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Making the Principle of Non-discrimination Work in the 21st Century:

***The Significance of Positive Measures to Combat Discrimination and Promote
Integration***

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Making the Principle of Non-Discrimination Work in the 21st Century: The Significance of Positive Measures to Combat Discrimination and Promote Integration

It is no coincidence that the OSCE is calling for respect for the principle of non-discrimination in its efforts to promote the social and economic integration of persons belonging to national minorities in its member states. The formulation of the legal principle of non-discrimination was largely inspired by the international treaties for the protection of national minorities that were adopted in 1919 in Paris. While the Minority Treaties system of the post-war settlements was quite an innovative one at the time, it did not prevent another destabilization of security in Europe. This is one of the reasons why we are at work here today seeking to address national minority integration, not in terms of a minimalistic anti-discrimination paradigm but in terms of a 21st century expanded view of the principle of non-discrimination that promotes integration.

The principle of non-discrimination as we inherited it from the last century was nothing more than the negative form of the rule of equality, or formal equality. Integration on the other hand refers to anti-discrimination in terms of substantive equality, or making available the tools that ensure integration of disadvantaged groups so that they are included in mainstream society on an equal footing with the majority. To put it more eloquently, allow me to quote the Director of the OSCE High Commissioner's office, Ambassador de Fonblanque, who recently told one of the preliminary seminars to the Economic Forum that:

The aim of integration is to create a state which all groups consider their common home, where all individuals are able to interact freely, where all have equal opportunities to participate and to benefit and where the causes of tensions arising from minority issues will have been eliminated.

These words are, of course, ideal thinking, but are very well put. They immediately communicate to us that integration policies must ensure a positive form of equality. To achieve this we must augment existing standards of non-discrimination with measures that meet the requirements of our 21st century globalizing world of diversity, migration movements, technology revolutions and physical and environmental challenges, as well as economic transitions. We need to adjust our national minority policies to a Europe which is very different than the one we had in 1919.

Certainly, it has been a maturing process for the international community to arrive at the stage where we are today. After the Minority Treaties system, the principle of non-discrimination was enshrined in the United Nations Charter, in the Universal Declaration on Human Rights (Article 2(1) and Article 7), in the 1966 Human Rights Covenants (Article 26) and, of course, in the International Convention on the Elimination of All Forms of Racial Discrimination. At the European level, the Council of Europe enshrined the principle of non-discrimination in the European Convention on Human Rights (Article 14) while the CSCE incorporated non-discrimination early on in Principle VII of the Helsinki Final Act.

Indeed, the move towards a 21st century paradigm of non-discrimination promoting substantive equality began in Europe at the end of the last century when the international community, and especially the European democratization efforts, turned their attention after the Cold War to finding alternative ways of combating discrimination. Since the early 1990s we have seen anti-discrimination efforts requiring ratifying states to take proactive measures to ensure non-discrimination and integration of members of national minorities. These include the Council of Europe's European Charter for Regional or Minority Languages, the Framework Convention for the Protection of National Minorities, the establishment of the Commission against Racism and Intolerance (ECRI) and Protocol 12 to the European Convention on Human Rights as well as the UN's softer effort in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The UN's Human Rights Committee also issued a General Comment 18 on the interpretation of Article 27 of the International Covenant on Civil and Political Rights in 1994 calling for positive measures where necessary to ensure the rights of members of national and other minorities. More recently, the European Union has initiated an ambitious anti-discrimination effort by establishing its Monitoring Centre on Racism and Xenophobia (EUMC) and by seeking implementation of the Amsterdam Treaty's Article 13 through its two directives on race and equality in employment. Add to these, the excellent elaborations the OSCE High Commissioner's office has enshrined in The Hague, the Oslo and the Lund Recommendations as well as the Warsaw Guidelines.

To those who have read these documents, it is obvious that even before the end of the century the international community had decided that in order to secure peace and stability, measures addressing the rights of persons belonging to national minorities must go beyond formal equality. As the Council of Europe has stated in connection with the adoption of Protocol 12:

The principle of equality requires that equal situations are treated equally and unequal situations differently.

So, what does it require in real terms to devise effective policies of anti-discrimination and integration? Which general principles should the OSCE adopt and, more importantly, which principles addressing the economic and social aspects of integration should the OSCE promote?

Much has already been discussed in the course of this week and my remarks may perhaps repeat what has been said. I will concentrate here mainly on the legal framework required to support effective policies of anti-discrimination and integration.

It would be nice if we did not need law to regulate our societies but experience has shown us that good legal structures can not only promote fair play but may also contribute to conflict prevention. Although there is no guarantee to the latter, this is more often due to bad law or inadequate implementation. However, where a legal framework is well designed, it should function as action-guidance for our behaviour. Thus, legal frameworks for the integration of members of national minorities must influence the behaviour of governments, the behaviour of civil society and the

behaviour of individuals, while also adjudicating when these do not comply with the laws.

