patients in care, flexibility should be exercised, and requested documentation should not include documents exclusively related to immigration status. ECRI has made this point, for example, in its third report on Azerbaijan, in which it strongly recommended that no-one should be wrongly deprived of health care on any discriminatory ground due to their lack of legal status in Azerbaijan and that persons in need of urgent medical treatment should not be required to produce a valid residence permit. In its fourth report on Spain, ECRI recommended that the authorities review the conditions for registration in the population register (which granted access to free health care, basic primary social services and social aid) of immigrants whose status is irregular to ensure that those who do not possess the necessary documents are not automatically excluded.

### **Recommendation 23**

The same medical standards should apply to all the professional activities of health care workers irrespective of the immigration status of the person in need of their services. All health care professionals should be made aware of the indivisibility of their obligations. Under no circumstances should a dual track health care system be permitted to exist where irregularly present migrants receive a lower standard of care than other patients.<sup>35</sup>

### **Recommendation 24**

Access to paediatric care and immunisation is important for all children, not only those who are regularly present within the jurisdiction. The health of the whole community depends on all children receiving these services. Similarly, all women may need medical services related to pregnancy and there should be no differentiation on the basis of the immigration status of the women in need. This care must include access to ante-, peri- and post-natal care and other related health services.

## **d) Housing**

### **Recommendation 25**

In some member States a highly problematic set of obligations has been or is being imposed on landlords (both public and private) and other providers of housing requiring them to share personal data and information with immigration authorities or to refuse to rent residential property to persons whose immigration status has not been established as regular. The penalties for failure to do so not only include fines, but also criminal sanctions with imprisonment for the landlords. These measures are contrary to the objectives set out in ECRI's GPR No. 1 on combating racism, xenophobia, antisemitism and

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<sup>34</sup> Application no. 30696/09, 21 January 2011.

<sup>35</sup> World Health Organization Fact Sheet No 323, December 2015; see also the ILO HIV and AIDS Recommendation 2010 (No. 200), Recommendation concerning HIV and AIDS and the World of Work.

intolerance. By forcing landlords to carry out immigration checks, where any failure on their part correctly to do so may have extreme consequences for them personally, is likely to encourage suspicion on the part of landlords that anyone who “looks foreign” needs to be subjected to further examination to ensure that he or she is not irregularly present. As highlighted above, as soon as immigration control and enforcement objectives enter areas of social and contractual arrangements, people frightened by the risk of possible fines and imprisonment are likely to err on the side of caution and refuse housing to all non-nationals. Even where they do take the risk to rent or provide housing to migrants, they may find themselves in a situation of anxiety about the legality of their actions. These kinds of laws can only stoke racism and discrimination and result in the denial of the right to housing under the European Social Charter (revised). In its fourth report on Italy, ECRI recommended that the authorities repeal the provision whereby the act of letting accommodation to migrants without legal status is punishable by a prison sentence of between six months and three years together with seizure of the accommodation. ECRI’s fifth report on Greece recommended the decriminalisation of the provision of accommodation to irregular migrants in order to enable charitable organisations to provide assistance to irregular migrants suffering from homelessness.

### **Recommendation 26**

ECRI has raised concerns about homelessness in some of its country reports, such as its fifth reports on Hungary and Greece. The right to housing is deeply embedded in international and European human rights law. It is guaranteed under Article 11 of the International Covenant on Economic, Social and Cultural Rights, Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 27(3) of the Convention on the Rights of the Child and Article 31 of the European Social Charter (revised). People must not be left vulnerable to the elements and violence on the streets. This has been affirmed by the European Committee of Social Rights in *Defence for Children International (DCI) v. Netherlands*<sup>36</sup> and *Conference of European Churches (CEC) v. Netherlands*.<sup>37</sup> The responsibility of states includes an obligation to allocate funding and resources to ensure that any person, irrespective of immigration status, receives an adequate standard of living. United Nations experts lauded the Government of the Netherlands for announcing in January 2015 a decision to provide funding to municipalities that offer emergency shelters for homeless migrants, following the above-mentioned *Conference of European Churches (CEC)* decision.<sup>38</sup> Access to housing should be provided in conditions of equality and non-discrimination.