According to experts, as a minimum, all levels of law must address discrimination. Constitutional rights are therefore not enough. Civil and administrative as well as criminal law must also address discrimination. Moreover, states should establish common provisions, such as independent specialized bodies to combat discrimination. These bodies must be empowered:

- To give assistance to victims;
- To investigate powers, including the police, border patrol, the armed forces and the prison systems;
- To initiate and participate in court proceedings;
- To monitor legislation and give advice on legislation; and
- To conduct awareness campaigns.

Ideally, the legal framework should also provide that civil society organizations, including trade unions, are entitled to bring civil and administrative cases as well as criminal proceedings. Where possible, the law should also provide free legal aid to victims, as well as language interpretation. In short, the law should provide adequate protection to the victims.

Furthermore, public authorities at the state, regional and local levels, as well as other public and semi-public institutions, should serve as a role model for anti-discrimination and equal opportunity policies. This means that specific training programmes on anti-discrimination legislation and equal treatment should be initiated for judges, prosecutors, civil servants and other persons working within areas influenced by policies and legislation on anti-discrimination and integration. This helps ensure their proper and effective practical implementation.

In addition, states can decide to adopt positive measures. However, except for the measures to ensure gender equality, positive measures to ensure higher participation and better integration of minorities are often controversial. One legal measure that has gained recognition as a positive integration tool is affirmative action. Unfortunately, affirmative action is often considered a compensation tool for past wrongs and to reward the deserving rather than what it also is, namely a tool to help institutions change their behaviour so that they can comply with the standards mandated by the legal framework on non-discrimination.

Affirmative action has proved effective especially in the employment sector. Affirmative action programmes in the employment context are designed to ensure a fair chance at job opportunities through:

- Identifying and dismantling discriminatory barriers such as biased testing or recruitment and hiring practices;
- Conducting outreach to under-represented minorities by targeting higher education, ethnic media, and minority organizations;
- Instituting mentoring and training programmes;
- Addressing hidden biases in recruitment, hiring, promotion and compensation practices, such as unnecessary job requirements;

- Setting flexible goals for managers and supervisors.

This is not to argue that in severe cases of exclusion proactive measures in other fields are not equally as important. Certainly, positive measures in the fields of education and health, as well as measures to improve living conditions, are essential. In fact, they are the prerequisites for members of minorities to be able to participate in mainstream society.

In the field of education, experts call for:

- Inclusive school systems where segregation is against the law;
- Legislation ensuring the right to bilingual as well as for mother-tongue instruction;
- Training and recruiting of members of national minorities; and
- Improved dialogue and communication between teachers and parents.

In addition, experts call for education for adult members of minorities and for textbooks that include chapters on the culture and history of minorities.

In the field of public participation, experts call for:

- Legislation establishing modalities and structures of consultation with national minorities both at the level of central and local government;
- Early involvement of minorities in the development of anti-discrimination and integration policies and programmes affecting them; and
- Transparency in such programmes.

They also suggest that awareness campaigns among minorities about the importance of education and political decision-making could be important. To that end, experts advocate the establishment of training programmes for members of national minorities, with a view to improving their political, policy-making and public administration skills.

Adequate living conditions, experts argue, includes legislation guaranteeing the right to housing for members of minorities, as housing is often the gateway to a normal and full life in enjoyment of equal opportunities. Without a registered abode many entitlements are simply not accessible for members of minorities. Securing through law adequate access to health benefits is also vital to ensuring the integration of minorities.

It goes without saying, of course, that affirmative action must be adapted to the specific situation. It therefore needs careful study and analysis. Moreover, to help public institutions implement positive measures such as affirmative action, accurate documentation on the existence of national minorities is necessary. Indeed, it is a prerequisite for the formulation of good government policy and fundamental to the task of promoting human rights and minority rights, especially the right to equal opportunities.

Yet, data collection on national minorities is often largely inadequate or non-existent. First, governments are often unaware of or unwilling to collect such data. Indeed,

some constitutions prohibit data collection on the basis of racial and ethnic characteristics. Other times, data protection laws are interpreted so as to hinder collection. Second, members of minorities often mistrust the ability of governments to maintain the confidentiality of data collected on the basis of ethnic classification and thus fear that they will be used to their detriment and result in negative stereotyping. Thus, there is an apparent need to identify legal lacuna that unfairly bar the collection of data on national minority membership and to identify strategies for collecting data that are consistent with privacy standards so as to overcome objections to this practice. Finally, it is important that the quality of the data collected is of such a standard that the minorities included in these statistics feel that their identities are fairly represented. This includes periodical review of categories.

Another major problem with implementing a legal framework of positive measures is that all state and local departments dealing with integration must co-ordinate their efforts. Thus, departments dealing with the judiciary system must be able to support departments dealing with employment, education, health, housing and public order when seeking to adapt integration tools. To fully integrate positive measures into a legal framework, anti-discrimination measures as well as positive measures must therefore be mainstreamed throughout the legal structure.