### **Recommendation 27**

As already observed, international law recognises the special position of children as vulnerable and requires their protection (Convention on the Rights of the Child). The best interests of the child, the overriding international duty to children, must always be served by ensuring that children, whether accompanied by adults or alone, have adequate shelter. The immigration status of children and their parents must never be used as an excuse to fail to deliver this right.

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<sup>36</sup> Complaint No. 47/2008, 20 October 2009.

<sup>37</sup> Complaint No. 90/2013, 1 July 2014.

<sup>38</sup> Office of the High Commissioner for Human Rights, Press Release, “Dutch decision to fund emergency assistance for homeless migrants welcome change of position” - UN experts” (28 January 2015, Geneva).

## e) Labour protection

### **Recommendation 28**

The right of everyone to the enjoyment of just and favourable conditions of work is guaranteed in numerous international instruments, including the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention on the Elimination of All Forms of Racial Discrimination, and the European Social Charter (revised).

Labour protection rights are not tied to immigration status. As the Court of Justice of the European Union affirmed in *O. Tümer v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*,<sup>39</sup> the status of worker and the rights attached to it must be accorded on the basis of non-discrimination to all workers irrespective of their immigration status. Any other approach which would exclude any workers (for instance on the basis of their irregular immigration status) from labour protection and rights would inevitably lead to exploitation and discrimination, which in turn is the breeding ground of racism and intolerance. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, in its General Comment No. 2, interprets a number of articles of the Convention on the Rights of All Migrant Workers and Members of Their Families, which align with issues contemplated in this GPR, including: Article 25 (on equal labour treatment) and Article 27 (on rights to social security). Equality in labour law is critical to ensuring good employment practices by employers and the necessary conditions of proper application of health and safety rules.

### **Recommendation 29**

Work place inspections to ensure the correct application of labour standards are necessary to protect everyone who forms part of the labour force. In some member States, authorities have increased the regulatory burden on labour inspectorates by including obligations to check immigration status and work permit status. This mix of activities is profoundly problematic. As highlighted above, all workers are entitled to equal application of labour standards irrespective of their immigration status. The social objective of labour standards, which is to guarantee employees minimum protections, would be undermined if any section of the labour force was excluded. Labour inspectors have a fundamental role in ensuring fair play in the labour market. They must be able to rely on all workers having access to them to complain about their working conditions in order to enforce labour standards. Bad practices in the work place hurt everyone and the job of inspectors is to ensure that such practices are prevented or stopped. Additional obligations which have the effect of contradicting the primary objectives of inspectors, such as checking immigration status, are not consistent with the social objective of labour standards and undermine efforts to address undeclared work, by excluding a section of the labour force. Where there are specific and exceptional circumstances, however, the GPR does make provision for deviation from this rule (see Recommendation 12) but only where covered by a specific law which controls the extent and justifications of an exception and recourse to judicial remedies.

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<sup>39</sup> Case C-311/13, 5 November 2014.

All but five Council of Europe member States have ratified the International Labour Organisation's Labour Inspections Convention, 1947. Article 3(2) states that: "Any further duties which may be entrusted to labour inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers." The International Labour Conference (95<sup>th</sup> Session, 2006)<sup>40</sup> on the Convention and associated documents, provided clarification for signatory states on the meaning of Article 3(2) in particular regarding control of irregular employment and migration. The Committee recalled that the primary duty of labour inspectors is to protect workers and not to enforce immigration law (§ 78).

Moreover, the European Parliament, in its Resolution of 14 January 2014<sup>41</sup> on effective labour inspections as a strategy to improve working conditions in Europe expressed great concern at the extreme vulnerability of migrant workers with irregular or unauthorised status, as they risk being exploited in undeclared work of low standards, with low wages and long working hours in unsafe working environments, and underlined that any cooperation between labour inspectors and immigration authorities should be limited to identifying abusive employers, and should not give rise to sanctions against, or expulsions of, the migrant workers concerned, as this would actually undermine the efforts to address undeclared work (§ 29). Separating the powers of labour inspectors from those of immigration authorities does not, however, prevent or otherwise affect the authority of immigration bodies to undertake activities related to immigration control and enforcement.

The firewall approach in labour inspections has also been addressed by the UN Special Rapporteur on the human rights of migrants, François Crépeau, and the Chair of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Francisco Carrión Mena, in their statement of 15 December 2015, ahead of International Migrants' Day (18 December 2015). ECRI has also addressed this issue in its third report on Azerbaijan in which it recommended that the law should not impose an obligation on labour inspectors who have had to deal with cases of racial discrimination against migrant workers in an irregular situation to communicate information permitting the identification of the victims to the immigration authorities.

### **Recommendation 30**

Some national laws create indirect discrimination by making core labour rights inaccessible to irregular migrants as any effort to access such rights results in the transfer of personal data and information to the immigration authorities. Instead of getting justice against exploitative employers, irregularly present migrants may be threatened with expulsion by the authorities. The consequence is that bad labour practices are not exposed and equality in the labour market is frustrated to the detriment of both national workers and migrant workers.<sup>42</sup> This is contrary to ECRI's GPR No. 14 on combating racism and racial discrimination in employment. In line with the EU Data Protection Directive and Regulation 2016, personal data protection duties should only be derogated from on specific grounds

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<sup>40</sup> Report III (Part 1B), General Survey of the reports concerning the Labour Inspection Convention, 1947 (No. 81), and the Protocol of 1995 to the Labour Inspection Convention, 1947, and the Labour Inspection Recommendation, 1947 (No. 81), the Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Labour Inspection (Agriculture) Recommendation, 1969 (No. 133).

<sup>41</sup> P7-TA (2014) 0012.

<sup>42</sup> See the UN Special Rapporteur on the Human Rights of Migrants 2014 report on the labour exploitation of migrants, paragraph 60.

and personal data information should not otherwise be shared with or transferred to immigration authorities.

A number of ECRI's fourth cycle reports highlighted the difficulty for irregularly present migrants to lodge complaints against employers for abuses, including racial discrimination. ECRI's fourth report on the Russian Federation, for instance, recommended the setting up of a functional mechanism whereby migrants in an irregular situation are able to report labour abuses by employers.

### ***Recommendation 31***

Migrant workers who leave the state, including on the basis of their irregular status, must either be able to enjoy the benefits of the social contributions which they have made or receive full reimbursement of contributions made. The state must not deprive them of the benefits of such contributions or reimbursement, thus effectively depriving them of part of their wages.

#### **f) Policing and criminal justice**

### ***Recommendation 32***

ECRI has called for the definition and prohibition by law of racial profiling in policing in its GPR No. 11 on combating racism and racial discrimination in policing. This is particularly clear regarding the problems of racial profiling by the police and its unacceptable consequences regarding racism and intolerance. In the case of irregularly present migrants, immigration status must not become a substitute for "race", thereby purporting to justify profiling in policing and criminal justice.

Recommendation 32 also calls for independent monitoring of police. ECRI's GPR No. 11 recommends governments of member States to provide for a body, independent of the police and prosecution authorities, entrusted with the investigation of alleged cases of racial discrimination and racially-motivated misconduct by the police.