Furthermore, these issues must receive full attention at the political level. Experts call for general measures of ongoing review of the legal frameworks, as well as adoption and implementation of national strategies and programmes expressing determined political will and moral leadership. Moreover, they stress the need to ensure that legislation regarding citizenship and naturalization does not discriminate against members of national minorities and that discrimination against immigrants or asylum-seekers is avoided. Finally, they stress the importance of developing and encouraging appropriate modalities of communication and dialogue between national minorities and central and local authorities to improve relations and tolerance and overcome prejudices. In particular, they emphasize the need to acknowledge wrongs done during violent conflicts and consider ways of compensating for them.

Positive measures also include a broad area of non-legal tools. Thus, they may range from technology transfer, capacity-building and financial assistance to market-based instruments. This also means that positive measures are not easily defined at a general level. They must be tailor-made to the specific situation or problem that they are destined to alleviate. Also, pilot projects may be needed to allow for changes and adjustments to be made. Integrating members of national minorities is not only a question of a rights-based approach to integration. In many of the OSCE member states, economic growth is often a major obstacle to the creation of opportunities and, thus, to ensuring effective participation.

The theory of how to create economic opportunities for marginalized groups introduces at least three ways of addressing the economic exclusion of members of national minorities. There is the growth model, the individual empowerment model and the security enhancement model. These, of course, overlap and intersect, and none is likely to be successful in isolation. They all address the need to change a society from a less to a more desirable state.

In member states where there is a need to address integration in terms of economic growth, this involves increased economic efficiency, expansion of productive capacity, technological advances, industrial diversification and adaptability to absorb exogenous shocks, as well as aspects of increased GNPs, average real incomes and general social welfare. The latter may involve embracing spiritual and cultural attainments, individual dignity and group esteem, and fulfilment of the necessary conditions for the realization of the potential of human personality as a result of reductions in poverty, inequality and unemployment. Moreover, in some cases improving a society may mean simply providing food, adequate housing provisions and clean drinking water. An intrinsic part of enhancing well-being requires investment in human capital and in higher-risk, higher-return activities. This requires effective state action to manage the risk of economy-wide shocks and effective mechanisms to reduce the risks faced by poor people, including health- and weather-related risks. It also requires building the assets of poor people, diversifying household activities and providing a range of insurance mechanisms to cope with adverse shocks, from public work to stay-in-school programs and health insurance.

These observations all bear on the issue of equity, self-reliance and self-determination and, ultimately, on the value of increased freedom, freedom to define one's own needs, to take part in making the decisions which affect one's life and, thus, to enhance the range of choices that we all would like to have. In short, economic participation is a prerequisite for a good life, for social interaction and social inclusion and ultimately for political integration.

It is therefore necessary to emphasize that because the ideal of integration is a compelling moral and political goal, the exclusion suffered by members of minorities is not only theirs. It is also a loss suffered by the majority population in its failure to realize fully extensive social spaces in which citizens of all origins exchange ideas and co-operate on terms of equality—which is an indispensable social condition of democracy itself.

It should be clear by now that effective integration policies are not a question of anti-discrimination measures *versus* positive measures. Rather, in most cases, it is a question of anti-discrimination legislation *combined* with positive measures to help combat discrimination and ensure equality. In other words, a very different paradigm than we inherited from the Minority Treaties system of 1919.

A final observation on positive measures: whereas positive measures enshrined in law function both to adjudicate wrongs and guide our behaviour towards one another, positive measures adapted through the soft governance of programming have the additional purpose of influencing our attitude. The more we interface with one another in daily life, the more we are likely to become tolerant and learn respect. In this regard, the field of the media plays a vital role. Discrimination in the media as well as integration through the media are both items high on the OSCE agenda. The reasons are obvious: hate speech promotes exclusion whereas media participation and balanced information promote inclusion.

Thus, the UN's Expert Committee on the Elimination of Racial Discrimination has argued convincingly that any ideas of racial or ethnic superiority, of racial hatred and incitement to discrimination and violence should be eliminated; that awareness and

responsibility among professionals of all media to not disseminate prejudices and to avoid reporting incidents involving individual members of minorities in a way which blames such communities as a whole should be encouraged; that educational and media campaigns to educate the public about minority life, society and culture as well as the importance of building an inclusive society should be developed; and that access by minorities to the media, including newspapers and television and radio programs, should be facilitated, including the establishment of their own media and the training of minority journalists. Finally, the Committee called for methods of self-monitoring by the media, through a code of conduct for media organizations, in order to avoid racial, discriminatory or biased language.

As we move towards the 100th anniversary commemorating the Minority Treaties system, it is perhaps time for the OSCE to take stock and reformulate the non-discrimination paradigm in new terms better adapted to our 21st century reality.

In concluding, I would therefore like to suggest to this esteemed Forum that a Statement of Principles on policies of integration of persons belonging to national minorities could include a paragraph on the principle of non-discrimination to the effect that:

Experience has shown that successful integration requires a two-pronged approach based on a mainstreaming of the principle of non-discrimination throughout the legal frameworks of states, finding expression in constitutional as well as civil, administrative and criminal codes. The implementation of these codes should be combined with positive measures, legal and/or soft, aimed at the specific area of concern and targeted towards particular national minorities.

Thank you for your attention.