### ***Recommendation 33***

Irregularly present migrants must be able to report crime to the police without fear of being reported to immigration authorities. It is in everyone's interests that crime is reported and investigated. It is highly detrimental to good policing that people should be deterred from reporting crime for fear of the consequences for themselves insofar as they are victims of crime. The whole of society must have confidence and trust in police in order for that authority to carry out its job correctly. If part of the society is afraid to come forward, then police will not be able function properly. It is the duty of law enforcement authorities to investigate reported crime and to instigate criminal proceedings where appropriate. The decisions of prosecutors to pursue criminal charges depend on everyone being able to give full and frank testimony in so far as it is relevant to proving the charges. If some members of the public or victims of crime are inhibited from giving testimony because of a fear that their personal data will be passed to the immigration authorities for immigration control and enforcement purposes, prosecutors, police and all parts of the criminal justice system are hampered in the execution of their duties. The EU Data Protection Directive 2016 acknowledges the importance of personal data protection in relation to criminal justice and judicial authorities and limits information sharing in this context. The Directive also calls on states to create an

independent supervisory body to monitor personal data protection within the criminal justice system.

In this context, ECRI's fifth report on Greece draws attention to a ministerial decision providing for residence permits to be issued - on humanitarian grounds - by the Minister of Interior to third country nationals who are victims or witnesses of racist offences; the permits are valid until the case is closed or a final court judgment issued. In its fourth report on Poland, ECRI recommended that victim-support centres and judicial authorities which deal with racially motivated offences against immigrants in an irregular situation refrain from communicating information that could alert the immigration authorities. Further, if victims of crime are fearful of reporting criminal offences which have been committed against them for reasons of personal data sharing between the police and other parts of the criminal justice system and immigration authorities for the purposes of immigration control and enforcement, this part of the public is denied human rights under the procedural obligations of states to investigate alleged instances of ill-treatment and, where appropriate, prosecute perpetrators of crime (Article 3 ECHR). In its fifth report on Greece, ECRI raised concerns about the severe under-reporting of racist violence, mainly due to fear amongst victims of being arrested and deported on account of their lack of residence permits.

Good practice from the Netherlands can be cited here. In Amsterdam a pilot project was set up which allowed persons with no identification papers to report a crime to the police as a victim or witness without being arrested or prosecuted on the grounds of their irregular status. In cases of serious crime, an order to leave the country can be postponed for a period of three months if the Prosecution Service decides that the presence of the person is necessary for the investigation. Following the success of the pilot scheme it will now be applied nationally. In November 2015, the pilot was awarded a prize for best practice in work with diverse communities by the Platform for Police Management of Diversity.

#### **IV. ASSISTANCE TO IRREGULARLY PRESENT MIGRANTS: SPECIALISED BODIES AND CIVIL SOCIETY**

##### ***Recommendations 34 and 35***

All persons, whether irregularly present migrants or others, are entitled to remedies in respect of breaches of their human rights. Bodies to assist them must be available where they can claim their rights without fear of the sharing of personal data or other information with immigration authorities for the purposes of immigration control and enforcement. In line with the EU Data Protection Regulation and Directive 2016, personal data protection duties should only be derogated from on specific grounds and personal data information should not otherwise be shared with or transferred to immigration authorities.

Such bodies may be anti-discrimination bodies already in existence in member States whose remit should clearly include irregularly present migrants. Reference is made to ECRI's General Policy Recommendations No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level and No. 7 on national legislation to combat racism and racial discrimination. The EU Data Protection Directive also recommends states to adopt an independent supervisory body to monitor information sharing amongst public actors. Access to an effective domestic remedy is inherent in Article 13 ECHR and has been developed and interpreted by the ECtHR in numerous

cases.<sup>43</sup> Further, civil society bodies are frequently the most important source of assistance for people in need to ensure that their human rights are delivered in practice as well as law. Civil society should be encouraged to make available their services and activities to all persons within the jurisdiction of the state irrespective of immigration status.

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<sup>43</sup> Al-Nashif v. Bulgaria, Application no. 50963/99, 20 September 2002; Shebashov v. Latvia, Application no. 50065/99, 9 November 2000, unreported; and Čonka v. Belgium, Application no. 51564/99, 5 May 2002.